



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 (CI Arb), 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 |

The Right to a Fair Trial: The Perspective of International Law and the Malaysian Experience

Raja Badrol Hisham Raja Mohd Ali

6.1 INTRODUCTION

Human rights law is one aspect of the international law which focuses on the protection of fundamental liberties. The international community, in concert, through the General Assembly had on December 10, 1948 proclaimed the Universal Declaration of Human Rights [UDHR] to ensure that the rule of international law of human rights plays its role to protect individuals who are, or will be unjustly deprived of their rights. Article 10 of the UDHR 1948¹ defines the internationally accepted concept of fair trial as a fair hearing conducted by an independent and impartial tribunal whereas Article 11² emphasis on the presumption of innocence and no penal offence should have a retrospective effect. Though the UDHR does not create legally binding duties on States, there are two Covenants adopted by the United Nations on the basis of the UDHR which creates legally binding duties on States. The two Covenants are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR). Under the ICCPR, States agree to ensure that the rights listed in the Declaration are effectively protected in their national laws.

1 Article 10 of the UDHR:

In this Article, everyone is guaranteed in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

2 Article 11 of the UDHR:

This Article states that:

1. Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence,
2. No one shall be held guilty of any penal offence on account of any fact or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed other than the one that was applicable at the time the penal offence was committed.