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Editorial Note

The December 2020 edition kicks off with the piece by Siva Subramaniam entitled, 'Determining the Law to Govern an Arbitration Agreement: A Quest for the Best Approach'. In this article, the author analyses the complexities surrounding the determination of the parties' choice of law in relation to an international commercial arbitration. This is especially so because the arbitration agreement is separate from the main contract, and the arbitration agreement could be governed either by the law of the underlying contract or the law of the seat of the arbitration.

In '*Orang Asli* Customary Land and *Adat Perpatih*: A Case Study on *Temuan* Land in Negeri Sembilan', Izawati Wook and others delve into the customs and customary law of the *Temuan* community in Negeri Sembilan. The authors adopt a qualitative approach through interviews and focus group discussions to investigate the concept, meaning and perspectives of customary land among the *Orang Asli* in several selected villages in Negeri Sembilan.

Last but not least, Eden HB Chua analyses the Federal Court decision in *Datuk Seri Anwar Ibrahim v Government of Malaysia* [2020] 3 CLJ 593, focusing on the Federal Court's refusal to rule against the constitutionality of the *National Security Council Act 2016*.

Dr. Sharifah Suhanah Syed Ahmad
Executive Editor

DETERMINING THE LAW TO GOVERN AN ARBITRATION AGREEMENT: A QUEST FOR THE BEST APPROACH

Siva Subramaniam*

Abstract

This article deals with the complexities surrounding the determination of the governing law in an international commercial arbitration, particularly the law which is to govern the arbitration agreement itself. The arbitration agreement is separate from the main contract or agreement between the contracting parties. Thus the question arises whether the arbitration agreement is to be governed by the law of the main underlying contract or the law of the seat of the arbitration. This article aims to examine the three stage approach test as founded in *Sulamerica Cia Nasional* v *Enesa Engelharia* and its application in three different jurisdictions, namely, Singapore, United Kingdom and Malaysia. The article then discusses the case of *Enka v Chubb* which appears to have resolved some of the complexities in this area of the law. This article argues that the adoption of a uniform international choice of law rule for arbitration agreements in the form of a validation principle is ultimately the way forward to end the quest for a proper approach to determine the governing law for the arbitration agreement.

Keywords: Arbitration agreements, choice of law, Malaysia.

I INTRODUCTION

The law relating to arbitration agreements forms one quarter of the ‘layer cake’ theory, frequently used to illustrate for a better and easy understanding of the applicable law in a commercial arbitration. The first layer is the law governing the substance of the dispute, and this relates to the causes of action, types of damages, remedies claimed and also the quantum. The second layer is regarding the law and procedural rules governing the conduct of the arbitration, or simply put, the *‘lex arbitri’* or the curial law which will facilitate the conduct of the arbitration proceedings. Then there is the third layer, which is the law governing the arbitration agreement. The last layer is the law governing the recognition and enforcement of the arbitration award. All these four layers make up the ‘layer cake’.

It is this ‘layer cake’ that all parties to the arbitration, including the appointed arbitrator(s), will look into to navigate how the arbitration will take place. Only once these applicable laws are determined, can the arbitration proceedings safely journey through this myriad of maze.

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This article examines the complexity surrounding the law governing the arbitration agreement and the impact that it has on the Malaysian legal landscape. The article discusses the various tests, *inter alia*, the early preference by the domestic courts to rely on the law of the substantive contract itself because this is seen as the easy choice, since it is already there to be *'picked'* and then the preference for the *Sulamerica* presumption. However, the latter test did not address the lacuna that still persists in this area when it comes to determining the governing law of the arbitration agreement. This approach was taken by the courts because the law of the seat will have 'curial' jurisdiction over the arbitral tribunal when it comes to enforcement of certain orders or reliefs sought by one of the parties. Perhaps, this emphasis by the courts to select the law of the seat as being the 'closest connection or most significant relationship' to be the governing law of the arbitration agreement is cloaked by its real purpose, which is to show the pro-arbitration stand being taken by the domestic courts of a state. This approach is actually without taking into consideration whether the dispute is actually capable of being arbitrated upon and thus is not likely to be challenged by the opposite party on the issue of the arbitrator's jurisdiction. Thus in order to circumvent this defect, it is suggested that the validation principle be applied when it comes to determining what is the law to govern the arbitration agreement.

II ARBITRATION AGREEMENTS

A *Core Requirements*

An arbitration agreement is the foundation of every intended arbitration. Without this agreement, there cannot be a consensus between both the parties to have their dispute resolved by way of an arbitration. There must also be consent between both parties to have their dispute resolved by arbitration. Then, with the existence of an arbitration agreement, it is said that the jurisdiction of the arbitrators is established.

Another vital factor about the arbitration agreement is that the arbitration clause in the arbitration agreement is deemed to be separate from the main contract. This would indicate that the arbitration clause cannot be seen as being part and parcel of the main contract. In fact, this clause is independent and distinct from the main contract.

This distinction is crucial for a commercial arbitration because even if the main contract is contentious for reasons of it being terminated, vitiated, or if even its validity is called into question by one of the parties to the dispute, because of the doctrine of separability,[1] *inter alia*, the arbitration clause is seen as separate and distinct from the

[1] The doctrine of separability is now incorporated in most States which have adopted the UNCITRAL Model Law on International Commercial Arbitration, adopted 21 June 1985 (amended 7 July 2006) UN Doc A/40/17 annex 1 and A/61/17 annex 1 ('Model Law') as its procedural law/curial law in relation to the conduct of the arbitration. For instance, Article 16(1) of the Model Law states that: 'The arbitral tribunal may rule on its own jurisdictions, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause'. Section 7 of the *Arbitration Act 1996* (England & Wales) also recognises the concept of separability of an arbitration agreement wherein it ensures that dispute resolution procedures selected by the parties survives the main agreement. This principle was again further re-enforced

main contract. Thus the designated arbitrators can exercise or rely on the doctrine of *kompetenz-kompetenz* empowering them to decide on their jurisdiction and decide on the merits of the dispute in the main contract. From this principle, it can be inferred that it is common for the parties' arbitration agreement to be governed by a law different from the law governing their underlying contract, i.e. 'it has long been recognized that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole'.[2]

To recap, some of the core elements required for a valid arbitration agreement are, *inter alia*, it must be in writing, there must be consent by both parties and the arbitration clause is separate from the main contract. Of course, there are also other elements, such as there must be a defined contractual relationship between the parties to the dispute and the subject-matter must be arbitrable.

B *Applicable/Governing Law*

It is a normal assumption that the law that is applicable to the substance of the dispute (substantive law) will be the applicable law of the arbitration agreement. But this may not always be the case, because there could be a situation where the arbitration agreement is governed by a different law from that of the main contract. Therefore, where there is no express choice made in relation to the applicable law to govern the arbitration agreement, then it is incumbent upon the arbitral tribunal to determine what is the applicable law concerned.

The question that arises is how does one determine what is the applicable law governing the arbitration clause, if there is no express choice of law? In this situation, the arbitral tribunal will look for the *implied* choice of law. However, if both an express and implied choice of law is absent, then it will be left to only one possible scenario[3] as being the most common and preferred approach, namely to choose the law with the *'closest connection'* or *'most significant relationship'*. This approach is expounded below.

in the case of *Fiona Trust & Holding Corp* v *Privalov* (2007) UKHL 40, where the House of Lords stated that, 'the principle of separability enacted in section 7 means that the invalidity of rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement'.

2 Gary Born, 'The Law Governing International Arbitration Agreements: An International Perspective' (2014) 26 *Singapore Academy of Law Journal* 819 ('Born, International Perspective').

3 Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law and Business, 2nd ed, 2014) Vol 1, 487 ('Born, *International Commercial Arbitration*') – National courts, arbitral tribunals and commentators have adopted a wide variety of choice of law approaches to issues of substantive validity, ranging from application of the law of the judicial enforcement forum, to the law of the arbitral seat, to the law governing the underlying contract (substantive law), to a 'closest connection' or 'most significant relation standard', to a 'cumulative' approach looking to the law of all possibly relevant-states. This multiplicity of choice of law rules leads to delay and expense, resulting from the need to engage in choice of law debates, before both arbitral tribunals and national courts, when disputes arise concerning …validity of the arbitration agreements. Hence, this is inconsistent with parties' expectation of an efficient, centralized dispute resolution mechanism in entering into international arbitration agreements.

C *The Law of the Seat (***Lex Arbitri***)*

The law of the seat of the arbitration is the curial law, or rather it is the law of the place or venue of the arbitration. This would also mean that the domestic courts of the place of arbitration will have curial or supervisory role over the arbitration proceedings. Once the law of the seat is selected, then this will affect the law that governs the arbitration. Also, the law of the seat will determine the nationality of the award which is relevant for the enforcement of the award.

In many jurisdictions,[4] both the civil and common law jurisdictions have adopted the substantive law of the arbitral seat to the arbitration agreements. It is thus commented[5] that 'in the absence of a choice of law provision, the validity of the arbitral clause (arbitral agreement) must be decided according to the law of the seat of the arbitral tribunal'.

In the upshot, it has been commented[6] that, except in cases where the parties make an express choice concerning the law to govern the arbitration agreement, the choice of the place of arbitration generally implies a choice of the application of the arbitration law of that place. However, there is also another view for this contention, which is found in Article V(i)(a) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*[7] ('*New York Convention 1958*') wherein it is submitted that arbitration agreements are 'procedural' in nature and thus it is inevitably subject to the law of the arbitral seat. Further in some of the awards, it is also said that 'as a matter of principle, because of its autonomous character, the validity of the arbitration clause is governed by the law in force in the country of the arbitral seat'.

However, this view eventually lost favour because it runs counter to the principle of party autonomy (which affirms the parties' freedom to select the seat, the arbitral

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[4] In the Indian case of *Citation Infowares Ltd., v Equinox Corp.* (2009) 7 SCC 220, where it was held that 'in the absence of any contrary intention, a presumption that the parties have intended that the proper law of the contract as well as the law of governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held'. Also in *National Thermal Power Corp. v Singer Co.* 1993 AIR 998, the Indian Supreme Court held that 'where …there is no express choice of law governing the contract as a whole, or the arbitration agreement as such, a rebuttable presumption may arise that the law of the country where the arbitration agreement is agreed to be held is the proper law of the arbitration agreement'. In *C v D* (2007) EWHC 1541 (Comm) – the Court of Appeal ruled that English law was the governing law of the arbitration agreement even though it appeared in a contract governed by New York law. The Court of Appeal decided this on the basis that London was the seat of the arbitration and so the parties had agreed that any challenge to an interim or final award would only be on the basis of English law and not New York law. Further it was also said in this case that 'an international arbitration agreement is 'more likely' to be governed by the 'law of the seat of the arbitration than the law of the underlying contract,' because the arbitration agreement 'will normally have a closer and more real connection' with the place of the seat. In a 1994 Tokyo High Court decision – the court held that 'if the parties' will is unclear we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply'.

[5] Born, *International Commercial Arbitration* (n 3) 509.

[6] Ibid 512.

[7] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention 1958*'). Art V(i)(a): Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) the parties to the agreement referred to in the article II were, under the law applicable to them, under some incapacity, or that said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

procedure and the law to govern their arbitration agreement). Therefore, as a consequence the national courts and the arbitral tribunals accepted the theory that the parties' intention as to the law of the seat of the arbitration will govern their arbitration agreement.

In a nutshell, the implied choice of law analysis would usually result in the application of the law of the seat as the governing law of the arbitration agreement. However, it allowed the application of other laws to be also considered.[8] Hence, this approach of implied choice of law is the preferred approach rather than merely relying on the procedural approach because the former is more keeping in touch with the party autonomy principles and on which the international arbitral process is founded.

D *Law of the Contract (Substantive Law)*

This arises when the parties to the dispute include a choice of law clause in the underlying contract by selecting the law which governs the contract as the law applicable to the arbitration agreement.[9]

It has been noted that[10] that since an arbitration agreement is just one of the many clauses in a contract, therefore the assumption is that the law selected by the parties to govern the contract (substantive law) will also govern the arbitration agreement.

What this approach tells us is that, an arbitration agreement is generally governed by the same law as the rest of the contract. However, due to the separability nature of the arbitration agreement, this paves the way for the arbitration agreement to be governed by a different law from that which governs the main contract.

E *'Closest Connection or Most Significant Relationship'*

This approach is a more flexible one than the earlier two approaches discussed above which are based on the application of a single connecting factor. The courts[11] will recognise and

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8 In *Bulgarian Foreign Trade Bank Ltd. v Al Trade Finance Inc* (2001) XXVI Yearbook Commercial Arbitration 291, a Bulgarian Bank concluded a contract with an Austrian Bank. The contract contained am arbitration clause which expressed a choice of Austrian law. A dispute arose between both the parties and arbitration was held in Stockholm. The award was challenged by the Bulgarian Bank in Sweden (the seat of the arbitration) on basis that the arbitration agreement was void for breach of an allegedly implied term of confidentiality. The Supreme Court of Sweden held that the arbitration agreement was valid under the law of the seat, although the parties' choice of law is the Austrian law to govern the underlying contract. This ruling is consistent with the accepted norm that the arbitration clause is separate from the main contract agreement.

9 In *Sonatrach Petroleum Corp. (BVI) v Ferrell International Ltd* (2002) 1 All ER 627, the English High Court decided that: 'where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract'.

10 'Chapter 3: Applicable Laws' in Nigel Blackaby et al, *Redfern & Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) 166-167 ('*Redfern & Hunter*').

11 *Sulamerica Cia Nasional v Enesa Engelharia* (2012) EWCA Civ 638 ('*Sulamerica*'). In this case, the Court of Appeal held that it agreed with the High Court's decision where the court refused to apply Brazilian law (although Brazilian law was expressly chosen in the parties' general choice of law clause in an insurance contract) because 'the possible existence of a rule of Brazilian law which would undermine that position tends to suggest that the parties did not intend arbitration to be governed by that system of law'. The court further reasoned, 'from the assumption, the parties intended the same law to govern the whole contract, including the arbitration agreement (i.e., the Brazilian law), but specific factors may lead to the conclusion that that cannot in fact have been their intention. So, this court is unable to accept that the parties implied choice of Brazilian

give effect to the parties' choice of proper law, express or implied, failing which it will seek to identify the system of law with which '[t]he contract has the closest connection or most significant relationship'. In almost all cases of such nature, the courts will conduct the general conflict of laws analysis to determine the validity of the arbitration agreement. Should this test lead to an undesirable outcome, then the court will avoid it by applying a different law which validates the arbitration agreement.[12]

In the case of *Arsanovia Ltd., & others* v *Cruz City 1 Mauritius Holdings*[13] (*'Arsanovia'*), the High Court of England overturned an arbitration award on the ground that the Tribunal did not have substantive jurisdiction over the arbitration. The court was to determine the law applicable to the arbitration agreement in the absence of an express choice of law clause. This was needed to ascertain which one of the claimants was a party to the arbitration agreement. The High Court relied on the test in *Sulamerica Cia Nasional* v *Enesa Engelharia*[14] *('Sulamerica')* and had to consider whether the parties had impliedly, if not expressly, chosen an applicable law before considering which system of law had the closest and most real connection with the arbitration agreement. The court was essentially required to decide whether the law of the main contract (Indian law) or the law of the seat (English law) was the applicable law of the arbitration agreement. In this case, two agreements (a joint venture agreement and the shareholders agreement) was governed by Indian law and contained arbitration agreements. Moreover, both the agreements also provided for LCIA arbitration seated in London and there was no express choice of law selected for the arbitration agreement. The High Court in this case decided that the terms of the arbitration agreement excluded parts of the Indian *Arbitration and Conciliation Act 1996*. This demonstrated a mutual intention of the parties to choose the law of India as the law of the agreement. The choice of an English seat did not mean that the parties were to have been taken to have impliedly chosen English law as the law applicable to the arbitration agreement. Therefore, Indian law was the governing law of the arbitration agreement. This governing law clause was a 'strong pointer' to the parties' intention about the law to govern the arbitration agreement. There was no contrary indication other than the choice of London being the seat of arbitration.

It was held that the parties to the dispute had actually made an implied choice that Indian law was the governing law of the arbitration agreement.

III WHEN DO ISSUES REGARDING THE ARBITRATION AGREEMENT ARISE?

Due to the separability nature of the arbitration agreement, the domestic courts must ask itself a fundamental question - whether such dispute should be referred to arbitration or it is for the courts to determine the dispute. This question becomes relevant when there are interim measures being sought by one of the parties in the arbitration proceedings, or when

law to govern the arbitration agreement'. Hence, the court applied English law (the law of the seat of the arbitration), on basis that it is the 'closest and most real connection'.

12 Born, International Perspective (n 2) 841.

13 (2012) EWHC 3702 (Comm).

14 *Sulamerica* (n 11).

the issue regarding the establishment of the arbitral tribunal is disputed. It also becomes relevant if the other party applies to the domestic court to sanction the appointment of an arbitrator. Then at the post award stage, proceedings are initiated in the domestic courts to have the award set aside, annulled or enforced.[15] All these issues relate back to the arbitration agreement itself and what choice of law governs it, be it the law of the seat *(lex arbitri)* or governing law of the underlying contract (substantive law). For instance, in *Arsanovia* case, the issue was regarding the correct law that is applicable to the arbitration agreement, namely, whether the shareholders agreement between Arsanovia and Cruz City also included Burley (a non-signatory). It was the contention of Arsanovia that the arbitral tribunal did not have the substantive jurisdiction to decide on the issue. This is because Burley was part of the shareholders' agreement and the applicable law was Indian law (and Burley did not agree to be bound under Indian law). Basically, the court held that the parties to the shareholders agreement had intended for the arbitration agreement to be governed by Indian law (and thus this would mean that Burley who is a non-signatory to the arbitration agreement in the shareholders agreement cannot be subjected to the jurisdiction of the arbitral tribunal).[16]

IV THE THREE-STAGE APPROACH IN SINGAPORE, UNITED KINGDOM AND MALAYSIA

A *Singapore*

In Singapore, the case of *FirstLink Investments Corp Ltd* v *GT Payments Pte Ltd*[17] ('*FirstLink Investments Corp*') relied on *Sulamerica* and endorsed the three-stage approach. In this case, the court proceeded to determine the law impliedly chosen by the parties, deciding in favour of the law of the seat, rather than the law of the underlying contract, on the basis of the parties' implied intention to choose the law of the seat which validates their arbitration agreement.[18] Then there is also the case of *BCY* v *BCZ*[19] *('BCY')*, where the High Court had to decide on the applicable law to govern the arbitration agreement, since there was no express choice of law on this. The dispute here related to a Sale & Purchase Agreement (SPA) for shares in a company. The SPA contained an arbitration clause providing for ICC arbitration seated in Singapore and the law of the underlying contract was New York law (but no law was specified to govern the arbitration agreement). The High Court relying on *Sulamerica* reiterated that to determine the governing law of

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[15] 'Chapter 6, Arbitration Agreements – Autonomy and Applicable Law' in Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Wolters Kluwer Law and Business, 2003) 109-110.

[16] Shaun Lee, 'Case Update: (1) Lack of substantive jurisdiction in respect of one respondent affects award as against the other respondent; (2) Substantive jurisdiction not affected by finding of liability under a different agreement', *Singapore International Arbitration Blog* (Blog Post, 27 March 2013) <https://singaporeinternationalarbitration.com/2013/03/27/case-update-1-lack-of-substantive-jurisdiction-in-respect-of-one-respondent-does-not-affect-award-as-against-the-other-respondent-2-substantive-jurisdiction-not-affected-by-finding-of-liability/>.

[17] (2014) SGHCR 12 ('*FirstLink Investments Corp*').

[18] Born, *International Commercial Arbitration* (n 3) 842.

[19] (2016) SGHC 249.

the arbitration agreement, the three-stage test is to be applied. The second stage, which is the asking what was the implied law of choice, was used to determine the applicable law to govern the arbitration agreement. The High Court applied the '*presumption test*' and held that since the whole relationship of both parties is to be governed by the same system of law, therefore the natural *inference* is that the proper law of the arbitration agreement should be the law of the underlying contract. Further, the governing law of the main contract is also a 'strong indicator' of the governing law of the arbitration.[20]

BNA v *BNB*[21] *('BNA')* is another relevant case on the issue of the proper law of the arbitration clause. The arbitration clause provided for submission of the dispute '[t] o the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai'. The Singapore Court of Appeal reversed the findings of the High Court [where the latter applied the *'three-stage approach'* as adopted in *Sulamerica* (in *lieu* of the absence of an express choice of law) to govern the arbitration clause in the Takeout Agreement (TA)]. The Court of Appeal held that from the arbitration clause, it can be inferred that Shanghai was the arbitral seat and the law of the People's Republic of China (PRC) was the applicable law of the arbitration agreement. In this case, the defendants commenced arbitration proceedings against the plaintiff. The plaintiff challenged the proceedings on grounds that the arbitration agreement was invalid under PRC law. This was because PRC law strictly prohibits a foreign arbitration institution (SIAC) to administer a PRC seated arbitration. The Singapore Court of Appeal applied the three-stage approach by endorsing *Sulamerica* but it arrived at a different decision from the High Court. The Court of Appeal's line of analysis was as follows.[22]

- Did the parties expressly choose the proper law to govern the arbitration agreement? In this case, there was none selected by the parties. If there was one selected, then this line of analysis would end here and there would be no need to go further.
- Did the parties make an implied choice regarding the proper law to govern the arbitration agreement? When there is *no* express choice of law stated in the arbitration clause, then the implied choice of law should presumptively be the proper law of the contract.[23] This is known as the '*Sulamerica* presumption'. In this case, PRC law was the governing law of the contract and thus PRC law applied to the arbitration agreement. The Court of Appeal also said that the word 'arbitration in Shanghai'

[20] Kabir Singh, Kartikey M. and Andrew Foo, 'Two Roads Diverged in a Clause – The Law of a Free Standing Arbitration Agreement vs. The Law of the Arbitration Agreement That Sits Within a Main Contract', *Kluwer Arbitration Blog* (Blog Post, 4 January 2017) <http://arbitrationblog.kluwerarbitration.com/2017/01/04/two-roads-diverged-in-a-clause-the-law-of-a-free-standing-arbitration-agreement-vs-the-law-of-an-arbitration-agreement-that-sits-within-a-main-contract/> ('Kabir Singh').

[21] (2019) SGCA 84.

[22] Samuel Koh, 'Unpacking the Singapore Court of Appeal's Determination of Proper Law of Arbitration Agreement in *BNA v BNB*', *Kluwer Arbitration Blog* (Blog Post, 19 January 2020) <http://arbitrationblog.kluwerarbitration.com/2020/01/19/unpacking-the-singapore-court-of-appeals-determination-of-proper-law-of-arbitration-agreement-in-bna-v-bnb/>.

[23] The view taken here is different from the view taken in *FirstLink Investments Corp* (n 17), where the High Court in this case stated that the law of the seat is the presumed implied choice of law to govern the arbitration agreement.

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should be interpreted in its natural meaning to mean that the seat of the arbitration is Shanghai.[24]

- What is the system of law with the 'closest connection or most significant relationship' with the arbitration agreement? This analysis only applies if the choice of law to govern the arbitration agreement by express and implied means, fails.[25]

B *United Kingdom*

We have discussed the *Sulamerica* case and the birth of the three-stage approach, and how it was applied in a common law jurisdiction (Singapore). Now returning to the jurisdiction of the courts in England and Wales, a relevant case is *Habas Sinai Vi Tibbi Istihsal Andustrisi AS* v *VSC Steel Company Ltd*[26] where the court again followed the guidance provided in *Sulamerica* and *Arsanovia* on the law to govern the arbitration agreement. In this case, the seat of the arbitration was in London, but there was no express choice of law clause governing the law of the arbitration agreement. Applying the three-stage approach, the court stated that under the implied choice (being the second test), the applicable law of the arbitration agreement was the law of the country of the seat (namely, the law of England and Wales).

Then, came the case of *Kabab-Ji S.A.L.* v *Kout Food Group*[27] *('Kabab-Ji')*. In this case, the Kabab-Ji entered into a franchise development agreement (FDA) with Kout Food Group. A dispute arose under the FDA and Kabab-Ji commenced arbitration proceedings against Kout Food Group, although the licensee of the franchise is Al Homaizi (which was acquired as a subsidiary by Kout Food Group). The crucial parts of the FDA (which contained an arbitration agreement) is as follows:

- the seat of arbitration is to be in Paris (but arbitral proceedings to be conducted in the English language);
- the ICC Rules on arbitration apply; and
- the laws of England was the law applicable to the underlying contract.

The arbitral tribunal held that French law (this being the law of the seat) is also the governing law of the arbitration agreement. The arbitral tribunal also decided that the issue whether Kout Food Group was a party to the arbitration agreement is governed under English law, and whether all rights and obligations of Al Homaizi was transferred to Kout Group Food. An award was made in favour of Kabab-Ji that Kout Food Group has breached the FDA. Enforcement of the award by Kabab-Ji was carried out in England. However, Kout Food Group successfully resisted the enforcement of the award at the High Court primarily on two grounds. First, it was argued that English law (and not French law) is the law governing the validity of the arbitration agreement. Therefore,

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24 Kabir Singh (n 20). It is submitted that this makes sense because once the place or venue of seat is determined, then the legal significance is that the system of law at the seat of the arbitration is the curial law/supervisory jurisdiction and it will govern the arbitral process until an award is made.

25 'Supreme Court Judgements' *Supreme Court Singapore* (Web Site) <https://www.supremecourt.gov.sg> – Case Summaries.

26 (2013) EWHC 4071.

27 (2020) EWCA Civ 6.

an express choice of law was already made as to the governing law of the arbitration agreement. Secondly, it was contended that Kout Food Group was not a party to the arbitration agreement under English law. Both arguments were successful.

Kabab-Ji then appealed to the Court of Appeal. The appeal was dismissed and the decision of the High Court was upheld. The appellate court held that the law of the underlying contract is not necessarily also the law of the arbitration agreement because of the existence of the doctrine of separability, wherein an arbitration agreement is separable from the main contract (this also is embodied in s 7 of the *Arbitration Act 1996*). In this case, Article 14 of the FDA (which is the arbitration clause) expressly specified that the dispute resolution is to be governed by English law. Hence, on this basis alone, the appellate court concurred with the findings of the High Court when it stated that since English law governed the arbitration agreement, therefore Kout Food Group did not become a party to the arbitration agreement between Kabab-Ji and Al Homaizi.[28]

The Court of Appeal also stated that once an express choice of law regarding the governing law is made, then it cannot be substituted by a different curial law, i.e., the law of the seat.

From all the cases above, it can be inferred that the final determination of the law that governs an arbitration agreement is of utmost importance because as the *Kabab-Ji* case has demonstrated, this determination put to rest the question whether an entity (Kout Food Group) was party to the arbitration agreement.

In summary, it is submitted that if there is no express choice of law of the arbitration agreement, then the law which has the 'closest and most real connection' applies.

Hence, the test of a 'strong pointer' as in *Arsanovia* and *BCY* was followed. The test here is determine whether the parties had expressly selected the law to govern the arbitration agreement, or to follow the law which has the 'closest connection or most significant relationship' and this could be either the law of the seat of the arbitration or the law of the underlying contract. The other approach is in *Sulamerica*, where the express choice of law governing the substantive contract is a factor to be considered, that is, the parties intended the arbitration agreement to be governed by the same law as the substantive contract, unless other factors emerge and this presumption (*Sulamerica* presumption) is displaced.

What is important in determining the governing law of the arbitration agreement, is firstly, whether there is an express choice of law made by the parties to the dispute. If yes, then the courts will recognize this choice and not go beyond to examine further. In the *Kabab-Ji* case, English law was the governing law of the contract, so the court extended the operation of English law from the other clauses to the arbitration agreement. Secondly, if there is an absence of the express choice of law in the arbitration agreement, then the courts will examine whether the parties have made an implied choice of law

[28] Joe Rich, 'Kabab-Ji: The Effect Of No Oral Modifications Clauses On Non-Signatories Of Arbitration Agreements Under English Law', *Kluwer Arbitration Blog* (Blog Post, 21 February 2020) <http://arbitrationblog.kluwerarbitration.com/2020/02/21/kabab-ji-the-effect-of-no-oral-modification-clauses-on-non-signatories-of-arbitration-agreements-under-english-law/>.

governing the arbitration agreement. Under this scenario, the *Sulamerica* presumption[29] will apply and this presumption is rebuttable to the point that the governing law of the main agreement extends to the arbitration clause. If there is an absence of the implied and express choice of law, then the 'closest connection and most significant relationship' test will be applied. In most instances, the arbitral seat is most likely to be adopted to be the governing law of the arbitration agreement.

Up to now the area surrounding the application of the correct choice of law to govern the arbitration agreement is muddled or to put it simply, quite confusing especially when multi conflict of laws must be applied in order to determine which is the applicable or governing law.

Very recently, the English Supreme Court had the opportunity to re-visit the complexities surrounding this area of the law in the case of *Enka Insaat Ve Sanayi AS* v *OOO Insurance Company Chubb & Ors*[30] ('*Enka* (SC)'). Briefly, the facts of this case are as follows. On February 1, 2016, a power plant which was insured by Chubb Russia, was severely damaged by a fire. Chubb Russia had provided insurance cover in favor of the owner of the power plant against such damage. The owner of the power plant had entered into a contract with another company (the main-contractor) for construction works to be carried out at the plant. The main-contractor then engaged a sub-contractor (Enka) in this construction project. The contract between the main-contractor and Enka included an agreement that disputes between them would be resolved through arbitration proceedings in London. In May 2014, the main contractor had transferred its rights and obligations under the contract to the owner of the power plant. In this case, the contract had been executed in both Russian and English versions (the Russian version was to prevail in the event of inconsistency). However, the contract did not have an express choice of law clause to determine which law is to govern the arbitration agreement. The dispute resolution clause in the contract stated that all disputes were to be settled under the Rules of Arbitration of the ICC, London. Chubb Russia, by way of subrogation, acquired all the rights of the owner of the power plant to pursue a claim on liability against the party responsible for the fire. Chubb Russia alleged that Enka was responsible for the fire and commenced court proceedings in Moscow. Enka argued that since there was an arbitration agreement executed between itself and the owner of the power plant, this matter should be arbitrated. Enka further issued a notice to arbitrate and in the interim, sought an anti-suit injunction to restrain Chubb Russia from proceeding with the court proceedings in Russia.

The High Court refused the anti-suit injunction to Enka. On appeal to the Court of Appeal,[31] Enka's appeal was allowed. Further it was decided that the proper court to grant the anti-suit injunction was the English court. This is because the parties had selected London as the seat of the arbitration and thus it being the 'curial law' has the power to

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[29] In *Sulamerica* (n 11), the choice of law of the main agreement was Brazilian law and the seat of the arbitration was in London and because under Brazilian law, the arbitration was at risk of being ineffective, the court held that the presumption that Brazilian law (being the law of the main agreement) to govern the main agreement was rebutted and thus law of the seat (London) was selected as the governing law of the arbitration agreement.

[30] (2020) UKSC 38 ('*Enka* (SC)').

[31] (2020) EWCA Civ 574 ('*Enka* (CA)').

determine on any remedies that a party is seeking. English law was also to be used to determine whether Chubb Russia was in breach of the arbitration agreement when it proceeded to commence court proceedings in Russia. The Court of Appeal applied the three-stage approach and conducted the following analysis to determine the applicable law to govern the arbitration agreement when the law governing the seat (London) is different from the law of the main contract (Russia).[32]

(a) The first question is whether there was an *express* choice of law clause in the arbitration agreement? If there is an express choice of law clause in the main contract, then this may amount to an express choice of law to the arbitration agreement as in *Kabab-Ji* (where the court held that the English law as the governing law of the main contract is also the express choice of law of the arbitration agreement).

(b) The next question is whether there is an *implied* choice of law for the arbitration agreement. The implied choice of law governing the arbitration agreement is the law of the main contract, and if this implied choice of law is absent, then the law of the seat is to be selected.[33] The test as in *Sulamerica* was followed (*Sulamerica* presumption).

(c) The general rule should be what is the 'curial law' (or law of the seat) that is applicable to the arbitration agreement and if this is determined, then this law will be the governing law of the arbitration agreement.[34]

It is submitted that the Court of Appeal's the reason for selecting the law of the seat as the governing law of the arbitration was to promote legal certainty because if the curial court ceded procedural questions around arbitration agreements to a foreign court, then this would create a risk of parallel proceedings. Lord Justice Popplewell in the Court of Appeal introduced a new line of analysis; firstly, whether there had been an express or implied choice of law and secondly, in the absence of such express or implied choice of law, the *Arbitration Act 1996* (England & Wales) is to be the same as the 'curial law' as a matter of 'implied choice' and thus the governing law of the arbitration agreement. This would mean that the governing law of the arbitration agreement need not be the law of the underlying contract. Finally, the Court of Appeal held that given the choice of a London seat in *Enka*, therefore the arbitration agreement was to be governed by English law.[35] This decision of the Court of Appeal was partly upheld by the Supreme Court on

[32] Mihaela Maravela, 'Hold on to Your Seats, Again! Another Step to Validation in *Erika v Chubb Russia*?', *Kluwer Arbitration Blog* (Blog Post, 5 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/05/hold-on-to-your-seats-again-another-step-to-validation-in-enka-v-chubb-russia/>.

[33] *Sulamerica* (n 11) – Lord Justice Moore-Bick stated the fact 'that the seat of the arbitration was in a different country from the country whose law governed the main agreement was an 'important factor' pointing away from the law governing the agreement'.

[34] *Enka* (CA) (n 31) – Lord Justice Popplewell said that 'supervisory jurisdiction was somewhat a misleading label, as the court of the chosen seat has a raft of powers, even when there is technically no arbitration to supervise. The term curial law, being the procedural law of the arbitration proceedings, was to be preferred'.

[35] *C v D* (2017) EWCA Civ 1282 – Lord Justice Longmore said 'by choosing London as the seat of arbitration, the parties must be taken to have agreed that proceedings on the award should only be permitted by English law and the choice of a seat for the arbitration must be a choice of forum for the remedies seeking to attack the award.' Lord Justice Longmore also went on to recognize the 'doctrine of separability' between the law of the underlying insurance contract and the arbitration agreement and added that 'if there is no express choice

October 9, 2020.[36] The Supreme Court arrived at the same conclusion as the Court of Appeal but via a different approach. The Supreme Court's decision on what is the proper law to govern the arbitration agreement can be summarized as follows:

(a) The law applicable to the arbitration agreement will be as what the parties to the dispute have chosen and in the absence of such choice, then it is the system of law to which the arbitration agreement is *'most closely connected'*.
(b) If the parties have not specified the applicable law to the arbitration agreement but they have chosen the law to govern the main contract containing the arbitration agreement, then this choice of law will apply to the arbitration agreement.
(c) Where the parties have made no choice of law to govern the arbitration agreement, or the contract as a whole, the court must determine the law with which the arbitration agreement is most closely connected. In most circumstances, it will be the law of the seat of the arbitration.

This third approach mentioned above is the default rule and it is supported by the following considerations; (i) the seat is where the arbitration is to be performed, (ii) it maintains consistency with international law and legislative policy, (iii) the law of the seat is likely to uphold the reasonable expectation of contracting parties who specified a location for the arbitration without choosing the law to govern the contract and lastly (iv) this approach provides legal certainty, allowing parties to predict easily which law the court will apply in the absence of a choice.

The majority of the Supreme Court held as follows,

> … the contract in this case contains no choice of law that is intended to govern the contract or the arbitration agreement within it. In these circumstances the validity and scope of the arbitration agreement is governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause is most closely connected. We would therefore affirm - albeit for different reasons – the Court of Appeal's conclusion that the law applicable to the arbitration agreement is English law.[37]

of law of the arbitration agreement, then choice of law is limited to whether the law with which that agreement (arbitration agreement) has its closest and most real connection is that of the seat of the underlying contract or the law of the seat of the arbitration'. To this question, Lord Justice Longmore replied that 'the answer is more likely to be the law of the seat of the arbitration than the law of the underlying contract'. The ratio in this case further supports the contention that the 'curial law' is always the mush preferred choice of law for the arbitration agreement, when there is no express choice of law stated. Lord Justice Neuberger also agreed with the Lord Justice Moore-Bick and held that, 'accordingly, (i) there are a number of cases which support the contention that it is rare for the law of arbitration agreement to be that of the seat of the arbitration rather than that of the chosen contractual law, as the arbitration clause is part of the contract, but (ii) the most recent authority is a decision of this court which contains clear dicta (albeit obiter) to the opposite effect, on the basis that the arbitration clause is severable from the rest of the contract and plainly has a very close connection with the law of the seat of the arbitration'.

[36] *Enka* (SC) (n 30).

[37] Ibid [171].

It has been commented[38] that the majority of the Supreme Court stated that for commercial parties, 'a contract is a contract and that they would reasonably expect a choice of law to apply to the whole of that contract, is sensible'. This majority view of the Supreme Court is also consistent with the principle affirmed by the House of Lords in *Fiona Trust & Holding Corpn* v *Privalov.*[39] However, the majority of the Supreme Court did not agree with the Court of Appeal's argument in this case 'that the doctrine of separability is relevant because due to its separable nature of the arbitration agreement, thus this led to the distancing of the arbitration agreement from the underlying contract'.

The Supreme Court also confirmed the 'validation principle' in cases where the arbitration agreement would be deemed to be invalid by relying on the principle of contractual interpretation i.e., that the contract should be interpreted properly so that it is valid rather than ineffective (*'verba its sunt intelligenda ut res magis valeat quam pereat'*). This is done to ensure that the commercial purpose of the arbitration clause is upheld because the parties are unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is a risk that that choice of that law would undermine that agreement.

It can be said that the Supreme Court applied the default rule and then concluded that the arbitration agreement is governed by English law, since English law is the system of law with which the arbitration agreement is most 'closely connected', the seat being in London.

C *Malaysia*

There is no automatic principle that the law of the seat of the arbitration will determine the choice of law for the arbitration agreement or clause. When the parties have failed to expressly state the choice of law to govern the arbitration agreement, then there will not be an easy determination process to determine the applicable law for this. It has been commented[40] that, the situation could be much worse if for some unknown reason or by an accidental omission, the parties do not select the law of the seat as well. This would be challenging because arbitral tribunals will then be faced with the problem of whether they can ignore mandatory provisions and public policy applicable to the place with the 'closest connection or most significant relationship'.

In Malaysia, ss 18(1) and 18(2) of the *Arbitration Act 2005*[41] fortifies the view that an arbitral tribunal can decide on its jurisdiction based on the doctrine of *kompetenz-*

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[38] Mihaela Maravela, '*Enka* v *Chubb* Revisited: The Choice of Governing Law of the Contract and the Law of the Arbitration Agreement', *Kluwer Arbitration Blog* (Blog Post, 11 October 2020) <http://arbitrationblog.kluwerarbitration.com/2020/10/11/enka-v-chubb-revisited-the-choice-of-governing-law-of-the-contract-and-the-law-of-the-arbitration-agreement/>.

[39] (2007) UKHL 40: House of Lords held that the 'construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute to be decided by the same tribunal'.

[40] Belden Premaraj, 'The Choices of Law – Better Safe Than Sorry The Malaysian Arbitration Perspective', *beldenlex.com* (Web Page) <http://beldenlex.com/training/publications/The%20Choices%20of%20Law%20-%20Better%20Safe%20Than%20Sorry.pdf>.

[41] Act 646 ('*Arbitration Act 2005*'). Section 18(1) reads 'The arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement' and s 18(2) reads

kompetenz and that an arbitration clause which forms part of an agreement is independent and separable from the main agreement itself. Hence the doctrine of separability is followed in Malaysia.[42] This would mean that one of the core elements required to find the governing law of an arbitration clause incorporated in the main agreement will be governed by the same arbitral principles applied in Singapore and in England and Wales.

Then, there is s 9(1) of the Act which states an 'arbitration agreement' means 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen …'. This provision however is silent on the issue of what law is to govern the arbitration clause in the main agreement. The law governing the arbitration agreement is important as it will eventually determine whether the dispute is arbitrable[43] in Malaysia, should the law be selected by way of implied choice or the law having 'closest connection or most significant relationship'.

Lastly, there is s 22 of the *Arbitration Act 2005*.[44] This provision concerns the seat of arbitration. This provision is important because it provides that once the seat of the arbitration is decided, then the governing law would be the arbitral law of the State where the seat is located. Further, from this determination, it is also *inferred* that the Malaysian courts will have supervisory jurisdiction over the arbitration that is taking place in its jurisdiction.

On the issue of substantive law, there is s 30 of the *Arbitration Act 2005*[45] which deals with the applicable law to the substantive dispute (or the law of the contract). Simply put, this is the law that will govern the relationship between both the parties to the dispute in relation to the entire contract and not the arbitration agreement.

At this juncture, it is pertinent to consider the case of *Thai-Lao Lignite Co Ltd & Anor* v *Government of The Lao People's Democratic Republic*[46] *('Thai-Lao Lignite')* which was decided by the Federal Court. The Federal court coined a single question of law for its consideration, namely, where the governing and substantive law of the contract is foreign law and the seat of the arbitration is in Malaysia, does the parties' stipulation of Malaysia as the seat constitute an express choice of law for the arbitration agreement. To

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'(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement and (b) a decision by the arbitral tribunal that the agreement is null and void shall not invalidate the arbitration clause'.

[42] *Chut Nyak Isham Nyak Ariff v Malaysian Technology Development Corporation Sdn Bhd* (2009) 9 CLJ 32, where Apandi Ali J, held that '… s 18 of the Arbitration Act 2005, which touches on the competency of the arbitrator itself to decide on the validity of any arbitration agreement'. Also in the Federal Court case of *Press Metal Sarawak v Etiqa Takaful Bhd* (2016) 9 CLJ 1, on the issue of reliance on the Canadian Supreme Court case in *Dell Computer Corporation v Union des Consommateurs* (2007) SCJ No. 34, it said that, 'in a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence-competence principle …'.

[43] *Arbitration Act 2005* (n 41), s 4(1) states that 'any dispute which the parties have agreed to submit to arbitration under an arbitration may be determined by arbitration unless the arbitration agreement is contrary to public policy or the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia'.

[44] Ibid s 22: '(1) The parties are free to agree on the seat of the arbitration' and '(2) Where the parties fail to agree under subsection (1), the seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.'

[45] Ibid s 30(1): 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'.

[46] (2017) 9 CLJ 273.

answer this question, the Federal Court undertook its own analysis wherein it said that the law of the main contract is Laotian law. Further, the Federal Court also held that there is a separate arbitration agreement in the form a project development agreement (PDA). Since there was no express choice of law being designated to govern this arbitration agreement and the seat of the arbitration was in Kuala Lumpur, therefore the courts in Malaysia will have supervisory jurisdiction and/or act as the 'curial law'. Lastly, it was held the UNCITRAL Rules is the applicable rules to be applied in the conduct of the arbitration.

The single issue relating to this case was what is the express choice of law governing the PDA when it is a separate agreement from the main agreement. Jeffrey Tan FCJ, stated as follows,

> …by applying the conflict of law rules, the law that has the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement. In this case, the arbitration was conducted in Kuala Lumpur and thus the Arbitration Act 2005 was the lex arbitri because the seat of the arbitration was Kuala Lumpur. This would also mean that the Arbitration Act was also the curial law. This would mean that New York law had no connection to the arbitration agreement. The PDA required the arbitral tribunal to be trained in New York law. But that was because New York law governed the substance of the dispute. The parties submitted on New York law. But that was to address the third-party beneficiary issue. Only the law of Malaysia had the connection, the closest and the most real at that, to the arbitration agreement. Hence, under the conflict of laws rules, the law applicable to the arbitration agreement should be the law of Malaysia.[47]

The Federal Court also mentioned that the three-stage test espoused in *Sulamerica* was applied when it arrived at the decision that Malaysian law should be the governing law of the arbitration agreement and this was because there was no express choice of law made here. These findings by the Federal Court were based on its understanding that although there was an agreement on the law applicable to the substance of the dispute in an international arbitration (governing the law of the contract), then the governing law of the agreement shall still be determined by the conflict of laws rules. The Federal Court also held that s 37(1)(a)(ii) of the *Arbitration Act 2005*[48] is crucial when determining this issue as to the governing law of the arbitration agreement. This provision requires a consideration of the question whether an arbitration agreement is valid under the law which the parties have subjected it to.

The *Sulamerica* presumption was not applied in this case. If it was applied then the rebuttable presumption will indicate that New York law, being the law of the substantive dispute (or contract) is the applicable law to the arbitration agreement. Be that as it may,

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47 Ibid [187].

48 *Arbitration Act 2005* (n 41). Section 37(1)(a)(ii) concerns an application to set aside an award of the arbitral tribunal at the High Court (being the supervisory and/or curial court of the seat of the arbitration), provided 'the party making the application provides proof that the arbitration agreement is not valid under the law to which parties have subjected it…'.

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it is commented that the Federal Court's findings in this case can be subjected to much debate, for the following reasons.

(a) There is no necessity to apply the conflict of laws rule to determine the governing law applicable to the arbitration agreement since because of party autonomy, i.e., both parties had actually selected New York law as the law of the contract and this was stated in Article 18 of the PDA.
(b) If such is the situation, then the parties have already determined that the governing law of the arbitration agreement is New York law. This is because New York law is mentioned in Article 18 of the PDA, whereas Kuala Lumpur is only selected as the law of the seat to provide 'curial' services to the conduct of the arbitration.
(c) The test of 'closest and most real connection' need not be applied yet, unless the three-stage approach is used in an analytical way to determine the governing law of the arbitration agreement. If this was used, then the outcome may have been different.
(d) There was no express choice made by the parties.
(e) Implied choice, applying the *Sulamerica* presumption, can be rebutted since the parties have mentioned in Article 18 of the PDA that New York law is to govern the law of the contract. Applying the 'strong pointer' principle as in *Arsanovia* and *FirstLink Investments Corp*, it is submitted that New York law is the law of the arbitration agreement.
(f) Following from the above, there is no need to discuss the issue of 'closest connection or most significant relationship'.

It is unclear why the Federal Court rushed to apply the 'closest and most real connection' principle in this case. Perhaps the Federal Court was mindful of Malaysia being a Model Law[49] State and also a signatory of the *New York Convention 1958* that it placed emphasis on s 37(1)(a)(ii) of the *Arbitration Act 2005*, and may have applied the validation principle.[50] This principle goes beyond the law of a single jurisdiction, as it diminishes the inconsistencies that arise in a choice of law clause rules and it is more in harmony with the purposes of international instruments and also parties' objectives in concluding international commercial agreements.

In a more recent case of *Arch Reinsurance Ltd* v *Akay Holdings Sdn Bhd*[51] *('Arch Reinsurance')*, the Federal Court held that the dispute resolution clause in both a Subscription Agreement and Bond Agreement contained an arbitration clause but there was no such clause in the Charge, which merely stated that (i) parties submit to the non-

[49] Model Law (n 1) art 34(2)(a)(i) – 'Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) …an arbitral award may be set aside by the court … only if the party making the application furnishes proof that …the said agreement is not valid under the law to which the parties have subjected it …'

[50] Born, International Perspective (n 2) 834 – this validation principle provides that, if an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, its validity will be upheld, even if it is not valid under any of the other potentially applicable choices of law. This validation principle better effectuates with the parties' objectives and also consistent with the *New York Convention 1958* (n 7) and the Model Law (n 1).

[51] (2019) 1 CLJ 305.

exclusive jurisdiction of the Malaysian courts and (ii) Malaysian law as the governing law. Arch proceeded to issue foreclosure proceedings, which is statutory in nature in the Malaysian court for the sale of the land (under the *National Land Code 1965*) that was charged to it by Akay. Akay filed an anti-suit injunction to halt or stay the civil proceedings in the national court and contended that the underlying dispute must first be resolved by arbitration before Arch could commence foreclosure proceedings. The High Court dismissed Akay's application. On appeal to the Court of Appeal, the findings of the High Court were reversed. The matter proceeded to the Federal Court. One of the issues before the Federal Court was whether the dispute underlying the Charge fell within the scope of the arbitration agreement. Another issue was whether statutory foreclosure proceedings is arbitrable under the Malaysian *Arbitration Act 2005*. However, what is relevant here is whether the Federal Court was correct in applying Malaysian law as being the choice of law to determine the dispute relating to the scope of the arbitration agreement. This is because in *Thai- Lao Lignite* case, the Federal Court held that in the absence of an express choice of law to govern an arbitration agreement, then the applicable law of the arbitration agreement will be the law of the seat, which is Malaysia.

In the *Arch Reinsurance* case, the arbitration agreement provided for Singaporean law as the seat of the arbitration and the governing law. Therefore, if it is accepted that this is the parties' express and implied intention as to their commercial efficacy, then it can be argued that the curial law (the law of Singapore) is the right forum to decide on this dispute. It will then be for the courts in Singapore to decide on the arbitrability of the remedy sought by Arch against Akay. This is one of the shortcomings in the choice of law approach if the test of closest and most real connection is applied, which will depend on the substantive law of the underlying contract as being the law of the arbitration agreement.

V THE CURRENT APPROACH

In Malaysia, it appears from the *Thai-Lao Lignite* case that the validation principle will be applied to give effect to the arbitration agreement. The Federal Court applied the conflicts of law rule when it decided that the law of the seat is also the law of the arbitration agreement, when the dispute resolution clause was silent on this.

The Singapore Court of Appeal's decision the *BNA* case that PRC law which was the law of the seat should be the governing law of the arbitration agreement is now doubtful because it said that the invalidating effect of PRC law on the arbitration agreement was *not* a relevant consideration in determining the proper law of the arbitration agreement. However, the Court of Appeal suggested that if there was evidence of the parties' awareness of the effect of PRC law on the arbitration agreement, then the invalidating effect would be considered. This approach is contrary to what was decided in *Sulamerica* and also in the *BCY* case.

The courts are now embarking upon the *validation principle* in an attempt to prevent the arbitration agreement from being ineffective or invalid under the law of the seat. This was the approach taken in *Enka* by the Court of Appeal. It is also commented[52]

[52] Born, International Perspective (n 2) 848.

that the traditional choice of law approach suffers from grave deficiencies in the form of unpredictable and arbitrary results. The validation principle is the way to move forward to select the national law which would give effect to the parties' arbitration agreement.

When one looks closely at *Sulamerica*, it will be noticed that it actually involved an application of the validation principle because the Court of Appeal conducted the general choice of law analysis which led to the law (Brazilian law) that would invalidate the arbitration agreement. Rather than arriving at an undesirable outcome, the Court of Appeal avoided it by applying the law of the seat (London) which validated arbitration agreement. London as the seat of the arbitration entailed acceptance by the parties that English law would apply to the conduct and supervision of the arbitration. It can be inferred that the parties intended English law to govern all aspects of the arbitration agreements.

In the United States of America, the law of the seat is important. The *Federal Arbitration Act 1925* (FAA) basically controls arbitrations involving interstate or foreign commerce and also implements the *New York Convention 1958*. This would mean that the scope of the FAA is such that it appears to constitute the law governing the arbitration agreement when there is an express choice of state (or foreign law) in relation to the arbitration agreement itself that is inconsistent with the FAA's policies. In *Pedcor Mgt Co. Inc. Welfare Benefit Plan* v *North American Indemnity*,[53] the arbitration agreement expressed a choice of Texan law but the court took the position that 'it is well established that the FAA pre-empts state laws that contradict the purpose of the FAA by requiring a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'

The decisions in cases from the United States indicate that the *Sulamerica* presumption is the preferred choice. Further in the case of *AT&T Mobility LLC* v *Concepcion*,[54] the US Supreme Court held that the rule under California state law was an obstacle to the full purposes and objectives of Congress, so the application of California state law to the arbitration agreement was pre-empted by the FAA.

Moreover, it has been commented[55] that the FAA creates a body of federal substantive law of arbitrability and pre-empts contrary state law policies because once the dispute is covered by the FAA, the federal law applies to all questions of interpretation, construction, validity, revocability and enforceability. The United States courts have taken a way out to resolve the dilemma of what law to apply in relation to the arbitration agreement by looking at an Act passed by Congress because there is a pre-emptive power enshrined in it. In most common law jurisdictions, the approach on how to deal with the proper law of the arbitration agreement is still to look at the substantive law of the main contract and the law of the seat when implying the proper law of the arbitration agreement, and with a caveat that the presumptive law may be rebutted if it invalidates the arbitration agreement.

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[53] 343 F 3d 355 (5th Circuit, 2003).

[54] 131 S.Ct 1740, 1753 (2011).

[55] *Redfern & Hunter* (n 10) 163.

VI *SULAMERICA* PRESUMPTION vs VALIDATION PRINCIPLE

In advancing the argument for the usage of the validation principle, it is prudent to look into the relevance of the *Sulamerica* presumption and whether this accords with the *New York Convention 1958*. The reasoning[56] behind this proposal is because one ought to remember that the validation principle in essence expressly aims to validate the arbitration agreement. This also gives the parties the commercial intention to agree to an effective and workable international dispute resolution mechanism.

The *Sulamerica* presumption actually deviates from the *New York Convention 1958*, especially Article V(1)(a) where the said Article states that in the absence of the express or implied choice of law, the *New York Convention 1958* provides for the default selection of the law of the seat and not the law which has the 'closest and real connection'. In *Kabab-Ji*, the Court of Appeal relied on English contract law as the law of the arbitration agreement, although the principles of the contract law conflicted with the choice of law principles of the *New York Convention 1958*. Then in *Enka*, the Court of Appeal endorsed the three-prong test in *Sulamerica* and said that the parties had selected the law of the seat as the proper law of the arbitration agreement. The court's reasoning was based on two primary grounds: (i) due to the separability doctrine, the arbitration agreement is viewed as being separate and distinct from the main contract, therefore the governing law should also be treated as separate and (ii) the jurisdiction of the arbitral tribunal to rule on its own on the application of the choice of law (when there is an overlap between the governing law of the arbitration agreement and the main agreement).

There is also an argument that the separability doctrine, (which is advocated as being one of the reasons for the distinction between the arbitration agreement and the main agreement itself, especially on what choice of law is applicable) is just to reflect the parties' presumed intention that their agreed procedure for resolving disputes should remain effective. Otherwise in such circumstances, this would render the substantive contract ineffective. It is also further commented[57] that the purpose of the doctrine is to give legal effect to that intention and not to insulate the arbitration agreement from the substantive contract for all purposes.

In *Enka*, the court fell into the usual argument which is to give precedence as to the governing law of the arbitration agreement, whether it should be the law of the seat or the law of the main contract. The majority of the Supreme Court held that the arbitration agreement is most 'closely connected' with the law of the seat if the parties had chosen one. Also, it is consistent with international law and legislative policy, such as the *New York Convention 1958*. The other reason for treating an arbitration agreement as governed by the law of the seat of arbitration (in the absence of choice) is because under Article VI(a) of the *New York Convention 1958* – the applicable law of the arbitration agreement is the law of the seat in the absence of an agreement of the parties on this.

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56 Steven Lim, 'Time to Re-Evaluate the Common Law Approach to the Proper Law of the Arbitration Agreement', *Kluwer Arbitration Blog* (Blog Post, 5 July 2020) <http://arbitrationblog.kluwerarbitration.com/2020/07/05/time-to-re-evaluate-the-common-law-approach-to-the-proper-law-of-the-arbitration-agreement/>.

57 Ibid.

The Singapore case of *BNA* is another example where the High Court did not apply the validation principle and in fact found that its application could create problems at the enforcement stage because Article V(1)(a) of the *New York Convention 1958* contains choice of law provisions for determining the proper law of the arbitration agreement. This is in line with the parties' intention, whereas the validation principle seeks to validate an arbitration agreement without necessarily having regard to the parties' choice of law.

What then is the position when it comes to the choice of law as to the governing law of the contract? In order to answer this, Articles II and V(1)(a) of the *New York Convention 1958*[58] must be read together. Both these articles must be read together because Article V(1)(a) prescribes a choice of law rule and also gives effect to the parties' autonomy, providing for application of the law selected by the parties (either express or implied) to govern their agreement to arbitrate. This Article also prescribes a default rule, where the arbitration agreement will be governed by 'the law of the country where the award was made'.

It has to be borne in mind that the opposite position on the choice of law is the application of the law of the seat of the State with the 'closest connection or most significant relationship' to the arbitration agreement. It has been commented[59] quite extensively that the 'closest connection or most significant relationship' has its shortcomings. Firstly, this test produces uncertain and unsatisfactory results. Secondly, the law of the seat of arbitration is based upon an exclusive focus on the procedural aspects of arbitration and totally ignores the contractual character of the agreement to arbitrate. Thirdly, the law of seat also mistakenly converges the law of the arbitration agreement with the law governing the arbitral proceedings, which do not necessarily coincide. Fourthly, the law of the seat of the arbitration also disregards the close connection between the arbitration agreement and the main contract. Most importantly, this test of 'closest connection or most significant relationship' disregards the doctrine of separability when the parties intend to choose a neutral forum in order to resolve their disputes.

Enter the validation principle, which is consistent with the *New York Convention 1958*.[60] This principle is not connected to a single law of a jurisdiction and in fact it looks into the parties' intention in concluding arbitration agreements and thereafter submits disputes to resolution by arbitration. Therefore, Articles II and V(1)(a) of the *New York Convention 1958* requires recognition of the parties' implied choice of law by way of validation principle where there is a national law that will give effect to the parties' agreement to arbitrate, rather than to invalidate the arbitration agreement.

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58 *New York Convention 1958* (n 7). Article II: 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration'.

59 Born, International Perspective (n 2) 831.

60 Also consistent with arts 8, 34 and 36 of the Model Law (n 1).

VII CONCLUSION

The quest for the best approach in determining the law to govern the arbitration agreement has been going on for quite a while. The quest is likely to continue on, because not all national courts have grasped an accurate understanding as to how to ascertain the parties' core intention. If the choice of law rules still hang on to the notion of a single jurisdiction, then it will bring a disorderly situation to the doctrine of separability. This will also defeat the pro-enforcement objectives stand adopted in the *New York Convention 1958*. Therefore, it is submitted that the adoption of a uniform international choice of law rule for arbitration agreements, i.e. a validation principle, is to be lauded because it would be applied to select that national law which would give effect to (validate) rather than invalidate the parties' arbitration agreement. It is further submitted that the jurisdictions which choose this approach would stand out as being neutral and as selecting an efficient means of resolving commercial disputes.

ORANG ASLI CUSTOMARY LAND AND *ADAT PERPATIH*: A CASE STUDY ON *TEMUAN* LAND IN NEGERI SEMBILAN

Izawati Wook*, Arif Fahmi Md Yusof**, Intan Nadia Ghulam Khan***, Kamilahwati Mohd****, Fareed Mohd Hassan*****, Abd Hakim Mohad******

Abstract

There is a dearth of scholarly writing on the customs and customary law of the *Orang Asli* communities, particularly on land matters, the ownership of which is usually contentious. Land is an essential foundation for the vulnerable indigenous peoples to maintain their livelihood and identities. By providing a case analysis on the customs, practice, use and traditions relating to the land of the *Orang Asli Temuan* in Negeri Sembilan, drawn upon the framework of common law jurisprudence on indigenous peoples' customary land, this article illustrates the significance of land and its security for the communities. In particular, this article investigates the concept and perspectives relating to customary land among the *Orang Asli* in selected villages, namely, Langkap in Kuala Pilah, Parit Gong in Jelebu and Bukit Kepong in Pasir Panjang. The article takes a qualitative approach through interviews and focus group discussions with the headmen, leaders of the communities, and relevant stakeholders, including an expert in the *Adat Perpatih* (customary laws) which are practiced by the *Temuan Orang Asli*. The research found that the *Temuan* people regard the land on which they live as a territory belonging to the community where the members have different types of rights. Within that territory, families have ownership rights over certain areas meant for different uses including for settlement and economic activities with boundaries that are known to the community of members. The ownership of these areas of land is passed to the next generation according to their customary rules. This also includes the land regarded as ancestral land passed from their ancestors. Beside this part of the land, areas surrounding the settlement and agricultural areas within the territory are regarded as common access areas meant for foraging to find food or other resources to add to their source of income. This topic is under-researched

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yet vital for policy makers, decision-makers and the public in paving the way for greater protection of indigenous peoples' lands.

Keywords: indigenous people, *Orang Asli*, *Temuan*, customary land, *adat perpatih*, land security, sustainable development goals.

I INTRODUCTION

This is an exploratory study on the land of the *Temuan Orang Asli* in Negeri Sembilan, Malaysia. The study is analysed under the framework of common law jurisprudence which recognises the land rights of indigenous peoples in Malaysia. It highlights the position of customary land of the *Orang Asli* communities and land that they occupy at present, particularly focusing on the concept, scope, land use and practice, inheritance and distribution under their customary law. A study of the customs of the diverse *Orang Asli* communities requires empirical work of its own. This topic is under-researched but is vital for policy makers, decision-makers and the public in paving the way towards greater protection of indigenous peoples' lands.

The Malaysian legal system is characterised by legal pluralism.[1] Each racial community has its own customs and customary legal system. The areas of law to which the *adat* of different communities commonly applies includes matters of land tenure and the inheritance of ancestral land and property.[2] However, little is written and known outside of the *Orang Asli* communities about their customs.[3] Discussions of *adat* in the context of the legal system in Malaysia are often confined to groups with significant numbers, namely, the Malays, the natives in Sabah and Sarawak, Chinese and Indians.

The rights and interests of *Orang Asli* communities in land have also not been adequately taken into account in legal studies on land and natural resources. Even though reported judgments on cases relating to land claims by the *Orang Asli* make reference to the concept of customary land as developed from evidence presented in the cases, the limited number of cases may not reflect the whole scenario because of the diverse cultures of the indigenous communities. Apart from legal discourse, although there have been numerous studies on *Orang Asli* communities, in depth research into the lands and customs of these communities remains limited.

The research uses a qualitative approach to perform case studies in three villages. The villages selected are *Kampung Orang Asli* Parit Gong in the district of Jelebu, *Kampung Orang Asli* Langkap in the district of Kuala Pilah, and *Kampung Orang Asli* Bukit Kepong in Pasir Panjang in the district of Port Dickson. Of the three villages mentioned, there are

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1 Wu Min Aun, *Malaysian Legal System* (Pearson Malaysia, 2nd ed, 2005).

2 Malay adat law which is a mixture of traditional practice and Islamic law, and native adat are still widely practised and recognised under the law. Chinese and Hindu law on marriage and divorce have diminished in relevance since the coming into force of the *Law Reform (Marriage and Divorce) Act 1976* (Malaysia). The Act was largely based on English legislation. It introduced a uniform law on marriage, divorce and its ancillary matters among non-Muslims.

3 See MB Hooker, 'The Challenge of Malay Adat Law in the Realm of Comparative Law' (1973) 22 *International and Comparative Law Quarterly*, 492.

631 residents in Parit Gong, 447 residents in Langkap and 91 residents in Bukit Kepong. All three villages have good access roads and are equipped with basic infrastructure, such as water and electricity supply and internet connection. There is also a community hall *(balai adat)* in each village which is used by the communities for their traditional ceremonies.

Data was collected by interviewing headmen, chairpersons of the village committees and other key persons, most of whom are from the Board of Customs *(Lembaga Adat)* of the communities. The empirical work was conducted through several visits to the villages between October 2018 and July 2019. The work was conducted with permission of the government department on the *Orang Asli* affairs, i.e. the *Orang Asli* Advancement Department (*Jabatan Kemajuan Orang Asli (JAKOA))*. Permission of the headmen of the three communities were obtained prior to the conduct of the research. The researchers also carefully obtained the written consent of each participant and the identities of the participants are kept anonymous.

In addition to the above, to understand the complex nature and substance of the customs, a focus group discussion was also conducted involving an expert on *Adat Perpatih* in Negeri Sembilan and an anthropologist who is an expert on the *Orang Asli* communities.

This article is arranged as follows. Parts II and III explain the context in relation to the land of the *Orang Asli*, the legal position and the issue of land security as well as the significance of security of tenure of the land of vulnerable minority communities. Part IV briefly analyses the position of the common law principle which provides for recognition of the customary land of the indigenous peoples in Malaysia. With this background, Part V highlights the practice of *Temuan* communities in Negeri Sembilan, in relation to their land as a basis for their livelihood, communal system and customs, including the use of land and aspects of distribution and inheritance. Part VI summarises the findings of this research on the customary land of the *Temuan* communities, illustrating its significance for the well-being of the communities as well as the society at large.

II *ORANG ASLI* AND THEIR LAND IN CONTEXT

The term '*Orang Asli*' is a Malay phrase for 'original peoples' or 'first peoples'. The phrase refers to communities known as 'aboriginal peoples' in various states of Peninsular Malaysia. There are various laws in Malaysia which affect the *Orang Asli*. These laws include the *Federal Constitution*,[4] the *Aboriginal Peoples Act 1954*, the *National Forestry Act 1984*[5] and the *Wildlife Conservation Act 2010*.[6]

Specifically, under the *Aboriginal Peoples Act 1954*, aboriginal peoples are defined using characteristics including language, way of life, custom and belief as well as lineage or blood relation to the aborigines.[7] An aboriginal ethnic group is defined as 'a distinct tribal division of aborigines as characterised by culture, language or social organisation

4 *Federal Constitution* (Malaysia) art 8(5)(c); art 45(2); Sch 9 Item 16 ('*Federal List'*).

5 *National Forestry Act 1984* (Malaysia) ss 40(3), 62(2)(b).

6 *Wildlife Conservation Act 2010* (Malaysia) s 51(1).

7 *Aboriginal Peoples Act 1954* (Malaysia) s 3.

…'. It may also include any group that is declared by the state authority as such.[8] An aboriginal community is defined as the 'members of one aboriginal ethnic group living together in one place'.[9] This article uses the term *Orang Asli* to refer to the communities characterised as the aboriginal peoples.

The *Orang Asli* communities are classified into three groups: *Negrito*, *Sen'oi* and Proto-Malay. These distinctions are made according to their religion, social organization and physical characteristics.[10] These three main groups have 18 different sub-groups. The *Temuan* people, who are the focus of this study, is a sub-group of Proto Malay.

The *Orang Asli* are minority communities and are generally regarded as marginalised in Malaysia. After more than 60 years of independence, they remain at the lowest rung of Malaysian society. More than one-third of *Orang Asli* are living in poverty[11] and experiencing household food insecurity resulting in malnutrition and chronic energy deficiency.[12] Many suffer from poor health, with a disproportionately high number of deaths in childbirth, high infant mortality rates, a lower life expectancy compared to the national average, and higher reported rates of infectious and parasitic diseases and malnutrition.[13] In terms of education, the number of dropouts from both primary and secondary schools among the *Orang Asli* children remains high, with an all-round poor academic performance.[14] These facts reflect a serious inequality of these minority communities as compared to the rest of the country's population.

Compounding to this is the issue of security of land and the recognition of their land rights under the law. The legal position on the status of ownership of land on which the communities are living, is complicated. The *Aboriginal Peoples Act 1954* provides some form of protection to the land of the *Orang Asli*. It allows for the state authorities to declare the land occupied by the *Orang Asli* within their jurisdictions as an Aboriginal

[8] Ibid s 2.

[9] Ibid.

[10] For a detailed account on the population and history, see Colin Nicholas, *The Orang Asli and the Contest for Resources* (International Work Group for Indigenous Affairs, 2000); Iskandar Carey, *Orang Asli: The Aboriginal Tribes of Peninsular Malaysia* (Oxford University Press, 1976); Robert Knox Dentan et al, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, 1997).

[11] Malaysia Economic Planning Unit, *Strategy Paper 02: Elevating B40 households towards a middle-class society, Eleventh Malaysia Plan* (Strategy Paper, 2015) <www.epu.gov.my/sites/default/files/Strategy%20 Paper%2002.pdf>.

[12] See Nor Haidanadia Hasni et al, 'Food Security among Orang Kintak in Pengkalan Hulu, Perak' (2017) 7(3) *International Journal of Academic Research in Business and Social Sciences,* 851; CS Pei, G Appannah and N Sulaiman, 'Household Food Insecurity, Diet Quality, and Weight Status Among Indigenous Women (Mah Meri) in Peninsular Malaysia' (2018) 12(2) *Nutrition Research and Practice*, 135; Goy Siew Ching et al, 'Applying Territorial Approach to Rural Agribusiness Development in Malaysia's Aboriginal (Orang Asli) Settlements: A Comparative Study of Pos Balar, Kelantan and Pos Sinderut, Pahang' (2016) 12(4) *Malaysian Journal of Society and Space*, 109.

[13] See Nicholas (n 10) 33-6; Lim Y AL, 'Intestinal Parasitic Infections Amongst Orang Asli (Indigenous) In Malaysia: Has Socioeconomic Development Alleviated The Problem?' (2009) 26(2) *Tropical Biomedicine*, 110.

[14] S Renganathan, 'Educating the Orang Asli Children: Exploring Indigenous Children's Practices and Experiences in Schools' (2016) 109(3) *The Journal of Educational Research*, 1-11*;* NC Zairil Khir Johari, 'The Need for Decentralization: A Historical Analysis of Malaysia's Education System' in C. Joseph, *Policies and Politics in Malaysian Education* (Taylor & Francis, 2017), ch 12.

Area (s 6) or an Aboriginal Reserve (s 7). In addition, the state authorities may also use power provided by the *National Land Code 1965* to set aside land for the *Orang Asli*.

Nonetheless, in practice, based on a report by the *Orang Asli* Advancement Department, the government department which was established to administer the affairs of the *Orang Asli*, less than 25% of the lands occupied by the *Orang Asli* have been declared as aboriginal reserve or aboriginal area under the law.[15]

Furthermore, while common law in Malaysia has established that these communities have legal rights over their customary land, unless affirmed by a court of law, the land status remains uncertain. On the other hand, there are many communities who live on land that may not fulfil the common law requirements of customary land. This includes communities who have been relocated by state authorities from their previous customary land to another location.

Data from a 2013 report of a national inquiry conducted by Malaysian National Human Rights Commission (Suhakam) on the position of land rights of the indigenous peoples exposed numerous incidents of land predicaments.[16] This is consistent with many other research reports[17] and news highlighting the encroachment on the peoples' customary lands by outsiders for logging, commercial plantations and farming, and infrastructure development. An important recommendation made by the Suhakam report was to establish a redress mechanism to resolve issues and grievances involving the indigenous peoples' customary or ancestral lands rights.[18] This recommendation was supported by a task force established later to study the report.[19]

III LAND SECURITY AND SUSTAINABLE DEVELOPMENT GOALS

Secure tenure rights to land have been recognised as an important indicator of sustainable development goals as prescribed in the 2030 Agenda of Sustainable Development Goals (SDGs), as adopted by the United Nations General Assembly (Indicator 1.4.2 and Indicator 5.a.1).[20] The global indicator framework measures progress of the implementation of 17 sustainable development goals. The Agenda contains numerous elements that can

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[15] Jabatan Kemajuan Orang Asli, (Unpublished Report, 2016). See Nicholas (n 10); Human Rights Commission of Malaysia (Suhakam), *In-depth Discussion on Native Customary Land Rights of the Orang Asli in Peninsular Malaysia* (Report, 13 June 2009).

[16] Human Rights Commission of Malaysia (Suhakam), *National Inquiry into the Land Rights of Indigenous Peoples* (Report, 2013) accessed at http://www.suhakam.org.my/documents/10124/1326477/SUHAKAM+BI+FINAL.CD.pdf.

[17] See e.g., Rusalina Idrus, 'The Discourse of Protection and the Orang Asli in Malaysia' (2011) 29 (Suppl. 1) *Malaysian Studies* 53; Colin Nicholas, *Orang Asli: Rights, Problems, Solutions* (Suhakam, 2010); Hasan Mat Nor et al, 'Mengapa Kami Jadi Begini? Konflik Masyarakat Orang Seletar dan Pembangunan Iskandar, Johor Bahru, Malaysia (Why Have We Become Like This? The Conflict of Orang Seletar Communities and Iskandar Development, Johor Bahru Malaysia)' (2009) 5(2) *Malaysian Journal of Society and Space*, 16.

[18] Human Rights Commission of Malaysia (Suhakam) (n 16).

[19] Loh Foon Fong, 'Cabinet Forms Committee on Indigenous Land Rights' *The Star* (online, 17 June 2015) <http://www.thestar.com.my/News/Nation/2015/06/17/cabinet-approves-indigenous-lands-rights/>.

[20] *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UN Doc A/RES/70/1 (adopted 25 September 2015).https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

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go towards articulating the developmental concerns of indigenous peoples especially concerning human rights principles and standards.[21] Some elements which are relevant to the *Orang Asli* include the goals to end poverty and hunger, achieve food security and improved nutrition, promote sustainable agriculture, good health and well-being for people, and clean water and sanitation.

Malaysia has endorsed the Agenda in its planning framework. The 11th Malaysia Plan reflects the multi-dimensional nature of the SDGs with the specific aim of reducing inequalities in society, including the *Orang Asli*. As an integral element of the SDGs, the international standard as reflected in the *United Nation Declaration on the Rights of Indigenous Peoples* (UNDRIP),[22] to which Malaysia voted for adoption at the UN General Assembly in 2007, requires strong protection of land and resource rights of indigenous peoples. The Declaration provides that the indigenous peoples have the right to own and possess the lands and resources that they traditionally occupy or use. Their special relationship is acknowledged as the principal source of livelihood, social and cultural cohesion that is fundamental to their identity and spiritual welfare. States thus have a duty to respect the special relationship and to have due regard for their traditional patterns of use and occupancy. For this reason, irrespective of the position of land rights of other people in a particular state, ownership of the lands of the indigenous peoples must be established.

IV COMMON LAW PRINCIPLES ON THE RECOGNITION OF INDIGENOUS LAND RIGHTS

Under Malaysian common law, the lands of indigenous peoples like the *Orang Asli*, which have generally been occupied by them for a long time, are recognised as legally owned by these communities. There have been a number of court cases which have affirmed this position based on developed common law principles.

Briefly, common law recognises and protects existing rights of people including rights relating to land ownership. The legal rights which arise from the customs of the people continue to exist unless they are extinguished by legislative provision or an act of executive government authorised by legislation. Legal rights of indigenous people neither depend on statutory provision nor declaration by the executive government. They exist on their own and are protected by the common law, subject to extinguishment by means authorised by law. On this basis, state land ownership is not absolute but subject to existing legal rights.

This legal principle is the basis for the recognition of the land rights of indigenous peoples in Malaysia including the *Orang Asli* of Peninsular Malaysia and natives in Sabah and Sarawak. Specific to the *Orang Asli* communities, the rights recognised under common law exist in tandem with, or complementary to, the rights protected by

[21] Ibid.

[22] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, Agenda Item 68, UN Doc A/RES/61/295(2 October 2017, adopted 13 September 2007).

the *Aboriginal Peoples Act 1954*, which is a special statute providing for protection of the minority communities.[23]

The basis of the customary rights is custom or known as '*adat*' in Malay. Conceptually, the terms '*adat*' or 'custom' is used interchangeably with the terms customary law or native law.[24] Under the Malaysian law, custom or *adat* is one of sources of law recognised by the Federal Constitution and is enforceable by the common law.[25] This is similar to English law, in which custom is also a source of law.[26]

In relation to the indigenous peoples' land rights, custom as practiced by the communities gives rise to legal rights, recognised and enforceable by the court of law. The customary legal rights continue to exist unless extinguished by a clear and plain legislation or by an executive act authorised by such legislation. When customary legal rights are extinguished, compensation must be paid.[27]

At present, the customs of certain sections of society are codified in statutes. For instance, some part of custom on customary land of the Malay communities in Negeri Sembilan is regulated by the *Customary Land Enactment 1926*. This statute, amongst others, provides for the registration of 'customary' land. Another example of the customs of local communities that has been codified in the form of a statute is distribution of *harta sepencarian* (jointly acquired property) governed by various *Syariah* enactments in all Malay states.

However, such statutes containing the codification of custom do not necessarily exclude related or other parts of customs as an element that may have the force of law.[28] Where customs are codified, such codification does not extinguish uncodified and related customs.[29] This is similar to the position of Islamic law in Malaysia, which has been incorporated into legislation. Reference to other written sources and to the opinions of experts on the contents of Islamic law are common practice and are allowed although not specifically mentioned in the legislation.[30]

The *Orang Asli*, similar to other groups considered as indigenous peoples in Malaysia, are also regulated internally by their own traditional laws on various matters including land and natural resources.[31] Even under the relevant international law jurisprudence, the legal systems of indigenous peoples are recognised as an integral part of their identity.[32]

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[23] *Kerajaan Negeri Selangor v Sagong Tasi* [2005] 6 MLJ 289 (Court of Appeal); *Yebet Bt Saman v. Foong Kwai Loong* [2015] 2 MLJ 498.

[24] Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak* (Suhakam 2009), 17.

[25] *Federal Constitution* (Malaysia) art 160(1), which defines the word 'law' to include 'written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof'.

[26] E K Braybrooke, 'Custom as a Source of English Law' (1951) 50(1) *Michigan Law Review* 71, 72.

[27] *Kerajaan Negeri Selangor v Sagong Tasi* [2005] 6 MLJ 289 (Court of Appeal); *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677 citing *Mabo (No 2)* (1992) 175 ALR 1, 3.

[28] *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2006] 1 MLJ 256.

[29] Ibid 285-6.

[30] See for example, M. Siraj, 'Recent Changes in the Administration of Muslim Law in Malaysia and Singapore' (1968) 17(11) *International and Comparative Law Quarterly*, 221.

[31] See Yi Fan Chung, 'The Orang Asli of Malaysia: Poverty, Sustainability and Capability Approach' (Master of Science Thesis, Lund University Centre of Sustainability Science, 2010).

[32] *United Nations Declaration of the Rights of Indigenous Peoples* art 5.

This reflects the significance of the customs of communities and the understanding of them in the consideration of laws.

An important piece of evidence which is essential to prove the existence of customary land rights is continuous occupation and control of particular area of land for a long time or for several generations.[33] Occupation of land forms the connection between communities and the land. This can be in the form of settlement or use of land for agriculture. The test of occupation to meet the evidentiary burden is the existence of 'sufficient measure of control to prevent strangers from interfering.'[34] Continuation of a long established practice of their custom and exercise of the customary right over the land is important to prove the connection.[35] However, an actual physical presence is not a pre-requisite to establish continuous use and occupation.

As custom is the basis of the rights, their contents are determined by custom of the particular communities. In other words, the types and extent of the rights are defined by practice, usage and traditions of the communities. Nonetheless, it has also been held by the courts that changes in the communities' traditional law and custom do not affect the connection of communities to the land.[36]

A *Customary Right to Land*

The courts in Malaysia have recognised that the *Orang Asli* communities have the customary right to live on land that they have occupied for generations, and that this right is proprietary in nature.[37] In the case of *Sagong bin Tasi v Kerajaan Negeri Selangor* (*Sagong bin Tasi*),[38] the Court of Appeal held that the plaintiffs in the case, who were *Temuan* people, had ownership of the lands in question under a customary community title of a permanent nature. It was affirmed that the customary land of the *Temuan* tribal group is a proprietary right with full beneficial interest in, and to the land. The lands are inheritable, that is, capable of being passed down from generation to generation.

In a more recent case of *Mesara Long Chik v Pengarah Tanah Dan Galian Pahang*,[39] the plaintiffs who were the *Semoq Beri* communities, a subgroup of *Sen'oi*, claimed for a declaration that they have rights and interest over an area of land of about 12 acres in Maran. They also claimed, among others for the return of the land, or in alternative, compensation for the loss of the land. The plaintiffs stated that although they had moved from the area, they had inherited the land from their ancestors and continued to frequent the land, on which was planted a variety of fruit trees. They used to collect the fruits from the area during fruit season and sell them for income. In fact, they had in both 1985 and

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[33] *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677.

[34] Ibid. See also *Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor* [2016] 8 MLJ 289 ('*Sangka bin Chuka'*).

[35] *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241; *Kerajaan Negeri Selangor v Sagong Tasi* [2002] 2 MLJ 591, *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418; *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677.

[36] *Sagong bin Tasi v Kerajaan Negeri Selangor* [2005] 6 MLJ 289.

[37] Ibid. See also *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] 5 MLJ 268.

[38] *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289, [35].

[39] *Mesara Long Chik v Pengarah Tanah Dan Galian Pahang* [2018] 1 LNS 1009.

1989 made applications to the state authority for a land grant, but there was no positive response. Subsequently, a grant of a temporary license was issued in 2005 by the state authority to an individual, following which fruit trees on the land were cleared.

The High Court in Kuantan found that the plaintiffs had proved their rights over the land on the test of occupation and control over the land, and that these rights were recognised and enforceable by the common law. However, although the court recognised the legal right over the land that the court termed '*geran adat*' (custom grant) under the common law,[40] the court only allowed for compensation for the trees on the land according to s 11 of the *Aboriginal Peoples Act 1954*.

In addition, cases on claims to land rights have been confined to customary land of the indigenous communities. The principles derived from these cases therefore may not extend to land occupied by the *Orang Asli* upon resettlement, which is often occurs because of government initiatives. In relation to this, it has been suggested by Azman J, in an obiter statement, in *Pedik bin Busu v Yang Dipertua Majlis Daerah Gua Musang*,[41] that the Orang Asli own the land that is given to them by the government through the Resettlement Scheme, although they have yet to be given title to the land.

B *Rights to Resources or Foraging*

In view of the cases on *Orang Asli* land rights decided thus far, it appears that the common law is unsettled as to whether the recognition of the *Orang Asli* customary rights extend to the areas of land on which they customarily foraged for living.

The Court of Appeal in *Sagong bin Tasi*[42] held that the *Orang Asli* customary land rights recognised by the common law is limited to the land that they occupy, namely, the area over which they have direct control (for instance through settlement and agricultural activities on the land). This view has been followed by another Court of Appeal decision in *Ketua Pengarah Jabatan Hal Ehwal Orang Asli v Mohamad bin Nohing (Batin Kampung Bukit Rok) (Mohamad bin Nohing)*.[43] Vernon Ong JCA in *Mohamad bin Nohing* reiterated the position in *Sagong Tasi* stating as follows:

> Whilst actual physical presence on the land is not necessary, there can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering.[44]

The Court of Appeal in *Mohamad bin Nohing* reversed the High Court ruling[45] that the customary land of *Semelai* people in the case includes the right to exclusively occupy and use the land and its resources which extend to surrounding areas that they use to forage for resources.

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40 Ibid 22.

41 *Pedik bin Busu v Yang Dipertua Majlis Daerah Gua Musang* [2010] 5 MLJ 849, [13].

42 *Sagong bin Tasi* (n 36). The Court of Appeal affirmed the High Court ruling in *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591.

43 [2015] 6 MLJ 527.

44 Ibid [41].

45 *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] 5 MLJ 268.

The High Court position in this aspect is in line with the decision in *Adong bin Kuwau v Kerajaan Negeri Johor*,[46] the first land claim case by the *Orang Asli* in which the customary rights of the *Jakun* community to the areas in which they traditionally foraged for food and other needs, were affirmed.

A similar position was also taken by the High Court in *Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor*.[47] The High Court held that the customary land rights of the indigenous communities extend to the area of land used for collection of forest produce, hunting and foraging commonly located surrounding the village of the communities as such activities are continuously in practice integral to the communities' custom and traditions and vital to their livelihood. These have been 'the primary source and essence of their very existence and will continue to be essential to their future livelihood'.[48] A failure to recognise this would be viewed as 'threatening the continuation of not only the character but also the contents of their traditions and custom, and potentially in the long run the very survival of the *orang asli*, as presently identifiable with their custom and traditions …'.[49]

Correspondingly, the High Court in the case of *Eddy bin Salim v Iskandar Regional Development Authority*[50] held that that the recognition of the customary right, which is non-exclusive, over land at common law,

> …includes the surrounding waters in which their customary activities are being carried out. Hence a claim for native customary rights over lands covering rivers, streams within the boundaries of the land used by them for fishing and gathering of produce of such waters should be claimable but subject to proof.[51]

Therefore, the actual practice by the communities is important to determine the extent of the rights of the communities.

On the other hand, the view which restricts the land rights of the *Orang Asli* to occupation by settlement and cultivation has been criticised as failing to fully appreciate the customary land system. The courts accept the principles that the customary rights are dependent on the custom and practice of the indigenous people but they refuse to give full effect to them.[52] This goes against the common law basic principle of the recognition of the land rights of the indigenous peoples, in which the nature and scope of the rights are determined by their customs.

V THE *TEMUAN ORANG ASLI* AND CUSTOMARY LAND

In the context of framework of the common law principles discussed above, the practice of the *Orang Asli* investigated through the lens of a case study would be significant in

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[46] *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418.
[47] *Sangka bin Chuka* (n 34).
[48] Ibid [61].
[49] Ibid [62].
[50] 2017 1 LNS 822.
[51] Ibid [7.2].
[52] Bulan and Locklear (n 24).

understanding the practices of *Orang Asli* communities, which are diverse in terms of their custom, practice and traditions. This part of the article will explain the practices of the *Orang Asli* in Negeri Sembilan with the examples of three villages in the state.

There are 67 *Orang Asli* villages in Negeri Sembilan, with a total population of 10,563 as at 2015. This constitutes less than 1% of the total population of Negeri Sembilan (which stood at 1,098,500 in 2015).[53] Most of the *Orang Asli* in Negeri Sembilan are of *Temuan* descent, whose total population as at 2015 had reached 7,884, or about 75% of the total *Orang Asli* population in the state. Another subgroup of the *Orang Asli* living in Negeri Sembilan are the Semelai, who live near the border of the state of Pahang. These two sub-groups are under the main group of Proto-Malay, one of three classifications of *Orang Asli* in Malaysia.

The *Temuan* communities are the descendants of the earliest population in Negeri Sembilan. They are believed to have resided in the area for about 5,000 years, having arrived from surrounding regions of Sumatera and Kalimantan (Borneo).[54] They are physically indistinguishable from the Malays, and their language may be regarded as a dialect of Malay, excepting few distinctive terms of their own and a slightly different accent.[55]

In terms of their belief system, a majority of the *Temuan* community hold ancestral beliefs in nature spirits such as the spirit of the forest, evil spirits and the respect of the spirits of ancestors. A small number of them are Christian or Muslim.[56]

A Adat Perpatih *(*Perpatih *Custom) Practised* by Temuan

Similar to the majority of the Malays in Negeri Sembilan and Naning in Melaka, *Temuan* communities also practice *Adat Perpatih* as their culture, with slight variations amongst various communities in the state.[57] *Adat perpatih* is a form of custom practiced by communities in Negeri Sembilan different from the other forms of custom practiced by Malay communities in Peninsular Malaysia, known as *Adat Temenggung*. Relative to formal laws, customs are larger in scope and inclusive of rules, practice, usage of daily conduct and relationships among family and community members. Some customs may be enforceable in a court of law.

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[53] Rosiswandy Mohd. Salleh, *Sejarah Pengamalan Adat Perpatih di Negeri Sembilan* (Jabatan Muzium Malaysia, 2017).

[54] Anuar Alias, SN Kamaruzzaman and Md Nasir Daud, 'Traditional Lands Acquisition and Compensation: The Perceptions of the Affected Aborigin in Malaysia' (2010) 5(11) *International Journal of the Physical Sciences* 1696; Dentan et al (n 10).

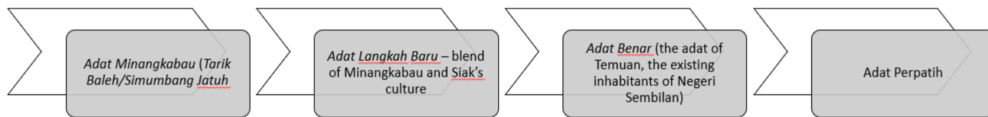
[55] Dentan et al (n 10).

[56] 'Penduduk Orang Asli Mengikut Agama Mac 2018' *Portal Data Terbuka Malaysia* (Webpage, 16 July 2018) <http://www.data.gov.my/data/ms_MY/dataset/penduduk-orang-asli-mengikut-agama-mac-2018>; Haliza Mohd Said, Zainal Abidin Ramli and Sukma Dina Radin, 'Enhancing Temuan Tribe Economic Activities as an Indigenous Attraction in Kampung Dengkil, Mukim Sepang, Selangor' (2012) 4(1) *Interdisciplinary Journal of Contemporary Research in Business* 421.

[57] Nur Asmira Anuar and Fauziah Fathil, 'The Role and Contributions of Orang Asli in the Formation of Adat Perpatih' in Nerawi Sedu, Nurazzura Mohamad Diah and Fauziah Fathil (eds), *Being Human: Responding to Changes* (Partridge Publishing Singapore, 2019).

It is believed that *Adat Perpatih* as it is practiced in Negeri Sembilan today has evolved from and has been shaped by diverse customs of communities. Its origins can be traced to those who migrated in a series of migrations from Minangkabau through Siak, in Sumatera, and also the existing *Orang Asli* inhabitants who were living in the region.[58] *Adat Minangkabau*, also known as *Tarik Baleh/Simumbang Jatuh*, forms the origin of *adat* in Minangkabau. As people from Minangkabau migrated to Siak, they brought their customs and culture promoting the blend of the two cultures, known as *Adat Langkah Baru*. Other waves of migration from Siak to the areas in the southern part of the Malay Peninsula brought together the mixed customs and later assimilated with existing *adat* of the existing inhabitants, namely, the *Orang Asli*, referred to as *Adat Benar*.[59] In other words, the *Adat Perpatih* is the outcome of a blend of customary practice that has been practised for more than 650 years until today by the majority of the Malays in Negeri Sembilan and also, which is largely unknown, the *Temuan* people.

Table 1: The blend of the three cultures



The *Adat Perpatih* is mainly characterised by a social structure in which relationships and social processes are matrilineal in nature. Descent is determined matrilineally. It also regulates other aspects of life comprising politics, economy, social, moral, cultural and spiritual aspects of communities.

According to Nur Asmira and Fauziah Fathil,[60] the *Adat Benar* of the *Orang Asli* in Negeri Sembilan played an important role in shaping the content of *Adat Perpatih* in several aspects. A prominent aspect is the distinctive tradition of the *Orang Asli* on geo-political or territorial organisation of the state which was already in place at the time of arrival of the migrants from Minangkabau. The territorial divisions were Jelebu, Sungai Ujong, Klang and Johol. Each district was headed by a *Batin* or chief of the clan.[61] The four chiefs of the four territories shared the same ancestry, i.e., the descendants of *Batin Seri Alam*.[62] This territorial division was adopted by the Minangkabau migrants which formed the origin of *'Undang Yang Empat'* (Four Chieftains) currently in practice. It was also reported that later, the *Orang Asli* created five minor areas forming the 9 territories in former Negeri Sembilan, i.e. Naning, Rembau, Jelai, Pasir Besar and Segamat.[63] This system of territorial divisions originated under *Adat Benar* of the *Orang Asli*, headed by

[58] Ibid.
[59] Ibid; Salleh (n 53).
[60] Anuar and Fathil (n 57).
[61] Ibid, citing RJ Wilkinson, *Notes on the Negeri Sembilan, Papers on Malay Subjects* (Oxford University Press, 1911) 11.
[62] Ibid, citing A. Samad Idris, *Negeri Sembilan Gemuk Berpupuk Segar Bersiram: Luak Tanah Mengandung* (Jawatankuasa Penyelidikan Budaya Muzium Negeri Sembilan, 1994) 24.
[63] Ibid.

Batins, was also adopted in the current practice of *Adat Perpatih* in Negeri Sembilan. The chief of each territory, known as *Undang*, enjoys direct authority over their territory without the interruption from higher authority in the Federation, i.e. the *Yang Dipertuan Besar* (the King of Negeri Sembilan).

B *Community Leadership*

For the *Temuan* communities, their village or *kampung* is "conceived of as a corporation of people in relation to their estate".[64] Generally, they are 'ruled' by a hierarchy of leaders who rank, in order of precedence: *Batin*, *Sandang*, *Jenang*, *Jekerah/Jengkerah*, plus a number of *Pelimas/Panglimas*.[65] These offices form a 'customary board' *(Lembaga Adat),* which administers the customs of the communities including marriage, divorce and property distribution. This research found that this system continues to be in practice in all three villages.[66] However, in Parit Gong, the *Sandang* is known as *Tok Mangku*, which carries the same meaning. Parit Gong also has a higher number of *Pelima*.[67]

In particular, *Batin* who is the headman, is the chief custodian of custom (referred to as *ibu Adat*, "mother of *Adat*"). *Batin*, assisted by his deputy (*Sandang*) and other officers, is commonly referred to settle dispute in the community. The *Tok Mangku* or *Sandang* acts as a judge tasked to make decisions for disputes involving members of the communities. The *Jekerah* and *Pelima* function like committee members to assist in the administration of the village and ceremonial activities in the communities.

Leadership appointments, especially in Parit Gong and Langkap, are made according to the *Adat Perpatih*, in which maternal lineage is important. Under the system, all leadership offices i.e. *Batin, Sandang/Tok Mangku* and *Jenang* must be passed on from a man to his sister's son *(anak buah)*.[68] According to Hood Salleh, a renowned anthropologist specialising on the *Orang Asli* communities, a few conditions must be satisfied for this appointment. First, the person to be appointed must be of rightful clan *(perut)* affiliation and rightful base *(telapak)*. Second, the person must be an adult without serious physical or mental handicap, virtuous in the sense that he is not greedy *(hakap)*, and possesses sound knowledge of traditions *(adat)*.[69] The community leaders in Parit Gong and Langkap explained that decisions on the appointment of traditional offices are made by the communities themselves through consultation with the community members.[70]

In addition to the customary system, each village has an administrative committee presided over by a chairperson. The members of this committee are appointed by a government department specific for *Orang Asli* affairs which was established under the *Aboriginal Peoples Act 1954*. This committee mainly functions to assist in the

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[64] Hood Salleh, 'Bases of Traditional Authority among the Orang Asli of Peninsular Malaysia' (1989) 35 *Akademika* 75.

[65] Ibid.

[66] Interview and focus group discussion with the leaders of the three communities.

[67] Focus group discussion with the leaders of Parit Gong communities.

[68] Interview and focus group discussion with the leaders of the three communities.

[69] Hood Salleh (n 64).

[70] Interview and focus group discussion with the leaders of the three communities. See also Anuar and Fathil (n 57).

administration and management of a village. These two community leadership structures coexist together and are intended to complement each other.

C *Land Use and Ancestral Land*

The three villages are aboriginal reserves under the *Aboriginal Peoples Act 1954*. For Parit Gong, the size of the reservation is about 700 acres, comprising the present settlement areas and the 'old village' (referred to as *'kampung lama'*) that is the area of the former settlement which they regard as *tanah saka* (ancestral land). This ancestral land is within the forest surrounding the present village. In this area, fruit orchards are maintained. There is also a graveyard which continues to be used. The order declaring this land as an aboriginal reserve was made by the state government in 2015, following a wait of about 50 years after the application.[71] The community in Parit Gong are seeking for the surrounding forest areas outside of the *tanah pusaka* to be reserved under the Act as well, as they are also dependent on the area for their livelihood.

In Langkap, the size of the area under reservation is about 1200 acres. The reservation comprises the village namely, the settlement area and plantation, but not their ancestral area which is within the Berembun Forest Reserve.[72] The reservation for Bukit Kepong is much smaller at only 220 acres, comprising the village settlement area and a rubber plantation belonging to the villagers.[73]

In Bukit Kepong, according to the headman, the community has lived in the village since its opening by their own community in 1914. Before that, they lived separately in smaller family units surrounding the present area. Living closer together, the headman explained, was regarded as easier for community activities. On the other hand, Langkap and Parit Gong communities were re-grouped by the government in the present settlement area in the 1940s and in 1972, respectively, mainly for safety reasons due to communist resurgence. According to Langkap headman, the Langkap area once became a centre for settlement of *Orang Asli* from surrounding areas, including Sg Sampo, Sg Lui and Sg Kalebang. After Malaysia's independence in 1957, many of the *Orang Asli* went back to their original places. The people who originated from Langkap continued to live in the area until now. Thus, all the three communities had originally lived in the surroundings of the present village for a long time. Parit Gong was settled by the communities about a century ago.

Almost all community members in the three villages manage their own small-scale rubber plantations, with a minority of them maintaining oil palm trees within the reservation areas. Land areas used for these plantations were originally forested area, cleared by individual families which was the norm in the past. Ownership of the land is based on family. The boundaries of each family land are known to all community members which are commonly marked by fruit trees. Any disputes will be resolved by referring to their customary board.

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[71] Focus group discussion with the leaders of Parit Gong communities.

[72] Interview with the leaders of Langkap communities.

[73] Interview with the headman.

According to all *Batin* in the three villages, the headmen used to have discretion to allocate certain areas of land in the village settlement to new families who had no land. However, at present, vacant areas of land to be given to new families are becoming scarce. For them, no land owned by a family which is meant for agriculture should be left unattended. Thus, it is common for headmen and elders in the communities to advise anyone who has left any land unworked on, to work the land, as it is important for their future generations. The *Temuan* people feel that they would lose the land if it remains unworked.

Furthermore, especially for Parit Gong and Langkap, although they have moved their settlement from *kampung lama*, i.e. the former areas which are in the forest surrounding the present villages within forest reserves, the communities regard the former areas as belonging to their communities. They refer to these areas of land as *tanah pusako*, which means ancestral land inherited from their *nenek moyang* (ancestors). Each parcel of land belongs to a family unit and the members know the boundary of each parcel. This generally works by mutual understanding using certain natural boundaries such as rivers or a particular type of tree such as *pinang* palm trees or jackfruit trees. These areas of land are commonly planted with a variety of fruit trees which provide a relatively good yearly income.

D *Inheritance of Land*

The rules relating to inheritance of ancestral land upon the death of a member of the communities are made according to the matrilineal system, especially in Parit Gong and Langkap. Following the *adat perpatih*, the ancestral lands of the communities are passed to daughters. Daughters took care of the land for the community. This works like a trustee of the land for the community. Meanwhile, a son is expected to work and find his own property. A son may also get married and work the land which belongs to his wife. A male from outside the community marrying a female from the community will have to work the land belonging to his wife. He is also expected to support the village leadership. A male marrying a female from outside the community will have to live in his wife's village.[74]

However, in Bukit Kepong, the customary rules on inheritance are currently rarely practised. The headman states that the rules are felt to be unnecessary to the community at the village, as most members of both genders are working outside of the village.[75] This reflects changes to the custom practised by Bukit Kepong which is located near tourism area in Port Dickson.

E *Sale or Exchange of Land*

Generally, the sale of ancestral land is strictly prohibited under the custom. However, it may only be allowed in exceptional cases for instance in situations in which the owner is in dire need of funds such as for a costly medicinal treatment, but this is extremely rare.

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[74] Interview and focus group discussion with the leaders of Langkap and Parit Gong communities.

[75] Interview with the headman.

In such situations, the land can only be sold to other members of the community. The *Batin* at Langkap and the customary board at Parit Gong will be the witnesses for the sale.

F *Foraging Areas*

In Parit Gong and Langkap, the forest areas surrounding the village and the ancestral land are considered by the communities as *tanah rayau* or foraging areas. In these areas which are located within the forest reserve, plant resources such as *petai* (parkia speciosa), rattan, some forest fruits, and a few small animals are important sources for food and income. Some villagers, especially those who have no rubber or oil palm plantations, rely on this area to supplement their income.

Unlike ancestral land which belong to family units in the communities, the foraging areas are not owned by anyone and are considered common access. Although there is a relatively small number of villagers going to the forest areas to find these resources, it remains an important source of income. The people in the communities have asserted their rights to access these areas. The people in Langkap and Parit Gong also hope that the foraging areas are gazetted for their protection under the *Aboriginal Peoples Act 1954*. In a way, the continued dependence of the *Orang Asli* upon land and the forest is not only important for their livelihood, identity and local environment but also a factor in determining their culture and customs.[76]

G *Land as the Communities' Territories and Community Responsibility*

As was mentioned above, it is recorded in history that the *Orang Asli* in Negeri Sembilan practices geo-political or territorial organisation of their areas. This reflects a kind of attachment that many *Orang Asli* communities (not only in Negeri Sembilan) have to the land that they and their ancestors have lived on.[77] This land is a definite territory consisting of a large tract of land occupied by a community that has lived in the area for a very long time governed by their specific custom. Robert Dentan has also recorded that *Temuan* consider that their communities have more or less exclusive rights over land with clear boundaries.[78]

This is similar to the practice of other sub-groups of the *Orang Asli*. Kirk Endicott and Juli Edo wrote that,[79] the *Sen'oi*, a group of *Orang Asli*, who have permanently settled in one place for a long time, referred to their territory as *saka', lengri' or dengri'* [territory] and the communities residing in the *saka'* as *gu* [group]. These communities regard themselves as the original occupants in the area. As such, the members of the community have rights within the communal territory – to dwell, forage and gather forest

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76 Roozbeh Kardooni et al, 'Traditional Knowledge of Orang Asli on Forests in Peninsular Malaysia' (2014) 13(2) *Indian Journal of Traditional Knowledge*, 283.

77 Dentan et al (n 10).

78 Ibid 74.

79 Kirk Endicott, 'Property, Power and Conflict Among the Batek of Malaysia' in Tim Ingold, David Riches and James Woodburn (eds), *Hunters and Gatherers* (St. Martin's Press, 1988) 110; Juli Edo, 'Claiming Our Ancestors' Land: An Ethnohistorical Study of Seng-oi Land Rights in Perak, Malaysia' (PhD Thesis, Australian National University, 1998).

resources and to use the land subject to certain customary conditions. There is also a shared belief that members must ensure that the land and its resources exist in perpetuity for the use of future generations.[80] By mutual understanding, the communities recognise the boundaries of their territory which are normally marked by certain trees, rivers or streams. The *Sen'oi* cannot enter another *gu's* territory regarded as *saka' mai* [belonging to others].[81] They only move to another territory by joining or marrying into the group which owned the territory.[82] With the consensus of the community, individuals and families could acquire personal rights within the communal territory by clearing forests or opening up land for cultivation.[83]

In addition, groups of western *Semang*, *Mendriq* and *Jahai* also practise the same concept of a defined territory in which they have control subject to certain restrictions under their customs.[84]

The relationship of a community to the land that they live on entails a responsibility of the community leadership and members in *Temuan* communities to take care of the present and future community. The interviewees stressed repeatedly that taking care of the land is important for the communities. The land and the communities cannot be separated. Members of the communities may go out and work elsewhere, but they can and should always go back to their original place.

VI CONCLUSION

This paper has outlined the concept, use of and practice in relation to the land of the *Temuan* communities in Negeri Sembilan using case studies of three communities in the state. The discussion draws from the framework of the judicial principles and content of the common law recognising the customary land rights of the indigenous peoples as developed through several cases involving land ownership claims. The crux of legal rights recognised by the courts are the customs of the communities themselves, with their practices and usage in relation to the land. However, the common law has been restrictive in that it tends to exclude the right to access resources in areas regarded as foraging areas. These areas are within the communities and are vital for the livelihood of those depending on it. This article provides local case studies to highlight the practice of the communities to allow further assessment of the local dimensions of the issues.

Taken together, the data suggests that the *Temuan* people regard the land that they live on as a territory belonging to the community in which the members have different types of rights. Within that territory, families have ownership over certain areas meant

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80 Endicott (n 79), 141 (Batek, a subgroup of the Orang Asli); Edo (n 79), 299.

81 Edo (n 79) 10; Endicott (n 79) 114; Dentan et al (n 10) 74.

82 Juli Edo, 'Traditional Alliances: Contact between the Semais and the Malay State in Pre-modern Perak' in Geoffrey Benjamin and Cynthia Chou (eds), *Tribal Communities in the Malay World* (Institute of Southeast Asian Studies, 2003) 137, 143-44.

83 Nicholas (n 10).

84 Ibid. See also the concept akin to a defined territory practiced by *Semelai* group: Zanisah Man & Shanthi Thambiah 'Kinship and *Semelai* Residential Arrangements: Belonging to Village and the Resilience of Communal Land Tenure in Tasek Bera, Malaysia' (2020) 21(4) *The Asia Pacific Journal of Anthropology*, 315-331.

for different uses including for settlement and economic activities with boundaries known to the community members. The ownership of these areas of land passes to the next generation according to their customary rules. This also includes the land being regarded as ancestral land located within the surrounding forest areas passed from their ancestors. The ancestral land may only be sold in exceptional situations but only within the communities. In this way, their land remains solely within their communities. It is passed down and taken care of by members of the community for the well-being of present community members as well as that of future generations.

Beside this part of land, especially in Langkap and Parit Gong, areas surrounding the settlement and plantation within the territory are regarded as common access meant for foraging to find food or other resources to add to their source of income. These common areas serve as buffer zone to members who are in need. Although at present only a minority of the communities are fully dependent on these area for their livelihood, there are many others who regularly go into the forest to supplement their primary income to varying degrees. This equates to the common law understanding on usufructary rights recognised in some cases but not others, subject to the extent of use.

Furthermore, as the economic system practised by the communities is predominantly agricultural, land is considered as one of the principle elements that the communities seek to safeguard. Therefore, it takes a central domain in the communities. It becomes the base for the members of the communities. It unites and safeguards at the same time.

It also appears that these communities have their own 'legal systems' with custom and customary rules as the 'law' which governs them. This is similar to many indigenous peoples around the world and has been recognised in several international instruments as an integral part of the identity of indigenous communities. The community at large needs to know them and their 'legal system'. Often denial against the rights of indigenous people is because of ignorance. We must acknowledge that within the 'big legal system' that we have, there are multiple other legal systems that exist within the communities. These community systems, including that of the indigenous peoples, must be acknowledged, recognised and respected in our quest for 'sustainable development'. Further, the 'special relationship' between the indigenous people and the land they occupy must be acknowledged as the principal source of livelihood, social and cultural cohesion fundamental to their identity and spiritual welfare as affirmed in the UNDRIP. It has been pointed out this is legally possible to be implemented under the construct of the present Malaysian Federal Constitution without the need for any amendment, although the recognition of *Orang Asli* customary land rights consistent with the UNDRIP may necessarily require the State to reduce or relinquish the excessive control they currently possess over *Orang Asli* and their lands.[85]

The findings of this research provide an insight as to the position of land to the communities which may enhance understanding on the matter. This will contribute to public knowledge and awareness, which is important to pave the way towards policy and legal changes. Public knowledge and awareness about the ways these communities use

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[85] Yogeswaran Subramaniam, 'Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia' (2011) 19 *Waikato Law Review*, 44.

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their land and its significance to them will allow for a better understanding of the need to protect these communities. This in turn may assist in efforts for policy and legislative changes, especially in terms of the manner in which state authorities deal with the *Orang Asli* for greater protection of their land.

SEPARATION OF POWERS AFTER THE MALAYSIAN *NATIONAL SECURITY COUNCIL ACT 2016*

Eden HB Chua*

Abstract

Since the enactment of the *National Security Council Act 2016* ('*NSCA 2016*'), there have been concerns that the *NSCA 2016* potentially usurps the *Federal Constitution* of Malaysia. The *NSCA 2016* introduces a series of exceptional security measures that bypasses certain constitutional safeguards and lifts constitutional restrictions on the infringement of the liberty of the people. In *Datuk Seri Anwar Ibrahim v Government of Malaysia* ('*NSCA No.1*'), the Federal Court refused to rule on a challenge brought against the constitutionality of the *NSCA 2016* except to express doubts on its constitutionality. The Federal Court's refusal was premised on the reasoning that the challenge was mounted in the absence of a specific exercise of powers under the *NSCA 2016*. As the case was 'abstract, academic or hypothetical' in nature and after considering Article 128(2) of the *Federal Constitution* and s 84 of the *Courts of Judicature Act 1964*, the Federal Court held that the case was non-justiciable. This case note critically evaluates this decision in light of the separation of powers principle.

Keywords: Separation of powers, *National Security Council Act 2016*, Malaysia.

I INTRODUCTION

Lord Acton's often quoted warning that '[p]ower tends to corrupt and absolute power corrupts absolutely'[1] is a poignant reminder of the real possibility of the arbitrary misuse of concentrated powers. This statement continues to be relevant in understanding questions on the exercise of the constitutional powers under the Malaysian *Federal Constitution* ('*FC*'). Considering the current threats that international and domestic terrorism pose to national security, the concentration and expansion of powers in the hands of the executive government becomes all the more prevalent and acceptable. Total arbitrary abrogation of personal liberty has and will always be 'the favourite and most formidable instruments of tyranny'.[2]

The *National Security Council Act 2016* ('*NSCA 2016*') is one such federal legislation that allows the exercise of executive powers beyond constitutional limits but is deemed

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1 John Dalberg-Acton, Acton-Creighton Correspondence (Liberty Fund, 1887).

2 Alexander Hamilton, 'Federalist No. 84' in Alexander Hamilton, John Jay and James Madison (eds), *The Federalist* (Liberty Fund, 2001) 444 ('Hamilton').

necessary in combating the war against terrorism. The *NSCA 2016* appears to be an attempt to constrain the authority of the *FC*, as it may be argued that the whole process of enacting the *NSCA 2016* and its provisions was unconstitutional. If the *NSCA 2016* is in fact unconstitutional, it should be deemed to be so by virtue of Article 4 of the *FC* and it is for the judiciary to pronounce on the constitutionality of an impugned law. Arguably, if the courts refuse to rule on its constitutionality, this may create a lacuna in the *FC* concerning the enforceability of Article 4 and thereby raise concerns about separation of powers issues between executive and judiciary.

In *Datuk Seri Anwar Ibrahim v Government of Malaysia*[3] (*'NSCA (No. 1)'*),[4] a specific question which was central to the case related to the proper jurisdiction of the Federal Court to adjudicate on any constitutional questions that are referred to it from the High Court. A secondary issue was whether the *NSCA 2016* was unconstitutional. The Federal Court in a vote of five to two[5] declined to exercise its jurisdiction to answer the constitutional questions referred to it, due to their 'abstract, academic or hypothetical' nature. This was because there was absent a specific exercise of powers under the challenged *NSCA 2016*. The constitutionality of the *NSCA 2016* was therefore left unanswered by the majority of the Federal Court. This decision has not attracted broad public scrutiny as the *NSCA 2016* is less than four years old at the time of this writing and possibly due to the fact that the Act has never been invoked since its commencement. However, the decision is a significant one as it could (or begin to) potentially shape the dynamics between executive and judicial powers in Malaysia.

The aim of this case note is to provide some general observations on the relations between the executive and the judiciary, particularly concerning the proper role of the Federal Court in adjudicating on important constitutional questions, and its implications on the separation of powers principle in Malaysia. In the main, the author expresses a concern that the Federal Court's reasons in refusing to exercise its jurisdiction in the *NSCA No. 1* case might have indirectly expanded the nature and scope of executive authority at the expense of the judiciary. This decision might have marked a shift towards an expansion of the executive power. The discussion in this case note will proceed as follows. After the Introduction in Part I, Part II provides a brief overview on the separation of powers principle under the *FC*. Part III then evaluates the Federal Court's judgment in *NSCA (No. 1)* and provides some observations, specifically on its impact on the separation of powers between the executive and judiciary. Finally, Part IV set outs the author's concluding remarks.

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[3] [2020] 3 CLJ 593.

[4] This case shall be referred to in this case note as *NSCA (No. 1)* as one could expect that there might be future challenges on the constitutionality of the *NSCA 2016*.

[5] The majority judgment was delivered by Nallini Pathmanathan FCJ, with whom Azahar Mohamed CJM and Zawawi Salleh, Abang Iskandar Abang Hashim and Idrus Harun FCJJ expressed their agreement. David Wong Dak Wah CJSS and Tengku Maimum CJ dissented.

II SEPARATION OF POWERS IN MALAYSIA

The *FC* heralds the practice of a constitutional government by assigning governmental powers among several branches and departments. These governmental branches and departments exercise their powers on the lines of the Westminster tradition of a parliamentary government based on the principle of separation of powers.[6] The very purpose of separating the powers and functions of the government is to avert a potentially tyrannical or repressive regime. As noted Publius, '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands… may justly be pronounced the very definition of tyranny'.[7] The principle of separation of powers is not presupposed but can be logically inferred from the manner in which the functions of the executive, legislature and judiciary is administered and distributed under the *FC*.[8] Most importantly, the supremacy of the *FC* provides a strong assurance that the powers of the government cannot be above the highest law of the land.[9] Within the socio-political and juridical context of the process towards achieving separation of powers in Malaysia, the interrelation of judicial power with executive power has been a foremost concern.

Chapter 3 of the *FC* is the primary repository of the executive power of the Federation. The constitutional structural framework of executive power consists of 'a constitutional monarchy, a Westminster style parliamentary executive, and a prime-ministerial system of government'.[10] Additionally, the Federal executive consists of 'the conference of rulers, the *Yang di-Pertuan Agong* (the Federal King), the Prime Minister

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6 Shad Saleem Faruqi, *Our Constitution* (Sweet and Maxwell, 2019) ('Shad Saleem Faruqi, *Our Constitution*'); and Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, 2012) 19-21 ('Harding, *The Constitution of Malaysia*').

7 Hamilton (n 2) 249.

8 Chapter 3 and Chapter 4 are dedicated to the executive and federal legislature respectively, whereas Part IX is dedicated wholly to the judiciary. See HP Lee, 'The Judicial Power and Constitutional Government - Convergence and Divergence in the Australian and Malaysian Experience' (2005) 32(1) *Journal of Malaysian and Comparative Law* 5.

9 *Federal Constitution* (Malaysia) art 4. Article 4 reads as follows,

4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) The validity of any law shall not be questioned on the ground that—

(a) it imposes restrictions on the right mentioned in Clause (2) of Article 9 but does not relate to the matters mentioned therein; or b) it imposes such restrictions as are mentioned in Clause(2) of Article 10 but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or—

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

10 Harding, *The Constitution of Malaysia* (n 6) 59.

(PM), the Cabinet, the civil service, the police and the armed forces'.[11] Article 39 of the *FC* vests the 'executive authority of the Federation' in the *Yang di-Pertuan Agong* and is exercisable by him or by the Cabinet or any Cabinet minister. Article 40(1) of the *FC* however limits the *Yang di-Pertuan Agong's* function by requiring him to act on the advice of the Cabinet. Article 80(1) which concerns the distribution of executive powers in the Federation provides that 'the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws'. Since the Malaysian Independence of 1963,[12] it is an undeniable fact there can hardly be a 'pure' separation of powers in which the practice of the separation of powers can remain 'absolutely separate and distinct'.[13] Under the *FC*, while the *Yang di-Pertuan Agong* is part of the executive government, the *Yang di-Pertuan Agong* also exercises a share of legislative power as the *Yang di-Pertuan Agong's* assent is required for a bill to come into force.[14] Additionally, the members of the Cabinet are either drawn from Federal Parliament or the Senate,[15] with the result that both the dominance of executive and legislative powers in the possession of the ruling coalition party that has garnered more seats in Parliament.

The judiciary is one of the 'checks and balances' mechanisms incorporated into the Malaysian constitutional framework. The framers of the *FC* feared a dictatorial executive which was not subject to the constitutional democracy and the rule of law. Therefore, they provided by way of Article 121 of the *FC* the '[j]udicial power of the Federation'. The original clause 1 of Article 121 read: '…the judicial power of the Federation shall be vested in the High Court'.[16] However, the original clause was substantially changed and it now provides that the High Court 'shall have such jurisdiction and powers as may be conferred by or under federal law'.[17] While the notion of 'judicial power' is amorphous, a classic definition was formulated by the High Court of Australia in the case of *Huddart Parker v Moorehead*[18] where it was described as 'the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property.'[19] The judicial power of the Federal Court is illustrated in Article 128(1) of the *FC* which vests the sole jurisdiction in the Federal Court to determine the following two kinds of cases, to the exclusion of the rest of the courts:

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11 Shad Saleem Faruqi, *Our Constitution* (n 6) 4.

12 Officially, August 31, 1957 marks Malaya's independence from the British, while September 16, 1963 was when the Peninsular Malaysia allied with Sabah, Sarawak and Singapore to create Malaysia. Singapore formally left Malaysia in 1965.

13 Hamilton (n 2) 252. Publius stated that it would be a misconception of the pure theory of separation of powers by requiring the functions and powers of each branch of government to be kept totally distinct from one another. The separation of powers principle is to be adapted and adjusted to fit with local circumstances.

14 *Federal Constitution* (Malaysia) art 66.

15 *Federal Constitution* (Malaysia) art 43(2)(b).

16 HP Lee (n 8) 5.

17 *Federal Constitution* (Malaysia) art 121(1).

18 (1909) 8 CLR 330.

19 Ibid 357.

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(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
(b) disputes on any other question between States or between the Federation and any State.

Despite the heading of Article 121 of the *FC* that reads: 'Judicial Power of the Federation', Article 128(3) of the *FC* provides that 'the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law'. The *Courts of Judicature Act 1964*[20] ('*CJA 1964*') as a federal law is effectively relevant in this respect. Under s 81 of the *CJA 1964*, the Federal Court is vested with the same jurisdiction as is exercisable by the High Court which in turn derives its judicial power from federal law.[21] It can be said that the *CJA 1964*, which was passed in the same year as the *FC*, had in some way deprived the Federal Court of its inherent powers originally vested in Article 121 of the *FC*. Yet, Rule 137 of the *Rules of the Federal Court 1995* specifies that the Federal Court enjoys inherent powers to hear any application or to make any order so as to prevent injustice.[22]

Prior to the amendment of the original clause in Article 121, the system of checks and balances was generally premised on constitutional supremacy and suggested a strong judicial commitment at the time to ensure that the boundaries of powers set forth in the *FC* are maintained. Suffian LP's pronouncement in the seminal case of *Ah Thian v Government of Malaysia*[23] is worth noting:

> … [t]he doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. [t]he power of Parliament and of state legislatures in Malaysia is limited by the Constitution; and they cannot make any law they please.[24]

This pronouncement is elucidative and reflective of the judiciary's will at that time to hold the government to a high level of accountability. Another interpretation of the distribution of governmental powers was given by Raja Azlan Shah FCJ when His Lordship expressed that '[p]arliament is endowed with plenary powers of legislation' and it is therefore not the proper role of the courts to interfere with Parliament's right to amend the *FC*.[25] The beginning of the present amended Article 121(1), however, correlates to an expansion of the influence of executive power and a substantial decline of the judiciary's past

[20] Act 91 ('*CJA 1964*').
[21] Section 81 of the *CJA 1964* reads: 'the Federal Court for the purposes of its jurisdiction under Article 128(1) and (2) of the Constitution (herein called the ―original jurisdiction‖) shall have the same jurisdiction and may exercise the same powers as are had and may be exercised by the High Court'.
[22] Rule 137 states: 'Nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court'.
[23] [1976] 2 MLJ 112.
[24] Ibid 113.
[25] *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

assertiveness in the protection of an individual's rights. This can be discerned from a number of cases, with the exception of recent pronouncements in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[26] and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak.*[27] The latter case in particular, established the judiciary's role in defending fundamental principles such as judicial independence, separation of powers and protection of minorities, and confirmed the existence of the basic structure doctrine in Malaysia.[28]

Against this backdrop, it can be said that the Federal Court in the *NSCA No.1* case was handed an opportunity to maintain a fair balance of powers in its determination of the question of the constitutionality of the *NSCA 2016*. This, however, comes with a legislative constraint on the Federal Court to decide on constitutional questions. Whilst s 84 of the *CJA 1964* does not expressly prohibit the adjudication of constitutional questions, but as in any exercise of powers, based on the questions of 'which powers, how much of them, and how they can be effectively limited' which are essential to the objective of the realisation of the idea of a limited government,[29] some limits must still be there as a guide for the Federal Court to decide the appropriate circumstances that it has the jurisdiction to adjudicate on a controversy. This demonstrates why a balancing act that attempts to achieve an acceptable balance between the exercise of executive power and judicial power remains a delicate matter. In Malaysia, it is the judiciary that is the most vulnerable amongst the departments of power, as the power of the executive government has always been on the rise.[30] Publius, writing on the American constitutional government, had foreseen the situation in which the judiciary would be placed when it was expressed that the judiciary 'will always be the least dangerous to the political rights of the Constitution'[31] and 'beyond comparison the weakest of the three departments of power'.[32]

In Publius' view, under a limited constitution, it is constitutionally legitimate for the judiciary to declare as void any legislative act which is contrary to the constitution.[33] The concept of a limited constitution, as used by Publius, implies constitutional limitations on the legislative authority to enact laws that are beyond the scope of the constitution. The courts therefore act as the 'bulwarks of a limited constitution'.[34] The *FC* through Article 4, likewise places limitations upon the legislative and executive authority to implement laws that are inconsistent with the authority of the *FC*, and intrinsically, the peoples' authority. Where it is plain that Article 4 has been triggered, the courts are therefore required to make a declaration of unconstitutionality. That said, assuming that a law should be declared void for unconstitutionality, such a declaration of unconstitutionality is by no

[26] [2017] 5 CLJ 526.
[27] [2018] 3 *CLJ* 145.
[28] It is not the aim of this case note to discuss both these cases but suffice it to say that both are landmarks cases on the area of constitutional supremacy in Malaysia.
[29] MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 2nd ed, 1998) 12.
[30] See generally HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford University Press, 2nd, 2017).
[31] Hamilton (n 2) 402.
[32] Ibid.
[33] Ibid 403.
[34] Ibid 405.

means a straightforward effort for the courts. The courts, in hinging its decision on Article 4, would need to establish its interpretation on the circumstances or reasons intrinsic to the text of the *FC* itself. In some ways, as will be discussed in the next part, the Federal Court's attempt in maintaining the divisions of powers could either constrain or unbound the capability of its judicial power to interfere with the exercise of the executive power.

III LOCATING AN ACTUAL CONTROVERSY

A *The Background of the NSCA. No. 1 decision*

Pursuant to Article 66(4A) of the *FC*, which enables bills to become laws automatically without the assent of the *Yang di-Pertuan Agong* after 30 days,[35] the *NSCA 2016* was enacted and came into force on August 1, 2016. The *NSCA 2016* establishes a National Security Council with the Prime Minister as its Chairman.[36] The Prime Minister is empowered to declare security areas if this is necessary in the interests of national security.[37] Part V of the *NSCA 2016* vests special powers in the executive authority which includes, *inter alia*, the power to control movement, arrest, seizure and search, and the use of reasonable and necessary force.[38]

Though the *NSCA 2016* has never been invoked by the Federal government, its constitutionality was immediately challenged by Anwar Ibrahim, the leader of the opposition coalition party *Pakatan Harapan*. The challenge failed at the High Court and the Court of Appeal for the reason that it was related to the legislative competence of the Federal Parliament to make laws, and as such, the High Court lacked jurisdiction to adjudicate on the case. Both the High Court and the Court of Appeal held the view that only the Federal Court could determine the challenge as it fell within the scope of Articles 128(1), 4(3) and (4) of the *FC*.[39]

The Federal Court was therefore called upon to decide on two constitutional questions. The first question was whether s 12 of the *Constitution (Amendment) Act 1983*, s 2 of the *Constitution (Amendment) Act 1984* and s 8 of the *Constitution (Amendment) Act 1994* were null and void as they abolished the requirement of royal assent, thereby infringing the basic structure of the *FC*. The second question was whether the *NSCA 2016* was unconstitutional on the grounds that it was enacted pursuant to these unconstitutional amendments, it was not enacted based on Article 149 and it infringed the freedom of movement in Article 9(2) of the *FC*. These questions raised important issues relating to the Federal Court's proper jurisdiction to adjudicate on referred constitutional questions which challenged the legislative competence of the Federal Parliament. Thus, reference must be made to the relevant provisions in the *FC* and the *CJA 1964*. Only where there

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[35] *Federal Constitution* (Malaysia) art 66 (4)(a) reads: '[i]f a Bill is not assented to by the Yang di-Pertuan Agong within the time specified in Clause (4), it shall become law at the expiration of the time specified in that Clause in the like manner as if he had assented thereto'.

[36] *NSCA 2016* (Act 776) (Malaysia), ss 3 and 6.

[37] Ibid s 18.

[38] Ibid ss 22 to 36.

[39] *Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor* [2017] 6 CLJ 311 (High Court) and *Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor* [2019] 1 CLJ 445 (Court of Appeal).

was an affirmative yes to the existence of jurisdiction, could the unconstitutionality of the *NSCA 2016* be decided by the Federal Court. From the point of view of Malaysian constitutional law, the Federal Court's decision on this issue is significant in the sense that the constitutional status of the Federal Court *vis-à-vis* the other branches of the government would be further clarified.

B *The Federal Court and Constitutional Questions in NSCA No.1*

The question of whether the Federal Court could determine any constitutional question referred to it was central to the case. There are two general points of view on this. One view is that the Federal Court's jurisdiction is limited to the adjudication of non-abstract cases or controversies which arise only from concrete, real and actual disputes[40] This viewpoint reflects the decentralised or diffused model of judicial review.[41] On the other hand is the argument that the Federal Court is capable of adjudicating on any constitutional case including those of abstract nature, essentially resembling but not identical to that of a constitutional court.[42]

In *NSCA (No.1)*, all judges agreed that the Federal Court practises a decentralised scheme of constitutional review. The decentralised constitutional review was described as the common law model which essentially indicates that 'constitutional questions are not determined in the abstract but by reference to the factual disputes from which they arise'.[43] Thus, while the Federal Court is the final appellate court for all questions of law and constitutional issues, it is not a constitutional court. On this basis, Pathmanathan FCJ, in her Ladyship's written judgment for the majority of the Federal Court, rejected the view that the constitutional questions referred to in the challenge could be determined without infringing the Malaysian constitutional scheme. In arriving at this conclusion, Pathmanathan FCJ referred to Article 128(2) of the *FC* and s 84 of the *CJA 1964* as a basis that the Federal Court's jurisdiction is solely confined to a concrete case or controversy and such was not the case here.

The heading of s 84(1) of the *CJA 1964* states as follows – '*Reference of constitutional question by High Court*'. The section establishes the referral jurisdiction of the Federal Court by enabling the High Court to refer to the Federal Court any question which pertains to the *FC*. Where the High Court refers such questions to the Federal Court, the High Court 'may stay the same on such terms as may be just to await the decision of the question by the Federal Court'. In such a situation, the Federal Court *shall* determine the case 'subject to any rules of the Federal Court'.[44] Article 128(2) of the *FC* contains

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40 Andrew Harding, 'The Fundamentals of Constitutional Courts', *International Institute for Democracy and Electoral Assistance* (Web Page, 18 April 2017) <https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf>.

41 Ibid.

42 The Federal Court is not a constitutional court but it is suggested here that the Federal Court's inherent Article 121 judicial power coupled with Rule 137 of the Rules of the Federal Court 1995 may allow the Court to determine constitutional questions of any kind as the Court sees fit.

43 *NSCA (No. 1)* (n 3) [33].

44 *CJA 1964* (n 20) s 85(1).

a similar provision.[45] While these provisions point to the exclusive jurisdiction of the Federal Court in the adjudication of constitutional cases, Pathmanathan FCJ held that the Federal Court is not bound to determine any constitutional question referred to it under s 84(1) of the *CJA 1964*, citing *Mark Koding v Public Prosecutor* (‘*Mark Koding*’)[46] and previous authorities on the powers available to the Federal Court in the disposal of cases.[47] In *Mark Koding* the Federal Court declined to answer whether the *FC* could be amended to affect its basic structure. Pathmanathan J used this example of refusal to answer as a basis of her Ladyship’s view that it is not compulsory for the Federal Court to answer any constitutional question referred to it, and saying otherwise would be ‘misguided’. Although there is no indication in s 84(1) of the *CJA 1964* that the Federal Court could decline to answer a constitutional question, Pathmanathan FCJ observed:

> Section 84 does not fundamentally change the nature of the Federal Court into a constitutional court. It is not a carte blanche for all constitutional questions to be referred to and determined by the Federal Court in every case.[48]

Against this backdrop, Pathmanathan FCJ held that the Federal Court could refuse to answer referred constitutional questions of abstract, academic, or hypothetical character as the common law model of constitutional review is only concerned with factual disputes. The learned Federal Court judge further quoted a passage from the judgment in the Hong Kong Court of Appeal case of *Leung TC William Roy v Secretary for Justice* (‘*Leung TC William Roy*’):[49]

> One of the recognized dangers of dealing with hypothetical or academic cases is that the court may be asked to decide important principles without the benefit of a full set of facts. There is also to be considered a practical factor: - the administration of justice would hardly be served if the courts were regularly to entertain cases which were not real but only hypothetical.[50]

In determining whether the questions raised against the constitutionality of the *NSCA 2016* were concrete, Pathmanathan FCJ stated that there must be ‘a real and actual controversy between the parties which will affect their rights and interests’.[51] As observed by Pathmanathan FCJ, there could be certain exceptions to this well-established principle, one of which was that ‘a real threat to a party’s rights can give rise to an actual controversy that

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45 The relevant part of Article 128(2) of the Federal Constitution reads: ‘the Federal Court shall have jurisdiction (*subject to any rules of court regulating the exercise of that jurisdiction*) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.’ (emphasis added).

46 [1982] 1 MLRA 477 (‘*Mark Koding*’).

47 *NSCA (No. 1)* (n 3) [29].

48 Ibid [32].

49 [2006] HKCU 1585 (‘*Leung TC William Roy*’).

50 Ibid [28].

51 *NSCA (No. 1)* (n 3) [43].

is not abstract or academic'.[52] In *Tan Eng Hong v Attorney-General* ('*Tan Eng Hong*')[53] (a Singapore Court of Appeal case cited with approval by Pathmanathan FCJ), the applicant was arrested and detained under s 377A of the Singapore *Penal Code* for the commission of an act of gross indecency. A challenge against the constitutionality of s 377A was later made. VK Rajah JCA disagreed with the Attorney-General's proposition that violations of constitutional rights only crystallise when a person is prosecuted under an allegedly unconstitutional law. Instead, the court held that such violations may occur earlier when a person is arrested and detained under an allegedly unconstitutional law. Nevertheless, in order to meet the *locus standi* test, the applicant must 'demonstrate a violation of his constitutional rights'.[54] However, 'a real and credible threat of prosecution'[55] suffices to demonstrate a violation of constitutional rights.

In *Leung TC William Roy*,[56] the Hong Kong Court of Appeal allowed the challenge of constitutionality brought against certain provisions in the Hong Kong Crimes Ordinance. The Court of Appeal held that a remote prospect of prosecution of the crimes was not fatal to the case where there exists ascertainable exceptional circumstances. Thus, the Court of Appeal remarked that although 'a prosecution is neither in existence nor in contemplation and there is no relevant decision which directly affects the Applicant… it is clear on the facts that he and many others like him have been seriously affected by the existence of the legislation under challenge'.[57]

Based on the general principles distilled from *Leung TC William Roy* and *Tan Eng Hong*, the majority in *NSCA (No.1)* then stated that there might be an exceptional case where the very existence of the law affects the rights or interests of the complainant. An example of an extreme scenario when the mere existence of a law would give rise to an actual controversy would be 'Holocaust-type laws' which specifically targeted against a minority group and this would warrant the Court to intervene. On the factual situation of *NSCA (No. 1)*, Pathmanathan FCJ found that applicant Anwar Ibrahim, in his affidavit in support of his challenge, had not shown that his rights had been affected by the *NSCA 2016* or the amending provisions. Unlike the facts in *Leung TC William Roy* and *Tan Eng Hong*, it was not shown that the *NSCA 2016* had interfered with the applicant's personal life, nor was it alleged that he would face a real and credible threat of action under the *NSCA 2016*. As such, it had not been demonstrated to the majority's satisfaction that the applicant had satisfied the *locus standi* test. Pathmanathan FCJ thus concluded:

> To answer the questions posed would be *a significant departure* from the deep-rooted and trite rule that the court does not entertain abstract or academic questions, and may even represent *a fundamental shift away* from the common law model of concrete review towards the European model of abstract review in constitutional adjudication. Exceptionally cogent reasons would need to be provided to persuade

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52 Ibid [57].
53 [2012] SGCA 45.
54 Ibid 109.
55 Ibid 111.
56 *Leung TC William Roy* (fn 49) [29].
57 Ibid.

the Federal Court to undertake such a radical departure from established principle. In this case, the parties have not attempted to do so.[58]

C *The Middle Ground: The Minority's Approach*

Although the minority (consisting of Chief Justice Tengku Maimun and Chief Judge of Sabah and Sarawak Wong Dak Wah) held the same view as the majority on the substantive nature of the Malaysian constitutional review scheme, they adopted divergent approaches to the jurisdictional questions. With regards to the referral jurisdiction of the Federal Court, Tengku Maimun CJ expressed the view that the language in ss 84 and 85 of the *CJA 1964* are 'comparatively broader'.[59] Both provisions are accordingly to be construed as Parliament originally intended, by their original language and meaning, which clearly shows that their words are couched in the mandatory, and therefore the Federal Court is obliged to answer any special cases transmitted to it. Specifically, the words 'shall… deal with the case and hear and determine it' in s 85(1) implies that the Court cannot refuse to answer a case referred to it.

While Tengku Maimun CJ opined that cases of academic, abstract or hypothetical character are out of the ambit of the Federal Court's jurisdiction, her Ladyship also took a broader view by identifying if a case contains a 'live' issue, together with a broad reading of ss 84 and 85 of the *CJA 1964*. The significant point in Tengku Maimun CJ's judgment was when her Ladyship mentioned Article 4 of the *FC* which would render any law inconsistent with the *FC* to be void and her Ladyship's statement that only the courts are 'exclusively seized with the power to make declarations of unconstitutionality'.[60] This latter pronouncement is an apt restatement of the inherent judicial power of the Federal Court by claiming the declaration of unconstitutionality is the sole right of the judiciary. Tengku Maimun CJ also disagreed with the threshold of 'exceptional case' in *Leung TC William Roy* and *Tan Eng Hong* as the *FC* ought to be interpreted within its four walls. This is especially so when Article 4 of the *FC* is involved. The supremacy of the *FC* must take precedence over any foreign judicial analogies or precedents and thus 'judicial review over the validity of laws was intended to be as broad as possible'.[61]

In a slightly different approach but with similar findings, Wong Dak Wah CJSS opined that based on the wordings of Article 128(2) of the *FC* and ss 84 and 85 of the *CJA 1964*, the words 'any proceedings' appearing 'are not tied with any further requirements that there must exist a concrete dispute or actual controversy affecting the rights and interests of the parties before this Court can exercise its referral jurisdiction'.[62] In addition, his Lordship agreed with Tengku Maimun CJ on the mandatory requirement of the word 'shall' in s 85(1). Having stated that the Federal Court is duty bound to answer the referred questions, his Lordship stated that it is for the Federal Court to decide if the referred

[58] *NSCA (No. 1)* (n 3) [64].
[59] Ibid [75].
[60] Ibid [87].
[61] Ibid [90].
[62] Ibid [124].

questions were valid in view of the provisions in s 84(1). The proper operation of ss 84 and 85 of the *CJA 1964* was neatly summarised by Wong Dak Wah CJSS as follows:

> The position of the law, as circumscribed by the Federal Constitution, provides that both the High Court and the Federal Court will have the concurrent jurisdiction to determine constitutional questions. It can be said that the High Court Judge controls which of those two Courts will make the determination as he or she is given the discretion whether to transmit or not subject to the only exception to this rule in any matter falling within Articles 4(3), 4(4) and 128(1) of the Federal Constitution whereby only the Federal Court will have the exclusive jurisdiction to determine such type of constitutional questions.[63]

The majority's proposition that the Federal Court could not determine the constitutionality of legislation in *vacuo* is 'tempting', but Wong Dak Wah CJSS rejected this view as there was no vacuum at all in the present challenge, since the primary issue was the unconstitutional amendment of the *FC* which enabled the enactment of the *NSCA 2016*. It is unclear if, based on Wong Dak Wah CJSS's interpretation, every abstract or academic question without factual dispute needs to be answered by the Federal Court. But it appears to be so, especially if constitutional rights are clearly implicated.

Wong Dak Wah CJSS similarly referred to Article 4(1) of the *FC*. The learned judge explained the effect of Article 4(1):

> It is patently clear from the language of Article 4(1) that any law inconsistent with the Federal Constitution is void. The word 'void' is self-explanatory - any law made in excess of the Federal Constitution once declared by a Court of competent jurisdiction to be null, void and of no effect ceases to exist as law. Any judicial declaration to that extent would effectively delete that law or the relevant portion of that law from existence. This is not judicial supremacy but constitutional supremacy. It is only the Courts that have the affirmative and final power to put beyond rest that the law was made in excess of Parliamentary power or within Parliamentary power but inconsistent with the Federal Constitution.[64]

A reading of the judgments of Tengku Maimun CJ and Wong Dak Wah CJSS shows that the principal reason for not finding the referred questions to be abstract, academic or hypothetical, was the fact of the unconstitutionality of the amendments by Parliament. The minority could not ignore this obvious fact as it directly implicates the constitutionality of the *NSCA 2016* under Article 4 of the *FC*. Further, it cannot be disregarded that where Article 4 is infringed, the Federal Court has a constitutional duty to intervene and that judicial review over the constitutionality of legislations is to be exercised in 'as broad as possible' manner.[65] Once the questions were found to be justiciable, the minority agreed that the courts cannot adopt 'a "wait and see" approach because a void law remains

63 Ibid [135].
64 Ibid [148].
65 Ibid [90].

void'.[66] Particularly, Wong Dak Wah CJSS noted that if, the courts were to wait for the executive to invoke a void law, they would neglect their role as the guardian of the *FC*. This view stands in contrast to the majority's view that such a situation is rare and must be exceptional.

There are two more significant opinions expressed by the dissenting judges. The first was that this case was not an exercise of judicial supremacy, but rather that of constitutional supremacy rooted in Article 4 of the *FC*. In this regard, Tengku Maimun CJ stated, 'permitting challenges of this kind is not an affront to the sanctity of the Rule of Law and unbefitting of the judicial role but, on the contrary, it accords completely with the Rule of Law'.[67] Wong Dak Wah CJSS said that the overall thrust of constitutional supremacy is the courts' 'affirmative and final power' to hold that 'the law was made in excess of Parliamentary power or within Parliamentary power but inconsistent with the Federal Constitution'.[68] Secondly, the constitutional history surrounding Article 4 could provide a broader understanding of the courts' constitutional role and the intended effects of Article 4. Wong Dak Wah CJSS referred to the original draft in Article 4 which was eventually omitted:

> 4. Enforcement of the Rule of Law
> (1) Without prejudice to any other remedy provided by law-
>
> Where any person alleges that any provision of any written law is void, he may **apply to the Supreme Court for an order so declaring and,** if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and, in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.
>
> Where any person affected by any act or decision of a public authority alleges that it is void because-
> (i) the provision of the law under which the public authority acted or purported to act was void, or
> (ii) the act or decision itself was void, or
> (iii) where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principles of natural justice,
>
> he may apply to the Supreme Court and, if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstances of the case; [emphasis added].

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[66] Ibid [90] [149].
[67] Ibid [95].
[68] Ibid [148].

To show that the framers of the *FC* had intended for the constitutionality or validity of legislation to be challenged, Wong Dak Wah CJSS suggested to look at draft Articles 4(1)(a) with draft Article 4(1)(b)(i). The learned judge observed that draft Article 4 was rejected in entirety and replaced by the current Article 4 'not because the drafters considered it repugnant to the very ethos of the Federal Constitution, but that they intended for that document to be even broader than what the draft itself proposed'.[69] The inclusion of the notion 'rule of law' would, in the framers' opinion, constrain the way in which the *FC* could be interpreted. In favouring the present provisions in Article 4, they intended 'the supremacy of the Federal Constitution to be stretched as widely as possible'.[70]

Does the minority's decision constitute a significant or radical departure from the position of the majority? For the dissenters, it is not. It is quite clear from their judgments that they had not refuted the majority's upholding of the decentralised constitutional review. Rather, their interpretation allows the courts to inquire into the constitutionality of legislation *ex-ante* and to rule it to be unconstitutional. Faced with a federal legislation of potentially repressive implications, it may be that both judges were trying to achieve a middle-ground, where Article 4(1) of the *FC* was invoked to justify their decision, and the risks of exceeding their judicial capacity are mitigated by not ruling out the possibility of them declining to answer an abstract, academic or hypothetical question in the absence of a live dispute after approaching the facts of the case holistically.

D *Separation of Power Issues*

The Federal Court's refusal to answer the referred constitutional questions in the *NSCA No.1* case was certainly uncontroversial if one were to consider the nature of constitutional review in Malaysia. In the course of their examination of ss 84 and 85 of the *CJA 1964*, the majority rightly stated that '[t]he referral jurisdiction in Article 128(2) FC and section 84 CJA forms part of the constitutional framework'.[71] Pathmanathan FCJ's narrow formulation of s 84 of the *CJA 1964* as rejecting the idea that it could give carte blanche for all constitutional questions to be determined by the Court in every case, and that it does not transform the Federal Court into a constitutional court is a correct proposition when examined within this context. Those who adopt the view that the Federal Court could determine any constitutional question arguably have failed to distinguish the constitutional role of the Malaysian judiciary in tandem with Article 128(2) and s 84 of the *CJA 1964* from that in other countries with a constitutional court of an entirely different origin.

But this understanding leaves much to be said, if its implications are considered. In some ways, in setting a high threshold of requiring a case to be 'exceptional', it might have expanded the sweep of executive and legislature powers. More hurdles are added for a review of constitutionality to be possible. An unintended consequence would be that Article 4 may be rendered redundant. This is troubling to those who reject a dictatorial leadership if the prospect of invoking the *NSCA 2016* is materialises. This concern is more so closely related to the basic idea of separation of powers. Depending how one measures

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[69] Ibid [155].

[70] Ibid.

[71] Ibid [32].

the importance of the *NSCA 2016*, it could also be argued that the minority offended the separation of powers principles by truncating the powers of the executive and legislature to enact necessary laws. Thus, while there is a sense of rigidity in Pathmanathan FCJ's rationale, its outcome seems to be correct.

Putting aside the contrasting opinions, perhaps the majority had concentrated too much on the expectation for an 'exceptional case' or 'exceptional circumstances' to be present. This would have the unintended effect of sidestepping other relevant constitutional provisions that ought to be considered, and in this connection, arguably *fell short of* utilizing judicial power of the Federal Court. In *NSCA (No. 1)*, it is Article 4 and Article 149 of the *FC* that could be considered. The primary issue, as pointed out by the dissenting judges was that there had been a clear-cut breach of Article 4 and Article 149 of the *FC*. Both judges stressed the paramount importance of the *FC* under which the Federal Court is its exercising judicial power. They were primarily concerned that the legislature had exceeded its power in enacting the *NSCA 2016* in breach of Article 149.

In response to the Senior Federal Counsel's argument that the *NSCA 2016* was not enacted pursuant to Article 149(1) of the *FC* as there is no referral to or mention of Article 149 in the *NSCA 2016*, Wong Dak Wah CJSS referred to the legislative powers of Parliament in Article 74(1) of the Federal Constitution. Article 74(1) empowers Parliament to make laws on matters enumerated in the Federal List or the Concurrent List and Article 74(3) requires Parliament to enact laws *'subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution'*. Applying the 'pith and substance' test,[72] the minority opined that the provisions of the *NSCA 2016* are strongly related to the subject-matter in Article 149(1)(f).[73] As the title of the *NSCA 2016* evidently implies, its provisions are no doubt directed at public order and security-related matters.[74] Thus, the minority held the view that the *NSCA 2016* did not comply with Article 74(3). Pertinently, Tengku Maimun CJ stated that '[a]rticle 149 is a safeguard of liberty'.[75] Rather than a provision imposing restraint on personal liberty, Article 149 is to operate as a limiting condition for any subversion or security-related offences that fall under its purview.

It is uncertain if the decision of the dissenting judges would have the effect of *enhancing* the constitutional balance pertaining to the executive, legislative and judicial powers. It is submitted that it is likely to be so. At least their judgments underline the importance of engaging with the *FC* as a whole as well as the proactive attitude towards the interpretation of a potentially drastic national security legislation, which would allow such type of laws to come under considerably more judicial scrutiny. This approach is a recurring expression of the prismatic approach to constitutional interpretation as applied in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* ('*Sivarasa Rasiah*').[76] In

[72] Quoting *Mamat bin Daud v Government of Malaysia* [1988] 1 MLJ 119.

[73] Article 149(1)(f) reads: 'which is prejudicial to public order in, or the security of, the Federation or any part thereof ...'.

[74] Wong Dak Wah CJSS specifically referred to ss 24, 25 and 26 of the *NSCA 2016*. Section 24, in particular, allows the security forces to control, restrict and prohibit the movement of any person or any vehicle within or into the security area.

[75] *NSCA (No. 1)* (n 3) [105].

[76] [2010] 3 CLJ 8.

Sivarasa Rasiah, Gopal Sri Ram FCJ pronounced a generous and liberal interpretation of fundamental rights in Part II of the *FC* which is now considered a part of the basic structure of the Constitution and it follows that any law that infringe this basic structure could be rendered unconstitutional under Article 4. In the absence of discussion on Article 4 and Article 149 of the *FC* in the majority's judgment, this left an impression that the constitutional capacity and power of the executive and legislature to enact severe laws is emboldened, whereas the central idea of the dissenting judges is that Parliament simply does not possess plenary authority to enact laws.

IV CONCLUDING REMARKS

The *NSCA No.1* is a case which illustrates a basic problem of government – the management of conflicts within the governmental administration of a democratic society. The case presented an opportunity for the Federal Court to define the relations between the main branches of government. The constitutional questions raised in the case, which concerned the constitutionality of the *NSCA 2016* would have required an interpretation of Article 4. The Federal Court faced a difficult task as the case involved a challenge to the government's right to secure national security and even its existence through the *NSCA 2016*. These questions were left undecided by the majority and unfortunately, there was no concern raised over this.

The issue, as this case note sought to analyse, was whether the majority was right to narrow the scope of its referral jurisdiction by refusing to answer the referred constitutional questions due to their 'abstract, academic or hypothetical' nature. The majority relied on previous authorities including *Mark Koding* and reasoned that the Federal Court's referral jurisdiction is to be discerned where it could be firmly based on the text of Article 128(2) of the Federal Constitution and s 84 of the *CJA 1964* rather than on the underlying notion of unrestricted judicial power and judicial review. This reasoning can be premised on an alternative view of a separated powers as an instance of the Federal Court respecting the legislative power of Parliament where a law concerned has not been invoked or exercised. In contrast, in holding the view that the *NSCA 2016* was in violation of Article 149, the minority's approach displayed a thorough, temperate and inventive use of judicial power that can be said to be imaginative and more receptive to constitutional challenges, as a greater significance was attached to Article 4 of the *FC* as well as to fundamental rights. It is submitted that the reasonings of the majority and the minority in the *NSCA No.1* case cannot be faulted for interpreting the *FC* inconsistently or incorrectly. In further regard to the minority's reasoning, it can be deduced that the Federal Court is able to exercise its judicial power to nullify an unconstitutional law to avert a *potential* calamity and therein lies the key difference between the two reasonings.

What is clear from the divergent opinions between the majority and the minority is that there would not be a dividing line in terms of the type of referred constitutional questions that can be classified as abstract, academic or hypothetical. The Federal Court in the *NSCA No.1* became divided when the questions raised a controversy that was not straightforward to be ascertained and can therefore be viewed as less abstract. Arguably, considerations of fundamental personal liberties and public interest do have a bearing

on whether there is a controversy that requires adjudication. It is suggested that the minority's view of a 'live' dispute under the guidance of Article 4 may be a suitable test in the discovery of a controversy and may represent a judicious use of judicial power.

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