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We Care

MESSAGE FROM THE EDITOR

Welcome to the final edition of the Legal Cauldron for the year 2010. It has been quite a year for JHJ and we are proud to cap off the year, once again, by bringing you more legal writings from the JHJ team. We hope you enjoy reading them as much as we enjoyed writing them.

But having won the Action Coach Award for Best Team in 2009, JHJ has spent 2010 trying to bring ourselves “to the next level”. To most this would mean: “How does the firm garner more business?” Yes, we do not deny that finances are always a consideration but it is not JHJ’s only consideration. In taking it to the next level, one of the things we noticed, as do many others, is that a significant number of fresh lawyers, practitioners in their maiden year, are ill-equipped to handle the practicalities of the legal daily life. A statistic we came across state that as many as 60% of fresh lawyers leave in their first five years of practice.

It stems likely from the system that trains and produces lawyers; it provides the substantive education of a lawyer, but not the practical training for the practitioner. We are not suggesting an overhaul of institutions that educate legal undergrads; they do a sublime job of educating young promising minds with the substance that is to form the tool of their trade. But instead of whining and complaining, we want to complement the current legal education; that is one of our programmes in taking ourselves to “take it to the next level”.

Starting in 2011, JHJ is proud to introduce the JHJ-360° STUDENT ATTACHMENT PROGRAM.

This is our way of doing our part as responsible corporate citizens and our little way of contributing to the legal fraternity. We acknowledge that the idea is not new but it has been sadly abused. We ensure that our program is not another “learn how to use the photocopier” program and our dedicated team has come up with a structured curriculum, incorporating most of the useful practical know-how a practising lawyer would need.

For starters, there will be a series of lectures, dialogues, Q&As, comprehensive tasks and assignments that the student has to go through for a period of 360 hours spread over 9 months.

The progress of these students are monitored and assessed along the way in our effort to mould them into competent practitioners with the variety of practical problems we throw at them. But rest assured, we have our lawyers on site providing the much needed guidance and tips and even some elements of fun in the learning process. We are strong proponents of the “learning must be fun” school of thought. We also wait in great anticipation of what we will learn from conducting this program as well.

We would also like to let it be known that when we’re not out saving the world, we are also creatures of leisure and of social and academic pursuits. Among our ranks are musicians, tennis, cricket and badminton players, joggers, gym nuts, taekwondo exponents, football fanatics, wannabe chefs, and even law tutors. For a firm that isn’t considered very large, we certainly have the variety of one. We are quite normal outside the courtroom and the corporate environment.

Nonetheless, all our blood flow red. It was brought to our attention that every three seconds someone is in need of a blood transfusion. We did not wait to find out how many would die from the lack thereof, and headed straight to Asunta Hospital to do our part. All in the firm who were able donated, no matter how frightened they were of the needle. Scared? Yes. Regret? No. We all ended up feeling very good about ourselves along with a sense of connectedness with the society we are a part of. But of course, the free sandwiches, drinks, juice and cookies also helped. We at JHJ, would like to strongly recommend that the reader at least consider donating blood once, if not more in his lifetime. It is easy and relatively painless. Have a pleasant year end!

EDITOR

Andrew Chee

The life of the law has not been logic; it has been

experience.

Oliver Wendell Holmes

Interesting cases:

Affin-ACF Finance Bhd (formerly known as Asia Commercial Finance (M) Bhd) v Phang Ngan Heong (t/a Syarikat Kereta Kwong Yue) [2010] 7 MLJ 561:

You cannot pass good title to the purchaser of your vehicle if it was stolen, even though you had taken all reasonable precaution to ensure that there were no defects in ownership when you bought it. There will be a total failure of consideration.

TROUBLESHOOTING

A brief outlook into the rights of a photographer and the laws relating to photography in Malaysia.

By *Adrian Low*



INTRODUCTION

The line between the constitutional right to produce a work of art and privacy is often blurred. Photographers these days are facing more and more challenges in the pursuit of their endeavours particularly in the wake of public outcry in relation the abuse of individual privacy. The recent circulation in the internet and media of compromising pictures of YB Elizabeth Wong, a Selangor

State Assemblywoman has caused much outrage and debate over the existence of individual rights against privacy violation in Malaysia.

Although the current laws in Malaysia do provide mechanisms to deal with certain privacy violations, it is yet still difficult to ignore the growing concerns about the existing legislature and its inadequacies in dealing with such issues.

THE GENERAL RULE

Unofficially, the general rule is that any person may take photographs of whatever they want as long as it is done in a public place or where they have permission to do so. The following is non-exhaustive outline of your rights as a photographer.

PUBLIC PLACES

More often than not, you do not need to have permission to photograph in public, this include photographing building and parks as well as people that are in public areas. If you are on public property you can even photograph private property, for example standing on the street and photographing someone's garden. Examples of public places include parks, streets and sidewalks.

However, certain property owners or managers may prohibit photography from within their premises and you are expected to comply with such prohibition if you have notice thereof otherwise your permission or license to access or remain on such premises may be revoked resulting in you being ejected from the same for trespassing. This however does not prevent you from taking photographs from other locations. The need for permission depends on individual circumstances. While you may assume that photography is allowed without explicit permission but this is a judgment call and you should request for permission if you feel that the property owner is likely to object.

OBJECTIONS & CONFRONTATION

As a photographer you may likely face objections and quite possibly altercation or confrontation from security guards or employees of organizations who fear the effect or consequences of photography and the reasons more often than not are associated with security. Depending on the circumstances, security may not necessarily be an articulate reason. A security guard or the police may prevent you from photographing a particular subject if it can be shown that it amounts to an act of terrorism or the outcome will compromise the security of the area or impede safety or their ability to function or if the photos are taken while on private property.

YOUR RIGHTS UNDER THE FEDERAL CONSTITUTION

Your right to freedom of expression is entrenched in the Federal Constitution under Article 10. Freedom of expression is so fundamental that people enjoy it wherever they are and whatever their background or circumstance. Freedom of expression is a cornerstone of our democratic society. It proceeds on the premise that our being human entails living in this world with others in a continuous state of interaction and communication with them. The guarantee of freedom of expression protects the many ways by which we express ourselves including our various art forms like photography.

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Unfortunately, the freedom of expression is not absolute and does have its limitations, particularly where it involves the interest of the Nation (see: Article 10 (2) of the Federal Constitution).

YOUR RIGHTS UNDER THE OFFICIAL SECRETS ACT 1972

Under the Official Secrets Act 1972, you are not allowed to carry photographic apparatus within any prohibited places eg. military installations, naval bases, certain airports and other restricted premises or areas. (see: Section 2 and Section 7 of the Official Secrets Act 1972). Failure to comply may result in the seizure of any photograph, plate, film or other device belonging to such apparatus (see: Section 7(4) of the Official Secrets Act 1972).

YOUR RIGHTS UNDER THE COPYRIGHTS ACT 1987

Photographs can amount to artistic works of art which are eligible for copyright protection under the Copyrights Act 1987. Regardless of the quality or purpose, if you can show that you have expended sufficient effort in the arrangement, framing and the capturing of an image then in all likelihood the outcome of your work will be accorded with copyright protection under the said Act (see: Section 2 and Section 7).

In the case of **Kiwi Brands (M) Sdn Bhd vs Multiview Enterprise Bhd. (1998) 6 MLJ 38**, Abdul Malik J opined that "... the word "original" that appears in Section 7(3) of the Copyrights Act 1987 does not mean that the work must be the expression of original or inventive thought. I am of the considered view that originality which is required relates to the original or even novel form, the work must not be copied from another work. It should originate from the author ..."

Loosely translated, if a you were to capture an image of *Mona Lisa* and replace the face of *Mona Lisa* with yours by cropping and superimposing your face onto the said image and editing it so that the lighting colours and lines appropriately blend into the background, then the finished product would likely be deemed as an original work of art and enjoy the protection accorded under the Copyrights Act 1987 (unless the same contains an assertion or inference that it is the actual and original *Mona Lisa*).

If the a photograph is recognized and protected under the Copyrights Act 1987, then you may deal with the copyright as a movable property whether by way of assignment, testamentary disposition or by operation of law (see: Section 2 of the Copyrights Act 1987). Unless it can be shown that the photograph was a result of commissioned work wherein the person who commissioned the work will own the copyright (see: Section 26 of the Copyrights Act 1987), you may sell, assign or otherwise license its use to anyone you please in consideration of a fee. This is common practice with the *paparazzi*

when they photograph celebrities and sell or license such photographs to the tabloids and newspaper.

RIGHTS OF A SUBJECT IN A PHOTOGRAPH

Despite a common misconception to the contrary, members of the public have a limited scope of privacy when it comes to photography. Basically, almost everyone can be photographed except where they have secluded themselves in places where they can have a reasonable expectation of privacy like in a changing room, medical facility or inside their homes. In short, you may photograph an accident, child, celebrity, etc. in any public place. However such right is not without restriction.



RIGHTS OF A SUBJECT IN A PHOTOGRAPH UNDER THE PENAL CODE

It must be remembered that if you photograph someone in a compromising position without their consent, it could lead to an offence under the Penal Code. Section 509 of the Penal Code aims to protect the modesty of a person by punishing perpetrators with imprisonment of up to 5 years with or without fines.

Also, if it can be shown that you have published a photograph or image with the intention of defaming or imputing harm on the a person's reputation, then, Section 499 of the Penal Code can be invoked against you where if proven, you may be punished with imprisonment of up to 2 years with or without fine unless it can be shown that the publication of such photograph falls within any of the exceptions contained therein. For example, if it can be shown that the publication of the controversial photograph is for the public good or that the publication thereof was simply an expression of opinion done in good faith then the provisions of the First or Third Exception to Section 499 of the Penal Code may be relied on by the photographer or publisher respectively as a defence to their action.

RIGHTS OF A SUBJECT IN A PHOTOGRAPH UNDER THE DEFAMATION ACT 1957

In the civil arena, if the publication of a photograph taken by you is found to be libellous or false, then you may be sued by the subject in the photograph under the Defamation Act 1957 provided if it can be shown that the publication is founded on or calculated to cause damage to the subject or to the

the subject's profession, calling, trade or business held by the subject at the time of publication (see: Section 6 of the Defamation Act 1957).

Hence, an image of a celebrity taken at a mall whose face is later edited and superimposed into another picture with racy content and subsequently published with a caption claiming that the said photograph is a reflection of true events. Such act will likely expose the photographer and/or the publisher to a suit by that celebrity under the Defamation Act 1957.

You may rely on the provision of Section 7 of the Defamation Act 1957 as a defence if you can show that the publication of the controversial photograph was **unintentional** and that you are prepared to rectify the damage caused by your actions by for example, deleting or removing the photograph immediately and issuing a public apology to the subject. Alternatively, if you can prove that the publication of the controversial photograph is **justified** in that the contents therein are true or that it amounts to **fair comment** having regard to the circumstances surrounding the image then you may rely on the provisions of Section 8 and 9 of the Defamation Act 1957 as defence.

RIGHTS OF A SUBJECT IN A PHOTOGRAPH UNDER PRIVACY LAWS

Privacy is a fundamental right under Article 12 of the United Nations Universal Declaration of Human Rights where “ .. *no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence ..*”.

Although Malaysia had ratified Article 12, there is no specific statutory recognition of photography and the rights to privacy of the subject. However, the recent enactment of the “privacy specific” Personal Data Protection Act 2010, does offer some change in the form of privacy protection to the individual (although it would appear limited to the management and processing of personal data in the context of commercial transactions by data users, and to provide a safeguard for the interests of data subjects).

The case of **Ultra Dimension Sdn Bhd vs Kook Wei Kuan (2004) 5 CLJ 285** clearly illustrates the position of an individual in relation to privacy and photography. This case primarily involves a claim in respect of a photograph taken on a group of kindergarten pupils and the respondent at an area outside the kindergarten. The controversial photograph was subsequently published in an advertisement that appeared in the “Star” and “Sin Chew Jit Poh” newspapers and carried the theme “*Bonus Link Your Points*”. The respondent's claimed that the appellant's action in supplying the said photograph for the purpose of advertisement was said to have invaded the privacy of the respondent.

In applying the findings enunciated in English law relating to the laws of privacy via Section 3 of the Civil Law Act 1956

(which *inter alia* allows for the reference and/or use of English Law in local matters), the learned *Faiza Thamby Chik J* here relied on *Halsbury's Laws of England, 4th edn. (vol. 45)* at p. 631, para 1383, which states that “.. *If the facts do not fall within the boundaries of an existing tort then no action lies ..*” (*emphasis added*). *Faiza Thamby Chik J* went on further to opine that “ .. *invasion of privacy will only give rise to a cause of action provided that the facts fall within the boundaries of an existing and recognized tort ..*” He also fortified his finding by relying on the findings in the case of **Kaye v. Robertson [1991] FSR 62** which referred to in the book “*Torts in the Nineties - Nicholas J Mullany*” which also establishes that privacy rights are not recognised under English law and therefore, there is no cause of action for invasion of privacy right.

Accordingly the act of photographing the children at the playground does not appear to fall within the ambit of recognized tort in Malaysia at the time (ie, trespass, defamation, infringement of copyright, nuisance etc.) and is therefore not actionable.

“If the facts do not fall within the boundaries of an existing tort then no action lies...”

The above findings appears to set the tone that there is no cause of action can be taken against a photographer or and publisher if the said photograph is (i) not offensive in nature; (ii) used for a decent purpose; and (iii) taken at a public place.

This is further strengthened by the findings in the case of **Dr Bernadine Malini Martin vs MPH Magazines Sdn. Bhd. & Ors., (2006) 2 CLJ 1117** which involved among other things, the unauthorized publication of a subject's photograph in a magazine. Here, *Hishamudin Yunus J* stated that “.. *In my judgment, in the present case, on the issue of costs, there are special grounds connected with the cause of action. The cause of action concerned the unauthorized publication of the plaintiff's photograph in a magazine meant for public circulation. To my mind, it was unethical and morally wrong for the 1st and 2nd defendants to have published the plaintiff's photograph for the purpose of their commercial promotion without her consent. It was an unwarranted invasion of the plaintiff's privacy. It is unfortunate for the plaintiff, that the law of this country, as it stands presently, does not make an invasion of privacy an actionable wrongdoing (it is actionable under the law of some other jurisdictions, for example, in the United States) ..*”

However, a noteworthy contrast in findings can be found in the case of **Murray vs Express Newspapers Plc. (2008) EWCA Civ, 446** which highlights a different stand in the UK to-date in respect of privacy laws. Here the claimant was an

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infant son of JK Rowling, a well known author. When the child was a little more than a year old, the defendant took his photograph without the knowledge of his parents and had it published in a magazine. The claimant successfully issued proceedings on the ground of infringement of privacy under Article 8 European Convention on Human Rights (ECHR) and the courts therein found that the claimant did have a reasonable expectancy of privacy.

The scope of application of the findings in the *Murray* case should be restricted and can be distinguished from the present matter as it involves the ECHR. In view of the findings in the *Ultra Dimension* case and the *Dr Bernadine* case above, it can be safe to conclude that privacy laws do not exist in Malaysia, at least for the time being and if you were to initiate any action against the photographer for the invasion of privacy, your action will most likely fail for reasons as mentioned above.

RIGHTS OF A SUBJECT IN PHOTOGRAPHS TAKEN FOR MEDICAL PURPOSES

Notwithstanding the above, a report appeared in the "Star" newspaper on 3rd September 2010 stating that a High Court in Penang found invasion of privacy as a cause of action in Malaysia. According to the report, a former journalist named Lee Ewe Poh, 50, underwent a procedure known as *stapler haemorrhoidectomy* at the Loh Guan Lye Specialist Centre. She discovered approximately 6 days later that Dr. Lim Teik Mau had taken photographs of her intimate parts without her consent while she was under anaesthetics. In his defence, Dr. Lim Teik Mau claimed that it was common procedure to take photographs of patients under sedation and that it was done to help the patient understand the procedure. In allowing a claim for invasion of privacy, Judicial Commissioner Chew Soo Ho said that surgeons must first obtain the consent of female patients before taking photographs of their intimate parts.

CONCLUSION

There is merit in the argument that a specific and dedicated law against photographers and the right to privacy is unnecessary for the time being because there are already laws against trespassing, stalking, defamation, reckless driving (as in pursuit of a subject), harassment, etc. These laws are available to everyone and not just celebrities. Photographers do have the right to photograph others as long as it is within the boundaries created by existing law. Admittedly, a line should be drawn against those who peer over walls or stalk to snap a picture. While you may have the right to capture photographs of various subjects, the circumstances above clearly indicate that such right is not without limitation. In conclusion and to avoid any "troubleshooting" in the future, it would be wise to

first check the surrounding circumstances before you depress the shutter release button.

By **Adrian Low**
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On the same note, JHJ would like to announce that our Adrian Low has recently tied the knot with his very lovely wife at a beautiful ceremony very recently this year.

CONGRATULATIONS Adrian. We are very happy for you!



Adrian and his wife making an entrance.



Some very happy JHJ attendees.



FREEZE!

Know your rights when under arrest.

By *Zainal Narudin*



Freeze! You're Under Arrest! We hear this cliché in American police shows on the tube very commonly; but do you know the true meaning of 'arrest', or what an arrest is in the first place? Well, in those shows, at the end

of the plot, the good cops tend to say "Freeze! You're Under Arrest!"; with both their hands holding a gun or slamming the suspect against the wall while trying to handcuff him. But that aside, have you ever imagined that that 'suspect' might have been you? Or that (God forbid) you might be at the wrong end of such an experience?

When accosted, restrained or detained by the police, what are your rights; what are your defences; your remedies even? Do you have the right to ask for the reasons for your arrest? What if a policeman restrains you and asks you to follow him to the police station? You might want to ask: "Why? Am I Being arrested? For what?"; but you restrain yourself and in your mind you ask, "Will this policeman even listen to me?" "Should he?" "Would he be duty-bound to answer? What do I do?"

An arrest literally means the deprivation of one's personal liberty by a person in authority. The arrest of a suspect is the first step in the criminal process against him and is a very important component of our Malaysian Criminal Procedure Code. An arrest is likely a means to facilitate investigations. Normally, the police will act based on a complaint of a victim or on reasonable suspicion before they arrest someone.

An arrest in Malaysia **must** be made in accordance *with Section 15 of the Criminal Procedure Code (Act 593, revised 1999)*.

Following are a few tips to remember.

When stopped by the police

If someone stops you and introduces himself as the police but he is in plain clothes and not in his police uniform, you always have the legal right to ask for his identity card (ID Card). A police officer on duty must have his ID Card on him always and if the purported police officer does not have any ID Card on him, you can (and should) leave the place immediately. Stopping you is not an 'arrest' and you are free to leave.

If the plain-clothed police officer flashes his ID Card and you notice that the ID Card is **red**, it would mean that the policeman is under suspension from duty and he has no authority to stop and question you in the first place. You can leave immediately. If however, the ID Card is **blue** or **yellow** or **white** and if the ID Card looks genuine enough, then answer him or follow his instructions. Be reminded though, you still have rights under the law.

"You are obliged to give the police officer your name, your IC number and your address ONLY."

If the police officer is in his police uniform, your immediate reaction must be to take note of his name and ID number which are attached to his uniform; and, if he had alighted from a patrol car or motorbike, take note of the registration number. The police officer cannot stop you from doing this. Please however, do remember to be tactful and mindful that a sudden burst or reaction from you might provoke a response and induce a tense moment.

When questioned by the police

Apart from the normal or routine minding the peace or traffic, most of the other times when a police officer stops you, it would be to ask questions to facilitate his investigations. You are obliged to give the police officer your name, your IC number and your address ONLY. If the police officer asks you for more information, he has to inform you as to the reasons for

**continued from previous page.*

his questioning. He may require information to facilitate investigations, in which case, he would normally request that you go down to the police station to record your witness statement. This does not mean that you are arrested. To be certain, you may ask the police officer if indeed you are being arrested. You will be considered arrested only if and when a police officer informs you that you are being arrested or the police officer physically restrains or prevents **you from leaving** or **takes you to the police station** or **handcuffs you**. If none of these happen, remember, you are not under any arrest, you are entitled to your rights and liberty and you may walk away from the place immediately.

Arrest and Detention

Article 5 of the Federal Constitution requires that you must be informed as soon as possible of the grounds of the arrest. An arrest may be considered illegal in law if you are denied information on the grounds of your arrest as soon as possible after an arrest is made. You have the right to ask for the grounds of arrest immediately upon your arrest but again, you must be mindful not to resist and quarrel with the arresting officer as your actions would be adverse to your own best interests. The law requires the arresting officer to inform you on the grounds of arrest as soon as possible upon an arrest and not at the time of arresting. Do not incite or create an opportunity for the arresting officer to invoke his rights under the law to use force against you. This would be unwise. Be polite and tactful always.

“You have the right to call your family members, friends or your lawyer.”

Take note that after the arrest you have the right to call your family members, friends or your lawyer. However, this right of communication may be denied when the police reasonably believe that the communication could result in an accomplice avoiding apprehension; or potential evidence being destroyed or tampered with; or potential witnesses being intimidated.

Rights on detention

Detention of a suspect may occur after his arrest. Any detention before an arrest may occur if it is under a preventive ordinance or law (like ISA) but that is the subject of another matter that is not discussed here. The suspect would normally be detained in the police station lock up until he is presented in court for a remand order or charge to be meted out against him or released where no remand order or charge can be brought against him.



How long can a suspect be detained?

The police can detain a suspect for only 24 hours from the time of arrest to facilitate their investigations. However, suspects arrested on a weekend may be detained until the following working day (perhaps exceeding 24 hours). The suspect must be produced before a magistrate within the said 24 hour period for a remand order allowing for a longer detention period failing which the suspect must be released immediately.

The magistrate has the power to deny or grant a remand of a suspect. The first remand order shall not be longer than 7 days (depending on the type of the offence). If within the first remand order, the police are unable to conclude their investigations, they may apply to the magistrate for a second remand order for a period of not more than 7 days after the expiry of the first remand order. The suspect must be released immediately upon the expiry of the remand order if no charge is brought against him. When a suspect is charged, then depending on the crime and the nature of the charge, bail may or may not be granted pending the trial in court. The suspect is then referred to as an accused.

Body search after arrest

The police may conduct a body search on the arrested person if the police have a reasonable suspicion that the arrested person is concealing a weapon or any other item that may provide evidence of the crime in question. Body searches must be conducted in a confined area and the suspect has the right to ask to be searched in a closeted place. All body searches must be conducted professionally and only a female police officer may search the body of a female suspect.

All men are not created equal but should be treated as though they were under the law.

Andy Rooney

Rights or remedies for wrongful arrest

A person has the right to bring an action against any unlawful arrest by the police. Sometimes a person may be arrested for extensive periods of time only for it to be discovered that the arrest was actually illegal in the first place. As was highlighted in the case of *Tan Kay Teck & Anor v The Attorney General [1957] 1 MLJ 237*, the court awarded RM 1,000 plus costs to each of the suspects (who sued the police) for unlawful arrest.

However, if the arrest was reasonable and genuine and done in accordance with laws and procedure, any action brought by a person who was released without charge would likely be dismissed by the courts. In the case of *Saw Kim Hai & Anor v Reg [1956] 1 MLJ 21*, the court held that a person can only claim damages for wrongful arrest which led to false imprisonment when the arrest itself was unlawful. The fact that a suspect was released later without a charge does not mean that the arrest itself was wrongful.

The most common examples of wrongful arrests are when the police were not able to produce an arrest warrant for an offence which in law requires a warrant of arrest. This would be an illegal arrest and an abuse of process.

Conclusion

This article hopefully sheds some light on a person's rights on arrest and detention. It is made simplistic for better understanding and by no means exhaustive and there are several exceptions to the general rules stated above. It is best that you consult your lawyers whenever you are faced with a similar situation.

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Afraid to bleed? NOT US!

JHJ @ Blood Donation Centre;
Assunta Hospital.



Hari doing his bit, not minding the big needle.



Small but FEARLESS!



The JHJ "family" and family members.



LOCAL COUNCIL ELECTIONS

Are we better off without it?

By Eunice Ong



The topic of local government elections would probably be foreign to most Malaysians born after the sixties as the last local government elections in Malaysia were held in 1963. However as of late, there have been loud calls for their restoration. For example, the Selangor State Exco's Local Government

Study and Research think-tank had in March 2010, urged that the Prime Minister considers supporting the restoration of local government elections.

Under the Federal Constitution, there are three lists in which law-making powers are set out. The three lists are (a) the Federal List which contains matters that only Parliament can make laws on; (b) the state list, which sets out matters that only State Legislative Assemblies can make laws on; (c) and the Concurrent list setting out matters which both the Parliament and State Legislative Assemblies can make laws on. Local government elections would properly be under the jurisdiction of the State and therefore likely to fall under the State List although admittedly, Parliament should have the authority to pass laws to prevent State resolutions that are repugnant to the Country's interests and to ensure that matters within the State's List are consistent as other states. However, any implementation of the proposal is held back by the **Local Government Act 1976** which expressly states in section 15 that:-

"...all provisions relating to local government elections shall cease to have force or effect."

The call for restoring local government elections are triggered by the growing problems faced by local

residents and visitors. One of the many causes of the poor quality of leadership may have stemmed from the fact that political parties nominate their grass root leaders without sufficient assessment of their qualifications and abilities.

It is also important for the residents to know their local councillors, so that they may be rest assured that the assessment rates that they pay every year will be managed properly and also that they will know who to turn to when they need to voice out their grouses. Nonetheless, very often an average resident will not know anything about the councillors in their district because of the apparent lack of transparency. Local government elections will help the residents decide on a suitable candidate to run these affairs.

"complaints are not sufficiently taken into account by the councilors."

Currently, the decision-making in local councils are or at least appear to be very much shrouded in secrecy. The council's accounts have not been made open for scrutiny. Many are dissatisfied with the uncertainty of the method in charging assessment rates, and exasperated that their complaints are not sufficiently taken into account by the councillors. Many have complained that the councillors seem to have made up their minds even before hearing of the complaints which would culminate in a breach of the fundamental principles of natural justice. The fact that local councils play all three, advisory, legislative and executive roles in the workings of local authorities only serve to emphasise the imperative in the argument for local government elections.

Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will plead, and no man can tell how to confute him.

John Selden

Nonetheless, the concerns of the federal government against restoring local government elections are not unfounded. The financial costs of conducting local government elections are very expensive. Can the public afford more monies spent and also risk more corruption? Furthermore, it does not automatically improve public services and does not serve as a guaranteed remedy for the growing problems faced by residents. There are many elected councillors in the world who have been found guilty of corruption but on the other hand, nonetheless, there are also appointed councillors who are responsible and accountable to the residents. Elections may help put more of such councillors in office but, once again, there is no guarantee.

One of the many problems that may crop up if local government elections are restored is that the elected local councillor may be from an opposing political party in Parliament and this may result in the inability to work with each other resulting in impasse. This, however, may just compel both the elected representative and the local councillor to work together as professionals despite being in opposing teams.

“...local government elections can also result in more politicking...”

But while the idea is borne of noble intentions, local government elections can also result in more politicking by fuelling further opportunities to political parties by using the campaigns to serve their political ends. The fact remains that appointment of councillors do reduce politicking, and with the whirlwind political events we see every day, the last thing we need is more politicking.

In light of the arguments for and against local government elections, it is submitted that there is no perfect system in which we operate. It is therefore incumbent upon us to choose the methods of a lesser evil. If an elected government is the cornerstone in a democratic society, one which we Malaysians subscribe to, would it not follow also that an elected local government is one that we should prefer? Or, would it instead be the lesser evil to sacrifice our basic right to vote because it is simply more convenient? Do the impracticalities of conducting local government elections outweigh the very fundamental right to vote?

“Convenience and justice are often not on speaking terms”

Lord Atkin, General Medical Council v Spackman [1943] 2 All E R 337

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Did you know...?

The Personal Data Protection Act 2010

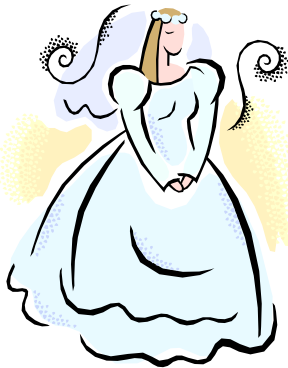
The Personal Data Protection Act will be Malaysia's first privacy-specific legislation. At present, personal information is only protected if you have a contractual agreement to keep it confidential. With the Act, use of personal data will be regulated to provide a safeguard for the ordinary person in the context of a commercial transaction. The guiding principles are:

- **General Principle:** The processing of personal data requires consent;
- **Notice and Choice Principle:** Data users are required to notify the data subjects regarding the purpose for which the data is collected and about the right to request access and correction of the personal data;
- **Disclosure Principle:** No personal data shall be disclosed without the consent of the data subject;
- **Security Principle:** A data user shall take practical steps to protect the personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction.
- **Retention Principle:** The personal data processed for any purpose shall not be kept longer than is necessary for the fulfillment of the purpose to which it was obtained for.
- **Data Integrity Principle:** A data user shall take reasonable steps to ensure the accuracy and to maintain the data current for the purpose it was collected for.
- **Access Principle:** A data subject shall be given access to his personal data and shall be able to correct the personal data where the data is inaccurate or incomplete.

DISSOLUTION OF MARRIAGE UNDER ISLAMIC LAW

The lesser known rights of the Muslim wife.

By *Maisyarah Amirullah*



“The parties should either hold together on equitable terms or separate with kindness... take them back on equitable terms or set them free on equitable terms but do not take them back to injure them or to take undue advantage. If any does that, he wrongs his own soul.”

al-Baqarah 229 & 231

The position of women in an Islamic marriage institution has always been questioned by critics outside the Muslim world. Islam is repeatedly accused of not being fair or equitable to the rights of women as compared to their husbands, and this includes divorce.

CAN A WIFE DIVORCE HER HUSBAND?

Often, it is argued that Islam gives the exclusive right for a husband to divorce his wife, but a similar right is not given to the wife and hence, there is opportunity for a husband to misuse the powers given to him to cause unnecessary hardship to his wife. Contrary to such beliefs, Islam gives equal rights to a wife to divorce her husband in order to protect her from any misconduct by her husband. How is this done in Islam? There are two methods for such a divorce, namely the “*fasakh*” and the “*khulu*”.

Khulu’ may be described as the dissolution of marriage by the wife giving the husband something (certain amount of money or property) for her freedom.

But for the purposes of this article, my focus will be on the dissolution of marriage by the court which is called “*Fasakh*” under Islamic Law. A “*Fasakh*” may be described as the

dissolution or rescission of contract of marriage by judicial decree.

FASAKH

The provision for *fasakh* is explained in the following verse :

“if a wife fears cruelty or desertion on her husband’s part, there is no blame on them if they arrange an amicable settlement between themselves, and such settlement is best, even though men’s soul are swayed by greed. But if ye do good and practice self restraint, God is well acquainted with all ye do,” an-Nisa’ : 128

TYPES OF FASAKH

There are two types of *fasakh*. The first is an “automatic *fasakh*”, whereas the other is “*fasakh* with the interference by court”.

The first type of *fasakh* or automatic *fasakh*, occurs in cases such as marriages occurring between blood relatives or siblings, or where a party to a marriage had converted out of Islam.

The second type of *fasakh* or “*fasakh* with the interference by court”, as the name suggests, happens when there is an intervention by court in dissolving or rescinding a marriage, for example in cases where a wife alleges that her husband does not pay maintenance for a continuous period of three months or more. The wife would then have the right to prove her allegation in court and the husband would be afforded the opportunity to refute the allegation. The presiding judge will take into consideration all the facts and circumstances surrounding the case supported by testamentary evidence before passing a binding judgment.

Interesting cases: **Dr Ismail Abdullah v Poh Hui Lin [2009] 7 AMR 277:**

*A doctor only has a duty to warn a patient of **material** risks of surgery. Furthermore, the doctor has “therapeutic privilege” and may withhold that information if the patient was of unusually nervous disposition and would refuse life-saving treatment.*

A “fasakh” may be described as the dissolution or rescission of contract of marriage by judicial decree.

STATUTORY PROVISIONS

Section 52 (1) of the Islamic Family Law (Federal Territories) Act 1984 provides 12 grounds upon which a woman who marries in accordance with *Hukum Syariah* being entitled to obtain an order for the dissolution of marriage / *fasakh*. They are:

1. husband’s whereabouts being unknown for a period of more than one year;
2. the husband’s neglect to provide maintenance for a period of three months;
3. the husband being sentenced to imprisonment for a period of three years or more;
4. the husband’s failure to perform his marital obligations;
5. the husband’s impotence at the time of the marriage;
6. the husband’s insanity;
7. leprosy;
8. vitilago or communicable venereal disease;
9. the husband’s cruelty;
10. the husband’s wilful refusal to consummate the marriage;
11. the wife’s lack of consent to the marriage;
12. any residual grounds i.e. any other ground recognized as valid for *fasakh* under *Hukum Syara’*.

HUSBAND’S INABILITY TO PAY MAINTENANCE

In a case in Kedah, *Abdul Aziz v Che Pah (1972) 2 JH 113*, the wife applied for *fasakh* on the grounds of the husband’s non-maintenance due to his indigent poverty. The wife’s witnesses stated that the husband was jobless. During the Court hearing, this allegation was disputed by the husband’s witnesses but the court found that there was no satisfactory evidence to show that he was not indigent and ordered the wife to take a “*yaminul istikzar*” oath; an oath to deny the husband’s testimony.

The court then ordered a “*muhlah*” (respite) period of three days. After the *muhlah*, the wife and her witnesses testified that the husband has not given any maintenance during that period. The court in this case therefore held that the husband was unable to provide maintenance and granted a *fasakh* divorce.

HUSBAND’S WHEREABOUTS UNKNOWN

In a case in Kelantan, *Rafiah v Hassan (1987) 6 JH 112*, the husband left the matrimonial home one morning, abandoning his family and never to return. He neither sent any maintenance to support the wife nor left behind any property that may be used for maintenance. After 5 months, the wife applied for *fasakh* under section 38 of the Kelantan Enactment 1983. After hearing the witnesses, the court accepted that the husband’s present whereabouts were unknown (*ghaib*) and granted *fasakh* under the residual clause in section 38(f) of the Enactment.

NON-APPEARANCE OF HUSBAND IN COURT

In a case in Malacca, *Rosnani v San Ahmad (1989) 7 JH 102*, the husband did not appear in court although the summons had been properly served on him. The husband had neglected his wife and their children for nearly 2 years and had not provided maintenance for them since his marriage to another woman. The wife’s evidence was confirmed by two witnesses. The court granted the *fasakh* as applied by the wife.

“the court accepted that the husband’s present whereabouts were unknown (ghaib) and granted fasakh...”

FASAKH ON GROUND OF HUSBAND’S CRUELTY

In a case in Selangor, *Hairun v Omar (1990) 8 JH 289*, the court granted *fasakh* based on grounds of cruelty and went on to state that cruelty to a spouse may be either of physical or mental in nature. In much the same way, “habitual assaults” extends to include both physical and mental assaults. The question of what “habitual” is becomes relevant in cases of mental cruelty only and should not be considered in cases where physical assault or battery occurs, as an act thereof (even if isolated) should be sufficient to establish cruelty.

**continued from previous page*

THE REALITY BEHIND SOCIETY'S PERCEPTION IN THE APPLICATION OF FASAKH

1. The complicated procedure and long duration in *fasakh's* application.

The case of *Noon Nahariah @ Yun bt Mohamed v Mohamed Isa b Ibrahim (Case Mal No. 167/94)* took 33 months to conclude while the case of *Norhayati Jaafar v Khairul Amri Ahmad Basri (Case Mal No. 1578/98)* took at least 9 months to conclude. In the first case, the reason why the case took a long time to reach a judgment was because the service of summons on the husband was irregular (sent to the wrong address) and the case had to be adjourned. Also, delays to proceedings occurred as a result of the husband's allegations, among others, that the wife had been *nusyuz* (disobedient to the husband's orders), and the transfer of case by the judge to another department and also due to medical leaves taken by the solicitors in charge.

2. A high standard of proof.

Majalah al-Islam in November 1996 at page 14 stated that the application on *fasakh* is the most complicated of court processes and takes a long period to conclude. This is due to the fact that the applicant bears the burden of proving and thereby needing to produce witnesses and clear evidence. Based on an interview conducted by the writer on 6th February 2009 with Prof. Madya Dr. Raihanah Hj Abdullah of the Academy of Islamic Study University of Malaya, it would appear that the main problem in *fasakh* is the burden of proving a case beyond reasonable doubt (akin to criminal trials).

3. The requirement on the number of witnesses which is very difficult to provide as the marital problems tend to be personal in nature.

Traditionally, one is required to produce testimonies from 2 male witnesses or from 2 female witnesses and a male witness. However, recent cases show that the judges are leaning away from such requirement. The case of *Siti Zubaidah bt Abdul Razak v Daud b Mohd Salleh* in the Syariah

Court of Wilayah Persekutuan Kuala Lumpur on 19th November 2007, Mamat Haizan b Salleh J held that even though there was only 1 male witness and 1 female witness, the court would, nevertheless, accept their evidence and in this case, went on to grant the *fasakh*. Unfortunately, despite this apparent leniency, many married women do not know the stand taken by our courts and thereby show great reluctance in bringing forward their claims.

4. The grounds for application of *fasakh* is restrictive

An example is seen in the case of *Anum bt Othman v Zulkifli b Yaakob (Mal Case No. 300/98)* where the application was based on a polygamous marriage. The provision does not state that *fasakh* can be granted on the ground of polygamous marriage and as such an application based on polygamous marriage could not be sustained. However, in this case, the *fasakh* was still granted but on the ground that the husband did not pay maintenance.

5. The duration of time taken by a wife before she has the courage to make application in *fasakh*

Tuan Abu Zaki Mohammad, (Registrar of MSWPKL) was of the opinion that most wives still love their husbands and still pine for them or live in the hope that their husbands will one day come back to them and their families. Some of these wives also feel ashamed because of the perceived societal stigma and would prefer to keep silent and let their problems fester indefinitely rather than bring an action that would embroil them and their families through open court proceedings.

6. The perception that the grounds for application of *fasakh* are limited to physical abuse alone.

This is clearly wrong as mental and emotional abuses also give grounds to an application for *fasakh*. Based on the case of *Zarina bt Syaari v Mohd Yusof b Omar (Mal Case No. 385/96)* the common definition of harm has been extended to mental torture. The court had granted *fasakh* application because the Defendant had been cheating, refusing to communicate with the Plaintiff, separated from her when he had a relationship with a Thai woman. Tan Sri Dato' Haji Mohd Azmi in the case of *Hairun bt Mohd Shariff v Omar bin Mohd Nor JH [1993]* was also of the same view.

The law will never make men free; it is men who have got to make the law free.

Henry David Thoreau

ANALYSIS OF *FASAKH* CASES

Based on a survey conducted in Syariah Court of Wilayah Persekutuan Kuala Lumpur in 2008/2009, 80% of the applications of *fasakh* were based on the grounds of husband's inability to pay maintenance.

PROCEDURE IN THE APPLICATION OF *FASAKH*

These are steps for those who intend to apply for *fasakh*:

1. The Jurisdiction of the court

The parties who wish to make application in Syariah Court in this country have to apply to the court that have jurisdiction to hear and decide on the case. The reason behind this is that each State has its own set of laws governing Syariah matters. For example, the Syariah Court of Wilayah Persekutuan Kuala Lumpur has jurisdiction towards persons residing in Wilayah Persekutuan Kuala Lumpur only.

2. Action before filing an application

Before 2004, parties who intended to apply for *fasakh* had to attend counseling sessions with JAWI (Jabatan Agama Islam Wilayah Persekutuan) before they can proceed with their application. But since 2004, this is no longer a compulsory requirement (*see*: Surat Pekeliling Ketua Pengarah/Ketua Hakim Syarie, JKSM Bil 3 Year 2004). An attempt was made to shorten the period in *fasakh* application so that an aggrieved wife may file her application without having to first attend the counseling session by JAWI.

3. Finding a Syariah lawyer to handle the case

Only registered Syariah practitioners are qualified to handle applications falling under the purview of Syariah matters. As such, it is advisable for an aggrieved wife to find a competent Syariah lawyer to avoid any unnecessary delays and errors from occurring.

4. Normal court's procedures

The following are the steps to be taken in a *fasakh* application:

- i) Plaintiff or the aggrieved wife first files and serves on the offending husband a Summons and Statement of claim;

- ii) The offending husband is then permitted to file and serve his Statement of Defence;
- iii) The claimant / aggrieved wife is given an opportunity to discontinue the case (normally where the parties agree on a truce (*Sulh*)) whereupon the matter is withdrawn from court;
- iv) The Court then directs the parties to prepare for hearing including the issuance of Subpoenas and compiling relevant documents to be adduced in Court (Case Management);
- v) The Mention and Trial of the case;
- vi) Judgment and Order; and
- vii) Right to Appeal.

ADVICE AND RECOMMENDATION

As seen in this article, indeed there is recourse to an aggrieved wife. I would conclude by advising an aggrieved wife to engage a Syariah lawyer for advice or refer the matter to the relevant bodies such as Malaysian Syariah Lawyers Association, Syarie Legal Aids Bureau, Angkatan Wanita Islam Malaysia (AWAM), PINTAS, Yayasan Wanita Islam (YATI), HAWA and many more. Relevant information about these organizations can be found in the Internet and newspapers.

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INTERESTING CASES:

Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd [2010] 1 MLJ 597:

If there is a "Time is of the essence" clause and also "Late Delivery" or "Liquidated Damages" clause (LAD), then time ceases to be of the essence in the contract; especially if the party with the right to terminate did not, or took a long time to do so.

T & TT Enterprise Sdn Bhd v Lembaga Pembangunan dan Lindungan Tanah [2009] 2 MLJ 205:

A, executing a power of attorney in favour of B in order to facilitate B's dealing with A's matter or property, does not necessarily create an agency relationship between them. A is not liable for everything B does in relation to that matter or property.

