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ABSTRACTS

Paper No 1/2011

Adjudicating Environmental Sustainability: Benching for Balance

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The growth of scientific insights, and the speed by which information is communicated, has to an extent, heightened human awareness and interest to seek conditions that will ensure their lives are not put at risk. This in turns brings to point, the need to seek balance to ensure that humans can continue to live with each other, and off the planet, without mortgaging their future and the Earth itself. The term sustainability, suggests that humans have a right to live peacefully and well, and that the environment should not be stretched to a point of no recovery. The problem arises when the law is expected to speak for both humans and environment, spelling and ironing out means to facilitate balance, as sustainability is about how humans determine their ability to sustain their existence, between themselves, as well as the very life support system that enables them to exist. Sustainability is not just about giving due consideration to the environment, it is also about equity and to an extent equality. Thus, the conundrum, humans are driven by different values that shape their interests and needs, which can lead to conflict and competing interests. This paper briefly looks at the options that the Malaysian Bench can take when adjudicating for environmental sustainability, lynch pinned on the question, will it be possible to adjudicate with the Earths interest in mind?

Key words: Environment, sustainability, earth, scientific, adjudicate

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Paper No 2/2011

Sustainability in Labour Disputes Management and Resolution: A Socio-legal Survey

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Sustainability is already a famous term which can be used for many purposes in nation development. It can also be applied in labour disputes management and resolution. This paper is the result of survey carried out by the researchers to measure the public responses and perspective on the efficiency or otherwise of the labour dispute resolution mechanism. The inefficiency of labour dispute resolution mechanism will retard industrial and economic development, hence affecting the sustainability of nation growth. Besides presenting the data and its analysis, this paper also examines the current mechanics of the labour disputes mechanism. A pertinent question to ask is whether such mechanism is still relevant and sustainable amid the rapid growth of industrialization and globalization.

Key words: sustainability, labour, disputes, resolution, Malaysia

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Paper No 3/2011

The Development of FDI Dispute Settlement in China and Malaysia

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Economic globalization has made Foreign Direct Investment (FDI) prevail in the developing countries. As the biggest developing country in the world and potent developing country in the Association of South East Asian Nations (ASEAN) respectively, China and Malaysia have became the favourable investment destinations in Asia. Accordingly, the relevant disputes also grow in large number in both countries. The objective of this paper is to explore the recent development of FDI dispute settlement in China and Malaysia, and propose pertinent suggestions for their future improvement. By adopting qualitative method, this paper focuses on evaluating three significant Multinational Investment Treaties (MITs), namely Washington Convention on the Settlement of Investment Disputes, World Bank Guidelines on the Treatment of Foreign Direct Investment, and Agreement on Trade-Related Investment Measures, to find out respective conflicts of Chinese and Malaysian policies and laws, and to further analyze their legislative differences by contrast. Practically, these MITs may standardize FDI in China and Malaysia and push their economic development. Nevertheless, both China and Malaysia as the developing countries have objective difficulties to fully implement these MITs for the reason that they were mostly legislated under the advocacy of developed countries in favor of their profits. On the way of the internationalization of Chinese and Malaysian legislations, both countries should carry through further negotiations and consultations to reform their domestic investment laws in accordance with these MITs so that they can avoid unnecessary legal conflicts and investment disputes in the future.

Keywords: FDI, Dispute Settlement, MITs, China, Malaysia

Paper No 4/2011

Nanotechnology and the dichotomy between discoveries and inventions: A legal critique

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Discoveries have traditionally been excluded from patentability in many Patent Acts. On the other hand, American Patent Act does not exclude discoveries from being patentable subject matters. Nano materials were found in the nature for ages and nanotechnology devices may be just counterparts to natural materials, hence there has been a debate as whether natural nano materials can be dealt as nanotechnology thereby whether or not they are patentable. This debate would be related to the old debate about determination of the boundaries between discovery and invention. In this article, the authors will critically analyse these two different approaches of dealing with discovery to specify the best approach which can suitably balance between encouraging innovation and avoiding encumbrance the market by an unduly huge number of patents. This analysis involves a definition to the (American) discovery and examines its characteristics to see whether it is discovery or not according to the laws which exclude discoveries from patentability, this will be done with focusing on nanotechnology context.

Key words: Nanotechnology, Patent, Discovery, Invention, Subject matters.

Paper No 5/2011

Tribunal Undang-undang Laut Antarabangsa sebagai Medium Penyelesaian Pertikaian ke atas Blok ND6 & ND7

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Konflik tuntutan bertindih antara Malaysia dan Indonesia ke atas kemewahan Blok ND6 dan ND7 yang terletak di Laut Sulawesi sehingga kini masih berlarutan dan belum menemui penyelesaiannya. Sehubungan dengan itu, objektif kajian ini adalah untuk menganalisis institusi dan bidangkuasa Tribunal Undang-undang Laut Antarabangsa (*The International Tribunal for the Law of the Sea*) sebagai medium penyelesaian bagi menamatkan kemelut ND6 & ND7 antara Malaysia dan Indonesia ini. Kajian ini mengambil pendekatan kualitatif disamping mengambil kira pelbagai faktor lain seperti geo-politik dan hubungan antarabangsa kerana dasar undang-undang antarabangsa itu sendiri adalah hasil campuran teori undang-undang dan juga politik antarabangsa. Dalam mencapai objektif tersebut, kajian ini menekankan kupasan terhadap isu dan penyelesaian di bawah undang-undang antarabangsa. Kajian ini mendapati bahawa Tribunal Undang-undang Laut Antarabangsa ini merupakan medium yang wajar dipertimbangkan oleh Malaysia dan Indonesia untuk mengakhiri kemelut ini, namun alternatif penyelesaian yang lain juga harus diberi perhatian seperti Mahkamah Keadilan Antarabangsa dan juga Pembangunan Bersama. Justeru, adalah diharap kajian ini berupaya membuka jalan dan membantu kedua-dua negara untuk menyelesaikan konflik dan dalam waktu yang sama ia juga mampu untuk menyumbangkan kepada perkembangan undang-undang antarabangsa dan juga dari segi cadangan pelaksanaan kepada penyelesaian pertikaian ini.

Kata kunci: Undang-undang Antarabangsa, Tribunal Undang-undang Laut Antarabangsa, Konvensyen Undang-undang Laut Antarabangsa 1982 (KUULA 1982).

Paper No 6/2011

Penyelesaian Pertikaian Pengguna di Malaysia, Thailand dan Filipina

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Dalam pasaran global, peningkatan dalam pengeluaran dan pengagihan barang telah meningkatkan lagi pilihan pengguna. Secara langsung perkembangan ini telah meningkatkan juga pertikaian pengguna. Perkembangan teknologi pemasaran juga telah membawa kepada pertikaian berdimensi baru. Penyelesaian pertikaian pengguna merupakan satu lagi aspek konsumerisme yang harus diberikan perhatian. Namun dalam menyeimbangkan ketidakseimbangan kuasa pasaran antara peniaga dan pengguna, antara cabaran hebat dalam sesebuah korpus perlindungan pengguna adalah untuk membangunkan satu sistem penyelesaian pertikaian yang memperkasakan hak dan kepentingan pengguna dan pada masa yang sama melindungi hak dan kepentingan peniaga beretika. Di kebanyakan negara Asia, terdapat peruntukan mengenai penyelesaian pertikaian dalam perundangan perlindungan pengguna. Keunikan Malaysia, Thailand dan Filipina dalam menangani pertikaian pengguna ditampilkan dalam bentuk perlindungan yang diperuntukkan. Ketiga-tiga negara ini mempamerkan elemen penyelesaian pertikaian alternatif dalam mekanisme yang kedapatan bagi penyelesaian pertikaian pengguna. Mengguna pakai metode analisis kandungan, kertas kerja ini akan mengupas peuntukan yang terkandung dalam perundangan perlindungan pengguna di ketiga-tiga negara Asia ini, iaitu, Malaysia, Thailand dan Filipina dalam menyediakan satu mekanisme yang bersesuaian dengan ciri-ciri pertikaian pengguna. Kertas kerja ini akan membincangkan Tribunal Tuntutan Pengguna Malaysia yang diwujudkan di bawah Akta Pelindungan Pengguna 1999, seterusnya menganalsis peruntuk mengenai Consumer Protection Board di Thailand seperti mana yang terkandung dalam Consumer Protection Act B.E. 2522 (1979) dan prosedur penyelesaian pertikaian pengguna terkini di Thailand iaitu Consumer Case Procedure under the Consumer Case Procedure Act B.E. 2551 (2008) of Thailand. Selain Malaysia dan Thailand, kertas kerja ini juga akan memerihalkan mekanisme yang terdapat di Filipina bagi penyelesaian pertikaian pengguna seperti yang terkandung dalam Consumer Act (RA 7394).

Paper No 7/2011

Resolution of Family Disputes: Mediation vs. Litigation

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Family disputes, more often than not, are rarely concerned with matters of fact but almost invariably complicated by the intense and intimate emotions of the parties in conflict. Therefore, the utilization of Alternative Dispute Resolution (ADR) such as conciliation and mediation, independent of litigation will lead to a more satisfactory resolution of disputes rather than relying on the judgments of the court of law. It has to be borne in mind that in Malaysian society, family ties are still very strong and as such when matrimonial disputes arise and marriages are on tender-hooks, parties often seek assistance from family members to salvage the marriage. If they consult the lawyers, the matter would be worst. As such, for family mediation to be successful, efforts should be made to promote and create public awareness on its advantages. Mediation is considered as a viable alternative to speedy settlement of disputes. It is a voluntary, non-binding private dispute settlement process in which a neutral person (mediator) helps the

parties try to reach a negotiated settlement. The role of the mediator is to facilitate the parties in dispute to arrive at a solution. He simply helps the parties to identify their common goals and problems. Mediation is different from litigation as the latter brings bad publicity, acrimony, high cost and high technicality. Mediation has come under the spotlight and watchful eye of many countries' legal systems for its ability to resolve conflicts between parties, reduce court case loads and reduce overall legal costs. Many jurisdictions already have existing legal provisions that give their courts the authority to order parties in dispute to mediation when deemed appropriate. In Malaysia, to encourage settlement of disputes through mediation including family disputes, the Bar Council established the Malaysian Mediation Centre (MMC) in 1999. The paper focuses on the development and advantages/merits of mediation as a suitable means of resolving family disputes as oppose to litigation. The law and the practice in some selected jurisdictions will be deliberated to study the performance of family mediation so far.

Paper No 8/2011

Court-annexed Mediation in the Syariah Court:
Some Problems and Prospects

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Islamic law considers any court-annexed framework for the resolution of disputes as part of the case management role of the judge. ADR processes, such as *sulh* and *tahkim* have been practised in Islam since the period of the Prophet Muhammad s.a.w and continued to be practised by the Companions and the generation after them. There are clear authorities that support the use of ADR in Islam either in the Qur'an or Hadiths of the Prophet Muhammad s.a.w. This paper examines the status of the court-annexed mediation programme of the Shari'ah Court in Malaysia. Issues especially relating to the backlog of cases, led to the introduction of *sulh* (mediation) as court-annexed process with a view to accessing the problems, and their resolution. Overcoming these operational challenges identified will go a long way in reducing the backlog of cases in the Shari'ah courts in Malaysia. A number of challenges are encountered in implementing this court annexed mediation. Some suggestions and recommendations are made to improve further the service of *sulh* at the Syariah Court.

Paper No 9/2011

Penggunaan Sulh atau Mediasi dalam Kes-kes Penukaran Agama

Faridah Jalil dan Rohizan Abdul Halim

Fenomena tukar agama merupakan suatu keadaan yang biasa berlaku dalam masyarakat di mana-mana negara di dunia ini tidak terkecuali juga Malaysia. Kebiasaannya di Malaysia pihak-pihak yang terlibat dalam kes penukaran agama akan menggunakan proses Mahkamah bagi mendapatkan pengiktirafan terhadap status mereka. Melalui perbicaraan di Mahkamah terbuka, pelbagai isu yang kontroversi akan timbul. Keadaan ini membangkitkan emosi masyarakat dan kesannya keamanan dan keselamatan negara akan tergugat dengan penganjuran forum tukar agama, cadangan penubuhan jawatankuasa antara agama, penganjuran perhimpunan haram, perbuatan khianat terhadap rumah ibadat dan sebagainya. Walhal dalam kes-kes penukaran agama, pihak yang terlibat adalah keluarga terdekat dan bukannya orang awam. Seharusnya dalam kes-kes penukaran agama, sulh dijadikan sebagai satu kaedah penyelesaian utama dan bukannya perbicaraan. Sulh atau mediasi di mana pertikaian diselesaikan dengan cara perbincangan semakin mendapat tempat dan dianggap cara terbaik dalam menyelesaikan pertikaian secara damai tanpa persengketaan. Sulh juga adalah satu kaedah yang diiktiraf dalam agama Islam, malahan diakui sebagai

wujud sebelum kedatangan Islam lagi dalam masyarakat Timur Tengah. Antara faktor yang mempopularkannya adalah kerana wujud hubungan kuat dalam sesuatu kaum atau etnik yang membolehkan pertikaian diselesaikan secara dalaman berbanding masyarakat Barat yang lebih bersikap individualistik. Dengan penggunaan Sulh dalam kes-kes tukar agama, kebajikan dan keselamatan pihak-pihak terlibat dapat dilindungi dan kontroversi juga dapat dielakkan. Bak kata pepatah Melayu menarik rambut dalam tepung, rambut jangan putus dan tepung jangan berselerak. Sulh dapat memastikan pihak-pihak dalam kes-kes penukaran agama mendapat keadilan sewajarnya dengan syarat pihak berkuasa dapat mewujudkan pakar dalam kedua-dua bidang undang-undang iaitu Sivil dan juga Syariah bagi menjalankan proses Sulh.

Paper No 10/2011

Mediation in schools: is it the way forward?

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Mediation is not a new concept and it has been used as one of the methods to resolve disputes between the two conflicting parties faster. This paper aims to discuss on the possibilities of implementing mediation as one of the methods in facing discipline problem among school children in Malaysia. Mediation is widely used in tackling special education issues and a critical analysis will be made as practiced in developed countries such as the United Kingdom and Australia. This paper highlights the possibilities of applying mediation in school environment as it will not only promote faster negotiation but also it makes us to rethink the future of our children. Blaming and shaming students might not be the way in dealing with discipline issues in schools. Thus, this paper suggests that mediation should be developed to suit with not only the school environment but also to promote a better relationship between teachers and school children as teachers are considered the '*loco parentis*', legal responsibilities of parents while children are at schools.

Paper No 11/2011

ADR and Sports

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There is an increase of sports disputes as a result of sports industrialisation and development of professional sports. Conventionally, these disputes are under the judicial controls of the respective Governing Sports Bodies (GSB). However, in many cases, the rights of athletes are not adequately protected, either by specific legislation or by the GSB's internal procedures. The disputes resolution and their settlements are lack of consistencies and unenforceable. Currently, the ordinary courts adjudicate issues on sports under the general heading of administrative law, contractual disputes and criminal proceedings. Although International Olympic Council created Court of Arbitration for Sports (CAS) in 1984 but unfortunately CAS is only suitable for high-level international disputes. The establishment of sports arbitration centre in Malaysia is highly needed to support the development of sports generally and providing efficient means of disputes settlement. This paper will critically discuss the significance of sports arbitration by comparatively analyse the scope of sports related cases, sports arbitration rules and proposed method of settlement and sports arbitration.

Paper No 12/2011

Institutional Dispute Resolution in Sports

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Special disputes need special attention and special qualifications. Law related cases in Sports are still dealt within structures which are either in the field of sport law or in other general laws. Despite that fact, the role of sport is increasing in every society and so is the complexity of law related sport cases. The various rules, the existence of executive factors for all sports teams, nature of injury, occurrence of illegal activities and the need for proper management of sports activities call for a comprehensive, concerted and appropriate response in the legal governance of sport activity including its dispute resolution mechanism. In Malaysia, disciplinary committees or boards operate within sports federations such as Badminton Association of Malaysia, Malaysian Hockey , Football Association, National Cycling Federations and others. Those committees or boards are either permanently or temporary established and follow the constitution of those superior international associations. In addition, there is also such a board within the National Olympic Committee and the National Sports Council of Malaysia which is based on the National Sports Council of Malaysia Act 1971. Currently there are law cases, customs, and their implementation in sports, but there is a lack of qualified and competent attorneys and judges to manage these aspects. Unqualified lawyers affect the outcome of the disciplinary committee of the international sport federations. In this article, we will examine the need for establishing proper and appropriate institutions to deal with any kind of judicial problem within the world of sports.

Paper No 13/2011

Undang-undang Buruh terhadap Dasar Penghantaran Buruh Migran Indonesia ke Luar Negara dan Pemasalahannya

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Buruh migran Indonesia yang bekerja di luar negara telah memberikan sumbangan yang bererti bagi pembangunan di Indonesia. Kajian ini bertujuan untuk melihat dengan mendalam undang-undang buruh terhadap dasar kerajaan Indonesia di dalam menangani penghantaran buruh migran Indonesia ke luar negara. Kajian ini terbahagi kepada tiga perbincangan utama, pertamanya untuk melihat undang-undang buruh Indonesia terhadap dasar penghantaran buruh migran Indonesia dan pemasalahannya; kedua, impak program penghantaran buruh migran Indonesia ke luar negara oleh pihak swasta dan ketiga, usaha menggubal perundangan terhadap perlanggaran pengurusan buruh migran Indonesia di negara destinasi. Amat diyakini bahawa undang-undang buruh Indonesia dan program penghantaran buruh migran Indonesia ke luar negara sedikit sebanyak mempengaruhi dasar luar negara Indonesia sebagai akibat daripada penghijrahan beramai-ramai buruh migran ke luar negara. Di akhir kajian akan diberikan cadangan dan kesimpulan berkenaan perundangan buruh di Indonesia dan langkah-langkah yang boleh kerajaan Indonesia ambil untuk mengatasi pemasalahan yang membelenggu buruh imigran mereka di luar negara.

Kata Kunci : Undang-undang buruh, buruh migran Indonesia, pemasalahan.

Paper No 14/2011

Terma Kelambatan dalam Kontrak Penerbangan: Hak Penumpang Penerbangan daripada Perspektif Undang-undang di Malaysia

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Sejak akhir-akhir ini penumpang penerbangan sering berdepan dengan masalah penundaan atau kelambatan penerbangan sama ada penerbangan domestik ataupun antarabangsa. Keadaan ini mungkin disebabkan oleh masalah-masalah yang tidak dapat dielakkan oleh syarikat penerbangan contohnya masalah teknikal, masalah cuaca dan proses ujian penerbangan. Mungkin pihak syarikat penerbangan dan lapangan terbang juga tidak mengingini kelambatan ini berlaku tetapi di pihak penumpang, mereka mengharapkan sesuatu dilakukan untuk memperbaiki kualiti masa pengangkutan udara. Berdasarkan Pertubuhan Pengangkutan Udara US, dalam tempoh masa April hingga Ogos, lebih dari 150,000 penumpang mengalami kelambatan penerbangan dan purata kelambatan adalah sebanyak 32 minit. Kebanyakan kelambatan disebabkan oleh 2 faktor utama iaitu pertama, kekurangan sumber penerbangan seperti pesawat kapal terbang, krew, pintu pagar dan sebagainya, dan juga kedua disebabkan oleh faktor lapangan terbang serta ruang kapal terbang yang terhad. Penulisan ini akan memfokuskan peruntukan undang-undang Malaysia mengenai terma kelambatan serta hak penumpang yang wajar diambil kira apabila berlakunya penangguhan atau kelambatan penerbangan.

Paper No 15/2011

Pengaplikasian Kaedah Pengantaraan bagi Menyelesaikan Pertikaian Kecuaian Perubatan di Malaysia

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Kecuaian perubatan adalah salah satu cabang di dalam bidang kecuaian professional. Tuntutan bagi kecuaian perubatan yang melibatkan para doktor adalah pelbagai dan ianya mencakupi kesilapan memberi diagnosa, memberi rawatan yang salah serta kegagalan untuk menjalankan rawatan dengan berhati-hati dan cermat. Tuntutan bagi kecederaan yang dialami akibat kecuaian perubatan merupakan salah satu daripada tuntutan kecederaan peribadi yang lazimnya dibawa ke mahkamah oleh mereka yang terbabit. Di Malaysia liabiliti dalam kecuaian termasuklah kecuaian perubatan adalah bersandarkan undang-undang Tort yang berasaskan kesalahan (*fault*). Ertinya ia merujuk kepada kegagalan suatu pihak untuk melaksanakan tugas untuk berhati-hati menurut undang-undang. Namun begitu, bukanlah satu perkara yang mudah bagi seseorang Plaintif untuk membuktikan kecuaian di pihak doktor yang merawatnya apabila pertikaian tersebut didengar di mahkamah. Justeru dewasa ini terdapat negara-negara lain di serata dunia telah mula memberikan perhatian kepada kaedah-kaedah penyelesaian pertikaian lain sebagai alternatif bagi menyelesaikan pertikaian perubatan. Kaedah pengantaraan adalah merupakan salah satu dari kaedah alternatif kepada litigasi yang boleh diapliaksikan. Maka kertas kerja ini adalah bertujuan untuk mengenalpasti apakah kelemahan atau permasalahan dalam undang-undang kecuaian perubatan yang menyebabkan pengantaraan menjadi satu kaedah alternatif yang paling efektif bagi menyelesaikan pertikaian perubatan di Malaysia.

Paper No 16/2011

Choice of Law Dalam Penyelesaian Pertikaian Perbankan Islam di Indonesia

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Wujudnya dualisme mahkamah antara mahkamah sivil dan mahkahamh syariah yang mempunyai kuasa menyelesaikan pertikaian perbankan Islam di Indonesia menimbulkan beberapa perbedaan pandangan. Setidak-tidaknya terdapat dua pandangan iaitu: *Pertama*, melihat bahawa perkara tersebut merupakan satu bentuk penerapak konsep *choice of law* bagi para pihak; Kedua, berpandangan bahawa peruntukan demikian akan menimbulkan ketidakpastian undang-undang. Permasalahannya, dalam Ayat (3) Pasal 55 Undang-undang No. 21 Tahun 2008 tentang Perbankan Syariah memberikan peruntukan persyaratan penyelesaian pertikaian oleh institusi selain Peradilan Agama tidak boleh bertentangan dengan prinsip-prinsip syariah. Sementara institusi berkenaan, khususnya Peradilan Umum belum menunjukkan kesediaan bagi mengendalikan jenis kes baru tersebut. Oleh itu, kajian ini bertujuan untuk mengenal pasti masih relevankah konsep *choice of law* dalam penyelesaian pertikaian perbankan Islam di Indonesia. Selain pendekatan sejarah dan analitis kritis, pendekatan harmonisasi juga akan digunakan dalam menganalisis isu ini bagi menemukan konsep penyelesaian pertikaian perbankan Islam yang tepat dan menepati kesesuaian dengan prinsip-prinsip syariah.

Kata kunci: *Choice of law*, penyelesaian pertikaian, perbankan Islam, Indonesia

Paper No 17/2011

Kaedah Publisiti Profesion Guaman: Menelusuri Kelemahan Memikiri Penambahbaikan

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Kaedah publisiti yang mengawal profesion guaman Malaysia masih berada di takuk lama, bersifat restriktif, serta tidak mengimbangi kepentingan profesion dan awam. Ia bukan sahaja menyekat penyebaran maklumat berguna kepada awam, bahkan menghalang peguam untuk memasarkan perkhidmatan mereka dengan lebih efektif. Adalah suatu paradoks untuk membincangkan tentang peranan perkhidmatan guaman pada era liberalisasi perdagangan dan pembukaan pasaran domestik andai penilaian semula atau pindaan tidak dilakukan terhadap kaedah berkenaan. Dalam kertas kerja ini, penulis menelusuri kelemahan yang terdapat pada kaedah publisiti dan memikiri penambahbaikan yang boleh dilakukan demi mengatasi kelemahan tersebut. Antara kelemahan yang dibincangkan termasuklah keterhadan jenis maklumat yang boleh diiklankan dan medium publisiti yang boleh digunakan; larangan terhadap perbuatan memujuk rayu; kelonggaran prosedur pemfailan, penilaian, pematuhan dan penguatkuasaan; serta mekanisme tindakan tatatertib ke atas peguam yang gagal mematuhi kaedah publisiti. Suatu soal selidik turut dijalankan ke atas sejumlah peguam untuk meninjau secara umum persepsi mereka terhadap kaedah publisiti sedia ada. Moga ilmu yang dipaparkan dalam kertas kerja ini dapat dipertimbangkan oleh Majlis Peguam dalam membangunkan kaedah publisitinya dengan lebih konsisten serta menepati keperluan profesion dan awam.

Paper No 18/2011

Perlindungan Harta Intelek menerusi Mahkamah Harta Intelek di Malaysia

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Harta intelek merupakan harta pemikiran atau harta intelek seseorang. Ia mungkin dalam bentuk rekaan asal, ciptaan, cap dagang atau pelaksanaan idea yang bernas. Dari aspek perniagaan, ia menyamai ilmu pengetahuan pemilik, iaitu komponen utama untuk kejayaan. Ia merupakan suatu kelebihan yang mengatasi syarikat-syarikat lain. Apabila pasaran dunia menjadi kian kompetitif, adalah penting bagi kita melindungi harta intelek seseorang itu. Memandangkan Malaysia kini begitu memanfaatkan teknologi maklumat di samping bergerak ke arah ekonomi yang berasaskan pengetahuan, kerajaan akui akan perlunya perlindungan harta intelek yang lebih mantap. Hal ini disebabkan Malaysia masih lagi dalam senarai perhatian antarabangsa sebagai salah sebuah negara yang mempunyai bilangan kesalahan harta intelek yang tinggi. Hatta, pada tahun 2007, Mahkamah Harta Intelek telah ditubuhkan di Malaysia. Secara amnya, Mahkamah Harta Intelek sangat signifikan atau bermanfaat kepada negara Malaysia dalam bergerak seiring dengan arus globalisasi dan modenisasi. Penubuhan Mahkamah Harta Intelek mampu menjadikan Malaysia gah di peringkat domestik dan juga di pentas dunia. Justeru, kajian ini akan berkisar tentang Mahkamah Harta Intelek yang sedia ada dalam menangani isu-isu harta intelek di tanahair ini. Kajian ini sangat signifikan sebagai salah satu platform atau wadah kepada perkembangan Undang-undang Harta Intelek selaras dengan arus pembangunan Malaysia khususnya dan antarabangsa amnya. Kajian ini bertujuan untuk menilai kewujudan Mahkamah Harta Intelek di Malaysia dengan mengambil kira ruang untuk penambahbaikan yang boleh dilakukan ke atasnya. Maka, pendekatan kualitatif bersifat diskriptif digunakan untuk menerangkan operasi Mahkamah Harta Intelek di Malaysia. Kewujudan Mahkamah Harta Intelek di Malaysia sangat penting dalam melindungi harta intelek yang sangat berkembang dek arus pembangunan.

Paper No 19/2011

A Review on Some Criminal Aspects of Consumer Protection Act 2009 of Iran

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"Consumer protection" is one of the principles in the constitution law of the Islamic republic of Iran. In regard of the implementation of the constitution law and to protect consumers more effectively, the parliament of Iran has ratified the Consumer Protection Act in 7/10/2009. To ensure that consumers' rights are fully protected, the Consumer Protection Act 2009 of Iran, has provided novel criminal responsibilities for goods and services providers which are mainly mentioned in section 3, 8, 18, 19 and 20. According to this Act, selling defective goods or services, warranty denial, having no standard license, lack of formal presentation for giving services after sales, unreal advertisement and collusion are criminalised. This paper is going to explain and analyse the criminal aspects of the consumer protection law of Iran.

Key words: criminal protection, consumer protection, Criminal Act of Iran.

Paper No 20/2011

Analisis Yuridis Kompetensi Absolut
Mahkamah Industrial di Indonesia

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Keberadaan Mahkamah Industrial yang menggantikan kedudukan Panitia Penyelesaian Perselisihan Perburuhan di Tingkat Daerah (P4D) mahupun di tingkat Pusat (P4P). Dasar hukum bagi P4 D / P4 P adalah Akta No. 22 Tahun 1957 tentang Penyelesaian Perselisihan Perburuhan jo Akta No. 12 tahun 1964 tentang Penamatan Kontrak di Perusahaan Swasta yang dianggap sudah tidak sesuai dengan kebutuhan masyarakat. Keberadaan Akta No. 2 Tahun 2004, tentang Penyelesaian perselisihan hubungan industrial (LN No. 6 TLN No. 4356) masih menimbulkan perdebatan di masyarakat. Diantaranya mengenai kompetensi, prosedur dan penerapan asas peradilan cepat dengan biaya murah masih diragukan. Terdapat beberapa kepentingan dari pekerja yang belum dapat ditangani oleh Mahkamah Industrial. Sampai sekarang aksi menolak Mahkamah Industrial hanya dilakukan sebatas protes melalui demo, mogok. Belum ada yang mengajukan gugatan ke Mahkamah Konstitusi berkaitan dengan adanya beberapa ketentuan seksyen dalam Akta No. 2 Tahun 2004 karena bertentangan dengan Perlembagaan (UUD 1945). Diantaranya adalah yang berkaitan dengan kompetensi Mahkamah Industrial, iaitu berdasarkan ketentuan syeksen 56 Akta No. 2 Tahun 2004.

Paper No 21/2011

Pengangkutan Udara Komersial di Indonesia:
Penyelesaian pertikaian terhadap kelewatan penumpang

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Pertikaian merupakan fenomena sosial yang sentiasa wujud semenjak bermulanya kehidupan manusia. Perkara ini terjadi kerana manusia mempunyai kepentingan atau keinginan yang tidak seragam. Keinginan yang tinggi dan persaingan yang kompleks dalam kehidupan moden berkecenderungan meningkatnya potensi timbulnya pertikaian antara manusia. Suatu hal yang tidak dapat dinafikan pada masa ini ialah ramainya penumpang yang kurang memperdulikan hak-haknya. Keadaan ini berlaku dalam semua transaksi termasuk dalam perkhidmatan penerbangan sehinggakan tanpa mereka sedari kerugian yang dialami tidak mereka tuntut kepada pengangkut udara komersial kerana faktor ketidakfahaman kepada hak-hak yang dilindungi oleh undang-undang. Pertikaian berlaku apabila penumpang dirugikan akibat menggunakan perkhidmatan penerbangan meliputi kematian, kecacatan kekal, kerosakan bagasi berdaftar atau kabin dan kelewatan pengangkutan penumpang. Pada hakikatnya mereka boleh menuntut kepada pengangkut udara komersial atas kerugian tersebut. Kertas kerja ini bertujuan untuk menganalisis mekanisme penyelesaian pertikaian penumpang dengan pengangkut udara komersial berdasarkan Undang-Undang No. 1 Tahun 2009 tentang Penerbangan (UUP 2009) dan Undang-Undang No. 8 Tahun 1999 tentang Perlindungan Konsumen (UUP 1999). Kajian ini menggunakan metodologi analisis kandungan yang menganalisis sistem penyelesaian pertikaian penumpang atau pengguna berdasarkan UUP 2009 dan UUPK 1999. Dapatan kajian ini menunjukkan bahawa sistem penyelesaian pertikaian antara penumpang dengan pengangkut udara komersial berdasarkan UUP 2009 dan UUPK 1999 tidak jelas dan mantap sehingga melemahkan hak penumpang. Kesimpulan kajian ini ialah sistem penyelesaian pertikaian dalam UUP 2009 dan UUPK 1999 yang sedia ada perlu disemak semula untuk meningkatkan perlindungan kepada penumpang atau pengguna. Dalam era globalisasi dan liberalisasi ini, penerbangan komersial merupakan penerbangan antarabangsa yang memerlukan pengaturan yang lebih baik.

Kata kunci: penumpang, pengguna, pengangkut udara komersial, perkhidmatan penerbangan dan penyelesaian pertikaian.

Paper No 22/2011

Potentialities and Constraints of Polygamy Practice in Malaysia: An Empirical Study

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The concept of polygamy is not a recent phenomenon. It is originated from the Shariah Law in Islam which is divine in nature. Indeed, it is not easy to practise as we think as there are some restrictions and obligations as clearly enumerated in the Shariah Law. It is noted that the practice of polygamy is enormous although there are some debates on it in the modern science. But there are some problems in the Malaysian family life such as the divorce rate is increasing; the husbands have been moving to settle in another state leaving their wives etc. Therefore, the polygamy practice is also increasing. In order to make it effective, some reformations have been made on the polygamy by enacting legislations such as the Islamic Family Law (Federal Territories) Act, 1984 is an ideally perfect which is quite based on the sources of Islamic Law including the Quran along with the reforms initiatives as made in the global Muslim Family Laws and principles which needs to be discussed as research work. Moreover, some important family laws such as the Civil Marriage Ordinance 1952, the Christian Marriage Ordinance 1956, the Divorce Ordinance 1952, the Registration of Marriage Ordinance 1952, the Sarawak Chinese Marriage Ordinance, the Sarawak Church and Civil Marriages Ordinance, the Sarawak Matrimonial Causes Ordinance, the Sabah Chritian Marriage Ordinance 1919 and the Sabah Divorce Ordinance 1963 etc., have been passed to regulate the different family affairs in Malaysia. Most of these laws have been repealed. In addition, some law reforms initiatives on the polygamy such as the Family Law Ordinance 1984, the Law Reform (Marriage and Divorce) Act 1976 as amended by the Law Reform (Marriage and Divorce) (Amendment) Act 1980 and the Law Reform (Marriage and Divorce) Act 1986 and in the Law Reform (Marriage and Divorce Rules 1982 etc.; have been made at home and abroad. This study will examine the present state of polygamy under the sharia law in Malaysia focusing on the Malaysian Muslim Family based on the primary and secondary sources consisting of at least 25 respondents in the different criteria such as students, lecturers, foreigners, ordinary people etc.; in Melaka City, Malaysia.

Paper No 23/2011

Right of Workers and Role of Trade Union in Dispute Resolution in Iran

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This paper discusses the right of workers and role of trade union to dispute resolution in Iran. To that end, the Iranian Labour Laws are analyzed in the light of the ILO standards. The focus is a critical assessment of the extent to which the Iranian Labour Laws are contrary or not to the ILO standards: Although, Articles 157 and 158 of Iran's Labour Act 1990 have emphasized that any dispute between an employer and a worker or an apprentice arising out of the enforcement of this Law and other Labour regulations shall, at the outset be settled through a direct compromise between the employer and worker or trainee or their representatives in the Islamic Labour Councils or in the Dispute Settlement Forums, the right of workers and trade unions is restricted to refer to the Councils and Forums in practice. Usually problems rise up when worker organizations wants to have an activity in general places. In these cases government

will consider the activity as an action against national security; therefore they will be referred to general courts as a criminal. Freedom of association is found Iranian Laws such as articles in the 6th chapter of the Labour Law Act 1990 contravene the ILO Convention No, 87 and No, 98. Iran does not ratify these Conventions. The ILO Committee of Expert and Committee of Freedom of Association declare that Iranian labours do not conform to the principle enshrined in the ILO contribution. The authors adopt a critical legal analysis method in the writing of the paper. Finally, the author will propose changes to the Iranian law in order to make them consistent with the ILO standards.

Paper No 24/2011

Peperiksaan dan Siasatan oleh Jabatan Siasatan dibawah Akta Persaingan sebagai Proses Kawalan Kes Persaingan di Indonesia

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Melalui peruntukan Seksyen 36 Akta Persaingan Indonesia, Komisi Pengawas Persaingan Usaha (KPPU) diberikan kuasa yang sangat luas, mulai dari menerima laporan sama ada daripada awam dan pengusaha, berkenaan tuduhan terjadinya amalan monopoli dan atau persaingan usaha tidak sihat; melakukan siasat dan selidik, panggil dan hadirkan saksi, dapatkan, memeriksa dan atau menilai surat, dokumen, atau bukti lain dalam proses peperiksaan dan siasatan; hingga pada akhirnya membuat keputusan, ada atau tidak adanya kerugian di pihak pengusaha lain atau awam. Melalui Keputusan KPPU Nombor 01/KPPU/Kep/IX/2010 tentang Cara Penyampaian Laporan dan Pelaksanaan Proses Kawalan mengenai Tuduhan Kesalahan dibawah Akta Persaingan Indonesia, terdapat perubahan penting pada pelaksanaan kuasa KPPU. Dengan alasan untuk meningkatkan ketelusan dan keberkesanan pengendalian kes di KPPU, maka proses peperiksaan dan siasatan yang awalnya dikendalikan semuanya oleh KPPU, sekarang telah diwakilkan kepada jabatan khusus yang disebut sebagai Jabatan Siasatan.

Paper No 25/2011

The Basic International Standards on the Recognition and Enforcement of Foreign Arbitral Awards

Mahmood Mowlavi

Arbitration is a well recognized mode for resolving disputes arising out of international commercial transactions. An arbitration award is a determination on the merits by an arbitral tribunal in an arbitration, and is analogous to a judgment in a court of law. Once a dispute between parties is settled, the winning party needs to collect the award. Unless the assets of the losing party are located in the country where the award was rendered, the winning party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located. Unless there is a treaty on recognition and enforcement of foreign arbitral awards between the country where the award is rendered and the country where the winning party seeks to collect, the winning party will be unable to use the court judgment to collect. However, one of the problems faced in such arbitrations related to recognition and enforcement of an arbitral award made in one country by the courts of other countries. This difficulty has been sought to be removed through various international conventions. The New York Convention is one of the key instruments in international arbitration which applies to the recognition and enforcement of foreign arbitral awards. However, the world of international arbitration has changed since the creation of the

Convention so it needs a complementary to the Convention which deals with the issues that have arisen in the practice of international arbitration during the last 50 years.

Paper No 26/2011

Housing Finance under Traditional and Islamic Laws: A Comparative Study

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Housing finance has become an important topic worldwide due to the recent economic downturn caused primarily by the fall of the US market in this industry. Traditional financial institutions have suffered losses while Islamic ones have not. Why? Because of traditional and Islamic financial systems are completely different. How are different? The best way to look at the issue would be to understand the very concept of housing finance from a comparative perspective. This is why the present topic has been chosen for study.

Paper No 27/2011

Testimony of Women in the Criminal Law of Iran

Seyed Ebrahim Ghodsi

The ways of proving murder in the criminal law of Iran are as follows: a) confession, b) testimony, c) compurgation and, d) judge's knowledge. In the criminal law of Iran before the Islamic Revolution, the credibility and validity of women's testimony has been like men's testimony. The 1991 Islamic Penal Code (about penance, retaliation and monetary compensation), Articles 117, 119, 128, 137, 153, 170, 189, 199 and the first segment of Article 237 state that women's testimony has no credibility and validity and only men's testimony is valid but Articles 74, 75, and the second segment of Article 237 state that women's testimony is accepted alongside with men's testimony. The 1996 Islamic Penal Code (about sentencing and inhibitory punishments) has not referred to testimony and there are two opinions among jurists regarding. The first opinion states that women's testimony like men's testimony has credibility and validity but the second opinion states that legislature's silence does not lead to the credibility of women's testimony and the legislature had to announce the credibility and validity of women's testimony explicitly and because it has not been clearly stated, then women's testimony is not authentic. Generally, why there is difference between the testimony of women and men in the criminal law of Iran after the Islamic Revolution of 1979? There are four opinions: a) testimony as duty, b) women's intellect deficiency in comparison with men, c) oblivion and women's unfamiliarity with monetary and business matters, d) time and place appropriateness.

Paper No 28/2011

Money laundry in Iranian laws

Mehran Farahmand

Money Laundry consist of any type of conversion, change, transfusion, assent or support of the Fund, which is said to be legally blazen with illegal source that is done intentionally and with knowledge, and earned through corruption, defalcation and collusion in governmental transactions, fraud, tax evasion, gambling and robbery. Due to article 6 of the Palermo Congress, Money Laundry is known as a kind of organized crime. In Islamic Republic of Iran, however in the various articles of Islamic Punishment Law and other laws, we can find several issues that are connected to the Money Laundry. In 2007 the

Legislator of Iran implemented the law of conflict with Money Laundry in 12 articles and 4 notes. In this law, in addition to determine the different punishments for the cause of the crime, they try to find ways to discover the crime. Regarding this issue, the banks more than before should follow the government in order to discover the crime and to prove it; and should declare all wanted information to the competent officials. However, the approval of this law and determining different punishments for informed supervisor, partner and assistant, can be precautionary; but it has shortcomings in punishments' form and scale, which even ruin the crime and punishment's discovery. So the mentioned objections and suggestions about the resolution of these objections will be examined in this paper.

Paper No 29/2011

The Effect of Unions on Job Security in Labor Law of Iran

Mehdi Shabannia Mansour

After Industrial Revolution and because of the pressures and turmoil in job employments, unions were formed in Iran. In theory, both IR Iran Constitution and Labor Law have legally recognized trade unions but existing incomplete rules and the performance of Ministry of Labor were incompatible with the objective of previous legislation and prevent development of Unions. Likewise, in view of International Labor Organization (ILO) standards, current unions in Iran are so weak that they are not comparable with those of developed countries. As unions are responsible for workers protection, therefore, lack of powerful independent unions and bargaining power affect job security in Iran.

Keywords: unions - job security - Labor Law of Iran – employment – bargaining power – employer.

Paper No 30/2011

Waqf in a Legal/Managerial Perspective
A Study in Waqf As an Islamic philantropy With Special Focus on Malaysian System

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In this paper, it is tried to portray an image of Waqf while considering it as a philanthropy model in Islam. This study has scrutinized the legal and managerial aspects of Waqf which is accompanied by particular focus on Malaysian system. Waqf could be defined as a sustainable development institution, a Social Responsibility Investment or a Civil Society Initiative; it is an enduring endowment. The consensus of scholars and the concept of Muslims' philanthropy are described and is followed by analysis of the Social Security Aspect of Muslim's Philanthropy since the Socio Economy Role of Waqf is a crucial fact which should be considered as an effective tool in eliminating poverty by introducing comprehensive methods. Charity in Islam is intended to be a source of social security; however, currently, most of Muslim countries tied in the challenge of poverty, It is important to find out whether this is the failure of Islamic financial system or endowment activities or whether it is the failure of ad in properly make use of the relevant knowledge. Due to the speedy growth of institutional Islamic philanthropy, poor governance and mismanagement also became a problem within the sector; hence, the issue of administration of Waqf lands in Malaysia and the Innovative Modes of Commercialization of the Waqf land are discussed respectively. In the next step, the legal issues of Philanthropic Waqf and challenges of Malaysian system regarding to Waqf is analyzed. As a final point, the relevant recommendation including recommendation for financial management of Awqaf in Malaysia and recommendation for legal aspect of Waqf is presented.

Paper No 31/2011

Kekurangan Remedi Kontraktual dalam Menjamin Hak Tebus Rugi Pengguna

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Seperti dalam kata-kata latin, *ubi jus ibi remedium*, di mana ada hak, maka adalah remedi, hak dan remedi adalah saling berhubung kait. Untuk menjamin hak pengguna daripada amalan-amalan peniaga yang hanya bertujuan untuk mengaut keuntungan semata-mata, remedi merupakan salah satu saranan di mana pengguna dapat menjamin hak tebus rugi mereka. Untuk memahami kepentingan remedi untuk menjamin hak dalam undang-undang kontrak peranan dan fungsi remedi akan dibincangkan dalam kertas kerja ini supaya dapat menghargai hubungan rapat antara remedi dan hak. Di Malaysia, remedi kontraktual telah diklodifikasikan dalam akta, di mana remedi-remedi ekuiti adalah tertakluk di bawah Akta Relif Spesifik 1950 (ARS 1950), manakala, remedi-remedi *common law* adalah tertakluk di bawah Akta Kontrak 1950. Selain daripada remedi-remedi kontrak *common law* dan ekuiti, perundangan Malaysia juga menyediakan remedi-remedi statutori untuk bidang-bidang spesifik. Sebagai contoh, Akta Jualan Barangan 1957 adalah salah satu contoh, di mana remedi-remedi *common law* telah dikodifikasikan untuk kontrak jualan barangan. Selain itu, Akta Pelindungan Pengguna 1999 adalah satu lagi contoh perundangan di mana remedi-remedi statutori telah dikodifikasikan khas untuk perlindungan pengguna. Remedi adalah penting untuk menjamin hak pengguna, kertas kerja ini akan menbincangkan permasalahan di mana remedi kontraktual dalam akta-akta tidak bertindak untuk menjamin hak tebus rugi pengguna untuk perlindungan pengguna.

Paper No 32/2011

Online Dispute Resolution: Methods and Process

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The growth of internet and information technology has transformed traditional business landscapes into those of electronic commerce or e-commerce. To create confidence and trust in cyberspace for consumers, there must be a system to make sure they are protected while they are doing online business especially when online disputes occur. Dispute resolution and information technology have coalesced into a more effective, more flexible and less costly way for solving disputes, compared to traditional approaches which is known as Online Dispute Resolution (ODR). Methods of ODR include negotiation, arbitration, mediation and med-arb. ODR for small and medium sized disputes, such as those involving B2C is seen to be more effective than courts. There are many ODR providers such as SquareTrade, SmartSettle, Better Business Bureau Online (BBBOnline) and e-Trust. This paper is a doctrinal research; it adopts the historical and jurisprudential approaches. This paper aims at exposing the different methods of ODR and explaining the development of ODR technology.

Key words: online dispute resolution, online arbitration, online mediation, online negotiation, med-arb, ODR provider.

Paper No 33/2011

Kaedah Menafkahkan Anak Yatim Berdasarkan Perundangan Islam: Suatu Kajian Literatur

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Statistik yang dikeluarkan oleh Jabatan Kebajikan Masyarakat telah memaparkan pertambahan bilangan anak yatim yang menghuni di Rumah Anak Yatim dan dianggarkan lebih daripada 40 ribu anak-anak yatim ini memerlukan bantuan sara hidup yang lebih sempurna. Permasalahan yang berlaku adalah apabila terdapat sebahagian institusi yang gagal menjaga keperluan asas anak yatim dengan baik, malah apa yang menyedihkan apabila terdapat institusi- institusi yang menggunakan anak-anak yatim ini sebagai alat untuk memohon bantuan dan simpati daripada masyarakat. Justeru, kajian ini cuba untuk merungkaikan permasalahan ini dengan meninjau kaedah yang sesuai untuk me*nafkah*kan anak yatim di Malaysia, khususnya di negeri Selangor. Kajian ini secara keseluruhannya adalah berhubung dengan permasalahan Perundangan Islam (*fiqh*) dan *usul fiqh* dan kajian ini akan melibatkan dua institusi utama iaitu Pertubuhan Kebajikan Anak Yatim Malaysia (PEYATIM), Ampang, Selangor dan Rumah Kebajikan Baiti Saidatina Khadijah, Gombak. Tinjauan awal literatur ini telah mendedahkan bahawa terdapat kelompangan di dalam kajian-kajian sebelum di mana tiada kaedah khusus untuk me*nafkah*kan anak yatim di negara ini. Justeru, adalah diharap kajian ini berupaya membuka jalan dan membantu pihak-pihak yang terlibat di dalam pengurusan anak yatim yang lebih sistematik dan dalam masa yang sama ia juga mampu untuk menyumbangkan kepada perkembangan dunia akademik secara amnya.

Kata Kunci: *Nafkah*, Anak Yatim, Perundangan Islam (*fiqh*)

Paper No 34/2011

Resolving Disputes in Islamic Finance Industry,
A Study of Dualism law in Indonesia

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Development of banking and Sharia business industries inseparable from conflicts and disputes.In Indonesia the resolving disputes in the Islamic Finance industry still in the debate, due to the dualism of regulation and two institutions, Religious court and Shariah Arbitration Board (BASYARNAS). This paper tries to describe framework of resolving dispute system of Islamic banking industry in Indonesia, the dualism between the Religious court and Shariah Arbitration Board (BASYARNAS), as well as some alternative solution to dualisme problem.

Paper No 35/2011

Environmental conflicts resolution under Indonesian Environmental Management Acts: A legal review.

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Between 1982 up to 2009 the Government of Indonesian had replaced the content of the EMAs several times, however the provisions in relations to conflict settlement by using litigation and non-litigation have been expressly provided for in the second EMA of 1997 and the third EMA of 2009. The District Courts are the main judicial mechanism commonly used as alternative for conflict resolution. The political dominance makes the Courts are helpless in maintaining its independence. As a result many judicial verdicts are not keen in interpreting the people's environmental rights in Indonesia. Hence, for environmental litigation cases, the utilization of mechanism outside the court room is encouraged even if there are some disadvantages and weaknesses in exercising such practice. The objectives of this paper will firstly analyze the effectiveness of the existing conflict resolution mechanisms as regulated by the EMAs in relation to environmental cases in Indonesia. Secondly, reviewing to the 2004 Law No. 4 on the Judicial Power (*Kekuasaan Kehakiman*) is to seek the establishment of Environmental Court as a possible new instrument to address environmental conflicts. Thirdly, in view of that, this paper will review practices of the environmental courts in many countries in respond to the environmental rights protection. Mostly data collected from the primary data, such as legislation, and regulations, the judicial verdicts and secondary data obtained journals on line. The writing is critical and analytical. Hence, this paper finds that the District Court is not a sole mechanism that may solve environmental conflict in Indonesia and that a new environmental judicial mechanism can be established to address issues pertaining to environmental conflicts.

Key words: environmental rights, environmental conflicts. Indonesian EMA, environmental court

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Paper No 36/2011

Resolving Disputes in Data Ownership in Electronic Contracts and Cyber Consumer Privacy Issues

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Ever-greater sophistication of electronic systems especially the Internet and 3W have given greater urgency to the issues of data protection, and the possibility of controlling the collection, handling, and storage of personal data. Consumers are not only ignorant about the fact that their private information is collected but also about their statutory rights. Without existing a secure and amen system to keep personal data and information, it cannot be expected consumers to enter into the online transactions. This paper is going to examine whether online marketers and Website owners consider the whole consumer privacy as an unfair assault on the net or not. Moreover, it scrutinizes the possibility of purchasing and negotiating consumers, personal data as well as their private information in Iran laws to be protected in a safe way. This paper will also examine disputes on these isues. What are the mechanisms available for consumers to complain if their pivate or data information is misused?

Key words: privacy, consumer, data, electronic, Iran, law.

Paper No 37/2011

Governans *Shariah*: Cabaran untuk Perlaksanaan ADR Perbankan Islam di Malaysia

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Dalam regim perundangan Malaysia sekular yang berteraskan undang-undang Inggeris sejak kemerdekaan untuk aktiviti komersilnya, kertas kerja ini bertujuan untuk mengupas cabaran perlaksanaan ADR Perbankan Islam dalam ruang lingkup governans *Shariah* yang begitu terhad. Kertas kerja ini juga berperanan sebagai sokongan kepada usaha-usaha positif kerajaan Malaysia untuk mewujudkan governans *Shariah* yang fleksibel dalam melaksanakan perbankan Islam di negara ini dengan menganalisa cabaran-cabaran untuk perlaksanaan ADR perbankan Islam. Adalah penting dalam mewujudkan governans *Shariah* yang *solid* untuk perlaksanaan ADR perbankan Islam beberapa faktor penting perlu dianalisa. Faktor-faktor tersebut adalah seperti peruntukan statut dan regulasi yang memihak kepada perlaksanaan ADR perbankan Islam, sejauhmana kontrak perbankan Islam boleh dilaksanakan mengikut kehendak *Syarak* di Malaysia, apakah proses ADR yang besesuaian dan sejauhmanakah proses ADR yang disarankan untuk perbankan Islam benar-benar menepati proses alternatif yang digariskan dalam Islam? Perbahasan dalam kertas kerja ini akan mengkaji sumber primer perundangan di Malaysia. Cabaran-cabaran yang dikemukan berupaya menambahbaik gavernans *Shariah* yang terhad di Malaysia.

Paper No 38/2011

Perlaksanaan "*ADR*" melalui Klausa Kontrak Perbankan Islam

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ADR atau *Alternative Dispute Resolution* bukanlah merupakan satu isu yang baru dalam konteks perbankan Islam. Perbankan Islam yang ternyata memelihara moral dan etika pihak-pihak yang berkontrak telah mendapat sambutan masyarakat termasuk bukan Islam. Namun, pelanggaran syarat-syarat perjanjian oleh pihak-pihak berkontrak ini telah menimbulkan persoalan bagaimana proses *ADR* ini boleh dilakukan untuk kontrak perbankan Islam bagi mengelakkan litigasi mahkamah yang menelan perbelanjaan kos dan masa yang tidak memberi keselesaan pada pihak pihak ini. Kertas kerja ini bukanlah bertujuan untuk memberikan penjelasan tentang *ADR* untuk perbankan Islam seperti sulh, mediasi, arbitrasi dan sebagainya yang sedang diperbahaskan oleh ramai cendiakawan. Ini adalah kerana ADR untukperbankan Islam melalui salah satu proses ini hanya boleh dilakukan sekiranya wujud persetujuan pihak-pihak yang berkontrak tatkala berlakunya persengketaan atau perlangagaran syarat-syarat perjanjian yang telah dimasuki sebelumnya. Kajian ini sebaliknya menganalisa kebarangkalian yang tinggi untuk perlaksanaan *ADR* dari saat bermulanya pihak-pihak yang berkontrak memasuki perjanjian melalui klausa dan terma untuk melakukan *ADR*. Kajian ini akan melihat '*trend'* yang diamalkan oleh Institusi kewangan dan perbankan bukan sahaja di Malaysia malah di luar Malaysia.

Paper No 39/2011

Forum Shopping and the Settlement of International Disputes Concerning Underwater Cultural Heritage

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The underwater cultural heritage (UCH) is a complex regime. This complexity is evidenced by, amongst many others, the various fora that may assume jurisdiction on the cases brought before it. For the inter-state international disputes involving UCH, it is a possibility dependent on the treaty regimes applicable, for example, the 1982 United Convention on the Law of the Sea (1982 UNCLOS) and the 2001 UNESCO

Convention on the Protection of the Underwater Cultural Heritage (2001 UNESCO Convention). Other fora different than those envisaged by the above two treaties may be possible if the disputes involved private actors. Thus, the strategic move by claimants to do forum shopping. This paper examines the particular problems of forum shopping in international law with particular reference to UCH matters. It also discusses the relationship between 2001 UNESCO Convention and 1982 UNCLOS on dispute settlement and to make sense of intrinsic limits present in the existing mechanism.

Paper No 40/2011

The Role of Shariah Advisory Council (SAC) in Islamic Finance Dispute Resolution: Malaysian Experience

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Litigation as the popular mode of dispute resolution in Islamic finance has proven inadequate in its application and interpretation of Shariah. Trails of Islamic finance cases have shown that civil court judges have no problems deciding on the civil law issues pertaining to Islamic finance, however, they are unsuited for adjudicating the Shariah issues. Section 55 -58 of the Central Bank Act 2009 accords formal recognition to the Shariah Advisory Council (SAC) astheir rulings is binding to the Islamic financial institutions and the courts. The recent case of RHB v. Alias and appeal case of Khalid Ibrahim v. Bank Islam challenged the said sections as unconstitutional. The objective of this paper is to analyse the role of SAC either as expert determination or expert ascertain of the rulings on Islamic finance. In the course of discussion, Article 74, Schedule 9 of the Constitution and the Shariah Governance Framework of Central Bank are analysed. Findings of the study showed that the role of SAC is merely expert ascertain of the rulings since they have no judicial power. Islamic financial law is divine in nature and different from the man made laws. Thus, the only expert determination of the law is God the Almighty.

'THE END'
