



FUNDAMENTAL LIBERTIES IN
MALAYSIA: CONSTITUTIONAL
FRAMEWORK

BY

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ABSTRACT

Fundamental liberties that are enumerated under Art. 5 – 13 of the Federal Constitution outline broadly general principles of fundamental liberties in Malaysia. They are significant in determining relationship between the people and the state. Since these liberties are constitutionally guaranteed, the state cannot take those rights away from the people without justification. However, several descriptions can be made to these provisions and they are subject to interpretation. Some retain the original structure and some provisions have been amended. Some are absolute and some are subject to limitation and restriction. This poses problems in so far to understand the scope and limit of fundamental liberties in Malaysia. In order to meet the current challenges, the constitutional framework of fundamental liberties must be examined and scrutinized. For that purpose, this thesis adopts doctrinal analysis approach which mainly based on library research. Using this approach, this thesis constantly refers to the provisions of the Constitution itself as its main reference. Statutes and juridical decisions are relevant in so far to explain the scope and framework of those provisions of fundamental liberties. Secondary sources such as books, articles, journal, reports and newspaper are useful in illustrating that framework. In reaching that objective, this thesis gives special emphasis on the ideas and philosophy of fundamental liberties, its origin, its scope within the parameters of the Constitution, its development in Malaysia and analysis on judicial attitudes towards the implementation of fundamental liberties. Some Islamic principles relating to fundamental liberties and illustrations on their application in the Malay traditions are analysed in order to understand the concept of fundamental liberties in Malaysia. *Islām* and Malay traditions play important role in the Federal Constitution and their role are not limited to rites and ritual. The provisions of the Constitution are not rigid as to exclude the application of Islamic principles as part of the instrument in interpreting the Constitution. A considerable part of the thesis analyses the method of interpretation by judiciary where it finds that there has not been a systematic and consistent approach in interpreting the said provisions of the Constitution. These uncertainty and ambiguity of interpretations have hindered the progress and development of fundamental liberties principles in this country, Malaysia. The attitude and stance of the judges towards expanding the principles of fundamental liberties are pathetic since judicial activism is seen as peculiar. The judges are not trained to be ingenious and to interpret fundamental liberties provisions in the light of its ideas, philosophy, themes and origin. For that, a certain degree of emphasis has been well incorporated in this research with a hope that the judges should move gallantly and give life to the provisions on fundamental liberties. For that, a systematic approach and thematic interpretation should be adopted to achieve such objectives. In collateral, this research also examines the mechanisms in which fundamental liberties are protected particularly on role of the Human Rights Commission of Malaysia (SUHAKAM) and other organisations in promoting fundamental liberties. This research discovers that although the constitutional framework provides room for the development of fundamental liberties in Malaysia such development is in fact minimal and negligible. The law governing fundamental liberties remains stagnant and does not progressively develop towards establishing a better civil society.

ملخص البحث

الحريات الأساسية المنصوص عليها تحت بنود 5-13 من الدستور الاتحادي تعطي كامل صورة مبادئ الحريات الأساسية في ماليزيا. هذه الأسس مهمة في تحديد العلاقة بين الشعب والدولة. ولما كانت هذه الحريات مضمونة دستورياً، لا تسحب الدولة هذه الحقوق من الناس دونما مبرر. إذاً، يمكن صنع العديد من المواصفات القابلة للتأويل على هذه الشروط. فبعض هذه الشروط باق على هيكله الأصلي وبعضها تم تعديله، في حين كان البعض مطلقاً والآخر قابلاً للتعديل والتقييد. وهذا يطلق مشاكل في فهم حد الحريات الأساسية في ماليزيا. و من أجل مواجهة التحديات الراهنة، يجب النظر في الإطار الدستوري للحريات الأساسية بدقة. ولتحقيق هذا الغرض، تنبئ هذه الدراسة منهج التحليل العقائدي الذي يقوم أساساً على البحوث المكتبية. وباستخدام هذا المنهج، تشير هذه الدراسة باستمرار إلى شروط الدستور نفسه كمرجع أساسي لها. إن القوانين والقرارات القضائية كانت مهمة لبيان نطاق وإطار شروط الحريات الأساسية. وقد وجدت أن المصادر الثانوية مثل الكتب والمقالات والمجلات والتقارير والصحف مفيدة في توضيح هذا الإطار. وللوصول إلى هذا الهدف، تركز هذه الدراسة خصيصاً على أفكار وفلسفة الحريات الأساسية، أصلها، وبعدها في إطار الدستور، وتطورها في دولة ماليزيا وتحليل المواقف القضائية من أجل تنفيذ الحريات الأساسية. وقد تم تحليل بعض المبادئ الإسلامية المتعلقة بالحريات الأساسية على تطبيقها في التقاليد الماليزية من أجل فهم مفهوم الحريات الأساسية في دولة ماليزيا. يلعب الإسلام والتقاليد المالوية دوراً هاماً في الدستور الاتحادي وهذا الدور لا يقتصر على الشعائر والطقوس. وشروط الدستور ليست جامدة لاستبعاد تطبيق مبادئ الشريعة الإسلامية كجزء من أداة تفسير الدستور. وهناك جزء من الدراسة يحلل أسلوب التفسير من جانب السلطة القضائية ووجد هذا الجزء أنه لم يكن هناك منهج منظم ومتسق لتفسير هذا الدستور. وهذا الغموض من التفسيرات يعوق دون تقدم مبادئ الحريات الأساسية في هذا البلد، أعني ماليزيا. وموقف القضاة من أجل توسيع نطاق مبادئ الحريات الأساسية مخزن منذ اعتبار النشاط القضائي أمراً خاصاً. وهؤلاء القضاة ليسوا مدربين على أن يكونوا بارعين لتفسير الحريات الأساسية في ضوء أفكارها، وفلسفتها، ومواضيعها ومنشأها. ولذلك، ركز البحث مع الأمل في أن يتحرك القضاة بشجاعة لإعطاء الحياة للأحكام المتعلقة بالحريات الأساسية. ولذلك، ينبغي تبني منهج منظم وتفسير موضوعي لتحقيق هذه الأهداف. وبالإضافة إلى هذا، يتناول هذا البحث أيضاً الآليات التي تتم بها حماية الحريات الأساسية خاصة في دور لجنة حقوق الإنسان في ماليزيا (سوهاكام) وغيرها من المنظمات التي تقوم على تعزيز الحريات الأساسية. ويكتشف هذا البحث أنه بالرغم من أن الإطار الدستوري يتيح مجالاً لتطوير الحريات الأساسية في مجال التقدم في ماليزيا إلا أنه في الحقيقة قاصر وغير كاف، وأن القانون الذي يحكم الحريات الأساسية لا يزال راکداً، ولا يتطور نحو إقامة مجتمع مدني أفضل.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Anchom binte Lampong v PP and Hussin bin Mandot v PP (1940) MLJ 22
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Daud bin Mamat v Majlis Agama Islam [2001] 2 MLJ 390
Danaharta Urus Sdn Bhd v Kekatong [2004] 2 AMR 317; [2004] 2 MLJ 257 (FC)
Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155
Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 (CA)
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Government of Malaysia v Selangor Pilot Association [1977] 1 MLJ 133; [1978] AC 337
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JP Berthelsen v Director General of Immigration [1987] 1 MLJ 134
Johnson Tan Han Seng v Public Prosecutor [1977] 2 MLJ 66
Kamariah bte Ali dan lain-lain v Kerajaan Negeri Kelantan, Malaysia dan satu lagi [2002] 3 MLJ 657
Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Yang Lain [2001] 7 CLJ 586 (HC); [2003] 1 AMR 721 (FC)
Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129
Kerajaan Negeri Selangor & Ors v Sagong Tasi & 6 Ors [2005] 5 AMR 629
Kesavananda Bharati v State of Kerala AIR 1973 SC 1461
Ketua Pengarah Alam Sekitar & Anor v Kajing Tubek & Ors [1997] 4 CLJ 253 (CA)
Ketua Polis Negara v Abdul Ghani Haroon & Another Application [2001] 3 CLJ 853.
Lai Kim Hon & Others v Public Prosecutor [1981] 1 MLJ 84
Lah Tai v Collector of Land Revenue (1960) 26 MLJ 82
Lembaga Tata tertib Perkhidmatan Awam, Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal [2000] 3 MLJ 281
Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor [2004] 6 CLJ 242 (HC); [2005] 4 CLJ 666 (CA); [2007] 3 CLJ 557 (FC)
Lim Guan Eng v Public Prosecutor [1998] 3 MLJ 14

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187
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Melan bin Abdullah v Public Prosecutor [1971] 2 MLJ 280
Meor Atiqulrahman bin Ishak & Ors v Fatimah bte Sihi & Ors [2000] 5 MLJ 375;
 [2000] 1 CLJ 393 (HC), [2005] 2 CLJ 255 (CA); [2006] 4 CLJ 1 (FC).
Minister of Home Affairs v Fisher [1980] AC 319 (PC)
Mohamad Ezam Mohd Nor v. Ketua Polis Negara and other appeal [2001] 4 AMR
 4605; [2002] 4 CLJ 309
Mohamed Yusoff bin Samadi v Attorney General, Singapore [1975] 1 MLJ 1
Mustapha v Mohammad & Anor [1987] LRC (Const) 16
Nasharuddin bin Nasir v. Kerajaan Malaysia & 2 Ors [2002] 3 AMR 3721
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Ooi Ah Phua v. Officer in Charge of Criminal Investigation, Kedah/Perlis [1975] 2
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Persatuan Aliran Kesedaran Negara v. Minister of Home Affairs [1988] 1 MLJ 442
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Public Prosecutor v Param Cumaraswamy [1986] 1 MLJ 512
Public Prosecutor v Yee Kim Seng [1983] 1 MLJ 252
Public Prosecutor v Zainur Zakaria [2001] 4 CLJ 209
Ramah bt Ta'at lwn Laton bt Malim Sultan [1982] 1B MLJ 1
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Stephen Kalong Ningkan v Government of Malaysia [1970] AC 379; [1968] 2 MLJ
 238.
Subramaniam Subakaran v PP [2007] 1 CLJ 470.
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1998] 3 AMR 2373;
 [1998] 3 MLJ 289
Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 AMR 1617
Teh Cheng Poh v Public Prosecutor [1979] 1 MLJ 50
*Teoh Eng Huat v Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat
 Istiadat Melayu Kelantan* [1986] 2 MLJ 228; [1990] 2 MLJ 306
*Tun Datu Hj Mustapha bin Datu Harun v Tun Datuk Hj Mohamed Adnan Robert,
 Yang Di-Pertua Negeri Sabah and Datuk Joseph Pairin Kitingan (No.2)* [1986] 2
 MLJ 420.
Yeap Hock Seng v Minister for Home Affairs, Malaysia [1975] 2 MLJ 279 at 281

Wong Ah Fook v State of Johore (1937) MLJ 128
Zakaria bin Abdul Rahman v Ketua Polis Negara, Malaysia & Anor [2001] 3 MLJ
385; [2001] 6 CLJ 273

LIST OF STATUTES

Aborigines Peoples Act 1954 (Act 134)
Banishment Act 1959 (Act 79)
Constitution (Amendment) Act 1963 (Act No. 25 of 1963)
Constitution (Amendment) Act, 1964 (Act 19 of 1964)
Constitution (Amendment) Act, 1966 (Act 59 of 1966)
Constitution (Amendment) Act 1971 (Act A30)
Constitution (Amendment) (No. 2) Act 1973 (Act A206)
Constitution (Amendment) Act 1976 (Act A354)
Constitution (Amendment) (No.2) Act 1984 (Act A585)
Constitution (Amendment) Act 1988 (Act A704)
Constitution (Amendment) Act 2001 (Act A1095)
Constitution (Amendment) (No. 2) Act 2001 (Act A1130)
Constitution (Amendment) Bill 1976 (Government Gazette Jil. 20 No. 15 dated 22/7/1976 Tambahan No. 2)
Constitution (Amendment)(No. 2) Bill 2001 (D.R. 24/2001)
Criminal Procedure Code (Act 593)
Criminal Procedure Code (Amendment) Act 2006 (Act A1274)
Criminal Procedure Code (Amendment) (Amendment) Act 2007 (Act A1304)
Commission of Enquiry Act 1950 (Act 119)
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Distribution Act 1958 (Act 300)
Emergency (Essential Powers) Act 1979 (Act 216)
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Guardianship of Infant Act (Act 351)
Human Rights Commission of Malaysia Act 1999 (Act 597)
Human Rights Commission of Malaysia (Amendment) Act 2009 (Act 1353)
Immigration Act 1959/63 (Act 155)
Income Tax Act 1967 (Act 53)
Internal Security Act 1960 (Act 82)
Islamic Family Law (Federal Territories) Act 1984 (Act 303)
Law Reform (Marriage & Divorce) Act 1976 (Act 164)
Local Government Act 1976 (Act 171)
Lock-Up Rules 1953
Malaysia Act (Act 26 of 1963)
Parks (Federal Territory) By-Laws 1981
Police Act 1967 (Act 344)
Police (Amendment) Act 1987 (Act A685)
Printing Presses and Publication Act 1984 (Act 301)
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Restricted Residence Enactment (F.M.S 39)
Sabah Land Ordinance (Cap. 68)
Sarawak Land Code (Cap. 81)

Societies Act 1966 (Act 502)
Social Security Act 1969 (Act 4)

LIST OF ABBREVIATIONS

A.C.	Appeal Cases
ACCIN	Allied Coordinating Committee of Islāmic NGOs
AIR	All Indian Report
Aliran	Aliran Kesedaran Negara
Art.	Article
AMR	All Malaysia Report
Annex.	Annexure
AWAM	All Women's Action Society
B.C.	Before Christ
Bhd	Berhad (Limited)
CA	Court of Appeal
Chap.	Chapter
Cl/cl	Clause/Clauses
CLJ	Current Law Journal
CLR	Commonwealth Law Report
Ed.	Edition
edit.	Editor
et. al.	<i>et alii</i> (and others)
FC	Federal Court
HAKAM	National Human Rights Society
HC	High Court
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immune Deficiency Syndrome
HRCMA	Human Rights Commission of Malaysia Act, 1999 (Act 597)
Ibid.	<i>Ibidem</i> (in the same place)
Id.	<i>Idem</i> (the same)
i.e.	<i>Id est</i> (that is)
IFC	Interfaith Council
IUM LJ	International Islamic University Malaysia Law Journal
<i>Itqān al-Mulūk</i>	<i>Itqān al-Mulūk Bi al-Ta'dīl al-Sulūk</i>
JMCL	Journal of Malaysian and Comparative Law
k.w.j	Karramallahuwajhah
Ltd	Limited
MCA	Malaysian Chinese Association
MIC	Malaysian Indian Congress
MCCBCHS	Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism
MLJ	Malayan Law Journal
MTUC	Malaysian Trade Union Congress
NGO	Non-Governmental Organization
No./no.	Number
Para/Paras	paragraph/paragraphs
Pbuh	Peace Be Upon Him
PC	Privy Council

PP	Public Prosecutor
r.a.	<i>Raḍiyallahu ‘anhu</i>
SC	Supreme Court
Sect.	Section
SUARAM	Suara Rakyat Malaysia
SUHAKAM	Human Rights Commission of Malaysia
Trans.	Translated/Translator
UDHR	Universal Declaration of Human Rights
UNCHR	United Nations Commission on Human Rights
v	versus
Vol.	Volume
WAO	Women’s Aid Organisation
YDPA	Yang di-Pertuan Agong

CHAPTER ONE

INTRODUCTION

The phrase “fundamental liberties” carries a parallel meaning with what the globe usually defines as “human rights”. Those two phrases have been perceived to be of highly importance in determining the standard of life and liberty of each citizen in a country. In Malaysia, fundamental liberties are enshrined in Part II, Article 5 – 13 of the Federal Constitution. Part II in particular, comprises provisions providing rights to the people such as the right of an arrested person, right to equality, right to life and personal liberty, right to education, right to profess religion and etcetera. The inclusion of those rights in the Constitution guarantees that those rights will be respected and protected from its main enemy, the state. However, its implementation is frequently being challenged in court particularly on rights of an arrested person, rights to equality, right to profess and practice religion, freedom of speech, assembly and association and right to property. Nevertheless, certain rights such as protection against slavery has never been challenged in the court of law.

Those rights enumerated in Part II of the Constitution comprise mainly rights pertaining to civil and political rights, such as the right to life and liberty, freedom of expression, right to property, right against slavery and forced labour, right to education and equality before the law. However, it is submitted that although social, cultural and economic rights, which includes the right to practice one’s culture, the right to food and the right to work were not explicitly defined in the draft Constitution, those rights are also inclusive in the general scheme of the provisions of Part II of the Constitution.

At present, issues emerging from fundamental liberties inevitably become highly debatable and attract innumerable responses from various sectors, including the public and organisations. Public are more aware about their rights than 100 years before. This awareness might be attributed to the collective effort by the government as well as the non-governmental organization which are actively promoting and campaigning these rights. Owing to this exigency, Human Rights Commission of Malaysia Act 1999 (Act 597) was introduced, and followed consequently, the establishment of the Human Rights Commission (SUHAKAM) in early year 2000. This country has later expounded itself in greater discussions and documentations specifically on the development of fundamental liberties viz-a-viz organizations like SUHAKAM and other non-governmental organizations.

Having said so, the purpose of this research is to understand the scope and framework of the provisions relating to fundamental liberties in the Federal Constitution. On the thesis that the Constitution is the guiding law relating to fundamental liberties, it endows the people with basic rights and freedoms, to which all citizens and non-citizens are entitled to that correspond with the internationally acceptable norms. However, the Constitution remains laconic and leaves rooms for further interpretation(s) and construction by both judiciary and executive. To an advantage, these rules on fundamental liberties are fairly challenged and become alive, thus open to various ways of interpretation. Unfortunately, the divergences of interpretations and unsynchronized courts' decisions have caused dissatisfaction and causing public to distrust the spirit of Constitution.

The approaches and methods used by the judges in interpreting the Constitution are worth to be examined to see whether the scope and limit of fundamental liberties as stated in the Constitution are properly applied. The writer

believes that through this research, readers will be exposed with at least, first, the methods, approaches and styles employed by the judiciary in interpreting constitutional provisions on fundamental liberties and second, whether the judicial interpretation is in line with the ambit of constitutional provisions and is within the true spirit of fundamental liberties as enshrined by the Constitution.

Albeit recognition(s) implied by the judiciary on the cruciality of fundamental liberties, the real truth is still far fetching. When adjudicating the conflict of rights between a state and a citizen, the judicial body seems to grant the state precedence over the citizen's basic rights.¹

The situation becomes so obvious when certain judges give literal and stringent interpretation of the Constitution in respect of life and liberty of its citizens in the expense of relinquishing the very basic human rights such as *a person is presumed innocent until he is proven guilty* when it comes to "national interest or national security".²

Based on the decided cases, the judiciary seems to formulate a certain doctrine that once the legislature has complied with all procedural requirements on laws, there would be no room for further elaboration or interpretation on their substance no matter how harsh or unwarranted they are. An example of such laws is the Drugs Dependents (Treatment and Rehabilitation) Act 1983 (Act 283) which grants power to a magistrate to issue a detention order against a person for a period of 2 years in a drug

¹ *Public Prosecutor v Datuk Harun bin Idris* [1976] 2 MLJ 116; See also, Abdull Hamid Embong, 'Undang-Undang Pencegahan – Pandangan Kehakiman', [2002] 6 CLJ xciii.

² Per Ong Hock Thye in *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129, "That, in the interest of national safety, personal inconvenience in individual cases must give away is explicitly recognized by the framers of the Constitution in Part XI arts 149-151 ... In the troublous times of war and in the chaotic post-war conditions the scope of legal and permissive interference with personal liberty has been extended and restraints have been legalized by the legislature which would not have been accepted as legitimate in normal times ... Under Art 149 any provision in the Internal Security Act designed against action prejudicial to national security is declared valid notwithstanding that it is inconsistent with any of the provisions of article 5, 9 or 10, namely the fundamental liberties."

rehabilitation centre without having to go for a formal trial. This order of detention supposedly can be issued after the magistrate has made enquiry and meticulously discharges his duties such as to give opportunity to a person produced before him to make representation, to consider a report by a Rehabilitation Officer, to have regard to the circumstances of the case and the character, antecedent, age, health, conduct, employment, family and other circumstances affecting such person. Such power is no doubt very wide and arbitrary if not exercised with caution. Even, in a rare instance, the court has reminded itself that the duties placed upon an enquiry officer under that Act are onerous as the personal liberty of an individual can be seriously affected if proper enquiry enjoined upon him is not carried out.³

A blatant encroachment of people's fundamental liberties is clearly manifested through the implementation of Section 5 of the Emergency (Essential Powers) Act 1979 which emanates from the 1969 Proclamation of Emergency. This provision prohibits any citizen to initiate legal proceedings against a public officer who acted in good faith during emergency period and the act was believed to be necessary for the sole purpose of public security. Consequently, an infant child was denied of his rights to commence a legal action (what more to seek redress) against the police force and government of Malaysia after his eight month pregnant mother and his father were killed in a raid. In that incident, the infant child filed an action in court against the police and Government of Malaysia claiming that the death of their parents, the shooting of the police in that raid was unlawful and in violation of the fundamental liberties guaranteed in the Federal Constitution. In their defence, the Government

³ *Sazali Mat Noh v Timbalan Menteri Dalam Negeri, Malaysia* [1998] 4 CLJ 462.

invoke section 5 of the Emergency (Essential Powers) Act 1979 as stated above and as such the infant's claim was denied.⁴

Another erosion of fundamental liberties could be evidently seen when the executive interferes and keeps its close watch by limiting the scope of freedom of speech and freedom to assemble despite the Constitution guarantees such rights. It is aggravated when majority of people due to their own ignorance have been swayed to believe that the said limitations were justly done. Conversely, various non-governmental organisations (NGOs) have hoisted out loud that our standard of civil liberties are still far reaching from the international standard. The writer has his own preliminary analysis that: this issue has been stagnant and unrest not because of intricacy but due to the attitude of the executive and judiciary.

1.1 OBJECTIVES OF THE STUDY

The main objectives of this study are:

- a) To determine the constitutional framework of fundamental liberties in Malaysia.
- b) To analyse constitutional provision on fundamental liberties.
- c) To examine and evaluate the court's attitude in interpreting provisions relating to fundamental liberties.
- d) To offer suggestion and recommendation regarding implementation and enforcement of fundamental liberties in Malaysia.

⁴ See further, S.Sothi Rachagan & Ramdas Tikamdas, 'Human Rights Commission of Malaysia Act 1999: A Critique' in S.Sothi Rachagan & Ramdas Tikamdas (edit.), *Human Rights and the National Commission*, HAKAM, Kuala Lumpur, 1999, pp. 173-202 at 184.

1.2 STATEMENT OF PROBLEM

The centre of deliberation on fundamental liberties is found in Part II of the Federal Constitution that outlines the protection broadly thus requiring interpretation. The task of interpreting the fundamental rights provisions is entrusted upon the judiciary. However, the interpretation is unsystematic. The unsystematic and incoherent judicial interpretation thwarted the development and progress of fundamental liberties protection.

1.3 HYPOTHESES

Fundamental liberties are very imperative and seen as the backbone of the Constitution itself. Thus, the following hypotheses need to be scrutinized thoroughly:-

- (a) That despite provisions of fundamental liberties in the Constitution remains laconic, they are satisfactory and sufficient to safeguard fundamental liberties in Malaysia;
- (b) That the state of fundamental liberties in Malaysia deteriorates due to unsystematic and incoherent methods, approaches and styles in interpreting provisions of fundamental liberties by the judiciary;
- (c) That the state of fundamental liberties in Malaysia will improve if methods, approaches and styles in interpreting provisions of fundamental liberties are employed according to the general theme of the Constitution and the original concept underlying fundamental liberties.

1.4 METHODOLOGY OF THE STUDY

The research employs doctrinal analysis approach which mainly based on library research. Field inquiry and quantitative survey are dispensable for library research.

Even so, all data(s) gathered from certain organization(s) as well as from the government are referred and analysed. The primary reference is the Federal Constitution itself. Statutes and juridical decisions are relevant in so far to explain the scope and framework of provisions of fundamental liberties. The secondary source such as reports, articles, journal, newspaper and book is analysed in order to illustrate the nature and application of the primary sources.

The research constantly refers to Part II of the Federal Constitution which contains provisions of fundamental liberties. There is no particular statute which defines Part II of the Federal Constitution. However, there are many legislations passed by the Parliament to regulate or rather 'to limit' the generality of those provisions such as Banishment Act 1959 (Act 79), Dangerous Drug Act (Special Preventive Measures) 1985 (Act 316), Internal Security Act 1960 (Act 82), Police Act 1967 (Act 344), Printing Presses and Publication Act 1984 (Act 301), Public Order (Preservation) Act 1958 (Act 296) and Restricted Residence Enactment (F.M.S 39). These statutes will be referred in the thesis to identify the constitutional framework and effect of these laws to fundamental liberties.

1.5 SCOPE AND LIMITATION OF STUDY

'Fundamental liberties' is a terminology used in Part II of the Federal Constitution. Other terms which may refer to 'fundamental liberties' comprise of civil liberties, civil rights, fundamental rights and human rights. For the purpose of consistency, the thesis will use the term 'fundamental liberties' and where appropriate, the term 'human rights' will be used interchangeably.

The primary objective of this research is to appraise the theoretical scope and implementation of fundamental liberties under the Federal Constitution as well as to