

TUNTUTAN LGBT DIMANAKAH PERCANGGAHANNYA DI BAWAH PERLEMBAGAAN PERSEKUTUAN?

ABDUL RAHIM SINWAN
PERSATUAN PEGUAM MUSLIM
MALAYSIA

FEDERAL CONSTITUTION

- **Art3(1):** Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

- **Perkara 3 (1)** *Islam ialah agama bagi Persekutuan; tetapi agama-agama lain boleh diamalkan dengan aman dan damai di mana-mana Bahagian Persekutuan*

Erti sebenar dan aplikasi **Perkara 3(1)** telah diterangkan dalam banyak keadaan oleh Mahkamah kita. Pertama sekali, keputusan Mahkamah Tinggi di dalam kes **Meor Atiqulrahman v Fatimah Sihi and others**, dilaporkan pada tahun 2000, di mana Hakim Mohd Noor Abdullah menyatakan;

“Islam ialah ugama bagi persekutuan tapi ugama-ugama lain boleh diamalkan dalam aman dan damai. Islam adalah ugama utama di antara ugama-ugama lain yang dianuti di negara seperti Kristian, Buddha, Hindu. Islam bukan setaraf dengan ugama lain. bukan duduk berganding bahu dengan agama lain atau berdiri sama sama tegak. Ia duduk di atas, berjalan dahulu, terletak di tempat medan, dan suaranya lantang kedengaran. Islam ibarat pokok jati. Tinggi, teguh, dan terang. Jika bukan sedemikian, Islam bukanlah ugama bagi persekutuan, tetapi adalah salah satu di antara beberapa ugama yang dianuti di wilayah ini, dan setiap orang sama-sama bebas mengamalkan mana-mana ugama yang dianuti. Tiada lebih di antara satu sama lain.”

Walaupun Perlembagaan melarang diskriminasi atas dasar agama semata-mata, namun terdapat pelbagai pengecualian dalam hal kedudukan agama-agama. Mahkamah tertinggi Negara dalam banyak kes telah memutuskan bahawa Islam sebagai agama bagi persekutuan tidak sama dengan agama –agama lain.

"...kedudukan Islam dalam Perlembagaan Persekutuan adalah berlainan daripada kedudukan agama-agama lain. Pertama, hanya Islam, sebagai satu agama, yang disebut dengan namanya dalam Perlembagaan Persekutuan, iaitu sebagai 'agama bagi Persekutuan' ... Perkara 3 Fasal (1).

Tun Ahmad Fairuz dalam kes Lina Joy

FEDERAL CONSTITUTION

PART II

FUNDAMENTAL LIBERTIES

□ 8. Equality.

- (1) All persons are equal before the law and entitled to the equal protection of the law.
- (2) **Except as expressly authorised by this Constitution**, there shall be no discrimination against citizens on the ground only of religion, race, **descent, place of birth or gender in any law** or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
- [Am. Act A1130]

FEDERAL CONSTITUTION

PART II

FUNDAMENTAL LIBERTIES

- ❑ **10. Freedom of speech, assembly and association.**
- ❑ **(1) Subject to Clauses (2), (3) and (4) -**
- ❑ (a) every citizen has the right to freedom of speech and expression;
- ❑ (b) all citizens have the right to assemble peaceably and without arms;
- ❑ (c) all citizens have the right to form associations.
- ❑ **(2) Parliament may by law impose -**
- ❑ **(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation** or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

HUMAN RIGHTS COMMISSION OF MALAYSIA ACT 1999 (ACT 597) PART II

□ ESTABLISHMENT OF THE HUMAN RIGHTS COMMISSION OF MALAYSIA

- 4. Functions and powers of the Commission.**
- (1) In furtherance of the protection and promotion of human rights in Malaysia, the functions of the Commission shall be-**
- (a) to promote awareness of and provide education in relation to human rights;**
- (b) to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;**
- (c) to recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and**
- (d) to inquire into complaints regarding infringements of human rights referred to in section 12.**

- (2) For the purpose of discharging its functions, the Commission may exercise any or all of the following powers:
 - (a) to promote awareness of human rights and to undertake research by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research;
 - (b) to advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken;
 - (c) to study and verify any infringement of human rights in accordance with the provisions of this Act;
 - (d) to visit places of detention in accordance with procedures as prescribed by the laws relating to the places of detention and to make necessary recommendations;
 - (e) to issue public statements on human rights as and when necessary; and
 - (f) to undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.

- (3) The visit by the Commission to any place of detention under paragraph (2)(d) shall not be refused by the person in charge of such place of detention if the procedures provided in the laws regulating such places of detention are complied with.
- **(4) For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.**

Merdeka University Bhd. v. Government Of Malaysia [1981] CLJ (Rep) 2009

- **Principles of Constitutional Interpretation.**
- **Eusoffe Abdoolcader J:** “Barwick CJ, said in the High Court of Australia in *Attorney-General of the Commonwealth ex relatione McKinlay v. The Commonwealth of Australia* 1975] 135 CLR 1 (at p. 17): ‘The only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning’. I said in *PP v. Datuk Harun bin Haji Idris & Ors.* [1976] 2 MLJ 116, 119, 120 (at p. 120) **that the Constitution is not to be construed in any narrow or pedantic sense** (*James v. Commonwealth of Australia* [1936] AC 578, 614 (at p. 614)) **but this does not mean that a Court is at liberty to stretch or pervert the language of the constitution in the interest of any legal or Constitutional theory,.....”**

Merdeka University Bhd. v. Government Of Malaysia [1981] CLJ (Rep) 2009

- **Universal Declarations of Human Rights**
- **Eusoffe Abdoolcader J:** "The Universal Declaration of Human Rights was proclaimed and adopted on 10 December 1948, by the General Assembly of the United Nations. **It is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules. *It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law.***"

Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 386

- Siti Norma Yaakob FCJ: "*Merdeka University Berhad* was decided in 1981. This begs the question as to whether acceptance of the **1948 Declaration as a non legally binding instrument has changed by virtue of s. 4(4) of the Human Rights Commission of Malaysia Act 1999**. In my opinion the status and the weight to be given to the 1948 Declaration by our courts have not changed. ***It must be borne in mind that the 1948 Declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties.***

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- By its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human rights and fundamental freedoms. ***Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on Member States. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which Member States can ratify or accede to and those principles will then have the force of law.***

Merdeka University Bhd. v. Government Of Malaysia [1981] CLJ (Rep) 2009

- **National Interest**
- **Eusoffe Abdoolcader J:**
- “...in brief, it connotes that the proposed course is conducive to the **advantage of the end in view** and **not to its detriment** .”