

The Malaysian Road to the Rule of Law: the Judicial Expressway

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Abstract

The rule of law is one of the key constitutional law concepts that one would have to appreciate in great depth within the study of constitutional law. There is however a varied approach to defining Rule of Law. Different systems of law may view the concept differently. Within a single system of law, the views of one constitutional player may differ to another. In view of the gap in terms of disparity of understanding that exists, this study attempts to scientifically analyse the term through a thematic analysis of case law in Malaysia in order to extract the emerging theme from the cases. This method of analysis is a purely clinical method without recourse to ratio or facts of cases. An understanding of the chronological development of an emerging theme from case law may be useful in demonstrating a trajectory that other institutions may appreciate and apply within their own administrative decision making, leading to a more consistent application of the rule within intra-state institutions.

Keywords: rule of law, basic structure doctrine

1. Introduction

According to Hilaire Barnett, in the United Kingdom, the Rule of Law, Separation of Powers and Parliamentary Sovereignty run like a thread throughout the constitution.¹⁵⁵ Comparing how the three constitutional law concepts apply to Malaysia, there are distinctions as well as similarities in the application of these concepts. For example, Malaysia upholds the concept of supremacy of the constitution rather than parliamentary sovereignty. Separation of Powers with its coordination between institutions rather than complete separation applies both to the UK and Malaysia via the Westminsterian system of Parliament. When it comes to comparing the UK and Malaysia in relation to Rule of Law (ROL), the nuances are complex and difficult to gauge. In simple terms, ROL means law above man. There are however philosophical, political, historical, and legal definitions for ROL. This is what makes

¹⁵⁵ Hilaire Barnett, *Constitutional and Administrative Law* (12thedn, Routledge 2017) 80.

understanding the doctrine somewhat elusive.¹⁵⁶ This paper confines its discussion of ROL within the legal perspective. The most taught and utilised position in the UK and Malaysia today would be Dicey's rule of law which covers three postulates, namely: 1. No man can be judged unless there is a clear breach of the law, 2. equality before the law, and 3. our rights are safeguarded by common law.¹⁵⁷

The UK has moved ahead with Bingham's understanding of the rule in eight simple terms namely: accessibility of the law, application of law and not discretion, equality before the law, adequate protection of human rights, resolution of disputes without delay, the exercise of power in good faith, independence of the judiciary and compliance with international law obligations.¹⁵⁸

In arriving at judicial decisions that encapsulate ROL, eminent Malaysian judges are not confined to the UK position. The fluidity in judicial approach provides for the reception of Indian cases as well. In discerning the reasons behind this reference, one must note the similarities and differences between the three legal systems. All three systems uphold constitutional law concepts such as separation of powers and rule of law in a similar manner. Nevertheless, it is important to note that there is a stark distinction between the UK legal system from that of India and Malaysia. Whilst the *grundnorm* of both Asian States would be Supremacy of the Constitution, The UK's apex norm is Parliamentary Sovereignty. This stark distinction has roots from the nature of the UK legal system which has an unwritten constitution and relies heavily on constitutional statutes and case law in establishing the trajectory of constitutional development. India on the other hand like Malaysia has a comprehensive written constitution that is somewhat in its youth and is heavily dependent on the judiciary for its development via judicial interpretation techniques.

International law and domestic law do not necessarily converge when it comes to the interpretation of ROL. Apart from this, intra and inter-institutional disparity exists in the interpretation of ROL. The question arises as to what rule of law actually means for Malaysia. This study attempts to systematically inquire into the meaning of ROL as it applies in Malaysia. The literature of legal commentators is juxtaposed with the views of the judges in determining the essence of ROL in Malaysia. Although legal commentators have attempted to ascertain the meaning of ROL through judicial decisions and political opinion, a scientific inquiry based on a thematic analysis has yet to be concluded. The approach of thematic analysis is premised on the notion that a clinical inquiry would efficiently

¹⁵⁶ Hilaire Barnett, *Constitutional and Administrative Law* (12thedn, Routledge 2017) 52.

¹⁵⁷ Albert Vann Dicey, *Introduction to the Study of the Law of the Constitution*. (Reprint, Liberty Classics 1982) 120-121.

¹⁵⁸ Lord Bingham, *The Rule of Law* (Penguin 2011).

determine the definition and proposed application of abstract concepts such as ROL specifically in Malaysia.

2. Literature Review - Academic and Judicial literature

Extant literature exists in relation to ROL within domestic and international law perspectives. Within the domestic perspective, Masum is of the view that ROL is necessary for purposes of sustained economic development and though elusive is also needed in order to respect human dignity.¹⁵⁹ Its adherence and reinforcement, however, are dependent upon the level of state intervention to the economy.¹⁶⁰ There is as such a jostling of sorts between ROL and authoritarianism.¹⁶¹ In achieving certain ends, ROL may be suspended.¹⁶² The authoritarian rule does not see judges as partners in the rule of law project. Balasubramaniam gives the example of Tun Mahathir as an authoritarian leader, who first came to power in 1981 with a reputation as an ethnocrat and Malay populist.¹⁶³ In spite of which, the term has been used generously in Tun's inaugural speech to his '*rakyat*' on 10 May 2018.¹⁶⁴ A gap surfaces whereby the understanding of politicians as to what ROL entails may differ from the view of legal luminaries.

Glover refers to two definitions of ROL, i.e. the formal definition and the material definition. The formal definition refers to inferior law conforming to superior law. The material definition, on the other hand, takes into account the content of the law and implies that the law should not only conform to the superior law but it should also conform to human rights.¹⁶⁵ Issues of compliance of human rights exist principally due to sharia law application and legal pluralism. At this juncture, it is interesting to note that Prof Shad Faruqi does not provide a bespoke chapter on ROL in his most recent book on the Malaysian Constitution perhaps due to the infancy of the culture of ROL in Malaysia. He acknowledges that in some types of cases, judicial decisions are either ignored or not enforced.¹⁶⁶ Pertinent constitutional law concepts like ROL have not taken root in the Malaysian legal system.¹⁶⁷ There is however some acknowledgement of the imperfect ROL in his earlier textbook. In effect, ROL provides for controls of arbitrary power, political and socio-economic rights,

¹⁵⁹ Ahmad Masum, 'The Rule of Law under the Malaysian Constitution' [2009] 6 MLJ c, ci-cii.

¹⁶⁰ Andrew Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal 1996) 274.

¹⁶¹ Khong Mei-Yan, 'The Rule of Law in Malaysia' (academia.au 2020) <https://www.academia.edu/10349791/The_Rule_of_Law_in_Malaysia> accessed 26 March 2020 .

¹⁶² *Ibid*, 5.

¹⁶³ Ratna Rueban Balasubramaniam, 'Hobbesism and the Problem of Authoritarian Rule in Malaysia' 2012 Hague Journal on the Rule of Law 4 211, 227.

¹⁶⁴ 'Breaking News! - Tun Dr. Mahathir Press Conference'(Berita Viral, 9 May 2018) <<https://www.youtube.com/watch?v=ONfnj-5dbz8>> accessed 26 March 2020.

¹⁶⁵ Constance Chevallier-Govers, 'The Rule of Law and Legal Pluralism in Malaysia' 2010 Religion, Law and Governance in South East Asia (Supp Ed) 90, 92.

¹⁶⁶ Shad Saleem Faruqi, *Our Constitution* (Sweet & Maxwell 2019) 247.

¹⁶⁷ *Ibid*, 304.

socio-economic justice, and effective governance.¹⁶⁸ Robson poses the question as to whether or not the constant and confusing usage of the phrase “the rule of law” undermines the actual ROL.¹⁶⁹ This goes back to the gap of disparity of views by the different constitutional players.

Within the international sphere, the notion of ROL has a very prominent place. However based on literature, understanding and application is in fact equally vague as with the domestic system. Kofi Annan during his time as Secretary-General of the UN confirmed that the ROL is a concept at the very heart of the United Nations’ mission. The ROL has received the most attention in the 21st century by virtue of the Millennium development goals¹⁷⁰ and later by virtue of the Sustainable Development Goals in particular SDG 16.¹⁷¹

According to Waldron, the international rule of law focuses on the individual. Since the United Nations embraces the notion of human rights, it incorporates the notion of rights to all individuals (nationals / non-nationals).¹⁷² With respect to international organizations, especially the UN, there is still no single, accepted understanding of its application and implementation.¹⁷³ International law subscribes to the thick understanding of ROL. The thick understanding defines the substance compliance to ROL as the domestic implementation of the rights and entitlements expressed in international treaties, agreements, and conventions.¹⁷⁴ Domestic systems like Malaysia may not necessarily have the capacity to meet with such high standards of ROL. Hence, intra and inter-institutional disparity exists in the interpretation of ROL.

3. Methodology

As stipulated at the onset of this paper, the approach employed in this study is to categorically analyse legal text. This approach of thematic analysis is premised on the notion that a clinical inquiry would efficiently determine the definition and proposed application of abstract concepts such as ROL specifically in Malaysia.

In other words, it is a hermeneutical critical interpretation of case law. Twenty cases which have mentioned the term ROL from 1988 to 2019 have been categorised for this analysis

¹⁶⁸ Shad Saleem Faruqi, *Document of Destiny* (Star 2008) 43 - 44.

¹⁶⁹ Glenna Robson, ‘A Layman Looks at the “Rule of Law”’ (2004) 168 JPN 332, 336.

¹⁷⁰ Kenneth James Keith, ‘The International Rule Of Law’ (2015) 28 Leiden Journal of International Law 403, 406.

¹⁷¹ SDG 16.3 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1 < <https://www.refworld.org/docid/57b6e3e44.html>> accessed 1 March 2020.

¹⁷² Jeremy Waldron ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’ (2011) 22 European Journal of International Law 315, 325.

¹⁷³ José Enrique Alvarez, ‘International Organizations and the Rule of Law’ (2016) 14 New Zealand Journal of Public and International Law 3.

¹⁷⁴ Erwin Van Ween, *CRU Report* (June 2017, The Clingendael Institute, Netherlands).

from the reading of a selection of twenty-five cases. The five additional cases selected were not categorised as the significance of the method of referring to ROL was not sufficiently clear for reliable categorisation within the themes of analysis. These cases range from the high court to federal court decisions with the bulk of the cases coming from the Court of Appeal. The cases cover a wide range of aspects of law, predominantly constitutional law but also criminal law, employment law, and procedural rules. From this analysis, 5 themes emerge that provide a bespoke Malaysian perspective of the ROL. The 5 themes are as follows:

- (i) ROL housed under articles 5 and 8 of the Federal Constitution,
- (ii) Dicey's three postulates on the ROL,
- (iii) the Basic Structure Doctrine of the Federal Constitution,
- (iv) Bingham's eight principles of the ROL, and
- (v) definitions by other legal commentators.

Through this thematic analysis, the most popularly referred to understanding of ROL surfaces. This, in turn, provides clarity as to the leanings of the judiciary in determining how the cogs of ROL operate within the Malaysian legal system. From this analysis, one is also able to determine individual Malaysian judicial luminaries' take on the ROL.

There are caveats in the understanding of how judicial pronouncements were categorized into themes. Firstly, the categorization is based on both explicit and implicit mention of the themes by the judges. Secondly, implicit categorization within each case tends to only include one or, at the most, two principles within the Diceyan postulates and the Bingham rules. As such, one may not be able to extract the emerging theme through independent scrutiny of one case but only through a holistic analysis of all cases referred to in this study.

There are limitations to this form of study. This form of textual analysis is readily used in analysing a variety of texts including newspapers, magazines, and social media postings. It is, however, a novel approach to analysing law or legal concepts in view of progressive development in the application of the law. The analysis does not go further to determine the rationale of the understanding of ROL that is given. A contextual understanding based on the facts is not included in this analysis which for some may appear to be an artificial manner of analysing case law. It is, however, a scientific analysis of secondary data (within the context of social sciences) which may assist the constitutional players to have an objective understanding of how the concept has been used and may be of assistance to chart the trajectory of this legal concept for the future.

A second limitation would be the fact that this analysis does not evaluate or even segregate the *ratio decidendi* from the *obiter dicta* in the cases referred to. Neither does it segregate the majority view from the dissenting one. As such the analysis is not layered but remains as one analysis on basic ROL. A more layered contextual approach would perhaps be

considered for future study on this rule. The rationale for this approach is that the study focuses on the perspective of ROL from the eyes of the legal luminary rather than the actual decisions of the case.

This type of analysis may prove to be useful for the political and social scientists, as it has been couched as far as possible in academic rather than legal terms. Here however lies the third limitation. Qualitative research methodology via interviews with judges would complement the analysis. Due to time and resource constraints, thematic analysis has been conducted in view of future possibilities of collecting primary data via interviews followed by discourse analysis.

4. Discussion & Analysis

The Federal Court in *Alma Nudo Atenza v PP* has adduced that the 'phrase ROL has become meaningless' due to the ideological abuse and over-usage of the term.¹⁷⁵ Different models of the ROL have been applied by various jurisdictions to interpret the axiom of ROL. Such observation by Richard Malanjum CJ poses an imperative question which should be answered with certainty. The prime question is: Which model is used by the Malaysian judiciary to interpret the indispensable legal doctrine of ROL? To answer this legal question, an analysis was made based on 20 different Malaysian cases which interpreted the phrase ROL. Interestingly, a trend was observed in the models used by the Malaysian judiciary to discern the principle of ROL over the past 3 decades. As the oldest case referred to was in 1988,¹⁷⁶ the past three decades were categorised into three different periodic intervals, to further explain the trend of the Malaysian judiciary in applying various models to providing a Malaysian understanding of the ROL.

In essence, cases from 1988 to 2008 are classified as early year cases, cases from 2009 to 2015 are identified as middle year cases and lastly, cases from 2017 to 2019 are assorted as recent cases according to the gradual approach of the judiciary towards the *principium* of ROL. Even though the doctrine of ROL has been elucidated and expounded by various models devised by nonpareil legal scholars, the Malaysian judiciary tends to interpret ROL under the aegis of the five aforementioned themes in a largely varied manner.

The five themes will be explained perspicuously to illustrate the trend of the Malaysian judiciary employing those models in interpreting the ROL. It is vital to appreciate that no cases have applied only a single model but the themes overlap as the court proceeds to elucidate the doctrine of ROL. The Federal Court in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd* has expressly accepted that the 'term ROL is not one that admits of a fixed

¹⁷⁵ [2019] 4 MLJ 1.

¹⁷⁶ *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

precise definition'¹⁷⁷ but an analysis on the models applied by the Malaysian judiciary is crucial as the 'ROL is the bedrock of which our society was founded and on which it has thrived'.¹⁷⁸

Since the early years, the Malaysian judiciary tends to encapsulate the principle of ROL under Articles 5(1)¹⁷⁹ and 8(1)¹⁸⁰ of the Federal Constitution by confirming that the concept of ROL is an intrinsic component of the common law of England¹⁸¹ which is incorporated in the supreme document of the nation via the word 'law' in Article 160(2).¹⁸² Early and middle year cases assert that the word 'law' in Arts 5(1) and 8(1) of the Federal Constitution includes both written law and the English common law, i.e., the ROL and all its integral elements as well as the procedural and substantive dimensions of the fundamental principle. It is trite law that the rules of natural justice which were formulated by Lord Diplock¹⁸³ form part of the ROL and according to the first thematic model, all facets and dimensions of the invaluable axiom are included and limited in the expression 'law' wherever used in the Federal Constitution, particularly in Articles 5(1) and 8(1) as adduced by the Federal Court in *Lee Kwan Woh v PP*.¹⁸⁴

The Federal Court confirmed that the ROL 'forms part and parcel of the common law of England'¹⁸⁵ and under section 3 of the Civil Law Act 1956,¹⁸⁶ the common law of England as well as the rules of equity that were administered in England on 7th April 1956 is allowed to apply in Malaysia as long as it is permitted by the respective inhabitants and rendered necessary by the local circumstances. As the expression of ROL is not defined or mentioned in the Federal Constitution despite being considered as the foundational value of the Constitution, section 3(1) of the Civil Law Act¹⁸⁷ allows the court to incorporate the principles of the common law to fill the lacuna with necessary modifications under the definition of law which is stated in Art 160(2) 'to prevent it from operating unjustly and oppressively'.¹⁸⁸ Even though section 3(1) of the Civil Law Act 1956 restricts the application of English common law post the cut-off date, the Privy Council in *Jamil bin Harun v Yang Kamisah & Anor*¹⁸⁹ settled that the English authorities after 7th April 1956 have persuasive

¹⁷⁷ [2019] 3 MLJ 561.

¹⁷⁸ *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779.

¹⁷⁹ Federal Constitution, Article 5(1).

¹⁸⁰ *Ibid*, Article 8(1).

¹⁸¹ *Lee Kwan Woh v PP* [2009] 5 MLJ 301.

¹⁸² Federal Constitution, Article 160(2).

¹⁸³ *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

¹⁸⁴ [2009] 5 MLJ 301.

¹⁸⁵ *Lee Kwan Woh v PP* [2009] 5 MLJ 301.

¹⁸⁶ Civil Law Act 1956, section 3.

¹⁸⁷ *Ibid*, section 3(1).

¹⁸⁸ *Choa Choon Neoh v Spottiswoode* [1869] 1 Ky 216, 221

¹⁸⁹ [1984] 1 MLJ 217.

value and fall under the discretion of the court to be applied in light of the local circumstances and written law.

In addition, the Federal Court in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* interpreted the term ‘law’ as a ‘system of law that encompasses the procedural and substantive dimensions of the ROL’ and further confirmed that it is at this point that Articles 5(1) and 8(1) interact.¹⁹⁰ The notion of ROL was further explained to be epitomised by Articles 5(1) and 8(1) as the Malaysian courts acknowledge that the principle of ROL is housed in the personal liberty provision in Article 5(1) and the equality provision in Article 8(1). The personal liberty and equality provisions in the Federal Constitution are viewed to encase the doctrine of ROL as it ensures that the fundamental liberties under Part II of the Federal Constitution¹⁹¹ will be given due regard to protect individual identities of the vulnerable minorities against assimilative compression of the secured majority.

In the early and middle years, such a model could be seen to be favoured by the Malaysian judiciary in interpreting the principle of ROL, notably by Gopal Sri Ram FCJ as the esteemed judge had adopted such a model in all of his decisions that were looked at in this analysis. As the Federal Court and the Court of Appeal have concurred to such an approach for nearly 27 years, recent judicial pronouncements have taken a different pathway to operationalise ROL by not limiting the principle to the word ‘law’ in Arts 5(1) and 8(1) but expanding it to be applied as the basic structure doctrine of the Federal Constitution.

Being the central precept of the Reid Commission as it drafted the Merdeka Constitution,¹⁹² ROL has been perceived as the ‘basic feature’¹⁹³ of the Malaysian Federal Constitution as the Federal Court has ruled that the Constitution ‘must be interpreted in light of its historical and philosophical context as well as its fundamental underlying principles’.¹⁹⁴ As the ultimate goal of constitutional interpretation is to uphold the rule of law,¹⁹⁵ middle and recent cases consider the quintessential principle as a ‘basic structure doctrine’¹⁹⁶ of the supreme document and is not limited to the expression ‘law’ in the Federal Constitution. Recently, the Federal Court has expressly confirmed that the doctrine of the basic structure of the constitution is germane to the Malaysian legal landscape in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*.¹⁹⁷ Rather than sheathing the essential doctrine of ROL within the ambit of the expression ‘law’ in the Federal Constitution, the gradual approach of

¹⁹⁰ [1998] 3 MLJ 289.

¹⁹¹ Federal Constitution, Part II.

¹⁹² Reid Commission, *Report of the Federation of Malaya Constitutional Commission 1957* (London, Colonial No. 330).

¹⁹³ *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd* [2019] 3 MLJ 561.

¹⁹⁴ *National Union of Bank Employees v Director-General of Trade Union* [2013] MLJU 1567.

¹⁹⁵ *Nik Nazmi bin Nik Ahmad v PP* [2014] 4 MLJ 157.

¹⁹⁶ *His Holiness Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr* [1973] 4 SCC 225.

¹⁹⁷ [2017] 5 CLJ 526.

the Malaysian judiciary has enabled the axiom of ROL to be interpreted as a foundational principle of the Federal Constitution¹⁹⁸ 'which permeates every provision of the Constitution and which forms its very core'.¹⁹⁹

In *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*,²⁰⁰ the Federal Court explicitly affirmed that the ROL should be viewed as an 'internal structure' or 'basic constitutional structure' of the Malaysian Federal Constitution. As the *sui generis* document is premised on the notion of rule of law,²⁰¹ the Court of Appeal has mentioned that the 'constitutional soul' of a judge should ensure the rule of law is maintained by defending the Constitution which illustrates that the axiom of ROL in Malaysia is under the purview of the Federal Constitution.²⁰² The Malaysian judiciary has adduced that 'a breach of jurisprudence relating to rule of law...will impinge the framework of the Federal Constitution'²⁰³ and declared that 'the ROL dies as does the Constitution itself'.²⁰⁴ In simple words, the principle of ROL is interpreted as the basic structure doctrine of the Malaysian Federal Constitution.

Such a model was not robustly received in the early years but the gradual approach from the first thematic model to the second thematic model began to appear since the middle years and was elevated in recent years. Compared to any other themes, the second thematic model is the only model which has an exact inflating graph over the past 3 decades as such a model can be observed to be more favoured by the Court of Appeal, especially, by Hamid Sultan bin Abu Backer JCA as the honourable judge has used this model more than other themes to explicate the principle of ROL based on the cases analysed.

Naturally, there is also the alternate view that the basic structure doctrine has no application in the country since it has not been expressly included in the Federal Constitution and has been used by Indian judges rather than UK judges. The question arises as to whether Art 160, read together with S.3 of the Civil Law Act 195, allows for the application of rulings from the Indian judiciary. Suffice to say that at this point, the reception of Indian cases for purposes of interpretation within local jurisdiction is invaluable as the provisions of the Indian Constitution are in *pari materia* to its Malaysian counterpart and ties in neatly with the prismatic approach as enunciated in the Federal Court decision of *Lee Kwan Woh v PP*.²⁰⁵

¹⁹⁸ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals* [2018] 1 MLJ 545.

¹⁹⁹ *Sugumar Balakrishnan v Pengarahl migresen Negeri Sabah* [1998] 3 MLJ 289.

²⁰⁰ [2018] 1 MLJ 545.

²⁰¹ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals* [2018] 1 MLJ 545.

²⁰² *Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd* [2018] MLJU 772.

²⁰³ *National Union of Bank Employees v Director-General of Trade Union* [2013] MLJU 1567.

²⁰⁴ *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660.

²⁰⁵ [2009] 5 MLJ 301.

In spite of the fact that the first and second thematic models are being used by the Malaysian judiciary to interpret the axiom of ROL, the Federal Court in *Sivarasa Rasiyah v Badan Peguam Malaysia*²⁰⁶ affirmed that the framers of the Malaysian Constitution derived the equality doctrine from Dicey's ROL. A consistent approach of referring to Dicey's three postulates of ROL to interpret the fundamental principle can be observed in the past 31 years. For example, the Court of Appeal has expressly stated that 'Art 8(1) is a codification of Dicey's ROL'²⁰⁷ and has also pointed out that the Malaysian Federal and State Constitutions are sketched by the 'ROL as drawn by Dicey'²⁰⁸ which proves that Dicey's Tripartite Model of ROL is extensively resorted to discern the concept of ROL.

In *Marathaei d/o Sangulullai v Syarikat JG Containers (M) Sdn Bhd*, the Court of Appeal accepted that Dicey's description of the ROL is 'neither exhaustive nor accurate' but appreciated that it has 'much of enduring value' which has influenced many Commonwealth constitutions and 'expressly incorporated into almost all of them' including Malaysia.²⁰⁹ The Federal Court in *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* even termed the notion of ROL in Malaysia as the 'Dicey ROL'.²¹⁰ In elucidating the tripartite model of Dicey, the Federal Court cited *Indira Nehru Gandhi v Raj Narain*²¹¹ to explain the tripartite model namely, the absence of arbitrary power, equality before the law and the constitution is not the source but the consequence of the rights of individuals.²¹² In comparison to the other two Diceyan postulates, the second postulate seems to be given prominence by the Malaysian judiciary as the apex court of Malaysia affirms that in a progressive democratic society, 'no one is above the law'.²¹³

Statistically, the Diceyan postulates have been consistently referred to more than any of the other four themes to interpret the rule of law in Malaysia. In all 3 time intervals, the Diceyan Model has been widely referred to, making it the highest referred theme compared to the other models. Out of the 20 cases which were analysed, the Diceyan view of ROL was mentioned in 16 cases in an implicit or explicit manner. Despite the gradual change between the first and second thematic model over the past 3 decades, the Diceyan Tripartite Model has been persistently applied by the Malaysian judiciary as the cornerstone of the principle of ROL. A consistent reference to Diceyan ROL as a foundational principle is observed in the judgments of Richard Malanjum CJ and David Wong CJ (Sabah & Sarawak) in interpreting

²⁰⁶ [2010] 2 MLJ 333.

²⁰⁷ *Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors* [2017] MLJU 770.

²⁰⁸ *Dato Dr Zambry bin Abd Kadir v Dato Seri Ir Hj Mohammad Nizar Bin Jamaluddin* [2009] 5 MLJ 464.

²⁰⁹ [2003] 2 MLJ 337.

²¹⁰ [2018] MLJU 32.

²¹¹ *Indira Nehru Gandhi vs Shri Raj Narain & Anor* [1976] 2 SCR 347.

²¹² *Sivarasa Rasiyah v Badan Peguam Malaysia* [2010] 2 MLJ 333.

²¹³ *Alma Nudo Atenza v PP* [2019] 4 MLJ 1.

the doctrine of ROL as these honourable members of the bench do also substantiate the Diceyan view using the other models.

Despite the fact that the analysis of the 20 cases undoubtedly proved that the Diceyan Tripartite Model is highly used by the Malaysian courts, Lord Bingham's 8 Principle of the ROL is found to be applied by the Malaysian judiciary mostly in an implicit manner. In Malaysia, the analysis of the 20 cases proves that Lord Bingham's 8 Principles are not construed in a comprehensive manner but applied by construing the sub-rules individually to discern the notion of ROL. For example, in *Nik Noorhafizi bin Nik Ibrahim v PP*, the Court of Appeal endorsed that in interpreting the Malaysian constitution, the court should take how the constitution of another member of the Commonwealth is interpreted into consideration²¹⁴ to uphold the ROL as an 'integral part of the democratic constitution founded on the Westminster model'. This was done without express mention of Lord Bingham's 8 Principles of ROL. However, the judgment does implicitly apply the 8th Principle of Lord Bingham's ROL which requires the state to comply with its obligations in international law.

Additionally, the 8th Principle of Lord Bingham's ROL Model was also been implicitly applied by Hamid Sultan bin Abu Backer JCA as the eminent judge mentioned that it is vital to take various international conventions into consideration 'within the parameters of what we widely call as rule of law as opposed to rule by law'.²¹⁵ Such implicit application of Lord Bingham's 8 Principles Model can be seen in various cases to substantiate other models rather than being the main theme applied to interpret the ROL in Malaysia. Exceptionally, in *Kerajaan Malaysia v Mat Suhaimi bin Shafiei*, the Federal Court expressly cited Lord Bingham in explaining the ROL.²¹⁶ Moreover, notwithstanding the fact that Lord Bingham's 8 Principles of ROL was formulated in 2011, the sub-rules defined by Lord Bingham can be traced in the Malaysian decisions since the early years which demonstrates the foresight of the 'central pillar of the democratic state'.²¹⁷

Referring to the statistics derived from the 20 cases, Lord Bingham's 8 Principles are found to be the second-highest referred to model in interpreting ROL since the early years. Similar to the Diceyan tripartite model, Lord Bingham's sub-rules were applied consistently to interpret ROL in Malaysia. Interestingly, based on the 5 analysed cases presided by Hamid Sultan bin Abu Backer JCA, it is observed that the honourable judge does favour Lord Bingham's 8 Principles of the ROL over the Diceyan tripartite model to interpret the ROL in

²¹⁴ *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660.

²¹⁵ *Pegawai Pengurus Pilihanraya Dewan Undangan Negeri Bagi Pilihan Raya Dun N.27 Amino Agos bin Suyub v Dr. Streram a/l Sinnasamy & Ors* [2019] MLJU 1558.

²¹⁶ *Nik Noorhafizi* (n 60).

²¹⁷ *National Union of Bank Employees v Director General of Trade Union* [2013] MLJU 1567.

Malaysia. Overall, Lord Bingham's 8 Principles of ROL does implicitly play a substantial role in Malaysia in order to understand the real meaning of the dogma of ROL.

Judicial creativity is the linchpin of the Malaysian legal system. Even though in the majority of cases the notion of ROL is interpreted predominantly by the aforementioned models, recent cases do provide special accentuation to definitions provided by other legal commentators such as Joseph Raz, Lon L. Fuller, HWR Wade, W.H. Moore, F.A. Hayek and Harry Jones to further elucidate the role and meaning of ROL in Malaysia. For example, the Federal Court in *Alma Nudo Atenza v PP* did refer to Joseph Raz's²¹⁸ and Lon L. Fuller's²¹⁹ work on ROL to outline the meaning of the concept.²²⁰ Furthermore, in explaining the ROL as a characteristic feature of democracies, the Federal Court did explicitly refer to a book written by WH Moore²²¹ to explain the role of the judiciary in upholding the ROL.

In spite of the differences between the authors and their composition, Abdul Malik Ishak J in *Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor* did profess that:

Whatever be the concept of rule of law, whether it be the meaning given by Dicey or the definition by Hayek or the exposition set-forth by Harry Jones, there is, as pointed out by Mathew J. in his article, 'substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against the arbitrary exercise of power, wherever it is found'.²²²

Such judgment does show that the Malaysian judiciary accommodates other definitions outside the normal models which are referred to as long it serves the great purpose of the ROL. It is imperative to note that in the early and middle years such express references to various definitions were unconventional but a substantial surge in the usage of other references to ROL can be seen in recent years. Such increment is expected to continue as judges have expanded the sources referred to in interpreting the ROL.

Table A: Depiction of the Thematic Analysis of the cases discussed

| No. | Case Name | Housed under Articles | BSD of the MFC | Dicey Tripartite | Bingham's 8 Principles | Others |
|-----|-----------|-----------------------|----------------|------------------|------------------------|--------|
|-----|-----------|-----------------------|----------------|------------------|------------------------|--------|

²¹⁸ Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195.

²¹⁹ Lon Luvois Fuller, *The Morality of Law* (Yale University Press 1964).

²²⁰ *Alma NudoAtenza* (n 59).

²²¹ William Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edn, Maxwell 1910) 101.

²²² [2007] 6 MLJ 709, 743.

| | | 5(1) & 8(1) | | Model | Model | |
|-----|--|----------------|----------------|----------------|----------------|----------------|
| 1. | <i>Alma Nudo Atenza v PP</i> (FC) [2019] 4 MLJ 1 | ✓ | ✓ | ✓ | ✓ | ✓ |
| 2. | <i>Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan &Ors</i> (COA) [2017] MLJU 770 | ✓ | | ✓ | | |
| 3. | <i>Dato Dr Zambry bin Abd Kadir v Dato Seri IrHj Mohammad Nizar bin Jamaluddin</i> (COA) [2009] 5 MLJ 464 | | ✓ | ✓ | | |
| 4. | <i>Dato Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail</i> (HC) [2015] 7 MLJ 763 | | ✓ | ✓ | ✓ | ✓ |
| 5. | <i>Government of Malaysia v Lim Kit Siang</i> (SC) [1988] 2 MLJ 12 | | | ✓ (dissent) | ✓ (dissent) | |
| 6. | <i>Hock Huat Chan Sdn Bhd v Assan bin Mohammad &Ors</i> (HC) [2008] MLJU 92 | | | ✓ | ✓ | |
| 7. | <i>Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals</i> (FC) [2018] 1 MLJ 545 | | ✓ | ✓ | ✓ | ✓ |
| 8. | <i>JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd</i> (FC) [2019] 3 MLJ 561 | ✓ (dissent) | ✓ (dissent) | ✓ (dissent) | ✓ (dissent) | ✓ (dissent) |
| 9. | <i>Kerajaan Malaysia v Mat Shuhaimibin Shafiei</i> (FC) [2018] MLJU 32 | | | ✓ | ✓ | |
| 10. | <i>Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd</i> (COA) [2018] MLJU 772 | | ✓ | | ✓ | ✓ |
| 11. | <i>Lee Kwan Woh v PP</i> (FC) [2009] 5 MLJ 301 | ✓ | | | ✓ | |
| 12. | <i>Marathaei d/o Sangulullai v Syarikat JG Containers (M) Sdn Bhd</i> [COA] [2003] 2 MLJ 337 | ✓ | | ✓ | | |
| 13. | <i>National Union of Bank Employees v Director-General</i> | ✓ | ✓ | | ✓ | |

| | | | | | | |
|-----|---|---|----------------|---|----------------|---|
| | <i>of Trade Union</i> (COA) [2013] MLJU 1567 | | | | | |
| 14. | <i>Nik Nazmi bin Nik Ahmad v PP</i> (COA) [2014] 4 MLJ 157 | | ✓ | ✓ | | |
| 15. | <i>Nik Noorhafizi bin Nik Ibrahim v PP</i> (COA) [2013] 6 MLJ 660 | ✓ | ✓ (dissent) | ✓ | ✓ (dissent) | |
| 16. | <i>Pegawai Pengurus Pilihanraya Dewan Undangan Negeri Bagi Pilihan Raya Dun N.27 v Dr. Streram a/l Sinnasamy</i> (COA) [2019] MLJU 1558 | | ✓ | | ✓ | |
| 17. | <i>Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor</i> (HC) [2007] 6 MLJ 709 | ✓ | | ✓ | ✓ | ✓ |
| 18. | <i>Sivarasa Rasiah v BadanPeguam Malaysia</i> (FC) [2010] 2 MLJ 333 | ✓ | | ✓ | | |
| 19. | <i>Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah</i> (COA) [1998] 3 MLJ 289 | ✓ | ✓ | ✓ | ✓ | |
| 20. | <i>Tony Pua Kiam Wee v Gov of Malaysia</i> (FC) [2019] 12 MLJ 1 | | ✓ | ✓ | | ✓ |

Table B: Models applied according to the periodic intervals

| Periodic Interval | Housed under Articles 5(1) & 8(1) | BSD of the MFC | Dicey Tripartite Model | Bingham's 8 Principles Model | Others |
|---------------------------|-----------------------------------|----------------|------------------------|------------------------------|--------|
| Early Years (1988-2008) | 3 | 1 | 5 | 4 | 1 |
| Middle Years (2009-2015) | 4 | 5 | 5 | 4 | 1 |
| Recent Years (2017- 2019) | 3 | 6 | 6 | 6 | 5 |

5. Conclusion

The Malaysian judiciary is required to interpret the principle of ROL in a precise manner so as to ensure the continuation of constitutionalism²²³ in Malaysia as well as to maintain law and order for the greater good of society.²²⁴ As adduced by the Federal Court of Malaysia,²²⁵ constitutionalism facilitates the creation of a 'democratic political system by creating an orderly framework' premised upon the doctrine of ROL. Being the vanguard of the axiom of ROL, the judiciary holds a substantial role 'to outline what is generally meant by the ROL'.²²⁶ With respect to such duty, the judges do direct themselves to the above-mentioned models to interpret the ROL of Malaysia having the Diceyan Tripartite Model as the first point of reference which is subsequently substantiated by other models.

A scrupulous examination provides an observation that a gradualist approach is taken by the judiciary to interpret the notion of ROL. Although the Diceyan view has been consistently perceived as the foundational principle of ROL, in the early years, the Malaysian courts encapsulated the axiom of ROL in the expression 'law', principally under Articles 5(1) and 8(1). A paradigm shift with respect to the essence of the concept of ROL is evident in recent years as instead of limiting the principle of ROL to the word 'law' in the Federal Constitution, today the stream of ROL flows throughout the Constitution by considering ROL as part of the basic structure of the Constitution. Out of the examined 20 cases, the first theme was observed in 10 cases, predominantly from the early and middle years whereas the second model has been applied in 12 different cases which 50% of them were decided in recent years.

The Diceyan view of ROL which asserts the notion as a safeguard that serves to counteract arbitrary exercise in the 'regime of exception'²²⁷ has been further justified by implicitly incorporating Lord Bingham's 8 Principles of the ROL in interpreting the doctrine. In the 20 cases discussed above, it is evident that the fourth model has been implicitly or expressly operationalised to interpret the ROL in 14 cases. This, in the view of the authors, can be perceived as the tool to construct the Malaysian road towards the thick perspective of the ROL. The meaning of the ROL under the Malaysian legal system has also been expanded by express references made to definitions of other legal commentators in recent years.

It is evident that only in 7 cases, express mention of unconventional sources have been made, chiefly, 5 instances of such reference has been made in recent years. The new wave of considering the fifth model paves the way for the court to interpret as well as enforce

²²³ *Dato Dr Zambry bin Abd Kadir v Dato Seri Ir Hj Mohammad Nizar bin Jamaluddin* [2009] 5 MLJ 464.

²²⁴ *Dato Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail* [2015] 7 MLJ 763.

²²⁵ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals* [2018] 1 MLJ 545.

²²⁶ *Alma Nudo Atenza* (n 59).

²²⁷ Tim Harper, *The End of Empire and the Making of Malaya* (Cambridge University Press 2011) 2.

constitutional provisions conferring rights with the fullness required to preserve ROL. In answering the prime question, it is apparent that Dicey's Tripartite Model is applied as the keystone of interpreting the notion of ROL with implicit integration of Lord Bingham's 8 Principles favouring more liberal judicial treatment of the concept of ROL in recent years.

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