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Editorial Note

The journal welcomes distinguished Alumnus, the Right Honourable, the Chief Justice Tun Tengku Maimun binti Tuan Mat through her Keynote Address delivered at a webinar entitled 'Parallel Perspectives From Malaysia and the United Kingdom'. The event was organised by the Alumni Association of the Faculty of Law, Universiti Malaya together with the Honourable Society of Middle Temple and the Malaysian Middle Temple Alumni Association, on 24 September 2021.

Authors Muhammad Kamaldeen Imam-Tamim and Khadijah Akorede Salawu then set out to examine the legality of the Nigeria Deposit Insurance Commission (NDIC) as the insurer of Islamic banks' deposits through the prism of the *Shari'ah.* Where some of its legislative framework for operations were found to be wanting, the authors proposed suggestions and recommendations to ensure *Shari'ah* compliance.

This is followed by Matthew Sebastian's piece which seeks to highlight the particular problems faced by foreign domestic workers (FDWs) in Malaysia, which are, excessive working hours and no rest days. The author submits that the Employment Act 1955 in Malaysia might be unconstitutional because it denies such protections to FDWs.

In her piece, 'A Comparative Study of Marital Rape Laws in Malaysia, Indonesia and Singapore: Towards Safeguarding Child Brides', Pavitra Kalaiselvan examines the dire legal situation in Malaysia pertaining to marital rape and child marriages, and compares the Malaysian situation with that of Indonesia and Singapore, where great strides have been made in both issues.

In 'Breach of Duty According to Medical Negligence Law in Nigeria and Malaysia', the authors, Kome-Bona Idollo et.al. compared the principles used in Nigeria and Malaysia to determine whether there was a breach of duty, concluding that while Malaysia has applied the *Rogers* test, Nigeria still applies the *Bolam-Bolitho* test.

Last but not least, Usharani Balasingam reviews the book 'Comparative Law: Global Legal Traditions' by Michael J Bazyler, Michael Bryant, Kristen Nelson & Sermid Al-Sarraf noting that the book serves a useful need not only for law students, but any reader who is seeking to navigate an interconnected, interdependent globe to comprehend global legal traditions and the cultures that shape it.

Dr. Sharifah Suhanah Syed Ahmad
Executive Editor

PARALLEL PERSPECTIVES FROM MALAYSIA AND THE UNITED KINGDOM*

Tengku Maimun Binti Tuan Mat†

I INTRODUCTION

Prior to the establishment of the Faculty of Law, Universiti Malaya in 1972 as the first law school in Malaysia, all our law graduates mostly qualify in the United Kingdom – specifically in England. Today, many of our graduates still do qualify in England but we have since established numerous local law schools to produce our own home-grown graduates. This fusion of backgrounds is a good thing because it keeps alive the variety of experiences and characters we have at the Bar and Bench.

I was accepted into the Faculty of Law, Universiti Malaya in the year 1978, and so I had the privilege of being the 7th intake of the Faculty. My years at the Faculty which I feel flew by far too quickly, were my most formative years. I say this for several reasons.

For one, I forged invaluable friendships with many people which have remained alive to this day and some of which have carried me through my legal career – one such relationship being the one I had with a classmate and who is one of my most ardent supporters – my husband.

I learned a great deal in law and in life from the towering figures who founded much of the legal structure and learning that we have today. Revered names such as Tan Sri Professor Ahmad Ibrahim, Tan Sri Professor Visu Sinnadurai (who I am pleased to welcome in the audience), and of course Dr Alima Joned who was my lecturer – and who I am so pleased to see on the virtual stage today – I must say that I am a very proud alumna.

Indeed, our alumni has achieved considerable feats and have held numerous significant and key national-level positions. We have had and still do have in our ranks alumni who are senior and respected members of the Bar, past and present Attorneys-General, PARFUM's Patron – Tun Raus Sharif as the first alumni Chief Justice, and most recently, the first ever Prime Minister from the Faculty. Even the Judiciary is proud to have within it graduates of the Faculty alumni throughout the Court hierarchy. The Top 4 senior-most judges are alumni as is the Chief Registrar of the Federal Court.

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* This was originally a Keynote Address delivered orally by the Right Honourable, the Chief Justice of Malaysia at a webinar entitled 'Parallel Perspectives between Malaysia and the United Kingdom' which was jointly organised by the Pertubuhan Alumni Rumpun Fakulti Undang-Undang Universiti Malaya (PARFUM), The Honourable Society of the Middle Temple and The Malaysia Middle Temple Alumni Association (TMMTA) via Zoom on 24 September 2021. The full text of the Keynote Address has been uploaded to the Malaysian Judiciary's portal/website and can be accessed at https://www.kehakiman.gov.my/sites/default/files/SP2021.10.15.pdf. The text of the Keynote Address is reproduced here with the kind permission of the Right Honourable, the Chief Justice of Malaysia and the Malaysian Judiciary.

† The Right Honourable Tun Tengku Maimun Binti Tuan Mat is the current Chief Justice of Malaysia.

Graduates from English universities are equally revered. Speaking specifically in the context of the Middle Temple, our immediate past Attorney General holds such a distinction. We have also senior and highly-regarded lawyers such as Master Cecil Abraham who is present today and on the judicial side, Justice Nallini is an astute example of the kind of quality Middle Temple has produced.

In that sense, both graduates from the Faculty as well as those from the Middle Temple are on equal footing in terms of their calibre. I am therefore most pleased that there is this tripartite collaboration between the Middle Temple, PARFUM and TMMTA as a testament to our strong stature and lasting friendship.

I also notice that the heads of the Malaysian alumni bodies of the other three major English Inns are also here with us today, and so I would like to take this opportunity to welcome you on board to be a part of this engagement with PARFUM and TMMTA.

The theme: 'Parallel Perspectives from Malaysia and The United Kingdom' is also most relevant to us. As we transition and acclimatise ourselves to the new conditions brought about by the 4th Industrial Revolution and the Digital Age, this cooperation between our institutions is not a choice but a timely necessity.

I note with great interest the two topics that will be the subject of discussion today. The first is 'The Pandemic, Virtual Courts, Zoom and Then?'. The second is 'The Conundrum of Cross-Legal Culture – To be Feared or Embraced?'.

I am sure that our erudite speakers have much to say on these two topics, nevertheless please allow me to share some general thoughts on the topics.

II DIGITALISATION, ACCESS TO JUSTICE AND THE RULE OF LAW

The pandemic began in late 2019 but we only witnessed the full debilitating effect of it on our justice system when lockdown measures were imposed in March 2020. During that time, we had already embarked on the course of digitalising our judicial processes but it was apparently not enough. In essence, the pivotal aspects of our justice system such as trials and hearings were always conducted physically. Digitalisation was only to the extent that it related to ancillary processes such as electronic filing and remotely conducted case management.

To be clear, even before the pandemic hit, we had already decided that the Courts should become completely paperless in stages and to this extent, hearings – in the appellate courts at least – became less bulky.

The problem, however, has been that change is always subject to inertia and so it had to be introduced gradually and integrated slowly. The Covid-19 pandemic, though a global health tragedy, has brought about some positive developments as a major impetus or catalyst for change.

With the lockdown measures in place, we had a stronger reason to embark on complete digitalisation to the extent that hearings, and now even trials, can take place either completely virtually or at least in part. There was, no doubt, resistance at first but all parties eventually came around and accepted the change, especially after the mechanism was legislatively endorsed.

These changes are important and are perhaps gaining traction because their profound effect on access to justice – an integral facet of the Rule of Law – have become all the more tangible. The Rule of Law requires that justice must be done according to valid law with primary emphasis on the notions that everyone is equal before the law and entitled to an effective remedy administered by an independent judicial system.

The fact that Courts have now taken to the online platform allows lawyers from all walks of life to appear before the Courts irrespective of physical limitations meaning that litigants have a better choice of counsel and should litigants choose to represent themselves, they now have greater, more direct access. The shift to an online venue, in my considered view, further bolsters judicial independence because it sends the clear message that the Courts are free and ever ready to perform no matter the circumstances but subject of course, to the laws and regulations in place. In other words, if the pandemic and measures passed in reaction to it indirectly impeded access to the Courts, the Courts remained ever ready to come down to the public while keeping the system running.

Needless to say, the online mechanism is a new ball game altogether and is riddled with its own flaws and complications especially when it involves trial, witnesses and perceived problems such as the oft-missed 'personal touch'. Detractors and critics are quick to point out that a fact-finder cannot read a witness's unspoken words or body language in an online setting in the same way he or she can read them in a physical one. I accept that these imperfections must be ironed out at the soonest and it is talks and discussions like these that help build the foundational ideas for future developments.

III THE CONUNDRUM OF CROSS-LEGAL CULTURE

This brings me to the second sub-topic on cross-legal culture. From my understanding and in our context, the word 'cross-legal' refers generally to a situation where rules and principles established by or within one jurisdiction are imported into and sometimes, applied with modification by another jurisdiction as a foundation or justification for that second jurisdiction's judicial decisions. The word 'culture' in 'cross-legal' suggests that the reliance on 'cross-legal' is the norm rather than a measure of last resort in select cases.

'Cross-legal' culture is most prevalent in cases where there is a paucity of authority or precedent within that country's own jurisprudence, such that references to another jurisdiction's case law makes for a handy guide. In the specific context of Malaysia and its legal history with Britain, many of our legal principles comprise remnants or reworked importations from the British legal system. Examples include our Evidence Act 1950, Contracts Act 1950, the Penal Code, Criminal Procedure Code and similar legislation which were developed by the British as a means to unify the application of the English law with modifications. These laws remain law to this day not just in Malaysia but other jurisdictions like India and Singapore.

In modern times, we have come to legislate our own laws or reworked old laws by referring not only to English laws but the laws of other countries to meet our own peculiarities. Our land law system – the Torrens system – is from Australia as is our company law legislation. Our Federal Constitution is itself a creative amalgamation and

upgraded version of the American and Indian Constitutions and the written constitutions of many other States that gained independence before us.

Given the divergence in our laws, legal culture and legal system, the crucial question that this webinar seeks to address is whether such a culture ought to be embraced or feared. I have always believed that we only fear what we do not understand and so to fear cross-legal culture is obviously out of the equation.

In Malaysia, given the complex nature of our laws and legal history we have good reasons to develop our laws by reference to cases from other jurisdictions. One example of this is the decision of the Federal Court in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor*[1] which developed the tort of harassment in Malaysia by building on the English jurisprudence on nervous shock cases, such as the landmark decision in *Wilkinson v Downton*.[2] The makings of the tort were foundationally the same but subject to local guidelines and developments. It is one of the many useful examples of how cross-legal culture, particularly with England, has benefited us.

That said, there are also serious implications when importing foreign jurisprudence wholesale without first understanding the context within which they were made. For instance, the laws and constitutional system of the other country, the context upon which those cases were decided, and so on, are all relevant when deciding whether the *ratio decidendi* of those cases are relevant to Malaysian law. It calls for caution.

In any case, it cannot be gainsaid that reliance on cross-legal culture in the modern sense has become increasingly relevant in a borderless world. Ideas are shared at a faster pace and our problems tend to converge as we all reach the same page.

The onslaught of this pandemic is one such example in which almost all jurisdictions are turning to the online platform and as such, the hiccups and teething problems we face when implementing them will bear some degree of similarity. Whether we are dealing with a common problem or a complex issue with its own set of intricacies, we have to curate a fine balance on the reliance on cross-legal culture. Perhaps our speakers can shed some light by suggesting on how we should draw that line, from the immense experience they have gained in their respective fields.

IV CONCLUSION

Whatever be our position on the prevalence of cross-legal culture or the boom in digitalisation, none of us can ignore the fact that we are all connected now more than ever before. This tripartite collaboration is therefore a step in the right direction as it is a manifestation of our willingness to work and learn together in spite of the physical limitations we face.

In this vein, I would like to add that this webinar also acutely highlights the importance of alumni institutions. Most of us graduated from our *alma maters* a long time ago but I do not see that as discharging us from the responsibility of ensuring that the next generation is given the same, if not a better opportunity than us. It is through

[1] [2016] 4 MLJ 282.
[2] [1897] 2 QB 57.

engagements such as these that we can give back to the institutions and people who made us what we are today.

With that, I bid PARFUM, the Middle Temple and TMMTA congratulations for hosting this event. I would like to thank our speakers Masters David Joseph and Michael Bowsher for logging on from England and also to Dr Alima Joned for logging on at what are perhaps ungodly hours there in the United States.

I would also like to record my sincerest appreciation to all the participants from the United Kingdom, Malaysia and other jurisdictions for attending as your attendance is a recognition of the importance of the discussions that are about to unfold.

EXAMINING THE LEGALITY OF NIGERIA DEPOSIT INSURANCE COMMISSION AS INSURER OF CUSTOMERS' DEPOSITS IN ISLAMIC BANKS IN NIGERIA

Muhammad Kamaldeen Imam-Tamim* and
Khadijah Akorede Salawu†

Abstract

The establishment of Nigeria Deposits Insurance Commission ('NDIC') was a major policy shift of the Nigerian government from rescuing the banks from collapsing to saving the deposits of the depositors; and the NDIC insures both conventional and Islamic banks. However, considering the ethical nature of the Islamic financial system, this study examines the legality of NDIC as insurer of customers' deposits within the provisions of Shari'ah by looking into the need for and the extent to which Islamic banks can participate in the scheme. The research used a qualitative method to retrieve data collected from both primary and secondary sources in order to examine the legality of NDIC (as the insurer of Islamic banks' deposits) and its operation through the prism of the Shari'ah. The purpose, functions and operations of NDIC were analysed and it was found that the major aim of establishing the NDIC is in line with the *maqasid al-Shari'ah* but some of the legislative frameworks for its operations contravene the provisions of the Shari'ah. Appropriate Islamic models, suggestions and recommendations, such as introduction of *Mudarabahh* or *Musharakah* arrangement where the parties involved would share the profit and loss in respect of the invested funds and the adoption of an Islamic Deposit Insurance Scheme to ensure that Islamic Banks' participation in Deposit Insurance Scheme is fully shari'ah-compliant were prescribed to amend these lapses and to further improve the standing of NDIC as an insurer of Islamic banks customers' deposits.

Keywords: Nigeria Deposit Insurance Scheme (NDIC); *Takaful*; Islamic insurance; Deposit Insurance Scheme (DIS); Islamic banking in Nigeria

I INTRODUCTION

Customers patronise banks primarily for the security they provide for their deposits.[1] Ironically, recent happenings in both global and local scenes have revealed that this

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1 Asyraf Wajdi and Dusuki, Nurdianawati Irwani Abdullah, 'Why do Malaysian Customers Patronise Islamic Banks?', (2007) 25(3) *International Journal of Bank Marketing* 142.

security is not ordinarily guaranteed when the financial institution encounters a crisis.[2] The need for the mitigation of the dire consequences to customers when this incidence occurs warranted the establishment of deposit insurance.[3] This has also contributed to the growth in the adoption of Islamic finance frameworks which are considered as alternative financial systems following the global financial crisis that has seen the collapse of several giant conventional financial institutions.[4] In spite of the benefits of the Islamic banking framework, both Shari'ah compliant financial institutions and conventional banks require the extra financial security that is provided by deposit insurance for their customers' deposits. This financial security is meant to provide assistance and encourage prudent risk taking to depositors of bankrupt banks.[5] The safety nets created by the deposit insurance avoid disintermediation[6] resulting in bank failures. Deposit insurance helps in maintaining confidence and soundness in the financial sector in countries where it is implemented.[7]

The Nigeria Deposit Insurance Corporation ('NDIC') was created for the protection of the banking industry and other related services that has to do with customers' deposits in Nigeria[8] with a view to promoting financial stability and protecting bank depositors whether in full or in part, from losses caused by the inability of banks to pay debts when due.[9] Nigeria operates both conventional and Islamic banking systems and the government has made it compulsory for operational banks to join the Depositor Protection Scheme as members and pay the required premium.[10] The general importance of the NDIC is to protect the interest of the depositors of deposit-taking financial institutions. This enhances financial security and encourages economic participation.[11] This overall importance suggests that a link exists between the concept of deposit insurance and the *Maqasid al-Shari'ah* (objectives of Shari'ah) which is aimed at promoting benefits and repelling harms and *Maslaha*, which means utility, good, beneficial or advantage.[12] This refers to something good for the public. It also relates to the preservation of faith, life, lineage,

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2 Joseph E Stiglitz, 'The Financial Crisis of 2007-2008 and its Macroeconomic Consequences' [2009] *Financial Market Reforms* 1-34.

3 Sebastian Schich, 'Financial Crisis: Deposit Insurance and Related Financial Safety Net Aspects', (2009) 2008 (2) *Financial Market Trends* 1.

4 Edib Smolo and Abbas Mirakhor, 'The Global Financial Crisis and its Implications for the Islamic Financial Industry', (2010) 3(4) *International Journal of Islamic and Middle Eastern Finance and Management* 372.

5 Edward J Kane, 'Designing Financial Safety Nets to Fit Country Circumstances' (Policy Research Working Paper No. 2453, World Bank, 2000) 2453.

6 Disintermediation in finance, is the withdrawal of funds from intermediary financial institutions, such as banks and savings and loan associations, to invest them directly. Generally, disintermediation is the process of removing the middleman or intermediary from future transactions. See: 'Disintermediation', *Investopedia* (Web Page, 6 December 2021) <www.investopedia.com/terms/d/disintermediation.asp>.

7 *Core Principles for Effective Deposit Insurance Systems* (International Association of Deposit Insurers, 2014) 6.

8 Ademola G. Olukotun, Olusegun O James and Kehinde Olorunfemi, 'Bank Distress in Nigeria and the Nigerian Deposit Insurance Corporation Intervention' (2013) 13(8) *Global Journal of Management and Business Research Finance* 59.

9 Ibid, 56.

10 Salisu Hamisu and Rusni Hassan, 'Depositors Protection Scheme: Appraisal of Islamic Banks Participation in Deposit Insurance System', (2017) 5(1) *Journal of Islamic Banking and Finance* 15.

11 GA Ogunleye, 'Deposit Insurance Scheme in Nigeria: Problem and Prospect', [2002] *NDIC Quarterly* 17.

12 IADI, 'Deposit Insurance from Shariah Perspective', (Discussion Paper, Islamic Deposit Insurance Group of the International Association of Deposit Insurers, 2010) 4.

intellect and property of human beings.[13] However, the basic principle of all Islamic financial transactions is that they must be free from *Riba* (Interest), *Gharar* (Uncertainty), *Maisir* (Gambling) and sale/purchase of unlawful goods and services.[14]Although the goals of the scheme are beneficial to Islamic banking system in Nigeria, the problem of the permissibility of insurance and the methods used in fulfilling this scheme needs to be in line with the Shari'ah to ensure its legality under the Shari'ah. This poses a problem because all financial institutions in Nigeria (Islamic banks included) are expected to be insured by NDIC. There are possibilities of NDIC violating the basic principle of all Islamic financial transactions as it is not Islamic oriented. There is no Islamic deposit insurance scheme in Nigeria to make provision for the peculiarities of Islamic financial system thereby ensuring the provision of an ideal climate for Islamic banks to be insured.

This study intends to look into the potential of deposit insurance (NDIC) in preventing the public from experiencing financial difficulties, instilling public confidence about the safety of deposits, promoting financial stability and maintaining the competitiveness of Islamic deposits while keeping the activities of the insurer in line with the provisions of Shari'ah.

II ISLAMIC BANKING SYSTEM IN NIGERIA

The establishment of the Islamic banking system is central to the injunctions of Islamic commercial transaction which prevents Muslims and the institutions that serve them from dealing in interests (*Riba*) and transactions considered to be contrary to Shari'ah.[15] This makes the fundamental aim of Islamic financial institutions to be that of offering Shari'ah compliant transactions and activities in all their dealings.

Islamic banking, also known as non interest banking, is defined as a banking system that is based on the principle of Islamic or Shari'ah law and guided by Islamic economics. Two fundamental principles of Islamic banking are the sharing of profit and loss, and the prohibition of the collection and payment of interest by lenders and investors. Islamic banks make profit through equity participation which requires borrower to give the bank a share in their profits rather than paying interest. Islamic banking is guided by the Islamic rules on transactions known as *Fiqh al-Muamalat*, which all banks must follow. According to Investopedia, there are over 300 Islamic banks in over 51 countries around the world, including the United States of America.[16]

Taking the cue from the part of the world where Islamic banking systems were adopted with increasing success, there were desires and agitations in Nigeria as to the implementation of Islamic banking systems in its financial sector, the reasons being Nigeria's high Muslim population, and seeing that the advantageous financial discipline

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13 Tawfique Al-Mubarak and Noor Mohammad Osmani, 'Applications of Maqasid al-Sharia and Maslahah in Islamic Banking Practices: An Analysis' (International Seminar on Islamic Finance in India, 2010) 4.

14 Burhan Uluyol and Adam Abdullah, 'Prohibited Elements in Islamic Financial Transactions: A Comprehensive Review' (2016) 21(3) *Al-Shajarah* 140.

15 Echekoba Felix Nwaolisa and Ezu Gideon Kasie, 'Islamic Banking in Nigeria: A Critical Appraisal of its Effect on The Nigerian Economy' (2013) *Review of Public Administration and Management* 37-48.

16 Evan Tarver, 'Islamic Banking', *Investopedia* (Web Page, 3 May, 2021) <http://www.investopedia.com/terms/i/islamicbanking.asp>.

is one of the characteristics of the Islamic banking system which is needed in the Nigerian economy as it is beneficial not only to the preservation of the Islamic principle among the country's Muslim population, but can also help in stabilising the financial sector of the nation as a whole.[17]

A *Customers' Deposits and its types in Islamic Banking*

A customer deposit is a funding component of a banking institution.[18] Customer deposit or bank deposit consists of money placed into banking institutions for safekeeping.[19] The account holder has the right to withdraw deposit funds, as stated in the terms and conditions in the agreement governing the account. Customer deposit refers to the liability rather than the actual funds that has been deposited. When someone opens a bank account and makes a cash deposit, he surrenders legal title to the cash, and it becomes an asset of the bank. In turn, this makes customer's deposit a liability owed by the bank to the depositor.[20]

Customers' deposits are important source of financial strength for Islamic banks as these deposits are used to increase the capacity for financing operations which thereby increase the profit for shareholders.[21] Basically there are four types of customers' deposits in Islamic banking and they are; Current deposits, Savings deposits, Term deposits and Investment deposits.

1 *Current Deposits*

Current deposits permit its customers to deposit and withdraw their money at any time and do not require a minimum balance in the deposit account.[22] It is based on the Shari'ah commercial principles of *Wadiah*[23] or *Qard Hasan*[24]. Under the *Amanah* arrangement, the

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17 Mustafa Daud, Ibrahim Mohd Yussof and Adewale Abideen, 'The Establishment and Operation of Islamic Banks in Nigeria: Perception Study on The Role of the Central Bank of Nigeria' (2011) 1(2) *Australian Journal of Business and Management Research* 14-29.

18 'Customer Deposits', *Financial Advisory* (Web Page, 3 May, 2021) <http://www.financialadvisory.com/dictionary/term/customer-deposit.asp>.

19 Julian Kagan, 'Bank Deposits', *Investopedia* (Web Page, 3 May, 2021) <https://www.investopedia.com/terms/b/bank-deposits.asp>.

20 Ibid.

21 'Deposits- Islamic Finance', *Financial Islam,* (Web Page, 23 April 2021) <http://www.financialislam.com/deposits.html>.

22 Jeroen P.M.M. Thijs, 'Islamic Banking Products and Operation' (Conference Paper, Conference on Islamic Finance: Structure and Instruments, 26 – 30 September 2011).

23 Wadi`ah refers to a contract by which an owned asset is placed with another party on the basis of trusteeship (amanah) for safekeeping purposes. See: Bank Negara Malaysia, 'Wadi`ah (Shariah Requirements and Optional Practices)' (Web Page, 20 December 2021) <https://islamicbankers.files.wordpress.com/2013/12/2013-ed-wadiah.pdf>; Issa Qaed Mansour Qaed, 'The Concept of *Wadiah* and its Application in Islamic Banking' (2014) 2(11) *Journal of Research in Humanities and Social Science* 70-74.

24 *Qard al-hasan* is a loan contract between a debtor and creditor whereby the debtor only pays back the principal amount which is borrowed. The debtor can pay more than the amount borrowed so long that it is not stated in the contract. See: Norma Md Saad, Mustafa Omar Mohammad and Mohammed Aslam Haneef, 'Empowering Community Through Entrepreneurship Training and Islamic Micro-Financing: Sharing the Experience of IIUM-CIMB Islamic Smart Partnership (i-Taajir)' in Patricia Ordoñez de Pablos, Mohammad Nabil Almunawar and Muhamad Abduh (Eds.), *Economics, Business, and Islamic Finance in ASEAN Economics Community* (IGI Global, 2020) 57-76.

Islamic banks treat the funds as a trust and cannot use these deposits for its operations.[25] However the Islamic banks do not guarantee the refund of deposits in case of loss resulting from circumstances beyond its control.[26] In *Wadiah*, the bank takes permission from the depositors to use the deposits and guarantees the return of the deposits whenever the depositors demand for it.[27] Current deposits based on the principle of *Qard Hasan* involves the customer giving the bank the authority to use his/her account funds to invest in its operations, and this is considered as a non-interest loan by the depositor to the bank.[28] The bank however is obligated to return the credit balance to the depositor who has no right to receive any profit on the balance.[29]

2 *Savings Deposits*

Savings deposits are similar to current deposits as it also permits customers to deposit and withdraw money at any time they want, however, savings account operates in a different way. Deposits in savings accounts are accepted based on the principle of *Mudarabah*.[30]*Mudarabah* is an investment contract where one party (*Rabb al-mal*)[31] provides the capital and the other party which is the bank (*Mudarib*) provides the skill and experience.[32] In a *Mudarabah* deposit, the depositor acts as the capital supplier while the bank acts as the investor.

3 *Term Deposits*

Term deposits are types of arrangement where the deposits of customers are held for a fixed period of time and these deposits are in turn used to invest in business activities in accordance with the Shari'ah.[33] This type of deposit is commonly structured based on the commodity of *Murabaha*, *Wakalah* unrestricted investment and *Mudarabah* general investments.[34]

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25 Shafi'i Abdul Azeez Bello and Rusni Hassan, 'Savings and Current Account in The Context of Sharia Contract', (2014) 1(12) *Arabian Journal of Business and Management Review* 10.

26 'Deposits- Islamic Finance', (n 31).

27 Abdus Samad and Mohammad Ashraful Ferdous Chowdhury, 'Islamic Banks' Return on Depositors and Conventional Banks' Deposit Interest: Is there Causality? Evidence of Causality from Bangladesh' (2017) 7(5) *International Journal of Economics and Financial Issues* 432.

28 Farooq, M.O., 'Qardh al-Hasana, Wadiah/Amanah and Bank Deposit: Application and Misapplication of Some Concepts in Islamic Banking' (Paper presented at the Harvard Islamic Forum on April 19 – 20, 2008) 1-24.

29 Farooq, M.O., *ibid*.

30 Ayub Muhammad, *Understanding Islamic Finance* (John Wiley & Sons, 2007) 189-190.

31 *Rabb al-mal* is referred to as the capital provider of funds in a *mudarabah* contract. See: 'Rab-ul Mal', *Investment and Finance*, (Web Page, 5 May 2021) <https://www.investment-and-finance.net/islamic-finance/r/rab-ul-mal.html>.

32 Abdus Samad and Mohammad Ashraful Ferdous Chowdhury, (n 36), 434.

33 Issa Qaed Mansour Qaed, (n. 33), 71.

34 'Islamic Fixed Deposit-i', *May Bank*, (Web Page, 15 December 2021) <https://www.maybank.com/islamic/en/deposits/term/fixed_deposit-i.page?>; Sanaa Nazami Maswadeh, 'How Investment Deposits at Islamic and Conventional Banks Effect Earnings Per Share?' (2020) 7 (11) *The Journal of Asian Finance, Economics and Business* 669-677.

4 *Investment deposits*

Investment deposits are based on the principle of partnership (*Mudarabah*) which entails profit sharing and it covers all accounts where the customer agrees to place deposits for a fixed term. In principle the bank is not allowed to provide guarantees for the principal and fixed return except on a voluntary basis.[35] However, banks can arrange a third-party guarantee.[36]

III DEPOSIT INSURANCE IN THE NIGERIAN BANKING SYSTEM

Nigeria operates a dual banking system of both conventional banking and Islamic/non-interest banking system. A bank Deposit Insurance Scheme ('DIS') is a financial guarantee particularly for customers with smaller income and savings, in the event of a bank failure. Bank deposit insurance schemes developed out of the need to protect depositors, especially the uninformed, from the risk of loss and to also protect the banking system from instability occasioned by uncertainty and loss of confidence. In this regard, Deposit Insurance becomes the tool through which such service can be rendered and they are established to perform functions such as the following, among others:[37]

i. Insuring all deposit liabilities of all licensed banks and such other deposit-taking financial institutions, such as micro-finance banks operating in Nigeria so as to engender confidence in the Nigerian banking system.
ii. Giving assistance in the interest of depositors in case of imminent or actual financial difficulties of banks particularly where suspension of payments is threatened.
iii. Guaranteeing payments to depositors in case of imminent or actual suspension of payments by insured banks or financial institutions up to the maximum deposit insurance coverage.

The banking system has been singled out for special protection because of the vital role banks play in an economy whether developed or developing. For a DIS to be effective in achieving the above objectives, it must be properly designed, well implemented by the agency established to execute the scheme and well understood by members of the public.[38] A well designed DIS contributes to the stability of a country's financial system by reducing the incentives for depositors to withdraw their insured deposits from banks following rumours about financial crises.[39]

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35 Md. Habibur Rahman, 'Guarantee of Investment Deposit in Islamic Banks: Fiqh Analysis' (2015) 1 (3) *Journal of Islam, Law and Judiciary* 37-53.

36 Ibid., 35.

37 Ganiyu A. Agunleye, 'Role of Deposit Insurance in Financial Inclusion: The Nigerian Experience', *Nigerian Observer* (Online, 2 June 2015) <https://nigerianobservernews.com/2015/06/role-of-deposit-insurance-in-financial-inclusion-the-nigerian-experience/>.

38 *Guidance for Developing Effective Deposit Insurance Systems* (Financial Stability Forum, 2001) 3.

39 GA Ogunleye, (n 11), 17.

The establishment of the NDIC brought about the introduction of an Explicit Deposit Insurance Scheme into the Nigerian banking sector. Along with the major function of NDIC which is to insure the deposits of all banks and other deposit-taking financial institutions licensed by the Central Bank of Nigeria ('CBN'), the NDIC is also fashioned to enhance the existing safety-net in the banking sector. The result of this is the boost in confidence of the customers of banks. It was also designed to serve as an additional framework and a substitute to the government support policy (implicit insurance) which was used prior to the creation of NDIC.[40]

Before NDIC was created, the Nigerian government had been trying to put in measures to forestall bank failures because of its adverse effects on citizenry. Because of this, underperforming banks were given government support. However, such direct support (implicit insurance) could not be sustained under the Structural Adjustment Programme introduced in 1986 which, among other implications, deregulated the economy towards market orientations. With the establishment of the NDIC the negative impact of bank failures was minimized while moral hazard associated with direct government support was eliminated.[41]

IV THE LEGAL FRAMEWORK OF THE NDIC

The NDIC is regulated by the Nigerian Deposit Insurance Corporation Act, No. 16, 2006 ('NDIC Act'). It empowered the Corporation to insure all deposit liabilities of licensed banks and other financial institutions[42] with the exception of insider deposits counterclaims and deposits held in the off-shore branches of local banks.[43] Section 3(1) of the NDIC Act states that, notwithstanding any provision contained in any other law, no person other than the NDIC shall insure deposit liabilities or guarantee payments to depositors of insured institutions operating in Nigeria.

The NDIC is empowered to come to the aid of an insured bank in case of imminent or actual financial difficulties which may threaten payment to customers.[44] This may be in the form of liquidity support to the banks on agreeable terms, giving guarantees for the banks' loans, or even taking over the management of a wobbling bank until its financial position improves.[45]

In the event that the NDIC exhausts all its protective alternatives and a failing bank still has to postpone payment, the NDIC is obliged to pay every insured depositor up to the insurable limit which is presently five hundred thousand naira (₦500, 000) and two hundred thousand naira (₦200, 000) per depositor per account in Deposit Money Banks

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40 'About Nigeria', *International Association of Deposit Insurers*, (Web Page, 13 November 2021) <https://www.iadi.org/ndic/about-nigeria/>.

41 BO Iganiga, 'Evaluation of Nigerian Financial Sector reforms using Behavioural Models', (2010) 1 (2) *Journal of Economics* 65-75.

42 *Nigerian Deposit Insurance Corporation Act No 16 2006* (Nigeria) s 3(1) ('NDIC Act')

43 Ibid s 2(1), 15(1) and 16; Insider Deposit is the deposit of bank staff while counter-claim is a deposit account used as collateral for a loan account in the same bank: Ibid s 16(a) and (b).

44 Ibid s 2(1)(b) and 37(2).

45 Banks and Other Financial Institutions Act LFN 2004 (Nigeria) s 36 ('BOFIA').

('DMB's) and Microfinance Banks ('MFB's) respectively.[46] For this reason, adequate financial resources are required to meet the scheme's obligations and operational costs. In Nigeria, the Act establishing the NDIC recognises four sources of funding the activities of the scheme. These are insurance premium contribution by participating institutions, capital contributions and periodic recapitalisation provided by the owners of the scheme, borrowing facility from the CBN and special contributions or levies imposed on healthy member institutions as and when necessary.[47]

In specific terms, section 17(1) of the NDIC Act states that the assessment rate for premiums by insured banks is set as 15/16 of 1% of the total deposits of member institutions per annum which is about 0.94 percent. For other deposit-taking financial institutions, the premium to be paid is set at 18/16 of 1% of total deposits per annum as at 31st December of the preceding year with the possibility of reduction in premium rate when the Deposit Insurance Fund ('DIF') is more than 10 times the paid-up capital as provided for in Section 12(2) of the NDIC Act. Section 16(a) to (c) specifies the assessment base as the total deposits of insured institutions except the following deposits: insider deposits[48], counter claims from a person who maintains both a deposit and loan accounts, with the former serving as collateral for the loan; and such other deposits as may be specified from time to time by the Board of NDIC.

Also, section 11(1) of the NDIC Act indicates the amount of initial capitalisation by the government as 5 billion with provision for periodic recapitalisation in Section 11(3). Also, where the DIF of the NDIC is not sufficient for its insurance obligations, Section 17(5) provides that all participating institutions shall be obliged to pay to the NDIC, special contribution of not more than 200% of the amount of an annual premium. Rules and regulations guiding distress resolution in Nigeria flows directly from the provisions of the BOFIA.[49]

Finally, the day-to-day administration of NDIC is also being funded[50] from the income earned on the investment of the DIF in accordance with the Act. Sections 13(1) to (3) gives the NDIC the power to invest money not immediately required in the Federal Government securities and in such other securities. The income of this investment is to be placed in the NDIC account and be defrayed for administrative expenses of the NDIC. Section 52(1) also gives the NDIC the power to borrow from the Central Bank of Nigeria such monies as it may deem fit for the discharge of its statutory functions, which include:[51] insuring deposit liabilities of licensed banks; provision of financial and technical assistance in the interest of depositors to banks in difficulties; rendering assistance to insured institutions in order to protect the interest of the depositors;[52] guaranteeing payments to depositors in the financial or banking sector in the case of imminent or actual

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46 NDIC Act (n 42) s 20(1).

47 Ibid s 10(1).

48 These are deposits of staff including directors of the insured institutions.

49 BOFIA (n 45) s 38.

50 NDIC Act (n 42) s 10(1)(a) to (e)

51 Ibid s 2. See also: 'NDIC Develops Framework for Non-interest Deposit Insurance Scheme' (Press Release, 12 January 2016) <https://ndic.gov.ng/ndic-develops-framework-for-non-interest-deposit-insurance-scheme/>.

52 GA Ogunleye, (n 11), 17.

suspension of payments by the insured institution; and ensuring orderly and efficient closure of failed institutions.

A *Requirements of the NDIC as Insurer of Customer's Deposit*

1 *Licensed banks*

One of the requirements of the NDIC is that once a deposit-taking financial institution is licensed by the CBN as Universal Banks (DMBs), MFBs or Primary Mortgage Institutions ('PMI's), such licensed financial institution automatically becomes a member institution of the NDIC as membership is compulsory as provided under the NDIC Act.[53]

2 *Insurance premium*

All member institutions of the NDIC are required to pay premium annually and the method employed in Nigeria is *Ex Ante* which means the payment is made annually by the members before the event envisaged happens and the payment is based on the formula 15/16 of 1% of the total annual deposits of banks by virtue of Section 1 of NDIC Act.

3 *The maximum deposit insurance limit*

Up until the year 2005, the maximum insurance limit was set at ₦50,000.00 per depositor in the event of a failure of an insured institution.[54] After the NDIC Act in 2006, the maximum coverage increased to ₦200,000.00 per depositor. At inception and up to the recent past, the insurance of deposit services was limited to only conventional licensed banks but that has changed with the extension of coverage to other deposit-taking financial institutions, specifically MFBs and PMIs at a limit of ₦100,000.00 and the reason is to encourage the small investors to improve on their banking habits since they are assured of the safety of the deposit at all times.[55]

V SHARI'AH PERSPECTIVE OF DEPOSIT INSURANCE

Insurance is a form of safeguard against uncertainties and it provides some form of financial recompense for losses suffered due to incidence of unanticipated events, insured within the policy of insurance.[56] In practical definition, insurance is the equitable transfer of the risk of a potential loss, from one entity to another, in exchange for a premium and duty of care.[57] It is a form of risk management primarily used to hedge against the risk of catastrophic financial loss.[58] Globally, insurance has grown into super profitable

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53 NDIC Act (n 42) s 15.

54 GA Ogunleye, 'Deposit Insurance Scheme in Nigeria: Problems and Prospects' (Conference Paper, Annual Conference of International Association of Deposit Insurers (IADI), May 2002), 8.

55 NDIC, *Thirty Years of Deposit Insurance System in Nigeria* (Nigerian Deposit Insurance Corporation, 2019) 164.

56 Insurance Information Institute, *Insurance Handbook-A guide to insurance: what it does and how it works* (Insurance Information Institute, 2010) 1.

57 Julian Kagan, 'Transfer of Risk', *Investopedia*, (Web Page, 16 November 2021) <https://www.investopedia.com/terms/t/transferofrisk.asp>.

58 Judy Feldman Anderson and Robert L. Brown, *Risk and Insurance* (Society of Actuaries, 2005) 2-3.

commercial enterprise through underwriting and investment of premium collected from the insured by the insurers.[59] The insurer predicts the likelihood that a claim will be made against his policies and prices his products accordingly, using tools of statistics and probabilities.[60]

On the ruling of the permissibility of commercial insurance in Shari'ah, Ibn Abiddin scrutinised maritime insurance practices that was prevalent in his time which has the same characteristics as contemporary commercial insurance and declared it impermissible under Shari'ah because it involved elements of uncertainty (*Gharar*) and interest (*Riba*).[61] Consequently, the same ruling is applied to commercial insurance which has a high level of uncertainty in that payment of the premium occurs when what is being bought is not well defined and in most cases, the amount to be paid or received is not known from the beginning and these activities are also enshrined in the transactions based on interest.[62]

Deposit insurance also shares similarity with cooperative insurance (*Takaful*) which is acceptable in Shari'ah.[63] *Takaful* is an arrangement in which a group of participants mutually agree to help members in the scheme who suffer loss or damage arising from specified risks.[64] In such arrangement, the participants agree to make contributions (*tabarru'*) into a fund to assist members during incidence.[65] The Takaful insurance has a similar basic principle as conventional deposit insurance because it provides protection for loss occasioned by the attachment of risk. However, Takaful differentiates itself from conventional deposit insurance in a number of ways some of which are as follows:[66]

i. Risk protection provided by persons who face exposure to the same type of risk through the system of *tabarru* (donation) into a common pool which is used to provide indemnity on claims[67] unlike conventional Deposit Insurance where risk is transferred to the insurer who provides indemnity in exchange for premiums.[68]
ii. The money paid by the insured to the conventional insurer in exchange for risk protection belongs to the insurer but the money paid to pool as *tabarru* belongs to the contributors.

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59 Julian Kagan, 'Insurance Premium', *Investopedia*, (Web Page, 15 December 2021) <https://www.investopedia.com/terms/i/insurance-premium.asp>.

60 Ibrahim Abikan Abdulqadir, 'Islamic Banks' Participation in Deposit Insurance Scheme: A Legal Appraisal' (2011) 21(1) *NDIC Quarterly Journal* 17-43.

61 Ibn Abiddin, *Hashiyat Radd Al-Mukhtar Ala al-Durar Al mukhtar* (Egypt: Matb'ah Al-Babi Al-Alabi, n.d).

62 Yusuf Sani Abubakar *et al,* 'Concept of Deposit Insurance: A Comparative Study between Conventional System and Shariah' (2016) 18(10) *IOSR Journal of Business and Management* 94.

63 Ibrahim Abikan Abdulqadir (n 60), 20-39.

64 Khairuddin H.A., 'Implementation of an Islamic Deposit Insurance System for the Islamic Financial Services Industry' (Conference Paper, Islamic Financial Stability Forum, 17 November 2011) 5.

65 'Shari'ah Approaches for the Implementation of Islamic Deposit Insurance Systems', *International Association of Deposit Insurers*, (Research Paper, 16 November 2021) <https://www.iadi.org/en/assets/File/Papers/Approved%20Research%20-%20Discussion%20Papers/Shariah_Approaches_for_IDIS-for-publication-Nov_2014-FINAL.pdf>.

66 Ibrahim Abikan Abdulqadir, (n 60), 17.

67 Ramin Cooper Maysami and John Joseph Williams, 'Evidence on the Relationship between Takaful Insurance and Fundamental Perception of Islamic Principles', (2006) 2(4) *Applied Financial Economics Letters* 2.

68 Simon Archer, Rifaat Ahmed Abdel Karim and Volker Nienhaus (eds.), *Takaful Islamic Insurance: Concepts and Regulatory Issues* (Wiley 2011) 25.

iii. The conventional Deposit Insurance may make any kind of investment including interest bearing ventures but a *takaful* operator may only invest in Shari'ah compliant businesses and may not involve itself in interest bearing investments.[69]

In view of this, it has been suggested that Islamic financial services being inseparable from the general principles of the Shari'ah, must base their foundations on the *maqasid al-Shari'ah* which is aimed at promoting benefits and repelling harm to ensure the distinction from conventional finance.[70] Thus, the Deposit Insurance Scheme employed by Islamic banks must be free from the elements that Islam strictly prohibits, which is why Muslim communities aspire for a deposit insurance system that meets Shari'ah requirements. This has led to the creation of Islamic Deposit Insurance Scheme in some Muslim dominated countries for Islamic banks.[71]

A *The Requirements of Shari'ah for a Deposit Insurance Corporation*

The basic principle of all Islamic financial transactions is that they must be free from prohibited elements such as interest (*riba*), uncertainty (*gharar*), and gambling (*maisir*).

1 *Interest (Riba)*

The concept of interest occupies a significant position in the economic system of Shari'ah.[72] Interest in Arabic is referred to as *Riba* which in classical Islamic Jurisprudence means surplus value without counterpart or to ensure equivalence in real value.[73] Interest (*Riba)* is strictly prohibited in Islam as dealing with interest-based transactions means declaring war with Allah and His Messenger (Muhammad, peace be upon him).[74]

One of the moral principles behind the banning of interest is the need to forbid inflated interest which is an instrument of injustice and this injustice stems from the fact that interest-based transaction encourages an imbalance in the share of power and wealth between the lender and the borrower.[75] The result of this is that interest-based transactions give the lender the capacity to exploit the needs of the borrower and to dictate the rate of return, leading to the potential of the lender maximizing his profits to the detriment of the borrower and in some cases impoverishing the borrower even more.[76] Interest exists in any financial transactions when there is an unequal exchange of two interest-based commodities or an exchange of money for money with different quantities, different

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69 Maryam Dikko, 'An Analysis of Issues in Takaful (Islamic Insurance)' (2014) 6(15) *European Journal of Business and Management* 1-5.

70 Mirza Vejzagic and Edib Smolo, '*Maqasid al-Shari'ah* in Islamic Finance: An Overview' (Conference Paper, Islamic Economic System Conference 2011 (iECONS 2011), 4-5 October 2011) 8-9.

71 'Deposit Insurance from the Shari'ah Perspective', (Discussion Paper, International Association of Deposit Insurers, February 2010) 3-4.

72 Muhammad Zubair and Sadia Khattak, 'Concept of Riba (Interest) in Islamic Law: Its Impact on Society' (2015) 27(4) *Sci.Int.* 3601-3603.

73 Abu Umar Faruq Ahmad and M Kabir Hassan, 'Riba and Islamic Banking', (2008) *Journal of Islamic Economics, Banking and Finance* 2.

74 Al-Qur'an, Baqarah (2) verse 279.

75 Muhammad Zubair and Sadia Khattak, (n 89), 3603.

76 Ibid.

values and at different times. Interest obviously gives an advantage to people with a surplus of money, who receive a premium on their money lent out to people faced with a deficit of money.[77]

Another reason for forbidding interest on a societal level is because it damages the spirit of cooperation among people, gives birth to enmity, hatred and is inherently a principal agent of class formation which creates a class of people whose money increases without them making any effort.[78]

Classical jurists opined that interest is prohibited outright and it includes both *Riba an Nasiah* (interests on loans) and *Riba al fadhl* (interest through unfair sales).[79] Interests on loans is practiced under the conventional banking system, it refers to duration of time which is given to the borrowers for the repayment of loans in return for extra over the principal amount.[80]

Islamic banking is different from conventional banking because Islamic banks are not allowed to offer a fixed rate of return on deposits and are not allowed to charge interest on loans.[81] Based on this guiding principle in Islamic financing on the prohibition of interest, Muslims are not permitted to receive or pay interest and are therefore barred from conducting business with conventional banks.[82]

In a DIS where banks pay premium to the deposit insurer and are reimbursed when the need arises, the technicality of labelling the acts as an interest-based transaction has raised debates. DIS does involve the exchange of money for money and it occurs with different values and at different times. Hence, some Shari'ah scholars would argue that it is an interest-based transaction and therefore non-permissible.[83] The interest element could occur also when the deposit insurer while carrying out activities like protecting deposits, investing the deposit insurance funds, lending to troubled banks, and obtaining external funds (when in deficit), carry out such activities in an interest-based system.[84]

2 *Uncertainty (Gharar)*

Uncertainty exists when either the object or the subject matter of a transaction or activity is uncertain. It can occur either naturally or through a deliberate act by parties involved in the contract. All transactions and activities including deposit insurance may contain the element of uncertainty. Shari'ah scholars distinguish two categories of uncertainty:

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77 M Shodiq, 'Sharia Compliance in Deposit Insurance', *Jakarta Post* (Online, 2 August 2016) <https://www.thejakartapost.com/academia/2016/08/02/sharia-compliance-in-deposit-insurance.html>.

78 Abdulrahman Haitham Shoukat Kabbara, *The Foundations of Islamic Economics and Banking* (Partridge Singapore, 2014) 110; Sayyid Abu Ala al-Maududi, *Economic System of Islam*, Ahmad, K. (ed.) Translated by Husain, R. (Islamic Publications, 4th ed., 1997) 187–188.

79 Imran Ahsan Khan Nyazee, *The Concept of Riba and Islamic Banking* (Niazi Publishing House, 1995) 17-21.

80 Md Akther Uddin, 'Principles of Islamic Finance: Prohibition of Riba, Gharar and Maysir' (MPRA Paper No. 67711, Munich Personal RePEc Archive, November 2015).

81 Beng Soon Chong and Ming-Hua Liu, 'Islamic Banking: Interest-Free or Interest-Based?' (2009) 17(1) *Pacific-Basin Finance Journal* 125-144.

82 Mohamed Ariff, 'Islamic Banking' (1988) 2(2) *Asian-Pacific Economic Literature* 46-62.

83 Jocelyn Grira, M Kabir Hassan and Issouf Soumaré, 'Pricing Beliefs: Empirical Evidence from the Implied Cost of Deposit Insurance for Islamic Banks', (2016) 55C *Economic Modelling* 152-168.

84 Wan Marhaini Wan Ahmad, "Some Issues of *Gharar* (Uncertainty) in Insurance" in Bakar M.D and Engku Ali, E.R.A. (Eds.) *Essential Readings in Islamic Finance* (Cert Publications, 2008) 247-268.

permitted and prohibited under Shari'ah. Shari'ah prohibits uncertainty when, for example, its existence is excessive, which could lead to undue losses for one party or disagreement between the transacting parties.[85] The uncertainty element exists in deposit insurance in respect of the failure of a bank. Nevertheless, such uncertainty may not be prohibited as it is unavoidable and naturally embedded in deposit insurance. The setting-up of a deposit insurance system is in line with the government's strategy that it must always be ready to face the failure of a bank and to protect insured depositors. Some Shari'ah scholars have disapproved of the deposit insurance model arguing that it entails excessive uncertainty as the insured risk might not materialize.[86]

According to another argument, such uncertainty is not prohibited as it does not provide an avenue for one party to gain while another to suffer loss. There is no issue of uncertainty in deposit insurance with regard to, for example, the deposit products covered, the amount to be reimbursed to insured depositors, and when they would be reimbursed, as an explicit deposit insurance system would address these through government regulation.[87]

VI PERMISSIBILTY OF NDIC AS INSURER OF CUSTOMER'S DEPOSIT FROM THE PERSPECTIVE OF SHARI'AH

Islamic banks like all other banks operating in Nigeria are mandated to participate in the DIS as stipulated by section 15 of the NDIC Act and non-compliance amounts to a criminal offence which makes the erring bank liable to a fine of five hundred thousand naira (₦500,000) on conviction for each day the offence continues.[88] The scheme aims at protecting the banking system and offering financial guarantee to the depositors.[89] In promotion and sustenance of public confidence in the banking system, the NDIC is empowered to come to the aid of an insured bank in case of imminent or actual financial difficulties which may threaten payment.[90] This may be in the form of liquidity support to the banks on agreeable terms, giving guarantee for the banks' loans, or even taking over the management of a wobbling bank until its financial position improves.[91] DIS is allowed in Shari'ah based on the following authorities:

> …help ye one another in righteousness and piety but do not help one another in sin…[92]

Evidence is also contained in the hadith narrated by Abu Hurayra that:

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85 Ibid.

86 Ebrahim M. A., *Risk Management in Islamic Financial Institutions* (MBA Dissertation, The University of Manchester, 2011) 24.

87 Wan Marhaini Wan Ahmad , (n 102), 247-268.

88 NDIC Act (n 42) s 15(1), (2) and (3).

89 PN Umoh, 'Bank Deposit Protection: The Nigerian experience', (2003) 13(4) *NDIC Quarterly* 34.

90 'Mandate, Powers & Functions', *Nigerian Deposit Insurance Commission*, (Web page, 19 August 2021) <https://ndic.gov.ng/about-ndic-3/mandate-powers-functions/>.

91 NDIC Act (n 42) s 2(1)(b) and 37(2).

92 Qur'an, *Al-Mai-dah (*5) verse 2.

> Once two women from the tribe of Huzail were fighting each other and one hit the other with a stone which killed her alongside the foetus in her womb. The Prophet (S.A.W) ruled that the compensation for foetus was freeing a male or a female slave and the compensation for the woman's life was blood money (*Diyah*) to be paid by the former's clan (*Aqilah*).[93]

The prophet's ruling that the clan should take responsibility was relied upon by scholars as evidence to support the coming together of persons to secure themselves from financial problems in the form of DIS.

With this in mind, Hamisu and Hassan argued that most of the basis of reference considered in justifying the permissibility of DIS has always been on the matter of public interest (*Maslaha*).[94] However, they opined that in many countries practicing an explicit Islamic Deposit Insurance system like Malaysia and Nigeria (NDIC), it is in a form of a tripartite arrangement, where the depository institutions (banks) perpetually pay yearly premiums while the deposit insurers on behalf of the government insures the depositors.[95]

This arrangement has been argued to breach the principle of *al-Ta'awun 'ala al-birr* (helping each other in good deeds) because of the fact that, the participation in the scheme was made mandatory by an act or a legislation and the financial institutions perpetually pay yearly premium, without any plan for a plough back of the premium or even a premium holiday at some point, even when the financial institution does not show any sign of weakness or failure.[96] Meanwhile the depositor who is being insured shares no risk in the arrangement. In Islamic social relationship both *ta'awun* (mutual help or cooperation) and *tabarru'at* (willingly relinquishing individual right for collective benefits) exist under willing and mutual agreement for cooperation towards achieving certain collective benefits.[97]

In another opinion, it has been argued that although the objectives of DIS is compatible with the *Maqasid al-Shari'ah,* some of the laws establishing it need amendments and likewise its operations need adjustments for Islamic banks to be fully integrated without going contrary to the principles of Shari'ah.[98] In view of this, the NDIC has created a framework which is the Non-Interest Deposit Insurance Scheme ('NIDIS') that caters for non-interest banking in Nigeria which takes into consideration the core nature and rules that guides their transaction.

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93 Al Bukhari, '*Sahih Al Bukhari'*, Hadith No. 2172.

94 Salisu Hamisu & Rusni Hassan, (n 10), 17.

95 Ibid. 15-25.

96 Mohammed Khnifer, 'Toward a Universal Islamic Deposit Insurance System' *Islamic Bank & Finance* (December 2010) 26.

97 Hairul Suhaimi Nahar, 'Insurance vs Takaful: Identical Sides of a Coin?' (2015) 13(2) *Journal of Financial Reporting and Accounting* 247–266.

98 Ibrahim Abikan Abdulqadir, (n 74), 17-43.

A *Islamic Provisions for Deposit Insurance*

Under the government regulation approach, the government, in the absence of a Shari'ah-compliant approach, implements the deposit insurance system by giving priority to the socio-economic benefits of the system over the way it is conducted. Such a view is strengthened by the fact that there is hardly any alternative to deposit insurance as a means to satisfy the legitimate need for deposit protection. In this regard, the government regulation approach tolerates the existence of any forbidden elements that are inherent in the deposit insurance mechanism. Other approaches are used where the government, in consultation with Shari'ah scholars, believes that the public interest argument alone is insufficient to justify a Shari'ah compliant deposit insurance system.[99]

A contract is the best available means, be it in Islamic or conventional legal systems, to reflect the intention and consent of contracting parties.[100] In the Quran, there are over 40 verses on several types of commercial contracts. Among the contracts that have been applied to Islamic financing and deposit products are loan (*qard*), cost-plus (*murabahah*), profit-sharing (*mudharabah*), profit and loss sharing (*musharakah*), leasing (*ijarah*), safe custody (*wadi'ah*) and agency (*Wakalah*).[101] For a DIS which is in compliance with the Shari'ah (Islamic Deposit Insurance Scheme ('IDIS')), applicable contracts include 'guarantee with fee' (*kafalah bil ujr*) and 'donation' (*tabarru*).[102]

There is an ongoing debate about the adoption of the guarantee contract in any financial transaction, owing to the existence of the fee element in the contract.[103] On the one hand, a number of classical Shari'ah scholars are of the view that charging a fee for a guarantee is not allowed based on the argument that the contract is voluntary in nature.[104] On the other hand, some Shari'ah scholars recognise the need to allow it, based on the current needs of the community.[105] They argued that receiving a premium in the form of a fee in deposit insurance is indeed necessary; as it is used to fund the operations of the IDIS. Besides reimbursing insured depositors in the event of failure, the fund is also needed to cover the deposit insurer's operating and development costs. Another justification of the need to collect premiums is that it is not feasible to develop an IDIS that is solely financed by the government or by private funds.[106] Deposit protection

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99 'Sharia Approaches for the Implementation of Islamic Deposit Insurance Systems', *International Association of Deposit Insurers*, (Research Paper, November 2021) <https://www.iadi.org/en/assets/File/Papers/Approved%20Research%20-%20Discussion%20Papers/Shariah_Approaches_for_IDIS-for-publication-Nov_2014-FINAL.pdf>.

100 'Different Persons Definition of Contract', *Law Teacher*, (Web Page, 18 August, 2021) <https://www.lawteacher.net/free-law-essays/contract-law/different-persons-definition-of-contract-law-essay.php>.

101 'Shari'a Approaches for the Implementation of Islamic Deposit Insurance Systems' (n 99).

102 Hairul Suhaimi Nahar, (n 97), 247.

103 Zamir Iqbal, 'Challenges Facing Islamic Financial Industry' (2007) *Journal of Islamic Economics, Banking and Finance*, 1-14.

104 Ibid.

105 Ramin Cooper Maysami and W Jean Kwon, 'An Analysis of Islamic Takaful Insurance – A Cooperative Insurance Mechanism' (1999) 18 (1) *Journal of Insurance Regulation*, 109-132.

106 Mher Mushtaq Hussain and Ahmad Tisman Pasha, 'Conceptual and Operational Differences Between General Takaful and Conventional Insurance' (2011) 1 (8) *Australian Journal of Business and Management Research*, 23-28.

through blanket guarantee could be costly to the government, which in turn would place a direct or indirect financial burden on the public.[107]

Another approach that can be adopted is the combination of both the government regulation and contract. Under this mixed approach, the deposit insurer will first find the most suitable contract which is the contract whose conditions match some or most of the deposit insurance operations.[108] Any aspect of operations that is not in line with the conditions will be addressed by government regulation. For instance, in Sudan, the government has assessed and decided to adopt a *takaful* contract for its IDIS. As a *takaful* contract involves voluntary contributions or premium payments from the Islamic banking institutions, the government could issue a regulation making premium payments mandatory.[109]

B *NDIC Framework for Non-Interest Deposit Insurance Scheme*

Nigeria does not operate a standalone Islamic Deposit Insurance Scheme, though Section 10(2) of the NDIC Act,[110] empowers the NDIC to develop a standalone framework for insuring the deposit liabilities of Islamic Banks. In the beginning, Islamic banks, essentially Ja'iz Bank, and conventional banks running non-interest packages (Stanbic IBTC and Sterling Banks) were not covered under NDIC DIS. Following the provision of Section 10(2) of the NDIC Act,[111] the NDIC developed a framework for insuring their deposit liabilities. The Maximum Deposit Insurance Coverage ('MDIC') for the Non-Interest Banking Institutions is set to be the same as the conventional banks, that is, five hundred thousand naira (₦500, 000) and two hundred thousand naira (₦200, 000) per depositor per account in DMBs and MFBs respectively.[112] The following Non-Interest Deposits are covered under the scheme: Safe Keeping Deposit, Interest Free Deposit for Investment, Profit Sharing/Loss Bearing Deposit, Profit and Loss Sharing Deposit; and any other deposit type that is Non-Interest Based and approved by the CBN.[113]

The following financial products are however not covered under the scheme: insider deposits; counter-claims from one person who maintains both a Deposit Account and a non-interest-bearing loan account and or a loan based on *murabahah* financing where the deposit account serves as a collateral for either or both of the loan accounts and inter-bank takings.[114]

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107 'Shari'ah Approaches for the Implementation of Islamic Deposit Insurance Systems', (n 99).

108 'Deposit Insurance from the Shari'ah Perspective', (n 71), 14.

109 Ramin Cooper Maysami and W Jean Kwon, (n 105), 109-132.

110 NDIC Act (n 42) s 10(2) states that 'The Corporation shall have the power to establish a separate Deposit Insurance Fund (DIF) for each category of insured institution in which all assessed premium shall be deposited and which fund the cooperation will utilize for the respective insured institutions'.

111 Ibid.

112 'NDIC Develops Framework for Non-interest Deposit Insurance Scheme', (n 51).

113 Ibid.

114 Ibid.

VII THE LACUNA IN THE PROVISIONS OF THE NDIC ACT FROM THE SHARI'AH PERSPECTIVE

Some of the provisions of the NDIC Act contravene the rules governing Islamic banking, which are mentioned in the following paragraphs.

A *Encouragement of Interest Based Investment by the NDIC Act*

Section 13(1) of the NDIC Act empowers the NDIC to invest its funds in Federal Government securities:

> (1) The Corporation shall have power to invest money not immediately required in Federal Government Securities or in such other securities as the Board may from time to time determine".[115]

The NDIC protects the DIF in safe but liquid financial instruments such as Treasury Bills, Federal Government Bonds and instruments of similar nature.[116] This type of transactions and investments by the NDIC is not allowed by the Shari'ah as the investment in Federal Government securities introduce elements of interest which goes against the principles of Islamic Banking.

B *Penal Interest of Section 15 of the NDIC Act for Membership Defaulter*

Section 15 of the NDIC Act states that:

> (1) All licensed banks and such other financial institutions in Nigeria engaged in the business of receiving deposits shall be required to insure their deposit liabilities with the Corporation.
> (2) Any licensed bank or such other deposit-taking financial institution which contravenes the provisions of subsection (1) of this section shall be guilty of an offence and be liable to a maximum fine of ₦500, 000.00 for each day the offence is committed.
> (3) All principal officers of such licensed bank or deposit-taking financial institution which contravenes subsection (1) of this section commits an offence and is liable on conviction to a term of imprisonment for 3 years or a fine of not more than ₦5,000,000 (five million naira) or to both.

Membership is compulsory under the NDIC Act and an Islamic bank desirous of operating in Nigeria has no choice but to be a participant in the insurance scheme, failure of which attracts penalty. This arrangement has been argued to breach the principle of *Al-Ta'awuni ala al-birr* (helping each other in good deeds).[117] Islamic social relationship of *Ta'awun*

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115 NDIC Act (n 42) s 13(1).

116 'Deposit Insurance', *Nigerian Deposit Insurance Commission*, (Web Page, 20 August, 2021) <https://ndic.gov.ng/deposit-insurance/#tab-1-2>.

117 Ibrahim Abikan Abdulqadir, (n 60).

(mutual help or cooperation) and *Tabarru'at* (willingly relinquishing individual right for collective benefits) are existing under willing and mutual agreement for cooperation towards achieving certain collective benefit without compulsion that can lead to a potential strain on the participating institutions.[118]

C *Interest charged on default of payment of premium*

Section 17(7) of the NDIC Act provides that:

> (7). Any premium payable by an insured institution and which remains unpaid for more than three months after a demand notice had been served on such institution, shall attract interest at a rate equivalent to the prevailing Minimum Rediscount Rate (MRR) of the Central Bank of Nigeria.

In a situation where a bank fails to pay its annual premium at the prescribed time, interest is to be paid on the premium for the default. Prohibition of Interest in Islam is not only in respect of receiving it, Muslims are enjoined to move away from both collection and payment of interest. However, because membership in the NDIC has been made compulsory, any bank (including Islamic Banks) that fails to comply with the time stipulated for payment of premium would be penalised by paying Interest which Islam abhors. The Prophet (S.A.W) has been reported to have cursed: 'the one who consumes *riba* (interest), the one who gives it to others, the one who writes it down and the one who witnesses it'.[119]

D *Interest based financial assistance*

The provision of Section 37(2) of the NDIC Act states:

> (a) Grant loan on such terms as may be agreed upon by the Corporation and the failing insured institution;
> (b) Give guarantee for a loan taken by the insured institutions;
> (c) Accept an accommodation bill with interest for a period not exceeding 90 days maturity exclusive of days of grace and subject to the renewals of not more than seven times.
>
> Provided that interest rates applicable to facilities extended to the failing institution shall not exceed the minimum Rediscount Rate of the Central Bank of Nigeria.

The pumping of money into ailing banks (including Islamic banks) by the NDIC is interest based. The liquidity support provided by the NDIC to financial institutions is interest-based, at the prevailing Minimum Rediscount Rate of the CBN.[120] This practice is open contradiction to the prohibition of interest in transactions under Islamic Law and

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[118] *Hairul Suhaimi Nahar, (n 97),* 247.
[119] *Sahih al-Muslim*, Kitab Musaqah, Hadith 1598.
[120] PN Umoh, (n 89), 57.

the basis of the prohibition is the commandment of the Law Giver where He says; 'O you who believe! Be afraid of Allah and give up what remains (due to you) from *Riba* (from now onward), if you are really believers. Failure to heed to this commandment attracts a promise of war against practitioners by Allah and His messenger'.[121]

E *Distribution of profit obtained from investment of the premium*

The profit obtained from the investments of the premium is shared between the Federal Government of Nigeria and the NDIC without any share given to the banks who pay the money and this runs contrary to the Islamic principle which states that 'there should be no infliction or reciprocation of harm'. This arrangement sidelines the banks which is the most important entity in the transaction and their depositor. This arrangement can be termed unjust especially in instances where the NDIC accrue a large profit.

F *The issue of continuous payment of premium*

Because of the nature of the DIS in Nigeria which is *Ex-Ante* (premium paid periodically in anticipation of future banks failure), banks are mandated to pay and this is a continuous payment whether or not the envisaged event occurs in years. This means that the banks keep losing a part of their money without trace or account or possibility of recovery of the same where no bank failure occurs. The financial institutions enjoy no plan for a plough back of the premium or even a premium holiday at some point, even when the financial institutions do not show any sign of weakness or failure. This also breaches the Islamic social relationship of mutual help or cooperation and exempts the banks from the profit and loss sharing in the transaction.[122]

VIII CONCLUSION AND RECOMMENDATIONS

The fundamental objective of all Islamic financial institutions is to offer Shari'ah compliant transactions and activities in all their dealings. A central tenet of this is that they must be free of interest-based transactions and all other activities considered by Shari'ah as unlawful. This injunction by inference also applies to all other institutions which take part in direct transaction with Islamic financial institutions, an example being an agency which insures their customers' deposits.

It has been established that the NDIC scheme is in line with Shari'ah. There are links that exist between NDIC and *Maqasid al-Shari'ah* which is aimed at promoting benefits and repelling harms and *Maslahah*, which refers to something good for the public. Deposit insurance protects the public from losing money that they place in a bank when the bank fails. Its implementation is a noble initiative as it prevents the public from facing financial difficulties, especially those people who have limited financial resources, who could be exposed to social problems as a result. Islam urges its followers to avoid

[121] Qur'an al-Baqarah (2): 278-279.
[122] Hairul Suhaimi Nahar, (n 97), 247.

poverty as this could lead them to disobey Allah.[123] Islam always wishes every creature to have a good and convenient life without having to face any difficulty.[124] It also urges its followers to prepare themselves to face any possible disasters, which includes finding a means to protect their wealth.[125] As such, the setting-up of a deposit insurance system represents the Muslims' response to the urge to protect their money when a bank fails.[126] Muslims are also urged to help each other in good deeds. In line with this principle, the government introduced deposit insurance as an initiative to assist the public in protecting their wealth. Such arrangements may also be made privately with the same intention of helping the public.[127] Nevertheless, the principle of Shari'ah is that all transactions of Islamic financial institutions must be free of interest, uncertainty, gambling, and sale/purchase of unlawful goods and services.[128]

In this research, attempts have been made in examining the importance, the features, the operations as well as the permissibility of the DIS. Distinctions were made between DIS and conventional insurance and similarities between the former and cooperative insurance permitted under Islamic law were highlighted. The research has shown the effectiveness and importance of the DIS in the protection of depositors in many countries. The establishment of the NDIC has gone a long way in ensuring that depositors in financial institution do not suffer any kind of loss resulting from the failure of a bank and also helps in regulating and supervising the activities of these financial institutions when the need arises. The NDIC insures both conventional and Islamic banks in Nigeria and a framework for NIDIS schemes have been developed to cater for Islamic Banking. However, based on the findings of this research, it is concluded that although the aim and objectives of the NDIC is in line with the Shari'ah and so is permissible, there still exists Shari'ah-compliance hurdles in the operation of the NDIC preventing the full participation of Islamic Banks and these hurdles are in form of interest based earnings, liquidity support and penalty. This research concludes that the NDIC operation as insurer of Islamic banks is both constitutional and legal. This is because it is set up by a legitimate government for the good of the general public and to the advantage of Islamic banks. An approach to insuring Islamic banks is through regulation by the government where there is no suitable DIS by Islamic contracts or one is yet to be developed due to constraints. This is the case in the Nigerian system. Islamic banks will be vulnerable to distress if they do not participate and will also discourage intending customers. This study therefore proffers the solutions and recommendations below to ensure that the operations of the NDIC are Shari'ah-compliant.

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123 Salisu Hamisu and Rusni Hassan, (n 10), 17.

124 Elvan Syaputra *et al,* 'Maslahah as an Islamic Source and its Application in Financial Transactions' (2014) 2(5) *Journal of Research in Humanities and Social Science* 66-71.

125 Issoufou Chaibou 'Deposit Insurance Scheme: A Comparative Study Between Conventional and Islamic Banking' (MCL Dissertation, International Islamic University Malaysia, 2008), 3 and 23.

126 'Deposit Insurance from the Shari'ah Perspective', (n 71).

127 Tawfique Al-Mubarak and Noor Mohammad Osmani, (n 13), 4-6.

128 Burhan Uluyol and Adam Abdullah (n 14), 140.

A *Recommendations*

i. The NDIC should target a benchmark on the amount in which a premium must reach and once this benchmark is reached, the profit generated from the investments of the premium paid by the Islamic banks may be shared among the premium payers and the NDIC. Islamic banks as corporate institutions are bound by the Islamic jurisprudential principle: 'there shall be neither harm nor reciprocating harm' and as much as NDIC stands for an equitable distribution of wealth and resources, they are equally legally restrained from allowing injustice to be done to their shareholders from which the premium is being paid.

ii. There should exist a type of premium tax holiday where Islamic banks do not pay premium for certain number of years in a situation where they do not experience failure for a specific period of time (our recommendation is 10 years). The reason behind this suggestion is for the times where the banking system enjoys stability for a considerable length of time and the NDIC's fund is not used for the object of its creation, a continued withholding of excessive liquidity after a while will amount to hoarding which negates the principle of equitable distribution and circulation of resources.

iii. There should be a profit and loss sharing arrangement in order to prevent interest-based operations. The Shari'ah prohibits the collection and payment of interest in any transaction but the principle of sharing profit and loss is allowed in Islam and this can be done by way of introducing a *Mudarabah* arrangement with the insured banks in respect of invested funds. In this case, the NDIC's share of the accruing profit would be a pre-agreed percentage and in case of loss, it bears no further responsibility than forfeiture of its managerial efforts and where the NDIC's funds forms part of the investment fund, a *Musharakah* arrangement would be appropriate where both the NDIC and insured banks would share both the profit and loss. The former will be based on a pre-agreed ratio which may not necessarily follow the ratio of contribution while the latter will be shared based on the percentage of the partners' contribution to the fund.

iv. Amendment of some sections of the NDIC Act (penal and interest-based dealings) to be in line with certain principles of Shari'ah. The following sections of the NDIC Act need amendments. Section 13(1) should be amended in a way that will involve investment of the Non-Interest Deposit Insurance Funds (NIDIF) in *Sukuk* bonds instead of just Government Treasury bills which is suitable for only DIF. Section 15 should be amended in such a way that it will only make membership voluntary and not mandatory. Section 17(7) should include a proviso that will exempt Islamic banks from paying interest on default in the payment of premium and to prescribe some other penalty. This reform will help reduce if not completely eliminate the hindrances restraining Islamic banks from the full enjoyment of the operations of the NDIC.

v. The Nigerian Government should adopt an Islamic Deposit Insurance Scheme (IDIS) and efforts should be made at the establishment of a common ground in the administration of an Islamic Deposit Insurance (IDI) to minimise and eliminate disagreements such that a point of consensus under Shari'ah is reached.

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PROTECTION FROM LONG WORKING HOURS AND NO REST DAYS FOR FOREIGN DOMESTIC WORKERS IN MALAYSIA

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Abstract

The increase of economic growth in Malaysia since the 1970s coupled with the reluctance of Malaysians to perform certain jobs categorized as '3D jobs' (ie dirty, difficult, and dangerous) created a demand for cheap labour. This ushered in a greater influx of migrant workers into the country including foreign domestic workers ('FDWs') who have become common-place in many households in Malaysia. Unfortunately, this phenomenon has coincided with a relaxed policy on labour laws to attract foreign investment leading to rampant abuse and exploitation of migrant workers including FDWs in Malaysia. FDWs in Malaysia are extremely vulnerable and are at greater risk to ill treatment by their employers and recruitment agencies due to many different factors such as poverty, limited career opportunities in their home countries, poor educational background, lack of access to legal expertise, and the very nature of their work which is generally conducted out of public view. Abuses against FDWs range from deception, excessive fees, non-payment of wages, illegal deductions, verbal abuse, physical or even sexual abuse. One particular form of abuse that has been understated is the excessive working hours and no rest days which FDWs around the globe, including in Malaysia, suffer from. This article seeks to highlight the problems faced by FDWs in Malaysia with regard to excessive working hours and no rest days, specifically the unfair discrimination which FDWs are subjected to due to their exclusion from labour protections under the Employment Act 1955. This paper will explore the constitutionality of the First Schedule to the Employment Act 1955 which specifically excludes FDWs from Part XII (Rest Days, Hours of Work, Holidays and Other Conditions of Service). Next, this paper will explore other viable protections including international conventions or treaties that Malaysia has ratified which could be utilized to protect FDWs from long working hours and no rest days. Finally, this paper will examine the challenges to access to justice faced by FDWs in Malaysia.

Keywords: Foreign Domestic Workers, working hours, rest days, Employment Act 1955

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I INTRODUCTION

Foreign domestic workers ('FDWs') are the forgotten and unappreciated heroes and heroines in Malaysia and worldwide. They enable the smooth running of the economy where members of society are free to pursue their careers with the comfort of knowing that their homes and loved ones are taken care of. It is a common - yet little publicised - fact that most FDWs are the sole breadwinners in their own nuclear family who remain in their home countries, where, through sheer hard work, they finance the livelihood of their families, including their childrens' education. Although their wages are too low to sustain a decent living, they manage to get by against the odds. Unfortunately, in spite of their tremendous efforts, their work is often underappreciated and undervalued even though they play a critical part in a society's success and well-being.

Legislation and regulations in many countries globally, including in Malaysia, discriminate against FDWs. They are often the subject of abuse and exploitation; some to the extent that it can only be termed as 'modern-day slavery'.[1] FDWs worldwide are regularly subjected to excessive working hours with no rest days, their wages always below the minimum wage scale of countries, and given no overtime pay to boot.[2] Despite the desperate need for protection as long working hours puts the health and safety of FDWs at risk, they are often excluded by local legislation from basic labour protections such as maximum working hours and weekly rest days.[3]

In Malaysia, FDWs are made up almost exclusively of documented and undocumented foreign women[4] who may come from countries such as Indonesia, Philippines, Cambodia, Thailand, Sri Lanka, and India[5] where they face 'intersectional discrimination'[6] as they are discriminated on multiple levels (ie gender, race and class). Specifically, the Employment Act 1955 ('Employment Act')[7] inexplicably excludes FDWs (in fact, all domestic workers) from basic labour protections that entitle other 'employees' to a maximum work hours

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1 Helen Schwenken, '"Domestic Slavery" Versus "Workers Rights": Political Mobilizations of Migrant Domestic Workers in the European Union', (2017) *The Center for Comparative Immigration Studies (CCIS), University of California, San Diego*. See also Bridget Anderson, 'Migrant Domestic Workers: Good Workers, Poor Slaves, New Connections', (2015) 22(4) *Social Politics: International Studies in Gender, State & Society* 636-652.

2 Malte Luebker, Yamila Simonovsky and Martin Oelz, 'Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection', (2013), (International Labour Organization (International Labour Office), 56-59.

3 Ibid.

4 See 'Case calls for Domestic Workers' Act', (20 May 2020), The Star: 'According to the Human Resources Ministry, there are 129,980 registered domestic workers in Malaysia. Statistics from the International Labour Organisation (ILO) estimate the number of both documented and undocumented migrant domestic workers in the country to be between 300,000 and 400,000'. Retrieved from <https://www.thestar.com.my/opinion/letters/2020/05/20/case-calls-for-domestic-workers-act>.

5 Foreign Domestic Helper (FDH), Immigration Department of Malaysia (Ministry of Home Affairs). Accessed on 4 April 2021.

6 'Intersectional discrimination' means 'discrimination on the basis of a combination of protected classes, ie where two or more bases for discrimination are alleged. For example, an entity that is not unlawfully discriminating on the basis of race or gender still may be discriminating against individuals who are, for example, Asian males'. This definition is obtained from the 'Intersectional Discrimination definition', Law Insider. Retrieved from: <https://www.lawinsider.com/dictionary/intersectional-discrimination>.

7 Act 265.

per week (and per day) as well as weekly rest days.[8] This discrimination violates the Malaysian Federal Constitution and the fundamental rights of these FDWs.

Notably, although Malaysia has ratified conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women 1979[9] ('CEDAW') and the International Labour Organisation ('ILO') Forced Labour Convention 1930 (No. 29)[10] which prohibit States to have legislation that discriminates against women and allow forced labour, Malaysia has by and large failed in its obligations towards FDWs. Malaysia has been able to insulate themselves from international obligations through a dualist regime that enables States to ignore international norms even after ratification.[11] Nevertheless, there remains some form of protection for FDWs provided in the Federal Constitution as well as other local legislation and mechanisms.

In this article, the writer will explore the viability of the protections afforded to FDWs in Malaysia in the Federal Constitution as well as other legislation. In particular, the writer will explore the constitutionality of the First Schedule of the Employment Act which specifically excludes FDWs from Part XII (Rest Days, Hours of Work, Holidays and Other Conditions of Service). Finally, the writer will examine the challenges to access to justice faced by FDWs in Malaysia.

II FDWS IN MALAYSIA

A *Regulation of FDWs in Malaysia*

In Malaysia, FDWs are known as a 'domestic servants'[12] who are not citizens of Malaysia; referred to either as a 'foreign domestic servant'[13] (as defined in the Employment Act) or as a 'foreign domestic helper' (as stated by the Immigration Department of Malaysia)[14]. Although foreign domestic servants are recognized as 'employees'[15] under

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8 Eleanor Taylor-Nicholson, Renuka Balasubramaniam and Natasha Mahendran, 'Migrant Workers' Access to Justice: Malaysia', (Research Report by Bar Council Malaysia, 2019) 90-91. Retrieved from: https://www.malaysianbar.org.my/cms/upload_files/document/Migrant%20Workers%20Access%20to%20Justice%20Report%20(28Nov2019).pdf.

9 United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, which came into force on 3 September 1981.

10 International Labour Organization (ILO), Forced Labour Convention, C29, 28 June 1930, which came into force on 1 May 1932.

11 Jenna Holliday, 'Enhancing Standard Employment Contracts for Migrant Workers in the Plantation and Domestic Work Sectors in Malaysia', International Labour Organization Research Report 2 July 2020). Retreived from: <https://www.ilo.org/asia/publications/WCMS_749704/lang--en/index.htm>. See also: Jaclyn Ling-Chien Neo, 'Calibrating Interpretive Incorporation: Constitutional Interpretation and Pregnancy Discrimination Under CEDAW', (2013) 35 *Hum. Rts. Q.* 910.

12 Section 2(1) Employment Act states that a 'domestic servant' is a person employed in connection with the work of a private dwelling-house and not in connection with any trade, business, or profession carried on by the employer in such dwelling-house and includes a cook, house-servant, butler, child's nurse, valet, footman, gardener, washerman or washerwoman, watchman, groom and driver or cleaner of any vehicle licensed for private use.

13 Section 2(1) of the Employment Act states that a 'foreign domestic servant' is a domestic servant who is not a citizen or a permanent resident.

14 Foreign Domestic Helper (FDH) (n 5).

15 Section 2(1) of the Employment Act defines an 'employee' as any person or class of persons—
(a) included in any category in the First Schedule to the extent specified therein; or

the Employment Act , they are not entitled to similar protection and benefits as other employees.

An 'employee' under the Employment Act is entitled to a maximum of 48 hours a week work limit, a maximum of eight hours a day with not more than five hours continuous work without a break (section 60A),[16] a weekly rest day in each week (section 60),[17] a minimum of eleven paid public holidays (section 60D),[18] between eight and 16 days of

(b) in respect of whom the Minister makes an order under subsection (3) or section 2A.

[16] Section 60A(1) of the Employment Act (Hours of Work) provides that except as hereinafter provided, an employee shall not be required under his contract of service to work—
(a) more than five consecutive hours without a period of leisure of not less than thirty minutes duration;
(b) more than eight hours in one day;
(c) in excess of a spread over period of ten hours in one day;
(d) more than forty-eight hours in one week: Provided that—
(i) for the purpose of paragraph (1)(a), any break of less than thirty minutes in the five consecutive hours shall not break the continuity of that five consecutive hours;
(ii) an employee who is engaged in work which must be carried on continuously and which requires his continual attendance may be required to work for eight consecutive hours inclusive of a period or periods of not less than forty-five minutes in the aggregate during which he shall have the opportunity to have a meal; and
(iii) where, by agreement under the contract of service between the employee and the employer, the number of hours of work on one or more days of the week is less than eight, the limit of eight hours may be exceeded on the remaining days of the week, but so that no employee shall be required to work for more than nine hours in one day or forty-eight hours in one week.

[17] Section 60(1) of the Employment Act (Work on Rest Day) provides that except as provided in subsection 60A(2), no employee shall be compelled to work on a rest day unless he is engaged in work which by reason of its nature requires to be carried on continuously or continually by two or more shifts: Provided that in the event of any dispute the Director General shall have power to decide whether or not an employee is engaged in work which by reason of its nature requires to be carried on continuously or continually by two or more shifts.

[18] Section 60D(1) of the Employment Act (Holidays) provides that every employee shall be entitled to a paid holiday at his ordinary rate of pay on the following days in any one calendar year: (a) on eleven of the gazetted public holidays, five of which shall be - (i) the National Day; (ii) the Birthday of the Yang di-Pertuan Agong; or (iii) the Birthday of the Ruler or the Yang di-Pertua Negeri, as the case may be, of the State in which the employee wholly or mainly works under his contract of service, or the Federal Territory Day if the employee wholly or mainly works in the Federal Territory; (iv) the Workers' Day; and (v) Malaysia Day; and (b) on any day appointed as a public holiday for that particular year under section 8 of the Holidays Act 1951 [Act 369]: Provided that if any of the public holidays referred to in paragraphs (a) and (b) falls on— a rest day; or
(i) any other public holiday referred to in paragraphs (a) and (b),
(ii) the working day following immediately the rest day or the other public holiday shall be a paid holiday in substitution of the first mentioned public holiday.

paid annual leave according to length of employment (section 60E),[19] as well as between 14 and 22 days of paid sick leave according to the length of employment (section 60F).[20]

However, notwithstanding that FDWs are 'employees' under the Employment Act, FDWs are wholly excluded from the above benefits as well as all of Part XII of the Employment Act (Rest Days, Hours of Work, Holidays and Other Conditions of Service).[21] To add fuel to the fire, FDWs do not benefit from minimum wage in Malaysia. They have been consistently excluded from minimum wage orders declared by the government, the most recent being the Minimum Wage Order 2020[22].

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[19] Section 60E of the Employment Act (Annual leave) provides as follows:

(1) An employee shall be entitled to paid annual leave of—
  (a) eight days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of less than two years;
  (b) twelve days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of two years or more but less than five years; and
  (c) sixteen days for every twelve months of continuous service with the same employer if he has been employed by that employer for a period of five years or more, and if he has not completed twelve months of continuous service with the same employer during the year in which his contract of service terminates, his entitlement to paid annual leave shall be in direct proportion to the number of completed months of service: provided that any fraction of a day of annual leave so calculated which is less than one-half of a day shall be disregarded, and where the fraction of a day is one-half or more it shall be deemed to be one day; and provided further that where an employee absents himself from work without the permission of his employer and without reasonable excuse for more than ten per centum of the working days during the twelve months of continuous service in respect of which his entitlement to such leave accrues he shall not be entitled to such leave.

(1A) The paid annual leave to which an employee is entitled under subsection (1) shall be in addition to rest days and paid holidays.

[20] Section 60F(1) of the Employment Act (Sick Leave) provides as follows:

(1) An employee shall, after examination at the expense of the employer—
  (a) by a registered medical practitioner duly appointed by the employer; or
  (b) if no such medical practitioner is appointed or, if having regard to the nature or circumstances of the illness, the services of the medical practitioner so appointed are not obtainable within a reasonable time or distance, by any other registered medical practitioner or by a medical officer, be entitled to paid sick leave, -
    (aa) where no hospitalization is necessary, -
      (i) of fourteen days in the aggregate in each calendar year if the employee has been employed for less than two years;
      (ii) of eighteen days in the aggregate in each calendar year if the employee has been employed for two years or more but less than five years;
      (iii) of twenty-two days in the aggregate in each calendar year if the employee has been employed for five years or more; or
    (bb) of sixty days in the aggregate in each calendar year if hospitalization is necessary, as may be certified by such registered medical practitioner or medical officer: provided that the total number of days of paid sick leave in a calendar year which an employee is entitled to under this section shall be sixty days in the aggregate; and provided further that if an employee is certified by such registered medical practitioner or medical officer to be ill enough to need to be hospitalized but is not hospitalized for any reason whatsoever, the employee shall be deemed to be hospitalized for the purposes of this section.

[21] Jennifer Whelan et al, 'Abused and Alone: Legal Redress for Migrant Domestic Workers in Malaysia' (2016) 6 *Indon. L. Rev.* 1.

[22] Section 2 of the Minimum Wages Order 2020 (Non-application) provides that this order shall not apply to a domestic servant as defined under subsection 2(1) of the Employment Act 1955 [Act 265], subsection 2(1) of the Sabah Labour Ordinance [Cap. 67] and subsection 2(1) of the Sarawak Labour Ordinance [Cap. 76]. Most FDWs earn below the minimum wage in Malaysia and therefore would come under the definition of 'employee' under the Employment Act. It must be noted that notwithstanding that an employee or domestic

B *Why are FDWs Excluded from Specific Labour Protections under the Employment Act?*

The rationale put forward by the Government of Malaysia as to why FDWs were excluded from protection of a maximum work hour limit and weekly rest days are two-fold: (i) that their work is 'exceptional' and (ii) their working hours are too difficult to define, making it impossible to enact legislation for FDWs.[23] This rhetoric is not peculiar to Malaysia and has been used by many countries worldwide to deny basic labour protection to FDWs.[24]

To address this rationale, reference is made to global statistics which show that there have been many countries, primarily developed countries like Australia, France, Germany, Ireland, and the Republic of Korea which have successfully enacted legislation with regard to maximum work hour limit and weekly rest days to protect domestic workers from long working hours.[25] For instance, one research study that examined global and regional data estimated that 'a total of approximately 20.9 million domestic workers are entitled to the same limitation of their normal weekly hours as other workers' and with regard to legislation for weekly rest, 'almost half of all domestic workers (25.7 million, or 49.0 per cent of the total) are entitled to a weekly rest period of at least 24 consecutive hours'.[26] This shows that the rationale put forward against legislation for domestic work in Malaysia are somewhat baseless. Legislation for domestic work is entirely feasible.

C *Working Hours of FDWs in Malaysia*

FDWs have one of the longest and most unpredictable working schedules. Due to the nature of their work they are constantly required to be on the beck and call of their employers at any time of the day and night. Therefore, on any given day a domestic worker is subjected to 'on-call duty' of 24 hours a day.[27] Furthermore, due to the fact that most FDWs in Malaysia live with their employer, this intensifies their long working schedule even further.[28] For these live-in FDWs, there is no delineation between working hours and non-working hours or rest periods.

An ILO study in 2016 concluded that on average an FDW in Malaysia works 14 hours a day with many FDWs subjected to 'on-call duty' or being on 'stand-by' 24 hours per

worker may earn more than the statutory limit of RM2,000.00 meaning they would not come under the definition of 'employee' as provided under Employment Act, section 7 of the Employment Act provides that the terms of employment must not be less favourable than the provisions of the Employment Act (which includes the provisions on working hours and rest days).

23 See New Straits Times, June 23, 1987: 'We will have problems defining, for instance, their [domestic workers] hours of work and the value of their accommodation by employers if they were to be included in the Employment Act' (Minister of Labour). See also Christine BN Chin, 'Walls of Silence and Late Twentieth Century Representations of the Foreign Female Domestic Worker: The Case of Filipina and Indonesian Female Servants in Malaysia', (1997) 31(2) *International Migration Review* 353-385.

24 Malte Luebker (n 2).

25 Ibid 131-134.

26 Ibid 62.

27 Claire Hobden, Inclusive Labour Markets, Labour Relations and Working Conditions Branch (INWORK), 'Working Time of Live-in Domestic Workers', (2013) *International Labour Organisation*.

28 Eleanor Taylor-Nicholson (n 8).

day.[29] Further, another study showed that FDWs in Malaysia worked an average of 65.9 hours a week in 2008 (the highest of all countries surveyed).[30] This may be considerably more in some cases where FDWs are required to work constantly even for different family members of the employer, and with only limited hours of sleep.[31]

D *Long Working Hours and Impacts on Health*

The World Health Organization ('WHO') has categorically stated that 'working for 55 hours or more per week is a serious health hazard'.[32] Even in Malaysia, the medical community has started to voice their concerns over the negative health impacts brought on by long working hours.[33]

There have been numerous studies and well documented research which concluded that long working hours negatively impacts the health of an individual. One such study is a recent global research which found that '745,000 people died from stroke and heart disease associated with long working hours in 2016'.[34] Long working hours in this study was considered to be 41 to 48 hours, 49 to 54 hours, and over 55 hours per week whereas normal working hours were listed as 35 to 40 hours per-week. From these figures, it is clear that FDWs in Malaysia work long hours and are in danger of health issues arising from long working hours.

Specifically with regard to FDWs, the common health impact that have been identified by research studies are fatigue, effects on psychological health, stress, effects on physical health, risk to safety and accidents.[35]

III UNCONSTITUTIONALITY OF THE EMPLOYMENT ACT

A *Protection under the Federal Constitution for FDWs*

In Malaysia, the Federal Constitution confers upon all citizens fundamental rights and liberties which are enshrined under Articles 5 to 13 of the Federal Constitution. Provisions which are also extended to all 'persons' (and not just citizens) include: (1) the right to life

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29 Holliday (n 11).

30 Malte Luebker (n 2).

31 Eleanor Taylor-Nicholson (n 8).

32 'Long Working Hours Increasing Deaths From Heart Disease and Stroke: WHO, ILO', (17 May 2021), *World Health Organization.* Retrieved from: <https://www.who.int/news/item/17-05-2021-long-working-hours-increasing-deaths-from-heart-disease-and-stroke-who-ilo>.

33 Imran Ariff, 'Avoid Overworking Employees to Safeguard Their Health, Bosses Told', (22 May 2021), Free Malaysia Today (FMT). Retrieved from: <https://www.msn.com/en-my/news/national/avoid-overworking-employees-to-safeguard-their-health-bosses-told/ar-AAKfyIp>.

34 Frank Pega et al, 'Global, Regional, and National Burdens of Ischemic Heart Disease and Stroke Attributable to Exposure to Long Working Hours for 194 Countries, 2000–2016: A Systematic Analysis from the WHO/ILO Joint Estimates of the Work-related Burden of Disease and Injury' (2021), *Environment International* 106595.

35 Amelita King Dejardin, 'Working Hours in Domestic Work', Domestic Work Policy Brief No 2, International Labour Organization, 19 May 2011. Retreived from: <https://www.ilo.org/travail/info/publications/WCMS_156070/lang--en/index.htm>

(Article 5) which has been given a 'prismatic' interpretation by some judges,[36] thereby conferring upon persons unenumerated rights which would encompass health and safety as well as the right to private life and family; (2) prohibition of slavery (Article 6) which prohibits forced labour and includes the right to choose one's employer;[37] (3) equality before the law (Article 8) which guarantees 'persons' from being unfairly discriminated against; and (4) freedom of religion (Article 11) which includes the right to practice his or her religion,[38]

FDWs, despite not being citizens, are not excluded from these provisions of the Malaysian Federal Constitution as the word 'persons' are used in Articles 5, 6, 8 and 11 of the Federal Constitution. This view was supported by the Industrial Court case of *Ali Salih Khalaf v. Taj Mahal Hotel*[39]. This expansive interpretation was similarly echoed in the Federal Court case of *Ahmad Zahri Mirza Abdul Hamid v. Aims Cyberjaya Sdn Bhd*[40] where the court held *inter alia* that 'all workers should be treated with fairness, dignity, and equality without distinction whether they were local or foreigners' which is in consonant with Article 8(1) of the Federal Constitution that all persons are to be treated equally before the law. Hence, FDWs are equally protected by the provisions of the Federal Constitution on fundamental liberties that includes Articles 5, 6, 8, and 11.

However, there are limitations to these protections as was pronounced by the Federal Court in the case *of Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor*[41] which opined that; (i) any contravention of the rights and liberties in the Federal Constitution does not extend to the infringement of an individual's legal rights

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36 See *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 MLJ 281 [15] where Gopal Sri Ram JCA (as he then was) stated, 'the fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit'. See also *Lee Kwan Woh v. PP* [2009] 5 MLJ 301 [10-11] where Gopal Sri Ram FCJ stated that, '...In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as 'life' and 'personal liberty' in art 5(1)…'

37 See *Barat Estates Sdn Bhd & Anor v. Parawakan Subramanian & Ors* [2000] 4 MLJ 107 [12] where Gopal Sri Ram JCA (as he then was) stated, 'In accordance with settled principles of constitutional interpretation, Art 6 must be given a broad and liberal construction… By its spirit and intendment it vests in an employee the right to be employed by an employer of his choice…That is because compelling an employee to work for a particular employer, without affording him a choice in the matter, is merely one form of forced labour…'

38 See *Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors* [2006] 4 MLJ 605 [16] where Abdul Hamid Mohamad FCJ stated, '...Practice may not be an integral part of the teaching of a religion, in the Islamic sense, it may be a "sunat" eg, performing the "sunat" prayers…However, it is not right to prohibit practice of religion…'

39 [2014] 2 MELR 194 [10]. In this case, the Industrial Court stated as follows: '…The court agrees with the sentiments that no persons, no human being should ever be illegal. Of the two categories of migrant workers in our country namely documented and undocumented, the latter category, that is those without work permits, passes or visas that is required by law before a migrant worker can work, is nevertheless equal before the law as art 8 of the Federal Constitution uses the word "persons" and not "citizen". Therefore rights guaranteed by it is equally extended to all persons including migrant workers of both categories…'

40 [2020] 5 MLJ 58 [83].

41 [2005] 3 MLJ 681 [18].

by another individual and is limited to contravention of rights by a public authority;[42] and (ii) Article 8(1) only applies to persons within the same class. Notwithstanding this decision, some jurists argue against the Federal Court's interpretation in holding only a 'vertical effect'[43] to Article 8 as too narrow. They argue that this narrow interpretation has caused significant hardship especially for women who are unable to seek protection from gender discrimination in private sectors.[44]

Having said that, it is submitted that the long working hours and no rest days that FDWs are subjected to have violated Articles 5, 6, 8 and 11 in the following ways:

(a) they are unfairly discriminated from basic labour protections under the Employment Act;
(b) FDWs are not able to have a private life distinct from working life affecting right to family;
(c) FDWs are unable to have the choice of their employer because documented workers who have entered Malaysia to work are required to work only for the employer who brought them into the country. The work permit is valid for only one year which can be renewed annually for up to three years but once the employer terminates their contract with the FDW, they are immediately subject to arrest and deportation as they are not allowed to secure a job with a different employer.[45] Work permits are also renewed by the employer or recruitment agency themselves.[46] Further, passports of the FDWs are often kept in the custody of the employer or recruitment agency resulting in a huge power imbalance where the FDWs have no other option but to comply with directions of their employer or risk arrest and even deportation if they were to change employers;[47]
(d) the health and safety of FDWs are put at grave risk; and
(e) they are unable to practice their religion due to prolonged working hours. In Malaysia and Singapore numerous instances have been reported by the Human Rights Watch where domestic workers were prevented from practicing their religion freely. For example, Christian FDWs were prevented from attending church services, and

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42 Ibid, [13] where it was held: 'We took time to examine this allegation carefully and we found that it is simply not possible to expand the scope of art 8 of the Federal Constitution to cover collective agreements such as the one in question. To invoke art 8 of the Federal Constitution, the applicant must show that some law or action of the Executive discriminates against her so as to controvert her rights under the said article. Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual' s legal right by another individual. Further, the reference to the 'law' in art 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen.'

43 'Vertical effect' is when constitutional law provides remedies to an individual where their rights are contravened by a public authority and not by a private entity. See M Chee Din, H Rahmat and R Mashudi, 'Pregnancy and Discrimination: Effect of the Case *Beatrice a/p At Fernandez v Sistem Penerbangan Malaysia and Others*', (2011), 19(2) *International Journal of the Computer, The Internet and Management* 29-33.

44 Ibid. See also Neo (n 11).

45 Philip S Robertson Jr, 'Migrant Workers in Malaysia - Issues, Concerns and Points for Action', (2009), *Fair Labor Association* 8-9.

46 Ibid.

47 Sri Wahyono, 'The Problems of Indonesian Migrant Workers' Rights Protection in Malaysia', (2007) 2(1) *Jurnal Kependudukan Indonesia* 27-44.

Muslim FDWs were not allowed to fast and conduct their daily prayers.[48] Further, it is also common for recruitment agents to require that the FDWs stop praying, and confiscate holy books as well as other prayer items.[49]

For the purposes of this article, the writer will only elaborate on the infringement under Articles 5(1), 11 and 8 (1) of the Federal Constitution. The focus of this article however will be primarily on the infringement under Article 8(1) of the Federal Constitution where FDWs are unfairly discriminated against by the exclusion from basic labour protections under the Employment Act which all other employees are entitled to. The writer submits that a legitimate case can be made that the exclusion of FDWs from basic labour protections under Part XII of the Employment Act is unconstitutional as it unfairly discriminates against FDWs who are subjected to 'intersectional discrimination'.

B *Infringement under Article 5(1) of the Federal Constitution*

Article 5(1) of the Federal Constitution provides that 'No person shall be deprived of his life or personal liberty save in accordance with law', otherwise known as the 'right to life'. Cases such as *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal*[50] have also held that this fundamental liberty must be read widely and interpreted liberally. Further, in the case of *Sivarasah Rasiah v. Badan Peguam Malaysia*[51], Gopal Sri Ram FCJ opined that Article 5(1) would encompass other rights as well such as right to privacy. Therefore, FDWs' right to private and family life are protected under the Federal Constitution.

However, these rights are regularly abused by employers as it is common place for FDWs to be under constant supervision and their movements severely limited. There have also been instances where employers use their children or neighbours to report on the activities of the FDWs.[52]

C *Infringement under Article 11 of the Federal Constitution*

As discussed in the paragraphs above, the FDWs' right to practice their religion has been curtailed and restricted even to the extent of confiscation of holy books and prayer materials of the FDWs.[53] Article 11 of the Federal Constitution enshrines the right to freedom of religion which includes practicing one's religion as held in the case of *Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors.*[54] It has been reported that one of the most common complaints by Indonesian FDWs are that they have been prevented from

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48 Human Rights Watch, 'Swept Under the Rug : Abuses Against Domestic Workers Around the World', (27 July 2006), *Human Rights Watch.* Retrieved from: <https://www.hrw.org/report/2006/07/27/swept-under-rug/abuses-against-domestic-workers-around-world>.

49 Ibid.

50 [2000] 3 MLJ 281.

51 [2010] 2 MLJ 333.

52 Chin (n 23).

53 'Swept Under the Rug: Abuses against Domestic Workers Around the World' (n 46).

54 [2006] 4 MLJ 605.

conducting their five daily prayers and having to handle as well as to eat pork contrary to the tenets of their religion.[55]

D *Intersectional Discrimination against FDWs : Infringement under Article 8(1) of the Federal Constitution*

Firstly, parallels can be drawn from the landmark South African decision of *Mahlangu and another v. Minister of Labour and others*[56] with the experience of FDWs in Malaysia with regard to their exclusion from basic labour provisions. The court in this case held that domestic workers in South Africa faced 'intersectional discrimination'[57] and were unfairly excluded from the definition of 'employee' in the Compensation for Occupational Injuries and Diseases Act ('COIDA') which meant that domestic workers were unable to make a claim for compensation under the COIDA.

The significance of this case is that; (1) the Court recognised that domestic workers in South Africa suffered from 'intersectional discrimination' under section 9(3) of the Constitution (Equality of Law);[58] and (2) the exclusion of 'domestic workers' from the meaning of 'employee' in the COIDA was unconstitutional as it discriminated against domestic workers. Although the distinction in the COIDA could be argued to be a 'reasonable classification' scenario as it refers to a particular category of workers and would not on its face infringe the equality of law principle, the Court took into account the historical and contemporary marginalisation of domestic workers due to intersectional factors that contribute to the discrimination of domestic workers.[59]

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55 Wahyono (n 47).

56 (CCT306/19) [2020] ZACC 24. This is a South African case where a domestic worker, Ms Mahlangu who had been employed by the same family for 22 years drowned in her employer's pool whilst performing her duties as a domestic worker. Subsequently, her daughter with the assistance of the South African Domestic Service and Allied Workers Union (SADSAWU) made an application to the High Court of South Africa to, *inter alia*, declare section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act as unconstitutional as it purports to exclude domestic workers employed in private households from the definition of 'employee'.

57 See Shreya Atrey, 'Beyond Discrimination: Mahlangu and the Use of Intersectionality as a General Theory of Constitutional Interpretation', (2021), *International Journal of Discrimination and the Law* 13582291211015637: 'Intersectionality is considered not just at the point of the discrimination inquiry to address intersectional discrimination based on multiple grounds under section 9(3) of the Constitution, but as a theory which guides the interpretation of all rights per se'.

58 Section 9 (Equality of Law) of the Constitution of Republic of South Africa, 1996 provides as follows:
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) …
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

59 *Mahlangu* (n 54) [90], where the Court stated that, '...Domestic workers experience racism, sexism, gender inequality and class stratification. This is exacerbated when one considers the fact that domestic work is a precarious category of work that is often undervalued because of patronising and patriarchal attitudes…'. Also see at [93] where Court further held '…In addition, as I will demonstrate below, these various grounds of discrimination intersect, thus rendering domestic workers amongst the most indigent and vulnerable members of our society. There is no doubt that although the distinction in COIDA could be said to refer to a category of worker which, on the face of it, would not trigger a section 9(3) enquiry, the same cannot be said of the historical and contemporary marginalisation of domestic workers, and the various listed grounds of discrimination that intersect where discrimination is made between domestic workers and other workers…'

Similarly, in the context of Malaysia, the experience faced by FDWs attract the same type of intersectional discrimination on the basis of gender, race, and class. The historical marginalisation of FDWs in Malaysia is quite apparent and it is glaringly represented by numerous laws like the Employment Act that specifically excludes FDWs from basic labour protection.

It is evident from the discussion above that long working hours, no rest days and being on 24-hour on-call duty infringes the fundamental rights and liberties of FDWs. Furthermore, as long working hours have been established by numerous studies to be a serious health hazard, FDWs' health and right to life are being drastically violated.

It is patently clear that the Government has discriminated against FDWs in Malaysia and that the First Schedule to the Employment Act which excludes FDWs from Part XII (Rest Days, Hours of Work, Holidays and Other Conditions of Service) is inconsistent with the Federal Constitution and unconstitutional. Hence, judicial review can be sought to invalidate the contravening sections in the Employment Act.

IV PROTECTION UNDER INTERNATIONAL LAW

A *International Law in Malaysia*

Malaysia has ratified several international conventions and treaties including some which are relevant to migrant workers such as; (1) Universal Declaration of Human Rights (UDHR); (2) Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW); (3) ILO Forced Labour Convention, 1930 (No. 29); (4) Equality of Treatment Convention (Accident Compensation), 1925 (No. 19); and (5) Minimum Wage Fixing Convention, 1970 (No. 131).[60]

Unfortunately, several specific conventions catered to domestic workers' rights have not been ratified by Malaysia, the most notable being the Domestic Workers Convention, 2011 (No.189).[61]

Having said that, the ratification of CEDAW (regardless of reservations) is a silver lining. It has several notable provisions which are significant to the protection of FDWs in Malaysia and their right to equal protection from long working hours, *inter alia*: (i) State Parties to adopt legislation to prohibit discrimination against women which includes modifying or abolishing existing laws, regulations, customs and practices which constitute '*discrimination against women*'[62] (Article 2);[63] (ii) State Parties to ensure

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60 Holliday (n 11).

61 See, eg, (1) Migration for Employment Convention (Revised), 1949 (No. 97), which includes the ILO Migration for Employment Recommendation (Revised), 1949 (No. 86); (2) Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); and (3) Domestic Workers Convention, 2011 (No.189). See also Holliday (n 11).

62 Article 1 of CEDAW provides that for the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

63 Article 2 of CEDAW provides that States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work (Article 11(d));[64] and (iii) State Parties to take all appropriate measures in the field of employment to ensure the right to protection of health and to safety in working conditions (Article 11(f)).[65]

Further, the CEDAW Committee has defined gender-based violence as a practice or abuse that disproportionately affects a woman's ability to enjoy their basic rights and this would constitute discrimination under CEDAW.[66] From this definition, it is evident that the exploitative conditions vis-à-vis long working hours with no rest days that FDWs face can be characterized as gender-based discrimination.[67] To date, Malaysia has failed in its CEDAW obligations to address these abuses levied upon FDWs by not modifying its legislation and regulations to protect FDWs from long working hours. Sadly, Malaysia like many dualistic States claim that they are not bound by these provisions.

B *Applicability of CEDAW in Malaysia*

The applicability of CEDAW in Malaysia was considered in the case of *Noorfadilla Bt Ahmad Saikin v. Chayed Bin Basirun & Ors*[68] where the High Court declared that CEDAW was binding on Malaysia and had the force of law. This meant that Malaysia was obliged to follow the provisions of CEDAW in interpretating Article 8(2) of the Federal Constitution.[69] This decision had the potential of revolutionising womens' rights in Malaysia as it had the effect of expanding the rights of women significantly. However,

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(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and
(g) To repeal all national penal provisions which constitute discrimination against women.

64 Article 11(1)(d) obligates all States Parties to ensure the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.

65 Article 11(1)(f) obligates all States Parties to ensure the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

66 Alice Huling, 'Domestic Workers in Malaysia: Hidden Victims of Abuse and Forced Labor', (2011) 44 *NYUJ Int'l L. & Pol.* 629.

67 Ibid.

68 [2012] 1 MLJ 832

69 Ibid [25] where it was held that, 'CEDAW is not a mere declaration. It is a convention. Hence, following the decision of the Federal Court in *Mohamad Ezam's* case (supra), it has the force of law and binding on members states, including Malaysia. More so that Malaysia has pledged its continued commitments to ensure that Malaysian practices are compatible with the provision and principles of CEDAW as evidenced in the letter

subsequently in the case of *Airasia Berhad v. Rafizah Shima Bt Mohamed Aris*[70], the Court of Appeal unequivocally reiterated the 'four-walls' approach by declining to consider international obligations and stated that CEDAW is not binding on Malaysia because it has not been transformed into local legislation.[71]

Notwithstanding the decision in *Airasia Berhad,* it is submitted that this case does not expressly overrule the decision in *Noorfadila* as the nature of these two cases are different. Article 8(2) was applicable in *Noorfadila* because a public authority was involved whereas in *AirAsia Berhad*, the parties were private. Therefore, in interpreting Article 8(1) with Article 8(2) of the Federal Constitution (which was amended after the ratification of CEDAW to include the word 'gender'); there is jurisprudence in favour of using CEDAW's provisions in expanding the interpretation of Article 8 which could ultimately support the argument that the exclusion of FDWs from basic labour protections under the Employment Act has violated Article 8(1) read together with Article 8(2) of the Federal Constitution.[72]

V OTHER PROTECTION FOR FDWS

A *Protection under Contract Law*

The fact that legislation sets no limits on working hours or provide weekly rest days for FDWs does not *ipso facto* mean that FDWs are prevented from negotiating terms for maximum work hours or weekly rest days into their agreements or employment contracts. FDWs are at liberty to insert terms to protect them from long-working hours and no rest days but face a number of significant obstacles in this regard.

Firstly, most FDWs are unaware of the existence of their employment contract let alone the terms stated in their employment contract.[73] This is due largely to the methods of recruitment of FDWs and the recruitment mechanisms that are in place where the contracts of employment are used primarily as an immigration mechanism.[74] Other factors include the lack of education or access to legal expertise possessed by these FDWs.[75]

Secondly, even if the FDWs were able to contract terms that provide maximum working hours and rest days into their contract, they face an uphill task in enforcing these contractual terms as the legal and enforcement process are time-consuming and burdensome.[76] If the FDWs initiate a claim, the FDWs' contract could be terminated

from the Permanent Mission of Malaysia to the Permanent Missions of the Members States of the United Nations dated 9 March 2010'.

70 [2014] MLJU 606.

71 Ibid [37] and [41] where the Court of Appeal held that, 'In our considered opinion, CEDAW does not have the force of law in Malaysia because the same is not enacted into any local legislation' and 'The practice in Malaysia with regard to the application of international law is generally the same as that in Britain, namely, the Executive possesses the treaty-making capacity while the power to give effect domestically rests with Parliament. For a treaty to be operative in Malaysia, therefore, it requires legislation by Parliament'.

72 Neo (n 11). See also Chee Din, Rahmat and Mashudi (n 43).

73 Eleanor Taylor-Nicholson (n 8).

74 Holliday (n 11).

75 Eleanor Taylor-Nicholson (n 8).

76 Ibid.

by the employer that would leave them in a state of 'limbo'. They would be unable to pursue employment with a different employer and will be forced to await the outcome of the claim. If their permit is revoked they could be subjected to arrests and deportation.[77] Further, if the FDWs initiate a claim, the FDWs will need to apply for a 'Special Pass'[78] and would have to somehow finance the claim whilst paying for their daily living expenses without having a job. This will often prove to be overwhelming and insurmountable for FDWs.[79] This likely outcome indubitably deters many FDWs from pursuing claims such as this.

B *Bilateral Memoranda of Understanding*

Bilateral Memoranda of Understanding ('MOUs') can potentially provide some protection for FDWs with regard to having a maximum work hour limit and weekly rest days. There have been several countries such as Nepal, Sri Lanka, Bangladesh, Pakistan, India, Vietnam , Indonesia, Philippines and Cambodia that have negotiated MOUs with Malaysia in relation to FDWs.[80] However, only the Philippines have actually included provisions to protect FDWs from long working hours ie maximum daily hours, at least eight hours of daily rest, 15 days of annual leave, and public holidays.[81]

The utilization of MOUs has not been successful and studies show that it does not result in any fundamental change for FDWs as not much weight is placed on MOUs in labour practices.[82] It has been stated that MOUs are mostly used as an immigration mechanism rather than a viable solution for labour grievances.[83]

Nevertheless, the writer submits that if there are contractual terms within the employment contract that protects FDWs from long working hours, this remains a significant protection that can be pursued by FDWs. However, the writer acknowledges the obstacles of access to justice faced by FDWs in this regard.

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77 See Robertson Jr (n 45) 8-9: 'Documented migrant workers who have entered Malaysia to work are required to work only for the employer who brought them into the country. Work permits are good for one year, and can be renewed annually for up to three years'.

78 Ibid, 7. A 'Special Pass' is a process that allows a terminated migrant worker to temporarily remain in the country while the worker's case is being considered, but this process is relatively difficult to access and expensive. This Special Pass is issued by the Immigration Department using the authority under Regulation 14 of the Immigration Regulations of 1963 which grants the discretion to the Immigration Department to allow an additional stay of one month for migrants for special reasons, and provides that the pass can be extended in one month increments issued at the discretion of the Immigration Department. There have been numerous cases when the denial of an application for the Special Pass effectively short circuits a worker's complaint under the Industrial Relations Department or Industrial Court to the relevant authorities.

79 Ibid.

80 Holliday (n 11).

81 Ibid.

82 Ibid.

83 Ibid.

C *Protection under the Occupational Safety and Health Act 1994[84] ('OSHA 1994')*

Section 4 of the OSHA 1994 states that one of the objects of the Act is *inter alia* to protect the safety, health and welfare of persons at work against risks to safety or health arising out of the work including promoting a healthy environment for persons at work which is adapted to their physiological and psychological needs.[85]

Further, Section 15(1) of the OSHA 1994 provides that it is the duty of the employer to ensure the health and safety of all his employees.[86] As we have discussed earlier, long working hours have been established by numerous studies to be hazardous to the health and safety of FDWs. Hence, if the employer does not provide adequate rest for the FDWs, it will be an offence under the OSHA 1994, specifically section 19 of the OSHA 1994.[87]

One challenge that may hinder FDWs in utilizing this protection is that there is no specific reference to FDWs under the OSHA 1994. Domestic workers are also not expressly stated in Schedule 1 of the OSHA 1994 to be covered under the Act which leaves their protection under the Act subject to interpretation by the courts and authorities.

VI CHALLENGES TO ACCESS TO JUSTICE

A *Legal Mechanism for Grievances*

FDWs in Malaysia have essentially two legal avenues to file their grievances: (1) to lodge a complaint with the Labour Department; or (2) for cases of wrongful dismissal, to lodge a complaint with the Industrial Relations Department.[88] However, statistics show that there is a disparity with the number of violations and cases pursued. Arguably, this is caused by several systemic factors such as lack of enforcement, the isolation of foreign domestic workers, and largely ineffective labour laws.[89]

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84 Occupational Safety and Health Act 1994 ('OSHA') (Act 514).

85 Section 4 of the OSHA 1994 states that the objects of this Act are—
(a) to secure the safety, health and welfare of persons at work against risks to safety or health arising out of the activities of persons at work;
(b) to protect persons at a place of work other than persons at work against risks to safety or health arising out of the activities of persons at work;
(c) to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs; and
(d) to provide the means whereby the associated occupational safety and health legislations may be progressively replaced by a system of regulations and approved industry codes of practice operating in combination with the provisions of this Act designed to maintain or improve the standards of safety and health.

86 Section 15(1) of the OSHA 1994 (General duties of employers and self-employed persons to their employees) states that it shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees.

87 Section 19 (Penalty for an offence under section 15, 16, 17 or 18) provides that a person who contravenes the provisions of sections 15, 16, 17 or 18 shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

88 Holliday (n 11).

89 Ibid. See also Eleanor Taylor-Nicholson (n 8).

To further exacerbate matters, if these FDWs do file complaints, they are often faced with difficulties in identifying who their employer is (as they are never given the actual employment contracts and deal exclusively with recruitment agents who do not divulge this information), producing evidence to substantiate their claim, and, are unable to maintain such claims due its long process to reach a resolution of final judgment.[90] It must also be noted that many abuses of FDWs are committed out of the view of the public which makes these claims difficult to prove.

B *Other Obstacles faced by FDWs*

FDWs face a myriad of challenges in obtaining a just and fair outcome to abuses against them. Firstly, the immigration system is skewed against FDWs as it is focused on breaches and sanctions against FDWs themselves rather than the employers.[91] Secondly, FDWs are in a vulnerable position because if they decide to make a complaint, their contract of employment could be terminated by their employer leaving them in an extremely vulnerable position as they are unable to secure another job with a different employer and places their migration status in serious jeopardy.[92]

Next, the labour laws in Malaysia are heavily discriminatory against domestic workers and the legal mechanisms in place are ineffectual for FDWs. Due to the lack of legal expertise and legal knowledge, FDWs face an insurmountable task in proving their claims in a tribunal or court of law.[93] All this and the fact that they are unable to unionize leaves FDWs without any legitimate chance to be successful in a complaint or claim.

VII CONCLUSION

As stated earlier, there have been numerous countries (mostly developed countries) that have enacted legislation vis-à-vis maximum work hour limit and weekly rest days. There have also been Latin-American countries such as Argentina, Chile and Paraguay that have enacted national legislation to protect FDWs.[94] FDWs unions within these countries have played an instrumental part in advancing the ratification of the ILO Domestic Workers Convention[95] in their respective countries.[96] Once ratified, these States are obliged to ensure that FDWsare provided with necessary labour protection, in particular, Article 10[97] which requires that FDWs have weekly rest of 24 hours consecutively and that they

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90 Holliday (n 11). See also Eleanor Taylor-Nicholson (n 8).

91 Ibid.

92 Robertson Jr (n 45). See also Eleanor Taylor-Nicholson (n 8).

93 Eleanor Taylor-Nicholson (n 8).

94 Lorena Poblete, 'The ILO Domestic Workers Convention and Regulatory Reforms in Argentina, Chile and Paraguay- A Comparative Study of Working Time and Remuneration Regulations', (2018) 157(3) *International Labour Review* 435-459.

95 ILO Domestic Workers Convention, 2011 (No. 189). Convention concerning decent work for domestic workers (05 September 2013Adopted16 June 2011) ('Domestic Workers Convention').

96 Poblete (n 94).

97 Domestic Workers Convention (n 93) Article 10 provides as follows:

1. Each Member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and

are entitled to normal working hours comparable with other workers. In Malaysia, FDWs cannot form a union and there are no major organisations in Malaysia that are specifically catered to FDWs. It is no surprise that there has been no tangible effort made by Malaysia to ratify the ILO Domestic Workers Convention.

FDWs in Malaysia face various forms of abuse and discrimination not only from the public but also legally through discriminatory legislation. The fact that authorities and laws discriminate against FDWs and deny FDWs basic labour protections such as a maximum-working-hours, weekly rest days, paid annual leave, and sick leave are abhorrent and denigrates FDWs to a lesser class of people. This perception is not lost on the general public who are in a way given the green-light by those in power to exploit FDWs and use them as their property rather than employees. It is conceivable that this lack of protection from the law may precipitate other forms of abuses towards FDWs such as violence and sexual abuse due to the fact that FDWs have been legally de-humanized.

The purpose and design of the Employment Act is to protect the rights of all employees from abuse, yet, it has failed on all accounts to protect the basic labour rights of FDWs, specifically with regard to long working hours and no rest days. Although there is no legitimate objective that has been advanced by the exclusion of FDWs from Part XII of the Employment Act, it has been perpetuated without due regard to the fundamental rights of FDWs that are enshrined within the Federal Constitution. Even the health and safety of FDWs have been totally disregarded. There is no basis or reasonable explanation why FDWs are excluded from Part XII of Employment Act and it is high time that the Employment Act is overhauled to be aligned with principles of the Federal Constitution and to international standards of employment of FDWs.

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weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work.

2. Weekly rest shall be at least 24 consecutive hours.
3. Periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work to the extent determined by national laws, regulations or collective agreements, or any other means consistent with national practice.

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A COMPARATIVE STUDY OF MARITAL RAPE LAWS IN MALAYSIA, INDONESIA AND SINGAPORE: TOWARDS SAFEGUARDING CHILD BRIDES

Pavitra Kalaiselvan*

Abstract

Pursuant to Article 19 of the Convention on the Rights of Child ('CRC'), a state party is obliged to provide pertinent legal protection for children from all forms of violence, including sexual abuse. Despite being a state party to both CRC and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Malaysia has fallen behind on achieving this. The Malaysian position of simultaneously legalising marital rape and child marriages, without placing any legal protection for girls has placed child brides vulnerable to becoming victims of marital rape. Thus, this paper aims to address the loophole in the existing laws relating to marital rape and child marriages in Malaysia, and suggests law reform to protect child brides. To achieve this aim, the laws relating to marital rape and child marriages in Malaysia and its lacuna will be examined. Following this, a comparative study will be conducted on laws relating to marital rape and child marriages in Indonesia and Singapore.

Keywords: Penal Code, marital rape, child bride, child marriage

I INTRODUCTION

Every individual has the right to be free from sexual violence, irrespective of their gender, age, and marital status. Unfortunately, this is not the case for women and girls in Malaysia as laws that violate this right remain in force. In 1989, lawmakers made a remarkable amendment to section 375 of the Penal Code. First and foremost, the qualifying age for a victim of statutory rape was increased from 14 to 16 years of age.[1] Secondly, the Exception to section 375 ('Exception') was revised by removing the marital rape protection for child brides below the age of 13.[2] These amendments to section 375 were erratic, where the lawmakers at one end increased the qualifying age for a victim of statutory rape to 16 as a crime control measure, while at the other end, protection from marital rape for child brides below 13 years of age was removed due to the legalisation of child marriages.

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1 Penal Code (Amendment) Act 1989 (Malaysia) s 7.

2 Ibid.

These amendments imply that a child below the age of 16 is incapable of giving consent for sexual intercourse unless she is married. The Exception and the legitimisation of child marriages in Malaysia have together placed child brides vulnerable to marital rape. It has been 33 years since the revised law came into effect, and major problems have emerged consequently. However, the Malaysian government has yet to review its decision to either criminalise marital rape or increase the minimum age of marriage to resolve these issues. This is due to the perception that it will violate religious beliefs.

Thus, this paper supports immediate law reform to safeguard child brides, being the most vulnerable victims of marital rape in Malaysia. This study is structured into five layers. The first layer of this paper briefly introduces the outline of this study and the terms used in this paper. In the second layer, this paper addresses the gaps in the current laws. In achieving this, the laws, issues, and Malaysian strategies to protect child brides are explored. In the third layer, the approach of Indonesia and Singapore in protecting child brides from rape within marriage are studied. Following this, the fourth layer discusses the issue of whether criminalising marital rape violates Syariah laws, weaknesses in the Malaysian strategy and the approach of Indonesia and Singapore in protecting child brides. In the final layer, law reform suggestions to remedy the Malaysian situation are proffered by the researcher.

Throughout this paper, the following terms are used, which bears the meaning prescribed as follows:

(i) 'Child marriage' refers to the marriage of an individual under 18 years of age.
(ii) 'Child bride' refers to a married female child under 18 years of age.
(iii) 'Marital rape' refers to sexual intercourse between a husband and wife in a valid marriage, which lacks the wife's consent.
(iv) 'Statutory rape' refers to a category of rape offence, where the victim is a child under 16 years of age who is deemed by law to be not capable to consent to the sexual act due to her young age.
(v) 'Qualifying age for a victim of marital rape' refers to the minimum age set by the law to be recognised as a victim for the offence of marital rape.
(vi) 'Qualifying age for a victim of statutory rape' refers to the minimum age set by the law to be recognised as a victim for the offence of statutory rape.

II LAWS, ISSUES AND THE MALAYSIAN STRATEGY

A *Amendment of the Exception and its effect*

The Exception in the Malaysian Penal Code is inherited from the Indian Penal Code 1860. The Indian Penal Code 1860 was adopted and introduced to the Straits Settlement Colony[3] in 1871 as the Straits Settlement Penal Code [No.14 of 1871 (S.S)] ('SS Penal

[3] Penang, Malacca and Johor.

Code').[4] The enforcement of the Exception in this nation can be traced back to the SS Penal Code.[5] Initially, the Exception in the SS Penal Code was framed as:

> 'Sexual Intercourse by a man with his own wife, the wife not being under 12 years of age, is not rape'.

Marital rape was criminalised in the SS Penal Code if the wife was under 12 years of age. Eventually, in 1936, the application of the SS Penal Code was extended to the Federated Malay States as Penal Code (F.M.S. Cap 45). The Exception in the Penal Code (F.M.S. Cap 45), was slightly varied by increasing the qualifying age for a victim of marital rape from 12 to 13 years of age.[6] Thereafter, the application of the Penal Code[7] was extended to the Federation of Malaya[8] in 1948 and throughout Malaysia[9] in 1976, without any amendments to the expression of the said Exception. Up until 1989, marital rape was criminalised in Malaysia on the condition that the wife was under 13 years of age. So, there was a certain extent of protection for child brides from marital rape, until the Exception was amended.

In 1989, section 375 was revised again.[10] This time, there were two distinct amendments in the newly substituted section 375. The first alteration increased the qualifying age for a victim of statutory rape from 14 to 16 years of age. Secondly, its Exception was modified by removing the qualifying age for a victim of marital rape set forth as follows:

> 'Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognised in the Federation as valid, is not rape'.

This amendment came into place as a crime control measure due to a sudden spike in the number of rape cases in 1988.[11] The qualifying age for a victim of statutory rape was raised due to the inability of a child below 16 years of age to understand the effect and consequence of her consent.[12] Along with this, the qualifying age for a victim of marital rape was removed from the Exception due to the existence of valid marriages of Muslim females below the age of 16 at that time.[13] The amendment to section 375 is inconsistent, as, on the one hand, the amended law aims to protect children by increasing the qualifying

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4 Straits Settlement Penal Code [Ordinance No.14 of 1871 (Straits Settlement)] ('SS Penal Code').

5 Norbani Mohamed Nazeri, (2010), 'Criminal Law Codification and Reform in Malaysia: An Overview', *Singapore Journal of Legal Studies* 375-399, 375.

6 Penal Code (F.M.S. Cap 45) (Malaysia) Exception to s 375 provides as follows:
'Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape'.

7 Penal Code (Malaysia).

8 Penal Code (Amendment and Extended Application) Ordinance 1948 (Malaysia).

9 Penal Code (Amendment and Extension) Act 1976 (Malaysia).

10 Penal Code (Amendment) Act 1989 (Malaysia) s 7.

11 Malaysia, Parliamentary Debates, House of Representatives (22 March 1989), (Tan Sri Dato' Mohamed Zahir Bin Haji), 2158. Retrieved from: < http://www.parlimen.gov.my/files/hindex/pdf/DR-22031989.pdf>

12 Ibid, 2162.

13 Ibid, 2163.

age for a victim of statutory rape to 16 years of age while on the other hand, the existing protection for child brides below 13 years of age was stripped out, as certain Malaysian laws permitted underaged marriages. This current law reform signified that unless a female child below the age of 16 is married, she is incapable of consenting to sexual intercourse. It is also observed that during the amendment process, the lawmakers had failed to delve into the level of maturity of a child under 16 years of age to understand the effects and consequences of her consent for marriage.

It is submitted that this amendment has stripped out the protection for child brides below 13 years of age, and therefore promotes a culture of rape. Over the years, child marriages have become a serious issue in Malaysia where cases of girls as young as 11 years old were married off to older men.[14] Presently, there is no accurate data on child marriages in Malaysia, and the Ministry of Women, Family and Community Development ('Ministry') is in the midst of collecting and coordinating statistics for underaged marriages and divorces, through its National Strategy Plan in Handling the Cause of Child Marriage.[15] Nevertheless, the available data revealed by the Ministry in its 2018[16] and 2020[17] parliamentary replies are summarised in Figure 1.

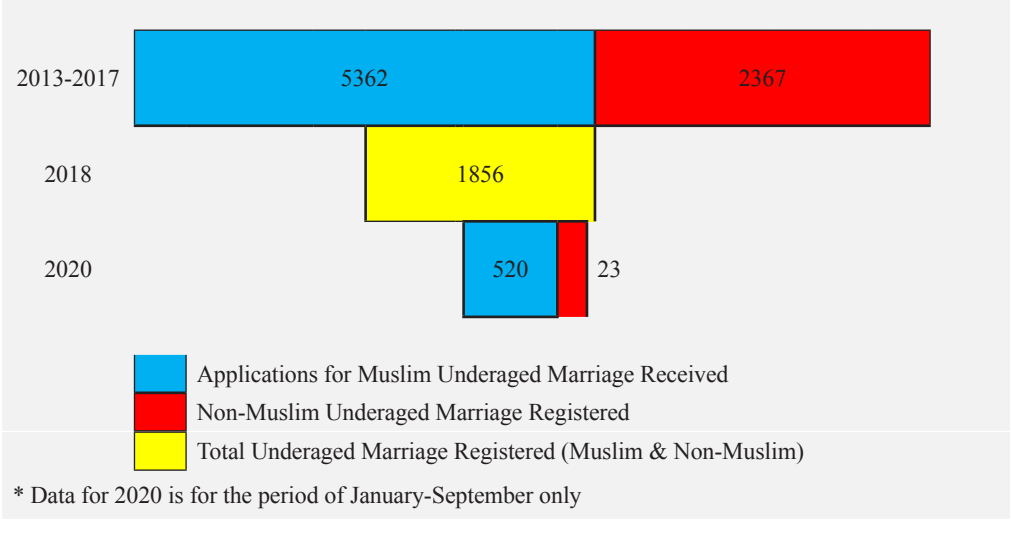

Figure 1: Figures of Underaged Marriage Registered and Applications for Underaged Marriage Received

14 New Straits Times, (12 August 2018), '11 and Married: Malaysia Spars Over Child Brides', *New Straits Times online.* Retrieved from: <https://www.nst.com.my/news/nation/2018/07/396076/11-and-married-malaysia-spars-over-child-brides>

15 Factor 6, National Strategy Plan in Handling the Causes of Child Marriage.

16 Malaysia, Parliamentary Debates, House of Representatives (16 August 2018), (Dato' Mohamad Ariff bin Md Yusof), 7. Retrieved from: <https://www.parlimen.gov.my/files/hindex/pdf/DR-16082018.pdf>

17 Malaysia, Parliamentary Reply, House of Representative, (2 December 2020), Question No.27. Retrieved from: <https://www.kpwkm.gov.my/kpwkm/uploads/files/Dokumen/Jawapan%20Dewan%20Rakyat/20201202%20-%20final.pdf>

According to the Ministry, the data for the period of 2013 to 2017 and 2020 were derived from the records of the Syariah Judiciary Department of Malaysia for Muslim marriages and the National Registration Department for non-Muslim marriages. Meanwhile, the data for 2018 was acquired from the Malaysian Department of Statistics. There is no data available for 2019. The Ministry also revealed that Sarawak, Sabah, and Kelantan are the top three states which recorded the highest number of underage Muslim marriage cases for the period of 2013 to 2017[18] and 2020[19]. For 2020, the figures only cover the months of January until September. These data do not reflect the true number of child marriages that have taken place for the abovementioned period, for several reasons. Firstly, for Muslim marriages, the actual number of marriages registered was not revealed. Secondly, the data only covers legally registered marriages. The figure of child marriages in the Rohingya community and unregistered customary marriages were not included in these data. Despite lacking accurate data, the available number gives an indication that the rate of child marriages is still significant. In addition to these data, it was revealed during the parliamentary debate on 2 December 2021 that as of this date, 445 children dropped out of school from the period of 2020 for the purpose of getting married, where 411 of them were girls and the balance 34 were boys.[20] This latest data reveals that child marriage is an ongoing phenomenon in Malaysia despite the preventive measures of its occurrence having been taken by the Malaysian government.

B *Issues arising from the Amendment of the Exception*

Throughout the 33 years since the 1989 amendment, legitimisation of child marriages and lack of protection for child brides have caused several issues to emerge which exposes child brides to great risk. Two such identified issues will be discussed further in the following paragraphs.

1 *First Issue*

Stripping out the protection for child brides and the legalisation of child marriages have paved the way for rapists to marry their child victims to escape the criminal justice system. Past research has found that in the case of a rapist marrying his rape victim, the wife could suffer from physical and mental abuse, be deserted by her husband, and in the worst-case scenario, be left to raise their child.[21] In the last ten years, there were numerous marriages between rapists and rape victims reported in Malaysia, where, in some instances, the rapists were far older than their victims.[22] Past studies have also shown that teens who married much older spouses experienced intimate partner violence such as

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18 Malaysia, Parliamentary Debates, House of Representatives (n 16), 9.

19 Malaysia, Parliamentary Reply, House of Representatives (n 17).

20 Ibid, 12.

21 Kelly C. Connerton, (1997-1998), 'The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists', *Albany Law Review* 61 Alb. L. Rev 237.

22 See for example *Riduan Masmud v PP* [2015] 1 LNS 449; The Straits Times, (6 October 2016), 'Malaysian Court Orders Retrial Of Rapist Who Married 14-Year-Old Victim', *The Straits Times online.* Retrieved from: <https://www.straitstimes.com/asia/se-asia/malaysian-court-orders-retrial-of-rapist-who-married-14-year-old-victim>

non-consensual sex which is unpleasant and painful.[23] In addition, the victim would drop out of school which deprives her of learning income-generating skills and face trouble securing employment.[24] This could leave a huge negative impact and deprivation of childhood on the child brides. Several reported cases of rapists marrying their underaged victims are discussed in the following paragraphs.

In 2012, Nur Fazira Saad was 13 years of age when she married 20-year-old Mohd Fahmi Mohamed Alias in Kedah. However, their marriage lasted for only about one year.[25] After their divorce in 2013, Saad Mustafa, the father of Nur Fazira Saad revealed that his daughter was a gang rape victim of Mohd Fahmi Mohamed Alias and two other teenagers.[26] Initially, a police complaint regarding the rape incident was lodged at the Kulim police station against Mohd Fahmi Mohamed Alias. However, his parents had solicited the victim's family to withdraw this complaint.[27] Thereafter, the complaint was withdrawn and both families decided to have them married to prevent them from being accused of engaging in pre-marital sexual intercourse.[28] It was also claimed that Nur Fazira Saad was abused by her in-law's family.[29]

In 2014, another case of a rapist marrying his victim emerged in Sabah. In *Riduan Masmud v PP*,[30] the accused person, a Sabah-based restaurant manager was charged with raping a child aged only 12 years and six months. The Sessions Court convicted him and sentenced him to 12 years imprisonment, two strokes of whipping, and one year of supervision after serving his sentence. On appeal, the High Court affirmed the Sessions Court's decision. The High Court judge, in his ruling, highlighted the accused's attempt to corrupt and tamper with the witness by marrying the victim halfway through the Sessions Court trial and paying a sum of RM5,000 to the victim's family.[31] This subsequently resulted in the victim's refusal to testify further against the accused, leading to inconsistency in the victim's testimony.[32] In order to clarify the inconsistency in the victim's evidence, the prosecution had to tender the victim's statement pursuant to section 112 of the Criminal Procedure Code.[33] The victim had also attempted to withdraw her police report against the accused.[34] Unfortunately, the police refused to allow the

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23 Christine Mwanukuzi and Tumaini Nyamhanga, (2021), 'It Is Painful and Unpleasant: Experiences of Sexual Violence Among Married Adolescent Girls In Shinyanga, Tanzania', 18:1 *Reproductive Health,* 1.

24 Joar Svanemyr, Venkatraman Chandra-Mouli, Charlotte Sigurdson Christiansen and Michael Mbizvo, (2012), 'Preventing Child Marriages: First International Day of The Girl Child "My Life, My Right, End Child Marriage"', 9:31 Reproductive Health, 1.

25 Christoper Tan, (29 November 2013), ''Saya Tiada Pilihan' - Bapa Nor Fazira', *Star Online*. Retrieved from: <https://www.mstar.com.my/lokal/semasa/2013/11/29/saya-tiada-pilihan--bapa-nor-fazira>

26 Munirah A Sani, (29 November 2013), 'Married Off Because She Was Raped', *Astro Awani online*. Retreived from: <https://www.astroawani.com/berita-malaysia/married-because-she-was-raped-26142 >

27 The Star, (29 November 2013), 'Dad: I Agreed To Teen Daughter's Marriage Because She Had Been Raped', *The Star online*.Retrieved from: <https://www.thestar.com.my/news/nation/2013/11/29/i-had-no-choice-then-says-father-of-teen-girl-dad-i-agreed-to-the-marriage-because-she-had-been-rape/>

28 Ibid.

29 Ibid.

30 [2015] 1 LNS 449 (Stephen Chung Hian Guan, J) (High Court in Sabah and Sarawak) ('Riduan Masmud').

31 Ibid [46].

32 Ibid.

33 Criminal Procedure Code (Malaysia) s 112.

34 Riduan Masmud (n 30).

withdrawal of the police report.[35] This case provides a clear-cut example of a rapist marrying his child victim in an attempt to escape the criminal justice system, although the accused's attempt failed in this case.

In 2015, 22-year-old Ahmad Syukri Yusuf was charged at the Kuching Sessions Court for raping a 14-year-old girl twice in October of that year.[36] Two charges were brought against him where if convicted, he could be sentenced to a maximum jail term of 30 years and whipping. Ahmad Syukri Yusuf married his victim after he was charged in the Sessions Court. Thus, upon production of his marriage certificate with the rape victim, the Judge acquitted him.[37] Following this, an application was filed in the High Court to review his acquittal, and a retrial was ordered.[38] No further data is available on the status of the retrial.

Another marriage between a 35-year-old man and a 14-year-old disabled girl was reported in Seremban in 2015. The man was accused of raping his 11-year-old sister-in-law. He made his 14-year-old wife record his sexual conduct with the victim and the video was circulated through Whatsapp.[39] According to the victim, she was raped multiple times by her brother-in-law. Eventually, he was arrested and charged pursuant to section 375(g) of the Penal Code at the Seremban Sessions Court where he pleaded guilty.[40] It was also reported that his 14-year-old disabled wife was his rape victim prior to his marriage with her, but no police report was lodged against the accused on this count.[41] The accused, by marrying his 14-year-old disabled wife, successfully evaded prosecution and escaped rape charges for offences committed against her. This case also raises doubt about the manner in which consent for marriage was obtained from the disabled child.

The trend of rapists marrying their child victims occurs among both Muslims and non-Muslims. However, non-Muslim child marriages of females below 16 years of age often go unreported as they only go through customary marriage, without registration pursuant to the law.[42] Although the government, through the intervention by the Department of Social Welfare has taken measures to prevent the occurrence of marriage between the rapist and his victim,[43] this can only be executed if the victim reports the rape incident in the first place.

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35 Ibid.

36 The Borneo Post, (18 March 2017), 'Sessions Court Adjourns Statutory Rape Case', *Borneo Post Online*. Retrieved from: <http://www.theborneopost.com/2017/03/18/sessions-court-adjourns-statutory-rape-case>

37 The Borneo Post, (15 July 2017), 'Bail Revoked for Man Charged With Statutory Rape', *Borneo Post Online*. Retrieved from: <http://www.theborneopost.com/2017/07/15/bail-revoked-for-man-charged-with-statutory-rape/>

38 The Straits Times, (6 October 2016), 'Malaysian Court Orders Retrial Of Rapist Who Married 14-Year-Old Victim', *The Straits Times online*. Retrieved from: <https://www.straitstimes.com/asia/se-asia/malaysian-court-orders-retrial-of-rapist-who-married-14-year-old-victim>

39 The Star, (5 December 2015), 'Laws To Protect Children,' *The Star Online*. Retrieved from: <https://www.thestar.com.my/opinion/letters/2015/12/05/laws-to-protect-children/>

40 Ibid.

41 Ibid.

42 Law Reform (Marriage and Divorce) Act 1976 (Malaysia), Christian Marriage Ordinance [Sabah Cap. 24] (Malaysia), Civil Marriage Ordinance [Sabah Cap. 92] (Malaysia).

43 Bernama, (4 August 2016), 'Rogol Tetap Rogol. Tidak Boleh Ditutup Dengan Perkahwinan', *Astro Awani online,* statement of Datuk Seri Rohani Abdul Karim, Minister of Women, Family And Community Development.

2 *Second Issue*

The second issue is the occurrence of child marriage in the Rohingya community. According to the statistics provided by the United Nations High Commissioner for Refugees ('UNHCR') as of May 2021, there are 102,560 registered Rohingya refugees and asylum seekers in Malaysia.[44] As Malaysia is yet to ratify the 1951 Refugee Convention and its 1967 Protocol, refugees and asylum seekers in Malaysia have no legal status and lacks legal protection from the government. Nevertheless, the issue of child marriage is under the purview of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')[45] and the occurrence of underage marriage among the Rohingya community needs to be addressed for the best interest of child victims in their community.

In general, Rohingya child marriages take place among their community which has settled in Malaysia. These are arranged marriages solemnised by a Kadi, the Islamic affairs judge from their community.[46] A glimpse of Rohingya child marriages can be seen from the 2019 reported case in Penang, where police and religious authorities intervened and stopped a marriage between an 11-year-old girl and a 21-year-old Rohingya man, following a tip-off by a social activist.[47] It was revealed by the father of the child bride that the marriage was arranged due to his family's financial difficulties.[48] Further, the victim would no longer attend school and would be married off when she was older.[49] It has become a practice among the community to stop the schooling of their daughters upon reaching puberty and marry them off to ease the family's financial burdens. As the ratio of males outweighs females in this community,[50] Rohingya girls settled in Malaysia are vulnerable to child marriages.

Another option sought by wife-seeking Rohingya men is to approach marriage brokers or agents to arrange trafficked girls into Malaysia for the purpose of marriage. Usually, a sum of money is paid for this purpose. Over the years, a human rights non-governmental organisation based in South East Asia known as Fortify Rights have

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Retrieved from: <https://www.astroawani.com/berita-malaysia/rogol-tetap-rogol-tidak-boleh-ditutup-dengan-perkahwinan-rohani-abdul-karim-113014>

44 See the UNHCR website, 'Figures at a Glance in Malaysia'. Retrieved from: <https://www.unhcr.org/en-my/figures-at-a-glance-in-malaysia.html>

45 Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') New York (entered into force 3 September 1981), art 16(2).

46 Elly Fazaniza, (2 October 2019), 'Child Marriage Not A Common Practice Among Rohingya Community', *The Sun Daily online*, quoting the statement of Myanmar Ethnic Rohingya Human Rights Organisation Malaysia (Merhrom). Retrieved from: <https://www.thesundaily.my/local/child-marriage-not-a-common-practice-among-rohingya-community-FI497456>

47 N. Trisha, (12 February 2019), 'It's A Sin To Send Her To School', *The Star online*. Retrieved from:<https://www.thestar.com.my/news/nation/2019/02/12/its-a-sin-to-send-her-to-school-no-normal-studies-for-rohingya-child-bride-who-has-come-of-age>

48 Ian McIntyre, (2 August 2019), 'Authorities and Social Activist Stop Wedding Of A Rohingya Man To A Child In Penang', *The Sun Daily online*. Retrieved from: <https://www.thesundaily.my/local/authorities-and-social-activist-stop-wedding-of-a-rohingya-man-to-a-child-in-penang-FL490722>

49 Ibid.

50 Figures at a Glance in Malaysia (n 44).

documented numerous cases of child-bride-trafficking into Malaysia.[51] In both types of marriage, there is either no consent from the child bride or consent is derived for the sake of easing their family's financial burden. The latter usually takes place with the hope of a better livelihood.

There are neither accurate statistics of child brides trafficked into Malaysia, nor statistics on child marriages in the Rohingya community. However, investigations conducted by the United Nations International Children's Emergency Fund ('UNICEF')[52], Al Jazeera[53], Rohingya Women Development Network[54], Fortify Rights[55], and CNA Insider[56] have identified numerous marriages of this kind. Recently, the US Department of State revealed in its 2021 Trafficking in Persons Report ('TIP Report') that Malaysia had been downgraded to Tier 3 which is the lowest tier rank. This was due to the insufficient effort to meet the minimum level in eradicating human trafficking and weak law enforcement efforts.[57] The 2020 TIP Report also disclosed that traffickers tend to recruit foreign women and young girls into Malaysia for the purpose of brokered marriages.[58] Moreover, statistics provided by UNHCR reveal that the number of registered male refugees and asylum seekers outweighs females, where 68% are males and only 32% are females.[59] Based on these statistics, an inference can be drawn that as the number of female Rohingya refugees settled in Malaysia is low, it is easy for male Rohingya refugees to resort to child-bride-trafficking as a source of income.

C *Malaysian Strategy*

In Malaysia, two major reforms were proposed to address the issue of marital rape and child marriage. Firstly, the new section 375A was introduced in the Penal Code as an alternative to the abolition of the Exception. Secondly, in 2018, the Federal Government proposed an increase to the minimum age of marriage in preventing child marriages. These two proposals will be discussed in detail in the following paragraphs.

1 *Enactment of section 375A of the Penal Code*

In 2006, the CEDAW Committee requested that Malaysia enacts laws to criminalise marital rape. However, instead of criminalising marital rape, section 375A of the Penal

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51 See the website of Fortify Rights, 'Malaysia: End Child Marriage, Protect Rohingya Refugee Girls'. Retrieved from: <https://www.fortifyrights.org/mly-inv-jnr-2019-02-21/>

52 Noor Aziah Mohd Awal and Mohd Al Adib Samuri, 'Child Marriage in Malaysia', (Working Paper, Universiti Kebangsaan Malaysia for UNICEF MALAYSIA.

53 Kaamil Ahmed, (8 May 2019), 'Rohingya Women, Girls Being Trafficked To Malaysia For Marriage', *Al Jazeera online*. Retrieved from: <https://www.aljazeera.com/features/2019/5/8/rohingya-women-girls-being-trafficked-to-malaysia-for-marriage>

54 Fortify Rights, (21 February 2019), 'Malaysia: End Child Marriage, Protect Rohingya Refugee Girls'.Retrieved from: <https://www.fortifyrights.org/mly-inv-jnr-2019-02-21/>

55 Ibid.

56 CNA Insider, (22 February 2017), 'Rohingya Brides For Sale in Malaysia'.

57 Department of State, United States of America, Trafficking in Persons Report, June 2021, 369.

58 Ibid, 113, 150, 151, 161.

59 Figures at a Glance in Malaysia (n 44).

Code was enacted in 2007 as a compromise.[60] Prior to the implementation of section 375A, a Special Select Committee was established to study the Penal Code (Amendment) Bill 2004. The committee's investigation found that marital rape contradicts the views of 'Syariah laws and other religions',[61] hence it would be inappropriate to criminalise marital rape in Malaysia.[62] During the second and third reading of the Penal Code (Amendment) Bill 2004 in Parliament, the question as to whether the husband has the right to have sexual intercourse with his wife regardless of consent[63] and the proposed abolishment of the Exception were raised. Unfortunately, the attempt to repeal the Exception failed. However, section 375A was successfully enacted.[64]

Section 375A of the Penal Code criminalises the act of a husband causing hurt, or fear of death, or fear of hurt to his wife or any other person for the purpose of having sexual intercourse with his wife. The gist of section 375A is to punish the husband for causing hurt, or fear of death, on his wife and not for having non-consensual sexual intercourse with his wife. On conviction under this section, the accused person can be sentenced to a maximum imprisonment term of five years. Ever since this law was enforced in 2007, there has only been one reported case of a charge being filed under this provision.

In the case of *PP lwn Mahathir Abu Bakar*,[65] the accused was charged with two offences. The first charge was for abetting rape[66] committed by a person named 'Ayie' on the accused's wife and the second charge was framed under section 375A, for causing fear of hurt to the victim (his wife) in order to have sexual intercourse. During the trial, the victim testified that the accused threatened her and forced her to have sexual intercourse with 'Ayie', while he watched the act taking place.[67] The Kangar Sessions Court found the accused guilty on both charges and sentenced him to six years imprisonment on the first charge and one year imprisonment on the second charge.[68] On appeal, the High Court found that the first charge was defective due to the prosecution's failure to specify the manner in which the accused abetted Ayie's rape, thereby proving that 'Ayie' was the main perpetrator for the rape. Hence, the accused was acquitted of the first charge. On the second charge, the High Court affirmed the findings of the Sessions Court and increased the imprisonment term to four years.[69] Upon analysing this case, the researcher is of the view that the punishment imposed pursuant to section 375A is lenient. In addressing this point, the elements of section 375A will be compared with the offences of criminal intimidation and rape under the Penal Code in the following paragraphs.

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60 Women's Aid Organisation, 'CEDAW & Malaysia', (April 2012), Malaysian Non-Government Organisations Alternative Report, 35. Retrieved from: <https://wao.org.my/wp-content/uploads/2018/08/Malaysian-NGO-CEDAW-Alternative-Report-2012.pdf>

61 Malaysia, Parliamentary Debates, House of Representatives, (12 July 2006), (Tan Sri Dato' Seri Diraja Ramli bin Ngah Talib), 75. Retrieved from: <http://www.parlimen.gov.my/files/hindex/pdf/DR-12072006.pdf>

62 Ibid.

63 Malaysia, Parliamentary Debates, House of Representatives, (13 July 2006), (Tan Sri Dato' Seri Diraja Ramli bin Ngah Talib), 39. Retrieved from: <https://www.parlimen.gov.my/files/hindex/pdf/DR-13072006.pdf>

64 Vide the Penal Code (Amendment) Act 2006 (Malaysia).

65 [2016] 10 CLJ 567 (Abu Bakar Katar, JC) (High Court in Malaya) *('*Mahathir Abu Bakar').

66 Penal Code (Malaysia) s 109, s 376.

67 Mahathir Abu Bakar (n 65) 572.

68 Ibid, 567.

69 Ibid, 568.

Firstly, as the gist of section 375A is to punish the husband's act of causing hurt, fear of death, or fear of hurt for the purpose of having sexual intercourse, it is crucial to compare this section with the offence of criminal intimidation pursuant to sections 503 and 506 of the Penal Code. Section 503 of the Penal Code explains 'criminal intimidation' as an act of threatening with injury to another person, with intent to cause alarm to the threatened individual.[70] While section 506 of the Penal Code adds on that '…if the threat is to cause death or grievous hurt…. shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both'.[71] Even though the wordings used to define the offence of 'criminal intimidation' differs from that of section 375A, the element of these offences are the same. However, unlike section 375A, section 506 imposes a longer imprisonment term of seven years.

Secondly, as the facts of *Mahathir Abu Bakar* reveals that the victim had non-consensual sexual intercourse with 'Ayie' and her husband, it is necessary to compare section 375A with the offences of rape and gang rape. Section 375(b) of the Penal Code interprets 'rape' as an act of a man having sexual intercourse with a woman without her consent. A person can be sentenced to a maximum imprisonment term of 20 years and is also liable to whipping on conviction.[72] On the other hand, section 375B of the Penal Code imposes an imprisonment term of ten to 30 years for the offence of gang rape, which is interpreted as an offence of raping a woman by one or more individuals in a group. In contrast to section 375A, the offence of rape and gang rape imposes a heavier punishment. The researcher is of the view that the Exception has hindered the accused from being charged for an offence of gang rape, despite the fact that the victim had non-consensual sexual intercourse with the accused and his friend, named 'Ayie'.

At this juncture, a comparison of punishment imposed for the offences of criminal intimidation, rape and gang rape under the Malaysian Penal Code would reveal that punishment under section 375A is very light. Thus, this sparks the question of whether the lighter punishment under section 375A provides a deterrent for the occurrence of marital rape, or protects a husband from a heavier sentence. Currently, as there are no available arrest statistics or crime reporting under section 375A, the effectiveness of this measure in combating 'marital rape' or forced sexual intercourse cannot be assessed based on these data. Despite the lack of data on section 375A, previous research has found that 9 to 11% of domestic violence victims reported sexual violence, particularly,

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70 Penal Code (Malaysia) s 503 provides as follows:
'Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation'.

71 Penal Code (Malaysia) s 506 provides as follows:
'Whoever commits the offence of criminal intimidation shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both; and if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both'.

72 See Penal Code (Malaysia) s 376(1).

forced sexual intercourse.[73] Even though section 375A was enacted to protect domestic violence victims, the law expressly criminalises the husband's act of causing hurt, fear of death, or fear of hurt to have sexual intercourse, and not for non-consensual sexual intercourse. The lack of the wife's consent is not an element embodied under section 375A. As such, at this point, whether section 375A comprehensively protects a victim from marital rape is questionable.

The wording of section 375A does not expressly incorporate non-consensual sexual intercourse between a legally married husband and wife and thus, imposes a lighter sentence. Hence, the researcher is of the view that Malaysia's approach of enacting section 375A as an alternative to criminalise marital rape does not comprehensively remedy the occurrence of spousal rape. Instead, the lighter sentencing imposed under section 375A shields a husband from sexual violence against his wife.

2 *Increasing the Minimum Age of Marriage*

The process of raising the minimum age of marriage in Malaysia is challenging, as there are several pieces of legislation that apply to different groups of people, setting different minimum ages across these groups.

The solemnisation and registration of non-Muslim marriages in Malaysia are governed by the Law Reform (Marriage and Divorce) Act 1976 ('LRA').[74] However, its application does not extend to Muslims[75] and natives of Sabah and Sarawak who are bound by native customary law or aboriginal customs, unless the parties opt to register the marriage pursuant to the LRA.[76] In addition, it also does not apply to marriages contracted under the Christian Marriage Ordinance [Sabah Cap. 24] or the Church and Civil Marriage Ordinance [Sabah Cap. 92].[77] Pursuant to section 10 of the LRA,[78] the minimum age for marriage is 18 years. However, a female aged 16 is allowed to marry with the authorisation of the Chief Minister.

On the other hand, Muslim marriages are governed by Islamic personal laws which differ from state to state. The Malaysian Federal Constitution confers powers upon the State Legislature to enact laws[79] pertaining to Islamic marriages.[80] For this reason, each state in Malaysia has its own Islamic Family Law Act, as tabulated in Table 1.

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73 Women's Aid Organisation Policy Brief (October 2018), 'Marriage Not a License to Rape'. Retrieved from: <https://wao.org.my/wp-content/uploads/2018/11/WAO-Policy-Brief-2018-1-Marital-Rape.pdf>'

74 See Law Reform (Marriage & Divorce) Act 1976 ('LRA') (Malaysia) s 3.

75 Ibid, s 3(3).

76 Ibid, s 3(4)(a).

77 Ibid, s 3(4)(b), (c).

78 Ibid, s 10.

79 Federal Constitution (Malaysia) art 74(2), art 77.

80 Ibid, See Item No1 of List II of the Ninth Schedule.

Table 1: List of Islamic Family Law Acts in accordance with the States in Malaysia[81]

States	Islamic Family Law Acts
Federal Territories of Kuala Lumpur, Labuan & Putrajaya	Islamic Family Law (Federal Territory) Act 1984 (Act 303)
Selangor	Islamic Family Law (State Of Selangor) Enactment 2003
Negeri Sembilan	Islamic Family Law (Negeri Sembilan) Enactment 2003
Malacca	Islamic Family Law (State Of Malacca) Enactment 2002
Johore	Islamic Family Law (State Of Johore) Enactment 2003
Pahang	Islamic Family Law Enactment 2005
Perak	Islamic Family Law (Perak) Enactment 2004
Kelantan	Islamic Family Law Enactment 2002
Terengganu	Administration Of Islamic Family Law Enactment 1985
Kedah	Islamic Family Law (Kedah Darul Aman) Enactment 2008
Perlis	Islamic Family Law Enactment 2006
Pulau Pinang	Islamic Family Law (State Of Penang) Enactment 2004
Sabah	Islamic Family Law Enactment 2004
Sarawak	Islamic Family Law Ordinance, 2001

In all these Acts, the minimum age for females to marry is 16, but it allows the marriage of a child below the specified age with the written permission of a Syariah Judge.[82] Permission of a Syariah Judge can be obtained through filing an application for underage marriage by the underaged individual. This must be done at the lower Syariah Court in the jurisdiction of the applicant's residence.[83] The applicant is required to submit a Notice of Application, which is supported by an affidavit enclosed with the required documents,[84] obtain a supporting letter from the marriage registrar, and pay a sum of fee fixed for the application.[85] The Syariah Court Judge will study the reasons for the underage marriage application, the family background of both the applicant and spouse, compatibility in marriage, sexual or reproductive background, and the applicant's understanding of marriage[86] before approving the application.

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81 Data collected and compiled from E-Syariah Official Portal: <http://www.esyariah.gov.my/portal/page/portal/Portal%20E-Syariah%20BI/Portal%20E-Syariah%20Carian%20Bahan%20Rujukan/Portal%20E-Syariah%20Undang-Undang>

82 Minimum age of marriage is prescribed under sections 7 or 8 of the legislation listed in Table 2.

83 'Applications For Marriage Requires Court Order / Permission', MyGovernment website: <https://www.malaysia.gov.my/portal/content/27657>

84 A copy of identity card, certificate of conversion to Islam (if applicable), marriage application form for the bride, marriage application form for the groom, and other related documents.

85 'Applications For Marriage Requires Court Order / Permission', (n 83).

86 Malaysia, Parliamentary Reply, House of Representative, (16 December 2021), 7. Retrieved from: < www.parlimen.gov.my/files/hindex/pdf/DR-16122021.pdf>

Meanwhile, the marriage laws of the natives of Sabah and Sarawak are governed by their native laws and customs which fall under the jurisdiction of their respective states,[87] as provided in Table 2. However, unlike the LRA and the state Islamic Family Law Acts,[88] the various native laws do not specify a minimum age for marriage.

Table 2 : List of Customary Laws in Sabah and Sarawak[89]

Orang Asli	Akta Orang Asli 1954
Sarawak	1. Native Customs (Declaration) Ordinance 1996 2. Majlis Adat Istiadat Ordinance 1997 3. Native Courts Ordinance 1992 4. Adat Iban 1993 5. Adat Bidayuh 1994 6. Adat Kayan-Kenyah 1994 7. Adat Bisaya 2004 8. Adat Lun Bawang 2004 9. Adat Kelabit 2008 10. Adat Penan 2011
Sabah	Native Courts Ordinance 1992 (Kaedah-Kaedah Mahkamah Anak Negeri (UndangUndang Adat Anak Negeri) 1995

In 2018, the former Prime Minister of Malaysia, Tun Dr. Mahathir Mohamad issued a directive to all states to increase the minimum age of marriage to 18.[90] Unfortunately, unanimity was not reached among the states for the same. Thus far, only Selangor has passed a bill to increase the marriage age to 18 years.[91] The bill to amend the Islamic Family Law (State Of Selangor) Enactment 2003 has also added a new section 8A, which sets out a stringent procedure for males and females below 18 years of age to get married. There is no total abolition of child marriages in Selangor, but the State has moved one step further toward preventing child marriages. Meanwhile, the Kelantan State government conducted a roundtable in 2018 which decided that underage marriages are consistent with Syariah law and has therefore declined to implement the relevant aspects of the Convention on the Rights of Child ('CRC') and CEDAW for Muslims in Kelantan.[92]

On 16 December 2021, Tuan Haji Idris bin Haji Ahmad, minister at the Prime Minister's Department, revealed during the parliamentary session that the Malaysian government had studied the proposal to increase the minimum age of marriage for Muslim

87 See List IIA of the Ninth Schedule to the Federal Constitution.

88 See Table 1.

89 Data obtained from National Strategy Plan in Handling the Causes of Child Marriage.

90 The Sun Daily, (21 October 2018), 'Tun Mahathir Orders State Govts To Raise Min Marriage Age To 18', *The Sun Daily online*. Retrieved from: <https://www.thesundaily.my/archive/tun-mahathir-orders-state-govts-raise-min-marriage-age-18-MUARCH585535>

91 Islamic Family Law (State of Selangor) (Amendment) Enactment 2018 (Enactment A56).

92 Malaysiakini, (29 November 2018), '"Child Marriage A Necessity In Kelantan" – Roundtable By PAS Gov't Concludes', *Malaysiakini online.* Retrieved from: < https://www.malaysiakini.com/news/453901>

females from 16 to 18 years of age.[93] Based on the feedback and opinions received, most of the states in Malaysia would like to maintain the minimum age of marriage as it is in their respective states' Islamic Family Law Act.[94] As such, the Malaysian government is of the view that there is no need to amend the minimum age of marriage for Muslim females in Malaysia.[95] It was also revealed that the Syariah Judiciary Department of Malaysia has implemented a strict Standard of Procedure ('SOP')[96] with effect from 28 September 2018 for underage Muslim marriages.[97] Further, following the adherence to this SOP, the number of approved Muslim underage marriages from the period of 1 September 2018 until 31 October 2021 have shown a reduction of 783 marriages compared to the period of 1 September 2015 until 31 August 2018.[98] Tuan Haji Idris bin Haji Ahmad also disclosed that the said strict SOP specifies certain criteria that will be taken into consideration such as the reasons for the marriage application, family background of the applicant and the future spouse, financial ability, education level, personal characteristics, health condition, sexual background, understanding on marriage, compatibility in marriage, presence of *wali*[99] (only for Muslim female applicants), and reports from the Department of Social Welfare Malaysia, Ministry of Health of Malaysia and the Royal Malaysian Police, if necessary.[100] Even though at one end the statistics revealed by Tuan Haji Idris bin Haji Ahmad shows a reduction in approval of underaged Muslim marriages, at the other end, the number of students dropping out from school for the purpose of getting married from the period of 2020 until 2 December 2021[101] remains relatively high.

In January 2020, the Ministry launched a five year National Strategy Plan in Handling the Causes of Child Marriage ('National Strategy Plan') which aims to increase awareness and change social perception relating to the marriage of minors.[102] Strategies and programmes were drafted to address six factors identified as the causes of underage marriages, of which loose laws that permit the marriage of a minor is one of the factors.[103] In its strategy, the government has taken a stand to increase the marriageable age for females under the Islamic Family Laws and customary laws listed in Tables 1 and 2 respectively.

The progress of the National Strategy Plan was questioned in parliament on 14 December 2020. Subsequently, the Ministry revealed that as of December 2020, only seven states have agreed to increase the minimum age of marriage to 18 years, and

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93 Malaysia, Parliamentary Reply, House of Representative, (n 86), 5.

94 Ibid.

95 Ibid.

96 Surat Pekeliling Ketua Pengarah, Ketua Hakim Syarie Jabatan Kehakiman Syariah Malaysia Bil.1/2018.

97 Malaysia, Parliamentary Reply, House of Representative, (n 86).

98 Ibid.

99 A male relation such as father, grandfather, brother or uncle who has the authority to give the bride in hand of marriage.

100 Malaysia, Parliamentary Reply, House of Representative, (n 86), 7.

101 Malaysia, Parliamentary Reply, House of Representatives, (n 17), 12.

102 Azura Abbas, (15 June 2021), 'Malaysia Unveils National Plan To Address Underaged Marriages', *New Straits Times online*. Retrieved from: <https://www.nst.com.my/news/nation/2020/01/557060/malaysia-unveils-national-plan-address-underaged-marriages-nsttv>

103 Ministry of Women, Family and Community Development, (16 January 2020), 'Executive Summary of National Strategy Plan In Handling The Causes Of Child Marriage', 5-10.

consultations will be conducted with other states to this end.[104] Even though the Federal Government has revealed its strategy to increase the minimum age of marriage to 18 years, it is observed that the minimum age of marriage for females as provided in section 10 of the LRA which applies to non-Muslims, is yet to be amended.

III OTHER JURISDICTIONS

In this section, the approaches undertaken in Indonesia and Singapore in protecting child brides from rape within a marriage will be explored. These countries are chosen for a comparative study of law due to their striking similarity with Malaysia from the perspectives of geographical location, religious belief and cultural values, besides being a state party to the CRC and CEDAW.

A *Indonesia*

1 *Marital Rape*

Like the Malaysian Penal Code, the Penal Code of Indonesia 1982[105] is the main legislation relating to criminal offences in this Republic. In 2004, the Law of the Republic of Indonesia Number 23 of Year 2004 Regarding Elimination of Violence in Household ('Act 23') was enacted as a preventive measure for household violence, and for protection of victims of household violence.[106] In addition to these statutes, the Aceh province of Indonesia practises Islamic Criminal Law and has its own criminal code known as Qanun Jinnayat. These Indonesian legal frameworks will be explored here to examine the position of marital rape in Indonesia.

Article 285 of the Indonesian Penal Code defines 'rape' as:

> 'Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years'.

Similar to Malaysia's Exception, Article 285 provides immunity for intercourse during the marriage from the offence of rape. On the other hand, Article 288 provides a certain level of protection for child brides, where the law reads as follows:

> '(1) Any person who in marriage has carnal knowledge of a woman of whom he knows or reasonably should presume that she is not yet marriageable, shall, if the act results in bodily harm, be punished by a maximum imprisonment of four years.

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104 Malaysia, Parliamentary Reply, House of Representative, (14 December 2020), (Question no. 31). Retrieved from: <https://www.kpwkm.gov.my/kpwkm/uploads/files/Dokumen/Jawapan%20Dewan%20Rakyat/20201214.pdf>

105 Also known as Kitab Undang-Undang Hukum Pidana.

106 Law Of The Republic Of Indonesia Number 23 Of Year 2004 Regarding Elimination Of Violence In Household ('Act 23') (Indonesia) art 4.

(2) If the act results in serious physical injury maximum imprisonment of eight years shall be imposed.
(3) If the act results in death, maximum imprisonment of twelve years shall be imposed'.

Article 288 criminalises sexual intercourse which causes bodily harm[107], serious physical injury,[108] or causes death,[109] on a wife who is presumed to be 'not yet marriageable'. However, an interpretation of the term 'not yet marriageable' is not provided under the Indonesian Penal Code. Nevertheless, Indonesian law[110] sets 19 years as the minimum age of marriage for females. Hence, if Article 288 and Indonesia's minimum age of marriage are read together, it can be interpreted that wives below the age of 19 are protected under Article 288. Article 288 does not use the term 'marital rape' or 'non-consensual sexual intercourse' but punishes a husband who has sexual intercourse which causes bodily harm or physical injury.

Meanwhile, in examining Act 23, Article 5 thereof criminalises sexual violence committed against an individual within the scope of the household.[111] On conviction, the accused can be imprisoned for a term of four to 15 years or fined pursuant to Article 47[112] of Act 23. 'Sexual Violence' is interpreted in Article 8 of Act 23 as forced sexual intercourse with an individual living within the household.[113] There is no exception placed on the husband, as the scope of 'the household' defined under Article 2(1) of Act 23 expressly includes the husband.[114] Even though the term 'marital rape' is omitted in the phrasing of the law, the law states that forced sexual intercourse committed by a

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107 Penal Code of Indonesia ('PCI') art 288(1).

108 See ibid art 288(2).

109 Ibid, art 288(3).

110 Law No.1 of 1974 on Marriage (Indonesia) art 7(1).

111 Act 23 (n 106) art 5 provides as follows:
'Anyone shall be prohibited to carry out violence in household against an individual within the scope of the household, by means of:
a. physical violence;
b. psychic violence;
c. sexual violence; or
d. negligence of household'.

112 Act 23 (n 106) art 47 provides as follows:
'Anyone forcing an individual living in the same house to commit sexual intercourse as referred to in Article 8 letter b shall be punished with imprisonment of not shorter than 4 (four) yeas and imprisonment of not longer than 15 (fifteen) years or fine of at least Rp12,000,000.00 (twelve million rupiah) or fine of not more than Rp300,000,000.00 (three hundred million rupiah)'.

113 Act 23(n 106) art 8 provides as follows:
'The sexual violence referred to in Article 5 letter c shall include:
a. forcing sexual intercourse carried out against an individual living within the scope of the household; b. forcing sexual intercourse against one of the individuals within the scope of the household for commercial purpose and/or a certain purpose'.

114 Act 23 (n 106) art 2 provides as follows:
'(1) The scope of household in this Law shall include:
a. husband, wife, and children;
b. people whose family relationship with the individual referred to under letter a is due to blood relationship, marriage, suckling at the same breast, care, and guardianship, who lives in the household; and/or
c. the individual working to assist the household and living in the household'.

husband on his wife, without her consent is an offence punishable under Act 23. In terms of punishment, the punishment prescribed under Act 23 is higher compared to Article 288 of the Indonesian Penal Code.

Contrary to the Malaysian position, Indonesia has moved forward to criminalise forced sexual intercourse as a step towards eradicating domestic violence by enacting Act 23. Despite this move, the terminology used in Act 23 was highlighted as problematic by CEDAW. In its concluding observation on Indonesia's combined 6th and 7th periodic report, CEDAW raised concerns about the Republic's failure to criminalise marital rape under its Penal Code and the absence of any explicit reference to rape or marital rape in Act 23.[115] CEDAW further recommended that Indonesia defines and criminalises marital rape, in line with the Convention and general recommendation No. 19 (1992) of the Committee on violence against women.[116]

From the Islamic perspective, Aceh's *Qanun Jinnayat* which is based on the *Al-Quran* and *Hadith*, interprets 'rape' under Article 1, No.30 as sexual intercourse against the vagina, rectum or mouth of the victim by the perpetrator's penis, mouth, or other objects used by the perpetrator with violence, force or threat to the victim.[117]

Unlike Article 285 of the Indonesian Penal Code, *Qanun Jinnayat*'s definition of 'rape' explains the *actus reus* of the offence with no exclusion placed on the spouse. Sexual intercourse with violence, force, or threat to the victim amounts to 'rape', where on conviction the offender could face imprisonment for a minimum term of 125 months and a maximum term of 175 months.[118] As the law does not exclude legally married couples, the interpretation covers the element of 'marital rape', which is forced sexual intercourse by a husband on his wife. *Qanun Jinnayat* had made headlines and has been constantly criticised for being discriminatory in favour of women. Nevertheless, when it comes to 'marital rape', even though the interpretation covers elements of marital rape, its application to husbands is not explicit. Despite the certainty of its application to married couples, the definition of 'rape' in *Qanun Jinnayat* illustrates that marital rape is in line with Syariah Laws. Besides the definition of 'rape' in *Qanun Jinnayat*, a fatwa[119] issued by the Indonesian Women's Ulama Congress, in 2017 declares that marital rape and child marriages are forbidden among the Muslim communities.[120] This further strengthens the view that criminalising marital rape will not violate Syariah Laws.

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115 'Concluding observations of the Committee on the Elimination of Discrimination against Women', CEDAW/C/IDN/CO/6-7, 27 July 2012 No.25(d).

116 Ibid.

117 *Qanun Aceh Nomor 6 Tahun 2014 Tentang Hukum Jinayat* ('*Qanun Aceh'*) (Aceh) art 1, no. 30 provides as follows (in its original language):
'30. Pemerkosaan adalah hubungan seksual terhadap faraj atau dubur orang lain sebagai korban dengan zakar pelaku atau benda lainnya yang digunakan pelaku atau terhadap faraj atau zakar korban dengan mulut pelaku atau terhadap mulut korban dengan zakar pelaku, dengan kekerasan atau paksaan atau ancaman terhadap korban'.

118 *Qanun Aceh* (n 117) art 48.

119 Religious verdict that assists in regulating Muslim conduct of activities in the country.

120 Meghan Werft, (29 April 2017), 'Female Muslim Clerics Issue Fatwa on Child Marriage & Marital Rape', *Global Citizen*. Retrieved from: < https://www.globalcitizen.org/en/content/female-muslim-clerics-issue-fatwa-on-child-marriag/>

2 *Child Marriages*

The Indonesian law relating to marriages is governed by Law No. 1 of 1974 on Marriage ('Law No 1'). Originally, Article 7(1) of the legislation sets the minimum age of marriage as 19 years for males and 16 years for females. Article 7(2) permits marriage below the minimum age if the dispensation is obtained by the parents of the bride or groom from the courts. A crucial amendment[121] was made to this statute in 2019, whereby Article 7(1) was amended by lifting the minimum age of marriage for females from 16 to 19 years. Simultaneously, Article 7(2) was also revised to permit marriage below the age of 19, in the event the parents of the bride and/or groom obtain a dispensation from the courts for urgent reasons which are supported by appropriate evidence. Even though the minimum age of marriage for females was raised, the law allows the opportunity for females below the age of 19 to marry in some circumstances.

According to the statistics on child marriages in Indonesia by the National Socio-Economic Household Survey (SUSENAS), only a slight decline was recorded from the period of 2008 to 2018.[122] A 2018 census revealed that one out of nine females aged between 20 to 24 years were married before the age of 18 years.[123] Increasing the minimum age of marriage is a measure taken by the Indonesian state to combat child marriages.[124] However, even after the minimum age of marriage was increased to 19 in 2019, the number of child marriages in Indonesia has still surged.[125] This surge is the consequence of the economic difficulties faced by the Indonesian society during the Covid-19 pandemic, and pregnancies out of wedlock which resulted in parents marrying off their children.[126] Furthermore, the loophole in Indonesia's amended law made the approval process for marriage dispensation easy.[127] In fact, a recent study in Indonesia reported that the Religious Courts received 34,000 marriage dispensation applications in the first half of 2020[128], and 97% of the applications were approved.[129] In granting marriage dispensations, the Religious Courts' judges are bound by the guidelines set under the Regulation of the Supreme Court of the Republic of Indonesia Number 5 of 2019,[130] where a dispensation is granted on the basis of the best interests of the child,

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121 Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan (Law No.16 of 2019) (Indonesia).

122 United Nations Children's Fund (UNICEF), Statistics Indonesia (BPS), National Development Planning Agency (Bappenas), 'Prevention of Child Marriage Acceleration that Cannot Wait', (Report, 2020) 7 <https://www.unicef.org/indonesia/sites/unicef.org.indonesia/files/2020-06/Prevention-of-Child-Marriage-Report-2020.pdf>

123 Ibid.

124 Ibid.

125 Arlina Arshad, (3 October 2020), 'Child Marriages On The Rise In Indonesia Amid Covid-19 Outbreak', *The Straits Times online*. Retrieved from: <https://www.straitstimes.com/asia/se-asia/child-marriages-on-the-rise-in-indonesia-amid-covid-19-outbreak >

126 Elga Andina, (2021), 'Increasing Number Of Child Marriages During Covid-19 Pandemic', Info Singkat , Vol. XIII, No. 4/II/Puslit/February/2021, 13-18, 14.

127 Ibid, 15.

128 January to June 2020.

129 Elga Andina (n 126), 14.

130 Peraturan Mahkamah Agung Republik Indonesia Nomor 5 Tahun 2019 Tentang Pedoman Mengadili Permohonan Dispensasi Kahwin ('PERMA No 5') [Regulations of the Supreme Court of the Republic of Indonesia No 5 of 2019 Guidance for Adjudication of Marriage Dispensations] (Indonesia) <https://jdih.mahkamahagung.go.id/index.php?option=com_remository&Itemid=46&func=fileinfo&id=8395>

gender equality and non-discrimination.[131] Prior to granting the dispensation, the judge is required to advise the applicant, bride or groom, their prospective spouse, and their parents on the risks of an early marriage.[132] The judge is also obliged to examine the grounds for the marriage,[133] the understanding and consent of the child,[134] and the age gap between the bride and groom.[135] Despite these procedures being in place in a preventive capacity, the number of child marriages has increased during the pandemic due to financial burdens on families, pre-marital sexual intercourse, and subsequent pregnancy out of wedlock.[136]

B *Singapore*

1 *Marital Rape*

Historically, both the Malaysian and Singaporean Penal Code[137] evolved from the SS Penal Code.[138] As these Acts originated from the same source, similarities in the law can be seen in these two statutes. Laws relating to marital rape in Singapore are embodied in the Exception to section 375 and section 376 A of the Penal Code. These laws will be discussed further.

(a) *Exception to section 375*

Initially, equivalent to the Malaysian position before the 1989 amendment, the Singapore Penal Code[139] in its Exception to section 375 had given husbands immunity from marital rape unless the wife was below 13 years. Eventually, in 2007, section 375 was amended[140] by removing the Exception and replacing it with new subsections 4 and 5 as follows:

> '(4) No man shall be guilty of an offense under subsection (1) against his wife, who is not under 13 years of age, except where at the time of the offense —
> (a) his wife was living apart from him —
> (i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;
> (ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;
> (iii) under a judgment or decree of judicial separation; or
> (iv) under a written separation agreement;

131 Ibid art 2.
132 Ibid, art 12.
133 Ibid, art 16c.
134 Ibid, art 16e.
135 Ibid, art 16f.
136 Elga Andina (n 126), 15.
137 Penal Code 1871, 2020 Revised Edition (Singapore).
138 Norbani Mohamed Nazeri, (2010), 'Criminal Law Codification and Reform in Malaysia: An Overview', Singapore Journal of Legal Studies 375-399, 375.
139 Chapter 224, Revised Edition 1985, ('Chapter 224') effective from 30 March 1987 until 11 November 1993.
140 Penal Code (Amendment) Act 2007 (No.51 of 2007) ('PCA 2007') (Singapore) s 68.

(b) his wife was living apart from him and proceedings have been commenced for divorce, nullity, or judicial separation, and such proceedings have not been terminated or concluded;
(c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;
(d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him for the benefit of his wife; or
(e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (d), and such proceedings have not been terminated or concluded.

(5) Notwithstanding subsection (4), no man shall be guilty of an offence under subsection (1)(b) for an act of penetration against his wife with her consent'.

Through this amendment, regardless of the wife's age, marital rape was punishable only if the wife was living apart from the husband and legal proceedings for separation of the spouse had been commenced or if a protection order had been obtained by the wife against her husband. Through this amendment, the lack of the wife's consent for sexual intercourse was made punishable as rape, if the conditions under section 375(4) were met.

Subsequently, section 375 was amended once again in 2019. The revised section 375(4) and (5) stipulate that:

'(4) No man shall be guilty of an offence under subsection (1)(b) or (1A)(b) for an act of penetration against his wife with her consent.
(5) Despite section 79, no man shall be guilty of an offence under subsection (1)(a) or (1A)(a) if he proves that by reason of mistake of fact in good faith, he believed that the act of penetration against a person was done with consent'.

Through this amendment,[141] the conditions laid down before a husband could be punished for marital rape were removed. The current section 375(4) of the Singapore Penal Code criminalises marital rape, if the sexual intercourse lacks the wife's consent, and is in line with the CEDAW committee's comment[142] to specifically criminalise marital rape and define rape to include the lack of the victim's consent. This victim-centric amendment came into place as the former law was insufficient to provide protection from grave abuse within a marriage and was well received by lawmakers.[143] Despite this development that criminalises marital rape, the new subsection 5 acts as an escape route from the charge, in the event the accused successfully raises the defence of mistake of fact.

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141 Criminal Law Reform Act 2019 (Singapore) s 110.

142 'Concluding Observations of the Committee on the Elimination of Discrimination Against Women', CEDAW/C/SGP/CO/4/Rev.1, 5 January 2012 Retrieved from: <https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-SGP-CO-4.pdf>

143 Singapore, Parliamentary Debates, (6 May 20190, (Mr Tan Chuan-Jin), Retrieved from: https://sprs.parl.gov.sg/search/fullreport?sittingdate=06-05-2019

Prior to this amendment taking place, the Islamic Religious Council of Singapore held a closed-door discussion on 12th September 2018 among 30 Islamic religious teachers to deliberate the abolishment of marital rape immunity from the Singapore Penal Code. The discussion concluded unanimously that marital rape had no place in Islam and fully supported the amendment.[144] This is another indication that forced sexual intercourse by the husband without the wife's consent is un-Islamic. However, on the other hand, the Singapore Islamic Scholars and Religious Teachers Association ('PERGAS'), through its media statement dated 29 September 2018, expressed that while marriage forbids sexual violence, however, the use of the term 'rape' contravenes the element of consent in a marriage. They proposed the enactment of a new law to criminalise sexual violence instead of abolishing marital rape immunity altogether.[145]

(b) *Section 376A*

Section 376A which specifically caters to sexual offences against a minor under the age of 16 years was introduced into the Singapore Penal Code in 2007.[146] Section 376A(4) provides that:

> 'No person shall be guilty of an offence under this section for an act of penetration against his or her spouse with the consent of that spouse'.

Sexual penetration pursuant to this section extends to penetration of the vagina, anus or mouth and penetration other than by the penis.[147] The scope of the victim under section 376A(4) is not limited to females but also applies to male victims. In line with section 375(4), section 376A(4) embodies the lack of consent of the victim as the element of the offence.

However, when section 376A was added vide the PCA 2007 the conditions which appeared in the 2007 amendments to section 375(4) were reproduced under its section 376A(5)[148] as well.

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144 Mediacorp, (12 September 2018), 'Masyarakat Islam S'pura Tegas Menentang Rogol Dalam Rumahtangga', *Berita Mediacorp online*. Retrieved from: <https://berita.mediacorp.sg/mobilem/singapura/masyarakat-islam-s-pura-tegas-menentang-rogol-dalam-rumahtangga/4128152.html>

145 Singapore Islamic Scholars and Religious Teachers Association ('SISRTA'), 'Feedback on Repeal of Marital Immunity Law For Rape' (Media Statement, 29 September 2018), [7]-[8].

146 Vide the Penal Code (Amendment) Act 2007 (No. 51 of 2007) (Singapore) s 68.

147 Singapore Penal Code (Chapter 224) Revised Edition 2008 ('Chapter 224, 2008') (Singapore), s 376A(1)(a), (b).

148 Ibid, s 376A(5) reads as follows:
'(5) No man shall be guilty of an offence under subsection (1)(a) for penetrating with his penis the vagina of his wife without her consent, if his wife is not under 13 years of age, except where at the time of the offence —
(a) his wife was living apart from him —
(i) under an interim judgment of divorce not made final or a decree nisi for divorce not made absolute;
(ii) under an interim judgment of nullity not made final or a decree nisi for nullity not made absolute;
(iii) under a judgment or decree of judicial separation; or
(iv) under a written separation agreement;
(b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;

Initially, sexual penetration towards a child bride below the age of 16 years was punishable pursuant to section 376A(4), but only if the conditions under section 376A(5) were met. Eventually, section 376A(5) was repealed in 2019.[149] In addition to the removal of section 376A(5), a new subsection (1B) was added which prohibits the accused from raising the defence of consent by the victim to the sexual penetration.[150] This differs from section 375(5). On conviction under section 376A(2)(b), the accused could face a maximum of ten years imprisonment if the victim is aged between 14 to 16 years,[151] or a maximum term of 20 years imprisonment if the victim is below 14 years of age.[152] Section 376A uses the term 'sexual penetration' in lieu of 'rape' as its scope does not limit to penile penetration but extends to penetration by the perpetrator's body part or anything else.[153] Nevertheless, the element of marital rape, which is sexual intercourse that lacks the wife's consent is embodied here and provides wider protection for child brides. The currently enforced section 376A is rigid, victim-centric, and it safeguards child brides below 16 years of age from sexual abuse by their husbands.

2 *Child Marriages*

Section 9 of the Women's Charter 1961 sets the minimum age of marriage as 18 years for non-Muslims.[154] However, the Minister of Social and Family Development has the discretion to authorise marriages below the minimum age in the event a special marriage licence is obtained[155] and subject to the consent[156] of the parents, guardian, or protectors of the minor[157]. In 2011, a new section 17A was added in the Women's Charter[158] which requires a person below the minimum age of marriage to attend and complete a marriage preparation programme as a pre-condition for the grant of a special marriage licence. This programme aims to prepare the underaged couple for the everyday struggles of married

(c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;

(d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women's Charter (Cap. 353) made against him for the benefit of his wife; or

(e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred to in paragraph (d), and such proceedings have not been terminated or concluded'.

149 See Singapore Penal Code (n 137), s 112(e).

150 See ibid, (n 137), s 112(c).

151 See Singapore Penal Code (n 137), s 376A(2)(b).

152 See ibid, s 376A(3).

153 See ibid, s 376A(1)(b).

154 See Women's Charter 1961 (Singapore) s 3(2).

155 See ibid, s 9, 21(2).

156 Ibid, s 13(1); Second Schedule.

157 Ibid, section which defines a 'minor' as a person who is below the age of 21 years and who is not married or a widower or widow.

158 Vide the Women's Charter (Amendment) Act 2011 (Singapore) s 3.

life.[159] As part of the special marriage licence application process, the Ministry of Social and Family Development interviews applicants to evaluate their aptness for marriage.[160]

Meanwhile, Muslim marriages in Singapore is governed by the Administration of Muslim Law Act 1966. Initially, the minimum age for Muslim marriages was set at 16 years and eventually increased to 18 years[161] with an amendment introduced in 2008.[162] Under special circumstances, a Muslim female below the age of 18 who has reached the age of puberty can be married.[163] Similar to non-Muslim underaged marriages, the consent of the parents or guardians is required[164] in addition to the condition to attend and complete the marriage preparation programme. This pre-requisite for Muslims came into effect in 2018.[165]

Singapore's move to set the minimum age of marriage at 18 and additional conditions for underaged marriages was successful, as the statistics on child marriages in Singapore shows a steady decline over the last decade for both Muslim and non-Muslim marriages, as shown in Table 3.

Table 3: Statistics of Underaged Marriages (Brides aged below 21)[166]

Year	Women's Charter	Administration of Muslim Law Act
2010	2.3%	6.6%
2020	0.6%	2.5%

Along with the reduction in the number of marriages of minors, the Singapore Ministry of Social and Family Development's statistics on special marriage licence application and issuance also exhibits a tremendous decline over the course of 10 years, as shown in Table 4.

159 Singapore, Parliamentary Debates, (10 January 2011), (Mr Abdullah Tarmugi). Retrieved from: <https://sprs.parl.gov.sg/search/report?sittingdate=10-01-2011>

160 Singapore Ministry of Social and Family Development Official Website: <https://www.msf.gov.sg/research-and-data/Research-and-Statistics/Pages/Special-Marriage-License.aspx>

161 Administration of Muslim Law Act 1966 (Singapore) s 96(4).

162 Vide Administration of Muslim Law (Amendment) Act 2008 (Singapore) s 19.

163 Ibid, s 96(5).

164 Ibid, s 94B(1), 4th Schedule.

165 Vide the Administration of Muslim Law (Amendment) Act 2017 (Singapore) s 23.

166 Data derived from 'Statistics on Marriage and Divorces, Reference Year 2020', retrieved from: <https://www.singstat.gov.sg/-/media/files/publications/population/smd2020.pdf>

Table 4: Number of Special Marriage Licence (SML) Applications Received and SMLs Issued[167]

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Number of SML applications received	41	38	25	29	24	16	23	19	11	16
Number of SML issued (out of the applications received within the same year)	13	26	19	15	12	12	16	9	4	2

The numbers projected above show that the Singapore government has applied a strict approach in issuing special marriage licences, as less than 50% of the applications received were approved. The steady decline in the number of special marriage licence applications indicates that the approach applied by Singapore is effective in preventing underaged marriages.

IV DISCUSSION

Despite the shortfall of accurate data on child marriages in Malaysia, the existing data shows that the number of child marriages is significant in Malaysia. Even though it was revealed recently that the rate of approval of Muslim child marriages in Malaysia has decreased due to strict adherence to SOP by the Syariah Judges, the adaptation of the SOP does not solve the issue. This is proven as the statistics also show that a massive number of girls have dropped out of school for the purpose of getting married. The position of Malaysian law which legalises marital rape and child marriages without placing any legal protection has made child brides vulnerable to becoming victims of marital rape. It is also found that child brides are likely to face intimate partner violence due to their young age, level of maturity, and social skills.[168] These factors make them more vulnerable to marital rape compared to adult brides. These laws also create room for the occurrence of rapists marrying their rape victims and the practice of child-bride-trafficking in the Rohingya community. These practices should be halted to protect child brides from suffering after their marriage. As previous studies have shown, besides the deprivation of education, child brides are also prone to abuse and violence.[169] Hence there is an urgent need for the Malaysian government to review these laws. At this juncture, after reviewing the Malaysian laws, issues, and strategy, and studying the Indonesian and Singaporean positions, four key points will be addressed.

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167 Data derived from 'Special Marriage Licence', at the website of the Singapore Ministry of Social and Family Development: < https://www.msf.gov.sg/research-and-data/Research-and-Statistics/Pages/Special-Marriage-License.aspx >

168 Report of the United Kingdom Department for International Development (DFID), (May 2017), 'Understanding Intimate Partner Violence In Rural Prevention And Response', 52. Retrieved from: < http://cdn-odi-production.s3-website-eu-west-1.amazonaws.com/media/documents/11517.pdf>

169 Kelly C. Connerton (n 21); Joar Svanemyr et al (n 24).

Firstly, on the issue of whether criminalising marital rape is in violation of Syariah laws and other religions, the 1989 amendment to the Penal Code in Malaysia removed the wife's age from the Exception due to legitimisation of child marriages and not due to inconsistency with religious views. The issue that criminalising marital rape contradicts religious beliefs only surfaced after CEDAW urged its state parties to criminalise this particular type of sexual violence. Moreover, during the parliamentary debate, the Special Select Committee's claim that criminalising marital rape violates religious teachings was unsubstantiated.[170] It is crucial to note that there are various past literature that have addressed this misconception. According to Muh Endriyo Susila, marital rape is not recognised in Islam, as the religion commands a husband the responsibility to treat his wife well.[171] Similarly, Usharani Balasingam and Johan Shamsuddin Sabaruddin propounded that marital rape which contains elements of violence is un-Islamic.[172] Meanwhile, several previous studies[173] put forward that Islam propounds the principle of gender equality, and oppressive interpretations of Quranic verses have caused the misconception that a wife has the duty to submit to her husband, who is superior. This consequently contributes to the view that marital rape is in line with Islamic teachings. In addition to these literature, the *fatwa* issued by the Indonesian Women's Ulama Congress forbids marital rape and child marriages, and Singapore's PERGAS is of the view that marital rape is against the teaching of Islam.[174] Both are indications that the criminalisation of marital rape does not violate Syariah laws.

Secondly, even though PERGAS were in support of criminalising marital rape during the closed-door discussion on 12 September 2018,[175] their opinion needs to be taken into consideration. PERGAS viewed that sexual violence is prohibited in marriage, however, the usage of the terminology 'rape' contradicts consent in Muslim marriage or nikah. This is due to marriage or nikah being interpreted as an agreement between a man and woman which permits sexual intercourse between the contracting parties.[176] Similarly, Indonesia has not abolished marital rape immunity in Article 285 of Penal Code, and the terminology 'forced sexual intercourse' is used in Article 8 of Act 23 instead of the phrase 'rape'. This further signifies that forced sexual intercourse which lacks the wife's

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170 Malaysia, Parliamentary Debates, House of Representatives, (n 63), 75.

171 Muhammad Endriyo Susila, (2013), 'Islamic Perspective On Marital Rape', 20(2) *Jurnal Media Hukum* 327-328.

172 Usharani Balashingam and Johan Shamsuddin Hj Sabaruddin, (2015), 'Section 375 Exception and Section 375 A Malaysian Penal Code - Legitimising Rape within Marriage : A Call for Reform', 42(2) *Journal of Malaysian and Comparative Law* 69, 97.

173 Mohd. Shahrizad Mohd. Diah, (1996), '*The Legal & Social Issues of Wife Battering and Marital Rape in Malaysia*', Dewan Bahasa dan Pustaka Kuala Lumpur); Dr.Jamal A.Badawi, (2016), '*Gender Equity in Islam, Basic Principles*, Islamic Dawah Movement of Southern Africa); Shagufta Zia, (2014), 'Marriage in Islam: Life Partnership or Discriminatory Family Set up? An Analysis of Some Protective Legal and Moral Shariah Provisions for Women with Special Reference to Surah An-Nisa'.

174 Mediacorp, (12 September 2018), 'Masyarakat Islam S'pura Tegas Menentang Rogol Dalam Rumahtangga', Berita Mediacorp online. Retrieved from: <https://berita.mediacorp.sg/mobilem/singapura/masyarakat-islam-s-pura-tegas-menentang-rogol-dalam-rumahtangga/4128152.html>

175 Ibid.

176 SISRTA (n 145).

consent is in line with Syariah law, however, usage of the term 'rape' against a husband could be offensive and rejected by society.

Thirdly, the Malaysian strategy to safeguard child brides from marital rape is weak. The scope of section 375A does not expressly incorporate non-consensual sexual intercourse between a legally married husband and wife and hence imposes a light sentence. Therefore, it does not provide comprehensive protection for marital rape victims. On the other hand, even though the Ministry has taken the effort to initiate the National Strategy Plan to prevent child marriages, this strategy is time-consuming. Whether the process of increasing the minimum age of marriage can be achieved within the five-year period of The National Strategy Plan remains a live question, as there are obstacles in achieving this. The amendment involves numerous statutes which cannot be amended or created simultaneously. Amending the Islamic Family Law Acts[177] is the major challenge for the Federal government. This is due to the lack of consensus from the State governments as religious belief is a factor that hinders the process.[178] Moreover, the Malaysian government after studying this issue, revealed recently that there is no need to amend the minimum age of marriage for Muslim females.[179] Similarly, there is no minimum age specified in the customary laws governing the natives of Sabah and Sarawak. Further research is also needed before these statutes can be amended to avoid offending the natives' beliefs, traditions, and cultural practices. These situations concerning the Islamic Family Law Acts and the customary laws further spark the question of whether the Malaysian government's strategy to amend loose laws that permit marriage of a minor vide its National Strategy Plan will proceed? Another weakness observed in the Malaysian strategy to raise the marriage age is that there will be no total abolition of child marriages. By setting out procedures to permit the occurrence of underaged marriages, the law creates room for child marriages to take place, and its efficiency to reduce marriages of minors is doubted. Further, prevention of child-bride-trafficking is not provided for under The National Strategy Plan. Aside from raising the minimum age, enhancement of law and enforcement pertaining to child-bride-trafficking is clearly necessary to prevent the marriage of trafficked child victims. This is crucial as marriages of trafficked child brides are unregistered and go unreported, leading to difficulty in tracing potential victims. Hence, the prevention of child-bride-trafficking is vital.

Fourthly, a comparative study of the laws of Indonesia and Singapore reveals that lifting the minimum age of marriage and simultaneously providing avenues for underaged marriages may not reduce the number of child marriages. The Indonesian experience should be taken as a lesson here. Not only did the dispensation for underaged marriages escalate even after the minimum age of marriage was raised, but 'stringent procedures' were also put in place to prevent underaged marriages. Singapore's approach of setting requirements for prospective couples to attend a marriage preparation course as a pre-condition to obtain the special marriage licence and the practice of interviewing applicants to assess their fitness for marriage should be considered in the Malaysian context as

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177 See Table 2.

178 Ibid.

179 Malaysia, Parliamentary Reply, House of Representative, (n 86).

well to prevent child marriages from occurring. Within the context of marital rape, both Indonesia and Singapore have amended their laws to safeguard vulnerable victims. Even though Indonesia adopts the term 'forced sexual intercourse' as an alternative to 'rape', the offence under Article 8 of Act 23 includes the element of rape within a marriage, which is sexual intercourse without the wife's consent. Indonesia has taken this necessary step to provide protection for the vulnerable victims of marital rape. On the other hand, Singapore's approach is exceptional of which not only does section 375(4) criminalise marital rape but it provides additional protections for child brides below the age of 16 years under section 376A(4).

V LAW REFORM SUGGESTIONS AND CONCLUSIONS

The clear issue on criminalising marital rape in Malaysia is not the violation of religious beliefs, but the usage of the terminology 'rape' against the accused husband. This can be seen from the approach of Indonesia to criminalise forced sexual intercourse instead of abolishing marital rape immunity. Similarly, PERGAS is in support of criminalising sexual violence in marriage instead of criminalising marital rape. PERGAS also considers that forced sexual intercourse without the wife's consent is a form of torture and not rape. Since Malaysia is firm in maintaining the Exception , and the process of increasing the minimum age of marriage in Malaysia is time-consuming, it is proposed that the element of marital rape, which is sexual intercourse without the consent of the wife should be criminalised as forced sexual intercourse. Modelled after Act 23 in Indonesia, this crime could fall under the Domestic Violence Act 1994. At the same time, as it is likely that lifting the minimum age of marriage will be a long process, the Malaysian government should adopt Singapore's approach. By implementing a pre-condition of completion of marriage preparation programmes and assessment of the fitness or maturity of the prospective child bride/groom before granting marriage authorisation. In this way, child marriages can be prevented.

To conclude, law reform is necessary as the current position of Malaysian laws places child brides as the vulnerable victims of marital rape, who lack legal protection. In view of the increasing domestic violence cases and remarkable rates of child marriages in Malaysia, it is time to update Malaysian laws in safeguarding these vulnerable victims.

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BREACH OF DUTY ACCORDING TO MEDICAL NEGLIGENCE LAW IN NIGERIA AND MALAYSIA

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Abstract

Medical negligence is an area that travels across a range of issues in societies today including Nigeria and Malaysia. Medical negligence constitutes an act or omission by a medical practitioner which falls below the accepted standard of care resulting in injury or death of a patient. A breach of duty presumes the existence of this unacceptable standard and therefore, it lies at the heart of negligence claims. With Nigeria and Malaysia being common law countries, similar principles in determining a breach of duty in treatment, diagnosis and information disclosure is expected. In determining the breach of duty to treat and diagnose, both countries share similar principles as they rely on the *Bolam-Bolitho* test. However, Malaysia applies the *Rogers'* principle in determining the duty to disclose information, but Nigeria still shows possibility of applying the *Bolam-Bolitho* principle. This can be attributed to the scanty case laws on medical negligence in Nigeria.

Keywords: Breach of duty, common law, medical negligence.

I INTRODUCTION

Breach of duty has been described to be central to medical negligence cases and common law has adopted various principles in making fair judicial decisions on whether a breach of duty has occurred. Negligence can be defined broadly as the breach of a legal duty by a defendant resulting in foreseeable damage undesired by the defendant to the plaintiff.[1] To prove negligence, there has to be an existence of a duty of care owed by the defendant to the plaintiff, breach of that duty by the defendant, damage to the plaintiff resulting from the breach and the resulting damages that was reasonably foreseeable.[2]

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1 Gilbert Kodilinye, *Commonwealth Caribbean Tort Law* Routledge, 3rd ed, 2013) 63.

2 Rebecca L Cypher, 'Demystifying the 4 Elements of Negligence' (2020). 34(2) *The Journal of Perinatal & Neonatal Nursing* 108, 108.

In certain cases, these elements are usually not separated from each other in determining the cause of action in negligence[3]. Denning L.J in *Roe v Minister of Health*[4] was of this view as he said:

> You will find that the three questions, duty, causation, and remoteness, run continually into one another. It seems that they are simply three different ways of looking at one and the same problem.[5]

However, it is commonly accepted that although the various elements of negligence overlap, they are of separate identities. Therefore, to determine whether negligence has been committed, it will require an analysis of each of these four legal elements.[6]

Particularly for medical negligence, breach of duty is the key ingredient of the tort to the plaintiff[7]as it represents what proving medical negligence entails.-

II COMMON LAW EVOLUTION ON BREACH OF DUTY

On establishing that a duty exists, the plaintiff has to then prove that there was a breach of that duty. A breach of duty suggests the existence of an acceptable standard of behaviour that will prevent undue risks of harm.[8] The general approach in determining a breach in the duty of care is for the court to examine the defendant's conduct using the test of a reasonable man 'who is neither a perfect citizen nor paragon of circumspection.[9]

Deciding whether there is a breach of duty was laid down brilliantly by Alderson B *in Blyth v Birmingham Waterworks* (*Blyth*)[10] where he said:

> Negligence is the omission to do something which a reasonable man guided upon these considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.[11]

This established the standard of care to be of 'reasonable care' in a normal case.[12] In the context of medical practice, the acceptable standard has been a controversial subject for many years. This stems from the fact that medical negligence cases are different from

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3 James Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) 76(3) *The Cambridge Law Journal* 480, 480.

4 *Roe v Minister of Health* [1954] 2 All QB 66, 86.

5 Ibid.

6 Goudkamp (n 3) 480.

7 Chudi C Nwabachili, 'The Legal Implications of Duty of Care' (2017) 5(4) *Global Journal of Politics* 1, 1.

8 Dauda Momodu and Tijani Idris Oseni, 'Medical Duty of Care : A Medico-Legal Analysis of Medical Negligence in Nigeria' (2019) 9 *American International Journal of Contemporary Research* 56, 56.

9 Michael Aondona Chiangi, 'Principles of Medical Negligence: An Overview of the Legal Standard for Medical Practitioners in Civil Cases' (2019) 4(4) *Miyetti Quarterly Law* 53, 57.

10 [1856]11 EX. 781 (*'Blyth'*).

11 Ibid.

12 Puteri Nemie Jahn Kassim, *Medical Negligence Law in Malaysia* (ILBS, 4th ed, 2016) 29.

any other cases. Medical activities are not within judicial knowledge and therefore, it will be difficult for the courts to determine the acceptable standard.[13]

The landmark case of *Bolam v Friern Hospital Management Committee*[14] established the *Bolam* principle that determined the standard of care demanded of a doctor.[15] In *Bolam*, the House of Lords through McNair J. found in favour of the defendant physician stating 'that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art'.[16] This meant that if a doctor reaches the standard of a responsible body of medical opinion, he is not negligent. It is expected that a medical practitioner lives up to the standard of an ordinary skilled member in his specialty.[17] This was inferred when McNair J. said:

> … A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.[18]

Medical practice has also devised guidelines to determine the competence and standards by which medical professionals should deliver their services.[19] The Medical and Dental Council of Nigeria ('MDCN') is the regulatory body for medical practitioners in Nigeria. This council is guided by the Medical and Dental Practitioners Act ('MDPA')[20] which sets the code of conduct for medical and dental practice. Medical practitioners are bound by these established rules which set an acceptable standard of medical practice concerning patients and the public[21]. Pursuant to the provision of the MDPA, medical practitioners are guided by the provisions of the Code of Medical Ethics 2004 of the MDCN. Rule 28 (A to I) of the Code[22] defines the acts and omissions which constitute medical negligence on the part of a medical practitioner.[23]

In Malaysia, the Malaysian Medical Council ('MMC') is the regulatory body for medical practitioners. This council is regulated by the Medical Act 1971 ('MA'). The MA is the legislation relating to the registration of medical practitioners and the practice of medicine in Malaysia. The Code of Professional Conduct 2019 as adopted by the MMC defines the forms of serious professional misconduct. Although it does not necessarily mention negligence, it states neglect or disregard of medical care to patients as serious

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13 Ibid.
14 [1957] 1 WLR 582 (*'Bolam'*).
15 Jahn Kassim (n 12) 30.
16 *Bolam* (n 14), 586-7.
17 Chiangi (n 9) 59.
18 *Bolam* (n14).
19 Chiangi (n 17).
20 Cap M8 2004.
21 Folake Tafita and Folakemi Ajagunna, 'Accessing Justice for Medical Negligence Cases in Nigeria and the Requisite for No-fault Compensation' (2017) 10 *Journal of Private & Comparative Law* 77, 79-80.
22 Code of Medical Ethics in Nigeria, 2004.
23 Ibid,

professional misconduct.[24] This contributes in sustaining the professional standards of medical practitioners in Malaysia.[25]

Each of these medical bodies creates a minimum standard for a medical professional to work with. Furthermore, it is expected that medical practitioners keep up with the latest development in their medical specialties.[26] It should also be stressed that the practice must be judged based on the date of the treatment and not the trial date. This was shown in the case of *Roe v Minister of Health & Anor*[27] where the incident occurred in 1947 but was tried in 1954. The risk of the incident that occurred became known by the medical profession in 1951. Lord Denning had highlighted the case could not be judged with a knowledge that came to light in 1951.[28]

Over the years, the *Bolam* principle has faced criticisms. It has been described to be unfair to claimants and too protective of the medical profession.[29] Challenges have frequently been made to the *Bolam* test to promote the interest of the patient.

The *Bolitho* test is one such challenge to the *Bolam* principle. It originates from the case of *Bolitho v City and Hackney Health Authority* (*'Bolitho'*)[30] where the doctors had not responded to a call made by the night sister. It was argued that if the doctor had intubated the child, the cardiac arrest and brain damage he suffered would not have happened. Medical opinion disagreed about intubation being mandatory in this situation. It was argued successfully by the defendants that the plaintiff could not prove that if the doctor on call had attended to the patient, she would have intubated the patient and there would have been a different outcome. This decision was upheld in the Court of Appeal. On appeal to the House of Lords, the decision of the Court of Appeal was also upheld. This decision was upheld not necessarily because the defendant had acted according to accepted medical practice.[31] Lord Browne-Wilkinson held that:

> The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of medical opinion relied upon can demonstrate that such opinion has a logical basis…'[32]

This decision by the House of the Lords trumped the 'medical opinion' as seen in the *Bolam's* principle. *Bolitho* appeared to curb the power delegated to medical professionals as there is no guarantee that the medical opinion provided will be accepted.[33] Although this suggests that there will be more avenues for plaintiffs to succeed in negligence cases, it is unlikely it will make a significant difference.[34] To be able to question how

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24 MMC Code of Professional Conduct 2019,
25 Malaysian Medical Association <https://mma.org.my/ >
26 Jahn Kassim (n 12) 37.
27 [1954] 2 QB 66,
28 Jahn Kassim (n 12).
29 Vivienne Harpwood, *Modern Tort Law* (2005). Psychology Press, 6th ed, 139.
30 [1998] AC 232 ('*Bolitho*').
31 Harpwood (n 29).
32 *Bolitho* (n 30), 778.
33 Jahn Kassim (n 12) 44.
34 Harpwood (n 29) 140.

logical a medical opinion is, judges will need to have some medical knowledge. This was acknowledged when Lord Browne-Wilkinson in *Bolitho* stated:

> …it will seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable…

Therefore, it will be in 'rare' and 'exceptional' cases that judicial intervention will be justified in medical opinions.[35]

Promoting a patient's interest was further developed in the Australian High Court case of *Rogers v Whitaker*.[36] The case determined that in negligence cases, a medical practitioner's duty is extended to providing advice and information. In this case, the plaintiff had stated that, if she had been warned of the risks, she would not have gone through with the operation. The High Court rejected the medical opinion in determining the disclosure of information. Instead, they formulated the requirement that involved warning of all risks of forgoing or undergoing a treatment especially when these risks are material.[37] This was provided when the High Court concluded that:

> to warn a patient of a *material risk* inherent in the proposed treatment; a risk is material if, in the circumstances of a particular case a *reasonable person* in the patient's position, if warned of the risk, would be *likely* to *attach significance* to it or if the medical practitioner is or should reasonably be aware that a particular patient, if warned of the risk, would be likely to attach significance to it. This is subject to therapeutic privilege.[38] (emphasis added)

The case of *Montgomery v Lanarkshire*[39] in 2015 drew fresh attention to disclosure of advice or information.[40] The case against the consultant was that the potential consequences of the vaginal delivery were not mentioned to Mrs. Montgomery as well as the alternative option - which was a cesarean section. It was therefore alleged that the consultant was negligent in obtaining informed consent from Mrs. Montgomery. However, the consultant stated that the risk of a serious consequence as a result of the shoulder dystocia was 0.2% for a brachial plexus injury and less than 0.1% for hypoxic injury and since the risk of a serious consequence was thought to be small, it was not discussed with Mrs. Montgomery. After the case failed on appeal in the Court of Session and the Inner House, it was heard at the United Kingdom Supreme Court. The argument in this appeal was that it was not appropriate to use the accepted practice of a body of reasonable medical practitioners when disclosure of information is considered. All seven justices at the Supreme Court supported the appeal. The ruling involved the exploration

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35 Jahn Kassim (n 12) 44.

36 (1992) 175 CLR 479.

37 Tracey Carver, 'Informed Consent, Montgomery and the Duty to Discuss Alternative Treatments in England and Australia' (2020) 25(5) *Journal of Patient Safety and Risk Management* 187, 188.

38 *Rogers* (n 36), 490.

39 [2015] UKSC 11(*'Montgomery'*).

40 Sarah W Chan et al 'Montgomery and Informed Consent: Where Are We Now?'(2017) *BMJ* 357, 357.

and discussion of both the risks and the options, not just the risks. This was provided when Lady Hale said:

> …it is not possible to consider a particular medical procedure in isolation from its alternatives. Most decisions about a medical care are not simple yes/no answers. There are choices to be made, arguments for and against each of the options to be considered, and sufficient information must be given so it can be done."[41]

The *Montgomery* test became one of not just 'material risk' but also of 'material information'. This concept for materiality allows clinicians to adapt the information to the needs of the patient.[42] It will involve understanding some of the patient's attributes such as the intelligence or anxiety level which will take a substantial number of visits from the patient to be able to be determined. This embraces a more substantive version of autonomy than it was accommodated previously in the law on informed consent.[43] The Montgomery test also recognized that disclosure of information by doctors is subject to a therapeutic exception.[44] The precise scope of the therapeutic exception and its justification has been left to future decisions. There has been just one clear instance of therapeutic privilege in English law - *Pearce v United Bristol Healthcare NHS Trust*.[45] Therefore, the rarity of application has allowed courts to avoid articulating why, when, and to whom, the defence of therapeutic privilege (exception) should apply.[46]

A *Framework in Malaysia*

Before 2006, the Malaysian courts applied the *Bolam* test in determining the standard of care concerning treatment and disclosure of information.[47] *Swamy v Matthews*[48] was one of the earliest cases where the *Bolam* test was applied.[49] In the case, different opinions were presented before the court but the testimony of the defendant doctor (which was that the dosage of the drug given to the plaintiff was based on personal experience) was accepted by the court. The defendant doctor was not found negligent because even though the skill carried out by the doctor might not have been of the highest degree, the *Bolam* test does not expect medical practitioners to possess the highest degree of skill.[50]

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41 *Montgomery* (n 39).

42 Emma Cave, 'The Ill-informed: Consent to Medical Treatment and the Therapeutic Exception' (2017) 46(2) *Common Law World Review* 140, 153.

43 Ibid 158.

44 Mohsin I Choudry, Aishah Latif, Leslie Hamilton and Bertie Leigh, 'Documenting the Process of Patient Decision Making: A Review of the Development of the Law on Consent' (2016) 3(2) *Future Healthcare Journal* 109, 110-111.

45 [1999] PIQR P53 (CA).

46 Rachel Mulheron, 'Has Montgomery Administered the Last Rites to Therapeutic Privilege? A Diagnosis and a Prognosis' (2017) 70 (1) *Current Legal Problems* 149, 186.

47 Dato' Mah Weng Kwai, 'Approach to Medical Negligence Claims by Malaysian Courts' (*Mondaq,* 28 July 2020) <https://www.mondaq.com/professional-negligence/969990/approach-to-medical-negligence-claims-by-malaysian-courts> accessed 28 January 2021.

48 *Swamy v* Matthews [1968] 1 MLJ 138.

49 Jahn Kassim (n 12) 46.

50 Ibid.

The *Bolam* test went on to be used in the case of *Elizabeth Choo v Government of Malaysia*,[51] *Asiah bte Kamsah v Dr. Rajinder Singh &Ors*,[52] *Hor Sai Hong & Anor v University Hospital& Anor*[53], and *Foong Yeen Keng v Assunta Hospital (M) Sdn Bhd & Anor*.[54]

However, the *Bolam* test was deemed inapplicable in determining the standard of care in providing advice to a patient on the material risks inherent in the proposed treatment.[55] This was established by the apex court in Malaysia in the case of *Foo Fio Na v Dr. Soo Fook Mun & Anor* (*'Foo Fio Na'*).[56] In this case, the plaintiff alleged that the first respondent had negligently performed the surgery on her vertebrae and had also negligently failed to inform her of the risks inherent in the surgery. The trial judge held that the first respondent had been negligent both in performing the surgery and not informing the plaintiff of the risk of paralysis inherent in the surgery. The Court of Appeal however allowed the respondent's appeal even though Gopal Sri Ram JCA (as he then was) noted the attraction of the *Rogers* approach when he nevertheless applied *Bolam*.[57] The Federal Court granted leave to appeal and noted that the main question to be determined was:

> Whether the *Bolam* Test as enunciated in *Bolam v Friern Hospital Management Committee* in the area of medical negligence should apply in relation to all aspects of medical negligence?[58]

In granting the leave application, the Federal Court noted:

> … the particular aspect of medical negligence relates more specifically to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent material risks of the proposed treatment.[59]

However, it is not exactly clear whether the Federal Court intended to grant leave to determine the application of the *Bolam* test to medical negligence generally (which was the original question or only with respect to the duty to advise or inform (which is the narrow question).[60]

Siti Norma FCJ (as she then was) while delivering the judgment of the Federal Court said:

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51 [1970] 2 MLJ 171.
52 [2002] 1 MLJ 484.
53 [2002] 5 MLJ 167.
54 [2006] 5 MLJ 94.
55 Dato' Mah Weng Kwai (n 47).
56 *[2007] 1 MLJ 593 ('Foo Fio Na')*.
57 *Dr Soo Fook Mun v Foo Fio Na* [2001] 2 MLJ 193 at 207-208.
58 *Foo Fio Na v Dr Soo Fook Mun [2007] 2 MLJ 129 at 130.*
59 Ibid.
60 Kumaralingam Amirthalingam, 'Medical Negligence and Patient Autonomy - Bolam Rules in Singapore and Malaysia - Revisited' (2015) 27 *Singapore Academy of Law Journal* 678.

> …we are of the opinion that the *Bolam* test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment…[61]

She noted toward the end of the judgment the importance of ensuring that the courts set the standard of care and concluded that the '*Rogers v Whitaker* test would be a more appropriate and a viable test of this millennium than the *Bolam* test'.[62]

After the *Foo Fio Na* case, the cases that followed showed the Federal Court ignoring the *Bolam* test.[63] The case of *Dominic Puthucheary & Ors (personal representatives of the estate of Thayalan s/o Kanapathipillai) v Dr. Goon Siew Fong & Anor*[64] in 2007 was one such example. The claim was that the deceased's death was caused by the failure to diagnose and treat a spinal injury. Two questions were presented before the High Court: (i) whether either or both respondents were negligent; and (ii) even if either or both were negligent, whether their negligence caused the deceased's death. The trial judge dismissed the plaintiff's claim and found for the defendants on both questions posed. The plaintiff then appealed to the Court of Appeal. The Court of Appeal dismissed the appeal as the plaintiff had not discharged the burden of proof with respect to the breach of duty and causation. Although the plaintiff lost the case, Gopal Sri Ram JCA (as he then was) while delivering judgment held that the plaintiff had rightly relied on the decision of the Federal Court in *Foo Fio Na.* This meant that determining the standard of care was not meant for medical opinion alone, but it was for the consideration of the courts.[65] Even though this case involved the duty to diagnose and treat and not to inform, the *Bolam* test was clearly not considered. It seemed to apply the *Rogers v Whitaker* test.[66]

The *Rogers v Whitaker* test went on to be applied in the case *of Dr. Ismail Abdullah v Poh Hui Lin (administrator for the estate of Tan Amoi @ Ong Ah Mauy, dec'd)*[67] and *Hasan Datolah v Kerajaan Malaysia.*[68] It was applied not just for the provision of information but also concerning treatment.[69]

The debate as to whether the ratio in the Federal Court decision of *Foo Fio Na* was purely intended for disclosure of information alone[70] was eventually settled in the recent case of *Zulhasnimar Hasan Basri v Dr Kuppu Velumani & Ors*[71] whereby the High Court dismissed the appellants' claims that the respondents had breached their duty in providing care to them as there was sufficient evidence to show that the first appellant showed a rare form of an abnormal uterus which cannot be seen without

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61 Ibid para 39.

62 *Foo Fio Na v Dr Soo Fook Mun* [2007] 1 MLJ 593 at [69].

63 Kumaralingam Amirthalingam (n 61).

64 [2007] 5 MLJ 552 (*'Puthucheary'*).

65 Ibid [16].

66 Dato' Mah Weng Kwai (n 47).

67 [2009] 2 MLJ 599.

68 [2010] 5 CLJ 764.

69 Dato' Mah Weng Kwai, 'Approach to Medical Negligence Claims by Malaysian Courts' (*Mondaq,* 28 July 2020) <https://www.mondaq.com/professional-negligence/969990/approach-to-medical-negligence-claims-by-malaysian-courts> accessed 28 January 2021

70 Ibid.

71 [2017] 8 CLJ 605.

surgery. Therefore, the first respondent was not able to foresee this damage. The Court of Appeal by a unanimous decision also affirmed the judgment of the High court. The Federal Court then subsequently resolved the uncertainty as to whether the *Bolam's* test or the *Rogers v Whitaker* test should apply in the light of the *conflicting decisions of the Court of Appeal in Malaysia.* The Federal Court restricted the *Rogers v Whitaker* test specifically to the duty to inform of risks and held that the *Bolam* test is to be applied to the standard of care for diagnosis and treatment and it is subjected to qualifications as decided by the House of Lords in *Bolitho*.[72] Since medical opinions frequently differ in diagnosis and treatment, the courts appreciated that it was not well equipped to resolve such issues and the *Bolam* test will make sense.[73] However, for the duty to inform the patients of the risk, the courts will decide whether a patient has been properly advised of the risks associated with a proposed treatment since it would not require any special scientific or medical knowledge.[74] Therefore in Malaysia, the test in *Rogers v Whitaker* is restricted only to the duty to inform of risks, whereas the *Bolam* test plus *Bolitho* is applied to the standard of care for diagnosis or treatment.

B *Framework in Nigeria*

In Nigeria, to determine whether a doctor has acted below the standard of care and breached his duty, it must first be established that there is a usual and normal practice. It must also be shown that the defendant has not adopted that normal practice. Additionally, there has to be proof that the skill adopted by the defendant would not have been taken by a professional of ordinary skill.[75] This explains the *Bolam* principle. This principle has been applied in some cases including *Ojo v Gharoro*[76]. In this case, the respondents had negligently left a broken needle in the appellant's womb which caused her pain. Although the needle was confirmed to be in her womb, the respondents were not found to be negligent because the act was not reasonably foreseeable and was an accident any reasonable doctor could make.

The *Bolam* test was also applied more recently in the case of *Unilorin Teaching Hospital v Abegunde*.[77] In this case, the respondent being the deceased's son, took out a writ of summons in a representative capacity of the family of the deceased, in the lower court and claimed declaratory reliefs as well as special and general damages against the appellant based on negligent treatment. The alleged negligent act in this case was improper record keeping and errors in the hospital's filing system The lower court granted the two declaratory reliefs, awarded ₦3,138,230.00 and ₦5,000,000.00 as special and general damages respectively in favour of the respondent. The appellant, dissatisfied with the decision of the lower court, filed a notice of appeal raising three questions. Firstly, whether the question of improper record keeping by the appellant was an issue at the

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72 Ibid [97].

73 Ibid [95].

74 Ibid.

75 Babatunde Rashidat Aderayo 'Breach of Duty of Care in Medical Negligence: Scope and Limitation' (2018). LLB dissertation, University of Lagos.

76 [2006] 10 NWLR 173.

77 [2015] 2 NWLR (Pt. 1447).

trial when viewed against the background of the pleadings filed by the parties. Secondly, whether the respondent proved the allegation of negligence against the appellant on the preponderance of evidence before the court and whether the trial judge evaluated the evidence properly. Lastly, whether the award of special and general damages against the appellant was erroneous in law and based on irrelevant consideration. The Court of Appeal per Ogbuinya, JCA set aside the decision of the lower court delivered in this case and held that a medical practitioner should be liable in negligence 'when he falls short of the standard of a reasonably skillful medical man, in short, when he is deserving of censure'.[78] The appellant had exercised professional skills which did not fall short of the standard of a reasonably skillful medical man. Therefore, he was held to be not liable for negligence.

However, in *Abi v Central Bank of Nigeria*,[79] Nwodo JCA effectively endorsed the *Bolitho* test while applying the *Bolam* test, with its focus on the question whether a particular professional opinion can be logically supported. In this case the plaintiff, an employee of the first defendant, was admitted in the second defendant's clinic where he was examined by the third defendant. The plaintiff claimed that the third defendant had negligently diagnosed, prescribed, and administered on him drugs, including gentamycin, which made him permanently deaf. The Court of Appeal, Abuja Judicial Division found that the third defendant had conformed to an acceptable standard practice, but stated:

> Where the questio[n] of assessment of relative risks and benefit of adopting a particular medical practice is in issue [, t]he standard of reasonable care will presuppose that the relative risks and benefit have been weighed by the experts in forming their opinion.… The judge is entitled to find the professional opinion reasonable or responsible [;] it is only when the trial judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark for reference…[80]

This has been the only recorded case where the *Bolitho test* has been applied but, it can be concluded that *Bolam* along with *Bolitho* could be applied in determining the standard of care of doctors to treat and diagnose following the precedence set by the Court in *Abi v Central Bank of Nigeria.*[81]

Also, in the disclosure of information, the case of *Medical and Dental Practitioners Disciplinary Tribunal v Okwonkwo*[82] is the only applicable case in Nigeria so far. It involved the refusal of a patient to undertake a blood transfusion on religious grounds which was granted, and which eventually led to her death. The medical practitioner was found guilty by the Tribunal of contravening a 'published Code of Ethics' ('Code') and stated that the Code enjoined a doctor 'not to allow anything, including religion to

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78 Ibid 421.
79 [2012] 3 NWLR 1, 35-36.
80 Ibid.
81 Ibid.
82 [2001]3 SCNJ 186 ('*Okwonkwo*').

intervene between him and his patient and that he must always take measures that lead to the preservation of life'.

This led to the medical practitioner being suspended from his practice for 6 months as he was found guilty of contravening the Code. The Tribunal's decision can be likened to a 'body of medical opinion' that *Bolam* stands for. However, on appeal to the Supreme Court, the decision of the Tribunal was overruled. The Court was of the opinion that the Tribunal found the respondent guilty simply because he continued holding onto the patient knowing full well that the correct treatment could not be given to the patient in the face of failure to obtain consent from the patient. The Court stated that the real question was whether a medical practitioner should proceed to administer the medical measure refused by the patient, without the patient's informed consent. Applying Section 35 and Section 36(i) of the 1979 Nigerian Constitution dealing with freedom of conscience and freedom of expression respectively, especially when the adult is of a sound mind, the court criticized the Code. It identified its failure 'to pin down on the conflict between the right of a patient to decide on what medical measures to agree to and the doctor's code of ethics'. Although the Supreme Court made no reference to the *Bolam*, *Bolitho* or *Rogers v Whitaker* principles in coming up with its judgment, it has criticized the 'body of opinion' view, which suggests that it did not find it logical.

It has also been inferred that the Nigerian Supreme Court could take the position in *Rogers*/*Montgomery* for future cases.[83] Even though it is in a different context, the Court favored the decision of the patient over that of the doctor in the choice of treatment which is what *Rogers/Montgomery* have come to emphasize. The apex Court held that:

> the court should not allow medical opinion of what is best for the patient to override the patient's right to decide for himself whether he will submit to the treatment offered him. The patient is free to decide whether or not to submit to treatment recommended by the doctor. If the doctor making a balanced judgment advises the patient to submit to the operation, the patient is entitled to reject the advice for reasons which are rational or irrational or for no reasons'.[84]

The inadequacy of the case laws on medical negligence in Nigeria has prevented the case laws from evolving in determining a breach in the disclosure of information. Therefore, the *Bolam-Bolitho* test could still be applied.

III CONCLUSION

The principles in determining whether there is a breach of duty are generally the same in both Nigeria and Malaysia. However, in Nigeria, judicial decisions are scant as the laws on medical negligence are still developing. This stems from social, cultural, religious, and even economic biases that worsen the already inaccessible litigation system.[85] Also,

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[83] Chiangi (n 9) 69.

[84] *Okwonkwo* (n 82) 226-227.

[85] Okanyi D.O and Gureje G.O, 'Socio-Cultural, Economic, Religious and Legal Impediments to the Implementation of the Law Relating to Medical Negligence in Nigeria' (2019) 1 *International Review of Law and Jurisprudence* 149, 156.

while Malaysia applies the *Rogers v Whitaker* test in determining the standard for giving informed choices, Nigeria applies the *Bolam-Bolitho* test. However, both countries still seem to still rely on the *Bolam-Bolitho* test in determining the standard of care for the duty to treat and diagnose.

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BOOK REVIEW OF 'COMPARATIVE LAW: GLOBAL LEGAL TRADITIONS' BY MICHAEL J. BAZYLER, MICHAEL BRYANT, KRISTEN NELSON AND SERMID AL-SARRAF

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The Comparative Law Global Legal Traditions is truly unique in its method, structure, articulation, resources, depth, reach and the stirring of intellectual engagement by an invitation to an intellectual debate of academic writings. It brings together a collaboration of experts in the areas of English (Michael Bazyler), German (Michael Byrant), Chinese (Kristen Nelson) and Islamic (Sermid Al-Sarraf) law. It is a pioneer law school casebook in presenting a global reading of the area of comparative law by selective representation of countries not only encompassing common law and civil law, but also Chinese law and Islamic law. It took ten years in the making and resulted in a highly intellectually academic 853 pages of text resource, yet with practical insights viewed through a lens of diverse perspectives.

The authors' approach is to respect the unique cultural inflections of the law as they vary between different legal traditions, arguing that differences in the pathways to arrive at solutions is worthy of comparison. The focus of the book is on law as an interpretive, or hermeneutic, activity in terms of which a culture informs legal reactions. Hence history and context play an important role. The focus is on the macro level of legal cultures and systems that impart a distinctive meaning to legal traditions and not on the individual legal institutions. In this regard, the search for general concepts or universal principles of law are not the aims of the book. The focus is to document similarities and differences, both of which are traced to the context from which each legal tradition has emerged.

Within each chapter, there are layers of comparative views by other renowned authors at times offering conflicting views to stimulate appreciation of different perspectives. Within each chapter there are sub-themes followed by notes and questions to further draw and stimulate debate and thought on the given topic.

In the first chapter, introduction to comparative law, the readers are invited to consider the aims and meaning of a study of comparative law. Is it an exercise beyond just making comparison of similarities and differences? It also allows a lens into how different legal systems with different cultures attempt to solve legal issues within the context of their environment. The interdependence of nations has pushed the borders of concentration beyond just domestic laws. The method of comparative law could provide a much diverse range of model solutions. The question of whether interdisciplinary studies (history, philosophy, anthropology and political science) or mainstream approach should

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inform the study of comparative law is debated. It covers issues such as law as an import and export, the history of comparative law, how to do comparative law, the taxonomic project and the concept of a legal tradition, the approach and structure of the casebook, comparative lawyering and women in law.

The four major parts of the book explores four legal traditions. German law is chosen to reflect the civil law system. English law is chosen to model the common law system. The eastern representation is Chinese law which is a secular system. The final legal system is that of a religion based legal tradition represented by Islamic law (*Sharia* law). Each part has seven chapters which are intended to empower students to compare and differentiate the legal traditions under review. Five common chapters are included in each part. These are the history and development of legal tradition (for Germany and the English common law there is a sub-chapter on constitutionalism), the political process, the judicial process, the legal actors and legal education and civil law (for Islamic law, civil law is represented as family law). The remaining two chapters for each part focuses on a legal subject most relevant to that legal tradition. The German constitution is in a single document and the discussion is on finding the proper balance between giving powers to governments to protect national security, public health and welfare and the placing of limits on government power to protect civil liberties. The German experiences during the Nazi era, post 9/11 and in the aftermath of the Covid -19 pandemic are explored. The focus of the English law chapters is given to the Brexit aftermath implications. The impact on Scotland (which voted to stay in the European Union) as part of the United Kingdom and the signal to the dream of a united Europe is articulated for intellectual thought.

The Chinese legal traditions include a chapter on foreign investment and trade law which is targeted for readers who wish to engage in trade with this fast emerging nation on an economic footing. The People's Republic of China (PRC) is a nation-state ruled by a single party (the Communist Party of China) whose rule is enshrined in Article 1 of the PRC Constitution. The lightning speed of economic growth in China in the last three decades would advocate for an alternative legal model for governance to the multiparty liberal democratic systems in the West. The Chinese population is just under 20% (1.38 billion) of the world population aside from the political and economic factors would justify a study of the same.

For Islamic law, the history and development of Islam and the *Sharia* (body of rules that make up Islamic law) is covered as a base. The theoretical influence is seen within three Muslim majorities' countries of Pakistan, Iran and Iraq. Each represent a different model on how Islam is manifested within the country's legal system. The book also goes the extra mile to explore how Islamic norms appear in secular nations of Europe, Australia and North America. A chapter is also devoted to Islamic family law which is a primary area where the rules of the classical Islamic jurists are salient. There is also a related discussion of the rights of women in Islam.

The book is rich in the bridging of the past and present in the representation of a comparative study of legal global traditions. It covers diverse sets of selected global traditions in a non-judgmental manner, bringing in authoritative literature with notes and questions to further guide the reader. It is a useful read not only for law students but

to any reader who for whatever reason is seeking to navigate through an interconnected interdependent globe to comprehend the global legal traditions and cultures that shape it.