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Contents

The Reform of the Law on Abortion in Malaysia: Regulating Gestational Limits on Abortion to Promote the Availability of Safe Abortion

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Abstract

It is frowned upon to have an abortion, and the law is not entirely clear in Malaysia. Many Malaysian women are experiencing difficulty seeking safe abortions due to the ambiguity and restricted abortion laws. They will thus have to resort to an unsafe and illegal procedure. This article examines Malaysia's abortion regulations from a civil law perspective and argues the case that they are ambiguous and restrictive. The article criticises the current legislative framework that governs abortion, drawing particular attention to legal gaps pertaining to gestational limits that fall under the purview of the legislation. This article will examine an idea for reform that would expressly regulate the gestational limits on abortion by comparing it with the abortion laws in England and Wales, and India. The authors conclude at the end of the article that women's access to safe abortions, where it is legal, has been hampered by Malaysia's restrictive abortion laws. The authors propose a legal reform that would guarantee women's rights to safe abortions in Malaysia by incorporating gestational limitations within the parameters of the law.

Keywords: Malaysia, Law Reform, Abortion, Gestational Limit, Autonomy, Safe Abortion.

1. Introduction

The issue of abortion rights in Malaysia, a country known for its religious diversity, pertains to the convergence of women's reproductive autonomy and nationalistic sentiments. The Malaysian legal system, which encompasses both civil law and Islamic law, encounters the

challenge of striking a delicate balance between religious doctrines, particularly within the predominantly Muslim community, and women's rights to obtain safe abortion services.

The recognition of safe abortion as a fundamental reproductive right is definitely acknowledged. It includes the entitlement of individuals to exercise autonomy over their own bodies and reproductive wellbeing without facing pressure, prejudice, or unwarranted barriers. Safe abortion services are crucial elements of comprehensive reproductive healthcare, playing a significant role in the overall health and wellbeing of individuals and communities.[1]

Access to safe abortions is still an unresolved issue in Malaysia. Access to safe abortions is frequently hampered by the limitations and ambiguities of the law. Regulations and policies on abortion are poorly interpreted and understood, which leads to poor implementation and a lack of safe, accessible services, causing many women to opt for unsafe procedures. The authors examined the regulations on abortion in Malaysia from the perspective of civil law and offered a critique of the current legislative framework on abortion. The critics are notably scrutinising the loopholes pertaining to gestational limits on abortion within the scope of the law.

The paper will be centred around the examination of these two research questions.

1) Why does Malaysia need a law reform on abortion?

2) How regulating the gestation limits on abortion could encourage safer abortions in Malaysia?

The article will analyse the significance of law reform on abortion in Malaysia by first examining the literature that reflects the challenges encountered by women in Malaysia in accessing safe abortions. The authors argue that the existing legislation on abortion in Malaysia is both restrictive and disconcerting, thereby impeding women's ability to access safe abortions. Consequently, the authors assert that reforming the law is legitimate. In the next section, the authors will examine the legislative framework on abortion in Malaysia with a specific emphasis on the regulation of gestational limits for abortion. This analysis seeks to illustrate the implementation of law reform to encourage access to safe abortions in the country. The primary subject matter of the discussion will be the Penal Code and the Termination of Pregnancy Guideline (TOP) 2012, with a slight twist over the Fatwa suggestion on Muslim abortion by taking into consideration Malaysia as a country of Muslim-majority. Throughout the discussion, the authors will analyse and compare the legislative framework on abortion in Malaysia with the abortion laws of England and Wales, and India, utilising these frameworks as a blueprint for possible reform. The authors address the significance of limiting gestational limits in the following section. In the final section, which serves as the conclusion, the authors propose recommendations for reforming the legislation in Malaysia to enhance women's entitlement to obtain safe abortion.

[1] Andrés López Cabello and Ana Cecilia Gaitán, 'Safe Abortion in Women's Hands: Autonomy and a Human Rights Approach to COVID-19 and Beyond' (2021) 23(1) Health and Human Rights 191.

2. Methodology

In this conceptual study, a doctrinal comparative methodology is employed. The doctrinal comparative research approach entails a methodical examination of legal texts, legislation, case law, and other legal sources to deduce legal principles, doctrines, and norms. The focus is on the interpretation and implementation of law within its doctrinal structure, depending on precedent and legal authority to set legal standards. The legislative structures governing abortion in England and Wales and India will be compared in this article, with a particular emphasis on regulating the gestational limits on abortions in Malaysia. The doctrinal methodology is guided by critical ideas such as strict attention to legal sources, rigorous logical reasoning, and unwavering commitment to legal precedent. This doctrinal technique is utilised in different domains of legal research, such as statutory interpretation, case analysis, comparative law, and the development of legal theory. Statutory interpretation involves the examination of legislative texts and judicial interpretations to clarify the meaning and extent of legal legislation. The integration of data from many sources and thorough analysis has the potential to support future research about the ongoing discussion on abortion rights in Malaysia and promote policies and practices that prioritise the dignity, autonomy, and wellbeing of women.

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4. Research Question One: Why Does Malaysia Need a Law Reform on Abortion?

4.1. The Challenges That Women Encounter Upon Accessing Safe Abortion in Malaysia Are Due to Laws Which Are Restrictive in Nature

In Malaysia, abortions are commonplace although there are differences in terms of safety. No abortion registry exists in Malaysia.[2] Although official figures on abortion rates are not readily available due to underreporting and the omission of cases from official records, abortions are prevalent in Malaysia. Annually, 90,000 abortions are performed in Malaysia.[3] The reform of the law on abortion in Malaysia is justified due to numerous challenges faced by women in acquiring safe abortion services.

The challenge in accessing safe abortion is primarily due to legal barriers because the law on abortion in Malaysia is restrictive and ambiguous in nature. These restrictive and ambiguous laws typically include several key elements that limit access to safe abortion services such as the lack of clarification on the regulatory requirements on abortion under the legislation, the ambiguity on the status of legality of abortion, limited legal grounds, and criminalisation. The restrictive nature of the law on abortion in Malaysia has significant consequences for women who seek reproductive healthcare services. Firstly, it restricts the availability of safe and

[2] Alifah Zainuddin, 'Doctor Clarifies Abortion Is Legal In Malaysia' (*CodeBlue*, 12 October 2022) <https://codeblue.galencentre.org/2022/10/12/doctor-clarifies-abortion-is-legal-in-malaysia/> accessed 4 April 2024.

[3] Lim Hwei Mian, 'Country Profile: On Universal Access to Sexual and Reproductive Health Malaysia' (2015) Asian-Pacific Resource & Research Centre for Women <https://arrow.org.my/publication/country-profile-on-universal-access-to-sexual-and-reproductive-health-malaysia/> accessed 4 April 2024.

lawful abortion services, compelling numerous women to contemplate risky procedures. In the absence of access to medically supervised abortion services, women are forced to resort to other methods that carry significant risks to their health. Unsafe abortions may result in problems such as excessive bleeding, infections, perforation of the uterus, or even death.[4] In contrast to the restrictive law in Malaysia, global trends in reproductive rights and healthcare advocate for policies that prioritise women's autonomy and safety. Many countries have moved towards the liberalisation, which includes decriminalising abortions and expanding access to reproductive healthcare services, recognizing that restrictive laws do not reduce the incidence of abortions, but instead drive it underground, where it becomes dangerous and inaccessible[5] In addition to that, the law's restricted character has also played a role in limiting access to abortion information, resulting in a misconception about its legality and impedes women's ability to access safe abortion services altogether in Malaysia.[6]

There are 240 abortion facilities in Malaysia, according to RRAAM; however, not all of them have undergone safety or medical quality evaluations.[7]

The co-chair of RRAAM, Dr. Sim-Pooey Choong, emphasised that while the private sector is more concerned with mental health concerns than the public sector is, many medical professionals are still reluctant to conduct abortions because of the stigma associated with the procedure. Consequently, numerous doctors and facilities clandestinely perform abortions.[8] Merely a fraction of the multiple individuals who carry out secure abortions, for instance, have registered to be included on RRAAM's website. Out of the 80 individuals interviewed by FRAAM around the nation, only 20 were willing to engage in the UNFPA initiative.[9] The individual doctor's discretion primarily determines the provision of abortion services in Malaysia's public healthcare system due to the absence of legislation governing such treatments. There are several privately run abortion centres; however they typically operate privately.

The restrictive nature of Malaysia's abortion legislation exacerbates the incidence of unsafe and clandestine abortions, jeopardising the wellbeing and survival of women. Literature indicates that the existing legislation regulating abortions in Malaysia is rather restrictive. It deprives women of the ability to make their own decisions regarding abortions, even in situations involving rape, incest, or when the baby is diagnosed with a terminal disease shortly after being born. If duly licensed medical professionals determine, in a sincere and conscientious manner, that the potential bodily or emotional damage resulting from

[4] Suravi Halder and others, 'Maternal Mortality and Morbidity Following Unsafe Abortion in a Tertiary Medical College Hospital' (2024) 6(1) European Journal of Medical and Health Sciences 67.
[5] Women and Foreign Policy Program Staff, 'Abortion Law: Global Comparisons' (Council on Foreign Relations, 7 March 2024) <https://www.cfr.org/article/abortion-law-global-comparisons> accessed 28 June 2024.
[6] Tong Wen Ting and others, 'Exploring Pregnancy Termination Experiences and Needs among Malaysian Women: A Qualitative Study' (2012) 12 BMC Public Health 743.
[7] Amanda Tiew and others, 'An Exploration of Sexual and Reproductive Health (SRH) Services Provided by Private Clinics in Peninsular Malaysia' (Reproductive Rights Advocacy Alliance Malaysia, October 2020) <https://www.rraam.org/research/> accessed 4 April 2024.
[8] Nandini Archer, 'The Law, Trials and Imprisonment for Abortion in Malaysia' *International Campaign For Women's Right To Safe Abortion* (Asia, 11 July 2018) <https://www.safeabortionwomensright.org/news/feature-the-law-trials-and-imprisonment-for-abortion-in-malaysia/>.
[9] ibid.

continuing the pregnancy is not outweighed by terminating the pregnancy, then the termination of the pregnancy may be considered. Therefore, women are obligated to continue with the pregnancy. Consequently, numerous ladies frequently opt for unsafe services.[10]

A different body of study examines the experiences and requirements of Malaysian women in relation to induced abortions, emphasising the difficulties they face in obtaining abortion information and services. Abortion is legally permitted in Malaysia, provided that there are valid physical and mental health reasons to do so. However, the availability of abortion services is hindered by public stigma and legal limitations. According to the literature, women in Malaysia face challenges in trying to obtain abortion information and services due to a lack of trustworthy information in the media and healthcare institutions. The limited availability of information and services pertaining to abortion can be attributed to various obstacles, including cultural, spiritual, and societal factors, as well as a lack of awareness on abortion regulations. Due to the difficulties in accessing legal abortion services, some women may resort to dangerous, self-induced abortions. This highlights the pressing requirement for the government to reassess its obligation to offer easily accessible abortion services within the legal framework in Malaysia. Additionally, the literature emphasises the significance of formulating policies and initiatives to advocate for safe abortions, which could potentially decrease the prevalence of risky and covert abortions and mortality rates among women.[11]

The World Health Organisation (WHO) reports that Asia experiences a higher incidence of unsafe abortions, with the majority occurring in South and Central Asia. Unsafe abortions and infant dumping are closely connected due to the same factor of unintended pregnancies. Women with unplanned pregnancies may turn to unsafe abortion techniques as a result of restricted availability of reliable and lawful abortion services or apprehension of public disapproval and legal consequences. When women are unable to access safe abortion services, they may feel driven to abandon or discard their newborn infants, leading to cases of baby dumping. Unsafe abortions and infant dumping are both consequences of circumstances such as tight abortion legislation, insufficient reproductive healthcare services, and societal taboos related to sexuality and reproductive decisions. Literature asserts that the phenomenon of baby dumping is not a new issue in Malaysia and has persisted for a significant duration. Research suggests that there has been an increase in cases of baby abandonment in Malaysia over the years. Factors that contribute to baby dumping in Malaysia include unwanted pregnancies, inadequate sex education, severe abortion laws, and societal taboos surrounding discussions about sex. Furthermore, the literature asserts that adultery and fornication are identified as factors contributing to the issue of baby dumping among Malaysian youth.[12]

Malaysia, a nation notorious for its high incidence of infant dumping in comparison with the rest of Southeast Asia, reportedly discards a neonate every three days, with the majority of

[10] Belinda Jia Hui Chow, Gary Kit Min Ng and Chee Ying Kuek, 'Abortion Law in Malaysia: Time to Review?' in Yang Chik Adam and Shahrina Anis Binti Samsudin (eds), *Proceedings of the 3rd International Conference on Law and Digitalization 2023 (ICLD 2023)*, Advances in Social Science, Education and Humanities Research 791.
[11] Tong and others (n 6).
[12] Maisyarah Rahmi Hasan and Nik Nor Azeah Nik Azman, 'Baby Dumping in Malaysia and Indonesia: Between National Regulation and Islamic Criminal Law' (2021) 20(2) Mazahib 321.

abandoned infants being discovered deceased.[13] Malaysian Police data reveals that a minimum of 10 infants had been abandoned within one month between 2018 and 2021.[14] Between 2020 and 2022, there were a total of 256 cases of newborns being abandoned. In the year 2020, in Ampang, a newborn baby was discovered in a mineral water container while still attached to its umbilical cord.[15] In 2021, a deceased baby with significant brain injuries was discovered in Kuching.[16] In 2022, a newborn baby, whose mother was reportedly a victim of rape, was found deceased with stab wounds in Terengganu.[17] It has been reported that some women who have been raped and women with foetuses possessing congenital abnormalities have been refused an abortion in Malaysia.

In conclusion, having to discuss the challenges women encounter in accessing safe abortions, it is wise for the authors to argue that the reform of the law on abortion in Malaysia is legitimate. With around 90,000 abortions taking place each year,[18] the absence of an official registry and the secretive nature of many procedures underscore the difficulties of accessing safe and lawful abortion services. The stringent restrictive regulations pertaining to abortion in Malaysia, along with the social disapproval and insufficient provision of reproductive healthcare services, contribute to the high incidence of unsafe abortions. Women encounter numerous challenges while attempting to obtain access to abortion services, such as restricted availability of information, high charges imposed by unregulated providers, and apprehension of legal consequences. The consequences of these challenges are significant, resulting in a higher likelihood of maternal mortality and illness, as well as the distressing occurrence of newborn abandonment. The correlation between unsafe abortion and baby dumping highlights the pressing necessity for comprehensive policies that aim to promote safe abortion and tackle the underlying factors contributing to an unsafe abortion. To address the complex concerns surrounding abortion in Malaysia, new and effective abortion legislation needs to be enacted. A reform of law is legitimate. In situations where they are legal, these regulations would ensure that women can access safe abortions. However, considering that Malaysia has a predominantly Muslim population, any legal changes regarding abortion must consider the Islamic perspective and avoid becoming overly permissive, particularly when it comes to abortion laws.

[13] Athira Nortajuddin, 'Southeast Asia's Baby Dumping Problem' *The ASEAN Post* (5 March 2020) <https://theaseanpost.com/article/southeast-asias-baby-dumping-problem> accessed 22 February 2023.
[14] SinarDaily, 'Baby Dumping Still Rampant' *SinarDaily* (Kuala Lumpur, 17 February 2022) <https://www.sinardaily.my/article/171553/malaysia/national/baby-dumping-still-rampant> accessed 14 April 2024.
[15] Bernama, 'Newborn Found Abandoned in Carton at Ampang Roadside' *New Straits Times* (Kuala Lumpur, 20 July 2020) <https://www.nst.com.my/news/crime-courts/2020/07/609989/newborn-found-abandoned-carton-ampang-roadside> accessed 14 April 2024.
[16] DayakDaily, 'Fatimah: Baby Dumping Case under Investigation' *DayakDaily* (Kuching, 14 January 2021) <https://dayakdaily.com/fatimah-baby-dumping-case-under-investigation/> accessed 14 April 2024.
[17] Rosli Ilham, 'Baby Boy, Just Born, Allegedly Stabbed to Death by Teen Mother' *New Straits Times* (Cukai, 8 February 2022) <https://www.nst.com.my/news/crime-courts/2022/02/769754/baby-boy-just-born-allegedly-stabbed-death-teen-mother> accessed 14 April 2024.
[18] Tiew (n 7).

5. Research Question Two: How Does Regulating Gestation Limits on Abortion Encourage Safer Abortions in Malaysia?

5.1. The Legislative Framework of Abortion in Malaysia and the Need for Reform to Ensure Safe Abortion

The argument for the right to safe abortions constitutes the foundation of right-based philosophy. Reproductive rights encompass the essential liberties and entitlements that individuals possess with regard to their reproductive health and decision-making. Reproductive rights comprise the basic liberties and prerogatives that individuals hold in relation to their reproductive wellbeing and the capacity to exercise agency in matters surrounding it.[19] Women are more likely to turn to riskier methods when they lack prompt access to safe and effective abortion services.[20]

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) acts as a crucial symbol in the global effort to promote gender equality and protect women's rights. Malaysia has a responsibility to adhere to the tenets of CEDAW, which, in the context of this article, encompass the promotion of women's reproductive health and the guarantee of safe abortions. The legislative framework concerning women's reproductive rights, particularly the right to safe abortions in Malaysia, is intricate. The existing legislation imposes limitations on accessing safe abortion services and primarily criminalises women and the clinicians involved in these abortion procedures. The CEDAW mandate encompasses the protection of women's reproductive rights within the wider context of striving for gender equality. Article 12 of CEDAW acknowledges and upholds the entitlement of women to healthcare services, which encompasses the provision of family planning. It emphasises the importance of guaranteeing women's access to information, education, and services linked to reproductive health.

Paragraph 18 of the CEDAW General Recommendation 35 categorises the refusal to provide safe abortion services as a form of gender-based violence:

> "Violations of women's sexual and reproductive health and rights, such as forced sterilisation, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."

Therefore, in referring above it is wise to say that Malaysia is obligated to protect and defend women's reproductive rights and ensure the provision of safe abortion services in nations where they are permitted by law.

[19] Willie J Parker, 'The Moral Imperative of Reproductive Rights, Health, and Justice' (2020) 62 Best Practice & Research Clinical Obstetrics & Gynaecology 3.
[20] World Health Organization, *Safe abortion: technical and policy guidance for health systems* (2nd edn, World Health Organization 2012).

Ishola acknowledges that the safety conditions under which an abortion can be performed are substantially impacted by the legal framework governing abortions in each country.[21] In Malaysia, abortion is considered taboo and is often discussed in private discourse. Currently, Malaysia lacks any government policy or legislation that expressly focuses on reproductive health,[22] nor an abortion legislation itself, which prevents Malaysian women from exercising their entitlement to a secure and lawful termination of pregnancy.[23] The legal reform on abortion could be broad; therefore, the focus of this paper is on regulating the gestational limits on abortion to encourage access to safe abortion in Malaysia.

5.2 Reform of Law – Regulating Gestational Limits on Abortion

In Malaysia, the regulation of abortion is primarily governed by *Sections 312* to *316 of the Penal Code*, which is founded on civil law. *Section 312 of the Penal Code* is the primary provision to be referenced in cases regarding abortion.

Section 312 of the Penal Code stipulates:

> "Whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.
>
> Explanation—A woman who causes herself to miscarry is within the meaning of this section.
>
> Exception—This section does not extend to a medical practitioner registered under the Medical Act 1971 [Act 50] who terminates the pregnancy of a woman if such medical practitioner is of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or injury to the mental or physical health of the pregnant woman, greater than if the pregnancy were terminated."

The aforementioned clause, to put it simply, provides that anyone who knowingly induces a woman to miscarry can face a maximum sentence of three years in prison, a fine, or both. If the woman is in a more advanced stage of her pregnancy (referred to as being "quick with child"), the penalty can be heightened, with a maximum sentence of seven years of prison and a monetary penalty. Nevertheless, there is one exception: suppose a doctor registered under the Medical Act 1971 holds the genuine belief that prolonging the pregnancy would pose a greater risk to the woman's life or health in comparison to terminating it, the doctor has the legal authority to terminate the pregnancy.

[21] Foluso Ishola, U Vivian Ukah and Arijit Nandi, 'Impact of Abortion Law Reforms on Women's Health Services and Outcomes: A Systematic Review Protocol' (2021) 10 Systematic Reviews 192.
[22] Women Aid Organisation, 'We Must Improve Maternal, Sexual, and Reproductive Health Rights in Malaysia' *Women's Aid Organisation* (25 April 2022) <https://wao.org.my/we-must-improve-maternal-sexual-and-reproductive-health-rights-in-malaysia/> accessed 20 April 2024.
[23] Alyaa Nadhirah Binti Dato Hj Mohamad Shariff and Ambi ST Singam, 'Telemedicine Abortion During Covid – 19 And The Challenges In Its Applicability In Malaysia' (2023) 11(3) Russian Law Journal 964 <https://russianlawjournal.org/index.php/journal/article/view/1385> accessed 20 April 2024.

One noteworthy feature of this clause is that it leaves open the question of any gestational limits and its bearing on whether abortion is permitted under legislative definitions. It could be argued that the Medical Act of 1971 only permits registered doctors to lawfully end a pregnancy, and that the clause only permits abortion in specific situations, such as when the procedure is essential to safeguard the pregnant woman's life or uphold her bodily or emotional wellbeing. The question that thus arises is: When is abortion permissible under the law? What are the legal gestational limits at which abortion is permitted under the law? The absence of a precise delineation in the Penal Code concerning the permissible timing and gestational stage of an abortion by a physician has exacerbated the challenges women face in obtaining safe abortion services.

Comparing the Abortion Act 1967 to the laws of England and Wales, *Section 1(1)(a) of the Act* contains the pertinent provision that specifies when abortion is permissible, thereby rendering it legal and accessible.

Section 1(1)(a) of Abortion Act 1967 provides that:

> "(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or……"

According to this provision of the legislation, if a pregnancy has not progressed beyond the 24th week and two licensed medical professionals, with sincere intentions, concur that continuing the pregnancy would present a higher likelihood of physical or mental harm to the pregnant woman or her current children, then carrying out an abortion is not deemed to be an offence.

In India, the law has provided a gestation limitation under *Section 3(2)(a)* and *Section 3(2)(b) the Medical Termination Act Amendment 2021*.

Section 3(2)(a) of MTP Amendment 2021 provides that:

> In section 3 of the principal Act, for subsection (2), the following sub-sections shall be substituted, namely: —
>
> "(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, —
>
> (a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or
>
> (b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners……"

Therefore, in simpler terms, a doctor may perform an abortion if the pregnancy is within its first twenty weeks. If the pregnancy is between twenty and twenty-four weeks and meets specific criteria, then, at least two doctors must agree to perform the abortion.

Both England and Wales, and India have explicit regulations that precisely outline the circumstances under which abortion is legally permissible. Any abortion that occurs beyond the specified gestational limits, as defined by the law, is considered a criminal offence under the Indian Penal Code in India and the Offences Against the Person Act 1861 in England and Wales.

The gestational limits for abortions are not specifically regulated by legislation in Malaysia. The Penal Code does not explicitly provide a specific time restriction for gestation, but it generally criminalises both women who seek abortions and the practitioners who perform them. Although Malaysian law does not specify a precise gestation limit, the judgment of doctors regarding the safe timing for abortion is likely influenced by the Termination of Pregnancy Guideline (TOP) established by the Ministry of Health in 2012. The guideline defines abortion as the intentional removal of an embryo or foetus, usually weighing 500 grams or having a gestational length of 22 weeks, from the uterus during a stage of pregnancy when it is incapable of surviving on its own. From a clinical perspective, the guideline recommends that abortions are considered safe when performed during the 22nd week of gestation.

However, the guidance provided in the TOP guideline conflicts with the decision made by the National Fatwa Council about the maximum duration for abortion in Malaysia. In Malaysia, in addition to civil law that applies to both Muslims and non-Muslims, Muslims are entitled to the application of fatwas issued by the National Fatwa Council, particularly when it comes to abortion. Fatwas are authoritative religious decrees or judgments issued by Islamic scholars or councils, grounded in their interpretation of Islamic Law (Sharia). The 26th Convention of the Fatwa Committee of the National Council for Islamic Religious Affairs addressed the issue of whether abortions are permissible when a doctor determines that the infant would have inevitable deformities. According to the scholarly consensus (ijma'), The Fatwa declares that it is considered makruh (disapproved) to abort a foetus that is between one and forty days old, unless there is a threat to the mother's health and both the husband and wife have provided their permission. The jurists uniformly concur that termination of a foetus less than 120 days old is permissible if it has severe abnormalities or illnesses that endanger the life of the mother. In addition, it is prohibited (haram) to abort a foetus that has reached a gestational age of more than 120 days, as this action is regarded as a type of homicide towards a foetus that has been endowed with a soul. The only exception to this limitation occurs when the termination of the pregnancy is required to protect the mother's life due to a serious deformity, and medical experts confirm that continuing the pregnancy poses a risk to the mother's life. In this scenario, it is acceptable to terminate the pregnancy to safeguard the life of the mother, which takes precedence within the specified gestation period.[24]

Based on this Fatwa, it can be deduced that abortion is typically permissible. Nevertheless, it is required for the termination to occur within 120 days, subject to specific circumstances, especially if there are serious malformations or illnesses that pose a threat to the mother's

[24] Qarar Majma' al-Fiqh al-Islami, No. 277.

life. The Fatwa highlights that a pregnancy should only be terminated if necessary and after taking the mother's and the foetus' welfare into thoughtful consideration.

Given the circumstances between what the guideline suggests and the Fatwa suggestion on the gestational limits on abortion, it leaves open the question of gestational limits and its bearing on at what stage abortion is permitted under legislative definitions in Malaysia. The question that thus arises is which specific gestation limits should be adhered to, and is the suggested clinical gestational limits based on the TOP guideline or the one indicated by the Fatwa? Suppose a Muslim is subjected to the Fatwa advice regarding the gestational limits on abortion which can only be done before 120 days under specific circumstances, what then would be the impact on non-Muslims if the gestational limit is not regulated under civil law or the Penal Code? In Malaysia, while Muslims are bound by fatwas, which often establish religious guidelines, including a suggested gestational period of 120 days for abortions under certain circumstances, non-Muslims are subject to the Penal Code, which does not specify a legal gestational limit for abortion procedures. While the Fatwa is not legally binding on non-Muslims, the Penal Code, which governs all citizens, lacks explicit provisions regarding gestational limits for abortion. Suppose one adheres to the suggested gestation restriction outlined by the TOP guideline, in that case, it is wise to argue that the guideline is not legally binding and can be readily contested.

In conclusion, the lack of explicit laws governing the gestational age at which an abortion may be performed in Malaysia creates difficulty and uncertainty. The Penal Code prohibits abortion without offering any criteria for determining when an abortion is legally acceptable, resulting in an unclear definition of gestational restrictions. The Penal Code specifies penalties for individuals who facilitate abortions, but it does not provide clear guidelines for the specific stages of pregnancy at which abortion is permitted. In contrast, other countries like England and Wales, and India have laws that explicitly state the permissible gestational periods for abortion procedures. The Termination of Pregnancy Guideline (TOP) issued by the Ministry of Health contributes to the intricacy of proposing a gestational threshold of 22 weeks for safe abortion procedures, which may not correspond with religious interpretations or legal norms. The issuance of fatwas by the National Fatwa Council, which offers guidance on Islamic principles concerning abortion, adds complexity to the issue, especially for Muslim individuals. The Fatwa proposes a maximum gestational period of 120 days for abortion in certain situations, considering religious factors. The absence of agreement and definiteness over the limits of gestation gives rise to significant inquiries concerning the rights, independence, and availability of healthcare for women in Malaysia. It emphasises the necessity of implementing extensive legal changes that give priority to women's reproductive rights while also preserving religious and cultural values.

In order to progress, Malaysia needs to tackle these legal and ethical intricacies by implementing unambiguous and comprehensive legislation that strikes a balance between women's rights and religious and cultural factors. This involves evaluating the influence of gestational restrictions on the availability of secure and lawful abortion services for all individuals, irrespective of their religious beliefs. Moreover, it is crucial to give utmost importance to the advancement of comprehensive sex education and reproductive health services to enable individuals to make educated decisions about their reproductive health and entitlements.

6. Navigating the Importance of Law Reform (Regulating Gestational Limits on Abortion): Perspective of CEDAW Within the Context of Local Legislation in Malaysia

Abortion laws and regulations often establish gestational age limits, which can be either permissive or restrictive. These constraints, which can be imposed through formal legislation, institutional policies, or personal practices of healthcare professionals, restrict the access to legal abortion based on the stage of pregnancy. Gestational age restrictions in many countries are established using grounds-based systems, where the limitations vary depending on the precise grounds or circumstances in which abortion is allowed.[25] Gestational age limitations vary depending on the reasons or conditions under which abortion is legal in different countries where they are tied to grounds-based methods.

Under international human rights law, it is against the law for governments to impose limitations or exert control over pregnancies or abortions, as this goes against their obligation to ensure that women and girls are not forced to resort to dangerous abortions. As a result, they must revise their laws in response.[26]

In Malaysia, the highest law of the land is the Federal Constitution, which outlines the rights of Malaysians. This foundational legal document serves as the supreme guide for governance and legal interpretation within the country. However, it is notable that the Federal Constitution does not contain any explicit clauses that specifically mention or safeguard the rights of women, including their reproductive rights. This omission is particularly significant in the context of the right to safe abortion, a critical aspect of reproductive health and autonomy. Although Malaysia does not have explicit constitutional protection for women's rights, it has signed several international conventions that encourage and advance the cause of women's rights. Particularly relevant among these is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW, sometimes referred to as an international bill of rights for women,[27] requires signatory countries to ensure that women are treated equally in all spheres of life, including healthcare and reproductive rights, and to end discrimination against them in all forms. Malaysia, as a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), has pledged to preserve the tenets of the agreement, which encompass protecting women's wellbeing and their autonomy in making choices regarding their reproductive health.

CEDAW, while not explicitly addressing the protection of the right to safe abortions, has been interpreted by its separate committees to support the inclusion of safe abortion as part of broader reproductive health and rights. *Paragraph 9 of the General Recommendation No.24 of CEDAW* addresses the importance of women's access to health care services, including reproductive health care. Arguably, according to WHO, the right to health care includes the

[25] World Health Organization, *Abortion Care Guideline* (World Health Organization 2022), ch 2 Abortion Regulation Including Relevant Recommendations <https://www.ncbi.nlm.nih.gov/books/NBK578931/> accessed 22 April 2024.

[26] Marge Berer, 'Abortion Law and Policy Around the World: In Search of Decriminalization' (2017) 19(1) Health and Human Rights Journal 13.

[27] Pooja Khanna, Zachary Kimmel and Ravi Karkara, 'Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for Youth' (UN Women 2016)<https://www.unwomen.org/en/digital-library/publications/2016/12/cedaw-for-youth> accessed 30 June 2024.

right to reproductive health because it encompasses both freedom and entitlement. Freedoms include the right to control one's health and body, such as sexual and reproductive rights.[28] Reproductive healthcare includes prenatal services, safe childbirth, access to contraception and access to safe and legal abortions.[29] In addition, the right to health encompasses the right to reproductive health, which is supported by research on the significance of gestational age in relation to abortion and human rights. It is argued that the right to health includes the right to reproductive health. Existing literature demonstrates that the right to reproductive health is an essential aspect of the right to health. It comprises the availability of comprehensive reproductive health care services, protection against harm, and the freedom to independently make choices regarding reproduction, including the option of safe abortions. To advocate for safe and high-quality abortion services as a health intervention, it is necessary to establish abortion legislations that are grounded in evidence.[30]

The domestic legal framework in Malaysia, which is silent on these important issues and, for the purposes of this article, relates to the gestational limits on abortion to ensure the availability of safe abortions, contrasts strongly with the international commitment to CEDAW. The lack of clear constitutional provisions regarding women's reproductive rights in Malaysia underscores a notable disparity between the country's international commitments and its domestic laws, encompassing both the Federal Constitution and the Penal Code at a specific level.

The Penal Code of Malaysia is not in line with the CEDAW's principles on reproductive rights, particularly relating to the gestational limits on abortion to ensure the availability of safe abortion. Notwithstanding the emphasis placed by CEDAW on women's rights to health, autonomy, and access to quality reproductive healthcare, these rights are seriously restricted by the severe legal restrictions imposed by the Penal Code. As discussed throughout the article, the legislation governing abortion provided under the Penal Code in Malaysia is restrictive and lacks an explicit definition. The authors have stated that when comparing the laws on abortion in Malaysia with those in England & Wales, and India, Malaysian law is restrictive and lacks detailed clarity, particularly in terms of not regulating the gestation limits on abortion. The absence of clear information can lead to inequalities in the availability of secure and lawful abortion services, which may compromise women's entitlement to reproductive healthcare and rights as a whole.

Arguably, literature asserts that women possess the inherent entitlement to self-governance over their own physical being and choices related to reproduction. This idea is fundamental to the concept of reproductive rights and is universally acknowledged as a fundamental human right on a global scale. Setting gestational restrictions can offer clarity and guidance for women and healthcare providers, enhancing access to safe abortions. However, it also prompts concerns regarding the degree to which these regulations uphold women's autonomy. Literature reflects that one way in which regulating gestational age limits can be

[28] World Health Organization, 'Human Rights' (*World Health Organization*, 1 December 2023) <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> accessed 30 June 2024.
[29] ReproductiveRights.gov, 'Know Your Rights: Reproductive Health Care'(*ReproductiveRights.gov*) <https://reproductiverights.gov/> accessed 30 June 2024.
[30] Joanna N Erdman, 'Theorizing Time in Abortion Law and Human Rights' (2017) 19(1) Health and Human Rights Journal 29.

viewed as respecting women's autonomy is by providing clear information and guidance for informed decision-making. By establishing specific timeframes within which an abortion is legally permissible, regulations offer women a framework within which they can assess their options and make choices that align with their individual circumstances, values, and reproductive goals.[31] Disregarding and restricting women's reproductive rights could be considered a violation of fundamental human rights. Reproductive autonomy is an individual's entitlement to make autonomous choices regarding their physical wellbeing and reproductive health, encompassing the ability to access safe abortions and contraception. The body of literature indicates that women's reproductive autonomy is a human right, and that depriving women of it would go against the principles of autonomy, nondiscrimination, and access to reproductive health care.

Further, safeguarding reproductive autonomy allows the essential entitlement to access comprehensive sexual and reproductive health care and knowledge, enabling people to lead extended and healthy lives.[32] Denying women the liberty to make their own reproductive decisions is discriminatory and constitutes a violation of their fundamental human rights.[33] In addition, the lack of regulations regarding the maximum time limit for an abortion during pregnancy can be viewed as an infringement of human rights, specifically in relation to the right to health. The body of research suggests that higher rates of maternal death and unfavourable health outcomes are linked to gestational age limits. Pregnant women who are seeking abortion care after the legal gestational age limit encounter obstacles due to insufficient resources, exacerbating pre-existing gender and social disparities. Inadequate regulations and limitations on gestational age for abortion restrict access to healthcare and increase the risk for individuals with pregnancies. Delayed access to abortion services may increase health risks and compel some to resort to self-induced abortions or continue with unwanted pregnancies.[34]

In summary, although the Federal Constitution of Malaysia is the ultimate legal document in the country, it does not contain any specific clauses safeguarding women's reproductive rights, including the right to a safe abortion at the specific level. The legal gap is particularly significant given Malaysia's commitment to international conventions such as CEDAW, which advocates for the elimination of discrimination against women and the safeguarding of their health and reproductive autonomy. The restrictive nature of the Penal Code in Malaysia on abortion further exacerbates this disparity, creating substantial legal barriers that hinder women's access to comprehensive reproductive healthcare. Disparities in access to safe and authorised abortion services are exacerbated by the absence of clear and enabling regulations, particularly with regard to gestational limitations for abortion. Consequently, this undermines women's ability to make well-informed and independent choices regarding their reproductive health. The literature underscores the importance of reproductive autonomy as a fundamental human right, and the lack of alignment between Malaysia's domestic laws and

[31] ibid.

[32] Dana-Sophia Valentiner, 'The Human Right to Sexual Autonomy' (2021) 22 German Law Journal 703.

[33] John A Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69(3) Virginia Law Review 405.

[34] Silvia De Zordo and others, '"The First Difficulty Is Time": The Impact of Gestational Age Limits on Reproductive Health and Justice in the Context of Cross-Border Travel for Abortion Care in Europe' (2023) 321 Social Science & Medicine 115760.

its international obligations represents a significant infringement on these rights. To rectify this, it is imperative for Malaysia to undertake comprehensive legal reforms that align its domestic laws with the principles of CEDAW. This entails implementing encouraging legislation on abortion including and for the purpose of the article, a gestational limit for abortion, guaranteeing that women have access to the requisite information and services needed to make well-informed decisions about their reproductive health. Through this action, Malaysia can enhance the safeguarding of women's health, preserve their autonomy, and achieve its obligations under international human rights standards.

7. Conclusion and Recommendation

In conclusion, the absence of specific legislation regarding the permissible gestational age for abortions in Malaysia poses significant barriers to women's healthcare and reproductive rights. The restrictive and ambiguous character of the abortion law in Malaysia and the uncertainty surrounding the gestational limits are highlighted when compared with the legal systems in other jurisdictions, such as England and Wales, and India. The lack of clarity in this situation might result in inconsistencies in the availability of safe and lawful abortion services, which may compromise women's entitlement to reproductive healthcare. Establishing regulations on gestational limits is crucial to guarantee prompt and secure access to abortion services while also considering the rights of individuals to control their reproductive choices, as well as the viability of the foetus and the health of the mother. Comprehensive regulations enhance the rights of women by equipping them with crucial information and guidance to make well-informed decisions regarding their bodies and reproductive options, while simultaneously upholding their autonomy. Non-compliance with gestational limitations could be deemed as a breach of basic human rights, specifically the right to health, and exacerbate the persistent prejudice against the women.

The correlation established in the existing literature between gestational age limits and increased rates of maternal mortality as well as unfavourable health outcomes has been discussed in this paper. This underscores the criticality of guaranteeing prompt availability of abortion services. Denying women the ability to make decisions about their reproductive health is a clear infringement upon their fundamental human rights. It perpetuates discrimination and unequal access to reproductive healthcare services, thereby contributing to their persistence.

In light of these considerations, the authors argue that the laws on abortion in Malaysia are restrictive and ambiguous in their details. The authors contend that, given that Malaysia is a signatory to CEDAW, an international agreement that promotes women's rights, the country should assess and amend its abortion laws to ensure that they comply with international human rights standards. This entails the establishment of transparent legislation including regulates the gestational limits on abortion. The primary objectives are to safeguard women's autonomy over their reproductive decisions, guarantee convenient availability of secure and lawful abortion services, and uphold their general health and welfare. The authors suggest implementing regulations to establish specific restrictions on the duration of pregnancies during which abortions can be performed under the law. To achieve this within the civil law framework, the authors suggest that the Malaysian government could adopt the proposed gestational limits outlined in the TOP guideline while still adhering to the fatwa recommendations for Muslims, which stipulate a maximum of 120 days. Alternatively, for a

unified and holistic strategy, the government could integrate the fatwa guidelines for a gestational limit of 120 days into civil law. This would take into consideration the demonstrated safety of the current gestational limitations on abortions, as both the Fatwas and the clinical gestational limits suggested by the TOP guideline are safe.

Bibliography

Archer N, 'The Law, Trials and Imprisonment for Abortion in Malaysia' *International Campaign For Women's Right To Safe Abortion* (Asia, 11 July 2018) <https://www.safeabortionwomensright.org/news/feature-the-law-trials-and-imprisonment-for-abortion-in-malaysia/>

Berer M, 'Abortion Law and Policy Around the World: In Search of Decriminalization' (2017) 19(1) Health and Human Rights Journal 13

Bernama, 'Newborn Found Abandoned in Carton at Ampang Roadside' *New Straits Times* (Kuala Lumpur, 20 July 2020) <https://www.nst.com.my/news/crime-courts/2020/07/609989/newborn-found-abandoned-carton-ampang-roadside> accessed 14 April 2024

Chow BJH, Ng GM and Kuek CY, 'Abortion Law in Malaysia: Time to Review?' in Yang Chik Adam and Shahrina Anis Binti Samsudin (eds), *Proceedings of the 3rd International Conference on Law and Digitalization 2023 (ICLD 2023)*, Advances in Social Science, Education and Humanities Research 791

Dato Hj Mohamad Shariff AN and Singam AST, 'Telemedicine Abortion During Covid – 19 And The Challenges In Its Applicability In Malaysia' (2023) 11(3) Russian Law Journal 964 <https://russianlawjournal.org/index.php/journal/article/view/1385> accessed 20 April 2024

DayakDaily, 'Fatimah: Baby Dumping Case under Investigation' *DayakDaily* (Kuching, 14 January 2021) <https://dayakdaily.com/fatimah-baby-dumping-case-under-investigation/> accessed 14 April 2024

De Zordo S and others, '"The First Difficulty Is Time": The Impact of Gestational Age Limits on Reproductive Health and Justice in the Context of Cross-Border Travel for Abortion Care in Europe' (2023) 321 Social Science & Medicine 115760

Erdman JN, 'Theorizing Time in Abortion Law and Human Rights' (2017) 19(1) Health and Human Rights Journal 29

Halder S and others, 'Maternal Mortality and Morbidity Following Unsafe Abortion in a Tertiary Medical College Hospital' (2024) 6(1) European Journal of Medical and Health Sciences 67

Hasan MR and Nik Azman NNA, 'Baby Dumping in Malaysia and Indonesia: Between National Regulation and Islamic Criminal Law' (2021) 20(2) Mazahib 321

Ilham R, 'Baby Boy, Just Born, Allegedly Stabbed to Death by Teen Mother' *New Straits Times* (Cukai, 8 February 2022) <https://www.nst.com.my/news/crime-courts/2022/02/769754/baby-boy-just-born-allegedly-stabbed-death-teen-mother> accessed 14 April 2024

Ishola F, Ukah UV and Nandi A, 'Impact of Abortion Law Reforms on Women's Health Services and Outcomes: A Systematic Review Protocol' (2021) 10 Systematic Reviews 192

Khanna P, Kimmel Z and Karkara R, 'Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for Youth' (UN Women 2016) <https://www.unwomen.org/en/digital-library/publications/2016/12/cedaw-for-youth> accessed 30 June 2024

Lim HM, 'Country Profile : On Universal Access to Sexual and Reproductive Health Malaysia' (2015) Asian-Pacific Resource & Research Centre for Women <https://arrow.org.my/publication/country-profile-on-universal-access-to-sexual-and-reproductive-health-malaysia/> accessed 4 April 2024

López Cabello A and Gaitán AC, 'Safe Abortion in Women's Hands: Autonomy and a Human Rights Approach to COVID-19 and Beyond' (2021) 23(1) Health and Human Rights 191

Nortajuddin A, 'Southeast Asia's Baby Dumping Problem' *The ASEAN Post* (5 March 2020) <https://theaseanpost.com/article/southeast-asias-baby-dumping-problem> accessed 22 February 2023

Parker WJ, 'The Moral Imperative of Reproductive Rights, Health, and Justice' (2020) 62 Best Practice & Research. Clinical Obstetrics & Gynaecology 3

Qarar Majma' al-Fiqh al-Islami, No. 277

ReproductiveRights.gov, 'Know Your Rights: Reproductive Health Care'(*ReproductiveRights.gov*) <https://reproductiverights.gov/> accessed 30 June 2024

Robertson JA, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' (1983) 69(3) Virginia Law Review 405

SinarDaily, 'Baby Dumping Still Rampant' *SinarDaily* (Kuala Lumpur, 17 February 2022) <https://www.sinardaily.my/article/171553/malaysia/national/baby-dumping-still-rampant> accessed 14 April 2024

Tiew A and others, 'An Exploration of Sexual and Reproductive Health (SRH) Services Provided by Private Clinics in Peninsular Malaysia' (Reproductive Rights Advocacy Alliance Malaysia, October 2020) <https://www.rraam.org/research/> accessed 4 April 2024

Tong WT and others, 'Exploring Pregnancy Termination Experiences and Needs among Malaysian Women: A Qualitative Study' (2012) 12 BMC Public Health 743

Valentiner DS, 'The Human Right to Sexual Autonomy' (2021) 22 German Law Journal 703

Women Aid Organisation, 'We Must Improve Maternal, Sexual, and Reproductive Health Rights in Malaysia' *Women's Aid Organisation* (25 April 2022) <https://wao.org.my/we-must-improve-maternal-sexual-and-reproductive-health-rights-in-malaysia/> accessed 20 April 2024

Women and Foreign Policy Program Staff, 'Abortion Law: Global Comparisons' (Council on Foreign Relations, 7 March 2024) <https://www.cfr.org/article/abortion-law-global-comparisons> accessed 28 June 2024

World Health Organization, *Safe abortion: technical and policy guidance for health systems* (2nd edn, World Health Organization 2012)

—— *Abortion Care Guideline* (World Health Organization 2022) <https://www.ncbi.nlm.nih.gov/books/NBK578931/> accessed 22 April 2024

—— 'Human Rights' (*World Health Organization*, 1 December 2023) <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> accessed 30 June 2024

Zainuddin A, 'Doctor Clarifies Abortion Is Legal in Malaysia' (*CodeBlue*, 12 October 2022) <https://codeblue.galencentre.org/2022/10/12/doctor-clarifies-abortion-is-legal-in-malaysia/> accessed 22 February 2023

Cybersecurity in International Arbitration

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Abstract

Cybersecurity is no longer a remote topic in international arbitration, as information technology ("IT") continues to be widely used in international arbitration proceedings. Incidents of cyberattacks are no longer foreign to the arbitration community. Although some of these cyberattack incidents are rare, they have occurred, and the consequences are damaging.

This article examines the use of illegally obtained evidence, including evidence obtained through hacking as a result of cyberattacks in arbitration proceedings, the importance of cybersecurity measures and the steps taken by the arbitration community to tackle cybersecurity risks in arbitration proceedings. However, there are practical challenges in implementing the recommended cybersecurity measures.

Keywords: Cybersecurity, international arbitration, cyberattack.

1. Introduction

Cybersecurity is no longer a technical topic but one that dominates conversation. It affects our daily and work lives. As we continue to live in this digital society, the legal industry, known for its traditions and resistance to change, inevitably have had to adapt to the use of technology. Technology now plays a vital role in legal work. Paperless courtrooms, virtual hearings, digital libraries, cloud computing systems, cloud sharing platforms, and cloud data storage are some of the basic changes seen in the legal industry. The legal community is thus not spared from cyber threats.

In fact, law firms and arbitration institutions, who hold a wealth of private and confidential information, are often targets of cyberattacks. These attacks may lead to data breaches. Data breaches of documents related to legal proceedings and the resultant leak of those documents can lead to profoundly damaging effects to all parties involved, including counsel, arbitrators, and even arbitral institutions. To adapt to the digital world, the legal community has introduced guidelines and protocols as an effort to introduce cybersecurity measures for arbitration proceedings. Arbitral institutions are seen to revise their institutional rules with cybersecurity threats in mind.

However, implementing the recommended cybersecurity measures poses significant challenges.

2. Incidents of Attacks

The legal community had seen more than its fair share of cyber threats. Some of these attacks, although rare, have happened. The attacks not only resulted in loss of sensitive data and financial harm, but also resulted in reputational damage, and in some extreme cases, have led to criminal investigations and legal actions.

2.1. Panama Papers

The Panama Papers was an unprecedented leak of 11.5 million files or an equivalent of 2.76 terabytes of confidential information from the database of the offshore law firm, Mossack Fonseca.[35] The leak was claimed[36] to be due to a hack of the law firm's server. The information obtained from an anonymous source by the German newspaper Süddeutsche Zeitung was shared with the International Consortium of Investigative Journalists, who then shared them with a large network of international partners, including the Guardian and the BBC[37].

The Panama Papers exposed a myriad of information relating to offshore accounts of some of the world's most powerful people with alleged indications of money laundering and tax evasion.

One leaked memorandum from a partner of Mossack Fonseca stated: "Ninety-five per cent of our work coincidentally consists in selling vehicles to avoid taxes."[38]

In the wake of the leak, investigations were launched by dozens of tax authorities around the world. Just early this year, it was reported that the trial of 27 people charged in connection with the Panama Papers money laundering scandal started in April 2024 in a Panamanian criminal court.[39]

The firm itself, notwithstanding being one of the largest offshore firms in the world at that time, was not able to survive the leak and closed in 2018.

[35] Luke Harding, 'What are the Panama Papers? A guide to history's biggest data leak' *The Guardian* (5 April 2016) <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers> accessed 19 May 2024.
[36] '"Panama Papers" law firm says "hacked by servers abroad"' *Astro Awani* (6 April 2016) <https://www.astroawani.com/berita-dunia/panama-papers-law-firm-says-hacked-servers-abroad-101341> accessed 19 May 2024.
[37] Luke (n 35).
[38] Juliette Garside, Holly Watt and David Pegg, 'The Panama Papers: how the world's rich and famous hide their money offshore' *The Guardian* (3 April 2016) <https://www.theguardian.com/news/2016/apr/03/the-panama-papers-how-the-worlds-rich-and-famous-hide-their-money-offshore> accessed 19 May 2024.
[39] Mariko Oi, 'Panama Papers money-laundering trial begins' *The BBC* (9 April 2024) <https://www.bbc.com/news/articles/cnek443n8zvo> accessed 19 May 2024.

2.2. Law firm in Singapore

Not far from our homeland, Singapore, news reports indicated that Singaporean firm Shook Lin & Bok was hit by a ransomware attack in April 2024.[40] The firm reportedly paid a ransom of USD 1.4 million in Bitcoin to the Akira ransomware group, the alleged cyber intruder. It was also reported that the Singapore firm had in its statement stated that "There is thus far no evidence that the firm's core document management systems which contain client data were affected."[41] Questions have been raised as to whether that is true, as the ransom was subsequently known by the public. In any event, there certainly were operational disruptions and financial loss.

2.3. Permanent Court of Arbitration Website Attack During the China–Philippines Maritime Boundary Dispute[42]

Arbitral institutions are not spared from cyberattacks as well. The website of the Permanent Court of Arbitration ("PCA") went offline during a hearing of the territorial dispute in the South China Sea between the Philippines and China. According to reports[43], hackers embedded the PCA's web page on the case with a code that infected visitors to the page, leaving anyone interested in the landmark legal case, and possibly their organisation, at risk of data theft. Eventually, the PCA website, which contained information about other cases, had to be taken offline for security reasons.

While the timing of the attack raised questions of whether it was orchestrated by certain parties, it nonetheless shows that arbitral institutions are also targets of cyberattacks.

3. Use of Leaked Documents

3.1 Arbitral Rules

Arbitration rules give wide discretion to arbitrators to decide on the admissibility of evidence, including evidence obtained illegally through hacking.

Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration provides that "the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

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[40] Ang Hwee Min, 'Law firm Shook Lin & Bok hit by ransomware attack' *The CNA* (Singapore, 2 May 2024) <https://www.channelnewsasia.com/singapore/shook-lin-and-bok-akira-ransomware-paid-ransom-bitcoin-4308441> accessed 19 May 2024.

[41] Nimitt Dixit, 'SG: Shook Lin Hit By Cyberattack, Says No Evidence Of Client Data Theft' *Asian Legal Business* (7 May 2024) <https://www.legalbusinessonline.com/other-news/sg-shook-lin-hit-cyberattack-says-no-evidence-client-data-theft> accessed 19 May 2024.

[42] Luke Eric Peterson, 'Permanent Court of Arbitration Website Goes Offline, with Cyber-Security Firm Contending that Security Flaw Was Exploited in Concert with China-Philippines Arbitration' *IA Reporter* (23 July 2015)<https://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration/> accessed 19 May 2024.

[43] David Tweed, 'China's Cyber Spies Take to High Seas as Hack Attacks Spike' *Bloomberg* (16 October 2015) <https://www.bloomberg.com/news/articles/2015-10-15/chinese-cyber-spies-fish-for-enemies-in-south-china-sea-dispute> accessed 19 May 2024.

Article 9(1) of the International Bar Association Rules on the Taking of Evidence in International Arbitration ("IBA Rules") provides that "the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence."

Article 25.2 of the Dubai International Arbitration Centre Rules 2022 provides that "the Tribunal shall have the power to determine the admissibility, relevance, materiality and weight of any such evidence."

Rule 36(1) of the International Centre for Settlement of Investment Disputes ("ICSID") Arbitration Rules 2022 provides that "the Tribunal shall determine the admissibility and probative value of the evidence adduced."

Rule 19.2 of the Singapore International Arbitration Centre Rules 2016[44] states that "the Tribunal shall determine the relevance, materiality and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination."

Article 27 of the Asian International Arbitration Centre (Malaysia) Arbitration Rules 2023 states that "the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." Further, *Section 21(3)(a) of the Arbitration Act 2005* also provides that the power conferred upon the arbitral tribunal shall include the power to "determine the admissibility, relevance, materiality and weight of any evidence."

By contrast, the International Chambers of Commerce Arbitration Rules 2021 is silent on the arbitral tribunal's power on admissibility of evidence.[45]

3.1. Article 9(3) of the IBA Rules Specifically Addresses Illegally Obtained Evidence

The IBA Rules, one of the most widely used soft law instruments in international arbitrations[46] regardless of the administering institutions, *ad hoc*, other rules or procedures governing international arbitrations[47], specifically address illegally obtained evidence in its *Article 9(3)*.

It is a new provision added in the 2020 version of the IBA Rules[48], stating that "the arbitral tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally." The use of the word "may", instead of "shall", was to give arbitral tribunals the discretion in deciding whether to exclude illegally obtained evidence.

[44] Similar provision is available at Article 32.2 of the SIAC Rules (7th edn) (consultation draft).
[45] Gullermo Garcia-Perrote, 'Admissibility of 'Hacked Evidence' in International Arbitration' (*Kluwer Arbitration Blog,* 7 July 2021) <https://arbitrationblog.kluwerarbitration.com/2021/07/07/admissibility-of-hacked-evidence-in-international-arbitration/> accessed 14 July 2024.
[46] Queen Mary University of London, '2015 International Arbitration Survey: Improvements & Innovations in International Arbitration' (2015) 35.
[47] International Bar Association Rules on the Taking of Evidence in International Arbitration, Foreword.
[48] Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration (January 2021) <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D> accessed 13 July 2024.

The choice of word was made after contemplating whether to capture the specific circumstances in which illegally obtained evidence should be excluded, but the IBA 2020 Review Task Force ("IBA Task Force") concluded that there was no clear consensus on the issue. National laws vary on whether illegally obtained evidence should be excluded from criminal and civil proceedings. Similarly, arbitral tribunals have reached different conclusions depending on, among other things, whether the party offering the evidence was involved in the illegality, considerations of proportionality, whether the evidence is material and outcome determinative, whether the evidence has entered the public domain through public "*leaks"*, and the clarity and severity of the illegality. The IBA Task Force has sought to accommodate this diversity by providing that the arbitral tribunal may exclude evidence under *Article 9(3)* whereas it shall exclude evidence where the grounds of *Article 9(2)* are present[49].

Article 9(3) of the IBA Rules is to be contrasted with *Article 9(2)*, which states "the arbitral tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection" on grounds of "commercially and technical confidentiality"[50], "special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution)"[51] and "considerations of … fairness or equality of the Parties."[52]

Illegally obtained evidence could therefore fall within those grounds under *Article 9(2) of the IBA Rules*. Under such circumstances, the arbitral tribunal is compelled to exclude the illegally obtained evidence. Nonetheless, the arbitral tribunal retains discretion to determine whether any of the specified criteria has been met. In addition, the introductory language of *Article 9(2)*, as revised by the IBA Task Force, makes clear that the arbitral tribunal has discretion to exclude the evidence in whole or in part, depending on whether the grounds listed in *Article 9(2)* apply to the whole document or only to some of its parts.[53]

3.2. Decisions of Arbitral Tribunal on Illegally Obtained Evidence

Even before the introduction of *Article 9(3) of the IBA Rules*, documents obtained through hacking or other illegal means have been requested to be admitted as part of the evidence in arbitral proceedings. In some instances, arbitral tribunals have excluded such documents from the proceedings, regardless of their relevance or materiality to the dispute.

In *ConocoPhillips v Venezuela*[54], the respondent requested[55] the arbitral tribunal for a hearing to specifically address their findings that the respondent "breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three

[49] ibid 30.
[50] IBA Rules (n 13) art 9.2(e).
[51] ibid art 9.2(f).
[52] Ibid art 9.2(g).
[53] Commentary on the 2020 IBA Rules (n 48) 26.
[54] *Conocophillips Petrozuata B.V. Conocophillips Hamaca B.V. Conocophillips Gulf Of Paria B.V. and Conocophillips Company v Bolivarian Republic Of Venezuela* (ICSID Case No. Arb/07/30).
[55] Respondent's Request dated 8.9.2013 <https://www.italaw.com/sites/default/files/case-documents/italaw1583.pdf> accessed 20 July 2024.

projects"[56]. In the respondent's request, the respondent produced new evidence disclosed by WikiLeaks, which would demonstrate that the respondent had engaged in good faith negotiations with ConocoPhillips. Although the majority of the arbitral tribunal did not find that they have the power to reconsider their findings[57], Professor Abi-Saab dissented, holding that arbitrators should not "close its blinkers"[58] on such "glaring evidence"[59], despite the evidence being unlawfully obtained from a third-party source. To do so, in the words of Professor Abi-Saab, would make "mockery not only of ICSID arbitration but of the very idea of adjudication". [60]

In *Caratube v Kazakhstan*[61], the claimant requested for leave to produce certain documents out of the 60,000 documents that were publicly available on the website of "KazakhLeaks"[62]. The documents were leaked to the website following the hacking of the respondent's government system. The tribunal allowed the production of non-privileged leaked documents but excluded privileged leaked documents, namely privileged attorney-client communications.[63]

In *Yukos Universal Limited v Russian*[64], US Statement Department cables emerged via "WikiLeaks" were relied upon by parties and considered by the arbitral tribunal when making their decision[65], with no issue of admissibility being ventilated.

In *Libananco v Turkey (ICSID ARB/06/8)*[66], the respondent obtained 1,000 privileged, private and confidential emails by intercepting emails and instant messages sent by, to and between the claimant and its counsel in connection with the arbitration over the years.[67] The interception was made pursuant to a Turkish court order issued in a separate money laundering investigation[68]. The arbitral tribunal decided to exclude all privileged documents and information obtained through the interception from the arbitration[69] to uphold the principles of procedural fairness as well as respect for confidentiality and legal privilege.[70]

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[56] Decision on Jurisdiction and the Merits dated 3.9.2013, para 404(d) <https://www.italaw.com/sites/default/files/case-documents/italaw1569.pdf> accessed 20 July 2024.
[57] Decision on Respondent's Request For Reconsideration dated 10.3.2017, para 24 <https://www.italaw.com/sites/default/files/case-documents/italaw3119.pdf> accessed 20 July 2024.
[58] Decision of Respondent's Request For Reconsideration Dissenting Opinion of Georges Abi-Saab, para 66 <https://www.italaw.com/sites/default/files/case-documents/italaw3121.pdf> accessed 20 July 2024.
[59] ibid.
[60] ibid.
[61] *Caratube International Oil Company LLP v Republic of Kazakhstan and Mr. Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13).
[62] Award dated 27.9.2017, para 150 <https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2923/DC11204_En.pdf> accessed 20 July 2024.
[63] ibid para 156.
[64] *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No. AA227).
[65] Final Award dated 18 July 2014, paras 1189, 1199, 1201, 1202-1208, 1213 and 1223 <https://pcacases.com/web/sendAttach/420> accessed 20 July 2024.
[66] *Libananco Holdings Co. Limited v Republic Of Turkey* (ICSID Case No. Arb/06/8).
[67] Decision on Preliminary Issues dated 23.6.2008, para 19 <https://www.italaw.com/sites/default/files/case-documents/ita0465.pdf> accessed 20 July 2024.
[68] ibid para 19.
[69] ibid para 82.
[70] ibid para 78.

In *Methanex Corporation v United States*[71], the claimant obtained documents by deliberately trespassing onto private property and rummaging through dumpsters inside the office building for documentation.[72] The arbitral tribunal did not allow these unlawfully obtained documents to be used in the arbitration. The arbitral tribunal found that the introduction of these documents into the arbitration proceedings would be "in violation of a general duty of good faith imposed by the UNCITRAL Rules".[73] With regard to the claimant's multiple acts of trespass over five and a half months, the arbitral tribunal found that such conduct "offended basic principles of justice and fairness required of all parties in every international arbitration".[74]

In *EDF (Services) Ltd v Romania*[75], the claimant requested the arbitral tribunal to admit an audio tape and a transcript of a recording of a conversation alleged to have occurred on 19 October 2001, which captured an offer of corrupt payment. As the audio recording was recorded at the home of the respondent's officer without her consent and in breach of her right to privacy,[76] the arbitral tribunal did not allow the illegally obtained evidence to be admitted, as it "would be contrary to the principles of good faith and fair dealing required in international arbitration"[77].

The arbitral tribunal shared the position in *Methanex Corporation v United States*[78], holding that the arbitral tribunal is "the judge of the admissibility of any evidence adduced" as provided under *Rule 34(1) of the ICSID Arbitration Rules*[79], the arbitral tribunal emphasized that:

> "Good faith and procedural fairness being among such principles, the Tribunal should refuse to admit evidence into the proceedings if, depending on the circumstances under which it was obtained and tendered to the other Party and the Tribunal, there are good reasons to believe that those principles of good faith and procedural fairness have not been respected."[80]

From the cases above, it appears that illegally obtained evidence and privileged information, regardless of relevance, tend to be excluded if admitting such evidence would contradict the principles of good faith and procedural fairness. However, these are not fixed rules and the arbitral tribunal retains wide discretion in deciding whether to admit or exclude such evidence.

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[71] *Methanex Corporation v United States of America*, North American Free Trade Agreement ("NAFTA") Chapter 11 Arbitration.
[72] Final Award of the Tribunal on Jurisdiction and Merits dated 3 August 2005, pt II – chp I - para 55 <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> accessed 20 July 2024.
[73] ibid pt II – chp I - para 58.
[74] ibid pt II – chp I - para 59.
[75] *EDF (Services) Limited v Romania* (ICSID Case No ARB/05/13) dated 8 October 2009 <https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf> accessed 20 July 2024.
[76] Procedural Order No. 3, para 1 and 38 <https://www.italaw.com/sites/default/files/case-documents/ita0264.pdf> accessed 20 July 2024.
[77] ibid para 38.
[78] ibid para 37 - 38.
[79] ICSID Arbitration Rules 2006 (as amended and effective April 10, 2006).
[80] ibid para 47.

In Malaysia, it is trite law that evidence even when obtained illegally, is admissible, as the issue is relevance. This is established in the Federal Court case of *Benjamin William Hawkes v PP*[81], where the Court held that:

> "Hence it is only procedural and not evidential. It is trite law that even in cases of evidence obtained illegally, its admissibility is unaffected as the issue is relevancy. This was explained by Lord Goddard in the Privy Council case of Karuma v The Queen [1955] AC 197:
>
> 'the test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issue. If it is, it is admissible and the court is not concerned with how the evidence is obtained.'"

In other words, evidence is admitted when it is relevant to proving or disproving an alleged fact. Once admitted, it is entered into record and can be considered by the arbitrator in deciding the matter. Admissible evidence therefore means that "the evidence introduced is of such a character that the court or judge is bound to receive it; that is, allow it to be introduced at trial."[82] This is to be distinguished from the weight of evidence. Only after the evidence is admitted will an arbitrator put the appropriate weight to it. Arbitrators are required to carefully consider whether to admit or exclude evidence tendered before them. If an arbitrator's decision to exclude evidence prevents a party from effectively presenting their case or undermines their right to a fair hearing, it could result in the arbitral award being set aside on the grounds of a breach of the principle of natural justice. Therefore, arbitrators must ensure that their decisions on admissibility of evidence do not compromise the fairness of the arbitration process.

4. Importance of Cybersecurity in International Arbitration

In the BCLP Arbitration Survey Report 2018[83], 90% of the respondents stated that cybersecurity is an important issue in international arbitration. The remaining respondents either considered it not important (6%) or were unsure (4%). Interestingly, two-thirds of those who did not consider it important sat both as arbitrators and practising counsel.

Despite the recognition of cybersecurity as an important issue in international arbitration, according to the 2021 International Arbitration Survey by the Queen Mary University of London[84], only around a quarter of respondents had "frequently" (18%) or "always" (9%) seen cybersecurity measures being implemented in their international arbitrations. The majority (57%) encountered such measures in less than half of their cases, while 16% respondents had "never" seen such measures in place.

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[81] [2020] 5 MLJ 417.

[82] Henry Campbell Black, Joseph R. Nolan and Jacqueline M. Nolan-Haley, *Black's Law Dictionary* (6th edn, St. Paul, Minn. West Publishing Co 1990) 47.

[83] Bryan Cave Leighton Paisner, 'International Arbitration Survey: Cybersecurity in Arbitration Proceedings' (Bryan Cave Leighton Paisner) 6 <https://www.bclplaw.com/a/web/160089/3WJsPc/bryan-cave-leighton-paisner-arbitration-survey-report-2018p.pdf> accessed 23 June 2024.

[84] Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (Queen Mary University of London) <https://www.qmul.ac.uk/arbitration/research/2021-international-arbitration-survey/> accessed 23 June 2024.

Implementing cybersecurity measures is crucial, as the consequences of security breaches can be highly damaging.

4.1. Reputational Damage

When a high-profile cyberattack happens, it often attracts media attention.[85] The media coverage can have a negative impact on the reputation of the parties, arbitrators, administering institutions and in some cases, third parties as well.[86] The exposure of sensitive data, confidential information and privileged communication as a result of cyberattack can result in an erosion of public trust and a loss of existing and potential clients' trust[87], who might be concerned with the cybersecurity measures are not up to par. The unavailability of data, networks, platforms, or websites due to disruption caused by a cyberattack incident[88] would bring about huge inconvenience to others and pose great risk to reputation.

4.2. Financial Loss

A study[89] on the impact of data breaches on share prices shows that the stocks of breached companies, on average, underperformed by -3.2% in the six months after a breach disclosure. It also shows that stock prices bottomed out 41 business days following a breach, sinking -1.4% on average. Stock prices recovered to their pre-breach disclosure levels 53 days after a breach.

Apart from the impact on share prices, financial losses may arise from ransom payments, operational disruptions such as down time, loss of productivity, expenses incurred for data recovery and investigations, loss of revenue due to loss of clients' trust, and increased insurance premiums.[90]

4.3. Legal and Regulatory Implications

A breach of data used in an arbitration may lead to a breach of confidentiality by arbitration stakeholders. Such a breach of confidentiality may then lead to actions based on either contract law or the tort of breach of confidential information, giving rise to injunctive relief to protect from potential or further breaches.[91] The disclosure of commercially sensitive,

[85] David Carnal, '5 Ways Cyberattacks Can Damage a Company's Reputation' (*Anapaya*, 19 May 2023) <https://www.anapaya.net/blog/5-ways-cyberattacks-can-damage-a-companys-reputation> accessed 23 June 2024.

[86] International Council for Commercial Arbitration, 'The ICCA Reports No. 6: ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration' (2022) International Council for Commercial Arbitration 9 <https://static.cpradr.org/docs/Cybersecurity%20ICCA-NYC%20Bar-CPR-protocol-international-arbitration-2022.pdf> accessed 20 July 2024.

[87] David (n 85).

[88] ICCA-NYC Bar-CPR Protocol (n 86).

[89] Paul Bischoff, 'How data breaches affect stock market share prices' (*Comparitech*, 5 June 2024) <https://www.comparitech.com/blog/information-security/data-breach-share-price-analysis/> accessed 24 July 2024.

[90] Thangaraj Petchiappan, 'The Financial Impact of Cyber Breaches on Businesses: Direct & Hidden Expenses' (*iLink Digital*, 2 October 2023) <https://www.ilink-digital.com/insights/blog/financial-impact-cyber-breaches-business-costs/> accessed 24 July 2024.

[91] Asian International Arbitration Centre (AIAC), 'Confidentiality in Arbitration: Fundamental Virtue or Mere Illusion?' (AIAC, 10 October 2023) <https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-Illusion > accessed 24 July 2024.

confidential, or personal information may violate laws or contractual commitments in business agreements. It may also trigger regulatory investigations or sanctions, or negligence claims.[92] Failure to adequately protect personal data used in arbitration may lead to liability under national data protection laws, such as the European Union's General Data Protection Regulation[93], Malaysia's Personal Data Protection Act 2010[94] and the Cyber Security Act 2024[95].

Apart from the parties involved, the arbitral tribunal and the administering arbitral institution, third parties outside the arbitration process may also be implicated[96] following cybersecurity or data breach. A data breach that reveals incriminating information could lead to further investigations as well.

4.4. Authenticity and Integrity of Data in the Arbitration Process

The use of digital files has become standard practice in international arbitration. However, digital files are easily altered, often without leaving detectable traces. This, coupled with the difficulty to differentiate a digital copy from a digital original, poses a cyber threat to the authenticity and veracity of data. Returning to a physical blue ink original may not resolve this issue, because such original may not exist.[97] Therefore, cybersecurity measures against such threats are important to preserve the integrity and authenticity of data to protect it from being tampered.[98] Without such protection, loss of integrity of data, or questions about the reliability and accuracy of data may arise due to a cybersecurity incident.[99] In the long run, the legitimacy of international arbitration may be undermined.[100] This may eventually lead to reputational loss to the arbitration process.

5. Steps Taken by the Arbitration Community to Tackle Cybersecurity Risks in Arbitration Proceedings

Some arbitral institutions have incorporated cybersecurity guidelines into their arbitration rules. For example, *Article 3.1(e) of the Hong Kong International Arbitration Centre Administered Arbitration Rules 2018* requires parties to upload files "to any secured online repository that the parties have agreed to use".

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[92] Stephen Cohen and Mark Morril, 'A Call To Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion' [2017] 40(3) Fordham International Law Journal 981, 989.

[93] Daniel Ling Tien Chong, 'Cybersecurity in International Arbitration: An Untapped Opportunity for Arbitral Institutions' [2002] 34 SAcLJ 432.

[94] At the time of writing this article, the Personal Data Protection (Amendment) Bill 2024 was passed by the House of Representatives (Dewan Rakyat), without any amendments.

[95] At the time of writing this article, the Cyber Security Act 2024 has been gazetted but has not come into force.

[96] Asmaa Saad Hussien and Hani Mohamed Mounes, 'Cybersecurity in international commercial arbitration (Legal vision)' (2024) 11(2) International Journal of Advanced and Applied Sciences 219, 225.

[97] Erik GW Schafer, 'Managing Data Privacy and Cybersecurity Issues' (*Global Arbitration Review*, 12 October 2023)<https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/2nd-edition/article/managing-data-privacy-and-cybersecurity-issues> accessed 24 July 2024.

[98] ibid.

[99] ICCA-NYC Bar-CPR Protocol (n 86).

[100] Dragana Nikolić and Sabine Leimüller, 'Cybersecurity in international arbitration: on the road towards green flags' (*schönherr*, 1 February 2024) <https://www.schoenherr.eu/content/cybersecurity-in-international-arbitration-on-the-road-towards-green-flags> accessed 24 July 2024.

Article 30A of the London Court of International Arbitration Arbitration Rules 2020 incorporated a new provision[101] providing that:

> "at an early stage of the arbitration, the Arbitral Tribunal shall…consider whether it is appropriate to adopt:
> any specific information security measures to protect the physical and electronic information shared in the arbitration; and
> any means to address the processing of personal data produced or exchanged in the arbitration in light of applicable data protection or equivalent legislation."

Rule 29(4) of the ICSID Arbitration Rules, in its 2022 revision, included a provision[102] requiring the tribunal to invite parties' views on "the treatment of confidential or protected information" before the first session.

A growing number of institutions, such as the Stockholm Chamber of Commerce, the International Centre for Dispute Resolution (being the international division of the American Arbitration Association), the Thai Arbitration Institute, and the ICC, have launched bespoke case management platforms to securely centralise file sharing in the effort to eliminate risks associated with email use.[103]

One of the most prominent steps taken to tackle cybersecurity risks in international arbitration is the publication of the Cybersecurity Protocol in International Arbitration ("Cybersecurity Protocol"). This protocol is a joint effort by the International Council for International Arbitration, the New York Bar Association and the International Institution for Conflict Prevention and Resolution. It was released in 2019 (2020 Edition) and updated in 2022. It aims to provide a framework for determining reasonable information security measures for individual arbitration matters and increasing awareness about information security in international arbitrations.[104]

Besides, the International Bar Association Cybersecurity Guidelines was published with the objective to provide a set of recommended best practices to help law firms protect themselves from breaches of data security, as stated in its introduction.

There is also the Protocol for Online Case Management in International Arbitration, which was developed to facilitate efficient and secure document sharing through the use of online case management tools. It sets out, among others, a list of properties and functionality of technical IT standards expected to be necessary for most arbitrations[105] as well as additional functionality depending on the needs of the arbitration.[106]

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[101] LCIA Arbitration Rules 2020, art 30.5.
[102] ICSID Arbitration Rules 2022, r 29(4)(k).
[103] John Choon and others, 'Data protection and cybersecurity in international arbitration remain in the spotlight' (Freshfields Bruckhaus Deringer) <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2023/data-protection-and-cybersecurity-in-international-arbitration-remain-in-the-spotlight/> accessed 25 July 2024.
[104] Cybersecurity Protocol, Foreword.
[105] Protocol for Online Case Management in International Arbitration, item 63.
[106] ibid item 64.

While there is no shortage of protocols and guidelines available for adoption by the parties in arbitration proceedings, there are practical challenges in implementing the recommended measures.

6. The Challenges in Implementing Cybersecurity Measures

There is a myriad of considerations to be taken into account when implementing relevant cybersecurity measures. The level of sensitivity or commercial value of the documents or information likely to be introduced into the arbitration is one of the main factors to consider;[107] the costs in implementing these cybersecurity measures and the financial resources of the parties to do so are also factors to consider. Therefore, any measures implemented not only have to be cost-efficient but also free from technological disparities to ensure a level playing field and prevent any party from gaining an unfair advantage.

Arbitrators and counsels involved in arbitration proceedings are often not IT experts.[108] They may lack the necessary knowledge and expertise in cybersecurity, and leaving the arbitral tribunal the power to make the necessary cybersecurity orders might require the tribunal to operate outside their professional qualifications and expertise.[109] The varying levels of awareness, resources and technical knowledge of data security issues among arbitrators may not in all cases equip them to deal with cybersecurity issues.[110]

Although guidelines and protocols set out measures or best practices, they are general in nature, and little guidance is provided as to which measures are appropriate in specific circumstances.[111] This may lead to tribunals setting their own cybersecurity measures based on their own concept of what is reasonable, without full knowledge or understanding of what may be in line with the norm or acceptable standards.[112]

According to BCLP's survey[113], 52% of respondents felt that a tribunal should in all cases have the power to impose cybersecurity measures, and 71% thought that a tribunal should have the power to impose sanctions for breach of measures either agreed upon by the parties or ordered by the tribunal.[114] However, requiring arbitral tribunals to decide on appropriate cybersecurity measures may place arbitrators in an uncomfortable position, as they need to decide the appropriate cybersecurity measures themselves.[115] At the very least, arbitrators will be making decisions which could potentially impact their own convenience, time and costs.[116]

[107] BCLP (n 83) 7.
[108] Claire Morel de Westgaver, 'Cybersecurity in International Arbitration – A Necessity and an Opportunity for Arbitral Institutions' (*Kluwer Arbitration Blog*, 6 October 2017) <https://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security/> accessed 27 July 2024.
[109] Daniel (n 93).
[110] BCLP (n 83).
[111] Daniel (n 93).
[112] ibid.
[113] BCLP (n 83) 5.
[114] BCLP (n 83).
[115] Daniel (n 93).
[116] ibid.

7. Conclusion

In conclusion, the arbitration community is not immune to cyberattacks. The need for robust cybersecurity in international arbitration is heightened by the contentious nature of arbitration, the often high-value and high-stakes disputes, along with the cross-border elements involved.[117]

While institutional rules and protocols offer a degree of guidance, the practical implementation of those cybersecurity measures remains challenging. The practical implementation is further complicated by the lack of a one-size-fits-all solution. However, ongoing efforts to adapt and strengthen cybersecurity measures are essential to mitigate risks and ensure the arbitration community is better equipped to face future threats. There is still much work to be done, and the collective effort of the arbitration community is essential for continued progress.

[117] ICCA-NYC Bar-CPR Protocol (n 86) 8.

Bibliography

Astro Awani, '"Panama Papers" law firm says "hacked by servers abroad"' *Astro Awani* (6 April 2016) <https://www.astroawani.com/berita-dunia/panama-papers-law-firm-says-hacked-servers-abroad-101341> accessed 19 May 2024

Ang HM, 'Law firm Shook Lin & Bok hit by ransomware attack' *The CNA* (Singapore, 2 May 2024) <https://www.channelnewsasia.com/singapore/shook-lin-and-bok-akira-ransomware-paid-ransom-bitcoin-4308441> accessed 19 May 2024

Arbitration Act 2005

Asian International Arbitration Centre (AIAC), 'Confidentiality in Arbitration: Fundamental Virtue or Mere Illusion?' (AIAC, 10 October 2023) <https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-Illusion > accessed 24 July 2024

Asian International Arbitration Centre (Malaysia) Arbitration Rules 2023

Award dated 27.9.2017 <https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2923/DC11204_En.pdf> accessed 20 July 2024

Benjamin William Hawkes v PP [2020] 5 MLJ 417

Bischoff P, 'How data breaches affect stock market share prices' (*Comparitech*, 5 June 2024) <https://www.comparitech.com/blog/information-security/data-breach-share-price-analysis/> accessed 24 July 2024

Black HC, Nolan JR and Nolan-Haley JM, *Black's Law Dictionary* (6th edn, St. Paul, Minn. West Publishing Co 1990)

Bryan Cave Leighton Paisner, 'International Arbitration Survey: Cybersecurity in Arbitration Proceedings' (Bryan Cave Leighton Paisner) <https://www.bclplaw.com/a/web/160089/3WJsPc/bryan-cave-leighton-paisner-arbitration-survey-report-2018p.pdf> accessed 23 June 2024

Caratube International Oil Company LLP v Republic of Kazakhstan and Mr. Devincci Salah Hourani v Republic of Kazakhstan (ICSID Case No. ARB/13/13)

Carnal D, '5 Ways Cyberattacks Can Damage a Company's Reputation' (*Anapaya*, 19 May 2023)<https://www.anapaya.net/blog/5-ways-cyberattacks-can-damage-a-companys-reputation> accessed 23 June 2024

Choon J and others, 'Data protection and cybersecurity in international arbitration remain in the spotlight' (Freshfields Bruckhaus Deringer) <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2023/data-protection-and-cybersecurity-in-international-arbitration-remain-in-the-spotlight/> accessed 25 July 2024

Cohen S and Morril M, 'A Call To Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion' [2017] 40(3) Fordham International Law Journal 981

Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration (January 2021)

<https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D> accessed 13 July 2024

Conocophillips Petrozuata B.V. Conocophillips Hamaca B.V. Conocophillips Gulf Of Paria B.V. and Conocophillips Company v Bolivarian Republic Of Venezuela (ICSID Case No. Arb/07/30)

Cyber Security Act 2024

Decision of Respondent's Request For Reconsideration Dissenting Opinion of Georges Abi-Saab,<https://www.italaw.com/sites/default/files/case-documents/italaw3121.pdf> accessed 20 July 2024

Decision on Jurisdiction and the Merits dated 3.9.2013, <https://www.italaw.com/sites/default/files/case-documents/italaw1569.pdf> accessed 20 July 2024

Decision on Preliminary Issues dated 23.6.2008 <https://www.italaw.com/sites/default/files/case-documents/ita0465.pdf> accessed 20 July 2024

Decision on Respondent's Request For Reconsideration dated 10.3.2017 <https://www.italaw.com/sites/default/files/case-documents/italaw3119.pdf> accessed 20 July 2024

Dixit N, 'SG: Shook Lin Hit By Cyberattack, Says No Evidence Of Client Data Theft' *Asian Legal Business* (7 May 2024) <https://www.legalbusinessonline.com/other-news/sg-shook-lin-hit-cyberattack-says-no-evidence-client-data-theft> accessed 19 May 2024

Dubai International Arbitration Centre Rules 2022

EDF (Services) Limited v Romania (ICSID Case No ARB/05/13) dated 8 October 2009 <https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf> accessed 20 July 2024

Final Award dated 18 July 2014 <https://pcacases.com/web/sendAttach/420> accessed 20 July 2024

Final Award of the Tribunal on Jurisdiction and Merits dated 3 August 2005 <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> accessed 20 July 2024

Garcia-Perrote G, 'Admissibility of "Hacked Evidence" in International Arbitration' *(Kluwer Arbitration Blog*, 7 July 2021) <https://arbitrationblog.kluwerarbitration.com/2021/07/07/admissibility-of-hacked-evidence-in-international-arbitration/> accessed 14 July 2024

Garside J, Watt H and Pegg D, 'The Panama Papers: how the world's rich and famous hide their money offshore' *The Guardian* (3 April 2016) <https://www.theguardian.com/news/2016/apr/03/the-panama-papers-how-the-worlds-rich-and-famous-hide-their-money-offshore> accessed 19 May 2024

Harding L, 'What are the Panama Papers? A guide to history's biggest data leak" *The Guardian* (5 April 2016) <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers> accessed 19 May 2024

Hong Kong International Arbitration Centre Administered Arbitration Rules 2018

Hussien AS and Mounes HM, 'Cybersecurity in international commercial arbitration (Legal vision)' (2024) 11(2) International Journal of Advanced and Applied Sciences 219

International Council for Commercial Arbitration, 'The ICCA Reports No. 6: ICCA-NYC Bar-CPR Protocol on Cybersecurity In International Arbitration' (2022) International Council for Commercial Arbitration <https://static.cpradr.org/docs/Cybersecurity%20ICCA-NYC%20Bar-CPR-protocol-international-arbitration-2022.pdf> accessed 20 July 2024

International Bar Association Cybersecurity Guidelines

International Bar Association Rules on the Taking of Evidence in International Arbitration

International Centre for Dispute Resolution being the international division of the American Arbitration Association

International Centre for Settlement of Investment Disputes Arbitration Rules 2022

International Chambers of Commerce Arbitration Rules 2021

Libananco Holdings Co. Limited v Republic of Turkey (ICSID Case No. Arb/06/8)

Ling DTC, 'Cybersecurity in International Arbitration: An Untapped Opportunity for Arbitral Institutions' [2002] 34 SAcLJ 432

London Court of International Arbitration Arbitration Rules 2020

Methanex Corporation v United States of America, North American Free Trade Agreement ("NAFTA")

Nikolić D and Leimüller S, 'Cybersecurity in international arbitration: on the road towards green flags' (*schönherr*, 1 February 2024) <https://www.schoenherr.eu/content/cybersecurity-in-international-arbitration-on-the-road-towards-green-flags> accessed 24 July 2024

Oi M, 'Panama Papers money-laundering trial begins' *The BBC* (9 April 2024) <https://www.bbc.com/news/articles/cnek443n8zvo> accessed 19 May 2024

Personal Data Protection (Amendment) Bill 2024

Petchiappan T, 'The Financial Impact of Cyber Breaches on Businesses: Direct & Hidden Expenses' (*iLink Digital*, 2 October 2023) <https://www.ilink-digital.com/insights/blog/financial-impact-cyber-breaches-business-costs/> accessed 24 July 2024

Peterson LE, 'Permanent Court Of Arbitration Website Goes Offline, with Cyber-Security Firm Contending that Security Flaw Was Exploited in Concert with China-Philippines Arbitration' *IA Reporter* (23 July 2015) <https://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration/> accessed 19 May 2024

Procedural Order No. 3 <https://www.italaw.com/sites/default/files/case-documents/ita0264.pdf> accessed 20 July 2024

Protocol for Online Case Management in International Arbitration

Protocol for Online Case Management in International Arbitration (3.7.2020) <https://www.lw.com/admin/upload/SiteAttachments/Platforms%20Protocol%20-%

20WG%20on%20LegalTech%20in%20Arbitration%20-%20November%202020.pdf> accessed 27 July 2024

Queen Mary University of London, '2015 International Arbitration Survey: Improvements & Innovations in International Arbitration' (2015)

—— '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' (Queen Mary University of London) <https://www.qmul.ac.uk/arbitration/research/2021-international-arbitration-survey/> accessed 23 June 2024

Respondent's Request dated 8.9.2013 <https://www.italaw.com/sites/default/files/case-documents/italaw1583.pdf> accessed 20 July 2024

Schafer EGW, 'Managing Data Privacy and Cybersecurity Issues' (*Global Arbitration Review*, 12 October 2023)<https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/2nd-edition/article/managing-data-privacy-and-cybersecurity-issues> accessed 24 July 2024

Singapore International Arbitration Centre Rules 2016

Tweed D, 'China's Cyber Spies Take to High Seas as Hack Attacks Spike' *Bloomberg* (16 October 2015) <https://www.bloomberg.com/news/articles/2015-10-15/chinese-cyber-spies-fish-for-enemies-in-south-china-sea-dispute> accessed 19 May 2024

UNCITRAL Model Law on International Commercial Arbitration

Westgaver CM, 'Cybersecurity in International Arbitration – A Necessity and an Opportunity for Arbitral Institutions' (*Kluwer Arbitration Blog*, 6 October 2017) <https://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security/> accessed 27 July 2024

Yukos Universal Limited (Isle of Man) v The Russian Federation (PCA Case No. AA227)

Judicial Oversight and Institutional Reform – The Attorney General and Public Prosecutor in Malaysia

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Abstract

Unlike most Commonwealth countries, Malaysia has a unique office of the Attorney General (AG) which fuses with that of the Public Prosecutor (PP).

This article seeks to discuss the wide discretionary powers of the AG/PP with reference to *Article 145(3) of the Federal Constitution*, in relation to:
i. Considerations of the judicial viewpoints and developments of the applicability of the doctrine of judicial review.
ii. The conflict of interest with the fusion of roles of the AG and PP, with emphasis on the importance of the AG/PP exercising his powers without being affected by politics.
iii. The paradoxical position of the PP which ideally should be independent of the Prime Minister and the Government of the day.
iv. Most importantly, the ongoing movement of separating the powers between the AG and the PP in Malaysia.

This article aims to address and review the potential issues arising from the current position concerning the fusion of roles in Malaysia, and to support the separation of the AG/PP's roles.

Overall, by the use of doctrinal legal research, this article analyses the AG/PP's position and concludes with a commendation of the positive developments resulting from the judicial decision in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors*, and the expectation of the much-needed reform, which shall take place at the end of 2024 by way of a Bill, separating the powers between the AG and the PP which would promote and strengthen the rule of law.

Keywords: Attorney General, Public Prosecutor, Federal Constitution, judicial review, separation of powers.

1. Introduction

Vested with great powers, the Attorney General (AG) holds a crucial role in Malaysia, especially while also holding the role as the Public Prosecutor (PP). *Article 145 of the Federal Constitution* reflects the advisory and prosecutorial powers of the AG/PP, allowing for the fusion of roles. Furthermore, it is also stated in *Section 376 of the Criminal Procedure Code* and the Interpretation Acts 1948 and 1967 that the same person holds both roles of the AG and PP. In essence, the role of the AG is set out in the Federal Constitution, whereas the role of the PP is laid down by the Criminal Procedure Code.

Unlike other Commonwealth countries such as Australia and the UK, there is no separate office for the functions of the PP in Malaysia. Instead, it is fused with the role of the AG, and therefore the AG/PP exercises both the powers of advising the Government and prosecuting alleged criminals.[118] The fusion between the two roles has existed ever since the drafting of the Malaysian Constitution, although the reasoning for doing so seems to be unclear, especially when referring to the Reid Commission Report 1957, which states that the AG/PP 'exercises the more professional functions of giving independent legal advice to the government, representing the government in the courts, and perhaps assuming responsibility for public prosecution'.[119]

This article primarily focuses on existing issues arising from the wide discretionary powers of the AG/PP, as well as the current plans to separate the powers between the AG and the PP. This has been done through doctrinal legal research, utilising its descriptive and prescriptive nature, by analysing existing legal sources which explain the current position of the AG/PP, with references made to key statutes and case laws of Malaysia. It is truly crucial to consider the unique role the AG/PP holds in Malaysia, taking into account its limitations, as it is ideal for the PP to be independent, and free from interference while carrying out the duties of both the AG and the PP.[120]

This article aims to critically examine and analyse the powers, roles, and potential reforms regarding the AG/PP. It also discusses the anticipation of further development concerning the roles of the AG and PP in Malaysia, especially through the expectations of a Bill separating both roles to be tabled by the end of 2024.[121] Through the discussions made in this article, implications supporting the separation of the two differing roles shall be present.

2. The Attorney General's Discretionary Powers

As it stands, the AG/PP enjoys broad discretionary powers as conferred by *Article 145(3) of the Federal Constitution*, especially where the AG leads the instigation of all criminal prosecutions on behalf of the state. By the interpretation of the said article in the case of *Long bin Samat & Ors v Public Prosecutor*[122], the AG/PP retains wide discretion, and so-called 'absolute power', over these proceedings. Furthermore, regulation and review of the AG/PP's powers used to be wholly out of the court's supervisory jurisdiction, notwithstanding the doctrine of judicial review.[123] The PP's unfettered discretionary powers allowed him to make

[118] Saravana Kumar Segaran, *Upholding the Federal Constitution: The Judicial Thoughts of Dato' Seri Hishamudin Yunus* (Rosli Dahlan Saravana Partnership 2022) 39-40.
[119] Aira Nur Ariana Azhari and Lim Wei Jiet, 'Separating the Attorney-General and Public Prosecutor: Enhancing Rule of Law in Malaysia' (2016) 34 IDEAS <https://www.ideas.org.my/publications-item/policy-paper-no-34-separating-the-attorney-general-and-public-prosecutor-enhancing-rule-of-law-in-malaysia/> accessed 31 March 2024.
[120] Martin Carvalho, 'Separation of powers: First steps afoot in splitting Public Prosecutor from AG, says Azalina' *The Star* (Petaling Jaya, 7 December 2022) <https://www.thestar.com.my/news/nation/2022/12/07/separation-of-powers-first-steps-afoot-in-splitting-public-prosecutor-from-ag-says-azalina> accessed 23 August 2024.
[121] Ivan Loh, 'Bill on separation of AG-PP powers could be tabled by year's end' *The Star* (Ipoh, 23 January 2024) <https://www.thestar.com.my/news/nation/2024/01/23/bill-on-separation-of-ag-pp-powers-could-be-tabled-by-year039s-end> accessed 31 March 2024.
[122] [1974] 2 MLJ 152.
[123] *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681.

all decisions regarding criminal prosecutions, and the courts were to refrain from exercising the powers under *Article 145(3) of the Federal Constitution*. This was a shared judicial viewpoint, where complaints against the PP's decision should not be directed to the courts.[124] Even so, the AG/PP's 'unfettered discretion' could be considered a contradiction in terms, especially since 'every legal power must have legal limits, otherwise there is dictatorship'.[125]

It is therefore noteworthy to consider the following development in the case of *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors*[126], where a passage from the Canadian Supreme Court in the case of *Nelles v Ontario*[127] was referenced, allowing the accused to seek civil court reliefs against the PP for maliciously pressing charges – judicial scrutiny of the PP's decisions was allowed.[128] Further development of the powers of the PP occurred in the recent case of *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors*[129] with the decision that the PP's discretionary powers were amenable to judicial review, under 'appropriate, rare and exceptional' circumstances, especially when the litigant does not have any other available method of redress.

The AG/PP, as a result, does not enjoy 'absolute or unfettered discretion' under *Article 145(3) of the Federal Constitution* anymore.[130] It is vital to note that there is a stringent two-step threshold during the leave stage to commence a judicial review application challenging the AG/PP's exercise of discretionary powers, as confirmed by the case of *Public Prosecutor v Ahmad Syameer bin Ahman Taufek*[131]*.* Hence, only in certain circumstances, the discretionary powers of the AG/PP are justiciable, and susceptible to a private right of action.[132] This development is a positive one, as absolute immunity for the PP 'has no place in a progressive democratic society and is contrary to the rule of law'.[133]

Moving on, this fusion of roles of the AG/PP causes a conflict of interest between both roles, notably during the circumstances of members of the Executive or those linked to the Government of the day being criminally investigated.[134] The AG's close working relationship with the Prime Minister and Cabinet members creates a conflict of interest when the PP is required to prosecute a member of the Government. The well-known decision of AG Tan Sri Mohamed Apandi Ali dropping charges against the former Prime Minister, Datuk Seri Najib Tun Razak, was widely criticised by the public. With the fusion of the roles of the AG/PP, it is inevitable that public suspicion of political bias would arise, even when the AG/PP's decisions are unerring. Such criticisms could have been avoided, if the roles of the AG and PP were kept separate.

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[124] *Johnson Tan Han Seng v Public Prosecutor*; *Soon Seng Sia Heng v Public Prosecutor*; *Public Prosecutor v Chea Soon Hoong*; *Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66.
[125] *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1978] 1 MLRA 132.
[126] [2014] 11 MLJ 481.
[127] [1989] SCJ 86.
[128] Tan Jun Yu, 'Judicial Review: Bringing the Rule of Law to Life' [2024] 1 MLJ 131, 137.
[129] [2021] MLJU 943.
[130] ibid.
[131] [2024] 2 MLJ 272.
[132] Tan (n 128) 139.
[133] *Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763.
[134] Karen Cheah Yee Lynn, 'Opening of the Legal Year Speech 2023: Speech by President of the Malaysian Bar' [2023] 1 MLJ 18, 30-31.

Nevertheless, the judiciary still plays an important role of overseeing the PP's execution of powers, as shown in the case of *PP v Mahathir Muhammad*[135], where Justice Hishamudin Yunus resolutely maintained the standpoint of ensuring the PP's office did not act beyond their respective extent of powers.[136] It is of utmost importance that the judiciary balances the PP's powers with the principles of equity and fairness.[137]

It is crucial to understand that the AG's position requires him to uphold the rule of law, being the guardian of public interest. He should only advise the Government on the legal aspects of policies, and not maintain any particular political stance. Similarly, he is also independent of political considerations when making prosecutorial decisions as the PP.[138] Therefore, it is clear that the exercise of powers of the AG/PP must not be affected by politics, while exercising his powers which are of a quasi-judicial nature.

3. The Powers of Appointing and Dismissing the Attorney General

It may be true that the fused role of the AG/PP could be considered a contradiction to the rule of law. Covered by *Article 145(1) of the Federal Constitution*, the Yang di-Pertuan Agong (YDPA), on the advice of the Prime Minister, is in charge of appointing the AG. This causes the issue where the YDPA and Prime Minister have powers to appoint the AG, yet the AG is not answerable to the Prime Minister nor the Parliament. Furthermore, the fact that the AG remains in office at the pleasure of the YDPA shows that it is the Prime Minister who determines the status of the AG's position and retains the power to remove the AG from office at any time.[139] The AG does not possess security of tenure. This is extremely problematic, while taking the fused role of the AG/PP into consideration. It is against public interest for the PP's quasi-judicial role to be controlled by the Government, with concerns regarding political interference of his functions.

Article 145(5) of the Federal Constitution states that the 'AG shall hold office during the pleasure of the YDPA', and Article 40 of the Federal Constitution is to be referred to, determining that the YDPA is to make decisions after having been advised by the Prime Minister or Cabinet members. With the AG lacking security of tenure, he could be removed anytime according to the Prime Minister's wishes. A prime example is the early removal of the former AG/PP, Tan Sri Abdul Gani Patail, due to his alleged health issues. It is interesting to note that the removal occurred when Tan Sri Abdul Gani Patail was a central member of the Special Task Force which investigated the 1MDB scandal, and also the fact that he barely had 69 days left in office before his official retirement.[140] This Special Task Force was disbanded by the succeeding AG, Tan Sri Mohamed Apandi Ali, and replaced by the National

[135] [2013] 2 CLJ 50.
[136] Segaran (n 118) 38-39.
[137] ibid 39.
[138] ibid 39-40.
[139] Azhari and Lim (n 119).
[140] Malaysian Bar, 'Resolution Adopted at the Extraordinary General Meeting of the Malaysian Bar Held at Renaissance Kuala Lumpur Hotel' (12 September 2015) <https://www.malaysianbar.org.my/article/news/agms-and-egms/resolutions/resolution-adopted-at-the-extraordinary-general-meeting-of-the-malaysian-bar-held-at-renaissance-kuala-lumpur-hotel-saturday-12-sept-2015> accessed 31 March 2024.

Revenue Recovery Enforcement Team (NRRET) which took no part in any investigations relating to the 1MDB scandal.[141]

Here lies the question–was Tan Sri Abdul Gani Patail's removal truly constitutional? There were conflicting views regarding this issue. The Malaysian Bar Council president, Steven Thiru, claimed that the removal of Tan Sri Abdul Gani Patail's position as the AG was unconstitutional, with the reason being non-compliance with *Articles 135(2) and 145(5) of the Federal Constitution*.[142] In response, Tan Sri Mohamed Apandi Ali cited *Article 145(6) of the Federal Constitution*, stating that it did not apply to AGs appointed after the date of 16 September 1963.[143] He continued to express that *Article 135 of the Federal Constitution* did not apply to the AG, due to *Part X of the Federal Constitution* being inapplicable to the AG's office.[144]

Either way, the main concerns do not arise from the powers of the Prime Minister to appoint and remove the AG, as the AG's main role is to legally advise the Government. It is the Malaysian position regarding the fused roles of the AG/PP that stand to be paradoxical. The PP should, ideally, be independent of the Prime Minister and the Government of the day, as practised by many other Commonwealth countries. Essentially, there is a conflict with the rule of law by allowing the Prime Minister to retain powers of selecting and dismissing the PP.

4. Separation of Powers Between the Attorney General and the Public Prosecutor

While considering separating the powers between the AG and the PP, it is important that practices of other Commonwealth countries are considered and compared with the current position of the AG/PP in Malaysia.

An ideal practice is carried out by the UK, where the role of the Attorney General and the Director of Public Prosecutions are not held by the same person. In the UK, the Attorney General superintends the Crown Prosecution Office, which is headed by the Director of Public Prosecutions.[145] The Attorney General is the chief legal advisor to the Crown and has a number of independent public interest functions[146] that are generally political in nature, unlike the role of the Director of Public Prosecutions which is generally non-political, following the Code for Crown Prosecutors.[147] Although the Attorney General is accountable to the UK Parliament concerning the Director of Public Prosecutions, and these two roles do work

[141] Attorney General's Chambers Malaysia, 'National Revenue Recovery Enforcement Team (NRRET)' (25 August 2015) <https://agc.gov.my/agcportal/common//uploads/publication/63/KENYATAAN%20MEDIA%20National%20Revenue%20Recovery%20Enforcement%20Team%20NRRET.pdf> accessed 31 March 2024.

[142] Hanis Zainal, 'Bar Council: Removal of Gani Patail as A-G unconstitutional' *The Star* (Petaling Jaya, 28 July 2015) <https://www.thestar.com.my/news/nation/2015/07/28/bar-council-removal-ag-unconstitutional/> accessed 31 March 2024.

[143] Malay Mail, 'Gani Patail's termination according to law, new AG says' *Malay Mail* (Kuala Lumpur, 29 July 2015) <https://www.malaymail.com/news/malaysia/2015/07/29/gani-patails-termination-according-to-law-new-ag-says/942141> accessed 31 March 2024.

[144] Federal Constitution (Malaysia), art 132(4)(b).

[145] Azhari and Lim (n 119); Attorney General's Office, 'Ministerial role: Attorney General' (2024) <https://www.gov.uk/government/ministers/attorney-general> accessed 23 August 2024.

[146] ibid.

[147] Crown Prosecution Service, 'The Code for Crown Prosecutors' (26 October 2018) <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 23 August 2024.

together to ensure the proper function of the UK legal system, there is no conflict of interest since the roles are separate, especially considering the independent nature of the role of the Director of Public Prosecutions and the limited powers of intervening in prosecutions held by the Attorney General.[148]

Australia also carries out a similar system to the UK, although there is a clearer separation between the two roles, with the Office of the Commonwealth Director of Public Prosecutions (CDPP) being an independent prosecution established by the Australian Parliament.[149] The Australian Attorney-General has limited oversight over the Office of the CDPP, serving as a check on abuse without threatening its independence. This, like the UK, also allows for the independent nature of both roles and ensures public confidence. With such considerations of the separation of roles carried out by the UK, Australia and other countries, it may be seen that there are possibilities that the current fusion of the AG/PP role in Malaysia may give rise to certain issues and public concerns relating to independence, accountability and transparency of the roles.

Currently, the Government is working on a Bill on the separation of powers between the AG and the PP. It is presumed that this Bill shall be tabled by the end of 2024.[150] The drafting of this Bill takes into consideration the practices of other countries, mainly the UK, Australia and Canada, which do not fuse the two roles together, and it is expected that the most suitable practices for Malaysia will be implemented and adopted. Amendments to the Federal Constitution and existing laws shall be made after thorough and careful consideration. Nevertheless, the separation of powers between the AG and the PP shall be a lengthy process, through three different phases.[151]

An empirical study on this process of separating the powers of the AG and PP began in March 2024, with the approval of the Cabinet.[152] The Special Task Force for Comparative Studies and the Technical Task Force have been established to speed up this process, consisting of Datuk Seri Azalina Othman Said, who is the Minister in the Prime Minister's Department (Law and Institutional Reform), and many others.[153] This institutional reform is prioritised by the Government, especially when urged by the All-Party Parliamentary Group Malaysia (APPGM) on Integrity, Governance and Anti-Corruption to expedite its commitment towards it.[154]

[148] Azhari and Lim (n 119).
[149] Commonwealth Director of Public Prosecutions, 'About Us' (2024) <https://www.cdpp.gov.au/about-us> accessed 23 August 2024.
[150] Loh (n 121).
[151] The Star, 'Separation of AG-PP powers a lengthy process, says Azalina' *The Star* (Kuala Lumpur, 4 December 2023) <https://www.thestar.com.my/news/nation/2023/12/04/separation-of-ag-pp-powers-a-lengthy-process-says-azalina> accessed 31 March 2024.
[152] Arfa Yunus, Martin Carvalho and Benjamin Lee, 'Empirical study on separation of AG-PP powers has started, says Azalina' *The Star* (Kuala Lumpur, 11 March 2024) <https://www.thestar.com.my/news/nation/2024/03/11/empirical-study-on-separation-of-ag-pp-powers-has-started-says-azalina> accessed 31 March 2024.
[153] ibid; Iylia Marsya Iskandar, 'Task forces set up to expedite separation of powers of AGC and public prosecutor's office' *New Straits Times* (Kuala Lumpur, 12 September 2023) <https://www.nst.com.my/news/nation/2023/09/954467/task-forces-set-expedite-separation-powers-agc-and-public-prosecutors> accessed 31 March 2024.
[154] Junaid Ibrahim, Rahimy Rahim and Allison Lai, 'All-party group urges government to commit to institutional reforms' *The Star* (Kuala Lumpur, 21 March 2024).

Apart from separating the powers between the AG and PP, it is vital to consider other factors, such as whether the AG and PP should enjoy security of tenure. Since the AG's role is to advise and represent the Government, it is in good sense to conclude that the AG's position depends on the Prime Minister, and should not be protected by security of tenure. The AG should be accountable to the Government which receives his legal advice, and this can be reflected when he is a member of the Parliament and the Cabinet. In contrast, the independent PP should be able to enjoy security of tenure, so that he can freely carry out prosecutions without political pressure, fear nor favour. Naturally, the PP also has to remain accountable for his decisions, and this can be done through judicial review.[155]

Such a move is much anticipated, since the division in responsibility between the AG and the PP shall provide for prosecutorial independence and transparency. Institutional independence shall be ensured, and there shall be less risk of political interference in Malaysia's legal process. It is true that the separation of powers between those of the AG and PP would promote and strengthen the rule of law.[156] This development in Malaysia will increase public confidence in the transparency of legal actions, especially in criminal prosecutions involving Government officials. Furthermore, negative perceptions of the Government's interference in judiciary matters may dissipate following the change.[157] The integrity of the institution shall be maintained, boding well even when scrutinised by the public.[158]

However, it is arguable that the mere separation of the roles of the AG and the PP may be insufficient.[159] This is due to how 'inextricably interwoven' the branches of Malaysia's Government are, and such practice is clearly distinct from other countries that follow the separation of powers doctrine in a stricter manner, such as the UK and India. It has been suggested that changes of the Government structure are also required to better uphold the separation of powers doctrine in Malaysia.[160] Nevertheless, these positive developments of allowing judicial review over the PP's decisions and the separation of powers between the AG and PP are truly desirable.[161]

5. Conclusion

Overall, it is instrumental that the powers of the AG/PP be regulated and separated, in order to uphold and strengthen the rule of law. It is generally expected that amendments will be made to the Federal Constitution, the Criminal Procedure Code, as well as the Interpretation

<https://www.thestar.com.my/news/nation/2024/03/21/all-party-group-urges-government-to-commit-to-institutional-reforms> accessed 31 March 2024.

[155] Azhari and Lim (n 119).

[156] Cheah (n 134).

[157] Bernama, 'Separating roles of AG, public prosecutor will increase public confidence in judiciary, say experts' *The Edge Malaysia* (Kuala Lumpur, 1 April 2023) <https://theedgemalaysia.com/node/661732> accessed 31 March 2024.

[158] Cheah (n 134).

[159] Segaran (n 118) 52.

[160] Hamid Sultan Abu Backer, 'Absolute prosecutorial discretion anathema to criminal justice system' *Free Malaysia Today* (14 October 2023) <https://www.freemalaysiatoday.com/category/opinion/2023/10/14/absolute-prosecutorial-discretion-anathema-to-criminal-justice-system/> accessed 31 March 2024.

[161] Segaran (n 118) 55.

Acts 1948 and 1967, since it is 'the strongest path to reform' as claimed by Dr Tricia Yeoh, the CEO of Ideas.[162] In essence, the direction solidified by the case of *Sundra Rajoo* has been long-awaited, positively developing the laws regulating the powers held by the AG/PP. The separation of powers between the AG and the PP is a much-needed reform, and it is expected that such a change will definitely contribute to the constructive growth of Malaysia's legal system.

[162] R Sekaran, 'Talks on separation of AG-Public Prosecutor powers heartening, says think tank' *The Star* (Petaling Jaya, 4 November 2023) <https://www.thestar.com.my/news/nation/2023/11/04/talks-on-separation-of-ag-public-prosecutor-powers-heartening-says-think-tank> accessed 31 March 2024.

Bibliography

Attorney General's Office, 'Ministerial role: Attorney General' (2024) <https://www.gov.uk/government/ministers/attorney-general> accessed 23 August 2024

Attorney General's Chambers Malaysia, 'National Revenue Recovery Enforcement Team (NRRET)' (25 August 2015) <https://agc.gov.my/agcportal/common//uploads/publication/63/KENYATAAN%20MEDIA%20National%20Revenue%20Recovery%20Enforcement%20Team%20NRRET.pdf> accessed 31 March 2024

Azhari ANA and Lim WJ, 'Separating the Attorney-General and Public Prosecutor: Enhancing Rule of Law in Malaysia' (2016) 34 IDEAS <https://www.ideas.org.my/publications-item/policy-paper-no-34-separating-the-attorney-general-and-public-prosecutor-enhancing-rule-of-law-in-malaysia/> accessed 31 March 2024

Backer HSA, 'Absolute prosecutorial discretion anathema to criminal justice system' *Free Malaysia Today* (14 October 2023) <https://www.freemalaysiatoday.com/category/opinion/2023/10/14/absolute-prosecutorial-discretion-anathema-to-criminal-justice-system/> accessed 31 March 2024

Bernama, 'Separating roles of AG, public prosecutor will increase public confidence in judiciary, say experts' *The Edge Malaysia* (Kuala Lumpur, 1 April 2023) <https://theedgemalaysia.com/node/661732> accessed 31 March 2024

Carvalho M, 'Separation of powers: First steps afoot in splitting Public Prosecutor from AG, says Azalina' *The Star* (Petaling Jaya, 7 December 2022) <https://www.thestar.com.my/news/nation/2022/12/07/separation-of-powers-first-steps-afoot-in-splitting-public-prosecutor-from-ag-says-azalina> accessed 23 August 2024

Cheah KYL, 'Opening of the Legal Year Speech 2023: Speech by President of the Malaysian Bar' [2023] 1 MLJ 18

Commonwealth Director of Public Prosecutions, 'About Us' (2024) <https://www.cdpp.gov.au/about-us> accessed 23 August 2024

Criminal Procedure Code (Act 593)

Crown Prosecution Service, 'The Code for Crown Prosecutors' (26 October 2018) <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed 23 August 2024

Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors [2015] 7 MLJ 763

Federal Constitution

Ibrahim J, Rahim R and Lai A, 'All-party group urges government to commit to institutional reforms' *The Star* (Kuala Lumpur, 21 March 2024) <https://www.thestar.com.my/news/nation/2024/03/21/all-party-group-urges-government-to-commit-to-institutional-reforms> accessed 31 March 2024

Interpretation Act 1948

Interpretation Act 1967

Iskandar IM, 'Task forces set up to expedite separation of powers of AGC and public prosecutor's office' *New Straits Times* (Kuala Lumpur, 12 September 2023) <https://www.nst.com.my/news/nation/2023/09/954467/task-forces-set-expedite-separation-powers-agc-and-public-prosecutors> accessed 31 March 2024

Johnson Tan Han Seng v Public Prosecutor; Soon Seng Sia Heng v Public Prosecutor; Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor [1977] 2 MLJ 66

Loh I, 'Bill on separation of AG-PP powers could be tabled by year's end' *The Star* (Ipoh, 23 January 2024) <https://www.thestar.com.my/news/nation/2024/01/23/bill-on-separation-of-ag-pp-powers-could-be-tabled-by-year039s-end> accessed 31 March 2024

Long bin Samat & Ors v Public Prosecutor [1974] 2 MLJ 152

Malay Mail, 'Gani Patail's termination according to law, new AG says' *Malay Mail* (Kuala Lumpur, 29 July 2015) <https://www.malaymail.com/news/malaysia/2015/07/29/gani-patails-termination-according-to-law-new-ag-says/942141> accessed 31 March 2024

Malaysian Bar, 'Resolution Adopted at the Extraordinary General Meeting of the Malaysian Bar Held at Renaissance Kuala Lumpur Hotel' (12 September 2015) <https://www.malaysianbar.org.my/article/news/agms-and-egms/resolutions/resolution-adopted-at-the-extraordinary-general-meeting-of-the-malaysian-bar-held-at-renaissance-kuala-lumpur-hotel-saturday-12-sept-2015> accessed 31 March 2024

Nelles v Ontario [1989] SCJ 86

Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1978] 1 MLRA 132

PP v Mahathir Muhammad [2013] 2 CLJ 50

Public Prosecutor v Ahmad Syameer bin Ahman Taufek [2024] 2 MLJ 272

Repco Holdings Bhd v Public Prosecutor [1997] 3 MLJ 681

Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail & Ors [2014] 11 MLJ 481

Segaran SK, *Upholding the Federal Constitution: The Judicial Thoughts of Dato' Seri Hishamudin Yunus* (Rosli Dahlan Saravana Partnership 2022)

Sekaran R, 'Talks on separation of AG-Public Prosecutor powers heartening, says think tank' *The Star* (Petaling Jaya, 4 November 2023) <https://www.thestar.com.my/news/nation/2023/11/04/talks-on-separation-of-ag-public-prosecutor-powers-heartening-says-think-tank> accessed 31 March 2024

Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] MLJU 943

Tan JY, 'Judicial Review: Bringing the Rule of Law to Life' [2024] 1 MLJ 131

The Star, 'Separation of AG-PP powers a lengthy process, says Azalina' *The Star* (Kuala Lumpur, 4 December 2023) <https://www.thestar.com.my/news/nation/2023/12/04/separation-of-ag-pp-powers-a-lengthy-process-says-azalina> accessed 31 March 2024

Yunus A, Carvalho M and Lee B, 'Empirical study on separation of AG-PP powers has started, says Azalina' *The Star* (Kuala Lumpur, 11 March 2024) <https://www.thestar.com.my/news/nation/2024/03/11/empirical-study-on-separation-of-ag-pp-powers-has-started-says-azalina> accessed 31 March 2024

Zainal H, 'Bar Council: Removal of Gani Patail as A-G unconstitutional' *The Star* (Petaling Jaya, 28 July 2015) <https://www.thestar.com.my/news/nation/2015/07/28/bar-council-removal-ag-unconstitutional/> accessed 31 March 2024

Sentencing Strides: A Critical Examination of the Deficiencies in the Malaysian Criminal Justice System

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Abstract

The current sentencing system for criminals in Malaysia, like any other country's criminal justice system, faces its share of shortcomings that warrant scrutiny. This paper explores the deficiencies within Malaysia's existing sentencing system, delving into key areas where the system falls short in meeting the goals of justice, rehabilitation, and equity.

In this article, the author discusses four prominent deficiencies in Malaysia's criminal justice system, which include:
i. The abolishment of the death penalty is still on the way; there is still a long way to go to completely abolish the death penalty policy and find effective alternative ways to regulatory sanctions.
ii. The discretionary nature of sentencing leads to inconsistency in outcomes. The lack of comprehensive and structured sentencing guidelines contributes to uncertain sentencing decisions that result in a common phenomenon of the disparity of similar offences.
iii. The punishment for recidivism still has an unreasonable and wide range, which results in unfair justice for repeat offenders.
iv. Restorative justice, as an alternative approach that focuses on repairing the harm caused by criminal behaviour through inclusive and cooperative processes, has not been formally implemented into the criminal justice system.

This paper underscores the need to address these deficiencies to establish a more just, consistent, and effective sentencing system that aligns with international best practices and the evolving landscape of criminal justice. Potential solutions will be further discussed below, ranging from the development of standardised guidelines to promote equitable sentencing to the increased utilisation of alternatives to incarceration and the infusion of restorative justice principles.

Ultimately, by addressing these shortcomings, Malaysia can enhance its criminal justice system, aiming to strike a balance between punishment, rehabilitation, and societal reintegration for offenders.

Keywords: Malaysian sentencing system, criminal justice, human rights, deficiencies, improvements.

1. Introduction

As is well known, the criminal justice system stands as a linchpin in upholding law and order within a society, guiding the response to criminal transgressions and shaping the consequences for those who breach the law. In Malaysia, a robust and fair sentencing system is integral to ensure that justice prevails and societal harmony is maintained. However, recent years have revealed critical deficiencies in the current Malaysian criminal sentencing system, presenting multifaceted challenges that necessitate careful examination and strategic reform. This study embarks on an exploration of these deficiencies, pinpointing four primary issues that underscore the urgent need for reform.

First and foremost, the abolishment of the death penalty is an ongoing effort, reflecting a transformative shift towards more humane and effective punitive measures. Yet, this transformation necessitates exhaustive deliberation and the careful formulation of viable alternatives to capital punishment. Secondly, the discretionary nature of sentencing has culminated in an unsettling inconsistency in outcomes. The absence of comprehensive and structured sentencing guidelines has contributed to a sentencing landscape marked by uncertainty, resulting in pervasive disparities in penalties for similar offences. This inconsistency undermines the foundational principles of justice and equity within the legal system.

A third critical issue revolves around the punishment for recidivism, where an unreasonable and broad range of penalties perpetuates a cycle of unfair justice for repeat offenders. Addressing this disparity is imperative to cultivate a rehabilitative approach that ensures penalties align with the nature and severity of the crime while facilitating the reintegration of individuals back into society. Last but not least, the concept of restorative justice, with its potential for transformative impact, has yet to be formally integrated into Malaysia's criminal justice system. This gap represents a missed opportunity to engage in a more holistic and community-centred approach to justice, one that encourages accountability, rehabilitation, and reparation.

By delving into these pressing issues, this study endeavours to shed light on the existing inadequacies within Malaysia's criminal sentencing system. Through meticulous examination and analysis, the author aims to propose meaningful reforms that foster a more equitable, consistent, and effective approach to criminal sentencing in Malaysia, aligning it with evolving societal values and international best practices.

Ultimately, this endeavour aspires to contribute to a criminal justice system that is not only just but also adaptive and progressive, ensuring a safer and more harmonious society for all.

2. The Halfway to Abolishing the Death Penalty

The death penalty, also known as capital punishment, is a legal process in which a person is sentenced to death by the state as a punishment for committing a serious crime.[163] This ultimate penalty typically involves the execution of the convicted individual. When searching the history of cases in Malaysia, the death penalty has been used for a variety of offences, including murder, treason, espionage, and other crimes deemed to be of a grave nature.

Even though the death penalty has existed since the Malaysian Penal Code was launched, there are more and more arguments appealing to abolish it, as it is inhumane and contrary to the values of civil society.[164] Thus, whether it should be abolished remains a question worth pondering. And the core of the question of the abolition of the death penalty is the identification of the most basic human right of the people - the right to living.

As of today, 108 countries, more than half of the world's nations, have abolished the death penalty for all crimes, and 144 countries have ceased the use of the death penalty in law or in practice.[165] Malaysia is one of the countries that had voted in favour of two UN General Assembly resolutions calling on countries to impose a moratorium on executions. Although executions were suspended, death sentences were still imposed.

As time passes, the Bill on the abolition of the mandatory death penalty is expected to be introduced in the parliamentary session in February 2023.[166] Azalina, the minister in the Prime Minister's Department of Law and Institutional Reform, stated that the Attorney-General's Office had studied the implementation policy of imposing the death penalty in lieu of punishment, covering 11 offences under the Penal Code and the 1971 Arms Increase Order, as well as 23 offences for which the death penalty was imposed by judges under the Penal Code, the Weapons Act 1960, the Arms Increase Order 1971 and the Township Act 1961. The implementation of alternative sentences instead of mandatory death sentences is expected to have a direct impact on the 1,327 prisoners who have already been sentenced to death by judges, and alternative sentences can be carried out for others who have not yet been charged.

There is no doubt that this Bill for abolishing the mandatory death penalty is seen as a huge step towards a more fair and humane criminal justice system. Meanwhile, in the author's opinion, there is still a long way to go, as although mandatory death sentencing has been

[163] Robert Bohm, *Deathquest: An introduction to the theory and practice of capital punishment in the United States* (Routledge 2016).
[164] Sangmin Bae, 'Is the death penalty an Asian value?' (2008) 39(1) Asian Affairs 47.
[165] Amnesty International, 'Death penalty 2021: Facts and figures' (*Amnesty International*, 24 May 2022) <https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures/> accessed 15 February 2023.
[166] Malay Mail, 'Azalina: Bill to abolish mandatory death penalty slated for tabling in Feb 2023' *Malay Mail* (Kuala Lumpur, 21 December 2022) <https://www.malaymail.com/news/malaysia/2022/12/21/azalina-bill-to-abolish-mandatory-death-penalty-slated-for-tabling-in-feb-2023/46545> accessed 15 February 2023.

abolished, the judges still have the power to sentence offenders to death by using their discretion, and this discretion will lead to several considerations:

i. Judicial discretion and bias: Discretionary sentencing can lead to variability in outcomes for similar cases, as different judges may impose different sentences for the same crime based on their personal perspectives and interpretations of the law. While judicial discretion allows judges to consider individual circumstances and factors when determining sentences, it can also be influenced by personal biases, societal attitudes, and other subjective elements.[167] This raises concerns about the potential for inconsistent and unfair sentencing, where factors such as race, socioeconomic status, or the quality of legal representation may play a significant role. It is well known that Malaysia is a common law country, and the sentencing decision follows former cases. Thus, even with discretionary power, there is a risk of arbitrariness in the application of the death penalty. Similar cases might receive vastly different sentences due to the subjective interpretations of judges, leading to a lack of predictability and consistency in sentencing outcomes.

ii. Wrongful convictions: We may acknowledge that worldwide, there are a host of wrongful convictions that lead to the death of innocent people.[168] Thus, discretionary sentencing can still exacerbate the risk of wrongful convictions and executions. If judges have broad powers to impose the death penalty, innocent individuals might be subjected to this irreversible punishment due to errors, inadequate legal representation, or unreliable evidence.

iii. Lack of alternative sentencing options: The abolition of the mandatory death penalty should be coupled with the availability of alternative sentencing options that are proportionate to the crimes committed.[169] Meanwhile, currently, the Bill for abolishing the death penalty does not attach alternative sentencing options or a monitoring system. This might include life imprisonment or other forms of punishment that allow for the possibility of rehabilitation and reintegration.

Thus, while abolishing the mandatory death penalty is a positive step towards a more just criminal justice system, it is crucial to address the potential pitfalls of discretionary sentencing. To ensure fairness and consistency, there must be clear guidelines and criteria for judges to follow when deciding whether to impose the death penalty. These guidelines should aim to minimise subjective interpretations and biases. Striking a balance between judicial discretion and safeguards against bias, arbitrariness, and wrongful convictions is essential to ensure that sentencing decisions are consistent, transparent, and respectful of human rights.

Furthermore, robust appeal and review mechanisms are essential to ensure that discretionary

[167] Siegfried L. Sporer and Jane Goodman-Delahunty, 'Disparities in sentencing decisions' in Margit E. Oswald, Steffen Bieneck and Jörg Hupfeld-Heinemann (eds), *Social Psychology of Punishment of Crime* (John Wiley & Sons Ltd 2009).

[168] D. Michael Risinger, 'Innocents convicted: An empirical justified factual wrongful conviction rate' (2007) 97 J. Crim. l. & Criminology 761.

[169] Hugo Adam Bedau, *The Death Penalty in America* (OUP 1998).

death sentences are subject to thorough scrutiny, as it helps prevent miscarriages of justice and provides a safeguard against arbitrary sentencing.

3. Disparity in the Sentencing of Similar Offences

As the author discussed in the first deficiency of the current sentencing system, judicial discretion and bias may influence the sentencing for the death penalty. At the same time, it will also result in disparities in sentencing decisions, not only for the sentencing of death but also for all punishment of offences.[170]

Disparity refers to a difference in treatment that may result in an unfair outcome. Meanwhile, disparity in sentencing means the cases in the trial are disposed of differently. Under the criminal justice system, criminals commit similar offences but receive different sentences. Furthermore, under *Article 8(1) of the Federal Constitution (FC)*, everyone is equal under the law. But, if there is a disparity in sentencing, it might cause a miscarriage of justice and violate the FC. This is a jeopardy to the criminal justice system because the criminals do not receive fair and equal treatment. As we know, "theft crimes" are the most rampant offence in Malaysia, through statistics from the Royal Malaysia Police, which shows that there are 41,479 reported cases under the offence of theft in 2021. Thus, we may analyse the phenomenon of disparity in sentencing in a chart to see more clearly. [171]

Cases[172]	*Ngu Shu Khan v PP [2019] 1 LNS 1723*	*Azra Ahmad Rosli v PP [2019] 1 LNS 548*
Name of Offender	Ngu Shu Khan	Azra Ahmad Rosli
Offence Committed	Theft of one handbag containing one power bank, and cash of RM200.	Theft of five iron drain covers, the estimated loss is approximately RM300.
Law	*Section 379 of the Penal Code*	*Section 379 of the Penal Code*
Age bracket	Adult	Adult
Background	First-time offender	First-time offender
Sentencing result	15 months' imprisonment	10 months' imprisonment

Through the above chart, we can clearly see that the basic background of the two cases is quite similar. Both are first-time offenders, they were convicted in the same year, the value of the stolen items is similar, they are both adults and they face the same charge under *Section 379 of the Penal Code*. Meanwhile, according to the first case law's judgement, the

[170] Yichen Pan and Wong Jun Hao, 'Comprehensive Research on the ways to Minimize the Disparity of Sentences in Similar Offences in the Malaysian Criminal Justice System' (2023) 1(4) West Science Law and Human Rights 287.

[171] *Ngu Shu Khan v PP* [2019] 1 LNS 1723.

[172] *Azra Ahmad Rosli v PP* [2019] 1 LNS 548.

court takes the rampancy of theft cases and public interest into consideration and decides to give a heavier sentence, which results in some disparity in the sentencing result.

Apart from that, there is another case law that has a hugely different result if we compare it to the previous case law: the High Court in Malaysia revised the 13-month jail sentence of a man over shoplifting to only one month.[173] Thus, we can clearly see the variance of aggravated punishment in the repeat offenders system in the Penal Code over time. Before the 20th century, the only legislative provision was *Section 75 of the Penal Code*, which only regulated the offence punishable under Chapter XII (Offences Relating To Coin And Government Stamps) or Chapter XVII (Offences Against Property). After that, legislators introduced *Section 75A* to regulate other serious offences and protect a wider range of social interests. Admittedly, both of these efficient provisions have some effect on protecting the whole society because of the severe punishment for repeated offenders.

All three cases above involve theft, specifically shoplifting, which are considered similar offences. Meanwhile, the differences in their sentencing results are evident. It is of great significance for us to analyse and explore effective and efficient methods, such as importing an AI judgement model to assist judges in handling each case in order to solve that phenomenon[174], and help achieve fairness and equality in criminal justice.

4. Unreasonable Range of the Aggravated Punishment for Recidivism

Repeated offenders are also named “recidivists”. Aggravated punishment for recidivism in order to protect the whole society and keeping safety is one of the most severe sentencing systems in criminal law. Scientifically, using criminal punishment methods to fight against the phenomenon of recidivism is not only crucial for punishing criminals, reducing the rate of recidivism and enhancing the effectiveness of prevention, but also for respecting both victims’ and criminals’ human rights.

Under Malaysian criminal law, the categories of recidivism can be divided into “common recidivism” and “special recidivism”. The former refers to any offenders who had committed a certain offence before, and after being sentenced, continued committed offences. The latter refers to specific offenders qualified under *Sections 75 and 75A of the Penal Code*. *Section 75* pertains to the punishment of persons convicted, after a previous conviction of an offence punishable with three years imprisonment, which is launched in the first original version of the Penal Code. *Section 75A* addresses the punishment of mandatory imprisonment for persons convicted of multiple serious offences, which is launched in the second version of the Penal Code.

[173] Hayati Dzulkifli, ‘Sentencing disparity: Judge reduces shoplifter’s sentence to one month’ *Daily Express* (Kota Kinabalu, 31 December 2019) <https://www.dailyexpress.com.my/news/145680/sentencing-disparity-judge-reduces-shoplifter-s-sentence-to-one-month> accessed 6 March 2024.

[174] Yichen Pan, ‘International Human Rights: Challenges and Solutions for Intelligent Judgment in the Ai Era’ [2023] 1 LNS(A) lvii The Malaysian Current Law Journal.

Thus, we can clearly see the variance of aggravated punishment in the repeat offenders system in the Penal Code over time. Before the 20th century, the only legislative provision was *Section 75 of the Penal Code*, which only regulated the offence punishable under Chapter XII (Offences Relating To Coin And Government Stamps) or Chapter XVII (Offences Against Property). Subsequently, legislators introduced *Section 75A* to regulate other serious offences and protect a wider range of social interests. Admittedly, both of these efficient provisions have some effect on protecting the whole society because of the severe punishment for repeated offenders.

Meanwhile, the rationality and effectiveness of the punishment need to undergo further and deeper study as follows:

First and foremost, the deficiency of "common recidivism". The principle of aggravated punishment for recidivism is a universal principle even in the whole world. Meanwhile, its application still needs some restrictions in order to protect human rights. To be more specific, no requirements restricting common recidivism may lead to excessive punishment for offenders[175], and the specific requirements may include: the offender's age, mental condition and the period of time between the offender committing the two offences. If the offender is only a child or youngster instead of an adult, their mind may not be mature enough to recognise their behaviour. Therefore if a youngster who commits offences twice are regarded as recidivists and their punishment is aggravated, it may not lead to a fair sentencing result, because they should be protected under the Child Act 2001, which defines children as anyone under the age of 18, provides for the protection and welfare of children, and sets out the rights and responsibilities of various parties, including parents, guardians, and the government, towards them.

Secondly, if the offender's mental condition is unusual, and they are even diagnosed with neuropathy, punishment becomes meaningless and violates human rights, since they cannot even control their behaviour. Furthermore, what is worth mentioning is the factor of the period of time elapsed between the offender's commission of the two offences. If there is a very long gap between the two offences, then it is unreasonable to impose an aggravating sentence.

Thirdly, the punishment for "special recidivism" is provided in *Sections 75 and 75A of the Penal Code*. *Section 75* only regulates crimes for the kind of property crimes, which is the punishment of persons convicted, after a previous conviction of an offence punishable with three years' imprisonment. The offender has to commit the behaviour which is forbidden by *Chapter XII or Chapter XVII of the Penal Code*, including offences relating to coin and government stamps, theft, extortion, robbery and gang-robbery, criminal misappropriation of property, criminal breach of trust, receiving stolen property, cheating, fraudulent deeds and dispositions of property, mischief, criminal trespass. Meanwhile, as a special and specific

[175] Michael Tonry, 'Legal and Ethical Issues in the Prediction of Recidivism' (2014) 26(3) Federal Sentencing Reporter 167.

legislation fighting recidivism, the protection of social interests only on the property, which is obviously not enough to regulate and punish the special recidivism.

Furthermore, as *Section 75A* defines "repeated offenders" depending on the definition of "serious offence". Under this provision, offenders who committed at least two counts of serious offences and were punished with at least two years of imprisonment for each of those convictions, shall be defined as "repeated offenders."[176] While, at the same time, *Section 52B of the Penal Code* defines "serious offence" as those who will be punished with imprisonment for at least ten years. This definition has evoked much controversy.

In the case of *PP v Asri Che Din*[177], the core issue is whether an offence under *Section 6(1) of the CESOWA*[178], which provides a sentence of imprisonment for a term of not less than two years and not more than ten years upon conviction, is considered as a serious offence. This means that judges have discretion on whether to sentence him to imprisonment for 10 years or below this term under this section. Meanwhile, on the other side, *Section 172D(4) of the Criminal Procedure Code* states that a "serious offence" is one where the maximum term of imprisonment that can be imposed is not less than ten years.

Thus, as the judge said in that case, if the court can impose a term of imprisonment of ten years or more, the offence is termed a serious offence. Meanwhile, in the author's opinion, the definition of "serious offence" in *Section 75A* should not merely depend on *Section 52B of the Penal Code* or *Section 172D(4) of the Criminal Procedure Code*, because these provisions define "serious offence" solely based on the result of punishment. The seriousness of the crime is not equal to serious punishment[179] due to the influence of other factors, for instance, the criminal's age, and subjective factors, which may lead to mitigating or aggravating factors for the final sentencing result.

Last but not least, it is well known that the subject of crime includes not only natural persons but also legal persons[180] (for example: units, companies, organisations, etc.). Meanwhile, it is still unclear whether in Malaysia, the legal person is suitable for aggravated punishment as a repeated offender as well. This loophole will lead to the inability to fundamentally solve the problem of crime committed by unit, and cannot effectively reduce the unit crime rate at the same time.

Thus, the above deficiencies of punishing repeated offenders should be solved more reasonably by combining the factors of human rights and the current criminal justice system.

[176] Thomas J. Miceli, *The Paradox of Punishment: Reflections on the Economics of Criminal Justice* (Palgrave Macmillan 2019) 121-48.
[177] *Public Prosecutor v Asri Che Din* [2018] MLRHU 973.
[178] Corrosive and Explosive Substances and Offensive Weapons Act 1958.
[179] Alfred Blumstein and Jacqueline Cohen, 'Theory of the Stability of Punishment' (1973) 64(2) J. Crim. L. & Criminology 198.
[180] Yoram Dinstein, 'International Criminal Law' (1985) 20(2-3) Israel Law Review 206.

5. The Conflict Between Retributive Justice and Restorative Justice

Restorative justice is a concept in the criminal justice system that seeks to repair the harm caused by criminal behaviour by bringing victims and offenders together to identify and address the harm caused and find a way to make amends.[181] Thus, restorative justice aims to restore relationships and repair harm rather than solely punishing the offender.[182] In the criminal justice system, restorative justice is implemented through various programs and initiatives that aim to provide a more comprehensive response to criminal behaviour. This can include restorative justice circles, victim-offender mediations, and other forms of community-based interventions. Furthermore, compared with the traditional criminal justice system which is based on retributive justice - a concept in the criminal justice system that holds individuals responsible for their actions by imposing a punishment that is proportional to the crime committed - restorative justice provides an alternative to traditional forms of punishment.

Until now, no official restorative justice has been introduced in the Malaysian criminal justice system. Nevertheless, with the development of technology for repairing the environment, some countries have implemented restorative justice in environmental justice cases. These include the US, Canada, Australia, New Zealand and England and Wales (common law countries), as well as China and Japan (civil law countries).

To sum up, there are several advantages to restorative justice compared to the traditional criminal justice system:

i. Encourages rehabilitation: Instead of encouraging the "an eye for an eye" approach, restorative justice aims to help offenders take responsibility for their illegal actions and make amends for the victims, which can lead to rehabilitation that focuses on the idea that criminal behaviour can be changed through appropriate treatment and rehabilitation programs. This theory is based on the belief that many individuals engage in criminal behaviour due to underlying social, psychological, or economic factors. These factors can be addressed and treated to reduce future criminal behaviour and recidivism as well.

ii. Addresses harm and conflict in a gentler way: Restorative justice focuses on repairing the harm caused by criminal behaviour. It provides a more complete response to the victim[183], who is the central to the whole process of restorative justice and can ultimately lead to a sense of healing.

iii. Reduces reoffending: Research shows that restorative justice programs have reduced

[181] Harleen Kaur and Ayushka Sharma, 'The Principle of Restorative Justice Towards the Strengthening of Crime Prevention as Viewed from the Pragmatic Gandhian Lens' in Raman Mittal and Kshitij Kumar Singh (eds), *Relevance of Duties in the Contemporary World: With Special Emphasis on Gandhian Thought* (Springer 2022).
[182] Jeremy Olson, Rebecca S. Sarver and Brad Killian, 'Seeing the Harm to Happiness: Integrating Satisfaction with Life into Restorative Practices' (2023) 34(1) Criminal Justice Policy Review 88.
[183] Liam J. Leonard, 'Can Restorative Justice Provide a Better Outcome for Participants and Society than the Courts?' (2022) 11(1) Laws 14.

reoffending rates compared to traditional forms of punishment because they help offenders realise their wrong behaviours at the root.[184] Thus, restorative justice programs are often more cost-effective than traditional forms of punishment, such as imprisonment or whipping.

Furthermore, as formerly stated, restorative justice in Malaysia's criminal justice system can be used in at least two aspects: both children who come into conflict with the law and environmental crimes.

5.1. Discussions on the Child Justice System

Restorative justice for children typically involves bringing together the child, the victim, and other relevant stakeholders, such as family members, community leaders, and service providers, to work together to repair the harm caused by the child's behaviour. This process is often facilitated by trained restorative justice practitioners, and the goal is to help the child understand the impact of their actions, take responsibility for their behaviour and make amends to the victim and the community. The core of this theory is based on the Child's Act 2001, which protects children who are under 18, avoiding severe punishment on them because their minds may not be mature and they do not realise their wrongful behaviour.

Nevertheless, the application of restorative justice to cases involving children is not unlimited; there are certain circumstances that may not be suitable for its implementation[185], which may include:

i. The nature of the crime and the degree of social harm caused by the child is very severe.
The nature of the crime, its impact on the victim, and the level of harm caused are crucial considerations for implementing restorative justice. Although certain cases informally apply restorative justice for children who come into conflict with the law, this is because the harm caused and the nature of the crimes are not that severe.

Thus, severe crimes that have caused significant physical, emotional, or psychological harm to the victim may pose challenges to the restorative justice process, as they are in conflict with the purpose of restorative justice and may not play an effective role in rehabilitation.

ii. The child who infringes the law whose attitude is impenitent.
In the process of restorative justice for child offenders, the first and foremost factor is to consider whether both the offender and the victim would like to take part in the restorative justice system. If either party is not willing to participate, restorative justice may not be a viable option. Therefore, it is important to assess the willingness of both parties before initiating the process.

[184] Kayla Welch, 'Restorative Justice: An Alternative Dispute Resolution Approach to Criminal Behavior' (2022) 1 J. Disp. Resol. 143.
[185] Yichen Pan, 'Comparative Analyse of the Exceptions in Resorting to Restorative Justice When Children Come into Conflict with the Law' (2023) 8(8) Malaysian Journal of Social Sciences and Humanities 1.

Furthermore, the offender must take responsibility for their actions and show willingness to make amends for the harm caused. This requires the offender to be willing to engage in a process of introspection and self-reflection and listen to the victim and the community's perspective on the harm caused.

iii. Young recidivism.

Young recidivism refers to instances where a juvenile offender reoffends after having previously been involved in the criminal justice system. The ultimate goal of restorative justice is to restore relationships, promote healing, and prevent future harm,[186] by involving all parties in the process of repairing the harm caused by the crime. Restorative justice aims to create a sense of closure for the victim, foster empathy and understanding between the victim and offender, and promote positive change in the offender's behaviour. The approach also seeks to strengthen the community by addressing the root causes of crime and create a sense of accountability and responsibility among all members.

Meanwhile, if the offender reoffends, it means the root cause of the crime still exists, suggesting that restorative justice does not express the effectiveness of its role. Thus, while restorative justice holds promise for addressing conflicts involving juvenile offenders, the above exceptions have to be carefully considered. Balancing the principles of restorative justice with the complexities of different cases, the rights of victims, and community safety requires a thoughtful and nuanced approach, and restorative justice should be viewed as one tool among many in a comprehensive approach to juvenile justice.

5.2. Discussions on Environmental Offences

As for the suitability of restorative justice for environmental crimes, we can examine the development of environment-related laws in Malaysia. Although the relevant environmental protection law has been amended countless times and the multiple fines under certain crimes have even increased to ten times, there continue to be many cases of environmental crimes each year.

The essence is that although the law has been more strictly amended, and the scope of the crackdown for those cases has been expanded, there has been no substantial innovation in the way of assuming responsibility. The consequence of this is ignoring the persistence of the particular consequences of environmental crime and also failing to take active measures to call for criminals to actively modify the environment.

Meanwhile, in developed countries which include New Zealand, Australia, Canada and the US, restorative justice is adapted into their domestic environmental crime system, appealing for the repair of the damage by the offenders. In this way, the offender may receive a less severe punishment and experience self-remorse, which solves the problem at the root and significantly prevents them from re-offending. Therefore, with the continuous development

[186] Ibid.

of social systems, more and more countries have begun to adopt the criminal concept of restorative justice - which is a new way of assuming responsibility for environmental damage caused to perpetrators - instead of traditional revenge justice methods.

Thus, it can be seen that restorative justice theory not only provides a practical reference for environmental justice to restore the damaged ecological environment, but also respects the legitimate rights and interests of offenders through adapting ideological enlightenment and institutional incentives to guide offenders to participate in damage restoration and environmental protection practices.

6. Conclusion

The exploration of the deficiencies within the current sentencing system for criminals in Malaysia sheds light on crucial areas that warrant attention and reform. The analysis has highlighted a range of challenges that undermine the system's effectiveness in achieving its core objectives of justice, rehabilitation, and equity. These deficiencies encompass both systemic and practical aspects, each contributing to a complex landscape that impacts offenders, victims and society as a whole.

The discretionary nature of sentencing has led to inconsistent outcomes, raising concerns about fairness and uniformity in the application of punishment. The absence of comprehensive and structured sentencing guidelines further compounds this issue, leaving judges with limited guidance in determining appropriate penalties for various offences. The overreliance on mandatory minimum sentences, while aiming to deter crime, can result in disproportionate punishments that fail to consider individual circumstances and the potential for rehabilitation.

Moreover, the limited emphasis on rehabilitation as a primary goal of sentencing overlooks the opportunity to address the underlying causes of criminal behaviour and promote meaningful reintegration into society. The absence of robust data and research impedes evidence-based policy-making and hinders efforts to assess the system's effectiveness over time.

Furthermore, the lack of integration of restorative justice principles and the scarcity of resources for offender reintegration underscore the need for a more holistic approach that prioritises victim satisfaction, community involvement and support for individuals seeking to break the cycle of crime.

Addressing these deficiencies requires a multifaceted approach that encompasses legal reforms, resource allocation, improved data collection as well as a shift towards more balanced and rehabilitative sentencing practices. Developing comprehensive and clear sentencing guidelines, promoting alternatives to incarceration, and integrating restorative justice principles can contribute to a more equitable, consistent, and effective sentencing system.

Moving forward, it is imperative for policymakers, legal practitioners, and stakeholders within the criminal justice system to collaborate in addressing these deficiencies. By undertaking these efforts, Malaysia has the potential to cultivate a sentencing system that aligns with international best practices, respects human rights and embodies the principles of justice, rehabilitation and social reintegration for the betterment of both individuals and society at large.

Bibliography

Amnesty International, 'Death penalty 2021: Facts and figures' (*Amnesty International*, 24 May 2022) <https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures/> accessed 15 February 2023

Azra Ahmad Rosli v PP [2019] 1 LNS 548

Bae S, 'Is the death penalty an Asian value?' (2008) 39(1) Asian Affairs 47

Bedau H A, *The Death Penalty in America* (OUP 1998)

Blumstein A and Cohen J, 'Theory of the Stability of Punishment' (1973) 64(2) J. Crim. L. & Criminology 198

Bohm R, *Deathquest: An introduction to the theory and practice of capital punishment in the United States* (Routledge 2016)

Corrosive and Explosive Substances and Offensive Weapons Act 1958

Dinstein Y, 'International Criminal Law' (1985) 20(2-3) Israel Law Review 206

Dzulkifli H, 'Sentencing disparity: Judge reduces shoplifter's sentence to one month' *Daily Express* (Kota Kinabalu, 31 December 2019) <https://www.dailyexpress.com.my/news/145680/sentencing-disparity-judge-reduces-shoplifter-s-sentence-to-one-month> accessed 6 March 2024

Kaur H and Sharma A, 'The Principle of Restorative Justice Towards the Strengthening of Crime Prevention as Viewed from the Pragmatic Gandhian Lens' in Raman Mittal and Kshitij Kumar Singh (eds), *Relevance of Duties in the Contemporary World: With Special Emphasis on Gandhian Thought* (Springer 2022)

Leonard LJ, 'Can Restorative Justice Provide a Better Outcome for Participants and Society than the Courts?' (2022) 11(1) Laws 14

Malay Mail, 'Azalina: Bill to abolish mandatory death penalty slated for tabling in Feb 2023' *Malay Mail* (Kuala Lumpur, 21 December 2022) <https://www.malaymail.com/news/malaysia/2022/12/21/azalina-bill-to-abolish-mandatory-death-penalty-slated-for-tabling-in-feb-2023/46545> accessed 15 February 2023

Miceli T J, *The Paradox of Punishment: Reflections on the Economics of Criminal Justice* (Palgrave Macmillan 2019)

Ngu Shu Khan v PP [2019] 1 LNS 1723

Olson J, Sarver RS and Killian B, 'Seeing the Harm to Happiness: Integrating Satisfaction with Life into Restorative Practices' (2023) 34(1) Criminal Justice Policy Review 88

Pan Y, 'Comparative Analyse of the Exceptions in Resorting to Restorative Justice When Children Come into Conflict with the Law' (2023) 8(8) Malaysian Journal of Social Sciences and Humanities 1

—— 'International Human Rights: Challenges and Solutions for Intelligent Judgment in the Ai Era' [2023] 1 LNS(A) lvii The Malaysian Current Law Journal

—— and Wong JH, 'Comprehensive Research on the ways to Minimize the Disparity of Sentences in Similar Offences in the Malaysian Criminal Justice System' (2023) 1(4) West Science Law and Human Rights 287

Public Prosecutor v Asri Che Din [2018] MLRHU 973

Risinger DM, 'Innocents convicted: An empirical justified factual wrongful conviction rate' (2007) 97 J. Crim. l. & Criminology 761

Sporer SL and Goodman-Delahunty J, 'Disparities in sentencing decisions' in Margit E. Oswald, Steffen Bieneck and Jörg Hupfeld-Heinemann (eds), *Social Psychology of Punishment of Crime* (John Wiley & Sons Ltd 2009)

Tonry M, 'Legal and Ethical Issues in the Prediction of Recidivism' (2014) 26(3) Federal Sentencing Reporter 167

Welch K, 'Restorative Justice: An Alternative Dispute Resolution Approach to Criminal Behavior' (2022) 1 J. Disp. Resol. 143

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