



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

Published in 2012 by
Thomson Reuters Malaysia Sdn Bhd (464942-H)
(trading as Sweet & Maxwell Asia)
No 17, Jalan PJS 7/19, Bandar Sunway
46150 Petaling Jaya, Selangor, Malaysia

Copy no: 112669664
Initial: WMN
Date: 11/7/12
Location: MAIN /PJ /ISTAC /NILAI /K /K2 /TRF

© Abdul Ghafur Hamid @ Khin Maung Sein

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without prior written permission, except for permitted fair dealing under the Copyright Act 1987. Application for permission for other use of copyright material including permission to reproduce extracts in other published works shall be made to the publisher. Full acknowledgement of the contributor(s), publisher and source must be given.

The contributors have asserted their moral right under the Copyright Act 1987, to be identified as the authors of this publication.

Perpustakaan Negara Malaysia

Cataloguing-in-Publication Data

Human Rights Law: International, Malaysian and Islamic Perspectives/
edited by Abdul Ghafur Hamid @ Khin Maung Sein

ISBN 978-967-5040-87-0

1. Human rights. 2. Human rights – Malaysia.
3. Human rights – Religious aspects – Islam.
I. Abdul Ghafur Hamid.
341.48

Cover design by Edward Goh

Cover photo © Darren Staples/Reuters

Printed by Print Assist (1901555-V)
7, Jalan Anggerik 5, Bandar Bukit Beruntung, 48300 Rawang, Selangor Darul Ehsan

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

Brookers
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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Mahmud is Professor at the Civil Law Department, Ahmad Ibrahim Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 Kulliyah 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 *syarie'* 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 Kulliyah 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 Kulliyah 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

<i>Editor's Introduction</i>	vii
<i>About the Contributors</i>	xi
<i>Table of Cases</i>	xxix
<i>Table of Statutes</i>	xxxvii

PART I

Human Rights Law: The International Framework

Chapter 1

Human Rights: Genesis and Perspectives	3
<i>Abdul Haseeb Ansari and Umar A Oseni</i>	
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
<i>Haniff Ahamat</i>	
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

2.4	The ICCPR and ICESCR.....	31
2.5	Conclusion.....	35

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..... Human Rights Committee (HRC) under the ICCPR	41 42
3.3.3	Effectiveness of human rights enforcement at the universal level.....	43 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 <i>habeas corpus</i>	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

6.3.4	Right to equality before the law	110
6.3.5	The presumption of innocence	111
6.3.6	Right to silence/freedom from compulsory self-incrimination	112
6.3.7	Right to expeditious hearings	113
6.3.8	Right to be informed of the charge	115
6.3.9	Right of defence	115
6.3.10	Trial in one's own presence	117
6.3.11	The principle of guilt.....	118
6.3.12	Freedom from double jeopardy.....	119
6.3.13	The principle of legality or " <i>nullum crimen nullapoena sine lege</i> "	119
6.4	Preventive detention in Malaysia: A violation of human rights to a fair trial?.....	120
6.5	Conclusion.....	122

Chapter 7

The Right to Equality and Non-Discrimination 123

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 141

Juriah Abd Jalil 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** 159*Nik Ahmad Kamal Nik Mahmud*

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** 173*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** 197*Farah Nini Dusuki*

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

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

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 AAziz

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 A 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 <i>wali-al-mazalim</i>	375
20.4	<i>Hisbah</i> institution	378
20.4.1	Modern <i>hisbah</i> institution	380

20.4.2 Functions and powers of <i>hisbah</i>	381
20.4.3 The <i>Muhtasib</i>	383
20.5 Conclusion	386

Chapter 21

Islamic Criminal Law and Human Rights	389
--	-----

Ramizah Wan Muhammad

21.1 Introduction	389
21.2 <i>Shari'ah, fiqh</i> 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 <i>Jihad</i> : Exclusively defensive	405
22.3.1 <i>Jihad</i> 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

24.3.1 Apostasy as a big sin and punishment for apostates	435
24.3.2 Modernists' misinterpretation of verses and <i>Hadith</i>	438
24.4 Issue of blasphemy	443
24.5 Conclusion.....	445
<i>Index</i>	447

Chapter Eighteen

Islamic Human Rights versus International Human Rights Instruments

Umar A Oseni and Yusri Mohamad

18.1 INTRODUCTION

The contemporary world has witnessed an increasing influence of human rights in all aspects of international relations.¹ A related development is the increasing prominence given to issues of rights of Muslims and Islam and human rights issues in Western countries. Issues ranging from the use of *niqab* (face veil) in France, minarets in Switzerland, building of mosques in the United States of America, use of RapiScan full-body scanner and its resultant privacy rights, and religious dress in the United Kingdom to Malaysia have generated a lot of controversy in recent times. These have raised several concerns on the harmonisation of the underlying philosophies between the Islamic human rights framework and international human rights instruments. As James Cockayne rightly observed, “[i]n a world increasingly portrayed as beset by the ‘clash of civilisations’, especially between the West and Islam, the universality of international humanitarian law (IHL) is increasingly threatened.”²

This chapter attempts to reframe the conflict between the Islamic human rights paradigm and the international human rights instruments. While recognising the philosophical differences between the Islamic paradigms and the international human rights instruments, it is submitted that, at this preliminary stage, there are some important areas of convergence and that the areas of irreconcilable differences could be effectively managed in a world gradually shrinking to a global hamlet. Though many in the West believe Islam is one of the greatest threats to universal human rights, Muslims believe that they have a lot to offer, through Islamic values, to the international human rights paradigm of human

1 Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003), p 1.

2 James Cockayne, “Islam and international humanitarian law: From a clash to a conversation between civilizations”, *IRRC*, vol 84, No 847 (September, 2002), p 597.