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Contents

Walk The Talk: The Ethical Challenge of Sustainable Development Between Companies and Governments

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Abstract

The everyday operations of a 21st-century business involve a number of intricate and multifaceted issues. Furthermore, there is a growing push for Sustainable Development (SD) from stakeholders and society at large. It is evident that there are several theoretical and practical interpretations of sustainable development, despite the fact that it is not a novel idea. According to the author's triple bottom line theory, the economic, social, and environmental facets must all be addressed at the same time and are valued equally. This article outlines in detail guidelines to improve the practical and realistic application of sustainable development within the reality of a very complex and constantly changing business setting, while also highlighting the unique obstacles that companies and the developing states encounter.

Keywords: Corporate Governance, Sustainable Development, Integrated Strategic Approach, Ethical Responsibility, Risk Exposure, The Precautionary Principle.

I. Introduction

For the last decade or so, the world of big business has discovered sustainable development. This discovery was triggered by major international events of a very different nature: the earth summit in Rio de Janeiro in June 1992, the terrorist attack on the twin towers in New York in September 2001 or, more recently, the earth summit in Johannesburg. At this last summit, states' representatives took a very active part in the development of a new approach based on the setting up of new public-private partnerships, at a time when large states (US, Russia) were clearly lagging behind.[1]

Beyond the effects of such events, there is continuous evolution, a kind of work done by a number of leading companies.[2] The most visible aspect from the outside is the choice made by some of them to make sustainable development an essential vector of their communication. For example, in France, EDF, the Lafarge Group, or Vivendi Environment to name just three examples.[3]

[1] Chad Holliday, 'Sustainable Growth, the DuPont Way' (2001) Harvard Business Review 129.
[2] Alexandre Michelot, 'Pour un principe de solidarité écologique ? De la critique à la proposition, du droit interne au droit international' (2020) 45(4) RJE 733.
[3] Laurence Tubiana, *Environment and Development: The Challenge for France* (Report to the Prime Minister, La Documentation française 2000).

They also chose this theme to think about their projection in the medium and long-term future and to organise the responses that they give to the new social demands that urge them to broaden the way of justifying their activity, even their existence, and to report on their choices and performance.[4]

These choices confirm the role that sustainable development can play as a vehicle for reform. However, for the researcher, especially with a legal background, there is a process that surprises. The challenges of sustainable development, whether they concern the future of the planet's climate or the equity of North-South relations, are issues that fall primarily within the political and moral responsibility of countries. Why would companies go beyond what the states are asking for through their policies and regulations? In which directions, with which benchmarks, will the companies that go forward lead this conversion to sustainable development?

The thesis takes a positive view by proposing an explanatory model of the uneven success of the sustainable development theme in the business world. One proposition is advanced: it is to prevent social protest phenomena that some companies are oriented towards sustainable development when they do not find a direct market. Therefore, only certain types of companies have a strategic interest in engaging in this kind of activity.

The second part adopts a normative point of view and seeks to clarify the dimensions of ethical responsibility for the long term and for the prevention of potential risks under the aegis of the precautionary principle.[5] The dimension of controlling the risks imposed on society is indeed one of the burning questions in the range of those raised by the quest for sustainable development in industrial countries.

II. The Risk Trigger Challenge

2.1 Sources of Uneven Conversion

The quest for sustainable development is usually understood as an integrated consideration of three requirements: economic development, environmental sustainability and social equity. It leads to concern about the implications of local decisions in the short and medium term for global and longer-term balances, going as far as intergenerational time, so that it "Meet the needs of today without compromising the ability of future generations to meet their own needs", as famously stated in the 1987 Brundtland report of the UN Commission on Environment and Development.[6]

[4] Peter Hardi and Terrence Zdan, *Assessing Sustainable Development: Principles in Practice* (International Institute for Sustainable Development 1997).

[5] Alexandre Michelot, 'Pour un principe de solidarité écologique ? De la critique à la proposition, du droit interne au droit international' (2020) 45(4) Revue Juridique de l'Environnement 733.

[6] Olivier Godard, 'Environnement et commerce international – Le principe de précaution sur la ligne de fracture' (2001) Futuribles 37.

But how can we ensure that the concern for the long-term global impact is reflected and influenced in the daily lives of economic agents? States are in the front line, having a duty to maintain their sovereign territory according to the objectives and obligations defined by the international community. Nevertheless, each state sees its share of responsibility modulated according to its capacities and its role in creating the problems.[7] However, the era of making states accountable alone no longer exists, when all the burden of concern for the common good was imputable to the state where the latter was the main seat if not alone of the impulse of economic development of society.[8] Non-governmental organisations, citizens, consumers and businesses are now calling for sustainable development to guide or position their actions.[9] It is therefore necessary to give intelligibility to the existence of other relays than those put in place by governments, especially in the case of companies.

One example is a classic economic mechanism: demand response. The company would be concerned with sustainable development because it would face an effective demand in this sense from its various partners. Shareholders, bankers, insurers, distributors, consumers and others would be demanding sustainable development, forcing companies to adapt.[10] It would be the ordinary course of economic relations which would ultimately convey the requirements of sustainable development through the frame of contractual relations and trade in goods and services. This answer shifts the question more than it answers it: how would the benefit of sustainable development have fallen on these different partners? It also raises technical difficulties. Ordinary economic relations are based on precise conditions concerning the nature of the exchange goods and the terms of exchange.[11] How can these relations directly integrate these concerns, which are foreign to the ordinary and rather indeterminate economic universe, given the spatial temporal horizon in which they take root, that of sustainable development? We feel the need for relays and mediation, but this explanation does not suggest any.

The existence of a still small segment of end consumers who are so keen to buy “green” or “ecological” products that they are willing to pay more for them, without even obtaining any benefits on the quality of consumer products, is not up to the phenomenon and does not explain the strategies of companies that are not in direct contact with the end consumer.[12]

Anticipate, first. One of the first conditions for companies to be able to place their activities under the umbrella of sustainable development is that some of them adopt proactive behavior and then disseminate the constraints and objectives they set themselves in the frame of

[7] Clair Gough and Simon Shackley, ‘The Respectable Politics of Climate Change: The Epistemic Communities and NGOs’ (2001) 77(2) International Affairs 329.

[8] Lindsay M. Dreiss and Mindy B. Rice, ‘Finding Climate Refugia on the US National Wildlife Refuge System: A Focus on Strategic Growth Values’ (2025) Conservation Science and Practice.

[9] Peter M. Haas, *Saving the Mediterranean: The Politics of International Environmental Cooperation* (Columbia University Press 1990).

[10] Maarten A. Hajer and Hendrik Wagenaar, *Deliberative Policy Analysis: Understanding Governance in the Network Society* (Cambridge University Press 2003).

[11] Thomas Hale, ‘Thinking Globally and Acting Locally: Can the Johannesburg Partnerships Coordinate Action on Sustainable Development?’ (2004) Journal of Environment and Development 220.

[12] David Levy and Peter Newell, *The Business of Global Environmental Governance* (MIT Press 2005).

economic relations through concertation and economic exchange upstream and downstream of the sectors.[13] The classical economic study of environmental policy instruments (regulations, taxation, negotiable permits, allocation of rights) is based on the same general assumption. In the case of effects external to ordinary exchange and collective property regulations, the behaviour of economic agents is assumed to be reactive. It is up to the public authorities to take the initiative by setting up a regulatory framework to which agents will adapt.[14] In this analytical framework, in situations of uncertain and controversial scientific information, uncertainty of rights and responsibilities, and absence of direct public intervention, no environmental internalisation should be observed, even less for global and long-term issues than for local issues.[15]

Yet, companies are taking the lead. They adopt plans and measures to improve the environmental profile of their activities (inputs, releases) or products (energy consumption at the point of use, end-of-life management of products, packaging recovery), implement environmental management systems or increase the safety of their production sites beyond current standards.[16] If these proactive or anticipatory behaviours are only attributable to factors such as the personality or ethical orientation of leaders, it would not be possible to make an economic characterisation. Such choices should be observable in the most varied contexts from the point of view of sectors or the size of enterprises.[17] This is not the case, for example when looking at the distribution of companies that have decided to implement an environmental management system under ISO 14001 or the European environmental management system program EMAS.[18]

We should place the concept of potential challenge in place of the concept of effective demand and seek to identify economic conditions that may lead companies to take into account in advance the threats related to potential risks, environmental or public health. We then come across the mechanism, the so-called 'questionable management', through conducting an analogy with the theory of "questionable markets" developed in industrial economics by William Baumol.

III. The Contestable Management Model

To account for the implementation of proactive management opportunities for contestation, we introduce two key concepts. The first is the time horizon for engagement in an activity. It is

[13] Thomas P. Lyon, '"Green" Firms Bearing Gifts' (2003) Regulation 36.

[14] Anja Schaefer and Andrew Crane, 'Addressing Sustainability and Consumption' (2005) 25(1) Journal of Macromarketing 76.

[15] Anil Markandya and Klaus Halsnæs, *Climate Change and Sustainable Development: Prospects for Developing Countries* (Earthscan 2002).

[16] John Robinson and David Herbert, 'Integrating Climate Change and Sustainable Development' (2001) 1 International Journal of Global Environmental Issues 130.

[17] Robert D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press 1993).

[18] Harold Winkler and others, 'Sustainable Development Policies and Measures: Starting from Development to Tackle Climate Change' in Kevin A Baumert and others (eds), *Building on the Kyoto Protocol: Options for Protecting the Climate* (World Resources Institute 2002) 61.

linked both to the amortisation of investments to be made and to the time required to justify what are called unrecoverable costs that entrepreneurs must bear to start in a sector of activity, without being able to recover them under normal conditions of competition.[19] The activities most affected by this type of cost, those which impose the longest horizon, are generally those of heavy industries, including specific equipment (blast furnaces, refining plants, thermal power stations, etc.). Those cannot be reassigned to other jobs which require large scales of production and duration to be profitable. These are also activities that, due to the nature of the production processes or products placed on the market, have a significant environmental impact and carry potential risks for the environment and public health. This commitment horizon is also the critical exposure horizon to a possible lifting of an environmental or health-based challenge.[20]

The second concept is the social legitimacy of the company. Some companies have to manage the social legitimacy of their activity or technical choices (processes, products) in relation to public interests or concerns.[21] The concepts of ownership rights and regulatory compliance, which are part of the traditional reactive model, do not take their place. From a practical point of view, social legitimacy should not be confused with legality: activities or behaviours that conform to the current state of regulation are no less disqualified in the eyes of a significant part, if not the majority, of the public.[22] This results in hostile actions and defective movements on the part of consumers or distributors.[23]

In order to preserve their social legitimacy in the face of threats of dispute based on potential environmental and health risks, some companies would put forward a management plan to deal with these threats at better of their interests.[24] Questionable management is management exposed to the discipline of potential social contestation, a basic mechanism comparable to how oligopoly pricing policies are disciplined by the threat of potential competitors when entry and exit barriers in the business sector are low.[25] The identification of this mechanism brings to light a new area of strategic management of the company: the management of its state of contestability or, in other words, of its exposure to different types of threats to its positions and activities. Such management would benefit from being engaged at the stage of designing

[19] Durwood Zaelke, Donald Kaniaru, and Eva Kružíková, *Making Law Work: Environmental Compliance & Sustainable Development* (INECE 2005).

[20] Sian Yearley, 'Social Movements and Environmental Change' in Michael Redclift and Ted Benton (eds), *Social Theory and the Global Environment* (Routledge 1994) 150.

[21] Ibid 156.

[22] To illustrate, after the episodes of legal challenge to its cultivation authorization before the French Council of State (1998) and then the European Court of Justice, Novartis' Bt corn was finally allowed to be grown in France (2001). Despite this, the company then announced that it was giving up on the introduction of this GMO on the market: it had the intuition that legality and social legitimacy did not mix.

[23] David Thompson, *Tools for Environmental Management: A Practical Introduction and Guide* (New Society Publishers 2002).

[24] Christopher Gough, 'The Respectable Politics of Climate Change: The Epistemic Communities and NGOs' (2001) 77(2) International Affairs 329.

[25] David L Swanson, *National Strategies for Sustainable Development: Challenges, Approaches and Innovations in Strategic and Co-ordinated Action* (IIED-GTZ 2004).

innovative processes and products.[26] However, the hedging actions against these risks must be modulated according to the stage of development of the company's projects.

IV. Morphology of Hedging Strategies

The company has different methods to limit its risks of exposure to the challenge: lengthening its forecast horizon by developing its ability to make rational anticipations, modulating the duration of its commitment, depending on the possibilities afforded to it by the type of technology characteristic of the field of activity in which it operates, reducing its objective exposure by excluding certain techniques and renouncing certain products, or by making additional safety investments, focusing on financial or insurance risk coverage measures, without worrying about further limiting the residual risks of environmental and health impacts, maintaining a dialogue and partnership with various civil society organisations that could play a key role in raising or amplifying a protest.[27]

At a given point in the company's commitment trajectory, only certain time sequences of actions can still be envisaged. The variety of options depends on the nature of the threats to be considered, but also on the options that have already been chosen and exhausted.[28] For example, the research and development phase preserves a greater latitude in reorienting technical choices than the production phase, which is more difficult to reverse because of the tool that has been built.

This leads to the idea of a path for managing contestability. Two viable paths deserve particular attention:

- The one in which decisions taken in the early stages neutralise possible bases for future environmental and health challenges; This trajectory is based on the assumption of good predictability of the threats of protest and on the idea that the protest would remain confined to environmental and health risks, without leading to more global challenges (rejection of globalisation, capitalism, etc.)[29];

- The one that is concerned with regularly replenishing the basket of options in order to be able to deal with disputes that were not initially anticipated; The aim is to avoid a

[26] Stefan R. Schaltegger, Roger Burritt and Holger Petersen, *An Introduction to Corporate Environmental Management: Striving for Sustainability* (Greenleaf Publishing 2003).

[27] Sandeep Sharma, 'Research in Corporate Sustainability: What Really Matters?' in Sandeep Sharma and Michael Starik (eds), *Research in Corporate Sustainability: The Evolving Theory and Practice of Organisations in the Natural Environment* (Edward Elgar 2002).

[28] John B. Robinson and Derek Herbert, 'Integrating Climate Change and Sustainable Development' (2001) International Journal of Global Environmental Issues 130.

[29] Terry Hale, 'Thinking Globally and Acting Locally: Can the Johannesburg Partnerships Coordinate Action on Sustainable Development?' (2004) 13(2) Journal of Environment and Development 220.

> situation where the development of the firm is accompanied by a gradual contraction in the range of options available to manage future episodes of dispute.[30]

In the economic theory of disputable markets, the weaker the market's contestability is, the more companies in an oligopolistic position can benefit from a situation rent at the expense of agents who demand their products.[31] This rental situation, however, has a counterpart in the form of an increased vulnerability to environmental and health-based challenges. The link between these two phenomena is not contingent. Indeed, the existence of barriers to entry and exit and the presence of specific assets such as productive equipment and skills, render it difficult or not at all, to redeploy without significant financial losses. Therefore, it implies significant sunk costs that limit the strategic mobility of the company and make it vulnerable to environmental and health challenges.[32]

When it arises, social protest mobilises various uncertainties and scientific controversies regarding possible risks. It relies on warning processes, initiated by scientists or NGOs and relayed by the media to public opinion. This challenge is characterised by proposing not only explanations (causes) to the negative phenomena reported or feared, but also by imputing responsibility to agents (experts, agencies, companies, generic objects such as GMOs).[33]The evolution of threats to the legitimacy of certain innovative techniques depends on the dynamics of the assumptions made about the environmental and health risks feared, especially the representations of these risks in the public.[34] If the protest takes hold, it tends to set the targets that it has given itself. These gradually become the object of a social struggle, whatever the further development of scientific knowledge of the risks highlighted.[35] In the case of GMOs, for example, protesters first mobilised health risks (allergies) and agronomic practices (formation of resistant trends among crop-harmful insects). Their protests then became widespread and radicalised. Eventually, they take the form of a demand for a general ban on all agricultural experimentation, framed as a fight against the 'commodification of the world' and in favour of preserving biodiversity, which is announced to be seriously threatened by this technology.[36] This has gone so far as to create a situation in Europe where the agricultural uses of these seeds are de facto blocked. Historical experience suggests that some threats of contestation can be realised in a credible way and would probably have deserved to be better anticipated by the companies concerned.[37]

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[30] Henrik R. F. Winkler, 'Sustainable Development Policies and Measures: Starting from Development to Tackle Climate Change' in *World Resources Institute Report* (World Resources Institute 2002) 61.

[31] Chad Holliday, 'Sustainable Growth, the DuPont Way' (2001) Harvard Business Review 129.

[32] Rod Rhodes, 'The New Governance: Governing Without Government' (1996) 44 Political Studies 652.

[33] Andrew Pharaoh, 'Corporate Reputation: The Boardroom Challenge' (2003) 3(4) Corporate Governance: The International Journal of Business in Society 46.

[34] Sally Yearley, 'Social Movements and Environmental Change' in Michael Redclift and Ted Benton (eds), *Social Theory and the Global Environment* (Routledge 1994) 150.

[35] The process of contestation can thus lead to lasting stigmatisation, the most dramatic example being that affecting nuclear technology in many countries in Europe.

[36] Michael Redclift, *Social Movements and Environmental Change* (World Health Organization, Routledge 2006).

[37] Catherine Gough, 'The Respectable Politics of Climate Change: The Epistemic Communities and NGOs' (2001) 77(2) International Affairs 329.

V. For an Integrated Strategic Approach

5.1 Market and Social Contestability

These different elements of analysis lead to the characterisation of two polar industrial configurations which are opposed from the point of view of the modalities of contestability. The first one refers to a configuration with a high degree of contestation by potential competition and a low degree of social contestation. The companies grouped in this category have one or another feature: a short commitment horizon (reversibility of commitments). It is a standardised and flexible production tool, an initial investment in fixed capital of a low level, with predictability commensurate with their commitment horizon[38]. Because of these characteristics, the markets in which these firms operate have a high degree of competition; the technological base of the activity does not allow the entry of barriers[39]. The strong contestability by competition limits profitability to the strict remuneration of production factors. In return, these companies are not very sensitive to threats of social protest that would be based on collective risks.[40] It is not that they cannot be challenged one day on the basis of scientific discoveries or changes in collective representations, but rather that they would then have the resources to get rid of the activity in question without suffering heavy losses. Even if the obsolescence horizon of the technologies used is shorter than the initial commitment horizon, the low residual costs to be amortised do not not constitute a threat to the economic security of the company.[41]

The second configuration is characterised by a low degree of contestation by potential competition and a high degree of social contestation based on environmental and health.[42] Firms hold heavy and specific assets, with low recoverable costs if they do not have the duration. Once they have invested in a particular activity, they cannot redeploy their assets without significant costs or easily exit the market if their social legitimacy is eroded or collapses. The branches of heavy industry and in particular the chemical industry are in this configuration.[43]

Of course, there are intermediate cases where a given activity may be exposed to both significant levels of competitive and environmental and health challenges. This is the case for the agricultural input industry, particularly for GMO production.[44] This situation then brings up

[38] James E Post, *Redefining the Corporation: Stakeholder Management and Organizational Wealth* (Stanford Business Books 2002).

[39] Maarten A Hajer, *Deliberative Policy Analysis: Understanding Governance in the Network Society* (Cambridge University Press 2003).

[40] Michael E Porter and Claas van der Linde , 'Green and Competitive: Ending the Stalemate' (1995) 73(5) Harvard Business Review 120.

[41] Robert D Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press 1993)

[42] James E Post, Lee E Preston, Sybille Sauter-Sachs, *Redefining the Corporation: Stakeholder Management and Organizational Wealth* (Stanford Business Books 2002).

[43] Jeremy G Richardson, *The Concept of Policy Style* (George Allen & Unwin 1982).

[44] Steve Rayner, 'National Case Studies of Institutional Capabilities to Implement Greenhouse Gas Reductions' (1993) 3(Special issue) Global Environmental Change 7.

the following dilemma: one train may hide another, the choice of certain options to reduce exposure to one form of contestation has the effect of increasing exposure of the firm to the other form of contestation. For example, the GMO industry's obsession with competition from US companies and its desire to force itself into Europe for this reason, may have led to a series of choices (types of GMOs first placed on the market, timing of introduction, changes in economic relationships with farmers, communication arguments to the general public) which have aroused a protest mobilising first the theme of environmental and health risks and then generalising around protectionist themes.[45]

This example shows that companies concerned about the future of their social legitimacy would benefit from making their state of contestability the integrated object of strategic management, without focusing on competition through markets and without separating the domains. The issue of health and environmental risks is often referred to a specialized department responsible for managing the downstream strategic decisions of the company from a strictly technical point of view, without proper strategic integration.

In the case of GMOs, proactive strategic management had begun to be undertaken, but only by using the traditional options of communication and negotiation of a public regulation which were expected to kill in the root of the threats to the development of biotechnologies (At the beginning of the 1990s, EU directives were adopted to control the release of GMOs at the research and experimental stage and to authorise their cultivation).[46] Without much Without much success, the companies concerned failed to see that their development strategies were doubly changing their exposure to the challenge: on the one hand, massive investment in specific assets related to new biotechnologies implied a commitment horizon that made them vulnerable to environmental and health challenges; on the other hand, this investment altered the balance of economic relations in the agricultural input sector, making them a threat to some farmers.[47]

There is no doubt that companies can come to sustainable development for a variety of reasons. Nevertheless, the proposed model around the concept of contestability allows us to understand why companies in certain sectors of activity and only some of them feel strategically involved in the theme of sustainable development or related themes. The chemical industry, which has been the most controversial industry for its environmental and health impact, has voluntarily adopted a strategic line of responsibility around the charter since the 1980s.[48] And a leading member of the Business Council for Sustainable Development, established at the Earth Summit in 1992. The proposed model also draws attention to the close links between market strategies and vulnerability to social protest. It may provide a stronger framework for the

[45] Olivier Godard, 'Environnement et commerce international – Le principe de précaution sur la ligne de fracture' (2001) Futuribles 37.
[46] Chad S Holliday, *Walking the Talk: The Business Case for Sustainable Development* (Greenleaf Publishing 2002).
[47] Steven Kelman, *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy* (MIT Press 1981).
[48] Michael Howes, *Politics and the Environment: Risk and the Role of Government and Industry* (Allen and Unwin 2005).

willingness of some companies to place their own development under the umbrella of sustainable development.[49]

From this analysis, two conclusions can be drawn. First, the idea that a company should only be concerned with its markets and competitiveness for the best benefit of its shareholders without worrying about maintaining its legitimacy leads to a blurred vision of the problems that managers must address. In a very prosaic way, this means that this idea leads to strategic mistakes. Secondly, it would be naive to expect a sort of spontaneous general conversion of companies of all sectors and sizes towards sustainable development, without considering the economic and technological characteristics of their activities and markets. While voluntary approaches can be considered credible when they are emanating from certain industrial configurations, they have no economic basis in other configurations. In the latter case, sustainable development can only be achieved through the mediation of public regulation, whether it uses regulatory instruments (emission standards) or economic ones, such as taxation or transferable emission permits.[50]

VI. An Ethical Responsibility Assumed

6.1 Long-Term And Risk Exposure

The emergence of the theme of sustainable development in the corporate world has gone hand in hand with the promotion of the ethical responsibility of economic actors.[51] In some cases, this may be only a response to the new ethical demands that are emerging within certain components of shareholding, such as some pension funds.[52] The movement is, however, more general. The company is being assigned new responsibilities and obligations to its partners and society from all sides.

This expansion of ethical reference is even more evident as states reveal their limitations in maintaining social ties and their difficulties in promoting economic development that do not involve social exclusion or a part of the future of humanity.[53]

The limitations and difficulties of states have many origins, as is known. The centre of gravity of influence power has shifted to multi and international bodies (the European Union, the World Trade Organisation), at the same time, that political regulation gives way to regulations by

[49] Anna Gueorguieva, *A Critical Review of the Literature on Structural Adjustment and the Environment* (World Bank Environmental Economics Series Paper 90, World Bank 2003).

[50] Stefan R Schaltegger, Roger Burritt and Holger Petersen, *An Introduction to Corporate Environmental Management: Striving for Sustainability* (Greenleaf Publishing 2003).

[51] Theo Henckens, 'Chapter 5 - Mineral Resources Ethics' in *Governance of the World's Mineral Resources* (Elsevier 2021) 71, based on Theo Henckens, Marie-Louise C M Ryngaert, Cornelis M J Driessen and Paul P J Worrell, 'Normative Principles and the Sustainable Use of Geologically Scarce Mineral Resources' (2018) 59 Resources Policy 351.

[52] Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2004).

[53] Douglas G Cogan, *Corporate Governance and Climate Change: Making the Connection* (CERES 2006) 300.

independent authorities or economic mechanisms ('financial markets').[54] The states, particularly developing countries, are experiencing serious difficulties in reforming themselves to better assume their most traditional missions (justice, security, the rule of law) under modern conditions. Finally, democratic governments face structural difficulties in designing and implementing long-range actions when they are not based on a solid and stable configuration of present interests.[55] National defense is an interesting example in this respect, since countries with long-term military security concerns are most prominent when these concerns are based on the current strength of a military industrial complex.[56]

Will companies be able to meet the ethical challenge of sustainable development better than governments? Will they not be crushed under the weight of responsibilities thus multiplied and densified? Will they be able to avoid the facilities and traps of hypocritical, opportunistic and cynical communication? The ethical dimension of business management is claimed by some managers and rejected by others who see it as a kind of category error.[57] In the eyes of the latter, companies are not entities with responsibilities for collective morality, let alone exercising a moral magisterium; Moreover, from ethics to moral order, regrettable shifts can be rapid.[58]

Nevertheless, let us accept the starting point and question the forms and ethical implications of the sustainable development theme for companies. Several figures can then give a translation to the guiding idea of corporate responsibility for sustainable development. The first task of our exploration will be to sketch them.

The uncertainties inherent in long time and the discontinuities between local and global phenomena impose on the thinking of sustainable development a need for the mediation of risk and potential danger, in their different probabilistic and non-probabilistic expressions. This is why the precautionary principle must be considered as the leading edge of sustainable development, if we are to avoid turning it into a slogan for crisis management.[59] Although this principle is primarily of interest to public action on collective risks, it cannot leave companies committed to promoting sustainable development indifferent. How to understand the requirements for companies?

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[54] Alan Boyle, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999).

[55] This is not an original observation. The German philosopher Hans Jonas had endeavored in his book on the principle of responsibility to grasp the consequences from the point of view of moral philosophy. It was his understanding that the dissemination of a 'fear heuristic' in society was necessary to overcome the structural inability of democratic governments to take firm action to safeguard the future; Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (University of Chicago Press 1984).

[56] Frank Biermann and Klaus Dingwerth, 'Global Environmental Change and the Nation State' (2004) 4 Global Environmental Politics 1.

[57] Frank Berkhout, 'Technological Regimes, Path Dependency and the Environment' (2002) 12 Global Environmental Change 1.

[58] Helena Alves-Pinto and others, 'Opportunities and Challenges of Other Effective Area-Based Conservation Measures (OECMs) for Biodiversity Conservation' (2021) 19 Perspectives in Ecology and Conservation 115.

[59] Theo Henckens, 'Chapter 5 - Mineral Resources Ethics' in *Governance of the World's Mineral Resources* (Elsevier 2021) 71, based on Theo Henckens, Marie L C M Ryngaert, Cornelis M J Driessen, and Paul P J Worrell, 'Normative Principles and the Sustainable Use of Geologically Scarce Mineral Resources' (2018) 59 Resources Policy 351.

VII. Ways of Interpreting Ethics of Sustainable Development

One of the main components of sustainable development is the inclusion of long-term relationships with distant generations as a relevant element in the decision-making horizons of companies and other social actors.[60] But what does that mean? Some groups or bodies in the administration, as well as some public or private enterprises, for example in the field of energy, have traditionally derived their power and notoriety from taking charge of a longer time rather than those with a shorter time that form the ordinary economic horizon, a long time which these actors willingly present themselves as guarantors. With the objective of sustainable development, this type of attitude is expected to become widespread:[61] the companies that claim to be responsible are then required to produce a discourse of responsibility that goes beyond short-term configurations and interests and extends virtually to intergenerational time.
The companies concerned will not be content with speeches. The speeches enterprises make expose them by displaying the norms and criteria on which they accept to play their legitimacy. The simple concern for their credibility will then command those enterprises to adopt a behavior and achieve observable performances that are in line with their discourse on sustainable development.[62] How can companies do this?

The future world is neither precisely given nor precisely identifiable, so the challenge for companies is not to plan for the very long term as short-term actions are planned. They have to deploy another intellectual structure of action around two poles: on the one hand, a concern for the viability of segments of development trajectories on which they have practical and cognitive control; on the other hand, concern for the initial conditions which they will pass on to the economic actors of tomorrow and to future generations.[63] Five examples can be given for which such a concern of intergenerational character is obvious, albeit with quite different timelines. They are the increase in the state's debt, the management of long-lived radioactive waste, pension reform; global climate change and soil contamination with polluting residues.[64] The first example concerns primarily public authorities, while the others are more directly relevant to enterprises.

With this aim, leaders have a duty of vigilance. They must be attentive to the rhythms of evolution, identify the imbalances that are emerging and identify the factors of irreversibility, critical points and potential bifurcations already discernible in the trajectories. Any elements

[60] Anna Gueorguieva, *A Critical Review of the Literature on Structural Adjustment and the Environment* (World Bank Environmental Economics Series Paper 90, World Bank 2003).
[61] Olivier Godard, 'Environnement et commerce international – Le principe de précaution sur la ligne de fracture' (2001) Futuribles 37.
[62] Hugh Turton, 'Long-Term Security of Energy Supply and Climate Change' (2006) 34(15) Energy Policy 2475.
[63] Warren Walker, 'Entrapment in Large Technology Systems: Institutional Commitment and Power Relations' (2000) 29 Research Policy 833, 846.
[64] David Victor and Thomas C Heller, *The Political Economy of Power Sector Reform: The Experience of Five Major Developing Countries* (Cambridge University Press 2007).

that they may suspect may pose a longer-term viability problem.[65] This applies to the three dimensions of sustainable development, economic, environmental and social.

In this context, the relationship between the future and future generations is a free promise and not a kind of obligation that results from the fundamental rules of reciprocity. This is all the more so as companies have several ways of assuming responsibility for the long term. Four reference points constitute the primary matrices of the enunciation of the sustainability promises of development: (1) the intergenerational contract between interlinked generations; (2) the investment generating future technical production possibilities, to be framed by the search for the satisfaction of essential needs; (3) wealth management centered on the transmission of an essential heritage; and (4) the reworking of the company's relationship fabric, both internally and externally, based on civic requirements.[66]

7.1 The Intergenerational Contract

With the figure of the intergenerational contract, the quality of the relationship established with distant generations passes first through the establishment of quality relations between different generations who share the same present and form society. This way, from time to time, the sustainability of development trajectories could be better ensured.[67] The reference to the idea of contract is intended to draw attention to the quest for equity between the parties and the need for explicit institutional procedures or mechanisms to achieve it.[68] Primarily concerned with the production and use of goods whose life span exceeds that of a generation, or with the production of goods intended by one generation for contractual transfer to another generation (education expenditure on the one hand, pay-as-you-go pensions on the other).[69]

Intergenerational equity, in the legal context, refers to the obligation for the current generation to manage natural resources and make decisions that do not hinder the ability of future generations to meet their own needs. It manifests itself in various areas of law, notably environmental law, health law, and labor law, and is articulated around the concept of sustainable development.[70]

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[65] Mathis Wackernagel and William Rees, *Our Ecological Footprint: Reducing Human Impact on the Earth* (New Society Publishers 1996).

[66] Martin Wagner, 'The Carbon Kuznets Curve: A Cloudy Picture Emitted by Lousy Econometrics?' (Discussion Paper 04-18, University of Bern 2004) 36.

[67] Thibault Deleuil, 'La Protection de la "Terre Nourricière": Un Progrès pour la Protection de l'Environnement?' (2017) 42 Revue Juridique de l'Environnement 255, 272.

[68] David Windsor, 'Stakeholder Influence Strategies for Smarter Growth' in Sanjay Sharma and Michael Starik (eds), *Research in Corporate Sustainability: The Evolving Theory and Practice of Organisations in the Natural Environment* (Edward Elgar 2004).

[69] Antoine Michelot, 'Pour un Principe de Solidarité Écologique? De la Critique à la Proposition, du Droit Interne au Droit International' (2020) 45 Revue Juridique de l'Environnement 733, 750.

[70] Theo Henckens, 'Chapter 5 - Mineral Resources Ethics' in Theo Henckens (ed), *Governance of the World's Mineral Resources* (Elsevier 2021) 71, based on Theo Henckens, MLCM Ryngaert, CMJ Driessen, PPJ Worrell, 'Normative Principles and the Sustainable Use of Geologically Scarce Mineral Resources' (2018) 59 Resources Policy 351.

The focus should be on implicit transfers of various burdens (debt, contaminated land, long-lived waste, lack of childcare, degradation of ecosystems and water resources...) that the generations of age to decide to impose on the following generations, even though these charges would probably not be accepted under these conditions if the present generations were to obtain the agreement of the succeeding generations in a proper contract.[71] Whatever the difficulty in defining the counterfactual situation as a point of comparison, this first reference leads to a question that business leaders should systematically ask themselves: would such action with lasting effects be freely accepted by future generations in the framework of a contract which would fix its benefits and burdens?

Thus, the most serious moral argument against the use of nuclear technology is that it imposes on a succession of future generations a vital threat to their safety in the form of very long-lived radioactive waste, and the corresponding obligation to be the guardians of this threat.[72] It is the present generations who directly benefit from the economic benefits of this technology (low-cost electricity supply) without the assurance that future generations will have the technical or political capacity to manage these wastes safely. If they had the choice, would future generations accept this contract? This may or may not be the case, depending on the rewards provided in the form of a less dangerous evolution of the global climate.

For companies, the most direct translation of the concern for equity between intergenerational relationships is to invent a method of personnel insertion adapted to each age. This should not only take into account the occupational expectations, the wage and choice of working time, but also to the explicit establishment of a link of solidarity between members of different age groups. The systematic use of early retirement to remove employees aged 55 and over from the company or, conversely, the collective refusal to reserve a place in the company for the younger generations are not compatible with the promise of sustainable development, regardless of the hygiene and environmental cleanliness of the facilities.[73]

7.2 Investing In The Future

There is no need to dwell too long on the essential role of investment in preparing for the future. Productive investment and technological progress make a decisive contribution to the promise of a sustainable future for future generations. And this despite all the doubts that have arisen about the general equation of progress. Contemporary demand is a demand for the selection of techniques that are truly interesting to consumers and a demand for control over the conditions under which the techniques are implemented.[74] It is not opposed to any

[71] Joshua Weiner, 'Comparing Precaution in the United States and Europe' (2002) 5(4) Journal of Risk Research 317, 349.
[72] Tom Wilbanks, 'Integrating Climate Change and Sustainable Development in a Place-Based Context' (2003) 3(S1) Climate Policy S147, S154.
[73] Sandra M Waddock and Malcom McIntosh, 'Beyond Corporate Responsibility: Implications for Management Development' (2009) 114(3) Business and Society Review 295, 325.
[74] L. Alan Winters, Neil McCulloch, and Andrew McKay, 'Trade Liberalization and Poverty: The Evidence So Far' (2004) Journal of Economic Literature 72.

innovation, if we exclude the claims of certain fringe fringes of the ecologist movement and other 'alternative' movements.

The guiding axis here is to ensure an enlarged reproduction of capital, to use this expression, but in a different sense than that which it took in economics with reference to Marx's analyses.[75] Indeed, the theme of sustainable development calls first for an expansion of the components of capital whose reproduction must be ensured, as suggested by Robert Solow, Nobel prize-winning economist. It is no longer just physical assets directly involved in production. Total capital includes the formation of human capital (knowledge, skills, know-how) to be directed towards preparing for the future. It also incorporates natural capital, the renewal of which can no longer be expected to be assured by nature alone.

The golden rule of reinvesting in new capital formation, drawn from the exploitation of exhaustible natural resources and natural environments, is a benchmark here. Sustainable development does not mean giving up the exploitation of natural resources; it means rebuilding, in the economic sense of the term, the resources used.[76] This involves the search for greater efficiency in the processing and use of these resources (such as energy efficiency, material efficiency), and the search for substitutes. If necessary, limits on current exploitation rates should be imposed, in order to preserve the natural capacity for the renewal of certain resources (marine fisheries).[77]

Sustainable development also leads to a new approach to the criteria for evaluating and selecting innovations, addressing the issue of collective risks and concerns about the social acceptability of new technologies.[78] New modalities for negotiating innovations need to be developed, particularly to broaden the types of partners involved in this negotiation so as to better represent relevant viewpoints.

Modernisation of the production tool, technological research, broadening of the scope regarding the components of capital, reinvestment of the rent derived from the exploitation of the natural factor, broadening the evaluation criteria and concerns for the social acceptability of innovations are then the axes of a sustainable development strategy for a company according to this figure of investment.[79]

The dashboard to be followed must be particularly sensitive to identifying and tracking failures or limitations of the industry promise. The latter may take the form of under-investment in

[75] Francesco Perrini, *Developing Corporate Social Responsibility: A European Perspective* (Edward Elgar Publishing 2006).

[76] David Morrow and Dennis Rondinelli , 'Adopting Corporate Environmental Management Systems: Motivations and Results of ISO 14001 and EMAS Certification' (2002) 20 European Management Journal 159, 171.

[77] Sanjay Sharma and Irene Henriques, 'Stakeholder Influences on Sustainability Practices in the Canadian Forest Product Industry' (2005) 26(2) Strategic Management Journal 159, 180.

[78] Oliver Salzmann, Aileen Ionescu-Somers and Ulrich Steger, 'The Business Case for Corporate Sustainability: Literature Review and Research Options' (2005) 23(1) European Management Journal 27, 36.

[79] Miguel Rocha, Cory Searcy and Stanislav Karapetrovic, 'Integrating Sustainable Development into Existing Management Systems' (2007) 18(1/2) Total Quality Management 83, 92.

capital formation, particularly with regard to the process of destruction of natural capital; insufficient progress of new techniques which are expected to replace existing techniques; failures in technological control (accidents, new technological risks remain unanswered); and an inability to solve certain societal problems from a technological response.[80]

7.3 The Ethics Of Heritage Transmission

With reference to assets, the central idea is that of the transmission of wealth, as it differs from the notion of an exchange contract. Heritage should not be understood here as a collection of objects that would be qualified once and for all as heritage objects, and among which one would find, for example, all natural resources.[81] Heritage involves a selection of goods, natural or not, to which is attached an essential value for the survival of a reference community, beyond individual destinies. This includes property with identity value for a community. Heritage is thus the desire of present generations to pass on certain assets to succeeding generations or at least to preserve them for their own use. This characteristic orients the nature of the phenomena to be studied: alongside indicators reflecting the objective evolution of assets classified as heritage (flow and stock, qualitative evolution), it is necessary to observe and analyse the forms and means of "asset investment" of the groups that make up the company or are its partners. These include resources (time, income) allocated and constraints accepted in connection with protection activities, restoration or management of heritage assets for their transfer.[82]

Naturally, the concern for transmission must consider not only goods valued positively but also those that are negative. It is because ultimately the preservation of the ability of future generations to make their own choices in life and development depends on the set of resources and heritage assets and challenges, that they will inherit.[83]

If we consider the heritage elements that those involved in the development of the enterprise might wish to transmit because of the identity value which would be recognised, several stand out. The most obvious heritages concern a mode of organisation, a style of human relations, particular know-how, trades and technical gestures that are learned on the job and passed on by example in a close relationship.[84] There is also the contribution of certain economic activities to preserving the territorial environment: a habitat, an economic fabric, and landscapes. Finally, the heritage reference is a particular requirement from the perspective of income distribution

[80] Amy Reilly, 'Communicating Sustainability Initiatives in Corporate Reports: Linking Implications to Organizational Change' (2009) SAM Advanced Management Journal Summer 33, 43.

[81] Derk Loorbach, 'Transition Management for Sustainable Development: A Prescriptive, Complexity-Based Governance Framework' (2010) 23(1) Governance: An International Journal of Policy, Administration, and Institutions 161, 183.

[82] Olivier Godard, 'Environnement et commerce international – Le principe de précaution sur la ligne de fracture' (2001) Futuribles 37, 62.

[83] Stuart L Hart and Mark B Milstein, 'Creating Sustainable Value' (2003) 17(2) Academy of Management Executive 56, 69.

[84] John Ledwidge, 'Corporate Social Responsibility: The Risks and Opportunities for HR; Integrating Human and Social Values into the Strategic and Operational Fabric' (2007) 15(6) Human Resource Management International Digest 27.

equity within a single generation, as noted by international law specialist Edith Brown-Weiss.[85] Income should be sufficiently redistributed to the most disadvantaged groups so that they can get out of a daily economic survival logic and take part in collective actions directed towards future generations; and by the same means, attain the full moral dignity which had been denied them until then.

7.4 The Civic Referrer

The emergence of sustainable development is inseparable from the rise in power of what we can call a citizen's claim. The common feature of these quite disparate movements is that they call into question the integral delegation of the responsibility for deciding collective fate to the elite who animate public institutions and who run companies.[86] In contrast, the legitimacy of new forms of participation, deliberation and social control over choices often left until then in the hands of entrepreneurs and only the control of administrative services suffering from lack of means is affirmed.[87] The claim of this social control is built in particular around an enhancement of the values of equity and justice based on the democratic postulate of fundamental equality of citizens.

For businesses, this civic requirement has multiple implications. Internally, wages and working hours cannot be the result of market arbitrage alone. The different categories of employees must be offered minimum conditions of income and free time to fulfil their various social roles, within the family and in the city.

The responsibility of companies is also engaged in different ways towards external partners. Companies thus have valuable information on their activities, affecting both the quality of products placed on the market, working conditions and impacts on the physical environment[88]. For those whose activity is based on innovation, they have information, which can be crucial, about collective risks to health or the environment. The concern to protect industrial secrecy and not to draw attention to possible problems in which the company could be involved often leads to strategies of information retention. They deprive consumers, citizens and public authorities of important means of identifying threats and taking them into account at an early stage.[89] The sense of social responsibility that sustainable development implies makes the transmission of public utility a full requirement whose conditions must be legally organised.

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[85] Tobias Hahn and others, 'Trade-offs in corporate sustainability: you can't have your cake and eat it' (2010) 19 Business Strategy and the Environment 217.

[86] Robert Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press 1993).

[87] Simon Yearley, 'Social Movements and Environmental Change' in Michael Redclift and Ted Benton (eds), *Social Theory and the Global Environment* (Routledge 1994) 150.

[88] Rolf Garvare and others, 'Management for Sustainability – A Stakeholder Theory' (2010) 21(7) Total Quality Management 737, 744.

[89] Derk Loorbach, 'Transition Management for Sustainable Development: A Prescriptive, Complexity-Based Governance Framework' (2010) 23(1) Governance: An International Journal of Policy, Administration, and Institutions 161, 183.

Finally, since the sustainable development claim is a demand for participation in the deliberation on choices that will have benefits for the community, it is up to the companies to establish a prospective partnership with representatives of those whose fate will be affected by their initiatives and strategic decisions: employees, population in the vicinity of their installations at risk, consumers, environmental protection NGOs, etc.[90]

Certainly, in contemporary society, these different ways of making the promise of sustainable development are not exclusive to each other but have to be combined. At the junction of ethical requirement, applied will and economic necessity there is the moment of strategic interpretation. The path to sustainable development cannot be unique. It is up to each company to invent its own.[91]

VIII. The Precautionary Principle in Relation to Potential Collective Risks

French law has a balanced definition of the precautionary principle, far from the extreme forms supported by this or that organisation. It was the Barnier Law 95-101 on strengthening environmental protection which defined it as the principle according to which "the lack of certainty, taking into account current scientific and technical knowledge, should not delay the adoption of effective and proportionate measures to prevent a risk of serious and irreversible damage to the environment, at an economically acceptable cost".[92] Community case law in 1998 extended this to the areas of public health and food safety in the context of the dispute with the UK government over the mad cow disease epidemic.[93] It has made it an autonomous legal standard, although its scope of application remains uncertain: who is directly concerned by this standard, the state alone or all public and private people, and thus companies?
Despite strong fears, the precautionary principle alone is not likely to have significant consequences for the exercise of civil and criminal liability by companies in the state of positive law: French law does not provide for a crime or offence of "lack of precaution"[94]; as regards the engagement of civil liability for defective products, it is already assessed by the courts without any reference to the notion of fault (we speak of responsibilities for risk). So, a principle for nothing? No doubt not.

8.1 Public Attitudes

Thinking must start from public attitudes toward risk. One thing is for sure. These attitudes are not the same towards chosen and assumed risks as well as risks incurred. The former do not cause rejection, while the latter arouse suspicion, mistrust, or denunciations and, when they are

[90] Sandra M Waddock and Malcolm McIntosh, 'Beyond Corporate Responsibility: Implications for Management Development' (2009) 114(3) Business and Society Review 295, 325.
[91] John Elkington, 'Governance for Sustainability' (2006) 14(6) Corporate Governance 522, 529.
[92] Shirley-Ann Hazlett, Rodney McAdam and Lisa Murray, 'From Quality Management to Socially Responsible Organisations: The Case for CSR' (2007) 24(7) International Journal of Quality and Reliability Management 669, 682.
[93] Charles O. Holliday Jr, Stephan Schmidheiny, and Philip Watts, *Walking the Talk: The Business Case for Sustainable Development* (Greenleaf Publishing 2002).
[94] Joshua Weiner, 'Comparing Precaution in the United States and Europe' (2002) 5(4) Journal of Risk Research 317, 349.

met, call for criminal sanctions.[95] This dichotomy manifests not only an attitude towards risks, but also more deeply, an attitude towards public institutions and the group of leaders responsible for creating or regulating collective risks: business leaders, civil servants, scientific experts and policymakers.[96] The public no longer has systematic confidence in how companies and public institutions manage collective risks. There is a general suspicion that the officials are under the influence of different lobbies and do not give due priority to health and environmental safety.[97]

One of the attributes of risks that are accepted and assumed is that they are subject to a deliberation of individuals, most often personal, sometimes collective within small groups (families, professional units):[98] everyone calculates their risks more or less explicitly and those who take the most are not those who calculate them least (formula 1 drivers, mountain climbing...).

This is why a significant change in attitudes towards collective risks in developing countries requires institutional and social innovations. That is to extend the class of risks on which the public has the power to deliberate and consider "responsibility" on their well-considered preferences.[99] It is by introducing new scenes and deliberation procedures that a culture of the chosen or consented risk can develop, away from both the inconsequential glorification of the 'risk for the risk' and the denial or flight of collective risk.[100]

8.2 Deepen The Reform Of Expertise

The gateways to be established relate primarily to the exercise of expertise. The nuclear syndrome, the asbestos battle and the tainted blood scandal have contributed to the suspicion of experts, to the point where the end of their supposed reign is perceived by some as a prerequisite for the restoration of a living democracy.[101] Restoring the conditions for a reasonable confidence in expertise is a first step towards implementing reasonable risk prevention.

This does not primarily and principally involve 'communication' actions. On the one hand, it involves opening up access to information held by companies in frameworks offering guarantees

[95] Martina K Linnenluecke and Andrew Griffiths, 'Corporate Sustainability and Organizational Culture' (2010) 45 Journal of World Business 357.

[96] Amy Reilly, 'Communicating Sustainability Initiatives in Corporate Reports: Linking Implications to Organizational Change' (2009) SAM Advanced Management Journal, Summer, 33.

[97] Frank Biermann, 'Global Environmental Change and the Nation State' (2004) 4 Global Environmental Politics 1.

[98] Andrew D F Price and K Chahal, 'A Strategic Framework for Change Management' (2006) 24(3) Construction Management and Economics 237.

[99] Raghunath Patra, 'Vaastu Shastra: Towards Sustainable Development' (2008) 17 Sustainable Development Journal 244.

[100] David Owen, *Beyond Corporate Social Responsibility: The Scope for Corporate Investment in Community Driven Development* (World Bank Report No 37379-GLB, 2007).

[101] David Nguyen, 'Hitting the Sustainability Sweet Spot: Having It All' (2010) 31(3) Journal of Business Strategy 5.

about the authenticity of these companies.[102] On the other hand, it involves establishing procedures enabling citizens to be made aware, directly or through representatives who would have their confidence, of the effective functioning of the expertise at its various stages, and in particular the collection of primary information.[103]

This can go as far as the financing of counter-expertise with the approval of the various parties involved. This may include the participation of "ordinary citizens" in expert panels, so that they can participate in defining the terms of reference and approach to be followed and then serve as witnesses.[104] It can also be based on consensus conferences involving citizens in a position to train and hear experts before deliberating on recommendations for risk prevention.[105]

These guidelines imply a much more thoughtful organisation of expertise, both at the level of the overall scheme (definition of the different types of expertise required) and at that of the rules applicable within an expert committee, such as pluralist disciplinary composition, declaration of interests, mention of minority opinions, or the personal responsibility of experts.

8.3 Take Responsibility Without Blabbing

Conflicts and suspicions often arise between those who create risks, the companies and the citizens exposed to these risks as producers, consumers, or users. These tensions can only have a chance of being overcome in a positive way, if the companies accept to assume civil liability for the damages that their activity or the products they put into circulation may create for health and the environment.[106] The defense of innovative forces does not involve their liability. The double talk sometimes heard, for example about GMOs: (1) "Rest assured, there is no danger, everything is under control"; (2) "we refuse to be held responsible if by chance a damage was realised because we are the glorious fighters of the modern battle of innovation" can only maintain the public's distrust and radical rejection of risks whose tangible benefits it would not perceive.[107] Responsibility assumed without fighting back is a condition for establishing a minimum of confidence in the corporate world. This liability must, where applicable, goes beyond the current legal rules, in particular when the damage is caused by a cascade of partial liability linked to each other by unclear contracts.

[102] Maria S Rocha, 'Integrating Sustainable Development into Existing Management Systems' (2007) 18(1/2) Total Quality Management 83.

[103] Stefan R Schaltegger, Roger Burritt and Holger Petersen, *An Introduction to Corporate Environmental Management: Striving for Sustainability* (Greenleaf Publishing 2003).

[104] Amy Gutmann, *Why Deliberative Democracy?* (Princeton University Press 2004).

[105] Donilo Borja and others, 'Rethinking Scenario Building for Sustainable Futures: Mobilizing Conscientização' (2025) 21(1) Ecosystems and People.

[106] Derk Loorbach, 'Transition Management for Sustainable Development: A Prescriptive, Complexity-Based Governance Framework' (2010) 23(1) Governance: An International Journal of Policy, Administration, and Institutions 161.

[107] Shalini Sharma, 'Stakeholder Influences on Sustainability Practices in the Canadian Forest Product Industry' (2005) 26(2) Strategic Management Journal 159.

The sense of responsibility must extend to active search for information. The precautionary principle certainly does not require that companies know what they cannot know, but that they seek to know what they can learn and take it into account.[108]

8.3.1 Precaution is Not a Threat to Innovation, It is the Condition

The precautionary principle is often criticised as a vital threat to innovation and entrepreneurship. This is taking things the wrong way and it is to endorse a conception of precaution that it is precisely to avoid, the one that makes it an abstention rule.[109]

It is first of all to take things the other way. The precautionary principle is not at the origin of the crisis of confidence noted and attitudes of refusal of collective risks incurred, but rather different scandals, health matters and major technological accidents.[110] It is rather the means to overcome this crisis of confidence by a double movement of channeling the protest and early but proportionate prevention of potential risks.[111]

In other words, it is by following the path of precaution that it will be possible to preserve the fundamental springs of innovation which, otherwise, risk being broken off in the face of a "front of refusal".

It is, then, an unintentional confirmation of the precaution conception that makes it a rule of abstention in the face of potential risks. This is not the objective of the law or of the doctrine developed in Europe.[112] The forbearance rule is defined as the requirement that a product or technique must be proven to be safe in the long term before anything can be authorised. In an uncertain and controversial universe, such proof is difficult to be provided.[113] The sponsor can only provide evidence that they have performed a set of tests and that these tests have produced acceptable results. Moreover, taken literally, the idea of harmlessness is to make zero harm a general social norm, this is obviously impossible in a world of scarce resources where the benefits of action can generally only be obtained if economic agents agree to bear certain costs.[114] A misguided conception of precaution as an abstention rule and the block refusal of

[108] Michele Naudé, 'Governance through Corporate Social Responsibility as a Key Organizational Principle' (2008) 6(2) Corporate Ownership and Control 393.
[109] Ian Kerr, 'Leadership Strategies for Sustainable SME Operation' (2006) 15(1) Business Strategy and the Environment 30.
[110] Alan Boyle, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999).
[111] Oliver Salzmann, Aileen Ionescu-Somers and Ulrich Steger, 'The Business Case for Corporate Sustainability: Literature Review and Research Options' (2005) 23(1) European Management Journal 27, 36.
[112] Steven Kelman, *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy* (MIT Press 1981).
[113] Ivan Montiel, 'Corporate Social Responsibility: Separate Pasts, Common Futures' (2008) 21 Organization & Environment 245.
[114] Warren Strugatch, 'Turning Values into Valuation: Can Corporate Social Responsibility Survive Hard Times and Emerge Intact?' (2011) 30(1) Journal of Management Development 44.

precaution are the two most assured ways to achieve the same result. That result is the systematic rejection of new collective risks associated with scientific and technical innovation.[115]

8.4 Monitoring, Surveillance And Evaluation of Current Policies

The application of the precautionary principle in the context of the Sustainable Development Goals (SDGs) has recently evolved, owing to an increasing understanding of the linkages between these goals and environmental and health concerns.[116] The notion of taking preventative steps in the face of potential threats, especially in the absence of full scientific certainty, is increasingly included in sustainable development policies, with a focus on the risks of irreparable damage.[117]

8.4.1 Recent Developments In The Application Of The Precautionary Principle With Regard To The SDGs

- The precautionary principle is increasingly being integrated into public policies related to the SDGs, including natural resource management, climate change mitigation, and biodiversity conservation.[118]

- Implementing the precautionary principle requires coordinated effort to address global concerns like climate change and biodiversity loss.[119]

- The precautionary principle now encompasses social and economic factors, in addition to environmental concerns. It entails evaluating the potential consequences of activities on vulnerable populations and ensuring that the measures implemented do not jeopardise their well-being.[120]

- Efforts are underway to improve risk assessment methodologies for scientific uncertainty, particularly through modelling and simulation.[121]

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[115] Andrew D F Price and K Chahal, 'A Strategic Framework for Change Management' (2006) 24(3) Construction Management and Economics 237.

[116] Rafael Almeida Magris and Leandra R Gonçalves, 'Overcoming Challenges and Identifying Opportunities for Marine Protected Area Planning: Lessons from Brazil' (2025) 180 Marine Policy 106798.

[117] Ndidzulafhi Innocent Sinthumule, 'Sacred Natural Sites as Other Effective Area-Based Conservation Measures (OECMs) for Biodiversity Conservation in South Africa: Key Opportunities and Challenges for Policy and Practice' (2025) 86 Journal for Nature Conservation 130.

[118] Ndidzulafhi Innocent Sinthumule, 'Conservation Effects of Governance and Management of Sacred Natural Sites: Lessons from Vhutanda in the Vhembe Region, Limpopo Province of South Africa' (2022) 19(3) International Journal of Environmental Research and Public Health 1067.

[119] Enric Sala and Kristin Rechberger, 'Protecting Half the Ocean' in Raj M Desai, *From Summits to Solutions – Innovations in Raj MImplementing the Sustainable Development Goals* (Brookings Institute Press 2018).

[120] John Studley, *Indigenous Sacred Natural Sites and Spiritual Governance: The Legal Case for Juristic Personhood* (1edn, Routledge 2018).

[121] James A Fitzsimons and others, 'Clarifying "Long-Term" for Protected Areas and Other Effective Area-Based Conservation Measures (OECMs): Why Only 25 Years of "Intent" Does Not Qualify' (2024) 30 Parks 89.

- Civil society has a crucial role in developing and implementing precautionary principles. Non-governmental organisations, citizen movements, and independent experts work to promote public awareness, influence policies, and monitor the principle's implementation.[122]

8.4.2 Examples Of How The Precautionary Principle Is Applied In The Context Of The Sdgs

- SDG 6 (Clean Water and Sanitation) emphasises sustainable water management and pollution control to protect aquatic ecosystems and human health.[123]

- SDG 12 (Responsible Consumption and Production) focuses on reducing environmental impact through waste prevention, extending product lifespans, and promoting reuse.[124]

- SDG 13 (Climate Action) emphasises reducing greenhouse gas emissions and responding to climate change using the precautionary principle to prevent irreversible consequences of global warming.[125]

- SDG 14 and 15 focus on protecting marine and terrestrial biodiversity to prevent species extinction and ecosystem degradation.[126]

8.4.3 Difficulties And Challenges:

- The precautionary principle can result in considerable economic costs and limits for firms and states.[127]

- Scientific restrictions can make assessing risks and implementing precautionary measures challenging due to their complexity and unpredictability.[128]

[122] Edward O Wilson, 'Half-Earth,' in *Our Planet's Fight for Life* (Liferight Publishing 2016).
[123] Timothy Searchinger and others, *World Resources Report: Creating a Sustainable Food Future* (World Resources Institute 2018).
[124] Courtney E Cooper-Vince and others, 'Household water insecurity, missed schooling, and the mediating role of caregiver depression in rural Uganda' (2017) 15 Glob Ment Health (Cambridge).
[125] Jan Buizer, Katharine Jacobs and David Cash, 'Making short-term climate forecasts useful: Linking science and action' (2016) 113(17) Proceedings of the National Academy of Sciences of the United States of America 4597.
[126] Daniela Diz and others, 'Mainstreaming marine biodiversity into the SDGs: The role of other effective area-based conservation measures (SDG 14.5)' (2018) 93 Marine Policy 251.
[127] Mariana Mazzucato, *Mission-Oriented Research & Innovation in the European Union: A Problem-Solving Approach to Fuel Innovation-Led Growth* (Publications Office of the European Union 2018) <https://data.europa.eu/doi/10.2777/360325> accessed 8 August 2025.
[128] David Lusseau and Francesca Mancini, 'Income-based variation in Sustainable Development Goal interaction networks' (2019) 2 Nature Sustainability 242 <https://doi.org/10.1038/s41893-019-0231-4> accessed 8 August 2025.

- Some argue that the precautionary principle may hinder innovation and economic development, particularly in new technologies.[129]

Finally, implementing the precautionary principle in the context of the SDGs is a complex problem that necessitates a delicate balance among environmental conservation, human health, and economic growth. To guarantee that this principle is effectively implemented, international collaboration must be strengthened, risk assessment improved, and all-important parties engaged.[130]

The SDGs ask for a big push to mobilise data and monitor frameworks in order to track transformations and exchange best practices. Data on the SDGs' intended outcomes are still in short supply.[131] To fill these gaps, official and non-official data, especially remote sensing and big data, will need to be integrated through platforms like the Group on Earth Observations or the Global Partnership for Sustainable Development Data. These and other activities must be accelerated with the help of the scientific community.[132]

IX. Conclusion

The uncertainties over the quality of certain sensitive products will lead to a new vigilance regarding entire production chains, including when they cross borders. The Bovine spongiform encephalopathy crisis and the British beef embargo have led to a growing awareness of this new requirement, which is nevertheless more general in scope.[133]

A new international trade situation is playing out on this risk/quality couple. Products that may be at risk will be allowed to circulate as far as the guarantees can be given on the environmental and health quality of production and distribution chains, from the extraction of natural resources, first and second processing, transport and storage operations, with their implications for the mixing of products from different origins, up to distribution to the general public.[134] Producers who cannot provide sufficient guarantees on the quality of the upstream sector and are not prepared to assume the crisis episodes that could occur risk seeing their products' circulation limited to territories and circuits. These are typically places that either control the

[129] Francesco Fuso Nerini and others, 'Mapping synergies and trade-offs between energy and the Sustainable Development Goals' (2017) 3 Nature Energy 10.

[130] Gabrielle G Singh and others, 'A rapid assessment of co-benefits and trade-offs among Sustainable Development Goals' (2018) 93 Marine Policy 223.

[131] Robert Scholes and others, *Summary for policymakers of the assessment report on land degradation and restoration of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (1edn, Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services 2018).

[132] Helena Alves-Pinto and others, 'Opportunities and challenges of other effective area-based conservation measures (OECMs) for biodiversity conservation' (2021) 19(2) Perspectives in Ecology and Conservation 115.

[133] Andrew K Wallis, Alecia R Kelly and Michelle LM Graymore, 'Assessing sustainability: a technical fix or a means of social learning?' (2010) 17(1) International Journal of Sustainable Development & World Ecology 67.

[134] Adrian H Wilkinson, Malcolm Hill and Paul Gallon, 'The sustainability debate' (2001) 21(12) *International Journal of Operations & Production Management* 1492.

flow of information or are willing to accept a higher level of risk in other parts of the world.[135] Despite the back-guard battles of some countries, the probable impact of the precautionary principle on international trade will be to differentiate the regimes for the movement of goods according to the classes of risks involved and the quality of traceability that will be offered.[136]
Businesses do not function in emptiness. As to the "business-as-society" model of the twenty-first century, contemporary company executives are expected to use their expertise, experience, and lessons gained from the past to address new and unique issues. Aside from the incessant daily struggles to stay competitive in a dynamic and ever-evolving economic environment, society's expectations of businesses are also evolving throughout time, moving towards greater social and environmental responsibility.[137]

[135] Reinhard L Steurer and others, 'Corporations, Stakeholders and Sustainable Development 1: A theoretical exploration of business-society relations' (2005) 61(3) Journal of Business Ethics 263.
[136] Walt Strugatch, 'Turning values into valuation. Can corporate social responsibility survive hard times and emerge intact?' (2011) 30(1) Journal of Management Development 44.
[137] Caroline Daub and Yves-Marie Sherrer, 'Doing the right thing right:i The role of social research and consulting for corporate engagement in development cooperation' (2009) 85 Journal of Business Ethics 573.

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Forging Pathways to Strengthen Laws Against Online Gender-Based Violence Towards Women and Girls in Malaysia

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Abstract

Online Gender-Based Violence ('OGBV') against women and girls is a growing concern in Malaysia, mirroring global trends of escalating digital abuse. This paper examines the current Malaysian legal framework addressing offences such as cyberbullying, doxing, online grooming, sextortion, and the non-consensual sharing of intimate images. While recent developments, including the Online Safety Bill 2024 and amendments to existing laws, mark progress, enforcement remains fragmented and inconsistent. Employing qualitative analysis of statutes, case law, international conventions, and academic literature, the paper evaluates legal gaps and compares Malaysia's approach with those of the United Kingdom and Australia to identify best practices. Key challenges include judicial limitations, cross-border enforcement hurdles, and the lack of victim-centered remedies. Drawing on Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and Convention on the Rights of the Child ('CRC') principles, the paper proposes gender-sensitive, victim-focused, and technologically adaptive reforms, alongside capacity-building for enforcement agencies and stronger public awareness measures, to create a safer digital environment for women and girls in Malaysia.

Keywords: Online Gender-Based Violence, cybercrime legislation, women's rights, legal reform.

I. Introduction

This paper will explore the pervasive issue affecting women and girls globally, known as Online Gender-Based Violence ('OGBV'), which refers to acts of gender-based discrimination occurring in the cyberspace,[1] such as through mobile phones, the Internet, social media, or email.[2] Notwithstanding the fact that unlike Gender-Based Violence ('GBV'), OGBV poses an

[1] Eduardo Carrillo and others, 'From Theory To Practice: Building and testing a framework for definitions of Online Gender-Based Violence and other terms' (World Wide Web Foundation, July 2024) <https://www.tedic.org/wp-content/uploads/2024/07/Framework-definitions-OGBV-2.pdf> accessed 2 January 2025.

[2] United Nations Human Rights Council (UNHRC), 'Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights

alarming threat which may significantly harm victims with just a tap of a button. The rise in OGBV cases was evident during the pandemic, where in 2021, about 88% of women in Asia and the Pacific have experienced such prejudice,[3] and that 1 in 10 girls have suffered some type of online violence since the age of 15.[4] Nonetheless, the occurrence is unavoidable due to the increase in the usage of technology in schools, universities and workplaces where they are heavily depended on as a form of communication and connection.[5]

The phrase 'The Law is Just an Aftermath' reflects the manner in which OGBV laws only arise after an offence has taken place. On numerous occasions, the statutes relating to OGBV fail to operate as a deterrent as perpetrators are either unaware of the existence of such laws or are not severely punished for it. For instance, Malaysia's current OGBV statutes lack specificity in addressing various forms of violence, like sexual extortion, non-consensual dissemination of intimate images ('revenge porn'), doxxing, online grooming, cyberstalking, cyberbullying and many more. Furthermore, even if such statutes exist, they fail to protect the rights of women and girls, who are frequently targeted. As a result, those who commit these crimes typically do not feel any remorse for their actions. Consequently, OGBV leads to the infliction of severe psychological, social, and legal consequences on victims. Based on research by *Inter-American Commission of Women*,[6] implications will vary from each victim and the form of OGBV they have experienced. Some examples of these negative effects include anxiety, stress, depression, agitation, and economic harm from the loss of work as an outcome of online smear campaigns. Victims tend to be socially withdrawn and choose to be in isolation from society, due to the tarnishing of their reputations through these digital platforms. To exacerbate the situation, the law remains outdated in comparison to the rapid evolution of online spaces by failing to address gender cruelty in ICT in existing statutes. As noted by Spandana and Leila,[7] this leaves victims without any adequate recourse to obtain justice.

Hence, this paper highlights the legal frameworks addressing various forms of OGBV and their overall effectiveness, as well as the judicial challenges that may arise. Comparison between Malaysia and other jurisdictions, like the United Kingdom and Australia and their respective OGBV laws, will also be made. Finally, a conclusion will be made on proposing

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perspective' (18 June 2018) UN Doc A/HRC/38/47, 7 <https://documents.un.org/doc/undoc/gen/g18/184/58/pdf/g1818458.pdf> accessed 2 January 2025.

[3] The Economist Intelligence Unit Limited, 'Methodology: Measuring the prevalence of online violence against women' (2021) <https://cdn.vev.design/private/WbTNgdOVVvgyq5TIBiYpWVmMCJQ2/hyw1xhPZO6_EIU_METHODOLOGY_PREVALENCE%20OF%20ONLINE%20VIOLENCE%20AGAINST%20WOMEN_FINAL.pdf.pdf> accessed 9 January 2025.

[4] UNHRC (n 2) 5.

[5] UN Women, 'Toolkit: Youth Guide To End Online Gender-Based Violence' (2023) 5 <https://asiapacific.unwomen.org/sites/default/files/2022-12/Youth-Toolkit_14-Dec_compressed-final.pdf> accessed 2 January 2025.

[6] Katya N Vera Morales, 'Online Gender-Based Violence Against Women and Girls: Guide of Basic Concepts' (2021) OAS Doc OEA/Ser.D/XXV.25 <https://www.oas.org/en/sms/cicte/docs/Guide-basic-concepts-Online-gender-based-violence-against-women-and-girls.pdf> accessed 20 January 2025.

[7] Spandana Singh and Leila Doty, 'The Transparency Report Tracking Tool: How Internet Platforms Are Reporting on the Enforcement of Their Content Rules' (*Open Technology Institute, New America,* 2021) <https://www.newamerica.org/oti/reports/transparency-report-tracking-tool/> accessed on 20 January 2025.

policy recommendations for enhanced legal protection and the exploration of further research to address OGBV against women and girls.

II. Legal Frameworks in Malaysia

An increase in incidences of OGBV have seemingly coincided with the rise of technology. As a result, lawmakers have introduced several statutes to address the concern. However, the question then arises: has this legislation actually fulfilled its purpose? As of 16 December 2024, the Senate passed the *Online Safety Bill 2024* ('Bill') which aims to prevent cyberbullying, exploitation and misinformation by regulating harmful content, and imposing duties and obligations on application service providers and content applications service providers ('Service Providers') licensed under the *Communications and Multimedia Act 1998* ('CMA'). The Bill encompasses two categories of 'harmful content' as stipulated under *First Schedule (Section 4)* such as content on child sexual abuse material as provided for under *section 4 of the Sexual Offences Against Children Act 2017 ('SOACA')*,[8] financial fraud, obscene and indecent contents and others. On the other hand, the *Second Schedule* provides for 'priority harmful content' such as content involving child sexual abuse material, and financial fraud, which requires additional regulation.

Additionally, *Sections 13 to 20* of the Bill imposes several duties on Service Providers to implement measures to detect and mitigate harmful content[9], establish robust reporting mechanisms on their platforms[10], provide responsive assistance to users for enquiries and concerns about online safety[11], as well as to prepare and submit an Online Safety Plan[12]. Non-compliance empowers the Malaysian Communications & Multimedia Commission (MCMC) to issue a notice to such Service Providers[13], who may then elect to pay the fine or request a formal review by the MCMC[14]. If the outcome of the review emerges to be unsatisfactory, then they may appeal to the Online Safety Appeal Tribunal as established under *Section 40***,** whose responsibility is to review any written instruction, determination, directions, or decision issued or made by the MCMC under the Bill. In addition, the formation of the Online Safety Committee consisting of, among others, the Minister, the police, other relevant ministries, and the Service Providers[15], also serves to advise and provide recommendations to MCMC on all matters relating to online safety[16]. Although a relatively new piece of legislation, the Bill is intended to promote safer internet use, including provisions with potential extraterritorial reach. It aims to protect vulnerable groups, such as children, and to complement existing laws like the *Child Act 2001 (CA)* as

[8] Sexual Offences Against Children Act 2017 (Act 792).
[9] Sexual Offences Against Children Act 2017 (Act 792), s 13.
[10] Sexual Offences Against Children Act 2017 (Act 792), s 16.
[11] Sexual Offences Against Children Act 2017 (Act 792), s 17.
[12] Sexual Offences Against Children Act 2017 (Act 792), s 20.
[13] Sexual Offences Against Children Act 2017 (Act 792), s 37.
[14] Sexual Offences Against Children Act 2017 (Act 792), s 38.
[15] Sexual Offences Against Children Act 2017 (Act 792), s 5.
[16] Sexual Offences Against Children Act 2017 (Act 792), s 10.

well as upcoming amendments to the *Communications and Multimedia Act (CMA)* and the *Penal Code (PC)*.[17]

Besides that, the *CMA*, specifically *Section 233*, criminalises the use of network resources or services by an individual to transmit any communication deemed offensive and potentially annoying to another.[18] It is presumed to cover the majority of OGBV cases such as revenge porn, cyberbullying, and online hate speech. Nonetheless, the provision had only seen previous application where defamatory words had been directed towards royalty and the Government[19]. For instance, in *Rutinin v Public Prosecutor*,[20] the appellant was convicted under S.233 of the Act and ordered to pay a RM15,000 fine, in default eight months' imprisonment for posting an offensive remark declaring that the Sultan of Perak had 'gone mad'. Similarly, in *Arunakirinathan lwn Pendakwa Raya*[21], the accused had posted a Facebook video containing derogatory remarks against the Sultan and the Malay community, after which he was convicted under *Section 233 and Section 504 PC*. In Malaysia, the *CMA 1998*, together with the *PC*[22] covers the majority of cyber crimes and also preserves gender equality between women and men. Nevertheless, the question arises as to whether the Act is sufficient to prosecute and punish perpetrators. As indicated by the Communications Minister, Fahmi Fadzil,[23] the *CMA 1998* should be amended for its outdated nature and modest fine which fails to meet current economic conditions, taking into account the monetary valuation in 1998.

In tandem with CMA, the PC also plays a major role in addressing OGBV towards women by virtue of *Section 383* on sextortion, *Section 509* on revenge porn and *Section 506* and *Section 507* for criminal intimidation. Notably however, the Code fails to specifically address the issue of discrimination faced by women digitally. Another notable initiative under PC is *Section 507A*, commonly known as the Anti-Stalking Law which provides that any individual who consistently harasses with the intent to cause grief, anxiety, or worry to another about their safety is guilty of the offence of stalking. In the context of OGBV, online stalking is often observed in situations where a victim may receive unwanted calls and messages from a perpetrator. According to The Star,[24] a freelance designer became the first individual to be charged under the Anti-Stalking Law for repeatedly harassing the victim by sending

[17] Sri Sarguna Raj, Steven Cheok Hau Cher and Nicole Chong, 'Key Points on the Online Safety Bill 2024, Adnan Sundra & Low' (*Adnan Sundra & Low*, January 2025) <https://www.asl.com.my/wp-content/uploads/2025/01/Key-Points-on-Online-Safety-Bill-by-SSR-SDR-format-draft_merge.pdf> accessed on 1 March 2024.

[18] Communications and Multimedia Act 1998, s 233.

[19] Dr Haezreena Begum Bt Abdul Hamid, 'Combatting Sexual Cyberviolence against Women in Malaysia' (2022) 3 MLJ ccxxxi.

[20] *Rutinin bin Suhaimin v Public Prosecutor* (2014) 5 MLJ 282.

[21] *Arunakirinathan a/l Thillainathan lwn Pendakwa Raya dan satu lagi rayuan* (2024) 9 MLJ 785.

[22] Penal Code (Act 574).

[23] Muhammad Yusry, 'Fahmi: Cabinet approves review of penalties under Communications and Multimedia Act' *Malay Mail* (Putrajaya, 8 March 2024) <https://www.malaymail.com/news/malaysia/2024/03/08/fahmi-cabinet-approves-review-of-penalties-under-communications-and-multimedia-act/122253> accessed 20 January 2025.

[24] Nurbaiti Hamdan, 'First man charged under anti-stalking law ordered to undergo psychiatric observation' *The Star* (Shah Alam, 11 Aug 2023) <https://www.thestar.com.my/news/nation/2023/08/11/first-man-charged-under-anti-stalking-law-ordered-to-undergo-psychiatric-observation> accessed on 20 January 2025.

messages containing expressions of love to her Twitter account, causing immense distress. However, the law had only been recently passed by the Dewan Rakyat under the *Penal Code (Amendment) Bill 2023*, and as such, the implementation of the Anti-Stalking Law has yet to be seen. The primary reason for that is the applicability of this provision only arises if the perpetrator's actions induce fear, anxiety, or distress occurring on a minimum of two occasions.[25] This creates uncertainty in instances where an offender commits the act continually on a single occasion, and how the courts may interpret the length and frequency of the actus reus required to constitute an offence[26].

Alternatively, the recognition of OGBV is vaguely visible under other Acts like the *Anti Sexual Harassment Act 2022 (ASHA),* and the *Domestic Violence Act 1994 (DVA). Section 2 of the ASHA* describes 'sexual harassment' as 'unwanted conduct of a sexual nature, in any form, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is reasonably offensive or humiliating or is a threat to his well-being.'[27] *Section 2(ec) of the DVA*[28] outlines that domestic violence encompasses communication with the victim or communication regarding the victim to a third party, with the goal to demean the victim's modesty through electronic means or otherwise. Doxing has been widespread where the perpetrators 'publish' a victim's private information online without consent with the aim of revealing victims' identity, often leading to being cyberbullied.[29] Nevertheless, Malaysia does not have any comprehensive law on doxing. *Parveen Kaur Harnam Singh* in her article states that[30] the *Personal Data Protection Act 2010 (PDPA)* may address doxing under *Section 6(1)(a),* where a data user shall not process an individual's personal data without their consent.[31] Subsequently, *Section 130* states that whoever commits such offence is liable to a fine of RM500,000 or three years imprisonment or both.[32] Even if the legislation does apply, however, there are no express statutory civil rights available for the victims.

Youths under the age of 18 are no strangers to OGBV. It has been reported that 94% of youths aged 12 to 17 in Malaysia are users of the Internet.[33] In response, the *Sexual Offences Against Children Act 2017 (SOACA),* specifically *Section 11* and *Section 12*, criminalises individuals who institute sexual communication with a child and child grooming, which may also occur in cyberspace.[34] These perpetrators may utilise media platforms to engage with children to cultivate a trustworthy relationship by masquerading as a friend through creation

[25] Penal Code (Act 574), s 507A(4).
[26] Datuk Dr Baljit Singh Sidhu, Charunee A/P Che Ron and Baraneetharan A/L Kishur Kumar, 'An Exploration of The Anti-Stalking Law in Malaysia' (2024) 2 MLJ clxxx.
[27] Anti Sexual Harassment Act 2022 (Act 840), s 2.
[28] Domestic Violence Act 1994 (Act 521).
[29] Dato' Dr Amar-Singh HSS, 'Cybersafety: Keeping Children and Teenagers Safe Online Guidebook for Teachers and Parents' (*Women's Centre for Changes*, 2021) 13 <https://www.wccpenang.org/wp-content/uploads/2021/09/FINAL-LOW-RES-Cybersafety-Handbook.pdf> accessed 20 February 2025.
[30] Parveen Kaur Harnam Singh, 'The Rise and Rise of Digilante Justice: Legal Reality of Doxxing in Malaysia (2022) 4 MLJ cviii.
[31] Personal Data Protection Act 2010 (Act 709), s 6(1)(a).
[32] Personal Data Protection Act 2010 (Act 709), s 130.
[33] Chow Zhi En, 'Empowering kids against online harm' *The Star* (Petaling Jaya, 16 August 2023) <https://www.thestar.com.my/news/nation/2023/> accessed 24 February 2025.
[34] *Hendra bin Mulana v Public Prosecutor* (2024) MLJU 41.

of fake profiles.[35] Further, the new amendment added through *Section 15A SOACA (Amendment) 2024*,[36] which provides for offences regarding sexual performances by children and *Section 15B,*[37] relating to sexual extortion demonstrates Malaysia's efforts to protect the younger generation from exposure to such violence[38]. *Section 17(2c) of CA 2001* penalises sexual abuse of a child for pornography, or sexual exploitation by the perpetrator for sexual gratification.[39] Despite these avenues, reported cases are low due to feelings of shame and humiliation, fear of prejudice, and concerns that victims would not be believed or understood.[40]

Overall, although there are Acts recognising OGBV, they are not extensive in nature and only generally cover online violence, rather than handling each of it separately. This causes legal ambiguity, leading to victims being unable to obtain justice. Moreover, victims of OGBV lack remedies such restraining orders and injunctions, unlike victims of GBV, which further illustrates the ineffectiveness of the legislation. On the other hand, the enactment of the Bill may be perceived as imposing excessively stringent rules on individual participants in cyberspace; yet, it is essential to safeguard users against online threats.

III. International Conventions

Alternatively, regarding international laws, *Zarizana and Janine*[41] emphasises that every State has a 'due diligence' to be accountable to human rights abuses, including violence against women occurring online as established by *CEDAW in the General Recommendation No. 35.*[42] According to the recommendation, VAW also encompasses '*forms of violence occurring online and in other digital environments*'. Malaysia has ratified the *Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')* and *Convention on the Rights of the Child ('CRC'),* under which they are obligated to follow. As viewed in *Noorfadilla v Chayed & Ors,*[43] it is the court's duty to consider the government's

[35] Ibid.
[36] Sexual Offences Against Children Act (Amendment) 2024 (Act A1734), s 15A.
[37] Sexual Offences Against Children Act (Amendment) 2024 (Act A1734), s 15B.
[38] Malay Mail, 'Protecting Malaysian kids online from sexual exploitation: Govt explores measures to safeguard against overseas predators' *MalayMail* (Kuala Lumpur, 8 January 2024) <https://www.malaymail.com/news/malaysia/2024/01/08/protecting-malaysian-kids-online-from-sexual-exploitation-govt-explores-measures-to-safeguard-against-overseas-predators/111286#google_vignette> accessed 20 January 2025.
[39] Child Act 2001 (Act 611), s 17(2c).
[40] Ida Lim, 'Mapping Malaysia's child sexual abuse cases: Why lower numbers doesn't always mean better' *MalayMail* (Kuala Lumpur, 2 February 2024) <https://www.malaymail.com/news/malaysia/2024/02/02/mapping-malaysias-child-sexual-abuse-cases-why-lower-numbers-doesnt-always-mean-better/115879> accessed on 20 January 2025.
[41] Zarizana Abdul Aziz and Janine Moussa, *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women* (2nd printing, International Human Rights Initiative, Inc. 2016) <https://www.peacewomen.org/sites/default/files/Due%20Diligence%20Framework%20Report%20final.pdf> accessed 19 January 2025.
[42] UN Convention on the Elimination of All Forms of Discrimination against Women 'General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19' (26 July 2017) UN Doc CEDAW/C/GC/35 para 20 <https://documents.un.org/doc/undoc/gen/n17/231/54/pdf/n1723154.pdf> accessed 19 January 2025.
[43] *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* (2012) 1 MLJ 832.

responsibilities at the international stage, particularly under international conventions such as *CEDAW*, in order to define 'equality' and gender discrimination under *Article 8(2) of the Federal Constitution ('FC').* This demonstrates the binding authority of CEDAW in Malaysia, as remarked by *Priscilla,* as it is a convention rather than a mere statement.[44]

Several platforms have been established under CEDAW to address online facilitated violence,[45] amongst which is the UN Committee for Elimination of Discrimination against Women, established to monitor the implementation of the CEDAW on a national level. Additionally, the UN Special Rapporteur provides guidelines for the UN, governments, and online service providers in establishing frameworks for analysing how new technologies may affect violence against women. Another body is the UN Working Group on Discrimination Against Women and Girls, which consists of five independent experts tasked with engaging with states and human rights advocates to exchange perspectives on the best practices for elimination of discrimination. Another body addressing this issue is the UN Working Group on Discrimination Against Women and Girls, comprising five independent experts tasked with engaging states and human rights advocates to share best practices for eliminating discrimination. The existence of such bodies and their initiatives reflect the growing international recognition of OGBV as a serious human rights concern and the commitment to address it through policy, advocacy, and monitoring. For example, the Working Group's country visits and thematic reports have highlighted OGBV issues and influenced national legal reforms and awareness campaigns. While the creation of these organisations alone does not eradicate OGBV, it demonstrates international law's increasing efforts and institutional mechanisms aimed at combating it. Additionally, the *CRC* was employed in Malaysia to safeguard the rights and welfare of all children under 18 nationwide, regardless of their status.

Even with the recognition of such international instruments, Malaysia's commitment to the conventions is less visible as it has yet to be fully incorporated with domestic laws[46]. *The Women's Aid Organisation (WAO)* and *Joint Action Group for Gender Equality (JAG)*[47] argued that the flawed gender equality legislation exists due to the challenges in aligning the international law with domestic law, which undermines fundamental equality for women and girls. Article *8(2) of FC* expressly prohibits gender discrimination, however, its application is constrained, as demonstrated in *Beatrice Fernandez v Sistem Penerbangan*

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[44] Priscilla Shasha Devi and others, 'Discrimination Against Women in Workforce: The Need to Move Forward' (2017) 3 MLJ xlvii.

[45] Platform of Expert Mechanisms on Discrimination and Violence against Women (EDVAW Platform), 'The digital dimension of violence against women as addressed by the seven mechanisms of the EDVAW Platform' (2022) <https://www.ohchr.org/sites/default/files/documents/hrbodies/cedaw/statements/2022-12-02/EDVAW-Platform-thematic-paper-on-the-digital-dimension-of-VAW_English.pdf> accessed on 5 January 2025.

[46] Serene Lim, *A Research on Women's Freedom of Expression on Social Media in Malaysia: Power x Expression x Violence* (KRYSS Network 2021) 13 <https://firn.genderit.org/sites/default/files/2022-08/Power_X_Expression_X_Violence.pdf> accessed on 9 January 2025.

[47] Women's Aid Organisation (WAO) and the Joint Action Group for Gender Equality (JAG), 'The Status of Women's Human Rights: 24 Years of CEDAW in Malaysia' (Women's Aid Organisation 2019) <https://wao.org.my/wp-content/uploads/2019/01/The-Status-of-Womens-Human-Rights-24-Years-of-CEDAW-in-Malaysia.pdf> accessed 10 January 2025.

Malaysia,[48] where the courts ruled that 'to invoke Article 8, the plaintiff must establish that the gender discrimination experienced resulted from infringements of their rights by government and public authorities, rather than by private entities'. This illustrates that the equality afforded for women and girls in both private spaces remain generally restricted.

IV. Judicial Challenges

One of the major challenges arising from OGBV is the relatively low number of reported cases. The question is whether these low numbers are a positive sign that OGBV cases are reducing, or whether victims distrust the legal system's safeguards against OGBV. The distinction is evident, as there is an absence of judicial remedies for women and girls experiencing OGBV compared to GBV. For instance, an immediate Emergency Protection Order (EPO) is offered to GBV victims as well as fines for those who contravene this ruling following *Section 3a of DVA 1994.* Consequently, the victims would be spared the cumbersome procedure of reporting to law enforcement or awaiting a court order, as the EPO would remain in effect for one week, following which the victims could seek a Protection Order (PO) or Interim Protection Order (IPO).[49] Contrastingly, reliefs like protection orders, restraining orders, or injunctions are not automatically available to OGBV victims, as they would need to institute an application from the courts, a time consuming and costly process which may result in victims having to suffer further humiliation and psychological trauma.[50]

The impact of OGBV on victims should not be underestimated as it involves their overall mental wellbeing which may persist through suicidal thoughts, loneliness and depression. To illustrate, a teenage girl had leaped to her death after asking her social media followers to vote on whether she should commit suicide, with 69% of her followers choosing death[51]. Although this may fall under the crime of abetting a suicide, which imposes an imprisonment for a maximum term of twenty years and a fine under *Section 305 of the PC***,** it was impossible to prosecute her followers due to the anonymity. The sole action taken by Instagram in response was adopting enhanced safety protocols, which included the removal of graphic depictions of self-harm, while non-graphic self-harm content is subjected to a sensitivity filter that conceals the post before its display.[52] Despite the fact that this case does not fall under OGBV, anonymity has caused tremendous obstacles in imposing liabilities. In 2020, a young girl committed suicide after her 20-year-old boyfriend threatened

[48] *Beatrice Fernandez v Sistem Penerbangan Malaysia & Anor* (2005) 2 CLJ 713.

[49] Soo Wern June, 'Dewan Negara passes Domestic Violence (Amendment) Bill 2017 and Private Employment Agencies (Amendment) Bill 2017' *New Straits Times* (Kuala Lumpur, 14 August 2017) <https://www.nst.com.my/news/government-public-policy/2017/08/267800/dewan-negara-passes-domestic-violence-amendment-bill> accessed on 20 February 2025.

[50] Dr Haezreena Begum Bt Abdul Hamid (n 18).

[51] Reuters, 'Padawan teen who reportedly jumped to death after Instagram poll sparks calls for probe' *News Straits Times* (Kuala Lumpur, 15 March 2019) <https://www.nst.com.my/news/nation/2019/05/488652/padawan-teen-who-reportedly-jumped-death-after-instagram-poll-sparks> accessed on 25 February 2025.

[52] Reuters, 'Malaysian teen believed to have jumped to death after Instagram poll' *NBC News* (Sarawak, 15 May 2019) <https://www.nbcnews.com/tech/tech-news/malaysian-teen-believed-have-jumped-death-after-instagram-poll-n1005921> accessed on 20 February 2025.

to disseminate private photographs, leading to charges under *Section 509 of the PC*[53]*.* Although it may seem like perpetrators are being punished, the psychological damage suffered by the victims which lead them to such thoughts are usually disregarded. This is because the victims seldom ever talk about their experiences during prosecution as they fear that their loved ones would not believe them or that they would be retaliated against by others.[54] This eventually causes low prosecution rates where only a small number of cases result in legal proceedings and convictions.

Finally, a major challenge posed when it comes to holding a person liable for OGBV is 'cross-border OGBV'. The anonymity and distance inherent in the digital realm enable criminals to commit acts of violence without remorse, as the primary function of the internet is to facilitate accessibility, affordability, and connectivity beyond geographical boundaries.[55] Furthermore, OGBV is known to be a transnational crime, which may cause issues in obtaining digital evidence because of privacy issues or territorial jurisdiction concerns,[56] considering the variation in laws across jurisdictions. *Dr Duryana Mohamed*[57] raised various concerns about the transnational character of cybercrime, which may be similarly applicable to OGBV cases such as determining the appropriate jurisdiction for prosecuting offenders, remote access to computers via the internet may be exposed to illegal interception of communications, and simultaneous warrants required to apprehend offenders in multiple countries. Additionally, mutual legal assistance treaties often involve high costs, including difficulties in coordinating with the authorities in foreign jurisdictions, language barriers in official documents and witnesses.[58] These challenges are exacerbated by a lack of expertise and technical proficiency in managing and analysing digital evidence, further complicating efforts to address OGBV cases on a global scale. Therefore, a comprehensive inquiry is fundamental to justice; without it, prosecution fails, and accountability is lost.

V. Comparative Analysis

On the subject of OGBV, Australia introduced robust laws to address the sharp rise in cases among its citizens, which were recorded to have increased by 50% since the outbreak of

[53] Mohamed Basyir, 'Penang teen leaps to death after 'boyfriend' threatens to viral private photos' *News Straits Times* (Georgetown, 11 August 2020) <https://www.nst.com.my/news/nation/2020/08/615846/penang-teen-leaps-death-after-boyfriend-threatens-viral-private-photos> accessed on 20 January 2025.

[54] Dristy Moktan, 'How online violence is shaping our lives' *Asia News Network* (Kathmandu 23 November 2022) <https://asianews.network/how-online-violence-is-shaping-our-lives/> accessed on 26 January 2025.

[55] Gurmeet Kaur, 'Internet Crimes Against Minors and Legal Framework in India' (2022) 68(4) Indian Journal of Public Administration 705.

[56] Adv Dr Shalu Nigam, 'Ending Online Violence Against Women in India: Calling for an Inclusive, Comprehensive, and Gender-Sensitive Law and Policy Framework'(*Impact and Policy Research Institute*, 2024) <https://www.impriindia.com/insights/ending-online-violence-against-women/#:~:text=The%20legal%20matrix%20to%20deal,to%20address%20cyberviolence%20against%20women.> accessed on 20 January 2025.

[57] Dr Duryana Mohamed, 'Investigating Cybercrimes Under The Malaysian Cyberlaws and The Criminal Procedure:Issues and Challenges' (2012) 6 MLJ i.

[58] Russell G Smith, 'Impediments to the Successful Investigation of Transnational High Tech Crime'(2004) 285 Trends & Issues in crime and criminal justice <https://www.aic.gov.au/sites/default/files/2020-05/tandi285.pdf> accessed on 27 January 2025.

COVID-19.[59] Firstly, the *Criminal Code Act 1995* criminalises offences targeting the criminal use of carriage services, such as Facebook messages[60], Twitter,[61] and even phone calls[62] as seen under *Section 474.15 of the Act.* Subsequently, *Section 474.17* establishes that utilising a carriage service to menace, harass, or violate, including the transfer, publication, and distribution of private sexual content or intimate photos exchanged without consent, constitutes a crime punishable by up to 7 years' imprisonment. Additionally, the *Sex Discrimination Act 1984* prohibits discrimination based on sex, marriage or relationship status, pregnancy or future pregnancy, breastfeeding, and familial responsibilities in several domains of public life, including employment. *Crimes (Domestic and Personal Violence) Act 2007* have expanded to include conduct where perpetrators use text messages, social media or other online spaces to stalk, intimidate or abuse their victims.[63] In Malaysia, there are no frameworks in relation to sex discrimination except for the *CEDAW***,** while the *DVA 1994* does not include personal violence caused by intimate personal relationships,[64] live-in relationships,[65] which are outside of domestic relations[66].

In the *Enhancing Online Safety Act 2018*, it enables the Safety Commissioner to formally direct the removal of non-consensually shared sexual images. The Commissioner may also investigate complaints of online harassment made by users, parents and guardians[67] as they see fit,[68] collecting evidence such as screenshots and statutory declarations.[69] The Australian government has recently passed the *Social Media Minimum Age Bill*, which prohibits children under 16 from accessing platforms such as TikTok, Facebook, Snapchat, Reddit, X, and Instagram. Non-compliance in preventing minors from creating accounts may incur fines of up to 50 million AU$ (approximately $33 million).[70] This restriction does not encompass messaging systems such as WhatsApp and Telegram, as these are vital communication tools that would not inflict the same kind of detrimental effects on minors utilising social media. Besides, establishing a mandatory online privacy guideline for technology companies

[59] Ginette Azcona and others 'From Insights to Action: Gender Equality in the Wake of Covid-19'(2020) UN Women <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Gender-equality-in-the-wake-of-COVID-19-en.pdf> accessed on 20 February 2025.

[60] *Clarke (a pseudonym) v R* (2023) VSCA 103.

[61] *R v Black* (2022) ACTSC 4.

[62] *Nchouki v The Queen* (2023) ACTCA 8.

[63] Crimes (Domestic and Personal Violence) Act 2007, s 8(1)(b1).

[64] Crimes (Domestic and Personal Violence) Act 2007, s 5(1).

[65] Ibid.

[66] The Law Society of New South Wales' Criminal law Committee (Committee), 'Statutory Review of the Crimes (Domestic and Personal Violence Act 2007)' (2011) <https://www.lawsociety.com.au/sites/default/files/2019-11/Statutory%20Review%20of%20the%20Crimes%20%28Domestic%20and%20Personal%20Violence%29%20Act%202007_Nov_2011.pdf> accessed on 4 December 2024.

[67] Enhancing Online Safety Act 2018, s 18 and s 19.

[68] Enhancing Online Safety Act 2018, s 19(2).

[69] Enhancing Online Safety Act 2018, s 187(7).

[70] Rod McGuirk, 'Australia's parliament considers legislation banning social media for under 16s' *The Associated Press* (Melbourne, 21 November 2024) <https://apnews.com/article/australia-social-media-children-ban-e02305486cb44aa07dcaf2964bec4e3d> accessed on 29 January 2025.

emphasising the best interests of children in data collection, use, and disclosure[71]. The Bill is an essential measure that Malaysian lawmakers should contemplate to address the 'lacuna' in the legal system.

In the United Kingdom, the *Online Safety Act 2023* was enacted recently which increased the responsibility of providers of regulated services for user-generated content by imposing numerous duties on them to identify, mitigate and manage risks of harm[72] and protecting children from encountering harmful content[73]. This Act offers users a 'triple shield' of protection from online platforms, mandating that digital businesses eliminate unlawful information, delete material that violates their own terms of service, and afford adults increased autonomy regarding the content they view and interact with.[74] It outlines criminal offences associated with violent online conduct, encompassing cyberflashing,[75] revenge porn,[76] and threatening communications,[77] which had been inserted in response to the rise of OGBV among younger generations, especially the practice of 'sexting'.[78] Doxing was also addressed under *Section 127 of Communications Act 2003,* which pertains exclusively to communications transmitted through social media that are deemed 'grossly offensive', or 'obscene' and it is unnecessary to demonstrate that the message was directed to or received by an individual, thereby narrowing the scope of the offense.[79]

Besides that, the *Protection from Harassment Act (PHA) 1997* contains two principal harassment offences under the PHA, which are the offence of harassment under *Section 2*, punishable by imprisonment for a term not exceeding six months or a fine, and harassment triggering fear or violence under *Section 4*, punishable by imprisonment for a term not exceeding ten years, a fine, or both.[80] Stalking was also covered under *Section 4A of the Act* with imprisonment for a term not exceeding ten years, or a fine, or both. The court in the case of *R v Musharraf* [81] had outlined a few elements to establish stalking like stalker's actions are persistent and not isolated incidents, knowledge or recklessness, evidence and documentation. This proves the effectiveness of the English Courts in addressing stalking although there was no mention of whether it may expand to online stalking especially in relation to gender. Contrarily, stalking in Malaysia is only covered under *section 507A of the Penal Code*, which does not provide for more serious stalking charges or sentences that are less appropriate for the crime committed. Additionally, the *Sexual Offences Act 2003*,

[71] Centre for Digital Wellbeing, 'The Impacts of Social Media in Australia, Research Brief' (*Centre for Digital Wellbeing*, December 2021) <https://digitalwellbeing.org.au/wp-content/uploads/2021/12/Research-Brief-Impacts-of-Social-Media-in-Australia.pdf> accessed on 5 March 2025.
[72] Online Safety Act 2023, s 10(2)(a).
[73] Online Safety Act 2023, s 12.
[74] João Tornada, 'Models of regulating the amplification of online content: A comparative study of the EU' s Digital Services Act and the UK's Online Safety Act' (2024) 3 CL 92.
[75] Online Safety Act 2023, s 187.
[76] Online Safety Act 2023, s 188.
[77] Online Safety Act 2023, s 181.
[78] Emily Costello, 'Too little, too late?' (2024) 174 NLJ 8064.
[79] Communications Act 2003, s 127.
[80] Protection from Harassment Act 1997, s 2 and s 4.
[81] *R v Musharraf* (2022) EWCA Crim 1482.

specifically *Section 15,*[82] is similar to *Section 12 of SOACA* but differs in that UK law does not require the communication to be unpleasant, instead it needs to be intentional making it as an offence that can be founded on an intention to elicit a sexual response, irrespective of whether the initial communication was sexual, and regardless of whether the message was received or not.[83]

A review of the legal systems in Australia and the UK provides essential knowledge about how to effectively combat OGBV. Both nations highlight the value of all-encompassing laws that cover various types of OGBV, such as stalking, online harassment, and the dissemination of private photos without consent. Malaysia could adopt the method of addressing the particular offences as a first step in mitigating OGBV. However, similar to Malaysia, both these jurisdictions also encountered issue on lack of public awareness of the laws despite the existence of robust and comprehensive laws.[84]

VI. Reforms

6.1 Strengthening the Laws

To successfully address the escalating threat of OGBV, enhancing Malaysia's OGBV legislation necessitates a comprehensive strategy that integrates both punitive actions and preventive measures suited to the digital era. Firstly, the lawmakers should take initiative to enact frameworks addressing specific types of OGBV. For instance, growing recognition of the impact of cyberbullying has moved the government to propose Anti-Cyberbullying amendments to the PC and the passing of the Bill.[85] The Online Safety Advocacy Group[86] had suggested that cyberbullying should not be addressed in the Penal Code as this will lead to a duplication of offence. The statute must encompass stipulations for various forms of cyberbullying, including cyberstalking, online hate speech, and doxing, while also revising laws to impose stricter penalties for recidivists and individuals inflicting serious harm, such as increased fines, extended prison sentences, and obligatory counselling programs for offenders.[87] Hence, to prevent victims from running into law enforcers who are unfamiliar

[82] Sexual Offences Act 2003, s 15.
[83] Professor Abu Bakar Munir and others, 'The Sexual Offences Against Children Act 2017: Flaws in the Law' (2018) 5 MLJ cxx.
[84] Olivia Todhunter, 'Logged in and fed up: Responding to gendered violence in online spaces' (2018) 22 MALR 420.
[85] Astro Awani, 'Online Safety Bill and Anti-Cyberbullying Laws must carefully balance rights and protections' *Awani International* (Kuala Lumpur, 22 November 2024) <https://international.astroawani.com/malaysia-news/online-safety-bill-and-anticyberbullying-laws-must-carefully-balance-rights-and-protections-497469> accessed on on 4 March 2025.
[86] Ibid.
[87] 'Specific Laws For Cyberbullying Needed' *New Straits Times* (Kuala Lumpur, 2024) 11 <https://advance.lexis.com/document/?pdmfid=1522468&crid=a465603a-d654-4e7e-b75f-d678a5d6bcea&pddocfullpath=%2fshared%2fdocument%2fnews%2furn%3acontentItem%3a6CGK-0RN1-DYR7-63VD-00000-00&pdcontentcomponentid=151977&pdteaserkey=sr0&pdicsfeatureid=1521734&pditab=allpods&ecomp=hcrrk&earg=sr0&prid=1d5e86ab-1deb-4c41-a4b4-4bf3285d3340&aci=la&aci=la&cbc=0&cbc=0&lnsi=df181feb-27fa-48fb-82ba-c94f33ae41b8&lnsi=f5bd1c7d-71cf-4ceb-9fe3-dbcccab5c687&rmflag=0&rmflag=0&sit=null&sit=null> accessed on 4 March 2025.

with OGBV or who are unaware of their potential seriousness, a similar strategy should be used when creating such tailored legislation.

Furthermore, regarding cross-border OGBV, it may require extraterritorial cooperation between States like the *Treaty on Mutual Legal Assistance on Criminal Matters 2004*, which helps ASEAN nations enhance the efficiency of their regulatory bodies in preventing, investigating, and prosecuting crimes through collaboration and mutual legal assistance. Correspondingly, Malaysia had also enacted the *Mutual Assistance in Criminal Matters Act 2002,* which allows access to digital evidence in foreign states,[88] and to seek the assistance of a foreign state to secure the attendance of a witness in that state to testify in a Malaysian court.[89] It should also be noted that the Act's extraterritorial scope crosses national boundaries and should not be restricted by the complexities of *Section 33 of Evidence Act 1950 (EA),* which mandates proof of prerequisites for evidence admissibility, undermines Parliament's intent for a swift and convenient method of evidence-taking abroad[90]. At a global level, Malaysia may incorporate the *UN Convention against Transnational Organised Crime* to enhance the legal cooperations between non-ASEAN nations.

Finally, the law may bridge the gap by reinforcing victim protection that includes both physical protection like restraining orders and psychological remedies. The offenders should be subjected to a PO issued by a court, which would prohibit them from persisting in committing OGBV, restrict contact with the victim, mandate the confiscation of their electronic devices, and/or forbid online interaction.[91] By recognising international agreements like the *Convention on Preventing and Combating Violence against Women and Domestic Violence (‘Istanbul Convention’),* Malaysia might have gone one step further in protecting the honour and dignity of women and girls. The Convention mandated the availability of psychological counselling for all victims and required the further development of current women's specialist support services with the necessary financial and human resources to deliver comprehensive services.[92]

6.2 Law Enforcement

Law enforcers serve an integral part in rectifying disparities within the legal system by implementing gender awareness training[93] for state agencies, including non-governmental organisations (NGOs) and police to enhance the comprehension of gender issues and prevent discrimination. This will streamline the reporting system, enhance the expertise of first responders and investigators in applying appropriate charges. In addition, the Sexual,

[88] Mutual Assistance in Criminal Matters Act 2002, s 8.
[89] Mutual Assistance in Criminal Matters Act 2002, s 9.
[90] Abdul Majid Bin Nabi Baksh and Margaret Liddle, ‘Statutory Construction of S 8(3) of the Mutual Assistance in Criminal Matters Act 2002 in Public prosecutor v Tan Sri Eric Chia [2006] 4 MLJ 697’(2006) 4 MLJ lxxxvi.
[91] Jane Bailey, ‘Canadian Legal Approaches to Cyberbullying and Cyberviolence: An Overview’ (2016) Ottawa Faculty of Law Working Paper No. 2016-37 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841413> accessed on 25 February 2025.
[92] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), ‘General Recommendation No. 1 on the digital dimension of violence against women’ (*Council of Europe*, 2021) <https://www.coe.int/en/web/istanbul-convention/general-recommendation> accessed on 5 December 2024.
[93] Women’s Aid Organisation (WAO) and the Joint Action Group for Gender Equality (JAG) (n 40).

Women and Children Investigation Division (D11) of the Royal Malaysian Police has been established to protect female victims and children by assigning at least one officer who has received training in victim counselling during the course of an investigation.[94] In combating online crimes against minors, this division also has created a unit called the Malaysia Internet Crime Against Minors (MICAC). This shows that Malaysia had taken measures to limit this global threat, albeit slowly, in the right direction.

6.3 Public Awareness

The lack of awareness and gendered understanding of violence is the fundamental reason why these laws do not significantly dissuade the offenders from doing the act, even though they offer victims an avenue to seek justice and assistance. Awareness campaigns, digital literacy courses, and cybersafe syllabus in schools should be utilised to promote insights of the hazards that restrict women from accessing the Internet.[95] To prevent OGBV, laws are not the answer, education is what matters and school can make the first approach by implementing gender-based violence syllabus among young students like the UK Council for Internet Safety has introduced an education system called 'Education for a Connected World' among schools where the curriculum includes managing online information, self-image, online relationships, cyberbullying, privacy, copyright, and etc.[96] NGOs had also taken numerous steps in addressing OGBV such as initiating helplines for victims to understand how to proceed when facing OGBV, like Talian Kasih, Tina by WAO and the AWAM Telenita Helpline.[97] The aid and advocacy afforded by the NGOs in raising awareness have definitely been effective in pushing for legislation, like the notable measure taken by the WAO in pressuring the policymakers into introducing the Anti-Stalking Law.[98] Without the platform these organisations provide, the voices of women in Malaysia would not be heard.

VII. Conclusion

OGBV against women and girls is a widespread problem that cuts across national and cultural borders to which Malaysia is not an exception. This paper underlines the need to reinforce the law to effectively address the challenges posed by OGBV in an increasingly digital world. Any frameworks for online safety, security, and data privacy must be gender-neutral with broad ramifications guaranteed by policymakers and the government.

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[94] Shizreen Farina bt Shahrul Rizal, 'Women Victims of Crime in Malaysia: Legal Reforms and Prospects of Restorative Justice Approaches' (2002) 1 MLJ clxxix.

[95] UN Women, 'Innovation and Technological Change, and Education in the Digital Age for Achieving Gender Equality and the Empowerment of All Women and Girls' (2022) <https://pages.devex.com/rs/685-KBL-765/images/Expert%20guidance%20CSW67.pdf> accessed on 5 March 2025.

[96] UK Council for Internet Safety, 'Guidance: Education for a Connected World' (*GOV.UK*, 2020) <https://assets.publishing.service.gov.uk/media/5efa05b4e90e075c5492d58c/UKCIS_Education_for_a_Connected_World_.pdf> accessed on 5 March 2025.

[97] Ming Teoh, 'Dynamic resource aims to help prevent online gender-based violence' (*The Star*, 25 November 2023) <https://www.thestar.com.my/lifestyle/family/2023/11/25/dynamic-resource-aims-to-help-prevent-online-gender-based-violence> accessed 5 March 2025.

[98] Women's Aid Organization, 'New Research Supports Calls to Make Stalking A Crime' (*Women's Aid Organization*, 2020) https://wao.org.my/new-research-supports-calls-to-make-stalking-a-crime/> accessed on 12 December 2024.

Lawmakers should also consider the recommendations mentioned in order to expand victim protection and introduce comprehensive anti-OGBV legislation. Therefore, tackling this specific issue entails both compensating victims and holding offenders accountable for their actions, as well as being mindful of the fact that persistent prejudice against women and girls is commonplace in our society. In response to this, further research needs to be adopted on the evolving nature of technology like Artificial Intelligence, which may affect the dynamics of OGBV and create new vulnerabilities.

Moreover, comprehensive research on the frameworks and measures adopted in countries other than Australia and the UK is necessary to incorporate strategies that can be adapted for Malaysia. Since the Bill had been passed by the parliament as of today, further research should be adopted on its effectiveness in mitigating OGBV.[99] Hence, it is true that technology is a 'double-edged sword' since women who defy established gender stereotypes frequently suffer hostility, but it is also an area of resilience and strengthening communities for women and girls experiencing OGBV.

[99] Allison Lai, Ragananthini Vetasalam and Benjamin Lee, 'Online Safety Bill passed despite resistance' *The Star* (Kuala Lumpur, 12 December 2024) <https://www.thestar.com.my/news/nation/2024/12/12/online-safety-bill-passed-despite-resistance> accessed on 12 December 2024.

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Convention on the Rights of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

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The ASEAN Way: Leading or Hindering the South China Sea Resolution?

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Abstract

The South China Sea (SCS) remains a geopolitical cauldron, brewing with overlapping territorial claims, contested resources, and strategic rivalries. This paper critically examines the role of the Association of Southeast Asian Nations (ASEAN) and its guiding principle, the 'ASEAN Way,' in managing and resolving the conflict. Anchored in consensus, consultation, and non-interference, this approach has long been praised for preserving regional stability; however, it is increasingly criticised for hindering decisive action against external pressures, particularly China's assertive behavior. Through historical analysis, case studies, and an evaluation of the *2016 Philippines v. China* arbitral award under UNCLOS, the paper explores whether ASEAN's diplomatic framework functions as an effective mechanism or an impediment to resolution. Findings suggest that while the ASEAN Way fosters inclusivity and minimises interstate conflict, it ultimately constrains ASEAN's capacity to present a unified front, leaving member states to pursue divergent strategies. Consequently, ASEAN's role in the SCS dispute is limited: neither a clear driver of resolution nor a direct obstacle, but rather a diplomatic framework insufficiently robust to address the complex interplay of sovereign interests, geopolitical tensions, and international law.

Keywords: ASEAN Way, South China Sea dispute, UNCLOS, China's nine-dash line, International arbitration, Geopolitical conflict, Regional security

I. Introduction

The South China Sea (hereinafter SCS) spans approximately 3.5 million square kilometers and is bordered by Brunei, China, Indonesia, Malaysia, the Philippines, and Vietnam.[1] It is home to numerous islands, islets, shoals, and reefs, the most significant being the Paracel Islands (Xisha), Pratas Islands (Dongsha), Macclesfield Bank (Zhongsha), and the Spratly Islands (Nansha).[2] Historically, the SCS has been a crucial fishing ground and navigational route, rich in oil and gas reserves, a key global trade hub, and a vital source of energy and

[1] Eugene C LaFond, 'South China Sea' (*Britannica*, last updated 15 March 2025) <https://www.britannica.com/place/South-China-Sea> accessed 17 March 2025.
[2] Hugo, 'South China Sea Islands' (*Peace Palace Library*, n.d.) <https://peacepalacelibrary.nl/south-china-sea-islands> accessed 17 March 2025.

fisheries for littoral states.[3] However, in recent decades, tensions have escalated due to competing territorial claims and geopolitical maneuvering.[4]

Two key developments have disrupted the region's stability. First, in the early 1970s, several coastal states physically occupied parts of the Spratly Islands, leading to overlapping claims and increased militarisation.[5] Second, under *Article 76(8) of the UN Convention on the Law of the Sea* (hereinafter UNCLOS),[6] coastal states — including Malaysia and Vietnam — submitted claims for extended continental shelves beyond 200 nautical miles (hereinafter nms), triggering diplomatic exchanges that shifted focus to China's Nine-Dash Line, a loosely defined boundary China uses to assert its claims over the SCS.

Today, the SCS has become a major flashpoint between China and some Association of Southeast Asian Nations (hereinafter ASEAN) members (Malaysia, Vietnam, the Philippines, and Brunei), further complicated by the involvement of external powers such as the United States. With its rich natural resources and strategic importance, the SCS is no longer just a regional issue but a global concern. China, in particular, has intensified its presence by building military installations and conducting aggressive patrols, leading to high-risk encounters with foreign vessels.[7]

As a Malaysian, whose own country is both a claimant and an ASEAN member, I am compelled to examine ASEAN's role in this dispute. Can the ASEAN Way, enshrined in *Article 20 of the ASEAN Charter*[8] as a principle of consultation and consensus, serve as an effective mechanism for resolution, or will it prove to be an obstacle?

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[3] Gleice Miranda and Valentina Maljak, 'The Role of United Nations Convention on the Laws of the Sea in the South China Sea Disputes' (*E-International Relations*, 23 June 2022) <https://www.e-ir.info/pdf/98097> accessed 20 March 2025.

[4] Bing Bing Jia and Zhiguo Gao, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' [2013] 107 AJIL 98 <https://www.jstor.org/stable/10.5305/amerjintelaw.107.1.0098?seq=1> accessed 17 March 2025.

[5] Simon Leplâtre, 'Beijing continues to militarise South China Sea islands' *Le Monde* (Paris, 24 August 2023) <https://www.lemonde.fr/en/international/article/2023/08/24/beijing-continues-to-militarize-south-china-sea-islands_6105761_4.html> accessed 17 March 2025.

[6] UN Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3

[7] FORUM Staff, 'China's patrols, aggression fail to intimidate South China Sea claimant nations' *Indo-Pacific Defense Forum* (24 March 2025) <https://ipdefenseforum.com/2025/03/chinas-patrols-aggression-fail-to-intimidate-south-china-sea-claimant-nations/> accessed 17 March 2025.

[8] Charter of the Association of Southeast Asian Nations (adopted at the 13th ASEAN Summit in Singapore in 2008, entered into force 2009) <https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf> accessed 17 March 2025.

This paper evaluates ASEAN's institutional response to the SCS dispute, focusing on the effectiveness of the ASEAN Way in facilitating resolution. It also examines the territorial and maritime claims of key stakeholders, and the legal framework established under UNCLOS and the 2016 Permanent Court of Arbitration (PCA) ruling, to assess whether ASEAN can play a meaningful role in resolving this complex regional conflict.

Ultimately, this paper argues that ASEAN's role in resolving the SCS dispute **will be limited**. Given that ASEAN lacks a unified foreign policy and that its members prioritise national interests over collective action, reaching regional consensus remains unlikely, leaving the ASEAN Way with little room to operate effectively.

II. Background

2.1 The birth of ASEAN

In the years leading up to ASEAN's formation, Southeast Asia was marked by deep ideological divides driven by Cold War tensions, with the rise of communism, particularly in Vietnam and Indonesia, fueling fears of regional instability.[9] At the same time, Konfrontasi (1963–1966) between Indonesia and Malaysia, along with territorial disputes, heightened mutual suspicion among Southeast Asian nations.

The region also grappled with political and economic disparities, ranging from monarchies to emerging democracies, and from resource-rich nations to developing economies. Ethnic, cultural, and linguistic diversity, combined with vast differences in geographical size and strategic interests, further complicated the prospect of regional unity.

In the post-colonial era, nationalism and regionalism were often seen as conflicting ideals, with strong sentiments of self-determination, national interest, and non-interventionism shaping Southeast Asian politics. However, amid communist insurgencies and ideological divides, growing instability underscored the need for a unified regional front.

"*The fragmented economies of Southeast Asia with each country pursuing its limited objectives and dissipating its meager resources in the overlapping or even conflicting endeavors of sister states, carry the seeds of weakness in their incapacity for growth and their self-perpetuating dependence on the advanced, industrial nations*."[10]

[9] Ryo Sahashi, 'Opposition and Cooperation: The Asia Pacific After the Cold War', in Ryo Sahashi, Yushiro Matsuda and Waka Aoyama (eds), *Asia Rising: A Handbook of History and International Relations in East, South and Southeast Asia* (Springer 2024) 269-270 <https://www.researchgate.net/publication/383655276_Opposition_and_Cooperation_The_Asia_Pacific_After_the_Cold_War> accessed 17 March 2025.

[10] Ponciano Intal, Jr. and Lurong Chen (eds), *ASEAN and Member States: Transformation and Integration* (ERIA 2017) <https://www.eria.org/ASEAN_50_Vol_3_Complete_Book.pdf> accessed 17 March 2025.

These were the words of Narciso R. Ramos, Foreign Minister of the Philippines, when on 8 August 1967, he and four fellow foreign ministers signed the foundational document for ASEAN.

Thus, ASEAN was established in 1967 through the *Bangkok Declaration*, with Indonesia, Malaysia, Singapore, Thailand, and the Philippines as its founding members. The declaration underscored ASEAN's commitment to unity, solidarity, and regional cohesion, particularly in economic and political spheres. It described ASEAN's first aim as to "strengthen the foundation" for a "community of South-East Asian nations", emphasizing regional cooperation while pledging to "preserve" the "national identities" of its diverse member states.[11]

ASEAN's decision-making process has been influenced by the Indonesian Village Method, rooted in the principles of *musyawarah* and *muafakat* — deliberation and consensus. This approach encourages flexibility, with participants avoiding rigid positions and deferring disagreements while prioritizing areas of agreement.

This principle was formally enshrined in *Article 20 of the ASEAN Charter 2008* (hereinafter 2008 Charter), commonly known as the ASEAN Way, and provides that:

(1) As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.
(2) Where consensus cannot be achieved, the ASEAN Summit[12] may decide how a specific decision can be made.[13]

While the 2008 Charter presents a singular definition, the ASEAN Way has been interpreted differently by states and scholars alike. This is significant, as it forms the core decision-making process of ASEAN, yet lacks a universally consistent understanding among its members.

2.2 ASEAN Member States' Interpretations of the ASEAN Way

ASEAN member states (hereinafter AMS), such as Myanmar, Laos, and Cambodia, joined ASEAN only in 1997/1999. As later entrants, they interpreted the ASEAN Way primarily as a principle of non-interference. This norm requires ASEAN to refrain from criticising member governments' actions toward their citizens and from using the domestic political

[11] The ASEAN Declaration (Bangkok Declaration) (signed 8 August 1967) <https://agreement.asean.org/media/download/20140117154159.pdf> accessed 17 March 2025.
[12] ASEAN Charter (n 8) Chapter IV 'Organs', Art 7(1) states that the ASEAN Summit 'shall comprise of Heads of State or Government of Member States', while Art 7(2)(a)–(b) establishes it as 'the supreme policy-making body of ASEAN' responsible for providing policy guidance and making key decisions.
[13] Ibid Art 20(1) and (2).

systems or governing styles of states as criteria for membership.[14] Singapore's former Foreign Minister, Shunmugam Jayakumar, asserted in 1997 that ASEAN's principle of non-interference in domestic affairs had been "*the key factor as to why no military conflict had broken out between any two member states since 1967.*"[15]

Since 1997, however, countries outside the region have criticized the non-interference doctrine for ASEAN's ineffectiveness in addressing regional issues.[16] Calls for its revision or abandonment have emerged within and beyond the association. Despite these pressures, ASEAN has maintained non-interference as a core diplomatic principle and a foundational element of its governance, as reaffirmed in the *2008 Charter*, even though a high-level advisory group of ASEAN's elder statesmen recommended adjustments.[17]
Meanwhile, the older founding members Meanwhile, the older founding members Singapore, Malaysia, Indonesia, Thailand, and the Philippines, who established ASEAN in 1967, equated the ASEAN Way with cooperation and coordination. These differing interpretations may hinder efforts to reach standard solutions, as member states do not share a uniform understanding of the decision-making process. As a result, determining the appropriate approach in a given situation becomes challenging. These diverging perspectives also complicate efforts to formulate a coordinated response to regional crises, such as the SCS dispute, which this paper will explore further.

2.3 Scholars' Interpretations of the ASEAN Way

Masalamani and Peterson argued that the ASEAN Way is an informal, personal decision-making style that emphasises compromise, consensus, and consultation.[18] Reflecting traditional Southeast Asian customs of *musyawarah* and *muafakat*, it embodies 'quiet diplomacy' by prioritizing non-confrontational problem-solving through closed-door

[14] Tram-Anh Nguyen**,** 'Norm or Necessity? The Non-Interference Principle in ASEAN' (2017) 9(1) PUJ <https://journals.library.cornell.edu/tmpfiles/CIAR_9_1_2.pdf> accessed 18 March 2025.
[15] Shanmugam Jayakumar, 'Opening Statement by H.E. Professor S. Jayakumar, Minister for Foreign Affairs of Singapore' (*ASEAN,* 24 July 1997) <https://asean.org/opening-statement-by-h-e-professor-s-jayakumar-minister-for-foreign-affairs-of-singapore> accessed 18 March 2025.
[16] Muhammad Fuad bn Othman and Zaheruddin Othman, 'The Principle of Non-Interference in ASEAN: Can Malaysia Spearhead the Effort towards a More Interventionist ASEAN' (Political Managements and Policies in Malaysia Conference, Kedah, July 2010) <https://core.ac.uk/download/pdf/12118557.pdf> accessed 18 March 2025.
[17] Mieke Molthof, *ASEAN and the Principle of Non-Interference* (1st edn, E-International Relations 2012) <https://www.e-ir.info/pdf/17552> accessed 18 March 2025.
[18] Logan Masilamani and Jimmy Peterson, 'The "ASEAN Way": The Structural Underpinnings of Constructive Engagement' (2014) FPJ 1, 5-9 <https://www.foreignpolicyjournal.com/wp-content/uploads/2014/10/141015-Masilamani-Peterson-ASEAN.pdf> accessed 18 March 2025.

discussions, thereby avoiding public embarrassment that might otherwise provoke defensiveness.[19]

They also highlighted a key limitation of the ASEAN Way: it works best within an Asian cultural context that values "saving face" and maintaining positive impressions.[20] Moreover, because it requires a unanimous consensus, the ASEAN Way often only meets the lowest common denominator, making it ineffective for high-profile political issues.[21] For example, any effort to reform Myanmar's military-dominated environment would violate the non-interference principle central to the ASEAN Way.[22]

However, Gillian Goh offers a contrasting view, arguing that the ASEAN Way is a strength in global conflict management.[23] She points to ASEAN's handling of the Cambodian crisis, contrasting it with the Organisation of American States' (hereinafter OAS) approach in Haiti, as evidence that its non-confrontational, consensus-based method encourages consultation and compromise. In her view, this demonstrates the ASEAN Way's potential as an effective tool for diplomacy and conflict resolution.[24]

Meanwhile, because the OAS has an enforcement mechanism, it can act more directly and aggressively, deploying military forces even at high economic and human costs. Goh notes that if ASEAN were not constrained by the ASEAN Way and had its enforcement capability, it could better uphold its values, gain international approval, and strengthen the position of frontline states like Thailand.[25] While the ASEAN Way minimises the risk of rapid escalation, its consensus-based, time-consuming process may leave critical issues unresolved for extended periods. Can this be considered an effective crisis management approach?

Shaun Narine emphasizes that ASEAN functions more as a tool for its member states to pursue their narrow self-interests rather than as a foundation for a shared regional

[19] Hiro Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way" (2003) 25(1) Contemporary Southeast Asia 104, 104-118 <https://www.jstor.org/stable/25798630> accessed 18 March 2025.
[20] Othman (n 16) 5.
[21] Ibid 7.
[22] Observer Research Foundation, *Occasional Paper* (Issue No. 453, November 2024) <https://www.orfonline.org/public/uploads/posts/pdf/20241112155731.pdf> accessed 18 March 2025.
[23] Gillian Goh, 'The "ASEAN Way": Non-Intervention and ASEAN's Role in Conflict Management' (2003) 3(1) SJEAA 113 <https://www.academia.edu/3988485/113Gillian_Goh_Stanford_Journal_of_East_Asian_Affairs_GreaterEastAsia_The_ASEAN_Way_Non_Intervention_and_ASEAN_s_Role_in_Conflict_Managementin_conflicts_in_Haiti_and_Nicaragua_and_between> accessed 18 March 2025.
[24] Ibid 115.
[25] Ibid 116.

identity.[26] This is largely due to the principle of non-intervention and the prioritization of state sovereignty, which hinders deeper integration by encouraging members to favor national interests over collective goals. Thus, Narine views the ASEAN Way as a limitation to achieving an integrated regional identity. To a certain extent, I agree, as ASEAN conventions, such as the Convention on Nature and Natural Resources,[27] often use language like "member states shall endeavor to,"[28] suggesting that while agreements may outline general goals, they lack enforceability. This phrase reinforces the principle of non-intervention, underscoring that state sovereignty takes precedence over regional obligations, ultimately limiting ASEAN's effectiveness in fostering deeper integration.

2.4 The ASEAN Way in Practice: Strengths, Limitations, and the South China Sea Dispute

While the 2008 Charter has ostensibly strengthened institutional cohesion granting the organization legal personality (*Article 3)* and formalizing the 'pillar system' to address political-security, economic, and socio-cultural dimensions (*Article 9)*, these structural reforms have not translated into more decisive action. The organisation remains hamstrung by its rigid adherence to consultation and consensus, as mandated by *Article 20.* This commitment, while emblematic of the ASEAN Way, continues to paralyse timely and effective responses to regional crises.

The 2008 Charter's emphasis on durable peace, mutual prosperity, and non-aggression, outlined in Chapter I Purposes and Chapter II Principles (*Article 1(1)(3), Article 1(1), Article 2(2)(c), and Article 2(2)(k)),* projects a normative ideal. However, in practice, these aspirations have failed to counterbalance ASEAN's chronic indecisiveness. Critics such as Leticia Simões have rightly condemned the bloc's "lack of an assertive position."[29] This critique is not theoretical; ASEAN's paralysis is visible in its inability to respond coherently to China's increasingly aggressive activities in the SCS. Despite repeated provocations,[30] harassment of vessels, construction of artificial islands in 2023, water cannon assaults, and

[26] Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers 2002) 1–8 <https://www.degruyter.com/document/doi/10.1515/9781626373440-004/html?lang=en> accessed 18 March 2025.
[27] ASEAN Agreement on the Conservation of Nature and Natural Resources 1985 (adopted on 9 July 1985).
[28] Ibid, an example can be Article 6(2)(a), 'They (AMS) shall, in particular, endeavour to control clearance of vegetation; endeavour to prevent bush and forest fires; prevent overgrazing by, inter alia, limiting grazing activities to periods and intensities that will not prevent regeneration of the vegetation.'
[29] Leticia Simões, *The Role of ASEAN in the South China Sea Disputes* (1st edn, E-International Relations 2022) 8 <https://www.e-ir.info/pdf/98115> accessed 18 March 2025.
[30] Keith Johnson, 'China's South Sea Aggression Is Backfiring' *Foreign Policy* (Washington, 06 June 2024) <https://foreignpolicy.com/2024/06/06/south-china-sea-philippines-fishing-vessels-maritime-conflict-shoal/> accessed 19 March 2025.

an overwhelming Chinese maritime presence,[31] ASEAN has not only failed to forge a unified front but has yet to put forward a credible and enforceable position. The futility of diplomatic platitudes is aptly captured by Prashanth Parameswaran: "*Words at diplomatic meetings cannot be divorced from actions on the water.*"[32]

What emerges, then, is a pattern of ineffectiveness that cannot be dismissed as circumstantial. ASEAN's consensus-based model, often praised for inclusivity, in practice produces outcomes aligned with the lowest common denominator: at best symbolic, at worst inert. The organization's normative commitments to peace and stability, while admirable, are insufficient in the face of geopolitical assertiveness. Critics argue that ASEAN's so-called "soft approach" does not merely limit its capacity — it erodes its credibility.

To be clear, the blame cannot rest solely on the ASEAN Way. The complexities of the SCS dispute, rooted in China's expansive historical claims, divergent positions among AMS, and contested interpretations under UNCLOS, render any diplomatic mechanism challenging. Nonetheless, the persistent failure to adapt ASEAN's decision-making ethos to evolving regional threats raises serious questions about the continued viability of *musyawarah* and *muafakat* in addressing high-stakes conflicts. This paper will argue that while the ASEAN Way is not the sole cause of stagnation, it is a significant impediment; unless recalibrated, it will continue to obstruct meaningful regional responses.

III. Claims to the SCS

Ludwig Erhard once said, *"A compromise is the art of dividing a cake in such a way that everyone believes he has the bigger piece."*[33] Applied to the SCS dispute, this metaphor underscores the difficulty of satisfying multiple, often conflicting, territorial claims. Each claimant insists it deserves a larger share of the region's resources and strategic advantages, or that its rivals' demands are excessive or unfounded. This raises a fundamental question: on what basis do these states justify their claims to a greater portion of the 'cake'? Unpacking these historical, geopolitical, and legal justifications is essential for understanding the complex dynamics that make resolving the SCS dispute such a formidable challenge.

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[31] Chetra Chap, 'ASEAN Remains Divided Over China's Assertiveness in South China Sea' *Voice of America English News* (Washington, 12 September 2023) <https://www.voanews.com/a/asean-remains-divided-over-china-s-assertiveness-in-south-china-sea/7264923.html> accessed 18 March 2025.

[32] Devianti Faridz, 'Experts: Nonaggression Pact on Sea Feud Likely to Test Beijing's Commitment to International Law' *Voice of America English News* (Washington, 17 July 2023) <https://www.voanews.com/a/experts-nonaggression-pact-on-sea-feud-likely-to-test-beijing-s-commitment-to-international-law/7185221.html> accessed 19 March 2025.

[33] Ludwig Erhard, *Prosperity Through Competition* (1st edn, Frederick A Praeger Inc., 1954) 13.

3.1 Tracking China's Historical Narrative

3.1.1 Pre-1935

Numerous historical records and literary texts indicate that Chinese fishermen and sailors have been aware of the SCS for centuries.[34] Ancient sources such as *Shi Jing* (475–221 BC) reference maritime activity, and Chinese dynasties received tributes from southern seafarers before the 3rd century AD.[35] By the *Song dynasty* (960–1279), official records began documenting Chinese names for various islands, and local gazetteers from Hainan reinforced knowledge of the region.[36] Proponents of China's claim often interpret these references as evidence of long-standing sovereignty. However, such assertions lack proof of continuous, effective state authority — an essential standard in international law.

China's maritime expansion continued during the *Ming dynasty*, particularly through *Zheng He's famous expeditions* (1405–1433),[37] is frequently cited to bolster historical claims. Yet these voyages were primarily diplomatic showcases, not administrative acts establishing control. While the *Silk Road on the Sea* thrived from the *Qin-Han period* (221 BC–220 AD) until the late *Ming* dynasty, it was geared towards trade rather than exercising sovereign power over maritime features.[38]

Boundary lines enclosing parts of the SCS began appearing sporadically on maps drawn by private cartographers, but it was not until the 20th century that the Chinese state undertook formal territorial delineation.[39] The 1935 gazette and atlas published by the *Commission on the Examination of Land and Water Maps,* listing 132 maritime features, marked the first official effort to define China's claims.[40] This discontinuity casts doubt on whether earlier historical references ever amounted to a legal or political assertion of sovereignty.

3.1.2 1936-1956: From an eleven-dash line to a nine-dash line

[34] Zou Keyuan, 'South China Sea Studies in China: Achievements, Constraints and Prospects' (2007) 11 SYBIL 85 <http://www.commonlii.org/sg/journals/SGYrBkIntLaw/2007/6.pdf> accessed 21 March 2025.
[35] Shen Jianming, 'China's Sovereignty over the South China Sea Islands: A Historical Perspective' (2002) 1(1) Chinese JIL 94, 102-105 <https://academic.oup.com/chinesejil/article/1/1/94/362104> accessed 21 March 2025.
[36] Ibid 98.
[37] J. K. Holloway and Bruce Swanson, 'Eighth Voyage of the Dragon: A History of China's Quest for Seapower' (1982) 35 Naval War College Review 107 <https://digital-commons.usnwc.edu/nwc-review/vol35/iss5/19> accessed 21 March 2025.
[38] Franck Billé, Sanjyot Mehendale and James Lankton, 'The Maritime Silk Road: An Introduction' in Franck Billé, Sanjyot Mehendale and James W Lankton (eds), *The Maritime Silk Road: Global Connectivities, Regional Nodes, Localities* (Amsterdam University Press 2022) 11–24 <https://doi.org/10.2307/j.ctv2x00w7b.4> accessed 21 March 2025.
[39] Holloway and Swanson (n 37), 117.
[40] Ibid 108.

Following World War II, China sought to reassert its sovereignty over the SCS islands. Under the *Cairo Declaration (1943)* and the *Potsdam Proclamation (1945),* Japan was required to relinquish control of all occupied territories, including the Paracel and Spratly Islands.[41] In 1946, China formally reclaimed these islands, reinforcing its territorial claims. By 1947, China's Ministry of the Interior circulated an official map depicting an **eleven-dash line** surrounding the SCS, labeled *"Position of the South China Sea Islands"*.[42] This was intended to reaffirm Chinese sovereignty over the island groups and establish a clear postwar territorial boundary.[43]

In 1953, China revised its claim by removing two dashes from the Gulf of Tonkin, reducing the eleven-dash line to the now-standard **nine-dash line**. While no formal agreement was made, this move likely reflected strengthening ties between China and the newly independent North Vietnam, as both shared communist leadership and strategic interests.[44] The maritime border in the Gulf of Tonkin was later formalized by a treaty in 2000 between China and Vietnam.[45] However, the fact that no formal explanation or legal basis accompanied this revision underscores the flexibility of China's claim; such political fluidity undermines the argument that China's claim rests on fixed historical rights.

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[41] Department of State (ed), *The Axis in Defeat: A Collection of Documents on American Policy Toward Germany and Japan* (Department of State Publication 2423, US Government Printing Office 1946) <https://www.ibiblio.org/hyperwar/Dip/AxisInDefeat/index.html> accessed 21 March 2025. The Cairo Declaration called for Japan to be stripped of all islands seized since 1914 and for territories like Manchuria, Formosa, and the Pescadores to be returned to China. The Potsdam Proclamation (Point 8) reaffirmed these terms, limiting Japan's sovereignty to Honshu, Hokkaido, Kyushu, Shikoku, and any minor islands designated by the Allies.

[42] Wei Pu, 'How The Eleven-Dash Line Became A Nine-Dash Line, And Other Stories' *Radio Free Asia* (Washington, 16 July 2015) <https://www.rfa.org/english/commentaries/line-07162015121333.html> accessed 21 March 2025.

[43] Daniel J Dzurek, *The Spratly Islands Dispute: Who's on First?* (Maritime Briefing, Vol 2, No 1, International Boundaries Research Unit, University of Durham 1996) 67 <https://www.durham.ac.uk/media/durham-university/research-/research-centres/ibru-centre-for-borders-research/maps-and-databases/publications-database/Maritime-Briefings-(Vol.-2-no.-1).pdf> accessed 21 March 2025.

[44] Bill Hayton, 'China's Claim on the South China Sea: How Many Dashes Make a Line?' (*FULCRUM Analysis on Southeast Asia*, 6 September 2023) <https://fulcrum.sg/chinas-claim-on-the-south-china-sea-how-many-dashes-make-a-line/> accessed 22 March 2025.

[45] Agreement between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Seas, Exclusive Economic Zones and Continental Shelves of the Two Countries in the Beibu Gulf/Bac Bo Gulf (adopted 25 December 2000); The treaty specifies the maritime border—specifically, the boundary of the territorial seas—in Article III. This article states that the delimitation line from point 1 to point 9 in Article II shall serve as the boundary of the territorial seas of the two countries in the Beibu Gulf (Gulf of Tonkin).

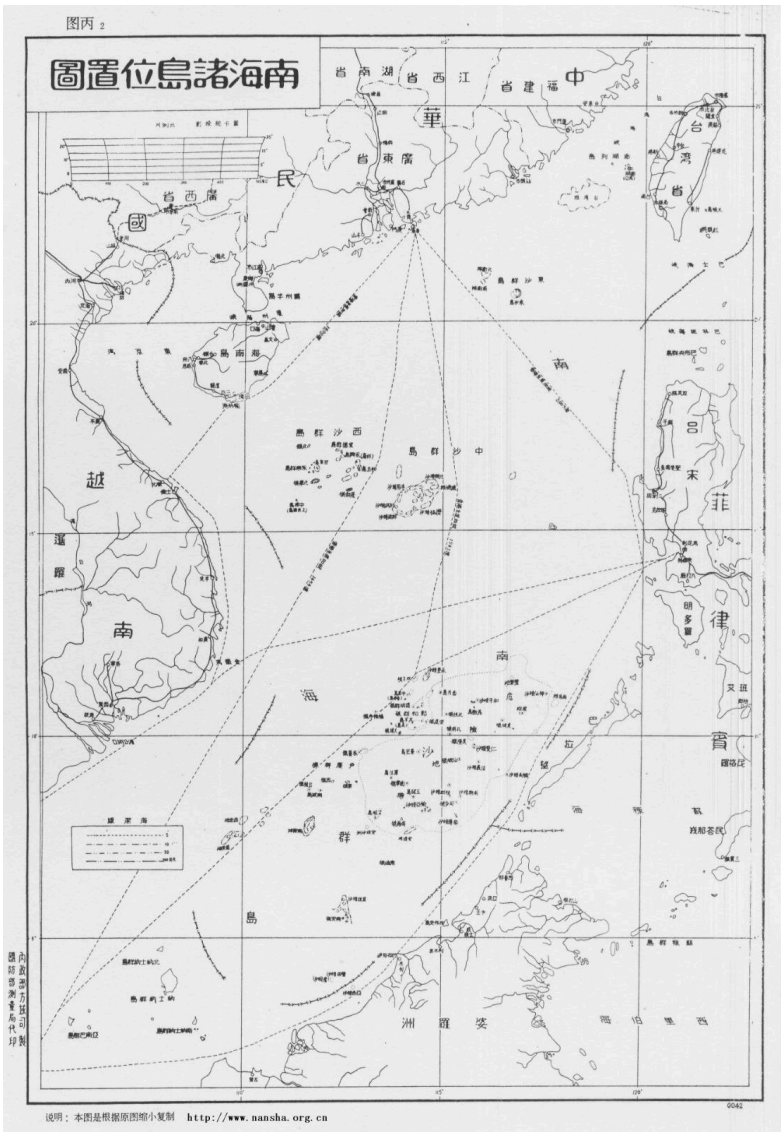

Figure 1: Eleven-dash line map from 1947[46]

[46] 'Why it's crucial to understand what the nine-dash line means' (*Rigoberto Tiglao*, 17 March 2023) <https://rigobertotiglao.com/2023/03/17/why-its-crucial-to-understand-what-the-nine-dash-line-means/> accessed 25 August 2025.

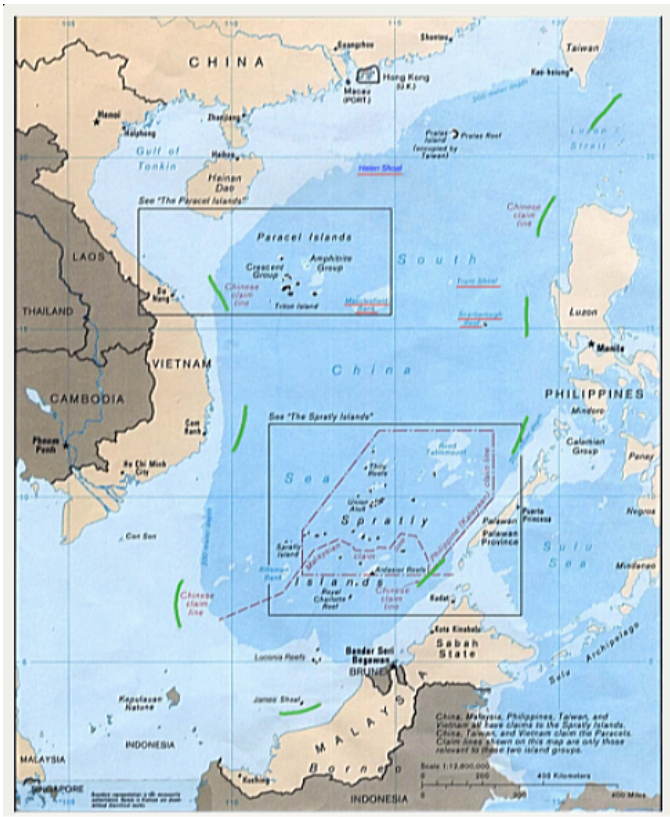

Figure 2: Nine-dash line map from 1947[47]

Although the nine-dash line remains a fixture on Chinese maps and serves as a potent symbol of sovereignty, its legal validity is highly contested. Historical presence, even if well-documented, does not automatically translate into lawful sovereign title, especially in light of UNCLOS requirements for effective and peaceful administration.

3.2 AMS Claims to the SCS

3.2.1 Vietnam, The Philippines, Malaysia, and Brunei

Vietnam's claims include the Spratly and Paracel Islands, and relations between Vietnam and China have long been strained, as seen in conflicts like the *1974 Battle of the Paracel Islands*. Although warming ties in the 1950s driven by shared communist affiliations provided only a temporary easing of tensions, the core issue of sovereignty in the SCS persisted. Reflecting its skepticism about ASEAN's ability to effectively manage SCS disputes, Vietnam has often sought to internationalise the issue, appealing to the United States, Japan, and India in line with UNCLOS principles to counter Chinese assertiveness.[48]

[47] Priscilla Tacujan, 'Chinese Lawfare in the South China Sea: A Threat to Global Interdependence and Regional Stability' 2022 10 Journal of Political Risk.
[48] Simões (n 29) 4.

In 2013, Vietnam's effort to pursue international arbitration was thwarted by China.[49] Tensions remain high today, as illustrated by Vietnam's strong reaction to a 2023 Barbie movie that briefly featured a map resembling China's nine-dash line, despite Warner Bros. denying any political intent.[50]

The Philippines focuses its territorial claims on its western fishing zones and has urged ASEAN to adopt a binding Code of Conduct, though only a non-binding declaration has been produced.[51] Following the *1995 Mischief Reef Incident* and a *1955 ASEAN Foreign Ministers' Meeting Joint Communique* condemning unilateral Chinese actions, the Philippines, inspired by Vietnam's approach, filed complaints with the Permanent Court of Arbitration at The Hague against Chinese assertiveness. Despite a favorable 2016 ruling, China has refused to comply.[52] While President Duterte did not enforce the ruling to maintain closer ties with China, this stance has shifted with Ferdinand Marcos Jr., elected in 2022, who now adopts a more assertive position in the SCS.[53]

Malaysia and Brunei currently assert territorial claims over waters adjacent to Peninsular Malaysia and East Malaysia (Sabah and Sarawak), while Brunei finds China's nine-dash line uncomfortably close to its shores. Both nations, however, refrain from publicly criticising China to maintain good relations despite occasional instances of Chinese belligerence. For instance, Malaysian Prime Minister Anwar Ibrahim — during speeches in Canberra (March 2024), Beijing (November 2024), and at the World Economic Forum (January 2025) — has

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[49] Richard Javad Heydarian, 'Vietnam's Legal Warfare Against China: Prospects and Challenges' *Asia Maritime Transparency Initiative* (Washington, 21 November 2019) <https://amti.csis.org/vietnams-legal-warfare-against-china-prospects-and-challenges/> accessed 22 March 2025.

[50] Paul Eckert, 'Map that triggered Vietnam 'Barbie' ban was 'child-like' drawing, Warner Bros says' *Benar News* (Washington, 07 July 2023) <https://www.benarnews.org/english/news/philippine/barbie-update-07072023155924.html> accessed 22 March 2025.

[51] Nestor Corrales, 'Philippines woos ASEAN to craft code on South China Sea' *The Nation* (Bangkok, 20 November 2023) <https://www.nationthailand.com/world/asean/40033055> accessed 24 March 2025.

[52] Aisya Muyassara Wisnugroho, 'International Law and the challenges in implementing UNCLOS: South China Sea Arbitration' *Modern Diplomacy* (Plovdiv, 17 July 2024) <https://moderndiplomacy.eu/2024/07/17/international-law-and-the-challenges-in-implementing-unclos-south-china-sea-arbitration/#_edn38> accessed 24 March 2025.

[53] Chad De Guzman, 'We Have to Do More': Marcos Urges Fiercer Response, While Showing Restraint, Toward Chinese Aggression in South China Sea' *TIME* (New York, 27 June 2024) <https://time.com/6992894/marcos-philippines-south-china-sea-response-restraint/> accessed 24 March 2025; 'As tensions escalate in the South China Sea, Philippine President Ferdinand "Bongbong" Marcos Jr. said his country must "do more" in responding to China's "illegal action" in the hotly contested waterway, following a confrontation last week that led to one Filipino navy serviceman losing a thumb'; Chad De Guzman, 'Like They Are Pirates': Philippines Slams Latest Chinese Confrontation in South China Sea' *TIME* (New York, 19 June 2024) <https://time.com/6989913/philippines-south-china-sea-armed-attack-finger-injury/> accessed 24 March 2025.

consistently underscored that fostering strong ties with China is Malaysia's priority.[54] Senior fellow Ian Storey of the ISEAS-Yusof Ishak Institute in Singapore notes that this stance does not indicate Malaysia is abandoning its territorial claims.[55] Similarly, researchers suggest that although Brunei maintains a low profile on disputes, it has not relinquished its territorial bases around Louisa Reef.[56]

3.2.2 Indonesia, Singapore, Thailand, Laos, Myanmar, and Cambodia

Thailand, Laos, Myanmar, and Cambodia, despite lacking direct stakes in the SCS disputes and benefiting from strong economic ties with China, consistently avoid criticizing Beijing in ASEAN reports and communiqués, as scholars have observed.[57] Their silence reflects not neutrality, but strategic deference. Indonesia, while officially stating it has no territorial dispute with China, has confronted repeated incursions by Chinese fishing vessels in the Natuna Islands' Exclusive Economic Zone (EEZ). Jakarta asserts sovereign rights under the 200 nm EEZ framework, while China, invoking its nine-dash line, continues to challenge this position—generating diplomatic friction and public outcry within Indonesia.

Singapore, though not directly involved in territorial claims, plays a balancing act. Its close military ties with the United States and firm stance on upholding maritime security and freedom of navigation reflect a normative commitment that occasionally puts it at odds with ASEAN's reluctance to confront China.[58] These diverging interests among member states, ranging from silent accommodation to cautious resistance, highlight ASEAN's inability to speak with one voice on the SCS issue.

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[54] Maria Siow, 'Malaysia's Anwar urges Asean not to 'single out' Beijing over South China Sea tensions at Davos' *South China Morning Post* (Hong Kong, 29 January 2025) <https://www.scmp.com/week-asia/politics/article/3296633/malaysias-anwar-urges-asean-not-single-out-beijing-over-south-china-sea-tensions-davos> accessed 24 March 2025; RFA and Benar News staff, 'How ASEAN nations shape South China Sea policies around China' *Benar News* (Washington, 21 February 2025) <https://www.benarnews.org/english/news/indonesian/south-china-sea-asean-02212025082321.html> accessed 24 March 2025.

[55] Ian Storey, 'Malaysia and the South China Sea dispute: A sea change under Prime Minister Anwar?' (*Think China*, 05 September 2024) <https://www.thinkchina.sg/politics/malaysia-and-south-china-sea-dispute-sea-change-under-prime-minister-anwar?utm_source=linkedin&utm_medium=social-organic> accessed 24 March 2025.

[56] Shannon Tiezzi, 'China Wood Indonesia's New President' (*The Diplomat*, 05 November 2014) <https://thediplomat.com/2014/11/china-woos-indonesias-new-president/> accessed 24 March 2025.

[57] Simões (n 29) 5-6; Siphat Touch, 'Patterns and Impacts of Chinese Assistance in Cambodia' in Yos Santosombat (ed), *Impact of China's Rise on the Mekong Region* (Palgrave Macmillan 2015) 195.

[58] "The US dismisses the nine-dash line as a threat to maritime freedom, while China argues that US intelligence flights and naval maneuvers near its artificial islands are designed to curb its rise as a major power." Max Fisher, 'The South China Sea: Explaining the Dispute' *New York Times* (New York, 14 July 2016) <https://www.nytimes.com/2016/07/15/world/asia/south-china-sea-dispute-arbitration-explained.html> accessed 24 March 2025.

This fragmented landscape underscores the difficulty of formulating a cohesive ASEAN response. The diplomatic impasse is not merely a product of differing national interests but a reflection of the deeper strategic calculus each state makes in navigating relations with both China and the U.S. Compounding this difficulty is China's invocation of historical rights via the nine-dash line, which, while politically powerful, faces serious legal scrutiny. The following section turns to the 2016 PCA arbitration ruling to interrogate the credibility of these historical claims under international law.

IV. Beyond ASEAN: UNCLOS & Arbitration

While this paper evaluates the efficacy of the ASEAN Way in galvanising a resolution to the SCS dispute, it is also crucial to consider the broader context, the *2016 Philippines v China* arbitration case, which reveals the complexity facing ASEAN.

UNCLOS provides a comprehensive framework for maritime governance, consolidating earlier conventions and dividing the seas into five zones: Internal Waters, Territorial Sea, Contiguous Zone, EEZ, and the High Seas.[59] However, as *Professor Robert Beckman* clarifies in an interview with Andrea Ho, "*territorial sovereignty disputes are governed by rules of customary international law on the acquisition and loss of territory, not by the UNCLOS."*[60] This bifurcation presents a major complication in the SCS, where claims involve both sovereignty over features and maritime entitlements. ASEAN's institutional structure is ill-equipped to address this legal overlap, further hampering unified action.

4.1 Case study

4.1.1 Philippines v China.[61]

On January 22, 2013, the Philippines initiated arbitration against China under *Section 2 of Part XV and Annex VII of UNCLOS***,** dispute mechanisms further clarified by *Articles 287(1) and 287(3).* With neither side declaring a preferred forum, both were deemed to have accepted arbitration under *Annex VII, Article 9.* On July 12, 2016, the arbitral tribunal

[59] "UNCLOS development traces back to efforts by the 1949 International Law Commission and culminated in the 1958 Geneva Conference and 1960 UN General Assembly, which initially produced four separate conventions on issues such as territorial waters, continental shelves, and high seas fisheries." Qamar Abad, Ghulam Murtiza and Ghulam Mujtaba, 'Law of the Sea: An Introduction' (2018) 2(1) Pakistan Social Sciences Review 272-<https://pssr.org.pk/issues/v2/1/law-of-the-sea-an-introduction.pdf> accessed 25 March 2025.

[60] Andrew Ho, Interview with Professor Robert Beckman, Adjunct Senior Fellow, Maritime Security Programme, Institute for Defence and Strategic Studies of Nanyang Technological University's S. Rajaratnam School of International Studies (06 May 2021) <https://gjia.georgetown.edu/2021/05/06/professor-robert-beckman-on-the-role-of-unclos-in-maritime-disputes/#:~:text=RB%3A%20UNCLOS%20is%20a%20universally,who%20owns%20particular%20land%20territory.> accessed 26 March 2025.

[61] *In re South China Sea Arbitration (Philippines v China)* PCA Case No 2013-19 XXXIII Reports of Intl Arbitral Awards 153 <https://legal.un.org/riaa/cases/vol_XXXIII/153-617.pdf> accessed 25 March 2025.

rendered a unanimous award in favor of the Philippines on maritime entitlements in the SCS.

Key findings included that China's nine-dash line has no legal basis, as *Articles 56 and 57* of UNCLOS determine EEZs and continental shelves by *distance*, not *historical claims*. The tribunal held that to assert historic rights, China would need to show a consistent effort to exclude others from resource exploitation, which it failed to do. The claim was thus reduced to a unilateral assertion, lacking the crucial element of *acquiescence* by other states. On the contrary, persistent objections, counterclaims, and contrary state practice have consistently undermined any presumption of acquiescence.

Moreover, the tribunal clarified that low-tide elevations (e.g. Mischief Reef, Subi Reef) cannot generate maritime zones. Rocks like Scarborough Shoal and Johnson Reef, under *Article 121(3),* are entitled only to a 12-nautical-mile territorial sea. No feature in the Spratly Islands met the criteria of an "island" under *Article 121(2),* disqualifying them from generating EEZs or continental shelves. These rulings dismantled much of the legal scaffolding underpinning China's maritime posture.

Yet the tribunal's findings, legally binding under *Article 11 of Annex VII,* were met with outright defiance. China declared the ruling "null and void" and refused to recognise it. Although UNCLOS offers a binding dispute settlement mechanism, its effectiveness hinges entirely on state compliance. *Article 12* allows for clarification but offers no coercive power. China's refusal to comply thus exposes a critical flaw: **UNCLOS lacks enforcement capacity**, leaving legal victories symbolically powerful but practically inert.

4.1.2 Implications

Perhaps the most alarming, but ultimately unsurprising, outcome of the Philippines v China ruling is China's outright dismissal of the award without facing any meaningful consequences on the international stage. This response severely undermines the credibility of the PCA and reinforces the perception that the international legal system is structurally skewed in favor of powerful states, particularly those holding veto powers in the UN Security Council, such as the United States, Russia, France, China, and the United Kingdom. The failure of the ruling to alter China's behaviour, even today, illustrates the unsettling reality that compliance with international law can be treated as optional. This detrimentally weakens the viability of international maritime law as a reliable mechanism for governing the lawful use of the seas.

In the aftermath of the ruling, it is more critical than ever for the United States, ASEAN, and other like-minded states to publicly affirm the award and reiterate the foundational role of international law in maintaining peace and stability in maritime domains. A key test will be whether ASEAN, despite its internal divisions, can present a unified stance in support of the ruling. As established, unity within ASEAN is difficult to achieve, thereby weakening collective resistance to China's actions in the SCS. So far, China appears unfazed

by any reputational costs incurred by defying the ruling, highlighting the limits of legal condemnation in the absence of diplomatic or economic consequences.

V. Evaluation

In answering whether the ASEAN Way leads or hinders the resolution of the SCS crisis, this paper contends that it neither propels nor obstructs resolution. Instead, it renders ASEAN largely ineffectual on the global stage.

Firstly, the ASEAN split over geopolitical challenges is not unique to the SCS experience, with a major instance of internal division being the response to Myanmar's military regime. In February 2021, when Myanmar's military ousted *Aung San Suu Kyi* and her government, ASEAN members were deeply divided. Founding members such as Indonesia, Singapore, Malaysia, and the Philippines called for restraint and dialogue, while others, notably Thailand and newer AMS, regarded the coup as an internal matter.[62] The bloc's consensus-based approach and non-interference principle have prevented a unified stance, as shown by the failure to effectively enforce the *2021 Five-Point Consensus*.[63] Additionally, varying strategies such as appointing special envoys versus practicing quiet diplomacy, differences in political systems, and economic development further contribute to ASEAN's disunity, undermining its capacity to confront the crisis cohesively.

This split is worsened by the ASEAN Way's reliance on consensus driven by individual interests. With membership doubling from five to ten, reaching a unified stance is even more challenging amid a high-profile security crisis that demands swift, assertive action. Diverse economic and political ties with China compel members to prioritize their interests over collective ones, making full implementation of the DOC and eventual COC unfeasible in the short term;[64] equally, China must accept ASEAN as a constructive partner in managing SCS tensions.[65]

Furthermore, leadership factors among ASEAN member states can outweigh the influence of the ASEAN Way in determining the resolution of the SCS dispute. This is evident in the Philippines, where the shift from the Duterte administration, which prioritized improving bilateral relations, to the more assertive President Ferdinand Marcos Jr., who has warned

[62] Adinda Khaerani Epstein, 'ASEAN still torn over security challenges' (*GIS*, 02 October 2024) <https://www.gisreportsonline.com/r/asean-issues/> accessed 26 March 2025.
[63] Sai Latt, 'Rethinking ASEAN's Five Point Consensus' (*Frontier MYANMAR*, 27 February 2025) <https://www.frontiermyanmar.net/en/rethinking-aseans-five-point-consensus/> accessed 26 March 2025.
[64] Declaration on the Conduct of Parties in the South China Sea (*adopted* 4 November 2002 in Phnom Penh, the Kingdom of Cambodia) <https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2/> accessed 26 March 2025.
[65] Dr Tang Siew Mun, 'What is at Stake for ASEAN?' (2016) ASEAN Focus Issue 5/2016 16 (July, Special Issue on the South China Sea Arbitration: Response and Implications).

China against escalating tensions over sovereignty, illustrates how national leadership can play a decisive role. Ultimately, leadership decisions have a greater impact on SCS resolution than the consensus-based approach of the ASEAN Way.[66]

Despite the *ASEAN Charter* providing for dispute settlement mechanisms (*Article 25*), several disputes among AMS have instead been resolved at the ICJ. These include the Preah Vihear case (*Cambodia v Thailand, 1962*),[67] Pulau Litigan and *Pulau Sipadan (Indonesia v Malaysia, 2002)*,[68] and Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (*Malaysia v Singapore, 2008*).[69] While this might be attributed to ASEAN's lack of a dedicated court and robust internal legal framework, it more fundamentally reflects a lack of confidence among member states in ASEAN's capacity to manage conflicts. The ASEAN Way, grounded in loose norms rather than binding rules, obstructs the organization's ability to enforce decisive measures. In practice, ASEAN's approach to the SCS disputes has been limited to urging restraint, adherence to the DOC, and anticipation of the COC. This soft approach explains, at least in part, why critics continue to call for a more assertive stance, though it is not the sole factor hindering ASEAN's effectiveness in addressing the crisis.

Despite ongoing provocations and stand-offs, it is believed that all parties share an interest in achieving a peaceful resolution.[70] Muhammad Aiman Nasuha Azari et al**.** note that "*[T]his dispute will never find its way out if each claimant country insists on defending its interests. Only cooperation and high tolerance can ensure an outcome that satisfies all claimant countries.*"[71]

While this paper evaluates the ASEAN Way and its shortcomings in addressing the SCS dispute, the key to a solution ultimately lies in compromise, as previously noted via Ludwig Erhard's cake metaphor, even though every party currently seems determined to secure the 'larger piece' they believe they deserve.

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[66] Tessa Wong, 'Philippine president warns China against 'acts of war' *BBC* (Singapore, 01 June 2024) <https://www.bbc.com/news/articles/c7223knz3ezo> accessed 26 March 2025.

[67] *Temple of Preah Vihear (Cambodia/Thailand)* [1962] ICJ Rep 6, 52, 63 <https://www.icj-cij.org/case/45> accessed 26 March 2025.

[68] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625 <https://www.icj-cij.org/case/102> accessed 26 March 2025.

[69] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12 <https://www.icj-cij.org/case/130> accessed 26 March 2025.

[70] Mara Cepeda, 'Asean states may differ in approach to South China Sea spat, but all are seeking peace' *The Straits Times* (Singapore, 16 April 2024). <https://www.straitstimes.com/asia/se-asia/south-china-sea-claimants-should-settle-dispute-peacefully-vivian> accessed 26 March 2025.

[71] Muhammad Aiman Nasuha Asari et al, 'Disputes in the South China Sea and the Role of China and ASEAN in Conflict Resolution' (2023) 11 Journal of Business and Social Development 38 <https://jbsd.umt.edu.my/wp-content/uploads/2024/04/4.-DISPUTES-IN-THE-SOUTH-CHINA-SEA-AND-THE-ROLE-OF-CHINA-AND-ASEAN-IN-CONFLICT-RESOLUTION.pdf> accessed 26 March 2025.

6. Conclusion

While the ASEAN Way, based on consultation, consensus, and non-interference, is central to ASEAN's identity, it has resulted in a lack of assertiveness and coordinated action in the SCS dispute. This essay has shown that although the ASEAN Way renders ASEAN less effective on the global stage, it is not solely responsible for the impasse. Competing maritime and territorial claims, divergent interests among AMS, and the complex legal frameworks of UNCLOS and customary international law all contribute to the challenge. Ultimately, the ASEAN Way neither leads nor outright hinders resolution; rather, it is one of many factors that complicate efforts to achieve a unified solution.

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Appendix

Salient features of the UNCLOS

Part II: Territorial Sea and Contiguous Zone, Section 2: Limits of the territorial sea

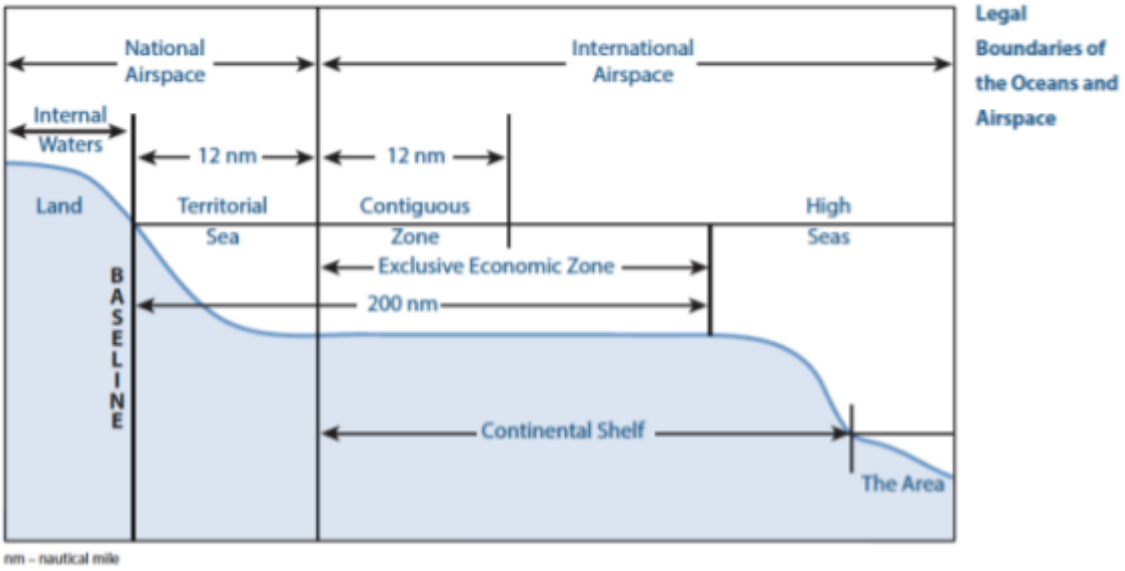

Figure 3: Maritime Zones Schematic <https://sites.tufts.edu/lawofthesea/chapter-two/> accessed 24 March 2025.

Article 5 establishes the *normal baseline*, defined by the low-water mark officially recognized by the coastal state. *Article 7* permits straight baselines in exceptional cases (e.g., deeply indented coastlines, deltas, fringing islands), provided they follow the coast's general direction and enclose only waters connected to the land. Low-tide elevations are excluded unless they host permanent installations or have recognized status. Furthermore, *Article 14* allows states to combine different baseline methods, as long as they remain consistent with these provisions.

Article 8(1) defines *internal waters* as those on the landward side of the baseline, granting coastal states full sovereignty over rivers, lakes, ports, inlets, and bays. Under *Article 8(2),* if a straight baseline encloses areas not previously classified as internal waters, foreign vessels retain the right of innocent passage. *Article 19(1)* clarifies that innocent passage must not threaten the peace, good order, or security of the coastal state, while *Article 19(2)(a)–(l)* lists prohibited activities, such as fishing, launching or landing aircraft, and conducting military exercises.

Article 3 establishes that a coastal state's *territorial sea* extends 12 nms from its baselines. *Article 4* defines the outer limit as the line every point of which is 12 nms from the nearest

point on the baseline. *Article 2(1)* states that the coastal state exercises control and jurisdiction over its territorial sea, and *Article 2(2)* extends these rights to the sea floor, subsurface, and overlying airspace.

Part II, Section 4: Contiguous Zone

Article 33(2) establishes that the *contiguous zone* extends 24 nms from the baseline — that is, 12 nms beyond the 12-mile territorial sea — serving as a transitional area between the high seas and the territorial sea. Under *Article 33(1)(a)-(b),* coastal states may enforce immigration, fiscal, sanitary, and customs laws in the contiguous zone, though their jurisdiction is limited to the surface and floor, unlike the territorial sea, which also covers the subsurface and airspace.

Part V: Exclusive Economic Zone

Article 55 defines the *EEZ* as the area beyond and adjacent to the territorial sea, balancing the coastal state's rights with the freedoms of other states. Under *Article 57*, a coastal state's EEZ extends up to 200 nms from its baselines. *Article 56(1)(a)* grants sovereign rights over natural resources in the water column and seabed, including energy from wind, currents, and waves. Unlike the territorial sea or contiguous zone, the EEZ does not restrict freedom of navigation or overflight (*Article 87(1)(a)–(b)*); furthermore, *Article 87(1)(c)* allows all states to lay, remove, or repair submarine cables and pipelines, while *Articles 56(1)(e) and 87(1)(f)* protect fishing and marine scientific research rights.

Part VII: High Seas

Article 86 defines the *high seas* as the ocean areas beyond the Exclusive Economic Zone, where no state may claim sovereignty. *Article 87* affirms that national jurisdiction does not extend to the high seas, though states may conduct activities, provided they are peaceful (*Article 88*), such as fishing (*Article 87(1)(e)*) and marine scientific research (*Article 87(1)(f)*).

This overview of UNCLOS provisions underscores the legal framework governing maritime entitlements, one that AMS must navigate when addressing the SCS disputes. Understanding these specific zones and rights clarifies the complexities ASEAN faces, beyond its consensus-based approach. In essence, while the ASEAN Way relies on consultation and non-interference, it must also contend with established international law that defines states' maritime claims. Appreciating UNCLOS is therefore key to grasping the scope and limits of ASEAN's influence in resolving the SCS conflict.

Malaysia's Aging Rule of Law in An Ever-Algorithmic Future: A Study of Digital Governance's Impact

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Abstract

Malaysia's rapid digital transformation has introduced algorithmic governance tools, such as AI-assisted policing, centralised socio-economic databases, and online content regulations, that pose novel challenges to constitutional order. This study assesses how these innovations test the rule of law's core principles of legality, equality, and procedural fairness. Drawing on three case studies, the Pangkalan Data Utama (PADU) database, Section 233 of the Communications and Multimedia Act, and predictive-policing initiatives, they illustrate fractures created by opaque data practices, overbroad regulatory powers, and the absence of independent oversight. In response, the paper proposes a cohesive reform framework comprising constitutional recognition of digital rights, targeted statutory amendments, and the establishment of an independent Digital Constitutional Commission. These measures aim to bolster transparency, accountability, and protection against arbitrary exercise of power in Malaysia's evolving governance landscape.

Keywords: Rule of law, Malaysia, digital rights, and constitutional reform.

I. Introduction

Malaysia's public sphere has rapidly transformed with the introduction of biometric-enabled welfare disbursements[1] and automated takedowns of online content[2]. Although these innovations enhance efficiency and access, they test the resilience of Malaysia's legal framework against algorithmic governance. This study, therefore, reconceptualises digital governance as a constitutional issue, examining its impact on the rule of law's principles of fairness, transparency, and protection from arbitrary power.

Drawing on Albert Venn Dicey's classic pillars of supremacy of law, equality before the law, and robust judicial oversight,[3] it maps these enduring ideals onto Malaysia's Federal Constitution ('FC'), exposing hidden fractures where ouster clauses, broad speech restrictions, and the absence of explicit digital rights undermine citizen safeguards. This

[1] 'Malaysia's Targeted Fuel Subsidy Overhaul Would Use MyKad Biometric ID' (*ID Tech Wire*, 7 November 2024) < https://idtechwire.com/malaysias-targeted-fuel-subsidy-overhaul-would-use-mykad-biometric-id/#:~:text=Malaysia's%20government%20is%20proposing%20a,through%20borrowed%20or%20duplicated%20credentials> accessed 6 June 2025.

[2] Radzi Razak, 'Malaysia Leads Global Surge in Social Media Takedown Requests' (*The Malaysian Reserve*, 10 June 2024) <https://themalaysianreserve.com/2024/06/10/malaysia-leads-global-surge-in-social-media-takedown-request/> accessed 6 June 2025.

[3] RA Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (University of North Carolina Press 1980) 66-90.

study will touch on three real-world case studies: (1) the Pangkalan Data Utama ('PADU') centralised data initiative that exposed sensitive personal records without consent;[4] (2) Section 233 of the Communications and Multimedia Act ('CMA')[5] wielded selectively to stifle political dissent online;[6] and (3) the rise of AI-powered profiling in policing.[7] Each example illustrates how algorithmic tools can erode constitutional guarantees when left unchecked.

To illuminate a path forward, this study concludes with a coordinated reform blueprint that spans constitutional amendments, targeted statutory updates, and the establishment of a new Digital Constitutional Commission. By aligning Malaysia's laws with the realities of an algorithmic era, it can ensure that technology serves justice rather than subverting it.

II. Conceptual Framework: Rule of Law Vs. Federal Constitution

Before delving into the intricacies of the uncharted intersection of the rule of law and the ever-growing prevalence of algorithmic digital governance, it is vital that the reader first understands certain concepts pertinent to the discussion, such as the concept of the rule of law in relation to the FC.

2.1. Understanding the Rule of Law in Malaysia

At its heart, the rule of law demands that no individual, neither the citizen nor the state, stands above the law. Albert Venn Dicey's seminal formulation anchors this principle in three pillars: (1) the supremacy of law over arbitrary authority, (2) equality before the law, and (3) the indispensable role of judicial oversight in protecting rights. In Malaysia, these lofty ideals are echoed in the FC's text. However, their practical application often reveals unsettling gaps when measured against contemporary governance challenges.[8]

a. Supremacy of Law Over Arbitrary Authority

Dicey's principle of legal supremacy finds clear expression in *Article 4(1),*[9] which declares any law inconsistent with the Constitution void. Yet successive legislatures have inserted

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[4] 'PADU: Significant Milestone in Government's Pursuit of Efficiency, Inclusivity' *The Sun Daily* (Kuala Lumpur, 3 January 2024) <https://thesun.my/malaysia-news/padu-significant-milestone-in-government-s-pursuit-of-efficiency-inclusivity-PK11937697> accessed 7 March 2025.

[5] Communications and Multimedia Act 1998 (Act 588) (as amended by the Communications and Multimedia (Amendment) Act 2024), s 233.

[6] 'The Passing of the CMA Amendments is Another Step Backwards for Freedom of Expression' (*Amnesty International Malaysia*, 10 December 2024) <https://www.amnesty.my/2024/12/10/cma-amendments-2024/> accessed 7 March 2025.

[7] Nurus Sakinatul Fikriah Mohd Shith Putera and others, 'Artificial Intelligence-Powered Criminal Sentencing in Malaysia: A Conflict with the Rule of Law' (2022) 7(SI7) Environment-Behaviour Proceedings Journal 442 <https://ebpj.e-iph.co.uk/index.php/EBProceedings/article/view/3813> accessed 7 March 2025.

[8] Constance Chevallier-Govers, 'The Rule Of Law And Legal Pluralism In Malaysia' (2010) 2(1) Islamic and Civilisation Renewal (ICR) Journal 90, 91-92 <https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://icrjournal.org/index.php/icr/article/download/682/668/3358&ved=2ahUKEwiyu7rw66MAxWPSGwGHb0QMG0QFnoECDwQAQ&usg=AOvVaw0ekYJs71isng75ZRjUw1U3> accessed 7 March 2025.

[9] Federal Constitution of Malaysia 1957, art 4(1).

ouster clauses, most notably in income tax[10] and national security statutes[11], that expressly bar judicial review of executive decisions. These carve-outs risk testing constitutional limits, permitting arbitrary exercises of power to proceed unchecked. Such tensions cast doubt on whether the Constitution's supremacy is substantive or merely symbolic.

The resilience of Dicey's vision, however, shines through in property rights disputes under *Article 13*,[12] particularly in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors.*[13] In this case, Orang Asli villagers were evicted from ancestral lands without titles or compensation, prompting the High Court on appeal to recognise their customary land rights as "property" under *Article 13*. By holding that the deprivation of property must be accompanied by adequate compensation, the court reaffirmed that executive actions must conform to constitutional limits. In doing so, *Sagong bin Tasi* demonstrates that judicial review remains the indispensable check on power, preserving the substantive supremacy of the Constitution.

b. Equality Before the Law

Article 8(1) enshrines the ideal that all persons are equal before the law and are entitled to equal protection, regardless of race, religion or status.[14] However, Malaysia's unique social landscape permits race-based provisions and discretionary licensing regimes to operate beyond meaningful judicial scrutiny.[15] These carve-outs dilute the promise of substantive equality, thereby entrenching legal privileges for certain groups and allowing executive discretion to flourish unchecked. An outcome starkly at odds with Diceyan equality.

This underlying tension finds concrete expression in *Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia & Ors*.[16] The Federal Court considered whether a pregnancy-linked resignation clause in a private collective agreement contravened *Article 8(1).* In drawing a firm line, the court held that the equality guarantee applies only to State action or laws of general application, not to private contracts. By doing so, it safeguarded the supremacy of public law constraints on arbitrary powers while clarifying that the constitutional promise of equality remains confined to its proper public-law sphere.

c. Predominance of Legal Spirit

A principle of due process is guaranteed under *Articles 5 and 13*.[17] *Article 5(1)* proclaims that 'No person shall be deprived of his life or personal liberty save in accordance with law'.[18] In *Lee Kwan Woh v Public Prosecutor*,[19] the Federal Court made clear that 'law' must extend

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[10] Income Tax Act 1967 (Act 53), s 106(3).
[11] Security Offences (Special Measures) Act 2012 (SOSMA) (Act 747), s 4(5).
[12] Federal Constitution of Malaysia 1957, art 13.
[13] [2005] 6 MLJ 289.
[14] Federal Constitution of Malaysia 1957, art 8(1).
[15] R Paneir Selvam, 'Towards racial harmony through legal reform' *Focus Malaysia* (Selangor, 11 April 2025) <https://focusmalaysia.my/towards-racial-harmony-through-legal-reform> accessed 16 July 2025.
[16] [2005] 3 MLJ 681.
[17] Federal Constitution of Malaysia 1957, art 5 and 13.
[18] Federal Constitution of Malaysia 1957, art 5(1).
[19] *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301.

beyond mere statutory language to include the bare essential principles of natural justice. When the court found that waiving an appeal without affording the accused a fair hearing breached this procedural-fairness requirement, it reaffirmed that both legislative provisions and executive decisions are subject to judicial oversight, a clear demonstration of the living legal spirit in Malaysia's courts.

However, this promise of robust oversight collides with constraints on judicial independence. While *Article 121* enshrines the doctrine of separation of powers,[20] the 1988 amendment carves out administrative acts from full judicial review, curtailing the courts' ability to question executive decisions.[21] By insulating broad government actions from meaningful scrutiny, this reform risks turning judges into passive observers rather than active guardians of constitutional guarantees.[22] Together, the tensions between due process safeguards and a narrowed remit for judicial review reveal how Malaysia's framework, while echoing Diceyan ideals in theory, falters in practice, especially as rapid digitalisation places new strains on these age-old principles.

2.2 Constitutional Loopholes

Despite the FC's high-minded commitments, a series of legislative and doctrinal gaps have carved out spaces where executive power can operate with minimal judicial check. Chief among these are so-called ouster clauses, which are statutory provisions inserted into various Acts, notably in income tax[23] and national security legislation[24], that expressly bar courts from reviewing executive decisions. By depriving citizens of any meaningful avenue to challenge administrative actions, these clauses undermine the Constitution's promise of legal supremacy and effectively place certain spheres of governance beyond the reach of judicial scrutiny.

Equally troubling is the broad language of *Article 10(2),* which authorises restrictions on speech 'in the interest of security, public order or morality'.[25] In the absence of an explicit proportionality requirement, this provision has become a catch-all justification for curbing online expression. Courts have tended to interpret the threshold for censorship expansively, allowing the executive to wield Section 233 of the *CMA* as an indiscriminate measure against dissent.[26] In practice, vague terms such as 'indecent' or 'false' become vehicles for selective enforcement, chilling legitimate debate without any clear legal guardrails.

Finally, Malaysia's constitutional text remains silent on digital-age rights. There is no explicit guarantee of privacy against state surveillance, no statutory mandate for data-protection,

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[20] Federal Constitution of Malaysia 1957, art 121.

[21] Malaysian Bar, 'Amendment of Article 121(1) of the Federal Constitution' (Malaysian Bar, 2025) <https://www.malaysianbar.org.my/cms/upload_files/document/amendment%20of%20art%20121(1).pdf> accessed 16 July 2025.

[22] Richard SK Foo, 'Malaysia—Death of a Separate Constitutional Judicial Power' (2010) Singapore JLS 227 <http://www.jstor.org/stable/24870497> accessed 7 March 2025.

[23] Income Tax Act 1967 (Act 53), s 106(3).

[24] Security Offences (Special Measures) Act 2012 (SOSMA) (Act 747), s 4(5).

[25] Federal Constitution of Malaysia 1957, art 10(2).

[26] Communications and Multimedia Act 1998 (Act 588) (as amended by the Communications and Multimedia (Amendment) Act 2024), s 233.

and no requirement for algorithmic transparency. As digital systems proliferate, this absence of express safeguards leaves individuals vulnerable to invasive profiling, unexplained automated decisions, and potential abuse of their personal data. In sum, these loopholes reveal a constitutional framework ill-equipped to contend with the complexities of modern technology governance.

III. Pressing Tensions in Digital Governance

The basic concept of the rule of law in Malaysia is laid down, along with the general concerns with regard to the rule of law in the digital age. Now, the right question to ask is, what specifically are the algorithmic challenges to the rule of law? However, contrary to the rule of law, it must be acknowledged that algorithmic decision-making, by its very nature, whether deliberate or accidental, operates in the opaque shadows with data-driven mechanisms that are often unchallengeable.

Thus, the two rarely align, and it raises many critical issues: in the bigger picture, who holds an artificial intelligence ('AI') system accountable if it wrongly denies a person government aid? Are algorithmic decisions even contestable in court? As governmental surveillance expands beyond mere cameras and into biometric databases and predictive analytics, do constitutional guarantees and protections, as outlined above, extend to digital privacy? Evidently, these pressing questions reveal a growing tension between technological efficiency and fundamental liberties.

With that said, this study would like to assert that Malaysia's current legal framework is critically ill-equipped to regulate algorithmic governance, leaving dangerous gaps in not only judicial oversight and digital rights but also general accountability. This study encompasses case studies on MyDigital ID, AI-assisted policing, the controversial CMA, anti-fake news laws, and the PADU system, highlighting the risks of a future with an unchecked algorithmic state. By examining the constitutional safeguards surrounding digital governance, this study calls for a new era of digital constitutionalism. One that not only fully embeds AI accountability and privacy rights, but also algorithmic transparency into Malaysia's legal system.

3.1 AI in Governance: Enhancing or Undermining Legality?

The future integration of AI into administrative governance promises efficiency and improved public service delivery. However, it also raises legal concerns regarding the rule of law, privacy rights, and algorithmic bias. As Malaysia advances its digital governance, this study finds that the inadequacy of its legal safeguards in the integration of AI into administrative governance warrants public scrutiny.

Among the safeguards neglected in the integration of AI is the absence of human oversight in all algorithmic decision-making, particularly in life-and-death areas like administrative rulings, eligibility for government aid, and automated law enforcement actions. These detrimental oversights, while done in the name of operational efficiencies, ultimately undermine the core principle of natural justice. The lack of safeguards can be seen in cases such as the MyDigital ID project and the implementation of AI-powered predictive policing.

a. MY Digital ID: Privacy and Data Security Concerns

Malaysia's MyDigital ID, integrated within the broader MyDIGITAL transformation initiative, seeks to improve citizen engagement with government agencies via a secure digital identity verification process. While this aligns with global trends toward digital transformation, citizens remain justly sceptical due to recent governmental leaks and poor policy implementations associated with privacy and data protection. The Malaysian government has attempted to ease concerns surrounding MyDigital ID by asserting that it will not attempt to create a central repository of sensitive information.[27] However, extensive leaks and breaches surrounding other government-operated sites in recent years give citizens more than enough reason to challenge such a claim.

For instance, while government-operated databases should have security protocols in place, cyber breaches still exist, such as source code leaks of voter databases and millions of ringgit-worth of Malaysian citizens' personal information exposed on an international gossip forum[28]. In addition, law professor, Dr Pavitira Manogaran, notes that once someone's biometric data gets exposed, it cannot be reinstated into the system like a password. Thus, citizens' biometrics are more likely to be used for unethical and illegal gains.[29] Unfortunately, this is compounded by the reality that no data protection act limits governmental authority over such data, nor does it keep third-party access at bay. Therefore, although the MyDigital ID project could potentially serve a reliable need from an administrative standpoint, without legal recourse, as this study suggests, it creates a situation for violation of personal freedom rights under *Articles 5 and 13 of the FC.* Therefore, logic calls for a true data protection act with proper enforcement to safeguard citizens' concerns.

b. AI-Powered Predictive Policing: Bias and Unconstitutional Surveillance

Unbeknownst to many, Malaysia has previously attempted AI predictive policing, relying upon an analytical review of data to assess where and when crimes are most likely to occur, and where officials should intervene prior to the incident.[30] Yet, such advancement would pose major constitutional and ethical challenges. Under the promise of enhancing law enforcement efficiency and objectivity, AI-powered predictive policing systems designed to analyse historical data to forecast where crimes are likely to occur or who might commit them have gained momentum in several urban areas. However, when these systems are introduced without adequate legal safeguards, institutional oversight, or transparency

[27] 'MyDigital ID: Does Malaysia's National Digital ID Store Your Personal Data? Here's MIMOS' Explanation' *Malay Mail* (Kuala Lumpur, 6 December 2023) <https://www.malaymail.com/news/malaysia/2023/12/06/mydigital-id-does-malaysias-national-digital-id-store-your-personal-data-heres-mimos-explanation/106159> accessed 7 March 2025.

[28] Izzat Najmi Abdullah, 'Alleged MyKad Data Leak Raises Concerns over Financial Fraud' (4 December 2024) <https://fintechnews.my/47086/cyber-security/mykad-data-leak-raises-c> accessed 7 March 2025.

[29] Pavitira Manogaran, 'Why Are Malaysians Reluctant to Register for MyDigital ID? A Reality Check on Data Privacy' (*Three Hundredth*, 23 February 2025) <https://threehundredth.com/why-are-malaysians-reluctant-to-register-for-mydigital-id-a-reality-check-on-data-privacy/> accessed 7 March 2025.

[30] Nurus Sakinatul Fikriah Mohd Shith Putera and others, 'Artificial Intelligence-Powered Criminal Sentencing in Malaysia: A Conflict with the Rule of Law' (2022) 7(17) Environment-Behaviour Proceedings Journal 441 <https://ebpj.e-iph.co.uk/index.php/EBProceedings/article/view/3813/2118> accessed 10 March 2025.

requirements, they risk replicating and even amplifying the very flaws they aim to eliminate.[31]

Unlike traditional police decision-making, which often relies on human judgment and case-by-case evaluation, predictive policing systems derive their recommendations from historical crime data, arrest records, and other socio-economic indicators. However, these data sources are often shaped by decades of biased law enforcement practices. As a result, the algorithms 'learn' these biases and reproduce them at scale.[32] For instance, if a district historically experiences over-policing due to racial profiling or poverty-linked patrolling, the algorithm will interpret this as a hotspot, regardless of whether actual crime rates justify the designation. The result is a feedback loop where marginalised communities, especially the urban poor or B40 groups, are disproportionately subjected to surveillance, checks, and enforcement actions.

This study is particularly concerned that AI could run rampant via facial recognition and big data collection efforts contrary to *Articles 5 and 8 of the FC*. Beyond that, the broader implication of this technology is the creation of accountability gaps, that is, given the opaque nature of AI decision-making, who holds the final blame or responsibility for errors that lead to wrongful prosecution? Therefore, it is asserted that without an explicit legal framework ensuring judicial oversight and bias mitigation measures, predictive policing risks morphing into unconstitutional mass surveillance rather than a tool for genuine crime prevention.[33]

c. Legal Analysis: Is Malaysia's Legal Framework Sufficient?

The introduction of Malaysia's AI governance standards, such as the Artificial Intelligence Governance and Ethics ('AIGE') framework, is a good initial step towards guaranteeing the responsible deployment of AI in Malaysia.[34] However, the standards remain non-binding since they are not endowed with legal force that would make public or private actors accountable for AI breaches.[35] As things stand, Malaysian laws do not touch on issues such as algorithmic responsibility for AI or provide any redress for individuals whose rights have been impacted by AI decision-making.[36] That stands in stark contrast to the European

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[31] Farlina Said and Farah Nabilah, 'AI Governance in Malaysia: Charting a Path Forward' (*ISIS Malaysia*, December 2024) 17 <https://www.isis.org.my/wp-content/uploads/2024/12/AI-Governance.pdf> accessed 8 June 2025.
[32] Ibid.
[33] Ibid.
[34] R Paneir Selvam, 'The EU AI Act as a Model for Malaysia's AI Safety Framework – Part 1' *Focus Malaysia* (Selangor, 31 December 2024) <https://focusmalaysia.my/the-eu-ai-act-as-a-model-for-malaysias-ai-safety-framework-part-1/> accessed 10 March 2025.
[35] 'Malaysia's Artificial Intelligence Governance and Ethics (AIGE) Guidelines' (*Deloitte*, n.d.) <https://www2.deloitte.com/content/dam/Deloitte/sg/Documents/risk/sea-risk-my-aige-guidelines.pdf> accessed 10 March 2025.
[36] G Vijay Kumar, 'Insight into Malaysia's Newly Launched AI Governance & Ethics Guidelines' (*Chambers and Partners*, 11 December 2024) <https://chambers.com/articles/insight-into-malaysia-s-newly-launched-ai-governance-ethics-guidelines> accessed 10 March 2025.

Union's General Data Protection Regulation ('GDPR')[37], which provides individuals with a 'right to explanation' of AI-based decisions impacting their rights.

In the absence of equivalent provisions, Malaysian citizens can be subjected to impenetrable algorithmic decisions without effective means of appeal. This study strongly believes that a far-reaching legislative framework, potentially in the form of a Digital Bill of Rights, is needed to place citizens' rights at the heart of AI-driven procedures. This would ensure that technological advancements cannot occur at the expense of fundamental legal protections, thus upholding the rule of law in an algorithmic era.

3.2 Social Media Regulations: A Delicate Balancing Act

In the internet age, social media regulation poses a complex policy dilemma: how does one limit evil on the internet while still gripping on core fundamental freedoms? Malaysia's evolving legal environment for online regulation is emblematic of this conundrum marked by growing complaints against state excess and arbitrary application. The policy of content regulation by the government, particularly by controversial legislations such as the Communications and Multimedia Act (as amended by the Communications and Multimedia (Amendment) Act 2024) ('CMA') and Anti-Fake News Acts, has left people questioning whether such Acts are performing their intended purposes or are being utilised as control tools. The judiciary, as the protector of constitutional liberties, has a fundamental role in interpreting this legislation. However, the extent to which the courts have been effective in protecting free expression is an unknown factor.

a. Controversial Legislation: CMA & Anti-Fake News Laws

Malaysia's increasingly stringent regulation of social media, exemplified by *Section 233 of the CMA*,[38] raises significant legal questions concerning the permissible limits of state intervention on the freedom of expression. *Section 233* criminalises online communications deemed 'indecent, obscene, false, menacing, or grossly offensive'. While ostensibly targeting cyber harassment and disinformation, the provision's excessively broad terminology grants wide prosecutorial discretion. This has facilitated selective enforcement which disproportionately targets political activists, journalists, and government critics, while often failing to address similar conduct by politically aligned actors.[39] The 2024 amendments exacerbate these concerns by increasing penalties and expanding regulatory powers.[40]

This discretion operates within a constitutional framework that permits speech restrictions.

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[37] 'What Is GDPR?' (*GDPR.eu*, n.d.) <https://gdpr.eu/what-is-gdpr/> accessed 10 March 2025.

[38] Communications and Multimedia Act 1998 (Act 588) (as amended by the Communications and Multimedia (Amendment) Act 2024), s 233.

[39] Deepak Pillai and others, 'An Overview of Key Changes Introduced by the CMA Amendment Bill' (*Christopher Lee and Ong*, January 2025) <https://www.christopherleeong.com/wp-content/uploads/2025/01/2025-01_An-Overview-of-Key-Changes-Introduced-by-the-CMA-Amendment-Bill.pdf> accessed 20 March 2025.

[40] 'Malaysia: Government Stifles Expression, Increases Online Controls, and Facilitates Transnational Repression' (*CIVICUS Monitor*, 18 January 2025) <https://monitor.civicus.org/explore/malaysia-government-stifles-expression-increases-online-controls-and-facilitates-transnational-repression/> accessed 20 March 2025.

Article 10(2)(a) of the FC authorises Parliament to impose restrictions deemed necessary or expedient for national security, public order, or morality. However, such constitutionally permissible restrictions are not absolute; they must conform to rule of law principles demanding legislative clarity, proportionality, and fairness in enforcement. The application of *Section 233* demonstrates a conspicuous absence of these essential safeguards, rendering it vulnerable to abuse and undermining its constitutional legitimacy.

Parallel concerns also arise from the government's persistent efforts to regulate 'fake news'. Although the standalone *Anti-Fake News Act 2018* was repealed in 2019,[41] its core enforcement mechanisms were effectively revived through exceptional measures.[42] Initially justified as a way to deal with disinformation on national security and public order issues, the Act has been highly criticised for its potential politicisation.[43] During the 2021 National Emergency, the *Emergency (Essential Powers) Ordinance 2021 (EO 2021)*[44] reinstated criminal penalties for 'fake news' by inserting new offences directly into the *Penal Code* and *CMA*.[45] This bypassed parliamentary scrutiny and relied on similarly broad definitions, demonstrating how emergency powers can circumvent democratic checks.[46]

Crucially, the *CMA* has now embedded additional enforcement powers within its framework. The 2025 amendments inserted a new *211A*, empowering the Malaysian Communications and Multimedia Commission to direct a content applications service provider to suspend its services where it has contravened content-related provisions, breached license conditions relating to content, or failed to comply with relevant Ministerial or Commission instruments.[47] In parallel, amendments to *section 233* expanded and clarified offences relating to "grossly offensive, antecedent, obscene, false, or menacing" online content, with significantly increased penalties.[48] While these changes fall short of creating an actual standalone "fake news" offence akin to repealed Anti-Fake News Act 2018, they nevertheless consolidate similar regulatory tools within the *CMA* framework. The combination of excessively broad statutory language, enhanced sanctioning powers, and limited procedural safeguards remains to create significant issues to the freedom of expression under *Article 10*, as the government still has wide discretion in defining and addressing prohibited speech.

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[41] Anti-Fake News Act 2018 (Malaysia) (Act 803) (later repealed by the Anti-Fake News (Repeal) Act 2019 (Malaysia)).

[42] 'Malaysia: Fake News Ordinance Threatens Freedom of Expression' (*ARTICLE 14,* 15 March 2021) <https://www.article19.org/resources/malaysia-fake-news-ordinance/> accessed 20 March 2025.

[43] Lasse Schuldt, 'Malaysia's Fake News Law: An Authoritarian Wolf in Democratic Sheep's Clothing?' (*Verfassungsblog*, 13 April 2021) <https://verfassungsblog.de/malaysia-fake-news/> accessed 20 March 2025.

[44] Emergency (Essential Powers) Ordinance 2021 (Malaysia).

[45] Imran Shamsunahar, 'Malaysia's emergency ordinance and the clampdown on public discourse' *IDEAS* (Kuala Lumpur, 11 June 2021) <https://www.ideas.org.my/malaysias-emergency-ordinance-and-the-clampdown-on-public-discourse> accessed 16 July 2025.

[46] Shannon Teoh, 'Malaysia approves controversial law allowing govt, states to bypass lawmakers in fund allocations' *The Straits Times* (Kuala Lumpur, 31 March 2021) <https://www.straitstimes.com/asia/se-asia/malaysia-approves-controversial-law-allowing-govt-states-to-bypass-lawmakers-in> accessed 16 July 2025.

[47] Communications and Multimedia (Amendment) Act 2025 (A1743), ss 211A.

[48] Communications and Multimedia (Amendment) Act 2025 (A1743), ss 233.

b. The Role of Courts in Digital Governance

In the bigger picture, judicial interpretation has been critical in determining the constitutionality of social media legislation.[49] The courts have had to weigh the government's interest in maintaining public order against the constitutional right to free expression, frequently navigating difficult legal and political terrain.[50] Even historical data shows that Malaysian courts have taken varied approaches, sometimes upholding speech restrictions in the interest of national security[51], while in other cases recognising the importance of free expression in a democratic society.[52] Interestingly, cases challenging *Section 233 of the CMA* have encountered difficulties that tend to result in judgments prioritising literal statutory interpretation at the expense of substantive constitutional reasoning.[53] While legally accurate, this fails to address broader concerns about the impact of the law on democratic discourse and the threat of arbitrary enforcement.

Other countries, such as the United Kingdom[54] and India[55], have been more liberal in their treatment of digital free speech. UK courts have upheld the doctrine of proportionality to make sure that rules on the net are not unduly invasive and applied equally. The Indian Supreme Court's landmark ruling in *Shreya Singhal v. Union of India (2015)*[56] struck down *Section 66A of the Information Technology Act 2000 ('ITA')*[57] as it was ambiguous and had a chilling effect on speech.[58] These judgments confirm the need for judicial review to avoid legislative excesses. Malaysian courts have, nonetheless, not yet adopted a strong proportionality test in cases of digital rights. This study believes that future reforms must incorporate more specific statutory definitions, closer due diligence by the judiciary, and procedural safeguards to guarantee that regulation does not come at the expense of fundamental freedoms.

A concrete illustration of Malaysia's restrained proportionality approach can be seen in *Syarul Ema Rena binti Abu Samah v Pendakwa Raya.*[59] Here, the High Court engaged in a

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[49] Congressional Research Service, 'The Supreme Court and Social Media: Government Officials' Use of Platforms under First Amendment Scrutiny (LSB11146)' (US Congress, March 2024) <https://crsreports.congress.gov/product/pdf/LSB/LSB11146> accessed 22 March 2025.
[50] Ibid.
[51] *Prosecutor v Adam Adli Abd Halim* [2014] 4 CLJ 881.
[52] *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 1 AMR 837.
[53] *Syarul Ema Rena binti Abu Samah v Pendakwa Raya* [2018] MLJU 1128.
[54] Timothy Pinto, 'The Online Safety Act's Approach to Protecting Freedom of Expression' (*Taylor Wessing*, 2 November 2023) <https://www.taylorwessing.com/en/interface/2023/the-uks-online-safety-act/the-online-safety-acts-approach-to-protecting-freedom-of-expression> accessed 22 March 2025.
[55] Aviral Srivastava, 'Navigating the Fine Line: Bombay High Court's Landmark Ruling on Intermediary Liability and Free Speech in Digital India' (*IPRMENTLAW*, 28 October 2024) <https://iprmentlaw.com/2024/10/28/navigating-the-fine-line-bombay-high-courts-landmark-ruling-on-intermediary-liability-and-free-speech-in-digital-india/> accessed 22 March 2025.
[56] *Shreya Singhal v Union of India* (2015) AIR 2015 SC1523 [India].
[57] Information Technology Act 2000, s 66A [India].
[58] Shelal Lodhi Rajput, 'Unravelling the Bombay High Court's Ruling on Freedom of Speech and Expression in the Digital Age' (*IACL Blog*, 21 November 2024) <https://blog-iacl-aidc.org/2024-posts/2024/11/21/unravelling-the-bombay-high-courts-ruling-on-freedom-of-speech-and-expression-in-the-digital-age> accessed 22 March 2025.
[59] *Syarul Ema Rena binti Abu Samah v Pendakwa Raya* [2018] MLJU 1128.

rudimentary balancing test when upholding *Section 233(1)(a) of the CMA*[60] against constitutional challenges. While acknowledging free speech protections under *Articles 8 and 10,*[61] the court deferred broadly to parliamentary intent, accepting that restrictions on 'jelik' (offensive) online content were proportionate to maintaining public order and morality. Notably, it dismissed concerns regarding vagueness and distinguished from the Indian Supreme Court's landmark *Shreya Singhal* ruling, which struck down a similar provision for overbreadth and chilling effects, by emphasising 'local context'. This contrasts sharply with *Shreya Singhal's* rigorous, rights-centric proportionality analysis, where the court demanded precision in statutory language and prioritised expressive liberty against speculative state interests. This contrast underscores how Malaysia's current jurisprudence applies proportionality superficially, focusing on rational connection rather than necessity or even minimal impairment. Consequently, as seen in *Syarul Ema Rena*, constitutional reasoning remains subordinate to literal statutory interpretation, leaving digital rights vulnerable to ever-expansive state discretion.

c. International and Domestic Support

In recent years, these issues have attracted international scrutiny. In its 2022 Universal Periodic Review, the United Nations Human Rights Council called on Malaysia to repeal or revise laws, including *Section 233*, that can be used to criminalise legitimate expression.[62] The call echoes similar recommendations from the Human Rights Commission of Malaysia (SUHAKAM), which has urged Parliament to reform online speech laws in line with international human rights norms.[63]

The approach of comparative jurisdictions offers clear guidance. The UK's proportionality test, developed under the *Human Rights Act 1998*,[64] requires courts to consider whether restrictions on rights pursue a legitimate aim, are rationally connected to that aim, and impair the right no more than necessary.[65] If Malaysian courts were to adopt such a framework, many *Section 233* prosecutions would likely fail to satisfy the threshold. To safeguard the rule of law in the digital sphere, Malaysia must narrow the scope of *Section 233* by clearly defining its operative terms, removing vague language, and ensuring that offences require demonstrable harm rather than a subjective offence. Additionally, legal reforms should incorporate a similar proportionality requirement either through judicial reinterpretation or statutory amendment, compelling courts to weigh the state's interest against the individual's right to expression.

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[60] Communications and Multimedia (Amendment) Act 2025 (A1743), s 233(1)(a).

[61] Federal Constitution of Malaysia 1957, art 8 and 10.

[62] Centre for Independent Journalism and others, 'Universal Periodic Review Stakeholder Report' (CIJ Malaysia 2023) 2, 6 <https://cijmalaysia.net/wp-content/uploads/2023/10/FINAL-2-UPR-FOR-REPORT.pdf> accessed 15 June 2025.

[63] 'SUHAKAM Firmly Upholds the Principles of Freedom of Expression and Opinion' (*SUHAKAM*, 9 August 2025) <https://suhakam.org.my/category/press-statement/#:~:text=SUHAKAM%20firmly%20upholds%20the%20principles%20of%20freedom,Human%20Rights%20(UDHR)%20and%20the%20Federal%20Constitution.&text=The%20Malaysian%20Communications%20and%20Multimedia%20Commission%20(MCMC),Communications%20and%20Multimedia%20Act%201998%20(Act%20588)> accessed 15 June 2025.

[64] Human Rights Act 1998 (UK).

[65] Larry Laudan, 'The Burden of Proof: Why the Prosecutor Should Bear It' (2013) University of Hong Kong Faculty of Law Research Paper No. 2013/048 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393488> accessed 15 July 2025.

Moreover, structural safeguards must be introduced. Establishing an independent digital rights ombudsperson could serve as a reliable neutral mechanism for reviewing speech-related complaints, ensuring that enforcement is fair, balanced, and free from political interference. Such an institution would not only strengthen public trust but also uphold the spirit of constitutional guarantees under *Article 10*. Ultimately, reforming *Section 233* is not simply a matter of legal drafting; it is a litmus test for Malaysia's commitment to democratic governance in the digital era. If left unaddressed, the current regime risks entrenching a culture of fear and silence, eroding both civil liberties and the institutional legitimacy of the law itself.

3.3 Big Data Collection & Processing: Privacy Concerns

With data being labelled the 'new oil'[66] in a world where governments are increasingly using large-scale data collection, pressing questions about privacy, security, and individual agency arise. For as much as big data analytics can streamline policymaking and service delivery, it also creates new risks if left unregulated. It must be stressed that, without robust legal safeguards and public oversight, the accumulation of large amounts of personal data on government-held databases can undermine civil liberties, particularly where citizens have no effective recourse against data misuse or overreach.

a. The PADU Database: A Tool for Economic Planning or a Risk to Privacy?

Introduced in 2024, PADU is a centralised socio-economic database intended to streamline service delivery, especially targeting subsidies and welfare.[67] Yet this centralisation, while efficient in theory, poses significant legal and constitutional risks that highlight deeper frictions between digital governance and the rule of law.

First, the architecture of PADU presents what technologists term a 'single point of failure', a centralised repository of sensitive personal information that becomes a prime target for cyberattacks.[68] This fear is not theoretical. In December 2024, a major breach involving the MyKad system underscored the vulnerabilities of centralised government databases.[69] In PADU's case, the aggregation of health records, income brackets, household structures, and biometric identifiers into one system magnifies both the risk of unauthorised access and the potential for misuse, be it for surveillance, discrimination, or commercial exploitation.

Second, the issue of consent and individual agency remains conspicuously absent. Unlike many data systems governed by the private sector, which are subject to the *Personal Data*

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[66] Nisha Talagala**,** '"Data as the New Oil" Is Not Enough: Four Principles for Avoiding Data Fires' (*Forbes*, 2 March 2022) <https://www.forbes.com/sites/nishatalagala/2022/03/02/data-as-the-new-oil-is-not-enough-four-principles-for-avoiding-data-fires/#> accessed 24 March 2025.

[67] PADU, 'Pangkalan Data Utama (PADU) Official Website' (*Government of Malaysia*, n.d.) <https://www.padu.gov.my> accessed 24 March 2025.

[68] 'Is PADU Malaysia's Database Already Outdated?' (*Big Domain Blog*, 2024) <https://blog.bigdomain.my/padu-malaysia-database-is-outdated/> accessed 10 June 2025.

[69] Izzat Najmi Abdullah, 'Alleged MyKad Data Leak Raises Concerns over Financial Fraud' (4 December 2024) <https://fintechnews.my/47086/cyber-security/mykad-data-leak-raises-c> accessed 10 June 2025.

Protection Act 2010 (PDPA), PADU operates in a legal vacuum. The *PDPA*, even with recent amendments, applies strictly to private entities, leaving government-driven data initiatives like PADU unregulated. As a result, citizens have no legal entitlement to be informed about the nature and scope of data collected, nor any opt-out mechanism or redress avenue in the event of misuse.[70] This gap creates a troubling asymmetry: the state holds vast data on individuals, yet individuals lack corresponding rights over how their data is used.[71]

This concern has sparked significant public criticism and legal debate since PADU's implementation. Cybersecurity experts and civil society groups have highlighted how the system's lack of explicit opt-in consent, absence of data minimisation principles, and the opaque manner in which personal data is collected and managed pose serious threats to individual privacy.[72] Critics argue that the government's exemption from the *PDPA* creates a regulatory blind spot, leaving citizens with no clear avenues for redress if their data is mishandled or leaked.[73]

Prominent legal and civil society groups, such as Pergerakan Tenaga Akademik Malaysia (GERAK) and Persatuan Industri Komputer dan Multimedia Malaysia (PIKOM), have publicly called for urgent reforms, including transparency, a clear legal framework, and the extension of *PDPA* protections to government-held data.[74] Legal experts further note that because PADU is currently exempt from the *PDPA*, no statutory liability protects individuals in the event of a breach.[75] These critiques emphasise a broader institutional reluctance to uphold data privacy under *Articles 5 and 13*. While international jurisprudence increasingly recognises informational privacy,[76] Malaysia remains hesitant to reinterpret these constitutional rights in a digital context.

b. Lack of Comprehensive Protection for Government-Held Data

The PADU example exposes not only legal loopholes but also conceptual issues in understanding what liberty and autonomy mean in the digital age. While traditional constitutional rights are tied to physical and actual tangible harms, algorithmic governance

[70] 'PADU: Big Data or Big Brother?' (*Malaysia Now,* 25 March 2024) <https://www.malaysianow.com/news/2024/03/25/padu-big-data-or-big-brother> accessed 24 March 2025.
[71] Ibid.
[72] Izzul, Ikram, 'PADU Database Raises Concerns' *The Edge Malaysia* (Petaling Jaya, 25 January 2024) <https://theedgemalaysia.com/node/697502> accessed 12 June 2025.
[73] Ibid.
[74] 'GERAK Raises Alarm over PADU Personal Information Database' (Aliran, 2024) <https://m.aliran.com/civil-society-voices/gerak-raises-alarm-over-padu-personal-information-database> accessed 12 June 2025; 'PADU Security Breach: PIKOM Urges Govt to Engage Crucial External Expertise' (*The Vibes*, 6 January 2024) <https://www.thevibes.com/articles/news/100580/padu-security-breach-pikom-urges-govt-to-engage-crucial-external-expertise> accessed 12 June 2025.
[75] Alexander Wong, 'Fahmi: Malaysia Govt Guarantees PADU Data Security' (*SoyaCincau*, 24 February 2024) <https://soyacincau.com/2024/02/24/fahmi-malaysia-govt-guarantee-padu-data-security/> accessed 12 June 2025.
[76] Hannah Humble, 'International Law, Surveillance and the Protection of Privacy' (2021) 25 The International Journal of Human Rights 1 <https://gala.gre.ac.uk/id/eprint/29181/1/29181%20HUMBLE_International_Law_Surveillance_and_the_Protection_of_Privacy_%28AAM%29_2020.pdf> accessed 12 June 2025.

and data surveillance inflict much subtler and systemic forms of control that are often without an immediate or visible injury. For instance, data collected without consent can be used to create predictive profiles that inform eligibility for government assistance or monitoring by enforcement agencies. These algorithmic outputs are opaque by design and may encode biases that disproportionately affect marginalised communities, yet the legal system offers no meaningful route to challenge or audit such processes.

From a rule-of-law perspective, the core issue is more so one of accountability. The concentration of data power in the state, coupled with the absence of oversight mechanisms, not only enables arbitrary decision-making but also undermines the principle of legal transparency. In Diceyan terms, where the rule of law demands that all administrative acts be subject to law and reviewable by courts, PADU operates as a shadow architecture beyond constitutional reach. This is compounded by the absence of any legislative or judicial requirement for algorithmic explainability.[77] Citizens have no right to know how decisions affecting their welfare are made, let alone to contest them.

Further, PADU's risks extend into the political domain. There is a growing concern that such a centralised tool, while ostensibly neutral, can be weaponised for political ends, such as profiling opposition supporters, monitoring dissent, or influencing voter behaviour under the guise of public service targeting. Without strong data protection laws, judicial safeguards, or independent oversight bodies, the architecture of PADU enables potential abuses of power under the cover of efficiency. What PADU represents, then, is not merely a technological upgrade but a constitutional stress test. It asks whether Malaysia's legal system, rooted in analogue-era conceptions of liberty and state power, can adapt to the realities of automated governance. The current answer, reflected in weak institutional responses, outdated statutes, and a passive judiciary, suggests a significant misalignment between digital governance practices and the principles of the rule of law.

It is evident that correcting this misalignment requires more than patchwork regulatory fixes. It calls for a reconceptualisation of rights in the digital age, one that treats data privacy, algorithmic accountability, and informational self-determination as constitutional necessities rather than optional extras. This means extending the *PDPA's* reach to public-sector databases, recognising data privacy as a fundamental right under *Article 5*,[78] and obliging the government to enact clear, enforceable safeguards for consent, transparency, and redress. Ultimately, the PADU system reveals a deeper truth about Malaysia's digital trajectory: without proactive legal reform, the machinery of algorithmic governance may entrench, rather than dismantle, inequality and opacity. Therefore, in the name of safeguarding the rule of law in this new terrain, this study observes vigilance, a willingness to read old rights in new contexts, and to hold the state to account in all domains, digital or otherwise.

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[77] 'The Personal Data Protection (Amendment) Bill 2024: An Analysis and Upcoming Developments' (*Christopher & Lee Ong*, 25 September 2024) <https://www.christopherleeong.com/viewpoints/the-personal-data-protection-amendment-bill-2024-an-analysis-and-upcoming-developments/> accessed 25 March 2025.

[78] Federal Constitution of Malaysia 1957, art 5.

IV. Reform Proposals

4.1 Constitutional Amendments In The Digital Age

As Malaysia advances into the digital era, with the ever-growing integration of technologies like AI and big data into the field of governance, it set out to ponder a future seminal challenge: keeping these innovations aligned with the rule of law. The imperative is that technological advancements should not unravel the rule of law, but bolster it with informed legal reforms. Therefore, this study recommends several essential reforms to safeguard constitutional rights in the digital world.

a. A Digital Bill of Rights?

The pace of digital transformation necessitates a complete re-examination of constitutional rights to explicitly protect digital freedoms. This study proposes the inclusion of provisions in the FC to enshrine digital rights, including privacy, data protection, and the right to transparency in digital decision-making. These rights should encompass freedom from blanket state surveillance and recognition of informational self-determination as a protected liberty. Given the wide powers currently exercised without clear citizen safeguards, constitutional recognition would provide the judiciary with a firmer footing to interpret and apply protections under *Articles 5 and 8.*

In comparison, the European Union's GDPR is a relevant point of reference, entrenching wide-ranging data protection rights like access, rectification, and erasure of personal data. Further, it imposes transparency and accountability on data processors, something Malaysia's current legal framework still falls short of. Malaysia's *PDPA* has been roundly criticised for being narrow in scope, especially for its exclusion of government-held data. This exclusion creates a huge loophole in safeguarding citizens' personal data as the state is free to gather and process information without adequate regulation.

b. Remove Ouster Clauses

Ouster clauses, statutory provisions that prevent judicial review of executive decisions, present a serious threat to the principle of legal accountability. While originally justified on grounds of administrative efficiency or national security, these clauses now undermine one of the most critical elements of the rule of law: that the courts must be able to scrutinise executive action. This is especially dangerous in the context of digital governance where decisions such as the denial of digital subsidies, algorithmic profiling, or administrative enforcement based on blurry datasets can directly impact citizens' lives and liberties.

When these decisions are shielded from judicial review by ouster clauses, individuals are left without effective remedies and constitutional guarantees lose their practical meaning. In the digital age, where administrative decisions are increasingly automated and potentially flawed due to biased data or technical errors, judicial review serves as a vital mechanism to identify and correct injustices. In particular, *section 106(3) of the Income Tax Act 1967*,[79] which bars courts from questioning tax assessments, and *section 4(5) of the Security*

[79] Income Tax Act 1967 (Act (Malaysia), s 106(3).

Offences (Special Measures) Act 2012,[80] which precludes any challenge to preventive detention orders, should be singled out for immediate repeal.[81] This reform would not only restore balance among the branches of government but also re-establish trust in the legal system by ensuring that all executive actions, especially those involving digital tools, remain within the bounds of constitutional scrutiny.

c. Strengthen Article 10

Article 10 of the FC guarantees the freedom of speech, but its effectiveness is diluted by the sweeping powers granted under *Article 10(2)(a)*, which permits Parliament to restrict speech in the interest of security, public order, or morality. The absence of a clear proportionality test has led to vague and inconsistent enforcement, particularly in the digital realm, where online speech is often met with punitive action under laws like *Section 233 of the CMA*. To address this, *Article 10* should be amended to incorporate a proportionality clause requiring that any restriction on free speech must be necessary to achieve a legitimate aim, proportionate to the harm, and represent the least restrictive means available.

Such a reform would align Malaysia's legal standards with those of mature democracies such as the United Kingdom and India, both of which have judicially developed proportionality frameworks to assess speech restrictions. A constitutional proportionality test would also empower Malaysian courts to engage in substantive rights-balancing, enabling more nuanced judgments that protect both public order and individual liberties. In the age of digital communication, where misinformation and hate speech coexist with legitimate dissent and activism, it is crucial that the law is not appliedly indiscriminately. By embedding proportionality into *Article 10*, Malaysia can build a legal regime that upholds freedom of expression while still allowing targeted, reasonable interventions against harmful content.

4.2. The Role of the National AI Initiatives

Malaysia's establishment of a National AI Office is a strategic move towards centralised control of AI. It is tasked with formulating policies, coordinating AI initiatives, and establishing a regulatory framework to ensure ethical use of AI.[82] It has also introduced a five-year technology action plan and an AI code of ethics to address ethical concerns on the use of AI.

However, the formation of such programmes depends on whether they are couched in harmony with constitutional principles and are adaptable enough to keep up with the rapidly evolving digital landscape. A national AI policy is a welcome move, but the lack of clear legal safeguards is an open vulnerability. Without strong legislative backing, such programmes can become mere recommendations instead of binding commitments for AI

[80] Security Offences (Special Measures) Act 2012 (Malaysia), s 4(5).

[81] Richard SK Foo, 'Malaysia—Death of a Separate Constitutional Judicial Power' (2010) Singapore JLS 227 <http://www.jstor.org/stable/24870497> accessed 7 March 2025.

[82] 'Malaysia Launches National AI Office, Policy Regulation' (*Reuters,* 12 December 2024) <https://www.reuters.com/technology/artificial-intelligence/malaysia-launches-national-ai-office-policy-regulation-2024-12-12/> accessed 28 March 2025.

developers and government agencies. Thus, constant monitoring and revision of AI policies are necessary to prevent potential abuses. This study advocates for a formalised framework of AI governance to ensure that technological advancement serves the public good without compromising fundamental rights.

V. Conclusion

The integration of digital technology into governance is both unavoidable and irreversible, in a way raising a constitutional watershed issue. As AI and big data play an ever-growing role in policy implementation, Malaysia stands at a juncture: will our jurisprudence evolve to safeguard basic rights, or will unchecked digital governance erode them?

Without robust constitutional safeguards, unrestricted development of AI and digital surveillance can undermine due process, privacy, and judicial independence. Algorithmic decision-making, if left unchecked, may supersede democratic deliberation, concentrating power in opaque systems rather than accountable institutions. But fret not, Malaysia is not without remedy. By incorporating digital rights into the FC, it can harmonise innovation with constitutionalism. Thus, the issue now is not whether to embrace digital governance but whether our rule of law is robust enough to uphold justice amidst technological turmoil.

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Should Malaysia Mandate a Minimum Remuneration for Pupils in Legal Chambers?

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Abstract

Pupil remuneration in Malaysia remains a pressing but under-addressed issue. The *Legal Profession Act 1976 (LPA)* does not clearly define the minimum wage or benefits to which pupils are entitled. As a result, many pupils are paid minimal amounts, sometimes below the national minimum wage, and are left struggling with the rising cost of living. Without proper legal protection, this lack of clarity allows some law firms to exploit pupils under the guise of fulfilling vague statutory obligations.

This article examines the current legal framework surrounding pupil remuneration in Malaysia and argues that the provisions under the LPA are ambiguous and inadequate. It draws attention to the lack of specific amounts detailing minimum remuneration and the absence of enforcement mechanisms, both of which contribute to ongoing exploitation.

The article explores the idea of legislative reform that would expressly outline a minimum wage for pupils and highlights the efforts that have been made to advocate for minimum remuneration for pupils in Malaysia. Establishing a statutory minimum wage would not only protect pupils from exploitation but also preserve the integrity of the legal profession in the country.

In conclusion, to support this proposal, it includes a comparative analysis with jurisdictions such as the United Kingdom and Hong Kong, where clearer regulations have improved fairness and transparency in pupillage arrangements.

Keywords: Minimum Remuneration, Pupil, The Legal Profession Act 1976 (LPA)

I. Introduction

Before we delve into the topic of remuneration for pupils in Malaysia, it is important to first understand what pupillage entails.

1.1 The Definition of Pupillage

To understand what ‘pupillage’ is and who a ‘pupil’ is, we must first understand how one becomes a certified lawyer in Malaysia.

First of all, before going through the pupillage period, you must first obtain a Bachelor of Laws degree (LLB). If you graduate from a public university in Malaysia, the LLB alone is sufficient.

However, if you graduate from a private university, you must also pass either the Certificate in Legal Practice (CLP) or the Bar course to qualify.[1]

Under *Section 12(2) of the Legal Profession Act 1976 (LPA),* a lawyer in Malaysia must undergo a nine-month period of pupillage before being admitted as an advocate and solicitor.[2] A person undergoing pupillage is referred to as a pupil and may also be called a pupil in chambers, chambering student, or chambie. The master is a lawyer with at least seven years of legal practice who supervises the pupil during their pupillage. The purpose of pupillage is to provide practical legal training before entering full practice.[3]

The conventional way to serve the 9-month pupillage is for pupils to join a law firm and attach themselves to a qualified lawyer who becomes their master. The pupil is responsible for working for the firm, while the master guides them throughout the period.[4]

In West Malaysia, the period of pupillage is nine months, whereas in Sabah and Sarawak, under *Section 4(1A) of these Advocate Ordinance Sabah*,[5] and *Section 4(1A) of the Advocate Ordinance Sarawak*,[6] the period of pupillage is twelve months.

Therefore, 'Pupillage' is a mandatory process that needs to be gone through to qualify as a lawyer in Malaysia.

1.2 Current Issues that are Encountered by Pupils in Malaysia

Currently, pupils in Malaysia may receive remuneration solely from their pupil master, as stipulated under *Section 12(3) of the LPA 1976:*

> *"(3) No qualified person shall, without the special leave in writing of the Bar Council, hold any office or engage in any employment of any kind, whether full-time or otherwise, during his period of pupillage, but nothing in this subsection shall preclude a pupil from receiving remuneration from his master."*[7]

However, there are notable shortcomings in this provision. Firstly, the *LPA 1976* does not specify the amount of remuneration that a master is required to pay a pupil. This lack of clarity leaves the matter largely to the discretion of the pupil master, allowing wide variation in practice. Secondly, a plain reading of the provision suggests that there is no statutory obligation for

[1] Legal Profession Qualifying Board, Malaysia, 'About Us' <https://www.lpqb.org.my/index.php?Itemid=61&id=47&option=com_content&view=article> accessed 24 May 2025.

[2] Legal Profession Act 1976, s 12(2).

[3] Malaysian Bar, 'Pupillage' <https://www.malaysianbar.org.my/article/members/become-a-member/pupillage/pupillage> accessed 24 May 2025.

[4] Ibid.

[5] Advocate Ordinance Sabah, s 4(1A).

[6] Advocate Ordinance Sarawak, s 4(1A).

[7] Malaysia Bar (n3).

masters to remunerate their pupils. Although it has become a convention to provide some form of allowance, there is no legal requirement enforcing it.

Moreover, although pupillage is a statutory requirement under the LPA, pupils are not classified as employees and therefore do not fall under the protection of employment legislation such as the *Minimum Wage Order 2024*, which sets the national minimum wage at RM1,700.

Consequently, some masters pay pupils as little as RM500 per month. In a city like Kuala Lumpur, where the cost of living continues to rise, such an amount is grossly inadequate to cover even basic expenses, let alone allow for savings.

The absence of a mandated minimum allowance leaves many pupils financially dependent on parents, partners or personal loans to complete the nine-month chambering period. Those from affluent backgrounds are able to complete pupillage with relative ease, while others may be discouraged, delayed or even forced to abandon the process entirely.

For pupils from B40 or lower M40 households, the challenge is even more severe. Without sufficient financial means, they may be compelled to postpone pupillage, take up side jobs in violation of *Section 12(3) of the LPA* or accept exploitative arrangements simply to qualify.[8] This has the effect of systematically disadvantaging capable candidates from underprivileged backgrounds and reinforcing socio-economic barriers to entry into the legal profession.

The problem is compounded by a fragmented legal framework that leaves a compliance loophole. No specific agency is empowered to enforce a minimum remuneration for pupils. The Department of Labour, for example, has no jurisdiction unless an employment relationship is proven. This means pupils have no legal recourse to file wage complaints under the *Employment Act* or to seek protection from unfair labour practices, despite their work often being similar to that of junior staff.

The result is a profession where access is, in reality, limited to those with external financial support. This undermines meritocracy and perpetuates systemic inequality, particularly for aspiring lawyers who must relocate to urban centres like Kuala Lumpur.

II. Reasons Pupils Are Not Granted Minimum Remuneration

During his presidency, Salim Bashir stated:

> "We are committed to creating a more inclusive legal profession. Pupils should not be treated as free labour. The Bar Council is studying proposals to regulate remuneration more effectively." [9]

[8] Legal Profession Act 1976, s 12(2).

[9] Hailey Chung Wee Kye, 'Malaysian Bar working on wage scheme for pupillage, says president' *The Malaysian Insight* (Kuala Lumpur, 27 December 2020) <https://www.themalaysianinsight.com/s/291919> accessed 8 August 2025.

There are strong and practical reasons why pupils should be entitled to a minimum level of remuneration, particularly given the realities of their training period.

2.1 Fair pay for equivalent work

Pupils are not mere observers. They are active participants in a firm's daily operations, drafting pleadings, conducting legal research, attending court, assisting in client meetings and managing files. Their work carries real weight and responsibility. To deny them fair remuneration simply because of how their role is classified is to overlook the substance of their contribution.[10]

In many cases, pupils shoulder workloads that directly benefit their firms, performing tasks similar to those of junior employees. Some even report extended working hours to meet deadlines. When measured by responsibility and commitment, there is little difference between pupils in law firms and fresh graduates starting careers in other fields such as marketing, engineering or accounting, all of whom are entitled to fair entry-level pay.

For comparison:

- Engineering Graduates: Fresh graduates in mechanical, electrical, and industrial engineering typically earn between RM3,500 and RM5,000 monthly. Those with specialised expertise in automation or robotics may command even higher salaries.[11]

- Accounting Graduates: Entry-level salaries for accounting graduates generally range from RM3,000 to RM4,500, with higher earnings potential for those holding professional certifications like ACCA or CPA.[12]

- Marketing Executives: Fresh graduates entering the marketing field earn between RM3,000 and RM4,500 per month. Skills in digital marketing and data analytics tend to attract premium salaries.[13]

- Human Resource Executives: New entrants in HR roles typically earn between RM3,000 and RM4,000 monthly, especially if they hold relevant HR certifications.[14]

[10] Messrs. Shamil Shakil, 'On Minimum Remuneration and the Professional Treatment of Pupils' (*LinkedIn*, 18 June 2025) <https://www.linkedin.com/pulse/minimum-remuneration-professional-treatment-pupils-jbufc/> accessed 8 August 2025.
[11] Samantha Toh, 'Fresh Graduate Salary in Malaysia for 2025: What to Expect, Insights and Analysis' (*Job Majestic*, 12 February 2025) <https://www.jobmajestic.com/blog/en/fresh-graduate-salary-malaysia-2025/?utm_source=chatgpt.com> accessed 24 May 2025.
[12] ibid.
[13] ibid.
[14] Ibid.

In contrast, pupils typically receive monthly allowances ranging from RM1,000 to RM1,500, [15] which fall below the national minimum wage and highlight the financial hardship many face during their mandatory training period. While pupils are still in the learning phase, effective learning requires a stable foundation. A fair wage enables pupils to focus on enhancing their skills without the added stress of financial instability.

2.2 Skyrocketing Living Expenses

It is undeniable that the cost of living has steadily increased over the years. Based on the notional Consumer Price Index, the average annual increase has been 10.9% from 2020 to 2024. Meanwhile, salaries and allowances have not increased proportionately. According to a report by PwC, the living wage in Kuala Lumpur is RM2,967 for a single adult, which is significantly higher than the RM500-RM1,000 that many pupils are paid nowadays.[16]

The reality is that the current pupil wage is far below the basic living wage required for a single adult. For students from less affluent families, this creates a major challenge. Not only do parents need to provide financial support during their children's studies, but they are also expected to assist once the students complete their degrees. With such low wages, it is clear that the current pupil salary is insufficient to sustain their daily needs, making it extremely difficult for many to support themselves.

Despite performing professional-level duties, many pupils are paid well below a living wage, which presents a significant challenge for aspiring lawyers, especially those from less privileged backgrounds. This wage disparity makes it challenging for them to sustain themselves during this crucial stage of their careers. While pupils are still in the learning phase, effective learning requires a stable foundation. A fair wage enables pupils to focus on enhancing their skills without the added stress of financial instability.

III. Why Should Pupils Not Be Granted Minimum Remuneration?

Despite ongoing calls for reform, there are still several reasons why the Bar Council of Malaysia has not introduced a mandatory minimum remuneration for pupils, as outlined below.

3.1 Affect Pupil and Small Law Firm

Imposing a minimum remuneration for pupils may increase the operating costs of law firms, which can, in turn, reduce the number of pupillage positions they are willing to offer. This requirement may also indirectly impact pupils in smaller towns and states, where firms may

[15] K. Pakaran, 'Bar Council to set minimum wage for chambering lawyers' *Free Malaysia Today* (Petaling Jaya, 24 December 2024) <https://www.freemalaysiatoday.com/category/nation/2024/12/24/bar-council-to-set-minimum-wage-for-chambering-lawyers/> accessed 24 May 2025.

[16] Malar Odayappan, Thomas Chan and Afiq Fauzi , 'Towards equity: How corporate Malaysia can lead in wage reform' (*PwC Malaysia*, 24 May 2025) <https://www.pwc.com/my/en/perspective/esg/250706-how-corporate-malaysia-lead-wage-reform.html> accessed 24 May 2025.

struggle to afford the mandated allowance. As a result, some pupil candidates might be unable to qualify as lawyers simply because there are not enough law firms able or willing to take them in.

Pupils need a firm to chamber with, and if the minimum allowance is set too high, they may find it difficult to secure a place.[17] Moreover, many small firms are genuinely unable to pay the minimum wage. Therefore, a more flexible approach creates a win-win situation, where pupils can still complete their chambering even if they do not receive offers from large firms, and small firms can engage assistance at a manageable cost.

3.2 Pupillage Serves as Both an Apprenticeship and a Continuation of Education.

Pupillage is a form of 'apprenticeship' and/or an extension of legal education. Therefore, imposing minimum remuneration for pupils could detract from the true purpose of 'pupillage'.

It may also be argued by some lawyers that pupils are provided with a free platform to practise practical legal knowledge, where they are not held responsible for mistakes because they work under the guidance of their masters. While errors can be made during this learning phase, once a pupil qualifies as a lawyer, any mistakes they make will be met with stern reprimands from the judge or clients in court.

According to the Oxford Dictionary, an apprentice is 'a person who is learning a trade from a skilled employer, having agreed to work for a fixed period'. Under this view, pupils are not paying to be actively taught, but rather for the chance to observe and learn from their masters in a real-world setting. The master's priority is to serve clients, not to teach, and in many cases, the pupil's presence may be more of an interruption than an asset.[18]

For instance, if you proceed with a case incorrectly, such as failing to file a crucial document within the prescribed time frame, leading to the dismissal of the client's case, the client may suffer substantial harm due to the lawyer's negligence. In such a scenario, the case could be forfeited entirely. How would you explain this outcome to your client? Would you admit that a simple error on your part resulted in these severe consequences? Under the *LPA 1976* and the *Rules of Professional Conduc*t, such acts of negligence can severely tarnish your reputation and professional standing, potentially resulting in disciplinary action and irreparably damaging your career.

In other words, pupils are given a golden opportunity to learn beyond the academic realm, gaining practical experience that will shape their future legal careers.

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[17] Raevathi Supramaniam, 'Fixing minimum allowance for pupils may affect small firms, Bar president says' (*The Malaysian Bar*, 21 May 2022) <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/fixing-minimum-allowance-for-pupils-may-affect-small-firms-bar-president-says> accessed 24 May 2025.

[18] Fahri Azzat, 'A Pupil's Remuneration' (From the Bar Stool, 23 November 2020) <https://fromthebarstool.life/2020/11/23/pupils-remuneration/> accessed 24 May 2025.

3.3 Cultural Resistance

Perhaps the most understated barrier to reform lies in the legal profession's own internal resistance, particularly among senior practitioners. Many current masters underwent pupillage under similar unpaid or low-paid conditions and have come to view such hardship as a rite of passage.

There exists a deeply rooted cultural belief that early struggle builds resilience, and that introducing entitlement to remuneration would erode the spirit of sacrifice traditionally associated with the formative years of legal training. This entrenched mindset continues to shape attitudes within the profession, making it difficult to achieve consensus on pupil wage regulation, even within Bar Council deliberations.

IV. The Approaches Out There to Solve the Issue

In order to fight for the minimum remuneration for pupils in Malaysia, there are a few approaches that can be carried out to improve this perspective, making it fairer and just for the pupils, as stated below.

4.1 Young Lawyers Movement

The Young Lawyers Movement has undertaken many activities to advocate for minimum wages for pupils. This article will highlight only a few major incidents or dramatic approaches. Before that, it is necessary to explain what the 'Young Lawyers Movement' is. The Young Lawyers Movement (YLM) in Malaysia has been actively advocating for the implementation of a mandatory minimum remuneration for pupils (chambering students). Their efforts aim to address the financial challenges faced by pupils during their mandatory training period.

Firstly, YLM has been a key advocate for minimum remuneration for pupils in Malaysia. In 2020, they launched a Change.org petition, gathering over 4,200 supporters and presented it to the National Young Lawyers and Pupils Committee and several State Bar Committees. Their efforts led to the Malaysian Bar recognising the issue and conducting surveys to gather data on remuneration. In other words, the YLM's actions have directly contributed to the reform of *LPA 1976*, allowing enforcement of minimum pay. Despite challenges, such as balancing the needs of small firms, the YLM's campaign has sparked important discussions on fair pay, promoting socio-economic inclusion and professional development for young lawyers and pupils.[19]

Secondly, during the Malaysian Bar's Extraordinary General Meeting (EGM) in May 2022, representatives from the YLM, including spokesman Goh Cia Yee, strongly advocated for the implementation of a binding minimum remuneration for pupils. They argued that the existing guidelines were insufficient and called for enforceable rules to prevent exploitation. YLM

[19] Lawyers & Pupils for Minimum Pay, 'Implement minimum pay for pupils in Malaysia' (*Change.org*, 20 November 2020) <https://www.change.org/p/malaysian-bar-implement-minimum-pay-for-pupils-in-malaysia> accessed 24 May 2025.

emphasised that justice within the legal profession should encompass socio-economic rights, including fair compensation for pupils.[20]

Thirdly, YLM in Malaysia has been at the forefront to secure fair remuneration for pupils by pushing for legislative amendments to the *LPA 1976*. They have called for the Act to be revised to empower the Bar Council to enforce a binding minimum allowance for chambering students, addressing the longstanding issue of low or no pay for professional-level work. YLM has engaged directly with legal stakeholders and policymakers, conducted nationwide surveys to support their proposals, submitted motions at the Malaysian Bar's AGM, and participated in public forums and media engagements to raise awareness. Their advocacy contributed to the Bar Council's proposal to amend *Section 77 of the LPA 1976*, with the aim of enabling the Council to regulate pupil remuneration more effectively.[21]

4.2 Amendment made by Bar Council on the Legal Professional Act (LPA).

Before the amendment to the *LPA 1976, Section 77(1)* did not expressly empower the Bar Council to regulate or enforce minimum remuneration for pupils. As a result, many law firms pay pupils extremely low allowances, as little as RM500, or in some instances, offer no allowance at all.

However, following the amendment introduced by the Bar Council, *Section 77(1)* now grants statutory authority to regulate 'fees, salaries, allowances, and working conditions for lawyers and pupils'. This significant change means the Bar Council is now legally empowered to mandate and enforce minimum remuneration standards, ensuring a more equitable and sustainable framework for those undergoing pupillage.[22]

4.3 Bar Council

To support the forthcoming implementation of minimum remuneration for pupils, the Malaysian Bar, on 22 November 2024, announced the engagement of an independent economic advisory firm to develop a recommended remuneration framework.

This initiative stems from a 2021 resolution affirming the Bar's commitment to protecting pupils' welfare through fair compensation, despite the Bar Council's prior lack of statutory authority under the pre-amended LPA 1976.

In December 2024, the advisory firm conducted two confidential nationwide surveys, one targeting law firms and the other directed at pupils and first-year legal assistants, to gather

[20] Ida Lim, 'Young lawyers push for Malaysian Bar to have binding minimum pay for chambering students' *Malay Mail* (Kuala Lumpur, 28 May 2022) <https://www.malaymail.com/news/malaysia/2022/05/28/young-lawyers-push-for-malaysian-bar-to-have-binding-minimum-pay-for-chambering-students/9279> accessed 24 May 2025.

[21] Ibid.

[22] 'What Changes to Legal Profession Act Entails' *Daily Express* (Kota Kinabalu, 24 April 2024) <https://www.dailyexpress.com.my/read/5885/what-changes-to-legal-profession-act-entails/> accessed 24 May 2025.

accurate data on existing pay structures. The purpose of this research was to establish a baseline, identify regional disparities, and recommend appropriate minimum allowance rates, including a formula for periodic adjustments.[23]

V. Minimum Remuneration for Pupils in Other Jurisdictions (Other Countries)

5.1 United Kingdom

The Bar Standards Board's Bar Qualification Rules, introduced in 2019, require all pupil barristers to be paid a minimum award during their pupillage. This is to ensure their income reflects the Living Wage Foundation's recommendations. [24]

From 1 January 2024, the minimum annual award will be £23,078 for pupillages based in London and £21,060 for those outside London. These figures are intended to align with the cost of living, ensuring that pupils receive enough financial support to manage their day-to-day expenses throughout the course of their training.[25]

5.2 Hong Kong

In Hong Kong, as of 1st September 2019, pupils undertaking pupillage must be paid a minimum monthly honorarium of HK$6,000, as stated in *paragraph 11.9A of the Hong Kong Bar Association's Code of Conduct*.[26] Additionally, if a pupil master fails to make this payment without a valid reason, it may be considered a professional misconduct or a breach of proper professional standards under *paragraph 11.13*.[27]

VI. Conclusion

In toto, it is understood that pupillage is a learning phase, and financial gain should not necessarily be the primary consideration when choosing a law firm. However, the Malaysian Bar Council must also ensure that the rights of pupils are not exploited by their masters. This is

[23] Malaysian Bar, 'Circular No 395/2024 | Survey on Minimum Remuneration for Pupils' (*Malaysian Bar,* 22 November 2024)
<https://www.malaysianbar.org.my/cms/upload_files/document/Circular%20No%20395-2024.pdf> accessed 24 May 2025.
[24] Bar Standards Board, 'Minimum Pupillage Award from 1 September 2019 Announced' (*Bar Standards Board,* 6 December 2018)
<https://www.barstandardsboard.org.uk/resources/minimum-pupillage-award-from-1-september-2019-announced.html> accessed 24 May 2025.
[25] Ibid.
[26] Bar Standards Board, 'BSB Announces Minimum Pupillage Award from 1 January 2024' (*Bar Standards Board,* 27 October 2023)
https://www.barstandardsboard.org.uk/resources/bsb-announces-minimum-pupillage-award-from-1-january-2024.html accessed 24 May 2025.
[27] Hong Kong Bar Association, *Code of Conduct of the Bar of the Hong Kong Special Administrative Region* (14 November 2018, updated 11 February 2025)
https://www.hkba.org/uploads/d319cd0a-c88e-4b1d-89db-affa2beb3096.pdf accessed 24 May 2025.

crucial, as pupils often perform tasks equivalent to those of regular employees, despite being new to the profession.

Therefore, the Malaysian Bar Council should consider amending *section 12(3) of the LPA 1976* to clearly define the minimum remuneration that must be provided to pupils. This would prevent law firms from offering unreasonably low allowances and ensure that pupils are treated fairly during their chambering period.

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