# INSAF

## THE JOURNAL OF THE MALAYSIAN BAR

Vol 41 No 1 June 2024 ISSN No: 0126-8538


*Co-published by the Malaysian Bar and the International Islamic University Malaysia (through Ahmad Ibrahim Kulliyyah of Laws)*

ISSN 0126-8538

9 770126 853002

Malaysian Bar
Wisma Badan Peguam Malaysia
2 Leboh Pasar Besar
50050 Kuala Lumpur
T: 03-2050 2050
E: council@malaysianbar.org.my
W: malaysianbar.org.my

Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia
PO Box 10
50728 Kuala Lumpur
T: 03-6421 4252
E: aikol@iium.edu.my
W: https://kulliyyah.iium.edu.my/aikol/

## ABOUT THE JOURNAL

First appearing in January 1967, INSAF is the journal of the Malaysian Bar, which publishes case notes, book reviews, commentaries, legislation reports, articles and academic papers on legal topics related to Malaysian law and legal system, as well as broader perspectives related to international law and legal issues.

After relaunching in 2022, INSAF is now a synergistic collaboration with the International Islamic University Malaysia ("IIUM"), where representatives from both the Malaysian Bar and IIUM are members of INSAF's Joint Editorial Board.

The Joint Editorial Board welcomes original and unpublished submissions of manuscript. Details for the format of submissions can be found at: **bit.ly/INSAFauthors** and submissions may be made via: **bit.ly/insaf_2022**.

The INSAF Joint Editorial Board reserves the sole right and discretion not to publish any manuscripts received, or if published, to edit them for space, clarity, and content. The views expressed in the articles or academic papers published are strictly the respective author's and do not represent the views of the Malaysian Bar, Bar Council or IIUM.

***Also available online:***
***insaf.malaysianbar.org.my***

***We accept submissions throughout the year.***
***Scan here to submit your original articles and more.***

**CONTENTS**


**PRACTITIONER NOTE**

No Limitation for Unjust Enrichment Claims In West Malaysia?
*By Puthan Perumal* 1 – 8

**ACADEMIC ARTICLES**

Enforcement of Human Rights Conventions Under International Law and Its Key Challenges
*By Mohamed Hanipa Maidin* 9 – 32

Tracing the Development of the Law for Estate Administration in West Malaysia
*By Azhani Arshad, Akmal Hidayah Halim, Rahmawati Mohd Yusoff* 33 – 58

The Salient Features of the Cyber Security Act 2024
*By Ida Madieha Abdul Ghani Azmi* 59 – 78

Ai and the Death of the Legal Profession: Much Ado Over Nothing
*By Ida Madieha Abdul Ghani Azmi* 79 – 105

**CASE REVIEW**

Stay Or Nay: The Court's Approach to a Stay of Proceedings Pending Disposal of Arbitration against Non-Parties in Malaysia
*By Sandhya Saravanan* 106 – 122

The Joint Editorial Board for INSAF would like to sincerely thank the following individuals who served as reviewers in Vol. 41 No. 1 (2024):

**Abu Daud Abd Rahim**
**Foong Cheng Leong**
**Khairil Azmin Mokhtar (Assoc. Prof. Dr.)**
**Rajsurian Pillai**
**Sarah Yong Li Hsien**
**Sodiq Omoola (Dr.)**
**Sonny Zulhuda (Assoc. Prof. Dr.)**
**Suzi Fadhilah Ismail (Assoc. Prof. Dr.)**
**Syahirah Abdul Syukor (Assoc. Prof. Dr.)**
**Wan Mansor b Wan Mohamed**
**Wan Noraini binti Mohd Salim (Dr.)**
**Yap Yeow Han**

# NO LIMITATION FOR UNJUST ENRICHMENT CLAIMS IN WEST MALAYSIA?

* Puthan Perumal

## ABSTRACT

Unjust enrichment was only recognised as an independent cause of action in the United Kingdom in 1991 through the case of *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. Singapore's Court of Appeal in the case of *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] SGCA(I) 1 ("Esben Finance") has held that claims in unjust enrichment, do not come within the ambit of the Singapore's Limitation Act 1959 and therefore such claims in unjust enrichment, are not time-barred. West Malaysia's Limitation Act 1953 share a common legislative history with the Singapore's Limitation Act 1959 as both are modelled after the English law of limitations. This principle in *Esben Finance* should thus be adopted in West Malaysia.

**Keywords:** cause of action, unjust enrichment, restitution, time-barred, Limitation Act 1953

* Advocate & Solicitor.
*Email puthan23@gmail.com*

## INTRODUCTION

An article to explore the possibility to adapt Singapore's position that claims in unjust enrichment are not time-barred under the existing limitation law.

## SINGAPORE'S POSITION ON LIMITATION REGARDING CLAIMS FOR UNJUST ENRICHMENT

In the Singapore Court of Appeal case of *Esben Finance Ltd v Wong Hou-Lianq Neil,*[1] it was held: -

> 81 However, the law of restitution and unjust enrichment is a developing branch of the law of obligations and most claims in this particular area of the law would not have been in the contemplation of the legislature at the point of drafting the Limitation Act as well as its predecessor legislation. Indeed, in the SAL Report, the SAL Reform Committee noted that the Limitation Act is "couched only in terms of obligations known to the drafters at the time of drafting", and **this would therefore not include obligations such as unjust enrichment and other restitutionary claims, which were not known in 1959** when the act was drafted (at para 64). The Committee therefore recommended that the law of limitations in Singapore in relation to the law of restitution was "plainly in need of reform" (at para 67).
>
> 82 In Consultation Paper No 151, the Law Commission of England and Wales noted that the 1980 UK Act laid down limitation periods for specific and limited restitutionary claims but did not explicitly apply to the "bulk of restitutionary claims". The Commission concluded that (at paras 5.2–5.3):
>
> This means that the central choice facing the courts has been to construe the 1980 Act, albeit artificially, as applying to these claims; or to conclude that no limitation period applies to common law restitutionary claims and that any equitable

1 [2022] SGCA(I) 1, ('***Esben Finance***").

restitutionary claims should be left to the doctrine of laches. [emphasis added]

83 Further, in the report of the Law Commission of England and Wales on the law of limitation, it was noted that **unjust enrichment was only recognised as an independent cause of action by the House of Lords in 1991, in the case of Lipkin Gorman** (see Law Commission of England and Wales, Limitation of Actions: Item 2 of the Seventh Programme of Law Reform (July 2001) Law Com No 270 at para 2.48). **Given that the Limitation Act was modelled after the 1939 UK Act, it must follow that claims in unjust enrichment were not within the contemplation of the local legislature in 1959 (which, significantly, represents the present law in Singapore today).** There would also be no basis for claims for restitution of wrongs (apart from claims founded on a civil wrong in one of the established grounds under the Limitation Act) to be construed as coming under the Limitation Act, as Parliament similarly did not envisage such claims as coming within the Limitation Act.

84 Indeed, it should be noted that statutory limitation periods are emphatically as well as quintessentially creatures of statute, and **it is not the function of the courts to act as "mini-legislatures" by reading into the Limitation Act a statutory limitation period for a claim which the Legislature did not intend to impose**. **The Limitation Act does not, understandably, contain any "sweeping-up" or "catch-all" provision imposing a general limitation period for all other claims not expressly specified in the Act itself. This suggests that the Legislature did not intend all claims to be subject to a limitation period but only those which it deemed ought to have been so limited (namely, the claims expressly specified in the Act). It follows that claims which could not have been within the contemplation of the Legislature at the time the Limitation Act and its predecessor legislation were enacted could not have been intended by the Legislature to be subject to statutory limitations under the respective statutes (in particular, the Limitation Act)**.

> 85 We acknowledge that the position that we have reached is an unhappy one. However, in view of the statutory wording of the Limitation Act and its legislative history, **we decline to (artificially) hold that restitutionary claims, including those in unjust enrichment, come within the ambit of the Limitation Act. Until the lacuna in the law has been addressed by Legislature, restitutionary claims are therefore not time-barred**. As we further elaborate at [123] below, this should be an urgent clarion call for legislative intervention.

## THE MALAYSIAN POSITION ON LIMITATION REGARDING CLAIMS FOR UNJUST ENRICHMENT

What would be the position in the West Malaysian jurisdiction where the Limitation Act 1953 (Act 254) applies?

Sections 6(1) and 6(7) of the Singapore's Limitation Act 1959 state: -

> 6(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued: (a) actions founded on a contract or on tort; (b) actions to enforce a recognizance; (c) actions to enforce an award; (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture …
>
> 6(7) Subject to sections 22 and 32, this section shall apply to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

Sections 6(1) and 6(6) of the Limitation Act 1953 (Act 254) state:

> 6 (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say: (a) actions founded on a contract or on tort; (b) actions to enforce a recognisance;(c) actions to enforce an award; (d) actions to

> recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture. …
>
> (6) Subject to sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

It can safely be said that the two abovementioned provisions are *in pari materia*.

We can also see that the legislative history of the Limitation Act 1953 (Act 254) coincides with the legislative history of the Singapore Limitation Act 1959, as both are modelled after the English law of limitations at about the same time.

It is also trite that unjust enrichment was only recognised as an independent cause of action by the House of Lords in 1991, in the case of *Lipkin Gorman v Karpnale Ltd*.[2]

Having set the parameters above, can it then be argued that the rationale and the legal reasoning in ***Esben Finance (supra)***, (in that restitutionary claims, including those in unjust enrichment do not come within the ambit of the Limitation Act and are therefore not time-barred) should be adopted in the West Malaysian context?

Respectfully, there is no clear reason why it should not be applied in the West Malaysian courts.

In particular, paragraph 84 of ***Esben Finance (supra)*** comes to the aid of such an assertion that it should apply. The Singapore Court of Appeal said:

> The Limitation Act does not, understandably, contain any "sweeping-up" or "catch-all" provision imposing a general limitation period for all other claims not expressly specified in the Act itself.

When we study the Limitation Act 1953 (Act 254), we would find that it too does not contain any sweeping-up or catch-all provision

---

2 [1991] 2 AC 548.

imposing a general limitation period for all other claims not expressly specified in the 1953 Act itself.

To demonstrate the intention of Legislature to the contrary, we may look at the Limitation Ordinance 1952 (Sabah Cap. 72). In the Malaysian Court of Appeal case of *Lin Wen-Chih & Anor v Pacific Forest Industries Sdn Bhd & Anor*,[3] Justice S Nantha Balan JCA held:-

> **[179]** As stated earlier, the period of limitation for a cause of action for breach of contract (in writing) is 6 years (per item 95 of the Schedule). **And the limitation period for a cause of action for unjust enrichment is also 6 years (per item 97 of the Schedule)**. In the context of the claim for unjust enrichment, it is relevant to mention that the claim is for restitution.

Item 97 of the Schedule to the Limitation Ordinance 1952 (Sabah Cap. 72) provides that for a suit for which no period of limitation is provided elsewhere in this Schedule, the period of limitation is 6 years.

Item 97 of the Schedule to the Limitation Ordinance (Sarawak) (Cap 49) also provides that for a suit for which no period of limitation is provided elsewhere in this Schedule, the period of limitation is 6 years.

These would be examples of a "sweeping-up" or "catch-all" provision imposing a general limitation period for all other claims not expressly specified in the Act itself, contemplated in ***Esben Finance supra***.

As pointed out earlier, the Limitation Act 1953(Act 254) does not contain an equivalent provision as Item 97 of the Schedule to the Limitation Ordinance 1952 (Sabah Cap. 72) nor of that in the Limitation Ordinance (Sarawak) (Cap 49).

Therefore, it is respectfully submitted, and to use the words of the Singapore Court of Appeal in ***Esben Finance supra***, that this suggests that the Legislature did not intend all claims to be subject to a limitation period but only those which it deemed ought to have been so limited (namely, the claims expressly specified in the Act). As further pointed out by the Singapore Court of Appeal in ***Esben Finance supra***, this is

[3] [2021] 4 MLJ 367.

only strengthened by the rationale that unjust enrichment was only recognised as an independent cause of action by the House of Lords in 1991 in the case of *Lipkin Gorman v Karpnale Ltd*,[4] and therefore such a claim could not have been within the contemplation of the Legislature at the time the Limitation Act 1953 (Act 254) and its predecessor legislation were enacted.

Until and unless Parliament addresses the lacunae in the Limitation Act 1953(Act 254), the position should be that restitutionary claims, including those relating to unjust enrichment do not come within the ambit of the Limitation Act 1953(Act 254) and is therefore not time-barred.

Until such time, we should welcome the decision of ***Ebsen Finance supra*** into jurisprudence of West Malaysia.

There is also another point to consider. At paragraph 76 of ***Ebsen Finance supra***, the Singapore Court of Appeal held:

> 76 For completeness, we make two further points. First, the respondent had initially argued (although this point appears to have been dropped during the hearing itself) that the **appellants' claim in unjust enrichment was time-barred under s 6(7) of the Limitation Act, as the appellants had, in his view, sought equitable relief**. However, to begin with, the claim in question has to be one "founded upon any contract or tort or upon any trust or other ground in equity". **A claim in unjust enrichment does not fall into any of those categories**. In addition, the analysis above in relation to the legislative history of the Limitation Act demonstrates that claims in unjust enrichment were simply not envisioned in the drafting of the Act.

We saw earlier that Singapore's section 6(7) of the Limitation Act is equivalent to our Section 6(6) of the Limitation Act 1953(Act 254). Based on paragraph 76 of ***Ebsen Finance supra***, it would appear that a claim for unjust enrichment is not a claim for equitable relief envisioned in the drafting of the Limitation Act 1953(Act 254) and

---

4 [1991] 2 AC 548.

therefore Section 6(6) of the Limitation Act 1953 (Act 254) is not applicable in such claims.

## CONCLUSION

To conclude, as the wordings of the Limitation Act 1953(Act 254) currently stand, it is respectfully submitted, firstly, that the legal position in West Malaysia should be that restitutionary claims, including those in unjust enrichment do not come within the ambit of the Limitation Act 1953(Act 254) and is therefore is not time-barred. Secondly, a claim for unjust enrichment is not a claim for equitable relief for the purposes of the Limitation Act 1953(Act 254) and therefore, Section 6(6) of the Limitation Act 1953 (Act 254) is not applicable.

# ENFORCEMENT OF HUMAN RIGHTS CONVENTIONS UNDER INTERNATIONAL LAW AND ITS KEY CHALLENGES

* Mohamed Hanipa Maidin

## ABSTRACT

The key challenges in efficiently enforcing human rights conventions under international law are the central theme of this essay. Ergo, this essay 's sole intention is to highlight a slew of primary challenges faced by the international community in ensuring an effective enforcement of international human rights conventions under international law. Despite the fact the essay mentions two popular paradigms that have duly emerged under international law - Pinochet and Filartiga paradigms – which bring fresh international inventions in offering new ways of addressing human rights abuses, it never seeks, however, to offer any solution let alone practical solutions in tackling the problems of human rights abuses. This essay is essentially the improved or edited version of the earlier paper initially presented before law students at Simad University in Somalia. This essay also argues that the key challenges in effectively enforcing international human rights law ought to be given due recognition and top priority in its attempt to end the predicament of impunity plaguing the global population.

**Keywords:** human rights, Pinochet paradigm, individualistic. international law, International human rights conventions

* Mohamed Hanipa Maidin has a master degree in international law (LL.M) and he is a former Deputy Minister of Law in Malaysia as well as a former Member of Parliament. He was also a practising lawyer for almost 25 years. He had appeared as a human rights lawyer in public interest litigations in Malaysian courts.
*Email hanipamaidin12@gmail.com*

## INTRODUCTION

The emergence of the doctrine of human rights is premised on the assumption that the state is in high need to duly protect and preserve human dignity. As far as the rights of human beings are to be duly honoured and ennobled, they are essentially inherent or inalienable rights that are duly bestowed upon all human beings.

Muslims believe that such rights are duly endowed by the Almighty God as succinctly stated in the Muslims' holy book - the Quran which reads "We have ennobled the Children of Adam**..." (**17**:** 7)

Be that as it may, whenever Muslims talk about human rights such rights are always viewed as *Theocentrism* (God-centred rights).[1] *Au contraire*, as far as the Western paradigm of human rights is concerned, such rights are invariably viewed under the lens of *Anthropocentrism* (men-centred rights).[2]

Ergo, historically speaking, Muslims never had to resort to any bloody war or armed conflicts to demand from the states for such rights to be duly conferred to them. Hence human rights are considered to be their birthright.

On the other hand, anyone who pores over the history of Western history will easily find that the Western people had to ferociously fight to gain due recognition of even their elementary rights[3] and to attain and enjoy such fundamental liberties many innocent lives had to be unnecessarily sacrificed. Simply put, the Western people had to "purchase" rights and liberties by trading with their sacred lives.

As we may be fully aware, the West, having indulged in the Thirty Years' War (1618-1648) finally agreed to halt such bloodshed

---

1 See Macrina A Morados, "Theocentrism and Pluralism: Are They Poles Apart?," *Policy Perspectives* 5, no. 3 (2008): 37–49.

2 Pu Jingxing and Guo Song, "Abandon Selfish Western Anthropocentrism to Solve Pandemic with Chinese Man-Nature Philosophy," Global Times, 2021, https://www.globaltimes.cn/page/202109/1233265.shtml.

3 Holly J McCammon and Karen E Campbell, "Winning the Vote in the West: The Political Successes of the Women's Suffrage Movements, 1866-1919," *Gender & Society* 15, no. 1 (2001): 52–82.

by signing the Treaty of Westphalia in 1648. The Thirty Years' War was one of the most devastating war in European history resulting in a death toll of approximately eight million people.[4]

Prof Eric Posner rightly pointed out that the 1948 Universal Declaration of Human Rights arose from the ashes of the Second World War and aimed to launch a new, brighter era of international relations.[5] Armed conflict or war and poverty are often said to be the major enemies of human dignity.[6]

The enforcement let alone the effective enforcement of international human rights conventions has been facing a whole raft of challenges. Hence this essay seeks to address this issue.

This essay would, therefore, be structured in the following fashions. Firstly, it will touch on the problems faced by the international community in coming to terms with an agreed-term definition of human rights. Secondly, the essay will embark on the discussion of theories of human rights. Bearing in mind the law on human rights is far from being static, we shall also dive into the discussion on the progressive development of theories of human rights in the third limb of this essay.

As the primary aim of this essay is on the primary challenges in enforcing human rights conventions under international law, the three aforementioned issues will be deliberated in a minimalist fashion only.

And as the issue of key challenges in efficiently enforcing human rights conventions under international law is the major plank of this essay, the issue will be discussed relatively at great length in this essay. Ergo, this essay will highlight the main challenges faced by the international community in ensuring international human rights conventions under international law are duly observed. This essay will argue that the prime challenges in effectively enforcing international

---

4 Joshua J. Mark, "Thirty Years' War," World History Encyclopedia, 2022, https://www.worldhistory.org/Thirty_Years'_War/.

5 Eric Posner, "The Case against Human Rights," The Guardian, 2017, https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights.

6 See: Douglas Donoho, "Human Rights Enforcement in the Twenty-First Century," *Ga. J. Int'l & Comp. L.* 35, no. 1 (2006): 1–52, https://digitalcommons.law.uga.edu/gjicl/vol35/iss1/2/.

human rights law ought to be given due recognition and top priority in ending the problem of impunity which has been plaguing the global population.

Finally, before concluding this essay we shall also delve into two new paradigms of the enforcement of human rights violations under international law that have fortunately emerged. The first model is known as the *Pinochet* paradigm/effect and the second model is popularly branded as the *Filartiga* paradigm. Despite the existence of these two significant paradigms which essentially seek to end impunity, these two paradigms, however, still face challenges as well in effectively ending human rights abuses.

## THE PROBLEM OF RESOLVING AN AGREED DEFINITION OF HUMAN RIGHTS

It goes without saying that hitherto international law jurists have not been able to resolve the issue of the true and definitive meaning of human rights. The international legal fraternities have been wrestling even with the definitive meaning of the word "right" as the definition of such a term is highly contentious and has been subject to jurisprudential debates.[7]

The clashes of the true definition of human rights are, in fact, not a new phenomenon. Hence, the global community has been grappling with settling on a conclusive definition to date. The term ‘human rights’ is said to have appeared for the first time in the modern international document in the Washington Declaration by the United Nations on 1 January 1942.[8]

Such being the case, one may argue that the term ‘human rights’ is relatively a nascent phenomenon.

---

7 M.N. Shaw, *International Law* (London: Cambridge University Press, 2014).

8 Shabtai Rosenne, *The Perplexities of Modern International Law: General Course on Public International Law*, vol. 291 (Leiden/ Boston: Martinus Nijhoff Publishers, 2002).

Some Muslim scholars, on the contrary, are of the view that Al-Quran is the *Magna Carta* of human rights.[9] The Muslim holy book seems to agree with the universalist on the right to life and dignity when it says "We have certainly ennobled the children of Adam "[17:7].

## THEORIES OF HUMAN RIGHTS

Theories of human rights over the past half-century have broadly appeared to perpetuate a rigid dichotomy between a universalistic conception of human rights and a relativistic approach.[10]

The former so-called "Western" model has been accused of advocating an individualistic approach to rights that prioritises the individual's rights against society; by contrast, the "Non-Western values" approach emphasises social stability, privileging community and duties over the rights of the individual.[11]

Universalism believes that the fundamental values and principles highlighting the concept of human rights are - according to this theory - of universal character. Every human being is, therefore, entitled to be protected from any human rights infringement.

These values and principles deal with the concept of liberty and freedom, the belief in democracy and political rights, and the acknowledgment of social and economic rights. Universal human rights are frequently said to be predominantly based on Western ideologies. Historically speaking, the idea that human rights are universal is often associated with the renowned English philosopher, John Locke (1632-1704).[12]

Relativism, being a long-standing rival of universalism, is normally characterised as a set of views about the connection between

---

9 *Umar* Ahmad Kasule, *Contemporary Muslims and Human Rights Discourse: A Critical Assessment* (Malaysia: IIUM Press, 2009).

10 Yvonne Tew, "Beyond 'Asian Values': Rethinking Rights" (UK: Centre of Governance and Human Rights, 2012), https://www.repository.cam.ac.uk/handle/1810/245115.

11 Tew, p.3.

12 Matthew Lower, "Can and Should Human Rights Be Universal?," *E-International Relations* 1 (2013), https://www.e-ir.info/2013/12/01/can-and-should-human-rights-be-universal/.

morality and culture or humanity. In essence, cultural relativism is based on the morals, ethics, and customs of each human society. Franz Boas, a German American anthropologist who is also known as 'the father of American Anthropologist' is often said to have expounded the theory of cultural relativism.[13]

Relativists believe that experience is primarily human's connection to reality. From experience, judgment is derived. Human's judgment is culturally bound too, according to this theory. The idea of relativism challenges universalism and the intent of the declaration. Hence, relativists believe that beliefs, values, and therefore rights are a product of culture. They vary. And they differ from culture to culture or place to place. Relativists hold the view that there is no such thing as " one size fits all" in so far as human rights are concerned.

If Asia and Africa are to be placed in a box marked as "Third World States" it is often said that as far as these two continents are concerned, the social and economic rights trump other human rights and it characterises the Asians and Africans view on human rights.[14] Yvonne Tew believed that the "Asian values" are a good illustration of cultural relativism.[15] The same may also apply to the "African values".[16]

## THREE GENERATIONS OF HUMAN RIGHTS

As the law of human rights is not static, jurists of international law have developed new theories of human rights based on the progressive development of such rights. Hence many commentators have talked of 'generations' of human rights, which is, according to Martin Dixon, another way of describing how the substance of human rights has

---

13 Suresh Gurramkonda, "Cultural Relativism," Eden IAS, 2022, https://edenias.com/cultural-relativism-by-dr-suresh-gurramkonda/.

14 See supra, Note 7

15 See supra, Note 10.

16 The relativism influence can be seen, for example, in one of the preambles of the African Charter on Human and People's Rights where it is stated that "Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights".

become more refined as the very concept of "human rights" has become more entrenched in the system of international law.[17]

**First generation of human rights**

The first generation rights essentially entail civil and political rights which are considered to be the core of most human rights treaty regimes. Such rights include matters as such as the right to life, the abolition of slavery, the right to a fair trial, the prohibition of torture, and the right to recognition before the law.[18]

**Second generation of human rights**

When many colonised states had been emancipated from the yoke of colonialism and in turn gained independence, they, along with countries such as China, began to assert another form of human rights which related to matters of social and economic significance, such as the right to work,[19] the right to social security, the right to an adequate standard of living, and the right to education. And the jurists have catalogued all of these rights under the rubric of the second generation of human rights.[20]

As far as the enforcement mechanisms for second generation rights are concerned, they, however, tend to be more flexible and less powerful than those available to the individual claiming a violation of their civil and political rights.[21]

**Third generation of human rights**

As far as the third generation rights are concerned they often include very general concepts such as rights to development, the right to a

---

17 Martin Dixon, *Textbook on International Law* (USA: Oxford University Press, USA, 2013).

18 Dixon.

19 See for instance Article 15 of African Charter on Human and People's Rights which provides that "Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work". See also Article 27 (1) of the Asean Human Rights Declaration which states "Every person has the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed."

20 See supra, Note 17.

21 Ibid.

protected environment, the right to peace, and a wide-ranging right of self-determination.[22]

## ENFORCEMENT OF HUMAN RIGHTS UNDER INTERNATIONAL LAW

The desire to effectively enforce international human rights laws stems from the common mission of the international community which is based on a shared understanding that international law has a key role to play not only in setting standards for governments, non-state actors, and their agents, but also in prescribing the consequences of a failure to meet those standards.[23]

Though the idea of holding individuals responsible for egregious conduct toward their fellow human beings is not totally foreign, the duty to regulate such behaviour is often reserved for municipal or domestic criminal law and is part of civil law. Hence when it comes to the enforcement of human rights laws, it would be, relatively speaking, much easier to enforce human rights obligations that are contained in municipal or domestic law as states are generally equipped with a whole raft of enforcement agencies - such as police force - at their disposal. Any individual who violates human rights protection under any relevant law would be sufficiently dealt with by states via the relevant enforcement agency. Be that as it may, the likelihood of impunity would be relatively minimal.

Generally, human rights protections are enshrined in many constitutions of many states in the world.[24] And such constitutions are

---

22 Ibid.

23 Steven R Ratner, Jason S Abrams, and James L Bischoff, "Individual Accountability for Human Rights Abuses: Historical and Legal Underpinnings," in *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, ed. And Steven R. Ratner, Jason S. Abrams and James L. Bischoff (Oxford: Oxford University Press, 2009).

24 See, for example, The Federal Constitution of Malaysia and The Provisional Constitution of the Federal Republic of Somalia respectively. Both of these constitutions are replete with provisions relating to certain guaranteed set of human rights.

more often than not treated as the supreme law of such states.[25] Be that as it may, any law or act which is repugnant to such constitutions would be generally considered to be invalid and unconstitutional. Unless such states are being catalogued as failed states, the issue of enforcement of human rights is, in general, not problematic. If at all such enforcement is infected with inefficiency such a problem is often associated with the lack of a strong political will in enforcing such embedded rights due to a slew of elements such as corruption or abuse of power. But it needs to be emphasised here even though the issues of enforcement of human rights laws in municipal or domestic law are quite relevant to this essay, they are not its focus herein.

## MAJOR OBSTACLES IN ENFORCING INTERNATIONAL HUMAN RIGHTS CONVENTIONS

Harold Koh was right when he argued that whilst international human rights are under-enforced, "they are enforced" through the transnational legal process.[26]

International law has been invariably subject to juristic debates in that some of the jurists are of the view that it is not, in essence, a "true" law because the popular view seems to suggest it is not generally enforceable. Such criticism is founded on the assumption that the hallmark of a system of law is that its rules are capable of being enforced against malefactors. And such a vital element - to the critics -

---

25 See Article 4 (1) of the Federal Constitution of Malaysia which enshrines the supremacy of the constitution by prescribing "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" ; see also Article 4 (1) of The Provisional Constitution of the Federal Republic of Somalia which states that "After the Shari'ah, the Constitution of the Federal Republic of Somalia is the supreme law of the country. It binds the government and guides policy initiatives and decisions in all sections of government".

26 C Harris Lecture Addison and Hongju Koh, "How Is International Human Rights Law Enforced?," *International Law of Human Rights* 74, no. 4 (2017), https://www.repository.law.indiana.edu/ilj/vol74/iss4/9.

is absent in international law.[27] Some international lawyers argue that international law has long been burdened with the charge that it is not really law.[28]

In addition to that, critics seem to formulate a test that determines the binding quality of any 'law' is the presence or absence of assured enforcement of its rules. This paper is, however, not aimed at rebutting such a debatable test.

Many believe that the major stumbling block in effectively enforcing a plethora of international human rights laws is that international law is purely a state action. Yes, the key underlying feature of international law is the state consent. As rightly pointed out by Noura Erakat, the enforceability of international law heavily depends on voluntary state consent and compliance. Therefore, in the absence of the political will to make state behaviour compatible with the law, violations are the norm rather than the exception.[29].

By virtue of this very element, any international conventions - inclusive of conventions dealing with human rights under international law - are only binding against the state if the same are duly signed, acceded and ratified. And interestingly the states are not bound to sign, accede and ratify any international human rights conventions. In other words, they cannot be compelled to do so as international law duly recognises the sovereignty of any state. Be that as it may, each state possesses the sovereign right to decide upon its social and economic structures as well as to lay down laws that will influence the national character of the state and of life within it.[30]

---

27 Hersch Lauterpacht, "The Doctrine of Non-Justiciable Disputes in International Law," *Economica*, no. 24 (1928): 277–317, https://doi.org/https://doi.org/10.2307/2548052.

28 Eric Posner and Jack Landman Goldsmith, *The Limits of International Law* (United States of America: AEI: American Enterprise Institute for Public Policy Research, 2005), https://coilink.org/20.500.12592/qvrh9b.

29 Noura Erakat, "No, Israel Does Not Have the Right to Self-Defense in International Law against Occupied Palestinian Territory," *Jadaliyya*, 2014.

30 Vaughan Lowe, *Sovereignty Inside the State* (in Oxford University Press eBooks, 2015), https://doi.org/https://doi.org/10.1093/actrade/9780199239337.003.0005.

Another major obstacle which hinders any effective enforcement of international human rights conventions will be the following factor. International law itself consciously permits states to impose some reservations to specific Articles in such conventions when the requirement of the Article may be seen to have conflicted with an area of domestic law.

In essence, reservations and understandings are statements made by state parties at the end of such conventions thus limiting some of their obligations under the terms of such conventions. Reservations and understandings which are absolutely legal and lawful under international law may, however, weaken the efficacy of the enforcement let alone effective and efficient enforcement of any international human rights convention.

To rub salt to the wound, under dualist conception, international obligations effectively would only gain the status of domestic law upon the actual incorporation of such international obligations into the domestic system. This is because a dualist system always treats the international and domestic systems of law as separate and independent.[31]

In other words, international legal obligations have to pass through a "domestic filter" to attract the status of enforceability in the domestic legal order. International law highly values the sovereignty of any state. Hence each state has the sovereign right to decide upon its social and economic structures, and to lay down laws that will influence the national character of the State and of life within it. The upshot of this is that any state that embraces the doctrine of dualism may, for instance, duly sign and even ratify any international human rights instruments, but it may concomitantly procrastinate to implement and execute such laws by not taking any necessary action to incorporate such international human rights instruments into domestic laws. [32]

---

31 Marko Novaković, "Basic Concepts of Public International Law– Monism & Dualism," *Међународни Проблеми* 66, no. 1–2 (2014): 322–43.

32 In the case of Air Asia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318, the Malaysian Court of Appeal held that for an international treaty to be operative in Malaysia, it requires legislation by parliament. The decision shows that Malaysia embraces the dualism doctrine. See

Be that as it may, the dualist conceptionis always viewed as an anathema to the efficacy of enforcing any international human rights instruments. Until and unless a state is ready and willing to embrace the ideology of monism which treats international law obligations, ipso facto, as part of the domestic legal system, and enforceable like any other source of domestic law, the dualist conception would oftentimes pose a great obstacle in successfully enforcing any international human rights instruments as these instruments need to be firstly domesticated before they can be enforced like any other municipal law. States often provide a whole raft of justifications and excuses in refusing to domesticate such international human rights instruments even though they may, at the same time, duly acknowledge the positive elements appearing in those international instruments.

As international law does not possess a system of institutionalised enforcement such as the absence of a "police force" or compulsory court of general competence, it badly needs the "help" of individual states to enforce any ratified international treaties on human rights in the domestic domain. This is another major factor contributing to the weak enforcement of international human rights conventions.

It is often argued that the watershed for the development of the principle of individual accountability for human rights abuses was the exercise undertaken by the victors of World War II following the previously unimaginable atrocities of that conflagration, particularly the Holocaust.

Despite the unimaginable atrocities - systemic and serious human rights violations - committed in World War II, the said War, ironically produced positive development as far as the enforcement of human rights doctrines was concerned. To cite one glaring example was the timely creation of the International Military Tribunal at Nuremberg and the related war crimes trials driving home this pertinent point - no individual could escape from the long arm of international law when he committed crimes or atrocities against anyone.

---

also Mohamed Hanipa Maidin, "THE IMPLICATIONS OF THE PARIS AGREEMENT AND NDC TO MALAYSIA" [2023] 3 MLJ ccxvii.

Historically, individual officials bore personal responsibility for outrageous conduct toward their citizens and noncitizens during wartime and they ought to be held accountable for such crimes.

Consequently, the IMT Charter, for instance, contained a very significant provision holding individual criminal responsibility for violations of the laws and customs of war, as well as other egregious acts in connection with the war encompassed under the rubric of' crimes against humanity. The criminalisation of the war was also incorporated under the said Charter.

As if foreseeing the strength of several possible powerful criminal defences for several international crimes such as the defences of superior orders, command of the law, and act-of-state immunity, the Charter decided to eliminate all such defences thereby subjecting even heads of state to criminal liability. These principles could be found in the Charter of the Tokyo Tribunal and Control Council Law No. I0, the latter of which governed many significant prosecutions of Nazis below the level of those tried before the IMT and endorsed by the UN General Assembly in 1946.

## THE INEFFECTIVE ROLE OF SECURITY COUNCIL IN THE ENFORCEMENT OF INTERNATIONAL LAW

Hannah Moscrop argues the birth of international human rights law was under the United Nations, created by the victors of World War II. As such, she contends that the UN system therefore favoured, and indeed still does, the interests of the powerful states of the mid-1940s. This is most strongly reflected in the powers of the P-5 in the Security Council.[33]

Under the existing make-up of the UN Charter, it is plain and obvious that the UN has specifically reserved the enforcement powers only to the Security Council especially when such enforcement powers have to do with matters involving the existence of any threat to the peace, breach of the peace, or act of aggression. And such enforcement

---

33 Hannah Moscrop, "Enforcing International Human Rights Law: Problems and Prospects," E-International Relations, 2014, https://www.e-ir.info/2014/04/29/enforcing-international-human-rights-law-problems-and-prospects/.

measures are clearly spelt out in Chapter VII of the UN Charter (comprising several Articles ranging from Art 39 to Art 54 of the Charter).

The five permanent members of the UN Security Council (P5)[34] are fully aware that the United Nations would not have been founded without them having the power of the veto, hence these five members have invariably exploited these advantages to the hilt in ensuring that all major decisions would require the support, or at least the acquiescence, of them.

Some scholars argue that the veto power conferred by the UN Charter is the most significant distinction between permanent and non-permanent members of the Security Council. But from the get-go, the veto has been a steady source of tension between the permanent members and the wider membership of the U.N.[35] It is undisputed that vetoes affect the Council's ability to address some of the most serious violations of the U.N. Charter and international law.

Historically speaking China has used its veto more actively and, in each of these cases, has done so with Russia. Together with Russia, it vetoed resolutions on Myanmar and Zimbabwe in 2007 and 2008, with its remaining 11 vetoes in this period being on resolutions related to Syria.[36]

Since 2000, Russia has effectively vetoed many draft resolutions particularly on Syria and on Ukraine. It also vetoed resolutions on the 20th anniversary of the genocide in Srebrenica, Georgia, Yemen sanctions, Venezuela, and climate and security.[37]

---

34 The permanent members are China, France, Russia, the United Kingdom, and the United States.

35 Shamala Kandiah Thompson, Karin Landgren, and Paul Romita, "The United Nations in Hindsight: Challenging the Power of the Security Council Veto," URL: https://www. justsecurity. org/81294/the-united-nations-in-hindsight-challenging-the-power-of-the-security-council-veto (дата звернення 07.12. 2023), 2022, https://www.justsecurity.org/81294/the-united-nations-in-hindsight-challenging-the-power-of-the-security-council-veto/.

36 Thompson, Landgren, and Romita.

37 Security Council Report, "In Hindsight: Challenging the Power of the Veto," Security Council Report, 2022,

The United States is the only member of the P3 (France, the United Kingdom and the United States) that has continued to use its veto with all but two resolutions related to the Israel-Palestine conflict. It vetoed a resolution on Bosnia and Herzegovina in 2002, and its most recent veto was on a counter-terrorism resolution in August 2020.[38]

As these numbers and issues indicate, vetoes affect the Council's ability to address some of the most serious violations of the U.N. Charter and international law. On matters related to Syria, the use of the veto has blocked the Security Council's condemnation of chemical weapons attacks, shut down a chemical weapons investigation mechanism and prevented a referral to the International Criminal Court.

As far as the issue of Ukraine is concerned, the use of the veto has effectively blocked investigations and the establishment of criminal tribunals, as well as condemnation of Russian aggression against Ukraine.

It goes without saying that as far as the situation in the Middle East - including the Palestinian issue - is concerned, the veto arguably is one of the major obstacles hindering the cessation of the ongoing armed conflicts involving Israel in Palestine. The veto power - frequently invoked by the Israeli major ally (the United States) has prevented, for instance, the condemnation of the building of illegal settlements, and the use of violence against Palestinians. The 2020 U.S. veto of a draft resolution on the prosecution, rehabilitation, and reintegration of foreign countries and Russia's 2021 veto of a draft resolution on climate and security may portend their new readiness to deploy the veto on thematic issue.[39]

In exercising such powerful powers, the UN has also provided, for instance, several key articles in the UN Charter in ensuring the SC could efficiently and effectively carry out such enforcement powers. Two central planks which substantially characterise international law

https://www.securitycouncilreport.org/monthly-forecast/2022-05/in-hindsight-challenging-the-power-of-the-veto.php.

38 Security Council Report.

39 See supra, Note 35.

are the principle of state sovereignty and the principle of non-intervention. And these two vital elements seem to have been duly embodied in Article 2 (7) of the Charter. Despite the fact that Article 2 (7) is ominously silent in prescribing the entity which has the authority to decide whether in any particular case the reservation of domestic jurisdiction applies, the *proviso* in the said Article, nevertheless, seems to offer the necessary way out when it provides "this principle shall not prejudice the application of enforcement measures under Chapter Vll." Unfortunately, this proviso is rarely invoked for genuine purposes. More often than not, the proviso was indiscriminately invoked by superpowers in "disciplining the recalcitrant states" - a term which is haphazardly coined by them in justifying the "punishment" against such purported "recalcitrant" states. The unilateral military action by the US and its allies against states such as Iran, Syria and Iraq were cases in point.

While some commentators argue that the primary purpose of the United Nations is the enforcement of international peace and security, others assert that the United Nations has a second and equally important purpose as evidenced in the Charter's preamble, namely the international protection of human rights.[40]

As human rights violations have been occurring in the present internal conflict in Sudan in which the UN can simply take a judicial notice, the UNHCR, - the UN Refugee Agency - addressed the international community in desperate need of a humanitarian intervention to end the human rights violations in that country.[41] As of May 2023, the Human Rights Council reported that more than 600 people had been killed in the fighting, more than 150,000 had fled Sudan, and over 700,000 had become internally displaced.[42]

---

40 Johannes Van Aggelen, "The Preamble of the United Nations Declaration of Human Rights," *Denv. J. Int'l L. & Pol'y* 28 (1999): 129.

41 UNHCR - The UN Refugee Agency, "Sudan: UNHCR Warns of Increasing Violence and Human Rights Violations Against Civilians in Darfur," UNHCR, 2023, https://www.unhcr.org/news/press-releases/sudan-unhcr-warns-increasing-violence-and-human-rights-violations-against.

42 Peter Louis, "Sudan Violations in Spotlight at UN Human Rights Council," UN News, 2023, https://news.un.org/en/story/2023/05/1136552.

It is germane to state here that despite the fact the rules of law are supposed to be nonreciprocal - meaning that they apply irrespective of what the other side has done - what we are witnessing in the current ongoing armed conflict between the superpower Israel and the helpless Palestinians, the human rights protections duly enshrined in a plethora of international human rights conventions are more often than not consistently violated rather than adhered to.[43]

Yes, International Humanitarian Law (IHL), or the laws of war, has existed in some form for thousands of years even before the birth of the Hague Regulations of 1907 and Geneva Conventions of 1949, alongside other treaties, and customary international law in ensuring, for instance, human rights are duly observed. Unfortunately, violations - such as deliberately targeting civilians or imposing collective punishment - are a matter of routine in the present war between Israel and Hamas in Palestine.

It goes without saying that the United Nations Security Council has miserably failed to cease the war and in turn duly protect human rights as the United States - being a close ally of Israel - has been consistently vetoing any resolution which called for a humanitarian ceasefire on the said ongoing situation in Gaza. The US and its close allies have been endlessly invoking the oft-quoted excuses namely Israel's right to defend itself must be duly acknowledged.[44] While Israel's right to self-defence may be arguably relied upon by Israel after the Hamas' attack on October 7, 2023, the counter-attacks by Israel have been beset by revenge rather than a legal and justified self-defence under the provisions contained in the UN Charter.

The UN special rapporteur on human rights in the occupied Palestinian territories - Francesca Albanese - forcefully argued that Israel's right to self-defence has been duly forfeited under international law in that such a defence can only be properly invoked when a state is

---

43 Clive Baldwin, "How Does International Humanitarian Law Apply in Israel and Gaza?," Human Rights Watch, 2023, https://www.hrw.org/news/2023/10/27/how-does-international-humanitarian-law-apply-israel-and-gaza.

44 Shakeeb Asrar, "How The US Has Used Its Veto Power at the UN in Support of Israel," Al Jazeera, n.d., https://www.aljazeera.com/news/2023/10/26/how-the-us-has-used-its-veto-power-at-the-un-in-support-of-israel.

duly threatened by another state, which is, in her opinion, not the case. It is undisputed that since 1967, the international community has designated the West Bank, and the Gaza Strip as militarily occupied. Thus, she also argues that Israel never claims it has been threatened by another state. *Au contarire,* Israel always claims that it has been threatened by an armed group within an occupied territory. Under such circumstances, she contends that Israel cannot claim the right of self-defence against a threat that emanates from a territory it occupies, from a territory kept under belligerent occupation.[45]

While we concede that laws of war only apply in specific situations, notably during an armed conflict or an occupation, international human rights law, as rightly argued by a senior legal adviser of Human Rights Watch, would be applicable and enforceable at all times, governing the duties of all states to protect the rights of the people in the territory where they have jurisdiction or a degree of control.[46]

## THE NEW PARADIGMS SHIFT IN ENFORCING HUMAN RIGHTS VIOLATIONS

Sovereignty essentially affirms the territorial integrity of the state, and the rule of non-intervention has long been considered the *grundnorm* of international law but the emergence of a few normative and institutional seem to have challenged the sovereignty norm. This is evident in a slew of human rights litigations.[47]

---

45 Kunal Purohit, "Does Israel Have the Right to Self-Defence in Gaza?," Al Jazeera, accessed March 7, 2024, https://www.aljazeera.com/news/2023/11/17/does-israel-have-the-right-to-self-defence-in-gaza; See also: Erakat, "No, Israel Does Not Have the Right to Self-Defense in International Law against Occupied Palestinian Territory."

46 See supra, Note 43.

47 William J Aceves, "Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation," *Hastings Int'l & Comp. L. Rev.* 25, no. 3 (2001): 261.

In modern times new paradigms of the enforcement of human rights violations have fortunately come to the surface and they are often known as the *Pinochet* paradigm and *Filartiga* paradigm.

In *Regina Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet,*[48] British House of Lords decided that traditional principles of immunity could not protect a former head of state from prosecution in the face of torture claims. And In *Filartiga v. Pena-Irala,* [49]the Second Circuit Court of Appeals acknowledged the universal prohibition against torture and the potential civil liability of perpetrators in the United States courts.

Via these two cases, national tribunals held government officials accountable for serious human rights abuses. We may say that with the emergence of these two important paradigms, the sovereignty norm should, in principle, never be improperly invoked to mask human rights abuses. Yes, in both cases, we may safely argue that human rights norms trumped the sovereignty norm.

One may also argue that the international endeavour in establishing individual responsibility for human rights abuses, and its determination to remove the immunity of government officials for these acts as duly reflected in the *Pinochet* and *Filartiga* case is not really a new invention or a nascent phenomenon.

Many international law scholars hold the view that one of the earliest efforts to establish individual responsibility for human rights abuses as well as to remove the immunity of government officials for these heinous acts, was detectable in the Charter of the International Military Tribunal at Nuremberg for the Charter established individual criminal responsibility for crimes against peace, war crimes, and crimes against humanity.[50]

---

48 Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 All E.R. 97 (H.L. 1999) (Amnesty International and others intervening).

49 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

50 Aceves, "Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation."

## PINOCHET PARADIGM/ EFFECT

Despite the fact the House of Lords believed that a large majority of the charges against Pinochet were not proper grounds for extradition under British law, it nonetheless, held that Pinochet could potentially be extradited for alleged acts of torture committed after Britain's 1988 ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In driving to the latter conclusion, the majority of Law Lords dismissed Pinochet's claim that he was entitled to immunity from arrest on the torture charges because of his status as a former head of state.[51]

It is germane to share herein the opinion of one of the lords - Lord Brown-Wilkinson - who found that not all acts by a head of state constitute official acts of state that merit immunity from prosecution. In his view, the critical issue is to determine which acts constitute official functions of a head of state. He suggested that it would be inconsistent if international law prohibited and criminalized certain acts and yet recognized that such acts could be designated official functions subject to immunity.[52]

As far as international lawyers are concerned the General *Pinochet* paradigm drives home this pertinent point: the courts of many countries were closed to investigations or lawsuits involving abuses by the local military or police, due to formal amnesty laws or informal threats, bribes, or other pressures. As such, many advocates of international human rights believe that the *Pinochet* paradigm has rekindled a new hope in bringing any violators of human rights to justice thus the *Pinochet* case is often seen as a viable alternative. Unlike before, transnational prosecutions of human rights violations in the courts of other states are now considered to be legally possible.[53]

Via this new model there is a new way for bringing a former head of state to trial outside his home country and such a model signals

---

51 Curtis A Bradley and Jack L Goldsmith, "Pinochet and International Human Rights Litigation," *Mich. L. Rev.* 97 (1998): 2129.

52 Aceves, "Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation."

53 Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press, 2005), http://www.jstor.org/stable/j.ctt3fj29r.

that neither the immunity of a former head of state nor legal amnesties at home could shield participants in the crimes of military governments. The most important thing is that victims of torture and crimes against humanity truly believe that their tormentors might be brought to justice.[54]

## FILARTIGA PARADIGM

The second paradigm of the enforcement of human rights violations is popularly known as the *Filartiga paradigm*. This paradigm was officially born after the 1980 decision of *Filartiga* which involved a Paraguayan resident of the United States who sued a former general of the Stroessner regime for the torture and murder of her brother. About 20 cases had been decided in favour of victims of, inter alia, torture; cruel, inhuman, and degrading treatment; forced disappearance; extra-judicial killing; and genocide.

It is interesting to note that in *Filartiga*, the United States court held that customary international human rights norms are part of the United States federal common law thus the United States courts may therefore hear claims for damages based on violations of those norms. In particular, the court found that "official torture is now prohibited by the law of nations" and that torturers, like pirates before them, are *hostes humani generis* (enemies of all humankind), and therefore subject to suit under American law i.e. the Alien Tort Statute (ATS). Hence under this new model, the court held that torture, long prohibited by virtually all nations' laws and several international conventions and declarations, is now prohibited by customary international law. The case further provides for jurisdiction in a disinterested forum for individual torture claims.[55]

Subsequently, in the case of *Sosa v. Alvarez-Machain*[56] the United States Supreme Court finally took the opportunity to grant jurisdiction for claims alleging violations of modern customary

---

54 Roht-Arriaza.

55 Michael Danaher, "Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala," *Stan. L. Rev.* 33, no. 2 (1980): 353–69, https://doi.org/https://doi.org/10.2307/1228482.

56 542 U.S. 692 (2004)

international human rights norms. The case also upheld the *Filartiga paradigm* thus reaffirming that international law is part of the United States law and making a clear statement in favour of accountability for violations of human rights.

It is beyond doubt those two aforementioned paradigms have enlivened hope for many victims of human rights abuses around the globe. Nowadays they start to believe that human rights violations in any part of the world would never be left unaddressed by the global community though it may take many years to end the impunity.

## ARE PINOCHET AND FILARTIGA PARADIGMS EFFECTIVE TOOLS IN ENDING IMPUNITY?

Though both *Pinochet* and *Filartiga* paradigms establish a good template in which individual responsibility attaches to government actors that commit human rights abuses and immunity no longer protects them from prosecution, the enforcement of human rights norms in the international scene remains ineffective. This is due to the conspicuous absence of effective international institutions in enforcing such rights. Hence most of the enforcement of human rights norms has devolved to national institutions.

It is argued that the enforcement of human rights abuses by national institutions may suffer from herculean challenges due to several factors - the primary one would be a lack of political will. To cite one glaring example, despite the fact Israel showed a strong commitment to bringing Adolf Eichmann - one of the greatest Nazi war criminals - to justice in the Israel court but hitherto no attempt has been made to bring Benjamin Netanyahu - the Israeli Prime Minister - to book for his alleged war crimes or other international crimes in the Israeli court.

## CONCLUSION

Though human rights violations around the world have not shown any sign of decrement, the enforcement of such violations, unfortunately, remains the weakest component of either the international or municipal human rights system.

Having said that, we could still, nonetheless, exhale a sigh of relief that the emergence of the light at the end of the tunnel seems to be almost certain. Nowadays we notice the readiness of the international community to create new paradigm shifts in enforcing human rights transgression by the emanation of new models such as the *Pinochet* and *Filartiga* paradigms in ensuring any human rights violations should never be left unaddressed.

It is instructive also to note that in August 2015, France, with the support of Mexico, launched the "Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocity". The aim was to have the permanent members – the P5 – voluntarily pledge not to use the veto in cases of genocide, crimes against humanity, and war crimes on a large scale.[57]

Among the veto-wielding permanent members, so far only France and the United Kingdom have supported this initiative. As of April 2020, 103 member states and two U.N. observers had signed the declaration.[58]

In a similar vein, in July 2015, the Accountability, Coherence and Transparency (ACT) group, which consists of 27 small and medium-sized states working to enhance the Council's effectiveness by strengthening its working methods, developed a code of conduct for member states regarding Security Council action against genocide, crimes against humanity and war crimes. The code is meant to encourage timely and decisive action by the Council to prevent or end the commission of genocide, crimes against humanity, and war crimes.[59]

As with the later French-Mexican initiative, the code of conduct urges the permanent members to agree to refrain from using their veto in situations involving mass atrocity crimes and also invites current and aspiring elected members to refrain from casting a negative vote in

---

57 Thompson, Landgren, and Romita, "The United Nations in Hindsight: Challenging the Power of the Security Council Veto."

58 Thompson, Landgren, and Romita.

59 Security Council Report, "In Hindsight: Challenging the Power of the Veto."

such cases, as it envisions the fight against atrocities as a collective responsibility of all member states.[60]

As of 10 February 2022, the code of conduct had been signed by 122 member states, including eight currently elected Council members, two permanent members (France and the United Kingdom), and two observers.[61]

*This paper was initially presented before the law students at SIMAD University, Somalia on 17 September 2023. The title of the presentation was "The Enforcement of Human Rights and the Key Challenge in the 21st Century". This is the improved and edited version of the said paper.

60 Security Council Report.
61 Security Council Report.

# TRACING THE DEVELOPMENT OF THE LAW FOR ESTATE ADMINISTRATION IN WEST MALAYSIA

[*] Azhani Arshad

[**] Akmal Hidayah Halim

[**] Rahmawati Mohd Yusoff

## ABSTRACT

The Portuguese, Dutch, and British administrations for over 400 years prior to Malaysian independence greatly influenced the structure and procedures for estate administration in West Malaysia. This is evident from the provisions of the primary statute, namely, the Probate and Administration Act 1959, which are derived from the Administration of Estates Act 1925 and procedures provided in the Malaysian Rules of Court 2012, which have been adopted mainly from the Non-Contentious Probate Rules 1954 of the United Kingdom. Hence, this article seeks to trace the origins of the applicable laws to analyse the evolution and development of the law for estate administration in the Straits Settlements, Malay States and the Federation of Malaya. The discussion includes the reception of English law into the Malaysian legal system in general and in the area of estate administration and the law of succession particularly. This article adopts a doctrinal analysis by examining existing primary and secondary materials, including statutory provisions such as the Probate and Administration Act 1959, the Rules of Court 2012, the Wills Act 1959, the Small Estates (Distribution) Act 1955, the Distribution Act 1958, case laws, and other legal and non-legal literature relating to the development of estate administration in West Malaysia. This article aims to contribute significantly to the existing body of literature and information on estate administration. It is observed that foreign laws on estate administration were applied generally, and this situation persists until today, resulting in some irregularities when such laws are applied to Muslims in West Malaysia, which are not in tandem with the current needs and practicalities.

[*] Senior Lecturer, Faculty of Law, Universiti Teknologi MARA (UiTM), 40450, Shah Alam, Selangor Malaysia.
E-mail: azhani_arshad@uitm.edu.my

[**] Associate Professor, Department of Legal Practice, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, 53100 Kuala Lumpur, Malaysia.

[**] Senior Lecturer, Department of Law, Universiti Teknologi MARA (UiTM), Segamat, 85000 Johor.

**Keywords:** Estate Administration, West Malaysia, evolution, law and procedure, reception of English law

## INTRODUCTION

Malaysia was one of the Commonwealth countries that gained independence from British colonisation on 31 August 1957. Prior to that, Malaysia or Malaya (as it was then known) was under the administration of the Portuguese, Dutch and British respectively for over 400 years. Thus, the laws of those countries had applied to its subjects the administration of justice generally and estate administration particularly.

When Penang was initially ceded to the British, succession disputes involving the inhabitants of Penang, comprising of three primary ethnicities, namely the Malays, Chinese and Indians (Hindus), were resolved with the assistance of the East India Company. Upon the demise of Sultan Muhammad Jiwa of Kedah in 1778, his son, Tunku Abdullah who succeeded him, agreed to surrender Penang to the British in exchange for financial aid and the promise of British support in succession disputes.[1]

According to Raman[2] and Halim *et al.*,[3] the present laws on the administration of estates in Malaysia and Singapore originated from English Common law, Equity and Statutes. It began with the introduction and enforcement of the Charters of Justice and later, the dual-system of English law and customary law was adopted in Malaysia. The structure and procedure of estate administration initiated during the colonial period still exist in the current legal framework.

Hence, this article seeks to trace the origins of the applicable laws to analyse the evolution and development of the law for estate administration in the Straits Settlements, Malay States and the Federation of Malaya. The discussion includes the reception of English

---

1 Sharifah Suhana Ahmad, *Malaysian Legal System* (Selangor: Malayan Law Journal Sdn. Bhd.; Charlottesville, Va.: Lexis Law Pub., 1999), 8.

2 G Raman, *Probate and Administration in Singapore and Malaysia* (Singapore: LexisNexis Singapore, 2012), 4.

3 Akmal Hidayah Halim et al., *The Law of Wills and Intestacy in Malaysia* (Malaysia: Department of Islamic Law & Harun M. Hashim Law Centre, 2009), 1.

laws to the Malaysian legal system in general and in the area of estate administration and the law of succession particularly.

## METHODOLOGY

Due to the nature and scope of the study, this article adopts a doctrinal analysis method by examining the existing primary and secondary materials, including statutory provisions in the Probate and Administration Act 1959, the Rules of Court 2012, the Wills Act 1959, the Small Estates (Distribution) Act 1955, the Distribution Act 1958, case laws and other legal and non-legal literature relating to the development of estate administration in West Malaysia. This research explores the development of the law for estate administration in West Malaysia through online, literature and case study research. Relevant materials relating to the development of estate administration was collected from local libraries and through literature such as textbooks, articles, journals, legal encyclopedias, Halsbury's Laws of Malaysia, Case Digest, Mallal's Digest and statute annotators.

## RECEPTION OF ENGLISH LAW IN THE MALAYSIAN LEGAL SYSTEM

*Reception* is "the introduction of English law in a foreign place, outside the jurisdiction of the United Kingdom"[4]. In this context, it refers to the early reception into Malaya through the Straits Settlements in 1807.

[4] M B Hooker, "English Law in Sumatra, Java, the Straits Settlements, Malay States, Sarawak, North Borneo and Brunei," in *The Laws of South-East Asia, Volume II: European Laws in South-East Asia, Essays on Portuguese and Spanish Laws, the Netherlands East Indies, English Law, American Law in Philippines and 'Europeanization' of Siam's Law 2*, vol. 2 (Singapore: Butterworth & Co. (Asia) Pte Ltd, 1988), 360; Michael F Rutter and Molly Cheang, *The Applicable Law in Singapore and Malaysia: A Guide to Reception, Precedent and the Sources of Law in the Republic of Singapore and the Federation of Malaysia* (Singapore: Malayan Law Journal Pte Ltd, 1989), 2.

For purposes of this discussion, the authors have classified it in two sections, namely, the Straits Settlements and the Malay States:

(i) The Straits Settlements

Before the British colonial rule began in 1824, there was no established legal system and administration of justice, and as such, the Sultans and their chiefs invariably resolved all disputes. In Malacca, during the Sultanate, Islam became the state religion; hence, the Sultanate administered the state and resolved all disputes by referring to Islamic law and Malay customary law or *adat*. At that time, Islamic law was the law of the land modified by local customs. It was evident in *Ramah v Laton*[5], which held that Muslim law is not foreign law but a part of local law and the law of the land which the Court must take judicial notice of.

The Malacca Sultanate ended when the Portuguese occupied Malacca in 1511, followed by the Dutch in 1641 before it was eventually ceded to the British. British-rule began with the occupation of Penang in 1786 and the laws of England were introduced in the Straits Settlements vide the Regulation of 1794, known as Lord Teignmouth's Regulation.[6]

This was followed by the introduction of the Royal Charter of Justice of 1807 (hereinafter referred to as "the First Charter") in Penang, which marked the beginning of the statutory introduction of English law into the country and the most significant event in Malaysia's legal history.

(ii) The Malay States

Unlike the Straits Settlements, English law was not introduced into the Malay States by legislation. The British judges and local judges who were educated in English law adjudicated disputes in a civil court and introduced the principles of English law in matters where there was a lacuna in the local laws. There was no reception of English law in the

5 (1927) 6 FMSLR 128.

6 Roland St John Braddell, *The Law of the Straits Settlements: A Commentary* (Kuala Lumpur: Oxford University Press, 1982), 8; *Fatimah & Ors v D Logan & Ors* [1871) 1 Ky 255.

Malay States as the Charters of Justice did not apply to the Malay States and the sovereignty of the Malay Rulers remained unimpaired by treaties and agreements.[7]

## RECEPTION OF ENGLISH LAW OF SUCCESSION

The English law of succession was undoubtedly the law which governed succession in the Straits Settlements. This is evident from the establishment of the Court of Judicature in Penang in 1807 which held the jurisdiction and powers of the Superior Court in England. The Court was empowered to, among others, exercise authority over the persons and estates of infants and lunatics, as well as to grant probate and letters of administration. Regulations were subsequently introduced regarding the conduct of executors and administrators, and the Court was given the power to grant these persons a commission for their troubles.[8]

In addition, section 14 of the Court of Justice Ordinance of 1878 provided as follows:

> The Supreme Court shall have the same powers of granting Probates of Wills and Testaments, and Letters of Administration to the estates of all persons leaving moveable or immoveable property in the Colony, as are vested in Her Majesty's High Court of Justice in England, subject to such modifications, to suit the several religions and customs of the native inhabitants, as have hitherto been recognised by the Court.

It was delivered by Norris R, in the case of *Moraiss and Others v De Souza*[9], that from the time of the introduction of the First Charter in 1807 up until the Indian Act XX of 1837 came into operation, the English law of Inheritance was the law of this Colony. The Act contains a preamble: "Within these Settlements, land can be lawfully bequeathed and inherited only according to the rules of English law."

---

7 Hooker, English Law in Sumatra, 389.

8 Braddell, *The Law of the Straits Settlements: A Commentary, 12*.

9 (1838) 1 Ky 27.

This implies that the English law of inheritance governed only the real property of the inhabitants in the Straits Settlements.

The introduction of the English law of succession in the Straits Settlements through the First Charter can also be inferred from the decision of Benson Maxwell, R. in *Regina v Williams*[10]:

> "...The classification of property into 'real and personal', of actions or "pleas" into "real, personal and mixed", and the power given to grant Probates and Letters of administration, shew that the law of England was alone in contemplation."

In 1875, in *Jemalah v Mahomed Ali*[11], Theodore Ford, J, and in the 1887 appeal case of *Ismail b Savosah v Madinasah,*[12] the presiding judge enunciated the same rule; however, the latter overruled the former's decision. The rule was again laid down in *In Re Sinyak Rayoon*[13] and *Scully v Scully*.[14]

Subsequently, in 1889, in *Ee Hoon Soon v Chin Chay Sam & Ors*[15], Goldney J, in deciding a case involving a purported Dutch will in Malacca, held as follows:

> "it seems at the time of the making of the will and the death of the testators, Malacca was a British possession, and as immoveable property is governed by the law of the place where it is situated, the succession of this property is governed by the English law which was then in force."

Undeniably, most cases cited earlier on the reception or introduction of English laws in Malaya relate to the law of succession. The English law of succession was introduced by cases such as *Moraiss and Others v De Souza*[16], *In the Goods of William*

10 (1858) 3 Ky 16 at 26.
11 (1875) 1 Ky 386.
12 (1887) 4 Ky 311 at 315.
13 (1888) 4 Ky 331.
14 (1890) 4 Ky 602.
15 (1889) 1 SLJ 147 at 147.
16 (1838) 1 Ky 27.

*Caunter*[17], *In Re Chong Long's Estate*[18], *In the Goods of William Russell*[19], *In the Goods of Thomas Kekewich*[20] and others.

In the Malay states, several reported cases illustrate how trial judges referenced English law and its principles in adjudicating succession disputes. In *In Re The Will of Yap Kwan Seng, Decd*.[21], the court had to determine whether the rule against perpetuities, as a principle of English common law, should be adopted in the Federated Malay States. The learned judge, Sproule Ag CJC (as he then was), decided that the disputed trust was void *ab initio* because it infringed the rule against perpetuities and he accordingly applied the abovementioned English common law principle and stated at p. 317:

> "We have, as a matter of fact, adopted freely on these States a great mass of English rules of law and equity, civil and criminal law and procedure, either directly or derivatively. The latter might be said to a certain extent, even of our land tenure and registration. The commercial law of England is welcomed here. Our judges are interchangeable with those of the Colony..."

In his remarks, he further suggested that there should be some form of uniformity of rules and principles of law throughout the Straits Settlements and the Federated Malay States.

A similar position was taken by the judges in Yau *Yok Seong & Anor (Minors by their guardian Ho Kew Kee @ Ho Ah Ngan) v Yau Yok Fook & Anor (Trustee of the Will of Yau Tet Shin)*[22]. In this case, the learned judges adopted the entire Evidence Ordinance of the Straits Settlements to interpret a will in the Federated Malay States. Among other provisions, section 100 of the Evidence Ordinance provided that in construing the will, the rules provided by the English courts for the interpreting English wills might be applicable. In applying this section,

---

17 (1838) 2 Ky 20.
18 1843) 2 Ky Ecc 13.
19 (1813) 2 Ky 6.
20 (1813) 2 Ky 1.
21 (1924) 4 FMSLR 313.
22 (1923) 3 FMSLR 151.

the judges had taken it to mean that in construing wills, they considered themselves as sitting in the English Court, interpreting a foreign will.

In a later case in Selangor, *In Re the Estate and Effects of Thomas Albert Duffy, Decd*[23], the executor who resided in the Federated Malay States obtained a properly authenticated copy of the will and applied for its probate. Unfortunately, there was no specific provision (in the Probate and Administration Enactment 1920) for such a case as Section 5 of the Enactment only provided for letters of administration instead of a grant of probate. Thus, in accordance with English practice, the trial judge issued a probate to the executor or petitioner limited to the time when the original will was produced.

Meanwhile, *In the Matter of the Estate of Yong Nee Chai, decd*[24], Terrel JA ruled on the jurisdiction of the Supreme Court of the Federated Malay States to make representation Orders for the sons and/or beneficiaries of the deceased in the construction of the deceased's Will, as follows:

> "Unfortunately, the Civil Procedure Code makes no provision for the representation order.....and that as under section 49 (i)(a) of the Courts Enactment, the original civil jurisdiction of the Supreme Court shall consist of the same jurisdiction and authority within the F.M.S. as is now exercised in England by the Chancery and King's Bench Divisions of the High Court of Justice, this conferred upon the Court the power to make representation orders which is certainly vested in the Chancery Division of the High Court in England." (223).

Based on the above, it can be deduced that there was never any reception of English law to the Malay States, either in the Federated Malay States or the Unfederated Malay States. Rather, the judges were influenced by and introduced the principles of English law when adjudicating matters whenever there was a lacuna in the local laws and customs. There are views that the portions of laws that were later

---

23 (1933) 9 FMSLR 109.
24 (1939) MLJ 222.

introduced and adopted by legislation were merely English principles and models for local laws, but never English law in its original form[25].

It can also be inferred from the decision of the judges in the case of *Haji Lateh bin Haji Salleh as Administrator of the Estate of Abdullah bin Che Nay, Decd v Tuan Man & Ors*[26] that most of our Acts are derived from various English Acts:

> "Most of the limitation periods both in India and here, as well as the rules governing the running of time in the bodies of the Enactments, are clearly taken from the various English Acts. One fundamental difference is that in India, suits out of time must be dismissed "although limitation has not been set up as a defence" whereas in this country, the English rule has been restored, and limitation must be pleaded. Speaking generally, it may be said that our law seems to be intended to follow the law in India and England, with such modifications as have been considered desirable. The backbone and marrow of our Enactment is the English law." (94)

## EVOLUTION OF THE LAW FOR ADMINISTRATION OF ESTATES IN WEST MALAYSIA

The law and procedure on estate administration in West Malaysia evolved from the Straits Settlements, the Malay States and the Federation of Malaya. Remarkably, the applicable law and procedure of the Federation of Malaya reflects the present legal framework for the administration of estates in West Malaysia.

### Administration of Estates in the Straits Settlements

The law on estate administration was of general application, i.e., applicable to both Muslims and non-Muslims alike, except for the distribution of a Muslim's estate.

---

25 *In Re the Will of Yap Kwan Seng, Decd* (1924) 4 FMSLR 313 at 316.
26 (1926) 6 FMSLR 88.

(i) Non-Muslims (and of a General Application)

*Court System*

In the early 19th century, all applications or matters relating to the law of succession, also known as ecclesiastical cases, would have been filed and heard at the Court of Judicature before a Recorder. A Resident Councillor in Malacca could also grant letters of administration to an intestate's estate[27]. The grant issued by the presiding local government in 1781 and 1788 (Dutch Government) was expressly recognised by Benjamin Malkin R, according to English law in *Rodyk v Williamson*, a case which was unfortunately not reported but referred to and mentioned in In *the goods of Abdullah, deceased*[28] and *Moraiss and Others v de Souza*[29].

The Court of Judicature was abolished in 1868 and reconstituted as the Supreme Court of the Straits Settlements and it was Judges who decided on the administration of estates. Meanwhile, any appeals on the judges' decision lay directly with the King or Queen in Council (Privy Council) until the Court of Appeal was constituted in 1873.

*Applicable Laws/ Legislation*

In the Straits Settlements, the *lex loci* was the law of England, which had been modified by the Indian and Colonial Legislatures. Thus, the administration of estates was governed by the Indian Act XX of 1837 which dealt with transmitting personal property only (moveable) and not real property. This Act was later extended to immovable property with the passing of Indian Act XXV of 1838.[30] These Acts were later repealed and replaced by section 33 (later known as section 35) of the Conveyancing and Law of Property Ordinance 1886 which, vested all the property of the deceased, whether moveable or immovable, in the personal representatives.

Notwithstanding the establishment of one court, namely the Supreme Court, by the First Charter, the distinct roles of the Court of

---

27 *Khoo Tiang Bee Et Uxor v Tan Beng Gwat* (1877) 1 Ky 413.
28 (1835) 2 Ky Ecc 1.
29 (1838) 1 Ky 27.
30 Braddell, *The Law of the Straits Settlements: A Commentary, 33*.

Probate and Court of Chancery were also recognised in the Straits Settlements under Chapter XLIII of the Civil Procedure Ordinance 1878. The said chapter provided a comprehensive procedure for the administration of estates, especially in dealing with contentious and non-contentious proceedings in granting probates or letters of administration. The Ordinance was, however, repealed by the Civil Law Ordinance of 1909.

Apart from that, grants of probate and letters of administration issued in the United Kingdom and other British possessions were recognised through the enactment of the United Kingdom and Colonial Probates Ordinance 1893. Upon resealing the same by the Supreme Court, it would have had the same effect and operation in the Colony as if the Supreme Court had granted it.

The Probate and Administration Ordinance 1934 (Cap 51), which repealed the Indian Succession Act, was enacted in relation to probate and letters of administration, and amended thrice: in 1936, 1940 and 1941. The distribution of an intestate's estate was regulated by section 4 of the Distribution Enactment 1929 (the same provision still exists in the present Distribution Act 1958). This statute, however, did not apply to people governed by the Parsee Intestate Succession Ordinance of the Straits Settlements.

*The Practice and Procedure*

Accordingly, the practice was that, upon the death of a person, the representative of the deceased whether named in the will (if he died testate) or as agreed by the heirs or next-of-kin[31], would file an application at the Supreme Court for the extraction of letters of representation (grant of probate or letters of administration) irrespective of whether the deceased or their heirs were Muslim or non-Muslim. In the event the deceased died without leaving any next-of-kin in the Colony, an application for letters of administration would be made by the Registrar as an Official Administrator. These letters of administration were, however, subject to revocation from the next-of-kin[32].

31 *In the goods of Khoo Chow Sew* (1872) 2 Ky 22.
32 *In the Goods of Andrew Muir Watson* (1882) 2 Ky 29.

*Small Estates*

The District Delegates Ordinance 1887 was enacted and introduced to the Straits Settlements to make further provisions for grants of probate and letters of administration where the estate was of small value. For such cases, District Delegates were appointed for the Judges of the Supreme Court to grant Probate and Letters of Administration to the estate of deceased persons. The conditions stipulated that the deceased's property must not exceed $500 in value, and the deceased (whether testate or intestate) was a permanent resident within the local limits or District of the Delegates at the time of death.

The petition and citation were in accordance with forms prescribed by the Civil Procedure Ordinance 1878. However. Probate or Letters of Administration could not be granted if a caveat has been entered. Upon hearing of the application by the District Delegates, all documents filed and notes of evidence had to be forwarded to the Registrar of the Supreme Court, who would then prepare and issue the grant of Probate or Letters of Administration, as the case may be, for extraction.

(ii) Muslims

The law of succession of Muslim intestates, changed three times.[33] From the First Charter until the passing of the Mohammedans Ordinance in 1880, Muslim estates were distributed according to English law. Section 33 of the 1880 Ordinance provided a provision regarding the succession of Muslim intestates. Subsequently, the Mahomedans (Amendment) Ordinance XXVI of 1924 was enacted to consolidate Ordinance V of 1880 and Ordinance XXV of 1908 to amend the law relating to Muslims. Among others, it dealt with the distribution of Muslim estates in accordance with Islamic law, save for section 27 of the 1924 Ordinance which stated that the estate of an intestate Muslim who died after 1 January 1924 should be administered and distributed according to Islamic law except in circumstances where the local custom was in force and notwithstanding the fact that any next-of-kin was not a Muslim (the latter being contrary to Islamic law).

---

[33] Charles Herbert Withers Payne, "The Law of Administration of and Succession to Estates in the Straits Settlements..." (Singapore: Printers Limited, 1932), 185.

The provisions also stated that the administration of the deceased's estate was to be made by way of an application for probate or letters of administration and should be dealt with by the ordinary court, namely the Supreme Court. The procedure to be complied with was as required by the Civil Procedure Code, except for letters of administration that required additional particulars of the school of law (*mazhab*) to which the deceased belonged to.

Generally, the administration of Muslim estates was of general application and subject to the same procedure as for the non-Muslims. As such, all applications or petitions relating to the issuance or revocation of letters of administration, validity of the will or decrees declaring that the deceased had died intestate were made by the civil court judge. Therefore although a person was a Muslim and governed by his law, reported cases showed the tendency of the judge to adjudge such wills in accordance with the Wills Ordinance instead of Islamic law.[34]

## Administration of Estates in the Malay States

Until the close of the 19th century, the people of the Malay States did not have any formal system for succession of property. If any disputes arose, it would be settled by the elders of the village in accordance with ancient customs. If the disputants were unsatisfied, they were more likely to resort to the *kris* (fighting) than to the Kathi.[35]

### *Applicable Law/Legislation*

It is clear that up to 1907, the laws of property and succession in the Malay States was Malay customary law. The law prevailing in the Malay states before the British intervention was *adat Perpatih* in most areas of Negeri Sembilan and parts of Malacca and *adat*

---

34 *Re Kulsome Bee, deceased* (1930) SSLR 64.

35 E N Taylor, "Malay Family Law," *Journal of the Malayan Branch of the Royal Asiatic Society* 15, no. 1 (1937): 9.

*Temenggung* in other parts of the Peninsula, with local variations. Most of them were unwritten.[36]

Pursuant to British intervention, the law on estate administration in the Straits Settlements also became applicable to the Malay States. The power of legislation was vested in the State Councils and the Federal Council, which consisted of representatives from the Malays and other ethnicities, that were controlled by British officers. By the 1880s, in each of the Federated Malay States, orders by the Sultan in Council (formal assent) had given way to the introduction of complex ordinances (statutes), with many copied or adapted from the Straits Settlements and Indian Legislation. Each state produced these laws in published editions respectively.[37]

The Probate and Administration Enactment 1920 applied to the Federated Malay States and vested all the deceased's property, without distinction as to whether moveable or immovable, in his personal representative. Whereas the Unfederated Malay States had their own comprehensive piece of legislation on the administration of estates, for instance, the Terengganu Probate and Administration Enactment and Kedah Administration of Estates Enactment 1337.

*Court System*

A Supreme Court was set up in the Federated Malay States headed by a Chief Judicial Commissioner assisted by several Judicial Commissioners.[38] Judges in the Straits Settlements were seconded there, and senior magistrates were appointed to try all cases except cases involving Malay customs and religion. The decisions were subject to appeal to the Residents in Council. Meanwhile, many Unfederated Malay States had their own High Court.[39] After the British intervention, magistrates were appointed by the British to administer

---

36 Zanur Zakaria and Taylor Griffiths Curt, "The Legal System of Malaysia," in *ASEAN Legal Systems* (Singapore: Butterworths Asian, 1995), 81–84.

37 Hooker, "English Law in Sumatra, 391.

38 James Foong, *The Malaysian Judiciary: A Record from 1786 to 1993*, (Kuala Lumpur: Malayan Law Journal Sdn Bhd, 1994).

39 Foong, *The Malaysian Judiciary: A Record from 1786 to 1993, 73*.

justice in those states. Eventually, the local High Court judges were replaced by English officials who were legally qualified and trained.[40]

*The Practice and Procedure*

The application for grants of administration or determination of any issue arising in the law of succession generally or upon the will of the deceased or for leave to sell the deceased's interest in the deceased's estate were filed by way of an originating summons. In addition, some formal transmission proceedings became necessary to establish the Mukim register. In the old land enactment, a Collector was given extraordinary powers or jurisdiction to hear or determine claims to succeed in the Mukim registered land. The Court had no power to interfere in the decision of the Collector except on final appeal. Alongside, the Supreme Court would only entertain claims to the land registry.

Upon passing of the Land Code of 1926, the abovementioned provision was omitted and replaced by a new chapter in the Probate and Administration Enactment 1920. Through the application, a Collector was conferred with comprehensive jurisdiction to distribute any estate up to $3000 in value, including land, chattel, money and securities. The Collector was also given the power to appoint an administrator.

*Small Estates*

It is also to be noted that in 1923, the Small Estates Distribution Bill was introduced into the Federal Council of the Federated Malay States and later referred to a Select Committee, which was rejected because the Committee did not consider any legislation necessary. The concept of small estates' distribution originated in section 37A of the Federated Malay States Land Enactment of 1911, which gave the Collector of Land and Revenue powers of summary distribution over the land of any deceased persons if the value of the land did not exceed one thousand ringgit in value. Later, an amendment was made to the Probate and Administration Act in 1926 to introduce an additional chapter that dealt with summary proceedings of small estates. The

[40] Foong, *The Malaysian Judiciary: A Record from 1786 to 1993, 26*.

Collector of Land Revenue was given exclusive jurisdiction to grant administration and distribution orders for estates valued below $3000 and when any part of the estate consists of land or immovable property. to the

**Administration of Estates in the Federation of Malaya**

The Federation of Malaya Independence Act 1957 was an Act of Parliament in the United Kingdom which provided for and connected to the establishment of the Federation of Malaya as an independent sovereign country within the Commonwealth. Pursuant thereto, it was for the Federal government to legislate on probate and administration matters for Muslims and non-Muslims alike as provided in List 1 (Federal List) of the Ninth Schedule of the Federal Constitution. Thus, there was no longer a distinction between the Straits Settlements and the Malay States.

The general rule of Article 74(1) of the Federal Constitution gives the Federal Parliament powers to make laws with respect to any of the matters listed in the Federal List or the Concurrent List, namely the First and the Third of the Ninth Schedule. The Federal List include matters relating to succession, both testate and intestate, probate and letters of administration, which do not include Islamic personal law relating to gift or succession, both testate and intestate. Therefore, probate and administration are matters listed in the Federal List and governed by statutes of general application such as the Probate and Administration Act 1959, Rules of Court 2012, Small Estates (Distribution) Act 1955 and Public Trust Corporation Act 1995.

*Applicable Law/ Legislation*

In 1959, a bill was tabled to amend and consolidate legislations relating to the grants of Probate and Letters of Administration known as the Probate and Administration Act 1959. The proposed bill generally followed the provisions of the Probate and Administration Ordinance (Cap 51) of the Straits Settlements and included specific provisions contained in similar legislation in the United Kingdom, i.e. the Administration of Estate Act 1925. It was initially governed by the Probate and Administration Act 1920, which was applied in the Federated Malay States and incorporated the official Administration

Enactment 1905 as Chapter III, which allows the resealing of Probate and Letters of Administration grants made in the Colony, United Kingdom or any other British possession.

Before the Probate and Administration Act 1959, the Distribution Act 1958 was enacted in relation to intestate estate distribution. The Act is based on the English Statute of Distribution 1670 (later replaced with the Administration of Estates Act 1925) and provides a comprehensive statutory framework for the devolution of moveable and immovable property of a deceased person who dies intestate. However, it does not apply to persons professing the religion of Islam and to any estate subject to distribution governed by Parsee Intestate.[41] The Distribution Act 1958 came into force on 1 May 1958 (in West Malaysia), was revised in 1983, and assumed the title of the Distribution Act 1958. Subsequently, amendments were made to the Act in 1975 and 1997.

It is interesting to note that the Wills Act of 1959 resulted from the consolidation of laws relating to, derived and obtained from the Wills Ordinance of the Straits Settlements and the Wills Enactment of the Federated Malay States. It adopted the provisions of the former Ordinance, the same as the Wills Act 1837 of the United Kingdom, and aimed to provide a uniform law concerning wills throughout the Federation of Malaya. Thus, any wills made in the Straits Settlements and the Federated Malay States prior to the date of coming into effect of the Wills Act 1959 would not have been affected. Hence, it is evident that the provisions of the Wills Ordinance regarding testamentary disposition was intended to be applied equally to Muslims, as in the case of *In the Goods of Abdullah*[42] and *Kader Bee & Anor v Kader Mustan & Ors*[43]. However, later cases such as *Abdul Rahim v Abdul Hameed & Anor*[44], *Katchi Fatimah v Mohamed Ibrahim*[45], *In Re The Will of M. Mohamed Haniffa, Deceased. Abdul Jabbar v M. Mohamed*

41 Azhani Arshad, *The Annotated Statutes of Malaysia: Distribution Act 1958. of 196* (Selangor: LexisNexis Sdn Bhd, 2022).
42 (1835) 2 Ky Ecc 1.
43 (1878) Ky 432.
44 (1983) 2 MLJ 78.
45 (1962) MLJ 374.

*Abubacker*[46], *Siti v Mohamed Nor*[47], *Saeda binti Abubakar & Ors v Haji Abdul Rahman bin Haji Mohamed Yusup & Ors*[48], showed that a Muslim may dispose of his property by way of a will only in accordance with and subject to the school of law which he professed. This is also consistent with section 2(2) of the Wills Act 1959, which states that the Act shall not apply to Muslims.

The Public Trust Corporation Act 1995 was later enacted to amend laws relating to the Public Trustee and Official Administrator to provide for the vesting of property, rights and liabilities of the Public Trustee and Official Administrator in a company (or corporation as it was defined) and to regulate the exercise of functions and powers by the company. This Act repealed the Public Trust Act of 1950.

*The Practice and Procedure*

The procedures for the grants of representation evolved from the Civil Procedure Code of the Straits Settlements, the Rules of the Supreme Court 1957, Order 71 (non-contentious) and Order 72 (contentious) of the Rules of the High Court 1980 as well as Order 41 of the Subordinate Court Rules 1980 which came into force on 1 June 1980 and eventually the later provisions were provided in the Rules of Court 2012.

The former Rules of the High Court 1980 were derived from the United Kingdom Rules of the Supreme Court 1965; the provisions of Order 71 were taken mainly from the Non-Contentious Probate Rules 1954 of the United Kingdom, which originated from Chapter XLIII of the Civil Procedures Ordinance 1878.

The procedure for estate administration as outlined in the Rules of Court 2012 (previously known as the Rules of High Court 1980), covers everything from the application for a grant of representation to the process of distributing the estate or its proceeds to the beneficiaries. Meanwhile, the process by the Estates Distribution Office (previously known as the Small Estate Distribution Division/Unit) commences with a petition for a distribution order and continues until the

46 (1940) MLJ 286.
47 (1928) 6 FMSLR 135.
48 (1918) 2 FMSLR 352.

distribution of the estate, namely by direct transmission or grant of letters of administration or order for sale (however, the latter has since been deleted by the Small Estates (Distribution) (Amendment) Regulation 2024 (PU(A) 194/2024)[49]. The administration of estates by Amanah Raya Berhad, on the other hand, covers four of its main roles, namely, as trustee, personal representative, summary administrator of the deceased's moveable property and administrator of any undistributed funds.

*Small Estates*

The Small Estates (Distribution) Bill 1955 was redrafted and adopted by the Legislative Council on 2 June 1955. This provision applied to estates valued at no more than $ 5,000 and where land formed part of the small estate. Therefore, the powers or jurisdiction given to the Collector of Land Revenue in administering small estates excluded those estates consisting solely of moveable property which did not apply to the Straits Settlements. However, in cases where the deceased left behind an estate comprising of property in the Federated Malay States and the Straits Settlements, the courts would have dealt with the estate comprehensively.

Notwithstanding the above, there are specific provisions of the Small Estates (Distribution) Act 1955 that apply to specific States, namely Part III to Negeri Sembilan, Part IV to Sabah and Section 34 to Malacca and Penang. It is also worth noting that the small estate's value was increased to RM10,000 by the Small Estates (Distribution) Amendment Ordinance 1959. Later, the value was again increased to RM25,000 by the Small Estates (Distribution) (Amendment and Extension) Act 1972 when the Ordinance was revised and re-enacted as the Small Estates (Distribution) Act 1955 (Revised 1972). With the Small Estates (Distribution) (Amendment) Act 1977, the value was replaced with RM50,000.[50] The word 'fifty' was subsequently amended to 'three hundred' by the Small Estates (Distribution) (Amendment) Act 1982, which was later amended by the Small Estates (Distribution) (Amendment) Act 1988 and 2009, which again increased the amount to six hundred thousand ringgit and two million ringgit respectively.

[49] Wef 15 July 2024/

[50] Balan, 1977.

The latest amendment being the Small Estates (Distribution) (Amendment) Act 2022 (Act A1643), which took effect on 15 July 2023, now sets the estate value at five million ringgit.

Part IV of the Small Estates (Distribution) Act 1955, a special provision relating to the state of Sabah, was inserted by the Small Estates (Distribution) (Amendment and Extension) Act 1972 (Act A127), which took effect on 23 June 1972 and repealed the Administration of Native and Small Estates Ordinance (Cap 1, Vol. 1) 1941 but it is not yet in force. Hence, the Ordinance is still applicable in cases of native estates until such a date to be specified by the Minister, such as in *Ensui Gudul @ Godol v Suin @ Abdul Samad bin Dongkiris & Ors*[51], *Jumaiah bt Maruan @ Marwan v Hong Yee Mei & Other Appeals*[52], *Goh Beng Li @ Angeline binti Umpu v Goh Beng Chu @ Mariana binti Umpu*[53].

51 (2011) 3 MLJ 498 (HC)/
52 (2014) *6 MLJ 428* (CA)/
53 (2018) MLJU 977 (CA).

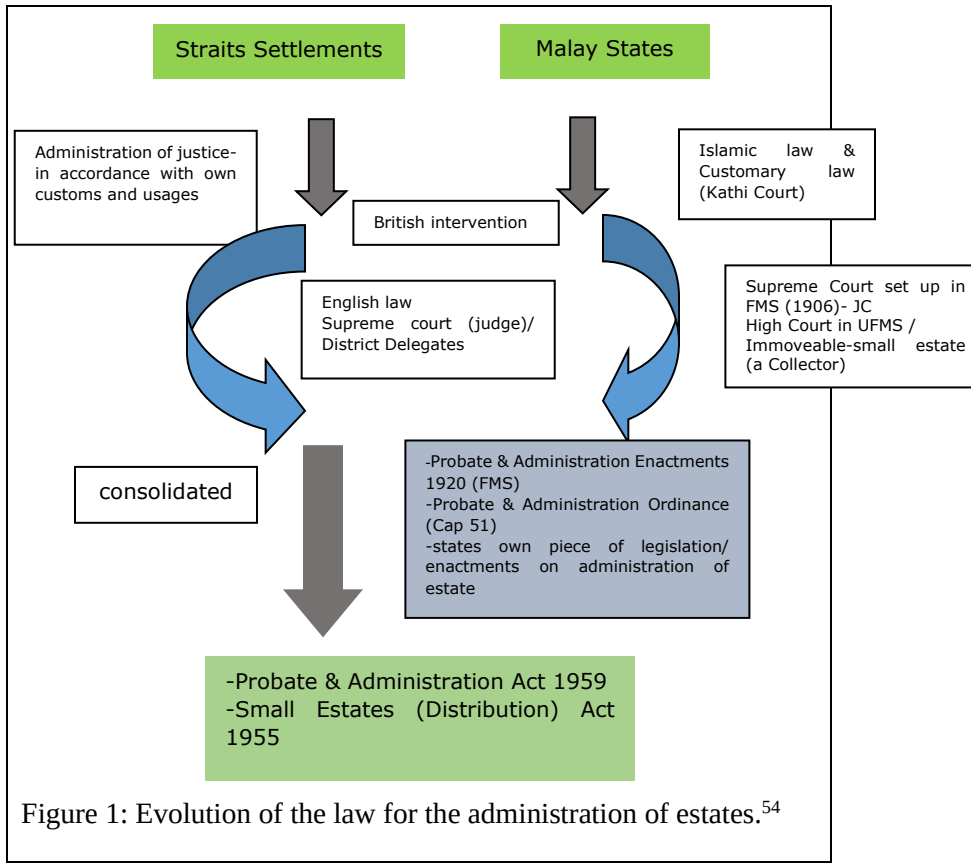


Figure 1: Evolution of the law for the administration of estates.[54]

## CURRENT LEGAL FRAMEWORK FOR ESTATE ADMINISTRATION IN WEST MALAYSIA

Generally, there are four administrative bodies or institutions involved in the administration of a deceased's estate in West Malaysia. They are: the High Court, the Estate Distribution Office (previously known as the Small Estates Distribution Division) under the Department of the

[54] Authors' construction.

Director General of Lands and Mines, the Public Trust Corporation or Amanah Raya Berhad and the Syariah Court.

*Applicable Law/ Legislation*

The main provisions to grant letters of representation are now found in the Probate and Administration Act 1959, while the procedures for obtaining them are set out in Order 71 of the Rules of Court 2012. Other statutes that govern the law and procedure for estate administration in West Malaysia are the Courts of Judicature Act 1964, Small Estates (Distribution) Act 1955, Distribution Act 1958, Wills Act 1959 and Public Trust Corporation Act 1995. For Muslim estates, state laws; specifically the Administration of Islamic Law statutes and the Muslim Wills statutes (as the case may be) continue to apply. Selangor via the Muslim Wills (Selangor) Enactment 1999 was the first state in Malaysia to enact legislation on Islamic wills, followed by Negeri Sembilan, Malacca and four other states. The aim is to provide provisions for Muslim wills and related matters. It came into force on 16 June 2000 and applies only to Muslims in the State of Selangor. Supplementary to the Statutes, the Muslim Wills Management (Selangor) Rules 2008 was enacted effective 19 June 2008.

The Small Estates (Distribution) (Amendment) Act 2022 (Act A1643), which came into force on 15 July 2024, amended the interpretation of "small estate" and the definition of "property." For a small estate, the estate of a deceased person now may include immovable or movable property, and the total value of the estate shall not exceed five million ringgit. The amendment also empowers the Estate Distribution Officer of a State to distribute and administer the deceased's estate within the Small Estates (Distribution) Act 1955. To address the difficulties beneficiaries or petitioners face in obtaining information on the deceased's estate and liabilities for estate administration, section 8C was introduced to allow the Estate Distribution Officer to grant letters of administration *pendente lite* (in Form FA) to obtain information from relevant parties pending the issuance of a distribution order.

*The Practice and Procedure*

The current legal framework provides that if an intestate estate's value exceeds five million ringgit, it falls under the jurisdiction of the High Court to administer it. For an intestate estate with a total value not exceeding five million ringgit, the Estate Distribution Officer of the Estate Distribution Office has jurisdiction to administer the estate. If an estate consists solely of moveable property and is valued at less than six hundred thousand ringgit, it will be administered by the Public Trust Corporation known as Amanah Raya Berhad by the issuance of a Declaration or Direction, as the case may be. The determination of Islamic law of succession and the issuance of a *faraid* certificate fall under the jurisdiction of the respective state's Syariah Court.

Orders 71 and 72 of the Rules of Court 2012 set out the procedural rules for applying for a Grant of Probate and Letters of Administration for a deceased person's estate at the High Court. Order 71 relates to non-contentious probate proceedings, while Order 72 relates to contentious probate matters. The High Court process for the administration of estates include the application for letters of representation right to the distribution of the estate or its proceeds to the beneficiaries. Meanwhile, the Estate Distribution Office handles estate administration from the petition for the distribution order to the final distribution of the estate, either through direct transmission, distribution order in Form E or grant of letters of administration in Form F. The administration of estates by Amanah Raya Berhad, on the other hand, covers four of its leading roles; trustee, personal representative, summary administrator of the deceased's moveable property and administrator of any undistributed funds. Meanwhile, the Syariah Court is only responsible for issuing the inheritance certificate or *faraid* certificate and determining substantive laws which govern a deceased Muslim's estate, such as the division of or claims to jointly-acquired property, wills, gifts made while in a state of deathbed illness (*marad-al mawt*) and *inter vivos* gifts. A *faraid* certificate is required to establish the distribution order that is issued subsequently by the High Court, Estate Distribution Office or Amanah Raya Berhad, as the case may be.

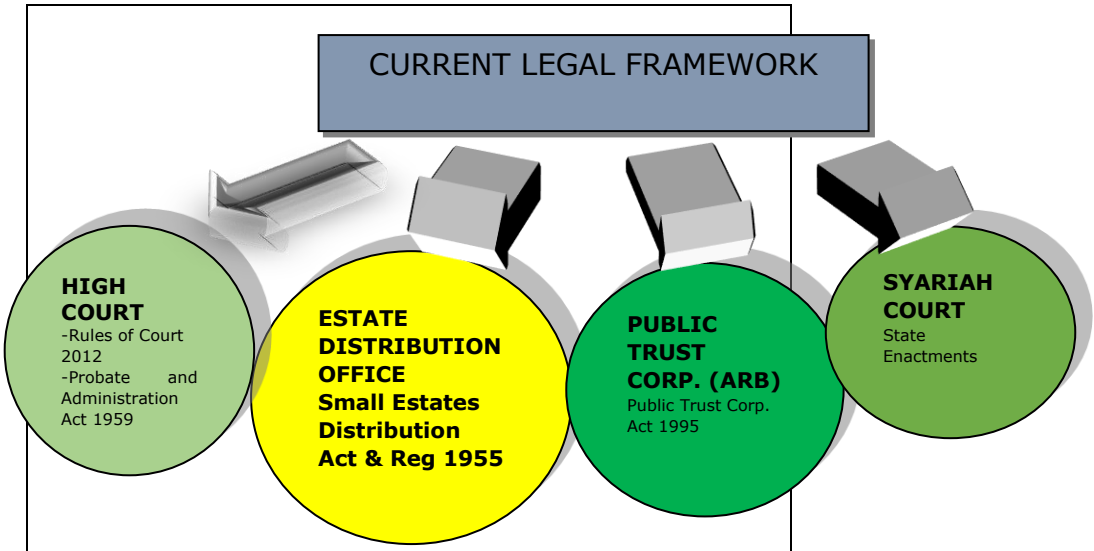


Figure 2: Current Legal Framework. [55]

## CONCLUSION AND SUGGESTIONS

Based on the discussion above, it is evident that Malaysia's law of succession evolved from English succession laws, introduced through the Charters of Justice into the Straits Settlements. The discussion has also highlighted that the Probate and Administration Act 1959 was adopted from the Administration of Estates Act 1925, and its procedures have largely been derived from the Non-Contentious Probate Rules 1954 of the United Kingdom. The former evolved or originated from the Indian Act XX of 1837, while the latter originated from Chapter XLIII of the Civil Procedures Ordinance 1878. Both were English laws that were initially introduced in the Straits Settlements vide the Royal Charters of Justice and such laws were later extended to the Malay States through their respective legislations.

[55] Authors' construction.

Since the model of the law on estate administration in West Malaysia originated from English law or common law, this article has shown that its structure and procedures closely resemble those of the common law. Hence, after more than 60 years of independence, the need for reform has become evident given Malaysia's pluralist society. Ibrahim[56] strongly suggests that the Malaysian courts apply our laws by prioritising the local conditions and its people, thus establishing and developing our very own Malaysian Common Law. Similarly, Wan Ahmad[57] states that perhaps the most fitting term to describe the legal evolution and development of this Malaysian Common Law is "malaysianisation."

It can also be established that the multiple sets of laws and administrative bodies or jurisdictions involved in estate administration in West Malaysia, namely, the High Court, Estate Distribution Office, Amanah Raya Berhad and the Syariah Court, among others, has led to confusion among the public and stakeholders involved in the process of estate administration regarding the different roles and functions of those bodies and agencies. Thus, in order to simplify and expedite the administration process while achieving uniformity in laws and procedures for estate administration, it is suggested that a single body or a one-stop agency be established to handle estate administration in West Malaysia.

---

56 Ahmad Ibrahim, "Towards A Malaysian Common Law?," *Malayan Law Journal* 2 (1989): 49.

57 Wan Azhar Wan Ahmad, "Malaysian Common Law," The Star, 2007, https://www.ikim.gov.my/index.php/2007/09/18/malaysian-common-law/.

# THE SALIENT FEATURES OF THE CYBER SECURITY ACT 2024

* Ida Madieha bt. Abdul Ghani Azmi

## ABSTRACT

This article uses the 5W1H method to analyse the salient features of the Cyber Security Act 2024. The legal analysis focuses specifically on the extent of the regulatory duties outlined in the Act. As a result, the penalties and enforcement mechanisms will not be discussed. The Act will be framed by comparing its provisions with those in other nations' benchmark laws. The article ends by highlighting areas to be addressed in the future by looking at recent legislative revisions in different countries.

**Keywords:** cybersecurity, critical information infrastructure, designation, duties of CII entities, cyber incidence notification

* Professor, Civil Law Department, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia.
E-mail: imadieha@iium.edu.my

## INTRODUCTION

The entry into force of the Cyber Security Act 2024 on 26th August 2024 was a momentous occasion. Prior to that, a total of four regulations were released, i.e. the Cyber Security (Period for Cyber Security Risk Assessment and Audit) Regulations 2024, the Cyber Security (Notification of Cyber Security Incident) Regulations 2024, the Cyber Security (Licensing of Cyber Security Service Provider) Regulations 2024 and the Cyber Security (Compounding of Offences) Regulations 2024. Malaysia has a lot to celebrate with this achievement, but there is also a substantial catching up with other countries that have legislated earlier on cybersecurity. In the region, Malaysia rolled out the law later than Singapore and Vietnam, who did that in 2018[1] and China in 2016. Outside Asia, the US promulgated its cybersecurity law in 2015, and the EU in 2019.[2] The lessons learned from these countries is that a strong lead agency at the national level is needed, endowed with the authority to ensure compliance, followed by stiff enforcement measures.

The benchmarking with other countries also demonstrates that achieving optimal protection over cybersecurity is an incremental process and not a one-off attempt, depending on the readiness of the industry players. More so when huge gaps can be found in the level of cyber resilience among the NCII (National Critical Information Infrastructure) sectors, as was found during the successive engagement process with the industry players. Rolling out a platinum-level legal framework would not work as the gap between these sectors has to be bridged first. Experience from other countries has shown that no one model fits all. With the fast-changing technology, the law must inevitably move fast, constantly revised to keep tabs of the trends in cyber-attacks and the sophistication of technology.[3]

---

1 Ngoc Son Bui and Jyh-An Lee, "Comparative Cybersecurity Law in Socialist Asia," *Vand. J. Transnat'l L.* 55 (2022): 631.

2 Liudmyla Balke, "China's New Cybersecurity Law and US-China Cybersecurity Issues," *Santa Clara L. Rev.* 58 (2018): 137, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2849&context=lawreview.

3 Ching Yuen Luk, "Strengthening Cybersecurity in Singapore: Challenges, Responses, and the Way Forward," in *Security Frameworks in Contemporary Electronic Government* (IGI Global, 2019), 96–128,

The Act explicitly provides for the application of the law to the Federal and State Governments. The provision illustrates the government's position to adopt stringent cybersecurity measures. Whilst such commitments are admirable, the next concern is whether these government agencies would equally be subjected to prosecution for failure to comply with the statutory obligations. On this note, the express provision is that the federal and state governments would not be liable for prosecution for any offenses under the Act. This assertion does not mean that the governments, particularly their officers, are entirely absolved from liability. Government officers are subjected to the highest standards of conduct, honesty, and probity in discharging their public duties as well as in their private lives. Disciplinary action can be taken against them for any misconduct which includes non-compliance with statutory obligations.

This article explores the salient features of the Cyber Security Act 2024 by addressing the 5W1H method with the following queries: (1) The corpus of cybersecurity law: What is cybersecurity law? (2) The rationale for cybersecurity law: Why is there a need for a specific and dedicated cybersecurity law? (3) The subject matter of protection: What is the subject matter of protection? (4) The locus of protection: Where are the locations of the computer/computer systems that are being secured? (5) The manner of protection: How are we securing the computer/computer system? and lastly (6) The time frame of statutory obligations: When do the statutory obligations commence?

By addressing these basic questions, the corpus of law known as 'cyber-security law' would be elucidated. The article will start examining the first question i.e. The corpus of cybersecurity law: What is cybersecurity law?

https://doi.org/doi:10.4018/978 1 5225 5984 9.ch005. Ching was of the view that "The chase for a perfect cybersecurity system or strategy is both impossible and unnecessary. However, it is important and necessary to establish a cybersecurity system or formulate a cybersecurity strategy that can monitor, detect, respond to, recover from, and prevent cyber-attacks promptly, and make the nation stronger, safer, and more secure.

## THE CORPUS OF CYBERSECURITY LAW: WHAT IS CYBERSECURITY LAW?

As far as a decade ago, the legal solution to problems posed by cyber-attacks is addressed through an amalgam of "century-old privacy norms, torts, and criminal laws that deal with hacking and intrusion into privacy."[4] Whilst these legal norms are useful in addressing the liabilities of these cyber-attacks, they have little to do with the protection of systems, networks, or data targeted by them. Sad to say, many countries do not have in place a set of cohesive cybersecurity laws even though the world is now heavily dependent on the internet. In other words, there was a lack of clear consensus as to the corpus of law known as cybersecurity law.

History has also shown how the vital interest in the safeguarding of personal data led to the promulgation of personal data laws. However, there seems to be a lack of adequate safeguards on the information systems that are vital to national security and economic interests. Breach notification was first created for personal data and not for attacks on national security and economic harms caused by cyber-security incidents.[5] Whilst the harm posed by personal data may transcend human integrity and may encroach into business and economy, the harm posed by a breach of security is even more multifaceted and multidimensional which includes the loss of life.

The ultimate question to address is if we were to develop the legal framework, the focus should be on maintaining confidentiality, integrity, or availability of systems, networks, and data, also known as the CIA triad.[6] Traditional cyber-crimes law resolves the issue of confidentiality of data but does little to address integrity and availability of information which is the effect of ransomware and malware attacks.

On this basis, cybersecurity law cannot be a stand-alone law. The law must be read together with existing provisions on computer crimes, criminal law, and other procedural laws. Moreover, as the need for

---

4 Jeff Kosseff, "Defining Cybersecurity Law," *Iowa L. Rev.* 103 (2017): 985.

5 Jeff Kosseff, "Upgrading Cybersecurity Law," *Hous. L. Rev.* 61 (2023): 51.

6 Kosseff, "Defining Cybersecurity Law."

cybersecurity cuts across all sectors, the relevant legislations from these sectors also form the backbone of the legal corpus understood as cybersecurity laws.

This is the exact spirit adopted by the Cyber Security Act 2024 that defines the term "cybersecurity" as "the state in which a computer or computer system is protected from any attack or unauthorized access, and because of that state— (a) the computer or computer system continues to be available and operational; (b) the integrity of the computer or computer system is maintained; and (c) the integrity and confidentiality of the information stored in, processed by or transmitted through, the computer or computer system are maintained".[7]

---

[7] In comparison see, Section 2 of Singapore's Cybersecurity Act 2018 is as follows–

"cybersecurity" means the state in which a computer or computer system is protected from unauthorized access or attack, and because of that state —

(a) the computer or computer system continues to be available and operational;

(b) the integrity of the computer or computer system is maintained; and

(c) the integrity and confidentiality of information stored in, processed by, or transmitted through the computer or computer system is maintained;

See also Article 2 of the Japan Basic Act on Cybersecurity Act (Act No 14 of 2014):

The necessary measures have been taken to prevent the leakage, loss, or damage of information that is recorded, sent, transmitted, or received in electronic form, magnetic form, or any other form that cannot be perceived by the human senses (hereinafter referred to as "electronic or magnetic form" in this Article) and to securely manage that information in other such ways; that the necessary measures have been taken to ensure the security and reliability of information systems and of information and communications networks (including the necessary measures to prevent damage from unauthorized activities directed at a computer through an information and communications network or through a storage medium associated with a record that has been created in electronic or magnetic form (hereinafter referred to as "electronic or magnetic storage medium")); and that this status is being properly maintained and managed."

The above definition anchors on the state of the computer or computer system involved. As such, "cyber security" in the Act is meant to indicate the preferred status quo of the computer or computer system whereby there exists an absolute protection to the integrity of the system operation and the information stored within such a system.

The type of cyber-attack ranges from a real threat to a potential threat, which are both treated as threat under the Act. This is the distinction drawn between cybersecurity threats and cybersecurity incidents. Under the Act, a cybersecurity threat is defined as "an act or activity carried out on or through a computer or computer system, without lawful authority, that may imminently jeopardize or may adversely affect the cyber security of that computer or computer system or another computer or computer system"[8].

A cyber security incident is defined as "an act or activity carried out on or through a computer or computer system, without lawful authority, that jeopardizes or adversely affects the cyber security of that

---

[8] Section 4 of the Cyber Security Act 2024. The term 'cyber security incidents' has been defined in both NSC Directive No. 26 as well as the General Circular No. 4 on the Management and Handling of Public Sector Cyber Security Incidents as follows:

a. NSC Directive No. 26

"cyber security incident" is an unwanted cyber incident that results in impairment of information confidentiality, interference with the integrity of the data or system, or interference that fails to obtain information from a computer system and the possibility of a breach of information security regulations, certain policies or security standards practices, as well as incidents involving misuse of cyberspace resulting in financial loss to a party or contribute to terrorism-related activities, as well as the posting of content that is contrary to the laws of the country, touches the sensitivity of society or is capable of influencing the thinking of society and is capable of threatening the stability and security of the country as well as undermining national values and identity.

b. General Circular No. 4

"Cyber security incident" is an unwanted cyber incident when the loss of information confidentiality, interference with the integrity of data, or systems, or interference that causes failure in obtaining information from computer systems and the possibility of violations of information security rules, certain policies, or cyber security standard practices.

computer or computer system or another computer or computer system"[9]. The element of 'imminent' and the possibility of attack could be understood from the definition of 'cyber threat' as opposed to a cyber security incident.

## THE RATIONALE FOR CYBERSECURITY LAW: WHY IS THERE A NEED FOR A SPECIFIC AND DEDICATED CYBERSECURITY LAW?

History has shown that laws are regulated to compel individuals to follow certain normative values. Given that many countries have faced regular and consistent cyber-attacks, some form of regulation is needed to mitigate the harms posed by these attacks. In Malaysia, statistics have shown that the highest number of attacks come in the form of malware, followed by intrusion attempts, website intrusion, and denial of service attacks. On that basis, the exact purpose of the specific and dedicated cybersecurity regulation is to achieve that state of 'cybersecurity' as desired.[10]

The most fundamental question is why is a need for cybersecurity regulation. In the EU, the discourse is the notion that the fundamental right to security can be extended to a new right to cybersecurity.[11] Vagelis Papakonstantinou, for example, suggests:

> "It is suggested that this could be achieved through the distinction between cybersecurity as *praxis*, whereby actions and measures undertaken by the cybersecurity addressees are meant, and cybersecurity as a *state*, whereby a conceptual protective sphere is created to the benefit of the cybersecurity recipients within which they are and remain (cyber)secure. This distinction is considered useful in order to create clarity and improve understanding in today's complex global environment that creates confusion. Such confusion becomes evident as early as when trying to provide cybersecurity

---

9 Section 4 of the Cyber Security Act 2024. Both these definitions were a deliberate departure from the NSC Directive No. 26 and the General Circular No. 4.

10 Annegret Bendiek and Eva Pander Maat, "Cybersecurity by Regulation," in *11* (Santa Clara Journal of International Law, 2013), 421–53.

11 Pier Giorgio Chiara, "Towards a Right to Cybersecurity in EU Law? The Challenges Ahead," *Computer Law & Security Review* 53 (2024): 105961, https://doi.org/https://doi.org/10.1016/j.clsr.2024.105961.

> with a commonly accepted definition. The distinction between cybersecurity as *praxis* and as a *state* is also critical while examining the existence of a new right to cybersecurity because it sheds light on its necessary parts: under a *praxis* lens the cybersecurity's addressees, recipients, as well as, its subject matter and protective scope become identifiable; under a *state* lens, the cybersecurity protected sphere for natural and legal persons emerges, that forms the core of the right to cybersecurity."[12]

The easiest way to justify the need for cybersecurity laws can stem from the three types of harms resulting from cyber-attacks i.e. (1) harm to individuals (2) harm to business interests and (3) harm to national security. For individuals, the harm comes in the form of leakages of personal data and identity theft. The harm to business interest comes in the form of the cost in mitigating cyber-attacks and incidents, business reputation, and loss of clientele as well as conducting cyber forensics. The third type of harm is the damage caused to national security. Cyber-attacks on critical infrastructure can bring enormous harm to the country. Attacks on the power grid, for example, do not only cause chaos in the country but can potentially cause human deaths.

In Malaysia, before the promulgation of the Cyber Security Act 2024, two national policies were framed: (i) the National Cyber Security Policy 2006 (NCSP) followed by the Malaysian Cyber Security Strategy 2020-2024 (MCSS)[13]. The MCSS that replaces NCSP is more inclusive and comprehensive in terms of strategic initiatives rolled out to protect the CII. Five core pillars constitute the bedrock of MCSS i.e. which includes strengthening legislative framework and enforcement.[14]

All these strategies rolled out by the national policies are short of the actual legislative support, which means that there was no legislative power to instil compliance. It is clear thus, that a specific

---

[12] Vagelis Papakonstantinou, "Cybersecurity as Praxis and as a State: The EU Law Path towards Acknowledgement of a New Right to Cybersecurity?," *Computer Law & Security Review* 44 (2022): 105653, https://doi.org/https://doi.org/10.1016/j.clsr.2022.105653.

[13] Among the key recommendations of the NCSP is to implement ISMS certification for the CII entities.

[14] Both the National Cyber Security Policy 2006 and Cyber Security Strategy 2020-2024 are available at https://www.nacsa.gov.my/.

and dedicated law is needed to bolster cybersecurity governance in Malaysia.

## THE SUBJECT MATTER OF PROTECTION: WHAT IS THE SUBJECT MATTER OF PROTECTION?

Cybersecurity is not only concerned with information but also the hardware, devices, control system, and network as the 'cybersecurity' targets involve more than just data, but also system and network security. This is transparent from the definition given by The International Telecommunications Union (ITU) which defines cybersecurity as "the collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber environment and organization and user's assets" within the cybersecurity foci of CIA triad and objectives.

It must be reiterated here that cyber-attacks such as trojan horses, malware, denial of service (DDoS), ransomware, or botnet attacks compromise the ability of the system to operate. Thus, the impact posed on the computer and computer system could be more than the availability of the system, as it compromises the fundamental ability of the system to operate as normal.

Core to the cybersecurity laws is the protection of critical information infrastructure and not personal computers belonging to individuals not connected to the CII. The impression of the members of the public is that the new law is supposed to resolve the issue of cyber-crimes as at the time of the drafting of the law, that is the main problem faced by the public. Instead, cybersecurity law is set to address the security of a 'protected system' i.e. computer systems managed under large corporations, entities, and government offices. As such the Act targets 'a critical system' called the "national critical information infrastructure" (NCII) that refers to a computer or computer system, the disruption to or destruction of which would have a detrimental impact on the delivery of any service essential to the security, defence, foreign relations, economy, public health, public safety or public order

of Malaysia, or on the ability of the Federal Government or any of the State Governments to carry out its functions effectively.[15]

What constitutes the object of protection is the computer and computer system which forms part of the NCII. On this point, the scope of the definition of 'computer system' covers not only the IT system but also the operational technology system in the following manner:

> "Computer system" means an arrangement of interconnected computers that is designed to perform one or more specific functions, and includes— (a) an information technology system; and (b) an operational technology system such as an industrial control system, a programmable logic controller, a supervisory control and data acquisition system, or a distributed control system.[16]

It becomes clear that the object of protection is beyond the computer and data, but also encompasses the control system. In an Internet of Things, where hardware, devices, and systems are all connected, the control system is equally a point of attack.

This definition is adopted from the Singapore Cybersecurity Act 2018, along with the definition of the term 'computer' itself.[17] The term 'computer' in the Cyber Security Act 2024 is a refined and revised version of the same term in the Computer Crimes Act 1997 and

---

15 Section 4 of the Cyber Security Act 2024. The stand taken by under the Act displays a deliberate departure from the existing practice under the NSC Directive No.26 and General Circular N.4/2022 that has already determined the meaning of CNII to be as follows:
"Critical systems that include information (electronic) assets, networks, functions, processes, facilities, and services in an information and communications technology environment that are important to the country where any disruption or destruction to them can have an impact on national defense and security, national economic stability, national image, the Government's ability to function, public health and safety and individual privacy."

16 Section 4 of the Cyber Security Act 2024.

17 For literature on Singapore, see Benjamin Ang, "Cybersecurity and Legislation: The Case Study of Singapore," in *Cybersecurity and Legal-Regulatory Aspects*, ed. Gabi Siboni and Limor Ezioni (World Scientific, 2021), 89–102, https://doi.org/https://doi.org/10.1142/9789811219160_0004.

Evidence Act 1950.[18] Under both Acts, a computer must carry out both the processing and displaying functions at the same time. However, in the world of the Internet of Things many devices no longer perform display functions and with cloud computing, even storage is not done in the computer system itself, but instead on the cloud. Due to this, it is submitted that the definition of a 'computer' contained in Malaysian statutes is outdated. Ideally, the notion of 'computer' must not be fixated with the requirement of a specified feature. In contrast, the UK and Australian legislation chose not to statutorily define the term 'computer' for fear that it would have been overtaken by technological changes.[19]. The Australian Security of Critical Infrastructure Act 2018 also does not specifically define the word 'computer'.

One possible option is to adopt newer terms such as 'ICT device' which includes any communication device or application encompassing mobile phones, computers, network hardware, software, the Internet, satellite systems, and so on. The current ongoing negotiation of the UN cybercrime treaty, for example, uses the term 'misuse of ICT device'. However, as the Cyber Security Act 2024 would have to be read together with the existing laws such as the Computer Crimes Act 1997, and Evidence Act 1950 that deal with cybercrimes, the term 'computer' had to be retained so as not to confuse judges, lawyers, and the public.

Other relevant terminologies used are 'network security' under the Communications and Multimedia Act 1998 and 'data security' under the Personal Data Protection Act 2010. Cyber security instead deals with the whole ecosystem from the transmission of signals to the receiving of signals and whatever process in between. It covers the hardware, software, devices, switches, and controls that are necessary

---

[18] See also Money Services Business Act 2011, Rules of Court 2021, Development Financial Institutions Act 2002, Sarawak Syariah Evidence Ordinance, 2001, State Sales Tax Enactment 1998, Cyber Centre & Cyber Café (Federal Territory of Kuala Lumpur) Rules 2012.

[19] The UK Computer Misuse Act 1990 does not define a computer because rapid changes in technology would mean any definition would soon become out of date. The task of defining what constitutes a 'computer,' in the UK, is thus left to the Courts, who are most likely to opt for the most recent definition. In *DPP v McKeown, DPP v Jones* ([1997] 2 Cr. App. R. 155, HL, at page 163), a computer was defined by Lord Hoffman as *"a device for storing, processing and retrieving information."*

for the process to take place. The nearest provision to cybersecurity is s 52A of the Electricity Supply Act 1990 which deals with supply infrastructure information security. This provision mandates licensees under the Act to take measures to ensure a quality electricity supply that is continuous and reliable.[20]

The next issue is to identify the sectors that form part of the critical information infrastructure. Different countries adopt different thresholds as to what sectors are essential to that country. For example, under the Australian Security of Critical Infrastructure Act 2018, there are no specific definitions of Critical Information Infrastructure. The Act, instead, provides a comprehensive list of what would be considered as "critical infrastructure." A total of 11 sectors have been listed as the critical infrastructure sector; i.e. communications, financial services and markets, data storage and processing, defence, higher education and research, energy, food and grocery, healthcare and medical, space technology, transport, and water and sewerage.

The delineation of sectors falling within the CII concept not only varies from one country to another but is also tied down to the sector that faced the most risk in the form of cyber-attacks due to the

---

[20] Supply infrastructure information security 52A. (1) Any licensee as directed by the Commission supplying electricity to consumers shall be responsible for the preservation of confidentiality, integrity, and availability of its information, information systems, and supporting network infrastructure about its duties and other matters as provided under this Act. (2) The licensee shall— (a) take the necessary measures, establish and implement standards and employ the relevant information security controls to prevent, avoid, remedy, recover or restore its information, document, instrument or records stored in its computers and for its operational system by its computers from any risk of— (i) threat or unauthorized access; and (ii) intrusion or removal; (b) take necessary measures to ensure the resiliency of its supporting network infrastructure to minimize business impact against various threats to its activities under the licence; and (c) ensure that the reliability, continuity and quality of electricity supply, its performance of duties and conformity to the provisions of this Act and any regulations made thereunder shall not be jeopardized thereby and shall report to the Commission within the time specified by the Commission, and in the event of any incident which interferes or affects the performance of the activities under the licence, report such incident immediately to the Commission and other relevant authorities.

significance of data systems retained in a particular organisation/sector. Sectors that are not currently perceived as critical to a country at present might be crucial to be protected in the future. One example is research data, currently hosted in research institutes and tertiary institutions may one day be 'prime data and systems' to be intruded for assorted reasons.

The sectors identified in Australia are skewed towards energy and essential facilities that support the country and economy. In Malaysia, using a risk-based analysis, the 11 National Critical Information Infrastructure Sectors identified are: Government Sector, Banking and Finance Sector, Transportation Sector, Defence and National Security Sector, Information, Communication, and Digital Sector, Healthcare Services Sector, Water, Sewerage, and Waste Management Sector, Energy Sector, Agriculture and Plantation Sector, Trade, Industry, and Economy Sector, Science, Technology, and Innovation Sector.

The identification of the 11 risk sectors meant that cybersecurity traverses public and private infrastructure. On this basis, the framework of cybersecurity law must strive to protect both private companies and government computers.

The remaining question is what is not covered within the framework of the cybersecurity law? One big vacuum is with regard to cyber-attacks by state actors. The consequences of cyber warfare have been well addressed in many literatures. The problem with cyberwarfare is the difficulty of attributing the attacks to any nation or state agents as it implies accountability as well as sovereignty of a nation.[21] This is unfortunate as the consequences of cyberterrorism are far more serious than cyber-attacks on businesses and corporations. The anatomy and impact of cyber-crime, cyber-warfare, and cyber-attack warrant these attacks to be treated differently.[22] On this point,

---

21 Peter Margulies, "Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility," *Melbourne Journal of International Law*, 2013, https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1687488/05Margulies-Depaginated.pdf.

22 Yuchong Li and Qinghui Liu, "A Comprehensive Review Study of Cyber-Attacks and Cyber Security; Emerging Trends and Recent Developments," *Energy Reports* 7 (2021): 8176–8186.

Gervais views the lack of consensus on legal norms on cyberwarfare reflects the problem of standard setting on state's conduct in cyberspace at the international level.[23] This reluctance has led to a power vacuum, lending credence that international law fails to address modern challenges in the rapid development of information and communication technologies. Worse still, the existing international instruments do not help determine how cyber-attacks ought to be understood under the existing jus ad bellum (use of war) and jus in bello (wartime conduct) frameworks.[24] This leads to uncertainty and difficulty in going after the perpetrators using international law instruments.[25]

## THE LOCUS OF PROTECTION: WHERE ARE THE LOCATIONS OF THE COMPUTER/COMPUTER SYSTEMS THAT ARE BEING SECURED?

The locus or place of protection of the computer/computer system is not something that forms the main criteria under the cybersecurity law. If the computer/computer system were to be located within certain buildings, then securing them is easy as it is a matter of designating the building under the Protected Areas and Protected Places Act 1959. However, an intrusion into computer systems can occur regardless of where the physical computer/computer systems are. The nature of networking means the range of computer/computer systems in need of protection surpasses those devices physically located in one location.

Locus is however still important in determining legal jurisdiction. With many companies choosing to use cloud services, the question of data sovereignty and data residence becomes an issue. On this basis, Malaysia chose to adopt the position in Singapore that states,

---

23 Kubo Mačák, "Is the International Law of Cyber Security in Crisis?," in *2016 8th International Conference on Cyber Conflict (CyCon)* (Tallinn, Estonia: IEEE, 2016), 127–139, https://ccdcoe.org/uploads/2018/10/Art-09-Is-the-International-Law-of-Cyber-Security-in-Crisis.pdf.

24 Michael Gervais, "Cyber Attacks and the Laws of War," *Journal of Law & Cyber Warfare* 1, no. 1 (2012): 8–98.

25 Samuli Haataja, "Cyber Operations against Critical Infrastructure under Norms of Responsible State Behaviour and International Law," *International Journal of Law and Information Technology* 30, no. 4 (2022): 423–43, https://doi.org/https://doi.org/10.1093/ijlit/eaad006.

if 'part' of the NCII is in Malaysia, that will be sufficient to establish Malaysian jurisdiction over the system.[26] Though the issue of 'partly' can be difficult to establish with precision, the thinking is that if the attack is made to a computer system that is connected to the ones in Malaysia, e.g. belonging to a branch of a Malaysian NCII entity then it is subjected to Malaysian law. The same principles apply to employee's own devices. As soon as the device is connected to a computer system in Malaysia, it is subjected to Malaysian law. The 'partly' criteria avoid the insistence that the device must be physically present in Malaysia all the time.

## THE MANNER OF PROTECTION: HOW ARE WE SECURING THE COMPUTER/COMPUTER SYSTEM?

The question as to how we secure the cybersecurity of the nation depends on the regulatory model to be adopted. As with many other countries, Malaysia chose a system that is based on both coercive and cooperative laws i.e. a mixture of carrots and sticks. As such the main mode of identifying the essential assets is through designation or mapping of the primary assets to be protected.

In this context, there are potentially two ways to do this:

1. To designate the organizations identified as 'NCII' first. By doing this, all the computer systems hosted by the NCII organizations would be deemed to be falling within the essential computer systems.

2. To identify 'essential services' that form the backbone of the 'NCII." By doing this, only the computer systems that serve the 'essential services' would be considered as falling within the boundary of the NCII.

In Singapore, the designation is done by mapping the computer and computer systems connected to essential services in the country.[27]

---

26 Section 3 of the Cyber Security Act 2024.

27 See Kah Leng Ter, "Singapore's Cybersecurity Strategy," *Computer Law & Security Review* 34, no. 4 (2018): 924–927.

The process is meticulous, but it would give an accurate account of the assets to be protected.

On the other hand, designating the organizations that serve essential services is much easier as the focus is on the organization, rather than the computer or computer systems that they host. Malaysia chose the latter to continue with the existing practice prevalent in the banking and telecommunication industry that focuses on the organization for easy governance.[28].

Mapping the NCII should be the first task as once the computer/computer systems falling under NCII are identified, then targeted organizations will be the ones to execute the duties and responsibilities of ensuring their cyber resilience.

In Malaysia, with the wide range of sectors involved, the task of designation is given to the sector lead. For that, the Act provides for the appointment of the sector lead for the eleven NCII sectors.[29] To conserve the sensitivities of the government sector agencies, it is further provided that no government NCII entity shall be designated under a sector lead who is non-government entity. The placement of the major responsibility of designation to the sector lead is a major departure from the practice in Singapore. This is deliberately done as these sector leads have a better knowledge of the agencies in their sector and have a stronger rapport with them. Moreover, following the former practice under the NSC Directive No 26, the lead sectors have been tasked with the designation, so naturally, these obligations were carried forward into the Act.

## THE TIME FRAME OF STATUTORY OBLIGATIONS: WHEN DO THE STATUTORY OBLIGATIONS COMMENCE?

Today's vulnerabilities will be tomorrow's point of attack. It is thus important for the law to be forward-looking and consider imminent threats to prevent cybersecurity incidents from ever occurring. The progressive nature of the cybersecurity law constitutes the main distinguishing criteria from cybercrime. The latter, like many other criminal laws, aims to punish the culprit after the act has been

[28] Section 17 of the Cyber Security Act 2024.
[29] Section 16 of the Cyber Security Act 2024

committed. Relying on cybercrime to deter cyberattacks is no longer a sufficient deterrent in a world of diverging, diversifying, and evolving forms and intensity of cyber-attacks. In addition, the frequent audit that has been mandated under the law means that agencies should be able to identify vulnerabilities that may be points of attack in the future much earlier. On this basis, the approach adopted in the cybersecurity law is both reactive and defensive.

One important reactive measure is the obligation to notify National Cyber Security Agency (NACSA) of any cyber security incident.[30] With the insistence on incident notification, organizations commence their mitigation process immediately after the incident, including rolling out measures to avoid future attacks. The ambit of the law is thus not focusing only on events already occurring but also imminent threats in the future. The whole basis of cybersecurity is to prevent, detect, respond to, or recover from incidents, served through a mixture of proactive and reactive measures.

The ensuing issue is the exact form and manner of the notification. In the US, the timeline given for the reporting of cybersecurity incidents is 72 hours.[31] The time for reporting is shorter in Australia which is no later than 24 hours for cyber incidents. The Cyber Security Act 2024 is silent on the form, manner, and time of cyber incidents and threats. The Cyber Security (Notification of Cyber Security Incident) Regulations 2014 prescribed this to be the initial notice within 6 hours after the cyber incidents. The detailed report on the affected system is expected later i.e. within 14 days of the incident.[32]

The breach notification for cyber incidents is the same breach notification obligation as set under the personal data protection law.[33]

---

30 Section 23 of the Cyber Security Act 2024. See also s 23 of the Australian Security of Critical Infrastructure Act 2018

31 Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) Reporting Requirements, Proposed Rule, 89 Fed. Reg. 23644 (April 4, 2024)

32 Rule 3(3) of the Cyber Security (Notification of Cyber Security Incident) Regulations 2024.

33 Privacy interests and cybersecurity interests overlap to a certain extent. See literature like Brandon W Jackson, "Cybersecurity, Privacy, and Artificial Intelligence: An Examination of Legal Issues

In the US, this is made possible through the Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) which sets uniform cybersecurity incident reporting requirements for operators of critical infrastructure.

On the defensive side, cyber hygiene practices and standards are important in ensuring the cybersecurity posture of the whole country. The monitoring of such cyber hygiene practices is through the setting of cyber hygiene baselines through a code of practices which can be based on internationally recognised standards.[34] Second, the Act sets the obligation for the entities to conduct an annual cyber security assessment and biennial compliance audit.[35]As some sectors such as the telecommunication and banking sectors have put in place stringent cybersecurity standards, their full observance would be considered as compliance with the Cyber Security Act 2024. The disparities in cybersecurity standards can provide weak points for cyberattacks. NACSA as the lead agency's main role is to 'mentor' sectors with weaker cybersecurity resilience through continuous monitoring and upgrading of security cybersecurity baselines and standards.

The remaining vacuum in the loop is individuals who use and connect to the information resources. The human aspect of the whole ecosystem is one of the neglected aspects of cybersecurity laws. Cains et al, in their seminal article, posit that most laws focus on software,

---

Surrounding the European Union General Data Protection Regulation and Autonomous Network Defense," *Minn. JL Sci. & Tech.* 21 (2019): 169, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1476&context=mjlst; Read also Maria Grazia Porcedda, "Cybersecurity, Privacy and Data Protection in EU Law.," 2023.

34 Section 21 of the Cyber Security Act 2024

35 Section 22 of the Cyber Security Act 2024. Regulation 3 of Cyber Security (Period for Cyber Security Risk Assessment and Audit) Regulations 2024.
"A comprehensive risk assessment enterprise risk management strategy, which includes a careful risk definition, crafting of policies and procedures aligned with the organisation's approach to risk management, and a comprehensive corporate compliance programme that ensures the policies and procedures are being followed, can change the outcome and impact of major security incidents". Briget MEAD, Joseph Goepel, Jared Paul MILLER, 'Defensibility: Changing the Way Organisations Approach Cybersecurity and Data Privacy' (2021) 33 SAcLJ 127.

hardware, and devices but do not touch much on the individuals involved.[36] NCII entities, thus must train their personnel on cybersecurity as the main weakness in the loop is the humans themselves.[37] In the Internet of Things, machinery and equipment can be controlled remotely, rendering it more crucial than ever to train human resources.[38] The increasing volume and sophistication of cyberattacks mean that continuous training needs to be conducted to ensure that the humans behind the essential computer and computer systems are well-equipped to address them. To that extent, the provision under the Cyber Security Act 2024 on mandatory participation in cyber exercises could achieve this to a certain measure. What the NCII sector requires is close assistance from the lead agency in terms of resources, expertise, and training to face the non-ending cyber onslaught.

## CONCLUSION

The nation's move to ensure the attainment of cybersecurity through strict legal obligations under the Cyber Security Act 2024 highlights the importance of protecting our information resources. Frequent and continuous cyber-attacks could lead to massive loss of government resources, business losses as well as harm to the economy, society, and country.[39] Due to rapid changes in technology, diversity, and intensity of cyberattacks since the beginning of the drafting of the Cyber Security Act 2024, three countries that were benchmarked i.e. the EU, Australia, and Singapore have introduced new revisions. Among areas

---

36 Mariana G Cains et al., "Defining Cyber Security and Cyber Security Risk within a Multidisciplinary Context Using Expert Elicitation," *Risk Analysis* 42, no. 8 (2022): 1643–1669, https://doi.org/https://doi.org/10.1111/risa.13687.

37 Li and Liu, "A Comprehensive Review Study of Cyber-Attacks and Cyber Security; Emerging Trends and Recent Developments."

38 Rolf H Weber and Evelyne Studer, "Cybersecurity in the Internet of Things: Legal Aspects," *Computer Law & Security Review* 32, no. 5 (2016): 715–28.

39 Xiang Liu et al., "Cyber Security Threats: A Never-Ending Challenge for e-Commerce," *Frontiers in Psychology* 13 (2022): 927398, https://doi.org/https://doi.org/10.3389/fpsyg.2022.927398.

of revision is the express extension to the Internet of Things, cloud computing, smart devices, and artificial intelligence. The EU through the proposed Cyber Solidarity Act (2023/0109 (COD), set up a regional-based cybersecurity alert system. Australia's Cyber Security Act 2024, meanwhile expands the list of the essential services as systems of national significance. Singapore's revisions in the Cybersecurity (Amendment) Act 2024, focus on the extension of the measures beyond the CII to include the supply chain as well. At the same time, the provision was strengthened to explicitly cover cloud computing services.

Whilst this article highlights the salient features of the Cyber Security Act 2024, the journey to attain the optimal state of cybersecurity is ongoing. Continuous updating of the technical baselines and standards can be done through the introduction of a new code of practices as well as directions from the NACSA's Chief Executive as the lead agency. On top of that the Act also requires continuous revision to take stock of global trends, to achieve global and harmonised standards as well as respond to new forms of cyber-attacks and technological changes. True to the phrase, both the journey and the destination is important to Malaysia.

# AI AND THE DEATH OF THE LEGAL PROFESSION: MUCH ADO OVER NOTHING

* Ida Madieha bt. Abdul Ghani Azmi

## ABSTRACT

This article examines the usage, risks, challenges, and potential legal liabilities of AI in legal practice. Using statutory interpretation, doctrinal analysis, and content analysis, the article examines the usage of artificial intelligence in legal practice and analyses the ethical and legal implications of such practice with a special focus on Malaysia, with useful precedents from the United States of America (USA) and the United Kingdom (UK). AI systems can be challenged for 'unauthorised provision of legal practice'. In Malaysia, only authorised persons can practice as advocates and solicitors, leaving out the position of AI tools as ambiguous. This article considers whether AI systems give legal advice and represent clients in courts in Malaysia. By tracing the development in the UK, US, and Europe, the article recommends regulating online legal advice and emphasising human oversight for using such AI systems. As the discourse on potential legal liabilities arising from the deployment of AI is still evolving, this article is confined to contemporary discourse on the issues. Countries may need to revisit their strict regulation on legal practitioners in lieu of the widespread use of AI tools to assist advisory and representation. AI systems may not be suited to professions that depend substantially on 'human professional conduct and etiquettes' such as legal practice. In such an instance, AI is best for 'human in the loop decision-making model' but not to replace the professional human.

**Keywords:** legal practice, artificial intelligence, advocate and solicitor, attorney, access to justice

* Civil Law Department, International Islamic University Malaysia.
E-mail: imadieha@iium.edu.my

## INTRODUCTION

Artificial intelligence (AI) is a set of enabling technologies that can contribute to a wide array of benefits across the entire spectrum of the economy and society.[1] A lot has been written on the usefulness of AI platforms in legal practice.[2] Almost all highlight the pros and cons of with enough emphasis on the potential risks of using such tools.[3] Among the useful functions are: legal research and e-discovery; document automation; predictive legal analysis; case management; legal advice and expertise, automation, and information and marketing.[4] As in other activities and industries, AI is expected to simplify legal work and boost access to justice as well.

This article is divided into 4 parts. Part I focuses on the value conferred by AI to legal practice. The various utilities of AI systems to legal practice are highlighted in this Part. Part II espouses the ethical challenges posed by the deployment of AI in legal practice. The discussion continues with legal liabilities arising out of activities done using AI systems in Part III. Part IV ends the discussion by looking at whether the various representations made by the AI system could amount to legal practice or at best, legal advice.

## THE USEFULNESS OF ARTIFICIAL INTELLIGENCE TO LEGAL PRACTICE

Whilst all the debate on access to justice is based on physical access to the court system, the recurrent debate is on how AI assists in narrowing or reducing the access to justice gap. The wider availability of

---

1 Preamble 3 of the Regulation (EU) 2024/1689 of the European Parliament and of the Council (of 13 June 2024).

2 Bryan J.F. Plat, "LawGPT: The Benefits and Drawbacks of AI in Legal Practice," *University of Richmond School of Law Journal of Law & Technology*, n.d., https://jolt.richmond.edu/2024/03/01/lawgpt/ .

3 British Institute of International and Comparative Law, "The Use of AI in Legal Practice," 2023, https://www.biicl.org/publications/use-of-artificial-intelligence-in-legal-practice.

4 The Law Society, "AI in Legal Practice," 2024, https://www.lawsociety.org.uk/topics/research/ai-artificial-intelligence-and-the-legal-profession.

technology promises more efficient and easier access to legal justice.[5] Tools that use natural language processing and machine learning are widely utilised in search engines, and chatbots could provide easy legal references and materials to users. Other tools that substantially assist users, lawyers included, are tools that facilitate writing, citation, and grammar checks. With the wide range of useful tools, Whalen divided them into four categories:

(i) Generic technologies – these are general tools useful to everybody.

(ii) Shallow legal tech – these are tools that assist legal practice such as legal search and retrieval in the form of databases or docket management systems, contract management systems, or patent prior art search engines. The feature of these tools is that it does not engage with the law directly, do not make legal determinations, and the bulk of the legal work is done by the practitioners themselves.

(iii) Deep legal tech- these are technologies that 'afford primarily legal uses and that engage directly and deeply with the law'. These technologies make legal determinations, by enforcing the law, or perhaps updating the law itself.' The example given is tax preparation software, that processes inputting data and makes determinations about tax obligations. Another example is smart contracts that are designed to monitor conditions and self-execute as the agreement dictates.[6]

Macgrath examines how the AI-driven search tool, Case Genie assists in searching for unknown unknowns in particular case law research to assist a barrister in looking up authorities for his arguments. Unknown unknowns are cases that are not known to the barrister but may be relevant in developing his contentions. The cases may not be from an area that is obvious or identical but may be similar and relevant. However, interestingly, the AI platform works in an unknown way, not like a calculator. The way the system works is known as a

5 The Law Society.

6 Ryan Whalen, "Defining Legal Technology and Its Implications," *International Journal of Law and Information Technology* 30, no. 1 (2022): 47–67.

closed or 'black box' system, and not as simple as two plus two. The author perceived that to be the limitation of Case Genie that adds mystery to the system.[7]

With the widely touted promises AI makes to the legal profession, it remains to be seen whether this is true on the ground. Can AI be the death of legal practice as said by Richard Susskin? The following discussion considers the level of adoption of AI in legal practice. The aim of the AI system developer is for these systems to replace lawyers to save clients' money. The ensuing part examines the ethical challenges faced in the process.

## ETHICAL CHALLENGES

Despite the numerous benefits associated with chatbots (i.e., computer programs that facilitate interactions between people through 'chatting'), the issues of user privacy and their impact on customer service representatives must be approached with caution.[8]

Whelan, for example, posits the harm when technological tools could alter the substance of the law. The example given is speech screening software that classifies speech as either constitutionally protected free expression or regulatable unprotected speech. These types of technology require legislative oversight. For instance, when the law in question raises more important moral considerations, then there are more serious legal implications to be considered as right to a human decision.

With the rise of chatbots and tools to assist and simplify legal documents, scholars are quick to report the potential liabilities arising from such use. As reported by the BIICL Report, the potential liabilities for legal practice include accuracy and accountability; transparency, trust, communication, and duty of competent representation; bias and

---

7 Paul Magrath, "The Genie and the Lamp: How Can Artificial Intelligence Help Us Find New Case Law?," *Legal Information Management* 22, no. 3 (2022): 114–18.

8 Ming-Hui Huang and Roland T Rust, "A Strategic Framework for Artificial Intelligence in Marketing," *Journal of the Academy of Marketing Science* 49 (2021): 30–50.

fairness; privacy, data protection, conflict of interests and duty of confidentiality, and lack of human judgment and interpretation.[9]

This part will delve into some of the ethical issues posed by AI systems.

**Transparency**

One elusive risk associated with AI systems is the lack of transparency.[10] The complexity of AI systems makes it difficult for legal professionals to comprehend how decisions are made. This can make it difficult to hold AI systems accountable for their decisions, which is problematic in legal contexts where transparency and accountability are crucial.

**Dependency**

In addition, there is the possibility that excessive reliance on AI systems will lead to a lack of critical thinking and human judgment. AI systems can aid in legal decision-making, but they should not replace the knowledge and discretion of attorneys.[11] A reliance on AI systems that is excessive can result in legal professionals becoming complacent and not interrogating the outputs of the AI system, leading to potentially erroneous decisions. Legal implications about data protection, intellectual property, and liability for decisions made by AI systems could be additional hazards. Legal professionals must use AI systems by applicable laws and regulations.

**Lack of human judgment and interpretation**

Despite the attractive promises that AI technologies offer to the practice of law, they cannot replace human lawyers. Specifically, AI cannot replace the moral conscience attributed to humans. AI would be incapable of understanding human social norms, empathy, and self-reflection, all of which are crucial in the legal profession. Importantly,

---

9 British Institute of International and Comparative Law, "The Use of AI in Legal Practice."

10 Stefan Larsson and Fredrik Heintz, "Transparency in Artificial Intelligence," *Internet Policy Review* 9, no. 2 (2020).

11 Jonathan Michael Spector and Shanshan Ma, "Inquiry and Critical Thinking Skills for the next Generation: From Artificial Intelligence Back to Human Intelligence," *Smart Learning Environments* 6, no. 1 (2019): 1–11.

the sound judgment that comes from years of experience cannot be readily replicated by AI. It has been said that the raison d'être of a counsel's expertise is that he possesses sound judgment. According to Yamane,[12] judgment is "the non-automobile collection of exclusively human qualities or capacities."

Current AI systems are limited in their abilities. For example, it cannot compete with human abilities in a complete sense.[13] Contrary to human attorneys, AI cannot reason contextually and cannot account for the non-legal considerations that frequently accompany legal decisions. AI cannot, for instance, assess the emotional impact of a decision on a family or the compromises that may be required for the benefit of children.

AI is also unable to explain or communicate its reasons.[14] In contrast, a lawyer can delve deeply into issues, comprehend human nature, and unearth information that may be concealed due to self-interest or other complex human factors. In contrast, AI may not be able to weigh these factors as effectively as a human attorney.

Furthermore, the AI system may not be able to reason contextually, consider non-legal concerns, communicate reasons, provide explanations, and establish a strong attorney-client relationship. These are all essential aspects of legal practice that require human skills and expertise.[15] While admittedly, AI can aid in legal decision-making, it cannot supplant the knowledge and discretion of human lawyers.

Yamane argues that, based on legal ethics, AI should not replace the work of a human lawyer; otherwise, this would violate their

---

12 Nicole Yamane, "Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands," *Geo. J. Legal Ethics* 33 (2020): 877.

13 Juan José Gamboa-Montero et al., "Detecting, Locating and Recognising Human Touches in Social Robots with Contact Microphones," *Engineering Applications of Artificial Intelligence* 92 (2020): 103670.

14 John McCarthy, "Generality in Artificial Intelligence," *Communications of the ACM* 30, no. 12 (1987): 1030–35.

15 Milan Markovic, "Rise of the Robot Lawyers," *Ariz. L. Rev.* 61 (2019): 325.

obligation to provide competent representation.[16] Based on ethical principles, AI's role is limited to enhancing the work of attorneys. AI programs that do not include human attorneys should not provide legal advice, as doing so would constitute the unauthorised practice of law, such as using self-help apps and online forms. Unauthorised legal representation can be committed by AI which functions as an expert system and gives advice without involving human attorneys. Yamane emphasises that AI systems have the potential to reduce access to justice, given that the majority of those in need of legal assistance cannot afford an attorney.

## The way forward: Ethically based algorithm platform

The legal vacuum in which AI systems operate compels lawmakers and policymakers around the world to create wholly new rules tailored to AI systems. The focus of the legislation may be liability, personhood, or the legitimacy of activities involving such instruments. The Artificial Intelligence Act [17], passed by the European Union in response to a proposal for an AI regulatory framework, is among the earliest regulatory frameworks to govern AI. The Act focuses on the responsibilities of the AI system's developer. The paramount concern is that the AI systems being developed are secure and adhere to existing fundamental rights laws. Such objectives highlight the underlying concern that intelligent systems could be designed to violate and evade fundamental rights. It is crucial that consumers can rely on developers to create systems that are not only secure but also trustworthy in terms of legal compliance, respect for fundamental rights, consumer protection, and algorithms based on transparent and proportional logic. The Act enumerates several fundamental liberties that are guaranteed to all individuals. These liberties include respect for private life and personal data protection, ensuring that one's personal information remains confidential and secure. The Act also guarantees equal rights for women and men, recognising that every individual should have equal access to opportunities and treatment regardless of their gender. Freedom of expression is also a fundamental right that is guaranteed, allowing individuals to freely express their opinions and ideas without fear of censorship or persecution.

---

16 Yamane, "Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands."

17 Regulation (EU) 2024/1689.

In addition, the Act ensures that individuals have access to effective remedies and a just proceeding, including the right to a defence trial and presumption of innocence. This ensures that everyone is treated fairly and can defend themselves against any accusations. The Act also guarantees superior administration, ensuring that government agencies and public officials act in the best interests of the people they serve. Decent working conditions and consumer safeguards are also fundamental rights that are guaranteed, protecting individuals from exploitation and ensuring their safety.

The Act recognises the importance of protecting the rights of children, ensuring that they are treated with care and provided with appropriate education and support. The Act additionally acknowledges the importance of integrating individuals with impairments into society, providing them with equal opportunities and support. Added to that are environmental security and human health and safety, fundamental rights that are guaranteed, ensuring that individuals have access to a safe and healthy environment to live and work in. Finally, the Act recognises the freedom to engage in commerce and the freedom of science and art, allowing individuals to pursue their interests and contribute to society in their unique ways.

Furthermore, the Act recognises certain considerations and provides guidelines for developers of AI systems in regard to certain legal and ethical issues arising from AI. Specifically, the Act outlines matters that must be considered when building AI systems aiming to communicate with humans, detect emotions, or generate or manipulate content. When building AI systems that aim to communicate with humans, developers must ensure that the system is designed in a way that is respectful of human dignity and privacy. For example, a chatbot used in customer service should be programmed to provide respectful and accurate responses to users, while also ensuring that user data is kept confidential.[18]

The Act also recognises the need to consider the ethical implications of using biometric information to detect emotions or determine association with social categories. For example, an AI

---

[18] Saslina Kamaruddin et al., "The Quandary in Data Protection and Rights to Privacy of AI Technology Adoption in Malaysia," in *2021 Innovations in Power and Advanced Computing Technologies (i-PACT)* (IEEE, 2021), 1–5.

system used to analyse facial expressions to determine a person's emotional state must be designed in a way that respects the person's privacy and avoids any potential biases. In addition, the Act recognises the potential dangers of using AI to generate or manipulate content, such as deepfakes.[19] When building such systems, developers must ensure that the system is designed in a way that is transparent and accountable. For example, an AI system that is used to generate news articles must be designed in a way that indicates that the content is generated by an AI system and not a human writer.

As can be seen, the intention of the Act is to provide guidelines for developers to ensure that their AI systems are designed in an ethical and responsible manner. By considering the guidelines outlined in the Act, developers can create AI systems that are respectful of human dignity and privacy, avoid potential biases, and are transparent and accountable. This will help to ensure that AI technology is used in a way that benefits society.

## LEGAL CHALLENGES FROM THE USE OF AI IN LEGAL PRACTICE

As the world is catching up with advances in technology, the legal evolution is even slower. Scholars are quick to extend legal principles developed for the physical world to online activities. The rate of litigation and legislative proposals is slow in the making. As a result, the legal norm setting is still a work in progress. Most proposals are targeted towards civil liabilities, as it is thought that conferring criminal liabilities to the AI system is too distant a possibility.

The use of an AI system comes with a variety of potential liabilities, including bias, privacy, moral quandaries, and interpretability.[20] If the AI system is only used as a practice instrument, the range of concerns includes competence, confidentiality, supervision, and unauthorised practice. While the AI system has the

---

19 John Fletcher, "Deepfakes, Artificial Intelligence, and Some Kind of Dystopia: The New Faces of Online Post-Fact Performance," *Theatre Journal* 70, no. 4 (2018): 455–71.

20 Steven A Wright, "Ai in the Law: Towards Assessing Ethical Risks," in *2020 IEEE International Conference on Big Data (Big Data)* (IEEE, 2020), 2160–69.

potential to revolutionise the legal profession, it also poses several ethical and legal risks.[21] The potential for bias in AI systems is a significant concern. AI systems are only as objective as the data on which they are trained; if the data used to train an AI system is biased, the system will also be biased. This can have substantial effects on legal decisions and outcomes, potentially leading to the unjust treatment of certain groups. Whilst some of these are clear ethical concerns, some of the breaches can transcend into legal liabilities.

This part will analyse some of the issues with the evolving norms on civil liabilities.

**Civil liabilities**

The risks of using AI systems are well-developed and have been identified by many reports. On this point, the EU is leading the discourse by coming up with several legislative instruments on AI. On the grounds of technological neutrality, Prof Ryan Abbott[22] espouses that laws should regulate behaviour rather than technology. According to him, we should be more concerned with the behaviour itself rather than how that behaviour occurs. Calling the AI the 'reasonable robot' Ryan Abott argues that the law should not discriminate between people and AI when they are performing the same tasks. However noble his aspiration, it is not quite precisely clear what the implications on legal norm setting are.

In leading such discourse, the EU opts to view it from the 'risk' point of view. In a white paper on artificial intelligence, the EU espouses ‘excellence’ and ‘trust’ as the two core values to be achieved in any AI platform[23]. In the Guidelines of the High-Level Expert Group, there are seven key requirements for an expert system:

(i) Human agency and oversight
(ii) Technical robustness and safety

---

21 Corinne Cath, “Governing Artificial Intelligence: Ethical, Legal and Technical Opportunities and Challenges,” *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 376, no. 2133 (2018): 20180080.

22 Ryan Abbott, *The Reasonable Robot: Artificial Intelligence and the Law* (Cambridge University Press, 2020).

23 White Paper on Artificial Intelligence: A European approach to excellence and trust, Brussels, 19.2.2020; COM (2020) 65 final.

(iii) Privacy and data governance
(iv) Transparency
(v) Diversity, non-discrimination, and fairness
(vi) Societal and environmental well-being, and
(vii) Accountability

The core objective of the paper is to address the risks posed by AI systems on fundamental issues. Among the risks identified are:

(i) Risks to fundamental rights, including personal data and privacy protection and non-discrimination
(ii) Risks for safety and effective functioning of the liability regime

The White Paper emphasised that for high-risk AI applications, the need for human oversight cannot be underplayed. The second principle put forward is the transparency requirements. The principle underscores the importance of keeping accurate records of the data set used to train and test the AI systems, but also the programming used to validate the AI systems. Included within the parameters of the principle is the need to maintain safety and avoid bias, robustness, and accuracy. On this note, it has been noted that:

> 'The specific characteristics of AI including complexity, autonomy, and opacity (black box effect) – may make it difficult or prohibitively expensive for victims to identify the liable person and prove the requirements for a successful liability claim"

The same line of approach is adopted by the EU Digital Services Act Regulation 2022.[24] The objective of the Act is to draw a comprehensive and fully harmonised framework for due diligence obligations for algorithmic decision-making by online platforms. Similarly, when legal advice given by autonomous bots turn out to be faulty or wrong, a person seeking compensation for damage suffered,in Member states using the fault-based liability rules, would have to prove negligence as well as a causal link between that fault and the relevant damage. These rules must be adapted to maintain trust in the judicial system.

---

24 (EU) 2022/2065.

## Liability for wrongful advice

There is a significant risk that these tools could be used as self-help remedies, like online medical sites that provide advice on diagnosis and medication based on symptoms provided by internet users. What would the developers of these autonomous systems be liable for if the advice turned out to be untrue, fraudulent, defamatory, or outright criminal? Due to the disparity in internet penetration between rural and urban areas, there is a significant risk that rural residents will be unable to utilise the bots' services.[25] Therefore, the autonomous system creates voids in access to justice, and the outcome would be identical if the physical court system were utilised. Fundamentally, it must be acknowledged that AI cannot replicate all human capabilities; therefore, it should not be viewed as a replacement for human attorneys but rather as their assistants.

Concerns are raised about using AI in legal practice, whether in the form of legal advice, legal representation, or judicial decision-making. Given that regulations governing legal practice and judicial procedure focus on living people, with the increasing reliance on AI as an instrument in legal practice, there is a need to re-examine existing laws and determine if they need to be expanded to include non-human legal assistance.

## Attribution of liability

Who is responsible for incorrect or careless advice or actions given by a human attorney or human-staffed law firm? This is the most fundamental issue in legal practice. Whilst the legal liabilities of human personnel are well documented in law and jurisprudence, the liabilities of expert intelligent systems have raised a wide range of liability concerns.[26] Some academics have advocated imbuing AI with legal personality. The personhood theory is circumstance-dependent. Where AI is only used as an instrument, the person operating the AI would bear sole responsibility, as the AI would be considered the operator's

---

25 Sandra Monteiro et al., "Critical Thinking, Biases and Dual Processing: The Enduring Myth of Generalisable Skills," *Medical Education* 54, no. 1 (2020): 66–73.

26 Adrian A S Zuckerman, "Artificial Intelligence–Implications for the Legal Profession, Adversarial Process and Rule of Law," *Forthcoming in (2020)* 136 (2020).

property. With a system that is more sophisticated and intelligent, it may be possible to view the AI as the representative of the person managing it.[27] According to the principle of agency, the system's operator is the principal and the AI is the agent, making the operator liable as the principal offender. It is also conceivable that in the future we will have a more intelligent AI that can handle legal tasks without human supervision. Scholars argue that this is when AI became a legal person with legal personhood and legal rights and obligations.

With the heavy reliance on AI for the provision of services, several suits have arisen involving organisations that used them and even against the platform themselves. It was reported on 23 February 2024, that Air Canada was held liable when its chatbot gave passengers bad advice. The airline's line of argument is the chatbot is responsible for its actions as it is a separate entity that is responsible for its actions. In this case, the chatbot promised a discount that was not available. The decision by a civil resolution tribunal, i.e. British Columbia Civil Resolution Tribunal was that the chatbot had been wrong. The statements by the Tribunal are that 'Air Canada is solely responsible for the information put up on their website'. The main problem that has been identified is the non-reliability of the advice given by the AI system which has been labelled as AI hallucinations. The Tribunal found that it is not right to place the entire blame on the chatbot. Instead, it is the responsibility of the website owner to make their chatbot reliable.[28]

## The way forward: algorithm-based decision making

The evolution of civil labilities arising from activities conducted using AI systems can either be risk-based, fault-based, or entirely on faulty products. As the whole spectrum of liabilities is now being examined as to their suitability and extension to the digital world, the EU's position by imposing the responsibility on the developers of the AI to integrate ethical concerns into the system is laudable. Whilst we do not expect AI systems to behave like human beings, it is of the essence for

---

27 Alyson Carrel, "Legal Intelligence through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21st Century Legal Professional," *Ga. St. UL Rev.* 35 (2018): 1153.

28 BBC, 23rd Feb 2024.

them to be 'ethical by design' so that many of the risks associated with their use can be avoided.

## THE NOTION OF A 'QUALIFIED PERSON' FOR THE PURPOSE OF PRACTICE IN MALAYSIA

The suitability of AI systems for legal practice has posed innumerable issues. The primary one is whether these systems can operate as full-fledged lawyers/legal firms to represent clients in court as what DoNotPay sought to do. This part examines the notion of a 'qualified person' for the purpose of practice in Malaysia.

### "Qualified person" to practice

Is there a possibility that DoNotPay, ChatGPT, or another AI platform be acknowledged as a fully-fledged attorney or legal practitioner in Malaysia? Can a sophisticated system be considered a representative for an attorney to represent a client in court? This does not appear to be supported by the current legal framework governing legal practice in Malaysia. In Malaysia, the legal practice and judicial process are governed by statutes that emphasise the roles and responsibilities of human lawyers and judges. The Legal Profession Act 1976 ('LPA') stipulates that only "qualified persons" may be enrolled as High Court advocates and solicitors. In addition, only advocates and solicitors admitted and registered under the Act are permitted to provide legal representation and appear in court.[29] The person must possess a law degree from one of the universities recognised by the legal profession qualifying body to be qualified.

In Malaysia, the Legal Profession Qualifying Board has the authority to determine the requirements for entry into articles for the purpose of admission as an advocate and solicitor. The Act established additional criteria for a qualified person i.e. qualified person must have completed pupillage. Under section 29 of the LPA, only a human advocate and solicitor can be admitted to the court and maintain a certificate to practice as an advocate and solicitor. In section 3 of the LPA, the stringent requirements for the application of a practising certificate are outlined. According to section 37 of the LPA, no

---

29 Ani Munirah Mohamad, Zaiton Hamin, and Mohd Bahrin Othman, "Organizational Implications of Technology Adoption at the Malaysian Civil Courts," *J. Legal Ethical & Regul. Isses* 22, no. 1 (2019): 1–5.

unauthorised person may operate as an advocate or solicitor. The ability to represent a client in court is outlined in Part IV of the Act. Specifically, section 35 confers the "exclusive right to appear and argue in all Courts of Justice in Malaysia." Section 36 stipulates that for an advocate or solicitor to practise, their name must appear on the roll and they must possess a valid practising certificate. Whoever is not so certified will be referred to as an "unauthorised person."

The LPA lists the following as activities relating to the legal profession that an "unauthorised person" is prohibited from performing, including:

(a) Drafting documents pertaining to real property, legal proceedings, or a trust

(b) Preparing documents related to probate or letters of administration

(c) Preparing documents for company incorporation or formation.

(d) Writing letters or notices on behalf of a claimant threatening legal proceedings other than a letter or notice that the matter will be handed to an advocate and solicitor for legal proceedings

(e) Soliciting or negotiating for settlements for any claim arising out of personal injury or death and founded upon a legal right or otherwise.

As can be seen from the above, the list of duties to be performed by an "authorised person" under the LPA includes responsibilities typically performed by advocates and solicitors. One wonders whether this provision will be revisited in the future, given that some of these documents can now be prepared using an intelligent system.

There is no mention of technological instruments or systems used in the decision-making process in any of these laws and regulations. Order 5 rule 6 of the Rules of Court 2012 essentially reaffirms the principle that the standard method for filing a lawsuit is through a lawyer or in person. All these rules are in place to ensure that citizens receive equitable treatment within the normal judicial system, including the right to notice of charges and a hearing before an impartial judge.

In lieu of examining whether an AI can supplant a human lawyer, it is also possible to examine the function of the AI. If it is only to supplement a task typically performed by a human lawyer, such as document management, document review, and form automation, then the human lawyer who endorses the work could be held liable. This is possible for tasks that are not extremely complex, such as drafting legal documents, providing advice, communicating, and interacting with clients, investigating facts, and performing other repetitive tasks typically performed by junior lawyers.[30]

Some legal tasks involve multitasking, which necessitates human judgment, compassion, and wisdom; therefore, the combination of humans and machines will increase efficiency. In this instance, AI cannot supplant humans. In the end, the stringent professional ethics of the legal profession prevent AI from being accepted as fully-fledged attorneys. How does the law define the responsibilities and rights of AI? Can people believe that a robot judge has the authority to determine our lives or deaths? Once these concerns have been adequately addressed, it will be time to accept a fully committed AI lawyer.

**Online platform information is not equivalent to a lawyer's advice**

Several cases in the US illustrate the position that online platform information is not equivalent to a lawyer's advice. In *Mescall v Renaissance at Antiquity*[31], it was considered in the footnote that:

> [1] … Defendants allege that Plaintiff's response appears to have been partially written with the aid of ***artificial intelligence*** ("AI"). (Doc. No. 18 at 7, Doc. 20 at 1-2). The use of ***artificial intelligence*** to write pleadings is a novel issue and appears to be untread territory in the Fourth Circuit. However, recent caselaw from outside of this jurisdiction supports the common-sense conclusion that the use of ***artificial intelligence*** creates challenges, raises ethical issues, and may result in sanctions or penalties when used inappropriately. *Mata v. Avianca, Inc., No. 22-cv-*

30 Teng Hu and Huafeng Lu, "Study on the Influence of Artificial Intelligence on Legal Profession," in *5th International Conference on Economics, Management, Law and Education (EMLE 2019)* (Atlantis Press, 2020), 964–68.

31 2023 U.S. Dist. LEXIS 203028.

> *1461, 2023 U.S. Dist. LEXIS 108263, 2023 WL 4114965, at *1 (S.D.N.Y. June 22, 2023)* (finding "bad faith on the part of [legal counsel] based upon acts of conscious avoidance and false and misleading statements to the Court" and imposing sanctions when counsel "submitted non-existent judicial opinions with fake quotes and citations created by the ***artificial intelligence*** tool ChatGPT").

In *Ex parte Lee*, a case brought to the Court of Appeals of Texas,[32] the appellant cited three published cases that appeared to be non-existent. The briefs were therefore found to be not in substantial compliance with the Court rules. The legal arguments in the brief may have been prepared by artificial intelligence (AI). However, in this case, there was no information as to why the briefing was illogical and the court in this case therefore refrained from asking for a show cause letter, in particular a specific certification that none of the court briefs were generated using artificial intelligence or that any language was drafted by generative artificial intelligence or that any 'quotations, citations, paraphrased assertions, and legal analysis, will be checked for accuracy, using print reporters or traditional legal databases, by a human being before it is submitted to the Court.'

*In J.G v N.Y. Dep't of Educ*.[33], ChatGPT was used to get a suggestion on the billing rates of a lawyer. In this case, ChatGPT-4 was used as a cross-check and not used as the only source of the applicable billing rates. In rejecting the submission, the court said:

> In claiming here that ChatGPT supports the fee award it urges, the Cuddy Law Firm does not identify the inputs on which ChatGPT relied. It does not reveal whether any of these were similarly imaginary. It does not reveal whether ChatGPT anywhere considered a very real and relevant data point: the uniform bloc of precedent, canvassed below, in which courts in this District and Circuit have rejected as excessive the billing rates the Cuddy Law Firm urges for its timekeepers. The Court therefore rejects out of hand ChatGPT's conclusions as to the appropriate billing rates here. Barring a paradigm shift in the reliability of this tool,

---

32 673 S.W.3d 755.

33 2024 U.S. Dist. LEXIS 30403.

> the Cuddy Law Firm is well advised to excise references to ChatGPT from future fee applications.

In *Faridian v DoNotPay Inc.*,[34] Superior Court of the State of California for the County of San Francisco, DoNotPay has been sued for unauthorised legal practice. DoNotPay is an AI platform that assists consumers in settling small legal claims. The suit is over the use of the tool to draft demand letters, a small claims court filing, and LLC operating agreements which were claimed to be poorly drafted. The tool was first developed to settle parking tickets but later expanded to include some legal services.[35]

*In Lola v. Skadden*, [36] the judge of the Second Circuit ruled that the plaintiff, who solely engaged in document review, was not practising law in North Carolina because her services could have been performed by a machine. The court explained that practising law requires "some degree of independent legal judgment," which was lacking in this case. In *Janson v. LegalZoom.com*, Inc.[37], a Missouri court ruled that filling out forms on LegalZoom's website did not constitute the unauthorised practice of law in and of itself. The court did note, however, that LegalZoom was not a law firm and should not be substituted for an attorney or law firm. The court also noted that LegalZoom includes a disclaimer to this effect on its website, thereby confirming its conclusion that a website offering interactive legal documents could never supplant a human attorney.

A lot of concerns have been raised on the potential problems with ChatGPT e.g. risk to client confidentiality, privacy, and intellectual property; the possibility of being manipulated to enable unethical or criminal activity. The issue remains whether these liabilities are already set in terms of general liabilities from the use of AI, as the legal norms are still evolving and the discourses on them are still brewing.

---

34 No CGC-23-604987.

35 The Star, 3rd Oct 2023.

36 620 F.F.App'x 37 (2d Cir.2015).

37 802 F. Supp.2d 105.

These issues are not readily resolved and, as suggested by Sinshaw,[38] should be incorporated into the architecture of the bots themselves so that the resulting autonomous systems are at least ethically acceptable. In actuality, the service provided by bots cannot be regarded as legitimate legal practice. Traditionally, to effectively render legal services, one must be regarded as a member of the legal profession, i.e., a qualified individual for the purposes of the legal profession law. In Malaysia, autonomous systems cannot be regarded as qualified individuals and cannot be granted the full status of advocate and solicitor. In this regard, the legal profession should be able to impose restrictions on which categories of autonomous systems it will recognise and which it will not.

## Legal advice privilege

In addition, the unique attorney-client relationship is a crucial aspect of legal practice that cannot be replicated by AI. The relationship is founded on confidentiality, confidence, and trust and is governed by professional ethical obligations, legal liability, and malpractice insurance.[39] A human lawyer must act in the client's best interest and be able to offer individualised advice and direction that is tailored to the client's particular needs and circumstances.

Stockdale[40] discusses the concept of professional privilege in the context of using autonomous online platforms. Professional privilege comes in two forms; i.e. litigation privilege and legal advice privilege. The rationale of the privilege is that complete disclosure is needed from the client for the solicitor to find the best solution. In exchange, the client is guaranteed complete confidentiality over the information given. This forms the crux of the client privilege notion. The question

---

38 Drew Simshaw, "Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law," *Hastings LJ* 70 (2018): 173.

39 Ana Lucic et al., "Reproducibility as a Mechanism for Teaching Fairness, Accountability, Confidentiality, and Transparency in Artificial Intelligence," in *Proceedings of the AAAI Conference on Artificial Intelligence*, vol. 36, 2022, 12792–800.

40 Michael Stockdale and Rebecca Mitchell, "Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?," *The International Journal of Evidence & Proof* 23, no. 4 (2019): 422–39.

then is whether when an autonomous platform is used by individuals to solicit legal advice, the platform is enjoying the professional privilege defence as well. Even more so when the autonomous platform provides advice without the supervision of a human mentor.

The support for this contention is *R (Prudential plc and another) v Special Commissioner of Income Tax*[41], where the Supreme Court held that the legal advice privilege could potentially cover advice given by non-legal professionals, in this case, accountants, but this is a matter best left to the Parliament. Looking into what these autonomous platforms do – either in the form of preparing smart contracts for the client or provision of legal advice, the next question arises as to whether this advice amounts to professional legal advice as the latter entails the provision of service of a lawyer registered with a professional body as is being practised in most parts of the world. It is suggested that for this to happen then professional bodies would have to start accepting autonomous robots as their members. Secondly, some consumers may be willing to pay for cheaper legal advice even though it will not confer on them the comfort of professional privilege. It would be useful though for the protection of consumers that they receive mandatory early warning that reliance on autonomous platforms will be void of professional privilege protection. However, like many other online caveats or reservations, many of those are not read by consumers, let alone understand their consequences. Another arising issue is the implications of legal practice assisted with technological tools when solicitors relying on them have limited understanding of the technology. To resolve all these issues, Stockdale suggests that professional bodies should introduce rules to require solicitors that use technological tools heavily to introduce a minimum level of supervision by a lawyer.[42]

## Lawyer's workflow: the distinction between advisory and representation

Chew et al, argue that most AI solutions are not designed to make a judgment but rather, produce the necessary information to feed into the

41 [2013] UKSC 1.

42 Stockdale and Mitchell, "Legal Advice Privilege and Artificial Legal Intelligence: Can Robots Give Privileged Legal Advice?"

judgment. The current AI systems are designed based on the 'human in the loop decision-making' model.[43]

The role of AI is to serve as a tool that enables lawyers to generate insights and make predictions about the outcomes of various courses of action. Whilst, the lawyer's role is to determine the implication of the insight or prediction for the client and decide on what strategy to take. On that basis, it is of paramount importance that lawyers need to understand technology, and more crucial than ever for legal firms to hire technologists to assist with the firm functions. Based on that premise, the suggestion that lawyers are slowly being replaced by AI is a false notion. Instead, the AI system's primary function is to assist with helping the clients in their practice, such as to organise and review data. The idea is that technology has transformed, and not displaced the role of lawyers.

Could the AI systems be treated akin to the role of non-lawyers? The role of non-lawyers is more widely practised in developed countries because of the liberalisation of legal services. Liberalisation permits the setting up of alternate business structures and non-lawyers. In Malaysia, the role of non-lawyers is not so well established.

**The way forward: Regulate online legal advice**

Realising that there is a necessity to come up with some kind of rules on the use of AI in legal practice, the Supreme Court of Washington came up with suggested amendments to General Rule (GR) 24 on the definition of the practice of law.[44] Chief Justice Fairhurst, came up with the ruling to give some clarification on the practice of law in Washington. The GR 24 defines the practice of law in Washington. The proposal is to add to section (b) permitting online self-representation legal service providers. The problem is that these online self-

---

43 Chew, A. Lim, Wei Zhen J. & Ng, I (Huang Ying), "Analysing the Traditional Roles of Lawyers in Light of Technology in Singapore," The Law Society of Singapore, n.d., https://www.lawsociety.org.sg/publication/analysing-the-traditional-roles-of-lawyers-in-light-of-technology-in-singapore/.

44 Washington State Bar Association, "Regulation of Online Legal Services," 2024, https://www.wsba.org/connect-serve/committees-boards-other-groups/practice-of-law-board/proposed-amendments-to-gr-24.

representation legal service providers may not give accurate and fair representation to consumers, rendering them vulnerable to wrongful advice. To address these legitimate consumer concerns, it was suggested that the definition of 'practice of law' explicitly authorise information and document preparation services under clear limitations with the registration of such provider entities with the professional bodies. It was recognised that online advice and documentation are part and parcel of the fabric of life. The concept of a law office being an entity owned and run exclusively by lawyers is changing. Multi-jurisdictional practice is an inescapable consequence of technology. The traditional idea of the lawyer-client relationship is changing as disciplines start to merge and innovate to find more effective and efficient ways to solve complex problems that have a legal component.

By allowing these online platforms to continue to operate but under strict consumer law rules and regulations by the Bar and the Court, consumers can easily resort to the platforms for legal information, especially for those who cannot afford to pay legal fees. By not regulating, consumers may fall prey to these online platforms. Unfortunately, there are no existing rules that regulate the provision of interactive online legal assistance. The service given by legal counsel is often personalised to the needs of the client's situation. These online platforms may in the future provide personalised advice, so it is better that these platforms be regulated.

On this point, the Washington State regulatory authority has forwarded suggestions on the state rules on legal practice. The suggested amendment is to recognise an interactive AI system where consumers can obtain legal information either relating to civil law matters or to generate legal documents. Such recognition is regardless of whether the AI system constitutes a practice of law or not. Several strict conditions were set e.g. the consumers must have a means to view the blank template and the final document before finalising a purchase of that document. Secondly, there must be a review by an attorney licensed to practice law in the State of Washington. There must also be mechanism for the user to raise any consumer complaint and be provided with all the necessary information for consumer redress. The

online site is not allowed to undertake several activities such as using the consumer information for something else.[45]

**The way forward: The need for human oversight**

As lawyers start to depend on technological tools to take up some tasks, it is thus duty-bound on them to check on the quality of the work. Just like it is the responsibility of senior lawyers to check on the work of chambering students, likewise a lawyer should be responsible for the work done by artificial intelligence. On this point, Yamane calls for lawyers to maintain a baseline of knowledge about the AI programs they use including: (1) why the AI program produces its result and (2) what the AI program is and is not capable of.

Lawyers must use reasonable care in staying abreast of technological advances. AI results should not automatically be accepted as true. Lawyers must check that the AI program they are using is working properly and (2) review the program's result to provide competent legal representation.[46]

Checking on the AI system should be part and parcel of the evolving responsibilities of lawyers like the duty to check the work of non-lawyers or para-legals. On this point, Murray suggested that lawyers should embrace AI systems as a powerful tool that can enhance their efficiency and quality of work, but reminded as well of the importance of human oversight and judgment in the use of AI for law.[47] He is of the view that lawyers should not ask AI to perform tasks that the AI is good at and leave the talents and skills that are uniquely human to human lawyers.

In this light, AI does not portend the demise of the legal profession. As there is still a need for 'lawyer judgment,' which is comprised of prudence, knowledge, discernment, and foresight,

---

45 Washington State Bar Association, "Regulation of Online Legal Services."

46 Yamane, "Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands."

47 Michael D Murray, "Artificial Intelligence and the Practice of Law Part 1: Lawyers Must Be Professional and Responsible Supervisors of AI," *Available at SSRN 4478588*, 2023. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4478588

attorneys must become more tech-savvy.[48] Moses added that AI may result in the loss of employment for junior lawyers, but this could be easily compensated for by retraining the new lawyers on how to work with AI or even by incorporating their knowledge of legal rules and principles into the development of legal systems.[49] Humans are superior at reacting to unanticipated events, so it would be preferable to divide the task between humans and AI. Simultaneously, humans can learn to navigate unfamiliar terrain with the assistance of expert systems, data analytics, and machine learning. Humans can also extract useful information from large datasets using these expert systems, which would be beneficial for their practice.

## CONCLUSION

Richard Susskind, in his controversial treatise, 'The End of Lawyers? predicts that the future of legal service will be a world of virtual courts, internet-based global legal businesses, online document production, commoditised service, legal process outsourcing, and web-based simulated practice.[50] The future of legal practice has been and continues to be shaped by technological development. The old romantic notion of the 'wise' and 'know-all' lawyer continues in the digital era, substantiated to a considerable extent with the assistance of AI. Whether this assistance amounts to 'mere help' or 'mere tool' or a 'replacement' or 'agent' in legal parlance is still being evolved.

Within the context of Malaysia, the Legal Profession (Practice and Etiquette) Rules 1978 imposes stringent professional obligations on practising solicitors. The imposition of these obligations is justifiable because a transgression of professional conduct can result in severe consequences, including malpractice. In the Rules, professional ethics such as reverence for the court, upholding client's interests, justice, and the dignity of the profession, not deceiving the court, and

---

48 Michael Legg and Felicity Bell, "Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer," *U. Tas. L. Rev.* 38 (2019): 34.

49 Lyria Bennett Moses, "Artificial Intelligence in the Courts, Legal Academia and Legal Practice," *AUSTRALIAN LJ* 91 (2017): 561.

50 Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford University Press, 1998).

conducting oneself with candour, courtesy, and fairness are well-established. A practising attorney is also subject to stringent obligations in the conduct of litigation, such as maintaining professional independence, conducting defence and prosecution in a fair and honourable manner, and ensuring that no innocent person is convicted.

In Malaysia, the admission requirements for the practice of law are similarly stringent and demanding. A candidate must be a qualified individual who meets the citizenship requirements, has completed the required pupillage, has passed the Bahasa Malaysia Qualifying Examination, and has a law degree from one of the specified universities listed in the LPA.

Many law firms are utilising AI platforms to streamline their work and increase their efficacy as the use of AI in the legal profession becomes more widespread. This study found, however, that the current legal provisions in the country do not support the recognition of AI lawyers as 'qualified persons' under the law, so they cannot be legally referred to as 'advocates and solicitors' within the Malaysian legal context. This finding calls into question the legitimacy of the use of AI platforms in Malaysia and the legal profession. There are concerns about the impact on the legal profession and the potential risks associated with relying too heavily on technology, even though the use of AI in legal practice can offer many benefits, such as increased efficiency and accuracy.

An important issue raised by the study is the need to strike a balance between the legitimacy of AI tech tools and the community's need and desire for such services. In addition to ensuring that the legal profession maintains its standards and integrity, it is essential to consider the requirements of clients and the larger community. AI tech-tools lawyers may make legal services more accessible and affordable, especially for those who cannot afford traditional legal services. At the same time, it is essential to ensure that the use of tech-tools lawyers does not compromise the integrity of legal services or diminish the role of human attorneys. Human lawyers possess a variety of skills and expertise that cannot be replicated by AI, such as the ability to reason contextually, consider non-legal concerns, and develop a strong lawyer-client relationship.

Undeniably, the legal profession is one of society's most important occupations. It plays a crucial role in maintaining harmony, justice, and strong institutions, which are essential components of Sustainable Development Goal 16 (SDG 16). However, the legal profession faces numerous obstacles that hinder its ability to achieve this objective thoroughly. The increasing demand for legal services that cannot be met by the industry's limited number of attorneys is one of the most significant obstacles.

The advent of AI has provided a remedy for this difficulty. The AI systems, which are machines powered by AI, are increasingly being used in the legal profession to provide legal services that are typically provided by lawyers. These machines can perform a variety of legal duties, such as document review, contract analysis, legal research, and even legal counseling. The use of AI tools in the legal profession can substantially strengthen SDG 16's essential components of peace, justice, and strong institutions.

Even though the current legal system in Malaysia does not permit AI tools to practise law, it is crucial for future research to continue examining the use of AI tools and to develop appropriate legal provisions in Malaysia that strike a balance between the benefits and risks associated with their use. This may include the development of standards and guidelines for the use of AI in legal practice as well as consideration of the ethical and professional implications of relying on technology to perform legal tasks.

In conclusion, the findings of the study highlight the need for Malaysia to carefully consider the use of AI tools in the legal profession and to devise appropriate legal provisions that strike a balance between the benefits and risks of their use. While AI tools have the potential to increase the accessibility and affordability of legal services, it is essential that they do not compromise the quality of legal services or diminish the role of human lawyers.

Nonetheless, the lack of appropriate reporting of AI usage in legal practice in Malaysia is cause for concern in the context of Malaysia. Without appropriate reporting, it is difficult to determine the extent to which AI is being utilised in the legal profession and the potential risks associated with its use. In addition, the lack of distinct legal provisions governing the use of AI in legal practice raises

questions regarding the accountability of legal professionals who employ AI systems.

All court personnel, advocates, and solicitors play a crucial role in legal practice. Advocates and solicitors are now responsible to ensure that the integrity of the judicial system is not compromised should they employ AI technologies in their legal practices.[51] This necessitates legal firms to take measures to secure that their AI systems are transparent, accountable, and bias-free. In addition, legal professionals must be aware of the risks and limitations of AI systems. They must be willing to use their professional judgment when using AI-generated insights to inform legal arguments and decisions. Legal professionals must not rely solely on AI systems in their day-to-day practice. The way forward would be to collaborate to establish ethical guidelines for the development and use of AI systems in the legal profession.

## ACKNOWLEDGMENT

This research is funded by the Malaysian Ministry of Higher Education under FRGS21-225-0834, entitled "The Legal Framework for the Use of Artificial Intelligence in Legal Practice in Malaysia: Balancing Due Process and Access to Justice".

51 James A Cohen, "Lawyer Role, Agency Law, and the Characterization Officer of the Court," *Buff. L. Rev.* 48 (2000): 349.

# STAY OR NAY: THE COURT'S APPROACH TO A STAY OF PROCEEDINGS PENDING DISPOSAL OF ARBITRATION AGAINST NON-PARTIES IN MALAYSIA

* Sandhya Saravanan

## ABSTRACT

The topic issue is stay of proceedings and the key issue is stay of proceedings pending disposal of arbitration against non-parties. This essay shall examine the court's approach in determining the merits of an application for a stay of proceedings pending disposal of arbitration proceedings with a narrow perspective of circumstances where the application is brought against and involves a non-party to the arbitration proceedings. This essay will study the case of *Protasco Bhd v Tey Por Yee* with an understanding of how the Commonwealth counterparts have dealt with the same as discussed in the case, and its application to cases that have later developed in Malaysia, in line with the main tenet of the legal and justice system i.e. prompt and efficient disposal of litigation.

**Keywords:** civil procedure, stay of proceedings pending disposal of arbitration, court's inherent powers, duplication of proceedings, section 10 of the Arbitration Act 2005

* E-mail: ssarandhya@gmail.com

## INTRODUCTION

While a stay of proceedings pending disposal of arbitration between parties to the arbitration is mandatory pursuant to section 10(1) of the Arbitration Act 2005 ("AA"), the same cannot be said when one of the parties to the stay application involves a non-party to the arbitration proceedings. This was decided in the case of *Protasco* Bhd *v Tey Por Yee* ("*Protasco*") and confirmed by the Federal Court in the case of *Jaya Sudhir A/L Jayaram v Nautical Supreme Sdn Bhd & Ors ("Jaya Sudhir")*. Therefore, section 10 AA is inapplicable in these circumstances. The Court of Appeal in *Protasco* explained that the power to grant a stay in such circumstances would be derived from its inherent power to stay court proceedings pending arbitration, in the interest of justice of the particular case according to Order 92 Rule 4 of the **Rules of Court 2012.** The grounds of judgments are worth studying.

## THE BACKGROUND FACTS OF THE *PROTASCO* CASE

In this case, Protasco Bhd had brought a claim against PT ASU (company) as the first defendant, Tey Por Yee, as the second defendant, and Ooi Kock Aun as the third defendant. The dispute between Protasco and PT ASU was governed by an arbitration clause in the sale and purchase agreement concerning 76% of the total issued share capital of PT ASI from PT ASU. The claim relates to how Tey and Ooi, directors of Protasco Bhd brought a proposal for investment that envisaged that Protasco Bhd could control and benefit from a new venture in Aceh, Indonesia for the development and production of oil and gas at an oil field. A first sale and purchase agreement was entered into between parties two weeks after Ooi was appointed as director.

A second sale and purchase agreement was executed and one of the salient terms of the agreement is that the entire purchase price of USD22 million be payable upon execution of the agreement. PT ASU, however, failed to comply with the terms of the agreement, and the agreement was eventually terminated. Pursuant to an

investigation conducted by Protasco Bhd on the said transaction, it was found that PT ASU is owned, related, or is the alter-ego of Tey and Ooi. Protasco Bhd's cause of action against Tey and Ooi, amongst others, is premised on deceit, fraud and breach of fiduciary duties.[1]

Tey and Ooi subsequently filed a stay of proceedings in the High Court pending disposal of the arbitration proceedings between Protasco Bhd and PT Asu, and the application was allowed. Protasco appealed against the stay on the ground that they were not parties to the arbitration agreement.

## THE APPROACH TAKEN BY OTHER COMMONWEALTH JURISDICTIONS

In arriving at its decision, the Court of Appeal in *Protasco* had referred to several Commonwealth jurisdictions in an attempt to study how the courts have approached the issue in similar circumstances. In the UK case of *Reichhold Norway ASA and Another v Goldman Sachs International*[2], it outlined the standard to be adhered to: (a) whether there are rare and compelling circumstances to allow the stay; (b) whether there are very strong reasons for granting such stay; and (c) whether the benefits likely to result from granting such a stay of proceedings outweigh any disadvantage to the non-party.[3] From the standard outlined, it can be gleaned that the threshold set to allow for a stay of proceedings in such circumstances is high. The 'rare and compelling circumstances" test was applied in the High Court case of *Siemens Industry Software GmbH & Co And Ors*[4] and affirmed by the Court of Appeal.

---

1 See paragraphs 8 to 27 of the Protasco judgment.

2 [2000] 2 All ER 679.

3 See paragraph 33 of the Protasco judgment. This was later applied in the English High Court case of Mabey and Johnson v Danor and Others [2007] All ER (D) 177.

4 [2013] 1 LNS 914.

In Hong Kong, the guiding principles outlined in the case of *Linfield Ltd v Taoho Design Architects Ltd and Others*[5] are: (a) that the stay must cause injustice to the claimant in the arbitration; and (b) that the applicant for a stay must satisfy the court that the continuance of the arbitration would be oppressive or vexatious to him or an abuse of court process. Here, the court took into account the fact that the parties (both the arbitrating party and not) did not agree to be bound by any findings in the arbitration proceedings and, as such, any findings made in the arbitration would not bind the parties in the court. As such, there was no point in the stay pending the outcome of the arbitration proceedings - a logical justification for the stay dismissal.

In Australia, however, in the case of *Hi-Fert Ltd v Kiukiang Maritime Carriers Inc*[6], the Federal Court has taken a different approach to justifying a dismissal of a similar stay application. The plaintiff has initiated their actions against two defendants. The plaintiff's claims against the first defendant are premised on both, contractual claims that fall within the scope of the arbitration clause between the parties, and non-contractual claims. The second defendant, who is not a party to the arbitration, along with the first defendant made a stay application pending disposal of arbitration between the arbitrating parties. The Court held that the plaintiff having properly commenced proceedings in Australia was entitled to prosecute the proceedings against the defendants in court. If the plaintiff succeeds in the proceedings, there would not be a need to pursue the contractual claims in arbitration. Therefore, the court imposed a condition on the stay of the contractual claims that the reference to arbitration in respect of the contractual claims does not proceed until after the final determination of the proceedings in the Federal Court.[7] As observed by the Court of Appeal, the factor that weighed

5 [2002] HKCFI 513. See paragraphs 37 and 38 of the Protasco judgment.

6 [1998] 159 ALR 142.

7 See paragraphs 39 to 45 of the Protasco judgment.

heavily in the outcome of the case was the need to avoid re-litigation on the same issues.

The Singapore Court of Appeal case of *Tomolugen Holdings Ltd And Another v Silica Investors Ltd and other Appeals* ("*Tomolugen*")[8], however, viewed that the "rare and compelling circumstances" test as propounded in the case *Reichhold Norway* should not have a high threshold. The Singapore Court of Appeal further identified four options that could be adopted in such circumstances. **Option A** would be to stay the whole court proceedings, including that of the non-parties, an option preferred by Tey and Ooi too (2nd and 3rd Defendants). **Option B** would be to allow the proceedings against non-parties not caught by the arbitration agreement would be heard and determined first, followed by the arbitration proceedings. **Option C** would be to allow for the court proceedings against the non-parties and the arbitration proceedings to run concurrently. **Option D** would be to allow for a stay of the court proceedings on certain issues, while allowing other issues to be concurrently determined by the court and in arbitration.[9]

The Singapore Court of Appeal, in arriving at its decision, considered the following factors relating to both the arbitration and the court proceedings:[10]

a) Overlap in parties;
b) Overlap of issues;
c) Overlap in factual matrix giving rise to the cause of action;
d) Overlap in witnesses; and
e) Overlap in reliefs.

8 [2015] SGCA 57.

9 See paragraphs 47 to 50 of the Protasco judgment.

10 See paragraph 51 of the Protasco judgment.

The Singapore Court of Appeal decided that in order for a stay to be granted in favour of arbitration, the applicant must establish a prima facie case that:[11]

a) There was a valid arbitration agreement between the parties to the court proceedings;
b) The dispute in the court proceedings fell within the scope of the arbitration agreement; and
c) The arbitration agreement was not null and void, inoperative or incapable of being performed.

In this case, the Singapore Court of Appeal reversed the High Court's findings and allowed a stay of the court proceedings against the non-party Defendants. It was determined that whether or not the Plaintiff is willing to offer to arbitrate the main issue with the remaining Defendants, the court proceedings against them on all allegations would still be stayed, as it would serve the interest of case management which the court exercised pursuant to its inherent power.

However, the application of the *Tomolugen* case in *Protasco* focusses narrowly on considering the potential for overlap of issues raised in both the court proceedings and the arbitration. The cause of action of conspiracy to defraud or to injure will require ventilation, during the arbitration proceedings, of Tey and Ooi's alleged engineering and implementation of the conspiracy. The cause of action in breach of contract will also, to a considerable extent, touch on the facts relating to the parts played in this venture by Tey, Ooi and Dato' Chong as well as both parties' agents and/or nominees.

In determining the best option to adopt, the Court of Appeal evaluated the scope of the arbitration clause in the agreement between Protasco Bhd and PT ASU i.e. whether it encompasses all the causes of action namely conspiracy to defraud. This would include determining whether it

11 See page 175 of the Tomolugen judgment.

involved disputes arising from pre-contractual inducements to enter into the agreement.

On this point, the House of Lords has taken an expansive interpretation of the arbitration agreement in that it includes any dispute arising out of the relationship into which the parties have entered, as seen in the case of *Premium Nafta Products Limited and Others v Fili Shipping Company Limited and Others* ("*Fiona Trust*")[12]. Accordingly, arbitration clauses were to be construed in accordance with this presumption unless intended otherwise.[13]

Following *Fiona Trust* and bound by the Federal Court decision in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd*[14], both conspiracy to defraud and imposition of a constructive trust would be dealt with in any putative arbitration, adopting a commercial purpose and interpretation of the arbitration clause between parties.

It follows that the Court of Appeal had two options available in determining whether a stay of proceedings should be granted to the non-parties:[15]

a) Stay the court proceedings only to the extent required under section 10 of the *AA* but on the condition that the parts falling outside the scope of section 10 be resolved by the court first; or

b) Stay the court proceedings only to the extent required under section 10 of the *AA* where PT ASU is concerned, and allow the arbitration and remaining court proceedings to run concurrently.

Ostensibly, the first option is a better option. The reasoning by the Court of Appeal is that if the arbitration proceeds before the court proceedings, the arbitrator is

---

12 [2007] UKHL 40.

13 See paragraphs 57 to 61 of the Protasco judgment.

14 [2016] 5 MLJ 417.

15 See paragraph 62 of the Protasco judgment.

bound to consider the allegations of a conspiracy to defraud against PT ASU. This would inevitably mean that the arbitrator would make a finding of facts concerning Tey and Ooi and the issues of conspiracy to defraud would be relitigated in the court proceedings. While this may be so, it cannot be argued that such a re-litigation would amount to res judicata since Tey and Ooi are not parties to the arbitration agreement and the arbitrator's findings are not binding on the court.[16]

What seems to be the Court of Appeal's primary concern is the veracity of the evidence of Tey and Ooi when given in arbitration, and then again in court proceedings balanced against the right of a party to an action to be afforded a full and proper opportunity to defend serious allegations and causes of action made against him personally which carry grave consequences. The failure to accord a full opportunity to defend such causes of action might potentially result in a breach of natural justice based on the facts of the case.[17]

## THE *PROTASCO* DECISION

Therefore, in adopting *Tomolugen's* reasoning, the court is bound to strike a balance between the following considerations:[18]

a) The plaintiff's right to choose whom it wants to sue and where;
b) The court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause;
c) The court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes; and
d) The balance that is achieved should be just in all the circumstances of the case.

---

16 See paragraphs 64 to 73 of the Protasco judgment.
17 See paragraphs 74 to 89 of the Protasco judgment.
18 See paragraphs 90 to 97 of the Protasco judgment.

The Court of Appeal, at the close of the parties' submissions, invited relevant parties to consider entering into a consensus on whether parties would want to be bound by certain issues raised in the course of the arbitration. No concessions were made.[19] Taking into account the myriad factors involved, the Court of Appeal reversed the findings of the learned High Court judge and ordered for the arbitration between Protasco Bhd and PT ASU to be stayed until the court proceedings between Protasco Bhd and Tey and Ooi were determined.[20] This can be viewed as a peculiar decision since the Court of Appeal was tasked with deciding on the merits of a stay of the court proceedings, i.e., whether it should stay the court proceedings or not. Given the circumstances of the case, the Court of Appeal viewed that it was in the interest of justice to stay the arbitration proceedings instead.

Therefore, *Protasco* should rightly also be considered an authority for the Court's discretion to stay arbitration proceedings pending disposal of court proceedings, even when it can arguably be said that *AA* envisions arbitration proceedings to be prioritised. While the Court of Appeal, in the earlier part of the judgment, referred to the high threshold required to warrant a stay, there was neither express application of what amounted to special circumstances or rare and compelling circumstances based on the facts of the case.

Notwithstanding the decision, the Court of Appeal, in obiter, acknowledged that the plaintiff's right to sue while being a fundamental right, is not an absolute one. It may be stayed even against non-parties to an arbitration agreement.

And that is, in fact, the decision the Court of Appeal took in its earlier decision in a factually similar case of *Dr Dieter Gobbers v Jacob and Toralf Consulting Sdn Bhd*

---

19 A similar consideration was made in the Hong Kong High Court case of Linfield Ltd v Taoho Design Architects Ltd and Others [2002] HKFCI 513.

20 See paragraphs 92 to 97 of Protasco judgment.

*& Ors and other appeals*.[21] The First Defendant's stay application for the matter to be referred to arbitration was allowed. A similar application was made by the Second to Fifth Defendants to stay the proceedings pending the outcome of the arbitration between the Plaintiffs and the First Defendant. It was held that concurrent proceedings would cause confusion and injustice and that the applicants/said defendants would be put to considerable expense and inconvenience if duplicated proceedings amounted to special circumstances to warrant a stay of proceedings against non-parties of the arbitration proceedings. It must be highlighted that it was also the non-parties to the arbitration proceedings who applied for the stay of court proceedings pending arbitration between parties. This case was not referred to in *Protasco*.

## CASES POST-PROTASCO AND THE APPLICATION OF THE PROTASCO PRINCIPLES

Shortly after the Court of Appeal's decision in *Protasco*, on a different panel of judges, the Federal Court in *Jaya Sudhir*[22] had the occasion to decide on a related issue and took a similar stance as in the case of *Protasco*, albeit on a different application i.e. an injunction to freeze the arbitration proceedings pending the disposal of the plaintiff's (non-party) suit. The Federal Court accepted that courts may decline to give effect to the exclusive jurisdiction clause or arbitration clause where interests of third parties are involved or where there is a risk of parallel proceedings and inconsistent decisions arising out of the conduct of an arbitration.

---

21 [2015] 1 MLJ 507. The Plaintiff alleged that pursuant to negotiations between the Plaintiffs and the First Defendant, the Plaintiff were induced into entering a settlement agreement. The Plaintiffs claim to be indemnified for the losses and damages from the Second to Fifth Defendants as a result of the alleged inducement.

22 The ***Protasco*** decision has been affirmed in the Jaya Sudhir case, at [74] and [91].

The Federal Court further explained once duplication of proceedings is identified, the following considerations should be made: a) the court's desire to hold commercial parties to their bargain; and b) prevention of parallel proceedings and the risk of inconsistent findings and avoiding causing inconvenience to third parties. In arriving at its decision, the court held that it would be oppressive, vexatious, and unconscionable for the arbitration proceedings to continue because the appellant is not a party as his proprietary rights may be impinged.[23]

In a more recent case of *Handal Energy Bhd & Ors v Brian Chang & Ors*[24], the High Court had the occasion to decide a similar issue. Following the decision of Protasco, Quay Chew Soon JC (as he then was) recognised that a stay may be granted in respect of non-parties to an arbitration agreement. It is important to understand the facts of the case. The stay application premised on an arbitration clause between the 2nd Plaintiff and the 4th Defendant was made by the Defendants (both parties and non-parties to the arbitration) on 28.12.2020 pursuant to section 10 of *AA* and Order 92 Rule 4 of the *Rules of Court 2012*. The parties had commenced arbitration proceedings in Singapore as per the agreed arbitration clause between the 2nd Plaintiff and the 4th Defendant.

On 23.2.2021, the 2nd Plaintiff filed a Notice of Discontinuance, thereby discontinuing its action against the Defendants without leave of the Court as the Defendants have yet to file their Defence. Therefore, with the discontinuance of action by the 2nd plaintiff, the stay application pursuant to section 10 of the *AA* was no longer in effect. The Court applied the *Protasco* principle to

23 See paragraphs 60 to 82 of the Jaya Sudhir judgment.

24 [2021] MLJU 1077.

decide the stay application against non-parties. On appeal, the High Court's decision was affirmed.[25]

What stood out in this case was the last-minute exit of the only party to the arbitration proceedings, which resulted in an unsuccessful invocation of a mandatory section 10 stay application. Was this exit a strategy to circumvent having to be bound by the arbitration proceedings? Should this fact be given more weight when considering a stay application, especially if it is within the court's discretion? These remain rhetorical questions. The author, however, opines those factors such as whether the non-party is the Plaintiff or the Defendant, whether it is the non-party seeking a stay of proceedings, and the intention of the party to circumvent the operation of an arbitration clause should be considered on a case-by-case basis.

Similarly, in *LNH Landscaping Sdn Bhd*[26], notwithstanding it was obiter, Wong Kian Kheong J (as he then was) remarked that he would not have allowed the stay against the non-party, following *Protasco*. He further stated that in determining whether to allow the stay, a balancing exercise must be carried out by taking into account: a) the overriding consideration is justice and prevention of abuse of court process; b) the factors to be considered are not exhaustive, however, the court should not consider the merits of the suit and arbitration in question; c) the court may attach any weight to any factor as the court deems fit; and d) the court may accept certain factors in preference to other matters. This reinforces that the judges who are ultimately triers of facts, while guided by the principles set out by the higher courts, should

---

25 The Defendant appealed to the Court of Appeal vide Civil Appeal No. W-02(IM)(NCvC)-685-04/2021 and leave to appeal before the Federal Court was dismissed vide Civil Application No. 08(i)-102-02/2022(W).

26 See LNH Landscaping Sdn Bhd v TKH Construction Sdn Bhd and Other Appeals [2021] MLJU 761.

consider them on a case-to-case basis. No one-fits-all solution would be ideal.[27]

In the case of *Samling Resources Sdn Bhd v Ekovest Bhd*[28], the court held that the path of least resistance is for the present action for, amongst others, negligent misrepresentation against the 1st Defendant (party which engaged in discussions with the Plaintiff before designating the 2nd Defendant to procure a subcontract from the Plaintiff) to proceed and be disposed of before the arbitration between the Plaintiff and the 2nd Defendant (wholly owned subsidiary of the 1st Defendant and the party to the JVA agreement with the Plaintiff) is allowed to proceed. Based on the Plaintiff's allegation, it would be reasonable to ensure that issues between the said parties are ventilated before the arbitration proceedings between the Plaintiff and the 2nd Defendant commences.

On a different factual matrix, in the case of *Grand Dynamic Builders Sdn Bhd v KSK Land Sdn Bhd*[29], the courts were tasked with ascertaining the special circumstances for a stay pending disposal of arbitration between arbitrating parties against a non-party which is the Corporate Guarantor in an enforcement of a Corporate Guarantee proceedings. The Defendant's main argument for an order for stay is that the Plaintiff is claiming for

---

27 See paragraph 7 of the Protasco judgment.

28 [2022] 9 MLJ 803. Vide a letter of award, Lebuhraya Borneo Utara Sdn Bhd awarded the said works package in the sum of more than RM2 billion to the Plaintiff. The Plaintiff claims against the Defendants for negligent misrepresentations and/or misstatements arising from the signing of a Joint Venture Agreement which provides for the incorporation of a joint venture company (SEJV) with 70% (Plaintiff): 30% (2nd Defendant) shareholding structure to pursue and undertake the project and for the Plaintiff to ensure any subcontracts awarded to subcontractors be assigned to SEJV. The defendants recommended several subcontractors which were not suitable to carry out the works under the project and the subcontractors failed to perform their obligations under the contracts.

29 [2023] MLJU 3113.

the same sum in both the arbitration and the corporate guarantee suit, the issues concerning the outstanding sum ought to be ventilated between the principal debtor (not a party to the court action) and creditor (Plaintiff) before the Corporate Guarantee can be rightfully enforced.

The court held that it was an irrevocable and unconditional guarantee from a prima facie reading of the Corporate Guarantee. The High Court further explained that the issues relating to the Corporate Guarantee are independent of, and distinct from, the facts or dispute in the arbitration. The High Court further rejected the argument of potential invocation of issue estoppel and res judicata should a stay not be allowed, explaining that they can be raised in the appropriate forum at the appropriate time depending on whether the Court or the Tribunal has determined any issue or matter. Guided by the *Protasco* decision, the High Court also observed that common factors between the suit and the arbitration proceedings are merely the initial factual matrix in both proceedings. However, they devolve into different causes of action i.e. in the suit, the issue of liability under the Corporate Guarantee as opposed to the Arbitration where the dispute between the Plaintiff and the principal debtor for the outstanding sum allegedly not paid for works done in the project. Stay was not granted in this case.

In the Court of Appeal case of *Abd Rahman bin Soltan*[30], in dismissing the appeal against the High Court's decision to proceed with the suit despite the commencement of the arbitration, the court took into account public interest factor. Should the proceedings be stayed, the Defendant may rely on section 41A(1)(a) and

[30] See the Court of Appeal case of Abd Rahman bin Soltan & Ors v Federal Land Development Authority & And another and other Appeals [2023] 4 MLJ 318. The Learned Panel consist of Lee Swee Seng JCA, Hadhariah Syed Ismal JCA and Wong Kian Kheong JJCA, specifically paragraph 67 of the judgment.

(b)[31] of the *AA* to assert that proceedings in the arbitration and subsequent award of the arbitrator cannot be disclosed to the public. However, public interest demanded that the issues be tried expeditiously in open court.

In the case of *Tumpuan Megah Development Sdn Bhd v Ing Bank N.V. & Anor*, the Plaintiff commenced an action pursuant to section 37 of the *AA* to set aside the Malaysian Award made in the Malaysian Arbitration. By a stay application, the Plaintiff is seeking to stay the action pending the disposal of the REJA (UK Award) setting aside application. Interestingly, the High Court viewed that the Protasco test of rare and compelling circumstances would equally apply to parties of the arbitration. In assessing whether there are rare and compelling circumstances to necessitate a stay, the court considered: a) whether the outcome of the REJA Setting Aside application would affect the present action; and b) Whether the balance of justice lies in favour of allowing the stay application. The Court dismissed the stay application.[32]

It can be observed that the main theme flowing from the cases post-*Protasco* is the interests of the non-party should a stay of the court proceedings be allowed and the arbitration between parties proceed. In most cases, albeit unconsciously, the courts have weighed the need to avoid parallel proceedings and inconsistent decisions when arriving at their judgments.[33] It must be borne in mind that this should be so since the invocation of section 10 of the *AA* between parties to the arbitration is mandatory and the court has very little wiggle room to decide

---

31 Section 41A (1) provides that no party may publish, disclose or communicate any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings unless otherwise agreed by the parties.

32 [2024] MLJU 2689**.** See paragaphs 21 to 25 of the Tumpuan Megah case.

33 See paragraph 48 of the Samling Resources judgment, see paragraph 67 of Abd Rahman bin Soltan judgment, see paragraphs 37 to 41 of the Grand Dynamic Builders judgment.

otherwise. With the expectation of a mandatory stay between parties to the arbitration, the court would need to be tactful about deciding the interests of the non-party of the arbitration vis-à-vis a mandatory stay of proceedings pending disposal of arbitration proceedings, which is evident from the cases mentioned above.

At this juncture, it is important to reflect on the cases discussed above and note that, beginning with the *Protasco* decision and continuing through to the most recent case, the correct test in those circumstances remains unclear. Is it the rare and compelling circumstances as applied in the case of *Reichold Norway* and discussed in the *Protasco* case or the traditional test of special circumstances as applied in most stay of proceedings applications? While most cases have applied the special circumstances test, few have instead applied the rare and compelling circumstances[34] test. The author views that the former should still be the test, as it would be for the other stay applications. That said, it can perhaps be agreed that both tests set a high threshold to meet.

## CONCLUSION

### Has the dust settled? The way moving forward

While this issue may not be a novel one, the differing factual matrix of each case warrants a fresh perspective of the principles every time they are applied. Following *Protasco*, the courts have a point of guidance in determining the merits of a stay application pending disposal of arbitration proceedings against a non-party. The application of the *Protasco* principles has so far been consistent and somewhat predictable in that a stay of the court proceedings is usually not allowed.

---

[34] See paragraph 59 of the Samling Resources judgment, see paragraph 22 of the Tumpuan Megah case and see paragraph 28 of Apex Marble Sdn Bhd v Leong Tat Yan [2021] 1 LNS 37 .

This, of course, is notwithstanding the orbiter made in the *Protasco* case in that the Plaintiff's right to sue while being a fundamental right, is not an absolute one. It may be stayed even against non-parties to an arbitration agreement.

'Special circumstances', following the cases discussed above, has arguably a high threshold. What will amount to 'special circumstances' is still open for discussion and should rightly be so. With the increase in plaintiffs commencing court actions against both parties and non-parties to arbitration, the court's task in dealing with this issue would always involve striking a delicate balance between the avoidance of duplicity of proceedings and ensuring prompt and efficient disposal of litigation, on the one hand, and, undoubtedly, the interests of justice, on the other.