

HUMAN RIGHTS IN THE MALAY WORLD¹⁸⁶

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Background

Human rights as a concept can be viewed as controversial—what might appear to be a right to some is not necessarily so apparent to others and, indeed, different worldviews might have different priorities. Human rights are often thought of as a set of principles that guarantee minimum human dignity; they are also the subject of disagreement and varying interpretations. Of note is the conflict between the aspirations of many human rights advocates and what many Muslims consider to be Islamic ideals. Is there any hope for the reconciliation, where they do have different conclusions, of the aspirations of human rights advocates with the aspirations of religious teachings, in particular those of Islam?

This paper sets out to explain how the Malay Muslim world implemented and made sense of human rights, how human rights are conceived and practiced in the modern nation state that is Malaysia, and lastly how the Centre for Human Rights Research and Advocacy (CENTHRA),¹⁸⁷ as part of the Malaysian Alliance of Civil Society Organisations (MACSA), is working to improve the status of human rights in Malaysia.

Universalism vs. Cultural Relativism

Human rights are derived from a European understanding of Judeo-Christian ethics that in turn were secularized during the Renaissance and Reformation. From the sixteenth to the eighteenth centuries, these were known as natural rights emanating from natural law. Today, they are known as human rights and have become legal rights enshrined in international law, such as in the Universal Declaration of Human Rights (UDHR).

The origins of the UDHR as a document can be traced to political landmarks in European and American history,

such as the Magna Carta of the United Kingdom (1215), the French Declaration of the Rights of Man (1789), and the US Bill of Rights (1791). Notwithstanding the UDHR's primarily Western origin, some—among them the Office of the United Nations High Commissioner for Human Rights—hold that human rights as encapsulated in the UDHR are universal, meaning they apply to every human being. Cultural relativists, however, object to universalism and argue that human rights are culturally dependent, and that no moral principles can be applied to all cultures. They argue that human rights are not the only way to guarantee humanism, and that the values of Asia and Islam should be equally important to those of Europe on the humanistic approach. They argue that culture is a source of moral rights and the basis of differentiation and distinction, and any existence of policy and consciousness has a very close relationship with the local history and culture and, hence, must take these into account. In this context, universalism is seen by cultural relativists as a form of new imperialism.¹⁸⁸

The division of the principles of the UDHR into the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in a way reflects the schism between universalism and cultural relativism. In the Cold War era, the universal versus culture debate was predominantly between the communist world, which championed economic and social rights, and Western democracies, which concentrated more on civil and political rights. While that debate collapsed with the demise of the Soviet Union, some of its themes survived. Now, debates take place primarily in an economic context between developed and less-developed countries, or alternatively in a religious context between the West and Islam.¹⁸⁹

The Intellectual Basis for Cultural Relativism

The intellectual basis of a cultural relativist approach to human rights may be found in AJM Milne's book *Human Rights and Human Diversity: An Essay in the Philosophy*

¹⁸⁶ Paper presented at the Islamic Tradition, Human Rights Discourse, and Muslim Communities Conference organized by the Atlantic Council at the Oxford Centre for Islamic Studies, Oxford, United Kingdom, on May 5, 2018.

¹⁸⁷ CENTHRA (www.centhra.org) is a founding member of the Malaysian Alliance of Civil Society Organisations in the Universal Periodic Review process, or MACSA.

¹⁸⁸ "Universalism and Cultural Relativism in Human Rights International Law Essay," *Lawteacher.net*, May 2018, <https://www.lawteacher.net/free-law-essays/international-law/universalism-and-cultural-relativism-in-human-rights-international-law-essay.php?vref=1>.

¹⁸⁹ Dr. Gyan Basnet and Mansoor Hassan Albalooshi, "Human Rights Debate: Universalism versus Relativism," *Eurasia Review*, June 27, 2012, <https://www.eurasiareview.com/27062012-human-rights-debate-universalism-versus-relativism-oped/>.

of *Human Rights*, published in 1986. Milne argues that the drafters of the UDHR failed to consider the diversity of cultures and worldviews and instead settled on a universal standard.¹⁹⁰ Noting the importance of cultural differences, the American Anthropological Association (AAA) criticized the UDHR even while it was drafted in 1947. In its Statement on Human Rights,¹⁹¹ submitted to the UN Commission on Human Rights responsible for drafting the UDHR, the AAA stated:

It is a truism that groups are composed of individuals, and human beings do not function outside the societies of which they form a part. The problem is thus to formulate a statement of human rights that will do more than just phrase respect for the individual as an individual. It must also take into full account the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably bound.¹⁹²

The AAA also postulated that the West's history of colonizing and evangelizing other cultures made the West problematic to reference—at least in as far as the recognition of universal human rights were concerned. They proposed that the UDHR be drafted with reference to three principles,¹⁹³ namely respect for individual differences including a respect for cultural differences, acceptance that no technique of qualitatively evaluating cultures has been discovered, and recognition that standards and values are relative to the cultures from which they are derived. These principles, however, were not implemented by the UN Commission drafting the UDHR, leading to criticism from cultural relativists.

HUMAN RIGHTS IN MALAYSIA

Rohaida Nordin, in her research paper *Malaysian Perspective on Human Rights*,¹⁹⁴ states that the interpretation of human rights in Malaysia favors a localized Asian approach based on the Confucian tradition rather than on Western tradition.¹⁹⁵ This is not quite true as Malaysia's approach is Islam-based, and not Confucian in origin.

Nonetheless, under the previous Tun Dr. Mahathir-led administration, human rights were viewed as a conflict between Western and Asian values and an attempt to undermine the sovereignty of former colonies of the West, including Malaysia. Because of this, Malaysia prefers to deal with issues relating to human rights on a case-by-case basis and within its own domestic jurisdiction, resisting international monitoring and refusing to become a party to most international human rights instruments.¹⁹⁶

Malaysia's highest law is the Federal Constitution. Article 3(1) provides that Islam is the religion of the federation. Thus, all human rights principles in Malaysia must take this fact into account. The Federal Constitution is also the source of human rights law in Malaysia. Part II of the constitution enshrines rights under the heading of “fundamental liberties,” which are basically another term for human rights. Among the rights recognized are the rights to life and liberty (Article 5), equality (Article 8), freedom of speech, thought, and expression (Article 10), and religion (Article 11).

As a federation of previously independent Malay Muslim Sultanates, Malaysia is a multiethnic and multi-religious country, and is the perfect showcase of why a universalist approach to human rights cannot function effectively. The sheer diversity of beliefs alone would render the approach unworkable. Understanding the different belief systems at play, it quickly becomes apparent that one needs to approach human rights from a cultural relativist standpoint to achieve their successful realization within Malaysia.

The Malaysian Constitution does this by providing appropriate limitations on the granting of human rights. Article 5 on the right to life and liberty, for example, while generously interpreted to include the right to livelihood and quality of life,¹⁹⁷ limits this to “so far as permitted by law.” This article enables the application of the death penalty, which advocates argue is necessary to deter serious crime such as drug trafficking and murder. Still, that is not to say that laws are not routinely amended to better reflect the ideals of right to life.

190 A.J.M. Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (The Macmillan Press, London, 1986): 3-4.

191 “Statement on Human Rights,” *American Anthropologist New Series* 49, No. 4 (October-December 1947), https://www.jstor.org/stable/662893?seq=1#page_scan_tab_contents, 539-543.

192 Ibid, 539.

193 Ibid, 541-542.

194 Rohaida Nordin, “Malaysian Perspective on Human Rights,” *Jurnal Undang-undang* (2010): 14.

195 Ibid, 19.

196 Ibid, 21.

197 *Lee Kwan Woh v. Public Prosecutor* (2009), 5 MLJ 301, Federal Court of Malaysia.

Recently, the Malaysian cabinet agreed to amend the law on drug trafficking to render the death penalty discretionary and not mandatory for drug traffickers.¹⁹⁸ This has been enacted in the form of an amendment to the Dangerous Drugs Act of 1952,¹⁹⁹ and although criticisms remain on who gets to exercise this discretion (i.e., the public prosecutor vis-à-vis the court),²⁰⁰ this is nonetheless a positive step forward from a human rights perspective.

As another example, the principle of equality as enshrined in Article 8 of the Malaysian Constitution has been amended in practice to protect historically persecuted groups. While the law sounds ideal on paper, critics argue that complete equality in treatment, absent affirmative action or positive discrimination, would render the spirit of the equality clause meaningless. This argument relates to the history of the indigenous peoples of Malaysia, the Bumiputera Malays, and the injustices visited upon them in the pre-independence era. It is to this end that the constitution also recognizes affirmative action for this group in the form of Article 153, established to remedy these past injustices due to a legacy of colonialism. It is on this basis that the New Economic Policy, which is a set of affirmative action regulations, was promulgated in 1970 and continues to operate to this day.

Freedom of speech, thought, and assembly are also limited by various laws, with the justification that previous incidents such as the 1969 racial riots resulted in untold suffering for Malaysians and the devastation of property, lives, and the economy. As a result, the Sedition Act was amended in 1970 to include Section 3(1)(f), effectively protecting the fragile racial and religious harmony that exists in Malaysia today.

Malaysians do enjoy the right to peaceful assembly as guaranteed by the Peaceful Assembly Act of 2012, enacted by the government to replace the Police Act of 1967, which required police permits for public rallies. Unlike the Police Act, the Peaceful Assembly Act merely requires notice, which is a vast improvement on the previous position.

Malaysia's perspective on human rights is that they must be in line with local cultures and norms, and in line with Islam's position as the religion of the Malaysian federation. Subject to this, human rights may

be realized as far as it is possible without contravening such norms. The alteration of Malaysian laws to approach synergy with the demands of the human rights discourse has been seen in recent years, with slow but steady liberalization about certain laws pertaining to restrictions on speech and assembly.

IMPROVING THE STATE OF HUMAN RIGHTS IN MALAYSIA

Improving human rights in Malaysia, while ensuring that their values and norms are adhered to in accordance with the cultural relativist worldview, is a constant challenge. Fortunately, various civil society organizations (CSOs) have been established to meet this need, such as the Center for Human Rights Research and Advocacy (CENTHRA).

CENTHRA's mission obtained a much-needed boost between July and September 2017 when the Ministry of Foreign Affairs held consultations with several local civil society organizations—including CENTHRA—to explore a variety of human rights concerns in Malaysia. Human rights practices in the country had come under scrutiny following Malaysia's participation in the Universal Periodic Review (UPR), a process for regularly evaluating the human rights practices of UN members initiated by the UN General Assembly in 2006.

Throughout the consultative sessions, the progress and implementation of human rights measures in Malaysia were discussed and the various CSOs in question were encouraged to be forthright about their concerns and to identify current and future challenges.

Upon the conclusion of the consultative sessions, various CSOs in attendance, including CENTHRA, decided it was in their common interest to unite and form a coalition of CSOs with the aim of studying, as well as advocating, human rights issues in Malaysia for the UPR process for many years to come. CENTHRA, together with representatives from other CSOs, announced the formation of the Malaysian Alliance of Civil Society Organisations in the UPR process.

The collective stand within MACSA is that any recommendation accepted and implemented by Malaysia—in addition to upholding international human rights

198 "Malaysia Moves Closer to Scrapping Mandatory Death Penalty for Drug Traffickers," Reuters, August 7, 2017, <https://www.reuters.com/article/us-malaysia-lawmaking-death-idUSKBN1AN17C>.

199 Via the Dangerous Drugs (Amendment) Act 2017.

200 Kasthuriraani Patto and Ramkarpal Singh, "Proposed Amendments to the Dangerous Drugs Act, 1952—Kasthuriraani Patto and Ramkarpal Singh," *Malay Mail*, November 24, 2017, <http://www.themalaymailonline.com/what-you-think/article/proposed-amendments-to-the-dangerous-drugs-act-1952-kasthuriraani-patto-and>.

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instruments such as the Universal Declaration of Human Rights of 1948, the Cairo Declaration on Human Rights in Islam of 1990, and the ASEAN Human Rights Declaration of 2012—must also be in tandem with Malaysia's own laws and customs, particularly the Federal Constitution as well as the constitutions and positions of the states within the federation.

CONCLUSION

The question of what constitutes human rights depends firmly upon whether one is inclined to the universalist view that human rights must be applicable to all despite their chiefly Western origin, or that modifications are in order given the same. The Malay world is very

much influenced by the Islamic conception of human rights. Malay customs follow Islamic law and tradition, which emphasize balance between the greater good and individual exercise of rights.

Human rights as practiced in contemporary Malaysia are those derived from its highest law, the Federal Constitution. The constitution recognizes the need to balance rights with responsibilities and safeguards to ensure they are not abused, that the greater good of society takes precedence over the individual exercise of rights, and lastly that any right must consider local values and norms. This is thought to be the ideal solution as this provides for maximum possible exercise of rights by any individual without endangering society.

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