Human Rights Law: International, Malaysian and Islamic Perspectives

Edited by Abdul Ghafur Hamid @ Khin Maung Sein

SWEET & MAXWELL ASIA
Human Rights Law: International, Malaysian and Islamic Perspectives

Edited by
Abdul Ghafur Hamid @ Khin Maung Sein

SWEET & MAXWELL ASIA

THOMSON REUTERS
Affiliated Companies

AUSTRALIA
Thomson Legal and Regulatory Limited
100 Harris Street
Pyrmont, Sydney
Australia, NSW 2009

CANADA
Carswell
One Corporate Plaza
2075 Kennedy Road
Scarborough, Ontario M1T 3V4

HONG KONG
Thomson Reuters Hong Kong Ltd
10/F, Cityplaza 3
Taikoo Shing
Hong Kong

SINGAPORE
Thomson Reuters Corporation Pte Ltd
18 Science Park Drive
Singapore 118229

NEW ZEALAND
Brookers
PO Box 6343
Auckland

UNITED KINGDOM/EUROPE
Sweet & Maxwell Ltd
100 Avenue Road
London NW3 3PF

UNITED STATES OF AMERICA
West Group
PO Box 64526
St Paul, Minnesota 55164-052
Recommended Stockists

Australia
Thomson Legal and Regulatory Limited
Brisbane, Sydney, Melbourne, Perth

Canada and USA
Carswell
Ottawa, Toronto, Calgary, Montreal, Vancouver

Hong Kong
Thomson Reuters Hong Kong Ltd
Hong Kong

India
NM Tripathi (Private) Ltd
Bombay

Eastern Law House (Private) Ltd
Calcutta

MPP House
Bangalore

Universal Book Traders
Delhi

Indonesia
Pt Ina Publikatama
Jakarta

Japan
Kinokuniya Co Ltd
Tokyo

Kokusai Shobo Ltd
Tokyo

Malaysia
Thomson Reuters Malaysia Sdn Bhd
trading as
Sweet & Maxwell Asia

New Zealand
Brokers
Auckland

Pakistan
Pakistan Law House
Karachi, Lahore

Philippines
MegaTEXTS Phil Inc
Cebu

Singapore
Thomson Reuters Corporation Pte Ltd
trading as
Sweet & Maxwell Asia

South Korea
Information & Cultural Korea
Seoul

Thailand
Booknet Co Ltd
Bangkok

Kinokuniya Bookstores
Bangkok

UK/Europe/Middle East/Africa
Sweet & Maxwell Ltd
London
Editor’s Introduction

The world is changing dramatically in the present age of the Internet, rapid communication and movement of persons, and the free flow of messages and ideas across international borders. Ordinary people these days increasingly know more about their fundamental rights. As a result, human rights are not only at the forefront of concerns today for prosecutors and criminal lawyers but also for multinational corporations, businessmen, trade unions, workers in the global economy, and even for the man on the street. The world has become a global village and what happens to individuals in one country often has profound impact on those in other countries.

Whatever the rationale behind the origin of human rights is – be it the command of God Almighty, the theory of natural law, or the idea of a “higher” norm that dictates States to observe the rights of individuals – the subject of human rights has become one of the top priorities for every State in the world. This is truly reflective of the commitment of States proclaimed during the World Conference on Human Rights in 1993 to the effect that “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.”

The idea of embarking on a research project exploring the width and depth of “International Human Rights Law” originated during brainstorming sessions of the International Law and Maritime Affairs (ILMA) Research Unit of the Ahmad Ibrahim Faculty of Laws, International Islamic University Malaysia. The ILMA Research Unit was established in the Faculty with the primary objective of “promoting interdisciplinary research and consultancy works on specialized areas of international law, including, but not limited to, international human rights law, international trade law, and maritime law.” Due to current trends towards opening up more democratic rights globally as well as locally, members of the Unit decided to take on the subject of human rights and to structure its exploration in such a way that it begins with international human rights law, continues with the Malaysian position in respect of human rights, and ends with the Islamic perspective of human rights, which is the niche area of the University.

The work has accordingly been divided into three parts and consists of 24 chapters. Part I evaluates the nature, scope and effectiveness of the
international legal framework for human rights. The first three chapters deal with the genesis and perspectives of human rights, sources, and the issue of enforcement, respectively. The other chapters give an in-depth analysis of selected fundamental human rights. Within the space constraints, it was necessary to isolate certain rights for consideration. The jurisprudence of the Human Rights Committee and the European Court of Human Rights influenced the selection of rights with the emphasis on rights most commonly claimed by individuals. This is also the main reason why civil and political rights take priority over others. Elements of economic, social and cultural rights and collective rights are, nevertheless, considered where possible.

Part II is entitled “Malaysia and Human Rights: Traditions versus Universality”. Originally conceived as a comprehensive analysis of the Malaysian position in relation to the application of international human rights law and the contemporary human rights issues in Malaysia, the contributors who responded have tried their best to present a picture of Malaysia in terms of human rights. It must be noted, however, that after finalizing the chapters, the Government of Malaysia has introduced a number of reforms on human rights, inclusive of announcements repealing the Internal Security Act and other laws restricting the right to liberty, amending laws restricting freedom of assembly, and amending section 15 of the Universities and University Colleges Act 1975 in order that university students can enjoy their civil and political rights. All these proactive movements by the Government towards respecting fundamental human rights in Malaysia are to be warmly welcomed.

The final Part of the work looks at human rights from the Islamic perspective. In other words, this Part elaborates the position of Shari’ah (Islamic law) in respect of human rights. The contributors are mostly scholars from the Islamic Law Department of the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia. The Part begins with chapters dealing respectively with the Islamic concept of human rights, a comparison between Islamic human rights and international human rights instruments and basic human rights in Islam. They are followed by an analysis of “Mechanisms for Protection and Enforcement of Human Rights in Islam”. The later chapters consider the hotly debated issues concerning criminal punishment under Islamic law and women's rights, terrorism, jihad, freedom of religion, apostasy and blasphemy from an Islamic law perspective.

This work is designed to present the three aspects of human rights law in a clear and accessible fashion, addressing a number of key questions. Although structured to form a coherent exposition of human rights law, each chapter can be read as a self-contained paper, reflecting the distinct
perspective of its contributor(s). It aims to be a resource of value to all those interested in exploring and studying human rights law.

I am greatly indebted to all those who so readily agreed to contribute chapters to this work. My sincere appreciation also goes to those at Sweet & Maxwell Asia for their excellent job done. It is hoped that this volume will encourage debate and dialogue on human rights law, be that international, Malaysian or Islamic.

Abdul Ghafur Hamid @ Khin Maung Sein
International Islamic University Malaysia
Kuala Lumpur, Malaysia
January 1, 2012
About the Contributors

Abdul Ghafur Hamid @ Khin Maung Sein is Professor of Law and Coordinator of the International Law and Maritime Affairs (ILMA) Research Unit at the International Islamic University Malaysia (IIUM). He obtained his LLB and LLM in International Law from the University of Yangon, Myanmar, and his PhD in Law from IIUM. His principal research area is international law and he has special research interests in international law of the sea, international law of armed conflict, human rights and humanitarian law, and international trade law. With nearly 40 years of teaching and research experience, he has authored or edited 14 books and published numerous articles in international and refereed journals. Professor Ghafur is a Life Member of the Maritime Institute of Malaysia (MIMA), a Member of the Asian Society of International Law, and an Editorial Board Member of the Journal of East Asia and International Law. He recently completed a research project entitled “Reforming Laws Relating to the Protection of Marine Environment in Malaysia”, commissioned by the Law Reform Committee of the Prime Minister’s Department of Malaysia.

Abdul Haseeb Ansari obtained his BSc from Gorakhpur University, India, and LLM and PhD from Banaras Hindu University, India. He has special interest in revenue law, environmental law, international law and comparative jurisprudence. He has contributed extensively on different aspects of environmental law, comparative jurisprudence and revenue law, and has long experience of teaching and guiding research in these subjects. His wide contribution to the body of knowledge in these fields includes publication of over 90 articles and four books. He is the editor of the Journal of Islamic Law Review. Professor Ansari is a member of some international institutions of high repute. He is presently working as a Professor at the International Islamic University Malaysia. In 2005 he received the best researcher award, and in 2008 he was honoured with the outstanding researcher award by the university. In the same year, he bagged the outstanding paper award of the Emerald Literati Award.

Farah Nini Dusuki is a senior lecturer at the Faculty of Law, University of Malaya (UM). Before joining UM she worked at the Ahmad Ibrahim Kulliyyah of Laws as an Assistant Professor and Head of the Department of Private Law. She obtained her LLB and MCL degrees from the International Islamic University Malaysia and PhD in Child Law from the University of Wales, Cardiff, UK. Her areas of expertise include child
law, criminal justice and legal method. She has written mainly on child law and the rights of children.

**Farid Sufian Shuaib** is an Associate Professor of Law at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, and currently holds the post of Deputy Dean (Student Affairs). He received his legal education in Malaysia and England. He has written articles in local and international journals on issues in the Malaysian legal system, constitutional law and media law. He has authored several books including *Powers and Jurisdiction of Syariah Courts in Malaysia*, now in its second edition, and co-authored *Constitution of Malaysia: Text and Commentary*, now in its third edition.

**Haniff Ahamat** is an Assistant Professor at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia. He has a PhD from the University of Essex, concentrating on anti-dumping and unfair trade practices law. He specialises in public international law, trade policy law and competition law. He assisted the Malaysian Ministry of International Trade and Industry (MITI), Ministry of Domestic Trade and Consumerism, and affected companies in various advisory and advocacy capacities. He has also given talks to members of the Malaysian Civil Service on issues of public international law at the Institute of Diplomatic and Foreign Relations, an agency under Wisma Putra (Malaysian Foreign Ministry).

**Khairil Azmin Mokhtar** is an Associate Professor at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM). He obtained his LLB (Hons) and MCL degrees from IIUM and PhD from Aberystwyth, UK. He is currently Deputy Dean (Research and Postgraduate) of the Ahmad Ibrahim Kulliyyah of Laws, IIUM. His research interests include administration of Islamic affairs, administrative law, human rights, and constitutional law. He has published extensively in these areas in refereed journals and presented papers in local as well as international conferences.

**Juriah Abd Jalil** is an Associate Professor at the International Islamic University Malaysia (IIUM). She obtained her LLB degree from IIUM, LLM from the University of Wales, Aberystwyth and PhD in Broadcasting Law from the University of Exeter, England. She was admitted to the Malaysian Bar in 1990 and has been lecturing at the Ahmad Ibrahim Kulliyyah of Laws (AIKOL), IIUM since 1993. She has taught various subjects ranging from intellectual property law, law of evidence, civil procedure, and professional practice. She is currently Head of the Legal Practice Department, AIKOL. She has written two books, namely *Confidential Information Law* and *Industrial Design Law*, and has authored various articles published by local and international journals.
Mohd Hisham Mohd Kamal is an Assistant Professor at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM). He obtained his LLB (Hons) and LLB (Shari'ah) from IIUM, LLM in International Law from the University of Hull, UK, and PhD from IIUM. He teaches, researches and has published books and journal articles in the areas of public international law, Islamic international law and Islamic legal system.

Mohammad Naqib Ishan Jan, born in Afghanistan, is an Associate Professor and the Head of the Alternative Dispute Resolution Unit at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM). He is also a member of the World Trade Organization and Globalization Unit, and the International Law and Maritime Affairs Unit at IIUM where he obtained his Bachelor’s and Master’s degrees and PhD in Law. His areas of expertise include international law of armed conflict, international human rights law, refugee law and the law of the United Nations. He has published extensively in these specialized areas. He has taught public international law, the law of torts, and the law of contracts. He has published a number of books and numerous articles in refereed law journals, and presented academic papers at national, regional and international conferences.

Najibah Mohd Zin is Professor at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM). She obtained her Bachelor of Laws (LLB) and Master of Comparative Law (MCL) from IIUM, and her PhD in law from Glasgow Caledonian University, UK. She currently lectures on Shari'ah law, family law, and women's legal issues. In addition to teaching and supervising postgraduate research, she is also a member of the Shari’ah Committee under the Malaysian Attorney General’s Office and the Shari’ah Judiciary Department of Malaysia, as well as a panel member for the Malaysian Bar Advocates and Solicitors Disciplinary Board Committee. She was a Visiting Fellow at the Oxford Centre for Islamic Studies, United Kingdom (2011) and Asian Law Institute, National University of Singapore (2005).

Nik Ahmad Kamal Nik Mahmod is Professor at the Civil Law Department, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia. He is currently the Deputy Rector (Student Affairs) of the University. He was also the former Dean of the Kulliyyah of Laws as well as Dean of the University’s Centre for Postgraduate Studies. He has written substantially in the area of labour law and administrative law. He is also the holder of the Emerald Literati Network, Outstanding Paper Award 2009. He is currently the Head of Cluster of Governance, Law and Public Management of the National Council of Professors. He was also the first President of the Asian Society of Labour Law. He is the Chairman of the committee to draft the amendment to section 15 of
the Universities and University Colleges Act 1971 and also Chairman of the committee to amend the Private Higher Educational Institutions Act 1996. Both committees are under the auspices of the Ministry of Higher Education Malaysia.

Nora Abdul Hak, LLB (Hons), LLB (Shari‘ah), MCL (IIUM), PhD (Glasgow Caledonian), is an Associate Professor at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia. Her PhD is on “Family Mediation and Tahkim (arbitration) in Resolving Family Disputes”. She teaches and researches in family law, Islamic jurisprudence, alternative dispute resolution (ADR), law of probate and succession, and Islamic legal system. Her major research interests are in family law, ADR and women’s rights and gender issues. She has published in refereed law journals, delivered conference and seminar papers in Malaysia as well as overseas, and has contributed chapters to books in the areas of family law, ADR and probate and succession law. She has also supervised Masters and PhD students. She was a visiting fellow at the Asian Law Institute (ASLI) of the National University of Singapore in 2005 and a guest lecturer at the Cairo University, Egypt in 2007.

Raja Badrol Hisham is a Senior Academic Fellow at the Legal Practice Department, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM). He graduated from IIUM in 1990. Prior to joining his alma mater in 2004, he was an officer with the Malaysian Legal and Judicial Services and has served as a legal officer at Wilayah Persekutuan and Negeri Sembilan. He was admitted as an Advocate and Solicitor to the Malaysian Bar in 1995 and later practised law, especially in the areas of civil and criminal litigations. Together with a team of lecturers, he designed the Legal Method and Mooting courses, which are core papers at the Kulliyyah for year 1 and 2 students respectively. Currently, he is imparting his knowledge on criminal procedure to final year undergraduates, and conducts courses on effective negotiations and ethics to potential syariek lawyers for the Diploma in Shari‘ah and Legal Practice. He also teaches criminal process to prison officers undergoing the Diploma in Law and Correctional Studies.

Ramizah Wan Muhammad is an Associate Professor at the Department of Islamic Law, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM). She joined the Department in 1992. She was an IIUM graduate where she completed her LLB in 1992, LLB (Shari‘ah) in 1993, Master of Comparative Laws in 1994 and her PhD in 2006. Her research interests are Islamic legal system (Shari‘ah Court), gender issues, Islamic criminal law and usul fiqh. She publishes both in Bahasa Melayu and English.
RK Salman obtained his Bachelor of Laws (LLB) degree from Bayero University Kano in 1995 and proceeded to Nigerian Law School for his Barrister at Law (BL) Degree in 1996. He obtained his Master of Laws (LLM) Degree at the prestigious Obafemi Awolowo University (Ile-Ife), Nigeria in 2005 and his PhD at the International Islamic University Malaysia in 2011. He briefly taught constitutional law and Nigerian legal system at the University of Ilorin, Nigeria between 1998 and 1999. He has published extensively in refereed local and international journals. His areas of interest include constitutional law, human rights law and civil litigation. Presently, he teaches civil litigation, research methodology, and alternative dispute resolution at the Nigerian Law School, Lagos as a Senior Lecturer.

Shamrahayu A Aziz is an Associate Professor at the International Islamic University Malaysia (IIUM), where she has been teaching since 1991. She obtained her doctorate in 2007. Her areas of interest include Islamic criminal law and procedure, constitutional law and human rights. She has taught these courses for almost 18 years. She has reviewed various legal publication manuscripts for local and international journals and has edited a book on freedom of religion and enforcement of moral law. In 2011 she published two books: Criminal Procedure in the Shariah Courts and Issues in the Enforcement of Islamic Criminal Law. She has written chapters in books, book and case reviews, and about 20 journal articles. She has presented papers in local and international conferences and was invited as guest speaker by various government agencies. She is a member of the Shari’ah Committee at the Malaysian Attorney General's Chambers and a member of the Special Committee to Review Secondary School History Curriculum and History Textbook. She has been a columnist in Berita Harian (a Malay daily) since July 2010. She has also been invited as panellist in local and international TV and radio programs.

Umar A Oseni is a Research Fellow at the Harvard Law School, USA. He received his LLB (Hons) in common and Islamic law from the University of Ilorin, Nigeria, and obtained his Master in Comparative Law (MCL) (with distinction) and PhD from the International Islamic University Malaysia. His doctoral research was on the legal framework for alternative dispute resolution in courts with Shari’ah jurisdiction in Nigeria, Malaysia and Singapore. Umar is a member of the following professional bodies: Chartered Institute of Arbitrators (CIarb), UK; International Centre for Dispute Resolution Young & International (ICDR Y&I); Young International Arbitration Group (YIAG) of the London Court of International Arbitration; Mediators Beyond Borders; and the Nigerian Bar Association.
Yusri Mohamad is an Assistant Professor at the Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia (IIUM). He obtained his LLB (Hons) and LLB (Shari’ah) degrees from IIUM, LLM degree from the School of Oriental and African Studies, London, UK, and PhD from IIUM.
Contents

Editor's Introduction ........................................................................................................... vii
About the Contributors ..................................................................................................... xi
Table of Cases .................................................................................................................. xxix
Table of Statutes ............................................................................................................. xxxvii

PART I
Human Rights Law:
The International Framework

Chapter 1
Human Rights: Genesis and Perspectives ................................................................. 3
Abdul Haseeb Ansari and Umar A Oseni

1.1 Introduction ................................................................................................................. 3
1.2 The influence of the early liberal philosophers ...................................................... 4
1.3 Human rights law's challenge to the traditional understanding of international law ................................................................................................................... 7
1.4 Categorisation of human rights .............................................................................. 10
1.5 The ideological debate: Universalism and cultural relativism ............................. 12
  1.5.1 Universality of human rights ........................................................................... 13
  1.5.2 Cultural relativism ......................................................................................... 14
  1.5.3 The attitude of Asian countries towards the universality of human rights ...................................................................................................................... 16
1.6 Human rights in the 21st century ............................................................................ 18
  1.6.1 Future of international human rights law ....................................................... 19
  1.6.2 Right to live in a healthy environment ......................................................... 20
  1.6.3 Gay rights ................................................................................................... 21
  1.6.4 Preventive detentions .................................................................................. 22
  1.6.5 Discrimination against women .................................................................... 23
1.7 Conclusion ................................................................................................................. 23

Chapter 2
International Human Rights Instruments:
Hard and Soft Law ........................................................................................................ 25
Haniff Ahamat

2.1 Introduction ................................................................................................................. 25
2.2 Human rights provisions of the United Nations Charter ..................................... 26
2.3 The UDHR: Its history, status and continuing relevance .................................... 28
Chapter 3
**Enforcement: The Key Human Rights Challenge** .......................... 37
Abdul Ghafur Hamid @ Khin Maung Sein

3.1 Introduction.......................................................... 37
3.2 Primacy of domestic enforcement.................................. 38
3.3 Enforcement at universal level ...................................... 40
  3.3.1 Monitoring mechanisms established by
      the United Nations............................................. 41
  3.3.2 Monitoring mechanisms established by treaties.............. 41
      Human Rights Committee (HRC) under
      the ICCPR...................................................... 42
      Individual complaint procedure............................ 43
  3.3.3 Effectiveness of human rights enforcement at
      the universal level............................................ 45
3.4 Regional approaches to human rights enforcement .............. 45
3.5 Coercive compliance: Sanction and humanitarian intervention .. 47
  3.5.1 Sanction......................................................... 48
      Sanctions adopted by individual States:
      countermeasures................................................ 48
      Sanctions imposed by the Security Council................... 49
  3.5.2 Humanitarian intervention.................................... 50
3.6 Human rights enforcement against multinational corporations.. 51
3.7 Conclusion............................................................ 55

Chapter 4
**The Right to Life and Freedom from Torture** ......................... 57
Khairil Azmin Mokhtar

4.1 Introduction............................................................. 57
4.2 The right to life....................................................... 57
  4.2.1 The right to life in international human rights law ....... 57
  4.2.2 The right to life under the
      Federal Constitution of Malaysia............................ 59
  4.2.3 The right to life and State obligations .................... 61
      4.2.3.1 The negative obligations.............................. 61
      4.2.3.2 The positive obligations............................. 62
  4.2.4 Death penalty.................................................... 63
      4.2.4.1 Death penalty and international
      human rights laws............................................. 64
      4.2.4.2 Death penalty and its exceptions in Malaysia ....... 66
  4.2.5 The right of the unborn and the prohibition of abortion .. 67
      4.2.5.1 The right of the unborn and the prohibition of
      abortion in international human rights laws..... 68
      4.2.5.2 The prohibition of abortion in Malaysia and
      its exceptions................................................. 69
4.2.6 Is there a right to die? Euthanasia .................................................. 70
4.3 Freedom from torture ........................................................................... 72
  4.3.1 The prohibition of torture in international humanitarian law ........ 73
  4.3.2 The prohibition of torture in international human rights laws ...... 75
  4.3.3 Freedom from torture under the Malaysian Constitution ......... 76
4.4 Forms of torture .................................................................................. 78
4.5 Torture and cruel, inhuman or degrading (CID) treatment .............. 82
4.6 War on terror and government sanctioned torture............................ 83
4.7 Extraordinary rendition ...................................................................... 84
4.8 Conclusion .......................................................................................... 86

Chapter 5
The Right to Liberty: A Pillar of Freedom in a Democratic Society ........ 87
Abdul Ghafur Hamid @ Khin Maung Sein

5.1 Introduction ......................................................................................... 87
5.2 The right to security of the person .................................................... 88
5.3 Deprivation of liberty ......................................................................... 89
  5.3.1 Nature and meaning of “deprivation of liberty” ......................... 89
  5.3.2 Preventive detention and the right to liberty ......................... 91
  5.3.3 “Lawfulness” of the deprivation of liberty ..................... 93
5.4 Freedom from “arbitrary” arrest or detention .................................... 94
  “Arbitrariness” of arrest or detention ........................................ 95
5.5 Informing reasons for arrest and promptly informing the charges .... 97
5.6 Bringing promptly before a judge ...................................................... 98
  5.6.1 Promptly ................................................................................. 98
  5.6.2 Judge or other officer authorised by law to exercise judicial power .................................................. 99
  5.6.3 Length of pre-trial detention: within a reasonable time ......... 99
5.7 Challenging lawfulness of detention: right of habeas corpus .......... 100
5.8 Right to compensation for unlawful arrest or detention .......... 102
5.9 Conclusion ......................................................................................... 103

Chapter 6
The Right to a Fair Trial: The Perspective of International Law and the Malaysian Experience .......... 105
Raja Badrol Hisham Raja Mohd Ali

6.1 Introduction ......................................................................................... 105
6.2 The Malaysian position on ICCPR .................................................... 106
6.3 Fundamental elements of fair trial ..................................................... 106
  6.3.1 Equality before the courts and tribunals .................................. 106
  6.3.2 Access to court and to public hearing ................................. 107
    To initiate proceedings or sue at law ..................................... 108
  6.3.3 Right to competent, independent and impartial courts and tribunals ........................................................................... 108
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.3.4</td>
<td>Right to equality before the law</td>
<td>110</td>
</tr>
<tr>
<td>6.3.5</td>
<td>The presumption of innocence</td>
<td>111</td>
</tr>
<tr>
<td>6.3.6</td>
<td>Right to silence/freedom from compulsory self-incrimination</td>
<td>112</td>
</tr>
<tr>
<td>6.3.7</td>
<td>Right to expeditious hearings</td>
<td>113</td>
</tr>
<tr>
<td>6.3.8</td>
<td>Right to be informed of the charge</td>
<td>115</td>
</tr>
<tr>
<td>6.3.9</td>
<td>Right of defence</td>
<td>115</td>
</tr>
<tr>
<td>6.3.10</td>
<td>Trial in one's own presence</td>
<td>117</td>
</tr>
<tr>
<td>6.3.11</td>
<td>The principle of guilt</td>
<td>118</td>
</tr>
<tr>
<td>6.3.12</td>
<td>Freedom from double jeopardy</td>
<td>119</td>
</tr>
<tr>
<td>6.3.13</td>
<td>The principle of legality or “nullum crimennullapoena sine lege”</td>
<td>119</td>
</tr>
<tr>
<td>6.4</td>
<td>Preventive detention in Malaysia: A violation of human rights to a fair trial?</td>
<td>120</td>
</tr>
<tr>
<td>6.5</td>
<td>Conclusion</td>
<td>122</td>
</tr>
</tbody>
</table>

Chapter 7

The Right to Equality and Non-Discrimination

Haniff Ahamat

7.1 Introduction                                                                 | 123  |
7.2 Relevant provisions and underlying concepts                                | 124  |
7.3 The special position of the non-discrimination principle                  | 125  |
7.4 What constitutes “discrimination”?                                        | 127  |
7.5 International Convention on Elimination of Racial Discrimination (ICERD)  | 130  |
7.6 Convention on Elimination of Discrimination Against Women (CEDAW)         | 132  |
7.7 Affirmative action                                                         | 132  |
7.8 Private sector discrimination                                              | 136  |
7.9 Islam and non-discrimination                                               | 137  |
7.10 Conclusion                                                               | 139  |

Chapter 8

Freedom of Expression and Freedom of Religion

Juriah Abd Jalli and Mohd Hisham Mohd Kamal

8.1 Introduction                                                               | 141  |
8.2 Freedom of expression                                                      | 141  |
8.2.1 Freedom of expression and the new communication technology              | 142  |
8.2.2 The provision under the UDHR and the ICCPR                              | 143  |
8.2.3 The importance of freedom of expression                                 | 146  |
8.2.4 Rights protected under this freedom                                     | 148  |
8.2.5 Limitation to freedom of expression                                     | 150  |
8.2.6 Restriction on the ground of national security                          | 151  |
8.3 Freedom of religion                                                        | 152  |
8.3.1 Freedom of religion in the UDHR and the ICCPR                           | 152  |
8.3.2 Freedom to change religion                                               | 155  |
8.4 Conclusion                                                                | 156  |
Chapter 9
The Right to Work and the Right to Education
Nik Ahmad Kamal Nik Mahmod

9.1 Introduction ......................................................... 159
9.2 The right to work .................................................. 160
  9.2.1 Is there a guarantee of the right to work? ................. 161
  9.2.2 Elements of the right to work ............................... 162
    Access to employment ........................................ 163
    Free choice in employment ................................ 164
    Freedom from arbitrary dismissal ........................... 165
9.3 The right to education ........................................... 165
  9.3.1 The right to education in international
        human rights instruments ................................ 166
  9.3.2 Access to education ....................................... 166
  9.3.3 Aims and objectives of education ....................... 168
  9.3.3 Academic freedom ....................................... 170
  9.3.4 The right to human rights education ................... 170
9.4 Conclusion ....................................................... 172

Chapter 10
Women's Rights and the Impact of CEDAW
Nora Abdul Hak

10.1 Introduction .................................................... 173
10.2 Women's rights as human rights ............................. 173
10.3 CEDAW and its main provisions ............................ 174
10.4 CEDAW and contemporary women's rights issues ......... 176
  10.4.1 Non-discrimination in employment and work place .... 177
  10.4.2 Non-discrimination in marriage and family ............ 178
  10.4.3 Violence against women ................................ 183
  10.4.4 Trafficking in women ................................... 186
10.5 Reservations to CEDAW ...................................... 189
10.6 The enforcement of CEDAW ................................... 192
  10.6.1 Weak enforcement mechanisms .......................... 193
    10.6.1.1 Weak reporting mechanism ........................ 193
    10.6.1.2 Weak adherence to the normative
           principles of the Convention ....................... 194
  10.6.2 The Optional Protocol: Enhancing enforcement ....... 194
    10.6.2.1 The communications procedure .................... 194
    10.6.2.2 The inquiry procedure ............................ 195
10.7 Conclusion ..................................................... 195

Chapter 11
Protection of Children's Rights
Farah Nini Dusuki

11.1 Introduction .................................................... 197
11.2 Theoretical perspectives of children's rights ............ 199
Contents

11.3 International children’s rights ................................................................. 201
  11.3.1 Introduction .................................................................................. 201
  11.3.2 The United Nations and children’s rights .................................. 202
11.4 Convention on the Rights of the Child ........................................... 203
  11.4.1 Introduction .................................................................................. 203
  11.4.2 General aims and classifications of the Convention’s rights ........ 205
  11.4.3 Enforcement of children’s rights ................................................... 207
    11.4.3.1 General Measures of Implementation ..................................... 208
11.5 Main areas of concern in respect to children’s rights ................. 209
  11.5.1 Violence, abuse and neglect ......................................................... 210
  11.5.2 Juvenile justice ........................................................................... 210
  11.5.3 Children and armed conflict ......................................................... 212
11.6 Children’s rights in Malaysia .............................................................. 213
  11.6.1 Introduction .................................................................................. 213
  11.6.2 Legal framework on children’s rights ........................................... 214
  11.6.3 General issues of concern .............................................................. 216
11.7 Conclusion .......................................................................................... 219

Chapter 12
Rights of “Refugees” and “Migrant Workers” ........................................... 221
Mohammad Naqib Ishan Jan

12.1 Introduction ......................................................................................... 221
12.2 Refugees, asylum seekers and internally displaced persons:
    Are they the same or different? ......................................................... 221
12.3 United Nations Convention Relating to the Status of Refugees .... 226
    12.3.1 Definition of refugee .................................................................. 227
    12.3.2 Rights of refugees ..................................................................... 236
    12.3.3 UN High Commissioner for refugees ........................................ 238
12.4 Migrant workers .................................................................................. 240
    12.4.1 Definition of migrant workers ................................................... 240
    12.4.2 Key factors driving migration ................................................... 241
    12.4.3 Problems facing migrant workers ............................................. 242
    12.4.4 Rights of migrant workers ......................................................... 243
12.5 Malaysia and the issue of migrant workers ..................................... 248
12.6 Conclusion .......................................................................................... 249

Chapter 13
Right to Self-Determination, and Rights of Indigenous Peoples and Minorities ........................................... 251
Mohammad Naqib Ishan Jan

13.1 Introduction ......................................................................................... 251
13.2 Right to self-determination ............................................................... 251
    13.2.1 The origin and development of the right of self-determination .... 252
    13.2.2 Definition and forms of self-determination ............................... 254
## Contents

13.2.3 Peoples and their right of self-determination ........................................... 256
13.2.4 UN decolonisation and self-determination ............................................... 257
13.2.5 Palestinians and the right of self-determination: 
  A case study .................................................................................................. 258
13.2.6 Self-determination today ............................................................................ 263
13.3 Rights of minorities ....................................................................................... 263
  13.3.1 Definition of minorities ........................................................................... 264
  13.3.2 Minorities rights under Article 27 of the ICCPR .................................... 265
  13.3.3 The UNGA Declaration on Minorities Rights, 1992 ............................. 267
13.4 Rights of indigenous peoples ........................................................................ 268
  13.4.1 Definition of indigenous peoples ......................................................... 268
  13.4.2 Indigenous peoples' rights ...................................................................... 269
    13.4.2.1 The right to be on ancestral lands and enjoy the benefits thereof ...... 270
    13.4.2.2 The economic, social, and political rights of the indigenous peoples  271
    13.4.2.3 The indigenous peoples’ “right to self-determination” ................. 272
    13.4.2.4 Protection of the cultural heritage of indigenous peoples ............. 273
13.5 Conclusion .................................................................................................... 276

## PART II

**Malaysia and Human Rights: Traditions versus Universality**

*Chapter 14*

**Application of International Human Rights Law in Malaysia** .......................... 279

*Mohd Hisham Mohd Kamal*

14.1 Introduction ................................................................................................. 279
14.2 An overview of the Malaysian approach towards reception of international law ........................................................................................................... 280
14.3 Obligations under international human rights treaties ................................ 284
14.4 Obligations under customary international law ......................................... 287
14.5 Human Rights Commission of Malaysia Act 1999 and the role of SUHAKAM ........................................................................................................... 290
14.6 Conclusion .................................................................................................... 292

*Chapter 15*

**Fundamental Liberties under the Federal Constitution: A Critical Analysis** ...... 293

*Farid Sufian Shuaib*

15.1 Introduction ................................................................................................. 293
15.2 Genesis of fundamental liberties .................................................................. 293
15.3 Judicial interpretation of fundamental liberties .................................. 296
15.4 A brief comparison with the ICCPR, ICESCR and others ............... 303
15.5 Status and justiciability ................................................................. 308
15.6 Conclusion .................................................................................. 309

Chapter 16
Contemporary Human Rights Issues in Malaysia ............................ 311
Farid Sufian Shuaib
16.1 Introduction .............................................................................. 311
16.2 Gender equality ................................................................. 311
16.3 Detention without trial .......................................................... 312
16.4 Freedom of speech ................................................................. 315
16.5 Conclusion .............................................................................. 317

PART III
Human Rights: Islamic Perspective

Chapter 17
Islamic Concept of Human Rights .................................................. 321
Shamrahayu A Aziz
17.1 Introduction .............................................................................. 321
17.2 Islam and human nature .......................................................... 322
17.3 Objectives of human rights in Islam ........................................ 324
17.4 Origin and sources of human rights in Islam ............................. 328
17.5 Duty-based concept ................................................................. 329
17.6 Conclusion ................................................................................ 330

Chapter 18
Islamic Human Rights versus International Human Rights Instruments .... 333
Umar Å Oseni and Yusri Mohamad
18.1 Introduction .............................................................................. 333
18.2 Underlying philosophy of Islamic human rights ......................... 335
   18.2.1 Value-based rights in Islam: Human rights as human values ........ 335
   18.2.2 The Muslim ummah: Religious universalism versus cultural relativism ........ 339
18.3 Areas of convergence between Islamic human rights and international human rights framework ........................... 344
   18.3.1 Basic individual rights ......................................................... 344
   18.3.2 Equality of men and women ................................................. 345
   18.3.3 Right to learning and education ........................................... 345
   18.3.4 Freedom of thought and conscience .................................... 345
   18.3.5 Public and environmental rights ........................................... 346
18.3.6 Right to work ................................................................. 346
18.3.7 Right to the presumption of innocence ......................... 346
18.4 Points of divergence ....................................................... 346
18.4.1 Does right to life include right to abortion in international law? ................................................. 348
18.4.2 Gay marriage: Freedom from discrimination and rights to marriage and family life .......................... 350
18.4.3 Freedom of religion ....................................................... 352
18.4.4 Gender equality or gender equity? .................................. 353
18.5 Contemporary practice of Muslims majority countries and human rights issues .................................. 354
18.5.1 Efforts at establishing international Islamic human rights standards .............................................. 355
18.5.2 Impact of European powers and globalisation on Islamic human rights .......................................... 356
18.5.2.1 Normative hegemony and international human rights standards .............................................. 357
18.5.2.2 Muslim nations: Adoption of Western values of human rights .................................................. 357
18.5.2.3 Negative impact of international NGOs.......................................................... 358
18.5.2.4 Apologetic attitude in contemporary human rights issues ...................................................... 359
18.6 Conclusion ........................................................................ 360

Chapter 19
Basic Human Rights in Islam ................................................. 361
Shamrahayu A Aziz
19.1 Introduction .................................................................. 361
19.2 What are basic rights? ...................................................... 361
19.3 Freedom of religion ....................................................... 362
19.4 Right to life ................................................................. 364
19.5 Right to justice ............................................................. 366
19.6 Right to freedom ............................................................ 368
19.7 Conclusion ................................................................. 369

Chapter 20
Mechanisms for Protection and Enforcement of Human Rights in Islam ............................................ 371
Shamrahayu A Aziz and RK Salman
20.1 Introduction .................................................................. 371
20.2 The judiciary as a human right protection mechanism .......................................................... 371
20.2.1 The Islamic judiciary or tribunal .................................. 372
20.2.2 Independence of judiciary in Islam .................................. 373
20.3 Institution of wali-al-mazalim ........................................... 375
20.4 Hisbah institution .......................................................... 378
20.4.1 Modern hisbah institution .............................................. 380
Chapter 21
Islamic Criminal Law and Human Rights 389
Ramizah Wan Muhammad
21.1 Introduction 389
21.2 Shari'ah, fiqh and human rights 389
21.3 Islamic criminal law: Crimes and punishment 393
21.4 The objectives of Islamic punishment 394
21.5 Analysis of hudud punishment in relation to human rights 397
21.6 Conclusion 401

Chapter 22
Terrorism, Jihad and Human Rights in Islam 403
Mohd Hisham Mohd Kamal
22.1 Introduction 403
22.2 Islam is a peaceful religion 403
22.3 Jihad: Exclusively defensive 405
22.3.1 Jihad in defence of human rights 408
22.4 Terrorism 409
22.5 Conclusion 411

Chapter 23
Women's Rights in Islam 413
Najibah Mohd Zin
23.1 Introduction 413
23.2 An overview on the principles of equality between sexes 413
23.3 Women and children - basic rights 417
23.4 Marital rights and obligations 419
23.4.1 Right to marry and choose her spouse 420
23.4.2 Financial rights during marriage and after divorce 421
23.5 Rights to divorce 423
23.6 Women and custodial rights 426
23.7 Rights to private ownership 427
23.8 Right to inheritance 428
23.9 Political rights 429
23.10 Conclusion 431

Chapter 24
Freedom of Religion, Apostasy and Blasphemy in Islam 433
Mohd Hisham Mohd Kamal
24.1 Introduction 433
24.2 Freedom of religion 433
24.3 Issue of apostasy 435
Chapter Fourteen

Application of International Human Rights Law in Malaysia

Mohd Hisham Mohd Kamal

14.1 INTRODUCTION

This chapter discusses the application of International Human Rights Law in Malaysia. It begins with an overview of the Malaysian approach towards the reception of international law. Thereafter this chapter discusses the obligations of Malaysia under international treaties and that under the customary international law. On the basis that Islam is the religion of the Federation, international human rights law is applicable on the condition that it is not contrary to Islam. Finally, this chapter discusses the role of the Human Rights Commission of Malaysia (SUHAKAM) in promoting human rights.

Malaysia is a federation with 13 States and three Federal Territories. The supreme law of the Federation is the Federal Constitution.¹ The Federal Constitution expressly provides that Islam is the religion of the Federation.² Islam is also the religion of the States in Malaysia.³ The Federal Constitution enumerates the legislative matters for Parliament to enact for the whole Federation and that for the State Legislative Assemblies to enact for the respective States.⁴

---

¹ Federal Constitution, Article 4(1).
² Federal Constitution, Article 3(1).
³ Laws of the Constitution of Johore (First Part), Article 57; Laws of the Constitution of Kedah, Article 33A; Laws of the Constitution of Kelantan (First Part), Article 5; Constitution of the State of Malacca, Article 4A; The Laws of the Constitution of Negeri Sembilan 1959, Article 5; Laws of the Constitution of Pahang (Part I), Article 23; The Laws of the Constitution of Perak (Part I), Article 5; The Laws of the Constitution of Perlis, Article 5(1); Constitution of the State of Penang, Article 5(1); The Constitution of the State of Sabah, Article 5A; Laws of the Constitution of Selangor 1959, Article 47; Laws of the Constitution of Terengganu (First Part), Article 3.
⁴ Federal Constitution, Articles 73-74.