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Editorial for (December 2023 Issue)

Malaysia practices federalism, consisting of Peninsular Malaysia and East Malaysia (Borneo), and is characterized by its diverse cultures and varied legal traditions. This issue features three papers that explore significant legal aspects in Malaysia: Constitutional law, Criminal law, and Contract law.

The first paper critically examines the implementation of provisions in the Federal Constitution related to the exclusive allocation of special revenues or resources to the Borneo States, with a particular focus on the two-fifths (40%) Special Grant to Sabah under Article 112C and Part IV of the Tenth Schedule of the Federal Constitution. Any disputes concerning the review of the 40% Special Grant or the determination of revenue for its calculation must be resolved in strict compliance with the Federal Constitution. Additionally, redress may be sought through various avenues, such as the appointment of an independent assessor, public litigation in courts of law, or political negotiations based on mutual consensus.

The second paper explores the rationale and consequences of imposing natural life imprisonment as an alternative to the death penalty in exceptional cases where the death penalty is not mandatory. It argues that a natural life sentence contradicts human rights, fails to serve the public interest, violates the freedom and dignity of prisoners, and falls short of achieving penological goals. The paper advocates for the abolition of natural life sentences worldwide, proposing parole as an alternative to uphold human dignity and protect the social and human rights of prisoners.

The third paper seeks to complement existing legal literature and stimulate discussion on the general duty of good faith in contract law. Like England and Singapore, Malaysia does not recognize a general duty of good faith in contracts. Instead, the law has developed on a piecemeal basis through implied contractual terms. This approach is more likely to respect the parties' intentions than imposing a general overriding duty of good faith, as it upholds the freedom of contract. Nonetheless, if the parties wish to impose a duty of good faith, they should explicitly include it in the contract to avoid ambiguity.

Lastly, I extend my gratitude to our readers, authors, and the editorial board and staff for their unwavering support and dedication in bringing another issue of JMCL to fruition.

Dr. Su Wai Mon
Managing Editor

SPECIAL FINANCIAL PROVISIONS FOR SABAH UNDER THE FEDERAL CONSTITUTION: THE ISSUE OF THE 40% SPECIAL GRANT

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EMERITUS PROFESSOR DATUK DR. SHAD SALEEM FARUQI**

Abstract

In the asymmetrical and consociational federal system of Malaysia, the special position of the Borneo States is prescribed in the Malaysian *Federal Constitution*. The financial provisions in the *Federal Constitution*, include exclusive assignment of special revenues and resources to the Borneo States. Specifically, the two-fifths or 40% Special Grant to Sabah under Article 112C and part IV of the Tenth Schedule of the *Federal Constitution* is popularly highlighted in recent times. This provision originates from the Malaysia Agreement 1963 and the Malaysia Act 1963. The implementation of the 40% Special Grant appears as a conundrum and will be deliberated on an analytical basis in this article. Before embarking on the discourse of the provisions of allocation of grants, revenue and the issue of the 40% Special Grant to Sabah, this article shall first discuss the special position of the Borneo States in the *Federal Constitution*. An analysis on the 40% Special Grant shall then be made. This article will address the relevant provisions on the 40% Special Grant including its review, the constitutional issues and the implementation of the 40% Special Grant through voyage of time, as well as an analysis of the Federal Estimates of Revenue and Expenditure from 1964 onwards. To address issues pertaining to the 40% Special Grant, several actions are recommended. Any dissensions pertaining to the issues of review of the 40% Special Grant or determination of revenue for purposes of calculation of the 40% Special Grant must be conciliated in strict compliance with the provisions of the *Federal Constitution*. Redress may be sought from different avenues such as appointment of an independent assessor, public litigation in the courts of law or political negotiations on mutual consensus.

Keywords: Malaysia Agreement 1963, Malaysia Act 1963, *Federal Constitution*, Special Grant.

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I INTRODUCTION

Through the Malaysia Agreement 1963,[1] Sabah, Sarawak and Singapore[2] joined hands with Malaya, to re-constitute the Federation of Malaya into a consociation of a larger and more diverse Federation of Malaysia. Pursuant to the Malaysia Act 1963,[3] the Federal Constitution of the Federation of Malaya was significantly amended and was adopted as the *Federal Constitution*[4] of Malaysia which granted a number of iron-clad guarantees on the autonomy and special position of the Borneo States. 87 Articles out of (the then) 181 Articles and 10 out of 13 Schedules of the *Federal Constitution* were amended and 35 new Articles were inserted into the *Federal Constitution* to accommodate the consociation. Through this consociation the Borneo States were given a constitutional special position in certain matters including but not limited to, legislative powers, safeguards against constitutional amendment and award of special grants under the financial provisions of the *Federal Constitution*. The sources of revenue of the Borneo States as provided in the *Federal Constitution* is encapsulated in Part III of this article which includes grants and assignments. Despite the special position given to the Borneo States in all the enumerated matters and the variety of sources of revenue available to the Borneo States, it is unfortunate that Sabah and Sarawak were still ranked as the poorest States in Malaysia.[5] The aspirations that were set in theory is yet to be translated to a successful reality.

On reflection many factors may have caused the delayed success, however in this article, an analysis of the Ministry of Finance's Federal Estimates of Revenue and Expenditure from 1964 onwards is conducted to discover the bridging gap between the constitutional financial provision and the reality of its execution. The article also scrutinises the provisions related to the two-fifths[6] growth revenue grant or popularly coined as the "40% Special Grant" including its review, constitutional issues and its implementation through voyage of time in juxtaposition with the foundational documents such as the Malaysia Report of the Inter-Governmental Committee ('IGC Report').[7]

It may be surmised that the availability of crucial information such as contribution of revenue from the relevant States is critical in addressing the conundrum of the 40% Special Grant. Previously, from the year 1964 up till 1972 the information of estimated revenue contributed from Peninsular Malaysia, Sabah and Sarawak to the Federal government was made available by distinct segregation of columns labelled :(i) Malaya/Malaysia Barat,

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1 *Agreement concluded between the United Kingdom of Great Britain and Northern Ireland, The Federation of Malaya, North Borneo, Sarawak and Singapore,* signed 9th July 1963, UN Treaty No.10760.

2 By virtue of the *Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State,* Signed 7th August 1965, UN Treaty No.8206, and the Constitution and Malaysia (Singapore Amendment) Act 1965, Act 53/1965, Singapore was separated from Malaysia on 9th August 1965.

3 *Malaysia Act No.26 of 1963* (Malaysia).

4 *Federal Constitution* (Malaysia).

5 Bernama "Sabah's Hardcore Poverty Six Times the National Rate, Says Rafizi", *The New Straits Times*, (Online 14 March 2024) < https://www.nst.com.my/news/nation/2024/03/1025727/sabahs-hardcore-poverty-six-times-national-rate-says-rafizi> ;"Most Hardcore Poor are from Sabah and Sarawak", *The Star* (Online 21 August 2023) < https://www.thestar.com.my/news/nation/2023/08/21/most-hardcore-poor-are-from-sabah-and-sarawak>.

6 *Federal Constitution* (Malaysia) Tenth Schedule, Part IV, item 2.(1).

7 Malaysia, *Report of The Inter-Governmental Committee* (Signed 27th February 1963).

(ii) revenue from Sabah and (iii) revenue from Sarawak respectively.[8] The segregation however could not be seen in the contemporary. Internalization and compliance of the *Federal Constitution* and re-dedication to the pacts of the past may be the key to address the issues of the 40% Special Grant. [9]

II SPECIAL POSITION OF THE BORNEO STATES

A *Special Position of Sabah and Sarawak*

The special position of Sabah and Sarawak within the *Federal Constitution* is evident from the following characteristics.

1 *Legislative lists*

The supplementary State List IIA in Schedule 9 of the *Federal Constitution* confers additional powers on the Borneo States in eight[10] matters including native law and custom, ports and harbours and the Sabah Railway in Sabah. The Supplementary concurrent list for Sabah and Sarawak extends the legislative competence of these States to cover nine matters including shipping under fifteen tons, charities and theatres.

2 *Federal powers to have uniform laws not applicable to the Borneo States*

Parliament may legislate on state matters for promoting uniformity of laws of two or more states as provided under Article 76(1)(b). However, this power of the federal parliament in terms of land and local government is not applicable to Sabah and Sarawak pursuant to Article 95D. Land, agriculture, forestry and local government are generally state matters, however the exclusivity to Sabah and Sarawak of these matters are provided in Article 95E.

3 *Federal powers and international treaties*

Pursuant to Article 76(1)(a), Parliament may make laws with respect to any matter enumerated in the State List for implementing any treaty with a foreign nation or any decision of an international organisation. However, in the event that the aforesaid law affects among others, native law and custom in Sabah and Sarawak, duty to consult the States concerned must be exercised, pursuant to Article 76(2). Though the duty to "consult" does not impose a duty to obey,[11] consultative process do help to safeguard the interest of the Borneo States.

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8 See Abstracts of the Estimated Revenue of Malaysia, Estimates of Malaysia Federal Revenue for the years 1964 to 1972, Malaysia Ministry of Finance.

9 Muguntan Vanar, ' Sabah's 40% Special Grant cannot be Displaced by Mere Political Agreement, says Constitutional Expert' *The Star* (online, 11 May 2022). <https://www.thestar.com.my/news/nation/2022/05/11/sabah039s-40-special-grant-cannot-be-displaced-by-mere-political-agreement-says-constitutional-expert >.

10 Initially, pursuant to the Malaysia Agreement 1963 and Section 36 of the Malaysia Act no.26 of 1963, six matters were enlisted under Schedule 9, List IIA. Through the course of time eight matters were enlisted however only six matters of the additional powers are currently conferred after considering the repealed items.

11 Shad Saleem Faruqi, *Our Constitution* (Sweet & Maxwell 2019) 79.

4 *Amending the Constitution*

The power of amending the *Federal Constitution* which belongs to the federal parliament is not as extensive in relation to Sabah and Sarawak as it is in relation to the West Malaysian States. Under Article 161E(2) the concurrence of the Yang di-Pertua Negeri of Sabah and/or Sarawak is required in a constitutional amendment affecting any of the matters enumerated therein. The case of *Loh Kooi Choon v Government of Malaysia*[12] sets out the different methods prescribed for the amendment of the *Federal Constitution,* that *inter alia* includes Article 161E which is of special interest to East Malaysia.[13] Parliament's power to legislate on matters enumerated under Article 161E, is circumscribed by strict rigors of the article.[14]

A constitutional amendment that greatly diluted the special position of Sabah and Sarawak is the Constitution (Amendment) Act 1976,[15] to amend Article 1(2). Previously the Article stated that the states of the Federation shall be (a) the 11 States of Malaya ... (b) the two Borneo States ...; and (c) Singapore. Sabah and Sarawak were mentioned separately to underline their special status. Since 1976 Sabah and Sarawak were included in Article 1(2) as two of the thirteen states. This was a status down-grade, which was recently rectified by virtue of the Constitution (Amendment) Act 2022.[16] It is worthy to explore whether the Constitution (Amendment) Act 1976,[17] to amend Article 1(2) was submitted to the Governors of Sabah and Sarawak for their concurrence.

5 *Islam in Sabah and Sarawak*

(i) In 1963 there was no state religion in Sabah or Sarawak. However, pursuant to Enactment No.8 of 1973,[18] the Constitution of the State of Sabah[19] was amended by the addition of Article 5A which recognised Islam as the official religion of Sabah.

(ii) In 1963, the *Federal Constitution* contained Articles 161C and 161D; however these were repealed in 1976 pursuant to the Constitution (Amendment) Act 1976.[20]

(iii) The repealed Article 161C provided that, if financial support is given by the federal government for Islamic institutions and Islamic education in the Borneo States, the consent of the State Governor must be obtained. Further, an equivalent amount will be allocated for social welfare in the Borneo States.

(iv) The repealed Article 161D provided an exception to Article 11(4). In the Borneo States a state law restricting the propagation of any religious doctrines to Muslims may not be passed without a special two-thirds majority in the legislative assembly.

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12 [1977] 2, MLJ 187.

13 Also See *Robert Linggi v Government of Malaysia* [2011] 2 MLJ 741 and *Government of Malaysia v Robert Linggi* [2015] MLJU 2156.

14 Note also, the decision in the case of *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119.

15 *Constitution (Amendment) Act 1976, Act A354* (Malaysia).

16 *Constitution (Amendment) Act 2022, Act A1642* (Malaysia).

17 See (n 15).

18 *Enactment No.8 of 1973* (Sabah, Malaysia).

19 *Constitution of the State of Sabah* (Sabah, Malaysia).

20 See (n 15).

(v) The native, "non-islamic" character of Sabah and Sarawak has been diluted over the years and islamisation has been a key policy of the federal government since the eighties.[21] This arouses deep discontent within the non-Muslim natives of Sabah and Sarawak.[22]

(vi) State Syariah laws have been enacted in Sabah and Sarawak to provide that in the case of Muslims, native law will not apply and the syariah courts shall have jurisdiction. This has led to conflicts between syariah and native courts.

(vii) Authorities in West Malaysia have imposed hurdles in the path of import into Sabah and Sarawak of Bibles in Bahasa Melayu. The Kalimah Allah controversy raised in the case of *Titular Roman Catholic Archbishop of KL v Menteri Dalam Negeri & Ors*[23] has aroused the anger of Christians in the Borneo States. But note the heartening case of *Jill Ireland bt Lawrence Bill v Menteri bagi Kementerian Dalam Negeri Malaysia & Anor*[24] which upholds the rights of non-Muslims in Sarawak.

6 *Native Courts*

In Sabah and Sarawak, besides Syariah Courts there is a system of native law and native courts as provided in the item 13, List IIA, 9th Schedule of the *Federal Constitution*.

7 *High Court for Sabah and Sarawak*

The High Court has two wings – one in Malaya and the other in the States of Sabah and Sarawak. Appointment of the Chief Judge of the Sabah and Sarawak High Court requires consultation with the Chief Minister of these States.[25]

8 *Appointment of Judicial Commissioners*

Prior to 1994 it was the law that Judicial Commissioners in the High Court for Sabah and Sarawak shall be appointed by the Yang di-Pertua Negeri on the advice of the Chief Judge of Sabah and Sarawak. Accordingly, Article 122AB (as amended in 1994) to transfer this power to the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the Chief Justice of the Federal Court was declared to be a violation of Article 161E(2)(b) and therefore unconstitutional as decided in the case of *Robert Linggi v Government of Malaysia*.[26] However, the decision was overruled by the Court of Appeal.[27]

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21 Syaza Shukri, 'Islamist Civilisation in Malaysia', *Religions 2023 Vol.14 Issue 2*, <https://www.scopus.com/inward/record.uri?eid=2-s2.0-85148886423&doi=10.3390%2frel14020209&partnerID=40&md5=1eb61ddf038c9fa1797e11611381e63a>.

22 Vanitha Nadaraj, 'Will Islamisation Provoke Sabah, Sarawak Split From Malaysia?' , *Eurasia Review News and analysis, 25th September 2023*, < https://www.eurasiareview.com/25092023-will-islamization-provoke-sabah-sarawak-split-from-malaysia-oped/ >.

23 [2014] 4 MLJ 765.

24 [2021] 8 MLJ 890.

25 *Federal Constitution* (Malaysia) Art 122B(3).

26 See (n 13).

27 Ibid.

9 *Representation in Parliament*

Ideally, a state's representation in the elected House should be proportionate to the state's population. Sabah has 25 members of parliament ('MPs'), whereas Sarawak has 31 MPs respectively. Together, Sabah and Sarawak have 56 out of 222 or 25.2% of the MPs in the Dewan Rakyat. This is disproportionately large based on their population. However, it must be noted that it is lesser than the 33% envisaged for Sabah, Sarawak and Singapore in 1963 in order to give these States protection against amendments requiring a two-thirds majority.

10 *Emergency powers*

Even during an emergency under Article 150, the native law or customs of Sabah and Sarawak cannot be extinguished by emergency law.[28]

11 *Development plans*

Policies of the National Land Council and National Council for Local Government are not binding on Sabah and Sarawak.[29]

12 *Fiscal federalism*

The federal government's stranglehold over most of the lucrative sources of revenue is not as strong in relation to Sabah and Sarawak as it is in relation to the other states. In several areas Sabah and Sarawak enjoy fiscal privileges that are not available to the Peninsular States: [30]

(a) Loans

Sabah and Sarawak are allowed to raise loans for their purposes with the consent of Bank Negara.[31]

(b) Special sources of revenue

These States are allocated special revenues to meet their needs above and beyond what other States receive.[32] Sabah and Sarawak are also entitled to earnings (taxes, fees and dues) on eight sources of revenue including ports and harbours, import and excise duty on petroleum products, export duty on timber and other forest produce and state sales tax.[33]

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28 *Federal Constitution* (Malaysia) Art 150(6A).
29 Ibid Art 95E(2).
30 Shad Saleem Faruqi, (n 11) 80.
31 *Federal Constitution* (Malaysia) Art 112B.
32 Ibid Art 112 C(1)(b).
33 Ibid Art 112C & Schedule 10, Part V.

(c) Special grants

These States enjoy some special grants.[34] However, Sabah and Sarawak are deeply unhappy about the lack of fiscal federalism. It is alleged that the Borneo States do not derive the kind of financial benefit they deserve as a result of their contribution to the national coffers from petroleum, hydroelectricity and tourism. There is discontent about inequitable sharing of wealth derived from Sabah and Sarawak. It is alleged that federal allocations to the Borneo states do not take into account the huge direct and indirect federal earnings from these states.[35] It is asserted that the Tenth Schedule Part IV promises 40% share of the States' revenues.[36]

Money represents power and is at the heart of government,[37] therefore it is understandable that to cement the special position of the Borneo States of Sabah and Sarawak in Malaysia's asymmetrical[38] and consociational federal system, the *Federal Constitution* included financial provisions for assigning special revenues and resources to the Borneo States in addition to the allocations to all States. Finance is the lifeblood of every administration, and no government can implement its promises and programmes without money.[39] A statement made by the late Tun Suffian rings truth till this day, wherein the subject of division of revenue between the central government and the state government is a rather neglected subject despite it being vital.[40] This article aims to provide a clear picture of categorization of financial provisions afforded to the Borneo States within a contemporary and historical dimension; and an emphasised discussion on the real-time issue of the special grants to the State of Sabah, specifically the 40% Special Grant.

B *Special Financial Position*

The regulation of Malaysia's financial matters presented in the *Federal Constitution* originate from the Reid Commission Report, IGC Report, the Malaysia Agreement 1963,[41] and the Malaysia Act 1963,[42]. The Reid Commission Report made recommendations for the financial provisions in the 1957 Constitution of the Federation of Malaya, which

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34 Ibid Art 112C and 112D.

35 JC Fong,' Federal State Relations: Sabah and Sarawak', *Malayan Law Journal, [2019] 3 MLJ xxviii*.

36 Roger Chin, Official Statement of the President of the Sabah Law Society (Facebook, 26 March 2022) < https://m.facebook.com/story.php?story_fbid=pfbid0U6McFHGYJwsyJ8usAJcutU7FtAXnHk2H4BAt4pKPv3zCX3M6qxdvDnUMwc21QXypl&id=100522628235153>.

37 RH Hickling, *Malaysia Public Law* (Pelanduk Publications (M) Sdn Bhd, 1997) 60.

38 Shad Saleem Faruqi, 'The Constitution Amendment Act 2021: A Step Towards redemption or mere symbolism, Wisdom Foundation Policy Talk Webinar: The 2021 Constitutional Amendment MA63 and the Status of the Borneo States in Malaysia', (Facebook, 25th January 2022, 8.00pm) < https://fb.watch/dYSFNpx5Ji/ >.

39 Tun Mohamed Suffian Bin Hashim, *Tun Mohamed Suffian's an Introduction to the Constitution of Malaysia,* eds Tunku Sofiah Jewa et al (Pacifica Publications, 3rd ed, 2007) 221.

40 Tun Mohamed Suffian, 'Division of Revenue', ed GW Bartholomew, *Malayan Law Review Legal Essays* (Malayan Law Review, 1975) 1-23.

41 Popularly coined as "MA63".

42 *Malaysia Act No.26 of 1963* (Malaysia) is distinguished from *Malaysia Act 1963 Chapter 35* (United Kingdom) which was passed in the Parliament of the United Kingdom.

provides grants and revenues to the states in general.[43] Upon the formation of Malaysia and the adoption with amendments of the 1957 Constitution of the Federation of Malaya, the IGC Report made recommendations on the special financial provisions for the Borneo States in the 1963 *Federal Constitution*. The Financial Provisions recommended by the IGC Report are stated at paragraphs 24(1-25) of the report.[44]

The background of the special financial position of the Borneo States in the *Federal Constitution* is attributed to the condition and bargaining power held by the Borneo States at the inception of Malaysia. The abundance of natural resources owned by the Borneo States, the size of the area of the Borneo States and the requirement of development and infrastructure of the Borneo States were all factors that afforded a higher bargaining power on the financial terms for the Borneo States. As interestingly put:

> 'Essentially, The Federation of Malaya was the suitor in this marriage, and the more favorable financial treatment was part of the bride-price'.[45]

Furthermore, the need for infrastructural and economic development of the Borneo States was also one of the key factors in determining the special financial position of the Borneo States.

Constitutionally, Sabah and Sarawak have some advantages fiscally over the other states.[46] It is important to understand on a constitutional perspective, that prior to the formation of Malaysia, the Federation of Malaya practiced an equal status position among its 11 States with a strong central government. However, upon the formation of Malaysia, the constitutional position of the Borneo States was special over and above the other States in Malaya. The concept that the Borneo States are partners in the Federation of Malaysia must be distinguished from the concept of equal status. Simply put, the situation is one of equal partner versus equal status. The former concept is about being two of the founding partners from the four different territories and the latter concept is about having equal status or "equal footing"[47] in terms of constitutional rights. The 11 states experienced an equal status position in the Federation of Malaya. The Borneo States however have special constitutional position in the Federation of Malaysia.

The concept of equal status among member states were broken[48] because an asymmetrical position in the Federal set-up of Malaysia was put into being, which gives a special position to the Borneo States on several aspects including but not limited to immigration, legislation[49] and financial aspects. The original constitutional design as an asymmetrical federation as envisaged under the Malaysia Agreement 1963[50] was made true

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43 KC Vohrah, Philip TN Koh, Peter SW Ling, *Sheridan & Groves the Constitution of Malaysia* (Malaya Law Journal, 5th ed, 2004) 384-399 and see also *Federal Constitution* (Malaysia) Art 96 to 112.

44 Malaysia, *Report of the Inter-Governmental Committee* (n 7) 8-12.

45 KC Vohrah, Philip TN Koh, Peter SW Ling (n 43) 428.

46 Kevin YL Tan and Jaclyn L Neo, *Constitutional Principles and Institutions Text, Cases & Materials* (Thomson Reuters Asia Sdn Bhd, 2023) 122.

47 Ibid 116.

48 RH Hickling, *Essays in Malaysia Law* (Pelanduk Publications (M) Sdn Bhd, 1991) 160.

49 *Federal Constitution* (Malaysia) Art 161E, List IIA, List IIA of the Ninth Schedule.

50 Kevin YL Tan and Jaclyn L Neo (n 46) 116.

at the inception of Malaysia prior to the constitutional amendments and re-amendments which were made thereafter.

On the special financial position of the Borneo States, the *Federal Constitution* in Chapter 2, of Part VII encompassing Articles 112A-112D are for the exclusive application to Sabah and Sarawak only. The 40% Special Grant is derived from Articles 112C and 112D. A view of the Federal Estimates of Revenue and Expenditure in the Year 1965 will concisely show the special financial position of the Borneo States. There is clear separation of segregated columns of the estimated revenue between Malaya, Sarawak and Sabah.[51] Further, a view of Lampiran B of the 1965 Federal Estimate and Revenue[52] will show the existence of a dedicated column on the 40% Special Grant to Sabah pursuant to Para 2(1) of Part IV of the Tenth Schedule of the *Federal Constitution*, which were made true to the financial constitutional provisions.

III SPECIAL FINANCIAL PROVISIONS UNDER THE *FEDERAL CONSTITUTION* FOR SABAH AND SARAWAK

A *Provisions that Assign Special Revenue, Resources and Grants*

The *Federal Constitution*, the supreme law of the land, sets out provisions that, among other things, regulate the financial arrangements for Federal-State relations. The extent of efficacious operation of these provisions however is a subjective matter and in order to have a successful federal fiscal arrangement a good deal of negotiation and compromise is apparently required.[53] The financial provisions encapsulated under Part VII of the *Federal Constitution* include provisions that assign revenue, resources, and grants which can be categorized as discretionary and mandatory. Generally, the revenue for states is derived from two categories of sources,[54] namely grants and other sources such as taxes and fees. A summary of the sources of revenue and their corresponding constitutional provisions is provided in Table 1 herein.

Table 1

Source of Revenue		Constitutional Provision	Mandatory/ Discretionary	Enforceability
Grants	Capitation Grant	Article 109(1)(a) Part I, Tenth Schedule	Mandatory	In force
	State Road Grant	Article 109(1)(b) Part II, Tenth Schedule	Mandatory	In force
	Special Grant	Article 112C Part IV, Tenth Schedule	Mandatory	In force and subject to review

[51] Abstract of the estimated revenue of Malaysia for the year 1965, Extract of the Estimates of Malaysia Federal Revenue and Expenditure for the year 1965, Malaysia Ministry of Finance.

[52] Appendix B-Lampiran B, Statutory Grants and other Payments to State Governments 1965, Extract of the Estimates of Malaysia Federal Revenue and Expenditure for the year 1965, Malaysia Ministry of Finance.

[53] Kevin YL Tan and Jaclyn L Neo (n 46) 122.

[54] Tun Mohamed Suffian Bin Hashim (n 39) 224.

Table 1 (continued)

Source of Revenue		Constitutional Provision	Mandatory/ Discretionary	Enforceability
	Aid for Borneo States for Social welfare	Article 161C	Mandatory	Repealed by Act A354[55]
	Grant equal to the State's Cost of the State Road Transport Department	Section 3, Part IV, Tenth Schedule	Mandatory	No longer enforceable L.N 17/63 as amended by P.U.(A) 33/1974 , P.U.(A) 258/1975, P.U.(A) 99/1976 and finally P.U.(A) 5/1980[56]
	30% customs revenue in lieu of medicine and health	Section 4, Part IV, Tenth Schedule	Mandatory	No longer enforceable Item 18, List IIIA, Ninth Schedule Health[57]
	Specific Purpose Grant	Article 109(3)	Discretionary	In force
	Contingency Fund	Article 109(5), 103	Discretionary	In force
	State Reserve Fund	Article 109(6)	Discretionary	In force
Other Sources	Assignment of taxes and fees to States	Article 110 Part III, Tenth Schedule	Mandatory	In force
	Revenue collected from State List	Article 74 List II & IIA Ninth Schedule	Mandatory	In force
	Revenue collected from Concurrent List	Article 74 List III & IIIA Ninth Schedule	Mandatory	In force
	Additional Sources of Revenue assigned to the Borneo States	Part V, Tenth Schedule	Mandatory	In force except for Sections 4, 5,6 of Part V
	Raising of Loans	Article 111	Discretionary	In force
	Royalty	Article 110(3B) Article 112C(4)(a)&(b)	Mandatory	In force

55 Repealed by *Constitution (Amen*dment) 1976 Act A354 (Malaysia) on 27th August 1976.

56 The grant equal to the State's Cost of the State Road Transport Department is subject to the condition that the State of Sabah and Sarawak has the power to make laws with respect to the carriage of passengers and goods by land or mechanically propelled road vehicles. Sabah and Sarawak had this power only until the end of the year 1977 as no further amendment was made after the Borneo States (Legislative Powers) Amendment Order, 1979. See L.N 17/63 which were subsequently amended by P.U.(A) 33/1974, P.U.(A) 258/1975, P.U.(A) 99/1976 and finally P.U.(A) 5/1980.

57 Tun Mohamed Suffian Bin Hashim (n 39) 234: 'Since 1st January 1971, medicine and health in Sabah has become a Federal responsibility and the assignment of the customs revenue (30%) has been discontinued', (The additional source of revenue assigned to Sabah in the form of 30% of all customs revenue is subject to the condition that medicine and health remains as an item in the concurrent list and that the expenses of that item are borne by Sabah. Consequently, in Sabah, medicine and health remained as an item in the concurrent list until the end of year 1970); See Federal Constitution (Malaysia) Item 18, List IIIA, Ninth Schedule.

B *Special Grant of 40%*

1 *Provisions on the 40% Special Grant*

The constitutional provision of special grants is found at Article 112C of the *Federal Constitution*. It provides among others that, subject to review pursuant to Article 112D, the Federal Government shall annually pay to the States of Sabah and Sarawak the special grants specified in Part IV of the Tenth Schedule. This provision was incorporated verbatim in the Federal *Constitution* from Section 46 of the Malaysia Act 1963 which is derived from Annex A of the Malaysia Agreement 1963. The detailed provisions on the 40% Special Grant for Sabah is encapsulated in Section 2 (1) of Part IV of the Tenth Schedule. The recommendations made in the IGC Report at paragraph 24(8) and (9), may be referred as a directive in providing insight and explanation of the intended application of this special financial provision.

In Part IV of the Tenth Schedule, of the *Federal Constitution* under the heading of Special Grants to the States of Sabah and Sarawak it is among others stipulated that:

> *'2.(1) In the case of Sabah, a grant of an amount equal in each year to two-fifths of the amount by which the net revenue derived by the Federation from Sabah exceeds the net revenue which would have been so derived in the year 1963 if -*
> *(a) the Malaysia Act had been in operation in that year as in the year 1964; and*
> *(b) the net revenue for the year 1963 were calculated without regard to any alteration of any tax or fee made on or after Malaysia Day;*
> *("net revenue" meaning for this purpose the revenue which accrues to the Federation, less the amount received by the State in respect of assignments of the revenue)'.*

In fortifying the comprehension of the abovementioned Section 2(1)(a) and (b) of Part IV Tenth Schedule of the *Federal Constitution*, reference can be made to para 24(8) of the IGC report which stipulates that:

> *'24(8) Subject to the provisions of review made in sub-paragraph (9) below, North Borneo should receive each year a grant equal to 40% of any increase in Federal revenue derived from North Borneo and not assigned to the State over the Federal revenue which would have accrued in 1963 if these financial arrangements had been in force in that year. The sum payable would be calculated on the basis of actual revenue received in each year.'*

The provision altogether appears complex, however it essentially means that Sabah will receive a yearly grant of 40% of the difference in growth revenue that the Federation received from Sabah. This difference in growth is derived by subtracting the 1963 net revenue amount from the current year net revenue amount. The year 1963 is taken as the base year[58] for calculation, and the amount used for the 1963 net revenue is a

[58] Harry E Groves, *The Constitution of Malaysia* (Malaysia Publications Ltd, 1964) 145.

hypothetical net amount[59] of which the Federation would have derived from Sabah. It is to be noted that in achieving the figure of the current year net revenue amount, the deductions of assignments to Sabah must be taken into account. Further discussion on deduction of assignments may be found in this article at paragraph titled: "3 *(c) Permissible Deductions"*.

A simple analogy to assist in the comprehensions of this provision is a typical arrangement between a sales agency and its sales company:

> The Sales company promises to reward the salesperson a special incentive along these lines*: "For every increase in monthly sales by the salesperson, the Company will give the salesperson a special incentive of 10% of the amount of that increase"*. Presupposing that the salesperson manages to make a total sale of RM1000 in January, thereafter a total sale of RM1500 in February. To obtain the increased amount of RM500, the amount of RM1000 will be subtracted from the amount of RM1500. The Company will pay to the Salesperson the incentive amount of RM50 being the 10% of the RM500 increase.

Applying the same concept, the special grant is two-fifths or 40% of the annual growth of revenue received by the Federation from Sabah.

It is axiomatic that the actual calculation of the 40% net growth revenue is not as straightforward as the simple illustrated analogy. The calculation of "net revenue" involves meticulous financial details and application of complex accounting formulation expertise. Basically, in approaching the matter of the 40% Special Grant it is imperative to ascertain what constitutes the net revenue and what are the amounts to be deducted to obtain the net revenue. It will involve calculation of the items due to the Federal Consolidated fund. It is therefore crucial that the Federal financial statements reflect the specific amounts of revenue derived from the Borneo States as previously implemented.[60]

It is also important to note that a great amount of autonomy is afforded to the Borneo States in terms of the federal fiscal arrangement of the 40% Special Grant. The existence of an entrenchment clause[61] as encapsulated in Article 161E of the *Federal Constitution* solidifies this position. Furthermore, matters arising from the review of the 40% Special Grant does not require consultation with the National Finance Council[62] and thus indicates the autonomous federal fiscal arrangement with the Borneo States.

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59 Ibid.

60 See (n 51).

61 The entrenchment clause carries a considerable weight in terms of autonomy of the Borneo States in federal fiscal arrangement, Michael Hein, "Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe', *International Journal of Constitutional Law,* 18/1(2020), 78-110, "Entrenchment Clauses are not just symbolic declarations without legal and political consequences but important instruments in constitutional struggle".

62 *Federal Constitution* (Malaysia) Art 112D (7).

2 *Review of the 40% Special Grant*

The provisions of review of the 40% Special Grant emanates from Annex A of the Malaysia Agreement 1963 and from Section 47 of the Malaysia Act 1963. Recommendations in the IGC report regarding the constitutional provisions for review of the special grant may also be referred to, as a directive to understand the operation of the provisions of review. The pertinent questions to be answered in the operation of these provisions are: *What is the special grant review; How is the review conducted; and How are review disputes resolved.* These questions will be addressed within the constitutional dimension in juxtaposition with its foundational documents.

(a) The special grant review

Essentially a review is carried out as an appraisal or assessment to determine whether the financial arrangement regarding the special grant is feasible or otherwise. The provision of the special grant review is encapsulated under Article 112D (1) until (8) of the *Federal Constitution*. The matters that can be reviewed are the annual balancing grant,[63] escalating annual grant,[64] growth revenue grant[65] and any substituted or additional grant made by virtue of Article 112D.

During the review, certain items assigned under the Part V of the Tenth Schedule and the provision of Article 112C(4) may be varied, subject however to notice being given by the Federal Government to the State or States concerned. The items assigned under Part V of the Tenth Schedule that may be varied are items under Sections 1,2,3,9 and 10; whereas items under Section 4,7 and 8 cannot be varied.[66] Items under Section 5 and 6[67] can only be varied during the 'projected second review'.[68] During the review it is important to consider the financial position of the Federal Government as well as the needs of the States or State concerned.[69] The recommendations made at paragraph 24(9)(i) and (vi) of the IGC Report provides an insight of the constitutional provisions of review and variation. The review (when an independent assessor is involved in the process) must also bear in mind that the revenue to the State will be sufficient to meet the cost of State service at the existing time with the reasonable anticipation of expansion of the State (or States)[70]. The IGC report is explicit in enunciating that these rights of revenue recommended is an "as of right" entitlement.

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63 *Federal Constitution* (Malaysia) Tenth Schedule, Part IV, s 1(1).

64 See Ibid s 1(2).

65 Ibid s 2(1).

66 *Federal Constitution* (Malaysia) Art 112D(5).

67 Ibid Art 112D(5).

68 *Federal Constitution* (Malaysia) Art 112D(4), stipulates that the second review of the special grant is to be held in the year 1974.

69 Ibid Art 112D(2).

70 Paragraph 24(9)(ii) IGC Report.

(b) Conducting the review

In conducting a review, the parties involved are the Federal Government and the relevant State Government.[71] Simply put, the review involves a government to government ('G2G') interaction. The review procedure requires the making of an Order by the Yang di-Pertuan Agong, modifying Part IV of the Tenth Schedule and Article 112C(2),[72] of which the Order shall be laid before both the House of Representatives and the Senate.[73] It is viewed that the alteration of the special grant constitutes an amendment to the financial arrangement between the Federation and the State; therefore there is a requirement to obtain concurrence of the Yang di-Pertua Negeri of the respective State, as circumscribed under Article 161E(2)(c).[74] Though enshrined in the *Federal Constitution*, the requirement of concurrence of the State government instead of the Legislative assembly is remarked by some views as odd.[75]

The review is to be conducted every five years or any longer period as agreed between the Federal Government and the State Government.[76] However, the first review must be done in the year 1969 and thereafter the second review is to be done in the year 1974.[77] A detailed discussion of the performance of the review is found in this article at paragraph titled: "3 (*d) Matters that have transpired through the voyage of time on the implementation of the 40% Special Grant*".

(c) Resolving review disputes

In resolving disagreements or disputes pertaining to the review of the special grants, an independent assessor may be mutually appointed by the Federal and State Governments.[78] The recommendations of the independent assessor shall be binding on the governments concerned. The National Finance Council need *not* be consulted on matters related to the review of the special grants under Article 112D.[79] The *Federal Constitution* is silent on the method, guideline or criteria of appointment of the independent assessor. However, there are views that, on the assumption of similarity in the process of appointment of an arbitrator, the arbitration system or rules may be applied to assist in the appointment of

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71 *Federal Constitution* (Malaysia) Art 112D(1).

72 Ibid.

73 *Federal Constitution* (Malaysia) Art 112D(8).

74 Sukumaran Vanugopal, *The Constitutional Rights of Sabah and Sarawak* (Sweet & Maxwell Asia, 2013) 381.

75 Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing Ltd, 2012) 147.

76 *Federal Constitution* (Malaysia) Art 112D(3).

77 See Ibid Art 112D(4) ; The years 1969 and 1974 were selected as the years for the first and Second review pursuant to recommendations in the IGC Report, particularly at Paragraph 24(9)(iii) &(iv). It is noteworthy that items under Section 5 and 6 under Part V of the Tenth Schedule of the *Federal Constitution* cannot be varied until the projected second review in 1974. This may be attributed to the passing of the Borneo States (Legislative Powers) Order 1963 of which certain Legislative powers of the Federation was extended to the Borneo States pursuant to Article 76A and 95C of the *Federal Constitution*. The award of the grant is conditional upon the Borneo States having the prescribed legislative powers. This Order however has been amended vide P.U(A) 33/1974, P.U.(A) 258/1975, P.U.(A) 99/1976 and finally P.U.(A) 5/1980.

78 *Federal Constitution* (Malaysia) Art 112D(6).

79 Ibid Art 112D(7).

an independent assessor, whereby a modern construct approach is adopted.[80] In practice however, there is preference of resolving financial problems between federal-state relation on an official level[81] whereby matters are dealt with between the Federal Finance Minister and the Chief Minister of the State.[82]

3 *The Constitutional issues surrounding the 40% Special Grant*

The special provision on the 40% Special Grant raises riveting issues of law and accounting. Suffice to say that these issues may be the reason why the 40% Special Grant appears as a conundrum. These issues need to be identified and analysed, to uphold the rule of law and the sanctity of the *Federal Constitution*. As the constitutional issues are live contemporary issues, the list below is not conclusive of the issues surrounding the 40% Special Grant and may be subject to discovery of future related issues.

(a) Determining 'revenue which accrues to the Federation'

The *Federal Constitution* at Section 2(1) of Part IV of the Tenth Schedule defines: '..(*"net revenue" meaning for this purpose the revenue which accrues to the Federation, less the amount received by the State in respect of assignments of revenue)*'. The discerning question is, how does one determine the "revenue which accrues to the Federation"? Are they revenues derived from the Federal list, State List, Concurrent List and the special List for the Borneo States all together? Or is it only in respect of the revenue derived by the Federal Government directly or indirectly from items in the State list?

Tourism, oil and oilfields are in the Federal List. Are Federal earnings in Sabah from these Federal items part of the 'revenue which accrues to the federation'? Or is it only in respect of indirect Federal earnings from items in the State List? For example, land is in the State List. Thus, Assessment and Quit Rent are collected by the State. However, Real Property Gains Tax for properties transferred in Sabah is collected by the Federal government. Is Real Property Gains Tax part of the revenue derived by the Federal Government from Sabah?

A clue to answering these conundrums may rest on the provision of Consolidated Funds. Article 97 and 112C(2) of the *Federal Constitution* provides a crystal clear mandate.

> Article 97(1) provides:
> *All revenues and moneys howsoever raised or received by the Federation, shall subject to the provisions of this constitution and of federal law, be paid into and form one fund, to be known as the Federal Consolidated Fund.*

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80 Roger Chin, "Negotiate the Special Grant Conferred by Article 112D Thus Extinguishes Sabah's 40% rights conferred by Article 112C of the *Federal Constitution*?", Wisdom foundation Policy Talk 37 (Facebook, 10 May 2022) < https://fb.watch/g63H0Jfe8a/>.

81 Sukumaran Vanugopal, (n 74) 383.

82 Nicholas Fung, 'The Constitutional Position of Sabah' FA Trindade (ed) *The Constitution of Malaysia Further Perspectives and Developments* (Oxford University Press, 1986) 92-113.

Further, Article 112C(2) stipulates:
The amounts required for making the grants specified in the said Part IV, and the amounts receivable by the State of Sabah or Sarawak under Section 3 or 4 of the said Part V, shall be charged on the Consolidated Fund; and the amounts otherwise receivable by the State of Sabah or Sarawak under the said part V shall not be paid into the Consolidated Fund.

The *Federal Constitution* clearly mandate that the 40% Special Grant is to be paid from the Federal Consolidated Fund. It is submitted that in determining 'revenue which accrues to the Federation', only the amounts paid into the Federal Consolidated Fund shall be considered, and these are revenues from the Federal List and the Concurrent List. A clearly segregated reporting of the Federal's Estimated revenue from Sabah is also crucial in determining the 'net revenue'.

(b) Territories of Sabah

In the provision '*two-fifths of the amount by which net revenue derived by the Federation from Sabah'* in Section 2(1) of part IV of the Tenth Schedule, is it important to define the territories of Sabah in order to determine the net revenue derived by the Federation from Sabah. Do the territories cover only the land mass, or do they include Territorial waters, the continental shelf, and the exclusive economic zone? These issues require thorough examination by reason of the Latin doctrine of *Nemo Dat Quod Non Habet.*[83] It may be crucial to establish the parameters of territorial sovereignty in order to determine the amounts to be considered in the calculation of the net revenue derived by the Federation from Sabah.

(c) Permissible deductions

How do we determine the permissible deduction to calculate the 40% Special Grant? What is the meaning of "*less the amounts received by the State in respect of assignments of the revenue*" in Section 2(1) Part IV of the Tenth Schedule?

Article 112C(2) stipulates among others that, the amounts receivable by the State under Section 3 and Section 4 of Part V of the Tenth Schedule are charged on the Federal Consolidated Fund. It is submitted that, the assignments under Section 3 and 4 received by Sabah, are the permissible deductions. This is because these assignments are distinguishable from other items assigned to Sabah in Part V of the Tenth Schedule because they are charged from the Federal Consolidated Fund. Whereas the other assignments are paid directly to the State Consolidated Fund.

Section 3 involves assignment of export duty whereas section 4 involves assignment of 30% customs revenue. Export duty and customs revenue are items under the federal list (See item 8(b) List I), however by virtue of Article 112C they are assigned to the Borneo States. These assignments however are subject to the conditions set out in the provisions.

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[83] Oxford Dictionary of Law, 2018, Ninth Edition, Oxford University Press - Latin doctrine of *Nemo Dat Quod Non Habet* ('No One can give what he has not got'), a basic rule that a person who does not own a property cannot confer it on another except with the true owner's authority.

It is opined that these items are identified as the permissible deductions because, the duty export and customs revenue which ought to be paid into Federal Consolidated Fund, is paid to the Borneo States as assignments instead. Therefore, in calculating the net revenue, these items are deducted accordingly.

In the contemporary dimension however, can the '*amounts received by the State in respect of assignments of the revenue*' be distinguished easily as per, for example the Federal Estimates of Revenue and Expenditure of 1968 and the Sabah Estimates of Revenue and Expenditure 1968? The answer would be in the negative because a view of the contemporary Estimates of Revenue and Expenditure will show that the particular item is no longer stated. Perhaps the fact that Section 4 of Part V of the Tenth Schedule is no longer applicable[84] has resulted to non -necessity of the deduction of this assignment. On the other hand, Section 3 of Part V of the Tenth Schedule involves assignment of export duty to the State which is subject to the levy of royalty by the State. These matters of royalty are intertwined with the riveting matters of territories which, though intricate must be addressed expeditiously.

(d) Matters that have transpired through voyage of time on the implementation of the 40% Special Grant

From the year 1964 up till 1972, one may see clearly the estimated revenue contributed from Peninsular Malaysia, Sabah and Sarawak to the Federal government. This is attributed to the distinct segregation of columns labelled :(i) Malaya/Malaysia Barat, (ii) revenue from Sabah and (iii) revenue from Sarawak respectively.[85] Thus, the revenue from the Borneo States were easily identified previously compared to currently. Thereafter, the abstract of the estimated revenue of Malaysia is combined as a whole and no longer distinctly segregated.

Similarly, the 40% Special Grant was also mentioned in the relevant appendices known as "Lampiran C or B" (respectively) of the Estimates of Malaysia Federal Revenue and Expenditure from 1965 until 1970. The financial statements were made true to the Constitutional provisions.[86] From 1971 onwards however, there was no longer any mention of the 40% Special Grant but instead it was identified as "Sabah Annual Grant" or "Pemberian Tahunan Sabah". This may be due to the grant review pursuant to the Sabah Special Grant (First Review) Order, 1970[87] whereby instead of the 40% Special Grant, a fixed amount at the following rates were given:

- 1969 – RM20 million
- 1970 – RM21.5 million
- 1971 – RM23.1 million

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[84] *Federal Constitution* (Malaysia) Ninth Schedule List IIIA, Item 18 provides that medicine and health (including matters specified under item 14(a) to (d) in the Federal List) are in the concurrent list only until the end of the year 1970.

[85] See Abstracts of the Estimated Revenue of Malaysia, Estimates of Malaysia Federal Revenue for the years 1964 to 1972, Malaysia Ministry of Finance.

[86] See Lampiran C or B of the Estimates of Malaysia Federal Revenue and Expenditure for the years 1964 until 1970.

[87] P.U.(A) 328/1970.

- 1972 – RM24.8 million
- 1973 – RM26.7 million

It was opined that the review of 1969 may have been possible because information was made available then to the Sabah State Government to show that the amounts in the review amounted to approximately 40% of the revenue collected from Sabah then, as well as the projected growth of such share in ensuing years in the five-year period.[88]

Thereafter no other review was made and the payment of RM26.7million was paid annually from the year 1974 until the year 2019. In the year 2020 RM53.4million was paid following a negotiation between the State Government and the Federal Government.[89] In the year 2021 however, the amount reverted to the previous amount of RM26.7million.[90] Consequently, further negotiations between Federal and Sabah State Government ensued[91] resulting in the gazette of the *Federal Constitution* (Review of Special Grant Under Article 112D) (State of Sabah) Order 2022[92] whereby instead of the 40% Special Grant, another interim fixed amount at the following rates were given:

- 2022 – RM125.6 million
- 2023 – RM129.7 million
- 2024 – RM133.8 million
- 2025 – RM138.1 million
- 2026 – RM142.6 million

On 22nd November 2023, another order was made, named the *Federal Constitution (Review under Special Grant under Article 112D)(State of Sabah) Order 2023*[93] whereby instead of the previous fixed interim amount, grants of the following amounts were given:

- 2022 – RM125.6 million
- 2023 – RM300 million
- 2024 – RM306 million
- 2025 – RM312 million
- 2026 – RM318 million
- 2027 – RM325 million

88 Roger Chin, Official Statement of the President of the Sabah Law Society (Facebook, 26 March 2022) < https://m.facebook.com/story.php?story_fbid=pfbid0U6McFHGYJwsyJ8usAJcutU7FtAXnHk2H4BAt4pKPv3zCX3M6qxdvDnUMwc21QXypl&id=100522628235153>.

89 Chong CT, Warisan Plus in Government: A retrospective from the Campaign and Beyond, Bridget Welsh et al (eds), *Sabah from the Ground: The 2020 Elections and the politics of survival* (SIRD and ISEAS Publishing, 2021).

90 Ibid.

91 "Federal Government, Sabah agree in 4.7% fold increase in Special Grant", *The Edge Markets* (Online, 14 April 2022) < https://www.theedgemarkets.com/article/federal-govt-sabah-agree-47fold-increase-special-grant>.

92 P.U. (A) 119/2022.

93 P.U.(A) 364/2023.

A Public litigation case has been filed by the Sabah Law Society to obtain answers pertaining to the 40% Special Grant.[94] Simultaneously a civil case pertaining to the 40% Special Grant was also filed [95] before it was withdrawn.[96]

Negotiations abound on the application of the 40% Special Grant formula. In any event should there be departure from the original formula, the constitutional provisions and constitutional safeguards must be strictly complied with.

It is interesting to observe the evolution of the label for the 40% Special Grant column found in the "Lampiran B, C or E" (respectively) of the Federal Estimates of Revenue and Expenditure for the years 1965 up until 2022.[97] This "Lampiran B, C or E' (respectively) is essentially the table of the statutory grant and other payments to the State government. Initially, from the years 1965 until 1970 the 40% Special Grant column was labelled as "Pemberian Mengikut Per. 2(1) Bahagian IV Jadual Ka-Sapuloh dalam Perlembagaan" or Grant under Para 2(1) of Pt. IV of the Tenth Schedule of Constitution. Thereafter, from the years 1971 until 1995 the column was labelled as "Pemberian Tahunan-Sabah or Annual Grant -Sabah". From the years 1996 until 2008 the column was labelled as "Pemberian Khas" which included the award of grants to other states such as Kedah and Selangor. From the years 2009 until 2022 the column was labelled as "Pemberian Khas Tahunan" which also still included the award to other states. The label of the column may continue to change and evolve in the future, however due to the current turn of events there appears to be a need to specify the column as the 40% Special Grant, true to the Constitutional provisions.

It is not clear why the Article 112D reviews stopped in 1970, however there may be several reasons for the absence of review:

(i) The 1969 Emergency

An emergency proclamation does not *ipso facto* suspend any provision of the *Federal Constitution* or of the Federal-State relations unless there is an explicit provision in an

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94 E-Kehakiman Sabah dan Sarawak, Case No.: BKI-25-14/6-2022< https://ekss-portal.kehakiman.gov.my/portals/web/home/list_search_case/?state_id=12&case_no=BKI-25-14/6-2022&name=&ic_no=>. >https://m.facebook.com/story.php?story_fbid=pfbid0zUu1tuJ9RajxBs7LWR1QGtaynTfWa5wB3VXcYyzkTNqzEqxbSqGVR8GzZWWwSxMJl&id=100522628235153> ,
Bernama, 'Sabah Law Society applies for Judicial Review on Special Grant to State', *Daily Express* (online, 9 June 2022) <https://www.dailyexpress.com.my/news/193829/sabah-law-society-applies-for-judicial-review-on-special-grant-to-state-/>.

95 E-Kehakiman Sabah dan Sarawak, Case No.: BKI-24NCvC-84/6-2022 < https://ekss-portal.kehakiman.gov.my/portals/web/home/list_search_case/?state_id=12&case_no=BKI-24NCvC-84/6-2022&name=&ic_no= >, FMT Reporters, 'Sabah PH Reps Go To Court Over 40% Revenue Share for State', *Free Malaysia Today.com* (online, 3 June 2022) < https://www.freemalaysiatoday.com/category/nation/2022/06/03/sabah-ph-reps-go-to-court-over-40-revenue-share-for-state/>.

96 Paul Mu, 'PH Sabah to withdraw originating summons', *New Straits Times* (online, 20 September 2023) < PH Sabah to withdraw originating summons | New Straits Times (nst.com.my) >.

97 See Estimates of Malaysia Federal Revenue and Expenditure from 1965 until 2022, Ministry of Finance.

Emergency Ordinance or Emergency Act of parliament. In any case, the Proclamation of Emergency of 1969[98] came to an end in 2011.[99]

(ii) Agreement between the parties

Article 112D allows the parties to "agree on the alteration or abolition of any of those grants, or the making of another grant instead of or as well as those grants…". However, this requires a formal order by the Yang di-Pertuan Agong. Further, the constitutional requirements and safeguards must also be satisfied.

(iii) Political agreement

A mere political arrangement between a political alliance partner at the Federal and State level is not enough to displace Article 112C. The Constitution cannot be set aside by a mere political or administrative arrangement.

(iv) Unilateral declaration

Even more so a unilateral declaration by any one party that the 40% Special Grant provision is no more applicable has no legal effect.

(v) Atrophy

Has the time lapse since 1970 caused Articles 112C and 112D to lapse? The answer is "No". Constitutional law does not recognise atrophy of constitutional provisions. The case of *Lembaga Tatatertib Perkhidmatan Awam, Hospital Pulau Pinang v Utra Badi A/L Perumal*[100] applied the case of *Francis Coralie V Union of India*[101] which states among others that, "….*This principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but, in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get* ***atrophied or fossilised*** *but remains flexible*

98 As a result of the 13th May 1969 riot tragedy, a Proclamation of Emergency of 1969, was proclaimed by the Yang di-Pertuan Agong on 15th May 1969 and published in the gazette on the same day. Following this proclamation several laws were promulgated including the Emergency (Essential Powers) ordinance no. 2 of 1969 which lead to the formation of a National Operations Council (NOC) and the creation of the post of a Director of Operations, whom was vested with legislative and executive powers. It is worthy to note that the Sabah Special Grant (First Review) Order 1970, P.U.(A) 328 was made on 18th August 1970 which was during the period of NOC government.

99 Pursuant to the *Federal Constitution* (Malaysia), Art 150(7), at the expiration of six months from the date a proclamation of emergency ceased to be in force, any laws made while the proclamation was in force shall cease to have effect. Resolutions to annul the Proclamation of Emergency of 1969 (including the Proclamation of Emergency of 1966 and the Proclamation of Emergency of 1979) was passed at the House or Representatives on the 24th November 2011, and at the Senate on the 20th December 2011: See Malaysia, *Parliamentary Debates,* House of Representatives, 24th November 2011, Bil 61 <https://www.parlimen.gov.my/files/hindex/pdf/DR-24112011.pdf and Malaysia, *Parliamentary Debates*, House of Senate, 20th December 2011, Bil 22 < https://www.parlimen.gov.my/files/hindex/pdf/DN-20122011.pdf >.

100 [2000] 3 MLJ 281.

101 AIR 1981 SC 746.

enough to meet the newly emerging problems and challenges applies with greater force in relation to a fundamental right enacted by the Constitution …".

4 *What needs to be done to address the issues of the 40% Special Grant*

In conciliating the issues of the 40% Special Grant, understanding and internalizing the *Federal Constitution* together with its 'constitutional foundation documents'[102] is crucial. This is to encourage and uphold the sanctity of the *Federal Constitution*, the rule of law as well as recapture the spirit of accommodation, moderation and compassion that animated the leaders of the Malaysia Agreement in 1963.[103] The Federal Government and West Malaysians must re-dedicate themselves to the pacts of the past.[104]

All factions within Sabah must unite to adopt a common front. Transparent negotiations with the Federal Government must be reopened under Article 112D. This provision permits a mutual agreement to alter, abolish or replace the constitutional provisions by order of the Yang di-Pertuan Agong. There is also no bar to reinforcing, reinstating or renegotiating the terms of Malaysia Agreement 1963 and incorporating them in a constitutional amendment. Consequently, an independent assessor under Article 112D is required by the *Federal Constitution* if no agreement can be reached. The Federal government can seek an advisory opinion of the Federal Court under Article 130 of the *Federal Constitution*.

Court redress may be sought to recover monies due since 1973. Reliance may be made on the authority of the Federal Court case of Ministry of Finance, *Government of Sabah v Petrojasa Sdn Bhd*[105]. It was held in this case that the non-payment of a debt is a denial of a right to property under Article 13 of the *Federal Constitution*. Mandamus may be issued for the purpose of enforcing the right of a person who has been deprived of his property not accordance with law. It is also noteworthy that Article 98(1)(b) of the *Federal Constitution* provides that all Federal debts are to be charged on the Federal Consolidated Fund. In the event that the matter does go through litigation process, interesting questions will arise such as: Will estoppel apply due to the agreement of Sabah leaders since 1973 to forgo their right? It is opined that estoppel cannot be applied against a constitutional right; and Will the time limit of 36 months shield the federal government under the various limitation laws. These matters require due deliberation.

IV CONCLUSION

The laws and constitutional financial provisions related to the Borneo States and the 40% Special Grant has been set out from the inception of Malaysia. The events that unfold from the beginning of Malaysia to this day has been recorded in the passages of history.

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[102] Jeyan Marimuttu, 'Malaysia Agreement: Malaysia Act 1963 Safeguard and guarantees for the Borneo Territories', *Malayan Law journal,4, Ixvi*, 'The Constitutional Foundation Documents comprises of *inter alia*, The Malaysia Agreement 1963, The Malaysia Act 1963 and The IGC Report.

[103] Shad Saleem Faruqi (n 11) 85.

[104] Shad Saleem Faruqi, "Federal -State Relations with Special Emphasis on Sabah and Sarawak" Webinar conducted by the Faculty of Law University of Malaya, 20th September 2022.

[105] [228] 4 MLJ 641 FC.

The actions that are taken today determines the success of tomorrow. There must be a balance between the deliberated design of yesterday and the life of tomorrow.[106]

It is submitted that, in the wake of the circumstances that prevail today, the issue of 40% Special Grant requires attention and efficacious action on all levels of society including but not limited to the three branches of the federal government and State governments respectively.

If it appears at the Federal-State level, there is mutual consensus to alter or abolish the grants or make another grant (Article 112D(1)) or there is mutual agreement to have a longer period of review of the special grant (Article 112D(3)), or acknowledgement of the State's acceptance of notice from the Federal Government on the variation of assignments (Article 112D(5)), then such outcome can only be binding subject to the strict compliance of the procedural requirement of an order made by the Yang di-Pertuan Agong to modify the special grant in Part IV of the Tenth Schedule and Article 112C(2). Further, any unconstitutional acts done in violation of the constitution or any agreements between the Federal and State governments cannot supersede the laws set out in the *Federal Constitution*.[107] The requirement of concurrence pursuant to the safeguards of the constitutional position of the Borneo States (Article 161E) must also be fulfilled.

On the other hand, if there is disagreement or dissensions between the Federal Government and the Borneo States pertaining to the review of the special grants, then it is high time for the Federal and State government to jointly appoint an independent assessor according to the constitutional provisions to give way to the independent assessor to provide his binding recommendations.[108]

The cornerstone to uphold the rule of law and harmony is through understanding and acquiescence of the *Federal Constitution* together with the directives in constitutional foundation documents. With mutual co-operation towards a common ground, the halcyon days will be upon us.

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[106] Shad Saleem Faruqi, "Constitutional Amendments and the Basic Structure of Malaysia", UM-NUS Joint Hybrid Symposium (University of Malaya, 14 & 15 October 2022).

[107] Vanar M, "Sabah's 40% Special Grant Cannot Be Displaced By Mere Political Agreement, Says Constitutional Expert",*The Star Online* (Online, 11 May 2022) < https://www.thestar.com.my/news/nation/2022/05/11/sabah039s-40-special-grant-cannot-be-displaced-by-mere-political-agreement-says-constitutional-expert>.

[108] Malaysia, *Report of the Inter-Governmental Committee* (n 7) Paragraph 24(9)(i).

ABOLITION OF NATURAL LIFE SENTENCE IN MALAYSIA: A CRITICAL ANALYSIS

MOIN UDDIN*

Abstract

A natural life sentence is a severe punishment in which prisoners remain in prison until death. This sentence is used as an alternative to the death penalty in exceptional situations which do not mandate the punishment of death. In Malaysia, the Court was empowered by the law till 3rd April 2023 to impose a natural life sentence in the criminal justice system based on Section 130A(f) of the Penal Code. This law aroused the vexed issue that a natural life sentence does not achieve the purposes of sentencing in the criminal justice system. In addition, a natural life sentence violates human rights laws as it is inhumane or degrading to the accused. This paper aims to critically analyse and examine the rationales and consequences of imposing a natural life imprisonment. The qualitative research method has been used in gathering and analysing data. This study concludes that a natural life sentence contradicts human rights, fails to achieve public interest, violates the freedom and dignity of the prisoners, and also fails to attain penological goals. This research suggests that the natural life sentence should be abolished around the world with an option of parole to establish human pride and dignity and protect the social and human rights of the prisoners.

Keywords: Natural life sentence, public interest, human rights, pardon and natural life sentences, *Shari'ah* and natural life sentences.

I INTRODUCTION

The implementation of sentencing in a criminal justice system plays a vital role in reducing recidivism.[1] The main objective of all categories of punishments is to avoid unfairness, inconsistency, and prejudice.[2] Different terms of detention are used to punish the criminal and a natural life sentence is one of them. However, in Malaysia, the term 'natural life sentence' was not used in the penal code, but it was known as 'imprisonment for life'

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1 Recidivism is the propensity of a person to regress to a prior behaviour or repeat undesirable actions, particularly relapse into criminal activities. It could be measured in various forms such as re-engagement, re-arrest, reconviction, or re-imprisonment.

2 Gerald Gardiner, 'The Purpose of Criminal Punishment' (1958) 21 *Modern Law Review* 117.

which is defined as 'imprisonment until the death' of the convict.[3] A second terminology of imprisonment is used in the Penal Code which is 'life imprisonment' which means imprisonment for 30 years.[4] In a natural life incarceration scheme, the prisoners are incarcerated for the whole of their natural lives[5] with no date for release[6] while life imprisonment prisoners can be released after serving a certain, i.e. 30 years imprisonment in Malaysia.[7] Legal scholars have categorised natural life imprisonment as the most punitive punishment for sensationalised crimes after the death penalty. However, a pardon is an exception to the general rule to quash or alter any type of punishment imposed by the Court.[8] Kandelia has rightly mentioned that natural life sentence is an imprisonment for a severe crime under which the condemned person is to remain in prison for the rest of his or her lifetime.[9]

It is generally known that all offences are regarded as crimes against society while the Courts normally determine the appropriate punishment for each offender. The variations in the facts of each case and the legal elements involved are the leading reasons for imposing different types of punishment or durations thereof.[10] In these situations, the Court must have vast knowledge of all the goals of sentencing. These are retribution, deterrence, incapacitation and rehabilitation to maintain justice. It can be summarised by referring to the enunciation of Francis Guan who has claimed that natural life sentence is considered as the most punitive sentence as it is incarceration until the death of the criminal.[11] Therefore, this law became a highly controversial issue in Malaysia and even in many other countries around the world to take out natural life sentence from the criminal justice system because it contradicts human rights, fails to protect the interest of the public and the accused, violates freedom and human dignity and fails to attain penological goals.

A qualitative research method is adopted to analyse the perspective of laws involving the implementation of natural life sentences in Malaysia. This research utilised published as well as unpublished materials to enrich the current analysis of laws. The study also refers to related Islamic law materials to discuss the wisdom of punishment in the *Shari'ah*.

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3 *Penal Code (Act 576)* (Malaysia) s 130A(f).

4 Malaysian Prison Department, FAQ: Prisons terms and definitions (online, 5 May 2023) <http://www.prison.gov.my/portal/page/portal/english/soalan_en>.

5 Marieke Liem and Jan Maarten Elbers, 'The Role of Human Rights in Long-Term Sentencing' (2015) 26(2-4) *Security and Human Rights* 282.

6 Malaysian Prison Department (n 4).

7 Ibid.

8 Daniel T. Kobil, 'The Quality of Mercy Strained: Wresting the Pardoning Power from the King' (1991) 69(569) *Texas Law Review* 636.

9 Seema Kandelia, 'Life Meaning Life: Is There Any Hope of Release for Prisoners Serving Whole Life Orders' (2011) 75(1) *Journal of Criminal Law* 70.

10 *PP v Loo Choon Fatt* [1976] 2 MLJ 256 (RCRJ Ipoh) 256 ('*Loo Choon Fatt')*.

11 Francis Guan, *Criminal Procedure* (LexisNexis Malaysia, 2nd ed, 2006) 419; Dirk Van Zyl Smit and Catherine Appleton, *A policy briefing on life imprisonment* (University of Nottingham, 2018) 1-2.

II NATURAL LIFE SENTENCE IN MALAYSIA

Natural life imprisonment is imposed on the offender when there are exceptional or mitigating circumstances which do not justify the imposition of the death penalty.[12] This sentence is sometimes considered as an alternative to capital punishment. This severe punishment was imposed in Malaysia by virtue of Sections 173(b), 173(j) (i) and 173(m) (ii) of the Criminal Procedure Code (Act 593) of Malaysia. Further, Section 130A(f) of the Penal Code (Act 574) of Malaysia provided that, "imprisonment for life means (subject to the provisions of any written law conferring power to grant pardons, reprieves or respites or suspension or remission of punishments) imprisonment until the death of the person on whom the sentence is imposed."[13] On the other hand, the Malaysian Prison Department has introduced separate terminology for fixed term incarceration that is 'life imprisonment' which is defined as "Prisoners sentenced to 30 years' imprisonment."[14]

The main objective of section 130A(f) of the Penal Code of Malaysia was to safeguard the community by separating criminals who are a serious threat to the lives and personal security of others. Another purpose of this section was to condemn behaviour that society deems to be extremely shameful and that seriously violates basic human rights and values. In the case of *Che Ani Bin Itam v PP ('Che Ani')*, the Federal Court of Kuala Lumpur pronounced that this section does not violate the Federal Constitution of Malaysia ('FC').[15] Therefore, this law became a highly debatable issue in Malaysia. Eventually, on 3rd April 2023, Parliament decided to abolish this harsh and degrading punishment from the criminal justice system in Malaysia.

III NATURAL LIFE SENTENCE IN OTHER COUNTRIES

Law is a form of social science that needs to be developed in line with the demands of the people and national goals.[16] This development must be just and fair and without any kind of discrimination. There are approximately 65 out of 216 countries in the world that are currently imposing "natural life sentences"[17] in their jurisdictions such as Bangladesh, Indonesia, Denmark, Austria, Canada, Italy, England and Wales, Turkey, the United States, Sweden, Ukraine, Nigeria, South Africa, Kenya and Bulgaria.[18] However, many other countries have successfully abolished the natural life imprisonment by classifying it as indefinite, cruel, and severe in nature. These abolitions are mostly initiated by the

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12 Michael L. Radelet and Ronald L. Akers, 'Deterrence and the death penalty: The views of the experts' (1996) 87 *Journal of Criminal Law & Criminology* 1.

13 *Penal Code* (n 3*)* s 130A(f).

14 Malaysian Prison Department (n 4).

15 [1984] 1 MLJ 113 (Federal Court), 114-115.

16 Sridevi Thambapillay, 'Recent Developments in Judicial Review of Administrative Action in Malaysia: A Shift from Grounds Based on Common Law Principles to the Federal Constitution' (2007) *Persidangan Undang-undang Tuanku Ja'afar* 276.

17 "Natural life sentences" is defined as 'imprisonment until the death' of the convict. On the other hand, "life imprisonment" is defined by the Malaysian Prison Department as imprisonment for 30 years. The term of imprisonment for "life imprisonment" may vary in different jurisdictions.

18 Penal Reform International, 'Life imprisonment' (online, 27 April 2023) <https://www.penalreform.org/global-prison-trends-2021/life-imprisonment/>.

cultural influence of former colonial masters, Portugal, or Spain. It is noteworthy that 183 jurisdictions of the globe officially enforce life imprisonment, which typically entails a period of incarceration ranging mostly from 20 to 30 years. Some European countries including Bosnia, Croatia, and Herzegovina implement the maximum term of custody at 45 years.[19]

A *Natural Life Sentence under the ECHR*

The European Court of Human Rights (ECHR) emphasises the protection of life and liberty of all human beings. According to this Court, if an offender is sentenced to a natural life sentence with a potential hope of release by any local law of the county, the punishment will not be categorised as a violation of basic human rights. A worthy explanation about natural life sentence can be found in the case of *Kafkaris v Cyprus ('Kafkaris')* [20] where the European Court of Human Rights (ECHR) acknowledged that the implementation of an irreducible life imprisonment on an adult criminal may be violation of Article 3 of ECHR.[21] The Court, however, viewed that in several cases where incarceration was subject to review for the purpose of parole after the passing of the minimum term for serving natural life imprisonment, it could not be alleged that the life sentence prisoners had been deprived of any hope of release from prison. The Court had additionally established that even in the lack of a minimum term of unconditional sentence and even when the possibility of parole is narrowed down for convicts serving a life imprisonment, the prisoners are having a faith that one day they will be released from prison. The Court had presented that in such situations a life sentence does not become 'irreducible' by the mere point that in practice it may be served in full. Therefore, the Court concluded that it is sufficient for the purposes of Article 3 of ECHR that a life incarceration is de jure and de facto reducible.

Furthermore, the ECHR decided that the imposition of an irreducible life imprisonment on an adult criminal may violate Article 3 because the convict had no prospect of release, de jure (legal recognition) and de facto (factual recognition). Therefore, an irreducible sentence establishes inhuman or degrading action which violates Article 3 of ECHR. However, in the *Kafkaris* case Judge Bratza opined that non-existence of any review and protections attaching to the executive discretion conditionally to relieve a life prisoner is important in relation to Article 5(4).[22] In addition, Judge Bratza reaffirmed that Article 5(4) of ECHR required the lawfulness of the constant custody of a natural life sentence inmate to be ascertained by "a sovereign body with the power to mandate release and following a procedure containing the necessary judicial safeguards, including the possibility of an

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19 Ibid.

20 [2008] ECHR 143 (European Court of Human Rights).

21 Article 3 of the ECHR provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

22 Article 5(4) of the ECHR provides that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

oral hearing."[23] Likewise, in the *Vinter and Others v United Kingdom ('Vinter')*[24] case, the Grand Chamber of the ECHR governed that all inmates punished to life imprisonment had two rights namely prospect of relief and the right to have their sentence reviewed. . If the sentencing authority fails to provide these two rights, the inmates will be eligible to file a petition to be free from inhuman or degrading treatment.[25]

B *Natural Life Sentence under International Laws*

Many international instruments are urging Member States to legislate rules offering the conditional release of all inmates in certain circumstances. For example, neither the Council of Europe recommendations on the management of long-term prisoners nor the United Nations Recommendations on Life Imprisonment in 1994 grants the possibility of lifetime imprisonment although both recognise following a steady and rigorous review that some life-sentenced inmates may never be deemed safe for release. The main objective of providing a review process is that the guidelines envisage rehabilitation as an integral part of the penal process.[26] Similarly, Article 10(3) of the International Covenant on Civil and Political Rights in 1966 provides that "the penitentiary system shall comprise treatment of prisoners the necessary target of which shall be their reformation and social rehabilitation."[27] Bohlander has indicated that the importance of an independent review process is stipulated by the Rome Statute of the International Criminal Court 1998 under Article 77, although a natural life sentence is permissible as the extreme penalty for the most serious offences. Article 110 requires that the court must review after 25 years to determine whether a natural life sentence should be reduced.[28]

It can be identified from the international human rights principles that the European Court of Human Rights and many other international organisations have proposed eradicating natural life imprisonment. The Malaysian criminal justice system was wise to abolish the natural life sentence to protect the fundamental rights of those incarcerated for life.

IV REASONS FOR THE ABOLITION OF NATURAL LIFE SENTENCE

The abolition of a natural life sentence, or imprisonment until the death of the criminal, is advocated for several reasons rooted in humanitarian, social, ethical, legal, and practical considerations. Here are some of the supporting arguments:

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23 *Kafkaris* (n 20), 3, 38, 40-41, 62, 63, 65, 68.

24 Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013 (GC).

25 Dirk Van Zyl Smit and Pete Weatherby, Simon Creighton, 'Whole life sentences and the tide of European human rights jurisprudence: what is to be done?' (2014) 14(1) *Human Rights Law Review*.

26 United Nations office at Vienna Crime Prevention and Criminal Justice Brance, Recommendations on Life Imprisonment: 2, 4, 6-7.

27 *International Covenant on Civil and Political Rights* (23 March 1976), art. 10(3).

28 Michael Bohlander, 'The Remains of the Day: Whole Life Sentences after Bieber' (2009) 73(1) *The Journal of Criminal Law* 34, 35, 36, 47.

A *Natural Life Sentence Contradicts Human Rights*

Imprisonment of a person for the rest of his life opposes fundamental human rights. It has been challenged as a violation of human rights on the basis that it generates debilitating psychosis which is an inhumane or degrading treatment of the accused person.[29] Hodgkinson opined that incarceration for natural life makes life far more depressing and meaningless than life normally is in prison.[30] Hodgkinson and Kandelia, Gyllensten argued that many countries justified the imposition of a natural life sentence as a punishment for the most serious offences. In many countries, although it is possible to file a petition to the Head of State, President, King, Ruler or Governor for a pardon, or petition to the court for a determinate tariff after serving a certain period of time, this process aids those under the capital punishment and not the natural life sentence.[31] In other words, the death penalty is replaced with a natural life sentence to avoid the execution of the culprits. This has no benefit to society or even to the family of the convict because the person is going to live in prison for his whole life. It is the silent execution of the death sentence. The offenders who are suffering such punishment are rarely able to humanise or to reform to a legal path because of having no hope of release.[32] In comparison between prisoners who are serving long-term sentences with a prospect of release and those incarcerated for their whole life, the latter group suffers heavily due to feelings of futility.[33] Therefore, a natural life sentence is labelled an inhumane or shameful treatment of the felon in international human rights laws unless a reformation is confirmed by the legal authority.[34]

B *Violation of Human Nature*

No human being is free from perpetrating errors. Thus, a person may commit a crime because of his human nature or his need or by mistake or for any other reason. According to John Finnis, it is in the nature of human beings that they will be rehabilitated or reformed by the moral teachings which are good for everyone.[35] In that context, having education is one of the fundamental rights of every human being. If a person has committed a severe offence, it doesn't mean that the person must be killed or put in jail until he dies but a reformation process must exist to influence or convince him to become law abiding and a better person.[36] Therefore, when the person is able to prove that he is reformed and

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29 Smit and Weatherby, Creighton (n 25) 59.

30 Peter Hodgkinson, 'Europe A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies' (2000) 26(3) *Ohio Northern University Law Review* 625-664.

31 Peter Hodgkinson and Seema Kandelia Lina Gyllensten, 'Capital punishment: a review and critique of abolition strategies' in Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications* (Ashgate, 2008) 249.

32 Simon Hattenstone and Eric Allison, 'UK criminal justice: Are whole-life prison sentences an infringement of human rights?' *The Guardian* (online, 5 December 2012) <https://www.theguardian.com/law/2012/dec/05/whole-life-prison-sentence-human-rights>.

33 The Public Interest Litigation Project, 'Lifelong imprisonment' *Law and democracy* (online, 16 October 2017) <https://pilpnjcm.nl/en/dossiers/lifelong-imprisonment/>.

34 Smit and Weatherby, Creighton (n 25) 65-71.

35 John Finnis, *Natural law and natural rights* (Oxford University Press, 2011) 23.

36 Julian H. Wright Jr, 'Life-without-parole: An alternative to death or not much of a life at all' (1990) 43 *Vanderbilt Law Review* 529.

educated enough to contribute to social welfare, then parole must be given. Hence, the person will live in society and will have a natural life which will protect the interest of the convict as well as the interest of the public.

C *Natural Life Sentence Fails to Achieve Public Interest*

Natural life incarceration defeats the public interest as it is unsuccessful in rehabilitating offenders to work for the sake of their family or community or for the development of the country. An imprisonment that fails to formulate an appropriate mechanism for rehabilitating the offender fails to benefit society.[37] It fails to reduce the number of criminals. A punishment must make an appreciable contribution to penological improvement otherwise it should be considered an excessive sentencing.[38] Lord Taylor CJ in the case of *R v Cox ('Cox')*[39] adopted a basic rule of sentencing for custody that it is "the kind of offence which… would make all right thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one."[40]

D *An Outdated Practice of Law*

The imposition of natural life sentence can be considered an outdated practice of law in the modern world. The Constitution is recognised as a dynamic, organic and living instrument which must be evolved continuously with the needs of the people and national aspirations.[41] Many countries like India have paid considerable attention to the goals of sentencing. They have displayed their concern about what happens during the incarceration period and the provisions, if any, made for the criminal when released from punishment. India has developed a formula which is known as "the rarest-of-rare cases formula." This formula has no statutory definition, but it depends on facts and circumstances of a particular case, harshness of the offence, the demeanour of the criminal, past history of his connection with criminality, chances of reforming and integrating him into the society and so on. The Indian Supreme Court applied the rarest-of-rare cases formula in the case of *Surja Ram v State of Rajasthan ('Surja Ram')* wherein it stated that:

> While considering the punishment to be given to the accused, the court should be alive to not only the right of the criminal to be awarded a just and fair punishment by administering justice tempered with mercy as the criminal may justifiably deserve, but also to the rights of the victims of the crime to have the assailant appropriately punished and society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with public abhorrence for the heinous crime committed by the accused. On the facts

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37 Liem and Elbers (n 5) 290.

38 J. Mark Lane, '"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence' (1993) 26(2) *Loyola of Los Angeles Law Review* 350.

39 [1993] 1 WLR 188.

40 Peter Welch, *Criminal Litigation and Sentencing* (Cavendish Publication Limited, 2nd ed, 1995) 316.

41 Thambapillay (n 16) 276.

> and circumstances of the case, we are of the view that the crime committed by the accused falls into the category of rarest-of-rare cases for which the extreme death penalty is justified.[42]

It can be pointed out from the above judgment that the court considered the nature of the specific offence and its seriousness in deciding the case to make sure that there is no miscarriage of justice in the case. Hence, it can be said that the formula leads judges to take into account all factors related to the offence and the offender.

In the case of *State of Rajasthan v Baisakha ('Baisakha')*, the Rajasthan High Court ordered that this was not a case which fell within the rarest-of-rare case category and held that the ends of justice would be served, having regard to the circumstances, by imposing life imprisonment.[43]

E *Natural Life Sentence Violates the Constitution*

Natural life imprisonment violates the freedom and dignity of the person which are fundamental civil rights under the canopy of Article 5(1) of the FC. In this Article, the phrase 'save in accordance with law' justifies the deprivation of personal liberty only if the law allows. However, the word 'law' can be interpreted to refer to not only the statutes passed by the parliament but also natural justice[44] and a higher standard of due process.[45] As the Court of Appeal ruled in the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Another ('Tan Tek Seng')*[46] that Art. 5(1) of the Federal Constitution can be interpreted broadly and liberally to form quality of life and fairness.[47] The rulings of the case also directed that the imposed punishment should not be severe, but it should be reasonable and fair, and proportionate to the crime committed. This principle was affirmed by the Federal Court in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor ('Sivarasa Rasiah')*.[48] In this case, the Court also stated that the enacted law must be just and fair.[49] In addition, the Court of Appeal in *Sugumar Balakrishnan v Director of Immigration, State of Sabah & Anor ('Sugumar Balakrishnan')*[50] sanctioned that Art 5(1) should read together with Art 8(1) to ensure the doctrine of substantive fairness which "requires … to ensure that any punishment that he imposes is not disproportionate to the wrongdoing complained of."[51] This principle was affirmed later in several cases namely in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia ('Dr Mohd Nasir')*[52]

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42 AIR 1997 SC 18 (Indian Supreme Court) 8.

43 [1999] Cri L.J. 1399 (Rajasthan High Court) 7.

44 *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiasahu Suruhanjaya Pasukan Polis & Ors*, [1995] 1 MLJ 315 ('*Raja Abdul Malek Muzaffar Shah')*; Thambapillay (n 16) 275.

45 Normawati Hashim, 'The Need for a Dynamic Jurisprudence of Right to "Life" Under Article 5(s) of the Federal Constitution' (2013) 101 *Procedia-Social and Behavioral Sciences* 299-306; Thambapillay (n 16) 276.

46 [1996] 1 MLJ 261.

47 Thambapillay (n 16) 275.

48 [2010] 2 MLJ 333, 346.

49 Ibid.

50 [1998] 3 MLJ 289.

51 Ibid 315.

52 [2006] 6 MLJ 213, 219-220.

and *Lee Kwan Woh v Public Prosecutor ('Lee Kwan Woh'),*[53] *Alma Nudo Atenza v Public Prosecutor and another appeal ('Alma Nudo Atenza').*[54]

Based on the above reasonings, it can be submitted that a natural life sentence is unreasonable and unfair, and disproportionate to the crime committed as it is enacted in disregard of public concerns and entirely at the will of the Parliament. The term 'law' should not exist at the will of the Parliament. The statutory law of natural life sentence is questionable from the point of view of constitutional supremacy.

F *Natural Life Imprisonment Fails to Attain Penological Goals*

Natural life sentence is excessive in the nature of punishment in the criminal justice system as there is no hope of parole or release of the convicts from prison. Lawyer Baljit Sidhu has said that "a natural life imprisonment term (means that the) prisoners are likely to die there."[55]

In order to understand the concept of excessiveness of sentence, it is required that one must evaluate the reasons for imposing the punishment. A punishment is an instrument to protect the common benefits of the community from usurpation as well as illegal motives of personal greed. The justification of punishment is underlined largely based on two basic theories namely the utilitarian and the retributive.[56] The utilitarian model validates punishment on the ground that it balances the benefits and detrimental effects of criminal punishment. The supporters of this idea believe that it is a potential theory which reduces recidivism from the society. However, the justification of retributive theory is that it suitably responds to the voluntary violation of any law. This theory does not ponder on its effects on society.[57] Therefore, the purposes of sentencing emerged from these two theories are mainly retribution, deterrence, incapacitation and rehabilitation.[58]

G *Violation of the Purposes of Punishment*

The theory of retribution prevents risk of recidivism by removing personal avenge and hostility from the individual or society.[59] A proper implementation of this theory creates a feeling in people that the criminal procedure and law enforcement forces are working efficiently, so that criminals are punished adequately. Moreover, deterrence creates fright among people as it punishes convicts effectively for their commission of crimes. It deters potential offenders from committing further or repeating crimes in society with the feeling that the same conditions will happen if they too commit the

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53 [2009] 5 CLJ 631.

54 [2019] MLJU 280.

55 V Anbalagan, 'Lawyers warn of the other death sentence' *FMT News* (online, 16 October 2018) <https://www.freemalaysiatoday.com/category/nation/2018/10/16/lawyers-warn-of-the-other-death-sentence/>.

56 Australian Law Reform Commission, *Family Violence - A National Legal Response* (ALRC Report 114, 2010) vol 1, 175.

57 C. L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (Oxford University Press, 1987) 7, 46-47.

58 Australian Law Reform Commission (n 56) 175-76, 179.

59 Joel Meyer, 'Reflections on some theories of punishment' (1968) 59(4) *The Journal of Criminal Law, Criminology, and Police Science* 595.

offence.[60] Furthermore, incapacitation removes criminals from the society for reducing the sensationalised crimes by executing death penalty, imposing natural life imprisonment, or house arrest. It is also known as prevention as criminals are kept in custody or issued the death penalty to incapacitate them from committing further serious crimes. In the case of *R v Sargeant ('Sargeant'),*[61] Lawton LJ opined that natural life sentence in justified in special circumstances. He said that if an offender has no possibility of deterrence and rehabilitation, he should be locked up until death. On the contrary, it can be argued that the stated two theories namely retribution and incapacitation do not establish civil justice that a person can be free from prison if it can be guaranteed that he will not harm anyone again and will lead a better life than before.

Rehabilitation is the only process which prevents future crime by changing behaviour of offenders. It provides training programme, counselling, education, treatment centre and so forth to alter the criminal mentality of the public. It is the only effective punishment which provides an opportunity to rehabilitate criminals without focusing on the crime.[62] As a result, they will possess more understanding of the evil nature of crime, a new set of moral values, human dignity and a desire to act for social development. Rehabilitation plants interior purification, redemption, and repentance.[63] In reality, most of the prisons of the world are incompetent to provide adequate and quality services for the prisoners.[64] It can be noted from all theories of the purpose of sentences that transforming people from criminal behaviour to a natural life or life with dignity should be the supreme concern of all kinds of punishments.

H *Violation of the Concept of Rehabilitation: The Behaviourist Approach*

The core penological goal is rehabilitating or naturalising human behaviour from criminality. The legalistic approach of implementing punishment is that all crimes are committed by the free will of the criminals, thus, they must suffer for their wrongdoings. However, it is opposed by the behaviouristic approach which believes that crime is not entirely controlled by the offender but an effect of forces.[65] This approach claims to investigate the behaviour and personality of an offender so that the community can understand the problems and workout to overcome them.[66] Both theories require punishment of the criminals while the major purpose is to purify the interior behaviour and to show repentance for their criminal activities.[67] Therefore, the convicted person can come back to society as a better person than before and can contribute to the betterment of humanity. This moral purification process can adequately preserve human dignity and

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60 Meyer (n 59) 596.

61 [1974] 60 Cr App R 74.

62 Smit and Weatherby, Creighton (n 25) 65.

63 Meyer (n 59) 597.

64 T. D Hutto, 'Goals and Service Delivery in Corrections Facilities' in Miles B Santamour and Patricia S Watson (eds), *The Retarded Offender* (Praeger Publishers, 1982) 387.

65 Albert W. Alschuler, 'The changing purposes of criminal punishment: A retrospective on the past century and some thoughts about the next' (2003) 70(1) *The University of Chicago Law Review* 19.

66 Sol Rubin et al, *The Law of Criminal Correction* (West Publishing Company, 1963) vol 2.

67 Meyer (n 59) 598.

social rights of the offenders.[68] This is also the major concern of imposing punishment under Islamic criminal justice system.[69] However, imprisonment for life ignores such inner purification and repentance of the prisoners. Their moral corrections and repentance do not benefit them unless the Head of the State issues a pardon. Hence, natural life sentence fails to protect social rights of the prisoners as it does not permit them to work for the social welfare after the moral correction from criminality.

Therefore, it could be pointed out that natural life imprisonment is an irrational, harsh and unusual monolithic punishment. It emphatically kills the hope of the prisoners for release from the jail, devalues and overthrows the humanity of the convicts because of causing severe psychological distress and depression as there is no incentive of freedom or no certain length of confinement before death.

V POWER OF PARDON IN MITIGATING A NATURAL LIFE SENTENCE

Imprisonment for life was practiced in Malaysia for serious crimes, but this sentence could be reduced or pardoned by the right to pardon by the *Yang di-Pertuan Agong (YDPA)* or the Ruler or the Governor of each State as provided in Article 42 of the Federal Constitution. Despite the fact that Article 42 provides for a Pardons Board, its composition and its procedure, the court held that the power of pardon is a "discretionary power" of the YDPA[70] and his decisions cannot be questioned or reviewed by the Court.[71] Abdul Hamid CJ. also proclaimed that the federal law[72] does not mandate the YDPA to follow the advice of the Pardons Board, but he makes pardon decisions based on his discretionary power specified under Article 42(1) of the Constitution.[73] A similar power is given to every Ruler of each State for crimes committed in that respective State. This special power is regulated to establish justice and protect public interest and conscience.[74]

According to some legal scholars, the power of pardon should be exercised on the advice of the Pardons Board designed under Article 42(5).[75] It can be pointed out from this provision that the members of the Pardons Board of each State consist of the Attorney General of Malaysia, the Chief Minister of the State and not more than three other members, who shall be appointed by the Rulers or the *Yang di-Pertua Negeri*.[76] While the Pardons Board of the Federal Territories comprises the Attorney General of

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68 Gardiner (n 2) 118.

69 Majdah Zawawi and Nasimah Hussin, 'Forgiving the Enemy: A Comparative Analysis of The Concept of Forgiveness in Shari'ah and Malaysian Law' (2015) 23 *Pertanika Journal of Social Sciences & Humanities* 49.

70 *Sim Kie Chon v. Superintendent of Pudu Prison* [1985] 2 MLJ 385 (No.1) ('*Sim Kie Chon')*.

71 *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529 ('*Juraimi')*; *Superintendent of Pudu Prison v Sim Kie Chon* [1986] 1 MLJ 494 (No 2) *('Sim Kie Chon' No 2')*; *Public Prosecutor v Lim Hiang Seoh* [1979] 2 MLJ 170 *('Lim Hiang Seoh')*.

72 *Federal Constitution of Malaysia* arts. 42(4) (a), 40(1), (1A), (3) *('FC')*.

73 *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64.

74 *Lim Hiang Seoh* (n 71).

75 Shamrahayu Abdul Aziz, 'The Continuing Debate on Death Penalty: An Exposition of International, Malaysian and the *Shari'ah* Perspective' (2015) 23(1) *IIUM Law Journal* 73.

76 *FC* (n 72) art. 42(5).

Malaysia, the Federal Territories minister, and a maximum of three other members chosen by the King as he is the chief of the Federal Territories Pardons Board. In the process of pardon under this Article, the Attorney-General would generate a conflict of interest as he was the prosecutor of the case and now playing a significant function to advice on all legal issues in the pardon petition. He also ascertains the bidding of the ruling government in the pardon meeting. If the offender is a member of the ruling party, then the pardon decision may be done by looking to the political involvement, but not for the public interest. As a result, the function of the power of pardon would be exercised as an instrument to patronise political benefits.[77]

It can be identified from Article 42 that the pardoning authorities are relatively unknown to any of the disputing parties. As the third party to the dispute, they would arbitrarily decide on pardon petition without acknowledging the true pain and suffering of the disputing parties of the committed crime. Aside from that, the decision would be criticised by the public and would cause dissatisfaction to the victim or his relatives as they would feel that justice has not been achieved. This feeling of resentment would later grow and encourage the need for revenge. As a result, this would lead to a prolonged feeling of hatred and add to the possibility of causing unrest in society which might lead to further crime.[78] Therefore, it is submitted that the current practice of the power of pardon would not be properly utilised to establish social peace and justice unless the pardoning authorities decide the plea of pardon by creating a mutual understanding between the parties on the issue.[79] However, this study does not propose to empower sufferers of the committed crime to control pardoning authority but rather to allow them to contribute to enhancing the quality of the pardon process by expressing their unique perspectives.

VI NATURAL LIFE SENTENCE UNDER THE *SHARI'AH*

The protection of freedom and human dignity is one of the core purposes of imposing punishment in Islamic criminal justice system. According to this model, the prison authorities must safeguard the wellbeing of the inmates and their human pride. They need to treat the prisoners as free individuals with the exception of being confined to custody. However, Ayatollah has stated that the prisoners should carry out as little hardship as possible while it can still be called a prison sentence as necessity is relative.[80] It is also noted that if someone is imprisoned for a long term, the jail administration should not dehumanise or treat them less favourably than other prisoners. It is also imperative that the police and the prison service should not violate legal rights of the prisoners. When a prisoner commits a crime in the prison, he must be handed over to legal authorities in the same way as another free person who commits a crime outside the prison.[81] They must

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77 Daniel Pascoe, 'What the Rejection of Anwar Ibrahim's Petition for Pardon Tells Us about Malaysia's Royal Pardon System' (2016) 18(1) *Asian-Pacific Law & Policy Journal* 72, 82.

78 Majdah and Nasimah (n 69) 47.

79 Pressreader, 'Hope within the prison walls' *The Star Malaysia* (online, 24 May 2015) <https://www.pressreader.com/malaysia/the-star-malaysia/20150524/281539404548545>.

80 Ayatollah Sayyid Muhammad Sadiq Al Shirazi, 'Rights of A Prisoner' in *The Rights of Prisoners according to Islamic Teachings*, tr Z. Olyabek (CreateSpace Independent Publishing Platform, 2014) 36.

81 Ibid.

not be transferred to any other authority to punish for their wrongdoings. According to the Islamic criminal justice system, a natural life sentence should not be supported for the following reasons:

A *Contradicting the Nature of Punishment in Islam*

Islamic criminal justice system provides certain punishments for murder and for some other offences which are known as *Qisas* offences. It also prescribes some specific punishments for many other wrongdoings. In the history of Islamic judicial system, no judge of the *Shari'ah* court has given the natural life sentence for any offence, but it has decided the cases based on the similarity of punishment for each case when the offender is proven guilty. The main two sources of the *Shari'ah* namely *al-Qur'an* and *Sunnah* of the Prophet Mohammad (PBUH) and even any analogy of *Shari'ah* judges do not apply natural life sentence for any offence. However, the *Shari'ah* has imposed a punishment based on the nature of the crime which is prescribed in the divine rulings as Surah Al-Baqarah has prescribed that: "O you who believe! *Al-Qisas* (the Law of Similarity in punishment) is prescribed for you in case of murder" (2:178). This verse can be interpreted that an offender should be punished based on the nature and harshness of the crime. It does not justify the natural life imprisonment which puts the offenders in the prison for their whole life. This punishment does not carry any rational benefit to the people. According to the majority Islamic schools of thought, an offender can be incarcerated until showing repentance from the crime.[82] Therefore, natural life sentence should not be implemented in any case as it is not fair to the convict or the public.

B *Violating the Rehabilitation Purposes of Islam*

The Islamic criminal justice system has articulated that educational programmes may be set up by prisoners to teach fellow prisoners in any field of learning - material or spiritual, morality or, economics, politics or sociology - which will be considered as rehabilitation.[83] However, Magee has claimed that currently lifetime prisoners are controlled differently from other prisoners. None of the programs of education or rehabilitation available to others in even the strictest of the prisons is available to natural life prisoners. Their life is much more stressful and hopeless.[84] Karpal Singh who was a renowned Malaysian lawyer claimed that "Natural life imprisonment is like living dead … cruel. It should be abolished like mandatory death penalty."[85] This sentence comes without any realistic chance of relief. Hence, indefinite nature of life imprisonment is inhuman, unjust and

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[82] Rudolph Peters, *Crime and punishment in Islamic law: theory and practice from the sixteenth to the twenty-first century* (Cambridge University Press, 2005) no 2, 34.

[83] Baroness Vivien Stern, 'Alternatives to the death penalty: the problems with life imprisonment' (2007) *Penal Reform International, Penal Reform Briefing No. 1*, 9.

[84] Dennis L. Peck, 'Book Review: Slow Coming Dark: Interviews on Death Row' (1986) 11(1) *Criminal Justice Review* 59.

[85] Athi Shankar, 'Do away with natural life sentence' (online, November 2012) <http://www.freemalaysiatoday.com/category/nation/2012/11/11/do-away-with-natural-life-sentence/>.

contrary to the principle of equality before the law which infringes the basic rights of the prisoners.

Islamic law has encouraged criminals to become regretful or remorseful after a commission of an offence. A similar ideology was established in Christianity.[86] It is pointed out that if a criminal has repented or apologised after the commission of a crime, he should be pardoned to protect human dignity. Additionally, if someone humiliates a person or practices oppression with the intention of upholding the pride of mankind, then his claim will be disregarded because human dignity will never be protected by disregarding someone's legal rights.[87] According to Al-Quran (9:105), "Work. Allah, His Messenger, and the Believers will observe your work: and you will be brought back to the Knower of the unseen and the seen, then will He show you the truth of what you did." In fact, in Islam the sentenced person may carry on his daily activities through his nominee. Prophet Muhammad (PBUH) said, "People have dominion upon their wealth and their selves."[88] Therefore, it can be highlighted from the prophetic teachings that the prisoner may choose to engage in all dealings and transactions inside the prison, personally or through a representative. However, at the present time it is very rare to find a prison where prisoners are allowed to deal business during the sentenced period. In addition, imprisonment confines the life of prisoners from all kinds of social activities in the current world. It is found in an event that Sam Kian Seng who was a life inmate was not given a chance to join in the funeral of his parents[89] which clearly indicates that natural life sentence disrupts the basic rights of prisoners to live as a natural human being. Islam disregards such a severe and inhuman punishment to signify the people's dignity and freedom by giving them a chance to repent after the commission of an offence instead of leading a lifetime imprisonment.

C *The Current Pardon Practice Violates the Rights of the Victim in the Shari'ah*

The concept of pardon in the tenets of Islamic law is different from current secular law practices. Islamic criminal justice system empowers the victim (in the case of injury) or his family (in murder cases) to participate in the pardon power based on the law of parity. There are limits on the discretionary power of the rulers or anyone else[90] as the unlimited discretion of the state in matters of pardon would not result in fairness in *Qisas* cases which require retaliation or compensation (*Diya*).

The *Shari'ah* recommends forming a fair and peaceful dispute resolution process where all disputing parties are directly involved in the decision-making process.[91] This

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86 Gardiner (n 2) 118.

87 Ayatollah (n 80) 7.

88 Muhammad Bin Ali Bin Ibrahim AlAhsai, *Awali Al Laila Al Aziziah in Religious Hadiths* (Bayrut: Dar Iḥya' al-Turath al-'Arabi lil-Ṭibaah wa-al-Nashr wa-al-Tawzi, 2009) vol 1, 222.

89 Pressreader (n 79).

90 Ebru Aykut, 'Judicial Reforms, Sharia Law, and the Death Penalty in the Late Ottoman Empire' (2017) 4(1) *Journal of the Ottoman and Turkish Studies Association* 17.

91 Daniel Pascoe and Michelle Miao, 'Victim–Perpetrator Reconciliation Agreements: What Can Muslim-Majority Jurisdictions and the Prc Learn from Each Other?' (2017) 66(4) *International and Comparative Law Quarterly* 969.

unique dispute resolution also expects to adopt a peaceful negotiation among people in the society.[92] This rule offers the victim or his family to grant pardon with or without compensation (*Diya*) with their free choice and without any coercion or pressure. This pardoning power will also be implemented for the sake of Allah and His mercy. Thus, it is worth noting that the injured party may issue a pardon by accepting monetary compensation or charity or without any worldly compensation.[93] If the punishment is waived in lieu of pecuniary penalty, it must be paid from the own wealth of the convict.[94] The amount of the compensation could be negotiated between the disputing parties.

Islamic rule of pardon ensures justice through peaceful settlement between disputing parties.[95] Based on this notion, once the victim or his family has chosen to pardon the offender with or without remedies, there will be no longer any ill-feeling or dissatisfaction or vengeance towards the criminal. Anyone who wishes to avenge the death of the victim shall be given painful recompense. Once pardon is granted, even by only one member of the legal heirs of the deceased, the consequence would be the lifting of the imposed punishment.[96] However, the convict must provide the remedies to the aggrieved family accordingly. After getting a decision from the victim or his family, the Executive Head of the State may issue pardon to release the offender. It is expected that in the pardoning proceedings, the rights of the sufferer of the offence and the offender will be well protected. However, after proffering the above Islamic rule of pardon, the government may impose an additional punishment which is lesser than the original punishment to rehabilitate the offender to become a better person than before.[97] It is important to note that the author does not intend to adopt the *Shari'ah* perspective to the present pardon process, but rather to inspire pardoning authority to allow the sufferers of the committed crimes to express their views before the pardon decisions are made.

VII CONCLUSION

Incarceration for lifetime contravenes human rights, fails to protect the interest of the public, and disrupts social rights and human honour and dignity. It also violates the equality of law. It is submitted that the main objective of punishment should not be the punishing of criminals, but to eradicate crimes and have justice for the people at large and lead them to a peaceful life.[98] The public interest is best served if the imposition of punishment induces the offenders to return from criminal behaviour to an honest living. Wan Yahya Judge supported this theory and opined that the court never wanted to judge

92 Ridoan Karim and Shah Newaz, Ahmed Kabir, 'A Comparative Analysis of Retributive Justice and the Law of Qisas' (2017) 2(2) *Journal of Nusantara Studies* 174.

93 Peters (n 82) 7-8, 39.

94 Osama Adli, *Diyya Al-Qatl [Blood Money in Homicide]* (Cairo, Dar Al-Nahda Al-Arabia 1985) 66.

95 Mohamed Azam Mohamed Adil, 'Islam prefers mercy over retribution' *International Institute of Advanced Islamic Studies (IAIS) Malaysia* (online 22 June 2022) <https://iais.org.my/publications-sp-1447159098/dirasat-sp-1862130118/shariah-law-governance-halal/item/1343-islam-prefers-mercy-over-retribution>.

96 Majdah and Nasimah (n 69) 48.

97 Ibid 49.

98 Gardiner (n 2) 117.

as a vehicle of vengeance in imposing punishment to the accused.[99] The court always sends criminals to prison for rehabilitation and never intends to punish them. All these responsibilities are given to the prison authorities who should transfer prisoners to an institution of correction and teach them to self-reflect and consequently to respect the law. Therefore, an option of parole should be implemented if there is alteration of criminal behaviour towards honest living. In this situation, a parole board should be formed to decide about the fate of the convicted person.

Every prisoner should be subjected to custodial discipline during imprisonment. As long as offenders are incarcerated for a lifetime, they must be governed by the law of the prison. A conditional acquittal may play an incentive to ensure that prisoners follow prison rules and regulations because the more a prisoner follows the rules, the higher are the chances that he or she may be released at the earliest available opportunity. This incentive was not applicable to prisoners serving lifetime imprisonment who have neither hope of release nor anything to lose. The sentiment of accountability of lifetime prisoners is being killed because there is no way to return to the usual life to serve the community.[100] Although the law of the pardon may reduce the lifetime incarceration, it may not always bring justice to the disputing parties if it is influenced by the bad motive of politics. Additionally, if the pardoning authority decides arbitrarily, it may be an injustice to the victims of the crime. To overcome these ambiguities, the pardoning authority should ensure mutual understanding among the disputing parties and safeguard all prospective legal rights before coming to a decision of pardon. The purpose of this proposal is not to control the pardon power, but to improve the standard of the pardon decision-making process. Therefore, this study suggests that the legislature should not just abolish the law of natural life sentence, but reform the law by educating and taking care of the prisoners in such a way that they would be naturalised to an ordinary human being and would become effective members of the community to contribute to social prosperity.[101] Consequently, this reforming exercise would uphold the human rights, interest of the public, social rights and dignity of the convicts.

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[99] *Hari Ram Seghal v Public Prosecutor* [1981] 1 MLJ 165 (ACRJ Malacca) 6 *('Hari Ram Seghal').*

[100] Mohsan Alhamad, 'Prisons in Islamic Sharia Law' *Linked In* (online, 18 November 2014) <https://www.linkedin.com/pulse/20141118131240-314687442-prisons-in-islamic-sharia-law>.

[101] Gardiner (n 2) 129.

GOOD FAITH IN CONTRACT LAW: THE MALAYSIAN PERSPECTIVE

NG SENG YI*

Abstract

The recognition of a general duty of good faith in contracts varies by country. In Malaysia, it has become the subject matter of recent cases but without much academic writing. This article seeks to complement the existing legal literature and to generate discussion on this area of law. This article uses a doctrinal approach with comparative law analysis to examine the duty of good faith in contract law. Like England and Singapore, Malaysia does not recognise a general duty of good faith in contracts. However, it has developed the law on a piecemeal basis through contractual implied terms. This approach is pragmatic for two reasons: first, it acknowledges that good faith is already inherent in Malaysian contract law; second, context is crucial- a duty of good faith will only be implied by law and/or in fact into contracts when the tests of implied terms are satisfied. This approach is more likely to respect the intention of the parties than having a general overriding duty of good faith since it affirms the freedom of contract. This article further highlights the potential challenges arising from the introduction of 'relational' contracts as to whether a general duty of good faith can be implied in such contracts. It is argued that if the parties intend to impose a duty of good faith, they should expressly stipulate it in the contract for the avoidance of doubt.

Keywords: Good faith, contract law, Malaysia

I INTRODUCTION

It is not uncommon that some legal concepts are like an elephant. 'It is difficult to describe, but you know it when you see it'.[1] The notion of good faith is one example. Although it does not have a definite legal meaning, it is no stranger to the courts. The more contentious question is whether a general duty of good faith exists in all contracts.

In this article, Part II deals with three preliminary matters, namely the objective and the scope of discussion of this article, as well as the definition of the phrase 'good faith'

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[1] *Cadogan v Morris* [1998] EWCA Civ 1671, [17] (Court of Appeal). It is known as the elephant test. There, Stuart-Smith LJ refused to set out precise guidelines to determine the validity of a tenant's statutory notice for the new lease of a flat. His Lordship suggested that most cases will answer the legal question(s) on their own facts.

in existing literature. Part III provides a comparative overview of the approaches taken in civil law jurisdictions and select common law countries. Part IV sets out the research analysis in fourfold. First, it reviews the law of implied terms in Malaysian contract law. It also studies the relevant local cases relating to the implied duty of good faith (if any). Second, it considers the possible implications arising from the recognition of a general duty of good faith in Malaysian contract law. Third, it evaluates whether the approach taken by the Malaysian courts is satisfactory and pragmatic. Fourth, it explores the potential challenges and recommendations in the context of the doctrine of good faith in contract law. Part V concludes that as a matter of general rule, Malaysia does not recognise a general duty of good faith in contracts. However, the Malaysian courts have developed the law on a piecemeal basis by implying a duty of good faith by law and/or in fact into certain contracts based on circumstances of the case. For two reasons discussed therein, this article argues that this approach is satisfactory and pragmatic. It respects the cornerstone of the common law of contract, namely the freedom of contract and contractual certainty. This article goes further to acknowledge the potential challenges arising from the introduction of 'relational' contracts as to whether a general duty of good faith is to be implied into such contract. In any event, if it is the parties' contractual intention to impose a duty of good faith, the parties should expressly stipulate so in the contract.

II PRELIMINARY MATTERS

Three preliminary matters are dealt with here. First, the duty of good faith has noticeably been considered and discussed in several recent cases in Malaysia. As there appears to be lack of academic writing on the doctrine of good faith in contract law taking into account the recent local cases, this article seeks to complement the existing legal literature in Malaysia[2] and to generate discussion on this area of law.

Second, it is acknowledged that good faith also exists in other areas of law in Malaysia, among others, administrative law,[3] company law,[4] land law[5] and equity.[6] This article limits the scope of its discussion to the duty of good faith in contract law.

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2 Cheong May Fong, 'Good Faith in Contract Law: A Comparative Survey' (Universiti Malaya – Universitas Indonesia Law Seminar, Kuala Lumpur, 16 December 2006) 7-9; Visu Sinnadurai and Low Weng Tchung, *Sinnadurai: Law of Contract* (Lexis Nexis, 5th ed, 2023) [4.47]-[4.49]; Nurhidayah Abdullah, 'Good Faith in Contractual Performance: Chasing a Mirage?' [2022] (Jan) *Journal of the Malaysian Judiciary* 200-260; Nurhidayah Abdullah and Zuhairah Ariff Abd Ghadas, 'The Application of Good Faith in Contracts during a Force Majeure Event and Beyond with Special Reference to the COVID-19 Act 2020' (2023) 14(1) *UUM Journal of Legal Studies* 141-160.

3 A decision of the public authority exercised in bad faith may be subject to judicial review in public law. See, *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449, 470 (Federal Court).

4 A company director owes a statutory duty to exercise his powers 'for a proper purpose and in good faith in the best interest of the company'. See, *Companies Act 2016* (Malaysia) s 213(1). See also, *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd* [2018] 2 MLJ 177, [155]-[192] (Federal Court).

5 If a subsequent purchaser is a purchaser in good faith and for valuable consideration, her/his title and interest in the land would be indefeasible notwithstanding any vitiating factors. See, *National Land Code* (Malaysia) proviso to s 340(3). See also, *See Leong Chye v United Overseas Bank (M) Bhd* [2021] 5 MLJ 759, [68] (Federal Court).

6 The Malaysian courts have invoked equity to grant relief against unconscionable and/or unfair transactions between the parties to ensure the observance of good conscience and practical justice. See, *PECD Bhd v*

Third, the phrase 'good faith' has been defined by dictionaries as 'faithfulness, loyalty, truthfulness'[7] and/or 'done in an honest and sincere way'.[8] The existing literature has suggested that good faith revolves around, among others, honesty, fair dealing, fidelity to the contractual purpose and cooperation between the parties.[9] However, these definitions do not translate into a universal content which applies across all contracts. This may cause uncertainty, as 'good faith presupposes a set of moral standards against which [contracting party is] to be judged, but it is not clear whose (or which) morality this is'.[10] In this regard, Lady Arden extra-judicially clarified that good faith has 'both a subjective and an objective meaning'.[11] One must act in a manner which s/he reasonably believes is honest and fair, and that it must be considered so by the court according to the understanding of a reasonable third party.[12] Ultimately, it is for the court to determine the requirements of good faith applicable to a particular contract based on the context and the circumstances of the case.[13] It is not uncommon that the court is entrusted to ascertain the scope of open-ended legal concepts based on the factual matrix of the case. One instance is the concept of reasonableness[14] in the law of contract. The doctrine of good faith is arguably another example.

AmTrustee Bhd [2014] 1 MLJ 91, [63]-[68] (Federal Court); *RHB Bank Bhd v Travelsight (M) Sdn Bhd* [2016] 1 MLJ 175, [32] (Federal Court).

7 *Oxford English Dictionary* (online, 24 February 2024) 'good faith'.

8 *Cambridge Dictionary* (online, 24 February 2024) 'good faith'.

9 AF Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 75-76; Jeannie Marie Paterson, 'Good Faith Duties in Contract Performance' (2014) 14 *Oxford University Commonwealth Law Journal* 283, 292-298; Yong Qiang Han, 'When West Meets East: Thinking Big in Singapore over Good Faith in Commercial Contract Law' (2019) 1 *Journal of Commonwealth Law* 317, 350-360; Mindy Chen-Wishart and Victoria Dixon, 'Good Faith in English Contract Law: A Humble "3 by 4" Approach' in Paul B. Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume 1* (Oxford University Press 2020) 204-206; Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 7th ed, 2022) 619-621; Nurhidayah Abdullah (n 2) [7]-[13].

10 Roger Brownsword, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract Law' in Roger Brownsword, Norma J Hird and Geraint Howells (eds), *Good Faith in Contract: Concept and Context* (Ashgate, 1999) 16.

11 Lady Arden, 'Coming to Terms with Good Faith' (2013) 30 *Journal of Contract Law* 199, 200.

12 David Campbell, 'Good Faith and the Ubiquity of the "Relational" Contract' (2014) 77 *Modern Law Review* 475, 485.

13 Martin Hogg, 'The Implication of Terms-In-Fact: Good Faith, Contextualism, and Interpretation' (2017) 85 *George Washington Law Review* 1660, 1691; Paula Giliker, 'Contract Negotiations and the Common Law: A Move to Good Faith in Commercial Contracting?' (2022) 43 *Liverpool Law Review* 175, 198.

14 The courts are empowered to determine the sum of liquidated damages which is reasonable for a breach of contract. See, *Contracts Act 1950* (Malaysia) s 75. See also, *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15, [66] (Federal Court). See further, Ng Seng Yi, 'Cubic Electronics: A Fresh Look or A Daze on Section 75 of the Contracts Act 1950' (2021) 3 *Malayan Law Journal* lxxxviii, cxiv-cxvii; May Fong Cheong and Pei Meng Tan, 'The New Law on Penalties in Malaysia: The Impact of Cubic Electronics after Cavendish Square' (2023) 38 *Journal of Contract Law* 132, 142-147.

III COMPARATIVE OVERVIEW OF GOOD FAITH

A *Civil law*

The notion of good faith finds its origins in Roman law.[15] In Germany[16] and Italy,[17] the Civil Codes impose a general obligation to act in good faith on the contracting parties. The French Civil Code provides that '[c]ontracts must be negotiated, made and performed in good faith'.[18] It extends the duty of good faith not only to the performance of the contract, but also the negotiation and formation of the contract. Noticeably, the Civil Codes do not generally define good faith. One may argue that it is immaterial to define good faith.[19] It is because the requirements and contents of good faith are largely determined based on the facts of the case.[20] As a result, civil law judges 'have a greater power to evaluate the fairness of the contract and intervene to reinstate the balance of interests between the parties'.[21]

B *United States*

Despite being a common law country, the United States has codified its commercial law in the form of the Uniform Commercial Code. It provides that '[e]very contract… imposes an obligation of good faith in its performance or enforcement'.[22] Similarly, the American Restatement (Second) of Contracts states that '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'.[23] Two observations are relevant here. First, unlike the Civilian version, the American version of good faith only applies to the performance and enforcement of contracts but not at the pre-contractual stage. Second, although the Uniform Commercial Code defines good faith as 'honesty in fact in the conduct or transaction concerned'[24] and 'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade',[25] its scope remains vague. It is 'difficult to determine what a trade is, and a given trade may not have any standards [of good faith] at all'.[26] For completeness, in some lender liability

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15 Martin Josef Schermaier, '*Bona Fides* in Roman Contract Law' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000) 63-92.

16 German Civil Code, para 242.

17 Italian Civil Code, art 1337.

18 French Civil Code, art 1104.

19 Woo Pei Yee, 'Protecting Parties' Reasonable Expectations: A General Principle of Good Faith' (2001) 1 *Oxford University Commonwealth Law Journal* 195, 220-221.

20 Martijn Hasselink, 'Good Faith' in Arthur Hartkamp and others (eds), *Towards A European Civil Code* (Kluwer Law International, 1998) 289.

21 Giuditta Cordero Moss, 'Commercial Contracts and European Private Law' in Christian Twigg-Flesner (ed) *The Cambridge Companion to European Union Private Law* (Cambridge University Press, 2015) 153.

22 Uniform Commercial Code, s 1.203.

23 Restatement, s 205.

24 Uniform Commercial Code, s 1.201(19).

25 Uniform Commercial Code, s 2.103(1)(b).

26 Robert S Summers, 'The Conceptualisation of Good Faith in American Contract Law: A General Account' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000) 122.

cases, the American courts appear to have extended the contractual liability to tortious liability for breach of an implied duty of good faith and fair dealing.[27]

C *Canada*

In Canada, a duty of good faith has been demonstrated in three circumstances before 2014.[28] They include rules which (i) require the cooperation of the parties to achieve the contractual purposes,[29] (ii) relate to the exercise of contractual discretion which must not be made arbitrarily,[30] and (iii) preclude a party from conduct which seeks to evade contractual obligations.[31]

In the 2014 case of *Bhasin*,[32] the Supreme Court of Canada introduced a general duty of honesty in contractual performance. There, a vendor was alleged to have terminated a dealership agreement for an improper purpose. The vendor allegedly forced a merger of its dealer with another competing dealer and appointed the competing dealer to audit the dealer's business records. The dealer argued that the vendor's termination was not made in good faith. In the judgment, the Canadian apex court recognised 'good faith contractual performance [as] a general organising principle of the common law of contract'.[33] It went on to acknowledge a specific duty to 'act honestly in the performance of contractual obligations'.[34] As the parties may reasonably expect 'a basic level of honesty and good faith in contractual dealings', they 'must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract'.[35] There, it was decided that the vendor was in breach of this specific duty of honesty in contractual performance for its termination of the dealership agreement. Noticeably, this duty does not operate as an implied term but rather a general doctrine of contract law.[36] Since then, *Bhasin* has been considered and/or applied by the same court in two recent occasions.[37]

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27 *First National Bank v Twombly* 689 P.2d 1226, 1230 (1984). However, tortious breach of duty of good faith remains contentious and is arguably not of general application: see Anon, 'Lender Liability: Breach of Good Faith Lending and Related Theories' (1988) 64 *North Dakota Law Review* 273, 296-298.

28 John McCamus, 'Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance' (2004) 29 *Advocate Quarterly* 72, 77-90.

29 *Dynamic Transport Ltd v OK Detailing Ltd* [1978] 2 SCR 1072 (Supreme Court).

30 *Mitsui & Co (Canada) Ltd v Royal Bank of Canada* [1995] 2 SCR 187 (Supreme Court).

31 *Mason v Freedman* [1958] SCR 483 (Supreme Court).

32 *Bhasin v Hrynew* [2014] 3 SCR 494 (Supreme Court). See also, John Enman-Beech, 'The Good Faith Challenge' (2019) 1 *Journal of Commonwealth Law* 35, 63-64.

33 Ibid [33].

34 Ibid.

35 Ibid [60] and [73].

36 Ibid [74]. See also, John D McCamus, 'The New General "Principle" of Good Faith Performance and the New "Rule" of Honesty in Performance in Canadian Contract Law' (2015) 32 *Journal of Contract Law* 103, 113.

37 *CM Callow Inc v Zollinger* [2020] SCJ No.45 (Supreme Court); *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* [2021] SCJ No.7 (Supreme Court). See also, John D McCamus, 'The Canadian Doctrine of Good Faith Contractual Performance: Further Clarification' (2022) 38 *Journal of Contract Law* 1.

D *England*

In *Carter*, Lord Mansfield once sought to broaden the application of good faith duty in insurance contracts to a 'governing principle… applicable to all contracts and dealings'.[38] However, as commercial law prefers 'the benefits of simplicity and certainty which flow from requiring those engaging in commerce to look after their own interests', this proposition 'did not survive'.[39] Indeed, the House of Lords in *Walford* authoritatively held that the requirement to negotiate in good faith at pre-contractual stage was unenforceable due to the lack of certainty. It would be inherently 'repugnant to the adversarial position' of the negotiating parties where each party are entitled to pursue their own interest.[40] Bingham LJ in *Interfoto* observed that there is no overriding principle of good faith. However, his Lordship acknowledged that English law has instead developed 'piecemeal solutions in response to demonstrated problems of unfairness'.[41] Three instances are relevant here.

First, a duty of good faith has been implied by law in certain contracts, such as employment contracts,[42] partnership contracts[43] and insurance contracts.[44] In these instances, it upholds the contractual relationship of trust and confidence between the parties. What remains uncertain is whether a general duty of good faith can be implied in other contracts. In *Yam Seng*,[45] Leggatt J found on the facts that a long-term distribution agreement constituted a relational contract. An implied duty of good faith was imposed on the vendor to not knowingly supply misleading market information to the distributor.[46] Although *Yam Seng* is a judgment of the court of first instance with limited precedential value,[47] it has nevertheless reignited the debate on the recognition of a general duty of good faith in all (relational) contracts.[48] In fact, *Yam Seng*'s proposition has met with a

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38 *Carter v Boehm* (1766) 3 Burr 1905, 1909-1911.

39 *Manifest Shipping Co Ltd v Uni-Polaris Ins Co Ltd (The Star Sea)* [2001] UKHL 1, [45] (House of Lords).

40 *Walford v Miles* [1992] AC 128, 138 (House of Lords).

41 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439 (Court of Appeal).

42 *Malik v BCCI* [1998] AC 20, 45-49 (House of Lords). See also, Lord Bingham, 'From Servant to Employee: A Study of the Common Law in Action' in Sir Jeffrey Jowell (eds), *Lives of the Law: Selected Essays and Speeches 2000-2010* (Oxford University Press, 2011) 255-268.

43 Roderick I'Anson Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 21st ed, 2022) ch 16; Laura Macgregor, 'The Partner's Fiduciary and Good Faith Duties: More than Just an Agent?' in Paul S Davies and Tan Cheng-Han (eds), *Intermediaries in Commercial Law* (Hart Publishing, 2022) 267-270.

44 *Insurance Act 2015*, ss 2-8 (new statutory duty of fair presentation as an example of good faith). See also, John Birds and others, *MacGillivray on Insurance Law* (Sweet & Maxwell, 15th ed, 2022) ch 16.

45 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (High Court). See case commentaries, Edward Granger, 'Sweating Over an Implied Duty of Good Faith' [2013] *Lloyd's Maritime and Commercial Law Quarterly* 418, 421-426; Ewan McKendrick, 'Good Faith in the Performance of a Contract in English Law' in Larry DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press, 2015) 196-209; JW Carter and Wayne Courtney, 'Good Faith in Contracts: Is There an Implied Promise to Act Honestly?' (2016) 75 *Cambridge Law Journal* 608, 609-619; Ewan McKendrick, 'Doctrine and Discretion in the Law of Contract Revisited' (2019) 7 *Chinese Journal of Comparative Law* 1, 13-15.

46 Ibid [141]-[144].

47 Ewan McKendrick, 'Good Faith in the Performance of a Contract in English Law' (n 48) 204-205; Yong Qiang Han (n 9) 331.

48 Zhong Xing Tan, 'Keeping Faith with Good Faith? The Evolving Trajectory Post-Yam Seng and Bhasin' [2016] *Journal of Business Law* 420, 429-437.

mixed reaction[49] by the court of first instance[50] and the Court of Appeal,[51] but without an authoritative judicial guidance by the Supreme Court[52] to date.

Second, in determining whether a contractual discretion should be exercised in good faith, a growing number of cases have applied administrative law principles. If a contract empowers *A* with a discretionary right, *A* must not exercise her/his contractual discretion arbitrarily. Contractual discretion is not 'unfettered'.[53] In *Paragon*,[54] a lender was authorised to vary the interest rate on loans payable by the borrower at its discretion. The Court of Appeal held that there was an implied term where the lender must not exercise its discretion 'dishonestly, for an improper purpose, capriciously or arbitrarily'.[55] Similarly, although the discretion to value investment securities could be subjective considering the fluctuating interest rate of the market, it is necessary to restrain one from abusing its contractual discretion.[56] In *Socimer*, Rix LJ suggested that contractual discretion should 'be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality'.[57] To that end, contractual discretion 'must be exercised consistently with its contractual purpose'.[58] The parties should adopt a decision-making process similar to the *Wednesbury* public law concept.[59] It examines the mechanism, and not the quality, of the discretion where it should not be made irrationally or arbitrarily.[60]

Third, if the contract expressly requires the parties to act in good faith in contractual performance, the court will generally give effect to it. For instance, a term which expressly requires the parties to 'resolve the dispute or claim by friendly discussion' before the commencement of the intended arbitration has been ruled as an enforceable condition

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49 Gerard McMeel, 'Foucault's Pendulum: Text, Context and Good Faith in Contract Law' (2017) 70 *Current Legal Problems* 365, 395-396.

50 *Bates v Post Office Ltd* [2019] EWHC 606, [702]-[742] (High Court). cf *TSG Building Services plc v South Anglia Housing Ltd* [2013] EWHC 1151, [44]-[46] (High Court).

51 *Candey Ltd v Bosheh* [2022] EWCA Civ 1103, [29]-[43] (Court of Appeal). cf *Re Compound Photonics Group Ltd v Vollin Holdings Ltd* [2022] EWCA Civ 1371, [228]-[234] (Court of Appeal). See also, *Globe Motors Inc v TRW Lucas Varity Electrical Steering Ltd* [2016] EWCA Civ 396, [67]-[71] (Court of Appeal).

52 In *Pakistan International Airlines Corpn v Times Travel (UK) Ltd* [2021] UKSC 40, [26]-[27] (Supreme Court). Lord Hodge observed in obiter in the context of lawful act economic duress that English law has never recognised a general principle of good faith in contracting nor a doctrine of inequality of bargaining power.

53 Jack Beatson, 'Public Law Influences in Contract Law' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995) 269.

54 *Paragon Finance plc v Nash* [2001] EWCA Civ 1466 (Court of Appeal).

55 Ibid [32].

56 David Foxton, 'A Good Faith Goodbye? Good Faith Obligations and Contractual Termination Rights' [2017] *Lloyd's Maritime and Commercial Law Quarterly* 360, 363-364.

57 *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [66] (Court of Appeal). cf *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [91]-[92] (Court of Appeal). See also, Jonathan Morgan, 'Against Judicial Review of Discretionary Contractual Powers' [2008] *Lloyd's Maritime and Commercial Law Quarterly* 230, 239-240.

58 *British Telecommunications plc v Telefonica O2 UK Ltd* [2014] UKSC 42, [37] (Supreme Court).

59 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [28]-[31] (Supreme Court). The *Wednesbury* principle was derived from *Associated Provincial Picture House Ltd v Wednesbury Corp* [1948] 1 KB 223 (Court of Appeal). A decision of the public authority can be quashed by a court order of certiorari if it is wholly unreasonable.

60 Michael Bridge, 'Limits on Contractual Freedom' (2019) 7 *Chinese Journal of Comparative Law* 387, 407

precedent to invoke the arbitration clause.[61] Also, if a development agreement stipulates that '[i]n all matters relating to this agreement the parties will act with the utmost good faith towards one another', the court in *Berkeley* held that the landowners who intended to sell the land to a third party but not the developer were in breach of the said clause.[62] They were injuncted from selling the land before the developer became entitled to be paid a fee for its work done in developing the land. For completeness, in *Compass*, the Court of Appeal in turn cautioned that if the contract contains more specific provisions, 'care must be taken not to construe a general and potentially open-ended obligation such as the obligation to co-operate or "to act in good faith"', which may override the effectiveness of the specific clauses.[63]

E *Singapore*

In Singapore, the duty of good faith in contracts has been developed on a piecemeal basis. In *Ng Giap Hon,*[64] a stockbroker authorised its agent to trade in securities in return for a commission under an agency agreement. The agent sued the stockbroker for commissions which were allegedly due to him by two clients but which the stockbroker had intercepted. He argued that in doing so, the stockbroker had breached its implied duty to act in good faith for the business interception. The Court of Appeal refused to imply a term of good faith where the stockbroker would not do anything to prevent the agent from earning his commissions. However, the apex court did not outrightly reject the doctrine of good faith.[65] It was observed that much clarifications would be required and until 'the theoretical foundations [and] structure of this doctrine are settled', it would be inadvisable to apply it in practice.[66]

To this end, the law has recognised certain categories of contract such as insurance contracts as contracts of utmost good faith.[67] Second, the courts will not intervene in the exercise of a contractual discretion so long as it is exercised honestly and in good faith, and in the manner which is not capricious or arbitrary.[68] Third, an express duty to negotiate in good faith within an existing contractual framework is legally enforceable.

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61 *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104, [3] and [26] (High Court).

62 *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330, [33], [109] and [142] (High Court).

63 *Compass* (n 57) [154]. There, the Court of Appeal found on the facts that there was no breach of the express term to 'co-operate with each other in good faith'.

64 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] SGCA 19 (Court of Appeal).

65 Colin Liew, 'A Leap of Good Faith in Singapore Contract Law' [2012] *Singapore Journal of Legal Studies* 416, 439.

66 *Ng Giap Hon* (n 64) [60]. See also, *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16, [3] (Court of Appeal).

67 *Tay Eng Chuan v Ace Insurance Ltd* [2008] SGCA 26, [30] and [32] (Court of Appeal). Cf *Dong Wei v Shell Eastern Trading (Pte) Ltd* [2022] SGHC(A) 8, [82] (High Court) (employment contract); *AL Shams Global Ltd v BNP Paribas* [2018] SGHC 143, [49] (High Court) (banking contract).

68 *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2015] SGHC 271, [83]-[85] (High Court); *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61, [99]-[102] (High Court); *MGA International Pte Ltd v Wajilam Exports (Singapore) Pte Ltd* [2010] SGHC 319, [103]-[107] (High Court); See also, Ong Ken Wei, 'The Limits to Contractual Discretion' (2021) 33 *Singapore Academy of Law Journal* 919.

In a lease agreement which contained an express clause to negotiate the new rental term in good faith, the Court of Appeal of Singapore in *HSBC* held that the parties could not 'simply walk away from the negotiating table for no rhyme or reason' and must duly comply with express rent review mechanism.[69]

In short, a general duty of good faith exists in civil law jurisdictions. However, it remains unsettled but evolving in common law countries. The United States imposes a statutory requirement of good faith via the Uniform Commercial Code. Canada has introduced a specific duty of honesty in contractual performance. On the other hand, England and Singapore have developed the law on a piecemeal basis without recognising an overriding duty of good faith in contracts.[70]

IV ANALYSIS OF MALAYSIAN POSITION

A *Implied terms and good faith*

Before examining the Malaysian cases, it is relevant to recap three types of implied terms in Malaysian contract law. First, a custom or usage of any market or trade which has been well-accepted can be implied into contracts.[71] Second, a term can be implied by law into certain contracts based on previous decided cases of identical factual matrix. Once a term is implied by law, it will be implied into all contracts of a similar class. Many of these implied terms have been incorporated into statutes.[72] They seek to address the broader concerns of policy consideration and contractual unfairness. Third, the court can imply a term in fact if it is (i) in the interest of giving business efficacy to the contract, and (ii) so obvious to an officious bystander that it goes without saying the parties must have intended to incorporate the term as part of their contract.[73] Unlike the English law position where the law is applied as an alternative test to each other,[74] the objective 'business efficacy' and the subjective 'officious bystander' tests must both be satisfied before a term can be implied into the contract in Malaysian contract law.[75] An implied term 'must be capable of clear expression' and 'must not contradict any express term of the contract'.[76]

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69 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] SGCA 48, [37] (Court of Appeal).

70 See the similar approach in Singapore: *Ng Giap Hon* (n 64) [60]; *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16, [3] (Court of Appeal). See also, *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] SGCA 21, [44] (Court of Appeal); *PH Hydraulics & Engineering Pte Ltd v AirTrust (Hong Kong) Ltd* [2017] SGCA 26, [133] (Court of Appeal).

71 *Sinnadurai: Law of Contract* (n 2) [4.20]-[4.22].

72 *Sale of Goods Act 1957* (Malaysia) ss 14 (implied undertaking as to title) and 16 (implied condition as to quality or fitness); *Hire-Purchase Act 1967* (Malaysia) s 7 (conditions and warranties to be implied in every hire-purchase agreement); *Consumer Protection Act 1999* (Malaysia), ss 30-38 (implied guarantees for supply of goods) and 53-56 (implied guarantees for supply of services).

73 *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, 168-172 (Federal Court).

74 *Mark and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [16]-[31] (Supreme Court); *Barton v Morris* [2023] UKSC 3, [21]-[23] (Supreme Court). cf *AG of Belize v Belize Telecom Ltd* [2009] UKPC 10, [21] (Privy Council), where Lord Hoffmann suggested that the process of implying terms into a contract is part of the exercise of contractual interpretation. The central question is 'what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?'.

75 *See Leong Chye v United Overseas Bank Bhd* [2019] 1 MLJ 25, [76] (Federal Court).

76 *See Leong Chye v United Overseas Bank (M) Bhd* [2021] 5 MLJ 759, [85] (Federal Court).

In a series of recent cases, the Malaysian appellate court is seemingly reluctant to imply a general duty of good faith into contracts. In *Seven Seas*,[77] a principal invoked the termination clause and served on its contractor a six-months' notice of its intention to terminate the sub-contractor agreement. The contractor argued that considering the close commercial relationship between the parties, there shall be an implied duty of good faith and honesty to not terminate the contract by a notice simpliciter.[78] The Malaysian Court of Appeal rejected the contractor's argument. It opined that the existence of the implied duty of good faith depends on the 'expressed intention of the parties which is to be ascertained from the terms of the contract, and on the nature of the relationship between the parties'.[79] There, the termination of the contract was held to be valid because it was made in accordance with the express termination clause. More recently, in *Hewlett-Packard*,[80] a product supplier terminated the appointment of its reseller due to a change of its regional company policy. Although the parties had a long-standing business relationship, the Malaysian Court of Appeal held that the product reseller agreement in question did not impose an implied duty of good faith on the supplier to ensure the continuation of the reseller's status.[81] The appellate court noted that 'there is no general implied duty of good faith in commercial contracts and the court should be slow to imply such a duty'.[82] Again, in *Aseambankers*,[83] the Malaysian Court of Appeal held in the context of a banker and customer contractual relationship that 'there is no general duty of good faith in common law'.[84] Even if there was such a duty, it was found that the bank had not breached its duty of good faith as it had acted within its express contractual rights at all material times.[85] In the supporting judgment, Mohamad Ariff JCA however acknowledged that 'it will be unwise to simply dismiss in totality the existence of a duty of good faith and fair dealing in contractual relationships'.[86] If a duty of good faith is to be taken simply as an implied contractual duty to act in good faith after considering the 'construction of the particular contract against its contractual background and context, it can be applied in a practical sense'.[87] The observations made by Mohamad Ariff JCA are evident in three circumstances.

First, a duty of good faith has been implied by law into certain classes of contract.[88] It is an implied term of every employment contract that an employee must serve her/his

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77 *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd* [2008] 4 CLJ 217 (Court of Appeal).

78 Ibid [28].

79 Ibid [30].

80 *Hewlett-Packard (M) Sdn Bhd v Agih Tinta Sdn Bhd* [2022] 6 MLJ 853 (Court of Appeal).

81 Ibid [66]-[83].

82 Ibid [79].

83 *Aseambankers Malaysia Bhd v Shencourt Sdn Bhd* [2014] 4 MLJ 619 (Court of Appeal). See also, Lee Hock Beng, 'Good Faith and the Aseambankers Case' (2017) 6 MLJ xxxvii.

84 Ibid [126] and [325]. See also, *Bank Pembangunan Malaysia Bhd v Ketheeswaran a/l M Kanagaratnam* [2022] 5 MLJ 393, [41] (Court of Appeal). cf *Tan Ah Sam v Chartered Bank* [1971] 1 MLJ 28, 29 (Federal Court). There, the Malaysian Federal Court held that banks must act in good faith and without negligence in dealing with a crossed cheque under the then Malaysian Bills of Exchange Ordinance, ss 80 and 82C.

85 Ibid [126].

86 Ibid [322].

87 Ibid [322].

88 *Sinnadurai: Law of Contract* (n 2) [4.48].

employer with good faith and fidelity.[89] Also, a partner owes her/his co-partners a duty to act in good faith in all dealings arising from their partnership agreement.[90] Besides, the parties to a joint venture agreement must act in good faith towards each other in achieving the objective(s) of the joint venture.[91] A contract of insurance is a contract of utmost good faith. Both the insured and insurer have a continuing duty of good faith towards each other.[92] The law is well-established in these contexts for policy consideration. In these instances, a fiduciary relationship of trust and confidence exists between the parties. Where contracting parties are of significant unequal bargaining power, the law does not simply imply a duty of good faith to protect the weaker party from unfairness. Rather, Parliament has intervened to redress the balance. Under the Malaysian Consumer Protection Act 1999, an unfair term of a consumer contract may be declared as unenforceable or void.[93] In determining whether a term is procedurally or substantively unfair, the court may consider, among others, the bargaining strength of the parties[94] and/or whether the term is substantially contrary to reasonable standards of fair dealing.[95]

Second, the position is less clear in the contracts apart from the recognised classes of contract above. In cases where the 'business efficacy' and the 'officious bystander' tests are satisfied, the court is willing to imply a duty of good faith in fact into contracts. The early case of *Pasuma*[96] is illustrative. It concerned a dispute arising from an exclusive distribution agreement. The Federal Court observed that 'it is difficult to resist the conclusion that there was an implied condition that… [contracting] parties should be reasonably honest and truthful with each other'.[97] It will be recalled that in the English case of *Yam Seng*, Leggatt J found on the facts that the vendor was in breach of its duty of good faith towards its exclusive distributor for knowingly providing misleading market information. However, his Lordship added that it was fact-sensitive based on the presumed intention of the parties. His Lordship doubted that English law was ready to recognise its implication as a 'default rule… into all commercial contracts'.[98] Arguably, *Pasuma* should similarly be construed within its factual matrix. It did not introduce a general duty of good faith in contracts. Indeed, in holding that there was an implied duty of good faith between the parties, the Malaysian apex court examined the facts and the nature of the parties' contractual relationship. There, *A* and *B* entered into an exclusive

89 *Zaharen bin Hj Zakaria v Redmax Sdn Bhd* [2016] 5 MLJ 91, [44] (Court of Appeal).

90 *Vasu Devan v Nair* [1985] 1 MLJ 137, 141-142 (Federal Court); *Soo Boon Siong v Saw Fatt Seong* [2008] 1 MLJ 27, [21]-[26] (Court of Appeal); *Takako Sakao v Ng Pek Yuen* [2009] 6 MLJ 751, [12] (Federal Court).

91 *Genisys integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd* [2008] 6 MLJ 237, [8] (Court of Appeal); *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd* [2011] 4 MLJ 173, [26] (Court of Appeal).

92 *Leong Kum Whay v QBE Insurance (M) Sdn Bhd* [2006] 1 MLJ 710, [15] (Court of Appeal); *ALW Car Workshop Sdn Bhd v AXA Affin General Insurance Bhd* [2019] 4 MLJ 561, [26]-[35] (Federal Court); *AmGeneral Insurance Bhd v Sa'Amran a/l Atan* [2022] 5 MLJ 825, [163] (Federal Court).

93 *Consumer Protection Act 1999* (Malaysia) s 24G.

94 *Consumer Protection Act 1999* (Malaysia) s 24C(2)(b) (procedural unfairness).

95 *Consumer Protection Act 1999* (Malaysia), ss 24C(2)(c) (procedural unfairness) and 24D(2)(d) (substantive unfairness).

96 *Pasuma Pharmacal Corp v McAlister & Co Ltd* [1965] 1 MLJ 221 (Federal Court). See also, *Gentali (M) Sdn Bhd v Kawasaki Sunrock Sdn Bhd (No.3)* [1998] 5 MLJ 409, 424 (High Court).

97 Ibid 226.

98 *Yam Seng* (n 45) [131].

agreement for the distribution of *B*'s chicken essence in certain countries. Despite *B*'s undertaking to replace defective chicken essence supplied by it to *A*, *B* found out that stocks of poor quality nevertheless remained in the market. *A* had fraudulently inflated the amount of chicken essence to be replaced by *B*. The court applied the twofold tests of an implied term. First, suppose an officious bystander raises a question as to what would happen if a party were to deceive the other on the defective stock. A reasonable man will simply conclude that it 'would be the end of the relationship between [them]'.[99] Second, the distribution agreement was to 'continue for a very long time and throughout that time there was always the possibility that the question of replacement of defective stock would arise'.[100] It would be difficult for the parties to continue with their business dealings after discovering that *A* had been defrauding *B* for its own benefits. The business efficacy of the contract had regrettably been undermined.

Third, the court has followed the English law position in applying public law principle of *Wednesbury* reasonableness[101] in the exercise of contractual discretion in good faith. In *KAB Corp*,[102] a contractual discretion was conferred on *A* to determine the amount of the administrative fee for the procurement of its consent for *B*'s third-party assignment of a property. The Court of Appeal observed that such discretion must not subject *B* to *A*'s 'uninhibited whim and fancy'.[103] It was necessary to imply a term that the discretion must be exercised honestly and in good faith, having regard to the contractual provisions and the context of the case.[104] It was a presumed reasonable expectation and common intention of the parties that 'there should be a genuine and rational, as opposed to an empty or rational, exercise of discretion'.[105] Also, if a main contractor 'reserve[s] the right to omit wholly or in part of the works' from its subcontractor and that '[n]o claim whatsoever will be entertained for such omissions' under a subcontract, the discretionary right could 'not be exercised unreasonably in the absence of good faith'.[106] If the subcontractor was/is at all material times ready to perform and complete the contract as agreed, the main contractor could not prevent it from doing so without proper reasons.[107]

In summary, three propositions can be made here. First, as a matter of general rule, the Malaysian contract law does not recognise a general duty of good faith. Second, the general rule is not absolute and is subject to exceptions. A contractual duty of good faith can be implied by law and/or in fact if the construction of the contract against its background renders it necessary and without it the contract will not work. Third, the implied duty of good faith must not contradict the express terms of the contract. These

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99 *Pasuma* (n 96) 220-221.

100 *Pasuma* (n 96) 221.

101 In Malaysian public law, the general rule is that a discretion should be exercised reasonably and for a proper purpose. It cannot be free from legal restraint. Where it is wrongly exercised, it becomes the duty of the courts to intervene. See, *Pengarah Tanah dan Galian v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, 148 (Federal Court).

102 *KAB Corp Sdn Bhd v Master Platform Sdn Bhd* [2019] 6 MLJ 752 (Court of Appeal).

103 Ibid [29].

104 Ibid [29]-[30].

105 Ibid [29].

106 *Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd* [2013] 2 MLJ 620, [2e] and [11] (Federal Court).

107 Ibid [15].

propositions share striking similarities with the piecemeal development of the doctrine of good faith in the law of contract in England and Singapore. In the following sections, this article examines the possible implications of a general duty of good faith in contracts. It also evaluates whether this piecemeal approach is satisfactory and pragmatic.

B *Implications of a general duty of good faith*

A general duty of good faith means that a duty of good faith is implied into all contracts regardless of the contractual background and context.[108] Like express term, the breach of an implied term creates a cause of action in contract. If the breach of an implied term of good faith duty is so fundamental and/or goes to the root of the contract, the innocent party is entitled to either terminate or affirm the contract and claim damages.[109] The Malaysian High Court's decision of *Aseambankers*[110] was a case of a lender-borrower/banker-customer relationship. Upon relying on the American authorities, the High Court held that a breach of the implied duty of good faith can be extended to incur a separate tortious liability on the defaulting party. However, it was overruled by the Court of Appeal for the very reason that Malaysian court is bound by the confines of the Malaysian Civil Law Act 1956[111] to apply English law in commercial matters in the absence of local written law.[112]

Also, a general duty of good faith is inconsistent with freedom of contract and contractual certainty. Such a duty not only will be imposed on the parties regardless of the contractual background and context, but can also in effect disregard the express terms of the contract which have been freely agreed upon by the parties. In *Aseambankers*, the borrower contended that the bank had threatened it with legal action if it did not repay and service the interest on the loan under the facility agreement.[113] The borrower further alleged that its default was due to a breach of the bank's duty to act in good faith to allow drawdown of the loan facility for the borrower's benefit to complete a construction project.[114] Suppose the bank owes a general duty of good faith towards the borrower, the bank would in effect be faulted for enforcing its contractual rights to recover loan under the express terms of the facility agreement. A banking transaction of significant value is commonly noted for detailed terms being incorporated in the contract at arm's length and on the advice of legal counsel. To subject it to a general duty of good faith will clearly undermine the commercial needs of certainty in the banking industry.[115] Similarly in *Seven Seas*, the principal should not be prevented from terminating the contract in accordance with the express termination clause. To invalidate the termination of the contract on grounds of a general duty of good faith will compromise the express

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108 See, the Civil codes discussed at Part III above. See also, the Canadian position in *Bhasin* (n 32) [74] in the context of a specific duty to act honestly in contractual performance.

109 *Contracts Act 1950* (Malaysia) s 40. See generally, *Sinnadurai: Law of Contract* (n 2) ch 12.

110 *Shencourt Sdn Bhd v Aseambankers Malaysia Bhd* [2011] 6 MLJ 236, [300]-[310] (High Court).

111 *Civil Law Act 1956* (Malaysia) s 5(1).

112 *Aseambankers* (n 83) [117]-[126] (Abdul Malik Ishak JCA) and [314]-[315], [327] (Mohamad Ariff JCA).

113 Ibid [249].

114 Ibid.

115 Ibid [329].

termination mechanism agreed between the parties. It will subordinate one's commercial interests to another in the name of good faith. It is against the contractual certainty and freedom of contract (and conversely, to exit contract). It is especially so where parties have in fact formalised their relationship into a written contract to set out their respective contractual rights and obligations.

C *Malaysian approach is satisfactory and pragmatic*

There is no need to recognise a general duty of good faith in contracts. Arguably, the current Malaysian approach in developing the law on duty of good faith on a piecemeal basis is satisfactory and pragmatic. Two reasons are offered here.

First, good faith is already inherent in Malaysian contract law as an underlying contractual attitude. Parties are expected to act honestly in performing the contract. The implication of a good faith duty '[does] no more than express the normal expectation of contracting parties'.[116] However, it does not necessarily equate to an actionable implied term of good faith duty. In many instances, the existing contract law principles are self-sufficient. The very recent case of the Malaysian Federal Court in *Lai Fee*[117] is of relevance. In affirming the common law position[118] that the contracting parties are not expected to arrange their affairs on the basis that other people may commit fraud applies in Malaysia, Vernon Ong FCJ associated it to the application of the Malaysian Contracts Act.[119] His Lordship observed that the Malaysian Contracts Act 'starts on the assumption that all contracts are valid' and that contracts must be made by the free consent of the parties.[120] A contract becomes voidable if the innocent party's consent to the contract was procured by coercion, fraud, misrepresentation or undue influence.[121] It is in the context of these vitiating factors that Vernon Ong FCJ suggested the duty to act in good faith constitutes 'a *sine qua non* in every contract'.[122] Parties must 'conduct themselves on the expectation of honesty, good faith and fair dealing' and are 'not expected to arrange their affairs on the basis that other people may commit fraud'.[123] In the absence of this expectation, there shall be no free consent and there will not be an agreement.[124] A contract becomes void due to the vitiating factors.[125] The duty of good faith merely constitutes an underlying

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116 Leggatt J, 'Contractual Duties of Good Faith' (Commercial Bar Association Lecture, London, 18 October 2016) [23]. See also, Daniel Markovits, 'Good Faith as Contract's Core Value' in Gregory Klass and others (eds), *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 293.

117 *Lai Fee v Wong Yu Vee* [2023] 3 MLJ 503 (Federal Court). There, A relied on the representation of a dormant company incorporated by B that the balance purchase price would be paid in the future and agreed to effect immediate transfer of their partnership business. On default of the payment, it was held that the B was *ipso facto* liable to A for fraudulent trading under the Malaysian Companies Act.

118 *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [44] (Supreme Court).

119 *Lai Fee* (n 117) [57]-[70].

120 Ibid [58]-[61].

121 Ibid [61]. These vitiating factors are statutorily provided in the *Contracts Act 1950* (Malaysia) ss 14-18.

122 Ibid [62].

123 Ibid [67].

124 Ibid.

125 Ibid [66].

attitude of the parties in contracting.[126] It should not be regarded as an actionable general term of good faith duty in contracts.

Second, it is only when the circumstances of the case require a standard higher than the implicit contractual attitude of good faith, and as a matter of necessity, the courts will imply a term of good faith duty by law and/or in fact into contracts. One may argue that if good faith is already implicit in contract law principles, to imply a specific term of good faith duty is to imply a redundant term in the contract.[127] Two arguments are offered here. First, the law does not simply imply a duty of good faith in contracts. It will be recalled that in the recognised classes of contract where a duty of good faith is implied by law, a special relationship (fiduciary or otherwise) exists between the parties. It is necessary to imply a duty of good faith to uphold the trust and confidence of the parties' contractual relationship. Similarly, when implying a term in fact, the courts must investigate two questions. First, if an officious bystander were to suggest a term that the contract should be performed in good faith, would the parties without hesitation reply with a common 'Oh, of course!'?[128] Second, is it commercially necessary to give business efficacy to the contract by implying a duty of good faith, without which the contract will lack commercial coherence to achieve its intended contractual purpose? Both questions must be examined through a strict construction of the contract against its contractual background and context. This appears to be the case of *Pasuma*. The exercise of contractual discretion is yet another example. It is trite law that the courts will not rewrite the parties' bargain.

However, there is a risk that a contractual discretion, if left unfettered, will substantially affect the rights of the other party. This arises especially where there is a significant imbalance of power between the parties. In the absence of statutory protection,[129] the law may fall short of ensuring that the contractual discretion is not abused. While the party may nevertheless exercise its decision-making power in good faith, it is arguably only an unenforceable moral duty but not a legal duty to do so. In this regard, the Malaysian courts have sought to imply a term to exercise the contractual discretion in good faith. Such discretion 'must not be exercised arbitrarily, capriciously or unreasonably'.[130] However, context is crucial. As Vernon Ong JCA noted in *KAB Corp*, 'context will shape the content of the implied term and the practice of contractual review'.[131] There, it was found that the parties were of significant imbalance of power. The individual office unit owner was compelled to pay an administrative fee to obtain the developer's written consent for a third-party assignment of the office unit. Having regard to the relevant sale and purchase agreement and the House Rules, Vernon Ong JCA

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126 See also, *CIMB Bank Bhd v Maybank Trustees Bhd* [2014] 3 MLJ 169, [162]-[165] (Federal Court); *Bellajade Sdn Bhd v CME Group Bhd* [2017] 1 MLJ 92, [91]-[94] (Court of Appeal).

127 JW Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19 *Journal of Contract Law* 155, 162-163; Elisabeth Peden, '"Implicit Good Faith" – or Do We Still Need an Implied Term of Good Faith?' (2009) 25 *Journal of Contract Law* 50, 56-59. cf Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 *Current Legal Problems* 297, 330-331.

128 *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206, 227 (Court of Appeal).

129 The *Consumer Protection Act 1999* (Malaysia) specifically deals with the protection of individual consumers, but not to commercial contracts in general.

130 *KAB Corp* (n 102) [29].

131 Ibid [28].

held that the dominant developer's exercise of absolute discretion to impose excessive administrative fee, despite it simply being 'a matter of administrative expediency', was 'plainly arbitrary, unreasonable, unfair and oppressive'.[132] Second, and more importantly, the contractual implication of a specific term of good faith duty provides an actionable recourse to sue on a contractual breach of the (implied) term. An implicit good faith attitude does not.

Reading the two reasons together, it balances the general rule that there is no general duty of good faith in contracts, and the need to create space for exceptions on a piecemeal basis to achieve justice and contractual fairness. It must be emphasised that a term is implied not because it is reasonable.[133] Rather, it is because the court finds that, as a matter of necessity, the parties must have intended to include it as part of the contract.[134] In line with the freedom of contract and contractual certainty, it does no more than realising the understanding and reasonable expectations of the parties at the time of making the contract.[135] Where the circumstances of the case require a standard higher than the underlying attitude of good faith, the breach of a specific term of good faith duty, express or implied, constitutes an actionable cause of action. It allows the innocent party to seek appropriate legal redress. This pragmatic approach respects the freedom of contract and contractual certainty which are essential to commerce. It is satisfactory and pragmatic.

D *Potential challenge and recommendations*

Without derogating from the above, it must be cautioned that the law continues to develop and is in a 'state of flux' in other Commonwealth countries.[136] As Lord Bingham extra-judicially highlighted the significance of transnationalisation of commercial law,[137] one must remain vigilant of the legal development of good faith duty in the form of an implied duty in the common law of contract.

The English landmark case of *Yam Seng* indicates that a duty of good faith is likely implied into contracts if the contract is a 'relational' one. There, Leggatt J observed that the parties' agreement in the form of a distributorship contract 'required the parties to communicate effectively and co-operate with each other in its performance'.[138] The contract was regarded as 'relational' in nature and that a good faith duty imposed on the parties was necessary.[139] The question then arose as to what precisely is a relational contract? Broadly, Leggatt J described it as a contract which requires 'a high degree of communication, co-operation and predictable performance based on mutual trust and

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132 Ibid [32].

133 Pek San Tay, 'Interpretation and Implication of Contractual Terms in Malaysia' in Mindy Chen-Wishart and Stefan Vogenauer (eds), *Contents of Contracts and Unfair Terms* (Oxford University Press, 2020) 254.

134 *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, [55] (Federal Court).

135 John Wightman, 'Good Faith and Pluralism in the Law of Contract' in Roger Brownsword and others (eds), *Good Faith in Contract: Concept and Context* (Ashgate, 1999) 137.

136 See, eg, *Ng Giap Hon* (n 64) [47]-[60].

137 Lord Bingham, 'The Law as the Handmaid of Commerce' in Visu Sinnadurai (ed), *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (Professional Law Books, 2004) 373-375.

138 *Yam Seng* (n 45) [143].

139 Ibid [142].

confidence' and which involves 'expectations of loyalty'.[140] Assuming a contract is identified as a relational contract, does a duty of good faith constitute a term implied by law or in fact?[141] How is it different from the well-established categories of contract where a duty of good faith has already been implied by law based on similar factual matrix of the case? In concluding that a contract is relational, the courts may well have considered the relevant contractual background and context, potentially leading to implication of a term of good faith duty in fact. It is also unclear whether relational contracts mean contracts which are long-term, or which are lacking in detail but solely premised on the trust and confidence between the parties.[142] It will be 'no easy task' to define a category of relational contracts.[143] The scope and implications of relational contracts in the application of good faith duty remain to be more extensively clarified by the court.

Nevertheless, it must be remembered that context is crucial. Rather than determining whether a contract is relational and therefore a general duty of good faith is implied by default, the court should always resort to the tests of implied terms and examine the relevant facts of the case. A specific and actionable term of good faith duty can be implied only if it is a matter of necessity. It will be recalled that in *Yam Seng*, the vendor was under a specific implied duty of good faith to not knowingly supply misleading market information to the distributor.[144] Leggatt J only arrived at this specific implied duty of good faith after examining the factual matrix of the case that such duty was necessary to be implied to make the contract works.

Alternatively, if the parties intend to govern their contractual relationship by a duty of good faith without resorting to the implied terms, they should expressly stipulate so in the contract.[145] In *Seven Seas*, although the Malaysian Court of Appeal rejected the existence of a general implied term of good faith duty, it nevertheless suggested that the duty of good faith may exist based on the 'expressed intention of the parties which is to be ascertained from the terms of the contract'.[146] To this end, contracting parties may consider to include an express term of good faith duty as follows:

> In all matters relating to this agreement, the parties shall act in good faith towards each other. For the purposes of this agreement, good faith means the parties shall cooperate with each other honestly and fairly to do such acts as may be reasonably required to give full effect to the terms and conditions of this agreement.

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140 Ibid [142]. See also, *Bates* (n 50) [725]-[726] and [738].

141 Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 15th ed, 2020) [6.076].

142 Ewan McKendrick, 'Implied Terms' in Hugh Beale (ed), *Chitty on Contracts: General Principles*, vol 1 (Sweet & Maxwell, 34th ed, 2021) fn 149.

143 Ewan McKendrick, 'The Regulation of Long-term Contracts in English Law' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995) 316.

144 *Yam Seng* (n 45) [141]-[144].

145 Lady Arden (n 11) 212-213; Paul S Davies, 'The Basis of Contractual Duties of Good Faith' (2019) 1 *Journal of Commonwealth Law* 1, 28. Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press, 10th ed, 2022) 499.

146 *Seven Seas* (n 77) [30].

V CONCLUSION

Pragmatism is important in the common law of contract.[147] The doctrine of good faith is a telling example. As a matter of general rule, Malaysia does not recognise a general duty of good faith in contracts. However, the general rule is not absolute. Like the position in England and Singapore, Malaysia has developed the law on a piecemeal basis through contractual implied terms.

It is opined that the Malaysian approach is satisfactory and pragmatic for two reasons. First, it acknowledges that good faith is already inherent in Malaysian contract law. However, it does not necessarily translate into an actionable general duty of good faith. In many instances, the existing contract law principles are self-sufficient. Second, context is crucial. It is only when the tests of implied terms are satisfied to render a duty of good faith necessary and without it the contract will not work, the court will imply a duty of good faith by law and/or in fact into contracts.

However, the introduction of 'relational' contracts in *Yam Seng* may pose challenges as to whether a general duty of good faith can be implied into such contracts. It is hoped that the court will clarify the scope and implications of a relational contract vis-à-vis the application of a general duty of good faith in the near future. If the parties intend to impose a duty of good faith, they should expressly stipulate so in the contract. This pragmatic approach does not derogate from the established rules of contract law. It is more likely to respect the intention of the parties than a general overriding duty of good faith. It affirms the importance of the freedom of contract and contractual certainty. At this juncture, one will certainly remember the words of Lord Steyn delivered in a lecture, where his Lordship said:[148]

> I have no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary. As long as our courts always respect the reasonable expectations of parties, our contract law can satisfactorily be left to develop in accordance with its own pragmatic traditions. And where in specific contexts duties of good faith are imposed on parties, our legal system can readily accommodate such a well-tried notion.

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147 Lady Hale, 'Principle and Pragmatism in Developing Private Law' (Cambridge Freshfields Lecture 2019, Cambridge, 7 March 2019) 13.

148 Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' in Visu Sinnadurai (ed) *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (Professional Law Books, 2004) 273-274. See also, Justice Steyn, 'The Role of Good faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy' (1991) 6 *Denning Law Journal* 131, 141; Vasanti Selvaratnam, 'Good Faith: Is English Law Swimming against the International Tide?' [2020] *Lloyd's Maritime and Commercial Law Quarterly* 232, 249.