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Right to Early Childhood Education in Malaysia, International and Domestic Perspectives

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Abstract
Education is one of the most empowering rights to set a person up for success throughout his or her life. Studies have revealed that early childhood education is a very important aspect of developmental growth that leads to a marked increase in qualifications and earnings. However, neither domestic nor international law focuses on the right to early childhood education. This research analyses the various international and domestic laws in relation to the right to early childhood education and its potential of being recognised as a stand-alone right within domestic and international systems of law.

Keywords: education, early childhood
PROJECT CODE: TRGS/ERFS/1/2018/TLS/001

1. Introduction

Malaysian courts recognize that a system of law worthy of being called 'just' must be founded on fundamental values. "The law must be related to the fundamental assessments of human values and the purposes of society".[1] Fundamental rights therefore must be protected. The right to education is thought to be encapsulated as part of the fundamental liberties of the State. However, a strict interpretation of Article 12 of the Federal Constitution however demonstrates that there is no right to education per se, merely rights in respect to education.

The term education in itself is broad-based and covers the whole spectrum of a person's life. A complete educational background after all provides the platform towards upward social mobility.[2] Needless to say, that the developmental years are the most important years of

[1] *Alma Nudo Atenza v PP* [2019] 4 MLJ 1, 35.
[2] Prime Minister's Office, Malaysian Education Blueprint (2017) <https://www.moe.gov.my/index.php/en/dasar/pelan-pembangunan-pendidikan-malaysia-2013-2025> accessed 21 November 2018.

the child's life as it is at that point whereby the foundation is set without which the child will fall behind and may remain in that circumstance for the rest of his/her life.

In Malaysia, there is no compulsion on the state to provide early childhood education. This could account for the low enrolment of Malaysian children in early childhood programmes in Malaysia. Research has indicated that only 84.2% of young children in Malaysia have been enrolled in early childhood education programmes.[3] There are intractable hurdles and challenges that have emerged, particularly within marginalized communities in Malaysia due to the lack of compulsory early childhood education.

This study looks at the right to early childhood education within the international legal sphere in comparison with the current national sphere. Secondary data on specific and general international conventions, declarations, agreements and framework in comparison to the domestic constitutional and legislative setting will be analysed to determine the availability of early childhood education within an international sphere and Malaysia's obligations towards these international sources of law. The research aims to be of practical utility in demonstrating to policy makers Malaysia's international obligation and to provide a strategy for the implementation of early childhood education of children residing in Malaysia.

2. Methodology

The paradigm of research for this study is doctrinal, encompassing empirical elements through qualitative content analysis of relevant laws and policies.[4] This study aims at categorically analysing the various formal international sources of law which provide either directly or indirectly for the right to education. These conventions include the Convention on the Rights of the Child 1989 (CRC),[5] the International Covenant on Civil and Political Rights 1966 (ICCPR)[6] and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).[7] These primary conventions are complemented by other secondary conventions, some of which have been acceded to by the Malaysian government.

The research also looks at various soft laws that exist within the international sphere such as declarations, committee comments and resolutions. These sources of law though merely evidentiary are no less important as they pave the way towards the formation of customary international law on the right to education in general.

The procedural aspect of incorporation of international norms to meet the educational needs of children residing in Malaysia is covered through an analysis of the theories of

[3] Lydia Foong, *et al*, 'Private Sector Early Child Care and Education in Malaysia: Workforce Readiness for Further Education' (2018) 36 Kajian Malaysia 127.
[4] Anwarul Yaqin, *Legal Research and Writing* (LexisNexis 2007) 11.
[5] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 13 (CRC).
[6] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[7] International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 993 (ICESCR).

incorporation of international law into the domestic sphere. The focus here would be the dualism theory as Malaysia subscribes to this approach of application of international law.

Although a doctrinal study has its limitations, it does provide the foundational setting towards further socio-legal studies in collaboration with social scientists. Such collaborative work will be part of the research trajectory on this area of law. Selection of scope of study specifically covering international law as well as domestic law is conducted for the purpose of clearly demarcating both international and domestic law thereby acquiring a holistic perspective of the right to early childhood education.

3. Benefits of Early Childhood Education

It is evident that the early years of a child's life are crucial to later learning and social development.[8] It is the earliest years that lay the foundation of all learning. The building blocks of life are good health and nutrition, safety and support for emotional development in a caring home environment, and early and continuing cognitive stimulation through positive play and early learning.[9] It is in essence, the basic human right of every child to receive the support they need for their development. However, while early childhood is a time of massive potential for a child's development, it is also a period when children are especially susceptible to being left behind.[10]

Research in social science, psychology and neuroscience has shown that a child's early years is important to the progress in later years.[11] If a child has had the opportunity of early childhood education, research has proven that there is a marked increase in qualifications and earnings[12]from better school performance, increased school retention and increased higher education participation.[13] Further, studies have shown that children with the benefit of early childhood education have better social benefits including better health[14]and reduced crime levels.[15]

Beyond the development of a child, the lack of early childhood education has a great impact on a state. Research has indicated that it leads to a weaker economy and results in a great

[8] Anon, 'Early Childhood Education and Care' (No. 4, 2012) Oireachtas Library & Research Service 3.

[9] United Nations Educational, Scientific and Cultural Organization, 'Education for All 2000-2015: Achievements and Challenges' (UNESCO Publishing 2015) <https://en.unesco.org/gem-report/report/2015/education-all-2000-2015-achievements-and-challenges> accessed 13 December 2019.

[10] International Labour Office, *Right Beginnings: Early Childhood Education and Educators: Global Dialogue Forum on Conditions of Personnel in Early Childhood Education* (International Labour Office, Sectoral Activities Department 2012) 5 <https://www.ohchr.org/Documents/Issues/Education/QuestionnaireEducation/ILOPartIIIOfIV.pdf> accessed 13 May 2020.

[11] Oireachtas Library & Research Service (n 8) 3.

[12] Edward C. Melhuish, 'Preschool matters' (2011) Science 300.

[13] M. Najeeb Shafiq, Amanda E. Devercelli, Alexandria Valerio, 'Are There Long-Term Benefits from Early Childhood Education in Low- and Middle-Income Countries?' (24 September 2018) Education Policy Analysis Archives, 26(122) <https://epaa.asu.edu/ojs/article/view/3239> accessed 28 May 2020.

[14] Arthur J Reynolds, Suh-RuuOu, Judy A Temple, 'A Multicomponent, Preschool to Third Grade Preventive Intervention and Educational Attainment at 35 years of Age' (2018) JAMA Pediatrics 247.

[15] James J. Heckman, 'The economics of inequality: The value of early childhood education' (Spring 2011) American Educator 31, 32.

strain on the health, education and welfare system of a state.[16] An investment in early childhood education results in the most critical and cost-effective investment a country can make[17]as there would be a higher employment rates, increased tax revenues and accompanying reductions in welfare expenditure,[18] making early childhood a critical time to accumulate human capital.[19]

As early intervention is important, as such, early childhood education should be universal, free and inclusive.[20] Provisions of this nature, however, are yet to metamorphose into law within the international sphere. The states that do provide for compulsory early childhood education are few and far between. The main impediment is the lack of agreement among policymakers about the need for early childhood education.[21] Certain States indirectly provide for compulsory early childhood education via an early start to primary schooling coupled with free entitlement for those below the age of official primary schooling. Quality compulsory early childhood education is a privilege that only those who can afford private early childhood education can benefit from. The market approach that has led to early childhood education becoming a commodity and eventually minimizing the moral and legal responsibility of the state to provide the service.[22]

Governmental and social community involvement in providing early childhood education would be ideal coupled with the recognition that children are holders of rights of not only education but also early childhood education. The market approach should be replaced as it is the underserved in the community who would benefit from the opportunity of compulsory education early in life. This in turn will inadvertently stem the widening economic and equality gaps in society.

4. Limitation of International Obligations- An Analysis

In relation to incorporation of the right to early childhood education into the Malaysian legal system, it is observed that this right is contained in various international and regional laws. Three limitations however surface:

Firstly, written provisions refer to the right to education in general or the right to primary education specifically. None of the international or regional laws specifically provide for early childhood education. Referring to the CRC, Lundy explains that qualifications and

[16] Pia Rebello Britto, 'Early Moments Matter for Every Child UNICEF for Every Child' (2017) UNICEF 3.
[17] Pia Rebello Britto, *et al*, 'Nurturing Care: Promoting Early Childhood Development' (2017) 389 Advancing Early Childhood Development: From Science to Scale 91-92.
[18] Alison Elliott, 'Early Childhood Education Pathways to Quality and Equity for All Children' (Australian Council for Educational Research (ACER) 2006) 24, 25 <https://research.acer.edu.au/cgi/viewcontent.cgi?article=1003&context=aer> accessed 13 May 2020.
[19] International Labour Office (n 10) 5.
[20] Maria Herczog, 'Right of the Child and Early Childhood Education and Care in Europe' (2012) 47 (4) European Journal of Education 550.
[21] International Labour Office (n 10) 5, 6.
[22] Jane Beach, Carolyn Ferns, 'From Child Care Market to Child Care System' (2015) Our Schools/Ourselves 53, 54.

limitations reflect the actual rather than ideal position in a State.[23] Certain regions including South East Asia may not be equipped to provide free education within the broad corpus of educational stages which includes early childhood education.

Secondly, some of the international laws referred to are merely soft law. As long as these soft laws have not crystallized into customary international laws, they would not be binding on the States.

Thirdly, is that even if these treaties and customary laws are binding, Malaysia's reception to these international sources of law remain opaque. Malaysia is neither a party to the pertinent general human rights conventions such as the ICCPR and the ICESCR, nor are customary international laws automatically binding on Malaysia.[24]

These limitations nevertheless do not hamper the progressive development of the law and the gradual acknowledgement of the importance of early childhood education as part of the educational trajectory of every human being.

5. International Framework

One of the oldest international obligations is the 1948 UN Declaration of Human Rights ('UDHR'). To further strengthen the view that education starts early, Article 26(1) of UDHR provides that 'Everyone has the right to education'.[25] Article 26(1) further stipulates that education shall be free, at least in the elementary and fundamental stages and that elementary education shall be compulsory for all. This general right to education is one of the few rights with a socio-economic character to make it into the Universal Declaration.[26] The ambitions of the declaration were subsequently followed via general and specific human rights treaties.

Both general and specific human rights treaties cover the right to education, which as mentioned in the paragraph above is of socio-economic character or also referred to as a second generation right. The general human rights treaties referred to in this analysis are the ICCPR and the ICESCR. States Parties to the ICESCR recognize the right of everyone to education through Article 13. States Parties agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. States Parties further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.[27] Looking at Article 13(2)(a) of ICESCR, primary education includes the elements of availability,

[23] Laura Lundy, Karen Orr and Harry Shier, 'Children's Education Rights Global Perspective' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook on Children's Rights: Global and Multidisciplinary Perspectives* (Routledge, Abingdon 2017) 364.
[24] *PP v Rajappan* [1986] 1 MLJ 152, 157.
[25] Universal Declaration of Human Rights (adopted 10 December 1948) U.N. Doc.A/810 p 71 (1948) (UDHR).
[26] Lundy, Orr and Shier (n 23) 364.
[27] ICESCR, Article 13 Clause 1.

accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.

The second clause however limits the brush stroke approach of clause (1) where States Parties to the Covenant recognize that, with a view to achieving the full realization of this right, primary education shall be compulsory and available free to all. Through Article 14, States commit to realize a plan within two years of becoming party to the covenant. However, nowhere in Articles 13 or 14 does early childhood education feature.

Although the ICCPR does not specifically refer to the right to education, under the ICCPR, the responsibility of providing protection to the child has been assigned to the family, society and the state pursuant to Article 24(1). Article 24(1) of ICCPR reads that, "every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State". Early childhood education can be argued as being one of those measures of protection on the part of the State.

What is interesting to observe is that while most of the provisions refer very clearly to this right to education in general, Article 24 of the ICCPR refers to protection. The concept of child's rights in itself is open to many perspectives. It has been said to be difficult to define and it is " ... plaiting with fog and knitting with treacle."[28]There has been research undertaken on the problems and inconsistencies of the child rights albeit somewhat rare.[29] A question arises as to whether the right to education is a right per se or is protective in nature. It can be argued that since most of the treaties refer to education as a right, the protective measures under the ICCPR may not be used to include education.

Adaptations of the general right to education have also been included in other conventions such as the Convention on the Elimination of Racial Discrimination 1965 (ICERD),[30] Convention on the Elimination of Discrimination Against Women 1979 ("CEDAW"),[31] and more recently the Convention on the Rights of Migrant Workers 1990 ("CRMW")[32] and the Convention on the Rights of Persons with Disabilities 2006 ("CRPD").[33] It is encouraging to note that out of these four conventions that provide for the adaptation of this right, Malaysia is party to two of them i.e. CEDAW and CRPD. In fact, Malaysia is party to the most

[28] Sarah Te One, 'Defining rights: Children's rights in theory and in practice' (March 2011) 2 (4) He Kupu: The Word 41.
[29] Ann Quennerstedt, Carol Robinson and John I'Anson, 'The UNCRC: The Voice of Global Consensus on Children's Rights? (2018) 36(1) Nordic Journal of Human Rights 38, 39.
[30] Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).
[31] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).
[32] Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 39481 (CRMW).
[33] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

comprehensive articulation of education rights i.e. the CRC[34] which will be dealt with in the following part of this analysis.

The leading international framework for protection of children's rights is the CRC and is used in any discussion and debates on children's rights.[35] It started as a devotion towards children's welfare and optimism about their future and now used to protect children.[36] It is historically considered the most complete proclamation on children's rights. As a result of Initiatives by the Polish government in 1978,[37] the CRC was adopted in 1989 by member states of the United Nations. Today, the CRC is the most ratified of all the United Nation Human Rights treaties.[38]

Malaysia acceded to the CRC in February 1995 but has made reservations in respect of five main articles of the CRC.[39] State parties who ratified the CRC, had a mutual duty to implement the CRC in their own jurisdiction. Likewise, Malaysia, through the adoption of the Child Act 2001. As many of its current statutes on children did not conform with the CRC,[40] CA was drafted to consolidate and amend existing laws relating to the care, protection and rehabilitation of children[41] with the intention to uphold the protection and welfare of her children.[42]

The Child Act 2001 is said to be the most complete statute and covers all areas of law relating to children in Malaysia.[43] In addition to the Child Act 2001, Malaysia has also drafted the National Policy and Plan of Action for Children in 2008 as well as the National Child Protection Policy and Plan of Act to incorporate the CRC.[44]

The CRC provided bespoke rights for children by providing them an avenue that constructed on an agreed international ambition for education with a specific focus on children,[45]

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[34] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 13 (CRC).

[35]Eugeen Verhellen, *The Convention on the Rights of the Child: Background, Motivation, Strategies, Main Themes* (Routledge International Handbook of Children's Rights Studies 2015) <https://ww.routledgehandbooks.com/doi/10.4324/9781315769530.ch3> accessed on 31 May 2019.

[36] Paula S. Fass, 'A Historical Context for the United Nations Convention on the Rights of the Child' (2011) The Annals of the American Academy 27.

[37]Quennerstedt, Robinson and I'Anson (n 29) 40.

[38] Hanita Kosher, *Children's Rights and Social Work* (Springer 2016) 15.

[39] Article 2 (Non- discrimination), Article 7 (Name and Nationality), Article 14 (Freedom of Thought, Consciousness and Religion), Article 28 (1)(a) (Free Compulsory Education at Primary Level) and Article 37 (Torture and Deprivation of Liberty) of the CRC. The provisions are only applicable if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.

[40] Rojanah Kahar and Najibah Mohd. Zin, 'Child Related Policy and Legislative Reforms in Malaysia' (2011) 8 International Journal of Social Policy and Society 21.

[41] The Child Act 2001 repealed and consolidated the Juvenile Courts Act 1947, Women and Girls Protection Act 1973, and the Child Protection Act 1991.

[42] Anon, 'The Establishment of the National Council for Children: A Way Forward for a Better Protection of the Child' Welfare in Malaysia (2016) Law Review 2603.

[43] Kahar and Zin (n 40).

[44] Child Protection System in Malaysia, *An Analysis of the System for Prevention and Response to Abuse, Violence and Exploitation against Children, Ministry of Women, Family and Community Development and UNICEF Malaysia* (2013) UNICEF Malaysia2 2.

[45] Ibid, 22.

particularly their future.[46] As a result, were two extensive articles, Articles 28 and 29. Both provide for rights for children in relation to their education. One must keep in mind that the CRC must be understood as a whole and all rights are linked. As such, Article 28 and 29 cannot be considered in isolation. These two articles combined with other provisions under CRC, particularly the General Principles, formed a series of interrelated privileges for children around the right to education.[47]

Article 28 of the CRC focuses on mainly issues of access to education by compelling countries to recognize the right of a child to education from primary to higher education with equal opportunity.[48] Article 29 focuses on goals of education and provides that education should be directed to the fullest development of the child, with respect for human rights and fundamental freedoms, gender equality, and other targets contained in the UN provides for the recognition by state to the right of the child to education.[49]

In 2005, the UN Committee on the Rights of the Child adopted its General Comment: Implementing Child Rights in Early Childhood (CRC/C/GC/7/Rev. 1) General Comment No. 7, pursuant to the General Day of Discussion in 2004. The General Comment No. 7 on implementing child rights in early childhood, identified key areas where rights to early childhood were relevant.[50]The UN Committee interprets the right to education under Articles 28 and 29 during early childhood as beginning at birth and is closely linked to young children's right to maximum development, particularly under Article 29(1).[51] While the CRC Committee on the Rights of the Child acknowledges that that parents and primary caregivers are a child's first educators and have responsibilities to provide early childhood education, the Committee emphasized that the State should ensure that all young children receive early childhood education citing research that demonstrates that early childhood education has a positive impact on young children's successful transition to primary school, their education progress and their long term social adjustment.[52] The interpretation under General Comment 7 was welcomed by the UN agencies and organizations in assisting to reinforce efforts to develop quantity and quality early childhood programmes and facilities.[53]

While General Comments by the UN Human Rights Monitoring Committee are not themselves legally binding documents, these comments are widely regarded as useful contributions to the understanding of human rights instruments, including that of the CRC[54]

[46] Lundy, Orr and Shier (n 23) 364.
[47] Lundy, Orr and Shier (n 23) 364.
[48] Lundy, Orr and Shier (n 23) 364.
[49] Lundy, Orr and Shier (n 23) 365.
[50] Herczog (n 20) 542, 551.
[51] UN Committee on the Rights of the Child (CRC), 'General comment No. 7 (2005): Implementing Child Rights in Early Childhood' (2006) United Nations 13 <https://www.refworld.org/docid/460bc5a62.html> accessed 29 September 2019.
[52] Ibid, 14.
[53] Priscilla Toka Mmantsetsa Marope and Yoshie Kaga, 'Investing against Evidence - The Global State of Early Childhood Care and Education' (2015) UNESCO Publishing: United Nations Educational, Scientific and Cultural Organization 42 <http://unesdoc.unesco.org/images/0023/002335/233558E.pdf> accessed 29 September 2019.
[54] United Nations Educational, Scientific and Cultural Organization (UNESCO) *Right to Education Handbook*, 2019 165.

by providing authoritative interpretation.[55] It has been recognized that the ratification and implementation of human rights conventions may impose legal duties, and the UN General Comments can help clarify and provide guidance to member states to their duties and obligations in the implementation of the rights in the respective conventions and covenants.[56]

In addition, while the CRC does not contain articles on the right of the child to the development of his or her capacities during the early years of life, it is worth noting that the CRC was drafted by the UN working group at a time when a majority of governments were confirming in the draft World Declaration on Education for All (1990) that " ... learning begins at birth ... ".[57]

According to the United Nations Committee on Economic, Social and Cultural Rights, education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.[58]

While primary education is not synonymous with basic education, there is a close correspondence between the two. "[B]asic learning needs" has been defined in the World Declaration on Education for All. The Declaration defines in its Article 1 as:

> essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.[59]

Whilst enforcement remains weak within international law, regional law may be able to garner more stringent enforcement. It is observed that regional law also contains provisions in relation to the right to education. The ASEAN Human Rights Declaration 2012 stipulates in its Article 31 as follows:[60]

> Article 31:
> (1) Every person has the right to education.
> (2) Primary education shall be compulsory and made available free to all. Secondary education in its different forms shall be available and accessible to all through every appropriate means. Technical and

[55] Marope and Kaga (n 53) 42.
[56] Ibid.
[57] Marope and Kaga (n 53) 39.
[58] UN Economic and Social Council, 'General Comment No. 13: The Right to Education (Art. 13 of the Covenant)' (UN Committee on Economic, Social and Cultural Rights (CESCR) 1999) E/C.12/1999/10.
[59] World Declaration on Education for All, Adopted by the World Conference on Education for All, Jomtien, Thailand, (5-9 March 1990).
[60] ASEAN Human Rights Declaration (adopted 18 Nov 2012) Phnom Penh, Cambodia (2012) (AHRD).

> vocational education shall be made generally available. Higher education shall be equally accessible to all on the basis of merit.

While most of the international frameworks provide that compulsory education begins at primary level, the CRC Committee on the Rights of the Child through General Comment 7 has emphasized that the State should ensure that all young children receive early childhood education citing research that demonstrates that early childhood education has a positive impact on young children, long term. This is further supported by the majority of governments confirming that learning begins at birth through the World Declaration on Education for All.[61]

Although Malaysia is yet to be party to the core human rights covenants such as the ICCPR and the ICESCR, these treaties have been for a long time the focus of SUHAKAM for governmental accession. There has been some level of optimism with regards to precipitated accession to the human rights covenants by the Pakatan Harapan government. This optimism however has been somewhat dampened due to the recent withdrawal of commitment to international treaties by the Malaysian government.

6. Malaysia's Domestic Legislative Setting

6.1 Malaysian Federal Constitution

The fundamental liberties in Malaysia are set out under Article 5 to 13 of the Federal Constitution. There are 9 headings: liberty to person, prohibition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality, prohibition of banishment and freedom of movement, freedom of speech, assembly and association, freedom of religion, rights in respect of education and rights to property. One would note, that within these nine headings, there are no specific articles with reference to the right to education. However, one would presume that to read the right of education into the Federal Constitution, one would have to refer to Article 12(1) on rights in respect to education. Article 12(1) provides that:

> Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth
>
> (a) in the administration of any education institution maintained by public authority, and in, particular, the admission of pupils or students or the payment of fees; or
>
> (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

However, research has indicated that the main purpose of Article 12(1) was to provide basic rights on education as opposed to the right to education.[62] The founding fathers in drafting the Federal Constitution included Article 12(1) to provide a safeguard for religious freedom

[61] Marope and Kaga (n 53) 39.

[62] Joseph M. Fernandao and Shantiah Rajagopal, 'Fundamental Liberties in the Malayan Constitution and the Search for a Balance' (1956- 57) 13 (1) International Journal of Asia Pacific Studies 1–28 <http://dx.doi.org/10.21315/ijaps2017.13.1.1 ,12> accessed 1 October 2019.

and choice in terms of education,[63] particularly in terms of the non-Malay communities to establish and maintain schools in the vernacular languages.[64] Further, Article 12(1) aims to prevent discrimination on religious grounds in the administration of public education.[65] Professor Dr. Shad Saleem Faruqi, reaffirms this view, explaining that the provisions in Article 12(1) have to do more with the federal- state relations in the management of education, ensuring equality and non-discrimination in public institutions of learning,[66] respect for the linguistic rights of minorities, respect for the rights of parents to choose their children's education and medium of instruction.[67] As such, while there are provisions for education under the Federal Constitution, these provisions do not guarantee the right to education or a right to free education.[68]

Despite the fact that there are no specific provisions to the right to education under the Federal Constitution, one could reference Article 5(1) of the Federal Education. Taking the lead from the Indian Supreme Court decisions, advocates for the right to education could refer to Article 5(1) of the Federal Constitution, wherein the right to education falls within the ambit of the right to life and liberty to person. Article 5(1) states that no person shall be deprived of his life or personal liberty in accordance with law. A similar provision can be found under Article 21 of the Indian Constitution. The Indian Supreme Court in the case of *Mohini Jain (Miss) v State of Karnataka and Others*[69]found that while the right of education had not been guaranteed as a fundamental right under Part II of the Indian Constitution, the right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. Thus, the Supreme Court of India was of the view that the State Government is under an obligation to provide educational facilities at all levels to its citizens.[70]

The 1992 Supreme Court decision of *Mohini Jain*[71]was subsequently reaffirmed by the Indian Supreme Court in the case of *Unni Krishnan v State of Andhra Pradesh.*[72] Here, the Supreme Court interpreted 'deprivation of life' under Article 21 of the Indian Constitution, to mean living in dignity which includes within its education as well. And further explained that education transfigures the human personality into a pattern of perfection through a synthetic process of the development of the body and the enrichment of the mind.[73] As such, it was interpreted that the Article 21 of the Indian Constitution provided for the right of education up to the age of 14 years.

[63] *Ibid*, 1-28.
[64] Fernandao and Rajagopal (n 63) 1-28.
[65] Andrew Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal Sdn. Bhd1996) 202.
[66] Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia* (Star Publication (Malaysia) Bhd. 2008) Selangor, Malaysia 356.
[67] Ibid, 356.
[68] Faruqi (n 67) 356.
[69] [1992] 3 SCC 666.
[70] Ibid, 673.
[71] Mohini Jain (n 70) 672.
[72] [1993] AIR 2178.
[73] Ibid, 2182.

In view of the decision from the Indian Supreme Court in *Unni Krishnan v State of Andhra Pradesh*[74]and *Mohini Jain (Miss) v State of Karnataka and Others,*[75] Article 5(1) of the Malaysian Federal Constitution which refers to life and liberty to persons, could also be interpreted to include the right to education. What is not clear, however, is whether this line of argument could be extended to also include the right to early childhood education.

6.2 Education Act 1996

The key legislation on education in Malaysia is the Education Act 1996. The Education Act 1996 implements government policies on education that had been developed since independence in 1957. The Education Act 1996 is meant to be the most comprehensive legislation of all matters concerning education. Two key components of the Education Act 1996 refer to policies and directions and sources of regulation around primary and secondary education in Malaysia.[76]

Sections 27-29 of the Education Act 1996 obligate the state to provide primary education. These provisions were included in the Education Act 1996 through amendments in 2002. In addition to the states having to provide primary education, every parent is obligated to enrol their child upon attaining the age of six into primary schools pursuant to section 29A of the Education Act 1996. All children are required to remain in primary school for the duration of the six years. There are however no provisions under sections 27-29A that provide for early childhood education, as such there is no compulsion on the state to provide for early childhood education nor a similar obligation on parents to enrol their children into early childhood education programmes.[77]

Despite the lack of obligation on the state to provide early childhood education under the Education Act 1996, the Education Act 1996 does formally recognize the framework of early childhood education under section 15 of the act.[78] There is no age recommended for children to be enrolled in early childhood education, however, analysts have suggested that it is within the age of four to six.[79] Further Part IV Chapter 2 of the Education Act 1996, centres around the administrative framework implementing early childhood education, wherein it provides that early childhood education centres i.e. kindergartens/preschools must be registered under the Education Act 1996. These provisions also state that early childhood education providers are required to implement the Standard National Pre-School Curriculum.[80] The majority of pre-schools or early childhood providers are through private entities, however, the Ministry of Education is allowed to set-up pre-schools for early childhood education within the premises of a national primary school.[81]

[74] Mohini Jain (n 70).
[75] Mohini Jain (n 70).
[76] ESPACT: Education Services Provider, 'National Education System: The Education Act 1996 (EA1996)' <https://www.espact.com.my/national-education-system/the-education-act-1996> accessed on 11th May 2020.
[77] Malaysian Education Act 1996, section 27-29A.
[78] Ibid, Section 15 Part IV Chapter 1.
[79] Foong and others (n 3) 127.
[80] Education Act 1996, section 22(1).
[81] Lily Muliana Mustafa and Mohamed Nor Azhari Azamn, 'Preschool Education in Malaysia: Emerging Trends and Implications for the Future' (2013) American Journal of Economics 347.

Despite the lack of compulsion on the state or parents to provide for the right to early childhood education under the EA, the incorporation framework for administering early childhood education, would suggest an official acknowledgement for early childhood education in Malaysia. However, these official acknowledgments are not sufficient to resolve the low enrolment of children into early childhood education programmes, particularly in rural parts of Malaysia.[82] The recognition of the right to early childhood education and compulsion on the state and on parents to the necessary provisions under the EA to provide early childhood education, could resolve the lower enrolment rates in Malaysia.

6.3 Child Care Centre Act 1984

The Child Care Centre Act 1984 provides for the registration, control and inspection of childcare centres and for purposes connected therewith. While the Child Care Centre Act 1984 itself does not provide for a child's education, it is mentioned in the Child Care Centre Regulations 2012. The term 'care' under Regulation 3 of the Child Care Centre Regulations 2012 has been defined to include minding, supervising and educating a child at a childcare centre indicating that educating a child is part of caring for a child. Pursuant to Child Care Centre Act 1984, a childcare provider would then be responsible to provide for this education at the childcare centre. There are however no provisions within the Child Care Centre Act 1984 or regulation as to how a childcare provider is to educate a child. The inclusion of education within Child Care Centre Regulations 2012, reinforces the view of the state's recognition of the need for early childhood education. There are provisions of the Child Care Centre Regulations 2012 that recognize the need for early childhood education. However, due to the non-compulsory nature of the provisions of the Act, this re-affirms that there is no right to early childhood education provided via the Act.

6.4 Child Act 2001

The Child Act 2001contains provisions that are protective of the child. However, there are no provisions on the right to education or early childhood education in the Child Act 2001. From this, one can deduce that the right to education or for that matter, the right to early childhood education, does not feature even indirectly through the Child Act 2001.

6.5 Other Child Related Legislations

The Child Care Centre Act 1984 and the Child Act 2001 are not the only legislation in Malaysia that are referred to on the protection of children. There are the Adoption Act 1952,[83] Anti-Trafficking in Persons Act 2007,[84] Birth and Death Registration Act 1957,[85] Sexual Offences Against Children Act 2017,[86] Guardianship of Infants Act 1961,[87] Care Centre

[82] Ministry of Education Malaysia, 'Education for All 2015: National Review Report Malaysia' (2015) UNESDOC Database <http://unesdoc.unesco.org/images/0022/002297/229719E.pdf> accessed 23 August 2019.
[83] Adoption Act 1952.
[84] Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.
[85] Births and Deaths Registration Act 1957.
[86] Sexual Offences Against Children Act 2017.

Act 1951,[88]Children and Young Persons (Employment) Act 1966,[89] Domestic Violence Act 1994,[90] Criminal Procedure Code[91] and Penal Code.[92]

Some of these legislations are specifically enacted with children in mind, others have provisions with reference to children. These legislations have both public and private law elements that extend to protecting children ranging from citizenship and criminal law to family law. However, the legislations fail to provide any rights to education or early childhood education.

7. Conclusion

It cannot be disputed that early childhood education contributes extensively towards the educational success of a child. Our Malaysian Education Blueprint acknowledges that a thorough educational background serves as a bedrock for social mobility.[93]

At the international level, while the relevant international obligations refer to education in general, international bodies like the United Nations have emphasized on the need for early childhood education. The leading international framework for protection of children's rights is the CRC and is used in any discussion and debates on children's rights.[94] The UN Committee interprets the right to education under Articles 28 and 29 of the CRC to begin at birth and is closely linked to a young child's right to maximum development.[95] The right to education is a right that is also enshrined in other international obligations.[96] As a signatory to many of these international obligations, Malaysia is bound by its obligation to provide education, now more so the early childhood education in view of the UN Committee Comments under the General Comment No. 7.

To date only 84.20% of young children in Malaysia are enrolled in early childhood education.[97] This is significantly lower than the nearly 100% enrolment of children in Malaysian primary schools. One of the factors could be that there is no compulsion on the state through legislation to early childhood education in Malaysia. While the Federal Constitution refers to rights in respect of education, the crux of Article 12 serves to provide a safeguard in religious freedom and choice in terms of education for non-Malay communities.[98] However, the right to life in Article 5(1) of the Federal Constitution could be liberally interpreted as has been done by the Supreme Court of India to include the right to

[87] Guardianship of Infants Act 1961.
[88] Care Centre Act 1993.
[89] Children and Young Persons (Employment) Act 1966.
[90] Domestic Violence Act 1994.
[91] Criminal Procedure Code.
[92] Penal Code (ACT 574).
[93] Prime Minister's Office (n 2).
[94] Verhellen (n 35).
[95] UNCRC, General Comment No. 7 (Implementing Child Rights in Early Childhood) CRC/C/GC/7/Rev.1, para 28.
[96] Article 26(1) 1948 UN Declaration of Human Rights, Articles 13 and 14 International Covenant on Economic, Social and Cultural Rights 1966; Article 24 International Covenant on Civil and Political Rights 1966 as well as general right to education under Convention on the Elimination of Racial Discrimination, Convention on the Elimination of Discrimination Against Women and Convention on the Rights of Migrant Workers.
[97]Foong and others (n 3) 129.
[98] Harding (n 66) 202.

education. Whilst there are provisions in the Education Act that provides a framework and recognition for early childhood education in Malaysia, there is no compulsion for the State nor for parents to provide for early childhood education unlike that of primary education.

Based on the laws that deal with children in general, there seems to be a scarcity of legislation that particularly refers to the right to education or the right to early childhood education. These statutes, whilst protective in nature, do not cover 'rights' per se in particular, the right to early childhood education. Without legislations providing for these rights, the possibility of having the 100% enrolment rate for early childhood education would be remote. However, all is not lost, as there is formal governmental recognition of the need for the right to early childhood education in Malaysia through a number of key legislations involving children. One of the two Key Result Areas specifically for education under the Government's Transformation Programme has been pre-school enrolment.[99] The crucial next steps would include the gradual transformation of policies on 100% enrolment for pre-schools into ensuring the right to early childhood education through the formal recognition and creation of the relevant constitutional and legislative provisions.

[99] Prime Minister's Office (n 2).

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Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 39481 (CRMW).

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Patient Centred Decision Making in Healthcare in Malaysia

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Abstract
This is a conceptual paper to analyse the patient-centred decision-making approach adopted in healthcare in Malaysia. This study reviews literature on the history of patient-centeredness and the requirement of shared decision-making and its consequences in healthcare practice. It aims to evaluate the crucial elements of shared decision-making particularly the factors that affect the voluntariness and informed consent in medical practice. This paper reviews the existing literature surrounding the phenomenon of shared decision-making for medical treatment in the healthcare, particularly giving importance to the patients' views and how it plays a role in shared decision-making. This study provides an overview of the perplexing concept of shared decision-making and the various concerns that have surrounded the topic leading to its recognition. Hence in Malaysia, there is no specific law that governs the provisions for shared decision-making approach in the healthcare practice. This study aims to explore the Malaysian Medical Council Guideline on Consent for Treatment of Patients by Registered Medical Practitioner (MMC Guideline on Consent) and the current Malaysian laws to determine whether they are sufficient to address the element of informed consent requirement in shared decision. Finally, lack of empirical evidence is recognised in this paper and several suggestions are made for future research and recommendations for the enactment of new provisions pertaining to medical treatment.

Keywords: patient-centred approach, shared decision-making, informed consent

1. Introduction

For about two decades, a practice that has become known as patient or person-centred care (PCC) and the associated notion of shared decision-making (SDM) have been making headway in Western health care research, organisation, policy and business. This emphasis has been visible as a general initiative,[100] but is especially salient regarding

[100] Ezekiel Jonathan Emanuel; Linda Emanuel, 'Four Models of the Physician-Patient Relationship', JAMA; Apr 22, 1992; 267, 16; Research Library p. 2221.

chronic or durable conditions, care of the elderly and demented, as well as other areas involving long-term, home-based and/or quality of life-oriented care.[101] To some extent, this trend has evolved into an alleged 'culture' or 'movement', embodying a special ideology or mission.[102] Shared decision-making is a joint process that permits patients and their providers to decide healthcare treatment choices, taking into consideration the best medical evidence, along with the patient's preferences and values. This process offers patients the support they need to make the best personalised care decisions, while permitting providers to feel confident in the care they prescribe.[103] SDM is part of PCC and is progressively thought to be the best standard of medical care by the community, doctors, and policy makers.[104] Involving patients in decision-making helps increase their experience and awareness in healthcare and decrease cost and utilisation of healthcare services. Patients might change their health behaviour following involvement in decision-making.[105] Emphasis on decision-making has brought about the evolution of shared decision-making (SDM), where doctors and patients share values and information, and patients have a dynamic role in deciding healthcare choices.

SDM takes into consideration the results from existing evidence-based practices, in addition to the patient's values, desires, and preferences. Patient-centred care is a commonly utilised concept in modern healthcare structure. The drive towards patient-centred care is noteworthy and advancing these services is becoming a key focus of many global healthcare systems.[106] Healthcare leaders and patients' advocates argue that the current model of healthcare has an inclination to be (1) too disease-centred (concentrating mainly and only just on pathologies and frequently needless technology solutions that provide inadequate concern to the individual's experiences during sickness, autonomy, and particular interests of patients), or (2) highly system or staff-centred and unsuitably positioned to help the interest of the organization and experts who deliver service.[107]

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[101] David Edvardsson, Elizabeth Watt and Frances Pearce, 'Patient experiences of caring and person-centredness are associated with perceived nursing care quality' (2016) Journal of Advanced Nursing 217.

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[106] Rinchen Pelzang, 'Time to learn: understand patient-centred care' (2010) 19(14) Br J of Nurs 912 <https://www.ncbi.nlm.nih.gov/pubmed/20647984> accessed 1 July 2019.

[107] Vikki Ann Entwistle, Ian S. Watt, 'Treating Patients as Persons: A Capabilities Approach to Support Delivery of Person-Centred Care' (2013) 13(8) Am J Bioeth 29 <https://www.ncbi.nlm.nih.gov/pubmed/23862598> accessed 1 July 2019.

2. Patient-Centred Care

The discussion of SDM would not be comprehensive without drawing attention to patient-centred care (PCC) particularly because SDM is considered to be one of the fundamental components of many PCC models.[108] Patient-centred care can be explained as 'treating the patient as an exclusive individual'.[109] Angela Coulter, in 'The Autonomous Patient: Ending Paternalism in Medical Care', defines patient-centred care as, "Health care that meets and responds to patients' wants, needs, and preferences and where patients are autonomous and able to decide for themselves".[110]

The term 'patient-centred care' originated in the US in 1988 by the Picker/Commonwealth Program for Patient-Centred Care with the aim of highlighting to healthcare providers, staff, and systems to change and modify their emphasis from diagnosis and management of disease to the needs and desires of patients and families.[111]

PCC shows respect for the patient, as a person and is very much about considering the patients' point of view and circumstances in the decision-making process. It also denotes a doctor-patient encounter characterised by openness to a patient's needs and preference, utilising the patient's informed wishes to guide activity, communication, and information-giving, and shared decision-making.[112] It is a way of seeing health and illness that affects an individual's general well-being and an effort to empower the patient by increasing his/her role in their health. The basic functions of patient-centred care are to make patients more informed and provide reassurance, comfort, support, acceptance, confidence, and legitimacy.[113]

In PCC, a person's specific health requirements and desired health outcomes are the motivating force behind all health care decisions and quality measurements. Patients are considered partners with their health care providers, and these providers treat patients

[108] Mary Atkinson Smith, 'The Role of Shared Decision Making in Patient-Centred Care and Orthopaedics' (2016) 35(3). OrthopNurs 144 <https://nursing.ceconnection.com/ovidfiles/00006416-201605000-00003.pdf> accessed 1 July 2019.

[109] Richard W. Redman, 'Patient-centred care: an unattainable ideal?' (2004) 18(1) Res Theory NursPract 11<https://www.ncbi.nlm.nih.gov/pubmed/15083659> accessed 3 July 2019.

[110] Julian Tudor Hart, '*The Autonomous Patient: Ending Paternalism in Medical Care*' (2002) 95(2) JRSM 623 <https://www.researchgate.net/publication/25094978_The_Autonomous_Patient_Ending_Paternalism_in_Medical_Care/link/5530eb4c0cf2f2a588ab5c81/download> accessed 1 July 2019.

[111] Picker Institute, 'Picker Principles of patient-centred care' (2016) <https://www.picker.org/about-us/picker-principles-of-person-centred-care/> accessed 1 July 2019.

[112] Anne Rogers, Anne Kennedy, Elizabeth Nelson and Andrew Robinson Rogers, 'Uncovering the limits of patient-centredness: implementing a self-management trail for chronic illness' (2005) 125(2) Qual Health Res 224.
<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.922.8851&rep=rep1&type=pdf> accessed 1 July 2019.

[113] Pelzang, (n 7).

not only from a clinical viewpoint, but also from a mental, emotional, social, spiritual, and financial viewpoint.[114] Similar to other value-based healthcare systems, PCC comprises a change in the way providers practice and healthcare systems are planned and achieved. PCC also characterises a change in the outdated practices of patients and their relatives from one of submissive 'order taker' to one of dynamic 'team member'.[115]

The fundamental philosophy of PCC requires the caretaker to appreciate the patient as an individual rather than as a group of illness. PCC uses a combination of activities including engagement, observation of the patient's beliefs and values, having an empathetic presence, and taking care of physical and emotional needs to provide care to patients.[116] Patient participation is enabled by working with patients' beliefs and values through providing information and mingling freshly formed perceptions into care activities which in turn reinforces one of the significant philosophies of PCC, namely shared decision-making.[117] PCC accepts that the patients are capable of deciding their particular expectations and desires and that they are capable of making choices and decisions concerning what they need and desire.

3. The Concept of Shared Decision-Making

Shared decision-making is considered as one of the characteristic components of patient-centred care that allows and encourages patients to contribute actively in their health-related management.[118] It is presently a widely acknowledged feature of patient-centred care in this modern age of healthcare standards worldwide.

According to Glyn Elwyn and Marie-Anne Durand, shared decision-making is "an approach where healthcare professionals and patients make decisions together using the best available evidence about the likely benefits and harms of each option, and where patients are supported to arrive at informed preferences".[119] Basically, SDM is merely assisting another individual make an informed decision, whatever choice or behaviour change they face. That may not appear too difficult, but the process itself can be intricate. This is particularly true in circumstances where patients and clinicians have significantly different levels of experience, knowledge, and know-how. Healthcare is a

[114] Anon, 'What Is Patient-Centred Care?' (2017) NEJM Catalyst <https://catalyst.nejm.org/what-is-patient-centered-care/>accessed 3 July 2019.
[115] *Ibid*.
[116] Pelzang (n 7).
[117] Moira Stewart, 'Towards a global definition of patient centred care' (2001) 322(7284) BMJ 444<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1119673/pdf/444.pdf> accessed 3 July 2019.
[118] Chong Guan Ng, Syahrir Zaini, 'Shared Decision Making in the Treatment of Depression' (2012) 27(2) Malaysian Journal of Psychiatry 23.
[119] Glyn Elwyn, Marie-Anne Durand, 'Mastering Shared Decision Making: The When, Why and How' (EBSCO Health Notes, 20 Feb 2018) <https://health.ebsco.com/blog/article/mastering-shared-decision-making-the-when-why-and-how> accessed 1 July 2019.

good example where choices and options offered are very unfamiliar and full of uncertainty.

Charles, *et al*, defined a set of features in SDM affirming " ... that minimum two partakers, the clinician and patient be involved; both members exchange information and take steps to build a compromise about the favoured treatment; and an arrangement is agreed on the treatment to execute."[120] The generally accepted 4 ethical principles necessitates SDM to be the benchmark in most medical practices.[121] SDM is vital for valuing autonomy in empowering patients to make reasoned and informed choices and for beneficence by comparing the benefits of treatment against risks, as well as cost and non-maleficence in keeping away harm. The fourth principle of justice (allocating cost, benefit, and risk fairly) might also be boosted if patients elect to have fewer procedures.[122]It would also be more equitable if less educated individuals are engaged to a similar degree as those educated.

One way to reflect on SDM is to classify decisions into those that require discussion against those where that level of investment might not be needed.[123] Typically, these decisions are circumstances where the risks are higher. Further, making the incorrect choice could be painful, irritating, costly or lead to regret. Decisions in healthcare are usually of this nature and especially where there are treatments or investigations to be considered. Nevertheless, the problem is that most individuals are often ignorant of two significant issues.[124] Firstly, people are unaware that there are other possibilities that exist, or no one informs them that choices exist. Overall, healthcare professionals and organisations are not proficient in making patients aware that options do exist. Secondly, even if patients do become aware that choices that exist, often after searching the internet, there has been a tendency to be unenthusiastic among healthcare professionals to encourage and support a process of deliberation. Patients who bring their own findings to clinic appointments are frequently met with scepticism, and there are several reasons for this reluctance.

It is important that healthcare professionals understand the concepts relevant to SDM so that they would be capable of applying them while taking care of patients. The academic

[120] Cathy Charles, Amiram Gafni, Tim Whelan, 'Shared decision-making in the medical encounter: what does it mean? (or it takes at least two to tango).' (1997) 44(5) SocSci Med 681 <https://www.ncbi.nlm.nih.gov/pubmed/9032835> accessed 4 July 2019.

[121] Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* 5thed, Oxford University Press 2001.

[122]Anne M Stiggelbout, *et al*, 'Shared decision making: really putting patients at the centre of healthcare' (2012) 344 BMJ 28 <https://www.bmj.com/content/344/bmj.e256.full> accessed 9 July 2019.

[123] Glyn Elwyn, Amy Lloyd, *et al*, 'Collaborative Deliberation: A model for patient care' (2014) 97(2) Patient EducCouns 158 <https://mayoclinic.pure.elsevier.com/en/publications/collaborative-deliberation-a-model-for-patient-care> accessed 1 July 2019.

[124]Elwyn, Durand (n 20).

model of therapeutic decision-making is separated as 4 types depending on the part played by the staff providing medical service namely, paternalistic, informed, agent, and shared.[125] Among these 4 types, the shared concept is well distinguished against the others since the exchange of knowledge in both directions happens in the shared type only.[126] This shared concept of medical decision-making is consistent with the type of bi-directional exchange of knowledge between patient and clinician as emphasised in the definition of shared decision-making above. Over a period of time, many ideas associated with physician-patient relationships have been persistently echoed in shared decision-making. Significant concepts associated with physician-patient relationships can be summarised by the ensuing four groups.

Firstly, building excellent physician-patient relationships involve good communication.[127] Good communication in healthcare is important as unpredictability is impossible to be entirely left out in the process of decision-making. Trusting relationships should be formed between clinician and patient by means of effective conversation techniques for good communications to happen. Clinicians will be more able to appreciate patient issues and visibly recognise patient preferences once a reliable bond is initiated. Trust is the basis on which SDM is achieved.[128]

Secondly, patient autonomy must be maintained for good communication.[129] The concept of autonomy is linked mutually to customer-centred values in the social order and medical ethics for patients' safety. It has been stressed to resolve difficulties appearing in medical practices indicated by paternalistic decisions. Once autonomy is assured, patients tend to exert their power to choose freely and agree to the outcome of decision-making.[130]

Thirdly, assured of their autonomy, patients enthusiastically take part in decision-making.[131]The reassurance of patient participation will occur when the clinician presents

[125] Jong-Myon Bae, 'Shared decision making: relevant concepts and facilitating strategies' (2017) 39 Epidemiol Health 1 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5733387/pdf/epih-39-e2017048.pdf> accessed 7 July 2019.
[126] Ibid.
[127]Jurgen Kasper et al, 'Turning signals into meaning –'Shared decision making' meets communication theory' (2012) 15(1) Health Expect 3 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5060601/pdf/HEX-15-03.pdf> accessed 4 July 2019.
[128] Betty Chewning, *et al*, 'Patient preferences for shared decisions: a systematic review' (2012) 86(1) Patient EducCouns 9 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4530615/pdf/nihms-279704.pdf> accessed 7 July 2019.
[129] Bae (n 26).
[130] Myfanwy Davies, Glyn Elwyn, 'Advocating Mandatory Patient 'Autonomy' in Healthcare: Adverse Reactions and Side Effects' (2008) 16(4) Health Care Analysis 315 <https://www.ncbi.nlm.nih.gov/pubmed/17975729> accessed 7 July 2019.
[131] Yves Longtin, *et al*, 'Patient Participation: Current Knowledge and Applicability to Patient Safety' (2010) 85(1) Mayo Clin Proc 53

appropriate suggestions as he sums up the current issues and attempts to describe the benefits and drawbacks of every available option. Fourthly, for a patient to willingly agree to a decision, the process must be patient-centred, emphasising on the patient's characteristics namely the clinician recognises the patient's individual needs and desires and makes a decision.[132]

4. Shared Decision-Making Process

Shared decision-making process encompasses three interrelated stages, namely 1) patient engagement stage, 2) discussion stage, and 3) decision stages.[133] The three stages involve several interworking principles that support the overall idea of SDM, with patient engagement being the initial stage of the process. After the patient engagement stage is initiated, there is a continuous progression into the discussion stage, with the decision stage being the final emphasis. Once the decision stage has been reached the shared decision-making process might move back and forth from the discussion and patient engagement stages. These stages work together to promote empowerment and activation among patients and encourage effective communication between patients and healthcare providers. These stages encourage partnership and create beneficial collaboration among healthcare providers and stakeholders in a way that positively improves patient care experiences.[134]

5. Patient Engagement Stage

A survey by the National eHealth Collaborative in the US in 2012 revealed that patient engagement is a crucial element in the transformation of healthcare and SDM but their answers varied significantly regarding the definition of patient engagement. The answers included descriptions such as patients utilising online educational material to learn more about their health, patients communicating with healthcare providers concerning changes in their health, patients scheduling appointments online with their healthcare providers, patients sending e-mails to their healthcare providers to ask questions, and patients discussing health-related questions face to face with their healthcare providers.

<https://www.researchgate.net/publication/40819547_Patient_Participation_Current_Knowledge_and_Applicability to Patient Safety> accessed 4 July 2019.

[132] Michael J. Barry, Susan Edgman-Levitan, 'Shared Decision Making — The Pinnacle of Patient-Centred Care' (2012) 366(9) N Engl J Med 780 <http://projects.iq.harvard.edu/files/shared_decision_making/files/sdm_pinnacle_of_patient_centered_care.pdf?m=1446225643> accessed 5 July 2019.

[133] S. Chow, G. Teare, G. Basky, 'Shared decision making: Helping the system and patients make quality health care decisions' (2009) Saskatoon: Health Quality Council <https://hqc.sk.ca/Portals/0/documents/Shared_Decision_Making_Report_April_08_2010.pdf> accessed 7 July 2019.

[134] Mary Atkinson Smith, 'The Role of Shared Decision Making in Patient-Centred Care and Orthopaedics' (2016) 35(3) OrthopNurs 144 <https://nursing.ceconnection.com/ovidfiles/00006416-201605000-00003.pdf> accessed 1 July 2019.

The absence of a standardised and formal explanation of patient engagement generates challenges when it comes to executing and improving the process of patient engagement.[135] Patient engagement may also be well-thought-out as a form of information exchange between patients and their healthcare providers.[136]

Participation in engagement allows individuals to be involved in activities that permit them to attain the greatest benefit from healthcare services offered to them and also allows them to balance precise and comprehensive information with their preferences, needs, and capabilities.[137] Patient engagement within the SDM process helps to involve patients in their personal care to promote further positive patient outcomes and self-involvement in care management. Patients who are engaged in this method are more likely to take proactive steps in managing their individual health on a regular basis.

6. Discussion Stage

The SDM process progresses with the discussion stage, which is a focused and thorough derivative of patient engagement. This stage involves verbal communication between the healthcare worker and the patient. It may be regarded as a form of counselling that emphasises on available treatment options, patient preference, and healthcare professional recommendations. The discussion stage is a two-way form of communication between the treating physician and the patient. Preceding this discussion stage, the treating physician might evaluate existing literature pertaining to a precise disorder or course of treatment to support evidence-based practice. The patient may review information collected during the course of patient engagement and prepare a list of preferences based on the disorder-related information he has obtained. The healthcare provider must empower the patient to enquire about the efficacy of available and suggested treatment options, to include the risks and benefits during the discussion stage.

The healthcare worker may play a part in this stage through decision support that includes the use of counselling and decision aids to further inform and educate patients. The usage of decision aids may help to improve health literacy, increase patient satisfaction, improve patient experience, encourage patient empowerment, and positively support the complete SDM process. Health coaches can teach and mentor patients so that they will have the necessary skills, knowledge base, and understanding

[135] Ian Worden, 'The path to increased patient engagement lies in the definition' (2013) <https://docplayer.net/11134630-Ian-worden-mba-mhi-pmp-healthcare-cio-and-patient-engagement-advocate.html>accessed 7 July 2019.
[136] Chow, Teare, Basky (n 34).
[137] Centre for Advancing Health, 'A New Definition of Patient Engagement: What is Engagement and Why is it Important?' (2010) <http://www.cfah.org/pdfs/CFAH_Engagement_Behavior_Framework_current.pdf> accessed 7 July 2019.

needed to empower and encourage patients to make decisions grounded on their own desire and preferences.[138]

7. Decision Stage

Patients and provider collaboration are encouraged by the decision stage by supporting a mutual agreement connected to the plan of treatment.[139] The commencement of the decision stage might involve discovering the availability of recommended or desired treatment choices. The decision stage may then advance into negotiating specifics of the plan. This stage may further consist of choosing when and where to receive treatment relating to the plan of care. The physician might not at all times be in agreement with the patient throughout the decision stage. However, the aim of this decision stage is to develop the plan of care so that it demonstrates the patient's value, preference, and desired health outcomes.[140]

8. Shared Decision-Making and Informed Consent

SDM depends on the basic principle of both patient autonomy and informed consent. The model accepts the fact that patients have their own values that influence the understanding of risks and benefits in a different way from the way a physician interprets them. Informed consent is at the centre of shared decision-making,[141] i.e. without an understanding of the benefits and shortcomings of all treatment options, patients cannot participate in making decisions. Often there is usually more than one option, with no clear distinction of which option is the best. SDM varies from informed consent in that patients make their decisions based on their values and beliefs, as well as on being fully informed.

There have been recent criticisms within the medical community of the traditional method of informed consent and calling for a replacement of those methods with a SDM style.[142] SDM can be defined as a discussion in which patients and doctors work in collaboration to appreciate the circumstances of the patient and to decide how to

[138] France Légaré, Dawn Stacey, Nathalie Brière et al, 'A conceptual framework for interprofessional shared decision making in home care: Protocol for a feasibility study' (2011) BMC Health Serv Res 11 <https://www.researchgate.net/publication/49798586_A_conceptual_framework_for_interprofessional_shared_decision_making_in_home_care_Protocol_for_a_feasibility_study> accessed 7 July 2019.
[139] Chow, Teare, Basky(n 34).
[140] Chow, Teare, Basky (n 34).
[141] Simon N Whitney, Amy L McGuire, Laurence B McCullough, 'A typology of shared decision making, informed consent, and simple consent' (2004) 140(1) Ann Intern Med 54 <https://www.ncbi.nlm.nih.gov/pubmed/14706973> accessed 4 July 2019.
[142] Erica S. Spatz, Harlan M. Krumholz, Benjamin W. Moulton, 'The New Era of Informed Consent Getting to a Reasonable-Patient Standard Through Shared Decision Making' (2016) 315(19) JAMA 2063 <http://ignacioriesgo.es/wp-content/uploads/The-new-era-of-informed-consent.pdf> accessed 8 July 2019.

address their wishes ideally while the definition of informed consent is basically a twin process where, clinicians disclose the benefits, risks and choices of a planned procedure or treatment and patients agree to or reject the suggestion. Informed consent prerequisites came from laws associated with battery, and therefore represent a fixated attempt to shield patients from whatever occurring to their bodies in the absence of their knowledge.[143] Informed consent was not proposed to recognise the values of distinct patients and their exceptional circumstances.

Whereas SDM is envisioned to be utilised across diverse circumstances in which patient preferences have a noteworthy role in considering the possible harms and benefits of a decision, informed consent prerequisites are applicable with few exclusions only to invasive procedures and treatments.[144] As a consequence, the law does not require clinicians to deliberate with patients what diagnostic tests or monitoring strategies to use in situations where a procedure is not being done. By contrast, SDM is proposed to be utilised for any situation where patient values and preferences should play an important part in balancing the harms and benefits of a medical decision. This comprises the discussion on a full range of procedures and treatments, as well as investigation plans or attentive waiting, each time these are reasonable choices.

SDM can also be differentiated from the informed consent process by how and what information is given to patients. Informed consent mostly involves "disclosure to patients" and not "discussion with patients" inferring that the informed consent process can be accomplished by a one-way information discussion. Furthermore, informed consent disclosures frequently happen when a treatment option has already been selected, whereas SDM dialogue needs the way onward uncertain prior to the discussion and that the most suitable course of action arises via this discussion. This reveals that in SDM choices are deliberated without presuming that one choice merits more consideration whereas others take an alternative role. With respect to the amount of information mandatory for informed consent, what is followed is frequently stated to be either a "reasonable physician" standard or a "reasonable patient" standard.

The *Bolam* test[145] in England was applied to determine what should be disclosed. The test holds that the law imposes a duty of care between a doctor and his patient, but the standard of that care is a matter of medical judgement. The test was further acknowledged in *Sidaway v Bethlem Royal Hospital Governors & Ors*[146] though not unanimous, with judges employing different emphasis on the patient's right to make

[143] *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).
[144] Rachel A Lindor, Marleen Kunneman, Matt Hanzel, *et al*, 'Liability and Informed Consent in Context of Shared Decision Making' (2016) 23(12) AcadEmerg Med 1428 <https://onlinelibrary.wiley.com/doi/pdf/10.1111/acem.13078> accessed 8 July 2019.
[145] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
[146] [1985] AC871.

informed treatment decisions as opposed to the doctor's professional judgment in disclosing information. Under the "reasonable physician" standard, doctors must inform the benefits, risks, and alternatives to treatment that a reasonable doctor under similar situations would disclose. What these benefits, risks, and alternatives constitute is decided principally by similarly skilled doctors and is commonly established by the testimony of other clinicians as stated above. In the "reasonable patient" standard, doctors must inform the benefits, risks, and alternatives to treatment that a reasonable patient would find material to his or her decisions.[147] Even under this standard, the law has deliberately evaded needing clinicians to deliberate what the individual patient before them would want to know, in its place concentrating only on a "reasonable" or representative patient, based on a fear that deliberating the needs of every individual patient would excessively burden the clinicians.[148] Distinct to the two standards of informed consent, that focuses on the one-way delivery of information, shared decision-making needs a discussion and emphasises explicitly on the information required for an individual patient.

In *Montgomery v Lanarkshire Health Board*, the established concept that the disclosure of information by clinicians when procuring an effective consent for treatment must be decided on the foundation of what a reasonable group of medical opinion approves should be told and made aware in the situation.[149] Despite considerable deliberation about the exact implications of Montgomery, there is an overall agreement that, post-Montgomery, consent necessitates a process of shared decision-making based on discussion between clinician and patient about the benefits and material risks of the presented choices including the choice of no treatment. The discussion required here maintains the viewpoint of the clinician as well as increases the importance of the perspective of the patient. This is emphasised in the Montgomery two-limbed test of a material risk. This is well-defined as a risk that is considered material, either from the viewpoint of a reasonable person in the patient's position or from that of the particular patient concerned. The legal opinions supporting this test recognise that the clinician and patient may view the benefits and risks of treatment choices differently in terms of their own values.

The justification mentioned in *Montgomery* meant for this novel test of materiality focuses on the fundamental ethical position the law rightfully now confers reverence for patient autonomy in procuring consent. The Montgomery decision offers new horizons to expand patient-centred care within the doctor–patient relationship by recognising the

[147] *Canterbury v. Spence* 464 F.2d. 772, 782 (D.C. Cir. 1972).

[148] Jaime S. King, Benjamin W. Moulton, 'Rethinking Informed Consent: The Case for Shared Medical Decision-Making' (2006) 32 Am.J.L. & Med 429 <https://pdfs.semanticscholar.org/e3b1/663dc4a4de0ded0ae63bd54c64939d94cdeb.pdf> accessed 8 July 2019.

[149] [2015] UKSC 11.

change of a more patient-centred method to the law of informed consent. Montgomery upsets well-known medical views around negotiating, acquiring, and recording the act of informed consent, and it brings into clearer attention the inevitable requirement for doctors to make sensible, well-reasoned decisions amid ethical values. The Montgomery decision is decisively complementary to good medical practice as it is presently understood. This adapting process is totally reliant on the doctor initiating discussion and a beneficial cooperation where knowledge and information can be spontaneously exchanged between patient and doctor.

9. Ethical Principles of Shared Decision-Making

As the familiarity of the ethical consequences of physician-patient relationships becomes more refined, clinicians must fit in these teachings into reality. Many clinicians have yet to achieve the equilibrium between complete patient autonomy and beneficence in clinical practice. Many doctors still underrate disclosure and misjudge the variability in patient wishes. Patients often obtain either insufficient medical data to establish an informed decision or too few doctors' views to feel confident in their choice. To fulfil their ethical duties towards the patients, healthcare professionals must have a structured medical decision-making that satisfies the importance of both ethical values namely autonomy and beneficence. SDM can achieve this purpose by promoting patient autonomy, while also leaving room for clinician beneficence.

Recognition for autonomy and beneficence are two vital principles that oversee medical ethics.[150] Beneficence compels clinicians to do "good" for the advantage of their patients, respect for autonomy necessitates them to ensure that patients have adequate information to make a well informed and autonomous decision.[151] Though this autonomy and beneficence can satisfy one another, they may often conflict, necessitating their relational importance to be recognised.

Historically, beneficence has been assumed in terms of the patients' "medical" benefit, rather than promoting their best interests on a wider level. As a result of their sophisticated training and knowledge of medicine, clinicians took the responsibility of acting as agents for their patients, deciding the best treatment choices to fulfil the primary goal of improved health. The beneficence-focused, decision-making model forced patients to accept not only their clinician's treatment choices, but also their clinician's levels of risk aversion, values, and personal preferences. Frequently treatment results effect significantly more than the patient's health, such as their participation in their favourite activities, ability to work, and caring for their children. Beneficence unrestricted by concerns for patient autonomy quickly turns into paternalism.

[150] Beauchamp and Childress (n 22).
[151] Ibid.

SDM is a process of communication in which the clinician and patient utilise complete and impartial information on the benefits and risks associated with all feasible treatment alternatives and information from the patient that may make one treatment alternative more desirable than the others to arrive at a treatment decision. While this definition incorporates the traditional disclosure crucial for legal informed consent, it goes past the mere presentation of risks, facts, and alternatives. SDM comprises a heartier conversation, which involves both the patient and the clinician in assessing the patient's therapeutic goals and life preferences to come to an informed choice.

As a result, SDM encourages both autonomy and beneficence. While appreciated for any therapeutic decision, its approaches demonstrate most effective for use in preference-sensitive circumstances. Here, the patient and provider exchange information to better appreciate all the possibilities of the options the patient faces, and to deliberate about the patient's individual values as they associate the benefits and risks of each option. While the patient and clinician mutually take part in the treatment decision, SDM gives preference to patient autonomy over beneficence, but only sufficient to tip an otherwise even balance.[152] In cases of disagreement after discussion, the patient's preference should govern the treatment. By defending patient autonomy and accepting the importance of provider analysis and opinion, SDM offers the most effective technique of allowing clinicians to fulfil their ethical responsibilities to patients.

10. Shared Decision-Making in the Malaysian Context

Even in countries where SDM is formally recommended by the government, its execution has proved difficult. In countries that have inadequate healthcare resources and an overburdened healthcare system such as Malaysia implementing SDM is even more difficult. Unfortunately, we have inadequate knowledge of in what manner to inculcate the SDM concept into our existing healthcare practices. Not much is understood about the decision-making preference and roles of patients and clinicians and, furthermore, it is not known if this Western concept of SDM is applicable to cultures where relatives and communities strongly impact healthcare decisions.[153] Various notions of harmony and family virtue, which spring from different religious or moral codes affect healthcare decisions in Malaysia.

There are also many gaps in the practice, research, laws, and policies associated with SDM in Malaysia. Clinicians do not include patients regularly in decision-making and still

[152] Benjamin Moulton, Jaime S. King, 'Aligning Ethics with Medical Decision-Making: The Quest for Informed Patient Choice' (2010) 38(1) L Law Med Ethics 85 <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1324&context=faculty_scholarship> accessed 7 July 2019.
[153] Ng (n 5).

act in a paternalistic manner in making healthcare choices for patients. Cultural and language variety also makes the practice of SDM difficult in Malaysia. Doctors not only have to communicate in a language that may not be their mother tongue but also to recognise patients' personal and cultural values. Communicating risk, compromise, and reaching agreement involve high-level communication skills and calls for high language proficiency. Moreover, the public–private dual healthcare system results in practice disparities. Both issues make the implementation of SDM a challenging task.

In Malaysia, health literacy is low, which might contribute to the poor patient participation in decision-making.[154] Local health information quality is insufficient and mostly poor, and this is further hampered by the lack of translation into common languages which prevents cultivating health literacy and increasing health awareness. One of the key steps to empower patients to be involved in decision-making is 'patient education'. Access to appropriate, understandable, and precise information boosts health literacy and encourages patients in selecting the most suitable option for their health. There needs to be simultaneous effort from government organisations, non-government organisations, professional bodies, and academic institutions to enhance the quality of, and access to, patient information.

The Malaysian Medical Council guideline describes that the relationship between a patient and a physician must be collaborative and be a partnership that facilitates free dialogue in which a physician's clinical knowledge and a patient's preferences and needs are mutually exchanged to decide the best therapeutic option. Although the Malaysian Medical Council recommends the practice of SDM, its execution remains challenging. The council needs to collaborate systematically with other stakeholders, namely the Ministry of Health, patient support groups, professional bodies, and academics, to come up with a plan to grow the awareness and the execution of SDM. Changes must be initiated in the healthcare system by incorporating SDM within its policies. Presently, there is no health policy in Malaysia that precisely looks into the matters concerning SDM.

11. Conclusion

The SDM process will continue to become popular as patient-centred care continues to encourage patient engagement, in addition to provider and patient discussions that determine the plan of treatment. The aim and purpose of SDM is for patients to make high quality-decisions. To achieve this, healthcare professionals should be a partner who 'shares' relevant information. SDM also helps to positively impact patient outcomes and experience. It is thus significant for SDM to be completely understood by healthcare professionals and patients before implementation. SDM is applicable to a broader range of clinical decisions

[154] Ibid.

and requires a more deliberate emphasis on the needs of the individual patient compared to informed consent although they may overlap in basic ways. The implementation and enablement of SDM should be ideally one of the basic foundations of federal healthcare policies as it has a positive effect not only on patients and physicians but also on government health systems.

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

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

Keywords: rule of law, basic structure doctrine

1. Introduction

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

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

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

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

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

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

[156] Hilaire Barnett, *Constitutional and Administrative Law* (12thedn, Routledge 2017) 52.
[157] Albert Vann Dicey, *Introduction to the Study of the Law of the Constitution.* (Reprint, Liberty Classics 1982) 120-121.
[158] Lord Bingham, *The Rule of Law* (Penguin 2011).

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

2. Literature Review - Academic and Judicial literature

Extant literature exists in relation to ROL within domestic and international law perspectives. Within the domestic perspective, Masum is of the view that ROL is necessary for purposes of sustained economic development and though elusive is also needed in order to respect human dignity.[159] Its adherence and reinforcement, however, are dependent upon the level of state intervention to the economy.[160] There is as such a jostling of sorts between ROL and authoritarianism.[161] In achieving certain ends, ROL may be suspended.[162] The authoritarian rule does not see judges as partners in the rule of law project. Balasubramaniam gives the example of Tun Mahathir as an authoritarian leader, who first came to power in 1981 with a reputation as an ethnocrat and Malay populist.[163] In spite of which, the term has been used generously in Tun's inaugural speech to his '*rakyat*' on 10 May 2018. [164] A gap surfaces whereby the understanding of politicians as to what ROL entails may differ from the view of legal luminaries.

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

[159] Ahmad Masum, 'The Rule of Law under the Malaysian Constitution' [2009] 6 MLJ c, ci-cii.
[160] Andrew Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal 1996) 274.
[161] Khong Mei-Yan, 'The Rule of Law in Malaysia' (academia.au 2020) <https://www.academia.edu/10349791/The_Rule_of_Law_in_Malaysia> accessed 26 March 2020.
[162] *Ibid*, 5.
[163] Ratna Rueban Balasubramaniam, 'Hobbism and the Problem of Authoritarian Rule in Malaysia' (2012) 4 Hague Journal on the Rule of Law 211, 227.
[164] 'Breaking News! - Tun Dr. Mahathir Press Conference'(Berita Viral, 9 May 2018) <https://www.youtube.com/watch?v=ONfNj-5dbz8> accessed 26 March 2020.
[165] Constance Chevallier-Govers, 'The Rule of Law and Legal Pluralism in Malaysia' 2010 Religion, Law and Governance in South East Asia (Supp Ed) 90, 92.
[166] Shad Saleem Faruqi, *Our Constitution* (Sweet & Maxwell 2019) 247.
[167] Ibid, 304.

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

Within the international sphere, the notion of ROL has a very prominent place. However, based on literature, understanding and application is in fact equally vague as with the domestic system. Kofi Annan during his time as Secretary-General of the UN confirmed that the ROL is a concept at the very heart of the United Nations' mission. The ROL has received the most attention in the 21st century by virtue of the Millennium development goals[170] and later by virtue of the Sustainable Development Goals in particular SDG 16.[171]

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

3. Methodology

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

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

[168] Shad Saleem Faruqi, *Document of Destiny* (Star 2008) 43 - 44.
[169] Glenna Robson, 'A Layman Looks at the "Rule of Law"' (2004) 168 JPN 332, 336.
[170] Kenneth James Keith, 'The International Rule of Law' (2015) 28 Leiden Journal of International Law 403, 406.
[171] SDG 16.3 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1 < https://www.refworld.org/docid/57b6e3e44.html> accessed 1 March 2020.
[172] Jeremy Waldron 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 European Journal of International Law 315, 325.
[173] José Enrique Alvarez, 'International Organizations and the Rule of Law' (2016) 14 New Zealand Journal of Public and International Law 3.
[174] Erwin Van Ween, *CRU Report* (June 2017, The Clingendael Institute, Netherlands).

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

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

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

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

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

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

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

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

4. Discussion & Analysis

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

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

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

[175] [2019] 4 MLJ 1.
[176] *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

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

Since the early years, the Malaysian judiciary tends to encapsulate the principle of ROL under Articles 5(1)[179] and 8(1)[180] of the Federal Constitution by confirming that the concept of ROL is an intrinsic component of the common law of England[181] which is incorporated in the supreme document of the nation via the word 'law' in Article 160(2).[182] Early and middle year cases assert that the word 'law' in Arts 5(1) and 8(1) of the Federal Constitution includes both written law and the English common law, i.e., the ROL and all its integral elements as well as the procedural and substantive dimensions of the fundamental principle. It is trite law that the rules of natural justice which were formulated by Lord Diplock[183] form part of the ROL and according to the first thematic model, all facets and dimensions of the invaluable axiom are included and limited in the expression 'law' wherever used in the Federal Constitution, particularly in Articles 5(1) and 8(1) as adduced by the Federal Court in *Lee Kwan Woh v PP.*[184]

The Federal Court confirmed that the ROL 'forms part and parcel of the common law of England'[185] and under section 3 of the Civil Law Act 1956,[186] the common law of England as well as the rules of equity that were administered in England on 7th April 1956 is allowed to apply in Malaysia as long as it is permitted by the respective inhabitants and rendered necessary by the local circumstances. As the expression of ROL is not defined or mentioned in the Federal Constitution despite being considered as the foundational value of the Constitution, section 3(1) of the Civil Law Act[187] allows the court to incorporate the principles of the common law to fill the lacuna with necessary modifications under the definition of law which is stated in Art 160(2) 'to prevent it from operating unjustly and oppressively'.[188] Even though section 3(1) of the Civil Law Act 1956 restricts the application of English common law post the cut-off date, the Privy Council in *Jamil bin Harun v Yang Kamisah & Anor*[189]settled that the English authorities after 7th April 1956 have persuasive value and fall under the discretion of the court to be applied in light of the local circumstances and written law.

[177] [2019] 3 MLJ 561.
[178] *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779.
[179] Federal Constitution, Article 5(1).
[180] *Ibid*, Article 8(1).
[181] *Lee Kwan Woh v PP* [2009] 5 MLJ 301.
[182] Federal Constitution, Article 160(2).
[183] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.
[184] [2009] 5 MLJ 301.
[185] *Lee Kwan Woh v PP* [2009] 5 MLJ 301.
[186] Civil Law Act 1956, section 3.
[187] Ibid, section 3(1).
[188] *Choa Choon Neoh v Spottiswoode* [1869] 1 Ky 216, 221
[189] [1984] 1 MLJ 217.

In addition, the Federal Court in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* interpreted the term 'law' as a 'system of law that encompasses the procedural and substantive dimensions of the ROL' and further confirmed that it is at this point that Articles 5(1) and 8(1) interact.[190] The notion of ROL was further explained to be epitomised by Articles 5(1) and 8(1) as the Malaysian courts acknowledge that the principle of ROL is housed in the personal liberty provision in Article 5(1) and the equality provision in Article 8(1). The personal liberty and equality provisions in the Federal Constitution are viewed to encase the doctrine of ROL as it ensures that the fundamental liberties under Part II of the Federal Constitution[191] will be given due regard to protect individual identities of the vulnerable minorities against assimilative compression of the secured majority.

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

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

[190] [1998] 3 MLJ 289.
[191] Federal Constitution, Part II.
[192] Reid Commission, *Report of the Federation of Malaya Constitutional Commission 1957* (London, Colonial No. 330).
[193] *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd* [2019] 3 MLJ 561.
[194] *National Union of Bank Employees v Director-General of Trade Union* [2013] MLJU 1567.
[195] *Nik Nazmi bin Nik Ahmad v PP* [2014] 4 MLJ 157.
[196] *His Holiness Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr* [1973] 4 SCC 225.
[197] [2017] 5 CLJ 526.

principle of the Federal Constitution[198] 'which permeates every provision of the Constitution and which forms its very core'.[199]

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

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

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

In spite of the fact that the first and second thematic models are being used by the Malaysian judiciary to interpret the axiom of ROL, the Federal Court in *Sivarasa Rasiah v*

[198] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals* [2018] 1 MLJ 545.
[199] *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1998] 3 MLJ 289.
[200] [2018] 1 MLJ 545.
[201] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals* [2018] 1 MLJ 545.
[202] *Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd* [2018] MLJU 772.
[203] *National Union of Bank Employees v Director-General of Trade Union* [2013] MLJU 1567.
[204] *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660.
[205] [2009] 5 MLJ 301.

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

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

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

[206] [2010] 2 MLJ 333.
[207] *Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors* [2017] MLJU 770.
[208] *Dato Dr Zambry bin Abd Kadir v Dato Seri Ir Hj Mohammad Nizar Bin Jamaluddin* [2009] 5 MLJ 464.
[209] [2003] 2 MLJ 337.
[210] [2018] MLJU 32.
[211] *Indira Nehru Gandhi vs Shri Raj Narain & Anor* [1976] 2 SCR 347.
[212] *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333.
[213] *Alma Nudo Atenza v PP* [2019] 4 MLJ 1.

Despite the fact that the analysis of the 20 cases undoubtedly proved that the Diceyan Tripartite Model is highly used by the Malaysian courts, Lord Bingham's 8 Principle of the ROL is found to be applied by the Malaysian judiciary mostly in an implicit manner. In Malaysia, the analysis of the 20 cases proves that Lord Bingham's 8 Principles are not construed in a comprehensive manner but applied by construing the sub-rules individually to discern the notion of ROL. For example, in *Nik Noorhafizi bin Nik Ibrahim v PP*, the Court of Appeal endorsed that in interpreting the Malaysian constitution, the court should take how the constitution of another member of the Commonwealth is interpreted into consideration[214] to uphold the ROL as an 'integral part of the democratic constitution founded on the Westminster model'. This was done without express mention of Lord Bingham's 8 Principles of ROL. However, the judgment does implicitly apply the 8th Principle of Lord Bingham's ROL which requires the state to comply with its obligations in international law.

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

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

Judicial creativity is the linchpin of the Malaysian legal system. Even though in the majority of cases the notion of ROL is interpreted predominantly by the aforementioned models,

[214] *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660.
[215] *Pegawai Pengurus Pilihanraya Dewan Undangan Negeri Bagi Pilihan Raya Dun N.27 Amino Agos bin Suyub v Dr. Streram a/l Sinnasamy & Ors* [2019] MLJU 1558.
[216] *Nik Noorhafizi* (n 60).
[217] *National Union of Bank Employees v Director General of Trade Union* [2013] MLJU 1567.

recent cases do provide special accentuation to definitions provided by other legal commentators such as Joseph Raz, Lon L. Fuller, HWR Wade, W.H. Moore, F.A. Hayekand Harry Jones to further elucidate the role and meaning of ROL in Malaysia. For example, the Federal Court in *Alma Nudo Atenza v PP* did refer to Joseph Raz's[218] and Lon L. Fuller's[219] work on ROL to outline the meaning of the concept.[220] Furthermore, in explaining the ROL as a characteristic feature of democracies, the Federal Court did explicitly refer to a book written by WH Moore[221] to explain the role of the judiciary in upholding the ROL.

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

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

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

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

No.	Case Name	Housed under Articles 5(1) & 8(1)	BSD of the MFC	Dicey Tripartite Model	Bingham's 8 Principles Model	Others
1.	*Alma Nudo Atenza v PP* (FC) [2019] 4 MLJ 1	✓	✓	✓	✓	✓
2.	*Ambigaa/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors* (COA) [2017] MLJU 770	✓		✓		
3.	*Dato Dr Zambry bin Abd Kadir v Dato Seri Ir Hj Mohammad*		✓	✓		

[218] Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195.
[219] Lon Luvois Fuller, *The Morality of Law* (Yale University Press 1964).
[220] *Alma Nudo Atenza* (n 59).
[221] William Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edn, Maxwell 1910) 101.
[222] [2007] 6 MLJ 709, 743.

	Nizar bin Jamaluddin (COA) [2009] 5 MLJ 464					
4.	*Dato Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail* (HC) [2015] 7 MLJ 763		✓	✓	✓	✓
5.	*Government of Malaysia v Lim Kit Siang* (SC) [1988] 2 MLJ 12			✓ **(dissent)**	✓ **(dissent)**	
6.	*Hock Huat Chan Sdn Bhd v Assan bin Mohammad & Ors* (HC) [2008] MLJU 92			✓	✓	
7.	*Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals* (FC) [2018] 1 MLJ 545		✓	✓	✓	✓
8.	*JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd* (FC) [2019] 3 MLJ 561	✓ **(dissent)**	✓ **(dissent)**	✓ **(dissent)**	✓ **(dissent)**	✓ **(dissent)**
9.	*Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* (FC) [2018] MLJU 32			✓	✓	
10.	*Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd* (COA) [2018] MLJU 772		✓		✓	✓
11.	*Lee Kwan Woh v PP* (FC) [2009] 5 MLJ 301	✓			✓	
12.	*Marathaei d/o Sangulullai v Syarikat JG Containers (M) Sdn Bhd* [COA] [2003] 2 MLJ 337	✓		✓		
13.	*National Union of Bank Employees v Director-General of Trade Union* (COA) [2013] MLJU 1567	✓	✓		✓	
14.	*Nik Nazmi bin Nik Ahmad v PP* (COA) [2014] 4 MLJ 157		✓	✓		
15.	*Nik Noorhafizi bin Nik Ibrahim v PP* (COA) [2013] 6 MLJ 660	✓	✓ **(dissent)**	✓	✓ **(dissent)**	
16.	*Pegawai Pengurus Pilihanraya Dewan Undangan Negeri Bagi Pilihan Raya Dun N.27 v Dr. Streram a/l Sinnasamy* (COA)		✓		✓	

	[2019] MLJU 1558					
17.	*Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor* (HC) [2007] 6 MLJ 709	✓		✓	✓	✓
18.	*Sivarasa Rasiah v Badan Peguam Malaysia* (FC) [2010] 2 MLJ 333	✓		✓		
19.	*Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* (COA) [1998] 3 MLJ 289	✓	✓	✓	✓	
20.	*Tony Pua Kiam Wee v Gov of Malaysia* (FC) [2019] 12 MLJ 1		✓	✓		✓

Table B: Models applied according to the periodic intervals

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

5. Conclusion

The Malaysian judiciary is required to interpret the principle of ROL in a precise manner so as to ensure the continuation of constitutionalism[223] in Malaysia as well as to maintain law and order for the greater good of society.[224] As adduced by the Federal Court of Malaysia,[225] constitutionalism facilitates the creation of a 'democratic political system by creating an orderly framework' premised upon the doctrine of ROL. Being the vanguard of the axiom of ROL, the judiciary holds a substantial role 'to outline what is generally meant by the ROL'.[226] With respect to such duty, the judges do direct themselves to the above-mentioned models

[223] *Dato Dr Zambry bin Abd Kadir v Dato Seri Ir Hj Mohammad Nizar bin Jamaluddin* [2009] 5 MLJ 464.
[224] *Dato Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail* [2015] 7 MLJ 763.
[225] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals* [2018] 1 MLJ 545.
[226] *Alma Nudo Atenza* (n 59).

to interpret the ROL of Malaysia having the Diceyan Tripartite Model as the first point of reference which is subsequently substantiated by other models.

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

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

It is evident that only in 7 cases, express mention of unconventional sources has been made, chiefly, 5 instances of such reference have been made in recent years. The new wave of considering the fifth model paves the way for the court to interpret as well as enforce constitutional provisions conferring rights with the fullness required to preserve ROL. In answering the prime question, it is apparent that Dicey's Tripartite Model is applied as the keystone of interpreting the notion of ROL with implicit integration of Lord Bingham's 8 Principles favouring more liberal judicial treatment of the concept of ROL in recent years.

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

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Tracing Derivative Action: Application of the *Foss v Harbottle* Rule in Malaysia

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Abstract
The *Foss v Harbottle* rule is under Common Law. In light of the Companies Act 2016, this article traces the development of the common law principles and discusses the possible current application of the said principles in conjunction with the Companies Act 2016. This article subsequently evaluates the sufficiency of the current jurisprudence in Malaysia.

Keywords: Minority shareholders, lifting the corporate veil, *Foss v Harbottle*, Companies Act 2016, derivative action, corporate governance

1. Introduction

1.1 Overview

This paper aims to provide an overview of the exceptions to the general doctrine of separate legal entity, in particular, the methods in which the minority shareholders could take an action against the company as a whole in certain exceptional circumstances. A separate legal entity, as described by Dewey[228], is a legal fiction, or a metaphysical entity.[229] According to Collier,[230] the rule in *Salomon v Salomon* has been liberally applied in Malaysian cases such as *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd*.[231] This principle is seen in *Development and Commercial Bank Bhd v Lam Chuan Co & Anor*[232] whereby Abdul Malek J had stated that the company is a different person than its members.[233] Lord Sumner in *Gas Lighting Improvement Co Ltd v Commissioner of Inland Revenue*[234] similarly commented that the 'machinery' is 'not impersonal though inanimate'.

As Malaysia takes the position in *Salomon*, it is noted that our nation adopts the jurisprudence of the fiction theory; in which the company as a person is merely a legal

[228] Abu Bakar bin Munir, 'Lifting the Corporate Veil and the Criminal Liability of a Company' [1994] 1 MLJ 146 citing John Dewey, 'The Historical Background to Corporate Legal Personality' [1926) 25 Yale LJ 655.
[229] Geoffrey Morse and Francis Beaufort Palmer, *Palmer's Company Law* (22nd edn, Sweet & Maxwell 1976) 149.
[230] Berna Collier, 'The Application of the Rule in Salomon v Salomon in Malaysian Company Law' [1998] 2 MLJ 65.
[231] *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd* [1996] 3 MLJ 533 (FC).
[232] *Development and Commercial Bank Bhd v Lam Chuan Co & Anor* [1989] 1 MLJ 318 (CA).
[233] *Ibid*.
[234] *Gas Lighting Improvement Co Ltd v Commissioner of Inland Revenue* [1923] AC 723.

fiction.[235] Despite giving recognition as a legal person, Salmond argues that only a human being can be recognised as a natural person; whereas companies and other entities, such as the church, is classified as a legal person.[236] In other words, the company is a person, by a legal fiction. Under section 20 of the Companies Act 2016, members have an identity separate from the company and this identity continues to exist until it is removed from the Register.[237]

The most beneficial doctrine that flows from the doctrine of separate legal entity is the doctrine of limited liability. In a sense, the courts would 'limit' the liability of the shareholders according to the number of shares ascribed to him.[238] In another sense, the creditors of the company would look to the company to fulfil its contractual obligations, not the directors themselves.[239]

As a result of the doctrine of corporate personality, is the concept of shareholder ownership,[240] as Parkinson put it, the legal model includes the shareholders having the privilege of the corporation operated for their benefits.[241] The directors, to a certain extent, dictate the objectives of the company.[242]As the court explained in *Macaura v Northern Assurance Co Ltd*,[243]a company is a separate entity from its members. Since the corporation is a single unit, a problem arises if the minority shareholders suffer a wrong from the majority shareholders within the company itself. This paper will analyse the rule in *Foss v Harbottle*[244] and subsequently, the Malaysian position in the courts, the Companies Act 1965 and the Companies Act 2016 respectively.

It is uncertain as to whether the new principles under the Companies Act 2016 will bring a positive change to the status quo of case laws. The current state of case law has not taken the new principles of the Companies Act 2016 into account. With the introduction of the Companies Act 2016, it is imperative to critically examine the potential lacunae of the law to prevent miscarriages of justice. This paper aims to discuss the developments of the derivative action in Malaysia, critically assess the merits of the current law of derivative action in Malaysia to determine whether the law is satisfactory in this area and briefly compare and contrast the position of this doctrine against other Common Law jurisdiction.

[235] Zuhairah Ariff Bt Abdul Ghadas, 'The Myth of Corporate Personality: An Overview from the English Law and Shariah' [2008] 3 ShLR 13.
[236] Ibid, citing John William Salmond, *Salmond on Jurisprudence.* (10th edn, Stevens and Haynes 1913).
[237] Companies Act 2016.
[238] Siew Cheang Loh, *Corporate Powers Accountability* (2nd edn, LexisNexis 2002).
[239] Mark Weinstein, 'Limited Liability in California 1928-31: It's the Lawyers' [2005] 7 Am. L. & Econ. Rev 2.
[240] Ross Grantham, 'The doctrinal basis of the rights of company shareholders' [1998] 57 CLJ 3.
[241] John Edward Parkinson, *Corporate Power and Social Responsibility* (Oxford University Press 1993).
[242] Ibid.
[243] *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HOL).
[244] *Foss v Harbottle* [1843] 67 ER 189 [1843] 2 Hare 461 (Ch).

2. Development of the Principle under Common Law

2.1 The Logic of *Foss v Harbottle*

As stated above, one of the effects of the doctrine of separate legal entity is limited liability. The concept of limited liability limits the liability only towards the amount of assets in which a director owns.[245]In a logical sense, if the body corporate is a single unit, the members of the company on a general rule cannot take action against itself. Therefore, the problem arises if the members, particularly the minority shareholders suffer a wrong from within the company. It is established in *Foss v Harbottle*[246] that the 'proper plaintiff' of an action against the company is the company itself.[247]

Foss is followed in *MacDougall v Gardiner,*[248] in which a shareholder's claim was dismissed as his claim was not a personal claim, but rather the "proper plaintiff" was the company itself. The rule in *Foss* was heavily debated and referred to in the English decision of *Prudential Assurance Ltd. v. Newman Industries Ltd. (No 2),*[249] in which the plaintiff must prove a *prima facie* case of fraud, or the derivative action will not be considered. This is much to the dismay of minority shareholders as L.S. Sealy commented.[250]

The rule in Foss is essentially refined by Jenkins LJ in *Edwards v Halliwell*[251] to include that the proper plaintiff who brings an action for a wrong done to the company is the company itself and the wrong is a transaction that is made binding on a company by a simple majority of shareholders and the minority shareholder is unable to object due to the majority principle.[252]This rule itself is desirable for several reasons.[253] Firstly, Christopher Hale debated that the *Foss* principle was beneficial as litigation was more difficult with this doctrine in place.[254] This prevents unnecessary litigation, in which the decision whether to sue must be made, which is usually a financial and corporate rather than a legal matter.

[245] Loh (n 11).
[246] *Foss* (n 17).
[247] *Foss* (n 17).
[248] *MacDougall v Gardiner* [1875] 1 ChD 13.
[249] *Prudential Assurance Ltd. v. Newman Industries Ltd. (No 2)* [1982] Ch. 204 (CA).
[250] Leonard Sealy, 'More Bleak News for the Minority Shareholder' [1987] 46 CLJ 3, 398.
[251] *Edwards v Halliwell* [1950] 2 All ER 1064 (CA).
[252] Ainul Azam bin Ahmad Khamal, 'There and Back Again- Perspectives on the Law of Derivative Action in Malaysia' [2017] 5 MLJ 124 citing Ibid.
[253] Pearlie Koh, 'The Statutory Derivative Action in Singapore: A Critical and Comparative Examination The Statutory Derivative Action in Singapore - A Critical and Comparative Examination' [2001] 13 Bond Law Review 64.
[254] Christopher Hale, 'What's Right with the Rule in Foss v Harbottle?' [1997] Company Financial Insolvency Law Review 219.

Secondly, the *Foss* rule prevents a form of duplicative litigation.[255] Cheffins adds that litigation will have an adverse impact not only on the shareholders, but other stakeholders, such as creditors, who might have their payments defaulted, and employees, who might suffer retrenchment.[256] This also increases the number of litigations against the defendant itself, further burdening the courts.

2.2 The Problems of *Foss v Harbottle*

Nevertheless, there are consequences of the *Foss* principle to the minority shareholders. In *Wallersteiner v Moir (No 2)*[257], Lord Denning commented that such a derivative action would not be effective as a minority loses out to the majority.[258] A rationale of this phenomenon is that the company is not able to sue as most part of the company is controlled by the dominating party.[259]Naturally, the decision in *Prudential* has brought some dissatisfactions, as criticised by Sealy in *A Marathon that Nobody Wins*,[260] 'de facto' control is not strictly defined and could lead to possibly worse results for the minority shareholders. *Prudential,* as Sealy mentioned, though a simple case of fraud, had been decided on purely procedural grounds, whereby the sole purpose is in which time would be saved.[261]Therefore, the consequence of the *Foss* rule is the inability of the minority shareholders to take action against the company.[262] The Jenkins Committee of England and Wales noted that the minority shareholders have no right of complaint other than the ground of fraud.[263]

Due to this nature, it is held under *Elder v Elder Watson*[264] that the rule in *Foss* should be taken liberally. Under the common law, there are five exceptions under *Edwards v Halliwell* as *ultra vires* and illegality; special majorities; personal rights; fraud by controlling majority; and when justice requires it (although this exception has been disputed in *Prudential Assurance Co Ltd v Newman Industries (No 2)*[265]. Anthony Boyle argued that an obiter dictum can be read into the *Foss* rule to grant this exception.[266] Though Sealy would claim that this rule is the "very foundation" that a minority shareholder could bring an action in the first place).[267] These exceptions can be argued as not exceptions at all, but instead, as Wedderburn stated, merely as the impossibility for the confirmation by the majority to

[255] Koh (n 26).
[256] Brian R Cheffins, 'Reforming the Derivative Action: The Canadian Experience and British Prospects' (1997) 227 Company, Financial and Insolvency Law Review; cited in Koh (n 28).
[257] [1975] 1 All ER 849; [1975] QB 373.
[258]*Ibid*.
[259] Peter Hayden, 'Added protection' 159 NLJ 313.
[260] Leonard Sealy, 'A Marathon that Nobody Wins' [1981] 40 CLJ 1, 29.
[261] *Ibid*.
[262] Saleem Sheikh, 'Judicial policy on corporate giving' [1990] 87 LSG 25, 16.
[263] Board of Trade, 'Report of the Company Law Committee 1962' (Cmnd. 1749, 1962) 4, 6.
[264] *Elder v Elder Watson* [1952] SC 49.
[265] Ahmad Khamal (n 25), citing *Prudential* (n 22).
[266] Anthony Boyle, 'A Liberal Approach to Foss v. Harbottle' [1964] 27 Modern Law Review 603.
[267] Sealy (n 33).

arise,[268] save perhaps the fifth requirement, whereby Sealy, as mentioned, would argue is the fundamental reason for the exceptions.

3. The Statutory Derivative Action

3.1 The Growing Trend of Shareholder Rights and Statutory Derivative Action

There was a growing trend in the 1990s to provide a larger emphasis on shareholders.[269] It is not uncommon for most common law jurisdictions to adopt a form of statutory derivative action to solve the problems of common law derivative action. In England, Wales and Northern Ireland, the new statutory position is seen under the new sections 260-264 of the Companies Act 2006 (UK).[270] The law committee overseeing this amendment stated in the paper: '*Shareholder Remedies*' that these provisions do not overrule the rule in *Foss*, but merely a new procedure that would be more flexible and modern to determine if a shareholder can pursue an action.[271]

A derivative claim under the England, Wales and Northern Ireland jurisdiction may be brought under section 260 of the Companies Act 2006,[272] whereby a member of a company may seek relief on behalf of the company (section 260(1)) from an act or omission involvingnegligence, default, breach of duty or breach of trust by a director, as defined under section 260(5),of the company.[273]

In Canada, the statutory method is seen to be more drastic. In the drafting of the Canadian Business Corporations Act,[274] the Proposals for a New Business Corporations Law for Canada, also known as the Dickinson Committee[275] had explicitly stated that the 'alternative system' will replace the 'infamous doctrine'[276] of *Foss* with its 'injustices' and 'prejudices'.[277]In Singapore, the provisions providing statutory derivative action were found under sections 216A and 216B of the Companies Act. This particular doctrine was taken *in pari materia* from the Canadian Business Corporations Act,[278] as seen in sections 239(1) and 239(2) of the said Act.

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[268] Kenneth Wedderburn, 'Shareholders' Rights and the Rule in Foss v. Harbottle' [1957] 15 CLJ*2,* 194.
[269] American Law Institute Tentative Draft No 6 at 3 cited from Koh (n 26).
[270] Companies Act 2006.
[271] Law Commission, *Shareholder remedies* (Law Com No 246, 1997).
[272] Section 260 of the Companies Act 2006 (n 43).
[273] Ibid.
[274] Canada Business Corporations Act, RSC 1985.
[275] R. Dickerson, *et al*, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Ministry of Supply and Services Canada, 1971), vol 1 para 482.
[276] Ibid.
[277] Dickerson (n 48).
[278] Canada Business Corporations Act (n 47).

3.2 The initial Statutory Derivative Action and Common Law Principles under the Companies Act 1965

Prior to section 181 of the Companies Act 1965, the only statutory remedy by the Malaysian courts would be to wind up the company under the rule of 'just and equitable' grounds,[279]or under the Companies Ordinance 1940.[280] In this aspect, the law had to be reconsidered in drafting the Companies Act 1965.[281]

There exists 2primary methods of derivative action, one by the courts and the common law, and another by the statutory method.[282]Derivative action was usually executed by the courts following the principles of Common Law. For example, the principles in *Edwards v Halliwell* were followed by Malaysian courts such as in *Tan Guan Eng v Ng Kweng Hee.*[283] Gopal Sri Ram JCA in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd v Ors*[284] who affirmed the decision in *Tan Guan Eng*, also approved the derivative action under statutory means under s181 of the Companies Act 1965.[285] His Lordship stated that a derivative action is an ingenious device used by the courts to overcome 'judicial non-interference'.[286] Essentially, it is a method to curb the injustice that arose from the *Foss* rule.

In this vein, for a period of time, the Malaysian courts followed to a large extent the exceptions held in *Edwards* and statutory derivative action based on section 181.It must be noted that it can be argued following the decision in *Elder v Elder Watson Ltd*[287] that the word 'oppressive' was too strictly defined.[288] Therefore, Gopal Sri Ram JCA noted that a key element in section 181(1)(a) is that it should be taken at a purposive approach. This was according to *Re Kong Thai Sawmill (Miri) Sdn Bhd*[289] whereby 'oppression' under section 181includes any conduct which departs from fair play.[290] This principle was also taken suit in other common law jurisdictions such as in Canada in *Re Ferguson and Imax Systems Corp;*[291] as well as in Australia in *Re Associated Tools Industries Ltd.*[292] However, the weakness of the

[279] Canada Business Corporations Act (n 47).
[280] Canada Business Corporations Act (n 47) citing Straits Settlement 49 of 1940, section 166(6).
[281] Ibid.
[282] Straits Settlement 49 (n 53).
[283] Mohammad Rizal Salim, 'The Shareholders' Derivative Action' [2000] 1 MLJ 44.
[284] *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd v Ors* [1995] 4 CLJ 551.
[285] Ahmad Khamal (n 25).
[286] Ahmad Khamal (n 25).
[287] *Elder* (n 37).
[288] Loh (n 11).
[289] *Re Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* [1978] 2 MLJ 227 (PC).
[290] Ibid.
[291] *Re Ferguson and Imax Systems Corp*., 43 O.R.2d 128, 137 (Ont. C.A. 1983).
[292] *Re Associated Tools Industries Ltd* [1963] 5 FLR 55 (FC).

broad scope of 'oppression' is that it lacks a proper definition. This leads to uncertainty of the criteria of 'oppression'.[293]

The rule in *Foss* was scrutinized by the Corporate Law Reform Committee, to address the drawbacks to the principle,[294] specifically that the common law does not adequately offer a remedy under the situation of section 181 of the Companies Act 1965. Hence, there was a need to introduce a statutory derivative action which abolishes all forms of common law derivatives.[295]The Corporate Law Reform Committee also indicated that another problem of the common law derivative action is the problem of free riders,[296] in which the aggrieved minority shareholder is obliged to fund the legal costs to commence the action. Such an obligation is a major disincentive to commence the said action.[297]

Similarly, another criticism of the provision is the *locus standi* of the applicant. In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor,*[298] it was held that membership was to be held generally, and not strictly. Therefore, a beneficial owner of a share who is not a member could technically pray for a leave from the court.[299] The Corporate Law Reform Committee suggested extending the provision to include beneficial owners of shares.[300] Subsequently, another criticism is that the plaintiff is required to prove *prima facie* that the company is entitled to the relief before pleading the action itself.[301] This places a high standard of proof on the plaintiff prior to the action itself.

A similar criticism is that the plaintiff has to bear his own costs of litigation. If the plaintiff fails in the litigation, he has to pay the taxed costs of the defendant. Whereas if the plaintiff succeeds, any amount of damages will be awarded to the company itself.[302]In regards to the winding up order by the courts, sections 181(1)(a) and 181(1)(b) allows the court to wind up companies if the manner conducted by the directors proved to be oppressive.[303]

Section 218(1)(i) of the Companies Act 1948 is a similar provision in England and Wales. Lord Wilberforce addressed this provision in *Ebrahimi v Westbourne Galleries Ltd & Ors,* that this doctrine allows the court to use legal obligations to address equitable principles in cases of

[293] Aishah Hj Bidin, 'Legal Issues Arising from Minority Shareholders' Remedies in Malaysia and United Kingdom' [2003] 7 Jurnal Undang-undang dan Masyarakat 51-69.
[294] Ibid, citing Corporate Law Reform Committee Consultation Document, 'On Members' Rights and Remedies'.
[295] Corporate Law Reform Committee Consultation Document, 'On Members' Rights and Remedies' [2007] 6, para 3.
[296] Ibid, 2.03.
[297] Corporate Law Reform Committee Consultation Document (n 68).
[298] *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113.
[299] Ibid.
[300] Corporate Law Reform Committee Consultation Document (n 68).
[301] Bidin (n 66).
[302] Bidin (n 66).
[303] Teng Kam Wah, 'Power to the Minority Shareholder' [1997] 2 MLJ 37.

unfairness.[304] In other words, the company can only be wound up if the court is satisfied that it is just and equitable for the company to be wound up.[305]Naturally, this was unsatisfactory to the minority shareholders as he is of obligation to justify the winding up order, in which, following that, the court is obliged to grant the winding up order.[306]

The Malaysian position differs from the English position in this aspect. This is due to the meaning of the term 'oppression' from the English cases such as *Re Jermyn Street Turkish Baths Ltd* which differs from Malaysian cases such as *Re Kong Thai Sawmill (Miri) Sdn Bhd*[307]as stated above. However, it can be argued that a remedy of such a conduct, under s181, is subjected to the discretion of the courts.[308] Due to this fact, the court may grant an order to wind up the company despite not being prayed to do so, or to provide an appropriate alternative remedy depending on the situation, as seen in *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd.* [309] This may be beneficial as winding up the company may not be in the company's best interests.

However, AnuarJ in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors,*[310] stated that despite the differences in s181 and the just and equitable rule in section 218 of the Companies Act 1948, the outcome is the same. He noted that despite how sections 218 or 181 were construed, the courts were entitled to impose equitable rights on strict legal obligations.

3.3 Introduction of the Companies Amendment Act 2007

The provisions of sections 181A-E were introduced in the Companies Amendment Act (2007 Amendment) which provide for derivative action on behalf of the company. Sections 181 A-E were debated by the Corporate Law Reform Committee in the Consultative Document 6.[311] The statutory derivative action was first aptly attempted in *Celcom (M) Bhd v Mohd Shuaib Ishak.*[312] It was held that the derivative action under s181A must be strictly applied. There must also be a direct causal nexus whereby the complainant must prove, " ... between the complainant and how he ceased to be a member."[313] This case was to be said to impose a strict requirement on the provision.[314] Another requirement, as stated by Abdul Hamid

[304] *I bid*.
[305] Teng (n 76).
[306] Teng (n 76).
[307] *Re Kong Thai Sawmill* (n 62).
[308] Teng (n 76).
[309] *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129.
[310] *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1995] 2 SLR 297.
[311] Corporate Law Reform Committee Consultation Document (n 68).
[312] *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636.
[313] Ibid.
[314] Ahmad Khamal (n 25).

Embong JCA, is to prove 'good faith', which is based on honest belief and that the application is not of a collateral purpose.[315]

It is due to the two important factors of whether the derivative action is brought in good faith for the best interests of the company;[316] that the Court of Appeal sets the bar high for such an action, with a strict adherence to the provision.[317] The court in *Celcom (M) Bhd*[318]held that on the issue of good faith, there is a twofold test of good faith under section 181B: (i) an honest belief by the respondent, and (ii) that the claim is not meant for a collateral purpose.

These requirements are important, as stated by Annabelle Yip and Hon Yi Lim in the Singaporean Court of Appeal case of *Ang Thiam Swee v Low Hian Chor*.[319] The necessity to prove a good faith is established under section 216A(3) of the Singaporean Act.[320] Both limbs are held as important as 'personal matters' would be avoided from these frivolous claims.[321] However, there is a slight emphasis on the issue of honest belief in the Malaysian jurisdiction, rather than the Singaporean emphasis on both honest belief and interests of the company. As the Malaysian requirement for 'honest belief' and 'interest of the company' is more akin to the Australian decision of *Swansson v R A Pratt Properties Pty Ltd and Another,*[322] itis a twofold test, rather than merely one from the Singaporean statute.

Imperfections in these particular amendments still exist. For instance, section 181A was silent on a possibility of a multiple derivative action[323] which is an action taken by a minority shareholder against a subsidiary or a related company,[324] seen in the Hong Kong case of *Waddington Ltd v Chan Chun Hoo Thomas and others.*[325] Therefore, due to the lacunae in the statutes, the courts would often refer to the common law[326] as shown in *Ranjeet Singh Sidhu v Zavarcoplc*[327]which refers to cases such as *Waddington.*[328] In this particular case,

[315] *Celcom (M) Bhd* (n 85).
[316] Vivian Chen, 'The Statutory Derivative Action in Malaysia: Comparison with an Australian Judicial Approach' [2017] 12 Asian Journal of Comparative Law 1.
[317] Ahmad Khamal (n 25).
[318] *Celcom (M) Bhd* (n 85).
[319] *Ang Thiam Swee v Low Hian Chor* [2013] SGCA 11.
[320] Section 216A(3) of the Companies Act.
[321] Annabelle Yip and Hon Yi Lim, 'Ang Thiam Swee v Low Hian Chor [2013] SGCA 11 (Singapore, Court of Appeal, 31 January 2013): Acting in Good Faith' [2013] Wong Partnership LLP <http://www.mondaq.com/x/234352/Shareholders/Ang+Thiam+Swee+v+Low+Hian+Chor+2013+SGCA+11+Singapore+Court+of+Appeal+31+January+2013+acting+in+good+faith> accessed 28 May 2020.
[322] [2002] 42 ACSR 313.
[323] Aiman Nariman Mohd Sulaiman, 'The Statutory Derivative Action in Malaysia: Filling in the Gaps' [2012] 20 IIUMLJ 177.
[324] Victor Joffe, 'The multiple derivative action: pt 1' [2009] 2 JIBFL 61.
[325] *Waddington Ltd v Chan Chun Hoo Thomas and others* [2008] HKLR 1381. [2008] HKCFA 63.
[326] Ahmad Khamal (n 25).
[327] [2016] 2 CLJ 975.
[328] *Kumagai Gumi Co Ltd (n 85*).

multiple derivative action was applied in Malaysia via section 181A(3) of the Companies Act 1965.[329]

3.4 The Current Position under the Companies Act 2016

Remedies for minority shareholders are found in sections 346 to 351 of the Companies Act 2016.[330] Section 346 is similar to section 181 of the Companies Act 1965 in providing a remedy to a minority shareholder in cases of oppression.[331]Section 346 of the Companies Act 2016 states that a member, upon proving either that (a) the affairs of the company were exercised as oppressive to one or more shareholders including himself; or (b) if an act of a company is prejudicial to one or more members, including himself;[332] the court has a discretion to (a) Direct, prohibit, cancel or vary a transaction or resolution, (b) regulate the conduct of the company, (c) to allow purchasing of shares, (d) to provide a reduction in the purchasing of shares or (e) to wind up the company.[333]

Section 346 of the Companies Act 2016 is a personal claim. The individual member or debenture holder brings an action under his name. Whereas, under section 347, the proceedings are derivative, in which the applicant brings the claim in the company's name by way of section 347(2). Sections S347- 350 of the Companies Act 2016 is similar to the amended provisions of section 181A-E of the Companies Act 1965, as elaborated below. Section 347(1)of the Companies Act 2016 states that the complainant may initiate, intervene in, or defend a proceeding on behalf of the company. Essentially, the complainant may take action against the majority shareholders on behalf of the company itself. This would mean that the plaintiff no longer has to take a representative action to include all the shareholders except the defendants. Rather, the plaintiff will be acting under the company's name.

Section 347 of the Companies Act 2016 is similar to section 181A of Companies Act 1965. Sections 181A(1) and (2) are identical in nature to sections 347(1) and (2). However, most importantly, under the Companies Act 2016, common law rules are abrogated under section 347(3).[334] This differs from the Companies Act 1965. Under section 181A(3) of the Companies Act 1965, the right of a person to bring an action under Common Law is not abrogated.

[329]Ainul Azam bin Ahmad Khamal, 'There and Back Again: The Journey Continues - Recent Perspectives on the Law of Derivative Action in Malaysia' [2019] 6 MLJ 119.
[330] Companies Act 2016 (n 10) s 346-351.
[331] Chan Wai Meng, *Essential Company Law in Malaysia: Navigating the Companies Act 2016* (1st Edn, Sweet & Maxwell 2017).
[332] Companies Act 2016 (n 10) s 346(1).
[333] Companies Act 2016 (n 10) s 346(2).
[334] Companies Act 2016 (n 10) s347(3).

Section 348 of the Companies Act 2016 states the procedure of which the derivative action via section 347 is initiated. This section is identical with section 181B of the Companies Act 1965. Similarly, section 348(5) of the Companies Act 2016 is identical to section 181C of the Companies Act 1965. Under section 348(4) of the Companies Act 2016, the twofold test of honest belief and best interests of the company is retained. It is opined that the same high standard of the Companies Act 1965, held in *Celcom(M) Bhd*[335] still applies.

Section 349 of the Companies Act 2016 is parallel to section 181D of the Companies Act 1965. This states that a ratification or an approval of the conduct by the members of the company does not prevent any persons from bringing a claim. However, the court may take the ratification or order into the consideration of the order to be made. Section 350 of the Companies Act 2016, which is identical to section 181E of the Companies Act 1965, gives power to the court to make orders on (a) authorise the complainant to control the conduct of proceedings, (b) gives direction for conduct of proceedings, (c) for any person to provide assistance and information to the complainant, (d) to require the company to pay legal fees and disbursements or to grant leave of an injunction, (e) to make orders on costs.

Section 351 of the Companies Act 2016, which corresponds to section 368A of the Companies Act 1965, is a wide provision that gives power to the court to grant injunctions if any offences under the respective acts were committed. From the comparison above, it is clear that the major difference between derivative actions under the Companies Act 2016 and the Companies Act 1965 is that the Companies Act 2016 expressly abrogates the common law principles, whereas the Companies Act 1965 did not.

Although it is of the Corporate Law Reform Committee's intention for the common law principles to be abrogated in the new statute, there are many uncertainties in whether the Companies Act 2016 would allow common law principles in practice and in case law.[336] One of the uncertainties is the multiple derivative action as decided in *Ranjeet Singh.*[337] The Companies Act 2016 is similar to the Companies Act 1965 that it is silent on this issue. Since the Companies Act 2016 expressly abrogates common law principles, it is unclear whether doctrines such as multiple derivative action should continue in the current legal framework.

Conversely, several of the interpretations decided in case law based on the said provisions of the Companies Act 1965 are clearly to be retained. For instance, due to the identical nature of sections 181A (1) and (2) of the Companies Act 1965 and sections 347(1) and (2) of the Companies Act 2016, the strict requirement of the direct causal nexus " ... between the complainant and how he ceased to be a member ... " decided in *Celcom (M) Bhd* should be followed.

[335] *Celcom (M) Bhd* (n 85).
[336] Ahmad Khamal (n 25).
[337] *Ranjeet Singh Sidhu v Zavarco plc* (n 100).

Therefore, it is appropriate to refer to the Corporate Law Reform Committee in regards to this issue. The Corporate Law Reform Committee recommends that common law derivative action be abrogated in favour of the statutory derivative action. In this regard, the Corporate Law Reform Committee achieved its goal. It must be noted that the Companies Act 2016 does provide certain provisions that compensate the exceptions under *Edwards,* namely, fraud in section 213;special majority in sections 33(1) and 38(6); and personal rights in section 71.[338]

However, as common law rules regarding derivative action were repealed, the Malaysian position seemingly becomes less vague as compared to the previous situation with the Companies Act 1965.[339] It is of this author's opinion that the removal of Common Law principles from the law is a benefit, rather than a loss. The common law rules of *Foss* are restrictive, and much antiquated in an age where shareholder power is seen with more value.[340] To quote Lord Browne Wilkinson in *R v Secretary of State for the Home Department, ex-parte Pierson*,[341] "Parliament is presumed not to have intended to change the common law unless it is clearly indicated such intention either expressly or by necessary implication."

Despite the clear express abrogation of Common Law principles, the 2019 decision of the Federal Court in *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd*[342] affirmed the common law principle of 'wrongdoers' control'. Wrongdoer's control was an essential requirement in the common law derivative action.[343] If a company is 'deadlocked' in which the company is equally split between 2 opposing views, the plaintiff has to prove that the defendant has control over the board. This is called the Wrongdoer's Control test.

Under the Companies Act2016, there is no such requirement. The recourse back to the common law principles trivialises the express prohibition of section 347(3) of the Companies Act2016. It must be noted that Raus Sharif CJ admitted in his judgment that the case arose in 2012, and thus the Companies Act2016 does not retrospectively apply to this case. Therefore, it is for this reason that the author opines that this decision is not to be followed.

[338] Chan (n 104).
[339] Ahmad Khamal (n 25).
[340] Koh (n 26).
[341] *R v Secretary of State for the Home Department, ex-parte Pierson* [1998] AC 539.
[342] *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1.
[343] Ibid.

4. Conclusion

Due to the developments of the law under sections 181A-E of the Companies Act 1965, it is this author's opinion that the case laws decided based on the said provisions of the Companies Act 1965 fully applicable to the new legislation due to the similarity of the provisions of section 347 of the Companies Act 2016 and sections 181A-E of the Companies Act 1965.It is also of this author's opinion that a more recent development in the case law, made in light of the Companies Act 2016, should be made explicit that the case law made under the Companies Act 1965 is to be followed. In light of the future developments in case law, English Common Law principles should be slowly replaced by Malaysian precedents as the lacunae starts to be filled with established legal doctrine.

Due to the abrogation of the common law principles, it can be concluded that the flaws in the common law actions are solved. Maintaining the principles of *Edwards v Halliwell* would only complicate matters further as the Corporate Law Reform Committee suggestions in the Companies Act 2016 have filled the gap left by the Common Law. Moreover, by abrogating the Common law principles, the law is now streamlined. This analysis also demonstrates that the law, like any other human developments, should not be static, but a dynamic, evolving force that improves over time.

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Corporate Criminal Liability for Corporate Killing in Malaysia

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Abstract
The overwhelming majority of corporate killing cases in Malaysia have attracted no criminal justice attention. Are corporations free to kill? Unrestricted corporate power generates immeasurable social damage. What can be done to curtail the reckless, negligent, and immoral practices by these corporations? While legislative and regulatory mechanisms currently exist, they are simply insufficient and ill-fitting. This paper focuses on criminal liability for manslaughter arising out of work-related deaths caused by corporations, referred to as corporate killing. Specifically examining fatal accident cases in the Malaysian construction industry, the author seeks to assess the possible application of corporate killing in Malaysia. Ultimately, this paper argues that Malaysia should incorporate corporate killing legislation to pave the way for more accurate, effective, and fair prosecutions of corporations for their acts of killing.

Keywords: Corporate Killing - OSHA 1994 - Corporate Criminal Liability - Workplace Deaths - Construction Industry.

1. Introduction

Society demands that perpetrators, living or artificial, suffer the requisite punishment.[344] Corporations can and do kill,[345] as numerous fatalities at workplaces have been ascribed to the failure of corporations in safeguarding working conditions and practices.[346] The offence of 'corporate killing' refers to occurrences where culpability can be attributed to a corporation for the death of a human being.[347] In Malaysia, corporate killing involves killing at workplaces, killing due to unsafe products, killing of third parties due to companies' negligent business operations, and killing involving public transportation.[348] With ever-increasing economic growth and technological advancement, the problem of workplace accidents is increasingly alarming. Malaysia's Department of Occupational Safety and Health reported that there were 259 fatal accident cases in 2019, of which 84 were killed at construction sites - recording the highest number of deaths across the nation's economic

[344] Sylvia Rich, 'Corporate Criminals and Punishment Theory' [2016] 29 CJLP 97.
[345] Donald Miester, 'Criminal Liability for Corporations that Kill' [1990] 64 TLR 919.
[346] Robin Edwards, 'Corporate Killers' [2001] 13 AJCL Law 231.
[347] Ireland Law Commission, *Consultation on Corporate Killing* (LRC CP 26 - 2003).
[348] Hasani Mohd Ali, 'Corporate Killing for Malaysia: A Preliminary Consideration' [2009] 13 JUM144.

sectors.[349]The construction industry in Malaysia employs an estimated 1.2 million workers - close to 10 percent of Malaysia's workforce – and is a major contributor to the economy.[350]While being one of the most important industries in terms of GDP contribution, it has long been recognised as one of the riskiest sectors and should not be left to its own devices.

Fatal accidents caused by corporations could be prevented through the enforcement of corporate killing. Thus, this paper focuses on the possible application of corporate killing liability in Malaysia, by critically assessing justifications for the doctrine of corporate killing and considering approaches that have been used by other common law countries. The general goal is to contribute to a more cogent framework of corporate criminal liability in Malaysia.

2. Basis of Corporate Criminal Liability

Corporate criminal liability refers to the legal responsibility of a corporation for criminal actions, or the failure to act in some cases, committed by the corporation's employees for the benefit of the corporation.[351] This section considers the basis of corporate criminal liability: first, by discussing the legal standing of a corporation and how it is separate from those who create it, and, secondly, by examining the common law attribution models for corporate criminal liability.

Companies are 'distinct and independent' entities that are separate from their members. The House of Lords' decision in *Salomon v Salomon & Co Ltd*[352] is the leading case that introduced the significance of the separate legal personality. There, Lord Halsbury stated " … it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself". French contends that corporations are more than a group of persons with a purpose, expounding a "theory that allows treatment of corporations as fully-fledged members of the moral community, of equal standing with the traditionally acknowledged residents: human beings",[353] namely recognising companies as distinct and separate entities.

[349] Department of Occupational Safety and Health, 'Occupational Accident Statistic 2019' (*DOSH*, 2019) <https://www.dosh.gov.my/index.php/statistic-v/occupational-accident-statistics-v?own=0> accessed 10 May 2020.

[350] Anon, 'NST Leader: Building death' *New Straits Times* (Kuala Lumpur, 17 February 2020) <https://www.nst.com.my/opinion/leaders/2020/02/566175/nst-leader-building-death> accessed 11 May 2020; Construction Industry Development Board (CIDB), *Construction Industry Review 1980-2009 (Q1).*

[351] YBhg Datuk Tun Abd Majid b. Tun Hamzah, 'Extent of Responsibilities of Corporate Organisations for Bribery Acts of Their Employees' (*Legal Plus Sdn Bhd*, 2 Dec 2014) <https://www.legalplus.com.my/extent-of-responsibilities-of-corporate-organisations-for-bribery-acts-of-their-employees/> accessed 7 April 2020.

[352] [1897] AC 22 (HL).

[353] Peter French, 'Collective and Corporate Responsibility' [1984] CUP 32.

Although corporations are artificial legal creations with no physical existence, conscience, beliefs, feelings, thoughts nor desires, it is argued that justice is generally not served by prosecuting some natural person who happens to work for the corporation. Thus, companies themselves should face justice.[354]If corporations are legal personalities, corporations should be considered to have moral personalities. While companies have unlimited capacity,[355] they should be able to be convicted of crimes such as manslaughter.

Companies as legal entities generally require *actus reus* and *mens rea* to be liable for crimes.[356] The maxim *actus non facitreum nisi mens sit rea* is a distinctive feature of criminal law. It is translated as 'an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence'. A common dispute that surfaces when attributing criminal liability to corporations is that corporations do not have minds nor wills of their own, thus being incapable of possessing the requisite *mens rea*. As Ferguson comments, " ... the central issue that arises in attaching criminal liability to a corporation is the theoretical difficulty of attributing a culpable mental state (or *mens rea*) - a required element of most criminal offences - to non-human, artificial entities."[357] Theorists such as French, Fisse, Braithwaite, and Bucy established the concept that the mental element of corporate misbehaviour can be found in the corporation's culture.[358] This means that the court could be required to review the entire corporate arrangement within the managerial hierarchy, to see whether the corporation's arrangement or operations created scope for the commission of the offence.

Common law models hold individuals liable for corporate crimes, and then attribute it to the company.[359] The main forms of attribution are vicarious liability and the identification principle.[360] The vicarious liability principle renders any act committed by an employee within the scope of corporate activity attributable to the company, be it the *mens rea* or *actus reus,* or both. It is wholly derivative.[361] Lord Atkins, in *Mousell Bros Ltd v London and Northwestern Railway Co*[362] held that an employer can be vicariously liable for the criminal conduct of its employee as long as said conduct was committed in the course of his

[354] Ibid.
[355] Companies Act 2016, s 21.
[356] Maria Kelt and Herman von Hebel, 'General Principles of Criminal Law and the Elements of Crime' in Roy S K Lee ed, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Inc. 2001) 14.
[357] Gerry Ferguson, "Corruption and Corporate Criminal Liability" in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities - International Colloquium Berlin 1998* (Freiburg: edition inscrim 1999) 153.
[358] Brent Fisse and John Braithwaite, 'Corporations, Crime and Accountability' [1993] CUP 75.
[359] Kathleen F Brickey, *Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents* (2nd edn, CBC 1992) 8.
[360] Aiman Nariman Mohd Sulaiman, Effendy Othman, *Malaysia Company Law: Principles and Practices* (2nd edn, CCHM 2018) 105.
[361] John Minkes and Leonard Minkes, *Corporate and White Collar Crime* (1st edn, Sage Publications Ltd 2008) 64.
[362] [1917] 2 KB 836.

employment and the relevant statutory provision criminalising such conduct does not state that it may only be committed by a natural person.

On the other hand, the main underlying principle of the identification principle is the derivation of the requisite *mens rea* from the company's 'directing mind and will'. This refers to an individual or individuals who are of sufficient standing that they are 'identified' with the company. This requires courts to determine if the crime was committed by a high position officer who might be considered an 'alter ego' of the company. It is also known as the directing mind theory, as seen in *Tesco Supermarkets Ltd v Nattrass,*[363]where the House of Lords held that a corporation can be held liable for an offence committed by its employee as long as the employee is considered as the 'directing mind' of the corporation.

To date, Malaysia has no workable doctrine for the imputation of criminal liability to corporations.[364] While most Malaysian cases apply the identification principle,[365] vicarious liability has been applied in several cases such as in *PP v Teck Guan Co Ltd*[366] and *Kumpulan Wang Persaraan (Inc.) v Meridian Asset Management Sdn Bhd* - these cases have not been overruled.[367] Both theories are muddled and problematic due to the difficulty in proving a causal link between the wrongdoer and the crime, mainly in cases where systemic errors are present.

3. Corporate Killing in Malaysia

Currently in Malaysia, there is a plethora of legislation that addresses different areas of criminal corporate liability.[368]However, there is no single consolidated legislation in place for the offence of corporate killing in Malaysia, rendering it effectively unrecognised legally.[369]Corporate crimes are not only physically or financially harmful, but can also disrupt the moral fabric of society,[370] threatening the trust that is fundamental to community life.[371]Families of victims and employees without recourse lose their sense of security and hope in the flawed legal system, while corporations escape despite having unsafe working environments. This is partly due to the fact that existing laws which impose liability upon the corporation do not cover negligent manslaughter even though workplace deaths involving corporations continue to persist.

[363] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.
[364] Ali (n 5) 144.
[365] Ali (n 5) 146-148.
[366] *PP v Teck Guan Co Ltd* [1970] 2 MLJ 141.
[367] *Kumpulan Wang Persaraan (Inc.) v Meridian Asset Management Sdn Bhd* [2013] 9 MLJ 614.
[368] Section 144 of the Securities Commission Act 1993, s 138(3); Consumer Protection Act 1999.
[369] Ali (n 5) 145.
[370] Sir Henry Sumner Maine, *Ancient Law,* (10th edn, London: J..M. Dent & Sons Ltd 1931) 16.
[371] Russell Mokhiber, *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust* (1st edn, San Francisco: Sierra Club Books 1989) 10.

3.1.1 Malaysian Legislation

Legislation enforced by the Department of Occupational Safety and Health to implement safety and health requirements for construction sites and regulate construction activities are found in the Occupational Safety and Health Act 1994[372]and Factories and Machinery Act 1967.[373] The Factories and Machinery Act 1967 was enacted in 1967 to legislate matters relating to the safety, health, and welfare of persons in respect to the registration and inspection of machinery which are still applicable today.[374] However, criticisms of the Act led to the enactment of the Occupational Safety and Health Act 1994, an Act that was based largely on the United Kingdom's Health and Safety at Work Act 1974.[375]The main purpose of the Occupational Safety and Health Act 1994is to secure the safety, health, and well-being of employees at work by providing the legislative framework to promote, stimulate, and encourage high standards of safety and health at work.[376] Its enactment took on an approach of encompassing self-regulation which was based on the Robens Report, which states that the responsibility for managing safety and health lies with those who create the risks and those who work with the risks.[377] The Occupational Safety and Health Act 1994 was a step forward for Malaysia due to its comprehensive approach in dealing with workplace accidents, where all related parties must participate in the efforts.

Under the Occupational Safety and Health Act 1994, responsibilities are clearly laid out in order to provide an opportunity for the enforcement division to better carry out enforcement procedures. Section 39 of the Act provides Occupational Health and Safety officers with various powers, such as the power to enter premises, to inspect, to investigate, to confiscate and to take samples. Section 52 provides for offences committed by a body corporate. In this context, a body corporate is like a person who is subject to sanctions of criminal law. However, since a corporation cannot be imprisoned, Section 56 provides that a body corporate or trade union that is convicted shall only be liable to the imposition of a fine only. Section 61 provides for prosecution by the Occupational Health and Safety officer or an officer specially authorised in writing by the Director-General. The power to prosecute cannot be undertaken without the consent of the Public Prosecutor of the Attorney General Chambers. In addition to prosecution, the Department of Occupational Safety and Health is authorised to issue notices, such as improvement and prohibition notices under section 48. They may prosecute corporate entities if they fail to satisfy the requirements contained in notices, and directly prosecute these entities for offences committed under the Act.[378]

[372] Occupational Safety and Health Act 1994.
[373] Factories and Machinery Act 1967 (FMA).
[374] Roznah Ab Rahman, 'Safety and Health at Work Legislation in Malaysia: Current Direction and Challenges' [2011] 1 LNS 27.
[375] Health and Safety at Work Act 1974.
[376] Section 4 of the Occupational Safety and Health Act 1994.
[377] Ismail Bahari, *Pengaturan Sendiri Di Dalam Pengurusan Keselamatan dan Kesihatan* (1st edn, McGraw Hill, 2002).
[378] Section 61 of the Occupational Safety and Health Act 1994.

Under the Interpretations Acts 1948 and 1967, a person is defined to include a 'body corporate'.[379] Strictly speaking, whenever the term 'person' is used in legislation - as often is the case - it would encapsulate a body corporate. A 'body corporate' is included within the definition of a 'company' and a 'corporation' as defined in sections 3 and 134 of the Companies Act 2016. Section 11 of the Malaysian Penal Code also defines the word 'person' to include any company or association or body of persons, whether incorporated or not.[380] A person responsible for death may be charged either under sections 302 (for murder) or 304 (culpable homicide not amounting to murder) or 304A (causing death by negligence) of the Penal Code.[381]Though it is not very likely that industrial death will result in the charge of murder under Section 302, a charge for culpable homicide not amounting to murder under Section 304 or causing death by negligence under Section 304A is likely to be levelled against the offender. The question here is whether a corporation can be charged for death or fatality due to a workplace accident. There is no doubt that the meaning and status of corporations as a legal person is well developed under company law, however, the law is silent on the position of corporate liability for killing. The cases below will illustrate that none of the Malaysian cases have found corporate entities liable for the death of persons. In short, regulations in Malaysia have proven to be insufficient, under-enforced, and perceived as non-criminal matters, risking many going unpunished and unregulated.

3.2 Major Casualties in Malaysia

A report by the International Labour Organisation on the deaths of Nepali workers overseas stated that Malaysia had the highest number of deaths, followed by Saudi Arabia and Qatar.[382]The construction sector in Malaysia is responsible for a number of these deaths as it incurs higher accident risks in comparison to other sectors.[383]This was evidenced by a report released in 2018 by the Construction Industry Development Board of Malaysia (CIDB), which stated that the fatality rate in the Malaysian construction industry is approximately 10 times higher than that in the United Kingdom. This may be attributed to how construction workers are unprotected from probable worksite threats such as treacherous heights, hazardous weights, sharp moving objects, electric currents, and chemicals.[384]The following are some instances of fatality cases in Malaysia: as recent as the 10January 2020, a construction company manager died after slipping from a height of 3.9 meters while inspecting formwork, and on May 2019, an Indonesian couple was killed in a

[379] Section 3 of the Interpretations Act 1948 and 1967.
[380] Section 11 of the Penal Code.
[381] Sections 302, 304 and 304A of the Penal Code.
[382] Maria Chin Abdullah, 'Treat Migrant Workers Right' *The Sun Daily* (Kuala Lumpur, 8 May 2019) <https://www.thesundaily.my/opinion/treat-migrant-workers-right-FG855788> accessed 2 May 2020.
[383] The Department of Occupational Safety and Health (n 6).
[384] Construction Industry Development Board (CIDB) (*CIDB Annual Report*, 2018) <http://www.cidb.gov.my/index.php/en/corporate-info/annual-report> accessed 4 May 2020.

worksite incident at Gombak LRT station where a multi-storey car park under construction in Taman Melati collapsed.[385]

In 2016, a fatal accident in Bukit Bintang in which a failing crane killed a 24-year-old woman instigated a Department of Occupational Safety and Health crackdown on crane operators.[386] Solutions to reduce crane accidents have been unsatisfactory due to the poor implementation of a secure approach by employees and the inadequately trained crane handlers.[387] For example, the QR code solution implemented to prevent the falsification of a crane operator certificates had proven itself to be inadequate.[388] The *Jaya Supermarket* case illustrates that construction sites are not only danger zones to workers, but also the public.[389] In the case, the building collapsed and killed company employees and other non-employees, resulting in both the company and director being charged under Section 17 of the Occupational Safety and Health Act 1994.[390] In the case of *Bright Sparklers Explosion* 1991, the Royal Commission of Inquiry found the company responsible for the fatal accident but, nevertheless, the company and its officers were not prosecuted in court.

There are many other corporations in Malaysia that have failed to abide by regulations and policies designed to prevent harm. However, close to none of these cases will likely bring about the filling of homicide charges, much less a successful prosecution for the crime. This is upsetting because in most cases, the fear of prosecution may deter corporations from becoming offenders while encouraging an environment of compliance to laws and regulations.

Corporations have failed to provide safe work systems, such as safety practices and risk control. This is because many corporations sacrifice safety for profits by not establishing wide-ranging accident prevention policies and instead focus on maximising profit.[391]The top reasons for fatal construction accidents are unsafe techniques, job site conditions, human

[385] Anon, 'Building collapse near Gombak LRT Terminal: Indonesian couple found in final embrace' *Malay Mail* (Kuala Lumpur, 23 May 2019)<https://www.malaymail.com/news/malaysia/2019/05/23/building-collapse-near-gombak-lrt-terminal-indonesian-couple-found-in-final/1755830> accessed 29 September 2019.
[386] Royce Tan, Yee Xiang Yun, N. Trisha, 'Crackdown on Crane Drivers', *The Star Online* (Kuala Lumpur, 6 September 2016) <https://www.thestar.com.my/news/nation/2016/09/06/crackdown-on-crane-drivers-dosh-to-order-stop-work-at-sites-with-unqualified-operators/> accessed 20 September 2019.
[387] Muhammad Ikhwan Rozali and Hazinah Kutty Mammi, 'Secure Crane Operator Certificate Using Encrypted QR Code' [2018] 3 UTM Computing Proceedings 1.
[388] *Ibid*.
[389] Anon 'Standard Keselamatan di Tapak Pembinaan Perlu Dipertingkatkan', *Bernama* (Kuala Lumpur, 31 March 2008) <http://www.nccc.org.my/v2/index.php/nccc-di-pentas-media/2008/991-bernama--standard-keselamatan-di-tapak-pembinaan-perlu-dipertingkatkan> accessed 20 October 2019.
[390] Yuen Mei Keng, 'Jaya Supermarket Collapse: Director Yap Choon Wai' *The Star Online* (Petaling Jaya, 27 September 2010) <https://www.thestar.com.my/news/nation/2010/09/27/jaya-supermarket-collapse-director-yap-choon-wai-charged> accessed 27 September 2019.
[391] Abdul Abdul Hamid, Muhd Abd. Majid and Bachan Singh, 'Causes of Accidents at Construction Sites' [2008] MJCE 244.

elements, ineffective management, unsafe equipment, etc.[392] Whereas the leading sub-causes are working at high elevation, incorrect or no work procedures, and failure of structures.[393] The most ordinary non-compliance is the failure of corporations to grant adequate supervision and risk assessments under Section 15 of the Occupational Safety and Health Act 1994, causing deaths of employees.[394] To add, apart from public-listed companies, corporate social responsibility is not mandatory for most companies in Malaysia, thereby removing social accountability.[395] Most companies also do not prioritise compliance with corporate governance standards and guidelines.[396] To solve these issues, it is proposed that the implementation of a cogent corporate killing framework would ensure a higher level of compliance by holding corporations liable and preventing them from escaping without repercussions.

3.3 Effectiveness of the Occupational Safety and Health Act 1994

Although the Occupational Safety and Health Act 1994 places emphasis on criminal sanctions for any breach or non-compliance, after 26 years, what remains to be seen is whether these sanctions are enough of a deterrent.[397] The usual actions taken against corporations are administrative in nature, such as suspending licenses and giving preference to individual liability.[398] Furthermore, in most cases, corporations would rather pay fines than undergo criminal trials under the Occupational Safety and Health Act 1994 due to the comparatively low fines, risks of loss of reputation, and the intensity of a full trial.[399] Current penalties in Malaysia are a maximum fine of RM50,000 and imprisonment of not more than 2 years.[400] It is severely insufficient and will only promote the breach of laws as it is less costly to pay fines than to abide by the law and improve companies' health and safety procedures. In 2016, construction company Ireka Engineering was only fined RM15,000 for failing to provide a safe working system which resulted in a labourer falling to death. In the same court, Asia One Management Development Sdn Bhd was fined RM15,000 for a similar offence.[401] With due respect to the Sessions Court, the penalty is measly and cannot

[392] Abdul Rahim Abdul Hamid, *et al*, 'Causes of Crane Accidents at Construction Sites in Malaysia' [2019] IOPCS 220.
[393] Ibid.
[394] Abdul Rahim Abdul Hamid, *et al*, 'Noncompliance of the occupational safety and health legislation in the Malaysian construction industry' [2019] IOPCS 220.
[395] Mohammed Abdullah Mamun, 'Corporate Social Responsibility Disclosure in Malaysian Business' [2017] 2 ASMJ.
[396] Nadya Ngui, 'More than 180 Malaysian listed firms lack compliance' *The Star*, (Kuala Lumpur, 17 December 2015) <https://www.thestar.com.my/business/business-news/2015/12/17/slack-on-governance> accessed 20 October 2019.
[397] Section 3 of the Occupational Safety and Health Act 1994.
[398] Ali (n 5) 146-148.
[399] Kamal Halili Hassan, 'Corporate Liability Under Malaysian Occupational Safety and Health Legislation' [2015] 16 IJBS 281, 291.
[400] Section 19 of Occupational Safety and Health Act 1994.
[401] Bernama, 'Construction firms fined over safety issues after workers' deaths' *Malaysia Kini* (Kuala Lumpur, 16 November 2016) <https://www.malaysiakini.com/news/363067> accessed 27 September 2019.

correspond with the offences committed. Moreover, prosecution is not a core component of the regulatory process, and convictions mostly only result in sanctions that are less harsh compared to criminal law.

The success of any legislation depends on its execution and enforcement. In the case of the Occupational Safety and Health Act 1994, it has been proven that the implementation and enforcement of the law have been largely ineffective.[402]Section 29 of the Occupational Safety and Health Act 1994 states that in certain classes of industries, Safety and Health officers shall be appointed. These officers shall possess such qualifications or have received such training as the Minister may from time to time prescribe. The Occupational Safety and Health (Safety and Health Officer) Order 1997 states the classes of industry activity that are required to employ full-time Department of Occupational Safety and Health-registered Safety and Health officers, besides stipulating the qualifications for a person to register with the Department of Occupational Safety and Health as a qualified Safety and Health officer.[403] Since these Safety and Health officers are employed by contractors, it is likely to cause them to lack autonomy, resulting in less stringent regulations to be implemented.[404] Site inspections are often only done after significant incidents such as fatalities or complaints.[405] The shortage of enforcement, monitoring, and safety audits on compulsory safety and health requirements is largely due to a lack of dedication, inadequate workforce, and low budget allocation.[406] Enforcement and monitoring from the Department of Occupational Safety and Health seem to be lenient and inadequate for employers due to reasons like the shortage of enforcement officers.[407] Annually, there are around 24,000 operating construction sites running but with only 110 Department of Occupational Safety and Health officers available, and only a third of the sites get scrutinized.[408] Furthermore, the reluctance or failure to notify the Department of Occupational Safety and Health on accident cases results in unproductive investigations from the enforcement authority, causing inaccuracy in control measures of proposed improvement action plans.[409]

[402] Rohaida Affandi and Hock Tai Chia, 'The Weaknesses of OSHA 1994 Implementation in Malaysian Construction Industry' [2014] 4 UNIMAS JCE 1178.
[403] Occupational Safety and Health (Safety and Health Officer) Order 1997.
[404] Section 29 of Occupational Safety and Health Act 1994.
[405] Dr. Jefferelli Shamsul Bahrin, 'Self-Regulation and Occupational Safety and Health Act (OSHA) 1994' *DOSH* <http://www.dosh.gov.my/index.php/list-of-documents/osh-info/occupational-health-3/2082-self-regulation-and-occupational-safety-and-health-act-osha-1994/file> accessed 27 September 2019.
[406] Affandi and Chia (n 61).
[407] Hamid (n 51).
[408] Heap Yih Chong, Thuan Siang Low, 'Accidents in Malaysian Construction Industry: Statistical Data and Court Cases' [2014] 20 JOSE503.
[409] Hamid (n 51).

3.4 Malaysia's Theory on Corporate Criminal Liability

As mentioned, it is unclear if the identification principle or vicarious liability applies in Malaysia. However, cases show that Malaysia is more heavily shaped by the identification principle.[410] A recent development shows that the principle was expanded to include architects and employers instead of just the contractor, causing further confusion.[411]In the case of *Yue Sang Cheong Sdn Bhd,* the Federal Court specifically stated that *mens rea* was essential in proving the guilt of the company and is to be ascertained from those entrusted with powers.[412] The case of *Yap Sing Hock & Anor v Public Prosecutor* held that corporations can be held liable for offences where the officer or director can be regarded, from evidence, as the controlling will of the company.[413]

However, the identification principle imposes severe limitations on the scope of corporate liability and has been subjected to a barrage of criticism by experts. Pinto and Evans submit that only a narrow class of corporate officers' acts in law are attributable to their employer.[414] Moreover, there is great difficulty in identifying an individual who embodies the company and who is culpable. It also limits the liability of corporations where the commission of crimes is beyond the power of the directing mind of corporations, as seen in *PP v Kedah & Perlis Ferry Service Sdn Bhd*.[415] In this case, the company was charged for 'being knowingly in possession' of disapproved goods without receiving clearance from the customs department. The Courts did not impose a finding of guilt on the company because the company officers and agents had no knowledge that the goods did not receive custom clearance. This illustrates that if they can prove that they have no knowledge of offences, the corporation can be considered not guilty, fleeing from its responsibility.[416]It has also been proven to be much harder to prosecute large corporations as the directing mind could not be found due to a more diffused structure, where overall responsibility for safety matters can be blurred and no one individual may carry that responsibility. This discriminates against small companies with identifiable designated responsibilities. This issue is central to our discussion, as larger corporations are usually the cause of major disasters and significant human casualties.

[410] *R v HM Coroner for East Kent*, *ex parte Spooner* [1989] 88 Cr App R 10.
[411]Bernama, 'Amendments to OSHA to be tabled in Parliament this month' *The Star* (Taiping, 1 March 2019) <https://www.thestar.com.my/news/nation/2019/03/01/amendments-to-osha-to-be-tabled-in-parliament-this-month> accessed 20 October 2019.
[412] *Yue Sang Cheong Sdn Bhd v Public Prosecutor* [1973] 2 MLJ 77.
[413] *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714.
[414] Amanda Pinto, Martin Evans, *Corporate Criminal Liability* (2nd ed, Sweet & Maxwell 2008) 39.
[415] *PP v Kedah & Perlis Ferry Services Sdn Bhd* [1978] 2 MLJ 221.
[416] Home Office, 'Reforming the Law on Involuntary Manslaughter: The Government's Proposal' (Home Office, May 2000) 13.

4. Corporate Killing: Australia and the United Kingdom

Corporate killing is statutorily recognised in the United Kingdom (UK) and some Australian states.[417] In Australia, the federal statute of the *Criminal Code Act 1995* significantly altered the Australian law of corporate criminal responsibility. The Act addresses issues of corporate criminal responsibility by introducing what it referred to as the "corporate culture" principle. The Act defines 'corporate culture' as an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or in the part of the body corporate where the offence occurred.[418] This principle enables the court to examine the entire corporate arrangement, especially within the managerial hierarchy, to see whether the corporation's arrangement or operations created scope for the commission of the offence. Section 12.3 of the Act provides that one of the ways of proving the fault element in an offence involving a corporate body is to prove that a corporate culture existed within the body corporate that directed, encouraged, tolerated, or led to non-compliance with the relevant provision, or that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. This rule of attribution significantly departs from the identification principle - there is no longer a need to link the conduct of senior managers and the way the organisation was managed. It does not focus on the conduct of a particular individual as is done under common law but on the corporation as a whole.[419] Therefore, it is immaterial that the company had a policy in place aimed at preventing the occurrence of the offence if the 'culture' as a whole, in fact, encouraged it. The law enables an inference to be drawn as to whether the overall organisational structure encourages positively or implicitly the commission of the particular offence.[420]

In the United Kingdom, the Corporate Manslaughter and Corporate Homicide Act 2007was introduced as a product of public outcry, primarily due to the failed prosecution of the *Herald Free Enterprise*.[421] The Act can only prosecute corporate bodies. However, it leaves the liabilities of individuals under other laws unaffected. The principal purpose of the Corporate Manslaughter and Corporate Homicide Act 2007is to protect workers' safety at work. The Act requires a substantial element of a gross breach of duty resulting from the way the organisation's activities were 'managed or organised by its senior management'. The senior management test in the Corporate Manslaughter and Corporate Homicide Act 2007 overcomes the limitations of the common law identification principle which requires a controlling mind to be guilty of gross negligence and now focuses on the overall management of the organisation's activities rather than the actions of individuals.

[417] Australian Capital Territory, Queensland, the Northern Territory and Victoria.
[418] Criminal Code Act 1995, (Cth) Part 2.4, s 12.3(6).
[419] Rick Sarre, 'Legislative Attempts to Imprison Those Prosecuted for Criminal Manslaughter in The Workplace' [2002] MurdochUeJlLaw 21.
[420] Anthony O Nwafor, 'Corporate Criminal Responsibility: A Comparative Analysis' [2013] 57 JAL 98.
[421] *R v P&O European Ferries (Dover) Ltd (Herald Free Enterprise Case)* [1991] 93 Cr App R. 72.

The Corporate Manslaughter and Corporate Homicide Act 2007 provides that (1) conduct of corporations must fall below what is expected[422] and that (2) senior management must perform a substantial role in the breach.[423]The dual requirement rebuts any argument that a corporate defendant might face liability solely on the basis of a low-level employee's unauthorised acts, nevertheless it will not let companies that were evidently involved in culpable behaviour to escape liability. In examining 'gross breach', it considers if the corporations failed to abide by any health and safety legislation, the severity, and the extent of risk of death imposed.[424]Essentially, proving the negligent act of a corporation leading to a workplace death is all that is necessary to claim for damages. This is a noteworthy difference and development from the conventional approach where *mens rea* of the board of directors must be proven to hold a corporation liable for any crimes, including killing. It is to note that the Corporate Manslaughter and Corporate Homicide Act 2007 supplements the existing regulatory regimes by compelling compliance with the health and safety regulations and acting as a backstop against careless regulatory oversight. With its harsher moral and punitive sanctions, it tips the scales toward pre-emptive compliance.

5. Policy Rationales of Corporate Killing

This section considers whether the extension of corporate killing serves the best interest of society. It first states the justifications for criminal liability, then considers and rebuts several counterarguments, including the sufficiency of civil remedies, the potential for over-deterrence, and the duplication of laws. In Malaysia, individuals are more likely to be liable. This is a major flaw because corporations are at most times blameworthy and should be the appropriate cost bearer.[425] Corporations are generally profit-driven, and knowingly most crimes are driven by profits. Thus, where financial penalties might be involved, there is a good socio-political case for digging into the company's deep coffers.[426] Furthermore, if companies could benefit from the abilities of their human counterparts, they ought to also accept the burden of the criminal conduct of their human elements.[427]

In circumstances of systemic internal corporate recidivism, civil regulatory penalties are inadequate to support society's interest in making corporations liable.[428] The deterrent effect of civil suits are minimal - while private lawsuits are settled for damages, structural reforms are lacking. On the contrary, the stigma as a killer may generate a huge deterrent

[422] Section 1(4)(b) of the Corporate Manslaughter and Corporate Homicide Act 2007.
[423] Section 1(3) of the Corporate Manslaughter and Corporate Homicide Act 2007.
[424] Section 8(2) of the Corporate Manslaughter and Corporate Homicide Act 2007.
[425] Ali (n 5) 144.
[426] Miester (n 2) 919.
[427] Pinto, Evans (n 71) 39.
[428] James W. Harlow, 'Corporate Criminal Liability for Homicide: A Statutory Framework' [2011] 61 DLJ 123.

effect of criminal liability.[429] Although corporate entities cannot be sent to prison, heavy fines would be a deterrent to other corporations.[430] Leigh argued that the social stigma associated with a conviction must be taken into account.[431] Criminal sanctions give rise to criminal stigma, which attacks the liable corporation's public image.[432] Arguments that corporations cannot be stigmatised by punishment are invalid. Fisse argues that business corporations commonly attach huge significance to having a good public image.[433] As a result, corporations are more likely to react positively to criminal stigma by endeavouring to restore their images and reclaim public confidence. While fines impose an economic effect, criminal stigma adds non-financial effects that should be the target of corporate punishment as well. Therefore, criminal stigma deserves serious consideration as a device to deter corporations. On this basis, the argument that civil monetary penalties have the same function as criminal fines is defeated. It is the very essence of criminal law that can be the antidote against corporate misconduct. As Braithwaite stated, 'while a great deal of crime is committed for the sake of corporate profit, a great deal is not'.[434] More than a mere financial loss to corporate offenders, a larger message is sent to the offender and to the community. Criminal sanctions are a bigger deterrent than civil fines as they carry a social stigma and present social and economic aspects not found in civil penalties.

The role of criminal law is to bring corporate powers to face criminal conviction for wrongdoing by making society aware of their crimes and by properly deterring them from committing crimes. Besides deterrence, there are other justifications of corporate criminal liability.[435] The retributive character of criminal liability should also be recognised in order to break from the old conception that corporations have no personality. Criminalising corporations for killing also has a communicative aspect and therefore a symbolic significance.[436] It carries a message for both the offender and the society - communicating to offenders the condemnation they deserve, while displaying to society the values protected.

[429] Sara Sun Beale, 'Is Corporate Criminal Liability Unique?' [2007] 44 ACLR 1503, 1524.
[430] Anita Ramasastry and Robert C Thompson, 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law - A Survey of Sixteen Jurisdictions ' [2006] Fafo Report 536.
[431] Leonard Herschel Leigh, *The Criminal liability of Corporations in English Law* (1st edn, Lowe & Brydone 1969) 159.
[432] Richard A. Posner, *Economic Analysis of Law* (4th edn, Little, Brown and Company 1992) 422.
[433] Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' [1983] 56 SCLR 1141.
[434] John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (1st edn, Routledge Kegan Paul plc 1984) 331.
[435] Charles Walsh & Alicia Pyrich 'Corporate Compliance Programs as a Defence to Criminal Liability: Can a Corporation Save its Soul?' [1995] 47 RLR 638.
[436] N. D. Walker, "The Ultimate Justification: Varieties of the Expressive Theory of Punishment" in *Crime, Proof and Punishment: Essays in Memory of Rupert Cross* (1st edn, Butterworths 1981) 109-121.

There are arguments against criminal sanctions stating that over-deterrence leads to an overspill, as when a corporation catches a cold, someone else sneezes. Sanctions that are uncalibrated to the level of harm can have a quite pernicious effect when the target of a sanction is a corporation.[437]The cost of high fines would have a propensity to spill over to stockholders, bondholders and other creditors. There are also concerns that successful convictions would bring adverse effects such as mass layoffs, a decline in taxes, products and services, and the shifting of the burden of sanctions to consumers. In order to address these concerns, it is crucial to consider the connection between excessive deterrence, shareholders, and consumers. Firstly, shareholders can benefit from undiscovered profits made from offences by the company. They too bear the responsibility for their risks in return for the right to eject management whom they find unsatisfactory.[438] Furthermore, when they pay for shares, the potential fines are reflected in the price they pay. With regards to consumers affected by high fines, most companies in highly competitive industries will not be able to put up with the arbitrary prices lest it loses sales to its competitors. In the case of oligopolies, corporations have to absorb the cost of fines because they do not directly control the price of their products.

Admittedly, criminal fines are not flawless. It is tricky and intricate to calculate a fine which is both fair and effective. Gunter Heine stated that " ... the law should more accurately define the intention of the penalty, and make explicit its underlying policy on deterrence and compliance ... ".[439] The methods to better calculate a fine must be in equilibrium, a point where the certainty and the amount to be paid together is an effective restraint. Another way to solve it would be to combine it with other sanctions. Other sentencing tools include remedial, publicity order, corporate probation, community service, corporate death penalty, and dissolution for habitual offenders.[440]

It is important that Malaysia should have in place corporate manslaughter legislation like the Corporate Manslaughter and Corporate Homicide Act 2007 to fill in the gaps. The arguments of duplications would be irrelevant as sentencing provisions within the corporate manslaughter laws are more appropriate and would supplement current regulatory rules by compelling violators to abide by health and safety regulations, functioning as a backstop against negligent regulatory oversight.[441] With legislation in place, companies and their officers will then observe a high standard of duty of care and be more vigilant in complying

[437] Anon, 'Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions' [1979] 92 HLR 1226, 1366.
[438] Braithwaite (n 91) 332.
[439] Gunter Heine, 'Sanctions in the Field of Corporate Criminal Liability' in Albin Eser, Gunter Heine and Barbara Huber eds., *Criminal Responsibility of Legal and Collective Entities* (1st edn, International Colloquium Berlin 1998) 242.
[440] Ireland Law Commission (n 4).
[441] Aida Abdul Razak, 'Corporate Manslaughter and the Attempt to Reduce Work-Related Deaths: A Comparative Study of the United Kingdom, Australia and Malaysia's Legislative Framework' (DPhil thesis, Adelaide Law School 2018) 145.

with their duties to the employees, stakeholders and the public generally to prevent serious repercussions to the goodwill and reputation of the body corporate involved. A homicide prosecution, with its stricter moral and punitive sanctions, could alter the equation in remarkably egregious situations and tip the scales toward pre-emptive compliance.[442] This is because of a simple mathematical logic - corporations that are determined to work around regulations use a cost-benefit analysis, therefore the cost of punishment needs to exceed the expected cost of honouring regulations.[443]

With criminal legislation in place, the prosecution will bring offences before the judge on behalf of victims. This would relieve the deceased's kin of the responsibility to take legal action which requires financial commitment and the gathering of necessary evidence which would likely be beyond their means.[444] With proper investigations conducted by a professional prosecutor, victims' families are more likely to claim appropriate legal responses and remedies from the company. The enhancement of the range of actions available to the regulators would relieve the victims and benefit the general public. With that, it is also hoped that public awareness pertaining to health and safety at work would increase. It is to note that to successfully curb the predicament of Malaysia, the legislation must work in conjunction with other health and safety laws. Other measures of improvement would include the discretionary power of the judiciary to make decisions regarding corporate killing, proper protocols for prosecution, training programs for policies, and at least one director in each corporation who specializes in Health and Safety.

6. The Road to Reform

6.1 A Critical Approach to the Common Law Experience

The success of the introduction of a completely new concept in the Malaysian legal realm is heavily dependent on the existence of a solid theoretical background. There must be an analytical view of the common law experience and not merely an adaptation of traditional theories. As mentioned, the identification theory adopted by Malaysia is drastically problematic and rooted in individualistic ideas, with a simple palliative effect at best. Although the identification theory is by far the most popular model of attributing corporate criminal liability, it is not in harmony with studies on large organisations like corporations. The search for the guilty mind is in most of the situations unfruitful and, in the end, no liability is attributed to the corporation. Furthermore, the identification theory does not incorporate a holistic view of the corporate entity, which better explains the reality of corporations and corporate misconduct. The theory is superficial and neglects important features of corporations. These other corporate features like their nature, structures,

[442] Harlow (n 85).
[443] Anne D. Samuels, 'Reckless Endangerment of an Employee: A Proposal in the Wake of Film Recovery Systems to Make the Boss Responsible for His Crimes' [1987] UMJLR 873, 886.
[444] Razak (n 98) 145.

decision-making processes, and internal culture, have a strong impact on theories about corporate criminal liability. It is important that the Malaysian legislature be aware of the limitations of the common law theories and be acquainted with what has been proposed as a solution and alternative to these limitations in order to avoid taking a problematic and flawed position.

6.2 A New Approach

Malaysia should look at alternative models of corporate criminal liability that considers the corporate life, organisation, and culture to construct a more compelling method of ascribing criminal liability to corporations. Every organisation's culture is closely intertwined with its leadership. The management may create a culture that sacrifices safety for profits, or it may create a safety-first culture. UK's senior management test will remove the requirement to prove fault by the directing mind of the company. Alternatively, the 'corporate culture' principle is a regulatory tool that would encourage an ethical environment of compliance which addresses the risk of work-related deaths. It would enable courts to examine the entire corporate arrangement, to see whether the corporation's organisations or procedures allowed room for the commission of the offence.[445]

6.3 The Role of Legal Scholars

No legislative change would come easy without an exhaustive doctrinal debate and a paradigm shift in our legal systems to accept the attribution of criminal liability to corporations. It is encouraged that Malaysian scholars trigger these changes by developing models and bringing into discussion all aspects related to corporate killing, including both conceptual and practical concerns. Basic questions such as the concept of corporate crime and the need to use criminal law to control corporate crime needs to be addressed. Therefore, for the seeds of corporate killing to grow in Malaysia, they must first come in the form of appraisals and legal research for it to evolve into a recognised legal concept in Malaysia.

7. Conclusion

Leonard Leigh once stated that 'it is important that the public realises that powerful entities are not above the law'.[446] It is therefore time to put to halt the apathy and behaviour of profit-driven corporations that show meagre concern for their employees' welfare and safety. Malaysia cannot simply rely upon existing legislation; there is a pressing need to focus on incorporating corporate killing legislation for the purpose of ensuring effective compliance with the law. This paper explained the theoretical basis of attributing corporate

[445] Crimes (Industrial Manslaughter) Act 2003; Work Health and Safety Act 2011.
[446] Leonard Herschel Leigh, 'The Criminal Liability of Corporations and Other Groups' [1977] 9 OLR 247, 287.

criminal liability and highlighted that Malaysia's adaptation of the identification principle suffers from conceptual problems. The amount and severity of fatal accident cases have shown the immediate need for a critical approach to put a stop to corporate criminality. This paper attempted to justify why criminal liability is needed for corporate killing and whether it can be used as an effective controlling device. It is proposed that corporate killing can only be effective when incorporated into lawin order to balance concerns about excessive criminalization for a reasonable response to intolerable corporate conduct. Taking into account Malaysia's organisational culture and practices,[447] Malaysia could look to other common law countries and introduce corporate killing legislation either by the insertion of a suitable corporate manslaughter provision in the Occupational Safety and Health Act 1994 which should be read together with the Penal Code, or by creating a new legal framework reserved exclusively for unlawful deaths caused by corporations.[448] The latter would act as a stronger retributive, preventive, and reformative tool as it could allow for alternative sanctions of sufficient magnitude.[449]Before these legislative reforms can happen, Malaysian legal scholars need to trigger structural and legislative changes by developing theoretical constructions that will support the attribution of criminal liability to corporations that kill. We need the courts to recognise that killing is a grave injustice whether committed by an individual or corporation - this will be a crucial first step.

[447] Md Zabid Abdul Rashid, Murali Sambasivam and Azmawani Abdul Rahman, 'The influence of organizational culture on attitudes towards organizational change' [2004] 25(2) LODJ 161.
[448] The Occupational Safety and Health Act 1994.
[449] Razak (n 98) 198.

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