JOURNAL OF THE CENTRE FOR RESEARCH IN LAW AND DEVELOPMENT IN ASIA

2021

CENTRE FOR RESEARCH IN LAW, DEVELOPMENT IN ASIA
CRELDA
Taylor's Law School

TAYLOR'S UNIVERSITY
Wisdom • Integrity • Excellence

TAYLOR'S LAW SCHOOL

ISSN: 2289-7259; e-ISSN: 2710-6527

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Right to Secondary Education - An Analysis of Malaysia's Domestic and International Obligations

Marini Arumugam
Lecturer, Taylor's Law School
Taylor's University, Malaysia
Marini.Arumugam@taylors.edu.my

Tamara Joan Duraisingam
Senior Lecturer, Taylor's Law School
Taylor's University, Malaysia
TamaraJoan.Duraisingam@taylors.edu.my

Lai Mun Onn
Senior Lecturer, Taylor's Law School
Taylor's University, Malaysia
Lai.MunOnn@taylors.edu.my

Abstract

Secondary education more so than primary education, plays a crucial role in the redistribution of income, growth and reducing poverty. So crucial is the role of secondary education that countries that have invested in secondary education show faster economic growth. Despite the significance of secondary education, education is only compulsory in Malaysia from the age of 6 until 11 with no compulsory secondary education required. Research shows that only 95.25% of children enrol in lower secondary school education. This percentage drops significantly to 86.46% enrolled in upper secondary school. While there have been calls to review the Education Act to make secondary education compulsory in Malaysia, there has been no shift to make that change. This study aims to look at the right to secondary education within the legal sphere, reviewing not only domestic laws but also against Malaysia's international obligation with the potential of being recognized as a stand-alone right within the domestic and international system of law. It finds that through liberal reading of the Federal Constitution, the right to secondary education could be recognized. This recognition is in line with Malaysia's international obligation. However, despite the possible recognition of the right, this paper finds that there is no provision in any Malaysian laws to provide for the right to secondary education.

Keywords: right to secondary education, human rights.

1. Introduction

Education is a fundamental right, one that is enshrined under the Universal Declaration of Human Rights (UDHR Article 26). Education as a right, is not only meant to be universal but also of the highest priority and a key right. The right to education has meant that states are placed with a legal obligation with regards to decisions on education and the education system.[1] The scope of the right to education is broad and covers many aspects of education. This includes the right to a set number of compulsory years in school for every child in the state to be provided by law[2] and include providing secondary education. Secondary education more so than primary education, plays a significant role in redistributing income, ensuring growth and reducing poverty.[3] So crucial is the role of secondary education that countries which invest in secondary education, show faster economic growth.[4] Despite the significance of secondary education, Malaysia has one of the lowest years of compulsory education in the world, providing for only 6 compulsory years of education from the age of 6 until 11.

In early 2020, Raja Permaisuri Agong Tunku Hajah Azizah Aminah Maimunah Iskandariah tweeted her surprise to realize that there was no compulsory secondary education in Malaysia and called for a change.[5] Prior to that on the 28th of January 2019, the former Deputy Minister of Education, YB Teo Nie Ching had highlighted that the then government was reviewing the Education Act to make it mandatory for students to complete schooling from Year One until Form Five. She was further quoted as saying that parents that fail to send their children to school will face a fine of up to RM5,000 or six months imprisonment. However, since that announcement there has been no change to the Education Act to make secondary education compulsory in Malaysia. The Malaysian Government previously committed to making lower and upper secondary education compulsory by 2015 as stated under the Malaysian Education Blueprint 2013- 2025.[6] The target under the Malaysian Education Blueprint was for all students to leave formal schooling with a minimum SPM or equivalent vocational qualification.[7] This was part of the target to provide equal access to quality education of international standard.[8] The government's Shared Prosperity Vision 2030, extending the compulsory education from the age of 11, would ensure that the benefits from Malaysia's growth would be shared and distributed fairly and equitable. However, to

[1] UNESCO, Right to Education Handbook (2019), 165.
[2] Sonja Grover, 'Secondary Education as a Universal Human Right, Education and the Law' (2004) 16(1) Education and the Law 21.
[3] J.B.G. Tilak, Education and Its Relation to Economic Growth, Poverty and Income Distribution - Past Evidence and Further Analysis, World Bank - Discussion Paper (1989) (1) 46.
[4] J.B.G. Tilak, *Education and Development in India: Critical Issues in Public Policy and Development* (Palgrave Macmillan, 2018) 219-266.
[5] Asian Strategy & Leadership Incorporated (ASLI), Compulsory Education: Building the Future through Compulsory Education (2020).
[6] Ministry of Education, Malaysian Education Blueprint 2013 -2025, (Preschool to Post Secondary Education), 2013, 1-12.
[7] Ibid, 1-12.
[8] Ministry of Education, Blueprint (n 6), 1-12.

date there is no compulsory secondary education in Malaysia, effectively discharging itself from the legal obligation of ensuring that older children in Malaysia receive basic secondary education.

It has to be noted that since independence wherein very few children had access to education, the Malaysian education system has achieved extensive and rapid coverage with the great majority of children in Malaysia having not only full access but completing their education. Within the Malaysian Education Blueprint, there were five outcomes for the Malaysian Education System as a whole, access, quality, equity, unity and efficiency.[9] Ensuring that all Malaysian children deserve equal access to education, the Ministry of Education aspired for 100% enrolment of all children from preschool through to upper secondary school level by 2020.[10] However, despite the rapid expansion in the enrolment of secondary school, enrolment rates in secondary schools have plateaued, remaining lower than that of high-performing education systems. This was a concern highlighted by the 2011 UNESCO Review. In comparison to many high performing countries, there is still an unacceptable percentage of Malaysian children between the ages of 12 to 16 who are not enrolled in secondary school. Typically, children in Malaysia enter lower secondary school in Form 1 at the age of 12 and complete at the age of 15. Upper secondary school at Form 4 starts at the age of 16. As of 2018, only 95.25% of children between the ages of 12 to 14 were enrolled in lower secondary school.[11] The percentage drops significantly to 86.46% of children between the ages of 15 to 16 are enrolled in upper secondary school.[12] Further in 2018, only 96.8% of children transition from Year 6, Primary School, to Form 1, Secondary School.[13] Similarly, only 96.76% of children transition from Form 3, Secondary School to Form 4, Secondary School.[14] In comparison to high performing nations, the enrolment ration of Malaysian children in secondary school only stands at 86 in comparison to 152, 152 and 151 in countries like Finland, United Kingdom and Australia respectively.[15] Further, in countries like Finland, 99.99% of children transition from primary to secondary schools, however in Malaysia it is only 91.05%.[16]

The drop of enrolment in secondary schools is particularly an issue of concern with boys, wherein there is a massive gap with the male to female ratio.[17] This gap is widened further between lower to upper secondary schools. The 'Lost Boys' is an area of concern, potentially creating social and political instability.[18] Another segment of population that is under-enrolled in secondary schools are children from indigenous and minority groups, particularly Orang

[9] Ministry of Education, Blueprint (n 6), 2- 9.
[10] Ministry of Education, Blueprint (n 6), 2-9.
[11] Ibid, 41.
[12] Ibid, 41.
[13] Ibid, 41.
[14] Ibid, 41.
[15] Ibid, 43.
[16] Ibid, 43.
[17] Ibid, 3-20.
[18] Ibid, 3- 20.

Asli, Penans,[19] Peribumi Sabah and Peribumi Sarawak. The data on student outcomes for indigenous groups are limited. However, based on data on the Orang Asli, the enrolment rates of indigenous groups are alarmingly poor, with higher dropout rates in comparison with the national average.[20] In comparison to the national average, only 30% of indigenous children complete secondary school.[21] This lower than acceptable enrolment is far from the target of the state to ensure 100% enrolment of all children in secondary school and could be attributed to the failure to recognise the right to secondary education and making secondary school education compulsory.

This study aims to look at the right to secondary education within the legal sphere, reviewing not only Malaysian domestic law but also Malaysia's international obligation with the potential of the right of secondary education being recognised as a stand-alone right within the domestic and international system of law. Secondary data on domestic constitutional and legislative setting will be analysed as well as general international conventions, declarations, agreements and framework to determine the availability of the right of secondary education. The study aims to be a practical utility in demonstrating to policy makers of not only Malaysia's international obligation but also constitutional and legal obligations to ensure that all children in Malaysia have a right to secondary education.

2. Methodology

This study is done through a descriptive-comparative study methodology, encompassing empirical elements through qualitative content analysis by examining national and international sources of laws and policies on the right to secondary education not only in Malaysia but internationally. These sources of research include law reports locally as well as internationally, legislation and policies, journal and studies not only secondary education but also education in general.

Doctrinal study has its limitations, however it provides for the foundation towards further social-legal studies in partnership with other social scientists. Such joint work will in the future be part of the research trajectory on this novel area of law. The study in domestic as well as international law is required to clearly set out the borders and similarity between both international and domestic law and as a result acquiring a holistic perspective on the right to secondary education.

[19] Ibid, 4-15.
[20] Ibid, 4-20.
[21] Ibid, 4-21.

3. Importance of Secondary Education

There is a two-prong benefit to education. The first is the private benefit of education which benefits the individual and the second is the social benefit which is gained by the state.[22] One of the key individual benefits of education, is wealth. In fact, one of the key correlations between poverty and for many the inability to even meet basic survival needs, is the lack of education.[23] The impact of secondary education can clearly be seen in terms of eradicating poverty, economic development and health and well-being. The impact is most significant in young women. As a result of the social benefit to the state from secondary education, states should protect and defend the right to secondary education.[24]

It has always been thought that primary education was key to reducing poverty. However, research has indicated that, it is in fact extending compulsory education to the end of secondary education that is vital to the reduction of poverty.[25] The more educated an individual, the higher chance they have to obtain employment with higher earning potential.[26] Young people who complete secondary education have an 80% probability of avoiding poverty.[27] In fact, worldwide, between 72% to 96% of families that live in poverty have less than nine years of education.[28] It is estimated that an increase in school years among adults could reduce the number of people in poverty by close to 60 million and reduce worldwide poverty by 420 million.[2930] In Malaysia, income inequality has dropped significantly with secondary education. The Gini coefficient had dropped by 7% percentage points over two decades in Malaysia with the increase of adults with secondary education.[31] Individuals with secondary education are able to earn a higher income subsequently contributing financially to the state through tax. A more educated and skilled labour force also promotes economic growth.[32] In fact it is estimated that state per capita income would increase by 75% in low income countries which could eventually eradicate poverty.[33]

[22] M. Najeeb Shafiq, Benefits of Primary and Secondary Education, Forthcoming in Dominic Brewer & Lawrence Picus (Eds.), Encyclopedia of Educational Economics and Finance, forthcoming. Thousand Oaks, (2013) CA: SAGE, 1.
[23] Grover (n 2), 26.
[24] Katarina Tomasevski, Un-asked Question about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A response to Kenneth Roth, Leonard S. Rubenstein and Mary Robinson, Human Rights Quarterly, (2005) 27(2) 709- 720.
[25] Katarina Tomasevski, Progress report of the Special Rapporteur to the Economic and Social Council on the right to education (2002) 23 <http://www.education.org> accessed 22 January 2020.
[26] UNESCO, Global Education Monitoring Report 2016 Education for People and Planet: Creating Sustainable Futures for All (2016), 58.
[27] Tomasevski (n 25), 23.
[28] Ibid, 23.
[29] UNESCO, Reducing global poverty through universal primary and secondary education (2017) 12.
[30] UNESCO, Global Education Monitoring Report 2016 (n 26), 61.
[31] UNESCO, Reducing global poverty through universal primary and secondary education (n 29), 13.
[32] UNESCO, Right to Education Handbook (n 1), 35.
[33] UNESCO, Global Education Monitoring Report 2016 (n 26), 61.

In addition, eradicating poverty and economic development, secondary education also plays a significant role in the health and well-being of individuals. Empirical evidence has shown that individuals with more education live longer than their less educated fellow citizens.[34] In fact, higher education has correlation with a reduction in mortality from diseases[35] and reducing illness. This eventuality leads to less impact on the resources of the state.

Of the two genders, the impact of secondary education is the most significant with young women. Young women with higher education are less likely to die at childbirth[36] and have fewer and healthier children.[37] It is estimated that if girls receive all 12 years of education, the early birth rate drops by 59% and child deaths go down by 49%.[38] The benefit of secondary education also has an intergenerational benefits to girls especially as mothers with higher education have children who enter schools earlier and complete more years of school[39] Child marriages also reduced significantly as well. It is estimated that child marriages globally would be reduced by 64% if every girl completed 12 years of education.[40]

4. Malaysia's Domestic Legislative Setting

4.1 Malaysian Federal Constitution

A lot of countries have provided for the right to education in their Constitution, adopting the provision in 1948 United Nations Universal Declaration of Human Rights that provides that the right to education should be provided to everyone under Article 26. However, in Malaysia, fundamental liberties are set out under Article 5 to 13 of the Federal Constitution. There are 9 headings: liberty to person, prohibition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality, prohibition of banishment and freedom of movement, freedom of speech, assembly and association, freedom of religion, rights in respect of education and rights to property. One would note, that within these nine headings, there are no specific articles with reference to the right to education. It is commonly presumed that the right to education is found under Article 12(1) on rights in respect to education. However, Article 12(1) was actually drawn up with the core purpose of providing basic rights on education as opposed to the right to education.[41]

[34] Debora Mackenzie, 'More Education is what makes people live longer, not more money' (New Scientist, 18th April 2019) <https://www.newscientist.com/article/2166833-more-education-is-what-makes-people-live-longer-not-more-money/> accessed 22 November 2020.
[35] Robert A. Hahn, Benedict I. Truman, 'Education Improves Public Health and Promotes Health Equity' (2015) 45(4) International Journal Health Service 657-678.
[36] UNESCO, Teaching and Learning: Achieving Quality for All, EFA Global Monitoring Report 2013/4 (2013), 13.
[37] UNESCO, Education for All Global Monitoring Report: Education Transform Lives (2013) section 5.
[38] Malala Fund, Beyond Basics, Making 12 Years of Education a Reality for Girls Globally (2015) 6.
[39] Shafiq (n 22), 11.
[40] UNESCO, Global Education Monitoring Report (2017).
[41] Joseph M. Fernandao and Shantiah Rajagopal, 'Fundamental Liberties in the Malayan Constitution and the Search For a Balance' (1956- 57) 13 (1) International Journal of Asia Pacific Studies 1–28 <http://dx.doi.org/10.21315/ijaps2017.13.1.1 ,12> accessed 1st October 2019.

The Article 12(1) provides that:

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

The founding fathers in drafting the Federal Constitution included Article 12(1) to provide a safeguard for religious freedom and choice in terms of education,[42] particularly in terms of the non-Malay communities to establish and maintain schools in the vernacular languages.[43] In addition, Article 12(1) aims to prevent discrimination on religious grounds in the administration of public education.[44] Professor Dr. Shad Saleem Faruqi reaffirms this view, explaining that the provisions in Article 12(1) have to do more with the federal-state relations in the management of education, ensuring equality and non-discrimination in public institutions of learning,[45] respect for the linguistic rights of minorities, respect for the rights of parents to choose their children's education, medium of instruction and affirmative action policies.[46] As such, while there are provisions for education under the Federal Constitution, these provisions do not guarantee the right to education or a right to free education.[47] As such, there is no guarantee to the right to secondary education, none of which would compel compulsory secondary education in Malaysia.

Despite the fact that there are no specific provisions to the right to education under the Federal Constitution, the right to secondary education could be implied from Article 5(1) of the Federal Constitution. The Indian Supreme Court took a similar approach in the interpretation of Article 21 of the Indian Constitution. Article 5(1) states that no person shall be deprived of his life or personal liberty, save in accordance with law. Similarly, Article 21 of the Indian Constitution provides that no person shall be deprived of his life or personal liberty except according to the procedure established in law. The Indian Supreme Court in the case of *Mohini Jain (Miss) v State of Karnataka and Others*[48] found that while the right to education had not been guaranteed as a fundamental right under Part II of the Indian Constitution, the

[42] Ibid, 1-28.
[43] Fernandao and Rajagopal (n 41), 1-28.
[44] Andrew Harding, 'Law, Government and the Constitution in Malaysia' (1996) Malayan Law Journal Sdn Bhd, 202.
[45] Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia* (Star Publication (Malaysia) Bhd. 2008) Selangor, Malaysia, 356.
[46] Ibid, 356.
[47] Faruqi (n 45), 356.
[48] [1992] 3 SCC 666.

right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.[49] Here the Supreme Court explained that in order for all rights to create a life, dignity has to be satisfied. In India, a dignified life can only be met through education, as such education was key to a right to life and was a responsibility of the State. The Supreme Court of India was of the view that the framers of the Indian Constitution would have intended for the State Government to be under an obligation to provide educational facilities at all levels to its citizens.[50]

The 1992 Supreme Court decision of *Mohini Jain* was subsequently reaffirmed a year later by the Indian Supreme Court in the case of *Unni Krishnan v State of Andhra Pradesh*.[51] Here the Supreme Court interpreted 'deprivation of life', under Article 21 of the Indian Constitution, to mean living in dignity which includes within its education as well. The Indian Supreme Court further explained that education transfigures the human personality into a pattern of perfection through a synthetic process of the development of the body and the enrichment of the mind.[52] As such, it was interpreted that the Article 21 of the Indian Constitution provided for the right of education up to the age of 14 years. The decisions by the Indian Supreme Court eventually led to the amendment of the Indian Constitution to include Article 21A 2002 which protected the right to free and compulsory education for children between the ages of six and fourteen in India as well passing of the Right of Children to Free and Compulsory Education (RTE) Act 2009 by the Indian Government. The impact of this change in India was so great as it had converted what was a non-enforceable right to education in Directive Principles of State Policy into an enforceable Fundamental Right.

In view of the interpretation from the Indian Supreme Court in *Unni Krishnan v State of Andhra Pradesh* and *Mohini Jain (Miss) v State of Karnataka and Others* of Article 21 of the Indian Constitution, Article 5(1) of the Malaysian Federal Constitution which refers to life and liberty to persons, could similarly also be interpreted to include not only the right to education but also the right to secondary education. Correspondingly to India, in order for Malaysian children to live a life of dignity, the state should protect the right to education. Malaysia should take a leaf from India, and make the necessary amendments to include provision for the protection to the right to education - at the very least, to protect the right to education until the age of 14.

It is worth noting that in discussing the inequity of primary education in Malaysia, it is worth stating that the Article 8 of the Federal Constitution provides that all persons are equal before the law and are entitled to equal protection of the law. There should be no discrimination on the ground of religions, race, descent, place of birth or gender in any law.

[49] Ibid.
[50] [1992] 3 SCC 666, 673.
[51] [1993] AIR 2178.
[52] Ibid, 2182.

The right to education was reaffirmed by the High Court in 2000 in the case of *Jakob Renner (An Infant Suing Through His Father and Next Friend, Gilbert Renner) & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors*.[53] While this case involved a child with special needs and non-Malaysia, Low Hop Bing J, reinforced that justice is in favour of providing continuous education to children, particularly whose educational needs are disrupted. The views of the High Court stress the importance of education for all children in Malaysia and as such it is the role of the state to guarantee that education is available to all children in Malaysia.[54]

Unlike a number of states around the world, there is no specific right to education, more so the right to secondary education enshrined in the Malaysian Federal Constitution. As such, there is no guarantee to the right to secondary education, none which would compel compulsory secondary education in Malaysia, ultimately limiting any form of protection as to education for young people in Malaysia. However, the implicit reading of the right to education into the Malaysian Federal Constitution and ultimate acknowledgement, would provide for the highest level of protection that can be accorded and ultimately enshrining the right to education in the legal codes in Malaysia, particularly the right to secondary education.

4.2 Education Act 1996

The key legislation on education in Malaysia is the Education Act 1996 (EA). The EA implements government policies on education that had been developed since independence in 1957. The EA is meant to be the most comprehensive legislation of all matters concerning education with the aim of fully developing the potential of children in Malaysia. Two key components of the EA refer to policies and directions and sources of regulation around primary and secondary education in Malaysia.[55]

The Education Act 1961 (EA) came about to implement the Razak Report 1956 which outlined the education policies that would be the foundation to formulate the national education system in Malaysia.[56] Sections 27-29A of the EA obligates the state to provide compulsory primary education to all Malaysian children. Primary education is to be provided free and is compulsory. These provisions were included in the EA through amendments in 2002 pursuant to the gazette by the Malaysian Government through Professional Circular No. 14/2002: Implementation of Compulsory Education in Primary Level in 2003 dated 27th November 2002

[53] [2000] 5 MLJ 254.
[54] Makhtar M, Asarik.N and Mohd Yusob M.L , 'Right to Education for Irregular Migrant Children in Malaysia: A Comparative Analysis' (2015) 23 (S) Pertanika Journal Social Science & Humanities 85-96, 89.
[55] ESPACT, Education Services Provided - National Education System <https://www.espact.com.my/national-education-system/the-education-act-1996> accessed 11 May 2020.
[56] Ministry of Education, Education in Malaysia: A Journey to Excellence, Appendix 1: A Brief History of Education in Malaysia (2008).

and Guidelines for Implementation of Compulsory Education in Primary Level in 2003. Free education here means that there are no tuition fees imposed. Pursuant to the recommendation by the United Nations Declarations of Human Rights (UNDHR) and Convention of the Rights of the Child (CRC), the Malaysian Government in 2012 had announced the abolishment of school fees in primary school with the aim of providing access to quality and affordable education to every child irrespective of their socio-economic background. Children in Malaysian are required to start primary education the year they turn 7 and are required to remain in primary school for the duration of the six years from the ages of 7 to 12 years old. While children are required to remain in primary school, pursuant to section 29 of the EA, children are allowed to complete their primary education within 5 to 7 years.

The state, through the Ministry of Education, is obligated to provide primary education under National and National-Type schools as well as required to maintain these schools under sections 27 and 28 of the EA.[57] The state has made primary education compulsory pursuant to section 29A(1) and made a decree to the same. In addition to the state having to provide primary education, every parent who is a Malaysian citizen is obligated to enrol their child upon attaining the age of six into primary schools pursuant to section 29A of the EA. Parents are required to ensure that their child remains in primary school for the six-year duration. Parents who fail to send their primary-age children to school shall be fined RM5000 or imprisonment or both. However, it is thought that this provision has yet to be applied.[58]

Pursuant to section 2 of the EA, secondary education consists of the two parts, lower secondary and upper secondary. Students enter lower secondary level for three years and would sit for a public examination known as Pentaksiran Tingkatan 3 ('PT3') at the end of the three years. On completion of the three years, students then can enter upper secondary level for two years and will complete Sijil Pelajaran Malaysia ('SPM') at the end of the two years by the age of seventeen years old. Provisions with regards to secondary education are provided within sections 30 and 31 of the Education Act. Pursuant to section 30, the State only has a duty to provide secondary education under National secondary and technical school and any other secondary school that are determined by the Ministry of Education.[59] Further to section 30(2), the State may provide upper secondary education at any National school.[60] Further, the Ministry of Education, under section 31, may establish and maintain any secondary school.[61] If one is to compare secondary education to primary education within the EA, the state has not only failed to make secondary education compulsory but are not compelled to

[57] Education Act 1996, sections 27 and 28.
[58] Maheran Makhtar and Nor Aida Ab Kadir, 'Child Marriages and the Right to Education: The Legal and Social Perspectives' (2019) 4(15) International Journal of Law, Government and Communication 22, SUHAKAM, Report on Access to Education in Malaysia (2013) 10.
[59] Education Act (n 57), section 30.
[60] Ibid, section 30(2).
[61] Ibid, section 31.

maintain or provide secondary schools education. Further, while parents who fail to ensure their children's primary school education could be fined, or worse still imprisoned, there are no similar legislative provisions for secondary school level. This would suggest that there is no urgency or seriousness to ensure that all children in Malaysia enter and complete secondary school education.

4.3 Child Act 2001

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

4.4 Other Child Related Legislations

There are a number of child-related legislations that have references to children in Malaysia. Some statutes are more specific like the Child Care Centre Act 1984, the Sexual Offences Against Children Act 2017, the Guardianship of Infants Act 1961, the Care Centre Act 1993, the Children and Young Persons (Employment) Act 1966, and the Children and Young Person (Employment) Act 1966. Others like the Adoption Act 1952, the Anti-Trafficking in Persons Act 2007, the Birth and Death Registration Act 1957, the Sexual Offences Against Children Act 2017, the Guardianship of Infants Act 1961, the Domestic Violence Act 1994, the Criminal Procedure Code and the Penal Code have references to children. Some of these statutes are specifically enacted with children in mind, others have provisions with reference to children. These legislations have both public and private law elements that extend to protecting children ranging from citizenship and criminal law to family law. However, the legislations fail to provide any rights to education or right to secondary education.

In Malaysia, a review of the relevant legislation would indicate that there is no specific legislation providing and compelling for secondary education, which ultimately limits the protection afforded to children in Malaysia. It must be noted that while a legislative framework may not be as significant or provide for as strong a protection as a constitutional one, a guarantee of education within a legislative framework allows a State to articulate the right to education in specific details and allows for changing needs of the individual state. Collectively, both legislative as well as constitutional protection, provides the strongest protection to the right to education.[62]

[62] UNESCO, Implementing the Right to Education, A Compendium of Practical Examples, Based on Results of the Seventh Consultation of Member States on the Implementation of the Convention and the Recommendation against Discrimination in Education (2010), 12.

5. International Frameworks

5.1 United Nations Declarations of Human Rights

One of the oldest international obligations is the 1948 UN Declaration of Human Rights (UNDHR). The UNDHR is the key reference on human rights principles. Article 26 discusses education and provides as follows:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect of human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 26(1) of UNDHR provides that 'Everyone has the right to education' which means everyone has the right to education not only at elementary stages but also at the later stages, including at secondary level. Article 26(1) further stipulates that education shall be free, at least in the elementary and fundamental stages and that elementary education shall be compulsory for all. This general right to education is one of the few rights with a socio-economic character to make it into the Universal Declaration.[63] Eventually leading to a shift in attitudes wherein education is now considered a public policy and intertwined with modern function of a state.[64] The ambitions of the declaration were subsequently followed through via general and specific human rights treaties.

There are however no requirements for States to make education compulsory until the end of secondary school. The lack of compulsion of secondary education however has resulted in an aborted basic education which Sonja Grover explains results in a violation of Article 26(2).[65] Article 26(2), which stresses that education is to encourage the development of the individual's full potential, "Education shall be directed to the full development of the human personality and to the strengthening of respect of human rights and fundamental freedoms ... ". As such, states including Malaysia not only have a legal obligation but ethical obligation

[63] Laura Lundy, Karen Orr and Harry Shier, 'Children's Education Rights Global Perspective' in Martin D. Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook on Children's Rights: Global and Multidisciplinary Perspectives* (Routledge, Abingdon 2017) 364.
[64] UNESCO, Right to Education Handbook (n 1), 37.
[65] Grover (n 2), 21.

to provide compulsory comprehensive 'basic education', which include secondary education, ensuring that the potential of children in Malaysia are maximised.[66]

In addition to Article 26, Article 22 is equally as important in terms of ensuring education. Article 22 UNDHR provides that, "Everyone, as a member of society, is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." The lack of secondary education is inextricably linked to poverty but also health as well. As such, the right to secondary education can be interpreted implicitly to include the right of every person to a certain minimum acceptable quality of life and standard of life.[67]

5.2 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is arguably the most important international treaty that deals with the right to education. This right is guaranteed under Article 13 of the ICESCR. According to the treaty body that monitors the implementation of the provisions of the ICESCR, the Committee on the Economic Social and Cultural Rights ('ICESCR'), Article 13 is the most wide-ranging and comprehensive article on the right to education in international human rights law.

State parties to the ICESCR recognise that everyone has a right to education and they agree that " … education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace ... ". Further, the ICESCR comments that " … education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities ... ".

However, in paragraph 2 of Article 13, whilst recognising that the right to primary education shall be compulsory, the same is not for secondary education. Instead, it is recognised that secondary education '…shall be made generally available and accessible to all by every appropriate means'. For it to be made generally available, this means that it is not dependent on the student's ability or capacity but that state parties will have to ensure that secondary education is made accessible to all without discrimination, within safe physical reach and affordable to all. In 1999, the Committee on Economic, Social and Cultural Rights, General Comment had reinforced that State parties have an obligation to take concrete steps towards

[66] Ibid, 25.
[67] Ibid, 26.

achieving free secondary education.[68] In addition, states have to ensure the completion of basic education and consolidation of the foundation of life-long learning and human development, preparing students for vocational and higher educational opportunities.[69] Only 86.46% of children between the ages of 15+ - 16+ are enrolled in upper secondary schools,[70] which means nearly 15% of children in Malaysia between the ages of 15+ -16+ are not enrolled in any formal education and have not completed basic education. Further, only 17.78% of children between the ages of 17+ - 18+ are enrolled in post-secondary education, which means statistically less than 20% of children are being prepared for vocational and higher education opportunities.[71] In comparison to countries like Australia and the United States of America, wherein 20% of the population have higher education, less than 10% of the Malaysian population have higher education.[72] For states which do not have compulsory primary education upon being state parties to the ICESCR, Article 14 provides that those states are given 2 years to come up with a plan to progressive implement it within a reasonable number of years. However, there is no such requirement when it comes to secondary education.

5.3 International Covenant on Civil and Political Rights

As for the International Covenant on Civil and Political Rights (ICCPR), the right to education is not mentioned explicitly. However, the right can be implied in Article 18 and Article 24 paragraph 1. Article 18 which deals with religious and moral education provides that "State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions ... ". Article 24(1) provides that " … every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State ... ".

It can be said that this right to such measures of protection required by his status as a minor includes the right to education even though it is not explicitly mentioned in the ICCPR. In its General Comment no 17, the Human Rights Committee ('HRC'), which is the treaty body that monitors the implementation of the provisions of the ICCPR, notes that '…such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural'. The HRC goes further and notes that " … every possible measure should be taken to… provide them with a level of education

[68] CESCR General Comment No. 13: The Right to Education (Art. 13) Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 (Contained in Document E/C.12/1999/10).
[69] Ibid.
[70] Ministry of Education (n 6), 41.
[71] Ibid, 41.
[72] Ibid, 41.

that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression ... ".

5.4 Other International Conventions

The right to education has also been recognised in the United Nations human rights treaties such as the Convention on the Elimination of Racial Discrimination 1965, Convention on the Elimination of Discrimination Against Women 1979 (CEDAW), the Convention on the Rights of Migrant Workers 1990, and the Convention on the Rights of Persons with Disabilities 2006 (CRPD). Malaysia is a state party to two of these human rights treaties, namely CEDAW and CRPD. In addition to that, Malaysia is also a state party to arguably the most important treaty regarding the right to education, the Convention on the Rights of the Child. The relevant provisions in the Convention on the Rights of the Child will be discussed in the following part.

5.4.1 Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the UN General Assembly in 1979 and is often describe as an International Bill of Rights for women. It has been ratified by over 189 member states, including Malaysia. The right to education for women is pursuant to Article 2 and Article 10. Article 2 makes it compulsory for all states that ratify the CEDAW to ensure that there is no discrimination against women. Article 10 addresses girls' legal right to education and provides that state parties shall take all appropriate measures to eliminate discrimination to ensure to them equal rights with men in the field of education. Member states are required to eliminate discrimination against women in education throughout the life cycle and at all levels of education, which means that the education must be accessible in both law and practice to all women. The Committee on the Elimination of Discrimination against Women, in its general recommendation No. 36, have stated that member states have an obligation to protect girls and women from any form of discrimination that denies them access to all levels of education and to ensure that where this occurs that they have recourse to avenues to justice.[73]

Malaysia ratified CEDAW in August 1996 but had maintained reservations on Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g) on consideration that these Articles are in conflict with the Federal Constitution and Islamic law. To date, Malaysia has yet to incorporate the CEDAW into national law. There have been calls to provide a comprehensive gender equality legislation, and while the government has previously indicated its intention to enact a Gender Equality Act, to date, there is no comprehensive national law pursuant to CEDAW. Despite the lack of national laws, Malaysia still has an obligation towards enforcing its obligation under CEDAW, including ensuring that there is no discrimination against women in terms of

[73] Committee on the Elimination of Discrimination against Women, General recommendation No. 36, On the Rights of Girls and Women to Education (2017) 3.

education as well as provide a legal protection to ensure that women have access to all levels of education, including secondary education. One of the issues that plague girls in Malaysia is access to schooling in remote areas in Malaysia, particularly in Sabah and Sarawak.[74] This has contributed to lower than average literacy rates than national literacy rates.[75] There is no protection provided under the Education Act 1996 to ensure that girls/women have access to secondary education. While there is a duty to provide secondary education, it is not compulsory to provide and ensure secondary school education.

5.4.2 Convention of the Rights of the Child

The Convention of the Rights of the Child (CRC) without doubt is the leading framework for protection of children's rights, internationally. In any debate and discussion on children's rights, the CRC will play an important role. The CRC was finally adopted in 1989 and came into force in 1990. Today, the CRC is the most ratified of all the United Nation Human Rights treaties and has helped transform children's lives around the world. The CRC provides bespoke rights for children by providing them an avenue constructed on an agreed international ambition for education of children, particularly their future. The specific provisions dealing with the child's right to education is found in Articles 28 and 29 of the CRC.

Article 28 focuses on making education accessible. State parties recognise the right of a child to education and are to make it accessible to all children equally. As for secondary education, Article 28 paragraph (1)(b) provides that state parties are to make it available and accessible to every child. There is no obligation imposed on state parties to make it compulsory. Article 29 on the other hand focuses on the aims of the education and its contents. It provides that education should be directed to the fullest development of the child, with respect for human rights and fundamental freedoms, gender equality, and other targets contained in the UN provides for the recognition by the state to the right of the child to education. The Committee on the Rights of the Child is of the view that " … (a)n Education with its contents firmly rooted in the values of article 29(1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related phenomena ... ".

All the rights of the child in the CRC, just like all human rights, are interdependent and interrelated, and as such to understand the said articles 28 and 29, they must be read together with the other provisions of the CRC. By doing so, it can be seen that these two articles combined with other provisions under CRC formed a series of interrelated privileges for children around the right to education. In fulfilling the obligations pursuant to Article 28 and 29, the state parties are not only obligated to respect, protect and fulfil rights (Article 4),

[74] WAO, The status of Women Human Rights: 24 years of CEDAW in Malaysia (2019) 237.
[75] Ibid, 237.

the implementation of all rights under CRC including Article 28 and 29 are guided by all times by the rights to non-discrimination (Article 2), consideration of the best interest of the child (Article 3.1), life, survival and development (Article 6) and respect for the view of the child (Article 12).

Malaysia became a state party of the CRC in February 1995 and made several reservations to the provisions of the CRC. Malaysia has since withdrawn some of them and there are 5 reservations remaining. At that time, the available statutes in Malaysia were not in conformity with the provisions of the CRC and therefore, Malaysia enacted the Child Act 2001 ('CA') to transform their CRC treaty obligations into domestic law. In order to protect the welfare of children, the CA consolidated and amended the then existing laws which relate to the care, protection and rehabilitation of children. There are no provisions under CA towards providing children the right to education nor the right to secondary education.

One of the reservations entered by Malaysia is in Article 28 paragraph (1)(a) which provides for free compulsory education but only in relation to primary education. However, Malaysia also made a declaration saying that with the amendment of the Education Act 1996 in 2002, primary education is made compulsory in Malaysia. However, it is not made compulsory to all. It is submitted that this is related to the reservation to Article 2 of the CRC which emphasises the principal of non-discrimination requiring the State to ensure that necessary steps are taken to eliminate discrimination and safeguard equality in areas including education. In ratifying the CRC, Malaysia has committed itself and has an obligation to make laws and policies consistent with the provisions of the CRC.

5.5 ASEAN Human Rights Declaration 2012

The ASEAN (Association of South-East Asian Nations) Human Rights Declaration was adopted in November 2012 by the ASEAN member states. Malaysia is one of the member states. The ASEAN Human Rights Declaration 2012 provides for the right of education and it is found in Article 31. Article 31 provides as follows:

(1) Every person has the right to education.
(2) Primary education shall be compulsory and made available free to all. Secondary education in its different forms shall be available and accessible to all through every appropriate means. Technical and vocational education shall be made generally available. Higher education shall be equally accessible to all on the basis of merit.
(3) Education shall be directed to the full development of the human personality and the sense of his or her dignity. Education shall strengthen the respect for human rights and fundamental freedoms in ASEAN Member States. Furthermore, education shall enable all persons to participate effectively in their respective societies, promote understanding, tolerance and friendship among all nations,

racial and religious groups and enhance the activities ASEAN for the maintenance of peace.

5.6 The Education For All Movement

The Education For All (EFA) Movement is a global commitment to provide quality basic education for everyone all around the world. The World Conference in Jomtien 1990 resulted in the World Declaration on Education For All and a Framework for Action to Meet Basic Learning Needs. It addressed the basic learning needs of children, youth, and adults. The commitment was reiterated in the World Education Forum (Dakar, 2000). Subsequently, the Incheon Declaration for Education 2030 adopted at the World Education Forum in Incheon, South Korea in 2015 reaffirms this commitment. The 6 education goals were identified:

(a) Goal 1 - Expand and improved comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children;
(b) Goal 2 - Ensure that by 2015, all children, particularly girls, those in difficult circumstances, and those belonging to ethnic minorities, have access to and complete, free and compulsory primary education of good quality;
(c) Goal 3 - Ensure that the learning needs of all young people and adults are met through equitable access to appropriate learning and life-skills programmes;
(d) Goal 4 - Achieve a 50% improvement in adult literacy by 2015, especially for women, and equitable access to basic and continuing education for all adults;
(e) Goal 5 - Eliminate gender disparities in primary and secondary education by 2005 and achieve gender equality in education by 2015, with a focus on ensuring girls' full and equal access to and achievement in basic education of good quality; and
(f) Goal 6 - Improve all aspects measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills.

The EFA Framework was originally developed as a response to problems and challenges faced by least developed countries, however, Malaysia as an upper-middle-income country has achieved most of the EFA goals.[76] Despite great strides and developments in the Malaysian Education System, the state understanding there was room to accelerate progress in meeting EFA goals, put into place the Education Development Master Plan 2001-2010 as well as the Malaysia Education Blueprint (2013- 2025). The plans state that 'every child in Malaysia deserves equal access to education'.

Despite the gains met under the EFA goals, there are several education section challenges. It has been difficult for the state to reach the percentage of children who for various reasons have either never enrolled or dropped out of education in Malaysia. It has yet to be conclusively identified whether these children are marginalized poor, immigrants or children

[76] Ministry of Education, Malaysia Education for All End Decade Review Report 2000- 2015 (2015), 11.

from indigenous groups.[77] In addition, equity to education is an issue, and this is reflected in the gaps to access education between rural and urban areas, and socio-economic backgrounds as well as in terms of gender.[78] In terms of secondary education, gains have been met in Goal 2 and Goal 5 of the EFA in Malaysia.

Goal 2 of the EFA refers to ensuring that all children have access to primary education. These policies, resources and structures that have been put into place to meet Goal 2 of the EFA in Malaysia, have also indirectly flowed into secondary education. There has been a number of programmes specifically implemented to ensure more children have access to education, particularly children from poor families in urban and rural areas, remote areas, indigenous population and undocumented children, children living in plantation estates and refugees.[79] These programmes include financial programmes providing sufficient financial aid to alleviate the financial burden of children of poor families to encourage these children to attend school as well specific programmes for the indigenous population.[80] These programmes were not only rolled out to primary school children but also have been extended to those in secondary education. The positive impact of these programmes can be seen by the increase in the enrolment rate, not only for primary education but also for secondary education.[81] These increased rates are also the highest in the state of Sabah, which had previous high under-enrolment rate in comparison to the rest of the country.[82] These higher rates indicate a positive impact of reaching indigenous population. However, despite these encouraging improvements in the enrolment rates, there are still 250,000 uncounted children that should be pursuing secondary school education.[83]

As part of meeting Goal 5 of the EFA, a number of policies and resources have been allocated to ensuring equity and quality in education for male and female students in Malaysia. Malaysia has managed to achieve gender parity in education since 2005 for primary education. However, while girls have thrived under policies implemented, data have indicated boys have been falling behind, particularly in terms of secondary education.[84] Boys particularly leave at lower secondary education and do not transition into upper secondary.[85] While the issue of 'Lost Boys' is not a problem that is unique to Malaysia, it is an urgent issue of concern. If left unattended, it would result in a social and political instability.

The EFA Movement emphasizes the need for primary education to be made not only compulsory but also free. However, in comparison, secondary education is only to be made

[77] Ibid, 9.
[78] Ministry of Education, Education for All (n 77), 9.
[79] Ibid, 29.
[80] Ibid, 31.
[81] Ibid, 33.
[82] Ibid, 33.
[83] Ibid, 34.
[84] Ibid, 58.
[85] Ibid, 60.

available and accessible. This is consistent with the provisions of the various human rights conventions referred to earlier. This does not however mean that the commitment towards secondary education is weaker - it is instead a recognition that making secondary education free and compulsory is currently beyond the resources of many countries. In ensuring access to primary education, the Education Act 1996 had been amended under the Education (Compulsory Education) Regulation 2002 to make primary education compulsory.[86] The policy implementing compulsory primary education has resulted in close to 100% primary school completion in Malaysia.[87] As such, similarly, the same approach should be adopted to make secondary school education compulsory as well to ensure 100% of children in Malaysia also complete secondary education.

5.7 The International Labour Organization Minimum Age Convention 1973

The International Labour Organization (ILO) Minimum Age Convention 1973 was adopted in 1973 to ensure the effective abolition of child labour and to ensure that the minimum age for admission into employment or work is consistent with the fullest physical and mental development of young persons. The convention provides that the minimum age for admission into employment or work " … shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years ... ". Each state shall make a declaration upon ratification of the convention stating what it deems to be the said minimum age.

Malaysia made a declaration to the effect that the minimum age is 15 years. As such, that would mean that compulsory schooling in Malaysia should be up to 15 years old. It would appear then that Malaysia is technically in breach of this convention although the object and purpose of the convention is not to determine the rights of children to education. Having said that, it means that the ILO is of the view that compulsory education should be up to at least 15 years old - in Malaysia, this will cover the lower-secondary school age.

6. Conclusion

Secondary education, more so than primary education, plays such a significant role in not only eradicating poverty and redistributing, but also ensuring economic growth and increasing the health and well-being of individuals, particularly young women. However, despite these significant gains in secondary education, Malaysia has one of the lowest years of compulsory education in the world, only providing for 6 compulsory years of education for ages 6 until 11. There are no national legislations, including the Education Act 1996 that provides for legal obligation to provide for the right to education. While the Education Act 1996 does state that there is a duty to provide access to secondary education, there is no legal obligation. As such,

[86] Ibid, 29.
[87] Ibid, 29.

effectively discharging itself from the legal obligation of ensuring that older children in Malaysia receive basic secondary education.

However, while there is no legal obligation pursuant to any national legislation, there is a right to education, including the right to secondary education, pursuant liberal interpretation of right to life under Article 5(1) of the Federal Constitution. In addition, Malaysia's international obligation particularly pursuant to the requirements of CEDAW, CRC, ASEAN Human Rights Declaration and ILO Minimum Age Convention, would require Malaysia to make the necessary changes to make secondary school compulsory and provide for the right to education. Despite the state's increased commitment to financially support programmes for students not only more economically disadvantaged but also from indigenous groups through commitments for the state's goals under EFA, these efforts have not been sufficient to ensure that 5-10% of the hardest-to-reach population of children enter and complete secondary education. Further, while gender disparity has reduced significantly for girls, new emerging issues have arisen where boys are falling behind in secondary education. Ultimately, while policies and resources can be put into place, the best way forward is to ensure secondary school education is compulsory through amendments to the existing Education Act 1996. With these proposed changes, the enrolment of Malaysian children would significantly increase, ensuring that 100% Malaysian children received and complete secondary school education as targeted under the Malaysian Education Blueprint.

References

Adoption Act 1952 (Act 257).

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670).

ASEAN Human Rights Declaration (adopted 18 Nov 2012) Phnom Penh, Cambodia (2012) (AHRD).

Asian Strategy & Leadership Incorporated (ASLI), Compulsory Education: Building the Future Through Compulsory Education (2020).

Births and Deaths Registration Act 1957 (Act 299).

Care Centre Act 1993 (Act 506).

CAS v MPPL and another [2018] MLJU 1769.

CESCR General Comment No. 13: The Right to Education (Art. 13) Adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 (Contained in Document E/C.12/1999/10).

Child Act 2001 (Act 611).

Children and Young Persons (Employment) Act 1966 (Act 350).

Committee on the Elimination of Discrimination Against Women, General Recommendation No. 36, On the Rights of Girls and Women to Education (2017).

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

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

Criminal Procedure Code (Act 593).

Domestic Violence Act 1994 (Act 521).

Education Act 1996 (Act 550).

ESPACT, Education Services Provided - National Education System <https://www.espact.com.my/national-education-system/the-education-act-1996> accessed 11 May 2020.

Faruqi, S.S., *Document of Destiny, The Constitution of the Federation of Malaysia* (Star Publication (Malaysia) Bhd 2008).

Federal Constitution of Malaysia 1957.

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

Grover, S, 'Secondary Education as a Universal Human Rights, Education and the Law' (2004) 16(1) Education and the Law 21.

Guardianship of Infants Act 1961 (Act 351).

Hahn, R.A. and Truman, B.I., 'Education Improves Public Health and Promotes Health Equity' (2015) 45(4) International Journal of Health and Services 657.

Harding, A., *Law, Government and the Constitution in Malaysia* (Malayan Law Journal Sdn. Bhd. 1996).

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 993 (ICESCR).

Jakob Renner (An Infant Suing Through His Father and Next Friend, Gilbert Renner) & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors [2000] 5 MLJ 254.

Lundy, L., Orr K. and Shier, H., 'Children's Education Rights Global Perspective' in Ruck M.D., Peterson-Badali M. and Freeman M. (eds), *Handbook on Children's Rights: Global and Multidisciplinary Perspectives* (Routledge, Abingdon 2017).

Mackenzie, D., 'More Education is What makes people live longer, not more money' (New Scientist, 18 April 2019) <https://www.newscientist.com/article/2166833-more-education-is-what-makes-people-live-longer-not-more-money/> accessed 22 November 2020.

Madhuvita Janjara Augustin v Augustin a/l Lourdsamy & Ors [2018] 1 MLJ 307.

Makhtar, M, Asari, K.N. and Mohd Yusob, M.L., 'Right to Education for Irregular Migrant Children in Malaysia: A Comparative Analysis' (2015) 23(S) Pertanika Journal Social Science & Humanities 85.

Makhtar, M. and Ab Kadir, N.A., 'Child Marriages and the Right to Education: The Legal and Social Perspective' (2019) 4(15) International Journal of Law, Government and Communication 18.

Malala Fund, Beyond Basics, Making 12 Years of Education a Reality for Girls Globally (2015).

Ministry of Education Malaysia: Educational Planning and Research Division, *Quick Facts 2019,* (Malaysia Educational Statistics, 2019).

Ministry of Education, Education in Malaysia: A Journey to Excellence, Appendix 1: A Brief History of Education in Malaysia (2008).

Ministry of Education, Malaysia Education for All End Decade Review Report 2000-2015 (2015)

Ministry of Education, Malaysian Education Blueprint 2013 -2025 (Preschool to Post Secondary Education, 2013).

Mohamed Ezam bin Mohd Noor v Ketua Polis Negara [2002] 4 MLJ 449.

Mohini Jain (Miss) v State of Karnataka and Others [1992] 3 SCC 666.

Penal Code (Act 574).

Sexual Offences Against Children Act 2017 (Act 792).

Shafiq, M.N., 'Benefits of primary and secondary education' in Brewer D & Picus L, *Encyclopedia of Educational Economics and Finance 1* (Eds.) (Thousand Oaks, CA: SAGE 72, 2014).

SUHAKAM, Report on Access to Education In Malaysia (2013).

Tilak, J.B.G., Education and Its Relation to Economic Growth, Poverty and Income Distribution - Past Evidence and Further Analysis, World Bank - Discussion Paper (1989).

Tilak, J.B.G., Education and Development in India: Critical Issues in Public Policy and Development (Palgrave Macmillan, 2018).

Tilak, J.E.G., 'Education and Development: Lessons from Asian Experience' (2001) 3 Indian Social Science Review 219.

Tomasevski, K., 'Unasked Questions about Economic, Social, and Cultural Rights from Experience of the Special Rapporteur on the Right to Education (1998-2004): A response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson, Human Rights Quarterly' (2005) 27(2) 709.

Tomasevski, K., The Right to Education, Progress Report of the Special Rapporteur to the Economic and Social Council on the Right to Education (2002) <http://www.education.org> accessed 22 January 2020.

UNESCO, Education for All Global Monitoring Report: Education Transform Lives (2013).

UNESCO, Educational Attainment and Maternal Mortality, Education for All Global Monitoring Report (2014).

UNESCO, Global Education Monitoring Report (2017).

UNESCO, Global Education Monitoring Report 2016 Education for People and Planet: Creating Sustainable Futures for All (2016).

UNESCO, Implementing the Right to Education, A Compendium of Practical Examples, Based on the Seventh Consultation of Member States on the implementation of the Convention and the Recommendation against Discrimination in Education (2010).

UNESCO, Reducing Global Poverty through Universal Primary and Secondary Education (2017).

UNESCO, Right to Education Handbook (2019).

UNESCO, Teaching and Learning: Achieving Quality for All, EFA Global Monitoring Report 2013/4 (2013).

Universal Declaration of Human Rights (adopted 10 December 1948) U.N.Doc. A /810 p 71 (1948) (UDHR).

Unni Krishnan v State of Andhra Pradesh [1993] AIR 2178.

WAO, The Status of Women Rights: 24 year of CEDAW in Malaysia (2019).

World Declaration on Education for All, Adopted by the World Conference on Education for All, Jomtien, Thailand, (5- 9 March 1990).

Making Rights a Reality: A Case for Enforcing Constitutional Rights Horizontally

Mark Goh Wah Seng
Senior Lecturer, Law Department
HELP University, Malaysia
gohws@help.edu.my

Abstract
Whilst calls to uphold and protect our constitutional rights have so often been raised, the legal position is far from the truth. An examination of the constitution reveals that Part II of the Federal Constitution declares our fundamental rights without restricting its enforcement between individuals per se. Despite the absence of such limitations, the Malaysian courts have consistently rejected the horizontal enforcement of constitutional rights, thereby rendering the individual's constitutional rights largely illusory. Given the constraint, this article aims to explain why our constitutional rights should be enforced horizontally and suggest a proper method which the courts can adopt to enforce these rights horizontally.

Keywords: Federal Constitution; constitutional rights; public and private divide; horizontal enforcement; individuals; illusion

1. Introduction

The call to uphold and protect our constitutional rights is raised so often that it has now become a cliché. Whilst these sources and judicial decisions consistently recognise our constitutional rights as an important foundation in our Federal Constitution, the legal position is far from the truth. An examination of the Federal Constitution reveals that the constitution merely specifies the different constitutional rights found in Part II of the Constitution. It does not prohibit nor limit (either expressly or impliedly) the horizontal enforcement of constitutional rights between individuals.

Despite the absence of any prohibition or limitation found in the Federal Constitution, the Malaysian courts have consistently held that constitutional rights are only enforceable against the government and not between individuals per se. This dichotomy between the private and public divide was ironically created by the judiciary, the very institution which was established to protect and defend the constitutional rights of individuals. In *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia*,[88] the Federal Court of Malaysia had expressly declared that constitutional law is a branch of public law *which deals with the contravention of individual rights by the Legislature or the Executive or its agencies* (emphasis mine). The Federal Court's view was subsequently affirmed by the Court of Appeal in *Airasia Berhad v Rafizah Shima*

[88] [2005] 3 MLJ 681, para 13.

Mohamed Aris[89] where the Court of Appeal had observed that " … The interpretation accorded by Beatrice's case on the constitutional effect is called [the] *'vertical effect' ….*[which] essentially *constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority*." [emphasis mine]

The decisions of the courts to create a private and public divide have effectively limited the impact of constitutional rights amongst individuals. Based on the current position of law, the enforcement of constitutional rights between individuals in Malaysia remains largely illusory. Whilst the state is actively promoting and instilling the importance of protecting one's constitutional rights on one hand, on the other, the effectiveness and enforceability of these rights between individuals are largely muted. This results in a zero-sum game.

This article will provide various reasons to justify why the Malaysian courts should adopt the horizontal approach to constitutional rights instead of the current 'public and private divide.' The final part of this article will propose the proper method which the courts can adopt to enforce constitutional rights horizontally, thereby transforming the rights from an illusion into a reality.

2. Can Individuals Enforce their Constitutional Rights Against Each Other?

There are currently two prevailing views on this issue.[90] The first, known as the 'vertical view'[91] argues that public law (i.e. constitutional law in this case) is strictly confined to the relationship between the state and the public. Hence, public law (i.e. constitutional law in this case) does not regulate the relationship between private individuals. This means that an individual will not be able to enforce his/her constitutional rights against another individual.[92]

The opposing view (better known as the 'horizontal view') however contends that besides the state, constitutional rights are enforceable between individuals inter se.[93] Although the

[89] [2014] 5 MLRA 553, 560 at para 26.

[90] Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' [2003] 102(3) Michigan Law Review 387, 388.

[91] Ibid, 394: "The first polar position is that of a purely vertical approach to the issue ... Rights regulate only the conduct of governmental actors in their dealings with private citizens but not relations among private citizens … The well-known justifications for this division lie in the values of liberty, autonomy, and privacy. A constitution's most critical and distinctive function is to provide law for the lawmaker, not for the citizen, thereby filling what would otherwise be a serious gap in the rule of law."

[92] Gardbaum (n 90), 446: "Once again, this appears to involve a paradigmatic instance of vertical effect: private individuals have no constitutional duty to refrain from race or sex discrimination in choosing what contracts to enter into and with whom, or in disposing of their property, or against whom to assert and exercise property rights."

[93] Gardbaum (n 90), 359: "The horizontal position expressly rejects a public-private division in constitutional law, and its justifications reflect a well-known critique of the "liberal" vertical position." Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423, 424-426: "In 2003, the United Nations Commission on Human Rights (Commission), historically the most important incubator of human rights agreements, received two proposed instruments that might appear to realign human rights law horizontally: private actors would have

horizontal view may be subdivided into various subcategories, essentially this view has two sub-categories. They are the 'direct horizontal' view and 'indirect horizontal' view.[94] The horizontal view (direct or otherwise) effectively provides the individual with the additional protection of the law over personal interests, preferences, and actions.[95] Besides relying on civil laws, the individual may also enforce his constitutional rights against the other individual, thus making the constitution a reality.

Whilst the direct horizontal view takes the position that an individual may rely on the constitution to enforce his constitutional rights against another individual (since the constitution governs the relationship between private individuals),[96] the proponents of the indirect horizontal view have adopted a less aggressive approach. Whilst disagreeing that constitutional duties should be directly imposed on individuals alike,[97] the proponents of the latter view asserts that constitutional rights, like a 'brooding omnipresence' should influence and shape the relationships amongst individuals through different ways.

Regulation is one way in which the constitution could be enforced. The constitution can regulate the laws by 'placing limits on an individual's interests, preferences, and/or action.' Although individuals are not bound by the Constitution, the laws that they invoke and rely on in actions inter se are so bound.[98] So, for example, if " ... the Constitution prohibits racially

duties as well as rights, and they would owe those duties to society as a whole or to individuals within it. The draft Declaration on Human Social Responsibilities (Declaration) would identify duties that all individuals owe to their societies; and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (draft Norms) would set out duties of businesses under human rights law." The draft declaration was prepared by a special rapporteur to the Commission, Miguel Alfonso Martínez of Cuba, and is appended as Annex I to his report. UN Commission on Human Rights, 'Promotion and Protection of Human Rights: Human Rights and Human Responsibilities' (17 March 2003) Annex I, UN Doc. E/CN.4/2003/105; John H. Knox, 'Horizontal Human Rights Law' [2007] American Journal of International Law 1.

[94] Cheryl Saunders, 'Constitutional Rights and the Common Law' in András Sajó and Renáta Uitz (eds), *The Constitution In Private Relations: Expanding Constitutionalism* (The Netherlands Eleven International Pub, Utrecht 2005) 183, 213, cited in Victor V. Ramraj, 'Beyond the Courts, beyond the State: Reflections on Caldwell's "Horizontal Rights and Chinese Constitutionalism"' [2012] 88(1) Chicago-Kent Law Review 93. In her survey of Canada, South Africa, and Australia, Saunders discovered that in a common law legal system, constitutional rights might influence private legal relations in four ways: direct affect of the rights and obligations of parties under the common law; they may override the common law through a state action doctrine, treating the courts as emanations of the state; they may indirectly influence the common law, under authority of the constitution; they may be used as a source on which courts draw in the parallel development of the common law.

[95] Gardbaum (n 90), 391.

[96] As Justice Walsh expressed in the Irish case of *Meskell v Coras Iompair Eireann* [1973] IR 121, 133, "[I]f a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right." Similarly, in *Educational Company of Ireland Ltd v Fitzpatrick (No 2)* [1961] IR 845, 368, it held that " ... if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it."

[97] Gardbaum (n 90) 398; Ernest Caldwell, 'Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes', [2012] 88(1) Chicago-Kent Law Review 77.

[98] Gardbaum (n 90), 421.

restrictive covenants valid contracts, then private individuals otherwise wishing to enter or enforce them are indirectly regulated by the Constitution."[99]

Creative judicial interpretation is another method where the constitution can be used to influence individual rights indirectly. Nowhere does it state that the constitution is only applicable to the individual-state relationship. On the contrary, the extent and effect of the constitution is solely dependent upon the interpretation of the courts. A strict interpretation would limit constitutional rights whilst a liberal interpretation of the constitution would enlarge the impact of the constitution. Examples of these contrasting approaches can be seen in the decisions of the following jurisdictions; the Irish courts,[100] the courts of the United States,[101] and Germany[102] *vis a vis* the Malaysian courts.[103] In *Shelley v Kraemer,*[104] private covenants that restricted the sale of houses to only whites were held by the US Supreme Court to contravene the equal protection clause.[105] The equal protection clause was also successfully applied in the United States against a private restaurant owner who had refused to serve another individual.[106] In Ireland, the Supreme Court in *Meskell v C.I.E.*[107] has recognised that constitutional rights 'carr[y] with it its own right to a remedy or for the enforcement of it' and they are rights in addition to common law and equitable right(s).[108] This principle was subsequently adopted in *Hunter v Duckworth & Co Ltd*[109] and *Gray v Garda Commissioner.*[110] In *Parsons v Kavanagh* the Irish High Court granted an injunction against a defendant, an unlicensed transport company that was found to have interfered with the

[99] Gardbaum (n 90), 437.

[100] Per Justice Costello in *Hosford v John Murphy & Sons* [1987] I.R. 621, 626 where it was stated, "Uniquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials."

[101] Examples of cases which adopt the horizontal rights include *Shelley v Kraemer* (1984) 334 U.S. 1, *Peterson v City of Greenville* (1963) SCt, 373 US 244 and *Burton v Wilmington Parking Authority* (1961) 365 U.S. 715.

[102] The *Lüth Case* (1958) 7 BVerfGe 198, 207f, deciding for Lüth, the Constitutional Court held that there must be " ... a balancing or weighing of the colliding constitutional principles and the application of rules of the civil law." According to Robert Alexy, 'Constitutional Rights, Balancing and Rationality' [2003] 16(2) Ratio Juris 131, 133, Lüth's decision was considered 'groundbreaking' because this decision effectively allows the values or principles found in the constitutional rights to apply not only limited between the citizen and the state but it expanded into 'to all areas of law' as well. The 'radiating effect' of constitutional rights over the entire legal system has resulted in Constitutional rights becoming ubiquitous.

[103] *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia* [2005] 3 MLJ 681; *Airasia Berhad v Rafizah Shima Mohamed Aris* [2014] 5 MLRA 553.

[104] (1948) 334 U.S. 1.

[105] U.S. Constitution, Section 1 Amendment XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[106] See *Burton v Wilmington Parking Authority* (n 101); *Peterson* (n 101).

[107] [1973] I I.R. 121.

[108] Ibid, 134.

[109] [2003] IEHC 81.

[110] [2007] IEHC 52, [2007] 2 I.R. 654; "For all of these reasons, Gray is a straightforward application of Meskell." Gerard Hogan, 'The Farthest - December 1972' [2019] LXII Irish Jurist 1, 7.

plaintiff licensed transport company's constitutional right to earn a livelihood.[111] The approach of the Irish, US, and German courts to extend constitutional rights horizontally between private individuals was not well accepted by the Malaysian courts. The Malaysian courts had instead chosen to adopt the pedantic 'hands-off' approach on constitutional issues between private individuals. This approach has negatively deprived Malaysians of the right to enforce their constitutional rights against each other.

3. The Malaysian Position

A review of the list of cases in Malaysia indicates that the Malaysian courts have adopted the 'vertical view.' It is however humbly submitted that the reasons which were provided by the courts are trivial and are devoid of any justification. In *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia,*[112] the applicant, a flight stewardess, was required to resign when she became pregnant. When she refused to do so, the respondent, following the terms of the collective agreement, terminated her services. Being dissatisfied with the respondent's decision, the applicant applied to the court for a declaration that *inter alia* the 'collective agreement was void since it contravened Art. 8(2) of the Federal Constitution.'

In rejecting the applicant's allegation that the collective agreement contravened Article 8(2) of the Federal Constitution, the Federal Court held that " ... it is simply not possible to expand the scope of [Art.] 8 of the Federal Constitution to cover collective agreements such as the one in question."[113] The court reasoned that "*Constitutional law,* as a branch of public law, *deals with the contravention of individual rights by the Legislature or the Executive or its agencies." (emphasis mine)* Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual.'[114] The Federal Court also decided that 'the reference to the [word] "law" in [Art.] 8 of the Federal Constitution does not include a collective agreement entered into between an employer and a trade union of workmen.'[115] Based on the reasons given, the Federal Court concluded that 'to invoke Art. 8 of the Federal Constitution', the applicant must show that by some law or action of the Executive, it has breached Article 8' which the applicant has failed to do so.[116]

The decision of Beatrice Fernandez was subsequently followed by the Court of Appeal in *Airasia Berhad v Rafizah Shima Mohamed Aris*.[117] Explaining the decision of Beatrice, the Court of Appeal in *Airasia* held that "The interpretation accorded by Beatrice case on the

[111] [1990] 10 I.L.R.M. 560. In *Murtagh Props. Ltd. v Cleary* [1972] I.R. 330, the Irish High Court ordered an injunction against a trade union for violating an individual's constitutional right to equality by objecting to the employment of women by plaintiff publican). See *Lovett v Gogan* [1995] 1 I.L.R.M. 12.
[112] [2005] 3 MLJ 681.
[113] *Beatrice a/p AT Fernandez* (n 103) 688, para 13 B.
[114] Ibid, 688, para 13 C.
[115] Ibid, 688, para 13 D.
[116] Ibid, 692, para 29 D.
[117] [2014] 5 MLJ 318.

constitutional effect is called 'vertical effect' which essentially stipulates that constitutional law, as a branch of public law, only addresses the contravention of an individual's rights *by a public authority* ... " [118] (emphasis mine). This view was subsequently adopted by the High Court in the case of *John Dadit v Bong Meng Chiat & Ors*[119] on Article 5 of the Federal Constitution.

4. Why Should Malaysia Adopt The 'Horizontal' Approach on Constitutional Rights?

It is submitted that the 'vertical view' which asserts that constitutional rights are only enforceable against the state may be too restrictive. Why must there be a difference between breaches committed by private individuals and the state concerning constitutional rights when those committed by the individuals are just as serious as the breaches which are committed by the state?[120] To reduce the harshness, it is suggested that the courts should invoke the provisions of 'Fundamental Liberties' in Part II of the Federal Constitution horizontally. The argument that the Malaysian courts should adopt the horizontal view instead of the current 'vertical' view can be supported by the following reasons:

(A) Legal definitions (or Artifice)

As Richard Kay rightly pointed out, what legally defines a 'person',[121] 'property', 'contract' or other legal units will determine the extent of their particular rights or liabilities.[122] The scope of these legal definitions (or artifice) may oftentimes cause harm or deprive the parties of certain rights or protection by the relevant legislation merely because these parties do not come within the scope of the legal definition.[123] If individuals can suffer even though certain concepts are defined by the law, what more if these concepts are not defined at all? This is particularly true for the definition of 'public' in the context of Constitutional Law.

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[118] Ibid 326, para 261.

[119] [2015] MLRHU 1351.

[120] Erwin Chemerinsky, 'Rethinking State Action' [1985] 8(3) Northwestern University Law Review 503, 510: "Private discrimination causes and perpetuates social inequalities at least as pernicious as those caused by government action."

[121] Richard Kay, 'The State Action Doctrine, the Public- Private Distinction, and the Independence of Constitutional Law' (1993) Faculty Articles and Papers 10, 329, 336 <https://opencommons.uconn.edu/law_papers/10> accessed 8 August 2019 '*The very definition of a person is, in many respects, a legal artifice. The corporate personality is the most familiar example of this phenomenon. But the influence of legal definition is far broader than this. That a human being can sustain a legal wrong but a tree cannot is the result of an implicit decision of the state.'*

[122] Ibid, "The history of slavery reveals that not even a physical human being is immune from redefinition with respect to the capacity to bear rights and duties." Mark Tushnet, 'The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy' (1975) 10(119) Law & Soc. Rev.

[123] Kay (n 121) 336: "Thus, the very conceptual categories in which we define what is an injury, who has caused it, and who has suffered from it are public artifacts. Perhaps more to the point, the distinction between public and private is itself determined by law."

What does the term 'public' encompass? How many persons must be affected before it is categorised as the 'public'? Should a group of people within a community or an organization (e.g. 'Trade Union') be considered the 'public'? The ambiguity surrounding the word 'public'[124]is confusing. This unfortunate result may be caused by the penumbra of uncertainty,'[125] which is an inherent feature of the English language.[126]

This conundrum can be solved if the term 'public' is viewed from a 'normative' aspect[127] which includes the individual instead of merely referring to a common enterprise of the people in a state, i.e seen from a "positive empirical sense."[128]

The idea that the public derives its existence from the individual is rooted in the social contract theory.[129] The theory basically states that 'society is formed by the [collective] agreement' of individuals. It is 'individuals' who have collectively decided to lend their rights in exchange for better living conditions.[130] Seen from this perspective, Roscoe Pound had labelled 'public law' as a 'subordinating law' over 'private law.' In fact, Pound went so far as to argue that the validity of public law is dependent upon the individual.[131]

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[124] This dilemma could be traced back to Gustav Radbruch, Kurt Wilk (tr), *The Legal Philosophies of Lask, Radbruch, and Dabin* (ed, Cambridge, Mass.: Harvard University Press 1950) 124; Roscoe Pound, 'Public Law and Private Law' (1939) 24(4) Cornell Law Review 469; Sin Boon Ann, 'Public Law: An Examination of Purpose (Part I)' (1991) Sing. J. Legal Stud. 431, 434 where the author queried, "What is the meaning in law of a public law case?"

[125] H.L.A. Hart, *Concept of Law* (Oxford: Clarendon Press 1961), 119 " ... [words have] a core of certainty and a penumbra of doubt."

[126] Sin Boon Ann, 'Public Law: An Examination of Purpose (Part II)' (1992) Sing. J. Legal Stud. 164, 174, "The English language unfortunately, and very much unlike the language of mathematics, suffers from a lack of precision and open-texturedness … [and the] failure to articulate which sense is being used that has often been the source of confusion in the private/public distinction debate."

[127] Ibid, 176, " … the individual has subordinated a part of his freedom to the legitimate authority which then reserves the right to dictate how and when the individual should or should not behave. This quintessentially represents the second notion of the word 'public'. It is the notion that 'public' stands for the right of the legitimate authority to interfere with the rights of the individual in the name of societal interest. In real terms it may mean for instance, the act of the individual in not contracting with another solely on the basis of race, should be seen as falling into the public domain such that it ought to attract the intervention of the state. Used in this sense therefore, the word 'public' acquires a normative aspect."

[128] Sin (n 126), 175, " … 'public' may be viewed in the positive empirical sense. This may be seen at different levels. At one level, "public" refers to the whole body politic, or the aggregate of the citizens of a state, county or community. In other words, it refers to or relates to the people in a country or community as a whole. Seen in this context, it may be said that 'public' is the embodiment of the community of people, the community of which is normally, although not necessarily, defined by some geographical or territorial boundary."

[129] n/a, 'Social Contract Theory' (*Internet Encyclopedia of Philosophy*) <https://iep.utm.edu/soc-cont/>accessed 13 February 2021, " ... all their Wills, by plurality of voices, unto one Will: which is as much to say to appoint one Man, or Assembly of men, to beare their Person … this is more than Consent … it is a real Unitie of them all, in one and the same Person ... as if every man should say to every man, I authorise and give up my right of governing my self to this man or to this Assembly of men on this condition that thou give give up thy right to him and Authorise all this actions in like manner … This is the generation of that LEVIATHAN, or rather of the Mortal God to which we own under the Immortal God, our peace and defence."

[130] Sin (n 126) 174.

[131] Pound (n 124), 479, "Most of all, however, the idea of public law, as a subordinating law, replacing private law has been furthered by the general acceptance since the world war of what may be called a give-it-up

Based on the arguments above, it can be concluded that the public owes its existence to individuals who form the basic unit of society. Hence, it is only right that public law should include the individual[132] since individualism resides at the heart of society.[133] The importance of the individual was emphasised by Ronald Dworkin when he noted that, "Individual rights are political trumps held by the individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[134] As the English jurist William Blackstone stated, "The public good is … nothing more essentially interested, than in the protection of every individual's private rights."[135]

(B) Natural Rights

Fundamental rights (or 'natural rights'), according to Natural Lawyers[136]came into existence long before any constitution was created.[137] Proponents of Natural Law argue that our fundamental rights which are found in the constitution today were originally natural rights. These fundamental rights are God-given inalienable rights. These rights pre-existed even before the idea of democracy was born or the constitution was created. The constitution, argues natural lawyers, does not create these basic or natural rights. Instead, the constitution

philosophy … Hence they cannot be recognized as valid except in the scheme of some individual system, and even in that system, valid for the individual whose scheme it is, the criterion of highest value is not demonstrable to that individual."

[132] Kevin Y.L. Tan, "The Role of Public Law in a Developing Asia' (2004) Sing. J. Legal Stud. 265, 271, "Fundamental to public law logic and thinking is the idea that there should be limits to state and government power and that law and legal institutions should be established and nourished to check the use of such power. Law was seen as a means to protect individuals from the arbitrariness and caprice of unbridled power."

[133] Societies, made up of individuals and any number and type of groups, strive for what is good through their own rules and conventions outside the laws of states. In classic republican theory, the individual's freedom may be partly compromised to serve the needs of the state; Gabrielle Appleby, Alexander Reilly, Laura Grenfell, *Australian Public Law* (Third Edition, Oxford University Press 2018) 19.

[134] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), xi. Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press 2006) 31, "Certain interests of individuals are so important that it would be wrong for the community to sacrifice those interests just to secure an overall benefit."

[135] William Blackstone, *Commentaries on the Laws of England* (1827 ed, Clarendon Press), 101.

[136] Richard A. Epstein, 'The Utilitarian Foundations of Natural Law' (1989) 12 Harvard Journal of Law and Public Policy 711, 713, "While natural lawyers recognize the difference between analytical and empirical truths, they often strive to identify a grand set of necessary empirical truths about human nature that are not made, but rather are discovered through some combination of introspection, observation, and rational discourse."

[137] Karl Deuble, 'The Constitution and Enforceable Natural Law' (2016) The Review: A Journal of Undergraduate Student Research 17, 2 <https://fisherpub.sjfc.edu/ur/vol17/iss1/5/> accessed 18 July 2019, "The role of government is then to protect these rights because in a state of nature these rights are not protected. Man only creates a government so that he may gain protection of his natural rights. This limited view of government is very important because evidence of this natural theory of law is a huge part of our Constitution that is often misunderstood or ignored."

is created to formally recognize, protect and enforce the existence of these rights in society,[138] thereby preventing society from falling back into the destructive 'pre-social' contract position.

The Natural Law argument has exposed the absurdity of the vertical viewpoint in two aspects. Firstly, fundamental rights are not creatures of the constitution. Secondly, the vertical argument that constitutional rights are inapplicable between individuals today shows that instead of recognizing and protecting the natural rights of individuals, (which it was originally intended to) the Constitution has instead effectively taken away the natural rights of its citizens[139]in terms of the Constitution's horizontal effect.

The horizontal enforcement of constitutional rights is also supported by Positivism.[140] According to Kelsen, "It is … possible for the legal order, by obliging the law-creating organs *to respect or apply certain moral norms [emphasis mine]* or political principles or opinions of experts to transform these norms, principles, or opinions into legal norms, and thus into sources of law."[141] When natural rights are codified in the Constitution, the courts should enforce these rights strictly[142]and not impose any limits or conditions on the enforcement of these rights.

(C) Horizontal Effect of the Constitution on Government Link Companies

The post-modern governments of today are increasingly " ... export[ing] ... functions to private actors which were traditionally considered attributes of sovereignty, or [were] at least perceived as integral parts of the operation of a legitimate government."[143] This phenomenon

[138] On the relationship between Natural Law and the Federal Constitution please refer to Sharon K. Chahil, 'A Study of the relationship between Natural Rights Theory and the Doctrine of Constitutionalism Encapsulated Within the Federal Constitution' [2005] 6 MLJ i.

[139] B. Lobo, 'Does The Law of Human Rights Pervade all Malaysian Law in view of Part II of the Federal Constitution?' [2007] 7 MLJ lxxxvi, xcvii: "Further, as submitted, 'Fundamental rights' in Part II of the Constitution can override any other provision (including art 127) of the Constitution. It is natural law. It is binding on all human beings. With respect, as such it cannot be 'abridged' by any legislation including Constitutional legislation." Dworkin (n 134), according to Professor Dworkin, rights are always seen as 'trumps'.

[140] n/a, 'Legal Positivism' (*Internet Encyclopedia of Philosophy*) <https://iep.utm.edu/legalpos/#H1> accessed 15 February 2021, "Legal positivism is a philosophy of law that emphasizes the conventional nature of law - that it is socially constructed … Legal positivism does not base law on divine commandments, reason, or human rights … [it] does not imply an ethical justification for the content of the law, nor a decision for or against the obedience to law. Positivists do not judge laws by questions of justice or humanity, but merely by the ways in which the laws have been created."

[141] Hans Kelsen, Anders Wedberg (trans.), *General Theory of Law and State* (Cambridge, MA: Harvard University Press; reprinted, New York: Russell and Russell 1961), 132.

[142] John Austin, *Austin: The Province Of Jurisprudence Determined* (Wilfrid E. Rumble ed, Cambridge University Press 1995) 157, "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."

[143] Renáta Uitz, 'Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?' in András Sajó, Renáta Uitz (eds), *An Introduction, in The Constitution In Private Relations: Expanding Constitutionalism* (Eleven International Pub 2005) 1, 13, cited in Ramraj (n 94) 97 " … in the twentieth century, threats to fundamental rights no longer emanated from the state alone, but precisely from powerful private parties or bearers of societal power, which usually means incorporated companies and associations." Florian RÖdl,

has increased the relevance and importance of horizontal rights; particularly between the public and companies which are controlled or linked to the government (GLCs).[144] Due to the rise of privatisation, the threat against the constitutional rights of individuals does emanate from the government directly but through various indirect forms and shades. They include multinational enterprises (which could be in a form of a public-private partnership[145]), government link companies (GLC's), and even state restraint.[146]

This view strikingly resembles the development of Malaysia, which is almost identical to the development of other countries. There was a point in time in Malaysia's history where important operations of the state which affect society (for example water, electricity, transport, and telecommunications[147]) were controlled and handled solely by the

'Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect' [2013] 20(2) Indiana Journal of Global Legal Studies 1015, 1025.

[144] Ramraj (n 94), 97; Chemerinsky (n 120), 501-502. According to Thynne, "In its divestment programme … the Government will have to transform its undertakings which are commercially viable into something which may eventually be sold off in the market. The transformation process follows three broad strategies. First, the entity concerned may be commercialised without any accompanying change to its legal-structural characteristics. Secondly, public organisations may be corporatised. This essentially entails transforming the legal structure of the enterprise into a corporate body which in law may own property, and may sue and be sued. The process of incorporation may either take the form of the creation of a body by an Act of Parliament, in which case it becomes a statutory board, or the form of a company registered under the Companies Act. Thirdly, the final strategy in the transformation process lies in selling the enterprise to the public.' Ian Thynne, 'Public Enterprise Transformation: Changing Patterns of Ownership, Accountability and Control'in Ng and Wagner (eds.) *Marketisation in ASEAN* (Institute of Southeast Asian Studies, Singapore 1990) 170-172.

[145] Fong-Woon Lai, Muhammad Kashif Shad, et al, 'Revisiting Privatization and Economic Growth in Malaysia: An Empirical Examination' (2018) SHS Web of Conferences 56, 05004, ICML, 9 <https://www.shs-conferences.org/articles/shsconf/pdf/2018/17/shsconf_iclm2018_05004.pdf> accessed 25 June 2019.

[146] Ramraj (n 120), 100-101, "The crucial point - and the one that resonates even more widely in an era dominated by multinational enterprises and the rise and resurgence of private power (and its hybrid variations) that operate within and beyond the state-is that the moderation or restraint of state power ought no longer to be the singular concern of constitutional law … But whatever the case might be domestically, it is increasingly apparent-and this is the second point-that threats to individual and communal well-being come not only or primarily from the state, but from multiple forms and shades of private power and the projection of that power around the globe ...". Roberto Mangabeira Unger, *Law In Modern Society* (The Free Press 1976) 201-202, " … the increasing recognition of [coporatisation and privatisation] over the lives of their members makes it even harder to maintain the distinction between state action and private conduct."

[147] K.L. Phua, 'Corporatization and Privatization of Public Services: Origins and Rise of a Controversial Concept' (2001) Akademika 58, 45, 45-46 <ejournals.ukm.my/akademika/article/download/2966/1891> accessed 25 June 2019, "The policy of privatization of public services was first introduced in Malaysia in 1983… In the years that followed, major public sector entities such as Malaysian Airline System, Lembaga Letrik Negara and Jabatan Telekom were privatized (broadly defined) and became Malaysia Airlines, Tenaga Nasional and Telekom Malaysia respectively."

government. Before the advent of "privatization"[148] and "corporatization",[149] there existed a clear demarcation between the public and private services in Malaysia. Telecommunications, for example, came under the control of the Malaysian Telecommunications Department (Jabatan Telekommunikasi Malaysia (JTM)).[150]

However, with the rapidly rising globalised economy and an intense global move towards privatization (including various public-private forms of partnerships,)[151] "post-modern governments" are now slowly releasing and transferring the control and operations of these basic services which affect society at large into the hands of private companies.[152] This is evident from the increasing numbers of government-linked companies like Tenaga Nasional Berhad, Telekom, Syabas, and Petronas (commonly known as 'GLC's) where the government continues to retain direct or indirect control over these companies through the investment arm of government.[153]

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[148] Ibid, 46-47, "The Economic Planning Unit's definition of privatization is "transfer to the private sector of activities and functions which have traditionally rested with the public sector" and involves one or more of the following components: management responsibility, assets or the right to use assets, and personnel (Economic Planning Unit no date). Thus, in Malaysia, privatization of public services can refer to any of the following (Jomo et al. 1995; Adam and Cavendish 1995) (with corporatization being a mild form of privatization): contracting out of services to the private sector, e.g., laundry, cleaning and laboratory services in hospitals; equipment and facilities maintenance management contracts, e.g., getting a private company to manage a public facility, joint ventures with the private sector, partial private ownership of publicly-owned facilities complete transfer of ownership of public facilities to the private sector, allowing the private sector to build and operate facilities such as private colleges and universities, medical centres, highways, television stations and so on."

[149] Phua (n 147), 46, *'Corporatization being a mild form of privatization*'; "The strategies of commercialization include corporatization, a scheme of approximating the private sector model of incorporation within the context of public ownership … ". Yuwa Wei, 'Corporatization and Privatization: A Chinese Perspective' [2002] 22(2) Nw. J. Int'l L. & Bus. 219 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1547&context=njilb> accessed 25 June 2019.

[150] Shankaran Nambiar, 'Revisiting Privatisation In Malaysia: The Importance of Institutional Process' [2009] 14(2) Asian Academy of Management Journal 21, 27, 33-37 <http://web.usm.my/aamj/14.2.2009/AAMJ_14.2.2.pdf> accessed 25 June 2019.

[151] Lai, Shad, et al (n 145), 9.

[152] Malaysian examples include Tenaga Nasional Berhad, Malaysian Airline System, and Malaysian International Shipping Corporation and Malaysia Airports Berhad (through a complete sale). See, Bakul H Dholakia and Ravindra H Dholakia, 'Malaysia's Privatization Programme' [1994] 19(3) Sage Journal 25, 27-28 <https://journals.sagepub.com/doi/pdf/10.1177/0256090919940302> accessed 25 June 2019. In the UK public services which were privatized included the British Rail, British Gas, British Airways and British Telecoms. See John Moore, 'British Privatization - Taking Capitalism to the People' [1992] Harvard Business Review<https://hbr.org/1992/01/british-privatization-taking-capitalism-to-the-people> accessed 25 June 2019.

[153] Nambiar (n 150), 27, "The privatisation wave in Malaysia had its beginnings in 1983, when then Prime Minister Mahathir Mohamad publicised his government's intention to embark on a privatisation policy. This was followed by the publication of Privatisation Guidelines by the Economic Planning Unit (EPU) of the Prime Minister's Department in 1985. These guidelines constituted the official document on privatisation. In February 1991, the Privatisation Masterplan (PMP) was announced. This plan set out the country's privatisation policies. In formulating its privatisation policy, the government aimed to achieve the following objectives: i. To relieve the financial and administrative burden of the government; ii. To improve efficiency and increase productivity; iii. To facilitate economic growth; iv. To reduce the size and presence of the public sector in the economy; and v. To assist in meeting the national development policy targets." On how privatization came about, see an opinion piece by Jomo Kwame Sundaram, 'How Privatisation Came To Be' *New Straits Times* (Kuala Lumpur 15 March,

The privatization of public services has also affected the constitutional position and thus action against these departments.[154] When public services were categorised as the 'state' previously, they were regulated and controlled by the constitution. However, after these public services were privatised or corporatized, it seems that these departments (which are still providing the same services) will not be caught under the constitution once they become 'GLC's since they are now classified as 'companies.' This is so even though the functions of these government link companies remain the same and their actions continue to affect society at large. Consequently, individuals' (who were able to enforce their constitutional rights against them) are now prevented from doing so merely because these departments are now companies and are classified as 'legal personalities'/individuals in the legal sense.[155] This will produce an absurd result and a lacuna in the law.

It begs to reason therefore that in line with the increasing developments of GLCs in the modern government, 'we need to find innovative ways of moderating power that stretch our contemporary understandings of constitutional law' as an author, Victor V. Ramraj[156] has alluded to. One way to achieve this is by expanding the horizontal rights on the modern state as opposed to the vertical view.

(D) Human Rights Commission of Malaysia

The Human Rights Commission of Malaysia Act 1999 ('HRC') was established to demonstrate Malaysia's commitment to human rights, her active involvement in the United Nations, and the growing international emphasis on human rights.[157]

2019) <https://www.nst.com.my/opinion/columnists/2019/03/469334/how-privatisation-came-be> accessed 25 June 2019.

[154] Sin (n 126), 432, the subject of control of public power is particularly pertinent in the era of privatisation. With the hiving off of state enterprises through sale to the private sector, a transformation has taken place in the way in which public goods are being delivered. Traditional functions of government, such as provision of health, broadcasting, telecommunications and utility services, have increasingly been taken over by the private supplier. In consequence, the state progressively reduces its profile in these departments, limiting itself to the role of performing the regulatory functions. The choice of a private supplier in delivering public services raises equally interesting questions concerning the scope of public law.

[155] Unger (n 146) 201, "Corporatism's most obvious influence on the law is its contribution to the growth of a body of rules that break down the traditional distinction between public and private law ... ". In *Beatrice a/p AT Fernandez* (n 103), the Federal Court held since constitutional law is a branch of public law which deals with the contravention of individual rights by the Legislature or the Executive or its agencies, it does not apply to the respondent because the respondent is a company.

[156] Ramraj (n 120), 95, 'If private and hybrid (public-private) forms of power are increasingly operating beyond states, we need to find innovative ways of moderating power that stretch our contemporary understandings of constitutional law."

[157] As leader of the Malaysian delegation to the UNCHR, Tan Sri Musa, in 1994 first suggested to the Government that the time was right for Malaysia to establish its own independent national human rights institution. Several factors influenced this proposal: the growing international emphasis on human rights and recognition that it crosses boundaries and sovereignty; Malaysia's active involvement in the United Nations system; the changing political climate in Malaysia with a more politically conscious electorate and dynamic civil society … ". On 9

One of the primary duties of the Commission under the HRC is to inquire into complaints regarding infringements of human rights.[158] These are fundamental liberties that are enshrined in Part II of the Federal Constitution.[159] As the Commission is duty-bound to create awareness of human rights in Malaysia, the HRC has empowered the Commission to receive complaints both from private individuals and the public alike.[160] Under sections 12(1)[161]and 13(2)[162]of the HRC, the Commission is authorised to inquire into any complaint(s) which is lodged by an aggrieved person with the Commission against the government or *another individual*.[163]

Complaints against alleged breaches of constitutional rights against another individual can be horizontally enforced under s 4(2)(f)[164]of the HRC since the Commission (representing the individual) may unilaterally apply to the High Court as an 'aggrieved person' under s 12(1) of the HRC[165] and O 53 (read with s 25(2) of the Courts of Judicature Act 1964 and paragraph 1 of the Schedule of the Rules of the High Court 1980.[166]

The combined effect of all the provisions mentioned above allows anyone (including an individual) to be the respondent to a complaint under the HRC.[167] This indirectly allows constitutional rights to be horizontally enforced between individuals. Holding a similar view, the Network on National Human Rights Institutions (NNHRI) had in its report stated that while

September 1999, the Human Rights Commission of Malaysia Act 1999 was gazetted and the Human Rights Commission of Malaysia (SUHAKAM) was established by Parliament <http://www.suhakam.org.my/about-suhakam/sejarah> accessed 13 September 2018.

[158] Section 12(1) of the Human Rights Commission Of Malaysia Act 1999 - "The commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of such person or group of persons."

[159] Ibid, "The Commission may, on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of human rights of such person or group of persons." Lobo (n 139) xc, "In countries with written Constitutions, the domestic source of human rights law will usually be the Constitution. Hence the definition of 'human rights' in s 2 of the HR Act 1999 which refers to Part II of our Constitution."

[160] K.M.P. Setiawan, 'Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia' (2013) Doctoral Thesis 122-123, 128, 140.

[161] Lobo (n 139), lxxxvi.

[162] Section 13(2) of the Human Rights Commission Of Malaysia Act 1999, section 13(2) - "Where an inquiry conducted by the commission under section 12 discloses the infringement of human rights, the commission shall have the power to refer the matter, where appropriate, to the relevant authority or person with the necessary recommendations."

[163] Telephone Conversation between the author and Ann Jennifer Victor Issacs, Deputy Secretary, Policy & Law Group Human Rights Commission of Malaysia (SUHAKAM) on 22 May 2021, "The complaints and monitoring department hears complaints of any nature which includes neighborhood complaints … ".

[164] Lobo (n 139), cxxi.

[165] *Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Others* [2003] MLJU 94, "Section 12 (1) of the Act also employs the word 'may' and thus it gives Suhakam the discretion to 'inquire into an allegation of the infringement of the human rights of such person or group of persons.'"

[166] Now, Rules of Court 2012.

[167] Lobo (n 139), cxix.

the Commission is given a wide mandate in its investigation, the Commission's investigation is 'still relatively passive.' Because of this, the NNHRI has recommended the Commission to adopt a more pro-active approach by embarking on fact-finding missions to indigenous peoples who are standing off against corporations.[168] The suggestion given by NNHRI has highlighted the reluctance of the Commission in investigating and enforcing horizontal constitutional rights against individuals even though it is empowered to do so.

(E) Protection of Selective Fundamental Rights

Certain constitutional rights in Malaysia are already horizontally enforceable. Take defamation for example; the individual's right to sue the other person for words or statements which affect the reputation of an individual effectively restricts the freedom of expression of one party whilst simultaneously protecting the right of reputation of the other party.[169] The 'right of reputation' as acknowledged by the Court of Appeal in *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor*[170] was considered a facet under the right of life in Article 21 of the Indian Constitution,[171] which has its equivalent in Article 5 of the Federal Constitution.

[168] Asian NGO Network on National Human Rights Institutions (ANNI), *2018 Report on the Performance and Establishment of National Human Rights Institutions in Asia*, 51-52 <https://www.forum-asia.org/uploads/wp/2018/12/2018_ANNI-Report_FINAL.pdf> accessed 20 February 2021.

[169] Gardbaum (n 90) 388, 440-446, "The issue of defamation has been a leading vehicle for courts to address the issue of indirect horizontal effect not only in the United States but also in Germany, Canada, and South Africa." In the same article, Gardbaum also discusses the horizontal impact of defamation on free speech; On the relationship between the right to free speech and defamation, see Tom Bennett, 'Horizontality's new horizons-re-examining horizontal effect: privacy, defamation and the Human Rights Act' [2010] 21(3) Ent LR 96 (Part 1) and 145 (Part 2).

[170] In *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242, para 55, the Court of Appeal acknowledged that, "It is trite law that in a defamation suit, whether for slander or libel, the law presumes that some damages will flow from the publication." This position has long been established by learned Lord Justice Bowen in the case of *Ratcliffe v Evan* [1892] 2 QB 524, 528 where he said, "The law presumes that some damages will flow in the ordinary course of things from the mere invasion of his absolute right of reputation."

[171] *Subramanian Swamy v Union of India* (2016) 7 SCC 211, AIR 2016 SC 2728, where the Supreme Court held that 'reputation of an individual is an important part of one's life'. The Supreme Court also quoted *Board of Trustees of the Port of Bombay v Dilipkumar Raghavendranath Nadkarni & Ors* 1983 (1) SCC, 124, wherein it was observed that 'right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.'

Contractual freedom (whether it is viewed as personal liberty[172] or a right to life[173] guaranteed under Article 5 of the Federal Constitution) is limited under the Contract's Act 1950 because of the protection given to the weaker contracting party.[174] The statutory protection afforded to the weaker party against unfair agreements upholds the equality provisions found in Article 8 of the Federal Constitution. Employment contracts,[175] the law of tort,[176] and copyright[177] are other areas where the law has allowed individuals to legally enforce their rights horizontally.

The two examples and specific areas of the law which are listed above bring to question the extent and breadth of our fundamental rights between individuals per se. Why must the

[172] *Masa Anak Nangkai And Ors v Lembaga Pembangunan Dan Lindungan And Ors* [2011] MLJU 197, "A wrong no matter how artfully disguised as the Principal Deed and the Joint Venture Agreement are, cannot overwhelm the fact that they are in violation of articles 5 and 13 of the constitution and Section 8 (a) of the Land Code." In this case, the State Government of Sarawak entered into various agreements with development companies to develop an oil palm plantation project which was made purportedly under a different name and purpose. Essentially, the development affected a native customary land. The Federal Court in *CIMB Bank Berhad v Anthony Lawrence Bourke and Alison Deborah Essex Bourke* (Federal Court Civil Appeal No. 02-105-10/2017(W)) held that an exclusion clause in a loan agreement was void and unenforceable as it was an agreement in restraint of legal proceedings under section 29 of the Contracts Act 1950 and was also contrary to public policy.

[173] Shad Saleem Faruqi, *The Laws Relating to Staff Discipline at Malaysian Universities*, 1, 6 <https://legal.usm.my/v3/phocadownload/act%20605%20-%20the%20law%20relating%20to%20staff%20discpline%20at%20malaysian%20universities.pdf> accessed 4 August 2019, "We must remember that the terms of a 'private contract' cannot displace the public law principles of natural justice. Further, a litigant may argue that 'livelihood' is part of the constitutional right to 'life' and cannot be deprived 'save in accordance with law'." Dato Gopal Sri Ram, 'The Workman And The Constitution' [2007] 1 MLJ clxxii, clxxxii, "The enumerated and non-enumerated rights enshrined in Part II of the Constitution are conferred on the public at large or a class of the public and not upon any particular individual. Hence, it is not open to an individual or even a group of individuals in society to purport to contract out of these fundamental rights."

[174] Under section 11 of the Contract's Act 1950, contracts entered by minors are void. Illegal, immoral contracts and contracts against public policy are also void under section 24 of the Contract's Act 1950. Other void contracts include agreement in restraint of marriage of a person other than a minor s 27, agreement in restraint of trade, profession or business s 28 and agreements in restraint of legal proceeding except contracts to a dispute arbitration or award of scholarship under section 29. Contracts entered by minors are regulated under the Protection of Children And Young Persons (Employment) Act 1966 (Revised 1988). See also Nithiyanantham Murugesu, 'The Role of the Law and the Courts in Preventing the Abuse of Children - The Malaysian Perspective' [2010] 5 MLJ cxxv; Patrick Selim Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Clarendon Press, Oxford, 1978) 5, "Unlike classical law which adopts a formalistic view of contract and enforces the common intentions of the parties on the basis that the contract is freely entered into whatever the terms agreed, modern contract law is characterised by the development of doctrines which promote contractual fairness and provide protection to the weaker party in a given contractual transaction."

[175] Vanitha Sundra Karean, 'The Constitutional Right To Livelihood As A Developing Field In Malaysian Labour Jurisprudence' [2007] 5 MLJ cclxxxiv, "Employment cases have revealed an emerging labour law theory which relies upon constitutional principles at its foundations, [particularly Article 5(1) of the Federal Constitution]." See also Vanitha Sundra Karean, 'Charting New Horizons In Procedural Fairness and Substantive Fairness In Individual Labour Law In Malaysia' [2007] 6 MLJ i; Farheen Baig Sardar Baig, 'Security of Tenure vs Retrenchment: The Law and Practice in Malaysia' [2006] 3 MLJ cxxv; Ashgar Ali Ali Mohamed, 'Monetary Compensation In Dismissal Without Just Cause or Excuse: Legislative Guideline A Necessity' [2005] 6 MLJ xliii.

[176] On the relationship between the Constitution and Tort law, see William Binchy, *Meskell, the Constitution and Tort Law* (33 D.U.L.J. 2011), 339-368.

[177] Wenwei Guan, 'Copyright v Freedom of Contract: The "Contract Override" Issue in Hong Kong's Copyright Amendment' [2017] 46 HKLJ 115.

horizontal effect of our fundamental rights be solely dependent upon Parliament's intention? Shouldn't *all* our fundamental rights be available to everyone or at least all citizens?

5. The Proper Approach the Courts Should Adopt

As the bedrock of the country, the Constitution is not merely another piece of legislation but the country's foundation where the whole structure of the country is built on. When it comes to deciding conflicting constitutional rights between private individuals, the method which is suggested by Richard Kay in his article entitled 'The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law'[178]is a useful method to adopt.

In his article entitled 'Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect', Florian Rodl asserts that fundamental rights in the Constitution must be viewed as a 'valued activity'.[179] This view is based on the fact that the existence of fundamental rights presupposes the existence of private law. Based on this view, one could argue that every law (including private law) has an inherent constitutional character[180] that is intrinsically woven into it. Constitutional rights have an indirect horizontal effect between individuals not because of their direct application or control (which they do not have) but the influence of the values which these constitutional rights have on private law disputes between individuals.[181]

In *Dato Menteri Othman Baginda v Dato Ombi Syed Ali*[182], the Federal Court had provided some guidance (particularly the first and second step) as to how the courts could apply fundamental rights found in the Federal Constitution as a 'valued activity.' Firstly, since the Federal Constitution is a document that is sui generis, the canons of interpretation that apply to ordinary statutes cannot be applied to the Constitution.[183] Secondly, in interpreting the fundamental rights of a Constitution (found in Part II of the Federal Constitution) the courts should not adopt the literal approach. Conversely, following the third principle, the courts

[178] Kay (n 121). For a similar approach, see also RÖdl (n 143), 1030.

[179] RÖdl (n 143), 1030, "Fundamental rights have effects as values and, as such, provide orientation for the formation of concepts in private law." Chemerinsky (n 120), 533, "Rights are protected in this society in order to safeguard valued activities. Consider for example freedom of expression." See Thomas Irwin Emerson, *The System of Freedom of Expression* (Random House, 1970) where the author tried to justify why the freedom of speech is a valued activity.

[180] RÖdl (n 143), 1022, "In other words, fundamental rights presuppose private law. At least the general freedom to act … ". RÖdl (n 143), 1030, " … fundamental rights express the constitutional character always inherent to private law. Private law itself has a constitutional character. Private law is a free and democratic societal constitution."

[181] Kenneth M. Lewan, 'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany' [1968] 17(3) International & Comparative Law Quarterly 571, 599.

[182] [1981] 1 MLJ 29.

[183] Ibid, 32, para B-C; see also Kay (n 121) 388, "Because of the extraordinary nature of the law of the Constitution, it has certain characteristics that mark it off from other kinds of law."

should apply the prismatic approach.[184] This requires the presiding judge to be guided by the prevailing 'requirements of a just society in their own time'[185] (which is argued will differ from one society to another). One way which the courts could apply the prismatic approach is by considering fundamental rights as constitutional 'values' rather than just 'rights.'[186] Finally, the courts should interpret fundamental rights 'generously' whilst simultaneously reading any derogations or limitations upon these rights restrictively.[187]

Where there are conflicting rights between private individuals, the court should rely on fundamental rights to provide the necessary guiding principles[188] and references in assisting the court to determine what are legitimate interests that are worthy of protection.[189] This approach will also assist the courts to form a weightier decision between conflicting private law rights. The recognition of these constitutional values will also allow the courts through their inherent powers to develop the common law which is in line with the prevailing constitutional values of society.

In cases where the rights of an individual (based either on common law or legislation) do not conform or are found to be in conflict with the constitutional values or principles of the

[184] *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, 339, "The first has to do with the methodology of interpretation of the guaranteed rights. In three recent decisions this court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted." Other cases which applied the 'prismatic approach' include *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 and *Shamim Reza bin Abdul Samad v Public Prosecutor* [2009] 2 MLJ 506.

[185] *Boyce v The Queen* [2004] UKPC 32, [2005] 1 AC 400 per Lord Hoffmann, 416, para 28.

[186] Chemerinsky (n 120), 553.

[187] Gopal Sri Ram, 'The Dynamics of Constitutional Interpretation' [2017] MLJ Commemorative Issue 1, 17, " … Whilst the guaranteed rights are to be read generously, derogations upon a right are to read down, that is, they should be read narrowly and restrictively." Chemerinsky (n 120), 535, "Legislatures can limit what might be included in contracts or modify the common law, but simple legislative majorities cannot change the character of constitutional rights."

[188] Christoph Busch, 'Fundamental Rights and Private Law in the EU Member States' in Christoph Busch and Hans Schulte-Nolke (eds), *EU Compendium Fundamental Rights and Private Law: A Practical Tool for Judges* (European Law Publishers 2011) 1, 12, "According to the doctrine of "indirect horizontal effect", human rights are not used as a source of obligation but only as a source of inspiration for interpreting the private law rules. Consequently, they influence the relations between private parties only indirectly "through the interpretation of open textured norms, general clauses and value-oriented concepts such as good faith, reasonableness or negligence, which leave a margin of interpretation for courts." RÖdl (n 143) 1024, " … fundamental rights provide orientation as to what is considered unconscionable, in bad faith, and inequitable. They offer a guiding principle as to what are legitimate interests worthy of protection. They can be a point of reference for determining which rights are protected from violations by any third parties and which justifications can be put forward for interventions in the rights of third parties. This effect of forming concepts of private law by providing orientation is often expressed with the vivid term 'radiation' (Ausstrahlung)."

[189] Chemerinsky (n 120), 507, "Rights are values which can be protected by statute, common law or federal law. What is important is that protection is needed … ". Kay (n 121), 339, "Consequently, a wider reach of the constitutional rules would inevitably create more occasions for measuring the relative strengths of constitutional claims in the particular circumstances."

country, such rights should be set aside.[190] Where there are conflicting constitutional rights, the courts should perform a 'balancing act'[191] between both competing constitutional rights by weighing the common law or statute against each of the conflicting constitutional rights.[192] The constitution should act as a guidepost on the way the common law or statute should be interpreted or modified following the circumstances of each case[193] and the court should endeavour to achieve the best possible result by interpreting the rights of both parties in the widest possible and most equitable way.

6. A Change in the Horizon?

Based on the reasons and the suggested guidelines which are provided above, there is no reason why the Malaysian courts should continue to enforce constitutional rights vertically. By accepting the horizontal view, the judiciary will be able to transform constitutional rights from an illusion into a reality.

[190] Chemerinsky (n 120), 535, "If rights represent fundamental values, then any unjustified infringement of those values should be halted'; In a unanimous decision, the High Court of Australia in Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520, 566 decided that 'Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds.'"

[191] *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 (Supreme Court of Canada), para 97, "When the common law is in conflict with Charter values, how should the competing principles be balanced? In my view … It must be remembered that the Charter 'challenge' in a case involving private litigants does not allege the violation of a Charter right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary."

[192] Chemerinsky (n 120), 504, "Liberty would be best protected if the courts openly articulated the competing interests that they were balancing. This would force the courts clearly to identify and define the conflicting liberties, enhancing understanding of each of the rights at stake."

[193] This is in line with Article 4(1) of the Federal Constitution which states that, "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

References

Airasia Berhad v Rafizah Shima Mohamed Aris [2014] 5 MLRA 553.

Alexy, R., 'Constitutional Rights, Balancing and Rationality' [2003] 16(2) Ratio Juris 131.

Appleby, G., Reilly A. and Grenfell, L., *Australian Public Law* (Third Edition, Oxford University Press 2018).

Asian NGO Network on National Human Rights Institutions (ANNI), *2018 Report on the Performance and Establishment of National Human Rights Institutions in Asia*<https://www.forum-asia.org/uploads/wp/2018/12/2018_ANNI-Report_FINAL.pdf> accessed 20 February 2021.

Atiyah, P.S., *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (Clarendon Press, Oxford, 1978).

Austin, J., *Austin: The Province of Jurisprudence Determined*, (Wilfrid E. Rumble ed, Cambridge University Press 1995).

Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285.

Baig, F.B.S., 'Security of Tenure vs Retrenchment: The Law and Practice in Malaysia' [2006] 3 MLJ cxxv.

Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia [2005] 3 MLJ 681.

Bennett, T., 'Horizontality's new horizons- re-examining horizontal effect: privacy, defamation and the Human Rights Act' [2010] 21(3) Ent LR 96 (Part 1) and 145 (Part 2).

Binchy, W., *Meskell, the Constitution and Tort Law* (33 D.U.L.J. 2011).

Blackstone, W., *Commentaries on the Laws of England* (1827 ed, Clarendon Press).

Board of Trustees of the Port of Bombay v Dilipkumar Raghavendranath Nadkarni & Ors 1983 (1) SCC 124.

Boyce v The Queen [2004] UKPC 32, [2005] 1 AC 400.

Burton v Wilmington Parking Authority (1961) 365 U.S. 715.

Busch, C., 'Fundamental Rights and Private Law in the EU Member States' in Christoph Busch and Hans Schulte-Nolke (eds), *EU Compendium Fundamental Rights and Private Law: A Practical Tool for Judges* (European Law Publishers 2011).

Caldwell, E., 'Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes', [2012] 88(1) Chicago-Kent Law Review 77.

Chahil, S.K., 'A Study of the relationship between Natural Rights Theory and the Doctrine of Constitutionalism Encapsulated Within the Federal Constitution' [2005] 6 MLJ i.

Chemerinsky, E., 'Rethinking State Action' [1985] 8(3) Northwestern University Law Review 503.

CIMB Bank Berhad v Anthony Lawrence Bourke and Alison Deborah Essex Bourke (Federal Court Civil Appeal No. 02-105-10/2017(W)).

Contracts Act 1950.

Dato Menteri Othman Baginda v Dato Ombi Syed Ali [1981] 1 MLJ 29.

Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242.

Deuble, K., 'The Constitution and Enforceable Natural Law' (2016) The Review: A Journal of Undergraduate Student Research 17 <https://fisherpub.sjfc.edu/ur/vol17/iss1/5/> accessed 18 July 2019.

Dholakia, B.H. and Dholakia, R.H., 'Malaysia's Privatization Programme' [1994] 19(3) Sage Journal 25 <https://journals.sagepub.com/doi/pdf/10.1177/0256090919940302> accessed 25 June 2019.

Dworkin, R., *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press 2006).

Dworkin, R., *Taking Rights Seriously* (Harvard University Press 1977).

Educational Company of Ireland Ltd v Fitzpatrick (No 2) [1961] IR 845.

Emerson, T.I., *The System of Freedom of Expression* (Random House 1970).

Epstein, R.A., 'The Utilitarian Foundations of Natural Law' (1989) 12 Harvard Journal of Law and Public Policy 711.

Faruqi, S.S., *The Laws Relating to Staff Discipline at Malaysian Universities* <https://legal.usm.my/v3/phocadownload/act%20605%20-%20the%20law%20relating%20to%20staff%20discpline%20at%20malaysian%20universities.pdf> accessed 4 August 2019.

Federal Constitution.

Gardbaum, S., 'The "Horizontal Effect" of Constitutional Rights [2003] 102(3) Michigan Law Review 387

Gray v Garda Commissioner [2007] IEHC 52, [2007] 2 I.R. 654.

Guan, W., 'Copyright v Freedom of Contract: The "Contract Override" Issue in Hong Kong's Copyright Amendment' [2017] 46 HKLJ 115.

Hart, H.L.A., *Concept of Law* (Oxford: Clarendon Press 1961).

Hill v Church of Scientology of Toronto [1995] 2 SCR 1130.

Hobbes, T., *Leviathan: The Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (1651).

Hogan, G., 'The Farthest - December 1972' [2019] LXII Irish Jurist 1.

Hosford v. John Murphy & Sons [1987] I.R. 621.

Human Rights Commission of Malaysia Act 1999 (Act 597).

Hunt, M., 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423.

Hunter v Duckworth & Co Ltd [2003] IEHC 81.

John Dadit v. Bong Meng Chiat &Ors. [2015] MLRHU 1351.

Karean, V.S., 'Charting New Horizons In Procedural Fairness and Substantive Fairness In Individual Labour Law In Malaysia' [2007] 6 MLJ i.

Karean, V.S., 'The Constitutional Right To Livelihood As A Developing Field In Malaysian Labour Jurisprudence' [2007] 5 MLJ cclxxxiv.

Kay, R., 'The State Action Doctrine, the Public- Private Distinction, and the Independence of Constitutional Law' (1993) Faculty Articles and Papers 10 <https://opencommons.uconn.edu/law_papers/10> accessed 8 August 2019.

Kelsen, H. and Wedberg, A. (trans.), *General Theory of Law and State* (Cambridge, MA: Harvard University Press; reprinted, New York: Russell and Russell 1961).

Knox, J.H., 'Horizontal Human Rights Law' [2007] American Journal of International Law 1.

Lai, F., Shad, M.K., *et al*, 'Revisiting Privatization and Economic Growth in Malaysia: An Empirical Examination' (2018) SHS Web of Conferences 56, 05004, ICML <https://www.shs-conferences.org/articles/shsconf/pdf/2018/17/shsconf_iclm2018_05004.pdf> accessed 25 June 2019.

Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520.

Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301.

Lewan, K.M., 'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany' [1968] 17(3) International & Comparative Law Quarterly 571.

Lobo, B., 'Does the Law of Human Rights Pervade all Malaysian Law in view of Part II of the Federal Constitution?' [2007] 7 MLJ lxxxvi.

Lovett v Gogan [1995] 1 I.L.R.M. 12.

Lüth Case (1958) 7 BVerfGe 198.

Masa Anak Nangkai And Ors v Lembaga Pembangunan Dan Lindungan And Ors [2011] MLJU 197.

Meskell v Coras Iompair Eireann [1973] IR 121.

Mohamed, A.A.A., 'Monetary Compensation In Dismissal Without Just Cause or Excuse: Legislative Guideline A Necessity' [2005] 6 MLJ xliii.

Moore, J., 'British Privatization - Taking Capitalism to the People' [1992] Harvard Business Review <https://hbr.org/1992/01/british-privatization-taking-capitalism-to-the-people> accessed 25 June 2019.

Murtagh Props., Ltd. v Cleary [1972] I.R. 330.

Murugesu, N., 'The Role of the Law and the Courts in Preventing the Abuse of Children - The Malaysian Perspective' [2010] 5 MLJ cxxv.

n/a, 'Legal Positivism' (*Internet Encyclopedia of Philosophy*) <https://iep.utm.edu/legalpos/#H1> accessed 15 February 2021.

n/a, 'Social Contract Theory' (*Internet Encyclopedia of Philosophy*) <https://iep.utm.edu/soc-cont/> accessed 13 February 2021.

Nambiar, S., 'Revisiting Privatisation In Malaysia: The Importance of Institutional Process' [2009] 14(2) Asian Academy of Management Journal 21 <http://web.usm.my/aamj/14.2.2009/AAMJ_14.2.2.pdf> accessed 25 June 2019.

Parsons v Kavanagh [1990] 10 I.L.R.M. 560.

Peterson v City of Greenville (1963) S.c. 373 US 244.

Phua, K.L., 'Corporatization and Privatization of Public Services: Origins and Rise of a Controversial Concept' (2001) Akademika 58, 45 <ejournals.ukm.my/akademika/article/download/2966/1891> accessed 25 June 2019.

Pound, R., 'Public Law and Private Law' (1939) 24(4) Cornell Law Review 469.

Protection of Children and Young Persons (Employment) Act 1966 (Revised 1988) (Act 350).

Radbruch, G. and Wilk, K. (tr), *The Legal Philosophies of Lask, Radbruch, and Dabin* (ed, Cambridge, Mass.: Harvard University Press 1950).

Ram, G.S., 'The Dynamics of Constitutional Interpretation' [2017] MLJ Commemorative Issue 1.

Ram, G.S., 'The Workman And The Constitution' [2007] 1 MLJ clxxii.

Ramraj, V.V., 'Beyond the Courts, beyond the State: Reflections on Caldwell's "Horizontal Rights and Chinese Constitutionalism"' [2012] 88(1) Chicago-Kent Law Review 93.

Ratcliffe v Evan [1892] 2 QB 524.

RÖdl, F., 'Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect' [2013] 20(2) Indiana Journal of Global Legal Studies 1015.

Saunders, C., 'Constitutional Rights and the Common Law' in András Sajó and Renáta Uitz (eds), *The Constitution In Private Relations: Expanding Constitutionalism* (The Netherlands Eleven International Pub, Utrecht 2005).

Setiawan, K.M.P, 'Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia' (2013) Doctoral Thesis.

Shamim Reza bin Abdul Samad v Public Prosecutor [2009] 2 MLJ 506.

Shelley v Kraemer (1984) 334 U.S. 1.

Sin, B.A., 'Public Law: An Examination of Purpose (Part I)' (1991) Sing. J. Legal Stud. 431.

Sin, B.A., 'Public Law: An Examination of Purpose (Part II)' (1992) Sing. J. Legal Stud. 164.

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333.

Subramaniam a/l Vythilingam v The Human Rights Commission of Malaysia (Suhakam) & Others [2003] MLJU 94.

Subramanian Swamy v Union of India (2016) 7 SCC 211, AIR 2016 SC 2728.

Suhakam <http://www.suhakam.org.my/about-suhakam/sejarah> accessed 13 September 2018.

Sundaram, J.K., 'How Privatisation Came to Be' *New Straits Times* (Kuala Lumpur 15 March, 2019) <https://www.nst.com.my/opinion/columnists/2019/03/469334/how-privatisation-came-be> accessed 25 June 2019.

Tan, K.Y.L., 'The Role of Public Law in a Developing Asia' (2004) Sing. J. Legal Stud. 265.

Telephone Conversation between the author and Ann Jennifer Victor Issacs, Deputy Secretary, Policy & Law Group Human Rights Commission of Malaysia (SUHAKAM) on 22 May 2021.

Thynne, I., 'Public Enterprise Transformation: Changing Patterns of Ownership, Accountability and Control' in Ng and Wagner (eds.) *Marketisation in ASEAN* (Institute of Southeast Asian Studies, Singapore 1990).

Tushnet, M., 'The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy' (1975) 10(119) Law & Soc. Rev.

U.S. Constitution Amendment XIV.

Uitz, R., 'Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now?' in András Sajó, Renáta Uitz (eds), *An Introduction, in The Constitution In Private Relations: Expanding Constitutionalism* (Eleven International Pub 2005).

UN Commission on Human Rights, 'Promotion and Protection of Human Rights: Human Rights and Human Responsibilities' (17 March 2003) Annex I, UN Doc. E/CN.4/2003/105.

Unger, R.M., *Law In Modern Society* (The Free Press 1976).

Wei, Y., 'Corporatization and Privatization: A Chinese Perspective' [2002] 22(2) Nw. J. Int'l L. & Bus. 219 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1547&context=njilb> accessed 25 June 2019.

Rule of Law in Malaysia: Judicial Lenses and Executive Myopia

Tamara Joan Duraisingam
Senior Lecturer, Taylor's Law School
Taylor's University, Malaysia
tamarajoan.duraisingam@taylors.edu.my

Nakeeran Kumar s/o Kanthavel
Student, Taylor's Law School
Taylor's University, Malaysia
keeran3022@gmail.com

Abstract
The rule of law according to Lon Fuller focusses on the 'morality of the law'. Thus, a government must seek to provide an environment in which each citizen may realize to his or her maximum potential the rational plan of life to which he or she aspires. Society must be free and directed to the good of each of its members. Any government which fails, in a material degree, to meet these requirements may fail to deserve the label of a 'legal system'. The term rule of law, however, has been a term used by politicians to secure political mileage during election campaign periods and continues to be used upon formation of a new government. In Tun Mahathir's inaugural speech to his 'rakyat' on 10 May 2018, the term 'rule of law' was used at least 3 times. Within the domestic sphere, the Federal Constitution of Malaysia provides through Article 8 that all persons are equal before the law and entitled to the equal protection of the law. The terminology used is 'all persons' and not 'all citizens' which seems to uphold the Diceyan postulate of equality before the law. Regardless of its transcendent nature and noble assurance of a government of laws and not men, there would be gaps in the usage of the term 'rule of law' as it does not reach all levels of community. This paper critically appraises the concept of rule of law in Malaysia as it was and how it seems to be evolving under the current constitutional post-pandemic landscape.

Keywords: rule of law, equality.

1. Introduction

Rule of Law is a prosaic concept that has withstood the test of time. All institutions of government use the term frequently to reassure citizens that democracy prevails within the State and citizens are ruled by 'law' and not 'men'. In fact, in Tun Mahathir's inaugural speech to his 'rakyat' on 10 May 2018, the term 'rule of law' was used at least 3 times.[194] The question arises as to what the domestic understanding of the rule of law is, and is it in line with the

[194] Berita Viral, 'Breaking News! - Tun Dr. Mahathir Press Conference - 12:30PM - 10/5/2018' (*Youtube*, 10 May 2018) <https://www.youtube.com/watch?v=ONfNj-5dbz8> accessed 9 February 2021.

international perspective? The Pakatan Harapan government was on a toboggan ride of turning political manifesto into policy. In this arduous process, the question remains as to whether the rule of law is adequately safeguarded within the State.

This paper uses two perspectives to gauge the notion of the rule of law today:
(i) the thick perspective and ponderous incorporation of international law, and
(ii) how the rule of law is reflected in society.

For the first part, actions of the executive are juxtaposed with interpretations from the judiciary. For the latter analysis, the Federal Constitution is evaluated to determine human rights application in the State, paying particular attention to the right to education.

2. International and Domestic Perspectives of the Rule of Law

Commentators view rule of law differently depending on politics, philosophy, period of time and spectrum of law. Within the international system of law, a thick understanding of the rule of law is observed. This thick understanding of the rule of law focuses on the individual and incorporates first and second generation rights. Waldron's view is that 'rule of law in the international sphere is primarily focused on the individual. Given that the UN understanding of rule of law embraces human rights, it must incorporate all individuals within the jurisdiction and territory of the State, regardless of nationality or even lack thereof'.[195]The thick understanding of the rule of law does not distinguish between the citizen and non-citizen as it promotes inclusiveness. Referring to the United Nations (UN) Sustainable Development Goals, SDG 16 contains the target of 'promoting the rule of law at the national and international levels and ensuring equal access to justice for all'.[196] A circular definition emerges whereby the rule of law is part of inclusivity and inclusivity has the rule of law as its target.

A State that truly encapsulates the international law perception of the rule of law would be party to the international laws governing rights and inclusivity. Primary treaties governing rights would be the International Covenant on Civil and Political Rights 1966[197] and the International Covenant on Economic Social and Cultural Rights[198] whereas the ones potentially governing inclusivity includes the Convention relating to the Status of Stateless

[195] Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 European Journal of International Law 315, 325.
[196] UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' A/RES/70/1 (21 October 2015) <https://www.refworld.org/docid/57b6e3e44.html> accessed 8 February 2021.
[197] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[198] International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force on 3 January 1976) 999 UNTS 993 (ICESCR).

Persons 1954[199] and the Convention relating to the Status of the Refugee 1951[200] amongst others. The standard therefore is rather high and only currently applicable to developed nations. Commentators such as Lon Fuller subscribe to this all-embracing view. Fuller was of the view that a government must seek to provide an environment in which each citizen may realize to his or her maximum potential and the rational plan of life to which he or she aspires. Society must be free and directed to the good of each of its members.[201] The focus of the thick perception of rule of law is the development of the individual and not the collection of individuals.

The thin perspective of the rule of law, on the other hand, looks at form rather than substance. Whilst international law favours the thick perception of the rule of law, a number of developing States' political activities seem to lean towards the thin perspective. Malaysia is no exception to this rule. Here lies the dichotomy within the States. The States may use particular ornate rhetoric of the thick perspective and yet operationalise the thin perspective of the rule of law. According to the Clingendael Conflict Research Unit (CRU) report on Rule of Law in Fragile Societies, 'a false impression of consensus prevails in the international discourse on what the rule of law amounts to and how it should be implemented'.[202]

Political rhetoric on the rule of law may be a gloss over the actual happenings within the State. Three institutions are responsible for upholding the rule of law. The 'bulwark of the rule of law'[203] would be the judiciary. Although the executive may have the yoke of operationalising and serving as the spokesperson for the State, nonetheless it is the judiciary that serves as the 'guardian of constitutional rights';[204] 'custodian of the rule of law';[205] 'central pillar of a democratic state';[206] 'protectors of dignity of man'.[207] Based on the Westministarian system of government, the legislative, on the other hand, work in-line with the executive to allow for the operationalization of the rule of law via legislation bearing in mind that ultimately it is the courts that decide on the validity of the law based on the *grundnorm* of supremacy of the Constitution.[208]

Due to the fact that the public focus tends to be the executive rather than the progress within the judicial branch, it is no wonder that some commentators view rule of law as 'meaningless

[199] Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (Stateless Persons Convention).
[200] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugees Convention).
[201] Lon Fuller, *The Morality of Law* (Yale University Press 1964).
[202] CRU Rep June 2017, 48.
[203] *Alma Nudo Atenza v PP* [2019] 4 MLJ 1, 31.
[204] *Hock Huat Chan Sdn Bhd v Assan bin Mohammad & Ors* [2008] MLJU 92, 102.
[205] *Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd* [2018] MLJU 772, 11.
[206] *National Union of Bank Employees v Director General of Trade Union* [2013] MLJU 1567, 11.
[207] *Nik Noorhafizi bin Nik Ibrahim v PP* [2013] 6 MLJ 660, 701.
[208] Federal Constitution of Malaysia, Article 4.

thanks to ideological abuse and general over-use'.[209]If the focus were specifically on the judiciary rather than the executive, there would be more credence in the authenticity of the rule of law. This, however, needs to be done with the presumption that the institutions of government work as an integrated whole.

3. Methodology of Research - Theories and Methods of Analysis

Two theories are relied on in this analysis. The first being the theory of coordination which is used in the international sphere but also applies in the domestic sphere, and the second is the gradualist approach to international law. The theory of coordination apposite to international law envisages that in order for international law to apply effectively, States would have to work in a coordinated rather than confrontational manner. When it comes to abstract constitutional law concepts such as the rule of law, the theory of coordination is cascaded down to the three institutions of government. The rule of law operates well when the decisions of the judiciary propel the executive to work in tandem with the former. On the other hand, the gradualist approach refers to the gradual incorporation of international law within the municipal system of law. As a dualist state, a treaty would have to be transformed in order to apply within the State. Rather than having one document which incorporates all the treaty provisions, Malaysia tends to gradually bring in international law through progressive enactments of statute law. Tracking compliance with international law becomes arduous as it requires continuous observation of legal development.

Two methods of analysis are employed. In order to determine the development of the rule of law within the lenses of the judiciary, a content analysis of cases that have referred to the rule of law is conducted. This is followed by the case study method to determine how the rule of law is reflected in society. The methods are confined to the doctrinal paradigm of research. Cases from 1998 to 2019 that discuss the rule of law have been analysed. Furthermore, cases from all levels of the higher courts are referred to in this analysis.

The gradualist approach applies to both the broad understanding of the rule and incorporation of international law. Case law tends not to steer away from the Diceyan postulates of the rule of law - no man can be punished unless there is a clear breach of law; equality before the law; rights are safeguarded by the common law of the land. The Court of Appeal decision of *Marathaei d/o Sangulullai v Syarikat JG Containers (M) Sdn Bhd*[210] repeatedly refers to Dicey when referring to the rule of law. In *Kerajaan Malaysia v Mat Suhaimi bin Shafiei*,[211] the Federal Court uses the Diceyan rule to elaborate that freedom is not absolute but under the law. In *Nik Noorhafizi bin Nik Ibrahim v PP*,[212] the Court of Appeal

[209] *Alma Nudo Atenza* (n 203), 34.
[210] [2003] 2 MLJ 337.
[211] [2018] MLJU 32.
[212] [2013] 6 MLJ 660.

confirmed that 'the equality doctrine, in reality, is drawn from Dicey's Rule of Law, one of the pillars of which is that persons are equal before the law'. Hence, the link is established between Dicey's second postulate and Article 8 of the Federal Constitution of Malaysia. This link has been referred to even earlier in the case of *Sivarasa Rasiah v Badan Peguam.*[213] Apart from the Diceyan rule of law however, the movement towards a rather contextualized notion of the rule of law is observed. Looking at *Sivarasa* once again, the case refers to 'a system of law that encompasses the procedural and substantive dimensions of the rule of law'. The case of *Lee Kwan Woh v PP*[214] confirmed that 'it is settled law that the rule of law has both procedural and substantive dimensions'. Although the *Marathaei d/o Sangulullai v Syarikat JG Containers (M) Sdn Bhd*[215] case uses Dicey as the foundational rule it is also acknowledged that, "It is now well settled that at common law, both procedural and substantive fairness may be read into a statute on the basis that Parliament is presumed to have legislated in accordance with ROL."

The most recent case that indicates the expansion of the rule of law would be *Alma Nudo Atenza v PP.*[216] It is acknowledged that it is 'opportune' and 'necessary' for us to now outline what is generally meant by the Rule of Law lest it becomes meaningless due to overuse and abuse. The case provides that, "While the precise procedural and substantive content of the rule of law remains the subject of much academic debate, there is a broad acceptance of the principles above as the minimum requirements of the rule of law."

Critical evaluation of the progressive development of the rule of law informs us of two distinct features:

(i) there is consistent usage of the Diceyan postulates in Malaysia, with the focus towards Articles 5 and 8 of the Federal Constitution, and
(ii) the broader perspective of the rule of law, however, is not consistently referred to.

To opine that with the new executive fiat comes a broader understanding of the rule of law is remote. Federal Court judgements are progressing towards a broad interpretation of the rule of law albeit inconsistently. Judicial interpretation falls in between the thin and thick perspectives given to us via international law. In terms of parallel movement, the judiciary moves at a faster pace compared to the executive. This is specifically seen within the context of the reception of international law into the State.

The two U-turns in acceding to pertinent human rights treaties such as The Rome Statute of the International Criminal Court[217] and the International Convention on the Elimination of All

[213] [2010] 2 MLJ 333.
[214] [2009] 5 MLJ 301.
[215] *Marathaei* (n 210).
[216] [2019] 4 MLJ 1.
[217] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (RSICC).

Forms of Racial Discrimination[218] at first glance demonstrates an outright rejection of the thick perspective of the rule of law. This can also be perceived as a clear rejection of the broader notion of the rule of law as employed by the judiciary. Upon careful scrutiny, however, it is also observed that the Diceyan postulates that are consistently referred to by the judicial arm of government do not call for the incorporation of international law perspective. It is Lord Bingham's principles on the rule of law which looks upon international law as the eighth principle and refers to compliance with international obligations and not accession to it. It is possible therefore to theorize that although not operating at the same speed in their understanding and application of the rule of law, the executive is not necessarily lagging too far behind the judiciary in its application of the rule.[219]

4. Judicial Reception of International Law

Observing the reception and application of international law within Malaysia, the cautious approach once employed by the judiciary is slowly moving towards the gradualist approach. Different dualist States employ different methods of giving effect to treaty obligations. Either the treaty itself is enacted and has a full legal effect within the State to the extent of its enactment,[220] or the treaty remains unenacted. Thio notes that in the field of human rights law, governments such as Singapore have not seen fit to adopt specific enabling legislation. However, amendments to existing law may take place after accession to the treaty.[221] This gradualist approach is employed in Malaysia as well.

As with other Commonwealth jurisdictions, the Malaysian courts have attempted to construe the Federal Constitution in a broad-based manner. In the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor*,[222] Supreme Court Judge Edgar Joseph Junior enunciated as follows, "In construing constitutional documents it is axiomatic that the highest of motives and best of intentions are not enough to displace constitutional obstacles. Whenever legally permissible the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by the Constitution, enjoying as they do, precedence and primacy … ".[223]

In the case of *Adong bin Kuwau & Others v Kerajaan Negeri Johor and Anor*,[224] a wide interpretation was given to proprietary rights under Article 13 of the Federal Constitution to

[218] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).
[219] Lord Thomas Henry Bingham, *The Rule of Law* (Penguin, 2011).
[220] For example in the UK, the Diplomatic Privileges Act 1964 enacts the Vienna Convention on Diplomatic Relations 1961.
[221] Li-ann Thio, 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) 4 National Taiwan University Law Review 335, 351.
[222] [1992] 1 MLJ 697.
[223] Ibid, 701.
[224] [1997] 1 MLJ 418, 433.

include aboriginal peoples' rights both under common as well as statutory law. The Court of Appeal in the case of *Sagong Bin Tasi v Kerajaan Negeri Selangor*[225] confirmed that the liberal interpretation of statute law is needed in order to give full effect to Article 8(5)(c) of the Federal Constitution, which sanctions positive discrimination in favour of the Orang Asli.[226] In the case of *Sagong*, Section 12 of the Aboriginal Peoples Act 1954, concerning the acquisition of aboriginal land, was interpreted in an extraordinary manner so as to leave no room for the State authority to exercise discretion when granting compensation to the Orang Asli.[227] In the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors*, the term 'deprivation of life' under Article 5(1) of the Federal Constitution included the right to livelihood within the interpretation of the word 'life'.[228] Deprivation of a clean environment results in deprivation of livelihood which in turn results in deprivation of life.

In the case of *Noorfadillabinti Ahmad Saikin v Chayed bin Basirun and Ors*[229], Justice Zaleha Yusof took the bold step of using CEDAW to give effect to the provisions of the Federal Constitution by stating the following, "In interpreting art 8(2) of the Federal Constitution, it is the court's duty to take into account the government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under art 8(2) of the Federal Constitution."[230] Judicial interpretation techniques are employed in order to safeguard the rights of persons in Malaysia.

There have been positive developments in terms of incorporation of international law within the Malaysian domestic system. Malaysian courts are able to apply common law as it was applied in the United Kingdom on the 7th of April 1956.[231] The common law of today, which incorporates human rights and includes the provisions of the European Convention on Human Rights, however, only has persuasive weight. Nevertheless, from the case of *Majlis Perbandaran Ampang Jaya v Steven Phao Cheng Loon & Ors*,[232] it is made clear that updated common law may be applied by Malaysian Courts. This allows for international law to be incorporated through common law.

However, when it comes to the application of international human rights laws such as the Universal Declaration of Human Rights (UDHR), the Malaysian courts tend to be more cautious in their approach. In the case of *Merdeka University Bhd v Government of*

[225][2005] 6 MLJ 289.
[226] Ibid, 311.
[227] [2005] 6 MLJ 289, 310.
[228] [1997] 3 MLJ 23, p 43; *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Lembaga Tatatertib Perkhidmatan Awam v Utra Badi* [2000] 3 MLJ 281; *Nor Anak Nyawai v Bornow Pulp* [2001] 6 MLJ 241.
[229] [2012] 1 MLJ 832.
[230] Ibid, 843.
[231] Section 3(1)(a) of the Civil Law Act 1956.
[232] [2006] 2 MLJ 389.

Malaysia,[233] a petition to the *Yang di Pertuan Agong*[234] for an incorporation order for Merdeka University was rejected. The plaintiff issued a writ asking for a declaration that the rejection of petition was in contravention to the Federal Constitution; and that the refusal to establish a university was an unreasonable and improper exercise of the discretion conferred by Section 6 of the Universities and University Colleges Act 1971. Justice Eusoffe Abdoolcader referred to the judgment of *Lim Cho Hock v Government of the State of Perak & Ors*[235] and stated that, " … the court's power to make declarations is confined to matters justiciable in the courts and limited to legal and equitable rights and does not extend to moral, social or political matters."

In the case of *Mohamed Ezam bin Mohd Noor v Ketua Polis Negara*,[236] where an appeal against the decision of the High Court judge who refused to grant writs of habeas corpus, Federal Court Judge Siti Norma Yakob stated that international standards established by the UDHR and other UN documents were not legally binding on the Malaysian government. As a result, the Court was not obliged or compelled to adhere to the 1948 Declaration. The aforementioned cases demonstrate that the UDHR is not part of Malaysian law. In the case of *Nor Anak Nyawai v Borneo Pulp Plantation*,[237] the UN Declaration on the Human Rights of Indigenous Peoples was cited by Justice Ian Chin not as part of the decision since it was not the law of the land, but rather invoked for educational purposes. However, these decisions do not imply a complete rejection of human rights law. What these cases do indicate is that the Malaysian courts do not give cognizance to soft law and customary international law. Hence, it is not international human rights law that is rejected, but the status of the document which holds the human rights provisions. More recent judgements have seen the use of international conventions as a guide to understanding certain concepts. In the case of *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*,[238] the definition of who a stateless person is was determined through examination of the Convention Relating to the Status of Stateless Persons 1954.[239] Again in the case of *Madhuvita Janjara Augustin v Augustin a/l Lourdsamy & Ors*,[240] there was mention of the same Convention through the examination of the common law. Whilst the executive tap dances on the molasses of international law application within the States, the judicial arm goes a step further to refer to unincorporated treaties as a guide in decision making.

[233] [1981] 2 MLJ 356, 366.
[234] His Majesty the King of the Federation of Malaysia.
[235] [1980] 2 MLJ 148, 153.
[236] [2002] 4 MLJ 449.
[237] [2001] 6 MLJ 241, 297.
[238] [2017] 8 MLJ 122.
[239] Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 26 April 1954) 360 UNTS 117 (CSSP).
[240] [2018] 1 MLJ 307.

5. Who is Responsible and Accountable in Upholding the Rule of Law in Malaysia?

Needless to say, the rule of law is not merely a utopian principle but an ideal notion any democracy strives for. The survival of the rule of law in a sovereign independent country depends upon the responsibility and accountability vested in the pillars as well as the people of the nation to uphold the quintessential doctrine. Joseph Raz elucidates that the *grundnorm* of the rule of law is that society should be ruled and guided by the law but not men.[241] Impliedly, it does allude that the obedience of the people towards the law is the cornerstone of the axiom.

Significantly it affirms that to uphold the rule of law in a community, all actions must have a foundation in law and be authorised by law.[242] Such a proposition formulates an imperative question which should be answered affirmatively: who is responsible and accountable in protecting, preserving and defending an effective system of checks and balances which is necessary to guarantee that the country is ruled by the rule of law and not by rule by law?[243] As this chapter centres on the practice of the rule of law in Malaysia, the proposed question will be answered within the Malaysian landscape.

Before delving into the mechanism of the state machinery, the distinction between responsibility and accountability must be briefly explained. Simply put, the vital difference between both aspects is that responsibility can be shared while accountability cannot. Responsibility is understood as an obligation to do the right thing but accountability is discerned as being answerable to provide a public account.[244] In Malaysia, such distinction is indispensable as the responsibility to uphold the rule of law is shared by all members of the Malaysian society but the accountability to sustain the existence of the axiom as the bedrock of the nation rests upon the judiciary of the democratic State.[245]

Dr. Harold Crouch expounds that Malaysia is a nation 'whose significant democratic and authoritarian characteristics are inextricably mixed'[246] but concurrently it is trite law that the Malaysian Constitution is the highest law of the land and it is declared that no lawmaker within the shores of Malaysia has the authority to make law which contravenes the Federal

[241] Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195, 197.
[242] Ibid, 196.
[243] Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (ECS Wade ed, 10th edn, Macmillan 1959) 202.
[244] Angela Marie Smith, 'Attributability, Answerability, and Accountability: In Defense of a Unified Account' (2012) 122 Ethics 575, 587.
[245] *National Union of Bank Employees v Director-General of Trade Union* [2013] MLJU 1567.
[246] Hoong Phun Lee, 'Competing Conceptions of the Rule of Law in Malaysia' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (Routledge 2004) 244.

Constitution.[247] To answer the above-mentioned principle question, it is fundamental to understand who is responsible for complying towards the constitutional provisions and who is accountable in guarding the supremacy of the Constitution.

Under the Malaysian frame of reference, the Federal Constitution is captured as an image reflecting the notion of rule of law. In regards to the responsibility of preserving the rule of law, it is a shared responsibility among all three pillars of the Constitution as well as pre-eminently the people of the nation. Unfortunately, legal scholars do acknowledge that the foundational principle 'seems so obscure and out of touch' with the reality of the layman.[248]

As adduced earlier, the conceptual vision of the rule of law can only be transformed into reality if the law to be obeyed by the common citizen is capable of guiding the behaviour of its subjects.[249] Even though legal supremacy rests on the Malaysian Constitution,[250] political supremacy is vested with the people of Malaysia. As Malaysia is a great champion of electoral democracy,[251] Malaysians are participants of rule of law in Malaysia and share the responsibility of upholding it.

The liability of shared responsibility is not limited to the people of the country but extended to the Government of Malaysia, mainly consisting of the Legislature and the Executive bodies. It is pivotal to note that at the premiere of the winning coalition of GE14, Tun Dr Mahathir Mohamed himself assured that the Government of Malaysia will administer the nation according to the rule of law and not draconian laws.[252]

Such affirmation and express commitment to adhere towards the rule of law does prove that both the Legislature and Executive are responsible in upholding the cardinal principle. Moreover, according to the sacrosanct oath of office taken by the Members of Parliament, the Legislature and Executive bodies of the nation are responsible to operate the state machinery to defend the rule of law. In the event of failing to fulfil such a paramount duty, the 4th pillar and/or Supreme Pillar of the Constitution, His Majesty including the Royal Highnesses, the Rulers are entrusted to uphold the rule of law and order in the country.[253]

[247] *Pegawai Pengurus Pilihanraya Dewan Undangan Negeri Bagi Pilihan Raya Dun N.27 Amino Agos bin Suyub v Dr Streram a/l Sinnasamy & Ors* [2019] MLJU 1558.
[248] Glenna Robson, 'A Layman looks at the 'Rule of Law'' (2004) 168 JPN 332.
[249] *Lim Cho Hock* (n 235), 196.
[250] Federal Constitution, Article 4.
[251] Edmund Bon Tai Soon, 'Foraging for Rights to Forge a Nation: Is it Time to Reconstitute the Malaysian Constitution?' (2008) Law Review 232, 233.
[252] n/a, 'Dr M: Govt to steer Malaysia according to rule of law' *The Star* (Petaling Jaya, 4 October 2019) <https://www.thestar.com.my/news/nation/2019/10/04/dr-m-govt-to-steer-malaysia-according-to-rule-of-law> accessed 8 February 2021.
[253] *Nik Nazmi bin Nik Ahmad v PP* [2014] 4 MLJ 157.

As previously mentioned, responsibility and accountability have an inherent discrepancy within them. The judiciary, being the central pillar of the democratic state[254] is not only responsible to uphold the rule of law but also accountable to sustain the survival of the principle in Malaysian democracy. The Federal Court in *Alma Nudo Atenza v PP* propounded that it is the duty of the courts to declare what is a valid Act of Parliament[255] and such decision cannot be invalidated by any authority outside the courts.[256]

Malaysian judicial pronouncements do profess that the power of the courts is a natural and necessary corollary of the rule of law[257] and it is stressed that the role of the judiciary in upholding the rule of law is in no way inimical to the democratic government.[258] As rule of law is the bedrock to which our society was founded and on which it has thrived,[259] the 'constitutional soul' of the judge is accountable to safeguard the rule of law as it ensures a nation which is once recognised to be an oasis is not turned into a desert. Conclusively in answering the prime question, the responsibility to uphold rule of law in a nation is upon all members of the society but the accountability and the last word lies with the judiciary.

6. What is the Status of the Rule of Law under the Malaysian Federal Constitution?

As the standing of the judiciary in upholding the rule of law in Malaysia has been explicated, it is necessary to elucidate the status of the concept of rule of law under the Malaysian legal context. As aforementioned, the fountainhead of the operation of the rule of law in Malaysia is the Federal Constitution as confirmed in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals*.[260]

The Federal Court ruled that the Constitution 'must be interpreted in light of its historical and philosophical context as well as its fundamental underlying principles'[261] and affirmed that rule of law is a 'basic feature' of the Malaysian Federal Constitution[262] because it was the central precept of the Reid Commission when it devised the Merdeka Constitution.[263] Various judicial precedents have declared that the definition of 'law' in the Federal Constitution is not exhaustive but open-ended by reference,[264] *inter alia*, to Article 160(2) of the Federal Constitution which encapsulates the concept of rule of law inherently within it.

[254] *National Union of Bank Employees v Director-General of Trade Union* [2013] MLJU 1567.
[255] [2019] 4 MLJ 1.
[256] *Medical Council Of India v The State Of Kerala* Writ Petition (C) No 178 & 231 of 2018.
[257] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and other Appeals* [2018] 1 MLJ 545.
[258] Ibid, 565.
[259] *JRI Resources SdnBhd v Kuwait Finance House (M) Bhd* [2019] 3 MLJ 561.
[260] *Indira Gandhi a/p Mutho* (n 257).
[261] *National Union of Bank Employees v Director General of Trade Union* [2013] MLJU 1567.
[262] *JRI Resources Sdn Bhd* (n 259).
[263] Reid Commission, *Report of the Federation of Malaya Constitutional Commission 1957* (London, Colonial No.330).
[264] *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1.

Consequently and imperatively, the word 'law' in Articles 5(1), 8(1) and in other fundamental liberties provisions in the Federal Constitution must, therefore, be in tandem with the concept of the rule of law and not rule by law.[265]

The gradualist approach shows that a paradigm shift has occurred in respect to the stature of the concept of the rule of law under the Federal Constitution. Instead of limiting the facets and dimensions of rule of law only to the expression 'law' wherever used in the Constitution, recent decisions do adduce that the stream of the rule of law flows throughout the Constitution.

The quintessential principle is reckoned as a 'basic structure doctrine'[266] of the supreme document which requires the court to interpret the Constitution as a *sui generis* instrument whose 'provisions should be read broadly and purposively in a way to advance the protection of fundamental rights' as the ultimate goal of constitutional interpretation is to maintain the rule of law.[267]

As to further substantiate the claim that the rule of law forms the basic structure and is not limited to the word 'law' in the Federal Constitution, the recent unanimous decision of the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[268] confirmed that the doctrine of the basic structure of the constitution applies in Malaysia and most importantly, pronounced that the doctrine of separation of powers and the independence of the judiciary are part of the basic structure of the Constitution. Even though the rule of law was not explicitly mentioned in the referred decision, in the Federal Court decision of *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd*, it was asserted that the doctrine of separation of powers and independence of the judiciary is 'based on the rule of law' which impliedly declares the notion of the rule of law as a part of the basic structure of the Malaysian Federal Constitution.[269]

As the rule of law is declared as the basic structure and foundational principle of the Constitution,[270] the notion of rule of law provides an added safeguard for the fundamental liberties which is enlisted in the Federal Constitution.[271] The existence and prominence of the rule of law in the Malaysian judiciary ensures that the fundamental liberties under Articles 5 to 13 will be given due regard which is vital to protect individual identities of the vulnerable minorities against the assimilative compression of the secured majority.

[265] *Lee Kwan Woh v PP* [2009] 5 MLJ 301.
[266] *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v State of Kerala and Anor* [1973] 4 SCC 225.
[267] *Nik Nazmi bin Nik Ahmad v PP* [2014] 4 MLJ 157.
[268] [2017] 5 CLJ 526.
[269] *JRI Resources Sdn Bhd* (n 259).
[270] *Indira Gandhi a/p Mutho* (n 257).
[271] Federal Constitution, Part II.

Even though the entire Constitution should be interpreted within the ambit of the rule of law, special accentuation should be given to the provisos under Part II of the Federal Constitution as F.A. Hayek has identified that the virtue of rule of law is the protection of individual freedom.[272] The fundamental liberties under the Federal Constitution should be interpreted in light of the rule of law as it is necessary to relate the law with the indispensable 'assessments of human values and purposes of the society'.[273] For instance, in *Nik Noorhafizi bin Nik Ibrahim v PP*, the court interpreted Article 5(1) in consideration of the rule of law to accommodate the procedural and substantive rules of justice within the liberty of a person.[274]

Similarly, in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah*, the Diceyan postulate of 'equality before the law' was stated to be enclosed within Article 8(1) and affirmed that the 'basic principle of the rule of law permeates every provision of the Constitution'.[275] The above-mentioned examples do corroborate the gradualist approach of the Malaysian judiciary favouring a more liberal judicial treatment upon the notion of rule of law. Progressively, the courts have expressly acknowledged that the foundational axiom is necessary for giving full force and might to the Federal Constitution,[276] principally in defining as well as enforcing the rights of individuals.[277]

Speaking of rights of individuals, aside from a bill of rights containing an enumeration of individual fundamental liberties, the supreme document also contains provisos which recognise group-specific rights and legitimises affirmative action policies in favour of Malays and natives of Sabah and Sarawak. Even though the rule of law requires scrupulous adherence to human rights standards, notably, equality before the law,[278] the Federal Court ruled that in Malaysia, 'there cannot be absolute freedom' and declared that freedom is not an absolute right but granted under the law.[279]

Being in a plural society, the courts perceive that fundamental liberties interpreted in the light of the rule of law are not a charter for treating the unequals alike or the equals unequally, but contend that the Diceyan doctrine of equality can only survive by resting on valid classifications.[280] Therefore, although the courts have accepted rule of law as a basic structure of the Constitution, the optimal potential of the doctrine is restricted due to the unresolved

[272] [1980] 2 MLJ 148, 198.
[273] *National Union of Bank Employees v Director-General of Trade Union* [2013] MLJU 1567.
[274] [2013] 6 MLJ 660.
[275] [1998] 3 MLJ 289.
[276] *Pegawai Pengurus Pilihanraya Dewan Undangan Negeri Bagi Pilihan Raya Dun N.27 Amino Agos bin Suyub* (n 247).
[277] *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333.
[278] Raz (n 241), 333.
[279] *Kerajaan Malaysia* (n 211).
[280] *Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor* [2007] 6 MLJ 709.

political and social issues[281] which Professor Dr Shad Saleem Faruqi coined as 'dark clouds over the horizon'.

While the scope of the supreme law is both vast and deep, the crux of the Federal Constitution can be observed in Part II of the charter which enlists the fundamental liberties which are converged upon the rule of law. As asserted earlier, courts being the vanguards of the doctrine of rule of law bear the duty of interpreting the provisions by construing the Constitution in its entirety so as to safeguard fundamental liberties.[282]

Essentially, as the notion of rule of law flows throughout the Constitution, the meaning of a provision in dispute is adjudicated with regards to the other Articles in the Constitution itself which formulates several issues that contravene the utopian intentions of the doctrine. As for this exposition, the practical germaneness of the rule of law to the enforcement of the rights in respect of education by virtue of Article 12(1)[283] is examined comprehensively.

Before delving into the adherence of the enforcement of Article 12(1) according to the rule of law, it is crucial to grasp the historical background of education in Malaysia generally. In the era of British colonisation (1786-1957), the pyramidal colonial educational system created an ominous inequality in the distribution of educational opportunities between members of society. Although the Malay feudal class had access to secondary and/or tertiary education via the British-oriented elitist education systems, the majority of the Malay population could only pursue education at elementary level, whereas, the educational policy of the great number of Indian and Chinese people were concentrated upon vernacular schools. This allowed the British to maintain economic and cultural separatism in the society.[284]

As Malaysia achieved independence, the dream of democratization of education was realised by the 'rapid provision of universal, free primary and secondary education' and notably, the Alliance Party did perceive education as an instrument to form a more egalitarian and unified community.[285] Due to the crisis in May 1969, there was a pressing need for the Alliance Party 'to restructure the Malaysian society' by launching the New Economic Policy in 1971, principally favouring the Bumiputra population in various sectors of the nation, especially education.[286] Such legitimised preferential treatment is still regarded by some scholars to be against the Diceyan rule of law whereas the advocates of affirmative action perceive it as a 'necessary evil' to preserve the 'social contract'.

[281] Shad Saleem Faruqi, *Our Constitution* (Thomson Reuters 2019) 290.
[282] Edmund Bon Tai Soon (n 251), 233.
[283] Federal Constitution, Article 12(1).
[284] Viswanathan Selvaratnam, 'Ethnicity, Inequality and Higher Education in Malaysia' (1988) 32 Comparative Education Review 173, 175.
[285] Ibid, 177.
[286] Reuben Balasubramaniam, 'Hobbism and the Problem of Authoritarian Rule in Malaysia' (2012) 4 Hague Journal on the Rule of Law 211, 227.

Through a narrow lens, Article 12(1) is a priceless provision, which eradicates discrimination in the context of religion, race, descent or place of birth, in admission into any public educational institutions, payment of fees or any public aid. The issue against the Diceyan notion of rule of law arises when Article 12(1) is interpreted in view of Articles 153(4) & (8A) which affirms the preferential treatment favouring the Malays and natives of Sabah and Sarawak in every facet of education.

The concept of open competition or contest mobility which was practised in the early years of independence[287] was removed and replaced by a 'quota system' which was deemed essential to reflect the ethnic composition of the country in public educational institutions. For example, the recent controversy regarding the 90% allocation of matriculation admission to Bumiputras[288] substantiates the rift of the notion of rule of law, within Article 12(1), on paper and in practice due to its interpretation as well as enforcement.

Anyhow, it is vital to understand that a blanket preferential policy which has witnessed mismanagement of quotas has proven to widen the intragroup inequality.[289] To illustrate, referring to the Constitution (Amendment) Act of 1971[290] and the Universities and University Colleges Act of 1971,[291] tertiary educational institutions were required to admit more Bumiputra students to actualise the objectives of the Second Malaysia Plan (1971-1975) which was based on the 1971 New Economic Policy[292] but due to the aforementioned reason, the mission remains as a future vision.[293]

Furthermore, the lack of regard for a thick perspective of rule of law in enforcing educational rights has forced the non-Bumiputras to pursue education through private institutions which are comparatively expensive, funneling some of them through a vicious cycle of lower educational opportunities leading to lower living standards.[294] Education is observed as an avenue of self-advancement and 'the talisman of hope and symbol of success'[295] by the

[287] Shad Saleem Faruqi (n 281), 181.
[288] Nathaniel Tan, 'Maszlee and the return of dangerous political fault lines' *The Star* (Kuala Lumpur, 21 May 2019) <https://www.thestar.com.my/opinion/columnists/all-the-pieces-matter/2019/05/21/maszlee-and-the-return-of-dangerous-political-fault-lines/> accessed 8 February 2021.
[289] Nurul Izza Idris, 'Rethinking the value of preferential treatment' (2009) UCL Jurisprudence Review 45, 52.
[290] Constitution (Amendment) Act of 1971.
[291] Universities and University Colleges Act of 1971.
[292] Government of Malaysia, *Second Malaysia Plan 1971-75* (National Printing Department 1971) 232.
[293] James Joseph Puthucheary, *Ownership and Control in the Malayan Economy* (Eastern University Press 1960) 230.
[294] Malaysian Chinese Association, *Memorandum on the Review of the National Education System in Malaysia* (MCA Education Bureau 1975) app. 2.
[295] Thambiayya Marimuthu, 'Education, Social Mobility and the Plantation Environment' (1971) 2 Jurnal Pendidikan 91.

Malaysian community due to 'structural, socio psychological, and group-variable influence'.[296]

The preferential treatment opposing the ideal application of the rule of law has made the 'Bumiputra factor' the golden ticket to various educational opportunities at the expense of equality for all.[297] This proves that the preferential system opposing the optimal operation of the rule of law is not justified based on the nation's collective need and welfare but is instead heavily dependent on racial policies.[298]

However, every coin has two sides to it. In this case, the flip side would be explicated under distinct justifications. It is pertinent to emphasise that sameness is not required to achieve equality but the adoption of specific means as to fulfil specific needs are required for greater equity. For example, despite the preferential treatment over certain education matters, the Pakatan Harapan government has upheld the axiom of rule of law under Article 12(1) by providing the necessary funding for all public educational institutions in Malaysia, including vernacular schools irrespective of racial backgrounds under Part VII of the Federal Constitution.

For example, under the recent announcement of '2020 Budget', an equal amount of RM50 million was provided to Tamil and Chinese vernacular schools as well as Sekolah Berasrama Penuh (SBP) together with Maktab Rendah Sains Mara (MRSM) to maintain and upgrade the schools.[299] This authenticates that the Diceyan doctrine of equal rights under Article 12(1) is indubitably safeguarded, as every student of any public education institution is provided with the liberty to relish the fruit of public funding without being anchored down by their social background.

Additionally, the abolishment of fixed criteria to qualify for the School Textbook Loan Scheme further substantiates the operation of the rule of law in the educational policies of the Malaysian government as every student has equal access to competent resources.[300] Regardless of the disparities created by the preferential treatment, the notion of rule of law is practised under Malaysian educational policies by embodying social inclusivity as well as

[296] P.G. Carpenter and J.S. Western, 'Aspirations for Higher Education' (1982) 26 Australian Journal of Education 266, 278.
[297] Shad Saleem Faruqi (n 281), 187.
[298] *Manoharan Malayalam & Anor v Dato' Seri Mohd Najib Abdul Razak & Ors* [2013] 8 CLJ 1010.
[299] n/a, 'Education Ministry largest 2020 Budget recipient with RM64.1b' *New Straits Times* (Kuala Lumpur, 11 October 2019) <https://www.nst.com.my/news/government-public-policy/2019/10/528981/education-ministry-largest-2020-budget-recipient-rm641b> accessed 8 February 2021.
[300] Abd Murad Salleh, Marohaini Yusoff & Shahrir Jamaluddin, 'Penggunaan buku teks dalam kalangan guru dan murid sekolah menengah: satu tinjauan kuantitatif' (2008) 28 Malaysian Education Journal 147, 150.

nurturing communal integration via various policies such as 'Shared Prosperity Vision 2030'[301] in conjunction with racial distinctions as to reduce horizontal inequality.

The Reid Commission did mention that the preferential treatment is necessary as the 'Malays would be at a serious and unfair disadvantage if they were suddenly withdrawn'. The Commission also stated that 'the need for the preferences will gradually disappear so that there should be no discrimination between races' to uphold the ideal character of the rule of law.[302] The notion of rule of law can be optimally practiced in the Malaysian education system by enforcing educational rights as to placate and accommodate the disparate necessities of each distinct social group.

As a suggestion, a special criterion, exclusively concerning the preferential treatment in educational opportunities that are based on socio-economic status irrespective of race and religion would be a better alternative. The previous executive branch of government was expected to reform the Malay Agenda/ Bumiputra policy as the Council of Eminent Persons (CEP) advocated that reforms to the affirmative action policies are essential to carry Malaysia to the next economic tier.[303]

7. Conclusion

The idealistic axiom of the rule of law is a key hallmark of the Malaysian Federal Constitution which could potentially reshape the future of our nation despite the political situation of the country and protect the legitimate interests of each individual of the society. This chapter asserts that the dogma of the rule of law is the safeguard that serves to counteract arbitrary exercise in a 'regime of exception'[304] with authoritarian methods. The Malaysian road towards the thick perspective of the rule of law has just begun to be constructed as the Malaysian judiciary and executive have subscribed to the gradualist approach despite the different momentums which is evident through the recent judicial pronouncements and administrative decisions respectively.

[301] Adib Povera and Arfa Yunus, 'Education Ministry's main focus is vision for shared prosperity through education' *New Straits Times* (Putrajaya, 6 February 2020) <https://www.nst.com.my/news/nation/2020/02/563098/education-ministrys-main-focus-vision-shared-prosperity-through-education> accessed 8 February 2021.
[302] *Indira Gandhi a/p Mutho* (n 257), 74.
[303] James Chin, 'New Malaysia: Four key challenges in the near term' (2019) Lowy Institute for International Policy 1, 5.
[304] Tim N. Harper, *The End of Empire and the Making of Malaya* (Cambridge University Press 2001) 2.

In Malaysia, the executive restrains or progresses slowly in acceding to various international obligations[305] claiming to secure the 'social contract'[306] whereas the judiciary has started to construe the axiom of rule of law broadly by referring to unincorporated treaties in the decision-making process. The gradual incorporation of international law by the judiciary within the municipal system of law has transformed Malaysia from demarcating the axiom of the rule of law within the walls of the thin perspective, to broadly interpret it in consideration of the thick perspective. The gradualist approach has allowed the judiciary to stand in the middle of the road facing the direction of the thick perspective of the rule of law.

Nevertheless, it is vital to understand that the judiciary still waves a red flag in welcoming international human rights law as a whole and appreciates that 'some diminution in the strength of the rule of law' is necessary to accommodate executive decisions.[307] Therefore, the coordination between the executive and the judiciary is fundamental to adopt the international standards of the rule of law. As a recommendation to actualise such coordination, it is suggested that the rule of law should not be merely used as empty rhetoric but the executive should operationalise the rule of law conception of the judiciary and work as an integrated system to protect the basis of a democratic state.

Democracy can be defined as 'an interminable participative operation'[308] which is resolutely built upon the principle of rule of law. The Malaysian Federal Constitution is a *magnum opus* of compromise and moderation which is further strengthened by the shared responsibility of all members of the society in upholding the principle of rule of law. Even though the responsibility of preserving the principle is shared by all, it is indisputable that the accountability of defending the rule of law rests with the judiciary. The courts, being the guardian of constitutional rights,[309]interpret as well as enforce constitutional provisions conferring rights with the fullness required to preserve the rule of law.

The chronicle of the Malaysian Federal Constitution provides that the country is founded upon the principle of rule of law[310] and recent judicial decisions have affirmed that the rule of law is not merely a competing value but forms a part of the 'basic structure doctrine' of the supreme document. Rather than confining the axiom into the word 'law' in the Federal

[305] Tashny Sukumaran, 'Mahathir's U-turn on UN race treaty: for Malaysia, a necessary-if backwards- step?' *South China Morning Post* (Hong Kong, 2 December 2018) <https://www.scmp.com/week-asia/politics/article/2175870/mahathirs-u-turn-un-race-treaty-malaysia-necessary-if-backwards> accessed 8 February 2021.
[306] Mohd Roslan Mohd Nor & Mahmud Ahmad, 'The Malay Muslim Dilemma in Malaysia after the 12th General Election' (2013) 1 Malaysian Journal of Democracy and Election Studies 10, 11.
[307] *Madhuvita Janjara Augustin* (n 240), 245.
[308] *Mohinder Singh Gill & Anr. v Chief Election Commissioner & Ors* [1977] Indlaw SC 53.
[309] *Hock Huat Chan Sdn Bhd v Assan bin Mohammad & Ors* [2008] MLJU 92.
[310] Kevin Y.L. Tan, 'The Role of Law of Public Law in Developing Asia' (2004) Singapore Journal of Legal Studies 265, 285.

Constitution, the judiciary has progressed in acknowledging the dogma to be construed as an integral part of the *sui generis* document which cannot be impugned.

Although the reading of Article 12(1) in the ambit of Articles 153(4) and (8A) legitimises preferential treatment opposing the Diceyan postulates, such interpretation is required to preserve the sanctity of the 'social contract' as the preferential educational policy is 'deeply embedded in the structure of Malaysian society'.[311] As a suggestion to operationalise the Diceyan principle of rule of law within the Malaysian educational policies, the B40 benchmark[312] can be set as the special criterion concerning preferential treatment as it would embody social inclusivity and nurture communal integration.

The change of regime in May 2018 provided confidence to the people and a powerful reminder to politicians that deeper reforms consolidating the notion of rule of law would and should be made in the future years of administration. With yet another regime change in 2020 the hope is that the thick understanding of rule of law will progressively develop. Ultimately, it is affirmed that the rule of law acts as a 'facilitator and guarantor of sound business and investment environment'[313] which will enhance economic productivity and political stability of the nation regardless of which regime is actually in power.

[311] Nurul Izza Idris, 'Rethinking the value of preferential treatment' (2009) UCL Jurisprudence Review 45, 48.
[312] Rebecca Rajaendram, 'Giving B40 a chance at quality education' *The Star* (Putrajaya, 30 April 2019) <https://www.thestar.com.my/news/nation/2019/04/30/giving-b40-a-chance-at-quality-education/> accessed 8 February 2021.
[313] *Madhuvita Janjara Augustin* (n 240), 245.

References

Adong bin Kuwau & Others v Kerajaan Negeri Johor and Anor [1997] 1 MLJ 418.

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

Balasubramaniam R, 'Hobbism and the Problem of Authoritarian Rule in Malaysia' (2012) 4 Hague Journal on the Rule of Law 211.

Berita Viral, 'Breaking News! - Tun Dr. Mahathir Press Conference - 12:30PM - 10/5/2018' (*Youtube*, 10 May 2018) <https://www.youtube.com/watch?v=ONfNj-5dbz8> accessed 9 February 2021.

Carpenter, P.G. and Western, J.S., 'Aspirations for Higher Education' (1982) 26 Australian Journal of Education 266.

Chin, J., 'New Malaysia: Four key challenges in the near term' [2019] Lowy Institute for International Policy 1.

Civil Law Act 1956.

Constitution (Amendment) Act 1971.

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697.

Dicey, A.V., *An Introduction to the Study of the Law of the Constitution* (ECS Wade ed, 10th edn, Macmillan 1959).

Diplomatic Privileges Act 1964 (UK).

Faruqi, S.S., *Our Constitution* (Thomson Reuters 2019).

Federal Constitution of Malaysia.

Fuller, L., *The Morality of Law* (Yale University Press 1964).

Government of Malaysia, *Second Malaysia Plan 1971-75* (National Printing Department 1971).

Harper, T.N., *The End of Empire and the Making of Malaya* (Cambridge University Press 2001).

His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anor [1973] 4 SCC 225 (India).

Hock Huat Chan Sdn Bhd v Assan bin Mohammad & Ors [2008] MLJU 92.

Idris, N.I., 'Rethinking the value of preferential treatment' [2009] UCL Jurisprudence Review 45.

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

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 993.

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

Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1.

Kerajaan Malaysia v Mat Suhaimi bin Shafiei [2018] MLJU 32.

Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors [1997] 3 MLJ 23.

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

Lee, H.P., 'Competing Conceptions of the Rule of Law in Malaysia' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (Routledge 2004).

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

Lembaga Tatatertib Perkhidmatan Awam v Utra Badi [2000] 3 MLJ 281.

Lim Cho Hock v Government of the State of Perak &Ors [1980] 2 MLJ 148.

*Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara &*Ors [2017] 8 MLJ 122.

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

Madhuvita Janjara Augustin v Augustin a/l Lourdsamy & Ors [2018] 1 MLJ 307.

Majlis Perbandaran Ampang Jaya v Steven Phao Cheng Loon & Ors [2006] 2 MLJ 389.

Malaysian Chinese Association, *Memorandum on the Review of the National Education System in Malaysia* (MCA Education Bureau 1975).

Manoharan Malayalam & Anor v Dato' Seri Mohd Najib Abdul Razak & Ors [2013] 8 CLJ 1010.

Marathaei d/o Sangulullai v Syarikat JG Containers (M) Sdn Bhd [2003] 2 MLJ 337.

Marimuthu T., 'Education, Social Mobility and the Plantation Environment' (1971) 2 Jurnal Pendidikan 91.

Medical Council Of India v The State Of Kerala Writ Petition (C) No 178 & 231 of 2018 (India).

Merdeka University Bhd v Government of Malaysia [1981] 2 MLJ 356.

Mohamed Ezam bin Mohd Noor v Ketua Polis Negara [2002] 4 MLJ 449.

Mohinder Singh Gill & Anr. v Chief Election Commissioner & Ors [1977] Indlaw SC 53 (India).

n/a, 'Dr M: Govt to steer Malaysia according to rule of law' *The Star* (Petaling Jaya, 4 October 2019) <https://www.thestar.com.my/news/nation/2019/10/04/dr-m-govt-to-steer-malaysia-according-to-rule-of-law> accessed 8 February 2021.

n/a, 'Education Ministry largest 2020 Budget recipient with RM64.1b' *New Straits Times* (Kuala Lumpur, 11 October 2019) <https://www.nst.com.my/news/government-public-policy/2019/10/528981/education-ministry-largest-2020-budget-recipient-rm641b> accessed 8 February 2021.

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

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

Nik Noorhafizi bin Nik Ibrahim v PP [2013] 6 MLJ 660.

Noorfadillabinti Ahmad Saikin v Chayed bin Basirun and Ors [2012] 1 MLJ 832.

Nor Anak Nyawai v Borneo Pulp Plantatio [2001] 6 MLJ 241.

Nor M.R.M. & Ahmad M., 'The Malay Muslim Dilemma in Malaysia after the 12th General Election' (2013) 1 Malaysian Journal of Democracy and Election Studies 10.

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

Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor [2007] 6 MLJ 709.

Povera, A. and Yunus, A., 'Education Ministry's main focus is vision for shared prosperity through education' *New Straits Times* (Putrajaya, 6 February 2020) <https://www.nst.com.my/news/nation/2020/02/563098/education-ministrys-main-focus-vision-shared-prosperity-through-education> accessed 8 February 2021.

Puthucheary, J.J., *Ownership and Control in the Malayan Economy* (Eastern University Press 1960).

Rajaendram, R., 'Giving B40 a chance at quality education' *The Star* (Putrajaya, 30 April 2019) <https://www.thestar.com.my/news/nation/2019/04/30/giving-b40-a-chance-at-quality-education/> accessed 8 February 2021.

Raz, J., 'The Rule of Law and Its Virtue' (1977) 93 LQR 195.

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

Robson, G., 'A Layman looks at the 'Rule of Law'' (2004) 168 JPN 332.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

Sagong Bin Tasi v Kerajaan Negeri Selangor [2005] 6 MLJ 289.

Salleh, A.M., Yusoff M. & Jamaluddin S., 'Penggunaan buku teks dalam kalangan guru dan murid sekolah menengah: satu tinjauan kuantitatif' (2008) 28 Malaysian Education Journal 147.

Selvaratnam V., 'Ethnicity, Inequality and Higher Education in Malaysia' (1988) 32 Comparative Education Review 173.

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat [2017] 5 CLJ 526.

Sivarasa Rasiah v Badan Peguam [2010] 2 MLJ 333.

Smith, A.M., 'Attributability, Answerability, and Accountability: In Defense of a Unified Account' (2012) 122 Ethics 575.

Soon, E.B.T., 'Foraging for Rights to Forge a Nation: Is it Time to Reconstitute the Malaysian Constitution?' (2008) Law Review 232.

Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1998] 3 MLJ 289.

Sukumaran, T., 'Mahathir's U-turn on UN race treaty: for Malaysia, a necessary-if backwards-step?' *South China Morning Post* (Hong Kong, 2 December 2018) <https://www.scmp.com/week-asia/politics/article/2175870/mahathirs-u-turn-un-race-treaty-malaysia-necessary-if-backwards> accessed 8 February 2021.

Tan, K.Y.L., 'The Role of Law of Public Law in Developing Asia' (2004) Singapore Journal of Legal Studies 265.

Tan, N., 'Maszlee and the return of dangerous political fault lines' *The Star* (Kuala Lumpur, 21 May 2019) <https://www.thestar.com.my/opinion/columnists/all-the-pieces-matter/2019/05/21/maszlee-and-the-return-of-dangerous-political-fault-lines/> accessed 8 February 2021.

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261.

Thio, L., 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) 4 National Taiwan University Law Review 335.

UN General Assembly 'Transforming our world: the 2030 Agenda for Sustainable Development' A/RES/70/1 (21 October 2015) <https://www.refworld.org/docid/57b6e3e44.html> accessed 8 February 2021.

Universities and University Colleges Act 1971.

Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

Waldron, J., 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 European Journal of International Law 315.

Suing China over COVID-19: International and Malaysian Perspectives

Chong Wei Li*
Law Graduate of Queen's University Belfast
CLP Candidate 2020, Malaysia
weili2997@gmail.com

Abstract
COVID-19 had far-reaching economic and social consequences which stunned the rate of globalisation. The emergence of COVID-19 within China and the Chinese government's failure to promptly and transparently provide needed information to the international community raises the question whether the Chinese government and/or its officials could be held civilly or criminally liable under international law or domestic law. In the United States, several individuals, small businesses and States have filed a total of at least 14 different suits against China (and affiliated entities and officials) based on its perceived culpability in causing the pandemic. This article explores which court has the competence and jurisdiction to deal with the international responsibility of the Chinese government. This article discusses four possible scenarios under both national courts and international forums for a lawsuit against China. Specifically, the author also analyses the Malaysian position on the possible legal actions against China.

Keywords: International law, sovereign immunity, COVID-19, liability, Foreign Sovereign Immunity Act, arbitration, China, Malaysian perspective.

1. Introduction

COVID-19 changed everything. Efforts to prevent and contain the spread of the virus have caused the world to change. COVID-19 had far-reaching economic and social consequences which stunned the rate of globalisation. The COVID-19 pandemic has caused a near standstill in the global economic activity and a financial crisis with yet unforeseen consequences. World economies are in shambles, but when the dust settles fingers will be pointed and responsibility strictly apportioned. One would be able to foresee the issue of China's legal liability for the COVID-19 outbreak. In particular, a $20 trillion lawsuit has been filed against Chinese authorities in the U.S. over the coronavirus outbreak. American lawyer Larry Klayman and his advocacy group Freedom Watch along with Texas company Buzz Photos have filed a USD 20 trillion lawsuit against the Chinese government, Chinese army, the Wuhan Institute

* My deep and sincere gratitude to my family and friends for their continuous and unparalleled love, help and support. I am forever indebted to my parents for giving me the opportunities and experiences that have made me who I am. I would also like to thank Ms. Puteri Sofia Amirnuddin for encouraging me to submit a piece of work for academic publication.

of Virology, Director of Wuhan Institute of Virology Shi Zhengli and Chinese Army's Major General Chen Wei.[314]

Under the immense human and economic loss caused by the COVID-19 pandemic, do they have any basis for filing a lawsuit? With the current state of international law, is the claimant State required to prove negligence or breach of an international legal duty to receive any compensation from China?

According to the fundamental principles of international law, a State breaches its international responsibility when it violates international obligations or intentionally commits a wrongful act. Thus, the claimant State should prove that China has violated its international obligations. In this case, only an internationally wrongful act such as the breach of an international treaty or the violation of another State's territory will be taken into consideration. With regards to the pandemic, China has not breached any general legal duty or obligation. The subsequent question is which court has the competence and jurisdiction to deal with the international responsibility of the Chinese government. There are four possible scenarios for a lawsuit against China.

2. National Courts

First of all, a lawsuit can be brought in the national courts. At least twelve class-action lawsuits have been filed against the Chinese government and governmental departments in the federal U.S. courts. The lawsuits are concerned with COVID-19 related losses, death and injuries. It is possible to file a class action against a country and an analogy can be drawn to Libya that faced a class-action lawsuit for the 1988 Pan Am bombing over Lockerbie, and they eventually paid U.S. 1.5 billion to the American victims' families.[315] Nevertheless, law professor Stephen L. Carter from Yale University and several other jurists question the legal liability of these COVID-19 related class-action suits since it is hard to prove and there is no basis for the American courts to have jurisdiction. Professor Carter explains that nation-states are immune from such lawsuits.[316]

In accordance with the principles of international law, the national courts are not competent to entertain an international dispute between States. As mentioned above, the individual complaints in domestic courts have no legal basis. Hence, China can invoke its immunity from such jurisdiction. In a case where any local court made a judicial decision in this matter and ordered compensation from China, that decision would not be enforceable.

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[314] *Buzz Photo v People's Republic of Chin*a, No. 3:20-cv-656 (N.D. Tex. Mar. 17, 2020).

[315] n/a, 'Libya pays $1.5 billion to settle terrorism claims', *CNN* (United States, 31 October 2008) <https://edition.cnn.com/2008/WORLD/africa/10/31/libya.payment/index.html> accessed 6 May 2021.

[316] Stephen L. Carter, 'Can China Be Sued Over the Coronavirus?' (*Bloomberg Opinion*, 24 March 2020) <https://www.bloomberg.com/opinion/articles/2020-03-24/can-china-be-sued-over-the-coronavirus> accessed 6 May 2021.

Moreover, the judicial doctrine called “sovereign immunity” or “state immunity” offers foreign governments a protection against prosecution in American courts. In the U.S., the 1976 Foreign Sovereign Immunities Act (FSIA)[317] provides foreign governments with state immunity, that protects the Chinese government or its political subdivisions, departments, and agencies from being sued without its consent in U.S. federal and local courts, except in relation to certain actions relating to commercial activity in the U.S. or acts of terrorism.

On April 21, 2020, the state of Missouri filed a lawsuit in the U.S. District Court for the Eastern District of Missouri against the People’s Republic of China (“PRC” or “China”) and various other parties.[318] The lawsuit seeks damages from the defendants for their role in unleashing the COVID-19 pandemic, an action that, as the state has alleged, roiled the world for the last three months, put millions of people out of work, and killed thousands in the process. Paul J. Larkin Jr. concludes that the events here are not the type of ordinary commercial or tort law claim that the FSIA allows in American courts.[319] Missouri does not claim that it is a party to a broken contract or a commercial deal gone sour. Nor does the state aver that its personnel or residents have been the victim of a simple motor vehicle accident or the distribution of a poorly manufactured consumer device. Even if the defendants committed deceit on an unprecedented scale in responding to the outbreak of COVID-19 in Wuhan and are legally responsible for their actions under Missouri law, the FSIA is unlikely to allow this case to go forward.[320]

The terrorism exception allows certain plaintiffs to sue countries that have supported certain acts of terrorism and have been designated "state sponsors of terror." Until 2008, this exception was subject to the FSIA's general bar on punitive damages. In 2008, Congress moved the terrorism exception to § 1605A of the FSIA, which is not subject to the bar on punitive damages.[321] Additionally, § 1605A(c) created a federal cause of action for U.S. nationals, Armed Forces members, U.S. Government employees or contractors, and their legal representatives, and it expressly authorizes punitive damages.[322] The 2008 amendments also specified that plaintiffs could file new actions for pre-enactment conduct under § 1605A.

In 2008, the FSIA was invoked by Saudi Arabia to preclude a lawsuit filed by families and victims of the September 11 attacks who alleged that the Saudi leaders had indirectly financed al-Qaeda. Congress responded in 2016 by overriding President Obama's veto of the Justice Against Sponsors of Terrorism Act (JASTA), amending FSIA and allowing the families' suit against Saudi Arabia to proceed in U.S. courts. In *Opati v Republic of Sudan*, the Supreme Court unanimously ruled in May 2020 that FSIA allowed for punitive damages on cause of

[317] The Foreign Sovereign Immunities Act of 1976.
[318] *Missouri ex rel. Schmitt v. People’s Republic of China*, No. 1:20-cv-00099 (E.D. Mo. filed Apr. 21, 2020).
[319] Paul James Larkin, Jr., ‘Suing China Over COVID-19’ (2020) 100 Boston University Law Review Online 91.
[320] Ibid.
[321] 28 U.S.C. § 1605A.
[322] Ibid § 1605A(c).

action from pre-enactment conduct, in a case related to the 1998 United States embassy bombings.[323]

Klayman, his advocacy group Freedom Watch and Buzz Photos, a Texas company, filed the lawsuit in the US District Court for the Northern District of Texas, alleging that the novel coronavirus was 'designed by China to be a biological weapon of war' and that it was released by China 'accidentally or otherwise.'[324] Two observations are relevant here. First, this might be one of the rare complaints against foreign officials in which the foreign state is the 'real party in interest,' which means that the Foreign Sovereign Immunity Act governs both state and official immunity in this case under the Supreme Court's reasoning in *Samantar v Yousuf*.[325] Although the individual defendants are named as alleged joint tortfeasors, it is unlikely that the plaintiffs are seeking $20 trillion damages from the individual defendants' pockets. Second, and more fundamentally, there is no such thing as 'accidental' terrorism. To qualify for the terrorism exception, plaintiffs must at least establish the existence of "an act of international terrorism in the United States," among other elements.[326] Nevertheless, the lawsuits' bare-bone allegations that the pandemic is a result of a leakage from a Chinese biological weapons facility would neither qualify as an alleged "act of international terrorism" nor an act that occurred in the United States.

On July 30, 2020, the Senate Judiciary Committee approved the Civil Justice for Victims of China-Originated Viral Infectious Diseases (COVID) Act, which would amend the Foreign Sovereign Immunities Act to permit lawsuits against China for claims related to the coronavirus. Nevertheless, Shira Anderson and Sean Mirski argue that the Bill is unlikely to become law -especially considering the makeup of the newly elected Congress.[327] They have argued that although the Bill is likely to fail on the Senate floor, the committee's approval sends a powerful message; at least some members of Congress are willing to risk diplomatic blowback in order to take action that they understand as holding China accountable.[328]

Therefore, domestic laws, barring all its other benefits, are unsuited for this task for the principle of sovereign immunity, which prevents local courts from ruling on the acts of foreign governments. Sovereign immunity is not a favour courts do for foreign regimes. It is an act of reciprocity, a peace treaty resting on a shared understanding. So broad is the traditional doctrine that a British court held in 1894 that even if a foreign ruler moves into one's country,

[323] 590 U.S. ___(2020).
[324] *Buzz Photo* (n 314).
[325] 130 S. Ct. 2278 (2010).
[326] 28 U.S.C. § 1605B; *In re Terrorist Attacks on Sept. 11, 2001*, 298 F. Supp. 3d 631, 642 (S.D.N.Y. 2018)
[327] Shira Anderson and Sean Mirski, 'An Update on the Coronavirus-Related Lawsuits Against China' (*Lawfare*, 22 January 2021) <https://www.lawfareblog.com/update-coronavirus-related-lawsuits-against-china-0> accessed 6 May 2021.
[328] Shira Anderson and Sean Mirski, 'How Can China Respond to the Coronavirus-Related Lawsuits Against It?' (*Lawfare*, 3 September 2020) <https://www.lawfareblog.com/how-can-china-respond-coronavirus-related-lawsuits-against-it>accessed 6 May 2021.

takes on an assumed name and conceals his true position and enters into a contract, a lawsuit against him for breach is still barred.[329]

For the lack of enforceability, we must redirect our attention to supranational legal frameworks for remedies and solutions to this precarious inquiry. Unlike national courts, China would not be protected by sovereign immunity before an international court.

3. International Health Regulations 2005

After the spread of SARS in 2003, the World Health Organization (WHO) adopted an International Health Regulation (IHR) by making member countries accountable to counter such global pandemic. Article 6 mandates each member country to " ... notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information."[330] Further, Article 7 goes on to state that if a country " ... has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information."[331] These regulations are further fortified by Articles 11 and 12 of IHR which requires the WHO to share such verified data with other countries so that they can enact precautionary measures.[332]

Some alleged that China not only failed on both counts, but also censored, misled and suppressed information from the media and the WHO, about novel coronavirus and its effects. Moreover, China portrayed COVID-19 as a new form of Pneumonia that could not be transferred from one human to another, which was later admitted by Chinese authorities as otherwise. Research published on 29 January 2020 in the New England Journal of Medicine indicated that, among officially confirmed cases, human-to-human transmission may have started in mid-December 2019,[333] and the delay of disclosure on the results until January 20, rather than earlier in January, brought criticism of health authorities. Collectively, these actions made it difficult for countries around the world to adequately prepare for this deadly virus leading to colossal damages to economy and public health.

Although China has admitted its initial missteps and underestimation of public risks, it had quickly acted to inform the WHO and scientists in the United States soon after. China's Global Times said, "This miscalculation did not hinder the communication between Chinese and foreign scientists. All data were sent out, including a thesis by Chinese scholars in

[329] *Mighell v Sultan of Johore* [1894] 1 QB 149.
[330] International Health Regulations 2005, Article 6.
[331] Ibid, Article 7.
[332] International Health Regulations 2005, Articles 11 and 12.
[333] Qun Li, Xuhua Guan, Peng Wu, et al, 'Early Transmission Dynamics in Wuhan, China, of Novel Coronavirus-Infected Pneumonia' (2020) 382 New England Journal of Medicine 1199.

international academic journals ... ".[334] On 20th January 2020, China made public its findings on human-to-human transmissions. Global Times argued, "At the global level, the time lost could have been compensated by taking resolute measures. This was especially true for those countries far from China."[335]

4. International Court of Justice

In order to resolve the legal dispute, a lawsuit could be brought in the International Court of Justice (ICJ). The ICJ is one of the principal judicial bodies of the United Nations (UN) for settling disputes between States. For a court to be competent for settling this claim, the court must obtain the consent of the adverse countries to resolve their differences. Since neither China nor the United States recognizes the jurisdiction of the court, the ICJ has no competence to render a judicial decision for this possible lawsuit.

Some jurists think that it is not worth bringing an action against China in the ICJ.[336] The ICJ can only exercise its jurisdiction when a State has given its consent, which is not the case. The reason why consent is important is because the international legal system operates on state sovereignty which is recognised in the UN Charter.[337] Alexander and others are of the opinion that rendering an advisory opinion of the ICJ could offer a safer and more advantageous option. Consent from the disputant parties is not necessary for invoking the advisory jurisdiction of the ICJ.[338] Even though an advisory opinion from the ICJ is not legally binding, it could nevertheless help to set a precedent for the international community which would help to regulate the conduct of states. This would aid states to participate proactively in the fruitful functioning of the United Nations system, says Alexander.[339]

Alternatively, the third option is that a State could contemplate filing a lawsuit against China before the Permanent Court of Arbitration (PCA), for having endangered the world population and hurt the international economy by its poor management of the COVID-19 pandemic, on the basis of a violation of the WHO International Health Regulations.

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[334] Global Times, 'Bild editor sells soul attacking China's virus record: Global Times editorial' *Global Times* (Beijing, 20 April 2020) <https://www.globaltimes.cn/content/1186214.shtml>accessed 6 May 2021.
[335] Ibid.
[336] Guo Shuai, 'Don't bother suing China for COVID-19 before the ICJ' *China Daily* (Beijing, 9 April 2020) <https://www.chinadaily.com.cn/a/202004/09/WS5e8ec46aa3105d50a3d15041.html> accessed 6 May 2021.
[337] United Nations Charter, Chapter I, Article 2(1).
[338] Atul Alexander, 'Gauging the Advisory Jurisdiction of the International Court of Justice in the Face of COVID-19' (*Jurist*, 6 April 2020) <https://www.jurist.org/commentary/2020/04/atul-alexander-icj-covid/> accessed 6 May 2021.
[339] Ibid.

5. The Permanent Court of Arbitration

The PCA, established by treaty in 1899, is an intergovernmental organisation providing services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organisations, and private parties. The PCA's functions are not limited to arbitration; they also include providing support in other forms of peaceful resolution of international disputes, including mediation, conciliation, and other forms of alternative dispute resolution.

The cases dealt with by the PCA span a range of legal issues involving territorial and maritime boundaries, sovereignty, human rights, international investment, and international and regional trade. Similarly for the ICJ, the PCA is competent to entertain a dispute only if the states concerned have accepted its jurisdiction.

With regard to health issues, China, as one of the 122 Member States of the PCA is bound by the WHO International Health Regulations adopted on 23 May 2005. These impose several obligations on the WHO Member States in the event of a public health emergency of international concern. The Regulations stipulate, in Article 56 section 3, that any dispute between states regarding their application or interpretation may be settled through arbitration under the auspices of the PCA:

> A State Party may at any time declare in writing to the Director-General that it accepts arbitration as compulsory with regard to all disputes concerning the interpretation or application of these Regulations to which it is a party or with regard to a specific dispute in relation to any other State Party accepting the same obligation. The arbitration shall be conducted in accordance with the *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States*[340] applicable at the time a request for arbitration is made. The States Parties that have agreed to accept arbitration as compulsory shall accept the arbitral award as binding and final. The Director-General shall inform the Health Assembly regarding such action as appropriate.[341]

Nevertheless, the same article, in its section 4, specifies that, "Nothing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organisations or established under any international agreement."[342] Therefore, a state

[340] PCA, 'Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States' <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf> accessed 6 May 2021.
[341] International Health Regulations 2005, Article 56 section 3.
[342] Ibid, Article 56 section 4.

alleging a violation of the WHO 2005 International Health Regulations by China in its management of the COVID-19 crisis could invite it to settle their dispute through the arbitration of the PCA, but China could refuse.

Essentially, the PCA issues binding decisions but has no enforcement power. The issue of compliance of international law, including decisions of international courts and tribunals, has always been viewed as one of the most striking weaknesses of the international legal system. This limitation is partly explained by the lack of enforcement mechanisms under international law that is comparable to those under domestic law. Like for the ICJ, the implementation of PCA's decisions relies on the voluntary execution by the states. We shall then examine precedents where a powerful State defies a decision rendered by an international court or tribunal.

In *Nicaragua v United States*,[343] the ICJ held that the United States had violated both treaty law and customary international law by supporting the Contra rebels, and ordered the United States to refrain from all such acts and make reparation to Nicaragua. Faced with the United States' non-appearance in the merits phase of the case and subsequent rejection of the judgment, Nicaragua brought the issue of enforcement to the UN Security Council pursuant to Article 94 of the UN Charter.[344] This course of action unsurprisingly failed to gain any success due to the United States' veto power as a permanent member of the UN Security Council. Nicaragua then turned to the UN General Assembly (UNGA), at which it managed to persuade the UNGA to pass four resolutions requesting the U.S. to comply with the judgment.[345] While on the surface, these resolutions did not change the rhetoric that the U.S. was pursuing, it did draw public attention to the U.S.' behaviour and put pressure on Washington to adjust its foreign policies. For instance, its strategy to resort to the Security Council and General Assembly had the effect of securing publicity for the issue, which helped convince the U.S. Congress to cut off aid to the Contras in 1988. The United States subsequently lifted its trade embargo against Nicaragua in 1990 and provided the new government of Violeta Chamorro with a significant aid package. Thus, U.S. non-compliance notwithstanding, Nicaragua's initiation of the case and its subsequent strategy eventually helped secure its intended outcome.

As opposed to the ICJ, the PCA is not a UN body, so it cannot even rely on the eventual assistance of the UN Security Council. Thus, a state which would not recognise the PCA jurisdiction may refuse to implement its rulings. For example, in 2013 the Republic of the

[343] (1986) I.C.J. 14.

[344] Article 94(2) of the UN Charter says, "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

[345] Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004) 197-211.

Philippines brought a case against the People's Republic of China concerning a territory dispute in the South China Sea. The PCA declared it had jurisdiction over the case, but China declared that it would not participate in the arbitration. On 12 July 2016, the Court ruled in favour of the Philippines, but China rejected the ruling.[346]

It is submitted that since China is one of the big fives like the United States, China may defy a court or arbitral tribunal's decisions even if China were found liable for the COVID-19 outbreak as shown in the cases of *Nicaragua v United States* and *The South China Sea Arbitration*. Looking at these precedents, the question is then: what are the options that may be available for claimant states, even in the face of China's defiance of the arbitral award, to enforce the arbitral award? Dr. Lan Nguyen argues that the arbitral award could be considered to have impact and not 'just a piece of paper'. She suggests that putting a spotlight on the situation at global forums such as the UNGA could be an option to draw attention to activities which are inconsistent with the legal order established by the award.[347] Vietnam took a measure of a similar nature after the deployment of the Chinese oil rig Haiyang Shiyou 981 in 2014 near the Paracels. Vietnam sent various letters to the UN Secretary General requesting the content of the letters that Vietnam had sent to China condemning the Chinese activities in the Vietnamese EEZ and extended continental shelf be circulated in the sixty-eighth session of the UNGA.[348]

6. International Criminal Law Framework

The fourth option is the United Nations Security Council (UNSC) which has the power under the International Criminal Court's (ICC) Rome Statute to refer cases to the ICC or adapt a resolution against China based on its " ... primary responsibility for the maintenance of international peace and security." Many nations of the world have long sought a mechanism for more effectively prosecuting international criminal law violators. For decades, the UNSC has been the most viable vehicle given the sway held by the most powerful countries and the ability to impose meaningful sanctions. Chapter VII of the United Nations Charter authorizes the UNSC to " ... maintain or restore international peace and security."[349] However, United Nations proceedings generally are not criminal in nature, but diplomatic. Moreover, with

[346] Permanent Court of Arbitration, *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)*<https://pca-cpa.org/en/cases/7/> accessed 6 May 2021. See also Tom Phillips, Oliver Holmes and Owen Bowcott, 'Beijing rejects tribunal's ruling in South China Sea case' *The Guardian* (London, 12 July 2016) <www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> accessed 6 May 2021.

[347] Lan Nguyen, 'The South China Sea Arbitral Award: Not 'Just a Piece of Paper''(*Maritime Issues*, 7 August 2019) <http://www.maritimeissues.com/politics/the-south-china-sea-arbitral-award-not-just-a-piece-of-paper.html#_edn1> accessed 1 June 2021.

[348] United Nations, 'Submission in Compliance with the Deposit Obligations Pursuant to The United Nations Convention on the Law of the Sea (UNCLOS)' (*United Nations,* 8 October 2020) <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/VNM.htm> accessed 1 June 2021.

[349] United Nations Charter, Chapter VII, Article 39.

factions at the UN and the U.S., U.K., France, China, and Russia all hold vetoes as the five full-time members of the UNSC, enforcement becomes extremely difficult in light of the different interests and rivalries among those countries and their allies.

Due to the challenges with imposing accountability for criminal behaviour internationally, nations, through the United Nations General Assembly, sought and achieved ratification of the controversial Rome Statute establishing the International Criminal Court ('ICC'), which was adopted in July of 1998 and went into effect in July of 2002.[350] The ICC's jurisdiction is even more limited than international criminal law in general, as the court has jurisdiction over only 4 categories of crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.[351] As with international criminal law generally, the ICC only has " ... jurisdiction over natural persons."[352]

The ICC's jurisdiction is further limited by the fact that several major nation-states do not recognise its jurisdiction - including both China and the United States. China has neither signed nor ratified the Rome Statute,[353] which means that it is not subject to the ICC's jurisdiction.[354] Similarly, although the United States originally signed the Rome Statute, it later informed the United Nations that it does not intend to become a party to the treaty, and the United States Senate has never ratified the Rome Statute.[355]

Therefore, there are significant impediments to imposing criminal liability under international law for China's response to COVID-19. Even assuming that an appropriate individual could be identified and then found liable, none of the acts currently recognized as criminal under international law would likely cover China's activities. 'Genocide' only covers a discrete list of acts, all of which must be "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such."[356] Despite China may have acted negligently - even recklessly with disregard for human life - by failing to crack down on wet markets, failing to adequately regulate laboratories studying dangerous pathogens, and acting slowly to respond to and notify the public about COVID-19 - it does not seem that it engaged in those actions with intent to destroy any specific group of people.

'Crimes against humanity' only encompasses a list of specific actions, all of which must be " ... committed as part of a widespread or systematic attack directed against any civilian population."[357] Hence, without further evidence, it does not seem that allowing lax security

[350] Rome Statute of the International Criminal Court.
[351] Ibid, Article 5.
[352] Rome Statute of the International Criminal Court, Article 25 § 1.
[353] Assembly of the State Parties of the International Criminal Court, 'State Parties to the Rome Statute: Chronological List' (*International Criminal Court*) <https://bit.ly/39UDWP7> accessed 6 May 2021.
[354] Rome Statute of the International Criminal Court, Article 11.
[355] *Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010) at 119-20 n.16 (describing this history).
[356] Rome Statute of the International Criminal Court, Article 6.
[357] Ibid, Article 7 § 1.

standards to persist at dangerous laboratories, allowing wet markets to thrive and wreak havoc, or even suppressing information would constitute a widespread or systematic attack directed against a civilian population.

7. Malaysian Position on the Possible Lawsuits against China

The legal basis, as far as foreign sovereign immunity is concerned, is Section 3 of the Civil Law Act 1956,[358] which applies the common law in Malaysia as ruled in *Village Holdings (1988)*.[359] Malaysia's approach is based on a restrictive immunity rather than an absolute immunity. The relevant statutes among several passed by Parliament to give effect to treaties are:

(i) Diplomatic Privileges (Vienna Convention) Act 1966,[360] as amended in 1999, to give effect to the Vienna Convention on Diplomatic Relations 1961,
(ii) International Organizations (Privileges & Immunity) Act 1992,[361] and
(iii) Consular Relations (Privileges & Immunities) Act 1999.[362]

None of these statutes bar Malaysians from suing a foreign State for alleged tortious acts which caused loss and damages suffered by them. Jurisdictional immunity can be waived voluntarily by a State or consent can be given to the jurisdiction of another state in its lawsuit. And more importantly, jurisdictional immunity is limited to acts of governments and it does not extend to commercial transactions entered by the State sovereign.

The most significant question is, "What if China does not participate in the Malaysian Court proceedings?" This is an open question since no precedent exists to date and in the event China refuses to accept service of the lawsuit and thereby not submitting to the jurisdiction here, a Malaysian Court, most legal practitioners and scholars agree, would not proceed with the suit or pronounce a judgment. However, there are some legal scholars and lawyers who practise international law vehemently argue that some good grounds on the wider public interest litigation exist for judicial intervention by some bold judges at the appellate stage in our judiciary to hear the suit even if the single Judge at High Court level throws it out.

Further, as discussed earlier, Malaysia follows the 'Doctrine of Restrictive Immunity' and not 'Absolute Immunity' of foreign sovereign states, as exemplified by our Supreme Court in *Commonwealth of Australia v Midford (1990).*[363] The key issue in this case was whether Australia was entitled to immunity in respect of the seizure of property by its Customs Officers. The following is the decision of the Supreme Court, delivered by Gunn Chit Tuan SCJ:

[358] Civil Law Act 1956, section 3.
[359] [1988] 2 MLJ 656.
[360] Diplomatic Privileges (Vienna Convention) Act 1966.
[361] International Organizations (Privileges & Immunity) Act 1992.
[362] Consular Relations (Privileges & Immunities) Act 1999.
[363] [1990] 1 MLJ 475.

> Section 3 of the Civil Law Act only requires any Court in West Malaysia to apply the common law and the rules of equity as administered in England on the 7th day of April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop …. It is correct, as pointed out, that the law in England on sovereign immunity on 7 April 1956, was as declared in cases such as The Parlement Belge. That is, at that time a foreign sovereign could not be sued in personam in our courts. But when the judgment in The Philippine Admiral was delivered by the Privy Council in November 1975, it was binding authority insofar as our courts are concerned …. When the Trendtex case was decided by the United Kingdom Court of Appeal in 1977 it was of course for us only a persuasive authority, but we see no reason why our courts ought not to agree with that decision … That is more so in view of the very strong persuasive authority in the Congreso case in which the House of Lords had … unanimously held that the restrictive doctrine applied at common law … We are therefore of the view that the restrictive doctrine should apply here although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.

Hence, without requiring the intervention of Parliament, the law in Malaysia was brought in line with the major trading nations. Consequently, there is no State Immunity Act here, unlike Singapore which had one enacted in 1979 following the U.K. State Immunity Act of 1978.

Another significant issue in the proposed lawsuit is that it is based on 'tort' i.e. negligent or wrongful act or acts that caused death, injury losses, damages to another or a body/organization and not on contractual commercial matters, terrorist activities or acts or war. It could be quite correctly concluded that a clear mechanism for lawsuits of this nature or precedents i.e. decided cases are non-existent in Malaysia but a few relevant decided cases here and in the UK, Singapore, Australia and India provide proper guidelines and the means. Kandiah Chelliah argues that the legal maxim " ... the duty of the Court is to give effect to a national law and not international law if there is a real conflict between them ... " becomes applicable.[364] Some of the findings in *Anthony Woo v. Singapore Airlines*[365] and the appeal therefrom in *Civil Aeronautics Administration v. Singapore Airlines*[366] in the Singapore Courts under its State Immunity Act 1978, offer some glimmer of hope for death or personal injury claims but it must be noted that Taiwan is not recognised by Singapore as a *de jure* (or *de facto*) State for the purpose of a claim of state immunity.[367]

[364] Kandiah Chelliah, 'Can China be sued in a class-action lawsuit over the SARS-COV 2 or COVID-19 pandemic in Malaysia' [2020] 1 LNS(A) lv.
[365] [2003] 3 Sing.L.R. 688 (Singapore High Court).
[366] [2004] SGCA 3.
[367] Ibid.

Unsurprisingly, there would also be internal or governmental objection to such a lawsuit since it disrupts the strong economic, diplomatic and bilateral ties enjoyed by both states all these years. The extraordinary criticism and abuse levelled against Australia which called for an official inquiry into the outbreak, the attack against Bild, and the U.S. lawsuits, are noteworthy instances. Thus, any lawsuit contemplated has to run the gauntlet of a powerful firewall, abuse and heavy criticism. It brings to focus the inherent problems associated with such a venture. It is submitted that Malaysian Judges, unlike their brethren in India, or the U.S. are rather cautious and take the 'strict law' approach, thus judicial activism or adventurism or a liberal approach is frowned upon, what more when a superpower and the world's second largest economy is involved. Essentially, it is quite unlikely that Malaysian High Court will proceed with the suit without the presence of the defendants and hear the plaintiffs' evidence.

8. Conclusion

COVID-19 pandemic has devastated economies, even ones as strong as the United States. It has ruined the lives of millions and will continue to do so in the near future. It has already killed hundreds of thousands of people worldwide, and many more will suffer early deaths further down the road because of unemployment and poverty caused by the pandemic.

Some might argue that we should not blame China as COVID-19 might not originate from China and instead, we should be grateful for China's tremendous humanitarian responses to countries all around the world especially developing countries during this global pandemic. It is undeniable that China's COVID-19 humanitarian aid has included medical supplies, equipment, and personnel; financial assistance; and knowledge-sharing to over 150 countries and international organisations.[368] However, we should bear in mind that financial assistance and other aids cannot extinguish a legitimate cause of action. The author submits that regardless of the origin of COVID-19 and China's humanitarian aid, the Chinese government's failure to promptly and transparently provide much-needed information to the international community still raises the issue of liability.

The questions with regard to legal actions remain: Is it possible for these countries to win the case? What would be a reasonable reaction to the Chinese government? Legally speaking, each type of national or international court/forum has its own jurisdiction, which means that it has the authority to decide specific types of cases. Any individual or government could file a lawsuit against the Chinese government seeking remedies for causing the COVID-19 pandemic. Nevertheless, based on the principles of international law, it seems that there is

[368] Jacob Kurtzer, 'China's Humanitarian Aid: Cooperation amidst Competition' (*CSIS*, 17 November 2020) <https://www.csis.org/analysis/chinas-humanitarian-aid-cooperation-amidst-competition> accessed 1 June 2021.

no national or international court/forum competent to bring a claim against China. This is because there are many obstacles to a successful lawsuit against China in front of domestic or international jurisdictions, to make it accountable for the pandemic and/or its consequences: the questionable jurisdiction of a court over China; the question of the action's legal basis; and, the difficult execution of a potential ruling. Nonetheless, other non-binding mechanisms are possible in order to investigate the issue, such as the recourse to the World Health Assembly. The paper concludes that without China's cooperation, it is extremely unlikely that China will be forced to pay any compensation for the COVID-19 pandemic.

References

Alexander, A., 'Gauging the Advisory Jurisdiction of the International Court of Justice in the Face of COVID-19' (*Jurist*, 6 April 2020) <https://www.jurist.org/commentary/2020/04/atul-alexander-icj-covid/> accessed 6 May 2021.

Anderson, S. and Mirski, S., 'An Update on the Coronavirus-Related Lawsuits Against China' (*Lawfare*, 22 January 2021) <https://www.lawfareblog.com/update-coronavirus-related-lawsuits-against-china-0> accessed 6 May 2021.

Anderson, S. and Mirski, S., 'How Can China Respond to the Coronavirus-Related Lawsuits Against It?' (*Lawfare*, 3 September 2020) <https://www.lawfareblog.com/how-can-china-respond-coronavirus-related-lawsuits-against-it> accessed 6 May 2021.

*Anthony Woo v Singapore Airline*s [2003] 3 Sing.L.R. 688.

Assembly of the State Parties of the International Criminal Court, 'State Parties to the Rome Statute: Chronological List' (*International Criminal Court*) <https://bit.ly/39UDWP7> accessed 6 May 2021.

Buzz Photo v People's Republic of China, No. 3:20-cv-656 (N.D. Tex. Mar. 17, 2020).

Carter, S.L., 'Can China Be Sued Over the Coronavirus?' (*Bloomberg Opinion*, 24 March 2020) <https://www.bloomberg.com/opinion/articles/2020-03-24/can-china-be-sued-over-the-coronavirus> accessed 6 May 2021.

Chelliah, K., 'Can China be sued in a class-action lawsuit over the SARS-COV 2 or COVID-19 pandemic in Malaysia' (2020) 1 LNS(A) lv.

Civil Aeronautics Administration v Singapore Airlines [2004] SGCA 3.

Civil Law Act 1956.

Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor [1990] 1 MLJ 475.

Consular Relations (Privileges & Immunities) Act 1999.

Diplomatic Privileges (Vienna Convention) Act 1966.

Global Times, 'Bild editor sells soul attacking China's virus record: Global Times editorial' *Global Times* (Beijing, 20 April 2020) <https://www.globaltimes.cn/content/1186214.shtml> accessed 6 May 2021.

In re Terrorist Attacks on Sept. 11, 2001, 298 F. Supp. 3d 631, 642 (S.D.N.Y. 2018).

International Health Regulations 2005.

International Organizations (Privileges & Immunity) Act 1992.

Kiobel v Royal Dutch Petroleum Co., 621 F.3d 111, 119 (2d Cir. 2010).

Kurtzer J., 'China's Humanitarian Aid: Cooperation amidst Competition' (*CSIS*, 17 November 2020) <https://www.csis.org/analysis/chinas-humanitarian-aid-cooperation-amidst-competition>accessed 1 June 2021.

Larkin, Jr. and Paul, J., 'Suing China Over COVID-19' (2020) 100 Boston University Law Review Online 91.

Li, Q., Guan, X., Wu, P., et al, 'Early Transmission Dynamics in Wuhan, China, of Novel Coronavirus-Infected Pneumonia' (2020) 382 New England Journal of Medicine 1199.

Mighell v Sultan of Johore [1894] 1 QB 149.

Missouri ex rel. Schmitt v People's Republic of China, No. 1:20-cv-00099 (E.D. Mo. filed Apr. 21, 2020).

n/a, 'Libya pays $1.5 billion to settle terrorism claims', *CNN* (United States, 31 October 2008) <https://edition.cnn.com/2008/WORLD/africa/10/31/libya.payment/index.html> accessed 6 May 2021.

Nguyen L., 'The South China Sea Arbitral Award: Not 'Just a Piece of Paper'' (*Maritime Issues*, 7 August 2019) <http://www.maritimeissues.com/politics/the-south-china-sea-arbitral-award-not-just-a-piece-of-paper.html#_edn1> accessed 1 June 2021.

Nicaragua v United States (1986) I.C.J. 14.

Opati v Republic of Sudan, 590 U.S. ___(2020).

PCA, 'Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States' <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf> accessed 6 May 2021.

Permanent Court of Arbitration, *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* <https://pca-cpa.org/en/cases/7/> accessed 6 May 2021.

Phillips T., Holmes O. and Bowcott O., 'Beijing rejects tribunal's ruling in South China Sea case' *The Guardian* (London, 12 July 2016) <www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> accessed 6 May 2021.

Rome Statute of the International Criminal Court.

Samantar v Yousuf, 130 S. Ct. 2278 (2010).

Schulte, C., *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004) 197-211.

Shuai, G., 'Don't bother suing China for COVID-19 before the ICJ' *China Daily* (Beijing, 9 April 2020) <https://www.chinadaily.com.cn/a/202004/09/WS5e8ec46aa3105d50a3d15041.html> accessed 6 May 2021.

The Foreign Sovereign Immunities Act of 1976.

United Nations Charter.

United Nations, 'Submission in Compliance with the Deposit Obligations Pursuant to The United Nations Convention on the Law of the Sea (UNCLOS)' (*United Nations*, 8 October 2020) <https://www.un.org/Depts/los/Legislationandtreaties/statefiles/vnm.htm> accessed 1 June 2021.

Village Holdings Sdn Bhd v Her Majesty the Queen in Right of Canada [1988] 2 MLJ 656.

Amendments to the Federal Constitution - An Analysis of the Basic Structure Doctrine

Sara Sofea Lukman Sheriff
Student, Taylor's Law School
Taylor's University, Malaysia
sara.sofea@icloud.com

Grace Alice Ninan
Student, Taylor's Law School
Taylor's University, Malaysia
gninan3@gmail.com

Abstract
In drafting the constitution, the Reid Report stated that the Federal Constitution defines the rights of both States and the Federation, and that there should be power to annul these rights. Article 4(1) of the Federal Constitution states that the highest law of the Federation is the Constitution. However, Parliament has the power to amend the Constitution, subject to certain limits. This article attempts to look at the limitations to constitutional amendments, the development of the basic structure doctrine in Malaysia and the applicability of the doctrine in the Malaysian context.

Keywords: Constitutional Law, Federal Constitution, Basic Structure Doctrine, Malaysian Constitutional Law.

1. Introduction

In the *Federalists Papers*,[369] President James Madison stressed that the essence of constitutionalism is reliant on the principle of limited government,[370] where the crux of the constitution should limit the over-exercise of government power and ensure the voice of the people live on through the ages.[371] Constitutional provisions in Malaysia similarly enshrine the authority and powers of the legislature,[372] executive[373] and the judiciary,[374] guaranteeing the separation of powers which provide for effective governance.[375] In upholding

[369] The Federalist Papers is a collection of 85 articles and essays written by Alexander Hamilton, James Madison, and John Jay to promote the ratification of the United States Constitution.
[370] James Madison, *Federalist No 51* (first published 1788, Wesleyan University Press 1961) 23.
[371] Samuel Issacharoff, 'Democracy and Collective Decision Making' [2008] 6 ICON 231, 247.
[372] Federal Constitution of Malaysia [1957] (Federal Constitution), Article 66.
[373] Ibid, Article 39.
[374] Federal Constitution, Article 121(1).
[375] Farid Sufian Suhuaib, 'Lessons from a Secular State: Essence of the Constitution and Its Implication on Judicial Interpretation of Human Rights Provisions in Turkey' [2019] 24(2) JITC 167, 170.

constitutional supremacy,[376] amendments are crucial to warrant its relevance and reflect the nation's values in a contemporary setting.[377] Thus, the Federal Parliament, comprising of elected representatives, is aptly vested with amending power where its procedural requirements are outlined in Article 159.[378] However, in recent years, the mere reliance on procedural limitations to Parliament's amendment power has become inadequate[379] which prompted courts to implement the substantive measure of the basic structure doctrine as a safeguard against valid, yet unconstitutional amendments.[380] Therefore, this doctrine questions the extent of Parliament's authority in amending the constitution despite the statement in *Phang Chin Hock's case*.[381]

2. Procedural Limitations

Articles 159 and 161E of the Federal Constitution lay out four procedures of constitutional amendment. The first is for minor amendments and is passed by a simple majority. Members in both Dewan Rakyat and Dewan Negara would need to vote with a simple majority before the bill assents to the Yang di-Pertuan Agong (YDPA) and this applies to only a handful of matters.[382] The next procedure is by two-thirds majority.[383] The difference is that the votes needed on the second and third readings must be two-thirds of the majority before being assented. If the YDPA refuses assent he could be bypassed after thirty days under the procedure of Article 66(4A)**.** An example of this amendment is the recent lowering of voting age to 18 years old.[384]

The next process is by the assent of the conference of rulers.[385] There are ten provisions that the conference can block, which are limitations on free speech that disallows the questioning of 'sensitive issues' in Article 10(4), citizenship rights in Part III, privileges, position, honours of rulers in Article 38, the applicability of the law of sedition in legislative and parliamentary

[376] *Ah Tian v Government of Malaysia* [1976] 2 MLJ 112, 113 (Federal Court).
[377] Vladmir N. Dzamic, 'Necessity to Amend the Constitution of the Republic of Serbia: Position and Importance of the National Assembly' (Research Conference, Netherlands, February 2014).
[378] Federal Constitution, Article 159.
[379] n/a, 'My Constitution: Judges and the Judiciary' (*Badan Peguam Malaysia*, 30 December 2010) <https://www.malaysianbar.org.my/article/about-us/committees/constitutional-law-committee/my-constitution-judges-and-the-judiciary> accessed 5 October 2020.
[380] Low Hong Ping, 'The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of Our Constitutional Identity' [2018] 45(2) JMCL 53, 67.
[381] *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 (Federal Court).
[382] Federal Constitution, Article 159(4)(a)-(c).
[383] Federal Constitution, Article 159(3).
[384] Trinna Leong, 'Malaysia's Mps Approve Amendment To Lower Voting Age From 21 To 18' *The Straits Times* (Singapore, 2019) <https://www.straitstimes.com/asia/se-asia/malaysias-federal-constitution-amended-to-lower-voting-age-from-21-to-18> accessed 28 October 2020.
[385] 'Report Of The Federation Of Malaya Constitutional Commission' (n 361), Article 159(5).

proceedings,[386] the precedence of Rulers,[387] the rights of ruler's to succession,[388] the Malay language's special position,[389] the privileges of the Malays and the natives[390] and the special procedure of constitutional amendment.[391] The procedure is similar to the two-thirds majority, with the addition of the consent of the conference. The last procedure is by the assent of governors,[392] which are modifications to the special rights of Sabah and Sarawak and require a two-thirds majority, the assent of the YDPA and the consent of the Governors of Sabah and Sarawak, upon the advice of the Chief Ministers.

3. The Development of the Basic Structure Doctrine

In determining the extent of the applicability of the doctrine of basic structure in the Malaysian constitutional realm, its origin must be noted. Elements of the doctrine are first mentioned in the Indian case of *Sajjan Singh v State of Rajasthan*,[393] where Mudholkar J observed that it is unusual for fundamental rights that are guaranteed in the Constitution to be easily changed. In *Kesavananda v. State of Kerala*,[394] the majority on the Indian Supreme Court bench articulated that the amendatory power of Parliament is not unlimited and does not extend to alter the basic framework of the constitution. The court further stated that the true basic foundation cannot be abrogated unreasonably as it could affect the public as a whole.[395]Chief Justice Sikri stated that the power to amend the Constitution is wide enough to permit its own amendment as long as its basic elements are not invalidated or 'denuded of their identity'. The Court also listed several basic features of the Indian Constitution which includes constitutional supremacy, the Constitution's secular and federal character and the separation of powers.

The early attempts to transpose this substantive doctrine in Malaysian jurisprudence were met with substantial reluctance. The first mention of this doctrine can be seen in *Government of Kelantan v Government of Malaysia*,[396] whereby Thomson C.J observed that Parliament did not do something radical that may require fulfilment of a condition not stated in the Constitution. This could be implied to refer to the basic structure doctrine. However in *Loh Kooi Choon*,[397] it was equated to fallacy for the potency of amending power to impliedly fall on the judiciary rather than what was textually stated in the constitution.[398] However, Raja

[386] Ibid, Articles 63 and 72.
[387] Ibid, Article 70.
[388] Ibid, Article 71.
[389] Ibid, Article 152.
[390] Ibid, Article 153.
[391] Ibid, Article 159(5).
[392] Ibid, Article 161E.
[393] [1965] 1 S.C.R. 933, 968.
[394] *Kesavananda Bharati v State of Kerala* [1973] AIR SC 1461, 1510 (Indian Supreme Court).
[395] Ibid, 1625.
[396] [1968] 1 MLJ 129.
[397] *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, 190 (Federal Court).
[398] Surendra Ananth, 'The Basic Structure Doctrine: Its Inception and Application In Malaysia' [2016] 1 MLJ 9, 11.

Azlan Shah FJ mentioned three concepts that are basic to Malaysia, namely, (i) fundamental rights, (ii) the allocation of sovereign authority between the States and the Federation, and (iii) separation of power amongst the executive, legislative and judicial branches, which is similar to the principles mentioned in *Kesavananda*.

The courts took a more literal stance in which the framers would have included a proviso to have that effect where the procedural and political limitations[399] would be a sufficient deterrent. This was observed in *Phang Chin Hock*[400] where Tun Suffian stated that the harmonious construction rule would protect the integrity of the constitution, where only federal law enacted in an ordinary manner, not under procedural amendment requirements,[401] should be subjected to Article 4(1).[402] The *Mark Koding case*[403] further depicted courts' uncertainty as the basic structure doctrine was deemed unnecessary to be decided on, but even if it were, parliamentary privilege enshrined in Article 63(2)[404] would fail to be considered a basic structure.[405] Thus, the extent of this doctrine was clearly limited in the early stages of implementation and Parliament's amendatory power was not as limited, contrasting with India's Parliament.

4. The Basic Structure Doctrine in Malaysia Post the Judicial Crisis of 1988

Post-1988, the encroachment of judicial power through the amendment made to Article 121(1),[406] saliently affected the propensity of the judiciary to declare amendments made unconstitutional, and reliance on the doctrine of basic structure further became unconceivable. The courts lacked to provide clarity on the extent as seen in *Sugumar's case*,[407] where Justice Gopal Sri Ram reiterated that judicial power lies with the judiciary and no other[408] but the Federal Court overturned the decision and failed to clarify its position. In *Danaharta Urus*,[409] however, it was clear that the dispensation of justice by the courts clearly fell in limitation to Parliament. A sense of consistency was provided in *Kok Wah Kuan's case*[410] where the courts held that laws may be only deemed unconstitutional if it infringes an express provision of the constitution[411] which led to a narrower scope of applying the basic structure

[399] Shukri Shahizam, 'Whither Non-Justiciability? An Argument for Judicial Review of Prosecutorial Discretion in Light of the Basic Structure' [2020] 2 MLJ 21, 26.
[400] *Phang Chin Hock* (n 381), 72.
[401] Federal Constitution, Articles 159 (1), 161 (E), 38(4).
[402] Federal Constitution, Article 4(1).
[403] *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120, 122 (Federal Court).
[404] Federal Constitution, Article 63(2).
[405] *Mark Koding* (n 403), 123.
[406] Constitution (Amendment) Act 1988.
[407] *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 (Court of Appeal).
[408] Ibid, 307.
[409] *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 2 MLJ 257, 270 (Federal Court).
[410] *Pendakwa Raya v Kok Wah Kuan* [2008] 1 MLJ 1 (Federal Court).
[411] Ibid, 13.

doctrine.[412] The textualist approach taken reaffirmed that the jurisdiction of the High Courts was now bound by federal legislation due to the deletion of judicial power from the constitution provision.[413] It should be noted that Malanjum CJSS's dissent paved the way for the acceptance of the doctrine in Malaysia. He disagrees that the High Courts have to look at federal law to see the jurisdiction and powers conferred to him, and instead argues that the doctrine of separation of powers and judicial independence are 'basic features' of the Federal Constitution. This dissent would later form the arguments in favour of the basic structure doctrine.[414]

However, the case of *Sivarasa Rasiah*[415] finally recognised the applicability of the doctrine of basic structure and declared Parliament unable to make laws contrary to it.[416] The Court of Appeal held that the fundamental liberties, in Part II,[417] should be protected by the doctrine and reaffirmed the prismatic form of interpreting fundamentals rights as stated in *Lee Kwan Woh*,[418] strengthening the position of the courts. Cases following it such as *Muhammad Hilman*[419] and the *Nik Nazmi case*[420] establish the bolder approach where fundamental liberties and separation of powers were held to form part of the basic structure doctrine. Despite the progress made, in *PP v Yuneswaran*,[421] the courts in determining whether infringement upon Article 10 of the Constitution arose,[422] departed from *Sivarasa's* stance and dismissed it as merely obiter[423] and thus could be overturned. This marked a stark departure once more where even in *Gan Boon Aun's case*,[424] the Federal Court failed to address and provide coherence as to whether infringement of the judiciary's power to regulate Parliamentary legislation was unconstitutional without further obfuscating the basic structure doctrine and stripping judicial power.[425]

With the lines continuing to blur, the landmark decision of *Semenyih Jaya*[426] secured the permanence of this doctrine and restored judicial power in the courts, limiting Parliament's amendment authoritative stature. The court held that any parliamentary provision

[412] Choo Chin Thye and Lucy Chang Weng, 'Federalism and Restoration of Sarawak's Territorial Waters and Boundaries' [2016] 6 MLJ 34, 43.
[413] Ibid, 46.
[414] *Maria Chin Abdullah v KetuaPengarahImigresen& Anor* [2021] MLJU 13.
[415] *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333, 342 (Federal Court).
[416] Yvonne Tew, 'On The Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics' [2016] 25 Pac. Rim L. & Pol'y J. 673, 685.
[417] Federal Constitution, Part II, Articles 5-13.
[418] *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, 312 (Federal Court).
[419] *Muhammad Hilman v Kerajaan Malaysia* (2011] 6 MLJ 507, 521 (Court of Appeal).
[420] *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157, 169 (Court of Appeal).
[421] *Public Prosecutor v Yuneswaran A/L Ramaraj* [2015] 6 MLJ 47, 50 (Court of Appeal).
[422] Ibid, 74.
[423] Sharon K. Chahil, 'A Critical Evaluation of The Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia' [2002] 3 MLJ 12, 18.
[424] *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 (Federal Court).
[425] Ibid, 28.
[426] *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 (Federal Court).

contravening the judiciary's ability to award the factum of compensation, or any such breach, would offend the basic structure of the constitution.[427] It stated that Parliament does not have the authority to undermine distinct features of the constitution especially the rule of law, separation of powers and especially independence of the judiciary.[428] The case of *Indira Gandhi*[429] further entrenched this doctrine as judicial review was deemed a basic structure and cannot be invalidated by constitutional amendments. This then allowed the civil courts to review the issue of Islamic conversion as even the Syariah court's jurisdiction[430] shall not prevent the judicial review application,[431] a basic feature of the constitution. Both cases constructively dealt with the controversy of the 1988-amendment[432] by upholding the basic structure doctrine, with the notion that the independence and vestiture of judicial powers in the judiciary cannot be altered as it remains a foundational feature of the constitution. Therefore, the courts would be effectively able to limit Parliament's amending power and not act as servile agents of the legislature.[433]

Undoubtedly, this has led to a sense of lucidity as to the application of the basic structure doctrine, where a broader determination of what constitutes a form of basic structure in reviewing constitutional amendments cam be seen in the recent *Datuk Seri Anwar case*,[434] which argued that the lack of royal assent propagated in the amendment to Article 66(4)[435] violates the basic structure doctrine. However, the amendment of Article 121(1) does still remain valid as the courts have merely taken an interpretive approach in limiting the effect of the amendment[436]which could leave the *Semenyih Jaya* and *Indira Gandhi* doctrine to be overturned by a future bench in the Federal Court.[437] Thus, it is evident that the extent of Parliament's procedural limitation has been side-stepped by the *Kesavananda* doctrine and finally being rooted in Malaysia's constitutional realm. This ultimately reinstates judicial power to an extent back in the judiciary, to ensure the substantive validity of amendments as well.

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[427] The Right Honourable Tan Sri Dato' Seri Utama Tengku Maimun bt Tuan Mat, 'The Importance of Constitutionalism in Public Institutions' (The Lawasia Constitutional & Rule of Law Conference 5 October 2019) MLJ 2019.

[428] *Semenyih Jaya* (n 426), 593.

[429] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak &Ors* [2018] MLJU 68, 94 (Federal Court).

[430] Federal Constitution, Article 121(1A).

[431] Dato' Seri Mohd Hishamudin Yunus, 'The Malaysian Constitution and the Basic Structure Doctrine' *Legal Herald* (Selangor, November 2018) < https://www.lh-ag.com/wp-content/uploads/2018/12/1-The-Malaysian-Constitution-and-the-Basic-Structure-Doctrine.pdf> accessed 17 October 2020.

[432] H.P. Lee, 'The Judicial Power and Constitutional Government-Convergence and Divergence in the Australian and Malaysia Experience' [2006] 1 JMCL < http://www.commonlii.org/my/journals/JMCL/2005/1.> accessed 13 October 2020.

[433] *Kok Wah Kuan* (n 410), 21 per Richard Malanjum CJ (Sabah and Sarawak).

[434] *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133 (Federal Court).

[435] Federal Constitution, Article 66(4).

[436] Tew (n 416).

[437] Abdul Fareed Abdul Gafoor, 'Speech by President, Malaysian Bar, at the Opening of the Legal Year 2020' (Putrajaya International Convention Centre, 10 January 2020) MLJ, 2020.

With the gradual acceptance of this doctrine in Malaysian's legal sphere, the role of the judiciary as the gatekeeper of the Federal Constitution is as alive as ever. In *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners*,[438] the court reiterated the vigour of this doctrine as both the Federal and Concurrent list cannot be read as carte blanche for Parliament to make laws contrary to the basic structure principles of separation of powers and the judicial power of the federation. However, this principle is not a wide net as seen in the recent case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor*,[439] where despite the Federal Court affirming this principle, the bench held that the liberty to travel would not be a fundamental liberty that should be outwardly protected by the doctrine of basic structure and hence the Immigration Act can implement laws that limit this right.

5. General Rules of Constitutional Amendment

To analyse if the power to amend the constitution is limited, we should first see if there are any provisions in the Constitution that limit Constitutional amendments. Article 150 provides for the proclamation of emergency, and whereby Article 150(5) provides for the Parliament to make any law in regards to any matter during an emergency. Article 150(6) expressly provides that any legislation that is passed under this article should be valid even if it is inconsistent with the Constitution. However, there are certain matters where the powers of the Parliament may not touch under an emergency proclamation, which are Islamic law, Malay customs, native law or customs in the States of Sabah and Sarawak, religion, citizenship and language. It is also worth noting that Article 150(7) provides that all emergency laws cease six months after the end of an emergency. Thus, the argument for the correct view of Article 150 is that it suspends the Constitution, but does not amend it,[440] and although the suspension lasts for several decades it may have a similar effect to a permanent constitutional amendment. Therefore, there may not be explicit limits to unconstitutional constitutional amendments.

6. The Importance of Limiting the Amending Power through the Basic Structure Doctrine in Malaysia

The implied substantive limitation of the Constitution via the implementation of the basic structure doctrine is authorised by the judicial power being vested in the High Courts, which limits Parliament's amending power has in turn proven significant in preventing the over-concentration of influence[441] which upholds the doctrine of separation of powers. A check

[438] *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Bhd; President of Association of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 3 MLJ 561.
[439] Ibid, 47.
[440] Shad Saleem Faruqi, *Document Of Destiny* (Star Publications, Malaysia 2008).
[441] Claudia Derichs, 'Malaysia in 2006: An Old Tiger Roars' [2007] 47(1) Asian Survey 148, 150.

and balance mechanism, concentrating on Parliament's constitutional function ensures proper distribution of authority[442] thwarting the institutionalisation of weaker governmental pillars.[443] In the context of the 1988 constitutional crisis, the deletion of the term 'judicial power of the Federation' in Article 121(1) was clearly a *coup de grace* at the co-equal stature of the judiciary[444] and the original jurisdiction of the courts.[445] Due to the Privy Council abolishment,[446] the courts became stricter in declaring the unconstitutionality of executive action as seen in *Berthelsen*[447] and *Dato' Yap Peng*,[448] where matters usually exempted from review such as national security and the Attorney General's discretion were submitted.[449] In fear of substantial judicial activism,[450] this led to the amendment by Parliament and for years, it enjoyed the unchecked power amending the supreme law while courts were confined to federal law.[451] The judiciary's independence, being a key feature of the Constitution's basic structure, as seen in *Semenyih Jaya*, helped reinstate the stature of separation of powers by guaranteeing the independence of the judiciary and reigniting judicial power.[452] Therefore, it is evident based on the constitutional crisis, that limiting Parliament's amendment power helps avert the unconstitutionality of the over-concentration of powers.

Despite the two-third majority criterion before a constitutional amendment can be passed, the majoritarian rule could still lead to dire outcomes.[453] This is because, with majority-governance in Parliament, this could lead to the deprivation of minority rights[454] and amendments made suited to the majority's ideals.[455]Furthermore, amendment power could also be vested in one-party majorities which could advance certain political interests that may not be beneficial to the nation as whole[456] and substantially reduces the effectiveness of the

[442] Mehmet Kabasakal, 'Measuring the Decline of Parliaments: New Indicators and Turkey as An Illustrative Case' [2019] 73(1) CILT 269, 273.
[443] G. Bingham Powell, *Contemporary Democracies: Participation, Stability and Violence* (HUP 1984) 238.
[444] A.J. Harding, 'The 1988 Constitutional Crisis in Malaysia' [1990] 39(1) Int Comp Law Q 57, 69.
[445] Torsten Persson, Guido Tabellini and Gerard Roland, 'Separation of Power and Political Accountability' [1997] 112(4) Q J Econ 1163, 1199.
[446] On 1 January 1978, appeals to the Privy Council in criminal and constitutional matters were abolished, while appeals in civil matters were abolished on 1 January 1985.
[447] *JP Berthelsen v Director General of Immigration, Malaysia &Ors* [1987] 1 MLJ 134, 138 (Supreme Court).
[448] *Public Prosecutor v Dato Yap Peng* [1987] 2 MLJ 311 (Supreme Court).
[449] H.P. Lee (n 432).
[450] Dato' Mohd Hishamudin Yunus, 'Judicial Activism: The Way To Go?' [2012] 6 MLJ 17, 21.
[451] Antonio Lamer, *The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change* (New Brunswick Law Press 1996) 54.
[452] *Hinds v The Queen* [1976] 1 All ER 353, 359 (Privy Council).
[453] Rio Hoe, 'Pros and Cons of Majority-Rule Explained' (*Singapore Consensus Examined*, 6 June 2017) <https://consensusg.com/2017/06/06/pros-and-cons-of-majority-rule-explained-in-5-minutes/> accessed 21 October 2020.
[454] Peter Emerson, 'Majority Rule: The Right May Be Wrong. In: From Majority Rule to Inclusive Politics' [2016] 319 PolSciQ 2, 13.
[455] Richard Albert, 'The Structure of Constitutional Amendment Rules' [2014] 49 Wake Forest L. Rev 919, 933.
[456] K. Pakaran, 'Disturbing Trend of The Bad and Ugly Emerging in New Malaysia' *The Star* (Kuala Lumpur, 14 July 2019) < https://www.thestar.com.my/opinion/columnists/heart-talk/2019/07/14/disturbing-trend-of-the-bad-and-ugly-emerging-in-new-malaysia> accessed 23 October 2020.

procedural limitation.[457] The whip system in place further inclines members of the same party to vote based on party lines as seen up to 2008 where a one-party majority occupied Parliament.[458] This issue was prominently seen in the 1983 amendment process, where despite intra-divisions in the governing party regarding limiting the Yang Di-Pertuan Agong's role, the bill successfully passed, proving exertion of party-influence in the constitutional process.[459] It can be argued that the framers were unable to predict the exertion of political influence and majoritarian rule[460] when drafting the constitution and thus, proves the necessity to limit Parliament's amendment authority.

The constitutionalist Emannuel Sieyes[461]articulates that the constitution itself is an exercise of constituent power, establishing the law of the nation and Parliament operates in the constituted power of the constitution.[462] Therefore, an unlimited amending power could jeopardise the integrity of the constitution. Constitutional integrity is the congruence of practises operating in the confines of the constitutional framework[463] and the embodiment of its ideals.[464] This adherence to protecting the essence of the constitution ensures that the acts of the relevant institutions are in line with it[465] where an unbounded power could result in a deficit of constitutional legitimacy.[466] For instance, individuals would be more willing to be bound to constitutional provisions that guarantee fundamental liberties that remain unaltered by Parliament, as it legitimises their belief in constitutional protection.[467] Hence, limiting Parliament's authority to amend and not destroy the constitution safeguards the constituted power by upholding constitutional integrity.

Another argument against Parliament's freedom to amend the constitution can be seen in the effects of the 1988 judicial crisis, where the Constitution is powerless in protecting itself. The effect was not only a decrease in judicial power, but also a state of confusion with the law in years to come. Further, although politicians are elected through a democratic process, we can see that legislation could be used as a weapon by politicians. After the 2013 elections, the past government enacted contentious security laws. Moreover, although fundamental

[457] Vibhanshu Shekhar, 'Malay Majoritarianism and Marginalised Indians' [2008] 43(8) EPW 22, 24.
[458] Thomas B Pepinsky, *The 2008 Malaysian Elections: An End to Ethnic Politics?* (CUP 2016) 544.
[459] Cindy Tham, 'Major Changes to the Constitution' (*Badan Peguam Malaysia,* 17 July 2007) <https://www.malaysianbar.org.my/article/news/legal-and-general-news/general-news/major-changes-to-the-constitution> accessed 19 October 2020.
[460] Joseph Fernando and Shanthiah Rajagopal, 'Fundamental Liberties in The Malayan Constitution And The Search For A Balance, 1956–1957' [2017] 13(1) IJAPS 1, 17.
[461] Emmanuel-Joseph Sieyès was a constitutional theorist who drafted the concept of popular sovereignty during the French Revolution.
[462] Frank Maloy, *The Constitutions and Other Select Documents Illustrative of The History of France 1789-1901* (Wilson Publishing 1904) 201.
[463] Theodore Vestal, 'An Analysis of the New Constitution of Ethiopia and The Process of Its Adoption' [1996] 3(2) MichLRev 21, 33.
[464] Susan J Brison, *Contemporary Perspectives on Constitutional Interpretation* (Routledge 1993) 142.
[465] Gedion T Hessebon, 'The Precarious Future of the Ethiopian Constitution' [2013] 57(2) J. Afr. Law 215, 224.
[466] H.P. Lee, *Constitutional Conflicts in Contemporary Malaysia* (2ed, OUP 2017) 333.
[467] Jeffrey Tulis and Stephen Macedo, *The Limits of Constitutional Democracy* (PUP 2010) 121.

liberties are protected under Part II of the Constitution, there must be a guarantee that these liberties are untouched by the Parliament. The judiciary on their part has sought to interpret these liberties generously,[468] and therefore equal protection should be given by other branches of government.

The cases of *Loh Kooi Choon*[469] and *Phang Chin Hock*[470] are landmark decisions in proving that the doctrine of basic structure would be inapplicable in Malaysia. However, Justice Gopal Sri Ram submits that both judgments could be faltered due to confusion in regards to the provisions of Articles 4(1) and 159(1), where the term 'this Constitution' and the 'provisions of this Constitution' were used respectively[471] implying that there is a more substantive limitation to Parliament's authority. This distinction cannot be dismissed as the former could imply consideration must be given to the entire framework and structure of the constitution[472] as seen in Chief Justice Zakaria's judgement in *Mohammad Nizar's case*.[473] Thus, applying the pith and substance canon of interpretation as well as the prismatic approach, the courts could have proposed that Parliament could retain its amendment jurisdiction as long as violations to the basic structure does not occur which would have been a more practical way to read Articles 4(1) and 159 harmoniously.[474] This is also in line with *Alma Nudo Atenza v Public Prosecutor*,[475] where it could be inferred that the basic structure doctrine should be read harmoniously in accordance with Part II of the Constitution, as they are 'parts of a majestic, interconnected whole'. This contrasts the actual approach taken which held only regular legislation needed to be in line with Article 4(1)**.** Thus, if a more prismatic approach were to be taken, both cases would have allowed courts early on to limit the amendment powers of Parliament and contend that even expressly the Constitution implies the necessity for limitations to be placed.

7. Potential Setbacks of the Basic Structure Doctrine and Limiting Parliament's Amending Power

Limiting Parliament's power could severely affect the vitality of the constitution due to hindrances on its capacity to develop. In the *Lembaga Tatatertib case*,[476] constitutional

[468] Iqbal Harith Liang, 'The Chronicles of the Basic Structure Doctrine' (*UMLR | University of Malaya Law Review*, 2020) <https://www.umlawreview.com/lex-in-breve/the-chronicles-of-the-basic-structure-doctrine> accessed 28 October 2020.
[469] *Loh Kooi Choon* (n 397).
[470] *Phang Chin Hock* (n 400).
[471] Datuk Seri Gopal Sri Ram, 'The Dynamics of Constitutional Interpretation' [2017] 4 MLJ 1, 7.
[472] Ibid, 11.
[473] *Dato' Seri IrHj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285, 307 (Federal Court).
[474] Andrew James Harding and James Chin, *50 Years of Malaysia: Federalism Revisited* (Marshall Cavendish 2014) 139.
[475] [2017] MLJU 884.
[476] *Lembaga TatatertibPerkhidmatanAwam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2000] MLJU 837 (Court of Appeal).

vitality was held as the perennialism of the Constitution, preventing it from being atrophied and rigid.[477] Despite how broad and exhaustive any provisions are, it is undeniable that the adopted text would be able to address all peculiar controversies[478] which stresses the importance in providing a system that allows to amend and revise outdated provisions, reflecting the contemporary norms of the nation.[479] This can be seen in the 1963 constitutional amendment,[480] where Parliament was able to update and include provisions safeguarding the rights and position for Sabah and Sarawak upon the conclusion of the Malaysia Agreement.[481] Moreover, a great indicator for vitality would be the potential for the constitution to respond to its surrounding circumstances[482] in which amendments should reflect. The Sensitive Matters Amendment[483] shows Parliament using its amendment authority to uphold the peace at the time after the 1969 racial riots.[484] Thus, Parliament's amendment power upholds vitality as this institution responds to contemporary issues, ensuring the continuous relevance of the constitution.

The dependence on Parliament for amending constitutional provisions could be said to provide some form of consistency as declarations of unconstitutionality by the courts can be reversed.[485] It is completely possible that declaration of amendments to be unconstitutional can be overturned by which this prevents the constitution from having a sense of consistency which should be expected specially to ensure the rule of law is upheld.[486] The less formalistic approach to constitutional interpretation further creates a vacuum of uncertainty.[487] This was seen in *Yuneswaran*,[488] where the Court of Appeal overruled the decision in *Nik Nazmi's case*,[489] resurrecting the previously unconstitutional act. This indirectly implies that the courts were meant to be no more but the *bouche de la loi*, the mouth of law,[490] as it has to remain

[477] *Weems v US* [1910] 54 L Fd 793, 801 (U.S Supreme Court).
[478] Lech Garlicki, 'Constitutional Courts versus Supreme Courts' [2007] 5(1) Int. J. Const. Law 44, 57.
[479] Micheal Burgess and Alan Tarr, *Constitutional Dynamics in Federal Systems: Sub-national Perspectives* (McGill-Queen's University Press 2012) 420.
[480] Malaysia Act 1963; n/a, 'My Constitution: About Sabah and Sarawak' (*Badan Peguam Malaysia*, 10 January 2011) <https://www.malaysianbar.org.my/article/about-us/committees/constitutional-law-committee/my-constitution-about-sabah-and-sarawak> accessed 25 October 2020.
[481] Agreement relating to Malaysia (with annexes, including the Constitutions of the States of Sabah, Sarawak and Singapore, the Malaysia Immigration Bill and the Agreement between the Governments of the Federation of Malaya and Singapore on common market and financial arrangements) (Malaysia Agreement) (adopted on 9 July 1963) 750 UNTS 10760.
[482] H.P. Lee (n 466), 299.
[483] Constitution (Amendment) Act 1971.
[484] Penyata Rasmi Dewan Rakyat, 23 February 1971, volume 1.
[485] Robert Martin, *Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (McGill-Queen's University Press 2003) 601.
[486] Wilson Tze Vern Tay, 'Basic Structure Revisited: The Case of Semenyih Jaya and the Defence of Fundamental Constitutional Principles in Malaysia' [2019] 14 AsJCL 113, 137.
[487] Ibid, 138.
[488] *Yuneswaran* (n 421).
[489] *Nik Nazmi* (n 420).
[490] K.M. Schonfeld, 'Rec, Lex Judex: Montesquieu and La Bouche De La Loi Revisited' [2008] 4 ECR 274, 300.

flexible and to a certain extent be inconsistent[491] and have Parliament be the main power in amending the constitution to provide structure to the process as a whole.

The prominence of the judiciary in the declaration of unconstitutional amendments could also result in a counter-majoritarian difficulty.[492] This would be avoided if substantial amending power remained vested in Parliament. The theory proposes that the issue of judicial control on constitutionality lies not in the power vested but the legitimacy of it.[493] This raises the query of accountability where it would infringe democracy to entrust the constitutionality of amendments to the supreme law in an institution that is unelected by the popular vote. In Malaysia, the appointment of judges by the Judicial Appointment Commission[494] upholds independence yet lacks the crucial principle of representative government that binds Parliament, making it better suited to alter constitutional provisions.[495] However, the undemocratic assumption of the judiciary can be countered as it defends democracy[496] as a whole by ensuring the amendments made are in line with the essence of the constitution and is able to do this objectively free from social milieu and political biases.[497]

Another reason why this particular limit may not be appropriate is because the tenets of doctrine are not found on a historical basis. The constitution domain should be portrayed as inspired by political and social happenings of a country,[498] and that to justify such an amendment should be done contextually.[499] Further, to ascertain a constitutional identity, we ought not to accept a set of characteristics that are regularly connected with liberal democratic constitutionalism without the comprehension of the political, social and economic conditions that lays behind the constitution.[500] It could be argued that a support of this ideology can be seen in the rejection of the basic structure doctrine in *Phang Chin Hock*, whereby to substantiate why the doctrine in the Indian constitution is because the Constituent Assembly's preamble and Directive Principles contains ideas and philosophies

[491] Tarunabh Kaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism' [2019] 82(4) MLR 603, 605.
[492] *Halsbury's Laws of Malaysia*, 'Salient Characteristics of the Federal Constitution' (3d edn, 2018) vol 3, para 100.
[493] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (YUP 1962) 111.
[494] Judicial Appointments Commission Act 2009, section 21.
[495] Daniel Greenwood, 'Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World' [2001] 53 Hofstra Law Rev. 781, 812.
[496] Mauro Arturo Rivera, 'The Counter-Majoritarian Difficulty: Bickel and the Mexican Case' [2010] 3 N. M. Law Rev. 26, 31.
[497] Nehaluddin Ahmad, Hjh Hanan bt Pehin Dato Hj Abdul Aziz, Hjh Masnoorani bt Hj Mohidin, 'Rights of Minorities in the Framework of International Legal Regime: A Comparative Study of the Indian Context' [2020] 5 MLJ 97, 104.
[498] R. Hirschl, 'From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11 International Journal of Constitutional Law 1.
[499] Adrienne Stone, 'Unconstitutional Constitutional Amendments: Between Contradiction and Necessity' [2018] SSRN Electronic Journal 1.
[500] Jaclyn L. Neo, 'A Contextual Approach To Unconstitutional Constitutional Amendments: Judicial Power And The Basic Structure Doctrine In Malaysia' (2020) 15 Asian Journal of Comparative Law 74.

that inspires their Constitution, which is not the case for our Federal Constitution. Hence, in interpreting the Malaysian Constitution, judges may opt for the four-walls doctrine, where comparative jurisdictions or international law principles may be irrelevant in interpreting Malaysia's constitution.[501]

8. Conclusion

Despite the issues aforementioned, it can be submitted that limiting Parliament's amendment power through judicial control presents more benefits as a whole. The counter-majoritarian difficulty can be considered a necessary sacrifice as it is a corollary to prevent abuse of powers[502] whereas the lack of consistency can be overcome by allowing the further development[503] of this area over time. In the Malaysian context, the basic structure doctrine clearly has been applied in a moderate manner[504] as even the amendment striking the judicial power of the courts still remains valid. It can be assumed that the courts recognise the legitimacy of the democratic procedure applied, yet at the same time have exercised their duty to reinstate their power as guardians of the constitution.[505]

"Our constitution is not a mere political document. It is essentially a social document … based on a social philosophy."[506] These words show how the Constitution is the most important document in a country, that not only has repercussions on the people but also on the future. Therefore, the Constitution should firstly be adequate enough to protect certain rights that should be indispensable towards fellow Malaysians. Further, the Constitution should also not lose the basic essence of what makes it unique to Malaysia by ensuring that its foundation complies with the intentions of those who have formed our Constitution.

[501] Tew (n 146), 681.
[502] Hon-Wah Ng, *Counter-Majoritarian Difficulty: Constitutional Review: Singapore and Hong Kong Compared* (Biblio Bazaar 2017) 262.
[503] Virendra Kumar, 'Statement of Indian Law-Supreme Court Of India through Constitution Bench Decisions Since 1950. A Juristic Review of Its Intrinsic Value and Juxtaposition' [2016] 58(2) Journal of the Indian Law Institute 189, 222.
[504] Tay (n 486), 142.
[505] The Malaysian Judiciary, *Yearbook 2012* (Percetakan Nasional Malaysia 2012) 375.
[506] Gabriella Negretto, 'Constitution-making and Liberal Democracy: The Role of Citizens and Representative Elites' [2020] 18(1) Int. J. Const. Law 206, 219.

References

Agreement relating to Malaysia (with annexes, including the Constitutions of the States of Sabah, Sarawak and Singapore, the Malaysia Immigration Bill and the Agreement between the Governments of the Federation of Malaya and Singapore on common market and financial arrangements) (Malaysia Agreement) (adopted on 9 July 1963) 750 UNTS 10760.

Ah Tian v Government of Malaysia [1976] 2 MLJ 112.

Ahmad, N., Pehin Dato Hj Abdul Aziz H.H., Hj Mohidin H.M., 'Rights of Minorities in the framework of International Legal Regime: A Comparative Study of the Indian Context' [2020] 5 MLJ 97.

Albert, R., 'The Structure of Constitutional Amendment Rules' [2014] 49 Wake Forest L. Rev 919.

Alma Nudo Atenza v Public Prosecutor [2017] MLJU 884.

Ananth, S., 'The Basic Structure Doctrine: Its Inception and Application in Malaysia' [2016] 1 MLJ 9.

Basic Law for the Federal Republic of Germany 1949.

Bickel, A., *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (YUP 1962).

Brison, S.J., *Contemporary Perspectives On Constitutional Interpretation* (Routledge 1993).

Burgess, M. and Tarr, A., *Constitutional Dynamics in Federal Systems: Sub-national Perspectives* (McGill-Queen's University Press 2012).

Chahil, S.K., 'A Critical Evaluation of The Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia' [2002] 3 MLJ 12.

Constitution (Amendment) Act 1971 (Act A30).

Constitution (Amendment) Act 1988 (Act A704).

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd [2004] 2 MLJ 257.

Dato' Seri IrHj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener) [2010] 2 MLJ 285.

Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133.

Derichs, C., 'Malaysia in 2006: An Old Tiger Roars' [2007] 47(1) Asian Survey 148.

Dzamic, N.V., 'Necessity to Amend the Constitution of the Republic of Serbia: Position and Importance of the National Assembly' (Research Conference, Netherlands, February 2014).

Emerson, P., 'Majority Rule: The Right May Be Wrong. In: From Majority Rule to Inclusive Politics' [2016] 319 PolSciQ 2.

Fallon, R.H., 'Political Questions and the Ultra Vires Conundrum' [2020] 87(6) U Chi L Rev <https://www.jstor.org/stable/10.2307/26927110> accessed 12 October 2020.

Faruqi, S.S., *Document Of Destiny* (Star Publications, Malaysia 2008).

Federal Constitution of Malaysia.

Fernando, J. and Rajagopal, S., 'Fundamental Liberties in The Malayan Constitution And The Search For A Balance, 1956-1957' [2017] 13(1) IJAPS 1.

Gafoor, A.F.A., 'Speech by President, Malaysian Bar, at the Opening of the Legal Year 2020' (Putrajaya International Convention Centre, 10 January 2020) MLJ, 2020.

Garlicki L., 'Constitutional Courts versus Supreme Courts' [2007] 5(1) Int. J. Const. Law 44.

Government of Kelantan v Government of Malaysia [1968] 1 MLJ 129.

Greenwood, D., 'Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World' [2001] 53 Hofstra Law Rev. 781.

Halsbury Laws of Malaysia, 'Executive Power to Make Regulations' (3rd edn, 2018) volume 3.
Halsbury's Laws of Malaysia, 'Salient Characteristics of the Federal Constitution' (3rd edn, 2018) volume 3.
Harding, A.J., 'The 1988 Constitutional Crisis in Malaysia' [1990] 39(1) Int Comp Law Q 57.
Harding, J.A. and Chin J., *50 Years of Malaysia: Federalism Revisited* (Marshall Cavendish 2014).
Hessebon, G.T., 'The Precarious Future of the Ethiopian Constitution' [2013] 57(2) J. Afr. Law 215.
Hinds v The Queen [1976] 1 All ER 353.
Hirschl, R., 'From Comparative Constitutional Law to Comparative Constitutional Studies' (2013) 11 International Journal of Constitutional Law 1.
Hoe, R., 'Pros and Cons of Majority-Rule Explained' (*Singapore Consensus Examined*, 6 June 2017) <https://consensusg.com/2017/06/06/pros-and-cons-of-majority-rule-explained-in-5-minutes/> accessed 21 October 2020.
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak &Ors [2018] MLJU 68.
Issacharoff, S., 'Democracy and Collective Decision Making' [2008] 6 ICON 231.
JP Berthelsen v Director General of Immigration, Malaysia &Ors [1987] 1 MLJ 134.
JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Bhd; President Of Association of Islamic Banking Institutions Malaysia & Anor (Interveners) [2019] 3 MLJ 561.
Judicial Appointments Commission Act 2009 (Act 695).
Kabasakal, M., 'Measuring the Decline of Parliaments: New Indicators and Turkey as An Illustrative Case' [2019] 73(1) CILT 269
Kaitan, T., 'Constitutional Directives: Morally-Committed Political Constitutionalism' [2019] 82(4) MLR 603.
Kesavananda Bharati v State of Kerala [1973] AIR SC 1461.
Kumar, V., 'Statement of Indian Law-Supreme Court Of India Through Constitution Bench Decisions Since 1950. A Juristic Review of Its Intrinsic Value and Juxtaposition' [2016] 58(2) Journal of the Indian Law Institute 189.
Lamer, A., *The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change* (New Brunswick Law Press 1996).
Law, D.S., 'Judicial Comparativism and Judicial Diplomacy' [2015] 163 Univ PA Law Rev <https://www.jstor.org/stable/24752760> accessed 8 October 2020.
Lee, H.P., 'The Judicial Power and Constitutional Government-Convergence and Divergence in the Australian and Malaysia Experience' [2006] 1 JMCL < http://www.commonlii.org/my/journals/JMCL/2005/1.> accessed 13 October 2020.
Lee, H.P., *Constitutional Conflicts in Contemporary Malaysia* (2ed, OUP 2017).
Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301.
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal [2000] MLJU 837.
Leong, T., 'Malaysia's Mps Approve Amendment To Lower Voting Age From 21 To 18' *The Straits Times* (Singapore, 2019) <https://www.straitstimes.com/asia/se-asia/malaysias-federal-constitution-amended-to-lower-voting-age-from-21-to-18> accessed 28 October 2020.
Liang, I., 'The Chronicles Of The Basic Structure Doctrine' (UMLR | University of Malaya Law Review, 2020) <https://www.umlawreview.com/lex-in-breve/the-chronicles-of-the-basic-structure-doctrine> accessed 25 October 2020.
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187.

Low, H.P., 'The Doctrine of Unconstitutional Constitutional Amendments in Malaysia: In Search of Our Constitutional Identity' [2018] 45(2) JMCL 53.

Madison, J., *Federalist No 51* (first published 1788, Wesleyan University Press 1961).

Malaysia Act 1963 (Act 26).

Maloy, F., *The Constitutions and Other Select Documents Illustrative of The History of France 1789-1901* (Wilson Publishing 1904).

Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] MLJU 13.

Mark Koding v Public Prosecutor [1982] 2 MLJ 120.

Martin, R., *Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (McGill-Queen's University Press 2003).

Muhammad Hilman v Kerajaan Malaysia [2011] 6 MLJ 507.

n/a, 'My Constitution: About Sabah and Sarawak' (*Badan Peguam Malaysia*, 10 January 2011) <https://www.malaysianbar.org.my/article/about-us/committees/constitutional-law-committee/my-constitution-about-sabah-and-sarawak> accessed 25 October 2020.

n/a, 'My Constitution: Judges and the Judiciary' (*Badan Peguam Malaysia*, 30 December 2010) <https:// www.malaysianbar.org.my/article/about-us/committees/constitutional-law-committee/my-constitution-judges-and-the-judiciary#> accessed 5 October 2020.

Negretto, G., 'Constitution-making and Liberal Democracy: The Role of Citizens and Representative Elites' [2020] 18(1) Int. J. Const. Law 206.

Neo, J., 'A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power And The Basic Structure Doctrine In Malaysia' (2020) 15 Asian Journal of Comparative Law 69.

Ng, H., *Counter-Majoritarian Difficulty: Constitutional Review: Singapore and Hong Kong Compared* (Biblio Bazaar 2017).

Nik Nazmi bin Nik Ahmad v Public Prosecutor [2014] 4 MLJ 157.

Official Statement, House of Representatives (*Penyata Rasmi Dewan Rakyat*), 23 February 1971, volume 1.

Pakaran, K., 'Disturbing Trend of The Bad and Ugly Emerging in New Malaysia' *The Star* (Kuala Lumpur, 14 July 2019) < https://www.thestar.com.my/opinion/columnists/heart-talk/2019/07/14/disturbing-trend-of-the-bad-and-ugly-emerging-in-new-malaysia> accessed 23 October 2020.

Pendakwa Raya v Kok Wah Kuan [2008] 1 MLJ 1.

Pepinsky, T.B., *The 2008 Malaysian Elections: An End to Ethnic Politics?* (CUP 2016).

Persson, T., Tabellini G. and Roland G., 'Separation of Power and Political Accountability' [1997] 112(4) Q J Econ 1163.

Phang Chin Hock v Public Prosecutor [1980] 1 MLJ 70.

Powell, G.B., *Contemporary Democracies: Participation, Stability and Violence* (HUP 1984).

Public Prosecutor v Dato Yap Peng [1987] 2 MLJ 311.

Public Prosecutor v Gan Boon Aun [2017] 3 MLJ 12.

Public Prosecutor v Yuneswaran A/L Ramaraj [2015] 6 MLJ 47.

Raina, A., 'Why There Are No Partisan Turnovers in Malaysia' [2016] 56(5) Cal. L. Rev. <https://www.jstor.org/stable/10.2307/26364390> accessed 17 October 2020.

Ram, G.S., 'The Dynamics of Constitutional Interpretation' [2017] 4 MLJ 1.

'Report of the Federation of Malaya Constitutional Commission' (London: Her Majesty's Stationery Office 1957).

Rivera, M.A., 'The Counter-Majoritarian Difficulty: Bickel and the Mexican Case' [2010] 3 N. M. Law Rev. 26.

Roznai, Y., 'Unconstitutional Constitutional Amendments - The Migration and Success of a Constitutional Idea' [2013] 61(3) Am. J. Comp <https://www.jstor.org/stable/43668170> accessed 10 October 2020.

Sajjan Singh v State of Rajasthan [1965] 1 S.C.R. 933.

Schonfeld, K.M., 'Rec, Lex Judex: Montesquieu and La Bouche De La Loi Revisited' [2008] 4 ECR 274.

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat [2017] 3 MLJ 561.

Shahizam, S., 'Whither Non-Justiciability? An Argument for Judicial Review of Prosecutorial Discretion in Light of the Basic Structure' [2020] 2 MLJ 21.

Shekhar, V., 'Malay Majoritarianism and Marginalised Indians' [2008] 43(8) EPW 22.

Sivarasa Rasiah v Badan Peguam Malaysia [2010] 2 MLJ 333.

Stone, A., 'Unconstitutional Constitutional Amendments: Between Contradiction and Necessity' [2018] SSRN Electronic Journal 1.

Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289.

Suhuaib, F.S., 'Lessons from a Secular State: Essence of the Constitution and Its Implication on Judicial Interpretation of Human Rights Provisions in Turkey' [2019] 24(2) JITC 167.

Tay, W.T.V., 'Basic Structure Revisited: The Case of Semenyih Jaya and the Defence of Fundamental Constitutional Principles in Malaysia' [2019] 14 AsJCL 113.

Tew, Y., 'On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics' [2016] 25 Pac. Rim L. &Pol'y J. 673.

Tham, C., 'Major Changes to the Constitution' (*Badan Peguam Malaysia*, 17 July 2007) <https://www.malaysianbar.org.my/article/news/legal-and-general-news/general-news/major-changes-to-the-constitution> accessed 19 October 2020.

The Malaysian Judiciary, *Yearbook 2012* (Percetakan Nasional Malaysia 2012).

Thomas, T., 'The Social Contract: Malaysia's Constitutional Covenant' (Malaysian Law Conference, Kuala Lumpur, October 2007).

Thye, C.C. and Weng, L.C., 'Federalism and Restoration of Sarawak's Territorial Waters and Boundaries' [2016] 6 MLJ 34.

Tuan Mat T.M., 'The Importance of Constitutionalism in Public Institutions' (The Lawasia Constitutional & Rule of Law Conference 5 October 2019) MLJ 2019.

Tulis, J. and Stephen, M., *The Limits of Constitutional Democracy* (PUP 2010).

Vestal, T., 'An Analysis of The New Constitution of Ethiopia and The Process of Its Adoption' [1996] 3(2) MichLRev 21.

Vile, J.R., 'Limitations on the Constitutional Amending Process' [1985] 496 Constitutional Commentary 373.

Weems v US [1910] 54 L Fd 793.

Yunus, M.H., 'Judicial Activism: The Way to Go?' [2012] 6 MLJ 17.

Yunus, M.S., 'The Malaysian Constitution and the Basic Structure Doctrine' *Legal Herald* (Selangor, November 2018) < https://www.lh-ag.com/wp-content/uploads/2018/12/1-The-Malaysian-Constitution-and-the-Basic-Structure-Doctrine.pdf> accessed 17 October 2020.

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2021

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