



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

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Abdul Ghafur Hamid @ Khin Maung Sein

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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.

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Chapter Two

International Human Rights Instruments: Hard and Soft Law

Haniff Ahamat

2.1 INTRODUCTION

Being one of the rapidly developing areas of international law, international human rights law has been subjected to serious discussions about the normative process underlying the law concerned. The sources of international human rights law are found in Article 38(1) of the Statute of International Court of Justice (ICJ) which stipulates treaties alongside other sources of international law. A treaty is the main source of law as far as human rights are concerned. The United Nations (UN) treaty system is testimony of the over-arching importance of treaties to human rights law. Those treaties are an integral part of the international human rights instruments. Nevertheless the role of customary international law, which is another important source of international law, also needs to be discussed because non-State Parties to the human rights treaties may still be affected by the reporting works of the bodies or institutions created by the human rights treaties. This is of course without prejudice to the basic rule in international law that a treaty does not bind a non-State Party.¹ As human rights treaties have a direct effect on the application of domestic laws and even customs, achieving consensus among States for them to be bound by such treaties would be difficult. Therefore soft law is vital as will be seen in the discussion on how non-treaty instruments (such as the Universal Declaration on Human Rights) contribute to developing later human rights treaty standards.

1 This rule derives from the Latin maxim *pacta tertiis nec nocent nec prosunt* which is reaffirmed in Article 34 of the Vienna Convention on the Law of Treaties: "A treaty does not create either obligations or rights for a third State without its consent."