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ClassPoint as an Engagement Tool in Borderless Learning for Law Students

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Abstract
Legal education in universities is one of the challenging courses for students, who encounter difficulty in grasping the law. With the introduction of technology-enabled learning, it has brought significant changes to teaching and learning activities since it was introduced in classroom in larger scale back in the 1980s.[1] The objective of the adoption of digital learning in the legal education setting is to achieve (forming and developing) certain competencies such as cognitive and meta-cognitive skills, knowledge, understanding and attitudes, as well as the development of social skills and growth in ethical values. Nevertheless, over the past years, there have been a considerable number of online educational tools such as Kahoot! Socrative, Quizzes and Nearpod that have been developed to supplement legal education in the classroom. The purpose of this study is to understand and analyse the effectiveness of ClassPoint features in Microsoft PowerPoint as an engagement tool for borderless learning. The research showed that ClassPoint features can foster and support law students learning process in a borderless setting. Pertaining to the use of ClassPoint, since it is a new tool in Microsoft PowerPoint developed in 2015, there is absence of literature on its effectiveness as an engaging tool in borderless settings particularly on law students. This research used an online survey (accessed via Google Form link) on 58 law students at a university in Malaysia. The sample size comprised Year 2 students, who has experienced the use of ClassPoint in virtual class. This research found that the application of ClassPoint improves their analytical thinking skills, creative and critical thinking skills. The students also felt that ClassPoint improves their abilities to be innovative and it also enables them to use their imagination. The research revealed that ClassPoint develops their evaluation and reasoning skills. Overall, the students enjoyed the use of ClassPoint as it does increase their interactions within the scope of the borderless learning environment.

Keywords: Blended learning environment, Online learning, ClassPoint, Efficient and effective teaching methods, Social interaction, Higher education, Borderless environment.

1. Introduction

[1] Han, I., Byun, S.Y. and Shin, W.S., 'A comparative study of factors associated with technology-enabled learning between the United States and South Korea' (2018) 66(5) Educational Technology Research and Development 1303-1320.

The educator may have prepared dynamic approaches of teaching and delivery of a particular module, however, if the relationship of the teacher and learner is disrupted due to many subdued reasons then the learning process becomes ineffective. The digital transformation of education systems at all levels has allowed incorporation of a new teaching–learning ecosystem called e-learning. The term e-learning was invented in the mid-1990s[2] after the popularization of the Internet and it essentially means the utilization of methods, structures, and ICT tools to create learning experience that can be formulated and created in borderless settings.[3] E-learning has been widely used in education and has been effective in achieving students' learning outcomes. However, with the outbreak of COVID-19 pandemic, there were concerns raised about whether the use of e-learning can foster and support student learning process in a virtual platform in times of lockdown. The travesty caused by COVID-19 has resulted in educators and learners to be a part of a biggest leap in education, caused the closure of physical classrooms all over the world and forced 1.5 billion students and 63 million educators to suddenly modify their face-to-face academic practices with the support of e-learning to purely virtual, remote learning.[4] The adversity erupted by the COVID-19 pandemic nevertheless shed light on the strengths and weaknesses of education systems facing the challenges of the utilization of e-learning in a virtual setting.

Bates[5] states that COVID-19 pandemic has demonstrated the current inequalities in the system and the need for universal and low-cost access to the Internet for education. This failure cannot be attributed to e-learning itself, but to the fact that the potential of this teaching method has been underestimated and excluded from the digital education projects of educational organizations. The future of e-learning must be built on principles of openness and interaction. For example, online educational tools provide learners with more knowledge to learn through designed educational tasks. There are various types of online educational tools such as Kahoot, Socrative, Nearpod and others which can be used in an e-learning environment. It is designed to teach students about certain subjects and concepts, which support learners in developing skills through online educational tools. The advancement in the technology creates a wide array of online educational tools which include the use of games in learning.[6] Hence the aim of this research is to analyse and understand the effectiveness of a newly developed educational tool, namely ClassPoint, a plug-in feature in Microsoft PowerPoint and whether it serves as an engagement tool for borderless learning.

2. ClassPoint

One of the emerging e-learning tools which can be used in educational platforms is ClassPoint. It was developed in 2015 by Inknoe, a Singapore-born education technology company that develops interactive products. It is an add-in or a plug-in for Microsoft PowerPoint enabling

[2] J. Cross, *An informal history of eLearning* (Emerald 2004) 1-8; W. Horton, *E-Learning by Design* (Pfeiffer, San Francisco 2006).
[3] J. Dron, J. and T. Anderson, *The Future of E-Learning*. In The SAGE Handbook of E-Learning Research (SAGE Publications Ltd 2019).
[4] T. Bates, Crashing into online learning: A report from five continents - And some conclusions | Tony Bates. Available online: <https://www.tonybates.ca/2020/04/26/crashing-into-online-learning-a-report-from-fivecontinents-and-some-conclusions/> accessed 8 May 2020.
[5] Ibid.
[6] M.R.M. Veeramanickam and N. Radhika, 'A Smart E-Learning System for Social Networking' (2014) 4(3) International Journal of Electrical and Computer Engineering 447-455.

educators to use their available lecture slides and to utilize ClassPoint features in the same lecture slides deck and solutions to digitally transform teaching and learning.[7] The features of ClassPoint include virtual pen, highlighter, laser pointer, the variation of drawing boards such as whiteboard, blackboard and chalkboard, multiple choice questions, short answers, polling, image upload, slide drawing, word cloud, pick a name and leader board. Educators may choose to embed multiple choice questions on the lecture slides to assess students' level of comprehension during lectures and as a recap strategy before embarking on a new topic.

Firstly, to use ClassPoint, lecturers need to install ClassPoint from its website https://www.classpoint.io/ onto their computer. At the point of this research, ClassPoint is compatible with Windows 7/8/10 & Office 2013/2016/2019/365. Currently, ClassPoint is not compatible with Macbooks, IOS or Android devices. Upon completion of the installation, lecturers can open the Microsoft PowerPoint in the usual way and will be able to view the ClassPoint ribbon on the taskbar. Once it has been successfully downloaded and the ClassPoint ribbon is visible on the taskbar, lecturers will then need to click on the 'sign in' button on the ClassPoint ribbon to create their own account. After signing up, lecturers will have access to all the features of ClassPoint.

To start using ClassPoint features, lecturers can either create a new slide deck or utilize the existing lecture slides. Lecturers can set questions in the multiple choice format or utilize word cloud into the Microsoft PowerPoint slides. Once the activities on the slides have been completed, lecturers can project the lecture slides and subsequently click on the ClassPoint icon at the bottom left corner of the screen to receive the automatically-generated class code. Students will be able to access the same lecture slides on their computer or mobile phones after entering the class code. Students can then use their mobile phone to scan the automatically-generated QR code or to enter the class code manually. The students' names will be projected on the lecture slides upon successful entry into the class. They can participate in the ClassPoint activities set by the lecturer on the lecture slides without the hassle of waiting for the lecturers to open a new window and search for the web-based interactive tool before the students can participate in the activities. Students will be able to engage in active learning especially during the word cloud or multiple-choice questions. For the latter activity, the top 6 fastest students who had entered the correct answers will be revealed after each question. Recently, ClassPoint has added a new feature namely the leader board and music features to make learning more enlightening and interesting. With the leader board feature, the overall 'winners' for the particular lesson will be displayed at the end of lecture slides. Lecturers who adopt ClassPoint as part of their teaching and learning will be able to export and save students' responses for future reference.

3. Literature Review

In the past, most of the teaching and learning for legal education took place physically on campus with minimum adoption of virtual or borderless classrooms in higher learning institutions. The norm was that legal educators will adopt the conventional lecturer-centred approach where the educators will impart knowledge to the students in a lecture setting. This is the common method as it focuses on the learning process of achieving a dynamical

[7] ClassPoint, 'Who We Are: About Inknoe' (*ClassPoint*, 2020) <https://www.classpoint.io/about/> accessed 8 May 2020.

combination of cognitive and meta-cognitive skills, attitudes, knowledge, and understanding, as well as the development of social skills and growth in ethical values in the physical classroom. Every legal education system and higher education study should target enabling its educators to achieve an optimal balance in the development of students' capabilities. Three main problems were observed namely, (i) lack of motivation to learn difficult subjects, (ii) too much emphasis on lecture-centred learning, and (iii) lack of self-efficacy learning. These are the challenges in facilitating law students in self-regulated learning as they are heavily reliant on delivery of the lecture in the classroom, lecture notes and textbooks. Hence this calls for a new academic environment to enhance legal educators' capabilities, competences, resources, and their educational delivery in a transformative learning way.[8]

The blended learning environment integrates the advantages of e-learning methods with some advantageous aspects of the traditional method such as face-to-face interactions. It brings traditional physical classes with elements of virtual education together.[9] The use of technology to support learning has been shown to be highly regarded and accepted by learners.[10] Although the use of online educational tools is not a new method, this calls for a new academic environment in which the teachers' capabilities (competences, resources and their applications surrounding reality) are focused on the learner in a transformative borderless platform.[11] In the process of teaching and learning, both the educators and students should have a clear direction on the objectives and learning outcomes. It is a common phenomenon that learning outcomes are expected in each module including learning in a virtual classroom.[12] There is evidence from previous research in the literature that many students expect to receive their grades and feedback online, using technology.[13] According to Garrison and Hanuka,[14] online learners can be connected to a community of learners anytime and anywhere without being bound by time, space or situation. Consequently, the increasingly prevalent practice of the convergence of text-based asynchronous, internet-based learning with face-to-face approaches also known as blended learning is having a volatile impact on traditional campus-based institutions of higher education. Blended learning is described by Thorne[15] as " … a way of meeting the challenges of tailoring learning and development to the needs of individuals by integrating the innovative and technological advances offered by online learning with the interaction and participation offered in the best of traditional learning." To this effect, the integration of synchronous and asynchronous learning can be both simple and complex as there is considerable complexity in its implementation with the challenge of virtually limitless design possibilities and applicability to so many contexts. The main feature of blended learning that makes it

[8] D. Herlo, 'Virtual Learning Environments Tools Used in Higher Education', Conference Proceedings (2012).
[9] A. Finn, and M. Bucceri, 'A case study approach to blended learning' (Los Angeles: Centra Software 2004).
[10] H. Parkin and L. Thorpe, 'Exploring student experiences of e-learning: A Phenomenographic Approach', paper presented at Bera Annual Conference, 2-5 September 2009, University of Manchester, Manchester, UK.
[11] Ibid 8.
[12] L. Norton, 'Assessing student learning' in, H. Fry., S.Ketteridge. & S. Marshall, *A Handbook for Teaching and Learning in Higher Education*. (Enhancing Academic Practice, 3rd ed., Abingdon: Routledge 2009) Chapter 10, 132-149.
[13] S. Bloxham and P. Boyd, Developing Effective Assessment in Higher Education (Berkshire: Open University Press 2007).
[14] D.R. Garrison and H. Kanuka, 'Blended Learning: Uncovering Its Transformative Potential in Higher Education' (2004) 7 The Internet and Higher Education 95-105.
[15] K. Thorne, Blended Learning: How to Integrate Online and Traditional Learning (London, UK: Kogan Page Limited 2003).

particularly effective is that it facilitates a community of enquiry that includes limitless access to the internet, open communication, critical debates, free and open dialogues, negotiation, and agreement.

Today, E-learning is still brazened with many undetermined issues to be elucidated and investigated. There are many factors potentially influencing E-learning effectiveness, such as media characteristics, learning context, technology, and learner characteristics. While our review of literature has demonstrated that E-learning can be at least as effective as conventional classroom learning under certain situations, we are not able to claim that E-learning can replace traditional classroom learning. Not every student will find E-learning suitable for his or her learning style. Some students feel bored or intimidated in front of the computer. Other important issues in E-learning must also be taken into consideration for example, issues of trust, authorization, confidentiality, and individual responsibility must be resolved.[16] Ownership of intellectual property should be properly compensated. Security on the Internet is a growing challenge primarily due to the open access by the public to this universal network. In addition, since multimedia materials are heavily used in E-learning systems, a high-bandwidth network is a basic requirement for efficient content access. Nevertheless, E-learning is a promising alternative to traditional classroom learning, which is especially beneficial to remote and lifelong learning and training. In many cases, E-learning can significantly complement classroom learning, hence, it will keep growing as an indispensable part of academic and professional education. Efforts should continue to explore how to create more appealing and effective online learning environments, thus, one way to achieve this is to integrate appropriate pedagogical methods, to enhance system interactivity and personalization, and to better engage learners.[17]

The technology enhanced classroom aims to promote this to meet specific learning requirements. While definitions vary from one institution to another, blended learning is defined in this article essentially as a combination of face-to-face and web-based environment. Interchangeably the term online learning has been used in the context of borderless learning and is defined as " … learning experiences in synchronous or asynchronous environments using different devices (e.g., mobile phones, laptops, etc.) with internet access. In these environments, students can be anywhere (independent) to learn and interact with instructors and other students … ".[18] The synchronous learning environment is structured in the sense that students attend live lectures, there are real-time interactions between educators and learners, and there is a possibility of instant feedback, whereas asynchronous learning environments are not properly structured. In such a learning environment, learning content is not available in the form of live lectures or classes; it is available at different learning systems and forums. Instant feedback and immediate response are not possible under such an environment.[19] Synchronous learning can provide a lot of

[16] S. Goyal, 'E-Learning: Future of Education' (2012) 6(2) Journal of Education and Learning 239-242.
[17] D. Zhang, J.L. Zhao, L. Zhou and J.F. Nunamaker Jr., 'Can e-learning replace classroom learning?' (2004) 47(5) Communications of the ACM 75-79.
[18] V. Singh and A. Thurman, 'How Many Ways Can We Define Online Learning? A Systematic Literature Review of Definitions of Online Learning (1988-2018)' (2019) 33 American Journal of Distance Education 289-306.
[19] Robert S. Littlefield, 'Embracing Service Learning Opportunities: Student Perceptions of Service Learning as an Aid to Effectively Learn Course Material' (2018) 18(1) Journal of the Scholarship of Teaching and Learning 25-42.

opportunities for social interaction.[20] The Corona Virus has made institutions go from offline mode to online mode of pedagogy. This catastrophe will show us the lucrative side of online teaching and learning. With the help of online teaching modes, we can sermonize a vast group of students at any time and in any part of the world. All institutions must scramble different options of online pedagogical approaches and try to use technology more aptly. Many universities around the world have fully digitalized their operations understanding the dire need of this current situation. Online learning is emerging as a lustrum amongst this chaos.[21] Amidst this deadly virus spread such online platforms are needed where:[22]

(i) video conferencing with at least 40 to 50 students is possible,
(ii) discussions with students can be done to keep classes organic,
(iii) internet connections are good,
(iv) lectures are accessible through mobile phones and not just laptops,
(v) possibility of watching already recorded lectures, and
(vi) instant feedback from students can be achieved and assignments can be taken.

However, it is important to construct equilibrium between e-learning and face to face environments, in view of the advantages of both methods, during the process of designing a blended learning environment. Today's students have fundamentally different ways of approaching knowledge acquisition, problem solving, and operating in the workforce.[23] Therefore, blended and online learning offers a mechanism for meeting their needs within the value system that they embrace; henceforth, this study will address the gap on their learning preference. To make the technology-based e-learning and blended learning effective and interesting, gamifying e-learning like the ClassPoint can be adopted. The gamification of e-learning is an instructional method that incorporates educational content or learning principles into multiple choice questions, short answer questions, discussion blackboards, polling etc with the goal of engaging learners. Applications of game-based learning draw upon the constructivist theory of education.[24] The coronavirus outbreak is the chance to make out the best from the current situation. We can learn a lot in this challenging situation. Technology provides innovative and resilient solutions at times of crisis to combat disruption and helps people to communicate and even work virtually without the need of face-to-face interaction. This leads to many system changes in organizations as they adopt new technology for interacting and working.[25] Therefore, educators are required to choose the best tool and implement it to impart education to their students. A step-by-step guide can be prepared by academic institutions to guide teachers and students on how to access and use various e-

[20] J. McBrien and P. Jones, 'Virtual spaces: Employing a synchronous online classroom to facilitate student engagement in online learning' (2009) 10 International Review of Research in Open and Distance Learning 1-17.
[21] S. Dhawan, 'Online Learning: A Panacea in the Time of COVID-19 Crisis' (2020) 49 Journal of Educational Technology Systems 5-22.
[22] G. Basilaia and D. Kvavadze, 'Transition to Online Education in Schools during a SARS-CoV-2 Coronavirus (COVID-19) Pandemic in Georgia' (2020) Pedagogical Research 5.
[23] Feza Orhan, 'Redesigning a Course for Blended Learning Environment' (2008) 9(1) Journal of Distance Education 54-66.
[24] Karl Maton, 'Cumulative and segmented learning: exploring the role of curriculum structures in knowledge-building' (2009) 30(1) British Journal of Sociology of Education 43-57.
[25] G. Mark and B. Semaan (2008). Resilience in collaboration: Technology as a resource for new patterns of action. In Proceedings of the 2008 ACM Conference on Computer Supported Cooperative Work, <http://www.ics.uci.edu/~gmark/cscw2008.pdf> accessed 8 May 2020.

learning tools and how to cover major curriculum content via these technologies thereby reducing the digital illiteracy.

Further, the evolutionary trends in the application and rise of the use of mobile devices must be considered the most important shift in business. The question must be asked - why not with online education? With mobile devices now mainstream, educators need to leverage student desires to use their personal devices for school. Using mobile awareness, schools can connect with online students and create a more personal relationship. This relationship can provide the student with opportunities to download dynamic learning from digital displays. These digital displays include mobile phones, notebooks, and tablets. Indeed, there is rapid expansion of wireless synchronization between media devices with Smartphones, notebooks, and tablets which should lead to a much more enhanced digital experience.

The use of mobile devices allows for teachers and learners to interact anytime from anywhere with seamless technology and borderless networks. The task of extrapolating and predicting the future of mobile learning is a justifiably difficult task but predicting trends can be accomplished by close analysis of the products and services used currently. Lastly, there are developments on the extension of current trends in mobile computing with possible application to the mobile learning environment. These technologies represent immediate changes already being witnessed in the mobile environment, how they will relate to mobile learning within the next five years, and possible implications. Hence, the ClassPoint tool serves as the state-of-the-art of contemporary and e-learning among the rising generation. The augmented feature of this facility enables the facilitator and the learner to grasp the content learnt in a simple and smooth manner.

4. Methodology

This study is a pilot study, using a self-completed online questionnaire, which took approximately 5 minutes to complete, with a total of 60 respondents from Taylor's Law School at Taylor's University. The data was collected from a cohort of students who have experienced learning law using ClassPoint taught by the co-author. The pilot study used a sample size of one cohort, and the demographic information is limited to Year 2 students studying LAW61504 Land Law I module. The design of the questionnaire was based on the literature, specifically previous studies on the use of online engagement tools to teach university students[26] and it used a Google Form survey shared via WhatsApp to encourage students to participate and complete the questionnaire via their mobile devices.

The pilot study confirmed the clarity and appropriateness of the questions, and the respondents' interpretation of the reasoning behind the type of questions used, the order of the questions and the scale used.[27] To measure the internal consistency of the online survey,

[26] D.R. Sanchez, M. Langer, and R. Kaur, 'Gamification in the classroom: Examining the impact of gamified quizzes on student learning' (2020) 144 Computers & Education 103666 <doi:10.1016/j.compedu.2019.103666> accessed 8 May 2020; Z. Zainuddin, M. Shujahat, H. Haruna, and S.K.W. Chu, 'The role of gamified e-quizzes on student learning and engagement: An interactive gamification solution for a formative assessment system' (2019) Computers & Education 103729 <doi:10.1016/j.compedu.2019.103729> accessed 8 May 2020; and N. Dabbagh, and A. Kitsantas, 'Using web-based pedagogical tools as scaffolds for self-regulated learning' (2005) 33(5/6) Instructional Science 513.

[27] W.G. Zikmund, *Business research methods* (London: Thomson/South-Western 2003).

Cronbach's alpha coefficient was used. The test revealed a figure of 0.981, which represented a good scale and valid test model.[28]

This study incorporated a mixture of 5-point Likert scale questions, with the response categories ranging from strongly agree to strongly disagree and open-ended qualitative questions. The questions were derived from literature with the Likert scale questions allowing for 'an expression of intensity of feeling' and the simplicity and the homogeneity of the Likert scale have made it feasible to construct the variables[29] and focused on students' perceptions of their engagement level in virtual class using ClassPoint. There were 24 questions in total, comprising 22 closed (Likert) questions and 2 open-ended questions. With regard to the open-ended questions, the purpose was to obtain a detailed description[30] from respondents in terms of " … what they, uniquely have to offer by way of information, experienced, feelings, images, attitudes, ideas and so on … "[31] i.e. the examples of ClassPoint that they have used in a virtual class.

The quantitative results were analysed using a series of Pearson correlation coefficient to understand the relationship between the effectiveness of ClassPoint and students' prior knowledge, motivation and interests, multiple-regression to test for the significance of the variables, gender and stage of academic development and a Mann-Whitney U test to analyse the responses of the students.

5. Sampling Procedures and Human Ethics Approval

Participants were selected systematically as they were students of the co-author studying LAW61504 Land Law I, which is one of the core modules under the Bachelor of Laws programme. The respondents are full-time students studying law virtually in times of COVID-19 pandemic.

In adhering to Taylor's University Human Ethics Policy Doc. Ref.: TU-ACA-POLY-HE Effective Date: 24 April 2014, Clause 4.3 Research and Teaching Activities stipulates list of activities which do not require ethical approval such as:

(i) research conducted by Taylor's University, the students' association or other departments for the purpose of evaluating educational practices or courses with no collection of identifiable private information,
(ii) exploratory research where the exact research aims have not yet been formulated and mainly in a form of preliminary interaction or discussion,
(iii) research in which the investigator is the subject of their own research, and where not physically or emotionally hazardous procedure is involved,

[28] N.K. Malhotra and D.F. Birks, *Marketing Research: An applied approach*. (2nd European ed. Essex: Pearson Education Limited 2006).
[29] G.A. Churchill Jr., *Marketing Research: Methodological foundations* (5th ed, Hinsdale: The Dryden Press 1991); C. León-Mantero, J.C. Casas-Rosal, C. Pedrosa-Jesús, and A. Maz-Machado, 'Measuring attitude towards mathematics using Likert scale surveys: The weighted average' (2020) 15(10) PLoS ONE 1–15 <https://doi-org.ezproxy.taylors.edu.my/10.1371/journal.pone.0239626> accessed 8 May 2020; R. Likert, *A Technique for the Measurement of Attitudes* (New York: Columbia University Press; 1932).
[30] Y. McGivern, *The practice of market and social research* (London: Prentice Hall 2003), p. 34.
[31] R. Kent, *Marketing Research: Measurement, Method and Application* (London: International Thomson Business Press 1999), p. 75.

(iv) some interviews which merely seek non-sensitive information, and interviews with public figures or professional persons in the areas of their duties or competence,
(v) research involving existing publicly available documents or information (public archival records),
(vi) case studies of business organisations and institutions unless the project involves gathering personal information of a sensitive nature about or from individuals,
(vii) study or data collection based on data abstraction from existing medical or laboratory record with no interaction with the human subject, and
(viii) study based entirely on existing biological specimen; with no interaction with the human subject concerned; with no collection of identifiable private information and with no further processing of and/or testing on the specimen.

Given that the current research conducted by the authors falls under the first category, ethics approval is not required as it complies with the institutional policy.

6. Analysis and Results

In terms of the respondents' demographic, 45 students (75%) were female, and 15 students (25%) were male and were studying LAW61504 Land Law I, a 2nd year module. The result of this survey warrants further investigation in assessing the effectiveness of ClassPoint amongst the law students in the borderless classroom. The future research will employ mixed method study on the effectiveness of ClassPoint and students' level of engagements from across all three years of students studying law at Taylor's Law School.

To investigate the respondents' level of enjoyment and the role of ClassPoint as an engagement tool in borderless learning, a series of questions were asked on students' prior knowledge of ClassPoint and their level of enjoyment in using ClassPoint in virtual class. The results displayed in Table 1 revealed a mixture of low levels of prior knowledge of ClassPoint and high levels of agreement to the statement on "I enjoy using ClassPoint in virtual class to learn about the law."

Most of the respondents have not previously heard or had knowledge of ClassPoint. Their level of agreement to statements was high as compared to 6.7% of the respondents who have previously heard of ClassPoint. The reasons for the high level of agreement could be because they have experienced other online learning tools prior to the use of ClassPoint and therefore was not aware of the existence of ClassPoint although it was launched in 2015. Despite the lack of knowledge on ClassPoint, a majority of the respondents (70%) enjoyed using ClassPoint in their virtual classes to learn about the law after having experienced the features of ClassPoint~~s~~. The positive responses can be found in the qualitative component of this study where respondents were asked to comment on the examples of ClassPoint that they have used in virtual class. The following were some of the responses:

"Quiz, Qn A which will show a bar chart of the common answer. The name selection."
"Online quizzes, interactive question-and-answer sessions."
"Whiteboard feature, live questions, randomised calling."
"Quizzes, writing out opinions on certain topics, powerpoint."
"Quiz during lectures and whiteboard."
One response highlighted: *"class point very lag."*

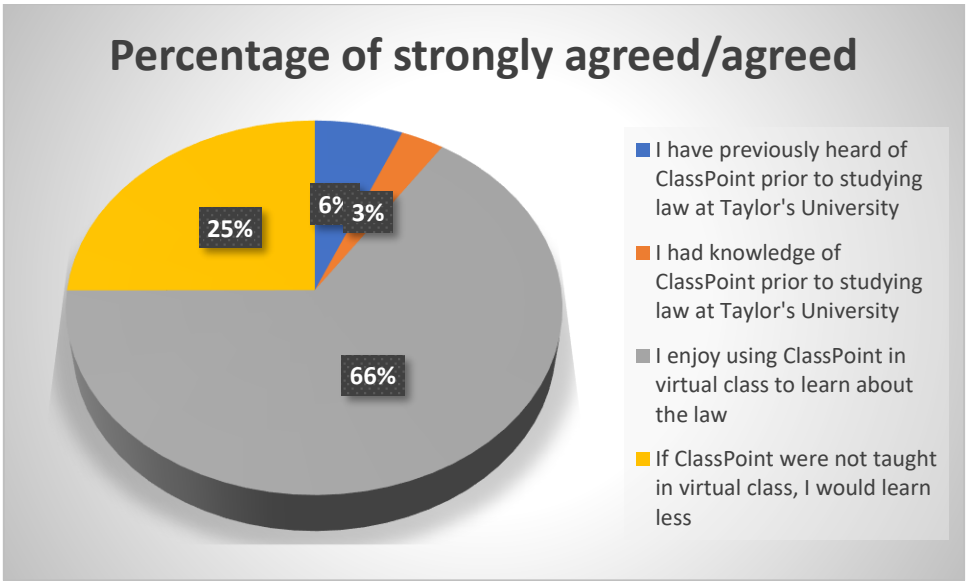

Table 1: Statistics relating to student prior knowledge and level of enjoyment in using ClassPoint in virtual class.

These results indicate that having experienced a new online tool is enjoyable in the eyes of the learner and that it is important for academics to introduce new, fresh, and up-to-date online learning tools to the students.[32] The literature also confirms the relationship between technology and student interaction. [33] The qualitative statements also provided some explanation as to why students enjoy the use of ClassPoint, highlighting the common feature of ClassPoint that is the online quiz and randomised name-calling. However, this study also revealed interesting insight on internet connectivity - that the use of ClassPoint can be lagging. It is pointed out that the use of ClassPoint requires internet connectivity and that since students were home-bound during the borderless learning, students' internet speed and bandwidth varies from one to another, depending on the location and internet data subscription of the individual student. Hence, lecturers need to manage students~~'~~ expectations when it comes to adopting a new online teaching and learning tool. Students will be expecting smooth and seamless use of the tool, but lecturers must manage student expectations by indicating at the onset that the new online teaching and learning tool will require the use of the internet. Lecturers must also provide an alternative method for students who have unstable internet connections so that they can also experience interactive sessions in virtual classes. In the next section, the study will investigate students' perception of their analytical thinking skills with the use of ClassPoint.

6.1 Improvement of Analytical Thinking Skills

From the research investigation on the respondents' perceptions of learning space in improving their analytical thinking and analysis skills, it can be seen from Table 2 that there is a similar trend in terms of moderate levels of neutrality.

[32] Y. Beldarrain, Y., 'Distance education trends: Integrating new technologies to foster student interaction and collaboration' (2006) 27(2) Distance Education 139-153.
[33] N. Dabbagh and B. Bannan-Ritland, *Online learning: Concepts, Strategies and Application* (1st edition, Upper Saddle River, NJ: Pearson Education 2005).

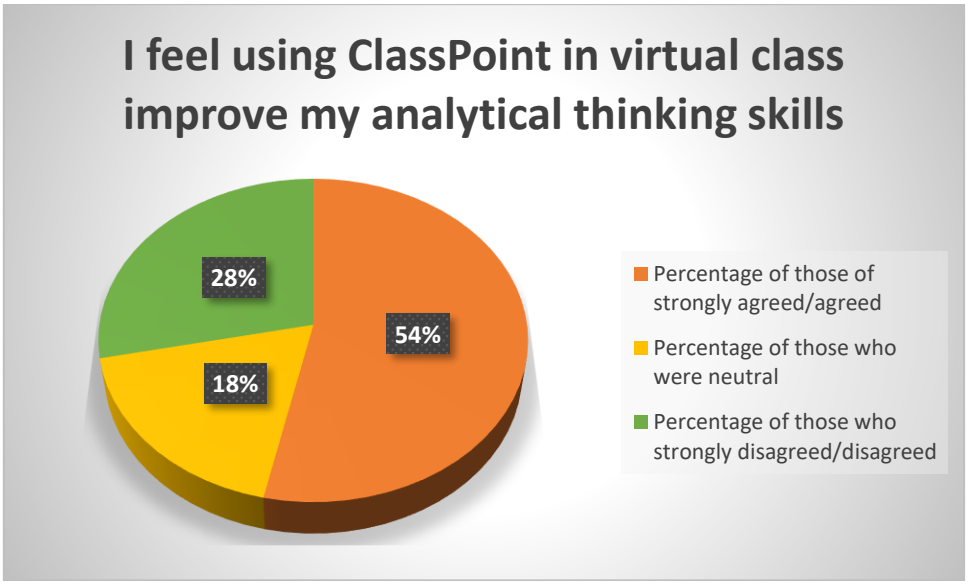

Table 2: Statistics relating to students' perception on the use of ClassPoint in virtual class in relation to the analytical thinking, analysis and evaluation skills.

A majority of the respondents either strongly agreed or agreed that using ClassPoint in virtual class improved their analytical thinking skills. These results are not surprising given the novelty of using ClassPoint for the first time in learning law. Students perhaps felt that the techniques ClassPoint used did test their analytical thinking skills, therefore the respondents were able to fully benefit from the effectiveness of ClassPoint. It has been argued in the literature that it is essential to develop instructional strategies for complex subjects which can critically assess students' analytical thinking skills using an online teaching and learning tool.[34] If the respondents did not feel that the teaching and learning tool improved their analytical thinking skills, it was likely that the way the tool was used did not assess analytical thinking. However, many of the respondents did feel that ClassPoint developed their analysis skills, and therefore felt that they have received the appropriate level of development in the analysis skill aspect. Given that students will be graduating into a digitalized working world where most of the knowledge and application of the knowledge will be performed partially on a virtual platform,[35] this study indicates that ClassPoint is equipped to develop students with the analytical thinking and analysis skills.

Regarding the respondents' perceptions on the improvement and development of their critical thinking and reasoning skills, it can be observed from Table 3 that there is a positive trend. Most of the respondents strongly agreed or agreed that ClassPoint can improve their critical thinking and a similar moderate high level of trend agreed that the use of ClassPoint in virtual class can develop their reasoning skills. Nevertheless, there was a high level of agreement with ClassPoint developing students' evaluation skills. It is argued in the literature that students completing multiple choice questions will improve learning which will lead to

[34] M.A.A. Ismail and J.A.M. Mohammad, 'Kahoot: a promising tool for formative assessment in medical education' (2017) 9(2) Education in Medicine Journal 19-26. <https://doi.org/10.21315/eimj2017.9.2.2> accessed 8 May 2020.

[35] J.J. Turner, P.S. Amirnuddin and H. Singh, 'University Legal Learning Spaces Effectiveness in Developing Employability Skills of Future Law Graduates' (2019) 16(1) Malaysian Journal of Learning and Instruction 49-79.

better performance.[36] Many of the students did share other online engagement activities that they have experienced apart from multiple choice questions such as: 'whiteboard feature', 'live questions', 'randomised calling', 'writing out opinions on certain topics, powerpoint' that perhaps contributed to the perceptions of ClassPoint improving students' evaluation, critical thinking, and reasoning aspects. It can also be argued that given that students are able to provide their answers to the questions posed via ClassPoint anonymously, this enables them to develop their evaluation skills.

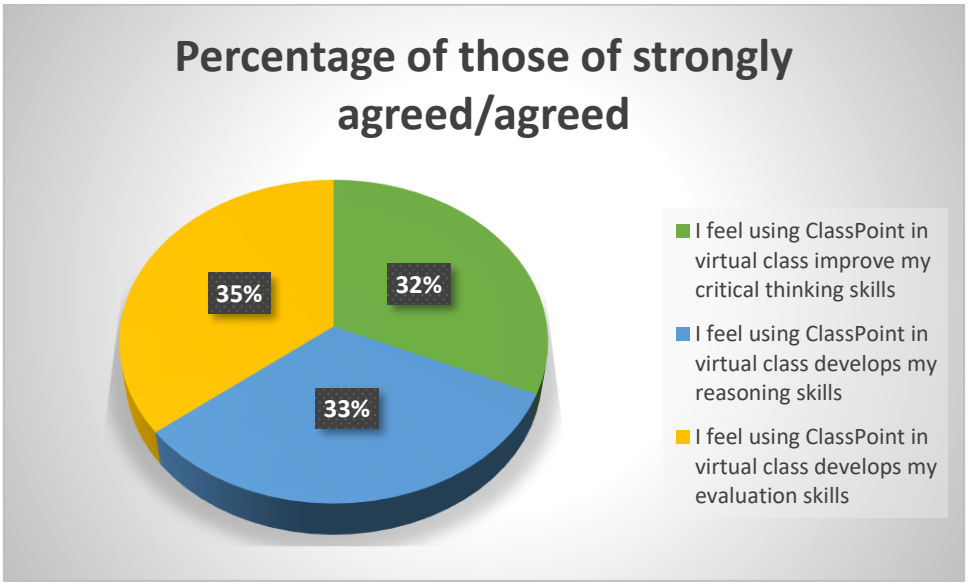

Table 3: Statistics on the use of ClassPoint in virtual class to improve critical thinking, reasoning, and evaluation skills.

6.2 Improvement of Creative Skills

Regarding the ability of ClassPoint to improve students' creative skills, it can be observed that there are the same moderate levels of neutrality. Despite the majority of respondents who are positive about the improvement of their creative skills, there are lower levels of agreement when compared to the questions relating to the use of imagination (see Table 4). With the exceptions of the results on ClassPoint to improve respondents' abilities to be innovative, there were low levels of agreement to statements relating to the effectiveness of ClassPoint in improving creative skills and imagination in virtual classes. Surprisingly, despite the new plug-in features of ClassPoint in Microsoft PowerPoint, the 'newness' element does not necessarily increase students' creativity and imagination significantly. The figure can be

[36] D.R. Sanchez, M. Langer, and R. Kaur, 'Gamification in the classroom: Examining the impact of gamified quizzes on student learning' (2020) 144 Computers & Education 103666 <doi:10.1016/j.compedu.2019.103666> accessed 8 May 2020; N. Kling, D. McCorkle, C. Miller, and J. Reardon, 'The impact of testing frequency on student performance in a marketing course' (2005) 81(2) The Journal of Education for Business 67-72; M.A. McDaniel, J.L. Anderson, M.H. Derbish and N. Morrisette, 'Testing the testing effect in the classroom' (2007) 19(4-5) European Journal of Cognitive Psychology 494-513; M.A. McDaniel, H.L. Roediger and K.B. McDermott, 'Generalizing test-enhanced learning from the laboratory to the classroom' (2007) 14(2) Psychonomic Bulletin & Review 200-206; M.A. McDaniel, P.K. Agarwal, B.J. Huelser, K.B. McDermott and H.L. Roediger, III, 'Test-enhanced learning in a middle school science classroom: The effects of quiz frequency and placement' (2011) 103(2) Journal of Educational Psychology 399-414.

expected to be higher if the respondents are assessed using ClassPoint where they would probably appreciate the features even better knowing that they are being examined in a new manner.

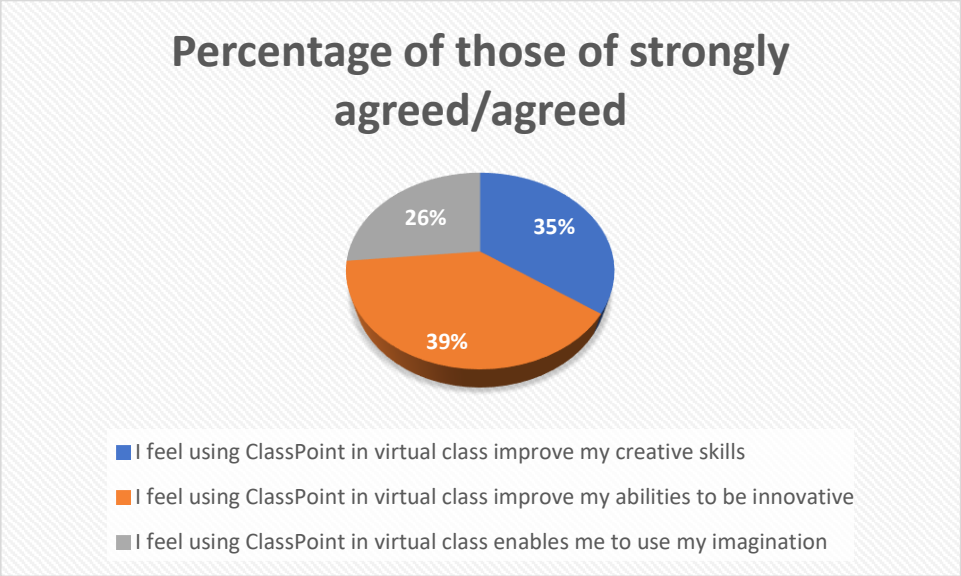

Table 4: Statistics relating to perceptions of ClassPoint to improve creative skills.

Nevertheless, these findings require further investigation in a future study with a larger number of respondents to get a better understanding of the effectiveness of ClassPoint as an engagement tool for law students in a borderless environment. A result which requires further explanation is the low level of agreement relating to ClassPoint in enabling imagination. This is particularly interesting as the respondents will be graduating in a digital world in which the World Economic Forum has highlighted that the future workforce is seeking for a dynamic composite of graduates who are imaginative and creative, which complements their technical skills.[37] Given the fact that working professionals are becoming more varied, there is a need for graduates with multiple points of view, different skills, and diverse perspectives.[38]

6.3 Development of Students' Willingness to Learn using ClassPoint

This research also investigates the effectiveness of ClassPoint in developing students' willingness to learn. It is rather surprising that there is a significantly high level of agreement on this aspect. Compared to the other aspects of the survey, students were on the same level of agreement when it comes to the use of ClassPoint in developing their willingness to learn in virtual classes (see Table 5).

[37] S.S. Parekh, (2020). 'Conquer the skills gap - and win the future - by rethinking talent' (World Economic Forum, 2020) <https://www.weforum.org/agenda/2020/01/reskilling-skills-gap-talent-hiring-diversity/> accessed 8 May 2020.
[38] Ibid.

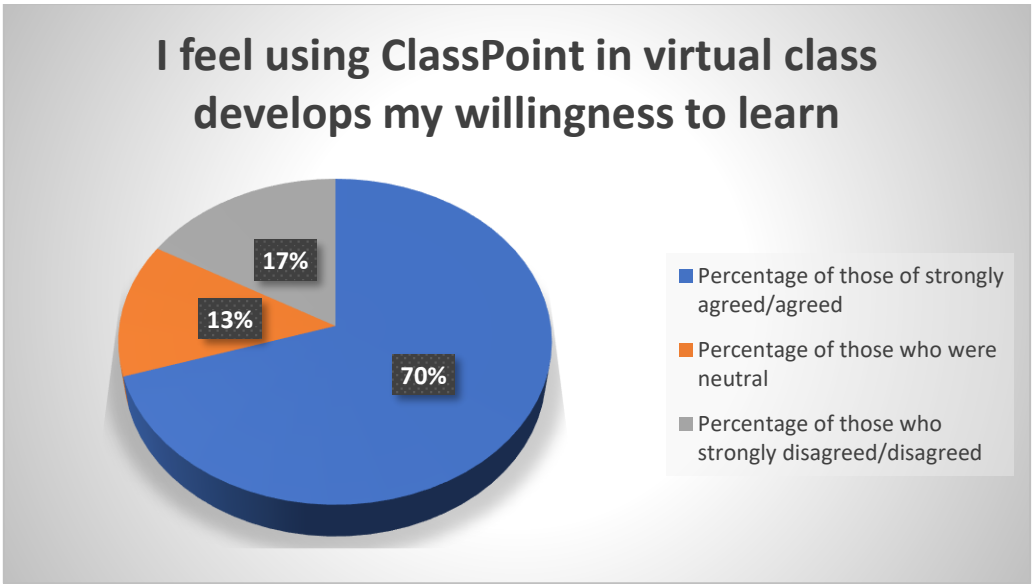

Table 5: Statistics relating to perceptions of ClassPoint to develop willingness to learn.

Having examined respondents' perception on analytical, critical, reasoning, and creative skills, this research further assesses whether ClassPoint is able to develop students' willingness to learn in a virtual class. One of the reasons for the high levels of agreement on developing students' willingness to learn using ClassPoint is perhaps because of the variety of engaging features on ClassPoint as discussed above. It is arguable that the variety of ClassPoint features in a single platform does motivate students to learn albeit in a borderless classroom. Thus, it could also be argued that the application of ClassPoint features can increase students' willingness to learn as they understand the contents taught hence, they are receptive to being tested during lecture. Therefore, the use of ClassPoint can be effective as an engagement tool in the borderless classroom.

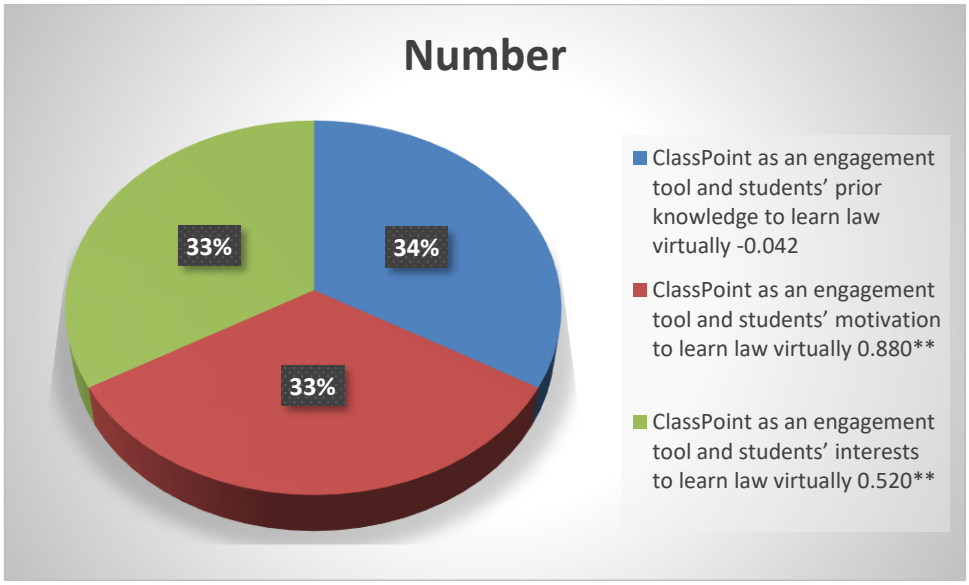

Table 6: Statistics relating to the relationship between students' prior knowledge, motivation and interests in learning law using ClassPoint as an engagement tool in the borderless classroom.

A series of correlations were conducted using the Pearson correlation coefficient (Table 6) to test the strength and direction of association between students' prior knowledge, motivation and interests in learning law using ClassPoint as an engagement tool. Two of the correlations namely students' motivation and interests were statistically significant and positive with the strongest correlation between the effectiveness of ClassPoint with students' motivation to improve their soft skills, with $r=0.880$, $p<.01$. One of the correlations namely students' prior knowledge proved to be insignificant with $r=0.042$. The results revealed that the fact that two of the antecedent relationships with students' motivation and interest to learn using ClassPoint in the borderless classroom were statistically significant and positive indicating that new and interactive teaching as an online tool has a role to play in stimulating students' interest to learn law virtually. It also revealed that students' lack of awareness or knowledge of ClassPoint will not affect the effective implementation of the latest online teaching and learning tool.

7. Conclusion

This research examined the effectiveness of ClassPoint and its impact on law students learning law virtually. It identified students' prior knowledge of ClassPoint, their level of motivation and interest to learn law using ClassPoint as an engagement tool in borderless learning. The research found that the students' lack of prior knowledge of ClassPoint is insignificant to determine the effectiveness of ClassPoint as students will always feel intrigued by the newness that it brought into the virtual class when it comes to learning law. The students were positive about the use of ClassPoint particularly on their evaluation skills which improves the way they learn law in a borderless classroom. The students considered that the use of ClassPoint was most effective in developing their willingness to learn and critical thinking skills. These perceptions are possibly due to the fact that the co-author tended to use features such as multiple-choice questions, short answer, word cloud and pick-a-name during lectures, resulting in students being 'on-standby' to answer questions in a virtual class. As a result, the students felt that their willingness to learn and critical thinking skills have improved due to these ClassPoint features. These activities replicate the way that lecturers ask students questions in a physical class to assess students on their level of comprehension during recap sessions and upon completion of sub-topics.

Despite being in a virtual, borderless environment, this study revealed that students' creative skills and abilities to be innovative can be improved by incorporating activities which go beyond the use of quizzes, word cloud or pick-a-name features. Lecturers can consider opting for image uploads or perhaps to engage in a flipped classroom where students make the presentation using ClassPoint. The utilization of similar features in a repetitive manner did not expose students to the full benefits of ClassPoint as much as it could be possible.

However, this research is not without its limitations. Firstly, the research was conducted through a pilot study where only surveyed students who studied LAW61504 Land Law I, a 2nd year module. The second limitation was the sample size, which only represents one cohort. The research would have benefitted from the participation of the entire law school population. These limitations are considered major, given that the research wished to study the effectiveness of ClassPoint in a virtual classroom. With regard to future research, it is the intention of the researchers to undertake a more holistic study covering all law students in

Taylor's Law School to investigate the effectiveness of the use of ClassPoints. Gaining the perspective of all the law students would provide the researchers a wider view of the effectiveness of ClassPoint as an engagement tool in a borderless environment.

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Steering the Boat: The Right to Fish in Malaysia and Australia

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Abstract
Malaysia is a country possessing a coast rich in biodiversity that contributes to the country's economy through tourism and the fishing industry. As incomes and the demand for seafood rises, commercial fishers are able to leverage on these new and unprecedented circumstances. However, there is considerable debate surrounding the status of fisheries and its impact on the environment. The present study focuses on the effectiveness and impact that the current legislation surrounding commercial and recreational marine fishing activities is having on the conservation of marine ecosystems and the protection of fish stock populations in Malaysia. The current legislation and methods of regulation enforcement in both Malaysia and Australia was compared to identify areas where Malaysia may improve in its efforts of protecting the fishing industry and marine environment. Findings of this study revealed a lack of assessment within the Malaysian fishery industry and low levels of regulation enforcement when compared to that of Australia. The review within the study revealed geographical, economic and food security implications in Malaysia that were not present in Australia. These implications play a role in the unsustainable nature of the Malaysian fishing industry. Despite these challenges, this study suggests that with increased legislation, enforcement, assessment and awareness, Malaysia can achieve sustainable goals within its fishery industry that conserves ecosystems and marine fish stocks.

Keywords: fisheries management, fishing rights, marine ecosystem.

1. Introduction

The commercial marine fishing industry is one that dates back hundreds of years, yet in recent times this industry has come under scrutiny on a global scale for the negative impacts it is having on ocean ecosystems.[39] In an effort to combat this as well as protect the future of the industry, many well-developed countries are creating legislation that enforce sustainable

[39] Ruth H. Thurstan, Simon Brockington and Callum M. Roberts, 'The Effects of 118 years of Industrial Fishing on UK Bottom Trawl Fisheries' (2010) 1(15) Nature Communications <https://www.nature.com/articles/ncomms1013.pdf> accessed 8 August 2021.

industrial practices.[40] The same cannot be said for lower socioeconomic countries that comprise >80% of the global catch and where fisheries are lacking formal assessment.[41] This study will examine and compare Malaysia's current legislation and assessment over its fishery industry to that of Australia.

A doctrinal approach will be employed to determine the adequacy of the laws that exist as well as its enforcement in relation to the right to fish in Malaysian waters. This approach forms the precursor to a socio-legal analysis on the right to fish and the responsibilities that fishing entails from both a recreational and commercial perspective. The scope of the research explores the adequacy of fishing laws only within Peninsular Malaysia, not including the states of Sabah and Sarawak that have separate local systems of legislation. It is important to state that although the discussions within this study focus solely on marine fishing, parallels may still be drawn and applied to the riverine wild catch industry as well.

Banakar states that traditional legal research has always utilized the top-down approach. Socio-legal research on the other hand conducts its studies both top-down and bottom-up.[42] The researchers are of the view that the top-down research must always serve as a starting point which more often than not is complemented by a comparative element to appreciate the best practices from jurisdictions with a similar legal framework. This forms the precursor to the bottom-up approach that allows for societal needs to scientifically inform future law-making. Since the law in relation to fishing is at best fragmented, there is a need to be selective of the laws referred to based on the reception to the law and its usage. The international and regional law commitments must also be taken into consideration in the selection of laws for this purpose. Gaps are then easily identified and best practices from other States are used to bridge those gaps. Relevant Malaysian legislation referred to in this analysis are the Fisheries Act 1985, the Exclusive Economic Zone Act 1984 and the Continental Shelf Act 1966. The comparative Australian legislation mentioned are the Fisheries Administration Act 1991, the Fisheries Management Act 1991, the Fisheries Levy Act 1991 and the National Compliance and Enforcement Policy 2020.

2. Malaysian & Australian Fisheries

Malaysia has a coast rich in biodiversity that spans 4,675 kilometres (km). The fishery industry of Malaysia has and continues to play a significant role in supplying food-based protein to the country. Annual estimations of tonnage produced within this industry has been approximated to a total of 1.7 million tonnes wherein 1.5 million tonnes were attributed to wild caught fish and the remaining 0.2 million tonnes from aquaculture.[43] International law zones have demarcations that allow commercial as well as recreational fishing to take place within these oceanic waters. Despite this, there are many conflicts that arise among South and Southeast

[40] Christopher Costello and others, 'Status and Solutions for the World's Unassessed Fisheries' (2012) 338 (6106) Science <https://www.science.org/doi/10.1126/science.1223389> accessed 8 August 2021.
[41] Ibid.
[42] Reza Banakar, 'On Socio-Legal Design' (2019) Lund University Working Paper, 3 <https://portal.research.lu.se/sv/publications/on-socio-legal-design> accessed 8 August 2021.
[43] 'Fishery and Aquaculture Country Profile: Malaysia' (*Food and Agriculture Organization of the United Nations,* May 2019) <https://www.fao.org/fishery/en/facp/mys> accessed 18 May 2021.

Asia (SSEA) countries in the context of these demarcations over access rights to fish resources.[44]

The lack of assessment within the SSEA fishery industries with the addition of conflicts where non-cooperation is evident leads to illegal, unreported and unregulated fishing (IUU) and Malaysia is no exception. In fact, approximately 980,000 tonnes of seafood are lost each year due to illegal fishing, and only 50% reaches local markets whilst the rest are untraceable.[45]

In addition to IUU, Yasin provides a list of issues that arise within Malaysian waters which include pollution, habitat destruction, destructive fishing methods, ineffective marine park management and planning, scarcity in research data, lack of research and monitoring, and issues in relation to loss of biodiversity among others.[46] However, as a developing country, there are multiple socio-economic complexities as well as food security and livelihood considerations that lead IUU activities.

The underlying problem in Malaysia appears two-fold wherein the administrative authorities have the responsibility to enforce legislation which ensures that Malaysian waters are well managed. In addition to this, preservation of stock, biodiversity and oceanic ecosystems can be better conserved by providing education and awareness to the country's citizenry. These increased inputs toward improved enforcement and education have been utilised in developed countries such as Australia.

On a global scale Australia is listed among the top four countries for sustainable initiatives within the management of wild fishers and has the third largest economic zone for fishing that spans approximately eleven million square kilometres.[47] The fishing industry contributes an annual landed value of AUD 3.9 billion to the national economy where AUD 1.4 billion stems from the commercial food-based industry and AUD 2.5 billion from recreational fishers.[48]

Australia is a smaller producer globally, ranked at 55th while Malaysia is 16th on the world major producers list.[49] This is a telling finding considering Australia has access to a larger

[44] Nerissa D. Salayo and others, 'An Overview of Fisheries Conflicts in South and Southeast Asia: Recommendations, Challenges and Directions' (2006) 29(1) NAGA WorldFish Center Quarterly 11 <http://pubs.iclarm.net/resource_centre/overview.pdf> accessed 20 May 2021.

[45] 'Fisheries Dept: Malaysia Loses RM6b a Year to Illegal Fishing' *Malaymail* (Kuala Lumpur, 4 September 2019) <https://www.malaymail.com/news/malaysia/2019/09/04/fisheries-dept-malaysia-loses-rm6b-a-year-to-illegal-fishing/1787016> accessed 9 March 2022.

[46] Abdul Hamid bin Yassin, 'Fisheries Management Policy in Malaysia: Issues on Responsible Fishing' (*SEAFDEC Institutional Repository,* 1997) <http://repository.seafdec.org/handle/20.500.12066/4281> accessed 2 October 2021.

[47] 'Australian Fishing Industry and Sustainability' (*Fisheries Research and Development Corporation*) <https://www.frdc.com.au/issues/q-and-a-australian-fishing-industry-and-its-sustainability> accessed 18 May 2021; 'Fishery and Aquaculture Country Profiles: Australia' (*Food and Agriculture Organization of United Nations*, 2015) <https://www.fao.org/fishery/en/facp/aus?lang=en> accessed 18 May 2021.

[48] 'Fishery and Aquaculture Country Profiles: Australia' (*Food and Agriculture Organization of United Nations*, 2015) <https://www.fao.org/fishery/en/facp/aus?lang=en> accessed 18 May 2021.

[49] 'Total Fisheries Production (metric tons)' (*The World Bank*) <https://data.worldbank.org/indicator/ER.FSH.PROD.MT?end=2016&start=1960&view=chart&year_high_desc=true> accessed 23 May 2021.

fishing zone with little to no fishing conflicts with neighbouring nations and yet possesses a significantly decreased output of seafood production compared to Malaysia. A suggested reason for this difference is due to the many sustainable initiatives in place and enforced by the Australian government to ensure the protection and conservation of native marine ecosystems. These tie into the focus of this paper that serves to highlight the impact of the lack of applied regulations as well as awareness among Malaysians in regards to national fishing legislation that is leading to marine habitat destruction from concerns such as overfishing.

3. Fishing Laws and Policies and International and Regional Commitments

3.1 Malaysia

A host of legislation exists in relation to fishing in Peninsular Malaysia waters. Due to its long-established culture, fishing is an activity that has been included in the apex law of the land, i.e. the Federal Constitution. Item 9(d) of the Federal list to the Ninth Schedule in the Federal Constitution empowers the Federation to engage in 'maritime and estuarine fishing and fisheries including turtles'. The Federal Constitution states that the federal government has jurisdiction over the marine estate up to 200 nautical miles out of the sea whilst the state governments have authority over the foreshore up to 3 nautical miles.

The Preamble of the Fisheries Act 1985 stipulates that it is a primary legislation that deals with conservation, management and development of maritime and estuarine fishing and fisheries, within Malaysian waters as well as internal waters. This is complemented by the Exclusive Economic Zone Act 1984 and the Continental Shelf Act 1966 which have generally been enacted in compliance with international law of the sea. Section 8 of the Fisheries Act 1985 makes it an offence to undertake fishing activities without a licence or in contravention of a condition or direction. Section 13 further provides that operating any stakes, appliances, devices, culture systems without a licence is illegal. Therefore, the act of setting up appliances or establishing any marine culture system is regarded as an offence within the same section. All foreign fishing vessels are required to obtain formal authorization to fish within Malaysian fishing zones and are not permitted to do so otherwise by virtue of s 15. In addition to this, s 26 clearly states that use of explosives, poisons and pollutants to catch fish is unacceptable with legal consequences associated.

The exclusive economic zone (EEZ) spans the distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.[50] Section 8 of the Act clearly provides that the Fisheries Act 1985 applies to the EEZ. Section 2(1) of the Continental Shelf Act 1966 (Act 83) provides that all rights in relation to the continental shelf are vested with the Federal Government. Sedentary creatures or fish that are usually found within coral reefs will fall under this category of fish and are the most vulnerable to illegal fishing. There is significant uncertainty as to the comprehension of citizenry in regard to the presence of these laws suggesting the existence of local anglers who are unaware of the legality of their actions and the consequences which incur penalization. As maritime fishing is part of the Federal list, all revenue from fishing produce goes to the Federal government.

[50] Exclusive Economic Zone Act 1984 (Act 311), s 3(1).

The Malaysian government provides fishing subsidies, such as reduced fuel prices. In 2018, as much as RM 600,525,989.00 worth of subsidised diesel and petrol was distributed.[51] Furthermore, in 2019 the Fisheries Development Authority of Malaysia (FDAM) requested the Ministry of Finance to provide it with the fuel subsidy supply quota annually instead of doing so monthly.[52] Muhammad Faiz Fadzil who is the FDAM Chairman states that this would allow the FDAM to better monitor and manage the fuel subsidy because demand for fuel varies according to the season.[53] This is possibly a step in the right direction, as the FDAM would be on alert if there is an unusual demand for fuel which may indicate IUU activities. Despite the positive impact of fuel subsidies on fishermen, Sumaila states that the fuel subsidy leads to issues of overfishing because it leads to a 'marginal increase in profit'.[54] Fuel subsidies are a catch-22 - whilst it assists in alleviating the economic poverty fishermen face, this subsidy leads to overfishing and eventually the worsening of fishing income. For long-term benefit, these subsidies would be better invested into fisheries management and conservation.[55]

Over the years, the Malaysian government has increased its policies surrounding the fishery industry in an attempt to improve the management of marine environment. Malaysia's National Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (Malaysia's NPOA-IUU) incorporates national, international and regional measures within its plan. Capacity building and promoting awareness programmes were rolled out by the Department of Fisheries Malaysia where focus was aimed toward encouraging the public on reporting all illegal fishing activities.[56] The creation of these policies serves as evidence of the Malaysian government's cognizance of the importance and crucial role of awareness programmes in curbing the onslaught of illegal fishing practices.

The international commitments of Malaysia directly or indirectly in relation to fishing include international law instruments as follows:

(i) the Law of the Sea Convention 1982,
(ii) the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES),
(iii) the Convention on Biological Diversity 1992 (CBD),
(iv) the World Organisation for Animal Health 1924 (OIE),
(v) the CODEX Alimentarius,
(vi) the Indian Ocean Tuna Commission (IOTC),
(vii) the South East Asian Fisheries Development Centre (SEAFDEC),
(viii) the Network of Aquaculture Centres in Asia-Pacific (NACA),

[51] 'Laporan Tahunan 2018' (Annual Report 2018) (*Fisheries Development Authority of Malaysia,* 2018) <https://www.lkim.gov.my/wp-content/uploads/2020/09/LKIM-2018-Complete-141119.pdf> accessed 9 March 2022.

[52] 'Give Fuel Subsidy Annually, Fisheries Development Authority urges Finance Ministry' *Malaymail* (Kuala Lumpur, 11 July 2019) <https://www.malaymail.com/news/malaysia/2019/07/11/give-fuel-subsidy-annually-fisheries-development-authority-urges-finance-mi/1770563> accessed 9 March 2022.

[53] Ibid.

[54] Rashid U. Sumaila and others, 'A Bottom-up Re-estimation of Global Fisheries Subsidies' (2010) 12 Journal of Bioeconomics 201, 202.

[55] 'Global Fishing Index: Malaysia' (*Minderoo Foundation,* 2021) <https://www.minderoo.org/global-fishing-index/results/country-reports/mys/> accessed 9 March 2022.

[56] 'Malaysia's National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (*Department of Fisheries Malaysia*, 2013) <http://extwprlegs1.fao.org/docs/pdf/mal163554.pdf> accessed 3 November 2021.

(ix) the Regional Plan of Action to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated Fishing 2013 (RPOA-IUU),
(x) the Asia-Pacific Fisheries Commission (APFIC), and
(xi) the ILO (considering that the right to fish is intertwined with labour laws).

There are, however, several conventions that Malaysia has chosen not to ratify and this includes (among others):
(i) the United Nations Fish Stocks Agreement (UNFSA),
(ii) the Port States Measures Agreement (PSMA),
(iii) the FAO Compliance Agreement 1993 (FAOCA), and
(iv) the ILO Work in Fishing Convention C188.

It is important to note that the conventions stated above which were not acceded to by Malaysia directly relate to fishing and the rights of fishermen. Regionally, the Association of Southeast Asian Nations (ASEAN) has incrementally created legal instruments that serve to improve the fishing practices and management of resources within ASEAN states. Policies on sustainable Fisheries Resource Management, IUU Fishing and Special Support for Small-scale Fisheries serve to encourage rights-based fishing, enhance participation of local communities in the fisheries management and stock-assessments, enhance capacity to resolve conflicts, whilst respecting traditional, artisanal and small-scale fisheries and providing assistance with the management of these fisheries resources. Relevant ASEAN instruments (among others) include:
(i) the Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region,
(ii) ASEAN-SEAFDEC, 2011a. Resolution on Sustainable Fisheries for Food Security for the ASEAN Region Towards 2020,
(iii) ASEAN-SEAFDEC, 2011b. Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region Towards 2020,
(iv) SEAFDEC 2020. Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region Towards 2030, and
(v) ASEAN, 2015c. ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into The Supply Chain.

It has been highlighted that the coverage of issues in relation to fishing may not be exhaustive. This is on top of the fact that the policies are scattered with inconsistent implementation within ASEAN member states.[57] It has been stated that there is a failure in policy implementation and evaluation.[58] This is not surprising considering the multitude of policies that exist within this sector.

ASEAN's strong preference for a rights-based approach is a step in the right direction. The rights-based approach resorts to quotas for individual fishers, providing exclusive use rights whilst limiting the number of fish caught. This rights-based approach to fishing assumes that fishermen, if allowed exclusive use rights whilst included more directly in fishery management

[57] Graeme Macfadyen and Heiko Seilert, 'Development of ASEAN General Fisheries Policy: Final Feasibility Study Report' (*ASEAN*, 19 June 2020) 36 <https://asean.org/wp-content/uploads/15.-AGFP-Feasibility-Study-report-28ASWGFi.pdf> accessed 25 October 2021.
[58] Ibid.

decisions, will clearly see the benefits of managing the allowable catch for the long-term health and productivity of their fisheries.[59] In other words, fishermen directly participate in the management of the Malaysian waters.

3.2 Australia

Australian fishery policy and planning is undertaken by the Australian Fisheries Management Authority (AFMA). The AFMA functions under the legislative organ, representing the Commonwealth Parliament to manage Australia's fishing industry which include both the domestic legislation and international fishery treaty obligations.[60] The objectives, powers, and functions of the AFMA are in line with the Fisheries Administration Act 1991 and the Fisheries Management Act 1991. These two pieces of legislation represent the fundamental foundation and statutory basis of the operations within the Australian industry.

There are two main objectives to the Fisheries Administration Act 1991 that surround the establishment of an Australian Fisheries Management Authority as well as a Fishing Industry Policy Council to encourage participation of persons involved within the industry in the processes of government policy formulation for fishery management.[61] The Fisheries Management Act 1991 defines the parameters of the Australian Fishing Zone (AFZ) and contains the majority of the Commonwealth fisheries offences enforced by the country. In addition to this it provides descriptive responsibilities relating to the pursuit of ecologically sustainable development and works alongside The Environment Protection and Biodiversity Conservation Act 1999 that states assessments are to be conducted for all Commonwealth-managed fisheries.[62]

The list below represents the principal current regulations applied by the AFMA regarding the fisheries industry:

(i) the Torres Strait Fisheries Regulations 1985,
(ii) the Fisheries (Administration) Regulations 1992,
(iii) the Fisheries Management Regulations 2019, and
(iv) the Fisheries Levy (Torres Straight Prawn Fishery) Regulations 1998.

In addition to the above listed principal regulations, the AFMA has created multiple other regulatory documents enforced by this industry. These are as follows:

(i) the Fisheries Management (Southern Bluefin Tuna Fishery) Regulation 1995,
(ii) the Fisheries Management (South East Trawl Fishery) Regulations 1998,
(iii) the Fisheries Management (Refund) Regulations 2001,
(iv) the Fisheries Management (Bass Strait and Central Scallop Fishery) Regulations 2002,
(v) the Fishery Management (Heard Island and McDonald Islands Fishery) Regulations 2002,

[59] 'Rights-based Fishing: Transition to a New Industry' (1996) 124 Resources for the Future <https://media.rff.org/archive/files/sharepoint/Documents/Resources/Resources-124_fishing.pdf> date accessed 26 October 2021.
[60] 'Legislation and Regulation' (*Australian Fisheries Management* Authority) <https://www.afma.gov.au/about/legislation-regulation> accessed 23 May 2021.
[61] Fisheries Administration Act 1991, s 3.
[62] Environmental Protection and Biodiversity Conservation Act 1999, Part 10 Division 2.

(vi) the Fisheries Management (Southern and Eastern Scalefish and Shark Fishery) Regulations 2004, and
(vii) Fishery Management (International Agreements) Regulation 2009.

Similar to Malaysia, the Australian fisheries participate in international level obligations of the law. International regulations are pertinent within the fishery industry unlike any other stock species; fish have migratory patterns that have no boundaries. The following list represents Australia's engagement in international regulations:[63]

(i) the Law of the Sea Convention 1982,
(ii) the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973,
(iii) the Convention on Biological Diversity 1992 (CBD),
(iv) the World Organisation for Animal Health 1924 (OIE),
(v) the CODEX Alimentarius,
(vi) the United Nations Fish Stock Agreement 1995,
(vii) the Code of Conduct for Responsible Fisheries 1991,
(viii) the Food and Agriculture Organization (FAO) Compliance Agreement 1993,
(ix) the Indian Ocean Tuna Commission (IOTC),
(x) the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),
(xi) the Network of Aquaculture Centres in Asia-Pacific (NACA),
(xii) the Western and Central Pacific Fisheries Commission (WCPFC),
(xiii) the Commission for the Conservation of Southern Bluefin Tuna (CCSBT),
(xiv) the South Pacific Regional Fisheries Management Organisation (SPRFMO),
(xv) the South Indian Ocean Fisheries Agreement (SIOFA),
(xvi) the Asia-Pacific Fisheries Commission (APFIC), and
(xvii) the ILO (considering that the right to fish is intertwined with labour laws).

In direct contrast to Malaysia, Australia appears to be participating in legislation that directly relates to fishing as well as the rights of fishermen. The AFMA oversees the implementation and adherence of these legislations by undertaking key activities such as developing management plans and arrangements that cover target and non-target species, such as bycatch, to ensure the consideration of broader marine ecosystem impact. Consistent consultation and liaisons with Regional Fishery Management Organisations (RFMOs) are carried out to ensure appropriate management of the high seas stocks. Domestically, the AFMA is continuously analysing, forecasting, and researching on local fishery performance to provide transparent and effective communications with stakeholders, and to ensure the development of ecological sustainability tools with the goal of minimising fishery impact on the marine environment.[64]

[63] 'International Fisheries Obligations Given Legal Effect' (*Australian Fisheries Management Authority*, 12 May 2015) <https://www.afma.gov.au/international-fisheries-obligations-given-legal-effect> accessed 24 May 2021; 'Legal and Arrangements' (*Department of Agriculture, Water and the Environment*, 2019) <https://www.agriculture.gov.au/fisheries/legal-arrangements> accessed 24 May 2021.
[64] 'Domestic Compliance' (*Australian Fisheries Management Authority*) <https://www.afma.gov.au/domestic-compliance> accessed 20 November 2021.

4. The Right to Fish and the Awareness Surrounding It

4.1 Malaysia

Article 5 of the Federal Constitution provides that all persons have the right to life. As India's Constitution also provides for this right, the Malaysian courts have acknowledged Indian case law which includes the right to livelihood within the ambit of the right to life. In the Indian case *Francis Corlie v. Union Territory of Delhi,* it was decided that the right to life encompasses the right to live with human dignity and all that goes along with it.[65] The right to life includes basic needs and the right to carry on such functions and activities as constituting the bare minimum expression of the human-self. Pavement dwellers in the case of *Olga Tellis v Bombay Municipal Corporation* contended that they had a right to live and one could not exercise this right without the means of livelihood. [66] In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan,* Justice of the Court of Appeal Gopal Sri Ram was of the view that the right to "life" appearing in Art 5(1) does not refer to mere existence. [67] It incorporates matters that encompass the quality of life and this would include lawful and gainful employment. The traditional or modern fisherman certainly has the right to gainful employment through fishing. Based on the discussion of the right to livelihood, it can be reasonably inferred that everyday civilians who undertake fishing activities whereby fish caught are brought home and consumed, do also have the right to fish. The question arises as to whether there is cognizance of the fact that the right only exists when the activity is lawful.

In Malaysia, recreational fishing laws only exist over areas deemed as marine parks or marine reserves. The Marine Parks & Marine Reserves Order 1994 states that the waters surrounding approximately 40 islands in Malaysian fishing zones have been demarcated as Marine parks wherein all forms of fishing of any aquatic animal is strictly prohibited. [68] The marine department of Malaysia's Ship Registry Division has released guidelines, for local fishing vessels carrying passengers for recreational fishing activities, which contains procedures focusing on vessel authorisation letter requirements and appropriate boat licensing and safety.[69] There is no mention of fishing regulations in terms of permitted catch species and sizes, and catch limits for recreational activities. This suggests that aside from marine park zones, recreational fishers are not bound to legislation regarding species of catch, size of catch and limit of catch.

Although the rights-based approach gives the fisherman certain rights in relation to the management of the sector, community involvement in the conservation of oceanic fish is moot at this point of time. The Convention on Biological Diversity 1992 has conservation of

[65] (1981) SC 745.
[66] (1986) SC 180.
[67] (1996) 1 MLJ 261.
[68] 'Information on Fisheries Management in Malaysia' (*Food and Agriculture Organization of United Nations*, 2001) <http://www.fao.org/fi/oldsite/fcp/en/mys/body.htm> accessed 10 August 2021.
[69] 'User Guideline For The Issuance Local Fishing Vessel Authorisation Letter To Carry Passengers For Recreational Fishing Activities' (*Marine Department Malaysia Ship Registry Division*, 2020) <https://www.marine.gov.my/jlm/admin/assets/uploads/images/contents/20201224120521-ec846-user-guideline-for-the-issuance-local-fishing-vessel-authorization-letter-to-carry-passengers-for-recreational-fishing-activities.pdf> accessed 10 August 2021.

biological diversity as one of its three objectives. [70] In order to fulfill this objective, in the 4th Conference, State parties adopted six principles, the fifth being involvement of local and indigenous communities. Malaysia's NPOA-IUU mentions participation and coordination as key to the full implementation of the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). Full participation of stakeholders in combating IUU fishing, including industry, fishing communities, and non-governmental organizations are meant to be encouraged.[71]

4.2 Australia

Australia upholds the seven core international human rights treaties. The right to life is covered in Article 6(1) of the International Covenant on Civil Political Rights (ICCPR) as well as Article 1 of the Second Optional Protocol to ICCPR that states every human being has the right to life.[72]

In regard to the right of the public to catch fish from territorial waters, the common law systems can be traced back prior to the Magna Carta where "the right of the owner of the soil over which the water flow (whether the owner be the Crown or not) to enjoy the exclusive right of fishing in those waters or to grant such a right to another as *profit à prende* is qualified by the paramount right to fish vested in the public… after Magna Charta, the Crown, in whom the title to the bed of tidal navigable rivers was vested, was precluded from granting a private right of fishery, the right of fishery being in the public…".[73]

However, in recent years the problems of environment degradation and stock depletion from overfishing became apparent on the world stage. This consequently required the creation of new laws and policies to which fisheries must abide by to ensure sustainable management of fish stocks. In *Harper v. Minister for Sea Fisheries & Others,* the High Court quoted '…the right of fishing in the sea and in tidal navigable rivers, being a public not a proprietary right is freely amendable to abrogation or regulation by a competent legislature'.[74] This was utilised to limit access to fishing and was applied to ensure sustainability and prosperity for the future of the fisheries industry.

Legislation surrounding the right to fish in Australia as well as the management of wild capture species is shared between the Commonwealth and its States. Each state has set guidelines for both commercial and recreational fishing based on species type and location. Australia has published extensive legislation, regulations and policies that relate to fisheries, aquaculture

[70] 'Convention on Biological Diversity' (*United Nations*, 1992) <https://www.cbd.int/doc/legal/cbd-en.pdf> accessed 11 August 2021.
[71] 'Malaysia's National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (*Department of Fisheries Malaysia*, 2013) <http://extwprlegs1.fao.org/docs/pdf/mal163554.pdf> accessed 12 August 2021.
[72] 'Right to Life: Public Sector Guidance Sheet' *(Australian Government Attorney-General's Department*) < https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-life> accessed 13 August 2021.
[73] 'Annex 1: Case Law Study: The Nature of Fishing Rights' (*Food and Agriculture Organisation of the United Nations,* 2004). <http://www.fao.org/3/y5672e/y5672e08.htm> accessed 21 August 2021.
[74] (1989) 168 CLR 314.

as well as recreational activities. These published materials are made readily available to the public and can be accessed on the respective state governing websites as listed below:[75]

(i) www.daffa.gov.au/fisheries,
(ii) www.afma.gov.au,
(iii) www.dpi.nsw.gov.au,
(iv) www.dpi.qld.gov.au,
(v) www.dpi.vic.gov.au,
(vi) www.pir.sa.gov.au,
(vii) www.fish.wa.gov.au,
(viii) www.nt.gov.au/dpifm/Fisheries,
(ix) www.dpiw.tas.gov.au, and
(x) www.australian-aquacultureporta.com.

Unlike Malaysia, each of the Australian states appear to have laws that are equally distributed for both commercial and recreational fishing activities. Pending the location and species type, there are an array of legislations put in place on recreational fishermen to which they must abide by. This may include laws on species that can be caught, specific catch sizes allowed, as well as specific number of animals that can be caught which can be determined by weight or per animal. As an example, the government of Western Australia requires all recreational anglers to first and foremost purchase a licence to fish in Western Australian waters. In addition to this, there is a list available at their websites of bag limits of the fish species that are permitted for catch. In Western Australia, each recreational fisherman is allowed to catch only three large pelagic finfish. These fish also have minimum legal catch sizes to which the fishermen must abide. Penalties will apply to those who do not follow the guidelines provided and these offences may result in payments of up to $400,000 AUD or imprisonment for four years alongside loss of boat licences, vehicles and equipment.[76]

In lieu of the stringency and the weight of the penalties, there is strong awareness amongst the Australian community regarding recreational fishing legislation. In Australia, the community awareness is sufficient enough that many initiatives are in place to promote community monitoring as an additional form of data collection method that can be used to store more information about recreational fishing.[77]

5. Implications of Illegal Fishing

5.1 Malaysia

As long as IUU fishing takes place, there is no certainty as to the number of fish that are being harvested from Malaysian waters. The situation is more dire in disputed EEZ zones. Baihaki

[75] 'Fisheries Services Australia' (*The Organisation for Economic Co-operation and Development,* 2020) <https://www.oecd.org/australia/39925925.pdf> accessed 11 August 2021.

[76] 'Recreational Fishing Guide 2022' (*Fisheries Sector of the Department of Primary Industries and Regional Development,* 2022) <http://www.fish.wa.gov.au/Documents/recreational_fishing/rec_fishing_guide/recreational_fishing_guide.pdf> accessed 18 August 2021.

[77] 'Community Involvement in Recreational Fisheries Data Collection: Opportunities and Challenges' (*Australian Bureau of Agricultural and Resource Economics and Sciences,* 2011) <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/abares/publications/TR11.5_Rec Fisheries.pdf> accessed 18 August 2021.

reports that the failure of the Malaysian and Indonesian government to amicably resolve the dispute over the EEZ boundary limits of the Northern Region of the Straits of Malacca causes IUU fishing within the area as well as the illegal detention of fisherman.[78] There are pockets of waters in which the catch is unknown.

The Department of Fisheries Malaysia (DOF) has been working with the Royal Malaysian Navy, and the Malaysian Maritime Enforcement Agency in an effort to reduce illegal fishing. These patrols are not in vain and have been successful in capturing illegal fishing boats. In February 2021, the Royal Malaysian Navy chased 9 Indonesian fishing boats.[79] Despite this, the DOF reports that the country loses approximately RM 6 billion per year due to the occurrence of illegal fishing.[80] Recently, the Malaysian and Indonesian governments have agreed to carry out joint patrols to catch illegal fishing vessels at least three times a year.[81] According to Hamzah Bin Zainudin, the effort is intended to capture fishermen from Malaysia, Indonesia and other countries who engaged in IUU activities.[82]

The chances of widespread environmental degradation, negative social and economic consequences exist.[83] Overfishing may cause several species of fish to disappear, to the effect of there being less commercially important fish available for consumption and possibly disturbing the marine food chain and ecosystem. Coral reefs are common breeding and living grounds for many species of fish. Therefore, anchoring of boats and the use of traditional fishing equipment such as trawls in low-tide waters may destroy coral reefs and in the long-run, impact the number of fish species. In the end, lesser fish results in lower income for fishermen.

The sea is vast and fluid, making it difficult to enforce environmental, social and economic policies and laws. Afriansyah is of the view that environmental concerns have often had to give way to economic competitiveness.[84]

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[78] Ahmad Baihaki, 'Fighting Illegal Fishing: Making a Big Bang with Big Data' *The Jakarta Post* (Jakarta, 28 February 2019) <https://www.thejakartapost.com/academia/2019/02/27/fighting-illegal-fishing-making-a-big-bang-with-big-data-1551250832.html> accessed 20 August 2021.

[79] 'Navy Drives Out Nine Indonesian Fishing Boats from Malaysian Waters' *The Star* (Kuala Lumpur, 7 February 2021) <https://www.thestar.com.my/news/nation/2021/02/07/navy-drives-out-nine-indonesian-fishing-boats-from-malaysian-waters> accessed 9 March 2022.

[80] 'Fisheries Dept: Malaysia Loses RM6b a Year to Illegal Fishing' *Malaymail* (Kuala Lumpur, 4 September 2019) <https://www.malaymail.com/news/malaysia/2019/09/04/fisheries-dept-malaysia-loses-rm6b-a-year-to-illegal-fishing/1787016> accessed 9 March 2022.

[81] M Ambari, 'Indonesia, Malaysia to Hold Joint Patrols Against Illegal Fishing' *Mongabay* (Jakarta, 1 February 2022) <https://news.mongabay.com/2022/02/indonesia-malaysia-to-hold-joint-patrols-against-illegal-fishing/> accessed 9 March 2022.

[82] Ibid.

[83] 'Malaysia's National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (*Department of Fisheries Malaysia*, 2013) <http://extwprlegs1.fao.org/docs/pdf/mal163554.pdf> accessed 1 November 2021.

[84] Arie Afriansyah, 'Indonesia's Practice in Combating Illegal Fishing: 2015 – 2016' (2016) 22 Asian Yearbook of International Law 293 <https://library.oapen.org/bitstream/handle/20.500.12657/38077/9789004379633_webready_content_text.pdf;jsessionid=F0E167F5A532200BAE553DD6AFE18835?sequence=1> accessed 1 November 2021.

The uncertainties also affect the very core of the State within the purview of international law i.e. sovereignty of state. At the level of the citizenry, it affects safety and security.[85] Legitimate fishers tend to lose out to illegal fishers as the pricing of legitimately caught fish would be higher. Legitimate fishers are therefore economically disadvantaged.

5.2 Australia

Australia is an exemplary example of a nation that has implemented measures to successfully combat illegal fishing where legitimate fishers are prioritised and advantaged. Through the years, Australia has faced a wide range of challenges from IUU vessels in southern and northern waters. Due to the crossing and adjoining borders of nearby countries, the northern waters were more heavily affected by illegal fishing as demonstrated in Figure 1 below.[86]

As demonstrated in Figure 1, between the 1990s to mid-2000s, illegal fishing within the Australian EEZ increased unprecedentedly. Due to the alarming increase the Australian government undertook multiple coordinated approaches such as policy and legislative responses, increased coastal surveillance, upgraded technological tools through mandatory VMS satellite vessel tracking as well as education, integration and collaboration between government agencies and neighbouring countries.[87] The success of these initiatives can be seen in Figure 1 below.

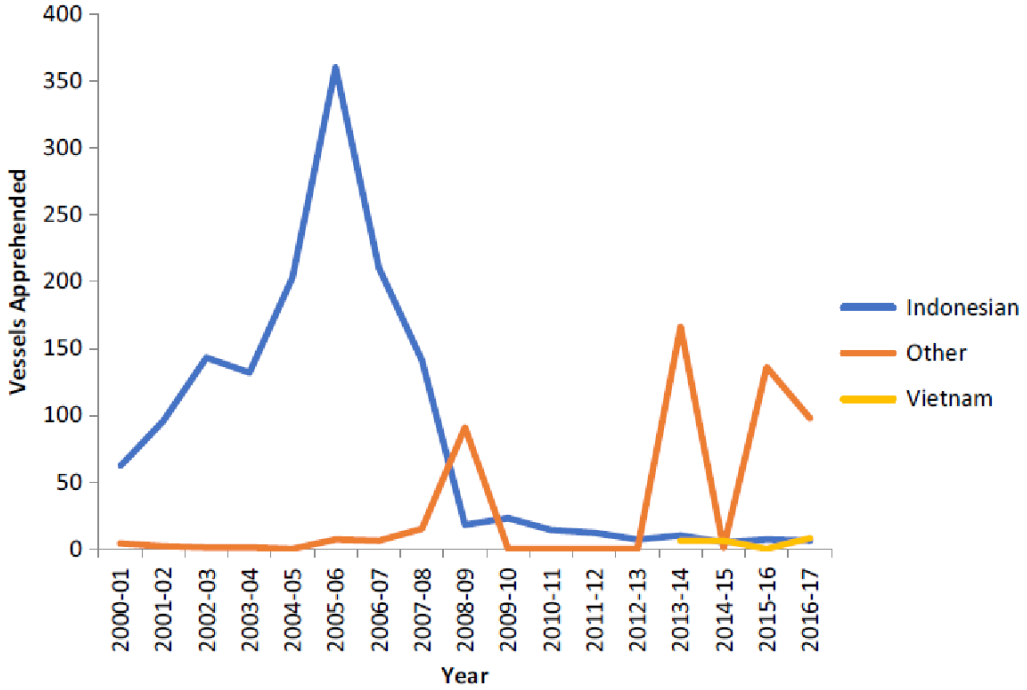

Figure 1: Data of apprehensions of foreign fishing vessels operating within the Australian EEZ from 2000 - 2017. This information was obtained from the Australian Fisheries Management Authority[88]

[85] (n 83).
[86] Joanna Vince, Britta D. Hardesty and Chris Wilcox, 'Progress and challenges in Eliminating Illegal Fishing' (2020) 22 Fish and Fisheries 518.
[87] Ibid.
[88] Joanna Vince, Britta D. Hardesty and Chris Wilcox (n 86).

Initiatives such as the Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia regarding Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf (MOU 1974) is another example of a successful endeavour. The social and economic implications of the MOU on illegal fishing resulted in forfeiture of boats, imprisonment and non-profitable fishing trips resulted in a decline of the activity.

These effective coordinated measures also had an impact on illegal fishing by domestic patrons. The New South Wales (NSW) Department of Primary Industries documented fishery officers contacting 49,000 fishers between 2018 – 2019 wherein 4,220 obtained a written warning, 2,461 were issued penalties and 221 were successfully prosecuted in court for fishing violations that were predominantly recreational in nature.[89] The overarching success of these measures in reducing illegal fishing by enforcing negative implications and proper enforcement remains apparent. This in turn has also allowed for a positive impact in reducing overfishing and population degradation.

6. Gaps in Malaysia's Law Administration

In Malaysia, the problem lies in the fact that there is no one single body that manages the seas. Various departments play different roles which leads to duplication, conflict and gaps in implementation. [90] Neither is there a single comprehensive legislation that addresses conservation and management as a whole.[91] Fragmentation of laws begins with the Federal Constitution and the division of powers in relation to water, fisheries and conservation between the federation and the state. A variety of laws and policies created at different levels of legislative and delegated power makes cascading down information about legitimate fishing an arduous task. Further up within the legal spectrum, one observes that even regional and international law is not comprehensive. The Law of the Sea Convention 1982 is probably the only document that forms some level of codification in relation to law of the sea.

When it comes to the implementation of the law, the focus is on the top-down rather than bottom-up approach. Early writings of Yasin observed that the top-down approach has alienated the spectrum of managers at state and district levels, who implement and enforce the policies. Due to the lack of understanding of such policies, there is weak enthusiasm by state and local managers of the relevant agencies to implement the management plan.[92]

With different types of fishing being carried out, i.e. traditional and commercial fishing, bottom-up approaches allow for active engagement of the commercial and non-commercial fishing community whilst allowing the public authority to take cognizance of traditional fishing practices which may in certain circumstances be in line with the notion of protective

[89] Joanna Vince, Britta D. Hardesty and Chris Wilcox (n 86).

[90] Jasim Saad, 'Review of Malaysian Laws and Policies in relation to the Implementation of Ecosystem Approach to Fisheries Management in Malaysia' (*Coral Triangle Initiative,* 2013) <https://www.coraltriangleinitiative.org/sites/default/files/resources/39_Review%20of%20Malaysian%20Laws%20and%20Policies%20and%20EAFM%20in%20Malaysia.pdf> accessed 12 October 2021.

[91] Ibid.

[92] Abdul Hamid bin Yassin, 'Fisheries Management Policy in Malaysia: Issues on Responsible Fishing' (*SEAFDEC Institutional Repository,* 1997) <http://repository.seafdec.org/handle/20.500.12066/4281> accessed 12 October 2021.

fishing in view of conservation. The study advocates the bottom-up approach to allow for commercial and traditional fishers to engage in policy-making and implementation. This is in line with the participatory approach advocated by international standards on fishing as part of the objectives of the Convention of Biological Diversity 1992.

There are several recommendations that Malaysia should look towards implementing. First, developing a 'traceable seafood supply chain' to ensure responsible production of seafood. Second, encouraging local markets to enlist suppliers who obtain seafood in a sustainable manner that adheres to domestic regulations. On the consumer side, increase awareness campaigns to encourage consumers to make conscious efforts to buy seafood from sustainable sources. Next, workshops to educate local fishermen on the impact of traditional gears and fishing methods and provide incentive for switching over to sustainable methods that do not destroy the local marine ecosystem. Lastly, Malaysia should ratify all conventions related to fishing to ensure that the country's policies and law are in accordance with international standards.

7. Conclusion

From the array of legislation and commitment to international law rules pertaining to the sea, it is clear that Malaysia practices a 'law habit' of observance when it comes to fisheries. Laws in relation to fishing are captured from the apex law of the land, the Federal Constitution, down to the policies of the executive fiat. Activities such as joint patrols of the sea demonstrate Malaysia's commitment towards stemming IUU fishing. Fishing subsidies buttress Malaysia's commitment towards the plight of the fisherman.

Based on the efforts discussed above, Australia appears to have been more successful compared to Malaysia in its implementation of the law with the state often being the main driver of policy change and implementation. Each state is given this responsibility due to the 'curse of natural resources' whereby each state differs in their high value fishery resources and therefore the decision-making process for conserving those specific species-based resources may differ.

Australia's broad and integrated approach to combating domestic and foreign IUU fishing serves as an excellent example of how assessed fisheries can successfully contribute to a country's economy as well as nurturing natural resources. The country has achieved this by a coordinated and consistent approach across all levels of government. In addition to this, Australia has also been successful in engaging with its neighbouring countries to address issues of illegal fishing. It is important to note that Australia has had the capacity to invest financially, legally, politically and diplomatically for this process to be the effective endeavour it is today. The same level of investment is often not available in other developing countries which must be considered when discussing implementation and policy failure.[93] Unique features of Malaysian federal law in relation to fishing, driven by the Federation and not the constituent units of the state, acts as a driver towards consistency in relation to creation and implementation of the law. Best practices of Australia can serve as a starting point to better the legal implementation of fisheries laws in Malaysia.

[93] Joanna Vince, Britta D. Hardesty and Chris Wilcox (n 86).

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The Role of SUHAKAM in Uncovering the Crime of Enforced Disappearance in Malaysia: An Appraisal of Its Public Inquiry on Enforced Disappearances

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ABSTRACT
Since 2016, three high-profile cases of enforced disappearances have occurred in Malaysia. The enforced disappearance of Amri Che Mat, Pastor Raymond Kho, and Joshua Hilmy-Ruth Sitepu shocked a nation that was not aware of a crime of this nature. Being a crime committed by the agents of the state, its secretive and complex nature makes it extremely difficult for the families to uncover the truth about their disappeared relative's whereabouts or fate. However, in uncovering the crime of enforced disappearance as a reality in Malaysia, the role played by SUHAKAM deserves special mention.

This paper analyses the measures taken by SUHAKAM to find the agents of the state responsible for the enforced disappearances. The analysis revealed that, by adopting a public inquiry, SUHAKAM was able to gather a diverse pool of evidence that ultimately led to the unmasking of enforced disappearances in Malaysia. Finally, it concluded that unless enforced disappearance is recognised as a distinct crime, the struggle endured by the families and SUHAKAM will be in vain.

Keywords: SUHAKAM, Enforced Disappearance, Malaysia, Public Inquiry, Evidence, Human Rights Commission Act 1999, Powers of SUHAKAM

1. Introduction

SUHAKAM, the Human Rights Commission of Malaysia published in 2019 and 2022, its final decision on the fate of four disappeared individuals. On 3rd April 2019, the Commission found the disappearance of both Amri Che Mat and Pastor Raymond Koh to be a case of enforced disappearance. It similarly found Joshua and Ruth Hilmy to be the victims of this crime on 22

April 2022. In the former case, SUHAKAM found the state agents responsible for committing their enforced disappearance. But in the latter case, although the victims were found to have disappeared involuntarily, the Commission was not able to find the state agents to be responsible for this crime. Thus, it was only in the Amri Che Mat and Pastor Raymond Koh cases that SUHAKAM directly implicated state agents as perpetrators. These findings raise a pivotal question about how SUHAKAM reached two separate conclusions in an enforced disappearance case.

Under international law, an enforced disappearance is considered to be the arrest, detention, abduction, or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorisation, support, or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.[94] One defining feature of this crime is the difficulty in obtaining any direct evidence, as the victim has vanished without a trace.

The difficulty of proving state complicity in an enforced disappearance has for a long time been a problem faced by the families of the forcibly disappeared and the prosecutors.[95] But the families have found the international human rights courts and UN treaty bodies to be effective venues for establishing state responsibility with the help of indirect and circumstantial evidence.[96]

In Malaysia, it was SUHAKAM that first ruled the disappearances of these four individuals as enforced disappearances.[97] The commission positively established this finding by using its power to conduct a public inquiry into the allegations of human rights violations. The Human Rights Commission Act 1999 provides the power to conduct inquiries into any allegations of human rights violations. Being a crime that, in most cases, does not leave any direct evidence,

[94] International Convention for the Protection of all Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED) art 2.

[95] Emilio Crenzel, 'Inside "State Terrorism": Bureaucracies and Social Attitudes in Response to Enforced Disappearance of Persons in Argentina' (2018) 10(2) J. Hum. Rights Pract. 268 <https://academic.oup.com/jhrp/article/10/2/268/5050863> accessed 29 December 2020.

[96] Thomas Buergenthal, 'Judicial Fact-Finding: Inter-American Human Rights Court' in RB Lillich (ed), *Fact-Finding before International Tribunals* (Ardsley-on-Hudson: Transnational Publishers 1990); Alexander Murray, 'Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts' (2013) 2 International Human Rights Law Review 57 <https://brill.com/view/journals/hrlr/2/1/article-p57_3.xml> accessed 29 December 2020; Gobind Singh Sethi, 'The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances' (2001) 8 Human Rights Brief 29 <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1507&context=hrbrief> accessed 29 December 2020.

[97] Keertan Ayamany, 'Suhakam Inquiry Finds Enforced Disappearance of Pastor, Wife "Involuntary" but No Evidence to Show by "Agents of the State"' *Yahoo News* (Kuala Lumpur, 15 April 2022) <https://malaysia.news.yahoo.com/suhakam-inquiry-finds-enforced-disappearance-042615961.html> accessed 17 August 2022; Ida Nadirah Ibrahim, 'Suhakam Concludes Activist, Pastor Victims of Enforced Disappearance' *Malay Mail* (Kuala Lumpur, 3 April 2019) <https://www.malaymail.com/news/malaysia/2019/04/03/suhakam-concludes-amri-che-mat-victim-of-enforced-disappearance/1739267> accessed 22 May 2023.

the public inquiry gave SUHAKAM a valuable opportunity to ascertain the fate of the disappeared persons. It also allowed a wide array of evidence to be collected and compiled to find state responsibility for the crime. However, it is to be understood that SUHAKAM's power to conduct an inquiry is limited. Although SUHAKAM can conduct quasi-judicial proceedings, its decisions are not binding. Further, it can only recommend measures to the government. Despite several limitations, SUHAKAM has been successful in uncovering the crime of enforced disappearance in Malaysia.

This article, therefore, explores the efforts of SUHAKAM in clarifying the fate of the disappeared persons in Malaysia. It traces the historical origins of SUHAKAM and examines the motivation behind its establishment. It also describes its powers, especially the power to conduct inquiry and analyse the scope and limitations of the power. It then examines the technique employed in ascertaining the fate of the disappeared individuals and compares the two cases, identifying the similarities and differences. It also examines how SUHAKAM formed different conclusions regarding state responsibility in the Amri Che Mat, Pastor Raymond Koh, and Joshua Hilmy-Ruth Sitepu cases.

It concludes that even though it had limited power and a dearth of direct evidence, SUHAKAM used its authority to initiate a public inquiry as a powerful tool to collect several crucial pieces of indirect evidence to ascertain the fate of the disappeared persons and finally hold the state responsible for this crime in the Amri Che Mat and Pastor Raymond Koh cases. However, in the Joshua and Ruth Hilmy case, despite using the same technique, SUHAKAM did not find state responsibility for their enforced disappearance due to insufficient evidence. This demonstrates that in an enforced disappearance case, proving state responsibility depends on a case-by-case basis. It also proves that no hard and fast rule can be employed, and only an independent, thorough, and impartial investigation can reveal the true nature of a serious violation of human rights like an enforced disappearance.

This study will be divided into five parts. Part One will explore the origins of SUHAKAM and the motivation behind establishing this body. In Part Two, the power of SUHAKAM to conduct an inquiry, its scope, and its limitations will be examined. This examination is important because SUHAKAM used the inquiry as a tool to ascertain the fate of the disappeared and hold the state responsible in two cases. Part Three analyses the techniques employed by SUHAKAM for clarifying the fate of the disappeared and holding the state responsible. This analysis will help identify the investigative techniques employed by SUHAKAM and demonstrate how these techniques can be used as a general fact-finding mechanism in future enforced disappearance cases in Malaysia. In Part Four, the similarity and dissimilarity between the Amri Che Mat and Pastor Raymond Koh cases and the Joshua Ruth Hilmy case will be analysed. This is done to identify the reasons for absolving state agents' responsibility in the Joshua and Ruth Hilmy case. Conclusions will be discussed in Part Five.

2. The Birth of SUHAKAM: Origin and Motivations

SUHAKAM (Suruhanjaya Hak Asasi Manusia Malaysia) is the acronym for the Human Rights Commission of Malaysia. It was established in 1999 by the Human Rights Commission of Malaysia Act 1999. There is no one fixed reason behind establishing a human rights

commission, and a combination of socio-political factors can be seen as a major driving force behind its creation.[98] Primary among these factors is the Mahathir administration's abuse of state power and the civil society backlash against it, which was a major reason for the creation of SUHAKAM.[99]

During the Mahathir years, the government employed stringent laws like the Internal Security Act (ISA) to jail political opponents and curb the *reformasi* movement.[100] The detention of persons without trial, the indefinite application of emergency provisions, the rise in custodial deaths, and police shootings were some of the major excesses of power perpetrated by the administration.[101] Apart from the civil society backlash, a United Nations Special Rapporteur report also criticised the administration for violating the human rights of political opponents and recommended the establishment of a human rights commission.[102]
Thus, it is contended that Prime Minister Mahathir's decision to establish SUHAKAM can be impliedly based on the following reasons: (1) to appease the civil society groups; (2) to improve Malaysia's international image, which was destroyed by the government repression of Anwar Ibrahim (The then Deputy Prime Minister) and his *reformasi* movement; and (3) to catch up with the human rights commitments made by the ASEAN neighbours.[103] The following reasons can therefore be ascertained as the catalysts for the establishment of SUHAKAM. However, the process preceding its enactment was criticised by civil society as flawed because of the absence of public consultation.[104] Despite the concerns of civil society, the Parliament swiftly passed the Act, and thus, SUHAKAM was born.

Since its inception, it has been argued that SUHAKAM was placed at the centre of the government versus civil society debate. Being a creation of the state, its control was in the hands of the state. However, being a human rights body, it was also mandated to inquire into allegations of human rights abuses by the state. Human rights organisations like the Abolish ISA Movement (AIM) had urged the government to empower SUHAKAM with more power.[105] On the other hand, the government representative made it well known that they had no

[98] Catherine Renshaw, Andrew Byrnes and Andrea Durbach, 'Testing the Mettle of National Human Rights Institutions: A Case Study of the Human Rights Commission of Malaysia' (2011) 1(1) Asian Journal of International Law 165 <http://www.journals.cambridge.org/abstract_S204425131000038X> accessed 18 April 2023.

[99] Greg Felker, 'Malaysia in 1998: A Cornered Tiger Bares Its Claws' (1999) 39(1) Asian Survey 43 <https://www.jstor.org/stable/2645593> accessed 23 April 2023; Meredith L Weiss and Bridget Welsh (eds), *Routledge Handbook of Contemporary Malaysia* (1st edn, Routledge 2018) 293.

[100] Ramdas Tikamdas, 'Human Rights in Malaysia: The Last 10 Years' (*Malaysian Bar*, 9 September 2009) <https://www.malaysianbar.org.my/cms/upload_files/document/ramdas%20tikamdas.pdf> accessed 23 April 2023, para 4.1.

[101] Ramdas Tikamdas, 'Evaluation of SUHAKAM's Reports for Three Years and the Government's Response' in S. Nagarajan (ed), *SUHAKAM After 3 years: Recommendations for Promotion and Protection of Human Rights and the Government's Response* (Era Consumer Malaysia, 2003).

[102] Commission on Human Rights, 'Report on the Mission to Malaysia' (1998) E/CN.4/1999/64/Add.1 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/052/96/PDF/G9805296.pdf?OpenElement> accessed 23 April 2023.

[103] Renshaw, Byrnes and Durbach (n 98) 172.

[104] Thio Li-ann, 'Panacea, Placebo, or Pawn? The Teething Problems of the Human Rights Commission of Malaysia (SUHAKAM)' (2009) 40 George Washington International Law Review 1271, 1274.

[105] Yusof Ghani, 'Show Your Teeth, AIM Tells Suhakam' *Malaysiakini* (Petaling Jaya, 10 April 2003) <https://www.malaysiakini.com/news/15129> accessed 7 May 2023.

intention to give teeth to SUHAKAM.[106] Despite being projected as a paper tiger, it is argued that SUHAKAM managed to bring human rights to the forefront in its first ten years of functioning.[107] The commission intervened in well-known human rights violations like the KESEAS highway incident, and the crackdown on *reformasi* leaders, thereby ensuring its relevance by holding the government accountable for its excesses.[108] Thus, despite being considered a creature of the state, SUHAKAM is said to have played a key role in bringing human rights issues to the public forum by holding the state accountable for such human rights violations.

In summary, it can be implied that the reason for creating SUHAKAM is more of a political play than a humanitarian concern. The backlash received by the Mahathir administration for excessive crackdowns on political opponents is one instance of arguing that political considerations were at the forefront of the government rather than a genuine concern for upholding human rights. However, notwithstanding the presence of clean motivation, the long-standing demand of NGOs was fulfilled with the creation of SUHAKAM. Regardless of the political motives, it can be contended that the birth of SUHAKAM has ignited open debates on human rights matters in Malaysia.

3. Powers of SUHAKAM

The Human Rights Commission of Malaysia Act 1999 is the statute that established SUHAKAM and guarantees it certain powers. The Act consists of 23 sections and is divided into 5 parts. The latest amendment to this Act was made in 2009.[109] In the following subsections, the powers of SUHAKAM will be examined. After the examination of its powers, the scope and ambit of its powers will be discussed. The nature of the scope and ambit of its powers will also be analysed to demonstrate its utility in investigating human rights violations.

3.1 Powers and Functions of SUHAKAM under the Human Rights Commission of Malaysia Act 1999

The preamble of SUHAKAM provides an overall idea of its fundamental purpose. This Act was enacted to provide for the establishment of the Human Rights Commission of Malaysia, to set out the powers and functions of such a commission for the protection and promotion of human rights in Malaysia, and to provide for matters connected therewith or incidental thereto.[110] Therefore, the protection and promotion of human rights in Malaysia are expressed as the core objectives of the human rights commission. Thus, by examining the preamble, the intention of the legislature is properly understood. That is, they have laid down

[106] Beh Lih Yi, 'Govt: We Don't Intend to Give Suhakam Teeth' *Malaysiakini* (Petaling Jaya, 27 March 2006) <https://www.malaysiakini.com/news/48965> accessed 7 May 2023.
[107] Ken Setiawan, 'The Politics of Avoidance: The Malaysian Human Rights Commission and the Right to Freedom of Religion' (2013) 25(2) Global Change, Peace & Security 213 <https://doi.org/10.1080/14781158.2013.787059> accessed 7 May 2023.
[108] ibid 218–19.
[109] Francis Johen Ak Adam, 'The Human Rights Commission of Malaysia (SUHAKAM)' (*Majlis Perbandaran Sibu*) <https://smc.gov.my/web/attachment/show/?docid=R0RtZ3FZRDBSd3BJQlVzY1lhZGRmdz09OjpdIuHJnvakRA9HPUyOP0rC> accessed 22 May 2023.
[110] Human Rights Commission of Malaysia Act 1999.

in clear and precise words the powers and functions of SUHAKAM to further the protection and promotion of human rights in Malaysia.

3.1.1 Functions of SUHAKAM

Section 4(1) of the Human Rights Commission Act 1999 lays down the functions of SUHAKAM. Section 4(1) also provides that the functions of the commission shall be in furtherance of the promotion and protection of human rights in Malaysia.[111] So, it can be implied that all the powers of the commission are directed to ensure the protection and promotion of human rights in Malaysia. As per Section 4(1)(a), the function of the commission is to promote awareness and provide education in relation to human rights.[112] The second function is to provide guidance and support to the government in developing laws and administrative policies and suggesting appropriate actions that need to be implemented.[113] Thirdly, the commission's function is also to provide suggestions to the government concerning the endorsement or joining of human rights-related treaties and other international agreements.[114] The last function of the commission is to inquire into allegations of human rights, as mentioned in Section 12.[115]

In conclusion, it is evident from Section 4(1) of the Human Rights Commission Act 1999 that the primary objective of SUHAKAM is to promote and safeguard human rights in Malaysia. All the functions of the commission are aimed at achieving this goal, which includes providing guidance to the government in developing policies and legislation related to human rights, making recommendations on international human rights agreements, and investigating alleged human rights violations. Thus, the commission has a critical role to play in ensuring that human rights are protected and upheld in Malaysia.

3.1.2 General Powers of SUHAKAM

Section 4(1) laid down, in a specific manner, the various functions of SUHAKAM. Meanwhile, Section 4(2) of the Act provides that the commission may discharge its functions by exercising certain powers. The powers are expressly mentioned in the Act. Firstly, the commission's power is to raise awareness about human rights, conduct research through various activities such as programmes, workshops, and seminars, and then share and circulate the outcomes of such research.[116] Secondly, the commission has the power to inform the government or relevant authorities about complaints made against them and suggest appropriate actions to be taken by the government or relevant authorities.[117] Thirdly, the commission is empowered to analyse and check any human rights violations as per the rules in this Act.[118] Fourthly, the commission has the power to visit detention centres as per the procedure laid down by the

[111] ibid s 4(1).
[112] ibid s 4(1)(a).
[113] ibid s 4(1)(b).
[114] ibid s 4(1)(c).
[115] ibid s 4(1)(c).
[116] ibid s 4(2)(a).
[117] ibid s 4(2)(b).
[118] ibid s 4(2)(c).

detention centre regarding such visits and make necessary recommendations.[119] Fifthly, SUHAKAM can issue public declarations and give statements on human rights issues when it is necessary to do so.[120] Lastly, the commission can perform any other activities that are appropriate and in line with the express laws in force.[121]
In conclusion, Section 4 of the Human Rights Commission Act of 1999 outlines the functions and powers of SUHAKAM (The Human Rights Commission of Malaysia) in promoting and protecting human rights in Malaysia. The Act's preamble establishes the core objective of SUHAKAM as the protection and promotion of human rights in the country. Section 4(1) further emphasises this objective by stating that the functions of the commission are directed towards the advancement of human rights.

The functions enumerated in Section 4(1) demonstrate SUHAKAM's multifaceted role in the human rights landscape. The commission is tasked with promoting and protecting human rights, providing guidance and support to the government in developing laws and policies, suggesting appropriate actions, and offering recommendations on endorsing or joining human rights-related treaties and international agreements. Additionally, SUHAKAM is empowered to inquire into allegations of human rights violations, as stipulated in Section 12.

Furthermore, Section 4(2) grants SUHAKAM specific powers to discharge its functions effectively. These powers include raising awareness about human rights, conducting research, sharing research outcomes, notifying the government or relevant authorities of complaints, suggesting appropriate actions, analysing and monitoring human rights violations, visiting detention centres, making recommendations, issuing public declarations and statements on human rights issues, and engaging in other activities per the applicable laws.

The comprehensive functions and powers outlined in the Act highlight the instrumental role of SUHAKAM in safeguarding human rights in Malaysia. The commission acts as an advocate, advisor, monitor, and investigator, working towards the protection, promotion, and awareness of human rights across various sectors of society. Through its activities, SUHAKAM contributes to the development of a human rights-oriented culture and facilitates the implementation of necessary measures to ensure the well-being and dignity of all individuals in Malaysia.

3.1.3 Powers of ‘Public Inquiry’ of SUHAKAM

The disappearances of Amri Che Mat, Pastor Raymond Koh, and Joshua-Ruth Hilmy were proved to be cases of enforced disappearance after SUHAKAM conducted a ‘public inquiry’ However, if one examines the Human Rights Commission Act of 1999, it can be identified that the word ‘public inquiry’ is not used in the statute anywhere. However, Part Three of the Human Rights Commissions Act 1999 provides the various powers available to SUHAKAM in conducting an inquiry. In the following subsections, the inquiry powers and the procedures relating to these powers will be examined and discussed. This will be described and examined to analyse whether ‘public inquiry’ can be derived from Part Three of the Act.

[119] ibid s 4(2)(d).
[120] ibid s 4(2)(e).
[121] ibid s 4(2)(f).

3.1.3.1 The Commission may inquire on its own motion or complaint

Part Three of the Human Rights Commission Act 1999 lays down the inquiry powers of SUHAKAM. Section 12(1) of the Act provides that the Commission may, *suo moto* or after receiving any complaint from any other person or group of persons, or any person acting on behalf of a person or group of persons may conduct an inquiry into an allegation of human rights violation.[122] Thus, from a literal reading of Section 12(1), it can be understood that the inquiry power of SUHAKAM confers them a discretionary power to choose whether to inquire on an allegation of human rights violation. Section 12(1) uses the word "may" and not "shall". It is because the word "may" imposes discretion on the authority of the legislature and is not a mandatory requirement.[123] However, the commission's power to conduct inquiries is limited in two circumstances. Section 12(2) provides that the commission shall not conduct inquiries into any complaints of alleged human rights in two circumstances.[124] One, mentioned in Section 12(2)(a), where any human rights matter is the subject of any court proceedings and is *sub judice.*[125] Two, as per Section 12(2)(b), where the matter has been ultimately decided by the Court.[126] Thus, the usage of the word "shall" here implies a compulsory obligation to bar SUHAKAM from conducting inquiries.

3.1.3.2 Disclosure and non-disclosure of human rights violation

Section 13 of the 1999 Act is a provision that lays down the procedure to be followed after the disclosure or non-disclosure of a human rights violation by SUHAKAM. Section 13(1) lays down that during the non-disclosure of a human rights violation by the commission, it shall readily record the findings and inform the person who made the complaint.[127] However, as per Section 13(2), if there is a disclosure of an infringement of human rights, then the commission shall refer the matter to the necessary authorities or person, where appropriate, together with the required recommendations.[128] Thus, Section 13 imposes a mandatory duty upon the commission to recommend the measures to be taken after disclosing or not disclosing a human rights violation.

3.1.3.3 Power relating to inquiries

Section 14 of the Act lays down the various powers that are available to SUHAKAM in the course of conducting an inquiry. Firstly, according to Section 14(1)(a), the commission has the authority to obtain and collect any evidence, whether written or oral, and to interview any individuals as witnesses, as they deem necessary or desirable for investigation.[129] Secondly, as per Section 14(1)(b), the commission can demand that any witness give their evidence, whether spoken or written, under oath or affirmation, which should be the same as the one

[122] ibid s 12(1).
[123] *Vidarbha Industries Power v Axis Bank Limited* (Supreme Court of India) [64].
[124] (n 110) s 12(2).
[125] (n 110) s 12(2)(a).
[126] (n 110) s 12(2)(b).
[127] (n 110) s 13(1).
[128] (n 110) s 13(2).
[129] (n 110) s 14(1)(a).

required in a court of law, and the commission may also have an authorised officer administer the oath or affirmation to each witness.[130] Thirdly, Section 14(1)(c) provides that the commission has the power to call upon any individual who is residing in Malaysia to appear before them in a meeting, to provide evidence or present any document or item that they possess, and also has the authority to question them as a witness or request that they produce any document or item that is in their possession.[131] Fourthly, Section 14(1)(d) provides that the commission has the power to accept any evidence, regardless of whether it would typically be considered inadmissible in civil or criminal proceedings under the Evidence Act 1950 [Act 56].[132] Lastly, under Section 14(1)(e), the commission has the power to grant or deny admission to the public of an inquiry or any part of an inquiry.[133]

In summary, Section 14 of the Human Rights Commission of Malaysia Act 1999 outlines the powers available to SUHAKAM during an inquiry. These include the ability to collect evidence, interview witnesses, administer oaths, summon individuals to provide evidence or documents, accept evidence that would typically be inadmissible, and control the admission of the public to an inquiry or part of an inquiry. These powers provide the commission with the tools necessary to conduct thorough investigations into potential human rights violations.

3.1.4 Public Inquiry as a specialised inquiry procedure or a general power of inquiry of the Commission?

A public inquiry is a process that is generally considered important in fact-finding situations.[134] What separates a public inquiry from a normal inquiry is that its purpose is well established and its functions are laid out in precise order.[135] Public inquiries are also said to be mechanisms of accountability and a vital component of the state machinery.[136]

It must be understood that the Human Rights Commission Act 1999 has not defined what a public inquiry is or what are the procedures to be conducted during a public inquiry. However, in the inquiry reports, SUHAKAM provided the meaning of "public inquiry". According to SUHAKAM, a public inquiry is defined in the Amri Che Mat report as-

"An *official review of events or actions ordered by a government body, that accepts evidence and conducts its open hearings in a more public forum and focuses on a more specific occurrence*".[137]

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[130] (n 110) s 14(1)(b).
[131] (n 110) s 14(1)(c).
[132] (n 110) s 14(1)(d).
[133] (n 110) s 14(1)(e).
[134] Stephen Sedley, 'Public Inquiries: A Cure or a Disease?' (1989) 52(4) MLR 469, 469 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2230.1989.tb02609.x> accessed 17 May 2023.
[135] New Zealand Law Commission, *The Role of Public Inquiries* (NZLC IP1, 2007) para 22 <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP1.pdf> accessed 17 May 2023.
[136] Emma Ireton, 'How Public Is a Public Inquiry?' [2018] PL 277, 277 <https://www.researchgate.net/publication/324123679_How_Public_is_a_Public_Inquiry> accessed 17 May 2023.
[137] SUHAKAM, 'Public Inquiry into the Disappearance of Amri Che Mat (Final Decision)' (*SUHAKAM,* 3 April 2019) <https://drive.google.com/file/d/1VB__ZJyop1ZaAYeDQ3KZOR-aqr2IUndg/view> accessed 17 May 2023, para 44.

However, in the Pastor Raymond Koh report, SUHAKAM defined public inquiry less transparently by changing 'Open' hearings to hearings only.[138] This implies a decline in transparency regarding the hearing process, as the commission can also conduct closed hearings in certain cases. From the examination of the definition, a few essential ingredients of a public inquiry can be identified, and they are: -

(a) It is an official investigation of any event or action.

(b) It is mandated by a government authority.

(c) Evidence is accepted during the inquiry.

(d) Hearings are conducted in an open or closed setting.

(e) The Involvement of the Public is essential.

(f) Focusing on specific cases or issues.

Thus, these six elements can be said to be the core ingredients of a public inquiry procedure. In the three reports on enforced disappearance, SUHAKAM considered the difference between a public inquiry and an ordinary inquiry. It held that, unlike other inquiries, the witnesses can submit statements and also listen to oral evidence submitted by other witnesses.[139]

SUHAKAM also considers public inquiry as a comprehensive human rights-based approach that can be used to investigate serious human rights violations with a much wider scope than receiving complaints from a single individual.[140] SUHAKAM considers a public inquiry to have two major objectives, one is to find the facts, and the second is to educate the government on the specific human rights issue.

Thus, according to SUHAKAM, the power to conduct a public inquiry has been laid down in Section 14 of the Human Rights Commission Act 1999. All three public inquiry reports on enforced disappearances made it expressly clear that Section 14 lays down the powers relating to the conduct of a public inquiry.[141] Even before the commencement of the public inquiry,

[138] SUHAKAM, 'Public Inquiry into the Disappearance of Pastor Raymond Koh (Final Decision)' (*SUHAKAM*, 3 April 2019) <https://drive.google.com/file/d/1qQ9WAQzizsZDGwHsiYM-mFWnlkg2XJPU/view> accessed 17 May 2023, para 48.

[139] SUHAKAM, 'Public Inquiry into the Disappearance of Joshua Hilmy and Ruth Sitepu (Final Decision)' (*SUHAKAM*, 15 April 2022) <https://suhakam.org.my/wp-content/uploads/simple-file-list/Final-Report-Public-Inquiry-into-the-Disappearances-of-Joshua-Hilmy-and-Ruth-Sitepu_compressed.pdf> accessed 17 May 2023, para 17; *Amri Che Mat* (n 137) para 45; *Pastor Raymond Koh* (n 138) para 49.

[140] *Amri Che Mat* (n 137) para 46; *Joshua Hilmy and Ruth Sitepu* (n 138) para 18; *Pastor Raymond Koh* (n 139) para 50.

[141] *Amri Che Mat* (n 137) para 48; *Joshua Hilmy and Ruth Sitepu* (n 138) para 20; *Pastor Raymond Koh* (n 139) para 52.

SUHAKAM collected statements from persons who gave information on the disappearances, and possible witnesses were actively investigated by the commission.[142]

In conclusion, the paragraphs highlight the significance of public inquiry as elucidated by SUHAKAM (The Human Rights Commission of Malaysia). While the Human Rights Commission Act of 1999 lacks a specific definition or fails to highlight procedural guidelines for public inquiries, SUHAKAM's inquiry reports provide clarity on the meaning and essential elements of a public inquiry. According to SUHAKAM, a public inquiry is an official review of events or actions mandated by a government body that accepts evidence and conducts hearings in either an open or closed setting. These six core ingredients of a public inquiry—official investigation, government authority mandate, evidence acceptance, open or closed hearings, public involvement, and a focus on specific cases or issues—form the basis of the procedure.

SUHAKAM emphasizes the distinction between public inquiries and ordinary inquiries. Unlike other types of inquiries, public inquiries allow witnesses to submit statements and listen to oral evidence from other witnesses. This distinction enhances transparency and inclusivity in the process. Furthermore, SUHAKAM views public inquiries as a comprehensive human rights-based approach, capable of investigating serious human rights violations from a broader perspective, rather than solely relying on individual complaints. The dual objectives of public inquiries, as stated by SUHAKAM, are to establish the facts and educate the government on specific human rights issues.

Section 14 of the Human Rights Commission Act 1999 grants SUHAKAM the power to conduct public inquiries, as explicitly highlighted in the three public inquiry reports on enforced disappearances. Additionally, before commencing a public inquiry, SUHAKAM actively collects statements from individuals with information on the disappearances and investigates potential witnesses. This proactive approach demonstrates the commitment of SUHAKAM to uncover the truth and address human rights violations effectively.

In essence, public inquiries play a vital role in ensuring transparency, accountability, and the protection of human rights. They serve as a platform for a thorough investigation, evidence collection, public participation, and government enlightenment. The insights provided by SUHAKAM and their diligent application of public inquiries to investigate enforced disappearances highlight the significance of this mechanism in upholding justice and safeguarding human rights.

4. Proving an Enforced Disappearance through a Public Inquiry – Analysing the SUHAKAM reports on Enforced Disappearance

This part examines the methods adopted by SUHAKAM in proving enforced disappearance by state agents in Malaysia. As enforced disappearance is a unique, complex, and secretive act, it is extremely difficult to obtain any direct evidence to prove state responsibility. However, it is argued that SUHAKAM employed public inquiry as a fact-finding investigation tool in finding

[142] *Amri Che Mat* (n 137) para 50; *Joshua Hilmy and Ruth Sitepu* (n 138) para 22; *Pastor Raymond Koh* (n 139) para 53.

the disappearances of Amri Che Mat, Pastor Raymond Koh, Joshua Hilmy and Ruth Sitepu as enforced disappearance cases. The following subsections will examine the methods used by SUHAKAM in establishing an enforced disappearance case in Malaysia. Further, the similarities in the reports will be analysed. The variances in the three reports will also be discussed to find out the reasons for not finding the agents of the state responsible for the enforced disappearance of Joshua Hilmy and Ruth Sitepu.

4.1 Elements to be proven at the Public Inquiry

In the three reports, the commission was tasked with proving whether the victims were abducted by the agents of the state or whether they were abducted by non-state agents with the authorisation, support, and/or acquiescence of the state.[143] SUKAHAM also had to determine whether the state had actively refused to share any information about the abduction with the families of the forcibly disappeared.[144] Thus, the commission's mandate was to find out whether these disappearances were perpetrated by state agents or non-state agents and whether the state denied the abduction of these persons and hid the whereabouts or fate of the disappeared persons.

4.2 Religious Issues as the reason for perpetrating enforced disappearance in Malaysia: SUHAKAM's findings

Religion and race are said to be the hallmarks of Malaysian society.[145] Although the country is not a deeply conservative theocratic state, the Malaysian Constitution expressly grants Islam the status of the country's dominant religion.[146] It is said that Islam's status as the religion of the state will not hinder the right of non-Muslims to practise their religious beliefs, as the Constitution expressly guarantees freedom of religion for all religious groups.[147] However, despite the constitutional guarantees, it is found that non-Muslims and sects like Shi'ism and Ahmaddiyas are subject to various types of discrimination.[148] The United States Commission on International Religious Freedom expressed its concern in its 2019 report by stating that

[143] *Amri Che Mat* (n 137) para 52; *Joshua Hilmy and Ruth Sitepu* (n 138) para 191; *Pastor Raymond Koh* (n 139) para 56.
[144] *Amri Che Mat* (n 137) para 56; *Joshua Hilmy and Ruth Sitepu* (n 138) para 194; *Pastor Raymond Koh* (n 139) para 59.
[145] Nur Amali Aminnuddin, 'Ethnic Differences and Predictors of Racial and Religious Discriminations among Malaysian Malays and Chinese' (2020) 7(1) Cogent Psychology 1766737 <https://www.tandfonline.com/doi/full/10.1080/23311908.2020.1766737> accessed 20 May 2023.
[146] Dian Abdul Hamed Shah and Mohd Azizuddin Sani Mohd, 'Freedom of Religion in Malaysia: A Tangled Web of Legal, Political, and Social Issues' (2010) 36 North Carolina Journal of International Law 647, 659 <http://scholarship.law.unc.edu/ncilj/vol36/iss3/5> accessed 20 May 2023.
[147] Mohd Azizuddin Mohd Sani and Dian Diana Abdul Hamed Shah, 'Freedom of Religious Expression in Malaysia' (2011) 7 Journal of International Studies 33, 34 <https://e-journal.uum.edu.my/index.php/jis/article/view/7916> accessed 20 May 2023.
[148] Mohd Faizal Musa, *Freedom of Religion in Malaysia: The Situation and Attitudes of "Deviant" Muslim Groups* (ISEAS Publishing 2022) 4-5 <https://www.iseas.edu.sg/wp-content/uploads/2022/09/TRS16_22.pdf> accessed 20 May 2023.

religious discrimination against non-Muslims and non-Sunni sects is legitimised at various levels in Malaysia.[149]

It is interesting to note that all three forcibly disappeared persons belonged to these religious minorities. During the investigations, SUHAKAM found that a religious undertone was visible in the enforced disappearances of Pastor Raymond Koh, Amri Che Mat, Joshua Hilmy, and Ruth Sitepu. In Amri Che Mat's case, the commission had convincing evidence to find that the Shia background of Amri Che Mat was the reason for the Special Branch to conduct surveillance against him.[150] In the Pastor Raymond Koh report, SUHAKAM identified the religious works undertaken by Koh, including alleged proselytization, as a reason for his enforced disappearance.[151] In the Joshua Hilmy and Ruth Sitepu report, SUHAKAM found their religious activities and provocative comments against the Holy Prophet to have led to their enforced disappearance.[152]

4.3 The Interplay Between Direct and Circumstantial Evidence in the Amri Che Mat, Pastor Raymond Koh, and Joshua Hilmy-Ruth Sitepu Cases

Proving an enforced disappearance is considered an extremely difficult process.[153] It is deliberately made difficult by fabricating or eliminating all evidence related to the crime, thereby making obtaining evidence a challenging task.[154] Thus, the prosecution will be placed under an extreme burden to prove the guilt of a person accused of committing an enforced disappearance.[155] However, the mandate of SUHAKAM was not to find individual responsibility but to answer the question of whether these disappearances were 'enforced disappearances' and, if so, whether the state agents were responsible.

In finding answers to these questions, the commission admitted both direct and circumstantial evidence as effective evidential tools. The significance of adopting circumstantial evidence as a reliable source of evidence was laid out by the Inter-American Court of Human Rights (IACtHR) in the case of *Bámaca-Velásquez v Guatemala* (2000).[156] The Court ruled that the

[149] United States Commission on International Religious Freedom, 'Factsheet: Enforced Disappearances in Malaysia' (*uscirf.gov*, October 2019) <https://www.uscirf.gov/sites/default/files/2019%20Malaysia%20Factsheet.pdf> accessed 20 May 2023, 1–2.

[150] *Amri Che Mat* (n 137) para 136.

[151] *Pastor Raymond Koh* (n 138) para 37.

[152] *Joshua Hilmy and Ruth Sitepu* (n 139) para 55, 56.

[153] Committee on Legal Affairs and Human Rights, 'Enforced Disappearances' (*Parliamentary Assembly of the Council of Europe*, 19 September 2005) Doc. 10679 para 10.1.2 <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11021> accessed 22 June 2022.

[154] Ophelia Claude, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudences' (2010) 5 Intercultural Human Rights Law Review 407, 415 <https://www.stu.edu/portals/law/docs/human-rights/ihrlr/volumes/5/407-462-opheliaclaude-acomparativeapproachtoenforceddisappearancesintheinter-americancourtofhumanrightsandtheeuropeancourtofhumanrightsjurisprudence.pdf> accessed 22 June 2022.

[155] UN Commission on Human Rights, 'Civil and Political Rights, Including Questions of Disappearances and Summary Executions: Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of Commission Resolution 2001/46' (8 January 2002) UN Doc E/CN.4/2002/71 para 69 <https://www.refworld.org/docid/3d6ce3c50.html> accessed 23 August 2022.

[156] *Bámaca-Velásquez v Guatemala* [2000] IACHR 7.

difficulties faced in obtaining any direct evidence necessitate the use of circumstantial and indirect evidence in an enforced disappearance.[157] In the Amri Che Mat report, SUHAKAM received direct evidence wherein witnesses claimed to have seen three cars boxing another car on the highway.[158] Apart from the direct evidence, the commission also found the circumstantial evidence of two people to be credible, as they testified to seeing the three same vehicles parked outside Amri Che Mat's house.[159] In the Pastor Raymond Koh case, the evidence of a police officer was critical in holding the agents of the state responsible for Koh's enforced disappearance. The officer's testimony to the wife of Amri Che Mat that Pastor Raymond Koh was also forcibly disappeared by the Special Branch, Bukit Aman due to his proselytization activities was found to be credible by SUHAKAM.[160]

However, in the Joshua Hilmy-Ruth Sitepu case, SUHAKAM failed to find any direct or circumstantial evidence regarding their enforced disappearance. The fact that state agents were responsible for perpetrating their enforced disappearance was not established in the Joshua Hilmy-Ruth Sitepu case.[161]

4.4 Findings and Recommendations of SUHAKAM: A Roadmap for the Future?

SUHAKAM found that it was the Special Branch, Bukit Aman, and Kuala Lumpur that perpetrated the forced disappearance of both Amri Che Mat and Pastor Raymond Koh.[162] However, in the Joshua Hilmy-Ruth Sitepu case, the commission could not convincingly hold the state agents responsible for participating in their enforced disappearance.[163] But despite finding the absence of direct state participation, their enforced disappearance was indirectly supported by the state as evidenced by its refusal to acknowledge the arrest of the two persons.[164] In the Amri, Koh, and Joshua Hilmy-Ruth Sitepu cases, the state was held responsible by SUHAKAM for refusing to acknowledge the arrest or detention and concealing the nature of the disappeared person's status.[165]

The similarities between Amri Che Mat, and Pastor Raymond Koh's enforced disappearances convinced SUHAKAM to mark these two as enforced disappearances committed by a common religious motive.[166] Though the religious element was also present in the Joshua Hilmy-Ruth Sitepu case, SUHAKAM could not find a specific religious motivation for committing the enforced disappearance like in the Amri Che Mat and Pastor Raymond Koh cases. In the Amri Che and Raymond Koh cases, SUHAKAM had convincing evidence to establish that both were

[157] ibid 131.
[158] *Amri Che Mat* (n 137) para 53.
[159] *Amri Che Mat* (n 137) para 150.
[160] *Pastor Raymond Koh* (n 138) para 137.
[161] *Joshua Hilmy and Ruth Sitepu* (n 139) para 239.
[162] *Amri Che Mat* (n 44) para 171; *Pastor Raymond Koh* (n 138) para 153.
[163] *Joshua Hilmy and Ruth Sitepu* (n 139) para 239.
[164] *Joshua Hilmy and Ruth Sitepu* (n 139) para 73.
[165] *Amri Che Mat* (n 137) para 177; *Joshua Hilmy and Ruth Sitepu* (n 139) para 279; *Pastor Raymond Koh* (n 138) para 157.
[166] *Pastor Raymond Koh* (n 138) para 158.

targeted by religious authorities,[167] while the targeting by religious authorities was not convincingly established in the Joshua Hilmy-Ruth Sitepu case.

In its recommendations, SUHAKAM urged the Malaysian government to ratify the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED) and codify enforced disappearance as an offence in the Malaysian criminal code.[168] Secondly, the commission also reminded the police and religious authorities to understand their respective powers and advised them not to exceed their limits, especially on sensitive issues such as proselytization.[169] Thirdly, police reforms were suggested by SUHAKAM, wherein the commission called for the creation of an accountability mechanism for the Special Branch. Fourthly, in all three reports, SUHAKAM emphasised the obligation of state authorities to respect the freedom of religion as a fundamental right.[170]

5. CONCLUSION

Enforced disappearance is a crime that causes immense psychological anguish to the families of the forcibly disappeared. The families are left in a state of permanent uncertainty regarding their loved one's fate. The right to know the truth about the fate or whereabouts of their disappeared loved one is a fundamental right that they possess. Denying this basic right is equivalent to condemning them to severe psychological torture. While the state had failed to appreciate the seriousness of enforced disappearance, SUHAKAM played a key role in unearthing this crime in Malaysia. Even though SUHAKAM was partly created by political motivations, its public inquiry into uncovering enforced disappearances turned out to be a clear indictment of the state's responsibility in perpetrating this crime.

Even though the Act didn't mention anything about public inquiry, SUHAKAM relied on its powers under Sections 12 and 14 to develop a systematic human rights-based approach to investigating a serious crime like enforced disappearance. In the cases of Amri Che Mat, Pastor Raymond Koh, and Joshua Hilmy-Ruth Sitepu, SUHAKAM made effective use of its broad public inquiry powers by accepting a wide variety of indirect evidence like witness testimonials to solve the disappearance. A public inquiry was particularly successful in investigating an enforced disappearance because of the large number of witnesses who came forward to testify. Thus, it can be said that public inquiry is a perfect method used by SUHAKAM in proving state responsibility for this crime. It is also found that religious reasons are apparent in the enforced disappearance of all the persons. However, unlike the Amri Che and Pastor Raymond Koh cases, the absence of clear and convincing circumstantial evidence of state agents' involvement prompted SUHAKAM to exonerate the agents of any culpability in the Joshua Hilmy-Ruth Sitepu case. But it is to be noted that these three public inquiry reports established these disappearances as "enforced disappearances" as defined under Article 2 of the ICPPED. The recommendations of SUHAKAM can be termed a well-founded and legally sound response

[167] *Amri Che Mat* (n 137) para 183.
[168] *Amri Che Mat* (n 137) para 215; *Joshua Hilmy and Ruth Sitepu* (n 139) para 287 read together with Chapter 7 Recommendations, paras 7 and 9; *Pastor Raymond Koh* (n 138) para 193.
[169] *Amri Che Mat* (n 137) para 195; *Pastor Raymond Koh* (n 138) para 175.
[170] *Amri Che Mat* (n 137) para 195; *Joshua Hilmy and Ruth Sitepu* (n 139) para 76; *Pastor Raymond Koh* (n 138) para 173;

to the Malaysian government. The need to accede to the ICPPED, to ensure accountability for special branch actions, and to respect freedom of religion is indeed the most effective mechanism to prevent enforced disappearances in the future.

This study provides the backbone for future research on strengthening the powers of SUHAKAM in its investigation of gross human rights violations like enforced disappearance. Future studies on enforced disappearance in Malaysia are recommended to understand the role of human rights institutions, NGOs and family members in preventing the crime of enforced disappearance.

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Safeguarding the Welfare of the Mentally Disordered under the Mental Health Act 2001[171]

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Abstract:

Part X of the Mental Health Act 2001 in Malaysia governs proceedings in inquiries into mental disorders. Specifically, the Malaysian courts are empowered to appoint a committee of person and/or a committee of the estate of the person to govern the affairs of a person who is determined to be mentally disordered and who is incapable of managing his or her affairs.

This article seeks to examine the process of appointment of such committees and the extent of powers available to these committees. Consideration is given to the current safeguards available to protect the welfare of the mentally disordered person within the current legal framework and commentary is provided on the adequacy of the existing safeguards.

Keywords: Mental Health Act 2001; committee of estate; committee of person

1. Introduction

The Mental Health Act 2001 (**"MHA 2001"**) came into force in 2010, when the Mental Health Regulations[172] came into operation in 2010. MHA 2001 is applicable to all parts of Malaysia, passed to consolidate the laws relating to mental disorders[173] and to provide for the admission, detention, lodging, care, treatment, rehabilitation, control and protection of persons who are mentally disordered.[174]

In particular, Part X of the MHA 2001 contains specific provisions allowing the High Court (henceforth referred to as the Court), on an application before it, to make an order directing an inquiry to determine whether a person subject to the jurisdiction of the Court and alleged to be mentally disordered is incapable of managing himself[175] and his affairs due to such mental disorder.[176] If the Court adjudicates that the person alleged to be mentally disordered is, owing to his mental disorder, incapable of managing himself and his affairs,[177] the Court may order that a committee of person and/or a committee of the estate of the person be appointed in respect of the mentally disordered person.[178]

[171] The author would like to thank Melissa Ho Mun Wai, Chen Yan Rong (Daphne) and Sabrina Tan Xiao Ying for their research findings in preparing this article.
[172] Mental Health Regulations 2010.
[173] Nur Aina Syafiqah Azawawi and Anisah Che Ngah, 'Mental Health Law Development in Malaysia' [2019] 1 CLJ(A) i.
[174] Mental Health Act 2001 (MHA 2001) Preamble.
[175] References to the masculine are henceforth deemed to be references to the feminine as well.
[176] MHA 2001, s 52(1).
[177] ibid s 56.
[178] ibid s 58.

This article will first examine the process of appointment and the extent of powers available to these committees, highlighting the distinctions between a committee of person and committee of the estate of the person. Consideration is then given to the safeguards available to protect the welfare of the mentally disordered person within the current legal framework as well as the adequacy of such safeguards.

2. Proceedings under Part X of the MHA 2001

2.1. Definition of a mentally disordered person

A mental disorder is defined under section 2(1) of the MHA 2001[179] to mean 'any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any disorder or disability of the mind however acquired'.

The legislation is clear, however, that a person is not to be dealt with as someone with a mental disorder only by reason of his promiscuity or other immoral conduct, sexual deviancy, consumption of alcohol or drug etc, [180] although this does not prevent the serious physiological, biochemical or psychological effects, temporary or permanent, of drug or alcohol consumption from being regarded as an indication that a person is mentally ill.[181]

Under Part X of the MHA 2001, section 51 defines a mentally disordered person as 'any person specifically found by due course of law to be both mentally disordered *and* incapable of managing himself and his affairs'.[182] Thus, it is only when a person with a mental disorder can be shown to be unable to manage himself or his affairs that any committee will be appointed.

The conclusion of whether a person is mentally disordered is a judicial decision. While Courts may be properly aided by medical opinions, ultimately the Court is not relieved from its obligation to exercise its discretion and form its own judgment,[183] not allowing the decision to be made completely vicariously through medical specialists.[184] The Court is not bound to accept the evidence of medical practitioners even in the face of unchallenged medical opinions, provided the Court has sound reasons to do so.[185]

2.2. Inquiry on a mentally disordered person – The Court procedure

Pursuant to section 52(3) of the MHA 2001,[186] the categories of people who can apply to the Court for an inquiry on a mentally disordered person are the relative[187] of the person alleged to be mentally disordered, or any public officer nominated by the Health Minister for the purpose of making the application.[188]

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[179] ibid s 2(1).
[180] ibid s 2(2).
[181] ibid s 2(3).
[182] ibid s 51.
[183] *Wong Kim v Loh Kim Foh* [2003] 4 MLJ 535 (HC).
[184] ibid.
[185] *Gary Lim Ting Howe v Lim Pang Cheong & Ors* [2015] MLJU 832 (HC), [34].
[186] MHA 2001, s 52(3).
[187] ibid s 2(1) - Husband or wife, son or daughter, father or mother, brother or sister, grandparent or grandchild, maternal or paternal uncle or aunt, nephew or niece.
[188] ibid s 52(3).

Upon an application being made, the Court generally follows a two-tiered process.[189] Firstly, the court determines whether on a *prima facie* basis, the allegation that the subject person of the application is mentally disordered[190] is potentially true. There does not need to be conclusive proof of this allegation,[191] merely whether there is *prima facie* evidence that the person is of unsound mind and is incapable of managing himself and his affairs.[192] The initial assessment allows the judge to determine if there is any real ground for an inquisition.[193] Thus, if the *prima facie* test is satisfied, the Court is empowered to order an inquiry as a second step to determine whether the person is unable to manage himself or his affairs due to his mental disorder. If the *prima facie* case is not satisfied, however, no inquiry will be ordered by the Court, with the result that the application will be dismissed *in limine*. The High Court decision of *Wong Kim v Loh Kim Foh*[194] was an instance where the Court found insufficient *prima facie* evidence to order an inquisition. While medical reports suggested that the 90-year-old defendant was suffering from Alzheimer's disease, a 55-minute interview conducted by the judge found that the defendant *"spoke freely and fluently"*, was *"cooperative and coherent"* and *"surprised me with his capacity for comprehension".*[195]

At any time after the application for an inquiry is made, the Court may require the person who is alleged to be mentally disordered to be produced for personal examination by the Court or a psychiatrist.[196] The factors to be considered by the psychiatrist[197] are the nature and degree of the person's condition, the complexity of his estate, the effect of the condition of the person upon his conduct in administering the estate; and any other circumstances the psychiatrist considers relevant to the estate and the person and his condition.[198] In the alternative or in addition, the Court may, on evidence it deems sufficient, order that the person be admitted into a psychiatric hospital for observation for a period not exceeding one month, which may be extended by a further one month vide application of the Medical Director.[199]

During the inquiry stage, the Court will consider the psychiatrist's report under section 54, the certification of the Medical Director under section 55, and other evidence and arguments it thinks fit to determine if the person is incapable of handling himself and his affairs by reason of his mental disorder.[200] Other questions that the Court may direct to be answered include those pertaining to the nature of the property belonging to the person alleged to be mentally disordered; the persons' relatives; and the period during which he has been mentally disordered.[201]

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[189] Note the differing approaches in *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor* [2018] 6 MLJ 141 (CA) and *Ng Pik Lian v Tai May Chean & Anor and other appeals* [2021] 10 CLJ 841 (CA).
[190] Within the meaning of the MHA 2001, s 51.
[191] *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor* [2018] 6 MLJ 141 (CA).
[192] *Wong Kim v Loh Kim Foh* [2003] 4 MLJ 535 (HC).
[193] ibid.
[194] ibid made pursuant to section 3 of the Mental Disorders Ordinance 1952 (now repealed) which contains a similar provision as section 52 of the MHA 2001.
[195] ibid 543.
[196] MHA 2001, s 54(1).
[197] As defined in section 2 of the MHA 2001.
[198] MHA 2001, s 54(2).
[199] ibid s 55(1).
[200] ibid s 56.
[201] ibid s 52(2).

It should be noted that while the application under section 52 of the MHA 2001 needs to meet the initial *prima facie* threshold by the Court, it is not mandatory that the Court must order an inquiry once the threshold is met. Section 52(1) gives the Court a permissive power to do so.[202] That said, it is expected that a successful application under section 52 of the MHA 2001 should at least be supported by medical evidence in the form of a medical nature by a medical practitioner who has had a reasonable opportunity of viewing the condition of the alleged mentally disordered individual.[203]

It is not easy to satisfy the threshold of what it means to be mentally disordered under section 51 of the MHA 2001. The mere presence of unchallenged medical findings on dementia may not suffice if evidence shows that a person is in fact capable of managing his day-to-day affairs. In this regard, the High Court decision of *Gary Lim Ting Howe v Lim Pang Cheong & Ors*[204] was presented with surveillance reports which showed the alleged mentally disordered individual shopping for groceries, buying breakfast, and playing golf. The Court found that the individual's *'ability to manage time and space would also appear to be sufficiently unimpaired as to permit him to not only drive two different models of cars, but also to drive into the heart of Kuala Lumpur at rush hour on a weekday, find parking, and then have breakfast at a coffee shop on Jalan Imbi.'*[205] The Court opined that the evidence proved that the individual's executive function was still intact.

Illustrations from case law where the Court has deemed it fit to appoint a committee over the mentally disordered person and/or his estate include where there is a court order from another jurisdiction declaring the individual to be of unsound mind and incapable of managing himself and his affairs.[206] The Court is, however, mindful not to allow the inquiry mechanism to be used purely as a litigious tool. In the High Court decision of *Tee Wee Kok v Teh Liang Teik & Ors*,[207] for instance, the Court dismissed an application which had been filed under the then Mental Disorders Ordinance 1952. The dismissal was on the basis that the application was found to be made not in the best interests of the individual alleged to be mentally disordered, but merely to protect the position of the plaintiff in pending suits as a consequence of a bitter feud between siblings. The Court refused to allow an application made to protect the plaintiff's commercial interests without having regard to the interests of the said individual.

2.3. Change in the landscape of the law at the inquiry stage

The emergence of the recent Court of Appeal decision of *Ng Pik Lian v Tai May Chean & Anor and other appeals*[208] has introduced a new dimension on how the law may apply with respect to the first stage *prima facie* assessment and second stage inquiry process. *Ng Pik Lian (supra)* lays down 2 key propositions. Firstly, an order for inquiry is subject to an appeal given its

[202] *Ling Towi Sing @ Ling Chooi Sieng & Ors v Dato' Ng Kong Yeam c/o Ling Towi Sing @ Ling Chooi Sieng* [2016] MLJU 425 (HC).
[203] *Tan Chin Yap v Nyanasegar A/L Muniandy & Anor* [2022] MLJU 2204 (HC).
[204] *Gary Lim Ting Howe v Lim Pang Cheong & Ors* [2015] MLJU 832 (HC).
[205] ibid [50].
[206] *Tan Guek Tian & Anor v Tan Kim Kiat (No. 1)* [2007] 3 MLJ 521 (HC).
[207] *Tee Wee Kok v Teh Liang Teik & Ors* [2010] 3 MLJ 84 (HC).
[208] *Ng Pik Lian v Tai May Chean & anor and other appeals* [2021] 10 CLJ 841 (CA).

intrusive nature on a person's fundamental liberties.[209] An order for inquiry was found to be a final decision disposing of the rights of the parties and was conclusive in nature in that a fundamental right of an individual had been affected, warranting an appeal. Secondly, the Court of Appeal found that a *prima facie* case is always rebuttable. This means that once a *prima facie* case is established, the party must be afforded the opportunity to rebut the same as a matter of justice within the same proceedings. The court expressly mentioned that it would be unfair for a person to go ahead with an inquiry before one can bring the evidence to rebut the *prima facie* case.[210]

The ratio decidendi of *Ng Pik Lian (supra)* is interesting and stands in contrast with another Court of Appeal decision delivered just 3 years prior in the case of *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor*[211] which held that once a *prima facie* case is established, no rebuttal evidence should be considered in the judge's deliberation on whether to proceed with the inquiry. Instead, rebuttal evidence should only be considered at the next stage, that is after the inquiry is performed, before relevant orders on the administration of affairs of the individual are made. [212] The difference between these two Court of Appeal decisions will be explored further below on the issue of safeguards available to mentally disordered people under the MHA 2001.

2.4. On setting aside an order made under the MHA 2001

It is apposite to also mention at this juncture that the High Court decision of *Gary Lim Ting Howe (supra)* referred to above was in effect a second-round determination of an individual's capacity to manage his affairs ('the second decision'). In that case, an earlier High Court decision had already made a determination that the individual was mentally disordered within the meaning of the MHA 2001 ('the first decision'). However, the first decision was obtained under circumstances where the individual had been adjudged to be bankrupt and was subject to continued public examination proceedings. As a result, judgment creditors applied to intervene to set aside the first decision and were ultimately allowed to intervene. A rehearing of their application to set aside the first decision was then ordered, whereby the individual was eventually found to be capable of managing his own affairs vide the second decision.

In addressing counsel's argument that the Court is not vested with the power to set aside a proper order under the MHA 2001, the later High Court decision notably found that the judgment creditors' right to apply for setting aside was rooted in section 62 of the MHA 2001[213] which provides that subject to the Act, the Court, may, on an application made to it concerning any matter connected with an inquiry, make such order in respect of the application and the costs of the application and of the consequent proceedings as under the circumstances seem just. The Court found that the application to set aside was made in consequence of a previous inquiry undertaken pursuant to section 52 and was therefore

[209] ibid 847.
[210] ibid 849-850.
[211] *Tan Poh Lee & Ors v Tan Kim Choo @ Tan Kim Choon & Anor* [2018] 6 MLJ 141 (CA).
[212] ibid 150.
[213] MHA 2001, s 62.

'connected with an inquiry' as required under section 62.[214] The Court of Appeal[215] decision which allowed the judgment creditors to intervene opined that pursuant to section 62, among others, anyone with information can seek remedy in court to challenge the status of the mental state of the relevant individual, bearing in mind that the mental status of any person is a fluid matter. The Court of Appeal was also presented with surveillance reports. The application of section 62 in this manner is examined further below in the context of safeguards available to the mentally disordered.

3. Committee of person and committee of estate

3.1. Individuals sitting on the committees

Once the Court determines that a person is mentally disordered and is thus unable to manage himself or his affairs, the court has the power to appoint a committee or committees of the person and of the estate of the person.[216] Broadly, a committee of person has the primary purpose of protecting the bodily safety of the mentally disordered individual and those around him; whilst a committee of the estate of the person (henceforth referred to as committee of estate) is aimed at managing the external affairs of the mentally disordered person including his property etc. If the Court deems fit, it may make provisions on the remuneration of the committee(s) out of the person's estate or the giving of security by the committee(s).[217]

It is possible for the same individual(s) to sit on both the committee of the person and the committee of estate.[218] It is, however, not necessary for both the committee of person and the committee of estate to be constituted. Section 58(2) of the MHA 2001 envisages that if a mentally disordered person is unable to manage his affairs but is not dangerous to himself or others, the Court may opt to appoint a committee of estate only without appointing a committee of persons.[219]

It appears that a single individual is sufficient to form a committee. While it is usual for the mentally disordered person's relative as defined under section 2 of the MHA 2001 to sit on the committee, blood relations are not a prerequisite, given the spirit and overall intent of the MHA 2001. In the High Court decision of *Liew Ju Min v Choo Wee Poh & Ors and another,*[220] an adopted daughter was found to be a suitable person to sit on the committee.

Indeed, a friend[221] can be appointed to sit on a committee, as the requirement for a relative to act as an applicant only applies during the inquiry stage.[222] For the purposes of the MHA 2001, a friend is described, among others, as a person, other than a relative, of or above eighteen years of age with whom the mentally disordered person ordinarily resides, and with whom he has or had been ordinarily residing for a period of not less than two years.

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[214] *Gary Lim Ting Howe v Lim Pang Cheong & Ors [2015] MLJU 832* (HC) [17] and [18].
[215] *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2014] 6 CLJ 55 (CA) [21].
[216] MHA 2001, s 58(1).
[217] ibid s 58(1).
[218] *Hasnah bt Baba v Juliah bt Mohd Hassan* [2020] MLJU 499 (HC).
[219] MHA 2001, s 58(2).
[220] *Liew Ju Min v Choo Wee Poh & Ors and another case* [2017] MLJU 133 (HC).
[221] MHA 2001, s 2.
[222] ibid s 52(3).

Ultimately, a guiding principle adopted by the Court across the board in appointing a committee is whether the best interests of the mentally disordered person would be served.

3.2. Committee of person

The majority of cases under Part X of the MHA 2001 do not deal with the formation of a committee of person. A reading of section 58(2) of the MHA 2001 indicates that a committee of person is only appointed in narrow circumstances – when the mentally disordered person is dangerous to himself or others. Case law has interpreted this to mean the *"tendency of the person becoming violent and inflict injury".*[223]

A fallback provision lies in section 73 of the MHA 2001, where the Court is presented with two options if it does not appoint a committee of person. The Court can either direct the person to be received into a psychiatric hospital;[224] or make an order handing him over to the care of a friend or relative who satisfies the Court that they undertake to take proper care of the person to prevent him from injuring himself or others.[225]

Given the distinction that the MHA 2001 makes between appointing a committee of person versus making the alternative decision of handing a mentally disordered person over to the care of a psychiatric hospital, friend or relative, the full extent of the powers of a committee of person remains to be illustrated. It may well be that a committee of person functions primarily in making medical decisions which have a bearing only on the immediate and urgent well-being of the mentally disordered person.

Across the Causeway, the Singapore High Court decision of *Re LP (Adult Patient: Medical Treatment)*[226] held that a committee of person had the power to act in place of the patient to give or withhold medical consent.[227] However, section 77(1)(b) of the Malaysian MHA 2001 allows a relative of a mentally disordered person to give consent on his behalf for surgery, electroconvulsive therapy of clinical trials if he is incapable of so consenting, without the requirement for the relative to first be part of a committee of person.[228] The question of the true ambit of powers of a committee of person thus lingers.

3.3. Committee of estate

There appears to be more clarity on the role to be performed by a committee of estate. Under the MHA 2001, a committee of estate essentially has powers for the management of the estate as the Court deems necessary and proper, with regard to the nature of the property, whether movable or immovable, of which the estate may consist.[229] Subject always to the directions of the Court, a committee of estate can, among others, execute conveyances and perform other acts in fulfilment of the contract entered into to dispose or sell his estate

[223] *Liew Ju Min* (n 220) para 41.
[224] MHA 2001 s 73(1).
[225] ibid s 73(2).
[226] *Re LP (Adult Patient: Medical Treatment)* [2006] 2 SLR 13 (HC).
[227] The relevant section in the Singapore legislation is section 9 of the now repealed Mental Disorders and Treatment Act. Section 58 of the MHA 2001 shares a similar wording as section 9.
[228] MHA 2001, s 77.
[229] ibid s 59(1), s 60 to s 70.

before he became mentally disordered;[230] sell and dispose of the mentally disordered person's business premises;[231] and surrender, assign or dispose of the mentally disordered person's lease or sublease.[232]

The committee of estate's power does not extend to the sale or charge of the estate or any part of the estate or to the letting of any immovable property for a term exceeding three years,[233] although the Registrar of the Court may receive a proposal on this matter which will then be referred to the Court for an order.[234] The Court may, if it considers it just or for the benefit of the mentally disordered person, order the sale, charge or otherwise disposal of any movable and immovable property to raise money for (i) the payment of debts, (ii) discharge of any encumbrance on the estate, (iii) provision for future maintenance of the mentally disordered person and his family and (iv) payment for costs for proceedings under the MHA 2001.[235] A committee of estate is also empowered to commence litigation proceedings on behalf of the individual adjudged to be mentally disordered, if so ordered by the Court.[236] In this regard, a person found to be mentally disordered under the MHA 2001 can only sue by litigation representative.[237]

It is important that a committee of estate stays within the scope of powers expressly conferred by the court order, given the judicial approval required before powers of management of the estate can be exercised. In the Singapore High Court decision of *Peter Edward Nathan v De Silva Petiyaga Arther Bernard and another,*[238] a transaction for sale was deemed invalid as the committee executing the sale on behalf of the mentally disordered individual had no power to do so under the terms of the court order.

4. Safeguards available to Mentally Disordered Persons under the MHA 2001

To be appointed as a committee on behalf of the person or estate of a mentally disordered individual is an onerous responsibility. It is thus necessary to explore whether the MHA 2001 as it stands affords the necessary protection to mentally disordered persons.

4.1. Inquiry stage and setting aside a perfected order

The two-tier process adopted by the Court in inquiring into the mental state and capacity of the individual is a useful mechanism. One of the main divergences in case law as it stands, is whether an individual ought to be given the opportunity to rebut a preliminary assessment before an inquiry is carried out (the *Ng Pik Lian* approach) or whether an individual should only be allowed to rebut a preliminary finding (the *Tan Poh Lee* approach). An inquiry has been described by *Ng Pik Lian* as an *"intrusive order"* against a basic right to enjoy living freely and without interference from others.[239] Further, the Court need not necessarily order an

[230] ibid s 65.
[231] ibid s 67.
[232] ibid s 68.
[233] ibid s 59(2).
[234] ibid s 60.
[235] ibid s 63.
[236] *Ling Towi Sing @ Ling Chooi Sieng & Ors v Sino-America Tours Corporation Pte Ltd* [2017] 1 LNS 1663 (CA).
[237] Rules of Court 2012, Order 76 Rule 2.
[238] *Peter Edward Nathan v De Silva Petiyaga Arther Bernard and another* [2016] SGHC 70 (HC).
[239] *Ng Pik Lian* (n 208) 842.

inquiry in determining if an individual is incapable of managing his affairs. That being the position, it is opined that the *Ng Pik Lian* approach is to be preferred in allowing an individual to rebut a preliminary assessment of being mentally incapable at a much earlier stage, instead of waiting to be subject to a potentially invasive inquiry.

The High Court case of *Gary Lim Ting Howe (supra)* is intriguing because it involves the setting aside of a perfected order. Ordinarily, perfected orders would render the court functus officio. There is no suggestion that the first decision was made in breach of rules of natural justice to warrant a setting aside in the usual course. Yet, the courts there had appeared to readily use section 62 as a statutory direction to allow the intervention of the judgment creditors. Further, it does not appear that the judgment creditors fall within the categories of persons who are typically empowered to apply for an inquiry.[240] It is opined that the use of section 62 in this manner is welcome to the extent that it signifies the courts' willingness to view the mental state of an individual as a live issue that has the capacity to change over time, but at the same time potentially widen the usual categories of persons who can question the state of mind of a person suspected to be mentally disordered.

Gary Lim Ting Howe (supra) might well be a case confined to its own set of facts[241] – it would be interesting to see if the Court would apply section 62 with equal force if, reversing the sequence of events in that case, an individual was *first* decisively found to be mentally capable of managing his own affairs but where subsequent fresh attempts are made to declare him mentally disordered upon the discovery of new facts.

At this stage, it is perhaps worth pointing out that in the recent High Court decision of *Tan Sri Dato' Kam Woon Wah v Andrew Kam Tai Yeow & Anor,*[242] the High Court granted an ad interim injunction to prevent the prosecution of MHA 2001 proceedings in a separate Originating Summons pending the disposal of underlying litigation proceedings between parties, who were father and son. The Court took note that the MHA 2001 proceedings were filed in the midst of ongoing legal battles between parties; where a psychiatric report had found no identifiable psychiatric or neurological disorder in the individual, and where no cogent countervailing evidence was presented to demonstrate such mental disorder. The Court found that if an ad interim injunction is not granted, the social standing of the individual would be greatly impacted. Indeed, the originating summons pertaining to the MHA 2001 proceedings was ultimately struck out by the High Court for being obviously unsustainable.[243]

In answer to how the Court might apply section 62 in a hypothetical scenario involving the reversal of sequence in events in *Gary Lim Ting Howe (supra),* it is posited that the Court would likely consider at least one of the following (non-exhaustive) factors before redetermining an individual's capacity to manage his affairs: (a) whether the application is made with the individual's best interests in mind or whether it is made with any evident ulterior motive in mind; (b) the length of time that has passed since the initial decision

[240] MHA 2001, s 52(3).
[241] *Gary Lim Ting Howe v Lim Pang Cheong & Ors* [2015] MLJU 832 (HC) was decided before the decision of *Ng Pik Lian v Tai May Chean & anor and other appeals* [2021] 10 CLJ 841 (COA), but *Ng Pik Lian* (supra) did not refer to *Gary Lim Ting Howe* (supra) in its decision.
[242] *Tan Sri Dato' Kam Woon Wah v Dato' Sri Andrew Kam Tai Yeow & Anor* [2022] MLJU 424 (HC).
[243] *Dato' Sri Andrew Kam Tai Yeow v Tan Sri Dato' Kam Woon Wah* [2023] MLJU 1146 (HC).

regarding the individual's mental state and (c) the strength of new evidence presented to the Court as to whether there is a *prima facie* case.

4.2. On individuals sitting on committees

The MHA 2001 is silent on the quality of persons deemed fit to be on a committee. Instead, the question of appointment of the committee is left to the Court for determination. Case law has appeared to develop sound guiding principles on this point – with the Court considering, among others, whether family members intending to sit on a committee have a clear, objective and realistic plan for the individual. In the Singapore decision of *Wong Sau Kuen and others v Wong Kai Wah,*[244] the court was mindful to ensure harmonious decision-making among members of the committee in order to facilitate workable solutions to problems that will no doubt arise from time to time and to aid in effective decision-making.

The courts have on occasion shown themselves willing to go the extra mile in the protection of the mentally disordered individual. In the case of *Liew Ju Min (supra),* the judge took the effort to personally visit the mentally disordered individuals at the hospital in the presence of parties, though not strictly required to under the MHA 2001. In the High Court case of *Goh Yong Peow v Goh Sok Choo & Ors,*[245] allegations were levelled against siblings regarding the management of assets and accounts of the mentally disordered person. In this case, the Court ordered the disclosure of documents pursuant to a discovery application in order to find out the nature, amount and value of all existing assets; and for the Court to determine if a committee should be appointed, and if so, who should sit on it.

4.3. The duration of a committee sitting

Given the lack of reported decisions on a committee of person, the discussion herein will focus only on a committee of estate. It is helpful to note that every power vested in the committee is subject always to approval by the court. This is to ensure that no act is left to the whim and fancy of the committee. Indeed, under section 71 of the MHA 2001, it is possible for the court to take a middle road approach by ordering maintenance in favour of a mentally disordered person without the setting up of the committee.[246] Importantly a committee does not have to sit forever. A finding of mental incapacitation is effectively a reversible one. Section 74 of the MHA 2001 allows a person (including the mentally disordered individual) to make an application to court if there is reason to believe a mental incapacity has ceased. The court may thereafter make an inquiry in this regard.[247]

4.4. On commencing and defending a legal suit

This last issue is specific to legal suits. A person found to be mentally disordered under the MHA 2001 can only sue or defend by litigation representative,[248] as stated in the procedural law of the Rules of Court 2012. The MHA 2001 and the Rules of Court 2012 are silent on who is suitable to be a litigation representative. Nonetheless, in the High Court decision of *Ling*

[244] *Wong Sau Kuen and others v Wong Kai Wah and Another* [2008] SGHC 5 (HC).
[245] *Goh Yong Peow v Goh Sok Choo & Ors* [2015] 10 MLJ 160 (HC).
[246] MHA 2001, s 71.
[247] ibid s 74.
[248] Rules of Court 2012, Order 76 Rule 2.

Towi Sing @ Ling Chooi Sieng & ors v Sino America Tours Corp Pte Ltd,[249] the Court agreed with a related Court of Appeal decision[250] that so long as there is valid court order appointing the plaintiff as committee of estate and to initiate legal proceedings for and on behalf of the mentally disordered person as a next friend or guardian ad litem, it did not matter that the plaintiffs are not technically litigation representatives as envisaged under Order 76 Rule 2(1) of the Rules of Court 2012.[251] The MHA 2001 would prevail over the Rules of Court 2012 as a subsidiary legislation.

The scenario in the paragraph above concerned the power to commence proceedings *after* an individual had been found to be mentally disordered. One of the more pertinent issues, however, is that there is no express provision under the MHA 2001 which requires that a plaintiff *first* be determined as a mentally disordered person prior to an institution of court proceedings by his or her litigation representative.[252] The potential implications of this are explored below.

In the High Court case of *Wong Kee Chong (An Infirm Suing Through His Wife And Next Friend, Chau Nyok Yen) v Wong Know & Ors,*[253] the plaintiff had sued the defendants through his wife as his next friend premised on a cause of action that there was a fraudulent transfer of the plaintiff's interests in 2 properties to the defendants when the plaintiff was not mentally competent to effect the transfer due to his chronic mental illness over a period of time. The Court found that the plaintiff's long history of chronic mental illness, which the defendants were aware of, meant that it was highly probable he was incapable of executing the transfer at the time.[254] The Court held that there was no legislative requirement for the plaintiff to be adjudged as a mentally disordered person within the definition of MHA 2001 before the appointment of a litigation representative is done, taking into account that the exception in Order 76 Rule 3(2) of the then Rules of High Court 1980[255] does not require a court order for the plaintiff's wife to act as his next friend.

On the other hand, in the more recent High Court decision of *Govindasamy A/L Munusamy lwn Krishnan A/L R Munusamy dan Lain Lain,* [256] the issue was whether a litigation representative could be appointed to act on behalf of an individual without him first being declared as mentally disordered under the MHA 2001. The Court effectively departed from *Wong Kee Chong (supra)* and found that Order 76 Rule 3 merely contained procedural rules on the appointment of litigation representatives. Importantly, the High Court considered itself bound by the Court of Appeal decision of *MTD Prime Sdn Bhd v See Hwee Keong & Ors and Another Appeal [2016] 4 MLJ 695*[257] which effectively stated that a person could only be said to be mentally disordered if he had been so assessed under the provisions of the MHA 2001. According to the High Court, it is not for anyone to determine the state of a person's

[249] *Ling Towi Sing @ Ling Chooi Sieng & Ors v Sino America Tours Corp Pte Ltd* [2019] MLJU 2157 (HC) [15].
[250] *Ling Towi Sing @ Ling Chooi Sieng & Ors v Sino America Tours Corp Pte Ltd* [2017] 1 LNS 1663 (CA) [15]-[19].
[251] Rules of Court 2012, Order 76 Rule 2.
[252] *Tan Chin Yap v Nyanasegar A/L Muniandy & Anor* [2022] MLJU 2204 (HC).
[253] *Wong Kee Chong (An Infirm Suing Through His Wife And Next Friend, Chau Nyok Yen) v Wong Kow & Ors* [2013] 3 CLJ 622 (HC).
[254] Contracts Act 1950, s 11 and s 12.
[255] Rules of High Court 1980, Order 76 Rule 3(2).
[256] *Govindasamy A/L Munusamy v Krishnan A/L R Munusamy dan Lain-Lain* [2020] MLJU 2138 (HC).
[257] *MTD Prime Sdn Bhd v See Hwee Keong & Ors and Another Appeal* [2016] 4 MLJ 695 (CA).

mental capacity without reference to the MHA 2001. It thus follows that a litigation representative cannot be appointed unless a person had been specifically adjudged to be mentally disordered under the MHA 2001.

One does wonder if the silence of the MHA 2001 on the appointment of litigation representatives could lead to instances where suits are handled by less-than-scrupulous individuals as purported litigation representatives on behalf of individuals with mental disorders without the need to first satisfy the rigorous processes set out in Part X of the MHA 2001. No doubt Order 76 Rule 2(1) of the Rules of Court 2012[258] is intended to facilitate access to justice for individuals with mental illnesses who do not have capacity to litigate[259] even when they may not be mentally disordered following the definition of the MHA 2001;[260] that the Courts would still be vigilant in ensuring a litigation representative is a person of substance; and that there is arguably no automatic right to sue a mentally disordered person[261] who has a litigation representative.[262] However, the utility of the MHA 2001 might be somewhat watered down in this aspect, at least in some cases, without further clarity being obtained.

5. Conclusion

The MHA 2001 is a commendable piece of legislation that has provided fundamental guidance on the protection of mentally disordered individuals. Much discretion is left in the hands of the Court, perhaps in recognition of the fluid nature of decision-making pertaining to mental disorders. As seen in the case law, the courts have shown themselves to be flexible and logical in approaching Part X of the MHA 2001. As per the wise words of the court in *Wong Kim v Loh Kim Foh*[263] when commenting on an individual who had Alzheimer's but maintained cognitive function, it is encouraging to note that the courts champion an individual's right to peace and quiet as a go-to concern.

"The defendant is now locked in a family dispute. It is hoped that this falling-out amongst them will be quickly resolved so that his wish to go home can be met and in the process be reunited with the plaintiff. In the twilight of his life, he deserves some peace and quiet."

Notwithstanding the potential uncertainty raised on the application of section 62 and issues regarding litigation representatives above, it seems that so long as the liberty of the mentally disordered person is at the forefront of the court's mind and is the overarching consideration of the Act, the MHA 2001 can remain a helpful guiding piece of legislation in many instances.

[258] Rules of Court 2012, Order 76 Rule 2(1).
[259] See the Masterman-Lister test in *Lim Thian Hock @ Lim Thiam Hock v Lim Choon Hiok* [2014] 9 MLJ 1 (HC).
[260] *Ziko Abbo v Ketua Polis Daerah Bau, Kuching, Sarawak* [2011] 3 CLJ 76 (CA).
[261] Under the MHA 2001.
[262] Rules of Court 2012, Order 76 Rule 1A and *JJ Raj v Dato Edward John Lawrence & Ors* [2015] 7 CLJ 238 (HC).
[263] *Wong Kim v Loh Kim Foh* [2003] 4 MLJ 535 (HC).

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End-of-life Decision-making: Ethical Conundrums in light of the Sanctity of Life

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Abstract

Ethical issues in end-of-life care, specifically the complex decision-making process involving medical professionals, patients, and families regarding treatment alternatives have been challenging. The context underlines the importance of social and health systems serving terminally ill patients' physical, emotional, social, and spiritual needs. It acknowledges the impact of modern medicine on mortality rates, patients' wish to die with dignity, and the importance of recognizing bereavement after death among primary carers. Advanced medical interventions to extend the lifespan of terminally ill patients raise questions about who should make such a decision and whether it is ethical. The aim of this study is to ascertain the ethical challenges and study the principles of biomedical ethics implicated in end-of-life care decisions among physicians, patients, and caregivers. A Literature review of library-based resources using descriptive and explanatory methods is employed in this study. Patients' autonomy, beneficence, non-maleficence, and justice should be considered while making end-of-life care decisions in dilemmas arising from treatment withdrawal and withholding, medical futility, physician-assisted suicide, and the doctrine of double effect. End-of-life care decision-making is challenging, but the application of bioethical principles to guide such decisions among key stakeholders is fundamental. Future research on other possible solutions for end-of-life care is recommended.

Keywords: End-of-life care, biomedical ethics, terminally ill, advanced medicine, primary carers

1. Introduction

The sanctity of life, which is at the basis of bioethics itself, is the explicit ethical dilemma in end-of-life decisions.[264] End-of-life care is the term used to describe the social and health system necessary to meet the physical, emotional, social, and spiritual requirements of patients who have life-threatening conditions, fatal diseases, or are nearing the end of their lives.[265] The clinical assessment of a terminally ill patient at this point should take into consideration the aspects pertaining to the patient's mental wellbeing, including personal beliefs, customs, and values that could be impacted by his or her spirituality and religious practice.[266] In light of this, making decisions concerning end-of-life care can be tricky.

[264] Steve Clarke, 'The sanctity of life as a sacred value' (2022) 37 (1) Bioethics 32 <https://doi.org/10.1111/bioe.13094> accessed 8 July 2023.
[265] Mohsin Choudry, Aishah Latif and Katharine G Warburton, 'An overview of the spiritual importances of end-of-life care among the five major faiths of the United Kingdom' (2018) 18 (1) Clin Med (Lond) 23 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6330909/> accessed 8 July 2023.
[266] ibid 23-31.

Modern medicine and technological advancement have increased life expectancy and altered the natural patterns of death. Supportive medical interventions like artificial medical nutrition therapy and oxygen therapy comprising the invasive or non-invasive ventilatory support in the intensive care unit can lengthen a patient's life by providing secondary assistance, despite the fact that many contemporary therapies and technologies do not heal chronic conditions.[267] Modern medicine has prioritized end-of-life care. This process starts with the diagnosis of a terminal illness and includes the patient's wish to die with dignity and the grieving period after death. Many people suffer hardships when their loved ones die. Families, informal caregivers, or close acquaintances of the patients are often required to deal with a wide spectrum of emotional difficulties and are required to make decisions for their loved ones — the patients, when providing therapy for them at the terminal stage of life, which includes preceding, throughout, and even after death.[268]

Family members, most if not all, are the patient's primary caregivers. The family of dying patients frequently goes through a time of intense stress after knowing the patient has been pronounced to have a grave diagnosis at a critical stage, which can lead to rage, despair, interpersonal conflict, and psychological issues.[269] When they are unable to alleviate the pain of a family member who is terminally ill, they may experience hopelessness, frustration, guilt, and futility.[270]

2. Methodology

This doctrinal research employs a descriptive-explanatory study methodology involving a qualitative analysis to examine nationwide literature pertaining to ethical considerations in deciding treatment or comfort care for dying patients. The sources of research encompass local legislation, such as the Malaysian Penal Code (Act 574), and global policies, as well as books, journals, and online articles regarding ethical issues in end-of-life care. A comprehensive search was conducted across various academic databases, including LexisNexis, PubMed, National Institute of Health (NIH), SAGE Journals, ScienceDirect, and Google Scholar, using the keywords "end-of-life" OR "palliative care" AND "ethical consideration." This search is aimed at identifying relevant articles or publications addressing end-of-life issues. A thorough examination of all articles was conducted in this literature review, from which a subset of 21 was carefully chosen to elucidate the author's perspective most effectively.

3. Who Decides End-of-life Care?

From an ethical perspective, the patient should be the main decision-maker to choose if the doctors were to limit care that does not heal but does prolong life momentarily. The patient's family, the delegate, or the doctor must make a decision regarding the patient's care if the patient is no longer capable of doing so.[271] Family members who are under deep stress,

[267] Sameera Karnik and Amar Kanekar, 'Ethical Issues Surrounding End-of-Life Care: A Narrative Review' (2016) 4 (2) Healthcare 24 <https://doi.org/10.3390/healthcare4020024> accessed 21 Nov 2022.
[268] PDQ® Supportive and Palliative Care Editorial Board, 'Grief, Bereavement, and Coping With Loss' (*National Cancer Institute*, 18 October 2022) <https://www.cancer.gov/about-cancer/advanced-cancer/caregivers/planning/bereavement-hp-pdq> accessed 5 August 2023.
[269] Susan H. McDaniel and others, *Family-Oriented Primary Care* (2nd edn, Springer New York 2005) 261-284.
[270] Melahat Akdeniz, Bülent Yardımcı and Ethem Kavukcu, 'Ethical considerations at the end-of-life care' (2021) 9 SAGE Open Medicine <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7958189/> accessed 8 July 2023.
[271] ibid.

depressed, and fearful will struggle to make decisions when their loved one is terminally ill. They are uncertain if they will make the right decision for the patient when they are uncertain of their loved one's wishes for terminal care.[272] Some relatives may choose different care. This will add to the challenges faced by doctors when making end-of-life decisions for their patients. Some are very reluctant to choose when to stop the treatment and may prefer the doctors to decide for them,[273] whereas some family members express a clear and unwavering desire that they want "everything" to be done to keep their loved one alive, which implies active resuscitation management involving cardiopulmonary resuscitation, invasive intubation for ventilatory support, and defibrillation in the event of a cardiopulmonary arrest.[274] The doctors, on the other hand, encounter ethical dilemmas in such circumstances when being pressured by family members who differ in their preferences of a patient's end-of-life treatment choice.[275]

Terminally ill patients should receive treatment that reduces pain, improves quality of life, and offers comfort in dying. However, achieving these objectives may be difficult. End-of-life care is ethically challenging because doctors, patients, and families must consider several treatment alternatives, including their indications, advantages, and risks, and decide whether to use medical technology to extend life or delay the natural death of the terminally ill patient.[276] Medical personnel, patients, and their main carers need to understand the fundamentals of biomedical ethics to address issues with regard to end-of-life care.[277]

4. Medical Ethics

4.1 Autonomy

Autonomy is the right of a patient to decide for himself or herself. Everyone has the right to choose the kind of care they want and have that decision honored. One of the key principles in medical ethics is respect for a patient's autonomy.[278] In order for there to be autonomy, the patient must have the capacity to make their own decisions. This concept mandates that medical professionals uphold a patient's self-determination rights even in cases where the patient suffers a cognitive impairment or lacks the mental capacity to decide for himself. Advance directive can be used to achieve preservation of a patient's autonomy in deciding his or her desired end-of-life treatment.[279] Generally, the treating doctors look for the authorized caretakers to make decisions in place of the patient who has been mentally incapacitated, and the discussion with the caretakers can be difficult when addressing end-of-life concerns

[272] McDaniel (n 269) 261-84.
[273] Timothy M. Smith, 'When patients, families disagree on treatment: 6 ways forwards' (*AMA*, 20 December 2018)<https://www.ama-assn.org/delivering-care/ethics/when-patients-families-disagree-treatment-6-ways-forward> accessed 8 July 2023.
[274] Akdeniz (n 270).
[275] Nüket ÖRNEK BÜKEN, 'Clinical ethical decision making process and determining factors at the end of life' (2016) 2 (3) Turkiye Klinikleri Journal of Medical Ethics-Law and History 24 <https://www.turkiyeklinikleri.com/article/en-yasamin-sonunda-klinik-etik-karar-verme-sureci-ve-belirleyici-faktorler-77246.html> accessed 21 November 2023.
[276] Karnik (n 267) 24.
[277] Akdeniz (n 270).
[278] Carlos Gómez-Vírseda, Yves de Maeseneer and Chris Gastmans, 'Relational Autonomy in End-of-Life Care Ethics: A Contextualized Approach to Real-Life Complexities' (2020) 21 BMC Medical Ethics 50 <https://pubmed.ncbi.nlm.nih.gov/32605569/> accessed 8 July 2023.
[279] Karnik (n 267) 24.

regarding the dying patients. If the patient is still able to make decisions but has not designated a proxy decision-maker, or if the patient is incapable of making decisions but the decision-maker was not appointed by the patient or is not aware of the patient's wishes, then this action may be against the principle of autonomy.[280]

Taking decisions regarding care for the dying is indeed challenging not just for the doctors, but also for the patients and their families since "decision making" itself is a sophisticated process of thought.[281] All individuals have the liberty to express their wills for terminal care. The Federal Patient Self-Determination Act (PSDA), which has been in place since 1991, has eased the communication between patients and their healthcare practitioners.[282] The PSDA imposes a set of obligations on hospitals and hospice organisations, requiring them to carry out a range of prescribed actions and verify compliance with certain predetermined conditions. In accordance with the aforementioned, patients are duly apprised of their entitlement to actively participate in the decision-making process pertaining to their medical treatment, and it is therefore crucial to inquire about the patients' advance directives (ADs) and meticulously record any preferences they may have concerning their desired or undesired care, for which the healthcare organisations must refrain from engaging in any form of discrimination against patients who assert their ADs.[283] The implementation of patients' ADs is required, contingent upon their legal validity and compliance with state law.[284]

Given the use of advanced medicines and prognostication, it is ethically necessary to respect the patients' wishes to convey their end-of-life treatment preferences. This autonomous right indeed has some restrictions, which pose an ethical conundrum. While acknowledging its limitations, the medical practitioners should respect the patient's autonomy and perform their obligations in a manner that serves the patient without causing any harm.[285] To add on, autonomy allows patients the freedom to direct their own care in accordance with their wishes; however, this right is frequently violated.[286] Their end-of-life care is not offered in line with their desires. This emphasises the ethical concern of autonomy regarding preferences for end-of-life care.

It is therefore said that ADs are drawn from the ethical principle of patient autonomy. Such ADs consist of instructions given orally or in written form apprising a patient's future direction of medical care in the event that the patient loses the ability to communicate, and the patient's judgements may be influenced for any reason.[287] Living wills, proxies, and "Do Not Resuscitate" (DNR) requests are examples of ADs signed by a competent patient.[288] A living will is written by a competent individual expressing their own wishes for end-of-life medical treatments, which include the insertion of nasogastric (NG) or percutaneous endoscopic gastrotomy (PEG) feeding tubes for continuous assisted nutrition and hydration therapy, as

[280] McDaniel (n 269) 261-84.
[281] ibid.
[282] Patient Self-Determination Act 1991.
[283] Dac Teoli and Sassan Ghassemzadeh, *Patient Self-Determination Act* (StatPearls Publishing 2022).
[284] ibid.
[285] Basil Varkey, 'Principles of Clinical Ethics and Their Application to Practice' (2021) 30 (1) Med Princ Pract 17 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7923912/> accessed 8 July 2023.
[286] Muneerah Lbugami and Usamah El Alem, 'Patient autonomy' (2021) 9 (1) International Journal of Medicine 58 <https://www.researchgate.net/publication/354416462_Patient_autonomy> accessed 8 July 2023.
[287] Eileen E. Morrison (ed), *Health care ethics: critical issues for the 21st century* (2nd edn, Jones & Bartlett Publishers 2009).
[288] Akdeniz (n 270).

well as how they should be handled in terms of terminal care, cardiopulmonary resuscitation (CPR), assisted ventilation, withholding or withdrawal of treatment, physician-assisted suicide, and euthanasia.[289] Malaysia lacks advanced decision-making laws and judicial judgements, but ADs assist patients in receiving their preferred treatment and support their families in making decisions. Additionally, ADs reduce costly, intrusive, and unnecessary care that patients have not sought. ADs also enhance the standard of terminal care and alleviate burden without impacting mortality.[290]

A patient's legal guardians or parents typically act as their proxies until they reach 18 years old. Individuals are permitted to elect a health care proxy once they reach the age of 18. One or more individuals, including members of the family and close friends, may serve as proxies. The patient has priority when making end-of-life decisions in terms of care. If the patient loses his or her ability to decide, all choices about medical care, including the withdrawal or continuation of life support, are left to the proxies[291] who are autonomously selected by the patient at a time when he was deemed lucid and was able to make a clear judgement. At a critical stage, when a patient becomes mentally impaired, the proxies' duty is to execute according to the patient's wish even though their personal preferences may conflict with those of the patient.[292] In the circumstance whereby the proxies refuse to make any decision, the healthcare providers are responsible for making the decision for which they find it optimal for the patient.

4.2 Beneficence & Non-maleficence

Beneficence demands that medical practitioners plead for the best medical intervention for their patients' best interest. In many cases, the patients' preferences in the direction of their end-of-life care support are not communicated via ADs, and their medical professionals, family members, or caregivers are not informed of their desires.[293] If a patient is unable to make decisions or has not explicitly expressed his or her wishes in the event of a terminal illness, the terminal care decision is made by the patient's medical practitioners after confronting the patients families, or their authorised representatives.[294] The medical professional's duty in the treatment of the terminally ill patient is to ensure the provision of the optimum and appropriate treatment at the patient's end of life.[295] In an effort to do what the medical doctor believes is in the patient's best interest, the doctor must be careful not to violate the patient's autonomy. Even if the doctor believes the patient's choice is not in their best interest, the patient's right to make that decision should be respected. Paternalism should therefore give way to patient autonomy.

The ethical principle of non-maleficence denotes that harm should never be intentionally inflicted. The doctor should not purposefully cause harm, pursuant to this principle. *Primum non nocere* is a fundamental rule of good medical conduct, and it is addressed in this principle

[289] ibid.
[290] Cristina Sedini and others, 'Advance care planning and advance directives: an overview of the main critical issues' (2022) 34 (2) Aging Clin Exp Res 325 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8847241/> accessed 8 July 2023.
[291] Akdeniz (n 270).
[292] Gómez-Vírseda (n 278) 21.
[293] Varkey (n 285) 17-28.
[294] BÜKEN (n 275) 24-33.
[295] McDaniel (n 269) 261-84.

(i.e., do no harm).[296] Non-maleficence is the moral justification for why suffering is induced, even when some medical therapies may cause discomfort or other detrimental consequences. When the benefit from the medical intervention to one patient outweighs the patient's risk of harm and the treatment is not given to cause a detrimental insult to the patient, the damage caused may be justified; however, many medical professionals believe that taking part in physician-assisted suicide violates this rule.[297] This stance is mirrored in the Osteopathic Oath, which is a requirement for all osteopathic medical school graduates, and it declares, "I will deliver no medicament for lethal purposes to any individual, despite what may be asked of me."

4.3 Justice & Fidelity

The moral principle of justice requires fairness in the delivery of healthcare services and seeks to ensure the equitable distribution of health resources.[298] Owing to the scarcity of medical resources, they should be allocated evenly and fairly. To avoid wasting scarce resources, the need to assess how advanced medical therapies are distributed will be crucial. The doctors have a moral obligation to advocate for the appropriate and fair treatment of terminally ill patients.

Another ethical rule, fidelity, calls on the medical professionals to be trustworthy and dependable for the dying patients. When medically necessary, practitioners should keep their patients updated on their condition. Additionally, the medical practitioners must be faithful in upholding the patient's preferences and decisions even when the patient is unable to speak for themselves and must be truthful in matters like diagnosis and prognosis. Naturally, this defence presupposes that the patient's request does not conflict with the treating doctor's own moral principles or code of medical ethics.[299]

5. Ethical Dilemmas in End-of-Life Care

5.1 Withholding and Withdrawal of Treatment

In the management of patients who are approaching the final stage of life, it may be ethically and medically appropriate to stop providing life-sustaining care. First, some therapies may merely be medically ineffective, in which case there is no moral, legal, or medical obligation to deliver treatment that is ineffective. Second, if the patient or his proxy does not want the therapy, it is permissible to withdraw and withhold it. It can be challenging for the doctors to stop interventions once they have already started. Nevertheless, an intervention should be stopped if it can no longer accomplish its intended purpose or if the patient no longer desires it. Hence, from an ethical viewpoint, refusing to receive therapy and withdrawing from it are morally equal.[300] The doctor is the sole member of the medical team with the authority to write orders indicating treatments that are to be withheld or discontinued, even though end-of-life care requires a team approach. Therefore, it is critical that doctors understand the fundamentals of withdrawing and withholding interventions when providing care for patients

[296] Akdeniz (n 270).
[297] ibid.
[298] ibid.
[299] Karnik (n 267) 24.
[300] Akdeniz (n 270).

who are getting close to the end of their lives. Sadly, a recent study discovered that most patients in intensive care units passed away without having their requests for life-sustaining care fulfilled.[301] Invasive medical procedures are commonly performed on these people against their wills.[302]

When caring for patients who are approaching death in life, decisions on whether to discontinue or suspend CPR, endotracheal intubation for assisted ventilation, and ANH are often considered. However, additional treatments, including antibiotics or other medications, operations, dialysis, diagnostic tests, or admissions to acute care facilities, might be discontinued or withheld.[303] A medical intervention's potential to achieve a goal set by the doctor, the patient, and the authorised decision-maker will determine whether it should be withheld or discontinued. The objective must be realistically attainable from a medical standpoint. It is appropriate to consent to a specific, time-limited intervention and to revoke that intervention if the objective is not attained within the allotted time frame. For instance, if the benefits of mechanical ventilation could not be recognised within a given timeframe, a time-limited usage of the technology might be suitable.[304]

It can be challenging for the doctor, the patient, or a legalised decision-maker to cease ventilator care during decision making. Withdrawing ventilator support when the aim of artificial breathing cannot be met is ethically acceptable if it is in conformity with the patient's preferences.[305] For the comfort of the patient after extubation, approaches for quick extubation or terminal weaning have been established, and management of discomfort with narcotic analgesics and tranquillisers is crucial. When a patient is nearing death, it's critical to determine their do-not-resuscitate (DNR) status in order to prevent futile and unethical cardiac resuscitation. The patient and the carers should be reassured that all other interventions for comfort care at the terminal stage will still be carried out.[306]

Withdrawing and withholding ANH needs specific attention. Doctors have long considered feeding and hydration, even for the dying, as standard care. Ethically, ANH is considered a medical intervention. As a symbol of care, nutrition and hydration can be difficult to withdraw or withhold, especially for families. The patient or proxy can stop ANH when they no longer meet care goals. In this situation, the doctor must comfort, counsel, and educate the patient and proxy. Families must recognise that symptoms like dry mouth may be handled and that fluids may worsen other end-of-life symptoms, including breathlessness and edema-induced pain.[307]

[301] Seema Rajesh Rao and others, 'Palliative and end-of-life care in intensive care units in low- and middle-income countries: A systematically constructed scoping review' (2022) 71 Journal of Critical Care 154115 <https://www.sciencedirect.com/science/article/pii/S0883944122001447#bb0120> accessed 8 July 2023.
[302] Lbugami (n 286) 58.
[303] Angela Luna-Meza and others, 'Decision making in the end-of-life care of patients who are terminally ill with cancer – a qualitative descriptive study with a phenomenological approach from the experience of healthcare workers' (2021) 20 (76) BMC Palliat Care <https://doi.org/10.1186/s12904-021-00768-5> accessed 8 July 2023.
[304] Varkey (n 285) 17-28.
[305] Akdeniz (n 270).
[306] Rao (n 301).
[307] Varkey (n 285) 17-28.

5.2 Medical Futility

In medical ethics, medical futility can complicate end-of-life treatment. The term "medically futile" is used to describe an intervention; however, there is no precise definition and few clinical instances in which all parties agree.[308] Most agree that brain-dead patients should not receive cardiac resuscitation. However, artificial feeding and hydration for a prolonged vegetative patient would not be universally considered medically futile. Depending on one's concept of medical futility, either intervention may be medically ineffective.[309] A more practical definition of medical futility is a treatment that will not achieve its intended purpose. Thus, in this latter description of medical futility, a therapy is futile if it does not follow the patient's needs or an advance directive if the patient has lost decision-making capacity.[310] When a dying patient's proxy makes an end-of-life care decision, futility conflicts may arise. The proxy decision-maker's misinterpretation of the prognosis, values, or distrust in the healthcare system may trigger conflicts. Education, defining the patient's goals, and fostering a team approach to decision-making after religious involvement can often settle problems. The institutional ethics committee may help resolve conflicts. Transferring services may be necessary if a conflict cannot be resolved. Advance care planning usually prevents medical futility conflicts.[311]

5.3 Physician-assisted Suicide

Physician-assisted suicide includes a doctor prescribing a lethal sedative-hypnotic upon the patient's self-request at end of life. In contrast, euthanasia entails the physician conducting the intervention that terminates the patient's life.[312] Only Oregon in the United States allows physician-assisted suicide. Physician-assisted suicide is immoral and violates the patient-physician relationship, according to most medical bodies such as the American Osteopathic Association, American Geriatrics Society, and the American Medical Association.[313] Many argue that the legalisation of physician-assisted suicide will nullify a societal commitment to palliative or hospice care. Similarly, many imply that maltreatment of vulnerable groups like the disabled and elderly may ensue.[314]

Intractable pain, sadness, fear of burdening family, or loss of dignity may prompt patients to desire physician-assisted suicide.[315] The doctor should confront patients' pains and fears that may lead to physician-assisted suicide. When necessary, involve the psychologists, psychiatrists, and priests in managing depression. Having a preacher on the healthcare team may help with spiritual issues revolving around abandonment, remorse, and hopelessness. Communication with multi-disciplinary teams to address several grounds for patients' request for physician-assisted suicide is important. The doctors should reassure their dying patients

[308] Akdeniz (n 270).
[309] Karnik (n 267) 24.
[310] Akdeniz (n 270).
[311] ibid.
[312] Ewan C. Goligher and others, 'Physician-Assisted Suicide and Euthanasia in the ICU: A Dialogue on Core Ethical Issues' (2017) 45 (2) Crit Care Med 149 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5245170/> accessed 8 July 2023.
[313] Herbert Hendin and Kathleen Foley, 'Physician-assisted suicide in Oregon: a medical perspective' (2008) 106 (8) Mich Law Rev 1613 <https://pubmed.ncbi.nlm.nih.gov/18595218/> accessed 8 July 2023.
[314] Goligher (n 312) 149-55.
[315] Luna-Meza (n 303) 76.

that they will be cared for and should not condone the patients' request for physician-assisted suicide, as it often stems from self-doubt.[316] Thus, the doctor's affirmation of such an approach may perpetuate the patient's self-worthlessness. A doctor who intentionally causes or accelerates the death of a terminally ill patient and, at the patient's request, commits criminal homicide,[317] as stated under Section 299 of the Penal Code (Malaysia):

"Whoever causes death by executing an act with the intent of causing death, or with the motive of causing such physical injury as is likely to be fatal, or with the knowledge that such act would cause death, commits culpable homicide."

5.4 Doctrine of Double Effect

Doctors have been reluctant to administer higher doses of narcotics to terminally ill patients out of concern that central nervous system depression will kill them. Some have called this euthanasia.[318] Studies have revealed that this effect has been exaggerated. However, even if delivering a narcotic may accelerate the dying process in a near-death patient, it is ethical to do so if the primary intention is pain management and not hastening death. This ethical concept of "double effect" enables the unintended implication—the death acceleration—to happen.[319] It is believed that the patient or proxy is aware of the unintentional effects of aggressive pain management.[320]

6. Conclusion

Most medical professionals encounter numerous ethical challenges when treating critically ill and dying patients. When treating near-death patients, doctors must consider moral dilemmas and conflict resolution. Doctors must also be decisive and communicative. Dying patients must be prioritised and respected in all decisions. Thus, end-of-life care requires advance care planning.[321] It is vital for doctors to comprehend the relevant ethical principles associated with medical futility, withdrawing and withholding medical interventions and other ethical and legal difficulties. Moreover, doctors should understand the ethical, legal, and professional implications of euthanasia and physician-assisted suicide, and their personal beliefs on this, and other end-of-life ethical dilemmas. Proper end-of-life care involves spiritual consideration.[322] The understanding of ethical concepts guides medical practitioners on how they can apply those biological ethics in caring for dying patients. An ethical obligation ingrained in the very nature of the doctor's job is to provide ideal care to terminally ill patients at the end of life. Future research on other possible solutions or alternatives regarding end-of-life care for terminally ill patients is also recommended.

[316] Goligher (n 312) 149-55.
[317] Malaysia Penal Code (Act 574), s 299.
[318] Hendin (n 313) 1613-40.
[319] Akdeniz (n 270).
[320] ibid.
[321] Sedini (n 290) 325-30.
[322] Åsa Rejnö and Linda Berg, 'Strategies for Handling Ethical Problems in End of Life Care: Obstacles and Possibilities' (2015) 22 (7) Nursing Ethics 778 <http://journals.sagepub.com/doi/10.1177/0969733014547972> accessed 21 Nov 2022.

7. Limitations and Strengths

One of the limitations of this research is its subjective nature, as the interpretations of the study rely on individual perspectives and analyses, which may differ among individuals. Nevertheless, these perceptions can be deemed reasonable and rational. Another limitation of this study is that doctrinal research does not address the discrepancy between observed real-world social behaviours and the behaviours required by legal norms. Despite its limitations, this research delineates the fundamental basis for enhancing understanding of the application of bioethics to resolute ethical dilemmas related to end-of-life care for critically ill patients. This is particularly relevant for key stakeholders involved in these decisions, including treating physicians, patients, and their primary carers.

8. Declaration of Originality and Conflicting Interests

The author declared this article as an original work based on independent research and analysis. Any sources used in the creation of this paper have been cited to give credit to the main authors. There are no potential conflicts of interest in relation to the research, authorship, and/or publication of this article.

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The Analysis of Child Sexual Grooming Offences in Malaysia

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Abstract

Children constitute vital stakeholders in the nation's development. Nonetheless, they are frequently under-represented in various situations, including child sexual grooming ("CSG") issues. In most CSG situations, children are oblivious that they are being exploited until they have been sexually assaulted to the degree of rape. In Malaysia, there is a growing concern about the CSG problem caused by sexual predators, which prompted the Malaysian government to enact the Sexual Offences Against Children Act 2017 ("SOACA"). The SOACA 2017 is the first piece of Malaysian legislation which specifically addressed offences on child sexual abuse ("CSA"). The paper aims to examine the correlation between legal inadequacies before the SOACA 2017 was enacted and how the SOACA 2017 addresses the cases on CSG. At the same time, the reported cases under the UK Sexual Offences Act 2003 ("SOA") will be referred to as well, as SOACA 2017 was modelled after UK SOA 2003.

Keywords: Child; Child Sexual Abuse; Grooming; Sexual Predator

1. Introduction

Children carry about one-third of Malaysia's 32.65 million population, amounting to 9.19 million individuals.[323] Nonetheless, the Government often overlooks child sexual abuse

[323] n/a, 'Statistics Dept: 9.19 million children under-18 in Malaysia in 2022' *The Star* (Kuala Lumpur, 28 Nov 2022) <https://www.thestar.com.my/news/nation/2022/11/28/statistics-dept-919-million-children-under-18-in-malaysia-in-2022> accessed 31 July 2023.

("CSA") issues.[324] In Malaysia, there are two stages of public awareness of CSA issues. The first stage occurred in the 1980s due to frequent occurrences reported in the mainstream media.[325] The Government responded to the public criticism by enacting child protection legislation, namely the Child Act 2001, and establishing a hotline for reporting suspected child abuse.[326] In 1985, the SCAN Team research team was established to conduct clinical analysis and advise the Government on cases concerning child abuse.[327]

The first stage focuses on perpetrators within familial ties.[328] Despite the occurrence of high-profile incidents, the general public was ignorant of the CSA problems caused by non-family members.[329] There could be two causes for the lack of reaction. First, the general public is unaware of the vast amount of cases on CSA since most cases go unreported, and their data are classified as Government secrets.[330] As a result, CSA issues remain marginalised, ignored, and never emerge on policy agendas. Second, no specific legislation addresses CSA, particularly child sexual grooming ("CSG"). As a result, no devoted body deals with the early discovery of sexual predators, and CSA victims are treated the same as adult victims. The issue has not been resolved, particularly in CSA cases; victims often opt not to reveal it to law enforcement because they experience a lack of support and humiliation.[331]

The second stage follows the disclosure that Richard Huckle, a British national, was detained in December 2014 due to collaboration between Australian and British authorities.[332] Huckle pretended to be a trustable English teacher and Christian patron in Malaysia between 2011 to December 2014 and used his position to obtain the children's trust and manipulate them into engaging in sexual activities with him.[333] In 2016, he was convicted in the United Kingdom for 71 criminal charges of CSA offences, with most of his victims being Malaysian children.[334] This revelation has sparked outrage and dismay among Malaysians, as law enforcement has

[324] Izmi Izdiharuddin B Che Jamaludin Mahmud, Nadzriah Ahmad and Rafizah Abu Hassan, 'A Legal Review between Impacts of Child Sexual Abuse and Criminal Compensation Order in Malaysia' (2022) 7 JISED 250.

[325] Norbani Mohamed Nazeri, 'Development of Child Evidence in Malaysia' (University of Malaya - Griffith University International Law Conference, Kuala Lumpur, 2007) <https://eprints.um.edu.my/13698/1/0001.pdf> accessed 29 May 2023.

[326] Irene Guat-Sim Cheah and Choo Wan Yuen, 'A Review of Research on Child Abuse in Malaysia' (2016) 71(Suppl 1) MJM 87.

[327] Ahmad Yarina and others, 'Suspected Child Abuse and Neglect Team (SCAN team): Early Establishment, Success Stories, Challenges and The Way Forward' (2015) 12 JAS 60.

[328] Yarina Ahmed and Siti Nur Fathanah Abd Hamid, 'Monster in the Family, Young Victims and Issues Across Border: Future Outlook of Child Sexual Abuse in Malaysia' (2020) 7 JCR 1713.

[329] n/a, 'Tragic list of young innocent victims of monsters' *The Star* (Kuala Lumpur, 30 November 2019). <https://www.thestar.com.my/news/nation/2012/03/13/tragic-list-of-young-innocent-victims-of-monsters> accessed 29 May 2023.

[330] Ananthalakshmi Anantha, 'How Malaysia allows child abuse to go unpunished' (*Reuters*, 14 November 2016) <https://www.reuters.com/article/us-malaysia-sexcrimes-insight/how-malaysia-allows-child-abuse-to-go-unpunished-idUSKBN1390AT> accessed 29 May 2023.

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[332] Karen McVeigh, 'Richard Huckle given 22 life sentences for abuse of Malaysian children' *The Guardian* (London, 6 June 2016) <https://www.theguardian.com/uk-news/2016/jun/06/richard-huckle-given-23-life-sentences-for-abusing-malaysian-children> accessed 29 May 2023.

[333] Najwa Rosli, Nabilah Hani Ahmad Zubaidi and Farah Nini Dusuki, 'Regulating the Protection and Rehabilitation of Victims of Internet Child Pornography in Malaysia' (2019) 9 IJARBSS 450.

[334] Tan Geok Mooi and Noor Aziah Mohd Awal, 'Sexual Offences against Children Act 2017 (Act 792) - A Boost to Police Investigation and Prosecution' (2020) 10 IJASS 273.

never investigated Huckle.[335] The government acknowledges that Malaysian laws are inadequate in dealing with CSA, especially in CSG situations.[336]

Further investigation indicated that Richard Huckle's grooming episodes are not isolated incidents. For example, a 2014 CyberSAFE survey shows 83% of schoolchildren are susceptible to online danger.[337] This survey correlates with the information provided by the Royal Malaysian Police as the figure shows that an average of 60 children were subjected to sexual assault before 2014, and perpetrators are someone these children befriend through the cyber world.[338] Further data from 2015 until May 2017 shows that there is a lack of detection of CSG cases despite a higher rate of children subjected to CSG:

Table 1. Child grooming reported cases in Malaysia

Year	Number of cases
2015	184
2016	183
From January until May 2017	117

(Source:) Royal Malaysia Police[339]

Upon the revelation of Richard Huckle and the prevalence of CSA, the Malaysian government introduced several legal reforms to deal with CSA cases in 2017, such as (1) the introduction of a specific child sexual abuse legislation, Sexual Offences Against Children Act 2017 ("SOACA 2017") which was enforced since 10.7.2017, (2) the establishment of specialised court in dealing with CSA cases, and (3) the publication of a guideline known as *Garis Panduan Khas Untuk Mengendalikan Kes Kesalahan Seksual Terhadap Kanak-Kanak Di Malaysia* ("Special Guidelines for Handling Cases Concerning Sexual Offenses Against Children in Malaysia") which aims to set a uniform approach between Malaysian agencies in dealing with CSA cases.

The legal reforms introduced by the Malaysian Government had been notified by ECPAT International, an international organisation for child advocacy, which recognised the SOACA 2017 as a "progressive step in protecting children from sexual exploitation & practical steps to prevent and respond to child sexual exploitation."[340]

[335] Ananthalakshmi Anantha and Joseph Sipalan, 'British paedophile exploited stigma of abuse in vulnerable communities' (*Reuters,* 9 June 2016) <https://www.reuters.com/article/us-britain-abuse-malaysia-idUSKCN0YV061> accessed 29 May 2023.

[336] Ananthalakshmi (n 330).

[337] Rozana Sani, 'Cybersafety: Raising online citizens' *New Straits Times* (Kuala Lumpur, 21 September 2014) <https://www.nst.com.my/news/2015/09/cybersafety-raising-online-citizens> accessed 29 May 2023

[338] n/a, 'Malaysia tops in South-east Asia for online child pornography' *The Straits Times* (Kuala Lumpur, 30 January 2018). <https://www.straitstimes.com/asia/se-asia/malaysia-tops-in-south-east-asia-for-online-child-pornography> accessed 29 May 2023.

[339] Ibid.

[340] ECPAT International, 'ECPAT Country Overview (Malaysia): A report on the scale, scope and context of the sexual exploitation of children' (October 2019). <https://ecpat.org/wp-content/uploads/2021/05/ECPAT-Country-Overview-Research-Report-Malaysia-2019.pdf> accessed 29 May 2023.

2. Literature Review

2.1 Definition of CSG

Despite its prevalence in Western media in the 1980s, there is a lack of consensus on the definition of CSG.[341] Nevertheless, this paper defines it as an offence in which the criminal engages with a child and creates trust to satisfy a person's sexual desire. A child can be defined as someone below the age of 18, consistent with the definition given by various Malaysian legislation.[342]

2.2 Offences before the SOACA 2017

Before the introduction of SOACA 2017, many legislations including the Penal Code, Film Censorship Act 2002 and Communications and Multimedia Act 1998 were used to investigate the CSG cases. However, the only legislation-related CSA case is Section 43 of the Child Act 2001 (prostitution) and Sections 14 & 15 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (child trafficking for sexual exploitation). These laws are inadequate because the police cannot propose a prosecution unless there is direct evidence that the CSA victim has already been subjected to a sexual assault. In a Sepang Session Court case, for example, an offender was only liable for statutory rape even though there was evidence that the offender sexually groomed the child through social media applications before committing the offence.[343]

2.2.1 Section 292 of the Penal Code & Section 5 of the Film Censorship Act 2002

Section 292(a) of the Penal Code is most commonly used to prosecute any case related to child pornography. Section 292(a) stipulates that a person will be liable for an offence if he or she possesses obscene material. Another potential child pornography offence is Section 5 of the Malaysian Film Censorship Act, in which it is unlawful to have an obscene film.

However, Sections 292(a) and 5 only apply CSG if the offender records the minor victim's private parts, such as genital photographs. For instance, a 21-year-old woman pleaded guilty under Section 292 to recording an obscene video of a 15 years old girl.[344] Meanwhile, in Singapore, Chan Chun Hong was convicted among other pornography offences under Section 292 (1) (a) of the Singapore Penal Code (*pari materia* with the Malaysian Penal Code respectively) after organising a child sex trip to Cambodia and exchanging child pornographic materials through emails with other internet users.[345]

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[341] Georgia M Winters, Leah E Kaylo and Elizabeth L Jeglic, 'Toward a Universal Definition of Child Sexual Grooming' (2021) 43 DB 926.

[342] Age of Majority Act 1971, s 2; Child Act 2001, s 2(1); Sexual Offences Against Children Act 2017, s 2(1).

[343] n/a, 'Penuntut rogol gadis bawah umur dipenjara, sebat' *Berita Harian* (Sepang, 14 November 2018) <https://www.bharian.com.my/berita/kes/2018/11/498049/penuntut-rogol-gadis-bawah-umur-dipenjara-sebat> accessed 28 May 2023.

[344] Juriah Abdul Jalil, 'Combating Child Pornography in the Digital Era: Is Malaysian Law Adequate to Meet the Digital Challenge?' (2015) 23(S) Pertanika J Soc Sci & Hum 137.

[345] *Chan Chun Hong v PP* [2016] SGHC 75.

2.2.2 Section 354 of the Penal Code

Section 354 is a genderless offence, which means that the victim can be either male or female. Section 354 provides that it is an offence if a person commits an assault or uses criminal force that is likely to cause outrage at the victim's modesty. An example of the application of Section 354 is the case of *Kamarul Azamin Mohamad*, where the offender was sentenced to eight years imprisonment and one stroke of whipping for touching the private part of a student at primary school.[346]

Nevertheless, there are two reasons why Section 354 is not an appropriate offence to prosecute CSG cases. First, the offender cannot be liable if the child consented to the offender's criminal force or assault. This deficiency can be illustrated in the case of *Samuel John Marisinapen* which one of the reasons for the acquittal is that the child, aged 12 and 6 months, consented to the sexual conduct committed by the offender.[347]

Second, another deficiency would be whether the grooming conduct can be considered assault under Section 354. One of the key elements establishing an assault is the offender's conduct which amounts to a threatening gesture against the victim.[348] In the United Kingdom, several cases like *Fairclough v Whipp*,[349] *DPP v Rogers*,[350] and *R v Sutton*[351] show a deficiency of law in the connection between the assault and CSA cases. In these three cases, the courts held that an indecent assault could be established if a hostile act existed. For instance, in *Fairclough*, the offender was charged with committing an indecent assault on a nine-year-old child by inviting the girl to touch him while walking along a riverbank. It was held that the offender was not guilty because of a lack of threatening conduct.[352]

2.2.3 Sections 377D and 377E of the Penal Code

Section 377D of the Penal Code focuses on the offender who commits gross indecency against the victim. Section 377E covers a victim under 14 who engages in gross indecent conduct after being encouraged by the offender. One of the earliest reported cases under Section 377E was in 2005 when the offender was convicted of paying RM 10 to a child in exchange for sexual gratification.[353]

In modern days, gross indecency has been given a broader interpretation to cover every aspect of sexual activity that may harm the child.[354] However, it is noted there are several gaps in Sections 377D & 377E in addressing CSG cases:

i. A CSA victim between 14 and under 18 is not entitled to the same protection as a victim below 14. It is because if the offender commits an offence of gross indecency to a victim below 14 years old, he can be liable for a punishment of not less than three

[346] *PP v Kamarul Azamin bin Mohamad* [2021] 8 MLJ 502.
[347] *Samuel John Marisinapen v PP* [2018] 11 MLJ 775.
[348] C. K. Thakker and others, *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code, 1860* (26th edn, Bharat Law House 2007).
[349] [1951] 2 All ER 834.
[350] [1953] 2 All ER 644.
[351] [1977] 3 All ER 476 (CA) Crim LR 569.
[352] *Fairclough* (n 349).
[353] *Kassim bin Utus v PP* [2005] 6 MLJ 320.
[354] *R v Sears* [2018] SADC 94.

years and not more than fifteen years and whipping under Section 377E. However, if the child is aged between 14 to 17, the punishment is less severe, carrying a sentence of imprisonment not exceeding two years under Section 377D of the Penal Code.

ii. Under Section 377E, the prosecutor must establish that the offender incites a child to act grossly indecently with the offender or another person. Therefore, the offender who sexually communicates with the CSA victim will not immediately be liable for an offence unless the offender's conduct influences the child, later causing the child to commit gross indecency. If the prosecutor cannot prove that the offender incites a child to do an act of gross indecency, the offender can still be liable for the offence under Section 377D of the Penal Code. However, as explained earlier, the punishment under Section 377D is not as severe as Section 377E.

2.2.4 Sections 509 of the Penal Code

Section 509 concerns offences relating to acts and conduct intending to insult the victim's modesty or intrude on the victim's privacy, regardless of the victim's gender. The offender can be liable for a punishment of imprisonment not exceeding five years or with a fine or both.

The term 'modesty' is not defined in Section 354 of the Penal Code. However, it has been stated that the term modesty encompasses all forms of indecent behaviour towards women, such as sending a letter containing inappropriate advances to a woman within the ambit of Section 509.[355] The application of Section 509 in the CSG case was reported in 2017 when the offender was convicted for sending his male organ to a journalist posing as an underage girl.[356] In sentencing the offender, the Magistrate concurred that under Section 509, the prosecutor is not required to prove the victim's age as long as the communication causes insult to the modesty of the person who receives the sexual message.[357]

2.2.5 Sections 211 & 233(1) of the Communications and Multimedia Act 1998

Section 211 forbids any individual from using a content applications service to provide indecent, obscene, false, menacing, or offensive content to annoy, abuse, threaten, or harass another person. Section 233(1) states that an offender is liable for an offence if he inappropriately utilizes network facilities or network services by initiating obscene, indecent, false, menacing, or offensive communication intending to annoy, abuse, threaten, or harass another person. Both provisions are inapplicable in CSG cases because Section 211 applies only if the person provides content application services such as subscription broadcasting or terrestrial free-to-air television. Section 233(1) requires evidence that the victim has been subjected to annoyance, abuse, threat, or harassment, which is improbable if the CSA victim is unaware of or has consented to the grooming process. It should also be noted that the

[355] Thakker (n 348).
[356] Nurbaiti Hamdan, 'Trader jailed and fined over lewd photo' (*The Star*, 18 May 2017) <https://www.thestar.com.my/news/nation/2017/05/18/trader-jailed-and-fined-over-lewd-photo-man-sent-picture-of-genitals-to-journalist-who-was-posing-as/> accessed on 27 May 2023.
[357] ibid.

grooming process is complex, as it is difficult to identify between caring and manipulative behaviour unless abusive conduct occurs.[358]

3. Methodology

This paper employs a doctrinal research method to discuss the effectiveness of SOACA 2017 in addressing CSG issues. Pearce et al. define doctrinal research as "the research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty, and predicts future developments."[359]

4. Findings & Discussion

Since the introduction of SOACA on 10.7.2017, the data showed improved detection of CSA cases. For example, 1921 cases in 2018, 1,865 cases in 2019, & 1,373 cases from January to September 2020 were classified as CSA cases.[360] This paper will discuss the substantive and procedural legal reforms introduced in SOACA 2017 concerning CSG cases.

4.1 Substantive legal reform

No reported CSG cases under SOACA 2017 have been found in online database research at LexisNexis and CLJLaw, as most reported cases involve physical injury against the CSA victims under Section 14 of the SOACA 2017. It is also noted that recent legal amendments to SOACA 2017 will be enforced on 11.7.2023.[361] Therefore, this research will rely on foreign-reported cases similar to CSG cases under SOACA 2017. There are three types of CSG-related offences under SOACA 2017, sexually communicating with a child (Section 11), child grooming (Section 12) and meeting following child grooming (Section 13).

First, Section 11 of SOACA 2017 states that it shall be an offence for someone to sexually communicate with a child or encourage a child to communicate sexually. The provision is in *pari materia* with Section 15A of the UK SOA 2003.

There are a few discussions concerning Section 11 SOACA 2017. First, what are the modes of communication that are considered under Section 11? According to the Explanatory Notes of SOA 2003, sexual communication encompassed every method of communication, ranging from email, text message, written note or oral communication, including talking sexually to a child via a chat room or sending sexually explicit text messages inviting a child to communicate sexually.[362]

The subsequent discussion in dealing with the Section 11 is that the offence is construed as strict liability and not age-discriminatory.[363] The legal provision of Section 11 differs from

[358] Elizabeth L Jeglic, Georgia M Winters and Benjamin N Johnson, 'Identification of Red Flag Child Sexual Grooming Behaviors' (2023) 136 Child Abuse Negl 105998.
[359] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin LR 83.
[360] Izmi (n 324).
[361] Sexual Offences Against Children (Amendment) Act 2023.
[362] Explanatory notes to the Serious Crime Act 2015, s 67.
[363] DR Deb 3 April 2017, Bil. 17, 83 <https://www.parlimen.gov.my/files/hindex/pdf/DR-03042017.pdf>.

Section 15A of SOA 2003 as, in the latter, the offender's *mens rea* and age must be established.[364] It means that the offender must intend to communicate with a child to obtain sexual gratification, and a person can be liable for an offence if that person is 18 years old and above.[365]

Therefore, a sweetheart defence, a consensual relationship between children, cannot negate a crime's element.[366] Several child advocacy groups, such as the CRIB Foundation (Child Rights Innovation & Betterment) & Voice of the Children, expressed deep concerns over criminalising two consensual children from engaging in a sexual relationship.[367] They stated that education should be prioritised since they believed it is normal for children to have mutual sexual curiosity.[368] This view is consistent with the court's approach in dealing with young offender's consensual sexual relationships, as in *Mohammad Arfah Jasmi* (20 years old offender v 13 years old victim),[369] *Nor Afizal Azizan* (19 years old offender v 13 years old victim),[370] and *Maxesythal Anak Sulang* (22 years old offender v 14 years old victim). In these cases, the court encouraged imposing a rehabilitation sentence rather than long-length imprisonment, or else the detention will have a consequential impact on the offender's future.[371]

The third issue is how to determine whether the communication is considered sexual. Section 11(2) of the SOACA 2017 provides for two situations: (a) the communication relates to sexual activity, in which the offender encourages the CSA victim to engage in sexual activity. If the offender asks the CSA victim to engage in sexual intercourse or masturbation, the communication falls within the definition of sexual activity.[372] Second, (b) any reasonable person would consider the communication itself to be sexual. There are limited judicial decisions in the Malaysian legal system in this context. However, Section 11(3) provides that a person cannot be subjected to criminal sanction if the communication is for education, scientific or medical purposes.

The English law provides that the issue of whether the communication is considered sexual is a question of fact.[373] Whether or not any conduct is sexual is based on the judge's discretion, and it is irrelevant to look at the offender's view when the said offender committed such conduct.[374] However, the judge should not exercise discretion arbitrarily, and it may suggest that the social norm is vital in determining whether certain conduct is sexual. There are a few examples from English cases:

[364] Sexual Offences Act 2003, s 15A.
[365] ibid.
[366] Dr Deb (n 363).
[367] Fatimah Zainal and Ragananthini Vethasalam, 'Loopholes in new law need to be plugged, say experts' *The Star* (Petaling Jaya, 30 March 2023) <https://www.thestar.com.my/news/nation/2023/03/30/loopholes-in-new-law-need-to-be-plugged-say-experts> accessed 10 July 2023.
[368] ibid.
[369] *PP v Mohammad Arfah Jasmi* [2008] 7 CLJ 836.
[370] *Nor Afizal bin Azizan v PP* [2012] 6 MLJ 171.
[371] *PP v Maxesythal ak Sulang* [2021] 1 LNS 767.
[372] Explanatory notes to the Sexual Offences Act 2003, s 78.
[373] *Regina v H* [2005] EWCA Crim 732, [2005] 1 WLR 2005.
[374] *Attorney General's Reference (No 1 of 2020)* [2020] EWCA Crim 1665, [2021] QB 441.

i. *R v Bradburn (Ashley)*: The offender sent a picture of his erect penis and asked the child to send him a photograph of her breasts.[375]

ii. *R v Evans*: The offender forwarded BlackBerry messages, "Would you fuck me? Where would you fuck me? Fast or slow? Skin to skin?".[376]

iii. *R v Miller (Douglas Andrew)*: The offender approached the children and asked if they would like to earn £30. After being refused, he later asks the children whether they can give him a hand job.[377]

iv. *R v Q (S)*: The offender told the child that plastic vaginas feel like the real thing in a Skype conversation. Later, the child heard the sound of a vacuum cleaner and moaning sounds made by the offender and was told by the offender that he was masturbating, which incited the child to do the same thing.[378]

Next is child grooming offences under Sections 12 and 13 of SOACA 2017. Section 12 prescribes child grooming as communication by any means with a child to commit or to facilitate the commission of offences of making or producing (Section 5), preparing to make or produce (Section 6), using a child in making or producing (Section 7), exchanging or distributing (Section 8) of the child sexual abuse material, physical, sexual assault on a child (Section 14), non-physical sexual assault on a child (Section 15), sexual performance by a child (Section 15A), sexual extortion of a child (Section 15B) or any offences states under the schedule of SOACA 2017 ("CSA offences"). Section 12 is not based on any foreign legislation, and there is no reported case from the Malaysian judiciary. However, there is no requirement to prove that the offender commits CSA offences or that the communication needs to be sexual, as long as it is established that the purpose of communication is to commit or facilitate committing CSA offences.

Section 13 is an extension to Section 12, which prescribes a more severe imprisonment punishment if the offender takes a step further to travel or physically meets with the child upon committing Section 12. Section 13 is modelled after Section 15 of UK SOA 2003 and Section 131B of the New Zealand Crimes Act 1961. In addition, the CSG offences under Singapore Penal Code are also based on Section 15 of UK SOA 2003 with several modifications.

Like Section 11 of the SOACA 2017, Sections 12 and 13 of the SOACA 2017 are non-age discriminatory and genderless offences. Comparatively, Section 15 of UK SOA 2003 is more specific whereby the grooming process occurs between an offender adult at least 18 years old and a child under 16 years old.

The central importance of Section 13 is that it must establish that the offender travels to commit or facilitate the commission of CSA offences. Based on the common law, the possible evidence that the offender intends to commit the Section 13 offence may be drawn from the latest communications between the offender and the child that triggered the meeting and the offender's previous conduct before the meeting occurred, such as travels to the meeting

[375] *R v Bradburn (Ashley)* [2017] EWCA Crim 1399.
[376] *R v Evans* [2012] EWCA Crim 2183.
[377] *R v Miller (Douglas Andrew)* [2016] EWCA Crim 1249.
[378] *R v Q (S)* [2014] EWCA Crim 2546.

with ropes, condoms, and lubricants.[379] There are several examples of Section 13 based on English cases, such as:

i. *R v Johnson*: The offender, a Sunderland professional footballer, pleaded guilty to several sexual exploitation acts against a 15 years old girl who is his football fan. The CSA victim often met him after matches, and the offender obtained her phone number. The offender continuously communicates flirtatious messages with that girl via WhatsApp and asks her to delete the messages at every communication end. The offender later asked her to use the Snapchat application, on which messages were deleted after 10 seconds unless it was saved. Throughout those communications, the offender had met the CSA victim twice in his car and committed sexual activity. The Crown Prosecutor has used those saved messages and his internet searches about the age of consent as evidence of child grooming.[380]

ii. *R v Mansfield*: The offender pleaded guilty to sending several consensual sexually explicit text messages communicating with a child of around 13-14 years old via internet chat rooms, email, mobile phone conversations, and text messages and followed by meeting with her at Newmarket, UK.[381]

iii. *R v Tomlinson*: The offender used various stratagems and devices like riddles and puzzles on several occasions to attract the attention of a 9 years old girl. At the last meeting, the offender met her and committed a sexual assault on her.[382]

iv. *R v Mohammed*: The offender worked as a security guard on a building site in Bury and used to chat with the local school girls who would hang around the site. One of the girls introduced to him was E. E, a vulnerable girl with significant learning and behavioural problems. The offender and E exchanged telephone numbers and made several intimate communications. At one time, E ran away from her foster home and stayed at the offender's home. The communication in the mobile phone of the E and the offender was used as evidence of sexual grooming.[383]

4.2 Procedural legal reform on SOACA 2017

The SOACA 2017 provided several legal procedural reforms to improve the conviction rate of CSA cases, such as Sections 17, 18, and 20. Section 17 deals with the presumption that a child is competent to give evidence before the court. The reason for the inclusion of Section 17 is that there is a stereotype that the court requires special precautions to take the child's statement as there is a possibility that the child does not fully understand the effect of taking an oath and is unable to distinguish between reality and fantasy.[384]

Section 18 of SOACA 2017 deals with the requirement to corroborate the evidence of a child as a witness. Before SOACA 2017 was introduced, the corroboration rule of child witness depended on whether the witness could give a sworn statement. If the child witness can

[379] Explanatory Notes to the Sexual Offences Act 2003, s 15.
[380] [2017] EWCA Crim 191, [2017] All ER (D) 135 (Mar).
[381] [2005] EWCA Crim 927, [2005] All ER (D) 195 (Apr).
[382] [2005] EWCA Crim 2681, [2005] All ER (D) 159 (Oct).
[383] [2006] EWCA Crim 1107, [2006] All ER (D) 167 (Apr).
[384] *Chao Chong v Public Prosecutor* [1960] MLJ 238.

provide a sworn statement, the evidence must corroborate as a matter of rule and prudence.[385] It means that if the judge believes in an uncorroborated child statement, the judge must record a corroboration warning in the judgment before convicting the offender.[386] If the child gives an unsworn statement, the evidence of the child must be corroborated as a matter of law. Section 133A of the Evidence Act 1950 provides that a failure to corroborate the child's unsworn statement can lead to the conviction being quashed.

However, Section 18 of SOACA 2017 changes this legal reasoning by allowing the court to convict the offender even if the child gave an unsworn statement. The legality of Section 18 was scrutinised in the High Court of *Chan Kok Poh*.[387] The court held that Section 18 is constitutional as it does not infringe the fundamental liberties provisions stated in the Federal Constitution.[388] Furthermore, the doctrine of *generalia specialibus non derogant,* a specific provision in a specific law overrides a general provision in a general law applies such that the specific provision of Section 18 of the SOACA 2017 prevails over the general law of Section 133A of the Evidence Act.[389]

Furthermore, Section 20 of the SOACA 2017 provides for the presumption of age of a child which requires the offender to take all reasonable steps to ascertain the child's age first. If the offender fails to do so, it would not serve as a defence to negate the CSA case. The purpose of Section 20 is to negate the criminal defence of mistake on the victim's age in that the offender has in good faith believed that the sexual counterpart is above the age of consent.[390]

In relation, Section 114A of the Evidence Act further eases for a prosecutor to prove the identity of the person as online grooming is notorious for being anonymous. It creates a presumption of facts in which a person whose name, photograph or pseudonym appears on any internet publication is presumed to publish in the said publication. However, relying on the presumptions under Section 114A of the Evidence Act 1950 and Section 20 of the SOACA may not suffice to convict the offender in the CSG case. It is because the constitutional principle in Malaysia does not allow double presumption in criminal cases.[391]

5. Conclusion

Before the introduction of SOACA 2017, there were several legal deficiencies in dealing with CSA cases, especially CSG issues, such as physical injury must occur and the issue of consent. Despite there being no reported cases of CSG issues, the situation in the common law had been expanded in Malaysia through SOACA 2017 and Sections 11 – 13 in particular, as the law allows for sexual predators to be convicted even if the child consented to sexual communication. This demonstrates that the protection against CSA had been expanded in Malaysia.

[385] Loo Chuan Huat v Public Prosecutor [1971] 2 MLJ 167b.
[386] Ibid.
[387] *Chan Kok Poh v Public Prosecutor* [2022] 9 MLJ 755.
[388] Ibid.
[389] Ibid.
[390] *Abdullah v Regina* [1954] 1 MLJ 195.
[391] *Alma Nudo Atenza v PP* [2019] 5 CLJ 780.

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