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Contents

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ARTICLES

SHORTER ARTICLES AND NOTES

Editorial Note

As the new Dean at the Faculty of Law, Universiti Malaya I am grateful to the editors of the Journal for this opportunity to write the Editorial.

This issue of the JMCL touches on three discrete and distinct areas – the implications for competition law in Malaysia with the increasing use of algorithm decision making systems, the argument for the introduction of a single High Court for Malaysia and the notion of *jihad* in Islamic law and Islam. They are however characteristically concerned with the intersections between tradition and modernity.

There are two articles which particularly focus on Malaysia and how the Malaysian legal system could and should respond to the emerging and continuing challenges, constraints and opportunities. Malaysia is a legal system framed not only by its history and traditions, but also modernity. The article on algorithms and competition makes the case for revision and reform in Malaysia – it draws on how other competition regulators, such as those in the US and EU, respond to decisions taken by self-executing algorithmic systems. Principles of competition law concern in the main consistency in decision making whilst ensuring that society benefits from positive economic efficiencies. How the new technology achieves that poses a palpable challenge for regulators, the Malaysia competition authority not being in a different position. Crucially too, the article attempts to show that the lesson to be drawn from other jurisdictions is that there needs to be consistency between regulation and policy. The latter, it might be opined, is to be shaped by Malaysia's past interactions with the principles of ***her*** competition law and ***her*** perceptions of the economic interest of the country.

Closely allied to that paradigm of seeking out consistency and efficiencies, the article on the Malaysian High Court goes some way to press for a workable fusing of the current High Court of Malaya and High Court of Borneo. It is argued by the authors that safeguarding provisions could be incorporated into the Federal Constitution to provide for the right balance of efficiencies in the administration of justice and the need to preserve the East-West balance of power in Malaysia. An interesting aspect of the argument deserving further research and exploration is qualitative (and possibly quantitative) evidence showing that actual better efficiencies could be gained through a joinder of the two courts. The now fairly long history of the two courts in administering justice in Malaysia should be ripe enough for deeper analysis, following on from the tantalising suggestion made by the authors.

The final piece whilst not about domestic law or indeed, Malaysian law, places a concept in Islamic thinking, the notion of *jihad*, against the modern international law system. It is of course an important evaluation given Malaysia's Islamic roots and its

place in the modern multilateral rule based system of international law. The work offers a clarification of the notion of *jihad* in Islam and Islamic jurisprudence. There has been a certain disquiet amongst Muslim scholars, including those in Malaysia, that the legitimate concept of self defence embedded in *jihad* is frequently lost in a western dictated discourse. Here too the approach, premised on historical Islamic sources, seeks to demonstrate the full breadth of the theories of *jihad*. It goes on however to engage with modernity – at least the modern international law concept of self-defence. It reasons that the notion is indeed consistent with Islam which connotes an ideology of peace.

It might thus be said that these three pieces show quite starkly the spirit of this journal – the law and legal norms relevant to Malaysia are seen necessarily through comparative and internationalist lenses.

Prof Dr J.C.T. Chuah
Dean

THE ESTABLISHMENT OF ONE HIGH COURT FOR MALAYSIA: A PIPE DREAM OR A POSSIBILITY?

Sheila Ramalingam[*]

Dato' Johan Shamsuddin Sabaruddin[**]

Saroja Dhanapal[***]

Abstract

On 9 July 1963, the Malaysia Agreement was signed in London for the formation of Malaysia, which would consist of among others, the Federation of Malaya, Sabah and Sarawak. Malaysia officially came into being as a sovereign nation on 16 September 1963. The 1957 Federal Constitution (which hitherto only applied to the Federation of Malaya) was then extensively amended to make it into a Federal Constitution for Malaysia. However, many aspects of the judicial and legal system as it was before the formation of Malaysia were maintained, as a compromise for the states of Sabah and Sarawak to join Malaya and become the Federation of Malaysia. On the advent of the formation of Malaysia, the Cobbold Commission was of the view that due to the distance between West and East Malaysia, there should be a separate High Court in the Borneo territories presided over by its own Chief Justice, with appeals going to a Federal Supreme Court for the whole of Malaysia. The two High Courts in Malaysia have remained in place until now, almost 60 years later. This paper seeks to explore whether there is still a need for there to be two High Courts in Malaysia, and whether there is at least the possibility of establishing a single High Court for the whole of Malaysia in place of the current two High Courts of co-ordinate jurisdiction and status in Malaysia.

Keywords: High Court in Malaya – High Court in Sabah and Sarawak – co-ordinate jurisdiction and status – constitution of High Court – Malaysia

I INTRODUCTION

On 9 July 1963, the Malaysia Agreement was signed in London for the formation of Malaysia, which would consist of among others, the Federation of Malaya, Sabah and Sarawak.[1] Malaysia officially came into being as a sovereign nation on 16 September 1963. The 1957 Federal Constitution (which hitherto only applied to the Federation of

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[1] Singapore was initially part of the newly formed Malaysia in 1963, but left the Federation in 1965: see Mohamed Suffian, *Tun Mohamed Suffian's An Introduction To The Constitution of Malaysia* (Pacifica Publications, 3rd edn, 2007) 14.

Malaya) was then extensively amended to make it into a Federal Constitution for Malaysia. However, many aspects of the judicial and legal system as it was before the formation of Malaysia were maintained, as a compromise for the states of Sabah and Sarawak to join Malaya and become the Federation of Malaysia.

One of these enduring aspects, which is also perhaps one of the most unique and peculiar aspect of Malaysia's judicial system, is the setting up of two High Courts of co-ordinate jurisdiction and status when Malaysia was formed. On the advent of the formation of Malaysia, the Cobbold Commission was of the view that due to the distance between West and East Malaysia, there should be a separate High Court in the Borneo territories presided over by its own Chief Justice, with appeals going to a Federal Supreme Court for the whole of Malaysia.[2] Therefore, the formation of two High Courts in Malaysia was largely for geographical reasons. Following therefrom, by *Section 13(1) of the Malaysia Act 1963*, *Article 121* was inserted in the Federal Constitution to provide for the constitution and the jurisdiction of the High Courts. *Article 121(1)* provided, among others, that there shall be two High Courts of co-ordinate jurisdiction and status, namely one in the States of Malaya, which shall be known as the High Court in Malaya; and one in the Borneo States, which shall be known as the High Court in Borneo (later re-named the High Court in Sabah and Sarawak).

The two High Courts in Malaysia have remained in place until now, almost 60 years later. The two High Courts give rise to various legal conundrums with no clear resolution, for example the inability to transfer cases between the High Court in Malaya and the High Court in Sabah and Sarawak,[3] the use of different languages in both these courts, separate legal profession for West Malaysia, Sabah and Sarawak respectively, and different laws on the same subject matter between East and West Malaysia on issues such as limitation, the application of English laws, interpretation and revision of laws. For example, there are three laws on the legal profession in Malaysia: the *Legal Profession Act 1976*, the *Advocates Ordinance 1953* in Sabah and the *Advocates Ordinance 1953* in Sarawak. The *Advocates Ordinance 1953* in Sabah prohibits advocates and solicitors from West Malaysia and Sarawak from practising in Sabah. Similarly, the *Advocates Ordinance 1953* in Sarawak prohibits advocates and solicitors from West Malaysia and Sabah from practising in Sarawak. All this has led to confusion and inconsistency in the application of the law between East and West Malaysia.[4]

This paper therefore seeks to explore whether there is still a need for there to be two High Courts in Malaysia, and whether there is at least the possibility of establishing a single High Court for the whole of Malaysia in place of the current two High Courts of co-ordinate jurisdiction and status in Malaysia. For the purpose of this research, a qualitative research method is adopted. The data collection method is document analysis

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2 See paragraph 159 of the Cobbold Commission Report.

3 See for example *Fung Beng Tiat v Marid Construction Co.* [1996] 2 MLJ 413 and *The Board of Trustees Of The Sabah Foundation & Anor v The Board Of Trustees of Syed Kechik Foundation & Ors; Syed Salam Albukhary & Ors (Discovery Defendants)* [2009] 1 LNS 799.

4 For a more detailed discussion on the problems associated with the system of two High Courts in Malaysia, see Ramalingam, S., Sabaruddin, J. S., & Dhanapal, S. *The Legal and Practical Issues Related to the System of Two High Courts in Malaysia*. Asian Journal of Law and Policy Vol 3 No 1 (January 2023) 1–19. https://doi.org/10.33093/ajlp.2023.1. eISSN: 2785-8979. MMU Press.

consisting of both primary and secondary sources such as the Federal Constitution, Federal Acts of Parliament, textbooks, journal articles, published law reports, online articles, media reports, and case law.

II THE JUDICIARY

Article 121(1) establishes two High Courts of co-ordinate jurisdiction and status, namely one in the States of Malaya, which shall be known as the High Court in Malaya; and one in the Borneo States, which shall be known as the High Court in Sabah and Sarawak. However, although there are two High Courts in Malaysia, there are several branches of the High Court in different states.[5] The location of the High Court will then determine whether it is a branch of the High Court in Malaya or the High Court in Sabah and Sarawak. The local jurisdiction of the High Court in Malaya is the territory comprising of the states of Malaya namely Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territories of Kuala Lumpur and Putrajaya. In the case of the High Court in Sabah and Sarawak, the territory comprises the states of Sabah, Sarawak and the Federal Territory of Labuan.[6]

Appeals from both High Courts lie in the Court of Appeal, and thereafter to the apex court in Malaysia known as the Federal Court. The current civil court system in Malaysia may roughly be divided into the superior courts which comprise of the Federal Court, the Court of Appeal and the High Courts in Malaya and in Sabah and Sarawak; and the subordinate courts which consist of the Sessions Court and the Magistrates' Court.[7] Figure 1 sets out the current hierarchy of courts in Malaysia which is retrieved from the Malaysian Judiciary's website:

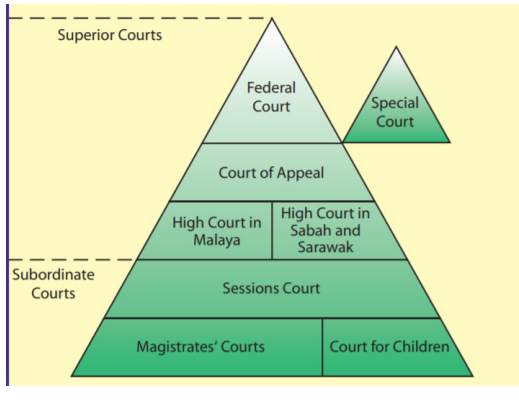

Figure 1: Hierarchy of Malaysian courts

Source: Malaysian Judicial Structure, retrieved from: http://www.kehakiman.gov.my/sites/default/files/document3/POJ-LAPORAN%20TAHUNAN/ENGLISH/IA-PT2.pdf

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5 See for example *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55.

6 See the Courts of Judicature Act 1964, s 3.

7 The Malaysian Judicial Structure, retrieved from: http://www.kehakiman.gov.my/sites/default/files/document3/POJ-LAPORAN%20TAHUNAN/ENGLISH/IA-PT2.pdf

Figure 2 sets out the current organization chart of the judiciary in terms of its administration, which is also retrieved from the Malaysian Judiciary's website:

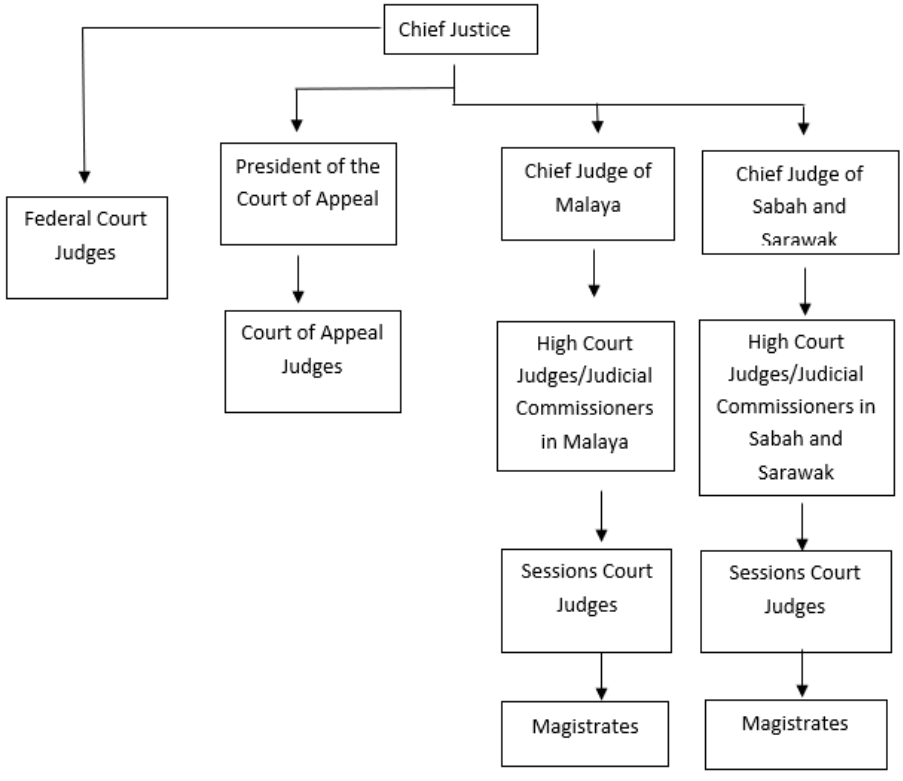

Figure 2: Organisation Chart of the Judiciary (Administration)

Source: Malaysian Judicial Structure, retrieved from: http://www.kehakiman.gov.my/sites/default/files/document3/POJ-LAPORAN%20TAHUNAN/ENGLISH/IA-PT2.pdf

A *The Cobbold Commission Report*

The Cobbold Commission was of the view that due to the distance between East and West Malaysia, there should be a separate High Court in the Borneo territories presided over by its own Chief Justice, with appeals going to a Federal Supreme Court for the whole of Malaysia.[8] It was also recommended that Judges of the Malayan High Court be made available to sit as Judges of the Borneo High Court as and when required and *vice versa*.[9] The Malayan members of the Commission[10] made further recommendations on the judiciary i.e. that there should be one Supreme Court for the Federation of Malaysia

[8] See paragraph 159 of the Cobbold Commission Report.
[9] Ibid.
[10] Dato' Wong Pow Nee and Enche M. Ghazali Bin Shafie.

with unlimited jurisdiction, appellate and original, throughout the Federation.[11] The High Court in Borneo should have unlimited original jurisdiction in all matters arising in the area,[12] and it should also be a court of appeal.[13]

It is clear from the recommendations of the Cobbold Commission that the establishment of two separate High Courts was due to the distance between East and West Malaysia. It is important to point out that this recommendation appears to have come from the members of the Cobbold Commission themselves, and not from representations made by the people of Sabah and Sarawak. If one reads the Cobbold Commission Report, one would see evidence and representations presented by the people of Sabah and Sarawak on issues such as immigration[14] and citizenship.[15] This is absent on the recommendation for the establishment of the High Court in Borneo (as it then was). Therefore, there is some doubt as to whether the people of Sabah and Sarawak themselves wished for a separate High Court. What is abundantly clear is that on record, the High Court in Sabah and Sarawak was established due solely to geographical reasons.

Another important recommendation is that the Commission clearly envisaged that the qualifications of the judges for both the High Courts were to be the same since it was recommended that judges may interchangeably sit in the High Court in Malaya as well as the High Court in Sabah and Sarawak. Therefore, in short, the Cobbold Commission recommended two exact same High Courts for East and West Malaysia respectively, separate only for geographical reasons.

B *The Inter-Governmental Committee Report*

The recommendations on the judiciary are found in paragraph 26 of the Inter-Governmental Committee Report. It stipulates that there shall be a Supreme Court of Malaysia for the whole of Malaysia in Kuala Lumpur. Normally at least one of the judges of the Supreme Court should be a judge with Bornean judicial experience when the court is hearing a case arising from a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State. What is 'Bornean judicial experience' is not spelt out in the report. One author opines that what this must mean is a judge who has either served in the High Court in Sabah and Sarawak or who has practised before that High Court, i.e. someone who has 'Sabah or Sarawak connections'.[16]

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11 See paragraphs 213 and 236(b)(i) of the Cobbold Commission Report.

12 Ibid.

13 Ibid.

14 See for example paragraph 148(g) of the Cobbold Commission Report.

15 See for example paragraph 148(k) of the Cobbold Commission Report.

16 Fong, J. C. *Constitutional Federalism in Malaysia*. (2nd Edition) (2016). Kuala Lumpur: Thompson/Sweet & Maxwell Asia, p 159. Section 2 of the Advocates Ordinance 1953 of Sabah defines a person with 'Sabah connections' as someone who was (a) born in Sabah or the Federal Territory of Labuan; (b) is ordinarily resident in Sabah for a continuous period of five years or more; or (c) domiciled in Sabah. Section 2 of the Advocates Ordinance 1953 of Sarawak defines a person with 'Sarawak connections' as someone who was (a) born in Sarawak; (b) is ordinarily resident in Sarawak for a continuous period of five years or more; or (c) domiciled in Sarawak.

The Inter-Governmental Committee also recommended that there should be separate High Courts for East and West Malaysia respectively.[17] Therefore, the Inter-Governmental Committee followed the recommendations of the Cobbold Commission, and preserved the position of there being one High Court for West Malaysia and one High Court for East Malaysia, as was the position before the formation of Malaysia. Each of the High Courts should have unlimited original jurisdiction and such appellate and revisionary jurisdiction over inferior courts. The High Court of the Borneo States should consist of a Chief Justice and not less than four and not (unless the Federal Parliament provides otherwise) more than eight Puisne Judges. The Chief Justice of the High Court of the Borneo States should be appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister of Malaysia, after consulting the Conference of Rulers, the Chief Justice of Malaysia, the Chief Justices of the High Courts and the Chief Ministers of the Borneo States. The Puisne Judges of the High Court of the Borneo States should be appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister, after consulting the Conference of Rulers, the Chief Justice of Malaysia and the Chief Justice of the Borneo States.

The qualifications for appointment as a judge of the Supreme Court or any of the High Courts should be as provided in the existing Federal Constitution.[18] It was also recommended that the Yang di-Pertuan Agong be empowered to transfer a Puisne Judge from one High Court to another. The provisions establishing the High Court of the Borneo States and providing for the appointment and removal of judges and for the court's jurisdiction may not be repealed or amended without the concurrence of the Governments of the Borneo States. Judicial Commissioners in the Borneo States should be appointed on the lines of the existing *Section 10(i)(b) of the Sarawak, North Borneo and Brunei (Courts) Order-in-Council* subject to the following two modifications; firstly that there should be two methods for the appointment of Judicial Commissioners i.e. by the Yang di-Pertuan Agong on the advice of the Chief Justice of Malaysia; and by the Head of State of North Borneo or Sarawak on the advice of the Chief Justice of the High Court; and secondly, Judicial Commissioners should be appointed only from among persons qualified under *Section 4(1) of the Advocates Ordinances of North Borneo and Sarawak* to practise as advocates before the High Court.

C *Amendments to the Federal Constitution and the Judiciary today*

Following the recommendations of the Cobbold Commission and the Inter-Governmental Committee Report, various amendments were made to the Federal Constitution on the judiciary.

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[17] In this paragraph the term 'Borneo States' could include Brunei; see (*) footnote to paragraph 26 of the Inter-Governmental Committee Report.

[18] Namely Article 125(1) on retirement age, Article 125(3) on removal of judges and Article 125(5) on suspension of judges.

1 *The establishment of two High Courts*

By *Section 13(1) of the Malaysia Act 1963*, *Article 121* was inserted in the Federal Constitution to provide for the constitution and the jurisdiction of the High Courts. *Article 121(1)* provided, among others, that there shall be two High Courts of co-ordinate jurisdiction and status, namely one in the States of Malaya known as the High Court in Malaya, with its principal registry in the States of Malaya as the Yang di-Pertuan Agong may determine; and one in the Borneo States known as the High Court in Borneo (later re-named the High Court in Sabah and Sarawak) with its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine. In determining where the principal registry of the High Court in Borneo is to be, the Yang di-Pertuan Agong shall act on the advice of the Prime Minister, who shall consult the Chief Ministers of the Borneo States and the Chief Justice (now Chief Judge) of the High Court in Borneo.[19]

Although there are two High Courts in Malaysia, there are several branches of the High Court in different states. In *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd*,[20] it was held as follows:

> *It is quite obvious that in creating a branch of the High Court in Malaya in each state, the legislature had two things in mind:*
>
> *(i) to enable the parties of a civil suit to have easy access to a branch of the High Court in Malaya located in a state where either the plaintiff or the defendant resides. When a person is sued for breach of contract or for that matter a tortious act when the breach or the tort was committed in the state where he resides, it is certainly unreasonable to require him to travel all the way, say, to Kuala Lumpur to defend himself…*
>
> *(ii) the obvious reason for the setting up of a branch of the High Court in Malaya in every one of the 11 states is to facilitate the disposal of cases in Malaya and to cut down, even if it is not yet possible to obliterate, the backlog of cases pending in any one or more of the branches of such High Court.*

The location of the High Court will then determine whether it is a branch of the High Court in Malaya or the High Court in Sabah and Sarawak. The local jurisdiction of the High Court in Malaya is the territory comprising of the states of Malaya namely Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territories of Kuala Lumpur and Putrajaya. In the case of the High Court in Sabah and Sarawak, the territory comprises the states of Sabah, Sarawak and the Federal Territory of Labuan.[21]

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19 See of the Malaysia Act 1963, s 13(4) and the Federal Constitution, Art 121(4).

20 [1987] 1 LNS 55.

21 See the Courts of Judicature Act 1964, s 3.

The High Court has two types of jurisdictions: original and appellate. Basically, the original jurisdiction of the High Court includes the jurisdiction to hear criminal and civil cases. The original jurisdiction of the High Court is unlimited in the sense that it may award a maximum sentence in criminal cases and in civil cases it may decide on matters where the claim exceeds RM1,000,000.[22] *Section 22 of the Courts of Judicature Act 1964* describes the criminal jurisdiction of the High Court to include offences committed (a) within its local jurisdiction, (b) on the high seas on board of a ship or on an aircraft registered in Malaysia, (c) by a citizen or a permanent resident of Malaysia on a ship or on an aircraft, or (d) by any person on the high seas where the offence is a piracy by the law of nations.

Section 23(1) of the Courts of Judicature Act 1964 states that the High Court shall have jurisdiction to try all civil proceedings where - (a) the cause of action arose; (b) the defendant or one of several defendants resides or has his place of business; (c) the facts on which the proceedings are based exist or are alleged to have occurred; or (d) any land the ownership of which is disputed is situated. *Section 24 of the Courts of Judicature Act 1964* allocates the specific jurisdiction of the High Court to include (a) jurisdiction in divorce and matrimonial cases, (b) jurisdiction in matters of admiralty which is similar to the jurisdiction of the High Court of Justice in England as stated in the United Kingdom Supreme Court Act 1981, (c) jurisdiction relating to bankruptcy or to companies, (d) jurisdiction to appoint and control guardians for infants as to the person and to the property, (e) jurisdiction to appoint and control guardians to idiots, mentally disordered persons and persons of unsound mind, (f) jurisdiction to grant probate of wills and testaments, and letters of administration of the estates of deceased for property situated within the High Court's territorial jurisdiction.

The appellate jurisdiction of the High Court also includes jurisdiction to hear criminal and civil appeals. *Section 26 of the Courts of Judicature Act 1964* states the jurisdiction of the High Court to hear criminal appeals from the subordinate courts within its territorial jurisdiction. For civil appeals, *Section 28(1)* prescribes that the High Court in general shall not hear civil appeals from subordinate courts which amount is RM10,000 or less except on the question of law. However, on matters relating to maintenance of wives or children, the High Court shall hear such appeals from the subordinate courts regardless of the amount involved.[23]

In any proceedings in the subordinate court, matters regarding the effect of any provision of the Constitution must be referred to the High Court.[24] For that the High Court may order the records of the particular proceedings to be submitted for the purpose of examination and decision and that it shall be carried out in accordance with *Section 84* of the Act.[25] The decision on the particular issue will be deemed as rules of court for the purposes of *Article 128(2) of the Federal Constitution.*[26] However, the High Court

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22 See the Subordinate Courts Act 1948, s 65(1)(b) which limits the civil jurisdiction of the Sessions Courts to hear a claim where the amount in dispute or the value of the subject matter does not exceed RM1,000,000.00.

23 Section 28(2) of the Courts of Judicature Act 1964.

24 Section 30(1) of the Courts of Judicature Act 1964.

25 Section 30(2) of the Courts of Judicature Act 1964.

26 Section 30(3) of the Courts of Judicature Act 1964.

in discharging this function is acting within its original jurisdiction.[27] The High Court also has general revisionary and supervisory jurisdiction over all the subordinate courts in both civil and criminal cases.[28] An overview of the jurisdiction of the High Court is provided in Table 1:

TABLE 1: OVERVIEW OF THE JURISDICTION OF THE HIGH COURT

Civil jurisdiction	Criminal jurisdiction	Appellate jurisdiction
All civil matters, where amount in dispute exceeds RM1,000,000. Matters relating to divorce and matrimonial cases, appointment of guardians of infants, the granting of probate of wills and testaments and letters of administration of the estate of deceased person, bankruptcy and companies, admiralty.	All matters, generally for offences which the Magistrates and Sessions Courts have no jurisdiction, e.g. offences which carry the death penalty.	Appeals from the Magistrates and Sessions Courts in both civil and criminal matters. For civil cases, amount in dispute must exceed RM10,000 except where it involves a question of law. Monetary limit does not apply to maintenance of wives and children. General revisionary and supervisory jurisdiction over all subordinate courts.

2 *The constitution of the High Courts*

By *Section 16 of the Malaysia Act 1963*, *Article 122A* was inserted in the Federal Constitution to provide for the constitution of the High Courts. *Article 122A* initially provided that each of the High Courts shall consist of a Chief Justice (now Chief Judge) and not less than four other judges and shall not, until Parliament otherwise determines, exceed eight. *Article 122A* has been amended several times. *Article 122A* has been renumbered as *122AA*, and *Article 122A* in its present form deals with the constitution of the Court of Appeal. *Article 122AA* now provides that each of the High Courts shall consist of a Chief Judge and not less than four other judges; but the number of other judges shall not, until the Yang di-Pertuan Agong otherwise provides, exceed sixty for the High Court in Malaya and thirteen for the High Court in Sabah and Sarawak.[29]

By *Section 17 of the Malaysia Act 1963*, *Article 122B* was inserted in the Federal Constitution to provide for the appointment of, among others, the Chief Justices of the High Courts and (subject to *Article 122C*) the other judges of the High Court by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.[30] Before tendering his advice on the appointment of the Chief Justice of each of the High Courts, the Prime Minister shall consult the Chief Justice

[27] Compared to the role of the Federal Court, where discharging of the same function under Article 128(2) of the Federal Constitution would be within its referral jurisdiction.

[28] Section 35 of the Courts of Judicature Act 1964.

[29] See Amending Order P.U. (A) 384/06 Constitution of the High Court (Judges) Order 2006.

[30] Federal Constitution, Art 122B(1).

of each of the High Courts and, if the appointment is to the High Court in Borneo, the Prime Minister shall consult the Chief Minister of each of the Borneo States.[31] If the appointment is of a judge to one of the High Courts, the Prime Minister before tendering his advice shall consult the Chief Justice of that High Court.[32] These provisions echo the recommendations made in the Inter-Governmental Committee Report. *Article 122B* was amended several times principally to effect changes to the names 'Supreme Court' to 'Federal Court', 'Lord President' to 'Chief Justice' and 'Chief Justice' to 'Chief Judge'.[33] The High Courts have a Chief Judge for both Malaya and for Sabah and Sarawak. However, in order of precedence, the Chief Judge of the High Court in Malaya takes precedence over the Chief Judge of the High Court in Sabah and Sarawak.[34]

By *Section 19 of the Malaysia Act 1963*, the qualifications for appointment as a judge of any of the High Courts were provided for in *Article 123 of the Federal Constitution*. A person is qualified for appointment under *Article 122B* as a judge of the Federal Court or as a judge of any of the High Courts if he is a citizen; and for the ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another. By *Section 22 of the Malaysia Act 1963*, the provisions in *Articles 125 to 127 of the Federal Constitution* on the retirement age, removal, suspension and remuneration of the judges of the superior courts (including the High Court) were adopted.[35] High Court Judges are not public servants as they fall under the exception of the service as provided under *Article 132(3)(c) of the Federal Constitution*. This means that the Judge is independent, his monthly remuneration is sourced from the Consolidated Fund of the country (which is not subject to the yearly country's budget)[36] and that his remuneration plus other terms of his office (including pensions) shall not be altered to his disadvantage.[37]

Some of the duties of the Chief Judges are to determine the dates and places for sittings of the Court,[38] issue directions on the distribution of business among High Court Judges whether of a particular or general nature,[39] issue directions on the distribution of business in the various departments of the High Court Registry,[40] and determine the days and hours when the High Court Registry shall be open to the public.[41] With regard to subordinate courts, Sessions Court Judges are appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judges,[42] and the Sessions Courts are located at such

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31 Federal Constitution, Art 122B(3).
32 Federal Constitution, Article 122B(4).
33 See Constitution (Amendment) Act 1966 (Act 59), Constitution (Amendment) Act 1983 (Act A566) and Constitution (Amendment) Act 1994 (Act A855).
34 See the Courts of Judicature Act 1964, s 8.
35 See the Federal Constitution, Arts 125(1), (3B), (3) and (4).
36 Federal Constitution, Art 125(6).
37 Federal Constitution, Article 125(7).
38 See the Courts of Judicature Act 1964, s 19.
39 See the Courts of Judicature Act 1964, s 20.
40 See the Rules of Court 2012, Order 60 rule 1.
41 See the Rules of Court 2012, Order 61 rule 3.
42 Subordinate Courts Act 1948, s 59(3).

places as the Chief Judge may direct.[43] First Class Magistrates are appointed by the State Authority on the recommendation of the Chief Judge.[44] The dismissal or termination of service of these officers are referred to the Judicial and Legal Service Commission,[45] of which the two Chief Judges are members.[46] Lastly, the Chief Judges with the concurrence of the Yang di-Pertuan Agong are also empowered to appoint as many subordinate officers as necessary for the due administration of justice.[47]

One important provision which affects the judiciary is *Article 161E(4) of the Federal Constitution* which provides for the control of immigration i.e. the entry into and residences in the East Malaysian States. As a result, *Section 66(1) of the Immigration Act 1959/63* provides that a citizen shall not be entitled to enter an East Malaysian State without having obtained a Permit or Pass in that behalf. However, this restriction is not applicable to, among others, judges of the Federal Court or of the High Court in Sabah and Sarawak, or members of any Commission or Council established by the Federal Constitution or by the Constitution of the East Malaysian State.[48] A learned author opines that this exception should now also include the Judges of the Court of Appeal and judges of the High Court in Malaya (who may be invited to sit as a judge of the Court of Appeal).[49] However, as it stands now, it would appear that a Judge of the High Court in Malaya sitting as a Judge of the Court of Appeal at Kuching, would require a Permit or Pass to enter East Malaysia. Similarly, a Judge of the High Court in Malaya who is transferred to the High Court in Sabah and Sarawak would be required to obtain a Permit or Pass. This actually contradicts the spirit of the recommendations of the Cobbold Commission which called for the interchangeability of judges between the High Courts.

3 *Appointment of Judicial Commissioners*

In accordance with *Section 16(3) of the Malaysia Act 1963*, the original *Article 122A(3)* provided that for the dispatch of business of the High Court in Borneo in an area in which a judge of the court is not available, the Yang di-Pertuan Agong acting on the advice of the Lord President, or for an area in either State, the Yang di-Pertua Negeri of the State acting on the advice of the Chief Justice of that court, may by order appoint Judicial Commissioners in that area for such period of for such purposes as may be specified in the order, an advocate or person professionally qualified to be admitted as an advocate of the court. On the powers of the Judicial Commissioner, *Article 122A(4)*[50] provided that a Judicial Commissioner shall have the same functions, powers and enjoy the same

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43 Subordinate Courts Act 1948, s 59(4).

44 Subordinate Courts Act 1948, s 78, applicable to the Federal Territory via P.U. (A) 43/1974.

45 See the Federal Constitution, Arts 138 and 144. See also Hamid, Y. T. S. D. A. (2012). *Administration of Justice in Malaysia*. The Denning Law Journal, *2*(1), 1-22, at page 16. Retrieved from: file:///C:/Users/Sheila%20Lingam/Downloads/156-520-1-PB.pdf

46 See the Judicial and Legal Service Commission website at http://www.spkp.gov.my/portal/eng/ahliSuruhanjaya.php

47 Subordinate Courts Act 194, s 106.

48 Immigration Act 1959/63, Section 66(1)(c).

49 Fong, J. C. *Constitutional Federalism in Malaysia*. (2nd Edition) (2016). Kuala Lumpur: Thompson/Sweet & Maxwell Asia. Page 158.

50 See the Malaysia Act 1963, Section 16(4).

immunities as a judge of that court. A similar provision for the appointment of Judicial Commissioners of the High Court in Malaya was provided for under *Article 122A(5)*.

It would be noted that different criteria apply in the appointment of Judicial Commissioners under *Clause (3)* and under *Clause (5) of Article 122A*. A Judicial Commissioner appointed for an area in the Borneo State under *Clause (3)* would be any advocate or person professionally qualified to be admitted as an advocate of the court and, subject to the limitations or conditions imposed by the order appointing him, shall have power to perform such functions of a judge of the High Court in Borneo. Whereas a Judicial Commissioner appointed for the dispatch of business in the High Court in Malaya under *Clause (5)* can be any person who is qualified for appointment as a Judge of the High Court (i.e. he must satisfy the conditions in *Article 123*) and his appointment is not subject to any limitations or conditions. *Article 122A* was amended by the *Constitution (Amendment) Act 1994,* by which amendment, *Clauses (3)*, *(4) and (5) of Article 122A* were deleted and a new *Article 122AB* was inserted for the appointment of Judicial Commissioners of both the High Courts. By the deletion of *Clause (3) to Article 122A* the constitutional right accorded to the Yang di-Pertua Negeri of Sabah and of Sarawak to appoint Judicial Commissioners on the advice of the Chief Judge of the High Court in Sabah and Sarawak was abrogated. Also, the deletion of *Clause (3) to Article 122A* revoked the requirement that a Judicial Commissioner appointed for a Borneo State should be an advocate or person professionally qualified to be admitted as an advocate of that court i.e., someone with 'Sabah connections' or 'Sarawak connections'.

In 2009, the Judicial Appointments Commission was set up under the *Judicial Appointments Commission Act 2009* mainly to assist the Prime Minister when advising the Yang di-Pertuan Agong regarding the appointment of superior court judges. The Judicial Appointments Commission comprises of the Chief Justice as the chairman of the Commission, President of the Court of Appeal, Chief Judges of the High Courts, a Federal Court Judge to be appointed by the Prime Minister and four eminent persons who are not members of the executive or the public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association (now known as the Sabah Law Society), the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.[51]

In addition to the qualification of superior court judges as stipulated in *Article 123 of the Federal Constitution*, *Section 23(2) of the 2009 Act* provides for further or other criteria of a candidate to be selected, which includes competency, integrity and experience; objective, fair, impartial and good moral character; decisiveness, ability to make timely judgments and good legal writing skills; industriousness and ability to manage cases well; and physical and mental health. A judge or judicial commissioner who has three or more pending judgments or unwritten grounds of judgments overdue for more than 60 days must not be selected.[52] A candidate who may provide diversity in the fields of

51 Judicial Appointments Commission Act 2009, s 5.

52 Judicial Appointments Commission Act 2009, s 23(3).

legal expertise and judicial knowledge will have a greater chance to be selected by the Commission.[53]

The 2009 Act is seen to have established a more standardised and systematic process of selecting superior court judges; however, it can also be seen as another 'encroachment' of the executive into the judiciary as it empowers the Prime Minister to select or remove members of the Commission and to decide on their allowances. The Prime Minister may or may not accept the recommendation by the Commission in that if he is unsatisfied with the recommendation of the Commission, he may request for further names to be recommended and the Commission shall adhere to that request.[54] However, the stipulated requirements as to procedures and related qualifications of the members of the Commission need to be adhered to strictly in order to ensure the quality and good reputation of those entrusted with the management of the judiciary.[55]

The constitutionality of *Article 122A* and the *Judicial Appointments Commission Act 2009* was addressed in *The Government of Malaysia v Robert Linggi*.[56] In this case, the respondent argued, among others, that the amendments to *Article 122A(3) and (4) of the Federal Constitution*, and the new *Article 122AB of the Federal Constitution* are null and void in so far as they concern the removal of the power of the respective Yang di-Pertua Negeri of Sabah and Sarawak to appoint judicial commissioners. In particular, the respondent argued that the amendments were contrary to *Article 161E(2)(b) of the Federal Constitution* which provides that the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak is required when any amendment to the Federal Constitution affects the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court, which concurrence was not obtained when amending *Article 122A*. In the High Court, it was held that the amendments to *Article 122A* and the insertion of *Article 122AB* took away the powers of the Yang Di-Pertua Negeri of Sabah and Sarawak to appoint judicial commissioners, who were held to be judicial officers of the court and therefore constituted part of the structure of the court. As the removal of such power affected the 'constitution' of the High Court, there was thus a non-compliance with *Article 161E(2)(b) of the Federal Constitution*. This made the amendments void. The decision of the High Court was, however, reversed on appeal to the Court of Appeal. In allowing the appeal, the Court of Appeal held that the appointment of judicial commissioners does not amount to the appointment of 'judges of that Court' within the meaning of *Article 161E(2)(b) of the Federal Constitution*.

Arguably, the effect of *Article 122AB of the Federal Constitution* is that the appointment of judicial commissioners to the High Court in Sabah and Sarawak is now no longer within the purview of the Yang di-Pertua Negeri of Sabah and Sarawak. This is then something which goes against the spirit of *Article 161E(2)(b) of the Federal Constitution* but has been condoned by the Court of Appeal in the *Robert Linggi* case.

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53 Judicial Appointments Commission Act 2009, s 23(4).

54 Judicial Appointments Commission Act 2009, s 24.

55 Ashgar Ali Ali Mohamed (General Editor). *Malaysian Legal System*. (2014). Selangor: The Malaysian Current Law Journal Sdn. Bhd. Chapter 25, pages 678-683.

56 [2015] 1 LNS 1515.

4 *Other matters*

The recommendation of the Inter-Governmental Committee that normally at least one of the judges of the Supreme Court should be a judge with 'Bornean judicial experience' when hearing a case arising in a Borneo State and that it should sit in that Borneo State, was not specifically provided for in the Federal Constitution. There is a case involving a timber company in Sarawak, Keruntum Sdn. Bhd., which lasted about 30 years in litigation over the issue of a revocation of a timber licence. Keruntum Sdn. Bhd.'s appeal was finally dismissed by the Federal Court on 15 March 2017.[57] However, in a review application,[58] it was then argued on behalf of Keruntum Sdn. Bhd. that the decision of the Federal Court should be set aside because in accordance with paragraph 26(4) of the Inter-Governmental Committee Report, at least one of the Federal Court judges should have 'Bornean experience' when hearing a case originating from Sabah and Sarawak. The Sarawak Government argued that this was not a legal or constitutional right.[59] The Federal Court in the review application held that a litigant could not enforce the recommendation under paragraph 26(4) of the Inter-Governmental Committee Report as such a recommendation was never implemented by legislative, executive or other action by the governments of the Federation of Malaya, Sabah or Sarawak, and was never incorporated into the Federal Constitution.[60] This position was affirmed and followed by the majority in the subsequent Federal Court decision of *TR Sandah ak Tabau & Ors*.[61]

What is of particular interest here is the unwavering stance taken by the Sarawak Government which is to move away from the recommendations of the Inter-Governmental Committee Report and, it is argued, move towards a more unified judiciary that is not delineated by mere geography.

By *Section 18 of the Malaysia Act 1963*, *Article 122C* was included into the Federal Constitution which provided for the transfer of a judge from one High Court to another. However, this is arguably still subject to immigration restrictions provided under *Article 161E(4) of the Federal Constitution* and *Section 66(1) of the Immigration Act 1959/63*. *Section 20 of the Malaysia Act 1963* provided for *Article 124 of the Federal Constitution* regarding the taking of the oath of office and allegiance as set out in the *Sixth Schedule of the Federal Constitution* by among others, High Court Judges. A person taking the oath on becoming a judge of a High Court shall do so in the presence of the Chief Judge of that Court or in his absence, the next senior judge available of that Court.[62] *Section*

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57 The Borneo Post Online. (2017, 16 March). *Timber company loses 30-year court battle*. Retrieved from http://www.theborneopost.com/2017/03/16/timber-company-loses-30-year-court-battle/

58 Pursuant to the Rules of the Federal Court 1994, rule 137.

59 V Anbalagan. (2017, 15 August). *Govt lawyer: No need for judge with Bornean experience to hear case.* Free Malaysia Today. Retreived from: http://www.freemalaysiatoday.com/category/nation/2017/08/15/govt-lawyer-no-need-for-judge-with-bornean-experience-to-hear-case/

60 *Keruntum Sdn Bhd v The Director of Forests & Ors* [2018] 4 CLJ 145.

61 *TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest, Sarawak & Anor and other appeals* [2019] 6 MLJ 141, 164-6 [25-7]. But see the dissenting judgment of David Wong CJ (Sabah and Sarawak) (as he then was), especially at page 193 [96].

62 See the Malaysia Act 1963, s 20(5); Federal Constitution, Art 124(5).

21 of the Malaysia Act 1963 introduced *Article 131A of the Federal Constitution* which provided for the performance of duties of superior court judges in the event of a vacancy or inability to act.

From the data stated in the paragraphs above, a concise comparison of the recommendations made by the Cobbold Commission, the recommendations of the Inter-Governmental Committee and the amendments made to the Federal Constitution and various Acts of Parliament on the judiciary is provided in Table 2:

TABLE 2: COMPARISON OF THE RECOMMENDATIONS OF THE COBBOLD COMMISSION, THE INTER-GOVERNMENTAL COMMITTEE AND THE AMENDMENTS TO THE FEDERAL CONSTITUTION AND OTHER LEGISLATION ON THE JUDICIARY

Recommendations by the Cobbold Commission	**Recommendation of Inter-Governmental Committee**	**Amendments to the Federal Constitution / Federal Acts**
Due to the distance between Borneo and Malaya, a separate High Court was recommended in the Borneo territories presided over by its own Chief Justice, with appeals to a Federal Supreme Court.	There should be two High Courts in Malaysia of co-ordinate jurisdiction and status i.e. the High Court in Malaya and the High Court in Borneo.	*Article 121(1)(b) of the Federal Constitution* established 2 High Courts of coordinate jurisdiction and status namely the High Court in Malaya and the High Court in Borneo (later the High Court in Sabah and Sarawak)[63].
The High Court in Borneo should have unlimited original jurisdiction in all matters arising in the area, and the High Court should also be a court of appeal.	Each High Court should have its own Chief Justice and unlimited original jurisdiction in the States for which it is established, as well as appellate and revisionary jurisdiction over inferior courts in those States.	The High Court in Sabah and Sarawak has its own Chief Justice (later Chief Judge), and the Chief Ministers of Sabah and Sarawak must be consulted on the appointment of the Chief Judge[64].
There should be one Supreme Court for the Federation of Malaysia with unlimited original and appellate jurisdiction.	There shall be a Supreme Court of Malaysia.	Both High Courts have original and appellate jurisdiction[65].

The commonalities between the High Court in Malaya and the High Court in Sabah and Sarawak are provided in Table 3:

63 Malaysia Act 1963, s 13(1)(b) and Federal Constitution, Article 121(1)(b).

64 Malaysia Act 1963, s 17(3) and Federal Constitution, Article 122B(3).

65 See generally the Courts of Judicature Act 1964, s 22 to 35.

TABLE 3: THE COMMONALITIES BETWEEN THE HIGH COURT IN MALAYA AND THE HIGH COURT IN SABAH AND SARAWAK

Subject Matter	Legal Provisions
Jurisdiction	• Original civil jurisdiction (Sections 23, 24 and 30 of the Courts of Judicature Act 1964). • Original criminal jurisdiction (Section 22 of the Courts of Judicature Act 1964). • Appellate jurisdiction (Sections 26 and 28 of the Courts of Judicature Act 1964). • General supervisory and revisionary jurisdiction over all subordinate courts (Section 35 of the Courts of Judicature Act 1964).
Qualification of judges	Article 123 of the Federal Constitution
Retirement age, removal, suspension and remuneration of judges	Articles 125 to 127 of the Federal Constitution
Appointment of judicial commissioners	• Article 122AB of the Federal Constitution • Judicial Appointments Commission Act 2009
Duties of Chief Judges	• Sections 19 and 20 of the Courts of Judicature Act 1964 • Order 60 rule 1 and Order 61 rule 3 of the Rules of Court 2012 • Sections 59(3), 59(4), 73 and 106 of the Subordinate Courts Act 1948 • Articles 138 and 144 of the Federal Constitution

The differences between the High Court in Malaya and the High Court in Sabah and Sarawak are provided in Table 4:

TABLE 4: THE DIFFERENCES BETWEEN THE HIGH COURT IN MALAYA AND THE HIGH COURT IN SABAH AND SARAWAK

Subject matter	High Court in Malaya	High Court in Sabah and Sarawak
Principal registry	Such place in the States of Malaya as the Yang di-Pertuan Agong may determine[66].	Such place in the states of Sabah and Sarawak as the Yang di-Pertuan Agong may determine on advice of the Prime Minister who shall consult the Chief Ministers of the Borneo States and the Chief Judge of the High Court in Sabah and Sarawak.[67]
Constitution of High Court	Consists of a Chief Judge and not less than 4 and not more than 60 other judges.[68]	Consists of a Chief Judge and not less than 4 and not more than 13 other judges.[69]

[66] Federal Constitution, Art 121(1)(a).
[67] Federal Constitution, Art 121(1)(b) and (4).
[68] Federal Constitution, Art 122AA(1)(a).
[69] Federal Constitution, Art 122AA(1)(b).

TABLE 4: THE DIFFERENCES BETWEEN THE HIGH COURT IN MALAYA AND THE HIGH COURT IN SABAH AND SARAWAK (continued)

Subject matter	High Court in Malaya	High Court in Sabah and Sarawak
Appointment of Chief Judges of the High Courts	By the Yang di-Pertuan Agong acting on the advice of the Prime Minister, who shall consult the Conference of Rulers,[70] the Chief Justice[71] and the Chief Judge of each of the High Courts.[72]	By the Yang di-Pertuan Agong acting on the advice of the Prime Minister, who shall consult the Conference of Rulers,[73] the Chief Justice,[74] the Chief Judge of each of the High Courts[75] and the Chief Minister of each of the States of Sabah and Sarawak.[76]
Appointment of judges of the High Court	By the Yang di-Pertuan Agong acting on the advice of the Prime Minister, who shall consult the Conference of Rulers,[77] the Chief Justice[78] and the Chief Judge of the High Court in Malaya.[79]	By the Yang di-Pertuan Agong acting on the advice of the Prime Minister, who shall consult the Conference of Rulers,[80] the Chief Justice[81] and the Chief Judge of the High Court in Sabah and Sarawak.[82]
Exemption from control of entry into Sabah and Sarawak	Judges from the High Court in Malaya must obtain a Permit or Pass under *Section 66(1) of the Immigration Act 1959/63* to enter Sabah or Sarawak	Judges of the High Court in Sabah and Sarawak are exempted from obtaining any Permit or Pass under *Section 66(1)(c) of the Immigration Act 1959/63*

D *Establishing a single High Court in Malaysia*

It would be remembered that the sole reason for establishing two High Courts is for geographical reasons, as stated in the Cobbold Commission Report.[83] That was in 1962. Since then, technology and travel have advanced manifold so that distance and geographical location are no longer a hindrance or concern.

For the two High Courts, there is now in place the integrated electronic court management system named the E-Court. The Courts in the Klang Valley and Putrajaya

70 Federal Constitution, Art 122B(1).
71 Federal Constitution, Art 122B(2).
72 Federal Constitution, Art 122B(3).
73 Federal Constitution, Art 122B(1).
74 Federal Constitution, Art 122B(2).
75 Federal Constitution, Art 122B(3). See also the Federal Constitution, Art 161E(2)(b).
76 Ibid.
77 Federal Constitution, Art 122B(1).
78 Federal Constitution, Art 122B(2).
79 Federal Constitution, Art 122B(4).
80 Federal Constitution, Art 122B(1).
81 Federal Constitution, Art 122B(2).
82 Federal Constitution, Art 122B(4).
83 Paragraphs 159 and 236(b)(i) of the Cobbold Commission Report.

were the first to be equipped with the E-Court system,[84] starting in stages from as early as 2009[85] and now has been extended to the High Courts in Johor Bahru, Ipoh, Kuala Terengganu and Kuching.[86] There are currently six technology applications adopted:[87] (i) E-Filing System which allows for electronic submission of court documents for purposes of filing and registration using the Internet; (ii) Case Management System (CMS) to improve service efficiency in handling cases managed by the court through a computer system. It allows for the computerisation of court processes, retrieval of information online, easy monitoring of performance and generates statistics automatically which in turn causes uniformity in reporting; (iii) Queue Management System (QMS) which is an electronic system that arranges for the attendance of lawyers in court; (iv) Court Recording and Transcription (CRT) which consists of video and audio recording both in open court and in chambers. All hearing and trials transcribed are stored electronically. Judges and lawyers may have access by way of compact disks; (v) Audio and Video Conference System (VCS) to conduct hearings and trials without the need of physically being present in court which saves transport fares, accommodation and related allowances. The system also allows users to share documents, picture files, images and the like among those in remote locations. This system is at the moment only used in the High Courts in

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84 Mohamed, D. *Electronic court system (E-court): development and implementation in the Malaysian courts and other jurisdictions*. (2011). The Law Review, 476-489 at page 479. Retrieved from: http://irep.iium.edu.my/7628/1/E-court_by_Duryana_Mohamed.pdf

85 Ibid.

86 Zain, N. A. M., Saman, W. S. W. M., & Yatin, S. F. M. *Managing Electronic Records in Malaysian Civil Courts: A Review of Literature*. (2017). International Journal of Academic Research in Business and Social Sciences, *7*(8), 909-919. Retrieved from: http://hrmars.com/hrmars_papers/Managing_Electronic_Records_in_Malaysian_Civil_Courts_A_Review_of_Literature.pdf

87 See Hamin, Z., Othman, M. B., & Mohamad, A. M. *Socio-legal implications of courtroom technology*. In *Humanities, Science and Engineering (CHUSER), 2011 IEEE Colloquium on* (pp. 143-147). IEEE. Retrieved from: https://www.researchgate.net/profile/Ani_Munirah_Mohamad/publication/261039454_Socio-legal_implications_of_courtroom_technology/links/0c960528c8ff0eb9a9000000.pdf, Hamin, Z., Othman, M. B., & Mohamad, A. M. (2012, June). *Benefits and achievements of ICT adoption by the High Courts of Malaysia*. In *Humanities, Science and Engineering Research (SHUSER), 2012 IEEE Symposium on* (pp. 1233-1238). IEEE. Retrieved from: https://www.researchgate.net/profile/Ani_Munirah_Mohamad/publication/258653167_Benefits_and_achievements_of_ICT_adoption_by_the_High_Courts_of_Malaysia/links/0c960528c9160c5fb0000000.pdf, Saman, W. S. W. M., & Haider, A. *The Implementation of Electronic Records Management System: A Case Study in Malaysian Judiciary.* In *AMCIS*. (2011). Retrieved from: https://pdfs.semanticscholar.org/887c/054381073aab08d6fafc29c5321a3ae0dbd8.pdf, Saman, W. S. W. M., & Haider, A. *Electronic court records management: a case study* (Doctoral dissertation, IBIMA-International Business Information Management Association). (2012). Retrieved from: https://pdfs.semanticscholar.org/1a78/dbd9f0dfe211755a0458c2b4f3c1ce69fbfb.pdf, Saman, W. S. W. M., & Haider, A. *E-court: Information and communication technologies for civil court management*. In *Technology Management in the IT-Driven Services (PICMET), 2013 Proceedings of PICMET'13:* (pp. 2296-2304). IEEE. Retrieved from: http://egov.ufsc.br/portal/sites/default/files/06641835_0.pdf, Wan, S., Mohd, S. W., & Haider, A. *E-court: technology diffusion in court management.* (2013). Association for Information Systems. Retrieved from: http://search.ror.unisa.edu.au/record/UNISA_ALMA51108680010001831/media/digital/open/991591020110 1831/12143259650001831/13143257590001831/pdf, and Kamal Halili Hassan & Maizatul Farisah Mokhtar. *The E-Court System in Malaysia*. 2011 2nd International Conference on Education and Management Technology IPCSIT vol 13. Singapore: IACSIT Press.

Sarawak; and (vi) Integrated Community and Advocates' Portal (CAP) to enable easy communication between the courts and the public via Short Messaging System (SMS) to notify on change of hearing or trial dates. Apart from effectively clearing backlog and increasing the settlement rate of cases,[88] the E-Court system is also an effective way of bringing the country closer together.

A new *Order 63A* was also included in the *Rules of Court 2012* on electronic filing. *Order 63A* establishes an electronic filing service which allows most pleadings and court documents to be electronically filed. Therefore, there is now no longer any real need for there to be two High Courts of coordinate jurisdiction and status. There can only be one High Court, with branches in all states, just like what is in place today. The problem with 'distance' envisaged by the Cobbold Commission all those years ago has been bridged with technology. A party who is electronically filing a Writ and Statement of Claim need only look at *Section 23 of the Courts of Judicature Act 1964* to determine which branch of the High Court would be the most appropriate to hear the claim. There will no longer be the issue of non-transferability of cases from one High Court to another.

For more effective administration, the High Court in Malaya at Kuala Lumpur has specialised divisions, namely the Criminal Division, Civil Division, Commercial Division, Appellate and Special Powers Division, Family Division, Muamalat Division, Intellectual Property Division and Information Technology Division. The New Commercial Court deals with matters such as admiralty, banking and financial transactions (except Muamalat cases), company law, partnership, insurance, maritime, sale of goods and agency. A Construction Court was also established pursuant to the *Construction Industry Payment and Adjudication Act 2010*, a specialized court which is a branch of the High Court in Malaya and deals with disputes involving the construction industry.[89] The divisions within the High Court can also be introduced to the High Courts in bigger cities such as Penang, Johor, Kuching and Kota Kinabalu where the volume of cases are high. If there is only one High Court, this can easily be done because there will be no need to obtain the consent of the Yang Di-Pertua Negeri of Sabah or Sarawak. With a single High Court, this will be properly under the purview of the judiciary alone which arguably makes a more efficient administration of justice.

There are already many similarities between the current two High Courts, such as the jurisdiction of the courts, the qualification of judges, the retirement age, removal, suspension and remuneration of judges, the appointment of judicial commissioners and the duties of Chief Judges. The main differences between the two High Courts are the appointment of the Chief Judges and judges of the High Court, the constitution of the High Court, principal registry and the entry into Sabah and Sarawak of judges of the High Court in Malaya.

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88 Wan, S., Mohd, S. W., & Haider, A. (2013). *E-court: technology diffusion in court management.* Association for Information Systems. Retrieved from: http://search.ror.unisa.edu.au/record/UNISA_ALMA51108680010001831/media/digital/open/9915910201101831/12143259650001831/13143257590001831/pdf.

89 Ashgar Ali Ali Mohamed (General Editor). *Malaysian Legal System*. (2014). Selangor: The Malaysian Current Law Journal Sdn. Bhd. Chapter 17, pages 404-413.

Chief Judges of the High Courts are appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister who shall consult the Conference of Rulers,[90] the Chief Justice,[91] and the Chief Judges of each of the High Courts.[92] If there is only one High Court, the Prime Minister now needs only to consult the Conference of Rulers, the Chief Justice and the Chief Judge of the one High Court. The only difference is that for the appointment of the Chief Judge of the High Court in Sabah and Sarawak, it is provided that the Prime Minister must also consult the Chief Ministers of Sabah and Sarawak.[93] In addition, there is also the requirement of obtaining the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak.[94]

If there is only one High Court, it is submitted that the only relevant consultation left in *Articles 122B and 161E(2)(b) of the Federal Constitution* is that with the Conference of Rulers and the Chief Ministers of Sabah and Sarawak. This is because the Judicial Appointments Commission set up under the *Judicial Appointments Commission Act 2009* to assist the Prime Minister when advising the Yang di-Pertuan Agong regarding the appointment of superior court judges already comprises of the Chief Justice as the chairman of the Commission, President of the Court of Appeal, Chief Judges of the High Courts, a Federal Court Judge to be appointed by the Prime Minister and four eminent persons.[95] As for the Yang di-Pertua Negeri of Sabah and Sarawak, *Article 38 read together with the Fifth Schedule of the Federal Constitution* provides that the Conference of Rulers consist of the Royal Highnesses the Rulers and the Yang di-Pertua Negeri of States not having a ruler.[96] Further, the Yang di-Pertua Negeri of Sabah and Sarawak are bound by the essential provisions of the *Eighth Schedule of the Federal Constitution* to act on the advice of the State Cabinet and shall accept such advice.[97] The head of the State Cabinet is the Chief Minister.[98] Therefore, the only real consultation with regard to the appointment of a Chief Judge of a single High Court would be the Conference of Rulers and the Chief Ministers of Sabah and Sarawak. Perhaps it would even be a good idea to include the Chief Ministers of Sabah and Sarawak as members of the Judicial Appointments Commission, to make the process of appointments of superior court judges more open, transparent and fair. If that is the case, then the only body that needs to be consulted would be the Conference of Rulers.

For the appointment of judges of the High Court, if there is only one High Court, the appointments may be made by the Yang di-Pertuan Agong acting on the advice of

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90 Federal Constitution, Article 122B(1).

91 Federal Constitution, Article 122B(2).

92 Federal Constitution, Article 122B(3).

93 Federal Constitution, Article 122B(3).

94 Federal Constitution, Article 161E(2)(b).

95 Judicial Appointments Commission Act 2009, s 5.

96 The Yang di-Pertua Negeri of States not having a ruler shall not be members of the Conference of Rulers only for the purpose of electing or removing the Yang di-Pertuan Agong or the Timbalan Yang di-Pertuan Agong, or in proceedings relating to the privileges, position, honours and dignities of Their Royal Highnesses or to religious acts, observances or ceremonies – see Item 7 of the Fifth Schedule of the Federal Constitution.

97 See the Constitutions of the States of Sabah and Sarawak, Art 10(1).

98 Constitution of the State of Sarawak, Art 6(3)(a) and Constitution of the State of Sabah, Art 6(3).

the Prime Minister who shall consult the Conference of Rulers and the Chief Judge of the High Court (instead of the respective Chief Judge of the High Court in Malaya for the appointment of judges to the High Court in Malaya, and the Chief Judge of the High Court in Sabah and Sarawak for the appointment of judges to the High Court in Sabah and Sarawak).[99] For the constitution of the High Court, *Article 122AA(1)* would have to be amended to provide for the number of judges for the single High Court instead of the two separate High Courts, with the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak as stipulated in *Article 161E(2)(b) of the Federal Constitution*. For the principal registry of the High Court, *Article 121(1)* would have to be amended to provide that it will be in such place as the Yang di-Pertuan Agong may determine. Since the High Court will have branches all over Malaysia with registries of their own, the principal registry of the High Court is of little consequence in terms of administration and dispensation of justice. The situation is analogous with the Court of Appeal and Federal Court, both of which were established for the whole of Malaysia but with only one principal registry for each respective Court.

Finally, with regard to the control of entry into Sabah and Sarawak, all judges of the superior courts should be allowed entry into Sabah and Sarawak without the need for a Permit or Pass. Therefore, *Section 66(1) of the Immigration Act 1959/1963* would have to be amended so that the immigration restriction would not be made applicable to all superior court judges, including judicial commissioners. This would actually be in line with the recommendations of the Cobbold Commission and the Inter-Governmental Committee which called for the easy inter-changeability of judges from one High Court to another.[100]

It is submitted that establishing one High Court for the whole of Malaysia, with branches of the same High Court in each state including in Sabah and Sarawak actually puts Sabah and Sarawak on equal footing as the States of Malaya because now, the Chief Judge of the High Court may be of Bornean descent, and so can be the third most important person in the judiciary. Currently, the Chief Judge of the High Court in Sabah and Sarawak is only at fourth place in order of precedence after the Chief Judge of the High Court in Malaya.[101] It is therefore submitted that having one High Court for the whole of Malaysia in fact puts Sabah and Sarawak on equal footing as the States of Malaya. According to *Article 161E(1) of the Federal Constitution*, the two thirds majority rule and the consent of the Yang di-Pertua Negeri may be dispensed with if the amendment is to put Sabah and Sarawak on equal footing as the States of Malaya. However, to maintain harmony and to avoid any conflicts, the researcher recommends that any amendments made that would affect the jurisdiction, status and constitution of the High Court in Sabah and Sarawak must be made with the consent of the Yang di-Pertua Negeri (this can be *via* the consultation with the Conference of Rulers) and more importantly, with the consent of the Chief Ministers of both States.

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99 See Federal Constitution, Article 122B(4).

100 See paragraph 159 of the Cobbold Commission Report and paragraph 26 of the Inter-Governmental Committee Report.

101 See Courts of Judicature Act 1964, s 8.

It cannot be denied that it is generally good to have East Malaysian judges in Sabah and Sarawak who understand and appreciate the local customs and peculiarities, and who would be able to address these local issues more effectively. For example, the former Chief Judge of the High Court in Sabah and Sarawak initiated the mobile courts for the interior parts of Sabah and Sarawak to dispense justice to rural folk, a system that may not be relevant or necessary in West Malaysia.[102] However, it is respectfully submitted that firstly, the duties of judges remain the same, which are to interpret the law. In that sense, it does not really make a difference as to whether the judge presiding over a matter is East or West Malaysian. Secondly and even more importantly, the solution proposed by the researcher will not in fact drastically change the current position of the judicial system, apart from having one High Court in place of the current two High Courts. The jurisdiction, status, constitution and provision on judges and judicial commissioners (such as the retirement age, remuneration, appointment, removal and suspension) will all remain the same. The only difference is that administratively, there will now be only one High Court with different branches throughout Malaysia.

Nevertheless, as a show of good faith, compromise and to convince the people of Sabah and Sarawak that the establishment of a single High Court is not taking away any of their entrenched rights, the researcher also proposes to give to the people of Sabah and Sarawak a further entrenched right by including in the Federal Constitution, an original recommendation of the Inter-Governmental Committee which was unfortunately omitted. This is the recommendation that when hearing a case arising from Sabah or Sarawak, the Court of Appeal or Federal Court shall, so far as is practicable, physically sit in Sabah or Sarawak, and that at least one of the judges on that panel of the Court of Appeal or Federal Court shall be a judge who is ordinarily resident in Sabah or Sarawak.[103] With regard to the latter part of the recommendation, the original wording used in the Inter-Governmental Committee Report is a judge with 'Bornean judicial experience'. However, since this term is not defined or explained anywhere, and therefore may give rise to further confusion and misunderstanding, the researcher suggests a more straightforward and clearer term, i.e., a judge who is ordinarily resident in Sabah or Sarawak or alternatively, a judge with 'Sabah connections' within the meaning of the *Advocates Ordinance 1953 of Sabah* or with 'Sarawak connections' within the meaning of the *Advocates Ordinance 1953 of Sarawak*.

Further, to avoid any fears of domination by West Malaysians in the judiciary, there can also be specifically provided in the Federal Constitution a fixed number of judges to be appointed as judges sitting in one of the High Court's branches in Sabah and Sarawak, to be judges who are ordinarily resident in Sabah and Sarawak. Currently, the Federal Constitution only provides for the maximum number of judges to be sitting in the High Court in Malaya and in the High Court in Sabah and Sarawak respectively.[104] Technically, this can also mean West Malaysians sitting as judges of the High Court in Sabah and Sarawak. With the amendment proposed by the researcher, the quota of East

[102] See Shaila Koshy. (2011, 19 December). *Mobile court service for rural folk.* The Star Online. Retrieved from: https://www.thestar.com.my/lifestyle/features/2011/12/19/mobile-court-service-for-rural-folk/

[103] See paragraph 26 of the Inter-Governmental Committee Report.

[104] See Federal Constitution, Article 122AA(1).

Malaysian judges will be preserved by the Federal Constitution, which in fact elevates the rights of East Malaysians.

Therefore, it is entirely plausible to set up a single High Court in Malaysia. However, this must be done by properly and delicately balancing the rights of all parties involved, especially East Malaysians who may (inaccurately) view this exercise as an abrogation of their special privileges. The benefits of having a single High Court are manifold, for example it will resolve the issue of non-transferability of cases between the current two High Courts, and East Malaysia will be on equal footing as West Malaysia as far as the judiciary is concerned. There will also be more independence in the judiciary in that the single High Court can now administer to its own specialised divisions such as the Civil Division, Commercial Division, Criminal Division, Intellectual Property Division and so on without the need of consent from the Chief Ministers or Yang Di-Pertua Negeri of Sabah and Sarawak. There can also be streamlined guidelines and practice directions for the single High Court which will be applicable throughout Malaysia, and not divided between East and West, which will contribute to a more effective and efficient administration of justice. All these serve to promote consistency, clarity and harmony in the law, which brings us closer to obeying the rule of law and the doctrine of *stare decisis*, and therefore brings us closer to having an ideal judiciary.

The establishment of a single High Court in place of the current two High Courts is in theory legally and administratively entirely plausible. The advancement of technology, infrastructure and technical development has effectively bridged the geographical gap between the two High Courts. There are many similarities between the two High Courts, and the differences between the two High Courts may quite easily be overcome legally and administratively, and practically by compromising and balancing the rights of all parties involved. The establishment of a single High Court in Malaysia has many benefits, and most importantly would resolve the issue of non-transferability of cases between the two High Courts and contribute to the overall efficiency of the administration of justice in Malaysia.

III LEGAL MECHANISM TO ESTABLISH A SINGLE HIGH COURT

A *Amending the Federal Constitution*

The Federal Constitution is not cast in stone. It may be amended to keep up with changing times. In this regard, the Reid Commission in drafting the original Constitution wrote:

> Method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the Constitution provides – by way of Act of Parliament to amend the Constitution, must be passed in each House by a majority of at least two-thirds of the members voting. This is a sufficient safeguard for the States because the majority of members of the Senate will represent the States.[105]

[105] The Reid Commission Report 1957, Chapter IV, paragraph 80. The safeguard envisioned by the Reid Commission, i.e. that the majority of members of the Senate will represent the States is no longer true today

The conditions and procedures for amending the Federal Constitution is provided for in the Constitution itself in *Articles 159* and *161E*. *Article 159 of the Federal Constitution* envisages four ways in which the Federal Constitution may be amended. Firstly, some parts of the Constitution may be amended by a simple majority in both Houses of Parliament such as that required for the passing of any ordinary law, as enumerated in *Article 159(4)*. Secondly, articles which are set out in *Article 159(5)* may be amended by a two-thirds majority in both Houses of Parliament and with the consent of the Conference of Rulers. These articles include, among others, the status of the national language.[106] Thirdly, articles which are of special interest to the East Malaysian States as set out in *Article 161E* which requires a two-thirds majority in both Houses of Parliament and additionally, the consent of the Yang di-Pertua Negeri of the State concerned. This includes, among others, the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court, as well as the powers of the State Authority to control the entry of, or residence by persons who do not belong to these States.[107] Lastly, amendments made pursuant to *Article 159(3)* (which is basically all other Articles in the *Federal Constitution* apart from those excepted under *Article 159(4)*, and amendments to any law passed under *Article 10(4)*) requires a majority of two-thirds in both Houses of Parliament.[108]

One interesting point to note is *Article 161E(1) of the Federal Constitution* which reads as follows:

> As from the passing of the Malaysia Act, no amendment to the Constitution made in connection with the admission to the Federation of the State of Sabah and Sarawak shall be excepted from clause 3 of Article 159 by clause 4(bb) of the Article; nor shall any modification made as to the application of the Constitution to the State of Sabah and Sarawak be so excepted unless the modification is such as to equate or assimilate the position of that State under the Constitution to the position of the States of Malaya.

Shorn of its convolutedness, what this Article says is that after the passing of the Malaysia Act, if the Constitution is modified for application to Sabah and Sarawak, the two-thirds majority rule and the concurrence of the Yang di-Pertua Negeri of those States do not apply if the modification of the constitutional provisions 'is to put Sabah and Sarawak on the same footing as the States of Malaya in regard to those provisions'.[109]

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because appointed senators now outnumber State senators 44 to 26: see Lee, H. P., Foo, R., & Tan, A. (2019). *Constitutional change in Malaysia*. The Journal of Comparative Law, 14(1), 119-138. However, the methods of amending the Federal Constitution as provided in the Constitution remain the same.

106 Federal Constitution, Art 152.

107 Federal Constitution, Arts 161E(2) and (4).

108 See Federal Constitution, Art 159. See also the judgment of Raja Azlan Shah FJ (as His Royal Highness then was) in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

109 Fong, J. C. *Constitutional Federalism in Malaysia*. (2nd Edition) (2016). Kuala Lumpur: Thompson/Sweet & Maxwell Asia. Page 208.

B *Dispute resolution mechanism*

In the event no amicable solution can be reached between the Federal and State Governments, *Article 128 of the Federal Constitution* confers the Federal Court with original and consultative jurisdiction to settle disputes between the States or between the Federation and any States. Further, *Article 130 of the Federal Constitution* enables the Yang di-Pertuan Agong (acting on the advice of the Federal Cabinet) to refer to the Federal Court for its opinion, any question on the provisions of the Constitution, and the Federal Court shall pronounce in open court its opinion on the same. In *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus,*[110] Salleh Abas, FJ (as he then was) held that where an advisory opinion of the Federal Court is sought under its consultative jurisdiction, the decision of the Federal Court is binding on the parties, 'although there is no provision in the Federal Constitution to say it is so'.[111]

Apart from this, there are also bodies established under the Federal Constitution for consultation on various subjects, one of which being the Conference of Rulers.[112] *Article 159(5) of the Federal Constitution* requires the consent of the Conference of Rulers whenever any law seeks to amend, among others, the provision relating to the National Language embodied in *Article 152 of the Federal Constitution*, and for the appointment of members of the Judiciary embodied in *Article 122B of the Federal Constitution*. It must be noted that although the appointment of judges is technically made by the Yang di-Pertuan Agong, by virtue of *Article 40(1) of the Federal Constitution*, His Majesty is bound to follow the advice of the Prime Minister.

'Consult' is not defined anywhere in the Federal Constitution or any of the interpretation statutes in Malaysia. In this regard, Lord Morris of Borth-y-Gest, delivering the judgment of the Privy Council in *Port Louis Corporation v Attorney-General of Mauritius*[113] held that 'the requirement of consultation was never to be treated perfunctorily or as a mere formality'. There is the opinion that based on the Reid Commission Report and the subsequent Government White Paper, the intention of the framers of the Constitution was clear in that when each member of the Conference of Rulers gives advice in respect of a candidate for, among others, judicial appointments, such advice is a personal exercise as a state representative, to be distinguished by an exercise of discretion that requires each member to accept the advice of the Prime Minister, Menteri Besar, Chief Minister or State Executive Council[114]. Therefore, if the Conference of Rulers disagrees with any of the candidates proposed by the Prime Minister, the Prime Minister has a 'constitutional obligation to inquire into the opinion of the Conference of Rulers and, to deliberate within the forum of the Conference on any findings that arise from the inquiry and, thereafter,

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110 [1981] 1 MLJ 29

111 At page 34.

112 See the Federal Constitution, Art 38, on the Conference of Rulers.

113 [1965] AC 1111.

114 Choo, C. T. & Lucy Chang, N. W. *Constitutional Procedure of Consultation in Malaysia's Federal System*. (2015). Malayan Law Journal. Volume 4. Page xiii. The learned authors in this article disagreed with the Court of Appeal's decision in *In the matter of an oral application by Dato' Seri Anwar Bin Ibrahim to disqualify a judge of the Court of Appeal* [2000] 2 MLJ 481 where it was held, among others, that in the matter of appointment of judges, the Yang di-Pertuan Agong is not bound to accept the advice, opinions or views of the Conference of Rulers.

to arrive at *consensus ad idem* with the Conference'.[115] In the words of a learned author: 'To ignore the substance of an advice given after consultation is to turn our back on the true intent carefully prepared by the framers of the Federal Constitution and our own constitutional history'.[116]

In summary, although what exactly is meant by 'consultation' is open to debate, it is submitted that free and frank consultation among all relevant stakeholders on the proposal of setting up a single High Court in Malaysia is a good mechanism to be utilised. Such a mechanism may potentially avert misunderstanding and conflict between the Federation and the States.

C *Summary of legal mechanisms*

From the discussion in the foregoing paragraphs, it is submitted that the most appropriate legal means to establish one High Court for the whole of Malaysia is through amendments to the Federal Constitution. This means obtaining two thirds majority in both Houses of Parliament, and the consent of the Yang di-Pertua Negeri and the Chief Ministers of Sabah and Sarawak. In the past, amendments were made to the Federal Constitution which, it is submitted, circumvented the requirement of concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak. For example, the amendment to *Article 122AB of the Federal Constitution* on the appointment of judicial commissioners to the High Court in Sabah and Sarawak which is now no longer within the purview of the Yang di-Pertua Negeri of Sabah and Sarawak.[117] Another example is the amendment in 1988[118] to the jurisdiction of the High Courts which took away the judicial power of the Federation which was originally vested in the High Courts, to such jurisdiction and powers as may be conferred by or under Federal law. This may also be seen as a breach of *Article 161E(2)(b) of the Federal Constitution* as the amendments were effected without the concurrence of the Yang di-Pertua Negeri of Sabah and Sarawak.[119]

In theory, the Federal Government may use its powers under *Articles 74 and 77 of the Federal Constitution* to establish a single High Court and unify all laws affecting legal practice by making use of *Item 4 of List 1 (Federal List) of the Ninth Schedule of the Federal Constitution*, which clearly lists 'civil and criminal law and procedure and the administration of justice'. In addition to this, the Federal Government is also free to utilize *Article 161E of the Federal Constitution* which does away with the two thirds majority rule and the consent of the Yang di-Pertua Negeri if the amendment is to place Sabah and Sarawak on the same equal footing as the States of Malaya.

So, while there are loopholes that can be taken advantage of to unify the judicial and legal system in Malaysia, it would be best to respect the safeguards provided in the

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115 Ibid.

116 Ibid.

117 See the Constitution (Amendment) Act 1994 (in particular ss 15 and 16), and the case of *The Government of Malaysia v Robert Linggi* [2015] 1 LNS 1515.

118 Constitution (Amendment) Act 1988 (Act A704).

119 See Fong, J. C. *Constitutional Federalism in Malaysia*. (2nd Edition) (2016). Kuala Lumpur: Thompson/Sweet & Maxwell Asia. Page 143, footnote 51.

Federal Constitution itself,[120] and also to make full use of all consultation processes, in order to avoid any dissatisfaction or unhappiness, especially among the people of Sabah and Sarawak. The safeguards entrenched in the Federal Constitution, as sought by the people of Sabah and Sarawak and as evidenced in the Cobbold Commission Report, the Inter-Governmental Committee Report and the Malaysia Agreement, are very much a live issue, as can be seen recently when the Federal Government announced the tourism tax without consulting Sabah and Sarawak. The Sarawak Government led by its Chief Minister Abang Johari Openg was cited as announcing that he was sending a team of lawyers to London to study the details of the Malaysia Agreement.[121]

IV CONCLUSION

In conclusion, it is submitted that the justification for having two High Courts in Malaysia, purely for geographical reasons, is no longer justifiable some 60 years later. It is totally plausible for there to be one High Court for the whole of Malaysia, the same as there is only one Court of Appeal and one Federal Court for the whole of Malaysia.

However, this must be done by properly and delicately balancing the rights of all parties involved, especially East Malaysians who may (inaccurately) view this exercise as an abrogation of their special privileges. The benefits of having a single High Court are manifold, for example it ensures that East Malaysia will be on equal footing as West Malaysia as far as the judiciary is concerned. There will also be more independence in the judiciary in that the single High Court can now administer to its own specialised divisions such as the Civil Division, Commercial Division, Criminal Division, Intellectual Property Division and so on without the need of consent from the Chief Ministers or Yang Di-Pertua Negeri of Sabah and Sarawak. There can also be streamlined guidelines and practice directions for the single High Court which will be applicable throughout Malaysia, and not divided between East and West, which will contribute to a more effective and efficient administration of justice.

The most suitable and appropriate legal mechanism to establish a single High Court would be to amend the relevant provisions of the Federal Constitution as well as all other relevant legislation in accordance with the prescribed methods stipulated in the Federal Constitution itself. However, in order to avoid any acrimonious scenarios and to promote harmony, it would be best to undertake the unification exercise with all the stakeholders being fully aware, and willingly confer their blessings. The basic policies must be freely agreed to before any amendments to the laws are made. This is because in the end, the quest to unify the judicial and legal system is to strengthen the administration of justice in Malaysia which will be beneficial to all Malaysians.

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120 This is also in line with the 'basic structure doctrine' as expounded in *Kesavananda Bharathi v State of Kerala* AIR 1973 SC 146, and now accorded a place in Malaysian jurisprudence: see for example *Sivarasa Rasiah v Badan Peguam Malaysia &Anor* [2010] 2 MLJ 333, *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

121 *5 Facts You Didn't Know About the Malaysia Agreement 1963*. Retrieved from: https://asklegal.my/p/5-facts-about-the-malaysia-agreement-1963

The advancement of technology, infrastructure and technical development has effectively bridged the geographical gap between the two High Courts. There are many similarities between the two High Courts, and the differences between the two High Courts may quite easily be overcome legally and administratively, and practically by compromising and balancing the rights of all parties involved. The establishment of a single High Court in Malaysia has many benefits, and most importantly would contribute to the overall efficiency of the administration of justice in Malaysia.

ADDRESSING ALGORITHMIC PRICING COLLUSION IN MALAYSIAN COMPETITION LAW: CONSIDERATIONS FOR ARTIFICIAL INTELLIGENCE ETHICAL GOVERNANCE

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Dr Jaspal Kaur Sadhu Singh**

Abstract

Artificial Intelligence ('AI') tools in the digital economy empower electronic agents to facilitate e-commerce transactions for digital enterprises in Malaysia. The growing number of Malaysian digital enterprises utilising digital platforms that employ AI algorithms - to customise services, predict market trends, and improve their pricing models - may result in various anti-competitive practices and tacit collusion amongst these enterprises. The absence of a formal agreement or human interaction evidencing an intent to co-ordinate poses regulatory challenges to monitor and control algorithms that trigger anti-competitive behaviour. The paper focuses on anti-competitive tacit collusion in algorithmic price setting. In the absence of formal agreement or human interaction, the possibility of colluding has caused various regulatory challenges to monitor or control such use of algorithms that may result in anti-competitive practices. This may render the Competition Act 2010 and the role of the Malaysian Competition Commission as nugatory. The paper, firstly, sets out the technological background of algorithmic pricing and collusion and its impact on consumer welfare; secondly, it examines Malaysian competition governance and the inadequacy of the regulatory tools to address the challenges presented by anti-competitive practices arising from tacit algorithmic collusion; and finally, the paper proposes the use of an AI ethical governance mechanism by the developer or deployer of the AI to ensure algorithms function ethically when used by digitised enterprises in Malaysia. This paper serves as a prescient proposal to the consequential issues of algorithmic pricing and collusion.

Keywords: Artificial Intelligence, anti-competitive, pricing algorithm, algorithmic collusion, AI ethical governance

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I INTRODUCTION

Digital enterprises operate within a digital ecosystem embraced mainly by new and innovative digital transformation. These digital enterprises have harnessed technological advancements to create a cutting-edge competitive advantage. Digital enterprises experience digital transformation by taking a multi-prong approach in strategising and changing their operational activities using technologies to identify the best customer experiences and manage a unique business model in a digital ecosystem. Such strategising requires continuous improvement in integrating physical and digital businesses and creating a culture that encourages iterative innovation while taking advantage of modern technologies' full potential, including factors such as analytics, cognition, and mobility.[1] The technological model of these enterprises is based on global trends that espouse the priority use of specific technical and technological tools in an enterprise's digital transformation.

A digital enterprise adopts not only profound digitalisation of all internal value chains of an enterprise design, production, logistics, technical support and product support. Equally important is its capacity to build close partnerships between the business and its counterparties that create common integrated information and communication space.[2] In addition, significantly, many of their business interactions with participants in the business chain participants are translated into digital services provided by third-party organisations that include analytics, references, applications, offers, contests, and call centres.[3]

As described by Uhl and Gollenia, digital enterprises are companies with excellent transformational ability, having 'the right instruments to monitor technological and socio-political trends and make the right strategic adjustments' and capable of surviving in future business ecosystems as their digital transformation imbues them with the capability to remain competitive in a rapidly-changing market.[4] Furthermore, digital enterprises are also keen on transforming and being proactive to new technologies that make them excel in innovation and exploit technologies to derive a real financial benefit.[5] Therefore it is only natural to expect these digital enterprises to be utilising Artificial Intelligence ('AI') tools as part of their transformation to obtain a market advantage and gain a financial advantage.

The deployment of AI tools that utilise algorithms generates efficiency in the digital market when large data is used to predict the consumer's preferences through profiling and making recommendations on the products or services to be purchased, forming a coalition of buyers to secure optimal terms and conditions.[6] AI tools enable the business to strategise on prices based on algorithms that consider competitor pricing, supply and

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1 Anna Obukhova, Ekaterina Merzlyakova, Irina Ershova and Kristina Karakulina, 'Introduction of digital technologies in the enterprise' (2020) 159 *E3S Web Conference* 1-10 <https://doi.org/10.1051/e3sconf/202015904004>.

2 Ibid 3.

3 Ibid.

4 Axel Uhl and Lars Alexander Gollenia, *Digital Enterprise Transformation* (Taylor and Francis, 2020).

5 Ibid.

6 Michal S Gal and KN Elkin-Koren, 'Algorithmic Consumers' (2016) 30(2) *Harvard Journal of Law and Technology* 309-353.

demand, and other external factors in the market. Such pricing technology also leads to gain unfair benefits when used to autonomously coordinate prices resulting in the phenomenon of anti-competitive price collusion and price surge[7] within the realm of competition law.[8]

Competition law prohibits market players from engaging in cartels or agreements restraining competition without compromising benefits to the consumer. This prohibition is based on the notion that competitors can make independent decisions only if the competition's consequences increase consumer welfare. However, the imposition of a too-strict or limited legal liability to curb AI tools and algorithms carries a risk of impeding the efficiency of the use of innovative technology, which may inhibit progress on technological innovation that benefits society.[9] Nevertheless, since algorithms should not be immune from the competition laws and the use of algorithms is not illegal *per se*, appropriately, specific uses of the algorithms should be considered illegal and therefore, both the programmers and the users be made aware of its potential legal consequences.

AI tools have the ability to interact with other algorithms to enable coordinated actions and to collude on price-setting without the human-in-the-loop, but it is difficult to prove an illegal cartel under competition law since such a collusive agreement must be evidenced and requires proof of communication between human actors to show an intent to act in a coordinated manner to proof concurrence of wills between the parties.[10] This phenomenon enables digital enterprises to escape responsibility for anti-competitive collusion by hiding behind the algorithms. Therefore, not all algorithmic price setting involves human actors, but it does provide the ability for competing digital enterprises to employ algorithmic price collusion. Since algorithmic price collusion may be explicit or tacit. This paper focuses on tacit algorithmic price setting as explicit collusion will fall within the ambit of the law discussed in the succeeding headings. This phenomenon poses a considerable challenge to the application and adequacy of the Malaysian Competition Act 2010 ('CA 2010') and Malaysia Competition Commission ('MyCC')[11] to identify and determine a case of infringement. Thus, the question arises of when does the use of the pricing algorithms amount to anti-competitive and how or on whom the legal liability could be imposed - whether on the developer or deployer of the algorithm facilitating the tacit collusion.

The phenomenon of placing pricing decisions in the "hands" of algorithms has gained concern among scholars and competition authorities since algorithms are capable of sustaining collusive outcomes more effectively than human decision-makers. However, to find the right balanced approach, a modern approach is recommended to recognise

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7 Surge pricing involves the use of algorithms to automate price increases on products and services in periods of high demand and limited supply and to lower prices when demand is weak. Such as used by *Uber*, *Grab* and *Open table*.

8 Michal S Gal, 'Illegal Pricing Algorithms' (2019) 62(1) *Law and Technology* 18-20 <https://ssrn.com/abstract=3326381>.

9 Thomas A Hemphill, 'Human Compatible: Artificial Intelligence and the Problem of Control by Stuart Russell' (2020) 40(2) *Cato Journal* 561-566.

10 Gal (n 8) 19.

11 The Malaysian Competition Commission, or the 'MyCC', is an independent body established under the Malaysian Competition Commission Act 2010 to enforce the Competition Act 2010.

its potential positive uses for AI in society, such as advancements in scientific research and possible anti-competitive consequences.[12] In balancing the posit to regulate the phenomenon whilst realising the benefits flowing from the use of AI tools, this paper proposes a co-regulatory model between businesses and regulators wherein the authors emphasise the need for some framework of values to be employed by developers in designing the algorithm as well as on the related AI tools audited against this framework. It is proposed that adopting an AI ethical governance framework in using AI tools imbued with the overarching principles of competition law is deployed. This will overcome the inadequacy of the CA 2010, particularly in situations where anti-competitive regulations are not viable to impose legal constraints on tacit algorithmic pricing models. Hence, a triumvirate approach is proposed to be adapted to find a solution in regulating anti-competitive practices resulting from algorithmic pricing by addressing technological factors, normative legal rules, and ethical considerations[13] in addressing anti-competitive AI tools usage in illegal pricing algorithms in Malaysia.

This paper firstly sets out the technological background of algorithmic pricing and collusion and its impact on consumer welfare; secondly, the examination of the inadequacy of the CA 2010 and MyCC's efficacy in addressing the phenomenon of unprecedented anti-competitive collusion using AI tools to execute joint algorithmic price-setting without human interaction in Malaysia; and finally, the paper proposes the adoption of an AI ethical governance through the operationalisation of an ethical governance framework to complement competition law principles in the development and deployment of AI. This paper serves as a prescient proposal to the consequential issues of algorithmic pricing and collusion in the digital marketplace.

II TECHNOLOGICAL BACKGROUND: ALGORITHM, ALGORITHMIC PRICING AND COLLUSION

Emerging technologies such as AI systems are increasingly ubiquitous and pervasive in businesses - developing at a pace that has left an ever-widening governance or regulatory gap. Naturally, there is a growing consensus that digital technologies break new "pacing" grounds[14] and presents a dilemma when AI technology raises novel challenges to the governing frameworks in place, such as traditional competition law. Therefore, it is crucial to contextualise this discussion by explaining the technology.

The word "algorithm" originated as a system of Arabic numerals developed in the nineteenth century by a Persian mathematician, *Abu-Ja'far Mohammed ibn-Mūsa al-Khuwārizmi,*[15] representing a set of mathematical instructions or rules. In the context of

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[12] Hemphill (n 9) 563.

[13] Joshua A Gerlick and Stephan M Liozu, 'Ethical and legal considerations of artificial intelligence and algorithmic decision-making in personalized pricing' (2020) 19 *Journal of Revenue and Pricing Management* 85-98 <https://doi.org/10.1057/s41272-019-00225-2>.

[14] Organisation for Economic Co-operation and Development (OECD), *Regulatory effectiveness in the era of digitalization* (June 2019) <https://www. oecd.org/gov/regulatory-policy/Regulatory-effectiveness-in-the-era-of-digitalisation.pdf>.

[15] Merriam-Webster Dictionary < https://www.merriam-webster.com/dictionary/algorithm>.

a computer, it helps to calculate an answer to a problem.[16] The learning by AI in machine learning pivots on the amount of data fed into the algorithm. AI's enormous ability to make efficient, accurate and intricate predictions increases with more data. The widespread use of AI is advanced by collecting and processing large data sets, commonly referred to as Big Data, that 'train' the algorithm.[17] AI is often referred to as an intelligent agent owing to its ability to learn from vast amounts of data and experience and make decisions through perception and cognition.[18] The former means the ability of AI to perceive the world and recognise patterns through experience, and the latter refers to the ability to learn and reason.[19] Russell and Norvig refer to the "intelligent agent" as a unifying theme in the study of AI, explaining AI as 'the study of agents that receive percept's from the environment and perform actions'.[20] They place the field of AI to surpass the ability of human intelligence to understand how we think as AI goes beyond merely understanding but extends to building intelligent entities.[21] This manner of intelligence is often spoken of as intelligibility, and a computer with intelligibility can perform in the same way as human intelligence. Definitions of AI can be organised along dimensions of thinking and acting. The thinking dimension covers thought processes and reasoning,[22] and the acting dimension deals with performance, either humanly or ideally.[23] It is well worth expanding on the acting dimension, which includes an AI that acts humanly, as it will include AI for "automated reasoning" and "machine learning". Automated reasoning uses 'stored information to answer questions and to draw new conclusions' whereas machine learning adapts 'to new circumstances and to detect and extrapolate patterns.[24] In other words, the algorithm in machine learning allows the AI to make predictions from the data that it has been provided.

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16 Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/algorithm>.

17 Brad Smith and Carol Ann Browne, *Tools and Weapons: The Promise and the Peril of the Digital Age* (Hodder and Stoughton, 2019) 195.

18 Ibid 194, 196.

19 Ibid.

20 Smith and Browne (n 17) viii.

21 Smith and Browne (n 17) 1.

22 Smith and Browne (n 17) 1-2. Thinking humanly refers to '[The automation of] … activities that we associate with human thinking, activities such as decision-making, problem solving, learning …'. See Richard Ernest Bellman, *An Introduction to Artificial Intelligence: Can Computers Think?* (Boyd & Fraser, 1978). Another definition regards AI as 'The exciting new effort to make computers think … machines with minds, in the full and literal sense.' See John Haugeland, *Artificial Intelligence: The Very Idea* (MIT Press, 1985). AI with respect to thinking rationally refers to 'The study of the computations that make it possible to perceive, reason, and act'. See Patrick Henry Winston, *Artificial Intelligence* (Addison-Wesley 1992). Another definition is 'The study of mental faculties through the use of computational models.' See Eugene Charniak and Drew McDermott, *Introduction to Artificial Intelligence* (Addison-Wesley, 1985).

23 Smith and Browne (n 17) 1-2. AI in terms of acting rationally 'is concerned with intelligent behaviour in artefacts'. See Nils John Nilsson, *Artificial Intelligence: A New Synthesis* (Morgan Kaufmann Publishers Inc,1998). Another definition is 'Computational Intelligence is the study of the design of intelligent agents'. See David Poole, Alan Mackworth and Randy Goebel, *Computational Intelligence: A Logical Approach* (Oxford University Press, 1998). Acting humanly refers to 'The art of creating machines that perform functions that require intelligence when performed by people'. See Ray Kurzweil, *The Age of Intelligent Machines* (MIT Press, 1990). Another definition is 'The study of how to make computers do things at which, at the moment, people are better'. See Elaine Rich and Kevin Knight, *Artificial Intelligence* (McGraw-Hill Inc, 1991).

24 Smith and Browne (n 17) 2.

The extent of the use of AI tools in Malaysia has been measured in terms of several factors. The AI Readiness Index 2022[25] ranks Malaysia in 29th place globally in terms of how ready a given government is to implement AI in delivering public services to its citizens. Albeit focused on public services, the report commented on the aspects imbibed in the local climate required for a country to be an AI leader. For instance, the report concludes that in terms of the human capital dimension, Malaysia appears to have the highest proportion of STEM graduates in East Asia[26] and a growing technology sector with an increase in companies defined as unicorns which are companies valued over US$1 billion.[27] Malaysia published its National Artificial Intelligence Roadmap ('Malaysian Roadmap') in 2021. It was launched in 2022,[28] setting the overarching policy and direction in positioning the nation to benefit from the AI revolution by assisting understanding and confidence in AI systems. Within this roadmap is a policy position on AI governance and ethics in developing and deploying AI tools by recommending the values of Responsible AI within the Malaysian Roadmap. These are further enumerated in Heading V. Additionally, the Malaysia AI Blueprint Annual Report 2021 indicates that the Big Data Analytics Maturity and the overall AI Maturity of Malaysian companies across twelve industry verticals, including the government sector, evidenced an improvement from 2020, albeit very slightly. However, the use of AI tools is rife in delivering services in industries such as telecommunication and finance and, generally, any sector that can provide consumer services on platforms in the digital marketplace. The Malaysian Roadmap's findings indicate there are hurdles to AI adoption amongst businesses, particularly AI governance. Still, the overall trajectory is one of continued growth, particularly in the private sector.[29]

This weak link to a lack of AI governance is concerning when an increased level of AI adoption is undertaken. The authors anticipate that the phenomenon of algorithmic price-setting collusion will be incremental in line with increased AI adoption. The OECD report on algorithm collusion highlighted that pricing algorithms might 'expand the grey area between unlawful explicit collusion and lawful tacit collusion, allowing firms to sustain profits above the competitive level' more effortlessly without the necessity of having to agree or even enabling digital enterprises to replace explicit collusion with tacit coordination.[30] While algorithms serve as tools to implement cartel agreements and facilitate coordinated interaction or discriminatory pricing, there are innumerable reasons for algorithmic collusion to occur without the element of an explicit arrangement,

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25 Oxford Insights, Government AI Readiness Index 2022 (Annual Report, 12 December 2022) <https://www.oxfordinsights.com/government-ai-readiness-index-2022>.

26 Ibid 12.

27 Oxford Insights (n 25) 42.

28 Rex Tan, 'Mosti launches five technology roadmaps to develop Malaysia's robotics, advanced materials, and AI industries' *Malay Mail* (Kuala Lumpur, 9 August 2022) <https://www.malaymail.com/news/money/2022/08/09/mosti-launches-five-technology-roadmaps-to-develop-malaysias-robotics-advanced-materials-and-ai-industries/21970>.

29 Malaysian Ministry of Science & Technology, Malaysia National Artificial Intelligence Roadmap 2021-2025 (2021) 29 <https://airmap.my/> 17.

30 Organisation for Economic Co-operation and Development (OECD), *Algorithms and Collusion: Competition Policy in the Digital Age* (2017) <www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm>.

coordination, or communication between parties. [31] Tacit collusion occurs when digital enterprises utilise the same dataset or an identical pricing software; or where it is an unintended consequence of the use of the pricing algorithm where the same dataset or source of data has been used to train the algorithm that allows the humans to program their pricing algorithms to monitor and respond to rivals' pricing and other keys terms of sale. Digital enterprises are aware that the likely outcome will be conscious parallelism and higher prices which are taking place without the need for the rivals to communicate with each other or otherwise enter into an illegal cartel agreement.[32]

In addition, unintended algorithmic collusion occurs when businesses develop and use algorithms to monitor competitors' by collecting, mining, and analysing data and information related to the competitors' decision-making or business practices which are then used to make pricing decisions for their businesses. This type of data, also known as "monitoring algorithms", is increasingly available on price comparison websites,[33] making it a common practice among businesses to deploy identical pricing software from the same developer to develop pricing strategies. This practice creates a type of digital cartel - the "hub and spoke" cartel - when competitors use the same "hub" for coordinating with each other, whether willingly or otherwise, by way of what is described as a "parallel algorithm". [34] This cartel is an algorithmically aided[35] collusion[36] or a pricing algorithm that facilitates anti-competitive activity.[37] The increasing AI-based sophisticated data-mining techniques, without human intervention, allow algorithm operations to operate like "robot-sellers" while making pricing decisions autonomously.[38] Meanwhile, the algorithms facilitate information exchange and enable rival firms' to fix prices and allocate markets or bids. Their agreement is enforced and monitored through the algorithm. The algorithms operate as mere "intermediaries". They are used as the central "hub" from which the leading players/or individual market players coordinate competitors' prices and all the other players' activities, i.e., the "spokes" collectively or individually. [39] Algorithmic pricing allows players to react instantly to market dynamics

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31 Terrell McSweeny, Commissioner, US Federal Trade Commission, '*Algorithms and Coordinated Effects*' in *Online Markets and Offline Welfare Effects: The Internet, Competition, Society and Democracy* (The Centre for Competition Law and Policy, University of Oxford, 2017) <https://www.law.ox.ac.uk/sites/files/oxlaw/online_markets_and_offline_welfare_effects.pdf > 58.

32 Ariel Ezrachi and Maurice E Stucke, 'Sustainable and unchallenged algorithmic tacit collusion' (2020) 17(2) *Northwestern Journal of Technology and Intellectual Property* 217-260 <https://scholarlycommons.law.northwestern.edu/njtip/vol17/iss2/2>.

33 See generally OECD (n 30).

34 Ariel Ezrachi, 'The Competitive Effects of Parity Clauses on Online Commerce' (Research Paper No 55/2015, Oxford Legal Studies, 2015) < https://ssrn.com/abstract=2672541>.

35 See example in *Meyer v. Kalanick*, 477 F. Supp. 3d 52, 54 n.1 (SDNY, 2020). The Plaintiff filed a class action alleging *Uber*'s pricing algorithm model amounted to horizontal price-fixing, restricting competition among drivers to the detriment of *Uber* users and in violation of the antitrust law under the Sherman Act (USA).

36 See also *United States v. Airline Tarif Publishing Co.*, 836 F. Supp. 9 (DDC, 1993); *United States v. Topkins*, 15 Cr. 201 (ND Cal, 2015).

37 Nidhi Singh, 'Virtual Competition: Challenges for Competition Policy in an algorithm driven market', *Kluwer Competition Law Blog* (11 September 2018) <http://competitionlawblog.kluwercompetitionlaw.com/2018/09/11/virtual-competition-challenges-competition-policy-algorithm-driven-market/>.

38 Joseph Harrington Jr, 'Developing Competition Law for Collusion by Autonomous Price Setting Agents' (22 August 2017) <http://dx.doi.org/10.2139/ssrn.3037818>.

39 See generally Singh (n 37).

by setting prices without direct interaction with each other by simply using the upstream suppliers' pricing algorithm. The competitors operating on the same platform usually use a single algorithm and the prices automatically align.[40] This algorithm-fuelled hub-and-spoke model facilitates collusion among the competitors.

These algorithms convey a predetermined decisional tree that assigns weights to decision parameters to suggest the optimal decision given to a particular data set and circumstances[41] to optimise price settings from consumer data. AI tools employ machine learning wherein the algorithm can refine and redefine its decision parameters, freeing the algorithm from the predefined preferences of the consumer to decide features to be used to make their determinations.[42] Such algorithms replicate human neurons' activity by creating an artificial neural network with discrete layers, connections, and directions of data propagation[43] - replacing the "invisible hand" referred to by Adam Smith with the "digital hand", which results in behavioural pricing and collusion amongst digital enterprises as the new norm in the digital economy.[44]

The algorithm enhances conscious parallelism or tacit collusion when the pricing algorithms used by individual enterprises respond to market dynamics and become synced and predictable without the involvement of any express agreement between the competitors. Hence, competitors can unilaterally operate their pricing algorithms to reach a similar understanding without negotiation. Despite the awareness among the competitors of the use of pricing algorithms to facilitate tacit collusion or conscious parallelism, it is legally difficult to get direct evidence to prosecute for having the intent to commit the anti-competitive act given the complex nature of the algorithms used and the difficulty in identifying the human perpetrator. Furthermore, self-learning capabilities from the data with AI tools[45] enable predictions without the human-in-the-loop, further complicating the finding of an infringement under competition law without the existence of any illegal collusion. This will be discussed further in Headings III and IV.

III PRICING ALGORITHMS: THE COMPETITION LAW IMPLICATION

Businesses' reliance on algorithm-predictive analytics for optimisation of business processes with the assistance of AI, big data collection, storage, and analytics-fuelled algorithms has become ubiquitous.[46] The increased use of technological tools like algorithms has automated pricing systems – referred to as "pricing algorithms" - that serve

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40 Ibid.

41 Thomas H Cormen, Charles E Leiserson, Ronald L Rivest and Clifford Stein, *Introduction to Algorithms* (MIT Press Cambridge, 2009) 192-93, 843-49.

42 Organisation for Economic Co-operation and Development (OECD), *Data-Driven Innovation for Growth and Well-being: Interim Synthesis Report* (2015); Ariel Ezrachi and Maurice E Stucke, *The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016).

43 Kenji Lee, Algorithmic Collusion & Its Implications for Competition Law and Policy (12 April 2018) <http://dx.doi.org/10.2139/ssrn.3213296>.

44 See generally Gal and Elkin-Koren (n 6).

45 See generally OECD (n 30).

46 Christopher Steiner, *Automate This: How Algorithms Came to Rule our World* (Penguin, 2012) 248.

as "digital butlers" in making critical business decisions on pricing. This exponential growth and usage of large amounts of data, combined with the rising use of pricing algorithms, has resulted in extraordinary levels of market transparency. This enables digital enterprises to react almost instantaneously to price movements by competitors. The pricing algorithm can set the price of an item for sale and can be written to rely on competitors' prices and demographic or other information about the customer.[47] Since the pricing algorithm generates the actual prices for transactions and evaluates complex data with speed and sophistication beyond human capability, pricing algorithms perceive price-setting as entirely machine-driven. [48]

Further, predictive analytics allows algorithms to measure the likelihood of future outcomes by analysing historical data to estimate demand, forecast price changes, and predict customer behaviour and preferences. This ability includes forecasting endogenous or exogenous shocks that might affect the market environment, such as the entry of new firms, variations in exchange rates or even natural disasters. This is valuable input for improved decision-making, business planning strategies, innovation and customised services. Still, predictive analytics go further to optimise the businesses' ability to gain a competitive advantage by reducing production and transaction costs, segmenting consumers, or setting optimal prices that effectively respond to market circumstances.[49]

The benefit of having the human-out-of-the-loop allows the pricing algorithm to optimise processes within their automated feature by processing large datasets at a speedier mode and lower cost when compared to the time and cost of undertaking the same tasks if humans performed these.[50] The very absence of the human element presents a significant conundrum in competition law in terms of establishing infringement, imposition of liability and the competence of enforcement agencies.[51] Therefore the use of pricing algorithms and dynamic pricing algorithms has been subjected to intense debate and investigation for causing excessive, unfair and discriminatory pricing in the airline industry,[52] taxi apps,[53] hotel booking apps[54] and other digital enterprises in violation of

47 Organisation for Economic Co-operation and Development (OECD), *Algorithms and Collusion - Note by the United States* (26 May 2017) <https://one.oecd.org/document/DAF/COMP/WD(2017)41/en/pdf>.

48 Ibid 5.

49 See example *United States v. Airline Tarif Publishing Co.*, 836 F. Supp. 9 (DDC, 1993); *United States v. Topkins, 15 Cr. 201* (ND Cal, 2015). Topkins and his co-conspirators alleged to have written the computer code to coordinate prices for wall posters they sold through the *Amazon Marketplace* that instructed algorithm-based software to avoid price competition. They were guilty of violating Section 1 of the Sherman Act (USA). This case exposed the act of collusion using software tools in the digital market highlighting the related challenges and risk of harm using digital technology.

50 See OECD (n 47) 5.

51 Maureen K Ohlhausen, 'Should We Fear The Things That Go Beep In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing' (Remarks from the Concurrences Antitrust in the Financial Sector Conference, 23 May 2017) <https://www.ftc.gov/system/files/documents/public_statements/1220893/ohlhausen_-_concurrences_5-23-17.pdf>.

52 See generally *United States v. Airline Tariff Publishing Co*, 836 F Supp 9 (1993) <http://www.usdoj.gov/atr/cases/dir23.htm>.

53 See *Meyer v. Kalanick*, 174 F Supp 3d 817 (SD NY, 2016). An example when taxi operators set consumer ride-fares in the *Webtaxi* app via the algorithmic pricing tool.

54 See *Eturas and al v Lietuvos Respublikos konkurencijos taryba* CJEU - C 74/14, EU (Fifth Chamber, 2016). An example of *E-TURAS*, a Lithuanian online travel booking system, that used an algorithm alleged to collude

competitional law in Europe and the United States. Nevertheless, since the investigation relied on the proof of evidence of the human act or intent that is traditionally applied in the "brick and mortar" business model, the enforcement agencies failed to prove an anti-competitive infringement. This debate also reflects the risk to consumer welfare that is expected to exacerbate further since AI-assisted pricing algorithm is a standard business tool in all sectors, irrespective of their size.[55]

Therefore, challenges presented by pricing algorithms to the current competition law ecosystem are multifarious. Firstly, as long as the static nature of the enforcement principle for anti-competitive collusion remains unchanged in the context of pricing algorithms, the action and consequences of independent pricing algorithms that interact with competitors in the absence of evidence to support an agreement to fix prices or set prices, will not tantamount to an infringement under traditional competition law principles.[56] The pricing algorithm is unlikely to amount to an agreement "by object"[57] or "by effect"[58] that leads to price discrimination without incorporating competitor data and elements of human communication.[59]

Secondly, the undetectable and autonomous working of the pricing algorithm makes it difficult for antitrust officials to identify the cheater or those who conspire to cheat because the algorithms can bypass by way of automating the conspirators' responses to changing market developments or speeding them up - avoiding the need for ongoing coordination between the participants.[60]

Thirdly, pricing algorithms coordinate interaction through tacit collusion or parallel accommodating conduct[61] allowing multiple competitors to use the same company software. This technology allows the algorithms to collectively gravitate towards higher prices on their own.

Fourthly, pricing algorithms enable price discrimination strategies for certain groups of customers. Since the core function of the pricing algorithm is to respond to market characteristics which unavoidably includes competitors' market behaviour and matching

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and coordinate discount rates when booking online via an email to several travel agencies participating in the system to vote on the appropriateness of reducing the online discount rate from 4 percent to a range from 1 to 3 percent, contrary to an anti-competitive rule under Article 101 of the Treaty on the Functioning of the European Union (TFEU).

55 Kaela Murie, 'Pricing Algorithms: Should Competition Authorities be Worried?' *European Law Blog* (21 December 2020) <https://europeanlawblog.eu/2020/12/21/pricing-algorithms-should-competition-authorities-be-worried/>.

56 See generally OECD (n 30).

57 The violation by "object" refers to agreements that, by their very nature, are anti-competitive. Examples of such agreements include price fixing arrangements, agreements that limit imports and exports, and agreements that divide the market.

58 The violation by "effect" refers to an agreement or concerted practice that is found to harm competition by assessing surrounding circumstances by way of an economic analysis of the market once the action occurred.

59 Organisation for Economic Co-operation and Development (OECD), Roundtable on Price Discrimination - Note by the United States (29-30 November 2016) <https://one.oecd.org/document/DAF/COMP/WD(2016)69/en/pdf>.

60 See generally McSweeny (n 31).

61 See generally Ezrachi and Stucke (n 42).

competitors' discounts, and presenting consumers with lower prices, it is theoretically considered pro-competitive and not anti-competitive.[62]

Finally, the price setting conceals the cross-subsidisation between different groups of consumers, which may not be considered fair. Price discrimination is driven not only by the cost to serve customers but also by customers' willingness to pay or to switch providers. Algorithmic approaches to this pricing structure may identify and exploit these differences between consumers more efficiently than prices set by humans.

Therefore, the aim of regulating price setting and collusion with the use of pricing algorithms may be beyond the scope and ambit of the present Malaysian competition law legal framework and the MyCC's ability to tackle issues of detection, investigation and evidence-collection that are incumbent in the process of proving such collusion.[63] The operability of pricing algorithms presents hurdles in building the evidential trail to claim infringement or establish an anti-competitive agreement or the required "meeting of minds" or "conscious commitment to a common scheme" of conduct or behaviour.[64]

This leads the authors to posit the reliance on an ethical dimension as a resolution to the legal conundrum. As a starting point in integrating an ethical construct in algorithmic pricing, Seele *et al* proffer a definition of algorithmic pricing that includes an ethical dimension:

> Algorithmic pricing is a pricing mechanism, based on data analytics, which allows firms to automatically generate dynamic and customer-specific prices in real-time. Algorithmic pricing can go along with different forms of price discrimination (in both a technical and moral sense) between individuals and/or groups. As such, it may be perceived as unethical by consumers and the public, which in turn can adversely affect the firm.[65]

There are different forms of algorithmic pricing. According to Seele *et al*., two of these are dynamic and personalised pricing:

> Dynamic pricing (sometimes also known as surge, yield, or real-time pricing) generally refers to the practice of dynamically adjusting prices to achieve revenue gains, while responding to a given market situation with uncertain demand… Personalized pricing is referred to as first-degree price discrimination, customized, or targeted pricing, and represents a pricing strategy whereby firms charge different prices to different consumers based on their willingness to pay.[66]

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62 See generally Murie (n 55).

63 Nikita Koradia, Kiran Manokaran and Zara Saeed, 'Algorithmic Collusion and Indian Competition Act: Suggestions to Tackle Inadequacies and Naivety' in Steven Van Uytsel (ed) *The Digital Economy and Competition Law in Asia: Perspectives in Law, Business and Innovation.* (Springer, 2021) 127-191.

64 See generally Harrington Jr (n 38).

65 Peter Seele, Claus Dierksmeier, Reto Hofstetter and Mario D Schultz, 'Mapping the Ethicality of Algorithmic Pricing: A Review of Dynamic and Personalized Pricing' (2021) 170(4) *Journal of Business Ethics* 697-719, 698-699 <https://doi.org/10.1007/s10551-019-04371-w>.

66 Ibid 699.

In this article, the authors' focus is on dynamic pricing as defined by Steele *et al* above, as it has a relatable cause of algorithmic collusion, discussed earlier.

IV INADEQUACY OF MALAYSIAN COMPETITION LAW IN ADDRESSING THE ANTI-COMPETITIVE CONSEQUENCES OF PRICING ALGORITHMS

Competition law, or antitrust law, consists of rules intended to protect the competition process and maximise consumer welfare.[67] The general aim of the law is to control and prohibit anti-competitive agreements that have as their object or effect the restriction of competition in a market or industry except if they have some redeeming virtue, such as the enhancement of economic efficiency.[68] The Malaysian CA 2010 and the Competition Commission Act of 2010 are primarily intended to regulate and control anti-competitive conduct by businesses and protect consumers and businesses against monopolies and dominant market players.

The scope of the law extends to an "enterprise" that includes "any entity carrying on commercial activities relating to goods or services".[69] The term "consumer" includes "any direct or indirect user of goods or services supplied by an enterprise in the course of business", and it encompasses " another enterprise that uses the goods or services thus supplied as an input to its own business as well as a wholesaler, a retailer and a final consumer".[70] The term "commercial activity" within Section 3(1) and (2) CA 2010 applies to both within and outside Malaysia subject to subsection (2) applies, "to any commercial activity transacted outside Malaysia which affects competition in any market in Malaysia". "Commercial activity", as defined in section 3(4) CA 2010, refers to all activity of commercial nature which is capable of extending to e-commerce activity carried out by digital enterprises except[71] for those excluded for a specific sector or related activities. [72]

The CA 2010 chiefly regulates two domains of competition law - the anti-competitive agreement under Section 4(1) and the abuse of dominance under Section

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67 Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 2015).

68 Ibid 3.

69 See *Competition Act 2010* (Malaysia) s 2.

70 Ibid.

71 "Commercial activity" is defined under Section 3(4) CA 2010 to include 'any activity of a commercial nature but does not include (a) any activity, directly or indirectly in the exercise of governmental authority; (b) any activity conducted based on the principle of solidarity; and (c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.' See *Competition Act 2010* (Malaysia) s 3(4).

72 See *Competition Act 2010* (Malaysia) s 3, First Schedule; s 13, Second Schedule.

10(1).[73] Section 4(1)[74] prohibits vertical[75] and horizontal[76] anti-competitive agreements[77] between enterprises or involves a decision by a trade association,[78] with the object or effect[79] of significantly[80] preventing, restricting, or distorting competition in any market for goods or services.[81] Such agreements include any price-fixing, price-setting or standard-setting[82] agreements or cartel that restricts the competition in that market that prominently showcases the use of pricing algorithm. In such situations, where an anti-competitive "object" is not found, the agreement may still breach the law on the basis that it has an anti-competitive "effect".[83] Furthermore, the "agreement" could be either on price or non-price whereby the seller imposes a fixed price or a minimum price at which the product must be resold or also known as the "Resale Price Maintenance" ('RPM'). Hence, any form of RPM that serves as the agreement's focal point is deemed anti-competitive within Section 4 CA 2010.[84]

Exchanges of commercially sensitive information between competitors can be deemed competition concerns if the information exchanged relates to pricing and is likely to infringe the CA 2010.[85] Pricing information, when exchanged, will violate the law, which includes future intended prices, costs, discounts, rebates, or allowances.

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73 Competition law generally regulates three main domains - the anti-competitive agreement, abuse of dominance and control of merger and acquisition. The Malaysian Competition Act 2010 does not provide for any merger and acquisition control provision.

74 *Competition Act 2010* (Malaysia) s 4.

75 The term "vertical" refers to an agreement between businesses that are at different levels in the business chain, such as between a wholesaler and a retailer. Such agreements are only considered anti-competitive if the effect restricts the competition in the market. See *Competition Act 2010* (Malaysia) s 2.

76 The term "horizontal" refers to agreements between two businesses that operate on the same level in the business chain between manufacturers, wholesalers, or retailers. The Act enlists that several horizontal agreements are deemed to be illegal or, *per se,* illegal among others when specifically, for fixing, directly or indirectly, a purchase or selling price or any other trading conditions or control technical or technological development. See *Competition Act 2010* (Malaysia) s 2.

77 The term "agreement" in Section 4(1) includes "any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices" which means the term covers both verbal and written agreements. See *Competition Act 2010* (Malaysia) s 4.

78 See Malaysian Competition Commission (MyCC), *Guidelines on Chapter 1 Prohibition* [2.3].

79 A further dimension to anti-competitive agreement is found in *Competition Act* (Malaysia) 2010 s 4(1), where it states that horizontal or vertical agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia or in any part of Malaysia.

80 Accordingly, such anti-competitive agreements are only prohibited if found to significantly 'prevent, restrict, or distort competition', and an agreement is not significant if the combined market share of the competitors in that market does not exceed 20% of the relevant market, or for non-competitors, all the parties individually have less than 25% market share in the relevant market. See Malaysian Competition Commission (MyCC) *Guidelines on Chapter 1 Prohibition* [3.4].

81 See *Competition Act 2010*, Malaysia s 4.

82 Price setting is regarded as the most serious of anti-competitive offences. It involves an agreement between competing persons or businesses, for some illegal purpose, such as raising prices, reducing or restraining output, dividing markets, or even allocating customers.

83 Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [2.5].

84 Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [2.4]- [2.5].

85 It requires the proof to have 'significantly preventing, restricting or distorting competition in the market', *Competition Act* 2010 (Malaysia) (Act 172) s 4(2).

The sharing of price information[86] and exchanging current price information[87] falls within the conduct deemed to have the "object" within Section 4(2) CA 2010 as it may facilitate price fixing and is thus considered significantly anti-competitive. On the matter of whether non-price information-sharing substantially reduces competition, it is assessed on a case-by-case basis.[88] The non-pricing information includes sales data, capacity information, demand data, market shares and investment plans. Meanwhile, the frequent exchange of confidential information among competitors in a market with few competitors is more likely to affect competition significantly.[89] In addition, the exchange of information between competitors that are not provided to consumers is also expected to have a significant adverse effect on competition.[90]

However, if the information is available to all competitors and customers, it is unlikely to cause concern. Meanwhile, information exchange at the horizontal level, such as research and development agreements, production agreements, commercialisation agreements or joint ventures, are considered on a case-by-case basis to determine their effect on competition.[91] Nevertheless, the MyCC guidelines rule out any genuine parallel behaviours which may or may not involve direct or indirect contact or communication between the parties concerned, either showing to have entered an agreement or arrangement or otherwise, in case of concerted practice, the conduct of direct or indirect contact or communication not within the CA 2010.[92] The task of proving this criterion is problematic in pricing algorithms.

Section 10(1) of the Act prohibits enterprises from engaging, independently or collectively, in any conduct that amounts to the abuse of a dominant position in any market for goods or services[93] if they have significant power[94] in a market to adjust prices, outputs, or trading terms, without any effective "push-back" from competitors or potential competitors. An abuse of a dominant position includes imposing unfair purchasing conditions, selling prices or unfair trading conditions on the supplier or consumer. The abuse of significant market power from the economic perspective is categorised as either

86 Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [3.6].

87 Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [3.8].

88 Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [3.7].

89 See MyCC Guidelines (n 83).

90 See MyCC Guidelines (n 84).

91 See MyCC Guidelines (n 82).

92 Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* p10 Para [3.5]; Sec *Competition Act 2010* (Malaysia) s 4(2).

93 See Competition Act 2010, Malaysia s 10.

94 According to the MyCC guidelines. an enterprise is considered dominant if its market share is above 60%. However, market share is not a conclusive criterion as other factors, such as whether there is an easy entry into the market, are also taken into account. For instance, where there is an enterprise with a new product and with new features that are protected by patents is considered dominant, even if it has a 20 to 30% share of a rapidly growing market where there is a rapid increase in consumers switching to the new technology. See Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [2.14[-[2.15].

an "exploitative conduct"[95] or an "exclusionary conduct".[96] Further, abuse of dominance includes applying different conditions to similar transactions with other trading parties to the extent that it can discourage new entrants, or expansion or investment by existing competitors, and force existing equal competitors from the market or seriously harm them.

The primary concern is whether the present CA 2010's structure on anti-competitive prohibition can extend its control measure effectively to price-setting algorithms or will it require a different regulatory consideration. The limitations in the legislative framework in Malaysia mirror the common phenomena worldwide in addressing the regulation of algorithmic-related anti-competitive activity. Thus, in this context, the Malaysian regulators and the MyCC need to address three key questions. Firstly, do the provisions of the CA 2010 and the powers of the MyCC, which were designed to address anti-competitive behaviour in the "brick and mortar" business environment, have sufficient legal tools and adequate expertise to intervene, manage and counter price-setting algorithms and tacit collusion leading to anti-competitive practices? Secondly, who should the competition authorities hold liable for such practices involving the problematic issue of attributing responsibility and accountability of the AI's behaviour to a human?

The *per se* rule of liability under Section 4(2) of the CA 2010 for price fixing or cartel infringement implies liability or illegality strictly without any of the following factors - any extrinsic proof of any surrounding circumstances, without any further inquiry into their effects on the market, the existence of any objective competitive justification or pro-competitive claims, or lack of scienter knowledge of its illegality.[97] Nevertheless, the formation of a cartel itself requires direct or indirect participation[98] among competitors, and that implies proof of the necessary human intent, engagement and facilitation behaviour to establish the act of infringement under Section 4 of the CA 2010. This requirement is complex to satisfy when dealing with proving tacit collusion arising from the use of pricing algorithms, as it does not involve direct human interaction in the act of collusion in price fixing. Furthermore, the issue of liability becomes more complicated when the competitors use a joint algorithmic price setter[99] which is designed to maximise the profits of the users.

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[95] An "exploitative conduct" refers to the 'ability of an enterprise to maintain price above the competitive level for some time without worrying about whether consumers will switch to other products or worrying that new competitors will enter the market'. See Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [2.4].

[96] An "exclusionary conduct" refers to the 'ability of an enterprise to dictate the level of competition in a market by preventing efficient new competitors from entering or significantly harming existing equally efficient competitors either by driving them out of the market or preventing them from effectively competing'. See Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [2.4].

[97] Such as Small Medium Enterprise (SME) involving a small market share, claiming either to have not consented or be present at Trade Associations decisions meeting, or, unaware that one's actions are wrong or contrary to law. See *Cameron Highlands Floriculturist Associations Case* (2012) MyCC/0003/201*; Malaysia Indian Hairdressing Saloon Owner* (2021) < http://www.mycc.gov.my>.

[98] See *Competition Act 2010* (Malaysia) s 2(a) and (b); Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [2.4].

[99] When competitors designed and shared dynamic pricing algorithms that were programmed to act in conformity with their agreement to set coordinated prices. See *United States v. Topkins*, 15 Cr 201 (ND Cal, 2015).

Section 4(2) CA 2010 provision on anti-competitive agreement covers even a "concerted practice"[100] Concerted practice refers to "any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition, and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either, to influence the conduct of one or more enterprises in a market; or that to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions of the competition".[101] Hence, the concerted practice covers an informal arrangement where one competitor sets the price, and other competitors follow without any reasonable justification or even an understanding between the competing parties that have not fully matured into an agreement through some contact between the parties directly or through another party.[102]

A concerted practice reflects a digital price-setting scenario among digital enterprises when entering into a tacit collusion or conscious parallelism[103] using the "hub and spoke" pricing algorithm discussed above. As the self-learning algorithm responds by enhancing the market dynamics for setting the price, under the right market conditions, the self-learning algorithms may independently arrive at tacit collusion, without the knowledge or intent of their human programmers or unsustainable allegation of anti-competitive activity in the absence of supporting communications between the humans.[104] Despite the awareness among the competitors of their concerted approach to pricing, such practices are difficult to evidence as concerted practices under the present competition law provisions. Therefore, establishing liability under traditional competition law principles for collusion from algorithmic price setting faces a hurdle since it is a tacit collusion without the human in the variable. The use of price-setting algorithms by third parties further complicates the matter. Hence, conventionally based legal tools of assessment under the *per se* rule of anti-competitive infringement under Section 4(2) of the CA 2010 lack the appropriate measures to pin down the liability on digital enterprises without the satisfaction of the requirement of the human action to establish collusion under the present legal structure. The resulting non-human factor in pricing algorithms that have replaced human activity requires a novel regulatory approach, such as an alternative ethical measure to counter the anti-competitive practices of digital enterprises.

Additionally, regulators are in a dilemma to control the algorithmic-facilitated commercial transactions in Malaysia because of its indispensable nature and efficient feature in facilitating the digital economy. As a developing nation, Malaysia has undeniably and vastly benefited from the opportunities of the digital economy and may

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100 See Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [2.5].

101 Ibid.

102 See Malaysian Competition Commission (MyCC), *Guidelines on Chapter 2 Prohibition* [2.6].

103 Tacit collusion, also known as, "conscious parallelism", occurs as a result of no illegal agreement or even any contact or communication among the competitors. Instead, each competitor acts unilaterally, in response to the behaviour of its rivals, to raise prices above competitive levels. See Ariel Ezrachi and Maurice E. Stucke, 'Sustainable and unchallengeable algorithmic tacit collusion' (2020) 17(2) *Northwestern Journal of Technology and Intellectual Property* 217-260, 218.

104 See generally Ezrachi and Stucke (n 103).

wish to take a pro-innovation approach. This approach will not rely on putting in place regulating mechanisms to inhibit the transformation into a robust digital economy. A softer approach is proposed by applying an ethical monitoring approach to enhance the competition law management on AI applications will be a viable way to monitor all these algorithmic abuses in the absence of adequate laws and simultaneously fill in the gap in the regulatory structure.

AI-based algorithmic price-fixing or price-setting is widespread among digital enterprises or platform-based industries such as *Lazada*, *Shopee* and *Grab* in Malaysia. The case involving *Grab's*[105] e-hailing service in Malaysia reflected the impact of the lack of the regulator's capacity to regulate the use of pricing algorithms. The inability to produce evidence of *Grab*'s automated theorem, based on the Evidence Algorithm ('EA') to detect their pricing algorithm, and the System for Automated Deduction ('SAD') for illegal pricing under CA 2010, reflected the difficulty of proving modus operandi of digital enterprises owing to the lack of expertise. Thus, MyCC's *parens patriae* role as the watchdog was undermined and, in the fault-finding stage, faced a multitude of problems in gathering intangible digitised-based evidence and automated theorem since the EA information and SAD systems access requires a degree of expertise that was absent amongst the members of the investigation team.[106]

The role of competition law and that of the regulators is tested in trying to take control of platform apps for fixing sellers' prices[107] (unlike price-fixing) on their platforms and the related abuse of dominance and consumer preferences. The *Grab* case[108] in Malaysia revealed that MyCC needs to take control of the digital economy in managing the practices arising from anti-competitive agreements or illegal mergers leading to abusive behaviour[109] in setting the pricing terms flowing from the use of pricing algorithm to exclusionary agreements, price discrimination, or unfair price hike[110] and price surges.[111] Digital enterprise mergers and algorithmic settings in the post-merger phase may become crucial business agreements that require diligent monitoring to reduce the damage to

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105 Malaysian Competition Commission, 'MyCC Proposes to Fine GRAB RM86 million for abusive practices' (News Release, 3 October 2019) <https://www.mycc.gov.my/sites/default/files/pdf/decision/Proposed%20Decision%20against%20GRAB%20%28Eng%29.pdf >.

106 Angayar K Ramaiah, Anupam Sanghi and Ningrum Sirait, 'Digital Market Governance and Challenges on Competition Law in Asia: Malaysia, India, and Indonesia' (Conference Paper, 5th International Multi-Conference on Artificial Intelligence Technology, 4-5 August 2021) 132-139 <https://www.ftsm.ukm.my/mcait2021/eproceeding/mobile/index.html#p=11>.

107 Julian Nowag, 'When Sharing Platforms Fix Sellers' Prices' (2018) 6(3) *Journal of Antitrust Enforcement* 382-408.

108 See generally, Malaysian Competition Commission (n 105).

109 Ahmad N Idris and Nazuin Z Kamarulzaman, 'MyCC proposes RM86.77m fine on Grab for abusive transit media practices' *The Edge (*Malaysia, 3 October 2019*)* <https://www.theedgemarkets.com/article/mycc-proposes-rm8677m-fine-grab-abusive-transit-media-practices>.

110 Bernama, 'E-hailing service providers to explain alleged fare hikes', *Free Malaysia Today* (Malaysia, 22 May 2022) <https://www.freemalaysiatoday.com/category/nation/2022/05/22/govt-to-monitor-e-hailing-amid-complaints-over-massive-price-surge/>.

111 Angayar K Ramaiah, 'Merger Phenomena in Digital Economy: Uber-Grab Competition Tell-Tale in Malaysia' (2020) 56 *European Proceedings* 638-650 <www.europeanproceedings.com>.

consumer welfare, as evidenced by the *Grab-Uber* merger in Malaysia.[112] Meanwhile, the unsupervised mergers of digital enterprises also may create barriers for newcomers, which may lead to market concentration and consequently impact consumer choice. When digital enterprise mergers become a common phenomenon among digital enterprises to gain a monopoly, the task of regulators controlling anti-competitive pre-and post-merger practices must be robust within a governance framework with continued monitoring striking the right balance between enforcement and embracing innovative technologies for growth and general consumer and economic well-being.

V USE OF ETHICAL FRAMEWORK IN FILLING THE LEGAL GAP

Monitoring pricing algorithms requires novel approaches to competition investigations and possibly even rethinking the legal definition of competition infringements. Algorithms that reach tacitly coordinated outcomes will, by their nature, be challenging to identify and interpret. Competition authorities must consider the tools used to identify issues and what constitutes an illegal act when algorithms interact. Likewise, companies using algorithms will need to review and test their pricing practices from a legal and economic perspective to avoid infringing competition law.

The alternative to exploring the inadequacy of the normative legal framework to address the dilemma of algorithmic collusion in Malaysia, but equally committed to aligning with the underpinnings of competition law, is ensuring that the algorithm used by the AI in pricing strategies aligns with ethical values that avoid the risks and harms to individuals, businesses, and society. In other words, adopting several strategies to manage the consequences of algorithm collusion when using AI tools to determine price can be combatted by adopting an ethical framework that will affect the algorithmic design and use.

Hence, the second part of the authors' proposition of regulating pricing algorithms is developing and using an ethical framework that will complement the reliance on the normative function of the competition law principles. The authors proffer that this approach can be part of a co-regulatory model between businesses and regulators whereby a framework of values must be employed by developers when designing the AI and for deployers to ensure that the AI tools they are using are audited against this framework to minimise anti-competitive practices. This ex-ante approach of an intervention at the stage of the algorithm's design has been forwarded as a feasible constraint in managing algorithmic pricing and collusion.[113]

Reliance on normative models of regulation such as laws, and in the case of pricing algorithms, the principles espoused within the legal constructs of competition law may not provide an effective model of minimising risks arising from the use of pricing algorithms.

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[112] Emir Zainul, 'MyCC to continue monitoring Grab post-merger' *The Edge* (Malaysia, 10 April 2018) <https://apps.theedgemarkets.com/article/mycc-continue-monitoring-grab-postmerger >; LW Khuen, 'MYCC assessing impact of Uber-Grab merger', *The Sun* (Malaysia, 10 April 2018) <http://www.thesundaily.my/news/2018/04/10/mycc-assessing-impact-uber-grab-merger >.

[113] See generally Gerlick and Liozu (n 13). See also, Ezrachi and Stucke (n 42).

Normative key principles found in legislation may not be fit-for-purpose and practical as the regulatory landscape may not be as dynamic as the technology and unable to keep pace with the development of AI technologies. This development can be in terms of both their potential altruistic and utilitarian uses and the potential harms and risks that may arise. With new technologies, we proceed through a series of milestones in terms of their lifecycle. There is a trajectory of firstly, invention, approval and adoption, followed by exploitation, and finally, regulation. Black and Murray identify the stages or lifecycle of the development of disruptive technologies touching on points where regulation becomes part of these stages - either before, at the point of, or after - commercial exploitation.[114] Regulation is justified as the proliferation of the use of technological innovation may present instances of documented risks that require managing. Black and Murray's allusion to ethical debates on the development and deployment of technologies contextualises the debates on the regulation of AI. Ethical debates often predate regulatory initiatives, and the lifecycle of AI is no exception. If the risks and challenges arising from the design and use of the AI require managing, governance frameworks or processes can be introduced in place of or before legal regulation. The accelerated use of AI, whilst yielding benefits, must be compatible with value-based principles within these governance frameworks. In a sense, the authors are proposing an ethical framework as a governance framework to be adopted by developers of AI tools.

The case for adopting an ethical framework to substitute traditional regulatory approaches that can manage competition law issues arising from pricing algorithms is an approach that can be taken before establishing a legal framework. Scheuerer speaks of a 'certain consensus regarding overarching and recurring paradigms' and 'overall relations of 'ethics', fairness, transparency, accountability, autonomy and the promotion of innovation.'[115] Therefore, employing a value-based ethical framework in the algorithmic design and development and subsequently deploying and using the pricing algorithm, such as algorithmic transparency in the design process, could lead to increased accountability.[116] Numerous organisations have made the prescient call to establish a set of guiding principles for algorithmic transparency and accountability, which are intended to minimise harm while simultaneously realising the benefits of algorithmic decision-making.[117] Adopting ethical constraints in algorithmic pricing is at its nascent stage, with a fervent pursuit by researchers to fill the gap.[118] Having said that, regulators have undertaken initiatives to introduce ethical considerations into pricing algorithms. Take,

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[114] Julia Black and Andrew Murray, 'Regulating AI and Machine Learning: Setting the Regulatory Agenda'., (2019)10(3) European Journal of Law and Technology 20 <https://ejlt.org/index.php/ejlt/article/view/722/980>.

[115] Stefan Scheuerer, 'Artificial Intelligence and Unfair Competition – Unveiling an Underestimated Building Block of the AI Regulation Landscape' (2021) 70(9) *GRUR International* 834–845, 835 <https://doi.org/10.1093/grurint/ikab021>.

[116] See generally Seele *et al* (n 65).

[117] See for example, Association for Computing Machinery, US Public Policy Council (USACM), *Statement on Algorithmic Transparency and Accountability* (12 January 2017) <www.acm.org/binaries/content/assets/public-policy/2017_usacm_statement_algorithms.pdf>.
See also, UK Competition and Markets Authority, *Algorithms: How they can reduce competition and harm consumers* (19 January 2021) <https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers>.

[118] See generally Seele *et al* (n 65).

for instance, the US Federal Trade Commission ('FTC'), which makes it mandatory for an algorithm to be, inter alia, transparent and accountable when used by businesses to avoid unfair or deceptive practices.[119]

The call is for these guiding principles to form a set of good practices found in an AI ethical framework.[120] The ethical framework provides values that must exist during the AI's lifecycle and, more importantly, serve as ex-ante monitoring of the algorithm's design. Ex-ante monitoring is validated as an effective manner of ensuring improvement in the development and design of the algorithm. [121] The developer of the AI tool can employ governance mechanisms to ensure that the algorithm functions in an ethical manner. And the deployer of the AI tool will have to ensure that ethical considerations were made in the process of development of the AI tool. In defining a "developer" and "deployer" of an AI system, the authors adapted these from the Second Edition of the Singapore Model AI Governance Framework 2020.[122] The definitions are as follows:

> "developer" is an entity that develops 'AI solutions or application systems that make use of AI technology.
> "deployer" refers to 'companies or other entities that adopt or deploy AI solutions in their operations as part of a useable service.
> "developer and deployer" are organisations that 'develop their own AI solutions and can be their solution providers.'

In drawing up a framework of relevant ethical principles to overcome the dilemmas of collusion and anti-competitive outcomes resulting from pricing algorithms, reference is made to the Malaysian Roadmap's first iteration of Principles for Responsible AI containing seven principles of fairness; reliability, safety, and control; privacy and security; inclusiveness; pursuit of human benefits and happiness; accountability; and

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[119] U.S. Federal Trade Commission, Using Artificial Intelligence and Algorithms (2020) <https://www.ftc.gov/business-guidance/blog/2020/04/using-artificial-intelligence-and-algorithms>. See also, U.S. Federal Trade Commission, Aiming for truth, fairness, and equity in your company's use of AI (2021) <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>.

[120] See for example, European Commission, *Ethical guidelines for trustworthy AI* (2020) <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai>;
The IEEE Global Initiative for Ethical Considerations in Artificial Intelligence and Autonomous Systems, Institute of Electronics and Electrical Engineers (IEEE), *Ethically aligned design: A vision for prioritizing human wellbeing with artificial intelligence and autonomous systems. (Vers. 1)* (2016) <https://standards.ieee.org/content/dam/ieee-standards/standards/web/documents/other/ead_v1.pdf?>;
The IEEE Global Initiative for Ethical Considerations in Artificial Intelligence and Autonomous Systems, Institute of Electronics and Electrical Engineers (IEEE), *Ethically aligned design: A vision for prioritizing human well-being with autonomous and intelligent systems. (Vers. 2)* (2017) <https://standards.ieee.org/content/dam/ieee-standards/standards/web/documents/other/ead_v2.pdf>;
The Organisation for Economic Co-operation and Development (OECD), *OECD AI Principles* (2019) <https://oecd.ai/en/ai-principles>;
Future of Life Institute. *Asilomar AI principles* (2017) <https://futureoflife.org/2017/08/11/ai-principles/>.

[121] Ariel Ezrachi and Maurice E Stucke, *Virtual competition: The promise and perils of the algorithm-driven economy* (Harvard University Press, 2016).

[122] Info-communications Media Development Authority (IMDA) and Personal Data Protection Commission Singapore (PDPC), *Model AI Governance Framework* (2020) <https://www.pdpc.gov.sg/-/media/files/pdpc/pdf-files/resource-for-organisation/ai/sgmodelaigovframework2.ashx>.

transparency.[123] There is a rudimentary explanation of these salient principles in the Roadmap.[124] However, this explanation is incapable of forming a distillate tool to guide developers and deployers as a risk assessment tool. The authors of the Final Report made a notation that the Principles for Responsible AI must be read in line with the provisions of the Federal Constitution and the Rukun Negara, and the Malaysian Roadmap is to be read as a "living document" which suggests that the Roadmap is expected to evolve with updated iterations.[125] Pending this further iteration, the authors propose that the starting point is scoping the corpus of documents that comprise existing AI ethical frameworks. Jobin *et al* distilled eleven overarching ethical values and principles from the content analysis of ethical frameworks adopted worldwide.[126] These ethical principles and their corresponding codes derived from the content analysis are found in the Table. These values are transparency, justice and fairness, non-maleficence, responsibility, privacy, beneficence, freedom and autonomy, trust, dignity, sustainability, and solidarity.

Table 1. Ethical principles identified in existing AI guidelines.

Ethical Principle	Included Codes
Transparency	Transparency, explainability, explicability, understandability, interpretability, communication, disclosure, showing
Justice & fairness	Justice, fairness, consistency, inclusion, equality, equity, (non-)bias, (non-) discrimination, diversity, plurality, accessibility, reversibility, remedy, redress, challenge, access and distribution
Non-maleficence	Non-maleficence, security, safety, harm, protection, precaution, prevention, integrity (bodily or mental), non-subversion
Responsibility	Responsibility, accountability, liability, acting with integrity
Privacy	Privacy, personal or private information
Beneficence	Benefits, beneficence, well-being, peace, social good, common good
Freedom & autonomy	Freedom, autonomy, consent, choice, self-determination, liberty, empowerment
Trust	Trust
Sustainability	Sustainability, environment (nature), energy, resources (energy)
Dignity	Dignity
Solidarity	Solidarity, social security, cohesion

To determine the specific values to be adopted in the regulation and oversight of the pricing algorithm, the harm, and risks that these values seek to suppress, minimise

123 Malaysian Ministry of Science & Technology, *Malaysia National Artificial Intelligence Roadmap 2021-2025* (2021) 29 <https://airmap.my/>.

124 Ibid 30.

125 Ibid 88.

126 Anna Jobin, Marcello Ienca and Effy Vayena (2019) 1 'Artificial Intelligence: The Global Landscape of Ethics Guidelines' *Nature Machine Intelligence* 389–399, 396 <http://ecocritique.free.fr/jobin2019.pdf>.

or eradicate have to be identified. These values will serve as the conceptual foundation of the ethical framework. By addressing the dilemma, the conceptual foundation of an ethical framework must be embedded in values that help overcome the dilemma. The dilemma of collusion through algorithmic pricing, namely dynamic pricing, is, first, the opacity and non-suitability of the algorithm. This may result in deception and a lack of clarification and transparency in the system. Secondly, the collusion may result in price discrimination among consumers, raising questions about fairness.

A *Transparency*

The need for "explainable" AI requires that any manner of pricing mannerisms or structure using algorithms must be explainable, such as the need for market transparency in competition law that prohibits misleading practices. The coding of the ethical principle of "transparency" in the Table is capable of encapsulating the principles of competition law. For market transparency to exist, consumers and regulators need to know the extent consumer data has been used to make decisions about the pricing, how the businesses arrived at the pricing, and, more critically, if there has been any manner of price discrimination. Taking the definition of price discrimination as being '…charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ…',[127] the discussion around transparency leads to the phenomenon of "algorithmic consumer price discrimination".[128]

This phenomenon converges with the principle of "justice and fairness", where price discrimination may lead to discrimination, inequality, and inequity.

B *Fairness*

The element of fairness is essential in building trust amongst consumers. Using dynamic pricing that results in different pricing systems leads to a loss of trust in businesses.[129] Examples include the loss of trust in companies such as *Amazon*[130] when discriminatory schemes were applied, resulting in price fluctuations for items in demand. Price fairness has been defined as the extent to which sacrifice and benefit are commensurate for each party involved.[131] The element of fairness, specifically, price fairness, must benefit

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127 *Post Danmark A.S v Konkurrencerådet* [2012] ECR I-172 (Case C-209/10) [30].

128 Christopher Townley, Eric Morrison and Karen Yeung, 'Big Data and Personalised Price Discrimination in EU Competition law' (Research Paper No 2017-38, Dickson Poon School of Law, King's College London, 6 October 2017) <http://dx.doi.org/10.2139/ssrn.3048688>.

129 Ellen Garbarino and Olivia F Lee, 'Dynamic Pricing in Internet Retail: Effects on Consumer Trust' (2003) 20(6) *Psychology & Marketing* 495-513.

130 Wei Ke, 'Power pricing in the age of AI and analytics', *Forbes* (New Jersey, 2 November 2018) <https://www.forbes.com/sites/forbesfinancecouncil/2018/11/02/power-pricing-in-the-age-of-ai-and-analytics/?sh=193a509b784a>.

131 Lisa E Bolton, Luk Warlop and Joseph W Alba, 'Consumer Perceptions of Price (Un)Fairness' (2003) 29(4) *Journal of Consumer Research* 474–491.

consumers and businesses. Consumers' perception of the price as unfair and unfavourable will lead them to other businesses.

The coding of the ethical principle in the table requires further review for it to be a cogent ethical principle to be considered in the exercise of a value or measurement to assess the pricing algorithm. Scheuerer, clarified that the understanding of the term "fairness" in the AI context differs from that in unfair competition law, where the latter is attuned to safeguarding competition and competition-related interests.[132] The European Commission's High-Level Expert Group alluded to the fact that there are many interpretations of the term "fairness".[133]

To ensure that the term "fairness" is coded to align with the dilemma arising from algorithmic pricing, guidance can be sought through legal constructs that regulate unfair competition standards. Under Section 5 of the United States Federal Trade Commission Act,[134] the FTC has the power to prohibit unfair methods of competition. The section is viewed as a "principle" based provision instead of a "rule" based. Applying this principle can provide the scaffolding to the ethical principle of fairness in developing and deploying AI systems that lead to collusion resulting from algorithmic pricing.

The legal standard to be established for assessing the algorithm to be unfair must be based on - firstly, the cause or likely causes of substantial injury to consumers; secondly, if consumers cannot reasonably avoid it; and, finally, the use of the algorithm 'is not outweighed by countervailing benefits to consumers or competition.'[135]

VI RECOMMENDATIONS

Following the discussion around the need for transparency and fairness, and upon review of whether these principles exist in the lifecycle of the AI, the question of accountability arises where these values are absent. Consequently, unlike human accountability, the algorithm as a digitalised system is subsumed under the principle of "responsibility" in the ethical principles identified by Jobin *et al*. Finality in the determination of which entity is held responsible and accountable is essential, as consumers must have avenues of redress.

The authors consider the manner in which "responsibility" can be operationalised to ensure, firstly, that developers and deployers of AI systems develop a framework as part of an internal governance tool to ensure collusion arising from algorithmic pricing that results in a lack of transparency and fairness is addressed; and secondly, to consider the best regulatory approach to be adopted in particular which authority or regulatory agency will hold the responsibility of reviewing and supervising developers and deployers of AI who partake in collusion arising from algorithmic pricing.

The authors, whilst aware of the debate for new regulatory interventions to manage AI regulation through algorithmic pricing, prefer to explore options involving soft

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132 See generally Scheuerer (n 115).

133 High-Level Expert Group on Artificial Intelligence, European Commission, *Ethics guidelines for trustworthy AI* (2019) 12 <https://ec.europa.eu/digital-singlemarket/en/news/ethics-guidelines-trustworthy-ai>.

134 *Federal Trade Commission Act*, 15 USC §45 (1914).

135 OECD (n 30) 38.

governance through self-regulation by businesses with adequate scaffolding provided by some regulatory oversight by regulatory institutions and agencies.

The authors recommend a regulatory moratorium and take the position of the OECD in exploring 'alternative courses of action'.[136] Taking a lighter touch in the form of voluntary measures, such as internal risk assessments to mitigate risks within a regulatory sandbox, is a method favoured by regulators.[137]

A *Internal Governance Measures*

Internal governance would require developers and deployers of AI tools to create and operationalise mechanisms employed as self-governance tools to ensure that algorithm design does not lead to anti-competitive practices.

These tools must include the essential role of "human-in-the-loop" overseeing the AI lifecycle. The responsibility is vested in an "audit" committee leading the integration of self-governance measures in the regulatory sandbox. This committee must undertake a rigorous impact assessment process using the values identified in an ethical framework. The impact assessment must contain an index of anti-competitive practices capable of identifying the potential harms and risks. It will serve the purpose of providing a rationale for using the algorithm. This will also facilitate any oversight body to evaluate the quality of the assessment providing redress for any grievance deemed to result in price collusion.

Therefore, the recognition and adoption of substantive AI principles that are the standards of responsible and trustworthy AI are essential. Jobin *et al*'s research on prevalent values of the different ethical tenets found in ethical frameworks can be integrated into the impact assessment index.

B *Regulatory Oversight*

With the publication of the Malaysian Roadmap, the authors foresee a continued iteration of the Governance and Ethics strategic initiative within the roadmap and the adoption of an AI Ethics National Framework. With the framework in the pipeline, one of the flagship initiatives of the said framework will include AI Governance, where a national AI Ethical Framework will be a crucial component. Owing to the policy vacuum resulting from Malaysia not having an AI National Framework, organisations have no detailed and readily implementable guidance to address critical ethical and governance issues when developing and deploying AI system solutions. With most national AI frameworks, it is an essential policy document that aims to promote public understanding and trust in AI systems.

Such national AI frameworks will provide an overarching policy and direction in positioning a nation to benefit from the AI revolution by assisting understanding and confidence in AI systems. Within these frameworks is a policy position on AI governance.

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[136] OECD (n 30) 46-51.

[137] See Ryan Morrison, 'Government backs UK AI regulatory sandbox', *TechMonitor* (Hull, 16 March 2023) <https://techmonitor.ai/technology/ai-and-automation/government-backs-ai-regulatory-sandbox>. For definition of "regulatory sandbox", see <https://www.lexology.com/library/detail.aspx?g=419b7b84-bde0-4c29-bb63-41df2aa3d0b1>.

Therefore, the absence of such a framework impedes forging standards in AI governance premised on a value-based ethical framework. There is immense potential for the development of a national policy that adopts a sector-specific framework as a tool of AI governance to set out overarching aspirational values that must be demonstrable in the life cycle of AI systems supported by a set of principles that can be used by developers and deployers of AI tools that carry out algorithmic pricing activities.

This sector-specific framework is a feasible starting point in ensuring a digital marketplace that promotes trustworthy and responsible AI in its use of innovative tools in a complex regulatory landscape with multiple regulatory and oversight bodies involved at the national level. Regulating the digital economy requires the coordination of different laws and oversight regulators that intersect in the various facets of the activities of such an economy. The algorithmic pricing and the anti-competitive risks arising from the use of the algorithm in the digital economy require a harmonious and integrated initiative of different agencies and regulators in Malaysia who are responsible for competition law as well as telecommunication law, data protection law, consumer law, to name a few amongst others.

Further, the phenomenon of tacit collusion from algorithmic pricing is at its nascent stage in Malaysia. Policymaking requires a sufficient volume of antecedent cases and investigations of the negative impact of the phenomenon to develop solutions. The use of algorithmic pricing is merely at the preliminary stages of this modern technology's growth trajectory. Therefore, these solutions must not impede or inhibit the growth of digital innovation in the digital economy. Nevertheless, regulators and agencies must not be pusillanimous in the dilemma presented by the type of algorithmic regulation of pricing but must embark on a graduated response.

To support internal governance measures adopted by businesses, an advisory body comprising the various agencies and regulatory stakeholders should be established - assigned with the responsibility at the first stage of its gestation to observe and collate evidence of the anti-competitive cases where tacit collusion from algorithmic pricing has resulted and the impact on consumers; and; at the second stage, to review and supervise businesses in operationalising self-governance tools to minimise harm to the consumers and overcome anti-competitive practices; and at the final stage, to coordinate and reconcile policies and laws to produce guidelines to minimise risks to consumers. Ideally, a regulatory sandbox could be developed. Article 53 of the European Commission AI Law proposal defines a regulatory sandbox as a controlled environment that facilitates developing, testing and validating innovative AI systems for a limited time before they are placed on the market or put into service under a specific plan'.[138] It will allow regulators and businesses to use this sandbox as an incubator to develop AI tools to craft best practices and ensure compliance with standards such as impact assessment tools and the sector-specific AI ethics framework.

[138] European Commission, *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts* (2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206>.

VII CONCLUSION

The regulatory structure in dealing with AI tools must view such transformative technologies as useful innovations to digital enterprises. The regulatory structure must shift to a pro-innovation approach to prevent over-regulation while being equally effective in minimising the risks and harms of such innovations. Reiterating the position of a moratorium in addressing the challenge of pricing algorithms and collusion through a legal framework, this paper aligns with the recommendation of the OECD in resorting to alternative courses of action. In exploring these alternative governance mechanisms to address the risks of algorithmic collusion, a risk assessment tool employing an AI ethical framework within a regulatory sandbox scaffolded by a regulatory oversight body could be vital in taking the path of a pro-innovation approach. This approach will support the underlying ethos of competition law to ensure that a fair market price architecture is indeed competitive and pricing algorithms are reliable, instilling confidence amongst consumers that price-setting is taking place both ethically and legally. The assessment based on competition law doctrine must expand beyond economic principled market study, progressing toward an ethics-based risk assessment strategy that could evolve into legal norms of Malaysian competition law. The gaps within the normative framework of the Malaysian CA 2010 on algorithmic pricing and collusion are capable of being filled by the proposed regulatory sandbox to craft best practices ensuring compliance with standards for risk assessment and the creation of a sector-specific AI ethics framework.

THE TERM *JIHAD* IN ISLAMIC JURISPRUDENCE WITH REFERENCE TO MODERN INTERNATIONAL LAW: A CRITICAL EXAMINATION

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Mohd Wafiq bin Mohd Jafree**

Abstract

The term "*jihad*" carries with it several negative connotations, where the term can be linked with acts of violence, extremism, and terrorism. This article goes against such views and argues that *jihad* is defensive in nature. It is to be contended that *jihad* can be utilized as a cause for self-defence, not as a means to enable aggression. In addition, the role of *jihad* under Islamic law will be compared briefly within the context of modern international law. Moreover, this article will further clarify the term "*jihad"* by reviewing its meaning and common misconceptions. This article also highlights that the term *jihad* is misunderstood, it is essentially a tool of self-defence and a last resort against oppressors and mandates that all other efforts must be tried before turning to violence. The claim that *jihad* is a holy war against non-Muslims is thus untrue from a philosophical and theoretical standpoint and does not reflect the fundamental principles of Islamic jurisprudence. Instead, this paper argues that *jihad* is a cause for self-defence rather than a cause of aggression.

Keywords: Islamic International Law, International Law, *Jihad*, Self-Defence, *Jus ad Bellum*, Just War.

I INTRODUCTION

The term "*jihad*" carries several misconceptions pertaining to its definition. At first glance and to the uninformed, the term "*jihad*" may refer to Islamic extremism or acts of Islamic terrorism. In the West, "*jihad"* has frequently been mistranslated as a form of "holy war" for Muslims to act against non-believers of the Islamic faith.[1] To fuel such misinformation further, the language of "*jihad*" has also been abused and employed by Islamic extremists to justify their acts of terrorism.[2] With these instances, "*jihad*" can be

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1 Asma Afsaruddin, '*Jihad*', *Encyclopedia Britannica* (Article, 12 May 2023) <https://www.britannica.com/topic/jihad>.

2 Brian Handwerk, 'What Does "*Jihad*" Really Mean to Muslims?', *National Geographic* (Article, 25 October 2003) <https://www.nationalgeographic.com/culture/article/what-does-*jihad*-really-mean-to-muslims>.

misinterpreted by the uninformed majority, as an act of aggression to be waged against non-Muslims. This view, however, is a misconception and this article aims to go against such an aggressive interpretation of "*jihad*." Instead, this article will strive to clarify the language of "*jihad*", where it is a cause for self-defence rather than a cause for aggression under Islamic international law. The term "*jihad"* will also be compared to in the context of modern international law.

The term "*jihad*" rose to popularity after the 9/11 attacks on the United States of America (US) more than ten years ago. The US and other Western nations generally assert that those responsible for the 9/11 attack adhered to the Islamic philosophy of *jihad* in order to wage war against the US and its allies around the world. Since then, several Islamic nations that are supposedly sheltering terrorists have been targeted by the US and its allies as part of a shared enemy that must be terrorized. There are now two schools of thought that approach *jihad* from quite distinct perspectives. The first is the usage of the term "*jihad*" by terrorists who interpret it literally without considering the context, leading to the continued use of the traditional definition of the term given by jurors in the past. The second viewpoint is that of individuals who believe that *jihad* is a threat to human life and should be eliminated from its foundation. According to this viewpoint, Western rulers attempted to destroy Muslim nations under the pretext of fighting terrorism without seeking a more thorough justification.[3] Hence, this article strives to provide clarity to the term "*jihad*" in the context of Islamic international law, in contrast to these views. This article also highlights that *jihad*, understood as war, is essentially a tool of self-defence, and a last resort against oppressors. This paper explores that *jihad* is a cause for self-defence rather than a cause of aggression.

II THE CONCEPT OF *JIHAD*

The Arabic word *jihad*, which appears in the Quran in a variety of situations and can refer to a variety of non-violent conflicts, such as the struggle to become a better person, literally means "struggle" or "striving." This is categorized as "*jihad* of the self," a crucial topic in Islamic devotional literature. Yet, in the unique context of Islamic international law*, jihad* typically refers to a violent conflict against foreigners. Islamic legal scholars of the Middle Ages distinguished between two primary types of military *jihad*: aggressive *jihad,* which involved pre-emptive or offensive attacks ordered by governmental authorities, and defensive *jihad,* which involved violent resistance to intruders.[4] However, in this article, it is contended that *jihad* is a cause for self-defences rather than a cause of aggression.

The Quran's injunction to battle (the word *jihad's* literal meaning) in God's way and the teachings of the Prophet Muhammad p.b.u..h and his early Companions serve as the foundation for the significance of *jihad*. *Jihad*, when used in its broadest sense, refers to the responsibility placed on all Muslims, both as individuals and as a community, to carry out and accomplish God's will: to live a moral life and to grow the Islamic community

[3] Ramlan *et al*, 'The Concept of *Jihad* in Islam' (2016) 21(9) *IOSR Journal of Humanities and Social Science* (IOSR-JHSS) 35.

[4] Mohammad Hassan Khalil, 'So, what really is *jihad*?', *The Conversation* (Article, 20 June 2019) <https://theconversation.com/so-what-really-is-jihad-118660>.

through preaching, teaching, leading by example, writing, etc. *Jihad* also encompasses the duty and right to protect the community and Islam from enemies. The call to *jihad* has inspired Muslims to defend Islam throughout history.[5]

The term "*jihad*" has gained remarkable popularity since the turn of the 20th century, being used by terrorist, resistance, and liberation groups alike to justify their actions and inspire their supporters. In Afghanistan, the Afghan Mujahiddin, the Taliban, and the Northern Alliance have engaged in *jihad* against foreign powers and among themselves. Muslims have also engaged in *jihad* in Bosnia, Kosovo, Chechnya, the southern Philippines, Kashmir, and other places. The Armed Islamic Group of Algeria has launched a *jihad* of terror against the Algerian government, and Osama Bin Laden and al-Qaeda have waged a global *jihad* against Muslim nations and the West. Palestine has described its conflict with Israel as a *jihad*.[6]

The significance of *jihad* is founded in the Quran's instruction to "struggle or exert" oneself in the way of God (the literal meaning of the word *jihad*). The Quranic teachings have been critical to Muslim self-awareness, piety, mobilization, expansion, and defence. *Jihad* as a struggle refers to the difficulty and complexities of leading a decent life: working against the evil inside oneself - to be virtuous and moral, making a sincere effort to conduct good actions and contributing to the reformation of society. It can also imply resisting injustice and oppression, propagating and defending Islam, and constructing a just society by preaching, teaching, and, if necessary, military conflict or holy war, according to one's circumstances.[7]

In a well-known Prophetic tradition, the non-violent and violent forms of *jihad* are contrasted. Muhammad reportedly informed his companions, "We return from the lesser *jihad* to the greater *jihad*," upon his return from war, according to Muslim legend. The bigger *jihad* is the more challenging and significant battle against one's ego, selfishness, greed, and evil.[8]

Throughout Islamic history, the idea of *jihad* has been utilized and abused and has numerous connotations. Although it has long been a significant aspect of Islamic tradition, some Muslims recently argued that *jihad* is a universal religious duty for all sincere Muslims to participate in the *jihad* in order to support a worldwide Islamic revolution.[9] This article will advocate that *jihad* is in contrast to this perception.

III *JIHAD* AS A CAUSE FOR SELF-DEFENCE

As stated previously, *jihad* can be a cause for self-defence. This view subscribes to the just war theory. Islam's concept of *jihad*, or combat in defence of human life and religious freedom, has legal parallels with the just war idea recognized by current international law.

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5 John L. Esposito, 'Unholy War: Terror in the Name of Islam and What Everyone Needs to Know about Islam', *United Nations Alliance of Civilizations* (Article) <https://www.unaoc.org/repository/Esposito_Jihad_Holy_Unholy.pdf>.

6 Ibid.

7 Ibid.

8 Ibid.

9 Ibid.

In Islam, the term "*jihad*" refers to a much broader idea that includes challenging deeds of kindness and spiritual conflict with evils. *Jihad* in the *Quran* and *Sunnah* provides rules of non-aggression, proper declaration, right intention, war as a last resort, and proportional retaliation, which foreshadow many aspects of the modern concept of the just war theory, which covers both *jus ad bellum* (justice to war) and *jus in bello* (justice in war).[10]

Jihad, taken in its broadest meaning, refers to the fight each believer faces as they pursue God's way. These battles can be won with the sword or the heart (or mind). Islam distinguishes between two types of *jihad:* There are two types of conflict: 1) the effort against the lower self, to purify the heart, shun evil, and improve oneself; and 2) the struggle against the oppressors and aggressors who perpetrate injustice.[11] Yet, *Jihad's* aim was not to subjugate people or force them to convert to Islam; neither was religion the driving force behind its conflict. *Jihad* was instead meant to combat injustice, stand up for the weak, and expel the adversary. Due to a lack of public awareness on the subject and misuse of the term by a small number of Muslims and extremist groups who did not adhere to the Islamic doctrine for the conduct of war, the term "*jihad*" is frequently misinterpreted by the media.[12]

Islam only permits the use of force when it is justified and under specific circumstances. Islam views the murder of one person without due process as the murder of all humankind. In the Quran, God declares:[13]

> *"Whoever kills a human being without (any reason like) murder or corruption on earth, it is as though he had killed all mankind" (Quran, Surah al-Maeda 5:32)*

Jihad is therefore essentially a form of self-defence rather than conquest. It is a reaction to military aggressions, and not merely to religious disagreements or differences.[14]

The world has a lot of misconceptions about Islam as a result of the terrorist incident that occurred in the US on September 11, 2001, also known as "9/11." Al-Qaeda, an extremist organization established in 1989 by Osama bin Laden and others, was responsible for carrying out this attack. Although they had targeted numerous other nations, people, and sites, the "9/11" attack was the most brutal. Their goal was to construct an international Islamic society based on their radical agenda.

Al-Qaeda is not the only extremist organization on the globe; others include the Taliban, the Islamic State of Iraq and the Levant (ISIL), and others.[15] In actuality, these organizations frequently engage in violence against one another and attack both Muslims

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10 Justin Parrot, '*Jihad* in Islam: Just-War Theory in the Quran and Sunnah', *Yaqeen Institute* (Article, 15 May 2020) < https://yaqeeninstitute.org/read/paper/jihad-in-islam-just-war-theory-in-the-quran-and-sunnah>.

11 Esposito (n 5).

12 Amanda Kretsch, 'The Misconception of *Jihad* in America', *Digital Commons* (Article, 2016) <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1109&context=ulra>.

13 Asghar Ali, 'Theory of War and Peace in Islam', *Irenees* (Article, September 2009) <http://www.irenees.net/bdf_fiche-analyse-931_en.html>.

14 Parrot (n 10).

15 'Global Terrorism Index', *Economics and Peace* (Article, 2016), <https://www.economicsandpeace.org/wp-content/uploads/2016/11/Global-Terrorism-Index-2016.2.pdf>

and non-Muslims.[16] They maliciously cite verses from the *Quran*, traditions of the Prophet p.b.u.h, and opinions of jurists taken out of their original contexts to justify their heinous deeds, which genuinely does not reflect Islam and is not consistent with the true spirit of *jihad*. When determining the meaning of their scriptures, they frequently quote these sources directly and frankly without mentioning the *Asbab al-Nuzul* (the reasons of revelation).[17] For instance, the Qur›an states:

> *"Fight those of the People of the Book who do not [truly] believe in God and the Last Day, who do not forbid what God and His Messenger have forbidden, who do not obey the rule of justice, until they pay the tax and agree to submit." (Quran, Surah at-Taubah 9:29)*

This verse was revealed before the Battle of Tabuk, according to *al-Tabari* (d. 923). The death of the Prophet's emissaries by a Roman ally, which sparked the Battle of Mut'ah, was the fundamental cause of this conflict. The first act of war that precipitated the clashes at Mut'ah and Tabuk, according to Ibn Qayyim (d. 1350), was done by the Romans.[18] Hence, in this situation, Muslims were permitted to fight as a form of self-defence, according to traditional Muslim jurists. This verse, according to its *Asbab al-Nuzul*, cannot be reasonably used as a proof of a violent Islam and it cannot be applied to justify attacks on non-Muslims in the name of Islam.

Another example of a Hadith mostly used by extremists is: Another example of a Hadith mostly used by extremists is:

> *"I have been commanded to fight the people until they say there is no God but Allah…". (Sahih al-Bukhari 25)*

Extremists are categorically mistaken when they interpret this verse from the *Quran* to suggest that Islam demands non-stop combat with non-Muslims until they convert to Islam. The people mentioned in this passage are those who often breach the peace, which excludes Jews, Christians, and other people of faith, according to Anas ibn Malik (d. 709), who revealed the true meaning of this verse.[19] This understanding is consistent with the extraordinary circumstances outlined in Islam to combat aggressors. In contrast to what the extremists have argued, this verse is therefore not always appropriate.

The idea that the Prophet p.b.u.h never forced anyone to adopt Islam was further emphasized by Ibn al-Qayyim. Only those who attacked the Prophet p.b.u.h initially faced a war with him. The Quran's text, which states the following, lends credence to this viewpoint:[20]

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16 Ibid.
17 Parrot (n 10).
18 Ibid.
19 Ibid.
20 Parrot (n 10).

> *"There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong." (Quran, Surah al-Baqarah 2:256)*

As a matter of fact, the Prophet p.b.u.h utilized *da'wah* (invitation) by composing and delivering letters requesting that other kings accept Islam. Among them were Caesar (the King of Rome), Mundhir bin Sawa (the Governor of Bahrain), Muqawqas (the Vicegerent of Egypt), Chosroes (the Emperor of Persia), and many others. Although only some embraced Islam and others did not, the Prophet p.b.u.h never declared war against them to force them to embrace Islam.[21]

The *Fee Sabil Lillah* (in the name of God), also known as the martyrdom operation, is another false philosophy that extremist groups have developed. They misappropriated a passage from the *Quran* in this context to support suicide bombing, falsely portraying it as a mission of martyrdom. For example, the Quran states:[22]

> *"Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into (the hearts of) the enemies of Allah and your enemies and others besides, whom ye may not know but whom Allah does know. Whatever you spend in the cause of Allah, shall be repaid unto you and you shall not be treated unjustly." (Quran, Surah al-Anfaal 8:60)*

This verse was given before the Battle of Badr, which only took place as a result of the adversaries' desire to assassinate and attack Muslims in Madinah.[23] As a result, the genuine meaning of this Quranic verse is that fighting is only acceptable in self-defence and never when attacking someone without a legitimate reason. Hence, the radical ideology of suffering martyrdom in God's name through acts like suicide bombings is not an accurate reading of the *Quran*. Islam forbids the use of suicide bombers.[24] Killing oneself can never be justified under any circumstance. God says in the Quran:

> *"O you who believe! ... Do not kill yourself, for truly Allah has been to you Most Merciful. If any do that in rancour and injustice, soon shall We cast him into the Fire." (Quran, Surah an-Nisaa 4:29-30)*

Jihad, or battle in the sense of fighting against oppressors, is thus only used as a last resort in Islam and is only used as a means of self-defence. Most significantly, though, all attempts at peaceful resolution must be made before engaging in combat. Only under extremely strict restrictions is this kind of *jihad* permitted. Hence, terrorism and the interpretation of the *Quran* by extremists are wholly against Islamic law. As a result of their inadequate comprehension of the real meanings of *jihad* as they are presented in Islam, misconceptions about *jihad* are prevalent in the media. Without a doubt, the *Jihad*

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21 Nighat Ruhkasana and Mussarat Jamal, 'The Methodology of the Prophet in Calling to Allah' (2014) 5(3) *Journal of Social Sciences Research* 828.

22 Esposito (n 5).

23 Ahmad Riyadi, '*Penafsiran Surah al-Anfal Ayat ke-60 Melalui Pendekatan Semiotika*' (2017) *Jurnal Studi Islam Indonesia* 1.

24 Kretsch (n 12).

shows that Islam is a religion of peace rather than one that supports terrorism when read and understood in the context of the just war theory. In actuality, there are significant parallels between Islamic international law and the current conception of just war theory and the resulting nonviolent tenets.

IV THE THEORIES OF *JIHAD*

It is to be mentioned that there are two theories of *jihad* in relation to the use of force; these are namely: the defensive and offensive theories.[25] This article aims to assert that the correct view to be taken is that *jihad* is to be used defensively with regard to the use of force.

A *Defensive Theory*

The *Qur'an* (22:39) allows the use of force in self-defence: 'Permission [to fight] is given to those against whom fighting is launched, because they have been wronged.'[26] It was the first time soon after the Prophet Muhammad p.b.u.h moved to Medina from Mecca[27] in 622 AD, that the *Qur'an* gave permission to use force in self-defence.[28] Verse 22:39 is written in the passive tense, 'against whom fighting is launched',[29] and therefore indicates that permission is given when Muslims are 'wronged', i.e., attacked. Verse 22:40 sheds some light on what the *Qur'an* means by wronging: '[they are] the ones who were expelled from their homes without any just reason, except that they say "Our Lord is Allah".' Permission to use force is therefore predicated on 'wronging' Muslims. This position is reinforced by verse 2:190: '[f]ight in the way of Allah against those who fight you and do not transgress. Verily, Allah does not like the transgressors.' This verse was revealed one year after Prophet Muhammad p.b.u.h migrated from Mecca to Medina.[30] 'Fight in the way of Allah against those who fight you' has two meanings. First, it allows Muslims to fight those who fight them, a reflection of the permission given in verse 22:39. The phrase 'who fight you' shows that Muslims cannot be aggressors.[31] This verse forbids aggressiveness but makes an exemption for the use of force in self-defence. Secondly, it exclusively refers to soldiers engaged in genuine combat (*qital*). "[A]nd do not transgress" denotes that it is forbidden to go beyond Allah's bounds, including using force against aggressors or for self-defence. The two verses in the *Qur'an* that discuss personal defence are verses 22:39 and 2:190, although verse 22:39 serves as the main passage on this topic.[32]

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25 Niaz A. Shah, 'The Use of Force under Islamic Law' (2013) 24(1) *European Journal of International Law* 344.

26 The translation of the Qur'an by Muhammad Taqi Usmani, *The Meaning of the Noble Quran* (2006).

27 A.Y. Ali, *The Meaning of the Noble Quran* (1989), 832.

28 A.M. Daryabadi, *The Glorious Quran: Text, Translation and Commentary* (2002), 603.

29 Ali (n 27).

30 M. Asad, *The Message of the Quran* (1997), 512.

31 Daryabadi (n 28).

32 Shah (n 25).

The verse "What has happened to you that you do not fight in the path of Allah and for the oppressed among men, women, and children," the *Qur'an* (4:75) authorizes the use of force to defend other Muslims who are being persecuted and are powerless to defend themselves. Here, the meaning is different. Verse 4:75 authorizes the use of force to defend individuals who are being persecuted for practising Islam and are unable to defend themselves, in contrast to verse 22:39, which permits the use of force in self-defence. The need for employing force to defend the weak and oppressed Muslims is that they must be subjected to an oppression that is so terrible that it forces them to flee their homes, such as genocide or torture.[33]

The use of force in self-defence and to defend those Muslims who are being persecuted but are unable to defend themselves is clearly justified by the *Qur'an*. Verse 4:75 specifies that Muslims have the right to use force to defend oppressed and defenceless fellow Muslims, but it does not forbid doing so when doing so would be morally justifiable. The *Qur'an* contains evidence that can be used to create a rule that will safeguard any oppressed people who are powerless to defend themselves. For instance, the *Qur'an* (5:32) declares that whomever saves a person's life "is as though he had rescued the life of all of humanity." Such a regulation would be developed in accordance with the *Qur'an's* higher ideals and message (2:213), which state that all people are members of one family and that the *Qur'an* (21:170) is a kindness for all people.[34]

In certain cases, the *Qur'an* (49:9) permits using force against non-Muslims as well: "[i]f two groups of the believers fight each other, seek reconciliation amongst them." And if one of them acts aggressively toward the other, fight that person until they submit to Allah's order. So, if it does, try to work out a fair settlement so that justice is maintained. Once more, it is okay to defend oneself against attackers. Verse 49:9 does not address the issue of an armed battle among Muslims or authorize the use of force by a ruler against revolt, according to the circumstances of its revelation. Many theories exist on the circumstances of its revelation, but it appears that the verse during the lifetime of Prophet Muhammad p.b.u.h addressed events such as a street fight or a family dispute.[35] Prophet Muhammad's immediate successors and later jurists were the ones who understood verse 49:9 to permit the use of force by a ruler against revolt. To support their interpretation, they use Fourth Caliph Ali's conflict with the rebels as an example.[36] Thus, this verse became a basis for using force against rebellion.

The *Qur'an* clearly provides support for the defensive theory of *jihad*. According to this idea, it is acceptable to use force in self-defence, to defend Muslims who are being oppressed but are unable to defend themselves, to avert a humanitarian crisis, and to put down a Muslim ruler's rebellion.

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33 Ibid.

34 Ibid.

35 I. Ibn Kathir, *Tafseer Ibn Kathir* (trans. Junaqghari, 2005), v, 67; A. Elahi, *Anwarul Bayan* (2008), v, 178.

36 N.A. Shah, *Islamic Law and the Law of Armed Conflict: The Armed Conflict in Pakistan* (2011), 66–67.

B *Offensive Theory*

The advancement of laws governing the use of force and the universality of the Islamic religion serve as the foundation for the aggressive philosophy of *jihad*.

The progression argument claims that in the early years of Islam, or the Meccan period, the Qur'an prohibited the use of force and encouraged patience instead (610–622 AD).[37] Nonetheless, *jihad* was permitted in self-defence during the Medinan period after Prophet Muhammad moved to Medina and established a Muslim community (622–632 AD). According to this theory, verses 9:5 and 9:29 abolished all verses pertaining to self-defence in the final year of the Medinan period (9 AH), making *jihad* a perpetual responsibility for Muslims of all ages.

In elaborating each stage of the progression argument in Mecca, *jihad* was not allowed.[38] The following verses are cited to support this argument:

i. *"The one who defends himself after having been wronged; there is no blame on such people" (42:41).*
ii. *"Blame, in fact, is upon those who wrong people and make mischief on earth unjustly" (42:42).*
iii. *"And if one observes patience and forgives, it is, of course, one of the courageous conducts" (42:43).*
iv. *"(O Muslims), many among the people of the Book desire to turn you, after your accepting the faith, back into disbelievers – all out of envy on their part, even after the truth has become clear to them. So, forgive and overlook till Allah brings out His command" (2:109) [emphasis added].*

There is scholarly consensus on this point: *jihad* was not allowed in Mecca. In Medina on the other hand, a new command (verses 22:39 and 2:190) was revealed and force was thus allowed in self-defence, a command alluded to in verse 2:109.[39] The following two verses are cited in support of this argument:

i. *"Permission (to fight) is given to those against whom fighting is launched, because they have been wronged' (22:39),*
ii. *"Fight in the way of Allah against those who fight you, and do not transgress. Verily, Allah does not like the transgressors" (2:190).*

There is scholarly consensus on this point as well. The claim is that during the eight years of the Medinan period, the *jihad* in self-defence rule was in effect. During this time, the Muslim community came together, and in the year 9 AH, two distinct instructions regarding polytheists and People of the Book were revealed (Jews, Christians, and

[37] Afsaruddin, *War and Violence*, in O. Leaman (ed.), *The Quran: An Encyclopaedia* (2008), 687; M. Bin Ismail Al-Bukhari, *Kashful Bari: Kitab Al-Maghazi (Book of Ghazqat)* (trans. S. Khan, 2008), 17.

[38] Shah (n 25).

[39] Ibid.

Sabians). It is argued that the *Qur'an* commands Muslims to fight and kill polytheists but to spare them if they convert to Islam. The following verse is used to bolster the claim:[40]

> *"So, when the sacred months expire, kill the [polytheists] wherever you find them, and catch them and besiege them and sit in ambush for them everywhere. Then, if they repent and establish [prayer] and pay [poor due], leave their way. Surely, Allah is most Forgiving, Very-Merciful."*

The People of the Book were to be fought and killed, but they could be spared if they agreed to pay *jizya* (protection tax) after being subdued. Verse 9:29 is cited to support this argument:[41]

> *"Fight those People of the Book who do not believe in Allah, nor in the Last Day, and do not take as unlawful what Allah and His Messenger have declared as unlawful, and do not profess the Faith of Truth; [fight them] until they pay the jizya with their own hands while they are subdued."*

The progression argument's proponents contend that verses 9:5 and 9:29 nullified passages 22:39 and 2:190, allowing for the use of force in self-defence. The norms of *jihad* evolved from a condition of patience to the use of force in self-defence followed by an obligatory *jihad* against polytheists and People of the Book, offensive *jihad* thus being a duty for every Muslim. If this interpretation is accepted, verse 9:5 would simply require Muslims to kill polytheists or convert them to Islam forcibly, which would amount to a law for genocide. Moreover, it would imply that Muslims are required by verse 9:29 to enslave the People of the Book.[42]

Yet, the progression argument seems to be weak in light of the analysis of verses 9:5 and 9:29 in their historical and *Qur'anic* contexts. Verse 9:5 and verse 9:29, we contend, do not negate verses 22:39 and 2:190. Verses 9:5 and 9:29 need to be looked at in their *Qur'anic* and historical settings in order to prove such claim. It is also needed to be determined whether other verses and situations in the *Qur'an* also contained the phrase "kill them [polytheists]." In order to understand how the People of the Book and polytheists were treated after verses 9:5 and 9:29 were revealed, the actions of the Prophet Muhammad p.b.u.h and his immediate successors must also be observed.[43]

1 *Quranic Verses 9:5 and 9:29*

Quranic Verses 9:1–9:29 were shown to address specific categories of individuals and their interactions with Muslims at that time, according to a detailed contextual examination. These passages do not have the subject matter or the desire to replace earlier verses with new regulations for the use of force,[44] but whether or not to terminate treaties with

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40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.
44 N.A. Shah, *Self-defence in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq* (2008).

specific tribes. A treaty connection is ended, and a non-treaty relationship is established when a treaty is dissolved. It does not imply that existing laws prohibiting the use of force are changed or that they are repealed. Elahi contends that verse 2:29 does not refer to eradicating the People of the Book if they do not accept Islam and promote Islam by mandatory *jihad*. *Jizya*, a representation of political hegemony and sovereignty, is the subject. The Muslims of the Arab society in the seventh century are mentioned in verse 2:29. It is not directed at the Muslims of the twenty-first century, which are not instructed to approach the People of the Book brandishing the *Qur'an* in one hand and a sword in the other, and threatening to kill them if they do not accept the *Qur'an* (i.e., adopt Islam) or pay *jizya*.[45] Verse 9:5 is about fighting those polytheists – Quraysh – who broke their covenants with the Muslims. It is not directly addressed to Muslims today.

2 *The "Kill Them" Language*

In addition to a context study, linguistic research shows that the words "kill them" were not used for the first time in verses 9:5 and 9:29 of the *Qur'an*. Verse translations before verses 9:5 and 9:29 have the same terminology.[46]

> *i. "Kill them wherever you find them, and drive them out from where they drove you out, as Fitnah (to create disorder) is more severe than killing" (2:191).*
>
> *ii. "They wish that you should disbelieve, as they have disbelieved, and thus you become all alike. So, do not take friends from among them unless they migrate in the way of Allah. Then, if they turn away, seize them, and kill them wherever you find them, and do not take from among them a friend or helper" (4:89).*
>
> *iii. "You will find others who want to be secure from you, and secure from their own people. (But) whenever they are called back to the mischief, they are plunged into it. So, if they do not stay away from you, and do not offer peace to you, and do not restrain their hands, then seize them, and kill them wherever you find them, and, we have given you an open authority against them" (4:91) [emphasis added].*

Every time the *Qur'an* calls for the death of non-Muslims, it depends on their doing or not doing something. Verse 2:191, for instance, talks about driving out non-Muslims from places where they have driven out Muslims. The killing depends on "if they turn away" in verse 4:89, but also depends on "if they do not keep away from you" in verse 4:91. On various occasions, the phrase "kill them" has been used in reference to specific groups of individuals. The same can be said for verses 9:5 and 9:29. They do not nullify or make any attempt to nullify texts referring to *jihad* for self-defence. The only normative meaning of verses 9:5 and 9:29 is that Muslims may take the way recommended by these verses under circumstances and settings identical to their own. Non-Muslims are not the only ones that are subject to the law against murdering for certain motives. According to Islamic law, Muslims may be killed in specific circumstances, such as during a rebellion.

45 Elahi, (n 35), 576.

46 Shah (n 25).

According to the results of contextual and linguistic research, killing polytheists is prohibited in the Qur'an.[47]

The *Qur'an* generally forbids the crime of genocide. Numerous *Qur'anic* scriptures and Prophet Muhammad's p.b.u.h deeds can be used to prove this claim, but verse 5:32 is the most pertinent:

> "*Whoever kills a person not in retaliation for a person killed, nor (as a punishment) for spreading disorder on the earth, is as if he has killed the whole of humankind, and whoever saves the life of a person is as if he has saved the life of the whole of humankind*."

The murdering of innocent people and saving lives are the two main divisions of the verse. The verse's killing portion can be used to stop or punish genocide, and the verse's rescuing portion can be used to support humanitarian action. The word "person" is used to imply that no one, regardless of religion, race, or skin colour, can be slain without the justifications outlined in verse 5:32. It also implies that everyone from any background can be rescued from oblivion and death. Nations and ethnicities of any sort can be included within the umbrella of the humanitarian intervention principle. It is significant to remember that the *Qur'an* explicitly mentions humanitarian engagement to shield Muslims from persecution in 4:75. It serves as another evidence that the *Qur'an's* main objective is to stop the killing of all innocent people.[48]

3 *The Practices of the Prophet and Caliph Abu Bakr*

Verse 9:1–9:29 was revealed before the Tabuk expedition in 9 AH, as was previously mentioned. In actuality, the Tabuk expedition started after verse 9:29 gave authority to attack the People of the Book27; as a result, verse 9:29 is viewed as a prologue to the battle of Tabuk. The ruler of Aylah, Rubah, signed a peace agreement with Prophet Muhammad p.b.u.h when he arrived in Tabuk by promising to give him *jizya*. Prophet Muhammad p.b.u.h drafted agreements for the inhabitants of Jarba and Adhruh, who likewise consented to pay *jizya* to him.[49] All of them did not practice Islam. Most of the previous polytheist tribes that had converted to Islam during the lifetime of Prophet Muhammad p.b.u.h (632 AD) rejected Islam and made attempts to break away from the Muslim state after the Prophet's death. Some even attempted an invasion of Medina,[50] the capital of the Islamic state.

The first Caliph, Abu Bakr, dispatched troops to reestablish Islamic rule by crushing the rebel tribes. Before sending him as a reinforcement to the expedition of Kindah, he gave commander Muhajir the following instructions: "[i]f this letter of mine reaches you before you have achieved victory, then - if you conquer the enemy - kill the fighting men and take the offspring captive if you took them by force."[51] Abu Bakr would have

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47 Ibid.

48 Ibid.

49 A.J. Ibn Jarir Tabari, *History of Al-Tabari (Tarikh al-Rusul wa'l muluk)* (trans. M. Ibrahim, 2003), 58.

50 Ibid, 476.

51 Ibid, 185.

given a different order if verse 9:5 meant to slay all polytheists: kill them all when you capture them. According to Caliph Abu Bakr and Prophet Muhammad's p.b.u.h deeds, verses 9:5 and 9:29 did not override verses 22:39 and 2:190 or permit the genocidal annihilation of polytheists.

The progression argument is neither supported by Muslim history or the existing customs of Muslim governments. People of the Book and other non-Muslims have resided in Muslim governments throughout the course of Islam. The Jews in Spain saw their golden age during the time of Muslim control. The Mughal rulers ruled the Indian subcontinent for centuries, and millions of Hindus and Sikhs, including the liberal Baber the Lion and the conservative Aurangzeb Alamgir, lived there.[52] In addition, all the existing Muslim governments are UN members, and the UN Charter from 1945 forbids the threat or use of force outside of self-defence. That is now considered to be customary law. If Islamic law had mandated that Muslim states engage in aggressive *jihad*, they would not have consented to this norm.

The second justification for the use of force is that Islam is universal, meaning that Muslims have a responsibility to spread its teachings to the rest of humanity. If their means of spread are hindered, such obstacles are to be removed, if possible and necessary, amicably or with a sword. As a result, it is known as the offensive *jihad* theory.[53]

There is no question that Islam is proclaimed by the *Qur'an* to be a religion for all people. There is no question that the *Qur'an* commands its followers to convey Islam's message to the rest of the world. Yet, for the following three reasons, the doctrine of offensive *jihad* cannot be supported by the *Qur'an*. First, a contextual interpretation of the texts they cite gives them a different interpretation. The passages do not back up the violent *jihad* notion. Second, the *Qur'an* lays out detailed guidelines that forbid the use of force in the spread of Islam. Lastly, their view violates the neutrality-based *Qur'anic* code of conduct for armed warfare.[54]

Nonetheless, the aggressive notion of *jihad* appears to be at odds with the three major tenets of the *Qur'an*: (a) justice for all of God's creations; (b) peace; and (c) freedom of religion. These *Qur'anic* themes are supported by the contextual interpretation of the verses quoted in favour of the offensive theory rather than the offensive theory of *jihad*.[55]

From this, it becomes evident that Islamic law permits using force in self-defence to protect people who are being oppressed and are unable to defend themselves. It also permits a Muslim king to put down rebels with physical force. The foundational texts of Islamic law do not support the offensive *jihad* notion and as a result, it has no basis in the primary sources of Islamic law.[56]

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52 I. Prasad, *A Short of History of Muslim Rule in India* (1930).

53 Shah (n 25).

54 Ibid.

55 Ibid.

56 Ibid.

V THE CONCEPT OF *JUS AD BELLUM* OF MODERN INTERNATIONAL LAW

Two fundamental ideas, namely discrimination, and proportionality form the basis of the laws of just behaviour in war. While the proportionality principle addresses how much force is ethically acceptable, the discriminating principle addresses lawful wartime targets. The traditional two principles can be supplemented with a third one, the principle of responsibility, which calls for an analysis of who is ultimately responsible for the war.

The *jus bellum justum* (just war theory), which is based on the idea of humanity, should direct how people behave in times of war.[57] Military commanders, theologians, and policymakers are said to adhere to the doctrine as a tradition of military ethics.[58] The goal of this theory is to guarantee that wars are conducted in a way that is morally justifiable, where all requirements must be satisfied for a war to be deemed just. These components can be categorized into two groups: 1) the authority to declare war (*jus ad bellum*); and 2) proper behaviour in times of war (*jus in bello*). Although being vital to the justice of the conflict itself, little has been spoken about what happens after a war. The third component, referred to as *jus post bellum* and dealing with the morality of post-war settlement and reconstruction, was established by modern scholars in response to this weakness. From the earliest Islamic and Christian eras up to the more secular present, the idea of *jus post bellum* has been a humanitarian attitude.[59] However, for the purpose of this article, the element of *jus ad bellum* would only be expounded upon.

Regarding *jus ad bellum*, it is a set of standards that should be used to decide if starting a war is acceptable, or whether it is a just war, before starting one. Islam holds that going to war should only be done as a last resort.[60] In light of this, every effort should be made to prevent conflict before a war is decided upon. A *Dar al-Islam* must present the adversary with three options, as was previously stated. Signing a pact to bring about peace is the most important one.[61] The observance of such a pact is required of all Muslims.[62] War must also be fought for a justifiable reason. This is comparable to what the *Quran* says:

> *"Do not take the life God has made sacred, except by right. This is what He commands you to do: perhaps you will use your reason." (Quran, Surah al-Anaam 6:151)*

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57 Erich Freiberger, 'Just War Theory and the Ethics of Drone Warfare', *E-International Relations* (Article, 18 July 2013) <https://www.e-ir.info/2013/07/18/just-war-theory-and-the-ethics-of-drone-warfare/>.

58 Jonathan Ramachandran, *Savior of the World* (2014) Five Loaves Two Fish Publications 183.

59 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Book Inc 1977) 132.

60 Huma Ahmad, 'Top Ten Misconceptions about Islam', *Universiti Kebangsaan Malaysia* (Article) <http://ukm.my/kamal3/iae/Misconceptions%20About%20Islam.pdf>.

61 Abdul Karim Bangura, 'Islam and Just War Theory', *Research Gate* (Article, 2004) <https://www.researchgate.net/publication/242227121_Islam_and_Just_War_Theory>.

62 Jaber Seyvanizad, 'Islamic International Law Concerning Law of Treaties' *SSRN* (Article, 21 August 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020173>.

This indicates that unless there is a legitimate reason, war is not permitted. This is also consistent with the *jus ad bellum* doctrine of modern warfare. Most fundamentally, Islamic law forbids war unless absolutely necessary.[63] One such circumstance is for instance, for the act of self-defence.

In terms of self-defence, self-defence falls firmly within the purview of justice because it is an abrogation of one's rights to be attacked by another.[64] Islam permits war in self-defence as stated in the *Quran*:

> *"To those against whom war is made, permission is given to fight, because they are wronged; and verily Allah is most powerful for their aid. They are those who have been expelled from their homes in defiance of right – (for no cause) except that they did say "Our Lord is Allah". Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues and mosques, in which the name of Allah is commemorated in abundant measure. Allah will certainly aid those who aid His (cause) for verily Allah is full of strength, exalted in might." (Quran, Surah al-Hajj 22:39-40)*

Hence, by the *Quranic* verses above; Islam allows for war to be committed for self-defence to defend Islam.

VI THE CLASSIC CONCEPT OF SELF-DEFENCE IN INTERNATIONAL LAW

Aggressive war is considered to be the "supreme international crime," according to the International Military Tribunal at Nuremberg. That was reaffirmed by the United Nations (UN) and supported by numerous court rulings. Nazi commanders claimed that their main motivation was self-defence against a fictitious Soviet Union onslaught. After a fair trial, their explanation for mass murder was rejected, and the responsible leaders were hanged.[65]

According to Article 2(4) of the UN Charter, "All members should refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." In contrast to the Briand-Kellogg accord, the Charter forbids all forms of force, not just the use of force in war.[66] The rule received universal acknowledgment and quickly became part of customary international law, as pointed out by ICJ in the case of *Nicaragua v. USA* .[67]

An exception to this rule is provided by Article 51, which reads as follows: "If a Member of the United Nations is subjected to an armed attack, nothing in the current

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63 Ali (n 13).

64 Bangura (n 61).

65 Benjamin B. Ferencs, 'Benjamin B. Ferencz response to Amnesty International question on fair standards to prosecute terrorism', *Ben Ferencz* (Web page, 2006) <www.benferencz.org/arts/88.html>.

66 Douglas P. Lackey, *Moral Principles and Nuclear Weapons* (Lanham: Rowman & Littlefield, 1984), 23.

67 Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (New York: Routledge, 7th ed, 1997), 309.

Charter shall limit their inherent right to individual or collective self-defence until the Security Council has taken the necessary action to maintain global peace and security. The Security Council must be immediately informed of any actions taken by Members in the exercise of this right to self-defence, but this does not in any way affect the Security Council's power and obligation under the current Charter to take whatever action it deems necessary at any time to maintain or restore international peace and security." Consequently, using force in any situation other than an armed attack is still prohibited, despite the fact that the definition of a "armed attack" has expanded and that certain people may have the right to self-defence even in situations where there has not been any prior use of force.[68]

In the *Caroline* case, the usual interpretation of the right to self-defence under customary international law was used. This argument was sparked by an incident in 1837 in which British citizens took control of and destroyed a ship in an American port. This happened as a result of the Caroline aiding American nationalist forces who were conducting raids into Canadian territory. Following the incident, the American Secretary of State outlined the fundamentals of self-defence in letters with the British authorities. There has to be "an immediate overwhelming need for self-defence, leaving no choice of means, and no time for thought." This principle was accepted by the British government at that time and later it became accepted as part of the customary international law.[69]

The principle of *jus ad bellum* proportionality (as opposed to the principle of proportionality in humanitarian law), which developed alongside necessity and the requirement of "no choice of means," has also become a necessary prerequisite for self-defence. However, because this principle is debatable, it must now be interpreted through the lens of State practice and opinion of jurists, with the assistance of the International Court of Justice's precedent and the opinions of commentators.[70] Today, the standards used to assess the right to self-defence are the "three whales" of necessity, proportionality, and lack of alternatives.

VII COMPARISON BETWEEN SELF-DEFENCE IN ISLAM AND MODERN INTERNATIONAL LAW

Jus ad bellum is regarded as the law intended to deter war in modern international law.[71] It refers to the circumstances under which states may employ force militarily, whether at war or otherwise.[72] It suggests a "just" cause to defend human rights and innocent life, to stop a despotic government from persecuting its own citizens

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68 Ingrid Detter, *The Law of War* (Cambridge University Press, 2nd ed, 2000), 85.

69 Malcolm N. Shaw, *International Law* (Cambridge University Press, 4th ed, 1997), 787.

70 Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004), 155.

71 'IHL and other Legal Regimes – Jus ad Bellum and Jus in Bello'*, International Committee of the Red Cross (ICRC)* (Article, 29 October 2010) <https://www.icrc.org/en/doc/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>.

72 'What are Jus ad Bellum and Jus in Bello?', *International Committee of the Red Cross (ICRC)* (Article, 22 January 2015) <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

and others, and to stop a politician from starting a war for his own political gain.[73] According to the current international law, Article 2(4) of the United Nations Charter forbids all member states from threatening or using force in their international relations against the territorial integrity or political independence of any state, or in any other way that is contrary to the goals of the United Nations.[74] The Charter only allows for two exceptions to the ban against war.[75] Firstly, in self-defence against an armed attack, as stated in Article 51 of the Charter as follows:

> *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."*[76]

Secondly, when the Security Council permits the use of force under certain circumstances, as stated in Article 39 of the Charter as follows:

> *"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."*[77]

Force may be used in self-defence in one of two situations. First of all, resorting to military force should only be done in extreme cases.[78] In order to effectively counter a specific danger, governments must evaluate all available options, select the ones they think most effective, and give non-military options a priority. This means that it is necessary for war to be the least favoured alternative.[79] Secondly, the use of force must be reasonable to the threat faced, restricted to what is required to confront that threat, and equal to that threat.[80] In actuality, this means that when a state uses self-defence, it must immediately inform the Security Council of the actions it took. Up until the Security Council has taken the required action to ensure international peace and security, the right to use force in self-defence is still in effect.[81] This is stated in Article 39 of the Charter.

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73 Bertrand Lemennicier, 'Classical Just War Theory: A Critical View', *Research* Gate (Article, 22-23 March 2003) <https://www.researchgate.net/publication/233996462_Classical_Just_War_Theory_a_Critical_View>.

74 Dapo Akande, 'Is Israel Use of Force in Gaza Covered by Jus ad Bellum?', *EJIL Talk*, (Article, 22 August 2014) <https://www.ejiltalk.org/is-israels-use-of-force-in-gaza-covered-by-the-jus-ad-bellum/>.

75 Michael Wood, 'International Law and the Use of Force: What Happens in Practice?' (2013) 53 *Indian Journal of International Law* 345.

76 Article 51, *Charter of the United Nations* (1945) 1 UNTS XVI.

77 Article 39, *Charter of the United Nations* (1945) 1 UNTS XVI.

78 Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) *The American Journal of International Law* 1.

79 John F. Coverdale, 'An Introduction to the Just War Tradition*'* (2004) 16(2) *Pace International Law Review* 221.

80 Bethlehem (n 78).

81 Ibid.

Comparing Islamic international law to current international law, Islamic law establishes tougher and more definite justifications for war. The justifications stipulated under the current international law are ambiguous and up to the Security Council's discretion.

VIII CONCLUSION

To conclude, this article has demonstrated that Islamic law permits *jihad* in Islam can be done for self-defence. It is important to clarify that the term "*jihad*" under Islamic law does not equate to a holy war that is to be waged against non-Muslims. This view is a widespread misconception. Instead, *jihad* in the context of the use of force is defensive in nature. It is to be done only in self-defence and not as means of aggression.

Furthermore, in the comparison of Islamic law to international law, it may be said that Islamic law establishes tougher and more definite justifications for war. The justifications stipulated under the current international law are ambiguous and up to the Security Council's discretion. However, it is to be observed that *jihad* as a cause for self-defence is in accordance with Article 51 of the UN Charter, where it can be enacted for self-defence.

In summary, it is to be emphasized that *jihad* does not refer to Islamic extremism or terrorism. It should be informed that Islam promotes peace and not aggression. Using *jihad* as a cause for self-defence is a means of last resort. Additionally, an act of self-defence is in accordance with contemporary international law. Hence, *jihad* is in adherence with modern international law.