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The Role of Various Stakeholders in the Incorporation of International Law for the Protection of Stateless Persons in Malaysia

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Abstract
This conceptual paper analyses the role of various institutions, be it governmental or non-governmental, regional or municipal, which through their actions may propel the Federal Government of Malaysia to consider protecting stateless persons who reside in Malaysia through the incorporation and application of international law domestically. Practices within the United Kingdom and the United States of America are evaluated to determine whether long-term solutions can take the form of supranational organizations. These states are selected as Malaysia shares characteristics of both states in its practices relating to stateless persons.[1]

Keywords: Stateless, refugees, monism, dualism.

1. Introduction

Malaysia like most developing states subscribes to the dualism theory of incorporating international law within the municipal sphere whereby international law would generally have to be incorporated before the law can be applied municipally due to the perception that both international law and municipal law operate in different spheres. States that subscribe to monism on the other hand allow for international law to apply directly as the

[1] Ideas for this paper were presented at International Conference on Social Transformation, Community and Sustainable Development, University Malaysia Sabah, UNISZA & Imus Institute of Science and Technology from 7-9 November 2017.

theory acknowledges that both international law and municipal law operate in the same sphere. Since international law does not apply automatically within the State, certain categories of people who are marginalized due to lack of citizenship (i.e. stateless) have minimal recourse to legal protection in Malaysia. Various governmental and non-governmental organizations therefore have come to the aid of stateless persons. In states like Malaysia, there is a need to maintain the fine balance between upholding State sovereignty and promoting transnational network systems which assist in the incorporation of international law for the protection of stateless persons residing in Malaysia.

Participation by non-state actors in human rights development of a State is rampant owing to the fact that the International Court of Justice has clearly recognized the increase of entities having qualified personality within the international system of law post WWII.[2] Non-state actors would include international governmental organizations like the United Nations, transnational groups or corporations as well as individuals. Most of the non-state actors have personality only between consenting subjects and have international rights and duties which are limited to their sphere of operation.[3] The United Nations is the exception to the general rule as it represents a vast majority of the international community.[4] It therefore has objective personality and is subject to a wide range of international rights and duties.

From these developments, one can deduce that there are various players who can assist in the promotion of incorporation of international law either directly via treaty accession and statutory implementation or indirectly through liberal interpretation of the Federal Constitution and use of the Monism method of incorporation of international law. NGOs, the media, regional bodies, treaties bodies and the national human rights institutions are able to promote incorporation of treaty law that protect stateless persons such as the *Convention relating to the Status of Stateless Persons 1954* (Stateless Persons Convention),[5] the *Convention on the Reduction of Statelessness1966* (Reduction of Statelessness Convention)[6] and the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* (Hague Convention).[7] NGO initiatives, media and the inherent reporting mechanisms within treaties encourage governments to act in the manner that promotes human rights in the country. Regional bodies may provide additional support to State efforts in protecting the stateless person. Additionally, there could be a regional mechanism of addressing the issue of statelessness that would transfer the burden from the State individually to South East Asian States collectively. This conceptual paper analyses the role of various institutions be it governmental or non-governmental; regional or municipal which through their actions

[2] *Reparations Case* [1949] ICJ Rep 174.
[3] Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 205.
[4] *Reparation for injuries suffered in the service of the Nations, Advisory Opinion* [1949] ICJ Rep 174, ICGJ 232.
[5] Convention Relating to the Status of Stateless (Stateless Persons Convention 1954) 360 UNTS 117.
[6] Convention on the Reduction of Statelessness (Reduction of Statelessness Convention 1961) 989 UNTS 175.
[7] Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930, 179 LNTS 4137.

may propel the Federal Government to consider protecting the stateless person who resides in Malaysia through the incorporation of International Law. Practices within the United Kingdom (UK) and the United States of America (US) are evaluated to determine whether durable solutions can take the form of supranational organizations. These states are selected as Malaysia shares characteristics of both states in its practices which relate to stateless persons.

2. The Role of NGOs and the Media

In promoting incorporation of international law, entities that would have a role to play include the media and non-governmental organizations. Non-governmental organizations (NGOs) especially those with transnational reach have what is known as a “universalist understanding of human rights”.[8] Such non-governmental organizations such as Amnesty International, SUARAM, MSRI actively work in Malaysia. Opinions of NGOs are important as NGOs are present in all levels of society, can be found across the region and have broad working relationships with trade unions, the media, academia as well as the private sector.[9] Depending on how aggressive these organizations are they will be able to influence governmental ministers in the decisions that they make. According to Thio, “Ministerial Pronouncements in a dominant party State carry quasi-law weight and shape expectations of how constitutional actors will act.”[10]

As the two-party system is in its infancy in Malaysia, the once opposition party that has been able to assert control in the last elections can be influential in shaping the reception of international law on stateless persons provided they are receptive and open to the causes of the various transnational non-governmental organizations. NGOs, often perceived as busy-bodies, cranks or mischief makers could very well assist governments in various ways. The Government should also be reminded that these organizations already have *locus standi* in countries like the United Kingdom.[11] Therefore, actions of the government in relation to stateless persons may be eventually open to review in court through the efforts of the NGOs.

Constitutional law jurist MP Jain did state that the Malaysian law pertaining to *locus standi* for application for judicial review of administrative action seems “ancient and antiquated

[8] Mark Tushnet, 'The Inevitable Globalisation of Constitutional Law' (2009) 49 (4) VJIL 989.

[9] Hao Duy Phan, ‘Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report’ (2009) 31(3) Contemporary Southeast Asia 472.

[10] Li-annThio, ‘Reception and Resistance: Globalisation, International Law and the Singapore Constitution’ (2009) 4 National Taiwan University Law Review 343.

[11] *R v Secretary of State for the Environment ex parte Greenpeace Ltd* (No 2) (1994) 4 All ER 35.

and out of tune with modern developments in judicial thinking in the common law world."[12] NGOs have a long way to go before *locus standi* be given in Malaysian courts.

Although the media and NGOs have a role to play in the universality of human rights treaties, States are in fact accountable to the policies that they promote. The traditional tenets of international law still hold weight today. Concepts such as territorial integrity, sovereign equality and non-interference assist the State in its promotion and implementation of human rights law. In contrast according to Parrish, 'new transnational leaders of globalization, i.e. corporations, the media, interest groups, religious organizations, as well as environmental, philanthropic and other non-governmental actors, are less accountable for the policies they promote'.[13]

Transnational networks have acted as the conduit to mobilize support for human rights by the gathering and disseminating information about human rights abuses, educating the public, defining human rights norms and lobbying governments.[14] Kingston gives the example of the 'Save Dafur' alliance in highlighting the positive role of such partnerships. Composed of more than one hundred organizations, the alliance's unity statement advocated the end of violence, facilitation of aid and safe return of displaced persons as part of its goals.[15] These are the boons of the network that ought to be maintained.

While various groups especially non-governmental and religious organizations within the State assist the stateless persons in Malaysia to a large extent, the onus is primarily on the State to ensure that various human rights standards do make their way into the local jurisprudence.

States are crucial to the creation of a world system that promotes human dignity for two reasons. Firstly, States are long-lasting entities whereas organizations may be dissolved at any point of time. A permanent existence is the virtue of the State but not a virtue possessed by organizations, be it national or international. Secondly, States are *ipso facto* subjects of international law whereas organizations do not automatically attain that status within the international forum.

Naturally there are banes in the traditional concept of sovereignty as well as some States do invoke territorial sovereignty to shield outside criticism and scrutiny of internal state

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[12] M.P Jain, *Administrative Law in Malaysia and Singapore* (3rd edn, Kuala Lumpur: Malayan Law Journal 1997) 765.

[13] Austen L Parrish, 'Rehabilitating Territoriality in Human Rights' (2011) 32 Cardozo Law Review 1106.

[14] David P Forsythe, *Human Rights In International Relations* (Cambridge University Press 2000) 166-72.

[15] Lindsey N Kingston, 'Legal Invisibility: Statelessness And Issue (Non) Emergence' (PhD, Graduate School of Syracuse University 2009) 167.

practices.[16] State sovereignty is also not able to shed its imperialistic and colonial nature. Nonetheless it assigns to itself treaty obligations which is the product of negotiations and consent.[17] This signifies legitimacy in the practice of States.

As transnational networks do not have the ability to consent to treaty laws, their actions as such do not benefit from the characteristic of legitimacy. In sum States are the key promoters of human rights due to their staying power, status within the international system and legitimacy of practice. Modern modes of incorporation of international law depend on a web of organizational influences.

The role of the media is important in addressing the issue of protection of stateless persons. For protection of stateless persons to appear as a core interest within the State, all organizations and institutions of the State would have to first understand the concept of statelessness and second realize that it is a conundrum of Malaysian society that needs to be given attention to. The media plays a strong influence in providing knowledge on the plight of the stateless person. Statelessness unfortunately has failed to emerge as an issue which grabs the public's attention. Kingston is of the view that the story of statelessness fails to emerge due to three factors[18]:-

Firstly, the story of statelessness is difficult to construct. A clear image of a stateless person does not appear and the narrative would not be all that easily understood. Secondly the issue lacks credible solutions at global level. There are various causes of statelessness and each cause may require a separate solution. The message therefore would be difficult to market and promote. Thirdly there is lack of political will due to the fact that statelessness has a close nexus to the concept of sovereignty.

Additionally, statelessness has always had to make way for refugee protection and rights. The refugee issue does not suffer the consequences of those factors extrapolated by Kingston. As the NGOs do not focus on the plight of the stateless and the media would find it difficult to clearly explain the issue, the institutions of government including the judiciary may not feel the need to develop this area of law. The other alternative would be to allow for regional bodies to highlight and address the issue of statelessness.

3. Roles of Regional Bodies

Just as NGOs and the media play an important role, regional bodies are also able to influence incorporation of international law. Within the European States, since the creation

[16] David Chandler, *From Kosovo to Kabul and Beyond: Human Rights and International Intervention* (2nd edn, London: Pluto Press 2006) 128-29.
[17] AL Parrish, 'Rehabilitating Territoriality in Human Rights' (2010) 32 Cardozo L. Rev 1124.
[18] LN Kingston, 'Legal Invisibility: Statelessness and Issue (Non) Emergence' (PhD, Graduate School of Syracuse University 2009) 7.

of the European Convention of Human Rights in 1951, a system has been put in place to ensure that States abide by European human rights law. Even dualist States like the United Kingdom that refused to incorporate the convention into local law until almost 50 years later, by virtue of the Human Rights Act 1998 have been held responsible for human rights violations within the regional plane. Hence the enforcement mechanism is strong. European based concepts like proportionality of governmental action or decision have made their way into the more conservative States like the United Kingdom due to the maturity of its transnational treaty body.

Within our region, ASEAN may be able to emulate the methods employed within the European system provided the rights protected are those rights that are suitably chosen for the region. At present there exists the ASEAN Intergovernmental Commission on Human Rights that handles matters in relation to human rights. Its mandate and functions have included developing strategies for the promotion of human rights; developing an ASEAN Human Rights Declaration; enhancing public awareness, promotion of capacity building; encouraging States to accede to international Human Rights instruments; promoting full implementation of ASEAN instruments relating to human rights; providing advisory, technical and consultative assistance; obtaining information from ASEAN Member States, developing common approaches, preparing studies and submitting annual reports.[19]

This Commission therefore merely plays a promotional and consultative role and is yet to achieve the level of competence that already exists within the European system. Respondents of an expert based survey on regional human rights co-operation in Southeast Asia were of the view that ASEAN member States lacked the readiness that was required for a protective rather than promotional body.[20] Looking at how ASEAN has been slowly developing, the South East Asian region sits more than fifty years behind the EU. Fortunately, there is the EU model in place that would allow for the expansion of human rights law enforcement within the ASEAN region.

4. Roles of Treaty Bodies

Major human rights treaties provide for a system of reporting which inadvertently leads to greater involvement of international law within the domestic setting. The Committee on the Elimination of Discrimination against Women established under Article 17 of *the Convention on the Elimination of All Forms of Discrimination against Women 1979* (CEDAW)[21] is an example of such treaty-based bodies. Although there have been criticisms as to its

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[19] Association of Southeast Asian Nations (ASEAN), Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, July 2009 <https://www.refworld.org/docid/4a6d87f22.html> accessed 22 February 2019.

[20] Hao Duy Phan, 'Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report' (2009) 31 Contemporary Southeast Asia 478.

[21] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979) 1249 UNTS 13.

competencies, nonetheless it is a Committee that has been established for purposes pertaining to the implementation of this treaty which other treaties may lack. Article 43 of the *Convention on the Rights of the Child* 1989 (CRC)[22] which provides for the creation of a monitoring body referred to as the Committee on the Rights of the Child is yet another example. The UNHCR was created prior to the *Convention relating to the Status of Refugees 1951* (Refugees Convention).[23] Refugees Convention creates the body that oversees not only the workings of the Refugees Convention but also the Stateless Persons Convention. For most part, State parties are required to report to supervisory bodies created under treaty.[24]

Although human rights treaties have their own monitoring mechanism to achieve compliance by the State, there are different levels of supervision that takes place. Article 35 of the Refugees Convention focuses on co-operation that the UNCHR needs from the States. During the 25th Meeting of the 2nd Conference of Plenipotentiaries,[25] a great deal of the discussion between representative States was related to who would be the one the State would have to co-operate with rather than the nature of the supervisory function of the said organization. Hence Article 35 is not considered to be a robust monitoring provision as Article 17 of CEDAW and Article 43 of CRC profess to be. Furthermore, there is no equivalent provision within the Stateless Persons Convention underscoring the point that there is no one monitoring body specifically monitoring the application of the Stateless Persons Convention. Nevertheless, UNHCR has spearheaded important developments in legal principal.[26] From 1995 onwards, ExCom conclusions and General Assembly resolutions have progressively developed UNHCR's mandate on statelessness[27].

NGOs are also given the opportunity to present shadow reports. In this way, compliance to international treaty obligations is monitored. It ought to be noted however that not all of the treaties provide for such a committee. As with the Stateless Persons Convention, The Hague Convention and the *Convention on the Nationality of Married Women 1957* (Nationality Convention)[28] do not create such committees. Apart from which the committees themselves may not be all that effective as it is unable to hear inter-state or individual complaints and therefore is unable to take enforcement action as such.

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[22] Convention on the Rights of the Child (CRC 1989) 1577 UNTS 13.

[23] Convention Relating to the Status of Refugees (Refugees Convention 1951) 189 UNTS 150.

[24] Rebecca J. Cook, 'Women's International Human Rights Law: The Way Forward' (1993) 15 Human Rights Quarterly 252.

[25] 'Conference Of Plenipotentiaries on the Status of Refugees and Stateless Persons', *Summary Record of the twenty-fifth Meeting* 1951 (UN Doc A/CONF2/SR25).

[26] Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 International Journal of Refugee Law 571.

[27] Matthew Seet, 'The Origins of UNHCR'S Global Mandate on Statelessness' (2016) 28 International Journal of Refugee Law 11.

[28] Convention on the Nationality of Married Women (Nationality Convention 1957) 989 UNTS 175.

CEDAW through its optional protocol mandates the committee to receive communications from individuals or groups of individuals and may initiate inquiries.[29] Unfortunately, not all conventions have this mandate. Be that as it may, the media plays a vital role as adverse reporting will affect the reputation of the State. Examples of such negative media reporting include the refugee swap deal between Malaysia and Australia. This can be seen as a non-legal constraint to the State's actions. International perception of legality of State action is important and provides the impetus for States to go in-line with international human rights standards.

5. The Role of National Human Rights Institutions

The developments that have taken place through human rights law has created what can be termed as 'hybrid organizations' known as National Human Rights Institutions (NHRIs). States have sponsored or created their own human rights organizations as a way to exert greater influence in the international arena.[30] In Malaysia the relevant organization would be the Human Rights Commission of Malaysia (SUHAKAM) created via an act of parliament i.e. the Human Rights Commission of Malaysia Act 1999 (Act 597) and which officially began its work in the year 2000.[31]

NHRIs become part and parcel of the transnational network system which is a form of 'cross-border collective action to promote compliance with universally accepted norms.[32] Networks can be defined as "a set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors" for whom cooperation is the best way to achieve common goals.[33] These transnational network systems may pressure the government to act in a manner compatible with international human rights standards.

Bodies like SUHAKAM act as a bridge between international human rights standards and their implementation at the national level.[34]The 1991 Principles relating to the status and

[29] For more information about the Committee on the Elimination of Discrimination against Women, see its web page <http://www2.ohchr.org/english/bodies/cedaw/index.htm> accessed 28 March 2013.

[30] Pierre-Marie Dupuy and Luisa Vierucci, *Ngos in International Law* (Edward Elgar Publishing Limited 2008) 71.

[31] Suruhanjaya HakAsasiManusia Malaysia (SUHAKAM) - My Profile' (*Suhakam.org.my*, 2019) <http://www.suhakam.org.my/info/profile> accessed 22 February 2019.

[32] Hans Peter Schmitz, 'Transnational Human Rights Networks: Significance and Challenges' Syracuse University <http://www.isacompss.com/info/samples/transnationalhumanrightsnetworks_sample.pdf> accessed 22 February 2019.

[33] Tanja Borzel, 'Organizing Babylon-On the Different Conceptions of policy Networks' (1998) 76 Public Administration254.

[34] Richard Carver, 'A New Answer to an old question: National Human Rights Institutions and the Domestication of International Law' (2010) 10 Human Rights Law Review 2.

functioning of national institutions[35] (the Paris Principles) enunciates the role of the NHRIs as the promoter of human rights treaties at national level at the same time contributing to the State's reporting function. Even though the Paris Principles is merely soft law, the international statement is one of the most authoritative statements made thus far. Nonetheless the powers vested unto SUHAKAM is in fact a far cry from the criteria put forward within the Paris Principles.

The Paris Principles provide that a national institution may be authorized to hear and consider complaints and petitions concerning individual petitions and may have quasi-judicial competence in that respect. The functions entrusted to them are based on:

(a) Seeking an amicable settlement through conciliation, binding decisions or on the basis of confidentiality;
(b) Informing parties about their rights and remedies and promoting access to them;
(c) Hearing complaints or petitions or transmitting them to any other competent authority and
(d) Making recommendations to competent authorities.[36]

SUHAKAM however does not have this far reaching authorization and acts merely as an advisory body without quasi-judicial enforcement powers.[37] The Paris Principles also provides for submission of opinions, recommendations, proposals and reports to Parliament. The Human Rights Commission Act 1999 merely provides for reports to be submitted to parliament under S. 21 of the Act. SUHAKAM could therefore have been vested with more powers, had all the criteria of the Paris Principles been applied domestically.

As the Paris Principles were only adopted by the General Assembly in 1993, initial human rights treaties created have not provided for the creation NHRIs to implement human rights law domestically. At the most, an international treaty body would be created to facilitate enforcement. The Stateless Persons Convention does not provide for an international body, neither does it provide for the creation of NHRIs. More modern human rights treaties however have been drafted to incorporate the role of NHRI's. One such example would be Article 33(2) of the *Convention on the Rights of Persons with Disabilities 2006*[38]which has in

[35] Principles relating to the status and functioning of national institutions for protection and promotion of human rights (endorsed by the UN Commission for Human Rights Res. 1992/54, 3 March 1992, annexed to GA Res. A/RES/48/134, 20 December 1993, A/RES/48/134).
[36] Additional principles concerning the status of commissions with quasi- judicial competence, The Paris Principles.
[37] Human Rights Commission of Malaysia 1999 (Act 597), section 4.
[38] Article 33 National implementation and monitoring: "States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties

fact been acceded to by the Malaysian Government. It is hoped that the NHRIs would be the link between States and human rights regimes. As noted in the earlier paragraph however even if the convention stipulates specifically the obligations of the NHRI, it is still subject to the local legal system in terms of the manner in which the said NHRI would operate. SUHAKAM for instance is confined by its limited functions based on Section 4(1) of Act 597.

According to Carver, NHRIs are given different mandates depending on the statute creating it. Of the statutes surveyed by Carver, 45 percent provide that the institutions have a treaty mandate whereby the NHRI is given authority to explicitly apply international human rights treaty law, in particular those treaties that have been ratified by the State. 10 percent have a national mandate, i.e. the institution only has mandate to promote or protect treaty rights that are explicitly contained in national law. Another 45 percent of statutes mandate the institution to defend human rights generically. This is termed as an unspecified mandate.[39]

Even though the Asian continent displays the highest proportion of statutes with treaty mandate, nonetheless the Human Rights Commission of Malaysia Act 1999 (Act 597) merely provides for a national mandate.[40] "Human rights" is defined in the act to refer to fundamental liberties as enshrined in Part II of the Federal Constitution.[41] This may be expected since Malaysia is a dualist State which focuses on the national laws and would only refer to treaty provisions provided they are incorporated within the domestic system. Nonetheless Section 4(4) of Act 597 does state that "For the purpose of this Act, regard shall be had to the *Universal Declaration of Human Rights 1948* (UDHR) to the extent that it is not inconsistent with the Federal Constitution".[42] As such SUHAKAM may not be directly enforcing treaty law within the State but does have its role to play in safeguarding human rights on a higher plane than what was previously safeguarded in Malaysia before the act came into force.

Nonetheless the UDHR has not been liberally utilized by the judiciary. One of the setbacks to the liberal usage of international human rights law is the fact that the UDHR articles looked at must be in line with the provisions of the Federal Constitution which include fundamental liberties enshrined in Part II of the Federal Constitution. These fundamental liberties however do not cover all first, second and third generation human rights which are available within the general understanding of the term. Rights that are covered are merely liberty of the person,[43] rights against slavery and forced labour,[44] protection against

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shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights."

Convention on the Rights of Persons with Disabilities 2006, GA Res. 61/106 Annex 1, A/61/49 (2006).

[39] Richard Carver, 'A New Answer to An Old Question: National Human Rights Institutions and The Domestication Of International Law' (2010) 10 Human Rights Law Review 6.

[40] Ibid 10.

[41] Human Rights Commission of Malaysia Act 1999, section 2.

[42] Universal Declaration of Human Rights 1948 (UDHR) U.N.Doc.A/810, 71.

[43] Federal Constitution of Malaysia 1957, Article 5.

retrospective criminal laws and repeated trials,[45] equality before the law,[46] prohibition of banishment and freedom of movement,[47] freedom of speech, assembly and association,[48] freedom of religion,[49] rights in respect of education[50] and rights to property.[51] Furthermore, even the rights covered through the Federal Constitution are limited in scope if compared to similar provisions under the UDHR. Hence application of the UDHR by the judiciary is in that sense somewhat limited. Certain provisions within the Federal Constitution refer to citizens alone thereby leaving stateless persons out of the equation.

Although Section 4(4) of Act 597 is open to liberal interpretation, nonetheless the case law pertaining to the application of the UDHR has been rather static. In the case of *Merdeka University Bhd v Government of Malaysia*[52] which was decided before the establishment of SUHAKAM, Justice Abdoolcader did state that "the Universal Declaration of Human Rights … is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules." Case law post establishment of SUHAKAM unfortunately employ a similar method of interpretation. In *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*[53]it was stipulated that the UDHR is merely a declaration, it is not a legally binding document for the High Court to give effect. As such the UDHR would only apply upon adoption through legislation. This understanding was repeated in the case of *Lim Jen Hsien & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*.[54] According to the court, the position has not changed even with of the enactment of section 4(4) of Act 597. Hence even though there is an avenue for judges to allow for the UDHR to have effect in the State via liberal interpretation of the statute establishing SUHAKAM, judges are still reluctant to do so.

Regardless of incorporation of the UDHR, Carver does point out that SUHAKAM appears to make considerable use of the insertion of international law into Act 597.[55] SUHAKAM does for example monitor the treatment of prisoners in order to ensure that there is compliance with the UN Standard Minimum Rules on the Treatment of Prisoners[56] in spite of the fact that Malaysia is a dualist nation that confines the mandate of the Commission to enforce rights protected in the national constitution. Section 4(2)(d) of Act 597 specifically grants

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[44] Federal Constitution of Malaysia 1957, Article 6.
[45] Federal Constitution of Malaysia 1957, Article 7.
[46] Federal Constitution of Malaysia 1957, Article 8.
[47] Federal Constitution of Malaysia 1957, Article 9.
[48] Federal Constitution of Malaysia 1957, Article 10.
[49] Federal Constitution of Malaysia 1957, Article 11.
[50] Federal Constitution of Malaysia 1957, Article 12.
[51] Federal Constitution of Malaysia 1957, Article 13.
[52] *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356, p 366.
[53] *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2015] 2 MLJU 2059.
[54] *Lim Jen Hsien & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 MLJ 122.
[55] Richard Carver, 'A New Answer to An Old Question: National Human Rights Institutions and The Domestication Of International Law' (2010) 10 Human Rights Law Review 14.
[56] Human Rights Commission of Malaysia (Annual Report 2007) 76.

power to SUHAKAM to visit places of detention in accordance with procedures as prescribed by the laws relating to places of detention and to make necessary recommendations. Within this monitoring process, treatment of stateless refugees is closely watched by SUHAKAM as well.

No doubt the Refugees Convention is yet to be acceded to, nonetheless the provisions of the UDHR especially those that relate to non-discrimination as well as certain international custom such as the principle of non-refoulment acts as sufficient mandate for SUHAKAM to act on refugee issues.[57] SUHAKAM has for example secured access to places of detention for the UNHCR.[58] SUHAKAM acts as the conduit between UNHCR and the government. The outcome of meetings between SUHAKAM and UNHCR have been conveyed to the Malaysian National Security Council and other governmental agencies.[59]

The problem that arises at this juncture is that the work of SUHAKAM in relation to refugees does not get official support from the institutions of government due to lack of accession to the Refugees Convention. As such attention to the plight of the refugee is sporadic and piecemeal. There is no systematic assistance to this group of persons within Malaysia coming from the NHRI. The same can be said about stateless persons as there is no hint of State accession to the Stateless Persons Convention. Nevertheless, there has been progress whereby on 14 September 2017, an MOU was signed between SUHAKAM and UNHCR to formalize their commitment towards protection of rights of stateless persons amongst others.[60]

Carver therefore only paints half the picture though his analysis. He fails to look at the judicial trend and include in his analysis pertinent case law like *Merdeka University Bhd v Government of Malaysia*,[61] *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara*[62] or *SIS Forum (Malaysia) v Dato' Seri Syed Hamid Albar*[63] which demonstrates a different perception of the role of SUHAKAM within the municipal sphere.

Nonetheless, the method employed within the local NHRI seems conventional and suited to the State that wants to promote human rights in a slow, fluid and consistent manner as opposed to liberal, more aggressive incorporation of international human rights law. There are advantages to having this method of subtle incorporation of international human rights law. According to Carver, "international standards elucidate the content of applicable

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[57] Human Rights Commission of Malaysia (Annual Report 2007) 76.
[58] Human Rights Commission of Malaysia (Annual Report 2007) 104-105.
[59] Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM) - My Profile' (*Suhakam.org.my*, 2019) <http://www.suhakam.org.my/info/profile> accessed 22 February 2019.
[60] Human Rights Commission of Malaysia (Annual Report 2017) 23.
[61] *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356.
[62] *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449.
[63] *SIS Forum (Malaysia) v Dato' Seri Syed Hamid Albar* [2010] 2 MLJ 377.

rights".[64] A clear interpretation of international law assists in the further growth and development of good human rights standards within the State. Apart from which "NHRIs use international standards as a means of extending the scope of rights that are applicable at the municipal level".[65] Carver in fact gives Malaysia as the example where rights are extended to refugees residing in the State.

According to Section 4(1)(c) of Act 597, SUHAKAM is able to make recommendations to the executive on the various treaties or other international instruments that ought to be subscribed or acceded to by the State. For SUHAKAM this is a central aspect of their work looking at the number of treaties that have been acceded to thus far by the Malaysian government.[66] NHRIs also do monitor legislation for compliance with international human rights law. S. 4(2)(c) specifically stipulates that the Commission may study and verify any infringement of human rights in accordance with the provisions of the Act. Although SUHAKAM focuses on governmental accession to the six core human rights treaties,[67] nonetheless SUHAKAM has conveyed to the government the view that there is room for the government to comply with the Refugees Convention on a progressive basis.[68] SUHAKAM however has yet to recommend accession to the Stateless Persons Convention.

NHRIs are able to propose laws that will give substance to the State's human rights treaty obligations. This is however an extensive process that not all NHRIs including SUHAKAM are ready to commit to. NHRIs in certain States do not stop at mere recommendations but actually do involve themselves in legislative initiation. There are also NHRIs that draft proposal for laws or amendments and later present these to parliamentarians willing to tableit in the House of Representative or Select Committee meetings. Examples of those States include Latin American States like Columbia and Peru.[69]

Again, SUHAKAM is yet to acquire such extensive mandate and therefore at present remains uninvolved in legislation initiation. In fact, even recommendations made by SUHAKAM are not necessarily accepted by the government. For example, SUHAKAM has for some time now pressed for accession to ICCPR and ICESCR. This however has not been acceded to by the Federal Government. Even though section 21(1) stipulates that SUHAKAM is to submit its annual report to Parliament every year, nowhere in section 21 is it stated that these reports are to be debated in Parliament.

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[64] Richard Carver, 'A New Answer to An Old Question: National Human Rights Institutions and The Domestication Of International Law' (2010) 10 Human Rights Law Review 16.

[65] Ibid 13.

[66] Ibid 16.

[67] Human Rights Commission of Malaysia (Annual Report 2016) 6.

[68] Human Rights Commission of Malaysia (Annual Report 2016) 178.

[69] Richard Carver, 'A New Answer to An Old Question: National Human Rights Institutions and The Domestication Of International Law' (2010) 10 Human Rights Law Review 13.

6. Durable Solutions through Supranational Organizations

Apart from mere promotion of incorporation of international law, one of the durable methods of dealing with statelessness within South East Asia would be through regional mechanisms rather than individual efforts of the State. Malaysia through the Association of South East Asian Nations (ASEAN) may need to establish a regional arrangement similar to that of the European Union (EU). The EU as a regional system of law has validity and legitimacy through the creation of treaties that govern the relationship between member states. So too ASEAN through the ASEAN Charter ratified by all member states of ASEAN has transformed itself from "a loose association into a union consolidated by a legally binding treaty"[70]. As certain key areas of law like asylum, immigration and refugee protection come under the purview of the EU, past practices within the United Kingdom prior to Brexit become important to shed light into how the burden of dealing with such instances is shared between EU states. The EU arrangements could be used as a model for ASEAN member States.

Data from the United States is relevant as the United States, like Malaysia, is a Federation albeit greater in size and population. The United States in contrast to the United Kingdom is not party to the Stateless Persons Convention. Contrary to the practice of the United Kingdom and Malaysia, the United States generally upholds the theory of monism in the incorporation of international law within its municipal system. The United States applies the principle of nationality based on the place of birth. Whereas Malaysia and the UK principally apply the principle based on descent of parents.

Malaysia shares the characteristics of both these States. Like the United Kingdom, Malaysia abides by dualism and goes by the philosophy that international law only becomes part of municipal law with the incorporation of a treaty via an act of parliament. Emulating characteristics of the United States, Malaysia too is not a party to the Stateless Persons Convention.

In comparison with United Kingdom's existing membership to the EU and Malaysian membership in ASEAN, the mechanism in place within the EU is rather advanced in spite of it being less than 60 years since its inception. One of the primary aims of the *Treaty of Rome* 1957 (hereinafter known as the EC Treaty) when it established the European Economic Community (now known as the European Union) was to remove the obstacles to the free movement of persons as highlighted in Article 3(1)(c) of the EC Treaty.[71] The Treaty of Maastricht on European Union 1992[72] (hereinafter known as the Maastricht Treaty)

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[70] Yuval Ginbar, 'Human rights in ASEAN-setting sail or treading water?' (2010) 10(3) Human Rights Law Review 504.

[71] Treaty Establishing the European Economic Community 1957 (EC Treaty) 298 UNTS 11.

[72] Treaty of Maastricht on European Union 1992 (Maastricht Treaty) OJ C 224,1.

established a three-pillar structure for the EU. Asylum seekers fell under the third pillar of Justice and Home Affairs. Under this pillar, each State negotiated and agreed with one another as equals on particular points. Justice and Home Affairs Ministers from each sovereign state of the EU naturally favoured securitarianism over humanitarianism. Hence asylum issues were dealt with inter-governmentally.[73]

The EU institutions predominantly the European Council, the European Parliament and the European Commission were initially not involved in the regulation of asylum seekers, which would include stateless persons and refugees. A new method of policy making also emerged under the Maastricht Treaty known as 'intensive transgovernmentalism'. This method allowed subordinates to the Heads of State to make decisions for the State. By virtue of the Treaty of Amsterdam 1997,[74] reception of asylum seekers, procedures for the granting and removal of refugee status and temporary protection for displaced persons are now regulated by the institutions of the EU.[75]

Regardless of the existence EU law in this area of asylum seekers, it cannot be denied that a restrictive immigration regime is the political landscape which Satvinder refers to as securitarianism over humanitarianism.[76] Commentators like Nathwani[77] and Feller[78] do not entirely agree with this stance. The mischaracterization of those in need of asylum causes the refugees and stateless persons to be classified as irregular migrants even though their plight is far more precarious than any other migrant. Control of movement therefore seems to be more important than seeing to their needs. There is the unfortunate link in the public mind between international terrorism and asylum which again causes tighter immigration rules. This coupled with the fact that the United Kingdom only became a member of the EU in 1973, chose to refrain from being part of all the treaties within the EU treaty system and decided to exit the EU from March 2017 onwards, indicates that not all EU initiatives may be sound and feasible to be emulated by ASEAN.

Law and practice of the United States is reviewed at this point as the United States, being a federation like Malaysia, shares the characteristic of failing to accede to the Stateless Persons Convention. Apart from that, various trends in the incorporation of international law within the municipal system have been developed within United States international

[73] Satvinder S. Juss,'The Decline and Decay of the European Refugee Policy,' (2005) 25 Oxford Journal of Legal Studies 751.

[74] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts 1997 (Amsterdam Treaty) OJ C 340, 173.

[75] Anthony W Bradley & KD Ewing, *Constitutional and Administrative Law* (14thedn, England: Pearson, Education Ltd 2007) 466.

[76] Satvinder S. Juss, 'The Decline and Decay of the European Refugee Policy,' (2005) 25 Oxford Journal of Legal Studies 751.

[77] Niraj Nathwani, 'The Purpose of Asylum,' (2000) 12 International Journal of Refugee Law 355.

[78] Erika Feller, 'Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come,' (2006) 18 International Journal of Refugee Law 512.

law jurisprudence and could have a bearing on the Malaysian practice. With regards to asylum seekers in the United States, a Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America[79] highlights that protection accorded to the asylum seeker within the EU is relatively strong compared to the United States. Asylum seekers are generally not entitled to government support in the United States save for a few minor exceptions. The EU has sufficient legislation that enables the court to effectively enforce rights of the asylum seeker. This however is lacking within the United States asylum system and even more so with the Trump administration. There is an inability to call upon basic protective functions of the state[80] for fear of deportation. It is contended that Malaysia too lacks a system of effective enforcement of rights for the asylum seeker which may include the stateless person.

One must take note of the fact however that the geographical landscape of States does have an influence on matters of asylum since insular States would be able to screen immigrants more carefully compared to continental states; an example being France. Within this perspective, we do share the characteristics of both the United States and the United Kingdom. The United States' main immigration in-flow of persons which causes problems for the State would be that of arrivals from Mexico. Apart from that, the United States is not geographically positioned to allow for asylum seekers to make their way there. The EU on the other hand has had to deal systematically and aggressively with the asylum issue within EU member states simply because the in-flux of asylum seekers makes administration of asylum more onerous. Even way back during the 24th Meeting of the 1st Conference of Plenipotentiaries, it was already acknowledged that there was a distinction between insular and continental countries.[81] Malaysia being an insular state apart from its connection to Thailand would allow for more stringent immigration control at borders and inadvertently less enforcement of rights for the asylum seeker.

7. Conclusion

Domestic systems within the international legal framework have developed in such a way to allow for greater reception of international law in spite of traditional theories being subscribed by States, including Malaysia. Traditional theories like dualism which form the basis of Malaysian reception on international law, is slowly giving way to monism through unconventional judicial interpretation techniques. This coupled with the role of various stakeholders in promoting the incorporation of international law provides constant support for the State in applying international law rules. Be that as it may, States have not chosen to

[79] R Hansen, S Martin, A Schoenholtz, P Weil, 'Report on the Workshop on Refugee and Asylum Policy in Practice in Europe and North America' (2000) 14 Georgetown Immigration Law Journal 801.
[80] Jaya Nogales, 'The Right to Have Rights: Undocumented Migrants and State Protection' (2015) 63 Kansas Law Review 1045.
[81] 'Conference Of Plenipotentiaries on The Status of Refugees and Stateless Persons', *Summary Record of the twenty-fifth Meeting* 1951 (UN Doc A/CONF2/SR25).

abandon the dualist approach. Malaysia for one is clearly dualist in its reception of both treaty and customary international law. General judicial approaches to international law and the promotional role of NGOs, the media, ASEAN, treaty bodies and SUHAKAM, the Malaysian human rights watchdog, have not caused an abandonment of dualism in favour of monism. At the most, there is what seems to be a gradual encroachment of international human rights law into the Malaysian legal system. This gradual encroachment can be seen as a boon in allowing for the plight of the stateless to be addressed in the State in a clear and systematic manner. Even regional sub-systems like the EU have seen the need to take the reins when it comes to asylum cases to ensure that a balance is met between the securitarian approach on one side and the humanitarian approach on the other. Whether this would be emulated by ASEAN is however yet to be seen.

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Challenges and Proposals to the Malaysian Healthcare System

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Abstract
The healthcare sector in Malaysia is facing many changes and influences that pose new challenges to the government and private healthcare organizations. Malaysia is a dynamic, rapidly progressing, multicultural country and constantly undergoing evolution from every aspect of its development, specifically the healthcare industry. Like many countries in the world, Malaysia is also facing healthcare issues and challenges. These challenges from pre-independence era have morphed into global issues which are more complicated as the country moves into the millennial age. Inevitably, the healthcare system will collapse in the future unless the government proactively tackles the challenges now. A healthcare system has been defined by WHO as all the activities whose primary purpose is to promote, restore or maintain health. This article has identified the major issues plaguing the healthcare system in Malaysia under the various headings: governance, economic and social challenges. The authors have also put forward various proposals to the meet the challenges.

Keywords: healthcare, healthcare system, issues and challenges, governance, proposals.

1. Introduction

The healthcare sector is facing many changes and influences that pose new challenges to the government and private healthcare organizations. Malaysia is a dynamic, rapidly progressing, multicultural country and constantly undergoing evolution from every aspect of its development, specifically the healthcare industry. Like many countries in the world, Malaysia is also facing healthcare issues and challenges. These challenges from pre-independence era have morphed into global issues which are more complicated as the country moves into the millennial age. Inevitably, the healthcare system will collapse in the future unless the government proactively tackles the challenges now. A healthcare system has been defined by WHO as all the activities whose primary purpose is to promote, restore or maintain health[82]. This article has identified the major issues plaguing the healthcare

[82] World Health Organisation, 'The world health report 2000 - Health systems: improving performance' (2000).

system in Malaysia under the various headings: governance, economic and social challenges. The authors have also put forward various proposals to the meet the challenges. This study is a library-based research which involved primary and secondary sources.

1.1 Pre-independence Healthcare in Malaysia

In 1910, general hospitals offering western medicine were available at each state in Malaya[83], existing hand in hand with traditional healing methods practiced by communities residing in Malaysia, namely Chinese medicine, indigenous beliefs as well as practices originating from Islam and Hindu Religion. Allopathic healthcare service was provided by the civil service and the focus at that time was to keep the British personnel and workforces in the plantations and mines, healthy from diseases namely malaria.[84] The challenges evolved into a fight against the epidemics of water-borne infections such as typhoid and cholera when the populations expanded into townships.

After the Japanese invasion, the colonial government provided midwifery clinics and first-aid facilities to the Chinese settlements, established to vanquish the Malaysian Communist's Party which were contesting for ruling power in Malaya. It was during this era that missionary hospitals such as Assunta Hospital in Petaling Jaya and Fatimah Hospital in Ipoh were set up, mainly to address the healthcare needs of these communities.[85] The healthcare services planning soon encompassed the rural areas which were populated heavily by the Malays.

1.2 Post-independence Healthcare in Malaysia

Being a colonial country, it is expected that Malaysia inherits a healthcare system similar to Britain. Strongly founded on socialist belief by the Health Minister, Aneurin 'Nye' Bevan, National Health Service Act was passed in Britain in 1946 and subsequently enforced on 5th July 1948[86]. The UK National Health Service was established and is held in high esteem throughout the world until today, as a comprehensive and holistic system, accessible to every citizen in the country.

Following the liberal welfarist ideology in post Second World War, the public hospital system, initially intended for the expatriate and local government officials, were accessible

[83] Chee Leng Chee and Simon Barraclough, 'The Transformation of Health Care in Malaysia' in Chee Heng Leng and Simon Barraclough (eds), *Healthcare in Malaysia: The dynamics of provision, financing and access* (Routledge 2009).
[84] MK Rajakumar, 'Foreword' in Chee Leng Chee and Simon Barraclough (eds), *Healthcare in Malaysia: The dynamics of provision, financing and access* (Routledge 2009).
[85] Chee and Barraclough (n 1).
[86] Tommy Thomas, 'A Constitutional Right to Healthcare'', *Abuse of Power: Selected Works on the Law and the Constitution* (Strategic Information and Research Development Centre 2016).

to the general population after Malaya was granted independence in 1957. The cost was heavily subsidized despite stratification of the wards according to the rank of government officers. The predominance of public hospitals persisted until 1970s, whereby corporate, for-profit hospitals were non-existent, save a few nursing homes and small maternity homes established by entrepreneurs.

In contrast to the hospitals, clinics which provided primary health care services (medical and dental) were made up by mainly by the private sectors, concentrated heavily in the cities and towns. These clinics operated on for-profit basis and relied on out-of-pocket payment by patients who can afford the service, hence services were aimed at the city-dwellers with higher income. This trend still persists till this day and in fact, has influenced the establishment of other types of private healthcare facilities and services, whereby the urban areas are very much coveted whilst the rural populations are left to the cared by the government. In 1967, as many as 1046 medical practitioners, 59% from a total of 1759 registered medical practitioners, were believed to be in private practice. [87]

Through national economic plans and expanded under New Economic Policy in 1970s, government set up a network of health clinics, to serve the rural population, where there was one health centre for every 21,697 population while the ratio for midwifery clinic was 1:5,147).[88] The success of this programme to address the challenges at that time was reflected by the drop in Maternal Mortality Rate (MMR) from 500 per 100 000 live births in 1950, to under 30 per 100 000 live birth in 2008.[89] Similarly, the infant, toddler and under 5 mortality rate were reduced from 75.5 per 1000 live births in 1957 to 5.5 per 1000 live births in 2008.[90] Communicable diseases which were viewed as a threat to the community were successfully reduced with the last polio outbreak occurring in 1977 and Malaysia was certified polio-free country in 2000[91]. Although diphtheria and whooping cough (tetanus) incidences has been low, dengue and tuberculosis persist to be endemic until today.

2. Healthcare Challenges in Malaysia

Malaysia faces a different facet of healthcare challenges with greater complexity presently compared to the issues in the 1970's and 1980's. Not limited to healthcare professionals, there are now more players and interested parties involved in the industry, as the stakes are higher due to liberalization policy and globalization. The major issues plaguing healthcare industry discussed in this paper are divided into governance, economic and social

[87] Safurah Jaafar and others, *Malaysia Health System Review*, vol 3 (Judith Healy ed, World Health Organization (WHO) 2012).
[88] Chee and Barraclough (n 1).
[89] Jaafar and others (n 5).
[90] Ibid.
[91] Ibid.

challenges. In this section, references are also made to other countries relevant to the discussion.

2.1 Governance

2.1.1 Unclear Stand on the Role of the State

The policy that the Government held throughout 1970's and 1980's was that Malaysia is a welfare country. The taxes collected were used appropriately to strengthen the education system by building schools and universities, and likewise in the healthcare aspect, multiple hospitals and clinics were set up, specifically in the rural area. This approach was contingent in ensuring that healthcare was accessible and equitable for most of the citizen in the country. The role that the state has upheld is that the government is the service provider, and this is reflected in the steady rate of GDP expenditure of 5.6 – 6.6 percent in the period of 1971-1981.[92]

However, under the 7th Malaysia Plan (1996-2000), due to pressure from international and regional financial institutions such as the International Monetary Fund, the World Bank, and the Asian Development Bank, the Mahathir administration introduced the concept of privatization. 'Malaysia Incorporated' was envisioned whereby the private sector is the main engine of a country's growth while the government ensures the enabling environment in the form of infrastructure, deregulation and liberalization.[93] Privatization Masterplan (PMP) , launched in 1991 officially included healthcare for private ownership when it recognized twelve private hospitals amongst 149 agencies to be privatized. The 6th Malaysia Plan also claimed that the government is committed to shift its role towards more policy-making, regulatory aspect as well as setting standards to ensure quality, affordability and appropriateness of care.

As such, there was a change in the policy which affected the nation in all aspects of governance, especially power, water and healthcare. With respect to healthcare, non-medical services segment of the medical functions was privatized in 1994, starting with MOH's pharmaceutical store in 1994, hospital support services in 1996 and followed by medical examination of foreign workers in 1997 to FOMEMA.[94] Subsequently, Remedi Pharmaceuticals, subsidiary of United Engineers Malaysia (UEM) were awarded a renewable

[92] Rajah Rasiah, Nik Rosnah Wan Abdullah and Makmor Tumin, 'Markets and Healthcare Services in Malaysia: Critical Issues' (2011) 3 Institutions and Economies (formerly known as International Journal of Institutions and Economies) 477 <http://ideas.repec.org/a/umk/journl/v3y2011i3p467-486.html> accessed 20 June 2019.
[93] Chee and Barraclough (n 1).
[94] Lee Poh Onn, 'What Lies Ahead for Malaysian Healthcare ?' (2015)4 ISEAS Economics Working Paper<https://www.iseas.edu.sg/images/pdf/ISEAS_Economics_Working_Paper_2015-04-01.pdf> accessed 16 April 2019.

fifteen-year concession to become supplier for government's medical store, inclusive of manufacturing, purchasing , storage and distribution activities.[95]

The privatization of hospitals stemmed from the belief that better management and institutional flexibility will drive the hospitals to be more efficient and effective.[96] It is also intended to serve those who can afford it, while relieving the public hospitals to cater for those who cannot use the public hospitals. Although PMP was launched in 1991, state development corporations and other government-linked conglomerates had started acquiring private hospitals from the year 1982.[97]

Consequently, the share of private ownership in overall healthcare expenditure had risen from 5.8 percent in 1981, reaching 7.6 percent in 1982 and later achieved 30.6 percent in 2004[98]. The government started to diversify its role into becoming investors when Kumpulan Perubatan Johor (KPJ) which was established in 1991, expanded its role and become one of the major private hospital owners in Malaysia. Malaysian government's investment arm Khazanah Nasional, owns a substantial portion of private hospitals when its subsidiary, IHH Healthcare acquires Parkway Pantai Ltd and Gleneagles chain hospitals, making it 14 private hospitals in Malaysia in total with 2,182 operational beds.[99]

As a state, the government cannot run from its role as regulator. Albeit drafted rather late as the private hospitals have mushroomed all over the country, the objective of Private Healthcare Facilities and Services Act 1998 (PHFSA) is to ensure that minimum standards are complied with to ensure patient safety and quality of care rendered to Malaysian citizens.[100] The Act is also intended to improve accessibility to healthcare and rationalize medical charges to a reasonable rate. [101] Furthermore, the act replaced the Private Hospital Act 1971, which were deemed inadequate as it did not cover other type of healthcare facilities and had no enforcement power even to inspect the premises.[102]

PHFSA is touted as far-reaching and governs almost all aspect of a private hospital's operation, from the pre-establishment state up until mortality assessment investigation. It also allows the enforcement officers to enter a premise should he believe that, amongst others, the investigation would be adversely affected or evidence tampered or destroyed, if

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[95] Ibid.
[96] Rasiah, Abdullah and Tumin (n 10).
[97] Ibid.
[98] Ibid.
[99] 'Our Hospitals' <https://www.ihhhealthcare.com/hospital-overview.html> accessed 16 April 2019.
[100] Afidah Ali, 'Legal Requirement For Medical Practitioners', *Persidangan Pakar Program Perubatan 2015* (2015) <http://medicalprac.moh.gov.my/v2/uploads/Laws & Medical Practitioners.pdf> accessed 16 April 2019.
[101] Nik Rosnah, Wan Abdullah and Lee Kwee-heng, 'Impact of Private Healthcare Facilities and Services Act 1998 [Act 586] and Regulations 2006 on the Medical Practice in Corporate Private Hospitals in Malaysia' (2006) 2 International Journal of Sustainable Development 91.
[102] Private Hospital Act 1971.

he delays the raid due to the delay in obtaining the warrant. The private healthcare facilities could also be closed down by the Ministry, due to reasons such as posing grave danger to the public, through legal-administrative procedures such as revocation of licence and enforcement action by the Ministry. [103]

Therefore, the government now plays a tripartite role; investor, regulator and service provider. The mixture of roles leads the government to be ambivalent in its policy making and decision making. The role of service provider has long been the governments' most effective tool to ensure election victory as the majority of the public depends heavily on public healthcare facilities.[104] On the other hand, the government is also the major shareholders in the companies owning most of private hospitals in the country, bringing in up to RM509 million in every quarter yearly.[105] Should any of these hospitals contravene any of the provision of law, the government must be decisive and impartial in legal action against all parties involved.

The Ministry's conflict is most apparent in the case of closure of a private hospital, Mawar Medical Centre in Negeri Sembilan in 2019. The hospital had received a substantial amount of fundings in capital grants and leased government land at a hugely discounted rate for the past 20 years. In November 2018, all but one specialist had mass-resigned from the centre. Effectively, the hospital has failed to comply with the Private Healthcare Facilities and Services Regulations 2006 (Private Hospitals and Other Healthcare Facilities) and following show cause letter[106] from the Director General of Health, the centre's licence was revoked. The patients were relocated to public hospitals as well as other private haemodialysis centres to ensure continuity of care. The government did not take over the hospital as it would be "selfish" since the government is also a service provider. The MOH is placed in a difficult position as it has to be mindful of its responsibility to uphold the law for the sake patient safety and to also consider public perception towards Minister and the Ministry.

2.1.2 Deteriorating Quality of Healthcare Professionals

Malaysia has long suffered from the shortage of healthcare professionals, until recently. Previously, the shortage of doctors was rather critical, whereby the doctor: population ratio was 1:1,105 in 2008. The target is to reach 1:400 in the year 2020. The ratio for other

[103] Private Healthcare Facilities and Services Act 1998.

[104] David Quek, 'The Malaysian Health Care System: A Review', *Intensive Workshop on Health Systems in Transition* (2009) <https://www.researchgate.net/publication/237409933_The_Malaysian_Health_Care_System_A_Review> accessed 20 June 2019.

[105] 'IHH Healthcare Q4 2018 Profit Quadrupled to RM509.4 Million; Recommends Dividend of 3 Sen per Share for FY2018' (2019) <https://ihh.irplc.com/medianews.htm?filepath=IHH/IHH Q4 2018 Press Release 27 2 2019_final.pdf> accessed 16 April 2019.

[106] Private Healthcare Facilities and Services Act 1998, s 43.

categories such as dentists and nurses were worse with the ratio being 1:7618 and 1:512 respectively.[107]

To increase the availability of healthcare professionals to the public, Malaysia has embarked on many programmes since 8th Malaysian Plan, whereby one of them being outsourcing of training. In 2011, it was found that the government has licenced more than 34 medical schools, offering more than 50 medical programmes to resolve the issue of insufficient doctors as speedily as possible. This is in addition to increased number of oversea medical institutions recognized from 239 in 1989, reaching up to 338 institutions in 2016.[108] The outcome was that Malaysia is faced with influx of new medical graduates yearly, more than the post of housemen training that the public hospitals could offer, resulting in long wait to be posted, between 6 months to one year. Hence, the MOH had to impose certain measures: revising the method of appointment, from permanent to contract appointment and introducing a moratorium on medical programmes with the cooperation of the Education Ministry up to April 30, 2021 with the aim of imposing quota on medical graduates by universities in the country. Training slots for houseman has also been increased from 10,835 to 11,706 by adding more training hospitals to become 47 hospitals in total.[109]

The more important issue however is the subpar quality of these mass-produced doctors, caused by decreased working hours, insufficient specialists to train and poor attitudes amongst most of the junior doctors. This is supported by data which shows that, less than 60% of houseman finished their training in the stipulated period, as well the number of housemen dropping out had tripled, from 368 in 2008 becoming 1441 in 2014. It was also found, that from those who had to extend their housemanship, 55% were due to incompetence and 45% had disciplinary issues.[110]

Likewise, the issue of quality of the workforce is not only limited to doctors but nurses as well. A private hospital reportedly claimed that as many as 79 out of 80 graduate nurses were unemployable and this is due to the quality of training received at the private institutions which were questionable[111]. This would later spiral to result in smaller number

[107] Safurah Jaafar and others, *Malaysian Health System Review* (Judith Healy ed, World Health Organization (WHO) 2012).
[108] Lim Chee Han, 'Housemanship Programme in Malaysia: Availability of Positions and Quality of Training' (*Penang Institute KL*, 2017) <https://penanginstitute.org/wp-content/uploads/jml/files/press-releases/2017/Housemanship-in-Malaysia-Press-Conference-21-July-Final.pdf> accessed 17 April 2019.
[109] Bernama, 'Government to Resolve Issue of Housemen Placement' *The New Straits Times* (9 June 2018) <https://www.nst.com.my/news/nation/2018/06/378286/government-resolve-issue-housemen-placement> accessed 16 April 2019.
[110] Chee Han (n 30).
[111] Malaysia Productivity Corporation (MPC), 'Reducing Unnecessary Regulatory Burdens on Business: Medical Professional' (2016) <https://www.healthpoint.co.nz/register/> 79.

of staffs qualified with post basic training, which were highly critical in technically demanding discipline such as peri-operative and haemodialysis specialty.

2.1.3 Weak Support for a Regulatory Mechanism

It is claimed that the private healthcare sectors in Malaysia is heavily regulated, with more than 50 legislations pertaining to medical and healthcare in the country[112]. Other than Medical Practice Division, MOH, other regulatory bodies are namely the professional bodies (boards and councils), authorities which regulates the healthcare facilities (Fire Department and local authorities) and equipment (medical devices and radiation containing equipment), as well as the enforcement agencies which enforce the statutes which governs the medical practices (for example Medicine Advertisement Board which issues advertisement approvals)[113].

Since healthcare affects all the citizens of Malaysia directly (which impacts the future of the country), it is only befitting that proper legal framework exists to protect patient's safety and quality of healthcare. Regulation is intended to enforce "responsible" conduct on business enterprises and in many countries, the presence of regulations is an indicator of proper monitoring and quality of services offered.[114] The government recognized the importance of regulatory and enforcement and has repeatedly reiterated its intention to strengthen the regulatory framework from 7th Malaysian Plan up till 11th Malaysian Plan.

On the other hand, the government is seen to be hesitant in upholding or carrying out strategic planning with regards to strengthening the regulatory mechanism in the healthcare industry. An example of that is the Pathology Laboratory Act 2007 [Act 674] which was drafted more than 10 years ago but yet to be enforced.[115][116] One wonders whether the situation was partly affected by well-connected big laboratories' reluctance to be regulated. The drafting of several important bills (namely Organ and Tissue Transplantation Bill and Assisted Reproductive Technology Bill) were delayed as the existing resources have to be diverted to complete the drafting process of Private Aged Healthcare Facilities and Services Act 2018 {Act 802] and its Regulations.

The manpower planning seemed to be non-existent as there is no plan to increase the government's enforcement officers, whereby less than 200 officers from Private Medical

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[112] Ali (n 19).
[113] Ibid.
[114] Lydia Nahan, 'Medical Tourism Expected to Reach RM2.8b in Revenue by 2020' *The Malaysian Reserve* (2018) <https://themalaysianreserve.com/2018/09/04/medical-tourism-expected-to-reach-rm2-8b-in-revenue-by-2020/> accessed 20 June 2019.
[115] Pathology Laboratory Act 2007.
[116] 'Implement Pathology Lab Act, Says MMA' (*The Star Online*) <https://www.thestar.com.my/news/nation/2017/06/15/implement-pathology-lab-act-says-mma/> accessed 16 April 2019.

Practice Control Section are expected to enforce Act 586, covering more than 10,000 licensed and registered healthcare facilities of varying stage of legal compliance all over Malaysia.[117] This is excluding estimated 1000 old folks/nursing home which comes under Act 802 and 500 private laboratories under Act 674.[118] This is an unreasonable and daunting task for any authority, especially with limited equipment and no additional incentives whatsoever. The situation is no different with other enforcement agency under MOH such as Medical Device Authority, Traditional and Complementary Medicine Division and Inspectorate Unit.

2.2 Economic Challenge - Lack of a Health Financing System

The public sector in Malaysia has always been traditionally the provider of healthcare services for 65% of its citizen. Yet, Malaysia's health expenditure as a per cent of GDP (4.4% in 2018) is relatively low by the world average and lower still when compared to the high-income countries such as Australia which spends 9.4% of the GDP for health expenditure, Japan 10.2%, South Korea 7.2%, and Singapore 4.9% respectively. Increased expenditure would translate to more public healthcare facilities built, better system delivery and overall wellbeing of the people in general.[119] The government currently subsidises 98% of public hospital services amounting to RM12.8 billion/year while the patients only pay 2% of the cost.[120]

However, there seem to a policy shift when corporatisation is introduced in the healthcare system. This shift is dictated by the market forces and the argument that the current healthcare system is unsustainable in the long run. The introduction of the concept of public hospital autonomy and full paying patient in the 10th Malaysia Plan signifies the slow entrance of privatisation into some of the services provided by the public sector.[121] The public is being cultured into thinking that if you want the service fast, you have to pay for it yourself.

Undeniably, privatisation of healthcare helps in offloading the workload of the understaffed and poorly maintained government healthcare facilities, by catering to the health needs of those who can afford such services. Private healthcare facilities, not bogged down by administrative bureaucracy, offers high tech equipment not available in government

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[117] 'Bilangan KPJKS Berlesen Dan Berdaftar Bawah Akta 586' (2019) <http://medicalprac.moh.gov.my/v2/modules/mastop_publish/?tac=Bilangan KPJKS Berdaftar Berlesen> accessed 18 April 2019.

[118] Department of Standards Malaysia, 'Status Report On The Number Of Malaysian Laboratories Accredited By Standards Malaysia' (2019) <http://www.jsm.gov.my/statistics2#.XLjgHS-B3ow> accessed 17 April 2019.

[119] Loh Foon Fong, 'WHO Lauds More Healthcare Spending' *The Star Online* (24 May 2018) Nation <https://www.thestar.com.my/news/nation/2018/05/24/who-lauds-more-healthcare-spending-ministers-measures-important-as-malaysians-are-living-longer-says/> accessed 17 April 2019.

[120] Quek (n 23).

[121] Ibid.

hospitals, faster service and convenience to the patients. In addition, private hospitals also increase the country's revenue by attracting medical tourists, as evidenced by Malaysian Healthcare Travel Council (MHTC) report of RM1.3 billion revenue in 2017 and more than one million health travellers' volume in 2017.[122]

In spite of that, due to the absence of national health financing system, the premium healthcare services and facilities remain out of reach for the average Malaysians. Most of the payment for services in private hospitals are from out-of-pocket payment which is unsustainable for long term. Burdened with monthly transportation, education, and property costs, most Malaysians consider insurance as a luxury, resulting in Malaysian health insurance rate of only 30%. Furthermore, global increase in healthcare costs (encompassing cost of medicine, professional fees and devices) will drive more and more Malaysians to public facilities in the future, resulting in underutilization of facilities in the private healthcare sector.[123]

2.3 Social Challenges

2.3.1 Change in Disease Burden

Disease pattern in Malaysia is undergoing transitional phase whereby major problems from acute infectious disease has changed into chronic lifestyle related disorders, such has cardiovascular diseases, diabetes mellitus, cancers and age-related disorders. In 2008, motor vehicle accidents, cardiovascular disease and cancers are major causes of admissions to public hospitals ranking 3rd, 5th and 10th respectively.[124] On the other hand, the prevalence of certain infectious diseases has been rising steadily, for instance in 2013, 43,346 dengue fever cases were reported, which is a 98% increase from 21,900 cases in 2012.[125]

The presence of immigrants and refugees have contributed to the changing demographic of disease burden. Tuberculosis notification was found to have increased from 78 per 100,000 population in 2012 to 81 cases per 100,000 in 2013.[126] In addition to that, the maternal mortality ratio has worsened from 23.8 in 2015 to 29.1 in 2016, due to increase in cases of obstetric embolism, postpartum haemorrhage and other associated medical disorders. [127]

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[122] Nahan (n 36).

[123] Mark Rao, 'Malaysia's Top-Rated Private Healthcare Not Accessible to General Public' (*The Malaysian Reserve*, 2019) <https://themalaysianreserve.com/2019/02/12/malaysias-top-rated-private-healthcare-not-accessible-to-general-public/> accessed 16 April 2019 and Quek (n 23).

[124] Ministry of Health, 'Country Health Plan: 10th Malaysia Plan 2011-2015' (2013).

[125] Unit Perancang Ekonomi, 'Kertas Strategi 5: Mencapai Akses Sejagat Kepada Penjagaan Kesihatan Berkualiti' (2015).

[126] Ibid.

[127] Ministry of Economic Affairs, 'Mid-Term Review of Eleventh Malaysia Plan 2016-2020 : New Priorities and Emphases' (2018).

2.3.2 Increased Expectation and Awareness

With the advancement of technology, Malaysians are exposed to more information and social media than the previous generation. In response, the expectation and awareness of Malaysians regarding healthcare services received have increased exponentially. A study done by Galen Centre for Health & Social Policy, a public policy research and advocacy organization, recently have identified that most citizens' wish list are shorter waiting time and caring doctors, in addition to cheaper medicine, tests and health insurance[128]. Thus, the healthcare system must be empowered and trained on how to handle public's expectation.

Online selling of healthcare products and consultation are preferred by patients who values convenience, cheaper price and privacy. Patients can also book any doctor they want through their mobile phone, and even get healthcare professionals to see them at home at premium fee. Currently, there is no specific law regulating the delivery of healthcare services or products via online, and MOH is looking into regulatory mechanism to regulate this industry to curb fake products and fraud transaction before this practice becomes uncontrollable.[129]

2.3.3 Emerging Health Technologies

The advent of new technologies to solve medical illness and condition have open up a new horizon. Proliferating rapidly amongst others is the aesthetic industry. Currently, the government attempts to regulate the industry by ensuring that only registered medical practitioners with Letter of Credentialing and Privileging (LCP) are allowed to practice aesthetic in private clinics, which are registered with Ministry of Health (MOH). Nonetheless, there are a lot of beauty spas manned by personnel with doubtful qualification and experience which are beyond the jurisdiction of MOH.

Looking closer, there are healthcare facilities which conduct operations done by fly-by-night surgeons, as well as unethical practice of operating patients without appropriate post-operative care.[130] Australia medical experts have condemned this practice and issued warnings to its citizens when Mr Leigh Aiple, an Australian was found dead after undergoing bariatric surgery in Malaysia.[131] This incident had somewhat tarnish the image of Malaysia

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[128] Codeblue, 'What Matters To Malaysians In Health Care' (*Codeblue.galencentre.org*, 2019).

[129] Affairs (n 51).

[130] 'MMC: We Can Act against Fly-by-Night Doctors' *The Star* (26 May 2007) <https://www.thestar.com.my/news/nation/2007/05/26/mmc-we-can-act-against-flybynight-doctors/> accessed 16 April 2019.

[131] FMT Reporters, 'Australian Experts Warn of Risks of Getting Plastic Surgery in Malaysia' (*FMT News*, 2017) <https://www.freemalaysiatoday.com/category/nation/2017/12/19/australian-experts-warn-of-risks-of-getting-plastic-surgery-in-malaysia/> accessed 15 April 2019.

and raised the question of the number of times such incidence went unreported in Malaysia.

Fertility treatment is another field where exciting new methods are being developed for affluent, childless couples. Although MHTC is aiming for Malaysia to be a fertility hub by 2020, caution is imperative as many of the procedures are still untested and controversial.[132] Another highly coveted experimental treatment is stem cell therapy which is believed to be the "magic" pill to solve all medical illness, yet there is only a handful of haematological cancers recognized to be treated with stem cell therapy[133]. Areas such as genetic modulation is fast becoming a favourite as well due to the potential of benefits that can be reaped from the technology.

At the moment, the Ministry's capacity and capability planning to equip the regulators or technical experts with the latest knowledge regarding these new health technologies is perceived to be insufficient. To be able to use the technologies, the government must have technical experts to advise the management properly on the next course of action.

2.3.4 Foreign Equity and Professionals

Malaysia has pledged commitments to comply with the General Agreement in Trade in Services (GATS) whereby countries signatory to this agreement agrees to cross border supply of services, consumption of services abroad, foreign direct investment and movement of health professionals between borders. Under GATS, there is a limit on the degree to which foreign operators can operate in the market, thus offering some protection towards local healthcare industry. At the same time, 1995 ASEAN Framework on Agreement in Trade in Services aims to promote free flow of goods, services, investments, capital and skilled labour to create an ASEAN Economic Community (AEC) by 2020.[134]

However, starting 2015, the government has introduced the concept of autonomous liberalization whereby new private healthcare facilities such as private hospitals and private medical/dental specialist clinics are allowed to have 100% foreign equities. There is some restriction towards other facilities such as for ambulatory care centres and haemodialysis centres, it is limited to 49% as well as having a joint venture with local company.[135]

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[132] Nahan (n 36).

[133] 'Arahan Ketua Pengarah Kesihatan Bil. 1/2016 Mengikut Peruntukan Akta Kemudahan Dan Perkhidmatan Jagaan Kesihatan Swasta 1998 [Akta 586]: Rawatan Terapi Sel' (2016).

[134] Nicola S Pocock and Kai Hong Phua, 'Medical Tourism and Policy Implications for Health Systems: A Conceptual Framework from a Comparative Study of Thailand, Singapore and Malaysia' (2011) 7 Globalization and Health 12 <http://www.globalizationandhealth.com/content/7/1/12> accessed 20 June 2019.

[135] 'Dasar Penyertaan Ekuiti Asing Dalam Kemudahan Kesihatan Jagaan Swasta' (2015).

This has effectively open up the floodgate to entry of foreign investors, who will bring in foreign professionals into Malaysia as well. Indirectly, this would increase flow of money out of the country, particularly the haemodialysis sector which is heavily subsidized by government, state zakat authorities, SOCSO and NGOs. By monopolization, this policy could be killing the local healthcare industry which is not backed by multinational giant pharma and equipment companies.

3. Proposals to Meet Healthcare Challenges

Looking at the current scenario, Malaysia requires a multiprong approach to tackle these issues without jeopardizing either the economic status of the country or the wellbeing of its citizens. The strategies that the government could consider are - establishing a single payor mechanism; strengthening the regulatory and enforcement arm; reducing political interference in healthcare policies and regular engagements with the stakeholders.

3.1 Establish a Single Payor Mechanism

It is fairly obvious that the government will not go back to being the welfarist state such as Norway, Sweden or Denmark where the tax collection is appropriated to cover the healthcare costs of all its citizen in all private healthcare facilities. Too deeply trapped in the web of capitalism, the only way to ensure equity and accessibility is maintained is by establishing a single payor mechanism[136].

The national health financing must fulfil several criteria to ensure that it is not misused and achieve its intended goal namely; be based on cost and risk sharing, made compulsory for everyone who can afford and integrates primary, secondary and tertiary levels as well as within the public sector and between the public and private sectors. [137] No doubt the current government has started to introduce two health financing schemes, MySalam and Skim Peduli Kesihatan untuk Kumpulan B40 (PeKaB40) but the schemes are far from what has been envisioned before.

MySalam is plagued by political issues regarding the foreign equity of Great Eastern Takaful Berhad, an insurance company which is owned by Singapore. There are various questions that were raised by the public, for example, the exclusion clause will exclude majority of Malaysians from benefitting it, the inclusion criteria were too narrow and the sustainability

[136] A single payor mechanism is where one entity not only collects healthcare fees and premiums, but is also the payer for all healthcare costs.
[137] MI Merican, Y Rohaizat and S Haniza, 'Developing the Malaysian Health System to Meet the Challenges of the Future.' (2004) 59 The Medical journal of Malaysia 84 <http://www.ncbi.nlm.nih.gov/pubmed/15535341>.

of the scheme after 5 years.[138] PeKaB40 was queried on why it had to be run by a corporation (costing the government another RM2 billion) when it can use government's machinery and network.[139] It was also reportedly being shunned by most general practitioners as the payment offered was lower than what was prescribed under Seventh Schedule, Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006[140].

In other words, the government may choose between compulsory health financing or tax-based system, both will ensure equity and access through single payor, multiple-provider system. Both systems have their own pros and cons and the government have to weigh them carefully to ensure that the coverage is comprehensive, and the system is sustainable in the long term. To address the concern of the public, some had even proposed that the government withhold the implementation of MySalam until all factors have been discussed thoroughly with all the relevant stakeholders.[141]

When the single payor mechanism is in place, the government can utilize all the general practitioners'(GP) clinics to play a bigger role in enhancing awareness, carrying out promotional activities and following up on patients with non-communicable disease within their vicinity effectively. This has been suggested by Dr Steven Chow, the President of Private Medical Practitioners Associations of Malaysia, for the past few years. Increased involvement of GPs with the community will hopefully address the issue of changing disease burden as well as manage the public's expectation towards healthcare delivery.[142] The impact of this win-win collaboration will greatly reduce the workload in government's clinic, decrease waiting time for the patients, provide personalised and focused treatment for the patients and strengthen the concept of private-public partnership, which has long been one of MOH's strategic plan.

3.2 Strengthening the Regulatory and Enforcement Arms

The complaints regarding uncoordinated enforcement activities of the MOH are not unheard of and thus, the Ministry has embarked on efforts to integrate the enforcement agencies into one Programme/ Authority[143]. However, this task proved to be easier said

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[138] Dr Michael Jeyakumar, 'Will MySalam Help, Harm Or Make No Difference?' (*Codeblue.galencentre.org*, 2019) <https://codeblue.galencentre.org/2019/03/05/will-mysalam-help-harm-or-make-no-difference/> accessed 20 June 2019.

[139] Mohamed Rafick Khan Abdul Rahman, 'Putting Political Mileage Ahead of Public Healthcare' (*Malaysiakini*, 2019) 1 <https://www.malaysiakini.com/letters/462637> accessed 16 April 2019.

[140] Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006.

[141] Jeyakumar (n 61).

[142] Dr Steven Chow, 'Utilise Our GPs To Ease Patients' Waiting Time and Cost' (*Codeblue.galencentre.org*, 2019) <https://codeblue.galencentre.org/2019/03/07/utilise-our-gps-to-ease-patients-waiting-time-and-cost/> accessed 12 April 2019.

[143] Ekonomi (n 49).

than done since the acts, power under the law, qualifications of enforcement officers and training required are very diverse. The merging of the enforcement entities requires critical analysis from multiple governance and technical aspects lest poor implementation of this initiative could result in negative outcome to the government, in particular legal implications as well as public safety.

Whether the integration of enforcement agencies takes place or not, it is high time that the government reviews all the laws pertaining to medical practice and healthcare in Malaysia. Some of it are already outdated, such as Nursing Act 1950[144] and the professional acts need to be standardized so that the implementation would be smooth. It is proposed that the government set up a professional body to oversee the registration and accreditation of all professional bodies such as Australian Health Practitioner Regulation Agency (AHPRA).[145] This way, not only all the boards and councils are standardized but it would also control the quality of education of healthcare professionals.

The government must also allocate a dedicated unit equipped with the skills and knowledge needed to review the regulations regularly. Although some amendments of the PHFSA are already on its way and currently undergoing public engagement phase, this exercise has to scheduled properly and the stakeholders involved need to be committed as well. Training and adequate human resources issues need to be tackled so that the implementation will be as per intended.

A proactive approach is essential so that new technologies can be regulated (if needed) before it inflicts too much damage to the society. Technical experts need to be trained, exposed and retained, as well as educating the public adequately on the risks taken by using any device/technology before the device/technology is sufficiently studied.

3.3 Reduce Political Interference in Healthcare Policy

Increased involvement of the state in the shares of private healthcare facilities makes quality monitoring or compliance assessment to legal requirements difficult to be carried out properly. Pressure from influential people may skew the officers' efforts into approving applications without comprehensive scrutiny and should there be any legal implications later, the officers will be held accountable. Overall, this promotes a culture of corruption, disintegrate the integrity of the processing officers and the officers trapped in a lose-lose situation which will affect their mental health and performance.

[144] Nursing Act 1950.

[145] 'Australian Health Practitioner Regulation Agency' (*Legal Services Commission Australia*, 2019) <https://lawhandbook.sa.gov.au/ch09s05s01.php> accessed 10 April 2019.

Even during the operation of healthcare facilities, since the government is the biggest stakeholders in private hospitals, investors will attempt to maximise earnings and profits from its investment. Hence, the attempt to control the fee and price of consumables will be futile and left to the market forces to decide[146]. Reduced politician's interference will also lead to impartial policy making and fair distribution of financial subsidies such as capital grants or funds in the healthcare industry. The legislative and executive arm must be separated again to maintain the check and balance, as intended by the Federal Constitution.

3.4 Transparency and Increased Engagement with the Public and Stakeholders

The mistake commonly made by the government is inadequate engagement with all the stakeholders and lack of transparency, resulting in unenforceable act or unactionable policy. An obvious example is Mental Health Act 2001[147] and Mental Health Regulations 2010[148], whereby none of the existing private psychiatric nursing home can be licenced as they cannot comply with the requirement set by the Act.[149] Similarly, Telemedicine Act 1997[150] was not enforceable and said to be repealed soon, because it was not comprehensive enough to cater to issues that could arise, for example how confidentiality and liability issues should be handled if a wrong diagnosis is made over a phone consultation.

A statute should be the last method of regulating any type of industry as compared to self-regulatory or usage of soft law. Statute is the least cost-effective method to monitor standards and ensure that they are adhered to. Soft law also facilitates compromise, and thus encourages cooperation between parties with different interests and values, different time horizons and discount rates, and different degrees of power.[151] Adequate awareness and public readiness is imperative before any law is enforced to ensure smooth implementation by the regulators.

4. Conclusion

The healthcare challenges in Malaysia are varied and extremely dynamic, influenced by multiple factors both from within and out of the country. During the pre-independence and independence period, healthcare was focused on the well-being of the British officers, plantation and mine workers, as well as eradicating communicable diseases, respectively. However, 1990's ushered in privatization plans of healthcare industry and the Government was supposed to change its role from service provider into policy makers and regulators.

[146] Chow (n 66).
[147] Mental Health Act 2001.
[148] Mental Health Regulations 2010.
[149] 'Bilangan KPJKS Berlesen Dan Berdaftar Bawah Akta 586' (n 40).
[150] Telemedicine Act 1997.
[151] Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421.

The major issues pertaining to healthcare in Malaysia can be divided into three; governance, economic and social challenges.

The root cause of current issues faced was indecisiveness of the government on which of the tripartite role (investors, regulators or service providers) that the government would like to play in near future. The other issues which reflect poor governance are the deteriorating quality of healthcare professionals and weak support for regulatory framework. The economic challenge was the absence of national health financing system, which is critical for ensuring universal health access, while the social challenges posed are the changing disease burden, increased public's expectation and emerging health technologies.

To handle these issues efficiently, it is proposed that a single payor mechanism is established, strengthening of regulatory and enforcements and increased engagements and transparency with the stakeholders before any policy or law is enacted. Implementation of these strategies hopefully could contribute to consolidate the current universal access to quality and safe healthcare, which will result in improved well-being of Malaysian citizens as a whole.

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Reforming Senatorial Appointments in the Dewan Negara

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Abstract
Despite being created with the purpose of ensuring oversight upon the popularly elected Dewan Rakyat, the Dewan Negara has been reduced to a mere rubber stamp over the decades. In order to reform the upper house and return it to a position of potency, this paper lays out several recommendations to improve upon the current system of senatorial appointment. This paper employs a legal doctrinal research methodology drawing from primary and secondary sources from a variety of legal jurisdictions, including a comparative legal analysis with the Republic of Ireland. First, the appointments made at the state level (which are currently done by the State Legislative Assemblies) are examined, and a system of direct elections is proposed as an alternative. Next, the paper focuses on the appointments made by the Yang di-Pertuan Agong (King) - which are currently done upon the advice of the Prime Minister and the Cabinet of Ministers - and explains why these should be done using the Irish specialist vocational panel system instead.

Keywords: Dewan Negara, Senate, elections, political reform, federalism.

1. Introduction

The Malaysian Parliament is a relic of the nation's colonial past, modelled after the bicameral Westministerian legislature both in structure and powers. According to the constitution, Parliament (which is vested with the legislative authority of the federation) consists of the monarch and two houses: the Dewan Rakyat (House of Representatives) and Dewan Negara (Senate).[1] The latter is the upper house of Parliament, and was created with the intention of preserving the rights and interests of the States from being overwhelmed by the federal legislature. As Mehdi writes, '[u]pper houses in federal democracies have come to serve the crucial purpose of guarding against majoritarian rule'.[2] The Dewan

[1] Federal Constitution of Malaysia, Article 44.
[2] Tahir Mehdi, 'Case for direct Senate elections' (*Dawn*, 13 March 2018) <https://www.dawn.com/news/1394959> accessed 11 November 2018.

Negara was also tasked with the duty of revising ill-considered populist legislation passed by the elected Dewan Rakyat. However 61 years after independence, the Dewan Negara today holds an insignificant role in the nation's legislative process - primarily due to constitutional amendments which have acted 'contrary to the spirit of the original constitution'.[3] The ruling government has, by appointing sympathetic members[4] over the years, undermined the effectiveness of the Dewan Negara as a check on its measures, and the effect is glaring: Bills passed by the lower house are rarely amended and its debates have little impact on the larger political scene.[5]

This state of affairs is unfortunate because the Dewan Negara has the capacity to become an important safeguard for the protection of rule of law in Malaysia. The rule of law is a legal doctrine which embodies the supremacy of the law over people, and necessarily excludes arbitrariness or wide discretionary powers of the government.[6] The Malaysian executive, which must also hold a majority in the Dewan Rakyat by virtue of Malaysia's parliamentary system, requires checks placed upon it to ensure the spirit of rule of law is not trampled upon, and currently the Dewan Negara is too domesticated to have this effect. Although the Dewan Negara does not have the power to veto Bills passed by the Dewan Rakyat, their criticisms hold important political capital. As the Bryce Commission noted, one of the main functions of an upper house is '[t]he interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it.'[7] By amending a Bill or even delaying one, there will be more political pressure upon the Dewan Rakyat to take those considerations into account. This is further strengthened by the fact that the process of overruling the upper house is slower and more arduous than simply compromising with them,[8] because Bills rejected by the Dewan Negara can only be tabled again in the lower house after a year.[9] This would compel the Dewan Rakyat to accept suggested amendments instead of pressing forward with a controversial Bill. In short, by taking a more active role in the legislative process the Dewan Negara can effectively guard against abuse of power by the Dewan Rakyat.

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[3] Wu Min Aun & RH Hickling, *Hickling's Malaysian Public Law* (Longman 2003) 26-27.

[4] Up until the Barisan Nasional (BN) government lost in the 14th General Elections in 2018, the Dewan Negara was predominantly filled with BN-aligned senators. Opposition parties made inroads in states like Kelantan and Penang when they started winning the majority of State Legislative Assembly seats (and thereby gained the power to appoint senators at the state level), but even as recently as the 13th Parliament (which was dissolved on the 7th of April, 2018) the Dewan Negara was overwhelmingly filled with BN affiliated senators. It was only when the Pakatan Harapan government came into power that non-BN senators were appointed by the monarch, see Mohd Azrone Sarabatin, 'Dewan Negara dikuasai pembangkang, sukar lulus RUU' *Berita Harian* (30 July 2018) <https://www.bharian.com.my/rencana/komentar/2018/07/455830/dewan-negara-dikuasai-pembangkang-sukar-lulus-ruu> accessed 5 June 2019.

[5] Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart 2012) 109.

[6] Ahmad Masum, 'The Rule of Law under the Malaysian Federal Constitution' [2009] 6 MLJ c, civ.

[7] Bryce Commission, *Report of the Conference on the Reform of the Second Chamber* (Cmd 9038, 1918) para 6.

[8] Robert Connor, 'House of Lords: Relevant or Relic? An Analysis of the Political Relevance of Legislature Upper Houses' (2013) 14 The Review: A Journal of Undergraduate Student Research 12, 14.

[9] Federal Constitution of Malaysia, Article 68(2).

In order to turn the upper house into an effective oversight chamber, the root of the problem must be tackled: the members sitting in the hall themselves. Thus, this paper seeks to establish that a reformed system of senatorial appointments is vital to enhance the rule of law in Malaysia.

Part I examines the potential in employing direct elections for senators, which is currently provided for (but remains unused) within the Federal Constitution. It is proposed that this would help strengthen the spirit of federalism in Malaysia and also foster greater accountability among senators to the people. Part II then looks at senatorial appointments made by the Yang di-Pertuan Agong (the King, henceforth referred to as the YDPA) upon the advice of the Prime Minister (PM) and the Cabinet - what this Article refers to as 'federal appointments' - and recommends that the Irish system of senatorial appointment from vocational panels be considered and applied to the Malaysian context.

2. Part I: Direct Election of 'State Senators'

According to the Seventh Schedule of the Federal Constitution, 26[10] of the 70 senators are appointed by the State Legislative Assemblies - two for each state.[11] The intention of the framers of the constitution was that these state-elected members would advocate for their respective home state at the federal level, and as such there were originally more of them than 'federally appointed' senators. However subsequent amendments which increased appointments made by the YDPA from 16 to a whopping 44 today have greatly diminished their relative influence. Reform is desperately needed, and thankfully the constitution itself contains a provision which may be of assistance: Article 45(4), which reads as follows:

> Parliament may by law -
> (a) increase to three the number of members to be elected for each State;
> (b) provide that the members to be elected for each State shall be so elected by the direct vote of the electors of that State.[12]

It is important to note that two drafters of the constitution, Sir William McKell and Justice Abdul Hamid disagreed wholeheartedly with the conception of a purely appointed senate. They believed that both Houses of Parliament should be elected by a full adult franchise, commenting that a Senate not created in such a manner 'does not conform to a system of

[10] According to Article 45(1)(b) of the Federal Constitution, the remaining 44 senators are to be appointed by the YDPA, see below in Part II.
[11] Federal Constitution of Malaysia, Seventh Schedule.
[12] Federal Constitution of Malaysia, Article 45(4).

parliamentary democracy, and is not in keeping with the aspirations of a people whose desire it is to enjoy self-government in the real sense and democracy in its purest form'.[13]

It is trite to say that elected representatives will be keener to carry out the will of their electors because they derive their legitimacy from the people; the people are the source of all political power after all. Micozzi uses a principal-agent model to illustrate this point: representatives have an agency relationship with their constituents, and because the future of the representatives' legitimacy lies in the constituents' hands, they have the power of rewarding (or punishing) past behaviour during each election.[14] Therefore, if senators were elected by the people, failure to perform adequately would make them unlikely to retain their position for long. The United States of America, which conducts senatorial elections, is a good example of this phenomenon: during the 2018 elections in the strongly Republican state of Texas, Democratic candidate Beto O'Rourke lost to Republican Ted Cruz by a mere 2.6%[15] - a significant number of Texans were clearly dissatisfied with Cruz's performance and opted for a better option instead.

If the people are tasked with electing senators, they will be responsible for ensuring that they act in accordance with the interests of their state and its people. Shad Faruqi commented that the so-called 'state senators' do not always act as delegates of their states, choosing to follow party affiliations instead.[16] This was seen in 2005, when women senators who vehemently opposed unjust amendments to the Islamic Family Law Bill were ultimately compelled to lend their support; and in 2015, when the National Security Council Bill was extensively discussed by the upper house yet accepted by them without any amendments.[17] If the senators were accountable to the electorate instead, they would be more likely to suggest amendments or even delay controversial Bills.

Additionally, this proposal to increase the number of state senators, coupled with their direct election, would return the spirit of federalism to Parliament and allow for states to safeguard their interests more effectively. As stated above, the original intention of the

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[13] Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission, 1957* (HMSO Colonial No 330, 1957) (Note by Sir William McKell and Mr Justice Abdul Hamid on Paragraphs 61 and 62).

[14] Juan Pablo Micozzi, 'Does Electoral Accountability Make a Difference? Direct Elections, Career Ambition, and Legislative Performance in the Argentine Senate' (2012) 75(1) J Politics 137, 138.

[15] 'Senate Election Results: Republicans Keep Majority' *The New York Times* (New York, 12 November 2018) <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-senate-elections.html> accessed 13 November 2018

[16] Shad Saleem Faruqi, 'Reflecting on the Law: Enhancing Senate's power' *The Star Online* (11 July 2012) <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2012/07/11/enhancing-senates-power> accessed 13 November 2018.

[17] Shad Saleem Faruqi, 'Reflecting on the Law: Reflecting on Dewan Negara's Role' *The Star Online* (28 April 2016) <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2016/04/28/restoring-constitutional-scheme-reflecting-on-dewan-negaras-role-people-would-like-to-see-the-dewan> accessed 13 November 2018.

Constitution for the states to retain a degree of influence in federal policymaking by having a majority in the Dewan Negara has been eroded by subsequent amendments. As stated by former Lord President of the Federal Court Tun Mohamed Suffian, this is 'contrary to the spirit of the original constitution which established the Dewan Negara specially as a body to protect in the federal Parliament, state interests against federal encroachments'.[18] The validity of these amendments was challenged in *Phang Chin Hock v PP*,[19] but nevertheless was upheld by the Federal Court.[20] Thus the best way to return power to the states is to proportionally increase the number of state senators, and this can be done by invoking Article 45(4)(a) and allocating one extra seat to each state, bringing the total number of state senators to 39. As suggested below, this will be equal to the new reformed number of federally-appointed senators, thus creating a balance of power in the Dewan Negara and ensuring the voices of the states do not go unheard.

As for the most suitable electoral system, a single transferable vote (STV) system is recommended over the traditional first-past-the-post (FPTP) system. To clarify, STV requires that a candidate must, in order to be elected, secure enough votes equal to or exceeding a set quota. The quota is calculated by 'dividing the total number of votes cast by one more than the number of candidates to be elected, and adding one to the result.'[21] Voters will be asked to rank candidates in order of preference, and candidates with more votes than the minimum required by the quota will have their surplus votes distributed according to their voters' ranking of preferences, until enough senators are elected.[22]FPTP on the other hand is far simpler, where the single candidate who gets the most votes is declared victorious.[23]

One of the main reasons STV is recommended over FPTP that it has the ability to eliminate the need for strategic voting that often occurs with the latter. An example to illustrate this fundamental flaw of FPTP would be the 2016 United States presidential election, where the polls indicated that either Donald Trump or Hillary Clinton would likely emerge victorious even though these two leading candidates were strongly detested by the general public in the United States.[24] This is because most of the registered voters were more concerned about whether their votes were going to go against the candidate they abhor, than for their ideal candidate. In such a scenario, it is highly unlikely that voters will cast their vote to

[18] Wu Min Aun and RH Hickling, *Hickling's Malaysian Public Law* (Longman 2003) 26-27.
[19][1980] 1 MLJ 70.
[20] However, in light of recent Federal Court decisions which have affirmed the basic structure doctrine as being applicable to the Malaysian Constitution this view may no longer be valid, see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.
[21] 'Electing Australia's Senators' (*Parliament of Australia*) <https://www.aph.gov.au/Senate/briefs/brief01> accessed 13 November 2018.
[22] ibid.
[23] 'More about FPP' (*Department of Internal Affairs, New Zealand*) <https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-STV-Information-More-about-FPP?OpenDocument> accessed 5 June 2019.
[24] Ed O'Brien and Nadav Klein, 'Why Trump and Clinton Are America's Most Disliked Presidential Candidates' *Fortune* (7 July 2016) <http://fortune.com/2016/07/06/donald-trump-hillary-clinton-2> accessed 9 April 2019.

third-party candidates as they fear that this might 'waste' their vote. This inevitably puts independent candidates at a disadvantage with no realistic chance of winning as voters would rather vote with the aim to prevent the other candidate from winning, than to vote for their preferred candidate.

With STV, voters would be able to cast votes that reflect their true preferences. This would not only grant voters the democratic choice they deserve, it would also provide independent candidates a fair chance to win. The possibility of forming an upper house in Parliament that incorporates independent candidates promotes more balanced discussions as there would be an eclectic blend of opinions. Subsequently, Parliament would be able to enact better laws. Furthermore, STV ensures voters that their vote has had an influence in the election, one way or another. In other words, by bringing STV into play, members of the electorate would be able to identify with a senator that they personally assisted to elect.

Thus, the proposed structure for a system of senatorial elections is as follows:

(i) As provided for under Article 120, an entire state shall form a single constituency and each voter shall have as many votes as there are seats to be filled.[25]

(ii) The number of seats in the Dewan Negara allocated to each state shall be increased from two to three.[26] Increasing the proportion of elected senators to appointed ones will achieve a more balanced body and strengthen its democratic legitimacy.

(iii) Instead of the first past the post system, proportional representation should be implemented, because if the former was used all seats could be won by candidates from the same party. Implementing proportional representation would ensure a diverse range of senators and allow small party and independent candidates to be elected. As was recommended for the panel elections above, a single transferable vote system is recommended.

(iv) No other powers of the Dewan Negara shall be amended, especially those regarding their role in the legislative process.[27] It is important to affirm the superiority of the Dewan Rakyat as a wholly elected body in passing Bills to prevent deadlocks between both houses in the event of an inability to reconcile disagreements.

3. Part II: Appointment from Specialist Vocational Panels

As stated above, this nation is faced with the unfortunate reality that the Dewan Negara is practically a ceremonial house that rubber-stamps any legislation passed by the Dewan Rakyat.[28] One reason is because Article 45(1)[29] empowers the YDPA to appoint 44 out of 70

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[25] Federal Constitution of Malaysia, Article120(a).

[26] Federal Constitution of Malaysia, Article45(4)(a).

[27] Federal Constitution of Malaysia, Articles 66(3) and 68.

[28] Ivan Oh, 'Total Revamp of Dewan Negara needed' *Malaysia Kini*(Malaysia, 28 May 2018) <https://www.malaysiakini.com/letters/427210> accessed 9 November 2018.

[29] Federal Constitution of Malaysia, Article 45(1).

senators and according to Article 40(1A),[30] the YDPA is bound by the advice of the PM. This would mean that the PM has complete control over the appointment of 63% of senators.

Having a majority of senators leaning towards the ruling party undeniably creates a house of yes-people that agrees to every legislation passed by the Dewan Rakyat. This was seen when 15 Bills were once passed in the Dewan Negara in just 2 days.[31] In contrast, if the majority of senators are from the opposition party, the passing of a legislation may be challenging for the Dewan Rakyat. This is because a legislation passed by the lower house may be rejected by the Dewan Negara just for the sake of opposing due to party instructions, regardless of whether the legislation is good or bad or if it reflects the voice of the people.

Such a scenario was recently played out when the senators decided to reject the Anti-Fake News Act repeal. It is said that with this repeal bill, the freedom of expression and the constitutional rights enshrined in our Federal Constitution would be upheld.[32] Nevertheless, it was rejected by the Dewan Negara, leaving many arguing that the rejection was not made with sincerity but coloured with political motivation.[33] As the rule of law should be recognised as having the potential to ensure the protection of individual rights,[34] such a rejection is seen as diluting the doctrine. Hence, there is a need for reform to create a proper balance within the chamber to ensure efficiency and create checks upon the government of the day.

According to the Federal Constitution, the appointed senators are supposed to represent the various sections of the Malaysian society such as persons who have rendered distinguished public service, profession, racial minorities and indigenous persons.[35] But the discussion above reveals that the spirit of the original Constitution has not been followed in today's context. The composition of the Dewan Negara is not supposed to be dominated with supporters of the PM to ease the passage of approval for a bill passed by the Dewan Rakyat. Thus, it is submitted that Article 45(1)[36] should be amended to ensure that federal appointments are more conducive to democratic legitimacy. As these are effectively done upon the wishes of the PM, it is suggested that such appointments should be removed entirely as there is room for political motivations and bias. Instead, a new system of appointment could be implemented where senators are appointed according to nominations made from specially constituted vocational panels.

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[30] Federal Constitution of Malaysia, Article 40(1A).

[31] Gan Pei Ling, 'Strengthening Dewan Negara' (*The Nut* Graph, 9 June 2010) <http://www.thenutgraph.com/strengthening-dewan-negara/> accessed 10 November 2018.

[32] 'Yoursay: Don't expect BN senators to repeal law they helped bulldoze through' (*Malaysia Kini,* 14 September 2018) <https://www.malaysiakini.com/news/443050> accessed 11 November 2018.

[33] ibid.

[34] Ahmad Masum, 'The Rule of Law under the Malaysian Federal Constitution' [2009] 6 MLJ 100.

[35] ibid, Article 45(2).

[36] Federal Constitution of Malaysia, Article 45(1).

In order to understand how such a system might be formed and how it would work, a similar system currently in place in the Republic of Ireland should be analysed, where 43 senators are elected to the upper house of the Irish legislature (Seanad Éireann) from 5 vocational panels.[37]

Article 14 of the Constitution of Ireland provides a list of the 5 panels:

(i) National Language and Culture, Literature, Art, Education and such professional interests as may be defined by law[38] for the purpose of this panel;

(ii) Agriculture and allied interests, and Fisheries;

(iii) Labour, whether organised or unorganised;

(iv) Industry and Commerce, including banking, finance, accountancy, engineering and architecture;

(v) Public Administration and social services, including voluntary social activities.[39]

Further details on the creation of the panels are laid out in the Seanad Electoral (Panel Members Act, 1947 (henceforth referred to as the 1947 Act). The process of appointing candidates to sit on the panels can be divided into two stages: nomination and election – each shall be explained in turn.

Nominations may be made either by members of the Oireachtas[40] or by registered nominating bodies which represent the different vocational groups. In order to qualify as a nominating body, the body must be primarily concerned with and representative of the interests and services relevant to the particular panel, and cannot be principally concerned with profit or composed mainly of persons under government employment.[41] A Seanad Returning Officer is tasked with maintaining a register of these bodies, which is revised annually. Once admitted to the list, each nominating body is entitled to nominate a fixed number of candidates according to a detailed plan provided for under section 26 of the 1947 Act:

> (1) At a Seanad general election, a nominating body which is registered in the register of nominating bodies in respect of a particular panel shall be entitled to propose for nomination to the panel such number of persons as is provided in that behalf by this section.

[37] Constitution of Ireland, Article 18.

[38] According to section 3(2) of the Seanad Electoral (Panel Members) Act 1947, the professional interests which fall under this panel are law and medicine (including surgery, dentistry, veterinary medicine and pharmaceutical chemistry).

[39] Constitution of Ireland, Article 14.7.1°.

[40] The bicameral Irish legislature, which consists of the DáilÉireann (lower house) and the Seanad. For the purposes of this Article however, this method shall not be considered as it goes against the aim of the reforms to enhance the separation of powers between different political institutions.

[41] Seanad Electoral (Panel Members) Act 1947, section 8(2).

(2) Where one nominating body, and no more, is entitled to propose for nomination to a particular panel, that body shall be entitled to so propose -
   (a) in the case of the cultural and educational panel - three persons,
   (b) in the case of the agricultural panel or the labour panel - eleven persons,
   (c) in the case of the industrial and commercial panel - nine persons,
   (d) in the case of the administrative panel - five persons.

(3) Where two nominating bodies, and no more, are entitled to propose for nomination to a particular panel, each shall be entitled to propose for nomination to the panel -
   (a) in the case of the cultural and educational panel - two persons,
   (b) in the case of the agricultural panel or the labour panel - six persons,
   (c) in the case of the industrial and commercial panel - five persons,
   (d) in the case of the administrative panel - three persons.

(4) Where three or more nominating bodies are entitled to propose for nomination to a particular panel, each shall be entitled to propose for nomination to the panel -
   (a) if the number obtained by dividing the appropriate number by the number of the nominating bodies is two or less - two persons, and
   (b) if the number so obtained is more than two - the number so obtained of persons if it is a whole number or, if it is not a whole number, the next higher whole number of persons.

(5) in subsection (4) of this section, the expression "the appropriate number" means -
   (a) in the case of the cultural and educational panel- ten,
   (b) in the case of the agricultural panel or the labour panel - eighteen,
   (c) in the case of the industrial and commercial panel- sixteen,
   (d) in the case of the administrative panel - twelve.

(For example, according to the 2018 revision of the Register there were 35 nominating bodies registered to propose nominations to the Cultural and Educational Panel,[42] therefore according to section 26 each body would be entitled to nominate two persons - see subsection 4(a) and 5(a)).

Of these nominees, a certain number of members from each panel must be elected to the Seanad in accordance with section 52 of the 1947 Act. The electorate for these elections consists of the members of the incoming Dáil, the outgoing Seanad, and the members of every county council or borough.[43] The elections use a single transferable vote system.[44]

[42] Seanad Éireann, *Register of Nominating Bodies (2018)* <https://data.oireachtas.ie/ie/oireachtas/electoralProcess/nominatingBodies/seanad/2018/2018-03-21_register-of-nominating-bodies-2018_en.pdf> accessed 22 February 2019.

[43] Seanad Electoral (Panel Members) Act 1947, section 44.

The benefits of implementing such a system in Malaysia are self-evident. Having qualified figures and members in the Dewan Negara would mean that a more diverse set of representation is in place. These senators would have in-depth knowledge of the issues and interests of their respective fields, hence allowing for more productive debates and wiser decisions in solving questions of public importance facing the country. The wider range of expert opinions would make it more likely that legislation will be passed only after careful and mature consideration.

This system will also control the pool of candidates from which members may be appointed. Under status quo the PM may elect any person so long as they are, in the opinion of the YDPA,[45] persons who 'have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service'.[46] The key issue here is that the phrase 'in his opinion' is subjective and therefore would not be subject to judicial review unless it constitutes an unreasonable exercise of discretion.[47] Hence the discretion accorded to the PM is wide and would in theory allow the appointment of any person who has a reasonable degree of expertise. In contrast, if the panel system were put in place the overall quality of candidates would necessarily increase, as the nominating bodies would put forth their best candidates without being swayed by other irrelevant considerations (political patronage, partisanship etc.)

The Malaysian version of a panel system could be largely based upon the Irish structure, with some localised modifications. Firstly, the fields covered by the panels could be the same: culture and education, agriculture, labour, industrial and commercial, and social services. This shall remain similar to the grounds for appointment under Article 45(2) and would therefore cover all the necessary and relevant fields for consideration. The nominating bodies would, like in Ireland, be bodies which are primarily concerned with each field: for example, the Malaysian Medical Council and Bar Council would be eligible to nominate candidates to the culture and education panel, and the Malaysian Trades Union Congress would nominate to the labour panel.

However, one additional field would be important given Malaysia's multicultural society: a panel for minority race and aborigine representation. This is because it is challenging for these groups to elect a person of their own community to represent them in the Dewan

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[44] Ibid, section 2 of the Second Schedule.

[45] In effect the opinion of the PM as the YDPA is bound to heed their advice as provided for under art 40(1A) of the Federal Constitution.

[46] Federal Constitution of Malaysia, Article 45(2).

[47] See *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, 148.

Rakyat; the fact that the first Orang Asli Member of Parliament was only elected in 2019[48] is proof of this. Therefore, this particular panel should be focused upon electing individuals who are actively involved in advancing minority rights, thereby acting as a bridge for inter-ethnic political cooperation. By ensuring that these racial minorities and aborigines are not excluded from the process of governing, the Dewan Negara would be able to safeguard their interests and establish that the Malaysian Parliament stands as the absolute symbol of democracy in Malaysia.

The Dewan Rakyat would be placed in charge of voting for senators from the candidates nominated to the panels using an STV system as well (the benefits of which were explained above). Allowing MPs to vote may at first seem like an opportunity for bias, but one must bear in mind the fact that the candidates are first selected by nominating bodies, which would ensure that only the best of their respective fields would be up for consideration. Furthermore, the fact that a proportional representation system is used (rather than a first-past-the-post system) allows for greater diversity in opinion, further reducing the influence of irrelevant considerations.

With that said however, the Irish system is not without its criticisms, primarily the argument that the Seanad is merely 'a place for grooming new Dáil candidates and as a political resting place for defeated deputies.'[49] Despite the intended purpose of serving as a chamber for non-political figures, the nomination and selection process today has become undeniably partisan. As Coakley notes on the 24th Seanad election in 2011, most candidates put forth by the nominating bodies had well-established political careers, and those who did not were largely aspiring party politicians.[50] This has been a consistent pattern throughout Ireland's history, and threatens to undermine the very purpose of this suggested reform.

It cannot be definitively said that the same situation will not arise in Malaysia as well if this system is established. However, it is suggested that the alternative (i.e. the status quo) is clearly the worse option as the PM (and the Cabinet) are far more likely to select candidates whose views align with their interests. The inclusion of external parties in the decision-making process - who have a vested interest in ensuring the best of their own are represented in the Dewan Negara due to their organisations' economic pursuits and social justice aims, for instance - will promote the selection of suitable candidates; and even if these persons happen to also be politically affiliated it is unlikely that they would also be

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[48] 'Official: BN's Ramli is first Orang Asli Member of Parliament' *New Straits Times* (26 January 2019) <https://www.nst.com.my/news/nation/2019/01/454769/official-bns-ramli-first-orang-asli-member-parliament> accessed 5 April 2019.

[49] Maurice Manning, 'The Senate election' in Howard R Penniman (ed), *Ireland at the Polls: The Dáil Elections of 1977* (American Enterprise Institute for Public Policy Research 1978) 167.

[50] John Coakley, 'The Final Seanad Election?' in Michael Gallagher and Michael Marsh (eds), *How Ireland Voted 2011: The Full Story of Ireland's Earthquake Election* (Palgrave Macmillan UK 2011) 247, 258-9.

underqualified or inept. The partisanship of candidates under this method would only be incidental, rather than determinative.

4. Conclusion

In conclusion, an amended version of Article 45(1), which clearly lays out the suggested system, is as follows:

> The Senate shall consist of elected and appointed members as follows:
> (a) three members for each State shall be elected in accordance with the Seventh Schedule; and
> (b) thirty-nine members shall be elected from six vocational panels of candidates in such a way as provided under federal law, as follows:
> (i) seven members from an Education and Culture Panel;
> (ii) six members from an Agricultural Panel;
> (iii) six members from a Labour Panel;
> (iv) six members from an Industrial and Commercial Panel;
> (v) seven members from a Social Services Panel;
> (vi) seven members from a Racial Minorities and Aborigines Panel.

Further amendments to the Seventh Schedule shall reflect the change from appointments made by the State Legislative Assemblies to direct election.

Since independence, it is undeniable that the rule of law has gone through different phases and the analysis above reveals that post-1957 amendments have not only weakened the rule of law, but they have also affected the doctrine of separation of powers. These changes have empowered the government of the day to encroach into the domain of the legislature by allowing Parliament to be dominated by its supporters. Such dominance arguably erodes the law-making capabilities of the Parliament and causes the check-and-balance mechanism supposedly in place to lose its efficiency. Thus, the suggested amendments would be able to inculcate the spirit of the rule of law by deterring the possibility of abuse of power. With a more diverse composition, the Dewan Negara will finally be able to act as an effective check on the government of the day.

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The Fundamental Impact on the Malaysian Legal Framework by the Federal Court decision of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2018] 1 MLJ 545

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Abstract

The plurality of the Malaysian Legal System has brought both a richer expanse of law, and a cross-jurisdictional conflict in the realm of personal law. This is demonstrated in wavering judicial judgements that have been passed over time. The contention between the Syariah and Civil Courts; the requirement of consent from both parents when converting minors and the protection of judicial independence and the separation of powers are areas of the law which have either been in doubt or conflict before the Federal Court decision in the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* (*Indira Gandhi*'s case).

Firstly, the Article provides for an overview of the case of Indira Gandhi; the facts, issues and the judicial development that led to the Federal Court decision. Secondly, the Article analyses and elucidates the rationality behind the Federal Court decision and explains why the decision of this case has impacted and changed the Malaysian legal framework for the better.

Keywords: Jurisdiction, Syariah Courts, Civil Courts, Basic structure doctrine, constitution, Judicial review, constitutionality of religious conversion.

1. Introduction

"The courts are the only defence of the liberty of the subject against departmental aggression ...". These were the words stated by the respected Raja Azlan Shah Ag CJ in the Federal Court case of Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd, where he emphasised the importance of the judiciary's role when it comes to protecting the liberty of the people by adjudicating on the lawfulness of state actions.[1] It is therefore an

* "A tribute to my grandfather, O.L.M. Salahudeen".
[1] [1979] 1 MLJ 135.

inherent responsibility of the court to bring clarity and stability to the law by interpreting statutes in a manner which protects the very notion of constitutionalism. Such a result may be achieved by interpreting the law prismatically as suggested by Gopal Sri Ram FCJ in the case of Lee Kwan Woh v Public Prosecutor especially when it comes to protecting the fundamental rights of the individual.[2] Gopal Sri Ram FCJ stated that:

> When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II.[3]

Therefore, the approach he propagated is based on a liberal and generous interpretation of the constitution which promotes and advances the fundamental liberties of the individual.[4] He further stated that any provision that limits the fundamental liberties must be given a restrictive interpretation by the courts.[5]

The Federal Court decision in the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* is an ideal example of the judiciary upholding such principles and protecting the very hallowed foundations of the Malaysian Legal system.[6]

The decision of the Federal Court has impacted the Malaysian legal framework in several ways, bringing clarity and coherence to certain areas of the law which have always been in conflict and doubt. The decision has clarified the jurisdictional clash between the Syariah Courts and the Civil Courts.[7] It has reinstated and reinforced the importance and necessity of obtaining the consent of both the parents when it comes to the religious conversion of children. Lastly, by following the case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*,[8] it has reincorporated the fundamental basic structure doctrine into the Malaysian constitution which in turn has implications on the independence of the judiciary and the separation of powers within the Malaysian legal framework.

[2] [2009] 5 MLJ 301.
[3] ibid 8 [8].
[4] Shad Saleem Faruqi, 'Law Makers or Law Finders? - Reflecting on the Law | The Star Online' (Thestar.com.my, 2015) <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2015/02/05/law-makers-or-law-finders-the-three-branches-of-government-have-many-points-of-contact-but-their-ove/> accessed 11 June 2019.
[5] *Lee Kwan Woh* (n 2) 9 [13].
[6] [2018] 1 MLJ 545 (FC).
[7] Srimurugan Alagan, 'Understanding Key Issues in the Federal Constitution' (2018) LR 9, 14.
[8] [2017] 3 MLJ 561 (FC).

2. The Pre-*Indira Gandhi* position

2.1 The Clash of Jurisdiction between the Syariah and Civil Courts

Indira Gandhi's case[9] made a reverberating impact because it conclusively dealt with the inflamed contention that previously existed. This was whether the civil or the Syariah court had equal status and power. Before 1988 this position was clear, the Shariah Courts were subject to review by the civil courts which rendered the secular court dominant.

However, with the advent of the Constitutional Amendments of 1988[10] the intertwined adjudicatory relationship was severed. Among the changes was the insertion of article 121 1A, which states that the civil courts '*shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts*.'[11] The jurisdiction of the Shariah court is fleshed out in Item 1 of List II in the Ninth Schedule of the Constitution. The crux of this State List is Islamic law as well as personal and family law of Muslim people, including marriage, divorce, maintenance and guardianship etc.

Prior to Indira Gandhi's case the civil courts were reluctant to transcend the borders between secular and Islamic law. The year of 2004 brought forth a case that was the '*spark that ignited a full throttled campaign between*' liberal and conservative legal activists.[12] *Shamala v Jeyaganesh*'s[13] case pronounced the " … contestation of jurisdiction [that] began under Art. 121(1A) …".[14] In this case the parties were initially married under civil law[15]. After four years the husband converted himself and their children to Islam, without his wife's consent or knowledge. The wife applied to the High Court seeking a declaration that the conversion of their two children to Islam was null and void. Faiza Tamby Chik J dismissed the application on the grounds that '*the Syariah Court is the qualified forum to determine the status of the two minors.*'[16]

Moreover, in *Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah*[17] the plaintiff's application to nullify her conversion to Islam was rejected. She applied on the grounds that because she was a minor at the material time, she did not consent to be converted. The Federal Court refused to adjudicate on the matter, with the contemporary Chief Justice Arifin Zakaria

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[9] *Indira Gandhi* (n 6).

[10] Law of Malaysia, Act A704, Constitution (Amendment) Act 1988.

[11] Federal Constitution of Malaysia.

[12] Tamir Moustafa, 'Liberal Rights versus Islamic Law? The Construction of a Binary in Malaysian Politics' (2013) 47(4) Law & Society Review, pp. 771-802.

[13] *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648.

[14] P. Rajanthiran R Sivaperegasam, The Impact of Art. 121 (1a) 1988 On Art. 11 - The Freedom of Religion in The Federal Constitution of Malaysia: The Apostasy Case of Lina Joy. Sejarah: Journal of the Department of History, [S.l.], v. 26, n. 1, Nov. 2017. ISSN 1985-0611.

[15] That is according to the Law Reform (Marriage Divorce) Act 1976, Act 164.

[16] *Shamala* (n 13).

[17] [2014] 3 MLJ 757 FC.

stating that 'the Syariah Court shall have the exclusive jurisdiction to determine whether a person is a Muslim or not.'[18]

Furthermore, the civil and Shariah courts crossed paths again in the 'most well-known Malaysian court case'[19] of Lina Joy.[20] Here a woman of Malay-Muslim background applied to the National Registration Department (NRD) to remove the word 'Islam' from her Identity Card. The NRD refused to do so without an apostasy declaration from the Syariah court. She argued that this refusal contravened her constitutional right to freedom of religion.[21] The case marked a glaring conflict between the two legal systems. The question arose whether or not the civil courts could adjudicate on personal matters relating to Muslim people, if they concerned freedoms found in the Constitution. The Federal Court, in a hair-splitting judgement, answered in the negative. It held that it was not within the civil court's jurisdiction to decide whether or not a person was Muslim. Thus, Lina Joy's appeal failed.

These cases illustrated that 'the civil courts were beginning to cede broad legal authority when issues around Islam were involved'[22]. This was 'even when it meant trampling on individual rights enshrined in the Federal Constitution and even when non-Muslims were involved.'[23] Theoretically speaking the strict division of the courts' jurisdiction was intended to create clarity. However, practically the opposite occurred, when familial and personal conflicts arose in cases between Muslim and non-Muslim people.

Not only, did the Civil courts concede judicial reviewing of Syariah decisions, it deduced that both courts were on equal standing. Strictly speaking, there is 'nothing' in the Constitution says that the Syariah courts is of equal standing to the civil courts' nor does it stipulate 'that the civil courts cannot maintain their traditional supervisory role over the Syariah courts when they act outside their boundaries.'[24] However, in cases such as *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* it was stated that the courts 'they are of equal standing under the Federal Constitution.' [25] This was purportedly due to Parliament's intention 'to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court'[26], thus, rendering both courts' status identical.

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[18] Tamir Moustafa, The Politics of Religious Freedom in Malaysia (2014) 29 Md. J. Int'l L. 481.
[19] *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2007] 4 MLJ 585.
[20] Ibid.
[21] Article 11 of the Federal Constitution of Malaysia.
[22] P. Rajanthiran R Sivaperegasam (n 14).
[23] Ibid.
[24] P. Rajanthiran R Sivaperegasam (n 14).
[25] [2008] 2 MLJ 147.
[26] *Mohamed Habibullah bin Mahmood v Faridah bt Dato' Talib* [1992] 2 MLJ 793.

2.2 The Consent of Both Parents Before the Conversion of a Child

The main bone of contention in the conversion of minors is not their individual capacity. It is rather that of one parent unilaterally converting them, without the consent of the other parent. Section 5 of the Guardianship of Infants Act 1961 stipulates the equality of both parents in matters concerning their children.[27] Interestingly enough, this provision has been used to both justify and negate a single parent's conversion of a child without the other's consent.

In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray*[28] the court held that the word 'parent' in Article 12(4), which states a minor's religion shall be decided by their parent, 'means a single parent'.[29] Thus, 'either husband or wife has the right to convert a child of the marriage to Islam'. In this case after years of a civil marriage, the husband converted himself and the couple's eldest child to Islam without his spouse's consent. The court dismissed the wife's claim to nullify the conversion once again.

The facts of this case are very similar to that of *Shamala v Jeyaganesh*.[30] In both, the converted spouse, being the natural fathers of their respective children, had the right to unilaterally convert them without the mother's consent. The non-Muslim parties did not have an avenue for remedy. This is because they did not have standing in the Syariah court and the civil court refused to charter the realm of Islamic family law. The result of this discrepancy in cross-jurisdictional matters was recognised in *Chang Ah Mee*'s case.[31] Here it was held that allowing 'just the father or mother to choose the religion would invariably mean depriving the other of the constitutional right under art 12(4)'.[32] However, the aforementioned was overruled by *Shamala*'s case.[33]

Narizan Abdul Rahman in his article recognized this inconsistency in judicial opinion as to whether the consent of both parents is required when converting a minor. He highlighted the judicial incoherence where in some cases the consent of one parent was sufficient to convert a child, where as in other cases the consent of both parents was required. The author called for a reform in this area of the law but failed to propose any amendments.[34]

Zaini Nasohah and others provided an analysis of the religious status of a child where one parent converts to Islam. The authors put forward the view that based on a study on the Islamic School

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[27] Act 351.
[28] [2008] 2 MLJ 147.
[29] Ibid.
[30] *Shamala* (n 13).
[31] *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah & Ors* [2003] 5 MLJ 106.
[32] Ibid.
[33] *Shamala* (n 13).
[34] Narizan Abdul Rahman, 'Conversion of Minor to Islam in Malaysia: Whither Consent of Parents?' (2008) 16 Jurnal Syariah 585-602.

of Laws (*Mazhab)*, where such a conflict arises the child should be given custody to the parent that is a Muslim and should be brought up as a Muslim.[35]

Nuraisyah Chua Abdullah provided for an academic analysis which is based on the religious conversion of a child where one parent converts to Islam and subsequently divorces their spouse. She did not base her suggested reforms on whether or not the consent of one or both parents are required. Instead, she put forward two different approaches the courts may take depending on whether the child has pre-existing religious beliefs and practices or where the child does not.[36]

Where the child possesses pre-existing religious beliefs, Nuraisyah referred to several English cases and proposed that the courts should grant custody to the parent who can best allow the child to continue their existing religious practices, as this is in the child's best interest and welfare. Similarly, where the child does not possess pre-existing religious beliefs, Nuraisyah proposes that once the court grants guardianship and custody of the child to one of the parents, the chosen parent/guardian should have the right to decide on the child's religion. Although her proposal did not resolve the conflict as to whether the consent of both parents is required before the conversion of a child, it is certainly worth mentioning.

Therefore, there was an evident inconsistency of judicial and academic opinion when it came to this area of the law prior to the Indira Gandhi case.

2.3 The Basic Structure Doctrine

It is of popular academic opinion that the basic structure doctrine found its roots in the Indian Supreme court case of *Kesavananda Bharati Sripadagalvaru & Ors v State of Kerala & Anor*.[37] However, according to Surendra Ananth, the doctrine gained its recognition in the case of Sajjan Singh v Rajasthan, in Mudholkar J's minority judgement.[38] In essence, His Lordship contended that the features of the Federal Constitution that 'are an amplification or concretisation of the concepts set out in the preamble' cannot be amended by Parliament.

In *Kesavananda*, the Indian Supreme Court expressly stated that there are certain features of the Federal Constitution that cannot be amended by Parliament as this would destroy the basic structure of the constitution. Shelat and Grover JJ listed features that were representative of the basic structure of the Indian Constitution, among which was constitutional supremacy,

[35] Zaini Nasohah, Abdel Wadoud Moustafa Mourdi Elseoudi and Mohd Izhar Ariff Mohd Kashim,'Status Agama Anak Bagi Ibubapa yang Memeluk Agama Islam di Malaysia.' (2010) 18(2) Jurnal Syariah 433-452.
[36] Nuraisyah Chua Abdullah, 'The Religion of the Child in Cases of One Parent's Conversion to Islam - A Review' [2007] LR 653.
[37] AIR 1973 SC 1461.
[38] AIR 1965 SC 845 at p 865.

separation of powers and the fundamental rights of the individuals.[39] The courts expanded upon Mudholkar J's minority judgement, and stated that the basic structure is discernible from the whole scheme of the Indian constitution and is not restricted to the preamble.[40]

Therefore, the basic structure doctrine is an important element especially for countries such as Malaysia which are governed by a constitutional monarchy. The doctrine recognizes that there are certain features of the constitution that are the foundational pillars which support it and should not be removed. These features cannot be amended by any statute unless expressly sanctioned by the Federal constitution itself, and if any such attempt is made, then the courts can strike down such legislation as unconstitutional.[41] This was stated by Gopal Sri Ram FCJ in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*.[42] The features which form part of the basic structure of the constitution are to be decided on a *'case by case basis'*,[43] but among them are the independence of the judiciary and the separation of powers.

Unfortunately, after 1988, the judicial independence was in a weakened and injured state.[44] This was primarily due to the aftermath of the 1988 Judicial Crisis, where the Constitution (Amendment) Act 1988[45] was passed. In addition to the insertion of Article 121 (1A), Article 121 of the Federal constitution was also amended and provided that the powers of the judiciary are vested in them by the Federal law. The amended Article 121 states that, " … the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."

This meant that the parliament could decide the powers of the judiciary and that the parliament can pass laws which restricts or prevents judicial review.[46] This was seen in the case of *PP v Kok Wah Kuan*,[47] where it was stated by Abdul Hamid Mohamad PCA that, "After the amendment (to Article 121), there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts". Therefore, Abdul Hamid Mohamad PCA verified that the amendment had indeed damaged the independence of the judiciary, thereby affecting the separation of powers and the upholding of the rule of law in the federation.

Thus, prior to the case of Indira Gandhi, there was conflicting and inconsistent judicial opinion as to whether the basic structure doctrine is part of the Malaysian legal framework, especially in

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[39] *Kesavananda* (n 37) 1603.
[40] Ibid.
[41] Alagan (n 7) 5.
[42] [2010] 3 CLJ 507.
[43] Ibid.
[44] Tan Seng Teck, '"Exclusionary Rule, Judicial Integrity and Activism - The Case of Mapp v Ohio': Should Malaysia Adopt a Similar Practice?' [2006] LR 620.
[45] Constitution (Amendment) Act 1988.
[46] Andrew Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 The International and Comparative Law Quarterly 57-58.
[47] [2008] 1 MLJ 1.

light of the 1988 constitutional amendment. In the case of *Loh Kooi Choon v Government of Malaysia*,[48] the Federal Court appeared to have rejected the basic structure doctrine. Raja Azlan Shah FCJ stated that:

> There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.[49]

In the subsequent case of *Phang Chin Hock v Public Prosecutor*,[50]Suffian LP impliedly rejected the doctrine by stating that it is not necessary to assess whether the doctrine should be applicable or not. In his reasoning, he had fundamentally agreed with Raja Azlan Shah's judgement in *Loh Kooi Choon*[51]. This stance was primarily based on the contention that the Indian constitution is different from the Malaysian constitution, as it has an express preamble which the Malaysian constitution does not possess, and therefore the basic structure doctrine has no grounds in Malaysia. However, Surendra Ananth strongly rejects this basis of reasoning. He contends that " … the doctrine was not one that drew its existence purely from the preamble. It owes its existence to scheme of the Constitution as a whole. This was made clear … in Keshavananda Bharati."[52]

Subsequently, in *Sivarasa*, Gopal Sri Ram FCJ revived the doctrine and expressly cited the case of *Keshavananda Bharati* with acceptance.[53] The High court in *Public Prosecutor v Gan Boon Aun*,[54] referred to *Sivarasa*, and held that the separation of powers formed part of the basic structure doctrine in Malaysia. This decision may have been an attempt to circumvent the amendment to Article 121, but unfortunately the Court of Appeal set aside the judgement on the basis that it contravened the Federal Court decision in the case of *Kok Wah Kuan*.[55]

Therefore, there has been an evident disparity of judicial opinion as to whether the basic structure doctrine is part of the Malaysian Legal framework. If it is found to be so, this would circumvent the 1988 constitutional amendment to Article 121 since the amendment infringed upon the separation of powers and judicial independence in Malaysia, which are essential elements of the basic structure doctrine. As it will be established, this aspect of the Malaysian legal framework was clarified in the case of Indira Gandhi.

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[48] [1977] 2 MLJ 187.
[49] ibid 190.
[50] [1980] 1 MLJ 70.
[51] *Loh Kooi Choon* (n 48).
[52] Surendra Ananth, 'The Basic Structure Doctrine: Its Inception and Application in Malaysia' [2016] 1 MLJ cxlvi, 9.
[53] *Sivarasa* (n 42) 342.
[54] [2012] 9 CLJ 622.
[55] *Kok Wah Kuan* (n 47)

3. The *Indira Gandhi* case

3.1 Facts of the Case

The Appellant, Indira Gandhi (wife) and the Respondent, Patmanathan (husband) got married and their marriage was registered under the Law Reform (Marriage and Divorce) Act 1976[56]. They had three children who were aged, 12 years, 11 years and 11 months when the Appellant had submitted for judicial review on the 9th of June 2009. The husband had converted to Islam on the 11th of March 2009. At the time, the two older children were with the mother, whereas the youngest was with the father.

The Appellant later received documents establishing the conversion of the three children to Islam. These documents included the conversion certificates; granted by the Islamic Religious Affairs Department of Perak. The children were registered as Muslims by the Registrar of Muallaf ("registrar"). The children had no knowledge of nor were they present before the Registrar when the registration and conversion took place.

The Appellant instituted an action for Judicial Review to the High Court to obtain a declaration that the certificates were void, since the legal procedure followed by the registrar in their issuance had breached the provisions of sections 96 and 106(b) of the Administration of the Religion of Islam (Perak) Enactment 2004 ("Perak Enactment 2004")[57], sections 5 and 11 of the Guardianship and Infants Act 1961 (GIA) and Article 12(4) of the Federal Constitution. The husband was named as the 6th Respondent and the others were named as the first to the fifth Respondents.

3.2 Decision of the Courts

The Appellant's claim for judicial review was allowed by the High Court and the certificates were quashed and nullified. The High Court held that they had the jurisdiction to review the matter and to ensure that the procedures under the Perak Enactment 2004 were adhered to by the Registrar. The ouster clause under Section 101(2) was held not to oust their jurisdiction where there is a failure of compliance with statutory procedure.

The Respondents appealed to the Court of Appeal, and the decision was reversed by the majority. They held that the validity of the conversion was an issue that fell within Syariah Court jurisdiction, therefore the High Court had no power to challenge the decision of the registrar. Furthermore, they held that the registration was proof that the conversion was done to the satisfaction of the Registrar and therefore the ouster clause was valid.

[56] Law Reform (Marriage and Divorce) Act 1976.
[57] Administration of the Religion of Islam (Perak) Enactment 2004.

The Appellant then appealed to the Federal Court and was granted leave on 19th of May 2016, where three issues were to be addressed:

i) Whether the High Court has the jurisdiction to review the actions of the Registrar of Muallafs who are Syariah authorities exercising statutory powers vested by the Perak Enactment 2004?
ii) Whether a child from a marriage under the Law Reform (Marriage and Divorce) Act 1976 (civil marriage) who is below 18 years must comply with both section 96(1) and 106(b) of the Perak Enactment 2004 before their conversion can be registered?
iii) Whether both the parents of a child of a civil marriage must consent before a certificate of conversion to Islam can be issued for the child?

With regards to the first issue, the courts held that the Appellant is challenging legality and administrative procedure that was followed by the Registrar of Muallafs and not the conversion itself, therefore the matter falls within the purview of judicial review. Under Article 121 (1) of the Federal Constitution, the judicial power is vested with the High Courts, and section 25 and para 1 of the Schedule of the Courts of Judicature Act 1964 and Order 53 of the Rules of Court 2012 confers jurisdiction on the High Courts to exercise supervisory powers. Thus, the power of judicial review vests with the High Court and Article 121 (1A) does not oust the jurisdiction of the civil courts. The High Court therefore had the jurisdiction to review the actions of the registrar and to question the legality of the proceedings in issuing the certificates.

In addressing the second issue, the Federal Court highlighted that section 100 of the Perak Enactment makes it obligatory for the Registrar to be satisfied that the requirements are fulfilled under section 96(1) which requires the individual to utter the declaration of faith (shahadha), and 106 (b) which requires the written consent of a parent where the child is less than 18 years. The Federal Court held that both requirements must be fulfilled cumulatively for the certificate of conversion to be valid. Since the children were never present before the Registrar and never uttered the declaration of faith, the procedure was not complied with and the legality of the conversion and registration was declared void.

Lastly, in addressing third issue, the court held that since religion affects the wellbeing and future of the child, Article 12(4) should be given a purposive interpretation and would thereby require the collective consent of both parents (if both are alive). Furthermore, since the children were born out of a civil marriage, the husband remains bound to the provisions of the Guardianship of Infants Act 1961. Therefore, sections 5 and 11 of the GIA which grant equality of parental rights applies to this case, irrespective of the husband's conversion to Islam. Thus, the consent of both the parents was required before a legal certificate of conversion to Islam could be provided for the children.

4. The Post-*Indira Gandhi* Position

4.1 The Clash of Jurisdiction between the Syariah and Civil Courts

The primary reason for the clash of jurisdictions between the Civil and Syariah Courts always leads back to the interpretation of Article 121 (1) and Article 121 (1A) of the Federal Constitution. However, after the Federal court case of Indira Gandhi, it was clarified that the Civil courts and the Syariah courts do not possess equal status and powers. Articles 121(1) and (1A) of the Federal constitution simply defines the two courts' respective sphere of operation and does not grant the Syariah Courts the same ambit of power as the Civil High Court. By virtue of Article 121(1), which states that '*the judicial power is vested in the High Courts'*, Section 25 and paragraph 1 to the Schedule of the Courts of Judicature Act 1964 (CJA), and Order 53 of the Rules of Court 2012, the High Courts are granted judicial supervisory powers. Section 25(2) of the CJA states that:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule.
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.[58]

Paragraph 1 to the Schedule of the CJA reads:

> Prerogative writs
> 1. Power to issue to any person or authority directions, orders or writs including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.[59]

The significance of this is that the High Courts, as stated in Indira Gandhi, have the power of judicial review and can review the legality of any public authority even if the public authority is exercising their powers in relation to Syariah matters. Zainun Ali FCJ cited the English case of Anisminic Ltd v The Foreign Compensation Commission and Another [60]in order to prove this point and establish that in circumstances where a Syariah executive body exercises their powers in an ultra vires manner or where they fail to comply with the legal procedure, the Civil Courts can intervene, review and hold such a decision as a nullity even though the subject matter may fall within the domain of the Syariah courts.

The Syariah Courts on the other hand, do not possess the same judicial power of the High court. In *Indira Gandhi*, the Federal court followed the case of *Latifah bt Mat Zin v Rosmawati bt*

[58] Courts of Judicature Act 1964.
[59] Ibid.
[60] [1969] 2 AC 147 (HL).

Sharibun & Anor[61] and held that the status of the Syariah courts is similar to that of the Sessions Courts or inferior tribunals,[62] since they are established by the State Legislatures and derive their power from within the ambit of the 9th Schedule of the Federal Constitution.

Furthermore, the Syariah courts do not comply with the constitutional safeguards provided under Part IX of the Federal Constitution, which ensures judicial independence and provides for the constitutional protection of the tenure of the superior court judges (High Court, Court of Appeal and Federal Court). Therefore, it is evident that the Syariah courts are below the High Courts in terms of power and scope, and they do not have the necessary constitutional safeguards to adequately exercise supervisory powers such as judicial review.

Generally, the High Courts do not possess the jurisdiction or power to *adjudicate* in matters which fall within the jurisdiction of the Syariah courts. These are usually issues involving personal Islamic principles and laws, such as those within the State list or Concurrent list of the Federal constitution. Apostasy is an example of one of these issues.[63] However, after Indira Gandhi it is clear that the decisions of the Syariah Court may be *reviewed* by the High Court on the basis of their legality through the judicial review process.

There are two schools of thought when it comes to analysing and understanding the scope of the jurisdiction of the Syariah Court. One looks to the state legislation, such as the Perak enactment when jurisdictional clashes with the Civil Court arise, whereas the other looks to the Federal Constitution. It is wrong to look at the state legislation first because different states apply the Syariah law in a different manner.[64] Instead, as was decided by the Federal Court in Indira Gandhi, by simply looking at Item 1 of the Federal Constitution first, which reads that the Syariah Courts, " … shall have jurisdiction only over persons professing the religion of Islam …", it can be concluded that the moment one party to a conflict is *not* a Muslim, the Civil Courts will have jurisdiction regardless of whether or not the other party is a Muslim.

Therefore, as stated by Zainun Ali FCJ, the Civil Courts should not decline to hear a case involving Syariah matters simply based on the fear of possessing no jurisdiction, instead they should scrutinize the nature of the matter first, since Article 121 (1A) does not automatically oust the jurisdiction of the Civil court when it comes to Syariah matters.[65] Where the party before the court is a non-Muslim and the subject matter is within the jurisdiction of the Syariah Courts, the Civil courts will have jurisdiction as the non-Muslim has no locus in a Syariah Court. Where the parties involved are Muslim but the subject matter is outside the purview of the Syariah courts,

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[61] [2007] 5 MLJ 101.
[62] Alagan (n 7) 14.
[63] Mohd Altaf Hussain Ahangar,'Freedom of Religion in Malaysia: The Realistic Appraisal' [2008] LR 400.
[64] Segaran M.K., 'Forum Competition in Conversion Cases: A Review of Pathmanathan v Indira Ghandi (Court of Appeal decision)' [2016] LR 32.
[65] *Indira Gandhi* (n 6) 33.

the Civil Courts will also have jurisdiction.[66] Thus, the distinction between the Syariah and Civil courts jurisdictions was clarified and affirmed by the Federal court in Indira Gandhi.

4.2 The Consent of Both Parents Before the Conversion of a Child

One of the most significant aspects of the decision in Indira Gandhi was the clarification as to whether the word "parent" under Article 12(4) of the Federal Constitution required the consent of a single parent or both parents when it comes to the religious conversion of a child below the age of 18. The Federal Court decided that the consent of both parents is required before such a decision is made. In the rationalization of this decision, the court referred to the interpretive guide in the Eleventh Schedule of the Federal Constitution which states that singular words in the constitution can be interpreted as plural and plural words can be interpreted as singular. The court acknowledged that such a momentous decision affects the welfare and future of the child, therefore Article 12(4) should be given a purposive interpretation and not a literal one.[67] This is especially so when interpreting the fundamental liberties under the constitution, which article 12(4) falls under, as was stated in the case of Lee Kwan Woh.[68]

The Federal court also clarified the conflict as to whether the Guardianship of Infants Act 1961 could apply to a spouse who has converted to Islam but has children who were born out of a civil marriage. The court drew comparisons between Law Reform (Marriage and Divorce) Act 1976 (LRA) and the GIA, by stating that the LRA requires a converted spouse to be bound to his civil marriage obligations even after conversion to Islam, irrespective of section 3(3) of the act which excludes the act from applying to Muslims.

Likewise, although section 1(3) of the GIA excludes the act from applying to Muslims, this does not apply where the spouse is a convert and was originally in a civil marriage. Therefore, since section 5 and 11 of the GIA gives equal rights to both parents in the upbringing of their children, the husband remained bound by its provisions. Thus, the Federal Court clarified once and for all that Article 12(4) read together with the Eleventh Schedule of the Federal Constitution, along with the application of sections 5 and 11 of the GIA; the consent of both parents will always be required before converting a child below the age of 18, if both the parents are alive.[69]

The primary reason for the conflict of interpretation of Article 12(4) is due to the translation differences between the Bahasa Malaysia and the English version of the constitution. The phrase *'ibu atau bapa'* or *'his father or mother'* under the original Bahasa version of the constitution

[66] Alagan (n 7) 14.
[67] Maizatul Nazlina, Rahmah Ghazali, 'Federal Court: Unilateral conversion of Indira Gandhi's 3 children is null and void' (The Star Online, 2018) <https://www.thestar.com.my/news/nation/2018/01/29/federal-court-unilateral-conversion-of-indira-gandhis-3-children-is-null-and-void/>accessed 17 November 2018.
[68] Lee Kwan Woh (n 2).
[69] Indira Gandhi (n 6) 48.

denotes a parent in the singular, which indicates that a single parent can make the decision.[70] By virtue of 160B of the Federal Constitution, where there is a conflict of interpretation due to translation, the Yang di Pertuan Agong (YDPA) can prescribe the national language as the authoritative text, and the national language would take precedence over the English version.

Interestingly enough, the only reason why the Federal Court declared the English version as the authoritative text in this case was because the respondents had failed to obtain the required prescription from the YDPA under Art 160B in order to declare the national language as authoritative.[71] It is therefore submitted that, had the respondents obtained the required prescription from the Yang di Pertuan Agong, the outcome or judgment of the Federal Court may have possibly been very different since the respondents would have had a stronger case and this ground of appeal may have been defeated.

4.3 The Basic Structure Doctrine

The impact of the case of Indira Gandhi is momentous on this front, as the Federal Court expressly recognized the independence of the judiciary and the application of judicial review as a part of the basic structure of the constitution, which therefore cannot be affected by Article 121(1A) or by the legislature as it is 'intrinsic to, and arises from, the very nature of a constitution'.[72] The Federal Court made reference to the words of Professor Wade,[73] where he states that:

> ... it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact.

In establishing their reasoning, the Federal Court in Indira Gandhi followed the Federal Court judgment in Semenyih Jaya, which expressly stated that the courts are not a subordinate of the legislature and the judicial power " ... is vested exclusively in the High Courts, and the judicial independence and the separation of powers are recognized as features in the basic structure of the Constitution ... ".[74] However, since the wider concepts of judicial independence and separation of powers are meaningless without the power to actualize them,[75] the Federal court in *Indira Gandhi* had expanded on this further by expressly declaring that the power of *judicial review* vests with the High Court and this power cannot be ousted by the legislature. Srimurugan

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[70] *Indira Gandhi* (n 6) 42.
[71] Ibid.
[72] Calvin Liang, Sarah Shi, 'The Constitution of Our Constitution, A Vindication of the Basic Structure Doctrine' (2014) Singapore Law Gazette, 12.
[73] H.W.R Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.
[74] *Indira Gandhi* (n 6) 18.
[75] Surendra Ananth, 'The significant implications of the Indira Gandhi decision' (The Malay Mail, 2018) <https://www.malaymail.com/s/1565969/the-significant-implications-of-the-indira-gandhi-decision-surendra-ananth> Accessed 17 November 2018.

Alagan, in his analysis of the case of Indira Gandhi, cited with approval the decision of the Federal Court and stated that:

> It is well settled that this basic structure cannot be abrogated or removed by any constitutional amendment by the Parliament. The principle that Parliament cannot amend the Federal Constitution to alter the basic structure of the Federal Constitution is now part of our jurisprudence.[76]

The judgment in *Indira Gandhi* is therefore one of the most important decisions after the 1988 Judicial crisis, as it reinforces the independence of the judiciary and brings back life to the basic structure doctrine which had once eroded as a result of jurisdictional clashes, breaches of the separation of powers, and other legal challenges which were faced by the Malaysian legal system.

5. Conclusion

The Federal court case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* has certainly impacted the Malaysian legal system and has brought clarity to the three issues as demonstrated in this article. However, it must not be forgotten that the rulings of the case can be overruled by another Federal court decision. Although, this is very unlikely since the judgment was based on the progressive notions of gender equality, child welfare, democracy, and the spirit of constitutionalism. Therefore, the Federal court decision will certainly act as a landmark that shall hopefully encourage other judges in the judiciary to interpret legislation in a similar prismatic manner, especially when it comes to the fundamental rights of an individual.

[76] Alagan (n 7) 6.

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