Constitutional Law and Human Rights in Malaysia
Topical Issues and Perspectives

Editor
Khairil Azmin Mokhtar
LLB (Hons) (IIUM), Master of Comparative Laws (IIUM),
PhD in Law (Aberystwyth)
Associate Professor
Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia
Contents

Preface........................................................................................... vii
About the Authors........................................................................... ix
Table of Cases.................................................................................. xxxi
Table of Statutes............................................................................. xli
Table of International Conventions, Agreements and Treaties........... liii

Principal Organs of Government

Chapter One
The Doctrine of Separation of Powers: Judicial Review as a Check and Balance Tool..................................................... 1
1.1 Introduction.................................................................................. 1
1.2 Constitutionalism, rule of law and judicial review......................... 1
1.3 Doctrine of separation of powers, principle of check and balance and judicial review..................................................... 3
  1.3.1 Doctrine of separation of powers in Malaysia.......................... 4
  1.3.2 The principle of check and balance........................................ 7
  1.3.3 Judicial review........................................................................ 7
    1.3.3.1 The scope and nature of judicial review............................ 7
    1.3.3.2 Relief available in judicial review................................. 8
    1.3.3.3 Review of primary legislation/check on the Legislature..... 8
    1.3.3.4 Review of action and decision/check on the Executive...... 14
1.4 Selected issues and cases................................................................ 15
1.5 Conclusion.................................................................................... 20

Chapter Two
The Civil Service and the Doctrine of Holding Office at Pleasure.................................................................................... 21
2.1 Introduction.................................................................................. 21
2.2 The constitutional position of a public servant............................. 22
2.3 Appointment and security of tenure............................................ 23
2.4 The contractual nature of the relationship................................... 27
2.5 Procedural protections................................................................. 28
2.6 The roles and functions of the Service Commission and Council.................................................................................. 32
  2.6.1 Duty of confidentiality.......................................................... 33
  2.6.2 Disclosure in the public interest............................................. 34
Chapter Three
Crown Privilege under the Common Law and the Evidence Act.................39
3.1 Introduction..................................................................................................39
3.2 Crown privilege .........................................................................................40
3.3 Expanding scope of public interest immunity ......................................41
3.4 Court withholding evidence in the public interest ..............................42
3.5 Test applied for claim to withhold evidence ........................................46
3.5.1 Class claims and content claims .......................................................46
3.5.2 Balancing competing interests ........................................................47
3.5.3 Court's power to inspect documents ................................................48
3.6 Crown privilege under the Evidence Act 1950 .....................................49

Chapter Four
Accountability and Integrity of the Judiciary ...........................................57
4.1 Introduction..................................................................................................57
4.2 Maintaining judicial ethics .....................................................................58
4.3 Judicial ethics in Malaysia ......................................................................59
4.4 Judicial delinquents................................................................................60
4.5 Methods of supervising judges' conduct ..............................................63
4.5.1 Tribunal ...............................................................................................63
4.5.1.1 Criticisms on the process of judges' removal..........................65
4.5.1.2 Did the working party really intend to free Article 125(3) and (4) from political influence? ....66
4.5.2 Judges' ethics committee .................................................................68
4.5.2.1 Background of the Malaysian Judges' Code of Ethics ..........68
4.5.2.2 The scope of the Judges' Code of Ethics 2009 ..................72
4.5.2.3 Issues on the Judges' Code of Ethics 2009 .........................74
4.5.2.4 Disciplinary procedure on breach of Code .........................76
4.6 Conclusion..................................................................................................77

Chapter Five
Contempt of Court vs Freedom of Speech and Expression:
Rethinking the Courts' Attitude .........................................................79
5.1 Introduction..................................................................................................79
5.2 The Malaysian courts' approaches in striking a balance ..................80
5.3 Rethinking the Malaysian courts' approaches in striking a balance ..........87
5.4 Concluding remarks..................................................................................94

Chapter Six
Access to Justice: Adversarial Costs in Public Interest Litigation...........97
6.1 Introduction..................................................................................................97
6.2 Judicial discretion in awarding costs ....................................................97
6.3 Costs in the United Kingdom .................................................................101
6.4 Costs in Malaysia.....................................................................................106
6.4.1 Specific statutory provisions for order of costs .........................106
6.5 The position in Canada .........................................................................107
6.6 Different kinds of costs mechanisms ....................................................109
6.7 The Aarhus Convention .......................................................................109
6.8 Conclusion................................................................................................110

Chapter Seven
Functions and Privileges of Parliament: An Overview .....................111
7.1 Introduction................................................................................................111
7.2 What is Parliament?................................................................................112
7.2.1 Parliament building.......................................................................112
7.2.2 Parliament as an institution ............................................................112
7.3 The structure and main components of Parliament .......................113
7.3.1 Constitutional and legal framework of parliamentary privileges in Malaysia ....115
7.3.2 Parliament as the central organ of Malaysian democracy ..........115
7.4 Definition and purpose of parliamentary privileges ....................116
7.4.1 The sources and legal framework of parliamentary privileges in Malaysia ................117
7.4.2 Types of parliamentary privileges .................................................118
7.5 Privileges of the Houses of Parliament as a collectivity .................118
7.5.1 Rights of the House to regulate its own composition and have exclusive cognizance of matters arising within the House ........................................119
7.5.2 The power to discipline..................................................................121
7.6 Rights and immunities of individual members of Parliament .........122
7.6.1 Freedom of speech........................................................................123
7.6.2 Exemption from court attendance ..............................................125
7.6.3 Freedom from arrest......................................................................125
7.7 A comparison of two cases on power to punish for contempt:
A distinction between the power of the State Legislative Assembly and the Federal Parliament ...126
7.8 Conclusion................................................................................................129

Chapter Eight
The Election Commission: History and Functions ..........................131
8.1 Introduction................................................................................................131
8.2 Historical background...........................................................................131
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.3 The 1955 election: successful experiment of the elections</td>
<td>139</td>
</tr>
<tr>
<td>in Malaya</td>
<td></td>
</tr>
<tr>
<td>8.4 The Election Commission since independence</td>
<td>140</td>
</tr>
<tr>
<td>8.4.1 The organisation of Election Commission</td>
<td>140</td>
</tr>
<tr>
<td>8.4.2 Functions of the Election Commission</td>
<td>143</td>
</tr>
<tr>
<td>8.5 Demands for electoral reform</td>
<td>145</td>
</tr>
<tr>
<td>8.6 Conclusion</td>
<td>147</td>
</tr>
</tbody>
</table>

**Chapter Nine**

**Elected Members and the Right to Change Party**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.1 Introduction</td>
<td>149</td>
</tr>
<tr>
<td>9.2 Elections and the party system</td>
<td>150</td>
</tr>
<tr>
<td>9.3 Concept of an elected representative</td>
<td>151</td>
</tr>
<tr>
<td>9.4 Islamic theory of democratic government and the role of</td>
<td>152</td>
</tr>
<tr>
<td>elected representatives</td>
<td></td>
</tr>
<tr>
<td>9.5 Anti-defection law: Legal position in Malaysia</td>
<td>154</td>
</tr>
<tr>
<td>9.5.1 Anti-defection laws: Legal position in India</td>
<td>157</td>
</tr>
<tr>
<td>9.5.2 Is there a need to enact an anti-defection law in Malaysia?</td>
<td>158</td>
</tr>
<tr>
<td>9.6 Overcoming legal hurdles</td>
<td>161</td>
</tr>
<tr>
<td>9.6.1 The advantages and disadvantages of anti-defection laws</td>
<td>162</td>
</tr>
<tr>
<td>9.7 Conclusion</td>
<td>162</td>
</tr>
</tbody>
</table>

**Chapter Ten**

**Islamic Law within the Federal Framework and Legal System of Malaysia and Nigeria**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.1 Introduction</td>
<td>165</td>
</tr>
<tr>
<td>10.2 The nature of the Malaysian and Nigerian states</td>
<td>166</td>
</tr>
<tr>
<td>10.3 Status and scope of Islamic law</td>
<td>169</td>
</tr>
<tr>
<td>10.3.1 Civil law (Mumalai)</td>
<td>169</td>
</tr>
<tr>
<td>10.3.2 Criminal law</td>
<td>170</td>
</tr>
<tr>
<td>10.3.3 Harmonisation of Islamic law</td>
<td>173</td>
</tr>
<tr>
<td>10.4 Application of Islamic law</td>
<td>175</td>
</tr>
<tr>
<td>10.4.1 Jurisdiction of Islamic courts</td>
<td>175</td>
</tr>
<tr>
<td>10.4.2 Jurisdiction of civil courts (English courts) in Islamic law</td>
<td>178</td>
</tr>
<tr>
<td>10.4.3 Harmonisation of Islamic law in Malaysia and Nigeria</td>
<td>180</td>
</tr>
<tr>
<td>10.4.4 Obstacles to the application of full Islamic law</td>
<td>181</td>
</tr>
<tr>
<td>10.5 Conclusion</td>
<td>181</td>
</tr>
</tbody>
</table>

**Chapter Eleven**

**Enforcing the Law against Enforcers: The Enforcement Agency Integrity Commission**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>11.1 Introduction</td>
<td>183</td>
</tr>
<tr>
<td>11.2 The Ombudsman</td>
<td>184</td>
</tr>
<tr>
<td>11.3 Formation of the “Malaysian Ombudsman” – the EAIC</td>
<td>187</td>
</tr>
<tr>
<td>11.4 The Enforcement Agency Integrity Commission Act 2009</td>
<td>190</td>
</tr>
<tr>
<td>11.5 Conclusion</td>
<td>196</td>
</tr>
</tbody>
</table>

**Basic Concepts and Features of the Constitution**

**Chapter Twelve**

**General Principles of Good Governance in Public Administration: A Judicial Approach**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.1 Introduction</td>
<td>199</td>
</tr>
<tr>
<td>12.2 Public authority defined</td>
<td>200</td>
</tr>
<tr>
<td>12.2.1 Multiple powers</td>
<td>201</td>
</tr>
<tr>
<td>12.3 Judicial approaches on good governance</td>
<td>201</td>
</tr>
<tr>
<td>12.3.1 Jurisdiction versus no jurisdiction</td>
<td>201</td>
</tr>
<tr>
<td>12.3.2 Bona fides versus mala fides</td>
<td>202</td>
</tr>
<tr>
<td>12.3.3 Proper purpose versus improper purpose</td>
<td>203</td>
</tr>
<tr>
<td>12.3.4 Relevant facts versus irrelevant facts</td>
<td>204</td>
</tr>
<tr>
<td>12.3.5 Non-dictation versus abdication</td>
<td>205</td>
</tr>
<tr>
<td>12.3.6 Mechanical decisions</td>
<td>205</td>
</tr>
<tr>
<td>12.3.7 Non-restraint</td>
<td>206</td>
</tr>
<tr>
<td>12.3.8 Reasonable delay versus undue delay</td>
<td>207</td>
</tr>
<tr>
<td>12.3.9 No discrimination</td>
<td>208</td>
</tr>
<tr>
<td>12.3.10 Rationality (reasonableness) versus irrationality (unreasonableness)</td>
<td>208</td>
</tr>
<tr>
<td>12.3.11 Procedural propriety (procedural fairness) versus procedural impropriety</td>
<td>210</td>
</tr>
<tr>
<td>12.3.12 Right of hearing (audi alteram partem)</td>
<td>211</td>
</tr>
<tr>
<td>12.3.13 No bias (nemo judex in causa sua)</td>
<td>212</td>
</tr>
<tr>
<td>12.3.14 Reasoned decision</td>
<td>213</td>
</tr>
<tr>
<td>12.4 Conclusion</td>
<td>214</td>
</tr>
</tbody>
</table>

**Chapter Thirteen**

**Malaysian Constitution, Political Parties and the Party System**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>13.1 Introduction</td>
<td>215</td>
</tr>
<tr>
<td>13.2 Political parties and party system</td>
<td>215</td>
</tr>
<tr>
<td>13.3 Political parties and party system in the Malaysian Constitution</td>
<td>218</td>
</tr>
<tr>
<td>13.4 Political parties and party system in Malaysia</td>
<td>220</td>
</tr>
<tr>
<td>13.5 Conclusion</td>
<td>224</td>
</tr>
</tbody>
</table>
Chapter Fourteen
Living in Limbo: Constitutional and Legal Issues of Unregistered Births

14.1 Introduction .......................................................... 225
14.2 The importance of birth registration .................................. 225
14.2.1 Right to education ................................................. 226
14.2.2 Right to health and a family environment ...................... 226
14.2.3 Juvenile justice ................................................ 227
14.2.4 Entitlement to state benefits and participation in society ........ 227
14.2.5 Right to a name and nationality .................................. 228
14.2.6 Right to be exempted from certain laws ......................... 228
14.3 Factors of non-registration of birth ................................... 230
14.3.1 Political barriers ................................................ 230
14.3.2 Administrative barriers ......................................... 230
14.3.3 Legislative barriers ............................................. 230
14.3.4 Economic barriers .............................................. 231
14.3.5 Geographical barriers .......................................... 232
14.3.6 Social cultural barriers ......................................... 232
14.4 Registration of birth in Malaysia ..................................... 233
14.5 Registration of birth and the right to citizenship in Malaysia ...... 234
14.5.1 Proof of citizenship ............................................. 234
14.5.2 Registration of a child born overseas .......................... 235
14.6 Conclusion ............................................................ 237

Chapter Fifteen
Effective Federal-State Coordination Mechanism for Good Governance and Sustainable Land Administration

15.1 Introduction .......................................................... 241
15.2 Good governance in land administration systems .................... 243
15.3 Malaysian land policy framework ................................... 248
15.4 Legal regulatory framework ......................................... 250
15.5 Institutional and administrative framework .......................... 252
15.5.1 The National Land Council .................................... 253
15.5.2 Department of Director General of Land and Mines (DGLM) ......................................................... 254
15.6 Analysis of the effectiveness of the functions of the federal agencies in coordinating the land administration system .......... 256
15.6.1 Lack of powers for coordinating the federal and state land administration relationship ........................................ 256
15.6.2 Lack of powers for DGLM in coordinating land administration for country .................................................. 257
15.6.3 Federal and state jurisdictional issues .............................. 258
15.6.4 Lack of coordination between government agencies .......... 259
15.7 Globally emerging initiatives in nationalising management of land administration ........................................ 261

Chapter Sixteen
Eviction of Unlawful Occupiers of Land: Judicial Responses and Policies

16.1 Introduction .......................................................... 271
16.2 General concepts .................................................. 273
16.2.1 The squatter phenomenon in Malaysia .......................... 273
16.2.2 Judicial responses to the position of squatters on state and private land ................................................ 275
16.3 Emergency (Clearance of Squatters) Regulations 1969 .......... 280
16.4 Forced eviction under the international human rights dimension .......................................................... 283
16.4.1 An alternative to forced eviction? .................................. 285

Chapter Seventeen
Legal Status of the States in Malaysia before Independence: Were we Colonised?

17.1 Introduction .......................................................... 289
17.2 The British and the Malay States: Policy of non-annexation and treaty of protection ........................................... 290
17.2.1 The British and the Straits Settlements ......................... 294
Chapter Eighteen
Religious Rights and Freedom: Comparative Perspectives

18.1 Introduction ................................................................. 313
18.2 Islam as the religion of the Federation under Article 3(1) of
the Federal Constitution (FC) ........................................... 314
18.2.1 Adoption of official faith: Greece ................................ 314
18.2.2 Adoption of official faith: Ireland .............................. 315
18.2.3 Secular constitution: Australia .................. 315
18.2.4 Secular constitution: Nigeria .................................. 316
18.3 The first argument: Religious rights and freedoms
protected in the States’ Constitutions ................................. 316
18.3.1 States with official religion: Malaysia .............. 316
18.3.2 States with official religion: Greece ................ 317
18.3.3 States with official religion: Ireland ................ 317
18.3.4 Other secular states: Australia ............................. 318
18.3.5 Other secular states: Nigeria ............................... 318
18.4 Freedom of religion in Malaysia under Article 11 and the
restriction on religious rights under the FC .................... 319
18.5 The second argument: Democratic and secular constitutions ... 322
18.5.1 International human rights instruments .......... 322
18.5.2 The Universal Declaration of Human Rights ......... 322
18.5.3 United Nations Declarations ................................ 322
18.5.3.1 The 1981 Resolution ................................ 322
18.6 The practice of the European Court of Human Rights (ECHR) ... 324
18.6.1 Freedom of religion under the European Convention
for the Protection of Human Rights and Fundamental
Freedoms (the European Convention) .............................. 324
20.3 Understanding business-related human rights abuses in Malaysia.................................353
20.3.1 Overview ........................................353
20.3.2 Contributing factors..................................355
20.3.2.1 Regulatory vacuum in regards to business conduct .....................355
20.3.2.2 Misconceptions about CSR ................................356
20.4 Regulatory and voluntary-based solution mechanisms ............................................358
20.4.1 Regulatory approaches ................................358
20.4.2 Voluntary approaches ................................361
20.5 Findings of the study and some recommendations ................................................362
20.5.1 Harmonising the regulatory and voluntary approaches .................................362
20.5.2 Human rights as business and states responsibilities .........................364
20.5.3 Human rights principles are good for business ........................................364
20.6 Conclusion................................................365

Chapter Twenty One
Rights of the Orang Asli under the Federal Constitution...........367
21.1 Introduction........................................367
21.2 Legal definition of indigenousness ........................................368
21.2.1 Orang Asli ........................................368
21.2.2 Native of Sabah and Sarawak...............................370
21.2.3 Malay .............................................372
21.3 The Orang Asli rights under the Federal Constitution .................373
21.3.1 Article 8(5)(b) .......................................374
21.3.2 Articles 13(1) and (2) ..................................377
21.4 Law as a tool for the advancement of the Orang Asli .......................379
21.5 Conclusion ............................................381

Chapter Twenty Two
Right to Health: International Human Rights Law and the Experience of Other Countries ........................................383
22.1 Introduction ...........................................383
22.2 Brief concept of health ......................................383
22.3 Health and human rights ..................................385
22.4 International human rights instruments on the right to health...387
22.4.1 Regional instruments on the right to health ...........................392
22.4.1.1 Europe........................................392
22.4.1.2 American continent ..............................393
22.4.1.3 Africa ....................................394
22.4.2 Scope of the right to health ................................394
22.4.3 Constitutional rights to health ................................395
22.5 Implementing the right to health: examples of selected countries..............397
22.5.1 Position in Malaysia ....................................406
22.6 Conclusion ............................................408

Chapter Twenty Three
Rights of Persons with Disabilities (PWD): The “Almost Forgotten” Protection under the Federal Constitution ..........411
23.1 Introduction........................................411
23.2 International human rights law for PWD position in UN, CRPD ..................................414
23.3 Laws governing PWD in Malaysia ........................................419
23.4 Position in Federal Constitution for PWD ........................................423
23.4.1 Article 5 – Personal liberty ..................................423
23.4.2 Article 8 – Equality ......................................426
23.4.3 Article 12 – Education ......................................428
23.5 Conclusion ............................................430

Chapter Twenty Four
Freedom of Information: Principles and Challenges Towards Vision 2020 .................431
24.1 Introduction........................................431
24.2 History................................................431
24.3 Freedom of information as a human right under the umbrella of freedom of expression ........................................432
24.4 Movement toward freedom of information legislation .................433
24.5 Concept and scope of freedom of information ......................434
24.6 Principles under freedom of information and challenges .................436
24.7 Conclusion ............................................442

Chapter Twenty Five
Right to Privacy: Development, Cases and Commentaries ..............445
25.1 Introduction ...........................................445
25.2 Definition and scope of right to privacy ........................................446
25.2.1 Right to privacy in the common law ........................................448
25.2.2 Right to privacy in the islamic perspective ...............................450
25.3 Right to privacy in the Malaysian Constitution .................452
25.3.1 Right to privacy as a subset of right to life and liberty ......................453
25.3.2 Right to privacy as a subset of the right to property ......................455
25.4 Recent developments from Malaysian courts ..........................457
25.5 Conclusion ............................................465

Chapter Twenty Six
Slavery and Human Trafficking: Constitutional Provisions and Domestic and International Laws ..........................467
26.1 Introduction ...........................................467
26.2 Prohibition of slavery and forced labour in the Federal Constitution and international laws ............468
26.2.1 Slavery, forced labour and human trafficking ......................472
28.3 Freedom of speech as an integral part of democracy and the Shariah ........................................ 505
28.4 Freedom of speech: A universal and domestic right ......................................................... 507
28.5 Limitation and regulation of freedom of speech in civil society and from the Shariah perspective ........................................................... 511
28.6 Limitation and regulation of the freedom in international human rights law ......................................................... 513
28.7 Limitation of freedom of speech in the internet: Prohibition and regulation of negative content on the internet ........................................ 515
28.8 Illegal and harmful content on the internet: Initiative taken and approach adopted by the European Union and its institutions ......................................................... 516
28.8.1 Illegal content ......................................................... 516
28.8.2 Potentially harmful content ......................................................... 516
28.9 Laws regulating the internet in some countries ......................................................... 518
28.9.1 Internet Code of Practice of Singapore ......................................................... 518
28.9.2 Internet Code of Practice of Brunei Darussalam ......................................................... 518
28.9.3 Communications Decency Act 1996 and Child Pornography Prevention Act 1996 ......................................................... 518
28.9.4 Laws restricting and regulating internet content in Malaysia ......................................................... 519
28.9.5 Communication and Multimedia Act 1998 of Malaysia and regulation of internet content in Malaysia ......................................................... 519
28.9.6 Restriction under defamation law ......................................................... 522
28.10 Conclusion ......................................................... 522

Index ........................................................................ 525