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Contents

Proof of Native Customary Title through Evidence of Occupation on the Cultural Landscape

Ramy Bulan[1]

According to established principles of British colonial and international laws when the Crown acquired sovereignty over a territory, the land rights of local inhabitants under their own system of laws continued and are recognised as pre-existing rights. Their rights exist because they are derived from native laws, governance, practices, customs and traditions. Common law also acknowledges that use and occupation of land by indigenous inhabitants at the time of sovereignty gave rise to real property rights for at common law, every person who is in possession of land is presumed to have a valid title and persons in exclusive occupation of land have title that is good against anyone who cannot show better title. This paper presents a case study of Kelabit occupation, connection and interaction on the lands and territories as evidenced through historical, anthropological and archaeological records as well as oral narratives and cultural traditions passed down through the generations. Against the backdrop of a limited recognition of occupation and cut-off date for creation of NCR under the Land Code 1958, the writer discusses the cultural landscape of the Kelabit Highlands in Sarawak, showing how the burial customs, rich historical activities as evidenced in the megalithic as well as other non-megalithic cultural practices, unique to the Kelabit, mark past and continuous presence and connection to the land. Despite the absence of state demarcated and surveyed boundary, their presence is etched in the landscape of the land that they call their ancestral homeland providing a basis of claim both under their own laws and customs and under common law as well as satisfying the requirements of statute.

I. INTRODUCTION

The Sarawak Land Code 1957, which is the primary legislation governing land in Sarawak have several provisions on native customary rights (NCR) lands. Among the methods stipulated for creation of customary rights on land under section 5(2) of the Land Code

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are felling of virgin jungle, cultivation and occupation of such land, use of land for burial ground or shrine and for right of way. There is also a residual clause (f) "for any other lawful means". This sub-section is however restricted by s 5(1) which states: "As of the 1st day of January 1958, native customary rights may be created in accordance with the native customary law of the community or communities by any of the methods specified under s 5(2) if a permit is obtained under section 10". It goes further to provide that no recognition will be given to any NCR on any land in Sarawak created after 1 January 1958.

The emphasis in the Code is on the creation of rights by cultivation prior to 1958 and continued occupation of those lands. Against the backdrop of this cut-off date, this paper looks at creation of NCR, through customary usage of lands for burial and shrines, and extends it to the related cultural practices in connection to land with a focus on the Kelabit occupation of the Kelabit Highlands. It argues that Kelabit burial customs and traditions on land practised prior to 1958, created NCR on lands which continued to be occupied to this day by later generations of Kelabit. They fall within the purview of s 5(2). More importantly their rights exists because they are derived from native laws, governance, practices, customs and traditions, coupled with recognition of common law based on occupation.

Under early common law, every person who is in possession of land is presumed to have a valid title.[2] To state that possession is proof of ownership raises the critical question of what counts as possession and why it is the basis for a claim to title. Clear acts that are unequivocally 'acts of possession' that proclaim to the universe one's appropriation[3] may include useful labour on the land and sufficient control over the land. The locality and the usages of those who live there are materials in evaluating whether any given acts amount to sufficient occupation. [4]

The Kelabit have occupied the Kelabit Highlands as their ancestral lands since time immemorial. This highland area which spans approximately 2500 km in the interior of Borneo is part of the Northern Highlands of Sarawak in the north-east hinterland close to the border with Kalimantan, Indonesia. The Northern Highlands include the Maligan Highlands and the Kelabit Highlands and is situated at latitudes 2° O′ N - 4° O′ and longitudes 3° 25′ N - 3° 58′ N and longitudes 115° 12′ E - 115° 35′ E. It is the occupation of the Kelabit Highlands that is specifically dealt with here.

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2 See *Whale v Hitchcock* (1876) 34 LTR 136 (Div. C.A.); *Emmerson v Maddison* [1906] AC 569, 575 (PC); *Wheeler v Baldwin* (1934) 52 CLR 609, 621–622; and *Allen v Roughley* (1955) 94 CLR 98, 136–141.

3 Carol M. Rose, "Possession as the Origin of Property", *University of Chicago Law Review,* 1985, Vol. 52, pp. 73- 75; here Rose suggests that one cannot meaningfully ask why possession is a root of title unless one has some idea of what is meant by 'possession'. Two principles for defining possession are: (1) notice to the world through a clear act, and (2) reward for useful labour. The author goes on to suggest that the possession must be translated into clear acts of appropriation which are manifested in texts of cultivation, manufacture and development. This viewpoint, however, takes a narrow 'Western' economic viewpoint and dismisses the indigenous peoples' concept of their relationship with land.

4 Lord O'Hagan in *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, 288. See also *Cadija Umma v S. Don Manis Appu* [1930] AC 136, 141–142.

II. KELABIT DISTINCTIVE CULTURAL EXPERIENCE AND TRADITIONAL KNOWLEDGE CONNECTING THEM TO THE LAND

The Kelabit, one of the smallest native groups in Sarawak, are almost exclusively found in the Kelabit highlands. Prior to becoming Christians in 1940s, Kelabit burial rites involved primary and secondary burials, involving burials in large ceramic jars or stone urns which were later placed in the community burial sites many months later. This was always accompanied by expensive feasts with lots of *burak* (rice wine) drinking, followed by commemoration of the deceased through erection of memorial stones, megaliths, or creation of non- megalithic structures on the land. When they became Christians in mid 1940s, they ceased doing these burial rites that involved expensive feasts and turned to simpler burial rites according to their new found religious faith. Their expensive burial rites and commemoration of the lives of their elders through the erection of stones stopped or changed in form. Nonetheless the presence of those burial sites and those monuments on the physical landscape are proof of connection and occupation of land through customary usage of lands. Evidence of a strong megalithic as well as other non-megalithic cultural practices, unique to the Kelabit are scattered across the highlands. These stone monuments and cultural sites generally have a known history. They stand on traditional community lands or on individual cultivated lands and where the descendants of the creators of the monuments are known. This paper looks at the concept of occupation both at common law and customary laws and show how the cultural traditions contain evidences of customary tenure amounting to ownership of lands, which go beyond the cultivation or even the burial sites that the Land Code refers to. It argues that native laws and customs of the Kelabit people provide a basis of claim to their traditional territories.

Edward Banks and Tom Harrisson, both curators of the Sarawak Museum from the 1930s–1950s[5] wrote extensively on these cultural monuments. Academic writing by local Kelabit writers including Robert Lian,[6] Yahya Talla,[7] and Doris Lian[8] touched on the cultural heritage while this writer considered the juridical status of these sites within the existing law in 2005.[9] Following the ground breaking work of Linda Tuhiwai Smith in

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5 Edward Banks, "The Kelabit Country, an Account of a Recent Visit", *Sarawak Gazette,* 1939*,* Vol. 66, p. 158; see also Edward Banks, "Some Megalithic Remains from the Kelabit Country in Sarawak with Some Notes on the Kelabit Themselves", *Sarawak Museum Journal,* 1937, Vol. 15 Part IV, pp. 411–437; Tom Harrison, "A Living Megalithic in Upland Borneo", *Sarawak Museum Journal,* 1958, Vol. 8, p. 694. See also Guy Arnold, *Longhouse and Jungle, An Expedition to Sarawak*, Donald Moore Publication, 1959, pp. 79- 191.

6 Lian-Saging, Robert, *An Ethno-history of the Kelabit Tribe of Sarawak: A Brief Look at the Kelabit Tribe Before World War II and After,* BA thesis, Department of Arts and Anthropology, University of Malaya, 1976/77; Lian- Saging, Robert and Lucy Bulan, "Kelabit Ethnography: A Brief Report", *Sarawak Museum Journal,* 1989, Vol XL (61), p. 89.

7 Yahya Talla, "The Kelabit of the Kelabit Highlands", Clifford Sather (ed.), *Sarawak Report No 9*, University Sains Malaysia, Pulau Pinang, 1979.

8 Lian, Doris Balla, Batu Lawih, *The Kelabit Heritage,* BA thesis, Department of Arts and Anthropology, University of Malaya, 1988.

9 Ramy Bulan, *Native Title in Malaysia: Kelabit Land Rights in Transition*, Phd Thesis, Australian National University, 2005. Some of this material has been previously published as part of an article in Ramy Bulan "Boundaries, Territorial Domains and Kelabit Customary Practices: Discovering the Hidden Landscape", *Borneo Research Bulletin,* 2003, Vol. 34, pp. 18–61.

Decolonising Methodologies,[10] as a member of the tribe, this writer seeks to articulate the perspective of an insider, based on field research and interviews conducted for a doctoral thesis and further dialogues since then. Like many indigenous groups, the Kelabit have distinct ways of understanding their world, which rests on their history, distinctive cultural experience and traditional knowledge that connects them to their lands and territories. There is a need for articulation of legal theory by indigenous peoples themselves based on the distinct cultural and experiential groundings of indigenous peoples themselves. It is also argued that these ideas speak to the notion of collective voice and will of the community and the normative framework supplied by their cultural world view, which rests on the notion of perspectival truth.[11] Theirs is an inherent and pre-existing right not granted by legislation nor created by common law although recognised by it.[12] It is based on indigenous law, which has been described as a 'chthonic' law' recognised 'by criteria internal to itself as opposed to imposed criteria'.[13] Indigenous knowledge, which contains the indigenous legal traditions have characteristics that require different approach to respecting, accessing, processing, understanding, valuing and applying it.[14]The operation of the law in Malaysia today however requires the interplay of the "western" and indigenous knowledge.

A survey and mapping initiated by the International Tropical Timber Organization in 2005,[15] and the work done by Hitcher in 2009[16] introduced a good guide as to the locations of this cultural heritage. Further archaeological work done by the Cultured Rainforest Project which started in 2006 reveal a very rich cultural heritage on the land.

The Cultural Rainforest Project which was initiated 'to investigate the long term and present day interaction of people and rainforest in the interior highlands of Central Borneo' has focused on the Kelapang basin in the Southern Highlands where there are many megalithic and non-megalithic sites, illuminating patterns in their landscape setting and contextual association and establishing a tentative relative chronology. Suffice it is to state here that the archeological reports state that radiocarbon dates from secure archaeological contexts stretch back almost 2000 years.[17] Lloyd Smith writes 'it seems

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10 Smith, LT, *Decolonizing Methodologies: Research and Indigenous Peoples*, Zed Books, London and New York, 2012.

11 Gordon Christie, "Indigenous Legal theory: Some Initial Considerations", Richardson B.J et.al. (eds.), *Indigenous peoples and the Law, Comparative and Critical Perspectives*, Hart Publishing, 2009.

12 See *Nor anak Nyawai v Borneo Pulp Plantations* [2001] 6 MLJ 241.

13 HP Glen, *Legal Traditions of the World*, Oxford University Press, 2000, as cited by Christine Zuni Cruz, "Law of the Land- Recognition and Insurgence in Indigenous Law and Justice Systems", Richardson B.J et.al. (eds.), *Indigenous peoples and the Law, Comparative and Critical Perspectives*, Hart Publishing, 2009, p. 316.

14 Christine Zuni Cruz, *Ibid* at p. 312.

15 Survey and mapping was done by Wilhemina Cluny and Paul Chai PK and Report published as "Cultural Sites of the Northern Highlands, Megaliths and Burial Sites", ITTO Project PD 224/03 Rev I (F), *Transboundary Biodiversity Conservation: The Pulong Tau National Park*, ITTO & Forest Department Sarawak, 2007.

16 Sarah Hitchner, *Remaking the Landscape; Kelabit Engagement with Conservation and Development in Sarawak, Malaysia*, PhD Thesis, University of Georgia, Athens, Georgia, 2009. See also Sarah Hitchner, "The Living Kelabit Landscape: Cultural Sites and Landscape Modification, The Kelabit Highlands of Sarawak, Malaysia", *Sarawak Museum Journal,* 2006.

17 Lindsay Lloyd Smith et.al., *The Cultured Rainforest Project: Preliminary Archaeological Results from the First Two Field Seasons in the Kelabit Highlands*, Sarawak, Borneo, 2007, 2008, p. 48.

reasonable to expect that human occupation in the Kelabit Highlands stretches far beyond the Metal Age, the beginning of which is believed to be between c.500 BC and AD 0 in Borneo.

There is also evidence of rice agriculture which consists of 'phytoliths of domesticated rice in the upper segment of a core taken in a palaeochannel in the village of Pa' Dalih associated with a radio carbon date of the last few hundred years'.[18] This knowledge and archaeological reports underscores local understanding of the ancient and longstanding occupation of the highlands of the ancestors of the present inhabitants.

The evidence of occupation is of paramount importance in the context of the present drive by the government to conduct perimeter survey of lands based on aerial photography taken in late 1950s. That does not capture the actual land use consisting of the old longhouse settlements and the many burial grounds that are part of the village territory. This requires a discussion of the kinds of evidence needed to show occupation.

III. ADMISSABLE EVIDENCE ON OCCUPATION

At the heart of any claim to customary title to native ancestral land, is the element of proof of occupation of the land. Evidence of occupation and interaction on the land may be contained in historical records, anthropological, and archaeological documents, as well as oral traditions passed down through the generations. In a historic judgment in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*,[19] Mohd Noor Ahmad J, made a preliminary ruling that oral histories may be accepted as evidence in claims for customary title. Mohd Noor Ahmad J ruled that oral histories of Aboriginal peoples in Peninsula Malaysia relating to their practices on the land be admitted as evidence subject to the terms of s 32(1)(d) and (e) of the Evidence Act 1950. With respect to native customs, traditions, under ss 48 and 49 of the Evidence Act 1950, the opinions of a living person as to general rights and customs, tenets or usages may be accepted. These statements on oral histories must be of public and general interests, and must be made by a competent person who 'would have been likely to be aware' of the existence of the right or the correct customs, and must be made before the controversy as to the right or the customs.[20] Evidence on customary practices would be relevant to explain the significance of certain marks or monuments on the landscape to prove an enduring occupation and connection to the land. The question is what constitutes occupation?

A. Meaning of Occupation in Comparative Common Law Jurisdictions

Occupation is prima facie proof of possession.[21] The term possession is used here in a broad sense to express a conclusion of law arising from a sufficiently close physical relationship between a person and a parcel of land, due to his presence on or control over

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18 *Ibid.* at p. 36.
19 [2002] 2 MLJ 591 at pp. 622–624.
20 Mohd Noor Ahmad J, *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] MLJ 591, p. 623.
21 Blackstone, *Commentaries on the Laws of England,* 1825, Vol 2, 16th ed., pp. 3–9.

it either personally or through his agent or the like. The intention is to hold the land for one's own purposes.[22]

In one of the earliest recognitions of traditional land rights is in *Worcester v State of Georgia*,[23] where Chief Justice Marshall recognised that the Indians to have 'pre-existing rights of its ancient possessors'. Baldwin J in *Mitchell v United States*[24] referred to this as 'their right of occupancy … as sacred as the fee-simple of the whites'. Such possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites and their rights to exclusive enjoyment in their own way for their own purposes were as much respected'.

Once present, possession has been established by proof of occupation, the burden of rebutting that presumption shifts to the challenger. As Bracton wrote - 'Everyone who is in possession, though he has no right, has a greater right [than] one who is out of possession and has no right.'[25] Two legal maxims have arisen out of the application of these principles through numerous cases: first, that title is presumed from possession; and second, that possession is title against a challenger who cannot prove that he or she has a better title.[26] It is this that led Hall J to observe in *Calder v British Columbia* that, in enumerating the *indicia* of ownership, 'possession is of itself at common law, proof of ownership' [27] Acknowledging the existence of these common law rules, in *Delgamuukw v British Columbia,* Lamer CJC said that the fact of physical occupation is proof of possession at law, which in turn will ground title to land. [28] This leads to the question, what is necessary to constitute occupation? Kent McNeil in his treatise on *Common Law Aboriginal Title* explains it in this way:

Occupation is a matter of fact involving exclusive physical control of land, coupled with an intention (usually implied)[29] to hold or use it for one's own purposes. The degree of control necessary to establish occupation depends first, on whether the claimant, or no one, or another (in ascending order) is known to have a title, and secondary, on any other relevant circumstances, including the nature, utility, value, and location of the land, and the conditions of life, habits and ideas of people living in the locality.[30]

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22 McNeil, and Kent McNeil, *Common Law Aboriginal Title,* Clarendon Press, 1989, p. 6.

23 31 US 515 (1832).

24 34 US 711 (1835).

25 H de Bracton, *On the Laws and Customs of England,* SE Thorne, Trans, 1968, Vol. 3, p. 134; cited in Kent McNeil, "Onus of Proof of Aboriginal Title", *Osgoode Hall Law Journal,* 1999, Vol. 37, pp. 775 - 783.

26 See McNeil, *Ibid.* at p. 22, pp. 42–43, pp. 46–49, and pp. 56–58. Other leading texts that confirm these rules are W. Blackstone, *Commentaries on the Laws of England,*16th ed., Vol. 2, 1825, p. 196; *Ibid*, Vol. 3, pp. 177 - 180; F. Pollock and R.S Wright, *An Essay on Possession in the Common Law,* 1888, pp. 11–20; R E Megarry and H W R Wade, *The Law of Real Property,* 5th ed., 1984, pp. 102–109, and pp. 1158–1159; E H Burn (ed.), Cheshire and Burn, *Modern Law of Real Property,*15th ed., 1994, pp. 25–29; and *Halsbury's Laws of England,* 4th ed., 1973, Vol. 39(2), p. 267.

27 *Calder* (1973) SCR 313.

28 (1997) 3 SCR 1010, 1101.

29 *Butcher v Butcher* (1827) 7 B & C 399, 402.

30 McNeil, above n 22, 201.

The weight given to acts on the land depends on the land and the purposes for which the land can reasonably be used.[31] When occupation is established as a matter of fact through presence on the land, English law would accord possession in the absence of proof that there are other interests or that it should be given to another. Encapsulating these concepts in a sentence, McNeil says "occupation" is synonymous with "actual possession" or "possession in fact". When proven by evidence, it gives rise to presumption of "possession in law" – a legal concept.'[32]

As McNeil argued, where indigenous people were in occupation of specific lands at the time of acquisition by the British Crown, an actual Crown title by occupancy would be logically impossible. The fiction of original crown ownership cannot be used to support a Crown claim against persons who are in occupation, for the law deems a Crown grant to have been granted in those circumstances.[33]

Applying this principle to the indigenous inhabitants who were in occupation at the time of acquisition of sovereignty by the British Crown, McNeil concluded that the fact of indigenous occupation gave rise to possession that entitled them to a so-called possessory title to land, which he called customary title.[34] This view was accepted by Toohey J in the case of *Mabo (No. 2)*.[35] His Honour called it a 'traditional title' based on the fact of the presence of the indigenous people on acquired lands. His Honour said:[36]

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31 *Curzon v Lomax* (1803) 5 Esp 60. Acts that indicate an intention to hold or use it for one's purpose have been said to include enclosing, mining, building upon, maintaining the land and warning trespassers off the land, as well as cutting of the trees and grass and fishing in tracts of water.

32 Kent McNeil, *Emerging Justice* (2003) 141 fn 23. Elsewhere, McNeil, *Supra* n 25, p. 77, explains title that goes with possession. This is cited by J Y Henderson et.al., *Aboriginal Tenure in the Constitution of Canada,* 2000, p. 41 thus: "While in possession, a mere possessor has the *title that goes with possession* [as against other trespassers and adverse claimants who cannot show better title]. In addition he has a *presumptive title* [under English law from competing people who have better title or entitling conditions], provided his possession has not been shown wrongful by proof of a *jus tertii*. If he remains in possession for long enough he will also acquire a title by limitation [or time against the world], due to which he will no longer be a mere possessor because his possession will then be supported by a known right. If he loses possession, he will lose the title that goes with possession but retain the *presumptive title and title by limitation* (if acquired). If ousted he will also have a prima facie title by being wrongfully dispossessed. Any one of these last three titles, if unrebutted, will enable him to recover possession in ejectment or, as it has been known since 1875, an action for the recovery of land, against a defendant who cannot show a better title in himself."

33 *Ibid*. at pp. 216–217.

34 Kent McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals", *Monash University Law Review,* 1990, Vol. 16, p. 91.

35 (1992) 175 CLR 1, 178.

36 Per Toohey J, *Mabo No. 2* (1992) 175 CLR 1, 188 footnote 9 & 10; citing R Bartlett, 'Aboriginal Land Claims at Common Law', *University of Western Australia Law Review,* 1983, Vol. 15, p. 293, p. 313, p. 311, and pp. 319–320. Both McNeil and Toohey J assumed that the possessory title were separate concepts and separate bases of claim for indigenous people, thus separating customary title from aboriginal title and traditional title from native title. Noel Pearson, in 'Land is Susceptible of Ownership' takes this point but, instead of making a differentiation between possessory title and native title, argues that the common law on possession applies to native title. Pearson makes the point that it is not a question of choosing between Aboriginal occupation or aboriginal laws as the source of indigenous title – both are relevant. It is 'the right to occupy and possess the land under the authority of, and in accordance with, the traditional laws and customs of the indigenous peoples'. The distinction he says, 'is subtle but crucial'. www.capeyorkpartnerships.com .Site accessed on April 2014.

The crucial fact in proving native title is physical presence on the land: for that is what precludes the crown from having exclusive property rights in the land. It is not enough for the presence to be coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life. And the use of the land must be meaningful – although 'meaningful' is to be understood from the point of view of the members of the indigenous society.

United States and Canadian court decisions have looked for occupancy in the context of demands of the land and the society in question and examined the way of life, habits and customs of the indigenous people who occupy and use the land. It is clear that the foundational cases on native title in the common law world, arise from the fact of occupation of their [Indian] homelands since time immemorial.

To amount to occupancy, presence on the land must have been established 'long prior' to the time of inquiry, or 'a time in the indefinite past'[37] in an exclusive occupation of land. 'Exclusivity' does not mean that two or more indigenous communities could not be co-owners, as long as they were not disputing occupation.[38] Toohey J noted, that a number of groups could each have title, comprising the right to shared use of land in accordance with traditional usage.[39]A nomadic lifestyle is not necessarily inconsistent with occupancy, since the physical environment may dictate sparse and wide-ranging occupation. [40]

The question of occupation was more recently and concisely dealt with by the Canadian Supreme Court in the case of *Tsilhqot'in Nation v British Columbia.*[41] It seems clear that there must be sufficient, continuous and exclusive occupation, but what constitutes sufficient occupation to ground a customary title? What level of continuity is required? And what is meant by occupation exclusive to the group? These questions must be addressed both by the common law perspective as well as the native community's perspective.[42] For common law, the notion of possession is the basis for title whereas the latter focuses on laws, practices, customs and traditions of the group, where the groups' size, manner of life, material resources and the character of the lands claimed as customary lands would be material.[43] Dealing with the matter of sufficient occupation Chief Justice MacLachlin, delivering the unanimous decision of the Supreme Court held that:

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37 *Milirrpum v Naballco Pty Ltd* (Gove Land Rights Case) (1971) 17 FLR 141.

38 In the United States, it has been held that the two or more Indian groups who jointly and amicably occupied the same lands to the exclusion of others would have original Indian title: see *Turtle Mountain Band v United States* (1974) 490 F 2d 935, 944; *United States v Pueblo of San Ildefonso* (1975) 513 F 2d 1383, 1394–1395.

39 For example, one group may be entitled to come onto the land for ceremonial purposes, with another group having other rights in the land. Or native title could be held by a larger 'society' comprising all the rightful occupiers. In any case, occupation is a question of fact. *Mabo (No. 2)* (1992) 175 CLR 1, 189–190.

40 *Ibid*. *Mabo (No.2)* at p. 178.

41 (2014) SCC 44; This important case concluded a 30-year legal dispute, and now represents the latest and most comprehensive statement of the law of Aboriginal title in Canada. It is also the first successful Aboriginal title claim. By recognising and affirming the Tsilqot' in Nation's title to over 1700 square kilometers of territory, the SCC has given full effect to the words of section 35 of the *Constitution Act 1982 to recognise 'existing rights' of Aboriginal people.*

42 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para 147; see also *R v Van der Peet* (1996) CanLII 216 (SCC), [1996] 2 SCR 507.

43 Slattery B, "Understanding Aboriginal Rights", *Canadian Bar Review*, 1987, Vol. 66, p.727.

> [To] sufficiently occupy the land for purposes of title, [the group] in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group and the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land.[44]

The Supreme Court made it clear that what is required is a culturally sensitive approach to sufficiency of occupation. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the native group which, depending on its size and manner of living, might conceive of possession of land.

What about exclusive occupation and overlapping claims? The Canadian Supreme Court put this succinctly in *Tsilhqot'in Nation v British Columbia* where Chief Justice MacLachlin said:

> The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.[45]

Exclusivity of occupation should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had they chosen to do so.[46]As to continuity, this does not require indigenous groups to provide evidence of an unbroken chain of continuity

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[44] At para 38, writing for a unanimous court, McLachlin CJC affirmed and developed the framework laid in the case of *Delgamuukw v British Columbia* [1997] 3 SCR 1010 by explicitly setting out what each element of the test contemplates and requires. As the central issue in the appeal, the element of sufficiency was given the most treatment and developed extensively.

[45] *Tsilqot'in v British Columbia* (2014) SCC 44, para 48.

[46] *Marshall and Bernard*, para 65.

between their current practices, customs and traditions, and those which existed prior to contact.[47]

In Sarawak, the courts had the opportunity to deal at length with the question of occupation in *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*[48]. The existing occupation by the Iban plaintiffs and their practice of the same customs as practiced by their ancestors was relied upon as historical proof of occupation pre sovereignty. It was a question for the trier of fact. The Federal Court had the occasion to deal with the question of rights based on occupation in *Superintendent of Lands & Surveys Miri Division & Anor v Madeli bin Salleh*[49] The land in question had been subject of a concession to a third party, and after the concession ended and the owner resumed control, there was question of whether the plaintiff could be said to be in continuous occupation? The court adopted the meaning assigned to the word occupation by Lord Denning in *Newcastle City Council v Royal Newcastle Hospital* where His Lordship said:

> Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: See *Pollock and Wright on Possession*, pp 12 and 13. There must be something actually done on the land, not necessarily on the whole but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as 'occupied' by anyone, but anyone would say that a farmer occupies the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another.[50]

As with sufficiency of occupation, exclusive occupation must also be considered from common law as well as from the perspectives of the occupying native community's legal traditions. It is in this context that the cultural landscape and evidence of occupation of the Kelabit in the highlands is discussed. Their land based cultural practices and megalithic stone culture, established an unmistakable connection with the land that they inhabit.

IV. KELABIT LAND BASED CULTURAL PRACTICES: THE MEGALITHS

Kelabit stone monuments and other sites of cultural significance on the landscape mark it with unique character of Kelabit habitation. Apart from their *rumaq ma'un* or their ancient settlement sites and evidence of *amug*, or previously cultivated lands, among the most distinctive marks of Kelabit occupation of the land are their unique megalithic stone constructions scattered throughout the highlands which were often, though not always associated with burial rites and inheritance.

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47 *R v Van der Peet* 1996 CanLII 216 (SCC); [1996] 2 SCR 50 at para.65.
48 [2001] 6 MLJ 241; [2001] 2 CLJ 769.
49 [2008] 2 MLJ 677.
50 [1959] 1 All ER 734, p. 736, PC.

Megaliths are monuments of stones or rocks that are deliberately placed or worked by man.[51] They are incised, carved, shaped, hollowed out or balanced.[52] The megalithic period in Southeast Asia is roughly estimated to have occurred within the Metal and Bronze Ages between 3000 BC and 500 BC, which have emerged later than megalithic age in Europe , for example in France (before 4000 BC), and England and Denmark (3000 BC). Megaliths are also found in other countries in Europe like Spain, Portugal, Ireland and Sweden as well as Tibet, Korea, Indonesia and Melanesia. Similar features have been found in Naga country in Assam.[53] According to Phelan[54] megalithic culture in Borneo were discovered in only two regions of Borneo, and practised by the Murut and Dusun in the plains near Kota Kinabalu in Sabah and among the Kelabit and Lun Bawang in the northern highlands in Sarawak. Top and Eghenter have noted that the Saban, Lengliu and a small group of Punan in Kerayan, Kalimanatan, Indonesia, also had a megalithic culture.[55]

In the Kelabit highlands these megaliths take the form of *batuh narit* (rock art or carved stones), *batu sinuped* (menhirs or standing stones), *batu nangan* (dolmens or slab built structures), and *batu perupun* (stone mounds), and often accompanied by *batu nawi* (hollowed cylindrical stones). *Lepo batuh* (rock shelters) are also part of the culture associated with rocks and stones around which oral histories and mythology are woven. In many cases the erection of these stones were associated with burial rites or were themselves burial sites. In the latter, stone jars and earthenware vessels, porcelain bowls and other items like iron blades, copper alloy rings are also found.[56] Non megalithic cultural markers are found scattered in the highlands in the form of *nabang* (ditch cuttings) which is sometimes associated with *taka* (ox-bow lake), *kawang* (canopy cutting along mountain ridges), *bakut* (trenches), *kawang ebpaq* (canals) and other significant cultural sites such as *lubang main* (salt springs), *patun batuh* (stonewalls and enclosures in water) and fish traps.

Early anthropological writings indicated that the highlands formed the core of 'megazone of megalithic activity'[57] and that the numerous megalithic remains and stone

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51 Peter Phelan, *Traditional Stone and Wood Monuments of Sabah*, Pusat Kajian Borneo, Sabah, 1997; Ipoi Datan, "Cultural Sites and Features in the Highlands", Paper presented at the Highlanders Convention, 3-4 March 2001, Mega Hotel, Miri, Sarawak.

52 *Ibid.*

53 Edward Banks, "The Kelabit Country, an Account of a Recent Visit", *Supra* n 5, at p. 158.

54 *Supra* n 51.

55 L. Top and Christina Eghenter, "Kayan Mentarang National Park: In the Heart of Borneo", WWF Denmark & WWF Indonesia.

56 Lindsay Lloyd Smith, et.al., "The Cultured Rainforest Project: Preliminary Archaeological Results from the First Two Field Seasons in the Kelabit Highlands, Sarawak, Borneo", 2007, 2008, p. 43. Available online at http://www.arch.cam.ac.uk/research/projects/cultured-rainforest/crp-files/2013-lloyd-smith-et-al-crf-preliminary.pdf accessed on 28 September 2015.

57 Tom Harrison, "More Megaliths for Inner Borneo", *Sarawak Museum Journal*, 1959, Vol. IX No. 13-14, pp. 14–20.

carvings found in the Kelabit Highlands were definitely of Kelabit origin.[58]Cluny and Chai also reported that a mass collection of 42 megaliths are rare and unique and found nowhere else in Sarawak.[59] Stone works found in other areas of Borneo take the form of pole-like monuments[60] or sculpture of human figures,[61] but these were not found in the highlands. When Tom Harrisson mounted an expedition to Mt Batu Lawi (6,600 ft) in 1946, he noted that the only signs of previous human life and habitation were the megaliths by the Tabun River, which he took to be an indication that the Kelabit had once inhabited the area. JC Moulton also wrote of the presence of burial urns in the Tabun River similar to those used by the Kelabit in the rest of the highlands.[62]

Harrisson[63] compared what was known of the megaliths in the Kelabit Uplands with those found in Malacca and Negeri Sembilan and concluded that 'they could quite well have been erected as a similar integral part of a similar general culture',[64] but with its own peculiarities.[65] On the island of Borneo, no other known megalithic culture in the ancient or recent past is identical to that of the Kelabit, except by the people of the same stock, the Lun Kerayan and Berian in Kalimantan and closely related groups in Sabah, where rock carvings discovered in Ulu Tomani, Sabah[66] (1971), had features

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58 Edward Banks, "The Kelabit Country, an Account of a Recent Visit", *Supra* n 5; HG Keith complements the comments made by Banks in HG Keith 'Megalithic Remains in North Borneo' (1947) 20(1) *Journal of Malayan Branch of Royal Asiatic Society* 153–155. Edward Banks, curator of the Sarawak Museum, wrote in 1936 how he witnessed a burial ceremony where, among other rituals, scores of these stones, monuments, jars, both old and recent, and stone 'urns' were used in the ceremony. He also reported seeing a number of crude human carvings cut on stones, often in relief, which his informants said had been created by their ancestors. He opined that the stone objects in the Kelabit country are of recent and present Kelabit origin, and not Chinese. He noted that some identical carvings and numerous stone urns for reception of bones were found in the Naga Country of Assam, similar possibly because the people lived in similar climatic conditions, but concluded, however, that 'in Sarawak, at any rate, they are to be found mainly among the Kelabit, occasionally among the Murut, but among no other people'. Although we know now that there are similar burial practices in other areas, to the extent that the same practices were confined to people of the same stock, Banks was right.

59 Wilhemina Cluny and Paul Chai PK, (2007) Cultural Sites of the Northern Highlands, Megaliths and Burial Sites, ITTO Project PD 224/03 Rev I (F) – Transboundary Biodiversity Conservation: The Pulong Tau National Park, ITTO & Forest Department Sarawak.

60 George Jamuh 'Jerunei', *Sarawak Museum Journal*, 1950-1, Vol. 5, pp. 62–68.

61 See Walter Unjah, "The Stone of Demong", *Sarawak Museum Journal*, 1954, Vol. 6(12), pp. 61–64, for a legend about the only megalith so far attributed to the Iban.

62 J. C. Moulton, "An Expedition to Mount Batu Lawi", *Journal of the Straits Branch of the Royal Asiatic Society*, 1972, Vol. 62, pp. 1–7.

63 Tom Harrisson, "Megaliths of Central Borneo and Western Malaya Compared", *Sarawak Museum Journal*, 1962, Vol. 10, pp. 376–383. It must be noted that up until the early 1970s most of the writings on Kelabit was by Harrison, who as the curator of the Sarawak Museum and the government ethnologist kept other researchers out of the Kelabit territory. From the mid-1970s Kelabit themselves started to write their own stories.

64 There are archaeological and ethnographic examples of stone monuments from Assam to Luzon and out into eastern Indonesia, and there are some uncertain parallels with the stone culture in Java and West Sumatra. Harrisson took two Kelabits to see the megaliths in West Malaysia, and both were reported to have said that they are the work of the same people who originated in the Kelabit highlands. The Borneo stories of Tokid Rini (half human-half spirit figures) who could leap and fly 'leaving stones such as these as signs, was proved truer than they had thought'. *Ibid.* Tom Harrison, Megaliths of Central Borneo and Western Malaya, Compared".

65 *Ibid*. Tom Harrisson, citing R Heine-Geldern, *Prehistoric Research in the Netherlands Indies* (1945).

66 In Tom Harrisson, Barbara Harrisson *The Pre-History of Sabah,* Sabah Society, Sabah, Malaysia*,* 1971.

that closely matched the stone carvings found in the Kelabit country at Pa' Dalih and at Long Lellang in the Akah. Since no tradition of megalithic activity had been recorded among the present Tomani or the Tagal, nor are there any carved or cut rocks even in the megalithic area of the Kadazandusun peoples further north, Harrisson posited that this could be "one of the many lost signs that the upland Kelabit people … once spread continuously much further north and south until they were decimated by the introduced epidemics after the arrival of western civilisation on the coast'. Such a thesis perhaps supported RS Douglas' statement that the Kelabit are practically the same race of people as those known as Murut in the Trusan and Padas districts of Sabah.[67] Phelan's later documentation of some of these megaliths in Sabah reveals that they are done by Murut and Dusun but only in an area close to Kota Kinabalu. On a field visit to the area, this writer found a number of the standing stones similar to the ones in the highlands which were said to commemorate covenants or oaths between people, and were called oath stones.[68] Whatever may be the exact reasons, memorializing events in the community's history or the lives of individuals are connected to the stone culture. These erections of stone monuments may also be closely connected with burial rites.

V. STONE MONUMENTS, URNS AND JARS, AND BURIAL RITES

As a mark of respect, upper-class families threw huge feasts to honour parents or loved ones. This might happen while the individuals were alive,[69] but it was primarily done posthumously. On such occasions an individual or household erected or carved rocks, monoliths, stone 'tables', 'seats', dolmens or stone bridges to commemorate the life or the memory of the dead. They also constructed slab graves, 'forts' and deep stone burial urns in which the bones of the dead were placed.[70] Many of these sites were recorded by Cluny and Chai as part of an International Tropical Timber Organisation project on Transboundary Biodiversity Conservation to mark cultural heritage sites important to the local communities and to prevent destruction or damage by looting, vandalism and logging activities.[71] To appreciate the significance of these stone monuments, some knowledge of the burial rites is useful.

The Kelabit practised a form of primary and secondary burial not found among their neighbours. During the primary burial, an earthen jar would be used as a coffin.

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67 RS Douglas, "A Journey into the Interior of Borneo to Visit the Kalabit Tribes", *Journal of the Straits Branch of the Royal Asiatic Society,* 1907, Vol. 49, p. 53.

68 Interestingly, when Sabah became a partner in the formation of Malaysia together with Sarawak and Malaya, an oath stone was erected to commemorate the event.

69 This is called to 'nunang' or to honour a loved one, especially a parent.

70 T. Harrison, "Outside Influences on the Kelabits", *Sarawak Museum Journal* (Old series), 1954, Vol.19, pp. 104–125; see also Harrisson, "A Dying Megalithic in North Borneo", *Sarawak Museum Journal*, 1962, Vol. 10, p. 286.

71 Wilhemina Cluny and Paul Chai PK, *Cultural Sites of the Northern Highlands, Sarawak, Malaysia; Megaliths and Burial Sites*, International Tropical Timber Organisation, Project PD224/03 REV 1 (F), Transboundary Biodiversity Conservation, Pulung Tau National Parks.

The jar was broken off at about three quarters of its height, below the neck, and the corpse was placed in the jar in a foetal-like sitting position with hands clasped on the chest. The jar was then covered with the broken-off top quarter and secured with rattan strips. Where the corpse was too large or too long for the earthen jar, a *kelimeng* (special basket made from tree bark) was used to extend the height of the jar before placing the broken-off top quarter of the jar back on top and this was securely fastened. This jar was kept in the compound of the longhouse. A hole was pierced in the bottom of the jar and connected to a giant bamboo which was put into the ground to drain the liquids from the decomposing body. Some aristocratic families also used a *lungun* (elaborately crafted wooden coffin), sometimes carved with designs, which was mounted on poles. In the olden days, this *lungun* was kept in the family apartment within the longhouse, but in the late 1930s and early 1940s, after ten days, it was removed some distance away to a separate, specially constructed hut, but within the compound of the longhouse. While this was a demonstration of grief, a probable reason for keeping the body for a long time was to give time to accumulate sufficient rice and *burak* (rice wine) to feed the whole community in an elaborate *burak atey* (death wine-feast).

After a year or so, a secondary burial was held when the bones were laid in the communal *binatuh*, the permanent burial place[72] during the said feast. The removal might be accompanied by the erection of a stone monument, in loving memory and as a tribute to the dead, but no less a demonstration of the family's social status. Lasting for about four or five days with as many as 500 invited guests, the only manifest and organised activity was the removal of the bones from the jar-coffin into either a vat, or large jar, often of a dragon design, for the permanent burial. The internment of bones extended to the repatriation of bones of a deceased family member who had died outside his natal *bawang or* village.[73] Great significance was placed on a person's remains being buried in his birth place.

In the days of tribal hostilities and fear of enemy raids, the skull was separated from the body and 'buried' in caves elsewhere so that no enemy would raid the cemetery for skull trophies. It was also to prevent bears from marauding the site.[74] Once the jars with the bones were put in their final resting place, the members of the *bawang* would return home. They would place behind them, on the path or bridge, pieces of bamboo intertwined in the shape of an X to signal to the spirit of the dead to remain at the resting place and not to come back to the village to disturb the living.

As the Kelabit straddled the era of Christian conversion, the practice of keeping the bodies for many days gave way to simpler burials,[75] as much for hygienic reasons

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72 See Peter Metcalf *A Borneo Journey into Death: Berawan Eschatology from Its Ritual* (1981). Another group that practised secondary burial of the dead, but without a megalithic component, was the Berawan, a group related to the Kelabit.

73 Interviews with Sina Bulan, Kuala Lumpur, June 2002 and Galih Balang, Pa' Lungan, October 2002.

74 The writer's aunt Sina Balang Imat told a humourous story about one village that kept the heads in a particular cavern that had with a hole, a rock acted as security against enemy raids. One day the villagers were horrified to find that the hole in the ground led to an underground tunnel and a stream that had taken the skulls into the main river. From then on, the heads were properly buried in the cemetery.

75 This writer's maternal grandfather was one of the last individuals to be given a traditional primary and secondary burial. He died in 1946. The eldest son and daughter honoured his request to be so buried even though they had newly converted to Christianity.

as a separation from the old spiritual beliefs about life and death. The grandiose and ostentatious sacrifices of labour and wealth expended on these feasts underpin their importance.[76] As they required intensive cooperative human labor, only the wealthy could afford them. In a way these feasts functioned as a cultural mechanism for redistributing wealth while reinforcing kinship ties.[77]

Every *bawang* had its own *binatuh* (burial grounds), often located on raised ground or knoll or in a cave or in *lubang batuh* (hole in stone). *Guy Arnold*'s description of one of the sites in 1958 is illuminating:

> Between Pa' Dalih and the next village of Pa' Mada was a great burial stone in the middle of the jungle. We spent the morning there uncovering and excavating while Miri told the writer how the Kelabits used to perform a double burial ceremony. After a man had died and been buried, his bones, beads and other possessions were later dug up from the first grave and carried to a memorial stone where they were placed around it. The face of the stone was twenty feet high and ten broad, and three deep coffin niches had been cut in it where we found beads and other things that had been placed there long ago with the dead man's bones. Not far from Pa' Mada we excavated a longhouse site and near it, sunk flush with turf, was a large stone carved with many figures, deep-cut but worn, telling the story of the great leader who was buried underneath. The face of a woman, probably his wife, was carved on one corner, and there were dogs or other animals, some patterns whose meaning we did not understand, and fifteen diamonds along one edge representing the heads he had taken in battle.[78]

Kelabit *binatuh* (burial grounds) are spread out in the highlands, each historicising the settlement of people in the area. Most new settlements would not be too far from the old, so that the old burial sites would still be accessible. Hitchner lists at least 63 burial sites,[79] some of which are stone graves. People speak of the existence of *binatuh*, with reference to the location along a river, or *raan* (ridge top terrace) or *elung* (the confluence of rivers). Information on *binatuh* in caves or rock that people have personally shared with this writer include: *Binatuh Rayeh* used by the villages at Pa' Umur and Pa' Lungan at the confluence of Pa' Umur, Long Perurupan and Pa' Lulayan; *Lubang Batuh* (burial cave) at Punang Umur along Pa' Debpur; *Binatuh Pa' Mada* and *Pa' Bengar* at the confluence of Arur Kenangan, Long Bengar and Pa' Pa'it; *Binatuh Ramudu* at Pa' Daan; *Binatuh Pa' Tik* at Pa' Ngalah; and *Binatuh Batu Patung* at Pa' Di'it. Many more burial sites are on knolls or valleys such as *Binatuh Bario Lem Baaq* at Pa' Ramapuh and Arur Ketayan;

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[76] For a brief account of secondary burial, see Edward Banks, "Some Megalithic Remains from the Kelabit Country in Sarawak with Some Notes on the Kelabit Themselves", *Supra* n 5 at p. 429.

[77] Tom Harrisson, 'Megalithic Evidence in East Malaysia: An Introductory Summary' (1973) Vol VLVI (Part 1) *Journal of the Malaysian Branch, Royal Asiatic Society* 123–140.

[78] Guy Arnold, *Supra* n. 5, at p. 191. Details of this site were also told to this writer by Penghulu Henry Jalla, who spoke of his family's connection with the burial site (personal communication) Kuching, September 2003.

[79] Sarah Hitchner, *Remaking the Landscape: Kelabit Engagements with Conservation and Development in Sarawak, Malaysia,* 2009, pp. 184-200.

Binatuh Kubaan at Pa' Manau, *Binatuh Long Lellang* at Long Dati, and Long Sebuloh, *Binatuh Pa'Terap* at Ra'an Mekang. This is by no means an exhaustive list.

Recently, the Cultured Rainforest project has excavated a number of megalithic and burial sites, among them, the burial site at Long Diit, described as Menatoh[80] Long Diit. Lloyd-Smith's description is a valuable picture of what can be found in such a site. He wrote:

> Menatoh Long Diit is located on a lower terrace c.200 m South of the confluence of the Kelapang with the Di'it rivers. Approximately 60 m to the South lies a Dragon Jar cemetery also referred to by the same name. The megalithic site consists of a group of fourteen stone jars (average dimensions: 1.6 m high by 0.6 m wide) and seven slab structures (average dimensions: 1.5 m long, 0.7 m wide, and 0.7m high). Five of the jars stand upright, the other nine partially or completely fallen (Fig 5.1). All of the jars are carved form a grey/white, coarse crystalline quartzite sandstone that glitters in sunlight. All of the slab built structures were disturbed but appear to have a common architecture, with thicker (20-25 cm wide) uprights supports set lengthways in the ground and thinner (10-15 cm thick) slabs laid on top. One structure appeared to have a re-used stone jar fragment as an upright.
>
> Excavation was made at the base of one of the standing stone jars to investigate the nature of activity and to expose its foundations to retrieve datable material. Numerous clusters of artifacts were unearthed both on top of and beneath a large collapsed stone jar fragment artifacts' included 11 small ovoid earthenware vessels, one tubular earthenware vessel, and 20 small earthenware cylinder-shaped objects, probably earlobe stoppers. Fragments of two stone ware vessels were found, one Thai Sawankhalok bowl dating to the 14th or 15 th century AD (Chin 1988: 101,fig 101, fig 117,) and two blue and white porcelain bowls dating to the late Ming periods (16th century AD). Smaller items included whetstones, iron blades, copper alloy rings of the type traditionally hung from distended earlobes, small copper alloy bells, and over 400 glass beads. These artefacts are thought to have been placed in association with burials place at the site up until the conversion of local people to Christianity in the 1930s. A quantity (45 g) of cremated human bone and teeth were also found. As cremation burial has not been practised by the Kelabit in living memory (T Harrison 1962:10-2), these remains may represent an earlier use of the sites, perhaps the original burial remains in stone jars.
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> The base of the stone jar stood in a shallow cut 25 cm deep. River- rolled packing stones were placed on side of the stone jar. Whilst the antiquity of the stone jars and slab cists structures is still to be established (C dates pending), the site was certainly used for burial up until 1950s, the dead therefore being placed where previous dead were known to rest. Burial was said to be in wooden coffins but also reputedly inside the stone jars or within slab structures. The reason for separation

[80] Menatoh is the southern Kelabit word which is the same word for binatuh in the northern part of the highlands.

> between these burials and those associated with the Dragon jars 60 m away is unclear, and will be the focus of further investigations.[81]

Further investigation of the cemeteries, which the writers referred to as Dragon Jar Cemeteries, on the eastern side of the Kelapang River found fragments of 13 broken jars extended over a 40 m by 15 m area but appeared that the site could be larger. The archaeologists reported that:

> [M]any of the jars were set in the ground up to their shoulder or neck, (Fig 4.4) Where upper portions of the jars were visible, they had been deliberately removed at the shoulder, most likely during the burial rites of primary and then possibly second internment. At least seven different jar types were observed and can be dated between the 18th and 19th centuries AD based upon published comparisons in B Harrison (1990) and Adhayatman and Ridho (1984).[82]

Other burial jars are found elsewhere for example in Pa'Lungan at the site of the Belanai Singkulub a line of twelve burial jars are lined in a row on top of the ridge between Pa' Lungan and Long Rebpun. A few jar tops are protruding but many are buried.[83]

These burial sites show clear evidences of habitation and settlements in the area. Beyond the actual internment of bones of the dead through secondary burials at the established cemeteries, as was mentioned earlier, the Kelabit also erected megalithic and non-megalithic monuments which were accompanied by elaborate feasts that would last for days.

A. Megaliths: Monoliths, Menhirs, Memorial Stones and Rock Art

Megaliths took the form of *batu sinuped, perupun* and *batuh nangan.* A *batuh sinuped* may be a conical or rectangular standing stone, stone slab or menhir often with tapered or triangular tops. Most *batuh sinuped* occur singly but occasionally they may be clustered in a group of two or more.[84] *Batuh perupun* consists of stone slabs laid horizontally on the ground or multiple stone slabs laid on top of each other as a table-like structure, or river rolled stone mounds, with stones mounted on top of each other to a height of over two meters and diameter reaching up to 30 meters.[85]

The megaliths may also take the form of *batuh nangan,* a slab built structure, or capstones mounted on stone legs which are table like or chair like, in which case they are more appropriately called *batuh pelukung* (meaning supported stone) or dolmens.[86] These

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81 Lindsay Lloyd Smith, et. al., p 44.

82 *Ibid*. at p. 47.

83 Sarah Hitchner, *Supra* n 79, at p. 163.

84 The batuh sinuped in Arur Tang Barat in Pa'Berang has a cluster of five standing stones and some small ones.

85 There is a *perupun* (slab grave) at Arur Pegelawat about half an hour's walk from the present site of Pa' Ukat longhouse.

86 Sina Bulan and her adopted brother Tama Pasan erected a *batu pelukung* (dolmen) at Long Nipat in memory of their father Tapan Tepun.

structures may be small but can also be gigantic like the Batuh Ritong in Pa' Lungan. Stone slabs may also be laid horizontally into the ground as a bridge. The stones and slabs were often quarried elsewhere, perhaps from the nearest river, and carried a few kilometres overland and erected at the chosen spot. Sometimes the stones were carved and decorated in situ, in sunken relief, and the designs incised into the stone. These are called *batuh narit, or batuh nawi* (carved stones or rock art).

Carved stones are a common feature of the Kelabit megalithic landscape. *Arit* in Kelabit is a design, so a *batuh narit* is a stone that has been designed or carved.

Many old stone carvings are incision on stones or rocks so that the design stands out from the rest of the stone. It is generally agreed that the carvings are made with metal tools, thus they could have been made as early as 500 AD.[87] Carvings may be in the form of animals, like the Batuh Narit Kelabat – the figure of a gibbon found in the village of Batuh Patung. A more common design is that of spread eagled human figure, outstretched arms and legs and showing elongated earlobes. Such a figure was clearly seen between the new and old and longhouse in Akah River in Long Lellang, drawn on a large rock of about 10 ft high and approximately same width.[88] The discovery of that rock boulder in Long Lellang was described thus:

> A great wonder happened in the headwaters of the Akah, on the border of Kelabit country, recently. The river changed its course on its own. In the middle of the new river bed was a human figure complete with headdress, extended ear lobes, other ancient ones; but instead of being executed in high relief is incised into stone surface. It differs also in having feet that swirl into fin shaped; the hands show ordinary fingers, though only four.[89]

The rock carving had distinct similarities to other monuments, most notably the rock carvings near Ramudu, the most southerly point of the Kelabit Highlands, many days travel from Long Lellang. A similar design is carved on a stone at Batuh Narit Long Derung in Pa' Main. The creators of these old etchings and carvings are unknown. Others, whose creators are unknown, are said to have been erected by the legendary Seluyah or Tokid [Tuked] Rini[90] just like the monumental *Batu Ritung*, at Pa' Lungan. A number of carvings either on huge rock boulders or rock outcrops are visible today in Pa' Umur,[91] Pa' Dalih[92] and Ramudu.[93] Since there is no clear evidence of any other group having

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87 Tom Harrisson, "Megalithic Evidence in East Malaysia: An Introductory Summary", *Journal of the Malaysian Branch, Royal Asiatic Society,* 1973, Vol. VLVI (Part 1), pp. 123–140.

88 This writer visited this site in 2003. It is impossible to climb this huge rock boulder without assistance. My guide had to cut two small trees which were used as a bridge to get on to the boulder.

89 Hudson C. Southwell cited this in *Uncharted Waters*, Astana Publishing, Alberta, Canada, 1999, p. 289, and concluded that it was evidence that the Kelabit had lived on the upperside of the Meriggong gorge for centuries.

90 Lian Labang, "An Upland Stone Stor", *Sarawak Museum Journal*, 1958, Vol. 8, pp. 402–404. This rock is found in Ramudu.

91 At Arur Bilit, in Bala Pelaba's farm near the present Pa' Umur longhouse.

92 Also Batu Penagan, (chopping stone). See Arnold's description,. In *Longhouse and Jungle: An Expedition to Sarawak* p 191 (1959

93 Batuh Long Badang.

occupied the area for generations and practising the same culture, the probability is that these were also created by the Kelabit,

There are stones which were carved in 1940s, like Batu Narit Aren Tuan or Peripadan Tepun, said to be carved in honour of Raja Umong @ Penghulu Miri. There is a round stone, about a metre tall displaying several carvings, the face of a man, a standing figure of a man in loin cloth with a stick in hand probably to herd buffalo? This *arit* differs from the traditional patterns which portrayed animals, real or mythological.[94] At an old settlement in Long Dati there is a more recent carving on a boulder by the Akah river to commemorate the building of the first primary school. The year 1950, when the school was established is carved clearly on the rock following an ancient tradition of rock art among the Kelabit.

B. The Purpose of Megaliths

As previously indicated, megaliths were erected prior to 1958[95] but their significance as a mark of occupation of lands and territories continue into the present. The connection between megaliths, burial rites, and memorial to a deceased relative is clear, though on rare occasions they commemorated the lives of parents who were still living. This writer's mother, Sina Bulan and her older brother Pun Dukung erected a *batuh pelukung, or* dolmen in honour of their deceased father. Many other families would have done the same to honour their parents or loved ones, and the megalith would be named after the person who erected the stone, as in Batuh Pelukung Pun Dukung in Pa'Umur, Batuh Sinuped Udan Turun in Pa'Lungan, Batuh Sinuped Negeri Besar in Pa' Main.

Batuh sinuped and especially *perupun* were sometimes used as the spot to bury heirlooms of a deceased who died without an heir, thus preventing any ensuing quarrels between next of kin.[96] The Batu Ritung in Pa' Lungan is an example of this. This is a huge flat stone mounted on four huge cut stones. The creator of this monument is unknown, but it is clear that this was also a Kelabit burial site as evidenced from the beads that were excavated from the site.[97]

Megaliths were also erected to accentuate the upper class status of the family, to show personal strength as in Batuh Sinuped Along Tigan or a rite of passage into manhood as in Batuh Sinuped Tepu Lu'ui of Pa' Main. (Along Tigan and Tepu Lu'ui being the personalities). Boundaries between villages were also marked by erection of *batu sinuped as* boundary stones. For instance two *batuh sinuped* at Ra'an Berangad marks the traditional boundary between Pa' Umur and Pa' Main. They could also be raised as part of a name changing ceremony especially when located very near the longhouse site.[98]

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94 Perhaps because it featured a more recent creation; see Sarah Hitchner, *Supra* n 79, at p. 154.

95 The year 1958 is significant because of the arbitrary cut-off date.

96 Bala Pelaba and Galih Balang talked of the legend of a young lady called Liyuq who died in Patar Lem Liyuq',. Since she died without an heir, her property was buried with her in a huge mound of stones which may be still seen today.

97 Tom Harrison excavated this site in 1949.

98 Batuh Nangan Pa Pereh.

Apart from created forms, natural stone features were important part of Kelabit life, and mythology. Kelabit oral narratives tell of natural stone outcrops being used as shelters. For instance along the Depur River a Lepo Batuh or rock shelter was said to be the home of the ancestors of people from Pa' Terap and Pa' Umor for a time, before they split into two village communities. Certain rock structures were and are treated as rock shelters for hunters. At Lepo Batuh (rock shelter) in Pa'Dalih, earthenware, metal objects, glass fragments as well as bone and mollusc fragments were excavated indicating that the site may have been used as an overnight camp repeatedly.[99]Local stories connect Lepo Batuh to the pre-Christian forest spirit and giant Pun Tumid, who because of an accident of rock falling on his heel (tumid), and with a twisted heel could no longer hunt animals and in shame, hid in the forest to be a 'hunter of the hairless' while his sibling would hunt the wild. [100] These are among stone structures that feature in Kelabit narratives and mythology.

Batuh baliu (transformed rock) are rock features believed to have been a building or house that has been cursed and turned into stone because of breach of *adat* or taboo. Cruelty to animals and laughing at animals like cats, dogs and especially frogs was believed to cause one to be *masab,* bringing about a curse, hailstorms and could result in petrification of buildings and even people into stones. These narratives are alive through generational storytelling and songs representing the stories that connect people to the land.

VI. NON-MEGALITHS: CARVING AND MODIFICATION OF THE LANDSCAPE AND TERRITORY

Cultural markings on the land also take the form of non-megalithic structures that are just as significant, namely the *kawang* (canopy cutting), *nabang* (ditch cutting), *lega* (wooden platform), *bakut* (trench) or *kawang ebpaq* (canal). These are discussed in turn.

A. Kawang (Canopy Cutting on the Mountain Ridge)

Memorialisation of a loved one, a husband or an elderly person might take the form of cutting a *kawang.* This is a clearing through virgin forest 'to form a serrated edge, a kind of battlement along a mountain ridge, often on the most difficult, isolated and distinctive peaks that could be seen from miles around'.[101] The *kawang* like other structures created by leading families was one of the most labour intensive. With only simple implements for the task, like parangs, or adge, clearing a *kawang* was not easy, and took time. During that period the host family would feed the guests and kindred who had come to help.

There is evidence of *kawang* all over the highlands except in Long Lellang. The mountain ridges surrounding the plains of Bario Lem Baaq were said to have at least 24 *kawang.* In Pa' Lungan, there were at least five kawang along the mountain range of Buduk Kaber.[102] Named after their creators, they are called Kawang Balang Tepun,

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[99] Lindsay Lloyd Smith, et. al., p 39.

[100] Monica Janowski, makes reference to these stories in her book *Tuked Rini, Cosmic Traveller, Life and Legend in the Heart of Borneo*, 2014, NIAS Press.

[101] Guy Arnold *Supra* n 5, p. 191.

[102] Sarah Hitchner, *Supra* n 79, at p. 172.

Kawang Sinah Batang Riwat, Kawang Agan Urud, Kawang Usan Turin and Kawang Udan Tuna. All of the creators have living descendants in Pa' Lungan or Bario. Four *kawang* are reportedly found on Mount Murud,[103] the highest peak in Sarawak and there are others in Pa' Dalih,[104] Pa' Bengar,[105] Batuh Patong,[106] Pa'Umor[107] and Pa'Mein. Although many of these are now overgrown, it is possible to identify the secondary jungle from the old virgin jungle.

In 2000, a *kawang* called the Millenium Kawang was cleared in Bario to commemorate and to herald the millennium. This was a renewal of an old *kawang* site, which was done in the old tradition of commemorating important events on the landscape. With today's implements, like a chainsaw, it would be much easier and would need less labour to create these structures. At the time of writing , there are talks of clearing and recreating some of the old kawang, perpetuating the age old Kelabit custom.

B. Nabang (Ditch Cuttings)

A memorial in honour of a deceased person may involve the construction of a *nabang*.[108] Constructed at great expense, and a *burak* feast, this involved the cutting of a ditch in the ground, or across a ridge tract, either to divert the course of a river or to reclaim a large meander for arable land or to flood an area for growing rice. Such ditch cutting often resulted in the formation of a *taka* or an oxbow lake, which would be named either after its creator or the person in whose honour it was created[109]. Examples of such lakes along the Depur river are Taka Kara'eq', in honour of Pun Kara'eq,'[110] Taka Pun Ratu, after Pun Ratu. Similar *taka* (oxbow lakes) are found in Pa' Lungan known as Taka Udung Buluh, Taka Rawir, Taka Gia Ulang and others in Pa'Main, including Taka Tama'al. These *taka* were intentionally created, unlike others that occur naturally through the force of the river currents over time, as in Taka Bulan in Pa'Mada and Taka Lem Sa'ug in Pa' Dalih.

Today, ditches are still constructed for the purpose of flooding an area or draining an area for planting of padi.[111] These are simply called *abang* (ditches) differentiating them from *nabang* which were done ceremonially. This writer's informant, Galih Balang talked of a time when a great number of *nabang* were cut across the meandering rivers in Pa' Lungan and Pa'Umur. One elder cautioned, '*Tuen ngabang neh epbaq dih ngabi, anun meneh kuh tanaq inan anak katu kedidah mulun*', meaning, if all the rivers are cut

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103 Kawang Udan Tuna, Kawang Aren Tuan, Kawang Akun, kawang Pun Erang. All the creators were from the nearby village of Pa'Lungan.

104 Kawang Raja Umung and Kawang Liri@Langit Nubung.

105 Kawang Bayo.

106 Kawang Tama' Lian, Apad Bawang Runan

107 A series of *kawang* called *kawang mulaq* (many *kawangs*) on the ridge between Pa'Umur and Pa'Main.

108 Edward Banks, witnessed the elaborate burial rites which included the creation of a *naban*g. See Edward Banks, "The Kelabit Country, an Account of a Recent Visit", *Supra* n 5, at p. 158.

109 A *nabang* was also named after the man who created it, for instance Nabang Utung Ratu at Pa' Perey a tributary of the Pa' Umur river.

110 The writer has visited the site of Taka Kara'e' which has now become an oxbow lake frequented by fishing enthusiasts; it is about two hours by boat downriver from Bario. The lake is filled up when the river floods and the rest of the time remains an enclave for fish.

111 Examples in Pa'Lungan, nabang Karasan , nabang Pun Maradaq, and Nabang Balang Tepun.

(with ditches) what land would be left for the common folks to live on? The implication of this was that those who cut nabang on the land had first right to claim the land.

The connection with notions of life after death or increasing human fertility as suggested by Heine-Geldern and Fleming[112] for other megalithic complexes do not seem to feature prominently in Kelabit narratives, although there could have been some spiritual aspects. [113]. Even if that postulation was right, it was not the primary purpose of the *nabang.* Most *nabang* were straight ditches but with exceptional circular ones like the Nabang Pa' Libuh (*libuh* means round). It is uncertain why the exceptional shape was chosen except perhaps as a statement of personal preference or a non- conformist individual.

C. Lega (Platform for Ceremonial Slaughter of Animals)

Towards the west of the highlands, in Long Lellang, the local practice was the creation of a *lega,* a large wooden platform built specifically for the slaughter of animals to feed guests at a death feast ceremony. All transactions had to be performed on that *lega*. Although it did not leave a permanent landmark, the *lega* served the same purpose as the other monuments. Interestingly, despite the availability of plenty of rocks and boulders in rivers in Long Lellang, there are few if any *batu sinuped* in the locality. There is however a big *perupun* in Long Sebuloh, near Long Dati and a most distinctive rock carving of a man on a huge rock in the Akah River. There is evidence of *nabang* created by individuals who had come from the northern region to marry in Long Lellang including one at Long Dati and several along the banks of the Akah River towards the old longhouse site.[114]

D. Bakut and Kawang Ebpa' (Trenches): Adaptation and Cultural Reinvention

Lavish death feasts and burial rites remained a feature of Kelabit life until they turned to Christianity in the mid-1940s. Instead of abandoning their culture, they transformed the practice of creating *nabang* into creating *bakut* (a broad pathway) which involved the digging of trenches to create wide laterite roads for public use. A *bakut* was no less prestigious than other forms of commemoration. A number of these are clearly visible in the plains of Pa' Umur and its tributaries. Perhaps it was no less influenced by the

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[112] Mary E Fleming, "Observations on the Megalithic Problem in Eastern Asia", *Bulletin of the Institute of Ethnology*, 1963, Vol. 15, pp. 153–162.

[113] Harrisson attempted to explain the intent of these expressions as a reassurance to the spirit that everyone back in the highlands was right behind her or him, or that a 'path' or 'ditch' be interpreted as a path of spirit egress. T Harrisson, "A Living Megalithic in Upland Borneo", *Sarawak Museum Journal*, 1958, Vol. 8, p. 698 and p. 701.

[114] The writer and co-researcher spent three days in the area in 2003, with the most gentle, knowledgeable guide and informant in one Uncle Akan Sakai. Walking along the Akah river and through jungle paths, visiting the old longhouse, including the main burial sites, being shown the sites and getting a feel of the cultural landscape, was a walkabout outdoor tutorial which was a rare treat and absolute privilege. The pristine beauty of the forest along the river could only be described as breathtaking, seen by boat to Penan settlement Long Benali with stops at various *amug* along the river.

exposure of certain Kelabit to '*dalan rayeh'* (wide road) as they travelled out of the highlands to the nearest town.

Kelabit *lun merar* (leaders) like Aren Tuan of Pa' Lungan and others in the Kelapang suggested that all further efforts in the creation of landmarks on the land ought to be of public benefit. Diverting and straightening of the meandering rivers would be more beneficial, so that the rivers would be more navigable by boat. These were called *kawang ebpaq* (canals). In the late 1940s and early 1950s, this form of memorialisation was employed by the community. Villages would boast that they had the 'most straight rivers' implying that they had the most and best *kawang ebpaq*.[115]

Today, families do not wait to honour their loved ones posthumously. Many families throw lavish dinners either in the traditional longhouse or in posh hotels, inviting the whole community in that place, to *nunang* or honour their parents or loved ones. In a new form of memorialisation, these gatherings are primarily a time of thanksgiving and celebration of the parents' lives, a reinvention of an ancient tradition, providing continuity with the past.

VII. STONE MONUMENTS AS SYMBOLS OF HONOUR AND RIGHTS OF INHERITANCE

It is clear that the various forms of memorials are interconnected with no rigid rule with regard to their creation. Instead of elevating an upright menhir, or piling up of slabs or round stones, a flat cut stone could be used as a bridge across a *nabang* or across a natural valley or any of those combinations. At a site in Pa' Berang,[116] a group of eight menhirs stand on a knoll near the Debpur river. Four monoliths are between six and almost eight feet high, another four small ones are about two to three feet high and yet another four cut slab stones about six feet long serve as bridges over man-made ditches (*nabang*) close by. Most living Kelabit of this writer's parent's generation talk about a time when some Kelabit moved from valley of Patar Lem Liyuq to live at Pa' Berang but were forced to move into the higher plains of Pa' Debpur because frequent floods brought fish that ate the stems of their padi plants, ruining their crops.

Apart from filial piety, a wife could also hold a feast in memory of a deceased husband. Sina Balang Imat,[117] (deceased) who was 82 years old at the time of interview said that in her lifetime she had undertaken these ceremonial feasts seven times. The first was the creation of a *nabang* in memory of her deceased first husband, Akun, followed by the creation of a *nabang* in memory of her first husband's mother. After she remarried, she and her husband, Balang Imat (also known as Tapan Ulun) held a number of other feasts. They cut another *nabang* in honour of her mother, Pun Uwad Aren who was still living at that time, an occasion no less significant than a death feast. They threw another feast in honour of her husband's deceased mother, Pun Buraq, an then another, in memory of Laba Ayu, her husband's deceased father. In each of those occasions, a *nabang* ditch

[115] Galih Balang, Personal communication, Pa'Lungan, June 2003.
[116] This writer visited this significant site in November 2002.
[117] The writer's aunt, also known as Kareb Ayu' is from Pa' Umur.

was created. Her last feast in honour of Belaan Iyu, her own deceased father, a single *batu sinuped* (menhir) an upright stone of about seven feet high was erected. That was an upright stone found in the plains at Long Nipat whose creator was an unknown person. It was uprooted and re-erected at the present site at Rumaq Ma'un Long Main not far from the boundary between Pa' Umor and Pa' Main.

The commemoration of the life or death of someone without an heir by a close relative was a common way of inheriting and keeping the property within the family. For instance, Sina Balang Imat and her husband also erected a single menhir in honour of her husband's paternal uncle, who had no issue or heir. By that act, Balang Imat inherited the valuable ancient jar that belonged to his uncle which he passed down to his eldest daughter, Ruran Imat also known as Sinah Tulu Ayuq who at the time of writing is in her 70s. In another example, one Semeraq Langit (SM), had four daughters. His brother Tadem Ribuh (TR) had no surviving children. SM threw a lavish feast and created a *kawang* on the Arur Tegkang ridge in Bario Lem Baaq' in honour of TR. This entitled SM to inherit the family *belanai ma'un* (ancient jar) that TR had inherited as the eldest son. Since SM's eldest daughter had already inherited SM's *belanai* (jar), in fair distribution, TR's jar was inherited by SM's second daughter, Sina Kapong Raja.[118]

In another case, Tama Balan (TB) also called Tapan Tepun, had adopted Balan, the son of his deceased eldest brother. TB's other brother Liteh Bala (LB) had no son or heir. At Liteh Bala's death, TB threw a lavish feast in honour of his brother LB, thereby entitling his son Balan to the ancient jar that had been in LB's possession. These are examples of the complex indigenous legal traditions that sustain social cohesion, governing distribution and management of property and practices that are intertwined with attachment to the land.

VIII. CONCLUSION

The foregoing discussion shows cultural markings on the landscape bear specific meanings to the native inhabitants connecting them to the land. Although the forms have changed, many of the megaliths or non-megalith structures like the *nabang* or *kawang* that exist today have a known history. Their creators are known and their descendants still living. In the various forms, they embodied a permanent 'registering of death upon the landscape', and signified the celebration of life. Remnants of *kawang* may be seen along the mountain ridges in Bario Lem Baaq, and the neighbouring villages today. People are able to tell the exact ridges where they or their ancestors created a *perupun*, *kawang*, *batu sinuped, nabang* or *bakut.* A descendant would say 'my father lies there' or 'my ancestor is on that ridge', or 'that kawang marks our territory'. [119] Families lay territorial claims to burial sites where their ancestors have been laid. These cultural landmarks and stone burial monuments are revisited as indicators and proof of the occupation of the

[118] Sinah Balang Imat or Kareb Ayu' of Pa' Umur, personal communication, Miri, October 2002. This was confirmed by Sina Robert also known as Adteh Kediah Aran, Semeraq Langit's youngest daughter, a personal communication, Kuching, November 2002.

[119] Belaan Ayuq, personal conversation, Bario 2002.

highlands by the Kelabit.[120] Other stone features whose creators are unknown, are said to have been erected by the legendary Seluyah or Tuked Rini,[121] the half spirit men in Kelabit mythology.[122] Numerous carvings either on huge rock boulders or rock outcrops are visible today in Pa' Umur,[123] Pa' Ukat,[124] Long Lellang,[125] Pa' Dalih,[126] Ramudu[127] and Long Peluan. These rocks carry oral narratives that are very much part of the Kelabit story and history, evidencing their enduring occupation.

This paper has attempted to articulate a legal view of rights by an indigenous community based on its own distinct cultural and experiential groundings. As the paper has illustrated, the first source of Kelabit rights to their lands is their own customary law systems. As the Federal Constitution has clearly defined law to include 'custom and usages having the force of law' it is maintained that their customary practices have conferred that right. As a people, they have lived and occupied the highlands, and have continued to do so for generations practicing their own customs and legal traditions. Common law itself also acknowledges that persons in exclusive occupation of land have title that is good against anyone who cannot show better title.

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120 There have been megalithic activities discovered in other locations in Borneo, but it was argued that the Kelabit Highlands stonework has unique features of its own. See, for instance, T Harrisson and S O'Connors "Gold-foil Burial Amulets on Bali, the Philippines and Borneo", *Journal of the Malaysian Branch of the Royal Asiatic Society,* 1971, Vol. 44, pp. 71–77. Other examples are found in: Tom Harrisson, "Megalithic Evidence in East Malaysia: An Introductory Summary", *Journal of the Malaysian Branch of the Royal Asiatic Society* , 1973, Vol. 46, p. 123 on stonework by the Kadazan in coastal Sabah (on Pulau Usukan and other offshore islets in northwestern Sabah). See also Tom Harrisson, "A Dying Megalithic of North Borneo", *Sarawak Museum Journal*, 1962, Vol. 10, p. 386. In Tom Harrisson, Barbara *Harrisson The Pre-History of Sabah* (1971), they reported that the rock carvings discovered in Ulu Tomani, Sabah, in April 1971, had features that closely matched the stone carvings found in the Kelabit country at Pa' Dalih and at Long Lellang in the Akah. Since there is no tradition or record of any megalithic activity among the present Tomani inhabitants, the Tagal, nor are any carved or cut rocks known even in the megalithic area of the Kadazandusun peoples further north, Harrisson posited that 'it seems likely that this is one of the many lost signs that the upland Kelabit people … once spread continuously much further north and south until they were decimated by the introduced epidemics after the arrival of western civilisation on the coast'. Such a thesis perhaps supports RS Douglas's statement that the Kelabit are practically the same race of people as are those known as Murut in the Trusan and Padas districts of Sabah. See Douglas, *Blackstone*'s *Commentaries on the Laws of England,* 1990, Vol. 2, 16th ed., p. 1825.

121 Lian Labang, "An Upland Stone Story", *Sarawak Museum Journal*, 1958, Vol. 8, pp. 402–404.

122 Monica Janovski, encapsulated some of this mythology and the feat of Tokid Rini in her book, Supra n 100.

123 One batuh narit is located at Arur Bilit, in Bala Pelaba's farm a short walking distance from the present Pa' Umur longhouse.

124 Batu Narit Pa'Ukat shows a side profile of a hornbill along the broad, flat face of the rock with several heart shaped designs above the hornbill's head while on the back of the rock are carved three hundred horizontal notches.

125 The carving on a large boulder of almost ten feet high may be seen on the way from Long Lellang to the old longhouse site in Long Dati. Harrisson, (1958), p. 113, described the discovery of a rock boulder in Long Lellang, which . Southwell cited in *Uncharted Waters* (1999) 289. The rock carving had distinct similarities to other monuments, most notably the rock carvings near Ramudu, the most southerly point of the Kelabit Highlands, many days travel from Long Lellang.

126 See Guy Arnold's description, *Supra* n 5, p. 102 and 191.

127 Batu Narit Tuked Rini at Long Tenarit, a large and flat stone which used to extend perpendicular to the

Regardless of the nature of rights under their own indigenous legal system,[128] and despite the absence of a surveyed and well-delineated boundary, their presence and occupation is etched in the landscape of the land that they call Kelabit ancestral homeland. Kelabit rights are also conferred by statute. As the Sarawak Land Code s 5 (2) requires cultivation and occupation of land prior to 1958, it is argued that the evidence of their burial grounds, the megalith and other cultural monuments, bear distinctive marks of Kelabit presence on the land that would satisfy the requirements of s 5(2) of the Land Code. It is not a question of whether the exact form of the custom remains but whether the community that practiced those customs continues to exist and occupy the land. The vitality and dynamism of customary laws means that the forms could be changed through the exercise of decision making vested in the community and their leaders. Whichever approach they may choose to use, they may still prove their rights to their ancestral lands in the Kelabit Highlands.

[128] Kent McNeil, "Judicial Treatment of Indigenous Land Rights in the Common law World", Richardson B.J, Imai, S and McNeil, K (eds.*) Indigenous Peoples and the Law, Comparative and Critical Perspectives*, Osgoode Readers, Hart Publishing, Oxford and Portland Oregon, 2009.

Striking a Balance between Patent Rights and Access to Essential Medicines Through the Use of Compulsory Licenses – Comparative Study of Indian and Malaysian Patent Laws

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Abstract

In view of the exorbitant prices charged by pharmaceutical companies as patent monopolists, the economically underprivileged, mostly residents of developing countries, are regularly denied access to essential medicines in as much as the medicines are largely beyond their means. 'Compulsory Licenses' are one of the means for bridging the gap between the high charges imposed by pharmaceutical patent monopolists and the affordability of the economically underprivileged patients. In the pharmaceutical sector, 'compulsory licenses' can be employed by the government to allow generic pharmaceutical companies to produce and sell the patented essential medicines at a fraction of the price being charged by the pharmaceutical monopolists for meeting its twin objectives of ensuring accessibility and affordability of essential medicines for all. In this article, benefits and criticisms of compulsory licenses in the backdrop of the comparative breadth and depth of the Indian and the Malaysian provisions for compulsory licenses have been examined

I. INTRODUCTION

Though scientists have been successful in making inroads into finding cures for some of the deadliest diseases of this century, it is saddening to note that their success has remained largely beyond the reach of the economically underprivileged. Essential medicines, differing from medicines in general, are those which satisfy the priority health care needs of the people[1]. Unfortunately, about one-third population of the developing countries is denied regular access to these medicines.[2] This is because exorbitant prices of essential medicines deter millions from availing their benefits. These prices are further exacerbated by issuance of pharmaceutical patents up to twenty years long, resulting in the sanctioning of monopoly. Pharmaceutical companies, as patent holders, are then uniquely placed to set monopolistic high prices for their patented medicines and thereby advance inequity in distribution of essential, life-saving medicines.

To counter the adverse effects of patents, the medium of compulsory license has been designed to meet the twin objectives of affordability and accessibility of essential

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1 *Essential Medicines*, World Health Organization: http://www.who.int/trade/glossary/story025/en/ Site accessed on 26 July 2015.

2 *Access to Medicines,* World Health Organization: http://www.who.int/trade/glossary/story002/3n/ Site accessed on 26 July 2015.

medicines for all.[3] Compulsory license refers to the license to use patented invention without the permission of the patent holder.[4] It acts as a legal counterweight against patent monopoly by facilitating access to the patented invention at reasonable prices.[5]

Globally, World Trade Organization's Trade Related Aspects of Intellectual Property Agreement, 1995 (TRIPS Agreement) allows its member states to provide for limited exceptions to the exclusive rights conferred to a patent holder,[6] including the provision for use of a patent by the government or by third parties duly authorised by the government, without the authorisation of the rights holder[7]. Accordingly, India and Malaysia as signatories to the TRIPS Agreement have provided for compulsory licenses in their respective patents laws.

In line with the above, Malaysia became the first member state of WTO to grant a compulsory license for an antiretroviral (AIDS) drug.[8] Following unsuccessful price negotiations with the patent holders, GlaxoSmithKline and Bristol-Myers Squibb, the Malaysian Minister of Domestic Trade and Consumer Affairs, at the instance of the Malaysian Ministry of Health, in 2003 granted a two year long 'government use' license for three patented anti-retroviral drugs vis didanosine (ddl), zidovudine (AZT) and lamivudine + zidovudine (Combivir), for their use in the treatment of AIDS[9]. In furtherance thereof, in 2004 the Minister entered into a contract with a generic drug company, Cipla Ltd., to import the three compulsory licensed drugs from India. Where initially the cost of treatment per patient per year with the patented drugs, as charged by the patent holders, was USD10,000 to 15,000 post grant of compulsory licenses, the Minister by way of import of generic medicines from India was able to price the drugs at one seventh of the original price, resulting in the treatment of an additional 2,500 HIV patients. Not that the patent holders were left entirely without any remuneration: remuneration at the rate of 4% of the value of stocks delivered to Malaysia was offered to them.[10]

Nine years behind Malaysia, in 2012, India granted its first ever compulsory license for an anti-cancer drug in favour of an Indian generic pharmaceutical company, Natco Pharma Ltd.[11] Previously, Natco had approached Bayer Corporation for a voluntary license

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3 Raadhika Gupta, "Compulsory Licensing under TRIPS: How Far it Addresses Public Health Concerns in Developing Nations", *Journal of Intellectual Property Rights*, 2010, Vol. 15, pp. 357-363.

4 Article 31, *Agreement on Trade-Related Aspects of Intellectual Property Rights.*

5 Report of the ASEAN Workshop on the TRIPS Agreement and its Impact on Pharmaceuticals, Jakarta, 2-4 May 2000, *The TRIPS Agreement and Pharmaceuticals*, Directorate General of Drug and Food Control and World Health Organization: http://apps.who.int/medicinedocs/pdf/h1459e/h1459e.pdf Site accessed on 26 July 2015.

6 Article 30, *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

7 *Supra* n 4.

8 Marius Meland, *Malaysia Issues World's First Compulsory License*, http://www.law360.com/articles/1035/malaysia-issues-world-s-first-compulsory-license Site accessed on 26 July 2015.

9 *Letter from Minister of Domestic Trade and Consumer Affairs, Malaysia to Director of Operations*, Consumer Project on Technology: http://www.cptech.org/ip/health/c/malaysia/arv-license.html Site accessed on 17 July 2015.

10 Martin Khor, *Compulsory License and Government Use to Promote Access to Medicines: Some Examples*, Third World Network, 2014, pp. 7-9.

11 *Natco Pharma Ltd v Bayer Corporation*, 9 March 2012, Compulsory License Application No. 1 of 2011, Controller of Patents, Mumbai: http://www.ipindia.nic.in/iponew/compulsory_license_12032012.pdf Site accessed on 16 July 2015.

to its patented drug Sorafenib (brand name: *Nexavar*), used in the treatment of liver and kidney cancer, offering to manufacture and sell the drug at a price of about USD155 per month's therapy as compared to the USD4,400 being charged by Bayer at that time. However, Natco's request was resoundingly rejected by Bayer. After a lapse of more than two years, Natco applied to the Indian Controller of Patents ('Controller') to seek a compulsory license for the drug, and on March 9, 2012, the Controller finding that all three grounds for grant of a compulsory license were met by Bayer, granted India's first and only compulsory license to date.[12] Subsequently, Bayer appealed to the Intellectual Property Appellate Board, petitioned the High Court of Bombay and even the Supreme Court of India, to set aside the compulsory license granted to Natco. Nonetheless, all three quasi-judicial/ judicial bodies upheld the order of the Controller.[13] As a result, now thousands of Indian kidney and liver cancer patients have access to *Nexavar* at a fraction of the original price.

II. PURPOSE OF COMPULSORY LICENSE

In lieu of public disclosure of the working of the patented invention, patents are granted to legally entitle the holder to exclude others from practicing the patented invention for a pre- determined period.[14] It is believed that through disclosure of the working of a patented invention, the public at large shall benefit from diffusion of knowledge and information whereby others shall be enabled to come up with newer and better inventions. India[15] and Malaysia[16] with the view to achieving technology diffusion under their respective patent laws clearly specify that *inter alia* the right of exclusion of a patent holder shall not extend to acts done in furtherance of scientific research.

However, and especially in the pharmaceutical sector, the advantages of patents are offset by the debilitating effects of patent monopoly on the public welfare. Denial of voluntary licenses for the working of the patented invention, monopolistic prices and supply shortages of the patented medicines are but a few examples of the adverse effects of pharmaceutical patent monopoly. Accordingly, for removal of the disadvantages of pharmaceutical patent monopoly, State intervention is called for. To this end, since patents are privileges granted by the State, the State in situations warranting concessions for preserving public welfare can limit the scope of patents.[17] One such medium through which potential abuse of patents can be limited by the State is that of compulsory license. By way of compulsory licenses the State can authorise others to use the pharmaceutical patent[18] and thus ensure the existence of multiple competitors in the pharmaceutical market.

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12 *Ibid*.

13 Samanwaya Rautray, *Nexavar License Case: SC Dismisses Bayer's Appeal Against HC Decision*, The Economic Times: http://articles.economictimes.indiatimes.com/2014-12-13/news/57012244_1_bayer-s-compulsory-licence-glivec Site accessed on 16 July 2015.

14 Muhammad Zaheer Abbas, "Pros and Cons of Compulsory Licensing: An Analysis of Argument", *International Journal of Social Sciences and Humanity*, 2013, Vol. 3, No. 3.

15 Section 47(3) Indian Patents Act 1970.

16 Section 37(1) Malaysian Patents Act 1983.

17 *Supra* n 14.

18 *Supra* n 4.

India, in particular, mandates that patents must not impede protection of 'public health' and nutrition but instead should endeavour to promote 'public interest', especially in sectors vitally important for socio-economic and technological development.[19] In addition, the Indian Central Government's power to take measures necessary for protection of 'public health' is not in any way deterred by patents.[20] Hence, in line with its emphasis on 'public welfare', India provides for 'compulsory licenses' to *inter alia* secure the fullest commercial working of the patented invention to the extent reasonably practicable[21] and to make the patented invention available to the public at reasonably affordable prices[22].

III. COMPATIBILITY WITH TRIPS AGREEMENT

Notwithstanding the TRIPS Agreement's stipulation for each member state to provide for pharmaceutical product and process patents in their respective patent laws,[23] the Agreement also allows for certain flexibilities to its member states such as the freedom to give effect to the provisions of the agreement and the freedom to choose a customised method of implementation appropriate for the individual domestic legal system.[24] Other flexibilities include the freedom of a member state to take measures necessary for protection of public health and nutrition[25] and the freedom to grant compulsory licenses under Article 31 of the Agreement.[26] Though Article 31 prescribes the procedural and substantive conditions for grant of compulsory licenses yet it does not extrapolate on the scope of the substantive conditions.[27] Instead, the Agreement permits its member states to use their own discretion in framing the grounds for grant of compulsory licenses.[28]

Specifically, in the context of pharmaceutical patents, the Doha Declaration on the TRIPS Agreement and Public Health, 2001 acknowledges the necessity of member states to take measures for protection of public health and promotes the purposive interpretation and implementation of provisions of the TRIPS Agreement for meeting the objectives of accessibility and affordability of essential medicines for all.[29] The Declaration particularly encourages developing countries to fully explore the flexibilities of Article 31 of the TRIPS Agreement[30] and to freely determine the scope of compulsory licenses.[31]

Having incorporated these flexibilities in their respective patent laws, both India and Malaysia should now work towards adopting the most expansive interpretation of

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19 Section 83(d) Indian Patents Act 1970.
20 Section 83(e) Indian Patents Act 1970.
21 Section 89(a) Indian Patents Act 1970.
22 Section 90(3) Indian Patents Act 1970.
23 Article 27, *Agreement on Trade-Related Aspects of Intellectual Property Rights.*
24 Article 1.1, *Agreement on Trade-Related Aspects of Intellectual Property Rights.*
25 Article 8, *Agreement on Trade-Related Aspects of Intellectual Property Rights.*
26 *Supra* n 4.
27 *Ibid.*
28 *Ibid.*
29 Paragraph 4, *Declaration on the TRIPS agreement and Public Health*, 14 November 2001.
30 *Ibid.*
31 Paragraph 5, *Declaration on the TRIPS agreement and Public Health*, 14 November 2001.

the TRIPS provisions as possible for translating the flexibilities of the Agreement into tangible benefits for their economically weak and underprivileged populations.

IV. SCOPE OF COMPULSORY LICENSE

The TRIPS Agreement mandates that the scope and duration of a compulsory license must be limited to the purpose for which it has been authorised.[32] In furtherance thereof, India and Malaysia have included certain limitations with regard to the use of compulsory licenses, including limitations of non-exclusivity and non-assignability of compulsory licenses.[33] While India mandates a blanket prohibition on assignment of compulsory licenses, Malaysia prohibits a beneficiary of a compulsory license to conclude license contracts with third parties[34] but on the other hand allows assignment of compulsory licenses in connection with the 'goodwill' or 'business' or that part of the goodwill or business in which the patented invention is used.[35] Since the terms 'goodwill' and 'business' have neither been defined under the Malaysian Patents Act, 1983 and nor has its meaning been explored by the Malaysian Judiciary, the true interpretation of the scope and extent of this exception remains ambiguous.

Further limitations include a mandatory requirement of working of the compulsorily licensed patented invention in the respective territories of India[36] and Malaysia[37]. In this endeavour, an Indian beneficiary is barred from importing the patented invention from abroad inasmuch as the importation constitutes infringement of the rights of the patent holder,[38] though conversely no such restriction has been recognised in Malaysia. Additionally, beneficiaries are also bound to remunerate the patent holders for use of their patented invention and the amount of such payable royalty shall be set forth by the Indian Controller[39] and the Malaysian Corporation[40] at the time of fixing the terms of compulsory licenses. Pursuant thereto, the Indian Patents Act, 1970 lays down certain factors to be considered for establishing the value of 'reasonable' royalty viz. the nature of the invention, the expenditure incurred by the patentee in making, developing or obtaining the patent and other relevant factors.[41] *Nexavar* compulsory license being the case in hand, the Controller therein, with due regard to the 'reasonable' royalty factors, directed Natco to pay Bayer Corporation a royalty at the rate of 6% of the net sales value of *Nexavar*, which was later increased by the Appellate Board to 7%.[42] Moreover, under the Indian patents

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32 *Supra* n 4.
33 Section 90(1)(iv) and (v) Indian Patents Act 1970.
34 Section 53(2) Malaysian Patents Act 1983.
35 Section 53(1)(a) Malaysian Patents Act 1983.
36 Section 90(1)(ii) Indian Patents Act 1970.
37 Section 54(2)(b) Malaysian Patents Act 1983.
38 Section 90(2) Indian Patents Act 1970.
39 Section 90(1)(i) Indian Patents Act 1970.
40 Section 52 Malaysian Patents Act 1983.
41 *Supra* n 39.
42 *Bayer Corporation v Union of India*, 4 March 2013, (OA/35/2012/PT/Mum), Intellectual Property Appellate Tribunal: http://www.ipabindia.in/Pdfs/Order-45-2013.pdf Site accessed on 20 July 2015.

Act, 1970, the Controller while setting the terms and conditions of a compulsory license is bound to also ensure that the beneficiary is able to earn a reasonable profit from working of the patented invention without hindering the availability of the patented invention at 'reasonably affordable prices'.[43] Absence of a corresponding provision in the Malaysian Patents Act, 1983 is unfortunate as it may result in discouraging the Malaysian generic pharmaceutical companies from taking the initiative of acquiring compulsory licenses.

In addition, the scope of a compulsory license is also limited by its duration of applicability. Although the three Malaysian 'government use' licenses for antiretroviral drugs were granted for a period of two years[44], the Indian compulsory license for *Nexavar* shall continue to be in force for the remaining lifespan of the patent.[45] Moreover, in case Bayer Corporation, even after two years from the date of grant of the compulsory license, fails to dispel all three of the grounds which formed the basis for grant of the compulsory license to Natco, any interested person, including the Central Government, can approach the Patent Office to seek revocation of the concerned patent. If however Bayer, during the subsistence of the compulsory license, is able to offset all three grounds of the compulsory license, then based on the change in circumstances, upon Bayer's request, the Controller can terminate the compulsory license, provided Bayer is able to first establish non-recurrence of its previous conduct.[46] Similarly, in Malaysia a compulsory license can be amended[47] or cancelled[48] when the circumstances which gave rise to the compulsory license cease to exist. Herein, the inclusion of termination provision in the scheme of compulsory licenses reinforces the proposition that compulsory licenses are in fact not granted for the benefit of the applicant but instead are the medium for ensuring that the patented invention reaches the public.[49]

V. COMPULSORY LICENSE TO IMPORT FROM ABROAD

Ordinarily, a patent holder is entitled to exclude others from importing their patented invention from abroad, however in furtherance of 'public interest' the Indian Central Government can direct the Controller to authorise a beneficiary to import the compulsorily licensed patented invention.[50] As the Indian legislature has not narrowed down the ambit of 'public interest' under this provision by inclusion of any qualifications, in its broadest form 'public interest' can be read to include accessibility and affordability of essential medicines by all, and hence hypothetically in all circumstances where the twin objectives of accessibility and affordability are not met, a beneficiary can be allowed to import the patented medicine from abroad. This exception is notwithstanding the presence or absence of adequate pharmaceutical manufacturing facilities within the territory. Yet,

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43 Section 90(1)(ii) and (iii) Indian Patents Act 1970.
44 *Supra* n 8.
45 *Supra* n 11.
46 Section 94 Indian Patents Act 1970.
47 Section 54(1) Malaysian Patents Act 1983.
48 Section 54(2)(a) Malaysian Patents Act 1983.
49 *Supra* n 42.
50 *Supra* n 22.

this import authorisation need not entirely be unrestricted. The Central Government can, at its discretion, make these imports conditional upon payment of royalty or any other remuneration to the patent holder, and can otherwise stipulate the quantum of imports allowed, the sale price chargeable for the imported patented medicine, the period of importation, and any other condition that it may deem relevant.[51]

India by means of this exception has re-emphasised its pro 'public interest' patent policy which is found to be the common thread running through each provision concerning compulsory licenses under the Indian Patents Act 1970. In this regard, Malaysia lags behind India as it not only lacks an equivalent provision for 'public interest' guiding import authorisation under a compulsory license, but it has also to date not incorporated the WTO decision of 2003, as explained herein below.

VI. COMPULSORY LICENSE TO EXPORT TO OTHER COUNTRIES

Earlier, export under a compulsory license had been restricted under the TRIPS Agreement with only a limited implied exception existing for export of the surplus products upon satisfaction of the domestic demands. Principally, compulsory licenses were granted predominantly for supply to the domestic markets.[52] This restriction on export of patented medicines had a severe impact on accessibility of patented essential medicines, particularly affecting the interests of patients of countries with minimum to no pharmaceutical manufacturing capacities such as Malaysia of 2004, as these countries were left without any reasonable avenue for meeting their immediate demand for these essential medicines. Considering that the said restriction was one of the strongest deterrents against achieving a unanimous WTO approval of the TRIPS Agreement, pursuant to the Doha Declaration on the TRIPS Agreement and Public Health of 2001, a compromise was reached on 30 August 2003 to allow export of compulsorily licensed patented medicines to countries with insufficient or no manufacturing capacities[53] provided the importing countries grant a compulsory license in their territory for the patented medicine,[54] take reasonable measures for blocking re-export of imported medicines to another country[55] and provide for effective legal means for prevention of any inconsistent import or sale of patented medicines within their territories[56].

Nonetheless, WTO's laudable move has not escaped its fair share of criticisms. Its policy of requiring prior notification by a member state of its intention to import[57] or

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51 *Ibid.*

52 Article 31(f), *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

53 Paragraph 6, *Declaration on the TRIPS agreement and Public Health*, 14 November 2001.

54 Article 2(a)(iii), *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health,* 30 August 2003.

55 Article 4, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health,* 30 August 2003.

56 Article 5, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health,* 30 August 2003.

57 Article 1(b), *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health,* 30 August 2003.

export[58] patented medicines; prior establishment of a website specifying the details of the imported/ exported patented medicines;[59] and employment of distinguishing features like special packaging and/ or special colouring/ shaping for the patented medicines[60] have been criticised for being time consuming, cumbersome and unnecessary hindrances to effective importation of patented medicines.[61]

Though India has ratified the WTO decision of 30 August 2003,[62] Malaysia, favouring supply within its domestic territory,[63] has refrained from incorporating this decision despite previously having taken advantage of the flexibilities of this decision for importing patented antiretroviral drugs from India.[64] Unlike Malaysia, India not only allows exports to countries with insufficient or no pharmaceutical manufacturing capacities but also allows exports for supply and development of export markets in general.[65]

Another exception against prohibition of export has been devised for remedying the 'judicially or administratively determined' anti-competitive practices of a patent holder.[66] Ergo if denial of a voluntary license for meeting of external demands is found to be an anti-competitive refusal on part of the patent holder, then a compulsory license for export can be granted. Interestingly, considering that here the very act of an anti-competitive refusal is sufficient for permitting export of the patented invention, the scope of 'external demands' herein may even be wider than that of WTO decision of 2003 to additionally include demands of countries with adequate pharmaceutical manufacturing capacities[67]. Yet again, even though India has incorporated this additional exception of the TRIPS Agreement in its patent laws,[68] Malaysia has not.

VII. GROUNDS FOR CLAIMING A COMPULSORY LICENSE

An application for a compulsory license in India must satisfy any of the following three grounds, namely:

(i) non-satisfaction of the reasonable requirements of the public;
(ii) non-availability of the patented invention at reasonably affordable prices; or
(iii) non-working of the patented invention in India.[69]

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58 Article 2(c), *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health,* 30 August 2003.

59 Article 2(b)(iii), *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health,* 30 August 2003.

60 Article 2(b)(ii), *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health,* 30 August 2003.

61 *Supra* n 3.

62 Section 92A Indian Patents Act 1970.

63 Section 53(1)(b) Malaysian Patents Act 1983.

64 *Supra* n 9.

65 Section 90(1)(vii) Indian Patents Act 1970.

66 Article 31(k), *Agreement on Trade-Related Aspects of Intellectual Property Rights.*

67 Ng-Loy Wee Loon, "Exploring Flexibilities within the Global IP Standards", *Intellectual Property Quarterly*, 2009.

68 Section 90(1)(ix) Indian Patents Act 1970.

69 Section 84(1) Indian Patents Act 1970.

Separately, in Malaysia, a person can apply to the Registrar for a compulsory license where any of the following circumstances arise without a legitimate reason:

(i) non-meeting of public demand;
(ii) non-availability of the patented product for sale in any of the domestic markets;
(iii) unreasonably high prices of the patented product; or
(iv) non-production of the patented product or application of the patented process in Malaysia.[70]

Comparing the two sets of grounds, it is apparent that though the same are couched in different words, both India and Malaysia construe eligibility of compulsory licenses in similar circumstances. While the Indian Judiciary, in keeping with the spirit of the Doha Declaration of 2001, has liberally interpreted the scope of these grounds in the *Nexavar* case, the Malaysian Judiciary has not yet been approached to review the legality and scope of these grounds. In view of the similarities between the compulsory licensing regimes of the two countries, Malaysia is open to borrow the Indian learnings in this regard.

A. Meeting Reasonable Requirements of the Public

While patent holders have the prerogative to refuse a license for their patented invention, they are also bound to meet the 'reasonable requirements of the public' for their patented invention. With the view to balance the two competing interests, the Indian Patents Act, 1970 specifies that if a reasonably termed license to a patented invention is refused and in consequence an existing trade/ industry or other commercial activities or development thereof is prejudiced or establishment of a new trade or industry is prejudiced, or demand for the patented invention with regard to both quantity and price,[71] is not adequately met, or establishment or development of a market for export is prejudiced[72] or for that matter anti-competitive terms like exclusive grant back, waiver of right to challenge the validity of the patent, coercive package licensing etc. are mandatorily included in the license agreement[73], then the patent holder shall be considered to have not met the 'reasonable requirement of the public'.

Independently, in case a patent holder even after expiry of three years from the date of grant of patent does not work the patented invention to an adequate commercial extent or to the fullest extent that is reasonably practicable[74]or otherwise hinders the working of the patented invention in India by way of importing the patented invention,[75] then again the reasonable requirements of the public shall be deemed to be not met. In the context of essential medicines, working the patented medicines to an 'adequate commercial extent' refers to meeting the 100% demand, with no patient being left in want of a patented

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70 Section 49(1)(a) and (b) Malaysian Patents Act 1983.
71 *Supra* n 42.
72 Section 84(7)(a) Indian Patents Act 1970.
73 Section 84(7)(c) Indian Patents Act 1970.
74 Section 84(7)(d) Indian Patents Act 1970.
75 Section 84(7)(e) Indian Patents Act 1970.

medicine.[76] As in the case of Bayer Corporation, its act of making the patented medicine available to less than 3% of the eligible patients was determined by the Controller to be insufficient for meeting the reasonable requirements of the public.[77]

B. Making the Patented Invention Available to the Public at Reasonably Affordable Prices

'Reasonably affordable price' has neither been defined under the Indian Patents Act 1970 nor under the Malaysian Patents Act 1983. Its scope instead was determined by the High Court of Bombay in the *Nexavar* case wherein the court held that the reasonably affordable price of a patented drug is dependent on *inter alia* the evidence led by the applicant and the patent holder on their proposed respective prices; the relative price of the applicant in comparison to the patent holder; and the research and development costs incurred for the patented drug.[78] When Bayer priced *Nexavar* at about USD4400 for one month of therapy and on the other hand Natco offered to supply *Nexavar* at a much reduced price of about USD155 for a month long therapy, the High Court of Bombay after considering the purchasing ability of the public determined that the price being charged by Bayer was *'unreasonable for a very large section of the public'*. Even though Bayer had offered differential pricing under its Patient Assistance Program, and *Nexavar* provided it at subsidised prices to the economically weaker patients, the Court found that the cost of the medicines was itself so prohibitive that in spite of the subsidies the medicine remained unaffordable by the public at large. Consequently, the Court upheld the compulsory license granted by the Controller to Natco.[79]

Much as Bayer had failed to satisfy the Court as to the affordability of *Nexavar*, the mode of 'differential pricing' of patented medicines for the different economic stratum of a population is a viable alternative for pharmaceutical companies to recoup their costs and simultaneously ensure accessibility and affordability of the patented medicines by all. As explained later in this article, through differential pricing, pharmaceutical companies by charging in accordance with the paying capacity of the patient can equalise their high, low or even forgone profits on sale of patented medicines.

C. Working the Patented Invention in the Territory

Patents are not granted to merely enable patent holders to monopolise imports of the patented invention.[80] Rather, patents are granted to create a sound technology base and to contribute to the promotion and transfer of technological innovation and dissemination of knowledge in a manner which is conducive to the social and economic welfare of the

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76 *Bayer v Union of India*, AIR 2014 Bom 178.
77 *Supra* n 11.
78 *Supra* n 76.
79 *Ibid.*
80 Section 83(b) Indian Patents Act 1970.

people.[81] The question then arises as to how these objectives of patent protection can be secured.

As the hotly debated Article 27(1) of the TRIPS Agreement stipulates that patents shall be enjoyed without discrimination as to the place of invention, be it foreign or local,[82] accordingly, any requirement of local production of a patented invention shall run contrary to Article 27(1). But then the Agreement also acknowledges 'technology transfer' as one of the objectives of patent protection;[83] and local manufacture of a patented invention is most conducive for enabling transfer of technology in a territory. Consequently, these conflicting requirements under the TRIPS Agreement can only be resolved by harmonising the principle of exhaustion with the local working requirement. Take India, for instance, despite emphasising on the local working of a patented invention[84], it does not impose a mandatory obligation on patent holders to locally work their patented inventions, especially where it may not be feasible for a patent holder to work his invention in India.[85] While determining the extent of the working of *Nexavar* in India, the High Court of Bombay held that local manufacture is not necessary for establishing the working of a patented invention if the patent holder is able to satisfy the Controller as to why the patented medicine is not being manufactured in India, and if the Controller's concerns are alleviated, the patented medicine can be considered to be worked in India by way of imports.[86]

Moreover, in case the patent holder is found to have promptly taken adequate or reasonable steps to work the invention, but as on the date of application for a compulsory license, the patented invention has not adequately, or on a commercial scale, or to the fullest extent reasonably practicable, been worked in India, then if the Controller is of the mind that the time elapsed since sealing of the patent has been insufficient for working the invention, he can adjourn the proceedings for a maximum period of twelve months to allow the patent holder to fulfil his obligation of working the patented invention.[87] Further, if the patent holder is able to establish that he was unable to work the patented invention in India due to imposition of any State or Central Government's Act, Rule, Regulation, or Order, not being a condition for working the invention in India, then the period of adjournment shall be reckoned from the date of expiry of the preventive Act, Rule, Regulation or Order.[88]

Next, the question of determining the extent of local working of the patented invention shall depend on *inter alia* commercial scale of working and the resultant mutual advantage to technological advancement of producers as well as users of technology.[89]

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81 Section 83 (c) Indian Patents Act 1970.
82 *Supra* n 23.
83 Article 7, *Agreement on Trade-Related Aspects of Intellectual Property Rights.*
84 Section 83(a) Indian Patents Act 1970.
85 *Supra* n 76.
86 *Ibid.*
87 Section 86(1) Indian Patents Act 1970.
88 *Ibid.*
89 *Supra* n 76.

Hence, working of a patented invention is not formulaic and can be determined only on a case-to-case basis.

VIII. PROCEDURE FOR GRANT OF COMPULSORY LICENSE

At any time after expiration of three years from the date of grant of a patent (or four years from the date of filing of a patent application in Malaysia[90]), any person, including licensees of the patent holder, may apply to the Indian Controller/the Malaysian Registrar for a compulsory license on a patent.[91]

The procedure in India for processing an application for a compulsory license is that upon receipt of such an application, as a first step the Controller shall determine whether any of the grounds for claiming compulsory license have been satisfactorily proven by the applicant.[92] To that end, he shall consider the nature of the invention; the time elapsed since the sealing of the patent and the measures taken by the patent holder and/or his licensee for fully utilising the patented invention.[93] Next, he shall consider the ability of the applicant to work the invention to the public advantage and his capacity to undertake the risk of providing capital for working the invention.[94] Lastly, he shall consider if the applicant has made prior efforts for a reasonable period, ordinarily not exceeding six months, to obtain from the patent holder a voluntary license on reasonable terms and conditions.[95]

In so far as the extent of 'prior efforts' that are required of an applicant is concerned, the issue has been previously determined by the Controller in the case of *BDR Pharmaceuticals International Pvt. Ltd v Bristol Myers Squibbs Company*[96]. In this case, BDR Pharmaceuticals had initially requested Bristol Myers Squibbs to grant a voluntary license to itself, and in response, Bristol Myers had questioned BDR on its ability to continuously supply high volumes of the drug, capacity for maintenance of the requisite quality, capacity for compliance with regulatory standards, capability as to maintenance of a safe profile, and its litigation history. Instead of addressing these queries, negotiating or even seeking a settlement with Bristol Myers, BDR, assuming the queries to be "*clearly indicative of rejection of the application for voluntary license",* did not immediately pursue the matter. Only after almost a year, BDR preferred an application for compulsory license before the Controller of Patents. The Controller, finding that BDR had made no efforts to negotiate a voluntary license from Bristol Myers, rejected BDR's application for a compulsory license. In making this decision, the Controller held that during negotiations a patent holder is entitled to satisfy himself regarding the credentials and capability of the applicant as well as the terms and conditions of a voluntary license

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90 Section 49 Malaysian Patents Act 1983.

91 Section 84(1) Indian Patents Act 1970 and section 49(1) Malaysian Patents Act 1983.

92 Section 84(4) Indian Patents Act 1970.

93 Section 84(6)(i) Indian Patents Act 1970.

94 Section 84(6)(ii) and (iii) Indian Patents Act 1970.

95 Section 84(6)(iv) Indian Patents Act 1970.

96 *BDR Pharmaceuticals v Bristol Myers Squibb Company*, 29 October 2013, C.L.A. No. 1 of 2013, The Controller of Patents, Patents Office, Mumbai: http://ipindia.nic.in/iponew/Order_30October2013.pdf: Site accessed on 24 July 2015.

and even if the applicant believes the patent holder to be engaging in dilatory tactics, he must, in accordance with the scheme of law, continue the deliberations with the patent holder for a period of at least six months before applying for a compulsory license; excepting where there is an emphatic rejection from the patent holder in which case the applicant is not required to keep repeating the requests for a voluntary license.[97] Further, the Controller stressed upon the requirement of an applicant to establish 'prior' efforts and held that any attempts made subsequent to filing of an application shall unduly advantage the applicant by empowering him to pursue a compulsory license while simultaneously negotiating with the patent holder, and hence shall not be considered.[98]

Finally, if the Controller upon consideration of all the aforesaid factors is satisfied that a *prima facie* case for grant of a compulsory license has been made out by the applicant, he will then notify the patent holder(s) or any other interested party/parties[99] and provide them with an opportunity to present their respective case. [100] Upon conclusion of the hearing, the Controller after finding that any one or more grounds for a compulsory license exist can grant a compulsory license to the applicant on such terms and conditions as he deems fit. [101] Thereupon the patent holder may challenge the decision of the Controller before the Intellectual Property Appellate Board and/or the High Court but all the same, in the absence of a contrary condition, untill that time as when the decision of the Controller is stayed/ set aside by a higher quasi-judicial/ judicial authority, the beneficiary shall not be barred from taking the benefit of the granted compulsory license.

Conversely, the Malaysian procedure for grant of a compulsory license is not as elaborate as that of India. Although the Malaysian Corporation for deciding on the application for compulsory license[102] allows the applicant to present his case, furnish any relevant document or lead evidence to prove that prior efforts have been made to obtain a reasonably termed authorisation from the patent holder,[103] in striking contrast with India, the Corporation has no corresponding obligation to provide an opportunity to the patent holder for opposing the said application. Instead, the patent holder is permitted to approach the Corporation only subsequent to the grant of a compulsory license to seek cancellation[104] or amendment[105] thereof. This procedural defect can lead to far reaching consequences for the Malaysian patent holders as the imminent threat of applicants exploiting the compulsory licensing provisions by maximising the use and/ or manufacture of the patented invention during the period it takes for the patent holder to stay the operation of the compulsory license cannot be discounted. Hence, there is an urgent need to impress upon the Malaysian law makers to rectify such defect.

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97 *Supra* n 42.
98 *Supra* n 96.
99 Section 87(1) Indian Patents Act 1970.
100 Section 87(4) Indian Patents Act 1970.
101 Section 84(4) Indian Patents Act 1970.
102 Section 51(1) Malaysian Patents Act 1983.
103 Section 49(2) Malaysian Patents Act 1983.
104 Section 54(2) Malaysian Patents Act 1983.
105 Section 54(1) Malaysian Patents Act 1983.

IX. GOVERNMENT AUTHORISED COMPULSORY LICENSE

'Government authorised' compulsory licenses have been included in the TRIPS Agreement as an alternative to the ordinary mode of grant of compulsory licenses.[106] In situations of national emergency, other circumstances of extreme urgency and for public non-commercial use[107] in India and respectively during national emergency or during threat to public interest or threat to national security or threat to the development of vital sectors of the economy such as nutrition and health[108] or in case of anti-competitive exploitation of a patented invention in Malaysia[109] (non-inclusion of this additional criterion is a remiss on India's part), the Governments of both countries are empowered to grant 'government authorised' compulsory licenses.

The importance of 'government authorised' compulsory licenses lies in the fact that these licenses are equipped with an expeditious response action time. Particularly in relation to public health crises when urgent intervention is incumbent to prevent a full-blown epidemic, government authorised compulsory licenses for patented medicines aid in expeditiously securing adequate supply of requisite essential medicines.

Under the alternative expeditious mode of grant of government authorised compulsory licenses, the Indian Central Government can *suo motu* dispense with the prerequisite waiting period of three years and the requirement of six months of prior negotiations, and can without any delay issue a declaration in the Official Gazette to the effect that it authorises the grant of compulsory licenses to all applicants for the identified patents.[110] Whereupon the Controller can waive the ordinarily prescribed hearing for challenging the application and instead immediately proceed to grant compulsory licenses[111] on such terms and conditions that are favourable to achieving the lowest price of the invention without impinging on the patent holder's right to derive a reasonable advantage from his patent.[112] Separately, Malaysia also forgoes its ordinary procedure for grant of compulsory licenses in favour of the decision of the Minister.[113] Though the Malaysian patent holder has no say in the Minister's decision of grant of compulsory licenses, he or any other interested party can make their submissions with regard to the expected remuneration for exploitation of the patent.[114] While the Indian Government provides for grant of government authorised compulsory license to 'any person',[115] the Malaysian Government limits the beneficiaries of government authorised compulsory licenses to government agencies or the designated third parties.[116] Previously, following the 2001 Doha Declaration's affirmation that crises relating to HIV/ AIDS, tuberculosis, malaria and other epidemics represent national emergencies or other circumstances of

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106 *Supra* n 4.
107 Section 92(1) Indian Patents Act 1970.
108 Section 84(1)(a) Malaysian Patents Act 1983.
109 Section 84(1)(b) Malaysian Patents Act 1983.
110 *Supra* n107.
111 Section 92(3) Indian Patents Act 1970.
112 *Supra* n 107.
113 Section 84(1) Malaysian Patents Act 1970.
114 Section 84(3) and (4) Malaysian Patents Act 1983.
115 *Supra* n 107.
116 *Supra* n 113.

extreme urgency,[117] Malaysia had granted three 'government authorised' compulsory licenses for patented antiretroviral medicines.

X. COMPULSORY LICENSING OF INTERDEPENDENT PATENTS

In addition to the aforesaid grounds for grant of compulsory licenses, the TRIPS Agreement also provides compulsory licenses for interdependent patents i.e. those patents which cannot be exploited without infringing the other.[118] Both India and Malaysia respectively have incorporated the provisions for compulsory licensing of interdependent patents, but the scope of the parallel provisions in the two countries is at variance, with Malaysia focussing more on the 'priority' of the interdependent patents.

India stipulates that if a patented invention substantially contributing to the establishment and development of commercial or industrial activities of India[119] is prevented from being efficiently and most advantageously worked because the same would result in infringement of another patented invention, then a compulsory license for the other patented invention can be granted,[120] provided the patent holder of the other patented invention is able to secure a compulsory license for the concerned patented invention also.[121] This being the more general provision for compulsory licensing of interdependent patents, specifically India also recognises that in case of a single patent holder's bundle of patents consisting of two sets, with one set of patents meeting the reasonable requirement of the public and the other set qualifying for grant of a compulsory license, if the Controller finds that the second set of patents cannot be efficiently or satisfactorily worked without infringing the first set of patents and involves technical advancement of considerable economic significance in relation to the first set of patents, then along with the second set of patents he can grant a compulsory license for the first set of patents also, irrespective of the priority of the patents.[122]

On the other hand, Malaysia provides that if a later invention, constituting an important technical advance of considerable economic significance in relation to a patent with an earlier priority date (earlier patent) cannot be worked without infringing such earlier patent, then the Corporation can grant a compulsory license for the earlier patent to the extent necessary for the later invention to be worked without infringing the same,[123] and vice versa also grant a compulsory license for the later invention to the patent holder, licensee or beneficiary of the earlier patent.[124] Therefore, it is apparent that unlike India, Malaysia lays more importance on the priority of interdependent patents for grant of compulsory licenses, and in consequence, restricts patent holders of earlier

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117 *Supra* n 31.
118 *Supra* n 4.
119 Section 91(2)(ii) Indian Patents Act 1970.
120 Section 91(1) Indian Patents Act, 1970.
121 Section 91(2)(i) Indian Patents Act 1970.
122 Section 88(3) Indian Patents Act 1970.
123 Section 49A(1) Malaysian Patents Act 1983.
124 Section 49A(2) Malaysian Patents Act 1983.

patents from being the first to approach the Controller for seeking a compulsory license for an interdependent later invention.

XI. DEBUNKING CRITICISMS AGAINST COMPULSORY LICENSE

In spite of its obvious contribution towards achieving accessibility and affordability of essential medicines, compulsory licenses have been severely criticised by developed countries, home to all the major pharmaceutical companies.[125] The developed countries claim that interference with the exclusivity enjoyed by a patent holder may deter pharmaceutical companies from investing in research and innovation for new medicines. Pharmaceutical companies themselves allege that by being forced to reduce their prices under the threat of compulsory licenses, they will not be able to recover their costs of research and development, currently claimed to be USD5 billion per drug, and that in consequence they will face insurmountable losses.[126] Their asserted claims may have had force if pharmaceutical companies had been genuine in pricing their medicines. Instead, at the prices the medicines are being sold, the patients end up paying about twice the actual cost of the medicines while the global pharmaceutical companies earn a humungous profit margin of about 20-40%.[127] Shockingly, over a period of ten years from 2003 to 2012, the largest pharmaceutical companies have collectively earned a profit of USD711.4 billion.[128] Not all of their staggering profits have been dedicated to research and development. Rather, pharmaceutical companies spent about one-third of their sales revenue on marketing.[129] Plus pharmaceutical companies at the time of proclaiming costs to the tune of USD5 billion do not account for the substantial research subsidies and tax deductions which are offered to them by the State.[130] Lack of clarity on the net expenditure incurred on research and development cloaks pharmaceutical companies' practice of continuing to charge supernormal profits from the patients, even after recovery of their entire research and development cost.[131] In fact, the prices of essential medicines rarely reflect their 'fair value' but manifest the value that can be fetched from the market from 'grateful victims' who, left without any alternatives, pay the exorbitant prices of the medicines for their survival.[132] Not that the pharmaceutical companies should entirely

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125 *Supra* n 14.

126 Matthew Herper, *The Cost of Creating a New Drug Now $5 billion, Pushing Big Pharma to Change*, Forbes: http://www.forbes.com/sites/matthewherper/2013/08/11/how-the-staggering-cost-of-inventing-new-drugs-is-shaping-the-future-of-medicine/ Site accessed on 26 July 2015.

127 Richard Anderson, 6 November 2014, *Pharmaceutical Industry Gets High on Fat Profits*, BBC News: http://www.bbc.com/news/business-28212223 Site accessed on 26 July 2015.

128 Ethan Rome, *Big Pharma Pockets $711 Billion in Profits by Robbing Seniors, Taxpayers*, The Huffington Post: http://www.huffingtonpost.com/ethan-rome/big-pharma-pockets-711-bi_b_3034525.html?ir=India&adsSiteOverride=in Site accessed on 26 July 2015.

129 *Pharmaceutical Industry*, World Health Organization: http://www.who.int/trade/glossary/story073/en/ Site accessed on 26 July 2015.

130 *Rx R&D Myths: The Case Against The Drug Industry's R&D "Scare Card"*, Public Citizen's Congress Watch: http://www.citizen.org/documents/ACFDC.PDF Site accessed on 26 July 2015.

131 *Supra* n 11.

forgo 'healthy profits', but rather that their practices of 'profiteering' from the sale of essential medicines must be curbed. In this regard, compulsory licenses play a key role.

Having said that, the genuine concerns of the pharmaceutical companies can be mitigated, especially in countries where medical expenses are privately borne, through differential pricing of patented medicines on the basis of the varying economic abilities of the patients.[133] By charging higher prices from persons belonging to the higher income bracket, the subsidised prices offered to those with lower incomes can be offset so that not only every strata of the population is able to access the essential medicines but the pharmaceutical companies are also able to recoup their legitimate costs in accordance with the paying capacity of the patients. Despite the burden of complications in implementing the scheme of differential pricing, the shortcomings do not detract from its ability to improve the overall accessibility to essential medicines.[134]

XII. CONCLUSION

Developed countries, at the behest of their pharmaceutical companies, have been increasingly pressurising developing countries to strengthen their allegedly weak intellectual property laws. Through Bilateral Agreements and Multilateral Free Trade Agreements, developed countries to discourage the grant of compulsory licenses, and are increasingly threatening developing countries with trade sanctions.[135] Unfortunately, seeing that in spite of TRIPS compatibility, to date only a handful of compulsory licenses have been granted by developing countries, the developed countries have been successful in their threats to a certain degree.

In 2012, when India granted its first compulsory license for Bayer's patented medicine, *Nexavar*[136], developed countries raised a collective outcry against India and made tall allegations of misuse of compulsory licensing provisions,[137] culminating in demotion of India's position on the United States of America's Global Intellectual Property Index.[138] Still India, secure in its stance on maintaining accessibility and affordability of

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132 *The Price of Drugs for Chronic Myeloid Leukemia (CML); A Reflection of the Unsustainable Prices of Cancer Drugs: From the Perspective of a Large Group of CML Experts*, Blood Journal: http://www.bloodjournal.org/content/bloodjournal/early/2013/04/23/blood-2013-03-490003.full.pdf?sso-checked=true Site accessed on 26 July 2015.

133 *Supra* n 76.

134 Patricia M. Danzon and Adrian Towse, "Differential Pricing for Pharmaceutical: Reconciling Access, R&D and Patents", *International Journal of Health Care Finance and Economics*, 2003, Vol. 3, pp. 183-205.

135 Patralekha Chatterjee, 12 March 2013, *Leaked IP Chapter of India –EU FTA Shows TRIPS Plus Pitfalls for India, Expert Says*, Intellectual Property Watch: http://www.ip-watch.org/2013/03/12/leaked-ip-chapter-of-india-eu-fta-shows-trips-plus-pitfalls-for-india-expert-says/ Site accessed on 26 July 2015.

136 *Supra* n 11.

137 Amiti Sen, 27 March 2012, *US Protests Patent Issuance to Natco to Sell Copied Versions of Nexaver*, The Economic Times: http://articles.economictimes.indiatimes.com/2012-03-27/news/31245102_1_compulsory-licence-patent-owner-indian-patent-office Site accessed on 25 July 2015.

138 *Measuring Momentum*, GPIC International IP Index, First Edition, 2012, Global Intellectual Property Centre: http://dev.theglobalipcenter.com/wp-content/uploads/2013/01/020119_GIPCIndex_final.pdf Site accessed on 25 July 2015.

essential medicines, continued to stand steady against the relentless onslaught.[139] Rather, in 2013 the Union Ministry of Health approached the Department of Industrial Policy and Promotion (DIPP) in pursuit of 'government authorised' compulsory licenses for three anti-cancer drugs, namely Herceptin, Ixabepilone (both used in the treatment of breast cancer) and Dasatinib (used in the treatment of leukaemia), on account of the drugs being priced far above the reach of the common man.[140] With this admirable show of strength in the past, it is now unfortunate to note that with the advent of a new government at the centre, apprehensions are being raised that India is beginning to bow to the insistent pressure from the developed countries.[141] Two years since the Union Ministry of Health first sought compulsory licenses for the three anti-cancer drugs DIPP continues to demur in processing its request.[142] Taking note of this regrettable turn of events, *Medecins Sans Frontieres*, an international humanitarian aid organisation for providing emergency medical assistance,[143] recently launched a campaign calling for the Indian Prime Minister, Mr Narendra Modi, to remain steadfast against the intensifying pressure from the developed countries. The campaign cautions the Prime Minister against narrowing the scope of Indian patent laws and policies as any such action shall immediately impact India's ability to manufacture generic medicines at affordable prices.[144]

Contrastingly, Malaysia's stance on compulsory licenses remains ambiguous. Since the grant of its three compulsory licenses in 2003, Malaysia has not granted any other compulsory license to date. Moreover, Malaysia has also held back from incorporating the import/export flexibilities of WTO's decision of 2003 in its patent laws. More clarity in this regard will be gained only once the Ministry of Health determines the viability of Malaysian AIDS Council's request for 'government use' compulsory licenses for patented antiretroviral medicines, Lopinavir and Ritonavir, sold under the brand name of Kaletra, for use in the second line treatment of HIV/ AIDS.[145]

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139 Chidanand Rajghatta, 12 July 2013, *Don't let Rhetoric Trump Reason, Chidambaram tells US*, The Times of India: http://timesofindia.indiatimes.com/business/india-business/Dont-let-rhetoric-trump-reason-Chidambaram-tells-US/articleshow/21043653.cms Site accessed on 25 July 2015.

140 Sushmi Dey, 30 March 2013, *Government Begins work on 3 more compulsory licenses*, Business Standard: http://www.business-standard.com/article/companies/govt-begins-work-on-3-more-compulsory-licences-113032900230_1.html Site accessed on 25 July 2015.

141 G Pramod Kumar, 28 January 2015, *Will Modi Give up India's Intellectual Property Stand Just to Please Obama?,* Firstpost: http://www.firstpost.com/business/obamas-pressure-on-india-over-intellectual-property-rights-betrays-his-double-standards-2067809.html Site accessed on 25 July 2015.

142 Rituparna Bhuyan, 11 March 2014, *Health Minister's compulsory license proposal hits DIPP hurdle*, Moneycontrol: http://www.moneycontrol.com/news/cnbc-tv18-comments/health-mins-compulsory-license-proposal-hits-dipp-hurdle_1052711.html Site accessed on 26 July 2015.

143 *'What we do'*, Medecins Sans Frontieres: http://www.msfindia.in/ Site accessed on 25 July 2015.

144 *Don't Shut Down the Pharmacy of the Developing World*, Medecins Sans Frontieres: http://handsoff.msf.org/ Site accessed on 25 July 2015.

145 Malaysian AIDS Council, *Application for a Compulsory License for Kaletra*, 1 May 2012, Don't Trade our Lives Away: https://donttradeourlivesaway.files.wordpress.com/2012/05/here1.pdf Site accessed on 25 July 2015.

In this prevailing climate, it is necessary to realise that the fear of losing foreign investments is not a sound basis for sacrificing access to essential medicines. Economic development at the expense of public health is unsustainable. Therefore, it now falls upon developing countries, like India and Malaysia, to place the welfare of their people ahead of the threats made by the developed countries and to meet their opposition with a united front and collective strength. For this purpose both India and Malaysia should not only learn from the lessons of the other, but also emulate the other's pro public-health inclusion and interpretation of compulsory licensing provisions. Both countries should pro-actively grant compulsory licenses for overcoming the adverse effects of patent monopoly and/or for strengthening their domestic technical base. Otherwise, access to essential medicines shall remain a luxury for many.

An Initial Exploration of Malaysians' Perceptions of SOSMA 2012

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Abstract

The Security Offences (Special Measures) Act 2012 (SOSMA) was passed by Parliament to replace the old Internal Security Act 1960 (ISA) and was given the royal assent on 18 June 2012. Since SOSMA came into play, it has not laid to rest the ongoing debate of its predecessor the ISA which was contended to be in contravention not only of the Federal Constitution but also the basic principles upheld under the Rule of Law (RoL). SOSMA has been scrutinised and debated upon at various levels both locally and internationally. This study examines the perception of SOSMA by a selected group, focusing on its implication with reference to the ISA, the Malaysian Federal Constitution and the principles upheld under the RoL. The study was conducted by survey questionnaire using a 5-point Likert Scale. Since the whole study was to evaluate perceptions specifically related to the laws in Malaysia, a non-probability purposive sample was selected comprising of lawyers, law lecturers, law students and those who are working in other sectors but with a legal background. The findings indicate that on the whole the respondents were of the opinion that an Act dealing with internal security is essential and required. However, the consensus is that SOSMA needs to be amended as there is a clear indication that it contravenes basic human rights as upheld under the RoL, and that it infringes rights protected under the Federal Constitution. The study ends with a recommendation for the survey to be carried out amidst a larger population and should the findings be similar, the government is then advised to re-examine the SOSMA with a view to retain, amend or repeal the said Act.

I INTRODUCTION

As reported by Malaysia Defense and Security Report 2012[1], although Malaysia has not felt the full presence of international terrorist groups unlike some of its neighbours, there are still some local insurgents such as Kumpulan Mujahidin Malaysia (KMM), al-Ma'unah (Brotherhood of Inner Power), Barisan National Pembebasan Pattani (BNPP) and the Barasi Revolusi Nasional (BRN) that the government faces. The report went on to highlight that the government also faces a long-running dispute over the Spratly Islands

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1 Security Overview' 2012, Malaysia Defence & Security Report, 3, pp. 42-45, Business Source Complete, EBSCOhost. <http://edsb.bebscohost.com ezproxy. taylors.edu.my/eds/pdfviewer/pdfviewer?vid=19&sid=c0787800-2d83-4343-afff-c8da26582b58%40sessionmgr113&hid127> Site accessed on 26 December 2014.

in the South China Sea, which are claimed by China, Vietnam, the Philippines, Malaysia and Brunei (with the military presence on Spratly by all the claimants except Brunei) which also caused considerable regional tension with these groups. This has been made more critical with the insurgent and terrorist activity from the Thai Muslim Insurgency which has the potential to destabilise the border areas of Malaysia, in the state of Kedah. In addition, Thai groups, such as the Gerakan Mujahideen Islam Pattani (GMIP), the Pattani United Liberation Organisation (PULO), and the National Revolutionary are widely believed to have links with KMM as well as have the most extensive grassroots network and ties to Malaysia[2]. The report went on to state that piracy in South East Asia is still a major security issue where attacks are dispersed throughout the South East Asian water lanes which presents difficulties in monitoring piracy[3]. The report asserts that despite all these threats, the stringent use of the ISA – with more than 100 insurgents arrested since May 2001 – and close observation of suspects by the government makes any major non-State violent activity on Malaysia's territory an improbability[4].

As a result, in the past the ISA has been criticised extensively for its violation of human rights. According to Kee Thuan Chye[5], Malaysians have fought hard to get the ISA repealed where many have risked arrest to demonstrate against it. He cited the August 1, 2009 incident where about 15,000 took to the streets in Kuala Lumpur to call for the law's repeal, and nearly 600 were arrested. Due to the continuous criticism, the Prime Minister, Najib Abdul Razak issued a statement on September 15 announcing that the government will abolish the ISA and ease media controls. Subsequently, the ISA was repealed and replaced with SOSMA. However, the Malaysian government's decision to abolish the Internal Security Act has attracted a mixed response among international observers and human rights groups[6].

SOSMA has not laid to rest the multiple debates surrounding the ISA as SOSMA too has flaws, with provisions contrary to basic human rights upheld in the Federal Constitution, the RoL and laws of other nations. At a recent law conference, the then Attorney-General, Tan Sri Abdul Gani Patail[7], pointed out that section 4(3) SOSMA expressly provides that no person is to be arrested under the Act solely for his political belief or political activity. The Bar Council president, Lim Chee Wee[8] has stressed that the definition of 'security offence' being acts that are prejudicial to national security or public

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2 *Ibid.*

3 *Ibid.*

4 Security Overview' 2011, Malaysia Defence & Security Report, 3, pp. 42-45, Business Source Complete, EBSCOhost, <http://eds.b.ebscohost.com.ezproxy.taylors.edu.my/eds/pdfviewer/pdfviewer?vid=19&sid=c0787800-2d83-4343-afff-c8da26582b58%40sessionmgr113&hid=127> Site accessed 26 December 2014.

5 Chye, KT 2011, 'How did we tolerate the ISA for so long?', Penang Economic Monthly, 13, 11, pp. 36-37, Academic Search Complete, EBSCOhost, <http://blog.limkitsiang.com/2011/11/10/sell-one-law-get-two-free/>. Site assessed 26 December 2014.

6 Political Overview' 2012, Malaysia Defence & Security Report, 1, pp. 68-74, Business Source Complete, EBSCOhost. <http://eds.b.ebscohost.com.ezproxy.taylors.edu.my/edspdfviewer/pdfviewer?vid=20&sid=c0787800-2d83-4343-afff-c8da26582b58%40sessionmgr113&hid=117? Site assessed 26 December 2014.

7 Himanshu Bhatt, 2013, "*The Heat is on SOSMA*": http://www.malaysianbar.org.my/legal/general_news/the_heat_is_on_sosma.html. Site accessed on 15 December 2012.

8 *Ibid.*

safety, is too wide. He went on to assert that there needs to be a more precise and better definition, such as that found in the United Nations Convention for the Suppression of the Financing of Terrorism. According to Lim[9] "the radical departure from the ordinary rules of evidence may negatively impact on the accused's right to a fair trial and counter-terrorism laws, policies as well as decisions must not usurp the very rights and freedoms that the terrorists themselves are threatening". Among the other recommendations proposed by the Bar Council is that the power to intercept communications should be exercised by a judge, and for solicitor-client communication to be protected.

In line with this, the international human rights research and advocacy group, Human Rights Watch (HRW) has said in its annual World Report that Malaysia is "backsliding on human rights"[10]. HRW Asia Deputy Director, Phil Robertson said despite several reforms, protections for basic liberties in Malaysia have not significantly improved. Among other things, HRW criticised SOSMA for permitting police to authorise communication intercepts and for allowing prosecutors to bring up evidence without disclosing its source. Furthermore, acquitted suspects in the midst of an appeal may still be detained in prison or tethered to a monitoring device until the appeal is settled. Despite these serious criticisms, the HRW did recognise the reduction in days for initial detention without charge (from 60 to 28 days), and the requirement that a suspect be charged in court or released thereafter, as positive points[11]. As a result of these apprehensions raised under SOSMA, there is much debate between the authorities and human rights activists over the merits of such concerns. It is due to these concerns that this study was conducted to investigate the perceptions of Malaysians about SOSMA, with a view to add clarity to the issues being raised. However, the paper labours under a limitation, in that the samples selected for the study were limited to those who were well versed with the law, as laymen would not be able to give proper insights into the law.

II. BACKGROUND OF THE INTERNAL SECURITY ACT OF MALAYSIA

The first Act enacted for the purpose of protecting internal security in Malaysia was the ISA 1960. It is a preventive detention law originally enacted during a national state of Emergency as a temporary measure to fight communist rebellion. Under Section 73 (1) of the ISA, police may detain any person for up to 60 days, without warrant or trial and without access to legal counsel, on suspicion that "he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof[12]." After 60 days, the Minister of Home Affairs can then extend the period of detention without trial for up to two years, without submitting any evidence for review by the courts, by

9 *Ibid.*
10 *Ibid.*
11 *Supra* n 7.
12 Malaysia's Internal Security Act and Suppression of Political Dissent, A Human Rights Watch Backgrounder: http://www.hrw.org/legacy/backgrounder/asia/malaysia-bck-0513.htm. Site accessed on 15 December 2012.

issuing a detention order, which is renewable indefinitely. Such provisions are the reason for the criticism against the Act.

Thus, the Act has repeatedly been criticised by Malaysian human rights groups, the Malaysian Bar Council, the Malaysian Human Rights Commission, and international human rights groups, which called for its repeal[13]. The ISA's provisions violate fundamental international human rights standards, including prohibitions on arbitrary detention and guarantees of the right to due process and the right to a prompt and impartial trial[14]. According to Sunil Lopez[15], it seemed inconceivable that even in these 'enlightened times', there exists a patch of the past, a throwback, if you will, to the bygone era of tyrannical monarchs where the word of one is sufficient to affix guilt to a human being and as inconceivable it may be but the continued existence of legislation like the ISA was such a 'patch' and an unjust one at that. After such strong criticism came the much awaited decision to repeal ISA.

The Security Offences (Special Measures) Act 2012 was gazetted on 22 June 2012 to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters[16]. SOSMA was regarded by many as a direct replacement of the ISA. Prime Minister Datuk Seri Najib Razak[17] said the reform, including the rescinding of three emergency proclamations, ushers in a "new era" for Malaysia. He went on to add that the government would no longer limit individual freedoms but would instead ensure that their basic constitutional rights were protected. He also hoped other promised reforms, including the introduction of the Peaceful Assembly Act and amendments to the Universities and University Colleges Act, would herald a "golden democratic age in Malaysia".

However, the enactment of SOSMA has brought to surface some major issues in the Malaysian legal sphere. It is stated that there can be no grey areas as to the Law and the Act in question will have to be stringently monitored to ensure it serves only to uphold peace, liberty and freedom[18]. The Human Rights Watch for Asia-Pacific denotes that it perhaps allows for the government to add limits to previously unrestrained activities for crucially, the amendment also does away with the core principle of Criminal Law, presumption of innocence whereby in future cases, the onus will be on the defendant to prove his innocence[19]. The Malaysian Bar Council is of the opinion that the fact that SOSMA serves to further erode citizen rights and individual protection by ceding to the police force rather than the judges the power to intercept communications and at trial,

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13 *Ibid.*

14 *Ibid*

15 Sunil Lopez, 2008, "*The Internal Security Act 1960: A Throwback to the Era of Tyranny*", Malaysian Bar Council: http://www.malaysianbar.org.my/members_opinions_and_comments/the_internal_security_act_1960_a_throwback_to_the_era_of_tyranny.html. Site accessed on 15 December 2012.

16 Law Today: Security Offences (Special Measures) Act 2012 [SOSMA]**:** http://www.kpum.org/2014/03/law-today-security-offences-special-measures-act-2012-sosma/> Last accessed on 17 December 2012.

17 Ding Jo-Ann, 2012, *"False Hope in Security Offences Act*": http://www.thenutgraph.com/false-hope-in-security-offences-act/. Last accessed on 27 December 2012

18 *Supra* n 16.

19 *Ibid*

keeping the identity of prosecution witnesses classified thus negating cross-examination[20]. Suruhanjaya Hak Asasi Manusia (SUHAKAM) in its 2012 Annual Report highlighted further problems in relation to the Act whereby section 4 SOSMA does not provide for judicial oversight owing to the detention without trial being allowed to be extended to twenty-eight days[21]. Furthermore, section 5 gives the police the permit to deny immediate access to legal representation for up to forty-eight hours.

According to a recent report by The Malay Mail Online[22], the Home Ministry proposed a new law to combat terrorism in Malaysia, amid criticism that existing laws were unable to prosecute cases involving acts of terrorism committed beyond the country's borders. This is supported by the former Inspector-General of Police (IGP), Tan Sri Musa Hassan who said that anti-terror enforcement is hampered by the lack of power afforded to the authorities under SOSMA, as it requires that investigators gather sufficient evidence before they can proceed with prosecution[23]. Musa, who currently chairs the anti-crime NGO Malaysian Community Crime Care (MCCC), was quoted by Malay daily *Utusan Malaysia* as saying that too much time is spent collecting evidence and that it is difficult to prove the involvement of suspected terrorists recruited overseas.[24] On the other extreme, senior criminal lawyer, Datuk N. Sivananthan[25] said SOSMA might be effective in certain situations as it allowed the police to detain a suspect for up to 28 days when there was a real threat to public order or to the security of the country, provided that it was used properly, only in relation to offences against the State and/or offences relating to terrorism and nothing else. He went on to add that normal criminal trials were governed by the Criminal Procedure Code (CPC) and Evidence Act, but security offences would be tried under SOSMA and "the provisions in SOSMA are not the same as in the CPC as the latter has more safeguards and is fair to an accused person whereas provisions in SOSMA are lopsided in favour of the State". According to a report on Borneo Post Online[26], almost a year after SOSMA was gazetted to replace the repealed the ISA, arguments persist as to whether the new law provides the appropriate balance between safeguarding the national security and the rights of the accused. This study aims to identify the perception of a selected category of respondents on the provisions in SOSMA in line with the concerns raised with ISA, RoL and principles upheld in the laws of other states with regards to basic human rights.

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20 *Ibid*

21 *Ibid*

22 The Malay Mail Online, 2014, *"In view of Sosma 'Weaknesses', Home Ministry to Moot New Anti-Terror Law"*: https://my.news.yahoo.com/view-sosma-weaknesses-home-ministry-moot-anti-terror-090100636.html. Last accessed on 27 December 2014.

23 *Ibid.*

24 *Ibid.*

25 Borneo Post Online, 2013, "*Introduction of Sosma to replace ISA draws mixed reaction from law Practitioners:* http://www.theborneopost.com/2013/05/27/introduction- of-sosma-to-replace-isa-draws-mixed-reaction-from law- practitioners/#ixzz3N6Zq11lf. Last accessed on 21 December 2014.

26 *Ibid.*

III. METHODOLOGY

McConville and Wing[27] divided legal research into doctrinal and non-doctrinal research. Non-doctrinal research can be qualitative or quantitative while doctrinal is qualitative since it does not involve statistical analysis of the data. This research used a non-doctrinal research where a quantitative method was adopted. A survey questionnaire was used to gain insight of selected Malaysians' perceptions on the internal security laws in Malaysia. For the purpose of this study, a non-probability purposive sampling was used. A survey was conducted among 152 people comprising of representatives from legal practitioners, academicians, law scholars and other legal professionals. This is to obtain a clearer picture of the real issues surrounding internal security laws in Malaysia, to determine whether there is a need for SOSMA, and if so, does the Act meet the need, or are amendments required.

IV. FINDINGS

A. Demographic Information of Survey Samples

The survey questionnaire has 5 parts comprising of Part A which was designed to obtain key personal information, Part B which is on respondents' knowledge about the conditions in Malaysia, Part C which is on the respondents' knowledge of the laws in Malaysia, Part D which is on the perceptions of the respondents towards the provisions in SOSMA and Part E which is on respondents' perception of the ISA and SOSMA. Firstly, descriptive statistic was used to analyse part of the data such as demographic background which includes gender, nationality, highest level of education and current position. These data were converted in many forms to provide a clearer view of the findings. The data is presented in various forms such as charts, tables, and histogram. Table 4.1 represents the summary of the respondents' demographic profile. A total of 400 survey questionnaires were distributed and 175 were returned. Out of these, 152 were useable while 23 were rejected as they were incomplete.

Table 4.1: Percentage of Respondents' Gender

		Percentage
Valid	Female	66.4
	Male	33.6

Based on Table 4.1, the result shows that males and females do not have equal proportion, where 66.4% of the respondents were female while 33.6% were males. Since it was a non-probability purposive sampling (representatives from legal practitioners, academicians, law scholars and other legal professionals), a balanced distribution between

[27] McConville M and Wing H. C, (eds.), *Research Methods for Law,* Edinburgh University Press: Edinburgh, 2007.

both genders could not be obtained. Table 4.2 shows the findings of the respondents' nationality.

Table 4.2: Percentage of Respondents' Nationality

		Percentage
Valid	Malaysian	96.7
	Non Malaysian	3.3

As indicated in Table 4.2, 96.7% of the respondents are Malaysians while only 3.3% are non-Malaysians. One of the reasons for the small percentage of non-Malaysian is because the study is based on Malaysian legislations which are not within the ambit of knowledge of non-Malaysians. When data was collected, most of the respondents who were expatriates refused to answer the survey questionnaire due to inadequate knowledge on the laws. Table 4.3 gives the data on the respondents' educational background.

Table 4.3: Percentage of Respondents' Educational Background

		Percentage
Valid	Degree	73
	Masters	10.5
	PhD	4.6
	Professional Qualification	11.8

In terms of educational background, 73% of the respondents were law degree holders, followed by 10.5% who had masters in law, 4.6% with PhD in law and 11.8% had professional qualification which is a Certificate in Legal Practice. Table 4.4 provides the findings of the respondents' current position.

Table 4.4: Percentage of Respondents' Current Position

		Percentage
Valid	CLP Student	63.2
	Masters Student	2
	Lawyer	12.5
	Law Lecturer	12.5
	Others	9.9

63.2 % of the respondents were currently pursuing the Certificate in Legal Practice in a private institution in Kuala Lumpur where the data was collected, 2% were pursuing masters in a public university in Malaysia while 12.5% are currently working as lawyers in Malaysia. Another 12.5% are lecturing law in private universities in Malaysia. Lastly 9.9% of the respondents were employed in other professions such as legal executive, legal consultant, contracts manager, in house legal counsellor, legal advocate and IP consultant.

B. Malaysians' Perceptions of the Conditions in Malaysia

A total of 21 statements were given to the respondents in the survey questionnaire and respondents were asked to indicate their level of agreement or disagreement. A frequency count was carried out and table 4.5 shows the findings.

Table 4.5: Perceptions of the Conditions in Malaysia (%)

		DISAGREE	NEUTRAL	AGREE
B 1	Malaysia is a peaceful country.	23.7	25	**51.3**
B 2	Malaysia is a developed country.	29.6	**38.8**	31.6
B 3	Malaysia upholds freedom of speech.	**70.4**	21.7	7.9
B 4	Malaysia upholds freedom of assembly.	**69.1**	21.7	9.2
B 5	There are no internal conflicts in Malaysia.	**82.2**	12.5	5.3
B 6	There is no threat from terrorist in Malaysia.	**43.4**	34.9	21.7
B 7	There are no racial problems in Malaysia.	**82.9**	11.8	5.3
B 8	The political condition in Malaysia is stable.	**63.8**	26.3	9.9
B 9	Our rights are protected.	**55.3**	32.9	11.8
B 10	There is freedom of movement.	32.9	**34.3**	32.8
B 11	There is freedom to practice my religion.	17.8	28.9	**53.3**
B 12	There is equal distribution of wealth amongst all races.	**73.1**	19.7	7.2
B 13	All races are treated fairly.	**79.6**	15.1	5.3
B 14	Minority groups are protected adequately.	**68.4**	24.3	7.3
B 15	Malaysia is an Islamic country.	**41.4**	21.1	37.5
B 16	There is harmony amongst all races.	36.2	**42.8**	21
B 17	There is law and order in the country.	25.7	**38.8**	35.5
B 18	There are fair elections in the country.	**72.4**	19.1	8.5
B 19	The judiciary is independent.	21.7	36.8	**41.5**
B 20	Our rights are equivalent to international standards.	**71.7**	17.1	11.2
B 21	Malaysia is free of corruption.	**93.4**	5.3	1.3

As shown in Table 4.5, a majority of respondents disagreed with 14 out of the 21 statements inclusive of B3, B4, B5, B6, B7, B8, B9, B12, B13, B14, B15, B18, B20 and B21. The highest percentage of disagreement was with the statement B21 [Malaysia is free of corruption]. This finding is consistent with Ramon Navaratnam[28] who cited the

[28] Ramon Navaratnam, 2014, *"Malaysia Seen as Seriously Corrupted"*, Free Malaysia Today: <http://www.freemalaysiatoday.com/category/nation/2014/12/03/malaysia-still-seen-as-seriously-corrupt/> Site assessed on 20 November 2014.

announcement by the Transparency International Headquarters in Berlin stating that the Corruption Perception Index (CPI) for Malaysia registered only minimal improvement in 2014 and is still ranked low as number 50 out of 175 countries. Further, 93.4% of the respondents disagreed with the statements B7 [There are no racial problems in Malaysia] and B5 [There are no internal conflicts in Malaysia] with a high level percentage of disagreement, 82.9% and 82.2% respectively. These findings are consistent with past literature. According to Jeya Seelan[29], in Malaysia "…the skewed implementation of affirmative action or positive action policies as some may call it, contained in Article 153 of the Federal Constitution has resulted in discrimination against the non-Bumiputra minority communities". With regards to conflicts, Lai Fong Yang and Md Sidin[30] claimed that a number of researchers have identified inter-ethnic relations as one of the challenges to the social stability of the country[31]. They also stated that in the last three years a number of ethnic and religious tensions has continued to impact the life of Malaysians such as Kampung Medan clashes, Suqiu, the keris polemics, Negaraku incident, controversy over a tertiary education textbook on ethnic relations, controversy over freedom of faith and body snatching, Hindraf, cow head protest, Biro Tata Negara debacle, *pendatang* issue, disputes over the use of the word "Allah," arson attacks, etc[32]. Thus, it is not surprising that the respondents disagreed with the statements that there are no racial problems or internal conflicts in Malaysia.

The respondents also disagreed with statement B13 [All races are treated fairly] with a percentage of 79.6%. The other statements where more than 50% disagreed are B12 [There is equal distribution of wealth amongst all races], B18 [There are fair elections in the country], B20 [Our rights are equivalent to international standards], B3 [Malaysia upholds freedom of speech], B4 [Malaysia upholds freedom of assembly], B14 [Minority groups are protected adequately], B8 [The political condition in Malaysia is stable] and B9 [Our rights are protected]. The high percentage of disagreement to these statements indicates that the respondents have a lot of concern with regards to the conditions in Malaysia. Some of these findings are consistent with previous findings. For example, in the report given by the People's Tribunal stated that they had received many allegations and complaints about electoral misconduct of the general elections of 2013 not only from

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29 Jeya Seelan, 2013, *"Racial Discrimination in Malaysia: Perspectives from the Constitution and International Covenants*", The Malaysian Insider: <http://www.themalaysianinsider.com/opinion/jeya-seelan/article/racial-discrimination-in-malaysia-perspectives-from-the-constitution- and-in#sthash.j5xzghSb.dpuf> Site assessed on 20 November 2014.

30 Lai Fong Yang and Md Sidin Ahmad Ishak, "Framing Interethnic Conflict in Malaysia: A Comparative Analysis of Newspaper Coverage on the Hindu Rights Action Force (Hindraf)", *International Journal of Communication*, 2012, Vol. 6, pp. 166–189.

31 See generally, Abdul Rahman E, *The Culture and Practice of Puralism in Post-independence Malaysia,* Institute of Malaysian and International Studies (IKMAS), Univeristi Kebangsaan Malaysia, Bangi, 2000; S. A. Baharuddin, :Making Sense of National Unity in Malaysia: 'Break-down' versus 'Break-out' Perspective", *Readings on Ethic Relationas in a Multicultural Society*, M. K. Kabilan and Z. H. (eds.), COLLA Research Group, Kuala Lumpur, 2005, pp. 25-37; and Brown D, *The State and Ethnic Politics in Southeast Asia*, Routledge, London, 1994.

32 *Ibid.*

the losers but also from several independent observer groups, including those specially appointed by the Election Commission (EC)[33].

There were only 4 statements which respondents agreed to but the percentage of agreement is average. These are B1 [Malaysia is a peaceful country], with 51.3% of respondent agreeing, B11 [There is freedom to practice my religion] with 53.3% agreeing and B19 [The judiciary is independent] with 41.5% agreeing. An analysis of the findings in Section B indicates that as a whole, the respondents have a lot of concern as to the conditions in Malaysia in relation to fairness and justice as well as equality and peace.

C. Malaysians' Perceptions of the Laws in Malaysia

In this section of the survey questionnaire, the respondents were asked to state their level of agreement or disagreement to 23 statements that described the legal environment in Malaysia. For the purposes of clarity and depth of understanding, the 152 respondents were grouped into 2 categories, students and legal professionals (lawyers, lecturers and other legal professions). The groups are indicated in Figure 1.

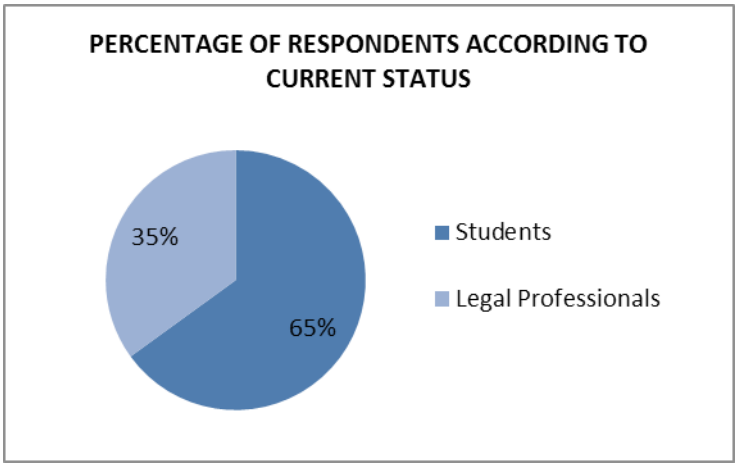

Figure 1: Percentage of Respondents According to Current Status

A total of 65% of the respondents were students currently pursuing either masters or CLP. On the other hand, 35% were lawyers, law lecturers and working in other legal professions. The reason for dividing them into two categories is due to the nature of the statements used in Section C. A large number of statements were related to SOSMA and the researchers knew from the pilot study carried out that students' knowledge of SOSMA is limited and they tend to take up a neutral stand in some cases. As such, combining

[33] Tribunal Rakyat, 2014, "*The People's Tribunal on Malaysia's 13th General Elections: Summary of the Report*": <http://www.globalbersih.org/2014/04/08/the-peoples-tribunal-on-malaysias-13th-general-elections-summary-of-the-report/> Site assessed on 29 November 2014.

their responses with the second group whose knowledge of SOSMA is greater as they deal with it in their professions would skew the results. Figure 4.6 shows the findings of the respondents' perceptions of the laws in Malaysia.

Table 4.6: Perceptions of the Laws in Malaysia According to Current Status

	Questions	STUDENTS (100%)			LEGAL PROFESSIONALS (100%)		
		DA	N	A	DA	N	A
C1	The Federal Constitution (FC) is the highest law in Malaysia.	7.1	19.1	**73.8**	0	11.4	**88.6**
C 2	There are no laws that contravene the provisions in the FC	**44.5**	26.2	29.3	37.8	17.1	**45.1**
C 3	SOSMA 2012 is an important law.	19.3	**52.5**	28.2	16.8	**49**	34.2
C 4	SOSMA 2012 is a law which is necessary.	22.3	**49.5**	28.2	32	**41.4**	26.6
C 5	SOSMA 2012 is better than ISA 1960.	26.2	**60.7**	13.1	26.5	**54.7**	18.8
C 6	Basic human rights are infringed by SOSMA 2012.	9.1	**55.6**	35.3	9.8	39.5	**50.7**
C 7	The powers of the courts are restrained by the provisions in SOSMA 2012.	9.2	**56.5**	34.3	11.7	39.3	**49**
C 8	The police are given excessive power in SOSMA 2012.	8.1	42.5	**49.4**	5.7	31.8	**62.5**
C 9	The Executive is given excessive powers to intervene in judicial matters related SOSMA 2012.	4.2	42.4	**53.4**	9.7	33.7	**56.6**
C 10	SOSMA 2012 is an adequate replacement for ISA 1960.	37.4	**54.5**	8.1	41.3	**49**	9.7
C 11	Rule of Law issues are dealt with satisfactorily by SOSMA 2012.	37.4	**58.4**	4.2	**52.7**	43.3	4
C 12	The independence of judiciary is upheld under SOSMA 2012.	39.4	**53.4**	7.2	**49**	45.3	5.7
C 13	Judges in Malaysia rule without fear or favour.	**56.5**	27.3	16.2	**49**	37.8	13.2
C 14	In Malaysia, there is separation of powers between the legislative, executive and judiciary.	**62.6**	18.3	19.1	**50.7**	26.7	22.6
C 15	Minority groups are adequately protected under the Federal Constitution.	**49.5**	30.3	20.2	**41.4**	30.3	28.3
C 16	There is freedom of assembly under SOSMA 2012.	40.4	**50.4**	9.2	**45.1**	52.9	2
C 17	There is freedom of speech under SOSMA 2012.	38.3	**53.5**	8.2	**45.3**	47	7.7
C 18	ISA 1960 was an oppressive piece of legislation.	7.1	39.4	**53.5**	3.8	26.2	**70**
C 19	SOSMA 2012 ensures human rights are protected in Malaysia.	34.4	**56.4**	9.2	**49**	35.8	15.2

Table 4.6: Perceptions of the Laws in Malaysia According to Current Status (continue)

	Questions	STUDENTS (100%)			LEGAL PROFESSIONALS (100%)		
		DA	N	A	DA	N	A
C 20	SOSMA 2012 should be repealed as it is similar to ISA 1960.	14.1	**57.5**	28.4	20.9	33.8	**45.3**
C 21	SOSMA 2012 is in conformity with international human rights standards.	34.4	**57.5**	8.1	**41.7**	39.4	18.9
C 22	SOSMA 2012 is in conformity with international democratic standards.	35.4	**57.4**	7.2	**47.3**	45.3	7.4
C 23	SOSMA 2012 protects the security and public order of Malaysia.	24.4	**59.5**	16.1	22.7	**56.7**	20.6

From the 23 statements, 12 statements revealed similar responses from both students and professionals. There are C1 [The Federal Constitution (FC) is the highest law in Malaysia], C3 [SOSMA 2012 is an important law], C4 [SOSMA 2012 is a law which is necessary], C5 [SOSMA is better than the ISA], C8 [The police are given excessive power in SOSMA 2012], C9 [The Executive is given excessive powers to intervene in judicial matters related SOSMA 2012], C10 [SOSMA 2012 is an adequate replacement for ISA 1960], C13 [Judges in Malaysia rule without fear or favour], C14 [In Malaysia, there is separation of powers between the legislative, executive and judiciary], C15 [Minority groups are adequately protected under the Federal Constitution], C18 [ISA 1960 was an oppressive piece of legislature]. These responses can be further categorised into three groups, statements with high percentage of agreement (C1, C8, C9 and C18), statement with high percentages of disagreement (C13, C14, and C15) and lastly, statements with high percentage of neutral responses (C3, C4, C5, C10, and C23).

With regards to those with high level of agreement among the professionals is the statement that the FC is the highest law in Malaysia (C1). This statement showed the highest percentage of 88.6% of agreement. This is followed by the statement that ISA 1960 was an oppressive price of legislation with 70% agreeing. The statement that excessive power is given to the police under SOSMA and the executive is given excessive power to intervene in judicial matter under SOSMA had 62.5% and 56.6% agreeing respectively. In the case of students, the highest percentage of agreement was also for the statement C1 (73.8%) and the second highest too is also similar which is C18 (53.5%). However, the third and fourth highest percentage of agreement is C9 (53.4%) and C8 (49.4%) while the responses for the professionals, the third is C8 (62.5%) and fourth is C9 (56.6%). Although the 4 statements which showed similar responses in terms of agreements are same for students and professionals, the percentage is lower in the case of students. This is because a large percentage of respondents from the students had chosen neutral for most of the statements related to SOSMA. The researchers randomly asked a few respondents as to why they have chosen neutral as their stand and the answer was that they are not very knowledgeable about SOSMA and preferred not to choose the other two options; agree or disagree.

It must be noted that C13 and C14 are linked in a way where it deals with separation of powers between the Legislature, Executive and Judiciary. Both groups of respondents disagreed and thus the conclusion that can be arrived at is that there is no true justice in Malaysia as for this to exist, there must be separation of power and room for judges to rule without fear and favour. In the case of C15 which states that minority groups are protected adequately, further analysis was done and the findings indicated that 65.8% of Indians and 69.8% of Chinese disagreed that minority rights are protected. The reason why this analysis was done was to identify specifically the perceptions of these two groups as they are considered as minorities in Malaysia. Thus, their responses are crucial as they feel that their rights are not protected adequately. However, to make a firm overall conclusion, a larger sample must be used.

It must be noted that for the students C3 [SOSMA 2012 is an important law], C4 [SOSMA 2012 is a law which is necessary], C5 [SOSMA 2012 is better than ISA 1960], C10 [SOSMA 2012 is an adequate replacement for ISA 1960], and C23 [SOSMA 2012 protects the security and public order of Malaysia], respondents from both groups choose neutral as their option. When selected respondents were asked to explain the reason for this, most of them indicated a common response which is these statements require responses which does not permit a firm answer be it to agree or disagree as SOSMA is an Act which is at its infancy level and only with more time can they give firm views on it.

The researchers found the responses to C6 [Basic human rights are infringed by SOSMA 2012], C7 [The powers of the courts are restrained by the provisions in SOSMA 2012], C11 [Rule of Law issues are dealt with satisfactorily by SOSMA 2012], C16 [There is freedom of assembly under SOSMA 2012], C17[There is freedom of speech under SOSMA 2012], C19 [SOSMA 2012 ensures human rights are protected in Malaysia], C20 [SOSMA 2012 should be repealed as it is similar to ISA 1960], C21 [SOSMA 2012 is in conformity with international human rights standards] and C22 [SOSMA 2012 is in conformity with international democratic standards] very interesting.

This is because the respondents from the first group comprising of students took up a neutral stand while respondents from the second group either agreed or disagreed to the statements. An analysis of these 9 statements indicate that all of them are related specifically to SOSMA 2012 which according to the students interviewed for further clarification on unclear issues, they are yet to receive detailed knowledge on this Act.

Thus, the researchers in their recommendation section call for the nation to take steps to educate the public via schools or campaigns on the implication of key acts including SOSMA on their lives. The researchers also carried out further analysis to identify the responses from the second group to these 9 statements to gain a better insight into their perceptions of the law. This is because the researchers are of the opinion that this group's perceptions are crucial in understanding how Malaysians perceive the state of law in Malaysia as the respondents in this group deal with the laws in Malaysia in their daily work life. Figure 2 shows the findings.

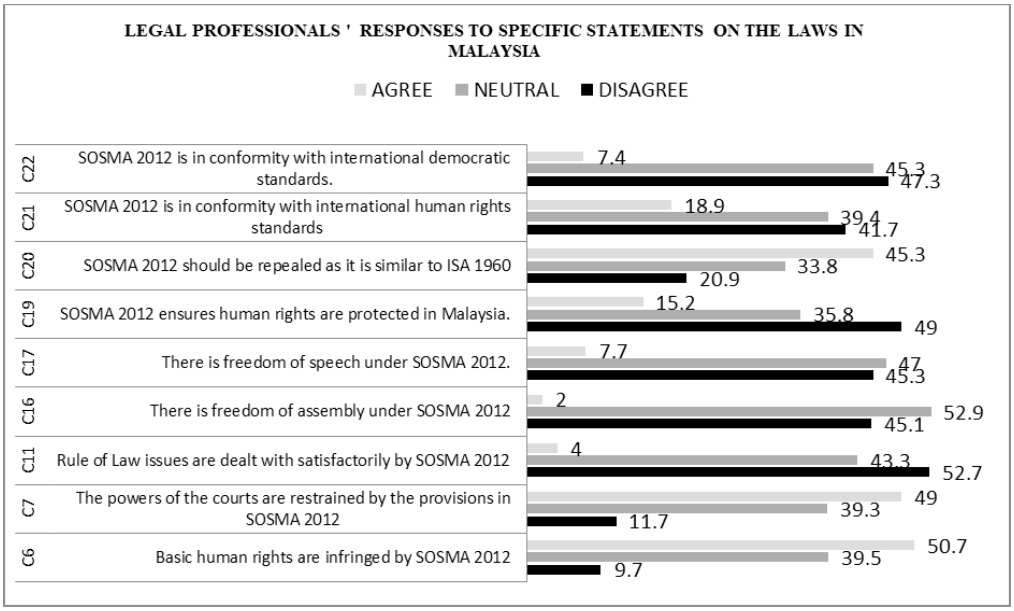

Figure 2: Legal Professionals' Responses to Specific Statements on the Laws in Malaysia

As shown in Figure 2, 50.7% of the respondents agreed to the statement that basic human rights are infringed by SOSMA 2012 (C6), 49% of the respondents agreed that the powers of the courts are restrained by the provisions in SOSMA 2012 (C7), 45.3% of the respondents agreed to the statement that SOSMA 2012 should be repealed as it is very similar to ISA 1960 (C20). On the other hand, 52.7% of respondents disagreed with the statement that the Rule of Law issues are dealt with satisfactorily by SOSMA 2012 (C11). 45.1%, 45.3%, 49%, 20.9%, 41.7% and 47.3% respectfully disagreed with statements C16 [There is freedom of assembly under SOSMA 2012], C17 [There is freedom of speech under SOSMA 2012], C19 [SOSMA 2012 ensures human rights are protected in Malaysia], C20 [SOSMA 2012 should be repealed as it is similar to ISA 1960], C21 [SOSMA 2012 is in conformity with international human rights standards] and C22 [SOSMA 2012 is in conformity with international democratic standards] respectively.

An unusual finding was found in the response to statement C2 [There are no laws that contravene the provisions in the FC] as shown in Table 4.6 where the highest percentage (52.5%) of students indicated disagreement while highest percentage (45.1%) of professionals indicated agreement. This contradiction was expected for as indicated earlier, the articles in FC are worded in such a way that it allows for new laws to be enacted which contravene the FC but yet permitted by FC. Thus, it is expected that people will be confused over the issue of whether there are provisions that contravene the FC. An example would be the enactment of SOSMA 2012 under Article 149 of FC which is questionable and at the same time defendable.

D. Malaysians' Perceptions of the Provisions in SOSMA 2012

In this section of the survey questionnaire, the respondents were asked to indicate the level of agreement or disagreement on whether the provisions conform to basic human rights upheld by the Rule of Law. A total of 9 main sections with 5 subsections from SOSMA 2012 were given to the respondents. The respondents were categorised into 2 groups; students and legal professionals to ensure clarity of findings. Table 4.7 shows the findings.

Table 4.7: Perceptions of the Provisions in SOSMA 2012

	Questions	STUDENTS (100%)			LEGAL PROFESSIONALS (100%)		
		DA	N	A	DA	N	A
D 1	S 4 (4) The person arrested and detained under subsection (1) may be detained for a period twenty-four hours for the purpose of investigation.	8.2	26.2	**65.6**	19.2	35.5	**45.3**
D 2	S 4(5) Notwithstanding subsection (4), a police officer of or above the rank of Superintendent of police may extend the period of detention for a period of not more than twenty-eight days, for the purpose of investigation.	**45.6**	18.1	36.3	**58.4**	17.1	24.5
D 3	S 4 (11)-Subsection (5) shall be reviewed every five years and shall cease to have effect unless, upon the review, a resolution is passed by both Houses of parliament to extend the period of operation of the provision.	19.2	39.4	**41.4**	26.9	**39.4**	33.7
D 4	S 5 (2) A police officer not below the rank of Superintendent of police may authorise a delay of not more than forty-eight hours for the consultation under paragraph (1)(a) if he is of the view that— there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence	27.5	31.2	**41.3**	**43.3**	26.5	30.2
D 5	S 5 (2) A police officer not below the rank of Superintendent of police may authorise a delay of not more than forty-eight hours for the consultation under paragraph (1)(b) it will lead to harm to another;	18.1	34.4	**47.5**	**47.3**	30.1	22.6
D 6	S 5 (2) A police officer not below the rank of Superintendent of police may authorise a delay of not more than forty-eight hours for the consultation under paragraph (1)(c) it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested;	22.2	36.4	**41.4**	**51**	24.5	24.5
D 7	S 5 (2) A police officer not below the rank of Superintendent of police may authorise a delay of not more than forty-eight hours for the consultation under paragraph (1)(d) it will hinder the recovery of property obtained as a result of such an offence.	22.2	34.4	**43.4**	**47.3**	31.9	20.8
D 8	S 5 (3) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution.	38.4	27.3	34.3	**51**	28.2	20.8

Table 4.7: Perceptions of the Provisions in SOSMA 2012 (Continue)

	Questions	STUDENTS (100%)			LEGAL PROFESSIONALS (100%)		
		DA	N	A	DA	N	A
D 9	S 6 (3) Notwithstanding subsection (1), a police officer not below the rank of Superintendent of police may—intercept, detain and open any postal article in the course of transmission by post; intercept any message transmitted or received by any communication; or intercept or listen to any conversation by any communication, without authorisation of the public prosecutor in urgent and sudden cases where immediate action is required leaving no moment of deliberation.	33.4	**35.3**	31.3	43.2	**43.6**	13.2
D 10	S 6 (4) If a police officer has acted under subsection (3), he shall immediately inform the public prosecutor of his action and he shall then be deemed to have acted under the authorisation of the public prosecutor.	25.3	34.3	**40.4**	**41.5**	32.1	26.4
D 11	S 8 (1) Notwithstanding section 51A of the Criminal procedure code, if the trial of a security offence involves matters relating to sensitive information the public prosecutor may, before the commencement of the trial, apply by way of an ex parte application to the court to be exempted from the obligations under section 51 A of the criminal procedure code.	25.2	**40.5**	34.3	**45.3**	20.8	33.9
D 12	S 8 (20) The public prosecutor shall disclose to the court the intention to produce sensitive information as evidence against the accused during the trial and the court shall allow the application under subsection (1).	17.2	**42.4**	40.4	30.1	26.3	**43.6**
D 13	S 9 (1) If an accused reasonably expects to disclose or to cause the disclosure of sensitive information in any manner, in his defense, the accused shall give two days' notice to the public prosecutor and the court in writing of his intention to do so.	13.1	33.3	**53.6**	**37.9**	30.2	31.9
D 14	S 23 The non-production of the actual exhibit protected under section 8 and 11 shall not be prejudicial to the prosecution's case.	18.3	**52.5**	29.2	**47**	26.6	26.4
D 15	S 24 Where a person is charged for a security offence, any information obtained through an interception of communication under section 6 shall be admissible as evidence at his trial and no person or police officer shall be under any duty, obligation or liability or be in any manner compelled to disclose in any proceedings the procedure, method, manner or any means or devices, or any matter whatsoever with regard to anything done under section 6.	32.4	**44.4**	23.2	**49**	33.8	17.2
D 16	S 30 (1) Notwithstanding Article 9 of the Federal Constitution, if the trial court acquits an accused of a security offence the public prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against his acquittal by the public prosecutor.	35.3	**42.5**	22.2	**37.9**	31.9	30.2
D 17	S 31 The Minister may make regulations as may be necessary or expedient for giving full effect to or for carrying out the provisions of this Act.	33.4	**42.5**	24.1	**45.1**	37.8	17.1

As shown in Table 4.7, the students took a neutral stand for 6 of the sections, namely; s6(3) – "Notwithstanding subsection (1), a police officer not below the rank of Superintendent of police may—intercept, detain and open any postal article in the course of transmission by post; intercept any message transmitted or received by any communication; or intercept or listen to any conversation by any communication, without authorisation of the public prosecutor in urgent and sudden cases where immediate action is required leaving no moment of deliberation", s8(1) – "Notwithstanding section 51A of the Criminal procedure code, if the trial of a security offence involves matters relating to sensitive information the public prosecutor may, before the commencement of the trial, apply by way of an ex parte application to the court to be exempted from the obligations under section 51A of the criminal procedure code", s23 – "The non-production of the actual exhibit protected under Section 8 and 11 shall not be prejudicial to the prosecution's case", s24 – "Where a person is charged for a security offence, any information obtained through an interception of communication under section 6 shall be admissible as evidence at his trial and no person or police officer shall be under any duty, obligation or liability or be in any manner compelled to disclose in any proceedings the procedure, method, manner or any means or devices, or any matter whatsoever with regard to anything done under section 6", s30(1) – "Notwithstanding Article 9 of the Federal Constitution, if the trial court acquits an accused of a security offence the public prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against his acquittal by the public prosecutor", and s31 – "The Minister may make regulations as may be necessary or expedient for giving full effect to or for carrying out the provisions of this Act".

As in the findings for Section C, the respondents gave the same reasons for adopting the neutral stand. Thus, the researchers adopted the responses of the legal professionals as an indication on the perceptions of the Malaysians on SOSMA with regards to the six sections that students took a neutral stand. However, the legal professionals disagreed that the sections conformed to the basic human rights upheld in RoL with 43.6% (D9) disagreeing to s6(3); 45.3% (D11) disagreeing to s8(1); 47% (D14) disagreeing to s23; 49% (D15) disagreeing to s24; 37.9% (D16) disagreeing to s30 and lastly 45.1% (D17) disagreeing to s31. For all these 6 sections, the legal professionals considered them to be violating basic human rights upheld in RoL.

There was a similarity in findings for s4(4) and s4(5) where for the first, the highest percentage of respondents agreed that detaining a person for a period of 24 hours does not contravene basic human rights. The percentage for students is 65.6% and for legal professionals is 45.3%. For s4(5), both groups of respondents disagreed where 45.6% of students and 58.4% of legal professionals claimed that this section which allows a police officer of or above the rank of Superintendent of Police to extend the period of detention for a period of not more than twenty-eight days for the purpose of investigation is a breach of human rights according to RoL. Similar responses were also indicated for s5(3) – "This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution", where both groups disagreed with 38.4% of students and 51% of legal professionals. They found that s5(3) contravene basic human rights advocated in RoL.

The findings for sections 4(11) – "Subsection (5) shall be reviewed every five years and shall cease to have effect unless, upon the review, a resolution is passed by both Houses of parliament to extend the period of operation of the provision", s 5(2) – "A police officer not below the rank of Superintendent of police may authorise a delay of not more than forty-eight hours for the consultation under paragraph (1) (a) if he is of the view that— there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence", s5(2) – "A police officer not below the rank of Superintendent of police may authorise a delay of not more than forty-eight hours for the consultation under paragraph (1)(b) it will lead to harm to another", s5(2) – "A police officer not below the rank of Superintendent of police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1)(c) it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested", s5(2) – "A police officer not below the rank of Superintendent of police may authorise a delay of not more than forty-eight hours for the consultation under paragraph (1) (d) it will hinder the recovery of property obtained as a result of such an offence", s6(4) – "If a police officer has acted under subsection (3), he shall immediately inform the Public Prosecutor of his action and he shall then be deemed to have acted under the authorization of the public prosecutor", s8(20) – "The public prosecutor shall disclose to the court the intention to produce sensitive information as evidence against the accused during the trial and the court shall allow the application under subsection (1)" and s9(1) – "If an accused reasonably expects to disclose or to cause the disclosure of sensitive information in any manner, in his defense, the accused shall give two days' notice to the public prosecutor and the court in writing of his intention to do so" were contradictory and as a result, the researchers had to carry out further analysis to gain perceptions which are valid and acceptable. The responses were reanalysed and responses which showed neutral were removed from the overall calculation and the new data was reanalysed using frequency count. Table 4.8 shows the findings.

Table 4.8: New Analysis of Data Excluding 'Neutral' Response

Sections	Questions	Students		Legal professionals	
		Disagree	Agree	Disagree	Agree
S4(11)	S 4 (11)-Subsection (5) shall be reviewed every five years and shall cease to have effect unless, upon the review, a resolution is passed by both Houses of parliament to extend the period of operation of the provision.	31.7	68.3	44.4	55.6
S5(2)(1)a	S 5 (2) A police officer not below the rank of Superintendent of police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1) (a) if he is of the view that— there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence	40.0	60.0	58.9	41.1
S5(2)(1)b	S 5 (2) A police officer not below the rank of Superintendent of police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1) (b) it will lead to harm to another;	27.6	72.4	67.7	32.3

Table 4.8: New Analysis of Data Excluding 'Neutral' Response (Continue)

Sections	Questions	Students		Legal professionals	
		Disagree	Agree	Disagree	Agree
S5(2)(1)c	S 5 (2) A police officer not below the rank of Superintendent of police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1) (c) it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested;	34.9	65.1	67.5	32.5
S5(2)(1)d	S 5 (2) A police officer not below the rank of Superintendent of police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1) (d) it will hinder the recovery of property obtained as a result of such an offence.	33.8	66.2	69.5	30.5
S6(4)	S 6 (4) If a police officer has acted under subsection (3), he shall immediately inform the public prosecutor of his action and he shall then be deemed to have acted under the authorization of the public prosecutor.	38.5	61.5	61.1	38.9
S8(20)	S 8 (20) The public prosecutor shall disclose to the court the intention to produce sensitive information as evidence against the accused during the trial and the court shall allow the application under subsection (1).	29.9	70.1	40.8	59.2
S9(1)	S 9 (1) If an accused reasonably expects to disclose or to cause the disclosure of sensitive information in any manner, in his defense, the accused shall give two days' notice to the public prosecutor and the court in writing of his intention to do so.	19.6	80.4	54.3	45.7

Through this analysis, it was found that respondents from both groups agree that s4 (11) and s8 (20) are correct; 68.3% of students and 55.6% of legal professionals agree that s4 (11) which allows for section 4(5) to be reviewed every 5 years and shall cease to have effect when upon review, a resolution is passed by both Houses of Parliament to extend the period of operation of the provision as complying with the basic human rights upheld by the Rule of Law. In addition, 70.1% of students and 62.5% of legal professionals also agree that s8 (20) which calls for the prosecution to disclose to the court the intention to produce sensitive information as evidence against the accused during the trial and the court shall allow the application as conforming to the basic human rights upheld by the Rule of Law. Respondents' responses to section 5(2)(1)(a)-(d), s6(4) and s9(1) were totally contradictory for the students respondents agreed that these sections conform with RoL while the respondents from the legal profession group disagreed claiming that these sections breach the basic human rights upheld in RoL. The percentage of legal professionals agreed to s5(2)(1)(a) were 58.9%; s5(2)(1)(b) with 67.7%; s5(2)(1)(c) with 69.5%, s5(2)(1)(d) with 69.5%; s6(4) with 61.1%; and s9(1) with 54.3%. The researchers are of the opinion that the data obtained from those in the second group, comprising of law lecturers, lawyers and those in other legal positions to be more valid as these people are constantly dealing with the laws including SOSMA 2012 in their daily work unlike the respondents who are still students and are not exposed to the laws on a daily basis.

E. Malaysian's View on the Future of SOSMA 2012

In this section of the survey questionnaire, the respondents were asked to indicate their agreement or disagreement to a set of questions given with reference to SOSMA 2012. Figure 3 indicates the findings.

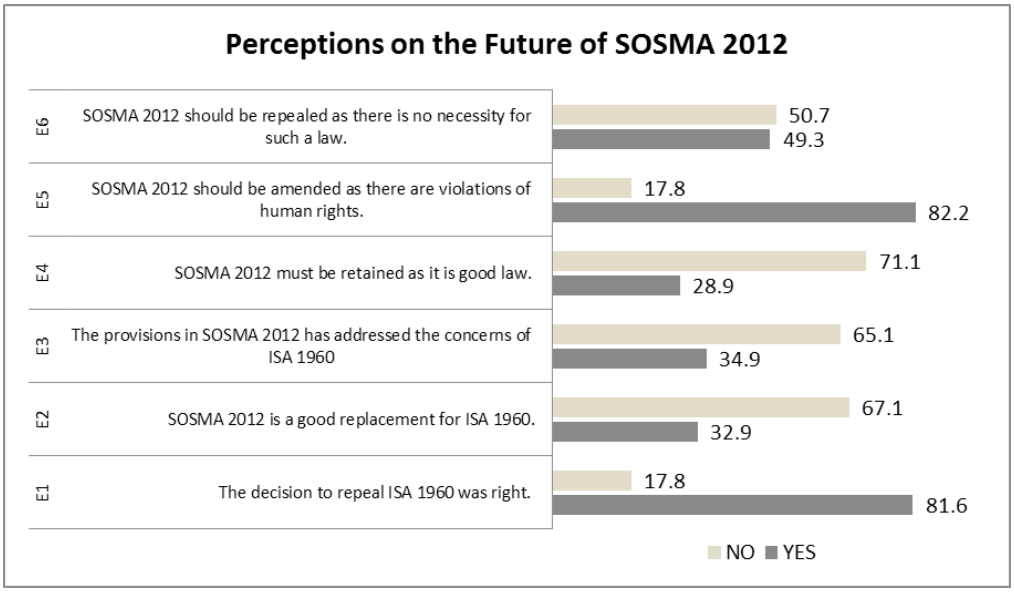

Figure 3: Perceptions on the Future of SOSMA 2012

As shown in Figure 3, the respondents' responses are very interesting. A large percentage of respondents (81.6%) agreed that the decision to repeal ISA 1960 was right. A large percentage of respondents (82.2%) also agreed that SOSMA 2012 should be amended as there are violations of human rights. However, the respondents disagreed to 3 of the statements which are E2 [SOSMA 2012 is a good replacement for ISA 1960], E3 [The provisions in SOSMA 2012 have addressed the concerns of ISA 1960], and E4 [SOSMA 2012 must be retained as it is good law]. A majority of respondents (67.1%) disagreed that SOSMA 2012 is a good replacement for ISA 1960 (E2) and a large percentage of respondents (65.1%) also disagreed with the statement that the provisions in SOSMA 2012 has addressed the concerns of ISA 1960. Further, with regards to the statement that SOSMA 2012 must be retained as it is good law (E4), a total of 71.1% disagreed. It must be noted that the differences in percentage between the respondents who agreed and disagreed to the statement that SOSMA 2012 should be replaced as there is no necessity for such law is only 1.4%. This shows that the respondents are not absolutely certain as to whether there is a necessity for such a law. This lack of certainty is probably due to the fear that the country would experience problems if there were no such stringent laws to address the current terrorists' incidents happening around the world.

V. CONCLUSION

Recent terrorist attacks around the world such as of the United States (US) World Trade Center on September 11, 2001; Bali bombings in 2002 and 2005; London Bombing in 2005; and the Mumbai bombing in 2008 has increased the concerns with regards to internal security. This has resulted in debates as to the enactment of the recent SOSMA 2012 with some claiming that the law is as bad as ISA 1960 where basic human rights are being violated while others stating that SOSMA 2012 is not restrictive enough to cater to threats of terrorism. This study aimed to get an insight into Malaysians' perceptions on this new Act with the purpose of creating a deeper awareness into the implication of the Act. It is found that a majority of the respondents in the study are of the opinion that the Act violates basic human rights and should not be retained. They also claimed that it has not addressed the serious concerns raised on its predecessor, ISA 1960. There is also consensus that the decision to repeal ISA 1960 was right and SOSMA 2012 is not a good replacement for ISA 1960. However, the interesting point is that an average percentage of respondents are of the opinion that there is a necessity for a law catering to the protection of the country's internal security amidst the increase in number of terrorist incidents throughout the world. The researchers are of the opinion that a more in depth survey comprising of a larger sample should be done prior to any action by the government to either retain, amend or repeal SOSMA.

Section 375 Exception, Explanations and Section 375A Malaysian Penal Code –Legitimising Rape within Marriage: A Call for Reform[1]

Usharani Balasingam*
Johan Shamsuddin Hj Sabaruddin**

Abstract

This paper's objective is to consider the constitutionality and defensibility of exception and explanations under s375 of the Malaysian Penal Code (Penal Code) which legitimises the offence of rape committed by a husband on his wife. Section 375A will also be considered to see if it provides a cure for the contravention. The current law legitimises rape committed within marriage. The rationale for the differentiation in treatment of rape within and outside marriage is explored and discussed. The justification for maintaining the provision in the current day setting considering the development of society, particularly with respect to women, who have gone from being treated as chattels or possessions to legal persona having rights and entitlements including the right to vote and rights under local laws, and international and regional conventions, is discussed. The relevance of the provision today and the need for reform of the Penal Code provisions to ensure compliance with the Malaysian Federal Constitution (Federal Constitution) in spirit and form and with current policies, regional and international conventions and the Islamic perspective are discussed. The relevance of local legislation such as the Malaysian Domestic Violence Act 1994 (Domestic Violence Act) and the effectiveness of the same in achieving the outcome of the policy and objective of the Act from the perspective of a rape offence are also discussed. The movement for reform to update outdated concepts currently reflected in present laws and to embody the current spirit and form of women's status and rights as humans within society is a call much repeated and yet still ignored. This paper strives to keep alive the call for reform reminding all concerned of the jarring discrepancies between the Penal Code and the Federal Constitution and Malaysian State responsibility under regional, international human rights instruments and Islamic principles. The recommendation is to delete the s375 Penal Code exception, explanations and s375A.

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1 This paper was presented at the International Conference on Law, Order and Criminal Justice (ICLOCJ) 19 & 20 November 2014 organised by International Islamic University Malaysia with the objective to gain recognition for the need for a review of the law. This was considered opportune as the relevant authority concerned namely the Institute of Public Security of Malaysia (under Ministry of Home Affairs) signed a MOU with Ahmad Ibrahim Kulliyyah of Laws for a law review in conjunction with the conference.

I. INTRODUCTION

As recently as May 2014, the Malaysian Prime Minister in his Facebook page renewed the government's commitment to the principles and values of human rights as well as the country's subscription to the philosophy, concepts and norms of the Universal Declaration of Human Rights (UDHR).[2] It is of import to note that article 1 of the UDHR reads: *All human beings are born free and equal in dignity and rights.* The mirror principles of equality and non-discrimination are housed in the said Article for both male and female. To also quote from the speech of the Attorney General:

> We never forget that the constitutional duty enshrined in article 145 of the Federal Constitution is owed to our fellow Malaysians. This is a duty that can never be shirked regardless how onerous the challenges may be. Robert Jordan aptly captured this sentiment when he stated that, 'Duty is heavy as a mountain, death, is light as a feather'. As Attorney General, I am proud to say that we will continue to strive to ensure that each task and assignment, be it small or large, will be carried out competently, independently and fearlessly, and most definitely without bias or favouritism.[3]

The Attorney-General also noted the ongoing work of the Working Committee to review laws on Violence against Women through consultation and meetings with relevant ministries and stakeholders like the Joint Action Group for Gender Equality (JAG).[4]

In 2006, the United Nations Committee on the Elimination of Discrimination Against Women[5] had requested that Malaysia enact legislation criminalising marital rape, defining such rape on the basis of lack of consent of the wife.[6] Malaysia's response to the same, as seen in the amendments to the Penal Code in 2006, was not to delete the exception. Instead s375A was introduced wherein a married man who has sexual intercourse with his wife by use of force or fear of death to her or another is guilty of an offence that carries

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2 Suhakam Press statement, 17 May 2014: "Suhakam Welcomes the Government Commitment to the Principles and Values of Human Right", http://www.suhakam.org.my/wp-content/uploads/2014/05/Press-Statement. Site accessed on 10 July 2014.

3 Tan Sri Abdul Ghani Patail "Opening of the Legal Year 2014", *Malayan Law Journal Articles*, 2014, Vol. 1, ciii.

4 See also UN General Assembly A/HRC/WG.6/17/MYS/1 17th Session *Human Right Council Working Group on Universal Periodic Review Malaysia National Report* 6 August 2013 GE 13-161132. It is to be noted that the Suhakam and Anti Rape Task Force Committee's recommendation to criminalise marital rape was previously ignored despite the (then) Suhakam commissioner Prof Hamdan Adnan stating that *Rape is violent and cruel and indeed should not happen between a husband and wife.* See, Devaraj Prema, "Furore Over Marital Rape. It should be seen as a Criminal Offence", *Aliran Monthly,* 2004, Vol. 24, Issue 9.

5 Malaysia is a signatory to the Convention on Elimination of Discrimination Against Women (CEDAW) and acceded to it in 1995.

6 United Nations Committee on the Elimination of Discrimination against Women Thirty-Fifth Session, 15 May 2006 – 2 June 2006. Excerpted from: Supplement No. 38 (A/61/38), *Concluding comments of the Committee on the Elimination of Discrimination against Women: Malaysia Combined Initial and Second Periodic Report,* para 39.

a maximum sentence of five years.[7] Malaysia's recent response to the United Nation Human Rights Council is that:[8]

> The Domestic Violence Act 1994 [Act 521] was enacted to curb the use of violence by a person against his/her spouse as well as provides a platform for victims to seek protection and justice. Act 521 was amended in 2011 to widen the definition of "domestic violence" to cover emotional, mental and psychological abuses. The concept of marital rape is not recognised in Malaysia's legal system. That notwithstanding, s375A of the Penal Code was enacted to prevent husbands from causing hurt or the fear of death to his wife in order to have sexual intercourse with her.

The United Nations Universal Second Periodic Report recommendation that Malaysia criminalise marital rape so as to allow equal protection of the law was rejected by Malaysia on the grounds that the concept of marital rape is not recognised in Malaysian legal system.[9] The process of ensuring the transformation of the societal structure power imbalance in favour of male gender favoured policies and laws has to be viewed as a continual process whereby persistence is a necessary attribute to attain a paradigm shift in the way women are to be treated in line with human dignity and the gender equality agenda of the United Nations and to eliminate violence against women.[10]

Suffice to state here, the point to be expanded upon later more fully is that it is the government's responsibility to make changes to the legal framework that discriminates against women, to uphold human dignity and eliminate violence against women and advance gender equality.

Malaysia has to address violence against women of which the legitimising of rape within marriage is arguably a significant flag or indicator of the status or regard women have in Malaysia. The area of focus is the defensibility of maintaining the immunity granted to a husband for marital rape. An ancillary question is whether the domination over, the lack of equality or the violence committed against women in cases of marital rape is cured by the possible charge of an alternative lesser offence under s375A.

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7 Hansard Parliament Debate Penal Code (Amendment Bill), 23 October 2007, pp. 1-5. Ms. Ellen Lee (Sembawang MP) raised the pertinent point that section 375A does not address the crime of marital rape and the protection to be given for this crime as opposed to assault. She cites United States, Britain, Australian, Taiwan, Hong Kong, Sri Lanka and the Philippines as having adopted marital rape laws. Other countries include New Zealand, Japan and Indonesia. See also Devaraj Prema *supra* n 4.

8 United Nations Human Rights Council Twenty – Fifth Session Agenda item 6 Universal Periodic Review Report of the Working Group on the Universal Periodic Review Malaysia A/HRC/25/10/Add.1 United Nations 4th March 2014.

9 Suhakam Table of Classification of UPR recommendation and Table on Government Position on UPR recommendation (item 146.129) http://www.suhakam.org.my/regional-international/upr/second-cycle-2013/HRC/25/10/Add.1/ Malaysia. Site assessed on 10 July 2014.

10 United Nations Development Programme Report (2013) *Humanity divided: Confronting Inequality in Developing Countries* where it was opined that Civic engagement, in and of itself, can greatly contribute to shifting people's opinions, interpretative schemes and attitudes. Available online at www.undp.org/poverty. Site assessed on 12 August 2014.

A. The Framework of the Paper

To begin, reference is made to the Malaysia's Millennium Development Goals (MDG) report to highlight the high rate of violence including domestic violence and marital rape against women in Malaysia. This is a matter of national concern that requires the immediate attention and address of policy and lawmakers. It will then be considered from a social perspective why marital rape should be a crime. This will be seen both in terms of impact to the wife/victim and the need to prevent the use of the exception in an abusive domestic relationship that undermines any law that strives to protect women from violence, violation and inequality.

The basis and rationale for the relevant exception will be shown to have been discarded in its country of origin as being no longer valid in current times. The Federal Constitution, regional and international declarations and conventions including the Convention on Elimination of Discrimination Against Women (CEDAW), which Malaysia has ratified, will be considered in order to advance the argument that the provisions of the exception to s375 and s375A should be deleted.

Finally, it is suggested that Islamic law does not condone the rape of a wife by her husband and that in fact rape by a husband of a wife is not Islamic. Further, there is a need to differentiate cultural and religious aspects in reviewing the continued desire for the exceptions legitimising marital rape. There is a need to reflect whether in resisting the calls to make marital rape a crime, lawmakers are in fact upholding and perpetuating the structurally and culturally male dominated biasness in a law which we are obliged to reform. An insight into the alarming status report of violence against women in Malaysia is produced below.

B. Alarming State of Violence Against Women in Malaysia

The Malaysia Country Report on MDG[11] 2010 highlighted that there is a low prosecution rate for acts of rape against women. It was reported *that perpetrators of acts of violence against women can apparently commit their acts with virtual impunity, indirectly rendering them "acceptable*". Alarming too is the comment that only 10 % of rape cases are reported. Research by the All Women Action Society (AWAM) shows that between 2000 and 2002, 52% of wives in relationships where there is domestic violence faced marital rape, often repeatedly.[12]

The findings in the report sum up the collective crimes of rape, incest and outrage of modesty cases at an incidence rate of 21.8 per 100,000 population. The report equates these crimes against women with the Malaysian rate for "assaults" leading to serious

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[11] United Nations Country Team Malaysia, Malaysia (2010) Millennium Development Goals United Nations Country Team, April 2011. Malaysia. See also UNESCO (2014) Priority Gender Equality Action Plan (2014-2021),37 C/4-C/5 – Compl. 1 France. In fact, the statistics reveal that, at the country level, reported cases trebled from around 1,200 in 2000 to around 3,600 in 2009, out of which there were only 162 prosecutions for rape, rendering a basis for the comment above.

[12] AWAM *Memorandum on Amendment to Law Relating to Rape* (2003) AWAM's statistics show that in the years 2000 – 2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands and physical force was used during sexual intercourse.

bodily injury and leading to death. If domestic violence is included, then women are at a greater risk of gender-based violence than the population is to mere "assaults". Thus, this is said to demonstrate a rampant state of violence against women.

The World Report on Violence and Health by the World Health Organization in 2002 suggested that 40–70% of women murdered worldwide were killed by their current or former husband or boyfriend, frequently in the context of an ongoing abusive relationship.[13]

The current state of law serves only to empower the married man to dominate his wife by turning a blind eye to equal treatment (irrespective of marital status) by forfeiting the requirement for the free consent of both parties for the sexual act. Further, it promotes violence against and violation of a married woman by an abusive husband on both a physical and nonphysical dimension for which there is no redress, as the law stands, under the Domestic Violence Act or the Penal Code since rape within marriage is legal.

If Malaysia intends to protect women in the sphere of domestic relationships and recognise the right status of women, the place to start and accord legal recognition of this is by recognising that a woman does not lose the rights she has as a human being and woman in relation to the offence of rape just by the fact of her marriage. There is a need for her consent. This signifies not only her status as an equal human being (a rights holder as opposed to property) but also that her consent is required as to the use of her physical body for sex irrespective of her marital status. Sections 375 and 375A of the Penal Code are contended to be in conflict in this regard with articles 5 and 8 of the Federal Constitution as will be explored further later.

Further, to protect the sanctity of marriage and respect for women, there is a need to ensure violence and violation in whatever form is not tolerated in the most basic and fundamental foundation of our social framework i.e. the family unit, and to accord greater protection to recognising and affirming this in policy, law and enforcement.

II. LIMITATIONS OF MALAYSIAN DOMESTIC VIOLENCE ACT 1994 AND SOCIAL PRESPECTIVES ON WHY MARITAL RAPE SHOULD BE A CRIME

On why men rape, we refer to the findings of Philip N.S. Rumney[14] where he scoffs at the idea that men rape stating that the argument that *"he lost control in his sexual excitement*' is simplistic and completely ignores our growing understanding of why men rape. The research cited suggests a rationale that is in line with power or dominance theory, which is expressed by researchers as male sexual expression of power, dominance and anger over women and the male's own feeling of insecurity or inadequacy.

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[13] WAO, 10 June 2013, Inadequate Protection for Women http://www.wao.org.my/news_details.php?nid=296&ntitle=Inadequate+protection+for+women#sthash.WB7eTFyd.dpuf Site accessed on 5 August 2014.

[14] Philip N.S. Rumney, "When Rape isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape"*, Oxford Journal of Legal Studies*, 1999, Vol.19, p. 252. He notes that "The assault may be triggered by what the offender experiences to be a challenge by a female or a threat from a male, something which undermines his sense of competency and self- esteem and activates unresolved feelings of inadequacy, insecurity and vulnerability. He attempts to restore his sense of power, control and worth through his sexual offense."

The law as it stands as regards marital rape favours this treatment of women as objects and the abuse of power and dominance by the male husband, and does not protect the weaker wife. One could argue that the reason domestic violence laws are proposed in the first instance is to curb the expression of male dominance over females in the family unit through the use of power (which is now translated into its physical and non-physical aspects).[15] To argue in favour of maintaining the immunity for a rape offence within marriage, which is the primary method by which men in abusive marital relationships demonstrate their dominance, power, subjection and violation of the female, is to aid and abet the male offender in the victimisation of the female. Hence, to argue that Malaysia has domestic violence laws and then turn a blind eye to the offence of rape within marriage is to make a mockery of any law purporting to curb domestic violence.[16]

The Domestic Violence Act does not create any new offence so there is no special protection afforded to women in a domestic context. The offences fall back on the Penal Code existing offences of hurt, criminal force and assault.[17] As marital rape is not an offence, no protection is afforded to married women. They remain vulnerable, unprotected and deprived of the equal protection of law accorded to unmarried women.

It is submitted that rape within marriage is arguably an incident reflective of domestic violence, to which the current state of law chooses to turn a blind eye. In 2012, the Domestic Violence Act was amended[18] to include recognition under the inclusion of item (f) in the definition of domestic violence to include:

> psychological abuse which includes emotional injury to the victim in addition to the pre-existing definition of fear of physical injury, causing physical injury or compelling the victim to engage by threat or force in any act, sexual or otherwise the victim has a right to abstain.

The amendment to recognise the dimension of violence in accordance with established Declarations[19] is welcomed. It is to be noted, however, that in the same Declaration marital rape is exemplified as violence against women.

However, the gap is that our current law does not recognise marital rape. Hence the victim (wife) here has no right to abstain and cannot have recourse to the remedy for psychological abuse given under the law if it is caused by marital rape. Marital rape needs to be outlawed in order to give effect to the remedy sought to be given to wives

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15 See, Domestic Violence (Amendment Act) Act 2012. Progress in protecting women rights has been slow-paced.

16 It is to be noted s375A does not penalise the offence of rape within marriage but focuses instead on the use of force or threat by a married man in order to have sexual intercourse with his wife. It is argued that this does not address the offence of violation caused by the act of rape within the context discussed in s375 Penal Code.

17 Nor Aini Bte Abdullah, "Domestic Violence Act: An end to a Nightmare?", *Malayan Law Journal*, 1995, pp. xli-xlv.

18 See, The Domestic Violence (Amendment Act) Act 2012. It is to be noted that it took almost 20 years for domestic violence to be categorised as a seizable offence in order to give it due and proper attention by law enforcement.

19 United Nations Declaration on Elimination of Violence Against Women Proclaimed by the General Assembly of United Nations 20 December 1993 Resolution 48/104 Article 1 includes physical, sexual or psychological harm in private life and article 2 exemplifies marital rape as violence against women.

under this amendment. At the moment what we have is just contradiction and a lack of effective remedy for married women because of the gaps in the law.

It would be untoward in this day in 2015 to overlook the physically, emotionally and psychologically abused state of a married rape victim whose offender is the husband.[20] According to research by Diana Russell, the impact of marital rape is more severe than stranger rape.[21]

> When you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with your rapist.[22]

Another point made by Rumney is that marital rape may, by its very nature, have a unique and devastating impact upon victims, precisely because of, and not despite, the relationship between victim and assailant. It is suggested the relationship is one of trust and confidence, the breach of which warrants more serious consideration. In fact the argument is that because of the relationship of trust, the more aggravating is the offence of marital rape and, in this regard, the related area of domestic violence. Hence protection against marital rape could be argued as a furtherance of the sanctity of the family unit.

That the impact of marital rape on the wife victim has serious consequences is supported by reference to the Working Paper of the Law Commission where it is noted that:

> it is by no means necessarily the case that non-consensual intercourse between spouses has less serious consequences for the woman, or is physically less damaging or disturbing for her, than in the case of non-consensual intercourse with a stranger'.[23]

The Commission also suggested that marital rape may be '*equally or even more, "grave" or serious as when the conduct takes place between non-spouses*' because it is an act

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20 N. Naffine, "Windows on the Legal Mind: The Evocation of Rape in Legal Writing" Melbourne U.L.Rev., 1992, p. 767. commented on traditional legal thinking about the nature of rape and how the law should best deal with it depends on outmoded and contested images of women and their relations with men' and '[w]hile academic lawyers continue to analyse legal doctrine in a matter which excludes the insights of other disciplines (particular the feminisms, criminology, and the social sciences) . . . they will be poorly placed to understand the true complexity of the crimes they wish to dissect and analyse and more particularly what those crimes mean to the women affected.

21 Diana H. Russell*, Rape in Marriage* 2nd ed. Indiana University Press, Bloomington, 1990. Russell found that out of a sample of 69 women 59% stated that they were 'extremely upset' by their experience of marital rape. Of 115 women in an earlier sample who were raped by strangers 61% stated that they were 'extremely upset'. Russell found that there was a significant difference in trauma related to the long-term effects of the assault: 52% of women raped by their husbands and 39% raped by strangers stated that they suffered 'great' long-term effects. Russell concluded that her findings argue strongly against the notion that wife rape is less traumatic than other forms of rape.

22 Finkelhor and Yllo (1985) *License to Rape-Sexual Abuse of Wives* New York, The Free Press. Also noted were the betrayal, anger, humiliation, and guilt suffered by the victim and many other responses: aversion to sex, fear of being raped again, inability to trust, feelings of defilement and lack of self-esteem, which were partly brought on by the verbal abuse which accompanied many of the rapes.

23 HSMO (1990)The Law Commission Working Paper No 116 *Rape within Marriage,* para 4.21.

'*that has been or should have been his means of expressing his love for his wife*'. In its final report the Commission reaffirmed this view concluding: *'[marital rape] ought to be viewed by the criminal law on the same basis as extra-marital rape'*. In so doing the Commission noted:

> A number of respondents agreed that one reason why marital rape was as serious as, if not more so than, rape by a stranger was that it was an abuse of an act used to express love and an abuse of trust'.[24]

The Law Commission Working Paper rationalises the reason for there being a separate crime for rape and for that crime to be regarded as a serious violation:

> Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe; the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing insecurity, the fear of veneral disease or pregnancy. We do not believe this later should be underestimated because abortion would be usually available. That is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value.[25]

Another point made in Rumney's paper that is worth noting is the fact of denial of the violence inherent in rape based on a previous consensual sexual relationship. Rumney highlighted the point that such approaches are inherently illogical:

> '[a rape] victim's vulnerability to psychological harm cannot be assessed by reference to her experience of an act which is essentially of a different nature to the one which constitutes that criminal act of rape. To argue otherwise would lead to the absurd result that any woman with an active sex life, married or not, in a relationship or not . . . is necessarily less traumatised by rape. [26]

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[24] *Ibid*. para 4.17. It is to be noted also under the Malaysian Penal Code the abuse of position of trust in the commission of rape would warrant heavier penalties under aggravated rape.

[25] HSMO (1990) The Law Commission Working Paper No 116 *Rape within Marriage* p 49-50. See also HSMO (1990) The Law Commission Working Paper N0 113 Rape within Marriage p 127 referring to Warren Young, Rape Study, A Discussion of Law and Practice (1983) p 121 stating seven victims of marital rape were interviewed at length in this study. Although all had been living in violent relationships for a long period of time, they nonetheless experienced real and severe mental anguish, including feelings of terror, helplessness, shame and degradation.

[26] *Supra* n 14.

This phenomenon is women specific and applies also in Malaysia.[27] The Rape Report (2002) makes the following points[28] - (1) That a woman does not give up her right to decide if she consents to sex upon marriage; (2) That rape within marriage causes great continuous suffering to the victim given the fact the party is known and should be classified as a crime; and (3) A study conducted on domestic violence in 1989/1992 found that in 50% of cases of domestic violence the husband had used physical force during sexual intercourse.

Women who experience rape in marriage suffer severe physical and psychological trauma from the abuse, which is often repeated many times. The evidence of the impact of rape within marriage is also illustrated by the fact that in marital rape, there is the added element of betrayal and a breach of intimacy, in addition to the violence used. Research indicates that marital rape survivors are more likely to suffer multiple long lasting psychological injuries compared with rape by a stranger or acquaintance.[29]

Criminalising marital rape is also extremely important symbolically, as it demonstrates the government's and society's evolving respect for women and the need to protect women from all forms of violence. Eliminating the marital rape exception sends a clear signal that any rape within or outside a marriage is inherently wrong. It also demonstrates the level of commitment that exists in the elimination of violence against women in the domestic setting and the recognition of human rights in the person of a woman. Much has been devoted here to bring to the fore the fact that rape within a marriage occurs usually in an abusive and dysfunctional marital relationship for which there is a need for redress for the victim.

III. SECTIONS 375 AND 375A PENAL CODE, ACT 574

Section 375 which defines the offence reads:

> A man is said to commit "rape" who, except in the case hereinafter excepted has sexual intercourse with a woman under the circumstances falling under any of the following description:
> (a) Against her will
> (b) Without her consent ….

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[27] Brown Victoria Msian Activist call for marital rape to be recognized as rape. Asia News Network The Star 13 August 2013 where activists voiced the reality that rape is an act of violence. It is all about power and control. It is a sexual assault on the victim. Marital rape is a form of domestic abuse and often occurs with other forms of abuse.

[28] Lai Suat Yan, Maria Chin Abdullah, Ong Ju Lin, Wong Peck Lin (2002) Alina Rastam Ed An Overview of Rape in Malaysia AWAM, Strategic Info Research Development (SIRD). Also in Memorandum on Amendment to Law Relating to Rape (2003). AWAM's statistics show that in the years 2000 – 2002, 52% of women who had been subjected to domestic violence had been forced into sex by their husbands and physical force was used during sexual intercourse. Similarly a WAO National Research on Domestic Violence (1989–1992), Malaysia, showed that of the 60 battered women who sought help from five agencies, 50% of the cases also reported their husbands had used physical force during sexual intercourse.

[29] AWAM, Anti Rape Task Force (2003) Memorandum on Amendment to Law Relating to Rape (September 2003) Proposal for Amendments Coordinator All Women Action Society (AWAM) p11 cited the Center for Research on Partner Violence, www.wellesley.edu America for reference.

(f) with her consent, when that consent is obtained by using his position of authority over her or because of a professional relationship or other relationship of trust in relation to her;[30]
(g) with or without her consent, when she is under 16 years of age.

The exception to s375 reads:

> Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in the Federation as valid is not rape.

This is followed by explanations wherein a woman who has a judicial separation order or a decree nisi not made absolute or has obtained an injunction restraining her husband from having intercourse with her or a Muslim woman living separately from her husband during the period of *iddah* is not deemed to be his wife under this section.[31]
Additionally s 375A, which was inserted in 2006 reads:

> Any husband, who during the subsistence of a valid marriage, causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to 5 years.

A. Need to Reform the Law – The Rationale for the Law No Longer Exists

The current exception to s375 under the Penal Code is an inherited provision from an era where the UDHR and the recognition of women as human beings to be accorded rights had yet to penetrate the fabric and structure of a male dominated legal world shaped by male dominated bias.

The immunity given to a husband for marital rape is based on the concept of property, that when a woman enters into a marriage contract she consents to sexual intercourse and is unable to retract that consent.[32] This position has undergone a change due to the changing societal roles and power balance within the hierarchical social structure and more importantly due to the recognition that humans, irrespective of gender, are entitled to equal human rights and human dignity. This is what underlies the UDHR among other

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30 Although this exception inserted in 2006 is targeted at medicine men, sinseh, bomoh or maid employers who may be in a position of authority or trust over women, but for the exception, this could be read to also include the husband.

31 Note that the onus is placed upon the woman to get a court order to safeguard her rights to protect herself from involuntary sexual intercourse with her husband. Section 375B of the Indian Penal Code does not require a women to get such an order but merely to live separately from her husband. A move more favorable to women than what currently exists in Malaysia.

32 The History of the Pleas of the Crown (1800) at p. 629. See also *R v Clarke* [1949] 2 All ER 448 and *R v Miller* [1954] 2 All ER 529.

rights documents. When the case of *R v R (1991)*[33] was heard in the Court of Appeal Lord Lane CJ stated that:

> a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

Lord Keith in the House of Lords noted that:

> Hale's proposition reflected the state of affairs at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways . . . marriage in modern times [is] regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband'.[34]

The immunity for marital rape stands no longer in the country of its origin in light of societal development and the recognition of the rights of women but we slavishly follow a law that is behind its time.

This is not in line with the principles that exist today in our Constitution, the international and regional commitment to which Malaysia has subscribed to or to Islamic law as the following parts of this paper will serve to propose.

IV. MALAYSIAN STATE RESPONSIBILITY IN THE INTERNATIONAL AND REGIONAL ARENA

The Malaysian government has committed itself to promoting the empowerment of women and the elimination of violence against women. The following are listed as indications of its commitment:

- ratification of and accession with reservations to the Convention on Elimination of Discrimination Against Women (CEDAW) in 1995;
- constitutional Amendment to article 8 (2) of the Federal Constitution to prohibit discrimination based on gender;[35]
- endorsement of the Declaration on Elimination of Violence against Women in the ASEAN Region. This Declaration, signed by the ASEAN Foreign Affairs Ministers in June 2004, stresses the importance of regional cooperation to eliminate violence against women;
- as the chairman of the Non-aligned Movement (NAM), Malaysia undertook an initiative to include the concerns of women as part of the agenda of the Movement.

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33 *R v R* [1991] 2 All ER 257. In interpreting s1(1) Sexual Offences Amendment Act (1976) which defines rape as having "unlawful" sexual intercourse with a woman without her consent, the word unlawful was treated as a mere surplusage not meaning outside marriage as was the prior common law position, thus revamping the law to recognize women as rights holders and not mere chattels. See also *R v J* [1991] 1 All ER 759.

34 *R v R* [1991] 4 All ER 481, pp. 483-4.

35 Note also that article 8(1) also provides that all persons are equal before the law and entitled to the equal protection of the law.

> The meeting endorsed the Putrajaya Declaration and the Programme of Action for the Advancement of Women in Member Countries of NAM. Among the outcomes of this meeting was the establishment of the NAM Centre for Gender and Development in Kuala Lumpur;

- the establishment of the Ministry of Family, Women and Community and the National Policy on Women 1989; the Second National Policy on Women and the Women's Development Action Plan in August 2009;
- on 8 November 2012, Malaysia adopted the ASEAN Human Rights Declaration (AHRD), which reaffirms the importance of ASEAN's efforts in promoting human rights, including the Declaration of the Advancement of Women in the ASEAN Region and the Declaration on the Elimination of Violence against Women in the ASEAN Region; and
- the third goal of the MDG of the United Nations which aims to promote gender equality and empower women.

The question posed by this paper is focused on whether, by condoning marital rape, Malaysia is in compliance with the spirit and form of its international, regional, constitutional and even Islamic obligations and commitment to protect women from violence and accord them human rights.

The common thrust to international and regional conventions is the founding doctrine in the parent document, the Universal Declaration of Human Rights wherein under article 1 the twin concepts of equality and non-discrimination are embedded. *All human beings are born free and equal in dignity and rights.*

Women's right to live free from violence is upheld by international documents such as the CEDAW especially through General Recommendations 12 and 19, and the 1993 United Nations Declaration on the Elimination of Violence against Women. In addition and in relation to these are the ASEAN and Putrajaya Declarations that affirm state responsibility to take affirmative action to protect and reform laws that violate human rights and discriminate and propagate violence against women and girls. Malaysia, in accession to CEDAW, made the following reservation:

> The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regard thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 9 (2), 16 (1) (a), 16 (1) (c), 16 (1) (f) and 16 (1) (g) of the aforesaid Convention.[36]

Article 16 is reproduced below:

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[36] Article 16(1)(f) deals with the right to guardianship and adoption and article 16(1)(g) the right to choose family name, profession and occupation. Art 9(2) refers to the granting of equal rights to women with respect to the nationality of their children.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
   (a) The same right to enter into marriage;
   (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
   (c) The same rights and responsibilities during marriage and at its dissolution.

With reference to article 16(1)(c), the argument here is that the rights and responsibilities during marriage would not translate to the right to commit violence during the course of a marriage. This is supported by recognition of the need for and enactment of domestic violence laws. It will be seen in the following parts that marital rape is arguably in conflict with and contradicts constitutional liberties and Islamic principles.

To rely on article 16(1)(c) to argue that it allows a husband (whether Muslim or non-Muslim) to rape his wife as a marital right would not only demean women by maintaining a stronghold on the property theory, it would also propagate a narrow construction of Islamic principles. It is to be reflected whether or not such an argument is, in fact, made by vested interests to preserve the imbalances in a cultural setting that strives to favour the male. In fact the phrase same rights and responsibilities during marriage may be argued to mean that mutual consent for sexual intercourse is required during the course of a marriage.

The reservation should not be manipulated to advance an argument that seeks a backdoor exit from upholding the obligation of eliminating violence. Malaysia should not seek to justify upholding discriminatory laws against women in this context by simply asserting that Malaysian laws do not recognise marital rape. This is especially so when the Declaration of Elimination of Violence Against Women plainly states the State obligation to outlaw marital rape[37] and recognises marital rape as an offence and an act of violence against women:

> Article 1
> For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.
>
> Article 2
> Violence against women shall be understood to encompass, but not be limited to, the following (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related

[37] See also article 7 of the United Nations Declaration on the Elimination of Discrimination against Women proclaimed by the General Assembly Resolution 2263 (XX11) of 7 November 1967 . See also article 2 (g) of the CEDAW.

> violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

CEDAW has also recognised that discrimination against women also occurs when there is discrimination or a distinction made between married women and unmarried women which serves to impair their human rights and fundamental freedoms in any field.[38] The Convention imposes on State Parties to the Convention the obligation to agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women.[39]

Malaysia initiated the Putrajaya Declaration[40] which itself states in:

> para 38. We hereby commit ourselves to: a) Review and amend all laws in order to identify and eliminate negative traditional and customary practices that discriminate against women; b) Establish appropriate national monitoring mechanisms for monitoring and evaluating implementation of measures taken to eliminate violence against women and girls.

The use of cultural difference as a rationale to justify inequality and discriminative treatment cannot be condoned or accepted as it will render naught the many Conventions listed previously to which Malaysia has been a party. It should be recalled here that the World Conference on Human Rights affirmed that:

> while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[41]

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38 CEDAW article 1 provides that "discrimination against women" shall mean any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

39 CEDAW article 8 section 3.1.

40 Putrajaya Declaration and Programme of Action on the advancement of women in member countries of the Non-Aligned Movement (NAM) 7-10 May 2005, Putrajaya, Malaysia http://www.choike.org/nuevo Putrajaya Declaration and Programme of Action on the advancement of women in member countries of the Non-Aligned Movement (NAM) Retrieved 10 July 2014. See also ASEAN Declaration of Elimination of Discrimination Against Women in ASEAN recognized that violence against women both violates and impairs their human rights and fundamental freedoms, limits their access to and control of resources and activities, and impedes the full development of their potential. It goes on to declare and resolve inter alia to enact and, where necessary, reinforce or amend domestic legislation to prevent violence against women, to enhance the protection, healing, recovery and reintegration of victims/survivors, including measures to investigate, prosecute, punish and where appropriate rehabilitate perpetrators.

41 World Conference on Human Rights, Vienna Declaration and Programme of Action adopted on 25 June 1993, I , No . 5. See also Agreed conclusions on the elimination and prevention of all forms of violence against women and girls E/2013/27 Agreed conclusions adopted by the Commission are transmitted to the Economic and Social Council, in accordance with the Council resolution 2008/29 of 24 July 2008, as an input to the annual ministerial review and the development cooperation forum E/CN.6/2013/11.

A common theme of the Declaration and Convention and other instruments that spring therefrom, some of which are singled out above, is the history of male dominance, power imbalance and embedment of policies and law that favour men and oppress or discriminate against women.

Given the importance of CEDAW which is ratified and acceded to by Malaysia we reproduce for emphasis and highlight Articles 1, 2 and 5 therein. The point to be established here is that marital rape is exemplified as violence against women. Hence the need for a paradigm shift in social and cultural patterns regarding the status of women and the obligation to revamp policy and law, especially s375 and s375A which are in question here. CEDAW does not allow women to be deprived of their fundamental freedom and rights (arguably also under articles 5 and 8 of the Federal Constitution) by making a distinction based on their marital status. The effect is to make s375 and s375A contradictory to CEDAW, which Malaysia has ratified and acceded to.

Article 1 provides that:

> discrimination against women shall mean any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 5 goes on to impose on the state the obligation to:

> modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[42]

This quite extensive review of international and regional documents ends with a reference to the Report of the Working Group on the issue of discrimination against women in law. At the 26th Session of the Human Rights Council (April 2014) under item 136, states were called on to *eliminate all laws which discriminate against women by prescribing*

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[42] See also article 2 CEDAW which states: State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a)To embody the principle of the **equality of men and women in their national constitutions or other appropriate legislation** if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, **prohibiting all discrimination against women**; (c)To establish legal protection of the rights of women on an **equal basis with men** and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f)To take all appropriate measures, including legislation, **to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women**; (g)To repeal all national penal provisions which constitute discrimination against women.

invasion of women's physical integrity and autonomy.[43] Reference is also made to the UN Commission on Women wherein the Commission reaffirms the UN instruments on elimination of violence against women and reiterates that it is an essential precondition for the attainment of the MDG.[44]

The objectives of the Malaysian Policy on Women 2009 include the provision:

> of a conducive environment, policy and legislation that are women friendly to increase the stature and wellbeing of women in all aspects physically, economically, socially, politically, health wise, psychologically and spiritually, recognising gender equality at all levels of the community in all sectors and in the domestic front strengthen the institution of marriage by recognising equal and just position of male and female.[45]

One cannot avoid asking whether it is equal and just to require a married woman to be subjected to sexual intercourse without her consent. It is in a dysfunctional and abusive relationship that a husband would commit rape against his wife in the context discussed earlier. There is no question of equality and justice in such situations where forced sexual intercourse is founded on an expression of power, dominance and control of the male husband over his female wife. Malaysia has a Plan for Action for the Development of Women comprising 13 sectors, one of which is the elimination of violence against women.

If there is no redress for marital rape under the laws of Malaysia, it is submitted that the transformation in spirit and form of all the instruments set forth above and also in the Policy on Women 2009 has yet to occur for Malaysian women. The jarring existence of the marital rape exception is a reflection that the championed change is in form only and solely a matter of rhetoric. It is not a change that is transformative or one that is in recognition of women's rights and the need for redress against violence.

V. FEDERAL CONSTITUTION

Malaysia practices constitutional supremacy as stipulated under Article 4 of the Federal Constitution. As Lord President Suffian said in *Ah Thian v Government of Malaysia*[46]:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

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43 Human Rights Council Twenty-sixth session Agenda item 3 Report of the Working Group on the issue of discrimination against women in law and in practice A/HRC/26/39 1 April 2014 wherein it is reiterated that the due diligence standard for violence against women (VAW) is laid out in the Declaration on the Elimination of Violence against Women (1993) in article 4(c), where States are urged to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

44 United Nations Commission on the Status of Women Fifty –Eight Session 10-21 March 2014.E/CN.6/2014/L.7

45 http://www.kpwkm.gov.my/dasar1, accessed on 29 August 2014.

46 *Ah Thian* v *Government of Malaysia* [1976] 2 MLJ 112.

In his paper Human Rights and the Malaysian Judicial System,[47] Court of Appeal Judge Justice Dato Abdul Malik Ishak also said that:

> If a law is unconstitutional, the court should strike it out. And if an executive act is unlawful, the court should not hesitate to quash it. In my view, the legislature, the executive and the judiciary should act in accordance with the law.

In this section, the question of whether the provisions of s375 exception and explanation and s375(A) are contrary to articles 5 and 8 of the Federal Constitution will be examined.

It is important that we examine the Federal Court position regarding the approach to the construction of a fundamental right and a constitutional provision. Towards this end, we have as the main guide the outline set out by the Federal Court in the decision of *Lee Kwan Woh v PP*.[48] Firstly, as the supreme law of the land it ought not to be interpreted by the use of the canons of construction that are employed as guides for the interpretation of ordinary statutes, and judicial precedent plays a lesser role. Secondly, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. It is a unique document to be interpreted liberally and generally and not literally. It is said to be the duty of future generations of judges to give life to the abstract statements of fundamental rights.[49] In the case of *Badan Peguam Malaysia v Kerajaan Malaysia*[50] the court aptly puts it:

> The long and short of it is that our Constitution – especially those articles in it that confer on our citizens the most cherished of human rights – must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

Thirdly, that the court when interpreting the other provisions of our Constitution, in particular, those appearing in Part II thereof, must do so in the light of what has been correctly referred to as "*the humanising and all pervading provisions of art 8(1)*.[51] Fourthly, whilst fundamental rights guaranteed by Part II must be read generously and in a prismatic fashion, provisos that limit or derogate those rights must be read restrictively.[52]

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47 Abdul Malik Ishak, "Human Rights and the Malaysian Judicial System", *Malayan law Journal,* 2009, Vol. 3, p. viii.

48 *Lee Kwah Woh* v *PP* [2009] 5 CLJ 631where the more restrictive approach in the case of *Government of Malaysia* v *Loh Wai Kong* was disapproved. See also *Sivarasa Rasia*h v *Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 and *Badan Peguam Malaysia* [2008] 1 CLJ 521.

49 *Lee Kwah Woh* v *PP* [2009] 5 CLJ 631 at p 640 cited with approval Lord Hoffman's comment in Boyce v Queen [2004] UKPC 32.

50 *Badan Peguam Malaysi*a v *Kerajaan Malaysia* [2008] 1 CLJ 521 in the judgment of Hashim Yusoff FCJ approved, inter alia, the cited passage in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim* v *Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19.

51 Ibid the Federal Court in the majority judgment of Hashim Yusoff FCJ also accepted and applied the following statement of the Court of Appeal in *Dr Mohd Nasir Hashim* v *Menteri Dalam Negeri Malaysia* - "When interpreting the other parts of the Constitution, the court must bear in mind all the providing provision of art 8(1). That article guarantees fairness of all forms of state action"

52 See the approach of court as the custodian and guardian of rights as stated in the case of *Prince Pinder* v *The Queen* [2002] UKPC 46 quoted with approval in *Lee Wan Woh* v *PP* [2005] 5 CLJ 631 at p 642.

In addition to the above, the need to construe the rights so as to be compliant with the provision of CEDAW is demonstrated in the case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors*. The court dealt with the issue of whether the refusal to employ a woman on the grounds of her pregnancy alone is a form of gender discrimination and thus unconstitutional under Article 8 of the Federal Constitution. The High Court Judge referred to CEDAW in clarifying the term "equality" and the concept of gender discrimination under article 8 of the Federal Constitution.[53]

It was held that CEDAW is not a mere declaration but that it has the force of law and is binding on member states. The Attorney General decided not to pursue the appeal against the above decision hence acknowledging the binding force of CEDAW. Hence in construing our Federal Constitution, the need for and importance of being compliant with CEDAW and the provisions therein is affirmed.

A. Article 8 Federal Constitution

The case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Awam,* characterised article 8(1) as *"*...all-pervading in effect…*"* that "…strike at arbitrariness in a state action and ensures fairness and equality of treatment..."[54] Article 8 (1) declares that *all persons are equal before the law and entitled to equal protection of the law.*[55]
Article 8 (2) provides:

> that except as expressly authorised by the Constitution, there shall be no discrimination against citizens[56] on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.[57]

Equality is a dynamic concept with many aspects and dimensions and it may not be imprisoned within traditional and doctrinaire limits.[58] This we need to be reminded of in light of the recent developments in favour of women (and human) rights in order to move and shape the law accordingly.

Article 8 of the Federal Constitution, on the face of it, the terms equal before the law and equal protection of the law may seem similar but they do have different connotations. Whilst equality before the law is a more negative concept that implies that no special privileges are to be accorded and that there is equal subjection of all to ordinary law, equal protection is more positive in that it implies equality of treatment in equal circumstances.[59]

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53 *Noorfadilla Bt. Ahmad Saikin* v *Chayed bin Basirun & Ors* [2012]1 MLJ 832 See also United Nations Human Rights Council Working Group on the Universal Periodic Review Seventeenth session Geneva, 21 October–1 November 2013 Malaysia National Report A/HRC/WG.6/17/MYS/1 6 August 2013.

54 *Tan Tek Seng* v *Suruhanjaya Perkhidmatan Awa*m [1996] 1 MLJ 261.

55 Protection given to all persons irrespective of citizenship.

56 Protection under the clause as provided only available to citizens.

57 Provision on gender inserted in the 2001 amendment to Federal Constitution.

58 *Maneka Gandhi* v *Union of India* AIR 1951 SC 41.

59 Durga Das Basu (1994) *Introduction to the Constitution of India* 16th ed., Prentice Hall of India New Delhi,p.87.

The equal circumstances here refers to the right of every woman whether married or not to consent to sexual intercourse.[60] This is because the rationale of married women as the property of her husband which underlies the marital rape exemption can no longer be argued to provide support to justify an unequal circumstances argument.

The fact that we have a law in the guise of the s375 exception and s375A of the Penal Code that discriminates between married and unmarried women's rights and that provides a married woman with a lower level of protection of the law may be argued to run counter to article 8(1) where the argument is that every woman is to be given equal protection of the law. This is particularly so as rape is considered a violent offence against women under the Penal Code.[61]

The contention to be advanced here is that the exception to ss375 and 375A is contrary to articles 5 and 8 of the Federal Constitution. Further, the argument is that it is in violation of articles 1 and 2(d) of the CEDAW, since it discriminates on what would constitute an offence based on the marital status of women. The end effect is to nullify by reason of marriage the existing protection against rape given to women. The Penal Code provisions are also not in line with articles 2(e) to (g) of the CEDAW. Our courts should construe the provision of our Constitution so that it is in tandem with and as far as possible complies with international conventions to which Malaysia is a party.[62]

As the point under consideration here is the crime of rape, which is a public and criminal offence, the listed exceptions to article 8 do not apply.[63] The Penal Code is a written public law that comes under the description of "any law" and thus is subject to the challenge that the provisions contested herein violate article 8 of the Federal Constitution.

Article 8 consists of aspects of equal treatment, equal protection and prohibition against discrimination. The argument is that the exception to s375 violates all three aspects in that rape offenders (who commit sexual intercourse without consent) are not treated equally, women are not protected equally and women and men are discriminated against based on whether they are married or not. A married woman is discriminated against unfavourably since her consent to have sex with her husband is lost by reason of marriage. This runs counter to article 2 of the CEDAW mentioned previously where women are not to be discriminated against based on marital status. At the same time married men are discriminated against favourably in relation to unmarried man when they

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60 CEDAW, Article 1 provides "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

61 Section 376 of the Penal Code provides for a punishment of up to 20 years and whipping. Aggravated rape as defined under s376 (2) carries the punishment of a term not less than 5 years and not more than 30 years and whipping.

62 *Supra* n 54.

63 Shad Saleem Faruqi, *Document of Destiny The Constitution of the Federation of Malaysia*, Star Publications (Malaysia) Bhd, 2008, p. 267. The exceptions as listed under Article 8 (5) do not invalidate or prohibit the existence of separate personal laws for different communities, religious institutions and offices reserved for persons professing that religion, protective discrimination may be resorted to in favor of the aborigines of Malay Peninsula, residence in a State may be required for the election or appointment of an authority in that State. The Malay regiment can be restricted to Malays.

have sexual intercourse with their wives without their consent under s375. An unmarried man is also discriminated against unfavourably with a charge of aggravated rape under s376 whereas a married man is chargeable under a lesser offence under s375A if the victim is his wife.[64] There is sexual intercourse (without consent) under s375A but the emphasis is on the offence of hurt and fear of death and not rape.[65]

It may be argued that the offence of sexual intercourse committed under the threat of hurt or fear of death by a husband provided under s375A does not equally protect women against the offence of rape as the elements of offence for a rape and the elements for an offence under s375A differ. Hence there is no equal protection before the law for women irrespective of their marital status. It has also been argued that the section does not offer any additional remedy to the aggrieved party as the offence of hurt and criminal intimidation already exist under the Penal Code. As the law stands, there is discrimination and unequal treatment in favour of married man and unmarried women. The discrimination is based on marital status, which CEDAW and article 8 of the Federal Constitution prohibit, as highlighted previously.

Professor Glanville Williams in his article *Rape is Rape*, contrary to its title, suggests that husbands who rape should be treated differently from a stranger who rapes and a different offence be coined.[66] Citing the exception of provocation (where the offender is deprived of self-control by grave and sudden provocation to cause the death of the person who provoked) which reduces murder to culpable homicide, he also argues that there is a good reason for giving a first offence of rape within a marriage some other legal name than rape suggesting assault rather than rape. One can only speculate if this trend of thought influenced the thinking and policy behind the amendment introducing s375A of the Penal Code in 2006. With this assumption in mind, we devote some time and space to review the justifications offered by Professor Glanville Williams.

Rape (excluding marital rape) and murder and culpable homicide are offences under the Penal Code. The criteria for the offence are not the same. Rape as discussed in this paper focuses on the absence of consent of the victim. Murder focuses on the intent or the lack of it through loss of control (going to mens rea) to support a provocation defence to qualify for the reduction of a murder charge to manslaughter. Rape is not a fault attributed to the victim unlike the provocation defence.[67] It is a show of dominance and power by a husband and is usually an intentional exercise of this power to violate the physical integrity of the body of the wife without her consent knowing the wife is

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64 The punishment for rape is aggravated and attracts enhanced punishment when under s376 (a) at the time of or immediately before or after the commencement of the offence it causes hurt to her or to any person or (b) at the time of or immediately before or after the commencement of the offence it causes to put her in fear of death or hurt to herself or to another person. Another line of argument is whether it is defensible to have a law wherein the offence committed is not determined by the elements of the offence but by the relationship between the offender and the victim to the extent it mitigates the offence as opposed to enhancing or aggravating the offence. This is in effect the outcome of Section 375(A).

65 Section 375A Penal Code does not require consent of the woman but require the woman to be hurt or put in fear of death to herself or another person and the penalty is a maximum 5 years.

66 Glanville Williams, "Rape is Rape", *New Law Journal* 1992, Vol. 10.

67 Note that even a provocation defence under Section 299 of the Penal Code is subject to three different provisos and consideration of whether the provocation in itself is sufficient to warrant a reduction of the offence.

powerless (since no remedies exist under the law) to complain. In an abusive relationship this may be a repeated event meant not only to derive power over the weaker party but to do so in all aspects, emotionally, physically and psychologically as discussed previously.

The need for consent for marital sex comes from the recognition that fundamental freedom and human rights are not nullified by marriage under CEDAW. Section 375A of the Penal Code does not recognise marital rape as an offence. It creates a different charge focusing on the conduct of the offender by requiring different elements of criminal intimidation as opposed to rape under s375. What is recognised as an offence against women is just of import as it demonstrates how the law serves to treat women and expects men to treat women.

Perhaps preferable to the alternative of s375A is the recognition of rape within marriage as a crime with provisions to cover a mitigation plea by the accused, an impact statement and the wishes of the victim wife. Equality of treatment as expounded by Jennings is that:

> Equality before the law means that among equals the law should be equal and should be equally administered that like should be treated alike…The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence.[68]

The contention here is that all women are equal regardless of their marital status and have the same rights before and after marriage. Marriage does not extinguish the fundamental freedoms and rights of the woman. If a husband can be charged for assault and battery against his wife then why not rape? There is no equality before the law (among women) if just by reason of marriage a woman loses her right to cry rape. The equal circumstance here is the need for a wife to consent to sexual intercourse. It is in the interests of gender equality, among other reasons, that this consent requirement remains even after marriage.

The issue raised here does not only touch on discrimination, favourable treatment and unequal protection but also touches on the issue of the personal physical integrity and dignity of the individual woman which is protected under Article 5 of the Federal Constitution, to be covered shortly.

To satisfy the test of reasonableness of differentiation of persons, in the words of Mohamed Azmi SCJ in *Malaysian Bar v Government of Malaysia,*[69] the classification must (i) be founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out of the group; and (ii) the differentia selected must have a rational relation to the object sought to be achieved by the law in question.

In the case of *Sivarasiah v Badan Peguam Malaysia,* the Federal Court also included the justifiability of the infringement, which requires us to weigh the reasonableness of why

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[68] Ivor Jennings, *The Law and the Constitution* 5th ed, University of London Press, London, 1959, p. 50. See also Durga Das Basu *Shorter Constitution of India* 13th ed., Wadhwa and Company Law Publishers, Agra Nagpur New Delhi India, 2002.

[69] [1987] 2 MLJ 165.

a right should be subjected to infringement and allow the court to review the objective rationale and proportionality of the state action. The court said:

> In other words, all forms of state action, whether legislative or executive that infringe a fundamental right must (i) have an objective that is sufficiently important to justify limiting the right in question; (ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

The question is whether the doctrine can save s375 exception and explanations and s375A in these current times. There have been other reasons and rationales put forward to maintain the notion of marital rape including: marital rape is less serious than other types of rape; extending the law of rape to married couples would undermine the institution of marriage; it would encroach upon marital privacy and hinder reconciliation, it would give vindictive wives the opportunity to make false allegations of rape; and rape within marriage would be very difficult to prove. These have been negated. Hence it is also the argument that the rationales given here would be weak support for an argument advancing reasonable classification to save s375 and s375A of the Penal Code from being unconstitutional.[70]

The contention here is that there are no possible intelligible criteria that could be used to argue for allowing discrimination between married women and unmarried women and in effect relieve married women of their rights to claim rape after marriage. The chattel theory on which the exception was founded has since been discarded as being unsound. Marital rape is now a crime in the country of origin. The effect of the provision is that it manifests inequality among the offenders when it legitimises differential treatment of rape offenders based on their relationship to the victim. What rationale or objective could be of so great import that it may be used to argue successfully in justifying the denial of a married woman's right to consent to the use of her body which she had prior to marriage and the equal protection of the law accorded to unmarried women. This is particularly so when rights in terms of other forms of trespass to a person are maintained. Here the issue of a conjoined fundamental liberty under Article 5 and 8 is raised. It is submitted that the discarded chattel theory cannot be relied upon by Malaysia since it contradicts Malaysia's avowed quest for gender equality, the Federal Constitution and CEDAW provisions, as referred to previously.

If Malaysia maintains the exception and explanations in s375 and s375A then no matter what arguments are drummed up in their support, they would be seeking to justify it by treating married women as inferior and conceding to the notion that married women are chattels and the property of men. It is unfair and unreasonable to maintain a law that gives a married man a legal license to violate a married woman's physical being without her consent.[71] The question also to be addressed is whether gender equality under Article

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[70] HSMO (1990) The Law Commission Working Paper No 116 *Rape within Marriage* Part 1V Para 4.26- 4.65. It considered the points raised but found them wanting. See also similar findings by Philip N.S. Rumney *supra* n 14.

8 also equates with the need for both parties to consent to sexual intercourse irrespective of marriage.

The doctrine of reasonableness is a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constitutes a denial of equality. Where the classification is not reasonable and is impugned then the action is unconstitutional. It is the argument here that the classification of legitimizing rape within marriage is not reasonable, rational nor proportionate as it serves as discussed above to violate the protections afforded under articles 5 and 8 of our Federal Constitution. It is proposed that the existence of s375 and s375A offends article 8 of the Federal Constitution.

In *Mithu v State of Punjab*,[72] the Supreme Court of India struck down the punishment for murder by a life convict under the Indian Penal Code (s303) as being unconstitutional on the grounds that the classification between persons who commit murder whilst under a sentence of imprisonment and those who commit murder while they are not under a sentence of life imprisonment sentence for the purpose of making the death sentence mandatory in the former case and optional in the latter case was not based on any rational principle.

In the case of *People v Liberta,* [73] the New York Court of Appeal held that the New York rape statute by protecting married men from rape while exposing unmarried and separated men to liability under the same act violated the equal protection clause of the 14th amendment to the United States Constitution. It was held that there was no rational basis for distinguishing marital rape and non–marital rape and the statute was held to be unconstitutional. The UDHR and the fundamental liberties embedded in our constitution are universal values applicable to all humans.

It is submitted that equality between the sexes is included in the equality "*in dignity and rights*" of all human beings declared by article I of the UDHR. Article 2 of the Declaration specifically states that all persons without distinction of sex are entitled to the human rights set forth therein. We need to look again to see if our current embodiment of the laws under s375 exception and explanations and s375A offends and violates the stand for women that our nation has undertaken to protect and uphold under the Federal Constitution, CEDAW, other international, regional instruments and Islamic principles or whether we are mired in a cultural mindset where our vision may be impaired.

B. Article 5 of the Federal Constitution

Article 5, Liberty of the person reads:

> (1) No person shall be deprived of his life or personal liberty save in accordance with law.

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71 United Nations Declaration of Elimination of Violence Against Women on marital rape being a violent act against women and CEDAW where there is an obligation not to discriminate based on marital status.

72 AIR 1981 SC 1829.

73 74 N.E. 2d 567 (N.Y.1984).

Any person here refers to both citizens and non-citizens and may include artificial legal personalities. As read the right is not an absolute right but a qualified right to be subject to deprivation under a just law. The qualification as argued here must also comply with the living spirit of article 8 on equality.

The concept of life here does not refer just to mere existence and the phrase deprived of life should be construed to refer to the case of death only. It has been argued to include "something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by an arm or leg".[74]

It is argued here that it also extends to any violation of the physical integrity or the use of the body of a women without her consent. According to Shad Saleem Faruqi, it covers the right to live with human dignity.[75] The idea of dignity becomes important if the complaint is about the living conditions of a violent or abusive home front. Does it offend human dignity if a woman does not have a say as to the use and control over her own body irrespective of her marital, employment or social status or standing in society?

The right to life in Malaysia has included right to livelihood, right to a reasonable healthy and pollution free environment and the right to reputation.[76] Does it arguably also include a married woman's right to decide as to the use of her body in the act of sexual intercourse?

It is to be acknowledged that only the very severe cases of marital rape see the doors of the police station as most women are protective of their family life and only in severe abuse cases is this course of action even contemplated. To back this up, we refer to the report cited earlier that only 10 % of rape cases are even reported.

The question to be addressed here is whether the right to personal liberty includes the right of a married woman to consent to sexual intercourse with her husband. According to Shad Saleem Faruqi citing the case of *Government v Loh Wai Kong*[77] personal liberty means liberty relating to or concerning the body of the individual. Further it means more than a right not to be subjected to unlawful arrest, imprisonment or other physical coercion. According to Tan and Lin Ann, this right extends not only to the freedom of expression or religion but also to the right to equal opportunity, the right to privacy and even the right to procreate.[78] The further argument here is that a wife who is raped is deprived of her right to choose to procreate as her consent is irrelevant for sexual intercourse. It can be seen that personal liberty has evolved from one's physical state to other dimensions[79] yet here the contention is not about expanding but merely reinforcing the liberty of choice of a married woman regarding the use of her physical body and the extended right to choose to procreate.

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74 Durga Das Basu (1965) *Commentary on the Constitution of India,* 5th ed., Sarkar & Sons (Ptv) Ltd, Calcutta, p.79.

75 Shad Saleem, *supra* n 63, p.206.

76 *Ibid.* p. 207.

77 *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33.

78 Kevin YL Tan, et.al.,*Constitutional Law in Malaysia and Singapore,* Butterworth, 1997, p.529.

79 In *Re JG*, *JG* v *Pengarah Jabatan Pendaftaran* (2006) the right was fluidly extended to cover a person's right to change the reference to her gender in the Mykad after undergoing a sex change operation.

It is the contention that a married woman's right to consent to sexual intercourse is within the realms of the right to life and personal liberty guarantee under Article 5. We are then posed with the question of whether or not married women have been deprived of this right in accordance with the law under s375 and s375A. The scope of law referred to here has been construed to include both substantive and procedural law and further that the law refers not just to lex (valid law no matter how unjust) but to jus and recht (i.e. a law that is just and right). It is the contention of this paper that ss375 and 375A are unjust and unfair laws. The tie–up of articles 5 and 8 is aptly demonstrated by the following passage from *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*[80]

> It is clear from the authorities thus far discussed that "in accordance with law" in art 5(1) refers to a law that is fair and just and not merely any enacted law however arbitrary or unjust it may be. The question whether an enacted law is arbitrary must be decided upon settled principles that govern the right in Parliament to pass discriminatory laws. So long as the law does not produce any unfair discrimination it must be upheld. This is the effect of the equality limb of art 8(1). And it is here that a discussion of that article becomes necessary. If s 46A passes the test of fairness as housed in the equality clause then it is a fair law and therefore is a valid law for the purposes of art 5(1).

Hence it is the contention here that there is no reason to pass or justify the existence of discriminatory laws that favour married men over unmarried men and favour unmarried women over married women and do not equally protect married women. It is not only unfair, unjust and arbitrary it is also in contravention of the Federal Constitution, CEDAW and the human rights instruments discussed herein and is hence unconstitutional.

It is suggested that the exception and explanations of s375 and s375A do not pass muster under articles 5 and 8 to be maintained as a valid law.

C. Jurisdiction of the Federal Government to Legislate on Marital Rape

This point needs to be addressed to put to rest the possible argument questioning the jurisdiction of the Federal Government to legislate on this issue. We note firstly that rape is an existing offence under the Penal Code. It is in the nature of a public law applicable to all citizens of Malaysia notwithstanding their religion. On the issue of jurisdiction to legislate on the offence, we turn to the Legislative List under the Ninth Schedule of the Federal Constitution and articles 74 and 77 of the Federal Constitution. In the Federal List the matters enumerated include defence, internal security and so on. Item 4 is reproduced:

> 4. Civil and criminal law and procedure and the administration of justice including-
>
> (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;

[80] [2010] 3 CLJ 507, although in this case the discrimination was held to be valid as it did not impede the livelihood of the member and the need for a nonpolitical Bar.

(k) Ascertainment of Islamic law and other personal laws for the purposes of federal law.

The jurisdiction of the Federal Parliament to make laws on this matter is clear and explicit. In the Federal Court decision *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*[81] FCJ Abdul Hamid Mohammad FCJ puts it succinctly:

> Criminal law is a federal matter – item 4. However the State Legislatures are given power to make law for the 'creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List-item 1 of State List. The two qualifications at the end of the sentence (i.e. 'against the precepts of that religion' and 'except in regard to matters included in the Federal List') limit the offences that can be created by a State legislature. So where an offence is already in existence in, say, the Penal Code, is it open to a State Legislature to create a similar offence applicable only to Muslims? Does it not fall within the exception 'except in regard to matters included on the Federal List 'i.e. criminal law? To me, the answer to that last –mentioned question is obviously in the affirmative.

Furthermore, article 75 provides:

> If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

VI. ISLAMIC PERSPECTIVES OF VIOLENCE AGAINST WOMEN AND RAPE WITHIN MARRIAGE

Many detractors of gender equality and those who oppose change and the recognition accorded to women as human beings with rights and fundamental freedoms have resorted to cultural or religious arguments to resist the changes that are necessary to manifest the rights to be accorded to women. This stance has been responded to under the Memorandum of Law Related to Rape as quoted below.

In the Quran and in the Sunnah, it is very clear that sexual relations has its place and are part of nature, decided by Allah for the continuation of the human species. The aspect of fun and pleasure is mentioned in the Sunnah. According to al-Ghazali, in his writings on the ethics of sexual relations, intimate physical relationship should not come suddenly, but that the way should be paved until the husband and wife are stimulated. It is very clear from this that sex is necessarily meant to be sex with mutual consent and mutual will; These elements are clearly absent in forced sex/marital rape where the husband does not seek the consent of his wife on the sexual act. Wives are often humiliated, abused and no ethics are observed. Islam does not allow wives to be treated this way and in fact abhors any form of violence towards women. Under Syariah law, it is a matrimonial offence for

[81] [2007] 5 MLJ 101, p.113.

the husband to be cruel to his wife. Forced sex reasonably constitutes an act of cruelty. This is detailed in Sections 127 & 128 of the Islamic Family Law Act (Federal Territory) (1984). Can a Muslim husband force sex on his wife? We stress that rape is rape, even if it is by the husband. In the spirit of mutual consent and consultation, there cannot be forced sex. There are ethics in sexual relation in Islam and mutual wish and desire must be present. According to al-Ghazali, sexual relations is a contract, and therefore it should not happen except through mutual agreement. Therefore, the recognition of marital rape would not be in contradiction to the spirit of Islam in marital relations.[82]

Some may argue that a wife is more likely to consent to avoid being divorced by the husband or because she is in a relationship where she feels obliged to consent and hence the occurrence of rape (sexual intercourse without consent) would be negligible within an Islamic context.[83] Hence we are focusing here on those incidents where there is no free consent of the wife. This is when there are issues of abuse, dominance and oppression of the wife such that the husband forces himself on her in the conduct of sexual intercourse without her consent. Ali Jarishah substantiates the concepts of freedom, right to justice, family life as follows:[84]

> The concept of freedom being sacred is reflected in the saying of Umar r.a. *Betapa kamu boleh memperhambakan manusia sedangkan ibu mereka melahirkan mereka dalam kebebasan*[85].

The concept of equality is also seen in Prophet Muhammad [p. b. u. h] saying that– "*sekalian kamu keturunan Adam, Adam pula daripada tanah*…" All of you are of Adam's descendant; Adam in turn is from the soil. The right to justice is available to all equally in the saying of Prophet Muhammad [p. b. u. h]:

> *Seseorang itu mesti menolong saudaranya sama ada yang menzalimi atau dizalimi. Kalau zalim ia mencegahinya atau kalau kena zalim, ia menolongnya. Hadith riwayat al – Shaikhan dan Turmuzi*[86]

In the context of non-violent family life it is said that both partners in a marriage have the right to be respected and valued emotionally in a situation of love and affection.

> *Diantara tanda- tandanya (Allah) ialah menjadikan pasangan suami isteri supaya kamu bertenang kepadanya. Dia menjadikan kasihsayang di kalangan kamu. (Surah Al Rum Ayat 21)*

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82 AWAM Anti Rape Task Force (2003) *Memorandum on Laws Related to Rape (September 2003) Proposal for Amendments*.

83 Ahmad Fadhli, *Obedient Wives can't See Rape in Marriage,* 12 July 2012, Movement for Change Sarawak (MoCS) http://mocsarawak .wordpress.com, accessed on 27 July 2014.

84 Ali Jarishah, *Kehormatan Hak – Hak Manusia Menurut Islam (Satu Kajian Perbandingan),* Dewan Bahasa dan Pustaka, 1992, p. 60.

85 Translation: How can you enslave humans when their mothers birthed them in freedom.

86 Translation: A person must assist his brethren whether the oppressor or the oppressed. If the oppressor to prevent or if oppressed to assist.

Amina Wadud argues that in the Qur'an, the male and the female are a contingent pair that function co-dependently on each other on a physical, social and moral level. Man is intended as a comfort to woman; woman is intended as a comfort to man.[87] She further quotes Sayyid Qutb:

> The man and the woman are both from Allah's creation and Allah …never intends to oppress anyone from His creation[88]

On the point of disruption of martial harmony Amina refers to:

> Within marriage there should be harmony (4.128) mutually built with love and mercy (30.21). The marriage tie is considered a protection for both the male and the female: "They (feminine) are raiment for you (masculine plural) and you are raiment for them". (2.187)

However in cases of marital discord the answer does not lie in violence.

> So good women are qanitat, guarding in secret that which Allah has guarded. As for those from whom your fear (nushuz) admonish them, banish them to beds apart, and scourge them. Then, if they obey you, seek not a way against them. (al Quran .Al – Nisa 4.34).

Amina argues that Sayyid Qutb explains nushuz not as disobedience of the husband but a state of disorder between a married couple.[89] The solution suggested is a verbal solution whether between husband and wife (Al Quran Al – Nisa 4.34) or between husband and wife with the helper of arbiters (as in 4:35, 128) failing which a separation and in extreme cases the scourging. Further the scourging cannot be such as to create conjugal violence or a struggle between the couple because that is "unislamic". She also refers to the fact that men who strike in cases of domestic violence (and rape) cannot seek assistance from this passage as the goal of these men is not harmony, to which the passage alludes, but harm and oppression.

The alternative argument that a woman can refuse to have sex with her husband is reflected in the fact that the man (and equally a woman) can seek a divorce from his wife on the grounds of *fasakh* - not having sexual intercourse without a reasonable excuse for a period of one year.[90]

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87 "…among his signs is this; that He created azwaj for you from your own anfus so that you may find rest in them (30:21) and "O mankind ! Be careful of your duty to your Lord Who created you from a single nafs and from it created it zawj and from that pair spread abroad [over the earth] a multitude of men and women" (4:1); see Amina Wadud, *Quran and Women* Kuala Lumpur, Fajar Bakti, 1992, at pp. 72-78.

88 See, Sayyid Qubt , Fi Zilal al Quran, 6 Vol. (Cairo: Dar al – Shuruq , 1980) , Vol 11 p.650.

89 Qutb Vol. 11, p. 653.

90 Ahmad Hidayat Buang, ed., *Undang – Undang Islam di Malaysia Prinsip dan Amalan,* Penerbitan Universiti Malaya, 2007.

The status of woman under Islamic law as seen in the case of *Chulas and Kachee v Kolson binte Seydoo Malim* [91] was more advanced even in the year of 1867. The issue in this case was whether a Muslim married women was under any disability to bind herself in contract. Sir P.B. Maxwell Recorder made the observation that the rule of English law that vests in the husband various rights in the property of his wife was not applicable to a Mohammedan marriage. He notes:

> The Mohammedan woman's contract is wholly different ...her right of property and her powers of contract are unaffected by marriage ; under the Mohamedan law she remains in this respect like an English femme sole…The incapacity to contract which affects a married women at common law is founded on the fiction that she and her husband are one person.

Sexual intercourse between consenting spouses does not entail abuse, violence and force. Rape on the other hand occurs where consent is absent and often, coercion (both physical and mental) prevails. One must consider to what extent a spouse can claim conjugal rights. In terms of conjugal rights, while some may argue that sexual intercourse between husband and wife - *jima* - is a religious duty and that the wife must submit, others have argued that the husband should perform *jima* with *adab* (courtesy). All religions value human dignity and life. None of them condone the use of force or cruelty in a marriage, however narrow interpretations of religious texts have often been used to justify the oppression of women.[92]

It is difficult to imagine a context where any right-minded, faithful and religious Muslim (or member of any religion for that matter) can defend marital rape, from the context of violence and violation that we have examined in this paper, as being acceptable to the Islamic religion (or any religion). It is not *Islamic.*[93]

VII. CONCLUSION AND RECOMMENDATION

There is a need to reform the bias in law caused by imbalances of power based on male dominance. The recognition of every person's human dignity in all international documents and Malaysia's Federal Constitution speak to the bodily integrity of an individual, human rights and the recognition of gender equality. There is a need to remove the legal shackles and discrimination that are based upon the cultural and societal stereotypes promoting male power dominance of a bygone era which regarded women as property. Given Malaysia's Policy on Women promotes gender equality in the private sphere, surely then it follows that the consent of married women to sexual intercourse in the marital context cannot be negated.

Even if Islamic law is interpreted in a very limited and narrow context to say women must submit to their husbands in the matter of sexual intercourse it is a situation where

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91 *Chulas and Kachee* v *Kolson binte Seydoo Malim* [1867] Leic 462.

92 Excerpt from Devaraj Prema, *Supra* n 4.

93 Yasmin Masidi, *Are Muslim Men Allowed to Beat their Wives,* Sisters in Islam, Selangor, Malaysia, 2009.

there is arguably consent, hence the application of s375 and 375A does not apply. In fact applying the argument that cruelty and violence is not permitted against a wife as seen earlier under Islamic law Enactments and in the Penal Code provisions that apply to all alike, there is no reason to maintain the current law that legitimises marital rape.

There is an outstanding commitment by and entrustment to member states under international instruments and the Federal Constitution regarding the need to not discriminate between women, married or unmarried, and to outlaw marital rape so as to protect women from violence in the home by upholding their human rights and dignity. To meet this commitment requires a change in the mindset of policy makers and empathy for the marginalised and unprotected married women under our laws especially in domestic violence context. It boils down to who is protected - the oppressor or the oppressed.

Oliver Wendell Homes' words best reflect the situation we are in now, where a law that is no longer a just law remains intact and becomes unjust and oppressive due to our inability to see the need to change an outdated legislation.

> It is revolting . . . if the grounds upon which [a rule of law] was laid down have vanished . . . and the rule simply persists from the blind imitation of the past.

Reference is made to *Government of Malaysia v Lim Kit Siang*[94] on the public defender role of the Attorney General where Salleh Abas LP had this to say:

> Our system requires the public to trust the impartiality and fair-mindedness of the Attorney–General.

Malaysia should review whether the time has come[95] to make the necessary change, and to quote our current Prime Minister:

> Sometimes inadvertently over the years we have lived with gender-biased laws and we don't realise that they discriminate against women. We will make a thorough review of laws with elements of discrimination against women[96]

It is the contention that the s375, exception and explanations and s375A, as they stand, are in conflict with the Federal Constitution, Malaysia state responsibilities under international and regional human rights instruments, and Islamic principles. It is thus subject to the challenge of unconstitutionality and is liable to be struck out. Hence the recommendation is as follows: That the Penal Code be amended by deleting the exception and explanations to s375 and s375A.

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94 *Government of Malaysia* v *Lim Kit Siang* [1988] 2 MLJ 12.

95 *Supra* n 6, for countries that have outlawed marital rape.

96 Salleh Buang, *In the Service of the Law Simplicity and Greatness Tun Suffian Legacy*, Tun Suffian Foundation Incorporated, 2007, p. 254.

What is Rule by Law?

Ratna Rueban Balasubramaniam*

Abstract

My aim in this paper is to sharpen the popularly perceived association between rule by law and worries about arbitrary power. I argue that the use of law as a cloak for arbitrary power or rule by law is pathological to the rule of law because it undermines law's capacity to facilitate or guide conduct. My analysis of rule by law pivots on the argument that the rule of law is an ideal of workable legal order understood as a framework of norms for facilitating the interests of legal subjects. The rule of law is therefore a moral idea to the extent that the attempt to construct and maintain such an order requires engaging the legal subject, as a rational moral agent possessed of vital interests. Since rule by law involves the attempt to use the law in a way that does not involve the systematic engagement of the legal subject so conceived but which nevertheless tries to project rule-of-law legitimacy by trading on the rule of law, rule by law strains the rule of law and corrupts the workability of legal order as a framework for facilitating the salient moral interests of legal subjects thus by damaging the rational and moral foundations of legal order. It is therefore apt to conceive of rule by law as a form of juridical pathology.

I. INTRODUCTION

The concept of the rule of law or legality is often contrasted with arbitrary power while the notion of rule by law, on the other hand, is commonly associated with arbitrary power.[1] As one author puts it, rule by law "carries scant connotations of legal *limitations* on government…."[2] Rule by law is most often linked to a scenario where a ruling regime tries to project a veneer of legal and political legitimacy for arbitrary power by exploiting the legal form, in particular the legal rules which may manifest as constitutional and/or legislative provisions. Thus, rule by law is most at home in an authoritarian setting where a ruling regime has complete control over the legislature so that it can change the law as necessary in order to ensure that it can claim that its actions are supported by

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1 It should be noted that one can unpack the concept of rule by law in a way that makes it analogous to a moral conception of the rule of law that is antithetical to the notion of arbitrariness. See Kenneth Winston, "The Internal Morality of Chinese Legalism" *Singapore Journal of Legal Studies,* 2005, p. 13.

2 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, p. 102.

formal legal rules.[3] However, the criticism that a government is engaged in rule by law can also extend to liberal democratic governments that use the legal form as a cloak for arbitrary power.[4]

In this paper, I develop a theoretical account of rule by law that aims to clarify and sharpen the perceived link between rule by law and arbitrary power. My analysis presupposes that legal subjects are rational moral agents possessed of dignity and self-respect and are therefore bearers of basic rights and interests that give expression to these features of their moral agency. Importantly, I regard the rational and moral dimensions of human agency as, generally speaking, inseparable from the perspective of the legal subject. It follows that for the legal subject, it is only rational to obey law if any given legal order aspires to engage his or her salient moral interests. In concrete terms, this means that it is rational to obey law only if the law systematically attends to values like reasonableness, fairness, impartiality, and equal respect for human rights as values that give expression to the legal subject's sense of self as a moral agent.

In light of this presupposition, I will argue that rule by law involves a conception of law as an instrument of control of legal subjects while trading on a different conception of law as a framework for facilitating the salient moral interests of legal subjects. I will argue that the rule of law is best understood as an ideal of legal order that depends on a conception of legal order as a framework for facilitating these interests. The essential difference between the ideas of control and facilitation emerges in the way these different conceptions of law engage legal subject's agency. When law is conceived as an instrument of social control, the legal subject's rational and moral agency are regarded as severable so that those who deploy the law under this model claim that there is a plausible basis to a claim of legal legitimacy even if the law does not engage the salient moral interests of legal subjects. However, when law is viewed as a framework of facilitation, claims of legal legitimacy are questionable if they do not engage these interests. My argument is that rule by law, in trading upon the rule of law, strains the rational and moral foundations of legitimate legal order and can ultimately undermine the operation of legal order as a framework of norms for facilitating conduct thus making rule by law a form of juridical pathology. The practice of rule by law, like a disease, damages the rational and moral foundations of legal order.

My analysis, which emphasises the perspective of the legal subject as a rational-moral agent when thinking about the legitimacy of legal authority and as underpinning

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[3] Tom Ginsburg & Tamir Moustafa, *Rule by Law: Judicial Politics in Authoritarian Regimes*, Cambridge University Press, Cambridge, 2008. I elaborate the most interesting features of the case studies in the book and the lessons we might learn from these studies in a review article entitled "Judicial Politics in Authoritarian Regimes", *University of Toronto Law Journal,* 2009, Vol. 59:3, pp. 405-41. My aim in this paper is to develop an insight emerging from these lessons: rule by law involves a problem of domination. The analysis presented here expands the linkage between rule by law and the problem of domination briefly sketched in Ratna Rueban Balasubramaniam, "Has Rule by Law Killed the Rule of Law in Malaysia?" *Oxford University Commonwealth Law Journal,* 2008, Vol. 8:2, p.211.

[4] David Dyzenhaus, for example, discusses the dangers of rule by law in connection to how some liberal democracies have used the legal form to develop anti-terrorism measures that violate the human rights of those subject to such laws. See generally David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* Cambridge University Press, Cambridge, 2006.

a conception of the rule of law as a framework of facilitation rather than control, draws its theoretical resources mainly from Lon Fuller's jurisprudential insights.[5] However, I also draw theoretical resources from Fuller's main jurisprudential antagonist, H. L. A. Hart. As is well known, Fuller and Hart disagree about how to understand the rule of law. Fuller argues that the rule of law comprises a set of conditions that must be fulfilled if law is to successfully guide conduct. Legal order, in his view, is a framework for facilitating human interaction so that workable legal order must comprise rules that are general, public, intelligible, non-contradictory, stable over time, prospective, and that official action should match declared rule. In his view, these conditions make up an "inner" or "internal" morality of law because the principles are not compatible with the use of law for immoral ends.[6] To support this claim, Fuller points to the breakdown of these principles within Nazi Germany.[7] In addition, Fuller argues that conscientious attention to these principles will orient the law towards moral goodness, even, he thinks, in the case of a tyrannical ruler.[8] Thus, in Fuller's view, the legal form is inherently moral. Hart, on the other hand, argues that the rule-of-law principles Fuller identifies are "compatible with very great iniquity." [9] The basis to Hart's objection is his commitment to legal positivism, a jurisprudential stance which claims that there is a conceptual separation between law and morality. In light of his positivist commitments, Hart argues that these principles are merely rational preconditions to legal order that must be fulfilled if law is to guide conduct but these principles are logically consistent with the use of law for immoral purposes.[10] Therefore, in Hart's view, the legal form is morally neutral.

As I will show, Hart fundamentally understands the rule of law as an ideal built upon an image of law as an instrument of control, an image that does not allow him to make full sense of his own concerns about how the danger of law as a tool of abuse can materialise. Indeed, when we inspect these concerns, we shall see that his claim that the legal form is morally neutral breaks down. Furthermore, what he has to say about this issue requires that we presuppose that the legal form is moral in precisely the way that Fuller argues, namely that for legal order to operate as a framework of rules to guide conduct, one has to take seriously the legal subject as a rational-moral agent where rule-of-law principles are a proxy for engaging the legal subject so conceived. Thus, in developing my argument I show why Hart goes awry in his analysis but my main intention is to draw out what I see as an important and productive linkage between Hart's and Fuller's ideas about how the danger of rule by law can arise. This linkage should not be obscured

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5 A pervasive theme in Fuller's work is the emphasis on the distinction between law as an instrument of social control and law as a framework for human interaction. See, for instance, Lon L. Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction" *Brigham Young University Law Review,* 1975, Vol. 1, p. 89. My explanation of what I describe in the text as the "control" and "facilitative" models of law echo Fuller's account of these differing conceptions of law.

6 Lon L. Fuller, *The Morality of Law*, rev. ed., Yale University Press, New Haven, 1969, Chapter 2.

7 Lon L. Fuller, "Positivism and the Ideal of Fidelity to Law – A Reply to Professor Hart", *Harvard Law Review,* 1958, Vol. 31:4, pp. 650-657.

8 *Ibid*, at p. 645.

9 H. L. A. Hart, *The Concept of Law*, 2nd ed., Oxford University Press, Oxford, 1994, p. 207.

10 H. L. A. Hart, "Book Reviews: The Morality of Law" Harvard Law Review, 1964-1965, Vol. 78, p. 1281.

by their disagreement about whether rule-of-law principles are also moral principles of legal order.

II. THE CONTROL MODEL OF LAW

At the core of legal positivism is the Separation Thesis, the thesis that there is no necessary connection between law and morality. [11] The basis to the Separation Thesis lies in the idea that law is a social construct, such that the moral goodness of law is dependent upon the moral character of a society and its legal officials. In support of the Separation Thesis, legal positivists point to the existence of immoral laws and wicked legal systems. Hart, in developing his theory of legal positivism is faithful to this line of reasoning. He explains that law comprises a "union of primary and secondary rules."[12]

Primary rules are rules of conduct while secondary rules are institutional rules governing the making, interpretation, and enforcement of primary rules. The most important secondary rule is the "rule of recognition," a rule which enables a society authoritatively to identify valid law by stipulating criteria that marks off legal norms from other norms of conduct.[13] The rule of recognition performs an epistemological function by enabling legal subjects to identify what counts as law without which there would be uncertainty about what the law requires. In keeping with the view that the moral goodness of law depends upon the moral character of legal officials, the criteria of the rule of recognition is to be discerned by looking at the grounds that inform how legal officials decide what counts as valid law.[14] These grounds, Hart says, need not reflect morally good values so that the rule of recognition need not stipulate morally good values as a criterion for judgments of legal validity.[15]

Hart's vision of legal order can be characterized as expressing a "control" model of law.[16] As the word "control" suggests, law's role is to control legal subjects to enable workable legal order. An underlying assumption of the control model of law is that legal subjects cannot be counted on, of their own accord, to cooperate in ways that would enable the maintenance of such order.[17] To ensure workable legal order, there has to be a sovereign lawgiver with absolute legal authority to decide how best to maintain legal order. Since the legal subjects are not capable on their own of cooperating to ensure workable legal order, the legal subject's judgments about how best to maintain legal order are not systematically relevant to the sovereign's judgments on that matter. Rather, the sovereign's judgments about how best to maintain workable legal order are final. They

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11 For an elaboration of the Separation Thesis and its various meanings within the positivist tradition, see James Morauta, "Three Separation Theses", *Law & Philosophy*, 2004, Vol. 3:2, p. 111.

12 Hart, *supra* note 9 at p. 84.

13 *Ibid*. at pp. 94-96.

14 *Ibid*. at p. 101.

15 *Ibid*. at p. 200.

16 At various points in *The Concept of Law*, Hart explicitly says that law is an instrument of social control. However, he also thinks that law should guide conduct and therefore ambiguates between both views. The argument that is to follow shows that the notion of "control" would run against the notion of "guidance" because both involve different conceptions of human agency. Hart is not sufficiently sensitive to this point and what follows from his view about rule-of-law principles is the idea that guidance is analysed.

need not engage the legal subject's salient moral interests except to the extent that the lawgiver thinks that addressing such interests are pertinent to the project of maintaining legal order.

Within this view, the role of the legal subject within legal order is primarily that of a passive recipient of law which transmits the judgments of the lawgiver to the legal subject through legal rules.[18] The subject is then expected to understand the rules and to obey accordingly. He or she is constructed as a fundamentally rational agent who is capable of understanding and obeying rules but the subject's role in framing and interpreting legal rules is subordinate to the lawgiver's judgments on these issues. In conceiving of the legal subject as a rational agent, the control model of law does not presume that that agency necessarily connects with the legal subject's sense of self as a moral agent. The operation of legal order under the control model only requires engagement with the former but not the latter. The control model of law echoes the proposition expressed in the Separation Thesis. Since the lawgiver's judgments about how best to maintain legal order does not need to engage the salient moral interests of legal subjects, the Separation Thesis captures this point in the claim that there is no necessary connection between law and morality.

What is striking about Hart's view, however, is that he resists the idea that there could be a legal order that is wholly indifferent to the salient moral interests of legal subjects, an idea that logically follows from the control model of law. If the rational agency of the legal subject can be severed from the subject's moral agency, then, in theory, it should be possible to imagine a legal order that is devoted to wholly immoral ideas and practices. However, Hart rejects this idea. He argues that formal legal order must reproduce a "minimum content of natural law" that embodies certain fundamental moral prescriptions.[19] Supposing that formal legal order should aim at promoting the survival of the group, laws must reproduce such content without which "men, as they are, would have no reason for obeying voluntarily any rules…."[20] Given certain facts about human nature and the world in which we live, among them, the fact that humans are physically vulnerable, have limited strength of will and character, and the fact that there are limited resources: the law must protect from harm, create rules for promise-keeping, and protect property. Without these protections, the survival of the group would be imperiled. If the law failed to provide these minimum moral protections, Hart says, it would be irrational to cooperate to maintain legal order; it would be irrational to see law as a source of binding obligation. In taking this view, Hart seems to suggest that the legal

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17 This is evidenced by Hart's discussion of a "minimum content" of natural law to legal order, an idea I will explain later. That discussion shows that Hart understands legal order to be a necessary precondition for group survival. In the absence of order, legal subjects would live in a state of nature." In the notes related to this discussion in the main text, Hart says he is following Hume and Hobbes. See Hart, *supra* n 9, at p. 303.

18 My explication of the control model is broadly consistent with the image of law that is at the root of the positivistic tradition where law is fundamentally characterized through the legislative form as the appropriate form through which to transmit the judgments of a lawgiving authority whether for purposes of maintaining order or for the purposes of pursuing a particular conception of political rule. See David Dyzenhaus, "The Genealogy of Legal Positivism", *Oxford Journal of Legal Studies*, 2004, Vol. 1 p. 39.

19 Hart, *supra* n 9 at pp. 193-200.

20 *Ibid*. at p. 193.

subject's rational agency cannot be severed from the subject's moral agency, running against the control model of law that underpins his positivist stance.[21]

Hart does not think, however, that his recognition that legal order must incorporate a minimum moral content undermines his positivist stance and the Separation Thesis.[22] Here, it instructive to consider his discussion about this minimum moral content in his earlier Harvard Law Review essay defending the Separation Thesis.[23] He contends with two arguments that attempt to refute that thesis which point to the fact that every legal order must express a minimum moral content thus revealing a necessary connection between law and morality at the level of legal order. The arguments are: first, the need for law to incorporate a minimum moral content shows that legal order is moral and second, since legal order comprises general rules of conduct, the generality of rules as applying to classes of conduct and groups of people triggers the operation of the principle of treating like cases alike. This principle, it is argued, is associated with the notions of fairness and impartiality showing a connection between legal order and justice.[24]

Hart's reply to these arguments invokes the thought that there can be wicked laws and wicked legal order. He argues that even though legal order must affirm a minimum moral content, that moral content need not be extended to all legal subjects. Instead, law can create a double standard by protecting the interests of one group at the cost of undermining the interests of another. A ruling regime can use the law to protect the salient moral interests of a select group at the cost of indifference to an outsider group. Speaking about this scenario, Hart says that the law could apply with "pedantic impartiality as between the persons affected, laws, which were hideously oppressive, and might deny to a vast rightless slave population the minimum benefits of protection from violence and theft…."[25] In using the phrase "pedantic impartiality" Hart means that the law could adhere to the principle of treating like cases alike, that is, by stipulating that a particular group should be enslaved in this way and then by equally oppressing all who fall within this group. This is meant to show that the principle of treating like cases alike only reflects the principle of "justice in the administration of the law, not justice of the law."[26] In Hart's

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21 Kristen Rundle's discussion of Hart's minimum content of natural law is instructive here. In her view, Hart's discussion on this issue has to suppose a moral conception of the person as the fundamental basis to workable legal order. The argument I am making with respect to the ambiguities in Hart's position makes the same point. See Kristen Rundle, "The Impossibility of an Exterminatory Legality: Law and the Holocaust" *University of Toronto Law Journal,* 2009, Vol. 59, p. 112.

22 One reason why Hart does not think the minimum content of natural law undermines the Separation Thesis as a conceptual truth about law is the fact that that content is dependent upon certain contingent facts about human nature. To make this point, he indulges in a philosophical fantasy to show that if human beings were invulnerable or able to process nutrients from the air so that limited resources would not be a problem, there would be no need for law to reproduce such content, thus leaving the Separation Thesis intact. Hart does not seem to see, however, that his philosophical fantasy is fundamentally a fantasy of dehumanisation so that we would no longer be talking about legal order as an order for human beings. It seems to me, therefore, that this argument strengthens rather than weakens the claim that formal legal order has to be predicated upon a moral conception of the legal subject thereby undercutting the control model of law that animates the Separation Thesis. See his explication of this fantasy in Hart, *supra* n 9 at pp. 95-200.

23 H. L. A. Hart, "Positivism and the Separation between Law and Morals" *Harvard Law Review*, 1958, Vol. 31:4, p. 593.

24 *Ibid*. at pp. 623-624.

25 *Ibid*. at p. 624.

26 *Ibid*.

view, the principle is merely formal and does not generate a substantive moral criterion of equality, as exemplified by the possibility of law operating to maintain an oppressive double-standard. It is only if law did not affirm the minimum moral protections at all by failing to extend these protections to anyone that we would see the deterioration of legal order into a set of "meaningless taboos."[27] But if the problem is only that there is a double-standard, there remains something we can recognize as a legal system. However, those who are its victims, Hart says, would have "no reason to obey law except fear and would have every moral reason to revolt."[28]

In my view, these arguments do not support the Separation Thesis and the conception of human agency associated with the control model that underpins that Thesis. To see the point, let me start with Hart's comments about what law might appear to be like from the perspective of those oppressed the slaves in his example. The claim that they would not have any reason to obey law conveys that they have no rational reason to see law as binding presumably because the law fails to engage their moral agency. This failure suggests that the legal subject's perception of law as a source of normative obligation is seen to have a moral basis. More than that, it suggests that the subject's exercise of rational agency in recognizing legal norms and in orienting their conduct to such norms is fundamentally dependent upon law's engagement with their moral agency. This point is further evidenced by Hart's claim that if there is a widespread failure to affirm the minimum moral content, the law would sink to the status of "meaningless taboos." Hart's claim suggests there is a rational breakdown in the sense that law's capacity to guide conduct now disappears. Again, this suggests that for law to operate rationally as a guide to conduct, law must engage the moral agency of the legal subject. For there to be legal order, there has to be systematic engagement with the rational and moral aspects of human agency, and these aspects are not, contrary to the control model, severable.

Despite his apparent claims to the contrary, Hart's line of analysis seems to involve the thought that workable legal order requires engaging the rational and moral agency of the legal subject and can be seen more clearly if we think through the argument by reference to Hart's rule of recognition. Recall that the rule of recognition plays an epistemological function in enabling legal subjects to identify what is to count as a legal norm. Unless they can identify such norms, law cannot guide conduct. His arguments suggest that at a conceptual level, the rule of recognition cannot perform its epistemological function if it comprises wholly immoral ideas; legal rules would be reduced to nonsense ("meaningless taboos"). This, in turn, implies the epistemological function of the rule of law is fundamentally dependent upon the idea that the rule is capable of engaging the legal subject's moral agency.[29]

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27 *Ibid*.

28 *Ibid*.

29 A similar point is made by Robert Alexy in his argument that the concept of law includes a "claim to correctness" so that in a "senseless" social order, there is no law because there is no claim to correctness. Alexy's point connects the epistemological function that law must play in ordering conduct with the idea that law must systematically aspire to engage the moral interests of legal subjects. See Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. by Bonnie Litschewski Paulson & Stanley L. Paulson, Clarendon Press, Oxford, 2002, pp. 32-33.

The further point to draw, then, is that contrary to Hart's claim that the principle of treating like cases alike is merely a formal principle that speaks to justice in the administration of the law, but not justice of the law, the rule-like character of legal order is a substantively moral idea. If the rule of recognition cannot perform its epistemological function when the practices that underlie the rule are wholly immoral, then this suggests that for legal rules to operate as guides to conduct, these rules have to have a foundation in morality, that is, they have to have a foundation in a conception of the legal subject as a moral agent who is a bearer of salient moral interests. More precisely, legal subjects have to be able to perceive legal rules as resting in such a foundation to be able to see legal rules as flowing from a systematic engagement with these interests, and through such engagement, with their moral agency. If that is the case, the values of fairness and impartiality associated with the principle of treating like cases alike are highly substantive because, from the legal subject's perspective, those values are material to the law's engagement with their moral agency.

All of this amounts to what I think is a fairly basic point: law cannot guide conduct unless legal subjects respect law. And respect for law will not be forthcoming if legal order does not operate on the basis that the rational and moral agency of legal subjects is severable. The reason why these aspects of agency are not severable is simply because legal subjects do not think they are. Hart's commitment to the Separation Thesis, and the central logic of the control model which underlie that thesis, do not allow him to engage with these ideas.

Indeed, what I think has happened here is that Hart's commitment to the Separation Thesis leads him to be insufficiently sensitive to the difference between immoral laws and immoral legal order. The claim that there can be valid but immoral laws is not implausible and so Hart is right to think that that is an aspect of reality that a theory of law should capture. But as we have seen, the claim that there can be legal order wholly devoted to immorality is a claim that even he resists. Yet, because he wants to defend the Separation Thesis, he struggles to find ways to show how legal order is not a moral idea. However, the example he gives, the example of the "rightless slave population" illustrates that law can be used to sustain a double-standard of unequal treatment between persons where their salient moral interests are concerned, shows only that, a double-standard. It does not show that legal order is not a moral idea. It only shows that the law reflects an inconsistent commitment to morality. The Separation Thesis, however, and the logic of the control model do not deliver the resources with which to engage this mixed reality. The grip of this logic falsely suggests that the right conclusion to draw from a mixed situation is that the rule of law is not a moral concept.[30] The logic of the control model of

[30] For an argument that Hart and other positivists (notably, Joseph Raz) do not adequately see that there will be pressure on the Separation Thesis once one acknowledges the difference between particular laws that are immoral and immorality at the level of legal order, see David Dyzenhaus, "The Legitimacy of the Rule of Law", David Dyzenhaus, Murray Hunt & Grant Huscroft, eds., *A Simple Common Lawyer: Festschrift for Michael Taggart* Hart Publishing, Oxford, 2009, p. 33.

law cannot generate the resources to make sense of the idea of "respect for law" without which one can't understand legal obligation. As I will now show, even by Hart's own account of the dynamics that lead to rule by law, one has to make sense of that idea.[31]

III. EXPLOITING RESPECT FOR LAW

Jeremy Waldron's analysis of these dynamics as he gleans from Hart's *Concept of Law* is instructive.[32] According to Waldron, Hart's analysis in that work conveys a somber message: the rise of formal legal order may well result in the use of law as a tool of abuse so that legal order is not a mark of moral progress for a society. This is to make a stronger claim than the Separation Thesis, which holds only that there is no necessary connection between law and morality. Waldron thinks that one can draw out a stronger and darker point about law from Hart's arguments, namely that with the rise of legal order, there emerges a danger that law may well become a source of oppression. He explains that the interplay of two main dynamics speak of this danger. First, with the rise of a legal bureaucracy and legal officials who make, interpret, and enforce law, legal subjects are likely to take a passive attitude towards legal authority because they are not actively participating in these processes. Second, when legal subjects develop such an attitude, what Hart himself characterises as a "sheep-like" attitude, legal officials may find it plausible to contemplate using the law as a tool for serving their own interests at the cost of failing to affirm the interests of legal subjects.[33] This creates a situation where legal officials can capture the formal institutional apparatus of legal order to achieve their oppressive ends, because officials can exploit the legal subject's uncritical sense of respect for legal authority. So the idea of respect for legal authority is fundamental to understanding this danger.

When we turn to Hart's proposed solution to the danger that law can become a tool of abuse, it is apparent that when he looks at the issue from the perspective of the legal subject, he is compelled to give the idea of respect for law a prominent place as a context for his suggested answer to the danger of that law can be used as a tool of abuse. Through this answer, Hart hopes to empower legal subjects against this danger. He says:

> So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What is surely most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the aura of majesty or authority which the official system may have, its demands must in the end by be submitted to a moral scrutiny.[34]

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31 Hence, some legal positivists argue, contrary to Hart, that law is not a source of obligation at all so that they are skeptical of the idea of legal normativity. See Jules Coleman, "On the Relationship between Law and Morality" *Ratio Juris,* 1989, p. 66.

32 Jeremy Waldron, "All We Like Sheep", *Canadian Journal of Law & Jurisprudence*, 1999, Vol. 2, p. 169.

33 Hart, *supra* n 9, at p. 117.

34 *Ibid*. at p. 210.

Notice that Hart's characterisation of the problem of rule by law involves having to reckon with the legal subject's sense of respect for legal authority. Essentially, he says that legal subjects must be critically minded and refrain from conflating that sense of respect with moral goodness. So the character of the problem seems to be that legal officials may exploit the legal subject's sense of respect for law. Hart tries to arm legal subjects with a defence against that exploitation. His proposed solution is that legal subjects should draw a bright-line distinction between claims of legal validity and the question of whether it is morally justified to obey law.

The difficulty with this view, however, is that if the basis to their sense of respect for law lies in the conviction that claims of legal legitimacy flow from a moral foundation to legal order, then that distinction may not be easy to draw. Indeed, Waldron's account of the dynamics that may lead to the use of law as a tool of abuse suggests that legal officials will count on this idea in trying to use law as a tool of abuse. They will try to use law as a cover for that abuse, in the hope that legal subjects will ultimately defer to their claim of legality and act in accordance with law out of respect for legal authority. Given that subject's moral sense for whether a law is morally troubling could well depend upon this sense of respect for legal authority, I think Hart is asking for the drawing of a line that may be very difficult to draw so that, consequently, his proposal does not empower the legal subject.[35]

At first blush, Hart's proposal would be wholly ineffective in situations when a ruling power engages in grossly immoral actions for the simple reason that when a power wishes to engage in acts of gross immorality, it is likely to do so extra-legally. It will not create a law for that purpose so that a legal subject can adjudge it as valid but immoral.[36] When we consider how his proposal would fare with respect to actions that fall beneath the threshold of gross injustice, his solution fares no better. As noted above, the major problem here is that the making of a judgment of immorality may be difficult precisely because of the legal subject's sense of respect for legal authority. Even in the case of laws allowing for detention without trial, we cannot clearly say that they are clear examples of immoral laws.[37] Especially if a ruling regime uses such a law in the context of claiming that it is necessary to preserve national security, legal subjects may defer to that claim precisely because there may appear to be some plausibility to this claim and because the power is yoked to a legal framework that projects a level of rule-of-law legitimacy. Judges may find it difficult to reject the government's arguments, in part, because it is

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35 This problem is a central part of Fuller's reply to Hart's 1958 Harvard Law Review essay defending the Separation Thesis. See generally, Lon L. Fuller, "Positivism and the Ideal of Fidelity to Law – A Reply to Professor Hart" *Harvard Law Review*, 1958, Vol. 31:4, p. 630.

36 For example, military dictatorships in South America engaged in the torture and "disappearing" of political opponents. These dictatorships tended to engage in covert action that did not involve the use of law when engaging in such actions. See Brendan Pereira, "Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile" in Ginsburg & Moustafa, *supra* n 3, at p. 26.

37 Indeed, there is reason to suppose that we cannot think about the immorality of indefinite detention without drawing resources from the law itself. See Ratna Rueban Balasubramaniam, "Indefinite Detention: Rule by Law or Rule of Law?", Victor Ramraj, ed., *Emergencies and the Limits of Legality*, Cambridge University Press, Cambridge, 2008, Chapter 5.

difficult to say that there is no moral cogency to the government's stance. [38] This fact also explains why constitutional liberal democracies post 9/11 has successfully been able to implement anti-terrorism laws and policies that violate human rights without too much judicial resistance. There is a sentiment shared amongst many judges that it may be justified to limit the human rights of non-citizens if doing so may enhance the safety and security of the citizenry.[39] In all of these instances, one of the major difficulties is that it is not easy to say that the government's stance is immoral to such a degree that its actions should engender moral outrage. And this murkiness stems from the fact that these governments also claim that such actions are legally legitimate, a claim that influences perceptions of the moral legitimacy of their actions. The fact that such judgments are murky (in the way described above), suggests that Hart's claim that one should draw a bright line distinction between legal validity and morality, unrealistic. The basic problem is that the legal subject's sense of moral right and wrong is heavily influenced by law itself so Hart's solution to the danger of immoral law involves asking them to easily unweave what is, from their perspective, likely to be two very connected things.

In order to begin to make sense of the problem with rule by law and its manifestation as the use of the legal form as a cloak for arbitrary power, I want to draw out how Hart's analysis of the concept of law contains an important truth that helps to illuminate the problem with rule by law. While Hart is wrong to inflate the idea of control as the main image of legal order, his analysis spotlights that the elements of the control model are related to the danger of rule by law. Rule by law seems to involve an attempt by legal officials to impose a dynamic of control where their judgments about how legal order should operate and what the law requires should supersede the interests of legal subjects. Furthermore, Hart uses an idea that helps to bring out an important aspect of rule by law, the idea of domination in saying that the danger of law becoming a tool of abuse stems from the desire to dominate legal subjects.

Phillip Pettit's analysis of the problem of domination helps to sharpen the linkage between control and domination.[40] According to Pettit's characterisation of the problem, A can dominate B if A has the capacity to interfere with B's ability to exercise choice over his/her salient moral interests without accounting to B for that interference. [41] Importantly, A need only possess the capacity to interfere with B's salient moral interests; A need not actually interfere. It suffices that B knows that A can interfere without accounting to B in order for there to be domination thus leading B to condition his or her choices in an effort to avoid A's interference. It follows that even if A is benevolent towards B, the problem of domination does not disappear. [42] As long as B knows that A can interfere

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38 Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?", *Yale Law Journal*, 2002-2003, Vol. 112, p. 1034.

39 This is the principal theme of David Cole's important book, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, The New Press, New York, 2003.

40 Phillip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press, Oxford, 1997.

41 Pettit sets out three conditions as characterising the problem of domination when an authority has: a) the capacity to interfere; b) on an arbitrary basis; c) in certain choices that the other is in a position to make. *Ibid*. at p. 52.

42 *Ibid*. at pp. 63-64.

without ever having to account to B for such interference, there remains a problem of domination since B's moral agency is nevertheless crimped as B suffers a loss to his or her freedom. B cannot see him or herself as an equal to the authority. In Pettit's words, this dynamic teaches us that when we are dominated, we cannot "look the authorities in the eye, confident of knowing where we stood and of not being subject to capricious judgment." [43] The problem of domination thus involves a situation where one party has control over the other in the sense that the former can make judgments affecting the salient moral interests of the latter without accounting to the latter so that the latter is not seen as a relevant participant in the making of such decision. Indeed, the perspective of the latter is not relevant at all to the making of such decisions. The result is that the victim of domination suffers a crimping of his or her moral agency, indeed, an impairment of that person's sense of moral agency as his or her sense of self-respect and dignity is negatively affected resulting in a feeling of vulnerability and disempowerment.

IV. THE FACILITATIVE MODEL OF LAW

To make sense of rule by law as juridical pathology, one needs to see how the attempt to use law as a tool of domination through principally requiring an approach to law that reflects the control model of law, ironically, trades upon a different vision of legal order than that constructed through the lens of the control model of law. Instead, with Fuller, one needs to understand legal order and the rule of law as an ideal of legal order predicated upon a vision of law as a framework of rules for facilitating human interaction, what I shall refer to as the "facilitative model" of law.[44] On this view, the role of formal legal order is to enable legal subjects to pursue their interests, especially their salient moral interests. Unlike the control model of law which supposes that legal subjects are incapable on their own of interacting in ways that would enable workable legal order, the facilitative model of law presupposes that they are fully able to do so.[45] It resists the notion that in the absence of formal legal order, there would be chaos and disorder. Therefore, under the facilitative model of law, it is a mistake to think that one requires a sovereign lawgiver to control legal subjects.[46] Rather, the role of the lawgiver is that

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43 *Ibid*. at vii.

44 Lon L. Fuller, "Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction", *Brigham Young University Law Review,* 1975, p. 89.

45 A persistent theme in Fuller's thought is that formal legal order should not be the principal foci for understanding legal normativity. It follows for Fuller, that it is a mistake to analyse the concept of law by reference to the idea of a sovereign authority. Hence, he says, "[t]he bulk of human relations find their regulation outside the field of positive law, however that field may be defined. The existing body of positive law in general serves only to fill that comparatively narrow area of possible dispute where conflicts are not automatically resolved by reference to tacitly accepted conceptions of rightness." Lon L. Fuller, *Law in Quest of Itself*, Beacon Paperback, Northwestern University, 1940, p.111.

46 Thus, Fuller resists the idea that one should understand law as a top-down system of rules backed by sanctions. Interestingly, Hart also rejects this view by distancing himself from John Austin's command theory of law which holds that law comprises the commands of an uncommanded commander habitually obeyed by legal subjects out of fear of sanction. However, Fuller criticises Hart for failing to follow the logical path of this distancing, namely in failing to see that if one moves away from a top-down picture of law, then one has to embrace a moral conception of law rooted in the idea that the very notion of workable legal order is a moral idea. See Fuller, *supra* n 7, at pp. 638-644.

of a manager of legal order in ensuring that legal rules will track the interests of legal subjects, especially their salient moral interests.[47] In this regard, the lawgiver does not enjoy the power to pass final judgment on how best to maintain legal order. Instead, that power rests with legal subjects whose lived experience under the law means they are best placed to make that judgment. Thus, under the facilitative model of law, the lawgiver's judgments about how to maintain legal order are always provisional upon a testing by legal subjects. Upon that testing, the lawgiver must adjust his decisions in light of the feedback that arises through that testing and engage in self-correction. The facilitative model of law embraces a different conception of human agency than that implicit in the control model of law. It supposes that the legal subject is possessed of both rational and moral agency and that both dimensions of the legal subject's agency cannot be severed from each other because, from the perspective of the legal subject, these dimensions of human agency are connected. A sense of self as a rational agent is tied to a sense of self as a moral agent who is possessed of dignity and self-respect. Therefore, it is only rational for the legal subject to see law as a source of binding obligation if legal order systematically engages the subject's moral agency. For there to be such engagement, it is crucial that the subject is an active participant in the project of maintaining legal order. This, again, differs from the control model which portrays legal subjects as passive recipients of law.[48]

It is through this package of ideas encapsulated in the facilitative law of legal order that we can more fully appreciate the moral significance of rule-of-law principles and why Hart is wrong to dismiss these principles as purely rational preconditions to legal order. To see how, we need to go back to Hart's observation that the operation of legal order understood as a framework for conduct entails the principle of treating like cases alike. Hart treats this principle as a narrow formal one because he is reasoning from within a control model of law which sees law as an instrument for conveying the final judgments of the lawgiver to legal subjects constructed as passive recipients of law. Under the grip of this thinking, he sees the principle as a narrow formal principle because the legal subject's rational agency is supposedly severable from the subject's moral agency. On the facilitative model of legal order, however, the principle of treating like cases alike becomes a proxy for engaging the moral agency of legal subjects. When the lawgiver chooses to rule through rules, this choice must engage the legal subject's rational agency in purporting to ask legal subjects to understand and obey legal rules. Since from the perspective of the legal subject, the subject's rational agency cannot be severed from the subject's sense of self as a moral agent, the subject will likely perceive

47 My use of the term "manager" may seem jarring as a description of the role of the lawgiver since Fuller explicitly associates the positivist view of law with a form of social ordering he calls "managerial direction." However, the term "manager" is apt because I am talking about the role of the lawgiver as a manager of legal order and its rules in ensuring that the rules track the interests of legal subjects not as a manager of persons who are deemed subordinate to a superior. The latter expresses the dynamic of control I outline in the paper and is reflected in managerial direction. For an elaboration of "managerial direction," see Fuller, *supra* n 6, at pp. 217-215.

48 "…the analytical positivist sees law as a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen….[L]aw is seen as simply acting on the citizen – morally or immorally, justly or unjustly, as the case may be." *Ibid*. at p. 192.

this enterprise of trying to construct legal order as engaging his or her moral agency.[49] Therefore, the lawgiver's duty to respect rule-of-law principles underscores a "bond of reciprocity" between the lawgiver and legal subjects.[50] The character of that bond requires that the lawgiver adhere to rule-of-law principles failing which it will not be rational for the subject to obey law. And through that adherence, the subject is entitled to expect that the lawgiver will discharge his/her duty with a view to serving the interests of legal subjects. Thus, through the lens of the facilitative model of legal order, where the rational and moral dimensions of the subjects are connected, the principle of treating like cases alike, which is implicit in legal order, is a substantively moral idea. It conveys not only that legal subjects are rational agents under law, they are also moral equals under law and so that the law should aspire to protect their salient moral interests in service of their equal moral agency.[51]

At a practical level, rule-of-law principles become the basis for a practice of accountability where the lawgiver is expected to fulfill a justificatory burden in claiming rule-of-law legitimacy for exercises of public power in the law's name, a burden which shows that the lawgiver is engaging the legal subject's salient moral interests. [52] This duty flows from the lawgiver's morality of role as a manager of legal order. In order to manage legal order effectively, the lawgiver must be responsive to the legal subject's actual experience of the law and pay attention to the subject's judgments as to whether law successfully facilitates his or her interests. Therefore, legal order must contain appropriate institutional channels and feedback mechanisms for legal subjects to signal these judgments to the lawgiver. These institutional channels enable the subject to participate in the project of maintaining legal order. It is no surprise, then, that formal legal order tends to contain institutional machinery that revolves around the management of rules. Hart's theory of positivism, for instance, gives us a picture of these institutions. In claiming that law consists of a union of primary and secondary rules, Hart sketches a system of rule-management which requires institutions like legislatures, courts, and law-enforcement agencies. Legislatures and courts are needed as institutional channels to enable the legal subject's participation in legal order in the creation and interpretation of laws; and law enforcement agencies are necessary to ensure that rules are obeyed. These institutions sustain the practice of accountability that is crucial to the success of legal order as a framework of rules for the guidance of conduct.

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[49] Hart recognises the element of autonomy associated with the choice to rule through rules so that he explains that legal order does not usually comprise "particularized forms of control." But because, as I argue, he is under the grip of the control model of law he does not seem to see that a recognition of a person as possessed of autonomy cannot be separated from a recognition of that person's moral agency. See Hart, *supra* n 9, at pp. 20-21.

[50] Fuller, *supra* n 6, at pp. 40-41.

[51] For an argument that a notion of liberal equality is implicit in Fuller's thought, T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford University Press, Oxford, 2001. See also Dyzenhaus, *supra* n 30, at p. 21.

[52] The practice of accountability is a basis to a "public culture of justification." See David Dyzenhaus, "The Legitimacy of Legality" *University of Toronto Law Journal*, 1996, Vol. 46, p. 129; David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" *South African Journal of Human Rights*, 1998, Vol. 14, p. 11.

The idea that rule-of-law principles are a proxy for engaging the legal subject's moral agency as the basis to a practice of accountability explains why Fuller also thinks that the lawgiver's duty to explain himself within that practice will tend to pull legal order towards moral goodness.[53] This idea can be seen if we notice that institutions like legislatures and courts, in particular, are associated with ideas like democracy and checks and balances or the separation of powers. These are important notions in political morality that grow out of the basic idea that the maintenance of workable legal order requires the legal subject's participation in the creation and interpretation of laws. The project of maintaining legal order, in requiring engagement with the legal subject as a rational and moral agent creates a definite moral trajectory which orients legal order to the salient moral interests of legal subjects. As Fuller says, "[t]here is therefore, in an ordered system of law, a certain built-in respect for human dignity, and I think, it is reasonable to suppose that this respect will carry over into the substantive ends of law."[54] Thus, a mature reflection of that trajectory manifests when a legal order contains a constitutional bill of rights that affirms the salient moral interests of legal subjects, generating a discourse of constitutionalism. Through that discourse, legal subjects can argue about the constitutional legitimacy of exercises of public power when deliberating about the legitimacy of law at the level of its creation and interpretation. All this reflects the idea that unless there is serious engagement with the rational and moral agency of the legal subject as connected dimensions of human agency, legal subjects will not respect law and the enterprise of maintaining legal order as a framework of facilitation will run aground.

V. THE PATHOLOGY OF RULE BY LAW

Given the centrality of the notion of respect for law within the facilitative model of law, and the practice of accountability that attaches to that model, we can now better understand the pathological character of rule by law. When an authoritarian regime tries to exploit the legal subject's sense of respect for law, it is trading on the idea that the legal subject will accept its claims to exercise power in a manner that is legitimate from a rule-of-law perspective without questioning that claim. As Fuller puts it:

> …once you create a legal order that purports to rest on a system directing human conduct by rules, the law-giver or law-enforcer is subject to a constant temptation to cheat on the system and to exercise a ruleless power under the guise of upholding a system of rules…. The ordinary citizen has a certain deference for law; he does not like to break law. This attitude is subject to exploitation by the legislator or

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53 "I shall have to rest on the assertion of a belief that may seem naïve, namely, that coherence and goodness have more affinity than coherence and evil. Accepting this belief, I also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull these decisions towards moral goodness, by whatever standards of moral goodness there are." See Fuller, *supra* n 7, at p. 636.

54 See Lon L. Fuller, "A Reply to Professors Cohen and Dworkin", *Villanova Law Review*, 1965, Vol. 10, Issue 4, pp. 666.

55 *Ibid*. at p. 657.

> policeman, who, acting in the name of law (that is, in the name of an impersonal regime of general rules) may exercise a power that does not respect those conditions essential for the achievement of a regime of general rules.[55]

Empirical studies exploring judicial politics in authoritarian regimes show that attempts to cheat on the system are not frictionless in the sense that they result in a breakdown in rule-of-law principles.[56] Since independent courts are seen as an institution that are emblematic of a commitment to the rule of law, authoritarian regimes have reason to tolerate the operation of such courts to "make up for their questionable legitimacy."[57] The difficulty for these regimes that wish to project rule-of-law legitimacy while carrying out authoritarian agendas, however, is that independent courts may potentially limit the regime's power thus curbing the regime's ability to protect its own interests. Therefore, an authoritarian regime must find ways to limit judicial power – the power of courts to render authoritative determinations about what the law requires within a legal order – without formally eviscerating judicial autonomy since such formal evisceration compromises the regime's desire to project rule-of-law legitimacy or legal legitimacy for its actions. Therefore, courts operating in an authoritarian context are likely to be embroiled in a "dialectic of empowerment – as regimes seek the benefits judicial empowerment can provide – and constraint, as regimes seek to minimize the associated costs of judicial autonomy."[58] In seeking to constrain the courts, authoritarian regimes may adopt formal strategies of manipulation of the law to exercise control over courts. This may manifest as changes in the law that curtail the legal subject's right of access to justice, repealing laws that affirm the salient moral interests of legal subjects or the creation of alternative courts that apply more relaxed procedural norms and that are staffed by judges friendlier to the regime's core interests. However, in addition to formal strategies of manipulation and control, authoritarian regimes are also likely to engage in informal strategies of manipulation aimed at trying to condition judicial attitudes so that judges will interpret the law in a way that will uphold the regime's interests, not the interests of legal subjects. These strategies may include weakening judicial protections from removal, controlling judicial appointments, and determining judicial salaries by reference to whether judges defer to the regime's interests. The point of such strategies is to send a clear signal to judges that they should not interpret the law by reference to the interests of legal subjects and should interpret the law by reference to the regime's interests instead. The combination of formal and informal strategies produces strains upon rule-of-law principles including clarity, stability, and non-contradiction. Importantly, such tensions also undermine the principle requiring congruence between official action and declared rule by preventing legal subjects from seeking the enforcement of laws that serve their salient moral interests or from having those laws enforced by impartial courts. The damage to these principles

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[56] See Ginsburg & Moustafa, *supra* n 3. A notable fact about all of the case studies set out in the book is that without exception, each case study shows that when a ruling regime strives to control an independent judiciary in an effort to avoid accounting to legal subjects in courts for its actions, there is a strain on rule-of-law principles.

[57] *Ibid*. at p. 4.

[58] *Ibid*. at p. 21.

has the effect of eroding the rule-like character of legal order as it becomes less and less clear that legal rules are mediating exercises of state power whenever the state claims to act in accordance with the law.[59]

The problem of domination helps to explain the breakdown in rule-of-law principles and an erosion of the rule-like character of legal order. Recall that the problem of domination is fundamentally about the absence of accountability so that A has the capacity to interfere with B's salient moral interests without accounting to B for such interference. In this regard, A's domination of B involves a violation of B's dignity and moral agency. Since the principles of the rule of law are a proxy for engaging the moral agency of legal subjects by sustaining a practice of accountability, in seeking to avoid accounting to legal subjects, a ruling regime is likely to take steps to protect its interests that invariably put pressure on these principles.

We can see the interplay of both formal and informal strategies adopted by ruling regimes to prevent legal subjects from bringing them to account effectively for their actions in court as part of an overarching program of domination. Formal strategies of manipulation are designed to enable the regime to interfere with the salient moral interests of legal subjects without accounting for such interference. A problem here, however, is that when the regime claims allegiance to the rule of law and seeks to project a claim of legal legitimacy for its actions, this signals to legal subjects that the regime wishes to engage their rational agency as legal subjects. But because, from the subject's perspective, that agency cannot be severed from the subject's sense of moral agency there is a likelihood that subjects are likely to contest the regime's claim. They will interpret the regime's claims through the lens of the facilitative model of law, and are likely to try to bring the regime to account by going to courts as institutional spaces designed for precisely that purpose. In doing so, legal subjects call for the regime to fulfill its duty to account as a manager of legal order. And here, they are going to rely on the expectation that courts, in virtue of their role morality as fair and impartial institutions that speak to the lawgiver's duty to self-correct in failing to engage the moral agency of legal subjects, will protect these interests by interpreting the law in a way that accords with a facilitative view of law. This will push the regime to engage in informal strategies of manipulation that put direct pressure on judges to defer to the regime. These strategies are necessary in order to corrupt judicial role morality by compelling judges to refrain from acting out of a facilitative understanding of legal order and to privilege the regime's interest in control and domination. This predicament reflects that the regime and its legal subjects operate under competing conceptions of legal order, the former under the control model of legal order, the latter under the facilitative model of legal order. Since the logic of both models is at odds as the control model privileges the perspective of the lawgiver while the facilitative model privileges the perspective of the legal subject, the result is competing pressures that ultimately strain rule-of-law principles as the backbone to the practice of accountability.

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[59] Hence, Robert Barros notes that there tends to be a rise of discretional forms of authority and a shift away from rule-governed authority in authoritarian regimes. See Robert Barros, "Courts in Context: Authoritarian Sources of Judicial Failure in Chile (1793-1990) and Argentina (1976 – 1983)" in Moustafa & Ginsburg, *supra* n 3, Chapter 6 at p. 168.

The basic problem that produces friction which damages rule-of-law principles, therefore, is that the desire to control and dominate legal subjects (which strives to crimp the moral agency of legal subjects) is inconsistent with the duty to adhere to rule-of-law principles as a proxy for engaging the legal subject's moral agency.

In the light of this basic problem, we can more clearly see why domination strains the rule-like character of legal rules. Legal rules are fundamental to the idea of accountability because the choice to rule through rules means that legal rules mediate the relationship between legal subjects and the state in a way that allows legal subjects to see themselves as bearers of self-respect, dignity, and freedom as the legal subject can see him or herself as subject to the rule of rules rather than the rule of a ruling power. The legal rules mediate the relationship between ruler and subject by enabling the latter to point out that the appropriate interpretation of law, as constituted by legal rules, is predicated upon the lawgiver's role morality to engage the moral agency of legal subjects, thus bringing the lawgiver to account for its decisions by reference to the rules so understood. On this view, legal subjects can use the rules to "look the authorities in the eye."

In being subject to law, they are not subservient to the whim or caprice of the ruling power. Rather, legal rules create a public base of knowledge among legal subjects as well as those who wield political power so that legal rules set out the basic framework within which to assess all claims of legal legitimacy.[60] The rules become an impartial standpoint from which to engage in such assessments since the right answer to questions about whether this or that exercise of state power is legitimate must be resolved by an interpretation of the rules, not through the fiat of a ruling power. With the existence of this public base of knowledge, it becomes harder for a ruling power to dominate legal subjects precisely because of the mediating role of legal rules. Throughout, rule-of-law principles are fundamental to the maintenance of that public base of knowledge since these principles affirm the rule-like character of legal order. When the law expresses the features of these principles, in being public, general, clear, coherent, and so on, the public base of knowledge remains intact so that the full mediating power of legal rules as a backstop against arbitrary power can be realised. Thus, it is not surprising that authoritarianism tends to be marked by opacity as an authoritarian regime will have to damage the rule-like character of legal order in order to privilege the use of discretional forms of authority which are more amenable to its desire to control and dominate legal subjects. The rule-like character of legal order is inimical to the desire to control and dominate precisely because that character constitutes a public base of knowledge about

[60] Thus, Pettit argues that the choice to rule through rules as the appropriate legal form is a "principled" approach to political rule because it avoids particularistic modes of rule. Here, rule-of-law principles speak directly to the principled nature of the choice to rule through rules. The reason for this is that the choice to rule through rules creates the basis for a common base of knowledge as between ruler and subject about where each stands. In his words, "[i]f the law does not satisfy such constraints [rule-of-law principles], then those who make, execute or enforce the law may easily be given arbitrary power over others." As I argue in the text, the point is that fulfillment of rule-of-law principles creates a public basis for assessing the legitimate uses of state power, and because that basis is publicly known, one's sense of self as free is enhanced as the danger of domination is reduced. Pettit, *supra* n 40, at p. 174.

what can pass as legally legitimate, knowledge that the legal subject can utilise to contest the regime's claims to rule-of-law legitimacy.[61] An authoritarian regime will not find this public base of knowledge favourable to its desire to exercise arbitrary power and to avoid accounting to legal subjects.

A serious difficulty follows from the demise of the rule-like character of legal order. Pettit's analysis of the problem of domination suggests that that we should not overlook the fact that people are highly sensitive to the problem of domination such that the fact that there is this problem is likely to be commonly known amongst those who are dominated.[62] Even if legal subjects are unsure in their judgments about whether a particular law is morally troubling in the light of their sense of respect for legal authority and its influence on their sense of moral right and wrong, it is likely that they will know they are being dominated under rule by law.[63] The perception that one is being dominated can be gleaned from the actions of the regime which show that if legal subjects try to challenge the ruling power, they may suffer an interference with their salient moral interests and that there is nothing they can do to prevent such interference by the regime. [64] This message is equally crystal clear when a ruling power is actively trying to constrain courts in an effort to resist attempts by legal subjects to engage in such challenges.

For instance, when the regime engages in formal strategies of manipulation that seek to reconfigure the legal landscape by cutting off procedural and substantive measures that allow the legal subject to go to court to argue for the legal protection of their salient moral interests, this will evidence the regime's unwillingness to account for its actions. Therefore, the attempt by a ruling power to "cheat" on the system is unlikely to go unnoticed as involving a problem of domination. It is likely to be clear to legal subjects that the regime is seeking to control and dominate legal subjects with a view of disabling legal subjects of the option to bring the regime to account. Here, the point will also be driven home to legal subjects when the regime relies on informal strategies of manipulation, which strives to put pressure on judges to ensure that courts will defer to the regime's interests. Such strategies are likely to raise questions amongst legal subjects about the impartiality of the judiciary. This too will convey to legal subjects that the attempt to cheat on the

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61 My account speaks directly to the thought that the rule of law and democracy are united in emphasising the right of legal subjects to participate in the making of political decisions affecting their salient moral interests. For a normative argument detailing the linkages between the rule of law and non-domination in justifying a democratic framework of governance, see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge University Press, Cambridge, 2007.

62 Pettit, *supra* n 40, at pp. 58-61.

63 To see how it is possible to know that one is dominated without having to first exercise moral judgment, think of the distinction between resentment and indignation, where only the latter requires a moral sensitivity to the plight of others: where we feel resentment on our own behalf, we feel indignation on behalf of another. The problem of domination is akin to the notion of resentment. We easily recognise (though not infallibly) when we are dominated but it takes a certain empathy with others in general, and a capacity to universalise, to make a moral judgment that there is cause for indignation. I am grateful to Phillip Pettit for clarifying this point.

64 See Pettit, *supra* n 40, at pp. 59-60.

system is part of an overall attempt to dominate them and to stop legal subjects from seeking the legal protection of their salient moral interests.[65]

Given that the problem of domination is likely to be obvious and known by legal subjects, there arises a threat to the basic idea that the law is operating as a guide to conduct. When it becomes apparent to subjects that legal rules do not mediate the relationship between ruler and legal subject, this adversely impacts the legal subject's perception that legal rules can be considered as a sufficiently stable normative framework with which he or she may plan and act in orienting his or her behavior to be in accordance with these rules. Note that even if the law seems to operate to guide conduct in other spheres of life, the fact that it does not adequately protect the legal subject's salient moral interests means that the subject is nevertheless the victim of domination because the law's failure to affirm the salient moral interests of legal subjects is likely to have a pervasive effect on the way legal subjects understand the legitimacy of legal order as a whole. It becomes difficult to perceive the law in its entirety as a framework of norms that strives to guide conduct because one never knows when a ruling power may interfere with the subject's salient moral interests. As Pettit argues, this inability to count on the law as a secure basis for affirming the salient moral interests of legal subjects produces a heightened sense of uncertainty and insecurity.[66] Legal subjects will have to orient their conduct by reference to the whim or caprice of a ruling power given that that power has the capacity to interfere with their salient moral interests without accounting for that interference.[67]

It is through this idea that we can start to make sense of Hart's claim, for example, that when there is widespread immorality in the law the system threatens to sink to the status of "meaningless taboos." At one level, this sinking takes place because it is much harder for legal subjects to interpret the law if it cannot be understood to reflect a commitment to the legal subject as possessed of salient moral interests.[68] At a more basic level, the sinking takes place because law will be unable to deliver certainty sufficient for legal subjects to rely on legal rules in determining how to act. If there is always the chance that a ruling power may interfere with their salient moral interests, then any judgments they make about how best to behave are not going to be the result of an understanding of what the law requires. It is irrational to see the law as a guide to conduct. Rather, it

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65 See my account of how the practice of rule by law has undermined public confidence in the independence of the Malaysian judiciary in "Has Rule by Law Killed the Rule of Law in Malaysia?", *supra* n 3.

66 "To suffer the reality or expectation of arbitrary interference is to suffer an extra malaise over and beyond that of having your choices intentionally curtailed. It is to have to endure a high level of uncertainty, since the arbitrary basis on which the interference occurs means that there is no predicting when it will strike. Such uncertainty makes planning much more difficult than it would be under a corresponding prospect of non-arbitrary interference. And, of course, it is likely to produce a high level of anxiety." Pettit, *supra* n 40, at p. 85.

67 This has been a central aspect of the ongoing "Kramer-Simmonds" debate. See Matthew H. Kramer, "On the Moral Status of the Rule of Law", *Cambridge Law Journal*, 2004, Vol. 63, p. 65 and Nigel E. Simmonds, "Straightforwardly False: The Collapse of Kramer's Positivism", *Cambridge Law Journal*, 2004, Vol. 63, p. 98.

68 Ronald Dworkin makes the point that morally obnoxious laws are harder to interpret because one cannot "supplement its language with auxiliary principles of fairness and justice." See Ronald Dworkin, "Philosophy, Morality and Law – Observations Prompted by Professor Fuller's Novel Claim", *University of Pennsylvania Law Review*, 1964-1965, Vol. 113 p. 672.

becomes rational to base judgments of right conduct on an understanding of the ruling power's expectations and preferences. When legal subjects must try to orient their conduct by reference to the whim or caprice of a ruling power, not legal rules, there is a falling away of law and an undermining of legal order because the rules are no longer guiding conduct. Thus, rule by law is pathological of legal order because it ultimately undermines the capacity of law to guide conduct by disengaging the law from the moral agency of the legal subject which in turn makes it irrational for the legal subject to see law as a source of binding obligation.

It is important to note that this problem of lawlessness need not manifest simply in cases where we are talking about authoritarian regimes that consistently and directly undermine the salient moral interests of legal subjects. The problem of lawlessness may issue even in cases where a ruling regime shows a reasonable degree of sensitivity to the salient moral interests of legal subjects. Indeed, the regime may show a sufficiently high level of sensitivity so as to gain the respect and allegiance of a majority of legal subjects.[69] None of this detracts from the fact that there remains a problem of lawlessness any time there is knowledge that the ruling power can interfere with the salient moral interests of legal subjects without accounting for that interference. Here, there is a difference between legal subjects having a sense of respect for a ruling power and their having respect for the rule of law. Keep in mind that the contrast between the rule of law and arbitrary power is, in part, about the role of legality as an antidote to authoritarianism and dictatorship. But the need to guard against arbitrary power also means that legal subjects should be rescued from a situation where the protection of their salient moral interests is ultimately left to the good-will of a ruling power. So even in a situation where a ruling power seems to have a good record in protecting the salient moral interests of legal subjects, it does not follow that the rule of law is in a good state of health if that power has the capacity to interfere with these interests without accounting to legal subjects.[70]

The danger of rule by law, therefore, is one that can transpire in any political context. In this regard, even constitutional liberal democracies are not immune from the problem of lawlessness that rule by law engenders. Thus, in a post 9/11 context, some constitutional liberal democracies have undermined the human rights of non-citizens in prosecuting the so-called War on Terror through, for example, the use of laws that allow for detention without trial. In doing so, there is a danger that in attempting to resist challenges to the

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[69] I am grateful to Victor Ramraj for pushing me to specify the normative difference between a benevolent dictatorship and the aspiration of the rule of law to engage the salient moral interests of legal subjects. The difference, again, lies in the idea of accountability and the absence thereof in the former case. Indeed, one can characterise the ruling regime in Singapore as practicing "stick and carrot" rule by law. Here, control and domination manifests through a combination of rewarding legal subjects for supporting the regime, thus creating incentives for subjects to refrain from challenging it, while resorting to coercion to punish those who choose to resist. This combination of reward and force, conditions the behaviour of legal subjects in a way that speaks to a problem of domination and vulnerability. The aim of "stick and carrot" rule by law is to dominate since it aspires to condition people to think it better to pursue material comfort and wealth rather than to exercise moral agency through political activism. It tries to convince them to give up their autonomy. See generally Cherian George, *Singapore: The Air Conditioned Nation Essays on the Politics of Comfort and Control, 1990-2000,* Landmark Books, Singapore, 2000.

[70] "A mere respect for constituted authority must not be confused with fidelity to law." See Fuller, *supra* n 3 at p. 41.

legal legitimacy of such actions, these democracies may weaken the moral resources of their laws in order to try to legitimise this undermining. This weakening may entail formal changes to the law akin to the changes one might see in an authoritarian context.[71] However, even in the absence of such changes, the weakening may also manifest in the acceptance by both government and the populace that it is permissible that the law should draw arbitrary distinctions between persons equally possessed of moral agency in the way that the law protects the salient moral interests of all legal subjects. This is dangerous to the integrity of liberal democracy as an attractive conception of political rule for that society because it mark a change in the legal culture by now weakening the basis of that culture in the idea of moral equality, a notion that is a cornerstone of liberal democratic thought.[72] At a practical level, if this change takes hold, a society risks losing juridical barriers that embody this commitment to equality if it countenances the idea that the law can draw arbitrary distinctions of principle between persons. Nothing is to assure that such distinctions cannot be drawn even between citizens if a ruling power deems that this is necessary to protect some greater good. Then, at an expressive level, should this view of law take hold, there will be a loss in the moral character of the law that is also likely to go hand in hand with a lowering of the law's moral authority in the estimation of legal subjects. When there is a loss of respect for law, this opens the door to precisely the problem of lawlessness that can afflict authoritarian regimes as legal subjects may cease to treat the law as a stable framework of norms that purports to guide their conduct by systematically engaging their moral agency. While they may not live in a conscious state of fear that the state may arbitrarily interfere with their salient moral interests without accounting for such interference, the fact remains that a weakening in the moral integrity of their law introduces an element of uncertainty about the prospects of such interference. It is far from evident that a society can easily repair the damage to the moral integrity of the *corpus juris* once such damage has taken place.[73]

VI. CONCLUSION

My aim in this paper has been to sharpen the popularly perceived association between rule by law and worries about arbitrary power. I have argued that the use of law as a cloak for arbitrary power or rule by law is pathological to the rule-of-law because it undermines law's capacity to facilitate or guide conduct. My analysis of rule by law

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71 Ratna Rueban Balasubramaniam, "Indefinite Detention: Rule of Law or Rule by Law?" in Victor Ramraj ed., *supra* n 37, Chapter 5.

72 See generally John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993.

73 This is an important aspect of Jeremy Waldron's arguments challenging the legal legitimacy of attempts by the Bush administration to loosen the absolute legal prohibition against torture both at international law and under American constitutional law. Waldron thinks that the prospects of damage to the *corpus juris* outweigh any possible benefit that may accrue if the law were to compromise its stance on the absolute legal prohibition against torture. See Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House", *Yale Law Journal*, 2005, Vol. 105:6, p. 1681.

pivots on the argument that the rule of law is an ideal of workable legal order understood as a framework of norms for facilitating the interests of legal subjects. The rule of law is therefore a moral idea to the extent that the attempt to construct and maintain such an order requires engaging the legal subject as a rational moral agent possessed of vital interests. Since rule by law involves the attempt to use the law in a way that does not involve the systematic engagement of the legal subject so conceived but which nevertheless tries to project rule-of-law legitimacy by trading on the rule of law, rule by law strains the rule of law and corrupts the workability of legal order as a framework for facilitating the salient moral interests of legal subjects thus by damaging the rational and moral foundations of legal order. It is therefore apt to conceive of rule by law as a form of juridical pathology.