

Utilising Economic Transformation Programme (ETP) through Islamic Finance: Generating Income for Malaysian Prison Department

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"It makes no sense to put people in prison and not train them to do something constructive." "We must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short term benefits — winning the battles while losing the war. It is wrong. It is expensive. It is stupid."

(Chief Justice Warren E. Burger 1907 – 1995)

ABSTRACT

Economic Transformation Programme (ETP) is where the Human Capital and resources are fully utilized. Prison Department is an avenue where most of the human capital available. The pressing issue is without the transformation, the prison department left as giant dummy without profiting the country and cost millions to the tax payers annually. Index crimes comprise 13 different categories, and are deemed to be serious offences occurring with sufficient regularity to serve as a measure of the overall crime situation in the country. An attempt is made to dwell on the subject with an aim to clarify the rationale of having a transformation within the Prison Department leveraging on various products and alternatives under Islamic Finance. The objective of the paper is to address the significant impact behind the idea of having the transformation utilising the Economic Transformation Programme (ETP). The positive impacts cover the inmates, victims of crime, government and the society at large. It is timely to transform the prison system since it involves tripartite relationship under the criminal justice system that needs special attention to be redressed and addressed. ETP looks into the humanity approaches, rights of crime victim, governments cost saved and society's pledged secured are incorporated into this paper. The paper claims that in ever increasing global market and interest in Islamic finance from all over the globe, the prison department should grab the chance of being part of it. Transformation is a must to reduce crime for a better world.

Keywords : Economic Transformation Programme (ETP), Prison Department, Human Capital, Cost Benefit, Transformation, Islamic Finance, Products, Sukuk, Waqf, equity financing, istisna'.

INTRODUCTION

Idleness in prison is dangerous. It can give rise to boredom and frustrations that can explode in disputes among inmates and in attacks by inmates upon prison staff. Prison industrial activity is, first and foremost, a management tool. It enhances discipline within prison by keeping inmates occupied and by raising their morale. During the 20th century, the periods of greatest unrest in prisons throughout the United States coincided with periods of depression in the prison. It is more expensive to operate a prison where the inmates are idle, tense, and disruptive than it is to operate a prison where the inmates are busy and well disciplined. Investments in prison industries can lower expenditures on day-to-day prison operations and decrease the likelihood of having to expend resources to quell disturbances. Moreover, prison industrial programmes enable inmates to produce items of value for the Government, such as furniture, electronics, signs, military gear, and so forth. Sale of these products, in turn, generates revenue that can be used to offset expenses that would otherwise have to be met through appropriated funds. FPI staff salaries are funded out of such earnings, and, for many years, FPI revenues were also used to subsidize educational and other programmes for inmates. Islamic Finance product may reflect the humanity approach and answers to the needy (in this case the crime victims).

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Persidangan Kebangsaan Ekonomi Malaysia ke VIII (PERKEM VIII)

"Dasar Awam Dalam Era Transformasi Ekonomi: Cabaran dan Halatuju"

Johor Bahru, 7 – 9 Jun 2013

The takaful and banking industry will continue to focus on ensuring effective risk management in the product development process and operations of takaful operators. An effective statutory regime for compensation is believed to be essential to effective crime prevention. Our current legislation has not taken into this matter seriously when prison left as a dormant cell and the victims has no avenues to recourse the cost of crime either through compensation or restitution. Indeed, a humanity and Shariah incorporation should be another important element to assist the takaful industry in achieving full Shariah compliance in the development and extending their products and services to the prison departments.

MUZARA'A CONTRACT UTILISING WAQF LAND

At the moment, a research done by JAWHAR² in 2013, recorded that there are 11,091.82 Hectare valued at RM99,329,170.69. The waqf land can be utilise for the benefit of ummah. The unutilise waqf land are able to be used via muzara'ah or share cropping Arrangement. Share-cropping is an agreement between two parties in which one agrees to allow a portion of his land to be used by the other in return for a part of the produce of the land. Muzara'a refers to literally joint act of planting. The terms refers legally to a contract for a planting compensated with part of the produce. The Maliki defined it as a partnership in crops. The Hanbali defined it as a landlord giving a farmer access to work his land or plant it with an agreement to share the crops³. In summary, muzara'a is an investment contract involving agricultural land. The two parties are the landlord and the worker or the farmer. The contract specifies that crop is to be shared between the parties according to agreed upon shares. There are three Parties involved in the contract :

1. Landlord
2. The farmer/worker
3. The object of contract is the land's usufruct if the farmer's provided the seeds and the farmer's labor if the landlord provided the seeds. Maliki ruled that once the seeds are sown or seedless bulbs are planted, the contract becomes binding.

Conditions of the Rukn :

1. Contracting parties
2. The crops
3. The plant
4. The contract object
5. The method of planting
6. The period of muzaraa

How Can It Be Done?

The proposed model can be short term and long term. It Depends on the types of crops and plants agreed ahead. This proposal is made to alleviate the current hardship that is faced by the community of Orang Asli. Further more the proposal is for the benefit of the minority group and to evade injustice from being done on them. Indeed it serves as economic assistant to boost the economic condition of Current Orang Asli. The government may provide the land, animals, seeds, livestock and other tools, while the other provides only a labor. The government will allocate lands and seeds and the types of crops and plant conditions must be known to both parties. It must be a kind of plant that conventionally grown as farming labor is applied. The contract period must be known to both. The period is determined by the agreement. Thus, the contract is defective if the farmer is not given access to the land for part of the period or if either party dies prior to its expiration. In summary, Abu Yusuf and Muhammad deem muzara'a to be a valid contract if it satisfies eight conditions;

1. Eligibility of the contracting parties
2. Specifications of the contract period
3. Fertility of the land and possibility of tiling it
4. Giving access to farmer

² For details refer to <http://202.75.4.234/spmwj/spmwV3.swf>

³ Al-Kasani (Hanafi) Vol 6, p175, Ibnu Qudamah (Vol 5, p382)

5. Product must be shared according to unidentified shares to effect the essence of partnership
6. Identification of the parties responsible for providing seeds, to avoid disputes and identify the object of the contract as either the land's usufruct, or the farmer's labor.
7. Specifying the shares of both parties the one providing the seeds and the one not providing them.
8. The genus of the seeds must be known.

The crop must be known to all parties. This ruling follows the fact that different crops affect the land differently. The ruling also based on juristic approbation does not render disclosure of the type of crop a condition for the contract, giving the farmer full discretion in selecting the crop. The planted crops must be eligible for growth in standard agricultural conditions. The contract is deemed to be defective if the following conditions are not met. Nature of the produce must be specified in the contract since it resembles rent, ignorance would render the lease defective. The produce must be shared between the contracting parties, thus the contract is deemed defective if all the products is given only to one of them. Shares in the produce must be specified otherwise the contract would contain ignorance that may lead to dispute. The produce must be divided according to unidentified shares. Thus, if the parties is guaranteed fixed amount, or the output of a fixed part of the land, the contract would not be valid, since that may be equal to the total produce. Alternatively, financing of the agricultural production can be obtained from a bank on muzaraah principles as follows;

1. Profit loss sharing mudharabah based contract
2. Wakalah contract executed between the bank and the government to appoint aborigines to cultivate the land. The money will be disbursed by the bank and the profit based on the agreed ration.

TAKAFUL

Takaful can be provided as a basis for protection. It is defined as a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to the participants in case of needs, whereby the participants mutually agree to contribute for the purpose.⁴ Whenever crime occurs, the payment will be made to pay the victim or the next of kin of the victim. The inmates will be more self responsible for the demeanour and damages caused to the victims. The inmates donate their Contributions to the Participants' **Takaful** Fund, which is used to pay for any loss or damage that any of the Participants may suffer from. This means that the Participants share the risks. There are basically two different types of Takaful models for the management and investment of funds by a Takaful operator, namely, the Mudarabah model and the Wakalah model. Other business models such as Waqf model, Tabarru' model and combination of models are also adopted by some Takaful operators on a slighter extent. The donation comes from the pay at prison industry they works daily.

Under the Mudarabah package, the Takaful operator accepts payment of the contributions from participants on the basis of equity partnership that is a risk-sharing mechanism where the profit is shared between the Takaful operator and the participants in a predetermined manner. The contract specifies how the surplus from the operations of Takaful is to be shared, in accordance with the principle of Mudarabah, between the participants as the providers of capital and the Takaful operator as the entrepreneur. However, under the Wakalah model, the group of participants can delegate their rights or business to the Takaful operator (Wakeel), who then acts as their agent and representative. Shareholders of the Takaful Operator provide the capital to establish the Wakalah Takaful as a donation and do not receive any share of the income generated from investing the Participants Takaful Fund. The Takaful operator assumes the business risk in developing and operating Takaful business on behalf of the participants but never participates in the mutual underwriting losses. It generates its income by charging a Wakalah fee for managing the underwriting operations and investing activities, based on the level of contribution, investment returns and generated surplus. This fee rate is fixed annually in advance and should be approved by the Shari'ah Supervisory Board of the Takaful Operator. All operating expenses are charged to the Participant Takaful Fund, while expenses for the investment activities are charged to the Takaful Shareholders Fund.

Based on Aqilah concept, Takaful are able to cover the misdeed of inmates and consequently protects the victims associated in their misdeed. The central idea of the doctrine of *Al-aqilah* is that, the members of the accused's tribe mutually agreed to a financial contribution for the purpose of

⁴ Sec 2, Takaful Act 1984.

protecting him (the accused) from financial liability arising out of causing a culpable homicide. This form of contribution has a resemblance to the contribution paid in today's *Takāful* practices. Meanwhile the compensation paid under the doctrine of *Al-āqila* has also a resemblance to today's *Takāful* indemnity (benefits) paid to the victim or his heirs. The idea of *Takāful* therefore developed through a contractual understanding and today is no exception, as the scheme of *Takāful* is practiced based on a contractual relation. The rights and obligations arising therein result from the contractual undertaking⁵. If the concept of *Al-āqilah* is applied, then the criminal will be socially liable towards the victim. If he is unable to afford paying *al-diyat* or compensation, then the burden will shift to the family.

The compensation scale for *al-jirh Jā'ifah* as written in many books is 1/3rd of *al-diyat*. Meanwhile for *al-jirh ghaira*, *Jā'ifah* is based on the *Al-hukūmah*, or the discretionary power of a judge. The jurists divide wounding into five main kinds.

1. *Iṭlaf al-'udw* (إتلاف العضو) - to cut or amputate totally any limb or organ of the body of another person like the amputation of a hand, foot, finger, eye, ear, lip etc.
2. *Iṭlaf salahiyah al-udw* (إتلاف صلاحية العضو) - to destroy or permanently impair the functioning or the power of the limb or an organ of another person.
3. *Shajjah* (شجة) – wounding on the head or face of any person which does not amount to the total amputation or destruction of the head or face.
4. *Jurh* (جرح) - wounding on any part of the body of a person other than the head or face leaving a mark of the wound whether temporary or permanent.
5. All kinds of other wounds.

In Malaysia, section 320 of the Penal Code designates the following kinds of hurt as “grievous”:

1. Emasculation,
2. Permanent privation of the sight of either eye,
3. Permanent privation of the hearing of either ear,
4. Privation of any member or joint,
5. Destruction or permanent impairing of the powers of any members or joint,
6. Permanent disfiguration of the head or face,
7. Fracture or dislocation of a bone,
8. Any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits.

Payment will be made to the eligible next-of-kin. The payment can be taken from the prison industry. The inmates will be more self responsible for the demeanour and damages caused to the victims. The payment they gained from the work at prison industry can be channelled to the victims. The same applies to the medical bills that caused huge economic impact on the victims. As a result of crime the victims may suffer losses in terms of physical, emotional, psychological and economic. These impacts of crime may cause huge losses to the victims. The government nearly spent millions for medical bills as result of free treatment at government hospitals given to the victims as a result of crime⁶. Financial losses to the state or victims (corporation, institution or individual) from financial deals are known as *darar mali*. *Darar mali* covers financial expenses in terms of financial and property loss. It also covers damages suffered as a result of crime. Neither financial costs nor economic costs of crime are easy to define or measure. For example, the economic costs of crime prevention can include security hardware, environmental design and various lifestyle measures. Estimates from the security industry, therefore, must underestimate total prevention costs; yet, by its very nature, the extent of the underestimation is indeterminate. Long-term and indirect costs of crime are often particularly difficult to define. For example, serious victimisation which causes severe emotional stress can in turn affect employability and, therefore, career earnings. These types of costs can be seen to have economic “multiplier effects” in which the victims’ families, relatives, business associates and even whole communities also suffer losses.

Apart from *darar mali*, financial crime involves *darar ma'nawi*, damage or injury caused to a person's reputation (*'ird*) or dignity (*sharaf*) by subjecting him to slander and ridicule, defamation, insult and abuse, causing the victim emotional pain or stress and apprehension, which will ultimately

⁵ Ma'sum Billaj, Modern Takāful, retrievable via www.Takāful.coop/doc_store/Takāful/Rediscovery.pdf.

⁶ Based on interview with Dr Faizal Salik, Head of OSCC, One Stop Crisis Centre(OSCC), Kuala Lumpur Hospital on Oct 23 2010.

affect his body even though there are no apparent physical marks.⁷ The injury is more abstract in nature. It involves trauma and mental injury, and is more similar to psychological disturbance. It is submitted that compensation for *darar ma'nawi* should be decided by an expert. This is due to the fact that many costs and bills need to be borne by the victim in order to get through the trauma and psychological blow caused by the crime. This type of crime may also come as a result of appalling treatment, discrimination, rude manner and even a beating which does not leave any visible permanent marks on the victim's body.

Due to the absence of physical marks apparent to the human eye, it is termed as moral or nonphysical damage, as distinct from physical injury or loss. Some jurists allow the coverage of injuries even as to pain and suffering. This is based on the maxim "*la darara wa la dirar*" ([There should be] no infliction of harm and no reciprocation of harm). Some jurists like al-Balqini argue that the amount of compensation will be decided by the judge to show that the wrongful act can never be free from any legal consequences.

Darar mustaqbal covers the future loss of the victims. It can be interpreted as losing income or losing the breadwinner in the family as a result of crime. The crime may also incapacitate the victim and cause them to lose their job. In the case of financial fraud victims, the future loss may cover the future possibility of losing job, savings, identity risk, education, disruption, etc.

The Shari'ah has given rights to victims of crime. Trade in all forms must be clean and honest. If one carries it out according to the guidance of the Qur'an and Sunnah, one will see Allah's blessings even though one may not be able to amass fabulous wealth. Indeed nine parts of ten of recommended livelihood lies in trade and commerce. It is hoped that in dealing with financial fraud, legislation and law enforcement ignore its victims. Alternatively, we may begin to look at restorative justice being applied to both criminals and victims, rather than punitive justice, which merely consider the criminal.

In line with Government Transformation Programme (GTP 2.0), inmates and upskillig, the prison industry was established. These prison industries are able to create employment within the prison. This paper submits that the takaful payment should be imposed on all inmates out of this employment. Some portion of income should be set aside for takaful payment. Why is this necessary? Inmates have families to support, court-imposed fines to pay, and victims to recompense. The wages that they earn through employment in prison GTP Programme, can help them meet those obligations. In *PP v Loo Choon Fatt* [1976] 1 LNS, *PP v Loo Choon Fatt* [1976] 2 MLJ 256, the High Court decided:

President and Magistrate are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is facing an array of witnesses with authority. The mitigation submitted by the convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike balance, as far as possible, between the interests of the public and interests of the accused.

Lord Goddard L.C.J in *Rex V Grondkowski* (1946) 1 30 ALL ER 560 at 561 offered valuable and insightful advice when he said:

The judge must consider interest of justice as well as the interest of the prisoners. It is too often nowadays, thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

Hilbery J stressed the importance of striking a balance between public interest and the interests of the convicted offender when he explained:

In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy

⁷ Muqaddam al-Said 1985, al-Ta'widan-dharār al-ma'nawi fi al-msu'liyyah al-madaniyyah, dirasah muqaranah, Bayrūt, Dār al-Hadathat, p 76.

*money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.*⁸

MUSHARAKAH AND MUDHARABAH

Equity financing: Using contracts such as *musharakah* and *mudharabah*, Islamic financial institutions can finance the operations of this sector and subsequently, share the profits generated thereafter. Musharakah concept is viable to be used. The prison department provides the labor (the inmates) to the manufacturer. This is applicable for example a car manufacturer that needs labor to manufacture cars. The prison department is able to provide the human capital. Alternatively, Mudharabah is a concept where the inmates invest in labor form. The bank or any interested parties can be the *rabbul mal* or the capital provider. By leveraging on the management system of the prison authorities and the readily available labour in the form of inmates, the Islamic financial institutions can play a role in generating results in the real economy;

CONCLUSION

Islamic Finances provides a whole spectrum of modes of financing and products to suit every need of each people. This gives flexibility to the banks and customer to choose it's suitability to serve their own needs and niche. The above proposals could be the benchmark to assist inmates and the prison department to generate income for the government. The government should take this idea to assist the inmates to polish their agricultural skills in cooperation with Agricultural ministry and consequently to pay for damages they have committed. Certainly the paper concludes with the following findings for some policy considerations;

- i. Takaful, Muzaraat, Modharabah and Musyarakah Models are the contract that can assist few parties, be it the government, the inmates and the society.
- ii. The Model proposed instilled a humanistic sense in Malaysian government policy. The inmates skills need to be instilled for long term survivorship. Laborship brings the inmates level closer to the industry relevency.
- iii. This Model suggest that government is a caring society and consequently evading all negative accusation on the treatment of inmates.

REFERENCES

- Albercht, P. A., and Backes, O. (1989). *Informal Justice: Mediation Between Offenders and Victims. Crime Prevention and Intervention: Legal and Ethical Problems*. Berlin: Walter de Gruyter.
- Alberta Solicitor General Victim Programs, Alberta, Canada. http://www.solgps.alberta.ca/programs_and_services/victim_services/victims_of_crime_service_agencies/Pages/default.aspx
- Albrecht, J (1995). The rights and Needs of Victims of Crimes. The judge's perspectives, 34 No. 1 Judge. J 29.
- Bahrudin Sayyin, Asmak Lai,(2006) Konsep WAKAF Dalam Islam, UPENA, UTM, KL
- Dean John Champion, (2003), *Administration of Criminal Justice*, Prentice Hall, New Jersey.
- Denise White (2002), *Great Tradition of Ethics*, 10th Edition, United Kingdom
- Department of Justice, Manila, Philippines. <http://www.doj.gov.ph/>

⁸ R v Ball [1951] 35 Cr. App. R. 164].

- Department of Rehabilitation and Social Protection, Ministry of Justice, Taipei, Taiwan.
<http://www.moj.gov.tw/>
- Directory of Crime Victim Services: an OVC Online Resource. *The Role of ADR Processes in the Criminal Justice System: A view from Australia*
<http://ovc.ncjrs.gov/findvictimservices/results2.asp>
- Dittenhoffer, T., and Ericson, R. (1983). The Victim Offender Reconciliation Program: A Message to Correctional Reformers. *University of Toronto Law Journal*, 33(3), 315-347.
- Djik, JJM Van and Fiseliar, JPS (1974). Studies of victimology. Nijmegen: institute of criminology.
- Doerner, W. & Lab. S. (2005). *Victimology, 4e*. Cincinnati: LexisNexis Anderson.
- Doerner, W. G., Knudten, M. S., Knudten, R. D., and Meade, A. C. (1976). Correspondence Between Crime Victim Needs and Available Public Services. *Social Services Review*, 50, 482-490.
- elias R (1985). Transcending our social reality of victimization: toward a new victimology of human rights. *Victimology an international journal*, vol 10, nos.1/4 p6-25.
- Elias, Robert (1983). *Victims of the System: Crime Victims and Compensation in American Politics and Criminal Justice*. New Brunswick, NJ: Transaction Books.
- Elias, Robert (1986). Community Control, Criminal Justice and Victim Services. In E. A. Fattah, *From Crime Policy to Victim Policy: Reorienting the Justice System*, p 290-316. New York: St. Martin's.
- ElizeEmsley (1996). Crime, History and Histories of Crime.
 England and Wales Support National Office, London, England. <http://www.victimsupport.org.uk/>
Enough is Enough at <http://www.enoughisenough.org.au/victims/>
- Erez, E. (1994). Victim Participation in Sentencing: And the debate goes on... *International Review of Victimology*, 3, 17-32.
- Evaluation Report: Grande Prairie Reconciliation Project for Young Offenders*. (1984). Ottawa, Canada: Consultation Centre (Prairies), Ministry of the Solicitor General of Canada.
- Ezzat A.Fattah (edt) (1992), *Towards Critical Victimology*, St Martin Press, New York.
- Ezzat A.Fattah (edt), (1989), *The Plight of Crime Victims in Modern Society*, Mcmillan Press, China.
- Ezzat A.Fattah, victimology Past, present and future, *criminology*, vol 33, nos 1(2000)
- Ezzat Abdul Fattah, (2001) *Towards a Critical Victimology*, oxford.
- Fattah, Ezzat (1986) *from crime policy to victim policy*. London: McMillan.
- Fattah, Ezzat (1992), *towards a critical victimology*. London:Mcmillan.
- Fattah, Ezzat A. (1997). *Toward a Victim Policy aimed at Healing, not Suffering*. In Robert C. Davis, Aurthor J. Lurigio, and W. G. Skogan, *Victims of Crime 2nd ed.*, p257-272. Thousand Oaks, CA: Sage.