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REASSESSING THE LEGAL STATUS OF GAZA IN LIGHT OF THE ICJ'S RECENT PALESTINE ADVISORY OPINION

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ABSTRACT

Israel unilaterally declared in 2005 that they disengaged from Gaza and that the latter was no longer an occupied territory. Since then, the legal status of Gaza has become a contentious issue. The debate has resurfaced due to Israel's onslaught in Gaza that started after 7 October 2023. The situation has become worse due to a very recent controversial proposal of President Trump to assume control over Gaza and the relocation of its Palestinian residents to neighboring countries, as well as the Israeli military's plans for an extensive ground invasion to militarily occupy Gaza entirely. The paper is primarily doctrinal legal research, analyzing various interpretations of Article 42 of the Hague Regulations and the recent Palestine Advisory Opinion of the International Court of Justice on effective occupation. The paper finds that the Court rejects the requirement of boots on the ground and affirms the potential control approach, according to which Gaza is still an occupied territory. The Court also reaffirms the self-determination of Palestinians, including the people in Gaza. Despite whatever plans are in the minds of US and Israeli leaders regarding Gaza, Israel is legally bound to respect the right to self-determination of Palestinians and thus the two-state solution.

Keywords: Occupation of Gaza; ICJ's Palestine Advisory Opinion; Hague Regulations; actual control approach; potential control approach

INTRODUCTION

Israeli armed forces occupied Palestine, inclusive of the Gaza Strip, the West Bank, and East Jerusalem, in 1967. In the Occupied Palestinian Territory (OPT), Israel extensively violated humanitarian and human rights law principles. In the 2004 Palestinian Wall Advisory Opinion, the International Court of Justice (ICJ) decided to respect the right of self-determination of Palestinians, to demolish the Wall, and to give reparation to them (Wall Advisory Opinion, 2004). Israel did not comply with the decision.

In 2005, Israel withdrew its armed forces from the Gaza Strip. Since then, a hot and deeply divided debate has started among States and commentators on the issue of whether Gaza is still an occupied territory. The definition of occupation has been interpreted in various ways, and commentators disagree on the facts. Concerning the interpretation of the law, many commentators rely on the traditional "Effective Control" test and argue to strictly apply the law of occupation as enshrined in Article 42 of the Hague Regulations (Schmitt, 2024; Arai-Takahashi, 2009).

On the other hand, many other commentators maintain that the existence or end of an occupation cannot be decided on the sole criterion of 'boots on the ground', but rather by looking at whether the occupier still maintains certain authority over the territory and its military can at any time take effective control (Shany, 2005; Benvenisti, 2012). This is the extensive interpretation of Article 42, which combines the actual and potential control approaches.

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The tragic Israeli military invasion and onslaught of Gaza started on October 7, 2023. At that time, the former Biden government made a statement that it opposed Israel's re-occupation of Gaza. Israel, however, announced that it intends to retain effective control of Gaza for an unlimited time (Parti, 2023).

The onslaught in the tiny enclave of Gaza underscores the magnitude of Israel's offensive. It is one of the most destructive military operations in recent history: in 11 months, 40,005 Palestinians were killed, 92,401 injured, and 1.9 million displaced (86% of the entire population) (Frankel, 2024). Regrettably, Israel did not accept any decisions of the UN Security Council and the General Assembly to cease fire or agree on an armistice, and ignored the ICJ's decision for interim measures.

Following over fourteen months of intense warfare, Israel and Hamas reached a ceasefire agreement on January 15, 2025. While this accord offers a glimmer of hope for peace, its implementation remains precarious, requiring coordination among the Israeli military, Hamas, the International Red Cross, international mediators, and an Israeli government facing internal divisions as hardline ministers voice their opposition (Lidman, 2025).

According to the ceasefire agreement, Israeli forces would be stationed predominantly along the borders of Gaza with Israel and Egypt, maintaining a strategic presence on a key road dividing northern and southern Gaza. The ceasefire's first phase is expected to last six weeks, during which Hamas is set to release 33 hostages in exchange for nearly 2,000 Palestinian detainees held by Israel. Subsequent negotiations are planned to further stabilize the situation (Lidman, 2025).

Amid these developments, on February 4, 2025, the newly elected US President Donald Trump and Israeli Prime Minister Benjamin Netanyahu held a press conference at the White House. During the briefing, Trump put forth a controversial proposal in which the United States would assume control over Gaza, the relocation of its Palestinian residents to neighboring countries, and the transformation of the war-torn region into what he described as the "Riviera of the Middle East" (Harvey, 2025).

Trump's statement marks a dramatic shift from long-standing US foreign policy, which has historically endorsed a two-state solution for Israel and Palestine. He also did not dismiss the possibility of deploying American troops, asserting that the US would take whatever steps necessary regarding Gaza (Harvey, 2025).

Coinciding with Trump's declaration, the fragile ceasefire crumbled on March 18, 2025, when Israel unexpectedly launched airstrikes on Gaza, resulting in the deaths of hundreds of Palestinians. The motivations behind Israel's renewed military offensive are varied, though domestic political dynamics appear to be a significant factor. Hardline factions within the Israeli government have persistently opposed the ceasefire, advocating for the total displacement of Palestinians from Gaza and the re-establishment of Israeli settlements that were dismantled in 2005. With Netanyahu relying on these factions for political stability, their influence appears to have played a decisive role (Krever, 2025).

Compounding the crisis, reports indicate that the Israeli military has drafted plans for an extensive ground invasion aimed at occupying Gaza entirely within the coming months and imposing military rule (Estrin, 2025). While the ceasefire agreement from January has not been officially nullified, the escalating military actions threaten to plunge the region back into full-scale war.

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Additionally, Israel's security cabinet has approved a highly contentious proposal to encourage the mass emigration of Palestinians from Gaza. These actions suggest that Israel is working to align with the US president's vision of taking over Gaza while simultaneously appeasing the hardline factions within its government. Critics argue that any large-scale displacement of Palestinians amid ongoing warfare would constitute ethnic cleansing, a violation of international law linked to war crimes and crimes against humanity (Karni, 2025).

Consequently, the question as to the legal status of the Gaza Strip has resurfaced. The debate again is whether the new Israeli arrangements on Gaza would amount to a renewed occupation of Gaza, or it is the intensification of the already existing occupation. What is crucial, however, is the accountability for Israel's serious violations of international humanitarian law (IHL) and international human rights law (IHRL) in Gaza.

The main objective of the present paper, therefore, is to reassess the legal status of Gaza after the so-called Israel's disengagement of 2005 and up to the present time, appraising the views of commentators from both sides of the spectrum and taking into consideration the recent ICJ's *Palestine Advisory Opinion*.

The methodology is primarily doctrinal legal research. As critical analysis of the primary sources is an important aspect of the doctrinal approach, the paper analyzes Article 42 of the Hague Regulations, the commentary of the ICRC, and the findings of the (ICJ's *Palestine* Advisory *Opinion*, 2024), the decided cases, and the reports of the Independent Inquiry Commissions. Reliable secondary sources are also referred to.

After introducing the topic, the paper goes on with the background of the research, that is, the Six-Day War, the Israeli occupation of Palestinian territory, and the effect of the unilateral disengagement plan of 2005. The next section identifies the law applicable to occupation, namely, the interpretation of Article 42 of the Hague Regulations and an appraisal of the theoretical debate. After that, the paper analyzes the ICJ's *Palestine Advisory Opinion* in terms of the legal status of Gaza and the obligations of the occupying power. The paper then concludes with findings and recommendations.

LEGAL EFFECT OF GAZA DISENGAGEMENT

Palestine, inhabited mostly by Arab Palestinians, was part of the Ottoman Empire. After the First World War, Great Britain was given a mandate to administer Palestine by the League of Nations. The root cause of the Israeli-Palestinian conflict was the Balfour Declaration issued by the British government because it announced Palestine as a "national home for the Jewish people." In response to the Balfour Declaration, thousands and thousands of Jews migrated to Palestine. It created tensions between the two communities in Palestine and led to violent clashes (Origin and History, 2024).

In 1947, a resolution was adopted by the UN General Assembly putting forward the "Partition Plan," and urging to establish an Arab State and a Jewish State in Palestine (GA Res. 181, 1947). Arab Palestinians did not accept the plan because they thought that it was not fair and entirely reversed their idea of the state of Palestine.

In 1948, after Israel's unilateral proclamation of independence, a war broke out. A Security Council resolution was adopted that fixed an armistice line known as the "Green Line" (SC Res. 62, 1948).

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After the Six-Day War that broke out in 1967, Israel occupied all the Palestinian territories beyond the Green Line: the West Bank, the Gaza Strip, and East Jerusalem (Hamid, 2023). The Security Council unanimously adopted resolution 242 (1967) on 22 November 1967, affirming the illegality of acquiring territory by military means and urging Israel to withdraw from the occupied territories (SC Res. 242, 1967).

Since the end of the Six-Day War, the United Nations has consistently affirmed that Israel is the occupying power of the Occupied Palestinian Territory (OPT) that includes the West Bank, the Gaza Strip, and East Jerusalem (*Wall* Advisory Opinion, 2004). The ICJ first applied the term OPT in the 2004 *Wall* Advisory *Opinion*. In the 2024 *Palestine* Advisory *Opinion*, the ICJ officially approved that the term 'Occupied Palestinian Territory (OPT)' encompassed the West Bank, the Gaza Strip, and East Jerusalem and decided that it 'constitutes, from a legal standpoint, a single territory unit (*Palestine* Advisory Opinion, 2024).'

The Israeli government announced in 2004 that there would be no more Israeli armed forces in Gaza by September 2005. This is known as the "*Gaza Disengagement Plan*." The rationale behind the disengagement was to isolate Gaza and avoid international pressure on Israel to go ahead with the Israel-Palestine peace negotiations. Israel wanted to show the world that they were no longer occupying Gaza and that they had no obligations toward Gaza as occupying power under the IHL.

This is the Israeli government's official position and is reaffirmed by the Israeli judiciary. In 2008, the Supreme Court of Israel had to deal with a case challenging the legality of cutting the supply of electricity and fuel to Gaza. In *Gaber Al-Bassiouni v. Prime Minister*, rejecting Gaza as an occupied territory, the Court held:

> "Since September 2005, Israel no longer has effective control over the events in the Gaza Strip….Israeli soldiers are not in the area on a permanent basis, nor are they managing affairs there….Nor does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip."

Apart from the Israeli government, many commentators also think that Gaza has not been an occupied territory since 2005 (Cuyckens, 2016; Samsan, 2010). They rely mainly on the traditional and strict interpretation of the definition of occupation, the essence of which is 'boots on the ground' or the physical military presence as the decisive criterion of the law of belligerent occupation. The 2005 decision of the ICJ in the *Armed Activities on the Territory of the Congo* case has come out as a booster for the traditional approach of boots on the ground.

On the other hand, Dugard, Special Rapporteur of the Human Rights Commission, found that:

> "The Disengagement Plan also provided that Israel would guard and monitor the external land perimeter of the Gaza Strip, continue to maintain exclusive authority in Gaza airspace, continue to exercise security activity in the sea off the coast of the Gaza Strip, and reserve the right to reenter Gaza at will (Dugard, 2008)."

In the same vein, Sanger checked the facts on the ground and affirmed:

> "Israel continues to control six of Gaza's seven land crossings, its maritime borders and airspace, and the movement of goods and persons in and out of the territory. Gaza is also dependent on Israel for water, electricity, telecommunications and other utilities, currency, issuing IDs, and permits to enter and leave the territory. Israel also has sole control of the Palestinian Population Registry, through which the Israeli Army regulates who is classified as a Palestinian and who is a Gazan or West Banker (Sanger, 2011)."

Due to this factual reality, the principal and subsidiary organs of the United Nations (GA Res. 63, 2008), international non-governmental organizations (Human

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Rights Watch, 2004), and a substantial number of eminent scholars (Dinstein, 2009; Aronson, 2005; Darcy, 2011; Jaber & Bentekas, 2023) believe that Gaza is still an occupied territory even after the disengagement.

This is the reason why the debate on the issue of whether Gaza is still occupied has become ongoing and tense to the extent that some commentators have looked for an alternative approach to justify the argument that Gaza is still an occupied territory. They have found the 'functional approach' as an exception to the general rule that foreign military presence is the decisive criterion for the effective control test (ICRC updated commentary, 2016).

Israel's military onslaught in Gaza since 8 October 2023 has put forward the issue of Gaza again and raised the question of Israel's obligations under IHL. In this tense situation, most commentators are eagerly waiting for the ICJ's recent *Palestine Advisory Opinion*, with the hope that it may shed light on the ongoing debate.

The following section will deal with the doctrinal debate on interpreting the definition of occupation enshrined in Article 42 of the Hague Regulations, focusing on the actual and potential control approaches, and touching on the functional approach. The next section will appraise the recent advisory opinion of the ICJ concerning the issue of the legal status of Gaza in the context of the entire OPT.

INTERPRETING THE DEFINITION OF OCCUPATION

This section focuses on the definition of occupation and the effective control test, which lies at the heart of the notion of occupation. The section analyses the two approaches of effective control: the actual control and the potential control approaches. It also appraises the functional approach as an alternative way of resolving the novel and problematic cases of occupation.

The term occupation is defined in Article 42 of the 1907 Hague Regulations as follows:

> "Territory is considered occupied when it is *actually placed under the authority of the hostile army*. The occupation extends only to the territory where such *authority has been established* and *can be exercised*"(Convention IV Respecting the Laws and Customs of War on Land, 1907).

In its 2004 *Palestinian Wall* Advisory Opinion, and the 2005 decision on *Armed Activities*, the ICJ's rulings on applying the law of occupation in the territories in question were entirely founded on Article 42 of the Hague Regulations. The same applies to the decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on questions relating to the law of occupation, for example, *Prosecutor v M. Naletilic´ and V Martinovic´*.

The above definition of occupation is, therefore, well established as the only legal basis to determine the existence of occupation. The requirements under Article 42 must be satisfied for the law of occupation to come into operation.

THE EFFECTIVE CONTROL TEST

Although the effective control test is "at the heart of the notion of occupation," one cannot find the concept either in the Geneva Conventions or the 1907 Hague Regulations. It is a concept that has gradually developed in the legal discourse on the requirements for the existence of an occupation (ICRC Commentary, 2016). The common understanding is that the notion of effective control must conform to the text of Article 42 of the Hague Regulations. This is in harmony with the textual interpretation that "a treaty shall be interpreted … in accordance with the ordinary meaning to be given to the terms of the treaty in their context…", as enshrined in Article 31(1) of the Vienna Convention on the Law of Treaties, 1969

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A careful perusal of the text of Article 42 demonstrates the fact that the first part of it encompasses the phrases "actually placed under the authority of the hostile army" and "such authority has been established", referring to the "actual exercise of authority." The second part uses the phrase "and can be exercised," indicating the "potential exercise of such authority" (Benvenisti, 2024).

The text of Article 42 is, therefore, a combination of the two approaches to the effective control test, namely "the actual and the potential control." Of the two approaches, the former postulates that the territory is occupied by establishing an actual exercise of authority over it, while the latter focuses on the ability of a foreign power to exercise its authority over it.

THE DEBATE ON THE INTERPRETATION OF THE EFFECTIVE CONTROL TEST

Restrictive Interpretation

The restrictive interpretation of Article 42 suggests that the occupying power must maintain a physical military presence in the occupied territory, often described as the idea of 'boots on the ground.' In this context, the term 'boot' is generally understood to refer to 'soldiers.' This perspective holds that the law of occupation mandates the presence of soldiers on the ground who exercise 'effective control' over the occupied territory (Schmitt, 2024). The military presence must be sustained for the entire duration of the occupation, not just at the outset but throughout the entire period. This interpretation is rooted entirely in the concept of '*actual control*' and does not consider the possibility of '*potential control*.'

In the cases of *Sargsyan v. Azerbaijan* and *Chiragov and Others v. Armenia*, for example, the European Court of Human Rights (ECHR) stated that occupation, as defined by the 1907 Hague Regulations, occurs when a state exercises actual authority over all or part of an enemy's territory. A fundamental requirement for such occupation is the physical presence of foreign troops—often referred to as the necessity of 'boots on the ground'—without which the occupation cannot be established.

Although many commentators have supported the actual control test and accepted the physical Military presence as the basic requirement for an occupation (Arai-Takahashi, 2009), several other commentators embrace the potential control approach (Shany, 2005; Benvenisti, 2012).

Dinstein acknowledges that while effective control is typically ensured through the presence of military forces on the ground, an alternative theoretical argument emerged following World War II. With the increasing strategic significance of airpower, some scholars suggested that an occupying power's authority might also be upheld by maintaining control over a foreign territory's airspace (Dinstein, 2019).

Benvenisti argues that the nature of warfare has changed, the strategic value of local resources has decreased, and at the same time, foreign power tends to bear heavier obligations toward the local population in modern times and concludes that the 'actual control' test would, therefore, be more beneficial for the foreign power because it could argue that it has no responsibilities toward the local population under the IHL in the absence of the actual exercise of governmental authority (Benvenisti, 2015).

He concludes that "the potential control test is preferable because it can fill the sovereignty gap and ensure that the occupant is accountable to the occupied population" (Benvenisti, 2015). Since these are the main objectives of the law of occupation, the potential control test is in

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harmony with both the textual and the teleological interpretation of Article 42.

The two approaches are the two versions of interpreting the occupation's definition under Article 42 of the Hague Regulation. Both are, therefore, qualified as valid interpretations. The only difference is that the actual control approach is strict and can create gaps in applying the law of occupation (difficult to apply in exceptional cases), whereas the potential control approach is more flexible and accommodating and can solve problems in novel situations.

Extensive Interpretation

Shany notes that key judicial precedents and authoritative military manuals have provided a largely consistent framework for determining when an occupation begins. This framework focuses on the actual presence of occupying forces within the territory and their capacity to exercise effective governmental authority (Shany, 2005).

In the *Trial of Wilhelm List and Others* (*The Hostages Trial*), the U.S. Military Tribunal in Nuremberg dismissed claims that certain areas of Greece and Yugoslavia were not occupied because they were under partisan control. Instead, the Tribunal stressed that occupation is defined by the occupier's ability to exert authority, even over regions it does not directly govern. The ruling stated:

> "It is evident that the German Armed Forces retained control over Greece and Yugoslavia until their withdrawal in the fall of 1944. Although partisan groups managed to take control of some regions at different times, the Germans had the capability to reassert physical control over any area whenever they chose. The resistance forces' control was only temporary and did not negate the German forces' status as an occupying power."

The dual requirement of actual and potential authority was formally established in the 1956 *U.S. Army Field Manual*. According to Section 355, an occupation is defined by three key conditions: (a) an invasion, (b) the inability of the previous government to exercise its authority in the area, and (c) the effective replacement of the legitimate government's powers by those of the occupying military. However, Section 356 highlights that the occupier's control over the territory does not need to be constant or immediate. Instead, it is sufficient that the occupying force has the capability to deploy troops within a reasonable timeframe to assert its authority in the occupied region.

The principle that occupation entails both a physical presence and the potential to govern the entire occupied territory has been reinforced in other major military manuals. For instance, the *United Kingdom Manual of Armed Conflicts* (2004) states that to determine whether an occupation exists, two criteria must be met: first, the previous government must be unable to publicly exercise its authority in the area, and second, the occupying power must be able to impose its own authority in place of the former government. Similarly, the *Canadian Joint Doctrine Manual: Law of Armed Conflict* upholds these same two conditions, mirroring the UK Manual's approach in defining a valid occupation.

After citing with approval the two criteria set in the British Manual, the Israeli Supreme Court in the *Tsemel case* held that Israel was at the relevant time the occupying force in southern Lebanon, notwithstanding its omission to exercise most functions of government in the area.

In *Naletilic´*case, the ICTY also accepts the capacity of the occupying power to send troops within a reasonable time as an alternative criterion for a valid occupation.

The argument for prioritizing potential control over actual control finds strong support in various policy considerations.

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This perspective discourages occupiers from neglecting their responsibility to govern the territories they occupy. If the standard were instead based solely on visible demonstrations of authority, occupiers might intentionally avoid maintaining law and order or providing essential governmental services. Such a scenario would leave the local population without any form of governmental protection, as their own government would be incapable of exercising authority, and the occupying force would deliberately evade responsibility.

Contrary to prevailing legal opinions and case law, the International Court of Justice (ICJ), in its ruling on the *Armed Activities* case, appeared to affirm the 'actual control' test. The Court observed that "[it] will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government." In this case, the Court does not regard the mere ability to enforce authority as an occupation.

Judge Kooijmans, in his separate opinion in the *Armed Activities* case, criticized this approach, arguing that the requirement for an occupying force to fully replace the authority of the Congolese government was an unjustified restriction of the well-established criteria of belligerent occupation, as recognized in customary law since 1907.

In this case, the Court ruled that Uganda was not the occupying power in Congo, despite maintaining a military presence in certain areas, because its forces did not control other regions. At the same time, the Congolese government had also lost authority over these contested areas. Shany described this outcome as creating a problematic legal situation in which no international entity assumed responsibility for the human rights and basic welfare of the affected population (Shany 2005).

Similarly, Ferraro criticized the ICJ's restrictive interpretation, arguing that it failed to reflect existing legal standards, which emphasize the capacity to exert authority rather than its actual implementation. He pointed out that a broader interpretation—one recognizing an occupier's potential to exercise governmental control—aligns with post-World War II jurisprudence, various military manuals, and the dominant views in legal scholarship (Ferraro, 2012).

The appraisal of the recent *Palestinian Advisory Opinion* would, therefore, be of paramount importance to see whether the ICJ retains the actual control approach or follows the extensive reading of Article 42 by emphasizing the potential control approach, which is *lex lata*.

AN ANALYSIS OF THE ICJ'S PALESTINE ADVISORY OPINION

On December 30, 2022, the UN General Assembly passed a resolution requesting an advisory opinion from the International Court of Justice (ICJ) in respect of the legal consequences that may arise from the ongoing violations by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, and from the policies and practices of Israel that affect the legal status of the occupation (GA Res. 77, 2022).

Subsequently, on January 17, 2023, the UN Secretary-General formally conveyed this request to the ICJ's Registry. The Court rendered its historic advisory opinion on July 19, 2024, at a critical moment when Israel's military operations in the Gaza Strip were at their peak.

At the outset, the Court emphasized that the application of international legal principles in a given territory depends on that territory's recognized status under international law. Therefore, it first

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examined the legal standing of the Occupied Palestinian Territory (OPT). The General Assembly's request specifically referred to "the Palestinian territory occupied since 1967," encompassing the West Bank, East Jerusalem, and the Gaza Strip. The Court affirmed that, from a legal perspective, the OPT constitutes a singular territorial entity whose unity, continuity, and integrity must be upheld. Consequently, all references to the OPT in this opinion pertain to this unified territorial unit (*Palestine* Advisory Opinion, para. 78).

The Court's main conclusions underscored that Gaza remains an inseparable component of the OPT, that Israel's extended occupation of the region constitutes a grave breach of international law, and that Israel must swiftly withdraw from the OPT. Additionally, the opinion addressed several unprecedented legal aspects. The Court also stressed that the United Nations and third-party States bear responsibilities in ensuring the implementation of its findings (*Palestine* Advisory Opinion, paras 265-83). In essence, this advisory opinion on Palestine ranks among the most significant rulings ever issued by the ICJ. This paper will particularly analyze the Court's stance on Gaza's legal status as an occupied territory.

THE LEGAL STATUS OF GAZA AND THE COURT'S OPINION

Reaffirming its 2004 *Wall* Advisory Opinion, the Court upheld that Article 42 of the Hague Regulations remains the definitive legal standard for determining whether a territory is under occupation. In its earlier ruling, the Court maintained that subsequent developments had not altered the occupied status of the West Bank and East Jerusalem or Israel's designation as the occupying Power. However, as the construction of the separation wall did not involve Gaza, the Court did not previously address Gaza's legal standing.

The Gaza Strip has been an integral part of the territory occupied by Israel since 1967. As the occupying Power, Israel exercised effective control over Gaza. Despite Israel's implementation of a disengagement plan, the situation on the ground continued to reflect Israel's authority over the region. Given the need for concrete evidence, the World Court examined official reports from UN Human Rights Council-mandated inquiry commissions. The first such report was submitted in 2015 by the Independent Commission of Inquiry, which affirms that:

> "The facts since the 2005 disengagement, among them the continuous patrolling of the territorial sea adjacent to Gaza by the Israeli Navy and constant surveillance flights of IDF [Israeli Defense Forces] aircraft, in particular remotely piloted aircraft, demonstrate the continued exclusive control by Israel of Gaza's airspace and maritime areas…. Israel regulates the local monetary market, which is based on the Israeli currency and has controls on the customs duties. Under the Gaza Reconstruction Mechanism, Israel continues to exert a high degree of control over the construction industry in Gaza…. Israel also controls the Palestinian population registry" (Report of Independent Commission of Inquiry, 2015).

A second report, presented in 2022 by the Independent International Commission of Inquiry on the OPT, including East Jerusalem and Israel, reaffirmed that Israel retains control over Gaza's airspace, territorial waters, border crossings, civilian infrastructure—including water and electricity supply—and key governmental functions, such as the administration of the Palestinian population registry (Report of the Independent International Commission of Inquiry, 2022).

These are the facts on the ground that are reliable and probative. In consideration of these facts, the Court is of the view that:

> "Israel remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip, including control of the land, sea, and air borders,

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> restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone, despite the withdrawal of its military presence in 2005. This is even more so since 7 October 2023" (*Palestine* Advisory Opinion, para. 93).

Referring to Article 42 of the Hague Regulation, the Court emphasized that a territory is considered occupied when it falls under the authority of a hostile army. It underscored the significance of the effective control test in defining occupation, asserting that a State is deemed an occupier when it exerts effective control over a territory that does not belong to it (*Palestine* Advisory Opinion, para. 90).

Regarding the effective control test, the Court did not specifically address the three key elements identified by Ferraro. However, in contrast to commentators who advocate the "boots on the ground" principle and prioritize physical military presence as the defining criterion for occupation, the Court ruled that occupation could still be confirmed even in the absence of military forces on the ground. The ruling of the court is in these words:

> "Where a State has placed territory under its effective control, it might be in a position to maintain that control and to continue exercising its authority despite the absence of a physical military presence on the ground. Physical military presence in the occupied territory is not indispensable for the exercise by a State of effective control, as long as the State in question has the *capacity to enforce its authority*, including by making its physical presence felt within a reasonable time" (Palestine Advisory Opinion, para. 91).

To support this position, the Court first referred to the *USA v Wilhelm List and others* (commonly known as the *Hostages Trial*). Following Germany's military invasion of Croatia in 1941, a puppet government was installed while Germany retained control through its military attaché. The Tribunal examined whether Croatia possessed sovereign independence from German military influence and concluded that it did not. It determined that occupation was not contingent upon the continuous physical presence of troops but rather on the control exercised by the occupying power, as troops could be redeployed at will.

Additionally, the Court referenced *Prosecutor v Mladen Naletilic` and Vinko Matinovic`*, where the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) outlined a key factor in determining whether an occupying Power's authority is established: the presence of a sufficient force or the ability to deploy troops within a reasonable timeframe to make the authority of the occupying power felt."

The Court, therefore, asserts that:

> "[F]or the purpose of determining whether a territory remains occupied under international law, the decisive criterion is not whether the occupying Power retains its physical military presence in the territory at all times but rather whether its authority "*has been established and can be exercised*." Where an occupying Power, having previously established its authority in the occupied territory, later withdraws its physical presence in part or in whole, it may still bear obligations under the law of occupation to the extent that it remains capable of exercising, and continues to exercise, elements of its authority in place of the local government" (*Palestine* Advisory Opinion, para. 92).

In the above ruling of the Court, the italicized phrase "*has been established and can be exercised*" is taken verbatim from the second part of Article 42 of the Hague Regulations. This ruling demonstrates that the Court in the 2024 *Palestine* Advisory Opinion reaffirmed the extensive interpretation of the effective control test, which is a combination of actual and potential control approaches, departing from the controversial opinion of the Court in its *Armed Activities* case that affirmed the actual control test as the exclusive criterion in determining the state of occupation.

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Based on the legal analysis and factual considerations regarding the Gaza Strip, the Court determined that Israel's withdrawal did not completely absolve it of its responsibilities under the law of occupation and that, instead, Israel's obligations remain proportional to the extent of its effective control over Gaza (*Palestine* Advisory Opinion, para. 94).

ANALYSIS

The ICJ's *Palestine Advisory Opinion* is a landmark and ground-breaking decision in many respects. The following is an analysis of important parts of the opinion that relate to the law on the existence of occupation and the legal status of Gaza.

The effect on the *Armed Activities* case

The *Armed Activities* case was decided in 2005. Many commentators were disappointed at that time as the judgment supported physical military presence as the requirement of belligerent occupation, departing from the existing State practice and case law. When the judgment was being prepared, the effects of the Gaza Disengagement Plan, 2005, might not have been seriously felt by the judges of the Court. In any case, due to the decision, the commentators were divided more on the issue of the legal status of Gaza. Many commentators and the ICRC tried to look for an alternative way of accommodating Gaza as an Occupied territory. They have found the functional approach as a solution. When the General Assembly applied to the ICJ for an advisory opinion on Palestine in 2023, many eyes were on the court, hoping that the court might clarify the law.

In the *Palestine* Advisory Opinion 2024, the Court casually refers to its own decision in the *Armed Activities* case 2005, by merely stating very generally that "A State therefore cannot be considered an occupying Power unless and until it has placed territory that is not its own under its effective control" (*Palestine* Advisory Opinion, para 90). These words are actually not in paragraph 173 of the *Armed Activities* case. The Court merely takes the general idea of 'effective control' from the *Armed Activities* case, without referring to the main ruling in that case that revives the actual control test. Immediately after generally referring to *Armed Activities* case, the Court goes on to pronounce its own ruling on the effective control test by asserting that "physical military presence in the occupied territory is not indispensable for the exercise by a State of effective control, as long as the State in question has the capacity to enforce its authority, including by making its physical presence felt within a reasonable time" (*Palestine* Advisory Opinion, para. 92)."

It is clear that the Court emphatically rejects the traditional requirement of 'boots on the ground,' and declares that without a military presence, there can be effective control and thus a state of occupation. In other words, the Court implicitly abrogated the requirement of physical military presence of foreign forces at all times in occupied territory as laid down in the *Armed Activities* case. The *Palestine Advisory Opinion* 2024, therefore, is a landmark decision.

The Legal Principle Applied by the Court

The Court refers to Article 42 of the Hague Regulations as the legal authority and relies on the second part of the Article, concerning whether the authority "has been established and can be exercised" (*Palestine* Advisory Opinion, para. 92). This opinion is primarily founded on the extensive interpretation of Article 42 and the application of the combination of the actual and potential control approaches of the effective control test.

The Court appears to favor the potential control approach, emphasizing that what matters is not the constant physical

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military presence of the occupying power, but rather its ability to assert authority, demonstrated by its capacity to project force and reestablish physical presence within a reasonable timeframe.

The Legal Status of Gaza as an Occupied Territory

Judge Iwasawa criticized the court's opinion by stating that the Court refrained from explicitly stating whether Gaza has continued to be 'occupied' under the law of occupation after 2005. However, due to the following grounds, there is no doubt that the Court considers Gaza as an occupied territory.

First, in its Advisory Opinion, the Court uses the term 'effective control.' This term can be interpreted as the continued existence of occupation.

Secondly, the approach applied by the Court is not functional, but a combination of the actual and potential control approaches of the effective control test. Israel's effective control has already been established, and Gaza has been affirmed as occupied territory. This fulfills the requirement of the actual control approach. After the Disengagement Plan of 2005, Israel still has "*the capacity to enforce its authority*, including *by making its physical presence felt within a reasonable time*." This fulfills the requirement of the potential control approach. Gaza, therefore, is still an occupied territory.

Thirdly, it is submitted that although the Court does not expressly state in its decision that Gaza is still occupied territory, it is implicit. In the context of the advisory opinion, the Court means that Gaza is still an occupied territory.

(1) Paragraph 93 of the Court's decision states that Israel has retained the ability to exercise, and has in fact exercised, key elements of authority over Gaza. This strongly suggests that Gaza continues to be under occupation.
(2) Additionally, paragraph 262 affirms that the geographical scope of the General Assembly's inquiry covers the Palestinian territories occupied since 1967, including the West Bank, East Jerusalem, and Gaza. The Court maintains that these areas collectively form a unified territorial entity whose integrity and continuity must be upheld. Therefore, any references in the opinion to the Occupied Palestinian Territory pertain to this indivisible territorial unit. This legal recognition, echoed by the United Nations and the international community, reinforces the principle that Israel's unilateral Disengagement Plan does not alter Gaza's status. Consequently, Gaza remains occupied territory alongside the West Bank and East Jerusalem.
(3) Furthermore, in the matter of the legal obligations of Israel relating to the right of self-determination of the people of Palestine and cessation of the prolonged occupation, the Court asserts in Paragraph 262 of the Opinion that "this illegality relates to *the entirety of the Palestinian territory occupied by Israel in 1967*." Here again, the Court did not leave Gaza behind and took Gaza as an occupied territory in the same position as the West Bank and East Jerusalem.

FINDINGS

From the preceding analysis and discussions, the following are the findings:

(1) In the *Palestine Advisory Opinion* 2024, the ICJ's decision is primarily founded on the extensive interpretation of Article 42 and the application of the combination of the actual and potential control approaches of the effective control test.
(2) In its decision, the Court appears to reject the requirement at all times of physical military presence of foreign

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forces in occupied territory as laid down in the *Armed Activities* case. The recent opinion of the Court is, therefore, a landmark decision.

(3) Although the Court does not expressly state in the advisory opinion that Gaza is still occupied territory, it is implicit. By reading the entire context of the opinion, it is clear that the Court treats *Gaza as part of an inseparable single territorial unit* and that Gaza remains an occupied territory together with the West Bank and East Jerusalem.

(4) The UN General Assembly, the Human Rights Council, the UN Fact-Finding Mission to Gaza, the Independent Commission of Inquiry established by the Human Rights Commission, the Independent International Commission of Inquiry on the Occupied Palestinian Territory, the International Committee of the Red Cross (ICRC), International human rights NGOs, and an overwhelming majority of legal commentators, strongly believe that Gaza is still an occupied territory even after the 2005 disengagement plan.

CONCLUSION

Applying the restrictive interpretation of Article 42, some commentators argue that there must be boots on the ground, and without a physical military presence, there can be no occupation. This interpretation is too strict and appears not to comply with the textual interpretation, which is the general rule of interpretation under the Vienna Convention on the Law of Treaties. It does not consider the ordinary meaning of the term "*can be exercised*" in Article 42. It ignores the clear terms of the treaty.

The extensive interpretation of Article 42, which embraces both actual and potential control approaches, is in harmony with the general rule of treaty interpretation. International jurisprudence, influential Military Manuals, and several commentators, including Shany, accept the extensive interpretation of Article 42. However, on the facts, Shany contends that Israel does not possess the capacity to exert its authority over Gaza in a short time, and even under the extensive interpretation, Gaza is not occupied (Shany, 2005). However, it is a fact that Israel can exert its power and authority over Gaza in a short time due to the proximity of Gaza's location, Israel's sophisticated technological advances, and the superior quality of its air force and the enormous war machine, which is second to none in the contemporary world. These facts are proven in many instances of Israel's raids and attacks on Gaza.

In the recent Israel-Hamas conflict, for example, immediately after the Hamas-led attack on 7 October 2023, Israel's air force bombed the Gaza Strip. On 13 October, land forces started operations in Gaza. "Operation Swords of Iron", a full-scale invasion of Gaza, was launched on 27 October (Flower, 2023). Within a month, the major parts of the Gaza Strip were under the control and authority of Israel. It is a clear indication that Israel possesses the ability to exercise its authority over Gaza at any time at will.

The ICJ, in its recent *Palestine Advisory Opinion*, follows the extensive interpretation of Article 42 and acknowledges Israel's effective control over Gaza even after disengagement. Thanks to the landmark opinion of the Court, there is no doubt that Gaza is still an occupied territory. Israel's continued and prolonged occupation of the OPT (including Gaza), the failure to respect the right to self-determination of Palestinians (including people in Gaza), and the Alleged commission of war crimes and crimes against humanity against Palestinians (including people in Gaza) are clear violations of international law for which Israel is responsible. Israel is, therefore, responsible for making full reparation to the people of Palestine.

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The controversial proposal of President Trump to take control of the Gaza Strip and to evacuate Palestinians from Gaza to other countries, and Israel's reported plan to militarily occupy the entire Gaza Strip, are blatant violations of international law and a total disregard of the legal rights of the Palestinian people.

As emphasized by the court in its Palestine Advisory Opinion, a resolution to the Israeli-Palestinian conflict can only be achieved through the realization of the Palestinian people's right to self-determination. This includes their right to establish an independent and sovereign State that coexists peacefully with Israel, with secure and internationally recognized borders for both nations (*Palestine* Advisory Opinion, para. 283).

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CONFLICT OF INTEREST

The author declares that he has no conflict of interest in this study.

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LEGISLATING AI AND IP IN MALAYSIA: A SUSTAINABLE GOVERNANCE FRAMEWORK FOR FAIR REMUNERATION

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ABSTRACT

Artificial intelligence is changing industries and raising important questions about fair compensation for intellectual property owners when their work is used by AI systems. Existing research has focused on global AI regulations, particularly the European Union AI Act, but comparatively little attention has been given examination of how these frameworks compare to Malaysia's National Guidelines on AI Governance and Ethics. This study therefore explores the legal and governance challenges related to AI's use of copyrighted works and patented inventions in Malaysia, where current laws struggle to address issues of authorship, inventorship, and fair remuneration. Analyzing these differences highlights gaps in transparency, enforcement, and accountability in Malaysia's AI governance. This study uses a qualitative legal research approach, reviewing policy frameworks, legal cases, and comparative governance models to propose a sustainable legal framework for AI in Malaysia. This framework provides lawmakers with actionable steps to position Malaysia as a regional leader in ethical AI governance. The findings suggest that regulatory shortcomings must be addressed through clearer legal provisions, stronger enforcement mechanisms, and structured remuneration models to support AI-driven innovation while protecting the rights of IP owners. The study contributes to the discussion on AI governance by offering policy recommendations that balance technological progress with the protection of intellectual property in Malaysia's growing digital economy.

Keywords: AI Governance, Intellectual Property; Copyright; Patents; EU AI Act; National Guidelines on AI Governance and Ethics; Fair Remuneration.

INTRODUCTION

AI is reshaping industries worldwide, influencing how intellectual property (IP) is created, shared, and used. From automated content generation to advanced design tools, AI often builds on existing copyrighted works and patented inventions. This dependence raises important legal and economic concerns, particularly about safeguarding the rights of IP owners and ensuring fair compensation when AI utilizes their creations (Latif, Manap, & Althabhawi, 2024). As AI technologies continue to evolve, they increasingly blur the lines between human and machine creativity. Works and inventions that once clearly originated from individual human effort are now the result of complex interactions between human inputs and machine-driven processes. Traditional IP frameworks developed at a time when creation and invention were exclusively human activities are now being tested in ways never before anticipated (Lucchi, 2023). Fundamental questions arise regarding the attribution of authorship and inventorship, the ownership of AI-generated outputs, and the appropriate legal and economic recognition for original creators whose work may form part of AI's

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training or output material. These challenges are not merely theoretical but they have real-world implications for the sustainability of creative industries, the fairness of innovation systems, and the broader economy (Lauber-Rönsberg & Hetmank, 2019). If left unaddressed, the unchecked use of existing IP by AI systems risks devaluing human creativity, undermining incentives for innovation, and causing significant financial losses for individual creators, businesses, and IP rights holders (Senftleben, 2023). In Malaysia, as in many jurisdictions, existing intellectual property laws do not yet fully account for the complexities introduced by AI technologies. While Malaysia's Copyright Act 1987 and Patents Act 1983 provide a strong foundation for human-centered IP protection, gaps remain in addressing AI's growing role in creative and inventive processes. The absence of clear statutory provisions on AI-generated works and inventions leaves the legal status of such outputs uncertain and exposes human creators to potential exploitation. Before exploring the specific legal and governance gaps facing Malaysia, it is crucial to recognize the deeper problem posed by AI's rapid advancement. AI's ability to generate outputs based on vast amounts of existing intellectual property raises profound questions about the future of authorship, inventorship, ownership, and fair compensation (Gervais, 2020). Without clear legal structures, there is a real risk that human creators will be sidelined, and the fundamental purpose of intellectual property law to protect and reward human creativity will be undermined, leading to an erosion of incentives for innovation and a weakening of the creative and technological sectors. Effective AI governance must not only address the attribution of human authorship and inventorship but must also ensure that fair remuneration frameworks are established to protect the economic interests of IP owners whose works are exploited, directly or indirectly, by AI systems Anantrasirichai & Bull, 2022). To frame these challenges properly, it is essential to revisit the theoretical foundations of intellectual property before this article turn into Malaysia's specific legal gaps and reform proposals.

THEORETICAL FOUNDATIONS OF INTELLECTUAL PROPERTY RIGHTS IN THE CONTEXT OF AI

The protection of intellectual property (IP) has long been justified by several foundational theories, most notably labor theory and personality theory. Labor theory, most prominently advocated by John Locke, asserts that individuals have a natural right to the products of their labor (Vaughn, 1978). When a person expends effort to create something new, that effort imbues the creation with a legitimate claim of ownership. Similarly, personality theory, articulated by Georg Wilhelm Friedrich Hegel, posits that creative works are an extension of the creator's personality and moral being, deserving protection to preserve individual autonomy and dignity (Hughes, 1988). Both theories deeply influence modern IP law frameworks, shaping the way societies perceive authorship, ownership, and the need for exclusive rights.

However, the rise of artificial intelligence (AI) systems capable of independently producing artistic, literary, and inventive works challenges these traditional notions. AI-generated outputs often lack direct, tangible human labor at the moment of creation, and the "personality" embedded in such works is arguably absent (Latif, Manap, & Althabhawi, 2024). Nevertheless, the deployment and operation of AI systems involve substantial human effort in their development, training, curation, and supervision. Scholars have noted, human creativity persists, albeit redistributed across different stages of AI deployment (Wu, Ji, Yu, Zeng, Wu, & Shidujaman, 2021). The labor of designing algorithms, selecting training datasets, and refining AI outputs reflects significant

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human intellectual investment, even if the immediate creator is non-human (Anantrasirichai & Bull, 2022). In this evolving landscape, adhering rigidly to traditional IP doctrines risks marginalizing the substantial human contributions involved in AI development. An equitable governance framework for AI and IP in Malaysia must reinterpret and modernize these theories, recognizing both the human elements underpinning AI systems and the societal need to incentivize innovation. Ensuring fair remuneration for those who contribute to AI's creative capacities not only honours the philosophical roots of IP protection but also strengthens the legitimacy and sustainability of Malaysia's digital economy.

In this context, a 'sustainable governance framework' refers not merely to the enactment of immediate regulatory fixes but to the establishment of a robust, adaptive legal and institutional structure that ensures the long-term protection of intellectual property rights while fostering continuous AI-driven innovation. Such a framework must balance short-term technological gains with enduring economic, cultural, and ethical stability. As such, the discussion below will first examine the main law governing intellectual property rights in Malaysia, focusing on how existing statutes such as the Copyright Act 1987, the Patents Act 1983, Malaysia National Guidelines on AI Governance And Ethics 2024 as well issues related to AI-generated works. to identify best practices and potential lessons for Malaysia's legal and governance frameworks.

MAIN LAWS GOVERNING INTELLECTUAL PROPERTY IN RELATION TO AI IN MALAYSIA

The Copyright Act 1987 (Act 332) is the core legislation governing copyright in Malaysia. It was original drafted to address the protection of copyrightable work encompassing literary, musical, artistic, and dramatic works, along with sound recordings, broadcasts, and films, aiming to establish a legal framework that protects creators' rights and guarantees fair compensation for their intellectual contributions (Parliamentary Hansard, 1986). However, the Act mainly addresses human creators, creating a void in its applicability to AI-generated works. It defines an "author" strictly as a human being (Khaw & Tay, 2017) which raises the issue of ownership when AI systems autonomously generate content.

The ambiguity of authorship and ownership regarding AI-generated works necessitates a reform of the Copyright Act 1987 to acknowledge AI's contribution to the creative process and establish a framework for assigning ownership and attribution. As AI technologies have now reached the capability to independently generate literary, artistic, or musical works without direct human involvement (Latif, Manap, & Althabhawi, 2024), traditional concepts of authorship face significant legal tension (Geiger, 2024). Some legal perspectives argue that AI should remain classified as a tool used by human creators, whereas others advocate for recognition of fully autonomous AI outputs.

The Patents Act 1976 [Act 291], on the other hand, regulates the patenting of inventions in Malaysia. It was designed to promote innovation by granting inventors exclusive rights to their creations, thereby driving technological progress and contributing to economic growth (Parliamentary Hansard, 1982). Similar to the Copyright Act, the Patents Act 1983 does not define the term "inventor" within the legislation. However, it can be reasonably assumed that the term "inventor," as understood under the Patents Act 1983 (Lim, 2004), refers to the individual or group of individuals who have contributed to the creation of an invention that meets the criteria for patentability (Azmi, 2014).

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The lack of clear definitions in both the Copyright Act 1987 and the Patents Act 1976 regarding the roles of AI in the creative and inventive processes presents significant challenges in adapting the current legal framework to the technological advancements brought about by AI. The current framework assumes that authorship and inventorship are exclusive to humans (Gaffar, 2024), an assumption that AI-generated outputs increasingly challenge (Schwartz & Rogers, 2022).

This challenges traditional concepts of intellectual property "authorship" and "inventorship," where the creator or inventor is typically a human. It highlights a significant gap in the legal framework regarding AI-generated works and inventions (Militsyna, 2023). Moreover, the level of human involvement in AI-generated outputs often varies. In some cases, human contribution is minimal, limited to the initial programming or data training phase (Kelly, Kaye, & Oviedo-Trespalacios, 2022). This blurring of roles creates legal uncertainty over how ownership should be attributed and has prompted calls for new categories such as "AI-assisted" works (Geiger, 2024). Without clear legislative updates, Malaysia's IP laws risk falling behind technological realities (Lauber-Rönsberg & Hetmank, 2019).

COPYRIGHT ACT 1987 (ACT 332)

The Copyright Act 1987 [Act 332] was first enforced on 1 December 1987 in Malaysia. The Act consists of six parts, which provide the framework for the protection of copyright in the country. These sections outline key aspects such as definitions, rights and ownership, copyright duration, infringement, and enforcement mechanisms. The Act is designed to protect creative works and provide a legal framework to uphold and enforce intellectual property rights. Section 3 of the Act defines the term "author" in relation to various types of works. Under copyright law, the identification of the author differs based on the type of work. For instance, in the case of literary works, the author is the individual who writes or creates the work. For musical works, the composer is considered the author. For artistic works, the author is the artist who is responsible for its creation. Section 10 of the Act further outlines the criteria for the subsistence of copyright in works created by an author or joint authors. The Act stipulates that an author must be a "qualified person" at the time of creation. Section 3 defines a "qualified person" as either (i) a Malaysian citizen or permanent resident or (ii) a corporate entity established, incorporated, or legally recognized under Malaysian law.

For a work to receive copyright protection, its creator must fall within the definition of a qualified person. This includes Malaysian citizens, permanent residents, or corporate entities incorporated in Malaysia. The Copyright Act 1987 establishes that copyright protection applies only to human creators, excluding non-human entities such as AI systems. By requiring human authorship, the Act limits recognition to individuals or legally recognized entities like corporations. This becomes particularly significant with the rise of AI-generated works, as AI lacks the human intellectual effort and creativity needed to qualify as an author (Watiktinnakorn, Seesai, & Kerdvibulvech, 2023). The growing capability of AI technologies challenges traditional understandings of authorship, raising concerns about ownership rights, enforcement mechanisms, and the fair distribution of economic rewards (Geiger, 2024). At the outset, it is clear that the current structure of the Copyright Act 1987 does not contemplate works generated independently by AI without human intervention. The requirement for human authorship means that creations solely produced by AI systems fall outside the scope of copyright protection under Malaysian law. This legal gap raises critical questions: Who, if anyone, owns the

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copyright in AI-generated works? Can the user of the AI tool, the developer of the AI system, or another party claim rights over such creations? (Latif, Manap, & Althabhawi, 2024).

PATENTS ACT 1976 (ACT 291)

The Patents Act 1976 [Act 291], which came into effect on 1 October 1986, establishes the legal framework for protecting inventions in Malaysia. It sets out the requirements for obtaining a patent, the rights of patent holders, and the procedures for enforcing patent protection. The Act aims to promote innovation by granting inventors exclusive rights over their creations, allowing them to commercially benefit from their inventions for a defined period. Under Section 11, a patent may be granted for an invention that is novel, involves an inventive step, and is capable of industrial application. The Act defines an "invention" broadly, covering any new product or process that provides a technical solution to a problem. However, certain exclusions apply under Section 13, which specifies that discoveries, scientific theories, and mathematical methods do not qualify for patent protection. A key aspect of the Patents Act 1976 is its recognition of an inventor's rights. Section 36 grants patent holders' exclusive rights to exploit their patented invention, assign or transfer the patent, enter into licensing agreements, and use the patent as a security interest. These rights give patent holders control over both the commercial and legal use of their inventions. The Act defines "exploitation" to include making, importing, offering for sale, selling, or using a patented product, as well as stocking it for sale or use. If the patent applies to a process, exploitation also covers the use of the process and handling any product derived from it.

Section 36 also establishes presumptions of infringement related to patented processes, protecting patent holders unless proven otherwise. The Act outlines the process for examining and granting patents, a responsibility overseen by the Intellectual Property Corporation of Malaysia (MyIPO). The examination ensures that inventions meet the required criteria, and once granted, a patent provides the inventor with a 20-year monopoly over its use. As AI takes on a greater role in innovation, the Patents Act 1976 raises important questions about inventorship. AI systems capable of generating new inventions challenge the traditional assumption that only humans can be inventors (Igbokwe, 2024). Since AI can autonomously develop novel solutions without direct human input, uncertainty arises over whether such inventions can be patented and who, if anyone, should be recognized as the inventor (Kim, 2020). At present, the Act does not recognize non-human inventors, restricting patent rights to individuals or legal entities. This issue has gained attention in global discussions on AI and intellectual property, with increasing calls for legal reform to address AI's role in the invention process (Afshar, 2022). Unless legislative reform is undertaken, Malaysia's patent system risks excluding significant AI-generated innovations from protection, undermining incentives for both AI developers and human collaborators. It would be detrimental to the growth of Malaysia's innovation ecosystem if valuable AI-generated inventions are left unprotected due to rigid interpretations of inventorship requirements.

MALAYSIA NATIONAL GUIDELINES ON AI GOVERNANCE AND ETHICS 2024

The Malaysia National Guidelines on AI Governance & Ethics 2024, launched by the Ministry of Science, Technology, and Innovation (MOSTI) on September 20, 2024, provide a framework for integrating AI into various sectors. These guidelines emphasize ethical development, societal values, and national priorities to ensure responsible AI deployment that supports economic growth, societal well-being, and

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technological advancement (MOSTI, 2024). Developed as part of the Malaysian National Artificial Intelligence Roadmap (AI-RMAP) 2021-2025, they align national AI strategies with international standards, reflecting Malaysia's ambition to become a high-tech nation.

Despite these efforts, the guidelines offer only a limited discussion on critical issues such as authorship, inventorship (referred to as "ownership"), and fair remuneration for intellectual property (IP) rights holders. The governance of IP, particularly in the context of generative AI, presents complex challenges, including liability for unauthorized use of creative works and inventions. These concerns remain inadequately addressed in the current legal framework. Additionally, references to the Intellectual Property Corporation of Malaysia (MyIPO) were inaccurately cited, as the guidelines should have referred to the Copyright Act 1987 and the Patents Act 1976. The absence of clear legal definitions for AI-generated works further complicates ownership rights, making it unclear whether authors, inventors, creators, developers, or users should hold legal claims. This legal uncertainty creates challenges in resolving intellectual property disputes and ensuring accountability, particularly in industries that rely on AI for creative or innovative processes (Alhosani & Alhashmi, 2024). Without a well-defined legislative framework, businesses and individuals face difficulties in protecting, licensing, and commercializing AI-generated works. The guidelines also do not outline dispute resolution mechanisms or legal protections for those developing or deploying AI technologies, highlighting the need for a dedicated legal framework to address AI-related intellectual property challenges.

While existing laws like the Copyright Act 1987 and the Patents Act 1976 offer general provisions for IP governance, they were not crafted with AI-generated works in mind. As a result, they fail to fully address the complexities brought about by generative AI technologies, as highlighted in the newly introduced guidelines. Unlike regulatory frameworks in the European Union's AI Act, Malaysia's guidelines lack binding provisions that would compel adherence through penalties or sanctions. This limits the practical effectiveness of the guidelines in regulating AI activities. It would be imprudent for Malaysia to rely solely on non-binding guidelines to regulate the rapidly evolving landscape of AI-driven innovation and creativity. As AI technologies continue to blur the lines between human and machine contributions, the absence of enforceable legal obligations risks creating inconsistencies in rights enforcement, protection gaps for creators and innovators, and uncertainties for investors and businesses seeking to operate within Malaysia.

METHOLODOGY

This study adopts a qualitative socio-legal research methodology to critically analyze Malaysia's intellectual property (IP) laws and AI governance frameworks in light of emerging technological challenges. It combines doctrinal legal analysis, comparative legal study, and policy evaluation to propose a sustainable governance model for AI and IP in Malaysia. The objectives of the study are threefold (i) to identify gaps in Malaysia's current IP and AI regulatory frameworks concerning authorship, inventorship, and fair remuneration, (ii) to evaluate best practices from selected comparative jurisdictions such as the European Union and United Kingdom,; and (iii) to propose concrete legal and policy reforms aimed at harmonizing Malaysia's frameworks with international standards while addressing local socio-legal realities. Primary sources include Malaysia's Copyright Act 1987, Patents Act 1976, and the Malaysia National Guidelines on AI Governance & Ethics 2024, while secondary sources encompass international

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frameworks such as the EU AI Act 2024, TRIPS Agreement, and academic literature on AI and IP law. Comparative case law and statutory models, including the UK's Thaler decision is reviewed to draw reform insights.

This methodology involves analysing statutory texts, judicial decisions, regulatory guidelines, and policy documents, supplemented by a critical review of scholarly commentary. The study also integrates policy-based proposals, including recommendations for statutory amendments, licensing mechanisms, transparency obligations, and the establishment of enforcement institutions like an AI Ombudsman. This multi-layered approach ensures that the study is not purely theoretical but offers actionable policy directions for Malaysia to develop a sustainable, innovation-friendly, and ethically grounded AI and IP governance framework.

CONCEPT OF SUSTAINABILITY IN IP AND AI GOVERNANCE

The concept of "sustainability" in AI governance extends beyond environmental stewardship to encompass long-term legal, economic, and ethical resilience (Mazzi, 2025). In the context of intellectual property (IP), sustainability means designing governance structures that protect creators' rights, foster continuous innovation, and adapt flexibly to technological advancements without undermining established legal norms (Jobin, Ienca, & Vayena, 2019). Building a sustainable AI governance framework demands more than sound principles as it requires deep engagement with realities on the ground. One of the most urgent gaps lies in the lack of localized empirical data (Niazi, 2024). Policymakers cannot meaningfully regulate what they do not fully understand (Candelon, Charme di Carlo, De Bondt, & Evgeniou, 2021). Without clear insights into how AI is being used in Malaysia, how people are responding to the IP issues it raises, and how courts and regulators are handling disputes, any rules or policies risk missing the real challenges on the ground. Grounding policy in real-world data such as sector-specific AI usage trends, stakeholder concerns, and emerging case law is not just a technical task. It is thus essential for building policies that are credible, responsive, and sustainable (Papagiannidis, Mikalef, & Conboy, 2025). However, Malaysia currently lacks comprehensive studies on AI's impact on IP, sector adoption rates, and active or pending litigation, making it difficult to design effective, localized policies.

Beyond just fixing data and literature gaps as highlighted by researcher above, Malaysia must also tackle deeper structural problems to make AI governance sustainable . It's easy to set broad goals like "fairness" and "transparency," but the real challenge is turning them into action (Arora, Gupta, Mehmi, Khanna, Chopra, Kaur, & Vats, 2024). Malaysia's three-pillar framework must therefore move beyond general aspirations and provide clear plans: Which agencies will enforce the rules? How will compliance be checked? What resources are needed, and what trade-offs must be made? Governance always requires tough choices, like balancing innovation with protecting rights (Zhang & Dafoe, 2020). In the end, building sustainable AI governance in Malaysia means realizing that ambition without action is meaningless. Big ideas must be turned into real steps, guided by accurate data, enforced by responsible agencies, and updated over time as technology and society change. To achieve this, Malaysia needs to focus on three key areas: (i) legal adaptability, (ii) economic fairness (iii) ethical transparency and the EU AI act as a regulatory benchmark.

LEGAL ADAPTABILITY

First and foremost, any serious conversation about sustainable governance must begin with Malaysia's legal system itself.

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Malaysia operates under a dualist legal tradition, meaning that international treaties and agreements do not automatically become part of domestic law unless they are explicitly incorporated through national legislation (Hamid, 2006). This characteristic, while common among many nations, poses a distinct challenge: even if Malaysia commits internationally to agreements like the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) under the World Trade Organization or expresses policy support for progressive frameworks such as the European Union AI Act (Guadamuz, 2024), these instruments remain largely aspirational unless Parliament enacts specific legislation to embed them into Malaysia's domestic legal order.

In the context of sustainable governance, it is not sufficient for Malaysia merely to ratify or endorse international standards. Sustainability demands that such commitments are fully domesticated which means that they have to be integrated into binding local statutes, regulations, or guidelines and rendered practically enforceable. Otherwise, Malaysia risks falling into a recurring pattern where international obligations exist on paper but lack tangible legal and operational effects. As such, successful governance requires more than symbolic compliance as it necessitates a legal system capable of internalizing and operationalizing international norms within the domestic sphere.

This structural reality becomes particularly salient when considering Malaysia's obligations under the TRIPS Agreement, which imposes minimum standards for the protection and enforcement of intellectual property rights among WTO members. Failure to fully incorporate these standards can lead to governance gaps, trade vulnerabilities, and weakened intellectual property enforcement frameworks (Correa, 2017). Furthermore, with the rise of complex fields like artificial intelligence, Malaysia must also grapple with emerging global instruments like the EU AI Act, which introduces forward-looking standards for transparency, fairness, and ethical development of AI systems (Guadamuz, 2024). Without proactive domestication efforts, Malaysia risks being left behind in both the innovation economy and the international regulatory landscape. Legal adaptability in Malaysia needs to be seen as an ongoing, active process. It involves updating laws, having open discussions between local and international stakeholders, and, most importantly, having strong political commitment to turn global best practices into real changes in Malaysia. Only by consistently making these efforts can Malaysia create a legal framework that is both strong and flexible enough to support long-term development and keep up with technological progress.

ECONOMIC FAIRNESS

A second key area, equally vital to sustainable governance, concerns economic fairness. In particular, it focuses on how Malaysia proposes to manage the relationship between AI technologies and intellectual property (IP) rights. In recent discussions, including proposals by scholars (Latif, Manap, and Althabhawi, 2024), the idea of introducing compulsory licensing mechanisms for AI training datasets and AI-generated inventions has been floated as a way to promote access to technology, ensure fair remuneration for copyright owners, and encourage innovation. However, such mechanisms must be designed with great caution, especially given Malaysia's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

TRIPS provides three key frameworks governing limitations and exceptions to IP rights. For copyright, Article 13 sets out the three-step test, requiring that any limitation must (i) be

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confined to certain special cases, (ii) not conflict with the normal exploitation of the work, and (iii) not unreasonably prejudice the legitimate interests of the rightsholder. For patents, Articles 30, 31 and 31bis permit compulsory licensing under strict conditions, mandating that each license must be considered on a case-by-case basis, must predominantly serve the domestic market, and must ensure that rightsholders receive adequate remuneration (Igbokwe & Tosato, 2022).

If Malaysia does not design its compulsory licensing mechanisms in compliance with these international frameworks, it could face international disputes, lose the trust of investors, and unintentionally weaken its own innovation environment. Therefore, finding the right balance is crucial. On one hand, it is important to ensure fair access to AI tools and prevent monopolistic control over critical datasets (Kattnig, Angerschmid, Reichel, & Kern, 2024). To address this, scholars in Malaysia have suggested creating a special licensing system specifically for AI. Such a system would allow AI developers to legally use copyrighted and patented materials for training their models, while ensuring that original creators are fairly compensated (Latif, Manap, & Althabhawi, 2024). Their proposals include setting standard royalty rates, establishing collective organizations to manage AI dataset licenses, and requiring transparency in reporting the copyrighted or patented materials used during AI training.

On the other hand, Gervais (2020) warns that if compulsory licensing schemes are too broad or poorly managed, they could discourage creators and investors, both of whom are essential for sustaining long-term technological progress. Over-weakening intellectual property protections risks undermining creativity and innovation. Therefore, ensuring fairness in AI governance is not simply about increasing access; it requires designing careful, TRIPS-compliant systems that balance technological access with the protection of creators' rights.

In this light, Malaysia's policymaking must be guided by a twin focus: (i) protecting the legitimate interests of IP owners and (ii) ensuring that AI development remains inclusive and dynamic, consistent with Article 30 of the TRIPS Agreement. Sustainable governance, as scholars suggest, is achieved not by favoring one side over the other but by creating a fair and stable environment where innovation and rights coexist harmoniously an approach that aligns with the broader objectives outlined in Malaysia's National Guidelines on AI Governance and Ethics (MOSTI, 2024).

ETHICAL TRANSPARENCY AND THE EU AI ACT AS A REGULATORY BENCHMARK

As artificial intelligence (AI) technologies become increasingly integrated into daily life and economic activities, establishing a strong foundation of ethical transparency is vital for any sustainable governance framework. The need for clear, enforceable transparency obligations has never been more urgent, particularly in Malaysia. In this context, the European Union Artificial Intelligence Act (EU AI Act) provides a valuable regulatory benchmark, especially through its comprehensive transparency rules.

Published in the Official Journal on 12 July 2024 and entering into force on 1 August 2024, the EU AI Act represents the first comprehensive legal framework regulating AI technologies across Europe. It seeks to ensure that AI is developed and deployed in ways that are safe, ethical, and aligned with fundamental rights and societal values. While its primary focus is on AI safety and ethics, the Act also addresses intellectual property (IP) concerns associated with AI-generated content. Preamble 48 highlight the obligation for AI

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systems to respect IP rights, ensuring safeguards against unauthorized use of copyrighted, trademarked, or patented content during both training and operation. Preamble 88 further emphasizes the importance of transparency and accountability in AI-generated outputs, highlighting the need to protect creators and maintain public trust (Guadamuz, 2024).

Article 50 of the EU AI Act reinforces transparency by requiring AI providers to clearly inform users when they are interacting with an AI system instead of a human. This applies to AI systems generating synthetic content, such as images, audio, or text, which must be marked as artificially created or altered. Providers must also disclose if AI systems are used for emotion recognition or biometric categorization, ensuring that users are informed about the system's operation. Most importantly, AI-generated or manipulated content, like deepfakes, must be disclosed, especially when it's used for public or informational purposes (Gils, 2024). The Act mandates that these disclosures be clear, accessible, and provided at the time of first interaction. These measures are designed to protect users, uphold intellectual property rights, and maintain trust in AI systems. Similarly, Article 53 requiring AI providers to establish policies to comply with IP and copyright law, including respecting rights reservations (Nordemann & Rasouli, 2025). This provision in way highligting the importance of ensuring that AI systems are designed and operated in a manner that acknowledges and upholds the intellectual property rights of creators. For intellectual property owners, these transparency obligations are particularly important. They empower rights holders to monitor the use of their creations, safeguard against unauthorized exploitation, and ensure fair attribution within AI-generated outputs (Guadamuz, 2024).

In the Malaysian context, embedding transparency standards within the National Guidelines on AI Governance and Ethics, as well as future AI legislation, would represent a significant step forward in which are currently lacking. As Jobin, Ienca, and Vayena (2019) emphasize, transparency is a fundamental principle across AI governance frameworks globally, and it serves as the cornerstone for the trustworthy and sustainable deployment of AI technologies. To incorporate legally binding transparency rules inspired by the EU AI Act could effectively address local challenges, such as ensuring proper attribution and fair remuneration for intellectual property (IP) owner as identified by Latif, Manap, and Althabhawi (2024). However, there is a noticeable gap in the Malaysian legal framework when it comes to addressing these issues, particularly in the realm of IP law. Currently, Malaysia lacks specific provisions within its AI-related legislation that explicitly mandate transparency in AI's use of intellectual property. As AI technologies evolve, there is growing concern over how AI interacts with intellectual property (IP) rights, especially when it comes to creating content, using data, or training models. In Malaysia, there are no clear rules on how AI should handle IP issues, leading to uncertainty for creators, developers, and others involved in the IP field. This is problematic because Malaysia's current IP laws do not fully address the challenges posed by AI-generated works. For example, it is unclear how to fairly attribute credit and compensate original creators whose works are used by AI systems. This gap in the law makes it difficult for stakeholders to navigate and protect their IP rights in the age of AI (Latif, Manap, and Althabhawi, 2024). Below is the summary of the concept of sustainability in IP and AI governance:

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Key Areas	Description	Key International Benchmark
Legal Adaptability	Malaysia must actively incorporate international obligations (e.g., TRIPS, EU AI Act) into enforceable domestic laws, ensuring that IP law remains responsive to AI developments.	TRIPS Agreement; EU AI Act principles
Economic Fairness	Introduce mechanisms like compulsory licensing, revenue-sharing, and ensure compliance with international standards to protect IP creators' rights while promoting innovation. This must align with both the copyright three-step test and the patent compulsory licensing conditions.	TRIPS Agreement (Article 13: Three-Step Test for copyright; Articles 30, 31, and 31bis for patents)
Ethical Transparency	Enforce transparency obligations on AI outputs, including disclosure of AI-generated content, respect for IP rights, and informing users when interacting with AI systems.	EU AI Act (Articles 50–53; Preambles 48 and 88)

COMPARATIVE ANALYSIS AND REFORM DIRECTION ON MALAYSIA CURRENT IP LAWS

In the area of copyright, the United Kingdom's Copyright, Designs and Patents Act 1988 (UKCPA), particularly Section 9(3), offers a valuable model. It attributes authorship of computer-generated works to *"the person by whom the arrangements necessary for the creation of the work are undertaken."* This approach appropriately recognizes the human creative contribution in AI-generated processes without requiring that a human manually produce each element of the output. In terms of patents, the UK Supreme Court decision in *Thaler v. Comptroller-General of Patents* [2023] UKSC 49 affirmed that AI systems cannot be recognized as inventors or authors under current law. The ruling mentioned that the statutory framework under the Patents Act 1977 requires an inventor to be a natural person and that an AI machine, lacking legal personality, could not fulfill the necessary legal criteria for inventorship (Matulionyte, 2024). The Court emphasized that granting patent rights demands accountability, creativity, and ownership qualities inherently tied to human beings. Therefore, even though AI may play a significant role in generating inventive ideas, it cannot independently claim inventorship under UK law.

The United States takes a similar position. In terms of copyright, the U.S. Copyright Office and the federal courts have consistently maintained that works created solely by AI, without human creative input, are not eligible for copyright protection, as seen in *Stephen Thaler v. Register of Copyrights* (2023). This decision emphasized that human authorship is a fundamental requirement under U.S. copyright law. In relation to patents, in *Thaler v. Vidal* (2022), the U.S. Court of Appeals for the Federal Circuit ruled that only natural persons could be named as inventors under the U.S. Patent Act. The court emphasized that the statutory language and legislative intent associate inventorship strictly with human beings. The court further clarified that the definition of "individual" under the Patent Act refers exclusively to natural persons and does not extend to non-human entities such as AI systems (Lavrichenko, 2022). In its reasoning, the court noted that the patent system is designed to incentivize human ingenuity and innovation, which presupposes human intellectual effort, accountability, and legal capacity.

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In Europe, similar developments are observed. Under copyright law, the EU Directive 2019/790 on Copyright in the Digital Single Market stresses the importance of human authorship but acknowledges that limited protections for machine-assisted outputs may be appropriate, provided that the human intellectual contribution remains central. On the patent side, the European Patent Office (EPO) in decisions J 8/20 and J 9/20 clearly confirmed that AI cannot be regarded as an inventor, reinforcing that inventorship under the European Patent Convention (EPC) must be attributed to natural persons only. The EPO reasoned that recognizing an AI system as an inventor would be inconsistent with the purpose of the patent system, which is to reward human creativity and ensure accountability for the innovation process. Even though AI systems are increasingly capable of producing inventive outputs, the EPO maintained that the requirement of a natural person inventor is fundamental to preserving the integrity and enforceability of patent rights across member states (Nordberg, 2022).

MALAYSIA'S LEGAL POSITION

Malaysia's current intellectual property framework, while well-established, does not yet fully address the complexities introduced by AI-generated works and inventions. Under the Copyright Act 1987, as amended, copyright protection is granted to works created by "qualified persons," defined under Section 3 as Malaysian citizens, permanent residents, or corporations incorporated in Malaysia. Importantly, the concept of "author" under Malaysian law is inherently human-centric. Section 3 defines the author according to the type of work, such as a writer for literary works or a composer for musical works, and implicitly presumes that the creator is a natural person. Further reinforcing this, Section 7(3) of the Act requires that a work must involve "sufficient effort" to be deemed original. The requirement of sufficient effort inherently demands human intellectual input, distinguishing it from outputs generated independently by AI. The Federal Court's decision in *YKL Engineering Sdn Bhd v Sungei Kahang Palm Oil Sdn Bhd* [2022] 8 CLJ 32 further clarifies that originality in copyright does not mean novelty but rather sufficient human skill, labor, and judgment. Thus, a work produced autonomously by AI without meaningful human input would likely fail to meet the threshold of originality under Malaysian law.

In the issues of ownership, Malaysian law maintains that the initial ownership of copyright under Section 26 belongs to the author unless the work is created under employment or commissioning, in which case ownership may transfer to the employer or commissioner. Since AI is not a legal person and cannot hold rights, any copyrightable work produced with AI assistance would vest in the human or entity responsible for orchestrating the creative process. The High Court in *Radion Trading Sdn Bhd v Sin Besteam Equipment Sdn Bhd & Ors* [2010] 9 MLJ 648 supported this view by confirming that copyright created in the course of employment vests in the employer, further reinforcing the human-centered structure of Malaysia's copyright ownership rules. The court stated that:

> "At this point, I move on to deal with the question whether the plaintiff is the owner of the copyright at the material time. In relation to this, s 26(2)(b) of the Act provides, inter alia, where a work is made in the course of the author's employment, the copyright in such work shall be deemed to have transferred to the author's employer, subject to any agreement excluding or limiting such transfer. By virtue of this provision, evidently copyright in the design drawings have transferred from PW1 to the plaintiff by virtue of his employment with the company."

In the context of patents, Section 20(1) of the Patents Act 1983 provides that the right to a patent belongs to the inventor.

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However, where an invention is made in the course of the inventor's employment or pursuant to a commission, the right to the patent shall, in the absence of any agreement to the contrary, belong to the employer or the commissioning party. Although the Act defines an "inventor" broadly as the actual deviser of the invention, it implicitly assumes that the inventor is a natural person capable of holding rights, entering into agreements, and assuming responsibilities. This human-centric assumption aligns with the common understanding of inventorship across major jurisdictions. Given the consistent interpretations across the United Kingdom, United States, and Europe that an inventor must be a natural person, there is a strong basis for Malaysia to take a similar stance. Current Malaysian Patent practice, in line with common law principles, expects that patents protect the fruits of human ingenuity as highlighted in YKL Engineering case above. No provision in the Patents Act 1983 presently contemplates the possibility of an AI entity being named as inventor, suggesting an implicit preference for human inventorship. Similarly, inventions created in the course of employment or under commission typically see ownership vesting in the employer, following principles similar to those applied to copyright. In the case of AI-assisted inventions, the employer or commissioning party directing the AI's operations would be the proper holder of the resulting patent rights, not the AI system itself.

Given these existing principles, it is clear that Malaysian IP law presently leans heavily toward a human-centered model of authorship, inventorship, and ownership. However, as AI technologies continue to advance, the absence of explicit statutory provisions addressing AI's role in creation and invention leaves a potential gap that could lead to uncertainty. To ensure that Malaysia's IP laws remain clear, competitive, and future-proof, legislative reform should focus on explicitly affirming that "author" and "inventor" must be natural persons. This approach ensures the protection and remuneration of individuals who contribute intellectual creativity and human ingenuity to the creation or invention. Upholding the rights of human creators aligns with the fundamental objectives of intellectual property law, which are rooted in labor theory and personality theory which aims to encourage innovation, rewarding personal effort, and promoting societal progress even as technological developments continue to reshape the creative and inventive landscape.

REMUNERATION FOR IP OWNERS

The increasing reliance of AI systems on copyrighted works and patented inventions has raised serious concerns about fair compensation for copyright owners. Many AI models, particularly those designed for automated content generation, are trained on vast datasets that include copyrighted materials without clear mechanisms for attribution, acknowledgment, or payment (Lucchi, 2023). This lack of transparency disrupts the balance within the intellectual property ecosystem and threatens the sustainability of creative industries. It also raises deeper legal questions about authorship, inventorship, and ownership issues that existing legal frameworks, built around human creativity, do not fully address (Ducru et al., 2024). While AI can generate content independently, much of its output is derived from protected works, underscoring the need for clear attribution and fair compensation systems for original creators. The absence of clear legal mechanisms leaves copyright and patent owners vulnerable to exploitation and revenue loss (Jones, 2023), particularly in jurisdictions where IP laws have yet to adapt to the complexities of AI. In this sense, Once authorship and inventorship are firmly attributed only to human creators by preserving the human-centric foundation of intellectual property law, a new question naturally arises on how should fair remuneration be ensured in an ecosystem

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increasingly influenced by AI technologies? (Mammen et al., 2024).

In addressing this concern, fair remuneration for IP owners can be achieved through several academic and policy-oriented approaches, such as compulsory (i) licensing schemes, (ii) revenue-sharing mechanisms, and AI-specific (iii) copyright and patent proposals for amended legislation as discussed above. Compulsory licensing, for instance, ensures that the use of copyrighted materials and patented inventions by AI systems is legally permissible while requiring AI developers to compensate copyright owners appropriately (Latif, Manap, & Althabhawi, 2024). Revenue-sharing models, which allocate a portion of profits derived from AI-generated outputs back to original content creators, offer a sustainable solution for equitable compensation (Senftleben, 2023) and should be incorporated into a dedicated AI governance act

Building on this foundation, concrete policy proposals should be considered. Universally, there is only limited precedent for structured remuneration mechanisms in the context of AI-generated outputs, but lessons can be drawn from sectors such as collective management in copyright law and patent licensing regimes. For Malaysia, a three actionable steps approach could be effective. First, a statutory framework for compulsory licensing should be introduced, mandating that AI developers who utilize copyrighted works or patented inventions in training datasets or operational processes must obtain a license and provide fair remuneration to rights holders (Latif, Manap, & Althabhawi, 2024). The issue of AI training on copyrighted material must also be addressed. Scholar argues that Malaysia should expand Section 13(2) of the Copyright Act 1987 to explicitly recognize AI training as a restricted act. Section 13(2) currently prohibits acts such as reproduction and adaptation without authorization but at the same time it does not specifically cover the use of copyrighted works for AI training purposes. It is thus suggested that expanding this section to treat AI model training as a restricted act requiring prior authorization from copyright holders in Malaysia would better align its legal framework with emerging international practices. This would ensure that rights holders are not exploited through the unlicensed use of their works in AI datasets, while simultaneously promoting responsible AI development through licensing mechanisms. Apart from that, this would also ensure TRIPS-compliance under Article 13 (Copyright Three Step test provision) and Article 31 (Patent Compulsory licensing provision) while adapting to local socio-economic contexts. Second, a revenue-sharing scheme should be embedded within a dedicated AI governance act, requiring AI operators and service providers to allocate a proportion of revenues generated from AI outputs to a central remuneration fund.

The end result of these proposed mechanisms is the creation of a balanced and sustainable IP ecosystem in which the rights of patent holders and copyright owners are protected, while AI innovation is encouraged. Ensuring fair remuneration not only addresses the economic interests of IP owners but also reinforces the value of creative works, fostering a climate of trust and collaboration between stakeholders (Kikkis, 2023). For Malaysia, such legal reforms have the potential to position the nation as a leader in ethical AI governance by demonstrating its ability to balance technological progress with the protection of IP rights. Ultimately, achieving fair remuneration for copyright owners will strengthen the creative economy, promote equity within the IP system, and contribute to the sustainable integration of AI into society. It is that in this paper clear rules on authorship, inventorship, and compensation, should be establish in line with Malaysia National Guidelines on AI Governance and Ethics governance framework with international best practices such as EU AI

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Act while addressing the socio-legal concerns unique to its context. A governance model that prioritizes remuneration for copyright owners ensures that AI's potential is realized responsibly, without compromising the rights of those who contribute to its foundational inputs.

TRANSPARENCY IN USING COPYRIGHTED WORKS AND PATENTED INVENTIONS FOR FAIRNESS AND ACCOUNTABILITY

Transparency in AI training datasets is a critical issue in protecting intellectual property rights (Buick, 2024). AI developers often rely on vast amounts of copyrighted and patented materials, yet many systems lack clear mechanisms for disclosing data sources or securing proper licenses. This raises concerns about ownership disputes and fair compensation for creators. Requiring developers to disclose the origins of training data and obtain appropriate licensing agreements would help address these challenges while providing legal clarity for both IP owners and AI developers.

Another important aspect of transparency is ensuring that patented inventions used in AI systems are properly authorized (Foss-Solbrekk, 2021). Without a structured verification process, AI developers risk unintentional infringement, leading to legal uncertainty. A centralized database that allows developers to check the IP status of technologies before integrating them into AI models could minimize these risks and promote a culture of compliance. Strengthening transparency measures in AI governance would not only protect intellectual property rights but also support innovation by fostering trust between AI developers and content creators. Thus, this paper suggest that AI developers disclose the sources of training data and secure proper licensing agreements would not only protect IP owners but also establish a clear and transparent legal framework for AI developers to operate within. Further, AI developers should be required to report on the specific purposes for which copyrighted works and patented inventions are used in their systems. This would provide clarity on how intellectual property contributes to AI outputs, enabling fair compensation mechanisms. At the outset, this transparency mechanism would help ensure compliance with legal and ethical standards (Mylly, 2023), fostering trust among stakeholders in line with with the requirements of the "transparency" under article 13 of EU AI Act ensuring that the IP used in the system is clearly documented and legally obtained.

ENFORCEABILITY OF NATIONAL GUIDELINES

A major challenge in Malaysia's AI governance is the enforceability of national guidelines. While the Malaysia National Guidelines on AI Governance and Ethics mark progress in regulating AI development, they mainly outline voluntary ethical principles, including fairness, transparency, and accountability. Without legal authority, these guidelines lack the strength to ensure compliance, making their real-world impact limited. Many AI developers and organizations may view them as recommendations rather than obligations, reducing their effectiveness.

The voluntary nature of the guidelines means that while AI developers and companies may adhere to ethical recommendations in the short term (Hagendorff, 2020), there is little incentive to ensure long-term compliance or to implement the necessary checks and balances to safeguard the interests of affected stakeholders. As a result, the guidelines may lack the power to address serious concerns about the issues discussed on ownership and fair remuneration for IP owners, or the prevention of discriminatory practices in AI systems. Without binding enforcement measures, these ethical principles risk being relegated to mere recommendations, unable to compel AI

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companies to make the necessary changes to their practices or business models. To strengthen the impact of the National Guidelines on AI Governance, the framework should shift from voluntary principles to legally binding regulations under a dedicated AI governance act. This would require clear compliance monitoring, penalties for violations, and enforcement mechanisms to hold AI developers accountable, regardless of their size or influence. Strict penalties for non-compliance would deter misconduct while ensuring remedies for affected parties (Garcia-Segura, 2024).

In the context of intellectual property, if an AI system infringes on copyrighted content or patented inventions without proper attribution or compensation, the developer could face financial penalties or be required to compensate the copyright owner. AI systems that fail to meet transparency or fairness standards could also be subject to fines or restrictions on their use. With the establishment of the National AI Office (NAIO) on 12 December 2024, there is hope that Malaysia will transition from a voluntary AI governance model to a legally enforceable framework, ensuring stronger protections and accountability in AI development and deployment.

OTHER SUGGESTIONS

Beyond legislative amendments and remuneration mechanisms discussed earlier, further structural and procedural reforms are necessary to ensure a holistic and future-proof approach to AI governance in Malaysia. As AI systems become more deeply integrated into creativeand commercial processes, it is crucial to establish complementary institutions and accountability frameworks that can respond to the emerging challenges. In this regard, two (2) additional proposals are worth considering: (i) the establishment of an AI Ombudsman to manage disputes and ethical issues, and (ii) the enhancement of accountability through mandatory AI Impact Assessments for AI-driven systems engaging with intellectual property rights and innovation ecosystems.

AI OMBUDSMAN

Building upon the earlier proposals, an additional structural reform could involve the establishment of an AI Ombudsman, modelled on Australia's AI Ethics Framework, to handle disputes arising from AI-generated works and inventions (National Justice Project, 2025). Such an Ombudsman could serve as a specialized, independent authority to mediate and adjudicate issues related to authorship, inventorship, ownership, and ethical concerns arising from AI activities. Where the AI Australia Ethics Principles emphasize accountability, transparency, and contestability (Department of Finance, 2025), the Malaysian AI Ombudsman could be empowered to issue non-binding recommendations, facilitate voluntary dispute resolution between parties, and advise on the interpretation of new statutory provisions relating to AI-generated intellectual property. Incorporating such an institution would enhance the adaptability and responsiveness of Malaysia's legal framework to the complexities introduced by AI-driven innovation. It would also promote public trust by ensuring that grievances arising from the deployment of AI technologies are addressed swiftly, fairly, and with due consideration to both innovation and rights protection. To dictate this effectively, the establishment of the AI Ombudsman should be grounded within a formal legislative framework, either as part of a broader AI Governance Act or through amendments to existing intellectual property such as Copyright Act 1987, Patents Act 1983 or and any technology and media legislations and regulations which exist in Malaysia. This framework should clearly define the Ombudsman’s jurisdiction, powers, and procedures, ensuring transparency, independence, and

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accountability in handling disputes. The Ombudsman should also have the authority to develop soft law instruments, such as codes of practice and advisory guidelines, which can guide stakeholders on compliance with ethical and legal standards related to AI-generated outputs.

ENHANCING ACCOUNTABILITY THROUGH AI IMPACT ASSESSMENTS

Strengthening accountability in AI governance apart from AI Ombudsman requires the introduction of mandatory AI Impact Assessments (AIIA) as a regulatory requirement for AI developers and deployers (Bogucka et al., 2024). The Netherlands has successfully implemented the Netherlands' AI Impact Assessment Framework (Information Policy Directorate et al., 2022), while Malaysia already applies the Regulatory Impact Analysis (RIA) framework to evaluate policies and regulations for efficiency, effectiveness, and fairness (Hassan, 2015). Introducing AIIAs in Malaysia would enable a structured assessment of the societal, ethical, and economic impacts of AI systems prior to deployment, thereby aligning AI governance with national objectives of responsible innovation and ethical oversight (Stahl & Leach, 2023). AIIA would serve as a structured evaluation tool, requiring developers to assess AI systems for fairness, transparency, and accountability. This includes identifying risks such as bias, discrimination, and potential infringement of intellectual property rights (Rodrigues, 2020). Documenting data sources, training methodologies, and decision-making frameworks would enhance transparency in AI development. Public disclosure of AIIA findings would further strengthen trust among stakeholders, ensuring AI systems operate within ethical and legal boundaries. Additionally, the findings in the United Kingdom case of *Clearview AI Inc. v. Information Commissioner* [2023] UKFTT 819 (GRC) highlight the consequences of non-compliance with data protection and intellectual property laws in AI development, supporting the need to mandate AI Impact Assessments and strengthen accountability mechanisms.

The *Clearview AI Inc* case decision demonstrates how AI developers who fail to adhere to data protection and intellectual property standards may face significant legal and financial repercussions. In that case, *The Clearview AI Inc.* was found to have unlawfully collected and processed biometric data without proper consent, resulting in enforcement actions and reputational damage. This outcome illustrates the urgent need for proactive measures, such as mandatory AI Impact Assessments, to identify and mitigate risks early in the AI development process. Implementing AIIAs would not only align Malaysia's governance approach with international best practices but also ensure that developers are held accountable for ethical and legal compliance before AI systems are deployed. By embedding such safeguards into the regulatory framework, Malaysia can promote responsible AI innovation while protecting fundamental rights and intellectual property interests.

ACTIONABLE ROADMAP AND WAY FORWARD

To effectively address the identified legal and governance gaps, Malaysia should implement a phased, structured roadmap that in line with immediate actions with medium- and long-term strategic reforms to ensure a resilient, forward-looking intellectual property and AI governance framework.

In the immediate or short term, Malaysia should prioritize amendments to the Copyright Act 1987 and the Patents Act 1976 to explicitly recognize "AI-assisted works" and "AI-assisted inventions" (Latif, Manap, & Althabhawi, 2024; Abbott, 2019). These amendments must clearly define the role of human creators and inventors where AI involvement is significant but not entirely

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autonomous. Concurrently, Section 13(2) of the Copyright Act 1987 should be expanded to classify the use of copyrighted materials for AI training as a restricted act requiring prior authorization. Malaysia should also introduce express disclosure obligations mandating applicants to specify AI's involvement in the creation or invention process (Novelli et al., 2024). Moreover, the establishment of an AI Ombudsman, modelled after Australia's AI Ethics Framework should be expedited to mediate disputes relating to AI-generated authorship, inventorship, ownership, and fair remuneration. Immediate steps should also include the formal adoption of transparency requirements for AI developers to disclose the sources of training data, licensing status, and the purposes for which copyrighted and patented materials are utilized.

In the medium term, Malaysia should move towards enacting a dedicated AI Governance Act that consolidates and strengthens ethical, legal, and regulatory principles in line with the approaches adopted in EU Act Approach. The AI Governance Act should establish legally binding regulations, integrate compulsory licensing mechanisms for AI training datasets incorporating revenue-sharing models to ensure fair compensation for IP owners, and mandate AI Impact Assessments (AIIA) for all high-risk AI applications Furthermore, Malaysia must ensure that its National Guidelines on AI Governance and Ethics transition from voluntary guidelines to enforceable statutory requirements. Enhancing the mandate and operational capacity of the National AI Office (NAIO) to supervise compliance, conduct audits, and impose penalties for breaches will be vital to the successful implementation of these reforms (The National Artificial Intelligence Office, 2024). This phase should also introduce a structured verification system to track and authenticate copyrighted works and patented inventions used in AI systems, minimizing risks of inadvertent infringement (Mylly, 2023).

In the long term, Malaysia should work towards embedding sustainability and international harmonization within its AI and IP governance frameworks. Full domestication of international standards such as the European Union's AI Act (Guadamuz, 2024) and the TRIPS Agreement (WTO, 1994) should be prioritized to align Malaysia's laws with global best practices. The establishment of a centralized IP verification and tracking platform is essential to ensure transparency in the use of copyrighted and patented works for AI training and outputs (Buick, 2024; Foss-Solbrekk, 2021). Malaysia must also foster sustained public-private collaboration to continuously update licensing frameworks, incentivize responsible AI innovation, and protect fundamental rights (Latif, Manap, & Althabhawi, 2024; Senftleben, 2023). Additionally, the country should advocate for the development of ASEAN-wide harmonized AI and IP regulatory standards to secure Malaysia's regional leadership in ethical and sustainable AI governance (ASEAN 2024).

CONCLUSION

As Malaysia embraces the promises of artificial intelligence, it must also confront the deeper questions of fairness, ownership, and accountability. AI may be a powerful tool for progress, but behind every innovation lies human creativity and labor, in which these must be respected and protected. This paper has shown that Malaysia's current legal framework, though well-intentioned, needs urgent reform to recognize AI's evolving role while ensuring that intellectual property owners are not left behind.

Building a sustainable governance framework is not just about catching up with technology, it is more or less about setting the foundation for a future where innovation

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and justice can grow hand in hand. It means redefining authorship and inventorship in a way that honors human contribution, ensuring fair remuneration for creators, and embedding transparency at the heart of AI development. Malaysia now stands at a crossroads: it can either be a passive observer of global trends, or a proactive leader in ethical, sustainable AI governance. The choice we make today will shape not only our economy but also our values as a society. True progress will come not only from what our machines can do but from how wisely, fairly, and courageously we choose to guide them.

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CONFLICT OF INTEREST

The authors declare that they have no conflict of interest to this study.

AUTHORS' CONTRIBUTION

All authors contributed to the final version and approved the submission.

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DIPLOMATIC IMMUNITY AND JUSTICE DENIED: PROTECTING DOMESTIC WORKERS UNDER INTERNATIONAL LAW

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ABSTRACT

Domestic work refers to labour performed in or for a household, often by individuals in vulnerable situations. This paper aims to examine how international law addresses the conflict between diplomatic immunity and the protection of domestic workers' human and labour rights. The core issue lies in recurring reports of abuse by diplomats, where domestic workers are subjected to inhumane treatment but are denied justice due to the shield of diplomatic immunity. Despite the existence of credible evidence in many cases, legal proceedings are often obstructed, raising serious concerns about accountability and access to remedies for victims. This study adopts a legal doctrinal analysis, drawing on case law, international conventions, and scholarly literature. The findings reveal that while international law—particularly the Vienna Convention on Diplomatic Relations (1961) and the Convention on the Privileges and Immunities of the United Nations (1946)—provides extensive protections for diplomatic personnel, it frequently fails to safeguard the rights of domestic workers in cases of abuse. By critically assessing the tension between immunity and accountability, this paper contributes to existing scholarship by highlighting the normative gap in international law that questions the adequacy of current mechanisms in addressing diplomatic impunity in employment relations. It offers a framework for reconciling diplomatic privileges with the protection of human rights, an area that remains underexplored in current literature. The research concludes that these legal frameworks require reform to prevent the misuse of diplomatic immunity. States and international bodies should consider amending these conventions to achieve a balanced approach between diplomatic privileges and accountability for human rights violations. Where diplomatic immunity

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persists, the sending state should take appropriate measures to ensure a fair trial or provide adequate compensation. Furthermore, adopting a narrower interpretation of "official functions," as seen in certain U.S. court decisions, may help limit the abuse of immunity. This paper underscores the need to close legal gaps and enhance enforcement mechanisms to protect domestic workers from diplomatic impunity.

Keywords: Domestic Workers; Diplomatic Immunity; Human Rights; International Law; Vienna Convention

INTRODUCTION

Diplomatic immunity (DI) is designed to facilitate peaceful and effective diplomatic relations by shielding diplomats from the legal authority of host states (Abusamra, 2024). Enshrined in the Vienna Convention on Diplomatic Relations, 1961, this legal protection is pertinent for the autonomy and security of diplomatic agents (Denza, 2008). However, its application has revealed significant tensions between protecting state representatives and enforcing fundamental human rights, particularly in the context of workers engaged in diplomatic homes (Butt, 2024).

Domestic workers (DWs)—often women from marginalized and economically vulnerable backgrounds—frequently face exploitative conditions, including unpaid wages, restricted freedom of movement, physical abuse, and threats of deportation (Dantes, 2023). Victims typically find themselves with limited or no avenues for redress when confronted with abuses perpetrated by diplomatic actors. The very legal frameworks established to facilitate international cooperation often function to insulate perpetrators from accountability (Bergmar, 2014; Mullally & Murphy, 2016). This denial of justice raises critical questions about the parameters of DI and the international legal system's responsibility to protect vulnerable individuals.

This article examines the legal and ethical implications of DI in cases involving the abuse of DWs. It analyzes relevant international legal instruments, state practices, and judicial decisions to explore the extent to which DI obstructs access to justice. The discussion further considers potential reforms and alternative legal avenues that could reconcile the protection of diplomatic functions with the imperative to uphold human rights. This study examines whether current international legal frameworks adequately protect domestic workers from abuse by diplomats, and how these frameworks can be reformed to ensure justice.

DWs are those who execute domestic work in or on behalf of a residential premises. (Article 1(a) and (b) of the Domestic Workers Convention 2011 (Convention No. 189)). This definition specifies that a DW is an individual who works to handle a household's needs. Examples of DWs include housemaids, cleaners, gardeners, personal chefs, personal drivers, and housekeepers. Similar to other groups of workers, DWs are susceptible to oppression, forced labour and other violations of their human rights.

What is more worrisome is that there are rumours that DWs have also been subjected to the tyranny of diplomats (Esim & Smith, 2004). DWs are also alleged to be oppressed from achieving proper legal justice because it is claimed that diplomatic officials are exempt from any criminal or civil law judicial process. Due to the DI of officials from the criminal and civil legal authority of the Host State, the abuse of rights and justice against DWs is at times compromised (Haynes, 2023).

It was reported by the International Labour Organization (ILO) that 52.6 million DWs were employed globally in 2010 (ILO, 2013). Since 1995, when 33.2 million DWs were first reported, this number has nearly doubled (ILO, 2013). According to reports, DWs are one of the migrant worker

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categories that frequently encounter forced labour issues (ILO, 1980). Additionally, according to estimates, 20.9 million DWs worldwide at one point were subjected to forced labour (ILO, 2013). More than 75.6 million DWs are employed worldwide, with women comprising nearly 76 per cent of the total workforce (ILO. 2021). Many continue to face conditions amounting to forced labour, with ILO (2022) estimating 27.6 million people globally trapped in forced labour, including a significant number in domestic work.

The issue of forced labour may appear in many different forms. For instance, according to reports, housemaids in Saudi Arabia are subject to a preposterous system that defines the position of a maid as someone who lives under sponsorship by the employer's family. This system allows for the slave-like exploitation of the human liberties of such DWs (Garcienda, 2023). It is said that DWs who travel to Latin America experience oppression because of their minority status. They experience oppression in the form of a lack of legal protection for their welfare in the nation where they make a living, unjust labour practices, and oppression by diplomats (Esim and Smith, 2024).

It is an incontrovertible fact that many employers, including diplomatic officials, are accused of mistreating DWs. Despite clear evidence placing some diplomatic abuses within the receiving state's legal jurisdiction, many diplomats evade investigation, arrest, or trial. Such immunity undermines natural justice by placing diplomatic status above the rule of law and due process (Hidayat & Syed Raza, 2024).

DWs are generally entitled to fundamental rights recognized in existing international instruments. The ILO highlights critical concerns regarding their welfare, urging states to address these issues through national laws and policies. This underscores the importance of ratifying the Domestic Workers Convention, 2011 (No. 189), which, to date, has been adopted by only 35 countries.

Although international instruments exist to protect the liberties and fates of DWs, this study examines whether current international law adequately safeguards them from abuse by diplomatic officials. It will also explore potential legal reforms to protect DWs from such exploitation.

This study fills that gap by examining how international law addresses the conflict between DI and the protection of DWs' rights. It contributes to existing scholarship by highlighting the inadequacy of current legal frameworks in reconciling diplomatic privileges with accountability for rights violations.

The objectives of this study are: (i) to analyse international conventions related to DI and DWs, (ii) to evaluate related case precedents, and (iii) to propose legal reforms.

Unlike earlier works such as Staiano (2013) and Mullaly & Murphy (2016), which primarily examined the human rights implications of DI in theory or through selected regional cases, this study situates DWs' labour rights within the framework of the Vienna and UN Conventions, offering a reform-oriented model that reconciles diplomatic privileges with accountability, an approach largely absent from previous scholarship.

RESEARCH METHODOLOGY

This study uses a doctrinal legal research approach, analyzing statutes, international treaties, international tribunal cases, and conventions as primary sources. It also refers to secondary sources such as journals and textbooks. A critical analysis examines legal protection against the misuse of DI in cases of DW mistreatment. The theme of

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this article is the discourse of national humanitarian law focusing on the plight of DWs in the context of international legal instruments (Saiful Izan & Mohd Hisham, 2023). Analytically, the study adopts an interpretative legal reasoning framework, supported by selected international or national case analysis. It interprets the relevant provisions of international conventions—particularly the *Vienna Convention on Diplomatic Relations (1961)* and the *Domestic Workers Convention (No. 189, 2011)*—to evaluate how different jurisdictions have balanced diplomatic privileges against accountability for human rights violations. The discussion integrates judicial precedents and state practices to identify emerging norms and inconsistencies in the application of DI.

However, the research is limited in scope to the international legal framework and selected state practices with reported cases involving diplomatic abuse. It does not include empirical fieldwork or in-depth national case studies beyond those publicly documented. Jurisdictional coverage is also constrained by the availability of case law and state-level data, which vary across regions. Despite these limitations, the doctrinal and case-law approach provides a robust foundation for assessing the adequacy of existing international legal protections for DWs.

LITERATURE REVIEW

DIPLOMATIC IMMUNITY V. HUMAN RIGHTS

The link between DI and the rights of DWs in diplomats' residential homes has become an increasingly interesting area of study. A Kartusch (2011) highlights the pervasive nature of violations and abuse suffered by migrant DWs engaged by diplomats, attributing to the lack of accountability largely to DI. The report underscores the essential role of non-governmental organizations in exposing abuses by reporting to United Nations (UNs) mechanisms associated with legal instruments like CEDAW, CERD, ICCPR, ICESCR, and MWC, and through emergency request to the UNs. Kartusch's work underscores the significance of the UN mechanisms in addressing these violations in the absence of domestic legal remedies.

Building on this concern, Staiano (2013) discusses the inherent tension between the rules on DI and the imperatives of international law, particularly in cases of egregious abuse. Staiano argues that the current framework allows for impunity and calls for the exploration of alternative remedies, focusing especially on the relevance of universal legal standards and the potential of international instruments to offer some form of legal recourse.

Naveen (2024) provides a more doctrinal analysis of DI under the Vienna Convention on Diplomatic Relations (1961), explaining its scope and underlying principles, including the concept of "persona non grata". While acknowledging the importance of DI for maintaining diplomatic relations, Naveen critiques the potential for its misuse, especially in private matters such as labour exploitation. The article highlights how such misuse challenges the balance between state sovereignty and human rights protection.

Mullally and Murphy (2016) analyze the evolving and often inconsistent jurisprudence surrounding state and diplomatic immunities in employment disputes involving DWs. Focusing on the UK and USA, the authors argue that the legal landscape is highly divided, with courts grappling to harmonize the principles of immunity with evolving international norms. This legal uncertainty, they suggest, undermines DWs' access to effective remedies and reveals deeper tensions about the role and purpose of international law.

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Butt (2024) further investigates the abuse of DI, highlighting a range of high-profile cases involving criminal acts such as human trafficking, corruption, and modern slavery. He underscores the challenge this poses to the legitimacy of diplomatic protections and international cooperation. The landmark English Supreme Court decision in *Basfar v Wong* (2022) is cited as a pivotal moment, where the court held that domestic servitude falls outside the scope of diplomatic immunity, thereby signaling a shift toward prioritizing human rights over rigid interpretations of immunity.

Özdan (2022) examines the theoretical underpinnings of DI and evaluates its consistency with overriding civil liberties standards, like the prohibition of slavery and torture. The chapter argues that absolute immunity is fundamentally at odds with international civil liberties law, and that when diplomatic protections are used to shield violations of peremptory norms, the legal framework itself must be questioned and reformed.

Across the literature, a clear convergence emerges on the recognition that DI, while central to maintaining international relations, has created significant gaps in accountability for abuses committed against DWs in diplomatic households. Kartusch (2011) and Staiano (2013) both highlight how the current framework perpetuates impunity, though Kartusch emphasizes the role of NGOs and UN mechanisms in filling this gap, whereas Staiano calls for reform through alternative legal remedies rooted in universal norms.

Similarly, Naveen (2024) and Özdan (2022) critique the doctrinal rigidity of DI under the Vienna Convention. Mullally and Murphy (2016) further substantiate these concerns through comparative judicial analysis, revealing inconsistent jurisprudence in the UK and USA. Butt (2024), in turn, moves the debate forward by illustrating how recent case law signals a judicial shift toward limiting DI in cases of domestic servitude.

Collectively, these selected works underscore the need to reconcile the legal shield of DI with accountability mechanisms for human rights abuses. While international treaties and advocacy efforts provide some avenues for redress, the lack of enforceable legal remedies remains a barrier. The literature demonstrates a growing consensus that reform is necessary to protect vulnerable DWs within diplomatic households, whether through reinterpretation of existing laws, policy changes, or international advocacy.

CONTEMPORARY ABUSE CASES

According to reports, certain DWs in the homes of diplomats were subjected to cruel treatment by their employers, had their human rights violated, and were made to perform labour like slaves (Naveen, 2024). A DW for a Qatari military diplomat was denied the right to a medical checkup in the reported case of *United States v. Al Homoud* (No. 15-cr-00391 (W.D. Tex. Feb. 9, 2016) despite complaining of an ongoing stomachache. She managed to flee her workplace and secure medical assistance to save her life. As a result, it was determined that she had cancer.

Meanwhile, a DW was also subjected to forced employment in the home of a Tanzanian diplomat in the case of *Mazengo v. Mzeng*i (No. 1:07-cv-00756 (D.D.C. Dec. 20, 2007). She was compelled to work for no pay. Additionally, her employer consistently refused her access to healthcare. She almost had to have her toes amputated since the procedure was delayed. The victim's lack of access to justice is the main issue when DWs are oppressed in a diplomatic family. This is because the diplomatic representatives frequently assert their immunity, and their sending state will not agree to waive it.

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This case, *Sabbithi v. Al Salleh* (623 F. Supp. 2d 93), involved three Indian DWs who brought a claim against a Kuwaiti ambassador in the USA as an illustration. They alleged in their lawsuit that the diplomat had not paid them their promised salaries and had required them to labour up to 19 hours a day without a break. Therefore, the Department of Justice of the USA has advised the sending state (Kuwait) to waive the diplomatic official's immunity, taking into account the diplomatic official's immunity. Kuwait, though, has declined to consider the plea.

The only "highest punishment" that a receiving state may apply against a sending state that resists to relinquish a DI is to declare the envoy will be *persona non grata* and no longer required on its soil. This circumstance is evident in the 2014 case of *United States v. Khobragade* (15 F. Supp. 3d 383). In this instance, Dr. Devyani Khobragade, a diplomat stationed in the USA, was detained in relation to allegations that she had participated in the mistreatment of her maid, a violation of the country's laws against fraud and false statements. As a result of her legal right to DI, the Indian government has vehemently condemned any action taken against her. Additionally, the Indian government refused to lift her immunity. Because of this, the USA has advised her to be removed from their sovereign territory.

The assassination of Kim Jong Nam in Malaysia, which is alleged to have involved a conspiracy by diplomatic representatives of the Democratic People's Republic of Korea (DPRK) Embassy, is another instance where DI was tried to be used (Shiddiqii, & Utama, 2023). Although there are compelling reasons to believe that these diplomats were involved in the murder of Kim Jong Nam, no additional action can be taken to ensure that the victim receives the respect she deserves. The only sanction Malaysia could impose at the time was to pronounce the DPRK's ambassador "persona non grata", which eventually led to his departure from Malaysia and return to his home country.

The concept of immunity of diplomatic officials does not stop protecting these individuals as people. The immunity is also extended to the building and the personal house of the diplomatic agents. Even though the premises of the missions and residences are abroad outside the boundary of the sending state, the duty of the receiving state to protect the inviolability of these premises is embedded under the Vienna Convention on Diplomatic Relations of 1961 ("VCDR 1961"). Article 22 of VCDR 1961 provides, among others, as follows:

> "Article 22
> 1.The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
> 2.The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
> 3.The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

According to Article 22, the sanctity of a mission's building and land is addressed in two distinct aspects. First, the premises of the sending state's mission are shielded from any actions or proceedings within the territory of the host state. Second, the receiving state is obligated to provide protection to the mission by taking all necessary measures. The receiving state is prohibited from entering the mission's premises without the explicit consent of the sending state's head of mission, even in cases of emergency, safety, or health inspections. The receiving state has no authority to enter, even if there is suspicion that the premises are being misused by the sending state beyond their intended function

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or for any legitimate purpose. (Roberts, 2009).

This has been agreed by the UK House of Commons Foreign Affairs Committee on the murder case of a British police officer, which happened outside the Libyan premises of the Mission in London in 1984 (Ashton, 2025). In this case, the Libyan government refused to permit the British authorities to enter the premises of the mission in London to search for the murder weapon and the murder suspect in the incident. The House of Commons Foreign Affairs Committee, upon carrying out an enquiry into what had happened, held that in such situation, when there is no continuing threat from the mission to the public, there is no justification that would allow the authorities to enter the said premises (United Kingdom House of Commons Foreign Affairs Committee 1st Report, (1984-5). paras 88-95). Additionally, it is clear that if the receiving state knew of any threat to the mission's premises, it was obligated to provide protection (Roberts, 2009).

The extension of the missions' premises is subject to the understanding between the sending state and the receiving state. Neither party can individually determine the extension, size, or border. The immunity of the premises is also extended to the residences of the diplomatic agents. Article 30 of the VCDR 1961 provides as follows:

> *"Article 30*
> *1.The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.*
> *2.His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability".*

Based on the provision above, the diplomatic officers possess not only protection from the legal authority of the receiving state but also the inviolability and protection of their private residences and property. This obligation is binding on the receiving state, as it is an international legal duty recognized by member states.

Similarly, the same obligation applied to Malaysia in the case of Kim Jong Nam. Although the Malaysian government had credible evidence implicating DPRK diplomatic agents, it lacked legal authority to act. It could not enter the mission's premises, search private residences, or inspect property without the permission of the sending state. As a result, justice for Kim Jong Nam remains unserved to this day, due to the provisions of the VCDR 1961 (Shiddiqii, & Utama, 2023).

INTERPRETATIVE LEGAL REASONING

INSTRUMENTS OF THE ILO

The passage of the Convention on Domestic Workers in 2011 (No. 189) represents the most recent advancement in the rights of DWs. Only 35 nations have ratified Convention No. 189 so far. Any person hired to perform domestic work as part of an employment relationship is covered by Section 2 of this Convention No. 189's broad definition of DW. As a result, it serves more than only housekeepers (Claire & Florences, 2021).

Article 5 of this Convention No. 189 expressly forbids DWs from being the target of any types of assault, harassment, or abuse. DWs are guaranteed fair terms of employment (Article 6, Convention 89), informed of the details regarding their employment clearly, and where possible, through a written contract concluded between the parties (Article 7, Convention 89). They are guaranteed the freedom of movement in their employment and the right to retain their travel documents, as affirmed in Article 9 of Convention 89. They are entitled to a weekly rest period of at least 24 hours, as stated in Article 10(2) of Convention 189. More importantly, Article

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17 mandates that Member States establish a robust system for filing complaints of DW abuse, ensuring thorough investigation, effective enforcement, and appropriate punishment for offenders.

INSTRUMENTS OF THE UNs

According to Article 55 of the Charter of the United Nations—the organization's founding document established in 1945—the UN is responsible for encouraging global respect for human rights and fundamental freedoms for everyone, regardless of race, gender, language, or religion (Owoeye et al., 2022). The UNs' member states, including Malaysia, affirm the concept outlined in Article 55. This pledge is included in Article 56 of the same Convention, which also states that Member States would work with the UN to implement the necessary measures to uphold the spirit of Article 55. The action that the States must take under Article 56 is described as "substantive rather than procedural," and the manner and methods of execution are at the liberty of the member nations. (Wolfrum, 2002).

The UNs made a significant stride in promoting human rights with the adoption of the Universal Declaration of Human Rights in 1948. Article 1 declares that every individual is born with equal dignity and rights. Articles 2 and 7 emphasize legal equality and protection from discrimination, including that based on race or social standing. Article 4 bans slavery outright, and Article 5 strongly denounces all forms of torture. Additionally, Article 8 upholds the right of individuals to pursue justice when their basic rights are violated.

The UDHR addresses key rights essential to the welfare of workers. Article 20 affirms that people have the right to express themselves freely and assemble peacefully. Article 22 ensures the right to protection of social security, while Article 23 upholds the right to employment, to just and favorable employment, to fair wages, and to join workers' organizations. Additionally, Article 24 ensures the right to reasonable working hours and paid leave.

Although not legally binding, the UDHR has paved the way for its principles to acquire the standing of customary international law (Abdul Ghafur, 2012). Other binding UN documents, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the United Nations Convention Against Torture (CAT), also recognize domestic workers as human beings.

States are required by the legally binding ICCPR to make sure that the civil and political rights of every person are respected (Abdul Ghafur, 2012). These rights include the right to liberty and safety (Article 9, ICCPR), freedom of movement (Article 12, ICCPR), freedom of association (Article 22, ICCPR), and equality before the law (Article 26, ICCPR), among others. They also include the right against any form of discrimination (Article 2, ICCPR), the right against deprivation of life (Article 6, ICCPR), the right against torture, cruel, inhuman, and degrading treatment (Article 7, ICCPR), the right against any form of slavery (Article 8, ICCPR), and more.

The legally binding ICESCR provides strong and comprehensive protection for DWs, equal to that of other workers. Article 6 of the ICESR requires State Parties to protect the right to select one's employment. State Parties are also required, among other things, to provide workers with adequate training and information so they are aware of their rights. The State Parties are required by Article 7 to ensure, among other things, that all workers receive equal treatment about their employment, including the right for recess and take time off (Article 7d, ICESCR), equal pay for work of a similar nature (Article 7a, ICESCR), and—most

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importantly—a safe working environment and conditions (Article 7b, ICESCR).

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is appropriate to DWs' rights, especially since women make up the majority of those employed as housemaids. Article 2 (e) mandated State Parties to take the appropriate actions to end any form of discrimination against women by any party. On the other hand, Article 2 (f) requires State Powers to make the necessary changes to domestic laws, regulations, and customs to eliminate all forms of oppression against women. On the other hand, Article 11 states the responsibilities of the State Parties to ensure that female workers are granted the same employment rights such as the ability to select a career (Article 11c, ICESCR), income equality (Article 11d, ICESCR), the right to social security benefits both during employment and retirement (Article 11e, ICESCR), and the right to receive health benefits (Article 11f, ICESCR).

Article 10 of the CAT mandates Members to make sure that their citizens receive the necessary information and training regarding the outlawry of torture (UNs Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984). A victim of such cruelty is guaranteed the right to be compensated and rehabilitated under Article 14.

Current United Nations instruments are well-crafted to safeguard the rights of DWs. However, to fully realize the spirit and intent of these conventions, commitment is needed from states like Malaysia, which have yet to ratify key legally binding instruments such as the CAT, ICCPR, and ICESCR. Even among states that have ratified these instruments, full implementation remains incomplete due to reservations and objections to certain obligations. For instance, Malaysia still maintains its exception to CEDAW's Article 9(2) since it is unable to provide Malaysian women the same rights as children who are granted citizenship (Human Rights Commission of Malaysia, CEDAW Report, 2022).

IMMUNITY OF DIPLOMATIC OFFICIALS UNDER VIENNA CONVENTION ON DIPLOMATIC RELATIONS (VCDR) 1961

VCDR 1961 contains guidelines for the development of bilateral domestic ties. These guidelines are regarded as the oldest and most fundamental in all international law (Denza, 2016). According to the provisions of Article 51, the Convention only became legally effective on April 24, 1964, the 13th day after the instrument of ratification by the 22nd country was forwarded to the Secretary-General of the UNs. 193 nations have ratified this convention. Malaysia accepted the Convention on 9 November 1965 (United Nations Treaty Collection, 2023).

The 53 articles of the Convention, which include regulations on DI and of diplomatic officers in performing their duties as a foreign delegation in the host country, among other things, outline the procedures for diplomatic relations between nations.

Under Article 31(1) of VCDR 1961, a diplomatic officer is exempt from criminal prosecution. A diplomatic official also has immunity from civil and administrative legal authority, except in three situations: (i) private immovable property disputes (Article 31(a), VCDR, 1961); (ii) inheritance disputes in which the agent represents himself, not the sending state (Article 31(b), VCDR, 1961); or (iii) situations involving professional or business services outside the scope of the diplomats official duties in the receiving state (Article 31(c), VCDR, 1961). A head of mission or staff member of a diplomatic office is referred to in Article 1(e) as a diplomatic agent.

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Diplomatic agents' family members, as well as the mission's administrative and technical personnel, are exempt from criminal, civil, and administrative jurisdiction, except in the circumstances specified in Article 31(a), (b), and (c).

This immunity, however, is not a completely unassailable privilege. According to Articles 32(1) and (2) of the VCDR 1961, a sending state may relinquish the privileges of a diplomatic agent by giving immediate consent to the receiving state. Therefore, it is evident that the sending state may forgo such immunity. The Court of Appeal had argued in the French case of *Nzie v. Vessah* (1978, 74, ILR 519) that a diplomat's immunity can only be waived with the explicit consent of the sending state, not through a private letter from an individual diplomat. In this case, a letter from a Cameroonian Embassy official in France, requesting the matter be heard by a French court, does not amount to a valid surrender of immunity.

In this case, the court ruled that the letter issued by one of the ambassadors to waive DI was unconstitutional. Since the government of Cameroon did not clearly and unequivocally consent to the waiver, the attempt to renounce immunity was deemed unlawful.

In the case of *Gustavo JL and Others* (187, 86, ILR 517), the Supreme Court of Spain reiterated its earlier ruling in *Nzie v. Vessah*, holding that the sending state, not the ambassador or his agent, has the authority to relinquish DI. A clear and unconditional waiver of DI must be formally and expressly granted by the sending state; it cannot be implied, presumed, or issued by an individual diplomat.

This can be determined from the decision in the 1987 case of *Public Prosecutor v. Orhan Olmez* (87 ILR 212), in which the Supreme Court of Malaysia argued that the Turkish Government's diplomatic note offering the First Secretary's presence to verify the veracity of some documents issued by the embassy did not directly relinquish its diplomatic protection.

The International Criminal Court's ruling in a case involving the USA and Iran governments provides evidence of the applicability of this immunity (International Court of Justice, 1980). In this case, the Iranian judiciary and the Iranian foreign minister both threatened to extradite a US diplomat, prompting the US government, among others, to request a ruling from the International Criminal Court. According to the International Court of Justice's ruling on the United States Government's counterclaim, any attempt by the Iranian Government to prosecute a U.S. diplomat would constitute a serious violation of its obligations under Article 31(1) of the VCDR 1961.

The immunity of a diplomatic officer in matrimonial proceedings applies not only to claims directly brought against the officer but also to legal proceedings related to family issues, such as divorce and alimony, as evidenced by numerous international cases. (*de Andrade v De Andrade*, 1984, 118 ILR 299; *P v. P (Diplomatic Immunity: Jurisdiction*), 1987, 1 FLR 1026; 114 ILR 485; In re *B (A Child) (Care Proceedings: Diplomatic Immunity*), 2022 EWHC 1751 (Fam); 2003, 2 WLR 168). Based on the foregoing, the VCDR 1961 shields diplomatic personnel, their families, and the technical and administrative staff of a foreign delegation from virtually all civil and administrative jurisdictions as well as all criminal jurisdictions. The immunity may only be resolved if the sending state clearly waives it. A diplomatic agent, their family members, and the employees of a foreign delegation are not susceptible to any legal action without such a waiver. Any action the receiving state takes against these diplomats will be viewed as a grave infringement of international law.

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A recent incidence on this issue can be seen in an Australian case involving *Shergill v. Singh* (2023, FCA 1346-326 IR 428), Navdeep Suri Singh, former Indian High Commissioner to Australia, was accused of exploiting his domestic worker, Ms. Shergill, including confiscating her passport, imposing excessive working hours, and underpayment. The Federal Court of Australia ruled that Singh was liable for significant breaches of Australian employment law, ordering him to pay $189,000 in unpaid wages. The case highlighted that a former diplomat could be held accountable for labor abuses, especially after leaving their official posts, challenging the traditional scope of DI.

In another case in Australia between *Arunatilaka v. Danaratna* (2024, 918-334 IR 52), Himalee Arunatilaka, a former Sri Lankan diplomat, was found to have exploited her DW, Ms. Danaratna, including imposing excessive working hours without proper compensation. The Federal Court ruled that Arunatilaka owed Ms. Danaratna nearly $500,000 in unpaid wages and interest, despite Arunatilaka's absence from the proceedings. This case underscored the judiciary's willingness to address labor abuses within diplomatic contexts, even when the alleged perpetrators invoke DI.

In *Swarna v. Al-Awadi*, (622 F.3d 123 (2d Cir. 2010) the District Court determined that a Kuwaiti diplomat's actions of denying his DW her promised benefits, abusing her physically, and raping her were not considered to be a part of the diplomat's official mission-related duties. Therefore, as stated in Article 31 (1) of VCDR 1961, the diplomat shall not have the right to assert DI from the local legal authority. The acts would not be immune from the Receiving State's jurisdiction because they would fall under the exemption of Article 31(1)(c).

Similar reasoning was used in the 2009 case of *Baoanan v. Baja* (627 F. Supp. 2d 155 (S.D.N.Y. 2009). In this instance, the court decided that a diplomatic officer's hiring of a DW had no direct bearing on the diplomat's official duties. Therefore, in matters related to employment, there is no entitlement to DI in the receiving state. However, it is significant to remember that the USA does not follow the common law system of law.

The Supreme Court in England also adopted a similar strategy (Sarto, 2023). The Supreme Court of England recently ruled in the case *of Basfar (Respondent) v. Wong (Appellant)* (2022, UKSC 20), in which Khalid Basfar, a Saudi Arabian diplomat, oppressed his Filipino domestic worker Josephine among other things by ordering her to wear a bell every day, failing to pay her salary, making her work up to 16 hours per day, barring her from communicating with outsiders, and denying her the right to rest and vacation, among other things. Khalif Basfar's actions, according to the Supreme Court of England, are not directly connected to the official duties of diplomatic personnel. Under Article 31(1)(c) of the VCDR 1961, the court rejected his claim to DI from England's jurisdiction (Ryan, 2024). The case is likely to set a new precedent in England, offering renewed hope to DWs abused by diplomats that they can pursue justice through civil actions.

These cases reflect a growing trend toward limiting the scope of DI, particularly concerning labour abuses and exploitation of DWs. Judicial systems are increasingly willing to hold diplomats accountable for actions deemed outside the protective boundaries of their official functions.

THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, 1946, AND THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES, 1947

The other pertinent international instruments that grant DI to members of organizations are the Convention on the

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Privileges and Immunities of the United Nations,1946 ("Convention 1946") and the Convention on the Privileges and Immunities of the Specialized Agencies,1947 ("Convention 1947"). Representatives of Member States are guaranteed rights and DI under Article IV of the 1946 Convention, including immunity from legal action. Only the Member State in which the representative is a citizen may expressly waive this immunity. For instance, only Malaysia has the authority to rescind the immunity of Malaysia's Permanent Representative to the UN.

On the other hand, the Convention of 1946 also provides a DI to the Secretary-General, Assistant Secretary-General, officials, and experts on Mission for the UNs (Sections 18, 19, and 22 of the 1946 Convention). The representatives of members, secretary-general, assistant secretary-general, officials, and experts on mission for the UN, however, may have different privileges depending on the regulations that apply to them. Only the United Nations Secretary-General is empowered to relinquish the DI of the Secretary-General, Assistant Secretary-General, representatives, and experts on mission (Sections 20 and 23 of the 1946 Convention).

Additionally, the Convention of 1947 grants privileges and immunity to its officials (Section 19 of the 1947 Convention), executive heads of each Specialized Agency (Section 21 of the 1947 Convention), and representatives of its members (Section 13 of the 1947 Convention). Each category's range of privileges and immunities may be different. The immunity for representatives of members of Specialized Agencies may only be waived by the relevant member state (Section 16 of the 1947 Convention), much as the immunity under the Convention of 1946. The waiver of immunity for the executive head or any official of a Specialized Agency may only be granted by that specific Specialized Agency itself (Plant, 2022).

FINDINGS

Finding 1: Diplomatic immunity overrides domestic justice mechanisms. Building on earlier scholarship by Staiano (2013) and Mullaly & Murphy (2016), which explored the human rights challenges created by DI, this study offers a deeper inquiry into how international law structurally allows immunity to override domestic justice mechanisms. Unlike prior works that focused on documenting human rights violations or advocating for state responsibility, this paper exposes how international legal instruments themselves—particularly the Vienna Convention and related frameworks—embed a hierarchy that privileges diplomatic protection over victims' access to redress. By doing so, the study not only identifies this normative imbalance but also proposes a recalibration of international legal norms to reconcile DI with the principles of rule of law and human rights.

Finding 2: Domestic workers are not entirely excluded from the protection of international law. In fact, existing frameworks—such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the ILO Domestic Workers Convention No. 189—affirm their right to humane treatment, fair working conditions, and protection from exploitation. The United Nations and other international bodies have also introduced various mechanisms, including special rapporteurs, treaty-body reporting, and periodic reviews, to strengthen compliance and visibility of DWs' rights. However, despite this extensive normative framework, the study finds that these protections remain largely ineffective.

DISCUSSION

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The judgments cited make it abundantly clear that international law offers insufficient protection for DWs. The judiciary is bound by existing legal frameworks that uphold the diplomatic immunity granted to diplomatic agents in cases involving clear violations of domestic law. The judiciary is constrained by existing legal frameworks that uphold DI, even in situations involving blatant infringements of domestic law and people's rights. Without an explicit waiver from the sending state, no investigation, prosecution, or sentencing can lawfully progress. In practice, when a problem arises between DI and the rights of DWs, immunity takes precedence.

It is high time to reassess these outdated regulations, more than a century after the enactment of treaties granting DI. The international community must pay close attention to the ongoing abuse of immunity by diplomats and sending countries. Unfortunately, there has been such a long silence over the actual occurrences of DW oppression.

International law at times fails to deliver justice to those abused by diplomats. According to the current legal framework, the culprit may be instructed to leave the territory of the receiving state if the sending state/sending organisation declines to relinquish the DI of a diplomatic officer. The international community may consider several recommendations to address this vulnerability. The provisions of the outdated international rules, which granted diplomatic officials complete protection without adequate checks and balances, should be changed first and foremost.

To prevent diplomats from abusing their immunity, the VCDR 1961, Convention 1946, and Convention 1947 need to be amended. Any alleged abuse of DI will be reported to the United Nations committee, and the decision to revoke immunity will no longer be made solely by the sending state but rather by an independent committee following a careful review of the reports and evidence provided.

In addition, the international community might also want to consider requiring the sending state that declines to lift the diplomatic representative's immunity to ensure that a just proceeding is held in the sending state's court. According to Article 31(4) of VCDR 1961, a diplomatic officer who possesses DI while on the territory of the receiving state is nonetheless subject to the legal authority of that country. Therefore, none of the requirements of the current VCDR 1961 conflicts with our proposal. Moreover, the UNs may wish to guarantee that its representatives are given access to the case at all times and report to the UNs General Assembly the results of the investigation and trial as a process of checks and balances, and to prevent any bias or injustice.

The UNs and the sending state or organisation must give urgent and focused attention to cases of abuse that fall outside the reach of any legal system. A dedicated compensation mechanism should be established to ensure that victims with legitimate claims, denied justice due to DI, receive appropriate redress. This must include compensation for lost wages, medical expenses, therapy, rehabilitation, and other essential needs. As previously noted, current international law offers no viable path to justice for these victims. The global community has failed profoundly by remaining silent in the face of ongoing abuses. A swift and coordinated response is essential to protect affected individuals, providing them with access to food, shelter, medical care, and rehabilitation so they can begin to rebuild their lives after such traumatic experiences.

States Parties is also encouraged to consider using a "narrower" interpretation of the definition of "official functions" as adopted in some United States court cases to exclude diplomatic officers from the

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enjoyment of civil jurisdiction immunity per Article 31 (1) (c) of the VCDR 1961 if these DI laws are challenging to amend due to the difficulty of gaining majority support and commitment.

Recent developments in other jurisdictions highlight an emerging trend toward strengthening accountability mechanisms in addressing abuses by individuals shielded by DI For instance, the United Kingdom has introduced clearer procedural guidelines and inter-agency coordination to ensure that diplomatic protections are not misused. The United States has adopted a more transparent complaints framework and public reporting mechanisms for cases involving DWs employed by diplomats. Similarly, Australia has advanced internal review procedures that balance international obligations with domestic accountability.

CONCLUSION AND REFORM PROPOSALS

The preceding analysis makes it clear that the rights of DWs are routinely violated, due to the immunity and privileges granted to foreign diplomats. The global society must adopt urgent action to tackle this issue. A reassessment of DI laws is essential to prevent misuse and ensure access to justice. This study offers a reform-oriented strategy that balances diplomatic privileges with responsibility by placing DWs labour rights in a unique way inside the framework of the Vienna and UN Conventions.

Without embedding these suggestions into binding legal instruments, they may lack enforceability and real-world impact. Key suggestions can be incorporated into legal frameworks, both domestically and internationally.

First, host countries can update their diplomatic protocols and labour laws to integrate: (i) Mandatory registration and approval of DW contracts, including specified working hours, wages, and leave entitlements; (ii) Condition for diplomatic accreditation: Granting accreditation only if diplomats sign legal agreements ensuring fair treatment and waive certain immunities in civil labour matters; (iii) Bank transfer requirement for DW salaries as a condition of employment permits. For example, the U.S. already requires certain diplomatic missions to use a written employment contract and pay wages through electronic transfer.

Second, a model Protocol or Convention Amendment can be created through the United Nations or regional bodies (e.g., AU, EU, ASEAN). It is a need to draft a Model Protocol on the rights of DWs in diplomatic homes**,** to be adopted voluntarily or incorporated into bilateral agreements.

Third, amending or clarifying interpretations of the Vienna Convention, especially Article 31 (Scope of immunity), and clarifying that immunity does not cover acts of a private natur*e*, such as labour exploitation or trafficking. Further, Article 9 (persona non grata), which mandates expulsion in cases of abuse findings, must be enforced.

Fourth, bilateral agreements between host and sending countries must include binding provisions that directly address the issue of DI in labour law violations. These agreements should incorporate: a waiver of immunity in cases involving labour rights abuses; joint monitoring mechanisms; third-party oversight from credible bodies such as the ILO or trusted NGOs; effective dispute resolution mechanisms, including arbitration panels to handle civil claims filed by DWs.

Fifth, establishing a special labour visa regime is essential. This visa category would be specifically tailored for DWs employed by diplomatic personnel and be

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tied to legal protection under the host nation's labour legislation, access to a transparent monitoring and grievance redress system. The right to automatically transfer to alternate employment in cases of abuse, protecting workers from sudden deportation if they flee an exploitative household.

Sixth, the creation of a Legal Aid Fund or Victim Compensation Scheme is crucial. This state-managed fund should be partially financed by contributions from sending states and diplomatic missions. A mandatory bond or insurance policy is required of diplomats employing domestic workers. Such a fund would ensure that victims receive compensation even in situations where legal prosecution is blocked by DI. These measures, collectively, would represent a significant step toward upholding the rights and dignity of DWs within diplomatic households.

TABLE 1. Proposed Suggestions and Legal Instruments

Suggestions	Legal Instruments
Contract approval, salary monitoring	Domestic labour law / Foreign affairs regulations
Immunity waiver for labour disputes	Bilateral agreements / Amendments to Vienna Convention
Safe reporting and legal aid	Host country anti-trafficking law / Immigration law
Persona non grata provisions	Diplomatic and consular regulations
International oversight	UN Convention / ILO Protocol / Regional human rights charters

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CONFLICT OF INTEREST

The authors confirm that they have no conflicting interest in this study.

AUTHORS' CONTRIBUTION

All authors contributed to the development of this article and approved the final version for publication.

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LEGAL VULNERABILITIES IN NON-MARITAL RELATIONSHIPS

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ABSTRACT

Non-marital cohabitation is prohibited under Syariah law and receives no legal recognition under the civil legal framework in Malaysia. Despite this, such relationships continue to occur, particularly among younger individuals navigating socio-economic pressures and barriers to marriage. The illegality and lack of formal status leave those involved, especially women and children, highly vulnerable to exploitation, abandonment and loss of economic security. Domestic labour, caregiving and financial sacrifices made in reliance on the relationship are not enforceable as rights in law, resulting in significant disadvantages upon relationship breakdown. Children born from these unlawful relationships face further uncertainty in matters of lineage, inheritance and identity, leading to long-term social stigma and limited access to welfare support. Current judicial remedies through equitable doctrines remain inconsistent and inaccessible to many affected individuals. This paper argues that limited protective measures grounded in the principles of Maqasid al-Syariah including classical perspectives of the four Sunni Schools of Thought and their emphasis on hifz al-nasl, hifz al-mal and hifz al-'ird and constitutional commitments to justice are necessary to prevent unjust deprivation. The aim is not to legitimise or normalise prohibited conduct, but to ensure that individuals are not denied essential protection from harm. A preventive and welfare-oriented approach can strengthen the justice system's credibility by demonstrating that safeguarding human dignity is paramount, ev en when moral norms are breached.

Keywords: Non-marital cohabitation; Syariah law; legal vulnerability; child rights; social protection

INTRODUCTION

Non-marital relationships, where couples live together without entering into a legally recognised marriage, have increasingly emerged as part of the evolving social landscape in Malaysia (Abd Rahman, 2018). Although Malaysia does not publish official cohabitation statistics, proxy indicators, such as rising average age of first marriage (DOSM 2019), increased reporting of relationship-related disputes at welfare agencies, and ethnographic studies documenting changing urban relationship patterns (Hill, 2020), demonstrate a measurable upward trend. While such relationships are not acknowledged under civil or Syariah law, their presence, particularly among younger, urban populations, reflects shifting social norms and a range of practical constraints. Economic pressures, high marriage costs, and

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interreligious differences are among the key factors that compel some couples to pursue informal partnership arrangements rather than formalising their union (Abd Rahman, 2018; Karuppiah, 2017). Additionally, for some couples, long-term emotional commitment and the desire to form a stable relationship, despite legal or religious barriers, also contribute to the choice to cohabit.

The absence of a legally recognised marital status creates significant legal vulnerabilities for individuals involved in these relationships. Women often assume substantial domestic, caregiving, and emotional responsibilities throughout the course of the relationship, yet their contributions are rarely supported by documentation that would enable them to seek rights or compensation in the event of relationship breakdown (Zakaria, 2021; Abdullah, 2015). Civil remedies such as constructive trust and unjust enrichment have been employed by courts in limited circumstances to protect beneficial interests, but the application of these doctrines remains highly case-specific and dependent on available evidence (Ali, 2019). Examples include *Liew Choy Hung v Fork Kian Seng* and *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene*, where courts examined financial records and inferred shared intention, illustrating the limited but significant civil avenues available.

Children born from non-marital relationships are also exposed to substantial uncertainty. Under Syariah law, the recognition of nasab and inheritance entitlements depends upon the existence of a valid marriage, which may restrict the legal and social rights of the child in matters of lineage and parental obligation (Mohd Nor, 2020). Civil law protects children's basic rights such as registration of birth, education and healthcare access; however, Syariah-based lineage rules still limit paternal inheritance, guardianship rights and nasab recognition. This distinction clarifies that children are not deprived "absolutely", but certain entitlements remain marriage-dependent. These issues expand beyond legal limitations and extend to the psychosocial development and societal acceptance of the child.

Although Syariah law prohibits non-marital cohabitation and provides for enforcement through the offence of khalwat (Omar, 2021), Islamic jurisprudence simultaneously emphasises the preservation of dignity, lineage, and welfare as part of the Maqasid Syariah framework (Sardar, 2014). Therefore, addressing the harms experienced by women and children in such arrangements is not a departure from religious principles, but a necessary measure to prevent further injustice and social vulnerability. Islamic jurisprudence provides an essential doctrinal foundation for understanding how vulnerability and welfare should be addressed in non-marital contexts. The principles of Maqasid al-Shari'ah, traditionally articulated by classical jurists such as al-Shafi'i, Abu Hanifah, Malik ibn Anas and Ahmad ibn Hanbal, identify the preservation of religion (hifz al-din), life (hifz al-nafs), intellect (hifz al-'aql), lineage (hifz al-nasl) and property (hifz al-mal) as the core objectives of Islamic law. These scholars consistently emphasised that legal rulings must prevent harm (darar) and secure welfare (maslahah) even when addressing conduct classified as morally impermissible. Within the Malaysian

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Syariah system, these objectives are reflected in judicial reasoning involving family protection, parental obligations and the safeguarding of children, where courts routinely interpret statutes through a welfare-oriented lens. Accordingly, providing limited legal safeguards for women and children affected by non-marital relationships aligns with Malaysian Syariah jurisprudence, as it fulfils the maqasid of protecting lineage, dignity and property without legitimising the prohibited relationship itself.

Compounding these issues is the lack of official statistics on the prevalence of non-marital partnerships in Malaysia, which renders policymaking more complex and obscures the scale of the problem (Jabatan Perangkaan Malaysia [DOSM], 2020). Non-marital relationships thus represent not only a legal and moral concern, but a pressing social welfare issue requiring appropriate legal consideration (Ahmad, 2018).

This article examines the legal challenges faced by individuals in non-marital relationships in Malaysia and assesses the adequacy of existing legal remedies in offering protection, particularly for women and children. The objective is not to legitimise or normalise such relationships, but rather to ensure that the justice system is capable of responding humanely and effectively to contemporary social realities.

In addition, the socio-legal silence surrounding non-marital relationships has contributed to widespread misconceptions within the Malaysian public. Many individuals mistakenly assume that a long-term cohabiting arrangement automatically grants them rights similar to marriage, including claims to shared property or entitlement to support if abandoned (Karuppiah, 2017; Malek, 2016). The lack of awareness therefore intensifies legal vulnerability by allowing exploitation to flourish under the assumption of protections that do not, in fact, exist (Karuppiah, 2017).

These private relationships also intersect with broader systems of governance and identity recognition in Malaysia. Issues relating to tenancy rights, access to health-care consent, insurance benefits, tax relief and welfare eligibility frequently arise because institutions are administratively structured around marital status categories. Individuals in non-marital relationships who require urgent medical decisions or financial protection often find themselves excluded or denied recognition, demonstrating how personal status law shapes participation in public life. For example, unmarried partners may be denied authority to provide consent during emergency medical procedures, face exclusion when attempting to claim insurance benefits because they are not recognised as lawful dependants, or encounter difficulties asserting tenancy or financial rights due to the absence of formal marital status. These real-life administrative barriers illustrate how personal status law directly affects access to essential services and public institutions. These challenges are exacerbated for migrants, refugees, and stateless populations who may form domestic partnerships outside formal structures due to administrative barriers or cultural incompatibility. For them, the absence of legal recognition can also trigger immigration risks, detention, or loss of custody over children, producing multi-layered harms that extend far

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beyond family law (Cheong, 2025; Selvakumaran, 2022).

Consequently, the lack of a lawful framework does not prevent these relationships from occurring but instead ensures that harm, when it does occur, remains unregulated and unaddressed (Malek, 2016; Karuppiah, 2017). The growing prevalence of non-marital partnerships demands a shift in legal perspective from condemnation alone to one that acknowledges the State's responsibility to prevent exploitation and uphold welfare. Examining the issue through a pragmatic and justice-oriented lens is therefore essential to ensure that vulnerable individuals are not abandoned by the very legal system designed to protect human dignity and fairness.

LEGAL AND SOCIAL CONTEXT IN MALAYSIA

The social landscape in Malaysia is further complicated by generational shifts in perception regarding marriage, autonomy, and economic survival. Millennials and Generation Z demonstrate a trend of delaying or avoiding marriage due to financial instability, including stagnant wages, high living costs and significant student loan burdens. These realities challenge the traditional assumption that couples will or should enter into marriage early, thereby exposing a growing cohort of individuals to legal vulnerability when they rely on informal domestic arrangements for companionship, survival or mutual support (Kelani, 2016. Younger women, in particular, may prioritise education and career building, only later realising that years spent in non-marital domestic dependency leave them without enforceable claims upon relationship breakdown. This behavioural shift, reflected in DOSM data showing continued rises in median age of first marriage, further demonstrates an indirect trend towards increased non-marital partnerships in urban settings.

International labour migration adds another dimension to this issue. Malaysian citizens working abroad or foreign nationals residing in Malaysia often form cross-cultural relationships where legal barriers to marriage, such as differing religious status, become immediate obstacles. In such cases, non-marital relationships emerge not as a rejection of marriage, but as a temporary or forced compromise. When these relationships break down, especially where foreign women are involved, the legal disenfranchisement is exacerbated by immigration restrictions and the absence of familial safety nets in Malaysia, placing them at heightened risk of destitution or trafficking vulnerabilities (Hill, 2020).

Additionally, mental health and domestic abuse concerns often remain unreported among non-marital partners because these individuals perceive that approaching either civil or Syariah institutions will expose them to punitive outcomes. Crisis response centres routinely report survivors who are too afraid to seek help due to fear of arrest or societal stigma. For example, women cohabiting without legal marriage may avoid lodging police reports for intimate partner violence due to concern that the situation will be escalated to Syariah enforcement authorities, leading to investigation for khalwat or unlawful cohabitation. Such findings indicate that the denial of recognition not only fails to deter relationship formation outside marriage, but also obstructs intervention where genuine harm occurs (Hill, 2020).

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Given that Malaysia is a signatory to the Convention on the Rights of the Child (CRC), there exists an international legal expectation to protect children irrespective of parental marital status. This commitment reinforces the argument that child welfare policy and legal protections must transcend doctrinal inquiries into parental relationships. By focusing solely on marital legitimacy, the legal system risks rendering innocent children collateral damage of adult decisions. Ensuring access to education, inheritance, healthcare and family support cannot remain conditional upon marital documentation if Malaysia is to meet its global obligations and moral commitments (Selvakumaran, 2022). To clarify, children in non-marital contexts are entitled to basic civil rights such as birth registration, schooling and healthcare; however, certain Syariah-linked rights, particularly paternal nasab, guardianship and faraid inheritance, remain restricted without a valid marriage, illustrating the mixed protection landscape.

Non-marital relationships in Malaysia exist against a legal and cultural backdrop that regards marriage as the exclusive gateway to the formation of a legitimate family. Although these relationships are neither legally recognised nor socially endorsed, they persist and have become increasingly observable, especially in urban communities experiencing shifting lifestyle choices, economic pressures and delayed marriage patterns (Abd Rahman, 2018; Karuppiah, 2017). The absence of a valid marriage not only restricts access to protection under both civil and Syariah family law but also reinforces a societal perception that individuals in such relationships do not warrant the same level of legal protection afforded to married couples (Abdullah, 2015).

In civil law, rights relating to matrimonial property, maintenance and custody do not apply without formal marriage registration. The Law Reform (Marriage and Divorce) Act 1976 clearly defines matrimonial entitlements as arising solely between legally married spouses. When disputes surface between unmarried partners, the matter shifts into a commercial or personal capacity framework where contributions must be proven through documentary evidence or strict financial records (Ali, 2019). As a result, the everyday relational labour typical of domestic partnerships, including homemaking, caregiving and emotional support , remains largely invisible in legal adjudication. Such gendered disadvantage places women in a structurally weaker bargaining position not only during the relationship but also in the aftermath of its breakdown (Zakaria, 2021; Abdullah, 2015).

Within Syariah jurisdiction, the consequences are compounded by criminal enforcement mechanisms. Cohabitation may constitute an offence such as khalwat, allowing authorities to initiate action that may lead to fines, public humiliation or detention (Omar, 2021). Public humiliation may occur when raid operations expose individuals to community scrutiny or media presence; detention refers to temporary custody under state Syariah Criminal Offences Enactments during investigation prior to court proceedings. The threat of criminal liability has a chilling effect on the ability of affected parties, particularly women, to approach courts for civil relief or religious mediation. In turn, exploitation,

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abandonment and psychological harm remain unreported due to the fear that seeking assistance may result in self-incrimination. Thus, rather than offering proactive protection, the legal environment often punishes the status without addressing the vulnerabilities that manifest from that status.

Children are perhaps the most severely impacted by this lack of recognition. The legal construction of lineage in Syariah law relies heavily on the legitimacy of marriage, affecting rights to paternal inheritance, family name and guardianship (Mohd Nor, 2020). Although civil procedures facilitate registration of birth, the emotional, relational and social impacts of being categorised as *anak tak sah taraf* extend beyond administrative boundaries. Musa et al. (2023) highlight that the stigma associated with illegitimacy continues to affect educational opportunities, identity affirmation and access to equitable family support systems. These consequences illustrate how legal status can shape the trajectory of a child's entire life through mechanisms beyond their control. From both doctrinal and statutory perspectives, Malaysian civil and Islamic laws establish clear principles governing legitimacy, lineage and parental rights, which significantly affect children born outside lawful marriage. Under civil law, the Births and Deaths Registration Act 1957 ensures a child's right to identity and documentation regardless of parental marital status; however, paternal recognition and related rights such as maintenance, guardianship and certain inheritance claims remain tied to valid marriage or clear proof of paternity through the Law Reform (Marriage and Divorce) Act 1976 (LRA). The LRA further restricts matrimonial property division (s.76), spousal maintenance (ss.77–81), and child custody and guardianship provisions (ss.88–90) to legally married couples, thereby excluding non-marital partners from accessing these protective remedies.

In Islamic family law, legitimacy (nasab) is governed through principles articulated by classical jurists such as al-Shafi'i, Abu Hanifah, Malik ibn Anas and Ahmad ibn Hanbal, and codified in the Islamic Family Law (Federal Territories) Act 1984 (IFLA). Sections 110–118 of the IFLA, which incorporate classical evidentiary presumptions such as the minimum six-month gestation rule, continuity of marriage at the time of conception, and attribution of paternity solely to a lawful husband, determine a child's access to paternal lineage, guardianship (wali) and faraid inheritance. Maintenance (nafkah) and related obligations are likewise conditioned upon the existence of a valid marriage.

Taken together, these civil and Syariah provisions illustrate the structural disadvantages faced by children born from non-marital relationships: while civil law secures basic rights such as identity, education and healthcare, Syariah-based lineage rules continue to restrict certain paternal entitlements without a valid marriage. At the same time, adults in non-marital relationships are excluded from matrimonial remedies afforded under the LRA and IFLA. Understanding this combined doctrinal and statutory framework is essential to appreciating the depth of legal vulnerability experienced by both children and their caregivers.

The enforcement landscape itself reveals fragmented institutional responsibility. Government agencies such as hospitals, welfare departments and schools often lack clear guidelines

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on handling cases involving unmarried parents, resulting in inconsistent administrative decisions that may restrict access to healthcare, financial assistance or identity documentation. Examples include: instances where unmarried mothers face additional verification requirements at schools for enrolling their child; hospitals seeking paternal documentation not legally required; welfare agencies inconsistently applying eligibility criteria for aid; and difficulties accessing tenancy rights due to the absence of spousal status. The absence of accurate national statistics regarding the prevalence of non-marital partnerships, as confirmed by the Department of Statistics Malaysia (DOSM, 2020), further impedes policy development. Without quantifiable data, affected populations remain statistically invisible, reinforcing a misleading assumption that non-marital relationships are insignificant in prevalence and impact (Ahmad, 2018).

The economic dimensions are equally pronounced. Where property is solely registered under one partner's name, the other remains legally unsecured regardless of their contribution to home-making or shared life planning. Financial exclusion extends to areas such as Employees Provident Fund nominations, insurance policies and income tax relief, where spousal status is the basis of entitlement. Economic dependency on a partner within an unprotected relationship may lead to silent coercion, intimate financial control and a heightened risk of homelessness or destitution upon separation (Karuppiah, 2020).

Comparatively, several jurisdictions outside Malaysia, including the United Kingdom and Australia, have developed mechanisms that grant limited remedies to individuals in non-marital unions , not to legitimise or encourage the relationships, but to prevent unjust enrichment and ensure fair distribution of assets acquired through shared life (Karuppiah, 2020). In the UK, for example, cohabiting partners may seek relief under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) and child-related financial support under the Children Act 1989, demonstrating that even in jurisdictions where marriage remains the preferred institution, protective measures exist to avoid injustice. This contrasts with Malaysia, where strong religious norms, Syariah enforcement and marriage-centred legal frameworks mean that cohabitation carries significantly greater stigma and legal consequence. While the Malaysian context is unique due to the dual legal system and strong religious sensitivities, these examples offer insights into balancing moral boundaries with practical protections. The lesson from international experience is clear: denying recognition need not equate to denying protection.

Islamic jurisprudence provides important ethical grounding for such protective approaches. Scholars have emphasised that *Maqasid al-Shariah* obligates the law to safeguard dignity (*hifz al-'ird*), property (*hifz al-mal*) and lineage (*hifz al-nasl*) as fundamental objectives of preserving justice (Sardar, 2014). Protecting women and children from harm aligns with this normative imperative. Thus, legal interventions aimed at mitigating vulnerability can be justified not as concessions towards prohibited behaviour but as expressions of the compassionate and just application of Syariah. In other words,

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protecting the innocent is not the same as endorsing the conduct of adults.

Taken together, the literature paints a coherent picture of structural invisibility: the system is designed to protect marriage, but it does not protect individuals when marriage is absent. Non-marital partners exist in a legally grey space where they may suffer tangible harm but have almost no channels to assert their rights. Children inherit vulnerability without agency or consent. Policy frameworks remain reactive and inconsistent. As Malaysia continues to modernise, the lack of a humane legal response risks widening disparities and perpetuating cycles of social exclusion.

RIGHTS, RESTRICTIONS AND DOCTRINAL LIMITATIONS

Judicial reluctance to extend protective doctrines stems partly from concerns regarding floodgates of litigation and the perceived legitimisation of prohibited conduct. However, this judicial conservatism enables exploitation by creating a safe environment for unscrupulous partners, often men, to enjoy the benefits of a domestic partnership while escaping accountability. The absence of statutory guidance leaves judges without clear criteria to evaluate domestic arrangements, producing inconsistent outcomes that undermine legal certainty and the predictability necessary for justice to operate effectively. The irony is stark: individuals who uphold the moral standard of marriage enjoy protection when it collapses, while those who fall short of this standard are punished far beyond the wrong committed, through total deprivation of rights (Ismail, 2016).

In some cases, women have invested years of unpaid domestic labour under the mutual expectation that marriage would eventually occur. When such promises are broken, the harm extends beyond emotional betrayal; it includes financial loss, lost employment opportunities and the erosion of economic independence. The law's refusal to acknowledge non-economic contributions therefore reinforces patriarchal norms that undervalue women's work in the private sphere (Boo, 2021). Robust equitable protection becomes essential to ensure that justice does not operate solely for the privileged or those with bargaining power.

There is also growing scholarly consensus that applying khalwat enforcement to individuals genuinely seeking assistance contradicts the broader objective of maqasid-driven justice. To substantiate this, existing Malaysian scholarship, such as Ismail (2016), Mohd Nor (2020), and Selvakumaran (2022), has repeatedly emphasised that punitive enforcement deters victims from pursuing rightful remedies, creating a welfare gap. These works collectively support the claim that contemporary scholars recognise the need for a harm-based, rather than punitive, approach, forming the basis of the "growing scholarly consensus". When Syariah courts are perceived as punitive rather than protective, victims withdraw into silence, further entrenching harm (Ismail, 2016). A separation between moral enforcement and welfare relief is therefore crucial. Syariah courts could operationalise harm-based triaging mechanisms where intervention focuses on preventing exploitation rather than punishing private morality. Such a shift would preserve Islamic values while aligning

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the system with contemporary human rights expectations.

Furthermore, children's vulnerability under current lineage doctrines requires urgent re-evaluation. Scholars have argued that maintaining a child's dignity and welfare is an Islamic imperative that supersedes parental misconduct. The current legal approach misplaces moral accountability by burdening children with the consequences of adult behaviour. A more equitable framework would allow judicial discretion to protect the child's rights in matters of inheritance and identity where doing so fulfils the objective of securing their future wellbeing, without undermining the religious significance of nasab (Selvakumaran, 2022).

The Malaysian legal structure continues to adopt a marital-centric model of familial protection. This model grants comprehensive legal entitlements only to couples whose relationships are validated through statutory or Syariah procedures. Consequently, individuals in non-marital relationships occupy a legal vacuum where rights are conditional, unpredictable and often unattainable (Abdullah, 2015). Within this framework, vulnerability becomes an inevitable consequence of legal exclusion.

Under the Law Reform (Marriage and Divorce) Act 1976, non-Muslim partners who are not legally married cannot seek matrimonial property division or maintenance, regardless of the duration and substance of their partnership (Karuppiah, 2017). When a dispute arises, the courts adjudicate such claims strictly through general property law, and the claimant bears the burden of proving ownership or contribution through tangible records such as receipts, banking documents or explicit contractual agreements. Domestic contributions are generally considered irrelevant, because homemaking and caregiving labour are not legally quantifiable under this structure. This illustrates a deeply gendered inequity, as women typically assume unpaid domestic roles, rendering their efforts invisible under property and contractual doctrines (Zakaria, 2021).

Equity has emerged as the limited judicial space where unmarried partners may seek justice. Courts occasionally acknowledge non-financial contributions by invoking doctrines such as constructive trust or unjust enrichment to recognise beneficial interests (Ali, 2019). However, these interventions remain discretionary and inconsistent, resulting in substantial outcome disparity. In *Liew Choy Hung v Fork Kian Seng* [2000] 1 MLJ 635, the court constrained its assessment to financial metrics, awarding a minimal share despite long-term relational contributions. Conversely, in *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115, the court adopted a more expansive approach that acknowledged shared intentions and indirect contributions. Although this signals a progressive shift, such outcomes are dependent not on principle but on judicial interpretation and the sophistication of legal representation available to the claimant. This raises concerns about access to justice, since the most vulnerable individuals are least able to litigate effectively.

Muslim parties face additional restrictions through the application of Syariah law. Non-marital cohabitation may constitute a criminal offence under khalwat, enabling state religious

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authorities to arrest and charge individuals for conduct deemed immoral (Omar, 2021). While intended to uphold religious values, this criminal approach creates unintended consequences. Partners experiencing abandonment or exploitation may avoid seeking legal help for fear of prosecution or public exposure. This paradox results in moral regulation without moral protection: the law reacts to the conduct but fails to mitigate the harm arising from it.

Children situated within these relationships endure long-term disadvantages. The legitimacy of nasab in Syariah law requires a valid marriage. Without it, a child's legal link to the father can be contested or denied, affecting inheritance rights and paternal responsibility (Mohd Nor, 2020). Beyond legal constraints, children may face stigma in school enrollment, social participation and familial relationships (Musa et al., 2023). By locating inherited vulnerability within the child, the legal system inadvertently sustains an intergenerational cycle of disadvantage based on factors beyond their control.

These challenges underscore a broader structural issue: marriage serves as the exclusive legal currency for accessing rights, protections and social legitimacy. Those who fall outside the marital framework receive inconsistent or no protective attention, even when substantial emotional, economic and familial bonds exist. Ahmad (2018) highlights that this legal absolutism blinds the system to the real harms faced by those in informal domestic arrangements, enabling exploitation without accountability. The resulting disparity is not merely legal but profoundly social, perpetuating inequality under the guise of moral preservation.

Comparative insights reveal that some jurisdictions have responded to similar issues by introducing limited protective schemes. For example, the United Kingdom allows claims for equitable property distribution and child-related support under statutory acts applicable to cohabiting partners (Karuppiah, 2020). Australia has extended de facto relationship rights under the Family Law Act 1975, ensuring that domestic responsibilities and emotional labour are recognised within property settlements. These developments are guided not by an endorsement of non-marital unions but by a commitment to preventing unjust deprivation. Malaysia, with its dual legal structure and religious sensitivities, requires a response tailored to its own context. Nonetheless, these jurisdictions demonstrate that safeguarding against exploitation does not undermine the institution of marriage.

Islamic jurisprudence provides ethical reinforcement for such protective responses. The doctrine of *Maqasid al-Shariah* emphasises the preservation of human dignity, justice and welfare as higher objectives of the law (Sardar, 2014). Protecting individuals who are vulnerable to harm aligns with these objectives, even if the relationship in which the harm occurs is itself prohibited. The principle distinguishes between condemning an act and protecting those who suffer from its consequences , a distinction central to the theological justification for legal intervention.

Overall, the legal analysis confirms that Malaysia's current framework remains insufficient to

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address the complexities of modern domestic arrangements. The law enforces moral order through punitive measures but does not address exploitation, abandonment or loss experienced within those same moral boundaries. Until suitable mechanisms are developed to mitigate these harms, individuals in non-marital relationships will remain legally unprotected, socially marginalised and disproportionately vulnerable, despite their undeniable presence within Malaysia's evolving social reality.

PROTECTIVE MEASURES AND POLICY CONSIDERATIONS

Malaysia's legal evolution demands a proactive rather than reactive paradigm. Legislators could consider limited statutory intervention specifically targeted at situations where non-marital relationships produce dependencies akin to marriage (Karuppiah, 2017; Hill, 2020). For example, property division frameworks tailored to shared domestic lives could require courts to consider not merely financial input, but also sacrifices made in reliance on the relationship (Karuppiah, 2017). These safeguards would serve the narrow function of preventing unjust enrichment, without institutionalising non-marital partnerships as an alternative to marriage.

A specialised mediation unit could be created within Syariah and civil jurisdictions to address disputes involving non-marital partnerships confidentially. This would remove the deterrent effect of criminal enforcement and provide a safe space for women and children to seek redress under welfare-based principles (Ismail, 2016). Additionally, public officers handling administrative matters, such as identity registration and welfare disbursement, require clear guidelines to ensure that service access is not arbitrarily denied due to social stigma or documentation gaps. Such reforms align with Malaysia's constitutional promise of equal protection under the law.

Moreover, government-led public education initiatives can reshape misconceptions surrounding legal vulnerability. Many individuals rely on assumptions that long cohabitation automatically confers rights similar to marriage; this misconception leaves them unprepared when separation occurs (Hill, 2020). Awareness campaigns and legal literacy programs could empower individuals, especially women, to understand their risks and take preventive actions such as documenting financial contributions or entering binding contracts.

As Malaysia continues its social and economic development, proactive harm reduction becomes essential to upholding justice. Maintaining punitive structures without complementary protection mechanisms perpetuates legal marginalisation. A justice system must be capable of addressing exploitation wherever it occurs, not only where moral norms are complied with. Introducing calibrated reforms does not erode the sanctity of marriage; rather, it strengthens the legitimacy of the legal system by demonstrating that protection applies to all persons, especially those who are most vulnerable.

A coherent legal response to the vulnerabilities experienced in non-marital relationships must reconcile Malaysia's commitment to the institution of marriage with the factual realities impacting individuals who do not fall within that protected structure.

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The objective is neither to legitimise nor normalise relationships outside marriage, but to prevent injustice where the law would otherwise be silent. In this regard, protective intervention must be framed as a measure to uphold welfare, dignity and fairness, rather than as recognition of the partnership as a family unit.

One of the most feasible approaches within the existing legal architecture is the utilisation of private agreements to regulate rights and responsibilities between partners. Where two individuals choose to share financial obligations or live together, a written agreement detailing ownership of property, financial contributions, and expectations relating to household expenses could provide a foundation for civil enforcement in the event of relationship breakdown (Karuppiah, 2020). Such agreements would operate purely as contracts and would not confer marital status. Their purpose is to reduce the risk of economic exploitation, particularly where one party sacrifices employment opportunities or personal development in reliance on the partnership. Agreements of this kind would also allow courts to ascertain intentions more clearly, reducing the dependency on equitable doctrines that require extensive litigation and subjective judicial interpretation (Ali, 2019).

The law of equity should equally be developed in a manner that better protects those who suffer genuine loss. Courts have demonstrated the capacity to extend equitable remedies based on fairness and shared domestic realities, as illustrated in *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene*. However, the absence of legislative guidance has resulted in unpredictable outcomes, leaving vulnerable parties uncertain about their prospects of justice (Abdullah, 2015). A more structured statutory framework guiding the application of constructive trust and unjust enrichment in domestic contexts could enable judges to reach more consistent and principled outcomes while maintaining judicial discretion where appropriate (Zakaria, 2021). Such reform would not equate non-marital relationships with marriage, but would ensure that the courts are equipped to address harm when it occurs.

For Muslim individuals, legal protection is further complicated by the potential for Syariah criminal investigation. It is not uncommon for individuals to avoid seeking Syariah legal redress, out of fear that their personal circumstances may lead to prosecution (Omar, 2021). This underscores the importance of distinguishing between enforcement of moral boundaries and the preservation of welfare. A harm-based approach, guided by the doctrine of *Maqasid al-Shariah*, would allow religious authorities to assist vulnerable parties without conflating assistance with endorsement. The principles of preventing exploitation, protecting property interests and ensuring the wellbeing of children remain fully aligned with Islamic legal objectives (Sardar, 2014). The challenge, therefore, lies not in reconciling legal protection with religious principles, but in ensuring that protective mechanisms are designed and administered in ways that uphold those principles.

Support from administrative and welfare institutions is equally crucial. Organisations such as the Department of Social Welfare (JKM) often act as first responders in cases involving domestic

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conflict or abandoned children. Yet their ability to intervene meaningfully is limited by the absence of formal legal status connecting the individuals involved. Strengthening collaboration between civil and Syariah authorities, welfare departments and community-based organisations could provide early intervention pathways for affected individuals to obtain counselling, shelter, and access to legal information without prejudice to their personal circumstances (Ahmad, 2018). Examples incorporated earlier, such as inconsistent documentation requirements at schools and hospitals and difficulties in welfare access, now support this argument with concrete justification. Without appropriate support systems, individuals experiencing crisis may be driven into homelessness, social exclusion or continued abuse.

The absence of official data on non-marital relationships remains a major obstacle to policymaking. Without empirical insight into the scale, demographics and socioeconomic profiles of affected groups, legislative or welfare initiatives risk being misaligned with actual needs (DOSM, 2020). Ethical, anonymised data collection and interdisciplinary socio-legal research could help bring visibility to the issue without encouraging or legitimising the conduct itself. In doing so, policy development could move away from the assumption that these cases are rare anomalies, and instead acknowledge their tangible and growing presence within the national social landscape.

Comparative observation offers valuable, albeit cautious, guidance. Jurisdictions such as the United Kingdom have enacted targeted statutory remedies for unmarried partners involving children, while maintaining the distinction between marriage and cohabitation (Karuppiah, 2020). Relevant UK laws, such as the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA), the Children Act 1989, and financial support mechanisms for cohabiting parents demonstrate how unmarried partners may seek equitable relief without equating cohabitation with marriage, offering comparative insight into calibrated harm-prevention systems. These examples affirm that legal protection need not compromise moral or religious principles, and that calibrated reforms can reduce harm without diminishing the privileged legal position of marriage.

Ultimately, the development of protective measures rests on the recognition that legal systems, particularly those founded on religious and ethical values, carry a responsibility to prevent injustice wherever it arises. Denying legal recognition to non-marital relationships does not negate the existence of responsibilities, dependencies and shared lives formed within them. Ensuring that individuals are not left entirely without remedy does not contradict public morality; rather, it reinforces a justice system that is compassionate, fair, and committed to preventing harm. Malaysia's dual legal system holds the capacity to conceptualise such protections within its own moral framework, offering tailored mechanisms that reflect both Syariah imperatives and constitutional guarantees of welfare and equality before the law.

As Malaysia continues to confront social changes that redefine personal relationships, it becomes increasingly important for the law to evolve in ways that protect its citizens

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from unintended vulnerabilities. Any solution must reflect local cultural and religious values, but it must also remain attentive to the lived experiences of those who are currently marginalised by the binary legal treatment of marriage versus non-marital relationships. In this regard, a shift from punitive enforcement toward preventive protection is essential to uphold the rights and dignity of individuals who remain invisible within the existing legal structure.

CONCLUSION

This article has examined the legal vulnerabilities faced by individuals involved in non-marital relationships in Malaysia and has demonstrated that these vulnerabilities are not merely theoretical but have substantial consequences for the lives, welfare and future prospects of those affected. The current legal structure, which remains deeply anchored in the principle that marriage is the sole legitimate basis for family recognition, has unintentionally produced gaps in protection that expose individuals, particularly women and children, to significant risk of harm. The legal and religious frameworks in Malaysia, both civil and Syariah, reinforce a binary distinction between the married and the unmarried, thereby creating a protected class entitled to comprehensive rights and a parallel class that is legally unrecognised, unsupported and invisible when disputes or crises arise (Abdullah, 2015; Omar, 2021).

While the prohibition of non-marital cohabitation reflects the moral and cultural commitments of Malaysian society, the absence of protection mechanisms for those already in such relationships has resulted in scenarios where exploitation and injustice remain unaddressed. Acts that infringe upon dignity, property and familial security are experienced not in the abstract but in the everyday lives of vulnerable individuals. The analysis shows that judicial intervention through equitable doctrines has provided sporadic relief, yet such remedies remain overly dependent on evidence and legal literacy that most affected individuals do not possess (Ali, 2019; Zakaria, 2021). Equally, Syariah criminal enforcement has deterred many Muslims from approaching courts to seek rightful redress due to fear of prosecution, thereby suppressing claims rather than resolving them (Omar, 2021).

Children, whose circumstances arise entirely beyond their control, remain the most disadvantaged. Their legal and social identities are shaped by lineage rules that prioritise marital legitimacy over welfare-based considerations, resulting in lasting stigma and limitation of entitlements (Mohd Nor, 2020; Musa et al., 2023). Without structural reform, these outcomes risk perpetuating cycles of intergenerational disadvantage, deepening social divisions, and contradicting broader commitments to equality and protection under the law.

The absence of official data regarding the incidence and characteristics of non-marital relationships in Malaysia significantly obscures the scale of the issue, rendering policymaking reactive and limited in scope (DOSM, 2020; Ahmad, 2018). The invisibility created by a lack of empirical evidence reinforces a legal narrative that neglects the factual reality of individuals who are in need of assistance. Addressing this gap requires coordinated effort not only from

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legislative frameworks but also from social welfare agencies, community institutions and policymakers who recognise the necessity of preventive and protective interventions.

Importantly, the ethical foundation for legal protection is already present within the values of both Malaysian civil law and Islamic jurisprudence. The objectives of *Maqasid al-Shariah*, namely the preservation of lineage, property, dignity and welfare, affirm that preventing harm and ensuring justice are central responsibilities of the legal system (Sardar, 2014). Protective intervention does not signify approval of the relationship structure but rather reflects a commitment to fairness and humanity in situations where vulnerability exists. The article has expanded on the classical juristic views and the relevance of Maqasid principles within Malaysia's Syariah administration. The evolving socio-legal environment of Malaysia suggests a need to shift from a purely punitive approach to one that recognises lived realities while upholding moral standards through compassionate enforcement.

The findings and analysis presented in this article suggest that reform is both possible and necessary. It should take the form of incremental yet meaningful improvements, such as strengthening the enforceability of private agreements, providing clearer equitable guidelines for judges, and enabling access to welfare services without creating fear of criminal repercussions. These measures would not undermine marriage as the central legal and religious institution of family life. Instead, they would reinforce the justice system's legitimacy by ensuring that harm is neither ignored nor left unremedied simply because it occurred outside recognised boundaries.

Ultimately, the law serves not only to validate relationships but also to protect human beings. To neglect the latter in pursuit of the former risks contravening both legal and moral values that Malaysia seeks to preserve. A legal system that acknowledges vulnerability and mitigates harm remains faithful to the principles of fairness, dignity and social responsibility. Recognising the challenges faced by individuals in non-marital relationships, and ensuring that they are not left without recourse, is therefore not a departure from societal values but a necessary evolution of the law to safeguard justice in contemporary Malaysian society.

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CONFLICT OF INTEREST

There is no conflict of interest.

AUTHORS' CONTRIBUTION

Author 1 conducted the research and contributed to manuscript writing; Author 2 contributed to writing, supervised the study, and served as the corresponding author; Author 3 finalised the manuscript, including formatting and preparation for submission.

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SMART CONTRACTS FROM CODING TO EXECUTION

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ABSTRACT

This paper explores the lifecycle of a smart contract, from the stages of coding and deployment to execution and verification, in order to show that a smart contract can indeed be self-executing, transparent, and immutable. While such functionalities introduce efficiency, trust, and reliability within industries such as financial, supply chain management, and health sectors, smart contracts at the same time have a host of technical and legal challenges arising. This paper identifies key issues: critical vulnerabilities in coding, deployment on immutable blockchains, address assignment complexities, triggering mechanisms, and aspects of privacy. This study has adopted a critical analytical approach to evaluate the technical and legal aspects of smart contract formation, complemented by inductive reasoning to derive general insights and recommendations from specific cases and patterns. The study states that the apt legal framework must be provided for liability, regulatory compliance, and solutions that would be unlooked-for. It further supports hybrid models that blend automation with human oversight, superior communication protocols regarding updating an address, and the use of technologies that allow transparency with the preservation of confidentiality in a balance. The concrete ideas it offers are attempts at technology design aligned with legal frameworks by bringing developers, regulators, and stakeholders together in implementing certain solutions. It emphasizes that continuous research will hence be important to assure reliability, security, and equitability in the adoption of smart contracts, expanding possibilities for their application in an increasingly changing digital environment.

Keywords: Smart contracts; blockchain; coding; deployment; execution.

INTRODUCTION

Smart contracts are an agreement that executes autonomously based on its terms when all conditions are met. Conceived in the 1990s by Nick Szabo, a combination of contract law with computer programming, they finally found an application that facilitates trustless transactions on blockchain networks (Szabo, 1996). The great popularity of these contracts, especially in their perceived capability to cut off the intermediaries, has made them gain widespread acceptance due to their low costs and enhanced efficiency; hence, this represents one of the cornerstones of digital ecosystems and decentralized applications (Christidis & Devetsikiotis, 2016). Their applications extend from finance to supply chain management to healthcare, among others, thus being versatile and having a potentially transformative impact (Pereira et al., 2020).

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This study focuses on addressing the technical and legal aspects of the lifecycle of smart contracts despite their potential and advantages over traditional contracts. While smart contracts promise self-execution, transparency and immutability but face issues like coding vulnerabilities, complexity in deployment, address assignment, triggering mechanisms and privacy concerns. And they are rigid and not adaptable in unexpected scenarios hence we need a hybrid approach of automation and human oversight. The study identifies a gap in aligning technology with the legal framework to ensure liability, regulatory compliance and balanced solutions hence we need developers, regulators and stakeholders to work together to address these challenges.

This paper investigates the lifecycle of smart contracts, from coding and deployment to execution and verification. The article explains each step in detail and de-mystifies how these contracts work, showing their transformative potential in a variety of industries. The journey will be important in effectively leveraging smart contracts in current and emerging use cases. This paper has analyzed, in view of operational challenges, the legal effect which the formation process of smart contracts could have and provides an understanding of limitations further in ways of development.

The blockchain technology is the backbone of smart contracts, thus enabling them to work in an automated and see-through manner. The technology runs on distributed ledgers that ensure tamper-resistant execution and immutable records as part of the solution to the question of trust in traditional ways of enforcing contracts. Transparency and verifiability via a blockchain network also give confidence to users and other stakeholders in the smart contracts (Buterin, 2013). This is where the consensus mechanism of this technology guarantees that participants in a network agree to something, further setting the integrity of smart contracts in stone (Imteaj, et al., 2021). Innovations like sharding and layer-two solutions in evolving blockchain platforms promise scalability and efficiency for the broadening of smart contract adoption (Timuçin & Biroğul, 2023).

Three main features constitute the basis on which smart contracts stand out: self-execution, transparency, and being tamper-proof. Due to self-execution, upon the satisfaction of the defined conditions, the contract comes into effect all by its own means without the influence or interference of any other intervening agent. This greatly reduces delays and the ability of humans to commit an error (Worley & Skjellum, 2019). In that blockchain serves on an open ledger, this allows transparency in the executed visibility of the contract, instilling a sense of trust and responsibility among both parties (Christidis & Devetsikiotis, 2016). Immutability ensures, through the deployment of a smart contract, that neither the code nor the database of that contract can be tampered with and hence the integrity of the agreement is retained (Fröwis & Böhme, 2017). The features put together form the backbone to ensure reliability and efficiency within smart contracts, thus making it a disruptive innovation in the contractual framework (Vasiu & Vasiu, 2023).

Smart Contracts, characterized by their self-executing code and reliance on decentralized blockchain technology, stand in stark contrast to traditional contracts, which traditionally rely on human interpretation and often involve intermediaries for enforcement (Savelyev, 2017). Meanwhile, electronic contracts find themselves in the middle ground, leveraging digital formats without the inherent programmability of smart contracts (Loddo et al, 2022). Additionally, a fundamental distinction arises in the realm of trust and intermediaries, as smart contracts tailored for a trustless environment obviate the need for intermediaries and depend on decentralized blockchain technology for

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transparency and immutability, while traditional contracts frequently employ intermediaries such as banks or legal entities to establish trust and enforce agreements (Giancaspro, 2017). In the meantime, Conventional contracts have humans—for example, lawyers and notaries—for writing, enforcement, and settlement, which is usually time-wasting and expensive. In smart contracts, execution is self-running, without intermediators; as a result, transaction costs come down drastically (Savelyev, 2017). However, despite that electronic contracts can enhance communication but might still necessitate intermediaries also for enforcement (Milosevic et al, 2002). The differentiation extends to the coding and programmability inherent in these contracts. Smart contracts are commonly scripted in programming languages expressly crafted for their creation, with Solidity being one of the prevalent languages for coding smart contracts on the Ethereum blockchain. The coding process entails specifying the terms, conditions, and logic governing the contract's execution. In contrast, traditional contracts, typically articulated in natural language, (like Arabic or English language) lack this programmable attribute (Hwang. et al, 2022). As for electronic contracts, they are executed similarly to traditional contracts but within an electronic environment (computers, e-mails, e-messages). However, electronic contracts, despite their digital nature, may not exhibit the same degree of programmability as smart contracts (Tok & Tunca, 2023). In the meanwhile, smart contracts are written under strict programming codes and unalterable transaction records. Once activated, a smart contract's execution cannot be halted (Nugraheni et al, 2022). In contrast, traditional contracts lack this inherent transparency and immutability, relying on amendments that may not be immediately apparent, so that traditional contracts can be amended through mutual consent, judicial decisions, or legal stipulations (Qutieshat et al, 2022). As for electronic contracts, while they offer transparency, they might not possess the immutability inherent in smart contracts. This is because electronic contracts are typically stored on central servers to authenticate electronic written documents (Hasan, 2007). On the other hand, smart contracts are inherently entwined with blockchain platforms, leveraging decentralized and distributed ledgers for execution. This integration ensures a transparent and tamper-resistant record of transactions (Stampernas, 2018). In contrast, traditional contracts typically depend on centralized databases and authorities for documentation and enforcement . This process relies on duplicates of paper records stored within these central entities, and all parties involved in the transaction are required to maintain physical copies of the contracts. Moreover, this traditional documentation method is susceptible to various risks such as damage, loss, forgery, and tampering (El Sayed El Gendy, 2019). As for electronic contracts, while digital, are versatile in their platform existence, with the capacity to operate on various platforms, including centralized databases, without mandatorily relying on blockchain infrastructure (Hasan, 2007).

METHODOLOGY

This study used a non-doctrinal (empirical) approach, looking at practical challenges, specific cases and patterns around the lifecycle of smart contracts. It used critical and inductive reasoning to evaluate technical vulnerabilities, legal challenges and hybrid solutions, real world applications and interdisciplinary collaboration. These are all hallmarks of a non-doctrinal approach which goes beyond theoretical or legal analysis and incorporates practical, technical and empirical insights into the research.

Given the pace of change in blockchain technology and its impact across industries like finance, supply chain and healthcare this approach is particularly

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relevant. The critical and inductive analysis not only reveals the existing challenges but also enables the development of new strategies that combine the strengths of smart contracts with flexible legal frameworks to make them work in complex real world scenarios.

FORMATION PROCESS

The term "formation" in the context of smart contracts refers to the process by which these digital agreements are created, deployed, and become active on a blockchain (Durovic & Janssen, 2019). The formation of smart contracts therefore involves several key steps as follows:

CODING AND PROGRAMMING

Any software, including a smart contract, starts with choosing an appropriate programming language. Since these contracts run on various platforms, several languages prevail to date. Among these widely used is Solidity-a language specifically designed to develop smart contracts running on the Ethereum blockchain (Wood, 2014). Most likely, Solidity syntax is quite alike compared to JavaScript; that's why it is easy for web developers who are into their familiar programming to get work done. Besides Solidity, which serves the highest number of Ethereum-based development, other languages also exist-let's mention Vyper, designed to be as simple and safe, while Rust is used with its target for Solana-based smart contracts, acting among many different preferences on so many different blockchains (Ethereum Foundation, n.d).

Writing a smart contract essentially means describing the terms, conditions, and execution logic of the contract in code (Hwang. et al, 2022). These contractual obligations are translated by the developers and transformed into algorithms, defining under what and when certain actions are to be triggered (Bassan & Rabitti, 2024). A basic smart contract for crowdfunding, for example, would have conditions on fund collection, deadlines, and refund mechanisms in case the funding goal is not achieved (Sindhavad et al., 2023). This requires great attention to detail so that the code actually reflects what is intended within the agreement (Shein. Esther, 2021).

However, coding in smart contracts is not without great challenges. Bugs in the code might lead to vulnerabilities that hackers might take advantage of, resulting often in severe financial and reputational consequences. A highly infamous example that comes into the picture has to do with the hacking of DAO in 2016 due to a flaw within the code; the hackers were consequently able to drain about 60 million dollars' value in Ether. This dampened the trust placed in the workability of the Ethereum ecosystem, eventually resulting in its hard fork along the blockchain to ensure the funds were recovered (Atzei et al., 2017). Another remarkable incident can be considered to be the bug in the Parity Wallet in 2017, where a bug in this multi-signature wallet froze and made inaccessible more than $150 million in Ether. That was because of the incorrect initialization of the wallet contract, where again the accurate coding and testing practices became important (Grishchenko et al., 2018).

To mitigate such risks, developers must rigorously test and audit their smart contracts using advanced tools like MythX, which provides security analysis for Ethereum smart contracts, and OpenZeppelin's security libraries, which offer pre-audited and secure implementations of common smart contract standards (Restack, 2023). Because it comes with a set of reusable tools, such tools spot vulnerabilities like reentrancy attacks, integer overflows, and access control defects before deployment. Formal verification was also another important method developed for this purpose, using standard industrial

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practices for ensuring strong smart contracts (Zhou et al., 2022).

The immutable nature of the blockchain amplifies these problems because, after a smart contract has been deployed, the only way to correct any kind of mistake are to deploy another contract or use some complex governance mechanism (Singh et al., 2023). Such immutability underlines that thorough pre-deployment testing and auditing are paramount (Andesta et al., 2019). In addition to integrate features such as upgradable contracts and kill switches—when legally and technically viable—they would be extra security against unexpected vulnerabilities (Seneviratne. Oshani, 2024). As smart contracts increase in terms of complexity, their keys to success will come through balancing functionality, security, and efficiency (Zhou et al., 2022). These measures, as taken together, ensure increasing the reliability of smart contracts and pave the way to broader adoption in a secure and trustworthy manner.

DEPLOYMENT ON BLOCKCHAIN

Deploying a smart contract onto the blockchain is a highly critical process that ensures it will be functional and prepared for execution on the network. First, the source code of the contract written in a high-level programming language, usually like Solidity, is compiled into bytecode by tools such as the Solidity Compiler (SOLC). This is necessary bytecode because it changes the human-target code into an understandable and executable format for EVM or any other blockchain virtual machine (Ethereum Foundation, n.d). This step ensures that the smart contract is compatible with the underlying blockchain architecture and ready to interact with other components of the system.

Once the bytecode has been generated, the next step involves deploying the contract on the blockchain. A transaction has to be sent to the blockchain network with the compiled bytecode and the initialization function if needed. Optimizing the bytecode of a contract by incorporating gas-efficient programming practices is rather important since it reduces the costs of deploying it (Chen et al., 2018). The transaction should be signed with the private key of the deploying party for authenticity and ownership purposes (Dannen, 2017). Besides that, developers should take into consideration, before deployment, the gas fees paid in cryptocurrency to compensate miners or validators for the computational resources used to store and execute the contract (Signer, 2018). The gas estimation tools, such as Ethers.js and Web3.js, would help in predicting the cost of such operations and ensuring that the deployment of a contract does not exceed the budget (Semnani & Yang, 2024).

Once compiled, the bytecode is then embedded in a blockchain transaction created by the creator of the contract (Brent et al., 2018). The transaction takes a number of required parameters, including gas fees paid in the blockchain's native cryptocurrency, the creator's address, and any initialization data that the contract requires (Zarir, et al., 2021). These parameters make sure the blockchain can process the transaction and dedicate resources to execute it (Pacheco et al., 2022). It is broadcast on the blockchain network, from where miners or validators confirm the transaction and then put it in a block (Angraal et al., 2017). Upon the confirmation from the network that it is successful, the smart contract is deployed and assigned an address (Kuppuswamy & Kodavali, 2024). The address is meaningful because this would be what is to be used by the user, applications, or other smart contracts in communicating with the deployed contract (Oluwatosin. Serah, 2023).

Deployment is an area that comes with its own set of challenges, requiring great attention to detail in both technical and

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strategic respects. First, there is the very important issue of the accuracy and robustness of the code in a smart contract. Since any blockchain transaction is immutable, errors in the deployed code are permanent and cannot easily be fixed. Such defects may lead to unintended consequences, ranging from huge monetary losses to operational disruption or even the exploitation of the system by malicious parties. Examples of this are the DAO hack in 2016 due to a reentrancy bug in the smart contract code, which led to several million dollars in losses, consequently showing how terrible bugs could be if left unsorted (Atzei et al., 2017). With the help of Remix, a kind of online IDE for smart contracts writing and debugging, developers deal with this issue, and also Truffle provides a fully-featured suite to test and deploy contracts in controlled environments (Sharma, 2020).

Another significant challenge at deployment is the management of gas fees, which is a mechanism paying miners or validators for the computational resource usages. Gas fluctuates depending on network congestion and the complexity of a smart contract's byte code. In that respect, excessive gas could be a huge bottleneck to smaller developers or resource-poor projects, eventually hindering the effective exploitation of blockchain technology. (Oliva & Hassan, 2021). In mitigation, the developers use tools like Ethers.js and Web3.js to estimate the gas costs accurately, besides optimizing the contract code for reduced computational complexity. The strategies that could help mitigate this are deploying contracts at times of low congestion or on blockchains that have less congestion (Semnani & Yang, 2024).

Besides these technical issues, deployment challenges also involve ensuring compatibility with existing blockchain ecosystems and regulatory frameworks (Wood, 2016). For example, a developer must check whether the smart contract meets all the standards of a given blockchain that it is about to be deployed on; otherwise, in the case of deploying an Ethereum-based smart contract, it would not be ERC-20 or ERC-721 compliant (Nelaturu et al., 2023).

The verification and validation of the deployed contract constitute another vital phase. Most developers do the source code verification of their smart contracts on platforms such as Etherscan, ensuring that it is visible and can be audited by users themselves (Godoy et al., 2022). The functionality of a smart contract is usually implemented and declared in its source code, thus available for review (Ahrendt et al., 2018). Testing should, when possible, first be performed in a controlled environment such as testnets—like Rinkeby or Goerli for Ethereum—which simulate blockchain conditions with limited financial risk, to detect and fix problems before real funds are put into a mainnet (Dwyer, 2023).

Furthermore, post-deployment monitoring is also very critical. These tools, Tenderly and Hardhat, can easily track the performance and usage of the contract against what it was designed for (Khan et al., 2018). Deployment is not only a technical issue but also a strategic process since one has to ensure that compatibility with the existing infrastructure, scalability, and legal and regulatory implications are duly taken into consideration while planning and executing such deployment (Fischer et al., 2017).

Finally, smart contract to be deployed should be capable of integrating well with other blockchain components. This will include compatibility checks against DApps and ensuring that the contract can handle all transactions without performance degradation (Rashid & Siddique, 2019). Such comprehensive addressing of these various challenges will surely make smart contracts more reliable and available, thus paving the way for the

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wider diffusion of blockchain technology in different applications.

ADDRESS ASSIGNMENT AND INTERACTION

Smart contracts are assigned their unique addresses during deployment. The blockchain network assigns this address in the transaction that confirms the creation of the smart contract (Knecht & Stiller, 2022). This address serves as the identity of the smart contract on the distributed ledger of the blockchain, hence allowing users and other contracts to locate and interact with it (Hu et al., 2018). This is an automated assignment, through the cryptographic hashing of the deployment transaction, which ensures that each address is unique and secure (Agrawal et al., 2016).

Basically, these addresses mean a great deal for entrance to interaction. The address of a smart contract lets every user send various transactions to that address to invoke internal functions or fetch data hosted on that contract (Albert et al., 2020). A typical use is in a lending protocol: For example, to use the DeFi application, one needs to interact with a smart contract for deposits and loans in consideration of its address referencing. These addresses play a big role in ensuring that all interactions are channeled to the right contract for efficient processing (Seitenov & Smagulova, 2020).

Nevertheless, such issues arise when the address of a smart contract may change or may have been communicated incorrectly to end-users. In their practical embodiment, although blockchain itself does promise immutability on deployed contracts, all platform updates or migrations often require that users operate with a new address from another contract. Migrations also give way to a difficult process, disrupted services, and/or financial losses when not taken appropriately by target users to the wrong ones (Bandara et al., 2019). Effective communication strategies include publishing updates through official channels and giving clear instructions to reduce these risks (Hou et al., 2023).

The subject of address assignment also points out a broader challenge of making systems more accessible and usable within the decentralized ecosystem (Zima, 2016). Designers need to think through not only how users locate a contract but also how they would interact with it, in increasingly complex systems that often deal with numerous different contracts and addresses (Nelaturu et al., 2020). Richer user interfaces and tools for the easier management of addresses, like ENS (Ethereum Name Service), could make quite a big difference in facilitating user experience and reducing the rate of user errors (Xia et al., 2022).

TRIGGING AND EXECUTION

By definition, smart contracts are triggered on the occurrence of one or more specific, predefined events, transactions, or conditions encoded in their logic to make them very effective and autonomous. These triggers lie in the code of the contract, acting as a catalyst that executes actions without the use of any intermediary (Bassan & Rabitti, 2024). For example, a user may trigger a smart contract to start a cryptocurrency payment; the smart contract will execute the actions encoded in it, such as transferring ownership of some digital asset, recording a transaction on the blockchain, or sending notifications to parties. In the case of attainment of some date or deadline, the contract could activate automated activities such as the release of funds to beneficiaries, penalization for non-compliance, or the process initiation.

A wide range of triggers for smart contracts demonstrates versatility in certain use cases that are studied upon. For example, a deposit of funds made by users into a certain lending platform triggers the respective smart contract to calculate the interest that is to be returned, disbursement

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of such is therefore an automated process upon determination, as indicated by (Christidis and Devetsikiotis, 2016). It could also be that, upon delivery, a supply chain actor will have to scan the QR code; in return, through the smart contract, payment will be released at the time of arrival of the goods to their destination (Saberi et al., 2019). Such cases of "if/then" show the efficiency and automation that smart contracts give to many sectors.

These triggers include an inherent logic that leads to actions that are normally executed by smart contracts, by design, to reduce delay or errors associated with manual operation (Shuvo. Mahbub, 2023). For instance, this can be programmed in a way that the smart contract automatically starts interacting every time there is externally sourced data—inputs from an oracle for anything from stock prices or weather data to delivery confirmation. This allows them to respond dynamically to external conditions, expanding their utility in diverse sectors such as supply chain management, insurance, and finance (Beniiche, 2020).

Moreover, the capability of conditional logic programming in smart contracts allows the handling of complex transactional workflows: multistage, multi-agent agreements when certain actions are executed after all conditions predefined are met in order for fairness and compliance to be ensured (Atzei et al., 2017). By nature, the blockchain is immutable and decentralized, adding another layer of security whereby the triggers and outcomes of smart contracts are tamper-proof and thus transparent in the building of trust among parties (Rashid & Siddique, 2019). These features make smart contracts a potentially transformative means of automating processes and raising efficiency and lowering costs in industries.

If some predefined instructions are inculcated into the contract, then the reliability of smart contracts increases manifold. These instructions ensure that the contract functions precisely as intended without ambiguity or external manipulation. However, if unforeseen circumstances arise, then the rigid nature of smart contracts can pose challenges. On the one hand, developers will be able to combine the automation with human oversight involved in a hybrid solution and hence make it more flexible. This way, they still retain blockchain's inherent benefits (De Filippi & Hassan, 2018).

VERIFICATION AND TRANSPARENCY

Verification of the performance of smart contracts is also hugely done through blockchain technology. Once the smart contract is triggered, if the conditions are validated by the blockchain network, then the smart contract will execute its instructions autonomously (Abdelhamid & Hassan, 2019). This whole process initiates when blockchain nodes verify the transaction against the conditions encoded within the contract. All these nodes combined ensure that the conditions are fulfilled before the execution of any event, utilizing decentralization so that tampering or fraud cannot occur (Patel & Singh, 2022). For example, an escrow agreement that has been satisfied will have a smart contract automatically release money to a seller upon confirmation in pre-defined parameters that goods have been received by a buyer, confirmation of delivery, or acknowledgment by the buyer (Asgaonkar & Krishnamachari, 2018).

Decentralized validation from this node-to-node interaction makes the process tamper-resistant and transparent, being recorded immutably, step by step, to the blockchain. This absence reduces associated costs of intermediaries and all potential delays while increasing basic trust among parties (Merlec et al., 2023). In the case of financial services, for instance, processes can be streamlined through smart contracts, thus allowing automatic disbursement where

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loan conditions—like credit ratings, verified through oracles—meet in real time, given real-time credit standing or income data (Sonawane et al., 2023). Similarly, the smart contract automatically executes supply chain management-related payments when shipment tracking confirms arrival at a destination (Shuvo, 2023). This adds to auditing and compliance due to the transparency of blockchain and its feature of immutability, where each executing step is traceable while having a clear origin in an easily identifiable manner. If a transaction happened because of a smart contract, it is recorded on-chain and, therefore, visibly auditable. That is how trust and accountability are further allowed by all parties involved due to independent verification of the taken acts (Rozario & Vasarhelyi, 2018). Moreover, the cryptographic security of blockchain ensures that once recorded, data cannot be altered or deleted, hence maintaining the integrity of the execution of the contract (Wright & De Filippi, 2015). This transparency goes a long way in helping industries such as supply chain management, where players need to have a view showing the movement and status of goods (Saberi et al., 2019).

Similarly, decentralized execution presents significant benefits, as it removes what is called a "centralized intermediary" in that regard. If there is a smart contract, and this network has been deployed on such a decentralized network, for instance, then realization takes place across many different nodes to ensure redundancy and also to ensure resilience. This, in essence, adds system reliability, with protection from a single point of failure or even tampering. Decentralized performance makes it even more inclusive: agents from different regions are able to interact with the contract without the constraints of centralized oversight (Christidis & Devetsikiotis, 2016). For example, this model is followed by decentralized finance applications to offer users around the world trustless, efficient financial services (Ojog, 2021).

By leveraging blockchain's verification mechanisms, transparency, and decentralized nature, smart contracts offer a robust framework for executing agreements. However, these advantages come with the responsibility of ensuring proper coding, rigorous testing, and adherence to best practices to mitigate potential vulnerabilities and maximize trust in the system (Zhou et al., 2022).

THE LEGAL IMPLICATIONS OF FORMATION PROCESS

The formation process of smart contracts entails a complex interplay of technical and legal considerations. From coding to deployment, address assignment, triggering, and execution, each stage introduces unique challenges that require robust legal frameworks. Addressing issues such as coding errors, liability, privacy, and regulatory compliance is essential to ensure the reliability, fairness, and enforceability of smart contracts in a rapidly evolving digital landscape. On the following will explore the legal implications of the process of forming smart contracts. The discussion that follows will explore the legal implications and complexities associated with each stage of the smart contract formation process, offering insights into how these challenges can be navigated effectively to promote the secure and efficient use of this transformative technology.

CODING CHALLENGES AND LEGAL LIABILITY

The first step of the smart contract creation process is coding and programming, which holds great legal significance. Contractual terms have to be clearly and precisely coded, as even slight ambiguities or errors in coding could lead to disputed interpretations of the code. For instance, a poorly written code might fail to express the intention of the parties to the contract through the creation of gaps that might result in disputes over its

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interpretation. In fact, such ambiguities let actions unintended by the parties pass through and thus defeat traditional legal frameworks enforcing a contract (Durovic & Janssen, 2019). These problems are further exacerbated by the automated and immutable nature of smart contracts, making the correction of errors post-deployment very challenging and costly (Singh et al., 2023).

Apart from issues related to drafting, legal systems also have to deal with questions of liability in cases where financial or operational losses arise because of vulnerabilities in the code. For example, the critical nature of secure programming practices is shown in such attacks as reentrancy, whereby an attacker abuses functionality to withdraw funds repeatedly (Atzei et al., 2017). In these cases, questions of liability become much more complicated. Should the developer who actually wrote the code be responsible? Or is the liability to lie with the parties approving and deploying the smart contract? These questions, however, make it imperative in the case of any coding errors for legal frameworks to address developer liability and hold someone accountable.

Moreover, shared liability issues arise from the use of pre-audited libraries and third-party components such as OpenZeppelin. While these libraries provide solutions which have been tested and are widely accepted, a set of vulnerabilities in third-party code would cause breaches or losses in several deployed contracts (Huang et al., 2024). When they do, however, an issue of who is responsible arises, whether it be the developer, the library provider, or the parties of the contract, arises and further complicates this already complex legal landscape. This, therefore, calls for the inclusion of indemnity clauses and detailed risk allocation agreements in the development of smart contracts, since liability may arise as pertains to possible third-party dependencies. Such clauses contribute to mitigating uncertainties, since the responsibilities and risks borne by each party are clearly stated, thereby providing a way to resolve disputes.

Another important legal issue concerns intellectual property rights over the smart contract code. Although it would, in theory, be assumed that the code of the smart contract being designed is owned by the developers, in many cases, the level of collaboration among participants leads to situations of licensing and rights usage (Bodó et al., 2018). Meanwhile, when several parties can collaborate in the development or operation of a smart contract—even based on similar code—an ownership and right to usage question needs to be made explicit. Ambiguities in such arrangements may further lead to disputes regarding control, royalties, and liability (Grishchenko et al., 2018). For example, copyright law can be relevant when determining ownership of smart contract code. If a blockchain-based contract is created by multiple developers, the default assumption under copyright law is that each contributor has rights over the code unless explicitly assigned otherwise through a licensing agreement. A dispute may arise if one developer claims exclusive rights and attempts to restrict its use, while others argue for open-source distribution. Similarly, if a smart contract is integrated into a patented blockchain-based process, questions may arise as to whether executing the contract infringes upon an existing patent, especially when the smart contract automates functions covered by the patent's claims. Therefore, ownership, licensing terms, and liability agreements should be clearly defined to avoid legal disputes.

CHALLENGES IN DEPLOYMENT

Further legal issues arise with the deployment of smart contracts. Because of the immutability of blockchain transactions, any errors or omissions in the deployed contract are not easily corrected. This may

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lead to disputes in cases where deployed code fails to meet the intent of the original agreement, and parties may seek alternative remedies such as deploying new contracts or introducing mechanisms for governance (Zhou et al., 2022). Besides, signing a deploying transaction with a private key means ownership, though there are possible disputes as to who has control over and management of the contract, especially when a project involves collaboration. To this end, the legal system has to consider whether liability lies solely with the deploying party or if other parties have equal liability (Dannen, 2017).

Furthermore, the deployment also has some associated costs, such as gas fees, which may turn contentious if the parties do not agree on its allocation. Thus, high fees or miscalculations may turn into a source of dispute in resource-constrained projects (Chen et al., 2018). The requirement to have proper budgeting and appropriation of deployment costs has to be deliberated within legal frameworks. However, such deployment costs—from among others, gas fees—to be effectively managed, call for clear and concise contractual terms and careful planning with attention to their legal framework and regulatory requirements (Canfora et al., 2020). Parties can reduce contention and build trust by incorporating within the smart contract transparent mechanisms for cost sharing, utilizing technological advances to find cost efficiencies, and ensuring compliance of the arrangement with applicable laws and regulations. Post-deployment reconciliation builds on fairness to ensure that mismatched costs, if any, get equitably settled (Gudmundsson, et al., 2024). A combination of these measures enables a smoother process of deployment in resource-constrained projects and reduces financial as well as legal risks considerably.

BLOCKCHAIN ADDRESS CONCERNS

Assigning unique blockchain addresses to smart contracts presents legal challenges related to accessibility and security, as these addresses are the primary medium for interaction. Errors or fraudulent representations can result in significant financial losses. For example, miscommunication of a contract's address could cause funds to be transferred to unintended destinations, raising critical questions about liability and restitution (Gritti et al., 2023).

Additionally, the issue of migration or change of addresses has its legal consequences, too, and for that, communication protocols need to be strong. If the users are not informed properly about the update, then they may further interact with compromised or obsolete contracts (Garside et al., 2021). The legal systems have to decide whether the liability for such information lies with the originator of the contract or with the platform on which the contract is residing.

To those, add the risks of fraudulent representation of smart contract addresses: villains may actively introduce sham addresses to either misappropriate funds or to mislead users into interacting with spurious contracts. This gives way to a rather complicated legal environment, and in cross-border situations, tracking and recovering misappropriated funds might just be impossible (Madir, 2018). Again, this further complicates the issue of liability when anonymity features inherent in blockchain technologies are utilized to evade detection by perpetrators.

For addressing these concerns, the legal frameworks would have to change and bring in strong mechanisms for accountability and restitution. Platforms and developers may be made to implement checks like address verification systems, checksum algorithms, or multi-signature authentication processes to minimize errors and fraudulent activities (Aitzhan &

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Svetinovic,2016). In disputes, courts may have to assess the reasonable measures taken by parties and perhaps even fault-based liability or shared responsibility models (Nollkaemper & Jacobs, 2012). Besides that, the regulatory measures would be able to cover increased transparency and consumer education so that users understand the critical importance of handling blockchain addresses with accuracy (Shaji Varughese, 2024). This would help increase confidence in blockchain systems and respond to the peculiar legal challenges introduced by reliance on unique blockchain addresses.

CHALLENGES IN TRIGGERING MECHANISM

Events or conditions that constitute the triggering mechanisms embedded into smart contracts raise some very thorny issues in the realm of jurisprudence, especially regarding consent and intention. These depend on external data supplied by third-party oracles, acting in an intermediary position to feed real-world input into the blockchain. This automation enhances efficiency but equally introduces a number of critical risks. Faulty data or even premeditated manipulation on the part of oracle providers will lead to unintended consequences, such as actual contract execution based on false or manipulated information. In those scenarios, legal liability is problematic to ascertain. There are questions whether the oracle provider owes damages for the defective data or whether the contracting party bears the liability due to a choice of the oracle with an inadequate amount of due diligence (Papadouli & Papakonstantinou, 2023). This gives reason to the importance of the contractual provision for oracle accountability, including arrangements that may reduce disputes by sharing liabilities.

Predefined triggers, along with the logic of execution, also question fairness and adaptability in contract law is that inherent in the rigidity of a smart contract's execution lies the fact that when the conditions are triggered, the contract executes as written, regardless of extraneous variables. The above-mentioned rigidness is opposite to other more traditional legal doctrines such as frustration or impossibility, which allow modification or discharge of contracts if any unexpected event has rendered performance not practicable or unfair. Thus, a natural disaster which causes supply chains to malfunction could bring traditional law relief but may see a smart contract executed and result in losses. Therefore, it creates the need for hybrid frameworks that provide human oversight or a fallback mechanism where manual interference or arbitration in exceptional cases can be facilitated (Molina-Jiménez & Felizia, 2023). It was to this that smart contracts would deal with unexpected events such that whatever solution was decided would remain equitable and without compromising any of the two parties but still provided the advantage of automation.

PRIVACY AND LIABILITY CHALLENGES

While blockchain plays a great role in the verification and execution of smart contracts and provides unparalleled transparency but introduces significant privacy and regulatory concerns. The immutability of blockchain means that contract details and execution history are tamper-proof and auditable, which builds trust among parties. However, this very feature can conflict with data protection laws, such as the General Data Protection Regulation (GDPR), mandating the right to rectify or delete personal data (Tatar et al., 2020). For example, in cases when a smart contract processes personal information, the latter might be unable to exercise his or her rights under these regulations, thus creating some sort of legal tension between the technical design of blockchain and principles of data protection. Such tugged demands might ultimately be reconciled only if innovative solutions—like storing personally identifiable information off-chain but referencing it on the blockchain with cryptographic hashes that can then be changed or deleted without

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tampering with the blockchain—are adapted by the legal frameworks (Voss, 2021).

Blockchain systems are transparent, an enviable development regarding audit purposes, however, this nature brings serious confidentiality issues to light, particularly in commercial transactions. Public blockchains are designed to permit all participants access to information about smart contracts, a decision that exposes delicate business knowledge such as pricing-sensitive information and proprietary methods. This openness can also dissipate competitive advantages and even lead to the misuse of disclosed information (Sedlmeir et al., 2022). Legal and technological fixes to confidentiality concerns are provided by the use of private or consortium blockchains (Yan Ying et al., 2020). However, these alternatives often come with trade-offs that may undermine exactly those characteristics that give blockchain its value. Indeed, one of the main challenges for the adoption of blockchain in sensitive applications is how to balance confidentiality and decentralization.

Decentralized execution implies more complexity in terms of liability, among other issues. In a distributed system, things happen over a lot of nodes many times without any kind of centralized control. It is in this structure that libility gets dissipated, and thus it is very hard to point out who is responsible in the case of errors, breaches, or even malicious activities (Zetzsche et al., 2017). For example, if a smart contract fails due to some problem in its coding or as a result of certain external manipulations, it will not be quite clear who is responsible—whether the developer, operators of nodes, or users. The legal frameworks will have to fill these lacunas by considering novel approaches, such as attributing liability based on the role played in the network or even decentralized insurance mechanisms to cover losses. Most importantly, industry-wide standards and models of governance will provide critical paths to accountability within the decentralized ethos of blockchain technologies.

CONCLUSION

This paper explores the transformative power of smart contracts in the digital alteration of agreements, emphasizing at the same time major challenges they are facing in the course of their creation and implementation. Smart contracts unleash unparalleled efficiency and reliability in domains like finance, supply chain management, and healthcare since they are self-executing, with inherent transparency supported by immutability. However, many aspects of implementing smart contracts involve complex technical and legal issues that require thorough debate and robust solutions. Every phase in the lifecycle of a smart contract—from coding, deployment, and address assignment to triggering mechanisms and verification—presents unique challenges.

Every step in the smart contract lifecycle—from coding to deployment, address assignment, triggering mechanisms, to verification—introduces unique challenges. Coding errors can lead to vulnerabilities or disputes, while mistakes during on-blockchain deployments are magnified because of their immutable nature. High gas fees and disagreements over their allocation create barriers to adoption. Ownership disputes involve liability and control concerns, especially in a decentralized collaborative environment. The risks include, but are not limited to, mistakes in the communication of blockchain addresses or migrations. Integrating blockchain with external data sources raises legal and privacy concerns, especially under strict data protection laws. Decentralized execution complicates liability and accountability, thus requiring innovative legal solutions.

The way to meet these challenges is through the formulation of appropriate legal

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frameworks that could give clarity on liability, regulatory compliance, and solutions to mitigate any force majeure events. Besides, mechanisms of governance need to be developed in order to handle erroneous contracts deployed without breaking blockchain's immutability feature. Standards should be defined regarding the cost-sharing agreements so that there are no disputes about the sharing of gas fees and deployment costs. Ownership and control over smart contracts, after their deployment, should be made very clear by the regulators. On the contrary, introduce rigid policies in place that would forcefully notice the users of any address change or migration in order to reduce risks of out-of-date addresses or fraud; encourage the use of user-friendly technologies like ENS, which ultimately will drive uptake and cut errors. Hybrid approaches that implement automation with human oversight, using rich protocols for communication and preserving privacy-enhancing technologies, have shown some promising pathways. Additionally, there will be further development in collaboration between developers, regulators, and industry players that can offer a balanced adaptive ecosystem where smart contracts may be smoothly integrated.

Eventually, the efficiency, cost-cutting, and building of trust in a digitized and decentralized world will be achieved with smart contracts when those challenges are dealt with, and technological innovations align with the legal frameworks. Further research and practical solutions necessary to ensure that the implementation of smart contracts in different applications is reliably, securely, and equitably implemented have been underscored in this study.

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CONFLICT OF INTEREST

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CONSTRUCTION OF MULTIPLE DISPUTE RESOLUTION MECHANISM FOR CROSS-BORDER E-COMMERCE IN THE CONTEXT OF GLOBALIZATION

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ABSTRACT

In the context of globalization and the rapid development of Internet technology, cross-border e-commerce has become an important part of contemporary international trade. However, this growth has not been without challenges, as cross-border transactions often give rise to complex e-commerce disputes that traditional dispute resolution mechanisms struggle to deal with. The study first provides an in-depth exploration of the various types and unique characteristics of cross-border e-commerce disputes, highlighting the shortcomings of traditional resolution methods. Then, the focus of this study turns to the construction of a diversified dispute resolution mechanism specifically targeted at the cross-border e-commerce environment. This mechanism covers a range of online resolution paths, including negotiation, mediation and arbitration, all adapted for the online realm. This study analyzes the effectiveness of these online resolution paths. The ODR platform in Guangzhou Comprehensive Pilot Zone not only improves the efficiency and fairness of cross-border e-commerce dispute resolution, but also provides solid support for the stability and prosperity of the global e-commerce market. The results show that they have significant advantages in improving dispute resolution efficiency and reducing overall costs. Although the online resolution path provides an effective and convenient means to handle cross-border e-commerce disputes, it needs to be continuously improved and adjusted to adapt to the continuous development of cross-border e-commerce in the context of globalization.

Keyword : cross-border e-commerce; dispute resolution mechanism; negotiation; mediation; arbitration.

INTRODUCTION

As a product of globalization, cross-border e-commerce not only provides a broad platform for communication and trade in the global market, but also promotes the flow of culture and capital, and deepens the process of global economic integration (Mahantesh, 2023). With the active cross-border e-commerce and frequent transactions, the legal boundaries are blurred, the supervision is complex and the cultural differences are significant. The settlement of disputes is no longer confined to the traditional legal way, but to a more diversified and convenient direction. With the continuous growth of international transactions and the gradual improvement of e-commerce laws and regulations, the traditional dispute resolution has been difficult to meet the requirements of speed, low cost and high efficiency, and the new dispute resolution mechanism must be operational and internationally applicable. The construction of dispute

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resolution mechanism in the field of cross-border e-commerce should not only consider the application and updating of laws, but also pay attention to the support of technology and the promotion of international cooperation. Under the background of globalization, how to build a more efficient, fair and convenient dispute resolution system can promote the development of international e-commerce legal system, enhance the self-regulatory ability of e-commerce platform, and promote the healthy development of international trade.

IMPACT OF GLOBALIZATION ON ELECTRONIC COMMERCE

Globalization has promoted the integration of the world economy and the rapid development of information technology (Singh, 2023). These changes have contributed to the rise and evolution of e-commerce. Driven by globalization, market boundaries are gradually blurred, and e-commerce connects long-distance buyers and sellers, making the circulation of goods and services more convenient. The integration of global supply chains enables e-commerce platforms to provide more diverse goods to meet the growing needs of consumers. Advances in information and communication technologies, an important feature of globalization, provide the infrastructure for the development of electronic commerce. The popularity of the Internet and the innovation of mobile payment technology have made online transactions possible, significantly improving transaction efficiency and reducing costs. This technological revolution has promoted the gradual evolution of e-commerce from the early electronic data interchange (EDI) to today's diversified online trading platform.

Globalization has also contributed to the harmonization of laws and norms governing international trade. With the development of transnational electronic commerce, there is an urgent need to formulate a unified international legal framework for electronic commerce (Obi-Farinde & Philippe, 2021). International efforts to eliminate trade barriers and develop mutually recognized electronic signature and network security regulations have provided a more stable and predictable legal environment for e-commerce. Globalization has led to culturally diverse business models.

CHARACTERISTICS OF CROSS-BORDER E-COMMERCE

With its unique operation mode and transaction process, cross-border e-commerce has brought new experiences to consumers and businesses. Consumers can enjoy more diversified commodity choices, compare product prices and services in different countries, while businesses can conduct data analysis and market research, more accurately locate target markets and consumer groups, and improve marketing efficiency. Cross-border e-commerce continues to promote innovation in logistics and supply chain management, and logistics service providers and supply chain enterprises continue to optimize cross-border distribution routes and warehousing solutions to meet the growing demand for international orders. The characteristics of cross-border e-commerce are also reflected in the innovation of payment methods. Cross-border transactions have put forward higher requirements for payment systems, including multi-currency processing, exchange rate conversion, cross-border payment security, etc., which has prompted payment service providers to continuously introduce innovative payment solutions to meet the needs of global e-commerce

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(Rezaee et al., 2022). With the increasing expectations of consumers for shopping experience and personalized services, cross-border e-commerce platforms have begun to pay more attention to providing customized user experience and customer services to enhance user satisfaction and loyalty.

CHALLENGES AND OPPORTUNITIES OF CROSS-BORDER E-COMMERCE

The development of cross-border e-commerce has brought challenges and opportunities. The challenges mainly come from legal issues, tax issues, logistics costs and cross-cultural communication barriers in cross-border transactions (Dung et al., 2021). In terms of law, cross-border e-commerce faces conflicts and inconsistencies in laws and regulations of different countries, which may lead to difficulties in contract enforcement, intellectual property protection and consumer rights protection. Tax issues are equally complex, and differences in tax systems in different countries may lead to additional tax burdens and increase the operating costs of enterprises. In terms of logistics, although technological advances have significantly reduced logistics costs, cross-border logistics still has problems such as long delivery time, high cost and unpredictability. Cross-cultural communication barriers are also a problem that cannot be ignored in cross-border e-commerce. Cultural differences may lead to errors in marketing strategies, inadequate customer service, and even business conflicts.

For consumers, cross-border e-commerce provides more commodity choices and shopping convenience, which helps to meet their diversified and personalized consumption needs. For enterprises, cross-border e-commerce has opened up new market space and provided opportunities for revenue growth. Technological advances also provide new ideas and tools to solve problems in cross-border e-commerce, such as block chain technology to improve transaction transparency. Smart contracts reduce contract execution risk and apply artificial intelligence in customer service and market analysis.

MULTIPLE DISPUTE RESOLUTION MECHANISMS FOR CROSS-BORDER E-COMMERCE

ONLINE NEGOTIATION

Online negotiation, as the first step in e-commerce dispute resolution mechanism, provides a direct communication platform for the parties. This process usually relies on the built-in communication tools of e-commerce platform or independent online negotiation service system. Online negotiation emphasizes rapid response and preliminary negotiation, and its purpose is to enable both parties to negotiate and resolve differences without involving legal procedures, so as to reach a consensus. This method has the characteristics of simple operation, low cost and less formal, especially for those cases with simple matters and small amount of disputes. In the negotiation stage, both sides can freely express their opinions and seek solutions that are in the best interests of both sides.

ONLINE MEDIATION

Online mediation mechanisms usually involve third parties-mediators or mediation agencies, using the network platform to intervene in disputes and help both sides find acceptable solutions（Dahlan et al., 2023）. The advantage of online mediation is that it is confidential and non-coercive, and the parties are not forced to accept any solution. Compared with traditional mediation, online

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mediation has the advantages of no geographical restrictions, flexible time and relatively low cost (Ballesteros, 2021). Mediators usually have legal and e-commerce related knowledge and can provide professional mediation services to help resolve cross-border commercial disputes.

ONLINE ARBITRATION

Online arbitration is a more formal form of dispute resolution that combines the legal effectiveness of traditional arbitration with the convenience of Internet technology. In the online arbitration process, the arbitrator or arbitration team uses electronic means to hear the case and ultimately make a legally binding decision. This mechanism is especially suitable for resolving more complex or large amount of e-commerce disputes, especially when the parties want to get a final decision quickly, the application of online arbitration is faster. The main challenges of online arbitration are the fairness of the process and the international recognition of the award.

LITIGATION SERVICES

Litigation services are the traditional way of resolving e-commerce disputes and involve formal court proceedings. Although the litigation process may be cumbersome and costly, litigation provides an authoritative way to resolve disputes, especially when dealing with complex legal issues and disputes over large amounts of money. In recent years, with the development of information technology, court systems in many countries have begun to provide electronic litigation services, such as online filing, electronic document services and network trial, to meet the needs of the digital age and improve judicial efficiency.

PLATFORM AUTONOMY MANAGEMENT

Platform autonomy management refers to the use of internal rules and procedures by e-commerce platforms to resolve disputes between platform users. The core of this mechanism is that the e-commerce platform directly participates in the mediation and settlement of disputes by using its own resources and technologies, such as evaluation system, credit system and platform rules. This autonomous approach can respond quickly and reduce processing costs when dealing with user disputes, but there is also a problem that the platform may favour its own interests (Hongmei, 2021).

CONSUMER PROTECTION AGENCY

Consumer protection agencies play a guardian role in cross-border e-commerce dispute resolution. These agencies are usually non-profit organizations established or recognized by the government to protect the rights and interests of consumers and monitor the legitimacy of e-commerce activities. They provide consumers with complaint channels, legal advice and educational information, and sometimes participate in the coordination and resolution of disputes.

DIVERSIFIED PUBLIC LEGAL SERVICES

Diversified public legal services provide a series of legal support services aimed at resolving e-commerce disputes. These services may include legal advice, dispute resolution advice, participation in legal proceedings on behalf of consumers, etc. Diversified public legal service providers include legal aid agencies, non-governmental organizations and online legal consultation platforms, aiming to make legal services more inclusive (Haryanto & Sakti, 2024).

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COLLABORATION BETWEEN GOVERNMENT AND ENTERPRISE

Government-enterprise collaboration refers to the cooperation between the government and enterprises in cross-border e-commerce dispute resolution. The government may provide a regulatory framework within which enterprises operate and self-regulate, which not only promotes the healthy development of the market, but also helps to form an effective dispute prevention and resolution mechanism (Zheng & Zheng, 2020).

INDUSTRY SELF-DISCIPLINE AND PLATFORM AUTONOMY

Industry self-discipline and platform autonomy are the measures taken by e-commerce platforms to maintain the stability of their own business ecosystem. The platform formulates a series of operating rules, including terms of service, trading rules and dispute resolution procedures, to guide user behavior and provide solutions in case of disputes. This self-regulatory mechanism emphasizes the interaction and cooperation between the platform and users, aiming at reducing the occurrence of disputes and solving problems quickly and effectively (Yanting et al., 2023).

SIMILARITIES AND DIFFERENCES OF MULTIPLE DISPUTE RESOLUTION MECHANISMS

We analyze the similarities and differences of multiple dispute resolution mechanisms in various types of cross-border e-commerce.

There are many similarities. In terms of voluntariness, most ADR mechanisms are based on the voluntary participation of both parties, providing a non-mandatory and more flexible environment for dispute resolution. In terms of confidentiality, ADR mechanisms typically provide a more confidential resolution process, which helps protect the privacy and trade secrets of parties involved. In terms of cost-effectiveness, compared to traditional litigation methods, ADR mechanisms are often able to resolve disputes at lower costs and reduce the economic burden on the parties involved. In terms of resolution speed, the ADR mechanism is usually faster than court litigation, which helps parties resolve disputes faster and restore normal business activities.

However, different mechanisms also vary. In terms of legal effectiveness, online arbitration usually produces legally binding awards, while online negotiation and mediation rely more on the voluntary compliance of both parties, resulting in relatively weak legal effectiveness. In terms of procedural formality, litigation services and online arbitration have more formal procedures, while online negotiation and mediation are relatively flexible and informal. In terms of cost, online negotiation and mediation usually have lower costs, while litigation services and certain online arbitration may involve higher costs. In terms of participating entities, the cooperation mechanism between the government and enterprises involves the joint participation of government agencies and the private sector, while platform independent management and industry self-discipline mainly rely on the rules and procedures of the e-commerce platform itself. In terms of dispute resolution scope, certain mechanisms such as diversified public legal services and consumer protection institutions may focus more on consumer rights protection, while online arbitration and litigation services are applicable to a wider range of commercial disputes.

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The similarities and differences of multiple dispute resolution mechanisms are shown in Table 1.

TABLE 1. Similarities and differences of multiple dispute resolution mechanisms

Type of mechanism	Online negotiation	Online mediation	Online arbitration	Online Litigation services	Self-management of the platform	Consumer Protection Agency	Diversified public legal services	Cooperation between government and enterprise	Industry Self-discipline and Platform Autonomy
Voluntary	✓	✓	✓	May be mandatory	✓	✓	✓	✓	✓
Confidentiality	✓	✓	✓	✗	✓	Possibly public	✓	Possibly public	✓
Professionalism	Medium	High	High	High	Medium	High	High	High	Medium
Cost-effectiveness	High	Medium	Medium	Low	Medium	Medium	High	Medium	Medium
Speed of resolution	Hurry up	Medium	Slower	Slow	Hurry up	Hurry up	Medium	Medium	Hurry up
Procedural form	Informal	Semi-formal	Formal	Formal	Informal	Informal	Formal	Formal	Informal
Legal effect	None	None	Have	Have	None	None	Have	Have	Have
Scope of participation	Participation of both parties	Both parties plus mediator	Both parties plus arbitrator	Court involvement	Platform participation	Participation of protection agencies	Multi-party participation	Government and enterprise participation	Platform and User Engagement
Applicable conditions	A simple dispute	Third-party assistance required	Complicated or enforceable	Complex legal issues	Disputes between users	Consumer rights protection	Legal advice and representation	Cross-sectoral coordination	Platform internal specification
Cultural sensitivity	Less consideration	Need to be considered	Less consideration	Might consider	Might consider	Need to be considered	Need to be considered	Need to be considered	Need to be considered

Traditional methods, although mature in legal frameworks and procedures, have limitations in terms of accessibility, cost, and time efficiency. For example, traditional methods often require the parties to appear in person, which not only increases travel and time costs, but may also face language and cultural barriers for cross-border e-commerce disputes. In contrast, online mechanisms provide a more flexible and cost-effective solution, allowing parties to easily participate in the dispute resolution process regardless of their location. In addition, the automation features and instant messaging of online platforms reduce the time required for dispute resolution.

However, each method has its limitations. Traditional methods may provide more formal and authoritative solutions in certain situations, while online mechanisms may face technical barriers and data security issues（Alessa, 2022）. In addition, differences in legal systems between different countries and regions may also affect the applicability and effectiveness of online dispute resolution mechanisms. This analysis not only highlights the advantages of our proposed online mechanism, but also

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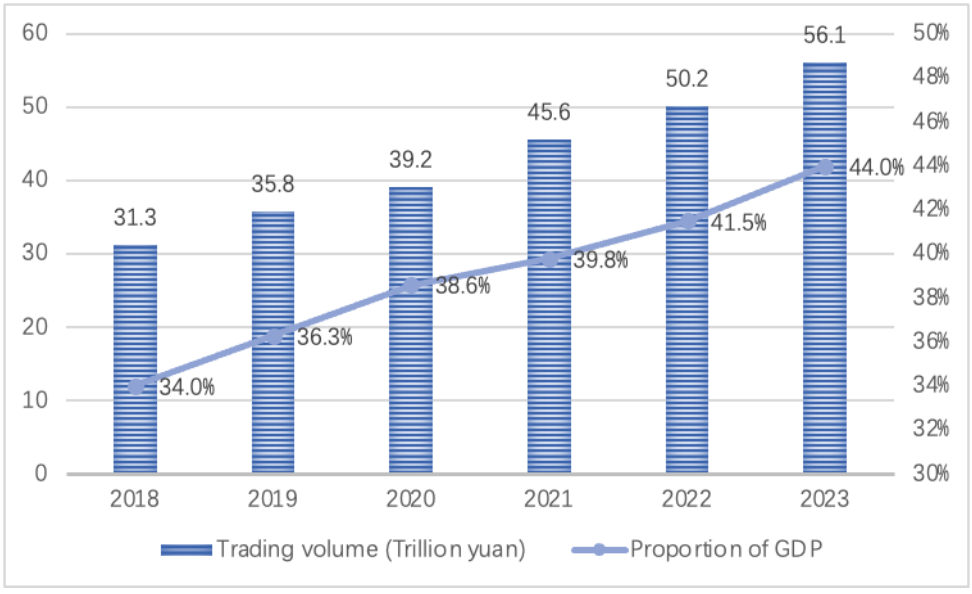
considers situations where traditional methods may be more suitable in specific circumstances.

CURRENT SITUATION AND PROBLEMS OF ONLINE DISPUTE RESOLUTION MECHANISMS IN CHINA

CURRENT SITUATION

With the increasing popularity of overseas online shopping, the convenience of international logistics warehousing and services, and favorable domestic cross-border export policies, the market size of cross-border e-commerce in China continues to grow. According to data from the General Administration of Customs, the total import and export value of China in 2023 was 41.76 trillion yuan, a year-on-year increase of 0.2%. The total import and export value of cross-border e-commerce in 2023 was 2.38 trillion yuan, a year-on-year increase of 15.6%, of which exports were 1.83 trillion yuan, an increase of 19.6%. As shown in Figure 1, the scale of cross-border e-commerce transactions in China increased from 9.0 trillion yuan to 17.48 trillion yuan from 2018 to 2023, with annual growth rates exceeding 10% each year. The scale of China's cross-border e-commerce exports will continue to grow under the influence of the increasing cross-border trade exchanges and the increasing penetration of Internet technology.

FIGURE 1. Scale of Cross Border E-Commerce Transactions in China



Source: http://mp.ofweek.com/internet/a956714423207

According to the statistics of NetEase E-commerce Research Center, the top 10 types of cross-border e-commerce transaction disputes in 2022 are: refund issues (27.64%), shipping issues (9.01%), store withdrawal without refunding deposit (8.70%), logistics issues (8.38%), merchant fund freeze (7.76%), product quality (6.83%), online fraud (6.21%), return and exchange difficulties (5.59%), and online counterfeit sales (5.28%), as shown in Figure 2.

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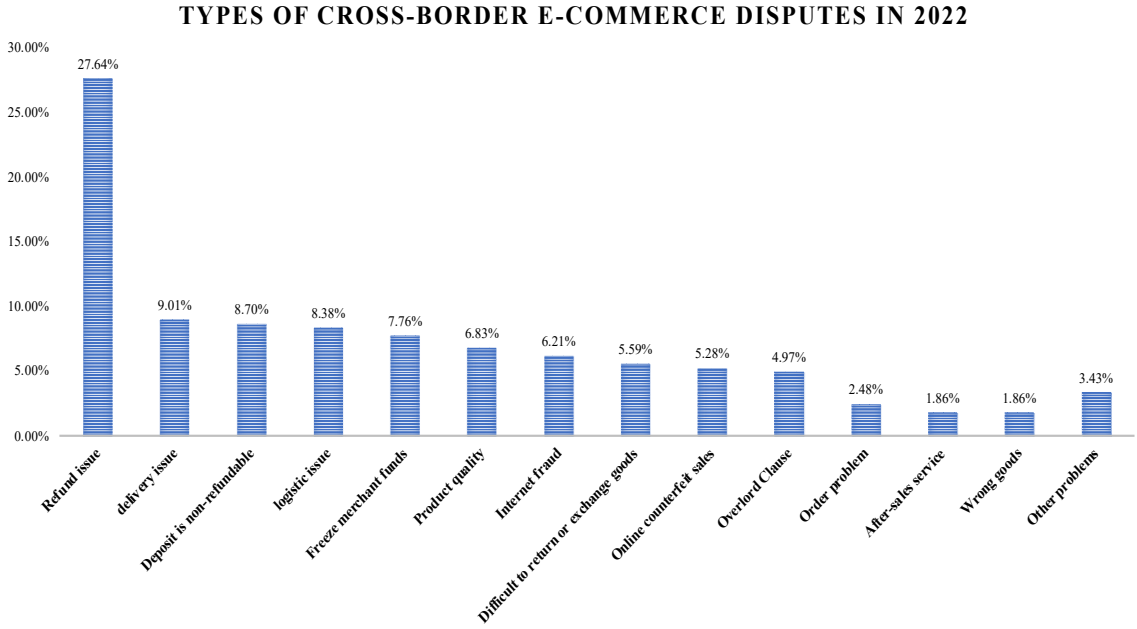
FIGURE 2. Types of Cross border E-commerce Disputes in China



Source: https://www.100ec.cn/zt/2022kjdstsbg/

The development of cross-border e-commerce in China is rapid, but cross-border e-commerce disputes between consumers and merchants have the characteristics of small dispute amounts and large dispute volumes. According to statistics from the E-commerce Research Center of the Online Economic Society, in 2022, the amount of e-commerce disputes in China's cross-border e-commerce disputes was mainly concentrated between 1000-5000 yuan (27.64%) and 100-500 yuan (18.32%), with generally small dispute amounts, as shown in Figure 3. The traditional international commercial arbitration and civil litigation systems often exhibit high costs, complex procedures, and other discomforts and limitations in resolving such small-scale disputes, which exceed the benefits obtained by the parties in safeguarding their rights. Therefore, there is an urgent need for a low-cost and fast dispute resolution method for such disputes.

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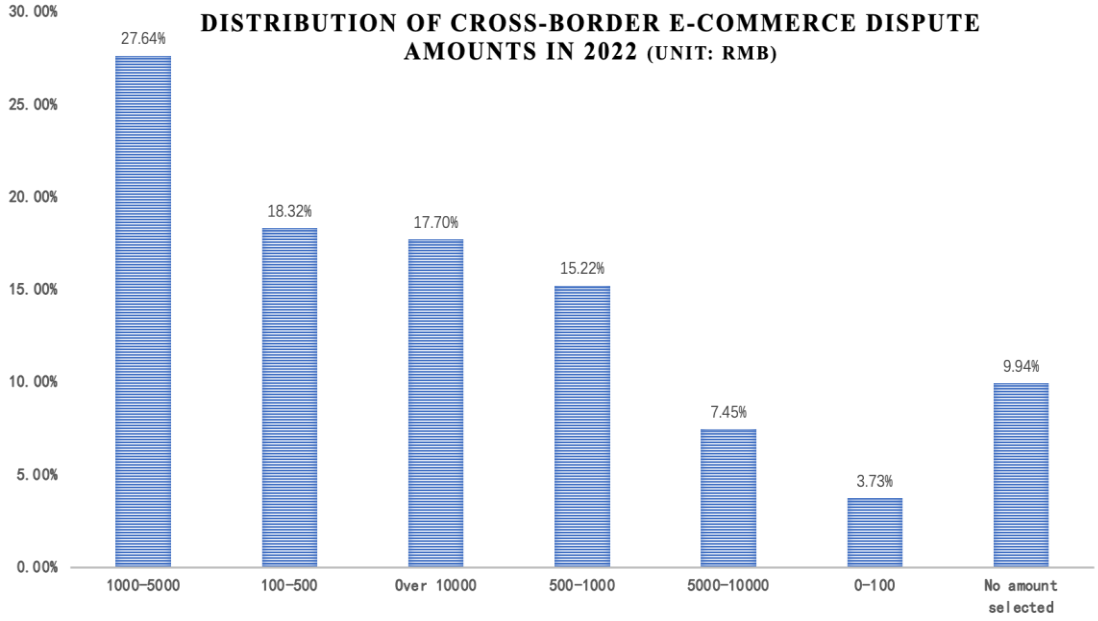
FIGURE 3. Distribution of Cross border E-commerce Dispute Amount in China



Source: https://www.100ec.cn/zt/2022kjdstsbg/

A large number of cross-border and cross regional transactions have triggered a large number of cross-border and cross regional civil and commercial disputes. With the virtual, global and other characteristics of the Internet gradually seeping into the corresponding legal relations, the existing legal system has been challenged, making the parties encounter insurmountable difficulties in resolving disputes through litigation in many aspects such as jurisdiction, application of law, recognition and enforcement of judgments. In this situation, the Alternative Dispute Resolution (ADR) mechanism has a unique advantage in resolving e-commerce disputes due to its flexibility. However, traditional ADRs are difficult to adapt to the needs of this globalized, fast, and efficient e-commerce. Coupled with the progress and support of Information and Communication Technology (ICT), it has given rise to the Online Dispute Resolution (ODR) mechanism in the field of cross-border e-commerce. The application of ICT technology in ODR makes dispute resolution more flexible, convenient, fast, and cost-effective, and ODR has enormous development potential.

MAIN PROBLEMS

At the legal level, there is currently no specialized legislation in China. In terms of substantive law, there is no specialized legislation in China to regulate the mechanism for resolving online disputes. Relevant provisions are scattered in relevant laws such as the Consumer Rights Protection Law, the Personal Information Protection Law, and the Electronic Signature Law, Electronic commerce law as well as some departmental rules or regulations. An effective supervision system for the existing mechanism has not yet been established. At present, many provincial and municipal People's Congress Standing Committees in China have formulated local regulations for diversified dispute resolution, but these regulations are not specifically formulated for non-cross-border e-commerce disputes, and the subjects involved do not include e-commerce platforms and ODR platforms.

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In terms of procedural law, there is currently no specialized law or unified procedural rules in China that specifically regulate the online dispute resolution process under the ODR model. For example, issues such as the status, jurisdiction, and effectiveness of ODR need to be clearly defined.

At the policy level, China has made some explorations in the resolution of cross-border e-commerce disputes, but it is not yet perfect. The Supreme People's Court issued the *Opinions on Further Deepening the Reform of Diversified Dispute Resolution Mechanisms* in 2016, in which Article 15 first stipulated the issue of online mediation. Subsequently, on September 25, 2020, the service guarantee of the People's Court further expanded its opening up to the outside world. It not only proposed to improve the diversified resolution mechanism for international commercial disputes, but also proposed to "promote the deep integration of judicial needs for foreign-related trials and cross-border litigation of parties, deeply integrate the construction of smart courts, build a foreign-related party litigation service platform, strengthen the application of cutting-edge technologies such as big data, cloud computing, blockchain, artificial intelligence, and 5G in the field of foreign-related trials, and improve the level of informationization of foreign-related trials and litigation services.". On December 27, 2021, the Supreme People's Court announced *Rules for Online Mediation of People's Courts*, which for the first time made provisions on online mediation of people's courts in the form of judicial interpretation. The timely introduction of the above series of judicial opinions and policies is of great significance for promoting the development of cross-border e-commerce in China, protecting the personal information rights and interests of cross-border consumers, and building a platform for resolving online disputes.

Despite their historical significance, traditional dispute resolution mechanisms face mounting challenges in the realm of cross-border e-commerce. A critical examination reveals limitations in accessibility, with complex legal procedures often excluding parties without extensive legal resources. The financial burden of pursuing disputes through these channels is also substantial, deterring many from seeking redress. Moreover, the efficiency of these mechanisms is impeded by lengthy court proceedings and bureaucratic delays, which are increasingly problematic in the fast-paced e-commerce environment（Carneiro et al.,2014）. The rapid growth of e-commerce has exacerbated these issues, leading to delays and increased costs that can significantly impact small and medium-sized enterprises.

SEVEN STRATEGIES OF MULTIPLE DISPUTE RESOLUTION MECHANISMS IN CROSS-BORDER E-COMMERCE

ESTABLISHMENT OF AN INTERNATIONAL REGULATORY COOPERATION NETWORK

The core of this suggestion is to create an effective cross-border regulatory communication mechanism in the context of globalization, promote the establishment of international e-commerce regulatory forums, regularly discuss regulatory strategies, legal updates, and emerging challenges. It mainly includes two aspects: establishing a cross-border regulatory communication mechanism and coordinating the implementation of international standards and regulations. The first point lays the foundation for establishing a comprehensive communication and coordination

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mechanism, while the second point is the specific actions taken to respond to emergencies based on this foundation.

1. Establish a cross-border regulatory communication mechanism

In the context of globalization, the creation of an effective cross-border regulatory communication mechanism can lead to the establishment of an international e-commerce regulatory forum, which meets regularly to discuss regulatory strategies, updates of laws and regulations, and emerging challenges. Communication mechanisms should include multi-level communication, not only among government agencies, but also among non-governmental organizations, industry associations and major e-commerce platforms, to facilitate the flow of information, coordinate regulatory actions and maintain the consistency of regulatory measures. The use of advanced information technologies, such as blockchain and big data analytics, should also be encouraged to improve the efficiency and transparency of communication mechanisms (Inshakova et al., 2020). Establish a permanent working group composed of national regulators and industry representatives to develop operational rules for the communication mechanism, handle the drafting of agreements, and oversee the implementation of the communication mechanism. The establishment of emergency contact points, in the event of major cross-border e-commerce disputes, can quickly gather the strength of all parties to jointly respond to unexpected cross-border e-commerce disputes.

2. Harmonization of international standards and regulatory implementation

In order to coordinate international standards and regulations, we should establish an international norm system that can not only adapt to the differences of laws in different countries, but also maintain a certain degree of unity. This system should reflect the regulatory needs of different countries for cross-border e-commerce and provide a clear and predictable trading environment for businesses and consumers (Liu et al., 2021). To achieve this, extensive cooperation and consultation among countries are needed, and international organizations such as the World Trade Organization (WTO) and the International Telecommunication Union (ITU) are used to promote the process of international legal harmonization. In terms of implementation details, we can draw lessons from existing international agreement models and formulate a series of minimum standards and best practice guidelines for cross-border e-commerce, covering all aspects of e-commerce, including consumer protection, data security, description of goods and services, payment systems and dispute resolution mechanisms. States should establish cooperative mechanisms to monitor the implementation of these standards and guidelines and periodically assess their effectiveness. In this process, international organizations and developed countries should provide technical assistance and constructive suggestions to help developing countries upgrade their regulatory standards and protect their competitiveness in the global e-commerce market.

DEVELOPMENT OF ONLINE DISPUTE RESOLUTION

This suggestion aims to build a unified online platform that provides a centralized and easily accessible dispute resolution venue for global consumers. The suggestion includes two points: building a unified online platform and achieving cross-border access and operation. The first point focuses

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on the technical construction and functionality of the platform, while the second point focuses on the security and user trust of the platform, both of which together ensure the integrity and effectiveness of the ODR system.

1. Build a unified online platform

A unified online platform can provide a centralized and easily accessible dispute resolution venue for consumers and businesses worldwide. Building such a platform needs to take into account the convenience of operation, multi-language support, legal applicability and other requirements. The platform should have the ability to deal with all kinds of e-commerce disputes, so as to reduce the complexity and uncertainty caused by different jurisdictions. The platform should integrate existing technical resources, such as electronic payment, online customer service, automatic dispute determination system, etc., to provide necessary technical support for dispute resolution (Ermakova, 2023). The platform also needs to design an efficient user interface to simplify the process of dispute submission and processing, so that users can easily submit disputes and follow up the progress of processing. Strengthen data protection and privacy security protection, properly manage and protect all personal and business information submitted to the platform. In addition to technical construction, it is also necessary to establish a rule system that links up with the laws and regulations of various countries. The operation of the platform should not only follow the principles of international law, but also respect the laws and regulations of various countries. It can cooperate with international legal organizations to study and absorb the legal practices of various countries and form a set of widely recognized operational norms. It should also be continuously monitored and evaluated so that the rules and practices of the platform can keep pace with the development trend of international e-commerce.

2. Achieve cross-border access and operation

Cross-border access and operation is another important part of building a multi-dispute resolution mechanism for cross-border e-commerce under the background of globalization. This requires online platforms not only to technically overcome national boundaries, but also to ensure that cultural differences do not become barriers to use of the platform. In order to achieve this, the platform should support multiple languages, provide diversified payment options, and adapt to Internet access conditions in different countries (Skhulukhia, 2021). At the operational level, the platform should provide stable and secure services in any country or region. With cloud computing and distributed server technology, users can quickly access it no matter where they are. The operation process of the platform needs to be flexible and able to adapt to different dispute resolution processes, including mediation, arbitration or judicial procedures. Achieving cross-border access also needs to take into account the global digital divide. The Platform should explore the possibility of working with developing countries to help users in those countries better access and use the Platform. Provide technical assistance, build infrastructure and carry out user education projects, and cooperate with the International Telecommunication Union and other institutions to enhance global Internet access capacity.

IMPROVE CONSUMER PROTECTION STANDARDS

The suggestion focuses on developing international consumer rights protection guidelines and implementing cross-border

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consumer education projects. The suggestion includes developing international consumer rights protection guidelines and implementing cross-border consumer education projects. The first point provides clear guidance and standards for consumer rights, while the second point is to popularize these guidelines through education, ensuring that consumers can understand their rights and act accordingly.

1. Develop guidelines for the protection of international consumer rights and interests

International consumer protection guidelines should outline the fundamental rights that consumers can expect when conducting cross-border electronic transactions, including the right to know, the right to choose, the right to fair dealing, and the right to security. Guidelines should emphasize the protection of consumer personal data and respect and protect personal privacy worldwide (Li, 2021). In developing these guidelines, input should be sought from a wide range of sources, including consumer groups, business representatives, legal experts and international organizations. Protection guidelines should describe in detail the various reasonable expectations in the course of cross-border transactions and provide clear guidelines to reduce disputes arising from ignorance of the laws of different countries. When formulating the guide, we should take into account the legal and cultural differences of different countries and regions, and put forward suggestions with universal applicability so as to facilitate the adjustment or adoption of each country according to its own situation. These guidelines should be written in language that is easy to understand, so that they can be used not only by legal professionals, but also by ordinary consumers to understand their rights and obligations. Once the protection guidelines are formulated, they should be widely publicized through various channels and ways, such as citing them in international trade agreements or promoting them through consumer rights organizations, so that these principles can be widely recognized and abided by. There is also a need to periodically review and update these guidelines to keep up with the rapidly changing cross-border e-commerce environment and the demands of new technologies (Liu & Li, 2020).

2. Implementation of cross-border consumer education projects

Cross-border consumer education programs should include advocacy of consumer rights, warnings about the risks of cross-border shopping, and guidance on how to resolve disputes safely and effectively. Projects should take diversified forms such as online seminars, interactive courses and educational videos to improve consumer's understanding of the legal environment of cross-border e-commerce (Fang & Wang, 2021). The content of educational projects needs to cover the whole process of e-commerce transactions, from the beginning of purchasing goods to the completion of transactions, and even how to deal with possible returns and refunds and other follow-up services. The project should emphasize the importance of data protection, educate consumers how to identify safe online payment methods, and how to avoid the abuse of personal information. When implementing these educational projects, they should work with multiple stakeholders, including cross-border e-commerce platforms, consumer protection agencies and educational institutions, to develop educational content and materials. Existing educational resources and channels, such as schools, community canters and online communities, should be used to expand the coverage of educational projects.

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Taking into account cultural and linguistic diversity, materials for educational programs should be provided in multiple languages, guaranteeing understanding and acceptance by consumers of different backgrounds.

STRENGTHEN CROSS-BORDER DATA PROTECTION AND PRIVACY SECURITY

The suggestion emphasizes the importance of developing cross-border data protection policies and implementing strict data security measures. The suggestion includes two aspects: developing cross-border data protection policies and implementing strict data security measures. The first point establishes the rules and principles of data protection, while the second point is to translate these principles into specific actions and measures to ensure the security and integrity of data.

1. Development of cross-border data protection policies

Cross-border data protection policy refers to the protection of personal information security and privacy in the process of transnational transmission and processing, which must balance efficiency and security, and measure the differences and compatibility of data protection laws in different countries (Arakelian et al., 2020). The policy should clarify the legal framework for data protection, enforcement agencies, compliance requirements and penalties for non-compliance. Such policies should be based on international best practices and principles of data protection, such as transparency, data minimisation, data quality, user consent, safeguards and restrictions on cross-border data flows. Among them, special attention should be paid to the collection and use of personal information, the collection of data is limited to the scope necessary to provide services, and there is a clear proof of user consent. Policy formulation should also adopt an inclusive strategy to fully consider and integrate the views and suggestions of various stakeholders, including government agencies, private enterprises, non-governmental organizations and consumer representatives. Cross-border data protection policies should be flexible enough to accommodate future developments in technology and emerging patterns of data use.

2. Implement strict data security measures

In the context of globalization, the prosperity of cross-border e-commerce requires the implementation of strict data security measures to prevent data leakage, abuse and other related risks. Technical protection measures should include enhanced data encryption, secure data storage and transmission protocols, timely patching of security vulnerabilities, and effective intrusion detection systems. Strengthen physical security measures in the data center, such as restricting unauthorized access and monitoring the security of the data center. In addition to technical measures, enterprises and organizations should formulate a comprehensive data security policy to clarify the security responsibilities and operating procedures of each link. Regular data security training for employees is required to raise awareness of the importance of protecting data. Strict data access control system should also be established, and only authorized personnel can access sensitive data (Yu, 2022). Data security measures should also include plans to deal with data leakage incidents, and take prompt action to reduce losses when data security incidents occur. The contingency plan should include incident response procedures, notification mechanisms, and data recovery strategies. Businesses and organizations should regularly review and test their data security measures, all of which are in optimal

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condition and adaptable to new security threats.

INTRODUCE MULTI-PARTY MEDIATION AND ARBITRATION MECHANISM

The core of this suggestion is to introduce an international e-commerce arbitration center in cross-border e-commerce dispute resolution to provide professional, efficient, and fair arbitration services. The first point emphasizes the necessity of establishing an international e-commerce arbitration center, which needs to develop clear arbitration rules that are compatible with international trade law and the characteristics of e-commerce. The second point discusses the importance of promoting multilingual arbitration and mediation services to adapt to the linguistic diversity of different countries and regions. The relationship between these two points is that the first point focuses on establishing an infrastructure and rule framework for international arbitration, while the second point is to ensure that the center's services can overcome language and cultural barriers, truly achieving internationalization and inclusiveness.

1. Establishment of an international centre for electronic commerce arbitration

In order to solve cross-border e-commerce disputes, an international e-commerce arbitration center should be established to provide professional, efficient and impartial arbitration services for e-commerce disputes worldwide. The Centre should establish clear arbitration rules, which must be compatible with international trade laws and regulations and take into account the special nature of electronic commerce (Senatore & di Prisco, 2022). The rules should ensure the transparency and speed of arbitration procedures and the enforcement of awards. The International Electronic Commerce Arbitration Center should have an international team of experts, including experts in the fields of law, electronic commerce, information technology and international trade. These experts should not only have rich theoretical knowledge, but also have practical experience in dealing with international commercial disputes. The Centre should also make use of information technology, such as online submission of documents and virtual hearings, to adapt to the needs of different regions and time zones and improve the efficiency of arbitration procedures. The International Center for Electronic Commerce Arbitration should also cooperate with relevant institutions in various countries to establish a system of mutual recognition of arbitral awards. Countries need to recognize and enforce the awards of the arbitration center so as to enhance the global effectiveness and authority of the awards. In order to achieve this goal, arbitration centers can sign agreements with countries or apply international treaties to recognize and enforce arbitral awards across borders.

2. Promotion of multilingual arbitration and mediation services

The nature of cross-border e-commerce requires arbitration and mediation services to adapt to the linguistic diversity of different countries and regions. Arbitration and mediation institutions should not only provide multilingual service personnel, but also establish corresponding language service support systems, such as translation and simultaneous interpretation, so that all parties can fully and equally participate in the arbitration and mediation process. The promotion of multilingual services also includes the provision of multilingual copywriting, documentation and website interfaces, as well as the training of multilingual service personnel (Kesuma & Triputra, 2020). Arbitration and mediation institutions should recruit professionals from

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different language backgrounds to enhance the international and inclusive nature of their services. Multilingual services should cover all aspects of the arbitration and mediation process, including the acceptance of cases, the submission of evidence, hearings and the issuance of awards. The promotion of multilingual services should also include the training and guidance of external legal service providers, such as lawyers, legal advisers, etc., to enable them to provide efficient representation for clients of different languages. Organize international seminars, professional training courses and public education activities to enhance the language service capabilities of the entire industry to provide strong support for multi-dispute resolution in the global cross-border e-commerce environment (Ma et al., 2022).

USE TECHNICAL MEANS TO OPTIMIZE DISPUTE SETTLEMENT

The suggestion emphasizes the use of smart contracts and blockchain technology to provide a transparent and automated contract environment, in order to reduce the default and disputes caused by human factors in traditional contracts. The deployment of intelligent contracts and blockchain technology focuses on ensuring the automation and transparency of contract execution through technological means, while the second point “application of artificial intelligence for dispute prediction and analysis” is to optimize the dispute resolution process using artificial intelligence to prevent and resolve disputes through prediction and analysis.

1. Deploy smart contracts and blockchain technology

In cross-border e-commerce activities, the deployment of smart contract and block chain technology can provide a transparent and automatic contract environment to reduce the breach of contract and disputes caused by human factors in traditional contracts. Smart contract is a procedural contract based on block chain technology, which can automatically execute the terms of the contract when the predetermined conditions are met, without third-party intermediaries, simplify the transaction process, reduce transaction costs and increase transaction security (Chen et al., 2022). Blockchain technology provides a decentralized execution environment for smart contracts, in which every transaction is recorded on the blockchain and is open to all participants, thus ensuring the untouchability of transaction records. This transparency can enhance the trust of both sides of the transaction and provide indisputable evidence in the event of a dispute.

2. Application of artificial intelligence for dispute prediction and analysis

Artificial intelligence technology is applied in cross-border e-commerce dispute resolution to analyze historical data and market trends to predict potential disputes and provide decision support. Using machine learning and data mining technology, AI systems can learn from past trading cases, identify patterns of disputes, and predict possible problems in specific trading or market environments. Businessmen can use the prediction results of AI to optimize their business decisions, such as adjusting contract terms, improving customer service processes, and even adjusting market strategies. Consumers can use dispute prediction to understand the potential risks and make more informed purchase decisions (Ghozali & Ispriyarso, 2021). In the aspect of dispute analysis, AI can automatically collect and process a large number of dispute case data, and provide a reference scheme for solving similar problems. With the continuous progress of

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artificial intelligence technology, more personalized dispute resolution services can be achieved in the future, providing customized solutions according to the specific circumstances and preferences of all parties. The application of artificial intelligence to predict and analyze disputes requires the collection and analysis of a large amount of data. In the process of implementation, we must pay attention to the issues of data protection and privacy. The decisions of AI systems must be transparent and interpretable, and the recommendations they provide must be reviewed manually to prevent unfair results.

The integration of automation and artificial intelligence is one of the innovative points of this study. Automated processes simplify the administrative tasks of dispute resolution, while artificial intelligence algorithms, especially machine learning models, are used to analyze dispute data, predict dispute trends, and recommend solutions（Ermakova, & Frolova,2021）. The application of these technologies not only improves the speed and accuracy of dispute resolution, but also provides users with a more personalized and efficient service experience.

PROMOTE CROSS-CULTURAL UNDERSTANDING AND ADAPTATION

The promotion of cross-cultural understanding and adaptation includes two small points: carrying out cross-cultural exchange projects and providing cultural adaptation services. The first point focuses on enhancing understanding and respect between different cultures through communication and education, while the second point is to ensure that service provision can adapt to the needs and expectations of different cultures, thereby promoting smoother cross-cultural communication and cooperation.

1. Carry out cross-cultural exchange programs

In the context of globalization, cross-cultural exchange programs should include various forms, such as online and offline seminars, workshops, cultural experience activities and visits between enterprises (Patil, 2020). To carry out cross-cultural exchange projects, we need to study the business culture and legal environment of participating countries in depth, and enhance the pertinence and effectiveness of the content. For example, special lectures can be held on business practices in specific countries or regions, inviting local business experts and legal advisers to share their experiences, so that participants can get first-hand information and advice directly from them. Exchange programs should encourage participants to engage directly in dialogue and discussion and promote two-way or multi-directional information exchange. By means of practical case analysis and simulated trading exercises, participants can learn how to deal with cross-cultural business transactions, how to seek common ground and avoid conflicts on the basis of respecting each other's culture. Exchange programs should also focus on evaluation and feedback, adjust the content and form of activities in time, meet the needs of participants, and effectively improve the quality of cross-cultural communication.

2. Provision of acculturation services

Cultural adaptation services pay more attention to the sensitivity and adaptability to different cultures in the process of service delivery, including understanding the business practices, holidays, working hours and communication methods of different places, and taking these factors into account. For example, when designing dispute resolution procedures, the language and

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methods of dispute resolution should be more moderate and avoid direct denial and strong attitudes in societies where politeness and indirect expression are emphasized. In these areas, solutions should be proposed in the form of suggestions rather than directives, and the process of communication should fully show respect and humility, enhance the willingness of both sides to cooperate, and enhance the acceptance of solutions. Service providers should take into account the work schedule and important holidays in different regions. For example, avoid scheduling important customer service events on Fridays or important Jewish holidays in the Middle East, and respect local religious and cultural practices. The arrangement of service time should be flexibly adjusted to adapt to the time habits and rhythm of life of consumers in different parts of the world.

CASES STUDY

The Guangzhou Comprehensive Pilot Zone, relying on the Guangzhou Arbitration Commission, provides a one-stop service platform (ODR platform) for cross-border e-commerce enterprises, integrating online negotiation, mediation, arbitration and other dispute resolution methods. As of May 2023, the Guangzhou ODR platform has handled more than 500 cases involving nearly 6 billion yuan, which has been recognized by multinational enterprises and effectively safeguarded the legitimate rights and interests of China's cross-border e-commerce enterprises. In 2019, Guangzhou Arbitration Commission innovated the Internet transnational remote trial. During the three-year epidemic, the Global Internet Arbitration Recommendation Standard was released, and the first ODR platform was launched to provide diversified, efficient and low-cost one-stop online commercial dispute resolution services for China's cross-border e-commerce and commercial entities from 21 APEC member economies（Chen, 2022）.

This platform provides dispute resolution services such as negotiation, mediation, and arbitration for cross-border e-commerce enterprises. The second is to efficiently resolve economic disputes, with a mediation rate of up to 60% and an average settlement period of only over 30 days. Legal documents with international enforcement power are issued to fully protect the rights and interests of cross-border e-commerce enterprises. The third is that the fees comply with the APEC-ODR framework's concept of fees that the parties can afford and are commensurate with the disputed amount, ensuring high cost-effectiveness.

At present, arbitration trial models from Hong Kong, Macau, Taiwan, South Korea, and Portuguese speaking countries have been integrated to effectively meet the dispute resolution needs of cross-border e-commerce enterprises in China. In July 2022, a memorandum of cooperation was signed with the Silicon Valley Arbitration and Mediation Center (SVAMC) in the United States. Across Asia, Europe and the United States, it has been recognized and promoted by more than 150 domestic arbitration institutions, as well as more than 40 overseas arbitration institutions in Hong Kong, Macao and Taiwan, countries and regions along the “Belt and Road”, and major economies in Europe and the United States. The “3+N” trial mode of ODR platform has been world-renowned（Chen et al.,2023）.

CONCLUSION

In the tide of globalization, cross-border e-commerce has become an important part of international trade with its unique business model. In the process of its rapid development, the complex and changeable

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disputes involving multiple interests are increasing. This paper analyzes the related issues and multiple dispute resolution mechanisms in depth, which shows that the formulation of international consumer rights protection guidelines, the implementation of cross-border consumer education projects, the formulation of cross-border data protection policies and the implementation of strict data security measures are all indispensable links in the construction of the mechanism. Conducting cross-cultural exchange programs and providing multilingual and cultural adaptation services can promote communication and understanding in the field of global e-commerce. The application of intelligent contract, block chain technology and artificial intelligence in dispute prediction and analysis is the technical support to improve the efficiency of dispute resolution. In order to effectively solve cross-border e-commerce disputes, it is necessary to establish a multi-level and multi-dimensional collaborative network to pool global wisdom and resources, which can improve the overall governance level of cross-border e-commerce and reduce the frequency and intensity of disputes. In a word, with the implementation of the above measures, the global e-commerce environment will be more mature and perfect, and the dispute resolution will be more efficient and fairer, which will provide a solid foundation for the stability and prosperity of the global e-commerce market. Furthermore, the implementation of online dispute resolution mechanisms raises important ethical considerations, particularly around data privacy and confidentiality. It is an important research direction for the future.

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CONFLICT OF INTEREST

The authors declare that they have no competing interests.

AUTHORS' CONTRIBUTION

The first author proposed the research framework, conducted the primary analysis, and drafted the manuscript. The second and third authors provided critical feedback, refining the study, and approved the manuscript. The final version was reviewed and unanimously approved by all authors to ensure its accuracy and completeness.

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A COMPARATIVE STUDY ON THE LEGAL FRAMEWORK GOVERNING JUVENILE OFFENDERS IN MALAYSIA AND INDIA

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ABSTRACT

Malaysia's juvenile justice system has experienced substantial alteration, notably after the introduction of the Child Act 2001, which replaced the Juvenile Courts Act 1947 (Act 611) and brought it in line with the Convention on the Rights of the Child. Despite this legal move, fundamental flaws persist in the system's actual operation. The main difficulty is the uncertain prioritising of rehabilitation above vengeance, notably in section 91 of the Act, which lacks explicit guidelines to orient the Court for Children towards rehabilitative justice. Furthermore, juvenile criminals are still sentenced to adult criminal proceedings, and diversionary alternatives are underutilised, as demonstrated in Public Prosecutor v Chong Waijun [2025] MLJU 514. The purpose of this study is to determine how well Malaysia's juvenile justice system meets its rehabilitative promises while also adhering to international legal norms. The study uses a doctrinal and qualitative legal research approach to conduct a comparative analysis of India's Juvenile Justice (Care and Protection of Children) Act 2015.The findings show that Malaysia's system falls short of establishing child-centered justice and consistently using international instruments like the Beijing Rules. The research proposes broad legislative change, clearer judicial standards, and increased use of diversionary procedures. It finds that significant reforms are required to guarantee a rights-based, rehabilitative approach to juvenile justice in Malaysia.

Keywords: Child Act 2001; Juvenile Offender; Juvenile Justice; Rehabilitation; Restorative Justice.

INTRODUCTION

A child in Malaysia is defined as an individual under the age of 18 according to the Child Act 2001, which is consistent with Malaysia's ratification of the Convention on the Rights of the Child. Section 82 of the Penal Code states that any youngster under the age of ten is not held criminally responsible for their behaviour. Meanwhile, a criminal aged 14 to 17 is referred to as a youthful offender (Oxford University Press, 2002). Under the Juvenile Courts Act 1947, section 2 applied to offender aged between 10 and 18. In this context, following Malaysia's ratification of the Convention on the Rights of the Child (CRC) in 1995, the Act was replaced by the Child Act 2001, which established a specialized Children's court. Moreover, section 11 confers jurisdiction on the court to hear charges against minors, while section 83(1) requires that arrest, detention and trial procedures for children follow the Child Act rather than adult criminal procedures. Nevertheless, implementation challenges persist, particularly in ensuring that rehabilitation is effectively carried out.

In addition, Malaysia's juvenile justice system is premised on protecting the rights of children in line with international standards such as the CRC and the United Nations Standard Minimum Rules for the

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Administration of Juvenile Justice (Bejing Rules). Section 91 of the Child Act reinforces this approach by discouraging the use of the term "punishment" in cases involving juveniles (Haji Zainol et al., 2024). While the legislative framework demonstrates a commitment to rehabilitation, its success depends on consistent judicial application and institutional practice. Without this, the rights based foundation risks remaining largely aspirational rather than practical.

The implementation of the juvenile justice system still shows significant gaps in its approach toward juvenile offenders, particularly in section 91 of the Child Act 2001. This section provides for various orders that may be imposed by the Court for Children. However, it does not clearly emphasise the principle of "rehabilitation over retribution." The absence of clear guidelines on rehabilitation leads to ambiguity in the sentencing of children who have been found guilty under the law. In contrast, the juvenile justice system in India, specifically section 18 of the Juvenile Justice (Care and Protection of Children) Act 2015, offers a more comprehensive approach by clearly prioritising rehabilitation and reintegration of juvenile offenders. For instance, section 18(1)(a) allows a child to return home after receiving advice or a warning, following appropriate investigation and counselling for both the child and his or her parents or guardians. The lack of clear rehabilitative measures in Malaysia's Child Act 2001 creates a gap that can hinder the full rehabilitation and development of juvenile offenders.

In furtherance of this, this issue is evident in the case of *Public Prosecutor v Chong Waijun* [2025] MLJU 514, where the accused, a child, was charged under the Dangerous Drugs Act 1952. The case raised concerns because, although the court had powers under the Child Act to order rehabilitation, the prosecution procedure still applied punitive adult laws rather than rehabilitative ones. In her judgment, Magistrate Anis Hanini Abdullah, presiding over the Ipoh Magistrates'Court, explicitly stated that 'the court recognises that the paramount objective in juvenile sentencing is not retribution but rehabilitation, ensuring that young offenders are given a genuine opportunity to reform rather than being subjected to punitive measures that may exacerbate delinquent tendencies.' She also expressed concern over the proposal to place the offender in Henry Gurney School, noting that "placing PKK in Henry Gurney School would expose him to a more hardened criminal environment, which may be detrimental to his rehabilitation". These statements reflect judicial concern over the existing legal system's tendency to punish children through approaches that are not in line with rehabilitative principles. Overall, these statements show that although national legal policy prioritises the rehabilitation of juvenile offenders, weaknesses in the implementation and the application of adult laws to children still occur. This not only creates inconsistencies in justice but also indirectly contributes to the increasing number of repeat juvenile offenders, as they do not receive constructive or holistic intervention in line with true juvenile justice principles. Studies also have shown that punitive measures without rehabilitative components often lead to higher rates of reoffending among juvenile offenders (United Nations Office on Drugs and Crime, 2020). This research critically examines the juvenile justice system in Malaysia by focusing on the legal treatment of juvenile offenders. It aims to identify the fundamental principles underlying the concept of juvenile justice in addressing juvenile delinquency, to evaluate the extent to which the legal frameworks in Malaysia and India provide for the effective management of juvenile offenders, and to propose improvements that would enhance the rehabilitative focus of the Malaysian juvenile justice system in line with international best practices.

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This study focuses primarily on examining the legal framework governing juvenile offenders in Malaysia, with particular emphasis on how existing laws address issues of rehabilitation and protection. It further adopts a comparative perspective by analysing India's juvenile justice system to draw lessons and identify models that promote a more child centered and rehabilitative approach. The main legislation under review is the Child Act 2001 (Act 611), supplemented by relevant provisions of the Penal Code and the Criminal Procedure Code, Judicial interpretation is also considered through key cases such as such as *Public Prosecutor v Chong Waijun* [2025] MLJU 514 and *PP v Morah Chekwube Chukwudi* [2017] MLRAU 276, which illustrate the practical application of juvenile justice principles and highlight gaps in the protection of children in conflict with the law. In addition, the comparative reference to India provides insights into best practices and potential reforms that could strengthen Malaysia's juvenile justice framework.

This research adopts a doctrinal legal methodology to address the stated objectives. Doctrinal analysis is primarily concerned with determining "what the law is" through a structured examination of statutory provisions and judicial decisions. As noted by Shukla (2023), this approach is typically library based and relies on a systematic review of legal sources to clarify and interpret established doctrines. In addition, a qualitative perspective is integrated to provide a deeper understanding of how these legal provisions operate in practice. This approach is also normative in nature and does not aim to explain or predict human behavior as seen in social or sociological research. Instead, it emphasises determining how individuals ought to act according to the existing legal framework. This study also adopts a qualitative approach, as it aims to conduct an in-depth analysis of the juvenile justice system, particularly in relation to the legal treatment of juvenile offenders and the effectiveness of rehabilitation programs within Malaysia's juvenile justice framework. Qualitative research is an approach that focuses on exploring human experiences, understanding the meanings underlying particular phenomena, and interpreting the social world from the perspectives of those involved. Unlike the more structured and objective nature of quantitative research, the qualitative approach prioritises words, narratives, and interpretive meaning over numerical data or statistics (Mills. J, & Birks. M, 2014). The primary sources referenced in this study consist of statutes and official reports issued by legislative bodies or Parliament. Secondary sources include scholarly books, journal articles, newspapers, and theses written by academics concerning the juvenile justice system in Malaysia. The data collection technique employed in this study includes library-based research to achieve the research objectives. This involves the examination of statutes, case law, journals, articles, books, and official reports issued by legislative institutions. A review of the existing literature reveals several Malaysian publications that explore the juvenile justice system in depth, particularly with regard to the legal treatment of juvenile offenders and the effectiveness of rehabilitation programs within the Malaysian context. Therefore, foreign journals and articles will also be referred to in this study to ensure comprehensive analysis.

JUVENILE JUSTICE SYSTEM IN MALAYSIA

The juvenile justice system in Malaysia was established under the Child Act 2001, which introduced the Juvenile Court along with protective provisions and special procedures for handling child offenders. Malaysia's juvenile justice system has developed dramatically over the last several decades, from a punitive one to one that is more consistent with international human rights standards. According to Abdullah and Nahid

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Ferdousi (2024), Malaysia's ratification of the United Nations Convention on the Rights of the Child (UNCRC) in 1995 marked a turning point in shaping its juvenile justice system, compelling the state to incorporate principles of child protection, rehabilitation and reintegration into domestic law. The Child Act 2001 reflects these commitments by embedding key UNCRC principles, including the best interests of the child, substantive justice and a rehabilitative focus. Nonetheless, the effectiveness of these measures remains constrained by persistent challenges such as weak inter agency coordination, limited resources and insufficient monitoring mechanisms. The cited study serves as an important reference, providing both historical context and an analysis of the practical realities influencing the operation of Malaysia's juvenile justice system.

The primary legislation governing juvenile justice includes the Child Act 2001, the Penal Code, and the Criminal Procedure Code 1976. In Malaysia, a "child" is defined as someone under the age of 18. The juvenile court system, created in 1947 and codified by the 2001 Act, hears matters involving minors and is presided over by a magistrate aided by two lay advisers. The Act emphasises privacy and child-friendly processes during trials. Section 91 of Child Act authorises the court to make non-custodial remedial orders, such as admonishment, supervision, and placement in the care of relatives. Besides that, according to Abdullah & Nahid Ferdousi, (2024), it can be determined that institutional care remains an important component of the system with facilities such as Henry Gurney Schools and Tunas Bakti Schools which offering rehabilitation services under either the Social Welfare Department or the Prison Department which depending on the seriousness of the offence. In this situation, children may stay at these facilities until the age of 21. Additionally, Probation Officers also play a vital role by generating extensive social inquiry reports to support judicial decisions. According to Mustaffa & Mazlan (2022), despite these developments, Malaysia has faced criticism for its insufficient use of diversionary devices. In addition, studies also indicate that the limited availability of diversion alternatives, along with an overreliance on formal, punitive criminal procedures, may undermine the rehabilitative effectiveness of the juvenile justice system. Therefore, it is essential ton conduct research to examine and identify various effective sentencing approaches for children, with the aim strengthening rehabilitation and reducing recidivism (Human Rights Commission of Malaysia, 2004).

In January 1996, the Malaysian government established a Cabinet Committee to address rising social issues, leading to the formulation of the Pelan Tindakan Sosial (PINTAS) or Social Action Plan. This initiative reviewed several statutes relating to child protection, including the Child Protection Act 1991, the Women and Girls Protection Act 1973 and the Juvenile Courts Act 1947. All three were subsequently repealed and consolidated into the Child Act 2001 which sought to harmonise laws on childcare, protection and rehabilitation while standardizing measures applicable to cases involving juvenile offenders (Nazeri N, 2007.). The term 'juvenil' can be defined as a young, immature person or a child, as stated in Kamus Dewan (2007). Children who are charged under the law have the right to legal protection as enshrined in Articles 37 and 40 of the Convention on the Rights of the Child. According to a study that has been conducted by the Ministry of Women, Family and Community Development and UNICEF Malaysia, the term juvenile justice refers to the legal framework, standards, procedures, and institutional bodies concerning juvenile offenders. Indirectly, the juvenile justice system in Malaysia plays a crucial role in handling criminal cases involving children and adolescents.

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JUVENILE JUSTICE SYSTEM IN INDIA

The Indian juvenile justice system is founded on the principle that children in conflict with the law should be treated with care, compassion and focus on rehabilitation rather than punishment. According to Aggarwal et al. (2011), the Indian juvenile justice system is based on the notion that children who have broken the law should be dealt with care, compassion and reformative aim. In this context, rather than being punished in the same way that adult offenders are. This approach is in accordance with constitutional protections and India's international commitments, notably the United Nations Convention on the Rights of the Child (1989), which emphasises the need to protect and rehabilitate child offenders in a way compatible with their dignity and rights.

The constitutional legality of this rehabilitative method was upheld in the landmark case of *Salil Bali v Union of India & Another* [2013] 7 SCC 705, In this case, the Supreme Court emphasising that the law must prioritise rehabilitation over retribution and cannot be changed only because of public pressure or high profile cases. The court reiterated that the existing legal system was in accordance with India's international commitments under the UNCRC. According to Parliament of India (2015), the Juvenile Justice (Care and Protection of Children) Act 2015 has been implemented in response to public outrage over high profile cases such as the 2012 Delhi gang rape. The fact that one of the accused was a juvenile sparked national outrage and intense scrutiny of the existing juvenile justice framework. In response to public demand, the government has established the J.S. Verma Committee to suggest legal reforms for better protection of women. The committee has maintained a strong stance in support of retaining the juvenile age limit at 18 years and has emphasised that any reform should be in line with constitutional morality and international obligations (Verma J S, Leila Seth and Gopal Subramanium, 2013). A significant and contentious change was the introduction of provisions allowing juveniles aged 16 to 18 years to be tried as adults for heinous offences, depending on a preliminary evaluation of their mental maturity and responsibility by the Juvenile Justice Board (JJB).

In a study by Palak Singh (2020), the author provides a comprehensive examination of the evolution of India's juvenile legal system, tracing its development from the British colonial era to the implementation of the Juvenile Justice (Care and Protection of Children) Act 2015. The article also analyses the application of the principle of "rehabilitation over retribution", and highlights the controversy surrounding the 2015 Act, particularly its provision allowing juveniles aged 16 to 18 who commit serious offences to be tried as adults, subject to a preliminary assessment by the Juvenile Justice Board.

According to Aggarwal et al. (2011), the Juvenile Justice (Care and Protection of Children) Act 2015 was enacted to replace the earlier Juvenile Justice Act 2000 in response to the need for a more robust and effective justice system that incorporates both deterrent and reformative approaches. Besides that, recognizing that juveniles require a different treatment from adults, Parliament emphasised that children should be given greater opportunities for transformation and rehabilitation which is achievable only through a specialized justice framework. In this context, a child is also defined as any person who has not completed 18 years of age as stated in section 2(12) of Juvenile Justice (Care and Protection of Children) Act 2015. The act also further classifies children into two categories which are children in need of care and protection and children in conflict with law as outlined in section 2(13) of Juvenile Justice (Care and Protection of Children) Act 2015. This explicit classification and legislative structure reflect the Act's

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fundamental goal of ensuring that juveniles are handled with in a manner that prioritises both their welfare and rehabilitation.

BALANCING REHABILITATION AND RETRIBUTION WITHIN MALAYSIA'S JUVENILE JUSTICE FRAMEWORK

According to Ahmad et al. (2022), the administration of juvenile justice in Malaysia, regulated by the Child Act 2001 has displayed numerous fundamental flaws that impede the complete protection of children in confrontation with the law. Section 91 of the Child Act 2001 allows the court for children a variety of punishment alternatives for juvenile offenders, including detention in a place of refuge or the Henry Gurney School. However, the Act has placed insufficient emphasis on rehabilitation as the primary goal. This lack of clarity is especially problematic in light of Malaysia's obligations under Article 40(1) of the Convention on the Rights of the Child (CRC), which emphasises the need of juvenile justice systems to promote the reintegration of children into society and foster their constructive role within it (Ruggiero, 2022).

The treatment of juvenile offenders under adult penal law remains a troubling concern within the justice system. This issue was clearly illustrated in *Public Prosectur v Chong Waijun* [2025] MLJU 514, where a juvenile was charged under the Dangerous Drugs Act 1952 which is a statute designed primarily for adult offenders. Despite the court's recognition that rehabilitation should be prioritised over punitive measures, the legal process applied in this case contradicted the fundamental principles of juvenile justice. Magistrate Anis openly acknowledged the importance of focusing on the child's rehabilitation rather than resorting to harsh punishment. This case not only highlights the structural gaps in the current legal framework but also reflects a broader tension between punitive laws and the rehabilitative aims of juvenile justice. It underscores the urgent need to reassess how juveniles are prosecuted, ensuring that legal responses align with the principles of rehabilitation and child welfare, rather than exposing young offenders to environment that may worsen their situation. In addition, the rehabilitative philosophy enshrined in the Child Act 2001 and reinforced by the case of *PP v Morah Chekwube Chukwudi* [2017] MLRAU 276 was also considered by the court. It was emphasised that, in accordance with these principles, an alternative corrective approach should be pursued. The court was therefore of the view that punitive measures alone were insufficient, and that corrective strategies focusing on the juvenile's reintegration and personal development were warranted. Nevertheless, this decision has emphasized an essential point, while judicial discretion might tend towards rehabilitation, the structural limits of the law prevent the continuous implementation of child-friendly justice concepts (Human Rights Commission of Malaysia, 2008.). This instance demonstrates the discrepancy between the legal framework's rehabilitative goal and actual execution.

TABLE 1. Juvenile Facilities in Malaysia

State	Juvenile Rehabilitation Facility	Gender Intake	Managed by
Perlis	Rumah Kanak-Kanak Arau	Mixed	Department of Social Welfare (Malaysia)
Kedah	Asrama Akhlak Pokok Sena Asrama Akhlak (P) Jitra	Male Female	Department of Social Welfare (Malaysia)

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Pulau Pinang	Sekolah Tunas Bakti Telok Air Tawar Asrama Akhlak Paya Terubong	Mixed Male	Department of Social Welfare (Malaysia)
Perak	Sekolah Tunas Bakti Taiping Sekolah Henry Gurney Wanita, Batu Gajah	Mixed Female	Department of Social Welfare (Malaysia) Malaysian Prison Department
Selangor	Pusat Perkembangan Kemahiran Kebangsaan Serendah Sekolah Integriti Kajang	Mixed Mixed	Department of Social Welfare (Malaysia) Malaysian Prison Department
Kuala Lumpur	Sekolah Tunas Bakti Sungai Besi Asrama Sentosa Asrama Bahagia Kampung Pandan	Male Female	Department of Social Welfare (Malaysia) Department of Social Welfare (Malaysia)
Melaka	Sekolah Tunas Bakti Sungai Lereh Sekolah Henry Gurney Telok Mas	Male Mixed	Department of Social Welfare (Malaysia) Malaysian Prison Department
Negeri Sembilan	Rumah Kanak-Kanak Rembau	Mixed	Department of Social Welfare (Malaysia)
Johor	Asrama Akhlak Lelaki Kempas Sekolah Integriti Kluang	Male Mixed	Department of Social Welfare (Malaysia) Malaysia Prison Department
Pahang	Rumah Kanak-Kanak Tengku Ampuan Fatimah, Kuantan Sekolah Integriti Bentong	Mixed Female	Department of Social Welfare (Malaysia) Malaysia Prison Department
Terengganu	Sekolah Tunas Bakti Marang Sekolah Integriti Marang	Male	Department of Social Welfare (Malaysia) Malaysia Prison Department
Sabah	Sekolah Tunas Bakti Kota Kinabalu Sekolah Henry Gurney Kota Kinabalu	Male Female	Department of Social Welfare (Malaysia) Malaysian Prison Department
Sarawak	Sekolah Tunas Bakti Kuching Sekolah Henry Gurney Puncak Borneo, Kuching	Male Mixed	Department of Social Welfare (Malaysia) Malaysian Prison Department

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The Malaysian Prison Department (2020), notes that its role within the criminal justice system extends beyond carrying out custodial sentences to include rehabilitation programmes that support reintegration. With backing from the Ministry of Home Affairs and the Ministry of Education, prison based initiatives such as education and skills training are aligned with the national *Education for All* agenda championed by UNESCO.

In Perlis, Rumah Kanak-Kanak Arau operates as a mixed gender institution under the Department of Social Welfare, focusing on care and protection rather than punitive measures. Its approach reflects the family based model of Rumah Tunas Harapan (RTH), which provides a home like environment for children who cannot remain with their biological families (MyGOV, 2024). In Kedah, rehabilitation services are delivered through gender specific facilities which Asrama Akhlak Pokok Sena for boys and Asrama Akhlak Jitra for girls. Both are administered by the Department of Social Welfare and function as non-custodial hostels aimed at moral development and behavioural reform, consistent with the obejctives of Probation Hostels under section 61 of the Child Act 2001.

In Pulau Pinang, juvenile rehabilitation is provided through two facilities under the Department of Social Welfare which are Sekolah Tunas Bakti Telok Air Tawar which accepts both male and female juveniles. Meanwhile, Asrama Akhlak Paya Terubong which is limited to male offenders. Sekolah Tunas Bakti operates under section 65 of the Child Act 2001 as a semi custodial institution combining detention with educational and vocational programmes. By contrast, Asrama Akhlak Paya Terubong functions under section 61(1) as a placement centre for youths involved in criminal activity or deemed beyond parental control. It accommodates those on remand, awaiting transfer, or serving Probation of Morality Orders, with the primary aim of offering structured rehabilitation and treatment within a controlled environment before reintegration into the community (Department of Social Welfare Penang, 2023).

In Perak, Sekolah Tunas Bakti Taiping serves female and male juveniles under the supervision of Department of Social Welfare Malaysia (JKM), whilst Sekolah Henry Gurney Wanita, Batu Gajah is a detention facility for female juvenile offenders overseen by the Malaysian Prison Department. The Henry Gurney schools, developed by the Prison Department offer a more secure correctional approach which focuses on juvenile offenders who have engaged in more serious or repeated criminal conduct (Department of Social Welfare Malaysia, 2023). In Selangor, Pusat Perkembangan Kemahiran Kebangsaan Serendah under Department of Social Welfare Malaysia has offers vocational training as well as behavioural reform, whilst Sekolah Integriti Kajang under the Prison Department focuses on detained youths who require structured correctional education. Sekolah Integriti facilities are developed to support the rehabilitation of juveniles within the prison system with a rehabilitation rather than punitive focus (Jabatan Kebajikan Masyarakat, 2023). In addition, the Department of Social Welfare Malaysia operates three schools in Kuala Lumpur which are Sekolah Tunas Bakti Sungai Besi, Asrama Sentosa and Asrama Bahagia Kampung Pandan. These shelters follow the paradigm of Taman Seri Puteri (TSP), institutions that care for girls in moral danger or needing rehabilitation under section 55 of the Child Act 2001 (Department of Social Welfare Malaysia, 2023).

Furthermore, Melaka has features both Sekolah Tunas Bakti Sungai Lereh which is under supervision of Department of Social Welfare Malaysia and Sekolah Henry Gurney Telok Mas which is operated by the Malaysian Prison Department serves both

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male and female convicts. This dual approach represents the state's combination of rehabilitative and correctional services. Meanwhile in Negeri Sembilan, Rumah Kanak-Kanak Rembau is a mixed-gender of Department of Social Welfare Malaysia facility which centred on care and shelter rather than discipline, comparable to Darul Kifayah which assists orphans and underprivileged children through moral guidance and religious education (Federal Territory Islamic Religious Council, 2024). Next, Johor has Asrama Akhlak Lelaki Kempas which is handled by the Department of Social Welfare Malaysia, while Sekolah Integriti Kluang is managed by the Malaysian Prison Department. This division highlights the dual track approach of social welfare based and correctional rehabilitation (Department of Social Welfare Malaysia, 2023). Moreover, Pahang operates Rumah Kanak-Kanak Tengku Ampuan Fatimah Kuantan which is managed by the Department of Social Welfare Malaysia, while Sekolah Integriti Bentong is managed by the Malaysian Prison Department. Thus, these institutions reflect a complementary structure that meets both protective care and criminal rehabilitation demands (Department of Social Welfare Malaysia, 2023).

In Terengganu, Sekolah Tunas Bakti Marang and Sekolah Integriti Marang which are managed by Malaysian Prison Department and Department of Social Welfare Malaysia serve the dual mandate of welfare-based training and prison-based rehabilitation. Meanwhile Sabah has Sekolah Tunas Bakti Kota Kinabalu which is operated by Department of Social Welfare Malaysia and Sekolah Henry Gurney which particularly for female juvenile offenders is managed by Malaysian Prison Department (Department of Social Welfare Malaysia, 2023). This structure guarantees that both male and female minors in Sabah have access to state funded rehabilitation treatments. Finally, Sarawak has a Sekolah Tunas Bakti Kuching which particularly for male juvenile offenders, whereas Sekolah Henry Gurney Puncak Borneo Kuching is managed by the Malaysian Prison Department, highlighting the theme of a bifurcated rehabilitation and custodial juvenile justice infrastructure.

In addition, further consideration relates to the development capacity of children compared with adults. Studies show that juveniles often lack the maturity to fully appreciate the consequences of their conduct to resist peer influence or to make rational decisions in the same way as adult offenders. This raises doubts about the effectiveness of deterrence based penalties such as imprisonment or corporal punishment which presuppose that offenders act after weighing risks and benefits. In fact, many children engage in unlawful behaviour impulsively or under external pressure without anticipating long term repercussions. Although courts sometimes argue that rehabilitative or less severe sentences could encourage delinquency, such reasoning disregards the fact that young offenders rarely comprehend the seriousness or proportionality of punishment. Thus, rehabilitation offers a more appropriate response as it better reflects children's cognitive limitations and supports constructive reintegration rather than isolation (Samuri & Mohd Awal, 2009).

Therefore, Malaysia's juvenile justice framework exemplifies a structured but fragmented system that combines welfare based rehabilitative with correctional approaches across various states. While the establishment of several institutions demonstrates the country's commitment to combat juvenile delinquency, the system is still profoundly divided between social welfare and initiatives and punitive punishments. This dual track approach highlights the critical need for comprehensive, child centered reforms that are consistent with international standards, ensuring that all children in conflict with the law are treated with dignity, receive effective rehabilitation and are protected from institutional harm. Strengthening statutory clarity, improving diversion programs and

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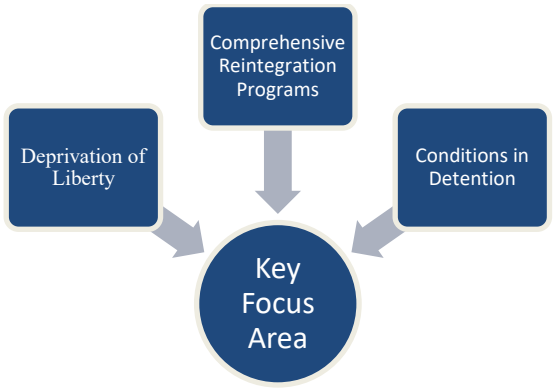
promoting community-based alternatives would be critical to Malaysia's juvenile justice system becoming more cohesive and rights based.

COMPARATIVE INSIGHTS FROM INDIA'S JUVENILE JUSTICE FRAMEWORK AND LESSONS FOR REFORM IN MALAYSIA

FIGURE 1. Recommendations for Reforming Malaysia's Juvenile Justice System



Several substantial improvements are needed to strengthen Malaysia's juvenile justice system and ensure compliance with international human rights norms. These recommendations are based on the comparative experiences of other countries, notably those with established child justice systems, as well as the provisions of the Convention on the Rights of the Child (CRC).

First and foremost, by referring to Figure 1, Malaysia should evaluate its legislation, regulations and judicial practices to ensure that loss of liberty for children is only used as a last resort. Although section 84 of the Child Act 2001 mentions custody as a last resort, it lacks enough statutory safeguards to ensure strict compliance in practice (Ministry of Women, Family and Community Development and UNICEF Malaysia, 2013). In contrast, section 15 of the Indian Juvenile Justice (Care and Protection of Children) Act 2015, juveniles aged 16 to 18 years old who are being accused of heinous offences, the Juvenile Justice Board (JJB) must conduct a preliminary assessment of the child' s capacity, ability to understand the consequences and circumstances of the offence before deciding whether to transfer the case to a regular court for trial as an adult. This ensures that institutionalisation is not automatic and alternatives such as counselling and community service are considered first (National Law University Odisha, 2024). As a result, it is critical that Malaysia establish explicit legislative criteria requiring that detention can be considered only after less restrictive alternatives have been thoroughly evaluated.

Next, the Child Act 2001 should be changed to contain specific measures protecting children's rights during arrest, inquiry and police detention. Malaysia's legislative framework currently lacks explicit protections for juveniles at these important times (Ab Aziz et al., 2022). The Juvenile Justice (Care and Protection of Children) Act 2015 of India provides a practical model through is Juvenile Justice Act 2015 which mandates the establishment of Special Juvenile Police Units and the appointment of Child Welfare Police Officers in every policy station which can be seen in section 107 of Juvenile Justice (Care and Protection of Children) Act 2015. Thus, Malaysia can improve juvenile protections and align with global best practices and uphold CRC principles by implementing similar procedural measures such as designated officers training, prohibition of adult lock up detention and mandated guardian and legal counsel presence.

Besides that, by referring to Figure 1, Malaysia should progressively transition from its current model of large scale centralised institutions such as Sekolah Tunas Bakti (STB) and juvenile hostels to smaller, decentralized and community based open detention facilities (Ministry of Women, Family and Community Development and UNICEF Malaysia, 2013). This adjustment would promote a more child friendly and rehabilitative environment,

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lowering the chance of institutionalisation and improving reintegration outcomes. In addition, there is an urgent need to improve the physical architecture and operational procedures of existing hostels, Henry Gurney School and Sekolah Tunas Bakti. In this context, these institutions should be transformed into home like therapeutic environments rather than maintaining a prison like atmosphere marked by discipline, drills and strict regimentation. The emphasis should be on nurturing care, emotional support and therapeutic interventions (Ministry of Women, Family and Community Development and UNICEF Malaysia, 2013). Moreover, Malaysia's juvenile justice system would substantially benefit from implementing a more thorough and systematic reintegration framework, particularly one that is consistent with internationally accepted best practices. In this regard, India's community based care approach under the Juvenile Justice (Care and Protection of Children) Act 2015 offers a more child friendly alternative where they have provided a smaller, decentralised facilities such as Observation Homes, Special Homes and Fit Facilties which designed to provide tailored care, focusing on psychological support education and emotional well-being (Prachi CP, n.d). Therefore, Malaysia could benefit by restructuring its institutional modes towards smaller, community-oriented settings ensuring detention centres function as therapeutic environment that promote healing, social adjustment and psychological well-being. Thus, by undertaking legislative amendments, strengthening procedural safeguards, decentralizing detention facilities and establishing a holistic reintegration framework it can helps Malaysia advance towards a more rehabilitative and rights based juvenile justice system which prioritises the best interests of a child while enhancing long term reintegration outcomes and reducing reoffending.

CONCLUSION

In conclusion, this study emphasises the critical need for Malaysia to reform its juvenile justice system in ensure stronger compliance with international human rights standards and to foster a truly rehabilitative approach. Although the Child Act 2001 was an important legislative step towards harmonizing Malaysian legislation with the Convention on the Rights of the Child (CRC), there are still gaps in its actual implementation. Current provisions, particularly section 91 of the Child Act are vague and insufficiently direct courts to prioritise rehabilitation over punitive measures, resulting in inconsistent outcomes. A comparison with India's Juvenile Justice (Care and Protection of Children) Act 2015 shows that Malaysia's legal framework still lacks comprehensive diversion options and defined processes for community based rehabilitation. The case of *Public Prosecutor v Chong Waijun* [2025] MLJU 514 and *PP v Morah Chekwube Chukwudi* [2017] MLRAU 276 demonstrates the courts' limited ability to completely apply rehabilitative goals due to structural limits in the law. Furthermore, Malaysia's current institutional structure which is centred on large scale detention facilities such as Sekolah Tunas Bakti and Henry Gurney Schools remains fragmented, combining welfare oriented and correctional approaches without a cohesive rehabilitative strategy. Without therapeutic, child sensitive rehabilitation programming, these institutions risk repeating recidivism cycles rather than aiding reintegration into society. Drawing on India's holistic reintegration model, this study proposes that Malaysia adopt a more community based rehabilitative juvenile justice system. Reform efforts should focus on reducing the use of detention to a last resort, improving procedural safeguards for children during arrest and investigation and redesigning institutional settings to provide a home like therapeutic environment. Individualised reintegration plans that include vocational training and

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family assistance are also required to ensure that juveniles have the tools they need for effective reintegration.

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CONFLICT OF INTEREST

The authors declare that they have no conflict of interest in this study.

AUTHORS' CONTRIBUTION

All authors contributed to the final version and approved the submission.

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THE RIGHTS OF JUVENILES DURING TRIAL IN IRAQ: A LEGAL AND ISLAMIC JURISPRUDENTIAL ANALYSIS

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ABSTRACT

The administration of justice in any legal system is based on implementing appropriate punishment. There is a tendency towards deviating from applying the rules of normal criminal procedures in treating juvenile offenders. The law requires that in dealing with a child, "the best interest of the child" should be considered, including appropriate social procedures from arrest until the determination of the case. The procedure is in line with the Islamic perspective on the rights and protection of children from birth to when they reach majority. The juvenile is subject to two procedures; one applicable to adults within the fundamental rights requirements and the second, applicable to juveniles, requiring confidentiality in the trial process, which is guaranteed in both conventional and Islamic laws. Recent developments in Iraqi juvenile justice, such as the STRIVE Juvenile and the 2024 Proposal (recently enacted into law), to reduce the marriage age, have profound implications for juvenile detainees and juvenile justice. In Iraq, for instance, both the Criminal Procedure Code and the Juvenile Welfare Law make provisions in the best interest of the child in the trial proceedings. However, the Iraqi courts make exceptions in cases relating to juvenile recruitment into terrorism. This research examines the enforcement of guarantees in juvenile trials in cases of juveniles recruited into terrorism under the current development in Iraq and from the Islamic perspective. The methodology adopted is the doctrinal legal analysis with a case study approach to determine the court's adherence to the guarantees stipulated in the law in juvenile trials. This research found that the STRIVE juvenile project has a positive effect, while the 2024 proposal to reduce the marital age limit for girls harms the guarantees for juvenile justice. This research suggests a suspension of the 2024 proposal for marriageable age limit reduction with a contemporary Islamic view on protection for children. And a complete reliance on the Juvenile Welfare Law in handling juvenile cases. While enacting legislation or amending existing criminal laws to keep pace with technological advancements and novel and emerging issues.

Keywords: Juvenile; Guarantees; Shariah Perspective on Children; Legal System; Iraq.

INTRODUCTION

Iraq has taken some steps in recent years to improve the rights and protections afforded to young defendants in court. One noteworthy development is the Strengthening Resilience through Victim Identification, Engagement and Support for Juveniles (STRIVE Juvenile project), which was started in July 2021 by the Iraqi government in partnership with the United Nations Office on Drugs and Crime (UNODC) and the European Union (UNODC, 2021). The goal of this initiative is to provide all-encompassing national measures to stop and combat violent extremism and terrorism that targets

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Juveniles.[1] It focuses on enhancing conditions in detention, guaranteeing equitable treatment, and assisting in the rehabilitation and reintegration of young people who have been deprived of their freedom (UNODC, 2021).

A juvenile is generally referred to as a person who has not attained the age of 18 years of age based on standard international usage. Under the Iraqi Welfare Law, Article 3 defines a juvenile in the following words:

> "This law applies to juvenile delinquents, minors, and juveniles at risk of delinquency, and their guardians, with the meanings defined below for the purposes of this law.
> First: A child is anyone who has not yet reached the age of nine.
> Second: A juvenile is anyone who has reached the age of nine but has not yet reached the age of eighteen.
> Third: A juvenile is considered a (*sabi*) if he has reached the age of nine but has not yet reached the age of fifteen.
> Fourth: A juvenile is considered a (*fata*) if he has reached the age of fifteen but has not yet reached the age of eighteen.
> Fifth: A guardian is the father, mother, or any person to whom a minor or juvenile is entrusted or to whom the upbringing of one of them is entrusted by a court order."

From the above definition, a juvenile is referred to as a minor when he/she is less than 9 years old, the person becomes a juvenile at age 9 but below 18 years, and the juvenile is regarded as a young person from 15years old but below 18 years.

Under Islamic Law, there is no specific definition of a child. Rather, a child is distinguished from an adult based on the attainment of puberty. For instance, the Quran states:

> "The pen is lifted from three: the sleeping person until he wakes, the child until he reaches puberty, and the insane until he regains sanity." (Hadith: Abu Dawood, 4402; Qur'an, 24:59; 4:6).

Similarly, Islamic scholars traditionally define juveniles (*sabi*) as those who have not reached puberty (*bulugh*). Puberty is determined not just by physical signs but also by mental maturity (*rushd*) (Islam, 2015). In Islamic jurisprudence, a juvenile is defined as a human being who has not yet reached puberty and is therefore not subject to legal rulings. The age of puberty differs for males and females, and is usually defined as 15 years of age or the occurrence of certain signs, such as menstruation in females and wet dreams in males (Obalowu & Bolanle, 2022). From the different perspective of juveniles under Islamic law. There is no specific definition of a juvenile. Rather, a juvenile is determined by the attainment of puberty and mental capacity. Hence, where a juvenile lacks understanding of his actions and has not attained 15 years, the person is a juvenile.

In June 2023, the Iraqi Ministry of Justice, UNODC, and UN-Habitat partnered to improve facilities and living conditions at juvenile detention centres in Baghdad and Mosul, in line with the goals of the STRIVE Juvenile project, furthering efforts to improve juvenile justice (UNODC, 2023).

Furthermore, the second National Steering Team Meeting of STRIVE Juvenile in Iraq took place in December 2022. This meeting, which was organised by the Ministry of Justice's Juvenile Reform Department, the National Security Advisory, and the High Judicial Council, focused on fostering national ownership through ongoing communication, demonstrating Iraq's dedication to juvenile justice reform (UNODC, 2022).

[1] The term 'juvenile' is used throughout this paper to refer to individuals below 18 years of age, in accordance with Iraqi Juvenile Welfare Law No. 76/1983 and standard international usage. When a child is used, it is only in reference to international conventions or Islamic law. While, a minor is only used to refer to a court document or citation.

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Recent legislative ideas, however, have created anxieties about the rights of minors. According to reports in November 2024, the government of Iraq was debating changes to the personal status law that would allow men to marry young girls by lowering the legal age of consent to nine (9) years old. Critics contend that by essentially legalizing child marriage and putting young girls at greater danger of abuse, this action could compromise Juvenile's rights and protections, including juvenile rights and protections in juvenile justice circumstances (Reyes, 2024).

These contrasting developments highlight the ongoing challenges and complexities in Iraq's efforts to balance juvenile reforms with legislative changes that have a greater impact on Juvenile's rights.

Researchers have expressed their opinion on the guarantees in domestic and international legislation for juveniles in juvenile trials in Iraq and across the globe. Al-Matchtomia and others (2020) discussed the protections that the juvenile defendant should have during the trial process. They also addressed the right to defense, which states that the juvenile defendant should be allowed enough time, if able, to voice his or her own opinions on the charges against him. After taking on the role of defending the young person. They concluded that the laws governing juveniles, both domestically and internationally, generally fall short of the guarantees that they ought to contain. In her article, Cecilia Polizzi (2017) offers a thorough examination of the parallels and discrepancies between counter-terrorism procedures and the rule of law's regulations on juveniles in battle. The article demonstrates how nation-states can issue anti-terrorism treaties that violate juvenile justice principles because they focus on punishment rather than rehabilitation and reintegration when terrorism and crimes related to it are not addressed at the international level. With an emphasis on the Israeli occupation and the previous Coalition in Iraq, Khen (2014) His article examines the distinctive juvenile justice systems seen in occupation regimes. It draws attention to how these regimes are evolving and calls for more safeguards for juveniles' rights within criminal justice systems. Either the direct application of human rights law or the modification of particular laws governing occupied territory can accomplish these protections.

Similarly, scholars have discussed juvenile guarantees from an Islamic perspective. Comparing Islamic teachings on child protection with child protection and guarantees under domestic and international regulations. Jauhari and others (2023) in their research, where they compared Islamic law on child protection with Indonesian Civil Law, Child Protection opined that Islamic law provides the best protection for Juveniles when compared to conventional domestic legislation and international conventions on child protection. Adding that child protection begins from when a mother becomes pregnant until growth. It also protects Juvenile in special conditions. Similarly, Saiful Islam (2015) argues that justice and penalty inscribed in Islam differ from what is applicable in conventional legislation. Adding that Islamic law in upholding peace in the society does not punish juveniles with qiyas and hadd under Islamic criminal law. Also, Chughtai and others (2021) added that the Qur'an and Sunnah focus on compassion and mercy when dealing with Juvenile in the justice system. For the reason that Islam emphasizes reformation, rehabilitation, and social reintegration of Juvenile into society, which are considered the modern-day concepts for juvenile justice.

Therefore, compared to other studies reviewed above, this research examined juvenile guarantees within the recent policy and legislative reforms in Iraq alongside the Juvenile Welfare Law and the Islamic

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perspective on child protection and juvenile justice.

This research adopts qualitative doctrinal legal research in its analysis. Qualitative legal research lays down a different emphasis on legal doctrines and concepts. The doctrinal research emphasis is purely fundamental in exposing the laws as they exist; however, qualitative legal research analyses the law from a social reality, as revealed in this research (Kaka et al., 2024). It also seeks to answer broader issues with a specific focus on points of law as a direction. Qualitative legal research does not restrict itself to case reports and other traditional primary and secondary legal documents for analysis (Soren, 2021). However, it is dependent on doctrinal methods in the sense that, without a thorough grasp of fundamentals, the qualitative researcher would not be able to chart their voyage in a meaningful manner (Alhejaili, 2024). The researchers utilized the traditional method of research in law to analyse online-based resources that were gathered (Cahyani et al., 2024). To examine the guarantees available to a juvenile defendant during trial in Iraq.

THEORETICAL FRAMEWORK: RESTORATIVE JUSTICE AND ISLAMIC MAQASID AL-SHARIAH

Restorative justice theories prioritize rehabilitation, community involvement, and reparation over retribution. Islamic law aligns with this via the principles of *rahma (mercy)*, *islah (reform)*, and *maslahah (public interest)* (Chughtai et al., 2021). Restorative justice programs seek to restore victims' dignity and facilitate offender reintegration through community involvement and informal supervision (de Beus & Rodriguez, 2007). Restorative justice principles rely on processes that encourage offenders to accept responsibility, which is linked to lower re-offending (Choi et al., 2012). Braithwaite (1989) and Zehr (1990) have, as far back as the 1990s, addressed the concept of restorative justice. While Braithwaite introduced "re-integrative shaming," an important aspect of restorative justice, Zehr, on his part, criticized the conventional punitive justice system. Their integrated principle developed the concept of restorative justice, especially in the context of *islah* (reform) in Islamic law. Furthermore, the best interest of the child principle is codified in Article 3(1) of the UNCRC, and parallels can be drawn with *maslahah al-atfal* in Islamic jurisprudence (Jauhari et al., 2023).

Comparatively, other Islamic countries have incorporated restorative justice and Islamic principles into their juvenile justice systems. Egypt's Juvenile Law No. 12 of 1996 sets the legal age of responsibility at 12 and prioritizes rehabilitation, which aligns with Shariah. Morocco raised the marriage age to 18 under Islamic justification (Islam, 2015, p. 15). Malaysia, in its Child Act 2001, emphasizes diversion and child-sensitive proceedings. In Jordan, Juvenile Law No. 32 of 2014 provides for specialized juvenile courts and restorative justice measures. Indonesia's Juvenile Court Law No. 11 of 2012 prioritizes diversion and restorative justice, and integrates restorative justice with Islamic child protection norms (Hadiputra et al., 2024; Islamicus et al., 2024; Zampini, 2023).

Therefore, Iraq needs to incorporate restorative justice and Islamic principles in its juvenile justice system, like its other Islamic counterparts. This will enable it to effectively achieve "the best interest of the child principle" in its juvenile justice.

RECENT DEVELOPMENT IN JUVENILE GUARANTEES AND THE IRAQI JUVENILE WELFARE LAW

Iraq's Juvenile Welfare Law No. 76 of 1983 ensures specific rights for juveniles during trials, such as confidentiality, rehabilitation, and protection from harsh punishment. Recently introduced changes in Iraq have

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had varied effects on these rights. They include both positive and negative developments.

Positive Developments:

1. STRIVE Juvenile Project (2021–Date)

The STRIVE Juvenile project was launched as a collaborative effort between the EU and the UNODC to assist Iraq in preventing juvenile radicalization and rehabilitating Juvenile associated with terrorism. The initiative focuses on the rehabilitation, reintegration, and justice reform of Juvenile and teens who have been involved in violent extremism or terrorism-related crimes (UNODC, 2023a). It follows the ideas of preventing young radicalization, improving juvenile justice protections, and rehabilitation and reintegration for affected juveniles.

The STRIVE Juvenile project operates in Iraq, Jordan, and Lebanon, with Iraq being a key focus due to the high number of juveniles arrested on terrorism-related offenses. This effort, backed by the EU and the UNODC, seeks to improve juvenile justice standards by ensuring proper legal representation, compassionate detention facilities, and fair trial procedures. It promotes trial confidentiality by campaigning for closed hearings and the protection of juvenile identities (UNODC, 2023a).

The project also aims to train judges, prosecutors, and law enforcement officers on how to deal with juvenile cases while adhering to international child rights norms. The key objectives are to:

Prevent Radicalization: Law enforcement and juvenile justice personnel will be trained on how to handle situations involving adolescents who are related to violent extremism. Develop programs to combat extremist narratives in juvenile incarceration facilities and to engage local communities and families to prevent re-recruitment into extremist organizations.

Provide a fair juvenile justice system: the project works with Iraq's government to increase legal protections for juveniles under the Juvenile Welfare Law No. 76 (1983). Ensuring that fair trials, alternative sentencing, and rehabilitation are being promoted as alternatives to severe sentences for juvenile offenders. At the same time, it advocates for confidential trials for juveniles, so that their cases are not treated in the same way as adult terrorism cases.

Rehabilitate and reintegrate former child combatants: The project calls for the provision of education, psychological support, and vocational training to incarcerated juveniles (UNODC, 2023a). Assisting with the social reintegration of minors forced to join ISIS or other armed groups (UNODC, 2024b). As well as supporting Iraqi families in reintegrating their juveniles once they have been released from detention.

2. Judicial Reforms and Juvenile Detention Improvements (2023)

In 2023, Iraq implemented significant judicial changes and improvements in juvenile confinement, with emphasis on improving the treatment and rehabilitation of young people charged with criminal offenses. The collaboration between UN-Habitat, UNODC, and Iraq's Ministry of Justice aims to rehabilitate juvenile detention centers in Baghdad and Mosul, ensuring that detained juveniles receive a fair and compassionate trial. The emphasis has been focused on rehabilitation rather than punishment, which coincides with the confidential trial rights by seeing Juvenile as victims of circumstances rather than criminals.

The judicial reforms were focused on the following aspects:

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i. Drafting the Juvenile Welfare Law

On July 15, 2023, the Investigator Organization for Supporting the Rule of Law and Democracy (IOL), in partnership with the Iraqi Ministry of Justice, held a conference in Baghdad to debate the Juvenile Welfare Law draft. This program, sponsored by the EU and supported by the Norwegian People's Aid (NPA) and Public Aid Organization (PAO), seeks to align Iraq's juvenile justice system with international norms and commitments. This serves as a positive move towards protecting the guarantees available to juveniles.

ii. Renovation of Juvenile Detention Centres

The United Nations Human Settlements Programme (UN-Habitat) and the UNODC, in collaboration with the Iraqi Ministry of Justice, have undertaken projects to improve conditions at juvenile detention facilities in Baghdad and Mosul. Notably, the Ninawa Juvenile Reformatory in Mosul has added classrooms, a gym, and a multipurpose hall, helping roughly 300 Juvenile and young people (UNODC, 2023a). Similar changes were made to the Young Boys Rehabilitation School (Al-Rashad) in Baghdad, which was completed in November 2024. Now equipped with four outdoor leisure areas, a solar-lit football field, refurbished restrooms, a dental clinic, and a quarantine room for isolating infectious diseases, the institution serves about 270 minors, including those imprisoned for terrorism-related offenses. These improvements are intended to create a safer and healthier living space, which will aid in the rehabilitation and reintegration of young people into society. These programs demonstrate a larger dedication to treating young people involved in terrorist actions primarily as victims, emphasizing rehabilitation and reintegration over punishment. Iraq hopes to assist these young people in re-establishing their lives and making valuable contributions to their communities by improving living circumstances and granting them access to education and vocational training.

iii. Workshops on Juvenile Treatment

Terre des Hommes Italy (TDH Italy) held a workshop in June 2023 as part of the UNODC-led, EU-funded STRIVE Juvenile project, focusing on the treatment of adolescents detained owing to alleged terrorist affiliations. This program sought to provide professionals with the required skills to facilitate the rehabilitation and reintegration of these young people (UNODC, 2023b). As part of the government's efforts to enforce the guarantees for juveniles during trial.

iv. Mapping and Assessment of the Child Justice System

In February 2023, the Ministry of Justice in Iraq's Kurdistan Region (KRI), in collaboration with UNICEF and funded by the German government through the KfW Development Bank, released a comprehensive report evaluating the KRI's child justice system (Iraq, 2023). The analysis identified gaps in policy, legislation, and institutional capacities, laying the groundwork for developing child-friendly services for juveniles in contact with the law. These reforms and enhancements in 2023 demonstrate Iraq's commitment to strengthening its juvenile justice system, ensuring that it corresponds with international norms and prioritizes the rehabilitation and reintegration of young people into society.

IMPACT OF THE STRIVE JUVENILE PROJECT IN IRAQ

The STRIVE Juvenile in Iraq has three major impacts. They are:

1. Rehabilitation and Reintegration of Juveniles

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The project, which collaborated with the UN-Habitat and the Iraqi Ministry of Justice, as stated earlier, improved conditions in juvenile detention centers in Baghdad and Mosul for rehabilitation and reintegration of the juveniles (UNODC, 2024a). Similarly, the project increased family engagement by expanding the capacity for family visits at the Ninawa Juvenile Reformatory by 60%. Providing greater reintegration opportunities through enhancing family ties while the child is in detention. While the STRIVE project has indeed renovated juvenile centers (UNODC, 2023a), its long-term impact remains dependent on sustained local governance and community engagement, areas where current policy remains ambiguous and under-resourced.

2. Capacity Building and Training

The project has held workshops to improve the skills of professionals working with adolescents affiliated with terrorist and violent extremist organizations. These seminars are focused on rehabilitation and reintegration techniques, ensuring that stakeholders have the required tools to properly serve affected juveniles (Nation, 2023). This move is not only limited to the intentions of the Juvenile Welfare Law but equally aligns with Islamic principles on the care for juveniles, especially those under detention.

3. Policy Development and Cross-Sector Coordination

STRIVE Juvenile has played an important role in promoting cross-sector collaboration, bringing together diverse governmental and non-governmental organizations to face the difficulties posed by child recruitment into terrorist activities. This collaborative approach guarantees that policies are holistic and address the multiple juvenile justice characteristics (UNODC, 2024c). Also, the project has been essential in raising awareness about the significance of child safety in preventing and combating terrorism. By creating information assets and facilitating discussions, STRIVE Juvenile has helped to a better understanding of the necessity for specialized techniques when dealing with juveniles in Iraq.

In conclusion, the STRIVE Juvenile Project has made tremendous progress in addressing the complicated issue of Juvenile involvement in terrorism and violent extremism in Iraq. The project has built a strong foundation for the rehabilitation and reintegration of affected juveniles, while also encouraging a more coordinated and informed national response to these difficulties.

THE RULES AND PROCEDURES FOLLOWED IN CASES INVOLVING JUVENILES' *VIS-À-VIS* RECENT REFORMS

It cannot be overemphasized that the accused (juvenile) does not possess full mental maturity and requires special procedures and guarantees when appearing before the court. This is in line with ensuring justice for young people and providing them with distinctive procedures that consider their psychology and feelings. Juvenile courts specialize in hearing cases for a specific age group and are based on personal considerations. These procedures apply to all crimes committed by juveniles, whether they are terrorist crimes or non-terrorist crimes. Therefore, in adjudicating cases against juveniles, guarantees for juvenile justice must consider the following:

1. Confidentiality of Sessions or Trial

The general rule is that trial sessions are conducted publicly, as stipulated by all procedural laws. This enables the public to monitor court proceedings directly, which fosters confidence in the court's fairness and seriousness (Mahdi, 2015). By extension, it allows the parties involved to do the same. Publicity guarantees human rights and is one of the general principles of law. Publicity

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means that the doors of the session are open to anyone who wishes to attend (Al-Billeh & Al-Hammouri, 2023). However, under the Iraqi Juvenile Care Law, the minor is tried confidentially according to Article 58, which states that: "The trial of the minor is conducted in a secret session in the presence of their guardian or a relative, if available, and others whom the court deems relevant to the matters concerning juveniles" (Article 58 of the Iraqi Juvenile Welfare Law).

It is clear that the Iraqi legislator, in the Juvenile Care Law, has deviated from applying the general rules regarding the confidentiality of sessions, allowing the trial to take place in ordinary rooms, not in courtrooms. The confidentiality principle aims to instill confidence in the juvenile and enhance their sense of reassurance, distancing them from fear, and also to avoid the psychological impact that the juvenile may suffer from the public's perception. It is worth noting that confidentiality in trials is a matter of public order and is considered one of the principles to be followed by the courts in order not to vitiate the proceedings or for the trial to result in nullity (Mohamed, 2006). Therefore, it is expected that in all trial proceedings regarding juveniles, including proceedings against juveniles charged with terrorist-related offenses, confidentiality must be observed by the courts.

2. The trial of a juvenile cannot be conducted in absentia

In the case of a juvenile who is absent or has escaped from trial, the court issues an order for their arrest or for them to surrender. For the reason that the trial cannot proceed until they are apprehended and tried in person. In this regard, the Nineveh Juvenile Court, in its capacity as an appellate court, ruled that: "Upon review and deliberation, it was found that the appeal was within the legal time frame, thus it was decided to accept it in form. Upon reviewing the contested decision, which involved referring the juvenile defendant (S) as a fugitive to this court for a non-summary trial based on the provisions of (Resolution No. 160 of the dissolved Revolutionary Command Council of 1983, amended/First/1), it was discovered to be incorrect and contrary to the law: it is not permissible to refer a juvenile defendant who is a fugitive to the competent court for trial in absentia based on the provisions of Article 70/First of the Juvenile Care Law No. 76 of 1983, as it states: (The criminal case shall expire after ten years for felonies and five years for misdemeanors. It was established from the civil status card that the defendant (S) was born on 2/5/2000, thus they are considered a juvenile at the time of committing the crime. Therefore, it was decided to annul the contested referral decision and return the case file to its court to follow the aforementioned procedures and make efforts to apprehend them and refer them in custody to this court. The decision was issued unanimously based on the provisions of Article (54) of the Juvenile Care Law on 31/7/2022" (Decision of the Nineveh Juvenile Court in its capacity as the Court of Cassation, No. 326/T/2018, [unpublished]).

3. Conducting the Trial of the Minor Without Their Presence in Offenses Against Public Morality:

Most Arab and foreign legislation related to juvenile matters adopted the principle of conducting trials of minors in absentia if the offenses involve issues of public morality and ethics. The Iraqi legislators, in the Juvenile Care Law, also adopted this principle and specifically stated in Article 59 thus and it reads: "The juvenile court may conduct the trial without the presence of the minor in offenses against public morals and ethics, provided that someone entitled to defend them is present at the trial, and the court must bring the minor to inform them of the measures taken against them."

The purpose of removing the accused minor from the courtroom is to prevent them

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from hearing words that could be detrimental to public morals and ethics, as such exposure could also negatively impact the minor's psychological state. In other cases, however, it is not permissible to conduct the trial of the minor without their presence (Al-Darwish, 2019).

4. Study of the Juvenile's Personality

Legislation concerning juveniles has focused on their psychological and social aspects, leading to the establishment of various offices dedicated to studying juveniles' personalities. The Iraqi legislator, in the Juvenile Care Law, established an official specialized office for conducting preliminary examinations of juvenile defendants, named the "Personality Study Office." This office is responsible for assessing the juvenile physically, psychologically, and socially before their trial and preparing a report to be attached to the case file (Mohamed, 2006, p. 374). The law does not entrust this task to unofficial entities due to concerns over potential bias or influence on the personnel involved. The office is designed to be comprehensive, involving specialists from multiple fields and tasked with several responsibilities.

The Personality Study Office consists of various specialists, including psychologists, psychiatrists, and social researchers, and may also include experts in criminal sciences or other relevant fields (Nasser, 2020). The Supreme Judicial Council is responsible for appointing the office members, with a physician serving as its director (Article 15 of the Juvenile Welfare Law). The law permits the Personality Study Office to collaborate with specialized scientific and health institutions to prepare the pretrial examination report.

According to Article 12 of the Juvenile Care Law:

1. "A Personality Study Office shall be formed in each juvenile court, linked to the juvenile court, consisting of: a specialist physician or practitioner in mental or neurological disorders, or a paediatrician if necessary; a specialist in psychoanalysis or psychology; several social researchers.
2. The office may be reinforced with several specialists in criminal sciences or other fields related to juvenile affairs.
3. The Minister of Justice appoints the office members, and a physician serves as its director."

It is noteworthy that the legislators directly linked the Personality Study Office to the juvenile court, considering it a part of the court itself, rather than making it an independent entity or attaching it to an external institution. This arrangement can yield numerous benefits (Al-Qaisi, n.d.). When the juvenile court issues a ruling, it must consider the juvenile's circumstances and take into account the report issued by the Personality Study Office. This is outlined in Article 62 of the Juvenile Care Law, which states: "The juvenile court shall issue its ruling in the case by considering the circumstances of the juvenile in light of the report from the Personality Study Office."

In this context, the Ninawa Juvenile Court, in its capacity as a court of cassation, ruled as follows: "Upon examination and deliberation, it was found that the decision of the Ninawa Investigative Court for juvenile cases related to terrorism, which required cassation intervention, was incorrect and contrary to the law. The report from the Personality Study Office must include all data concerning the juvenile defendant and must be signed by the specialist physician named in the statement from the Supreme Judicial Council, not by another physician, following the provisions of Article 14 of the Juvenile Care Law. Therefore, the cassation court intervened by deciding based on the referral decision to annul it, and return the case file to its court for following this procedure." The decision was issued unanimously based on the provisions of

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Article 54 of the amended Juvenile Care Law of 1983 on 13/11/2018 (Decision of the Nineveh Juvenile Court in its capacity as the Court of Cassation, No. 463/T/2018, dated 11/13/2018, [unpublished]).

5. Juvenile's Right to Self-Defense

According to general rules and specific agreements and laws regarding juveniles, the juvenile has the right to defend themselves as they are a party to the case and are mostly the ones aware of the circumstances surrounding the accusations against them (Al-Billeh & Al-Hammouri, 2023, pp. 2, 9). This is in line with Article 40 of the UN Convention on the Rights of the Child which provides that: "The right of every child accused of violating the law to be treated in a manner consistent with enhancing his sense of dignity and worth, taking into account the age of the child and aiming at his reintegration into society, and he also has the right for the basic guarantees, legal advice and other assistance necessary to defend him, avoid judicial proceedings and refer him to reform institutions".

The court does not always hear the juvenile's defense, especially if it deems them unfit to represent themselves (Arteaga, 2002). Unless it senses some maturity in their response, allowing them to be the last to speak in court so they can address all allegations made by the prosecution. If the court permits the juvenile to defend themselves, it must provide certain accommodations, such as asking questions clearly and simply, ensuring the juvenile has the freedom to speak without interruption, and avoiding repetition in their statements (Al-Machtomi et al., 2020). The judge should not overwhelm the juvenile with excessive questioning or provoke them, especially if they resort to insults regarding other parties or witnesses, whether verbally or in writing. However, the judge should gently remind the juvenile to stay on track and allow them to finish their thoughts (Polizzi, 2017, pp. 9–12).

Additionally, the juvenile must be made aware not to withhold any information from the court, as this might be their last opportunity before the case is closed and a ruling is made (Al-Machtomi et al., 2020). If the juvenile does not speak the language of the court, the court must provide a translator to maintain the fairness of the proceedings.

The judge should refrain from any form of manipulation or deception with the juvenile, such as implying that there is evidence or arguments to coerce a confession of guilt. Such tactics could instill fear in the juvenile, impair their ability to defend themselves, and potentially lead them not to speak truthfully.

6. Appointment or Delegation of a Lawyer

The right to defense is a sacred right guaranteed by all legislation. It is enshrined in the Iraqi Constitution under Article 19, Paragraph 11 of the 2005 Constitution of the Republic of Iraq, which states: "The court shall appoint a lawyer to defend the accused who does not have a lawyer at the state's expense."

The right to defense is based on the principle of allowing individuals to present their case before the judiciary to refute accusations and provide evidence of their innocence. Therefore, the lawyer must possess skills and expertise in adjudicating juvenile cases to succeed in this role (Zampini, 2023).

The right to seek assistance from a lawyer is one of the most essential rights enjoyed by the accused (the juvenile). The presence of a lawyer helps to enhance the accused's confidence and ensures the legality of the proceedings, as well as aids in understanding legal terms that may be unfamiliar to the juvenile, such as crime, eyewitnesses, or denial, among others (Al-Machtomi et al., 2020). Additionally, a lawyer assists the court in understanding the

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juvenile's personality and reaching the truth. The lawyer also acts as a monitor of the proceedings, especially in cases of absentia.

If the accused (the juvenile) is unable to appoint a lawyer due to financial constraints, the court shall appoint a lawyer without charging the accused for the fees. This is stipulated in Article 144 of the Iraqi Code of Criminal Procedure No. 23 of 1971, which states:

> "The President of the Criminal Court shall appoint a lawyer for the accused if they have not appointed one. The court shall determine the lawyer's fees upon concluding the case, and the appointment decision is considered a power of attorney. If the lawyer provides a legitimate excuse for refusing the appointment, the president shall appoint another one."

7. Right to Legal Counsel

It is noteworthy that the right to seek the assistance of a lawyer is constitutional and legal, especially when the accused is a juvenile. Often, accusations can cause psychological distress in the juvenile, which may impair their ability to defend themselves or may leave them lacking the courage to confront what is presented in court or to question witnesses (Al-Machtomi et al., 2020).

The Iraqi legislator, in the Juvenile Care Law, allows for the defense of the juvenile (the accused) by individuals other than lawyers, such as their guardian, relatives, or representatives from social institutions (Nammur, 2013). Article 60 of the Juvenile Care Law, provides that: "The juvenile court may accept the defense of the juvenile by their guardian, a relative, or a representative from social institutions without the need for a written power of attorney while observing the provisions of Article 144 of the Code of Criminal Procedure."

The presence of a lawyer to defend the juvenile is mandatory, whether in felony or misdemeanor cases or during the recording of their statements while confessing at the investigation stage, according to Coalition Provisional Authority Order No. 13 of 2004. If a lawyer is not present and this is documented by signature, the court's decision may be subject to annulment (Al-Machtomi et al., 2020, pp. 724–728). The presence of a public prosecutor is also required; if absent, the court's decision may likewise be annulled. As revealed in a recent decision of the Ninawa Juvenile Court. In that case, the Ninawa Juvenile Court, in its capacity as a court of cassation, ruled as follows: "Upon examination and deliberation, it was found that the cassation appeal was filed within the legal time frame; thus, it was decided to accept it formally. Upon reviewing the contested decision, which involved referring the accused (S) to this court for trial in a non-summary case according to the provisions of Article 4/1 of the Anti-Terrorism Law No. 13 of 2005, the court found it to be incorrect and contrary to the law, and premature for the following reasons: it was noted that the Deputy Public Prosecutor had not signed the statement of the accused recorded by the investigating judge during their presence on 25/6/2018. Therefore, the decision to refer the case was annulled, and the case file was returned to its court for further proceedings. The decision was issued unanimously based on the provisions of Article 54 of the Juvenile Care Law of 1983 on 14/11/2018.

CONSIDERATION OF MULTIPLE CRIMES IN A SINGLE CASE

The Juvenile Care Law grants special provisions for juvenile defendants, allowing the court to consider multiple crimes committed by a juvenile in a single case, regardless of the number of offenses, provided they fall under the same section of the law. The court consolidates all charges against the juvenile and, if the juvenile is found guilty of each crime, it executes the most severe penalty. As provided in Article 67 of the Iraqi Juvenile Welfare Law, which states that: "If a juvenile is accused of

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committing more than one crime under the same section of the Penal Code, they may be tried in a single case and sentenced according to the measures prescribed for each crime, ordering the execution of the most severe measure exclusively."

This provision represents a departure from the general rule established by the Code of Criminal Procedure in Article 132(4) which stipulates that: "If the crimes are of the same type and occurred within one year against multiple victims, provided that the number does not exceed three in each case, b) The crimes are considered of the same type if they are punishable by the same type of penalty under a single article of the same law." The legislators in the Code of Criminal Procedure have mandated that the multiple crimes considered in a single case should not exceed three. In contrast, the legislators in the Juvenile Care Law have diverged from this rule by allowing for multiple crimes to be addressed in one case, as long as they fall under the same section. This is evident in the review of another recent decision of the Anbar Juvenile Court.

In that case, upon review and deliberation, it was found that the Anbar Juvenile Court erred in its application of the law regarding the case of the juvenile (A). The juvenile confessed during the investigation that he had legal guarantees regarding his involvement in crimes committed in 2015, including the kidnapping of an Iraqi army soldier during an attack on the Al-Sajariya area with his terrorist group, as well as killing the soldier with a pistol. Additionally, he admitted to transporting explosives and weapons via boats and engaging in clashes with security forces, resulting in the death of an Iraqi soldier. These statements were supported by the juvenile's testimony as a witness and reinforced by the evidence presented, which constitutes sufficient and convincing grounds for convicting juvenile (A) of a single crime, as it forms one terrorist project due to the events occurring concurrently within the same year amidst ongoing battles in Anbar province.

Since the court ruled otherwise, its decisions were deemed incorrect and contrary to the law. It was decided to annul all decisions issued in this case and return it to its court for a new trial, directing a single charge against the juvenile and convicting him accordingly, imposing the appropriate measures under the law. The decision was issued unanimously based on the provisions of Article 259/A/7 of the Code of Criminal Procedure on 24/10/2017.

The Anbar Juvenile Court had previously decided the following:

1. Commitment to a Juvenile rehabilitation facility for thirteen years for the crime of killing two Iraqi army soldiers.
2. Commitment to a Juvenile rehabilitation facility for twelve years for the crime of kidnapping an Iraqi army soldier.
3. Commitment to a Juvenile rehabilitation facility for six years for his involvement in the attack on Al-Sajariya and for transporting explosives and weapons, with the most severe measure from point (1) above being enforced without exception (Federal Court of Cassation Decision No. 1386/Criminal Authority/Juveniles/2017 dated 10/24/2017 [unpublished]).

JUVENILE GUARANTEES, POSITIVE REFORMS AND PROCEDURAL REQUIREMENTS FROM THE ISLAMIC PERSPECTIVE

According to Shariah, juveniles' rights, particularly in legal and judicial matters, are profoundly based on justice, protection, and rehabilitation. Islamic law prioritizes the well-being of juveniles (*maslahah al-atfal*) and acknowledges that juveniles are not responsible for their actions until they achieve adulthood (*bulugh*). The Qur'an and Hadith, as the primary sources of Islamic principles, provide guidance on justice for

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juvenile offenders. It states that Allah (S.W.T) says "And when the children among you come of age (puberty), then let them (also) ask for permission, as do those senior to them (in age): Thus, Allah makes clear His signs to you (commandments and legal obligations): for Allah is full of knowledge and wisdom" (Quran 24:29).

Similarly, the Holy Prophet (peace be upon him) also said, "Three persons are not accountable, a child until he reaches the age of puberty, a sleeping person until he awakens, and an insane person until he comes sane" (Hambal, 1999). This reveals the fact that both the Qur'an and Hadith do not make Juvenile, sleeping persons, and insane persons criminally responsible for their actions. Therefore, when dealing with juvenile offenders, their criminal capacity must be determined, and they should not be considered criminally accountable for their actions until they reach puberty.

1. Positive alignment with Shariah Principles

   i. Confidential Trials and Protection for Juveniles: Shariah prioritizes Juvenile's dignity and privacy, which is consistent with Iraq's Juvenile Welfare Law No. 76 of 1983, which provides for confidential juvenile proceedings. The STRIVE Juvenile project, which seeks to provide legal safeguards and rehabilitation for juvenile offenders, is consistent with the Islamic ideals of justice (*adl*) and mercy (*rahma*) enjoyed by all Muslim faithful, including Juvenile. The Prophet (peace be upon him) treated Juvenile with mercy, love, and compassion. He said, "He is not one of us who does not have mercy on our young and does not respect our elders" (Hadith No. 1919 and 1920). In Islamic jurisprudence, a juvenile should not be treated as an adult criminal, (Jauhari et al., 2023) but rather given the opportunity to rehabilitate (islah) and reintegrate into society.

   ii. Rehabilitation above Punishment: Shariah prioritizes reform over revenge for juveniles. The Prophet Muhammad (peace be upon him) advocated treating juveniles with compassion and patience rather than harsh punishments (Chughtai et al., 2021, p. 2028). The latest initiatives to reform juvenile prison centres in Iraq in 2023 reflect the Islamic principle of restorative justice. Some schools of Islamic philosophy (e.g., Hanafi, Maliki) believe that juvenile offenders should be educated and reformed rather than punished as adults, a viewpoint supported by modern juvenile justice reforms.

2. Conflicts with Shariah Principles:

i. Lowering the Age of Legal Responsibility and Marriage (2024 Proposal):

A contentious legislative proposal in Iraq (2024) considers decreasing the legal age of consent to nine years old, potentially permitting child marriage. Islamic jurisprudence typically defines maturity (*bulugh*) as a prerequisite for responsibility, but most scholars emphasize both physical and mental maturity (*rushd*), which is not age-dependent. While some classical scholars allowed marriage at a young age, modern Islamic scholars say that legal and societal elements must be examined to avert harm (*darar*) and secure justice for Juvenile. In such a scenario, the legal responsibility (Taklif) in Islam must be determined by ascribing criminal responsibility to the child (Chughtai et al., 2021, pp. 2020–2030). This 2024 Marriage proposal has potential contradiction with Iraq's international obligations under the CRC and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),

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and inconsistency with modern Islamic reformist positions (Islam, 2015; Reyes, 2024).

Islamic law differentiates between a child (*sabi*) and an adult (*baligh*) based on maturity (*bulugh*) and intelligence (*aql*). Scholars disagree on identifying a fixed legal age for accountability. The Qur'an prioritizes mental and financial maturity (*rushd*) over full responsibility. Surah An-Nisa (4:6): reads: "Test the orphans until they reach marriageable age (*baligh*); if you find them to be mature (*rushd*), hand over their wealth to them." The Prophet Muhammad (peace be upon him) also stated, "The pen is lifted (i.e., no responsibility) for three: a sleeping person until they wake up, a child until they reach puberty, and an insane person until they regain their sanity." (Hadith: Sunan Abu Dawood 4402).

Furthermore, the Classical Hanafi and Shafi'i jurists set puberty markers at 12-15 for boys and 9-15 for girls. However, scholars emphasize that mental and emotional maturity is also important. Maliki and Hanbali schools require physical and intellectual maturity (*rushd*) to assume full legal responsibility (Islam, 2015, pp. 52–53). Contemporary Muslim scholars argue that legal responsibility should be based on mental competence and maturity rather than physical puberty.

Shariah-based legal systems (e.g., Egypt, Jordan, Morocco) have set the legal age for responsibility at 18 years old, considering modern psychological and social factors. Therefore, lowering the age to 9 contradicts (Reyes, 2024) this evolving consensus is because a child cannot fully comprehend the legal consequences.

Marriage in Islam is governed by three principles: consent, capability, and damage prevention (*darar*). Early marriages were permitted under classical Islamic jurisprudence, although they were not encouraged as a general rule. The following criteria are significant.

a) Puberty (*Bulugh*) against Maturity (*rushd*): Although some scholars historically permitted early marriages based on physical puberty, they also stressed that the kid be mentally and emotionally capable (*rushd*) of handling marriage. According to contemporary fatwas from Al-Azhar and other Islamic bodies, puberty is insufficient; emotional and intellectual maturity is also essential. According to Surah An-Nisa (4:6), marriage should only take place when both partners are capable of fulfilling their responsibilities.

b) The example of Aisha: Some supporters of early marriage point to Aisha, who purportedly married the Prophet at a young age. However, modern researchers say that historical sources on Aisha's age are inconsistent and that marriage norms in 7th-century Arabia were different. Many contemporary scholars reject adopting this as a blanket explanation for child marriage today, especially because modern science has demonstrated the psychological and physical harm it may inflict.

c) The Shariah principle of preventing harm (*Darar*): (Islam, 2015, pp. 53–54). The Prophet (PBUH) stated, "There should be neither harm nor reciprocating harm" (Hadith, Ibn Majah, 2340). Child marriage is associated with health hazards, maltreatment, and economic reliance, which go against Islamic beliefs of justice and well-being. Several Muslim-majority countries (e.g., Saudi Arabia, Egypt, Morocco, and Tunisia) have made 18 the minimum marriage age based on

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Shariah principles of safeguarding juveniles from harm.

ii. Juvenile Trials in Terrorism-Related Cases

According to reports, certain adolescents convicted of terrorism in Iraq were tried publicly and without competent legal representation. Shariah requires fair trials *(al-huquq al-qada'iyyah*) and due process (*qada' wa shuhud*), particularly for vulnerable individuals like juveniles. If children are falsely accused, pressured, or unfairly tried, it breaches Islamic concepts of justice and the Qur'anic requirement to maintain fairness (Surah Al-Ma'idah 5:8: "Be just, for it is closest to righteousness").

According to Iraq's Juvenile Welfare Law No. 76 of 1983, juvenile trials should be kept confidential; nonetheless, many terrorism-related cases are handled publicly, exposing juveniles to humiliation and revenge. Islamic law requires privacy in circumstances involving vulnerable people, particularly juveniles.

Juveniles who violate the Counter-Terrorism Law face harsh penalties, including life imprisonment. The Juvenile Welfare Law provides for alternative sentencing and rehabilitation, but it is frequently disregarded in terrorism cases. Shariah prioritizes rehabilitation (*islah*) over punishment, particularly for adolescents who have been pushed into committing crimes.

Human rights organizations have reported cases of forced confessions, in which juveniles are pressured to admit their involvement with ISIS. Islamic law strictly prohibits coerced confessions, as declared in Surah Al-Baqarah (2:256): "There is no compulsion in religion."

Juveniles who have not acquired mental and emotional development are not held fully responsible under Islamic law. The Prophet Muhammad (PBUH) stated, "The pen is lifted from three: the sleeping person, the child until he reaches puberty, and the insane person until he regains sanity." (Sunan Abu Dawood 4402). Sentencing adolescents to heavy punishments is against Islamic values of justice (*adl*) and kindness (*rahma*).

Many juveniles suspected of terrorism in Iraq were forced to join ISIS. Shariah does not hold anyone liable for conduct committed under coercion (*ikrah*). The Qur'an says in Surah An-Nahl (16:106): "Whoever disbelieves in Allah after having believed except for one who is forced while his heart remains assured in faith, then there is no sin upon him." This idea applies to juveniles coerced into committing acts of terrorism, which means they should not be punished as willing participants.

Islamic justice prioritizes rehabilitation above punishment for juveniles (Daharis, 2023). The Qur'an encourages restorative justice, as demonstrated in Surah Al-Ma'idah (5:39): "Whoever repents after his wrongdoing and reforms, Allah will turn to him in forgiveness." Several Muslim-majority countries (including Saudi Arabia, Morocco, and Indonesia) prioritize de-radicalization programs for minors over harsh sanctions.

Islamic law advocates for the protection of a child's dignity, including the implementation of confidential juvenile tribunals, particularly for juveniles accused of crimes. Any legal obligation should consider both physical and mental growth, rather than merely an arbitrary age. Instead of harsh punishment, the emphasis should be on reforming and educating juvenile offenders, as demonstrated by Islamic teachings and modern rehabilitation programs. Even if early marriages existed in history, Islamic doctrine requires preventing injury (*darar*), which ensures that young females are not forced to marry.

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Iraq's juvenile justice reforms are consistent with Islamic concepts of fairness and rehabilitation; yet, some suggested modifications (such as decreasing the consent age) raise severe ethical and theological difficulties. Shariah prioritizes child protection, fair trials, and humane treatment, which must remain important to any legal reforms.

In light of the preceding discussion, this study puts forth suggestions for enhancing the existing solutions as outlined in Table 1.

TABLE 1. Recommendations for policy and implications

MAIN ISSUE	SPECIFICS	DETAILS
Strengthen Legal and Policy Frameworks based on Maqasid al-Shariah	Suspend the implementation and appeal the 2025 law recently passed to reduce marriageable age and raise the minimum age of criminal responsibility to at least 15 years, as obtainable in most Muslim jurisdictions. Encourage restorative justice, ensure confidentiality in juvenile trials, and limit the use of harsh treatment.	Iraq should set a clear and just age of legal responsibility, implement gradual accountability measures before full maturity, and expand mediation approaches. As well as strengthen the law preventing media publicity and reduce the use of incarceration for juveniles and its place, and prioritize rehabilitation.
Improve juvenile detention centers with Islamic ethics of care	Provide child-friendly detention facilities, provide Islamic counseling, and mental health support	Detention centers should have clean, safe conditions, proper nutrition, and access to Islamic education. Also, introduce faith-based counseling programs using Islamic psychology and Qur'anic therapy.
Build the capacity of judges, law enforcement officers, and social workers	Train judges and lawyers in handling juvenile cases and child-centered Shariah principles, promote kindness *(ma'ruf*) in law enforcement, and train and engage imams and scholars in juvenile justice cases	Train judges to use mercy and education over punishments. Implement alternative sentencing like community service, religious mentorship, and financial restitution. Train police officers. And establish Islamic restorative justice councils to mediate juvenile cases before trial.
Expand education, vocational training, and Islamic rehabilitation programs	Provide compulsory Islamic and secular education in detention centers, integrate faith-based de-radicalization programs, and teach financial responsibility and work skills	Detention centers should offer Quranic studies, ethics, and vocational training to help with reintegration. Islamic scholars should counter extremist ideologies through authentic Islamic teachings on peace and justice to help terrorist recruitees on detention from recidivism. Similarly, practical skills like tailoring, carpentry, technology, and business management should be taught at detention centers.
Strengthen community integration based on Islamic social welfare (Takaful)	Promote family reconciliation and parental support. As well as using Islamic zakat and waqf for juvenile justice initiatives	Introduce parenting workshops for families of juvenile offenders to prevent reoffending, and counseling for families of detainees of terrorist recruitment to help in the reintegration

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		process. Also, establish waqf endowments to fund scholarships and rehabilitation programs for at-risk juveniles.

CONCLUSION

In conclusion, Iraq's juvenile justice system is undergoing considerable reforms, with an emphasis on legislative changes, infrastructure upgrades, rehabilitation programs, and judicial capacity development. However, obstacles persist in ensuring fair trials, protecting confidentiality, and incorporating international child protection norms into Iraq's legal and cultural frameworks. Islamic beliefs emphasize mercy, rehabilitation, and restorative justice, which are consistent with contemporary human rights initiatives. Iraq can develop a fair and effective juvenile justice system by combining Shariah-based ethical principles such as confidential trials, alternative sentencing, and community-based rehabilitation.

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CONFLICT OF INTEREST

The authors declare that they have no conflict of interest to this study.

AUTHORS' CONTRIBUTION

All authors contributed to the final version and approved the submission.

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THE RIGHT OF CHILD OFFENDERS TO FAIR TRIAL FOR OFFENCES PUNISHABLE BY DEATH PENALTY

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ABSTRACT

Section 11(5) of the Child Act 2001 (CA 2001) provides that the jurisdiction of the Court For Children (CFC) is to try all types of offenses committed by children except for offenses punishable by the death penalty. Therefore, when a child commits an offense for which the punishment is the death penalty, the child should be tried in the High Court. This research was carried out to determine the legal definitions of children, accused, and child offenders. Following that, this research examines the rights of child offenders according to international human rights law and Malaysian law. The author will also examine the pertinent cases. The author collects data using the library research approach. This research focuses on several rights of child offenders, namely the right to bail, the right to be detained separately from adults, the right to a closed trial, and the right to a fair sentence. Trial at the High Court is conducted by a judge, whereas in the CFC a judge will be aided by two advisers, one of the advisers shall be a woman. These differences may result in injustice to child offenders during trial in the High Court. Therefore, amendments to the CA 2001 should be made to preserve the rights of child offenders of offenses punishable by death.

Keywords: Criminal offenses; accused juvenile; High Court; death penalty; child justice system

INTRODUCTION

There are many incidences that involve conflicts between children and the law, and these children are claimed to be involved in criminal activities. It is a matter of whether these children will become a part of a society that loyal to the country or whether they will fall into the valley of crime (Csey et al, 2013).

According to the online Cambridge dictionary, a child is a phrase given to a person from the time he is born until he becomes an adult, or it refers to someone's son or daughter. Meanwhile, the Kamus Dewan mentions a child as a boy or girl and the child is not yet more than 7 to 8 years old (Siti Hajar Mohd Afendi et.al, 2023).

The Malaysian Child Act 2001 (Act 611)(hereinafter referred to as CA 2001) is a specific act enacted to address protection, care and rehabilitation of children in Malaysia and came into force in August 2002. This Act is a combination of three previous legislations, namely the Juvenile Courts Act 1947, the Child Protection Act 1999 and the Women and Girls Protection Act 1973. Act 611 listed three categories of children, namely children who need care and protection; children who need protection and

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rehabilitation; and children who have conflicts with the law.

Section 11(1) of the CA 2001 provides that the CFC is established to hear, decide or resolve any charge against a child as well as to exercise any other jurisdiction granted or to be granted to the child court. The CFC consists of a Magistrate and is assisted by two advisers appointed by the Minister. One of the advisers shall be a woman as provided in subsection 11(3) CA 2001. However, subsection 11(5) of the Act provides that the CFC shall only have jurisdiction to try all types of offences not including offences that can be punishable by death sentence.

In accordance with section 117 of the CA 2001, no provision in the act other than sections 96 and 97 shall affect the powers of the High Court and that any power which may be exercised by the CFC shall in the same manner be exercised by the High Court. Thus, children who commit offenses punishable by the death penalty can be tried in the High Court. If the child is tried in the High Court, what measures are taken to distinguish between the trial of an adult and a child? Does subsection 11(2) regarding the presence of two advisers appointed by the Minister applies at the High Court? According to section 18 of the Courts of Judicature Act 1964 (CoJA 1964) only one judge is required to hear and decide a trial in the High Court. Article 3, the Convention on the Rights of the Child 1989 (CRC 1989) states that the best interest of the child must be primary consideration in every action concerning children.

It can be seen that in any action involving children in Court, authorities or legislatures, the best interests of the child shall be the primary consideration. Additionally, article 37 clarifies that the torture of children is prohibited. Children should not be imprisoned for life without the possibility of freedom and should not be detained for no cause or in an unlawful manner.

In summary, children's best interest must be prioritized while taking action against the accused juvenile. Children are protected from both the death sentence and life imprisonment. Torture or cruelty to children is illegal. If a child is condemned to prison, it should be for the shortest possible term. When accused children are detained, they should be allowed to communicate with family members via visitation or postal mail. Similar to an adult, a child is entitled to legal aid or any form of assistance to represent himself in court.

To complete this study, various objectives must be met. The first objective is to define children as well as accused juveniles in accordance with the provisions of the law. The second objective is to identify the jurisdiction of the CFC and examine the rights of the accused juvenile in accordance with international human rights law as well as Malaysian laws. The third objective is to examine cases involving the accused juvenile. This is a legal research, and it is designed as a qualitative study. This study collects and analyzes data from primary sources such as legislation and reports of court cases using library research methodologies. For a more extensive study, secondary data was also collected among journal articles and reports.

DEFINITION OF CHILDREN AND ACCUSED JUVENILE ACCORDING TO THE LAW

Article 1 of the CRC defines a child as every human being under the age of 18. In Malaysia, section 2(1) of the CA 2001 defines a person under the age of 18 years as a child. Section 2 Age of Majority Act 1971 also stipulates that a person aged 18 years and above is an adult. However, according to section 2 of Adoption Act 1952, a person who is under the age of 21 years old and unmarried including a woman under the age of 21 who has been divorced can be called as a minor. While in section 2 Law Reform (Marriage and Divorce) Act 1976 'minor'

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was defined as every person who is 21 years old and below except a widow and widower.

However, some countries define children contrary to the definition of international law. Singapore in the Children and Young People Act 1993 has categorized a child as a person under the age of 14. Section 2 of th Act also defines a young person as a person between the ages of 14 and 17. Meanwhile, Brunei Darussalam through Section 2 of the Children and Young People Act (Decapitation 219) 14 Amendment 2012, defines a child as someone under the age of 14 and a young person as someone who is 14 years old and under the age of 18. The Protection of Children and Youths Welfare and Rights Act 2011 (amendment 2021) is Taiwan's national legal statute that touches on individuals who are 18 years old. The phrases used are children and adolescents. According to Article 2 of the Act, a child is a person under the age of 12. An adolescent is someone between the ages of 12 and 18.

Although section 2(1) of the CA 2001 defines a child as an individual under the age of 18, section 82 of the Penal Code states that a child under the age of ten shall not be punished if he commits an act that would be considered a crime if committed by an adult. This section provides absolute protection for children under 10 years of age as it is considered as *doli incapax* which is incapable of wrong. *Doli incapax* is a principle derived from Latin with the meaning of not being able to commit a crime. There is an assumption that children aged 10 and under are not guilty of an offense. However, through this principle, children aged 10 to 12 years old can be considered guilty of an offense if they reach maturity.

Section 83 of the Penal Code further states that a child aged 10 to 12 years old is not liable for the offense committed if the child has not attained the maturity level to understand the nature and consequences of the actions taken. As a result, the accused juvenile may be classified as someone aged 13 to 17 years old who committed a criminal offense under the Penal Code or any other provision of the law. If proven guilty, the accused juvenile may be sentenced to a term commensurate with the offense committed.

However, the definition of accused juvenile in Malaysia is different from Brunei Darussalam. According to Section 2, Children and Young People Act (Decapitation 219), in Brunei only children aged 7 years until the age of 18 can be categorized as juveniles. The criminal liability of children aged 7 to 14 is regarded as minimal due to the fact of the child's ability to think. The 14 years old accused, on the other hand, is accountable for the crime he committed since at this age, the accused is capable of discerning between 'true' and 'wrong' actions (Haji Zuneidy, 2019).

COURT FOR CHILDREN AND ITS JURISDICTION

The Juvenile Courts Act 1947 (Act 90) (JCA 1947) provides the Juvenile Court's jurisdiction to hear matters involving juveniles. The Act went into force in Peninsular Malaysia on 1 December 1949, in Sabah on 1 October 1972, and in Sarawak on 2 February 1986. A juvenile is defined under Section 82 of the JCA 1947 as a person who has achieved the age of criminal responsibility but is under the age of 18 (Yusramizza & Anis Shuhaiza, 2007). Yet, in tandem with the drafting of the Child Act in 2001, the CFC was founded. The CA 2001 (via section 130) abolished the JCA 1947, the Women and Girls Protection Act 1973, and the Child Protection Act 1991.

The Court For Children, commonly known as the Juvenile Court, was established to offer the accused the right to be treated differently from adult offenders. This is based on the child's maturity level, which indicates that the child is not yet capable of considering the potential consequences of an act or omission (Abdullah Sohaimi, 2015).

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The CFC has jurisdiction over cases involving individuals under the age of 18, which are recognized as children. This conforms with the definition of children in section 2(1) of the CA 2001. Section 82 of the Penal Code, on the other hand, states that children under the age of ten are incapable of committing a crime. Furthermore, section 83 of the Penal Code specifies that a child between the ages of 10 and 12 is deemed capable of committing a crime if the child is mature and capable of understanding his nature and acts when committing the crime. However, if a child of that age is not yet able to consider the circumstances and the consequences of his actions, then the child should not be held liable for the offenses he committed. It can be concluded that this child court only deals with children aged 13 to 17 years old. Offenders who have attained the minimum age of accountability must bear responsibility for the activities that they have committed, which are suitable for their age, skills, and mistakes (Norjihan Ab Aziz & Nur Najaa Syairah, 2023).

Other than hearing and deciding on any charge against a child, the CFC also exercises any other jurisdiction, which has been granted or will be granted to the Court by the CA 2001 or other written laws. Section 11(5) of the CA 2001 states that the Court For Children has jurisdiction to try all types of offenses except offenses punishable by the death penalty. Therefore, the accused juvenile who commits an offense that can be sentenced to death cannot be tried in this Court For Children. In addition, the Court For Children also does not have jurisdiction to try children charged with offenses along with adults. According to Section 83(4) of the CA, the child shall be tried in a Court having jurisdiction to try the offenses.

Section 11(2) of the CA 2001 provides that the child court must be consists of a Magistrate and shall be assisted by two advisers except for cases under sections 39(4), 42(4), 84(3) and 86(1). Section 39(4) of the CA 2001 explains the situations under which a child may seek protection and rehabilitation. As a result, the Court may reasonably issue an order placing the child in a sanctuary until an order under Section 40 of the same act is issued. Meanwhile, section 84(3) applies to the Court For Children's power to investigate cases involving children, except when the offense is a charge related to murder or other serious crime; or the Court believes that the child should be isolated from associating with any other person; or the Court believes that releasing the child will undermine the goal of justice. As a result, the child's release shall be contingent on the execution of a bond by the child's mother, father, or guardian.As for section 86(1), it provides for the custody of children who are not released on bail after arrest, in which the child shall be held in a place of detention specified in this Act.

According to section 11(3) of the CA 2001, it is mandatory for one of those advisers to be a woman. Section 11(4) of the CA 2001 states that the job of counsel is to advise the judge of the CFC on the punishment of a child offender found guilty or to enter a guilty plea and to advise the child's parent or guardian. The judge in the case of *PP v Ayasamy [1955]* said that among the roles of the counsel is to inform and give the court an opinion on the punishment or any other form of treatment of a child brought before him.

CHILD OFFENDERS FOR OFFENSES PUNISHABLE BY DEATH PENALTY

If a 14-years-old child is found guilty of an offense that can be imprisoned, then the child cannot serve imprisonment in the same facility as an adult prisoner according to section 96(3) of the CA 2001. This is to prevent the child from being affected by negative elements, traumatized, bullied by adult inmates, or receiving treatment that is

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different from what a child should receive. Further, section 97(1) of the CA 2001 specifies that the death sentence will not be carried out on child offenders who commit a capital offense. If the court finds that the child has committed an offense punishable by the death penalty, the Court will substitute the sentence to imprisonment, where the term of detention is in accordance with the approval of the Yang di-Pertuan Agong (YDPA) for offenses committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan. Whereas, for offenses committed in states without a King or Sultan, the period of detention is in accordance with the consent of the head of state, which is Yang di-Pertua Negeri.

Fortunately, section 96(1) of the CA 2001 states that if the child is 14 years old, he or she cannot be placed in jail or committed to imprisonment for failing to pay fines, damages, or costs. According to the Penal Code, there are few offenses that can be punishable with the death penalty. Among these are:

> 1. Section 302 of the Penal Code, which deals with the crime of murder. If convicted, the death sentence could be imposed.
> 2. Section 376(4) of the Penal Code: The offense of forcing a person to death while committing or attempting rape. The death sentence is the punishment for this offense.
> 3. Section 396 of the Penal Code: The crime of gang robbery and murder. This offense carries the death sentence, as well as thirty years in jail and flogging.

Therefore, children who commit the above offenses, shall be tried in the High Court as the child court has no jurisdiction to try the offence. In *PP v Ahmad Jasni [2001]*, the accused, who was 12 years old, was charged in the High Court with the murder of a 5-year-old girl. The issue in this case is whether a child can be sentenced to death. The Court has referred to section 16 of the JCA 1947 which provides that the death penalty cannot be imposed on children and that imprisonment will be imposed instead of the death penalty. The term of imprisonment is based on the approval of the Sultan of Selangor.

According to section 15(1) of the Courts of Judicature Act 1964 (CoJA 1964) and section 7 of the Criminal Procedure Code (CPC), the High Court convenes publicly to the public. However, the clause also allows the Court to hold a private hearing if the necessity of justice, security, or other sufficient considerations is considered (Sarirah, 2011). This is intended to safeguard the dignity of the accused juvenile as well as to prevent the accused juvenile from feeling inferior and oblique by society (Norazla, Nur Zulfah & Hammad, 2020). According to Paragraph 8.1, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted on 29 November 1985 by General Assembly, in order to avoid harm being caused to her or him by undue publicity or by the process of labeling, a private hearing is the best choice for a child offender. Additionally, the accused juvenile will be more open and comfortable answering questions from the Judge, the prosecution, and the defense counsel in a closed trial.

Section 117 of the CA 2001 stipulates that the High Court has the authority to hear criminal proceedings under the CPC and the CA 2001, as may be used by the CFC. The effect is that only section 96 and section 97 of the CA 2001 must be complied with by the High Court in hearing a criminal case against a child offender who has committed an offence punishable by the death penalty. No other provision shall affect or limit the jurisdiction of the High Court in the exercise of its jurisdiction to try trials involving children who commit offences punishable by the death penalty (Sarirah, 2011).

Ahmad Maarop J in *PP v KK [2003]* states that the method of trial of a child who commits an offense punishable by the death penalty is the same as the trial of an adult

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who committed the same offense. Only the punishment that can be handed down is different, where section 97 of the CA 2001 stipulates that children cannot be sentenced to death if convicted. In this case, the procedure used is the procedure for criminal trial in the High Court as provided in Chapter XX of the Criminal Procedure Code. Judge Ahmad Maarop also made a banning order to the media from disclosing names, addresses, schools, or entering or posting any details (including photographs) that allow children and victims to be identified or lead to their identity identification. This is in accordance with section 15 of the CA 2001, which has resulted in a variety of restrictions on media coverage and publications involving accused juvenile or children who are victims in a case being tried. If any person is determined to be sharing information about child offenders or child victims, the individual has violated section 15(4) of the CA 2001. If found guilty, the defendant may face a fine of up to ten thousand Malaysian ringgit or five years imprisonment, or both.

According to section 90(9)(b) of the CA 2001, once a prima facie case against a child offender has been proven, the child may opt to either give evidence under sworn statement or make any statement that represents him. There is no opportunity for a declaration of silence, child offenders cannot remain silent. If the High Court rules the child offenders to defend themselves, sections 181 to 182A CPC are followed. An accused person can testify under oath. However, there is no specific clause for the right to remain silent. As a result, children who are tried in the High Court may give testimony under oath or make any statement not under oath or remain silent. This is because, while the right to silence is not expressly mentioned in section 181 through section 182A of the CPC, it is implied in those sections (Sarirah, 2011).

CHILD OFFENDER'S RIGHTS BASED ON INTERNATIONAL HUMAN RIGHTS LAW AND MALAYSIA LEGAL FRAMEWORK

Malaysia became a State Party to the CRC on 13 February 1995 (Aminuddin & Kamaliah, 2010). Malaysia made 12 reservations when it signed the CRC, which was later reduced to 8, including articles 1, 2, 7, 13, 14, 15, 28(1)(a), and 37. Malaysia recently announced the withdrawal of the reservation on article 1 (definition), article 13 (freedom of speech), and article 15 (freedom of association and assembly). Malaysia still has reservations on article 2 (non-discrimination), article 7 (nationality), article 14 (freedom of conscience and religion), article 28(1)(a) (free and compulsory primary education), and article 37 (torture) (Noor Aziah, 2012).

In December 2006, Malaysia sent a National Report to the Committee on the Rights of the Child (CRC Committee) on developments in implementing the Convention. The CRC Committee has evaluated the 2006 National Report and has made several recommendations that can be implemented by Malaysia. According to the CRC Committee, the best interests of the child set out in article 3 of CRC is a general principle relevant to the implementation of the entire Convention. Malaysia shall ensure that the best interests of the child are the primary consideration whether in the review of laws, and judicial decisions as well as in any projects, programs, or services that will be provided to the child, as per Paragraph 37 Consideration of Reports Submitted by States Parties Under Article 44 of the Convention.

The CRC Committee received good information provided by Malaysia regarding Malaysia's willingness to amend the Necessary (Security Cases) Regulations 1975 to eliminate the imposition of the death penalty on children. Therefore, the CRC Committee recommended that Malaysia

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hasten its measures to amend the Regulations so that the execution of the death penalty on children cannot be carried out as per Paragraph 38 Consideration of Reports Submitted by States Parties Under Article 44 of the Convention.

RIGHT TO BAIL

According to article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Subsequently, article 37(b) of the CRC states that no child shall be detained unjustly or arbitrarily. Arresting, detaining, or imprisoning a child must be done in line with the law.

Section 84(1) of the CA 2001 stipulates that children arrested without or with a warrant must be brought to the Court For Children within twenty-four hours after their arrest. However, under section 84(3) of the CA 2001, the Court For Children has the authority to issue bail to the accused child who commits any type of offense, excluding murder or other major crime. The court cannot issue bail on the grounds of protecting the accused child's best interests. If the Court grants bail to the child offender, it will tarnish the aim of justice.

However, an exemption is provided under section 388(1) of the CPC, which states that the Court may give bail to any individual who commits an offense punishable by death if there is no sufficient evidence to suggest that such an individual has committed the offense. Only children under the age of 16, women, those who are sick, and the elderly are eligible for the guarantee.

RIGHT TO BE SEPARATED FROM ADULTS

According to Article 10(2)(b) International Covenant on Civil and Political Rights, an accused juvenile shall be separated from adults and brought speedily for adjudication. In addition, Article 10(3) stipulates that the place of detention of the accused juvenile should be different from the adult's facility. Section 85 of the CA 2001 addresses the separation of a child from an adult while in detention at a police station, places of detention, or in a courtroom.

This segregation is made to prevent children from associating with adult offenders and it is mandatory for a woman to accompany a girl who is detained or taken to the Police Station and Court. The purpose of this segregation is to prevent the dissemination of photos or any form of footage of children being taken to the Police Station or to the Court. Moreover, if a child aged 14 years old and above is ordered to serve a sentence of imprisonment, the child cannot associate with adult prisoners. This provision has explicitly stated that child offenders cannot be placed in the same prison as other adult inmates. Child offenders need to be placed in a special prison as per section 96(3) of the CA 2001. Children under detention pending trial must be separated from adult offenders and must be detained in separate institutions from adult offenders. Their rights to receive care, protection, educational, medical and physical had to be ensured whenever the children were placed in detention as per Paragraph 13.4 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted on 29 November 1985 by General Assembly.

There is, however, no clear guideline to obtain such separation. It is recommended that the police authorities develop a guideline or standard operating procedure while conducting arrests and isolating suspected children. This is done to protect the rights of the accused juvenile. Paragraph 15,

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Guidelines for Action on Children in the Criminal Justice System states that appropriate actions should be taken to provide a wide range of alternative and educational measures accessible throughout the state in the pre-arrest, pre-trial, trial, and post-trial phases, to avoid recidivism and promote the social rehabilitation of child offenders. As mentioned in paragraph 12 of the Beijing Rules, there is a need for specialized training for all law enforcement officers who are involved in the administration of juvenile justice. Thus, through the training and guidance given to the authorities, the juvenile justice system can be improved, and the rights of the accused juvenile can be preserved.

RIGHT TO A CLOSED TRIAL

The trial of a case involving an accused juvenile should be held privately and shall not be merged with the adult trial processes. If a child is arrested, he or she must be taken before the child court for trial (Teo, 2007). Only parties involved are allowed to attend the trial involving children. Section 12 (1) of the CA 2001 stipulates that the CFC shall convene in a special room that is different from the other Court conference room. The conference should also be held on a special day to try the accused juvenile. In the meantime, entrances and exits should be separated if the CFC is in the same building as the other Courts. Section 12(2) of the CA 2001 stipulates that different entrances and exits are to ensure that the accused juvenile is carried out without any interruption. In addition, the trial of the CFC may only be attended by members and officers of the Court, parents, guardians, advocates, witnesses, and any other person as determined by the Court as provided by section 12(3) of the CA 2001.

However, when it comes to the trial of a child in the High Court, section 15(1) of the CoJA 1964 provides that the place where the Court convenes in the trial of any matter, civil or criminal shall be treated as an open court to the public. However, the Court may hear a private hearing (in camera) if the Court is satisfied that there is an interest in justice, safety, and public safety.

Furthermore, section 7 of the CPC also provides that a Criminal Court that tries any criminal offense shall be treated as an open court to the public. The public can present in any hearing held in the Federal Court, Court of Appeal, and High Court. The exemption in section 15(1) of the CoJA 1964 has allowed the Court to hear cases in private where it is necessary to safeguard the interests of justice, safety, and public safety or other factors. In this regard, only certain parties are allowed to hear proceedings conducted such as court staff including lawyers, family members of the accused and victims, witnesses, bona fide representatives of the press as well as moral officers or officers from the welfare home (Sarirah, 2011). Section 12(3) of the CA 2001 provides that only members and officers of the Court, child offenders, parents or guardians, advocates, witnesses, and any person connected to the case are allowed to enter the court to hear the trial proceedings of the child. In the trial of a child, section 117 of CA 2001 grants the High Court the same powers as the child court. As a result, as allowed in section 12(3) of the CA 2001, the parties' attendance before the High Court may be limited. It also fits with the provisions of section 15(1) of the CoJA 1964, which permits for private hearings.

RIGHT TO A FAIR SENTENCE

The execution of the death penalty on children is prohibited. In accordance with article 37 of the CRC, no death penalty or life imprisonment can be carried out on children under the age of 18. Section 97(1) of the CA 2001 also provides that the death penalty cannot be made against a child who has been found guilty of an offence punishable by the death penalty. The death penalty will be replaced with imprisonment. The length of imprisonment is subject to the consent of the

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Yang di-Pertuan Agong, the King of state or Yang di-Pertua Negeri.

When a child is charged with murder, he is prosecute in the High Court, and if the prosecution proves the prima facie case, the Court will sentence him with imprisonment for as long as the YDPA consents to in place of the death penalty (Noor Hasliza & Zuhair, 2021). Section 293(1) of CPC states, "*when any youthful offender is convicted before any Criminal Court of any offence punishable by fine or imprisonment, the Court may, instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment*." Therefore, court may order child offender to perform community service not exceeding 240 hours, where it only applied to young offenders aged between 18 to 21 years old. Community service is defined by section 293(1)(e)(ii) of the CPC as any job, service, or course of instruction undertaken for the benefit of the general public, including work performed in exchange for payment to a jail or local authority and be overseen by the Minister in charge of women, families, and communities. Section 97A CA 2001 states that the CFC has the authority to order a child offender to conduct community service for a term of no more than 120 hours over a period of no more than six months.

A Community Service Order (CSO) is a non-incarceration alternative to imprisonment. The goal was to provide rehabilitation, prevent offenders from repeating crimes, and integrate them back into society in general, through the following core elements, punishment, rehabilitation and reparation. Punishment is by taking away an offender's spare time by assigning them tasks. Rehabilitation by imposing a social responsibility mentality and making community service a rewarding experience for the offender. According to the Department of Social Welfare, Ministry of Women, Family and Community Development, reparation is to create moral virtue in the offender while providing tangible advantages to society.

MNZMN v PP & Other Appeals [2023] the appellant, who was 15 at the time, had been charged at the Children's Courts in Sepang and Petaling Jaya. The three charges brought against the appellant were heard concurrently, where it is an offense under section 14(a) Sexual Offences Against Children Act 2017 and section 377C Penal Code. The appellant pled guilty to all of them. The Magistrates ordered the appellant to be placed in the Henry Gurney School for three years after reading the probation report produced by the welfare officer and hearing the recommendations of the two advisors appointed pursuant to the CA 2001 and the submission of the appellant's counsel and Deputy Public Prosecutor. After reviewing the appeal, the Court of Appeal judges considered that the appropriate punishment is to invoke section 91(1)(da) of the CA 2001 and order the appellant to perform community service of a total of 100 hours as prescribed and supervised by the Social Welfare Department, Ministry of Women, Family and Community which may include undergoing counseling, religious and moral education thereat.

The concept of family-based preservation, also known as Deinstitutionalisation (DI) on an international level, is an attempt to provide all children with the opportunity to grow up in a family context. In Malaysia, this concept assures children who require protection and care. The first alternative is to live with family members, and the ultimate option is to be placed in an institution under the Department of Social Welfare. The focus of the DI concept's implementation is on childcare provided by parents, family members, or others who are qualified and acceptable in a family setting, rather than on the ultimate closure of custodial facilities (Ministry of Women, Family and Community Development, 2016).

Section 293(1)(b) states that Court may order the offender to be delivered to his

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parent or to his guardian or nearest adult relative or to such other person as the Court shall designate on such parent, guardian, relative or other person executing a bond with or without surety or sureties, as the Court may require, that he will be responsible for the good behaviour of the offender for any period not exceeding twelve months or without requiring any person to enter into any bond make an order in respect of the offender ordering him to be of good behaviour for any period not exceeding two years and containing any directions to that offender in the nature of the conditions referred to in paragraphs 294a *(a)*, *(b)* and *(c)* which the Court shall think fit to give.

Judges may consider sentences in the form of community service orders and family-based preservation orders when sentencing the accused child. In *Tukiran bin Taib v. Public Prosecutor [1955]*, the offender was 17 years old when he was charged in the Magistrate's court at Tanjong Karang with the theft of 167 coconuts under section 379 of the Penal Code. He pleaded guilty and was sentenced to 4 months imprisonment. Bellamy J says, 'It has been stressed by this Court that it is very desirable that young offenders, that is, offenders between the ages of 17 and 21 years, who are also first offenders, should be kept out of prison, if possible.' Therefore, imprisonment should be the last resort of punishment.

CASE ANALYSIS

In *PP v Low Hai Voon [2010]*, a child offender aged 14 years and 9 months has been charged with murder under section 302 of the Penal Code. However, the charge has been changed to the offense of manslaughter without intent under section 304(a) of the Penal Code. The guilty plea of the child offender was recorded and accepted by the Court. The High Court judge has referred to section 91(f) of the CA 2001 and ordered that the child offender be sent to a school that has been approved by the Act until the offender reaches the age of 21.

In the case of *PP v Buri Hemna [1998],* the accused juvenile committed an offense under section 39B (1) of the Dangerous Drugs Act 1952 when he was 17 years old. The issue in this case is whether the accused should be tried by a High Court judge assisted by two advisers or without being assisted by two advisers. The Honourable Judge ruled that the High Court could try a child without being assisted by two advisers. According to him, there is no written law which says that a trial by the High Court does not need to be heard and settled by a judge only as provided by section 18 of the CoJA 1964. In addition, the judge in this case also explained that there is no legal provision that says that the trial of a child offender by the High Court should be handled as per the circumstances of the CFC.

Augustine Paul J in the case of *PP v Mohd Redzuan bin Saibom [2002]*, used section 16 of the Juvenile Courts Act 1957 to sentence a child convicted of violating section 39(1) of the Dangerous Drugs Act 1952. Section 16 of the Juvenile Courts Act states that the death sentence does not apply to child offenders. As a result, the Judge has substituted a jail sentence for the term allowed by the Yang di-Pertuan Agong or Tuan Yang di-Pertua Negeri. In *PP V Khairul Al Sidek bin Lurin & Anor [2010]*, the child offender was charged under section 302 of the Penal Code for the murder of the deceased, Mohd Azlie Hanif bin Gazali using a stick and a belt. The prosecution managed to prove the case beyond a reasonable doubt. Therefore, the child offender is ordered to be held in prison for the term approved by the Yang Di-Pertua Negeri Sabah in lieu of the death penalty convicted thereof pursuant to section 97(2)(b) of the Child Act 2001.

In another case, *PP v Muhammad Adli Shah bin Mohd Yusry [2021],* the accused was convicted for murder charge under section 302 of the Penal Code. On September 14, 2017, between 4.15 and 6.45

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a.m., a fire broke out at the Tahfiz Darul Quran Ittifaqiyah Centre, Jalan Keramat Akhir, killing 23 people, including 22 students and a warden. The High Court Judge ordered the accused to serve the sentence for the duration permitted by the Yang di-Pertuan Agong (YDPA) under section 97(2)(a) of the CA 2001, which allows the death penalty to be substituted for imprisonment. This is due to the accused's age at the time of the offense is 16 years. The death sentence cannot be inflicted on criminals under the age of 18 at the time of committing the offence.

Section 97 of the CA of 2001 eliminates the death penalty for child offenders and replaces it with imprisonment. The length of imprisonment is determined by the YDPA or the state TYT. In the matter of *Kok Wah Kuan v. Director of Kajang Prison, Selangor Darul Ehsan [2004]*, the issue in this case is the YDPA's authority to imprison child offenders who commit crimes punishable by death. The death penalty will be replaced with a jail sentences, the length of imprisonment will be determined by the YDPA. The Court of Appeal concluded that section 97(2) of the CA 2001 violates the notion of separation of powers, which is crucial under Malaysia's Federal Constitution. As a result, it is concluded that the section's provisions are unlawful and unconstitutional. Therefore, there is no mechanism for punishing child offender who commit murder offenses.

However, there are other views regarding the decision of the Court of Appeal which considers that there is no issue regarding the conflict of separation of powers in section 97(2) of the CA 2001 as the Yang di-Pertuan Agong only decides the period of imprisonment which is appropriate to the offence. The power to sentence or find guilty of a child who commits an offense punishable by the death penalty still rests with the Court (Anita & Tengku Noor Azira, 2014). In the meantime, the Board of Visiting Judges also plays a role in determining the length of imprisonment of the accused child. This is because the Board of Visiting Judges will assess the accused child at least once a year and the Board will submit the results of the report to the Yang di-Pertuan Agong. The outcome of the report will affect whether the child offender will be released early or the detention period will be extended as provided in Section 97(4) of the CA 2001. Therefore, the issue of conflict of power segregation should not be a major debate as the decision made by the Yang di-Pertuan Agong is on the advice of the Board of Visiting Judges and not the decision of the Yang di-Pertuan Agong alone. The Board of Visiting Judges is responsible for assessing the development of the accused's behavior throughout his stay in custody.

CONCLUSION AND RECOMMENDATION

According to local newspaper reports as well as a list of cases registered in the courts, the number of child offenders committing serious offenses is increasing day by day. Children are seen getting bolder to commit armed robbery, rape and murder.

Through the above discussion, section 97 of the CA 2001 has expressly stipulated that the death penalty should not be handed down or recorded against child offenders. It coincides with article 37 of the CRC, where no death penalty or life imprisonment can be carried out on children under the age of 18. Prison is a substitute for the death penalty and is in line with the provisions of section 97 of the CA 2001. The authors suggest that the Court be given the power to grant punishments other than prison sentences such as sending offenders to schools approved by the Act or to Henry Gurney School and so on.

In India, youthful offenders are sometimes detained because they require protection. Certified schools for the destitute and delinquents operate under the supervision of the government. In these

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schools, children are provided proper instruction in a disciplined manner so that when they are

The authors additionally proposed to revise the CA of 2001 to expand the Court For Children's jurisdiction to hear cases involving offenses punishable by the death sentence. If the CFC is given the authority to try the offense, it is assumed that the child's rights, such as the right to be separated from the adult and the right to a closed trial, will be protected.

The death penalty in Canada was abolished on 10 December 1998, therefore murder offences in Canada do not impose a death sentence but imprisonment. Section 14(1) Youth Criminal Justice Act 2002 states Youth Justice Court has jurisdiction to try any offence committed by young person. This section provides executive jurisdiction youth justice court, where the court may hear the trial in relation to all types of offenses except as specified by the provisions. Sections 42(2) Youth Criminal Justice Act 2002 enacted a specific provision on sentencing a youth. The section establishes forms of punishment such as reprimand, directing the young person to be discharged, imposing a fine, paying other people compensation, probation, custody supervision, rehabilitative custody, or any other conditions that the court considers appropriate.

Malaysia can adopt the provisions of the law and the juvenile justice system of Canada as a measure to strengthen the juvenile system in Malaysia. The abolition of the death penalty in Canada should be a guide to Malaysia in the trial of accused children. This is in line with the provisions of international law that ban the death penalty on children. Therefore, the Court For Children should be given the power to hear and decide the trial for children who commit offenses punishable by death.

Finally, the individuals involved in the juvenile justice legal system should get training or education. The training session will include the accused juvenile's rights as well as the principles and provisions of international legal instruments. According to paragraph 21 Guidelines for Action on Children in the Criminal Justice System, law enforcement officials should get education and training in human rights and juvenile justice system as a part of their trainings.

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CONFLICT OF INTEREST

The authors declare no conflict of interest among parties who have been involved in writing this artile.

AUTHORS' CONTRIBUTION

The first author takes full responsibility for several key aspects of the study: conceiving and designing the research, collecting and analysing the data, and preparing the manuscript. The second and third authors provided valuable feedback on the manuscript and revised it for intellectual content. All authors reviewed the final manuscript.

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IMPLEMENTASI AKTA PENGAMBILAN TANAH 1966 DAN KESANNYA TERHADAP KEDUDUKAN POLITIK MASYARAKAT MELAYU DI SINGAPURA, 1966-1990

(IMPLEMENTATION OF THE LAND ACQUISITION ACT 1966 AND ITS IMPACT ON THE POLITICAL POSITION OF THE MALAY COMMUNITY IN SINGAPORE, 1966-1990)

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ABSTRAK

Kepadatan penduduk Singapura semakin meruncing pada 1960-an, lebih-lebih lagi setelah berlakunya pembangunan ekonomi yang pesat. Keadaan ini secara tidak langsung memberi kesan terhadap penggunaan tanah di negara tersebut. Pada 1964, sebanyak 53.4 peratus tanah di Singapura telah digunakan untuk pelbagai sektor iaitu petempatan masyarakat, perindustrian dan perniagaan. Justeru itu, kerajaan Singapura mula merangka dasar supaya penggunaan tanah di negara tersebut dapat dikawal dan tidak disalahgunakan untuk tujuan yang lain. Berdasarkan kepada perkara tersebut, kerajaan Singapura melakukan semakan semula terhadap undang-undang yang membolehkan kawalan terhadap penggunaan tanah iaitu Ordinan Pengambilan Tanah yang berkuatkuasa di Singapura sejak 1920. Bahagian perundangan ini disemak semula dan dipinda kepada Akta Pengambilan Tanah 1966 (Land Acquisition Act 1966/LAA 1966) supaya dapat dikuatkuasakan secara menyeluruh di Singapura. Oleh itu, kajian ini bertujuan memperincikan pelaksanaan Akta Pengambilan Tanah 1966 di Singapura serta kesan penguatkuasaan akta tersebut dalam tempoh 1966 hingga 1990 terhadap kedudukan politik masyarakat Melayu. Kajian ini mengunakan kaedah analisis kandungan secara kualitatif berdasarkan sumber primer yang diperoleh dari National Archive Singapore seperti laporan dari Election Department dan House Development Board (HDB) sebagai sumber utama. Bagi mendapatkan kesinambungan kajian, Hansard Parlimen turut digunakan untuk rujukan. Selain itu, dokumen dari National Archive UK seperti rekod dari Foreign Office dan Colonial Office turut dijadikan sebagai sumber untuk rujukan. Dapatan kajian ini merumuskan tindakan yang dilakukan oleh kerajaan melalui LAA 1966 ini berjaya meningkatkan jumlah keluasan rizab tanah milik kerajaan dan menyusun semula petempatan masyarakat melalui HDB. Selain itu, penguatkuasaan LAA 1966 ini secara tidak langsung memberi kesan terhadap kedudukan politik masyarakat Melayu di Singapura.

Kata kunci: Perundangan; Politik; Demografi, Singapura; Melayu

ABSTRACT

Singapore's population density increased in the 1960s, especially after rapid economic development. This situation indirectly affected the use of land in the country. In 1964, 53.4 percent of the land in Singapore was used for various sectors, namely community settlements, industry and business. Therefore, the Singapore government began to formulate policies so that land use in the country could be controlled and not misused for other purposes. Based on this matter, the Singapore government reviewed the law that allows control over land use, namely the Land Acquisition Ordinance which has been in force in Singapore since 1920. This part of the legislation was revised and amended to the Land Acquisition Act 1966 (Land Acquisition Act 1966/LAA 1966) so that it could be enforced comprehensively in Singapore. Therefore, this study aims to detail the implementation of the Land Acquisition Act 1966 in Singapore and the impact of the enforcement of the act

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during the period 1966 to 1990 on the political position of the Malay community. This study uses a qualitative content analysis method based on primary sources obtained from the National Archives of Singapore such as reports from the Election Department and the House Development Board (HDB) as the main source. To obtain continuity of the study, Hansard Parliament was also used for reference. In addition, documents from the National Archives of the UK such as records from the Foreign Office and Colonial Office were also used as a source for reference. The findings of this study summarize the actions taken by the government through the LAA 1966 which successfully increased the total area of government-owned land reserves and reorganized community settlements through the HDB. In addition, the enforcement of the LAA 1966 indirectly affected the political position of the Malay community in Singapore.

Keywords : Laws; Politics; Demographics; Singapore; Malays

PENGENALAN

Perkembangan politik di Singapura pada 1950-an memperlihatkan berlakunya perubahan pentadbiran British kepada pentadbiran eksekutif yang terdiri dari masyarakat tempatan. Perkara ini berlaku ekoran perubahan perlembagaan yang dilakukan pada 1954 iaitu melalui pengenalan sistem pilihan raya bagi memilih parti yang akan membentuk kerajaan buat pertama kali dalam sejarah politik negara itu (CO 1030/475). Pilihan Raya Umum Singapura 1955 (PRUS 1955) merupakan pilihan raya pertama yang diadakan untuk tujuan pembentukan kerajaan yang diterajui oleh rakyat tempatan. Pada PRUS 1955 ini sebanyak 25 kerusi yang dipertandingkan dan Barisan Buruh (*Labour Front*/LF) menjadi parti paling banyak memenangi kerusi iaitu 10 kerusi. Walaupun begitu, kemenangan ini memerlukan gabungan dengan parti lain kerana jumlah kerusi yang dimenangi LF tidak melepasi syarat majoriti. Justeru itu, LF berpakat dengan beberapa parti lain iaitu *United Malays National Organization* (UMNO) satu kerusi, *Malayan Chinese Association* (MCA) satu kerusi, tiga orang ahli Majlis Perundangan yang dilantik secara langsung serta dua orang ahli LF yang dilantik oleh Gabenor, menjadikan jumlah keseluruhannya adalah 17 kerusi, sekali gus memperlihatkan LF mendapat majoriti untuk membentuk kerajaan baharu di Singapura (CO 1030/81). Seterusnya, kejayaan ini diikuti dengan perlantikan Presiden LF, David Marshall sebagai Ketua Menteri pertama negara itu (FCO 141/14444).

Menjelang Pilihan Raya Umum Singapura 1959 (PRUS 1959) memperlihatkan berlakunya perubahan terhadap politik negara ini kerana British menggubal Perlembagaan Singapura dan bersetuju untuk membentuk *self-government* yang terdiri dari rakyat tempatan sepenuhnya. Melalui penggubalan perlembagaan ini, ketua eksekutif Singapura akan dikenali sebagai Perdana Menteri dan bertanggungjawab merangka sepenuhnya dasar di negara tersebut (FCO 141/15096). Keputusan PRUS 1959 memperlihatkan perubahan transisi kerajaan dari LF kepada *Peoples Action Party* (PAP). Pada pilihan raya ini, PAP berjaya memenangi 43 dari 51 kerusi yang dipertandingkan, sekali gus menjadi parti pertama yang berjaya membentuk kerajaan secara '*single party*' tanpa memerlukan gabungan dengan parti lain di Singapura (FCO 141/17160). Kemenangan ini menjadi signifikasi terhadap penguasan politik oleh PAP di negara tersebut, terutamanya selepas Lee Kuan Yew mendapat sokongan penuh untuk dilantik sebagai Perdana Menteri pertama negara itu.

Justeru itu, petadbiran Lee Kuan Yew pada peringkat awal memperlihatkan tindakan beliau untuk membentuk Singapura bebas dari politik perkauman (FCO 141/17160). Namun begitu, tindakan politik yang dilakukan oleh beliau bukan untuk Singapura semata-mata, tetapi turut merangkumi tindakan mengukuhkan kedudukan politik PAP di negara ini. Antara tindakan tersebut adalah memperkenalkan

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sebuah undang-undang khas yang memberi kesan terhadap politik Melayu di Singapura iaitu Akta Pengambilan Tanah (*Land Acqusition Act* 1966/LAA 1966) (CO 1030/227). Walaupun ramai melihat tindakan ini dilakukan bagi tujuan pembangunan negara ini, namun LAA 1966 dikuatkuasakan bagi memecahkan kedudukan politik Melayu. Perkara ini dapat dilihat melalui tindakan yang dilakukan oleh kerajaan iaitu *Ethnic Intergation Policy* yang menetapkan setiap perumahan yang dibina oleh kerajaan mempunyai kuota khas mengikut kaum tetentu. Sehubungan itu, LAA 1966 yang dikuatkuasakan ini merupakan tindakan politik yang dilakukan oleh Lee Kuan Yew bagi mengukuhkan kedudukan PAP dan memberi kesan secara langsung terhadap politik masyarakat Melayu khususnya.

KAJIAN LITERATUR

Sungguhpun banyak kajian yang dilakukan oleh sarjana terdahulu tentang LAA 1966, namun kajian yang dilakukan hanya melibatkan perbincangan secara umum. Antaranya adalah kajian oleh Li-ann Thio (2025) yang membincangkan mengenai tafsiran undang-undang terhadap perlaksanaan sistem demokrasi di Singapura. Walaupun kajian ini ada membincangkan mengenai LAA 1966 yang dikuatkuasakan oleh kerajaan, namun konteks perbincangan hanya dilakukan secara umum tanpa melihat kesan perlaksanaan akta ini terhadap komuniti masyarakat di negara itu, terutamanya perkara yang membabitkan masyarakat minoriti di negara ini, khususnya bangsa Melayu.

Selain itu, kajian oleh C. Tremewan (2016) pula membincangkan tindakan kerajaan dalam usaha menyusun semula tahap sosioekonomi masyarakat di Singapura. Walaupun kajian ini membincangkan kerajaan berjaya menyusun semula petempatan masyarakat berdasarkan pengambilan tanah yang dilakukan melalui LAA 1966, namun kajian ini tidak memperincikan kesan perlaksanaan akta ini terhadap masyarakat Melayu sama ada dalam konteks politik mahupun sosioekonomi di negara itu. Begitu juga dengan dapatan kajian oleh Anne Haila (2015) turut membincangkan mengenai LAA 1966 melalui tindakan pembangunan semula petempatan yang dilaksanakan oleh kerajaan secara umum. Oleh itu kajian ini tidak membincangkan mengenai perlaksanaan LAA 1966 terhadap pemmbangunan semula petempatan dan kesannya terhadap masyarakat Melayu di negara ini.

Dapatan kajian oleh Connie Carter (2021) pula membincangkan pengukuatkuasaan undang-undang terhadap pembangunan ekonomi Singapura. Antara undang-undang yang dibincangkan dalam kajian tersebut adalah perlaksanaan LAA 1966 oleh kerajaan bagi memastikan zon industri, perniagaan dan petempatan masyarakat disusun semula di negara tersebut. Walaupun begitu, dapatan kajian ini tidak menyatakan kesan daripada tindakan kerajaan terhadap masyarakat di negara ini setelah LAA 1966 dikuatkuasakan. Kajian oleh Chan Heng Chee dan Sharon Siddique (2019) membincangkan pembentukan perpaduan masyarakat di Singapura melalui adalah melalui pembangunan semula petempatan masyarakat di negara ini. Kerajaan berjaya menyediakan kediaman baharu yang lebih tersusun dan moden untuk masyarakat melalui pembinaan perumahan baharu yang dikendalikan sebuah syarikat oleh *Housing and Development Board* (HDB). Walaupun kajian ini menyatakan HDB berjaya menyelesaikan permasalahan petempatan masyarakat di negara ini, namun begitu, kajian ini tidak memperincikan implikasi pembinaan HDB ini terhadap masyarakat minoriti di negara ini, terutamanya terhadap masyarakat Melayu sehingga perkara ini diperbesarkan oleh segelintir ahli politik pembangkang seperti Jeyaretnam dari Parti Buruh yang menyatakan kerajaan sengaja

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menyusun semula petempatan untuk membolehkan PAP mendominasi politik negara ini.

Dapatan kajian oleh Hussin Mutalib (2012) dan Rizwana Abdul Azeez (2016) membincangkan mengenai kelangsungan politik masyarakat Melayu dan Islam di Singapura berdasarkan kepada dasar dan tindakan yang dilakukan oleh kerajaan PAP di negara ini. Kedua-dua kajian ini menyatakan masyarakat Melayu di negara ini berjaya menyesuaikan diri dengan tindakan dari kerajaan yang mengutamakan masyarakat Cina dalam beberapa aspek seperti pendidikan, biasiswa dan perkhidmatan awam. Walaupun begitu, kajian ini tidak membincangkan dengan lebih terperinci kesan yang berlaku terhadap masyarakat Melayu di negara tersebut, terutamanya selepas kerajaan mengambil tanah melalui LAA 1966 yang mengakibatkan perkampungan masyarakat Melayu yang berusia ratusan tahun 'hilang' dari peta Singapura.

Berdasarkan kepada kajian oleh sarjana terdahulu mengenai perlaksanaan undang-undang dan pembangunan sosioekonomi Singapura, rata-rata kajian yang dilakukan hanya membincangkan perkara ini secara umum tanpa memperincikan kesan yang berlaku terhadap masyarakat Melayu, terutamanya implikasi dari perlaksanaan LAA 1966. Sehubungan itu, kajian yang akan dilakukan ini akan memperincikan penguatkuasaan LAA 1966 dan kesannya terhadap masyarakat Melayu di Singapura dalam konteks politik negara ini.

METODOLOGI

Kajian yang dilakukan berkenaan perlaksanaan LAA 1966 dan implikasi terhadap politik masyarakat Melayu di Singapura ini dilakukan menggunakan kaedah kualitatif berdasarkan analisis kandungan, iaitu proses menyusun data berbentuk teks atau media secara objektif dan sistematik bagi membuat kesimpulan tentang persoalan kajian yang dikaji. Sumber utama yang digunakan dalam perbincangan kajian adalah sumber primer, iaitu dokumen rasmi yang belum diolah meliputi laporan dari jabatan pilihan raya Singapura iaitu *Election Department* (ELD), minit mesyuarat HDB, *hansard* Parlimen yang diperoleh daripada *Singapore National Archive*. Selain itu, kajian ini turut menggunakan sumber dari *National Archive*, Kew seperti *Colonial Office* (CO) dan *Foreign Office* (FO) bagi mendapatkan kesinambungan dari kajian yang dilakukan. Penggunaan sumber primer tersebut penting sebagai bukti utama yang memperincikan perlaksanaan Akta Pengambilan Tanah pada peringkat awal di Singapura, iaitu semasa penjajahan British. Melalui pengunaan sumber primer tersebut, data yang diperoleh adalah secara langsung dari individu yang terlibat. Misalnya fail FCO 141/16510: *Singapore: Informal Meeting with Unofficial Members of the Legislative Council at Government House, 25 April 1919* mengandungi data yang melibatkan laporan minit mesyuarat pentadbiran British di Singapura bersama Gabenor berkenaan dengan dasar dan tindakan yang dilakukan oleh kerajaan. Laporan ini seterusnya diolah dan disesuaikan semula berdasarkan data yang diperoleh dari laporan HDB dan ELD. Di samping itu, kajian ini turut menggunakan akhbar Singapura yang diperoleh dari *Singapore National Archive* seperti Berita Harian dan *The Straits Times* bagi mendapatkan gambaran sebenar situasi politik yang berlaku pada 1960-an-1980-an.

PERKEMBANGAN DAN FUNGSI AKTA PENGAMBILAN TANAH DI SINGAPURA

Pentadbiran British di Singapura memperlihatkan beberapa perubahan yang dilakukan oleh penjajah tersebut. Perubahan yang dilakukan ini mempunyai kepentingan ekonomi untuk mereka dan berperanan melicinkan pentadbiran British di negara

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tersebut. Antara perubahan yang dilakukan oleh British adalah pengenalan terhadap undang-undang dari UK di Singapura. Sejak pentadbiran Negeri-Negeri Selat diperkenalkan pada 1896, pentadbiran British menggunakan undang-undang UK dalam pentadbirannya. Oleh itu berlaku kontradiksi antara masyarakat dan kerajaan kerana sistem undang-undang tersebut tidak sesuai dengan keadaan masyarakat di Singapura (FCO 141/15096). Sistem perundangan tersebut turut merangkumi Ordinan Pengambilan Tanah yang diperkenalkan pada 1920. Sebelum ordinan ini diperkenalkan di Singapura, pentadbiran British merujuk kepada Ordinan Pengambilan Tanah yang dilaksanakan oleh mereka di India pada 1894. Justeru itu, amalan penguatkuasaan undang-undang pengambilan tanah di Singapura mempunyai persamaan dengan perundangan pengambilan tanah di India (Hansard, Vol.122, 15 December 1919).

Dalam mesyuarat Majlis Perundangan Singapura pada November 1919, Setiausaha Negeri-Negeri Selat, Frederick James menyatakan cadangan pengenalan Ordinan Pengambilan Tanah di Singapura supaya tanah di negara ini tidak digunakan sewenang-wenangnya tanpa rundingan dari British, termasuk penjualan kepada masyarakat tempatan. Selain itu, beliau turut menyatakan melalui cadangan perundangan ini, tanah di Singapura boleh ditebus semula oleh kerajaan untuk kegunaan industri dan ekonomi (FCO 141/16510). Sebelum undang-undang ini dilaksanakan, pentadbir British di Singapura bimbang dengan keadaan tanah di Singapura yang semakin terhad. Di samping itu, penjualan hak milik tanah juga tidak terkawal mengakibatkan perkara ini berlaku. Justeru itu, Frederick James mencadangkan kepada kerajaan agar melaksanakan undang-undang tanah yang ketat di Singapura (FCO 141/16510). Oleh demikian, Gabenor Negeri-Negeri Selat, Laurence Guillemard meluluskan Ordinan Pengambilan Tanah pada 1920 yang bertujuan mengawal rizab tanah milik kerajaan supaya boleh ditebus guna semula untuk tujuan pembangunan sosioekonomi masyarakat dan negara (FCO 141/16510).

JADUAL 1. Keluasan Tanah Rizab Kerajaan di Singapura, 1890-1930

Tahun	Keluasan Tanah (ekar)
1890	33,943
1895	30,751
1900	27,360
1905	25,695
1910	21,270
1915	19,163
1920	22,420
1925	25,963
1930	29,254

Sumber: Annual Report on the Social and Economic Progress of the People of the Straits Settlements, 1891-1931. London: H. M. Stationery Office

Melalui perlaksanan Ordinan Pengambilan Tanah ini, pentadbiran British di Singapura berjaya menebus semula tanah di negara ini. Jadual 1 membincangkan keluasan rizab yang dimiliki oleh kerajaan British di Singapura dalam tempoh 1890-1930. Berdasarkan kepada jadual tersebut, jumlah keluasan tanah rizab milik kerajaan merosot dengan ketara dalam tempoh 1890-1920. Jumlah susut paling ketara adalah pada 1915, iaitu memperlihatkan jumlah keluasan tanah rizab milik kerajaan hanya 19,163 ekar berbanding 33,943 ekar pada 1890. Kemerosotan ini berlaku disebabkan oleh pembangunan yang dilakukan oleh kerajaan. Misalnya pada 1900-1913, jumlah tanah yang digunakan oleh kerajaan adalah 9,264 ekar bagi pembinaan rumah kedai dan kemudahan jalan raya untuk tujuan ekonomi (Annual Reports, 1914). Namun begitu, tempoh 1920-1925 memperlihatkan keluasan tanah rizab milik kerajaan meningkat semula iaitu dari 19,163 ekar pada 1915 kepada 19,163 ekar pada 1920 dan 25,963 pada 1925. Sehubungan itu, peningkatan keluasan tanah rizab kerajaan ini menunjukkan British berjaya mengawal pengunaan tanah di Singapura melalui

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perlaksanaan Ordinan Pengambilan Tanah yang diperkenalkan pada 1920.

Seterusnya, perkembangan politik di Singapura memperlihatkan negara ini merdeka sepenuhnya dari British berdasarkan kepada penyertaan negara ini dalam Persekutuan Malaysia pada 1963. Walaupun begitu, Singapura berpisah dari Persekutuan Malaysia pada 1965 dan perkara ini menyebabkan negara itu ditadbir sepenuhnya oleh kerajaan PAP melalui pimpinan Perdana Menteri, Lee Kuan Yew. Pertadbiran kerajaan pimpinan Lee Kuan Yew memperlihatkan kerajaan melakukan proses semakan semula terhadap perlembagaan negara ini. Lee Kuan Yew menyatakan perlembagaan negara perlu digubal semula mengikut acuan rakyat dan negara ini (*The Straits Times*, 19 September 1965). Antara undang-undang yang disemak semula adalah Ordinan Pengambilan Tanah 1920. Semakan semula terhadap ordinan ini dilakukan supaya rang undang-undang yang diperkenalkan dapat dilaksanakan secara menyeluruh bagi negara ini. Cadangan pindaan Ordinan Pengambilan Tanah 1920 ini dibentangkan di Parlimen pada 22 Jun 1966 oleh Menteri Undang-Undang, Edmund Barker. Semasa bacaan kali pertama di Parlimen, beliau menyatakan rang undang-undang Akta Pengambilan Tanah (*Land Acqusition Act* 1966/LAA 1966) bertujuan menguatkuasakan tanah rizab dengan lebih menyeluruh untuk negara (Hansard, Vol. 25, 1966). Selain itu, beliau turut menyatakan LAA 1966 dilaksanakan bukan untuk tujuan politik, sebaliknya adalah bagi melindungi tanah di Singapura, terutamanya untuk tujuan industri negara ini pada masa akan datang (Hansard, Vol. 25, 1966).

Walaupun LAA 1966 ini digazetkan untuk tujuan industri dan ekonomi oleh kerajaan, namun pemimpin dari parti pembangkang melihat perkara ini sebaliknya iaitu untuk tujuan politik kerajaan dan pengukuhan kedudukan PAP. Ketua Pembangkang, Chia Thye Poh dari Barisan Sosialis menyatakan undang-undang ini dilaksanakan bertujuan mengukuhkan kedudukan politk PAP semata-mata, bukan untuk tujuan ekonomi rakyat (The Straits Times, 29 Jun 1966). Oleh itu semasa pengundian, 37 ahli Parlimen bersetuju undang-undang ini diluluskan, manakala ahli Parlimen dari pembangkang, terutamanya dari Barisan Sosialis yang berjumlah 13 orang, sebulat suara membantah undang-undang ini dikuatkuasakan (*The Straits Times*, 30 Oktober 1966).

Perkara ini secara tidak langsung memperlihatkan penentangan LAA 1966 dalam kalangan ahli politik negara ini. Walaupun begitu, Perdana Menteri Lee Kuan Yew menyatakan akta ini berkuatkuasa untuk kerajaan menguruskan tanah di negara ini kerana pihak kerajaan mendapati terdapat segelintir pemilik tanah menjual tanah yang dimiliki untuk keuntungan sendiri. Justeru itu, beliau menyatakan melalui perlaksaaan akta ini, tindakan mendapatkan keuntungan melalui penjualan tanah ini dapat dielakkan, sekali gus membantu kerajaan meningkatkan taraf kehidupan masyarakat di negara ini (*The Straits Times*, 30 Oktober 1966).

TINDAKAN KERAJAAN DAN PENGUATKUASAAN AKTA PENGAMBILAN TANAH, 1966-1990

Penguatkuasaan LAA 1966 yang bermula 17 Jun 1967 memperlihatkan tindakan kerajaan terhadap akta tersebut di Singapura melalui beberapa aspek seperti menebus semula tanah wakaf dan tanah penduduk untuk pembangunan ekonomi serta menyusun semula petempatan baharu. Dari perspektif perundangan, akta tersebut menetapkan peruntukan utama yang menjadikan kerajaan sebagai pihak berkuasa mutlak terhadap pengambilan tanah. Antara peruntukan penting adalah kuasa kerajaan untuk mewartakan mana-mana kawasan sebagai kawasan pengambilan tanah. Setelah sesuatu

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kawasan diisytiharkan dalam Warta Kerajaan, pemilik tanah secara automatik kehilangan hak kawalan penuh terhadap hartanah mereka. Pemilik akan menerima Notis Pemerolehan (*Notice of Acquisition*) dan selepas tempoh tertentu, tanah tersebut menjadi hak milik kerajaan tanpa sebarang ruang untuk bantahan.

Dari sudut pelaksanaan, proses pengambilan tanah melalui akta tersebut terbahagi kepada empat peringkat. Pertama, kerajaan mengisytiharkan kawasan tertentu melalui Warta Kerajaan. Kedua, notis rasmi diserahkan kepada pemilik tanah untuk memaklumkan proses pengambilan. Ketiga, penilaian pampasan dilakukan oleh *Chief Valuer* dengan mengambil kira harga rasmi kerajaan. Keempat, pemilik menerima pampasan sama ada dalam bentuk wang tunai atau unit perumahan *House Development Board* HDB. Setelah kesemua perkara tersebut diselesaikan, kerajaan secara rasmi mengambil alih pemilikan tanah dan menggunakannya untuk tujuan pembangunan seperti pembinaan perumahan awam, jalan raya, atau infrastruktur lain.

Peruntukan dan proses tersebut memberi kesan terhadap pembangunan fizikal Singapura. Kerajaan dapat mempercepatkan projek perumahan awam dan transformasi bandar tanpa halangan perundangan yang besar. Namun, dari sudut masyarakat Melayu, akta tersebut membawa implikasi yang besar. Banyak perkampungan Melayu tradisional di kawasan pinggir bandar dan pusat bandar terhapus, penduduknya dipindahkan ke perumahan HDB dan pola penempatan mereka berubah. Perubahan geografi tersebut seterusnya memberi kesan langsung kepada pola politik dan perwakilan masyarakat Melayu dalam konteks politik Singapura pasca 1966.

Justeru, pemimpin pembangkang menyatakan tindakan yang dilakukan oleh kerajaan itu bukan hanya untuk kesejahteraan rakyat semata-mata, tetapi turut melibatkan tujuan politik. Mengulas mengenai perkara ini, pemimpin parti pembangkang, terutamanya dari parti Melayu seperti Ahmad Haji Taff dari Parti Kebangsaan Melayu Singapura (PKMS) menyatakan Lee Kuan Yew sengaja menyusun semula kedudukan rakyat di Singapura bagi memecahkan undi dan dominasi masyarakat Melayu di negara tersebut. Namun begitu, Lee Kuan Yew menafikan perkara ini dan menyatakan tindakan yang dilakukan oleh kerajaan terhadap perlaksanaan LAA 1966 adalah bagi menyediakan petempatan yang selesa dan lengkap untuk rakyat Singapura (Hansard, Vol 26, 21 December 1967).

Antara tindakan utama yang dilakukan oleh Lee Kuan Yew melalui LAA 1966 adalah menebus semula tanah wakaf dan tanah yang dimiliki secara kekal oleh pegawai British semasa mereka mentadbir negara ini. Pada 1960-an, tanah di Singapura kebanyakan dimiliki oleh pelabur tempatan dan luar secara persendirian serta dimiliki oleh syarikat asing, terutamanya dari British. Sehingga 1964, keluasan tanah yang dimiliki oleh syarikat British di Singapura berjumlah 478 ekar, manakala tanah yang dimiliki oleh warga asing adalah 381 ekar. (Singapore Land Report, 1966). Lee Kuan Yew berpandangan pemilikan tanah oleh warga asing dan syarikat luar akan merumitkan usaha kerajaan untuk membangunkan semula ekonomi negara ini (*The Straits Times,* 27 Mei 1967). Justeru itu, Menteri Pembangunan Negara, Lim Kin San dan Menteri Undang-Undang, Edmund Barker bekerjasama bagi mengambil semula tanah yang dimiliki secara wakaf dan persendirian oleh warga asing bagi tujuan pembangunan semula (Singapore Land Report, 1969). Perkara ini dibentangkan di Parlimen Singapura pada 19 December 1968. Menteri Menteri Pembangunan Negara, Lim Kin San menyatakan kerajaan perlu mengambil alih semula tanah di Singapura untuk tujuan pembangunan semula ekonomi. Tindakan tersebut dilakukan mengikut undang-undang yang diperuntukan iaitu melalui LAA 1966.

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Usul tersebut diluluskan secara sebulat suara di Parlimen pada 31 November 1969 (Hansard, Vol. 28, 19 December 1968).

Ekoran dari kelulusan dasar itu, kerajaan mula melakukan proses pengambilalihan tanah di Singapura bermula dengan tanah wakaf. Tindakan ini dilakukan melalui penguatkuasaan LAA 1966. Tindakan tersebut tidak bercanggah dengan Islam kerana pengambilan tanah demi kepentingan awam dibenarkan syarak. Dalam konteks perundangan Singapura, pampasan tersebut diserahkan kepada Majlis Agama Islam Singapura (MUIS) sebagai pemegang amanah tanah waqaf. Perkara tersebut dapat dilihat berdasarkan kepada kes yang berlaku pada 2019 iaitu melibatkan pertikaian tanah yang diwakafkan oleh Haji Kassim di Siglap. Ahli keluarga Haji Kassim, Fauziyah Mohd Ahbidin menuntut dua per tiga dari tanah itu. Walaupun begitu, tanah itu diletakkan dibawah MUIS sejak 1960-an dan akhirnya diambil alih kerajaan pada 1989. Mahkamah Tinggi pada 2019 menolak tuntutan Fauziyah dan menegaskan bahawa Haji Kassim seorang bermazhab Shafi‘i dan menurut hukum Shafi‘i, wakaf keseluruhan harta adalah sah. Oleh itu, keluarga tidak lagi mempunyai hak ke atas tanah tersebut (High Court Suit No 152 of 2019). Kes tersebut menunjukkan mengenai undang-undang Islam mengenai wakaf digabungkan dalam sistem perundangan Singapura, serta mengesahkan kuasa kerajaan dan institusi agama dalam mengurus serta mengambil alih tanah wakaf bagi tujuan pembangunan.

Pengambilalihan tanah wakaf oleh kerajaan Singapura menimbulkan kontroversi pada peringkat awal. Namun begitu, kerajaan menyatakan matlamat asal tanah wakaf tersebut digunakan untuk pembangunan ekonomi masyarakat, namun disalahgunakan sebagai tempat kediaman oleh masyarakat Melayu dan Islam (*The Straits Times*, 16 Januari 1969). Menteri Pembangunan Negara, Lim Kin San menyatakan penyalahgunaan tanah wakaf tersebut dapat dilihat berlaku di beberapa kawasan yang kemudiannya berkembang menjadi kampung oleh masyarakat Melayu di Singapura seperti Kampung Ladang, Kampung Pinang dan Kampung Sungai Blukar di Tanglin (*The Straits Times*, 16 Januari 1969). Sebahagian tanah di kawasan itu merupakan tanah wakaf milik Keluarga al-Sagoff dan diwakafkan untuk tujuan pembangunan ekonomi negara. Namun begitu, tanah wakaf ini disalahgunakan sebagai petempatan masyarakat. Justeru itu, kerajaan bertindak untuk mengambil semula tanah itu atas nama pembangunan semula petempatan baharu di negara ini (Hansard, Vol 28, 19 December 1968).

Selain pengambilan tanah wakaf, kerajaan Singapura turut memulakan langkah dengan mengambil semula tanah yang menjadi petempatan masyarakat Melayu di Singapura atas alasan penyusunan semula petempatan masyarakat di negara ini. Perdana Menteri, Lee Kuan Yew menyatakan petempatan masyarakat di negara ini perlu disusun semula supaya mempunyai kehidupan yang selesa dan moden. Selain itu, beliau turut menyatakan petempatan sedia ada tersebut tidak mempunyai kemudahan yang lengkap, terutamanya sekolah dan aspek kebersihan yang tidak sistematik. Oleh itu pada 1969-1971, kerajaan menggunakan LAA 1966 untuk mengambil semula tanah di Queesntown, Aljunied, Jalan Besar dan Tanglin bagi menyusun semula petempatan masyarakat dan zon perniagaan di kawasan tersebut (URA Annual Report, 1975).

Pengambilan tanah di kawasan ini menjadi kontroversi di Singapura kerana melibatkan petempatan masyarakat, terutamanya dalam kalangan bangsa Melayu di negara ini. Perkara tersebut dijadikan sebagai modal politik bukan sahaja dalam kalangan ahli politik di Singapura, malah turut dijadikan isu oleh ahli politik dari Semenanjung Malaysia seperti pemimpin UMNO di Johor. Pengerusi UMNO Johor, Othman Saat menyatakan kerajaan

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Singapura dibawah PAP tidak melindungi kedudukan masyarakat Melayu di negara tersebut dan tidak bertindak adil kepada mereka (Utusan Melayu, 28 Mac 1970). Turut senada dengan UMNO Johor, Selamat Shamsuri iaitu Naib Presiden Persatuan Kebangsaan Melayu Singapura (PKMS), sebuah parti pembangkang di Singapura. Beliau menyatakan kerajaan hanya mengutamakan masyarakat Cina, oleh itu kedudukan masyarakat Melayu di negara ini terpinggir berbanding kaum lain (Berita Harian, 29 Mei 1970). Walaupun begitu, Perdana Menteri, Lee Kuan Yew menafikan pengambilan tanah ini adalah bentuk penindasan yang dilakukan oleh kerajaan. Beliau menyatakan tanah-tanah ini diambil dengan bayaran pampasan dan tujuan pengambilan tanah itu adalah untuk pembangunan semula negara ini (Berita Harian, 29 Mei 1970).

Sehingga 1986, tanah seluas 27,629 ekar berjaya diambil alih semula oleh kerajaan Singapura melalui LAA 1966 atas alasan pembangunan semula. Tanah ini bukan sahaja yang dimiliki oleh warga dan syarikat asing, tetapi turut melibatkan tanah yang dimiliki oleh rakyat tempatan (URA Annual Report, 1988). Justeru itu, LAA 1966 ini berjaya menjadikan kerajaan Singapura sebagai pemilik tanah terbesar di negara ini dengan jumlah keluasan rizab negara iaitu 43,779 ekar iaitu meliputi 77.4 peratus tanah di Singapura (URA Annual Report, 1988). Jumlah keluasan ini bertambah setelah akta ini dikuatkuasakan. Kerajaan Singapura berjaya menggunakan akta ini bagi menebus semula tanah yang ada di negara ini atas nama pembangunan semula tanah di kawasan yang diambil alih itu. Melalui LAA 1966, pampasan yang diberikan kepada pemilik tanah adalah terhad dan dikawal sepenuhnya oleh kerajaan. Nilai pampasan turut ditentukan berdasarkan harga pasaran terbuka dan bergantung kepada penilaian rasmi oleh *Chief Valuer* yang dilantik kerajaan. Selain bayaran tunai, kerajaan turut menawarkan rumah kos rendah HDB sebagai bentuk penggantian kediaman. Walaupun langkah tersebut memastikan penduduk mempunyai tempat tinggal baharu, namun perkara tersebut mengubah cara hidup mereka secara drastik iaitu daripada kehidupan berasaskan kampung dengan jaringan komuniti tradisi, kepada kehidupan berasaskan bandar.

Jadual 2 membincangkan peningkatan keluasan tanah rizab yang dimiliki oleh kerajaan Singapura pada 1965-1990. Pada 1965, sebelum akta ini dikuatkuasakan, jumlah keluasan rizab tanah milik kerajaan di Singapura hanya berjumlah 22,478 ekar sahaja. Walaupun begitu, jumlah ini meningkat secara beransur-ansur. Misalnya pada 1970, jumlah keluasan tanah rizab yang dimiliki kerajaan adalah 29,815 ekar. Jumlah ini seterusnya meningkat kepada 33,571 ekar pada 1975 dan 37,193 ekar pada 1980. Jumlah keluasan pada 1985 mencapai kemuncak iaitu berjumlah 43,779 ekar tanah rizab yang dimiliki oleh kerajaan. Walaupun begitu, jumlah keluasan rizab tanah yang dimiliki oleh kerajaan Singapura pada 1990 merosot kepada 38,852 ekar kerana banyak pembangunan yang dilakukan oleh kerajaan seperti pembinaan Pusat Perindustrian Jurong dan juga petempatan baharu masyarakat di negara ini.

JADUAL 2. Jumlah Keluasan Tanah Rizab Kerajaan Singapura, 1965-1990

Tahun	Jumlah Keluasan (Ekar)
1965	22,478
1970	29,815
1975	33,571
1980	37,193
1985	43,779
1990	38,852

Sumber: Singapore Land Authority Annual Report, 1960-1990.

Berdasarkan jumlah keluasan tanah yang diperoleh semula melalui LAA 1966 ini, kerajaan Singapura mengemukakan rancangan membina semula petempatan masyarakat di negara ini. Menurut Perdana Menteri, Lee Kuan Yew, petempatan semula masyarakat dilakukan

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berdasarkan kepada Dasar Penempatan Negara yang memastikan taraf sosial rakyat iaitu pendidikan, kesihatan dan ekonomi terjamin (*The Straits Times*, 19 Julai 1973). Ekoran dari dasar ini, kerajaan Singapura menubuhkan sebuah jawatankuasa khas bagi penyusunan semula petempatan masyarakat melalui *Housing and Development Board* (HDB). HDB adalah sebuah badan khas yang ditubuhkan oleh kerajaan Singapura pada 1960 bagi menyediakan petempatan baharu kepada masyarakat di negara tersebut. Melalui HDB, kerajaan merancang untuk membina sebanyak 2,000,000 buah perumahan baharu di Singapura menjelang 2000.

JADUAL 3. Jumlah Pembinaan Rumah oleh HDB, 1960-1990

Tahun	Jumlah
1960	34,109
1965	79,781
1970	101,426
1975	157,921
1980	334,444
1985	749,281
1990	1,341,619

Sumber: Urban Redevelopment Authority Annual Report, 1960-1990

Rancangan kerajaan Singapura melalui projek penyediaan perumahan di negara tersebut dikendalikan sepenuhnya oleh HDB bermula dengan 1960. Pada tahun tersebut, sebanyak 34,109 buah perumahan yang berjaya dibina oleh HDB di Jalan Stirling. Sehingga 1990, sebanyak 1,341,619 buah rumah berjaya dibina oleh kerajaan melalui HDB. Jadual 3 membincangkan jumlah rumah yang dibina oleh HDB pada 1960 hingga 1990. Pada 1960, iaitu pada tahun pertama HDB ditubuhkan, sebanyak 34,109 buah rumah berjaya dibina di Singapura. Tempoh ini merupakan percubaan yang dilakukan kerajaan Singapura berdasarkan kepada tindakan menyusun semula petempatan di negara itu. Ekoran pembinaan rumah oleh HDB ini memperlihatkan kejayaan kerajaan menyusun semula petempatan masyarakat di negara ini, kerajaan meningkatkan jumlah pembinaan rumah baharu ini pada tahun berikutnya. Oleh itu jumlah pembinaan rumah oleh HDB ini semakin meningkat iaitu 79,781 buah dibina pada 1965 dan meningkat kepada 101,426 buah pada 1970. Setelah LAA 1966 dikuatkuasakan di Singapura, kerajaan berjaya meningkatkan pembinaan rumah dengan ketara. Oleh demikian, sebanyak 157,921 buah rumah berjaya dibina oleh HDB pada 1975. Jumlah ini terus meningkat pada 1980 iaitu 334,444 buah rumah dibina. Pada 1985, jumlah ini meningkat kepada 749,281 buah dan 1,341,619 buah rumah berjaya dibina oleh HDB pada 1990.

Jumlah ini membuktikan kerajaan berjaya menyediakan perumahan kepada masyarakat di negara ini. Rajah 1 menunjukkan contoh rumah yang dibina oleh HDB di Singapura. Berdasarkan kepada rajah tersebut, unit rumah yang dibina oleh HBD ini adalah jenis pangsapuri dan mempunyai dua kategori iaitu kediaman dua bilik dan kediaman tiga bilik. Pembinaan rumah oleh HDB ini menunjukkan petempatan baharu yang disediakan oleh kerajaan ini lebih tersusun berbanding kawasan kampung secara tradisional. Di samping itu, pembinaan rumah oleh HDB ini juga dapat menjimatkan penggunaan ruang tanah di negara ini (Hansard, Vol. 28, 19 December 1968). Tindakan ini dilakukan setelah LAA 1966 dikuatkuasakan. Perkara tersebut sekali gus membuktikan fungsi LAA 1966 yang dipraktikkan oleh kerajaan.

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RAJAH 1. Contoh Rumah yang dibina oleh HDB di Singapura

Sumber: HDB Annual Report, 1981

Selain itu, pembinaan perumahan HDB ini turut memperlihatkan matlamat kerajaan untuk menyusun semula petempatan masyarakat di negara ini melalui polisi khas yang digariskan oleh kerajaan iaitu *Ethnic Intergration Policy* (EIP). Setelah LAA 1966 dikuatkuaskan, sebahagian besar tanah persendirian, termasuk kawasan kampung tradisional Melayu, diambil alih oleh kerajaan dan digantikan dengan perumahan HDB. Namun begitu, penempatan semula melalui HDB turut melibatkan syarat yang mempengaruhi struktur sosial penduduk iaitu dasar EIP. Dasar EIP menetapkan had kuota etnik dalam setiap blok HDB bagi memastikan tiada kelompok etnik mendominasi sesuatu kawasan perumahan. Secara rasional, dasar tersebut dilaksanakan untuk menggalakkan integrasi sosial dan membina identiti kebangsaan bersama dalam sebuah negara majmuk.

Dasar EIP mula dirangka pada awal 1970-an oleh kerajaan, namun mula dikuatkuasakan dan diisytiharkan secara rasmi pada 1989. Pada 1970-an, Perdana Menteri, Lee Kuan Yew menyatakan petempatan masyarakat di Singapura masih 'ditakluk' stigma lama iaitu petempatan berasaskan kepada kaum (Berita Harian, 28 Mac 1988). Perkara ini secara tidak langsung memberi kesan terhadap rancangan kerajaan untuk membentuk perpaduan di Singapura. Oleh itu kerajaan memperkenalkan *Ethnic Intergration Policy* agar petempatan berasaskan kepada kaum di negara tersebut dapat dihapuskan. Pembinaan perumahan melalui HDB sebelum ini hanya berjaya mencapai objektif menyusun semula petempatan masyarakat di negara itu. Namun dari segi ukuran pembentukan perpaduan dalam kalangan masyarakat di negara ini, matlamat itu gagal dicapai kerana masyarakat di Singapura masih menjadikan kediaman oleh HDB ini mengikut kaum tertentu (Connie Carter, 2021). Perkara ini menyebabkan setiap perumahan itu diduduki mengikut kelompok kaum, sekaligus menjadikan kaum tertentu mendominasi kawasan tersebut.

Rajah 2 menunjukkan kawasan perumahan HDB yang dibeli mengikut kaum di Singapura. Berdasarkan kepada rajah tersebut, masyarakat Melayu di Singapura menjadikan bahagian Bedok, Tampines, Ayer Rajah dan dan Teban Gardens. Masyarakat Cina pula menjadikan bahagian Ang Mo Kio, Hougang dan Telok Ayer, sebagai kawasan petempatan. Masyarakat

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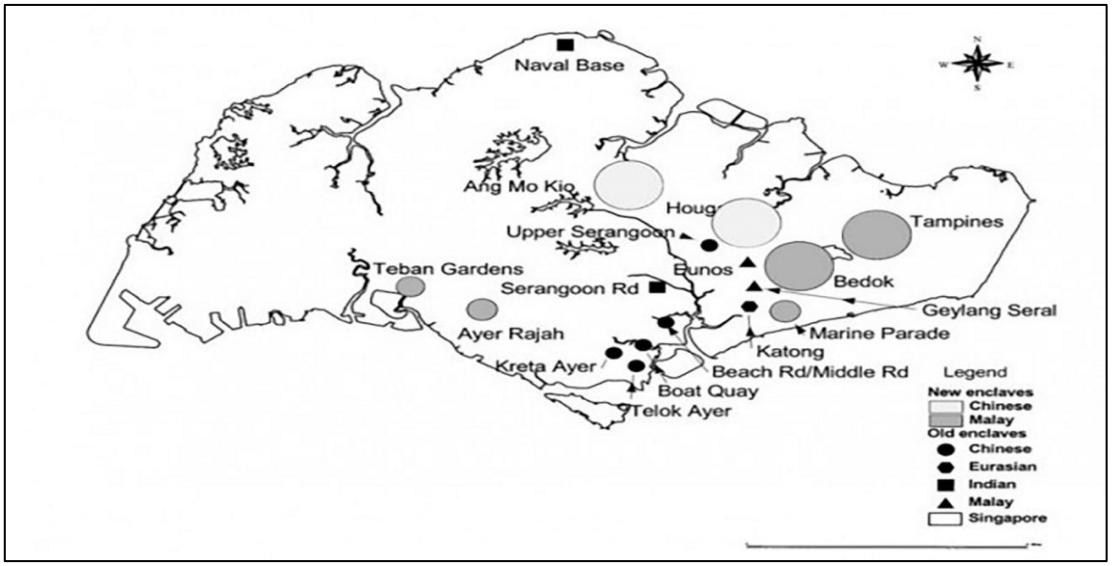
India pula menjadikan kawasan Serangoon dan Sembawang. Situasi ini secara tidak langsung menunjukkan masyarakat di negara tersebut masih memilih kediaman bedasarkan kepada kaum walaupun kerajaan melakukan proses penyusunan semula melalui HDB.

RAJAH 2. Petempatan Mengikut Kaum pada Blok HDB, Singapura, 1980-1989



Sumber: Minutes of Meeting HDB, HDB Annual Report 1981.

Justeru itu, kerajaan mula melaksanakan *Ethnic Intergration Policy* bagi memecahkan petempatan berasaskan kaum di negara tersebut. Melalui dasar etnik ini, kerajaan menetapkan setiap petempatan atau blok pangsapuri yang dibina oleh HDB mempunyai 67 peratus masyarakat Cina, 22 peratus masyarakat Melayu, dan 10 peratus India dan lain-lain tidak melebihi satu peratus (Hansard, Vol. 54, 4 August 1989). Melalui syarat ini, setiap perumahan yang dibina oleh HDB ini akan dihuni oleh setiap kaum yang ada di negara ini dan tidak didominasi oleh kaum tertentu. Walaupun begitu, dasar kerajaan ini ditentang oleh ahli politik dan persatuan badan bukan kerajaan (NGO). Mereka menyatakan perkara ini dilakukan bagi memecahkan kedudukan masyarakat Melayu di negara ini. Antara pihak yang paling lantang menentang tindakan ini adalah Persatuan Perniagaan Melayu Singapura (*Singapore Malay Chamber of Commerce*/SMCC) dan Majlis Pusat Singapura (MPS). Pengerusi MPS, Haji Suratman menyatakan tindakan yang dilakukan oleh kerajaan ini menentang hak kebebasan masyarakat untuk memilih kawasan kediaman sendiri. Manakala Pengerusi SMCC, Abdul Jalil Haron menyatakan kerajaan berusaha untuk mengelakkkan dominasi masyarakat Melayu di sesetengah tempat di negara ini (Berita Harian, 19 Mei 1989). Walaupun begitu, perkara ini dinafikan oleh Perdana Menteri, Lee Kuan Yew. Beliau menyatakan polisi ini membentuk perpaduan dalam kalangan masyarakat di negara ini. (*The Straits Times*, 17 Jun 1989).

Secara asasnya, kerajaan berjaya menyusun semula petempatan masyakarat di Singapura melalui LAA 1966. Penguatkuasaan akta ini membolehkan kerajaan Singapura mendapatkan semula tanah di negara ini. Perkara ini sekali gus membolehkan perumahan baharu dibina oleh HDB. Walaupun begitu, tindakan ini memperlihatkan berlakunya kesan negatif terhadap masyarakat Melayu, terutamanya setelah tanah diambil alih oleh kerajaan. Situasi ini mengakibatkan kampung tradisi

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tersebut 'lenyap' dalam peta Singapura. Oleh demikian, tindakan tersebut secara tidak langsung memberi kesan terhadap politik Melayu, lebih-lebih lagi melibatkan persempadanan dan kerusi yang menjadi faktor penting dalam konteks pilihan raya negara ini.

KESAN PENGUATKUASAAN LAA 1966 TERHADAP POLITIK MELAYU DI SINGAPURA

Perlaksanaan LAA 1966 di Singapura memperlihatkan berlaku kesan postif terhadap masyarakat negara ini, terutamanya setelah kerajaan menggunakan tanah itu bagi menyusun semula petempatan masyarakat di Singapura melalui pembinaan perumahan oleh HDB. Melalui pembinaan ini, sosioekonomi masyarakat lebih terjamin kerana petempatan yang selesa dan tersusun yang disediakan oleh kerajaan. Walaupun begitu, pembinaan perumahan HDB dan tindakan pindah milik hak tanah turut meninggalkan kesan negatif terhadap masyarakat di Singapura, terutamanya dalam kalangan masyarakat Melayu. Oleh itu, perlaksanaan tindakan ini ditentang oleh sebahagian ahli politik di negara ini, terutamanya dari pihak pembangkang. Mereka menganggap tindakan yang dilakukan oleh kerajaan pimpinan PAP bertujuan mengukuhkan kedudukan PAP terhadap politik negara ini.

Antara pihak yang paling lantang menyuarakan rasa tidak puas hati terhadap perlaksanaan LAA 1966 dari kerajaan adalah Abdul Rahim dari Barisan Sosialis dan Ariff Sahul Hameed dari *Workers Party*. Mereka menyatakan tindakan yang dilakukan oleh kerajaan secara tidak langsung menghilangkan identiti masyarakat Melayu secara beransur-ansur. Manakala Amir Ali Mohamed dan Omar Ninggal dari *United National Front* (UNF) pula menganggap tindakan yang dilakukan oleh Lee Kuan Yew ini bertujuan mengukuhkan kedudukan politik PAP melalui penguasaan masyarakat di negara tersebut (Berita Harian, 14 Ogos, 1971). Walaupun begitu, perkara tersebut dinafikan oleh Lee Kuan Yew dan pemimpin PAP yang lain. Lee Kuan Yew menyatakan perlaksanaan akta ini tidak mempunyai hubungkait dengan politik PAP, tetapi dilakukan bagi menstrukturkan semula petempatan masyarakat di Singapura bagi memajukan negara ini. Othman Wok, Ahli Jawatankuasa Pusat PAP, merangkap Menteri Hubungan Sosial Singapura pula menyatakan masyarakat Melayu di Singapura supaya mendapatkan maklumat yang tepat dan menasihatkan masyarakat Melayu supaya tidak terpengaruh dengan dakwaan pembangkang bahawa kerajaan pimpinan PAP menindas komuniti tersebut di Singapura (Berita Harian, 14 Ogos, 1971).

Walau bagaimanapun, kenyataan dari kerajaan ini tidak diendahkan oleh pemimpin dari parti pembangkang. Mereka menyatakan tindakan yang dilakukan oleh kerajaan melalui LAA 1966 dan penyusunan semula petempatan masyarakat ini memberi kesan terhadap masyarakat Melayu di negara ini. Antara kesan tersebut adalah kehilangan kampung tradisi masyarakat Melayu di Singapura (Berita Harian, 23 Ogos 1971). Pembangunan semula petempatan masyarakat memperlihatkan kerajaan menguatkuasakan LAA 1966, situasi ini sekali gus menyebabkan kampung tradisi masyarakat Melayu di Singapura seperti Kampung Tanjong, Kampung Reteh, Kampung Beremban, Kampung Sungai Belukar dan Kampung Sungai Tangan 'hilang' dari peta Singapura dalam tempoh 1970-an hingga 1980-an (Berita Harian, 23 Ogos 1971). Perkara ini menjadi polemik dalam kalangan pemimpin parti pembangkang, terutamanya dalam kalangan parti Melayu di Singapura, terutamanya semasa kempen pilihan raya umum.

Ekoran dari 'kehilangan' perkampungan Melayu ini, demografi politik di Singapura turut mengalami perubahan, terutamanya apabila tiada kerusi majoriti pengundi Melayu di Singapura.

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Perkara ini yang menjadi faktor utama penentangan pemimpin politik parti pembangkang, terutamanya dalam kalangan parti Melayu seperti PKMS kerana kelangsungan politik mereka seolah-olah 'ditamatkan' sejak penyusunan semula petempatan masyarakat di negara tersebut. Situasi ini dapat dilihat setelah persempadanan semula kawasan pilihan raya diumumkan pada 1979. Pengumuman kerusi baharu di Singapura oleh *Elections Department Singapore* (ELD) memperlihatkan perubahan yang berlaku terhadap kerusi yang dipetandjngkan di negara tersebut. Perubahan jni bukan sahaja merangkumi pertambahan jumlah kerusi yang dipertandingkan, malah turut melihatkan perubahan kedudukan serta garisan sempadan kerusi yang dipertanding.

Berdasarkan kepada laporan persempadanan oleh ELD pada 1979, sebanyak 75 kerusi yang dipertandingkan pada Pilihan Raya Umum Singapura 1980 (PRUS 1980). Jumlah kerusi yang dipertandingkan tersebut meningkat kepada 75 kerusi berbanding 69 kerusi pada Pilihan Raya Umum Singapura 1976 (*Report of Singapore Parliamentary Electoral Division*, 1979). Walaupun begitu, PRUS 1980 memperlihatkan tiada kerusi majoriti pengundi Melayu seperti PRUS yang lalu. Perkara ini menyebabkan pemimpin parti pembangkang mempersoalkan tindakan persempadanan semula yang dilakukan oleh ELD. Pemimpin politik dari parti pembangkang mendakwa ELD berat sebelah dan lebih cenderung terhadap PAP kerana hampir semua kerusi yang dibentuk merupakan kerusi majoriti pengundi Cina dan tiada kerusi majoriti pengundi Melayu seperti pilihan raya sebelum ini. Pengerusi PKMS, Abdul Rahman Mohamed Zin menyatakan garisan sempadan kerusi yang baharu ini memperlihatkan lebih banyak kerusi majoriti pengundi Cina yang dibentuk dan kedudukan politik Melayu semakin terancam (Berita Harian, 29 Julai 1979).

Sejak pilihan raya mula dilaksanakan secara menyeluruh di Singapura pada 1955, terdapat kerusi majoriti pengundi Melayu iaitu kerusi Kampong Kembangan, Siglap dan Southern Islands. Ketiga-tiga kerusi ini menjadi kawasan yang melibatkan persaingan parti politik Melayu di Singapura iaitu PKMS, PAP dan Kesatuan Melayu. Malah kerusi ini turut ditandingi oleh parti dari Malaysia seperti UMNO dan PAS yang bertanding dari PRUS 1955 sehingga PRUS 1968 (*Reports of Parliamentary Election, 1968*). Namun begitu, selepas persempadanan semula kawasan pilihan raya dilakukan pada 1979, kerusi ini dipecahkan sebagai kawasan baharu. Misalnya kerusi Siglap dipecahkan kepada dua bahagian iaitu Bedok dan Siglap. Kerusi Kampong Kembangan dipecahkan kepada tiga kerusi iaitu Kampong Kembangan, Kampung Ubi dan Aljunied (*Report of Singapore Parliamentary Electoral Division, 1979*).

Rajah 3 membincangkan persempdanan semula kawasan pilihan raya yang berlaku terhadap kerusi Kampong Kembang iaitu antara kerusi majoriti pengundi Melayu di Singapura. Pada PRUS 1955-1976, kerusi Kampong Kembangan ini merupakan kerusi majoriti pengundi Melayu. Demografi pengundi di kerusi ini dalam tempoh tersebut adalah 57.3 peratus pengundi Melayu, 29.6 peratus pengundi Cina dan 13.1 peratus pengundi India. Namun selepas akta LAA 1966 dikuatkuasakan dan tindakan kerajaan menetapkan *Ethnic Intergration Policy* terhadap perumahan yang dibina oleh HDB, berlaku perubahan terhadap demografi kerusi ini. Demografi pengundi ini berubah setelah persempadanan dilakukan pada 1979, seterusnya menjadikan kerusi ini sebagai kerusi campuran. Oleh itu pada PRUS 1980, demografi pengundi di Kampung Kembangan memperlihatkan 43.9 peratus pengundi Melayu, 36.7 pengundi Cina dan pengundi India 19.4 peratus (*Report of Singapore Parliamentary Electoral Division, 1979*).

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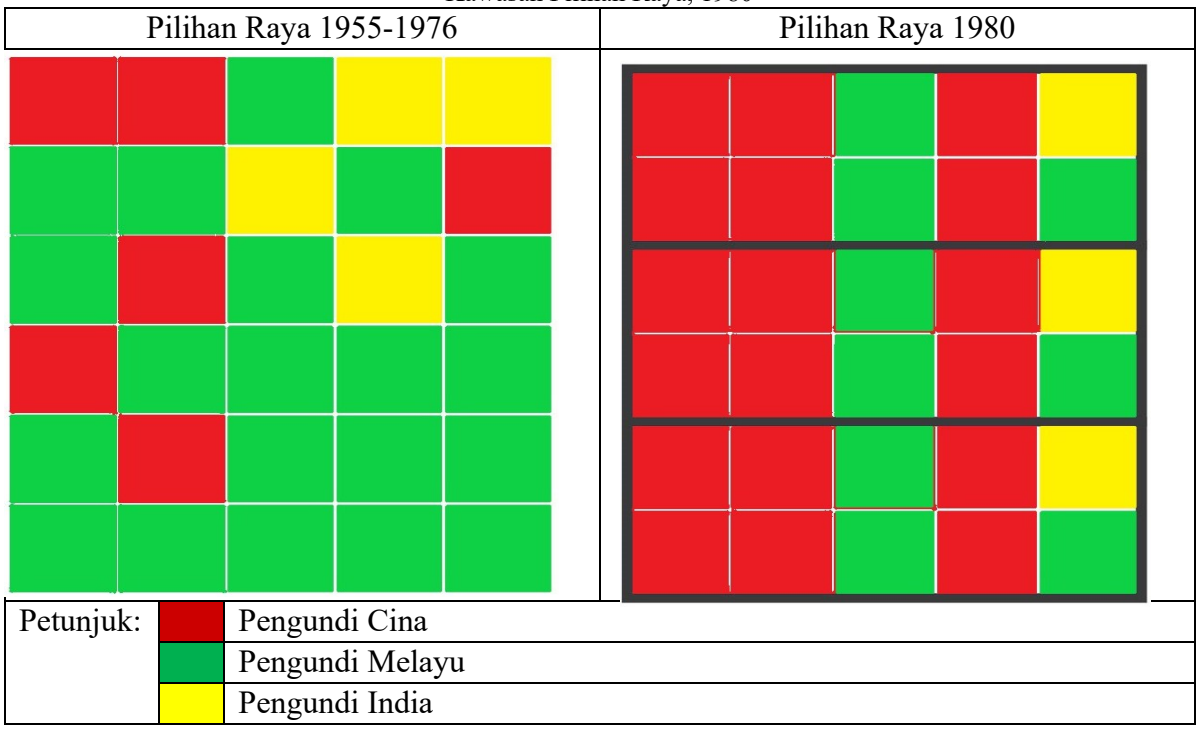
RAJAH 3. Perbezaan Demografi Pengundi Kerusi Kampong Kembangan Selepas Persempadanan Semula Kawasan Pilihan Raya, 1980



Sumber: Report of Singapore Parliamentary Electoral Division, 1979, Election Department.

Sehubungan perkara itu, ketiadaan kerusi majoriti pengundi Melayu di Singapura menyebabkan parti yang berteraskan masyarakat Melayu gagal memberi persaingan sengit terhadap politik negara ini. Sokongan dari pengundi Melayu semata-mata menyebabkan parti Melayu yang bertanding gagal memenangi kerusi setiap kali PRUS diadakan. Untuk menang pada kerusi yang dipertandingkan tersebut, setiap calon dari parti itu perlu mendapatkan sokongan dari pengundi Cina dan pengundi India kerana kerusi yang dibentuk dari persempadanan baharu memeperlihatkan banyak kerusi campuran (Berita Harian, 29 Julai 1979). Oleh itu bermula PRU 1980, jumlah parti Melayu yang mengambil bahagian untuk bertanding pada PRUS semakin merosot.

Justeru itu, kemerosotan parti Melayu yang terlibat dalam pilihan raya ini diambil peluang oleh PAP untuk mengukuhkan kedudukan parti itu terhadap politik Singapura, terutamanya dalam kalangan masyarakat Melayu di negara tersebut. Oleh itu, bermula dengan pilihan raya 1968, PAP berjaya menang semua kerusi yang dipertandingkan di negara tersebut, termasuk kerusi pengundi Melayu (Report of Parliamentary Election, 1968). Sebelum LAA 1966 dan perumahan HDB mengubah demografi pengundi, kerusi majoriti pengundi Melayu seperti kerusi Kampung Kembangan merupakan kubu terhadap parti pembangkang, terutamanya yang membawa agenda untuk masyarakat Melayu. Sejak PRUS 1955, kerusi Kampong Kembangan dimenangi oleh parti Melayu seperti UMNO pada PRUS 1955 dan PRUS 1959. Perkara ini secara tidak langsung membuktikan gerakan politik Melayu di Singapura memberi ancaman terhadap kedudukan PAP di negara ini. Oleh demikian, kerajaan PAP melalui Lee Kuan Yew melaksanakan LAA 1966 dan menetapkan kuota berdasarkan *Ethnic Intergration Policy* supaya petempatan masyarakat di negara ini tidak

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berkelompok mengikut kaum tertentu. Tindakan ini secara tidak langsung berjaya mengukuhkan kedudukan PAP terhadap politik negara ini.

KESIMPULAN

Secara kesimpulannya, tindakan kerajaan menguatkuasakan LAA 1966 bukan sahaja untuk menyusun semula petempatan masyarakat di Singapura, tetapi turut dilakukan untuk pengukuhan politik PAP. Perkara ini merupakan tindakan 'serampang dua mata' yang dilakukan oleh Lee Kuan Yew bagi mengukuhkan kedudukan politik PAP di negara ini. Pada peringkat awal, LAA 1966 ini dikuatkuasakan bagi mendapatkan semula tanah di Singapura dengan tujuan pembangunan semula kawasan bandar. Justeru itu, kampung-kampung Melayu yang berada di kawasan bandar seperti Kampung Beremban, Kampung Seranggoon Kecil dan Kampung Sungai Tangan berjaya diambil alih oleh kerajaan melalui LAA 1966 atas alasan pembangunan baharu negara. Penstrukturan semula petempatan masyarakat ini seterusnya memperlihatkan berlakunya implikasi terhadap masyarakat Melayu di negara ini. Dari sudut politik, kerusi majoriti pengundi Melayu yang menjadi ancaman terhadap PAP sejak PRUS 1955 di Singapura mengalami perubahan demografi kerana penyusunan semula masyarakat melalui pembinaan perumahan oleh HDB dan *Ethnic Intergration Policy*. Situasi ini memperlihatkan kerajaan berjaya mengubah demografi pengundi dari kerusi majoriti pengundi Melayu kepada kerusi campuran. Perkara ini bukan sahaja menyebabkan identiti politik masyarakat Melayu di negara ini semakin lemah, malah kelangsungan politik Melayu berjaya diambil alih oleh PAP. Situasi ini membantu PAP mengukuhkan kedudukan politik di Singapura. Oleh itu sejak PRUS 1968, PAP merupakan parti yang mendominasi politik di Singapura dengan memenangi semua kerusi setiap kali PRUS diadakan. Secara asasnya, walaupun LAA 1966 dilaksanakan untuk tujuan ekonomi, namun penguatkuasaannya turut merangkumi tindakan politik daripada kerajaan dan memperlihatkan penguasaan PAP terhadap politik Singapura semakin kukuh setelah petempatan masyarakat di Singapura berjaya disusun semula melalui HDB dan *Ethnic Intergration Policy*.

PENGHARGAAN

Kajian ini tidak dibiayai oleh mana-mana geran.

KONFLIK KEPENTINGAN

Penulis mengakui bahawa tiada konflik kepentingan yang berlaku di antara pihak-pihak yang terlibat sama ada di sektor kerajaan, badan berkanun atau swasta dalam penulisan artikel ini.

SUMBANGAN PENULIS

Setiap penulis telah menyumbang kepada penulisan kandungan artikel ini.

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