HARMONISATION OF *SHARI'AH* AND CIVIL LAW:

PROGRESS AND ACHIEVEMENTS

EDITORS

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FOREWORD

السلام عليكم ورحمة الله وبركاته

The Book on the Harmonisation of *Shari'ah* and Civil Law is a collection of selected articles written by the participants of the 5th International Conference on Harmonisation of *Shari'ah* and Civil Law 2023 (ICHSL 2023). The conference was organised through the joint efforts of the Harmonisation of Shari'ah and Law Unit (HSLU) of the Ahmad Ibrahim Kulliyyah of Laws (AIKOL) and the Attorney General's Chambers (AGC) to enhance the position of *Shari'ah* and law by presenting the harmonisation efforts of *Shari'ah* and Civil law made by researchers and scholars worldwide.

This book is timely, as IIUM is celebrating its 40th anniversary, which also marks its establishment as a unique institution of Islamic-based education over the last 40 years. The theme of this book is noteworthy as it highlights AIKOL, being one of the pioneer faculties established at the inception of IIUM in 1983, as being steadfast and ready to uplift the position of *Shari'ah* and law. The book showcases the harmonisation efforts of *Shari'ah* and Civil law carried out by its researchers and scholars globally. Their collaboration with the Attorney General's Chambers

demonstrates the strong support from the Government for this initiative.

The harmonisation of Shari'ah and law aligns with the IIUM Sejahtera Academic Framework (SAF), which emphasises the Islamisation of Knowledge (IOK) and the importance of fulfilling the objectives of *Shari'ah* (*Maqasid al-Shari'ah*). It is hoped that the Ahmad Ibrahim Kulliyyah of Laws will continue to produce well-balanced jurists who will serve as models and contribute to the *Ummah* and the world.

I would like to extend my gratitude and congratulations to the committee for their efforts in organising the conference and evaluating the selected articles, as well as the authors for their valuable contributions that made the publication of this e-book a success.

Thank you and *Wassalam.*

Tan Sri Dato' Dzulkifli Abdul Razak, Emeritus Professor
Rector,
International Islamic University Malaysia.

FOREWORD

السلام عليكم ورحمة الله وبركاته

It is the mission of the Ahmad Ibrahim Kulliyyah of Laws to work towards just laws and legal systems through the harmonisation of *Shari'ah* and law. To this end, the harmonisation of *Shari'ah* and law is the fundamental work of the Kulliyyah. This aligns with the University's mission of integrating Islamic revealed knowledge and human sciences for the benefit of the Ummah.

AIKOL, having successfully organised four conferences on the Harmonisation of *Shari'ah* and Civil Law since 2003, has taken the initiative to continue this effort by organising the 2023 conference to celebrate the 40th anniversary of the University and the Kulliyyah. It is apt to celebrate the anniversary that the conference would be able to review the milestones achieved and challenges that lie ahead.

The success of the conference (ICHSL 2023) has led to the publication of 20 papers presented as book chapters, comprising several themes, including *Maqasid al-Shari'ah* as a Guiding Tool For Harmonisation, Harmonisation of

Family Law, Harmonisation of *Shari'ah* and Civil Law, Harmonisation of Criminal Law and Tort, Harmonisation of *Shari'ah* and International Law/Conventions, Harmonisation of Law of Contract and Other Areas of Law, Codification of Islamic Law in Civil Court and Harmonisation of One Area of Law to Another, and Harmonisation in Islamic Finance.

We hope that this book will continue to serve as an impetus for the Harmonisation of *Shari'ah* and Law Unit, led by Professor Dr. Azizah Mohd, in partnership with other agencies such as the Syariah and Harmonisation of Law Division of the Attorney-General's Chambers, to rejuvenate a more systematic approach to advancing the agenda of harmonisation for the benefit of all related institutions.

I would like to thank Tan Sri Idrus bin Harun, the Attorney General of Malaysia, for agreeing to co-organise the ICHSL 2023 conference, as well as Dato' Anas bin Ahmad Zakie, the Head of the Syariah and Harmonisation of Law Division of the Attorney-General's Chambers, and Assoc. Prof. Dr. Badruddin Ibrahim as the Chair of the organising committee. Our thanks also go to Jabatan Kehakiman Syariah Malaysia (JKSM), Pejabat Mufti Wilayah Persekutuan (PMWP), Pusat Zakat Wilayah Persekutuan (PPZ-MAIWP), Lembaga Zakat Selangor (LZS), Yayasan Restu, Kompleks Seni Islam Antarabangsa Selangor, and all those who have directly or indirectly contributed to the conference and made the publication of this book possible.

Thank you and *Wassalam.*

Farid Sufian Shuaib, Professor Dr.
Dean,
Ahmad Ibrahim Kulliyyah of Laws.

FOREWORD

السلام عليكم ورحمة الله وبركاته

Alhamdulillah, all praise be to Allah, the Most High in Grace, for facilitating the organisation of the 5th International Conference on Harmonisation of *Shari'ah* and Civil Law (ICHSL 2023) and for granting us the ability to make this conference and the publication of the papers presented a success.

The need for mutual understanding and cooperation between various legal systems has never been more crucial in a world that is becoming increasingly interconnected. Harmonisation of Islamic law is extremely important for both the Muslim community and the larger international community.

The ICHSL 2023 conference serves as a platform for legal scholars, practitioners, and policymakers to come together and contribute to the ongoing discourse on harmonisation. Additionally, the publication of the chapters from the papers presented at the conference will provide further avenues for the expansion of knowledge and research on the harmonisation of *Shari'ah* and Civil law.

We wish to express our deepest gratitude and appreciation to Ahmad Ibrahim Kulliyyah of Laws (AIKOL), International Islamic University Malaysia (IIUM), and the conference committee members for their relentless efforts in ensuring the smooth organisation of the conference and the publication of this book. May this book pave the way for a harmonised approach to Islamic law.

Thank you and *Wassalam.*

Datuk Ahmad Terrirudin bin Mohd Salleh
Solicitor General,
Attorney General's Chamber Malaysia.

PREFACE

The harmonisation of *Shari'ah* and Civil law is not a recent development, especially in Malaysia. This concept has not been newly introduced but has rather evolved informally alongside the enactment and development of laws. The reason is that both *Shari'ah* and Civil law share the same spirit and objective i.e., the establishment of justice.

Shari'ah in its divine nature and system, has existed for a long time and has been practised and applied throughout the decades and phases of legal development over different cultures and civilisations. In alignment with cultural development and civilisation, the Civil laws were enacted across various countries, where many principles and legal contents to a certain extent are similar to the *Shari'ah* in many areas and legal aspects. The discussion in this book exhibits a clear example of those similarities.

Recognising the critical importance of harmonising *Shari'ah* and Civil law in Malaysia's diverse, multi-racial society, this book has been developed to showcase the progress and achievements of the ideas of harmonisation of *Shari'ah* and Civil law since May 2002, and to serve as a *raison d'etre* of the establishment of Ahmad Ibrahim Kulliyyah of Laws. In 2023, IIUM and AIKOL are celebrating their 40th anniversary, commemorating four decades since their establishment in 1983.

This book is the second publication of chapters by the Harmonisation of *Shari'ah* and Law Unit (HSLU) at AIKOL, IIUM, following its first publication in 2023. The book compiles conference papers that were presented at the ICHSL, held from 1st to 2nd August 2023. The conference was co-organised by the Harmonisation of *Shari'ah* and Law Unit (HSLU), Ahmad Ibrahim Kulliyyah of Laws, and the

Attorney General's Chambers of Malaysia. All the papers underwent a double-blind review process, requiring the authors to comply with the reviewers' suggestions before they were accepted for presentation and publication.

The book is organised into eight parts and contains a total of 20 chapters, each focusing primarily on the following conference sub-themes:-

1. *Maqasid Al-Shari'ah* as a Guiding Tool for Harmonisation;
2. Harmonisation of Family Law;
3. Harmonisation of *Shari'ah* and Civil law;
4. Harmonisation of Criminal Law and Tort;
5. Harmonisation of *Shari'ah* and International Law/ Conventions;
6. Harmonisation of the Law of Contract and Other Areas of Law;
7. Codification of Islamic law in Civil Courts and Harmonisation of One Area of Law to Another; and
8. Harmonisation in Islamic Finance.

On behalf of the contributors, we hope and pray that this collection will make a substantial contribution to the knowledge, progress and achievements of harmonisation of *Shari'ah* and Civil laws. We wish to thank Miss Lidiya Sabrina Faisal and Mr. Abu Ubaidah Zulkifli for their excellent work in formatting and typesetting the papers. Special thanks go to all ICHSL 2023 editors for their efforts, hard work and dedication in working together effectively to ensure that the book is published in record time. Our heartfelt thanks also go to the Publisher (IIUM CENTRIS), Associate Professor Dr. Zulfakar Ramlee, Associate

Professor Dr. Badruddin Hj. Ibrahim, the Paper Reviewers and the ICHSL 2023 Committee members from Ahmad Ibrahim Kulliyyah of Laws, IIUM (AIKOL) as well as Attorney General's Chambers of Malaysia and all who have directly or indirectly contributed to the publication of this book.

Jazaakumullahu khayran kathiira.

Editors,
Harmonisation of *Shari'ah* and Civil Law: Progress and Achievements.
October 2024.

ABBREVIATIONS

a.s.	Alaihis Salam
ACE	Advisory Committee on Expert
ACP	Assistant Commissioner of Police
AD	After Demise
ADR	Alternative Dispute Resolution
AGC	Attorney General Chambers
AIKOL	Ahmad Ibrahim Kulliyyah of Laws
AIR	All Indian Reports
ALL ER	All England Reports
AMA	Arbitration and Mediation Act 2023 (Nigeria)
Anr.	Another
ARB	Amanah Raya Berhad
ART	Assisted Reproductive Technology
Art.	Article
BNM	Bank Negara Malaysia
BOFIA	Banks and Other Financial Institutions Act

BW	Burgerlijk Wetboek (Civil Code)
CA	Child Act
Cap	Chapter
CBMA 2009	Central Bank of Malaysia Act 2009
CBN	Central Bank of Nigeria
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFRN	Constitution of the Federal Republic of Nigeria
CII	Council of Islamic Ideology
CLJ	Current Law Journal
CMSA 2007	Central Markets and Services Act 2007
CPA	Consumer Protection Act
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
D11	Sexual, Women and Child Investigations Division
DAX	Digital Assets Exchange
Dr.	Doctor
e.g.	*exempli gratia* (for example)

EA	Evidence Act
ed.	Edition, Editor
EPF	Employees Provident Fund
etc	*et Cetera*
EU	European Union
FCJ	Federal Court Judge
FHC	Federal High Court
FRACE	Financial Regulation Advisory Council of Experts
FRGS	Fundamental Research Grant Scheme
FSC	Federal Shariat Court
GIA	Guardianship of Infant Act 1961
HSNZ	Hospital Sultanah Nur Zahirah
i.e.	*id est* (that is)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMART	International Committee for Monitoring ART

ICSI	Intra-Cytoplasmic Sperm Injection
IFIs	Islamic Finance Institutions
IFLA	Islamic Family Law (Federal Territories) Act
IHL	International Humanitarian Law
IIUM	International Islamic University Malaysia
IOA	Islamic Youth Outreach Islamic Malaysia
ISESCO	Islamic Educational, Scientific, and Cultural Organization
IUI	Intra-Uterine Insemination
IVF	In Vitro Fertilization
JAIN	Jabatan Agama Islam Negeri
JAKIM	Jabatan Kemajuan Islam Malaysia
JCA	Judge of the Court of Appeal
KIMMA	Kongres India Muslim Malaysia
LJ	Lord Justice
LRA	Law Reform (Marriage & Divorce) Act 1976.
MACMA	Malaysian Chinese Muslim Association
MAIM	Majlis Agama Islam Melaka
MAIN	Majlis Agama Islam Negeri

MAT	Muslim Arbitration Tribunal
MKI	National Council for Islamic Religious Affairs
MLJ	Malayan Law Journal
MLJU	Malaysian Law Journal Unreported
MMC	Malaysian Medical Council
MOHE	Ministry of Higher Education
MR	Master of the Rolls (a title in English courts)
MSAR	Malaysian Society for Assisted Reproductive Technology
MWCA	Married Women and Children (Maintenance) Act 1950 (Revised 1981).
n.d.	No Date
n.p.	No Place/Publisher
NBC	National Bioethics Committee
NGO	Non-Governmental Organisation
NIFI	Non-Interest Financial Institution
NIMFB	Non-Interest Microfinance Bank
No.	Number
OIC	Organisation of the Islamic Conference

Ors.	Others
PC	Penal Code
PERKIM	Pertubuhan Kebajikan Islam Malaysia
PhD	Doctor of Philosophy
PLS	Profit and Loss-Sharing
QB	Queen’s Bench
r.	Rule
R.A.	Radi Allahu Anhu
RM	Ringgit Malaysia
s.	Section
S.A.W.	Ṣallā Allāhu ʿalayhi wa sallam
S.W.T.	Subhaanahu Wa Ta'ala
SAC	Shariah Advisory Council
SAC SC	Shariah Advisory Council of the Securities Commission
SBSN	State Shari'ah Securities
SC	Securities Commission
TVET	Technical and Vocational Education and Training

UCTA	Unfair Contract Terms Act 1977
UK	United Kingdom
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WHO	World Health Organization
WvK	Wetboek van Koophandel (Commercial Code)
WvS	Wetboek van Strafrecht (Criminal Code)
WWII	World War II

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PART I
MAQASID AL-SHARI'AH AS A GUIDING TOOL FOR HARMONISATION

DECRIMINALISING ATTEMPTED SUICIDE: AN INSIGHT INTO *MAQASID AL-SHARI'AH* PERSPECTIVE

Sahida Safuan[1]
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ABSTRACT

Criminalising suicide attempts was seen as a way to deter criminals from trying to find an easy way out of criminal liability. Nevertheless, it is undeniable that there are cases of attempted suicide induced by mental illness. Hence, it is unfair to place responsibility on people who attempt suicide as a result of their mental health conditions. Those who attempted suicide in this situation should be viewed as victims of their own conditions. Criminalising suicide attempts dissuade people from reporting instances of suicide attempts in order to avoid any potential legal implications. When cases go unreported, misleading data creates the false impression that suicidal behaviour is less prevalent in the country. The movement towards decriminalising suicide was driven by the fact that suicide is primarily regarded as a medical or psychiatric issue. Decriminalising suicide encourages those at risk of suicide to seek help from professionals, allowing for early intervention to prevent suicide. It is critical, however, to consider whether decriminalising suicide provides a green light for people to simply end their lives when things do not go as planned, and what mechanisms are proposed to avoid such incidents. This paper adopts qualitative method in an attempt to explore Islamic legal perspectives on decriminalising suicide attempts. It is proposed that the decriminalisation of suicide attempts must not hinder the preservation of life's principles enumerated under the *Maqāṣid al-Sharīʿah* which emphasise that life should be protected in every

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circumstance and anything that leads to its destruction is not permissible.

Keywords: Decriminalising suicide attempt, mental health, *Maqāṣid al-Sharīʿah.*

INTRODUCTION

In Malaysia, the move to decriminalise suicide attempts can be traced back to 2012 when the Law Reform Committee in the Prime Minister's Department began the effort to review and scrutinise Section 309 of the Penal Code.[3] However, only in February 2020 that the Attorney General Chambers (AGC) was directed to proceed with a thorough study to repeal the law.[4] The Penal Code (Amendment) (No. 2) 2023, to abolish Section 309 of the Penal Code, was introduced in the Dewan Rakyat for its first reading on 4th April 2023 by the Deputy Minister in the Prime Minister Department, Ramkarpal Singh a/l Karpal Singh.[5] The approval of the amendment bill on 22nd May 2023 has effectively resulted in the decriminalisation of the act of attempted suicide. This paper aims to investigate Islamic legal viewpoints regarding the decriminalisation of suicide attempts. Through the utilisation of a qualitative approach, this paper attempts to prove that the decriminalisation of suicide attempts should not conflict with the principles of preserving life outlined in the *Maqāṣid al-Sharīʿah*, which emphasises the protection of life in all situations and prohibits anything that endangers it.

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[3] Tan Yi Liang, "Suicide Law Under Review," Malaysian Bar, accessed January 26, 2023, https://www.malaysianbar.org.my/article/news/legal-and- general-news/legal-news/suicide-law-under-review.

[4] Veena Babulal, "Govt Urged to Impose Moratorium on Charges Against Those Attempting Suicide," New Straits Times, accessed January 26, 2023, https://www.nst.com.my/news/nation/2021/07 /705742/govt-urged-impose-moratorium-charges-against-those attempting-suicide.

[5] "Senarai Rang Undang-undang." Parlimen Malaysia, accessed January 23, 2023. https://www.parlimen.gov.my/bills-dewan-rakyat.html?uweb=dr&#.

DECRIMINALISING ATTEMPT SUICIDE IN MALAYSIA

Colonisation, politics, and religion are among the factors leading to the criminalisation of suicide attempts.[6] Section 309 of the Penal Code, which is *in pari materia* with the Indian Penal Code, was enacted in 1936 following the English Common Law. A significant legal stance taken against suicide in Europe may be traced back to Saint Augustine's proclamation that suicide is a sin.[7] The influence of religious institutions, which saw suicide as an immoral act and a criminal offence against God and the King, was a major driving force behind the reason for making attempted suicide a criminal offence.[8] Only God has the authority to take a life. Hence, the Bible considers suicide to be a transgression of the sixth commandment, which states, "Thou shalt not kill."[9] Islam also considers suicide a cardinal sin. In Islamic belief, it is held that individuals who engage in suicide are prohibited from attaining entry into paradise.[10] Thus, when the British colonised the Malay land, there was no problem for the locals, where the majority were Muslims, to adopt the law as it was in conformity with their personal beliefs. The religious influence fostered a strong belief that suicidal individuals must be disgraced and punished as criminals.

According to the data, the rate of suicide attempts in Malaysia has increased by 61.7% from 2016 to 2021, and the reasons for the attempts included emotional pressure, mental illness, financial

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[6] Brenda K. Ochuku et al., "Centering Decriminalization of Suicide in Low – and Middle – Income Countries on Effective Suicide Prevention Strategies," *Frontiers in Psychiatry* 13, no. 2 (2022).

[7] Sheila Moore, "The Decriminalisation of Suicide", (2000).

[8] Farah Nabihah. "Suicide: A Tragedy or a Crime?" University of Malaya Law Review, accessed January 12, 2023, https://www.umlawreview.com/ lex-in-breve/suicide-a-tragedy-or-a-crime#_ftn1.O.

[9] Exodus 20:13.

[10] Al-Bukhari, Sahih al-Bukhari, Vol. 2, Book 23, Hadith no. 446.

restrictions, drug misuse, and disease.[11] Hence, it is undeniable that there are cases of attempted suicide induced by mental illness, and it is unfair and erroneous to place responsibility on persons who attempt suicide as a result of their mental health condition. In this instance, persons who attempted suicide should be regarded as victims of their own mental health conditions.

Figure 1: Number of attempted suicide cases, 2016-2021.[12]

It is important to acknowledge that the suicidal crisis is commonly associated with mental illness. Both are interconnected, as diagnosable mental illnesses are present in the majority of suicide cases. Mental disorder is not merely a correlate but an important cause of the increased risk of suicide. The WHO estimate that 90% of all suicide victims have some kind of mental health condition, often depression or substance abuse.[13] A study was conducted to describe the clinical profiles of individuals charged with

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[11] Tharanya Arumugam, "Police Data Show Men Make up Bulk of Suicide Attempts since 2016," New Straits Times, accessed January 12, 2023, https://www.nst.com.my/news/online-special/2022/03/783404/police-data-show-men-make-bulk-suicide-attempts-2016.

[12] *Ibid*.

[13] L. Meyers, "World Mental Health Day Emphasizes the Link Between Suicide and Mental Illness." American Psychological Association, accessed January 27, 2023, https://www.apa.org/monitor/dec06/healthday.

attempted suicide who were sent to the psychiatric unit for criminal responsibility and fitness to plead evaluation and found that 73% of the individuals have psychiatric disorders.[14] Therefore, the criminalisation of suicide does not serve as an effective prevention of suicide.[15] Even worse, the law indirectly conveys the idea that a person who attempts suicide must ensure that the attempt is successful or else they will face legal repercussions that will only add to their burden.[16] Hence, the law actually prevents those individuals who require help from receiving the support that they need. Besides that, criminalising suicide attempts dissuades people from reporting instances of suicide attempts in order to avoid any potential legal implications.[17] When cases go unreported, misleading data creates the erroneous impression that suicidal behaviour is less prevalent. It is critical to recognise the importance of maintaining an accurate and robust suicide report so that the data may be used to develop an effective suicide prevention programme.[18]

IS SUICIDE ATTEMPT ALWAYS INDICATIVE OF A MENTAL DISORDER?

The movement towards decriminalising suicide was fuelled by the fact that suicide is primarily regarded as a medical or psychiatric issue. The question now is, does suicide always indicate a mental illness? Or can there be a presumption that all suicides are due to abnormal mental stress? It is important to understand that the act

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[14] Johari Khamis et al., "Attempted Suicide and Criminal Justice System in a Sample of Forensic Psychiatric Patients in Malaysia," *medRxiv*, (2021).

[15] *Ibid.*

[16] Bob Lew et al., "Decriminalizing Suicide Attempt in the 21st Century: An Examination of Suicide Rates in Countries that Penalize Suicide, A Critical Review," *BMC Psychiatry* 22, no. 1 (2022): 1–11.

[17] Farah Nabihah. "Suicide: A Tragedy or a Crime?".

[18] Ochuku et al., "Centering Decriminalization of Suicide in Low – and Middle – Income Countries on Effective Suicide Prevention Strategies".

of attempting suicide was made a crime so that social order could be preserved, and the accused could not so easily evade the grasp of the legal system. By making attempted suicide a crime, it cannot be used as a callous justification to absolve the accused of accountability for their actions. The criminalisation of suicide attempts is to avoid cases like *Public Prosecutor v Musdar bin Rusli*,[19] where the respondent was charged under Section 302 of the Penal Code for murdering his wife by stabbing her six times, with three stabs on the deceased front chest and another three stabs on the back of the deceased chest. Prior to the incident, the respondent and his wife were involved in an argument due to the non-stop crying of their two-year-old son. The deceased was blaming the accused for not helping her with the chores, and at that time, the accused had not been feeling well. He was also charged with attempted suicide by stabbing himself with a knife after killing his wife. He was sentenced to one year imprisonment in respect of the attempted suicide charge. A similar circumstance can be seen in the case of *Tompo bin Yara v Public Prosecutor*,[20] where the accused attempted to commit suicide by stabbing himself in the abdomen and slitting his throat after severely stabbing his wife. He was charged with his wife's murder as well as attempted suicide. He was then sentenced to six months in jail for attempting to commit suicide after the completion of the murder.

In another case of Jacob *Tiang Lee Yee v Public Prosecutor*,[21] the accused, who was involved in a serious debt, decided to kill his own family members to escape the debtor. After murdering his wife, daughter, and son and failing to murder his other son, he attempted suicide by hanging himself with a belt strung over the stairwell. The judge ruled a prima facie case against the accused on three charges of murder and one charge of attempted murder under Section 302 and 307 of the Penal Code, respectively. Unfortunately, the court failed to give justification for its decision in ruling that the prosecution was unable to make a prima facie

[19] [2017] MLJU 401.

[20] [2017] 2 MLJ 366.

[21] [2016] 12 MLJ 72.

case on Section 309 of the Penal Code. Hence, the accused was acquitted of the charge of attempted murder. The prosecution, on the other hand, was also unable to give any reasoning for their decision of not appealing on attempted suicide. The three cases discussed above have one thing in common: the accused attempted suicide after committing a murder. Furthermore, none of the accused is suffering from mental illnesses, as there is no clinical proof to support such a claim. Rather, they were all under tremendous pressure to avoid accountability after losing their self-control, which led them to conduct such a horrible act of murder.

Although some cases may appear to entail mental health issues on the surface, further investigation reveals that such a state of mental illness was not present during the commission of the crime. For instance in the case of *Public Prosecutor v Foo Chee Ping,*[22] where the accused was charged with murder after stabbing the deceased. He asserted that a voice instructed him to kill the deceased or else the deceased would continue to endure abuse. After killing the victim, he allegedly tried to end his own life by following the voice's instructions to stab himself and slit his throat with shattered glass. Witness testimony from a consultant psychiatrist indicated that the accused had damaged brain cells from excessive use of ecstasy, an amphetamine, which led to psychotic symptoms and erratic behaviour. When committing the crime, the accused was still in control of his cognitive abilities because he was aware of the nature of his act and that it was illegal. As a result, it cannot be concluded that mental illness played a role in motivating such crime. Therefore, criminalising suicide attempts was seen as a way to deter criminals from trying to find an easy way out of criminal liability because if they fail the attempt, they will face heavier repercussions.

It is noteworthy to mention that prior to the amendment, there are two ways how the government responds to cases of suicide attempts. On one hand, suicide attempts are viewed as mental health issues that need treatment. According to the Psychiatric and Mental Health Services Operational Policy, in-patient services shall be provided to patients who are severely depressed and have

[22] [2013] MLRHU 1410.

the risk of self-harm or suicidal behaviour. Such patients may be held in a closely monitored setting until it is determined that they are stable enough not to hurt themselves.[23] On the other hand, those who attempt suicide could also face penal consequences under Section 309 of the Penal Code. Suicide attempt survivors are likely to face prosecution under Section 309 of the Penal Code, which provides that if found guilty, they will be sentenced to one year in prison, a fine, or both. The mental health issues are not taken into consideration for a person charged under the said section. However, the assessment of the mental state of the accused is important to ascertain whether the accused was fit to enter a plea and be held criminally accountable when charged under Section 309 of the Penal Code. Therefore, the Magistrate can make an order to evaluate the mental state of the accused under Section 342 of the Criminal Procedure Code. According to the section, when the Magistrate is satisfied with the report from the medical officer that the accused is of unsound mind, he shall postpone the trial and shall remand the accused to be detained for observation in a designated psychiatric facility for a period not exceeding one month.

It should be noted that assessing criminal liability and fitness to plead is not required in all cases of attempted suicide. Rather, it is at the discretion of the Magistrate if the Magistrate believes that such an evaluation is warranted.[24] In the case of attempted suicide, the court must be extra cautious, and although it is not mandatory, the court should always opt for a psychiatric examination prior to trial so that justice could be served in a genuine case of attempted suicide due to mental illness. Whilst Section 342 of the CPC may be employed to safeguard individuals who attempt suicide as a result of psychiatric disorders, it is noteworthy that the utilisation of this provision may impede the individual's ability to promptly receive the necessary assistance to address their condition. The rationale behind this is that the accused is required to undergo the

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[23] Medical Development Division Ministry of Health Malaysia, Psychiatric and Mental Health Services Operational Policy.

[24] Johari Khamis et al., "Attempted Suicide and Criminal Justice System in a Sample of Forensic Psychiatric Patients in Malaysia".

trial process, and it is only upon the Magistrate's determination of their lack of sanity that they may be referred for psychiatric evaluation.

ISLAMIC RULING OF SUICIDE

Suicide is regarded as a grave sin in Islam. In Surah An-Nisa' verse 29, Allah explicitly cautioned Muslims against committing suicide, where it is specifically mentioned that *"O believers!...do not kill each other or yourselves. Surely Allah is ever Merciful to you."* According to Imam Ibn al-Jauzi, the verse has an apparent and obvious meaning, i.e., a clear prohibition for Muslims against committing suicide or taking their own lives.[25] It is also stated in Surah Al-Baqarah verse 195, where Allah prohibits human beings from causing and putting themselves into destruction, *"Spend in the cause of Allah and do not let your own hands throw you into destruction [by withholding]. And do good, for Allah certainly loves the good-doers".* The Prophet S.A.W. cautioned Muslims that individuals who commit suicide are forbidden to enter paradise. This indicates that suicide is prohibited in Islam. It was narrated by Abu Hurairah where the Prophet said:

> *He who commits suicide by throttling shall keep on throttling himself in the hellfire (forever), and he who commits suicide by stabbing himself shall keep on stabbing himself in the hellfire.*[26]

In another hadith, narrated by Thabit bin Ad-Dahhak, the Prophet S.A.W. said:

> *Whoever swears by a religion other than Islam is, as he says; and whoever commits suicide with something will be punished with the same thing in the hellfire, and cursing a believer is like murdering him; and whoever accuses a believer of disbelief, then it is as if he had killed him.*[27]

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[25] Ibn Al-Jawzi. *Zad al-Masir fi 'Ilm al-Tafsir.*

[26] Al-Bukhari, *Sahih al-Bukhari*, Vol. 2, Book 23, Hadith no. 446.

[27] Al-Bukhari, *Sahih al-Bukhari,* Vol 8, Book 78, Hadith no. 647.

Likewise, Muslims are prohibited from engaging in actions that may result in death. It is narrated by 'Amr bin Al-As:

> *I had a sexual dream on a cold night in the battle of Dhat as-Salasil. I was afraid if I washed it, I would die. I, therefore, performed tayammum and led my companions in the dawn prayer. They mentioned that to the Prophet. He said: Amr, you led your companions to prayer while you were sexually defiled? I informed him of the cause which impeded me from washing. And I said: I heard Allah say: "Do not kill yourself, verily Allah is merciful to you." the Prophet laughed and did not say anything.*[28]

It is clear from the hadith that engaging in actions that may result in death is prohibited in Islam. For instance, murdering another person is prohibited, whether with or without intention. As illustrated in Figure 2, scholars divided murder into three different types, i.e., intentional murder-suicide, semi-deliberate suicide, and unintentional suicide.[29]

Intentional القتل عمدا	Semi-deliberate القتل شبه العمد	Intentional القتل خطأ
Engaging in a potentially lethal act with the intention of committing .	Engaging in an action without the intent to cause death, using a tool that is not typically lethal but result in death.	Not intending to commit suicide or accidental homicide.

[28] Abu Dawud, *Sunan Abu Dawud*, Book 1, Hadith no. 334.

[29] Zulkifli Mohammad Al-Bakri, "Menyahjenayahkan Cubaan Membunuh Diri: Satu Pandangan," accessed January 29, 2023, https://zulkiflialbakri.com/1-menyahjenayahkan-cubaan-membunuh-diri-satu-pandangan/.

Figure 2: Three types of suicide

Since it is forbidden to take another person's life, it follows that taking our own life is also forbidden.

ISLAMIC PERSPECTIVE ON THE DECRIMINALISATION OF ATTEMPTED SUICIDE

It is acknowledged that the suicidal crisis is commonly associated with mental illness. Both are interconnected, as diagnosable mental illnesses are present in the majority of suicide cases. Islam categorises mental or psychological problems into two types, i.e., prolonged mental illness (*Mutbiq*) and temporary mental illness (*'Aridh/Ghair Mutbiq*).[30] The second category of psychological conditions can be treated with medications and therapies. Thus, individuals afflicted with the said conditions have the chance of recovery. A person suffering from mental illness is presumed to have a lack of mental capacity and cannot be convicted of any criminal offence. Although suicide is forbidden and considered a sin in Islam, the religion acknowledges that individuals with mental illnesses who are unable to arrive at a sound decision are not held accountable for their actions. Whatever happens, be it actions, words or confessions during the episode of mental illness, is not considered sinful, provided that his conditions must be confirmed by an expert as beyond the control of a sane mind. This is in line with the *hadith* narrated by *'Ali*:

> *I heard the Messenger of Allah say: Three groups are exempted from liability: from the child until he reaches puberty, from the sleeper until he wakes up and from the insane until he regains his sanity.*[31]

Al-Majnun, or insane in this hadith, means insane or anything related to it. An insane person behaves in a manner similar to a

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[30] Zulkifli Mohammad Al-Bakri,. "Menyahjenayahkan Cubaan Membunuh Diri: Satu Pandangan."

[31] Ahmad ibn Hanbal, *Musnad Ahmad*, Book 5, Hadith no. 367.

carefree and sensible baby, freed from the weight of responsibilities. Imposing prison sentences or fines for crimes committed by individuals lacking full mental capacity is unjust. In this sense, legislating against suicide attempts is not an efficient method to deter them. The law actually obstructs individuals in need from receiving the required assistance. Hence, decriminalising attempted suicide is a positive measure to safeguard the rights of mental patients requiring proper management and treatment. This aligns with the principle of safeguarding life outlined in the *Maqāṣid al-Sharīʿah*. The implementation of the principle of safeguarding life can function as a mechanism to ensure that persons who suffer from mental health disorders obtain adequate care and treatment that enhances their physical and psychological well-being. In light of the growing incidence of mental health disorders within society, safeguarding human life necessitates ensuring the provision of medical care that is readily accessible in situations where critical treatment is required to preserve the lives of individuals or their kin.

However, looking into another perspective, it is worth considering that decriminalising attempted suicide may allow individuals to attempt suicide for reasons requiring deterrence to evade accountability. There is never a good reason or adequate justification for someone who is in good mental health to take their own life under any circumstances. It was narrated by Bukhari, on the authority of Jundub ibn Abdullah, who said that the Prophet S.A.W. said:

> *A man among those before you were wounded. He was in such anguish that he took a knife, slit his wrist, and let the blood flow until he died. Allah Almighty said: My servant has preceded me with his soul, so I have forbidden Paradise for him.*[32]

It is also similar to another *hadith* narrated by Abu Hurairah R.A.:

[32] Forty Hadith Qudsi, Hadith no. 28.

> *We were in the company of Allah's Messenger S.A.W. in a battle, and he remarked about a man who claimed to be a Muslim, saying, "This (man) is from the people of the (Hell) Fire." When the battle started, the man fought violently till he got wounded. Somebody said, "O Allah's Messenger! The man whom you described as being from the people of the (Hell) Fire fought violently today and died." The Prophet S.A.W. said, "He will go to the (Hell) Fire." Some people were on the point of doubting (the truth of what the Prophet had said) while they were in this state, suddenly someone said that he was still alive but severely wounded. When night fell, he lost patience and committed suicide. The Prophet S.A.W. was informed of that, and he said, "Allah is Greater! I testify that I am Allah's Slave and His Apostle." Then he ordered Bilal to announce amongst the people: 'None will enter Paradise but a Muslim, and Allah may support this religion (i.e. Islam) even with a disobedient man.*[33]

Based from the *hadith*, suicide can occur without being caused by mental illness. Thus, there must be a drive towards developing measures that enable us to detect and exclude mental illnesses and suicide attempts with more confidence and certainty.[34] A clear distinction must be established to balance between mentally disordered-induced attempt suicide as well as escaping liability attempt suicide. A reference can be made to India, which has taken a step ahead in handling cases of mentally induced suicide attempts. India has not abolished Section 309 of their Penal Code. However, the Mental Healthcare Act 2017 always takes precedence in cases of suicide attempts where the presence of severe stress is always presumed. Section 115 of the Mental Healthcare Act 2017 provides that any person who attempts suicide is to be presumed to be suffering from severe stress, and they shall not be tried and punished under Section 309 of the Indian Penal Code. Subsection 2 of the said section imposes a duty

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[33] Al-Bukhari, *Sahih al-Bukhari*, Vol 4, Book 52, Hadith no. 296.

[34] Abdi Sanati, "Does Suicide Always Indicate a Mental Illness?" *London Journal of Primary Care*, no. 2 (2009): 93–94.

on the government to provide care, treatment and rehabilitation to those who attempt suicide due to severe stress in order to reduce the risk of recurrence of the suicide attempt.

CONCLUSION

Decriminalising suicide attempts should not be interpreted as endorsing the act of suicide, as it contradicts the core tenet of Islamic law. An effective strategy to reduce the suicide rate should be implemented alongside the decriminalisation of attempted suicide. Factors contributing to suicide must be addressed to achieve the objective of decriminalising the offence. However, there appears to be concern regarding the blanket applicability of decriminalisation to all forms of suicide, including those induced by mental illness and escaping liability suicide, which require distinct approaches to manage. There appears to be a vacuum in the law regarding the latter form of suicide due to the complete repeal of Section 309 of the Penal Code. The movement towards decriminalising suicide was fuelled by the fact that suicide is primarily regarded as a medical or psychiatric issue. The question now is, does suicide always indicate a mental illness? Or can there be a presumption that all suicides are due to abnormal mental stress? It is worth considering that decriminalising attempted suicide will cause individuals who attempt suicide for reasons that necessitate deterrent action could easily avoid culpability. Thus, there must be a drive towards developing measures that enable us to detect and exclude mental illnesses driven suicide attempts with more confidence and certainty. A clear distinction must be established to clearly balance between mentally disordered-induced attempt suicide as well as escaping liability attempt suicide. A reference can be made to India, which has taken a step ahead in handling cases of mentally induced suicide attempts. India has not abolished Section 309 of their Penal Code. However, the Mental Healthcare Act 2017 always takes precedence in cases of suicide attempts where the presence of severe stress is always presumed. Section 115 of the Mental Healthcare Act 2017 provides that any person who attempts suicide is to be presumed to be suffering from severe stress, and they shall not be tried and punished under Section 309 of the Indian Penal Code. Subsection

2 of the said section imposes a duty on the government to provide care, treatment and rehabilitation to those who attempt suicide due to severe stress in order to reduce the risk of recurrence of the suicide attempt.

THE FRAMEWORK OF *MAQĀṢID AL-SHARĪ'AH* AND ITS IMPACT ON *WAQF* LAW AND ECONOMY

Mohd Owais[1]
Mohammed R. M. Elshobake[2]

ABSTRACT

In Islamic law, the *endowment (waqf)* is a significant institution devoted to allocating property for charitable purposes, funding social and religious initiatives like education, healthcare, and poverty alleviation. This study delves into the importance of *Maqasid al-Shari'ah* within the *waqf* system and the economy. *Maqasid al-Shari'ah*, a foundational concept in Islamic jurisprudence, embodies the objectives of Islamic law, guiding its underlying principles and values across various domains, including economics, finance, and governance. According to the findings, *waqf* serves as a potent tool for fulfilling *Maqasid al-Shari'ah*, particularly in social welfare and economic development. This paper offers original insights into the developmental potential of *waqf*, contributing to the existing literature. Grounded in desk-based research, it adopts a doctrinal research paradigm to describe and analyse the relevant Islamic and legal rules from the primary and secondary sources. The exploration of *Maqasid al-Shari'ah*'s influence on the *waqf* system, and the economy illuminates how it can advance individual and societal welfare. This paper enriches understanding the concept of *Maqasid al-Shari'ah,* its impact on the *waqf* system, and its potential for enhancing both individual and societal welfare.

Keywords: Framework, *waqf*, *Maqasid al-Shari'ah*, Islamic law, economy

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INTRODUCTION

Endowment (waqf) serves as a tool for public benefit, notably in addressing poverty.[3] Its definition varies but stems from the root "*waqf*," which literally means "confinement and prohibition" or "forcing something to stop or stand still".[4] *Waqf* properties, due to their perpetual nature, cannot be sold, purchased, or gifted, thus forming a lasting resource[5]. Throughout Islamic history, *waqf* has functioned as a distinct economic sector, fostering cultural and civilizational growth. It facilitated the establishment of educational institutions, nurturing advancement in various fields like science, law, and humanities.

Moreover, *waqf* has been instrumental in funding essential public services such as healthcare, environmental conservation, animal welfare, and the upkeep of places of worship. Primarily, it has been a cornerstone in ensuring the welfare of diverse sections of the impoverished and needy in society. This enduring system has significantly contributed to societal progress and the upliftment of communities across Islamic nations, representing a crucial aspect of their historical and social fabric.[6]

Technically, the jurists' definitions of *waqf* have been formed by their perspectives on the concept. Ibn Qudamah and Shirazi defined "*waqf*" as "to hold up the root and spread its usufruct".[7]

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[3] Çizakça Murat, 'Islamic wealth management in history and at present', *Journal of King Abdulaziz University: Islamic Economics 28* (2015). 6-10.

[4] Ibrahim Siti Sara et al., 'Waqf integrated income generating model (WIIGM) for enhancing sustainable development goals (SDGS) in Malaysia: An evaluation of behavioural intention' *International Journal of Ethics and Systems 39*. no. 4 (2023): 841-858.

[5] Daud Dalila. 'The role of Islamic governance in the reinforcement Waqf reporting: SIRC Malaysia case' *Journal of Islamic Accounting and Business Research 10.* no. 3 (2019): 392-406.

[6] Sadique Muhammad Abdurrahman, et al., 'Socio-legal significance of family Waqf in Islamic law: its degeneration and revival' *IIUM Law Journal 24* (2016): 309.

[7] Ibn Qudāmah, *Al-Mughni*. (Misar: Maktabah al-Qahira, 1998), 3-4.

This definition is favoured for its alignment with the broader concept of *waqf* across the four school of law, addressing its core purpose.

Maqasid al-Shari'ah, in practical terms, refers to the objectives derived from the Qur'an and *Sunnah* for the welfare of individuals (*Masaleh al-Ibad*) or public interest.[8] This includes safeguarding the five primary objectives of *Shari'ah*, known as *kulliyyat al-Khams*: the protection of faith (*hifz ad-din*), life (*hifz al-nafs*), progeny (*hifz an-nasl*), intellect (*hifz al-'aql*), and wealth (*hifz al-mal*).[9]

According to Al-Shatibi, *Masaleh al-Ibad* is categorized into three main groups: Firstly, is necessity (*dhariruyyat*) which encompass fundamental needs crucial for individual and communal life. The absence or neglect of these necessities' risks endangering both individual and community existence. secondly is the needs *(hajiyyat*) which are complementary to necessities and involve facilitating needs by removing obstacles, alleviating hardships, and avoiding difficulties. While important, the absence of these needs does not significantly impact how people conduct their lives. Thirdly is embellishment or luxuries (*tahsiniyyat*) which pertain to enhancing moral conduct and belief systems. Unlike necessities and needs, the absence of *tahsiniyyat* does not disrupt human life or have detrimental consequences.[10] Shatibi's classification of *Masaleh al-Ibad* provides a framework for understanding varying degrees of public interest, distinguishing between essential, supportive, and morally enriching aspects within a society.

Utilising the doctrinal research methodology, this study will analyse primary Islamic legal sources, including Qur'anic verses,

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[8] Arshad Roshayani et al., Norzaihan Mohd Zain, Sharina Tajul Urus, and Ahmed Chakir. 'Modelling *maqasid* Waqf performance measures in Waqf institutions' *Global Journal Al-Thaqafah 8*. no. 1 (2018): 157-170.

[9] Al-Shatibi*, Al-Muwafaqat*. (Misar: Al-Nashir Dar Ibn Afaan, 1997), 17-22.

[10] *Ibid.*

hadiths, classical jurisprudential texts, and contemporary legal interpretations. It will critically evaluate the doctrinal foundations of *Maqasid al-Shari'ah* and their relevance to the *waqf* system, shedding light on how these principles influence economic practices within Islamic finance and philanthropy.

Through this research, a deeper understanding will be sought regarding how *Maqasid al-Shari'ah* shapes the objectives, ethical considerations, and economic implications of the *waqf* system. By dissecting doctrinal elements, this study aims to contribute to the broader discourse on Islamic jurisprudence, socio-economic development, and ethical governance, providing insights into the intersections between *Maqasid al-Shari'ah, waqf*, and the economy.

CONTRIBUTION OF *WAQF* TOWARDS FIVE *MAQASID AL-SHARI'AH*

In both their substantive and procedural forms, as well as in the senses of enactment, continuation, protection, and enforcement, Islamic laws are established for a variety of reasons, some of which are quite general and may apply to all laws, while others are unique to concerns.[11]

The term *Hifz al-Din* refers to the better transmission and development of religion as well as the safeguarding of its adherents and declared values. Worshipping Allah S.W.T., following His instructions, engaging in religious observances and their necessary tasks, and creating educational and scholarly seminaries are all ways to accomplish this. [12] Similarly, *Hifz al-Nafs* includes both protective steps and punitive actions. The former measure involves the basic needs of a human being such

[11] Mohammad, Mohammad Tahir Sabit Haji. "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy," *Intellectual Discourse* (2018), 1065-1091.

[12] Ibn Ashur, *Maqasid al-Shar'iah al-Islamiyah*. (Qatar: Dar al-Nafais, 2010), 197.

as having foodstuffs, clothes, a house for sustenance, and prohibition of activities that may jeopardise life.[13]

Likewise, *Hifz al-'Aql* safeguards each person's mind and is accomplished with the use of punitive measures, such as refraining from drinking alcohol and punishing those who engage in it. Similarly, *Hifz al-Nasl* safeguards the future generations of humanity, aiming to conserve and advance the ecosystem. Imam al-Ghazali emphasised the prohibition of adultery (*zina*) and highlighted marriage as a crucial factor in defending humanity.[14]

To fully realise *Maqasid al-Shari'ah* across all three levels, *Hifz al-Mal* is essential. Islamic law encourages the pursuit of wealth through legal means but strictly prohibits acquiring wealth illegally or through misappropriation and abuse. Notably, *waqf* institutions play a significant role in achieving these goals. Historically, the creation of *mosques,* religious schools, universities for *Salah* (prayer), propagation of Islam, and other religious activities, essential for *Hifz al-Din* and *Hifz al-'Aql*, relied heavily on *waqf* properties.

Crucially, to prevent evil in Islam, the income from *waqf* can be distributed among non-believers as a *taklif*.[15] This Islamic practice has the potential to alter their perception of Muslims, contributing to reducing Islamophobic attitudes. Remarkably, achieving these objectives within *Maqasid al-Shari'ah* is more feasible compared to general *waqf* strategies. [16]

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[13] Ibn Ashur, *Maqasid al-Shar'iah al-Islamiyah*, 197.

[14] Hassan Rusni et al., "*Cash Awqaf: How It May Contribute to SDGs?," Islamic Wealth and the SDGs: Global Strategies for Socio-economic Impact* (2021): 559-577.

[15] *Ibid*.

[16] Abdullah, Mohammad, 'Waqf, sustainable development goals (SDGs) and maqasid al-shariah' *International Journal of Social Economics 45*. no. 1, (2018): 158-172.

SYNTHESIS BETWEEN *MAQASID AL-SHARI'AH* AND *WAQF*

Muslim jurists have established that *Shari'ah* safeguards five fundamental human interests. Al-Shatibi suggested that this protection encompasses both affirmative actions and the prevention of threats to these five human interests.[17] Ibn Ashur also asserted that the objectives of *Shari'ah* aim to bring benefits to humanity while preventing harm.[18] When considering all three categories of benefit concerning the primary goals, *waqf* emerges as a mechanism capable of supporting both the attraction of good and the prevention of evil, serving the needs of people. [19] Further details can be explained through these concepts:

Protection of Religion (Hifz al-Din)

The preservation of religion encompasses various aspects, including the propagation (*da'wah*) of the faith, safeguarding its applied systems, and ensuring the well-being of its followers. Islam's preservation relies on faith in Allah, worship (*'ubudiyah*), fulfilling obligations, education through teaching and learning, and the establishment of educational institutions.[20] The gentle promotion and spread of Islam through pleasant words are highlighted in the Qur'an (16:125; 41:33) as crucial to safeguarding its essence.

Al-Ghazali emphasised that preventing evil within Islam is achievable through the propagation of the faith, encompassing enjoining good and forbidding evil, along with the enforcement of penalties against deviant groups and individuals.[21] *Waqf* assets can

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[17] Al-Shatibi, *Al-Muwafaqat*, 34-40.

[18] Ibn Ashur, *Maqasid al-Shar'iah al-Islamiyah,* 197-243.

[19] Tahir, "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy," 1086-1088.

[20] Al Ghazali, *Maqasid Al-Shariah*. (Lebanon: Dar Al Kotob Al-Ilmiyah Beirut,1997), 155-56.

[21] *Ibid.*

serve these purposes while adhering to the order of priorities based on the three types of *Shari'ah* objectives. For example, constructing a mosque might be considered a necessity (*daruriyyat*), while its maintenance, appointment of an imam, and a *mu'azzin* fall under needs (*hajiyyat*). Enhancements like carpeting and lighting, seen as luxuries (*tahsiniyyat*), can also be encompassed within *waqf* activities.

Likewise, establishing *waqf* for the construction of religious schools contributes to the propagation of Islam, its belief system, and ethical values and ensures preservation for future generations. This alignment of *waqf* assets with these activities underscores their significance in upholding and spreading the tenets of Islam.[22]

Protection of the Human Person (Hifz al-Nafs)

This objective aims to safeguard human life, either individually or collectively, encompassing preventive measures and punitive actions. Preventive measures include ensuring access to essentials like food, clothing, and shelter and preventing diseases. Additionally, it involves prohibiting activities that pose life-threatening risks.[23] Marriage is encouraged to sustain human generations, explicitly prohibiting the killing of children. Seeking sustenance through food, acquiring knowledge, and fulfilling obligations also contribute significantly to safeguarding individuals.[24]

In cases of extreme necessity or pressing needs for food and clothing, certain prohibited acts, like consuming pig or blood, may be permitted as a recognised benefit (*maṣlaḥah mu'tabarah*).[25] Throughout Islamic history, *waqf* has played a crucial role in

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[22] Hasan, "*Cash Awqaf: How It May Contribute to SDGs?"* 559-577.

[23] Al-Ghazali, *Maqasid Al-Shariah*. (Lebanon: Dar Al Kotob Al-Ilmiyah Beirut, 1997), 128-40.

[24] Ibn Ashur, Maqasid al-Shar'iah al-Islamiyah, 197.

[25] Syed Ali Salman et al., "*Towards a Maqasid al-shariah based development index*," No. 1435-18. (2014): 33-40.

providing for these preventive measures, ensuring the safety and well-being of individuals and communities.

Furthermore, medical care and programmes are established through *waqf* to protect both men and women from hazards like fire and drowning. Another vital aspect of *waqf* involves educating the public about preventive and punitive measures in fields such as *fiqh* and law, ensuring greater awareness and safety for individuals.[26]

Protection of the Human Mind (Hifz al'Aql)

Protection of the human mind involves education, critical thinking, experimentation, and the prohibition of intoxicants, aiming to preserve rational capacity. These measures are vital for optimal cognitive function. The growth of the human intellect is a central focus within this objective. Notably, critical thinking is considered crucial for the safeguarding and advancement of the human mind.[27]

Categorising education into three types: *ḍurūrī, ḥaji*, and *taḥsīni* underscores the importance of secular knowledge for the well-being of people, surpassing the significance of Islamic education. This perspective prioritises knowledge that benefits society. *Waqf*, therefore, serves as a resource for establishing educational institutions like colleges and universities, fostering both religious and scientific knowledge. It facilitates the procurement of materials and infrastructure for the collective benefit of individuals.[28]

Historically, *waqf* provisions for schools and universities have ensured accessibility to education and research for all

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[26] Arshad Roshayani Norzaihan et al., 'Modelling maqasid Waqf performance measures in Waqf Institutions' *Global Journal Al-Thaqafah 8*. no. 1 (2018): 157-170.

[27] Ibn Ashur, *Maqasid al-Shar'iah al-Islamiyah*, 197-200.

[28] Zailani, Muhammad Nooraiman et al., 'Maqasid Al-Shariah based index of socio-economic development: A literature review', *Journal of Muamalat and Islamic Finance Research* (2022): 50-55.

residents in Muslim societies, regardless of social distinctions. This inclusive approach has been made possible through the availability of *waqf* resources dedicated to educational pursuits.[29]

Protection of the Human Race (Hifz al-Nasl)

The *Shari'ah*, following the teachings of the Prophet Muhammad S.A.W. emphasises the protection and continuous regeneration of human lineage. [30] The preservation of the human race and its ongoing renewal are rooted in the sanctity of human blood. Continuous human regeneration not only contributes to the development of land and resources but also ensures human security and the preservation of religion. [31]

Al-Ghazali underscored the prohibition of adultery while acknowledging marriage as a fundamental means of ensuring the continuous regeneration of humans. Although adultery itself might not halt regeneration, it can lead to conflicts that escalate into severe consequences, even causing fatalities. Moreover, the long-term repercussions of adultery extend to future generations, impacting them physically and psychologically due to inadequate parenting and the exclusion of children from inheritance. [32]

Utilising *waqf* for family and charitable purposes is a sanctioned way to provide for one's children. Throughout history, revenues from *waqf* have been instrumental in supporting widows, and divorcees and aiding needy couples in marriage. These initiatives empower underprivileged and oppressed populations, offering them protection against vice and unethical practices,

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[29] *Ibid.*

[30] Hassan, "*Cash Awqaf: How It May Contribute to SDGs?"* 580-582.

[31] Azmi, Ahmad Shazrin Mohamed et al.,"Synthesizing the Maqasid al-Syariah for the Waqf property development," *IOP Conference Series: Earth and Environmental Science*, vol. 385, no. 1, p. 012051. IOP Publishing, (2019): 20-21.

[32] Abdullah Mohammad. "Reflection of Maqāṣid al-Sharī'ah in the classical Fiqh al-Awqāf," *Islamic Economic Studies* 27, no. 2 (2020): 79-90.

thereby preventing situations that result in fatherless children. Additionally, these efforts foster compassion and kindness within society.[33]

Protection of Individual Property (Hifz al-mal)

The protection of property stands as a fundamental prerequisite for achieving various *Shari'ah* objectives across the three categories: *ḍurūrī*, *ḥaji*, and *taḥsīni*. Both the Qur'an and *Sunnah* acknowledge the importance of property ownership. Al-Ghazali viewed the ethical utilisation of wealth for personal and social welfare as virtuous, contrasting it with its misuse or involvement in malevolent activities. Property is safeguarded against loss, and harm to others, and should be nurtured and expanded.[34]

The Prophet Muhammad S.A.W. highlighted the significance of righteous wealth while emphasising that good health and contentment surpass material luxuries. The *Shari'ah* encourages acquiring wealth through legitimate means like trade, labour, inventions, inheritance, charity, gifts, and *waqf*.[35]

On the other hand, the *Shari'ah* strictly prohibits the unjust acquisition of others' property, including forbidden transactions, wastefulness, and irresponsible handling of one's assets, such as leaving them unproductive. The *Shari'ah* also mandates compensation for damage to someone's property and prescribes penalties for theft.[36]

Waqf serves the purpose of providing for the poor and needy, often initiated by the endower (*waqif*). Both general *waqf* (*waqf am*) and specific *waqf* (*waqf khas*) can be established to benefit those in need. Whether in cash or immovable property, the

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[33] Mohammad. "Reflection of Maqāṣid al-Sharī'ah in the classical Fiqh al-Awqāf," 79-90.

[34] Al Ghazali, *Maqasid Al-Shariah*, 128-130.

[35] Tahir, "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy," 1080-1098.

[36] *Ibid*.

proceeds generated from these after-investment dealings are distributed among deserving individuals. Essentially, productive cash and landed assets can be employed for this noble cause.[37]

WAQF AND ITS RELATION TO *MAQASID AL-SHARI'AH*

Waqf plays a pivotal role in a nation's economic system, facilitating more effective socioeconomic growth. Once designated as *waqf*, a property cannot be sold, inherited, or gifted. It remains as a piece of property dedicated to Allah S.W.T., ensuring its perpetual preservation.

Maqasid al-Shari'ah denotes the objectives and purposes of Islamic law. It has become a critical aspect in pursuing *waqf*'s higher objectives within Islamic law. Employing the *Maqasid al-Shari'ah* strategy ensures that *waqf* property management aligns with its fundamental goal of serving the public good.[38]

The relationship between *waqf* and *Maqasid al-Shari'ah* is crucial as *waqf* is integral to fulfilling the goals of *Maqasid al-Shari'ah*, particularly in addressing the social welfare aims of Islamic law. *Waqf* assets are utilised for various charitable purposes, including healthcare, education, poverty alleviation, and other social services. This contribution to social justice aids socially disadvantaged groups, supporting programs aimed at reducing poverty and inequality, funded by revenue generated from *waqf* properties.

Furthermore, to advance economic growth, *waqf* serves as an economic tool by investing in diverse commercial, industrial, and agricultural ventures. The profits from these assets can support various social welfare initiatives. Education, a primary goal of

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[37] Abdullah Mohammad. "Reflection of Maqāṣid al-Sharī'ah in the classical Fiqh al-Awqāf," *Islamic Economic Studies* 27, no. 2 (2020): 92-93.

[38] Azmi, Ahmad Shazrin Mohamed et al.,"Synthesizing the Maqasid al-Syariah for the Waqf property development," (paper presented at IOP Conference Series: Earth and Environmental Science, IOP Publishing, vol. 385, no. 1, 012051, 2019), 385.

Maqasid al-Shari'ah, is another significant role of *waqf*. Educational institutions such as schools, colleges, and universities are established through resources donated by *waqf*, promoting knowledge, and learning while catering to less privileged segments of society.[39]

Waqf encompasses several objectives, spanning religious, social, well-being, and scientific aspects.[40] Qaradaghi's opinions categorise these into general and specific parameters, with general parameters detailed below:[41]

Submission to Allāh (S.W.T.) (al-'Ubudiyah)

Al-'Ubudiyah, encompassing *tawhid* (belief in the Oneness of Allah) and *ta'abbud* (submission to Allah), liberates humans from selfishness and self-interest.[42] Qaradaghi highlights the primary objective of *waqf* as being *'Ubudiyah* or submission to Allah, aligning with Qur'anic references to charity. Constructing a *waqf* requires a pure intention solely for the benefit of Allah (S.W.T.), as guided by Qur'anic principles (Qur'an 6:162). Early scholars described it as an act of charity (*al-bir*) encapsulating kindness towards others (*ihsan*) and being carried out for the sake of Allah and justice.[43]

To ascertain the essence of "*Ubudiyah*," Qaradaghi sets three conditions. Firstly, the donation must be solely for the benefit of Allah or motivated by genuine religious intentions. Secondly, the beneficiary must employ the *waqf* for a noble or at least non-sinful

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[39] Fisol Wan Nazjmi Mohamed et al., "*Waqf* Property Management Through the Maqasid Al-Shariah Approach," *Journal of Contemporary Issues in Business and Government| Vol* 27, no. 3 (2021): 29-30.

[40] Mohammad. "Reflection of Maqāṣid al-Sharī'ah in the classical Fiqh al-Awqāf," 95-96.

[41] *Ibid*, 80-82.

[42] *Ibid,* 84-85.

[43] Tahir, "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy" 1080-1098.

purpose. Thirdly, the *waqf* must adhere to philanthropic principles, embodying honesty, and religious virtues, and the donation should consist of the best possessions of the donor (al-Bukhari, 2:50), proving immensely advantageous.[44]

The principle of submission to Allah guides jurists and judges in determining the validity and interpretation of *waqf* deeds concerning the donot or settlor *(waqif)*, the subject matter of the endowment *(mawqūf*), the purposes and beneficiaries *(mawqūf alaihi)*, and the trustee over the *waqf* properties *(nāẓir)*. The *'Ubudiyah* of the *waqif* reflects in the quality of the *mawqūf*, impacting its administration. Similarly, the *nāẓir* is expected to adhere to these principles. Qualities like justice *(al-Adālah),* trustworthiness *(al-Amānah)*and qualification and skill to manage *(kifāyah)* the *waqf* in a *nāẓir* are linked to *'Ubudiyah* and enhance the utilisation of the subject matter of *waqf*. This concept of *'Ubudiyah* holds both legal and ethical significance. Ethically, a *nāẓir* possessing such qualities is expected to optimally manage the *waqf* in its truest sense.[45]

Trusteeship (al-khilāfah)

The objective of *waqf* aligns with the divine trust's mandate on Earth, echoing the teachings of the Qur'an (al Qur'an, 2:30). This goal seeks to ensure that every *waqf* functions in accordance with the overarching objectives of *Shari'ah*, fostering societal development and national progress. It's argued that donating immovable property is more in line with human purpose on earth than donating movable goods. Immovable property believed to secure the perpetuity of *waqf* should be meticulously maintained, protected from decay, and kept in good repair in perpetuity.[46]

While acknowledging the value of trusteeship in *waqf* management, it's suggested that the concept of *'Ubudiyah*, rather

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[44] Tahir, "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy" 1083-1092.

[45] *Ibid,* 1080-1098.

[46] *Ibid.*

than the type of *waqf*, is paramount. Regardless of the type of *waqf*, if managed with *'Ubudiyah*-based trusteeship, it's anticipated to endure for many generations. However, it's debatable whether immovable property solely ensures the perpetuity of *waqf*, given the historical disappearance of numerous *waqf* properties in the Islamic world.[47]

Preserving perpetuity necessitates laws to regulate trustees and governance, alongside norms of trusteeship grounded in *'Ubudiyah*. Development, as understood in the context of *khilāfah* (trusteeship), aims for comprehensive human progress. Qaradaghi asserts that *waqf* should pursue development, citing historical instances where *waqf* has contributed to socioeconomic necessities, scientific advancements, and cultural successes. Qaradaghi envisions *waqf* as a vehicle for the holistic socio-economic development of the ummah, utilising all resources; land, money, goods, and services to this end.[48]

Financial Sustainability (Ta'min Mawrad Mali)

Waqf assets and properties are intended for prolonged use under the guardianship of the *nazir*, who must ensure their protection from improper usage or transfer to third parties. *Waqf* serves the purpose of unlocking unproductive capital for comprehensive human development, meeting diverse societal needs, and providing access to permissible financial resources for the needy through benevolent loans *(qardh al-Hassan)*. This approach secures a continual income stream for both present and future generations of the Islamic *Ummah*.[49]

This characteristic of *waqf* is exemplified in the case of the captured lands of Iraq, which Umar R.A. chose to retain for the future generations rather than distributing them among the

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[47] Tahir, "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy"

[48] Mohammad. "Reflection of Maqāṣid al-Sharī'ah in the classical Fiqh al-Awqāf," 80-82

[49] *Ibid,* 95-96.

Muslims of his time, based on the counsel of Mu'adh bin Jabal. Islamic jurists considered this as *waqf*, and according to Qaradaghi, all *waqf* assets share qualities that benefit both contemporary and future Muslims.[50]

These principles yield several outcomes:[51]

1. The subject matter of *waqf* should generate recurring or sustainable benefits.
2. *Waqf* and their proceeds should cater to the necessities (*ḍurūrat*), needs (*ḥajiyat*), and luxuries (*taḥsīnyat*) of the majority of the community.
3. *Waqf* should empower Muslims to become self-sufficient in various endeavours and reduce reliance on external aid. Scholars have varying opinions on cash *waqf*: some view it as loan capital and approve of *murabahah*, while others do not perceive its benefits.
4. Wealth distribution or redistribution and economic justice (*i'adah aw tawzi' al thurwah*) stand as objectives of *waqf*. This aligns with Qur'anic guidance (59:7) and Mu'adh bin Jabal's advice, focusing on fairness for both present and future generations of Muslims. Wealth redistribution occurs through *waqf*, directing the wealth of the affluent towards the unemployed, those with low incomes, and the vulnerable, facilitating economic justice. This viewpoint may accurately apply to the preservation of state-controlled public property. However, regarding individuals, wealth redistribution is achieved through *waqf*, channelling the wealth of the affluent towards those in need.

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[50] Mohammad. "Reflection of Maqāṣid al-Sharī'ah in the classical Fiqh al-Awqāf," 80-82

[51] Tahir "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy." 1076-1077.

Islamic Solidarity (al-Takāful)

Absolutely, the fundamental concept of brotherhood among Muslims underscores the importance of empathy and support within the community. *Waqf* exemplifies this principle of Muslim unity and solidarity by utilising assets to alleviate the suffering caused by poverty and need. The *waqf* system acts as a mechanism to actualise the principle of Muslim unity and solidarity through the following:[52]

1. Supporting the Needy: *Waqf*, through its charitable nature, is primarily designed to benefit society, particularly the disadvantaged and needy. Assets dedicated to *waqf* are used for various charitable causes such as healthcare, education, poverty alleviation, and social services. By addressing these fundamental needs, the *waqf* system directly contributes to strengthening solidarity by uplifting and supporting those who are vulnerable within the community.
2. Redistribution of Wealth: *Waqf* serves as a means of redistributing wealth within the community. It allows individuals to contribute their assets for the collective benefit, ensuring that resources are directed towards the welfare of the entire society. This redistribution of wealth, especially towards those in need, fosters a sense of shared responsibility and unity among Muslims.
3. Promotion of Brotherhood: Islamic teachings emphasise the concept of brotherhood among believers. The *waqf* system embodies this principle by encouraging individuals to support each other's needs. Through *waqf*, individuals come together to contribute resources for communal benefit, fostering a sense of brotherhood and solidarity among Muslims.
4. Long-Term Community Support: *Waqf* assets are dedicated for perpetuity, ensuring sustained support for future generations. This long-term commitment to community welfare cultivates a sense of continuity in solidarity efforts,

[52] Tahir "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy." 1080-1098.

creating a legacy of support and care within the Muslim community.

5. Social and Economic Development: *Waqf* assets are often utilized for projects that contribute to social and economic development. Establishing educational institutions, healthcare facilities, and infrastructure projects through *waqf* not only benefits individuals directly but also contributes to the overall progress of society. This collective advancement strengthens the bonds of solidarity among Muslims.

In essence, the *waqf* system operates as a practical manifestation of Islamic solidarity, promoting communal support, equitable distribution of resources, and the advancement of the community's welfare. It embodies the core Islamic values of compassion, care for others, and mutual aid, fostering a cohesive and supportive environment within the Muslim community.[53]

This principle of solidarity underscores the necessity for careful planning in *waqf* endeavours to truly foster unity, both within families and within society at large. Sound planning ensures that *waqf* assets are effectively utilised to address the needs of individuals and communities, thereby nurturing and strengthening the bonds of solidarity among Muslims.[54]

Protecting Human Dignity (Himayah al-Malhufin)

Qaradaghi eloquently describes the role of *waqf* in preserving the dignity of the disadvantaged and vulnerable members of society. The *waqf* system, in his view, acts as a shield, protecting the weak and needy from failure, humiliation, and demoralisation. This protection aligns with *Shari'ah's* goals aimed at upholding human respect and dignity.[55]

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[53] Tahir "Maqāṣid al-Sharī'ah and Waqf: Their effect on Waqf law and economy." 1080-1098.

[54] *Ibid.*

[55] *Ibid.*

Human indignation often arises from the absence of principles of social and economic fairness and the prevalence of biases related to wealth, gender, class, race, and other factors. These biases lead to limited access to employment and opportunities for disadvantaged groups. Qaradaghi contends that *waqf* serves as a safeguard for the dignity of marginalized groups, such as the elderly, widows, orphans, minorities, women, and others facing discrimination within the socioeconomic framework of society.[56]

Through the mechanisms of *waqf*, wealth is redistributed from privileged segments to the underprivileged, empowering the latter with the necessary knowledge and skills to contribute meaningfully to society. By granting them opportunities and resources, *waqf* aims to ensure that these individuals are respected and valued by their fellow citizens, aligning with the principles of Islamic justice.[57]

In essence, *waqf* plays a pivotal role in promoting social justice, mitigating inequality, and fostering an environment where all members of society, regardless of their background or status, can lead dignified and respected lives.[58]

Altruism (īthār)

The concept of altruism within the context of *waqf* refers to the selfless act of donating assets or wealth, even if the donor might have personal needs for it. This act aligns with the teachings in the Qur'an (al Qur'an, 3:92), encouraging the offering of the best or preferred possessions for charitable purposes.[59]

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[56] Arshad Roshayani et al., "Modelling Maqasid waqf performance Measures in waqf Institutions," *Global Journal Al- Tahaqafah 8,* no. 1 (2018):157-170.

[57] Roshayani, "*Modelling Maqasid waqf performance*," 157-170.

[58] *Ibid*.

[59] Hassan "*Cash Awqaf: How It May Contribute to SDGs?"* 580-582.

The relationship between altruism and the principles of '*Ubudiyah* and *tanmīyah* is highlighted. '*Ubudiyah* refers to devotion or servitude to Allah, suggesting that altruism benefits the donor by fostering a sense of dedication and spiritual fulfilment. *Tanmīyah*, on the other hand, is the dedication of assets or wealth for the cause or objective of the *waqf*, emphasising the importance of using these resources optimally for the intended purpose.[60]

Moreover, this principle also underscores the importance of selecting the best and most beneficial assets for the *waqf*, emphasising quality over quantity. Both the donor (*waqif*) and the beneficiary (*mawqūf alaihi*) are encouraged to ensure that the assets dedicated to *waqf* are of the highest utility and serve the intended purpose effectively.[61]

Choosing the Highest and Best Utility (Ikhtiyar al-Ahsan wa Akthar Naf'an)

This principle involves selecting the most beneficial asset to cater to specific societal groups. It is applicable to the *waqif, mawqūf,* and *nāẓir.* The *nāẓir,* educated under this principle to donate their best property, is expected to derive the greatest social utility from the asset. This can be accomplished through both social and economic *waqf*, where assets are productive and generate income. Maximising the utility of *waqf* assets entails sound cash investments and enhancing fixed assets for increased yield and efficiency. Prioritising the productive aspect of *waqf* becomes crucial for addressing the current and future needs of societies. [62]

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[60] Tahir, "Maqāṣid al-Sharī'ah and Waqf," 1080-1098.

[61] Eldersevi Suheyib et al., "Analysis of Global Ethical Wealth Based on Maqasid al-Shari'ah: The Case of Waqf," *Islamic Wealth and the SDGs: Global Strategies for Socio-economic Impact* (2021): 469-484.

[62] Suheyib, "*The Case of Waqf,"*469-450.

MAQASID AL-SHARI'AH AND *WAQF* SYSTEM

Maqasid al-Shari'ah has had a significant impact on the *waqf* system. One of the key objectives of Islamic law is to promote social justice and alleviate poverty. *Waqf* is an important means of achieving this objective. Property is endowed for charity purposes to meet the needs of the underprivileged and impoverished. The interpretation and application of the *waqf* system have been influenced by *Maqasid al-Shari'ah.* Islamic jurists have employed the idea of *Maqasid al-Shari'ah* to create a more nuanced understanding of the *waqf* system. For instance, they stress the significance of ensuring that *waqf* property aligns with the endowment's purposes. This emphasis has led to greater consideration of the social and economic impacts of the *waqf* system.[63]

The framework of *Maqasid al-Shari'ah* can be used to mobilise resources for poverty alleviation, representing one method of incorporating *Maqasid* into the *waqf* system. This involves applying *Maqasid al-Shari'ah* guiding principles to distribute cash from *waqf* endowments to initiatives combating poverty and inequality. Thus, *waqf* can be utilised as a vehicle for social and economic advancement, aligning with the objectives of *Maqasid al-Shari'ah*. [64] Other scholars have expanded the scope of the *waqf* system by introducing fundamental and overarching *waqf* goals that could influence other economic sectors. According to *Maqasid al-Shari'ah*, environmental preservation is a religious duty, hence *waqf* can support this cause as environmental conservation is crucial for life continuation and achieving other objectives of the *Shari'ah*.[65]

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[63] Mahmud, Mek Wok et al., "Optimization of philanthropic waqf: The need for maqasid-based legislative strategies," *Shariah Law Reports* 2 (2010): 45-29.

[64] *Ibid*.

[65] Abd Halim Mohd Noor et al., "A Conceptual Framework for Waqf-Based Social Business from the Perspective of Maqasid Al-Shariah," *International Journal of Academic Research in Business and Social Sciences* 8, no. 8 (2018): 804-810.

Waqf properties and assets can be utilised for an extended duration. The *nāẓir* must safeguard *waqf* capital, preventing its transfer or misappropriation. *waqf* is seen as unlocking unproductive capital for comprehensive human development, meeting various societal needs, and providing halal financial resources through benevolent loans.[66] Therefore, *waqf* can ensure a stable financial resource for present and future generations of the Islamic *Ummah*. This attribute of *waqf* is evident from the *waqf* of the conquered lands of Iraq, when Umar R.A. did not distribute them among Muslims of his time; instead, he preserved them for future generations based on Mu'adh bin Jabal's suggestion. Islamic jurists considered it *waqf*, and Qaradaghi believes similar attributes exist in every *waqf* asset, sustaining current and future generations of Muslims.[67]

The objectives of *Shari'ah* guide donors regarding conditions imposed on *waqf* income distribution. In essence, the validity of a *waqif's* conditions is judged based on conformity with objectives of *Maqasid al-Shari'ah*. These objectives also direct the *nāẓir* to invest *waqf* assets in activities related to these objectives. When considering the economic role of *waqf* and interpreting *Shari'ah* texts and *fiqhi* reasoning on *waqf*, fresh perspectives should integrate the objectives and principles of *waqf* with *Maqasid al-Shari'ah*. This approach should be heeded by *fiqh* scholars, lawmakers, and the judiciary. It must coincide with an understanding of *waqf's* fundamental concepts as a charitable entity for sustainable public good, generating socioeconomic public goods, products, and services.[68]

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[66] Halim "A Conceptual Framework for Waqf-Based Social Business from the Perspective of Maqasid Al-Shariah,"

[67] Nasr M. "Maqasid Al Shariah in Wealth Management," *Journal of Wealth Management & Financial Planning* 2 (2015): 17-31.

[68] Rahhal, Alla'. & al-Sa'd, Ahmad. "Waqf wa Hifz Maqāṣid al Sharī'ah" (Jordan: General Iftaa` Department (GID), 2013), https://aliftaa.jo/Research.aspx?ResearchId=46#

MAQASID AL-SHARI'AH AND THE *WAQF ECONOMY*

The impact of *Maqasid al-Shari'ah* on the *waqf* economy is substantial. Across the Muslim world, *waqf* stands as a significant financial resource for charitable endeavours. Endowing property for philanthropic purposes addresses the needs of the underprivileged and needy. *Maqasid al-Shari'ah* ensures that *waqf* property aligns with the intended goals, leading to increase attention to its social and economic impacts. For example, *waqf* assets now contribute to funding crucial social services like healthcare and education, thereby promoting social justice and alleviating poverty. [69]

Moreover, *Maqasid al-Shari'ah* has bolstered the financial prudence in managing *waqf* properties. Islamic legal authorities emphasise the importance of ensuring that *waqf* assets are managed to yield fair returns on investment. This strategic financial management sustains the profitability of the *waqf* economy, enabling it to effectively support the needs of the underprivileged and destitute.[70]

In essence, *Maqasid al-Shari'ah* has transformed the way *waqf* properties are utilised, ensuring alignment with their intended goals. This heightened focus on the social and economic impacts of *waqf* highlights its role in serving the disadvantaged and maintaining financial sustainability in pursuit of charitable objectives.

IMPACT OF THE *WAQF* SYSTEM AND ECONOMY

The economy and *waqf* significantly influence society, especially in the realms of Islamic finance and philanthropy. A society's backbone, the economy, shapes employment, income distribution,

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[69] Mohd Noor, "*Conceptual Framework for Waqf-Based Social Business*," 804-810.

[70] Hasan, "*Cash Awqaf: How It May Contribute to SDGs*?" 580-582.

and overall well-being. The Qur'an underscores human creation's purpose as *ibādah*, focusing on worship and obedience to Allah. This spiritual foundation implies that socio-economic development should align with these higher goals. Advancements in wealth, health, living standards, and culture aim to aid people in worship and successfully navigating life's challenges. Obedience to Allah necessitates fulfilling both divine and human rights, forming a comprehensive framework for socio-economic development. Progress not in line with these higher objectives lacks true improvement.[71]

This perspective, rooted in Islamic principles, acknowledges diverse global beliefs. It recognises that not all individuals adhere to the Islamic definition of life's purpose and advocates for an inclusive approach to socio-economic development. Muslims are not obliged to force others to change beliefs but rather to share accurate information. The understanding of life's purpose varies among individuals and societies. Some immediately embrace it, others realise it over time, and some choose alternative paths. Therefore, socio-economic development objectives should be broad and inclusive, respecting diverse human beliefs while aligning with life's fundamental purpose on earth. This approach highlights the importance of fostering unity and cooperation among people of different beliefs within shared socio-economic goals.[72]

Islam adopts a comprehensive approach to human development, emphasizing the crucial role of achieving higher objectives in shaping public policy. Islamic law's goals harmonise with socio-economic development, aiming for higher purposes like *ibadah* and successfully navigating life's challenges. While progress and development are boundless, Islamic law emphasises

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[71]Ali Salman Syed. "Towards Maqāṣid al-Sharīʿah-Based Index of Socio-Economic Development: An Introduction to the Issues and Literature," *Towards a Maqāṣid al-Sharīʿah Index of Socio-Economic Development: Theory and Application* (2019): 1-20.

[72] Dar, Humayon A. "On making human development more humane," *International Journal of Social Economics* 31, no. 11/12 (2004): 1071-1088.

fundamental dimensions crucial for socio-economic development. These five key dimensions, as previously discussed, provide a foundational framework for a comprehensive understanding of development. Rooted in these dimensions, this framework aims to offer specific protections for Muslims engaged in *ibādah* and universal protections that empower everyone to thrive, make informed choices, and grow without coercion. This approach showcases Islam's commitment to fostering individual and collective well-being within a just and equitable society.[73]

The impact of the economy and *waqf* transcends various domains, influencing economic development, social welfare, Islamic finance, community empowerment, and sustainable development. These factors significantly shape the socio-economic environment, underlining the interconnectedness of economic activities with overall societal well-being. The principles of *waqf*, integrated into Islamic finance, play a pivotal role in promoting community development by offering financial stability and support for sustainable initiatives. Together, the economy and *waqf* not only shape material progress but also contribute to broader goals, including promoting social equity, empowering individuals, and facilitating the sustainable advancement of communities.[74]

IMPACT OF *MAQASID AL-SHARI'AH* ON THE *WAQF* SYSTEM AND ECONOMY

The impact of *Maqasid al-Shari'ah* on the *waqf* system and economy is substantial, shaping both the philosophical foundation and practical applications within Islamic finance and socio-economic development:[75]

1. Philosophical Underpinnings: *Maqasid al-Shari'ah*, the objectives of Islamic law, align with the *waqf* system by emphasising the broader goals of social justice, alleviation of

[73] Ali, "Towards Maqāṣid al-Sharīʿah-Based Index,"1-20.

[74] *Ibid.*

[75] *Ibid.*

poverty, and community welfare. These objectives guide the endowment of property for charitable purposes, focusing on meeting the needs of the underprivileged and vulnerable segments of society. The *waqf* system is thus fundamentally rooted in the broader objectives of *Shari'ah*, serving as a vehicle to realise these objectives.

2. Enhanced Social Justice: *Maqasid al-Shari'ah* reinforces the concept of social justice, and the *waqf* system embodies this principle by redistributing wealth and resources to benefit disadvantaged groups. *waqf* assets are used to provide essential services like healthcare, education, and social welfare, aligning with the goals of social equity and poverty alleviation set by *Maqasid al-Shari'ah.*

3. Economic Sustainability: *Maqasid al-Shari'ah* influences the economic sustainability of *waqf* assets. It guides the management and utilisation of these endowments, ensuring that the assets are invested and used in a manner consistent with the objectives of *Shari'ah*. This helps in generating revenues that support both current and future generations, ensuring financial stability and social support.

4. Community Empowerment: *Maqasid al-Shari'ah* encourages the empowerment of communities. In the context of *waqf*, it encourages the utilisation of endowments to support initiatives that foster self-reliance and sustainable community development. This includes educational institutions, healthcare facilities, and economic development projects, promoting self-sufficiency and community growth.

5. Alignment with Ethical and Social Values: *Maqasid al-Shari'ah* reinforces ethical and social values within the *waqf* system. It ensures that the management and utilisation of *waqf* assets are in line with Islamic ethics and principles, encouraging fairness, equity, and responsible stewardship of resources.

6. Expanded Scope of *Waqf* Initiatives: *Maqasid al-Shari'ah* broadens the scope of *waqf* initiatives beyond traditional charitable activities. It encourages the integration of *waqf* into diverse sectors, such as environmental preservation, cultural

development, and scientific research, reflecting the holistic objectives of Islamic law.

Overall, *Maqasid al-Shari'ah* serves as a guiding framework that reinforces the social, economic, and ethical dimensions of the *waqf* system. It enhances its role in promoting social justice, economic stability, and community welfare, ensuring that the objectives of Islamic law are reflected in the utilisation and management of *waqf* assets.

CONCLUSION

Waqf system and the economy undergo significant impact within the *Maqasid* framework. This perspective scrutinises traditional *waqf* jurisprudence and distils contemporary *waqf* structures, contextualising their dynamism and innovation. Understanding this bears importance for establishing, running, and guiding contemporary *waqf* within *Maqasid al-Shari'ah*. Assessing ethical performance in Islamic banks may utilise the aims of the Islamic moral economy or the framework of *Maqasid al-Shari'ah*, shedding light on practical implications within the *waqf* system and the economy.

Islam emphasises safeguarding five fundamental human rights: the right to faith, personhood, intellect, family, and property. Among the mechanisms ensuring these rights, *waqf* stands out. It calls for selfless donation benefiting many, securing these rights for present and future generations. Islam's five core values intricately align with *waqf's* objectives, evidenced in Qaradaghi's *waqf* aims. These aims merge *Shari'ah* goals with *waqf's* character, exemplifying their integration. The positive influence of *Maqasid al-Shari'ah* on *waqf* legislation promotes transparency and accountability, in line with Islam's goal of responsible stewardship for future generations' benefit.

Waqf's economic impact, guided by *Maqasid al-Shari'ah,* transcends mere material progress. It signifies a commitment to social equity, individual empowerment, and sustainable community advancement. This comprehensive discussion underscores *waqf's* relevance within Islamic jurisprudence and

societal well-being. The influence of *Maqasid al-Shari'ah* extends beyond *waqf* management, encouraging ethical economic practices aligned with Islamic principles, such as fair trade and corporate responsibility. Applied to *waqf* properties, this framework ensures socially responsible investments benefiting society.

Through the lens of the *waqf* system within *Maqasid al-Shari'ah*, the economy's impact is profound and varied. *Waqf* emerges as a catalyst for economic empowerment, sustainable development, and social welfare within communities, aligning with the broader economic objectives of *Maqasid al-Shari'ah* for societal well-being.

In conclusion, the framework of *Maqasid al-Shari'ah* benefits both the *waqf* system and the economy, promoting socially beneficial investments and fostering accountability and transparency in *waqf* management. Hence, it remains crucial when discussing *waqf* economics and its system.

Future studies exploring the impact of *Maqasid al-Shari'ah* on the *waqf* system and economy could delve deeper into several dimensions. Firstly, an in-depth analysis of the implementation challenges and barriers encountered in aligning *Maqasid*-based principles with contemporary *waqf* practices would be valuable. Investigating case studies across diverse socio-economic contexts to understand how *Maqasid* principles are adapted and applied within *waqf* structures could provide nuanced insights. Additionally, exploring the potential integration of technology, particularly blockchain or digital platforms, to enhance transparency, governance, and accessibility within the *waqf* system in line with *Maqasid* objectives could be an intriguing avenue for research. Furthermore, a comparative study examining the impact of *Maqasid* on *waqf* economies in various geographical regions and legal frameworks would contribute to a comprehensive understanding of its global implications.

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PART II
HARMONISATION OF FAMILY LAW

CHILDREN'S RIGHTS TO MAINTENANCE UNDER ISLAMIC AND CIVIL LAW IN MALAYSIA: TOWARDS HARMONISATION OF LAWS

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ABSTRACT

Islamic law regards children as a trust (*Amanah*) from Allah S.W.T., a trust that is to be discharged by parents through the performance of certain responsibilities, which include provision of care and custody, guardianship, and maintenance. Islamic law imposes the duty to maintain children primarily on the father. Relatives, including the mother, will also shoulder the responsibilities whenever the father is dead or is incapable of maintaining due to certain reasons like disabilities and poverty. It seems that Civil law, to a certain extent, shares quite the same principles. This paper, therefore, deals with children's rights to maintenance under two jurisdictions, namely Islamic and Civil law. The examination will focus on provisions of children's rights to maintenance under both jurisdictions, the extent of this responsibility as well as the analysis of the idea of harmonisation of laws under Islamic law in Malaysia, namely the Islamic Family

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Law (Federal Territories) Act 1984 and Civil law on maintenance particularly the Law Reforms (Marriage and Divorce) Act 1976 and the Married Women and Children (Maintenance) Act 1950. The research will adopt qualitative research, where the data and materials will be collected mainly from the library. Finally, the paper will propose certain recommendations for improvement of the laws wherever relevant and necessary.

Keywords: Children's rights, maintenance (*nafaqah)*, Islamic law, Civil law, harmonisation of *Shari'ah* and Civil law

INTRODUCTION

Children are societal assets and the future generation of a nation. They are the most vulnerable and highly dependent on their parents in order to survive, grow and develop. As a continuation of a family institution, children deserve protection of their rights, be it fundamental rights as well as the rights within family relationships. One of their rights under family relationships is the right to maintenance. In principle, both Islamic and Civil law acknowledge and recognise children's rights to maintenance mainly because the children are part of their parents and the family. What is more, if the children are incapable of maintaining themselves due to incapabilities, destitution, poverty, being minors or having no property to maintain themselves. This paper aims to identify the area of harmonisation of law between Islamic and Civil law as practised in Malaysia as well as the point of difference between the two legal jurisdictions.

CONCEPT OF MAINTENANCE AND THE DUTY TO MAINTAIN UNDER ISLAMIC LAW

Under Islamic law (the *Shari'ah*), maintenance (*nafaqah*) can be generally defined as what is spent for the purpose of maintaining a family with food, clothing, accommodation, and other necessary services or expenses[5] such as nursing mother, housemaid,

[5] See Zakiy al-Din Sha'ban, *Ahkam al-Shar'iyyah li Ahwal al-Shakhsiyyah*, 6th ed. (Benghazi: Univeristi Qaryunus, 1993), 675. See also Muḥammad Mustafa al-Shalabī, *Aḥkām al-Usrah fī al-Islām*, 2nd

education, and medical treatment. Islamic law imposes the duty to maintain children on the father. The reason is clearly due to the existence of lineage and blood relationship between the two of them.[6] The father's duty to maintain children is unanimously agreed by all Muslim scholars based on the authorities from the Qur'ān and the Prophetic Sunnah. [7] For example, the Qur'anic verse that indicates the duty to breastfeed is on the mother, and the duty to maintain the mother (including children) is on the father.[8] In the Qur'ān it is said to the effect:

> *The mother shall give suck to their offspring for two whole years if the father desires to complete the term. But he shall bear the cost of their food and clothing"*[9]

The above verse expressly lays down that maintenance is to be provided by the father to both mother and child. This is because the maintenance of the child is through the mother by means of suckling. Al-Qurtubī, in his commentary on the Qur'ānic verse, asserts: *"Allāh mentions maintenance of children (here) in the name of the mother because food is fed to children through the mother by way of suckling."*[10] Meanwhile, the Prophetic *Sunnah*

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ed.. (Beirut: Dār al-Nahdah al-'Arabiyyah, 1397H/1977CE), 417; Badruddin Hj Ibrahim and Azizah Mohd, "Parental Rights to Maintenance Under Islamic Law" *Shari'ah Law Reports* 4, (2007): 48.

[6] See Ibrahim & Mohd, "Parental Rights to Maintenance," 49.

[7] Al-Marghinani, Burhanuddin Ali ibn Abi Bakr, *al-Hidayah Sharh Bidayat al-Mubtadi*, Vol 3 (Cairo, Egypt: Dar al-Salam, 1420H/2000), 653; Al-Hattab, Abi Abd Allah Muhammad ibn Muhammad ibn Abd al-Rahman, *Mawahib al-Jalil li Sharh Mukhtasar Khalil*, Vol 6 (Dar al-Kutub al-'Ilmiyyah, 1416/1995), 588; Al-Imrani, Abi al-Husayn Yahya ibn Abi al-Khayr ibn Salim, *al-Bayan fi Madhhab al-Imam al-Shafi'i*, Vol 11 (n.p.: Dar al-Minhaj, n.d.), 245; Al-Bahuti, Mansur ibn Yunus ibn Idris, *Kashshaf al-Qina'*, Vol 5 (Beirut, Lebanon: Dar al-Fikr, 1402/1982), 281.

[8] Al-Qur'ān, 2: 233.

[9] *Ibid*

[10] Abū Abd Allāh Muḥammad ibn Aḥmad al-Ansarī al-Qurtubī, *Al-Jami' lī Aḥkām al-Qur'ān*, Vol. 3 (Beirut: Dār Ihya' al-Turrath al-Arabī,

supports the fact that the father is duty-bound to maintain his children to the extent that the mother may take his property in secret for the purpose of child maintenance when he has neglected his duty. It states:

> *A'ishah reported, Hind, the daughter of Utba', wife Abū Sufyān came to Allāh's Messenger (may peace be upon him) and said: "Abū Sufyān is a miserly person. He does not give adequate maintenance for me and my children, but (I am constrained) to take from his wealth (some part of it) without his knowledge. Is there any sin for me?" Thereupon, Allāh's Messenger (may peace be upon him) said: "Take from his property what is customary which may suffice for you and your children.".*[11]

The Muslim jurists differ about the father's condition in the maintenance of his children. Ḥanafī jurists assert that the father is legally responsible for providing maintenance to his children as long as he can earn a living, regardless of whether he is well off or not.[12] This is because the maintenance of his needy and incapable children is tantamount to saving his own life since his children are part of him.[13] If he is a poor person but has the ability to work, the responsibility for maintenance will not transfer to other members of the family. In such a situation, if there is a well-off mother or paternal grandfather, the maintenance may be temporarily provided by them, and it is considered a debt to be paid by the father when he is able to do so.[14] The responsibility of the father to provide maintenance to his children will not cease unless he is unable to work due to chronic disease, mental or

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1416H/1995CE), 163.

[11] Reported by Al-Bukharī and Muslim. See Muhammad bin Ali bin Muhammad al-Shawkani, *Nayl al-Awtar*, Vol. 5 (Beirut: Dar al-Ma'rifah, 1419H/1998) 870.

[12] Abī Bakr Muḥammad ibn Ahmad ibn Abī Sahal al-Sarakhsī, *Al-Mabsut*, Vol. 5 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1421H/2001CE), 210; Ibn al-Humam, *Sharh Fath al-Qadir,* 371.

[13] Al-Sarakhsī, *Al-Mabsut,* 210.

[14] Al-Sarakhsī, *Al-Mabsut,* 210.

physical handicap.[15] As long as he is able to work, he has to maintain himself as well as his family. In case he declines to work, he can be forced to work and if he wilfully refuses to do so, he can be imprisoned.[16]

In contrast, the majority of Muslim jurists of the Mālikī, Shafī'ī and Ḥanbalī Schools of law are of the view that the father is obliged to provide maintenance to his children only when he is able to do so, either in terms of possessing property or being capable of earning a living. The meaning of 'well off', according to the majority view, is that the father has a surplus either from his property or income from maintaining himself and his wife[17] for one day and one night.[18] In case he has no surplus for maintaining himself and his wife, he is not obliged to maintain his children, as the obligation of a person to maintain another person depends on his capability. Nevertheless, Shafī'ī and Ḥanbalī jurists are in agreement with the Ḥanafīs that the father may be required to earn a living if he is capable of doing so, in order to save his life as well as that of his children because they are a part of him.[19] Shafī'ī jurists further emphasise that if the father has surplus property, either movable or immovable, it shall be sold to provide maintenance to his children if there are no other means. In such a situation, he is considered as well off because he has a property surplus from his needs.[20]

In Malaysia, Islamic law in its original form (*Shari'ah*) is envisaged and governed under Islamic law enactments in all

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[15] *Ibid.*

[16] Ibn al-Humam, *Sharh Fath al-Qadir,* 371.

[17] Muḥammad ibn Aḥmad Ulaysh, *Minah al-Jalīl Sharh 'alā Mukhtasar al-Allamah Khalīl*, Vol. 3 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1424H/2003CE) 246; Al-Hattab, *Mawahib al-Jalil*, 88.

[18] Al-Nawawī, *Rawdat al-Talibin*, 3rd edn., Vol. 9 (Beirut: Al-Maktab al-Islāmī, 1412H/1991CE) 83; Taqiy al-Dain Muḥammad ibn Aḥmad al-Futuhī Ibn Najjar, *Muntaha al-Iradāt*, Vol. 4 (Mu'assasah al-Risalah, 1419H/1999CE) 460.

[19] Al-Bahutī, *Kashshaf al-Qina'*, 481.

[20] Al-Imranī, *al-Bayan,* 252–252.

thirteen states. The provisions of Islamic law enactments are arranged in line with the *Shari'ah* in its original form. The law also proclaims that in the event of any inconsistency of the Islamic law provision with the *Shari'ah*, the Islamic law provision will be considered void. Similarly, even though the provisions under the Islamic law enactments are not detailed or extensive, in the event of *lacuna* of the law, or where any matter is not expressly provided for in the enactment, the Court shall apply the *Hukum Syarak* (the *Shari'ah*) in its original form.[21] As the provisions are quite similar, this paper will mainly refer to provisions of the Islamic Family Law (Federal Territories) Act 1984 (the IFLA).

The IFLA does not define the word *nafaqah* or maintenance. However, as regards the application of the concept of *nafaqah*, as discussed earlier, the IFLA applied the principle of the *Shari'ah* in total. Regarding the duty to maintain, the IFLA states:

> *Except where an agreement or order of the Court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person ...*[22]

It is fully understood that 'man' in the above provision refers to the father of 'his children'. Moreover, the provision also clearly lays down the responsibility of a father to provide maintenance to his children whether the children are living with him or not. This emphasises that the duty of the father towards his children will not cease even after the dissolution of his marriage to the children's mother. This is illustrated in several cases; for example, in *Mansor v Che Ah*,[23] the Court held that a father is liable to maintain his children and ordered him to do so though custody was given to the

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[21] For example, please refer to the Islamic Family Law (Federal Territories) Act 1984, s. 134(A)(1) & (2). Hukum Syarak refers to Hukum Syarak according to the Mazhab Shafie, or according to one of the Mazhab Maliki, Hanafi or Hanbali. See Islamic Family Law (Federal Territories) Act 1984, s. 2.

[22] Islamic Family Law (Federal Territories) Act 1984, Section 72(1).

[23] (1975) 2 JH 261.

mother. In *Darus v Salma*,[24] despite an agreement that the wife would not make any claim against the husband after divorce, the Court held that the husband was still obliged to pay maintenance to the children, and this was also affirmed by the Appeal Board that the father could not contract out of his duty. In the case of *Roslaili v Ahmad Azman*,[25] the divorced mother claimed maintenance for her three sons, aged 14, 10 and 8. The Syariah Court held that he was liable under Islamic law and therefore ordered the father to pay RM300 a month for the maintenance of the three children and made an allocation for their education and Eid celebration. The above cases illustrate that a father is responsible for maintaining his children even after the marital relationship no longer exists.

As regards the father's condition, the IFLA provides for the assessment of maintenance, which is based on the father's means and his station in life.[26] Nevertheless, there are provisions empowering the court to order payment of maintenance in several situations, namely, if he refuses or neglects to provide reasonable maintenance, if he has deserted his wife, and the child is in her charge and pending matrimonial proceedings.

In *Khalid v Halimah* (1978),[27] the divorced mother claimed maintenance for her four children. The father was a merchant running a business with a working capital of RM60,000. The mother was a teacher earning about RM700 a month. The father had been paying RM100 a month for the children's maintenance. The learned Chief Judge ordered the husband to pay RM170 a month. The husband appealed, and the Board of Appeal reduced the amount to RM120 until the children were able to maintain themselves.

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[24] (1969) 3 JH 117.

[25] (2006) 21 JH(I) 101.

[26] Islamic Family Law (Federal Territories) Act 1984, Section 72(1).

[27] (1978) 1 JH (1) 69.

In the case of *Wan Tam v Ismail*,[28] the Chief Judge ordered the husband to pay RM250 per month for the maintenance of two children, and a further payment towards school textbooks. The husband appeared to be a man of means and agreed to the payment.

In *Mohamed v Selamah*,[29] the divorced mother claimed maintenance for her two children at RM90 a month. The father contended that he only earned RM170 a month. The learned Judge ordered him to pay RM70, and the husband appealed. The Board of Appeal reduced the payment to RM35 for the elder and RM25 for the younger child.

Nevertheless, in *Azura v Mohd Zulkefli*,[30] the Syariah Court ordered payment of maintenance of RM150 a month for each of the two daughters after taking into consideration the ability of the father to pay, as well as the needs of the daughters. The Court also discussed the conditions for the maintenance of the children, which included the capability of the father and the children's inability to earn a living.[31]

In the case of *Azizan v Maharum*,[32] the Syariah High Court ordered the applicant to pay maintenance of RM1,000 a month for his four children by means of salary deductions starting from January 2000. In December 1999, the applicant's salary decreased because of changes in his profession. At the same time, he was blessed with a new baby from his second marriage. The applicant therefore applied for a change to the order for maintenance of the children of his first marriage. The Court allowed the change in the order, reducing payment to RM900 per month.

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[28] (1985) 8 JH 55.

[29] (1980) 2 JH 95.

[30] (2001) 14 JH (II) 179.

[31] (2001) 14 JH (II) 179, 218.

[32] (2002) 15 JH (1) 13.

In the case of *Mohd Hassan v Siti Sharidza*,[33] the father appealed against the decision of the Syariah High Court. The Court had rejected his application to change the order of maintenance by the Syariah Lower Court which had ordered him to pay RM1,100 for maintenance to his three daughters aged 9, 7 and 4 years. After considering that the children were still small, and the maintenance expenditure was low, the Appeal Court ordered the father to pay RM300 for the first daughter and RM200 each for the second and the third daughters per month. The payment was to be made by salary deductions.

In the case of *Wan Mohd Kamil v Rosliza @ Mazwani*,[34] the Court ordered the father to pay RM200 a month for the maintenance of his daughter who was under the custody of the mother based on his capability until another order from the Court. The Court also ordered the father to support all expenses of the daughter's education.

Sometimes, the Court orders the payment of maintenance based on an agreement between the parties. This is illustrated by the case of *Rodziah v Badrol*.[35] The Court ordered payment of maintenance of two children amounting to RM30 as agreed by both parties.

PERSONS RESPONSIBLE FOR PROVIDING MAINTENANCE AFTER THE FATHER

The father's duty to maintain his children terminates upon his death. The question arises: who is the next most appropriate person?

Muslim jurists have two different views on the issue. Mālikī jurists assert that the responsibility of providing maintenance to children will not be transferred to other family members, whether they are the paternal grandfather, mother, or any other relatives.

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[33] (2004) 18 JH (II) 269.

[34] (2006) 21 JH (1) 135.

[35] (1981) 4 JH 128.

This is because, according to them, the responsibility is solely on the father. The paternal grandfather, mother, or any other relatives are not obliged to provide maintenance. The reason is that the duty of a person to provide maintenance to the children of his kin should be established at the outset and not by transmission.[36] This means that a person is only obliged to maintain his children and not his grandchildren. Based on this view, the responsibility of maintenance after the father is incumbent on the State.[37]

On the other hand, the majority of jurists of the other schools of law (*i.e.*, Ḥanafī, Shafī'ī and Ḥanbalī) are of the view that the responsibility of maintaining children of a deceased father transmits to other family members.[38] This view is preferable since the children have a blood and lineage relationship with other members of the family as their father himself had. In addition, some of them are also entitled to inherit from one another. These jurists, however, differ in opinion regarding the persons who are to be responsible for maintenance.[39]

Shafī'īs are of the view that the duty will be transmitted to relatives from lineal kinship based on priority. Firstly, it will go to the surviving paternal grandfather, regardless of how high since

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[36] Abī al-Hasan Ali ibn Nasir al-Din ibn Muḥammad al-Shazalī, *Kifayat al-Tālib al-Rabbanī lī Risalah Ibn Zayd al-Qayrawanī*, Vol. 2 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1417H/1997CE), 177; Ahmad ibn Ghanim ibn Salim ibn Mahanna al-Nafrawī, *Al-Fawākih al-Dawanī*, Vol. 2 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1418H/1997CE), 113.

[37] Abī al-Ḥasan Ali ibn 'Abd al-Salam al-Tusulī, *Al-Bahjah fī Sharh al-Tuhfah*, Vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1418H/1998CE), 610.

[38] Al-Sarakhsī, *Al-Mabsut,* 214–215.

[39] The differences of opinion among the jurists arise from their differences on the issue of relatives who are entitled to maintenance. The Shafī'ī view is that only the relatives from the lineal kinship are entitled to maintenance; while according to the Ḥanafīs relatives who are in the prohibited degree of marriage and according to the Ḥanbalīs those relatives who are entitled to inheritance. See J. Nasir Jamal, *Islamic Law of Personal Status*, 2nd ed. (London: Graham & Trotman, 1990), 192–193.

they are in a father-like standing to the fatherless child. Thereafter, it will go to the mother and later to the nearest relatives in lineal kinship, either from the father's or mother's side.[40]

Ḥanafīs maintain that the relatives who are responsible for maintenance after the father are relatives who are in prohibited degrees of marriage.[41] These include relatives from lineal or collateral kinship, regardless of whether they are entitled to inherit from the children.[42] In this regard, there are three situations of surviving relatives who are in prohibited degree to the children. In the first category are all surviving relatives in lineal kinship. In this situation, if they are all entitled to inherit, their liability will be according to their shares in the estate. For instance, in the case of a paternal grandfather and mother, the liability of the paternal grandfather is two-thirds, and the mother is one-third. In the case that only one of them is entitled to inherit, the responsibility is that of the one who is nearest to the children. If they are equal in terms of nearness, the responsibility is that of the one who is entitled to inherit. For instance, if there is a paternal grandfather and a maternal grandfather, the liability is that of the paternal grandfather.

The second situation is where there is a relative in lineal kinship and one with a collateral kinship. If none are entitled to inherit, maintenance is incumbent on the lineal kinsman. For instance, if there is a maternal grandfather and paternal uncle, the responsibility is on the latter. If both are entitled to inherit, they are duty-bound according to their shares in the inheritance. For example, if there is a 'mother' with a germane brother, the mother's duty is one-third, and the germane brother's is two-

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[40] Al-Imām Abī Ḥasan Ali, ibn Muḥammad ibn Ḥabib al-Mawardī, *Al-Hawi al-Kabīr*, Vol. 15 (Beirut: Dār al-Fikr, 1414H/1994), 34, 78, 80–84; Al-Imranī, *al-Bayan,* 245–246, 253–254.

[41] Jamal J. Nasir, 192–193.

[42] Al-Sarakhsī, Al-*Mabsut,* 214; Nizam & Muslim Scholars of India, *Al-Fatāwa al-Hindiyyah*, 587–589.

thirds. Where all relatives are collateral kin, they are responsible for the proportion of their shares.[43]

Ḥanbalīs base obligation according to the right to inherit from such children.[44] Whether they are many or few, their duty is proportionate to their inheritance, but only if they are well off. If they are poor, they are not liable.[45] For instance, if there is a well-off mother and two brothers of whom only one is well off, the responsibility of the mother is one-sixth, and the well-off brother is half of one-sixth; the remaining shares will not cause any liability to the poor brother.[46]

The above discussion seems to show that the view of Ḥanbalī jurists is more acceptable and practical since the one who gains benefit is the one who should assume the responsibility. This is in line with the Islamic legal principle: "The detriment is a return for the benefit"[47]

In Malaysia, there is a general provision that it is the duty of the next person who is responsible under Islamic law to maintain a child after the death of his parents or when his whereabouts are unknown. If the father is unable to fully maintain his children, then such persons are required to assume the duty to the extent of the shortfall.[48] The IFLA also empowers the court to order a person liable under Islamic law to pay or contribute to the maintenance of a child based on his means and ability.[49] However, there is no

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[43] Muḥammad Amin ibn Umar Ibn Abidin, *Radd al-Mukhtar 'alā al-Durr al-Mukhtar*, Vol. 10 (Damascus: Dār al-Thaqafah wa al-Turrath, 1421H/2000), 635–640; 'Abd al-Ghanī al-Ghunaymī al-Maydanī, *Al-Lubāb fī Sharh al-Kitāb*, Vol. 3 (Beirut: Maktabah al-'Ilmiyyah, n.d.), 106–107.

[44] See Jamal, *Islamic Law of Personal Status*, 192.

[45] Ibn Qudamah, 393–396; Ibn Muflih, 168–169.

[46] Muḥammad ibn Salih al-Uthaymin, *Al-Sharh al-Mumti' 'alā Zad al-Mustaqni'*, Vol. 11 (Cairo: Al-Maktabah al-Tawfiqiyyah, n.d.), 18–19.

[47] *Majjallah al-Aḥkām al-'Adliyyah*, Article 87.

[48] Islamic Family Law (Federal Territories) Act 1984, Section 72(2).

[49] *Ibid*, Section 73(2).

further clear indication as to who that person is. Similarly, there are no reported cases to illustrate the interpretation and application of the provision.

BASIC CONDITION OF THE CHILD AND THE SCOPE OF MAINTENANCE

Under the *Shari'ah*, the basic condition for a child to be entitled to maintenance is the child's incapability to maintain himself, for example, because of having no means of his own to do so. If a person owns property or has other means for self-maintenance, he must do so out of his or her resources. He or she is not entitled to maintenance except in the case of a wife whose maintenance is to be provided by her husband.[50]

In general, the entitlement of a person, including children, to maintenance under Islamic law is based on need except for the wife. She is entitled, whether she is poor or well-off. This is because of the confinement of the wife to her husband.[51] The Muslim jurists agree that children who are entitled to maintenance are those who do not have their means, either inherited or earned.[52] Based on these two significant conditions, it is unanimously agreed that a minor[53] child, whether boy or girl, is absolutely

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[50] Al-Sarakhsī, *Al-Mabsut,* 210; Sha'ban, *Al-Aḥkām al-Shar'iyyah,* 676.

[51] Sha'ban, *Al-Aḥkām al-Shar'iyyah,* 676; Al-Shalabī, *Aḥkām al-Usrah fī al-Islām*, p. 833.

[52] Fakhruddin Uthman ibn Ali al-Zayla'ī, *Tabyin al-Ḥaqā'iq Sharh Kanz al-Daqā'iq*, Vol. 3 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1420H/2000CE), 325, 329–330; Al-Hattab, *Mawahib al-Jalil* 588; Al-Imranī, *al-Bayan,* 252; Shams al-Din Muḥammad ibn 'Abd Allāh al-Zarkashī, *Sharh al-Zarkahshī 'alā Mukhtasar al-Khiraqī*, Vol. 6 (Riyadh: Maktabah al-Abikan, 1413/1993), 11.

[53] A minor is a person who has not yet reached the age of puberty. Puberty may attain by indication of some natural symptoms, *i.e.*, sexual dreams for a boy or girl; menstruation and pregnancy for girls. If the aforesaid indications are delayed, puberty is to be determined by age. However, Muslim jurists differ as to the age at which a person attains puberty. According to the majority, the age of puberty with respect to

entitled to maintenance if they have no property.[54] This is due to need and their inability to earn a living.

The IFLA does not lay down any conditions for the entitlement of children to maintenance. However, in Malaysia, in awarding maintenance to children, the Court considers the above-mentioned conditions. In *Faridah Hanim v Abd. Latiff,*[55] the Court discussed the conditions for children's entitlement to maintenance; in other words, no property; inability to earn money; and poverty with inability to earn a living. The Court also elaborated on who is considered incapable of earning their own living: small children or children under the age of puberty, unmarried girls, and students.[56] Similarly, in the case of *Azura v Mohd Zulkefli*,[57] the court considered the conditions of eligibility of children in awarding maintenance.[58]

As regards the scope of maintenance, based on what has been widely discussed in general by classical and contemporary Muslim scholars, maintenance consists of three essential basic needs: food, clothing, and accommodation.[59] However, some

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both genders is upon completion of his/her 15th lunar year, *i.e.*, approximately 14 years and 7 months according to the solar calendar. In contrast, Abū Ḥanifah views the age of puberty with respect to a boy as after completion of 18 years and with respect to a girl after completion of 17 years. This is also the dominant view held by Mālikī jurists. However, they make no differentiation between boys and girls, the age of puberty is after completion of 18 years, *i.e.*, about 17 years and 6 months based on the solar calendar. See Muḥammad 'Abd al-Rahman al-Hawarī, *Al-Bath fī al-Hajr wa Athāruhu fī Himayat al-Amwāl lī Mustaḥiqqiha* (n.p.: Dār al-Huda, 1409H/1989CE), 109–124.

[54] Al-Zayla'ī, *Tabyin al-Ḥaqā'iq,* 325; Al-Hattab, *Mawahib al-Jalil,* 588; Al-Imranī, *al-Bayan,* 252; Al-Bahutī, *Kashshaf al-Qina'*, 481; Ibn Qudamah, 387.

[55] (2006) 22 JH (I) 27.

[56] (2006) 22 JH (I) 27, 36.

[57] (2001) 14 JH (II) 179.

[58] (2001) 14 JH (II) 179, 218.

[59] See Zayn al-Din ibn Ibrahim ibn Muḥammad Ibn Nujaym, *Al-Bahr al-*

Ḥanafī and Shafī'ī jurists assert that the provision includes the expenses of pursuing knowledge.[60] Furthermore, Al-Shirbinī[61] and Al-Ramlī,[62] both Shafī'ī jurists, are of the view that maintenance includes the cost of medical treatment and medication.[63]

In Malaysia, although there is no clear definition of what constitutes maintenance of children, the law takes into consideration the above-mentioned elements. In this regard, the IFLA states:

> *Except where an agreement or order of the Court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention, and education as are reasonable having regard*

Ra'iq Sharh Kanz al-Daqā'iq, Vol. 4 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1418H/1997CE), 293; 'Abd al-Raḥman Taj, *Al-Sharī'ah al-Islāmiyyah fī al-Aḥwāl al-Shakhsiyyah*, 2nd edn. (Cairo: Matba'ah Dār al-Ta'lif, 1372H/1952CE), 215.

[60] Kamal al-Din Muḥammad ibn 'Abd al-Wahid al-Siwasī Ibn al-Humam, *Sharh Fath al-Qadir*, Vol. 4 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1995CE/1415H), 371; Nizam & Muslim Scholars of India, *Al-Fatāwa al-Hindiyyah*, Vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1421H/2000CE), 584; Al-Sayyid al-Bakrī ibn al-Sayyid Muḥammad Shata al-Dimyatī, *Hashiyah I'anah al-Talibin*, Vol. 4 (Beirut: Dār al-Fikr, 1422H/2002CE), 111.

[61] Al-Shirbinī is the Shafī'ī jurist of the 10th century of the Islamic calendar (Hijrah) or 16th century (CE) who died in 977H/1569CE.

[62] Al-Ramlī is also the Shafī'ī jurist of the 10th century (Hijrah) or 16th century (CE) who died in the early 11th century (1004H/1596CE).

[63] Shams al-Din Muḥammad ibn al-Khatib al-Shirbinī, *Mughni al-Muhtaj*, Vol. 3 (Beirut: Dār al-Fikr, 1421/2001), 571; Shams al-Din Muḥammad ibn Shahab al-Din al-Ramlī, *Nihayat al-Muhtaj*, Vol. 7 (n.p.: Dār al-Kutub al-'Ilmiyyah, 1414/1993), 218.

> *to his means and station in life or by paying the cost thereof.*[64]

In *Rasnah v Safri*,[65] the wife applied for the maintenance of her two sons at RM300 each. The court, after taking into consideration the salary of the father and the prospect of remarrying, ordered him to pay RM250 a month for the elder and RM200 a month for the younger son. In addition, the court ordered the father to pay RM200 per year for educational expenses to each son plus RM250 for the Eid celebration for the elder son and RM200 for the younger son.

Similarly in *Maimunah v Ahmad*,[66] the divorced mother claimed maintenance of RM1,000 a month for her two children aged 15 and 4 years. The court, after considering that maintenance is obligatory on the father and the job of the father as a technician, ordered him to pay RM350 a month to the elder child and RM200 to the younger. The court also ordered him to pay for education as well as Eid celebration expenses. In *Hasanah v Ali*,[67] the Syariah Court held that the father is obliged to maintain the children and ordered him to pay RM300 based on the cost of accommodation, food, clothing, medical treatment, and education of the children.

These discussions show that the maintenance of children shall not only be confined to food, clothing, and accommodation but also include medication, medical treatment, and education. Such items are considered essential in our present-day life. However, they are subject to the means of the father and those who assume his obligations after him.

Duration of Maintenance

There is no consensus among Muslim jurists on the duration of entitlement of children to maintenance. Ḥanafī and Mālikī

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[64] Islamic Family Law (Federal Territories) Act 1984, Section 72(1).

[65] (2002) 15 JH(II) 189.

[66] (2005) 20 JH(II) 270.

[67] (1999) 13 JH(2) 159.

scholars differentiate between boys and girls. In the case of girls, they agree that their entitlement to maintenance will come to an end when they get married,[68] as girls are generally considered to be unable to earn a living.[69] With respect to boys, there is a difference of opinion. Ḥanafī jurists are of the view that boys are eligible for maintenance till they reach working age, although they have not yet reached the age of puberty.[70] Ḥanafīs, however, do not fix a minimum age for working. Mālikīs maintain that the entitlement of boys to maintenance will come to an end at the age of puberty,[71] *i.e.*, 18 years old. Shafī'ī jurists do not differentiate between boys and girls. Their entitlement to maintenance will come to an end when they reach the age of puberty, *i.e.*, 15 years,[72] as there is no difference between boys and girls in terms of their capability to work or earn a living.[73] On the other hand, Ḥanbalīs do not set any age for termination of the entitlement of children to maintenance. Children are eligible for maintenance if they are poor and have no earnings of their own.[74]

Thus, based on the view of most Muslim jurists (*Jumhur*), when children reach the age of puberty, they will cease to be entitled to maintenance; there is a difference of opinion as to the age of puberty or working age. This applies to boys and girls according to the Ḥanafī, Mālikī and Shafī'ī Schools (*madhhab*, pl. *madhāhib*). However, the three schools are of the opinion that all children are entitled to maintenance if they are unable to earn a

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[68] Ibn al-Humam, *Sharh Fath al-Qadir*, 371; Nizam & Muslim Scholars of India, *Al-Fatāwa al-Hindiyyah*, 584–585; Al-Shazalī, *Kifayat al-Tālib*, 175.

[69] Al-Sarakhsī, *Al-Mabsut,* 210. This is also due to the fact that they are the responsibility of their fathers and after marriage their husbands.

[70] Ibn al-Humam, *Sharh Fath al-Qadir* 371; Ibn Abidin, *Radd al-Mukhtar,* 600–601.

[71] Al-Shazalī, *Kifayat al-Tālib*, 174.

[72] Al-Mawardī, *Al-Hawi al-Kabīr*, 84.

[73] *Ibid.*

[74] Al-Bahutī, *Kashshaf al-Qina'*, 482.

living due to chronic disease, or mental or physical handicap.[75] Nevertheless, it is acknowledged that some forms of physical disability do not completely prevent a child from earning a living. There are several handicapped persons who work. Therefore, if such handicapped children are able to have an income sufficient to maintain themselves, it would exclude them from eligibility.

Ḥanafī and Shafī'ī jurists further assert that children who are still pursuing their studies are entitled to maintenance if they cannot spare time to work and earn a living.[76] This view is fully supported by many contemporary Muslim scholars who emphasise that the entitlement of such children to maintenance depends on the success of their education.[77] This view is sound and most suitable to the present day. It ensures children's right to education. However, it is not clear to what level of study children are eligible for maintenance. It seems that it should be limited to the first degree of tertiary education.

In addition, Ḥanbalī jurists assert that children of working age who cannot get jobs are still entitled to maintenance.[78] This is also the view of Mālikī jurists.[79] This is reinforced by Al-Shalabī and Al-Zuhaylī, the contemporary Muslim scholars who illustrate that

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[75] Al-Sarakhsī, *Al-Mabsut,* 210; Al-Shazalī, *Kifayat al-Tālib*, 174–175; Abī Ishaq Ibrahim ibn Ali ibn Yusuf al-Fyruz Abadī al-Shirazī, *Al-Muhadhdhab*, Vol. 2 (Beirut: Dār Ihya' al-Turrath al-'Arabī, 1414/1994), 213.

[76] Ibn al-Humam, *Sharh Fath al-Qadir,* 371; Nizam & Muslim Scholars of India, *Al-Fatāwa al-Hindiyyah,* 584; al-Dimyatī, *Hashiyah I'anah al-Talibin*, 111.

[77] Al-Ghundur, 620; Sha'ban, *Al-Aḥkām al-Shar'iyyah,* 687; Maḥmud Muḥammad al-Tantawī, *Al-Aḥwāl al-Shakhsiyyah fī al-Shari'ah al-Islāmiyyah* (Matba'at al-Sa'adah, 1399H/1979CE), 468.

[78] Abī Ishaq Burhan al-Din Ibrahim ibn Muḥammad Ibn Muflih, *Al-Mubdi' Sharh al-Muqni'*, Vol. 7 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1418H/1997CE), 170.

[79] Al-Nafrawī, *Al-Fawākih al-Dawanī*, 111.

the inability to earn a living may be the result of unemployment levels in the national economy.[80]

Thus, children, whether minors or adults, boys or girls, are entitled to maintenance as long as they have no property and are unable to earn a living. Their inability to earn a living may be due to physical or mental illness, the extent of physical disability, or the pursuit of education.

The IFLA clearly states the duration of maintenance for a boy accrues until he reaches the age of 18, except for children who are disabled and incapable of maintaining themselves, and for a girl until she gets married. This is in line with the view of the Mālikī School. The child, however, can apply for an extension of maintenance for the purpose of pursuing higher education or training.[81]

There are several Malaysian cases illustrating children's rights to maintenance at tender ages. In *Faridah v Mohd Firdaus @ Jentle Francis*,[82] a divorced mother claimed maintenance for her two daughters, aged 13 and 10. The Syariah High Court ordered the father to pay RM100 per month to each of the daughters. In *Norazian v Khairul Azmi*,[83] a divorced mother claimed maintenance of RM400 for her two children aged 4 and 3 years, who were under her custody. In this case, the father worked as a marketing executive and had a monthly income of RM1,340; the Syariah High Court stated that maintenance is obligatory on the father and ordered him to pay RM200 for the older child, RM100 for the younger child, and RM50 for childminding.

There are a few cases where the Court did not allow the claim for maintenance of children who had passed the age of

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[80] Shalabi, *Ahkam al-Usrah fi al-Islam*, 833; Wahbah al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh*, 4th ed., Vol. 10 (Damascus: Dār al-Fikr, 1418H/1997CE), 7413.

[81] See Islamic Family Law (Federal Territories) Act 1984, Section 78.

[82] (2002) 15 JH (1) 25.

[83] (2002) 15 JH (1) 65.

maintenance. In the case of *Jinah v Aziz*,[84] the divorced mother claimed maintenance for five children at RM500 each per month. The Court allowed the application with respect to three of the children, as two of them had already reached the age of independence and were no longer studying.

Nevertheless, where the child is a girl who is not married and still studying, the application for maintenance is allowed. This was the case in *Faridah Hanim v Abd. Latiff*.[85] The divorced wife claimed maintenance for her three children: a daughter aged 19 and two sons aged 14 and 12. The Court, considering the father's income, which ranged between RM2000 to RM4000, and the needs of the children, ordered the father to pay RM450 a month for the first child, RM350 a month for the second child, and RM300 for the third child. In addition, the Court also ordered the father to pay for books, tuition, and tuition fees per year: RM400 and RM800 for the first child, RM200 and RM200 for the second child, and RM200 and RM100 per year for the third child. The Court also discussed several conditions where children would be entitled to maintenance, *i.e.*, that the children have no property and are not capable of earning money. The Court also expanded on those who are considered incapable of supporting themselves: small children or children who are under the age of puberty, girls who have not yet married, and children who are studying.[86]

From the above discussion, it is clear that children are entitled to maintenance until the age of eighteen in case they are no longer studying. If they are still studying, then they are entitled to maintenance until they complete their first degree of tertiary education. There is no distinction between sons and daughters. This is since a woman in the present day is just as capable of earning her living as a man.

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[84] (1986) 6 JH 344.

[85] (2006) 22 JH (I) 27.

[86] (2006) 22 JH (I) 27, 36.

Other Provisions of the IFLA

The IFLA also provides for the duty to maintain a child who is accepted as a member of the family and the duty to maintain illegitimate children. The IFLA states:

> *Where a man has accepted a child who is not his child as a member of his family, it shall be his duty to maintain the child while he or she remains a child, so far as the parents of the child fail to do so, and the Court may make such orders as may be necessary to ensure the welfare of the child.*[87]

As regards illegitimate children, the IFLA states:

> *If a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the Court, upon due proof thereof, may order the woman to make such monthly allowance as the Court thinks reasonable.*[88]

MAINTENANCE OF CHILDREN UNDER CIVIL LAW IN MALAYSIA

In Malaysia, a child's right to maintenance is mainly governed under the Law Reform (Marriage & Divorce) Act 1976[89] (the LRA) and Married Women and Children (Maintenance) Act 1950 (Revised 1981)[90] (the MWCA). The LRA is only applicable to non-Muslims in Malaysia other than Natives of Sabah and Sarawak or aborigines. Meanwhile, the MWCA is applicable to Peninsular Malaysia and non-Muslims only.[91]

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[87] Islamic Family Law (Federal Territories) Act 1984, Section 79 (1).

[88] *Ibid*, Section 80 (1).

[89] Act 164.

[90] Act 263.

[91] Law Reform (Marriage & Divorce) Act 1976, Section 3(1)-(3), Married Women and Children (Maintenance) Act 1950, Section 3(1),

The Concept and Causes of Maintenance

The concept of maintenance under Civil law, as highlighted by Shamsuddin Suhor, is any form of expense for the purpose of maintenance, whether it is a sum of money etc., which is spent by a person to another person under his responsibility. In a wider sense, maintenance includes all basic needs and their complements consisting of all allocations financially, physically, energy, and contributions in the form of materials from one party to another, whether husband or wife, ex-husband or ex-wife, child or children of marriage or outside marriage to continue their survival.[92]

Civil law also recognises blood relationships and kinship as entitling a child to maintenance. On this basis also, the Civil law regards a child as under the responsibility of its parents. Therefore, both the father and the mother are responsible for maintaining their children.[93] It follows that being a child deserves a right to maintenance, which is protected under the law. This right exists alongside the existence of a family institution that consists of children. This right is protected in such a way that whenever the maintenance duty is neglected, the court will have the power to order maintenance or to impose a penalty on the person in charge.[94]

Duty to Maintain Children

In general, both father and mother are obliged to maintain their children. The LRA states that:

> *Except where an agreement or order of Court otherwise provides, it shall be the duty of a parent to maintain or*

Section 13.

[92] Shamsuddin Suhor, "Nafkah," in *Undang-undang Keluarga (Sivil),* Vol. 9, ed. Shamsuddin Suhor & Noor Aziah Mohd Awal (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2007), 123-124.

[93] *Ibid.,* 126.

[94] *Ibid.,* 125 - 131.

> *contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.*[95]

Nevertheless, the primary duty to maintain lies on the father, while the mother will also be liable if she is capable of doing so. Section 93(1) provides:

> *(1) The court may at any time order a man to pay maintenance for the benefit of his child—*
>
> *(a) ...*
>
> *(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.*

In the case of *Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy*[96], the court said:

> *Therefore, it is clear that the husband has the primary obligation to maintain the children. The mother only has a secondary obligation where the court "is satisfied that having regard to her means it is reasonable to do so.*[97]

Similarly, in *Ng Say Chuan v Lim Szu Ling*[98], the court held that it is a well-established legal principle that the husband bears the primary responsibility for child maintenance, with the wife having a secondary duty.[99] In *Lim Siaw Ying v Wong Seng &*

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[95] Law Reform (Marriage & Divorce) Act 1976, Section 92.

[96] [2004] 6 MLJ 249.

[97] *Ibid*., para 4.

[98] [2010] 4 MLJ 796.

[99] See also Sivajothi a/p Suppiah v Kunathasan a/l Chelliah, [2006] 3 MLJ 184; Lau Hui Sing v Wong Chuo Yong (f) [2008] 5 MLJ 846.

Anor,[100] the court further elaborated on the extent of the responsibility of the father to maintain his children. The father's lack of a stable job or income, along with his health issues like diabetes, did not exempt him from his obligation to support the children. The court further held that the maintenance amount must be fair and enough for the children to maintain their lifestyle.

While the primary duty to maintain a child is on the father, the court will also order the mother to pay maintenance if she has the means to do so. In *Leow Kooi Wah v Ng Kok Seng Philip,*[101] the judge stated that, where both parents are salaried, they are jointly responsible for maintaining their children in accordance with his or her abilities. Meanwhile, in *Wong Kim Fong v Teau Ah Kau,*[102] the mother was ordered by the court to pay RM400 per month and the father a sum of RM800 for the maintenance of their son. In the recent case of *YAY v WHO & Anor,*[103] the court instructed the father to cover half of the child's health and education expenses on top of the monthly maintenance amounting to RM2,000 per month. The mother, on the other hand, was ordered to pay half of the child's expenses pertaining to health and education.

The MWCA, nevertheless, seems to impose the duty to maintain on the father where it states that:

> *If any person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a Court, upon due proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as to the Court seems reasonable.*[104]

The phrase "any person" that is together with the phrase "his wife" or a legitimate child' in one sentence seems to indicate the person who is responsible for maintaining children is the father.

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[100] [2009] 4 MLJ 409.

[101] [1995] 1 MLJ 582.

[102] [1998] 1 MLJ 359.

[103] [2023] 9 MLJ 169.

[104] Married Women and Children (Maintenance Act 1950), Section 3(1).

This is also in agreement with the view of Mimi Kamariah Majid, who states that 'there is no doubt that any person in the provision refers to the woman's lawful husband.[105]

As regards the meaning of the word "child", the Civil law seems to recognise illegitimate children as the LRA includes an illegitimate child under the definition of a child while the MWCA also provides for the duty to maintain illegitimate children on the biological father.[106] The MWCA states:

> *If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make such monthly allowance, as to the court seems reasonable.*[107]

On the other hand, Islamic law did not recognise a duty to maintain an illegitimate child due to the absence of a legal relationship between the biological father and the child. As mentioned in the IFLA,[108] Islamic law only imposes the duty to maintain an illegitimate child on the mother. However, Islamic law does not prohibit any charity or voluntary allowance by the biological father for the purpose of maintaining the illegitimate child.

Basic Condition of the Child and the Scope of Maintenance

The LRA defines a "child of the marriage" as a child of both parties to the marriage in question or a child of one party to the

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[105] Mimi Kamariah Majid, *Family Law in Malaysia* (Kuala Lumpur; Malayan Law Journal, 1999), 312. See also Norliah Ibrahim et al., *Family Law (non-Muslims) in Malaysia* (Kuala Lumpur: IIUM Press, 2021), 246.

[106] Law Reform (Marriage & Divorce) Act 1976, Section 2 & Married Women and Children (Maintenance) Act 1950, s. 3(2).

[107] Married Women and Children (Maintenance) Act 1950, Section 3 (1).

[108] Islamic Family Law (Federal Territories) Act 1984, Section 80.

marriage accepted as one of the family by the other party; and "child" in this context includes an illegitimate child of and a child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption. The LRA further defines the meaning of "child of the marriage" as defined in Section 2, who is under the age of eighteen years.[109] As regards the MWCA, there is no definition of the word child. Nevertheless, the MWCA provides the duty to provide maintenance, which shall include illegitimate children, as stated above.[110]

As regards the main condition of the child to be maintained, the MWCA mentions that the child is a child who is unable to maintain himself.[111] According to Mimi Kamariah Majid, the phrase 'unable to maintain himself' may provide a rule that regardless of age, so long as the child is unable to maintain himself renders him entitled to maintenance. Therefore, if a child has been issued a maintenance order while he is aged 30 years and mentally retarded, and is unable to maintain himself, he is eligible for maintenance. Similarly, if the child is mentally sound and pursuing tertiary education.[112] This also corresponds to and is in harmony with the principle of maintenance to children under Islamic law.

The LRA further highlights the scope of maintenance to include accommodation, clothing, food, and education as may be reasonable, having regard to his or her means and station in life or by paying the cost thereof.[113] In *CCKY v CCT*[114], it was held that the defendant is legally obligated under Section 92 of the LRA to not only provide accommodation, clothing, and food for the child

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[109] Law Reform (Marriage & Divorce) Act 1976, Section 2(1), Section 87.

[110] Married Women and Children (Maintenance) Act 1950, Section 3(2).

[111] Married Women and Children (Maintenance) Act 1950, Section 3(1).

[112] Majid, *Family Law in Malaysia*, 312.

[113] Law Reform (Marriage and Divorce) Act 1976, Section 92(1).

[114] [2021] 9 MLJ 518.

but also ensure the child's education. Considering the defendant's financial capabilities and the lifestyle they are accustomed to, it is reasonable for the child to attend a private or international school. Therefore, the Defendant's husband is instructed to cover the child's school fees at such a school and is also required to maintain the current insurance policies for the child until he reaches maturity. In the case of *Teo Ai Teng v Yeo Khee Hong*[115], the mother asked the Court for RM1,000.00 per month from the father to support each of their children and cover education and medical costs. The Court temporarily ordered the father to pay RM2,000 a month for both children, including these expenses.[116] This is in harmony with the scope of maintenance under Islamic law.

Duration of Maintenance

As regards the duration of maintenance, Section 95 of the LRA provides that the duration of maintenance to both ordinary male and female children is until the child reaches the age of eighteen years in the case of an ordinary child or ceases from certain disabilities (where the child is subject to certain disabilities) or completed higher education or training (if the child is still studying). The LRA provides that:

> *Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability or is pursuing further or higher education or training, on the ceasing of such disability or completion of such further or higher education or training, which is later.*[117]

The above provision does not differentiate between a boy and a girl, differing from the provisions under the IFLA. Prior to 2017, there was no clear provision for the parent's duty to maintain a

[115] [2009] 9 MLJ 721.

[116] See also YAY v WHO & Anor [2023] 9 MLJ 169.

[117] Law Reform (Marriage and Divorce) Act 1976, Section 95.

child who is above eighteen and still studying. This created difficulties in the application, as highlighted in the case of *Ching Seng Woah v Lim Shook Lin*[118]. The issue in this case was whether the Court might order the father to pay maintenance for children until their tertiary education. The Appeal Court, upholding the decision of the High Court, ordered the father to pay RM700.00 per month to each of his children and their school fees until they complete their first degree. The court defined the word physical disability under Section 95 to include involuntary financial dependence. Similar dissatisfaction was brought to the attention of the Federal Court in the case of *Punithambigai Poniah v Karunirajah Rasiah & Anor*[119]. The Court, however, did not agree with the decision of the Court of Appeal in the case of *Ching Seng Woah*[120] above and ruled that the words 'physical or mental disability' should be interpreted literally and decided that a child would cease to get maintenance once he reached 18 years regardless of whether he was pursuing higher education or not. The court also commented that it was up to parliament to change the law and that the duty of the court is just to interpret the law. In 2017, the law was amended, as can be found in Section 95 at present.

According to Sridevi, the above-amended provision seems to infuse a new life into the LRA by creating hope for all non-Muslim adult children who intend to pursue their tertiary education or training, especially those from broken homes, where the parents may not want to continue to support them financially.[121]

Other than the LRA, the Guardianship of Infants Act 1961 (the GIA) provides for the maintenance and education of a child who

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[118] [1997] 1 MLJ 109.

[119] [2000] 5 CLJ 21.

[120] [1997] 1 MLJ 109.

[121] See SriDevi Thambapillay, "The 2017 Amendments To The Law Reform (Marriage And Divorce) Act 1976: A Milestone Or A Stone's Throw In The Development Of Malaysian Family Law?," *IIUM Law Journal* 28, no. 2 (2020): 474.

has property. The GIA allows the guardian to make reasonable provisions out of the income of the property for the child's maintenance and education up to one thousand ringgit per month and if more is needed with the leave from the court.[122] This provision indirectly rules that the maintenance of a child who has property will be from his own property.

The above discussion, to a certain extent, distinguishes the duration of maintenance of a child under Islamic and Civil law regarding a girl. Under Islamic law, there is a clear provision for a girl who is incapable of maintaining herself to be maintained until she is married. Nevertheless, the point that a child is entitled to maintenance until eighteen years old unless he is subject to certain disabilities or is pursuing higher education is in harmony under both laws, *i.e.,* the LRA and the IFLA.

Duty to Maintain a Child Accepted as a Member of Family

Similar to the IFLA, the LRA also provides for a duty to maintain a child accepted as a member of the family. The LRA states:

> *Where a man has accepted a child who is not his child as a member of his family, it shall be his duty to maintain such child while he or she remains a child, so far as the father and the mother of the child fail to do so, and the Court may make such orders as may be necessary to ensure the welfare of the child.*[123]

TOWARDS HARMONISATION OF ISLAMIC AND CIVIL LAW ON MAINTENANCE

The above discussion reflects that both Islamic and Civil law protect the rights of children to maintenance. In principle, the provisions for children's maintenance under both laws are in harmony in terms of the father's duty to maintain his child. As

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[122] See Guardianship of Infants Act 1961, s. 17(1). See also Guardianship of Infants (Amendment) Act 1999, Act A1066.

[123] Law Reform (Marriage & Divorce) Act 1976, Section 99.

regards the mother, even though the IFLA is silent on the duty of a mother, based on the view of the Shafi'is school, the mother may also be liable to maintain if she is financially capable or has property and the father is incapacitated. As regards sharing responsibility, even though Islamic law does not point out that the mother shall jointly be liable to maintain her child, there is no provision that prohibits it if the mother is voluntarily doing so. Such a voluntary act is most welcome and commendable.

Both laws are also in harmony with the causes and scope of maintenance. The laws are in agreement that blood relation and kinship entitle the children to maintenance. The main scope of maintenance is food, clothing, accommodation, education, and medical treatment. The same goes for the condition of the child and the duration of maintenance. Both laws agree that maintenance is obligatory for the child who is incapable of maintaining himself. Even though there is a slight difference in terms of details, the main reason for the maintenance of a child who is incapable of maintaining himself is harmonious in both laws. The provision of the GIA[124] that provides for the maintenance of a child who has property further supports the idea that Islamic and Civil law are in harmony in terms of the condition of the child to be maintained.

As regards the duty to maintain a child accepted as a member of the family, both laws agree and are in harmony that the child's maintenance will be on the man who accepted him as a member of his family. This can apply to an adoptive or foster father or relative of the child.

CONCLUSION

Islamic law, in general, has clearly outlined the role of a father in providing maintenance to his children. This role extends to other family members when the father is incapable or dead. Such provisions on the roles of the parents and responsibility for children's maintenance reveal that Islamic law emphasises family responsibility in protecting children, especially in cases when they

[124] Guardianship of Infants Act 1961, Section 17(1).

have no property or are incapable of earning a living. At the same time, Islamic law safeguards children's rights to education and further ensures the rights of disabled children to maintenance.

However, the Islamic law provisions on the maintenance of children in Malaysian state enactments still lack a clear statement on the extent of the father's duty and the duty of other family members. A clear provision listing family members who are obliged to maintain a child according to priority is felt necessary to better safeguard children's rights to maintenance.

As regards to Civil law, the provisions of the LRA and the MWCA seem to be in harmony with Islamic law, particularly the IFLA, except for the provision on the father's duty to maintain his unmarried daughter. It is interesting to note that the GIA has highlighted the principle of 'ability to maintain himself' by providing a provision for the maintenance of a child who has property. This principle corresponds to and is in harmony with the Islamic law.

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HARMONISATION OF *SHARI'AH* AND ALGERIAN FAMILY LAW/CHILDREN'S MAINTENANCE

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ABSTRACT

This study delves into the crucial issue of children's maintenance in both *Shari'ah* and Algerian family law. Motivated by the vulnerability of children in society and the potential for parental injustice, the research adopts a comparative approach to analyse *Shari'ah* principles, scholars' opinions, and Algerian Family Law articles. In the broader context, the study underscores the societal importance of regulating personal status issues, particularly children's maintenance, through *Shari'ah*-based provisions. *Shari'ah* is valued for its commitment to fair and comprehensive maintenance provisions, ensuring justice for those entitled to it. Methodologically, the research examines *Shari'ah* principles and scholars' perspectives alongside a detailed analysis of relevant articles in Algerian Family Law. This comparative framework aims to unveil consistencies or disparities between the two systems concerning children's maintenance. In conclusion, this study contributes to the discourse on the regulation of personal status issues, emphasising the significance of aligning legal provisions with *Shari'ah* principles. By highlighting the strengths and potential improvements, the research seeks to inform future legal considerations and ensure effective protection of children's rights in matters of maintenance.

Keywords: *Shari'ah*, children's maintenance, family law, Algeria.

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INTRODUCTION

Maintenance is considered the cornerstone of every family unit, playing a pivotal role in maintaining familial cohesion and averting societal burdens. The obligation to provide maintenance, deeply rooted in preserving family integrity, holds immense significance in both Islamic principles, governed by *Shari'ah* and the legal framework of Algeria, as enshrined in the Algerian Family Code. To contextualise this study, it is imperative to explore the current challenges surrounding child maintenance in Algeria. Recent scenarios and statistical insights illuminate the complexities families face, underscoring the urgency and relevance of a comprehensive examination of the practical applications of maintenance provisions.

Within the Islamic context, maintenance, or *nafaqah*, holds a unique significance. In Islam, the provision of maintenance is not merely a legal obligation but aligns with the intrinsic nature of humanity. Islam, cognizant of the psychological and social needs of individuals, has established controls within *Shari'ah* to facilitate the fair and just provision of maintenance. Similarly, the Algerian legislator recognises the importance of maintenance and has incorporated legal controls within the Algerian Family Code. This legal framework obligates and bestows the right upon fathers to provide maintenance to their children, a responsibility that persists during marriage and endures even after separation. Exceptions to this rule have been outlined, allowing for a nuanced understanding of the legal obligations surrounding maintenance.

This article aims to address the pressing issues faced in Algeria concerning child maintenance. Through an examination of relevant statistics, the study seeks to shed light on the practical implications of maintenance provisions, identifying potential gaps and areas for improvement within the Algerian legal system.

In conclusion, this study endeavours to provide a comprehensive understanding of the concept of child maintenance in Islam and its legal manifestations in Algeria. By exploring the current challenges, incorporating statistical data, and elucidating the Islamic principles surrounding maintenance, the article aims to contribute meaningful insights to the ongoing discourse on

children's rights and the legal frameworks governing their maintenance in Algeria.

CHILDREN'S MAINTENANCE IN *SHARI'AH*

The Entitlement of Children's Maintenance from the Qur'an and Hadith

It is noted that there is no disagreement among Muslim jurists that the obligation of maintenance for a child is on the father, regardless of the gender of the child. This is by virtue of the Qur'anic verse where Allah says to the effect:

> *It is for the father to provide for them and clothe them with kindness.*[3]

In this verse, Allah emphasises the father's obligation to provide sustenance (*rizq*) and clothing for his children in a manner that is recognised as reasonable and customary.

This verse underscores the significance of the father's role in maintaining the well-being of his children, both materially and emotionally. The obligation to provide sustenance goes beyond basic needs and encompasses the broader welfare of the children. The term 'بالمعروف' encourages acts of kindness, generosity, and consideration in fulfilling these responsibilities, emphasising that it's not just about meeting the minimum requirements but doing so in a manner that is good, fair, and in accordance with cultural norms:

> *If they breastfeed for you, then give them their payment.*[4]

As far as hadith, there is a narration from Saidatina Aishah R.A. whereby Prophet Muhammad S.A.W. allows Hind binti 'Utba to take from Abu Sufyan's property as a means of maintenance:

> *Narrated Aisha (may Allah be pleased with her): Hind bint `Utba said, "O Allah's Messenger! Abu Sufyan is a*

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[3] Al-Quran, 2: 233.

[4] *Ibid,* 65:6.

> *miser, and he does not give me what is sufficient for me and my children. Can I take of his property without his knowledge?" The Prophet S.A.W. said, "Take what is sufficient for you and your children, and the amount should be just and reasonable.*

The scholars infer from this hadith that if the maintenance of the wife and children was not obligatory, the Prophet Muhammad S.A.W. would not have permitted her to take her husband's money without his knowledge and permission. In another narration from Abu Hurairah R.A.:

> *Abu Hurairah R.A. narrated that The Messenger of Allah S.A.W. said: "Give Sadaqah." A man then said, "Allah's Messenger, I have a Dinar." He then said to him, "Give it to yourself as Sadaqah." The man again said, "I have another one." The Messenger of Allah said: "Give it to your wife as Sadaqah" He said, "I have another one." He said, "Give it to your children as Sadaqah." The man again said, "I have another one." The Messenger of Allah said: "Give it to your servant as Sadaqah." He said, "I have another one." The Messenger of Allah said: "You know better to whom you should give it".*[5]

The honourable hadith of the Prophet S.A.W. illustrates that a person's charity is directed towards their own children immediately after being given to the same spender and their spouse. These are individuals whom the Messenger, may God's prayers and peace be upon him, instructed to provide financial support. And if we look at this hadith from another angle, we can say that the Prophet Muhammad S.A.W. has established an arrangement for those who are entitled to maintenance in the case of their multiplicity.

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[5] Abu Dawud, 'Bulugh al-Maram', Book of Zakah, Arabic reference, Book 4, Hadith 636, English translation: Book 4, Hadith 657, via: https://sunnah.com.

Children's Maintenance in the Case of Insolvency of the Father

In Islamic jurisprudence, ensuring children's maintenance, even in cases of the father's insolvency, is a fundamental obligation. While specific references directly addressing insolvency might not exist, various Islamic legal principles and teachings underscore the responsibility to provide for children and the approach to financial difficulties. The cases of financial hardship or insolvency include illness or disability, loss of employment, legal restrictions or imprisonment, debt and obligations or due to any unforeseen circumstances.

The first means is through the obligation of *nafaqah* by other family members. Islamic law mandates *nafaqah* primarily falls upon the father, which includes the obligation to provide for the basic needs of children, such as food, clothing, shelter, education, and healthcare. This duty is primarily under the obligation of the father, but it extends to other responsible family members if the father is unable to fulfil it due to genuine hardship. This is derived from Qur'anic verses such as Surah Al-Baqarah verse 233 and Surah At-Talaq verse 7 that emphasise the obligation of providing for dependents within one's capacity and without burdening oneself excessively:

> *No mother should be harmed through her child, and no father through his child.*[6]
>
> *Let a man of wealth spend from his wealth, and he whose provision is restricted - let him spend from what Allah has given him. Allah does not charge a soul except [according to] what He has given it. Allah will bring about, after hardship, ease.*[7]

The second means is through community support and intervention. Islamic principles encourage community support and intervention to assist families in need, especially when a father is unable to meet his children's financial needs due to insolvency.

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[6] Al-Qur'an, 2:233

[7] *Ibid*, 65:7

Islamic legal authorities and community leaders may intervene to assess the situation and ensure the welfare of the children, offering solutions that align with Islamic principles of fairness and compassion.

While there might not be explicit references addressing insolvency, Islamic scholars derive guidance from the Qur'an and hadith to address contemporary issues. These principles emphasise compassion, fairness, and the welfare of children, emphasising the responsibility of parents and the community to support families in times of financial hardship.

Children's Maintenance in the Case of Divorce or Death

Islamic jurisprudence places significant emphasis on ensuring the welfare and proper maintenance of children, whether in cases of divorce or after the death of a parent. The specifics of maintenance and financial support are determined by Islamic legal principles and guidelines, with a primary focus on prioritising the best interests of the children.[8]

CHILDREN'S MAINTENANCE IN ALGERIAN FAMILY LAW

The Entitlement of Children's Maintenance in the Algerian Family Law

The entitlement of children's maintenance in Algerian family law is outlined in Article 75. It stipulates that the father is obligated to provide for the maintenance of his child unless the child possesses resources. Maintenance is to be provided for male children until they reach the age of majority, while daughters are entitled to maintenance until the consummation of their marriage.

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[8] Saleh Boubshish, "Nafaqah al-Zawjah wa al-Awlad fi Hal al-Issar wa al-Imtinaa' bayna al-fiqh al-Islami wa Qanun al-Usrah al-Jazairi" *Majalat al-Ihyaa 4,* no. 1(2002): 234.

The Responsibility for Children's Maintenance Lies with others

The Algerian legislation specifies the father's responsibility to provide maintenance for his child, unless the child has personal resources. This obligation extends for male children until they reach the age of majority and for daughters until they marry, and the marriage is consummated. The father remains obliged if the child has a physical or mental handicap or is pursuing education. However, this responsibility ceases when the child becomes self-supporting.[9] Therefore, the law sets different timelines for maintenance: for male children, it spans from birth to legal adulthood, while for daughters, it extends from birth to marriage and consummation. After these respective periods, the father is no longer responsible for providing maintenance.

The Responsibility for Child Support Falls on the Mother

What should be noted in the field of maintenance is that Article 76 of the Algerian Family Code clearly states the following:

> *In the case of the father's incapacity, the maintenance of the children is the responsibility of the mother when she can provide for it.*[10]

In cases where the father is unable to fulfil the duty of providing for his children, the responsibility for this maintenance is transferred to the mother if she is capable and possesses sufficient income from a job, inheritance, or profession.[11]

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[9] 'Law no. 84-11 June 1984 of the Modified and Supplemented Family Code, 2007,' Article 75.

[10] *Ibid,* Article 76.

[11] Abdulaziz Saad, 'Qanun al-Usra al-Jazairi fi tawbihi al-Jadid', *Dar Houma 4,* (2010): 105.

Children's Maintenance in the Case of Divorce

Article 72 states the following:

> *In the case of divorce, it is the father's responsibility to provide the beneficiary of custody with decent housing or, failing that, rent for the exercise of custody. The woman with custody remains in the marital home until the execution by the father of the judicial decision relating to housing.*[12]

Based on the above, it is evident that the established principle dictates that the responsibility for the children's maintenance falls solely on the father, with no shared obligation from others. This is because the child is exclusively attributed to their father without involvement from anyone else, emphasising the direct link between the child and their paternal origin.

The Conditions for the Child's Entitlement to the Father's Maintenance in Algerian Family Law

For the child to be entitled to maintenance from his father, a set of conditions must be met, derived from Article 75 of the aforementioned Algerian family law as follows:

> *The father is obligated to provide for the maintenance of his child unless the child has financial means. For males, this obligation continues until they reach the age of maturity, and for females, until marriage. This obligation persists if the child is incapacitated due to mental or physical disability or if the child is pursuing education. It ceases when the child becomes self-sufficient.*

[12] 'Law no. 84-11 June 1984 of the Modified and Supplemented Family Code, 2007,' Article 72.

Law Number 15/01 Includes the Establishment of the Maintenance Fund

The Algerian legislature aimed to protect families and alleviate challenges hindering the lives of vulnerable members. This led to the enactment of Law 15/01 establishing the maintenance fund. This step followed an examination of cases before the judiciary, where implemented judicial rulings proved ineffective, and legislative measures fell short in addressing these issues.[13]

The establishment of the maintenance fund through Law 15/01 in Algeria holds significant importance in addressing the issue of children's maintenance following divorce or family separations. Its significance lies in providing a structured mechanism to ensure financial support for children when one parent, usually the father, is unable to fulfil this obligation. Article 3(2) of Law No. 15-01 outlines the eligible beneficiaries of the maintenance fund as follows:

> *The recipients entitled to maintenance are the children under custody represented by the custodial woman according to family law, as well as the divorced woman who is entitled to receive maintenance.*[14]

According to the text of the article, these categories are foster children and divorced women who are sentenced to maintenance.

As for conditions for benefiting from dues to the maintenance fund, law No. 15-01 restricted the category of beneficiaries from the financial entitlements of the maintenance fund to divorced women and children in custody after the dissolution of the marriage bond; it also restricted the benefit from these entitlements to objective conditions contained in Article 3 thereof, which are as follows:[15]

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[13] Mabrouk Ben Zeioush, "Nafaqah al-Mutallaqat wa al-Awlad fi dil al Qanun raqm 15/01 al-motadamin incha al-Sonduq al-Khas biha" *Majalat al-Bahit li al-Dirasat al-Akadimiya 5*, (2015): 218.

[14] Law number 15-01 dated January 4, (2015), 'includes the establishment of the Maintenance Fund'.

[15] Gharbi Houria, "Sonduq al-Nafaqah wifqan li-Qanun Raqm 15/01"

i. Determination of the right to maintenance according to a judicial judgement of divorce that ruled the maintenance;
ii. Unable to fully or partially implement the order or judgement for maintenance;
iii. The debtor's inability to pay; and
iv. Not knowing the debtor's place of residence.

CONCLUSION

The exploration of child maintenance within the framework of *Shari'ah* principles and Algerian Law illuminates a significant alignment in their core tenets. Both *Shari'ah* and Algerian Law emphasise the inherent duty of meeting a child's fundamental needs, emphasising the parental, particularly the father, responsibility in ensuring the welfare, sustenance, and overall welfare of their children. According and through what has been studied, the most important results reached are as follows:

i. The Algerian law and the *Shari'ah* have established means and methods to protect the right to maintenance and also made it possible for him to claim it through the judicial authority.
ii. In order for the father to provide maintenance for his son, it is required that he be able, and the father's ability refers to his financial capacity or capability to fulfil this obligation.
iii. If the father is unable to provide maintenance and the mother is well off, the duty of maintenance transfers to her.
iv. Maintenance for a boy who has reached the age of legal majority continues if he is incapacitated due to a mental or physical lesion or if he is engaged in studies, as for the girl, until her marriage and consummation.

Based on the aforementioned findings, here are several recommended suggestions:

Majalat al-Maarif 22, (2017): 304.

i. Using various audio, visual and written media, as well as mosques and universities, to spread the Islamic family culture.
ii. The need to address the legal voids, especially related to reviewing the amount of maintenance in Algerian family law.
iii. The need to allocate an article in the Algerian Family Code that deals with the provisions related to the maintenance of foundlings and orphans.

HARMONISING MALAYSIA'S LOCAL LAWS WITH THE CONVENTION ON THE RIGHTS OF THE CHILD TO COMBAT CHILD MARRIAGE

Muhammad Al-Ghazalli Abdol Malek[1]
Mohd Al Adib Samuri[2]

ABSTRACT

Child marriage in Malaysia presents a complex challenge, deeply embedded within the country's diverse legal systems, including *Shari'ah*, Civil, and customary laws, and conflicting with the Convention on the Rights of the Child (CRC). This chapter examines the discrepancies between Malaysia's domestic laws and international commitments to children's rights, specifically focusing on the eradication of child marriage. Using a qualitative methodology, the study analyses academic literature, legal documents, and reports from international and local organisations, employing content analysis to explore legal provisions and the dynamics of legislative advocacy. The findings reveal significant legal loopholes within Malaysia's legal frameworks that enable child marriage, notably the variation in the minimum age of marriage and the allowance of exceptions under certain conditions. The chapter advocates for aligning the marriage age at 18 across all laws, mandatory registration of marriages, stricter law enforcement against child marriages, and specialised training for legal professionals. It highlights the need for a comprehensive approach that integrates legal reforms with societal education and awareness to combat child marriage effectively.

Keywords: child marriage, Islamic family law, international convention, *Siyasah al-Shar'iyyah,*

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INTRODUCTION

Child marriage, a practice long embedded in various societies,[3] stands at the crossroads of tradition and the urgent need for legal reform. Traditionally viewed by some as a religious or traditional practice,[4] its persistence into modern times challenges contemporary values and legal frameworks. This complex issue transcends mere theological or sociological analysis, demanding a critical legal perspective to address its implications within the fabric of society. Despite its lower visibility in Malaysia compared to regions like South Asia, child marriage remains a significant concern. Data from UNICEF Malaysia, highlights that up to 2018, 83% of married children were Muslim, compared to 17% from non-Muslim communities, underscores the pressing nature of this issue within the Muslim community.[5] This disparity has not only drawn parliamentary attention but has also amplified the need for a proactive approach towards eradication.[6]

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[3] Harald Motzki, "Child Marriage in Seventeenth Century Palestine" in Islamic *Legal Interpretation: Muftis and Their Fatwas,* eds. Muhammad Khalid Masud, Brinkley Messick, and David Powers (Cambridge, MA: Harvard University Press, 1996); Yaqeen Institute "Ending the Debate on Aisha (Ra)'s Age - Sh. Omar Suleiman | Lecture." Youtube, October 24, 2018. video, https://www.youtube.com/watch?v=5gDTh-6X9vo.

[4] Mies Grijns and Hoko Horii, "Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns," *Asean Journal of Law and Society 5*, no. 2 (2018): 453-466.; Elisabet le Roux and Selina Palm, "What Lies Beneath? Tackling the Roots of Religious Resistance to Ending Child Marriage" *Girls Not Bride*, 2018.; Kasjim, "Abuse of Islamic Law and Child Marriage in South-Sulawesi Indonesia." *Al-Jami'ah: Journal of Islamic Studies* 54, no. 1 (2016): 95-122.

[5] "Towards Ending Child Marriage in Malaysia: Advocacy Brief." *UNICEF Malaysia*, October 2022. https://www.unicef.org/malaysia/reports/ towards-ending-child-marriage-malaysia.

[6] Dewan Rakyat. Fourteenth Parliament, Fourth Term, Second Meeting. (2 December 2021).

In Malaysia, a country distinguished by its legal pluralism, mirroring its ethnically diverse population, the legal framework is segmented into Civil, Islamic, and customary laws. This segmentation is particularly evident in matters of personal law, such as marriage, where individuals must adhere to the laws corresponding to their religious affiliations. Non-Muslims are required to marry under Civil law, whereas Muslims are governed by their respective states' Islamic family law and related personal affairs. Within the framework of Islamic family laws in majority states in Malaysia, there exists a provision that allows males under 18 and females under 16 to enter into marriage, contingent upon receiving approval from the Syariah Court judge. This specific regulation has drawn criticism for its role in facilitating child marriages, an issue that is perceived as contravening the rights of children who need protection.

Addressing child marriage requires a broadened scope of analysis. This chapter aims to dissect the child marriage discourse through the lens of the Convention on the Rights of the Child, examining Malaysia's adherence to this international treaty alongside the domestic legal provisions that enable child marriage. By adopting a qualitative methodology, this discussion looks into various academic sources, including articles, conference proceedings, research reports, and scholarly books, employing content analysis to scrutinise the legal narratives surrounding child marriage. This endeavour seeks not only to analyse the legal frameworks facilitating this practice but also to evaluate Malaysia's commitment to mitigating child marriage in alignment with the Convention on the Rights of the Child.

CHILD MARRIAGE IN LIGHT OF THE CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child (CRC), established under the auspices of the United Nations, serves as a foundational international agreement among member states. By ratifying this convention, a state commits itself as a State Party to uphold its principles and obligations. However, these commitments must be

integrated and harmonised with its domestic legal framework.[7] This process necessitates adjustments within the national legal system to align with the convention's requirements, prompting states to expedite legal reforms in instances of discordance. Enacted in 1989, the CRC comprises 54 articles detailing a comprehensive array of children's rights, centring on the paramountcy of the child's best interests. This framework encompasses rights crucial for children's survival, protection, education, health, development, and participation,[8] establishing a universal mandate for the preferential safeguarding of children's rights.[9]

The matter of child marriage has emerged on the international stage as a critical concern, paralleling broader social development advancements.[10] Despite the absence of a specific provision within the CRC explicitly addressing child marriage at its inception, the convention inherently prioritises the protection of children's rights. The global community, therefore, interprets the CRC's provisions, particularly Article 6, as a foundational basis for efforts aimed at addressing child marriage, emphasising the

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[7] Farah Nini Dusuki, "Kerangka Perundangan Antarabangsa Berkenaan Perkahwinan Kanak-kanak," in *Pembendungan Perkahwinan Kanak-kanak*. ed. Mohd Al Adib Samuri (Bangi: UKM Press), 49-62; Noor Aziah Mohd Awal, and Mohd Al Adib Samuri, "UNICEF Malaysia Final Report: A Study of Child Marriage in Malaysia", United Nations International Human Rights Law, Report Status: Embargo, 2017, https://www.ohchr.org/en/instruments-and-mechanisms/ international-human-rights-law.

[8] Ladan Askari, "The Convention on the Rights of the Child: The Necessity of Adding A Provision to Ban Child Marriages," *ILSA Journal of International & Comparative Law 5*, 123-138 (1998).

[9] Anita Abdul Rahim, *Jenayah Kanak-kanak Dan Undang-undang Malaysia* (Kuala Lumpur: Dewan Bahasa Dan Pustaka, 2012).

[10] Mohd Al Adib Samuri. "Perkahwinan kanak-kanak: Trend dan Faktor Pendorong," in *Pembendungan Perkahwinan Kanak-kanak*, ed. Mohd Al Adib Samuri (Bangi: UKM Press), 17-26.

state parties' duty to guarantee children's right to life and protection against discrimination.[11]

In 2014, the Committee on the Rights of the Child provided further clarification on the CRC through a general comment, identifying child marriage as a detrimental traditional practice infringing upon children's rights.[12] This interpretation draws from Article 24(3), which mandates state parties to shield children from harmful traditional practices. Moreover, Article 19 calls for the adoption of comprehensive measures—legal, administrative, social, and educational—to protect children from all forms of maltreatment, exploitation, neglect, and violence, whether at home or in the care of guardians.[13] Reflecting on these articles, the committee advocates for all state parties to establish 18 as the minimum age for marriage within their domestic legal systems, thereby ensuring legal protection against child marriage.[14]

LEGAL FRAMEWORKS IN MALAYSIA SUPPORTING THE PROCESS OF CHILD MARRIAGE

Malaysia stands among the nations where the practice of child marriage is ongoing, largely because such unions have historically been accepted within local traditions and not classified as detrimental to children's rights. To date, child marriages are administered under Malaysia's Islamic family law.[15] The governance of marriage for Muslims in Malaysia is codified

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[11] Askari "The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages".

[12] General Comment. Committee of Children's Rights. (2014).

[13] Dusuki, "Kerangka Perundangan Antarabangsa Berkenaan Perkahwinan Kanak-kanak," 49-62.

[14] Megan Arthur et. al., "Child Marriage Laws around the World: Minimum Marriage Age, Legal Exceptions, and Gender Disparities," *Journal of Women, Politics & Policy 39*, no. 1 (2018): 51–74.

[15] "Towards Ending Child Marriage in Malaysia: Advocacy Brief." *UNICEF Malaysia*, https://www.unicef.org/malaysia/reports/towards-ending-child- marriage-malaysia.

within the states' Islamic family law enactment. The establishment of age limits for marriage within Islamic family law occurred in the 1980s, reflecting the aspirations of the CEDAW Convention, which advocates for member states to standardise the age of consent for marriage. This development was met with resistance in the 1950s when initial proposals to set a marriage age in state Islamic legislation were opposed by Malaysia's religious authorities, preventing the integration of such regulations into Islamic law.[16] The current legal provisions in Malaysia that enable child marriage include the following.

In most states, the legal minimum age for marriage is set at 18 years for males and 16 years for females.[17] This disparity indicates that females in the Muslim community can marry at a younger age compared to males, meaning girls aged 16 and older are not required to seek approval from the Syariah Court for marriage. For those children, there is no minimum age limit for marriage, so children as young as nine can be married off with approval from the court. Nonetheless, this stipulation differs in the states of Selangor and Kedah, where the legal marriage age has been elevated to 18 for both sexes.[18] In contrast, other states permit females aged between 16 and 18 to marry without necessitating Syariah Court approval. Consequently, the Syariah court does not review the applications of girls who have attained the age of 16, leading to a lack of statistical data on such marriages.

Secondly, the legal framework provides Muslim boys and girls under the age of 16 the option to marry, contingent upon receiving approval from the Syariah Court following a specific protocol. This marriage application must be initiated by the girl's

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[16] Maila Stivens, "Religion, Nation and Mother-love: The Malay Peninsula Past and Present," *Women's Studies International Forum* 33, no. 4 (2010). 390-401.

[17] Islamic Family Law (Federal Territories) Act 1984 (Act 303), s.8, and Enactments of the Islamic Family Law (all states in Malaysia except Section 7, Enactment of the Islamic Family Law (Terengganu and Sarawak)).

[18] Enactment of the Islamic Family Law (Selangor and Kedah), Section 8.

wali or legal guardian, as outlined in the enactment of the respective states.[19] This clause effectively offers a legal pathway for Muslim minors to enter into marriage, albeit this flexibility stands in contrast to the age requirements set forth by international conventions regarding child marriage.

Thirdly, there may be risks for some individuals who opt to perform an Islamic *nikah* without the permission of the Syariah Court and then formalise the union legally later. This approach underscores the principle that marriages conducted in accordance with Islamic rites are deemed valid, irrespective of initial legal registration. Consequently, this provision allows for the post hoc legal recognition of marriages, even among minors who lacked Syariah Court authorisation at the outset of their union.[20]

Fourthly, the legal stipulations concerning sexual offences under state Islamic law exert considerable pressure on parents to marry off their children.[21] In Malaysia, individuals as young as 14 can be prosecuted for Islamic criminal offences, with a specific category for 'young offenders' aged between 10 and 16.[22] These minors are subject to prosecution and punishment akin to adult offenders. Faced with the legal ramifications of sexual offences, including pregnancy resulting from out-of-wedlock relationships, parents may opt to marry off their children to mitigate the risk of legal consequences. This manoeuvre is often seen as a strategy to legitimise the offspring and circumvent potential Islamic legal actions against their child.[23]

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[19] Zuliza Mohd Kusrin, "Perkahwinan kanak-kanak menurut Undang-undang Keluarga Islam di Malaysia," in *Pembendungan Perkahwinan Kanak-kanak*. ed. by Mohd Al Adib Samuri (Bangi: UKM Press), 125-139.

[20] Islamic Family Law (Federal Territories) Act 1984 (Act 303), Section 11, and Enactments of the Islamic Family Law (all states in Malaysia).

[21] Samuri, "Perkahwinan Kanak-kanak: Trend dan Faktor Pendorong." 17-26.

[22] Syariah Criminal Procedure (State of Selangor) Enactment 2003, Section 2.

[23] "Nikah Usia Muda Jangan Jadi Sesalan," *Berita Harian*, September

In the context of non-Muslim children in Malaysia, marriage matters fall under the jurisdiction of Civil law, specifically governed by the Law Reform (Marriage and Divorce) Act 1976 (Act 164). This Act incorporates several provisions that inadvertently facilitate child marriages among non-Muslims. Firstly, Act 164 sets the marriageable age at 18 years for both sexes.[24] This stance appears more stringent compared to Islamic law; however, girls aged between 16 and under 18 can still marry, provided they obtain a marriage license from the Chief Minister of their respective state.[25]

Secondly, unlike the procedures available through the Syariah Court for Muslim minors, Act 164 does not grant the Civil Court the authority to process marriage applications for non-Muslim minors, specifically girls aged 16 to under 18. Applicants often seek approval directly from the Registrar of Marriages at the National Registration Department, who is authorised by the Chief Minister, without going through the courts. Marriage applications are generally approved by the Registrar of Marriages without any specific procedural requirements.[26]

Thirdly, a segment of the non-Muslim population in Malaysia opts for underage marriages through customary practices, bypassing Act 164. These marriages, conducted under customary law, are later registered under Act 164 as civil marriages once the

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25, 2018. https://www.bharian.com.my/kolumnis/2018/09/477750/nikah-usia- muda-jangan-jadi-sesalan.; Mohd Al Adib Samuri, Noor Aziah Mohd Awal, and Muhammad Abral Abu Bakar, "Curbing Child Marriage Amongst Muslims in Malaysia: Towards Legal Reform," *UUM Journal of Legal Studies 13*, no.1 (2022) 1–20.; Muhammad Al-Ghazalli Abdol Malek, "Pembendungan Perkahwinan Kanak-kanak Menurut Konteks Perundangan Di Malaysia." (Master Thesis, Universiti Kebangsaan Malaysia, 2022).

[24] Law Reform Act (Marriage and Divorce) Act 1976 (Act 164), Section 10.

[25] *Ibid,* Section 21(2).

[26] Abdol Malek, "Pembendungan Perkahwinan Kanak-kanak Menurut Konteks Perundangan Di Malaysia".

individuals reach the age of 18.[27] This practice highlights the persistence of child marriages within non-Muslim communities despite Civil law prohibitions.

MALAYSIA'S ALIGNMENT WITH THE CONVENTION ON THE RIGHTS OF THE CHILD

When Malaysia ratified the Convention on the Rights of the Child (CRC) in 1995,[28] it marked a commitment to international standards for children's rights. However, ratification did not automatically incorporate all provisions of the convention into Malaysia's domestic legal framework.[29] Given Malaysia's dualism system, international laws require integration into national laws through amendments or legal reforms. Despite Malaysia's moral obligations, the direct application of international convention provisions is constrained by the need to harmonise these with the domestic legal system.[30] This process entails initially addressing and amending any conflicting child rights provisions within federal law to align with the convention's obligations.[31]

The issue of child marriage, recognised as a breach of children's rights,[32] has attracted international criticism towards

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[27] Dusuki, "Kerangka Perundangan Antarabangsa Berkenaan Perkahwinan Kanak-kanak," 49-62.

[28] Mohd Awal and Samuri, "UNICEF Malaysia Final Report: A Study of Child Marriage in Malaysia".

[29] Federal Constitution, Article 74-76.

[30] Dusuki, "Kerangka Perundangan Antarabangsa Berkenaan Perkahwinan Kanak-kanak." 49-62.; Nurhafilah Musa. "Konflik Perundangan Mengenai Perkahwinan Kanak-kanak di Malaysia," in *Pembendungan Perkahwinan Kanak-kanak*. ed. Mohd Al Adib Samuri (Bangi: UKM Press), 140-152.

[31] Abdol Malek, "Pembendungan Perkahwinan Kanak-kanak Menurut Konteks Perundangan Di Malaysia".

[32] "Towards Ending Child Marriage in Malaysia: Advocacy Brief." *UNICEF Malaysia*, October, 2022.

Malaysia for maintaining domestic laws that legally permit child marriages.[33] In adherence to the CRC, Malaysia is obligated to undertake legal reforms to combat child marriage, requiring the revision or amendment of domestic laws that contravene this commitment. Failure to address these legal discrepancies exposes Malaysia to further critique from the global community.[34] Although activists and human rights organisations have advocated for withdrawing certain reservations to the convention, the progression towards full compliance remains contingent upon the Malaysian government's resolve. To date, reservations on five articles - 2, 7, 14, 28(a), and 37 - have not been revised to meet the CRC's requirements.[35]

In response to its commitments, Malaysia has initiated measures to incorporate the rights enshrined in the convention into its domestic laws, notably through the enactment of the Child Act 2001 (Act 611) and its amendment in 2016, aimed at bolstering children's protection. Yet, Act 611 by itself does not suffice to shield children from child marriage, signalling a need for broader legal reforms. A critical concern remains the inconsistency in the marriage age limit across Malaysian states, which falls short of the federal definition of a child as anyone under 18. The lack of a uniform minimum marriage age underscores a significant gap in

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https://www.unicef.org/malaysia/reports/ towards-ending-child-marriage-malaysia.

[33] Abdol Malek, "Pembendungan Perkahwinan Kanak-kanak Menurut Konteks Perundangan Di Malaysia,"; Samuri, Mohd Awal, and Abu Bakar, "Curbing Child Marriage Amongst Muslims in Malaysia: Towards Legal Reform," 1–20.

[34] Mehrdad R. Asli, and Mojgan A. Byouki. "Forced Marriage in Islamic Countries: The Role of Violence in Family Relationships.". in *2016 Women and Children as Victims and Offenders: Background, Prevention, Reintegration.* ed. Helmut Kury, Slawomir Redo, and Evelyn Shea, (Switzerland: Springer International Publishing).

[35] "Status Report on Child in Malaysia (2019-2020)." *Child Rights Coalition Malaysia* (Petaling Jaya), 2020. 89.

legal protection, facilitating the legal occurrence of child marriages under Malaysian law.[36]

The obligation to uphold moral principles in protecting children's rights extends beyond the federal government, encompassing the responsibilities of state governments as well.[37] This mandate is rooted in the Ninth Schedule of the Federal Constitution, which includes the protection of children and young individuals, illustrating that the federal government's duty to prioritise children's best interests also applies indirectly in the context of safeguarding women and children.[38] At the federal level, this commitment is evident through the Ministry of Women, Family and Community Development, which oversees child-related affairs. The ministry introduced initiatives like the National Strategy Plan in Handling the Causes of Child Marriage, which targets seven objectives, 17 strategies, and 58 programs to address the drivers of child marriage.[39] Launched in alignment with the Convention on the Rights of the Child (CRC), the Child Act 2001, the National Child Policy, and the Child Protection Policy.[40] it also encompasses collaboration with 61 federal and state government agencies, non-governmental organisations, and international bodies.

Moreover, the involvement of other ministries indirectly related to children's issues plays a crucial role, such as the

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[36] "Status Report on Child in Malaysia (2019-2020)." *Child Rights Coalition Malaysia* (Petaling Jaya), 2020. 10.

[37] Musa, "Konflik Perundangan Mengenai Perkahwinan Kanak-kanak di Malaysia." 140-152.

[38] Federal Constitution, Item 1, State List, Ninth Schedule.

[39] Ministry of Women, Family and Community Development. (2020). *National Strategy Plan in Handling the Causes of Child Marriage*. (Putrajaya: Ministry of Women, Family and Community Development).

[40] Noor Aziah Mohd Awal, "Pelan Strategik Kebangsaan bagi Menangani Punca Perkahwinan Kanak-kanak di Malaysia," in *Pembendungan Perkahwinan Kanak-kanak.* ed. Mohd Al Adib Samuri, (Bangi: UKM Press), 169-180; Musa, "Konflik Perundangan Mengenai Perkahwinan Kanak-kanak di Malaysia," 140-152.

Ministry of Education through its commitment to retaining children in primary and secondary educational institutions, including mainstream and technical and vocational education and training (TVET) streams. Additionally, the Ministry of Health is tasked with expanding awareness of sexual and reproductive health education and advocating for the impact of marriage on the personal development and health of children. The Ministry of Home Affairs holds the authority to regulate and tighten civil marriage procedures, enhancing the transparency of officials handling marriage applications at the National Registration Department. However, the federal government's capacity to enact legal reforms on civil marriage is confined to the non-Muslim community.

Conversely, Islamic institutions in each state bear the responsibility of aligning Islamic law with the ratified international conventions, as the marriage of Muslim children falls under state jurisdiction. In addressing child marriage, State Islamic Religious Councils are expected to revise the marriage age limit to 18 years for both sexes in each states' Islamic family law enactment. Setting the age limit at 18 years is a benchmark reflecting global community development standards, including on the matter of child marriage.[41] State Islamic institutions possess the authority to drive the effort to curb child marriage through issuing fatwas, revising existing Islamic family law provisions, enacting significant advocacy on this issue through religious schools and mosques, and incorporating the underage marriage application procedures outlined by the Department of Syariah Judiciary Malaysia into the states' Islamic family law enactment.

In October 2018, the federal government of Malaysia took a significant step towards reforming marriage laws by proposing to establish 18 years as the uniform age of marriage for both genders. This proposal was deliberated during the Pre-Council of the Council of Rulers and subsequently presented at the Chief

[41] Alissa Koski and Jody Heymann. "Child Marriage in the United States: How Common Is the Practice, And Which Children Are at Greatest Risk?" *Perspect Sex Reprod Health 50*, no. 2 (2017): 59-65.

Minister's meeting, presided over by the Prime Minister.[42] Despite the initiation of this agenda at the federal level, progress has been hindered at the state level due to discrepancies in the administration of Muslim marriages across different states. Therefore, enacting this law reform necessitates action from state legislatures, engaging Islamic institutions like the state Islamic religious council and the state government's Mufti department to align the law with the convention's obligations.

The federal government's proposal, however, met with varied responses from state governments, particularly Islamic authorities.[43] Several states resisted the change, citing adherence to traditional Islamic rulings that permit child marriage.[44] This stance aligns with the views of certain international Muslim scholars who oppose government efforts to regulate child marriage through the imposition of a minimum age limit. This resistance mirrors the sentiments of some religious conservative groups found in other Muslim-majority countries.[45] The states that initially opposed this proposal included Perlis, Kedah, Pahang, Kelantan, Terengganu, Sarawak, and Negeri Sembilan.

In contrast, the Sultan of Selangor has decreed to approve the amendment, leading Selangor to become the first Malaysian state to revise its Islamic family law enactment on 6 September 2018,

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[42] Ministry of Women, Family and Community Development. *National Strategy Plan in Handling the Causes of Child Marriage*, 2020.

[43] Adam Abu Bakar, "Kerajaan Cadang Pinda 2 Akta Ketatkan Syarat Kahwin Bawah Umur." Free Malaysia Today. November 15, 2018. https://www.freemalaysiatoday.com/category/bahasa/2018/11/15/kerajaan-cadang-pinda-2-akta-ketatkan-syarat-kahwin-bawah-umur/.

[44] Suzianah Jiffar, "Umur Minimum Berkahwin Patut Diturunkan - Mufti Sabah." Berita Harian Online. September 22, 2018. https://www.bharian.com.my/berita/nasional/2018/09/476747/umur-minimum-berkahwin-patut-diturunkan-mufti-sabah.

[45] Shamsul Kamal Amarudin. "Harussani Tak Setuju Usia 18 Tahun Baru Boleh Kahwin." Berita Harian Online. September 21, 2018. https://www.bharian.com.my/berita/nasional/2018/09/476458/harussani-tak-setuju-usia-18-tahun-baru-boleh-kahwin.

thereby setting the marriageable age at 18 years for both sexes.[46] Following these developments, concerted efforts to engage with Islamic religious authorities and state Islamic institutions were intensified in 2019. A notable advancement occurred when the Kedah State Legislative Assembly passed the Islamic Family Law (Kedah) Enactment Bill 2022, which officially raised the marriageable age to 18 years, on 18 July 2022, marking a progressive step towards harmonising state laws with federal initiatives and international obligations.[47]

CONCLUSION

Addressing child marriage in Malaysia necessitates a holistic approach that encompasses legal reforms, societal awareness, and a commitment to upholding children's rights. A critical step forward is the alignment of the minimum age for marriage at 18 years across both Islamic and civil legal frameworks. This crucial reform would ensure a consistent legal standard throughout the nation. Specifically, amending state Islamic family law enactments in consistent with the Civil Law Reform (Marriage and Divorce) Act 1976 to universally set the minimum age of marriage at 18 marks a pivotal move towards addressing the issue at its root. Additionally, efforts to synchronise laws across all states are essential to eradicate the disparities and loopholes that currently facilitate child marriage.

While advocating for these robust legal measures, it is vital to engage in a discourse that considers the counterarguments against the complete ban on child marriage, particularly those that involve judicial or parental consent. Given Malaysia's rich cultural and

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[46] Siraj Mohd Zaini, "Selangor Negeri Pertama Pinda Had Umur Perkahwinan." Berita Harian Online. December 11, 2018. https://www.bharian.com.my/berita/kes/2018/12/508025/selangor-negeri-pertama-pinda-had-umur-perkahwinan.

[47] Noorazura Abdul Rahman, "DUN Kedah Lulus Had Umur Perkahwinan Perempuan Kepada 18 Tahun." Berita Harian Online. July 19, 2022. https://www.bharian.com.my/berita/nasional/2022/07/977805/dun-kedah-lulus-had-umur-perkahwinan-perempuan-kepada-18-tahun.

religious mosaic, a certain level of flexibility within the legal system may be warranted to accommodate unique cases and respect traditional practices. In instances where exceptions are permitted, judicial oversight plays a critical role in safeguarding the children's rights, ensuring that such marriages are justified and align with the children's best interests. This oversight mechanism should be complemented by accessible counselling and support services, enabling informed decision-making and offering necessary interventions. Therefore, maintaining a balanced legal framework that respects Malaysia's cultural diversity while providing for the scrutiny of exceptional cases is imperative. This approach ensures safeguarding children's rights within the complexities of individual and societal circumstances.

In support of these legal reforms, there is an undeniable need for enhanced training for legal practitioners, including judges, lawyers, and law enforcement officers, on child rights and the implications of child marriage. Such educational initiatives will bolster the judiciary's ability to effectively address this issue, prioritising the interest, welfare and rights of children in every case. Moreover, the mandatory registration of all marriages, including those conducted under customary and religious rites, is essential for effective oversight and the prevention of child marriages. Together, these recommendations form a robust framework for eradicating child marriage in Malaysia, reflecting a committed stance towards protecting children and upholding their rights within the broader context of societal values and legal obligations.

"FOR THE SAKE OF THE CHILD": ESTABLISHING HARMONISED STANDARD REGULATIONS FOR MALAYSIANS IN ADDRESSING ISSUES RELATING TO THE INTERNATIONAL PARENTAL CHILD ABDUCTION

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Norliah Ibrahim[2]

ABSTRACT

In recent years, there has been a notable increase in cases of parental child abduction on a global scale. It is not uncommon for custody battles between estranged parents to result in the non-custodial parent absconding with the child, leaving no trace. In some instances, the abducted child may be taken to another country by the non-custodial parent in order to evade detection and avoid punishment. This can have a detrimental effect on the child's long-term interests, particularly with regard to maintaining access to both parents. International efforts have been made to address this complex issue. The United Nations Convention on the Rights of the Child classifies parental child abduction as a crime, while the Hague Convention on Parental Child Abduction was created to resolve disputes related to court jurisdiction in determining the appropriate forum for such cases. Despite the fact that Malaysian Civil law criminalises parental child abduction, it has not proven to be an effective tool in combating the problem, particularly in cases involving international parental child abduction, due to the fact that Malaysia is not a signatory to the Hague Convention. This paper seeks to examine the position of parental child abduction

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under Malaysian Civil and *Shari'ah* laws, as well as the approach of the courts in dealing with such cases, especially those involving international parental child abduction. The paper also considers the implications of Malaysia adopting the Hague Convention in order to comply with international standards when addressing parental abduction, as well as the potential effects on the child's interests. Ultimately, the paper aims to propose a more effective solution by establishing harmonised standard regulations that can provide children with feasible protection against this problem, particularly in cases of international parental child abduction. By utilising a doctrinal methodology to arrive at its findings, the paper suggested that there should be a bilateral agreement between the countries affected besides establishing harmonised standard regulations for Malaysia in addressing international parental child abduction in protecting children's rights and welfare.

Keywords: *parental child abduction, custody, Hague Convention, Malaysian laws, harmonised standard regulations*

INTRODUCTION

Parental child abduction refers to the act of taking, retaining, or concealing a child by a parent, other family member, or their agent, in derogation of the custody rights of another parent or family member, including visitation rights.[3] This illegal act has adverse effects on the child and the person from whose custody the child is unlawfully taken. The child may experience psychological trauma and physical injury during the abduction, while the legal custodian may suffer from emotional distress due to the sudden separation from the child and the uncertainty of their whereabouts and well-being.

Following the termination of marital relations, custody of children often becomes a contentious issue between the parties involved. The mother is usually considered the primary candidate

[3] E.A. Schnitzer-Reese, "International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court," *Northwestern Journal of International Human Rights 2*, no.1 (2004).

for custody, particularly when the child is young, due to her natural attachment and compassion towards the child. Islamic law, similarly, gives preference to the mother with respect to the custody of her children. However, parental abduction may occur when the parent who is unable to obtain custody lawfully decides to abduct the child. Although mothers are more likely to abduct their children than fathers due to their emotional attachment, most cases of parental abduction are not intended to cause harm to the child but to secure custody by any means necessary.

RECOGNITION OF PARENTAL CHILD ABDUCTION AS A CRIME UNDER INTERNATIONAL LAWS

The Hague Convention on the Civil Aspects of International Child Abduction presents a mechanism for the retrieval and repatriation of children who have been removed from or detained outside their habitual residence jurisdiction in violation of custody rights, a predicament that frequently arises in the dissolution of an international marriage. The Convention endeavours to safeguard the welfare of the children implicated by discouraging and redressing the unilateral conduct of one parent. Article 8 of the Convention stipulates that any individual, institution, or entity alleging that a child has been removed or retained in contravention of custody rights may petition either the Central Authority of the child's regular residence or the Central Authority of any other Contracting State for assistance in securing the child's return. Additionally, Article 7 mandates that Central Authorities collaborate with one another and promote cooperation among the competent authorities in their respective states to ensure the speedy return of children and to accomplish the other objectives of the Convention, as stated in Article 10.

Therefore, the Convention serves as a return mechanism that does not aim to settle custody concerns or prevent the abducting parent from pursuing a more favourable custody verdict in a different country, often one where the abducting parent holds citizenship, has other family members, or belongs to a common

(i.e., empathetic) ethnic or religious community. To apply the Convention, the abducted child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights". Custodial rights may arise through (a) operation of law or (b) judicial or administrative rulings or an agreement with legal force under the law of the habitual residence country. Custodial rights disputes usually involve rights established by the operation of law. When the parties have an agreement or a judicial order, courts generally conclude that the issue of custodial rights is not in dispute.[4]

Other international instruments have also provided measures against child abduction. The United Nations Convention on the Rights of the Child (hereinafter referred to as UNCRC), which has been in force since 1989, also seeks to address the issue of child abduction. According to Article 11 of the UNCRC, contracting states must take measures to combat the illicit transfer and non-return of children abroad and promote the conclusion of bilateral or multilateral agreements or accession to existing agreements. Furthermore, Articles 35, 9, and 18 also address this issue.

Similarly, The Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, which has been in force since 1996, contains provisions related to child abduction. Specifically, Article 7 ensures the jurisdiction of the contracting state of the child's habitual residence, even if the child is not returned by the contracting state to which the child has been wrongfully taken or retained. Article 35 strengthens the contracting states' obligation to secure effective rights of access. Additionally, the European Convention on Recognition and Enforcement of Decisions Concerning Custody

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[4] National Center for Missing & Exploited Children and Kilpatrick, T. & Stockton LLP, *Litigating International Child Abduction Cases Under the Hague Convention* (2012), http://www.missingkids.com/en_US/Hague LitigationGuide/hague-litigation-guide.pdf

of Children shares the same objectives of locating children, securing their prompt return, and enforcing access rights through the administrative mechanism of central authorities. However, this Convention is concerned with the recognition and enforcement of court orders, unlike the Hague Convention. Thus, to utilise this Convention, applicants must already have or obtain court orders that support their position. Member states to the European Convention are confined to the continent of Europe and are drawn from members of the Council of Europe. Despite the existence of these instruments, they have shown to be of little assistance in resolving child abduction cases due to the lack of uniform application of international treaties by many signatory countries.[5]

ACCEPTANCE OF HAGUE CONVENTION BY MUSLIM COUNTRIES

While many countries worldwide have signed the Hague Convention, several Muslim countries have not. These include, but are not limited to, countries such as Iran, Saudi Arabia, Pakistan, and Malaysia. It's important to note that the decision to sign or not sign an international treaty such as the Hague Convention is a sovereign decision made by each country based on its unique circumstances and considerations. In the context of Muslim countries, cultural, legal, and political factors may influence their decision not to sign the Hague Convention. One significant factor is the influence of Islamic law, which forms the basis of personal status laws in many Muslim countries. Islamic law has specific provisions regarding child custody that may not align with the principles of the Hague Convention. For instance, under Islamic law, custody often defaults to the mother for young

[5] Nigel Lowe and Catherine Meyer, International Forum on Parental Child Abduction: Hague Convention Action Agenda (National Center for Missing & Exploited Children, 1999) https://www.icmec.org/wp-content/ uploads/2015/10/English.pdf.

children, but reverts to the father once the children reach a certain age.[6] This contrasts with the Hague Convention, which emphasises the habitual residence of the child and does not automatically favour one parent over the other. Consequently, Muslim countries may be hesitant to relinquish their prerogative to determine what is in the best interests of the child.[7] In circumstances where one parent is non-Muslim, and the court grants custody to that parent, it would generally contravene Islamic law to permit the child to return to the non-Muslim parent.[8] Therefore, allowing the child to reside with a non-Muslim mother who has been granted custody would in certain circumstances, result in the surrender of a Muslim child and pave the way for their conversion to non-Muslim. Due to this challenge and conflict with Islamic principles, several Muslim states have declined to cooperate in returning a Muslim child to a non-Muslim custodial parent in another country.[9] Political considerations may also play a role. The decision to sign an international treaty often involves a complex interplay of domestic and international politics. For some Muslim countries, like Egypt and Iran, the decision not to sign the Hague Convention may be influenced by broader geopolitical considerations, such as their relationships with western countries.

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[6] Ahmed Fekry Ibrahim, "The Best Interests of the Child in Islamic Juristic Discourse" in *Child Custody in Islamic Law: Theory and Practice in Egypt since the Sixteenth Century, (Cambridge Studies in Islamic Civilization)* (Cambridge: Cambridge University Press, 2018), 56–108.

[7] Chan Wing Cheong, "A Judicial Response to Parental Child Abduction" [2008] 2 MLJ i.

[8] Aayesha Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World: an Analysis," *International Journal of Humanities and Social Science 4*, no. 5 (2014): 267-277.

[9] Schnitzer-Reese, "International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court."

PRINCIPLE OF BEST INTERESTS OF THE CHILD

The United Nations Convention on the Rights of Children (UNCRC) has established the principle that the best interests of the child are of utmost importance in all actions concerning children. This principle is enshrined in Article 3 of the UNCRC as a primary consideration and as the paramount consideration in adoption. However, the UNCRC does not provide an exact definition of what constitutes the best interests of the child. The determination of this principle depends on various individual factors such as the age and level of maturity of the child, the child's environment, and the presence or absence of parents. The best interests of the child can be understood as both a rule of procedure and a substantive right. As a rule of procedure, any decision that affects a specific child or group of children must carefully consider the possible impact on the child or children concerned. As a substantive right, the best interest's principle guarantees that this principle will be applied whenever a decision is to be taken concerning a child or a group of children. state parties must fulfil their obligation to establish mechanisms that facilitate consideration of the best interests of the child and provide legislative measures to ensure that those with the authority to make decisions regarding children must consider the best interest rule as a matter of procedure. The principle set forth in Article 3 UNCRC intended to ensure that measures were put in place to allow for proper consideration of the well-being of the child when making a decision that affected the child. Nonetheless, national law may provide more specific guidance on general principles set forth in international instruments and should analyse applicable domestic legislation.[10]

Islamic law similarly places great emphasis on the best interests of the child as a paramount principle in addressing matters concerning children, particularly in cases of custody

[10] Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function," *The International Journal of Children's Rights 18*, (2010): 483-499, 10.1163/157181810X537391.

disputes. This focus on safeguarding the child's welfare is in line with one of the fundamental objectives of *Shari'ah* (*Maqasid al-Shari'ah* which seeks to protect the lives of progeny. The *Qur'an* and hadith provide numerous rules and regulations that guarantee the protection of children's rights and interests.[11] Moreover, the recognition of children's rights in Islam is upheld by various Islamic international bodies, such as the Organisation of the Islamic Conference (OIC). In one of its declarations, the OIC affirms that every child has the right to proper care in all aspects of upbringing, which is due from parents, society, and the State since birth. The Council of the Islamic Fiqh Academy, an OIC-affiliated organisation, has also endorsed a comprehensive ruling on the protection of children's rights and welfare based on *Shari'ah* principles.[12]

In the context of parental child abduction, the principle of best interest of the child is accorded equal significance. However, the court's degree of consideration of this principle in cases of parental child abduction is not equivalent to that in normal custody cases. The notion of best interests of the child as the "primary standard" in decision-making for children is a topic of great concern in cases of parental child abduction due to the elusive nature of its defining qualities and practical application. As previously mentioned, the Hague Convention on the Civil Aspects of International Child Abduction generally necessitates the return of children who have been wrongfully taken from or kept outside their habitual residence jurisdiction. Custodial disputes are to be resolved by the court of the child's habitual residence, but this may not be in line with the best interest of the child.

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[11] See for instance, Al-Quran, 17:49-50, 2:233 and 4:33

[12] The Islamic Fiqh Academy, 12th round meeting in Riyadh Saudi Arabia, September 23-28, 2000).

MALAYSIAN EXPERIENCE

Malaysia, like many Muslim countries, is not a signatory country to the 1980 Hague Convention on Child Abduction due to some reservations on the provisions of the Convention, particularly on the issue of the religion of the child in parental child abduction cases. Nonetheless, the laws in Malaysia generally recognise child abduction as a crime, and it is not in the best interest of the child. There are various laws that apply in Malaysia relating to children. Under the family law system, three major laws regulate matters pertaining to guardianship and custody of children, namely, the Islamic Family Law (Federal Territories) Act 1984 (Act 303) (IFLA) that governs Muslims, the Law Reform (Marriage and Divorce) Act 1976 (Act 164) (LRA) and Guardianship of Infant Act 1961 (Act 351) (GIA) which applies to non-Muslims. Other laws which specifically deal with crime against children are the Child Act 2001 and the Penal Code. These two laws apply to both *Muslim* and *non-Muslim* children in Malaysia.

With regard to custody of children, the governing principle under the IFLA, LRA, and GIA is the best interest of the child. Section 86(2) of the IFLA and Section 88(2) of the LRA similarly stipulate that the court shall prioritise the welfare of the child when deciding on custody, considering the wishes of the parents and the child, if applicable. Section 11 of the GIA, on the other hand, states that the court shall first and foremost consider the welfare of the child and the wishes of the parent or parents.

The principle of best interest of the child has been consistently upheld in Malaysia, as evidenced by judicial decisions in various *Shari'ah* and civil cases[13]. For instance, in *Wan Junaidah v Latiff*[14] the Syariah Court ruled that it was in the

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[13] Suzana Mohd Said and Shamsudin Suhor, "International Parental Child Abduction in Malaysia: Foreign Custody Orders and Related Laws for incoming Abductions," *Pertanika Journal of Social Science & Humanities 20*, (2012): 101 – 110.

[14] [1989] 8 JH 122.

best interest of the children for the elder child to remain in the custody of the father and the younger child with the mother. The court further ordered the parents to amicably arrange visitation rights. In *Mohamed Radhi v Khadijah,*[15] the court urged both parents to maintain a harmonious relationship for the sake of the children after the divorce. Therefore, the right of access should be viewed as a means of protecting the child's interests as well as the rights of both biological parents. This is to prevent a tug-of-war situation, as both parents bear equal responsibility for their children. Perhaps granting a joint custody order would be more appropriate to encourage the active participation of both parents in the best interest of their children.[16]

The Civil courts also prioritise the welfare of the child over other considerations.[17] In *Teh Eng Kim v Yew Peng Siong*,[18] the court emphasised that *"As the welfare of the children is the paramount consideration, the welfare of these three children prevails over parental claim… Parental rights are overridden if they are in conflict with the welfare of the child."* Similarly, in *Mahabir Prasad v Mahabir Prasad,*[19] the court ruled that it was in the best interest of the children to live with their mother in India, despite an agreement between the parents to give custody to the father before the decision was made.

Although IFLA and LRA do not directly provide for parental child abduction, both laws nevertheless make it an offence for the

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[15] [1998] 8 JH 247.

[16] Najibah Mohd Zin, "How Best Interests of the Child is Best Served in Islamic Law with Special Reference to its Application in the Malaysian Shariah Court," (2005) Cited in http://www.refworld.org/pdfid/4b6fe2a80. pdf.

[17] Normi Abdul Malek, "Factors Determining Welfare of the Child in Malaysian Civil Law of Custody: an Analysis of Decided Cases," *JUUM 15,* (2001): 171.

[18] [1977] 1 MLJ 234.

[19] [1981] 2 MLJ 326.

non-custodial parent to take a child who is in the lawful custody of the other parent outside Malaysia. The court may issue a restraining order upon the non-custodial parent from committing such action and non-compliance of the order will render the said parent to be in contempt of court.[20] (Section 105 IFLA & Section 101 LRA). As such, any attempt to take the child out of Malaysia without the consent of the custodial parent is deemed unlawful. These provisions may, therefore assist the court in curbing parental child abduction within a domestic context.

Other provisions on child abductions in Malaysia can be found in the Child Act 2001 (Act 611) and the Penal Code of Malaysia (Act 574). The Child Act 2001 criminalises any act by a parent or guardian that involves in bringing or sending a child without proper consent from the lawful custodian of the child. This is stipulated in Section 52(1) of the Act. According to Section 52(2) of the same Act, the person who commits such an act is liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or both. It should be noted, however, that the term lawful custodian in this Section refers to someone who has been conferred custody of the child by any written law or by the court's order, be it Civil or Syariah courts, as stated in Section 52(3). Thus, the existence of a court order on the custody of the child is a necessary condition for the offence. Without a court order, parents are generally considered by the law to have equal rights over the child, and are able to freely exercise their rights, including the right to travel with the child anywhere within or outside Malaysia.[21]

Section 48(2) of the Child Act 2001 delineates a punishment of ten thousand ringgit fine or imprisonment of up to five years or both imprisonment and fine for any individual who harbours or

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[20] By virtue of Islamic Family Law Act (Federal Territories) 1984, s.105 and Law Reform (Marriage and Divorce) Act 1976, s.101.

[21] Anis Suhaiza bt Md Salleh, "Parental Child Abduction in Malaysia: Is Everything Right with Our Domestic Laws?" *IIUM Law Journal 21*, no.2 (2015): 247-265.

illegally takes possession of a child or transfers a child for a valuable consideration. The charges concerning child abduction under Section 48 are defensible with regards to transfer taking place in contemplation of or pursuant to a bona fide marriage or adoption. Additionally, at least one of the natural parents of the child or the guardian of the child must have been a consenting party to the marriage or to the adoption by the adopting party and had explicitly consented to the specific marriage or adoption.

The provisions of the Penal Code deal with the kidnapping of children, specifically under two categories: kidnapping from Malaysia (Section 360) and kidnapping from lawful guardianship (Section 361). The explanation to Section 361 states that the word "lawful guardian" includes any person lawfully entrusted with care or custody of such minor or other person. The word "lawful guardian" does not necessarily mean either the parent of the child or anyone who is granted with a court order to be the legal guardian. This was decided in *Syed Abu Tahir a/l Mohamed Ismail v Public Prosecutor,*[22] in which the judge said that the lawful guardian who has been lawfully entrusted with care and custody of the child in the explanation of Section 361 must be construed liberally and the entrustment is not intended to be in a formal manner. The court may infer lawful entrustment in favour of the person in whose custody the child was living and cared for the child.[23]

Additionally, the Penal Code does not specify parents as the sole perpetrators of the act of kidnapping, as it may be carried out by anyone. Therefore, the punishment for the offence committed in either situation is similar, as mentioned in Section 363, *"Whoever kidnaps any person from Malaysia or from lawful*

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[22] [1988] 3 MLJ 485.

[23] Abdul Ghafur Hamid and Zaleha Kamaruddin, "International Parental Child Abduction in The Malaysian Legal Context: Addressing Issues and The Way Forward," *IIUM Law Journal 26,* no.2 (2018): 275 – 306.

guardianship shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine."

APPLICATION OF THE DOCTRINE OF FORUM NON CONVENIENS

Being a non-member country to the 1980 Hague Convention on Child Abduction, the application of the doctrine of *forum non-conveniens* in custody cases involving foreign nationals in Malaysia is seen as an alternative that may assist the Malaysian court in resolving the problems relating to parental child abduction as it is in line with the spirit of the Convention.

The aforementioned doctrine holds relevance in a scenario wherein the parent responsible for abducting a child has commenced a custodial proceeding in Malaysia, and the left-behind parent seeks to contest the proceedings before the Malaysian court, relying on a custodial order that was obtained in a foreign country. Grounded on this doctrine, the parent hailing from a foreign country can posit that the Malaysian court is not the proper forum to adjudicate the matter, given that the case is more closely connected with the foreign court. [24]

The case of *Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, Intervener)*[25] illustrates the application of the doctrine of *forum non-conveniens* in custody disputes. This case involved an Australian couple who were in a custody dispute over their daughter. The husband had taken the daughter to Malaysia for a holiday and did not return to Australia as scheduled. The wife applied to the Australian court for orders for the custody and return of the daughter. The husband subsequently filed and obtained an *ex-parte* interim order of

[24] Hamid and Kamaruddin, "International Parental Child Abduction in The Malaysian Legal Context: Addressing Issues and The Way Forward," 275 – 306.

[25] [2006] 6 MLJ 372.

custody and guardianship of the daughter from the Malaysian court. The wife applied to set aside the interim order of the Malaysian court and, *inter-alia*, for the delivery of the daughter to her in accordance with the Australian court's order. The orders sought were granted by the Malaysian court. In determining which forum is more appropriate for the best interest of the child, the court considered two factors: Firstly, whether the child would be harmed if returned to Australia; and secondly, whether Australia would apply the paramountcy of the child's welfare principle. Based on these considerations, the court's main concern was to ensure the prompt return of the abducted child to the country with which the child was substantially connected, unless there was a compelling reason to the contrary.[26] The application of the doctrine, nevertheless, carries a drawback of incurring substantial expenses and requiring a significant amount of time, particularly for the foreign parent who needs to participate in court proceedings in Malaysia.

RECOMMENDATIONS & CONCLUSION

Cases of parental child abduction arise due to a multitude of circumstances and typically involve clashes of social, cultural, and religious backgrounds. This is particularly evident when parents of differing religions and nationalities are involved. The complexity of the situation is exacerbated when the child is abducted across international borders. This is due to the countries and parties involved not sharing the same cultural and social values and operating under different legal systems. The inherent clash of cultural, religious, and legal norms often fails to resolve the issue of international parental child abduction. Despite the existence of the 1980 Hague Abduction Convention, the resolution of the problem under the Convention appears to be

[26] Suzana Mohd Said and Shamsudin Suhor, (2009). "Forum Non Conveniens in Child Custody Disputes in Malaysia" *Pertanika Journal of Social Science & Humanities 20,* (2012): 111-120.

lacking. The situation is further complicated when the child is abducted to countries that are not yet members of the Abduction Convention, like Malaysia. In such cases, the return remedy under the Convention is not applicable, and the process of returning the child to their habitual residence country becomes even more complex.

Given the gravity of the issue and the escalating number of incidents worldwide, ample research has been conducted on parental child abduction. Several solutions have been proposed, including diplomatic and legislative intervention via bilateral treaties, the adoption of legislative measures, judicial conferences, re-abduction, the utilisation of the United Nations Convention on the Rights of the Child (CRC), and the establishment of the International Family Court.[27] Among these proposed solutions, alternative dispute resolution (ADR) methods, particularly mediation, may be considered the most efficacious approach to tackling the issue of parental child abduction. Through mediation, parties may be able to resolve their dispute amicably without having to go through the court process, which is more costly and time-consuming. Furthermore, research shows mediation to play an important role in reducing litigation and increasing parties' satisfaction in dispute resolution.[28]

Although instances of international parental child abduction are not widespread in Malaysia compared to other Muslim nations, it is crucial for Malaysia to address this complex issue. This is due to the current global developments in family relationships that have affected a child's right to maintain regular contact with both parents. Child abduction necessitates a comprehensive and multifaceted strategy that involves legal, educational, and diplomatic endeavours. Therefore, it is

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[27] Debbie S.L. Long, "Parental child abduction in Singapore: the Experience of a Non-Convention Country," *International Journal of Laws, Policy and the Family 21*, no.2 (2007): 220-241.

[28] Forrest S. Mosten, "Mediation Makes Sense How to Prevent an International Crisis," *Family Advocates 15,* (1992-1993): 44-45.

appropriate for Malaysia to develop a set of standard harmonised regulations that promote amicable resolutions. To achieve this objective, several recommendations must first be taken into account:

Firstly, international cooperation is essential in cases of parental child abduction where international borders are crossed. This necessitates the establishment of bilateral and multilateral agreements between countries, focusing on cooperation in legal matters, enforcement of court orders, and the prompt return of abducted children to their home countries. The successful use of such instruments is contingent upon various political, cultural, and judicial factors, as well as the level of investment by competent authorities. When seeking a harmonious resolution within a bilateral or multilateral framework, it is crucial to have knowledge of and respect for different models and institutions related to parental authority across countries with distinct judicial and cultural traditions. This approach should also be in accordance with the child's right to maintain regular contact with both parents, whether through amicable or judicial means. The difference in the conception of parental responsibility highlights the need to respect different legal traditions. Therefore, it is necessary to deepen experience through training and encourage the creation of communication networks. Building a relationship of trust between authorities is crucial for effective cooperation, which can only be achieved by understanding the characteristics of different legal traditions and systems involved. In parallel to this, fully monitored multilateral cooperation should be developed to strengthen dialogue between states of Islamic tradition and western states, protecting the interests and development of children with roots in two different cultures.[29] Countries, such as Australia, France, Canada, Egypt and Lebanon have concluded bilateral agreements.

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[29] Caroline Gosselain (2002), Child Abduction and Trans frontier Access: Bilateral Conventions and Islamic States: A Research Paper, HCCH Special Commission of September / October 2002, https://assets.hcch.net/upload/abd2002_pd7e.pdf.

These agreements aim to promote and implement cooperation among states parties, with a view to regulating the difficult question of child custody and, in a larger sense, ensuring the protection of children's rights. The first agreement of this type was the agreement between Egypt and Canada regarding Cooperation on Consular Elements of Family Matters, which was concluded on 10 November 1997. Other agreements have since followed, including an agreement between France and Lebanon on cooperation in some family matters, between Australia and Egypt on the well-being of children, and between Canada and Lebanon on cooperation in some humanitarian consular matters. These agreements have in common:

i. The belief that the child's [best] interests lie in respecting his/her right to have personal, direct, and regular relations with both his/her parents;

ii. the promotion of respect for the non-custodial parent's rights of access; and

iii. the establishment of Advisory Commissions to ensure the amicable resolution of family disputes, particularly those relating to child custody and child access.[30]

Secondly, on the legislative framework, the establishment of a legislative framework is imperative to address the issue of parental child abduction in every nation. This framework should consist of stringent laws that explicitly define the act as a criminal offence and prescribe appropriate penalties. The international harmonisation of such laws can promote uniform legal action and enforcement across various jurisdictions, thereby aiding in the effective resolution of the problem at hand.

[30] Caroline Gosselain (2002), Child Abduction and Trans frontier Access: Bilateral Conventions and Islamic States: A Research Paper, HCCH Special Commission of September / October 2002, https://assets.hcch.net/upload/abd2002_pd7e.pdf.

Thirdly, on the specialised tribunal, the establishment of a specialised tribunal, akin to a central authority under the Hague Convention, which addresses all matters pertaining to parental child abductions, is a crucial measure. This tribunal employs a comprehensive array of methods and regulations to effectively address such issues. These methods include mediation and dispute-resolution mechanisms, which are instrumental in preventing child abduction. By encouraging mediation, parents can arrive at mutually agreeable solutions while avoiding the emotional and legal complexities inherent in abduction cases. To facilitate a more peaceful resolution of disputes, it is important to promote awareness of mediation services and provide training for mediators. Furthermore, the establishment of supportive services within the tribunal for parents and children involved in abduction cases is also important. These services may include counselling, legal aid, and access to resources that can help parents cope with the challenges they face during and after the abduction process. While a specialised tribunal may serve as a viable option to expedite the establishment of harmonised and standardised regulations, it is imperative to take into account the wider context and engage various stakeholders, including the Federal and State authorities, legal scholars, non-governmental organisations, as well as child welfare associations.

Fourthly, educational campaigns play a vital role in raising awareness among parents regarding the emotional, legal, and long-term implications of child abduction. Such campaigns serve as an effective means for imparting information related to alternative measures to abduction, including resorting to legal remedies or engaging in mediation. Additionally, educational campaigns underscore the significance of prioritising the best interests of the child.

In conclusion, the establishment of harmonised standard regulations for Malaysia in addressing international parental child abduction is a significant step towards protecting children's rights and promoting their overall welfare. Such regulations will contribute to a more efficient and effective legal framework,

facilitating international cooperation and ensuring the best interests of the child are upheld in these complex and sensitive cases.

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PART III
HARMONISATION OF *SHARI'AH* AND CIVIL LAW

CHALLENGES TO INTERGENERATIONAL TRANSFER OF DIGITAL ASSETS: A COMPARATIVE STUDY OF ENGLISH COMMON LAW AND THE *SHARĪ'AH*

Aishat Abdul-Qadir Zubair[1]

ABSTRACT

Intergenerational transfer in English Common Law focuses on the concept of individual autonomy and the right to dispose of one's property as desired, with considerations for family provisions and legal obligations to prevent unjust outcomes or disinheritance. *Shariah's* approach to intergenerational transfer is rooted in principles of fairness and social justice, aiming to maintain family ties and economic balance among heirs. While the shares are predetermined, they vary depending on the relationship of the heir to the deceased. This paper aims to conduct a comparative analysis of the intergenerational transfer of digital assets under English Common law and *Shari'ah*. Even though the data collection methodology employed was purely doctrinal, the functional method of legal comparison was used to analyse primary and secondary textual materials. The paper reveals that English Common law more than Islamic law faces challenges in adapting its legal frameworks to accommodate the unique nature of digital assets. The paper will, therefore avail scholars, particularly those involved in the distribution of an estate, the required knowledge on this class of asset and the rules to be followed in its transfer from generation to generation.

Keywords: *Digital assets, intergenerational wealth, Shari'ah; Common law, inheritance.*

INTRODUCTION

Intergenerational transfer refers to the passing of assets, wealth, values, knowledge, or responsibilities from one generation to another within a family or community. This transfer can

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encompass various elements, including financial inheritance, property, cultural heritage, traditions, and even intangible aspects like wisdom, skills, and ethical values. It involves the passing down of assets, real estate, investments, and wealth from parents or older generations to their children or younger heirs. Estate planning, including wills, trusts, and other legal mechanisms, facilitates the smooth transfer of these assets and ensures the wishes of the transferor are respected. Intergenerational transfer also involves strategies for managing and preserving wealth across generations. This includes planning for the continuity of family businesses, maintaining financial stability, and providing financial education to younger family members.

The digital world has affected the way assets as known traditionally are now viewed. Whereas hitherto the influx of technology in every aspect of human existence, Islam has recognised the possibility of having certain rights in terms of assets that will have value and can be inherited.[2] This invariably translates to a change in the way the inheritance of these classes of assets will now be viewed. Digital assets are said to represent around $2 Trillion plus market value with an approximate user of around 200 million plus.[3] This has increased considerably from the statistics given in 2020 by Research and Markets stating the value of digital assets to be around US$3.88 Billion.[4] This

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[2] Muhammad Wohidul Islam, "Al-Mal: The Concept of Property in Islamic Legal Thought," *Arab Law Quarterly* 14, no. 4 (1999): 361-368.

[3] "BofA Global Research Launches Coverage of Digital Assets Report Finds Digital Assets are Too Large to Ignore, " October 4, 2021 accessed on January 5, 2023, https://newsroom.bankofamerica.com/content/newsroom/ press-releases/2021/10/bofa-global-research-launches-coverage-of-digital-assets.html.

[4] "Digital Asset Management Market - Growth, Trends, COVID-19 Impact, and Forecasts (2022 - 2027)," Research and Markets Report, accessed on March 5, 2023, https://www.researchandmarkets.com/reports/4535818 /digital-asset-management-market-growth.

indicates therefore that digital assets are being widely accepted globally as a special category of assets.

Digital assets can be considered as assets that can be uniquely identified and stored digitally, with the features of being used to realise value.[5] In essence, they are referred to as assets that are not physical but digital in form. Access to goods and services for individuals as well as business and consumer interactions are being revolutionised by digital assets. The act of creating a blockchain-based "token" that digitally represents an underlying asset, which is frequently more analogous to a good or service than a financial instrument, is known as "tokenising" an asset.[6] While such a "token" might stand in for a share in a business or membership in an investment fund, it might also represent an ownership stake in real estate or a piece of art, to mention a few examples, or it might grant its holder access to blockchain capabilities. On a distributed ledger, ownership of the token is recorded, and a blockchain records all token purchases and sales.[7] Digital assets thus have limitless potential.

Furthermore, with the advent of Fintech sophistication, there is a great effect on the ownership of assets and the class of assets that can be owned. There are various diverse types of digital assets and the key distinguishing feature is that first, this type of asset is usually stored in a digital file which could be owned by a different person second, it exists within a searchable digital infrastructure and third, it has the capacity of providing a unique value to the owner of this digital asset.[8] The type of digital asset includes

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[5] "Digital Assets," Gartner Glossary, accessed on February 2, 2023 https://www.gartner.com/en/finance/glossary/digital-assets.

[6] "Asset Tokenization," PWC, October 2021 accessed on November 10, 2023 www.pwc.com/ng.

[7] *Ibid*.

[8] Wulf A. Kaa, "Digital Asset Market Evolution," *The Journal of Corporation Law* 46, no.4 (2021): 909-963

electronic mail, cryptocurrencies, logos, audio files, graphics, design files etc.[9]

The intergenerational transfer of digital assets has become an increasingly important topic in legal and scholarly circles due to the rise of digitalisation and the accumulation of wealth in the digital realm. The main aim of the research is to conduct a comparative analysis of the intergenerational transfer of digital assets under English Common law and *Shari'ah*. To ensure a comprehensive understanding of the legal implications and best practices surrounding this transfer, researching the intergenerational transfer of digital assets under both English Common law and *Shari'ah* serves several crucial objectives:

1. To explore its significance in addressing the complex issues related to the transfer of digital assets under both laws.
2. To ascertain whether a digital asset can be classified as property (*mal*) to be so-called and therefore capable of meeting the requirements to be considered inheritable properties (*al-mawruṭ)* under the Islamic law of inheritance (*miraṭh*).
3. To ascertain if the same rules of inheritance will avail such class of asset under the Islamic law of inheritance (*miraṭh*).
4. To gain a deep understanding of the legal frameworks governing such transfers.
5. To contribute to enhancing legal certainty for individuals and institutions in the transfer of their digital assets from generation to generation.
6. To raise awareness about the importance of the intergenerational transfer of digital assets. By disseminating the research findings, Muslims would be well-informed about the legal aspects, risks, and opportunities associated with digital asset transfer. This awareness encourages proactive

[9] Wulf A. Kaa, "Digital Asset Market Evolution," *The Journal of Corporation Law* 46, no.4 (2021): 909-963.

planning and empowers individuals to take appropriate steps to protect their digital legacies.

The research methodology employed in this paper is the doctrinal research method due to the fact that the Islamic law of inheritance is such that it is available in the textual verses of the glorious Qur'an as well as the *Sunnah* of the Prophet Muhammad S.A.W. While that of the English Common law is also rooted in legal text and cases. The paper also used the functional method of legal comparison to conduct a comparative analysis of the legal frameworks and principles under English Common law and Islamic law. In the end, the similarities and differences between the two systems in terms of ownership, inheritance, privacy, contractual obligations, and other relevant aspects were identified. It is important to state here that some ethical and cultural factors affect the findings of this research. The paper considered how principles of justice, fairness, privacy, and social responsibility shape the legal framework and outcomes of the intergenerational transfer of digital assets.

This paper is structured this way. Immediately after this introduction, the next section deals with the Legal framework for the intergenerational transfer of assets. The intergenerational transfer as it operates under English Common law is analysed which is closely followed by the process under the *Shari'ah*. After that, the findings of the study are discussed in the section preceding the conclusion.

LEGAL FRAMEWORK FOR ENGLISH COMMON LAW AND *SHARI'AH*

It is important to understand the legal precedents, statutes, and regulations that govern the transfer of digital assets, and ensure compliance with the established legal system. Similarly, in the context of Islamic law, this paper provides insights into the principles and guidelines outlined in the Qur'an and *hadith*, guiding the transfer of digital assets by Islamic jurisprudence. This would allow for the identification of challenges and gaps within the existing legal frameworks. By exploring legal precedents and clarifying legal ambiguities, this paper provides guidance and

clarity on matters such as ownership, inheritance, privacy, and security of digital assets. Improved legal certainty instils confidence among individuals, allowing them to plan and manage their digital estates more effectively.

The legal framework for intergenerational transfer of assets under the English Common law is The Wills Act of 1837, as amended by the Wills Act of 1852, as well as the Wills Law of various states. Next is the Administration of Estate Laws, also of the various states. The Wills Law applies to those who are married under the Act and left a will and can also apply to whoever makes a will according to the stipulations in the law. Administration of Estates Law on the other hand applies where a person dies without leaving a will behind.

On the other hand, the *Shari'ah* framework for intergenerational transfer of assets is rooted in the inheritance jurisprudence, i.e. the Qur'an, *Sunnah*, and *ijtihad.* For example, the verses from the glorious Qur'an provides to the effect:

> *For men, it is a share of what the parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much - an obligatory share.*[10]

The evidence above goes to show the equality and non-discrimination principles with regard to the transfer of assets in *Shari'ah*. In another verse of the Qur'an, Allah made clear the rules for the distribution of assets:

> *Allah instructs you concerning your children: for the male, what is equal to the share of two females. But if there are [only] daughters, two or more, for them is two-thirds of one's estate. And if there is only one, for her is half. And for one's parents, to each one of them is a sixth of his estate if he left children. But if he had no children and the parents [alone] inherit from him, then for his mother is one third. And if he had brothers [or sisters], for his mother is a sixth, after any bequest he [may have] made or debt. Your parents or your children - you know*

[10] Al-Qur'an, 4:7.

> *not which of them are nearest to you in benefit. [These shares are] an obligation [imposed] by Allah. Indeed, Allah is ever Knowing and Wise.*[11]

This verse shows the shares for each category of heirs which must be adhered to by the administrator of the estate in the transfer of the deceased estate. And finally, another verse of the Qur'an states:

> *They request from you a [legal] ruling. Say, "Allah gives you a ruling concerning one having neither descendants nor ascendants [as heirs]." If a man dies, leaving no child but [only] a sister, she will have half of what he left. And he inherits from her if she [dies and] has no child. But if there are two sisters [or more], they will have two-thirds of what he left. If there are both brothers and sisters, the male will have the share of two females. Allah makes clear to you [His law], lest you go astray. And Allah is knowing of all things.*[12]

This further provides rules for sharing and transferring assets to those who are deserving. All the above verses are a framework contained in the glorious Qur'an which is one of the main primary sources of *Shari'ah*. The second main primary source of the *Shari'ah* is the Sunnah and several hadith have been quoted:

> *Whoever dies leaving some property, then that property is for his heirs.*[13]

In another *hadith*, the Prophet S.A.W. mentioned to the effect:

> *Give the fixed shares to those who are entitled to them, and whatever remains should be given to the closest male relative of the deceased.*[14]

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[11] Al-Qur'an, 4:11.

[12] *Ibid*, 4:176.

[13] Al-Bukhari, 2004: 1123.

[14] Muslim, 2008:1615.

This evidence highlights the legal framework for the transfer of assets through generations from the English Common law and the *Shari'ah.*

INTERGENERATIONAL TRANSFER OF DIGITAL ASSETS UNDER ENGLISH COMMON LAW

Intergenerational transfer under English Common Law primarily operates through principles of testamentary freedom, legal statutes, and established precedents. It is an evolving and complex area of law that addresses the inheritance and disposition of various forms of digital property, including online accounts, social media profiles, cryptocurrencies, digital media, and other digital assets. Unlike physical assets such as real estate or personal belongings, digital assets are intangible and often have no physical presence.[15] As a result, the traditional legal frameworks governing the transfer of physical property may not readily apply to digital assets.[16] Common law jurisdictions are gradually adapting to address this modern challenge and establish guidelines for the intergenerational transfer of digital assets.[17] The following key considerations are relevant to the intergenerational transfer of digital assets under English Common Law.

1. Terms of Service and Digital Estate Planning: Many online service providers have their terms of service that dictate

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[15] Will Kenton, "What Are Intangible Assets? Examples and How to Value" March 20, 2022, accessed on October 12. 2022 https://www.investopedia.com/terms/i/intangibleasset.asp.

[16] Jason G. Allen, Michel Rauchs, Apolline Blandin and Keith Bear, "Legal and Regulatory Considerations for Digital Assets," Cambridge Centre for Alternative Finance accessed on April 30, 2023 https://www.jbs.cam.ac.uk/wp-content/uploads/2020/10/2020-ccaf-legal-regulatory-considerations-report.pdf.

[17] Bianca Kremer and Kevin Werbach, "The Global Challenge of Digital Asset Regulation" CPI Competition Policy International, February 23, 2022 accessed on April 20, 2023, https://www.competitionpolicyinternational .com/the-global-challenge-of-digital-asset-regulation/.

how digital assets will be treated upon the account holder's death.[18] Commonly, these terms prohibit unauthorised access or transfer of an account, and they may even require the deletion of the account upon the account holder's death. However, some service providers have introduced mechanisms for digital estate planning, allowing users to designate individuals who can access or manage their digital assets after their death.[19]

2. Digital Wills and Testamentary Capacity: A digital will is a legal instrument that outlines how an individual's digital assets should be managed and transferred after their death.[20] Common Law jurisdictions have started recognising digital wills, but the requirements and formalities vary.[21] One significant consideration is the testamentary capacity of the individual creating the digital will, ensuring that they have the mental capacity to understand the implications of their decisions.

3. Privacy and Data Protection Laws: Privacy and data protection laws impact the transfer of digital assets, as they govern the collection, storage, and disclosure of personal information.[22] Executors or beneficiaries seeking access to the digital assets of a

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[18] Noam Kutler, "Protecting Your Online You: A New Approach to Handling Your Online Persona After Death" *Berkeley Technology Law Journal* 26, no. 4 (2011): 1641- 1670, https://www.jstor.org/stable/24118668.

[19] Jamie P. Hopkins, "Afterlife in the Cloud: Managing a Digital Estate" *Hastings Science and Technology Law Journal* 5, no.2 (2013): 209-244.

[20] Maria Perrone, "What Happens When We Die: Estate Planning of Digital Assets" *Commlaw Conspectus* 21, (2012): 185-210.

[21] "Oklahoma Gives Executors Right to Control Deceased's Online Social Media Accounts", *Wealth Strategies Journal* (Dec. 8, 2010), accessed on May 14, 2023 http://www.wealthstrategiesjournal.com/2010/12/oklahoma -gives-executors-right.html.

[22] Uche Val Obi, "Nigeria: Data Privacy And Data Protection Law In Nigeria" *Mondaq* 14 April 2022, accessed on March 20, 2023, https://www.mondaq.com/nigeria/privacy-protection/1183140/data-privacy-and-data-protection-law-in-nigeria.

deceased person must navigate these laws while respecting the deceased's privacy rights.

4. Intellectual Property and Copyright: Digital assets can include copyrighted material, such as digital media, literary works, or artistic creations. The transfer of digital assets with intellectual property rights may require adherence to copyright laws, including obtaining proper licences or permissions for use or transfer.[23]

5. Cybersecurity and Authentication: The secure transfer of digital assets requires robust cybersecurity measures to prevent unauthorised access or fraudulent activities.[24] Common Law jurisdictions are increasingly recognising the importance of implementing strong authentication mechanisms to protect digital assets during the transfer process.

6. Jurisdictional Challenges: Digital assets are not bound by geographical boundaries, and service providers may operate in multiple jurisdictions.[25] Determining the applicable laws and jurisdiction for the transfer of digital assets can be complex, particularly when different countries have varying legal frameworks and conflicting laws.[26] Hence, given the evolving

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[23] Amnon Lehavi, "Intellectual Property, Data, and Digital Assets" in *Property Law in a Globalizing World* (Cambridge University Press, 2019).

[24] Yuchong Li and Qingui Liu, "A Comprehensive Review Study of Cyber-attacks and Cyber Security; Emerging trends and recent developments", *Energy Reports 7,* (2021): 8176-8186. https://doi.org /10.1016/j.egyr.2021.08.126.

[25] Jason G. Allen, Michel Rauchs, Apolline Blandin and Keith Bear, "Legal and Regulatory Considerations for Digital Assets" *Cambridge Centre for Alternative Finance,* accessed on May 14, 2023, https://www.jbs.cam.ac.uk/wp-content/uploads/2020/10/2020-ccaf-legal-regulatory-considerations-report.pdf; Bianca Kremer and Kevin Werbach, "The Global Challenge of Digital Asset Regulation" *CPI Competition Policy International* February 23, 2022, accessed on March 31, 2023 https://www.competitionpolicyinternational.com/the-global-challenge-of-digital-asset-regulation/.

[26] *Ibid*.

nature of technology and the digital landscape, English Common law is still adapting its legal frameworks to adequately address the intergenerational transfer of digital assets.

INTERGENERATIONAL TRANSFER OF DIGITAL ASSETS UNDER *SHARI'AH*

Under *Shari'ah*, intergenerational transfer, especially regarding inheritance, is guided by specific principles outlined in Islamic jurisprudence. The system of inheritance, known as *faraid*, governs the distribution of a deceased person's estate among their heirs. Islam, which is an all-encompassing religion speaks on every aspect of human lives, ownership of assets inclusive. Under Islamic Law, the concept of *mal* holds significant importance. *Mal* refers to wealth, property, or possessions, including both tangible and intangible assets. It encompasses various forms of property, such as money, land, livestock, commodities, and any other valuable resources. The concept of *mal* plays a crucial role in Islamic jurisprudence, as it is closely tied to economic activities, trade, and the overall welfare of individuals and society.[27]

1. Ownership of Digital Assets: Islamic law recognises the right to private ownership and emphasises the fair distribution of wealth upon a person's death. Therefore, digital assets owned by an individual are considered part of their estate and subject to inheritance rules outlined in Islamic law. The Qur'an provides guidelines on the distribution of inherited wealth, ensuring that heirs receive their rightful shares.[28] Under Islamic law, the ownership of *mal* is considered a fundamental right of individuals.[29] The Qur'an acknowledges private ownership and emphasises the responsibility of individuals to use their wealth in

[27] Wohidul Islam, "Al-Mal: The Concept of Property in Islamic Legal Thought", 361-368.

[28] Al-Qur'an: 7-14 and 176.

[29] It's importance is seen as it is regarded as one of the fundamental objectives of *Shari'ah* known as *Maqasid al-Shari'ah.*

a just and responsible manner.[30] Islam promotes the acquisition of wealth through lawful means and discourages any form of exploitation, fraud, or unethical practices in economic transactions.[31] Islamic law further provides a comprehensive framework for the management and distribution of wealth in society. It recognises the importance of individual ownership, but it also imposes certain obligations and restrictions to ensure social justice and economic equilibrium.[32]

The concept of *mal* as a property has been variously defined in the classical Islamic law text. The concentration on the proprietary characteristics of the *mal*, whether they are restricted to corporeal matters alone (*a'yan*) or they encompass usufructs (*manfa'a)* and rights (*huquq*), is primarily responsible for the discrepancies in definitions provided by jurists. While the *Jumhur*, which consists of the Maliki, Shafi'i, and Hanbali, belongs to the latter group, the majority of classical Hanafi jurists fall into the former category. Accordingly, the first group opines that *mal* should only be limited to the physical parts, whereas the second group opines that rights and usufructs are also considered to be properties in and of themselves. Interestingly, modern researchers seem to favour the second interpretation of the *Jumhur*, which incorporates rights and usufructs within the definition of *Mal*. In this study, we stick to the definition of Hanafi, which provides that *"Mal is what human instinct inclines to, and which is capable of*

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[30] Al-Qur'an, 4:29 *"O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent."*

[31] Islam permits trade but forbids unfairness, exploitation, and dishonesty. Qur'an says: *"Do not devour one another's property wrongfully, nor throw it before the judges in order to devour a portion of other's property sinfully and knowingly."* (2: 188). Also, Qur'an says: *"Do not devour another's property wrongfully – unless it be by trade based on mutual consent."* (4: 29).

[32] Bukhori Abdul Shomad and Abd. Wahid, "God's and Human's Authority on the Ownership of Wealth in Islam" *Advances in Social Science, Education and Humanities Research 492,* (Proceedings of the 1st Raden Intan International Conference on Muslim Societies and Social Sciences (RIICMuSSS 2019).

being stored hoarded for the time of necessity."[33] The *Majalla* also adopts this view. The intergenerational transfer of digital assets under Islamic law poses unique challenges and considerations due to the evolving nature of technology and the intangible nature of digital property. Islamic jurisprudence is founded on the principles of justice, fairness, and the preservation of rights, which can guide in navigating the transfer of digital assets from one generation to another. While Islamic law does not explicitly address digital assets, its principles can be applied to ensure a just and equitable transfer process. [34]

Overall, the concept of *mal* under Islamic law recognises the significance of wealth and property ownership, while also emphasising social responsibility, justice, and ethical conduct in economic affairs. It seeks to create a balanced and equitable society where individuals can enjoy the fruits of their labour while ensuring the welfare of the community as a whole.

2. ***Mirath***: Islamic law provides detailed guidelines for the distribution of wealth after a person's death. It ensures that the deceased's property is distributed among the heirs in a fair and just manner. The Qur'an specifies the shares of different heirs based on their relationship to the deceased. The law of inheritance is well documented in the Qur'an in Surah *Al-Nisa'* verses 7-14 and 176. Where the fractions of each share are clearly stated as well as the

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[33] Wohidul Islam, "Al-Mal: The Concept of Property in Islamic Legal Thought", 361-368.

[34] Islam forbids obtaining wealth through unethical methods including theft, fraud, bribery, or any other type of exploitation. The conduct of all economic activities should be guided by moral and legal standards. In fact, Muslims are obligated to provide a specific portion of their possessions, such as cash, gold, silver, and company assets, to qualified beneficiaries. Usury, also known as *riba*, which is the collection or payment of interest on loans, is outright forbidden by Islamic law. Islam, on the other hand, supports fair and useful financial dealings that foster shared risk and profit. Furthermore, the legitimacy and moral character of contracts and transactions are highly valued in Islamic law. It discourages any sort of deceit, ambiguity, or exploitation in commercial transactions and encourages openness, justice, and consent from both parties.

legal heirs and rules guiding each of these heirs. For example, in Surah *Al-Nisa'* verse 7, it is stated that gender is not a barrier. In addition, numerous hadith of the Prophet Muhammad S.A.W. talked about the rules of Inheritance. One of them is:

> *Give the fixed shares to those who are entitled to them, and whatever remains should be given to the closest male relative of the deceased.* [35]

It is important to note that Islamic law requires that individuals have testamentary capacity, meaning they must be of sound mind and legal age to make decisions regarding the transfer of their assets. This requirement ensures that individuals understand the implications of their decisions and can make informed choices regarding the distribution of their digital assets. However, this is not necessary in the case of inheritance i.e. after the death of the individual whose estate is to be distributed.

3. Documentation and Legal Formalities: Islamic law places importance on adhering to proper legal formalities when transferring property rights. Therefore, it is advisable to document digital assets and incorporate them into the overall transfer process[36] This can be achieved through a will (*wasiyyah*) or a trust (*waqf*) arrangement, which specifies the desired distribution of digital assets and ensures the lawful transfer of ownership. Documentation is also important in the eventual transfer of the distributed estate in the case of inheritance (*mirath*). The new owners of the assets would be required by law to ensure that proper documents are signed by the administrators to show that a proper transfer of assets has occurred from one generation to another.

4. Privacy and Data Protection: Islamic law places great importance on preserving an individual's privacy and personal rights. Therefore, access to a deceased person's digital assets must be managed in a manner that respects their privacy and complies

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[35] Muslim, *Sahih Muslim, Kitab Al-Faraid (The Book Pertaining To The Rules Of Inheritance)*, Book 11, Hadith Number 3929.

[36] Al-Qur'an, 2:282.

with applicable data protection laws.[37] The executor or designated representative should seek lawful access to digital accounts and assets while adhering to privacy rights.

5. Ethical Considerations: Islamic law encourages ethical conduct in all aspects of life, including financial matters.[38] When transferring digital assets, it is important to ensure that any associated intellectual property rights, licences, or copyright obligations are addressed in a manner that is consistent with Islamic principles of fairness and justice.

6. Charitable Contributions: Islamic law emphasises charitable giving (*sadaqah)* and the concept of *waqf*, which involves dedicating assets for religious, educational, or charitable purposes.[39] Individuals may consider designating a portion of their digital assets for such purposes in the intergenerational transfer contributing to the betterment of society and fulfilling their religious obligations.

FINDINGS

This research shed light on the intricate complexities surrounding the inheritance and passing down of digital assets within the legal frameworks of English Common law and the principles of *Shari'ah.* This study delves into the evolving landscape of wealth in the digital realm, exploring the unique challenges, legal ambiguities, and contrasting approaches between these two legal systems concerning the intergenerational transmission of digital assets. The findings are stated below:

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[37] Al-Qur'an, 49:12.

[38] See the verse "*You are the best nation that has been raised up for mankind; You enjoin right conduct, forbid evil and believe in Allah"*. (3:110) and the hadith of the prophet (s.a.w.): *"I have been sent for the purpose of perfecting good morals"*. (*Ibn Hambal*, No: 8595).

[39] Madya Zakariya bin Man and Salihu Abdulwaheed A, "New Dimension in the Mobilization of Waqf Funds for Educational Development" *Kuwait Chapter of Arabian Journal of Business and Management Review* 1, no.1 (September 2011).

1. Legal Frameworks: The research reveals that English Common law more than Islamic law, faces challenges in adapting its legal frameworks to accommodate the unique nature of digital assets. English Common law lacks specific legislation addressing digital assets, relying instead on general property laws and contractual terms. On the other hand, Islamic law directly mentions digital assets, leading to interpretation and adaptation based on existing principles.

2. Testamentary Capacity: The research finds that both legal systems require individuals to have a testamentary capacity to transfer digital assets to future generations. Testamentary capacity refers to an individual's ability to understand the implications of their decisions and make informed choices regarding the distribution of their assets, including digital assets.

3. Privacy and Data Protection: The research reveals that both legal systems have laws governing privacy and data protection, which impact the transfer of digital assets. These laws aim to balance the rights of individuals to privacy with the need to provide access to digital assets for rightful inheritors. Balancing privacy concerns and the inheritance rights of beneficiaries can present challenges in practice.

4. Inheritance Rules: The research shows that Islamic Law has specific rules governing inheritance, known as *faraid*, which determine the distribution of assets among heirs. These rules aim to ensure a fair and just distribution of assets, including digital assets. English Common law, on the other hand, follows intestacy rules or relies on testamentary instruments, such as wills, to determine the distribution of digital assets.

5. Estate Planning and Documentation: The research reveals that both legal systems emphasise the importance of estate planning and proper documentation to facilitate the transfer of digital assets. English Common law relies on testamentary instruments such as wills, trusts, or power of attorney, while Islam encourages individuals to incorporate digital assets into their estate plan through appropriate legal instruments, such as *waqf* or wills (*wasiyyah*).

6. Ethical Considerations: The research finds that both legal systems emphasise ethical considerations in the transfer of digital assets. These considerations include fair distribution among heirs, adherence to copyright laws, protection of privacy rights, and the preservation of the deceased's intentions and wishes.

Figure 1: Showing the points of convergence and divergence of English Common law and Shari'ah law as they relate to the intergenerational transfer of digital assets based on the findings of this research.[40]

This supports the hypothesis of this research that even though there are different points of divergence between the English Common law and Islamic law in the area of intergenerational transfer of digital assets, there are also some key points of convergence.

CONCLUSION/RECOMMENDATIONS:

Collaboration and coordination between the two legal systems can be beneficial in the ultimate establishment of international standards and guidelines for the intergenerational transfer of digital assets. This could involve sharing best practices,

[40] Source: Author

harmonising legal frameworks, and addressing conflicts of laws that may arise in cross-border scenarios. English Common law faces challenges in adapting its legal frameworks to accommodate the unique nature of digital assets. There is therefore the need for further development of laws and regulations specific to digital assets to ensure clarity and consistency in the transfer process. Privacy and data protection laws play a significant role in the transfer of digital assets. Balancing the privacy rights of the deceased with the inheritance rights of beneficiaries poses challenges that need to be addressed to facilitate a smooth transfer process. It is affirmed that Islamic law provides inheritance rules (*faraid*) that aim to ensure a fair distribution of assets, including digital assets, among heirs. These rules should be further studied and adapted to incorporate digital assets effectively. Awareness and education about the complexities of transferring digital assets need to be increased among individuals, legal practitioners, and policymakers in both English Common law and Islamic law jurisdictions.

HARMONISATION OF LAWS ON INHERITANCE BETWEEN MUSLIM AND NON-MUSLIM SUBJECTS

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ABSTRACT

Inheritance is a matter that needs to be prioritised by the living when there is an occurrence of death. Nowadays, the society in Malaysia is aware of the importance of inheritance. Among the general rules under inheritance is that the inheritance of Muslims is subject to distribution by *faraid*. As for non-Muslims, the division of inheritance needs to be carried out by the Distribution Act 1958. The difference in inheritance management and distribution between Muslims and non-Muslims is clear due to the differences in laws that govern the matter. However, when it involves non-Muslims who convert to Islam or are referred to as *muallaf*, the process of inheritance is a bit different, especially in cases when the converted deceased left non-Muslim heirs. In this study, the researcher employs a qualitative approach, by conducting library-based research on the relevant materials including, but not limited to statutory provisions, case laws, textbooks, journal articles, newspapers, conference proceedings,

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and seminar papers. Based on the findings, it is difficult to resolve inheritance issues involving *muallaf* and this may result in a conflict of power between the Syariah Court and Civil Court. To overcome this issue, it is suggested that a clear guideline in dealing with *muallaf* needs to be enforced in order to harmonise the laws on inheritance between Muslims and non-Muslims.

Keywords: *Muallaf*, inheritance, estate administration, Syariah Court, and harmonisation.

INTRODUCTION

When discussing the definition of *muallaf*, the definition that comes to mind of society is non-Muslims[5] who have recently converted to *Islam.*[6] Those who have performed the *Shahadah,*[7] and a Muslim[8] who requires instruction from more experienced Muslims are also referred to as *muallaf.*[9] These two definitions seem to be ingrained in the community and it is difficult to remove these definitions from society's minds until today. Although many

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[5] A non-Muslim is one who does not adhere to the Islamic faith.

[6] Islam is the faith that Allah SWT revealed to the Prophet Muhammad SAW as the final prophet and messenger to serve as a standard for all human beings' lives until the end of time. Retrieved from https://www.risalahIslam.com/2013/11/pengertian-Islam-menurut-al-quran.html; Azrin Wahid, "Benarkah istilah Muallaf hanya untuk yang baru memeluk Islam?", Utusan TV, March 20, 2023, https://utusantv.com/ 2023/03/20/benarkah-istilah-Muallaf-hanya-untuk-yang-baru-memeluk-Islam/; Noresah binti Baharom et. al., eds. *Kamus Dewan 4th ed.* (Kuala Lumpur; Dewan Bahasa dan Pustaka, 2010).

[7] *Shahadah* is a confessional speech that expresses the speaker's belief in the unicity of Allah Taala and in Prophet Muhammad SAW as His messenger. Retrieved from Hannani Juhari, Dua Kalimah Syahadah: Maksud dan Hikmahnya, Taqwa, https://taqwa.my/kalimah-syahadah/

[8] A Muslim is one who adhere to the Islamic faith.

[9] Anuar Puteh, "Keperluan Bimbingan Kepada Saudara Baru," in *Masa Depan Saudara Baru: Harapan, Realiti dan Cabaran,* eds. Razaleigh Muhamat@Kawangit, Faudzinaim Badaruddin & Khairil Khuzairi Omar (Bangi: Pusat Islam UKM, 2005).

efforts have been made to give awareness and understanding about *muallaf*, the way that society understands about the concept of *muallaf* remains unchanged. There are several meanings associated with *muallaf*, and the term itself has broad meaning. In terms of language, the word *muallaf* is derived from the word *allafa*, which means to join with others.[10] Non-Muslims who want to study more about Islam are also referred to as *muallaf*. In some cases, Muslims who have never followed the principles of Islam can be referred to as *muallaf* once they return to Islam. Those with tamed or reconciled hearts are also referred to as *muallaf.*[11] This demonstrates clearly that *muallaf* is defined broadly and does not only apply to non-Muslims who converted to Islam.

Other than having a broad definition, another aspect of *muallaf* that is unknown to most people is that it has different call period limits for *muallaf* according to state.[12] States, namely Pahang and Terengganu set *muallaf* call periods of seven and three years respectively, while Selangor and Melaka set theirs at five years. The minimum term limit in Sabah is five years, however it can go up to seven years. The remaining states do not have a calling time for *muallaf* which allows them to receive *zakat*[13] until they are informed by the authorities. After the period, they are no longer referred to as *muallaf* as now they are classified as Muslims, and no longer qualify for *zakat.*[14] *Muallaf* is eligible

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[10] Ibn Manzur. (2010). Lisanul Arab. Dar Al-Sodir.

[11] Suraya Sintang and Khadijah Mohd. Khambali@Hambali, "Saudara Baru dan Peranannya dalam Dialog antara Agama" *Jurnal Pusat Penataran Ilmu & Bahasa 20*, (2014): 109–125.

[12] Wan Mohd Fazrul Azdi Wan Razali, "Indeks Pengukuran Penentuan Had Tempoh Muallaf Di Malaysia," *Journal of Fatwa Management and Research 6*, (2015): 40.

[13] *Zakat* is property that qualified Muslims allocate to specific groups for distribution at a specific pace and under specific conditions. Retrieved from https://www.zakatselangor.com.my/info-zakat/zakat-kewajipan-berzakat/pengertianzakat/#:~:text=Zakat%20adalah%20mengeluarkan%20harta%20tertentu,untuk%20diagihkan%20kepada%20golongan%20tertentu.

[14] Azman Ab. Rahman, "Status Muallaf Perlu Dihadkan - Pensyarah"

over zakat even if he had wealth before, as he is considered an *asnaf.*[15] Zakat is seen as a mechanism for doing good deeds for the *muallaf*, preventing the *muallaf* from committing acts against Islam, and a mechanism to attract their hearts towards Islam, especially in the early phases of accepting Islam.

A diverse country with many different races that practise different ethnicities, faiths, and ideologies makes up Malaysian society. Even though society is made up of various races, each religion has its own personal law. As far as personal law in Malaysia is concerned, it is split into two categories namely Muslim personal law and non-Muslim personal law.[16] This division is made based on history since there is not only one religion in Malaya. When traders from various religions and races came to Malaya, people of various races and religions emerged. At that time, some were interested in entering Islam. This shows that the emergence of the *muallaf* occurred even before in Malaya. In the context of nowadays *muallaf*'s mixed society,[17] although before this they were followers of Buddhism[18], Christianity[19] or Hinduism,[20] when they convert to Islam, they will automatically be called *muallaf.* This situation occurs because many non-

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Berita Harian, 2016, https://www.bharian.com.my/berita/nasional/2016/06/168541/status-Muallaf-perlu-dihadkan-pensyarah.

[15] *Asnaf* is people who are qualify for aid through Muslims' *zakat* donations.

[16] Noor Aziah Mohd Awal, *Undang-undang Keluarga (Sivil) Jilid 9: Siri Perkembangan Undang-undang di Malaysia,* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2007).

[17] Anuar Puteh, "Program Kefahaman Islam Saudara Baru Cina di Kuala Lumpur" (Master Thesis. Universiti Kebangsaan Malaysia, 1999).

[18] Buddhism is an Indian religion or philosophical tradition that is founded on teachings credited to the Buddha. It is also known by the names Buddha Dharma and Dharmavinaya.

[19]Christianity is an Abrahamic religion where a monotheistic religion founded on the life and teachings of Jesus of Nazareth.

[20] Hinduism has its roots in the Indian subcontinent and is based on Dharma.

Muslims are interested in converting to Islam. After all, if asked what made them interested in converting to Islam, many would answer that Islam is a comprehensive religion that promotes moral principles. They were intrigued by the way Muslims supported one another and demonstrated harmony. The importance of unity in the Muslim community's life has a significant impact on the community of non-Muslims.[21]

Apart from the unique characteristics of Islam, some of them also converted to Islam for guidance and marriage. Since Malaysia is a country rich in various races and religions, it could often be seen that Muslims and non-Muslims are living within the neighbourhood. When often mixing with Muslims, some of the non-Muslims are attracted to the Muslim lifestyle that obeys the tenets of Islam which leads them to convert.[22] Not only that, sometimes there are situations where a few Muslims strongly encourage their non-Muslim friends or neighbours to learn more about Islam. They would apply the knowledge they have about this religion to answer all the questions raised by non-Muslims. In this way, it indirectly encourages non-Muslims to convert to Islam.[23] To some extent, some non-Muslim families even supported the conversion of their family members into Islam.[24] Although they will be of different religions, they will just allow their children to convert to Islam since their children are already interested in Islamic teachings. But even if this happens, Islam still emphasises *muallaf* to maintain a good relationship with their parents or family. Their responsibility will not cease to exist even

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[21] Sulaiman Dufford. (2010). *Liku-liku Pencarian Nur Islam: Pengalaman, Memeluk Islam di Barat,* Trans. Noresah Baharom (Kuala Lumpur: Institut Terjemahan Negara, 2010).

[22] Tengku Norhayati Tengku Hamzah. (2006). *Saudara baru di Kelantan: Suatu kajian mengenai dorongan dan cabaran di Kota Bharu, Kelantan*. Tesis MA, Universiti Malaya, Kuala Lumpur.

[23] Ninin Kholida Mulyono (2007). *Proses pencarian identitas diri pada remaja muallaf.* Tesis Sarjana, Universitas Diponegoro, Indonesia.

[24] Noor Hidayah Tanzizi (2023). '*Muka gengster' anak emak.* Retrieved from https://www.hmetro.com.my/utama/2023/03/948769/muka-gengster-anak-emak.

if they have different religions and beliefs. This clearly shows that Islam is not a religion that divides a family as previously claimed by irresponsible individuals.

Based on the encouraging factors that attract someone to Islam mentioned above, the rate of *muallaf* is increasing day by day, causing well-known Islamic scholars, namely al-Sha'rawi dan al-Qaradawi to categorise *muallaf* into two groups, namely Islamic *muallaf* and non-Muslim *muallaf*. The first group, it involves Muslims who are born Muslim and have criteria of *asnaf* zakat, but they are non-practising Muslims and do not perform basic tenets of Islam such as prayer,[25] engage in major sins, or continue to engage in minor sins.[26] Therefore, to encourage these individuals to change and repent, the Islamic authority will allocate zakat to this group provided that they do not use it in illegal activities such as purchasing cigarette, alcohol etc. The second group involves a group of non-Muslims who assist Muslims in preventing harm done by non-Muslims. They may receive zakat as compensation for their assistance to Muslims, so that they will be interested in embracing Islam.

From the perspective of legislation, generally Islamic law is safeguarded by the ruler[27] authority and is placed under the control of the state administrations.[28] According to Article 74 and 80(1) of the Federal Constitution, there is a different term for *muallaf* at the state and national level. At the state level it is called *muallaf,*

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[25] "Hukum Memberi Zakat Kepada Asnaf Yang Tidak Solat Atau Fasiq," Zakat Selangor, November 11, 2018, https://www.zakatselangor.com.my /keputusan-syariah-zakat/hukum-memberi-zakat-kepada-asnaf-yang-tidak-solat-atau-fasiq/.

[26] Mohd Asri Zainul Abidin, "Hukum Beri Zakat Kepada Orang Tidak Solat atau Fasiq," Jabatan Mufti Negeri Perlis, Jun 28, 2022, https://muftiperlis.gov.my/index.php/minda-mufti/684-hukum-beri-zakat-kepada-orang-tidak-solat-atau-fasiq.

[27] Sultan is the king's title for seven Malay states, including Terengganu, Johor, Kedah, Kelantan, Pahang, Perak, and Selangor.

[28] Hamid Jusoh, *The Position of Islamic Law in The Malaysian Constitution with Special Reference to the Conversion Case in Family Law*. (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1991).

while at the national level the term "brother Muslim" is employed. The difference in terms of these terms occurs because matters related to Islam are within the jurisdiction of the state which differs between one state and another.[29] Since each state has its own authority over *muallaf*, each state employs a body in charge of administering *muallaf*-related matters namely the State Islamic Religious Council (MAIN) and State Islamic Religious Department (JAIN)[30]. These two organisations are important as the money collected from zakat through them is utilised to aid the eligible *asnaf*, including *muallaf*.[31] Other than financial support, MAIN is fully involved in the formulation of policy pertaining to religious administration involving *muallaf* whereas JAIN is in charge of enactments, rules, or regulations, including the legislation of *muallaf*.[32] To oversee the administration of financial resources, such as zakat and the earnings from the excess of inheritance property without heirs, the MAIN established the *Baitulmal* unit or division[33] where the power of *Baitulmal* is conferred by the State list in the First Paragraph, Ninth Schedule of Federal Constitution[34] and under the authority of the respective

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[29] Federal Constitution, Article 74 and 80(1).

[30] Raja Dr. Nazrin Shah, *Titah DiRaja Kongres Majlis Agama Islam Seluruh Malaysia Kali Pertama,* (Putrajaya: Jabatan Kemajuan Islam Malaysia (JAKIM, 2011), 4.

[31] Tuan Sakaria Samela, "Tadbir Urus Saudara Baru: Antara Santunan dan Terpaksa," (Kursus Tadbir Urus Saudara Baru, Jabatan Agama Islam Wilayah Persekutuan (JAWI), 26-27 November 2016).

[32] Muhammad Haniff Baderun and Zuliza Mohd Kusrin, "Fungsi dan Bidang Kuasa Majlis Agama Islam" Universiti Kebangsaan Malaysia, accessed 15 September, 2017, http://ukmsyariah.org/terbitan/wpcontent/uploads/2015/09 /15-Muhammad-Haniff-Baderun.pdf, 188.

[33] Md Yazid Ahmad et al., "Baitulmal Interactions In Resolving Converts' Inheritance Claims In Malaysia," *International Journal of Advance Research 11;* 1767-1772.

[34] Federal Constitution, Ninth Schedule, First Paragraph, List II - State List.

state rulers[35]. Amongst *Baitulmal* authority is to handle property where a Muslim deceased has no heir or a *muallaf* who dies without leaving a Muslim heir.[36]

Furthermore, according to statistics, there is an annual growth in the number of *muallaf* per year. This is corroborated by data from the Malaysian Islamic Development Department (JAKIM), which revealed that 8,340 new Muslims converted to Islam in Malaysia in 2018.[37] As a result of the rise in the number of *muallaf,*[38] the well-being of *muallaf* cannot be maintained by the government alone. Non-governmental organisations (NGOs) also play an important role in looking after the welfare of *muallaf* by providing *zakat* for them. NGOs namely the Malaysian Islamic Welfare Organization (PERKIM),[39] Malaysian Chinese Muslim Association (MACMA)[40], Indian Congress Muslim Malaysia (KIMMA)[41] and Islamic Youth Outreach Islamic Malaysia (IOA)[42] have been founded to help maintain the welfare of *muallaf* in Malaysia, regardless of their operation at the state or national

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[35] Md Rozalafri Johori, Abdul Hadi Awang, Mohd Daly Daud, NKK Khalid and Wawarah Saidpudin "Tren kutipan dan penerimaan harta Baitulmal: Kajian kes di Selangor," (Muzakarah Fiqh & International Fiqh Conference, 2014), 1-9.

[36] Naziree Md Yusof and Nor Aida Ab. Kadir, "Harta si Mati Muallaf: Antara Tuntutan Keluarga Bukan Islam dan Hak Baitulmal" (Proceedings of Seminar Zakat, Wakaf dan Filantropi Islam, 2017), 1-27.

[37] Noreha Che Abah, Asmawati Suhid and Fathiyah Mohd Fakhruddin "Isu dan Cabaran Saudara Baharu di Malaysia: Satu Tinjauan Awal" *Jurnal AL-ANWAR 8* no.2 (2019): 1-13. ISSN 0128-0279.

[38] "MAIM Peruntuk RM13.1 Juta Bantu Muallaf Tahun Ini," Berita Harian Online, February 5, 2023, https://www.bharian.com.my/berita/nasional /2023/02/1060131/maim-peruntuk-rm131-juta-bantu-Muallaf-tahun-ini.

[39] PERKIM. Retrieved from https://www.perkim.net.my/

[40] MACMA. Retrieved from http://selangor.macma.my/

[41] KIMMA. Retrieved from http://kimma.my/

[42] IOA ABIM. Retrieved from https://www.abim.org.my/

level. All of these NGOs are significant since they were established to serve as a support centre and assist in ensuring the welfare of the *muallaf*. Additionally, these NGOs serve as middlemen to facilitate *muallaf* receiving zakat assistance if each *muallaf* complies with a few requirements established by the MAIN and completes the details in the documents required, as it will expedite the process of receiving zakat.[43]

Apart from the government or NGOs bodies that govern *muallaf*, one of the things that need to be given attention to is the rights of *muallaf* after converting to Islam. Identity, religion, financial and welfare education, and law are the five main rights of *muallaf* which need to be taken care of and to be given to all *muallaf* equally. In this paper, the main concern is about the law of inheritance involving *muallaf.* Although a Muslim can inherit a *muallaf*,'s property, this seems to be unjust to the *muallaf*'s non-Muslim heirs, resulting in many heirs having decided to take this matter to the Civil Court as they wish to reclaim their ownership of the *muallaf*'s property. Therefore, in this paper, the author will elaborate more on this issue rather than suggest some potential solutions to stop this issue from getting worse. With this research, it is hoped that the conflicts about the Civil Court's and the Syariah Court's respective areas of jurisdiction can be resolved effectively.[44]

INHERITANCE IN MUALLAF: OVERVIEW

Before a person embraces Islam, he or she should observe certain procedures. Firstly, the person must recite *Syahadah*[45] in front of

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[43] Siti Hamisah Manan, "Maklumat Lengkap Mudahkan Proses Bantuan Muallaf – NGO," Mstar, November 5, 2015, https://www.mstar.com.my/lokal/semasa/2015/11/05/ngo-Muallaf-perlu-inisiatif?itm_source=parsely-api.

[44] Zanariah Dimon and Zaini Yusnita Mat Jusoh, "Pengesahan Status Agama di Mahkamah Syariah: Satu Sorotan," (Prosiding Persidangan Penyelidikan dan Inovasi Antarabangsa Pertama 2014 (INSAN2014), Kuala Lumpur, 17-18 November 2014), 65.

[45] Mohamad Abdul Kadir Sahak, "Masuk Islam Dengan Dua Kalimah

the registrar of *muallaf,* any official, or anyone else who oversees the conversion of *muallaf* to Islam, witnessed by a male witness. If the person is unable to talk, a sign language interpreter can be hired to help the registrar of *muallaf*, any officer, or anyone else in charge of overseeing a *muallaf* conversion to Islam understand the sign language used.[46] When a conversion ceremony is performed in front of someone other than the registrar of *muallaf*, that person is in charge of escorting the *muallaf* to the registrar of *muallaf* for registration. Successfully registered *muallaf* to Islam are immediately qualified to receive the following help, which is determined by MAIN or JAIN including circumcision, worship equipment and funeral arrangements.

Estate administration should not be undertaken right after the death of *muallaf*. Another method that the heir must follow is subtracting funeral arrangements, paying off debts, and carrying out the decedent's will. For funeral arrangements involving *muallaf*, all these are borne by MAIN or JAIN. During the funeral arrangements, the original family of the deceased, who are not Muslims, are allowed to come to pay their last respects to the deceased. However, they are not allowed to perform their religious or customary rituals in front of the deceased. The funeral arrangements will be performed according to Islam. If the funeral is held inside the mosque,[47] the family members are not allowed to enter the mosque. But if the funeral is done outside the mosque, they are allowed to see the deceased for the last time. The MAIN or JAIN must administer the funeral arrangements throughout the process. If there is a dispute during the funeral of the deceased between non-Muslim heirs and also MAIN or JAIN, the Syariah Court will have the authority to resolve the dispute.

Syahadah (2)," Jabatan Mufti Negeri Perlis, January 13, 2020, https://muftiperlis.gov.my/index.php/coretan-isnad/205-masuk-islam-dengan-dua-kalimah-syahadah-2.

[46] "Al-Afkar #69: Status Syahadah Orang Bisu," Pejabat Mufti Wilayah Persekutuan, https://muftiwp.gov.my/artikel/al-afkar/3873-al-afkar-69-status- syahadah-orang-bisu.

[47] For Muslims, a mosque serves as a special place of worship for activities like prayer.

After the completion of the above-mentioned procedures, which include paying off debts and carrying out the decedent's will, only then estate administration can start. The management and distribution of the deceased's assets to the beneficiaries is known as estate administration.[48] In general, there are three administrative bodies that regulate inheritance in Malaysia, namely the Civil High Court, Estate Distribution Division, and Amanah Raya Berhad (ARB).[49] Each of these administrative bodies is differentiated according to their respective monetary jurisdiction. Additional points may be added for the legislation in administrative bodies, including the Public Trust Corporation Act 1995 (Act 532),[50] the Small Estates (Distribution) Act 1955 (Act 98),[51] and the Probate and Administration Act 1959 (Act 97).[52] In cases involving *muallaf*, it is the same as any other case which is through the services of existing administrative bodies. However, there is a slight difference in inheritance involving *muallaf* and other cases namely the property of *muallaf* cannot be inherited by their heir who are non-Muslims.[53] This is the principle that was

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[48] True Tamplin. *Estate Administration*. https://www.financestrategists.com/estate-planning-lawyer/estate-administration.

[49] Hani Kamariah Mat Abdullah et al., "Perkembangan Pengurusan dan Pentadbiran Harta Pusaka Islam Malaysia," *BITARA: International Journal of Civilizational Studies and Human Sciences 3*, (2020): 42–53.

[50] The Public Trust Corporation Act 1995 (Act 532) modifies the laws governing the Public Trustee and Official Administrator, provides for the transfer of the Public Trustee and Official Administrator's assets to a company, regulates how the company uses its authority, and addresses issues related to and incidental to the aforementioned.

[51] The Small Estates (Distribution) Act 1955 (Act 98) is a law that regulates the distribution of small estates left behind by the deceased.

[52] Letters of administration and probate are governed by the Probate and Administration Act 1959 (Act 97).

[53] Muhammad Wa'iz Md Norman, "Bolehkah Ahli Keluarga Yang Bukan Islam Terima Harta Pusaka Individu Muallaf Yang Telah Meninggal Dunia?," *Udakwah, April 12, 2021,* https://udakwah.com/pembahagian -harta-pusaka/#:~:text=%E2%80%9COrang%20Islam%20tidak%20mewarisi

highlighted in the Qur'an[54] and the *Sunnah*[55] which established this restriction.[56] Only Muslim heirs can inherit the *muallaf* property. On the other hand, *muallaf* is also incapable of inheriting the assets of his non-Muslim family members.[57] This is supported by Islamic law which firmly establishes that differences in belief hinder the entitlement of the heirs to inherit. Other than *muallaf* property, the deceased's non-Muslim family members also cannot access the Employees Provident Fund (EPF)[58] of the deceased. This is based on the judgement of the National Council for Islamic Religious Affairs' Muzakarah Fatwa Committee, which met on September 10, 2000. As for shares,[59] it has the same position as EPF where the deceased's non-Muslim family members cannot access the shares. However, as for matrimonial property, it is not the same as EPF and shares. The matrimonial property allows it to be divided among families, whether or not they are Muslim. But there is a condition that needs to be followed where matrimonial assets earned before or during the marriage of the *muallaf* and her or his previous partner must be distributed by each partner's contributions.[60]

%20harta,bukan%20Islam%20meskipun%20dia%20mahu.

[54] Qur'an is regarded by Muslims as a revelation from God and Islam's major religious text.

[55] *Sunnah* is the Islamic prophet Muhammad's customs and practices and serve as a guide for Muslims to follow.

[56] Abd al-Karim Zaydan, *Al-Mufassal Fi Ahkam al-Mar'ah Wa al-Bayt al-Muslim,* (Beirut: Muasassah al-Risalah, 1993).

[57] Nurul 'Izzah Baharudin and Noor Lizza Mohamed Said. "Method of Resolving Inheritance Problem of New Muslim Converts in Malaysia," *Islamiyyat The International Journal of Islamic Studies 39,* (2017): 47 - 56, http://dx.doi.org/10.17576/Islamiyyat-2017-3901-06.

[58] Employees Provident Fund (EPF) is an organization that oversees Malaysia's private sector employees' mandatory savings plans and retirement preparation. Retrieved from https://www.kwsp.gov.my/.

[59] Shares are securities that represent a portion of a company's owner capital.

[60] Rina Fakhizan Mohd Sukri et al., "The Rights of Non-Muslim Couples

In addition, in cases involving *muallaf* deceased who do not have Muslim heirs, *Baitulmal* will have the rights over the *muallaf* deceased's property.[61] Although *Baitulmal* is the organisation responsible for managing the assets of *muallaf* without heirs, its management varies depending on the state.[62] Each *Baitulmal* management has a unique approach which is controlled by each state's laws. The discretion of the managing *Baitulmal* determines how the *Baitulmal* is managed. *Baitulmal*'s basic foundation is that property management must not conflict with the Qur'an, *hadith*[63] and the inheritance process, even though the methods employed vary for each *Baitulmal.* As a result, *muallaf* does not have to be concerned about their property after passing away since it is the responsibility of *Baitulmal* to administer it rightfully.

In conclusion for this part, the aforementioned explanation leads to the fact that when an individual converts to Islam, they must deal with certain significant changes in their life. *Muallaf* must adopt a different way of life and adhere to the *Shari'ah*, including matters pertaining to their funerals since they will be buried according to Islamic burial methods. Furthermore, it must be emphasised that only Muslim heirs are permitted to inherit *muallaf's* properties and assets such as shares and EPF. However, in cases involving matrimonial property, the property could be divided into the non-Muslim partner. These significant changes are due to the fact that Muslims are bound by each state's family law in regard to their personal and family matters.[64]

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to Previous Marriage Property According to Islamic Perspective," *Al-Irsyad: Journal of Islamic and Contemporary Issues 6*, no.1 (2021).

[61] Majlis Agama Islam Selangor, *Harta Pusaka Saudara Baru*, https://efaraid.mais.gov.my/harta-pusaka-saudara-baru/.

[62] Jasni bin Sulong, "Hak Saudara Baru Terhadap Harta Pusaka: Analisis Undang-undang Semasa" Jurnal Islam dan Masyarakat Kontemporari 8, (2014): 27.

[63] Hadith is a narration related to the Prophet Muhammad (PBUH) or other significant leaders of the Islamic religion may be accepted or disapproved according to a set of terminology.

[64] Nurhafilah Musa and Faridah Jalil "Implikasi Pemelukan Islam dan Hak Muallaf di Sisi Perlembagaan Persekutuan dari Sudut Matlamat

INHERITANCE CHALLENGES AS A MUALLAF

The reality of the mentioned *muallaf*'s rights in inheritance is not as straightforward as imagined compared to Muslims by birth, as the *muallaf* obstacles and struggles in embracing Islam are greater. Although the inheritance for *muallaf* is a process that is easy to understand, it might be challenging in light of the non-Muslim family members as they are not eligible to inherit once the *muallaf* has converted to Islam .[65]

When talking about the inheritance challenge of *muallaf's* property, some of the non-Muslim family members believe they are more entitled to inherit the property rather than to be subjected to *Baitulmal.*[66] They are not satisfied as the property left by their *muallaf* family member is subjected to *Baitulmal* since they believe they are the heirs of the deceased. This lead to some cases where family members of the deceased *muallaf* challenged *Baitulmal* 's claim to the *muallaf* 's estate such as seen in the case of *Re Timah binti Abdullah*[67] where the Court decided that the non-Muslim heirs of a Japanese woman who had converted to Islam had no right to inherit the deceased's wealth. All her property was given to *Baitulmal* as a non-Muslim is prohibited from inheriting the property of a Muslim. The same case was cited in the case of *Islamic Religious Council of the Federal Territory v Lim Ee Seng & Yang Lain.*[68] In this case, the deceased named

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Pembangunan Lestari" (Proceeding of The Tuanku Ja'far Conference (TJC) 2017 Governance Towards Sustainable Development Goals. Bangi: Fakulti Undang-undang, Universiti Kebangsaan Malaysia, 2017).

[65] Rina Fakhizan Mohd Sukri, Zuliza Mohd Kusrin and Mohd Zamro Muda "The Implications of The Amendment of Act 164 to Marriage and Inheritance Property of Convert," *Journal of Contemporary Islamic Law 5,* no.1 (2020): 9-15 e-ISSN: 0127-788X.

[66] Md Yazid Ahmad et al., "Inheritance Management by Baitulmal In Malaysia: Role And Challenges," *International Journal of Advanced Research 8*, (2020): 1113-1120, (ISSN 2320-5407). www.journalijar.com.

[67] [1941] 10 MLJ 51.

[68] [2002] 2 AMR 1890.

Chew Tong Lee who is a Chinese-American, converted to Islam in 1973. Then, the deceased passed away on July 28, 1988. The question in this case was whether the widow of the deceased, who did not convert to Islam, is entitled to the assets of the deceased. The same rule applied where Judge Datuk Mohd Sani Yusof held that non-Muslim heirs of the deceased are not eligible to inherit the deceased's estate.

Other than the above-mentioned cases, a reference could also be made to the case of *Re Emily binti Abdullah @ Yeo Leng Neo* (1996), where the deceased who is a *muallaf* died and left a Muslim husband. Following the decedent's death, the deceased's estate was split into half (1/2) with the decedent's husband as matrimonial property. Since the deceased had no other heirs, it is impossible to divide the matrimonial property in half. Only 1/4 of the decedent's property goes to the husband; the remaining 1/4 goes to *Baitulmal*. In this case, the deceased's husband challenged *Baitulmal*'s claim to the decedent's estate and asked for *Baitulmal*'s portion in order to regain his right to the inheritance. The husband also asked for the redemption price to be lowered. However, in this case, this issue was resolved as *Baitulmal* has approved the application made by the decedent's husband. This case has the same position as the case of *Re Zarina binti Abdullah @ Ooi Po Tsuan* (2002), where the deceased died leaving no Muslim heirs. Thus, her husband, daughter, and *Baitulmal* received her wealth. The husband applied to acquire 1/4 of *Baitulmal* 's part in order to redeem the inheritance. The heirs also applied for the redemption price to be lowered. Similar to *Re Emily*'s, the *Baitulmal* has given its approval for the application.

Apart from that, in the case of *Itam binti Saad v. Chik binti Abdullah*,[69] the deceased has no Muslim heirs; he only has his widow and daughter who is non-Muslim to care for him. Applying the principle of inheritance for *muallaf*, the daughter of the deceased only received 7/16 of the share, the widow received 2/16, and *Baitulmal* received the remaining 7/16 of the deceased's estate. Unlike the previous cases, the heirs only agreed with what the Court decided and did not challenge the *Baitulmal* claim over

[69] [1974] 2 MLJ 53.

the deceased's estate. Moreover, in the case of *Re Zaiton binti Abdullah* (1989), the deceased was Chinese who was given by her parents to an adoptive Muslim Malay family since she was a child. She was later married but did not have any kids. Since the deceased was divorced in 1976 and left no heirs, the *Baitulmal* was to be responsible for the deceased's estate. Therefore, in this case, it clearly shows that *Baitulmal* has full authority over the estate of the deceased since the deceased did not leave an heir and has left the Power of Attorney that she wants to endow her property to the path of Islam.

In addition, apart from educating non-Muslims about *Baitulmal*'s rights to deceased property, not all non-Muslim family members could accept the conversion of their family members into Islam. They believe that conversion into Islam is an act of ruining the lineage of their ancestors and the religion they follow, and a disgrace to the good name of their family and their religion. This leads to a situation where some *Muallaf* prefer to keep their conversion to Islam secret in order to prevent any problems. Their concern was their honesty over the conversion would lead them to lose their family and be ostracised by the community.[70] In a few cases, some families are willing to disown their family members who have converted to Islam because they are ashamed to have family members who are not of the same religion as them.[71]

This can be seen in the case of *Lim Sek King,* also known by his Muslim name Abdul Wahid Abdullah, in which all of the heirs of the deceased are not Muslims. In this case, the deceased, who is a *muallaf*, silently converted to Islam in July 1992, and on November 11, 1992, he drowned while helping to rescue 40 tourists who were trapped on the other side of the river in Sungai Gameh. The deceased left behind a wife and three sons, with the oldest of whom had a rare disabling illness aged 13, and the other two aged 12 and five respectively. Based on the previous

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[70] Anuar Puteh (2008). *Bimbingan al-Qur'an saudara baru di Lembah Klang*. Bangi: Fakulti Pengajian Islam, Universiti Kebangsaan Malaysia.

[71] Siti Adibah Abu Bakar and Siti Zubaidah Ismail, "*Undang-Undang Pemelukan Islam Di Malaysia" Jurnal Syariah 26,* no.3: 301–326.

explanation, since the deceased has no Muslim heirs, *Baitulmal* will inherit the property. However, the Melaka Islamic Religious Council (MAIM) decided to use their discretionary power to return a house worth RM59,000.00 on May 10, 2005 out of consideration for the deceased's widow, who was unemployed and had dependent children who were still in school. MAIM also considered one of the deceased's children who had a medical condition that had been verified by a doctor to receive his father's property.

Along with the previously mentioned issues, laws concerning Muslims and non-Muslims will also be affected when one of the spouses converts to Islam. The concern arises on the status of civil marriage from a civil law standpoint. This is because the marriage would not be automatically dissolved[72] if one partner converted to Islam. Furthermore, the *muallaf* cannot be the party that initiates a claim for dissolution of marriage, but rather on the other partner.[73] This is illustrated in the case of *Ng Swee Pian v Abdul Wahid & Another*[74]. In this case, the plaintiff and the husband (the second defendant) are Buddhists who were married in accordance with the Civil Marriage Ordinance of 1952. The husband afterwards converted to Islam and requested the dissolution of their civil marriage from the Syariah Court because his wife refused to convert to Islam. The *Kadi* in Syariah Court gave the wife a notice informing her that she had to show up at the Syariah Court to hear the divorce request. The *Kadi* then annulled the marriage as the wife persisted in refusing to convert to Islam. In this case, the wife made a petition to the Civil High Court to declare that the Syariah Court has no jurisdiction to dissolve the marriage. The High Court held that since one of the spouses in the

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[72] Normi Abdul Malik, "Hadanah" in Najibah Mohd Zin et al., *Siri Perkembangan Undang-undang di Malaysia: Undang-undang Keluarga (Islam),* Jilid 14, (Kuala Lumpur: Dewan Bahasa dan Pustaka).

[73] Ahmad Ibrahim (1992), "Dissolution on Ground of Conversion to Islam," (Conference on reform of the Law Reform (Marriage and Divorce) Act 1976, Universiti Islam Antarabangsa Malaysia), 12.

[74] [1992] 2 MLJ 425.

marriage is not a Muslim, the Syariah Court has no jurisdiction to hear the case and dissolve the marriage.

Based on the challenges related to inheritance among *muallaf*, it can be concluded that the issue related to inheritance among *muallaf* is quite complicated to solve. This is because it is related to the rights of heirs who want to claim the deceased's property in addition to the conflict of jurisdiction between the Civil and Syariah Court to hear the case. Although it is clear and obvious that the Syariah Court has the authority to hear cases involving *muallaf*, but dispute occurs when it involves non-Muslim heirs since they will go to the Civil Court to get their rights. Therefore, to prevent this problem, effective solutions need to be proposed so that the harmonisation of Civil law and *Shari'ah* law in inheritance can be implemented.

SUGGESTION TO OVERCOME *MUALLAF'S* INHERITANCE ISSUE

Based on the challenges described above, several measures need to be taken to overcome *muallaf*'s inheritance issue. Among the author's recommendations is for the *muallaf* to do early planning such as making a will for their non-Muslim heirs. It was previously explained that only Muslim heirs can inherit the property of a *muallaf*, and the property will be subjected to *Baitulmal* if the *muallaf* left no heirs. This indirectly gives injustice to non-Muslim heirs. Although Islam forbids inheritance of property to a non-Muslim heirs, there are other alternatives suggested by this religion so that there is no dispute among non-Muslim heirs. Among them, Islam does not prohibit the *muallaf* from endowing property among his heirs regardless of their religion, by way of *hibah* or donation.[75]

[75] A contract known as a hibah specifies a person's voluntary, lifetime gift of property to another without looking for compensation. Retrieved from http://kelantan.jksm.gov.my/jksn/index.php/component/content/article/21-joomla/components/210-hibah?Itemid=951

Generally, *hibah* is found in the Qur'an and the *Sunnah* and is practised by Muslims all around the world, including Malaysia. *Hibah* is defined as the voluntary act of a donor giving a gift to a donee during the lifetime without the donor seeking payment from the donee.[76] *Hibah* is also defined as the act of giving away one's possessions to generate love and affection and to assist those in need.[77] *Hibah* is a gift that is permitted in Islam to family members or anybody the recipient chooses on the grounds of love and assistance. Since it assists in resolving numerous inheritance disputes, including the issue of inheritance involving *muallaf*, *hibah* is regarded as one of the most effective methods of inheritance.[78] However, *hibah* is specified with a maximum rate of 1/3 of the inheritance and is not intended for immoral matters.

Prior to today, Malaysia still does not have a particular provision addressing the *hibah* or gift. The only provision that explains *hibah* or gift is under List II Item 1 of the Ninth Schedule of the Federal Constitution where it states that the Syariah Court has the authority to hear cases regarding *hibah* or gift.[79] where it states that the Syariah Court has the authority to hear cases regarding *hibah* or gift. This demonstrates that *hibah* or gift is directly subject to the Syariah Court's jurisdiction and is managed by each state's administration. Back to the issue of inheritance involving *muallaf*, he should establish a good relationship with their non-Muslim families and not forget their responsibilities even though he has converted to Islam. Although their property cannot be given to their non-Muslim family members, there is another alternative that *muallaf* can do, which is by making a

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[76] Muhammad Fathullah Al Haq Muhamad Asni and Jasni Sulong, "Fatwa Concerning Qabd in Hibah and the Insertion of Qabd Element in States Fatwa in Malaysia," *Journal of Islamic Studies and Culture 4*, no.1 (2016): 143-154.

[77] Nazrul Hazizi Noordin et al., "Re-evaluating the Practice of Hibah Trust in Malaysia," *Humanomics 32*, no. 4 (2016): 418-436, 0828-8666 DOI 10.1108/H-052016-0044.

[78] Rositah Kambol "Pengurusan harta orang Islam melalui hibah: Isu dan penyelesaian," *Journal of Law and Governance 2*, no.1 (2019): 99-113.

[79] Federal Constitution, List II Item 1 of the Ninth Schedule.

hibah or donation to their non-Muslim family members. This is supported by the case of *Majlis Agama Islam Wilayah Persekutuan v Lim Ee Seng & Anor*[80] where in this case, the Court held that *hibah* is encouraged to be done by *muallaf* as it allows *muallaf* to give her or his property to his or her non-Muslim family members as Islam teaches that *muallaf* should care about the welfare of the *muallaf* s' family members.

This shows that even if their non-Muslim families are not included in the inheritance distribution, it is strongly encouraged if the deceased who is a *muallaf* to endow something behind or donates to them if their non-Muslim families who are in need. This good value is highly demanded in Islam as helping one's family members who are in trouble is an honoured practice.[81] The conversion of someone into Islam must not disregard any obligation to the family members such as maintenance, as there are many instances in which the husbands converted to Islam and neglected their responsibilities to their spouses and children. Therefore, with the presence of *hibah* or donation it can be used as a substitute measure in the inheritance that enables *muallaf* to divide their property among their ex-wives and children. This clearly shows that *hibah* and donation encourage the responsibility to be carried out even after converting to Islam[82] which shows the beauty of Islam that places a high value on love and respect for parents and families.[83]

In addition to promote *hibah* during the lifetime of the *muallaf*, the author suggests that there needs to be standardisation in *Baitulmal* governance throughout the states. As mentioned earlier, each *Baitulmal* in each state is administered according to the discretion of their respective officials. Since *Baitulmal*

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[80] [2000] 2 MLJ 572.

[81] Haslin Baharin, "Bantu Bukan Islam Tetap Dapat Pahala," Harian Metro, https://api.hmetro.com.my/node/13042.

[82] Baharudin and Mohamed Said. "Method of Resolving Inheritance Problem of New Muslim Converts in Malaysia," 47 - 56.

[83] Abdul Ghafar Don, Anuar Puteh & Razaleigh Muhamat@Kawangit, "Isu Dan Cabaran Dalam Dakwah Saudara Baru" (2017).

constant difficulties in dealing with non-Muslim family members,[84] it is time for a law or guidelines to be formed by each *Baitulmal* to standardise the existing governance for each state so that issues related to *muallaf* and non-Muslim families can be overcome quickly and effectively.[85] *Baitulmal* is the recipient of *muallaf's* estate who has no rightful heirs, therefore the author also advised *Baitulmal* to become a personal representative for *muallaf* once the *muallaf* has passed away. This action is very practical to be done when the *muallaf* is still alive so that the *muallaf* knows the whereabouts of his property when he dies. A *muallaf* can also write a lawful will stating that he appoints *Baitulmal* to manage his property when he dies later. Not only that, *Baitulmal*'s duties also need to be expanded by having the power to be the executor of the *muallaf* 's estate. In cases where the *muallaf* who has no heir intends to donate her property to charity, *Baitulmal* needs to play the role of executor by implementing the *waqf* desired by the muallaf.[86] With these powers of *Baitulmal*, it is hoped that in the future, the non-Muslim heirs of the *muallaf* will no longer challenge the authority of *Baitulmal* as the powers conferred to it were agreed upon by the *muallaf* themselves before they die.

Moreover, the *muallaf* should avoid concealing their conversion status from the non-Muslim heirs. This is because their concern was their honesty over the conversion would lead to cutting ties among the family members.[87] Things like this should not happen because it will cause more issues in the future

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[84] Sofiyyah Mohd Suhaimin, Md Yazid Ahmad and Anwar Fakhri Omar, "Baitulmal Initiatives in Dealing with Muallaf Inheritance Claims by Non-Muslim Heirs According to Siyasah Shari'iyyah," *Journal Of Contemporary Islamic Law 7, no.2* (2022): 66-72.

[85] Surtahman Kastin Hasan, *Sistem Ekonomi Islam di Malaysia*. (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2013).

[86] Waqf is property that is no longer owned by the owner, and its benefits are allocated for charitable purposes in line with the waqf's objectives.

[87] Siti Rohana Idris, "Jangan Sesekali Buang Keluarga", *Harian Metro* https://www.hmetro.com.my/mutakhir/2020/01/539749/jangan-sesekali-buang-keluarga-metrotv.

especially when the *muallaf* dies.[88] As discussed before, when someone converts to Islam, many changes and sacrifices need to be made, especially in matters of *muallaf's* burial where the body of a *muallaf* needs to be buried according to Islamic teachings. So, when the *muallaf* conceals his conversion, many problems will arise especially during the funeral of the *muallaf*. Many problems occurred due to this issues, which leads to heirs disputing the burial process in accordance with Islam as they are ignorant of the deceased's conversion.[89] Therefore, it is advisable that the *muallaf* be honest with their respective families or heirs about their conversion to Islam so as to prevent any trouble.

Last but not least, there is a need to organise an awareness campaign regarding *muallaf*. Although the issue of *muallaf* has been around for a long time in Malaysia, not everyone knows the procedures or rights of a *muallaf*. Aside from knowing that they need to recite *Syahadah* in oder to convert, most are ignorant of what to do after the registration process is completed, up to the extent of ignorance of their eligibility to receive zakat for a certain prescribed period. Therefore, an awareness campaign is important as it not only provides new knowledge to the public, but at the same time it encourages the public to learn more about Islam and convert to Islam if they are interested. The most important thing is that this awareness campaign gives exposure to the public about the rights of non-Muslim heirs to *muallaf* regarding inheritance. Usually, non-Muslim heirs bring this inheritance case to court to challenge the inheritance of *muallaf* because they lack knowledge and fear that their rights will be taken by *Baitulmal*. Misunderstandings and negative perceptions like this have caused many cases to happen in the court where they demand their rights from the *muallaf* for inheritance. Therefore, to prevent this negative perception from continuing to spread, awareness

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[88] Nurulfatiha Muah, "Akibat Tukar Agama Tanpa Pengetahuan Waris," Sinar Harian, https://www.sinarharian.com.my/article/36031/sinar-islam /akibat-tukar-agama-tanpa-pengetahuan-waris.

[89] "JAIPP Tuntut Mayat Muallaf, Pengkebumian Buddha Terhenti." Astro Awani, https://www.astroawani.com/berita-malaysia/jaipp-tuntut-mayat- Muallaf-pengkebumian-buddha-terhenti-37482.

campaigns are important to implement so that non-Muslims know that even if they have no right to the inheritance, they can still receive the *muallaf* 's property through *hibah* or donation.

CONCLUSION

In conclusion, Islam does not restrict interactions between Muslims and non-Muslims; rather it encourages everyone to be kind to one another and to treat others with respect, regardless of race or religion. Moreover, in issues involving *muallaf*, Islam has never taught its adherents to cut ties with their previous non-Muslim families, what more ignoring their responsibilities towards their non-Muslim family members. Therefore, the issue of *muallaf* especially regarding inheritance rights should not be dismissed as unimportant. Several suggestions have been proposed by the researcher namely encouraging *muallaf* to make early planning by making *hibah* or donations during their lifetime, standardising and expanding the power of *Baitulmal* and lastly organising awareness campaigns to give exposure to the public especially related to inheritance involving *muallaf*. These suggestions are suggested solely based on the challenges that *muallaf* has to overcome, especially those related to inheritance. If the issue or challenge of a *muallaf, especially* related to inheritance, is left to continue, it is feared that non-Muslims would perceive Islam negatively. Non-Muslims must have thought that Islam is a religion that would separate families and deny their rights to inheritance. They will also think that when their family members have converted to Islam, the responsibility of their family members towards them will be affected. Therefore, an effective action or solution needs to be created so that things like this will not happen other than protecting the good name of Islam, which emphasises love among human beings even though with different religions.

Moreover, effective action needs to be taken so that harmonisation between the Syariah Court and the Civil Court can be formed to overcome this issue. Among the alternatives that can be taken is there should be a network of collaboration between the Civil Court and Syariah Court so that *muallaf* inheritance conflicts

are resolved. Civil Court and Syariah Court can produce a guideline which explains the extent of their authority in handling *muallaf* cases. Although it is clear that the Syariah Court has authority in cases related to *muallaf*, there are some situations such as those involving non-Muslims that require the intervention of the Civil Court. Therefore, it is hoped that with this guideline, all parties will be clear about the division of powers, especially those involving cases of *muallaf.* Based on what was discussed before, most cases show that there is a conflict of power involving the Syariah Court and the Civil Court. Matters that should be under the jurisdiction of the Syariah Court have received the intervention of the Civil Court when it involves non-Muslim parties. Therefore, a harmonisation of law needs to be implemented by creating a guideline which explains the extent of the jurisdiction of the Civil Court in interfering in matters involving converts. With guidelines like this, it simultaneously avoids a conflict of power between these two courts in addition to giving a clear impression to the public that issues related to *muallaf* are within the jurisdiction of the Syariah Court.

Based on the previous explanation, it is hoped that issues related to *muallaf*, especially related to inheritance, can be resolved immediately and efficiently. Cooperation from all parties is highly encouraged to make this a success. With the suggested effective solutions, it is hoped that all challenges and issues regarding *muallaf* can be resolved in addition to encouraging more non-Muslims to convert to Islam.

CHALLENGES AND PROSPECTS IN LEGISLATING ASSISTED REPRODUCTIVE TECHNOLOGIES (ART) IN MALAYSIA AND PAKISTAN THROUGH A HARMONISED APPROACH

Majdah Binti Zawawi[1]
Bilal Hussain[2]

ABSTRACT

Religion and modern technology are both eager to achieve the welfare of society. Reproductive issues constitute a major part of bioethical and legal discussions in the current world, particularly in Muslim countries. The use of assisted reproductive technology (ART) has led to shifts in family relations, particularly in determining parenthood and the subsequent responsibilities that arise when third-party reproductive material is used. Although various reproductive techniques are practised around the world for all forms of infertility, their application in Muslim societies has been largely unregulated. Due to the prevalent use of third-party gametes and embryos, there is an urgent need for Muslim countries to regulate or legislate the use of these techniques through harmonising the *Shariʿah* with civil law. But this comes with many challenges. Hence, the main objective of this paper is to analyse the challenges that arise when efforts are made to legislate the use of assisted reproductive technologies by harmonising the *Shariʿah* position with the civil law position. This paper reviews previous efforts done by the governments of Malaysia and Pakistan in regulating fertility services and proposes approaches to regulating these services that are in line with the *Shariʿah* and in line with existing family law principles recognised under civil law. In doing so, the paper also identifies possible conflicts between the two legal systems that pose challenges in efforts to harmonise the law.

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It will be a valuable addition to the existing literature in the efforts towards harmonisation of reproductive technologies with *Shariʿah.* The paper adopts comparative, analytical, and normative approaches to the creation of comprehensive legislation. For this purpose, original *Shariʿah* sources and existing reproductive technology policies and guidelines will be reviewed. Aside from that, the recommendations of the International Islamic Fiqh Academy (OIC), local Fatwa councils, and reports of the Council of Islamic Ideology, as well as other research-oriented councils, will be examined.

Keywords: Assisted reproductive technology (ART), challenges, family law, harmonisation, legislation, *Shariʿah*

INTRODUCTION

Religion and science both aim for the welfare and betterment of human society. Every day, modern technology introduces ways to facilitate humanity by converting hurdles into ease. Similarly, reproductive technology revolutionised the health sector and paved the way for infertile couples in the human world. Consequently, reproductive technology resulted as shifters in family relations, especially in determining parenthood and the subsequent responsibilities that arise, particularly when third-party reproductive material is involved. Although assisted reproductive technology (ART) is used around the world for all forms of infertility, its application in Muslim societies has been unregulated. Muslim scholars need to immediately take a logical and much-needed step towards reproductive technology research that considers the scientific benefits and ethical, legal, and *Sharīʿah* implications.[3]

It is a reality that childless couples face social and cultural pressures and suffer disturbances in marital life. Therefore, the use of ART becomes the preferred solution to the natural issues of infertility.[4] Modern technology has advanced rapidly in the

[3] Sabbir Hasan, "Does Sharia Support Cloning: A Qualitative Analysis," *International Journal of Islamic Khazanah 13*, no. 1 (2023): 48-64.

[4] Aref Abu-Rabia, "Infertility and Surrogacy in Islamic Society: Socio-cultural, Psychological, Ethical, and Religious Dilemmas," *The Open*

context of medical science assisting childless couples to conceive a child through the assisted reproduction process in the last century. It proposed several methods such as intra-uterine insemination (IUI), In-Vitro Fertilisation (IVF), and Intra-Cytoplasmic Sperm Injection (ICSI). They could be used on the infertile couples themselves or in third-party assistance.

Children are the natural desire of man to achieve which he takes all possible steps. The traditional method of reproduction is sexual intercourse, which is legalised through a marriage contract, for infertility or any other contraceptive reason in one or both of the spouses, herbs or medical drugs are used. In such a situation, modern science has introduced assisted reproduction technology, from which couples around the world are benefiting, but such methods are not under any regulation in the Muslim world. Family relations, such as the determination of paternity, the legal status of descent, the mutual rights and obligations of parentage and children, etc. A number of questions have arisen about family laws in the Muslim world. The use of assisted reproductive technology between married couples is problematic in both *Shari'ah* and Civil law when a third party is involved, such as a rented womb, donated sperm, eggs, or embryos. In the absence of regulations for reproductive techniques, particularly for donated materials, there is much confusion and ambiguity among people in Malaysia and Pakistan.

According to the survey, there are approximately 260 ART centres in Asia. On a global basis, each ART centre in Asia serves an average population of 13 million people. ART is now practised in 20 countries in Asia, including Malaysia and Pakistan. It is noted in Asian countries practising ART that there is no state registry or reporting mechanism. Aside from that, in 12 Asian countries (including all Muslim countries), ART was restricted to heterosexual married couples. It is also mentionable in Asian and eastern societies that the attitude towards the use of ART might be very different from the attitude in the western world. So far,

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Psychology Journal 6, no. 1 (2013).

however, much of the discussion regarding the ethical and legal issues related to ART has been centred in the western world.[5]

It is stated that mainly western countries legalised assisted reproductive techniques. The western legalising countries may be classified into four categories: liberal legislation, moderate regulators, strict regulators, and very strict regulators. Every country has a different position on ART or third-party assisting reproduction. In addition, most of these legislations are enacted relying on the recommendations of ethical committees, which have collected field experts, religious scholars, and public opinions on the issue. Thus, the legislation reflects the sense of national policy in that country. Although there is some effort to protect new familial relationships, the rights of the resulting child nevertheless have many deficiencies.[6]

In general, most of the Muslim world has instructions regarding reproductive techniques that should be used only in a married couple as a necessary line of treatment, during the validity of the marriage contract, and with no mixing of genes. If the marriage contract has come to an end because of divorce or the death of the husband, then ART should not be performed on the female partner, even if the sperm belonged to her husband.[7] The importance of marriage still stands strong in relation to the children conceived through ART, whereby the couples seeking to register these babies have to be married; otherwise, the resulting child suffers as an illegitimate child.

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[5] J.G. Schenker and A. Shushan, "Ethical and legal aspects of assisted reproduction practice in Asia," *Human reproduction 11*, no. 4 (1996): 908-911.

[6] Majdah Zawawi, "Donated Materials in Assisted Reproductive Technologies: An Ethico-legal Analysis of ART Legislations Worldwide," *Journal of Medical Ethics and History of Medicine 3* (2010).

[7] Gamal I. Serour, "Opinio - Religious Perspectives of Ethical Issues in ART 1. Islamic Perspectives of Ethical Issues in ART," *Middle East Fertility Society Journal 10*, no. 3 (2005): 185-190.

However, in view of the complicated and sensitive issues involved and the fact that no supervision of ART clinics exists in most of these countries including Malaysia and Pakistan. Therefore, there is an urgent need for legislation or regulation harmonising with *Sharīʿah* and Civil law to ensure the surveillance of clinics providing reproductive services. Moreover, proper legislation is required to secure the rights and responsibilities of the infertile couple, the resulting child, and any third parties involved. Likewise, a lack of statutory regulations leads foreign parties to join third-party reproductive services, which results in exploitation. This issue doesn't limit itself to citizenship, birth certificate, legitimacy, adoption status, maintenance, or inheritance status but leads to human trafficking crimes.

LITERATURE REVIEW

In reviewing various literatures, it was found that not many writers dealt with the topic at hand. Most of them either discuss general ART methods or ethical debates, and only a few authors highlight the legal repercussions of the use of reproductive techniques, particularly donated material. In addition, only a few writings examined legislative conflicts with *Sharīʿah* principles in a systematic manner. In regard to Malaysia and Pakistan, the discussions on the challenges of legislating ART through a harmonising approach with *Sharīʿah* and family law principles are very finite. And a comparative study on this subject between Malaysia and Pakistan is also short. Nevertheless, few publications support this study.

Kooli[8] randomly explored the regulatory status of reproductive technology in fourteen Muslim countries including Pakistan, Malaysia, and Turkey. This study comparatively demonstrated numerous deficiencies in terms of structure, nature, and the coverage of controversial subjects.

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[8] Chokri Kooli, "Review of Assisted Reproduction Techniques, Laws, and Regulations in Muslim Countries," *Middle East Fertility Society Journal 24*, no. 1 (2020): 1-15.

As a medical professional, the dissertation of Ayesha Irshad[9] highlighted the several types of challenges in Pakistan on ART. Her[10] other paper underlined exploitative clinical practices through emotional advertisements, projection through social media, and foreign certifications with no registry or regulatory framework in Pakistan.

Muhammad Zubair Abbasi[11] Ayesha[12] made a legal analysis of the FSC verdict and pointed out questions considered by the respective courts in this judgement. They underlined the beyond jurisdiction of the court and the mixing of family law, contract law, criminal law, and customary beliefs. According to them, the court avoided actual discussion on surrogacy and consequently vested rights and responsibilities of parties in surrogacy. They called the transforming role of the court in the legal system of Pakistan "judicial legislation".

In particular phase of this topic, Mohamad[13] generally discussed the doctrine of harmonisation and *Sharīʿah* norms. He shared his experience of harmonising laws in the Islamic banking

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[9] Alysha Irshad, "An Analysis of Reproductive Genetic Technology and Assisted Reproduction with a Focus on Ethical, Social, Religious and Legal Challenges in Pakistan," (Ph.D. Dissertation, University of Innsbruck, Austria, 2016).

[10] Ayesha Irshad and Gabriele Werner-Felmayer. "An ethical analysis of assisted reproduction providers' websites in Pakistan," *Cambridge Quarterly of Healthcare Ethics 25*, no. 3 (2016): 497-504.

[11] Muhammad Zubair Abbasi, "Federal Shariat Court of Pakistan on Surrogacy: From Judicial Islamization of Laws to Judicial Legislation," Courting the Law. August 23, 2017. https://courtingthelaw.com/2017/08/23/commentary/federal-shariat-court-of-pakistan-on-surrogacy-from-judicial-islamization-of-laws-to-judicial-legislation/.

[12] Ayesha Ahmed, "Assisted Reproduction in Pakistan and the Alternative Discourse," *LUMS Law Journal 4,* (2017): 178-194.

[13] Tun Abdul Hamid Mohamad, "Harmonisation of *Sharīʿah* and Common Law In Malaysia: The Way Forward," (Seminar at 2nd International Seminar On Sharīʿ Ah And Common Law 2012, Universiti Sains Islam Malaysia).

and finance sector. Moreover, he quoted several examples of harmonisation of laws in Malaysia. According to his approach, which law that is not un-Islam, is Islamic.

Rahman[14] directly attempted to decode the use of assisted reproductive technology in Malaysia and the health and legal risks associated with reproductive methods, particularly when donated material is used. This paper criticised the Guidelines of the Malaysian Medical Council (MMC) on Assisted Reproduction and highlighted the inadequacy of the regulatory framework on ART practices throughout Malaysia. It insisted on legislating provisions to address and monitor laboratory and clinical practice related to reproduction, especially when third parties are involved.

Shah[15] presented a quantitative survey report on the declining fertility ratio and increasing use of fertility treatments in Malaysia. This paper analysed existing fatwas pertaining to ART and IVF clinical practices in Malaysia and the guidelines of the Fatwa Committee and the National Council of Islamic Religious Affairs Malaysia. In addition, it underlined the urgent need for *Shari'ah*-compliant guidelines for Muslim patients to benefit from ART treatment.

Goh Siu Lin[16] prepared a paper discovering legislative efforts done in Malaysia on surrogacy or assisted reproductive methods. It highlighted guidelines issued by the Malaysian Medical Association and the Malaysian Medical Council on surrogacy and assisted reproductive technology (ART), respectively. Moreover, it underlined the attempts by the Malaysian Ministry of Health to

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[14] Noraiza Abdul Rahman, Mazlifah Mansoor, and Mazlina Mohamad Mangsor. "Regulating In-Vitro Fertilisation Treatment in Malaysia: Obligations to Protect and Assist the Parties," (2020).

[15] Zailin Shah et al., "Is Assisted Reproductive Technique Sharīʿah-compliant: A Case Study at a Fertility Centre in Malaysia," *IIUM Medical Journal Malaysia 13*, no. 2 (2014).

[16] Goh Siu Lin. "The Potential Risks of Surrogacy Arrangements in Malaysia," A Malaysian Bar CPD Online Publication, no. 6 (September 2017). http://cpd.malaysianbar.org.my/wp-content/uploads/2018/04/LCAS_issues6-goh.pdf.

draft a proposal on surrogacy, sperm and egg banking, and sperm donation practices in the country. Additionally, this study showed the need for legislation harmonising with *Sharīʿah* and existing civil laws in the country because of its Muslim and non-Muslim population. Furthermore, it classified the ART practices and agreements regarding Muslim, non-Muslim, married, and unmarried females.

RESEARCH HYPOTHESIS

To study the hypotheses to investigate whether Malaysia and Pakistan have adequate legislative positions to harmonise *Sharīʿah* and existing family law principles on assisted reproductive technology or not.

RESEARCH METHODOLOGY

To study the research hypothesis, this paper applies comparative, analytical, and normative approaches to propose efficient legislation. For this objective, *Sharīʿah* position and existing reproductive technology policies and guidelines have been examined. Aside from that, the recommendations of the International Islamic Fiqh Academy, local Fatwa councils, and reports of the Council of Islamic Ideology have been reviewed to help harmonise the ART practices in Malaysia and Pakistan with *Sharīʿah* and civil law principles.

MEANING OF HARMONISATION

Harmonisation refers to the Arabic *tawfiq* which means to bring one idea into harmony or agreement with another.[17] It doesn't mean to combine *Sharīʿah* and civil laws with no caring of *Sharīʿah* jurisprudence. It is integration between *Sharīʿah* and civil law principles to deal with ART in the country which are not

[17] Muhammad Amanullah. "Principles to Be Followed in Partial Harmonisation between Islamic Fiqh and Man Made Law," *IIUM Law Journal 16,* no. 2 (2008).

contrary to *Sharīʿah* limits. It aims to bring in line *Sharīʿah* and family law principles to regulate ART throughout the country. Moreover, harmonisation is more of a process rather than a goal.[18] In Islamic jurisprudence, it may be termed methodology concerned with selection *(takhayyur)* of the relevant parts of the *Sharīʿah* and Civil law and piecing them together (*talfiq*) with a view to harmonising them into coherent and unified formulas.[19] The use of the word harmonisation in this area is quite new. However, the fact that the word harmonisation was not used earlier does not mean that the work of harmonisation was not done. This harmonisation activity was going on under other names, such as "Islamisation," or otherwise the same transactions to transform laws in Muslim states. Syariah Courts and *Sharīʿah* modifications into legislation can be termed harmonisation of *Sharīʿah* and Common law.

In this study, harmonisation of *Sharīʿah* and reproductive technology means reproductive processes within the permissible orbit of *Sharīʿah*. In other words, reproductive technology should be regulated by rulings endorsed by *Sharīʿah* jurisprudence and family law principles. For this purpose, harmonisation may be simply termed the unification of Islamic law and Civil law principles on the subject of assisted reproductive technology.

Legislating ART in Malaysia and Pakistan through a harmonised approach may be initiated through the following approaches:

1. Consulting discussions with national fatwa or ideology councils
2. Establishment of a special committee with medical, legal, and religious experts.

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[18] Muhammad Hashim Kamali, "Harmonisation of the *Sharīʿah* and Civil Law: Proposing a New Scheme for al-Usul Fiqh," (Conference paper in International Conference of Sharīʿah and Civil law 2. 29-30th June 2005, IIUM), p 244.

[19] Mohammad Hashim Kamali, "*Sharīʿah* and Civil Law: Towards A Methodology of Harmonisation," *Islamic Law and Society 14*, no. 3 (2007): 391-420.

3. Registry mechanism of reproductive services clinics with the cooperation of medical associations
4. Application of Moderate approaches by Syariah Courts into ART cases
5. Amendment and reviewing of medical and family laws
6. Introducing ART statutory legislation
7. Coordination among relevant authorities

ASSISTED REPRODUCTIVE TECHNOLOGY (ART)

Medical advancements gave hope to infertile couples that they could have children with medical assistance. Infertility services, which include counselling, tests, and therapies, help people with fertility issues discover solutions to their reproductive plans.[20] Various terminologies are connected with reproductive techniques that follow the artificial method of procreation.[21] Medically aided reproduction (MAR) was a term adopted by some researchers for reproductive technology, while others referred to Assisted Reproductive Technologies (ART). Moreover, the International Committee for Monitoring ART (ICMART) emphasised the importance of common definitions of assisted reproductive technology in order to benchmark its outcomes.[22] In short, ART includes several reproductive techniques, which are termed, ART.

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[20] Sirpa Soini et al., "The Interface Between Assisted Reproductive Technologies and Genetics: Technical, Social, Ethical and Legal Issues," *European Journal of Human Genetics 14,* no. 5 (2006): 588-645.

[21] F. Zegers-Hochschild et al., "The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology," *Human reproduction 24,* no. 11 (2009): 2683–2687

[22] Giulia Scaravelli, and Roberta Spoletini, "The Application of Reproductive Techniques (ART): Worldwide Epidemiology Phenomenon and Treatment Outcomes," in *Handbook of Fertility* (Academic Press, 2015), 75-87.

To brief this term, ART stands for Assisted Reproductive Technology. It is commonly used to refer to a host of techniques used to assist infertile couples in achieving pregnancy through non-coital methods of conception.[23] There are many other similar terms for these practices, but the most common term used to describe reproduction that is assisted by technology is "assisted reproductive technology," or ART. Nevertheless, it must be noted that ART does not guarantee pregnancy, nor does it provide a cure for the problems that cause infertility. It only provides a mere scientific approach and controlled reproductive process for dealing with infertility than traditional herbal medicine.

However, debate on the use of ART procedures has three main questions: (1) the criteria on the basis of which the maternity relationship should be defined; (2) how this new type of maternity can be integrated; and (3) how this procedure can be regulated under Islamic law.[24]

CONTEMPORARY *SHARĪʿAH* POSITION ON ART

Sharīʿah encourages marriage, the formation of a family, procreation, and the treatment of infertility, including ART in cases of incurable infertility. Islamic law conceptualises that a

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[23] Malaysian National ART Policy 2021 defined ART as Assisted Reproductive Technologies (ART) is all interventions that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of reproduction. This includes, but is not limited to, in vitro fertilisation (IVF), and embryo transfer (ET), intracytoplasmic sperm injection (ICSI), embryo biopsy, preimplantation genetic testing (PGT), assisted hatching, gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), gamete and embryo cryopreservation, semen, oocyte and embryo donation, and gestational carrier cycle. See National ART Policy 2021, available at https://www.moh.gov.my/index.php /database_stores/store_view_page/70/189

[24] Ayman Shabana, "Islamic Law, Assisted Reproductive Technologies, and Surrogacy," Islamic Law Blog, June 30, 2021. https://islamiclaw.blog/2021/06/30/islamic-law-assisted-reproductive-technologies-and-surrogacy/.

child should be related to a known parent. No way is permitted that leads to deceiving true genetic heritage. Therefore, surrogacy or other third-party assisted reproduction is not appreciated by *Sharīʿah*.[25]

Some scholars stated the *Sharīʿah* principles governing medical bioethics: first, the protection of human life (saving one life represents saving the lives of all mankind); second, physical well-being takes precedence over religious well-being; third, necessities override prohibitions; fourth, preventing harm is preferable to procuring benefits (the basic concept in harmful matters is prohibition, whereas the basic concept in useful matters is permissiveness); and fifth, *maslahah*, or the public good, requires help and care for the ill and needy.[26]

These principles may assist in understanding the *Sharīʿah* position on the use of ART and help harmonise with family law principles.

In *Sharīʿah*, an Islamic scholar, or *mufti*, could issue a religious ruling, or fatwa, relying on his interpretation. The *fatwa* might then be used as the basis for understanding the *Sharīʿah* position on the subject and may be adopted as a legal ruling on it. Therefore, after the first IVF experiment report, Al-Azhar University issued a fatwa on fertility treatment and *Sharīʿah* compliance in 1982.[27]

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[25] Organization of Islamic Cooperation, "IFA fatwa on IVF," in *Resolutions and Recommendations of the Council of Islamic Fiqh Academy 11-16 October 1986. Resolutions number 13-25*, (Jeddah: International Islamic Fiqh Academy)

[26] Aida I. Al Aqeel, "Islamic Ethical Framework for Research into and Prevention of Genetic Diseases," *Nature Genetics 39*, no. 11 (2007): 1293-1298.

[27] Gamal I. Serour, "Islamic Perspectives in Human Reproduction," *Reproductive Biomedicine Online 17*, (2008): 34-38; Marcia C. Inhorn, "Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam," *Cult Med Psychiatry 30, (2008)*: 427–50.

ISLAMIC FIQH ACADEMY[28]

After Al-Azhar's *fatwa*, the most effective effort has been found by the Islamic Fiqh Academy on assisted reproductive issues. This jurisprudential academy has collective wisdom from all over the Muslim world. In 1986, this body discussed reproductive techniques and categorised prohibited and permissible procedures.

Prohibited Methods:

1. Fertilisation takes place in-vitro between the semen taken from the husband and the ovum taken from a woman who is not his wife, and the fertilised ovum is then planted in his wife's womb.
2. Fertilisation takes place in-vitro between the semen taken from a man who is not the husband and the ovum taken from the wife, and the fertilised ovum is then planted in the wife's womb.
3. Fertilisation takes place in-vitro between the semen and the ovum taken from the respective spouses. The fertilised ovum is then planted in the womb of a volunteer woman.
4. Fertilisation takes place in vitro between the semen and the ovum taken from two strangers. The fertilised ovum is then planted in the wife's womb.
5. Fertilisation takes place in vitro between the semen and the ovum taken from the respective spouses. The fertilised ovum is then planted in the womb of the husband's other wife.

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[28] Organization of Islamic Cooperation, "IFA fatwa on IVF."

Permissible Methods:

However, there is no *Sharīʿah* restriction on the following sixth or seventh methods, in case of necessity, provided that all the necessary precautions are observed. These two methods are:

1. In-vitro fertilisation of a wife's ovum by her husband's semen and the implantation of the fertilised ovum in the womb of this same.
2. External insemination, by taking the semen of a husband and injecting it into the appropriate place in the womb or uterus of his wife for internal fertilisation.

Moreover, in 1991, the 1st International Conference on Bioethics of Human Reproduction Research in the Muslim World was held. Its major aim was to examine ART from a bioethical perspective and issue some guidelines to regulate assisted human reproductive methods.[29] Furthermore, ISESCO (Islamic Educational, Scientific, and Cultural Organization) worked on assisted reproductive technology and its ethical implications and produced a report in 1993. Later on, this organisation called for Ethical implications of human embryo research in the Muslim world.[30]

These *fatwas* paved the path for medical practitioners to use innovative procreation procedures on Muslims and in Muslim countries.[31]

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[29] Gamal I. Serour and A. R. Omran. "Ethical Guidelines for Human Reproduction Research in the Muslim World," *Journal International De Bioethique 4*, no. 1 (1993): 22-23.

[30] Islamic Organization of Education, Science and Culture (ISESCO). Serour, (2000), editor G. I. Serour. Ethical implications of human embryo research. Available at http://archive.isesco.org.ma/templates/isesco/publications /en/Human%20Embryo/humanEm.php

[31] Serour and Omran. "Ethical Guidelines for Human Reproduction Research in the Muslim World," 22-23.

MALAYSIA

In Malaysia, the very unique legislative framework prevails with mixed jurisdictions and mixed legal setups namely the Common law and the *Sharīʿah*.[32] Similarly, Pakistan has inherited legal heritage from the same origin and now a mixture of *Sharīʿah* and civil laws is prevailing. Both countries have a majority Muslim population and have subsequently made efforts to harmonise their legal systems with *Sharīʿah* and Civil law. In recent years, the Malaysian government has selected the health tourism business, including reproductive therapy, as one of the national priority economic areas to be promoted by the Malaysian Healthcare Tourism Council in order to increase revenue for the country. Malaysia's regulations on artificial reproductive rights are still hazy.[33]

Remarkably, Malaysia has had many experiences harmonising *Sharīʿah* with Civil laws. First, Malaysia is referred to as a model Islamic country, having *Sharīʿah* as its sole form of legislation. Its legal mechanism operates in parallel with Common law and *Sharīʿah* harmony. The Malaysian experience in maintaining such harmony between the two legal systems provides guidelines for other countries suffering such challenges. Second, Malaysia has developed a *Sharīʿah* court structure that interprets and applies Islamic law. Although it has been successful, there have been times when the implementation of the law has raised concerns as to the compatibility of *Sharīʿah* with modern principles of civil law based on Common-law values. Thirdly, it has gained global attention due to the potential for wider international implications regarding the implementation of *Sharīʿah* principles.[34]

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[32] Zulkifli Hasan, "Harmonisation of *Sharīʿah* and Common Law in the Implementation of Islamic Banking in Malaysia." Faculty of *Sharīʿah* and Law, Islamic Science University of Malaysia (2007).

[33] Nursyafiah Ahmad Razali, "A Proper Legislation for Assisted Reproductive Technology in Malaysia Must be Introducted: Legal Research"

[34] Adnan Trakic and Haydar Ali Tajuddin, Hanifah, eds., *Islamic Law in Malaysia: The Challenges of Implementation*. (Singapore: Springer,

GROWTH OF ART CLINICAL PRACTICES

Malaysian society has a pluralistic population consisting of the Malays, Chinese, Indians, and others. According to statistics reports, the fertility rate dropped from 2.3 in 2008 to 2.2 in 2011.[35] According to an estimated population in 2009, 15% of Malaysians are unable to have children.[36] In addition, the Minister of Health also expressed worry about the growing number of patients seeking fertility treatment, stating that it was anticipated that around 300,000 new couples in Malaysia would receive fertility treatment in 2006 alone.[37] Another study alarmed that on the east coast of Malaysia, a reproductive clinic has served 90% Muslim patients throughout its four years of existence.[38] Latest, from 2022 to 2023, the fertility rate of Malaysia is estimated at 1.924 births per woman, a decline of 0.88%. [39]

Actually, since the 1980s, Malaysia has been reported to have been practising ART and being at the forefront of medical technology.[40] MSAR (Malaysian Society for Assisted

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2021), Accessed June 4, 2023. ProQuest Ebook Central.

[35] Department of Statistic Malaysia, *Vital Statistics 2012*, http://www.statistics.gov.my/portal/images/stories/files/LatestReleases/vital/Vital_Statistics_Malaysia_.

[36] Sin Chew Daily online news item dated 12 July 2009 available at: www.mysinchew.com/node/27091#sthash. rIA0MuPM.dpuf

[37] Ahmad Murad Zainuddin et al., "First Year Experience in Assisted Reproductive Technology (ART) Services at IIUM Kuantan," *IIUM Medical Journal Malaysia 12*, no.1; 3-9.

[38] *Ibid*.

[39] Malaysia Fertility Rate 1950-2023 | MacroTrends. "Malaysia Fertility Rate 1950-2023," https://www.macrotrends.net/countries/MYS/malaysia/fertility -rate.

[40] Knchua. "IVF Treatment in Malaysia - Alpha IVF Fertility Center Malaysia," Alpha IVF Fertility Center Malaysia March 17, 2020, https://www.alphafertilitycentre.com/5012/ ivf-treatment-in-malaysia.html.

Reproductive Technology) published data regarding ART and stated that Malaysia has 17 ART clinics providing treatment and carrying out research as well as storage program donors for sperm, eggs, and embryos. Additionally, a general search on Google Maps indicates that there are more than 19 other ART clinics in Malaysia.[41] Furthermore, approximately 4 Malaysian government hospitals are offering IVF treatments: HSNZ (east coast zone), Hospital Kuala Lumpur (central zone), Hospital Sultanah Bahiyah (northern zone), and Hospital Wanita dan Kanak-Kanak Sabah (Sabah and Sarawak).[42]

The Malaysian government considers health tourism as a national key economic area, as according to the Malaysian Ministry of Health, some 400,000 foreigners visited Malaysia as 'healthcare tourists' in 2010, generating revenue of USD 101.65 million for the country.[43] Furthermore, around 65%–75% of the IVF success rate is revealed by Malaysian fertility clinics, which is the highest in any Asian country while also beating the averages of the UK and Australia.[44]

In Malaysia, the use of ART cases is on the rise. However, it is alarming to note that the Malaysian Parliament has not enacted any concrete law to regulate ART clinics. A number of infertile couples enter into ART or third-party assisting reproduction agreements without realising the consequences of this arrangement.[45] Consequently, all concerned parties suffer legal

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[41] Latifah Amin et al., "Current status and future challenges of biobank research in Malaysia," *Asian Bioethics Review 13,* (2021): 297-315.

[42] "Test-Tube Baby Born from Embryo Frozen for Six Years Makes History," The Sun Daily, September 10, 2019, https://thesun.my/local_news/test-tube-baby-born-from-embryo-frozen-for-six-years-makes-history-YF1456980.

[43] "Malaysia Wooing Foreigners to Join Healthcare Tourism | News from Tourism Cambodia," Tourism Cambodia, https://www.tourismcambodia.com/news/worldnews/2471/malaysia-wooing-foreigners-to-join-healthcare-tourism.htm.

[44] "IVF in Malaysia: Procedure, Cost, Success Rate & Best IVF Doctors." TMC fertility, https://www.tmcfertility.com/ivf/.

[45] Sridevi, "Selected legal issues concerning surrogacy in Malaysia."

repercussions and are deprived of their legal rights and responsibilities. As a result, the baby suffers his legitimacy issue, parents dispute on guardianship and custody, as well maintenance and property share (inheritance) issues.

The closest relevant legislation governing family matters amongst the non-Muslim population in Malaysia is the 1976 Marriage and Divorce Act, whereas Malaysian Muslims are bound by the *Sharīʿah* law. However, it is hopeful that the Malaysian Ministry of Health has proposed a draft, the Assisted Reproductive Technique Services Act.[46]

FATWA COMMITTEE AND THE NATIONAL COUNCIL OF ISLAMIC RELIGIOUS AFFAIRS

Rather than statutory provisions, there are some *fatwas* on fertility treatments in the Islamic world. Similarly, in Malaysia, the Fatwa Committee and the National Council of Islamic Religious Affairs granted *fatwas* on different occasions.[47]

1st *Fatwa*: The Council issued a *fatwa* on November 16–17, 1982, in its 5th Muzakarah (Conference) that validated IVF babies from the ovum (eggs) of a wife and the sperm of a husband that have been mixed using respectable means or using methods that are not contradictory to Islam. Moreover, it was decided that the resulting child can be a guardian and is entitled to receive

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Journal of Malaysia and Comperative Law 41, (2014): 35.

[46] "Laws on fertility treatment by 2012" New Straits Times, 27 February 2011, Obstetrical and Gynecological Society of Malaysia president Dr Mohamad Farouk Abdullah said the proposed legislation would likely be named Assisted Reproductive Technique Services Act. The legislation is yet to be adopted and is apparently in the final stages of formulation; Yuen Meikeng, "Act to Ensure Country Has Regulations on Artificial Reproduction." The Star, November 29, 2015, https://www.thestar. com.my/news/nation/2015/11/29/birth-of-a-new-law-soon-act-to-ensure-country-has-regulations-on-artificial-reproduction/.

[47] "Fatwa Kebangsaan – Bayi Tabung Uji." Portal Rasmi Fatwa Malaysia, accessed December 1, 2013. http://www.e-fatwa.gov.my.

inheritance from the rightful family. However, if the eggs are not from a married couple, it invalidates the procedure.

2nd *Fatwa*: On April 8, 2003, in its 55th Muzakarah, the Council prohibited the transfer of embryos into the wife's uterus after the death of the husband or after divorce.

3rd *Fatwa*: In its 56th Muzakarah on May 7, 2003, the Council declared it forbidden to fertilise the wife's ovum with the husband's sperm by their extraction before the solemnization of marriage, although the mixing process was conducted during the marital period.

4th Fatwa: In the 80th Muzakarah on February 1–3, 2008, the Council gave a prohibiting ruling over surrogacy even if the sperm and ovum were taken from a married couple. Moreover, it demonstrated that surrogate practices lead to genetic confusion for the unborn baby.

These *fatwa* guidelines indicated the permissibility of fertility treatment within the confines of the marriage contract. In addition, the council raised concerns about third-party assisted reproduction. It also stipulated that fertilisation or other processes must be done within the marriage contract and not otherwise. However, it is noted that these *fatwas* are very general and do not look into the details of the assisted reproductive technology processes. Furthermore, the Council didn't address the repercussions on rights and responsibilities regarding infertile couples using ART, donations of sperm, eggs, or embryos, and the resulting child, etc. There has been no effort on the part of the *Sharī'ah* or legal compliance regarding the ART practices.

The fact is that ART practices have gradually developed and are largely different from those used in the early days as laboratory technology and clinical procedures have been refined. Initially, reproductive technology was designed for tubal factor infertility, but gradually it became a common treatment for all causes of infertility. Along with modified reproductive techniques, several risks have arisen, including organ damage (lifelong impairments), death of the mother or resulting baby, and many legal repercussions. Although the Malaysian Medical Council (MMC)

issued guidelines on assisted reproduction in 2006, they are not adequate to address the repercussions of the use of ART.[48]

Furthermore, it is noted that IVF technology is prevailing as the most popular procedure in public and private hospitals in Malaysia to overcome infertility. Despite issues associated with reproductive techniques, no legal protection is found for infertile couples and potential children under existing guidelines or otherwise. And the reproductive clinics have no obligation at all to abide by any guideline or recommendation that has no legal enforcement. Instead, such clinical centres prioritise financial advantages for dealing with foreign couples, even if such patients do not conform to the religious and cultural concerns expressed in the guidelines. For instance, there is a guideline that ART should only be offered to married couples, but private hospitals offer it to any couple regardless of their marital status. Therefore, it provoked a raft of thorny questions regarding multiple births and the use of gamete donation in Malaysia. Consequently, proper legislation and a controlling mechanism over clinics are urgently needed.[49]

PAKISTAN

Pakistan is founded on Islamic ideology and has constitutionally declared Islam to be the state religion. It is a constitutional duty to harmonise all colonial existing laws with *Shariʿah* injunctions, and no new law can be enacted that is repugnant to the injunctions of Islam.[50] For this purpose, two statutory bodies were established and incorporated into the constitutional structure of the country. The first is the CII (Council of Islamic Ideology)[51], whose major function is to harmonise the civil laws with the *Shariʿah*

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[48] Rahman, Mansoor and Mangsor. "Regulating In-Vitro Fertilisation Treatment in Malaysia: Obligations to Protect and Assist the Parties." (2020).

[49] *Ibid*

[50] Constitution of Islamic Republic of Pakistan 1973, Art. 2, 227.

[51] *Ibid*, Art. 227-230.

perspectives and to advise the legislature on how to harmonise Civil law and *Shariʿah* law for new laws. The second is the Federal Shariat Court (FSC)[52], whose main task is to examine the law's compliance with *Shariʿah* positions, invalidate such provisions, and instruct the government to re-enact the law. In addition, Pakistan has imposed a constitutional duty on the government to legislate for the protection of marriage, the family, the mother, and the child.[53] However, there is no statutory provision to regulate ART practices and consequent legal reflections on the rights and duties of the infertile couple, donor, resulting child, etc.

GROWTH OF ART CLINICAL PRACTICES

It is recorded that Pakistan has more than 21.9% of couples facing infertility problems, but no specific regulatory framework is prevailing.[54] Moreover, Pakistan practised reproductive technology within 11 years of the world's first IVF experience in 1989, when the first IVF baby, Qasim, was born at the Infertility Advisory Centre (later renamed Hameed Latif Hospital), Lahore.[55] Currently, roughly 20 private IVF clinics have flourished in the nine big cities[56], providing reproductive facilities. Unfortunately, there is a dearth of an official database of ART cases in Pakistan; estimates suggest that 5,000 babies were born

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[52] Constitution of Islamic Republic of Pakistan 1973, Art. 203.

[53] *Ibid*, Art. 35.

[54] Bushra Naz and Syeda Shahida Batool. "Infertility Related Issues and Challenges: Perspectives of Patients, Spouses, and Infertility Experts," *Pakistan Journal of Social and Clinical Psychology 15*, no. 2 (2017): 3-11; Mehboob Sultan, Abdul and F. Ahmad. "Pakistan Reproductive Health and Family Planning Survey (2000-01): Preliminary report." Islamabad, National Institute of Population Studies (2001).

[55] M.Q. Butt, "Assisted Reproductive Technology (ART) as a Treatment of Infertility in the Light of Islamic *Sharīʿah,*" (Ph.D. Dissertation, GC University Lahore, 2019), 1-424.

[56] Irshad and Werner-Felmayer. "An ethical analysis of assisted reproduction providers' websites in Pakistan." 497-504.

through IVF in the country.[57] However, according to the latest statement, 1,000 births are assisted by the test-tube baby procedure annually, and 2,000 couples use this treatment annually in Pakistan. But no state policy is prevailing, even though the first court verdict was announced 29 years after the first birth in Pakistan.[58]

In Pakistan, the absence of parliamentary legislation on ART makes regulatory mechanisms weak, and guidelines come from committees or councils, the opinions of religious scholars, recommendations of the Council of Islamic Ideology (CII)[59], instructions provided by the National Bioethics Committee (NBC)[60], or rulings of courts, particularly the FSC[61], etc. The NBC provided Ethical Guidelines for Collection, Usage, Storage, and Export of Human Biological Materials (HBM) that include

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[57] Sumaira Jajja, "IVF Clinics & Mdash; in Business Big Time," DAWN, November 10, 2013. http://www.dawn.com/news/1055388

[58] "Shariat Court's Decision: Is the Battle Only Half Won for Solutions to Infertility?" The Express Tribune, February 25, 2017. https://tribune.com.pk/story/1338301/shariat-courts-decision-battle-half-won-solutions-infertility.

[59] The Council of Islamic Ideology is a constitutional body that advises the legislature whether or not a certain law is repugnant to Islam, namely to the Qur'an and Sunna.

[60] In 2004, the NBC-R (National Bioethics Committee for Research) was constituted to surveillance bioethics related activities in the health sector of Pakistan.

[61] The Federal Shari'at Court (FSC) is a constitutional court of the Islamic Republic of Pakistan, which has the power to examine and determine whether the laws of the country comply with *Sharia* law. The court was established in 1980 and its main office is located in the federal capital, Islamabad. The Federal Shariat Court is the only constitutional authority in the country designed to prevent enactment of un-Islamic laws by the parliament of Pakistan. It is predominantly focused on examining new or existing laws of Pakistan. If a law violates the Quran, sunnah or hadith, it prohibits its enactment.

umbilical cord and cord blood, sperm, oocytes, leftover frozen embryos following IVF, and other products of conception.[62]

Nevertheless, an official legal debate was tabled in 2015 in the case of surrogacy before the FSC.[63] The court considered the following questions: (i) As to whether the agreement executed between the parties for producing a child as a surrogate mother is in accordance with the Injunctions of the Qur'an and *Sunnah*? (ii) If it is presumed that the agreement is a lawful contract under the Contract Act, would the same also be in accordance with the Injunctions of the Qur'an and *Sunnah*? (iii) In the absence of any law, if a child is produced by a surrogate mother, under which law is the custody of that minor to be governed? (iv) If there is any other question raised by the parties. This petition started proper academic and legal discussions among jurists and others. After this verdict, the writers commented on the inadequacy of laws on reproductive techniques and criticised the judgement for avoiding actual reproductive issues.

The landmark FSC judgement on surrogacy led to the start of talk about assisted reproductive processes among scholars. Many legal criticisms were made of this verdict and its consequent implications.[64] Scholars highlighted beyond the jurisdiction of the court and the mixing of family law, contract law, criminal law, and customary beliefs. According to them, the court avoided actual discussion on surrogacy and consequently vested rights and responsibilities of parties in surrogacy. They called the

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[62] "Ethical Guidelines for Collection, Usage, Storage, and Export of Human Biological Materials (HBM)," National Bioethics Committee, Retrieved May 22, 2023, http://nbcpakistan.org.pk/assets/hbm-nbc-guidelines-final -18june-2016.pdf

[63] Farooq Siddiqui v. Mst. Farzana Naheed (2017), 2017 PLD (FSC 78) (Pakistan)

[64] Nikhil Goyal, "Sharī'a and Surrogacy in Pakistan." Islamic Law Blog. November 17. 2020. https://islamiclaw.blog/2020/11/17/sharia-and-surrogacy-in-pakistan/

transforming role of the court in the legal system of Pakistan "judicial legislation".[65]

Consequential issues of legitimacy in relation to ART use have also not been addressed in Pakistani legal provisions. All other guardianship, custody, and maintenance disputes rely on this issue. Although constitutional articles advise the state to ensure mother and child rights through necessary legislation, even with special provisions, no specific law has been introduced on the legitimacy of children. All provincial and federal assemblies have a number of child protection laws to fulfil constitutional and international convention requirements, but none deal with this issue. Indeed, all rights like parenthood, custody and guardianship *(wilayat*), maintenance, and inheritance are based on the determination of legitimacy. In the absence of codified legislation, Pakistani courts apply judicial mind in accordance with *Sharīʿah* injunctions in legitimacy cases. [66]

Some hope was given in 2013 when a Senate Committee of Pakistan was reported to have attempted to legislate on reproductive healthcare under the Reproductive Healthcare and Rights Act 2013.[67] It aimed to make legislation on reproductive healthcare in accordance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It stated objectives to ensure reproductive healthcare and rights for

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[65] Muhammad Zubair Abbasi, "Federal Shariat Court of Pakistan on Surrogacy: From Judicial Islamization of Laws to Judicial Legislation." Courting the Law. August 23, 2017. https://courtingthelaw.com/2017/08/23/commentary/federal-shariat-court-of-pakistan-on-surrogacy-from-judicial-islamization-of-laws-to-judicial-legislation/.

[66] There is pre-partition India legislation, the Shariat Application Act 1937, that laid down that in Muslim family matters, the rule of decision would be Muslim personal law. A substantial portion of personal law, therefore, remained uncodified and subject to interpretation by the courts.

[67] The Reproductive Healthcare and Rights Act 2013, https://scorecard.prb.org/wp-content/uploads/2018/05/Reproductive-and-Healthcare-Rights-Act-2013-national-policy.Sindh-Pakistan.pdf

couples and reduce the implications of pregnancy and childbirth, such as fistulas, infertility, etc. However, this law had no provision regarding the use of ART or other third-party assisting material for reproduction or its legal consequences for parties.

It is an alarming position that in Pakistan, reproductive clinics exploit childless couples through emotional advertisements, projection through social media, and foreign certifications. But it is disheartening that no registry or regulatory framework for reproductive clinics exists in Pakistan.[68] Thus, there is an immediate need to regulate reproductive clinics in the country to save people and make them aware of the legal repercussions of their rights and duties in the case of the use of ART or otherwise reproductive material.

COUNCIL OF ISLAMIC IDEOLOGY

First Recommendation: In 1988, the council banned all artificial reproductive techniques except for the following two methods:

1. Extracting the semen of the husband by any means and inserting it into the womb of the estranged wife through pachkari, etc.
2. Taking out the reproductive material of the husband and wife, mixing it in a tube, and delivering it to the wife's womb.[69]

Second Recommendation: In 2013, the council discussed the establishment of banks for the collection of women's reproductive tissues. The council declared that at the time of need, with the mutual consultation and consent of the spouses, taking out tissue and putting it back into the womb of the same woman is permissible. However, placing the tissue separated in this way in

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[68] Irshad and Werner-Felmayer. "An ethical analysis of assisted reproduction providers' websites in Pakistan." 497-504.

[69] Council of Islamic Ideology, Annual Report, (Islamabad: Council of Islamic Ideology; 1988-89), 129

the womb of another woman is not permissible. Also, it is not allowed to create a bank for this purpose.[70]

Third Recommendation: In 2015, the council looked into surrogacy and stated that giving and taking the womb for rent is unlawful under the *Shari'ah*. The person who commits this act will be a sinner, and it must be prevented. If someone commits this wrong act by renting the womb of a woman and a child is born, his lineage will be proven only by the mother and not by the donor. Moreover, all relationships will be established between mother and child; nothing will be linked to a sperm donor.[71]

Fourth Recommendation: In 2015, in the 218th session, the council issued detailed points on the legal repercussions of surrogate or third-party assisted births regarding rights and responsibilities. The council declared:

1. The recommendation of the Islamic Ideological Council and the decision of the FSC regarding the *Sharīʿah* status of surrogacy make it clear that all forms except for mixing the real father's sperm and the real mother's egg in the womb of the real mother are illegal according to the Qur'an and *Sunnah*.
2. If a child is born as a result of illegal surrogacy, the child will not be related to the sperm. If the woman is married, the child's relationship should be with the woman who gave birth and her husband. On the basis of lineage, the rights of the child, such as inheritance, alimony, custody, etc., will be related to the woman who gave birth and her husband.
3. If the woman is unmarried, then the child should belong to the woman who gave birth only. All rights, including inheritance, alimony, custody, etc., will continue between the woman and the child; however, if the woman is unable to support the child due to poverty, the government and the state will take this responsibility.

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[70] Council of Islamic Ideology, Annual Report, (Islamabad: Council of Islamic Ideology; 1988-89), 43.

[71] *Ibid,* 175.

4. The child who will be born from the pregnancy as a result of surrogacy will be entitled to all the rights, such as upbringing and education, and he deserves the same love and compassion that are given to children.
5. In the process of surrogacy, the man whose sperm has been placed in the woman's womb, even though the girl's lineage is not related to him, cannot marry the girl because the same child is the biological father.
6. Children born as a result of surrogacy have all the human rights granted at the national and international levels. There is no scope for buying and selling such children, sexual exploitation, prostitution, making obscene pictures and films of them, etc. The government should enact appropriate legislation in this regard in light of the decision of the FSC and the recommendation of the Islamic Ideology Council.[72]

CONCLUSION

ART has made it possible and even easier for couples with congenital infertility or other medical contraception to have children. In the western world, the use of ART raises many legal and ethical questions, but in Muslim societies, these questions become even more profound. In addition, debates are increasing due to the lack of legal provisions regarding assisted reproductive methods in the Muslim world. Moreover, medical clinics are seen exploiting infertile people in social media and newspapers. Besides, there is no legal protection for the rights of infertile couples, resulting children, and other involved persons. Therefore, it is an immediate need for Muslim countries to regulate assisted reproductive technology and decode *Sharīʿah* position to facilitate infertile couples.

Malaysia and Pakistan are known for their efforts in *Islamisation*, or harmonisation of laws and *Sharīʿah* in the Islamic world. Both Muslim countries have implemented moderate

[72] Council of Islamic Ideology, Annual Report, (Islamabad: Council of Islamic Ideology; 2019-20), 382

provisions of *Sharīʿah* and Civil laws by giving constitutional protection to Islamic identity. These countries harmonised in *Sharīʿah* and Civil laws principles regarding family matters, so now there is an urgent need to regulate reproductive clinic services particularly third-party assisted reproduction. Till recent times, under family law or other law no provision has direct relation with the regulation of ART or third-party involved techniques in Malaysia and Pakistan. Moreover, no express law to enforce the ART contracts or to secure the rights and duties of reproduction assistants, infertile couples, and resulting babies.

RECOMMENDATIONS

It is hoped that legislation harmonised with *Sharīʿah* and family law principles will regulate ART techniques and will help to surveillance reproductive clinics. To sum up, it is stated that a harmonised enactment reflecting religious and civil law norms will ensure public confidence in medical law, particularly in reproductive procedures. Indeed, reproductive legislation will be aware of repercussions on the use of ART and protect its affiliated rights and responsibilities in Malaysian and Pakistani society.

1. In Malaysia as well as in Pakistan, Medical Associations and the Bar Councils should conduct workshops and seminars to educate clinics, intended parents on the legal repercussions of rights and responsibilities of donor and childless couples.
2. It is proposed that both countries establish a special national committee comprising legal experts, religious scholars, medical professionals, policymakers, and representatives from relevant stakeholders to draft guidelines for reproductive technology. This committee should follow a harmonising and aligned approach between *Sharīʿah* and existing family law principles recognised under civil law on ART or third-party assistance in reproduction.
3. They should conduct comprehensive comparative studies to analyse the existing regulatory frameworks for ART in other Muslim-majority countries as well as in western countries that have successfully aligned their legal systems with regard to ART.

4. To foster public understanding and gather diverse perspectives, there should be public discourse on the ethical, religious, and legal repercussions of ART-affiliated rights and responsibilities. Public consultations, workshops, and seminars involving religious scholars, legal experts, clinical professionals, and social workers can pave the way to educating society on reproductive techniques and their consequences.
5. Both countries should develop efficient guidelines specific to ART and other third-party-involving methods. These guidelines can provide a framework for clinical practitioners, ensuring their legal rights and responsibilities regarding the use of ART or otherwise.
6. It is recommended to establish proper registries and reporting institutions or bodies on clinical services in the countries. It should record details of the services and patients for the future.
7. These Muslim countries should engage the Organization of Islamic Cooperation (OIC) and other international Muslim organisations to conduct research and make guidelines harmonising with *Sharīʿah* and family law principles.
8. To legislate ART, the principle of uniformity as well as diversity of population such as Muslim and non-Muslim citizens should be considered.
9. After enacting legislation for ART, there should be a mechanism for monitoring and evaluating its implementation. This includes tracking the impact of the legislation on individuals, families, and society, as well as assessing its effectiveness in achieving the intended goals for further needed modifications.

ETHNOGRAPHIC APPROACH TO HARMONISATION OF ISLAMIC LAW AND CUSTOMARY LAW IN THE INDONESIAN LEGAL SYSTEM

Benny Sultan[1]

ABSTRACT

Dispute resolution in the Indonesian legal system frequently involves both Islamic law and customary law, with the two often views as inseparable. While some groups maintain that there is no connection between them, others seek to harmonise the two systems. This chapter explores the harmonisation of Islamic law and customary law, emphasising the importance of preserving local traditions in the process of legal structuring in Indonesia. The study employs qualitative method with an ethnographic approach to analyse the relevance and interaction of Islamic law and customary laws, drawing from insights from interviews with ten chairmen in the D.I. Yogyakarta Province. Data was collected through observations, interviews, and documentation and analysed using qualitative descriptive methods. The findings reveal that the dynamics between Islamic law and customary law lead to a unification process where Islamic law integrates with customary law that are deeply rooted in the community. Customary law can play a crucial role in bridging Islamic law with social realities.

Keywords: *Harmonisation, Islamic law, customary law. ethnographic*

INTRODUCTION

In the past, Colonial legal politics in Indonesia incorporated Islamic law within the framework of customary law (*adat* law). Despite this, post-independence Indonesian legal theories largely dismissed the inclusion of Islamic law within customary law. Furthermore, the legal politics of post-independence Indonesian

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supported the gradual dismantling of the *adat* courts (*adat rechtspraak*), which weakened *adat* law as a formal legal system. On the other hand, Islamic law has been strengthened, particularly through the empowerment of religious courts. This is exemplified by the passing of Law No. 50 of 2009 which introduced the Second Amendment to Law No. 7 of 1989 concerning Religious Courts.

This study employs a qualitative research methodology with an ethnographic approach to analyse the relevance and co-existence of Islamic law and customary law. The research focuses on ten chairmen of D.I. Yogyakarta Province. Data collection methods involved observation, interviews, and documentation while data analysis was carried out throughout the research using qualitative descriptive techniques.

Islamic law has established a stronger presence in the Indonesian legal system having been integrated into a statutory law. In contrast, customary law has struggled to maintain its influence due to the lack of political support. As such, any efforts to elevate the role of customary law in the current legal framework must take into account the challenges posed by the prevailing legal and political dynamics.

LEGAL SYSTEMS AND SYSTEMS

A system is always related to the comprehensive existence of some parts or elements. It is also referred to as a whole, where the unity of parts, elements or units in a system are closely related. The meaning of 'System' itself is formulated by Black as an *"Orderly combination or arrangement, as of particulars, parts, or elements into a whole".* Schrode and Voich formulate the system as a complex unity of parts that are integrated into a whole, which consists of parts that are related to each other.[2]

Meanwhile, the System Theory itself has developed so interestingly and has received great attention from experts. For example, Organic Analogy Theory and Mechanical Analytical

[2] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2006)

Theory. Even Niklas Luhman is famous for his thoughts on the concept of Autopoietic, which refers to the diversity of biological cell systems throughout the world. Luhman uses the term Autopoietic to refer to systems, including economics, politics, law, science, and bureaucracy.[3]

A system has certain characteristics. Elias M. Awad in Salman and Susanto, suggests system characteristics[4] to be general if it interacts with its environment, and vice versa. It is said to be restricted if it isolates itself from any influence. Secondly, the system consists of two or more subsystems and each subsystem consists of another smaller subsystem, and it furthers into an even smaller subsystem. Thirdly, each subsystem is interdependent and in need of each other.

The illustration of the system could be seen in politics, where it exists as a Political System, the Government System, and the General Election System – which, according to Asshiddiqie, consists of two election systems, namely the district system and the proportional system where both carry the same function in organising elections in Indonesia-. In economics, there are the Capitalist Economic System, Socialist Economic System, and Islamic Economic System (*Shari'ah* Economics). Similarly, in law, there are Islamic legal systems, customary legal systems, western legal systems, and others.[5]

Law is fundamentally a system, where it is called the Legal System. Sudikno Mertokusumo explained, in essence that the system, including the legal system, is an essential unit that is divided into parts, in which each problem finds its answer within the system itself.[6]

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[3] Lili Rasjidi and Wyasa Putra I.B., *Hukum Sebagai Satu Sistem* (Bandung: Teen Rosdakarya, 1993)

[4] H.R. Otje Salman and Anthon F. Susanto, *Teori Hukum, Membina, Mengumpulkan dan Membuka,* (Bandung: Refika Aditama, 2004)

[5] Jimly Asshiddiqie, *Basics of Constitutional Law of the Republic of Indonesia Post-Reformation*, (Jakarta: Bhuana Popular Science. 2007)

[6] Sudikno Mertokusumo. *Mengenal Hukum: Suatu Pengantar,*

C.F.G. Sunaryati Hartono explained that a system consists of a number of elements or components that are interrelated with mutual influences and bound by one or several principles. The legal system also consists of a number of components, some of which at this point exist and function, but much more has yet to be developed.[7] According to Paul Scholten, law is a system which means that all rules are interrelated. These rules can be arranged logically, and for those that are specific, general rules can be found.[8]

Referring to this description, the concept of legal systems stems from the law consisting of several parts, in which there is a close interrelation between one part and another. Each part or element that is closely related to each other is bound by law where there is a goal to be achieved. From that concept, it explains that the law as a system means an order consisting of elements whereby it interacts with each other and works together to achieve the goals of unity.[9]

Based on the concept and formulation of the legal system outlined above, Satjipto Rahardjo emphasises the importance of interconnectedness among the components, which are bound together by legal principles. These legal regulations, though distinct on their own, are unified within a cohesive framework, all rooted in ethical judgement. Rahardjo further explains that when we refer to legal principles, we are speaking of a fundamental and essential aspect of legal regulation. It would not be an exaggeration to describe these legal principles as the "heart" of the legal system, as they form the core around which all legal rules are structured.[10]

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*(*Yogyakarta: Liberty Yogyakarta, 2005)

[7] C.F.G. Sunaryati Hartono, *Politik Hukum Menuju Satu Sistem Hukum Nasional,* (Bandung, 1991)

[8] Achmad Ali, *Menguak Tabir Hukum* (Jakarta: Haji Masagung, 2002)

[9] Sudikno Mertokusumo. *Mengenal Hukum: Suatu Pengantar.*

[10] Satjipto Rahardjo, *Ilmu Hukum*.

In laws and regulations, a number of principles are determined, such as the principles of *Shari'ah* Banking according to Law No. 21/2008, which is based on *Shari'ah* principles, economic democracy, and the principle of prudence (Article 2). Another example is the principles in the Election of Members of the DPR, DPD and DPRD according to Law No. 8/2012 whereby it consists of principles of direct, general, free, confidential, honest and fair (Article 2). These principles are not legal regulations, but understanding the principles will help the subject to understand the law.

According to Wayne R, the legal systems that are widely practised currently are Civil Law and Commercial Law.[11] Countries that practise this legal system are in full (pure) and mixed forms. Other experts, namely Zweigert and Kotz divide eight legal systems in the world, namely the Romanic legal system, i.e., the Germanic, the Anglo-American, the Nordic, the former Socialist, the Eastern, the Hindu and the Islamic. Eric L. Richard in Ade Maman Suherman divides the major legal systems consisting of Civil law, Common law, customary law, Islamic law, Socialist law, Sub-Saharan Africa and Par East.

On the other hand, Achmad Ali classifies legal systems as civil law, Common law, customary law, Muslim law and mixed law. He further explains that the context of Indonesia's legal system applies mixed law, where statutory legal systems, customary law, and Islamic law coexist.[12]

ISLAMIC LAW AND CUSTOMARY LAW

Islamic law and customary law are amongst the legal systems that exist in Indonesia in addition to statutory law. The concept of Islamic Law is different from the concept of statutory law, as the teachings of Islam believe that Islamic law *(Shari'ah)* is sourced

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[11] Huala Adolf, *Dasar-dasar Hukum Kontrak Internasional,* (Bandung: Refika Aditama, 2007.

[12] Achmad Ali, *Menguak Teori Hukum dan Teori Peradilan Termasuk Interpretasi Undang-undang* (Jakarta: Kencana, 2009)

from divine revelation, whereas statutory law is a concept of man-made law that derives from human beings, which contains different characteristics from Islamic law.

Etymologically, the word 'law' comes from the Arabic term *'Al-Hukm'*, which means hindered. While terminologically, it is a view of certain issues related to human actions or deeds. Islamic Law is seen as part of religious teachings (Islam), whose legal norms originate from religion. Syamsu Anwar argues that Muslims hold a belief that Islamic law is based on divine revelation. Therefore, it is called the *Shari'ah,* which means the path outlined by God for humans.[13]

Abd. Shomad explained that there are distinctive characteristics of Islamic Law that distinguish it from other legal systems, including legal systems that recognise two sets of legal sources, first, in regard to the source of law. Islamic law is based on transmitted sources (*naqli*) whereby the principles of *Shari'ah* are derived from Qur'an and *Sunnah*, whereas other legal systems are based on rational sources (*'aqli*) which is an effort to find law by prioritising thinking with a variety of methods. Islamic Law holds an important role in the development of national law long before the independence of the Republic of Indonesia. During the colonial period, Islamic Law in some aspects, were crystallised as part of customary law. Thus, the phrase *"Adat bersendi Syarak"* which translates as customs founded on Islamic law is well known in a number of customary law communities such as Gorontalo, Minangkabau, and Bolaang Mongondow.

Customary law (*Adatrecht/Adat*) is a legal system that grows and develops from customs in society.[14] Customary law is non-statutory law, which is based on the custom and small part of Islamic law. Customary law also covers laws based on judges' decisions that contain legal principles in the environment in which they decide cases. Based on this formulation, *Adat* law is

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[13] Syamsul Anwar, *Hukum Perjanjian Syariah, Studi Tentang Teori Akad dalam Fikih Muamalat,* (Jakarta: Raja Grafindo Persada, 2007.)

[14] Soepomo, *Chapters on Customary Law*, (Jakarta: Pradnya Paramita, 1993).

unwritten, non-statutory law that is applied in *Adat* courts (*Adatrechtspraak*). Von Savigny (1799-1861), who is famous for his thesis Volkgeist mentioned that all laws were originally formed in the way people say, customary law, in ordinary language. The law was first formed by custom and common belief, then by jurisprudence.[15]

At the beginning of the history of the nation and the State of Indonesia, customary law received great attention as there were a number of leading experts who consistently fought for the position of customary law in the national legal system, including Moh. Koesnoe who highlighted the misunderstanding of the position of customary law in the national legal system among many parties that is pro-contract. He also opined that those who oppose customary law are of the opinion that customary law is backward, to what is past.[16] Soetandyo argues that in the political arena of realising a national legal system by championing customary law, the proponents of the idea are actually heirs to an old idea that was originally put forward by the previous generation of nationalists, and was even stated in the text of the Youth Pledge in 1928[17]

Similarly, colonial legal politics placed Islamic law in the same position as customary law such as the Receptie theory by Christian Snouck Hurgronye, that for indigenous people basically applies customary law; Islamic law applies if the norms of Islamic law have been accepted by the community as customary law.[18]

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[15] Walter Friedman. *Legal Theory & Philosophy Critical Study of Legal Theories (Structure I).* (Jakarta: Cet. II. PT. Raja Grafindo Persada)

[16] Mohammad Koesnoe, *Pengembaraan Gagasan Hukum Indonesia,* Ch 3 (Epistema Institute dan HuMa), 25-75.

[17] Soetandyo Wignjosoebroto, *Hukum Yang Lahir Dari Bumi Kultural Rakyat, Tentang Hukum, Sejarah dan Keindonesiaan,* Ch 3 (Epistema Institute dan HuMa, 2015) 33-54.

[18] Syahrizal, *Customary Law and Islamic Law in Indonesia, Reflections on Several Legal Integrations in the Field of Inheritance in Aceh* (Aceh: Nadya Foundation, 2004), 129-131.

UNIFICATION AND SEPARATION OF ISLAMIC LAW AND CUSTOMARY LAW

Colonial legal politics that incorporated Islamic Law into customary law (for certain aspects and matters), played a role in the concepts and formulations until now. In this regard, it is known in customary societies such as the Minangkabau, Gorontalo and Bolaang Mongondow as the phrase "*Adat Bersendi Syarak*". This phrase carries a meaning that adat is supported by Islamic law. As a colonial legal policy, related to the colonial ruler's efforts to control the prevailing legal system as well as offering the colonial legal system as a source of law in the colony, as Hurgronye's role gave birth to the Receptie Theory, meaning that Islamic Law can be accepted as law if it has been implemented by the indigenous peoples. In this regard, customary law applies, as stated in Article 134 IS which is often called the Receptie Article[19]

The colonial legal politics that incorporate Islamic law and customary law in addition to being formulated in the concept and several theories produced by colonial legal experts, continued until the achievement of the independence of the Republic of Indonesia. Several new theories emerged then such as those formulated by Sajuti Thalib under the name *Receptio A Contrario* theory that highlighted several characteristics. Firstly, Islamic Law applies only to Muslims; secondly, its application must be in accordance with the beliefs and ideals of law, be it inner ideals and morals; and thirdly, customary Law would only be applicable to Muslims if it does not contradict with Islam and Islamic law. This theory is called *Receptio A Contrario* as it contains the theory that contradicts the Reception Theory.[20]

Thus, legal efforts to separate the position and role of Islamic law from customary law are increasingly clear. During the colonial rule of the Dutch East Indies, along with the entrance of the Continental European legal system as adopted in the

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[19] Nova Effenty Muhammad. *Epistemologi Pengembangan Hukum Islam*, Vol. 9 No. 1 (Al-Mizan, 2013)

[20] Sayuti Thalib, *Receptio A Contrario: Hubungan Hukum Adat dengan Hukum Islam,* (Jakarta: Bina Aksara, 1980), 15-17.

Netherlands, the legal system was then adopted in the colony in the Dutch East Indies in the form of the Burgerlijk Wetboek (BW), Wetboek van Koophandel (WvK.), Wetboek van Strafrecht (WvS) as codified books that are characterised by legislation and carry aspects of legal certainty.

As a largely unwritten law; customary law, which was originally conceptualised together with Islamic law, also faced a challenge from a strong statutory system as the prevailing legal system. In fact, until post-independence Indonesia, colonial legal products as a legacy of Dutch law continued to be applied as a source of law in the legal system in Indonesia based on the principle of concordance.

THE EXISTENCE OF ISLAMIC LAW AND CUSTOMARY LAW

The two legal systems in Indonesia influenced each other. But in its development, there is an erosion that weakens the position of customary law as a legal system, both on its legal substance and on its legal structure.

A legal system consists of three elements according to Lawrence M. Friedman,[21] namely elements of legal structure, legal substance and legal culture. The weakening of legal substances such as the abolishment of Customary Court, and abolishment of its legal structure has taken place after Indonesian independence. In fact, Customary Court decisions are part of the support for the existence of customary law.

When Law No. 14 of 1970 on the Principles of Judicial Power came into force, the abolition of adat courts was stipulated in Article 39. Based on the explanation of Article 39, it was stated that based on Law No. 1 Drt. 1961 on Temporary Measures to Organise the Unity, Structure, Powers and Procedures of the Civil Courts, Article 1 paragraph (2) by the Minister of Justice has

[21] Lawrence M. Friedman, *Law, Society, and History Themes in the Legal Sociology and Legal History*, (Cambridge University Press, 2011), 52-64.

gradually abolished the Customary/Swapraja Courts throughout Bali, Sulawesi, Lombok, Sumbawa, Timor, Kalimantan and Jambi. With Presidential Regulation No. 6 of 1966 concerning the Abolition of Adat/Swapraja Courts and the Establishment of State Courts in West Irian, the Presidential Regulation was upgraded to Law No. 5 of 1969.

Islamic law is quite the opposite. While Adat Courts are not recognized today as part of the national judicial system, Islamic law, particularly through the Religious Courts, has been given a constitutional foundation based on the 1945 Constitution of the Republic of Indonesia as one of the judicial circles Article 24 paragraph (2). The constitutional provision indicating the legal basis of the Religious Courts is then derived in Article 18 of Law No. 48 of 2009 on Judicial Power and regulated by Law No. 50 of 2009 on the Second Amendment to Law No. 7 of 1989 on Religious Courts and determines that the Religious Courts are state courts.

In fact, the strengthening of Religious Courts as a legal system in Indonesia is increasing with the existence of a number of laws and regulations that support and strengthen the authority of religious courts, including in *zakat* management, *hajj* management, *Shari'ah* banking, State *Shari'ah* Securities (SBSN) (*sukuk*), which shows a formalisation of Islamic law into legislation.

The influence of the Continental European legal system (Civil law) through the Indonesian legal system shows the characteristics of positivism that can be accepted and applied in the Islamic law system through the formalisation of Islamic law. Meanwhile, the customary law system which is also regulated and further developed from statutory law, shows controversy such as the recognition of indigenous peoples' rights, especially customary rights in Law No. 41 of 1999 concerning forestry in conjunction with Law No. 19 of 2004 concerning forestry, because the customary rights of indigenous peoples have actually been lost and efforts to restore them are not easy.

The customary law system shows its gradation, from customary law to finally only become custom found merely in

symbolical practice, such as in customary marriage practices, customary clothing, etc., which is just an effort to restore its identity so that the existence of customary law is still found in society and the national legal system.

CONCLUSION

The national legal system in Indonesia is built on the basis of the Islamic law, customary law and western legal influences. In recent times, the common law system has gained greater prominence due the effects of globalisation and liberalisation. These three legal traditions have continually interacted, each striving to shape and contribute to the formation of national law.

Among these, Islamic law has emerged as more prominent, successfully integrating with statutory law and adapting to modern legal frameworks. In contrast, customary law has struggled to maintain its relevance in the face of limited political support. Given these challenges, any effort to increase the role of customary law should be reconsidered as the current legal and political climate does not appear conducive to its advancement.

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PART IV
HARMONISATION OF CRIMINAL LAW AND TORT

HARMONISING OF SECTION 113 OF THE EVIDENCE ACT 1950, THAT IT IS A CONCLUSIVE PRESUMPTION A BOY UNDER 13 YEARS IS INCAPABLE OF COMMITTING RAPE

Mohamad Ismail Mohamad Yunus[1]
Shamshina Mohamad Hanifa[2]

ABSTRACT

Under Section 113 Evidence Act 1950, rapists among young offenders below the age of 13 years old had the privilege to this section as a defence to the offence charged against them. This section requires no evidence is admissible to disprove the presumption. Despite the criticism by many legal scholars regarding this archaic provision and the advancement and development of technology, Malaysia still applies Section 113 of Evidence Act 1950**.** In this paper, research has been conducted on the assessment on the maturity of the child, particularly the common age of a child that could discern between good and evil as well as looking at the Islamic perspectives on the age of criminal responsibility and accountability. This paper will also discuss thoroughly on the comparison between some selected countries such as Hong Kong, New Zealand, Australia, Canada, South Africa and Singapore which had almost similar provision to Section 113 Evidence Act 1950, on how these countries deal with this provision. As conclusion to this paper, several practical solutions have been proposed as references for the future study in establishing more efficient law approach in protecting the victim of rape committed by a young offender.

Keywords: *Presumption of fact, presumption of law, rebuttable presumption, irrebuttable presumption, conclusive presumption, rape***.**

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INTRODUCTION

The issue of rape committed by a young offender must be taken into a deep consideration and should be regard as a crucial social ill nowadays. Notwithstanding a numerous reported rape cases in Malaysia, there are numbers of cases were unreported due to the idea of not to tarnish the reputation of the accused child as he might have brighter future, assumption of incapability of rational thinking and sexual intelligence by a child as well as to protect the good name of the family. However, it is thought that there should be an urgent need for the review of such presumption in order to uphold justice at the right place.

Hence, this paper attempts to review for repealing the principle of irrebuttable presumption of law that a boy under the age of thirteen years is incapable of committing rape as stipulated under Section 113 Evidence Act 1950. Historically, it is to be noted that the Malaysian Evidence Act is based on the Indian Evidence Act 1872, which had its initial draft in the 19th century and that draft was based on English law which was originally passed by the British parliament in 1872. The presumption that a boy under 14 is incapable of sexual intercourse is longstanding and has its origins in Roman law, which applied 14 as the age of puberty where this was relevant in judicial proceedings.[3] In the nineteenth century case of *R v Waite,*[4] Lord Coleridge CJ. said that the rule at common law clearly laid down that "*a boy under fourteen is under a physical incapacity to commit the offence [of rape].*"[5] He went on:

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[3] Namibia High Court case of *The State v Bernard Guibeb and six others,* Case No: CC 41/97, at 2, 19 August 1998, accessed April 4, 2023,https://namiblii.org/system/files/judgment/high-court/1998/8/1998_8.pdf/retrieved

[4] [1892] 2 QB 600.

[5] [1892] 2 QB 600, at 601. The case involved a boy aged 13 having carnal knowledge of a girl aged eight. The boy's conviction of the felony of carnal knowledge of a girl under 13 was quashed, but he was sentenced to two months' imprisonment for common assault. The sentence of whipping was also cancelled. Blackstone's Commentaries on the Laws of England also wrote that "*A male*

> *That is a presumption juris et de jure, and judges have time after time refused to receive evidence to show that a particular prisoner* was *in fact capable of committing the offence.*[6]

It is to be noted that this ironclad rule was abolished by Britain by the reason that *"it belongs to the family of legal fictions that exist to protect the young, but developments in recent years in criminal law and in sentencing policy have removed any need for it and, in abolishing it, we would do some good and no harm."* (Lord Lucas, in his speech delivered in 1993, supporting the abolition of the provision equivalent to Section 113).[7] This means, the abolitionists oppose the idea of this presumption because its existence is absurd and would give rise to injustice as the young offenders will be protected from being charged with this kind of heinous offence.[8]

What remains ironic is that this rule, although inherited from the colonial, was later abolished by Britain in 1993. Yet, Malaysia has chosen to maintain it in the Evidence Act 1950, embracing it as part of our law. Many forums on rape law have been organised but the powers that have remained either indifferent or

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infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it." (Loc cit., IV 212).

[6] *Ibid*.

[7]Lord Lucas, L. M. Sexual Offences Bill, accessed on December 7, 2019. Parliament.uk:https://api.parliament.uk/historic-hansard/lords/1993/jun/22/sexual- offences-bill

[8] The Star Online, "Abolish Archaic Section 113." The Star, accessed on December 5,2 013, https://www.thestar.com.my/opinion/letters/2013/12/05/abolish-archaic-section-113/

[7] See SAcLJ 267 (1996), 276. Section 8 repeals section 115 of the Act in order to abolish the irrebuttable presumption of law that a boy under 13 years old is incapable of rape through Evidence (Amendment) Act 1996.

lackadaisical in abolishing the infamous Section 113. It is to be noted that several other commonwealth countries that apply similar evidence laws (including Singapore) have removed their equivalent of Section 113 from the statute in order to preserve the interest of the community. If they can, why not us. Therefore, it is opined that the irrebuttable presumption of law that a boy under the age of 13 incapable of committing rape should be abolished.[9]

Under the common law principle, there are two types of presumption which are voluntary and involuntary presumption. The difference between these two types of presumption is the former is permissive and the later is mandatory. Presumption is known as a statutory direction used to designate an inference, affirmative or negative, of the existence of some facts, drawn by the court. It is an inference of a fact made by the court upon proof of existence of certain facts known as basic facts. The presumed facts will be deemed as established or proven though no evidence tendered to prove its existence.[10]

In the case of *PP v Chia Leong Foo*,[11] the court held that presumption does not deal with admissibility of evidence but with a special mode of proving facts which must be proved by evidence. Other cases such as *Ng Kim Huat v PP*,[12] also held a similar view pertaining to presumption by the court.

The rationale behind the drawing of presumption is when the flow of a case is disrupted by the inability to produce evidence even though logically may be deemed to be in existence because of certain factors, which eventually give rise to such fact. For example, a handwriting of a dead person will find it difficult to prove the maker actually did it or not. In the event where the

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[9] Habibah Omar, Siva Barathi Marimuthu, Mazlina Mahali, *Law of Evidence in Malaysia*. 2nd ed, (Kuala Lumpur: Sweet & Maxwell, 2018), 509.

[10] Mohamad Ismail Mohamad Yunus. *The Eyes of the Laws*. (Kuala Lumpur: Anaasa Publication, 2022).

[11] [2000] 6 MLJ 705.

[12] [1961] MLJ 308.

maker is found dead, the court may draw presumption in order to overcome a stumbling block. Presumption must essentially be an inference of certain facts which is observed from the common course of nature, constitution of human mind, the usages and habits of society as well as ordinary course of human affairs.

In Malaysia, presumption is further categorised into two types which are presumption of law and presumption of facts. Presumption of law refers to inference that must be made and an individual has no discretion to reject such presumption. Another kind of presumption of law also indicated that conditional control of human logic is allowed. Meanwhile, presumption of facts is while presumption is drawn, the court has discretion to decide based on human logic.[13]

PROTECTION PROVIDED TO CHILDREN UNDER THE PENAL CODE

Section 82 of the Penal Code (PC), gives absolute protection to a child below 10 years of age from being prosecuted and punished for any offence as it states,

> *Nothing is an offence, which is done by a child under ten years of age.*

This is an irrebuttable presumption which would already be applicable for rape cases. Contrastingly, Section 83 of the PC provides conditional protection for a child above 10 and below 12 years of age as it states:

> *Nothing is an offence which is done by a child above ten years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion".*

Therefore, a person between the age of 10 and 12 is presumed to be *doli incapax* but this presumption is rebuttable

[13] Mohamad Ismail Mohamad Yunus. *The Eyes of the Laws*. (Kuala Lumpur: Anaasa Publication, 2022)

depending on the accused's degree of understanding of the nature and consequences of his act at the time of the commission of the crime. The burden of proof to determine whether the child offender has reached a sufficient level of understanding concerning the nature and consequences of the crime is on the part of the child.[14] Henceforth, it is submitted that child offenders are safeguarded with adequate protection under the Malaysian criminal justice system.

Despite such existing protection, one might wonder the justification for the absolute protection given to a male child below the age of 13 in respect of the crime of rape under Section 113 of the EA 1950. Indeed, the same child could be charged for attempted rape instead,[15] but this is particularly when Lord Lucas's speech is of relevance. He labelled the rebuttable presumption as a fictitious provision to protect the young. Rape victims of rapists below the age of 13 are likely to be younger than them. Must be younger, as evidenced in the two cases stated beforehand concerning a 5 and 6-year-old girl. In their formative years, having to go through one of the most inhumane experiences, that is rape, is simply cruel and is likely to leave the victims with long term psychological impacts, trauma, and behavioral changes. Henceforth, the victim's rights must be elevated in heinous crimes such as rape.

In another form of protection accorded to children under the Malaysian law is that if the accused person is a 'child' in accordance with Section 2 of the Child Act 2001 (CA 2001),[16] such a child would be tried for offences following the CA 2001.

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[14] Hussin, N, "Juvenile Delinquency in Malaysia: Legal Framework and Prospects for Reforms*." IIUM Law Journal* (2012), accessed December 6, 2019, https://journals.iium.edu.my/iiumlj/index.php/iiumlj/article/view/68

[15] *Nga Tun Kaing* [1917] 18 Cr. L.J. 943

[16] Mohamed, A. A. "Sexual misconduct in academic settings: domestic law and practice in Malaysia." *IIUM Repository* (2014), accessed December 6, 2019,http://irep.iium.edu.my/40232/1/International_Journal_of_Private_Law_Article.pdf

This essentially means that the procedure and punishment for the offence committed by the child would be different from the procedure and punishment applicable to an adult. A 'child' in relation to criminal proceedings is anyone between the age of 10 and 18 by virtue of Section 2 of the CA 2001. The biggest safeguard given to a child under the said statute is the establishment of the court for children which is a special court to decide criminal matters concerning children.[17]

Starting from the pre-trial, trial and post-trial stage, the child is treated differently compared to adult offenders and their identity is protected throughout the process. Imprisonment is considered as a last resort under s. 91(1) of the CA 2001. Henceforth, the form of punishment is not intended to inflict pain, but it is meant to rehabilitate the child.[18] This is another reason why the irrebuttable presumption of law under Section 113 of the EA 1950, cannot be justified. Rapists below the age of 13 could similarly be given the special treatment accorded to a 'child' under the CA 2001, and this particularly proves why the irrebuttable presumption must be abolished to hold the child offender responsible and to give him the proper and adequate rehabilitation required to ensure non-repetition of offences such as rape.

SECTION 4 OF EVIDENCE ACT 1950

Under Section 4 of Evidence Act 1950**,** the presumption is divided into three types. Section 4(1) provides for the rebuttable presumption of fact.

> *(1). Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it.*

The word "may" in the above provision strongly indicates

[17] Mohamed, A. A. "Sexual misconduct in academic settings: domestic law and practice in Malaysia."

[18] *Ibid.*

permissive presumption. Court in its discretion has power whether to invoke presumption or not in certain facts.

Meanwhile, Section 4(2) of Evidence Act 1950, construed for rebuttable presumption of law as stated,

> *(2). Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved.*

In this section, the word "shall" can be interpreted as a requirement. The court must invoke the presumption. The presumption can be rebutted by any evidence relevant to the facts in issue or any relevant facts. Such presumption will be in effect until and unless it is disproved by any other relevant evidence.

The third type of presumption can be extracted from Section 4(3) of Evidence Act 1950, such provision emphasises,

> *(3). When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.*

The Court is bound to make presumptions on the non-existence of the fact. Usually, in such circumstances, the court's hand is tied with the presumption. There is nothing that can rebut the presumption. This presumption is known as the irrebuttable presumption of law. This presumption will be the conclusive proof. One of the sections that falls under this type is Section 113 of Evidence Act 1950. The operation and application of irrebuttable presumption under Section 113 of Evidence Act 1950 will be further elaborated in this paper.

DEFINITION OF IRREBUTTABLE PRESUMPTION OF LAW

The word "conclusive proof" that can be found under Section 4(3) means that the court in this instance does not possess discretion but rather is compelled to draw a presumption of such fact. The court shall not allow the presumed fact to be disproved by any evidence. It is pertinent to note that this presumption will

only apply to the fact that has been declared as "conclusive" by the Act and not the other statute. Some of the examples that can be seen from the Evidence Act 1950 itself such as Section 41, 112 and 113 of EA 1950.

SCOPE AND APPLICATION OF SECTION 113 OF EVIDENCE ACT 1950

Section 113 of EA 1950, provides,

> *It shall be an irrebuttable presumption of law that a boy under the age of thirteen years is incapable of committing rape.*

The content of Section 113 of Evidence Act 1950, can be clearly understood that a child below the age of 13 years old cannot commit rape. Under the doctrine of irrebuttable presumption of law, if the basic fact is proven, the boy cannot be convicted for rape, but instead can be charged and convicted for assault or attempt to commit rape.[19].

The rationale behind this presumption is that a boy below the provided age is incapable of sexual intercourse or in other words, impotent and lacks criminal responsibility for the crime. However, in Malaysia, the minimum age that will be accountable and liable for crime committed started at the age of 10 as provided under Section 82 of the PC. Therefore, Section 82 of the PC is not supposed to give protection to the children who commit crime at the age of above 10. Nevertheless, Section 113 of EA 1950, provides a shield for those under the age of 13 as it is legally presumed that he is incapable of having sexual intercourse and this presumption is irrefutable and cannot in any circumstances be denied.

The doctrine of irrebuttable presumption applicable to Section 113 of the EA 1950, is in line with the latin maxim, the doctrine of *doli incapax*, where a child is incapable of criminal intention or malice even though they are capable of performing *actus reus*. The doctrine of *doli incapax* allows criminal liability

[19] *Nga Tun Kaing* [1917] 18 Cr. L.J. 943 (Rangoon).

to be imposed on those who are fully responsible. This doctrine portrays the effect on the legal validity of the child's will as well as its very existence. Thus, the application of this *doli incapax* itself denies the ability of the child to control his or her own physical body.[20]

Despite the existence of this section and based on the factor of the advancement of technology nowadays, many legal scholars have declared such a provision as an archaic provision that calls for reformation to ensure the efficiency and justice of law in place today. This section has become irrelevant in today's society as it opens the opportunity for the young offenders to commit such a heinous act and thus, ineffectiveness of the law in Malaysia.

The court's hand is tied down by the legal flaw of Section 113 of the Act, tied down by the imperfect legal technicality which is present in Section 113. The presumption cannot be rebutted even though the child has reached the full state of puberty, capable of an erection and penetration and can fully understand the implication of his action. Therefore, such a presumption which is based on legal reasoning does not reflect the human reality and to some extent, it can be illogical relevant.

It is incumbent to note that rape depends on whether penetration has been done and not depending on the age of puberty. The legislature shall reform Section 113 of EA 1950 with having this factor in mind to secure justice particularly to the victim.

LOOPHOLE IN SECTION 113 OF EVIDENCE ACT 1950 STATISTICS OF RAPISTS COMMITTED BY THE YOUNG OFFENDERS (AS OF 2022)

In 2022, the Malaysiakini, has reported police statistics on 2022 the increase in number of rape cases among the juvenile rapists.[21]

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[20] Lauren Eade, "Legal Incapacity", *Autonomy and Children's Rights, Newcastle Law Review* vol. 5 (2003): 160

[21] Azlan Zamhari, "*Increase in cases with juvenile rapists, police warn of*

The report also included the statement by Bukit Aman Principal Assistant Director of the sexual, women and child investigations division (D11), ACP Choo stating that one of the main causes of this problem is due to the easy access to the pornographic material, particularly online and social media.

ACP Choo also said that in most cases involving children below the age of 12 years old, they try to imitate the sex acts portrayed in the videos they have seen. Nevertheless, she made remarks that the offence committed by these juvenile offenders were due to either they are unaware or lacked the maturity to understand the consequences of rape.

Her statement on the exposure of minor to the explicit content was supported by the opinion of consultant pediatrician Dr. Amar Singh HSS, that agreed on such factor which could have contributed to the increasing number of juvenile rape cases.

Dr. Amar also added another reason was due to insufficient sex education at schools which is pertinent for children to possess knowledge, especially on sexual protection behaviour. The children should know how to handle when they are exposed to material such as pornographic and others to protect themselves against immoral behaviour.[22]

According to this report, it can be said that the advance the technology, the higher the risk of children being exposed to sexual materials, the higher the number of juvenile offenders in rape cases. On the other hand, Malaysian law cannot aid to curb this increasing in number in rape case among young offenders due to ineffective and inefficient law in operative. The worst is that Section 113 of the Act, even provides shields to the offenders and does not secure justice for the victim. In such circumstances, the heaviest punishment that could be imposed on the offender is he will be convicted for sexual assault case. The fact that the law does not serve the reality indicates poor images of law in

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easier access to explicit content,"Malaysia Kini, accessed 2022, https://www.malaysiakini.com/news/497318

[22] *Ibid*.

Malaysia.

To support the above discussed contention, there are few cases that can be referred to show the ineffectiveness of Section 113 of the EA 1950. However, this paper will only discuss further on two cases.

In the case of *PP v Ahmad Jasni Bin Abdul Ghafar (Juvana),*[23] . In this case, the accused was 11 years old and 11 months at the time of the commitment of the offence. The accused has committed rape against the victim, a 5 years old girl, Nur Shuhada Burak. On 21 October 2000, the accused went to the victim's house. The girl was raped and murdered later on. The girl was found dead with her pants shovelled into her mouth. It was found that the cause of her death was due to asphyxiation and smothering.

The court heard the case in an open High Court since it involves with an offence under Section 302 of the PC, as he was charged with the offence of murder. Even though Section 4(4) Juvenile Court Act**,** provides that the court has jurisdiction to try all kind of offences but not, the offence punishable with death.

At first the accused denied the offence charged, but after testimony from the fourth prosecutor's witness, the accused pleaded guilty to the offence charged. Nevertheless, in this case, the court, pursuant to Section 16 of Juvenile Court Act, cannot impose the death sentence on the accused. This case shows that the accused, 12 years old boy was capable of rape and murder of 5 years old girl. This can be seen when the court accepted his plea of guilt when he was capable of understanding the nature, quality and consequence of his actions when the charge was read against him.

In another case reported in the Sun daily on 4th July 2019, a 12 years old boy has been arrested for sexual assault case had been released on bail. In this case, the boy was alleged to have committed rape against a 4 years old girl. This case shows that the police hands were tied as they cannot investigate the case based on Section 376 of PC since the presumption of Section 113

[23] [2001] MLJU 385.

of EA 1950. protected the accused. Due to that, the boy had been released on bail since he cannot be charged under the severe offence which was Section 376 of PC.[24]

In the former case, it can be seen that the court accepted that the boy was capable of committing rape against the victim since he was capable to murder the girl, which is more severe than rape. The court decided that he had attained sufficient degree of maturity to understand his nature and consequence of his wrong action when the court accepted his plea of guilt. Thus, the former case shows that a boy under age of 13 is capable of committing rape.

Meanwhile, in the latter case, the boy was released on bail because the presumption was invoked. The presumption has become a shield for the police to investigate the case based on the actual offence committed and instead, the offence was amended to be the lesser offence, which was sexual assault (outrage of modesty).

Therefore, based on these two cases, the facts of such presumption deny the presumption that a boy under 13 years old is incapable to commit rape. The children in modern society develop quicker than before due to the advancement of technology, foods and the education system which is reasonable to justify its abolishment. The presumption also causes difficulty on part of the prosecution in proceeding with the case which, in turn, affected the interest of justice and the victims. Based on these reasons, the principle of irrebuttable presumption of Section 113 of the Act, was also alleged to be outdated and no longer relevant.

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[24] Alisha Nur, "12-year-old boy arrested in sexual assault case released on bail", Sundaily, accessed 2019, https://www.thesundaily.my/local/12-year-old-boy-arrested-in-sexual-assault-case-released-on-bail-A B1065882

ASSESSMENT ON MATURITY OF A CHILD: PIAGET'S THEORY

The criminal responsibility and accountability of children can be determined by looking at the factor of capacity. The capacity comprises two main elements, which are cognitive and volitional. Cognitive refers to the ability of a person to understand the requirements of the law and nature and consequence of his action while volitional is pertaining to the ability of a person to have full control of his actions and behaviour with reference to the requirements of the law. Criminal law requires both elements of capacity to be proven for an individual to be held accountable for criminal action. Based on this principle, any child who has not attained sufficient capacity cannot be held criminally accountable unless it is proven otherwise.[25]

It is difficult to distinguish between a child who reaches the age of capacity and a child who has not yet reached the level due to the development of a person that varies from one another. The doctrine of *doli incapax* which literally means "incapable of wrong". This notion can be interpreted as children at a certain age are incapable of discerning between evil and good. Thus, it provides a legal presumption that children are incapable of committing crime unless it is disproved otherwise.

In Malaysia, based on English principle of law, it determines the defence of *doli incapax*, by looking at the test of mischievous discretion. Among the factors evaluated based on this test includes the conduct of the child accused, his family background, evidence obtained during the police investigation, education background, expert evidence, and others.

Scientists and psychologists manage to produce more useful scientific discoveries on the relationship between the age and development of children's capacity. Among them is Piagets's theory founded by Jean Piaget. According to Piaget's theory, cognitive development can be classified into four main phases,

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[25] MacDiarmid, C., 2007. *Childhood and Crime*, Glasgow, Dundee University Press: 230.

which are:

STAGES	AGES
Sensorimotor	Birth- 2 years
Preoperational	2-7 years
Concrete operation	7-11 years
Formal operations	11-15 years

Based on Piaget's theory, a child at the age of seven is said to have the ability to think and make decisions independently. However, the child at the age of eleven is already capable of forming abstract reasoning. The theory indicates at the stage of formal operations, children have reached the level of maturity that is equal to an adult.[26]

It is noted that Piaget's theory is supported by Kohlberg's theory which emphasises each person undergoes three phases of moral development, namely the pre-conventional, conventional and post-conventional phases. Based on this theory, children who reach the conventional morality stage (from 11 years and above) have attained the minimum level of maturity, capable of differentiating between right and wrong.[27]

ISLAMIC PERSPECTIVES ON THE AGE OF CRIMINAL LIABILITY

Allah S.W.T. has made the age of puberty for someone as the time when he reached a maturity in his thoughts where he is

[26] MacDiarmid, C., 2007. *Childhood and Crime*, Glasgow, Dundee University Press: 230.

[27] Kendra Cherry, VeryWellMind, accessed on May 23, 2023, https://www.verywellmind.com/piagets-stages-of-cognitive-development-2795457

responsible and accountable for his actions. The Islamic scholars have differing opinions when determining the age of puberty for someone: [28]

Scholars from Shafi'i, Ahmad, Abu Yusuf from Hanafi on his second opinion, which also a fatwa in the *mazhab* and al-Awza'ie said the age of puberty for both boys and girls is when they reach 15 years old (*qamariyyah* years), which has been set by the scholars from *mazhab* Shafi'i, according to a narration by Ibn Umar:

> *I offered myself to the Prophet S.A.W. for battle of Uhud when I was 14 years old, and the Prophet S.A.W. did not allow me, for he does not consider me as someone who has reached the age of puberty. I offer myself to the Prophet S.A.W. when I was 15 years old for battle of Khandak and he allowed me for he considers me as someone who has reached puberty.*[29]

In Sunan Ibn Hibban (4728) and the original narration can be found in al-Sahihayn Imam al-Shafi'i said that the Prophet S.A.W. has rejected 17 companions, for they are 14 years old and is not considered as someone who has reached puberty. After that, the Prophet S.A.W. met companions of the age 15 years old, then he allowed them. Among them are Zaid bin Thabit, Rafi' bin Khadij and Ibn Umar.

> *When a child matures to the age of 15 years old, then what he did will be written and he will be responsible for his deeds and hudud is applicable to him.*

Al-Malikiyyah states that the age of puberty is 18 years old, it is also said it is until he dreams (and ejaculates), according to a *hadith* of the Prophet S.A.W.:

> *The pen has been lifted from three; for the sleeping person until he awakens, for the boy until he becomes a*

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[28] *International Journal of Ethics in Social Sciences*, vol. 3, No. 2, (December 2015): male become adults at the age of 18 years.

[29] This narration is written by Imam Ibn Hajar al-Asqalani in al-Talkhis al-Habir on 106/3 and Imam al-Baihaqi states that the hadith is dhaif

> *young man and for the mentally insane until he regains sanity.*[30]

While girls, they reach puberty when their menstruation starts. The Prophet S.A.W. said:

> *The Salat of a woman who has reached the age of menstruation is not accepted without a Khimar*[31]

Or when they are pregnant or when they experience growth of pubic hair. Al-Hattab presented five opinions in the *mazhab*, some said 18 years, 17 years and some commentators of the book al-Risalah added the age of 16 years old, 19 years old and Ibn Wahab said it is 15 years old according to a narration by Ibn Umar. However, Abu Hanifah stated the age of puberty is when a boy reaches the age of 18 years old and a girl when she is 17 years old. This is in accordance with a statement by Allah:

> *And do not approach the property of an orphan, except in the way that is best, until he reaches maturity.*[32]

Ibn Abbas R.A. said, that the age of 18 years old as the age of puberty is the opinion of a small number of scholars. However, it is accepted that it is the maximum age of puberty for boys while girls reach puberty earlier than boys. Hence, we reduced a year from it (17 years old).[33]

As a conclusion, generally, *mazhab* Shafi'i and Ahmad set the age of puberty for a child as 15 years old (*qamariyyah* years), while *mazhab* Maliki and Hanafi set the age of puberty for a child as 18 years old.[34] In crime committed by juveniles, it does not

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[30]Abu Amina Elias, "Hadith on Responsibility: Pen is lifted from three people" in Daily Hadith Online, accessed 2019, https://www.abuaminaelias.com/dailyhadithonline/2019/05/07/pen-lifted-from-three/

[31] Sunan Ahmad and ashab al-Sunan except al-Nasaie and Ibnu Khuzaimah and al-Hakim from Aisyah R.A. This hadith has a hassan sanad as stated by Syeikh Syuaib al-Arna'outh

[32] Qur'an, 17:34.

[33] *Al-Mausu'ah al-Kuwaitiyyah,* 15-17/2.

[34]A F Bahnassi, "Criminal Responsibility In Islamic Law" in NCJRS

include a person who has not reached the age of maturity as specified by Islamic jurisprudence. In Islam, different schools opined different views regarding the age that attained maturity. Based on the opinion of Imam Malik, Imam Shafi'i and Imam Ahmad, whether male or female, a child becomes an adult by reaching the age of 15 years. However according to Imam Abu Hanifah, a female child turns into an adult by attaining the age of 17 years.[35]

According to research by Ende and Steinbach in 2010, a person who becomes '*aqil* and *baligh* (possessing a complete mental abilities and biological sexual maturity) can be criminally liable for the crime committed. Tellenbach in his research in 2004, stated that, *baligh* person can be penalised for a crime.[36] In *qisas* law, intent will never be considered in a crime committed by a juvenile but instead, it will be based on carelessness. This means retribution will never be imposed against a juvenile. Here, it can be said that Islam considers the age of maturity seriously. If a boy commits sex with a girl and both are minors, the boy as well as the girl will not be considered for *hadd* punishment, but he will be liable to pay *mahr* (dower) to the girl.[37]

If the boy (juvenile) has committed sex with a woman who was not agreeable, he shall not be punished by *hadd* punishment, but will have to pay her dower. However, if the woman is fully willing to commit sex with him, she will not be given the dower.[38]

Based on the Islamic perspectives, it can be seen that different schools have different opinions on the age of maturity. The proposed solutions in handling sexual crime committed by a

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Virtual Library, https://www.ojp.gov/ncjrs/virtual-library/abstracts/criminal-responsibility-islamic-law-islamic-criminal-justice-system

[35]*International Journal of Ethics in Social Sciences*, vol. 3, No. 2, (December 2015): male become adults at the age of 18 years.

[36] *Ibid.*

[37] Munir, *Al-Fatawa Al-Khaniyah*, vol. 3, (2014).

[38] *Ibid.*

child or juvenile are also different from the solutions in Civil law. However, both Civil and Islamic law take into consideration the age of the offender before the offender can be held criminally liable.

HARMONISING BETWEEN OTHER JURISDICTIONS

The Malaysian Evidence Act 1950, is based on the Indian Evidence Act 1872 which is a codified form of the English law as pointed out in the case of *Looi Wooi Saik v PP,*[39] :

> *In this country the question is governed by the terms of the Evidence Ordinance which is the same as the Indian Evidence Act…it is generally accepted that the Indian Act was drafted by Sir James Stephen in 1872 with the intention of stating in a codified form the English law as it stood at that day.*

Therefore, the ironclad presumption of law under Section 113 of the EA 1950, got its roots from the English law which ironically had abolished the presumption equivalent to Section 113 of EA 1950, in 1993. Lord Lucas's speech delivered in 1993 supporting the abolition of the presumption is enlightening as it stated:

> *The ancient presumption that a boy under the age of 14 is incapable of sexual intercourse is not in accord with the facts and perhaps it never was… It belongs to the family of legal fictions that exist to protect the young, but developments in recent years in criminal law and in sentencing policy have removed any need for it and, in abolishing it, we would do some good and no harm….. allow some of the 25 or so boys under 14 who are convicted each year of indecent assault to be convicted of rape if that, rather than indecent assault, is what they have done. That is surely desirable. It will allow justice to be done to the victim of the crime to whom the lesser charge is a grave insult. Rape causes terrible distress. That distress is compounded if victims find that their*

[39] [1962] 1 MLJ 337, p. 339

> *assailants cannot be charged or convicted of the offence which they have committed. Victims' confidence that the law properly recognises their ordeal will be improved, and their recovery may be assisted.*[40]

In abolishing the archaic irrebuttable presumption of law, Section 1 of the Sexual Offences Act 1993, was enacted and implemented in England and Wales.[41] Therefore, it is ironic that Malaysia maintains and embraces Section 113 of the EA 1950, a provision inherited from Britain which they thought were nugatory and unjust as evidenced from the abolition of the presumption.

There are other jurisdictions that have opted to lower the age limit for the irrebuttable presumption of law. For instance, Section 18 of the Tasmanian Criminal Code Act 1924 ("CCA 1924") states:[42]

> *(1) No act or omission done or made by a person under 10 years of age is an offence*
> *(2) No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.*
> *(3) Repealed*

Before the amendment, Section 18(3) of the CCA 1924 stated:

> *A male person under 7 years of age is conclusively presumed to be incapable of having sexual intercourse". This irrebuttable presumption is not applicable in Tasmania anymore and persons between the age of 10 and 14 could be convicted of rape provided the prosecution could prove sufficient capacity of the*

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[40] Lord Lucas, L. M. "Sexual Offences Bill." accessed on December 7, 2019,Parliament.uk:https://api.parliament.uk/historic-hansard/lords/1993/jun/22/sexual- offences-bill

[41] Sexual Offences Act 1993 (UK)

[42] Criminal Code Act 1924 (Tasmania)

> *accused to know the act was wrong. The Law Reform Commission of Tasmania had rightly pointed out that "…it is certainly no longer true that males under 14 are necessarily incapable of the full sexual act.*[43]

On the contrary, Crimes Act 1961 of New Zealand takes a more progressive approach under Section 127 as it states that "there is no presumption of law that a person is incapable of sexual connection because of his or her age.[44]

The term sexual connection can be better understood by reference to Section 128(2) as it states:

> *(2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis, —*
>
> *(a) without person B's consent to the connection; and*
>
> *(b) without believing on reasonable grounds that person B consents to the connection.*

Sexual connection or intercourse is deemed as complete in New Zealand upon penetration and the law establishes that age cannot be a hindrance to such penetration. Thus, there is no irrebuttable presumption of law pertaining to rape in New Zealand.

In the Australian Capital Territory, New South Wales, South Australia and Victoria, the presumption was abolished completely by Section 68(1) of the Crimes Act 1900, s. 61S(1) of the Crimes Act 1900, Section 73(2) of the Criminal Law Consolidation Act 1935, and Section 62(1) of the Crimes Act 1958, respectively. Whereas, in Hong Kong, Section 3 of the Juvenile Offenders Ordinance (Cap 226), fixes the minimum age of criminal responsibility as 10 but in respect of people between

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[43] Criminal Code Act 1982 (Tasmania)

[44] Crimes Act 1961 (New Zealand)

10 and 14 years a rebuttable presumption of *doli incapax* applies. Hence, if the presumption is rebutted, they could be charged and convicted for rape.

As elaborated above, many jurisdictions have ridden their law from the irrebuttable presumption of law concerning rape for the best interest of the society and the victims. Malaysia should take a similar stance as the rebuttable presumption of *doli incapax* would still grant adequate protection to children between the age of 10 and 12 who are charged for rape by virtue of Section 83 of the PC.

It is observed that in some countries, after a thorough research and in line with the development of the technology, have made reformation on the law which is in *pari materia* with Section 113 of Malaysian Evidence Act 1950. Some legal scholars who made commentaries and critics, have made comparisons with few of the actions taken by the Commonwealth countries to ensure the effective operation of the law especially, law in *pari materia* of Section 113 Evidence Act 1950**.** In this paper, a comparison will be made between selected countries to analyse the best proposed solution to solve the problems arising from Section 113 of Evidence Act 1950.

Similarly, in Hong Kong, Section 3 of the Juvenile Offenders Ordinance (Cap 226), stipulates the minimum age of criminal accountability begin at 10 years old. It provides a shield for children under 10 years old that have committed an offence. The doctrine of *doli incapax* applies in this case. Nevertheless, children between the age of 10 until 14 years fall under the category of rebuttable presumption of *doli incapax* since they are not protected under Section 3 of the Juvenile Offenders Ordinance (Cap 226). Therefore, the doctrine of rebuttable presumption of *doli incapax* can be invoked in rape cases involving young offenders at the age of below 14 years old unless it can be proven beyond reasonable doubt that the child truly understands the nature, quality and consequences of the crime committed.

The presumption of sexual incapacity among young offenders under the age of 14 has longstanding and has its origin

in Roman law. As mentioned before, this contention was supported with the case of *R v Waite,*[45] the court in this case held that boy under the age of 14 years old is under the physical incapacity of committing rape. Hence, any evidence to rebut the presumption would be inadmissible. This harsh law became a slap in the face of common sense to Hong Kong when in 2009, the impact of this harsh law has invited difficulties for the court to decide in justice when two boys at the age of 13 years old were convicted of assaulting 12 years old girl when in fact, sexual intercourse had actually taken place.

Based on the above case, it can be seen that the law is still operative in Hong Kong despite the increasing number of rape case among young offenders especially under the age of 13 years old.

Similar position as in Malaysia, Section 115 of the Singaporean Evidence Act, provides for the same provision which held a boy under 13 years old is incapable of committing rape. Nevertheless, this irrefutable presumption was later repealed. Thus, the current position in Singapore provides no protection to the boy under the age of 13 from the offence of rape.[46]

As mentioned above, in New Zealand and Australian jurisdictions, the presumption has been abolished completely. The presumption of incapacity to sexual intercourse based on the age fact or can no longer be invoked in these jurisdictions.

Previously, the presumption under South African law was quite similar to the law in Hong Kong which set the maximum age to receive the protection under this presumption to be 14 years old. However, Law of Evidence and the Criminal

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[45] [1892] 2 QB 600, at 601.

[46] Dr. Ramalinggam, "Irrebuttable Presumption and Its Impact in Cases Involving Children," Studocu, accessed on 2016/2017, https://www.studocu.com/my/document/universiti-kebangsaan-malaysia/evidence-law-i/lecture-notes/irrebuttable-presumption-and-its-impact-in-cases-involving-children/3501718/view

Procedure Act (Amendment Act 1987) has abolished such provision and currently, any evidence may be submitted to rebut such presumption.

Earlier, Canada also provided for the same presumption and the age set up in the provision was 14 years old. Nevertheless, in line with the Law Reform Commission of Canada, Section 154 of the Criminal Code 1985, has been repealed in 1987. The present Canadian law provisions makes it an offence to have sexual connection with a boy or girl under the age of 14.

Based on the comparative study above, many countries have abolished the presumption and any evidence may be admissible to rebut the presumption subject to the discretion of the court. Therefore, Malaysia should have taken the step to reform the archaic Section 113 of the EA 1950, as well.

SUGGESTION FOR LAW REFORMATION

In light of the research findings as above discussed, there are many factors that can be taken into consideration by the legislature in Malaysia to produce effective potential solutions in the process of reformation of Section 113 EA 1950.

After analysing the scope and the loopholes of Section 113 of the Act, it can be said that the doctrine of the irrebuttable presumption in this section is strict, ineffective in order to establish justice, especially to preserve and protect the interest of the victim and put a heavy burden on the prosecutor to prove beyond reasonable doubt in the determining the alternative charge other than rape, if the actual and clear cut case of rape committed by boy under the age of 13 years old.

Many of the commonwealth jurisdictions had abolished the presumption totally which shall be an example to Malaysia to follow as well and not be left behind in this area of law. Even if it is not to be abolished, Malaysia shall have considered to lower the age provided in the section in line with the advance of technology nowadays. Piaget's and Kohlberg's theory above mentioned shall be made as a factor to re-evaluate the age specified for the invocation of the presumption.

Though Islamic law has its own views pertaining to the age of maturity, nevertheless the age recommended by Islamic law is quite high and irrelevant to modern society nowadays. However, the proposed solutions practised in some schools of thought, handling the case involving sexual crime committed by the young offenders can be considered by the legislature in Malaysia, but it is not sufficient to curb strictly and deter other children from committing sexual crime in the future. Strict sentences should be imposed on the offender as a deterrence.

Therefore, this paper recommends the Malaysian legislature to reform the law pertaining to this presumption, either by amending the presumption to be a rebuttable presumption and any relevant evidence may be adduced to rebut the presumption. Another solution would be by lowering the age provided in the section, to be at the age of 12 based on Islamic point of view and theories discussed above. They can also abolish or repeal the law totally as had been done by most of the commonwealth countries.

In order to preserve justice by the implementation of effective law, it is wise for Malaysia to reform the law, particularly on the presumption as to cover the loopholes that arise from the application of the presumption. Law without justice is nothing as the main purpose of having law is to serve justice.

CONCLUSION

Section 113 EA 1950, may seem like a harmless provision from the outset, but the reality is that it is an impediment in law that protects the offender from being held accountable for the offence of rape. The fact that 13-year old's or younger children can commit rape is bewildering but it is not far from the truth that children now are easily exposed to information and pornographic materials are accessible by them. This may be a factor that drives them to commit offences such as rape and a possible solution to that may be setting a minimum age for web surfing etc. Despite the presence of these layers of problems, we cannot negate the fact that Section 113 of the EA 1950, is unjust upon the victims of rape. It favors the notion that any and every boy below the age

of 13 is incapable of rape/penetration but this is far from reality and human nature.

There is no justification for Malaysia to hold onto a law that was inherited from their colonisers who have themselves abolished the same irrebuttable presumption of law which applied to boys below the age of 14. Moreover, as evidenced in the numerous laws emphasised beforehand, a lot of commonwealth countries have repealed their equivalent of Section 113 of the EA 1950. Malaysia's neighbour Singapore also does not have such an irrebuttable presumption of law concerning rape. The welfare of the child must be considered by the court and the punishment imposed must serve as a deterrent and be rehabilitative. After all, everyone's role in society is necessary to guide children, be it an offender or a victim. The presence of Section 113 of the EA 1950 causes more harm than good because the victims' rights are not adequately and justly addressed, and the child offender is given an undeserved and unfair

Lastly, as pointed out by Lord Lucas, the abolishment of Section 113 of the EA 1950, is desirable for only then will it allow justice to be done to the victim. Anything less is a grave insult to the victim. The criminal justice system is not meant to simply punish an offender. It also serves its purpose of deterring similar crimes in society. Indeed, there are only a few cases concerning rape where the offender is below the age of 13 but for those few cases, justice cannot be seen to be done until Section 113 of the EA 1950, is abolished. Such abolition would ensure that the EA 1950, is uniform with the principle of *doli incapax* under Section 82 and 83 of the PC. Furthermore, the child offender's rights are still intact by virtue of the protections accorded by the Child Act 2001. In the interest of justice and protection of vulnerable rape victim's rights, Section 113 of the EA 1950, should be abolished.

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HARMONISATION OF SHARI'AH AND INTERNATIONAL LAW/ CONVENTIONS

HARMONISATION OF *SHARI'AH* AND INTERNATIONAL TREATY

Chouaib Abderachid Ihaddaden[1]
Asma Akli Soualhi[2]

ABSTRACT

This study deeply investigates the overlap between Islamic and international legal frameworks concerning treaties, using a comparative approach to analyse where they converge and diverge. It strongly advocates for integrating Islamic legal principles into existing international treaty conventions, acknowledging the adaptable nature of Islamic law as a valuable asset for enhancing contemporary international treaty governance. Its recommendations focus on creating a complementary framework that merges Islamic jurisprudence with established international legal norms governing treaties. Additionally, the study highlights the importance of fostering dialogue among legal scholars, policymakers, and international bodies to establish universally applicable principles capable of accommodating diverse legal systems. This underscores the significance of incorporating Islamic legal principles to promote a more inclusive and comprehensive global governance system. Ultimately, the study aims to bridge the gap between Islamic and international legal perspectives by recognizing the potential synergy in combining these frameworks. By promoting dialogue and proposing integrated approaches, it seeks to contribute to a more harmonious and inclusive global legal landscape.

Keywords: *Shari'ah*, Islamic Law, international Law, Conventions.

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INTRODUCTION

Throughout history, treaties have served as pivotal instruments in shaping and governing international relations. Their significance spans across civilizations, emerging as fundamental tools within the realm of public international law. Particularly within the context of Islamic history, treaties played a profound role in organising relations between Muslim entities and other civilizations long before the codification of customary procedures by the International Law Commission of the United Nations Association. The intersection of *Shari'ah*, the Islamic legal framework, and international law regarding treaties presents a compelling and multifaceted area of study. The distinct legal foundations, historical contexts, and cultural perspectives embedded within these frameworks demand scrutiny to explore their co-existence, potential harmony, and points of divergence. This research endeavours to delve into the intricate relationship between *Shari'ah* and international law, specifically in the realm of treaty-making, to illuminate the convergence or disparity between these legal systems.

The focal point of this inquiry revolves around the harmonisation between *Shari'ah* and international law concerning treaties. The complexities arising from differences in legal principles, historical underpinnings, and socio-cultural contexts present a challenge in understanding the alignment or divergence of these legal systems, specifically in the domain of treaty formation, execution, and interpretation.

To address this research problem, this study employs the following multifaceted methodology:

1. Literature Review: A comprehensive exploration of Islamic legal texts, including the Qur'an, *hadith*, and seminal works by Islamic jurists, alongside an analysis of foundational international law texts and contemporary scholarly works on treaties.
2. Comparative Analysis: A comparative examination of key principles, norms, and practices of treaty-making in *Shari'ah* and international law, aimed at identifying areas of convergence and divergence.

3. Case Studies: Examination of historical treaties involving Muslim entities and other civilizations to discern legal frameworks, intentions, and implications, alongside contemporary instances where these legal systems intersect or conflict.

DEFINITION OF TREATIES IN ISLAM AND PUBLIC INTERNATIONAL LAW

Definition of Treaties in Islam

In Islam, treaties are a means of organising international relations between the Islamic state and other states, and these treaties fell under various names such as truce, covenant, and security. Islamic action was not limited to concluding treaties related to organising war. Rather, it concluded treaties related to organising neighbouring states and friendly relations in addition to organising some commercial and economic aspects[3].

Definition of Treaties in International Law

International conventions, commonly referred to as treaties, are legally binding instruments given various names (charter, protocol, pact, among others) and govern the rights, duties, and obligations of participating states[4].

"Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[5].

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[3] Hasan Taisir, Shammout. "The Nature of Treaties in Islamic Jurisprudence and International Law." *Journal of Innovation, Creativity and Change* 15, no. 3 (2021): 279-280. https://www.ijicc.net/.

[4] Fran, Djoukeng. "A Guide to the Basics of International Law," The Writing Center at Georgetown University Law Center, USA, accessed 2019, https://www.law.georgetown.edu.

[5] Vienna Convention on the Law of Treaties, 1969, art. 2.

The fundamental difference between treaties in Islam and international law lies not only in their nomenclature but also in their purposes and scope. Islamic treaties encompass a wider array of relationships beyond conflict resolution, incorporating aspects of neighbourly relations, commerce, and economic cooperation. On the other hand, treaties in public international law primarily focus on establishing legally binding agreements between sovereign states, encompassing a range of issues from trade to human rights and peacekeeping.

However, there might exist areas of convergence between the two frameworks. Both systems emphasize the binding nature of agreements and the importance of respecting commitments made between parties. Exploring these similarities and differences can shed light on potential points of harmony or divergence between Islamic and international legal perspectives on treaties, providing insight into the complexities of modern diplomatic relations and legal frameworks.

TYPES OF TREATIES IN ISLAM AND IN PUBLIC INTERNATIONAL LAW

Types of Treaties in Islam

Some scholars have divided the treaties in Islam into two main parts. The first part included the treaties that took place during the era of the Prophet Muhammad S.A.W. These treaties can be given the character of legislation as the treaty is not considered as a source of legislation; it has the character of the rule of the *Sunnah* of the Prophet. It took its rule from the legitimacy of the Prophet's *Sunnah* since it is not considered as an independent source. The second division involved treaties that occurred after the time of the Prophet Muhammad S.A.W. Such treaties cannot be given legislative character unless they are based on Islamic law in its provisions. In a word, treaties are viewed as contracts, involving legislation that is derived from one of the legislation sources on which it is based[6].

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[6] Hasan Taisir, Shammout. "The Nature of Treaties in Islamic Jurisprudence and International Law." *Journal of Innovation, Creativity*

Modern Muslim scholars made the distinction by the beginning of the 20th century. They distinguish a treaty from a contract in two respects: (i) the parties; and (ii) the subject. In a contract, the parties may be individuals or groups in addition to states. In any treaty, on the other hand, the parties are two or more states who conclude an agreement that is formally signed by authorized persons such as the heads of state or their representatives. The treaty's subject is a kind of international relations, affecting importantly the relations among states of the international community. In the case of a contract, however, almost anything other than this is the subject matter of the binding agreement. A contract will count as a treaty if its parties are both states and its subject matter is to do with their relations. This distinction is not made in classical *fiqh*. The parties to a contract may be states, groups, or individuals, but this is also true of treaties. Similarly, there is no distinction in their subject matter; treaties are not restricted to relationships between states as modern Muslim scholars have argued. Muslim jurists limited the Islamic treaties to the purposes of friendship and trade exchange, conciliation, protection pledges, safeguard covenants, and armistice treaties[7].

Types of Treaties in Public International Law:

Article 2 of the Vienna Convention on the Law of Treaties (VCLT) acknowledges treaties between states without explicitly delineating specific categories. It recognises the validity of treaties established between two or more States. A "treaty" is defined as follows: "treaty" means an international agreement concluded between States in written form and governed by international law,

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and Change 15, no. 3 (2021): 279-280. https://www.ijicc.net/.

[7] Ahmad Mohammed, Masri, "*The Classical Conceptions of Treaty, Alliance and Neutrality in Sunni Islam*," (thesis presented to The University of Newcastle, England 1998), 233-234, https://core.ac.uk/download/pdf/153776012.pdf

whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[8]

International contracts exhibit significant variation in both form and content. Distinctions among different types of contracts arise from their content and formal structure.

There are various types of international treaties based on their nature, broadly categorized into two: contractual treaties and legislative treaties. Contractual treaties encompass agreements between sovereign states that delineate the rights and obligations of the involved parties. These agreements concentrate on specific concerns and necessitate mutual consent. On the other hand, legislative treaties possess a broader scope, aiming to establish general rules and regulations directly applicable to the involved parties.

Another significant classification of international contracts pertains to the number of parties involved. A bilateral treaty denotes an agreement between two sovereign states, addressing the needs and interests solely of the involved parties. These agreements promote direct and targeted cooperation between specific countries. Conversely, multilateral treaties involve three or more sovereign states and address common concerns impacting the entire international community.

Additionally, contracts can be classified into fixed-term and open-ended contracts based on their duration. Interim agreements, also known as provisional agreements, typically address short-term concerns like trade or alliance negotiations. They remain valid for a specified period or until specific conditions are met. If these terms expire or change, these agreements might also expire or require renegotiation. In contrast, permanent treaties establish enduring commitments between states, emphasizing foundational principles and fostering sustainable cooperation. They ensure stability in international relations and govern areas such as human rights and security alliances. Generally, these agreements remain in effect unless mutually modified or terminated by the involved parties.

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[8] Vienna Convention on the Law of Treaties, 1969, Article 2.

However, international law classifies treaties based on their legal nature, the involved parties, and their duration. It emphasizes creating legal obligations, establishing norms, and regulating relations between states. Conversely, Islamic customs stem from a historical context and the application of Islamic law. They prioritise principles like friendship, trade, reconciliation, and protection when shaping international relations.

While direct similarities might not be evident, examining these differences can offer valuable insights into various approaches and considerations. Conflicts between Islamic jurisprudence and international law can arise during the drafting of contracts. Understanding these distinctions is crucial for grasping the complexity of diplomatic agreements and their legal implications within different legal frameworks.

THE VALIDITY OF TREATIES IN SHARI'AH AND INTERNATIONAL LAW

The Validity of Treaties in Shari'ah

i. The Legitimacy:

The structure of an Islamic state adheres to a set of defined principles that prohibit deviation from international treaties deemed necessary when engaging with non-Islamic countries or entities. If any provision within such a treaty conflict with the fundamental principles of the Islamic system, it would be considered a violation. Therefore, it is crucial for an Islamic state, in treaty relations with non-Islamic nations or groups, to ensure that the treaty's subject matter and content align with the general principles of *Shari'ah* law. Failure to adhere to these principles would render the state's actions unlawful. In such cases, the treaty should not be honoured and would be considered null and void, lacking legal standing as if it were never formed.[9]

[9] Habiba, Rhaybi, "Dawer Al Moahadat Al Dawliya fi Mokafahat Al Fasad –Dirasa Fiqhiya Maqasidiya," *Madjalat Jamiaat Al Amir Abd Al Kader Li AL Ouloum Al Islamiya, vol.36, No.03, Al jazair*, (2022): 76.

ii. Contract eligibility:

The validity of the covenant necessitates that the contracting party be a mentally sound, mature Muslim. Thus, the agreement is deemed invalid if it involves a minor, an individual lacking mental capacity, someone acting under coercion, a non-Muslim, or an incompetent person. Moreover, the authorisation of the caliph or imam is indispensable if the covenant is initiated by someone other than them. The caliph must explicitly grant authorisation, whether in written or verbal form, to represent and engage in a contract on behalf of the *'Dar al-Islam'* with another country or group of people.[10]

iii. The satisfaction:

Similar to any civil contract, a treaty requires the mutual consent and voluntary agreement of both contracting parties for its conclusion and validation. It must be free from defects in consent, such as coercion, fraud, or error. The expression of will must be unrestricted, as the stability of peace relies on mutual consent and choice. Therefore, a treaty established through coercion, oppression, dominance, or deception is considered invalid, contradicting the fundamental requisites of a contract.

iv. Clarity of the treaty:

A treaty must express itself unequivocally, clearly outlining its objectives and defining rights, obligations, and duties in unambiguous terms that require no interpretation or manipulation of words. Phrases that conceal puns, deception, fraud, or ambiguity, leading to confusion, should be avoided as they often hinder the treaty's objectives and may result in the forfeiture of legitimate rights. Historical treaties of the Prophet Muhammad S.A.W. such as the Medina Document and the Treaty of Hudaibiyyah, demonstrate explicit clarity. They adeptly pre-

[10] Wahba, Al-Zuhaili. "Ahkam Al Moahadat fi al shari 'ah al islamia," *Madjalat kulliyat Al shari 'ah wa al kanoun, UAE*, (2020), https://elibrary.mediu.edu.my/books/MAL05647.pdf

empted potential future discord, ensuring a smooth implementation.[11]

The Validity of Treaties in International Law

The validity of international treaties is a crucial aspect of international law that governs the legality and enforceability of agreements between states. Its validity hinges on various criteria, including compliance with legal principles, the parties' capacity to enter into a contract, and a clear expression of intent. These treaties form the foundation of international relations, establishing rights and obligations between states. They undergo meticulous scrutiny to ensure compliance with legal standards and legitimacy.[12]

Eligibility stands as a crucial criterion in validating a contract. It necessitates that all involved parties possess both the capacity and authority to enter into such agreements. The validity of international treaties relies heavily on the authorization and approval of the participating parties during the signing process. The exclusion of any party may compromise the legal standing of the contract.[13]

In summary, legitimacy hinges on the credibility and standing of all parties involved, as well as a clear declaration of intent. These components constitute the foundation for the validity and enforceability of treaties within the realm of international law.

In both *Shari'ah* and international law, fundamental principles such as consent, legitimacy, authority, and clarity significantly influence the assessment of a contract's validity.

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[11] Wahba, Al-Zuhaili. "Ahkam Al Moahadat fi al shari 'ah al islamia," *Madjalat kulliyat Al shari 'ah wa al kanoun, UAE*, (2020), https://elibrary.mediu.edu.my/books/MAL05647.pdf

[12] Rabiaa, Geghrouri. *Al insihab mina al moaahadat al dawlia motaadidat al atraf* (Biskra University, 2021), 8.

[13] *Ibid*.

Adherence to these principles is pivotal for the legal potency and validity of contracts within their respective legal frameworks.

STAGES OF CONCLUDING TREATIES IN *SHARI'AH* AND INTERNATIONAL LAW

Stages of Concluding Treaties in Shari'ah

i. Negotiation:

The initial stage involves the discussion of terms and conditions to be agreed upon, a process well-established since early Islamic times. An illustration of this is evident in the negotiations between the Prophet Muhammad S.A.W. and the Quraysh before finalizing the Treaty of Hudaibiyyah, during which both parties articulated and deliberated on their respective proposed terms and conditions.[14]

ii. Written treaties:

In *Shari'ah*, when terms are agreed upon, they represent mutual pledges rather than an immediate treaty. To transform these pledges into a treaty, they must be documented in writing. Examining Islamic treaties reveals their concise nature, often serving specific purposes: for ceasefire and reconciliation (*muhadanah*), the imposition of a poll tax (*jizyah*), or ensuring safeguarding/protection (*aman*). The typical format of these treaties commenced with an invocation invoking the names of god, such as *"In the Name of God, the Most Gracious, the Most Merciful,"* followed by the identification of the parties involved, including the status of Prophet Muhammad S.A.W. as "*Muhammad, the Messenger of Allah".* Subsequently, the treaties delineated their main objectives and terms, expressed in clear language to prevent any potential misunderstanding.

The procedural act of documenting agreements stands as a foundational principle in Islam's approach to interactions, be it

[14] Wahba, Al-Zuhaili. "Ahkam Al Moahadat fi al shari 'ah al islamia," *Madjalat kulliyat Al shari 'ah wa al kanoun, UAE*, (2020), https://elibrary.mediu.edu.my/books/MAL05647.pdf

among Muslims or in dealings with others. This was mentioned in the Qur'an in various places, in which it is legislated that writing is a general principle to affirm agreements[15]. The following verse is an example of that:

> *O believers! When you contract a loan for a fixed period of time, commit it to writing. Let the scribe maintain justice between the parties. The scribe should not refuse to write as Allah has taught them to write. They will write what the debtor dictates, bearing Allah in mind and not defrauding the debt. If the debtor is incompetent, weak, or unable to dictate, let their guardian dictate for them with justice. Call upon two of your men to witness. If two men cannot be found, then one man and two women of your choice will witness—so if one of the women forgets the other may remind her.1 The witnesses must not refuse when they are summoned. You must not be against writing ˹contracts˺ for a fixed period—whether the sum is small or great. This is more just ˹for you˺ in the sight of Allah, and more convenient to establish evidence and remove doubts. However, if you conduct an immediate transaction among yourselves, then there is no need for you to record it, but call upon witnesses when a deal is finalized. Let no harm come to the scribe or witnesses. If you do, then you have gravely exceeded ˹your limits˺. Be mindful of Allah, for Allah ˹is the One Who˺ teaches you. And Allah has ˹perfect˺ knowledge of all things.*[16]

After the expansion of the Islamic Empire, and particularly during the Umayyad era, treaties became more complex; therefore, the Caliphs invented a new position called "the writer of messages". His duty was to draw up, write and then stamp the treaties and the official letters of the Caliph.[17]

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[15] Ahmad Mohammed, Masri, "*The Classical Conceptions of Treaty, Alliance and Neutrality in Sunni Islam*," (thesis presented to The University of Newcastle, England 1998) 233-234, https://core.ac.uk/download/pdf/153776012.pdf

[16] Al-Qur'an, 2: 282.

[17] Ahmad Mohammed, Masri, "*The Classical Conceptions of Treaty,*

iii. Signing treaties:

This procedure was known since the time of the Prophet Muhammad S.A.W. He stamped every letter and treaty written on his behalf. It was mentioned previously that in the *Shari'ah* the Caliph or whomever he authorized are only persons entitled to sign and stamp the treaty. Islamic treaties therefore always bear the names, the signatures and their date as well as the stamps of the authorized persons. Moreover, it may be said that the Islamic treaty was unique at this time where it required witnesses to put their signatures on the treaty. Searching for this method in the counterpart treaties in international law shows that this procedure is not required.[18]

iv. Ratification of treaties:

In the *Shari'ah*, confirmation of any treaty concluded or to be cancelled must be done either by the direct approval of the Imam or through the use of consultation on the part of the supreme jurists (*Syura*). After these informal consultations there emerged later the Advisory Council Majlis al-Syura which confirms such treaties. An example of the first procedure was the Hudaibiyyah treaty where the Prophet Muhammad S.A.W. approved the treaty without consulting his followers. An example of the second procedure was the treaty between the Islamic State and the Cypriots during the time of `Abbasides and under the governorship of Abdul Malik Ibn Salih Ibn 'Abbas. When the Cypriots raised a rebellion, the governor was forced to cancel the treaty, and so he addressed a question to leading jurists of his time such as al-Layth Ibn Sa'ad, Imam Malik Ibn Anas, Sofyan Ibn Tyayna, Musa Ibn A'yun, Ismael Ibn `Ayyash, Yahya Ibn Hamza, Abu Ishaq al-Fazari and Makhlad Ibn al-Hussein seeking a legal opinion to justify his decision.[19]

Alliance and Neutrality in Sunni Islam," (thesis presented to The University of Newcastle, England 1998) 219, https://core.ac.uk/download/pdf/153776012.pdf

[18] *Ibid*., 219-220.

[19]Ahmad Mohammed, Masri, "*The Classical Conceptions of Treaty, Alliance and Neutrality in Sunni Islam*," (thesis presented to The

Stages of Concluding Treaties in International Law

During the negotiation stage, participating countries exchange perspectives to reach an international agreement.[20] Once negotiations conclude, the subsequent step involves dealing directly with international treaties. The final version, including formatting, is agreed upon, resulting in the creation of a formal document.[21] Moreover, the signing of a treaty is a process conducted by individuals acknowledged as participants in international law. This act symbolizes their satisfaction and commitment to the terms outlined in the agreement, formalizing the documents agreed upon during negotiations.[22] Additionally, ratification stands as a pivotal step in completing an international treaty, forming the bedrock of its legitimacy. Through this process, the parties involved assume the obligations stated in the treaty, effectively implementing its provisions. Ratification represents a formal commitment by each state party to adhere to its domestic laws and constitutional procedures.[23]

While both systems involve negotiation, documentation, signing, and ratification, the *Shari'ah's* emphasis on religious aspects, like invoking the name of God and the involvement of specific authorities, distinguishes it from international law. Additionally, the requirement of witnesses' signatures in *Shari'ah* treaties differs from common practices in international law treaties.

University of Newcastle, England 1998) 220, https://core.ac.uk/download/pdf/153776012.pdf.

[20] Ben Hawa, Amina. "Marahil Ibram Al Moaahadat Al dawliya wa Idmadjiha dimen Al Nidam Al Qanouni Al Djazairi," *Madjalat Al Bouhout wa Al Dirasat Al Qanouniya wa Al Siyasiya* 9, No2, (2019): 41.

[21] *Ibid*, 42.

[22] *Ibid,* 43

[23] *Ibid*.

THE TERMINATION OF THE TREATY IN SHARI'AH AND INTERNATIONAL LAW

The Termination of The Treaty in Shari'ah

The termination of a treaty marks the conclusion of its effects and the cessation of its validity between the involved parties. When both parties agree to end the treaty, it's termed the conclusion of the treaty. However, if one party unilaterally ends it, it's referred to as the denunciation of the treaty. The treaty can expire under the following circumstances:[24]

i. The expiry of the treaty term
ii. Violation of the terms of the treaty
iii. Assault by one party on the other
iv. Commit serious crimes (The scholars differed)

The Termination of The Treaty in International Law

Termination of the treaty based on the agreement of the parties previous will:

The termination of treaties based on the agreement of the parties is a recognised principle within international law, as detailed in Article 54 of the Vienna Convention on the Law of Treaties (1969):

> *Termination of or withdrawal from a treaty under its provisions or by consent of the parties. The termination of a treaty or the withdrawal of a party may take place:*
>
> *(a) In conformity with the provisions of the treaty; or*
> *(b) at any time by consent of all the parties after consultation with the other contracting States.*[25]

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[24] Wahba, Al-Zuhaili. "Ahkam Al Moahadat fi al shari 'ah al islamia," *Madjalat kulliyat Al shari 'ah wa al kanoun, UAE*, (2020), https://elibrary.mediu.edu.my/books/MAL05647.pdf

[25] Vienna Convention on the Law of Treaties, 1969. Article 54.

This article delineates various scenarios under which a treaty may be terminated, namely the termination of the treaty by its full implementation, the termination of the treaty with the expiration of the period specified for it, the termination of the treaty by fulfilling the rescinding condition and the termination of the treaty with the impossibility of its implementation.

The termination of the treaty by the (subsequent will) of its parties consist of an agreement to terminate the previous treaty, and the provisions of a later treaty conflicted with the provisions of an earlier treaty

i. Termination of an international treaty by the will of one of its parties:

The Vienna Convention on the Law of Treaties does outline provisions for the termination of treaties by the will of one of its parties. Article 56 of the Vienna Convention specifically addresses the issue of termination of treaties by notification or notice.

ii. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation, or withdrawal.

> *1. A treaty which contains no provision regarding its termination, and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:*
>
> *(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.*
>
> *2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.*[26]

There are two scenarios under which a treaty may be terminated by the will of one of its parties, as detailed in the

[26] Vienna Convention on the Law of Treaties, 1969. Article 56.

Vienna Convention on the Law of Treaties, namely violation of the provisions of the treaty and impossibility of implementing the treaty.

These scenarios highlight how a treaty can be terminated by the will of one party, either through explicit provisions within the treaty or inferred from the treaty's nature or the intentions of the parties involved, as recognized by the Vienna Convention on the Law of Treaties.

iii. Termination of international treaties for reasons of force majeure:

Article 62 of the Vienna Convention states:

> *Fundamental change of circumstances.*
>
> *1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:*
>
> *(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.*
>
> *2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:*
>
> *(a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.*
>
> *3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also*

> *invoke the change as a ground for suspending the operation of the treaty.*[27]

The termination of international treaties due to force majeure can occur under various circumstances: Firstly, due to state of war. If a state of war arises, it can be considered a force majeure event that significantly disrupts the conditions under which the treaty was established, potentially leading to the termination of the treaty obligations. Secondly, due to circumstances change such as unforeseen and drastic changes in circumstances, natural disasters or other extraordinary events, can also be construed as force majeure. If such changes render the fulfilment of treaty obligations impossible or fundamentally alter the original intentions of the treaty, it might lead to the consideration of terminating the treaty.

These circumstances illustrate situations where force majeure events, like a state of war or substantial changes in conditions, might prompt the revaluation or termination of international treaties.

In both *Shari'ah* and international law, termination of treaties often requires careful consideration of the circumstances and adherence to legal principles. While there may be similarities in the reasons for termination, the specific interpretations and procedures can vary between these legal frameworks.

CONCLUSION

Proceeding from the foregoing, we say that each of the two systems, namely *Shari'ah* and international law, gave great importance to the issue of treaties as a fundamental pillar in the organisation of international relations, which we have highlighted through this study by defining the treaties, showing their types, the conditions for their validity, the stages of concluding and terminating treaties in *Shari'ah* and international law, and this is what led us to reach the following results:

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[27] Vienna Convention on the Law of Treaties, 1969. Article 62.

Islamic law relies on the Qur'an, *hadith*, and jurisprudential opinions. In contrast, international treaty law primarily depends on the consent of states and their agreements. This fundamental difference can create challenges in finding common ground. Various interpretations and schools of thought exist within Islamic jurisprudence, making it difficult to present a unified approach to comply with international treaty law. Despite the differences, there are areas of convergence between Islamic law and international treaty law, such as principles of justice, fairness, and the protection of human dignity.

Through our findings, we draw the following recommendations:

1. The need to strengthen dialogue between legal experts from Islamic jurisprudence and international legal systems to be able to establish common ground by enhancing awareness among legal practitioners, the public and policy makers.
2. Bridging the gaps between Islamic law and international treaty law by holding conferences, seminars, and academic cooperation.
3. Recognizing and respecting the diversity of legal interpretations in Islamic law while achieving harmonisation, starting with areas where there is minimal conflict.
4. A statement of the legal practices that have succeeded in integrating aspects of Islamic law with the law of international treaties and taking them as a model.

HARMONISATION OF *SHARI'AH* AND INTERNATIONAL LAW CONCERNING REFUGEE PROTECTION

Hoda Ahmad Albarak[1]
Chouaib Abderachid Ihaddaden[2]

ABSTRACT

This study addresses the critical issue of refugee protection within both *Shari'ah* and international law. The significance of this topic stems from the vulnerable legal position of refugees, individuals who lack the protection of their home countries, leading to complex legal statuses, especially when uncertainty exists regarding their safeguarding in the countries, they have sought asylum in. Consequently, there is a pressing need to formulate specific provisions and laws to safeguard this right. To accomplish this, the study employs a comparative approach, initially examining the concept of asylum in both *Shari'ah* and international law. It subsequently delves into the current state of refugee protection within these systems, culminating in a comparative analysis of *Shari'ah* and international law concerning the right to asylum. By delineating similarities and differences, the study aims to elucidate the compatibility and disparities between the two systems regarding this pressing issue. This analysis is imperative as refugee matters significantly impact security, economic, social, and legal dimensions. Moreover, the study emphasises the necessity of international codification based on Islamic law principles to regulate the refugee issue. While international law is viewed as a man-made law fraught with deficiencies, *Shari'ah's* edicts emanate from a divine source, deemed free from imperfections.

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Keywords: Shari'ah, refugee protection, international law, safeguarding refugees.

INTRODUCTION

The recent surge in the phenomenon of seeking asylum is attributed to various causes, including religious, economic, environmental, and notably, political upheavals resulting in conflicts and exposure to oppression and tyranny—whether on a domestic or international scale. Consequently, the organisation of refugees has encountered exceptionally intricate challenges, necessitating deeper examination. The international community, recognising this, has dedicated efforts toward organising and safeguarding refugees. This commitment traces back to the League of Nations era and continues through the establishment of the United Nations. The focus has been on finding solutions by creating a framework of legal foundations and relief organisations worldwide, a matter embedded in *Shari'ah* over 14 centuries ago. *Shari'ah* took pioneering steps in formulating precise regulations, ensuring comprehensive protection for refugees, and outlining their rights and responsibilities. This realisation underscores the harmonisation existing between *Shari'ah* and legal frameworks concerning refugee protection. This alignment is substantiated by addressing the following issues:

What are the concepts of asylum and the means of protecting the refugee in *Shari'ah* and international law, and what are the points of similarities and differences between both systems in the context of the right to asylum?

THE CONCEPT OF ASYLUM IN SHARI'AH AND IN INTERNATIONAL LAW:

The Concept of Asylum in *Shari'ah*

The concept of asylum in the Qur'an

a) Al-Istidjara:

> *And if anyone of the Mushrikun (polytheists, idolaters, pagans, disbelievers in the Oneness of Allah) seeks your protection then grant him protection, so that he may hear the Word of Allah (the Quran and then escort him to where he can be secure, that is because they are men who know not.*[3]

b) Al-Hijra:

Migration is the departure from one land to another. At the beginning of the emergence of this great religion, the early Muslims of the Prophet's companions were subjected to enmity and persecution, which prompted them to migrate to Abyssinia, as they later migrated to Medina. The Almighty said:

> *For the poor emigrants, who were expelled from their homes and their (And there is also a share in this booty) property, seeking Bounties from Allah and to please Him. And helping Allah (i.e., helping His religion) and His Messenger Muhammad S.A.W. Such are indeed the truthful (to what they say).*[4]

c) Aman (safeguard):

The institution of *aman* is a subset of the concept of asylum in Islamic Law and involves the granting of refuge by a Muslim to a non-Muslim. The Qur'an states that *"[i]f an idolater seeks asylum with you, give him protection ... and then convey him to safety."* Aman can be granted to anyone and is not dependent upon the political, civil, social, cultural, religious or economic

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[3]Al- Qur'an, 9: 6.

[4] *Ibid,* 59: 8.

characteristics of the person fleeing persecution. As Arnaout notes, "even an idolator fleeing persecution in time of war, who takes refuge in the territory of Islam (*Dar al-Islam*)" is entitled to receive aman[5]. Sanctuary and safe havens "The Ka'bah" (Sacred Mosque in Mecca):

> *And [mention] when We made the House a place of return for the people and [a place of] security…*[6]

The concept of asylum in the Sunnah

a) Asylum to Abyssinia:

Upon searching for a solution to the persecution of the polytheists, the companions sought the Prophet's advice regarding migration, and he S.A.W. replied *"If you were to go to Abyssinia (it would be better for you), for the king (there) will not tolerate injustice and it is a friendly country, until such time as Allah shall relieve you from your distress*". Thus, his companions went to Abyssinia while afraid of apostasy and fleeing to God with their religion.[7] This was the first hijrah (migration) in Islam.

b) The Ka'bah:

The Prophet Muhammad S.A.W. was debarred from the Ka'bah by "the unbelievers" before his forced migration to Medina and upon his return; he was implored by God to "enter the Sacred Mosque secure and fearless". Once gaining access to the Ka'bah, *"... every person is deemed safe, even those who have committed a crime until they emerge from the sanctuary."* No fighting is allowed inside the precincts of the Ka'bah unless the sanctuary itself is attacked and its impartial and protective qualities are also

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[5] Kirsten Zaat, "The protection of forced migrants in Islamic law," (Australia: University of Melbourne, 2007), 20 https://www.unhcr.org/476652cb2.pdf

[6] Al-Qur'an, 2:125.

[7] Shahnaze Safieddine, *Migration to Abyssinia, Message of Thaqalayn*,12, no. 2. (2011),

revealed in the fact that armistices were declared and treaties were negotiated on its premises between warring parties[8].

c) The city of Medina:

The Prophet Muhammad also identified the city of Medina as a sanctuary in which he sought refuge upon his forced migration from Mecca. The Prophet is recorded as having said

> *I was ordered to migrate to a town ... called Yathrib and that is Medina ... [t]he terror ... will not enter Medina... Medina is a sanctuary ... a sanctuary from that place to that. In a hadith narrated by Abu Huraira the Prophet is thought to have said "I have made Medina a sanctuary between its two mountains (Harrat).*

The Prophet went to the tribe of Bani Haritha and said, *"I see that you have gone out of the sanctuary,"* but looking around, he added, "*No, you are inside the sanctuary*." The Prophet thus actively promoted the use of Medina as a material sanctuary protecting from harm to the earliest Muslim communities discouraging the *muhajirin* from leaving its safe grounds. Indeed, according to Abu Hurairah R.A. also, *"If I saw deer grazing in Medina, I would not chase them, for God's Apostle said, "(Medina) is a sanctuary between its two mountains."* This suggests at Islamic Law, an expansive approach to the concept of material sanctuary which in this fable-like reiteration provides protection not only to humanity but to all living beings and thereby metaphorically emphasising the gravity with which such sanctuary is associated. Similarly, Sad tells us that "I heard the Prophet saying, "*None plots against the people of Medina but that he will be dissolved (destroyed) like the salt is dissolved in water."*[9]

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[8] Kirsten Zaat, "The protection of forced migrants in Islamic law," 21-22.

[9] *Ibid*.

The Concept of Asylum in International Law

According to the statute of the office of the UN the concept of asylum is as follows:

> *Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it. Decisions as to eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of the present paragraph.*[10]

REFUGEE PROTECTION IN *SHARI'AH* AND IN INTERNATIONAL LAW

Refugee protection in Shari'ah

Shari'ah has given great attention to the refugee and among the protection it provided him we mention: Protection by entering Dar al-Islam and residence as needed or interest (Self-preservation). God Almighty said in the Qur'an:

> *And if anyone of the Mushrikun (polytheists, idolaters, pagans, disbelievers in the Oneness of Allah) seeks your protection then grant him protection, so that he may hear the Word of Allah (the Quran), and then escort him*

[10] United Nations General Assembly: *Statute of the Office of The United Nations High Commissioner For Refugees*, 428(V), Art 1, para 2, Ch 2, December 14,1950

> *to where he can be secure, that is because they are men who know not.*[11]

Based on this, entering this situation is one of his rights that were given to him by Sharia, provided that he does not harm.

Protecting the Refugee by Preserving His Religion

It is the right of the refugee that we leave him and what he owes, and if it is required of us to invite him to Islam, we do not force him to do so, according to the words of the Most High:

> *Let there be no compulsion in religion: Truth stands out clear from Error.*[12]
>
> *Say, "The truth is from your Lord": Let him who will believe, and let him who will, reject.*[13]
>
> *If it had been thy Lord's will, they would all have believed, all who are on earth! wilt thou then compel mankind, against their will, to believe!*[14]

Protection refugee from molestation

God Almighty said in the Qur'an:

> *And [lawful in marriage are] chaste women from among the believers and chaste women from among those who were given the Scripture before you*[15]

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[11] Al-Qur'an, 9:6.

[12] *Ibid*, 2: 256.

[13] *Ibid*, 18:29.

[14] *Ibid*, 10:99.

[15] *Ibid*, 5:5.

No return to the persecuting state

This matter is one of the most important reasons for the protection that the refugee is keen on, as this right is what prevents him from falling into the hands of the authorities of the persecuting state or any place where he fears that this may happen, and given the extreme importance of this right, the *Shari'ah* has approved it, as it stipulated The need not to return the refugee to the state of persecution.

Refugee protection in international law

Refugee Convention 1951 and its Additional Protocol in 1967

On December 14, 1950, the United Nations General Assembly passed Resolution No. 429, urging the convening of a conference of plenipotentiaries to review the draft convention concerning the status of refugees. This draft had been prepared by an ad hoc committee for refugees and stateless persons. Subsequently, this conference took place from July 2 to July 25, 1951.[16] The Convention relating to the Status of Refugees was established on July 28, 1951, following a series of prior international agreements addressing the same issue. Regarded as the paramount international document concerning the protection of refugees and the management of their concerns, this agreement became effective on April 22, 1954.[17]

The contemporary intergovernmental refugee regime was born post World War 2, with the creation of the UNHCR and the adoption of the 1951 Refugee Convention. While initially designed specifically for European war refugees, this legal framework became universal in scope with the 1967 Protocol

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[16] Ben Amarah Sabrina, "Dawer Monadamat Al Omam Al motahida fi himayat Al ladjin,", *Madjalat Al Hakika,* 7(1), (2008): 65, https://www.asjp.cerist.dz/en/downArticle/49/7/1/71734

[17] Hakas Asma, Amrawi Khadidja, "Mostakbal Himayat Al ladjin fi dil masai Hay'at Al Oumam Al Motahida," *Madjalat Al Hokouk wa Al Ouloum Al insaniya,* 15(03), (2022): 1027, https://www.asjp.cerist.dz/en/downArticle/315/15/3/202447

Relating to the Status of Refugees, which removed the previous temporal and geographical limitations to the refugee definition. With 145 and 146 State parties respectively, the 1951 Convention and its Additional Protocol evidence the large consensus existing within international society to protect refugees. Numerous soft law declarations and resolutions have repeatedly affirmed the core importance of asylum, evidencing its nature as a general principle of international law. The principle of non- refoulement, another cornerstone of refugee protection, is likewise widely considered as a peremptory norm of international law.[18]

The role of the UNHCR in refugee protection

The provision of legal protection and humanitarian assistance to groups covered by the UNHCR's mandate stands as a fundamental responsibility of the High Commissioner. This aspect is consistently underscored by both the United Nations General Assembly and the Executive Committee of the High Commissioner. They urge states and other partners of the UNHCR to collaborate, coordinate efforts, and bolster the High Commissioner's material and human resources to effectively fulfill this humanitarian mission. The primary objective behind the establishment of the High Commissioner is to provide international protection. This protection is aimed at safeguarding the fundamental human rights of refugees and ensuring that individuals are not forcibly returned to their country of persecution.[19]

Hence, the High Commissioner collaborates with asylum countries and other UNHCR partners to deliver international

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[18] Nantermoz, Olivia, "International Refugee Protection and the Primary Institutions of International Society" *Review of International Studies* 46, no. 2, (2020): 25. https://doi.org:10.1017/S0260210520000029

[19] Bilal Hamidi Badiwi Hassan, Dawer Al-monadamat, *"Al- Douwaliya Al- hokoukiya fi himayat Al-ladjin: Al-mofawadiya AL-samiya li Al-oumam Al- motahida li shoun Al-ladjin namoudadjan",* (Al-ordon: Modakirat Majister, Jami'at Al-sharq Al- Awsat, 2016): 108.

protection. This process involves various facets, including advocating for countries to permit the entry of asylum seekers, refrain from expelling or returning them to their persecuting state, and ensuring their treatment aligns with international humanitarian standards. Moreover, efforts are directed towards seeking enduring solutions to their challenges, with a focus on the most vulnerable groups, such as women, children, and others, addressing their specific needs. Additionally, the High Commissioner champions international conventions pertaining to refugees, urging countries to ratify and abide by them."[20]

Based on the statute of the United Nations High Commissioner for Refugees:

> *The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organisations…..*[21]

A COMPARISON BETWEEN SHARI'AH AND INTERNATIONAL LAW IN THE CONTEXT OF THE RIGHT TO ASYLUM

First, we will address points of agreement and then points of disagreement between Islamic *Shari'ah* and international law as for as the right to asylum is concerned[22]:

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[20] *Ibid*, 108-109.

[21] United Nations General Assembly: *Statute of the Office of The United Nations High Commissioner For Refugees*, 428(V), Art 1, para 2, Ch 2, December 14,1950

[22] Ahmad Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law*, 1st edition (Riyadh, 2009): 235 https://www.unhcr.org/4a9645646.pdf

Points of Agreement (Similarities) Between Shari'ah and International Law Concerning the Right to Asylum

Inadmissibility of returning a refugee to a country, where he may be at risk of being persecuted (Prohibition of imposing penalties on a refugee on account of illegal entry into or presence on a state territory "The principle of non-discrimination") The humanitarian character of the right to asylum- Inadmissibility of granting asylum to combatant refugees-Admissibility of granting asylum to prisoners of war- The requirement to satisfy refugees' basic needs-The requirement for family reunification- The protection of the refugee's funds and property- Ensuring that a refugee enjoys his essential rights and freedoms as a human being and a legal person- Inadmissibility of granting asylum to (non-political) criminals- Admissibility for an asylum-seeker to avail himself of temporary protection; and Cessation of asylum when conducive circumstances have ceased to exist[23].

Shari'ah (Islamic law) and international law share several common points concerning the right to asylum:

i. Protection of Refugees:

Both *Shari'ah* and international law recognize the importance of providing refuge to those fleeing persecution. They emphasise the duty to protect individuals escaping violence or persecution in their home countries[24].

ii. Non-Refoulement Principle:

Both legal systems uphold the principle of non-refoulement, which prohibits the forced return of refugees to a country where they might face threats to their lives or freedom. This principle ensures the safety and security of individuals seeking asylum[25].

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[23] *Ibid*, 235-236.

[24] Kirsten Zaat, "The protection of forced migrants in Islamic law," 22-23

[25] Ahmad Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law*, 1st edition (Riyadh, 2009): 235

iii. Humanitarian Considerations:

Shari'ah and international law underline the humanitarian aspect of granting asylum. They emphasise the ethical and moral obligation to assist those in need, irrespective of their nationality or religion[26].

iv. Legal Rights and Dignity:

Both legal frameworks recognise the rights and dignity of refugees. They promote fair treatment, access to legal rights, and the provision of basic necessities for asylum seekers and refugees[27].

v. International Cooperation:

Shari'ah and international law encourage cooperation among nations to address refugee issues. They stress the importance of collaboration between states, international organisations, and non-governmental entities to effectively manage refugee crises and provide sustainable solutions[28].

vi. Seeking Permanent Solutions:

Both systems emphasize finding lasting solutions for refugees, either through voluntary repatriation, integration into the host society, or resettlement in a third country[29].

vii. *Respect for Host Country Laws:*

Both *Shari'ah* and international law stress the importance of refugees respecting the laws and customs of the host country

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[26] Ben Amarah Sabrina, "Dawer Monadamat Al Omam Al motahida fi himayat Al ladjin,", *Madjalat Al Hakika,* 7(1), (2008): 65, https://www.asjp.cerist.dz/en/downArticle/49/7/1/71734

[27] Ahmad Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law*, 1st edition.

[28] Nantermoz, Olivia. "International Refugee Protection and the Primary Institutions of International Society", *Review of International Studies* 46, no. 2, (2020) https://doi.org:10.1017/S0260210520000029

[29] Ahmad Abou-El-Wafa, *The Right to Asylum between Islamic Shari'ah and International Refugee Law*, 1st edition

while seeking asylum. This includes adherence to legal processes and compliance with local regulations[30].

While there are similarities, it's also essential to acknowledge that there might be differences in specific interpretations and applications of these principles between *Shari'ah* and international law, given their distinct historical, cultural, and legal contexts.

Points of Disagreement (Differences) Between Islam and International Law in Respect of the Right to Asylum

In contemporary international law, asylum refers to the protection offered by one state to individuals or groups (refugees) from another state. However, in Islamic contexts, the concept differs in several aspects.[31] These differences do not inherently indicate a complete contradiction between Islamic principles and international law; instead, they underscore potential areas where interpretations or applications may differ. It's crucial to recognize that Islamic teachings allow for diverse interpretations, and within Islamic jurisprudence, there might be varying viewpoints regarding asylum that could align more closely with international norms."

CONCLUSION

Through what has been previously stated regarding the harmonisation between *Shari'ah* and international law in the issue of refugee protection, we have reached the following results:

Results:

1. The difficulty of reaching a final solution to the refugee problem because it is linked to several other international

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[30] Shahnaze Safieddine, *Migration to Abyssinia, Message of Thaqalayn*,12, no. 2. (2011)

[31] *Ibid*, 236-237.

issues, such as the issue of organising international migration, economic development and human rights;

2. The inability of intergovernmental organisations to contain the refugee crisis due to lack of financial support;
3. The absence of a unified international policy to address the issue of asylum;
4. At the end of asylum, *Shari'ah* took into account the need to establish security for the refugee. God Almighty said: "…and then escort him to where he can be secure…" , and this is what is unique to the *Shari'ah* from international law;
5. There is no doubt that the principle of asylum in *Shari'ah* is superior to the principle of asylum in international law in terms of source, because its source in *Shari'ah* is God Almighty, while in international law its source is the human mind, this is what makes the principle of asylum in *Shari'ah* an advantage that cannot be achieved in any way by any international laws or human organisations.

Through the results reached, we propose following recommendations:

1. Work to address the reasons leading to asylum;
2. The need to establish an international mechanism that guarantees the application of the principles of international solidarity and burden- sharing among countries in order to find solutions to refugee problems;
3. The need to conduct more research on Islamic sources in order to devise new mechanisms that help ensure protection for refugees at the international level;
4. Persuading countries that have not joined the international legislation on asylum to join or conclude agreements at the regional level or establish national laws concerning this issue;
5. Granting the High Commissioner broader powers and encouraging all persons of international law to cooperate and provide support to it to provide greater international protection for refugees.

HARMONISATION OF *SHARI'AH* AND INTERNATIONAL HUMANITARIAN LAW RULES FOR THE PROTECTION OF PALESTINIAN JOURNALISTS IN ARMED CONFLICTS

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Mohammed R. M. Elshobake[33]

ABSTRACT

The primary aim of harmonisation is to foster harmony between *Shari'ah* and Civil law. It does not entail a complete merging of these two legal systems but rather involves reconciling certain fair differences in specific areas of *Shari'ah* and Civil law. Harmonisation becomes necessary between *Shari'ah* and international humanitarian law, particularly when there are deficiencies in international humanitarian law regarding the protection of civilians. This paper will discuss the harmonisation of *Shari'ah* and international humanitarian law rules for the protection of journalists in armed conflicts. International humanitarian law categorises journalists as civilians and establishes legal regulations to protect them, while Islamic law is similarly committed to protecting civilians during armed conflicts against any form of violation. The research methodology is doctrinal, where several *Shari'ah* and legal documents will be explored for relevant texts in achieving the objective of this paper. The findings showed that harmonisation between *Shari'ah* and international humanitarian law regarding the protection of Palestinian journalists during armed conflicts is a complex and ongoing process that demands meticulous consideration, dialogue, and cooperation. While there might be similarities and shared objectives between the two legal frameworks, differences in sources, interpretations, and enforcement mechanisms

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also exist. This paper's value lies in proposing recommendations to enhance current laws, ensuring better protection of the rights of Palestinian journalists and media professionals, and establishing effective mechanisms to penalise perpetrators of violations against journalists.

Keywords: Harmonisation, *Shari'ah*, IHL, Palestinian journalists, legal protection.

INTRODUCTION

The rules and laws governing armed conflict undoubtedly have profound historical roots. They are derived from fundamental human values that are an integral part of all the philosophies and religions of the world. *Shari'ah* and international humanitarian law (IHL) share a common goal of protecting human life and dignity, including the protection of journalists who are not taking direct part in hostilities. *Shari'ah* provides guidelines for the protection of civilians in armed conflicts, emphasising the principles of proportionality, distinction, and necessity. Similarly, IHL provides rules and principles for the protection of journalists in armed conflicts, including the prohibition of targeting journalists, the obligation to respect their status as civilians, and the duty to facilitate their work.

This study provides an overview of the harmonisation of *Shari'ah* and IHL for the protection of Palestinian journalists in armed conflict, focusing on the principles governing the use of force under Islamic law of war in the four *Sunni* schools. This study briefly discusses the sources, and characteristics of the Islamic law of war. The discussion reveals the degree of conformity between these Islamic principles and modern principles of IHL and provides insight into how harmonising *Shari'ah* and IHL law can help reduce the journalists suffering caused by armed conflicts. Additionally, it underscores the principle of the universality of rights, specifically highlighting the right to equal protection before the law, a fundamental principle governing the entire domain of international human rights law.

THE TERM OF HARMONISATION

The Arabic term for harmonisation is "*tawfiq*", which aims to bring two or more different ideas or systems into agreement or harmony with each other. In the context of legal systems like *Shari'ah* and IHL, achieving *tawfiq* or harmonisation involves finding common ground or reconciling the differences between the two systems.[34]

Harmonisation refers to the process of bringing different legal systems, principles, or norms into alignment or agreement with each other. It involves reconciling and integrating diverse legal frameworks, rules, or practices to achieve consistency, coherence, and mutual compatibility.[35] The process of harmonisation often requires careful examination and analysis of the principles, values, and objectives underlying each legal system. It may involve identifying areas of compatibility, seeking common principles, or finding ways to accommodate certain aspects of one system within the framework of the other.[36] The harmonisation of *Shari'ah* and IHL therefore requires careful consideration, dialogue, and respect for legal pluralism. It is a complex issue that varies depending on the jurisdiction and the specific aspects of the law being considered.[37]

It is crucial to note that IHL's harmonisation technique involves Islamic teachings. In this respect, harmonisation should not be used to make Islamic prohibitions permissible, morality should not be compromised, the Qur'an and *Sunnah* should not be

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[34] Mohammad Hashim Kamali, "Shari'ah and Civil Law: Towards a Methodology of Harmonization," *Islamic Law and Society 14*(3), (2007): 392.

[35] Kidjie Saguin, and Michael Howlett. "Enhancing Policy Capacity for Better Policy Integration: Achieving the Sustainable Development Goals in a Post COVID-19 World." *Sustainability, 14*(18). (2022): 11600.

[36] Arthur Rosett, "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law," *American Journal of Comparative Law, 40(*3) (1992): 683-698.

[37] Shanna Corner, "The Boundaries of Religion in International Human Rights Law", *Journal of Human Rights, 21*(2), (2022): 191-209.

modified, and Islamic justice and equality should not be violated. *Shari'ah's* goals, objectives, public interest, prohibiting evil tactics or pretence, and other principles may be used in this harmonisation process.

In legal literature, the concept of legal harmonisation is primarily discussed in relation to comparative law.[38] Harmonisation refers to particular and broad aspects of the legislation of several nations or states within a federated country in order to improve interactions between their inhabitants.[39]

PRINCIPLES OF HARMONISATION

These guidelines are foundational in harmonisation efforts, though their precise application can vary based on specific circumstances and objectives:

i. Consistency:

Harmonisation aims to establish consistency by aligning and reconciling laws, rules, or legal frameworks. Its goal is to ensure a more uniform and predictable application of the law, resolving disputes, inconsistencies, or discrepancies that may emerge across diverse legal systems or conventions.[40]

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[38] Walter Joseph Kamba, "Comparative Law: A Theoretical Framework." *International & Comparative Law Quarterly. 23*(3), (1974): 485-519.

[39] Martin Boodman, "The Myth of Harmonization of Laws," *American Journal of Comparative Law, 39*(4), (1991): 699-724.

[40] Ahmad Nabil Amir, "Ahmad Ibrahim and the Islamization of Law in Malaysia." *Nurani: Jurnal Kajian Syari'ah dan Masyarakat, 22*(1), (2022): 159-178.

ii. Transparency:

The harmonisation process must be open and honest about its aims, objectives, and procedures. Transparency ensures there are no hidden agendas and fosters trust among involved parties.[41]

iii. Flexibility:

Recognising that different situations may demand distinct approaches, this principle advocates for adaptable regulations capable of accommodating diverse circumstances.[42]

iv. Consensus:

Harmonisation seeks consensus among multiple parties or jurisdictions. Striving for agreement fosters trust and encourages collaboration, facilitating smoother harmonisation processes.[43]

v. Proportionality:

This principle ensures that laws and regulations align with their intended objectives. They should neither be excessively burdensome nor overly restrictive but appropriately balanced to achieve their goals.[44]

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[41] Weny Almoravid Dungga, and Awad Al-Khalaf. "Integration of Labor Law in Islamic Law and Civil Law Citizenship (Harmonization of Principles and Their Implementation in Contemporary Society)", *Jurnal Pamator: Jurnal Ilmiah Universitas Trunojoyo, 15*(2), (2022): 289-304.

[42] *Ibid*.

[43] Salah Uddin, "International Humanitarian Law (IHL) and Islamic Law of Armed Conflict: Exploring Convergence of Rules Applicable to Armed Conflicts among Muslims." (Unpublished, PhD dissertation, University of Portsmouth, 2022).

[44] Ammar Essa Kareem et al., "Related International Legal Rules by Proportionality Principle in Humanitarian International Law." *Russian Law Journal, 11*(9), (2023).

THE IMPORTANCE OF HARMONISING SHARI'AH AND INTERNATIONAL HUMANITARIAN LAW

i. Comprehensive Protection:

Islamic law, rooted in the Qur'an and the *Sunnah* (prophetic traditions), encompasses various legal and ethical facets, notably in security and protection. Integrating *Shari'ah* and IHL allows the incorporation of additional principles into the legal system, enhancing civilian protection in armed situations.[45]

ii. Enhancing Compliance with International Standards:

Harmonisation ensures the alignment of Islamic legal principles with international human rights and humanitarian standards. This alignment fosters greater compliance by states and non-state actors engaged in armed conflicts with universally accepted norms, reducing the likelihood of human rights abuses.[46]

iii. Building Bridges and Dialogue:

Harmonisation initiatives enable researchers, professionals, and stakeholders from diverse legal and cultural backgrounds to engage, understand, and collaborate. Participation in this process cultivated mutual respect and comprehension, leading to collaborative solutions and shared protection of civilians during armed conflicts.[47]

Hence, harmonisation must be conducted while considering the ideals of *Shari'ah* and IHL. The objective is not to supplant any legal framework but to discover synergies and complementary

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[45] Md Hasnath Kabir Fahim, and Mohammad Aktarul Alam Chowdhury, "The Rise and Codification of International Humanitarian Law: Historical Evolution".

[46] Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," *American Journal of International Law, 98*(1), (2004): 1-34.

[47] Ibrahim Salama, Michael Wiener. "'Faith for Rights' in Armed Conflict: Lessons from Practice", *Journal of Human Rights Practice,* (2023): huad015.

measures to safeguard individuals in accordance with international humanitarian values.

SIMILARITIES AND DIFFERENCES OF IHL AND ISLAMIC LAW:

Similarities:

i. Protection of Human Life and Dignity:

Both IHL and Islamic law emphasise the sanctity of life and the dignity of every individual. They strive to alleviate suffering, uphold justice, and safeguard human rights and welfare, particularly in times of conflict.[48]

ii. Prohibition of Unjustified Violence:

Both IHL and Islamic law prohibit unjustified violence against civilians and non-combatants. They condemn deliberate attacks on civilians, torture, and other forms of cruel and inhumane treatment.[49]

iii. Principles of Necessity and Proportionality:

Both IHL and Islamic law stress the necessity and proportionality of the use of force.[50] They restrict the use of force to what is required to accomplish a lawful goal and limit the damage inflicted to the expected military gain.

iv. Protection of Property and Cultural assets:

IHL and Islamic law underscore the preservation of civilian infrastructure, cultural assets, and religious sites during armed

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[48] Thangavel, V. "Protecting and Promoting Human Rights in World Scenarios: A Qualitative and Quantitative Research".

[49] Timea Spitka, *National and International Civilian Protection Strategies in the Israeli-Palestinian Conflict*, (2023): 201.

[50] Muhammad-Basheer A Ismail, "Jihad Misplaced for Terrorism: An Overview of the Boko Haram Crisis from Islamic and International Humanitarian Law Perspectives", *International Conflict and Security Law: A Research Handbook,* (2022): 1389-1419.

conflicts. Recognising their significance to communities, both prohibit their wanton destruction, looting, and deliberate targeting.[51]

Differences:

i. Sources and Interpretation:

IHL derives from international treaties, customary practices, and legal precedents, while Islamic law stems from the Qur'an, the *Sunnah*, and religious scholars. Legal norms and principles may vary based on sources and interpretation approaches.[52]

ii. Religious and Cultural Context:

Islamic law is shaped by the beliefs, practices, and values of Muslim-majority nations and communities. In contrast, IHL is grounded in international law, devoid of religious precepts.[53]

iii. Application to non-Muslims:

Islamic law primarily applies to Muslims, [54] whereas IHL extends its protections to all individuals affected by armed conflicts, irrespective of faith or nationality.[55] This difference in scope may

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[51] Tiberiu Horea Moldovan, "The Russian Invasion in Ukraine and Cultural Heritage Protection", *Journal of Ancient History and Archaeology, 9*(2), (2022): 231-243.

[52] Sami Ur Rahman, et al., "The Conduct of Warfare in Islamic Law and International Law: A Comparative Study", *Pakistan Journal of Social Research, 4*(03) (2022): 815-820.

[53] Ahmed Al-Dawoody, and Alexandra Ortiz Signoret, "Respect for the Dead under International Law and Islamic Law in Armed Conflicts", *Anthropology of Violent Death: Theoretical Foundations for Forensic Humanitarian Action,* (2023): 219-249.

[54] Abdul Halim, "Non-Muslims in the Qanun Jinayat and the Choice of Law in Shariah Courts in Aceh", *Human Rights Review, 23*(2), (2022): 265-288.

[55] Katumi Oboirien, and Ogechi Oge. "Medical Ethics in International Humanitarian Law: Contemplating the Risks and Protection of Medical Personnel in Armed Conflict", (2023) Available at *SSRN 4389218*.

impact the legal safeguards and rights of non-Muslims under Islamic law and IHL.[56]

iv. Differences in Legal Mechanisms:

IHL provides a comprehensive legal framework with international courts and tribunals for implementation, enforcement, and accountability.[57] Conversely, Islamic law is interpreted and applied by national legal systems and religious institutions.[58]

IHL AND ITS CORE PRINCIPLES

IHL constitutes a body of laws and regulations applicable solely in situations where armed violence reaches the threshold of armed conflict, encompassing both international and non-international conflicts.[59]

The primary objectives of IHL are twofold: Firstly, to safeguard individuals who are not or are no longer involved in hostilities. Secondly, to restrict the methods and means of warfare, thereby shielding civilians from the repercussions of armed hostilities.[60]

The main treaty sources of IHL consist of the Hague Convention 1907, which delineates limitations on the means and

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[56] Kaleem Hussain, *Peace and Reconciliation in International and Islamic Law,* (Cambridge Scholars Publishing, 2023).

[57] Sharon Hofisi, *Combating Impunity: Examining Amicus Curiae, the International Criminal Court, and Accountability for Conflict-related Sexual Violence in the Ongoing Ukraine Conflict,* (2023).

[58] Lita Tyesta Addy Listya Wardhani et al., "The Adoption of Various Legal Systems in Indonesia: An Effort to Initiate the Prismatic Mixed Legal Systems", *Cogent Social Sciences, 8*(1), (2022): 2104710.

[59] Okubor Cecil Nwachukwu, "Armed Conflict under International Humanitarian Law," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence, 5,* (2014): 67.

[60] Nils Melzer, "International Humanitarian Law: A Comprehensive Introduction", *International Committee of the Red Cross,* (Geneva Switzerland, n.d): 17.

methodologies of warfare, and the four Geneva Conventions 1949, designed to safeguard specific vulnerable groups. These encompass individuals such as the wounded and sick within armed forces in the field, those wounded, sick, and shipwrecked among armed forces at sea, prisoners of war, and protected civilians. Notably, the Fourth Geneva Convention holds particular significance in humanitarian protection and aid. It was established to prevent the extensive suffering of civilians witnessed during the two World Wars in future conflicts. Expanding upon the realms of law covered in the Hague and Geneva Conventions, the initial two Additional Protocols to the Geneva Conventions 1977 further elaborate on the protection of civilians. These are known as Additional Protocol I, governing international armed conflict, and Additional Protocol II, governing non-international armed conflict.

IHL operates on four fundamental principles that guide its application and enforcement:

1. Humanity

This principle acknowledges the inherent dignity of every human being and aims to preserve and protect human life and dignity during armed conflicts. IHL mandates that all parties engaged in a conflict must respect and safeguard the human rights of individuals, refraining from any acts that might cause unnecessary harm to civilians, wounded or sick combatants, and other non-combatants.[61]

2. Distinction

Conflicting parties must consistently distinguish between combatants and civilians, as well as between military objects and civilian objects. IHL stipulates that the civilian population and

[61] Viola Vincze, "The Role of Customary Principles of International Humanitarian Law in Environmental Protection," *Pecs Journal of International and European Law 2017,* (2), (2017): 27-28.

individual civilians are entitled to general protection against hazards arising from military activities.[62] Breaching the principle of distinction, recognised in customary international law, constitutes a war crime in both international and non-international armed conflicts.[63]

3. Precautions

The principle of distinction also necessitates the duty to prevent or, at the very least, minimise incidental deaths, injuries, and destruction of persons and objects safeguarded against direct attack.[64] Thus, IHL mandates that 'constant care shall be taken during military operations' to disable the greatest possible number of individuals. The use of arms that unnecessarily aggravate the suffering of disabled individuals or render their death inevitable is deemed contrary to the laws of humanity.[65]

4. Unnecessary Suffering

IHL not only safeguards civilians from the impacts of hostilities but also prohibits or restricts means and methods of warfare that cause unnecessary suffering or excessive injury to combatants[66]. Recognising such means and methods as counterproductive, IHL deems it unlawful to employ weapons, projectiles, materials, or

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[62] Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, (Geneva: International Committee of the Red Cross, 2016).

[63] Roma Statute, Art., 8(2), (b)(i)-(ii).

[64] Nils Melzer, *International Humanitarian Law*, 18.

[65] *Ibid*, 18-19.

[66] Emily Crawford, "The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL," *Journal of the History of International Law, 20*(4), (December 2018): 556.

combat techniques that cause extra harm or needless suffering during conflicts.[67]

THE PROTECTION OF PALESTINIAN JOURNALISTS IN ARMED CONFLICTS UNDER ISLAMIC LAW

Islamic law recognises specific situations wherein taking a life might be permissible, such as in cases of self-defence, safeguarding the community from harm, or as a penalty for certain crimes in accordance with due process. However, these instances are subject to stringent conditions and necessitate meticulous assessment within *Shari'ah's* legal framework.

According to the sources of Islamic law, engagement in battlefield combat should solely target enemy combatants, ensuring the protection of civilians, including journalists and non-combatants. Deliberate harm to civilians or non-combatants during ongoing hostilities is strictly prohibited. This principle is explicitly articulated in the verse of Surah Al-Baqarah: "*And fight in the cause of Allah those who fight against you, but do not commit aggression. Indeed, Allah does not like aggressors.*"[68] The Qur'anic interpreters assert that this verse prohibits the engagement of non-combatant adversaries and considers any assault on non-combatants, such as women and children, as an act of aggression that displeases Allah the Almighty.

Furthermore, in verse 32 of Surah Al-Maidah, Allah Almighty stipulates: "*Whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely*."[69] This verse shows that killing a soul is equivalent to the annihilation of all of humanity, and that preserving a soul is equivalent to preserving all of humanity.

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[67] Additional Protocol I, Article 35(1)-(2)

[68] Al-Qur'an, 2:190

[69] *Ibid*, 5:32.

THE METHODOLOGY OF HARMONISING *SHARI'AH* AND IHL IN RELATION TO THE PROTECTION OF JOURNALISTS IN ARMED CONFLICTS

To accomplish the harmonisation between *Shari'ah* and IHL, several approaches must be employed:

1. Comparative Analysis

One approach involves conducting a comparative analysis of the principles and provisions of *Shari'ah* and IHL concerning the protection of journalists. This entails scrutinising the similarities and discrepancies between the two legal frameworks and identifying areas amenable to harmonisation.[70]

2. Interpretation and Adaptation

Another approach entails interpreting the principles of *Shari'ah* and IHL in a manner that allows for their harmonious integration. This may necessitate adapting certain elements of *Shari'ah* or IHL to ensure coherence and address any conflicts or inconsistencies that arise.[71]

3. Dialogue and Consultation

Engaging in dialogue and consultation among scholars and experts in *Shari'ah* and IHL holds paramount importance for harmonisation. This facilitates the exchange of ideas,

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[70] Evrin Lutfika et al., "Comparative Analysis and Harmonization of Global Halal Standards", *International Journal of Halal Research, 4*(1), (2022): 29-39.

[71] Nicolò Aurisano, and Peter Fantke. "Semi-automated Harmonization and Selection of Chemical Data for Risk and Impact Assessment", *Chemosphere, 302*, (2022): 134886.

perspectives, and interpretations, fostering a deeper understanding of each legal framework and pinpointing areas of convergence.[72]

4. Customary Practices

Assessing customary practices within Muslim-majority countries and communities aids in identifying existing mechanisms or norms offering protection to journalists during armed conflicts. Aligning these practices with IHL principles ensures a comprehensive and harmonised approach.[73]

5. Capacity Building and Awareness

Promoting capacity-building programmes and raising awareness among relevant stakeholders, including legal professionals, journalists, and military personnel, assumes significance in fostering a shared understanding of the legal frameworks and the imperative for harmonisation.[74]

6. Institutional Cooperation

Encouraging cooperation among pertinent institutions, such as *Shari'ah* councils, legal authorities, international organisations, and human rights bodies, serves to facilitate the harmonisation process. This collaboration involves sharing knowledge,

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[72] Weny Almoravid Dungga, and Awad Al-Khalaf. "Integration of Labor Law in Islamic Law and Civil Law Citizenship (Harmonization of Principles and Their Implementation in Contemporary Society)", *Jurnal Pamator: Jurnal Ilmiah Universitas Trunojoyo, 15*(2), (2022): 289-304.

[73] Muhamad Hasan Sebyar et al. "Harmonization Patterns of Islamic Legal Institutions and Custom Institutions in District of Mandailing Natal", *YMER, 22*(3), (2023): 1192-1205.

[74] Larry Keener, and Tatiana Koutchma. "Capacity Building: Harmonization and Achieving Food Safety in An Era of Unilateral Legislation", in *Ensuring Global Food Safety*, (Academic Press, 2022), 489-502.

expertise, and best practices to enhance the protection of journalists in armed conflicts.[75]

HARMONISATION BETWEEN *SHARI'AH* AND INTERNATIONAL HUMANITARIAN LAW REGARDING THE PROTECTION OF PALESTINIAN JOURNALISTS DURING ARMED CONFLICTS

The protection of journalists in armed conflicts is essential to ensure the free flow of information and to hold parties accountable for violations of human rights and IHL.[76] This is particularly important in the context of Palestine, where journalists have faced threats, violence, and arbitrary arrest and detention by Israeli forces.[77]

However, there is a discrepancy between *Shari'ah* and IHL regarding the protection of journalists in armed conflicts, particularly in terms of the definition of a journalist and the rules for their protection.[78] While both *Shari'ah* and IHL advocate for the protection of civilians, including journalists, in times of armed

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[75] Ossowska-Salamonowicz, et al., "Harmonisation of the National Laws of EU Member States and the Necessity to Amend the Polish Constitution of 2 April 1997", *Toruńskie Studia Polsko-Włoskie* (2022): 237-250.

[76] Muhammad Asif Khan et al., "Liability of the Private Military Companies for Violations of International Humanitarian Law", *Journal of Law & Social Studies (JLSS), 4*(2), (2022): 247-251.

[77] Timea Spitka, "Palestinian National Protection Strategies and Realities", *National and International Civilian Protection Strategies in the Israeli-Palestinian Conflict*, (Cham: Springer International Publishing, 2023): 71-105.

[78] Ahmed Al-Dawoody, and Pons William I. "Protection of Persons with Disabilities in Armed Conflict under International Humanitarian Law and Islamic Law", *International Review of the Red Cross, 105*(922), (2023): 352-374.

conflict, there are differences in the specific rules and guidelines to ensure their safety.[79]

To ensure the effective protection of Palestinian journalists in armed conflicts, there needs to be harmonisation between the guidelines of *Shari'ah* law and IHL rules. This can be achieved through dialogue between religious scholars and legal experts, with the aim of identifying areas of agreement and developing best practices or guidelines that can be adopted by both *Shari'ah* and IHL.[80]

One key area of focus could be the definition of a journalist, which may differ between *Shari'ah* and IHL. For example, while IHL recognises journalists as civilians and affords them protection under the Geneva Conventions,[81] *Shari'ah* law may not have a clear definition of what constitutes a journalist.[82] By developing a harmonised definition, both *Shari'ah* and IHL can provide strengthened protection to journalists in armed conflicts.

Ultimately, the harmonisation of *Shari'ah* and IHL rules for the protection of Palestinian journalists in armed conflicts can strengthen protections for journalists, ensure accountability for violations, and uphold the right to freedom of expression, even in times of conflict.

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[79] Muhammad Yuanda Zara, "Muhammadiyah's Views and Actions on the Protection of Civilians during the Japanese Invasion of the Netherlands Indies, 1941-1942." *Al-Jami'ah: Journal of Islamic Studies, 60*(1), (2022): 91-130.

[80] Rimona Afana. "The Occupation–colonialism Continuum: Impact on Transitional Justice in Palestine/Israel", in *Prolonged Occupation and International Law*, (Brill Nijhoff, 2023), 133-158.

[81] Yordan Gunawan et al., "Journalist Protection on the Battlefield Under the International Humanitarian Law: Russia-Ukraine War." *Jurnal Hukum, 39*(1), (2023): 1-11.

[82] Datuk Imam Marzuki, and Mohd Hasbi, "Journalist Philosophy: Binding the Norms of Islamic Law." *Konfrontasi: Jurnal Kultural, Ekonomi dan Perubahan Sosial, 9*(2), (2022): 206-215.

CONCLUSION

Harmonisation between IHL and Islamic law is a complex and ongoing process that demands meticulous consideration, dialogue, and cooperation. While there might be similarities and shared objectives between the two legal frameworks, differences in sources, interpretations, and enforcement mechanisms also exist. The impact of harmonisation efforts can vary, contingent upon the specific areas addressed and the level of implementation and enforcement.

This paper recommends the following:

1. Strengthen Accountability Mechanisms: Harmonisation efforts should focus on bolstering accountability mechanisms for violations of journalists' rights and safety during armed conflicts. This entails enhancing investigation processes, ensuring fair trials, and holding perpetrators accountable for attacks or abuses against journalists.
2. Increase Journalist Legal Protections: Harmonisation should augment legal protections for journalists by amalgamating applicable principles from both legal regimes. This could encompass rules safeguarding journalists from arbitrary arrest, custody, or prosecution and ensuring fair treatment if suspected of misconduct.
3. Engage a Spectrum of Stakeholders: It is necessary to involve legal experts, religious academics, journalists, officials from Muslim-majority countries, international organisations, and civil society groups. This engagement facilitates a productive discourse, enabling the comprehension of diverse opinions, resolution of issues, and identification of areas of consensus.
4. Integration into Legal Frameworks: It is essential to Incorporate IHL and Islamic law principles into local laws, regional agreements, and international treaties to harmonise legal requirements. This may necessitate amending existing laws, enacting new legislation, or drafting guidelines representing agreed ideals and addressing concerns regarding journalist protection.

5. Incorporate Relevant Islamic Legal Principles: It is necessary to identify and integrate pertinent Islamic legal principles aligned with journalist protection. Islamic law values freedom of expression, truth-seeking, and justice, which can fortify the legal framework for safeguarding journalists in armed conflicts.

HARMONISATION OF *SHARI'AH* AND THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

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Mohammed Harara[2]

ABSTRACT

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by Resolution No. 34/180 of the United Nations General Assembly on December 18, 1979, embraces the principle of eliminating all forms of discrimination against women in political, economic, and social realms. It urges signatory countries towards absolute gender equality, which is inconsistent with Islamic law. This study aims to discuss women's rights under CEDAW and Islamic law as well as the compatibility and conflict between CEDAW and Islamic law. Through the doctrinal research, this article endeavours to shed light on the avenues through which *Shari'ah* and CEDAW can come up with common ground, fostering a harmonious coexistence that upholds the rights and dignities of women within the context of Islamic law and the broader international legal framework. It is concluded that that *Shari'ah* offers women comprehensive rights and suggests that harmonisation between *Shari'ah* and the CEDAW could be achieved through substantial amendments to provisions conflicting with Islamic law or by states ratifying the CEDAW with reservations to articles inconsistent with Islamic law.

Keywords: Harmonisation, Islamic law, international law, women's rights, CEDAW.

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INTRODUCTION

The issue of women's rights is considered significant in both ancient and modern societies, serving as a focal point for intellectual inquiry. Within this discourse, there are secularists advocating for liberating women from the restrictions that govern their rights, while a moderate faction contends for women to enjoy their rights and duties in accordance with Islamic law's provisions and without exaggeration or negligence.

Amidst the clamour for freedom and equality among individuals, emerged the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It was adopted by Resolution No. 34/180 of the United Nations General Assembly on December 18, 1979. CEDAW stands as a pivotal step for proponents of absolute gender equality across all domains and the combatting of any discrimination limiting women's agency. To attain the Convention's desired goal of equal rights between men and women, it included articles outlining measures for its implementation while safeguarding against violations.

Yet, the CEDAW encompasses provisions conflicting with Islamic law. Islamic jurisprudence endows women with rights and protection, such that they boast of privileges surpassing those articulated in the Convention.

In the realm of legal discourse, the intersection of *Shari'ah* and international conventions, particularly the CEDAW, has sparked extensive debate and deliberation. The convergence of *Shari'ah*, deeply rooted in Islamic jurisprudence and ethics, and the principles enshrined within CEDAW, a pivotal international convention advocating for gender equality and women's rights, presents both challenges and opportunities.

The primary objective of this research is to unravel the pathways toward reconciling these legal systems, identifying points of convergence, and addressing potential divergences. Through the doctrinal research, this article endeavours to shed light on the avenues through which *Shari'ah* and CEDAW can find common ground, fostering a harmonious coexistence that upholds the rights and dignities of women within the context of Islamic law and the broader international legal framework.

DEFINITION OF HARMONISATION

The Arabic term for harmonisation is "*tawfiq*", which aims to bring two or more different ideas or systems into agreement or harmony with each other. In the context of legal systems like *Shari'ah* and international law, achieving *tawfiq* or harmonisation involves finding common ground or reconciling the differences between the two systems.[3]

Harmonisation refers to the process of bringing different legal systems, principles, or norms into alignment or agreement with each other. It involves reconciling and integrating diverse legal frameworks, rules, or practices to achieve consistency, coherence, and mutual compatibility.[4]

The process of harmonisation often requires careful examination and analysis of the principles, values, and objectives underlying each legal system. It may involve identifying areas of compatibility, seeking common principles, or finding ways to accommodate certain aspects of one system within the framework of the other.[5]

The harmonisation of *Shari'ah* and international law requires careful consideration, dialogue, and respect for legal pluralism. It is a complex issue that varies depending on the jurisdiction and the specific aspects of the law being considered.[6]

It is crucial to note that international law's harmonisation technique involves Islamic teachings. In this respect,

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[3] Mohammad Hashim Kamali, "Shari'ah and Civil Law: Towards a Methodology of Harmonization," *Islamic Law and Society, 14*(3), (2007): 392.

[4] Kidjie Saguin, Michael Howlett, "Enhancing Policy Capacity for Better Policy Integration: Achieving the Sustainable Development Goals in a Post COVID-19 World." *Sustainability, 14*(18) (2022): 11600.

[5] Arthur Rosett, "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law," *American Journal of Comparative Law, 40(*3) (Summer 1992): 683-698.

[6] Shanna Corner, "The Boundaries of Religion in International Human Rights Law", *Journal of Human Rights, 21*(2), (2022): 191-209.

harmonisation should not be used to make Islamic prohibitions permissible, morality should not be compromised, the Qur'an and *Sunnah* should not be modified, and Islamic justice and equality should not be violated. *Shari'ah's* goals, objectives, public interest, prohibiting evil tactics or pretence, and other principles may be used in this harmonisation process.

In legal literature, the concept of legal harmonisation is primarily discussed in relation to comparative law.[7] Harmonisation refers to particular and broad aspects of the legislation of several nations or states within a federated country in order to improve interactions between their inhabitants.[8]

PRINCIPLES OF CEDAW CONVENTION

The principles underpinning the CEDAW Convention signify a monumental stride in the global commitment to safeguarding women's rights. This international accord, adopted by the United Nations General Assembly on December 18, 1979, and enacted on September 3, 1981, stands as a beacon advocating for the eradication of all forms of discrimination against women. Comprising 30 articles across six segments, the Convention aligns itself with pivotal international treaties, such as the United Nations Charter of 1945, the Universal Declaration of Human Rights of 1948, and the two International Covenants on Human Rights of 1966; the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[9]

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[7] Walter Joseph Kamba, "Comparative Law: A Theoretical Framework." *International & Comparative Law Quarterly. 23*(3), (1974): 485-519.

[8] Martin Boodman, "The Myth of Harmonization of Laws," *American Journal of Comparative Law, 39*(4), (Fall 1991): 699-724.

[9] United Nations, "The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)", accessed December 24, 2023, https://www.un.org/womenwatch/daw/cedaw.

In its preamble, the CEDAW Convention included a set of fundamental principles stressing the belief in basic human rights and the imperative of equal rights between men and women. The Convention emphatically underscores the necessity of eliminating segregation and discrimination between genders, recognising this as a cornerstone for bolstering international peace and security. Moreover, it addresses the challenges impeding its implementation.[10]

At the heart of the Convention lies the concept of gender equality, compelling member states to obliterate any disparities, irrespective of their nature. Discrimination against women, as defined by the Convention, encompasses any distinction, exclusion, or restriction rooted in sex that diminishes or obstructs women's realisation of their human rights and freedoms across political, economic, social, cultural, civil, and other spheres. This definition disregards marital status, emphasising equality between women and men.[11]

With the impressive backing of 188 States parties, the CEDAW Convention enjoys widespread support. As governments become state parties, they hold the prerogative to enter reservations, delineating specific aspects of the treaty to which they won't adhere. Declarations, carrying equivalent weight, also feature in the implementation process.[12]

The foundational pillars of the CEDAW Convention rest upon three cardinal principles: non-discrimination, state obligation, and substantive equality.[13]

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[10] Ahmed Gomaa, *Elimination of all forms of violence and discrimination against women* (Cairo: Al-Warraq for Publishing and Distribution, 2014), 92.

[11] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art 1.

[12] IWRAW Asia Pacific, "CEDAW Principles", accessed December 20, 2023,https://cedaw.iwraw-ap.org/cedaw/cedaw-principles/cedaw-principles-overview/.

[13] PLD, "CEDAW South Asia Core Concepts", accessed December 20,

1. Non-discrimination: At the crux of equality lies the elimination of discrimination against women in every facet of life, holding both state and non-state actors accountable in the event of rights violations.
2. State obligation: Encompassing respect, protection, promotion, and fulfilment of human rights. This principle obliges due diligence in preventing, investigating, and sanctioning private acts of discrimination. All arms of government -legislative, executive, and judiciary, bear responsibility in fulfilling state obligations.
3. Substantive equality: Addressing negative female stereotypes. This principle strives to obliterate discrimination at individual, institutional, and systemic levels through corrective measures and positive actions. It seeks to rectify imbalances and aims for "equality of outcomes" by ensuring equal opportunities, access, and benefits for women.

WOMEN'S RIGHTS UNDER THE CEDAW CONVENTION

The provisions within the CEDAW encompass a range of rights specifically granted to women without discrimination. These rights are detailed as follows:[14]

Right to Non-Discrimination between Men and Women

The Convention articulates this right within its initial provisions, spanning from Article 1 to Article 6. These articles diligently address the eradication of all forms of discrimination based on gender. The Convention defines discrimination against women as any prejudice or restriction that favours one sex at the expense of the other. It calls upon state parties to condemn and combat all discriminatory practices, mandating the implementation of gender equality across political, social, and cultural spheres. Notably,

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2023, https://cedawsouthasia.org/about-cedaw/core-concepts/

[14] United Nations, "The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)".

states are prohibited from circumventing the application of gender equality. Instead, they are urged to take comprehensive measures to alter societal behaviours and norms that perpetuate discrimination. The Convention also urges legislative action to combat the trafficking of women and the exploitation of women in prostitution.[15]

According to Article 2 of the CEDAW convention, state parties to the convention work to adopt legislation and all appropriate measures to eliminate acts of discrimination against women so that women can enjoy their rights on an equal basis with men.

Women's Right to Exercise Political Rights

Article 7 to 9 underscore the entitlement of women to exercise their political rights without discrimination. The Convention urges states to eliminate discriminatory practices against women in the political arena, ensuring their equal participation alongside men. Specifically, it grants women the right to vote, partake in policy formulation, and engage in various organisations. Moreover, the Convention obligates countries to provide opportunities for women to represent the government at an international level. Additionally, it emphasises women's right to acquire, change, or retain nationality.[16]

Women's Economic and Social Rights

Article 10 to 14 delineate women's economic and social rights comprehensively. The Convention addresses measures to eliminate discriminatory practices in education, advocating for equal opportunities in vocational and career guidance, ensuring parity in educational access and scholarships, equal participation in sports, and grants to uphold family health and well-being. It

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[15] United Nations, "The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)", Art 1-6.

[16] *Ibid*, Art 7-9.

stresses the need to eliminate workplace discrimination and underscores states' responsibility to ensure healthcare provision and services. Furthermore, it mandates granting women equal economic and social rights as men, with consideration for issues faced by rural women, including healthcare, social security, and community participation. [17]

Women's Right to Equality in Marriage and Family Life

Articles 15 to 16 specifically affirm women's rights to equality in marriage and family life. The Convention acknowledges women's entitlement to equal legal status with men and nullifies any contract that undermines women's rights. Furthermore, it endorses women's right to choose their place of residence and imposes measures on states to ensure women's rights in marriage and family relations. These measures include the choice of spouse, determining offspring, guardianship rights, choosing a family name, and equal rights to ownership and possession of property.[18]

These provisions underscore the Convention's commitment to eliminating discrimination against women and ensuring their equal rights and opportunities in diverse spheres of life, including politics, economics, society, and family.[19]

WOMEN'S RIGHTS UNDER ISLAMIC LAW

Islamic law, deriving from the Holy Qur'an and the *Sunnah* of the Prophet, offers a comprehensive framework that defines and safeguards women's rights, shielding them from prejudice or vulnerability. Within this framework, Islamic law outlines various fundamental rights for women, including but not limited to the right to life, eligibility, employment, social entitlements, and

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[17] United Nations, "The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)", Art 10-14.

[18] *Ibid*, Art 15-16.

[19] Gomaa, *Elimination of all forms of violence and discrimination*, 98-105.

marital privileges. These rights are intricately woven into the fabric of Islamic teachings, ensuring equitable treatment and protection for women within society.

Women's Right to Life

The Islamic legal framework stands as a bastion of equity and fairness, particularly in safeguarding the fundamental right to life. Within this framework, women are granted an unequivocal right to life, holding an equal footing with men, devoid of any discriminatory biases. Islamic jurisprudence, rooted in the teachings of the Qur'an and the Prophet's *Sunnah*, unequivocally mandates the preservation of life without gender-based prejudice.[20]

In Islamic law, the sanctity of life is a foundational principle, transcending gender distinctions. The Qur'an distinctly states, *"And do not kill the soul which Allah has forbidden, except by right"*.[21] This injunction categorically prohibits the taking of any human life unjustly, affirming the equal value and sanctity of every individual, irrespective of gender. Such teachings emphasise the universal dignity and worth of both men and women, ensuring their right to life is inviolable and equal in stature.[22]

Islamic legal principles prescribe severe penalties for the unjust taking of a life, reinforcing the equality of this right. The concept of *Qasas*, or equal retaliation, is applied impartially in cases of homicide, regardless of the gender of the victim. The Qur'an asserts, *"And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous"*.[23] This principle underscores the sanctity of life and

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[20] Abdur Rahman I. Doi, "Women in the Quran and the Sunnah", accessed Dec. 20, 2023, https://www.iium.edu.my/deed/articles/woman_quran.html

[21] Al-Qur'anm 17:33

[22] *Ibid*.

[23] *Ibid*, 2:179

retribution, reiterating the equality of men and women in the eyes of the law.[24]

Furthermore, Islamic law considers any assault on a woman's right to life as an affront to humanity itself. The Prophet Muhammad S.A.W. unequivocally declared, "*Whoever kills a person having a treaty with the Muslims will not smell the fragrance of Paradise, though its fragrance is found for a span of forty years"*. This profound statement underscores the gravity of violating the life of any individual, irrespective of gender, highlighting the stringent consequences of such transgressions.[25]

The teachings of Islamic law thus firmly establish the intrinsic value of life, extending this principle equitably to both men and women. The core tenets of equality and fairness enshrined within these teachings underscore the universal and unassailable right to life for all individuals, transcending any gender-based discrimination.[26]

Women's Right to Legal Capacity

Islamic law is distinguished by its provision of equal rights for women, mirroring those afforded to men within the sphere of legal actions such as concluding and terminating contracts, engaging in trade, and pursuing legal claims. There are no specific conditions imposed other than the general prerequisites necessary for ensuring the validity and safety of these actions.[27]

An illustrative example supporting this is found in Sahih narrations, where Umm Hani' daughter of Abu Talib approached the Prophet Muhammad S.A.W. on the day of conquest along with

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[24] Niaz a. Shah, *Women, the Koran, and International Human Rights Law* (Netherlands: Brill, 2006), 45-67.

[25] *Ibid*.

[26] Abdur Rahman, "Women in the Quran and the Sunnah".

[27] Mahdi Zahraa, "The Legal Capacity of Women in Islamic Law," *Arab Law Quarterly* 11, no. 3 (1996): 245–63, https://doi.org/10.1163/157302596x00282

his companions. She informed him, "*O Messenger of Allah, "Messenger of God, my mother's son 'Ali has asserted that he is going to kill a man to whom I have given protection, so and so the son of Hubaira."* He replied, *"We have given protection to those to whom you have granted it, Umm Hani'."*[28]

It's crucial to note that while *Shari'ah* dictates that the testimony of a woman is considered half that of a man, this is not a diminishment of her competence or inherent worth. This ruling stems from concerns regarding potential lapses in memory or errors. As Allah S.W.T. states in the Qur'an, *"If one of them forgets, the other will remind her"*.[29] highlighting the collaborative nature of testimony to mitigate the possibility of forgetfulness.[30]

Women's Right to Work

The right of women to work under Islamic law is grounded in principles that advocate for justice, equality, and dignity for all individuals, regardless of gender. Islamic teachings emphasise the importance of women's participation in society, including the workforce, while upholding their rights and safeguarding their well-being.[31]

In Islam, there is no prohibition on women engaging in lawful professions or occupations. The Qur'an and *hadith* provide guidance that supports women's participation in economic activities and contributes to the betterment of society. Prophet Muhammad's first wife, Khadijah, was a successful

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[28] Muḥammad ibn 'Abd Allāh Khatib Al-Tabrizi, *Mishkat al-Masabih* (Beirut: Islamic Office, 1985), Hadith 189, 3977.

[29] Al-Quran, 2:282.

[30] Farhan Iqbal, *Are two female witnesses equal to one in Islam?,* accessed December 20, 2023, https://www.alhakam.org/female-witnesses-in-islam

[31] Muhammad Yahya Al-Nujaimi. "Women's Rights in Islam and the CEDAW Convention: A Purposeful Critical Reading," *Islamic Thought Forum, International Islamic Jurisprudence Academy*, (2007): 13-15.

businesswoman, serving as an exemplary figure for women's economic empowerment within Islamic history.[32]

Islamic law encourages fairness in employment practices, ensuring that women receive equal pay for equal work and are granted similar opportunities for career advancement as men. The principle of justice is inherent in Islamic teachings and applies to all aspects of life, including the workplace.[33]

However, within Islamic legal frameworks, there are considerations aimed at preserving modesty, protecting family life, and ensuring the well-being of women. For instance, certain professions or roles may be regulated to maintain modesty and respect cultural norms, but this doesn't equate to a blanket restriction on women's right to work.[34]

Moreover, Islamic jurisprudence places an emphasis on the importance of consent and choice. Women are not compelled to work but are granted the autonomy to decide whether to pursue employment based on their circumstances and personal choices.[35]

Islamic law also recognises and supports women's rights to property, ownership, and financial independence. This includes their right to retain their earnings and manage their wealth, ensuring economic autonomy irrespective of their marital status.[36]

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[32] Haleema Sadia, Rukhsana Shaheen Waraich, Sadia Halima, "CEDAW & Woman's Right to Work in Islamic Law," *Journal of Social Sciences and Humanities 30*(2), 2023: 26.

[33] Gomaa, *Elimination of all forms of violence and discrimination*, 40.

[34] Manjur Hossain Patoari, "The Rights of Women in Islam and Some Misconceptions: An Analysis from Bangladesh Perspective," *Beijing Law Review 10*(5), 2019: 1220.

[35] *Ibid*.

[36] Gomaa, *Elimination of all forms of violence and discrimination*, 41.

Women's Political Rights

In Islam, women possess equal political rights to men, including the right to vote and run for election in all parliamentary councils formed through elections. Hence, they hold the entitlement to serve as voters, candidates, deputies, or members within all parliamentary councils in their respective countries. This equality is rooted in the understanding that the electoral process, candidacy, and representation constitute forms of agency or testimony, and women hold the right to provide testimony. They also have the authority to appoint others to represent their interests. There exists no religious restriction preventing a woman from acting as an agent for another individual, notably as a candidate or representative of the populace, expressing their desires, aspirations, and will. Women engage in various services, oversee the execution of the state's financial policies, and contribute to legislation, particularly those concerning childhood, motherhood, and marriage, demonstrating an awareness of their gender-specific nature, issues, and concerns.[37]

Throughout Islamic history, there have been instances where women actively participated in political life. For example, during the time of Prophet Muhammad S.A.W., women were known to offer counsel, engage in public discussions, and contribute to important decisions affecting the Muslim community. The Prophet himself S.A.W. sought the advice of women and acknowledged their valuable insights.[38]

Women's social rights

In Islam, women actively engaged in various facets of social life, embodying roles that contributed significantly to their communities. Take, for instance, Umm Shrek, a prominent figure known for her support and affluence. She generously spent in the

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[37] Gomaa, *Elimination of all forms of violence and discrimination*, 41.

[38] Jamal A. Badawi, "The Status of Women in Islam," accessed December 21, 2023, https://www.iium.edu.my/deed/articles/statusofwomen.html

path of Allah and opened her home to accommodate guests, establishing a place of hospitality and care within her household.[39]

Moreover, women made impactful contributions to healthcare. Umm Al-Ala' stands as an example; she tended to Uthman bin Maz'un during his illness until his passing, showcasing the vital role women played in providing care and support during times of need.[40]

In the realm of knowledge and intellectual pursuits, women actively participated in scholarly gatherings and consultations. Umm Al-Darda' notably confronted Abd Al-Malik bin Marwan when he unjustly cursed a slave girl. She referenced the teachings of the Prophet Muhammad S.A.W. stating that those accustomed to cursing would not serve as intercessors or witnesses on the day of resurrection, highlighting women's engagement in upholding ethical standards and moral values.[41]

One of the fundamental social rights granted to women in Islam is the right to education. Islamic teachings emphasise the importance of seeking knowledge for both men and women. The Prophet Muhammad S.A.W. himself encouraged the education of women, stating that seeking knowledge is obligatory for every Muslim. This right to education empowers women to engage intellectually, contribute meaningfully to society, and pursue personal and professional growth.[42]

Islam also facilitated opportunities for women in professional domains, including roles within state offices. Women were able to contribute significantly to many fields such as healthcare and

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[39] Muslim bin Al-Hajjaj Al-Qushayri Al-Naysaburi, *Sahih Muslim* (Cairo: Dar Ihya' al-Kutub al-Arabiyya, n.d.), Hadith 2942, 4/2261.

[40] Muhammad bin Ismail al-Bukhari al-Jaafi, *Sahih al-Bukhari* (Beirut: Dar Ibn Kathir, 1993), Hadith 3714, 1/1430.

[41] Muslim, *Sahih Muslim*, Hadith 2598, 4/2006.

[42] Jamal A. Badawi, "Gender Equity in Islam," accessed December 21, 2023, https://www.iium.edu.my/deed/articles/genderequityinislam.html

education, excelling in certain occupations where their strengths and abilities often surpassed those of men.[43]

It's evident that Islam, in its general framework, grants women a range of social rights, thereby acknowledging their diverse contributions to society. However, certain responsibilities are specific to each gender, not as a result of discrimination but rather based on the unique roles that men and women are expected to fulfil within the societal framework. This distinction is grounded in complementary roles rather than inequality, recognising that some duties align more naturally with either men or women based on their inherent strengths and capabilities.[44]

Women's Marital Rights

Islam has bestowed upon women exceptional marital rights unparalleled in other religions. The foundation of conjugal life in Islam is rooted in honourable cohabitation, in accordance with the Almighty's directive: *"And live with them in kindness"*.[45] Furthermore, women have the right to receive their dowries, as stated in the Qur'an: *"And give the women [upon marriage] their [bridal] gifts graciously"*.[46]

Islam places great emphasis on ensuring that marital relationships are founded on principles of decency, respect, kindness, and the pursuit of mutual benefit while avoiding harm. The Prophet Muhammad S.A.W., highlighted the significance of treating one's spouse with kindness and benevolence, affirming, *"The believers who show the most perfect Faith are those who have the best behaviour, and the best of you are those who are the best to their wives."*[47]

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[43] Al-Nujaimi. "Women's Rights in Islam," 14.

[44] *Ibid*.

[45] Al-Quran, 4:19

[46] *Ibid,* 4:4

[47] Muhammad bin Isa Al-Tirmidhi, *Jami` at-Tirmidhi* (Beirut: Dar Al-Kutub Al-Ilmiyyah, n.d.), Hadith 1162, 3/466.

Yet, Islam goes further in safeguarding women's rights within marriage. It obligates men to provide for their wives' essential needs, including clothing and shelter. This obligation stems from the Qur'anic principle: *"Men are in charge of women"*,[48] signifying the responsibility men bear for the welfare and care of their spouses.[49]

Shari'ah meticulously organises and safeguards the rights of wives, accounting for their physical and emotional well-being. These rights are unparalleled, considering women's unique nature, both physically and psychologically.[50] This stands as a significant precedent, surpassing other treaties or agreements aimed at protecting women's rights within marriage. Islam prioritises the preservation and guarantee of these rights, setting a remarkable standard for the treatment and respect of women within marital relationships.

COMPATIBILITY AND CONFLICT BETWEEN CEDAW CONVENTION AND ISLAMIC LAW

CEDAW convention seeks to ensure gender equality by eliminating discrimination against women in various spheres of life. It advocates for absolute equal rights in all fields such as education, employment, politics, and family life.[51]

One area of compatibility lies in the shared goals of both CEDAW and Islamic law regarding women's rights. Both aim to ensure women's dignity, non-discrimination, and equitable treatment in various aspects of life. Many principles within CEDAW align with the broader spirit of justice and equality advocated by Islamic teachings.[52] Equality between the genders is

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[48] Al-Quran, 4:34

[49] Patoari, "The Rights of Women in Islam and Some Misconceptions," 1216-1218.

[50] Badawi, "The Status of Women in Islam."

[51] United Nations, "The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)".

[52] Musawah, "CEDAW and Muslim Family Laws", accessed December

an acceptance of the dignity of the two genders in equal measure. There must be no discrimination on the basis of caste, creed, colour, region or gender. Allah S.W.T. said: *"O humankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, so that you may know each other. Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you ..."*.[53] This verse applies to the relations between man and woman.[54]

However, conflicts arise between CEDAW and Islamic law regarding specific issues, such as inheritance, testimony, and family laws. For instance, CEDAW advocates for equal inheritance rights for men and women, while certain interpretations of Islamic law prescribe different inheritance shares based on gender. Allah S.W.T. stated: *"Allah directs you regarding your children's inheritance: to the male, a share equal to that of two females"*.[55] The concept of equality in this context shouldn't be seen as a simple mathematical equation. The division of inheritance doesn't imply any inherent inferiority of the daughter but considers her economic prospects and societal role. This rule reflects the responsibility placed on males as financial providers, while women are exempt from financial obligations.[56]

Similarly, in matters of testimony, CEDAW promotes equality, yet Islamic law assigns different weight to the testimony of men and women, where the testimony of a woman is considered half that of a man.[57] As previously mentioned, this ruling doesn't

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[53] Al-Qur'an, 49:13

[54] Najibah Mohd Zin, "Women's rights in Islam". *Human rights law: International, Malaysian, and Islamic perspectives*. (Malaysia: Sweet and Maxwell Asia, 2012), 414.

[55] Al-Qur'an, 4:11

[56] Shaikh Shaukat Hussain, *Human Rights in Islam*, 3rd Edition, (New Delhi: Kitab Bhavan, 2001), 64; Najibah, "Women's Rights in Islam", 428-429.

[57] Al-Quran, 2:282

diminish a woman's abilities or inherent value. It arises from concerns about possible memory lapses or mistakes. As Allastates in the Qur'an, *"If one of them forgets, the other will remind her*".[58]

In addition, the CEDAW convention conflicts with Islamic family law concerning women's equality with men in all matters related to marriage and family relations, both during marriage and upon its dissolution. This is because Islamic law assures the wife's rights that correspond to those of the husband, aiming to establish a fair balance between them. This practice arises from the respect for the sanctity entrenched in firm religious beliefs governing marital relationships. The foundation of the relationship between husband and wife lies in the harmony between their rights and responsibilities, fostering a complementary dynamic that strives for genuine equality rather than superficial formalities. According to the *Shari'ah*, the husband is obliged to provide the wife with an appropriate dowry and fully support her financially from his own resources. Additionally, upon divorce, the husband is responsible for her maintenance, whereas the wife retains her complete rights to her own finances and isn't obliged to contribute from her resources for her own upkeep. Consequently, *Shari'ah* confines the wife's right to initiate divorce, stipulating that this must involve a judge's ruling, whereas no such constraint is placed on the husband.[59]

MECHANISMS FOR HARMONISING CEDAW CONVENTION WITH *SHARI'AH*

Harmonisation between CEDAW principles and the *Shari'ah*, which forms the basis of legislation in many Muslim-majority countries, poses challenges due to divergent interpretations and religious and cultural contexts.

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[58] Iqbal, *Are two female witnesses equal to one in Islam.* See also Al-Quran, 2:282

[59] Yvonne Yazbeck Haddad and John L. Esposito, Islam, *Gender, and Social Change,* (New York and Oxford: Oxford University Press, 1997), 46-47.

Harmonisation between the CEDAW convention and the *Shari'ah* can be achieved through one of two approaches:

i. Amending the CEDAW Convention

One approach to align CEDAW with *Shari'ah* involves amending convention texts to reflect compatibility with Islamic principles. This requires a nuanced understanding of *Shari'ah* and collaboration between legal scholars, policymakers, and representatives from Muslim-majority nations. Amendments could be made to specific articles or clauses to better resonate with Islamic values while upholding the essence of gender equality.

Amending CEDAW in line with Islamic principles might involve rephrasing certain provisions to accommodate varying interpretations. For example, areas where conflict arises, such as inheritance rights or testimony, could be revised to offer flexibility while ensuring the fundamental principles of gender equality are maintained. This process would require careful consideration to uphold women's rights while respecting religious and cultural diversity.

However, this strategy demands delicate negotiations and a comprehensive understanding of both CEDAW and Islamic legal frameworks. It requires a balancing act to ensure that amended texts retain the essence of gender equality while adhering to Islamic principles.[60]

Accordingly, Islamic countries can submit a written notification to the Secretary-General of the United Nations, in accordance with Article 26 of the Convention, requesting that he reconsider some articles of the Convention that violate the *Shari'ah.*[61] Article 26 of the CEDAW Convention stated that: *"1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing*

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[60] Abdul Rahman Ghoneim, "Palestine Joins CEDAW Agreement: A Critical Study in the Light of Islamic Sharia," *Jeel Journal of Comparative Studies 10*, 2020: 89.

[61] Abdul Rahman Ghoneim, "Palestine Joins CEDAW Agreement: A Critical Study in the Light of Islamic Sharia," *Jeel Journal of Comparative Studies 10*, 2020: 89.

addressed to the Secretary-General of the United Nations. 2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request."[62]

ii. Signing with Reservations to The CEDAW Convention

When states ratify the convention, they have the option to enter reservations or declarations that exempt them from specific articles or provisions.[63] A reservation, made upon signing or ratifying a treaty, allows a state to assert its right not to adhere to certain provisions of the treaty. According to Article 2.1(d) of the Vienna Convention on the Law of Treaties 1969, a reservation is defined as *"a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."*[64]

The process of making and withdrawing reservations is governed by Articles 19-23. Under Article 19(a) and (b) of the Vienna Convention, a country can make reservations to a treaty at the time of signing or ratifying it, provided that the treaty does not prohibit or limit the types of reservations that can be made. However, compliance with these subsections alone doesn't automatically validate a reservation. Article 19(c) of the Vienna Convention prohibits reservations that are incompatible with the object and purpose of the treaty.[65]

The CEDAW Convention doesn't impose further restrictions or limitations on the types of reservations that signing or ratifying States can make. Instead, it explicitly allows for reservations against certain procedural articles on dispute resolution. Hence,

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[62] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art 23

[63] Musawah, "CEDAW and Muslim Family Laws".

[64] Vienna Convention on the Law of Treaties, 1969, Art 2.1(d).

[65] *Ibid,* Art 19-23.

the Women's Convention permits reservations that align with its object and purpose.[66]

In terms of the sheer number of reservations, the CEDAW Convention has encountered significant opposition.[67] Several Muslim countries referred to Islam, Islamic law, or *Shari'ah* as grounds for reservations on substantive matters.[68]

For instance, Saudi Arabia is one of the countries which made a general reservation to CEDAW. The reservations consist of the following:

> *1. In case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.*
>
> *2. The Kingdom does not consider itself bound by paragraph 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention.*[69]

The Sultanate of Oman also made reservations to all provisions of the CEDAW Convention not in line with the provisions of the *Shari'ah* and legislation in force in the Sultanate of Oman.[70]

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[66] Bharath Anandi Venkairm, "Islamic states and the United Nations convention on the elimination of all forms of discrimination against women: are the sharia and the convention compatible?" *The American University Law Review 44,* 2010: 1954.

[67] *Ibid*, 1955.

[68] Musawah, "CEDAW and Muslim Family Laws".

[69] United Nations, *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women* (New York: UN, 2010): 24.

[70] United Nations, *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women* (New York: UN, 2010): 22.

Egypt raised reservations to Articles 2, 9, and 16 of the CEDAW convention, affirming it would apply these articles only insofar as they didn't conflict with Islamic law. Article 2 urged nations to counter discrimination through legislative measures. Article 9 stipulated equal rights for women concerning their children's nationality. Article 16 mandated the elimination of discrimination against women in matters concerning marriage and family relations. In its reservation to Article 16, Egypt specified that its commitments

> *must be without prejudice to the Islamic Shari'ah provisions .... This is out of respect for the sanctity deriving from firm religious beliefs which govern marital relations in Egypt, and which may not be called into question...*[71]

Bangladesh, Libya, Iraq, and Tunisia expressed similar reservations.[72]

The Kingdom of Bahrain made reservations with respect to Article 2 of the CEDAW convention in order to ensure its implementation within the bounds of the provisions of the *Shari'ah* as well as Article 16 of the CEDAW convention insofar as it is incompatible with the provisions of the *Shari'ah*.[73]

The Government of the State of Kuwait declared that it does not perceive itself as obligated by the provision outlined in Article 16, paragraph 1 (f), as it contradicts the principles of *Shari'ah*,

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[71] Jennifer Jewett, "The Recommendations of the International Conference on Population and Development: The Possibility of the Empowerment of Women in Egypt," *Cornell International Law Journal 29*(1), 1996: 208.

[72] Ann Elizabeth Mayer, "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?", *Michigan Journal of International Law 15*(2), 1994: 323-324.

[73] United Nations, *Declarations, reservations, objections, and notifications of withdrawal of reservations*, 7.

where Islam holds the status of the official religion of the State of Kuwait.[74]

The Government of Brunei Darussalam has reservations concerning certain provisions of the Convention that might conflict with the Constitution of Brunei Darussalam and the beliefs and principles of Islam, the country's official religion. Specifically, without limiting the scope of these reservations, Brunei Darussalam expresses reservations regarding paragraph 2 of Article 9 and paragraph 1 of Article 29 of the Convention.[75]

The Government of the Republic of Maldives made reservation to article 16 of the CEDAW Convention, specifically regarding the equality of men and women in marriage and family matters without infringing upon the provisions of the *Shari'ah*, which governs all marital and family relations within the country's entirely Muslim population.[76]

Upon Malaysia's accession to the CEDAW Convention on 5 July 1995, the country issued reservations through the following declaration:

> *The Government of Malaysia declares that Malaysia's accession is contingent upon the understanding that the provisions of the Convention do not contradict the provisions of Shari'ah Law and the Federal Constitution of Malaysia. Accordingly, the Government of Malaysia does not consider itself bound by the provisions of articles 2(f), 5(a), 7(b), 9, and 16 of the aforementioned Convention.*

After committing to execute strategies and programmes aligned with the Beijing Platform for Action in 1995, Malaysia

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[74] United Nations, *Declarations, reservations, objections, and notifications of withdrawal of reservations*, 14.

[75] *Ibid*, 8.

[76] *Ibid*, 16.

subsequently withdrew its reservations to articles 2(f), 9(1), 16(1)(b), 16(1)(d), 16(1)(e), and 16(1)(h) on 6 February 1998.[77]

Following a constructive dialogue with the CEDAW Committee in May 2006, Malaysia intensified efforts to potentially withdraw the remaining reservations. Consultations were conducted with relevant government agencies, state governments, non-governmental organisations (NGOs), and other stakeholders. Consequently, on 19 July 2010, the Government of Malaysia informed the Secretary-General of its withdrawal of reservations to articles 5(a), 7(b), and 16(2) of the Convention. Currently, Malaysia maintains reservations solely on articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f), 16(1)(g), and 16(2).[78]

Qatar was specific in the reservation, where the Government of the State of Qatar accepted the text of article 1 of the Convention provided that, in accordance with the provisions of Islamic law. It made a reservation to Article 15, paragraph 1, in connection with matters of inheritance and testimony, as it is inconsistent with the provisions of Islamic law in addition to Article 15, paragraph 4, and Article 16, as it is inconsistent with the provisions of Islamic law and family law.[79]

CONCLUSION

This study delved into the intricate relationship between *Shari'ah* and the CEDAW. The Convention emphasises absolute gender equality across political, economic, and social domains, stands at odds with certain aspects of Islamic law, posing challenges regarding the harmonisation of *Shari'ah* and the CEDAW.

Throughout this exploration, it became evident that the *Shari'ah* grants women substantial and comprehensive rights,

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[77] United Nations, *Consideration of reports submitted by States parties under article 18 of the Convention Combined third to fifth periodic reports of States parties due in 2012: Malaysia* (New York: UN, 2016), 4.

[78] *Ibid*.

[79] *Ibid*, 23-24.

underlining the potential for compatibility and balance between the principles of CEDAW and Islamic law. However, achieving harmonisation requires thoughtful consideration and action.

The legal implications of this study underscore the need for nuanced approaches to reconcile CEDAW principles with *Shari'ah*, potentially through substantial amendments to conflicting provisions or ratification with reservations by states. This suggests a potential pathway towards fostering a more harmonious coexistence between the international legal framework advocated by CEDAW and the Islamic legal system, safeguarding women's rights without disregarding religious and cultural contexts.

Socially, this study highlights the significance of recognising and respecting cultural diversity and religious beliefs while striving for gender equality. It emphasises the importance of engaging in dialogue and seeking common ground to uphold women's rights within the context of Islamic societies. As for future research, further exploration could focus on comparative analyses between specific provisions of CEDAW and corresponding Islamic legal texts, seeking deeper understanding and potential avenues for alignment. Additionally, empirical studies could assess the practical impact of harmonising CEDAW principles with Islamic law in various socio-cultural settings, providing insights into its real-world implications for women's rights and societal dynamics.

HARMONISATION OF THE RIGHTS OF ORPHANS UNDER ISLAMIC LAW AND THE INTERNATIONAL LAW

Munazza Razzaq[1]
Azizah Mohd[2]
Noraini Md Hashim[3]

ABSTRACT

An orphan is a child raised without a family. The word 'orphans' in the Qur'an and *Sunnah* signifies the importance of protecting their rights and upholding their best interests. This article examines the provisions in Islamic law that confer specific rights on orphans. Additionally, the article emphasises a comparative analysis with the Convention on the Rights of Child (CRC) to gauge differences or coherence with Islamic principles. This analytical exploration seeks to illuminate the discrepancies or consonance with Islamic tenets. The research conducted a qualitative study by adopting a doctrinal approach to review primary and secondary data. They discerned common threads in safeguarding orphan rights within the *Shari'ah* and international conventions. The findings reveal common principles in Islamic law and international conventions regarding protecting orphan rights. This article proposes pragmatic pathways to harmonise these legal frameworks where collaboration is crucial, thus demonstrating the identification of common principles regarding protecting orphans' rights, as outlined in Islamic lawand international conventions.

Keywords: Child's rights, orphans rights, harmonisation, *Shari'ah*, international law, CRC.

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INTRODUCTION

Children, including orphans, are among the most vulnerable members of society and require attention and protection. Orphans in Pakistan have encountered various problems related to the protection of their rights. One scenario can be seen in Pakistan's welfare homes that provide shelter for orphans, such as Bint-e Mariam, Saba Homes, Pakistan Sweet Homes, and Anjuman Faiz-ul Islam[4]. It was observed that orphaned children in these shelter institutions commonly grapple with financial difficulties that impact their lives, care and upbringing, maintenance, education, health, and overall nurturing environment. These rights were identified as fundamental challenges encountered by orphans, both in general and in Pakistan. Therefore, harmonising *Shari' ah* with international law is necessary to ensure the comprehensive protection of orphaned children's rights**.**

The harmonisation of *Shari'ah* and international law in protecting the rights of orphans is a critical endeavour that seeks to ensure comprehensive and equitable safeguards for vulnerable children. Orphans, among the most vulnerable members of society, require robust legal frameworks that prioritise their well-being and protect their rights. *Shari'ah*, as derived from the Qur'an and the teachings of the Prophet Muhammad S.A.W., embodied the *Maqasid al-Shari'ah,*[5] which is a comprehensive system for the care and protection of orphans. On the other hand, international law offers a global framework of legal norms and standards that aims to protect the rights of all individuals, including children. By harmonising *Shari'ah* and international law, it is possible to create a cohesive and inclusive approach to

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[4] Interviewing orphans residing in various orphanages across Pakistan can be accomplished by utilizing a questionnaire.

[5] *Maqasid al-Shari'ah:* Ghazali wrote categorically that "The *Shari'ah* pursued five objectives, namely those of faith, life, intellect, lineage and property, which were to be protected as a matter of absolute priority." Mohammad Hashim Kamali, "Maqāṣid Al-Sharī'ah: The Objectives Of Islamic Law," *Islamic Studies, Islamic Research Institute, International Islamic University, Islamabad,* Vol. 38, No. 2 (1999), 193, https://www.jstor.org/stable/20837037

safeguard the rights of orphans, irrespective of their cultural or religious backgrounds. This harmonisation process bridges gaps or inconsistencies between the two legal systems and ensures that orphans have equal rights, protection, and opportunities for their overall well-being and development.

This study adopts a doctrinal research approach to explore the harmonisation of *Shari'ah* and international law concerning orphans' rights. Doctrinal research involves a systematic examination of legal theories and principles found in international law alongside an analysis of relevant Qur'anic verses and prophetic traditions. This approach allows the extraction and integration of legal principles that can be applied to protect the rights of orphans within an international legal framework.

PROTECTION OF ORPHAN'S RIGHTS UNDER THE *SHARI'AH*

A *Shari'ah*-based legal framework for orphans ensures the protection and well-being of all children, including those who have lost their parents. *Shari'ah* offers a comprehensive legal framework that emphasises justice, equality, and compassion. Furthermore, it is derived from the teachings of the Qur'an and the *hadith* and guides various aspects of society, including matters related to orphans. Islamic law stresses the care and support of orphans and considers it a fundamental obligation for Muslims.

In the Qur'an, Allah S.W.T. mentions orphans twenty-two times and calls upon believers who treat them with love and kindness in many places.

The Qur'an addresses orphans as *al-Aytam* in many verses. Furthermore, al-Rāghib defines an orphan (*yatim*) as a minor child who loses their father before coming of age. Ibn Manẓūr agrees with this definition in *Lisān al-ʿArab*, further clarifying that the loss of the mother will not render a human child a *yatim* but rather *munqatiʿ* (broken). This was because the father was considered to be the primary sustaining caregiver.[6]

[6] Muhammad Ziyad Batha, "Orphans In The Quran: A Contextual

Generally, an orphan child is defined as *"a fatherless or illegitimate child of a deceased mother. According to more general usage, a minor has lost both parents. Sometimes, the term is applied to a person who has lost only one of his or her parents.*[7]*"*

In the Qur'an, Allah enjoins good treatment with orphans, as the Qur'an says:

> *And remember we took a covenant from the children of Israel (to this effect), worship none but Allah S.W.T., treat your parents and kindred, and orphans and those in need with kindness, and speak fairly to the people.* [8]

In another place, the Qur'an says to the effect:

> *Their bearings on this life and the hereafter they ask thee concerning orphans says: the best thing to do is what is for their good; if ye mix their affairs with yours, they are your brethren; but Allah S.W.T. knows the man who means mischief from the man who means good, and if Allah S.W.T. had wished he could have put you into difficulties; he is indeed exalted in power, wise.*[9]

These verses highlight the importance of fulfilling the rights of orphans; it is a comprehensive command covering multiple aspects of kindness, righteousness, and being kind to orphans; thus, it is a duty prescribed by Allah and followed in the footsteps of the righteous.[10] In addition, Allah mentions in the Qur'an that the best rule for orphans is to keep their property, household, and

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Thematical Analysis," accessed on 12 July 2022, https://muslimmatters.org/2022/07/12/orphans-in-the-quran-a-contextual-thematical-analysis/.

[7] P Ramantha Aiyar's, *Advanced Law Lexicon*, 4th ed., Vol.1, (Nagpur: Lexis Nexis Butterworths Wadhwa): 3429.

[8] Al-Qur'an, 2:83.

[9] *Ibid,* 2:220.

[10] Muhammad Ziyad Batha, "Orphans In The Quran: A Contextual Thematical Analysis," Accessed 12 July 2022, https://muslimmatters.org/2022/07/12/orphans-in-the-quran-a-contextual-thematical-analysis/.

accounts separate; there should be less temptation to obtain personal advantage from their guardianship by mixing them with the guardian's property, household, or accounts. Therefore, the guardian's test revolves around determining what is truly in the best interest of the orphan. Even if human law fails to detect any wrongdoing, if the guardian yields to temptation, he must remember that he is sinning before Allah S.W.T., who would have guided him to stay on the right path. [11]

Hazrat Ali R.A., known for his profound knowledge and wisdom, emphasises the significance of being kind to orphans.

> *One of the best righteous acts is being kind to the orphans.*[12]

By highlighting this act as one of the best righteous deeds, he encourages Muslims to prioritise the well-being and care of those who have lost their parents. The right to have good treatment without discrimination was derived from the Qur'an and the *Sunnah*. This obligation is also emphasised in the Qur'an through passages such as

> *Therefore, be not harsh with orphans.*[13]

This includes a command to honour orphans.

Abu Dawud recorded from Sahl bin Sa`id that the Messenger of Allah said, the guardian of the orphan and I will be like these two in Paradise. He put his two fingers together - the middle and index fingers.[14]

Under a *Shari'ah*-based legal framework, orphans inherit their rights at birth without any assertions or perceptions. These rights incorporate the basic right of good treatment with orphans

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[11] The Holy Quran English translation of the meanings and commentary, Revised and Edited by The presidency of Islamic Researches, IFTA, Call and Guidance, King Fahad Holy Quran Printing Complex, 747.

[12] Al-Qur'an, 16:94.

[13] *Ibid*, 89: 17.

[14] Tafsir Ibn Kathir, accessed at https://qurano.com/en/89-al-fajr/verse-17/#tafsiribnkathir

including life, name, health, education, inheritance, a safe and protected environment for better development, and many other rights related to their person and property. Therefore, this article focuses on the rights guaranteed under *Shari'ah* and the CRC. Hence, further discussion will focus on the differences and coherence between the two legal frameworks, namely, *Shari'ah* and international law.

Right to Life

Orphans, like ordinary children, have the right to life. Before the advent of Islam, children's rights to life were quite rarer. Parents kill their children without respect or importance to human life. The reason for killing children is to make their false God happy. The Qur'an clearly states to the effect:

> *To show their ingratitude for the favours we have Bestowed on them! Then, enjoy (your short day), but soon will ye know. Moreover, they assign a portion of what we have bestowed for sustenance to things they do not know. By Allah (S.W.T), ye shall indeed be called to account for your false inventions.*[15]

The verse directly addresses the Arab tribes, especially the Pagans, who dedicate certain children, cattle, or produce from their fields to their false gods as acts of worship, rather than to the one true God. This behaviour highlights their folly. How can these people claim to offer gifts to God when it is God who has granted them all these blessings?[16]

It is important to note that they kill their children and practice female infanticide. The Qur'an mentions,

> *When news is brought to one of them, of the birth of a female child, his face darkens, and he is filled with inward*

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[15] Al-Qur'an, 16:55-56.

[16] The Holy Quran English translation of the meanings and commentary, Revised and Edited by The presidency of Islamic Researches, IFTA, Call and Guidance, King Fahad Holy Quran Printing Complex 747.

> *grief. With shame, he hides his people because of the bad news he has had. Shall he retain it on sufferance and contempt or bury it in the dust? Ah, what a wrong choice they decide on!*[17]

On the other hand, after the arrival of Islam, it guarantees the child the right to life and protects it against injury and harm. Likewise, the protection of life is one of the objectives of Islamic law (*Maqasid al-Shari'ah*). There is no religion or entity on Earth if life is not protected. Therefore, the family and state should protect children after birth, including orphans. No one is allowed to kill an innocent child, as it is considered murder, and the punishment for killing human life under Islamic law is retaliation (*qisas)*[18]. The Qur'anic verse categorically mentions the Qisas as:

> *O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. However, whoever overlooks his brother anything, there should be a suitable follow-up and payment to him with good conduct. This is an alleviation of your lord and mercy. But whoever transgresses after that will have a painful punishment.*[19]

> *And we ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. However,*

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[17] Qur'an, 16:58-59.

[18] Qisas literal means "justification in which one who has committed a crime is punished by the same act he has acted on upon the victim.Qisas also means equality as criminals will be sentenced to punishment that equals the severity of his crime upon the victim." Ahmad Muhammad Husni, Zaini Nasohah, A.B. Mohammad, Amir Husin Mohd Nor, "Qisas: The theory and its application on women a comparison between civil and Islamic views," accessed on January 2001, https:/doi.10.3923/sscience.2014.53.57, https://www.researchgate.net/publication/292055307_Qisas_The_theory_and_its_application_on_women_a_comparison_between_civil_and_Islamic_views.

[19] Al-Qur'an, 2: 178

> *whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed - then it is those who are the wrongdoers.*[20]

Killing is also prohibited in the Qur'an as it is a severe offence. The Qur'an rules that if a person kills one life, he kills the whole of mankind, as it states to effect.

> *Because of that, we decreed upon the Children of Israel that whoever kills a soul unless, for a soul or corruption [done] in the land, it is as if he had slain mankind entirely and whoever saves a life it is as though he had saved the lives of all mankind.*[21]

The prohibition of killing is also emphasised by the *hadith* of the Prophet Muhammad S.A.W., on the authority of Ibn Masood R.A., who said:

> *The Messenger of Allah S.W.T. said, "It is not permissible to spill the blood of a Muslim except in three [instances]: the married person who commits adultery, a life for a life, and the one who forsakes his religion and separates from the community.*[22]

From the above verses and the hadith of the prophet, Muslims and humans are commanded to protect and secure one another's lives. No one can take anyone's life except in permissible circumstances such as *qisas*. Hence, the child is the most innocent and pious body in this world, and protecting the child is the duty of the parents and the state.

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[20] Al-Qur'an, 5:45.

[21] *Ibid*, 5:32.

[22] Muslim, 14.

Rights to Care and Upbringing (Kafalah) and Maintenance under Shari'ah

Orphans are also entitled to care for and to be brought up. One of the means of protecting orphans under Islamic law is through foster parenting (*kafalah*).

Kafalah is an Arabic word that means "*to support*." Legally, *kafalah* is defined as the commitment to voluntarily take care of the maintenance, of the education and the protection of a minor, in the same way a parent would do for a child.[23] *Kafalah* resembles foster parenting and is witnessed as primarily a gift of care but not a substitute for lineal descent.[24] Moreover, *kafalah* seeks to remove one's burden and places it under the protection of the one who has assumed this responsibility. This concept is associated with the welfare of orphans. Thus, a *kāfil* is a legal guardian for orphans, and their duties are as orphan breadwinners, providers, protectors, and legal guardians. The guardian may be financial (e.g., co-signing a credit transaction) or physical (e.g., providing safety and shelter from potential harm).[25] For care and upbringing, orphan children may be fostered or adopted by foster parents in a traditional manner, or through welfare institutions.[26]

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[23] Prof. Emeritus Tan Sri Dato Dzulkifli Abdul Razak, *Family Fiqh in Malaysia,* (Contemporary Fiqh Unit IIUM: Islamic Book Trust, 2021), 148.

[24] *Ibid*.

[25] Alwani, Zainab, "Kafāla: The Qurʾanic-Prophetic Model of Orphan Care," *The Journal of Islamic Faith and Practice* 3, Issue 1.

[26] "According to the Gale Encyclopedia, foster care refers to full-time substitute care of children outside their own home by people other than their biological or adoptive parents or legal guardians. Children, who are removed from their biological or adoptive parents, or other legal guardians, are placed in foster care in a variety of settings. They may be placed in the care of relatives other than the family members involved in the neglect or abuse (kin placement), non-relatives, therapeutic or treatment foster care, or in an institution or group home." Azizah Mohd, Nadhilah A. Kadir, "Children Foster Care Law And Practice: What Malaysia Can Learn From Foster Care (Ihtidhan) In Jordan," *IIUMLJ*, (2014) 22, 295.

In such a situation, a foster or adoptive family shall assume responsibility for the child's care, yet the child's name and family background will remain unchanged in legal terms. The child lacks inherent inheritance rights from the foster family unless specified in a will or bequest. This approach appears to align more realistically with the innate connection of human beings with their ancestors through blood or lineage.[27] "According to Mahmud Shaltut and Atiyyah Saqar, adoptions are divided into two types: adoption that renders the status of parentage to the adopted child, and adoption that does not render the status of parentage to the adopted child. The second type of adoption is not prohibited in Islam, and indeed, it is highly encouraged if it can assist children who have no parents or guardians. The second kind of adoption is like the concept of fostering or foster parenting, where a child is only taken into the custody of a person without affecting their biological status."[28] The Qur'an states to the effect:

> *…nor has he made your adopted sons your sons, such is (only) your (manner of) speech by your mouths. But Od tells (ou) the truth, and he shows the (right) way.*[29]
>
> *Call them by (the names) of their fathers, that is, juster in the sight of God. But if ye know not their father's (names, call them), your brothers in faith, or your Mawlas.*[30]

The Qur'anic verse discusses the legal relationship between the child and the foster parents. This indicates that no child can be recognised by someone other than the father. It follows that blood

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[27] Azizah Mohd, Nadhilah A. Kadir, "Children Foster Care Law And Practice: What Malaysia Can Learn From Foster Care (Ihtidhan) In Jordan," *IIUMLJ*, (2014) 22, 295.

[28] Ed. Javaid Rehman, Ayesha Shahid, Steve Foster, *The Asian Yearbook of Human Rights and Humanitarian Law,* Vol. 4 (2020), Azizah Mohd and Nadhilah A. Kadir, *Protection of Adopted Children's Rights to Custody and Maintenance: An Appraisal of the Law Governing Muslims in Malaysia*, 183.

[29]Al-Qur'an, 33: 4

[30] *Ibid*, 33::5

ties between the child and birth parents are maintained, and the identity of the birth parents is not concealed.[31]

There are circumstances in which orphans survive with their relatives, such as paternal and maternal families, and depend on them for their life necessities. In this case, the question arises: Who will provide them with maintenance, especially after the death of their father? Muslim jurists have two views on this issue. Maliki jurists assert that the responsibility of providing maintenance to children will not be transferred to other family members, whether they are the paternal grandfather, mother, or any other relatives. According to them, the father was solely responsible for maintaining this. The paternal grandfather, mother, or any other relative was not obliged to provide maintenance. This is because a person's duty to maintain the children of his kin should be established at the outset and not by transmission. According to this view, maintenance is incumbent on the State after the father.[32]

Other jurists, including Hanafi, Shafi'i, and Hanbali, view that maintaining the orphans is transmitted to other family members. Because children have blood and lineage relationships with other family members, they sometimes inherit from one another. However, they differ in who is responsible for their maintenance.

According to Shafi'i, duty is transmitted to relatives through linear kinship based on priority. First, it goes to the paternal grandfather, regardless of how high it is. After that, it will go to the mother, and later, it will go to the nearest relatives in lineage kinship from the father's or mother's side[33]. However, in cases

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[31] Nadhilah A.Kadir, Azizah Mohd, "An Appraisal of child protection through adoption under Malaysian Registration of Adoptions Act 1952 and Kafalah in Morocco," *Contemporary Issues in Islamic Family Law, Property and Finance, ICFL,AIKOL*, (2021): 175.

[32] Badruddin Hj. Ibrahim, Azizah Mohd, "The Child's right to maintenance: The extent of the family's responsibilities in Islamic law and according to the family law provisions of Muslim countries", *Arab Law Quarterly* 25(2011): 416.

[33] Badruddin Hj. Ibrahim, Azizah Mohd, "The Child's right to

where no suitable family member is available to care for the minor, it becomes the state's responsibility to ensure welfare. The state is then bound to prioritise the best interests of minors and provide them with the necessary care and support.[34]

A classical jurist, Burhan al-Din al Farghani al Marghinani mentioned in his book that the maintenance of minor children is the liability of the father and no one else participated in this with him, this is due to the words of Allah, "*but he (the father of the child) shall bear the cost of their food and clothing on equitable terms".*[35]

Shari'ah mandates that orphans' basic needs, such as shelter, food, clothing, and education should be adequately provided. Islamic law encourages the community and family members to contribute to the financial support of orphaned children[36].

In Pakistan, it is important to note that many of orphan's living in orphanage homes and welfare homes. The government and private non-profit organisations working together for the betterment of orphans. For this purpose, Pakistan Bait-ul-Mal (PBM), established under the PBM Act of 1991, is a federal government organisation whose major function is to devise and execute the policies to cater to the needs of poor, destitute, widow, orphan and needy. With this mandate PBM takes initiative for establishment of Pakistan Bait-ul-Mal Dar-ul Ehsas/Sweet Homes/Orphanages.[37] This home provides basic facilities such as food, shelter, education, and healthcare in the best possible way. It is notable to mention here that under the control of Sweet Home,

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maintenance: The extent of the family's responsibilities in Islamic law and according to the family law provisions of Muslim countries", *Arab Law Quarterly* 25(2011): 416.

[34] Fatwa No.1766(866), Fatawa-I-Kazee Khan relating to Mohammedan Law, vol.I (Pakistan Educational Press: Lahore,1977).

[35] Translated by Imran Ahsan Khan Nyazee, Translation of Al Hidayah fi Sharh Bidayat al Mubtadi(Federal Law House:Lahore, 2015): 1061.

[36] *Ibid*.

[37] Murtaza, Amir, 181.

the cadet college for orphans was established in Sohawa Gujar Khan with the cooperation of Sidique Public School.[38] Sweet Homes provides the best facilities, but many orphans cannot access them because of hardships.[39]

Moreover, several non-governmental organisations take responsibility for orphans, including Edhi Homes, SOS Village, Faiz ul Islam, Saba Trust, Bint E Mariam, Agoush Trust for Orphanage, and Dar e Yateem. Moreover, Edhi Homes branches were established throughout Pakistan.[40]

Allah S.W.T. indicated in the holy book of the Qur'an that they spend charity on orphans. He mentioned to the effect:

> *They ask thee what they should spend in charity. Say: Whatever wealth ye spend that is good, Is for parents and kindred and orphans and those in want and wayfarers and whatever ye do that is good, Allah (S.W.T) knoweth it well.*[41]

In another place, the Qur'an says about charity in these words:

> *It is not righteousness that ye turn your faces towards east from west, but it is righteousness to believe in Allah and the last day, and the angels, and the book, and the Messenger; to spend your substance, out of love for him, for your kin, for the orphan, for the needy, for wayfarers.*[42]

The above verses explicitly state that faith is not merely a matter of words; it must realise the presence and goodness of

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[38] Pakistan Sweet Home Cadet College, Sohawa, (accessed 20 November 2021).

[39] Hardships includes orphans living in far flong areas, unable to get the awareness about orphan homes.

[40] Major features of Edhi Foundation which make it unique. https://edhi.org/major-features-of-edhi-foundation/

[41] Al-Qur'an, 2:215.

[42] *Ibid*, 2:177.

Allah, together with the practical deeds of charity and love towards orphans and the needy.[43]

Right to Name and Identity

After the birth of a child, parents are bound to give the child a good name. According to the Prophet Muhammad S.A.W. instructions,

> *By the seventh day, the child should be given a good name and its head shaved, along with all other hygienic measures required for healthy growth. This could be a festive event. At any rate, the child's right to care is so inalienable that not even a mother, the closest person to the child, can tamper with it.*[44]

Prophet Muhammad S.A.W. loves children and explicitly mentions their rights in many places. The Prophet S.A.W. said: *"Whoever is graced with a child should give him a beautiful name and beautify his character."*

Like other ordinary children, orphans also have the right to a good name and identity. Therefore, it is the duty of the caregiver or foster parents (*kafil*) to provide them with a good name and identity to their biological parents.

The *hadith* of the Prophet Muhammad S.A.W. asserted that, *"Surely you will be called on the Day of Judgment according to your names and (the names of) your fathers.*[45]*"* Henceforth, from

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[43] The Holy Quran English translation of the meanings and commentary, Revised and Edited by The Presidency of Islamic Research, IFTA, Call and Guidance, King Fahad Holy Quran Printing Complex.

[44] Shabina Arfat, "Islamic Perspective Of The Children's Rights: An Overview*," Asian Journal Of Social Sciences & Humanities* Vol. 2, No. 1(2013): 302.

[45] Dr. Muhammad Akbar Khan and Miss. Rabia Tus Saliha, "A critical analysis of the convention on the rights of the child (CRC), 1989 in the light of Islamic Law," *Hazara Islamicus*, Vol. 9, Issue. 1 Jan-June 2020 PP: 01-20, ISSN (Online): 2410-8065 ISSN (Print): 2305-3283 www.hazaraislamicus.com.

the beginning of Islam until now, the identification of children is recommended for the best interests of their rights, and it becomes an obligation for parents or legal guardians to take good care of their interests.

Right to Health

Health is a blessing from Allah S.W.T. to his creatures. It is essential for the preservation of life. Henceforth, based on *Maqasid al-Shari'ah,* Islam gives priority to protecting health(life) after faith. *Maqasid al-Shari'ah* protects faith, life, progeny, property, and intellect. Of these five, three were in good health: life, progeny, and intellect.[46] Imam Al-Ghazali states,

> *A proper understanding and implementation of religion, from the standpoint of both knowledge and worship, can only be arrived at through physical health and life preservation.*[47]

Islam gives importance to health worldwide. A person who wakes up in the morning and physically performs his work is the most blessed in this world. The Prophet Muhammad S.A.W. says:

> *Many people give themselves a raw without considering two blessings: health and spare time.*

It is noticeable that most people underestimate the importance of health when they are healthy. The Prophet Muhammad S.A.W. says:

> *Second to faith, no one has ever been given a greater blessing than health." In another hadith, the Prophet defines the relative importance of health and wealth:*

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[46] Auda, Jasser. *Maqasid Al-Shari'ah as Philosophy of Islamic Law: A Systems Approach*. International Institute of Islamic Thought, 2008. https://doi.org/10.2307/j.ctvkc67tg.

[47] Dr M.H. Al-Khayat, *Health as a Human Right in Islam*, (Cairo, Egypt: World Health Organization Regional Office for the Eastern Mediterranean, 2004), 14 ISBN: 92–9021–345–0

> *Wealth is of no harm to a God-fearing person, but to the God-fearing, health is better than wealth.*[48]

It is evident from the Prophet's Muhammad S.A.W. sayings that health is better than wealth; in other words, we can say that health is the most incredible wealth in this life. Ibn Abbas R.A. reported that the Prophet Muhammad S.A.W. said another place as given below:

> *Make the best use of five things before the onset of five others: your life before your death, your health before your illness, your free time before being too busy, your youth before your old age, and your wealth before you end up in poverty.*[49]

Health is essential for human life from birth until the end of life. Likewise, Allah S.W.T. loves his creatures and says in the Qur'an, *"He loves them, and they love him.*[50]*"* This verse conveys the extreme empathy of love between the creator and the creature. Allah created modes of safeguarding human health from the beginning of human life. Such as, at the time of birth of a child, Allah orders the mother to breastfeed[51] the child for two years, which gives complete nourishment and health[52]. In the Qur'an, Allah says to the effect:

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[48] Sahih Al Albani, Book No.14, The Book Adab Al Mufard, Hadith 301. Sunnah.com, accessed 1 February 2023.

[49] Shu'ab al-Imān 9767, https://www.abuaminaelias.com/dailyhadithonline/2012/08/15/gratitude-before-five/

[50] Al-Qur'an, 5:54

[51] Breast milk is recommended as the infant's sole source of nutrition for the first 6 months of life. It is recommended that complementary foods be added to the infant's diet at 6 months of age and that breastfeeding continue up to two years of age and beyond.

[52] Christine M. Dieterich, "Breastfeeding and Health Outcomes for the Mother-Infant Dyad" in *Pediatr Clin North Am* 60(1) (2013): https:// doi: 10.1016/j.pcl.2012.09.010

> *The mothers shall give this to their offspring for two whole years if the father desires to complete the term. However, he bears the cost of food and clothing on equitable terms. No soul shall have a burden on it that is more significant than it can bear. No mother was mistreated because of her child. Nor the father, on account of his child, shall an heir be chargeable in the same way. If they both decide on weaning, by mutual consent, and after due consultation, there is no blame for them. If ye decide on a foster mother for your offspring, there is no blame on you, provided ye pays (the mother) what ye offered on equitable terms. But fear Allah (S.W.T) and know that Allah (S.W.T) sees well what ye do.*[53]

The Qur'an endorses breastfeeding as a fundamental right for every newborn and infant with high recommendations for completing a breastfeeding cycle of two years, which is emphasised in the case of infants in dire need of milk nutrition. Ibn Ashour believes that this verse carries a confirmed right to infants' breastfeeding, and therefore, Islamic law considers breastfeeding as one of the child's most fundamental rights.[54]"

The right to proper nourishment and health was provided at birth. Moreover, the father is responsible for adequately maintaining the children and fulfilling all their necessities for better health and development as a human being.

In Islam, the right to health for children, including orphans, is as essential as that for adults. Islamic teachings guide parents and legal guardians in their day-to-day lives, their children's responsibilities, and many other issues in our lives. Further, Islam teaches about the parent-child relationship, and parents are asked to pray for their children's righteousness and healthy life.

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[53] Al-Quran, 2:233.

[54] Benaouda Bensaid, "Breastfeeding as a Fundamental Islamic Human Right," *Journal of Religion and Health* 13, (Springer Science+Business Media, LLC, Springer Nature), 20 https://doi.org/10.1007/s10943-019-00835-5

Right to Education

The concept of education is as old as human beings; Allah S.W.T. sent the first revelation **o**n the Holy Prophet S.A.W. and stated its effect.

> *Recite in the name of Allah (S.W.T) who created. Created man from a clot of congealed blood. Recite and your Lord are the most generous. Who taught by the pen. Taught man what he did not know.*[55]

The first word, "*Iqra'"* is a command that means read in Arabic, and that implies the concepts of learning, exploring and seeking enlightenment. This demonstrates that reading (knowledge) is a way of approaching the creator of all that exists.[56] It is observed from the verse that the initial verse on seeking knowledge in Islam does not specify whether it pertains to spiritual or worldly matters. This implies that all types of knowledge are highly valued and essential to Islam.[57] In another verse, the Qur'an says to the effect,

> *Ask them: Are those equal to those who do not know*? *Only they will remember [who are] people of understanding.*[58]"

In another place, the Qur'an says to the effect,

> *Allah (S.W.T) will raise to high rank those of you who believe and are endowed with knowledge.*[59]

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[55] Al-Qur'an, 96: 1-5.

[56] Tareque Bin Atique, "Importance of Education in the Light of Islam: An Overview," *Jagannath University Journal of Arts*, Vol. 2, No. 1, (2012): 192-200

[57] Dr A. Umar Alkali, Dr. Azizah Mohd, Dr Muhammad Alhaji Abubakar, "A Comparison Of Child's Right To Education Under Islamic Law And The Convention On The Rights Of The Child," *International Journal of Current Research in Social Science & Humanities 1* (2015): 13 – 21, http://innovativejournal.in/ijcrssh/index.php/ijcrssh.

[58] Al-Qur'an, 39: 9.

[59] *Ibid*, 58: 11.

According to Al-Attas, the meaning of education in its totality is inherent in the connotation's terms *"tarbiyyah," "ta'lim",* and *"ta'dib"* taken altogether. Although all terms refer to education, *ta'dib* is more accurate and precise for interpreting the concept of education. *Ta'lim* refers to instructing, teaching, training, going to school, and education, which contains elements of knowledge and schooling. *Tarbiyyah* means to nurture, to bear, to feed, to foster, to nourish, to cause to increase growth, to rear, and to bring forth to mature produce.[60]"

The Prophet Muhammad S.A.W. highlights the importance of education and guides Muslims to seek education and impart it to others. After the battle of Badr, the Prophet S.A.W. consulted with his close companions Abu Bakr al-Siddiq and Umar Ibn al-Khattab as to the fate of the prisoners. Abu Bakr suggested to release on the condition of ransom, while Umar suggested to killing them. The Prophet Muhammad S.A.W. later ransomed prisoners for freedom. He required he wealthy prisoners to pay based on their financial situation, whereas the poor but literate prisoners to teach ten Muslim children to read and write. He unconditionally released those who were neither rich nor literate.[61]

Under Islamic law, children's (including orphans) entitlement to education can be categorised into religious and nonreligious instruction. Both forms of education are crucial, contributing to a child's development into a responsible and devout Muslim in adulthood. Depriving a child of either type of education would equate to denying their right to education. Therefore, parents are obligated to inculcate in their children an understanding of the magnificence of Allah, along with imparting knowledge about

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[60] Nik Rosila Nik Yaacob, "An Islamic Perspective on the Role of Education in Responding to Social Issues Among Students in Malaysia," *US-China Education Review B*, ISSN 2161-6248 June 2013, Vol. 3, No. 6, 439-446.

[61] Rebaz R. Khdir, "The Fate of Prisoners of War Between the Quran, Traditions of the Prophet Muhammad and Practice of the Islamic State in Iraq and Syria," *European Scientific Journal* edition Vol.13, No.34 (2017) ISSN: 1857 – 7881 (Print) e - ISSN 1857- 7431,p.3, 10289-Article%20Text-29469-1-10-20171228.pdf.

moral distinctions and effectively training them in practical skills for their sustenance as adults.[62]

Islam also encourages education to protect intellect, as this is part of the *Maqasid al-Shari'ah*. This indicates that a child's right to education, including an orphan, is protected and safeguarded.

Right to Profess the Religion

Islam always encourages and provides freedom to individuals to choose the best religion. Children, including orphans, have many rights, including the freedom of religion. They usually opted for the religion of their parents.

It is evident from hadith that a child is born in *fitrah*. He was neither born as a Jew nor Christian etc. As Abu Huraira R.A. reported:

> *The Prophet Muhammad S.A.W. said, "No child is created but to his true nature (Islam). It is his parents who made him a Jew or a Christian or Magian. As an animal delivers a child with limbs intact, do you detect any flaws?" Then, Abu Huraira recited the verse, "The nature of Allah upon which he has set people"*

Ibn Shihab said that the funeral prayer should be offered to every child, even if he were the son of a prostitute, as he was born with a natural inclination towards Islam. If his parents are Muslims or only his father, and even if his mother practised practices other than Islam, and if he cries after delivery before his death, his funeral prayer must be offered. If the child does not cry after the delivery, his funeral prayer should not be offered, and he will be considered a miscarriage.[63]

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[62] Dr A. Umar Alkali, Dr. Azizah Mohd, Dr Muhammad Alhaji Abubakar, "A Comparison Of Child's Right To Education Under Islamic Law And The Convention On The Rights Of The Child," *International Journal of Current Research in Social Science & Humanities* 1(2015): 13-21, http://innovativejournal.in/ijcrssh/index.php/ijcrssh.

[63] Ṣaḥīḥ al-Bukhārī 1358, Vol.2 Book 23 Hadith 44, Sunnah.com, https://sunnah.com/bukhari:1358, Ṣaḥīḥ Muslim 2658e, Book 46, Hadith

Moreover, there is a hadith narrated by Malik bin Anas, which Talha has also reported. Ubaidullah, with the only variation that the Prophet remarked:

> *By his father, he shall succeed if he were true (to what he professed), or: By his father, he would enter heaven if he were true (to what he professed).*[64]

Another hadith is reported on the authority of Abu Hurairah R.A. that the Messenger of Allah said:

> *I have been commanded to fight against people so long as they do not declare that there is no god but Allah, and he who professed it was guaranteed the protection of his property and life on my behalf, except for the right affairs that rest with Allah.* [65]

Hence, Allah commanded Prophet Muhammad S.A.W. to profess the religion of Islam.

This hadith discusses the inherent nature of every child, emphasizing that all children are naturally inclined toward goodness and truth. This implies that parents play a crucial role in determining the religious path their children will follow. Consequently, parents bear the responsibility of creating an environment in which their children can explore various religions, thus enabling them to make informed decisions as they mature. This hadith also touches upon the notion that Allah understands the potential outcomes for individuals who pass away before having the opportunity to choose a religion. This suggests Allah's compassion towards those who are unable to select their faith during their lifetime, with the implication that such individuals will be judged accordingly in the afterlife.[66]

37, https://sunnah.com/muslim:2658e.

[64] Sahih Muslim: Book 1, hadith 9.

[65] *Ibid,* hadith 33.

[66]At-Tirmidhi, Book 32, Hadith 6, https://www.islamicity.org/hadith/search/index.php?q=27771&sss=1

The above discourse highlights that *Shari'ah* safeguards the rights of orphans and establishes a distinct set of provisions for them in comparison to children in general. These rights, as outlined in the Qur'an and *Sunnah*, are integral components of the *Shari'ah*. Consequently, it is imperative for states to formulate legislation aligned with the *Shari'ah* principles to ensure the well-being of orphans while also ensuring compatibility with international legal standards. This reflects a perspective that seeks to integrate Islamic values while maintaining a connection with the international legal framework.

A GENERAL OVERVIEW OF THE INTERNATIONAL LEGAL FRAMEWORK ON THE PROTECTION OF ORPHANS' RIGHT

Children's rights (including orphans) are a complex and relatively new aspect of legal rights, particularly when they are intertwined with human rights. Understanding the concept of children's rights proves to be challenging as it requires considering their interactions with other individuals, such as parents and the broader community. When considering children's rights, addressing the specific rights and challenges the orphans face is crucial. Orphans are a vulnerable group that often experiences hardship that requires special attention within the framework of children's rights.

The legal definition of orphan, which is considerable under the law, is "Any person (but particularly a minor or infant) who has lost both (or one) of his or her parents. More particularly, a fatherless child"[67]. Orphans by definition lack parental care and support, which can have profound implications for their overall well-being and development. Their rights encompass a broader set

[67] Soohan v. Philadelphia, 33 Pa. 24; Poston v. Young, 7 J. J. Marsh. (Ky.) 501; Chicago Guaranty Fund Life Soc. v. Wheeler, 79 111. App. 241: Stewart v. Morrison, 38 Miss. 419; Downing v. Shoenberger, 9 Watts (Pa.) 2, Accessed on 27 November 2023, https://thelawdictionary.org/orphan/

of children's rights and specific considerations related to their orphan status.

Over time, various international initiatives have been launched, starting from the era of the League of Nations with the introduction of the Geneva Declaration in 1924. Building on this foundation, the Universal Declaration of Human Rights in 1948 codified various legal principles, rights, and responsibilities. Article 25 and 26 of the Universal Declaration emphasise concerns for children to secure their well-being and future.[68]

In subsequent developments, the General Assembly passed a resolution in November 1959, proclaiming the U.N. Declaration on the Right of Child (1959). This declaration aimed to ensure that children have joyful childhoods and enjoy the rights and freedoms outlined in the document. It called upon parents, individuals, voluntary organisations, local authorities, and national governments to recognise these rights and work towards their implementation through legislative and other measures.[69]

Despite the Geneva Declaration's lack of a binding effect at the state level, the Declaration of the Rights of the Child marked a significant milestone. However, it was not until 30 years later, on November 20, 1989, that the United Nations General Assembly adopted the Convention on the Rights of the Child.

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[68] The Universal Declaration of Human Rights Act,1948,

Article 25(2): "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

Article 26 "1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all based on merit."

[69] UN Declaration On The Rights Of The Child, 1959, preamble.

Protection of Orphans Rights under The UN Convention on the Rights of the Child 1989 (the CRC)

The Convention on the Rights of the Child is extensive and encompasses key principles of the U.N. Charter. It recognizes the inherent dignity and unalienable rights of all individuals, emphasizing the pursuit of justice and peace on a global scale. Additionally, the Convention reaffirms the importance of existing international human rights treaties, underscoring that every person is entitled to rights and freedoms without discrimination.

The Convention on the Rights of the Child also emphasises the significance of family structure in promoting children's well-being and development. It acknowledges that the concept of the family provides vital protection and support for children's livelihoods. Moreover, it recognises the role of family culture in fostering children's physical and mental well-being and promoting peace, dignity, tolerance, freedom, equality, and solidarity.[70]

The CRC defines child under Article 1 as *"every human being below the age of eighteen years unless under the law applicable to the child, the majority is attained earlier.[71]"* The CRC further emphasises the protection of children's rights as a whole without discrimination. In this regard the CRC pointed out that

> *All children have all these rights, no matter who they are, where they live, what language they speak, what their religion is, what they think, what they look like, if they are a boy or girl if they have a disability if they are rich or poor, and regardless of whether their parents or families*

[70] United Nations Report of the Committee on the Rights of the Child, Eighty-ninth session (17 January–11 February 2022) General Assembly Official Records, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/355/04/PDF/G2235504.pdf?OpenElement.

[71] UNCRC, Article 1, https://www.unicef.org/child-rights-convention/convention-text

> *are, or what their parents or families believe or do. No child should be treated unfairly for any reason.*[72]

It is noteworthy to highlight that the CRC does not define who is an orphan or discuss the rights of orphans under any of its provisions. However, the above definition of a child seems to be exclusive and covers orphans in the capacity of a child.

Hence, to protect orphans, this paper will further explore some fundamental rights for children, including orphans, in comparison with the rights protected under the *Shari'ah*, particularly the rights to life, maintenance, care, and upbringing (*kafalah*); the rights to name and identity, health rights, he rights to education, and the right to profess a religion.

Right to Life

The right to life is the inherent right, whereby CRC places responsibility on the state to protect children's lives from society's evil. Article 6[73] has been added to the CRC as follows.

> *Survival and development refer to **e**very child's inherent right to life, and the State must ensure the child's survival and development.*

The right to life is a guiding principle of cardinal importance for the existence and efficacy of all other rights of the child.[74] A child's right to life applies to all children, including orphans (without exception). The right to life enshrined in Article 6(1) of the CRC is non-derogable and contains no exception to accommodate armed conflict or the death penalty. Moreover, there is a compelling argument that the right to life, and thus the

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[72] UNCRC, Article 2, https://www.unicef.org/media/60981/file/convention-rights-child-text-child-friendly-version.pdf

[73] UNCRC, Art. 1, "1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."

[74] P Newell and R Hodgkin, *Implementation Handbook for the Convention on the Rights of Child,* 3rd edn, UNICEF (2008): 83.

child's right to life, forms part of the rules of customary international law and may be the norm of *jus cogens*[75]. Therefore, the child's right to life should not be interpreted narrowly and imposed upon the State's positive obligations to adopt measures to protect the right.[76]

It is important to note that the CRC is the first convention that legally binds signatory states to incorporate these rights into their national legislation. For example, Pakistan, as a developing country and signatory[77], incorporates the children's rights in the CRC in its national legislation through the Act of Parliament, that is, the National Commission on the Rights of Child Act 2017, under Section 2(c).[78] It is further evident that Pakistan incorporated the right to life as a fundamental right under The Constitution of Pakistan,1973, before the CRC.

Another example is Malaysia, which is a signatory[79] to the CRC that also ensures the protection of the child's right to life, especially in the Federal Constitution of Malaysia,1957.[80] In 2001, Malaysia enacted the Child Act of 2001 to comply with the CRC and safeguard children's rights, including the right to life. For example, the preamble states, *"Recognizing that a child is not only*

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[75] *Jus cogen* means [Latin: coercive law] A rule or principle in international law that is so fundamental that it binds all states. A Dictionary of Law (7 ed.), Jonathan Law and Elizabeth A. Martin, Oxford University 2009, ISBN: 9780191726729

[76] Human Rights Committee General Comment No.6 Article 6 HRI/GEN/1/Rev 8, para 5, 167

[77] Pakistan ratified on November 12, 1990.

[78] National Commission on the Rights of Child Act,2017, Section 2(c) 'child rights" mean and include, but are limited to, rights of the child in the United Nations' Convention on Rights of the Child and any other domestic law."

[79] Malaysia ratified CRC in 1995.

[80] Federal Constitution of Malaysia, Art. 5: "Liberty of the person 5. (1) No person shall be deprived of his life or personal liberty save in accordance with law."

a crucial component of such a society but also the key to its survival, development, and prosperity.[81]"

The above provisions infer that an orphan's right to life is fully protected under an international legal framework and in the national legislation of state parties. This corresponds to the provisions under *Shari'ah* that protect orphans' lives in the same vein.

Rights to Care and Upbringing (Kafalah) and Maintenance under CRC

The CRC safeguards the rights of children, including orphans, facing deprivation of their fundamental rights. A crucial focus of CRC is to ensure children's entitlement to care, upbringing, and maintenance, especially in situations where they lack a family environment. Furthermore, the CRC highlights the obligation of state parties to provide specialized protection and aid to children who are unable to stay within their family environment for various reasons. This underlines the significance of alternative care measures such as foster placement, adoption, or placement in suitable institutions. The core principles embedded in the CRC prioritise the best interests of the child, encompassing their care, upbringing, and maintenance.

However, regarding orphans, Article 20[82] of the CRC protects the rights of children deprived of their family environment. It places responsibility on the state to provide exceptional protection and assistance to these children. Subclause (3) of Article 20 suggests various options for well-being, including foster placement, *kafalah* (Islamic guardianship),[83] or

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[81] Child Act, 2001, Preamble

[82] CRC, art. 20: Protection of Child without family: The state is obliged to provide special protection for a child deprived of a family environment and to ensure that appropriate alternative family care or institutional placement is available in such cases. Efforts to meet this obligation shall pay due regard to the child's cultural background.

[83]Adoption is defined as "A two step judicial process in conformance to state statutory provisions in whi

adoption, aiming to offer appropriate care when biological family support is unavailable.

Article 20(3) highlights the importance of prioritising alternative placements that ensure security, continuity of care, and emotional support, enabling children to form long-term attachments. The concept of *kafalah* was introduced to protect parentless children. Furthermore, the CRC is recognized as a vital and progressive instrument that aims to promote and safeguard these rights for children. CRC plays a crucial role in ensuring that children, especially those without parents, receive the necessary support and protection to grow and develop in a safe and nurturing environment.

The Pakistani government proactively addressed legislation regarding alternative care for children in need of protection and care through the Islamabad Capital Authority Act of 2018. Following the CRC, this legislative initiative focuses specifically on Sections 2(a)[84] and 5.[85] These sections pertain to providing care

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ch the legal obligations and rights of a child toward the biological paren ts are terminated and new rights and obligations are created between th e child and the adopive parents. https://legal-dictionary.thefreedictionary.com/adoption

Kafalah is defined "as the commitment by an individual or family (kafil) to voluntarily take responsibility for the daily care, education, safety, and protection of a child (makful) deprived of family care, in the same way a parent would do for their biological child."

"An Introduction To Kafalah", UNICEF, accessed on 2023, https://www.unicef.org/esa/media/12451/file/An-Introduction-to-Kafalah-2023.pdf

[84] Islamabad Capital Territory, 2018, s.2(a): "Alternative care" includes family care, placement in an institution established or regulated by the government or any other arrangement in the best interest of a child, as directed by the Court.

[85] Islamabad Capital Territory, 2018, s.5: "5. Child in need of care. A child in need of protection and care shall include a child who- (a) has been subjected to or is under serious threat of being subjected to child abuse or child exploitation while in the care of parents, legal Guardian, or any other person who has custody of the child in any (b) is unattended,

and upbringing for orphans whose parents may be deceased, and thereby unable to fulfil their parental responsibilities.

In Malaysia, the law protected the rights of children without families as early as 1952, before the ratification of the CRC. This law is embodied in the Registration of the Adoptions Act of 1952. The child may be adopted under the Act to ensure his care and upbringing. Further protection is in the Child Act of 2001, which provides for A Child in Need of Care and Protection under part V of the Act. This protection may include orphans as part of the population of children.

The right to maintenance also plays a pivotal role in the care and upbringing of children, including orphans, which includes their food, shelter, clothing, health, education, and all other basic substances of life of the children until adulthood. Fathers bear the basic responsibility. Under the CRC, the right to maintenance is not discussed separately but is highlighted under Article 3,[86] which deals with the best interest of the child without any discrimination. The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all rights recognized in the CRC and the holistic development of the child.

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a victim of an offense, child, domestic and such other workers, found begging, imprisoned with the mother or lives in an immoral, environment.

[86] CRC, art 3: *"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, the number and suitability of their staff, as well as competent supervision."

Additionally, there is no hierarchy of rights in the CRC; all the rights provided for therein are in the "child's best interests," and no right can be compromised by a negative interpretation of the child's best interests. [87]

Under Pakistani law, the primary duty of maintenance rests on fathers. At the same time, statutes do not explicitly define the term maintenance, whereby it can be inferred from judicial precedents that maintenance includes food, shelter, and all other necessities for children's physical and mental well-being. Under Section 488[88] of the Criminal Procedure Code,1898, the husband was bound to maintain his wives and children. Further, Section 9[89]

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[87] General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, Distr.: General 29 May 2013, https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

[88] CRPC, s.488: Order for maintenance of wives and children. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable maintain itself, [....} a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding four hundred rupees in the whole, as such Magistrate thinks fit and to pay the same to such person as the Magistrate from time to time directs. (2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance."

[89] MFLO,1961, s. 9 "Maintenance.—(1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking, any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband. (2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, 3 [to the Collector] concerned and his decision shall be final and shall not be called in question in any Court. (3) Any amount payable under sub-section (1) or (2), if not paid in due time, shall be recoverable as arrears of land revenue."

of the Muslim Family Law Ordinance 1961, and Section 17-A[90] of the Family Courts Act 1964, deal with the maintenance of children. The question arises in the case of the father's death: who will pay for maintenance? There is no specific provision for this issue. The Superior Court's judgement is binding on the grandfather to maintain his grandchildren in the absence or death of the father of the children.[91]

In light of the precedents in Pakistan, if a father is unable to provide maintenance for his children, the responsibility falls on the grandfather. However, a precedent set in the 1991 case of *Ghulam Nabi v Muhammad Asghar* and three others by the Supreme Court of Pakistan clarified that grandparents are only obligated to pay for maintenance if there are no close relatives alive. In cases where the father is alive, he is accountable for the financial support of his children, and neither maternal nor paternal grandparents bear the responsibility, regardless of their financial status. In the 1976 case *Haji Nizam Khan v Additional District*

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[90] Family Courts Act,1964, Section 7A, *"17A. Suit for maintenance.–*

(1) In a suit for maintenance, the Family Court shall, on the date of the first appearance of the defendant, fix interim monthly maintenance for wife or a child and if the defendant fails to pay the maintenance by fourteen day of each month, the defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.

(2) In a decree for maintenance, the Family Court may:

(a) fix an amount of maintenance higher than the amount prayed for in the plaint due to afflux of time or any other relevant circumstances; and

(b) prescribe the annual increase in the maintenance.

(3) If the Family Court does not prescribe the annual increase in the maintenance, the maintenance fixed by the Court shall automatically stand increased at the rate of ten percent each year.

(4) For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant.]

[91] PLD 1976 Lahore 930.

Judge Lyallpur and others, the Lahore High Court asserted that a financially sound grandfather must support his grandchildren if they are in need. The court emphasized the principle of Islamic social justice, contending that if a statute fails to address an issue, Muslim law should fill the gap. The Lahore High Court construed the doctrine of 'justice, equity, and good conscience' as synonymous with 'Islamic law' in this context. In Sultan Ahmed v The Judge Family Court, where the father was intentionally evading responsibility, the Lahore High Court ruled that the grandfather was obligated to maintain the children when the father was unavailable or in hiding. The court specified that the grandfather's duty to provide maintenance arises only if the grandchildren are in need and the father is deceased, absent, or incapable of fulfilling this obligation.[92]

In Malaysia, the Preamble of the Child Act further recognizes the role and responsibility of the family in society, to afford the necessary assistance to enable them to fully assume their responsibilities as the source of care, support, rehabilitation and development of children in society.[93] The law recognizes the responsibility of the family, care, support, rehabilitation, and development of children, which is achieved through the proper maintenance of children, including orphans.

The Islamic Family Law Federal Territories Act 1984, a pioneering act of state enactment that governs Muslims, mandates that fathers are responsible for maintaining their children, whether they are in the father's custody or the custody of others.[94] This responsibility considers the father's financial means and social standing or the cost of maintenance, which includes providing accommodation, food, medical attention, and education. However, Subsection 2 of the same provision stipulates that if the

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[92] Dr. Mudasra Sabreen,"Maintenance of the Child in Pakistan: A Much-Needed Legislation," *LUMS Law Journal,* https://sahsol.lums.edu.pk/node/12888#:~:text=In%20Islamic%20law%2C%20nafaqah%20(maintenance,as%20well%20as%20his%20children

[93] Child Act, 2001, Preamble.

[94] See Islamic Family Law (Federal Territories) Act 1984, Act 303, s. 72(1).

father cannot maintain the children, or if he is deceased or his whereabouts are unknown, the responsibility shifts to male relatives liable under the *hukum syarak*, such as the paternal grandfather and uncles. The duty to maintain the children does not transfer to the mother, even if she has the means, as the responsibility is transferred to male relatives under the *hukum syarak*.[95]

It can be concluded that the CRC and the state parties protect the best interests of the children, including orphans, and emphasize their care, upbringing, and maintenance for their physical and mental well-being. The above provisions regarding *kafalah* are in line with *Shari'ah* in protecting orphans, who are deprived of a family environment. *Kafalah* may include the care, upbringing, and maintenance of children, including orphans.

Right to Name and Identity

Following the birth of a child, parents must ensure that their child is registered in the national database, enabling them to access the rights provided by the state. The CRC addresses this significant matter in Articles 7 and 8, emphasizing the importance of registering children (including orphans) and granting them associated rights.

Article 7(1) of the CRC mandates that every child (including orphans) should be given a name from birth. While the Convention does not specify the type of name, national laws should establish mechanisms to prevent the registration of names that could subject children to ridicule or discrimination.

Article 7(2) further clarifies that the state is obligated to ensure that children enjoy the rights outlined in Article 7(1). This means that the state must actively guarantee that children (including orphans) can exercise their right to name.[96]

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[95] Dr. Nora Abdul Hak, Dr Roslina Che Soh and Dr Noraini Hashim, "Right of a Child to Maintenance: Harmonising the Laws in Malaysia," http://irep.iium.edu.my/9300/.

[96] P Newell and R Hodgkin, *Implementation Handbook for the*

Regarding orphans' rights to identity, Article 8 provides, among others, that a child's identity is preserved and recognized, including name, nationality, and family relations. The purpose of Article 8 is to ensure utmost respect for and protection of a child's identity, as established under Article 7.[97] In addition, Article 8(2) states that children are entitled to "appropriate assistance and protection." This assistance and protection encompass a range of measures, including legislative actions and the implementation of civil and criminal penalties, to safeguard a child's identity.[98]

As the adopting states incorporated these rights into their national legislation, the National Database and Registration Authority was established in Pakistan under the National Database and Registration Authority Ordinance 2000. This government department issues a child registration certificate after the birth of the child and protects its identity.

Meanwhile, in Malaysia, to protect a child's rights (including orphans) to name and identity, the law requires that the particulars of the birth of the child be registered under the Births and Deaths Registration Act of 1957.[99] Thus, the registrar issued birth certificates for children born in Malaysia.

The above discussion shows that both the CRC and *Shari'ah* safeguarded and upheld the fundamental rights of orphans, specifically focusing on their right to name and identity. State

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Convention on the Rights of Child, 3rd ed, UNICEF (2008): 104.

[97] Alistair MacDonald QC, "*The Rights of the Child*" (Family law: Jordan Publishing limited, 2014) 25.

[98] *Manual of Human Rights Reporting* HR/PUB/91/1 (Rev 1), 432-433.

[99] Birth and Registration Act,1957, s.7 "Particulars of births to be registered." 7. (1) Subject to the provisions of this Part, the birth of every child born in Malaysia shall be registered by the Registrar for the registration area in which the child was born by entering in a register in duplicate in manner prescribed such particulars concerning the birth as may be prescribed, and different registers shall be used and different particulars may be prescribed for live births and stillbirths respectively:"

parties acknowledge the CRC guidelines and ensure protection through national legislation.

Right to Health

The CRC further provides for the protection of children's rights (including orphans) to health, since health is a fundamental right, encompassing the right to lead a healthy and peaceful life. The CRC enshrines this right under Article 24; namely, it is the responsibility of the state to provide optimal healthcare facilities, particularly for children (including orphans). State parties strive to ensure access to essential healthcare services and education, including health and nutrition knowledge, for parents and children. Therefore, developed nations must support developing countries by providing critical healthcare facilities.

Article 24 states that the right to health cannot be understood in narrow biomedical terms or is limited to the delivery of health services. Rather, in its reference to food, water, sanitation, and environmental dangers, for example, it recognizes the wider social and economic factors that influence and impact the child's (including orphans) state of health.[100] According to Kavot Zillén, he states that:

> *The health of young children (including orphans) is at particular risk from (among other things) malnutrition, disease, poverty, and neglect. The Committee has highlighted that young children have special requirements regarding physical nurturance, emotional care, and sensitive guidance, as well as sufficient time and space for social play, exploration, and learning. Thus, proper intervention strategies during early childhood*

[100] Ziba Vaghri, Jean Zermatten, Gerison Lansdown, Roberta Ruggiero Editors, *"Monitoring State Compliance with the UN Convention on the Rights of the Child An Analysis of Attributes*," Chapter 22, Christian Whalen, Article 24: The Right to Health, 207. https://link.springer.com/chapter/10.1007/978-3-030-846473_22#:~:text=Thus%2C%20the%20text%20of%20Article,and%20post%2Dnatal%20care%2C%20and

> *have the potential for significant positive effects on young children's current health and future health prospects.*[101]

The right to health is vital for everyone, but it is significant for children, including orphans, because they are vulnerable and are more at risk of illness and health complications. Furthermore, when children are free from diseases, they are more likely to attain a higher level of physical, intellectual, and emotional development, and grow into healthier and more productive adults. Over the years, the world has made significant progress in fulfilling children's rights to health, and child mortality is declining worldwide.[102]

As one of the state parties, Pakistan has already complied with the above provision, as the right to health was protected. Under the Constitution of Pakistan,1973, under Article 38(d) of the Chapter of Public Policy, specifically addressing the promotion of social and economic well-being, including the provision of necessities such as food, clothing, housing, education, and medical relief. Pakistan Environmental Protection Act 1997 discusses how pollution affects the health, safety, and welfare of the people and property of the public (including orphans), further affecting biodiversity.[103]

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[101] Kavot Zillén, Children's Right to Health(Care) – in Light of Medical Advancements and Developments in Paediatric Care, Chapter 5, p.110.

[102] Organization of Islamic cooperation Statistical, Economic and Social Research and Training Centre for Islamic Countries (SESRIC), *The State of Children in OIC Member Countries* (OIC Outlook Series June 2015).

[103] Pakistan Environmental Protection Act, 1997, s.2(xxxiii), "pollution" means the contamination of air, land or water by the discharge or emission of effluents or wastes or air pollutants or noise or other matter which either directly or indirectly or in combination with other discharges or substances alters unfavorably the chemical, physical, biological, radiational, thermal or radiological or aesthetic properties of the air, land or water or which may, or is likely to make the air, land or water unclean, noxious or impure or injurious, disagreeable or detrimental to the health, safety, welfare or property of persons or harmful to biodiversity."

However, in Malaysia, the constitution does not explicitly mention the right to health but includes provisions related to the well-being and welfare of the people. However, the Environmental Quality Act of 1974 states that public health (including orphans) is protected from pollution.[104]

The incorporation of provisions by state parties to safeguard the well-being of orphans is a notable aspect of recent developments.

Right to Education

The right to education has a long history dating back to ancient times. It has been recognized in various documents, including the Magna Carta, the Universal Declaration of Human Rights, and the United Nations Convention on the Rights of the Child (CRC). Within the CRC, Articles 28 and 29 specifically addressed the importance of children's (including orphans) rights to education.

Article 28 focuses on the child's (including orphans) right to education, emphasizing the provision, accessibility, and equality of educational opportunities. Article 29 delves into the aims of education, highlighting the significance of the curriculum, teachers' roles, and overall learning environment. The right to education is grounded in equality, which ensures that all children have access to education.

According to Dr. A. Alkali, the CRC should be regarded as a comprehensive and integrated legislative framework, requiring consideration as a unified whole. When addressing the right to education for children, it is essential to consider the various provisions within the CRC. For instance, adherence to the

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[104] Environmental Quality Act,1974, s.2, "pollution" means any direct or indirect alteration of the physical, thermal, chemical, biological, or radioactive properties of any part of the environment by discharging, emitting, or depositing wastes to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety, or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to cause a contravention of any condition, limitation, or restriction to which a licence under this Act is subject;

principle of non-discrimination is imperative, as all children should receive equal treatment in their educational opportunities. Similarly, the best interest principle emphasizes that in any action concerning a child, their well-being should be the primary consideration. This entails assessing children's educational needs based on their age, social background, and immediate environment.[105] Thus, state parties must consider all relevant provisions for their national legislation.

As being the state party, Pakistan, while fulfilling the requirements of the CRC, added a provision related to education in the Constitution of Pakistan 1973, through the 18th amendment in 2010 under Article 25A.[106] This reflects that the right to education is very serious and fundamental.

Malaysia, as a state party, legislates the right to education as one of the fundamental rights under the Federal Constitution of Malaysia under Article 12.[107] It states that there should be no

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[105] Dr A. Umar Alkali, Dr. Azizah Mohd, Dr Muhammad Alhaji Abubakar, "A Comparison Of Child's Right To Education Under Islamic Law And The Convention On The Rights Of The Child," *International Journal of Current Research in Social Science& Humanities,* 1: 1 (2015)13 – 21, http://innovativejournal.in/ijcrssh/index.php/ijcrssh.

[106] Constitution of Pakistan,1973, Art. 25A, "Rights to Education: The State Shall provide free and compulsory education to all children of the age of five to sixteen years in such manners as determined by law."

[107] Constitution of Malaysia, Art 12, "Rights in respect of education 12. (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth— (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation). (2) Every religious group has the right to establish and maintain institutions for the education of children in its religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law, but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or

discrimination on the grounds of religion, race, descent, place of birth, or gender in any educational institution maintained by public funds. In 1996, Malaysia implemented compulsory education policies and further legislated the Education Act of 1996, which outlines the legal framework for education in Malaysia. However, the Human Rights Commission of Malaysia, under the round table, re-examines the Education Act 1996 and the subsequent amendment in 2001, which includes education aims and policies, to identify areas of improvement and to ensure accessibility to education for all children as intended by Articles 28[108] and 29 of the CRC. [109]

The preceding conversation regarding the educational rights of orphans relating to *Shari'ah* and the CRC concluded that the right to education is a fundamental entitlement. It is universally accessible to every child, including orphans, without discrimination.

The Right to Profess Religion.

The right to freedom of thought, conscience, and religion is based on the concept of freedom, which implies an absence of coercion. Article 14 of the CRC requires state parties to respect a child's (including orphans) right to freedom of thought, conscience, and religion.

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assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

[108] Subsequently, the Government of Malaysia informed the Secretary-General that it had decided to withdraw its reservation to articles 22, 28 paragraph 1 (b), (c), (d), (e) and paragraphs 2 and 3, article 40 paragraph 3 and 4, articles 44 and 45" made upon accession. http://www.bayefsky.com/html/malaysia_t2_crc.php

[109] Suruhanjaya Hak Asasi Manusia/ Human Rights Commission Of Malaysia, Convention On The Rights Of The Child Report Of The Roundtable Discussion, (19-20 January 2004). https://www.suhakam.org.my/wp-content/uploads/2013/11/ReportRTDonCRC.pdf

It also emphasizes the rights and duties of parents or legal guardians to guide the child in a manner consistent with the child's evolving capacities. The freedom to manifest one's religion or beliefs is subject to limitations prescribed by the law to protect public safety, order, health, morals, and the rights and freedoms of others.

Article 14(2) acknowledges the rights of parents to provide direction to their child regarding religion, considering the child's evolving capacities. The guidance provided by parents should be child-centered and achieved through discussion.

The issue of orphans and vulnerable children lacking parental direction is crucial. In such cases, state parties are responsible for addressing this matter and ensuring that orphans are made aware of their families' religion, as it affects their life, personality, education, clothing, eating habits, and culture. The state plays a role in helping orphans to make decisions about their religious beliefs.

State parties played a pivotal role and legislated this right under their Constitution as fundamental rights. For example, the constitutions of Pakistan and Malaysia have protected the right to profess religion under Article 20[110] and Article 11[111], respectively.

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[110] Constitution of Pakistan,1973, art.20, "Freedom to profess religion and to manage religious institutions 20. Subject to law, public order and morality,— (a) every citizen shall have the right to profess, practice and propagate his religion; and (b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions."

[111] Federal Constitution of Malaysia, art.11, "Freedom of religion 11. (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it. (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own. (3) Every religious group has the right— (a) to manage its own religious affairs; (b) to establish and maintain institutions for religious or charitable purposes; and (c) to acquire and own property and hold and administer it in accordance with law. (4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief

This illustrates that state parties ensure freedom of religion in their legislation without any discrimination.

Regarding the orphan's right to profess religion, it is one of the fundamental rights to be protected under the law. By protecting children's right to profess religion, the CRC indirectly protects orphans' right to religion.

Harmonisation Between Shari'ah and International Law

The above discussions point out the protection of orphans' rights as part of the children's population under both the *Shari'ah* and CRC. It is undeniable that both the *Shari'ah* and CRC aim to protect orphans' rights in their best interests, particularly rights to life, care and upbringing and maintenance, name and identity, education, health, and freedom of religion, which are essential for their well-being and future development.

According to Martin Boodman *"Harmonisation, or the process of bringing about harmony, implies a state of consonance or accord; the combination or adaptation of parts, elements or related things, to form a consistent and orderly whole.*[112]*"*

Harmonisation is the process of combining or adapting diverse elements to form a coherent whole while retaining individuality. This can be achieved by creating relationships between diverse things, both relative and absolute. The most common meaning of harmonisation is the creation of a relationship between accord and consonance.[113]

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among persons professing the religion of Islam. (5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality.

[112] Martin Boodman, The Myth of Harmonization of Laws, *The American Journal of Comparative Law*, Autumn, 1991, Vol. 39, No. 4 (1991): 699-724, https://www.jstor.org/stable/840738.

[113] Martin Boodman, The Myth of Harmonization of Laws, *The American Journal of Comparative Law*, Autumn, 1991, Vol. 39, No. 4 (1991): 699-724, https://www.jstor.org/stable/840738.

Following the process of harmonisation, the analysis of the protection of orphans' rights under *Shari'ah* and CRC reveals that *Shari'ah* and international law share common goals in protecting the rights of orphans. Exploring the potential areas of harmonisation between *Shari'ah* and the CRC sheds light on how these two legal systems can work together to ensure the comprehensive protection of orphans' rights and safeguard the well-being of orphaned children. The potential areas of harmonisation include the rights-based approach, whereby *Shari'ah* and the CRC emphasize the rights and well-being of individuals, including orphans. The principles of equality, non-discrimination, and the child's best interests are the standard foundations in both legal systems. By aligning these principles and emphasizing the protection of orphaned children's rights, the two legal systems can complement each other in promoting their well-being.

Secondly, the concepts of *kafalah* and *Shari'ah* guide the care provider in choosing *kafalah* and caring for orphans, emphasizing the appointment of suitable guardians who can provide love, care, and a nurturing environment. Islamic law recognizes foster care as one of the means of protection for children who need care and protection. The CRC recognizes the importance of providing a stable and supportive environment for orphaned children through appropriate guardianship and care arrangements. Harmonisation efforts can explore ways to integrate *Shari'ah* principles on guardianship with CRC, ensuring that the child's best interests are prioritised.

Thirdly, regarding legal protection and support for orphans, *Shari'ah* and the CRC emphasized the need for legal protection and support for orphans. This includes access to justice, legal aid, and advocacy services. Harmonisation efforts can explore ways to establish comprehensive legal protection mechanisms for orphaned children, drawing upon *Shari'ah* principles and international legal standards.

Fourthly, it is undeniable that *Shari'ah* and the CRC focus on the orphan's welfare. Therefore, to safeguard orphans' welfare, different provisions regarding the specific rights of orphans have been enacted, such as the right to life, name and identity, health,

education, and professing religion. Harmonising these rights between the two systems further codified the laws to protect orphans.

By identifying these potential areas for harmonisation, *Shari'ah*, the CRC, and other international legal frameworks can complement each other in providing a comprehensive legal framework for protecting orphan rights. The harmonisation process can draw upon the strengths and principles of both legal systems, ensuring that the well-being of orphaned children is effectively safeguarded.

CONCLUSION

Orphans are a part of the children's population and a part of society in general. They are future leaders of their nations who deserve the protection of their rights to save them from destruction or harm. It is not an exaggeration to say that all legal systems in this world, be they Islamic or civil law or national or international law, emphasize the protection and safeguarding of orphans' rights. To fully protect orphans' rights, the harmonisation and integration of *Shari'ah* principles with international legal frameworks can be one of the mechanisms. While international and civil laws may have limitations in adequately safeguarding these rights, the comprehensive system provided by Islamic law can contribute significantly to addressing this issue. Legal principles can be extracted from the Qur'an and *Sunnah* through doctrinal research. When synchronized with international law, they can form a robust foundation for protecting orphan rights. By implementing legal regulations that draw from both *Shari'ah* and international law, we can strive to create a just and inclusive society that upholds the rights and well-being of all children including orphans.

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PART VI:
HARMONISATION OF LAW OF CONTRACT AND OTHER AREAS OF LAW

REVISITING THE POSITION OF UNFAIR CONTRACT TERMS IN MALAYSIA

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Juhana Ayob[2]
Syazalia Che Suhaimin[3]

ABSTRACT

Unfair contract terms are usually found in the consumer contract. In most cases, the standard form of contract is commonly referred to as a 'take it or leave it' contract because the terms are drafted by the traders and the consumer is unable to discuss the terms of the contract which contains unjust terms. This paper seeks to revisit the legal framework governing unfair contract terms in Malaysia, embracing relevant rules and statutes as well as landmark cases that are concerned with unfair contract terms. The position of law relating to unfair contract terms in the United Kingdom is also examined for comparative approach as the law of contract as applied in Malaysia is essentially adopted from common law. Doctrinal analysis is employed as the method throughout the writing up. The paper analyses and highlights some weaknesses in the current legislation, in particular selected provisions of the Consumer Protection Act 1999. It finally concludes with some recommendation to improve the current legal framework of unfair contract terms in Malaysia.

Keywords: consumer contract, unfair contract terms, unjust, Consumer Protection Act 1999

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INTRODUCTION

A contract is an agreement in which both parties give consent to be held accountable for the conditions that they had agreed upon. To have a valid contract, there must be, among others, elements of an offer or proposal, acceptance, consideration as well as the intention to be legally bound by such a relation. All these requirements must be free from any factors which might vitiate or weaken the consent to such a contract. Once the parties execute a contract, they are bound by the terms and stipulations contained in that particular contract, meaning that the parties need to comply with it. However, there are situations where some of the agreed terms might be unfair to one of the parties. Such a contractual term is known as an unfair term. Generally, an unfair term denotes a term that unfairly favours one party to a contract at the expense of the other is known as an unfair term.[4] Thus, a term is said to be unfair when only one party is getting an advantage while the term causes the other party to be at disadvantage or cause any harm from it. The term is said to be unfair if the term has three attributes as follows:[5]

> *...First, the term must cause a significant imbalance in the parties' rights and obligations under the contract. Second, the term must not be reasonably necessary to protect the legitimate interests of the party advantaged by the term. Third, the term must cause financial or other detriments to a consumer if it were relied on.*

Unfair contract terms which are normally incorporated in the standard form contract, are commonly referred to as a "take it or leave it" contract because the terms are drafted by the traders and the consumer is unable to discuss the terms of the contract which

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[4] Wai Meng Chan and Pek San Tay, "Chapter 13: Unfair Contract Terms and Consumer Protection: Legislative and Judicial Controls in Malaysia" in *Contents of Contracts and Unfair Terms*, (Oxford University Press, 2020): 260.

[5] Anwar Abdul Rahman, "Unfair Contract Terms: Cases Review" in *Seminar on Law & Society II (SOLAS II)*, (School of Law, Universiti Utara Malaysia, 2017).

contains unjust terms.[6] In the context of a consumer contract, an unfair term is a clause in such a contract that is unfair to the consumer since it is more favourable to the traders.[7] According to Section 24A(c) of the Consumer Protection Act 1999, an unfair term is interpreted as;

> *A term in a consumer contract which, with regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer.*

Since consumers usually have much weaker bargaining power compared to traders, sufficient legal safeguards against unfair contract terms are very important in protecting consumers' interest.

Therefore, this paper is devoted to discussing the common law's approach in governing unfair contract terms, and the position in Malaysia. This write-up will also incorporate an overview of the existing legislation, embracing relevant rules and statutes and at the same time, delve into any relevant landmark cases as well as some recent cases that are concerned with unfair contract terms. In order to evaluate the provisions of the Consumer Protection Act, the Contracts Act, and relevant legislations' applicability with regard to unfair contract conditions in Malaysia, the library-based research approach was used. The paper will also contain a brief comparison of the position on unfair terms at common law and Malaysia. The paper will conclude with an important analysis, including some recommendations on how to further improve the current legal framework on unfair contract terms in Malaysia.

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[6] Adnan Trakic, "Statutory protection of Malaysian consumers against unfair contract terms", *Common Law World Review*, vol. 44, no. 3 (2015): 203.

[7] Naemah Amin, "Protecting consumers against unfair contract terms in Malaysia: The consumer protection", *Malayan Law Journal Articles*, vol. 1 (2013)

POSITION OF UNFAIR CONTRACT TERMS AT COMMON LAW: DOCTRINE OF FREEDOM OF CONTRACT

In the nineteenth century, the common law system saw the emergence of the freedom of contract doctrine. Apparently, it was a cornerstone of traditional contract law. The idea of freedom of contract, in general, contains two key components: everyone is free to deal with anybody they choose, and everyone is free to contract on any terms they desire. It is interesting to note a view by Sir George Jessel in 1875 in *Printing and Numerical Registering Co.v Sampson*[8] wherein he wrote that:

> *If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered freely and voluntarily, shall be held sacred and shall be enforced by the Courts of Justice.*

Thus, as long as it does not conflict with laws or public policy, contract freedom is respected. The flexibility of contract allows the parties to choose all the terms to be included in a contract and it requires the parties to enter into agreements voluntarily.[9] Hence, where the parties have the power to decide their contract, they are free to rely only on their judgement based on their needs and to take responsibility for the decisions that have been made.

The issue arises when there is a contract involving the consumer in which there is no prior discussion between the consumer and trader and the consumer will only rely on the notice given by the trader. However, before accepting the contract in such a typical scenario, the consumer does not need to read and comprehend all of its conditions. Such notification may be given

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[8] (1875) LR 19 Eq 462.

[9] May Fong, C. "The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract." *Jurnal Undang-Undang* 36, (2009): 53–81; Rothbard, M. N. "An Austrian Perspective on the History of Economic Thought" (2006)

before or at the time the contract is signed; nevertheless, if it is delivered after the contract has been created, it will not be valid.

In addition, the level of notice that is needed was laid down in the celebrated case of *Thornton v Shoe Lane Parking*[10], where the Court of Appeal observed that:

> *...terms which a person would not reasonably expect in a particular contract, need to be drawn especially to the attention of the customer. But even if a term has been validly incorporated, it is still possible to apply rules of construction which would render ineffective, or at least less potent, an unfair term such as an exclusion clause.*

However, when interpreting any unclear expression, the court in its discretion will employ the contra proferentem rule, which is the dominant norm and is least favourable to the party in question. At common law, even though agreements are blatantly unjust, they can be relied upon provided they are legally incorporated. It is worth noting that despite the applicability of unfair terms as permitted by the common law which is extensive, it can still be evaded by carefully drafting the agreement in question.

For instance, in the case of *L'Estrange v E. Graucob Ltd,*[11] the defendant contended that the express language rendered the legislation irrelevant and that he was not in violation of their agreement. The claimant, however, claimed that because she had not read the agreement carefully, she had not been aware of the condition and that it should not have applied.

However, the Court of Appeal determined that the contract's specific terms were enforceable and that the statutory sales provisions were therefore not relevant. Besides, the claimant's failure to read the contract carefully had no bearing on its legality because, by signing it, she agreed to be bound by its terms.

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[10] [1971] QB 163.

[11] [1934] 2 KB 394.

Notably, this decision highlights the Court's adherence to the principle of contract sanctity.[12]

The rule of incorporation states that unless it can be demonstrated that the signature was gained by fraud or misrepresentation, the individual who signs the contract is obligated by its terms even if he has not read them.[13] Therefore, to ensure that legal and commercial institutions are concerned, both consumer and business to business contracts are effectively protected and set up in such a way to promote a free and open market, this is the function of law in establishing freedom of contract.[14] However, it is necessary to consider the negotiation factors, such as equality of bargaining power, while determining whether the freedom of contract principle is still applicable now or not.[15]

INEQUALITY OF BARGAINING POWER

It is usually believed that unequal bargaining power undermines the freedom of contract, leading to an excessive amount of freedom between parties and the failure of the parties to fulfil their obligation under the contract. However, the injustices resulted from the freedom of contract doctrine's strict implementation, leaving consumers defenceless against the imbalance in bargaining power.[16]

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[12] *L'Estrange v E. Graucob Ltd* [1934] 2 KB 394.

[13] Peden, E and Carter J.W, "Incorporation of Terms by Signature: L'Estrange Rules", *Journal of Contract Law* (2005): 21.4

[14] K. Ilobinso, I, "Protecting Consumers in the Online Market From Unfair Contract Terms: the Nigerian Perspective.", *Nigerian Journal of Contemporary Law* 14(1), (2018): 51–68. https://doi.org/October 2018.

[15] May Fong, C. "The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract." *Jurnal Undang-Undang* 36, (2009): 53–81; Rothbard, M. N. "An Austrian Perspective on the History of Economic Thought" (2006)

[16] *See L'Estrange v Graucob Ltd* [1934] 2 K.B. 394.

The function of negotiating power in consumer law is quite clear-cut. The individual power of a single consumer is far lower than that of the provider because the latter will not suffer a significant loss from the loss of a single customer. As a result, providers can dictate the terms of the contracts, and consumers are compelled to accept them.

For instance, in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd,*[17] Lord Denning MR asserted that the idea of contract freedom is an instrument of tyranny against the weak[18] and that consumers' unequal bargaining power in standardised contracts must be protected.[19] Consumers are lured into signing contracts without reading or comprehending the fine print on the exclusionary provisions.[20] There is no question that a strong notion of contract freedom offers significant and measurable benefits.

The Common law created several helpful concepts when it would otherwise be unfair to enforce a contractual condition in order to lessen the adverse effects of the unequal bargaining power in standardised contracts. With respect to exemption clauses which are intended to evade liability, the courts interpret them extremely strictly.[21] According to the *contra proferentem* rule, the courts will read an unclear exemption language in favour of the party not attempting to rely on it.[22]

Furthermore, in *J. Spurling Ltd v Bradshaw,*[23] Denning LJ famously proposed that a consumer should receive additional

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[17] [1983] Q.B. 284.

[18] *Ibid.*

[19]Spencer Thal, 'The Inequality of Bargaining Power Doctrine: The problem of defining contractual unfairness' *OJLS* 8 (1988): 17, 22.

[20] Oren Bar-Gill, Seduction by Contract (Oxford University Press (2012) 8.

[21] *Photo Production Ltd. Respondents v Securicor Transport Ltd* [1980] A.C. 827, 850 (Lord Diplock).

[22] *Houghton v Trafalgar Insurance Company Ltd* [1953] 2 All ER 1409.

[23] [1956] 1 W.L.R. 461, 466.

notice when an exclusion clause is especially burdensome or unjust ('red hand' rule).[24] Finally, an agreement that would be intrinsically unfair to be enforced can be declared void by the courts by virtue of the doctrines of misrepresentation, duress and undue influence.[25] These rules are a justified incorporation into the common law and protect consumers against esoteric and incomprehensibly drafted contracts. However, the courts could extend the law furthermore than what would have been to interpret or to align it with the relevant legislation.

With regards to the position before 1970s, the exemption provision took effect because there was no statutory regulation of this field until the 1970s. Even though the courts tried to address the issue, in the end the common law was unable to match the creativeness of those who sought to be protected by the exemption clause.

Nevertheless, judicial control was prevailing, initially challenging the integration and interpretation of exemption clauses. For instance, Lord Denning MR in *Lloyd Bank v Bundy*[26] has created the doctrine of fundamental breach as a new tool in the struggle against exemption clauses. The doctrine held that no exemption clause, no matter how clear-cut, could legally shield a party from responsibility for a significant or fundamental contract breach. Since Mr. Bundy had an inferior bargaining position to the bank in this case, Lord Denning MR ruled that the contract was voidable. According to him, undue influence is a subset of a larger class in which the power dynamics between the parties warrant the court's intervention. It was clear that Mr. Bundy had signed the contract without seeking independent advice, which was extremely unfair and under pressure from the bank.

This doctrine was buried in *Photo Production Ltd v Securicor Transport Ltd*[27] when the exclusion clause was upheld

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[24] [1956] 1 W.L.R. 461, 466. *See* Para 5, 40.

[25] *Ibid. See* Para 4, 17.

[26] [1975] QB 326.

[27] [1980] AC 827.

by the House of Lords, which overturned the Court of Appeal's ruling and excused the party from liability for damages. According to Lord Diplock, the usefulness of the clause depended on how the contract was interpreted, and it did cover the damage. Although the requirement should have been eliminated with the adoption of the Unfair Contract Terms Act 1977, he observed that:

> *...the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses.*

The law development in the UK can be seen when the Parliament intervened by enacting the Unfair Contract Terms Act 1977 (UCTA 1977) wherein exemption provisions in consumer contracts are subject to a reasonableness test under the Act.[28] Despite its narrow focus, the Act is a significant piece of consumer protection legislation.[29] The Unfair Terms in Consumer Contracts Regulations of 1999 (UTCCR 1999) added the general notions of "unfairness" and "good faith" to English law, which further enhanced the protectionist strategy to the extent to which these measurements are justified incorporation into English law.

The UCTA 1977 was intended to promote a protectionist strategy in relation to business contracts only. The Act does not offer complete protection against deceptive language. Additionally, it covers particular instances of unfair terms. Penalty clauses in particular fall outside of its purview. There are various levels of protection according to the UCTA 1977. Some clauses offer complete protection, whilst others will be evaluated to see if the word was fair to include. The Occupiers Liability Act of 1957 and tortious liability resulting from carelessness are also covered by the UCTA 1977, which goes beyond liability resulting from contracts.

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[28] *See* UCTA 1977, Section 2 and 11

[29] *See* Cheshire, Fifoot and Furmston, *Law of Contract* (13th ed. Butterworths, 1996).

Only clauses that seek to exclude or minimise liability for negligence[30] or contract breach are covered under the Act. A wide definition is given to 'consumer' to include both natural and legal persons.[31] This offers substantial and much needed protection to small businesses as well as private individuals. In spite of that, there is a chance that the courts will stray into merely business transactions, which is by no means something that should be within their purview.[32] It must be noted that the name itself is wrong as the Act imposes no general duty of fairness on contracting parties.[33] Rather, it provides that where an exemption clause is unreasonable in the circumstances it will be void. The reasonableness test application guidelines are provided in Schedule 2 of the Act; however, the courts have broad discretion, and much will depend primarily on each individual case.[34] Indeed, the appellate courts have tended to afford much deference to trial judges in this respect.

Nevertheless, the House of Lords has given some guidelines. In *Smith v Eric S Bush*[35], the first question in this case was whether the valuer in this case was under an obligation to use reasonable care and skill; next, if the contract's exemption clause is covered by the Unfair Contract Terms Act 1977 and finally, for the purposes of the Act, whether relying on that exemption clause is just and reasonable. According to Lord Griffiths, the parties' level of bargaining strength and the commercial environment in which the contract was made must both be given significant weight.[36] This strikes a wise compromise between ensuring that the courts

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[30] *See* UCTA 1977, Section 2

[31] *Ibid.* Section 12.

[32] *Walford Electronics Ltd v Sanderson CFL Ltd* [2001] 3 TCLR 14, [63] (Gibson LJ).

[33] Ewan McKendrick, *Contract Law* (10th ed, Palgrave 2013) 194.

[34] Kah Leng, 'Assessing the Reasonableness of Exemption Clauses' 23 *SAcLJ* (2011): 577, 581.

[35] [1990] 1 AC 831.

[36] *Ibid*.

have due attention for maintaining market efficiency and safeguarding the consumer where he has little to no negotiating power.

The Act's exclusive application to transactions comes when one party relies on the other's stated standard terms of business and the customer lacks true contract freedom. This is because, in practice, neither party is free to negotiate the parameters of the agreement. The Act does not unduly limit a person's freedom to contract.[41] The interests of consumers who have the time and ability to search for the most favourable contract must not outweigh the broader public policy of defending the typical customer against unfair conditions. As Tuckey LJ[37] aptly stated, the UCTA:

> *...plays a very important role in protecting vulnerable consumers from the effects of harsh contract terms.*

Furthermore, Section 11(1) of UCTA 1977 spells out that:

> *...the requirement of reasonableness shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought to have been known to or in the contemplation of the parties when the contract was made.*

To be incorporated in the contract, the word must be just and reasonable. When parties engage in a contract, they typically decide on fairness and reasonableness without knowing what will happen in the future. In the event the term is totally restricted instead of providing exclusion to the liability, the contract's provisions, including its terms and the assurances it offers, must be relied upon by the party. It is unquestionably the responsibility of the person attempting to enforce the term to demonstrate that it was just and reasonable.

Another important legislation is the Consumer Rights Act 2015. This UK Act, which supersedes the Consumer Contracts Regulations and the Unfair Contract Terms Act of 1977 with

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[37] *Granville Oil & Chemicals Ltd. v Davis Turner & Co. Ltd*. [2003] EWCA Civ 570

regard to consumer contracts and notices, is applicable to contracts entered into after October 2015. Part 2 of the Consumer Rights Act of 2015 contains the provisions pertaining to unfair contract conditions.[38] For instance, Section 62 (4) of the Act says that:

> *a term or notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.*

Thus, Sections 61 and 62 (1 & 2) of the Consumer Rights Act of 2015 provide that if a term or notice is deemed unfair, the customer is not required to abide by it. Section 63 (1 & 2) further permits the consumer to rely on the term or notification if they so desire. Furthermore, Section 62(5) of the Act provides that:

> *Whether a term or notice is fair is to be determined by — taking into account the nature of the subject matter of the contract or notice, and by reference to all the circumstances existing when the term or notice was agreed and to all of the other terms of the contract or of any other contract on which it depends.*

An approximate but not full list of what may be considered unjust is included in Schedule 2 of the Act. According to Section 63(6) of the Act, a term of a consumer contract must be regarded as unfair if it has the effect that the consumer bears the burden of proof with respect to compliance by the parties involved.[39] Thus, Section 64(1) of the Consumer Rights Act of 2015 clearly states that a term related to the contract's subject matter will not be subject to an evaluation of fairness.

It is to be noted that Section 65(1) of the Consumer Rights Act of 2015 spells out that a trader cannot limit or eliminate liability for death or personal harm due from negligence in a consumer contract or consumer notice. According to Section 68

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[38] Department for Business, Innovation and Skills, *'Explanatory Notes to the Consumer Rights Act 2015*', at para 22.

[39] Oliver Bray, Ben Kerry, 'Digital content under the Consumer Rights Act 2015' *Entertainment Law Review*, 26(8), (2015): 271-273

of the Consumer Rights Act 2015, there is a requirement for transparency and that consumer notices and contractual terms be written in clear, comprehensible language that is legible, while Section 69 of the Consumer Rights Act of 2015 points out that any ambiguity should be resolved in the consumer's benefit.

POSITION OF UNFAIR CONTRACT TERMS IN MALAYSIA

Previously, there were no distinct laws governing unfair contract terms in Malaysia. Even though there is Contracts Act 1950, there exists no specific provision dealing with unfair terms since it just provides common enforcement of law in regulating the contractual relationship, but it does not really govern the contents of the contract, such as unfair terms.[40] Only in 2010 was the Consumer Protection Act of 1999 amended and following the amendment, Part IIIA has been added in regulating unfair terms to consumer contracts. Unlike the United Kingdom which has separate legislation dealing with unfair terms, in Malaysia, protection against unfair terms is provided under Consumer Protection Act 1999. The paper will be making some observations on the approach before the amendment and after the insertion of Part IIIA of the Consumer Protection Act 1999. Until 1999, there was no legislation governing unfair contract terms in Malaysia, and hence the above issue persisted for such a long time. For example, in *Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan,*[41] there was a clause inserted by the insurance company stating that the contract between the parties will be void from the start if there is any nondisclosure or misrepresentation of facts, regardless of whether the fact is important or not. This means that it disregards the necessity of material facts in order to nullify a contract. In this case, since the respondent breached the said clause, the insurance company *i.e.,* the liability to pay was not

[40] Farihana Abdul Razak and Zuhairah Ariff Abd Ghadas, "Legal issue due to unfair contract term: the Malaysia perspective", *Journal of Critical Reviews*, vol. 7, no. 19 (2020): 7457–7463.

[41] [2001] 1 MLJ 227.

imposed on the appellant even though the disputed terms seem to be unfair to the respondent.[42] It shows that the court would not intervene in the contract's terms, even if the said terms caused unfairness to the consumer, who has no equal footing with the insurance company. This is because the court will uphold the well-established freedom of contract doctrine, in which the theory is that the parties are at their liberty to make agreements and to decide how those agreements will be drafted. This is illustrated in the Federal Court case of *Berjaya Times Squares Sdn.Bhd. v M Concept Sdn.Bhd.,*[43] where the judge stated that when an agreement is not regulated by statute and in accordance to the idea of freedom of contract, the parties are completely free to come to any conditions they see fit[44].

Generally, Malaysian courts were reluctant to interfere with substantively unfair contract terms. Even so, there were instances where the court approached the aforementioned problems by making use of the 'inequality of bargaining power' theory which is found under common law.[45] Such a rule was introduced by Lord Denning in *Lloyds Bank v Bundy,*[46] even though it was refused in latter cases of *Pao On v Lau Yiu Long*[47] and *National Westminster Bank Plc v Morgan*[48]. However, there are two conflicting Court of Appeals decisions regarding it, in Malaysia.

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[42] As cited in Azwina Wati Abdull Manaf and Norazuan Amiruddin, "Comparative Study on Law of Unfair Terms of Contract in Malaysia" in *Proceedings of ADVED 2018-4th International Conference on Advances in Education and Social Sciences,* (Istanbul, Turkey: Ocerint, 2018), 752.

[43] [2010] 1 MLJ 597.

[44] *Ibid,* para 10, p. 607.

[45] Trakic, *Statutory protection of Malaysian consumers against unfair contract terms*, 205.

[46] [1975] QB 326.

[47] [1980] AC 614.

[48] [1985] AC 686.

The first ever Malaysian case decided on the doctrine of inequality of bargaining power can be seen in the Court of Appeal case of *Saad Bin Marwi v Chan Hwan Hua,*[49] where the court stated that the doctrine should be recognized in Malaysia by virtue of Section 3(1)(a) of the Civil Law Act 1956. In this case, the appellant is a farmer who obtains a portion of his income from the harvest of coconuts on land he leases from the respondents. Later, the respondents succeeded in persuading Saad to agree to sell them two parcels of Saad's land, valued at roughly RM 2.4 million, for RM 42,000. The agreement further said that the respondents were required to pay the RM 4,200 deposit. Nevertheless, no deposit was paid, but Saad was required to make up the difference by paying the respondent rent for the aforementioned rented land. Other than that, Saad was required to acquire indefeasible title within a year of the contract. Later, Saad made the decision to end the contract with the respondent. Therefore, the respondent brought a suit against Saad. The trial judge decided against the appellant and rejected the appellant's defence of undue influence. The appellant appealed to the Court of Appeal on the grounds of "unfair advantage," and the court then considered whether Malaysian law acknowledges a general notion of bargaining power disparity. Saad's appeal was accepted by the Court of Appeal, which came to the conclusion that the contract was void because it constituted an unfair deal.

It was deemed an unconscionable bargain based on the following six reasons:[50]

1. The land, which was valued at RM 2.4 million, was sold for only RM 42,000, which is an unfair conclusion (unfairness of outcome).
2. The agreement said that the respondent had given the appellant the deposit, but this was not totally accurate. The deposit was applied to the rent that the appellant owed to the respondent

[49] [2001] MLJU 761.

[50] Adnan Trakic, "The Inequality of Bargaining Power: Does Malaysia Need This Doctrine?", *Australian Journal of Asian Law*, vol. 17, no. 1 (2016), 11.

(unfairness of outcome).

3. Due to his reliance on the respondent's approval to harvest coconuts from the land that the respondent rented to him, the appellant was unable to freely negotiate the terms of the payment (unfairness of bargain).
4. The agreement was written in an unfamiliar language to the appellant *i.e.,* English. (unfairness of bargain).
5. The appellant received no independent advice regarding the contract (unfairness of bargain).
6. The appellant was hesitant to sell the property, as evidenced by the length of time he took to petition for the indefeasible title (unfairness of bargain).

Due to the above reasons, it was found that the respondent unfairly benefited from the appellant's deficiencies in negotiations when reaching the aforementioned agreement which was reflected in unequal bargaining power between the parties. Later, the High Court adopted the *Saad Marwi* case ruling in the case of *Standard Chartered Bank Malaysia Bhd v Foreswood Industries Sdn Bhd.*[51]

However, in *American International Assurance Co Ltd. v Koh Yen Bee,*[52] The Court of Appeal had some reservations about the doctrine's applicability and whether Malaysian law could be interpreted to include it. Nevertheless, the decision in *Saad Marwi*'s case is still applicable unless and until there is a Federal Court decision overruling it.[53] However, it must be noted that even though there were doubts by the Court of Appeal case of *American International Assurance*, the doctrine in *Saad Marwi*'s case is still recognized by them, if 'justice were to prevail' according to its particular fact.[54] In *the American International Assurance*'s case,

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[51] [2004] 6 CLJ 320.

[52] [2002] 4 MLJ 301.

[53] Trakic, *Statutory protection of Malaysian consumers against unfair contract terms,* 207.

[54] Ahmad Muzhaffar Abdul Razak and Shu Yee Teoh, "To What Extent Deciding the Validity of Exclusion Clause in a Contract", 4 *MLJ* cxl

the court separated this case from *Saad*'s case and agreed that the decision to grant the appeal *in Saad*'s case on the basis of fairness was correct and fair based on the facts of the case in rejecting the respondent's argument and allowing the appeal. Since there is no Federal Court case overruled *Saad Marwi*'s case, it can be concluded that the doctrine of inequality bargaining power which was applied in *Saad Marwi*'s case is still applicable and relevant in Malaysia.

Legal protection governing unfair contract terms in Malaysia was finally introduced in 2010 under Part IIIA of the Consumer Protection Act (CPA 1999). There are 10 important sections dealing with unfair contract terms, starting from Section 24A up to Section 24J. In terms of applicability, the protection under Part IIIA is restricted to consumer contracts and not extended to other commercial contracts.[55] Several relevant provisions would now be examined in turn. Firstly, Section 24B of the CPA 1999, which essentially states that provisions under Part IIIA are to be applied to all contracts. Section 24A(a) further provides that 'contract' is to have the similar interpretation as provided under Section 2(h) of the Contracts Act 1950, which defines a contract as *"an agreement enforceable by law"*.

Based on this section, it is observed that protection is to be given to all types of contracts. However, the protection is apparently limited to consumer contracts only.[56] It is to be noted that the CPA 1999 is a significant statute that was enacted to protect consumers. Next, according to Section 24A(c), 'unfair term' as discussed before, is defined as:

[2019]; 4.

[55] Naemah Amin, "Chapter 21: The Nature of the Law on Consumer Protection" in *Law and Commerce: The Malaysian Perspective*, edited by Mohammad Naqib Ishan Jan, (IIUM Press, Second Rep edn., (2012): 426.

[56] Chan and Tay, "Chapter 13: Unfair Contract Terms and Consumer Protection: Legislative and Judicial Controls in Malaysia" in *Contents of Contracts and Unfair Terms*, 274.

> *a term in a consumer contract which, with regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer.*

Therefore, it could be concluded that the scope of protection as afforded under the Act is only restricted to consumer contracts. In Section 3(1) of the CPA 1999, the term "consumer" is defined. To put it simply, a person cannot be considered a customer unless two requirements are met.[57] First, a person must purchase products or services for their own use, consumption, or domestic or home reasons. Second, the goods or services the individual purchases must be those that are typically bought for personal, domestic, or household use.

Next, the protection of unfair terms under Part IIIA is applicable in both standard forms of contract and negotiated contracts.[58] 'Standard form contract' as defined under Section 24A(b) means:

> *a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts normally used in that industry.*

This provision is also applicable to negotiated contracts as the wording in Section 24C(2)(d) states that, in evaluating the procedural fairness of a contractual provision, the court should also take into account whether or not the terms of the contract are negotiable.

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[57] Sakina Shaik Ahmad Yusoff, Rahmah Ismail, Shamsuddin Suhor, Azimon Abdul Aziz, Muhammad Rizal Razman, and Kartini Aboo Talib, "A Comparative Study on The Consumer Protection Legislation of Malaysia and Indonesia", *International Business Management*, vol. 5, no. 5 (2011), 267.

[58] *See* Chan and Tay, p.274.

LEGAL ISSUES/WEAKNESSES IN PART IIIA OF THE CPA 1999

Based on the above discussion, several issues can be analysed. Firstly, the protection of unfair terms does not solve the problem since it only protects the consumer contract. Thus, any type of contract that falls outside the scope of the consumer contract is left with no legal protection. It is also observed that even if there was an attempt made by the court in applying the doctrine of inequality of bargaining power or in cases where there exists an element of unfairness in the contract *i.e.,* unconscionable, there are still cases that are not in favour of such judicial intervention as discussed earlier. However, based on the recent Federal Court case of *CIMB Bank Berhad v Anthony Lawrence Bourke & Anor,*[59] it shows that the court is aware of the issue relating to the unfair terms in contracts. In this case, the respondents, a married couple, borrowed money from the appellant to purchase a house, and while the house was still being built, the appellant was legally required to pay the developer in instalments. Unfortunately, the developer terminated its sale and purchase agreement with the respondents because the appellant failed to make one of these progress payments, which led to a civil suit against the appellant by the respondents at the High Court.

The trial court dismissed the respondent's claim on the grounds that article 12 of the loan agreement released the appellant from all obligations.[60] The High Court's ruling was overturned when the respondents filed an appeal with the Court of Appeal. Later, the appellant filed an appeal with the Federal Court, where the Court of Appeal's ruling was upheld. The court favoured the

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[59] [2019] 2 MLJ 1.

[60] *"Notwithstanding anything to the contrary, in no event will the measure of damages payable by the Bank to the Borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amounts for loss of income or profit or savings, or any indirect, incidental consequential exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, and all such loss and damages are expressly disclaimed."*

couple in this case and determined that the exclusion clause in the aforementioned loan agreement was void because it conflicts with Section 29 of the Contracts Act 1950[61] even though it noted that they will not interfere with an agreement that was mutually agreed upon by both parties based on the freedom of contract. Besides, in a case involving unequal bargaining power in a commercial contract, the Federal Court remarked that parties rarely negotiate on equal footing. The Federal Court also stated that the exemption provisions are frequently included in banking agreements, and customers must agree to the terms and conditions of the bank's normal contract if they want to acquire a good or service.[62]

Another point to be highlighted is, even the protection against unfair terms is said to be provided to the consumer, but it is not expansive since Section 98 of the CPA 1999 just gives the power to the tribunal in hearing claims not exceeding RM50,000. It is thus observed that not everyone can enjoy the protection afforded under Part IIIA of the CPA 1999.

In addition to that, there is also an issue with regards to Part IIIA that imposes criminal liability on the offender, as provided under Section 24I. Firstly, it is not easy to enforce since fairness is involved with the variable and relative concept.[63] In this regard, it is also observed that Part IIIA itself lacks clarity. Arguably, the need to make unfair contract terms as an offence is not that practicable.

The last issue is pertaining to enforcement. Other countries have relevant enforcement bodies in place to monitor the unfair terms, such as Consumer Protection Agencies in Indonesia,[64] Consumers Association of Singapore and the Singapore Tourism

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[61] It provides agreements in restraint of legal proceedings to be void.

[62] Abdul Razak and Abd Ghadas, "Legal issue due to unfair contract term: The Malaysian perspective", p. 7461.

[63] Amin, Protecting consumers against unfair contract terms in Malaysia: The consumer protection, p. civ.

[64] Ahmad Yusoff, Ismail, Suhor, Abdul Aziz, Razman, and Aboo Talib, A Comparative Study on The Consumer Protection Legislation of Malaysia and Indonesia, p. 277.

Board in Singapore.[65] However, in Malaysia, there is yet any enforcement body that is empowered to keep an eye on and avert the use of unfair terms in order to protect the interests of the consumer.

CONCLUSION AND RECOMMENDATIONS

In a nutshell, it can be seen that courts in both Common law and Malaysia have been persistent upholding the doctrine of freedom of contract. Generally, they would not be inclined to intervene into the contents of the contract even if there are unfair terms affecting one of the contracting parties. At present, this issue is to some extent, governed under Unfair Contract Terms Act 1977 and Consumer Rights Act 2015 in the UK and for Malaysia, it falls under Part IIIA of the CPA 1999. From the above discussion, it has been deliberated that there are still loopholes in the current legal framework governing unfair terms in Malaysia. Unlike Malaysia, the governing law on unfair terms in the UK is much clearer and practical as it thoroughly covers contracts between business to business and business to consumer separately.

Therefore, there are several recommendations to enhance the current position of the laws. Firstly, there is a need to amend the current legal framework of Part IIIA of the CPA 1999 as well as some amendments to the Contracts Act 1950. The 1950 Act could be amended to incorporate principles relating to 'inequality of bargaining position' as it has some connections with the concept of unconscionable bargain as expressly mentioned in Section 16(3)(a). In other words, the term unconscionable bargain should include the rule of inequality of bargaining power in consumer contracts. This recommendation would make the application of the doctrine of undue influence more expansive. Another enhancement to the existing legislation could be done to Section 98 of the CPA 1999. The Tribunal should be empowered to hear consumer claims

[65] Farhah Abdullah, Tze Chin Ong, Norhoneydayatie Abdul Manap, Asiah Bidin, and Hartinie Abd Aziz, "A comparative analysis of unfair terms in consumer contracts in Malaysia and Singapore", *Pertanika Journal of Social Sciences and Humanities*, vol. 29 (2021): 12.

where the total amount does not exceed one hundred thousand ringgit, instead of the present amount of fifty thousand ringgit. Such an amendment would encompass more cases involving consumer claim disputes, parallel to the recent economic situation and the evolving rate of inflation. These amendments would facilitate better protection in relation to the unfair contract terms. Alternatively, it is proposed that Malaysia should enact a separate legislation on the unfair contract terms, emulating the approach in the UK as it is clear from the above discussion that the current law in the UK is more comprehensive and expansive to cater for those affected by unfair contract terms.

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PART VII:

CODIFICATION OF ISLAMIC LAW IN CIVIL COURT AND HARMONISATION OF ONE AREA OF LAW TO ANOTHER

CODIFICATION OF ISLAMIC LAW; *SIYĀSAH SYAR'IYYAH* A NORMATIVE STANDARD AND LEGISLATIVE INSTITUTIONALISATION

Sidra Zulfiqar[1]

ABSTRACT

The study aims to analyse the impact and rationale behind codification in the legal system of Muslim states. This research also intends to investigate the issue if some substantive and procedural codes are undergoing the codification and harmonisation process, then how can it be termed appropriate without a set criterion or standard to check? A brief account of the history of codification particularly from Islamic legal history and relevant arguments are presented. In light of the modern-day state system, how a state can be given the task to legislate a law while a state cannot be given the status of a *shāri'* (law giver)? In order to include applicability to the debate a few legislations have been discussed as a case to analyse the prime questions. It seems evident that the mere tailoring of existing civil codes to meet the legislative needs of Muslim territories has complicated the legal systems. Thus, it is required to build a system intrinsically coherent with the wider scope of *Shari'ah* particularly the *Siyāsah Shar'iyyah* is to be focused

Keywords: *Siyāsah Syar'iyyah,* codification, state, legislation

INTRODUCTION OF CODIFICATION OF ISLAMIC LAW; MODERN STATE AND POST COLONISATION

Codification of Islamic law is a material fact for almost all Muslim states in existence. After the end of the colonisation period the advent of nation state compelled the Muslim world to adopt the civil codes imported from the colonial legacy or introduce new enactments on the same pattern. This phase

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brought significant changes to the legal systems of these jurisdictions. The governance module provided by *Shari'ah* falls in the *Siyāsah Shar'īyyah* domain. But the *fiqh* tradition does not provide any harmonisation or Islamisation standards as it never existed or was not required previously.

So, a prime question to be explored here is, has there been a highly regulated normative order for *Siyāsah Shar'īyyah*? If so, can the Muslim states incorporate that into the existing legislative framework? Another question to be explored is how a Muslim State can benefit from *Siyāsah Shar'īyyah* in current social structure and international conventions? This inquiry aims to explore the codification of laws in Muslim states on the merits of traditional *fiqh* and the subsequent contradictions in order to bring harmonisation with the civil system and the prospects of legislative framework upgradation based on *Siyāsah Shar'īyyah* principles. As a case study a few selected civil laws from Pakistan, Malaysia, Egypt and Turkey have been discussed. Moreover, a very brief analysis of legislative standards for the enacted Islamic laws in the said jurisdictions has been carried out to demonstrate the contradictions and grey areas in existing hybrid legal framework.

Research Methodology

The research methodology selected for this study overall, is descriptive and qualitative research. The study is limited to provide an overview of the legal systems being reviewed here instead of a statute-based analysis to fulfil the research requirements. This study aims to focus on the issue if some substantive and procedural codes are undergoing the codification and harmonisation process, then how can it be termed appropriate without a set criterion or standard to check? In light of the modern-day state system, how can a state be given the task to legislate a law while a state cannot be given the status of a *shāri'* (lawgiver)?

HARMONISATION OF LEGAL SYSTEM

Harmonisation of law is a process to bring uniformity in the legal system. Generally, a standard legislation is used to fashion and tailor other legislations in order to bring harmony to both regimes. Harmonisation is very evident in the European legal system. Moreover, a trend on harmonisation of law is observed in international commercial law. When we observe harmonisation of Islamic law with Civil law it depicts a pattern of bringing the Islamic law in the same module of Civil law. This need of harmonisation is created by the specific historical happenings in Muslim lands. A closer look manifests that codification of Islamic law is the standard process being used. So here we would interpret the harmonisation of law as harmonisation of Islamic law with the Civil law.

Codification as Law Making Tool

Codification itself as an idea of law is argued for several different notions. Black's law dictionary defines codification as *"The process of collecting and arranging the laws of a country or state into a code, i.e.. into a complete system of positive law, scientifically ordered, and promulgated by legislative authority".* While the modern European legal dictionary EUR-Lex defines codification as a process of bringing together an act which goes through all stages of law-making procedures. Whereas consolidation is a process of bringing together different legislative instruments without any changes to the existing law. The same notion has been attributed to consolidation by many sources.[2] EUR-Lex defines consolidation as *"When an EU legal act is consolidated, it means that the original act and all its subsequent amendments and corrections are combined in a single easy-to-read document".* The purpose is to combine applicable rules[3] in a unified legal instrument. Consolidation

[2] Glossary, UK Parliament, Accessed, 7th December, 2023, https://www.parliament.uk/site-information/glossary/consolidation-bill.

[3] Voermans, Wim and Moll, Chris P. and Florijn, Nico A. and van Lochem, Peter J.P.M., "Codification and Consolidation in Europe as Means to Untie

sticks to the existing laws with no alteration in pre-existing law. The key difference is that codification creates *lex de novo* and consolidation unifies the laws on a particular subject. Consolidation instrument has no novel effect but a tool for simplification and clarity. Another relevant term, although similar to consolidation, is compilation. Compilation is used interchangeably with consolidation but at times it is referred to the corpus of laws not enacted in positive law[4] particularly in the US. These distinctions and differences have jurisprudential and scholarly potential for further debate and discourse but fall out of the scope of the subject matter here. Thus, our focus will be the notion of codification as a novel legislative process and consolidation as unifying existing laws.

Some define codification as an essential to common law others assume that codification is common between civil and common law systems both as a technique of law making. This leads to the historiography debates of evolution of state from federal state to new deal administrative state. Gunther Weiss contends that it is impossible to provide an exhaustive definition of codification[5] as it has several different notions and variants. He enlists some of the features of codification being mentioned here, namely authority, completeness, exclusiveness, absence of gaps, systematic, simplicity, reform, and national legal unification. Other notable writings to be consulted on the subject are Merryman and Perez-Perodomo.[6] An analysis of the current literature available on codification as a technique to law making suggests that codification is widely present in the post-modern

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Red Tape" *Statute Law Review*, Vol. 29, No. 2, (2008): 65-81, SSRN: https://ssrn.com/abstract=1113755

[4] See further GPO Us Government Publishing Office, Last Accessed 7th, Dec, 2023, https://www.gpo.gov/who-we-are/news-media/news-and-press-releases/gpo-makes-available-statute-compilations-in-uslm-xml-format.

[5] Weiss, Gunther A. "The enchantment of codification in the common-law world." *Yale J. Int'l L.* 25 (2000): 435, Weiss, "Enchantment of Codification," 451.

[6] Merryman, John Henry, Rogelio Pérez-Perdomo. "The civil law tradition: an introduction to the legal systems of Europe and Latin America", (Stanford University Press, 2018)

world. Some of the key features it demonstrates is the state desire to have a uniform system, the popular consent and obligation in the nation state system.

Codification means creation of codes in a jurisdiction enunciating the law of land as governed by competent authority. A code usually has two features. First *"it gathers together written rules of law and second it regulates different fields of law"*[7]. Diderot and D'Alambert observed in their Encyclopédie, the word code *"means a general presentation of laws; but this name is given to many sorts of presentations that are very different from one another"*[8]. Codification can be described as a process to create a new legal world ex novo, either by abrogating the "old law" or succeeding a complete legal order. The 18th century has viewed the most rapid and excessive codification in Europe specially and in the rest of the world generally. The modern codes have curbed customary law and other pluralistic legal systems. Some famous codes of Europe are the Napoleonic Code, the 1833 Svod Zakonov, the 1734 Swedish Code (*Sveriges Rikes Lag*) and the1683 Danish Code[9].

CODIFICATION AND ISLAMIC LEGAL TRADITION

Codification is termed as *Taqnin* in Arabic.[10] The Muslim Jurists are divided on the issue of codification of Islamic law. Hallaq remarks codification a power authority tool of nation state:

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[7] R.D. Encyclopaedia Universalis VI Codification as quoted in https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5119&context=lalrev.

[8] Diderot and D'Alambert 1779, III, 570, Accessed December, 2023, https://quod.lib.umich.edu/d/did/.

[9] Bellomo, Mario, *The Common Legal Past of Europe 1000–1800*. Trans. Lydia G. Cochrane.(Washington: CUA Press 1995), 32–33

[10] Muhammad Zaki Abdul Bar, *Taqnin al Fiqh al Islami al mabada wa al manhaj wa al tatbiq*, (Qatar: Idara' ahyah' al 'uloom al islami, 1986). Accessed January, 2019, https://ia800203.us.archive.org/20/items/waq7059/7059.pdf.

> *Codification is not an inherently neutral form of law-making, nor is it an innocent tool of legal practice, devoid of political or other goals. It is in fact a deliberate choice in the exercise of political and legal power, a means by which a conscious restriction is placed upon the interpretive freedom of jurists, judges and lawyers*[11].

Codification was not the only structural change that was introduced. Another acute, if not traumatic, change was affected by the importation, under colonial pressure, of an endless variety of European codes, at times lock, stock, and barrel.[12] The first of these was the Ottoman Penal Code of 1858, closely modelled after the French Penal Code of 1810. In 1860, the Ottomans adopted as their own, without change or adaptation, the French Commercial Code of 1807 (cultural, social, and legal differences between the Middle Eastern Ottomans and the European French did not seem to matter). In 1863 and 1880, the Ottomans also freely borrowed the French Maritime Law and the Law of Civil Procedure, respectively.[13]

This wave of massive borrowings extended to other European sources, including the Swiss, German, English, and Italian codes of law. Later, with the emergence of the nation-states after World War I, there were attempts at synthesizing the Islamic and European laws, and in this process, it was Egypt that led the way. By the 1970s, the Muslim world had been, legally speaking, dramatically westernised. It was only the law of personal status that continued to retain provisions from the traditional Islamic law, although this area too was codified.[14]

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[11] Wael B Hallaq, *Authority, Continuity, And Change In Islamic Law*, (Cambridge University Press, 2004)

[12] *Ibid*.

[13] *Ibid*.

[14] Tarek A. Elgawhary, *Restructuring Islamic Law: The Opinions of The 'Ulamā' Towards Codification Of Personal Status Law In Egypt*, Phd Diss. Princeton University 2004. Accessed January, 2019. https://dataspace.princeton.edu/jspui/bitstream/88435/dsp01dn39x377h/1/Elgawhary_princeton_0181D_11135.pdf

It is observed that there are a few viewpoints to analyse codification as a technique of law making Islamic law scholarship. Codification is perceived as a phenomenon of modern state whereas the traditional Islamic law is perceived to be incompatible with the nation state, Hallaq[15] and Feldman[16] seem to lead this view.

Another view regarding codification is held by Ghazi[17] and Nyazee.[18] Ghazi maintains that legislation in western sense was not part of the Islamic legal system not even Ottoman laws and *majalla* rather it was rephrasing or redrafting of already prevalent laws.[19] As Nyazee contends, the codification, if attributed to Islamic law, would not be the same as in western law "enforcement of statute by state authority". Rather it would mean compilation and uniformity of law.

On the other hand, we find scholars like Al-Fadl and Emon[20] who argue that the conception of Islamic law as distinct from codification is based on a fallacy and a deeper look manifests that the critique of state is being done by hitting the codification without true realisation of nature of state and codification as well.

The subject here deals with the implications of codification, as it occurred in Muslim lands and directly affected the Islamic legal tradition. In the name of *taqnin*, we find a few attempts to codify the Islamic law in the early period. The attribution of being a pioneer to bring forth the idea of codification lies with

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[15] Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 361.

[16] Noah Feldman, *The Fall and Rise of the Islamic State* (reprint, Princeton: Princeton University Press, 2012), 61–68.

[17] Mahmood Ahmed Ghazi, State and Legislation in Islam, (Islamabad: Sharīah Academy, 2006), 103-106.

[18] Marghinani, 'Ali B. Abi Bakr, I. Nyazee. "Al-Hidayah Fi Sharh Bidayat Al-Mubtadi," Vol. 1, (2006).

[19] Ghazi, *State and Legislation in Islam,* 10.

[20] Emon, Anver M., "Codification and Islamic Law: The Ideology Behind a Tragic Narrative," *Middle East Law and Governance* 8 (2016) 275-309.

Ibn al-Muqaffa'[21] as he wrote to the caliph about his concern regarding the diversity of legal interpretation and how the prerogative of ruler can be utilised to enact and promulgate legal decisions[22] and doctrines in the form of a uniform, binding code and define the normative standards.

It is reported that the caliph rejected this suggestion altogether, however while he went for *hajj*, he did request Imam Malik to compile a code to be enacted and implemented. Imam Malik is reported to politely refuse the task upholding that the diverse legal opinions are strong rooted and people are at liberty to disagree. Although Imam Malik compiled *Muwaṭṭa*' he held his view as described. It is also reported[23] that, both Al-Mahdī and Harūn al-Rashīd also requested Imam Malik to prepare a draft code but he disproved.[24]

Another significant compilation of traditional Islamic law with a purpose to be used as a legal manual is *the Fatāwā-i-'Alamgīri* also known as *Fatawa Hindiyyah*. It was compiled by a panel of several scholars, which was being led by Shaykh Nizam. The compilation was divided into different sections and subsections. A unique feature of this compilation turned code is inclusion of determining principles and their application in

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[21] Abd Allah Al-Muqaffa', *Āthār Ibn al-Muqaffa*' (Beirut: Dār al-Kutub al-'Ilmiyya, 1989), 312.

[22] Abū al-Fidā' al-Ḥāfiẓ ibn Kathīr al-Dimashqī, *Nihayat al-bidayat-wal-nihayat fe-el fitan-wal-malahem, (al-Riyāḍ : Maktabat al-Naṣr al-Ḥadīthah, 1968). 59.*

[23] Muhammad bin Jarir Bin Yazid Bin Kathir Bin Ghalib Alamli Abu Jafar Al tibri (Beirut: Muassa'ah Al a'lmi lil Matbua'at, n.d)., Muhammad bin Muhammad, *al matun al fiqhiyah wa silatiha Bi Taqnin al fiqh,* (Jaddah :Dar al bilad litaba'ah wa al nashar).

[24]Abd Allah Al-Muqaffa', *Āthār Ibn al-Muqaffa*' (Beirut: Dār al-Kutub al-'Ilmiyya, 1989), 312.

respective chapter.[25] It can be said that *Futawa Alumgeeree*[26] provided a comprehensive compilation of *Ḥanafī Fiqh a*nd followed a distinct methodology to collect the juristic opinions.

Majalla Al-Ahkam Al-Adliyah is supposed to be the first "formal and official" codification of law in Islamic legal history. The Ottoman Empire used Islamic law in its full form to govern the administration of Justice. This code is sometimes translated as "Islamic Code" which contains 1851 articles as a whole. The drafting committee consisted of 70 scholars of high eminent headed by Cevdat Pasha. Out of 1851 articles, one is an introductory Article and 99 enumerate the general principles of Islamic law or may be called Islamic legal maxims.[27] The introductory note provides an insight into the *Majalla* and its approach in unifying the law. The legal validity was derived from the avenue of *Siyāsah Shar'īyyah* It is to be noted here that the common law notion of codification to bring de novo law cannot be applied to these compilations as it is mere consolidation and bringing simplicity and systematic approach to existing legal rulings.

If historical context is analysed it becomes clear that the *Majalla* was enacted as an outcome of political and social realities of that time. The Egyptian counterparts of the Ottomans adopted the Code Napoleon for legal reform and grand Vazir Ali Pasha suggested the same to be translated for the empire. So, the temporal realities of the reform period gave rise to the promulgation of the *Majalla.*

Moreover, the colonisation of Muslim world introduced the Muslim lands and legal regimes with codification. There are two categories of codification in present day Muslim states; one is the codes imported from the European system as a legacy of

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[25] Niel B. E. Baillie, *The Moohummudan Law of Sale according to the Huneefeea Code: from the Futawa Alumgeeree, a Digest of the Whole Law, and Prepared by Command of the Emperor Aurungzebe Alumgeer* (Delhi: Delhi Law House, 1850).

[26] *Ibid.*

[27] Gülnihal Bozkur, *Review Of The Ottoman Legal System,* Accessed on January, 2019, http://dergiler.ankara.edu.tr/dergiler/19/835/10563.pdf.

colonisation and two the codes enacted by the Muslim states as a technology to law making.

History of Codification in Selected Jurisdictions

Codification simply compiles the rules on a specific area into a formal code thus making it simple, accessible, orderly, concise and thorough. One can trace the history of codification of law back to the Byzantine empire. But it is very interesting to note that Islamic legal history does not offer codes to be enacted in large numbers. Thus, if we inquire about the origin of current codification prevalent in Muslim majority states, it goes to the colonization of these lands. After the colonisation most of the Muslim lands were under direct control of the colonisers who enacted their own laws to govern the public. Even after the colonisation period the same legal system remained to be used and govern these nations.

For Muslims the *Shari'ah* is not a mere set of beliefs rather a code of life to live by thus, there was a strong public demand that the Islamic law be the law of land. Consequently, a wave of Islamisation of law and harmonisation of law took over with different timeline for different Muslim states. Here a brief overview of codification in different Muslim countries is being provided.

Malaysia

There are almost 133 years of colonisation faced by Malaysia which was previously the Malacca empire governed predominantly by the *Shari'ah*. For Malaya colonial era began in 1511.[28] When the Portuguese took over, then in 1641 the occupation was continued by the Dutch and afterwards in 1824 it transformed into a British colony via Anglo–Dutch Treaty. The British changed the Malayan administration from its base and enacted several codes and enactments of their own. The laws

[28] Kim, Khoo Kay. "The origin of British administration in Malaya." *Journal of the Malaysian Branch of the Royal Asiatic Society* 39, no. 1 (209) (1966): 52-91.

governing the Malacca empire prior to colonization included but not limited to compilation covering criminal offences, commercial transactions, family matters, evidence and procedure, and the conditions of a ruler in the period of Sultan Muzaffar Shah[29] (1446–1459). These laws were directly embedded in the Islamic legal Philosophy and generally the texts like *Fath al-Qarib* from Ibn Al-Qasim al-Ghazi, *al-Taqrib* from Imam Abu Syuja' and Hasyiyah *'ala Fath al-Qarib* from Ibrahim al-Bajuri were consulted. In the later period just like other Muslim states, modern state enacted compilations were adopted like the *Majalla al-Ahkam* of Egypt translated as *Majallah al-Ahkam Johor*, and the Code of Qadri Pasha translated as the *Ahkam Shar'iyyah Johor*.

After the British colonisation these laws were abrogated and replaced by several codes. For example, the Charters of Justice 1807 and 1826 were imposed, the traditional judicial system was replaced by the court of Judicature. The Courts Ordinance 1878 introduced a new court hierarchy. The Civil Law Enactment 1937 deemed the most impactful legislative instrument to alter the legal regime of Malay. The Islamic law of the Malay region was marginalised to the extent that it was limited only to personal matters just like in India. It can be said that the current legal system of Malaysia is based on English law. The contradiction and conflict of laws becomes evident in application of Federal Constitution, Law Reform (Marriage & Divorce) Act 1976 the Guardianship of Infants Act, 1961 side by side with Muslim family laws.[30] There is a long list of judgments by Syariah

[29] Ali Mohamed, Ashgar Ali, and Muhamad Hassan Ahmad. "British Administration of Malay Peninsula and Its Impact on the Status of Islamic Law." *Islamic Law in Malaysia: The Challenges of Implementation* (2021): 9-18.

[30] Ali Mohamed, Ashgar Ali, and Muhamad Hassan Ahmad. "British Administration of Malay Peninsula and Its Impact on the Status of Islamic Law." *Islamic Law in Malaysia: The Challenges of Implementation* (2021): 9-18.

Courts, and other High courts manifesting this internal conflict[31]. Rather, the existence of two court systems parallel to each other functioning under two opposite legal traditions itself makes it evident how fragile, complicated and flawed the system is. Moreover, it is significant that the codification of that era has altered the nature of the legal system in a manner that Islamic law could not be re- installed at its previous position. It is not unique to Malaysian and Pakistani laws; rather almost all Muslim states are facing the same problem.

Pakistan

British India remained colonized for almost 200 years and these years snatched away its centuries old, well-built detailed Islamic legal system. The Islamic law was replaced by western laws, but in the form of codifications based on the Common rather than the Civil Law. Such were the Penal Code of 1860, the Evidence and the Contract Acts, both of 1872, and the Transfer of Property Act of 1882. Unfortunately, two Muslim states Pakistan and Bangladesh share the same legacy till this day. There have been few enactments like family law[32] and *waqf* laws after independence but these seem to create more problems[33] than addressing the need. The root cause seems to be the old wine in a new bottle. The same colonial norms and Common law system and style is being used to formulate new legal instruments. This results in a vicious cycle of legislation, which is being declared

[31] Mohamad, Maznah. "Making majority, undoing family: Law, religion and the Islamization of the state in Malaysia." *Economy and Society* 39, no. 3 (2010): 360-384.

[32] Munir, Muhammad. "Reforms in triple talaq in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change." *International Review of Law* 2013, no. 1 (2013): 2.

[33] See Munir, Muhammad. "Reinventing the Islamic Law of Inheritance: The Share of Orphaned Grandchild in Islam and Pakistani Legal System." *SSRN 2430826* (2014). Munir, Muhammad. "The Share of Orphaned Grandchildren under Islamic Law and Pakistani Legal System: A Re-evaluation of Representational Succession in Section 4 and Its (Mis) interpretation by Courts." In *The Asian Yearbook of Human Rights and Humanitarian Law*, (2018) 95-116.

ultra vires by court judgments leading to amendments and the cycle goes on.

Egypt

Shari'a is an integral part of the Egyptian legal system, especially in matters of personal status. Egyptian law is derived from the French Napoleonic Code. There are several contradictions in the Egyptian constitution as Civil law stands parallel to the Islamic system. The Article 2 and Article 40 seems to contradict as well as the *hisbah* principal.[34] Article 2 states that Islamic law is the source of law whereas article 40 instated equality before law for everyone. Apparently, it makes *Shari'ah* the *grundnorm* but the Civil law structure, the notion of individual liberties, and adopted codes from colonial legacy have the same consequences as for other Muslim states.

Turkey

Turkey has a very unique case in terms of the legal developments there. Before it became a secular state, it was known as the Ottoman empire. Mostly the legal history of Ottoman Empire is divided into two different Eras.[35] These eras are the classical period and the reform period. The classical period is the period of traditional *Qadī* courts, the division of law fall *into ta'zir, jinayat, Siyāsah Shar'īyyah* and other actors of justice system known in Islamic history.[36] The reform period contains a number of new adaptations[37] in terms of codes and laws. Another name

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[34] Karim el Gawahary, "Shariah Of Civil Code: Egypt's Parallel Legal Systems," *Middle East Report* 197 (November/ December 1995).

[35] Sherif Arif Mardin, *Some Explanatory Notes on the Origins of the 'Mecelle' in the Muslim World*, 51:4, (1961): 275.

[36] Dora Glidwell Nadalski, "Ottoman and Secular Law", *International Journal of Middle East Studies* 8(4), (1977): 522

[37] Miller, Ruth Austin. *From fikh to fascism: The Turkish Republican adoption of Mussolini's criminal code in the context of late Ottoman legal reform*. (Princeton University, 2003.)

of this era is *tanzimat* era. The beginning of these reforms is 1839 the first *Hatt-i Hümāyun* (Imperial Decree) which sought to elucidate the adjudication between Muslims and non-Muslim subjects of the empire. These reforms were the result of international political pressure. Though the purpose could not be served and the state of affairs deteriorated adversely. A number of laws including the first Ottoman Constitution, first Penal Reform are a resulting phenomenon. The French Civil Code was also translated to be enacted. In 1851, a completely new criminal code was promulgated known as "*Kanun-u Cedid*".

The entire codes adopted to reform and modernised the empire include Commercial Code of 1850, the Penal Code of 1858, the Code of Commercial Procedure of 1861, and the Code of Maritime Commerce of 1863. After abolishment of Caliphate in 1924,[38] Turkey went through a reform period[39] and stripped off its religious identity. The criminal law introduced 1n 1926 abolished the previous law and the new legislation defined the offences as per European standards. Although Turkey was never proclaimed to be a Muslim state in order to have a state religion, the 95% Muslim majority does make it a Muslim state. The same struggle of Islamic law to be the law of the land is carried on among the general public.

CODIFICATION AND ITS CHALLENGES TO ISLAMIC LEGAL SYSTEM

It is essential to address the challenges and problems posed by codification. If codification does not pose any problems to the legal systems operational in Muslim territories, then there should not be an objection. Nevertheless, an examination of the enacted and codified laws brings forth several contradictions and inconsistencies in the legal system as entirety. For instance, as

[38] Gabriel Baer, "The Transition From Traditional to Western Criminal Law in Turkey and Egypt," *Studia Islamica 45* [Paris], (1977) 139-158

[39] Yavuz, Miyase Altıntaş. "Evolutionary secularisation of the Ottoman law in the nineteenth century: Roots and implications." *Eskiyeni* 44 (2021): 385-408.

described above the constitutional requirement of Islam being a source of law comes directly in conflict with other laws in place.

The family laws are directly guided by the *fiqh* tradition, but the laws of evidence and testimony are based on Common law. Furthermore, the transfer of property laws has clauses promulgated in the colonial time to devoid the locals from absolute control of their property and these are still effective. The civil and criminal procedural codes are also a century old legacy of the occupation. Not only these laws are coined in that era but have significant material deviations from *marfaa't* and *adb al-qadi* from Islamic legal tradition.

The overall effect on the system and structure operative, at present, leads to ambiguity and uncertainty. Several different enactments are referred to the apex court for ultra vires to the constitution based on Islamic injunctions clause. Not only it creates a political stir and legal battle but a social chaos and apprehension of Islamic identity under threat among masses. To be precise very few examples are being quoted here. Pakistan enacted Muslim Family Law Ordinance 1961 in order to codify on the basis of Islamic injunctions but as it was based on peace-meal approach it is still being interpreted by the apex courts with decisions overturned after some time[40] and a continued inconsistent judgement increasing confusion for the subjects. The *waqf* laws, *Qanoon Shahadat* (Law of evidence), and more recent the transgender protection Act[41] are all following the same pattern. In a recent judgement, Transgender Act 2018 has been declared ultra vires to the constitution by the Fderal Shariat Court (FSC). This has become a norm that a legislation once completed will be scrutinised by Islamic Ideology council or by the FSC with no improvement in the law-making process.

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[40] Munir, Muhammad. "The Rights of Women and the Role of Superior Judiciary in Pakistan with Special Reference to Family Law Cases from 2004-2008." *Pakistan Journal of Islamic Research* 3 (2009): 271-299.

[41] Zubair Abbasi, *Balancing Gender Rights: Pakistan's Federal Shariat Court's Verdict on Self-Perceived Gender Identity,* Accessed June 2023. https://ohrh.law.ox.ac.uk/balancing-gender-rights-pakistans-federal-shariat-courts-verdict-on-self-perceived-gender-identity/

This research argues that the challenges faced by the legal systems to function in accordance with Islamic injunctions is not based on the incompetency or incompatibility of the Islamic law but the flaws in the approach being adopted. The *Shari'ah* is referred to as living law, the division of *Shari'ah* into fixed and flexible does provide space and ample answers to novel situations and hard cases, the only condition is to look at the appropriate dimension. Thus, it is mandatory to revert to the Islamic tradition to find a suitable solution.

Siyāsah Shar'īyyah as a Tool for Law Making

Siyāsah can be defined as the exercise of authority by a ruler in accordance with the protection of the objectives of the law (*maslahah*), even if there is no specific text from the Qur'an or *Sunnah* that directly supports the action. When this authority is employed in compliance with the general principles of Islamic law, it is referred to as *Siyāsah 'adilah,* or 'just administration', and the commands issued by the ruler under this authority are binding on the subjects. In contrast, if the constraints of Islamic law are violated, it is considered *Siyāsah zalimah*, or tyrannical administration[42], and any directives given by the ruler are deemed invalid.

This approach to governance can be regarded as flexible in its interpretation and application. When there is no guidance provided by the *Sharī'ah*, Muslim authorities are authorised to enact legislation based on the *Sharī'ah* as the grundnorm. Imran Ahsan Nyazee, among other scholars, views *Sharī'ah* as a growing tree, where the roots represent the source *(usul)* such as the Qur'an and *Sunnah*, the trunk represents the fixed part consisting of norms established by the *fuqaha'* from specific evidence, and the branches represent[43] the flexible part consisting of norms determined by the state from general principles. The fixed part of the tree includes norms explicitly stated in the

[42] Al-Tarablusi, *Mu'in al-Hukkam fi ma Yataraddadu bayna 'l-Khasmayn min al-Ahkam* (Cairo: n.p., n.d.), 207–217

[43] Imran Ahsan Khan Nyazee, *Theories of Islamic Law* , (Islamabad: Federal Law House,2007),200-330.

Sharī'ah texts or derived from them using the strict analogy of *fiqh*, while the branches of the tree are the qanuns. In traditional Islamic terminology, the fixed part of the tree represents the normative aspects of the *Sharī'ah*, while the branches represent the legal framework established by the state based on general principles. The doctrine of *Siyāsah*, developed by Ḥanafī jurists, has played a significant role in the administration of justice[44] throughout Muslim legal history. As a result, both the *Qanun* of the Ottoman sultans and the *Mahzarnama* of the Mughal Emperor Jalal al-Din Muhammad Akbar relied primarily on the authority of the ruler to make final decisions on matters of dispute[45].

It must be understood that every legal system has a few norms to uphold and protect. To exemplify the French system is based on individual liberty, the UK law emerged from the empire to utilitarian system and other western systems also have an embedded normative standard as an underlying rationale for any law making. In the case of *Sharī'ah* the norm is that the sole law-making authority and Sovereignty lies with God. Human liberty and state authority has limitations: not a single doctrine can surpass the entire system. Thus, as stated earlier how two conflicting and contradictory normative systems can be merged or give rise to a hybrid system. It has to be defined what will be the normative standard of a Muslim regime which as per Islamic law seems the broad principles of *Shari'ah*. Hence all law making will be subordinate and supportive to this norm.

Siyāsah Shar'īyyah and Legislative Institutionalisation

The legislative institutionalisation is a notion to describe the process of discovering the background of the complex relationship[46] of social, economic, political and cultural level of

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[44] Faradj, Hisseine. "Ulu Al Amr & Authority: The Central Pillars of Sunni Political Thought." (2014).

[45] Abdul Wahab Khallaf, *AL Siyasat ul Shariah,Muassah ul Risalah* (Beirut: Dar al Fikar,1975): 73.

[46] Mikhail B. Rumyantsev, et.al, *Institutionalization of law-making principles as a way to transform scientific categories into the law-making solutions.*

public life as a norm (ideas, benefits, and ideals) to result in a particular legal framework. Social movements and cultural and civilizational changes turn the course of legislative regulations,[47] commands and legal order. If we reflect on *Siyāsah Shar'īyyah* as a prerogative of the ruler and evaluate it in the legislative institutionalisation context a comprehensive framework for legislation can be achieved.

There is no concept of de novo legislation in *Shari'ah* as the role of *Hakim* or law giver belongs to Allah, but an avenue has been provided to the judge and ruler as a matter of distinction. There are several examples from the era of Prophet Muhamad S.A.W. where he adjudicated or instructed on the basis of *Siyāsah Shar'īyyah.* [48] *Siyāsah Shar'īyyah* has its implications in civil as well as criminal and administrative domains. The need is to envisage and sketch it in the modern legal language. The legislative structure currently followed if altered to follow the pattern where the enactment from initial stage till final phase is compatible with traditional Islamic law will yield great results. A distinctive feature of *Siyāsah Shar'īyyah* is the regulation of otherwise matters of choice[49] (*mubah*). Several examples can be found from ottoman laws where registration of marriage became mandatory despite there is no requirements of *Sharī'ah.* The criminal justice system has been the most significant play field of *Siyāsah Shar'īyyah*. The punitive measures termed *ta'zir* are the true manifestations of *Siyāsah Shar'īyyah*. It is high time that *Siyāsah Shar'īyyah* should be utilised to its fullest. The scope of *Siyāsah Shar'īyyah* is not exclusive and limited to criminal law rather it entails to almost all the areas of law.

Accessed March, 2019, . http://www.dilemascontemporaneoseducacionpoliticayvalores.com/.

[47] Squire, Peverill. "The theory of legislative institutionalisation and the California assembly." *The Journal of Politics* 54, no. 4 (1992): 1026-1054.

[48] Muhammad Mushtaq Ahmed, "The Doctrine of Siyasah in the Ḥanafī Criminal Law and its implications for Islamization of laws in Pakistan", (PhD thesis., International Islamic University Islamabad, 2015), 100-124.

[49] *Ibid*.

CONCLUSION

The internal consistency of a legal system depends on the uniform normative standard operating as a base. If any Muslim state or nation has a firm determination to adopt and implement Islamic law as the law to govern and tool of obligation it must adhere to the legislative structure which promises to function in conformity with the *Sharī'ah*. The key to implementation of Islamic law is law making embedded and originating from Islamic legal tradition. The closest tool to modern legislation can be found in *Siyāsah Shar'īyyah*, which along with its intrinsic normative standards and parameters can play a vital role to serve the purpose.

PART VIII:
HARMONISATION IN ISLAMIC FINANCE

FEASIBILITY FOR HARMONISATION OF *SHARI'AH* AND COMMON LAW APPROACH IN THE RESOLUTION OF ISLAMIC FINANCE DISPUTES IN NIGERIA

Kudirat Magaji W. Owolabi Ph.D[1]

ABSTRACT

A few years back, some states in the Federal Republic of Nigeria announced the adoption of the full application of *Shari'ah*. This raised many questions about the feasibility of the coexistence of *Shari'ah* and Common law in a former British colony whose Constitution is primarily based on the British Legal System. Similar tensions have been displayed towards the application of *Shari'ah* in the resolution of Islamic finance disputes at the Common law courts or where parties adopt alternative dispute resolution (ADR). The reality is how to reconcile these two systems of Common law and *Shari'ah*. The paper therefore highlights resolution strategies as applicable to Islamic finance disputes by Common law-oriented courts in Nigeria and the danger therein. The paper contends that instances of Islamic finance cases appearing before the Common law courts in Nigeria are distressing. There is a need for an Islamic resolution framework to regulate Islamic finance disputes in Nigeria owing to the unique approach in the UK, which gives parallel recognition to Islamic finance matters whether at the English Court or before an arbitration tribunal. This paper therefore suggests that certain *Shari'ah* and Common law principles be harmonised provided the two legal systems are kept in equilibrium. Harmonisation is therefore necessary in the resolution of Islamic financial disputes, especially where the dispute is before the Common law-oriented court or where ADR is adopted.

Keywords: Harmonisation, Common law rules, *Shari'ah* rules, alternative dispute resolution, Islamic finance disputes, Nigeria.

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INTRODUCTION

For several years, there have been constant demands from investors who desire the provision of Islamic finance products in Nigeria.[2] It is not surprising when the industry receives impressive patronage on its arrival. The Islamic finance industry is growing daily due to its increased demand for Islamic financial products and services. The industry's constant commitment to public awareness with other economic opportunities and benefits plays a significant role in the development of Islamic finance in Nigeria. This is evidenced in the annual growth rate of about 10% recorded globally. [3]

The principles of Islamic finance are well laid down in the *Shari'ah*. Islamic finance is a system that operates and offers products, services, and instruments by the dictates of Islamic law.[4] The crux for the inclusion of *Shari'ah* rules into the Islamic finance system is, to bring closer end-to-end *Shari'ah* compliance to people who have faith in *Shari'ah* doctrines, as well as to ease the affairs of the businessmen in commercial transactions by way of risk-sharing.[5] In other words, Islamic finance contracts, products, and services must comply with the tenets of Islamic law as contained in the Qur'an and *Sunnah*. This explains the reason Islamic finance operates as a just and

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[2] Zakariya Mustapha, Sherin Kunhibava and Aishath Muneeza, "Court Referral and Nigeria's Financial Regulation Advisory Council Expert (FRANCE)," *ISRA International Journal of Islamic Finance, Emerald, Bingley 11*, no. 2 (2023): 207.

[3] Patricks Ogiji, "Understanding Non-Interest Islamic Banking," The Understanding Monetary Policy Series No 16, 67.

[4] Mustapha, Kunhibava and Muneeza, "Court Referral and Nigeria's Financial Regulation Advisory Council Expert (FRANCE)," 210.

[5] Habib Ahmed, "Islamic Banking and Shari'ah Compliance: A Product Development Perspective". *Journal of Islamic Finance 3*, no.2:15-29.

innovative financing alternative in accordance with the dictates of *Shari'ah*.[6]

Hence, *haram* (forbidden) products, activities, and services are explicitly prohibited in any Islamic finance contracts. Islamic law declares certain activities *haram* and form the basis of Islamic finance contracts/transactions. Accordingly, activities such as *riba* (interest), *gharar* (uncertainty), *iktinaz* (hoarding), *maysir* (speculation), *ihtikar* (monopolies), gambling, alcohol dealings, etc., are *haram*. Prohibitions of activities of this nature are fundamental under *Shari'ah* and must be avoided. Islamic financing comes in two categories.[7] First, is the 'Profit and Loss-Sharing' (PLS), and the second, is the 'Purchase and Hire of goods or assets and services on a fixed-return basis.' PLS operates in the form of *musharakah* or *mudharabah*. The second category, on the other hand, can either be in the form of *murabahah*, *istisna'*, *salam, sukuk* or *ijarah*. Invariably, the foregoing are the modes of financing in Islamic finance, though not so familiar with non-Islamic finance experts. Hence, a brief exposition of their connotations becomes expedient.

Musharakah entails a profit and loss sharing partnership or joint ownership contract where two or more partners join capital to finance a business plan or to acquire movable assets or real estate which can run on a permanent or provisional basis. It is pertinent to note that in *musharakah,* profits and losses are shared based on the agreed percentage and in proportion to the capital contributed by individual partners.[8] *mudarabah* is a profit-sharing and loss-bearing contract between the financier and the manager. Here, the financier supplies all the capital needed for the manager's proposed business plan/idea, and in return, the manager provides managerial expertise with the sole aim of

[6] Rusni Hassan "Shari'ah Non-Compliance Risk and its Effects on Islamic Financial Institutions," *Al -Shajarah 21*, no.3 (2016): 25.

[7] Muhammad Ayub. *Understanding Islamic Finance*. (England: John Wiley & Sons Ltd, 2004), 46.

[8] *Ibid*, 50.

generating profits for both parties.[9] Profits are shared on the mutually agreed percentage thus, only the financier takes all the risks. The manager only shares the loss if, due to his negligence, he contributed to the loss incurred in the contract, business, or transaction.

Ijarah simply means a lease contract. Under an *ijarah* contract, the lessee is entitled to use the 'leased asset' owned by the lessor for a stated period and at an agreed price while the lessor retains the ownership.[10] Majorly, *ijarah* contracts take the form of a hire-purchase arrangement, and with that, the lessor undertakes to ensure adequate maintenance of the 'leased asset.' This is to enable the lessee to enjoy full possession with uninterrupted access to the leased asset. Therefore, the lessee will be answerable for the damage caused to the 'leased asset' if, by negligence, he caused the damage. *Salam* is another mode of financing in Islamic finance. This is where parties enter into a contract of sale, and in consideration of a specified price.[11] Here, the seller undertakes to supply goods to the buyer at a future date, but payment is made at the time the contract is made. Certainty as to the price (consideration), quantity, objects of the contract, date, and place of delivery are essential criteria for a valid *salam* contract of sale. In other words, parties must reach a mutual agreement on issues such as the price, nature of the subject matter, time and mode of delivery and other issues that are essential to the contract.

Istisna' is another Islamic financing model where an advanced instalment payment is made to a contractor in the housing finance sector or to a manufacturer. *Istisna'* affords contractors the opportunity to seek for an advanced finance from the financier for the construction of a project/commodity based on the demand and specifications given by the financier. Hence, the asset is delivered to the financier in the manner agreed to by

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[9] Muhammad Ayub. *Understanding Islamic Finance*. (England: John Wiley & Sons Ltd, 2004), 46.

[10] *Ibid,* 50.

[11] *Ibid*, 55.

the parties.[12] *Sukuk* simply means bonds, and they are similar to asset-backed securities that take place in conventional banks. *Sukuk* occupies 60% of the total amount invested in Islamic finance products which, of course, earns *sukuk* the most successful product within the Islamic finance industry in the Nigeria market.

Hence, with all these opportunities available in the Islamic finance industry, one can then ask if there are laws and regulations guiding these activities in Nigeria? This paper attempts to find an answer to the foregoing poser. More so, the various Islamic finance products above are in the form of agreements between business partners or intending parties to such business. Thus, with the complex nature of human existence and interaction, conflict is bound to occur.

The main purpose of this paper is to examine the feasibility of the coexistence of *Shari'ah* and Common law in the area of dispute resolution. The appropriateness of the existing/current resolution framework applicable to Islamic finance disputes in Nigeria shall be analysed. The paper focuses on the resolution of Islamic finance disputes by Common law-oriented courts in Nigeria and the danger therein. In effect, this paper identifies the danger in the continuous and current litigation practice as applicable to Islamic finance disputes, which is more readily available with respect to Islamic finance dispute resolutions. The paper shall question the competence of the Nigerian Common law courts in handling and addressing *Shari'ah* issues in Islamic finance disputes. Emphasis shall be placed on the United Kingdom's (UK) approach to see how courts in the UK handle such disputes. Nigeria, being one of the British colonies, makes it desirable to borrow from the UK's approach. The paper shall contribute to the existing literature on Islamic finance through the discovery of a feasible harmonisation of *Shari'ah* and Common law in the resolution of Islamic finance disputes in Nigeria.

[12] Muhammad Ayub. *Understanding Islamic Finance*. (England: John Wiley & Sons Ltd, 2004), 55

To achieve the above-stated objectives, the paper employed a doctrinal methodology of legal research.[13] It adopts descriptive and analytical methods. These two selected methods are the most accurate for achieving the aim of this paper, which is to bring out a sustainable legal approach to the lingering legal issues surrounding alternative dispute resolution mechanisms for Islamic finance in Nigeria.[14] A descriptive method of research is necessary to describe and explain the position of the existing resolution framework applicable to Islamic finance disputes in Nigeria. It is also necessary to analyse the danger in the application of the Common law approach in the resolution of Islamic finance disputes in Nigeria. The paper utilises the relevant primary and secondary sources of the materials, which are subsequently subjected to evaluative, descriptive, and content analysis.

LEGAL FRAMEWORK FOR ISLAMIC FINANCE IN NIGERIA

Banks and Other Financial Institutions Act (BOFIA),[15] Central Bank of Nigeria Act (CBN),[16] and Companies and Allied Matters Act[17] are the laws that are often referred to any time the issue of Islamic finance comes up. Regrettably, these laws are not specifically designed to regulate the operation of the Islamic finance industry or activities emanating from the industry.[18] In

[13] Daniel Coetsee and Pieter Buys. "A Doctrinal Research Perspective of Master's Degree Students in Accounting." *South African Journal of Higher Education 32,* no. 1 (2017): 75.

[14] Vijay M. Gawas, "Doctrinal legal Research method: A Guiding Principle in Reforming the Law and Legal System Towards the Research Development," *International Journal of Law* 3, no.5, (2017): 128.

[15] Cap.B3 LFN 2004.

[16] No7 of 2007.

[17] Cap.C20 Vol.3, LFN 2004.

[18] Ahmed A. Muhammad-Mikaaeel and Abdulrazaaq O. Zakariya. "Corporate Governance Legislation for Islamic banks in Nigeria: Review of

2011, Nigeria amended its laws on BOFIA to give recognition to those banks/financial institutions that are based on profit and loss sharing and also to legalise 'specialised' banks. This amendment is reflected in Sections 23 and Section 61 of the BOFIA, where non-interest banks are labelled or described categorically as 'specialised' banks in Nigeria.[19] However, these provisions do not serve as a *Shari'ah*-based legal framework because the whole content of BOFIA is not structured in accordance with the *Shari'ah* principles and doctrines. For this reason, it cannot form the legal basis for the operation of the Islamic finance industry and its activities in Nigeria.[20]

Nevertheless, there are numbers of regulatory initiatives released by the CBN to boost the development of Islamic finance hubs in Nigeria. These include guidelines for the Regulation and Supervision of Institution Offering Non-Interest Financial Services in Nigeria in 2011 and Guidelines on the Regulation and Supervision of Non-Interest (Islamic) Microfinance Banks in Nigeria in 2017.

Guidelines for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria 2011 (Guidelines 2011)

At some points, it becomes indispensable for the CBN to develop the Guidelines 2011 to grant the requests of individuals, banks, and other financial institutions who wish to engage in non-interest banking products/services that are rooted in Islamic commercial jurisprudence. To this end, the CBN specifically referred to certain provisions such as Section 33(1)(b) of the

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Compliance with Islamic Principles," *Nirma University Law Journal 12, no.1*, (2022): 39.

[19] Lateef W. Adeyam et al., "Jurisdictional Conflicts Between Shariah Courts and Common Law Courts in the Application of Islamic Banking and Finance in Nigeria," *International Journal of Business Society 2*, no.8, (2018): 12-21.

[20] Ibrahim M. Yussof, and Adewale Abideen, "Establishment and Operation of Islamic Banks in Nigeria: Perception Study on the Role of the Central Bank of Nigeria," *Australian journal of Business & Management Research* 1, no.2, (2011): 15.

CBN Act; Sections 23(1), 52, 55(2), 59(1)(a), and 61 of BOFIA; Section 4(1)(c) of the Regulation on the Scope of Banking Activities and Ancillary Matters, No. 3 2010 that are explicit on non-interest banking.[21] Guidelines 2011 is aimed to regulate, supervise, and provide minimum standards to institutions offering Islamic Financial Services.[22] The Guidelines define non-interest Financial Institutions (NIFI) to include banks or other financial institutions that are being placed under the purview of the CBN and are into banking business or engrossed in the provision of financial products and services or engage in other business activities such as trading, investment, commercial and operates in accordance with any established non-interest banking principles.[23]

To ensure adequate compliance with Islamic finance products and services, the Guidelines 2011 provides for two *Shari'ah* Boards, namely, Financial Regulation Advisory Council of Experts (FRACE) and Advisory Committee of Experts (ACE). Both operate at regulators and institution levels respectively.[24] These boards are responsible for guiding, reviewing, and supervising the activities of Islamic Finance Institutions (IFIs) for the purpose of ensuring compliance with the *Shari'ah* and also issuing legal rulings pertaining to IFIs.[25] Specifically, FRACE is charged with the responsibility to offer expert opinion and assistance on matters referred to it by other regulatory agencies in the financial sector. FRACE also has regulatory and supervisory powers over the activities of the ACE.

The Guidelines 2011 further identifies two categories in which non-interest banking and finance can take place. The first involves non-interest banking and finance that is based on Islamic commercial jurisprudence. The second category involves non-interest banking and finance based on any other established

[21] Guidelines 2011, Paragraph 3.1.

[22] *Ibid*, Paragraph 2.

[23] Guidelines 2011, Para 1.

[24] *Ibid,* Para 8.2, 9.0 & 9.1.

[25] CBN Guidelines on the Duties & Responsibilities of FRACE and ACE.

non-interest principles. As regards the first category, the Guidelines 2011 gives a directive that all non-interest financial institutions must be explicit in their companies' memorandum and articles of association as to the nature of business activities of the institutions. Hence, business activities under this category must be in accordance with the principles and practices of Islamic commercial jurisprudence.[26] The institutions offering Islamic financial services under the second category will transact business using only financing modes or instruments that are in compliance with the stated principles and as approved by the CBN.[27]

Guidelines on the Regulation and Supervision of Non-Interest (Islamic) Microfinance Banks in Nigeria 2017 (Guidelines 2017)

The issuance of licenses by the CBN to some Non-Interest Financial Institutions (NIFIs) necessitated the need to develop similar Guidelines for Non-Interest Microfinance Banks (NIMFB) in Nigeria. The Guidelines came at that crucial period when a substantial number of advocates disclosed their interests in setting up such banks. The Guidelines are therefore designed to offer an alternative system different from the regular operations of conventional Micro Finance Banks (MFB). The intention is to operate based on the concept of profit and loss sharing rather than charging interest on their products and services.[28] It is the expectation of the CBN that the introduction of NIMFB will produce a broader and healthier competition among MFB's, thereby reducing the cost of doing business in Nigeria. More so, the provision of non-interest microfinance banking services comes with numerous opportunities, some of which include attractive financial inclusion to individuals, communities, and corporations who were left out in the

[26] Guidelines 2011: Para 3.2.

[27] *Ibid*: Para 10.1.

[28] *Ibid*, Para 1.

conventional MFBs. NIMFB can also assist in poverty elevation by way of improving the earnings and well-being of the poor.[29]

Accordingly, the Guidelines 2017 apply to NIMFB operating under the principles of Islamic Commercial Jurisprudence, one of the categories of Non-Interest Financial Institutions (NIFIs) introduced to operate by the Central Bank of Nigeria.[30] NIMFB is defined to include all microfinance Banks licensed by the CBN with the purpose of providing financial products and services or engaging in trading, investment, and other commercial activities.[31] Hence, there are categories of licenses that the CBN can issue for the NIMFBs. First, is the Unit NIMFB. Second is the State NIMFB and the third is the National NIMFB. The holder of the Unit NIMFB license is authorised to operate with a paid-up capital of Twenty Million Naira and the service branch cannot be more than one in a single location which will be the only branch aside from the head office within the same local government area. The holder of a State NIMFB license is authorised to operate in one State or the Federal Capital Territory (FCT) and is also permitted to open branches within the chosen State or FCT with a paid-up capital of one hundred million Naira. The holder of National NIMFB is authorised to operate in all the states of the federation including the FCT with paid-up capital of two billion Naira.

Paragraph 2 of the Guidelines 2017 forbids the NIMBs from partaking in certain business activities involving *riba*, gambling, or any act that is not in line with the principle underpinning the operations of NIFIs. Also, any business that the subject matter or terms are ambiguous or, unjust is forbidden under the Guidelines. Exploitation/unfair trade practices, dealings with pork, alcohol, intoxicants, arms and ammunition, pornography, and other transactions, products, and services which contradict the principle of Islamic commercial jurisprudence are also prohibited. NIMFBs cannot accept deposits from the government or its agent except if the deposits are for the discharge of payment

[29] Guidelines 2011, Para 2.

[30] *Ibid.*

[31] Guidelines 2017: Para 3.

services such as salary, gratuity, pension, etc. Foreign exchange transactions, international commercial papers, international corporate finance, international electronic funds transfer, clearing house activities except collection of money or proceeds of banking instruments on behalf of their customers, collection of third-party cheques, etc are equally prohibited.[32]

With the coming into effect of the Guidelines 2011 and 2017, it is not disputable that numerous Islamic finance transactions and banking services have tremendously thrived in Nigeria. The tremendous growth of Islamic finance is proof of the fact that the industry is viable. Hence, the dispute is a normal occurrence in human dealings particularly, in commercial hubs like the Islamic finance industry.[33] With all these emerging new businesses, products, and services that the IFIs are offering to the general public in the Islamic finance industry, disputes are inevitable.[34] As an alternative to the conventional financial system, the applicable resolution framework for Islamic financial disputes plays a significant role in the growth of the industry. The major concern is the idiosyncrasy of Islamic principles that are present and adopted by the parties in their financial transactions/contracts between them. Ordinarily, one would have expected the resolution of such disputes is to be carried out in accordance with Islamic doctrines, just as the disputes emanate from Islamic finance transactions.[35] Sadly, the opposite is the case in Nigeria. This is because the existing legal and administration of justice delivery systems in Nigeria influence the resolution process.

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[32] Guidelines 2017, Para 2.

[33] Mustapha, Kunhibava and Muneeza, "Court Referral and Nigeria's Financial Regulation Advisory Council Expert (FRANCE)," 207.

[34] Abdulfatai O. Sambo, and Abdulkader B. Abdulkader. "The Continuing Influence of Common Law Judges and Advocates in the Adjudication of Islamic Finance Disputes in Nigeria," *Bloomsbury Qaatar Foundation Journals 4,* (2015): 120.

[35] Abdul Rasyid, "Relevance of Islamic Dispute Resolution Processes in Islamic Banking and Finance" *Arab Law Journal Quarterly* 27, no.4 (2013): 344.

RESOLUTION OF THE ISLAMIC FINANCE DISPUTES IN NIGERIA

Nigeria operates a tripartite and mixed legal system in terms of the legislative framework and in the administration of the justice system.[36] As regards legal framework, Common, customary, and Islamic laws are applicable in Nigeria.[37] Nigeria inherited the Common law from the United Kingdom (UK) which led to tremendous impacts on her legal development.[38] Customary law in Nigeria consists of the indigenous customs, values, and traditions of a particular community that for a longer period have developed into law within that given community.[39] Islamic law is law derived from the Qur'an and the practices of Prophet Muhammad S.A.W.[40] Hence, where the contract is concluded following Islamic law, especially in cases of Islamic finance, Nigerian courts should be bound to uphold the parties' choice as the governing law.[41]

Regrettably, the Islamic finance industry in Nigeria operates under the existing conventional legal and regulatory frameworks.[42] The lack of a comprehensive specialised legal

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[36] Abdulmumini A. Oba, "Religious and Customary Laws in Nigeria." *Emory International Law Review 25,* no.2 (2011): 885.

[37] Abdulmumini A. Oba and Ismael S. Ismael. "Revisiting the Causes of Delay in the Adjudication of Islamic Personal Law Cases in Nigerian Jurisprudence," *Nnabdi Azikwe University Journal of International law & Jurisprudence 11,* no.1 (2020): 5.

[38] Adeyamo et al., "Jurisdictional Conflicts Between Shariah Courts and Common Law Courts in the Application of Islamic Banking and Finance in Nigeria," 17.

[39] Owolabi W. Magaji, "A Critical Assessment of Enforcement Mechanism under Customary Arbitration Practices in Nigeria," *Maiduguri Law Journal* 17, (2019): 5.

[40] Oba and Ismael. "Revisiting the Causes of Delay in the Adjudication of Islamic personal Law Cases in Nigerian Jurisprudence," 5.

[41] Maidara v. Halillu (2000) LCN/0855 (CA).

[42] Mustapha, Kunhibava & Muneeza, "Court Referral and Nigeria's Financial Regulation Advisory Council Expert (FRANCE)," 207.

framework at the levels of operation governing the resolution of such disputes that emanate from Islamic finance contracts gives concern. The operations of the industry are eminently exposed to *Shari'ah* non-compliance frameworks since parties are left with no other than the law, which is incompatible with one governing their financial transactions.[43] Consequently, this creates a risk to the set objective of end-to-end *Shari'ah* compliant impression set out to guide the Islamic finance practices. Certainly, the growth of Islamic finance in Nigeria requires beyond just a skeletal structure of what the country currently holds. Positive legislative, policy, and regulatory actions are desirable to attain an active practice in the industry. If *Shari'ah*-based legislation is adequately considered, financial inclusion and gains with other numerous economic and developmental benefits as projected at the infant stage of the industry are guaranteed.

The Nigerian administration of justice system consists of Civil and Shariah courts. These courts are well established in the Constitution of the Federal Republic of Nigeria (CFRN) 1999 with their unique and distinct jurisdictions.[44] The CFRN, 1999 is explicit on the jurisdiction of the *Shari'ah* courts by empowering the courts to hear issues emanating from Islamic personal law such as family law, gift, *waqf* etc. Regrettably, the jurisdiction conferred on the *Shari'ah* courts in the CFRN, 1999 does not extend to Islamic finance matters.[45] Consequently, the CFRN 1999 fails to make adequate provision for the adjudication of Islamic finance disputes in Nigeria.[46] By way of implication, the supreme law charges Civil courts with the jurisdiction to hear and determine finance matters and it does not distinguish where the

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[43] Ibrahim M. Ahmad and Abubakar Garba. "Shari'ah arbitration in the Shari'ah Governance Structure in Islamic Finance Institutions in Nigeria: A Proposal Model," *Journal of International Banking Law and Regulation 30,* no.4 (2015): 200- 208, 207.

[44] CFRN, 1999 (as amended), Sections 251-272.

[45] *Ibid,* Section 277(1) & (2).

[46] Adeyamo et al., "Jurisdictional conflicts Between Shariah Courts and Common Law Courts in the Application of Islamic Banking and Finance in Nigeria," 15.

nature of the dispute emanates from Islamic-based transactions.[47] In other words, any dispute from the Islamic finance industry will be heard and determined by the judges of the Federal High Courts (FHCs) in Nigeria. Accordingly, adjudication of Islamic finance disputes is subject to the rules and procedures of the Nigerian courts that lack expertise in Islamic financial jurisprudence. However, where the court is facing difficulty in interpreting certain or specific rules on *Shari'ah*, it may rely on the opinion of an expert witness.

The incompetency of the FHC judges to make independent interpretations and verdicts on the principles of Islamic law is another serious challenge.[48] Sadly, these judges are not well conversant with the knowledge of Islamic finance. Hence, adjudicating on such cases is detrimental to the Islamic tenets/principles adopted by the parties in their transactions. Several authors have disproved the jurisdiction of the FHCs on issues bordering on Islamic finance. The authors took the position that Civil courts such as FHCs lack appropriate expertise in handling matters emanating from Islamic financial jurisprudence.[49] These authors contend that those judges expected to be in the position to adjudicate on finance disputes should be those with *Shari'ah* finance proficiency to achieve smooth operation and sustainability of the Islamic finance industry. Justification for this assertion is that the situation will always present itself where the so-called Civil court judges handling Islamic finance disputes will be required to exercise their expertise, opinions, and skills on Islamic jurisprudence. This is correct to the extent that such expertise is vital to

[47] CFRN 1999 (as amended), Section 251, CFRN 1999.

[48] Ahmad and Garba. "*Shari'ah* Arbitration in the *Shari'ah* Governance Structure in Islamic Finance Institutions in Nigeria: A Proposal Model," 204.

[49] Sambo and Abdulkader. "The Continuing Influence of Common Law Judges and Advocates in the Adjudication of Islamic Finance Disputes in Nigeria," 120; Umar A. Oseni, "*Shari'ah* Court -annexed dispute resolution of three Commonwealth Countries: A Literature Review," *International Journal of Conflict Resolution 26,* no.2 (2015): 221; Umar A. Oseni, "Dispute Resolution in the Islamic Finance Industry in Nigeria," *European Journal of law and Economics 40,* no.3 (2015): 550.

determine issues relevant to the judicial resolution of Islamic finance disputes. Islamic finance research required to properly adjudicate on matters concerning Islamic finance is a matter of *Ijtihad* that is not left to the hands of any Muslim but a versed scholar of *Shari'ah.* The major fear is the unlimited power conferred on the FHC judges to hear and determine matters emanating from Islamic-based transactions, whereas the Shariah Court of Appeal jurisdictions are limited to Islamic personal law. Adjudication of Islamic finance disputes by judges with little or no *Shari'ah* knowledge particularly, where such adjudication is not done in accordance with the *Shari'ah* rules, contravenes the desire of the disputant parties.[50]

Aside from litigation, Islamic finance disputes can as well be resolved through arbitration and other alternative processes. This is so because the essential features of mediation (*sulh*) and arbitration (*tahkim)* are deeply entrenched in the Islamic legal system, hence *Shari'ah* values both reconciliation and discreet conflict resolution.[51] The Nigerian Arbitration and Mediation Act 2023 (AMA)[52] is the primary law that regulates ADR and specifically, arbitration in Nigeria. Hence, the relevant question is whether the Islamic finance dispute is arbitrable or not in Nigeria. To answer the question, the commercial nature of the disputes is the first step that guides the court whenever, the issue of arbitrability of the subject matter dispute is raised.[53]

The provision of the ACA defines commercial to cover all kinds of contractual relationships provided it is commercial in nature.[54] The judicial support of this is the case of *Kano State*

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[50] Ahmad and Garba. "*Shari'ah* arbitration in the *Shari'ah* Governance Structure in Islamic Finance Institutions in Nigeria: A Proposal Model," 205.

[51] *Ibid.*

[52] Arbitration and Mediation Act, 2023

[53] Owolabi W. Magaji K. "Determining the Arbitrability of the Subject Matter Dispute by the Nigerian Courts and Its Impacts on the Awards," *Redeemer University Law Journal 2*, (2023): 80.

[54] Arbitration and Mediation Act, 2023

Urban Development Board v Fanz Construction Co,[55] where the court held a similar view by defining 'commercial' to mean dealings between parties that are commercial in nature. In essence, any dispute arising from a relationship that is not commercial in nature is not arbitrable in Nigeria. Section 35 of the ACA further elaborates on the issue of arbitrability. It provides that where certain existing laws in Nigeria have placed restrictions on the submission of any matter to arbitration, AMA shall not be applicable notwithstanding the presence of an arbitration clause to resolve such disputes by arbitration. It is noteworthy that the existing law as mentioned in the AMA can be national, Islamic, or customary.[56]

Instances of such prohibitions are found in the Companies and Allied Matters Act 2020, Admiralty and Jurisdiction Act 2005, Copyrights Right Act 2004, and Trademark Act 2004. Each of these laws contains provisions that prohibit the submission of issues arising therefrom to arbitration. Arguably, none of these laws can accommodate Islamic finance disputes since the practice and procedure of resolution as stated therein are not *Shari'ah*-oriented. Islamic finance disputes, as one of the categories of disputes envisaged by Secction 65(b) of the AMA are *sui generis* in nature and thereby tainted with *Shari'ah*. In addition, no arbitral institution with arbitral power to arbitrate on Islamic finance in Nigeria. Hence, FRACE and ACE as established by the Nigerian CBN do not have arbitral power to arbitrate via alternative means such as ADR or arbitration. The existing structure of arbitration, as provided by the AMA failed to consider the peculiarity of Islamic arbitration. Thus, arbitration of Islamic finance disputes is not illegal but only arbitrable under specialised law, which is Islamic law. These are the challenges facing *Shari'ah*-based ADR and arbitration in Nigeria.

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[55] (1990) NWLR [Pt. 142] 1.

[56] Ahmad and Garba. "*Shari'ah* Arbitration in the *Shari'ah* Governance Structure in Islamic Finance Institutions in Nigeria: A Proposal Model," 207.

THE UNITED KINGDOM (UK) APPROACH

In the United Kingdom (UK), Islamic finance is a viable form of finance compared to its counterparts, conventional finance. [57] The legal basis for Islamic finance in the UK can be traceable to the Finance Act 2005 (now modified as Finance Act 2007) which categorises Islamic finance contracts among the 'alternative finance arrangements.' Subsequently, the English Income Tax Law 2007, the Corporation Tax Act 2009 and Finance Act 2009, the Financial Services and Market Act 2000 and the Financial Services Act are the UK national laws that make significant contributions to the development of Islamic finance in the UK. Thus, English law does not in any way pay special attention to Islamic finance over and above its conventional counterparts, but no form of bias or impartiality towards the industry can be detected.[58] The decision of the UK Supreme Court in *Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs* attests to this assertion where the apex court upheld the principle of 'no obstacles, but no special favours' towards Islamic finance under English law. The court thereby laid a strong emphasis on the fact that Islamic finance is an alternative yet equal form of finance to conventional finance.

At the introductory stage of Islamic finance, the UK faced similar challenges as currently being experienced in Nigeria particularly, in the area of dispute resolution. English Common law and Common law judges play a significant role in the resolution process of disputes emanating from Islamic finance.[59] This is so, despite the fact that the foundation of Islamic finance disputes is tainted with *Shari'ah* principles. However, the question arises as to how the English courts resolve disputes in Islamic finance cases. The resolution approach adopted by the English courts is quite different from what is obtainable in Nigeria. This is because in the UK, certain laws and the

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[57] Muhamed Zulkhibri and Turkhan A. Manap eds., *Islamic Finance, Risk-Sharing and Macroeconomic Stability*, (London: Palgrave Macmillan, 2019).

[58] *Ibid.*

[59] Ahmed Belouafi, and Abdelkader Chaci. "Islamic Finance in the United Kingdom," *Islamic Economic Studies 22*, no.1, (2014): 40.

amendment of the existing legal and institutional frameworks on Islamic finance were provided, to accommodate the introduction of a parallel Islamic finance system and its peculiarities.[60] The UK legislative parliament made a series of reformations on their resolution frameworks so the national law can be able to embrace *Shari'ah*-based finance contracts and transactions as one capable of being contractually recognised under English law that can also be enforced. This is done without undermining the well-established English law.[61]

The formation in the UK however, makes the Islamic finance contracts vague. This is because the English form of Islamic finance is a mixture of financial devices that are twisted and collectively activated to deliver a *Shari'ah*-compliance function.[62] This explains the reason the pronouncements of the English courts' cases on Islamic finance contracts/transactions are mostly presented as an ordinary contract that emanates from English law.[63] By this, English courts have identified the distinction between contractual and commercial elements of Islamic finance. Hence, parties are at liberty to pick their choice of commercial elements as they wish. Whereas the English contract law will prevail over *Shari'ah* principles of contract, the division of contractual and commercial elements therefore enables the English courts to isolate the contractual governing law of contract away from the Islamic financing mechanisms. By this, English courts will be able to enforce contracts that are *Shari'ah*-based. Hence, the English Court will always interpret *Shari'ah*-based principles and apply them in line with the English law particularly, where dispute before it, is *Shari'ah* oriented or

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[60] Belouafi and Chaci. "Islamic Finance in the United Kingdom," 40.

[61] Mohamad E. Daouk, "English Case law on Islamic Finance: Interpretation and Application of Shari'ah principles," *Journal of Islamic Finance 10,* no.2 (2021): 59.

[62] Johd Dewar ed., *Islamic Finance & Market 2021*. 8th ed. (London: Law Business Research Ltd, 2020).

[63] Sayyed Mohammed Musawi v. R. International Ltd ., Sayeed Mohammed Ali & Others*;* Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd & Others; Beximco Pharmaceuticals Ltd & Others v. Shamil Bank of Bahrain EC.

where the surrounding facts of the case call for the interpretation and application of *Shari'ah* principles. This is to enable the court to reach a well-rounded decision particularly, in situations where commercial and contractual elements cannot be detached as it is intertwined with *Shari'ah* compliant structuring except where the courts interpret the Islamic elements of the finance contract.

In the UK, alternative dispute resolution is also available. Hence, parties can explore ADR processes in Islamic finance disputes. Certain provisions of the English Arbitration Act, 1996 particularly Section 46(1b)) permit parties to select arbitral rules of their choice which will govern their arbitration proceedings. This right to choose as conferred on the parties in the 1996 Act extends to the parties' choice of law. Arguably, parties' choice of law can also cover Islamic law; if parties opt for religious law.[64] Consequently, courts and tribunals in England do apply and uphold *Shari'ah* principles in arbitration matters in appropriate circumstances. This is resorted to if the arbitration agreement between the parties clearly reflects such intention to adopt or apply Islamic commercial jurisprudential rules. This position was well established by the apex courts in *Halpern v Halpern* 2007 and *Hashwani v Jivraj 2011* cases.

Also, in *Sayyed Mohammed Musawi v R. International Ltd., Sayeed Mohammed Ali & Others,* the High Court decreed an award issued on June 3rd 2004 as valid and enforceable. In this case, there was a *mudharabah* agreement and the parties chose *Shari'ah* as their choice of the applicable law for the resolution of a dispute which may probably arise. Hence, this choice of law was clearly provided for in the arbitration agreement between them to reflect the parties' intentions. The argument was, there is no law except English national law recognised and acceptable as the valid choice of law for governing contracts including arbitration agreements. Nevertheless, the court by virtue of Section 46(1)(b) of the 1996 Act upheld the parties' choice of *Shari'ah* in this case as an applicable law to substantial matters of the disputes in arbitration. Here, the English court

[64] Daouk, "English Case law on Islamic Finance: Interpretation and Application of Shari'ah principles," 62.

distinguishes the choice of applicable law to the substantive matters of the dispute in litigation and one in arbitration under English law. This approach clarifies some reservations declared for the *Shari'ah* as a non-national law in the earlier decided cases. Interestingly, not only the arbitration agreement and the choice of law clause were approved by the court in this case, but also the award issued was enforced under the 1996 Act.[65]

Unlike Nigeria, there is an established Muslim Arbitration Tribunal (MAT) in the UK that offers arbitration services to all issues relating to commercial matters. The MAT operates legally binding services under the 1996 Act and can render awards that are *Shari'ah* compliant and enforceable before English courts. Thus, English courts enforce awards that emanate from Islamic finance disputes if such finance contracts/transactions give rise to arbitration proceedings. Such Islamic finance awards granted by Muslim Arbitration Tribunal are legally binding contracts. It is important to note that the subject matter must not involve illegal activities contrary to English Law. English Court will still not enforce an arbitral award that violates the public policy of England if the nature of the dispute is not civil. [66]

The decision of the Court in the *Shamil Bank* case testifies to the fact that the UK approach in arbitration cases is the best compared to the court's approach in litigations. This is because English courts now treat *Shari'ah* as a recognised choice of law applicable to the merits of the dispute in arbitration matters. The decision of the court in *Sayyed Mohammed Musawi* case from the practical point of view offers a revolutionary benefit and a greater advantage to disputants in arbitration as against the litigants who approach courts for resolution. Arbitration offers creditable benefits over litigation, and these include the right to appoint an arbitrator with prerequisite knowledge in *Shari'ah* who will decide the dispute based on the doctrines of *Shari'ah*.[67] Meanwhile, litigants can only benefit when a judge engages the

[65] Mohammad H. Tavana, "Sharia as the Applicable Law in Islamic Finance Disputes," *Transnational Dispute Management 19*, no.6 (2022): 5.

[66] 1996 Act, Section 33 and 82.

[67] Tavana, "Sharia as the Applicable Law in Islamic Finance Disputes." 7.

services of an Islamic law expert in respect of any question of *Shari'ah* that requires determination. Nevertheless, the English courts' efforts to harmonise Common law and *Shari'ah* rules in the resolution framework under English law reflect the UK financial system's positive attributes such as its flexibility and impartial approach explored by the courts. Thus, there is enormous lesson for Nigeria to learn from the UK litigation and arbitration approaches toward Islamic finance disputes.

WAY FORWARD TO HARMONISATION IN NIGERIA

Agitations for the supremacy of the *Shari'ah* over Common law continue to linger in the minds of its advocates in Nigeria. It seems the sovereignty of the *Shari'ah* may not be attainable in a few years to come since the current legal and administration of justice systems in Nigeria do not give room for that. Instead of seeking for sovereignty, harmonisation of the two legal systems may be implored to bring together both the *Shari'ah* and Common law rules by way of harmonisation particularly, in the sphere of resolution of Islamic finance disputes.

In Nigeria today, one of the viable ways to implement rules of Islamic law is through harmonisation with the existing Common law. Thus, the extent to which this harmonisation is feasible largely rests on the county's approach. It means that Nigeria must be prepared to approach the subject of Islamic law with a more open mind and apply the principles that are more readily acceptable and applicable since there is a need to work within the confines of the Constitution. Harmonisation through a system of parallel courts from the lowest to the highest level is ideally anticipated but not feasible as it requires a constitutional amendment. Hence, the process of amendment is rigorous and may not happen in years to come. While we await the constitutional amendment to happen as some have agitated, Nigeria can also focus on ways to infuse Islamic law into the existing Common law system in such a way that will be acceptable to all whether as Muslim and non-Muslim. Non-Muslims will be more willing to opt for Islamic law to govern their transactions and resolution of disputes if they can be

convinced that doing so is more beneficial to them and to the public at large.

Research has shown that *Shari'ah* and the Common law share numerous hysterical similarities compared to their variances.[68] The most mentioned variances between *Shari'ah* and the Common law include but are not limited to evidence and procedure, adherence to the principle of *stare decisis,* and discretion in evaluating evidence. A substantial procedural difference is that under the Common law, judges are permitted to exercise judicial discretion (they must have heard from both sides) in deciding the credibility of witnesses whereas, Shariah judges or *Kadis* must follow strictly the position of the Islamic law and procedures base on the evidence(s) adduced before the court.[69] Then, Islamic law does not allow the doctrine of *stare decicis* as it exists in Common law courts. In fact, there is no obligation on the Shariah Court or *Kadis* to rely upon or refer to interpretations of the higher courts' or their previous decisions even where the facts are similar. This is because the prescription of Islamic law is vividly clear.[70]

Again, Islamic law requires that, before any judge determines the applicable law or reach a final decision on a case, all relevant facts should be relatively considered, whether or not those facts were canvassed in the pleadings or through oral evidence(s). This is to ensure that justice prevails and appropriate laws are adequately applied to all relevant facts. In *Chamberlain v Abdullahi Dan Fulani,*[71] the *Kadis* of the Syariah Court of Appeal observed that the counsel to the appellant ignored to argue ground 2 as pleaded. He further observed that the learned Upper Area Court Judge ought to have raised certain questions

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[68] Adnan Trakic ed., *Shariah and Common Law, the Challenge of Harmonisation*, (Berlin: Walter De Gruyter).

[69] *Shittu v Biu* 1973 NNLR 196; Oba, Abdulmumini A., "Religious and Customary Laws in Nigeria." 888.

[70] Muhammad K. Masud, "Teaching of Islamic Law in Nigerian Universities" in *Islamic Law in Nigeria*, ed. S.K Rashid (Lagos Nigeria: Islamic Publications Bureau 1985), 142-155.

[71] [1986] 1 Sh. L.R.N 54: 61

during the proceedings, even though it was not pleaded. The *Kadis* then disagreed with the Common law court approach that facts or evidence which have neither been raised nor argued cannot be validly addressed by the court. In justifying this, he observed that it is obligatory for anyone who discovers default to put thing right with what authority he has. He relied on the Prophet Muhammad S.A.W. saying that *"whoever observes evil he should remove it with might, if he cannot, he must do that with the weapon of the tongue, if he could not then he must hate it."* Accordingly, Islamic law opposes the Common law position that stipulates that it is judicial virtue for a Common law court not to go beyond matters canvassed by the parties.[72]

Hence, if these identified variances between *Shari'ah* and Common law can be viewed from perspectives of the commonalities, the efforts towards merging the variances would be more helpful enough to achieve a sustainable harmonisation process.[73] In essence, the existing legal framework on dispute management should be advanced in such a way that certain *Shari'ah* and the Common law principles would be easily matched. This is possible so long the two legal systems are kept in equilibrium. It may not be an easy task since the country operates a tripartite legal system. Nevertheless, the fact that the existing laws which are necessary and applicable in Nigeria for the resolution of Islamic finance matters are well-matched with the *Shari'ah* principles seems to be a leading way for the harmonisation. Hence, there is no need to enact new laws or go through the rigour of amendment of the existing ones. What is most imperative for the existing laws to be cognizance of *Shari'ah* rules in application. This may require the Common law judges to interpret and pronounce the objectionable parts of the existing laws in such a way that would not interfere with the main objective of *Shari'ah*. Islamic law needs to be seen and interpreted flexibly in order to accommodate these variances that are considered un-Islamic. Nigerian Common law judges need to focus more on substance rather than form.

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[72] *Alhaji Umar v Bayero University Kano* [1988] 7 S.C.N.J 380.

[73] Trakic, *Shariah and Common Law, the Challenge of Harmonisation*.

So far, some *Kadis* of the Shariah Court in Nigeria have been able to accommodate some of the variances identified above for harmonisation of the two legal systems. For instance, Justice Kalgo in *Chamberlain v Abdullahi Dan Fulani* case addressed the issue of *stare decisis* under the Islamic law. He pointed out that his court would be guided by established authorities while he decided on the case at hand. Also, in *Alhaji Sulu and Anor v Hamdallah Abike*,[74] the Kadi therein relied heavily on the Court of Appeal decision which stated that an appeal from Area Courts and Appellate Courts should not be too strict when it has to do with matters of procedure. Hence, illustrations of these judgments of the *Shari'ah* Court of Appeal established how *Kadis* are willing to bring harmony between the two legal systems without necessarily compromising one another. The flexibility in the mindset of our Common law Judges and *Kadis* will definitely play a significant role in harmonising the variances identified with the two legal systems. *Kadis* now understand that the interpretation of Islamic law as was applied centuries ago can no longer meet the ongoing situation in the country. Hence the reality of today must be taken into account whenever interpretation and application of Islamic law is required.

The same goes for Common law judges. The Nigerian Common law approach should adopt certain Islamic law principles that are not offensive to the existing resolution framework applicable in Nigeria, just like the way the English court applies *Shari'ah* which is in line with the English law. Thus, harmonisation may only be feasible to a certain extent as there are some mandatory *Shari'ah* rules and principles to be fulfilled before such contract/transaction can be regarded as *Shari'ah*-compliant. For instance, any contract/agreement that is tainted with *riba* or *gharar* violates the mandatory rules of *Shari'ah* and cannot be enforced under Islamic law. In other words, it may not be possible to completely mix the two legal systems but at least, it will be of benefit to harmonise certain reasonable differences in selected areas of *Shari'ah* and Common law.

[74] [2002] Kwara State Shari'ah Court of Appeal Annual Report 27: 36.

Analysis of the English cases cited above presents arbitration as a better option compared to litigation particularly when the question of *Shari'ah* as the applicable law is concerned. Nigeria can emulate this in such a way that ADR processes including arbitration will serve as a comfort zone for parties who feel so distressed with the application of Common law approach by Common law judges in the resolution of Islamic finance disputes in Nigeria.

It is worth to note that ADR enables the parties to appoint persons with at least basic knowledge and understanding of the guiding laws and principles to settle their disputes. The adoption is not a substitute for having competent judges of Islamic law whose conferment of powers by the appropriate authority to adjudicate disputes is long overdue. It is rather a viable alternative for a better administration of justice.[75]

CONCLUSION

It is vital to conclude this research by emphatically reaffirming the set objective of this paper that is, to examine the feasibility of the coexistence of *Shari'ah* and Common law in Nigeria particularly, in the resolution of Islamic finance disputes. The paper therefore emphasizes that certain *Shari'ah* and the Common law principles can be harmonised provided the two legal systems are kept in equilibrium. The main purpose of canvassing for harmonisation in the resolution of Islamic finance disputes in Nigeria is to bring together both the *Shari'ah* and the Common law procedural rules by way of harmonisation. This paper has been able to emphasise on the significance of the divine nature of *Shari'ah,* as a binding law to Muslim. *Shari'ah* comprises of wordings of Allah as contained in the Qur'an and *Sunnah* of the Prophet Muhammad S.A.W. *Shari'ah* governs the affairs of Muslims including their commercial dealings. It is therefore canvassed in this paper that Muslims in Nigerians who

[75] Abdulqadir I. Abikan, Abdulqadir, "Islamic Banking Disputes: Between Judicial pluralism and ADR" *Journal of Islamic Banking & Finance 1*, no.1 (2011), 11-29.

observed *Shari'ah* in their financial contracts/transactions also desire a resolution of their disputes in accordance with their faiths and beliefs.

It is observed that the majority of the judges who are vested with jurisdiction to determine Islamic finance disputes in Nigeria are trained under the English Common law and procedure. Hence, the decisions of these judges are heavily influenced by their understanding of the Common law approach. The passive attitude of the courts towards seeking the opinion of *Shari'ah* experts indicates to a certain extent their reluctance in accepting *Shari'ah* as one of the sources of law. This justifies the need for Nigerian judges with jurisdiction over Islamic finance disputes to acquire appropriate knowledge of the traditional Islamic legal concepts so they can be able to apply them in the context of modern finance. This will certainly form the basis prerequisite to a sound legal framework for the Islamic finance industry. The Nigerian legislature should then give due attention to the suitability and procedures of *Shari'ah* governance particularly the legal status of *Shari'ah* resolution, legal avenues for disputes involving *Shari'ah* issues, and mechanisms of monitoring and supervising *Shari'ah* compliance. The Nigerian Islamic finance industry needs a credible and reliable legal avenue for the settlement of legal disputes arising from Islamic finance transactions. Until Islamic finance is fully developed, the Common law and judges with little or no knowledge of Islamic law will continue to rule and make decisions on Islamic finance cases albeit by way of harmonisation.

ADR can be considered as the best alternative to court proceedings which can streamline the resolution of disputes and avoid the need for court proceedings. However, the lack of an adequate ADR framework that complies with Islamic law and procedure to deal with disputes arising from such *Shari'ah* compliant contracts/transactions remains the major reason for the low adoption of Islamic arbitration and ADR in banking and finance disputes. Presently, the industry is struggling to counter the risk management practices that come alongside conventional litigation when a dispute arises. Investors in Nigeria are more willing to adopt alternative resolution strategies that are *Shari'ah* compliance.

The paper thus recommends the adoption of the legal and arbitral approaches of the UK for harmonisation of the rules of *Shari'ah* and Common law in settling Islamic finance cases in Nigeria. This will take a long way for the rules of Islamic law to be recognised amidst the existing Common law rules in resolving Islamic finance disputes.

THE POSSIBILITY OF SHARIAH ADVISORY COUNCIL OF SECURITY COMMISION MALAYSIA (SAC SC)'S RESOLUTION AS AN EXPERT EVIDENCE IN SYARIAH COURTS: IN THE CASE OF INHERITANCE OF CRYPTO ASSETS

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ABSTRACT

The Malaysian regulatory framework for crypto assets has seen proactive developments. Despite the Shariah Advisory Council of the Securities Commission (SAC SC) issuing rulings on categorising crypto assets as commodities (*'urudh*), only four states fatwa committees have provided their *Shari'ah* opinions on these assets. An important question arises: are SAC SC's ruling binding in Syariah Courts, like in Civil Courts, in cases involving disputes over the legality of crypto assets as inheritable property? This study aims to assess the potential for SAC SC's ruling to serve as expert evidence in Syariah Courts, particularly concerning crypto assets. Through qualitative socio-legal research involving library-based search and semi structured interviews, this study analyses the data using content analysis. The findings indicate that Syariah Court should refer to SAC SC's rulings or opinions at their discretion, and no constitutional issues may be raised by disputing parties regarding this practice.

Keywords: *crypto assets, digital assets, harmonising Shari'ah and Civil law, SAC SC*

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INTRODUCTION

The regulatory landscape of crypto assets is evolving constantly due to proliferation of interest and uses on crypto assets.[4] In Malaysia, the Central Bank of Malaysia (BNM) and Securities Commissions of Malaysia (SC) jointly regulate crypto assets to promote fair and orderly trading and investor safekeeping. Any matters related to payment in the issuance and trading of crypto assets over the licensed and registered digital assets exchange (DAX) are subject to the laws and regulations of BNM. Meanwhile, any matters related to issuance and trading of crypto assets at licensed and registered DAX in Malaysia are subject to the laws and regulation of SC.[5] Besides, crypto assets are prescribed as securities and under the purview of SC.[6]

In the light of *Shari'ah*, the Shariah Advisory Council of Securities Commissions of Malaysia (SAC SC) in 2020 had issued their ruling that digital assets are recognized as assets (*mal*). Unfortunately, only five (5) states fatwa committees had issued their views on crypto assets. For instance, State Fatwa Committee of Perlis is the earliest state that issued their opinion on permissibility of crypto assets namely bitcoin as a *mal* with certain parameters in 2018 such as if a person owns bitcoin more than 85 grams of gold over a year, they are required to pay 2.5% of the current amount as *zakat*; any person who wishes to use bitcoin must be aware of its risks and understand how to use it operationally. Additionally, use of bitcoin may be restricted or

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[4] Abed et al., "Navigating Cryptocurrency Regulation: An Industry Perspective on the Insights and Tools Needed to Shape Balanced Crypto Regulation."

Oi, "Luno: Fueling Malaysia's Crypto Growth - Fintech News Malaysia." Luno, one of licensed and registered DAX in Malaysia reported that they had experienced significant growth in 2022 as 800,000.00 Malaysian users were recorded in their platform.

[5] Bank Negara Malaysia, "Joint Statement on Regulation of Digital Assets in Malaysia - Bank Negara Malaysia."

[6] as mentioned in Paragraph 3 of the "Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019"

outlawed due to external factors such as government bans or participation in money games run by third parties that offer higher returns. Followed by the State Fatwa Committee of Perak, Selangor and Sarawak in 2021 that crypto assets issued by registered and licensed DAX(s) in Malaysia are considered as *mal* and permissible to be used. In contrast, Mufti Department of Kuala Lumpur expressed their stance in 2018 that crypto such bitcoin is prohibited to be used by the public since it does not fulfil the criteria of money and can cause harm and damages to the country's monetary system. In the meantime, the researchers noted that the other nine (9) states fatwa committees are silent on this issue and yet to issue their rulings on crypto assets.

The absence of fatwa on legality of crypto assets as *mal* and estate from states fatwa committee may hinder the inheritance of crypto assets in the event of the death of crypto assets owner.[7] This is because illegal or non-*Syarie' mal* shall not be considered as an estate that can be inherited according to Islamic law. The process of separation of assets to be categorised as estate according to *Syarie'* must be preliminary done before the process of distribution begins and be brought to Syariah Court to decide whether crypto assets are *mal Syarie'* or otherwise. Since the crypto assets are under the purview of SC and SAC SC had issued their *Shari'ah* ruling on crypto assets and well versed on the operational of crypto assets, hence, this chapter aims to analyse the possibility of SAC SC's ruling or opinions to be accepted as expert's view in Syariah Court in the absence of fatwa on crypto assets in the respective state that exists *Shari'ah* disputes regarding the legality of crypto assets as *mal* and to determine it as estate in inheritance case.

[7] Nur Syaedah Kamis and Norazlina Abd. Wahab, "Analysing the loopholes on estate administration of cryptocurrency in Malaysia," *International Journal of Islamic Business* 7, no. 2 (December 31, 2022): 65–77, https://doi.org/10.32890/ijib2022.7.2.5.

METHODOLOGY

This study is qualitative in nature in which library-based search was conducted. It involves an analysis of the relevant statutory provisions, decided cases, books, journals and other online publications that discuss the issues related to SAC SC as statutory experts on crypto assets. The study also adopted semi-structured interviews which was conducted between July 2022 until February 2023 involving four (4) respondents consisting of *Shari'ah* and legal experts from different backgrounds. The interview comprises three elements related to the respondents' background and views on the possibility of SAC SC as statutory experts in Syariah Court when it comes to legality of crypto assets as *mal* and estate are also analysed.

THE POSSIBILITY OF SAC SC AS EXPERTS IN SYARIAH COURT IN THE CASE OF LEGALITY OF CRYPTO ASSETS AS *MAL* AND ESTATE.

The important question that must be taken into account is whether there would be any legal barriers that disallow SAC SC from testifying in Syariah Court in the absence of rulings by the state fatwa committee on permissibility of crypto assets and as estates that can be inherited by Muslims in the particular state.

It is undeniable that all finance matters are under the Federal matters (as stated in Item 7 of Federal List, Schedule 9 of Federal Constitution) including Islamic finance matters. However, there is a question as to whether the Civil Court has the capacity to hear the dispute in deciding whether crypto assets belong to the estate of a Muslim, and thus such assets can be inherited by Muslim. In the case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2006] 4 MLJ 705, Abdul Aziz Mohammad JCA held that:

> *The matter of succession and the matter of gifts according to Islamic law, where they involve Muslims, are matters within the judicial jurisdiction of the Syariah Courts. A dispute about gifts is not a dispute about probate and administration, just because it arises in the context of administration of an estate. In the course of administering an estate, various problems may arise, such as, in the case,*

> *on whether the property belongs to the estate, the answer to which depends, ... Each of the problems has to be solved according to the particular law that is applicable to the nature of the problem*[8].

Based on the above decision, this study argues that the crypto assets should be categorised as *mal* and therefore it falls under the jurisdiction of the Syariah Court. Since succession or Muslims inheritance matters are classified as Islamic law and personal matters that bestowed to State matters as specified in Item 1 of the State List, Schedule 9 of Federal Constitution, then, the dispute should be heard in Syariah Court as conferred in Article 121 (1A) of Federal Constitutions.

There are six (6) subject matters, namely foreign law, science, art, identity, genuineness of writing, finger impression, determination of *nasab* that opinion of experts can be accepted as circumstantial evidence (*qarinah*) in Syariah Court. This provisions are currently under the Syariah Court Evidence Enactments/Act in Malaysia. For instance, Section 33 of Syariah Court Evidence (Federal Territories) Act 1997 and Section 33 of Syariah Court Evidence (Sabah) Enactment 2004 provided that: -

> *When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions or relating to determination of nasab, the opinions upon that point of persons especially skilled in that foreign law, science or art, or in questions as to the identity or genuineness of handwriting or finger impressions or relating to determination of nasab, are qarinah.*

The phrase "*foreign law*" in that provision should not be directly translated in Malay language as *"Undang-undang*

[8] The appellant in this case appealed to Federal Court to set aside the decision of Court of Appeal and the FCJ unanimously dismissed the appeal and held that the Court of Appeal decision was correct and clear in the determination whether the assets in question had been given a valid hibah by the deceased to the appellant was a matter that fall within the jurisdiction of the Shariah Court.

negara asing" but it should be referred as all laws that are not within the expertise of Syariah Court such as laws relating to land, contracts, banking, finance which Syariah Court needs other references in the matters such as authentication of *hibah, waqf, wasiyyah* and other related matters.[9]

SAC SC is the statutory experts for Islamic capital market business or transactions with reference to Section 316F of Central Markets and Services Act 2007 ("hereinafter referred as to CMSA 2007") which stated that:

> *Where in any proceedings before any court or arbitrator concerning a shariah matter in relation to Islamic capital market business or transaction, the court or the arbitrator, as the case may be, shall – (a) take into consideration any ruling of the Shariah Advisory Council; or (b) refer such matter to the Shariah Advisory Council for its ruling.*

And the ruling made by SAC SC under Section 316F shall be binding on the Court or arbitrator as provided in Section 316G (b) of CMSA 2007.

> *Any ruling made by the Shariah Advisory Council under Section 316E and 316F shall be binding on – (b) the Court or arbitrator referred to in Section 316F.*

The decision in a landmark case of *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd* (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners)[10] significantly affected the duties and functions of SAC SC in the event where the matter of Islamic capital market was raised in the Civil Court. In this case, Section 56 and 57 of the Central Bank of Malaysia Act 2009 (CBMA 2009) were contested on the grounds that those provisions have encroached on the judicial power of the Civil courts, therefore it was held unconstitutional. These provisions provide that the rulings by the SAC SC should

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[9] Nasri, Mohd Sabree, and Ruzman Md Noor. "Kategori Keterangan Pendapat Pakar di Mahkamah Syariah: Isu dan Cadangan Pelaksanaan Undang-Undang." *Journal of Shariah Law Research* 5, no. 1 (2020): 35–54. https://ejournal.um.edu.my/index.php/JSLR/article/view/24151.

[10] [2019] 3 MLJ 561.

bind the court. In this case, the bank has granted the applicant credit facilities in which the applicant had defaulted in payment. The respondent (the bank) claimed the outstanding sum. The High Court granted the respondent's claim against the applicant for non-payment of the outstanding sum owed to the respondents under various Islamic Credit Facilities Agreements. The applicant contested on the compliance of this credit facilities with the *Shari'ah* and therefore appeal to the Court of Appeal. On appeal, the Court granted the applicant's request and instructed the SAC SC BNM to handle the inquiry about the *Shari'ah* compliance of clause 2.8 of the facilities agreement that the respondent had granted to the applicant. The SAC SC BNM submitted that the said clause in facilities agreement is compliant with *Shari'ah*. Dissatisfied with the decision, the applicant applied to the Federal Court for a reference.

The majority of the Federal Court judges unanimously interpreted the term "ruling" that was deemed binding in Section 57 of CBMA 2009 actually refers to the definition of "ruling" found in Section 56 (2) of CBMA 2009, which deals with ascertainment of the relevant Islamic law rather than resolution of disputes between the parties for the purposes of Islamic financial business. This is in accordance with item 4(k) of the Federal List in the Ninth Schedule to the Federal Constitution, where the legislature had purposefully used the terms "to ascertain" rather than "to determine", and the court can make a reference to SAC SC BNM under Section 56 of the CBMA 2009. Consequently, the ruling made in accordance with Section 57 of the CBMA 2009 did not resolve the dispute between the parties over the relevant Islamic financial facility. It was the presiding judge, not the SAC SC, who determined the borrower's liability under the financial facility. The SAC SC's ruling was limited to the *Shari'ah* matter alone. After referencing the SAC SC, the presiding judge would use his judicial authority to decide the matter based on the evidence presented to the court. The SAC SC did not usurp the court's judicial authority since it was not endowed with any judicial authority. Also, Section 56 (1) of the CBMA 2009 provided the Court the option of considering the SAC SC's published ruling or referring the *Shari'ah* matter to the SAC SC for a ruling. The word "or" in the sentence indicated that the Court had the option. Furthermore, the phrase "take into

consideration" in this section suggested that the Court alone has the judicial authority to resolve the dispute by applying the SAC SC's ruling to the particulars of the situation at hand.

Azahar Mohamed FCJ emphasized the views of the learned judge in the case of *Mohd Alias bin Ibrahim v RHB Bank Berhad*[11] and Court of Appeal judge in the case of *Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd*[12] are imperative in interpreting the statutory duty and function of SAC BNM in the Civil Court are confined exclusively as statutory evidence to the ascertainment of the Islamic law on Islamic finance or business matters. SAC BNM does not have power to hear and make decisions on the issues that arose between the disputing parties. The Court shall make the final decision.

In view of the position of SAC BNM ruling in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners),*[13] the researchers inferred that the duty and function of SAC SC also shall be the same in the event reference is made to SAC SC by the Court, where their ruling is to ascertain the disputed *Shari'ah* matters that arise in the case and not to resolve the main dispute between the parties.

Apart from that, Hussain, Hassan and Hasan[14] found that although SAC SC BNM is the highest authority in Islamic finance in Malaysia, the rulings passed by SAC SC are not fatwa within the context of administration of Islamic laws in Malaysia but such ruling can be considered to be an expert opinion and collective juristic inference (*ijtihad*) with respect to Islamic finance matters as opined by the learned judge in the case of *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor,*

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[11] [2011] 3 MLJ 26.

[12] [2013] 3 MLJ 269.

[13] [2013] 3 MLJ 269.

[14] Mohammad Azam Hussain, Rusni Hassan, and Aznan Hasan, "Analysis on the development of legislations governing Shariah advisory council of Bank Negara Malaysia," *Jurnal Syariah* 23, no. 2 (May 1, 2015): 325–42, https://doi.org/10.22452/https:/doi.org/10.22452/js.vol23no2.6.

Interveners) and *Mohd Alias bin Ibrahim v RHB Bank Berhad.*[15] Hence, SAC SC can be called to give opinion as expert in Syariah Court regarding crypto assets since they are Islamic capital market experts in Malaysia and in fact, they have their own rulings on crypto assets which may be referred by Syariah Court in deciding the disputing issue.

In respect of fatwa, the views and opinions of Mufti are important instruments in the legal context of resolving any dispute arising in Syariah Court. The gazetted fatwa issued by the respective state fatwa committee must be recognized as an authority by Syariah Court in states except in Kelantan.[16] This is due to the fact that none of the provisions in Kelantan Islamic Religious Council and Malay Customs Enactment 1994 provides on the binding effect of fatwa to the Muslims. Mat Salleh, Samuri and Mohd Kashim found that the fatwa is not binding against the Muslims in Kelantan due to if it is to the Muslims in Kelantan, then such a position seems to be the same as the judge's decision. Hence, such provision is not included in the Kelantan Islamic Religious Council and Malay Customs Enactment 1994, then it will not be recognized in Syariah Court nor shall it binds the Muslims in Kelantan.[17]

Besides that, Mat Salleh, Samuri and Mohd Kashim also found that the Mufti of state of Kelantan, Kedah, Negeri Sembilan, Pahang and Federal State of Kuala Lumpur that notwithstanding anything contrary to any written law, may not be called to give an opinion or statement concerning Islamic law in any Syariah Court.[18] This is because the Syariah Court judge

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[15] [2011] 3 MLJ 26

[16] Section 36(5) of Kelantan Islamic Religious Council and Malay Customs Enactment 1994.

[17] Mohd Kamel Mat Salleh, Mohd Al Adib Samuri, and Mohd Izhar Ariff Mohd Kashim, "Kedudukan Fatwa dan Pendapat Mufti Sebagai Autoriti di Mahkamah Syariah Malaysia," *Journal of Contemporary Islamic Law* 1, no. 1 (June 15, 2016), https://doi.org/10.26475/jcil.2016.1.1.01. The researchers had conducted interview session with the Honourable Dato' Daud bin Muhammad, Chief Syarie Judge of Shariah Court Kelantan in 2015.

[18] *Ibid.*

is entitled to bear witness and make his own decision (*ijtihad*) to the settlement of a dispute in court.[19] Besides, calling the mufti to testify in Syariah Court may tarnish their image, personality and credibility as the mufti and the religious advisor of the king. Moreover, it would also be unreasonable if the mufti being called as expert in Syariah Court because the mufti has different scope of duty from the judge whereas the duty of the mufti is to issue the fatwa or *Shari'ah* ruling together with the members of their respective state fatwa committees and is also involved as a member of the Fatwa Committee of the National Council for Religious Affairs. Since the scope of duty of the mufti is different from the judge, the mufti should have no obligation to appear in court either as an expert witness or to give evidence in the disputed case. Moreover, the duty to keep and maintain religious affairs and exercising other official duties may not allowed the mufti to be present and testify in Syariah Court.[20]

Furthermore, there were times where the fatwa issued by a mufti was not referred to by the Syariah Court. For instance, in the case of *Wan Shahriman Wan Suleiman & Anor v Siti Norhayati Mohd Daud*[21] in determining whether *ex gratia* awarded by the government to a pensioned judge is an estate. In this case, the judge in Syariah Appeal Court of Kuala Lumpur has set aside the earlier decisions od the Syariah High Court where *ex gratia* was decided as an estate based on a fatwa. Instead, the Syariah Court of Appeal ruled that *ex gratia* is not an estate after considering other relevant facts and evidence that have more weightage based on *ijtihad.* Similarly, in the case of *Che Mas Abdullah v Mat Sharie Yaakub,*[22] where the Court has made his own *ijtihad* in making the decision in determining Employees Provident Fund (EPF) is not joint property but an estate without referring to any fatwa related to EPF. Based on

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[19] *Ibid.*

[20] Farid Sufian Shuaib, Tajul Aris Ahmad Bustami, and Mohd. Hisham Mohd. Kamal, *Administration of Islamic Law in Malaysia: Text and Material*, 2001.

[21] [2010] 1 CLJ (Sya) 85.

[22] [2005] 2 CLJ (Sya) 1.

these cases, it can be concluded that the Syariah Court Judge has the power to use *ijtihad* in deciding the disputing matter before the court by considering all facts and evidence and not just relying on a fatwa.

In contrast, in similar fact and issue on whether EPF is a joint property or otherwise, the Syariah Court judge in the case of *Noridah bt Ab Talib v Hishamuddin bin Jamaluddin*[23] ruled that the savings in the Employees Provident Fund (EPF) are not considered matrimonial property. This decision is based on *fatwas* from the meeting of the National Council for Islamic Religious Affairs (MKI), which state that EPF savings are considered as an estate and must be distributed according to Islamic law of inheritance (*faraid*). The nominee acts as an executor (*wasi*), not as a beneficiary, and is responsible for distributing the funds to the rightful heirs. The Court emphasized that EPF savings are personal property of the contributor and should be treated as such upon the contributor's death.[24]

Overall, these cases demonstrate the balance between judicial discretion and the authoritative guidance provided by *fatwas* in Syariah Court decisions. Syariah Court judges are empowered to exercise *ijtihad* based on comprehensive consideration of facts and evidence, ensuring that their rulings are in line with both legal principles and religious guidelines as appropriate to the specific circumstances of each case. Considering the foregoing analysis, SAC SC's ruling has not been cited or referred to by Syariah Court judge in any Syariah Court cases. Hence, we further conducted semi-structured interviews with Shari'ah and legal experts to obtain their views on possibility of SAC SC to be referred as experts in Syariah Court in deciding the legality of crypto assets as *mal* in the event no fatwa issued on crypto assets. The following Table 1 presents the background of the respondents, while Table 2 summarizes their views on the possibility of SAC SC to give the opinion of

[23] [2009] 4 ShLR 115.

[24] Referred to the 67th Meeting of MKI on 22nd February 2005 which resolved that EPF is an estate and must be divided according to *faraid.*

an expert in Syariah Court in deciding the legality of crypto assets as *mal* and belong to estate.

Table 1. Background of informants.

Item(s)	R1	R2	R3	R4
Position	Former chairman of Shariah Advisory Council of Security of Commission s Malaysia	Advocates & solicitors and Syarie lawyer in Johor	Advocates & solicitors and Syarie lawyer in Perlis	State's mufti in Malaysia
Years involved in current position.	6 years	28 years	33 years	6 years
Expertise	Shariah, Islamic finance	Law and shariah	Law and shariah	Islamic studies

Table 2. Opinions regarding the possibility of SAC SC to give opinion of experts in Syariah Court in deciding the legality of crypto assets as *mal* and belong to estate.

Theme	R1	R2	R3	R4
The SAC SC ruling or opinion on crypto assets to be referred	It can be but rarely happens. The Court will refer to fatwa.	Syariah Court's views on *muamalat* matters are rigorous and has tendency to reject	The Syariah Court only referred to fatwa in making decision.	Fatwa should be referred by the Syariah Court if any.

by Syariah Court.		SAC SC's ruling.		
Action to be taken in the absence of fatwa on crypto assets.	Fatwa is required to be issued regarding this issue. However, it will take a long time to be issued and eventually the inheritance of crypto assets will be delayed.	The lawyers must assist the Syariah Court by submitting their argument with reference to the opinions from experts in *muamala*t to avoid this matter be brought in Civil Court.	Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia (MKI) should issue their opinion regarding this issue. However, it will take a long time to be issued and eventually cause delay in the inheritance of crypto assets.	State fatwa committee is required to be expert and has knowledge on crypto assets before issuing the fatwa.

Table 2 shows the results of the interviews conducted with four (4) respondents who have broad knowledge and experience in the study area. where R1 is the former chairman of SAC SC, R2 and R3 are the practising civil and syarie lawyer respectively and R4 is the honourable Mufti in one of the states in Malaysia. With broad and vast experience in the area, all respondents can be considered as the most suitable person to provide opinion and thought on the possibilities of SAC SC's ruling or opinion is being referred as expert evidence in Syariah Court in the absence

no fatwa issued on legality of crypto assets as *mal* and belong to estate.

Regarding their opinion on SAC SC's ruling or opinion on crypto assets to be referred by Syariah Court, R1 viewed that SAC SC can be referred but it is very rarely to happen and will eventually refer to the state's fatwa. R2 who has previous experience in making submissions by referring to SAC SC ruling as authority in Syariah Court, viewed that Syariah Court's views on *muamalah* matters are rigorous and has a tendency to reject SAC SC's ruling. R3 and R4 also opined that Syariah Court will refer to the state's fatwa in deciding such issues. As highlighted by R1:

> *It can happen but very rarely. So, in the event there is a case of death, he has bitcoins and ether amounting to RM 7 million and there is code. The code is guarded by a trusted child. How to inherit the crypto? Then he went to Syariah Court. While the Court will ask 'what is crypto?' and refer to the fatwa…*

Syariah Court may not accept the ruling or opinion SAC SC due to their high standard in *muamalah* as stated by R2:

Not necessarily what is argued by SAC SC is accepted by the Court. The question is whether the machine used (crypto machine) can be inherited? The answer is whether it is able to pass the shariah standard by Syariah Court? The view of the shariah advisor in the Syariah Court is more rigorous.

On the theme as to whether an action is to be taken in the absence of fatwa on crypto assets in the respective states. R1 suggested that a fatwa on crypto assets is required to be issued. Similarly, R3 also suggested that the Fatwa Committee of the National Council for Islamic Religious Affairs Malaysia (MKI) should issue the *Shari'ah* opinion regarding crypto assets at national level. Nevertheless, both R1 and R3 stated that, by requiring state's fatwa in such circumstances when there is issue arise on crypto assets in Syariah Court will cause delay in deciding the status of crypto assets in inheritance. R1 further stated that: -

> *So, in the event there is a case of death, and he has bitcoins and either amounting to RM 7 million and there is code. The code is guarded by a trustworthy child. How to inherit the crypto? Then he went to Syariah Court. While the Court will ask 'what is crypto?' and refer to fatwa. To issue the fatwa will take up to 2 or 3 years. So, I must be proactive and reactive.*

In respect of fatwa on crypto assets should be issued by State Fatwa Committee, since R4 is a Mufti, he clarified that they need to be expert and has knowledge first on crypto assets before issuing the fatwa for State Fatwa Committee to issue the fatwa regarding crypto assets. Meanwhile, in a different view, R2 stated that the lawyers must assist the Syariah Court by submitting their argument with reference to the opinions from experts in *muamalat* to avoid this matter being brought in Civil Court.

In view of the above findings, the researchers propose the following model in the event that the issue of legality of crypto assets as *mal* that belong to the estate of the deceased being raised before the Syariah Court as displays in Figure 1: -

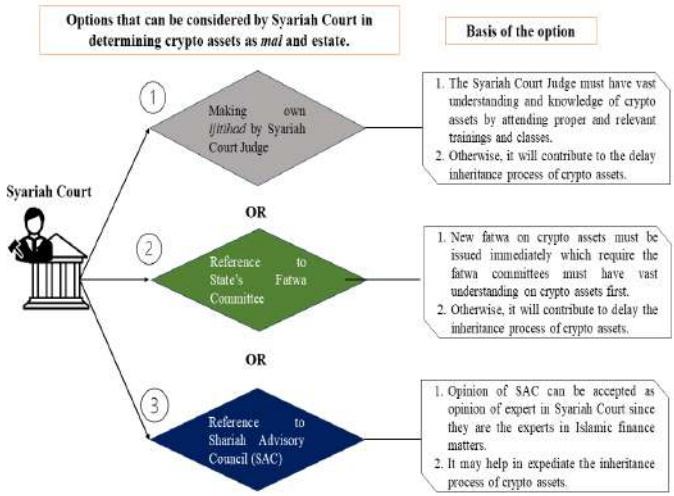

Figure 1: Proposed model on options that can be considered by Syariah Court in determining crypto assets as mal and estate in the event no fatwa issues on crypto assets.

Based on the proposed model in Figure 1, three (3) options are suggested that can be taken into consideration by Syariah Court judge in determining the legality of crypto assets according to *Shari'ah* and whether it belongs to an estate that can be inherited by Muslims. The first option is, Syariah Court judges have the authority to independently interpret whether crypto assets are permissible and can be inherited by Muslims. To effectively exercise this authority, judges must acquire extensive knowledge of crypto assets through appropriate training and education. Otherwise, their lack of expertise may lead to delays in inheritance cases involving crypto assets, as they cannot confidently apply independent legal reasoning without adequate understanding of the subject matter.

Second option is, Syariah Court may refer to the State's Fatwa Committee. However, due to no fatwa on crypto assets being issued by the State's Fatwa Committee, the new fatwa must be issued immediately. This circumstance requires the fatwa committee to be well versed and have proper understanding on crypto assets before issuing the fatwa. Otherwise, they need to call experts in their meeting to explain thoroughly all about crypto assets and consume a lot of time to reach consensus in issuing the new fatwa on the contemporary issue such as crypto assets.

The third option is, Syariah Court may refer to SAC SC on the basis that opinion of SAC SC can be accepted as opinion of expert in Syariah Court since they are the experts in Islamic finance and the ruling on crypto assets already existed which may be referred by Syariah Court judge in deciding this issue. This indeed, may help in expediting the inheritance process of crypto assets.

CONCLUSION

The researchers conclude that in respect of issues related to legality of crypto assets as *mal* and belong to estates that can be inherited by Muslim, the issues should be brought before a Syariah Court judge, and it is not unconstitutional. This issue must be determined according to *Shari'ah* since it is involved with Muslims personal matters as conferred in Item 1 of State

List, 9th Schedule of Federal Constitution. These particular issues might become disputed in Syariah Court in the event there is no specific fatwa on crypto assets issued by the respective State's Fatwa Committee.

Crypto assets represent a new type of digital asset that requires thorough understanding to assess its compliance with *Shari'ah* principles. In Malaysia, the Shariah Advisory Council (SAC) of the Securities Commission Malaysia (SC) has issued their own ruling on digital assets such as crypto assets. Therefore, Syariah Court has the discretion to refer and accept SAC SC's ruling or opinions as expert evidence to assist in deciding related issues. This practice aligns with the Qur'anic encouragement, as mentioned in Surah Al-Anbiya, verse 7:

So, ask the people of the message if you do not know.

The finding of this study contributes to theoretical implication by expanding the new literature related to SAC SC as expert evidence in Syariah Court. Besides, in terms of practical implication, the finding of this article can be referred to by the lawyers and judges as a guideline with regards referring SAC SC as expert evidence in Syariah Court. Furthermore, the absence of law or unstandardized fatwa may cause the process in Court to become lengthy and costly. Hence, by referring SAC SC as expert evidence in Syariah Court will help to expedite the proceeding and curb the delay in the inheritance process of crypto assets. It also will reflect the harmonisation of Islamic law in Malaysia by accepting the opinion of Islamic finance experts such as SAC SC in Syariah Court although they were established under Federal jurisdiction.

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