



Islam and Human Rights in the Federal Constitution



The Constitution

- The 1957 Merdeka Constitution lays down the foundational principles and basic structures for the governance of the Malayan nation.
- When Malaysia was formed, new provisions were engrafted on to the document to form the 1963 Malaysia Constitution.



Principal contents

- Nature of Malaysian polity and governance
- Separation of powers: Institutions and organs of government
- Division of powers between the state governments and the federal government
- The national legal order
- Fundamental liberties
- Common citizenship



Federal Constitution fundamental to nation and nation-building

- The Federal Constitution is foundational and fundamental instrument in the making of the Malaysian nation
- It is the supreme law of the land
- Other laws which are inconsistent with the Constitution is void
- All members of Parliament, the Cabinet and the Judiciary take an oath of office to preserve, protect and defend the Federal Constitution



Oath to to preserve, protect and defend its Constitution

- "I, ..., having been elected (or appointed) to the office ofdo solemnly swear (or affirm) that I will faithfully discharge the duties of that office [*my judicial duties in that office*] to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will **preserve, protect and defend its Constitution.**"

Oath prescribed in Federal Constitution by judges, parliamentarians and cabinet ministers



To preserve, protect and defend its Constitution

- Defend: to protect from attack, to offer support especially by arguing against objections or criticisms
- Protect: to keep safe, prevent from being harmed or damaged
- Preserve: to make sure something lasts; to keep protected



Oath of YDPA: Additional duty to protect Islam

Kami ibni Yang di-Pertuan Agong bagi Malaysia bersumpah dengan melafazkan:
Wallahi; Wabillahi; Watallahi;

maka dengan lafaz ini berikrarlah Kami dengan sesungguhnya dan dengan sebenarnya mengaku akan taat setia pada menjalankan dengan adilnya pemerintahan bagi Malaysia **dengan mengikut sebagaimana undang-undang dan Perlembagaan** yang telah disah dan dimasyhurkan dan yang akan disah dan dimasyhurkan di masa hadapan ini. Dan lagi kami berikrar mengaku dengan sesungguhnya dan dengan sebenarnya **memelihara pada setiap masa Agama Islam** dan berdiri tetap diatas pemerintahan yang adil dan aman di dalam Negeri.



Islam

- Article 3
- Article 11(4)
- Article 12(2)
- Article 4
- Article 8(2): Non-discrimination on religious grounds
- Article 8(5)(a):– Personal law
- Article 74
- Ninth Schedule List I, II and III: Division of powers



Article 3: The full text and its import vis-à-vis other Articles

- 3 (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.
- 3 (4) Nothing in this Article derogates from any other provision of this Constitution.
- *Malay text: Perkara 3 (4): **Tiada apa-apa jua dalam ini mengurangkan mana-mana peruntukan lain dalam Perlembagaan ini.***



Distribution of powers: State power on Islamic matters

- Lion's share of powers of powers of governance with Federation
- Islamic law and personal and family law of Muslims
- Mosques or any Islamic public places of worship, offences by Muslims against precepts of Islam etc.
- Syariah Courts which shall have jurisdiction over persons professing the religion of Islam.
- Islamic personal law and offences against Islamic precepts
- Restriction and control of propagation of religion to Muslims.



Fundamental Liberties

- Part II of Federal Constitution: Articles 5-13; Article 153
- Schedule to Courts of Judicature Act (Section 25 (2): Enforcement of rights conferred under Part II of Federal Constitution



What are fundamental liberties

- Basic guaranteed rights of every person is entitled to have universally referred to as human rights
- To be respected and protected by government entrusted with wide powers to administer nation, resources and its citizens.
- Bulwark against unwarranted encroachments into the personal space: life, liberty, dignity and property of the governed by legislative invasion or executive aggression.
- Rights described in the Universal Declarations of Human Rights proclaimed by the General Assembly of the United Nations in 1948 as the inalienable rights of all members of the human family who are endowed with inherent worth and dignity.



Reid Commission Report

- "A federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life."



Suhakam's remit

- Term “human rights” refers to fundamental liberties as enshrined in Part II of the Federal Constitution

Section 2 of Human Rights commission of Malaysia act 1999



Fundamental Liberties

- Art 5 : the right to life and liberty [person]
- Art 5: the freedom of movement [citizen]
- Art 8 : equality before the law and to protection of the law [person]
- Art 8: right to non-discrimination [citizen]
- Art 11: the freedom of religion [person]
- Art 10 : the freedom of speech [citizen]
- Art 10 : the freedom of assembly [citizen]
- Art 10 : the freedom of association [citizen]
- Art 12 : the right to education; [citizen]
- Art 13 : the right to property [person]



Permissible limitations on fundamental liberties

- All rights have their legitimate limits, fundamental liberties are not absolute.
- Exceptions: freedom from slavery and protection against retrospective criminal laws
- State must have certain carefully circumscribed powers to limit exercise of fundamental liberties in the interest of protecting other citizens, society and the nation
- Article 10 (speech): restrictions by law on in interest of national security, international relations, public order, morality, contempt of court, defamation, incitement to any offence, parliamanetary privilege
- Freedom of religion in the Federal Constitution is subject to general laws relating to public order, public health and morality.



Enforcement of fundamental liberties

- High Court expressly vested with powers to issue to any person or authority directions, orders or writs, including writs in nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution or for any purpose.
- Constitutional fundamental liberties without enforceable remedies worthless; where this occurs serious breakdown of constitutionalism and rule of law



Islamization: Federal involvement

- Islam is fundamentally a matter within the powers of constituent states
- Federal funding of and involvement in Islamic matters through Islamisation policies distorts the essentially secular character of nation's polity and governance.
- Constituent states' involvement with limited powers and territorial reach confined to their respective state boundaries and by limited state funds less overwhelming in terms of impact on administration and the populace.
- Islamization policies: Assimilation of Islamic Values, Islam Hadhari and Islam Wasatiyah (Islam Madani)



The Islamic (Universal) Values

To establish certain Islamic values which are universally accepted and emphasised in all religions:

- *Trust *Responsibility *Honesty
- *Dedication *Moderation *Diligence
- *Discipline *Cooperation
- *Honourable behaviour
- *Thanksgiving

(Dasar-Dasar Kerajaan; Edisi Ketiga, Kementerian Penerangan, October 1994).



The fruits of Islamisation policies

- Inculcation of universal values conveniently ignored and neglected
- Platform for gradualist/programmatic Islamisation of national policies, systems, institutions and bureaucratic machineries along Orthodox Islamic lines
- Islamization of national legal order
- Serious impact and implications on fundamental liberties in an essentially secular Malaysian nation with Islam as the religion of the Federation



Islamization and the national legal order

- Islamic state proponents ultimate vision is for the establishment of a constitutional framework and a legal and judicial system in which the Syariah law is the supreme law
- This should be worked out on through a subtle strategy to Islamicise the legal order.
- It should be low profiled, pre-planned, graduated and given a subtle secular or non-religious form and appearance buttressed by secular or non-religious reasons.
- This will be most effective in the face of likely opposition given the character of the Malaysian populace

Mohammed Imam: "Making Laws Islamic in Malaysia: A Constitutional Perspective" Current Law Journal [1994] 3 CLJ vii



....(a) Federal Constitution to be amended

- Article 3 (i) of the Federal Constitution imposes a positive obligation on Parliament to enact fundamental Islamic constitutional principles by recourse to its powers of amending the Constitution under Article 159.
- Intent that Article 3 assumes status of a superior provision over other articles
- Ultimately Islamic law a “super” *grundnorm*



.....(b) Other legislation

- With regard to other legislation, Malaysia should emulate the Pakistan modality whereby all laws are to be brought into conformity with the injunctions of the Quran and Sunnah and that no law (other than the personal laws of non-Muslims) should be enacted repugnant to such injunctions.



...(c) Use of creative judicial law-making power

- Judicial Islamization of the law by judges using their creative law-making power when adjudicating cases brought before them.
- The same strategy based on subtlety and imperceptibility is recommended.



Islam, Islamization policies and Fundamental Liberties

- **Islam as implemented by:**
- Executive arm of government (as guided/dictated by religion bureaucrats)
- Legislative arm of government
- Judicial arm of government



Federal Legislation: Trend in law-making

- Subject to scrutiny of religious authorities who can halt the implementation of such laws
- Domestic Violence Act 1994 could not be brought into force for almost 2 years.
- Certain provisions of the Act said to be contrary to Islamic laws and could not be implemented in their present form
- Subsequent Pusat Islam's blessings after scrutinising the Act.
- Similar fate to law reforms arising out of status of converted spouses after divorce and the religious upbringing up children
- Implication: Fundamental liberties (life and liberty, equality before the law, and religious freedom subordinated religious diktats of religion bureaucrats



State Legislation

- Powers to enact laws pertaining to offences against precepts of Islam
- Wide ranging implication on fundamental liberties
- ZI Publications: Freedom of speech,
- Borders case: Protection against retrospective laws
- Muhamad Juzaili: Life and liberty, equality and equal protection, movement, speech
- Kassim Ahmad: Life and liberty, equality, speech and expression



Offences against precepts of Islam

- "Precepts of Islam' held to encompass creed or belief ('aqidah'), law ('shari'ah') and ethics or morality ('akhlak') and not to the five pillars of Islam or to precepts of Islam
- Acting in contempt of a religious authority by defying or disobeying the fatwa regarding certain deviant teachings and beliefs
- Possession of a vcd the content of which is contrary to Hukum Syarak
- Conducting a religious talk without a tauliah
- Publishing a book containing content which is contrary to Islamic law
- Disseminating and distributing by way of selling the books deemed contrary to *Hukum Syarak*
- Questioning wearing of head scarf (tudung) and thereby ridiculing the practices of Islam" and acting in contempt of religious authority.



Progressive judicial approach in fundamental liberties adjudication

- **Progressive principles in giving life the fundamental rights:**
- Certain features that constitute the basic fabric of the Federal Constitution.
- Fundamental rights guaranteed by Part II form part of the basic structure of the Federal Constitution
- A prismatic methodology must be taken in construing fundamental liberties
- Corresponding principle is that “provisos” or restrictions that limit or derogate from a guaranteed right must be read restrictively
- Court must refer to the humanising and all-pervading provisions of Article 8(1) of the Federal Constitution
- State powers to enact laws creating offence against precepts of Islam subject to fundamental liberties



Regressive judicial retreat

- Limits imposed not subject to test of reasonableness.
- Judicial disinclination to make declaratory reliefs on constitutional rights
- Judicial inclination to equate powers on Islam with other repository of constitutional powers.
- Judicial expansionist construction of regarding Article 3 74 (State Lists) and 121A re Islam Islamic matters and Syariah Courts.
- Apex court blurs line between consistency and competency challenges.



1a. Early attempt to rewrite Federal Constitution: Supremacy of Islam

- Pada pendapat saya "Islam ialah agama bagi Persekutuan tetapi agama-agama lain boleh diamalkan dengan aman dan damai" bermakna **Islam adalah agama utama di antara agama-agama lain yang dianuti di negara ini seperti Kristian, Buddha, Hindu dan selainnya.** Islam bukan setaraf dengan agama lain, bukan duduk berganding bahu atau berdiri sama tegak. Ia duduk di atas, ia berjalan dahulu, terletak di tempat medan dan suaranya lantang kedengaran. Islam ibarat pokok jati - tinggi, teguh dan terampil. Jika bukan sedemikian Islam bukanlah agama bagi Persekutuan tetapi adalah salah satu di antara beberapa agama yang dianuti di negara ini dan setiap orang sama-sama bebas mengamalkan manamana agama yang dianutinya, tiada lebih satu dari yang lain.



1b. Positive obligation of government to protect, promote and magnify Islam

- Peruntukan Islam sebagai agama Persekutuan hendaklah diberi tafsiran yang sewajarnya. Ia bermakna Kerajaan bertanggungjawab memelihara menyemarak dan mengembangkan Islam sepertimana yang termampu dilakukan oleh Kerajaandan sepatutnya

Meor Atiqulrahman Isham v Fatimah Shihi & Ors[2000] 1 CLJ 393



1c. Implications revisionist reading of Article 3 on Article 11

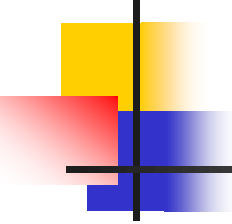
- Uagama-ugama lain hendaklah diatur-suai dan dihalatuju ke arah yang menjamin supaya ia diamalkan ***dengan aman dan damai dan tidak menggugat kedudukan utama ugama Islam*** bukan saja pada zaman ini tetapi yang lebih penting untuk zaman akan datang dan berterusan
- *..termasuk membuat undang-undang bagi menjamin rumah-rumah ibadat ugama-ugama lain tidak melebihi atau bersaing dengan Masjid Negara/Negeri dari segi lokasi dan keterampilan, saiz dan bentuk yang keterlaluan, ataupun terlalu banyak dan di merata-rata tempat yang takterkawal.*



Invoked but rejected in Subashini

- Submission that Islam is the religion of the Federation by virtue of Art. 3(1) of the Constitution is ground for giving victory to the Syariah Court side in a conflict of jurisdiction between the Syariah Courts and the secular courts.
- Of the four heads of submission, this occupies the most number of pages.
- **“The thinking behind this argument is akin to one that inclines towards making Islamic law, by virtue of Islam being the religion of the Federation, something like the supreme or prevailing law of this country.”**

Subashini Rajasingam v Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1



2a. Article 3 (1) : Fundamental liberties subject to Islam?

- Fundamental liberties (including religious freedom) are to be read with Article 3 (1)“
- Article 3 places the religion of Islam at par with the other basic structures of the Constitution
- Article 3 is the third in the order of precedence of the articles.
- Article 11 which is one of the fundamental liberties provided under Part II is to be read subject to Article 3.
- “Peace and harmony” given contorted significance
- *Note 1: Interposition of word ‘but’ in fact limits effect of Islam on other religions and not the other way around.*
- *Note 2: At hearing of appeal implies that practice of other religions must be in peace and harmony with Islam*

Menteri Dalam Negeri & Ors v Titular Roman Catholic Bishop of Kuala Lumpur
[2013] 6 MLJ 468



2b. Superadded significance: To protect, promote and to defend Islam

- Held: "Article 3 is not a mere declaration. But it imposes positive obligations on the Federation to protect, defend and promote Islam and to give effect by appropriate state action, to the injunction of Islam and to facilitate and encourage people to hold their life according to the Islamic injunction on spiritual and daily life."
- *Query: protect, defend and promote Islam with no regard to other fundamental liberties?*
- *Oath of office of 3 organs of government and of the YDPA*

*Court of Appeal in Catholic Herald Case
citing Mohammed Iman*



2c. Imam's rationalization for Islamization of national legal order

- Premised upon the argument that Article 3 which provides that Islam is the religion of the Federation serves the same purpose as the declaration in the constitutions of some Islamic countries that Islamic Shariah is the principal source of legislation.
- Another premise: Article 3, far from being innocuous, casts upon the Federation a positive obligation "to protect, defend and promote the religion of Islam and to assist, enable and facilitate Muslims, individually and collectively, to order their lives in accordance with the Injunctions of Islam.

Freedom of Religion under the Federal Constitution – A Reappraisal" (1994 (2) CLJ at page lxxv)



Where civil courts abdicate: Rights without remedies

- Real instances of injustice of litigants who have fundamental rights but are without remedies
- Arises where civil courts abdicates jurisdiction
- Fundamental rights become unenforceable
- Also an infringement of Article 8(1) which guaranteeing equal protection of the law.
- Muslims: Kassim Ahmad, ZI Publications, Transgender
- Non-Muslims: Sergeant Moorthy, Lina Joy



High Court raises issue of remediless rights

- *Nasir [Senior Federal Counsel] did not reply but argued that the proper forum to adjudicate the matter was the Syariah High Court.*
- *Judge: What is the remedy for the family then? The widow is not a Muslim and she cannot go to the Syariah Court, so she comes to the civil court.*
- *Nasir: It is not the function of this court to provide remedy for this matter. The fact that she cannot go to the Syariah Court does not mean that she can go to a civil court.*



continued...

- *Judge: She is not a Muslim and cannot go to a Syariah Court. When she goes to a civil court, the respondents there will say that the case cannot be tried in a civil court. So, she has no remedy?*
- *Nasir: Yes. She has no remedy.*
- *That answer was greeted with loud murmurs from the public gallery.*
- *The judge then asked: Is there something wrong then?*
- *The whole court went silent.*



Implications on fundamental liberties

- Fundamental liberties undermined and made vulnerable
- National legal order and system compromised with emerging signs of judiciary disinclination to enforce constitutional fundamental rights.
- Judicial mind-sets moulded by Islamic state ideas and ideals with fundamental liberties being considered anathema?
- Muslims and Non-Muslims alike: Article 3 given effect of overriding constitutional provision and even status of a *super grundnorm*?
- Muslims: Fundamental liberties subject to offences against “precepts of Islam?”
- Non-Muslims: “*Dhimmitude*”?



Principal concerns and fundamental questions

- Malaysian nation and polity: Islamic/Quasi Islamic or secular state?
- National legal order and system: Civil or syariah as the supreme law?
- Rule of Law or Rule of Religious Diktats?
- Is the High Court or Syariah Court the repository judicial power?
- Common nationality and equality before the law or diminished citizenship of *dhimmis* and “other” Muslims?
- Fundamental liberties subject to diktaks of religion bureaucrats and rendered remediless unenforceable constitutional rights?