

**FREEDOM OF MOVEMENT IN THE FEDERAL
CONSTITUTION FROM ISLAMIC PERSPECTIVE**

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AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries, which have been duly, acknowledged.

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In the name of Allah Most Gracious and Most Merciful

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ABSTRAK

Kajian ini merupakan suatu kajian perbandingan di antara Perlembagaan Persekutuan (Perkara 9) dan dari perspektif Islam. Matlamat utama kajian ini adalah untuk mencari titik persamaan dan cuba mengenalpasti percanggahan dari sudut Islam. Penulis mengenalpasti beberapa hak kebebasan bergerak yang diperuntukan oleh Pelembagaan Persekutuan dan juga Perlembagaan Islam. Walaubagaimanapun penulis lebih memberi kecenderungan tentang isu kebebasan bergerak dari perspektif Islam. Dilihat dari sudut ini, ia melibatkan beberapa tujuan kebebasan bergerak itu diberikan kepada manusia. Seterusnya, penulis juga mengenalpasti sekatan-sekatan bergerak yang diperuntukkan oleh Perlembagaan Persekutuan dan Perlembagaan Islam. Antara isu utama yang dibincangkan di dalam kajian ini melibatkan status hak kebebasan bergerak. Adakah kebebasan bergerak itu diberikan secara mutlak tanpa ada had batasannya di dalam Perlembagaan Persekutuan mahupun dari perspektif Islam. Dapatan hasil kajian ini menunjukkan beberapa interpretasi kebebasan bergerak di dalam Perlembagaan Islam ke dalam Perlembagaan Persekutuan. Walaupun dari sesetengah aspek masih wujud ketidakselarasan dengan undang-undang Islam tetapi kelemahan-kelemahan tersebut pasti boleh diatasi. Semoga kajian ini dapat memberi maklumat kepada masyarakat umum bahawa Perlembagaan Islam merupakan perlembagaan yang terbaik yang sesuai diikuti dan digunapakai di sepanjang zaman. Amatlah bertepatan jika penulis meyakini bahawa Undang-undang Islam adalah undang-undang yang tertinggi mana-mana undang-undang yang berlawanan dengannya adalah terbatal setakat mana ia berlawanan.

ABSTRACT

This is a comparative study between the Federal Constitution (Article 9) and Islamic perspective. The main purpose of the research is to find the similarities and identifying the inconsistencies from Islamic aspects. The writer identified some rights of freedom of movement that is provided by the Federal Constitution and also in Islamic Constitution. However the writer has the tendency to support Islamic Constitution. Relating to this issue, freedom of movement is granted to the human beings. Furthermore, the writer also recognized the restrictions on movement laid down by the Federal Constitution and Islamic Constitution. The main issue of the research; Is the freedom of movement absolutely given without limits in the both Federal Constitution and in Islamic Constitution? The findings have showed that some interpretations of Islamic law is in the Federal Constitution. Although in certain aspect the inconsistency with the Islamic law still exist, but it can be solved. Hopefully, the research would provide knowledge to the society that Islamic law is the best and eternally applicable. It is appropriate if the writer states that, the Islamic Law is the supreme Law of the Federation and any law, which is inconsistent with the Islamic Law shall, to extent of the inconsistent, be void.

ملخص البحث

تتناول هذه الدراسة (حرية الحركة في الدستور الفدرالي بمنظور إسلامي) مقارنة ما بين (المادة رقم 9) من الدستور الفدرالي والمنظور الإسلامي ، والهدف من هذه الدراسة البحث عن نقاط الالتقاء ، ومحاولة التعرف على مواضع التناقض والخلاف بينهما . وقد تبين للباحث مجال حرية الحركة الذي سمح بها الدستور الفدرالي والمنظور الإسلامي، ويميل الباحث إلى حرية الحركة التي توافق المنظور الإسلامي لأنه يتضمن الحرية التي توافق الإنسان ، وتبين للباحث أيضاً العقبات والعرائق التي تواجه الحركة التي حددها الدستور الفدرالي والإسلامي . ومن بين القضايا الهامة التي ناقشها البحث ما يتعلق بتحديد مجال مفهوم حرية الحركة من حيث أنها مقيدة أم مطلقة وفقاً للدستور الفدرالي والمنظور الإسلامي . ومن نتائج هذه الدراسة أن هناك تفسيرات متعددة لحرية الحركة وفقاً للبنود الموجودة في الدستور الفدرالي الموافق للمنظور الإسلامي أو المفاهيم الإسلامية مع وجود خلافات في بعض القضايا الموجودة في الدستور الفدرالي والتي تخالف المنظور الإسلامي، والتي يمكن معالجتها . لقد كشفت هذه الدراسة أن أحسن دستور يجب إتباعه هو النظام الإسلامي لأنه أدق وأفضل الدساتير على وجه الأرض . نتمنى أن تكون هذه الدراسة مفيدة لجميع أفراد المجتمع بما إحتوته من آراء وملاحظات .

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GLOSSARY

Ahl-Madinah	Medinna people
Al-Masjid al-Haram	the Sacred Mosque in Mecca.
<i>Al-Quran</i>	the Holy book revealed by Allah SWT to prophet Muhammad (p.b.u.h).
<i>As-Sunnah</i>	the tradition of Prophet Muhammad (p.b.u.h) including his deeds, saying and approval.
Ayah	the Quranic verse.
Caliph	the first four Islamic caliphs: <i>Abu Bakr r.a.</i> , <i>'Umar r.a.</i> , <i>'Uthman r.a</i> and <i>'Ali r.a.</i>
Dar al-Harb	enemy's country, hostile state.
Fard	incumbent (upon), religious obligation.
fard kifayah	when someone in the community performs it.
Hadd	Punishment, penalty.
Hadith	Saying of Prophet Muhammad (p.b.u.h).
Hajj	Pilgrimage to Mecca.
'ilm	to know (of), have knowledge (of).
imam	head of a State.
Islam	A word meaning literally 'submission' (to the will God). Islam is the name of one of the world's great monotheistic religious.
jihad	Holy war.
Muslim	believer of Islam.
messenger	Arabic " <i>Al-Rasul</i> ", the prophet.
Mushrikin	polytheist.
nazar	to vow, make a vow.

Surah	chapter of the <i>Al-Quran</i> . The number preceding colon denotes the chapter number while numbers after the colon denotes the verse number.
Ta'zir	discretionary penalty determined by <i>kadhi</i> .
Umrah	minor pilgrimage to Mecca.
'dimmi	a free non-Muslim under Muslim rule.

ABBREVIATION

Art.	Article
Bhd	Berhad
Cap.	Chapter
Dr.	Doctor
Etc	et cetera
F.M.S	Federated Malay States
Ibid	Ibidem
i.e.	that is
ISA	Internal Security Act
Ltd.	Limited
M.L.J	Malayan Law Journal
No.	Number
P.	Page
PP.	Pages
Prof.	Professor
Sdn	Sendirian
S.W.T	Subhanahu wataala
UK	United Kingdom
v.	Verses
Vol.	Volume

CHAPTER ONE

INTRODUCTION

1.1 Background of Research

Freedom of movement is an essential element in the Human Rights, which has been acknowledged all over the world. The law regarding the freedom of movement has been recorded in Universal Declaration of Human Rights which United Nation has agreed and declared in Regulation 271 A (III) on December 1948. The declaration respect, uphold and support the freedom of human being.

Nevertheless, the levels of understanding pertaining to the concept of “freedom of movement” are different from one country to another. Malaysia has legislated Federal Constitution which provide fundamental liberties freedom of movement. As a democratic country, the principal of movement must be scrutinously implemented in accordance with Universal Laws. Malaysia is a multi-racial country; the method used in Malaysia may differ from the Western counterparts. As a result, some issues are highlighted; what is the present freedom of movement that we practice in our country too unique? Does the alignment of such freedom in universal stage exist? How successful is our constitution in upholding the justice of human rights in this context?

From the Islamic perspective the rights of free movement is an element which can be seen during Prophet Muhammad’s (p.b.u.h) reign. The Charter of Medina is the constitution which guaranteed freedom for every citizen who were living in Medina. Islam gives a wider freedom of movement to human beings. However, this freedom is subject to the rules regulated by Allah. Islam acknowledges freedom of movement as long as it does not destroy the human life and it must comply with the rules of Allah The Almighty.

The vast and unlimited freedom would only trigger violence, violating human rights or worst causing chaos. It is also similar to the present constitution that provides the rights to free movement to be enjoyed by human within particular restrictions. Freedom of movement is undeniable necessary for people. However, the concept of movement has been interpreted by various of meanings until it has been misunderstood by the society at large.

1.2 Aim of Research

This project paper aims to explore the scope and dimension of freedom of movement as envisaged in the Malaysian Federal Constitution. The undertaken study attempts to compare the concept of freedom of movement from Islamic perspective with the Federal Constitution. Hence, the study tries to explore the existing principles in Islamic Law which are related to freedom of movement as well as the Federal Constitution.

1.3 Objectives of Study

In undertaking this project paper, the main objective; Firstly, to identify the concept of freedom of movement in our Federal Constitution as well as from Islamic perspective.

Secondly, to compare the concepts underlying the freedom of movement from both aspects, the Malaysian perspective and Islamic perspective. The writer has identified two main issues in undertaking this study. The issues are as follows:

1. Whether freedom of movement is a right of individual in Islam?
2. Is it legitimate to restrict the freedom of movement even if it is for the purpose of earning a living?

It is hoped that the study undertaken would provide a general perspective on the freedom of movement from both perspectives- Islamic perspective and Malaysian perspective.

1.4 Methodology of research

In undertaking this study, the writer has employed the secondary data as the source to gather information.

This project paper has relied heavily on secondary data, which the writer gathered from his visits to various libraries. These are the following libraries; which have been visited to collect data.

1. Library of International Islamic University of Malaysia (IIUM).
2. Library of University of Malaya.
 - a) Perpustakaan Utama.
 - b) Library of Law.
3. Library of National University of Malaysia.
 - a) Perpustakaan Tun Seri Lanang.
 - b) Library of Law.
4. National Library of Malaysia.
5. Library of Islamic University College of Malaysia (KUIM).

1.5 Literature Review

A book written by Walid Idris Said Bin Sharairya. 1999. *Right and Freedom of Movement in Islam*.

The author of this book explains the basic concepts of rights and free movement in Islam and compares it to the international perspective that is the Universal Declaration of Human Rights (UDHR). Meanwhile, the writer in undertaking this study has focused on the issue of freedom of movement from Federal Constitution of Malaysia and compares this concept from Islamic point of view.

A book written by MD. Akhir Hj. Yaacob. 1985. *Hak Asasi Manusia Menurut Islam (satu pendekatan perbandingan)*.

The author of the book above discusses the general view on human rights from Islamic perspective and do not discuss the freedom of movement specifically.

A book written by A. Rahman Doi. 1992. *Orang Bukan Islam Di Bawah Undang-Undang Syariah*.

A. Rahman Doi discusses the rights of non-Muslims under Islamic Law including the issues on movement. However, his book does not discuss the issues on movement in the Federal Constitution.

Ali Jarishah Dan Hj. Mohd Marzuqi Shafie. 1992. *Kehormatan; Hak-Hak Manusia Menurut Islam (Suatu Kajian Perbandingan)*.

Ali Jarishah and Hj. Mohd Marzuqi Shafie discuss the liberties from Islamic perspective but not the freedom of movement in the Federal Constitution.

CHAPTER TWO

ANALYSIS OF FREEDOM OF MOVEMENT

2.1 Introduction

The second chapter is basically concerned with the concepts freedom. The word of 'freedom' has been differently interpreted because the various shade of meaning that has been given to freedom by commentators from different disciplines.

Freedom has a basic meaning that we could not describe explicitly. Which is why any serious distortion or deviation from its core concept has not commanded general acceptance. Yet beyond this basic clarity, the meanings and implications of freedom vary considerably and tend to become increasingly complex.

The conceptual analysis of freedom has not received as much attention from Muslim jurists as it has in the writings of Western scholars on the subject. Freedom in Islam is determined by reference to the normative evidence of the *Quran* and *Sunnah*, but there is considerable variation in the understanding of that evidence and the manner in which commentators have related it to the theological, legal and politic subject matter.¹

¹ Mohamed Hashim Kamali, 1999. *Freedom Equality and Justice in Islam*. Ilmiah Publishers Malaysia and Islamic Foundation. UK. P. 2.

2.2 Definition

Before providing a detailed examination of the idea of freedom of movement, it is useful to explain the basic meaning of freedom. Freedom is defined as a right of action. It is a right that affirms the freedom of human being to do something without encountering any moral or legal obligation. In other words, it is a license to do something without any obstacle, or to refrain from doing something without any enforcement.²

According to **Webster's New World Dictionary**, 'freedom' is the sum of rights and exemptions possessed in common by the people of a community or a state.³ Thus, a certain similarity and convergence is obvious between the definitions of these two terms, freedom and right.

Sir John Salmond, defined "right" as an interest recognized and protected by the Law, respects for which is a duty and disregards for which is a wrong. While Holland said right is a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.⁴

Freedom is a state of liberty, guaranteed by the law to the extent that it bestows personal freedoms (of thought, speech, assembly etc.) on the individual and protects physical freedom from assault by others or by agents of the state. Freedom of the individual exists within society when the only restraints serve to prevent harm to other individuals⁵.

To a reader of constitutional law, freedom means something different to what it might mean to a philosopher or a mystic. Whereas the philosophically-oriented *Mu'tazilah* and the *Asya'ariyyah* were preoccupied with the freedom of the human will versus predestination and determinism, to the Sufi and mystic, freedom primarily

² Walid Idris Said Bin Sharaiyra. 1999. *Right and Freedom of Movement In Islam*. Univision Press Sdn Bhd. first published. P. 13.

³ Walid Idris Said Bin Sharaiyra. 1999. *Right and Freedom of Movement In Islam*. P. 13.

⁴ Walid Idris Said Bin Sharaiyra. 1999. P. 14.

⁵ Geoffrey Robertson. 2000. *The New Penguin English Dictionary*. Head of Doughty Street Chambers P. 558.

meant freedom from the desires of the self that released one from dependence on the material world, freedom from everything else except God and devotion to Him.⁶

In Arabic, freedom means ‘*hurr*’ as opposed to ‘*abd* (slave), but was also used as a qualitative term denoting nobility of origin and character. The phrase ‘*rajulun hurrun*’ did not only mean a free man as opposed to a slave but also of noble character and descent, in the same way as ‘*farasun hurrun* means a pedigree horse. Similarly, the phrase “*huwa min hurriyyat-e qawmihi*”, means that ‘he is among the most noble of his people’.⁷

The word ‘*hurriyya*’ does not occur in the Qur’an as such but other derivatives of the same root such as ‘*al-hurr*’, that is ‘a free man’ and ‘*tahrir*’ that is ‘releasing’ in the context mainly of releasing a slave by way of atonement (*kaffara*) occur frequently in the Qur’an. In English, the usage of ‘freedom’ is different from ‘independence’: Whereas freedom refers to the position of the individual within a group; independence is used in reference to the group itself. Freedom thus means the immunity of the individual from arbitrary and illegal action by the government, and his precise to participate in the formation and conduct of government. Independence on the other hand refers to the position of a group in relationship to other groups.⁸

Ibn ‘Ashur has defined *hurriyya* “as the opposite of slavery and the independence disposition of a prudent man to manage his own affairs by his own free will; his ability, in other words, to manage his personal affairs as he wishes free from the opposition and hostility of others.”⁹

⁶ Mohamed Hashim Kamali. 1999. *Freedom Equality and Justice in Islam*, Ilmiah Publishers Malaysia and Islamic Foundation. UK. P. 5.

⁷ Mohamed Hashim Kamali. 1999. *Freedom Equality and Justice in Islam*. P. 9.

⁸ Mohamed Hashim Kamali. 1999. P 10.

⁹ Ibid. P. 11.

2.3 Concept and Scope of Movement

Based on the previous discussion, it is understood that there is no restriction and to move freely by his own desires. Meanwhile the concept of movement on the basis of the above meanings, we can understand that movement has a close-relationship with freedom and it must be read together to explain the term of movement clearly and effectively.

It is impossible for us when we said one has a personal freedom but at the same time one is restrained from movement. A close relationship the terms of 'freedom' and 'movement' become easier to understand rather than interpret it. For the example, we are living in the government of a certain country, we are given various rights including the personal freedom, the right to reside in any place, the right to live in any part. At the same time, we must aside the laws which are sometimes restrain the given freedom.

Although the existing conditions would narrow down the scope of freedom of movement, such fundamental freedom could be restricted only in a case of public interest and public order which the law has a full authority to deal with the matter. Thus, this is the concept that has been used and interpreted it by the Federal Constitution in determining the status of freedom of movement within a citizen. A person is given the freedom to move whenever he or she wishes as long as in accordance with law. The laws do not mention about permissibility but it only states about restrictions and prohibitions. That means, everyone has vast freedom and its limitation is determined by the law.

The concept of movement in Islam is unlimited as long as it does not infringe the right of the others. The freedom of movement is enjoyed by mankind must be protected. Islam gives a vast freedom all around the aspects of human life. However this freedom is limited to protect the public interest. The freedom of movement as it was proclaimed by the Islamic point of view is a freedom that is not impending of disaster in human life. It is necessary to obey the rules of Allah (SWT) for the benefit of mankind.

This is incompatible with a freedom from a mankind, totally is determined by a strong desires for enjoyment and certainly it is inconsistent with the concept of freedom in Islam. The unlimited of freedom is likelihood-raised cruelty, infringed the right of the others and later on has caused chaos in society.¹⁰

A perusal of the legal texts indicates among other rights, the freedom of movement has been actually granted in Islam to all human beings fourteen centuries ago. The Qur'an, for example, assured the protection to man's freedom to move and travel from one place to another throughout the Islamic territories or abroad. At the same time, Islam granted him the right to return to his homeland without laying any hindrance for his return. Thus the right of movement is considered a fundamental right in the eyes of the Muslim constitutional jurists.¹¹

'Movement' is synonymous with the words 'travel,' or 'journey,' and migration. It is derivative of the verb 'to move' which means to change the position or location, to settle at a new home or place or to relocate or evacuate. '*Al-tanaqqul, al-irtihal, and al-hijrah*' in Arabic is equivalents of the English terms: traveling, sojourn, and migration. Movement means more than locomotion, for movement, it includes the right to migrate with the intent to settle down. The right to travel similarly comprises the right to enter any state and to return to the place of origin at any time.¹²

Movement can be divided into two types. Firstly, it is related to traveling (*safar*) for seeking welfare in this life and the Hereafter. Secondly it is migration or leaving the homeland (*hijrah*) in order to escape and avoid harm and molestation. Both types of movement depend on the individual's intention that had motivated him to move for *safar* or for *hijrah*. Muslim scholars defines traveling (*safar*) in the following words: Going out of the place of residence to another place or country with the intention of coming back home after a specific period, the minimum of which according to some jurists is three days. On the other hand, Muslim jurists identified migration (*hijrah*) as leaving one's motherland to another place with the intention of having the latter as a

¹⁰ JAKIM. 2003. "Kebebasan daripada perspektif Islam." Berita Minggu, Ahad 12 Januari. P. 17.

¹¹ Walid Idris Said Bin Sharaiyra. 1999. *Right and Freedom of Movement In Islam*. Univision Press Sdn Bhd. first published. P. 33.

¹² Walid Idris Said Bin Sharaiyra. 1999. *Right and Freedom of Movement In Islam*. P. 34.

permanent new home. The term '*hijrah*' was particularly used by classical jurists for Muslims who migrate from *dar al-harb* to *dar al-Islam*, whereas the term *isti'man* (asylum) was the expression which was originally used for non-Muslims who requested shelter in the Islamic state.¹³

In such way, the scope of movement was interpreted in Islamic learning and it is relevant indeed for the whole universe. Inevitably, in a daily routine of human life, people are not enjoying whenever their freedom when they were restrained and restricted from performing their obligation.

¹³ Walid Idris Said Bin Sharaiyra. 1999. PP. 34, 35.

CHAPTER THREE

FREEDOM OF MOVEMENT IN THE FEDERAL CONSTITUTION

3.1 Introduction

This chapter provides the overviews of the fundamental liberties i.e. freedom of movement as enshrined in our federal constitution. The concept of freedom of movement is to clarify the basis of liberty. It is also assumed to prevent or to avoid any interference by the administration body. Therefore, the administrative action needs not to prevent the rights except in accordance with validate laws.

3.2 Freedom of Movement under the Federal Constitution

Part II of the Federal Constitution provides the fundamental liberties to the Malaysian citizen.

Freedom of movement is highlighted in Article 9¹⁴ (1) provides that no citizen shall be banished¹⁵ or excluded¹⁶ from the Federation.

Article 9 Clause (2) provides subject to Clause (3) and to any law relating to the security of the Federation or any part thereof,¹⁷ public order, public health,

¹⁴ See Article 149(1)

¹⁵ See the Banishment Act, 1959 (No. 79 of 1972), which provides for the banishment or expulsion of persons who are neither citizens nor exempted. Section 17 provides that the onus of proving citizenship or exemption lies on the person proceeded against.

See also the commonwealth Fugitive Criminals Act, 1967 (No. 54) and the Commonwealth Fugitive Criminals (Amendment) Act, 1969 (No. A7).

¹⁶ See the Passports Act, 1966 (No. 150 of 1974), Section 2 of which requires the production of a passport on entry to or departure from Malaysia.

¹⁷ The words "subject to Clause (3) and to any law relating to the security of the Federation or any part thereof" were substituted for the words "Subject to any restriction imposed by any law relating to the security of the Federation" with effect from 16th September 1963 by the Malaysia Act, 1963 (No. 26), section 60(1).

or punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.¹⁸

Meanwhile under Article 9 Clause (3)¹⁹ provides, So long under this Constitution²⁰ any other state is in a special position as compared with the States of Malaya,²¹ Parliament by law imposed restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence.

The right of free movement is mentioned in the Federal Constitution. Although this right is considered as an absolute right,²² but actually it is not an absolute because there are too many laws restricted the freedom of this right. If it is an absolute right this means we can say that the individual right is the same with the right of society. The Constitution takes public interest and national right into account and this freedom depends on various factors such as political situation, economy and social.

It is known that the human right could be divided into two different parts i.e. an absolute right and a conditional right. The right that is not absolute means it is not bound by provisions of the Constitution, not imposed by laws or any statutes. This only happens theoretically. But practically, none of the right is absolute. So what is the benefit of having this right in the Constitution?²³

Under Article 9 every citizen has the right to move freely throughout the Federation and to reside in any part thereof. Definitely, then raises the question, how secured are the rights conferred by the Federal Constitution? The Federal Constitution

¹⁸ See Article 4(2) (a). P. 32; Immigration Act, 1959 (No. 155 of 1975).

¹⁹ Clause (3) was added with effect from 16th September 1963 by the Malaysia Act, 1963 (No. 26), section 60(1).

The proviso to clause (3) was repealed with effect from 19th September 1966 by the Constitution (Amendment) Act, 1966 (No. 59), section 2(1) and schedule. For the text of the proviso, which related to movement between Singapore and states of Malaysia, see P. 40 of the second edition.

²⁰ See articles 95B-95E, P. 227-231, 112A-112D, P. 249-254, 146D, P. 363, and 161-161E, P. 431-440, for the main provisions as to the special position of Sabah and Sarawak as compared with the states of Malaya.

²¹ "States of Malaya": not now defined in the Constitution, but prior to 27th August 1976 defined as a states other than Sabah and Sarawak (listed in Article 1(2). P. 17).

²² Mohamed Suffian Bin Hashim. 1976. *An Introduction To The Constitution of Malaysia*, 2nd Edition. Government Printer. P. 217.

²³ Mohamed Suffian Bin Hashim. 1987. *Mengenal Perlembagaan Malaysia*. Dewan Bahasa Dan Pustaka. P. 287.

declares the legal reality in this country; this constitution is the supreme law, any law passed after Merdeka Day, which is inconsistent with this constitution, shall, to the extent of the inconsistency, be void.²⁴

As part of constitutional law these rights of citizens are protected because two senses, firstly it cannot be changed as easily as other laws and secondly, it constrain other laws. If they conflict with it they will to that extent be repealed. This means that this Fundamental Liberty conferred by the Constitution may not be violated or infringed upon by any law, administrative or action.

The task to decide whether a law or an act has contravened the provisions of the Federal Constitution is given to the judiciary. In Malaysia the courts have the duty and the power to interpret and to enforce the laws of Malaysia. Where there is a conflict of laws or a conflict between a law and the rights of citizens, the courts have onerous task of deciding whether the law or the right should prevail.

The Courts of Judicature Act 1964 lays down the powers, jurisdiction and the administrative structures of the various Civil Courts of Malaysia, that are the High Court, the Court of Appeal and the Federal Court. Among the powers is as follow:

Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by part II of the Constitution, or any of them, or for any purpose.²⁵

From the provision of this act, section 25 (2) determines whether the High Court, the Court of Appeal and the Federal Court have a jurisdiction to protect the individual rights of movement. These courts have a jurisdiction to stand for trial, hearing and to decide any disputation over the human rights for every citizen. The provision is recognized by law to supervise and oversee this right from being infringed. It is obviously clear that a person who has a desire to restrict or deprive any personal life must follow the stated procedures otherwise the person who his freedom is being

²⁴ Article 4 of the Federal Constitution.

²⁵ Courts of Judicature Act 1964. Section 25 (2).

restricted could go to the court to obtain his rights or to challenge the detention imposed on him.

It must be noted that under Article 5 Clause (2) provides where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

However, the individuals have not absolutely rights. This means the freedom of movement can be still infringed, a clear example can be seen under Article 9 whereas a personal freedom can be dethroned if there is existing other provisions under Article 150. On the said Article, the Yang Di-Pertuan Agung has a lawful to declare the emergency. Besides, under Article 151 empowers government to make laws against preventive detention, provided that it is within these powers, is perfectly constitutional, and any person who says that it is unconstitutional has the right to bring government to court.

3.3 Exception of Movement Imposed by Law

As we mentioned the freedom of movement is not guaranteed absolutely by the Constitution. The Constitution of Malaysia has limited this personal freedom by providing other provisions in the Constitution itself.

The freedom of movement conferred by the Constitution may be suspended under certain conditions. Article 149 of the Constitution permits or empowers Parliament to make law against subversion irrespective of whether or not an emergency has been proclaimed, while the special powers conferred by article 150 may be assumed only after an emergency has been proclaimed. A law made under article 149 may only be made by parliament, whereas a law made under article 150 may be made either by the

Yang di-Pertuan Agung (when Parliament is not sitting-such law is called an ordinance) or by Parliament itself.²⁶

Article 150 of the Constitution gives special powers to the Yang di-Pertuan Agung to declare a state of emergency.²⁷ An ordinance or an act of Parliament enacted under article 150 is valid even if inconsistent with any provisions dealing with Muslim law or Malay custom or native law or custom in an East Malaysian state or religion or citizenship or language. A law made under article 149 may be inconsistent only with articles 5, 9 or 10²⁸ of the Constitution, which protect liberty of the person.

Clause 6 of this Article provides that any Act of Parliament or executive ordinance passed to deal with the Emergency may conflict with and override any other provision in the Constitution. In other words, emergency legislation can restrict in any fashion any of the provisions pertaining to Fundamental Liberties and may not be questioned by the court.²⁹

Next the discussion will be based on the exceptions of freedom of movement imposed by the statutes.

3.3.1 Internal Security Act. 1960

Both article 149 and article 150 fall under Chapter XI "Special Powers Against Subversion, Organized violence, And Acts And Crimes Prejudicial To The Public And Emergency Powers." The principal legislation passed under article 149 is the "Internal Security Act 1960" hereinafter known as ISA.³⁰

Pursuant to Article 149, the Act was passed to provide for internal security of the Federation, preventive detention, the preventive of subversion, the preventive of organized violence against persons and property and for matters incidental thereto.

²⁶ Mohd Suffian Bin Hashim. 1976. *An Introduction to The Constitution of Malaysia*. Kuala Lumpur. Government Printer. 2nd Edition. P. 224

²⁷ In reality, the Yang di-Pertuan Agung acts in on advice of the Prime Minister and his Cabinet. This power is thus enjoyed and exercised by the Federal Government.

²⁸ Mohd Suffian Bin Hashim. 1976. *An Introduction to The Constitution of Malaysia*. P. 224.

²⁹ See Federal Constitution. Article 150 Clause (6).

³⁰ Cyrus V. Das. 1996. "Government and Crisis Powers". *The Malaysian Current Law Journal*. Sdn Bhd. Kuala Lumpur. First Edition. P. 357.

Under Article 149, any provision in the ISA 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. This means sanction of encroachments on the rule of law is justified in the national interest.³¹

Section 8 of the ISA authorizes the Minister of Home Affairs to arrest and detained without trial for a period of up to two years a person whom he thinks is prejudicial to the security of the nation.³² This act. has a power of preventive detention that is stated under Chapter Two of the ISA.

“If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.”³³

“If the Ministers is satisfied that for any of the purposes mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but that for that purpose is it unnecessary to detain him, he may make an order (hereinafter referred to as a restriction order) imposing upon that person all or any of the following restrictions and conditions:

- (a) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment;
- (b) for prohibiting him from being out of doors between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or person as may be so specified;

³¹ Nik Abdul Rashid. 1977. “Erosion of Fundamental Rights”. The 4th Malaysian Law Conference. Kuala Lumpur. P. 57.

³² Nik Abdul Rashid. 1977. “Erosion of Fundamental Rights”. P. 58.

³³ Internal Security Act (ISA) 1960. Section 8 subsection (1).

- (c) for requiring him to notify his movements in such manner at such times and to such authority or person as may be specified in the order;
- (d) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organization or association, or from taking part in any political activities; and
- (e) for prohibiting him from traveling beyond the limits of Malaysia or any part thereof specified in the order except in accordance with permission given to him by such authority or person as may be specified in such order.”³⁴

Based on the above-mentioned provisions, it is understood that the right to freedom of movement is restricted when a person is being suspected by the minister who has reasonable ground to believe, acting on information, that a person was prejudicial to the security of the Federation or any part thereof. Besides, among the powers that are granted by the ISA to the government is to detain a person without trial if the minister or government may think fit. The power to detain without trial may be infringed, Article 151 of the Constitution but the provision provides several conditions to validate the detention.

In the case of **Karam Singh V. Menteri Hal Ehwal Dalam Negeri**³⁵ was the cornerstone in our history of Internal Security. In this case the appellant appealed against the decision of the High Court. The appellant applied for a writ of *habeas corpus*. The learned judge held that the order of detention was made in exercise of a valid power and that the detainee had not discharged the burden, which was on him, of showing that the order was made *mala fide* or improperly. The question whether there was reasonable cause to detain the appellant was a matter of opinion and policy, a decision, which could only be taken by the executive.

³⁴ Ibid. Section 8 subsection (5).

³⁵ Karam Singh V. Menteri Hal Ehwal Dalam Negeri, (1969) 2 M.L.J. P. 129.

3.3.2 Restricted Residents Enactment

Section 2 as it was enacted in 1933 reads as follows:

- a) Whenever it shall appear to the resident on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or mukim in the State or should be prohibited from entering into any particular districts or mukim or mukims in the State, the Resident may issue an order in one of the forms in the schedule for the arrest and detention or, if he is already in prison, for the detention of such person.

In the case of **Assa Singh v. Mentri Besar Johor**³⁶ the applicant Assa Singh s/o Teja Singh had been arrested and detained by the order of the Mentri Besar of Johor under the Restricted Residence Enactment (Cap. 39 of the laws of the Federated Malay States). He immediately after arrest protested and complained that he was never informed of the reasons for his arrest and detention, affidavit sworn by the police officer responsible for his arrest.

Ong Hock Tye C.J (Malaya) in his opinions said:

“I agree that article 9 of the Constitution has no application or relevance in the instant case. The right to move freely throughout the Federation and to reside in any part thereof is not an absolute an unqualified right, for it is expressed to be subject to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders.”³⁷

For the above reasons there is no doubt that a law which restricts under section 2 read with section 4 of the Enactment are consistent with the provisions of clause (2) of Article 9 of the Federal Constitution.

³⁶ (1969) 2.M.L.J. P. 30.

³⁷ Ibid. P. 34.

3.3.3 Public Order (Preservation) Ordinance 1958

Apart from the restriction Residents Enactment there is another ordinance which restraint citizens from movement. In Public Order (Preservation) Ordinance 1958 we concerned the restrictions to free movement is clearly unlimited.

In any proclaimed area-

- a) The Chief Police Officer or the Officer in Charge of a Police District may by order or by giving directions or in any other manner he thinks fit regulate, restrict, control or prohibit the use of any road, street, path or waterway or any public place to the public or any class of the public or to any vehicle or vessel or class or vehicle or vessel.³⁸

Depending on the provision under Section 4, the Chief Police Officer may by order to restrict a person stepped into any proclaimed area for the purpose of crime prevention and to protect public interest.

It is understood that the provisions under the ordinance pertaining to the closings of road, street, path or waterway is giving a basic meaning to restraint a body from movement. This is because 'freedom' which has been given by the constitution is not absolute rights that are the freedom can be abused easily or suspended due to reasonable action. Hence, we had a little inkling provided under this ordinance is elaborating consistent with the article 9 clause (3) of the Federal Constitution.

Section 6 subsection (2) of Public Order (Preservation) Ordinance 1958, provides that "A police Officer may take all reasonable steps to prevent any person, whether on foot or in a vehicle or vessel, from passing any such barrier and every person shall comply with any direction or signal of any such officer requiring the person to stop at before reaching any such barrier".³⁹

³⁸ Section 4(a) Public Order (Preservation) Ordinance 1958 F.M. No. 46 of 1958.

³⁹ Ibid. Section 6 (2).

Also in Section 6 subsection (3) provides for “A police officer may use such force as may be necessary to prevent any person from passing any such barrier, which force may extend to the use of lethal weapons.”⁴⁰

Under the provision of section 6 subsection (3) takes into account that the public interest is the more important than personal rights, and for the purported prevention crimes a police officer may use a certain force suchlike to fire somebody from a weapon those who are passing in any proclaimed area.

In a certain circumstances the rights to reside in any part thereof is also infringed by the law. If any person has been recently concerned acts involving or likely to cause or provoke a breach of the peace in a proclaimed area, a police officer may exclude the person or require a person to reside in such place or area whether in the proclaimed area or not. It is mentioned under section 13 (b) Public Order (Preservation) Ordinance 1958, stated that;

“by reason thereof it is necessary to exercise temporary control over that person, a Chief Police Officer may by order exercise in respect of the person any one or more of the following powers, namely;

- I. Exclude the person from the proclaimed area or any part thereof;
- II. Require the person to reside in such place or area whether in the proclaimed area or not as may be specified in the order and not to leave the area without such permission and subject to such conditions as may be so specified;
- III. Require the person to remain within doors during such hours as may be specified in the order;
- IV. Require the person to notify to the police at such place or places and in such manner as may be specified in the order his place of residence and any change thereof and to report to the police at such times and dates and in such manner as may be so specified;
- V. Require the person to enter into a bond for such amount with such sureties as may be specified for his good behaviour or for due compliance with the terms and conditions of any order made under this subsection”.⁴¹

⁴⁰ Ibid. Section 6 (3).

⁴¹ Ibid, section 13 b.

3.3.4 Immigration Act 1963

Sabah and Sarawak are treated in a special position as compared with the States of West Malaysia. Accordingly, as a result of clause (3), article 9 does not even give political guidance to Parliament with regard to movement between those two states or between either of them and any of the states of West Malaysia.⁴²

In **Datuk Syed Kecik Bin Syed Mohamed v. Government of Malaysia**,⁴³ the applicant, fearing that he would be expelled from Sabah, sought a declaration as to whether the Federal and state Governments had a right to expel the applicant.

In deciding for the applicant, Suffian L.P. found that the applicant, born in Kedah and a Malaysian citizen by operation of law, had come to Sabah in 1965 as a political secretary in a Ministry. He subsequently resigned and in 1971 secured a decision from the native Court declaring him to be a Native of Sabah, a decision with the learned Lord President held to be final.

The Lord President then found that under the Immigration Act 1963 (Act 155), the applicant “belongs to the State of Sabah” and “is a permanent resident of sabah.” In a concurring opinion, Lee Hun Hoe C.J. (Borneo), joined by Wan Suleiman F.J., analyzed the application of article 9 to the case. The learned Chief Justice said; Article 9 is subject to the special provisions of the immigration laws relating to the two Borneo States. Insofar as immigration is concerned, the Borneo States have full control.⁴⁴

The Immigration Act, 1963, which gives each of the Borneo States wide powers to control entry into and residence in the state can only, as these provisions, be changed with the concurrence of the state concerned. The Borneo States are, with certain exceptions, permitted to treat an ordinary Malaysian from peninsular Malaysia

⁴² L.A Sheridan & Harry E. Groves. 1987. “The Constitution of Malaysia”. Malayan Law journal (PTE) Ltd. 4th Edition. P. 67.

⁴³ *Datuk Syed Kecik Bin Syed Mohamed v. Government of Malaysia*. (1979) 2 M.L.J. Page101.

⁴⁴ *Ibid*, P. 106.

seeking entry into either States as if he were non-citizen.⁴⁵ The exceptions laid down as follows:

(1) Subject to subsection (2) and to sections 67 and 68, a citizen shall not be entitled to enter an East Malaysian State without having obtained a Permit or Pass in that behalf unless-

- a) He belongs to the East Malaysians State;
- b) He is a member of the Federal Government, or of the Executive Council or Legislative Assembly of the East Malaysian State (or of any Council having similar functions in the State).
- c) He is a judge of the Federal Court or of the High Court in Sabah and Sarawak, or is a person designated or nominated to act as such, or he is a member of any commission or Council established by the Federal Constitution of the East Malaysian State; or
- d) He is a member of any of the public services of the Federal, or of the public service of the East Malaysian State, or of a joint public service serving the East Malaysian State, or seconded to any such service.⁴⁶

3.3.5 Passports Act. 1966 (Act 150)

Section 2 of Passport Act provides that production of passports upon entry into or departure from Malaysia.

- (1) Every person entering Malaysia from any place beyond Malaysia shall produce to an immigration officer a passport; and that passport shall, in the case of a non-citizen, have a valid visa for Malaysia issued on the authority of and by or on behalf of the government of Malaysia.
- (2) Every person leaving Malaysia for a place beyond Malaysia shall, if required so to do by an immigration officer produce to that officer a passport.

⁴⁵ See article 161E of the Federal Constitution.

⁴⁶ Immigration Act 1963 (ACT 155).

- (3) An immigration officer may, in relation to any passport produced under this section, put to any person producing that passport such questions as he thinks necessary; and the person shall answer the questions truthfully.
- (4) An immigration officer may make on any passport produced under this section such endorsement as he thinks fit.

Based on the above-mentioned provisions, it is understood that a passport is a license of movement for a citizen who wants to leave the country. Inevitably, every person leaving Malaysia shall apply for a passport. So does non-citizen who wants to enter into Malaysia must have a valid visa. Also in this provision, it was given power to Immigration Officer to stop produce a passport if he thinks fit.

In **Government of Malaysia & ORS v. Loh Wai Kong**.⁴⁷ The Immigration Department refused to issue the applicant a new passport because the criminal charges were still pending. The respondent had applied for an order directing the appellants to issue a Malaysian passport to him. He contended that he had a fundamental right to travel abroad and that the refusal of a passport violated this right.⁴⁸

In delivering the judgment of the court, the learned judge Suffian L.P said; 'While the constitution by article 9 expressly gives the citizen, subject to the limitations set out therein, freedom to move freely within the country and to reside anywhere in it, it is silent as to the citizen's right to leave the country, travel overseas and have a passport for that purpose, and accordingly, in our judgment, the citizen has no constitutional right to leave the country and overseas. Indeed, as to the latter how can the constitution guarantee a right to be enjoyed outside the jurisdiction? The right to travel to foreign countries does not exist in international law but is governed by treaties, conventions, agreements and usage of different kinds, and it would be presumptuous and futile of our constitution-makers to confer a fundamental right which every foreign country may lawfully reject. Does a citizen have a fundamental right to leave the country with or without a passport? In our judgment no such right is

⁴⁷ *Government of Malaysia v. Loh Wai Kong*, (1979) 2 M.L.J. P. 33.

⁴⁸ *Ibid.* P. 33.

guaranteed by the constitution and Mr. Jag-Jit Singh who appeared on behalf the government was with respect correct in saying that in certain circumstances the government has power to stop a citizen from leaving; certainly when, as in this case, there is a criminal charge pending against him. It is impossible and undesirable to catalogue the other circumstances in which the Government may stop a person from leaving, and each case will have to be considered in the light of its own facts'.⁴⁹

3.4 Conclusion

Based on the above-mentioned statutes, it restrains the freedom of movement. We understood that the freedom of movement as provided under article 9 of the Constitution is not absolutely guaranteed because it is related to other provisions. If we observe the provisions of these statutes, we can conclude that most of the statutes are promulgated for the purpose of public interest and public order. For the example, a punishment against the offenders is not considered as restraining personal movement. When a person is being sentenced, the security of other people is protected. It must be noted that the powers under the above-mentioned statutes would indirectly help the government in administrating the country.

⁴⁹ Ibid. P. 35.

CHAPTER FOUR

FREEDOM OF MOVEMENT IN ISLAM

4.1 Introduction

This chapter provides the concept of freedom of movement based on Islamic perspective. In Islam, the concepts of movement are related to various reasons such as seeking knowledge, *jihad*, earning a living, visiting Holy places, travelling to *Dar al-Harb* and *hijrah* and asylum.

4.2 Purposes of Movement

In a daily routine, all human beings need to move from one place to another. It is the nature of human beings are related and all mankind cannot survive any longer without having connection to each other. In fact we believe that all human beings have a right to move with a certain purposes on traveling.

The purpose of movement in Islam is considered as a nature of human beings. Allah (SWT) says to the effect has stressed this obligation:

هُوَ الَّذِي جَعَلَ لَكُمُ الْأَرْضَ ذُلُولًا فَامْشُوا فِي مَنَاكِبِهَا وَكُلُوا مِن رِّزْقِهِ وَإِلَيْهِ النُّشُورُ

Al-Mulk 67: 15.