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**Dr. Tamara Joan Duraisingam**
PhD (UKM); LL.M (UM); LL.B (Hons.) (UM)
Taylor's Law School
Taylor's University
Tamarajoan.duraisingam@taylors.edu.my

## Editorial Board Members



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# MIGRANTS, REFUGEES AND THE LAW

By

Dato' Mohd Hishamudin Yunus
Former Court of Appeal Judge
Consultant, Messrs Lee Hishammuddin Allen & Gledhill
In conjunction with Law Awareness Day 2016

Mr. Harmahinder Singh,
Dean, Taylor's Law School,

Dato' Mahadev Shankar,
Adjunct Professor, Taylor's Law School,
and Former Court of Appeal Judge,

Distinguish guests,
Ladies and Gentlemen,
Selamat pagi, Good morning.

## 1. Introduction

First and foremost, I wish to say 'Thank you' to the Law School of Taylor's University for inviting me to deliver this keynote address and to launch the Law School's Law Awareness Day. It is indeed a pleasure and an honour to be so invited and to be associated with the School's Law Awareness Day.

And may I congratulate the Law School for launching this Law Awareness Day and choosing the theme 'Migrants, Refugees and the Law'.

## 2. Overview

I consider the theme 'Migrants, Refugees and the Law' as appropriate and timely as today issues on migrants and refugees are one of the issues that make headlines all over the world.

We have read quite recently that last year more than a million migrants and refugees crossed into Europe sparking a crisis as the European countries affected struggled to cope with the influx and how best to deal with resettling people.[1] The conflict in Syria continues to be by far the biggest cause of migration. Other causes are the ongoing violence in Afghanistan and Iraq, abuses in Eritrea, and poverty in Kosovo.

[1] (2016, March 4). Migrant crisis: Migration to Europe explained in seven charts. *BBC News Europe*. Retrieved from http://www.bbc.com/news/world-europe-34131911

Many of those that went to Europe claimed asylum. Last year Germany received the highest number of new asylum applications, some 467,000 applications; followed by Hungary with 177,130 applicants as at the end of December 2015.

Malaysia, on her part, has announced that she would accept 3000 migrants from Syria over the next three years.[2]

At home in Malaysia what made headlines was, first, the discovery of human smuggling camps and the bodies of illegal immigrants dumped in mass graves at Songkhla and Padang Besar near the Thai-Malaysia border.[3]

Secondly, there was the controversial announcement by the Government to bring into the country 1.5 million workers from Bangladesh in stages over 3 years,[4] only to be followed very soon after this announcement by another announcement, this time by the Deputy Prime Minister, of a freeze on all recruitment of foreign workers, including those from Bangladesh.[5]

## 3. Refugees

As at 2015, there were 21.3 million refugees worldwide, over half of whom are under the age of 18.[6] 54% of refugees worldwide came from three countries, namely,-

(1) Syria, 4.9 million;
(2) Afghanistan, 2.7 million; and
(3) Somalia, 1.1 million.

Turkey has become the world's biggest refugee hosting country having 2.5 million refugees. Pakistan is second, hosting 1.6 million refugees. Lebanon is third, hosting 1.1 million.

### *3.1. Refugees and International law*

Historically, States, for centuries, have been granting protection to individuals and groups fleeing persecution. However, the modern international legal regime on refugees is largely the product of the second half of the twentieth century. Like

[2] (2015, December 9). Malaysia accepts first of 3,000 Syrian migrants. *BBC News Asia*. Retrieved from http://www.bbc.com/news/world-asia-35048291

[3] (2015, May 25). Malaysia confirms discovery of 23 trafficking camps, 139 graves sites believed to contain migrants. *ABC News*. Retrieved from http://www.abc.net.au/news/2015-05-25/malaysia-mass-graves-of-suspected-migrants-deeply-concerning/6494908

[4] Carvalho, M. & Rahimy Rahim (2016, February 18). Malaysia and Bangladesh ink deal to recruit 1.5 million workers. *The Star Online*. Retrieved from http://www.thestar.com.my/news/nation/2016/02/18/bangladeshi-workers-malaysia-mou/

[5] Ling, S. (2016, February 19). Zahid Hamidi: Government freezes intake of all foreign workers, including Bangladeshis. *The Star Online*. Retrieved from http://www.thestar.com.my/news/nation/2016/02/19/zahid-hamidi-governemnt-freezes-intake-of-all-foreign-workers/

[6] UNHCR: The UN Refugee Agency. *Figures at a glance: Global trends, statistical yearbooks*. Retrieved from http://www.unhcr.org/figures-at-a-glance.html

international human rights law, modern international law on refugees has its origins in the aftermath of the Second World War as well as the refugee crises of the interwar years that preceded it.[7] Article 14(1) of the **Universal Declaration of Human Rights (UDHR), 1948**, guarantees the right to seek and enjoy asylum in other countries. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the "***right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions.***" (See the **American Convention on Human Rights**, art. 22(7); and the **African [Banjul] Charter on Human and People's Rights**, art. 12(3).)

*3.2. The 1951 Refugee Convention*

The foundation of international refugee law is the **1951 Convention relating to the Status of Refugees** ('the Refugee Convention') and its **1967 Optional Protocol relating to the Status of Refugees** ('the 1967 Optional Protocol'). The Refugee Convention defines the term 'refugee' and sets minimum standards for the treatment of persons who are found to qualify for refugee status. The Refugee Convention also establishes the principle of non-refoulement. (I will elaborate on this principle later.)

The Refugee Convention does not prescribe how States Parties are to determine whether or not an individual satisfies the definition of a 'refugee'. Instead, the Convention leaves it to the State Party to formulate the rules on asylum proceedings and the determination of refugee status. This, however, has resulted in disparities among different States as each State will formulate the laws on asylum based on its own resources, national security concerns, and experiences with forced migration movements. Despite differences at the national and regional levels, the overriding objective of the modern legal regime on refugees is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.

*3.3. The 1967 Optional Protocol*

Whenever we refer to the Refugee Convention of 1951, in the same breath we also refer to the 1967 Optional Protocol relating to the Status of Refugees. Originally, the Refugee Convention was of limited scope. It's scope was confined only to refugees in Europe and to events occurring before 1 January 1951. The 1967 Optional Protocol is a supplementary treaty to the Refugee Convention. It is a supplementary treaty that removes the geographical and time limitations written into the original Convention. In other words, this supplementary treaty (the 1967 Optional Protocol) turned the Convention into a truly universal instrument that could benefit refugees everywhere.

[7] International Justice Resource Center. *Asylum & the rights of refugees*. Retrieved from http://www.ijrcenter.org/refugee-law/

## 4. Who is a Refugee?

On the definition of the term 'refugee', Article 1(A)(2) of the Refugee Convention states that a refugee is an individual who is **outside his or her country of nationality or habitual residence** who is **unable or unwilling to return** due to a **well-founded fear of persecution** based on his or her **race, religion, nationality, political opinion, or membership in a particular social group.**

Although the Refugee Convention definition of 'refugee' remains the dominant definition, regional human rights treaties have since modified the definition of a refugee in response to displacement crises not covered by the 1951 Convention.

Countries in the Americas and Africa experiencing large-scale displacement as the result of armed conflicts found that the Refugee Convention definition of 'refugee' did not go far enough in addressing the protection needs of populations. Consequently, both Article 3 of the **Cartagena Declaration** and Article 1(2) of the **1969 Convention Governing the Specific Aspects of Refugee Problems in Africa** have extended the definition of 'refugee'. For example, the latter, that is to say, the **1969 African Convention** extends refugee status to an individual who '***owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality***'.

As of today, the total number of State Parties to the Refugee Convention is 145; whilst the total number of State Parties to both the Refugee Convention and the 1967 Protocol is 142. The only ASEAN States who are parties to the Refugee Convention and the 1967 Protocol are Cambodia and Philippines.

Malaysian is not a State Party to the 1951 Refugee Convention and its Protocol.

### *4.1. The principle of non-refoulement*

In relation to refugees, there is an important principle of customary international law called the principle of non-refoulement. We can find this principle in Article 33(1) of the Refugee Convention. It is expressed in the following terms:

> **No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.**

As this principle of non-refoulment is generally accepted as a principle of customary international law, this principle is binding on all nations regardless whether the State is a party or not to the Refugee Convention. This means that Malaysia, although not a party to the Refugee Convention, is, nevertheless, bound by this important principle of international law.

*4.2. Internally displaced persons (IDPs)*

Applying the definition of 'refugee' under the Refugee Convention, internally displaced persons (IDPs) are not considered refugees under the Convention. Who are 'internally displaced persons'? Unlike refugees, IDPs have not crossed an international border to find sanctuary but have remained inside their home countries; but they (IDPs) have fled from their homes because of compelling circumstances such as armed conflict, generalized violence and human rights violations.

It is estimated that at the end of 2014 there were some 38.2 million internally displaced persons (IDPs) around the world. Currently the country with the largest IDPs is Syria (7.6 million IDPs), followed by Colombia (6 Million) and Iraq (3.6 million).[8]

## 5. United Nation High Commissioner for Refugees (UNHCR)

The Office of the United Nation High Commissioner for Refugees (UNHCR) is a United Nation Agency established on 14 December 1950, with its headquarters in Geneva, Switzerland. Considered to be the guardian of the Refugee Convention, the agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide.

UNHCR's mandate has today been expanded to include protecting and providing humanitarian assistance to persons whom it describes as 'other persons of concern', including internally displaced persons (IDPs).

For its contribution in the field of human rights, the UNHCR has won two Nobel Peace Prizes, once in 1954 and again in 1981.

*5.1. UNHCR in Malaysia*

The UNHCR began its operations in Malaysia in 1975 when Vietnamese refugees began to arrive by boat in Malaysia and other countries in the region. From 1975 until 1996, UNHCR assisted the Malaysian government in providing protection and assistance for the Vietnamese boat people. Over these two decades, as part of an international burden sharing effort, UNHCR resettled more than 240,000 Vietnamese to countries including the United States, Canada, Australia, France, New Zealand, Sweden, Finland, Denmark and Norway. During that same period more than 9,000 persons returned home to Vietnam with the support of UNHCR.[9]

During the 1970s and 1980s UNHCR assisted the Malaysian Government in receiving and locally settling over 50,000 Filipino Muslims from Mindanao who fled

[8] UNHCR: The UN Refugee Agency (2015, June 18). *Global trends: Forced displacement in 2014.* Retrieved from http://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html

[9] UNHCR: The UN Refugee Agency, Malaysia. *UNHCR in Malaysia*. Retrieved from http://www.unhcr.org.my

to Sabah. UNHCR also supported the Malaysian Government in locally settling several thousand Muslim Chams from Cambodia in the 1980s and several hundred Bosnian refugees in the 1990s.[10]

During the last 10 years alone the UNHCR in Malaysia has resettled more than 100,000 refugees.[11]

Although Malaysia is not a State Party to the 1951 Refugee Convention and its Protocol Relating to the Status of Refugees, the Malaysian Government is nevertheless a member of the United Nations. That being so, Malaysia is obligated to co-operate – and she does co-operate – with UNHCR in addressing refugee issues on humanitarian grounds.

It must be mentioned here that Malaysia is a party to the **Convention on the Rights of the Child** and to the **Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW). Thus in dealing with refugees, Malaysia must give effect to her obligations under these two Conventions, where the issues involved women and children.

In Malaysia, presently, there are no legislative or administrative provisions in place to deal with the situation of asylum-seekers or refugees, UNHCR undertakes all activities pertaining to the reception, registration, documentation and status determination of asylum-seekers and refugees.[12]

In this article, from time to time I will be referring to the term 'refugees' and 'asylum seekers'. One might ask as to the difference between a 'refugee' and an 'asylum seeker'. An asylum seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated by the State authority of the country in which the claim to refugee status is made.

As part of its programme of humanitarian support for refugees and asylum seekers, UNHCR in collaboration with various bodies/partners such as government agencies, non-government organisations and volunteers, carry out, among others, the following activities:

- to provide assistance for refugees and asylum seekers in a variety of areas such as healthcare, education, shelter, counselling and other welfare needs;
- to carry out detention monitoring and intervention;
- to provide legal representation in court for offences under the Immigration Act;

[10] UNHCR: The UN Refugee Agency. *Malaysia factsheet*. Retrieved from http://www.unhcr.org/protection/operations/56167f6b6/malaysia-fact-sheet.html

[11] Sumisha Naldu (2016, March 24). UNHCR defends registration card system in Malaysia. *Channel NewsAsia*. Retrieved from http://www.channelnewsasia.com/news/asiapacific/unhcr-defends/2627594.html

[12] UNHCR: The UN Refugee Agency (2016, January). *Malaysia fact sheet*. Retrieved from http://www.unhcr.org/malaysia.html?query=malaysia

- to support long-term solutions for refugees, such as resettlement to countries like Australia, Canada, Czech Republic, Denmark, New Zealand, Sweden, and the United States.[13]

## 6. History of refugee policy in Malaysia

Malaysia's current policy toward refugees has its roots in its experience with Indochinese refugees in the 1970s and 1980s. After the fall of the South Vietnamese government supported by the US military in 1975, hundreds of thousands of Vietnamese began to leave the country. Most fled by boat to other countries in Southeast Asia, and, for a time, Malaysia was their principal first stop. These refugees were placed in camps under the auspices of the Malaysian Red Crescent Society in co-ordination with the United Nation High Commissioner for Refugees (UNHCR).

### *6.1. Malaysia's current policy on refugees*

Malaysia does not recognize the status of 'refugees'. Malaysia only allows asylum seekers to stay in this country on a temporary basis after which they have to go back to their country of origin or to be resettled in a third country.

Be that as it may, Malaysia has, on an *ad hoc* basis, voluntarily hosted certain groups of refugees such as the Khmer Muslims from Cambodia, Filipinos Muslims, and Bosnians.

Malaysia lacks any institutionalised protections for refugees. Under our general immigration law, refugees are not distinguished from other undocumented workers. In other words, refugees are considered illegal immigrants.

### *6.2. Fact sheet on Refugees*

In Malaysia, there were a total of 156,342 refugees and asylum seekers registered with UNHCR as at end January 2016.[14]

Table 1: By country of origin

| Country | Total |
|---|---|
| Myanmar | 143,669 |
| Sri Lanka | 3,278 |
| Pakistan | 1,476 |
| Somalia | 1,412 |
| Other countries | 6,507 |
| **Total:** | **156,342** |

[13] *Ibid*
[14] *Ibid*

Of the 143,669 refugees and asylum seekers from Myanmar, some 52,570 are Rohingyas, some 45,380 are Chins, and some 12,200 are Myanmar Muslims. The remainder are Rakhines, Arakanese and other ethnicities.

Among the refugees and asylum seekers that come under the category of 'Other countries' are Syrians, Iraqis, Yemenis, Palestinians, and Iranians. Some 70% of refugees and asylum-seekers are men, while 30% are women. There are some 33,640 children below the age of 18.

7. Living as a refugee (and asylum seeker) in Malaysia

I will now say something about living as a refugee and asylum seeker in Malaysia. Malaysians of my generation can never forget about the presence of the Vietnamese refugee camp in the 70s and 80s as we travelled south from Kuala Lumpur towards Seremban. As one approached Sungei Besi, one could see the refugee camp on the right side of the road. Today the camp is no longer there as the Vietnamese refugees have been re-settled elsewhere in receiving countries.

Although, presently, we hardly feel the presence of refugees and asylum seekers in our country, the truth is, as we have seen, there are some 156,000 refugees and asylum seekers in this country. Today the various refugee and asylum seeker communities are scattered throughout the country, living mostly in the Klang Valley. Unlike the era of the 70s and 80s, there are no longer refugee camps in Malaysia. Instead, refugees and asylum seekers share living spaces, sometimes in groups of up to 40 people or more, living in low-cost flats or housing areas side by side with local Malaysian homes in cities and small towns. Many also live near the construction sites or plantations where they seek employment.[15]

As Malaysia is not a State Party to the 1951 Refugee Convention and the 1967 Optional Protocol, we do not have an asylum system in place to regulate the status and rights of refugees and asylum seekers. The situation of refugees and asylum seekers in Malaysia is difficult as a result of their lack of official status.

As Malaysian law makes no distinction between refugees and undocumented migrants, refugees are at risk of being arrested and detained for immigration offences.

Refugees and asylum seekers in Malaysia have no access to legal employment. They tend to work in jobs that the local population do not wish to take (the 3D jobs: dirty, dangerous and difficult). Some employers exploit their dire situation by paying extremely low or no wages at all.

They are also at risk of being the victims of human traffickers.

[15] UNHCR: The UN Refugee Agency, *supra* n. 10

Refugee children are denied access to the formal education system in the country. However, some children are able to attend community-run learning centres and learning centres set up by UNHCR and NGO partners. Presently, there are 124 community-based learning centres. 11 of them are operated by six NGO partners, and 113 are run by the communities themselves with support from NGOs, faith-based organisations, and other stakeholders. Currently, some 6,100 (29%) registered refugee children aged 3-17 years old are enrolled in early childhood, primary, and secondary level education at these learning centres.

It must be mentioned here that UNHCR provides financial and material support to the learning centres. UNHCR has also signed memoranda of understanding with five private tertiary institutions, namely the HELP University, University of Nottingham Malaysia Campus, Limkokwing University of Creative Technology, International University Malaya-Wales, and Brickfields Asia College (BAC), all of which have collectively enrolled some 45 refugee youths in their foundation and undergraduate programmes.

Refugees and asylum seekers in Malaysia who are UNHCR document-holders are able to access healthcare facilities at a reduced rate, but the cost of treatment and refugees' irregular income make healthcare unaffordable to many refugees and asylum seekers.[16]

## 8. Refugees and Migrants: What is the difference?

Unlike migrants, refugees and asylum seekers do not choose to leave their countries; they are compelled to do so because of serious discrimination in their home countries, armed conflict, serious public disorder and other complex human rights issues.

Migrants, on the other hand, are persons who leave their countries to seek material improvements in their lives. The key difference between migrants and refugees is that migrants enjoy the protection of their home countries; refugees do not.

Migrants do not fall within the criteria for refugee status and are therefore not entitled to benefit from international protection as refugees.

### *8.1. Some suggested solutions for Malaysia's refugee problems*

It would be ideal if Malaysia were to be a party to the Refugee Convention. I hope that in the near future Malaysia will be a party to the Convention. But that is about for the future. In the meantime, however, there are certain measures that could be taken to alleviate the hardship faced by refugees and asylum seekers.

The first is the formal registration of all refugees and asylum seekers by the Government. It is true that refugees and asylum seekers registered with UNHCR

[16] UNHCR: The UN Refugee Agency, *supra* n. 12

are issued by UNHCR with the UNHCR refugee cards; and these cards act as an identification for refugees in Malaysia and is meant to protect them from arrest. However, it is often reported that refugees are still vulnerable to arrest and detention as illegal immigrants even though they hold these cards. This is because, strictly in law, the UNHCR refugee cards have no legal standing; and, furthermore, many enforcement officers have yet to be familiarised with these cards.

From the refugees' standpoint, having proper documentation and identification means a lot to them, especially if they have never been recognised as citizens in their own country, like the Rohingyas in Myanmar.

Apart from the issuance of the identification cards, the refugees and asylum seekers should also be accorded access to some basic needs like employment, healthcare and education.

With this system of registration, refugees and asylum seekers in this country would no longer need to live in fear of arrest and detention, and at the same time the enforcement agencies could monitor and enforce immigration rules more easily.

Another measure that could be taken towards helping the refugee problem is to formally permit them to work. If permitted to work and given proper training, refugees and asylum seekers could make a better contribution to Malaysia's economy than what they could at the moment. If refugees and asylum seekers were to be given employment rights, they would become financially independent. They no longer have to rely on charity. They could live with dignity.[17]

9. Migrants

In 2015 the number of international migrants was about 244 million.[18] Nearly two thirds of all migrants live in Europe (76 million) or Asia (75 million). Northern America hosted the third largest number of international migrants (54 million), followed by Africa (21 million), Latin America and the Caribbean (9 million) and Oceania (8 million).

In 2015, two thirds (67 per cent) of all international migrants were living in just twenty countries. The largest number of all international migrants live in the United States of America (47 million), followed by Germany with 12 million of migrants and the Russian Federation with also 12 million of migrants, and Saudi Arabia (10 million).

Nearly all countries are concerned by migration, whether as sending, transit, or receiving countries, or as a combination of these.

[17] Aslam Abdul Jalil (2015, August 5). Solutions for Malaysia's long-suffering refugees. *New Mandala*. Retrieved from http://www.newmandala.org/solutions-for-malaysias-long-suffering-refugees/

[18] United Nations, Department of Economic and Social Affairs, Population Division (2016). *International migration report 2015: Highlights* (ST/ESA/SER.A/375). New York: United Nations

### *9.1. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is a United Nations multilateral treaty governing the protection of migrant workers and families. Signed on 18 December 1990, it entered into force on 1 July 2003.

This United Nations Convention on the Protection of the Rights of All Migrant Workers constitutes a comprehensive international treaty regarding the protection of migrant workers' rights. It emphasizes the connection between migration and human rights.

As of May 2015, 48 states have ratified the Convention. The only ASEAN Country that has ratified the Convention is Philippines. Cambodia has signed the Convention but has yet to ratify it. Malaysia is not a party to this Convention.

So far, countries that have ratified the Convention are primarily countries of origin of migrants such as Mexico, Morocco and the Philippines. For these countries, the Convention is an important vehicle to protect their citizens living abroad. In the Philippines, for example, ratification of the Convention took place in a context characterized by several cases of Filipino workers being mistreated abroad: such cases hurt the Filipino population and prompted the ratification of the Convention.

No migrant-receiving state in Western Europe or North America has ratified the Convention. Other important receiving countries, such as Australia, Arab states of the Persian Gulf, India and South Africa have not ratified the Convention.

### *9.2. ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*

The ASEAN countries have recognized the importance of labour migration in the ASEAN region. In January 2007, ASEAN made a significant move to address the issues of migrant workers by adopting the **ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers**. The adoption of this declaration followed by the subsequent setting up in 2008 of the ASEAN Committee in the Implementation of the ASEAN Declaration (ACMW) demonstrate ASEAN's commitments to protect the rights of migrant workers.

The Declaration calls upon ASEAN States to ensure the dignity of migrant workers by undertaking the following obligations:

(1) the protection of migrant workers from exploitation, discrimination, and violence;
(2) the governance of labour migration; and
(3) the fight against trafficking in persons.

The Declaration does not contain concrete and specific provisions on how to implement its provisions. Nevertheless, it is a significant move towards the creation of a sectoral mechanism or instrument that can further promote and protect the rights of migrant workers.

The ASEAN Committee in the Implementation of the ASEAN Declaration is currently in the process of drafting an ASEAN instrument on the protection and promotion of migrant workers' rights.

*9.3. Migrant issues in Malaysia*

Malaysia has always been and is very dependent on migrant labour for its economic growth. Presently Malaysia has about 6 million migrant workers of which 2.9 million are documented. The remainders are undocumented.[19] In other words, the majority of migrants in Malaysia are undocumented. These migrants, documented or otherwise, are employed in various sectors such as manufacturing, construction, plantation and housemaids. The majority of them comes from Indonesia. The rest comes from countries such as Bangladesh, Nepal, Philippines, Thailand, Vietnam, Cambodia, Laos, Myanmar, Pakistan, Sri Lanka, India and China.

Currently migrant workers make up approximately 20% of the labour force in Malaysia. They make up around 50% of the construction workforce in the country, and nearly 60% of the workforce in the manufacturing sector.[20]

In Malaysia, matters pertaining to terms and conditions of work of migrants are regulated by the Employment Act 1955 and the Workmen's Compensation Act 1952, under the administrative jurisdiction of the Labour Department. Issues regarding relations between employers and migrant workers are covered by the Industrial Relations Act 1967, while labour unions are regulated by the Trade Unions Act 1959. These laws are all overseen and implemented by the Ministry of Human Resources.

In addition to the above laws, migrant workers' affairs are also regulated by immigration laws and regulations, supplemented by policies from the Ministry of Home Affairs which issues work permits.

*9.4. Legal problems concerning migrants*

There are several legal problems that migrants in this country face. Time does not permit me to touch on every issue. I shall touch on a few.

[19] Teh Wei Soon (2015, February 10). Migrant Workers: Malaysia's 'invisible' workforce. *Malaysian Digest*. Retrieved from http://www.malaysiandigest.com/features/541277-migrant-workers-malaysia-s-invisible-workforce.html

[20] Malaysian Digest, *supra* n. 19

*9.4.1. Equality before the law*

Article 8 of the Federal Constitution provides that 'All persons are equal before the law and entitled to equal protection of the law.'. This guarantee of equality extends to all persons whether citizens or not; and, accordingly, to all migrant workers whether documented or undocumented. This equality is also reflected in our Employment Act 1955 which applies to all workers, irrespective of whether the person is a local worker or a foreign worker. Even a migrant worker is accorded the right to make a complaint about discrimination at work to the Director General of Labour. However, there is a legal problem when it comes to trade unions. Although the Trade Unions Act 1959 provides that a migrant worker can be a member of a trade union, yet under the law he/she is prohibited from holding an executive position in trade unions.[21] It can be argued that this prohibition is discriminatory and is in contravention of the Constitution.

*9.4.2. Outsourcing of migrant workers*

The majority of migrant workers in the manufacturing sector are not hired directly by the factories, but by outsourcing agents, which manage not only the bureaucratic aspects of the recruitment and migration process, but also the wages of foreign workers. In other words, these outsourcing companies have become direct employers. These labour outsourcing companies are approved and regulated by the Ministry of Home Affairs. Workers hired by such labour outsourcing companies remain the employees of those companies and not the employees of the factories where they work. This means that the responsibility for labour management has moved from the employer (for whom the migrant worker is actually working) to the outsourcing companies.

The legal issue that arises is in designating who is the responsible employer for the purpose of ensuring that wages, conditions of work, and other aspects of the treatment of migrant workers (such as accommodation, access to medical care, etc.) comply with the relevant labour laws. Under this outsourcing arrangement, it becomes technically possible for a factory owner to claim that he/she is not legally responsible for the unlawful treatment accorded to migrant workers in his/her factory because they were provided by a labour contractor.

*9.4.3. Seizing of migrants' passports*

In Malaysia, it is common practice for employers to seize migrant workers' passports upon arrival to this country. This practice is, however, illegal under the Passports Act. Nevertheless, the withholding of migrant workers' passports is widely used as a mechanism of control by employers over the workers which enhances their vulnerability and restricts their ability to move.

[21] Trade Union Act 1959 (Act 262), section 28(1)(a)

*9.4.4. Access to justice*

Migrant workers are often fired by employers for filing complaints with government officials or groups like NGOs or trade unions. Termination of employment results in the ending of the work permit, which is the basis in law for the migrant's right to stay in Malaysia. Thus, filing a complaint prompts action by the employer that makes the migrant complainant subject to immediate deportation.

*9.5. Perception towards migrants*

Despite the fact that migrant workers actually contribute positively to our country, there is still uneasiness among some Malaysians on the presence of foreign workers. In general, the perception of Malaysians towards migrant workers has been quite negative.

Some even believe that the influx of foreign workers is the main cause of the increase in crime rates in the country. This is a fallacy because the cases of crime involving migrant workers are only less than 10% of the total crime cases nationwide.[22]

*9.6. The work of Tenaganita*

This article is incomplete if I do not say a few words on the good work of a non-governmental organization called 'Tenaganita'. Tenaganita was founded in 1991, born out of the struggles of women workers in the plantation and industrial sectors to gain their rights as workers; for decent wages, for decent living conditions and to stop discrimination and gender based violence.

Today Tenaganita's scope has grown to address issues of exploitation, discrimination, unequal treatment and violence not just against women, but also against refugees, documented and undocumented migrant workers, trafficked persons and domestic workers.

I take the opportunity to pay my tribute to the late Dr. Irene Fernandes, the founder of Tenaganita, for her outstanding and courageous work to stop abuses of migrant workers.

10. Conclusion

Refugees do not come to this country out of their own free will. They are forced to flee for their lives from their country of origin because they have been persecuted on the basis of their beliefs or ideology or dissent. They do not choose to come to our country to live off our prosperous economy; they come here in the hope that

[22] *Ibid*

their lives will be safer than it is back home. Their stay is temporary and hope to return when peace and democracy returns.

Personally, I hope someday in the near future Malaysia will be a party to the Refugee Convention and the 1967 Protocol. We have a moral duty towards humanity to be a party to this Convention. If Malaysia were to be a party to this Convention, then we can legalise the presence of refugees and asylum seekers in this country. Their status will no longer be that of illegal immigrants. They will then have access to medical facilities, to education, and to legal employments. They will be protected by our laws. They will not be exposed to exploitations. They will not be at risk of being the victims of human traffickers.

On migrants, although some migrants come to Malaysia because of choice, the vast majority of migrants, however, come to Malaysia because of economic hardship that they faced back home in their countries, and they look up to Malaysia as a place where they could find a decent employment in order to alleviate their economic hardship, as well as the economic hardship of their families back in their home countries.

Refugees and migrants are people and are entitled to be treated with dignity as human beings. We have a moral duty to make them feel welcome and secured. It must not be overlooked the fact that whilst there are migrants in this country, there are also Malaysian migrants overseas, in Australia, United Kingdom, Canada, New Zealand and the United States, towards whom we expect the host countries to accord respect, and fair and dignified treatment. We must appreciate the migrants' contribution to the economic development of our country. There must not be any feeling of prejudice towards refugees and migrants. They should not be looked upon as desperate or vulnerable people whom employers can take advantage off to exploit or to ill-treat. They deserve decent wages and fair terms of employment. They deserve the protection of the Constitution and the law.

I hope my keynote address will inculcate in the students of Taylors Law School awareness and interest or greater awareness and greater interest on the subject of migrants and refugees, particularly, on the legal aspects.

I end by wishing the students of the Law School all the best in your studies and a successful Law Awareness Day. Once again, thank you.

# PATEL v MIRZA: A NEW APPROACH TO THE ILLEGALITY DEFENCE

Harcharan Singh Ujagar Singh, Senior Lecturer in Law,
Taylor's Law School, Faculty of Business and Law, Taylor's University;
Barrister-at-Law (Lincoln's Inn); LL.M. (Merit)(Equity & Trusts)(London); Advocate & Solicitor of the High Court of Malaya (Non-practising)
Advocate & Solicitor of the Supreme Court of Singapore (Non-practising)
HarcharanSingh.UjagarSingh@taylors.edu.my

Abstract

In a landmark decision, a full bench of nine Justices of the United Kingdom Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 reviewed the proper approach to be taken by courts when confronted with a defence of illegality in private law claims. The claim in question was for the restitution of unjust enrichment arising out of a failed contract in which the claimant had paid a sum of money to the defendant pursuant to an illegal purpose that did not materialise. The Supreme Court unanimously allowed restitution, but there was a sharp difference in opinion on the proper approach to be adopted towards the illegality defence. A majority of the Supreme Court prescribed a new approach which the minority rejected. Whilst the new approach was formulated in the context of a claim for the restitution of unjust enrichment, it is arguable that the majority intended it to apply in all the other areas of private law involving the illegality defence. This paper seeks to examine how, if at all, the new approach has settled or clarified English law in the confused and confusing area of illegality.

Keywords: defence of illegality, recovery claims, rejection of rule-based approach, trio of considerations, proportionate response

## 1. Introduction

Illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment, and in a wide variety of circumstances[23]. This paper does not seek or purport to answer the question what kind of illegality triggers the illegality defence. This question is best answered by reference to any standard contract law text-book, although there is no uniform categorisation of when the illegality defence is engaged. Suffice it to say that whilst it is tempting to think that any and all types of legal wrong or transgressions of public policy will engage the illegality defence, that is not the case.

[23] Per Lord Toulson in *Patel v Mirza* [2016] UKSC 42 at [2]

Before *Patel v Mirza*[24] courts adopted a rule-based approach i.e. generally, the courts would not assist any claimant but would do so in certain exceptional situations. This approach was widely criticised. Despite undertaking a review, the United Kingdom Law Commission, did not recommend any reform. Accordingly, the United Kingdom Supreme Court responded to these criticisms in *Patel v Mirza*, formulating a new open-textured, multi-factorial approach with emphasis on the need for a proportionate response.
The question that this paper seeks to analyse is whether the new approach is satisfactory, to see if it has brought or will bring any clarity to this law. This will be done by examining the illegality defence, the pre-*Patel v Mirza* approach towards the applicability of the defence, the criticisms of such approach, followed by a detailed analysis of the decision in *Patel v Mirza* itself, before critically analysing the new approach formulated by the United Kingdom Supreme Court.

## 2. The Illegality Defence

This defence, which has been adopted in Malaysia[25], has its foundation in Lord Mansfield CJ's oft-repeated *obiter dictum* in *Holman v Johnson*[26] (a claim in contract):

> The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted.

The words 'lend its aid' and 'no right to be assisted' suggest that courts will not, in any circumstances, grant any remedy to a plaintiff if his claim is grounded on illegality, and that this may be so whether, in connection to the particular illegality in question, such plaintiff seeks to enforce some unperformed obligations on the part of the defendant or whether the plaintiff seeks to recover any benefits thereby conferred on the defendant. In short, illegality, prima facie, provides an iron-clad defence to both enforcement claims and restitution claims.

[24] [2016] UKSC 42
[25] See, e.g., Contracts Act 1950 s 24: Every agreement of which the object or consideration is unlawful is void.
[26] (1775) 1 Cowp 341, 343

*2.1. Public Policy Justifying the Illegality Defence*

Lord Mansfied's dictum, supra, clearly indicates that public policy[27] underpins the illegality defence. At least three broad possible public policy considerations have been put forward to justify the illegality defence:

*2.1.1. Maintaining the dignity of the courts*

Atiyah identifies the policy to be 'the undesirability of jeopardising the dignity of the courts.[28] The illegality defence has been described as a rule of 'judicial abstention' that 'precludes the judge from performing his ordinary adjudicative function in a case where that would lend the authority of the state to the enforcement of an illegal transaction or to the determination of the legal consequences of an illegal act.'[29] Whilst it is easy to see that the dignity of the courts would be offended in allowing a remedy to a plaintiff, for example, in cases involving gross immorality[30] or commission of serious criminal offences[31], it is questionable whether the same is the case where the plaintiff's infringement is innocent[32] or if the infringement is merely of, say, some regulatory legislation.[33]

*2.1.2. Deterrence*

The idea is that the courts' refusal to grant a remedy will deter persons from entering into illegal transactions. This 'rests upon the rather dubious assumption that everyone knows the law and will take heed of its deterrent effect. Deterrence is also properly the function of the criminal law, not the civil law.'[34] Phillip Sheperd QC, counsel for Patel, pithily dismissed the deterrence argument during submissions before the UK Supreme Court, stating, 'The difficulty with the deterrence argument is: who is being deterred? The

[27] Public policy was famously described as an "unruly horse" by Burroughs J in *Richardson v Mellish* (1842) 2 Bing 229 at 252

[28] Atiyah, PS, *An Introduction to the Law of Contract*, (1995, 5th ed, Oxford: Clarendon Press

[29] Per Lord Sumption in *Les Laboratories Servier v Apotex Inc* [2014] UKSC 55 at [23]

[30] See, for example, illustrations (j) and (k) to the Malaysian Contracts Act 1950 s 24

[31] But, see the startling observations by Lord Sumption at [253] – [254] in *Patel v Mirza* [2016] UKSC 42: "The rational rule, which I would hold to be the law, is that restitution is available for so long as mutual restitution of benefits remains possible…I would also reject the dicta…to the effect that there may be some crimes so heinous that the courts will decline to award restitution in any circumstances."

[32] See the discussion on the 'not *in pari delicto'* principle at paragraph 3 below

[33] In such situations courts have allowed plaintiffs to enforce agreements by focusing on the purpose of the legislation in question and whether there is a sufficiently close connection or link between the claim and the illegality. See, for example, *Shaw v Groom* [1970] 2 QB 504; *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683; *Hopewell Construction Co Ltd v Eastern & Oriental Hotel (1951) Sdn Bhd* [1988] 2 MLJ 621; *Ling Wah Press Sdn Bhd v Pustaka Utama Pelajaran Sdn Bhd* [1994] 3 CLJ 346.

[34] Ewan McKendrick, *Contract Law*, Palgrave, 11th edition (2015), page 269

defendant, if he succeeds will have been positively encouraged. So, deterrence as a policy is problematic.'[35]

*2.1.3. Maintaining the integrity of the judicial system*

Enonchong states that the policy is to protect 'the integrity of the judicial system by ensuring that the courts are not seen by law-abiding members of the community to be lending their assistance to claimants who have defied the law.'[36]

McLachlin J in the Canadian Supreme Court case of *Hall v Herbert*[37] further explains:

…to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law…the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web…"…We thus see that the concern, put at its most fundamental, is with the integrity of the legal system.

*2.2. A competing policy consideration*

Clearly, a strict and absolute application of the illegality defence allows the defendant to escape all liability irrespective of the merits of the plaintiff's claim, and no matter how unmeritorious or reprehensible the conduct of the defendant may have been. As stated by Lord Goff in *Tinsley v Milligan*[38]:

[I]t is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to the litigation. Moreover the principle allows no room for the exercise of any discretion by the court in favour of one party or the other.

Such 'an unforgiving and uncompromising'[39] doctrine is not only productive of injustice in some instances, it also runs counter to a competing public policy consideration of general application in law – that a person must not be allowed to gain from his own wrongdoing. As Lord Sumption stated in *Les Laboratoires Serviers and another v Apotex Inc and another*[40]:

[35] *Patel v Mirza* [2017] AC 467 at 473
[36] Enonchong, N, *Illegal Transactions* (1998) London: Lloyd's of London Press
[37] (1993) 101 DLR (4th) 129, 165
[38] [1994] 1 AC 340, 355
[39] *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 1 AC 1391, per Lord Walker at [185]
[40] [2014] UKSC 55, [2015] AC 430 at [18]

The doctrine necessarily operates harshly in some cases, for it is relevant only to bar claims which would otherwise have succeeded. For this reason it is in the nature of things bound to confer capricious benefits on defendants some of whom have little to be said for them in the way of merits, legal or otherwise.

The law had therefore steered 'a middle course between two unacceptable positions': as succinctly highlighted by Bingham LJ in *Saunders v Edwards'*[41]:

On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.

## 3. Pre-Patel v Mirza Approach

Having due regard to the conflicting public policy considerations in play, the courts developed a rule-based approach in determining the outcome of a claim tainted by illegality. Put simply, the rule-based approach involved the courts adopting a formulaic approach whereby the illegality defence would apply unless the plaintiff's claim fell within one or more of three broad exceptional categories of circumstances, outlined below, in which event the plaintiff would be granted a remedy notwithstanding the illegality.

### *3.1. Plaintiff not in pari delicto*

This exception has its origins in Lord Mansfield CJ's *obiter dictum* that 'if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, [*in pari delicto*] *potior est conditio defendentis*'[42]. This means that in the case of mutual fault, the position of the defendant is the stronger one, so that the court will refuse to assist the plaintiff and let the loss lie where it falls. Conversely, therefore, if the plaintiff were not *in pari delicto* (i.e. is less at fault than the defendant for the illegality concerned) the plaintiff's claim would be allowed.[43] In Malaysia the not *in pari*

[41] [1987] 1 WLR 1116, 1134

[42] (1775) 1 Cowp 341, 343

[43] For examples of the operation of the not *in pari delicto* exception see *Oom v Bruce* (1810) 12 East 225; *Hughes v Liverpool Victoria Friendly Society* [1916] 2 KB 482; *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192, PC; *Mohamed v Alaga & Co* [2000] 1 WLR 1815

*delicto* principle is said to be found in the words of the Contracts Act 1950, section 66.[44]

*3.2. Plaintiff not relying on the illegality*

In *Bowmakers Ltd v Barnet Instruments Ltd*[45] the English Court of Appeal held to the effect that a plaintiff could successfully bring a claim for conversion in respect of goods let to the defendant under hire-purchase agreements tainted with illegality so long as the plaintiff did not have to rely on the illegality to establish his title to the property:

…a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.[46]

In Malaysia, *Sajan Singh v Sardara Ali*[47], is authority for the proposition that a recovery claim will be allowed so long as the plaintiff does not rely on the illegality.

The majority decision of the House of Lords in *Tinsley v Milligan*[48] represents the high-water mark of the application of the no reliance principle, which extended its application to proprietary claims in equity. Milligan had contributed equally to the purchase price of a property which was put into Tinsley's sole name. Under trusts law, such a contribution gave rise to a rebuttable presumption of a resulting trust over a half share in the property in Milligan's favour. Tinsley sought to rebut this presumption by leading evidence of the illegal purpose of this transaction, which was known to both parties, and in which Milligan had participated, namely, to enable Tinsley to make false social security claims based on her (Tinsley's) registered ownership. The majority of the House of Lords held that Milligan's equitable proprietary right arose independently of the illegality. The source of her right was simply her contribution to the purchase price so that she did not have to rely on her own illegality in establishing her right. Accordingly, notwithstanding the maxim that

[44] *Ng Siew San v Menaka* [1973] 2 MLJ 154, FC affirmed in *Ng Siew San v Menaka* [1977] 1 MLJ 91, PC; *Ismail v Haji Taib* [1972] 1 MLJ 259, FC
[45] [1945] KB 65
[46] *ibid* at 71 per Du Parcq LJ
[47] [1960] 1 MLJ 52, PC
[48] [1994] 1 AC 340. See also *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2017] 5 MLJ 180, FC at [27] which is one of several Malaysian cases that cites *Tinsley v Milligan* with approval with regard to the no reliance principle

he who comes to equity must come with clean hands, the illegality defence failed, and Milligan was allowed to vindicate her equitable proprietary right.

*3.3. The timely withdrawal or locus poenitentiae principle*

This principle may be seen as an exception to the rule that a plaintiff may not rely on his own illegality. The rationale for this principle is to encourage parties to back out of an illegal purpose before it has been carried out. Basically, under this principle, a restitution claim would succeed if the plaintiff withdraws from the illegal purpose before any part of it had been carried out notwithstanding his reliance on his own illegality to explain how the property, the recovery of which he seeks, came to be in the defendant's name or possession[49].

Originally, the plaintiff also needed to show genuine repentance on his part[50]. However, this requirement was subsequently held to be unnecessary in *Tribe v Tribe*[51] where the plaintiff's withdrawal from the illegal purpose came about in purely fortuitous circumstances. Fully intending to defraud his creditors, the plaintiff transferred his shares in a company to his son (the defendant) so as to put them beyond the reach of his creditors. However, due to a change in circumstances over which he had no control, his need to defraud creditors disappeared. He then sought recovery of the shares. The defendant raised the rebuttable presumption of advancement to establish his title to the shares. The plaintiff sought to rely on the presumption of a resulting trust by pleading facts showing that his true intention was not to make a gift but to avoid the danger of losing his shares to creditors. The Court of Appeal held that he could lead evidence of the true purpose of the transfer, even though such purpose was fraudulent, to rebut the presumption of advancement as he had withdrawn from the transaction before any part of the illegal purpose had been carried into effect. With regard to the need for repentance, Millet LJ said[52]:

…genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent….voluntary withdrawal from an illegal transaction when it has ceased to be needed is sufficient.

In Malaysia, the withdrawal principle was recognised in *Palaniappa Chettiar v Arunasalam Chettiar*[53] although, on the facts, it did not apply as the illegal purpose had in fact been fully carried out thereby depriving the plaintiff any chance of timeous withdrawal.

[49] *Taylor v Bowers* (1876) 1 QBD 291; *Tribe v Tribe* [1996] Ch 107

[50] *Bigos v Boustead* [1951] 1 All ER 92 (where the plaintiff 'withdrew' not because he genuinely repented, but because the illegal purpose had been frustrated by external circumstances)

[51] [1996] Ch 107, [1995] 3 WLR 913

[52] *Ibid* at 938

[53] [1962] MLJ 143, PC

The Court of Appeal in *Tinsley v Milligan*[54] (Ralph Gibson LJ dissenting) after reviewing four English authorities[55] advocated the adoption of a flexible 'public conscience' test that addresses policy considerations rather than the rule-based approach when deciding whether or not grant relief to a plaintiff in cases of illegality:

These authorities seem to me to establish that when applying the "ex turpi causa" maxim in a case in which a defence of illegality has been raised, the court should keep in mind that the underlying principle is the so-called public conscience test. The court must weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing relief. The ultimate decision calls for a value judgment.[56]

However, on appeal to the House of Lords[57], the public conscience test was unanimously rejected. In his minority judgment Lord Goff stated:

There is no trace of any such principle forming part of the decisions in any of the cases in question. It follows that…it was not open to the majority of the Court of Appeal to dismiss the appellant's claim on the basis of the public conscience test invoked by Nicholls L.J., or indeed on the basis of the flexible approach adopted by Lloyd L.J…[58]

Lord Browne-Wilkinson, in turn in his majority judgment said:

[T]he consequences of being a party to an illegal transaction cannot depend, as the majority in the Court of Appeal held, on such an imponderable factor as the extent to which the public conscience would be affronted by recognising rights created by illegal transactions.[59]

The House of Lords' decision in *Tinsley v Milligan* thus laid to rest the public conscience test, which Lord Goff regarded as being the same as exercising judicial discretion[60]. However, it is more than arguable that it has now been resurrected by *Patel v Mirza* albeit stated in a modified form.

### *3.4. Calls for Reform*

The law on illegality, and the rule-based approach, in general, and *Tinsley v Milligan* and the 'no-reliance' principle, in particular, were never free from

[54] [1992] Ch 310
[55] *Saunders v. Edwards* [1987] 1 W.L.R. 1116; *Euro-Diam Ltd. v. Bathurst* [1990] 1 Q.B. 1; *Pitts v. Hunt* [1991] 1 Q.B. 24; *Howard v. Shirlstar Container Transport Ltd*. [1990] 1 W.L.R. 1292
[56] *Ibid* Per Nicholls LJ at 319-320
[57] *Tinsley v Milligan* [1994] 1 AC 340
[58] *Ibid* at 361
[59] *Ibid* at 369
[60] *Ibid* at 358

criticism.[61] The Law Commission of England and Wales described the effect of unlawful performance on parties' contractual rights as "very unclear" in its Consultative Report[62], and in the Court of Appeal in *Patel v Mirza* Gloster LJ observed as follows[63]:

As any hapless law student attempting to grapple with the concept of illegality knows, it is almost impossible to ascertain or articulate principled rules from the authorities relating to the recovery of money or other assets paid or transferred under illegal contracts. This court frankly recognised in *Tribe v Tribe* [1996] Ch 107 (per Nourse LJ, at p 121, and per Millett LJ, at p 135) that the authorities are irreconcilable.

With regard to the rule-based approach, it cannot be denied that, prima facie, legal rules promote certainty, consistency and predictability of the law, whilst judicial discretions tend to undermine these qualities. But, what if the legal rules themselves are complex, and uncertain and fluid in application as the Law Commission and Gloster LJ recognised? Or, what if a rule such as the no reliance principle, can lead to results that could be explicable on technical grounds, but does nothing to further the policy of the underlying legal prohibition?

Surely then, a strong argument can be made for replacing such rules with judicial discretion which gives judges the flexibility to come up with the most appropriate solution in the circumstances by having regard to all relevant policy considerations.

A brief analysis of *Tinsley v Millgan* suffices to show the inherent problems with the no reliance principle. In *Tinsley v Milligan* Lord Browne-Wilkinson explained the application of the reliance principle as follows[64]:

Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone, but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement does not apply a plaintiff can establish his equitable interest in the property without relying in any on the underlying illegal transaction.

[61] For an excellent summary of the difficulty surrounding the law of illegality, please see Andrew Burrows, *Restatement of the English Law of Contract* (OUP 2016) pages 221--222
[62] 'The Illegality Defence: A Consultative Report (2009)' (Consultation Paper No. 189, para 3.27)
[63] [2015] Ch 271 at [47]
[64] [1993] 3 All ER 65 at 87, HL

On the facts, Tinsley was unable to rebut the presumption of resulting trust. The presumption of advancement did not apply in her favour as she and Millgan were not in any of the recognised categories of relationship giving rise to this presumption. She was also unable to lead any evidence to rebut the presumption of resulting trust.

But, if the presumption of advancement had applied in *Tinsley v Milligan*, it is unlikely that Milligan would have succeeded. As Lord Browne-Wilkinson explained[65]:

In such a case, unlike the case where the presumption of resulting trust applies, in order to establish any claim the plaintiff has himself to lead evidence sufficient to rebut the presumption of gift and in so doing will normally have to plead, and give evidence of, the underlying illegal purpose.

Three related points emerge clearly from these two passages. Firstly, the no reliance principle approach is uncertain in scope and effect. Secondly, application of the principle depends on how the plaintiff pleads his case. If 'correctly' pleaded, he succeeds without any consideration to whether the policy underlying the prohibition is advanced or stultified by allowing his claim. Thirdly, the outcome of cases involving apparent gifts in transactions tainted with illegality depends on the type of relationship between transferor and transferee. In short, the no reliance rule was short on principle.

Not surprisingly the no reliance principle came in for strong academic criticism[66]. English Courts expressed disquiet even as they applied it[67]. The principle fared no better in other common law jurisdictions. For example, in Australia, the High Court in *Nelson v Nelson*[68] rejected the no reliance principle as the test of enforceability. Dawson J described this principle as wholly unjustifiable on any policy ground[69]. Toohey J highlighted that for the outcome of a particular case 'to be determined by the procedural aspects of a claim for relief is at odds with the broad considerations necessarily involved in questions of public policy'[70].

And in the Canadian Federal Court of Appeal, Robertson JA spoke of the difficulty with the exceptions to the classical model of the illegality defence as arising from "the legal manoeuvering that must take place to arrive at what is

[65] *ibid*
[66] See generally Berg [1993] JBL 513; Cohen [1994] LMCLQ 163; Enonchong (1994) 14 OJLS 295; Goo (1994) 45 NILQ
[67] See, for example, comments of Robert Walker LJ in *Lowson v Coombs* [1999] Ch 373 at 385, and Nourse LJ in *Silverwood v Silverwood* (1997) 74 P & CR 453 at 458-459
[68] (1995) 132 ALR 133
[69] *Ibid* at 166
[70] *Nelson v Nelson* (1995) 184 CLR 538 at 597

considered a just result"[71] and expressed the view that since the doctrine of illegality rested on public policy considerations "it is only appropriate to identify those public policy considerations which outweigh" the plaintiff's *prima facie* right to relief.[72]

Following *Tinsley v Milligan* the Law Commission of England and Wales included the illegality defence in the Sixth Programme of Law Reform (1995). Its first consultation paper, in 1999[73], recommended statutory reform by replacing the existing 'technical and complex rules' by a general judicial discretion[74] by way of statutory reform along the lines of the New Zealand Illegal Contracts Act 1970[75]. The second consultation paper, in 2009 noted the success of the New Zealand Act[76]. However, in its final confirmatory report, in 2010[77], the Law Commission concluded that although there were serious problems relating to the effect of illegality[78], the law of contract and unjust enrichment should continue to be developed by the courts. With regard to trusts law, statutory reform was recommended along the lines of a draft bill[79], but no legislation has been forthcoming.

With no reform forthcoming, English courts continued to grapple with the proper approach to the illegality defence. A discernible trend emerged. It favoured a flexible approach of applying judicial discretion after consideration of a range of factors and identifying the relevant competing policy considerations with a view to protecting the integrity of the legal system, rather than a strict rule based approach.[80]
In *Les Laboratoires Servier v Apotex Inc*[81] Etherton LJ described both counsel's rule based approach as "too dogmatic and inflexible"[82] and instead chose to follow the Law Commission's recommended approach:

that the illegality defence should be allowed where its application can be firmly justified by one or more of the following policies underlying its existence:

[71] *Still v Minister of National Revenue* (1997) 154 DLR (4th) 22 at para 24
[72] *Ibid* at para 49
[73] 'Illegal Transactions: The Effect of Illegality on Contracts and Trusts' (Consultation Paper No. 154)
[74] *Ibid* at para 1.19
[75] This section provides that the court may grant to any party to an illegal contract "such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purposes, or otherwise howsoever as the court in its discretion thinks just."
[76] 'The Illegality Defence: A Consultative Report' (Consultation Paper No. 189), para 3.81
[77] 'The Illegality Report' (Law Com No 320)
[78] *Ibid* paras 3.50 – 3.60. Broadly speaking these were complexity, uncertainty, arbitrariness and lack of transparency.
[79] Trusts (Concealment of Interests) Bill. See 'The Illegality Defence (HC 412, 2010), App A
[80] See *Gray v Thames Trains Ltd and another* [2009] 1 AC 1339, HL; *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391, HL
[81] [2012] EWCA Civ 593
[82] *Ibid* at [63]

furthering the purpose of the rule which the illegal conduct has infringed; consistency; the Claimant should not profit from his or her own wrong; deterrence; and maintaining the integrity of the legal system.[83]

Similarly, Toulson LJ advocated in *ParkingEye Ltd v Somerfield Stores Ltd*[84] that:

Rather than having over-complex rules which are indiscriminate in theory but less so in practice, it is better and more honest that the court should look openly at the underlying policy factors and reach a balanced judgment in each for reasons articulated by it.[85]

This trend continued in *Hounga v Allen*[86] where Lord Wilson in the leading judgment said:

The defence of illegality rests on the foundation of public policy…So it is necessary, first, to ask 'What is the aspect of public policy which founds the defence?' and, second, to ask 'But is there another aspect of public policy to which the application of the defence would run counter?

However, this trend suffered a setback when *Apotex* went on appeal to the UK Supreme Court.[87] Whilst the Court of Appeal's decision was unanimously upheld, the majority (Lord Sumption with whom Lord Neuberger and Lord Clarke agreed, and Lord Mance) reached the decision by not following Etherton LJ's approach. Lord Toulson[88], however, refused to criticise Etherton LJ's approach, pointing out that the Supreme Court itself had taken a similar approach in *Hounga v Allen*.

In *Bilta (UK) Ltd v Nazir (No. 2)*[89] the proper approach to illegality was not determinative of the outcome. Nevertheless, sharp differences of opinion were expressed on this matter. Lord Sumption advocated a rule-based approach, while Lord Toulson and Lord Hodge advocated the more open-textured flexible approach. Lord Neuberger thus expressed the view that the proper approach to the defence of illegality needed to be addressed as soon as appropriately possible.[90]

The opportunity for review arose in *Patel v Mirza*.

[83] *Ibid* at [66]
[84] [2013] QB 840
[85] *Ibid* at [52]
[86] [2014] UKSC 47
[87] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55
[88] *Ibid* at [62]
[89] [2015] UKSC 23
[90] *Ibid* at [15]

4. Patel V Mirza and The New Approach

The claimant (Patel) transferred £620,000 to the defendant (Mirza) under a scheme for Mirza to use the money to bet on share price movements based on inside information that Mirza expected to obtain. The scheme amounted to a conspiracy to commit the crime of insider dealing under section 52 of the Criminal Justice Act 1993. The insider information did not materialize, and the intended betting did not take place. Mirza failed to return the money to Patel, who then brought an action for its recovery based *inter alia* on unjust enrichment, arguing that the purpose or basis for transferring the money had failed totally. To establish his claim, Patel had to plead the facts surrounding the transfer, which clearly showed his active involvement in the conspiracy. Mirza raised the illegality defence.

The High Court[91] held that Patel's claim was unenforceable. In dismissing the claim, the trial judge held that, firstly, on the facts, the reliance principle of *Tinsley v Milligan* applied, and, secondly, the *locus poenitentiae* principle did not apply because Patel had not voluntarily withdrawn from the illegal scheme.

Patel's appeal was unanimously allowed by the Court of Appeal.[92] The majority (Rimer and Vos LJJ) adopted the classical rule-based approach. Whilst agreeing with the trial judge that the reliance principle did apply, their view was that the *locus poenitentiae* exception to the reliance principle applied. Gloster LJ's reasoning for allowing the appeal was different. She adopted the flexible multi-factorial public policy considerations judicial discretion approach.

Mirza's appeal to the Supreme Court was unanimously dismissed by the *coram* of nine Justices. However, their approaches were starkly dissimilar. Interestingly, both parties agreed that the rule-based approach should apply.

Nevertheless, five of the Justices (Lord Toulson, who delivered the main judgment, with whom Baroness Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed) rejected the rule-based approach, and adopted the flexible multi-factorial public policy considerations approach. In particular, the majority held that the no reliance principle of *Bowmakers Ltd v Barnet Instruments Ltd* and *Tinsley v Milligan* should no longer be good law, and that there was no need to refer to the *locus poenitentiae* doctrine in deciding the outcome. Their decision was based on the public policies involved and proportionality. They concluded that this was not an exceptional case where public interest required the dismissal of Patel's claim.

Three of the Justices (Lord Mance, Lord Clarke and Lord Sumption) rejected the majority's flexible approach, and opted to base their decision on the rule-based

[91] *Patel v Mirza* [2013] EWHC 1892 (Ch)
[92] *Patel v Mirza* [2014] EWCA Civ 1047; [2015] Ch 217

approach. They regarded the reliance principle as the starting point for prima facie rejecting Patel's claim but held that the *locus poenitentiae* doctrine, albeit in an expanded form, applied in Patel's favour.

Lord Neuberger also took a rule-based approach (albeit different from that of the other three Justices) in allowing Patel's claim, but recognised Lord Toulson's approach as being appropriate in some circumstances.

What emerges clearly, though, from the decision is that all the Justices agreed that, in general, illegality is not a defence to restitution of unjust enrichment claims.

*4.1. The Majority Reasoning: the trio of considerations*

Before formulating the new approach, Lord Toulson undertook a very lengthy review of the existing rules derived from case law relating to illegality, in particular the reliance principle and *Tinsley v Milligan*, to conclude that the state of the law was unsatisfactory, that there was a need for a change of approach[93] and then went on to draw heavily from Professor Andrew Burrows' *Restatement of the English Law of Contract* (2016, 2nd ed, OUP)[94] in formulating the new approach. In doing so Lord Toulson first identified the key question to be whether allowing a restitution claim tainted with illegality would 'damage the integrity of the legal system' and not 'whether the plaintiff is "getting something" out of the wrongdoing'.[95] He then rejected the rule-based approach, and set out what the majority considered to be the proper approach in answering this question[96]:

It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process?...one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality…That trio of necessary considerations can be found in the case law.

On the question of whether it would be disproportionate to refuse relief to which, but for the illegality, the plaintiff would be entitled, Lord Toulson

[93] *Patel v Mirza* [2016] UKSC 42 at [17] – [81]
[94] *Ibid* at [82] – [94]
[95] *Ibid* at [100]
[96] *Ibid* at [101]

referred to the eight factors suggested by Burrows in his *Restatement of the English Law of Contract* (2016, OUP) at pp 229-230 as potentially relevant.[97]

Lord Toulson concluded his approach by emphasizing that[98]:

The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

In allowing Patel's claim, Lord Toulson concluded[99]:

A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case.

Lord Kerr, in addition to agreeing[100] with Lord Toulson, delivered a concurring judgment rejecting the rule-based approach[101].

## 5. Critical Analysis of The New Approach

### *5.1. Is it really a new approach?*

It is easy to overlook a very important observation by Lord Toulson that the 'trio of necessary considerations can be found in the case law.'[102] The point being made appears to be that no new ground was being broken. In other words, this was not a revolutionary change in approach. Rather, it was some kind of refining and structuring of the existing law. With regard to the range of factors to be considered on the issue of proportionality, Lord Sumption observed that they too could be found in the case law.[103]

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[97] *Ibid* at [107]. The factors identified by Burrows are (a) how seriously illegal or contrary to public policy the conduct was; (b) whether the party seeking enforcement knew of, or intended, the conduct; (c) how central to the contract or its performance the conduct was; (d) how serious a sanction the denial of enforcement is for the party seeking enforcement; (e) whether denying enforcement will further the purpose of the rule which the conduct has infringed; (f) whether denying enforcement will act as a deterrent to the conduct; (g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct; (h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.

[98] *Ibid* at ]120]

[99] *Ibid* at [121]

[100] *Ibid* at [124], [142] – [143]

[101] *Ibid* at [133] – [134]

[102] *Ibid* at [101]

[103] *Ibid* at [260]

*5.2. Does the new approach promote certainty?*

How are courts to apply the trio of considerations to any given case? Given the very broad high-level generality of the identified considerations, it is not surprising that the Supreme Court could give little or no assistance on this question.

Public policy continues to be the underpinning of the law in this area, but what does public policy even mean? How are the courts supposed to accurately identify its contents in a particular case? And given that public policy, whatever it may mean, is not immutable, is it not possible that two cases with similar facts may have different outcomes as the public policy may have mutated in the meantime? Would not that then lead to incoherence, complexity and apparent arbitrariness, the very evils that the rejected rule-based approach was said to have engendered? If so, what is the need to do away with the rule-based approach, developed painstakingly over 250 years since *Holman v Johnson*?

It is therefore not surprising that the minority held very strong opposing views to the new approach. Lord Sumption had this to say about the new approach at various stages of his judgment:

With the arguable exception of (a) and (d) all of the considerations identified by Professor Burrows have been influential factors in the development of the rules of law comprised in the illegality principle as it stands today.[104]

…it would be wrong to transform the policy factors which have gone into the development of the current rules, into factors influencing an essentially discretionary decision about whether those rules should be applied…Perhaps most important of all, justice can be achieved without taking this revolutionary step.[105]

An evaluative test dependent on the perceived relevance and relative weight to be accorded in each individual case to a large number of incommensurate factors leaves a great deal to a judge's visceral reaction to particular fact. Questions such as how illegal is illegality would admit of no predictable answer, even if the responses of different judges were entirely uniform…Far from resolving the uncertainties created by recent differences of judicial opinion, the range of factors test would open a new era in this part of the law. A new body of jurisprudence would be gradually built up…[106]

[104] *Ibid* at [260]
[105] *Ibid* at [261]
[106] *Ibid* at [263]

The new approach is far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights. It converts a legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of "complexity, uncertainty, arbitrariness and lack of transparency" which Lord Toulson JSC attributes to the present law…We would be doing no service to the coherent development of the law if we simply substituted a new mess for the old one.[107]

Lord Mance[108] and Lord Clarke[109] expressed corresponding views in opposing and criticising the new approach.

Lord Toulson did attempt to answer these criticisms in his judgment.[110] His first retort, simply put, was that so was the existing law which he said was doctrinally riven with uncertainties. His second was that there is no evidence of uncertainty in those jurisdictions (New Zealand and the USA) that had adopted a relatively flexible approach to illegality. And his third was that whilst commercial transactions need certainty of the law, the same considerations do not apply to people contemplating unlawful activity. In such cases discovering where the public interest lay was more important.

On his third response, Lord Toulson found support from Lord Kerr who said:[111]

Certainty or predictability of outcome may be a laudable aim for those who seek the law's resolution of genuine, honest disputes. It is not a premium to which those engaged in disreputable conduct can claim automatic entitlement.

However, be that as it may, Lord Toulson's and Lord Kerr's argument does not take into account the plight of legal advisers who need certainty and predictability in advising clients who have engaged in such conduct and who now seek to recover benefits conferred.

Burrows[112] acknowledges that a flexible approach produces less certainty than clear and acceptable rules. However, he too argues that the law on illegality has always been uncertain notwithstanding the rule-based approach. He sees the new approach as rendering certainty through the greater transparency in the reasoning of the courts required by it. Burrows[113], however, disagrees with the majority view[114] that the law should not be too concerned with certainty when dealing with plaintiffs who have engaged in unlawful activities.

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[107] *Ibid* at [265]
[108] *Ibid at* [192], [204] – [208]
[109] *Ibid* at [216] – [219]
[110] *Ibid* at [113]
[111] *Ibid* at [137]
[112] Andrew Burrows, *Illegality after Patel v Mirza*, Current Legal Problems (2017) 70 (1): 55
[113] *Ibid*
[114] *Patel v Mirza* [2016] UKSC 42 at [113] per Lord Toulson, and at [137] per Lord Kerr

Virgo[115], on the other hand, agrees with Lord Sumption's view that the majority's approach was far too vague and wide. He points that the majority did not explain how the trio of considerations and the other range of relevant factors were applied on the facts of *Patel v Mirza* itself. Thus, the majority did not identify any reasons why they considered insider dealing as criminal, or how this was relevant to deciding how the illegality defence could or could not apply. Similarly, no policies which could be said to be adversely affected were identified, and the issue of proportionality of the law's response was not expressly addressed. He fears that the law may have gone a full circle in the development of the law, and reverted to a test similar to the previously discredited public conscience test. Virgo[116] continues to endorse a rule-based approach that generally rejects claims where the plaintiff is tainted with illegality but allows principled exceptions.

Murphy[117] whilst acknowledging that the majority approach is controversial in that it represents a departure from the usual common law method of reasoning-up by adopting a reasoning-down method, makes two arguments in support of *Patel v Mirza*. Firstly, he argues that illegality was one area where the reasoning-up approach had failed to produce a coherent set of rules, so that the majority's attempt to produce a coherent framework represents an improvement. Secondly, he points out that the common law itself has at times adopted a similar open-textured approach without disastrous consequences, an example being the approach adopted by courts when dealing with questions of abusing the process of the Court.

### *5.3. Proportionality*

Whatever might be the shortcomings of the new approach, the explicit emphasis on, and the need for proportionality, is to be lauded. This is not to say that proportionality was previously never a consideration. Cases decided under the not *in pari delicto* and the *locus poenitentiae* exceptions show how the courts grappled with this consideration. Apart from legitimising overt considerations of proportionality, the new approach allows a balance between a knee-jerk moralistic rejection of otherwise meritorious claims and a mindless application of the no reliance principle in allowing claims despite the plaintiff having been involved in serious unlawful conduct.

[115] Graham Virgo, *Patel v Mirza: one step forward and two steps back*, Trusts & Trustees (2016) 22 (10): 1090. Interestingly, Virgo appeared with Philip Shepherd QC as counsel for Patel at the UK Supreme Court.
[116] *Ibid*
[117] Emer Murphy, *The ex turpi causa defence in claims against professionals*, Journal of Professional Negligence (2016) 4 PN 241-245

*5.4. Scope of the new approach*

It is not entirely clear whether the new approach applies across the board to all causes of action. As Murphy[118] points out *Patel v Mirza* was a claim for restitution of unjust enrichment in the context of a failed contract, so that much of what was said in the Supreme Court could be regarded as *obiter*. This is reinforced by the fact that Lord Toulson relied heavily on Burrows' *Restatement of the English Law of Contract* in formulating the new approach. Further, the Supreme Court itself sent out a mixed message on this as there are also references in the judgments to the approach applying to contracts only.[119] An English High Court judgement[120] has doubted whether the new approach applies even to contractual disputes involving disputes other than failed contracts. However, very recently, the English Court of Appeal[121] approved of the application of the new approach in a claim by liquidators against a bank to recover negligently paid monies. It held that an appellate court should not interfere with a first instance application of the *Patel v Mirza* test merely because it would have taken a different view. To bar the company's claim would undermine the carefully calibrated *Quincecare* duty[122] and would not be a proportionate response, particularly where the bank's breaches were so extensive and the fraud so obvious.

*5.5. The status of locus poenitentiae*

The status of the *locus poenitentiae* principle is now unclear. Whilst the no reliance principle of *Tinsley v Milligan* was rejected by the majority, only Lord Toulson made any reference to the *locus poenitentiae* principle, and that was simply to regard it as irrelevant[123]. However, the principle is often seen as an exception to the reliance principle, and as such would seem inconsistent with the trio of considerations approach. It will, however, probably be a relevant factor to be considered in deciding the proportionality of the court's response although it will no longer be regarded as the main reason why a claim may be allowed.

6. Conclusion

*Patel v Mirza* has clearly resolved the disagreement in English courts as to the proper approach to be adopted towards the illegality defence, but, perhaps, no more than that.

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[118] *Ibid*

[119] *Patel v Mirza* [2016] 42 at [164] – [165] per Lord Neuberger.

[120] *Ronelp Marine Ltd v STX Offshore & Shipbuilding Co Ltd* [2016] EWHC 2228 (Ch), unreported (7 September 2016)

[121] *Singularis Holdings Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84

[122] I.e. the duty of care described in *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All E.R. 363

[123] *Patel v Mirza* [2016] 42 at [116]

Whether application of the trio of considerations coupled with the range of factors approach will successfully bring about clarity remains to be seen as these are early days. The common law tradition is to look to case law for guidance as to how any rule, test or approach is applied in factual situations. A seemingly good approach may prove difficult to apply, at least until a new body of coherent case law is built up, pending which legal advisers and their clients who need certainty and predictability will face difficulties. There is no assurance that the new body of case law on illegality will prove to be any less complex or uncertain than the rule-based approach.

Whether Malaysian courts will take the lead of *Patel v Mirza* also remains to be seen. As at the date of writing, there are no reported Malaysian cases referring to *Patel v Mirza*.

# LEGAL ANALYSIS ON STATELESS PERSONS – ISSUES IN SABAH [124]

Tamara Joan Duraisingam, Senior Lecturer in Law,
Taylor's Law School, Faculty of Business and Law,
Taylor's University; TamaraJoan.Duraisingam@taylors.edu.my

Abstract

Communities have been identified as being at risk of statelessness In Malaysia. Massey's definition of *de facto* statelessness is used to provide an understanding of how communities in Sabah are potentially *de facto* stateless. The article will touch on the history of migration and relate it to how migration from Philippines and Indonesia has brought about this situation of statelessness in Sabah. The article delves into the causes of statelessness in general and the Sabah stateless in particular. The consequences of being stateless will then be analysed. The article concludes with suggestions on how to move forward in terms of Sabah including how incorporation of International Law and the liberal interpretation of the Federal Constitution of Malaysia can assist in providing status to the Sabah stateless.

Keywords: *de facto*, *de jure*, stateless

## 1. Introduction

Within Malaysian domestic system, certain segments of our community have been given the unenviable status of being 'stateless persons'. In 2006, about 20,000 undocumented Indians born in the State both before and after independence were without birth certificates.[125] Due to conditions of life, in remote areas, such as agricultural estates, they have been either unable to register their births or ignorant of the need to register their births. Some have tried to apply for citizenship but are faced with numerous obstacles such as errors made in their applications either due to their own mistakes or mistakes by the National Registration Department. The Orang Asli also suffer the same issues of lack of documentation as the Indians do. Various factors including lack of knowledge and

[124] The ideas behind this article were presented at a '*Workshop for Academics: Researching and teaching nationality and Statelessness*' held on 27th & 28th September 2016, organized by USIM, UKM & UNHCR in Kuala Lumpur. The author has since put the ideas into written expression for purposes of publication.

[125] Ramdas Tikamdas, 'The Right to Identity and Citizenship under the Constitution and International Law' (Statelessness: An Obstacle to Economic Empowerment Conference, Kuala Lumpur, Malaysia, 2006, 2)

understanding of the importance of having documents causes the Orang Asli to be branded as stateless in Malaysia.

Focusing on the issue at hand, journalists have reported that a large population of street children exists in Sabah. Most of the children have been abandoned by their parents, who were illegal immigrants or refugees of Filipino or Indonesian descent.[126] They suffer the plight of being stateless due to the substantive issue of descent. Their lack of Malaysian descent coupled by failure to register their births in their respective States of descent causes them to be considered stateless persons in Malaysia.

### *1.1. Objectives of Research*

The objective of this research is to determine whether or not the Sabah street children are in effect stateless. The research then turns to the history of migration in Sabah which then eases into the 2nd and 3rd objectives which are the causes and consequences of statelessness in Sabah respectively. The final objective turns to steps that can be taken by various stakeholders to improve conditions in Sabah in relation to stateless street children.

### *1.2. Research Methodology*

This paper is a doctrinal paper that looks at various laws and literature pertaining to stateless persons within the international sphere in general and the domestic sphere (i.e. Sabah) in particular. The doctrinal analysis provides the platform for later quantitative and qualitative research to be conducted in this area of law specifically for Sabah.

## 2. The Concept of *De Facto* Statelessness

The concept of de facto statelessness becomes relevant as it is hypothesized that the Sabah stateless persons are stateless as of fact and not as of law. Hence *de jure* statelessness does not feature in this analysis.

According to Massey, as a general rule, non-enjoyment of rights attached to nationality does not constitute *de facto* statelessness. The exception lies where the person does not enjoy diplomatic protection and consular assistance of the State of nationality in relation to other States.[127]

Massey's definition on *de facto* statelessness is as follows:

[126] Anon, 'Stateless kids to get a home' *The Star* (London, 21 February 2005) 18
[127] Hugh Masey, *'Legal and Protection Policy Research Series'* (LPPR/2010/01), 31-32, 40

*De facto* stateless persons are persons outside the country of their nationality who are **unable or, for valid reasons, are unwilling to avail themselves of the protection of that country**.

Persons who have more than one nationality are *de facto* stateless only if they are outside all the countries of their nationality and are unable, or for **valid reasons**, are **unwilling to avail themselves of the protection of any of those countries**.[128]

Massey's definition of *de facto* statelessness becomes particularly important due to its adoption as part of the Summary Conclusions to the Prato Expert Meeting.[129] The Prato Conclusion goes further to highlight that prolonged non-cooperation including where the country of nationality does not respond to the host country's communications can be considered as a refusal of protection.[130] This notion may well apply to the stateless of Sabah.

In order to understand how statelessness is intertwined with irregular migration in Sabah, one has to look at the history of migration in Sabah.

*3. Migration in Sabah*

Historically, the Spanish conquest of the Philippines brought about migration from the Philippines to Sabah. Nomadic ethnic groups such as the Bajau Laut, who are also known as 'sea gypsies', have settled at the boundaries of Sabah.[131] Another group that has settled at the Sabah shores are the Suluk people that originate from the Sulu Sultanate of the Philippines. By the 16th century, the Brunei Sultanate had extended its powers to as far as Luzon, Sulu and South West Borneo. The expansion of the Brunei Sultanate, coupled the geographical landscape of Sabah with its 250-mile coastline and more than 200 islands, provided easy access into Sabah for Philippine and Indonesian citizens[132]. Easy access into Sabah has given rise to the problem of stateless children residing in Sabah.

During the Mindanao insurgency in the Philippines under the authoritarian rule of President Marcos, migration took place from the Philippines to Sabah between 1970 and 1977. At that point in time, the migrants were considered refugees of Suluk and Bajau origin, settling in the towns of Sandakan, Tawau and Lahad Datu.[133] By 1974, 54,000 IMM13 documents were issued under Regulation 11 (10),

[128] Ibid 60

[129] United Nations High Commissioner for Refugees, 'Expert Meeting The Concept of Stateless Persons under International Law Summary Conclusions, Prato Conclusions' (2010) (II (A) 2) Prato Conclusions < http://www.refworld.org/docid/4calae002.html> accessed 20 March 2014

[130] Ibid (F) (12)

[131] Kamal Sadiq, 'When States Prefer Non-Citizens Over Citizens: Conflict Over Illegal Immigration into Malaysia' (2005) 49 International Studies Quarterly 106

[132] TENAGANITA, Acting Today for Tomorrow's Generation (Regional Conference on Stateless / Undocumented Children In Sabah, Kota Kinabalu, Malaysia, 2005) 22

[133]Kamal Sadiq, (n 8) 106

Immigration Regulations 1963[134]. The IMM13 document issued under the Regulations allows the holder to reside and work in Malaysia, but the card is renewable on a yearly basis.

After 1978, even more persons claiming to be refugees from the Philippines began to make their way to Sabah. Technically, however, the reasons for claiming refugee status ended following the peace treaty between the Philippine Government and the Moro Liberation Front of 1976.[135] As such, those that arrived after 1977 were characterised as economic migrants that were fortunate enough to be able to establish networks with earlier arrivals to Sabah.

Cross-border movement in Sabah also included Indonesians who utilised informal entry routes to come into Malaysia. Early cross-border movement between the 1950s to the 1980s was prevalent, albeit unnoticed, as the Indonesians who arrived were not in competition with the local population.[136] Many of them eventually received permanent residence status and even citizenship. By the 1980s, however, bilateral labour laws were signed in the hope of a systematic in-flow of migrant workers. Unfortunately, since demand exceeded supply, illegal entry into Malaysia was rampant.[137] Hence, the stance of the Malaysian government became tougher by the 1990s with legalisation programmes introduced followed by security operations involving detention and deportation of illegal immigrants. The tough stand of the Malaysian government did not, however, stop undocumented migrants from Indonesia entering Malaysia.

In 2001, due to the strained relationship between the Malaysian and Philippine government,[138] the refugee status of Filipinos were revoked and further stay was conditional only upon receiving work permits.[139] The erratic policies of the Sabah State government have contributed to the next generation of Filipinos in Sabah being stateless.

As Malaysia is not bound by international treaty law that protects refugees and stateless persons, there is no obligation to create laws or specific procedures that allow for the granting of asylum or registering of refugees within the State. Nor is

[134] Immigration Regulations 1963, L.N. 228/1963

[135] Kamal Sadiq, 'When States Prefer Non-Citizens Over Citizens: Conflict Over Illegal Immigration into Malaysia', (n 8) 106; Z Abuza, *Militant Islam in SEA: crucible of terror* (Lynne Rienner Publishers 2003) 39

[136] Vijayakumari Kanapathy, 'Controlling Irregular Migration: The Malaysian Experience' (Regional Symposium on Managing Labour migration in East Asia, Singapore, 2007), 7

[137] Ibid, 8

[138] In 2000, the terrorist group known as the Abu Sayyaf, kidnapped foreign tourists and Malaysian from a resort off the island of Sipadan. This caused a strain the relationship between the two countries.

[139] Asian Migration News, 30 April 2001 as cited in Amarjit Kaur, 'Refugees and Refugee Policy in Malaysia' [2007] Journal of the UNE Asia Centre, 87

there an obligation to repatriate those who are no longer or not considered to be refugees. This has led to the increase in the number of stateless persons in Sabah.

## 4. Causes and Consequences of Statelessness in Sabah

Earlier account on the history of migration in Sabah relates to the subsequent causes and consequences of statelessness in that region. The following provides an illustration of the various causes and consequences of statelessness in Sabah.

### *4.1. Causes of Statelessness in Sabah*

Various causes of statelessness exist. In Sabah, foreign parents of Philippine or Indonesian descent tend to misunderstand the function of a birth certificate. Birth certificates are perceived by many as proof of citizenship when, in fact, the child's birth has to be registered in the respective consulate. [140] Hence, they have to go through a different process of registration compared to locals and may be unaware of this fact. Children of IMM 13 card holders can remain without proper documents due to a lack of knowledge on the part of their parents in Sabah. The child of an IMM 13 card holder is entitled to IMM 13 status, but the parents, due to their own ignorance, tend to apply for birth certificates rather than the IMM 13 card. This creates a lot of confusion as to the status of the child.[141]

There are various types of marriages that take place in Sabah. Marriages that are unregistered and mixed marriages are common in Sabah. By law, foreign workers are not allowed to enter into a marriage as long as they remain in the country. As such, their marriages are invalid and their children illegitimate. These children's births are not registered since one of the documents required upon registration is a marriage certificate.[142]

Mixed marriage between Indonesian and Philippine nationals is not a new phenomenon. The law requires that such marriages be registered at both consulates. The Indonesian government has a further requirement that entails all marriages having to be registered at the Indonesian District Court in Jakarta for the marriages to be legally valid.[143] Such cumbersome procedures make it difficult for children born of such marriages to have their births registered.

Mixed marriages between locals and foreigners may also pose a problem. A study conducted on women of Philippine origin in East Malaysia finds that foreign women who came to work in Malaysia express their dream of wanting to marry

[140] TENAGANITA, 'Acting Today for Tomorrow's Generation' (Regional Conference on Stateless / Undocumented Children In Sabah, Kota Kinabalu, Malaysia, 2005) 31

[141] Ibid, 34

34 C Olsen, 'Malaysia: Undocumented Children in Sabah Vulnerable to Statelessness' (Refugees International Bulletin, 13 June 2007)

[143] Undang-undang Republik Indonesia Nomor 23 Tahun 2006 Tentang Administrasi Kependudukan

local men.[144] However, where the local spouse has deserted the foreign spouse, the foreign spouse will not be able to register the births of their children with the National Registration Department. The children would normally be entitled to citizenship based on the *jus sanguinis* principle, but this is defeated due to lack of a marriage certificate.

Some of these children have been left behind by parents who were illegal immigrants. The illegal status of the parents is an inherent problem of theirs and an inadvertent cause of failure to register their births. Immigration crackdowns explained earlier exacerbate the situation.

In Sabah, some of the immigrants live in remote areas. Furthermore, there is a general lack of Philippine and Indonesian Consulate services and support in Sabah. The Philippine Embassy merely has a mobile consulate service that visits Sabah once every three months to handle important cases, such as emergency travel documents.[145] No permanent Consular service exists even though the need is dire due to the unresolved status of the ownership of Sabah in the eyes of the Philippine government.[146] Hence, the registration of births and issuance of passports are not on the agenda for the mobile consulate service. Passport renewals must be performed at the embassy in Kuala Lumpur. The Indonesian consulate services are available in major towns. Access to these services becomes an issue.

Prior to 1997, all children were issued a birth certificate. Since 1997, birth certificates of children born of foreign parentage have the words 'Daftar Asing' printed on their certificates. [147] Therefore, a great deal of confusion is caused by the various types of documents used to facilitate the work and integration of foreign workers.[148] Yet another problem pertaining to policy implementation that peculiarly arises in Sabah is that individuals may find their birth certificates being revoked without valid reasons being provided. [149] The Fact-Finding Mission to Sabah reports that individuals go to the Registration Department or take part in registration exercises in hope of getting an identity card only to get their birth certificates revoked. There have been cases where identity cards have been revoked and replaced by temporary identification receipts.[150]

The conclusion can be drawn that the predominant cause of *de facto* statelessness amongst those residing in Sabah is due to the failure to register births. The failure

[144] A-M Hilsdon, B Giridharan, 'Racialised Sexualities: the Case of Filipina Migrant Workers in East Malaysia' (2008) 15(6) Gender, Place and Culture, 622
[145] TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 39
[146] C. Olsen, 'Malaysia: Undocumented Children in Sabah Vulnerable to Statelessness' (n 34)
[147]TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 31
[148] A-M Hilsdon, B. Giridharan, 'Racialised Sexualities: the Case of Filipina Migrant Workers in East Malaysia' (n 21) 619
[149] TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 37
[150] TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 38.

to register births, in turn, is predominantly due to various negative internal and external factors. Internal factors include, lack of knowledge, types of marriages and the illegal status of parents. External factors are remote place of abode, inconsistent policies and poor policy implementation. The consequence of failure to register births is the increase in negative social conditions. Hence it is a cyclical problem that will cease only if the negative social factors that lead to the failure to register births are addressed.

*4.2. Consequences of Statelessness*

The consequences of statelessness are grave. Within the international sphere, an individual lacks diplomatic protection as a result of statelessness. A person must utilize nationality in order to obtain redress within the international sphere. For a stateless person, redress may not be conceivable as no State may be prepared to represent the individual.

Batchelor is of the view that:

… the stateless person is denied the vehicle for access to fundamental rights, access to protection and access to expression as a person under the law.[151]

Therefore, within the municipal sphere, the stateless person may not be able to exercise some 1st generation rights (i.e. civil and political rights) or 2nd generation rights (i.e. economic, social or cultural rights).

Generally, the most important rights of children jeopardised relate to education and health. Education is still inaccessible to thousands of stateless children of Sabah.[152] Children need to have a birth certificate or an identity card before they can be admitted into public schools in Malaysia.

Changes on birth certificates that took place in 1997 distinguishes foreign students from the local students and effectively denies them the right to public primary education. For stateless children without birth certificates however, the position has been constant. Such children have no right to primary or secondary public education as Article 12 of the Federal Constitution explicitly stipulates that there shall be no discrimination against any citizen with regards to admission to an educational institution maintained by a public authority.[153] Using the maxim *expressio unius exclusio alterius*, it is clear that non-citizens do not share these rights. The only option available to such individuals would be private education, which is too costly for most of the parents. In this respect, children of Indonesian descent have been more fortunate compared to the children of Philippine

[151] Carol Batchelor, 'Stateless Persons: Some Gaps in International Protection' (1995) 7 International Journal of Refugee Law 235
[152] TENAGANITA, 'Acting Today for Tomorrow's Generation' (n17) 45
[153] Article 12 of the Federal Constitution of Malaysia 1957

parentage. In Kota Kinabalu, for example, the Indonesian government has set up the '*Sekolah Indonesia Kota Kinabalu*'.[154] The Philippine government has not ventured along the same path and one of the reasons is the fact that a large proportion of the individuals who left the Philippines were refugees.

Children who have some level of education find that they are unable to further their education due to the lack of requisite documents. A birth certificate or identity card is needed for children to sit for major governmental exams. Therefore, there is a lack of motivation to study as the stateless child is unable to continue his or her education beyond a certain point.[155] Even if the child is within some form of education system, there is lack of support in terms of scholarships or other forms of aid. Although initiatives have been undertaken by civil society groups to assist these children, there are also fears that the initiative would be perceived by the government as the 'harbouring of illegals', which is an offence under the Immigrations Act 1959/63.[156] Hence no concrete initiatives have been formulated to provide *de facto* stateless children some form of further education.

The lack of access to education indirectly leads to greater violation of international norms. Sabah children that are *de facto* stateless engage in employment in order to contribute to the family income. Amongst the types of work that they perform include washing cars; carting wheelbarrows of goods in the market; selling plastic bags; peddling contraband cigarettes; and shining shoes.[157] Places of employment include markets, constructions site, shops and restaurants.[158] This employment is informal and stops if raids are conducted in those places of employment.

Young Sabah girls who are *de facto* stateless are sometimes taken in as illegal maids within domestic settings. If lucky, their employers will provide them with some basic education or skills training. This, however, depends on the goodwill of the employer. In other instances, the young girls are abused without recourse to assistance from governmental authorities due to their stateless condition.

Peculiarly for the stateless children of Sabah, the emotional turmoil of being separated from their parents, having no status in society and no right to education tends to lead to loneliness, frustration and hopelessness, which surfaces through behavioural changes. The Tenaganita fact finding team to Sabah witnessed children as young as six years of age smoking the cigarettes that they were selling. Drinking alcohol and glue sniffing is also not uncommon for these stateless

[154] Muguntan Vanar, 'No documents, so street children of KK can't get into school' *Sunday Star* (London, 18 Jan 2009)
[155] TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 50
[156]Section 55B of the Immigration Act 1959/63 (ACT 155)
[157] Muguntan Vanar, 'No documents, so street children of KK can't get into school' (n 31).
[158] TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 62

children.[159] Street children have also been blamed for petty offences, such as theft, in various parts of Sabah.[160]

Massive crackdowns on illegal immigrants also cause the *de facto* stateless person and *de jure* stateless refugee to fear arrest, detention and deportation. According to the Home Minister, the Home Ministry has been devising a mechanism that would enable the authorities to monitor all foreigners from the moment they enter the State until their departure from the State. One of the purposes of such a mechanism is to create an environment of fear and threat in order to compel foreigners without legal status to prepare to leave Malaysia immediately.[161]

There are various forms of detention that may occur. Administrative immigration detention occurs whilst asylum application is being processed. Additionally, there is pre and post criminal detention; and detention for the purposes of national security.[162] The stateless person in Malaysia is subjected to the two latter forms of detention. Mc Bride argues that such irregular status should not be an automatic basis for pre-trial detention.[163]

As a consequence of this method of detention, two problems arise for the stateless persons examined in the present research. Firstly, the stateless person, is living in the constant fear of arrest and detention. As they have no recourse to diplomatic protection, there would be no authoritative body to represent their interests. Secondly, for certain groups, such as the stateless children of Sabah, the arrest of their parents leads to an increase, rather than decrease, in the number of stateless children without any support and, therefore, concretizes their status of statelessness.

Street children in Sabah are also sometimes detained[164]. Cases have been reported of the deportation of children to Indonesia or the Philippines if relatives or friends do not attempt to secure their release.[165] There has also been a positive initiative by the government of rescuing these street children and handing them over to the Welfare Department, who later verifies their circumstances, takes the necessary steps to keep them off the street and provides them some education.[166] A special

[159] TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 58
[160] Muguntan Vanar, 'No documents, so street children of KK can't get into school' (n 31)
[161] Statement by Datuk Seri Hishammuddin Tun Hussein, Home Minister, reported by Zuhrin Azam Ahmad, 'Mechanism to monitor illegals, put ' fear into them'' *The Star* (Kuala Lumpur,16 Feb 2010) http://thestar.com.my/news/story.asp?file=/2010/2/16/nation/20100216143416&sec=nation accessed 25 October 2012
[162] The Equal Rights Trust Project, 'Stateless Persons in Detention' (2009) Legal Working Paper: The Protection of Stateless Persons in Detention under International Law, 32
[163] J. Mc Bride, 'Irregular Migrants and the European Convention on Human Rights' Council of Europe, Parliamentary Assembly, Committee on Migration, Refugee and Population, (2005) 21 AS/Mig/Inf, Caballero v United Kingdom (32819/96) 8 February 2000
[164]TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 66
[165]TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 67
[166] Muguntan Vanar, 'Sabah to rescue street children' *The Star* (Kuala Lumpur 9 July 2008)

federal task force has been set up that performs *Operasi Kanak-kanak Jalanan*, whereby children found on the streets or rounded up during state-wide anti-illegal immigrants exercises and sent to shelters.[167] Additionally, in an interview conducted with a Deputy Assistant Director of Immigration at Tawau, it was confirmed that children are currently being detained and deported together with their parents.[168] In this manner, the rights and safety of the children are safeguarded. Arguably, Malaysia is still attempting to achieve a balance between securitarianism and humanitarianism.

Stateless children are more susceptible to various diseases and health problems due to the fact that their living conditions are deplorable.[169] With the proliferation of clinics in Malaysia, some *de facto* stateless persons resort to getting treatment from private clinics as there may be clinics close to their place of abode. Rather than visiting government hospitals where their status of statelessness may be scrutinized and possibly lead to arrest and detention, private clinics may not insist on documentation, especially if the stateless individual is brought to the clinic by an informal employer. This, however, means higher cost of treatment.

In relation the stateless Sabah child, the cost of fees in the government hospital is double that the amount compared to what the Malaysian citizen pays even if the child is born in Malaysia.

*De facto* stateless persons tend to resort to other measures when encountering medical problems. Home delivery is what some *de facto* stateless persons resort to.[170] As a consequence of the home delivery, the child born will not have his or her birth registered. Self-medication using traditional methods is yet another common alternative for the stateless person, which naturally has its share of risks.[171]

## 5. Recommendations and Conclusion

In harnessing the existing strengths within the Malaysian Legal System, The Federal Constitution gives key provisions on the acquisition of citizenship in Malaysia that can be utilised to assist the plight of the stateless person. Amongst the key provisions are Article 14 (1) (b) read together with Section 1(e) Part II of the 2nd Schedule, which stipulate that those born within the Federation who are not citizens of any other country are citizens by operation of law. Article 19B Part III of the Second Schedule applies to abandoned new born children who are also

[167] Anon, 'Shelter in Kimanis takes stateless children off the streets' *The Star* (Kuala Lumpur, 27 February 2012)

[168]Interview with Surend Jayshree Praser, Deputy Assistant Director of Immigration, Tawau, Marco Polo Hotel, 8 July 2011, 7.45-8.10 pm. (Interviewee 1)

[64]TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 54

[170] Azizah Kassim, 'Filipino Refugees in Sabah: State Responses, Public Stereotypes and the Dilemma over Their Future' (2009) 47 (1) Southeast Asian Studies 69

[171] TENAGANITA, 'Acting Today for Tomorrow's Generation' (n 17) 58

entitled to citizenship by operation of law. Hence, the newborn stateless child could be made entitled to automatic acquisition of nationality. Citizenship by registration can be seen as a safety net for the abandoned child who has been unable to receive automatic citizenship by operation of law. Articles 15 to 18 of the Federal Constitution deal with citizenship by registration and the provisions cover a multitude of stateless persons. The provisions can be said to be protective of women and children, in particular, and work in line with the intentions of CEDAW[172] and CRC[173] treaty regimes. Citizenship by naturalisation is also available via Article 19 of the Federal Constitution.

Even without accession to the Stateless Persons Convention[174], pertinent rights can be made available to stateless women and children residing in Malaysia as the human rights conventions transcend the concept of citizenship. While not all of the rights provided for within the Stateless Persons Convention are contained in CEDAW and CRC, nonetheless the rights most crucial to the stateless person are included, such as education, health and employment. These are the rights that at least allow the stateless person to lead an organised life within the State. The additional provisions within the CRC, which even the Stateless Persons Convention has not considered, include the right to life, non-separation from parents, family reunification, freedom of expression, privacy, prohibition against torture, collective right of the minority child and cultural life.

Applying the bottom-up approach, NGOs are able to assist in the plight of the stateless person. The proliferation of NGOs in Malaysia is most certainly a boon to the State's human rights development. This is one of our strengths that can be nurtured for the betterment of the stateless person. NGOs advocate UNHCR programmes and help develop UNHCR's activities. NGOs that work closely with the UNHCR in Malaysia include, but are not confined to, the Malaysian Social Research Institute, SUARAM, Amnesty International and Health Equity Initiative. Certain NGOs, such as the Borneo Child Aid Society have begun providing education for stateless persons in Sabah. The internal and external relationships of NGOs that are mandated to assist the stateless person should to be strengthened to ensure that all share the similar objective of protecting stateless persons and ultimately eradicating statelessness. Strong internal relations would mean that the local NGOs are able to form coalitions and address problems collectively. Such coalitions are much easier to create compared to creating an association of member States, since NGOs are not constrained by the international legal concepts of sovereignty, territorial integrity and non-interference.

[172] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)
[173] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 13 (CRC)
[174] Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (Stateless Persons Convention)

In terms of external relations, transnational networking is the key to ensuring that the plight of stateless persons is addressed in equal measure worldwide. Such networks facilitate consistency of practice within the State and could lead to increased accession of relevant conventions. As stipulated by Tushnet, the transnational reach of NGOs provides a "universalist understanding of human rights" which is vital to the promotion of human rights within the State.[175]

In referring to the top-down approach, it is an advantage to have the UNHCR already providing assistance to the refugees and stateless in Malaysia. Additionally, it is beneficial that SUHAKAM works as a conduit between civil society and the federal government. The UNHCR has various competencies within the State including acting as *amicus curiae* as in the case of *Tun Naing Oo v Pubic Prosecutor Tun Naing Oo v Pubic Prosecutor*[176]. Perhaps, as proposed by Dolidze, the UNHCR can serve as a third-party interlocutor when third party intervention on behalf of a stateless person becomes necessary in instances where no State would be able to intervene in support of any application made by a stateless person in court.[177] SUHAKAM has worked together with the UNHCR in order to secure access to places of detention for the UNHCR. The Human Rights Commission of Malaysia Act 1999 (Act 597)[178] empowers SUHAKAM to improve human rights standards of the State. The hybrid approach is applied whereby, rather than 'coerce' the government into acceding the Stateless Persons Convention, SUHAKAM would be the best institution to coax the government into treaty accession since the institution has the closest nexus with the government compared to NGOs, the UNHCR or perhaps even other States. Continuous dialogue between the UNHCR and SUHAKAM, coupled with the link SUHAKAM has with the Malaysian government, is bound to have a positive bearing on the plight of stateless persons in Malaysia.

From the above analysis, it is clear that the Malaysian government is instrumental in improving the circumstances of stateless persons with the support of NGOs, the UNHCR and SUHAKAM. But the fate of stateless persons does not lie solely in the hands of the executive branch. The judiciary also has a pertinent role to play. Even though it is the State that is the subject of international law, the abstract entity of the State is made up of personnel from all three branches of government. As such, judicial reception of international law within the State is an important feature in providing protection to stateless persons. The judiciary should consider international law in good faith even though neither the Federal Constitution nor

[175] M Tushnet, 'The Inevitable Globalisation of Constitutional Law' (2009) 49(4) Virginia Journal of International Law 989

[176] [2009] 5 MLJ 680

[177] . Dolidze, 'Lampedusa and Beyond' Recognition, Implementation, and Justiciability of Stateless Persons' Rights under International Law' (2011-2012] 6(1) Interdisciplinary Journal of Human Rights Law 143

[178] The Human Rights Commission of Malaysia 1999 (ACT 597)

Human Rights Commission of Malaysia Act 1999 provides that the domestic court is bound by international law. [179]

Just as transnational network systems broaden the perspectives of officers working within NGOs, cross-national dialogue is capable of opening the minds of the judges to employ varied interpretation techniques. This highlights the importance of cross-national dialogue[180]. Discerning the *ratio decidendi* and *obiter dictum* through a simple reading of a judicial colleague's decision would not have the same effect as personally interacting with the judge and sharing thoughts and ideas. Judges should attend judicial conferences and interact with each other to enable the exchange of views on the various approaches that could be applied within the Malaysian context. The Malaysian judiciary has, in the past, employed a bold approach when interpreting provisions of the Federal Constitution in a liberal manner. Perhaps the time has come for further liberal reception and interpretation of international human rights instruments beginning with the UDHR.

Banks acknowledges that conventions are indeed indeterminate. Conventions:

…articulate a combination of rules and standards that grant State parties and adjudicators varying degrees of discretion.[181]

Failure to ratify or accede to a treaty may not prove detrimental to the State. Nevertheless, the entire operation of the international human rights legal regime depends on the principle '*pacta sunt servanda*'. A standardized approach to international law on stateless persons depends on accession to the three primary conventions which are the Stateless Persons Convention, the Reduction of Statelessness Convention[182] and The Hague Convention[183]. The Refugees Convention[184] ought to be acceded to as well. The Malaysian approach of acceding merely to a few specific conventions fails in protecting the stateless person at this point. As long as the Malaysian framework towards asylum is based upon national security, Malaysia will not accede to the primary conventions on statelessness such as the Stateless Persons Convention and the Reduction of Statelessness

[179] Rohaida Nordin, 'The Domestication of the Rights of the Indigenous Peoples (Orang Asli) in Malaysia' (Ph.D thesis, Lancaster University 2008) 145

[180] Li-ann Thio, 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) December (4) National Taiwan University Law Review 341

[181] Angela Banks, 'The Trouble with Treaties: Immigration and Judicial Review' Fall (2010) 84 Saint John's Law Review 1257

[182] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175 (Reduction of Statelessness Convention)

[183] Convention on Certain Questions Relating to the Conflict of Nationality Laws (adopted 13 April 1930, entered into force 1 July 1937) 179 LNTS 4137 (Hague Convention)

[184] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (Refugees Convention)

Convention. The approach based on national security will eventually cause the gap between the stateless person and the citizen to become more apparent.

In conclusion, it is deduced that statelessness in children of Sabah contain specific causes and consequences that relate to the history of migration within the region. These instances of statelessness remain *de facto* rather than *de jure* in the view of the author which in fact lessens the burden of the State as the focus on the international community remains on the *de jure* stateless. Nevertheless, the recommendations presented maintain a gradual yet progressive approach towards protection of the stateless person residing in Malaysia in particular the Sabah stateless. It is opined that Malaysia already has part of the tools necessary to provide an opportunity for Sabah stateless to live like any other citizen in this country.

# PROPOSED AMENDMENTS TO THE LAW OF RAPE IN MALAYSIA

Lai Mun Onn, Senior Lecturer in Law,
Taylor's Law School, Faculty of Business and Law,
Taylor's University; Lai.MunOnn@taylors.edu.my

Abstract

The offence of rape is provided for in section 375 of the Penal Code. This paper seeks to first identify what are the elements that make up the offence of rape. After identifying the elements and looking at the relevant case law, this paper will discuss if the law is satisfactory or not. Specifically, this paper will discuss if there is a need for the law to be gender specific, if rape should only be limited to vaginal sexual intercourse, are the 7 circumstances provided in section 375 necessary, should the age of consent be amended, should the exception remain and should there be a specific reference to the mental element of the perpetrator. In examining these issues, reference will also be made to the law on rape in neighbouring countries like Singapore and Thailand, as well as the law in India (as the Penal Code is based on the Indian Penal Code) and in the United Kingdom.

Keywords: criminal law, sexual offences, rape

## 1. Introduction

This paper seeks to propose reforms to the law of rape in Malaysia. First, the offence of rape is explained looking at the relevant statutes and case law. Thereafter, the elements will be examined in detailed to see if the law is satisfactory or not. If there is something lacking in the law or if it needs to be reformed, proposals shall be made on how the law can be improved.

Comparisons will be made with the law on rape in the United Kingdom, India, Singapore, Thailand and the United States of America. The legislations that will be referred to are as follows:-

(a) United Kingdom's Sexual Offences Act 2003;

(b) India's Penal Code;

(c) Singapore's Penal Code;

(d) Thailand's Criminal Code; and

(e) Texas Penal Code.

2. The Offence of Rape

The offence of rape in Malaysia is defined and explained in section 375 of the Penal Code.[185] Section 375 provides as follows: -

> A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:
>
> *(a)* against her will;
>
> *(b)* without her consent;
>
> *(c)* with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
>
> *(d)* with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
>
> *(e)* with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
>
> *(f)* with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her;
>
> *(g)* with or without her consent, when she is under sixteen years of age.
>
> *Explanation*--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception*--Sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, or is recognized in the Federation as valid, is not rape.
>
> *Explanation 1*--A woman--
>
> *(a)* living separately from her husband under a decree of judicial separation or a decree nisi not made absolute; or
>
> *(b)* who has obtained an injunction restraining her husband from having sexual intercourse with her,

[185] Act 574

shall be deemed not to be his wife for the purposes of this section.

*Explanation 2*--A Muslim woman living separately from her husband during the period of 'iddah, which shall be calculated in accordance with Hukum Syara', shall be deemed not to be his wife for the purposes of this section.

The first part of section 375 provides the elements that needs to be proved by the prosecution to establish the offence of rape. Basically, rape is when a man has sexual intercourse with a woman under the circumstances described in section 375 subsections (a) – (g). There is also a statutory exception provided for.

The prosecution will have to prove the following elements in order to successfully prosecute a person accused of committing rape:-

(a) The accused is a man and the victim is a woman

Section 10 of the Penal Code defines 'man' as a '…male human being of any age…'. The same section goes on to define 'woman' as a female human being of any age'.

(b) The accused must have sexual intercourse with the victim

(i) As stated above, section 375 contains an explanation which provides that penetration is sufficient to show that there was sexual intercourse.

(ii) Case law has further developed this. In *Nasrul Annuar bin Abd Samad*,[186] it was held that the penetration must be by the penis of the male accused. Based on the facts of this case, as the victim was not sure if the penetration was by the penis, the charge under section 375 failed to be proved.

(iii) In *Sidek bin Ludan v Public Prosecutor*,[187] it was held that penetration was proven as there was a tear in the hymen. It was held in obiter that even if there was no tear, any slightest penetration would suffice to show that sexual intercourse took place.

(iv) Further, and on line with this decision, case law has provided that there is also no need to show that ejaculation must have taken place[188] although the presence of semen can be evidence that penetration by the penis – and hence sexual intercourse – had taken place.[189]

[186] [2005] 1 MLJ 619
[187] [1995] 3 MLJ 178
[188] *Cheong You Hoi* [1999] MLJU 518
[189] *Ahmad Najib bin Aris* [2007] 2 MLJ 505

(c) The sexual intercourse must have taken place under one of the circumstances listed under subsections (a) – (g) of section 375 which has been reproduced above. These circumstances are where the sexual intercourse took place:-

(i) against the will of the victim,[190] or

(ii) without the consent of the victim,[191] or

(iii) with the consent of the victim but it was given under certain specific circumstances;[192] or

(iv) where the victim was under sixteen years of age. In this case, it does not matter if it was consented or not.[193]

(d) As mentioned earlier, there is an exception provided in section 375 where it will not be considered to be rape if the sexual intercourse was by a man with his own wife.

(i) It is provided that the marriage must however be '…valid under any written law for the time being in force, or is recognized in the Federation as valid'.[194]

(ii) Two explanations are also provided under the exception to explain further when a woman is deemed not to be a 'wife' for the purposes of this exception. Basically it lists down 3 situations. The first is where a woman is living apart from her husband under a decree of judicial separation or a decree nisi not made absolute.[195] The second is where a woman has obtained an injunction which restrains her husband from having sexual intercourse with her.[196] The third is where a Muslim woman is living separately from her husband during the period of 'iddah'.[197]

(iii) It must be noted that section 375A makes it an offence for a man to have sexual intercourse with his wife during the subsistence of a

[190] Penal Code, s 375(a). See the case of *Public Prosecutor v Nasar bin Ahmad & Ors* [1986] 2 MLJ 71 where the court found that the accused had sexual intercourse with the victim against her will and without her consent showing that there is can be overlap between 375(a) and (b).
[191] Penal Code, s 375(b). In the case of *Teo Eng Chan* [1988] 1 MLJ 156, it was held that there was no consent as consent was given out of fear. This is in line with section 90 Penal Code.
[192] Penal Code, s 375(c) – (f). For example, in the cases of *Aling bin Ayun* [1970] 2 MLJ 160 and *Chiu Nang Hong* [1963] 1 MLJ 119, consent of the victim was obtained out of fear of the victim from suffering physical harm.
[193] Penal Code, s 375(g)
[194] Penal Code, Exception to s 375
[195] Penal Code, Explanation 1 to the Exception to s 375
[196] ibid
[197] Penal Code, Explanation 2 to the Exception to s 375

valid marriage if he causes hurt or fear of death or hurt to his wife or any other person in order to do so.

(e) The punishment for rape is provided for under section 376 of the Penal Code.[198]

3. Is the law satisfactory?

In this section, the elements of the offence of rape will be looked into and analysis will be made if the law is satisfactory or not.

*3.1. Gender specific offence*

The first thing one can note is that the offence of rape is very gender specific where the perpetrator must be a male and the victim a female – this has been established earlier above.[199]

This has come under some criticism as the law does not protect a man for example from sexual intercourse against his will or without his consent – or the consent was obtained in a manner that does not arise from choice or freedom.

It is submitted that there is no justifiable reasons why a man should not be protected in the same manner as a woman is protected. The shame and humiliation that a man has to go through being made to engage in sexual intercourse against his will or without his consent should be the same or even worse when compared with a woman who is made to do the same. Obviously each case will stand on its own facts but it cannot be denied that the psychological as well as possible physical harm is real whether or not the victim is a male or female.

It is further submitted that this is a form of gender discrimination and the law needs to be amended to rectify the position.

Another problem that arises is where a man has undergone gender re-assignment surgery. In Malaysia, the practice is that such a person is required to go to the courts to seek for a declaration under the Specific Relief Act 1950 that his/her gender has been changed from what was the gender at birth.[200] This is usually accompanied by an application to compel the Registration Department to make the necessary amendment to the Identity Card (MyKad) to reflect the change of gender.

[198] This paper will not be looking into detail into the punishment for rape.
[199] See also section 375 of the Penal Code read with section 10
[200] See *Re JG, JG v Pengarah Jabatan Pendaftaran Negara* [2006] 1 MLJ 90, *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara* [2012] MLJU 1755, *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara* [2016] 12 MLJ 370

This means that a person who is born male will continue to be seen as one until the court has made a declaration that he is a female. He may have successfully gone through the gender re-assignment surgery and have the female genitals but if he has non-consensual (vaginal) sexual intercourse with another man (or it was against his will), it will not be rape unless there was a declaration from the court that 'he' is a 'she' before the sexual act.

The problem here is that a person may be for all intents and purposes a female in all perspectives – mental and physical (with reference to her genitalia and body structure) – after a gender re-assignment surgery but she can never be a victim of rape until and unless she has successfully applied to the courts for a declaration as such. The law is failing to protect people like these.

The position in Singapore and India is similar where their respective Penal Codes also define rape as having to be perpetrated by a man against a woman.[201]

It is interesting to note that some jurisdictions have moved away from being gender specific when it comes to the offence of rape. In Thailand, the offence of rape has been amended to use the words 'any person'[202] so that the perpetrator as well as the victim could me male or female.

This is also the position in the United Kingdom where the law on rape was amended in the Sexual Offences Act 2013. It removes the mention of gender when defining the act of rape under section 1 and replaces it as such:-

> (1) A person (A) commits an offence if—
>
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
>
> (b) B does not consent to the penetration, and
>
> (c) A does not reasonably believe that B consents.[203]

This way, the court does not need to be drawn into determining if the victim is legally a male or female – as long as there was a penetration of the victim's vagina, anus or mouth with the perpetrator's penis.

Further, there is also a problem on the flipside where the prosecution is required to show that the perpetrator is a male. Just like how there can be some confusion when it comes to a victim who was born a male but subsequently went through a gender reassignment surgery, the same problem can arise. The perpetrator could be born a female but subsequently went through a gender reassignment surgery and obtained a physiologically and anatomically correct and functioning penis. This

[201] Singapore Penal Code, s 375; Indian Penal Code, s 375
[202] Thai Criminal Code, s 276
[203] UK Sexual Offences Act 2003, s 1

person may then forcibly penetrate 'her' penis into a woman for sexual purposes and even if it was against the victim's will and/or without her consent, no offence will be committed as the perpetrator is not declared a 'male'.

If however we look at the law in the UK,[204] there is no need to show that the perpetrator is a male as long as he/she has a penis.

For the reasons stated above, it is submitted that the law should be amended to remove the gender specification of the perpetrators and victims for the sake of ensuring the all possible victims are protected and all perpetrators will not escape punishment due to technicalities as to what their gender is. As long as there is a reasonable doubt, the accused in Malaysia will walk free.

### *3.2. Vaginal Intercourse*

The second thing one can observe from section 375 of the Penal Code together with case law is that the offence of rape is only committed if there was vaginal sexual intercourse.

Although not expressly stated in section 375, it is clear enough that it does not include any other kinds of sexual intercourse – anal nor oral. The word used is 'sexual intercourse' and the explanation to section 375 provides that 'penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

As discussed above,[205] all cases make reference to vaginal intercourse – there must be penetration of the vagina of the victim and the penetration must be with the perpetrator's penis.[206]

It cannot refer to anal nor oral sex as these have been specifically covered under section 377A of the Penal Code. Section 377A provides as follows:-

> Any person who has sexual connection with another person by the *introduction of the penis into the anus or mouth of the other person* is said to commit carnal intercourse against the order of nature. (emphasis added)

It also cannot refer to penetration by anything else including other body parts. This is reflected in the recently amended[207] section 377CA which provides as follows:-

> 377CA. Sexual connection by object, etc.

[204] Ibid
[205] See notes 125-128 above.
[206] See *Nasrul Annuar bin Abd Samad* (n 2 above) where the charge failed as there was a doubt if the penis was used to penetrate the vagina of the victim.
[207] Amended by the Penal Code (Amendment) Act 2017 after the Court of Appeal acquitted the accused in *Bunya ak Jalong v PP* [2015] 5 MLJ 72 and called for the law to be amended.

> Any person who has sexual connection with another person by the introduction of any object or any part of the body, except the penis into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term of not less than five years and not more than thirty years and shall also be liable to whipping.

The question that begs to be asked is whether rape is only limited to vaginal sexual intercourse. The law in Singapore is the same – although the words are much clearer and unambiguous. The Singaporean Penal Code provides that the act of rape is when any 'man penetrates the vagina of a woman with his penis'.[208]

However, many other jurisdictions have moved away from this. The most telling one is India – where the Malaysian and Singaporean Penal Code is based on.

In India, rape is still only committed by a man but he can commit it by doing one of the following:-[209]

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or with any other person; or

(b) inserts, to any extent, any object or part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body such woman or makes her to do so with him or any other person, or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

So the law in India has been extended to cover anal and oral sexual intercourse as possibly rape. The penetration also is not limited to penetration by the penis.

This is similar in the UK where section 1 of the Sexual Offences Act 2003 defines rape as the penetration of the vagina, anus or mouth of the victim with the penis of the perpetrator. While the law still limits penetration only with the penis, it is extended to cover anal and oral sexual intercourse. This can be seen in the case of *R v Ismail*[210]where the accused was convicted of rape by inserting his penis into the mouth of the victim.

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[208] Singapore Penal Code, s 375

[209] According to section 375 of the Indian Penal Code, it must be done in one of seven descriptions listed therein.

[210] [2005]EWCA Crim 397. See also *R v Tilambala* [2005] EWCA Crim 2444 and *R v H* [2006] EWCA Crim 853 for examples of oral rape. For anal rape, see *R v B* [2007] EWCA Crim 2086 where the accused was convicted for committing anal rape on his sister.

In Thailand, the definition of rape is even wider. Section 276 provides as follows:-

> (1) Anyone who forcibly performs sexual intercourse with another by threatening the latter in whatever manner, by exercising forcible violence, by taking advantage of the latter being in a state of irresistibility, or by causing the latter to mistake him for a different person, shall be liable to imprisonment from four years to twenty years and a fine from eight thousand baht to forty thousand baht.
>
> (2) To perform sexual intercourse, in paragraph 1, means to satisfy the desire of the performer by using the genital organ of the performer to do something against the genital organ, anus, or oral cavity of another person, or using any other thing to do something against the genital organ or anus of another person.

Therefore, according to the law in Thailand, the act of sexual intercourse which is criminalized involves vagina, anal and oral sexual intercourse and it can be committed using objects and body parts.

It seems to imply that the law in these jurisdictions view non-consensual vagina sexual intercourse just as serious as non-consensual anal/oral sexual intercourse. It is a sexual act that was done without the consent of the victim and as such, has been categorized together as the offence of rape.

Coming back to Malaysia, should the law then be changed to not only limit the offence of rape to vaginal sexual intercourse? If this is to be done, then the amendments will not just affect the provision of rape in section 375 but also other provisions that deal with other kinds of sexual intercourse – eg. anal and oral sexual intercourse that is covered in sections 377A, 377B and 377C.

On the one hand, there is an argument that may be made that such an amendment is not urgent as anal and oral sexual intercourse – as well as penetration with objects and body parts – are already criminalised and as such, potential victims are afforded some sort of protection from the law and would be perpetrators may be deterred and if they are not, they will have to answer for their crimes.

On the other hand, the law needs to reflect the severity of the offences – and by separating the offences into different category such as 'rape' and 'carnal intercourse against the order of nature' (sections 377A, 377B and 377C), it may appear that the law views a particular crime less seriously as compared with the other.

It is therefore submitted that if the law on rape is to be amended, it should be a thorough one and will have to include amending all sexual offences found in the Penal Code.

*3.3. Circumstances making sexual intercourse rape*

In order for the sexual intercourse to amount to rape, it must be done under one of the 7 circumstances described under section 375 of the Penal Code. They are as follows:-

(a) against her will;

(b) without her consent;

(c) with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;

(d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;

(e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;

(f) with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her;

(g) with or without her consent, when she is under sixteen years of age.

As seen above earlier,[211] the Indian Penal Code also provides for 7 descriptions.[212] But in Singapore, section 375(1) of the Penal Code is very simple – the penetration

[211] n. 23

[212] The seven are slightly different from Malaysian law. There are:-
(First) — Against her will.
(Secondly) —Without her consent.
(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
(Fourthly) —With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be law-fully married.
(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupe-fying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
(Sixthly) — With or without her consent, when she is under sixteen years of age.

of the vagina must be without her consent.[213]If the victim is under 14 years of age, then it does not matter if there was consent or not.[214]

In the United Kingdom, the Sexual Offences Act 2003 provides that for it to be rape, there must not be any consent to the penetration.[215]

The question that arises is if there is such a need to describe the circumstances as such. It is submitted that there is no need to list down and describe the circumstances so specifically. It will not be helpful and it can cause more confusion.

Subsection (b) makes it very clear that if the sexual intercourse is without the consent of the woman, then it can be considered to be rape.

In the next subsection, it is provided that if there was consent but it was obtained under two different circumstances, it can still be considered to be rape. The first circumstance under subsection (c) is where the consent was obtained by putting the woman in fear of death or hurt. The second circumstance is where the consent was obtained under a misconception of fact and the man knows or has reason to believe that the consent was given as such.

It is submitted that these two circumstances are already covered under section 90 of the Penal Code which provides that if consent was obtained '…by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception…', such consent is not a consent as intended by any section in the Penal Code. Simply put, there is no consent if the circumstances in subsection (c) takes place and the situation will fall back then to subsection (b) where there was no consent to the sexual intercourse.

Similarly, in subsection (d), the circumstance described therein is where the consent was given mistakenly – because the woman believed that the man she is consenting sexual intercourse with is a man who she is married to or to whom she would consent. This also falls squarely under section 90 of the Penal Code where the consent was obtained under a misconception of fact and therefore it cannot be considered as a valid consent.

As for subsection (e), the circumstance here is where consent was given but the woman was unable to understand the nature and consequences of her consent. This too is covered under section 90 of the Penal Code where subsection (b) provides that the consent is not valid if it was given by a person who was unable to '…understand the nature and consequence of that to which he gives his

[213] Singapore Penal Code, s 375(1)(a). See *Public Prosecutor v Victor Rajoo* [1995] 3 SLR(R) 189 where it was held that just because there was no injuries suffered by the victim, it does not mean that the sexual act was consensual.
[214] Singapore Penal Code, s 375(1)(b)
[215] Sexual Offences Act 2003, s 1(1)(b)

consent'. However, section 90 is a bit more specific in that it provides that the reason why the person is unable to understand is because of unsoundness of mind or intoxication.

As for subsection (f), this seems to be something that is not covered under section 90. It is when the consent was obtained by using a person's position of authority over the woman or because of professional relationship or other relationship of trust.

It is suggested that perhaps one of the ways to simplify the law is to have a proper definition of 'consent' in the Penal Code. In the United Kingdom, the Sexual Offences Act 2003 provides that a person consents if he agrees by choice, and has the freedom and capacity to make that choice.[216] So in the circumstances that fall under section 375(c) – (f), there can be no consent as whether the agreement given was not by choice and/or the woman did not have the freedom and capacity to make that choice.

It is submitted that section 90 can be amended to include a definition or explanation as to what can amount to a valid consent. It can be expanded to also include situations which fall under section 375(f) where consent obtained by an abuse of position of authority or trust cannot be considered as a valid consent in the Penal Code.[217]
This way, the Penal Code need not have to list down all the possible scenarios and circumstances but instead to just provide the legal principle that can be applied in all circumstances.

One last thing to consider is subsection (a) to section 375. This is where the sexual intercourse took place against the will of the victim. Is there still a need to retain this? Section 375(a) provides that if the sexual intercourse is done against the will of the woman, it can amount to rape.

Can a woman consent to sexual intercourse when she is not willing to engage in it? It is submitted that if the sexual intercourse is not something that she is willing to engage in, the law should view that she is not consenting to the same.

Therefore, it is submitted that with a proper definition of consent in the Penal Code, subsections (a), (c) – (f) to section 375 can be removed.

[216] Sexual Offences Act 2003, s 74

[217] A good example is found in the UK Sexual Offences Act 2003 where section 74 provides that a person consents to something '…if he agrees by choice, and has the freedom and capacity to make that choice'.

*3.4. Statutory rape*

One of the circumstances that make sexual intercourse rape is where the woman is under 16 years of age.[218] This is referred to as 'statutory rape' – where it does not matter if there was consent or not. The law views that a woman under 16 years of age is not able to validly consent to sexual intercourse.

In every other jurisdiction, there is a law on this. But what is not common is the age. For example, in India, the age of consent is 18 years old.[219] That is high when compared with Singapore where the age of consent is 14 years old.[220] In Thailand, the age of consent is 15 years old.[221]

The question that is begging to be asked is what is the right age for the law to adopt? Even in Malaysia, the law is not very consistent. Although a person is no longer a child when he/she turns 18,[222] that person still is not allowed to vote in a general elections until he/she turns 21. But such a person's consent is not relevant in the context of sexual intercourse if she is a woman below 16 years old. Further, according to section 90(c) of the Penal Code, the general rule is that a person under 12 years old is unable to consent to anything (unless the contrary appears from the context).

With all these different ages, it is hard to understand why it is so. For example, a 17 year old girl can consent to sexual intercourse with a man as she is above 16 years old but the same girl cannot consent to sexual assault under section 14 of the Sexual Offences Against Children Act 2017 because she is under 18 years old.

Section 14 of the Sexual Offences against Children Act 2017 provides as follows:-

> Any person who, for sexual purposes –
>
> (a) touches any part of the body of a child;
>
> (b) makes a child touch any part of the body of such person or of any other person;
>
> (c) makes a child touch any part of the child's own body; or
>
> (d) does any other acts that involve physical contact with a child without sexual intercourse
>
> commits an offence…

[218] Penal Code, s 375(g)
[219] As amended by section 9 of the Criminal Law Amendment Act 2013.
[220] Singapore Penal Code, s 375(b). It is interesting to note that for the offence of sexual penetration, it will be an offence if the victim is under 16 (section 376A).
[221] Thai Criminal Code, s 277
[222] See also section 2 of the Sexual Offences Against Children Act 20917 where a child is said to be one under 18 years old.

It is strange that the law allows the man to have sexual intercourse with a 17 year old girl but does not allow him to 'touch any part of her body'. The law on the age of consent in Malaysia clearly needs to be standardised and clarified. On the one hand, just because a female is a child (under 18 years of age), it does not necessarily mean that she is unable to understand the nature of what she is consenting to when she agrees to have sexual intercourse. On the other hand, the paternalistic nature of the law seeks to protect young girls from being taken advantage of.

Another related issue is whether the Romeo and Juliet law has a place here in Malaysia. Romeo and Juliet laws are common in the United States and it is regarding situations where teenagers (or where the man is not much older than the girl) indulge in consensual sexual intercourse. It is not a situation where an older man takes advantage of the naivety of a young girl – but instead, it is a situation where young lovers consent to sexual intercourse which can lead to dire consequences for the young boy. Such law seeks not to criminalise such acts, or at the very least, ensure that the punishment is not unduly harsh.

For example, in the state of Texas, if a man has consensual sexual intercourse with a girl under the age of 17, but at least 14 years old, it may still be statutory rape but the man need not register as sex offender if there is no more than a three-year age difference between the two.[223]

There may be an argument against having such laws here in Malaysia as there is no sex offender register. Further, the judge can take into account the so called consent and the lack of coercion and violence to accordingly mete out a less harsh sentence. The reply to such argument is that eventually we will need to have a sex offender register. Furthermore, it may be important not to categorise young men 'in love' together with sex perverts and predators who take advantage of young girls.

Therefore, it is submitted that the age of consent needs to be re-looked into and changes need to be made to make the law more consistent. There is also a need to include provisions which deal with consensual underage sex where the perpetrator is not much older than the victim.

### *3.5. Marital rape*

The exception to section 375 provides that if the woman is the wife of the perpetrator, it shall not be rape.

[223] Texas Penal Code, s 22.011(e)(2)

In Singapore, a similar exception is found in section 375(4) of the Singapore Penal Code.[224] In India, this is provided for under Exception 2 to section 375 of the Indian Penal Code.

There is no such exception under Thai law but the law provides that the court may impose a more lenient punishment if the man and wife still wish to live together.[225]

In the UK, the House of Lords in the case of *R v R*[226] made it clear that there is no such exception under English law. Lord Keith of Kinkel in delivering the main judgment held as follows – 'in modern times the supposed marital exemption in rape forms no part of the law of England'.[227]

It is submitted that the law in Malaysia should be the same too. At the end of the day, the law on rape is straightforward – it is a sexual act that is carried out without the consent of the victim. It should matter who the victim is or how the victim is related to the perpetrator. The main question that needs to be asked is if the sexual intercourse was consented to. Just because the victim may have agreed to be lawfully married to the perpetrator, it does not mean that she had consented to sexual intercourse at any time.

In fact, it is submitted that it is ridiculous to impose upon the woman the obligation to take out an injunction restraining her husband from having sexual intercourse to protect herself from being raped by him. This is an unnecessary burden placed upon the victim when it should be the perpetrator who needs to take the responsibility and initiative to establish if there was consent in the first place.

As proposed earlier,[228] if there was a proper definition of consent in the Penal Code, it would make it easier for the court to decide if the sexual intercourse was rape or not – by applying the law to the facts to establish if there was in fact consent present. Consent cannot be implied based on something that took place some time ago. Just because a woman consented to be married to a man, it surely cannot mean she is consenting to sexual intercourse all the time and at any time.

### *3.6. The mental element*

All Criminal Law lawyers will be familiar with the Latin maxim, *Actus non facit reum nisi mens sit rea*. Basically, what it means is that an act itself is not criminal unless it is accompanied with a guilty mind. From this maxim, one can see that for each crime, there must first be the external elements (or some may call it *actus reus*)

[224] See *PP v N* [1999] 3 SLR(R) 499 where the accused had sexual intercourse with his wife after tying her up. The accused was not charged for rape but for wrongful confinement, causing hurt and criminal intimidation.
[225] Thai Criminal Code, s 276(4)
[226] [1992] 1 AC 599
[227] Ibid, at page 623
[228] See para 2.3 as well as section 74 of the Sexual Offences Act 2003.

and there must also be the guilty mind/mental element (or some may call it the *mens rea*).

In section 375, the external elements are clear – there must be sexual intercourse between a man and woman and it must be done in one of the circumstances listed under subsections (a) – (g).

What is not clear is the elements required to show the mental state of mind of the perpetrator. While subsections (c) and (d) make some reference to the state of mind of the accused,[229] section 375 generally does not make any reference to the state of mind of the accused. Although it is obvious that the sexual intercourse must be done intentionally, there is nothing to require the man to know or have reason to believe in the circumstances listed under subsections (a) – (g).

The law is similar in India and Singapore where no explicit reference is made to the state of mind of the perpetrator.

Under UK law however, the Sexual Offences Act 2003 expressly provides for the state of mind of the accused. The accused must not have reasonably believed that there was consent.

In the High Court case of *Rozi bin Ramli,*[230] the fact that the accused knew the victim was below 16 years old was something that the court needed to take into consideration to see if the accused was guilty or not of committing rape under section 375(g).

Therefore, although not explicit in section 375, Courts appear to require the perpetrator to have the mental element – at the very least, the necessary knowledge of the circumstances that make the sexual intercourse a criminal act.

It is submitted that it is imperative that the necessary guilty mind of the accused must be proven before he is found guilty of rape. It will not be fair to find him guilty of rape under section 375(b) (sexual intercourse without the woman's consent) if he honestly but mistakenly believed that the woman was consenting and it was reasonable for him to believe so.

In the case of *Teo Eng Chan & Ors*,[231] the Court considered the possibility that there was a mistake on the part of the accused in thinking there was consent and if that was the case, whether the accused can rely on section 79 of the Penal Code and be found to be not guilty. Section 79 provides as follows:-

[229] Subsection (c) requires the man to know or has reason to believe that consent by the woman was given under a misconception while subsection (d) requires the man to know that he is not the husband of the woman.
[230] [1997] MLJU 177
[231] [1988] 1 MLJ 156

> Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

This case appears to say that an accused may rely on this exception of mistake of fact to be acquitted of the rape charge. Therefore, even if section 375 is silent as to the state of mind of the accused, it does not prevent the accused from relying on section 79.

However, it is submitted that there is still a need to expressly provide for the state of mind of the accused in section 375. Section 79 is an exception and the burden of proving an exception lies on the accused.[232] This would mean that the accused will have to prove his innocence. If the mental element is provided for in section 375, the burden of proving it will lie on the prosecution.

It is submitted therefore that section 375 should be amended to explicitly provide for the mental element of the accused. The most suitable mental element would be what is provided in the English Sexual Offences Act 2003 where the accused must not have reasonable belief that the victim consented to the sexual act.[233] This means that if the accused believed that there was consent, it will be sufficient to acquit him even if there was in fact no consent but it was reasonable for him to believe as such.

The problem that may arise is if the accused honestly believed there was consent but no other reasonable person would have held such belief. This means that there could be a possibility that a person who does not have a guilty mind (he honestly believed there was consent) can still be found guilty of rape. Perhaps the reasoning behind this is that if a reasonable person would not have held such belief, it is highly probable that the accused could not have held such a belief.

## 4. Conclusion

The law on rape as provided for under section 375 of the Penal Code is in need to be updated and amended. Based on what had been discussed above, here is a summary of things that need to be amended:-

(a) The removal of references to gender in the definition of rape;

(b) The inclusion of oral and anal sexual intercourse in the definition of rape;

(c) The removal of circumstances (a), (c), (d), (e) and (f) in section 375 and the inclusion of a definition of 'consent';

[232] Evidence Act 1950, s 105

[233] This is in line with the proposal earlier that that section 375 be amended to just provide that rape is sexual intercourse without the consent of the victim.

(d) The age of consent to sexual intercourse will have to be consistent with other provisions regarding children in other statutes eg Sexual Offences Against Children Act 2017;

(e) Consensual sexual intercourse between children (or where the adult is not much older than the child) should be dealt with differently;

(f) The exception to section 375 should be removed;

(g) There should be expressly included the mental element of the perpetrator in the definition of rape under section 375.

These proposals are far-reaching and the amendments needed will affect more than just section 375 of the Penal Code. In fact, it may not be limited to the provisions of the Penal Code. But it is something that needs to be done to ensure that potential victims are protected and possible perpetrators be deterred and those who commit the wrong will be brought to justice and not escape due to technicalities.