

**ILKAP SPEAKER SERIES 1/2016**

***“AG’S PERSPECTIVES ON ARTICLE 5  
OF THE FEDERAL CONSTITUTION IN  
THIS CHALLENGING BORDERLESS  
WORLD”***

**TAN SRI DATO’ SRI MOHAMED APANDI ALI**

**“2(a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a Shari’ah prescribed reason.”**

# **The 1990 Cairo Declaration on Human Rights in Islam**

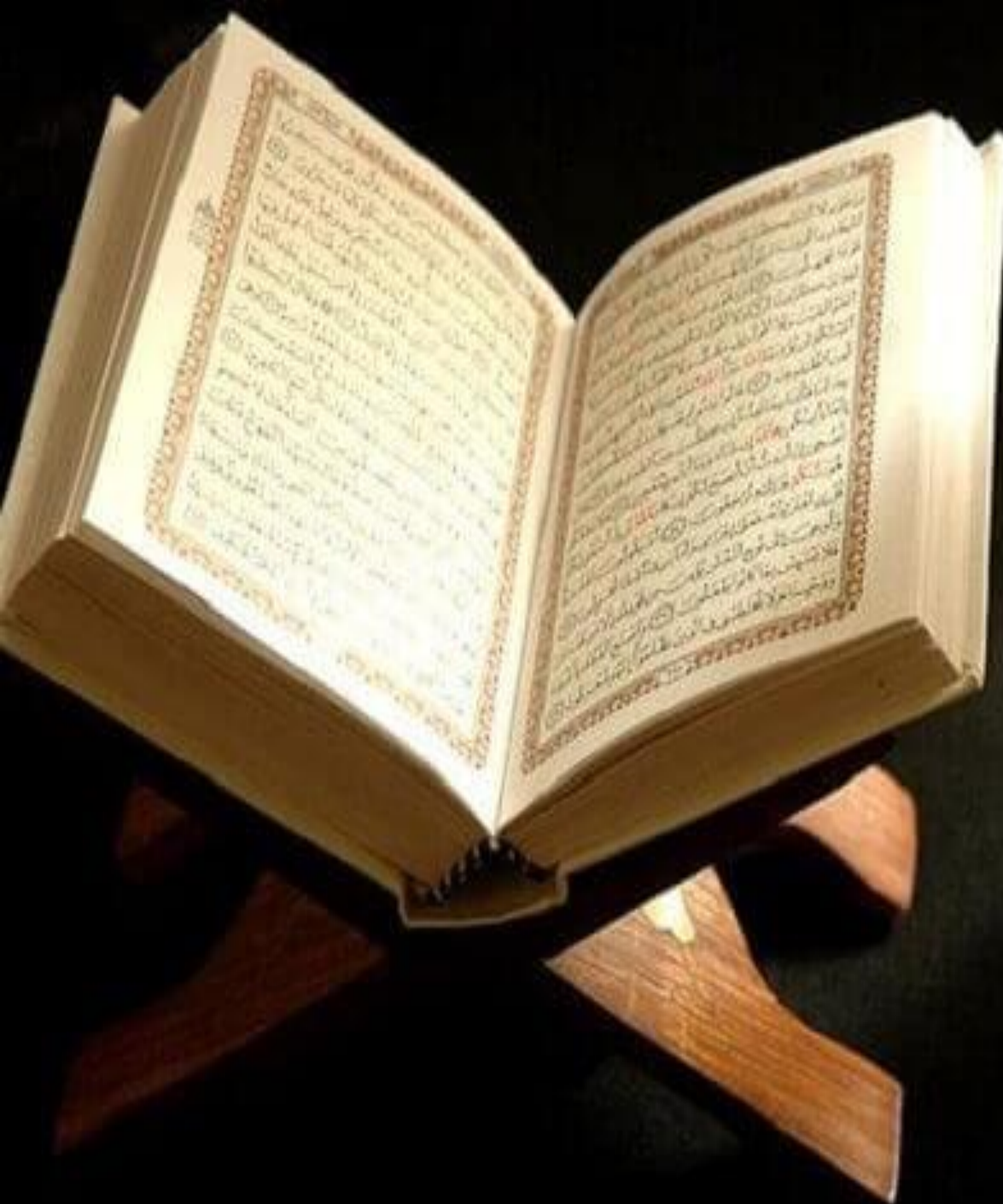
بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ



The Organisation  
of the  
Islamic Conference

ANNEX TO  
RES. No. 48/19 - P

THE CAIRO DECLARATION  
ON  
HUMAN RIGHTS IN ISLAM



**“...whoever kills a human being, except as a punishment for murder or for spreading corruption in the earth, it shall be as though he had killed all mankind; and that whoever saves a human life, it shall be as though he had saved the life of all mankind.”**

**Al Ma'idah : 32**

# IN A NUTSHELL:

- The principle of “Right to Life and Personal Liberty” **is not purely a creation of modern law.**
- It has been **long ingrained in our religion, life norms and values.**
- The law we had today provides a foundation for it to be **systematically implemented, respected and executed.**

## *Clause 39 of the Magna Carta:*

*“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice”*

# UNITED STATES OF AMERICA DECLARATION OF INDEPENDENCE

*“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”*



# UNITED STATES

## FIFTH & FOURTEENTH AMENDMENTS

### US Fifth Amendment (1791):

“No person shall be held to answer for a capital, or otherwise infamous crime, **unless on a presentment or indictment of a grand jury**, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

### US Fourteenth Amendment (1868):

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.”

# DECLARATION OF THE RIGHTS OF MAN



*“7. No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law.”*

# OTHER INTERNATIONAL INSTRUMENTS

- Article 3 of the United Nations Universal Declaration of Human Rights 1948 (UDHR)
- Article 2 of the 1953 Convention for the Protection of Human Rights and Fundamental Freedoms (generally known as the European Convention on Human Rights)
- Articles 6(1) and 9(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR)
- Paragraphs 11 and 12 (Civil and Political Rights) of the 2012 ASEAN Human Rights Declaration

## FUNDAMENTAL RIGHTS

## CONSTITUTIONAL GUARANTEES

161. A Federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life. The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done. The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise. It was suggested to us that there should also be written into the Constitution certain principles or aims of policy which could not be enforced by the Courts. We do not accept this suggestion. Any guarantee with regard to such matters would be illusory because it would be unenforceable in law and would have to be in such general terms as to give no real security. Moreover we do not think that it is either right or practicable to attempt to limit developments of public opinion on political, social and economic policy.

## FUNDAMENTAL RIGHTS

53. It has been agreed that the Federal Constitution should define and guarantee certain fundamental rights, and it is proposed to accept the principles recommended by the Commission for inclusion in Part II of the Federal Constitution although there have been some changes in drafting. The Article proposed by the Commission on the subject of the enforcement of the rule of law was, however, found unsatisfactory and has been omitted on the ground that it is impracticable to provide within the limits of the Constitution for all possible contingencies. It is considered that sufficient remedies can best be provided by the ordinary law.

Constitutional  
guarantees.

54. The Commission's recommendations on the subject of the special position of the Malays were included in two Articles, one dealing with the reservation of quotas in respect of entry into certain categories of appointments in the public services, permits, etc., and the other dealing with reservations of land for Malays. So far as the former is concerned, the Article has been redrafted to provide that the Yang di-Pertuan Agong should have the responsibility of safeguarding the special position of the Malays and the legitimate interests of other communities, and that in discharging this responsibility he should act on the advice of the Cabinet. He will be required to exercise his functions under the Constitution and federal law in such a manner as may be necessary

Special position  
of the Malays.

# SCOPE OF ARTICLE 5

- the right to life;
- the right to personal liberty;
- the right to the writ of habeas corpus;
- the right to know the grounds of arrest;
- the right to be allowed to consult and be defended by a legal practitioner of one's choice; and
- subject to limited exceptions, the right to be produced before a magistrate within twenty-four hours of arrest

# LIMITATIONS OF ARTICLE 5



Article 5 are non-derogable except:

- Proclamation of Emergency under Article 150 of the Federal Constitution.
- Laws enacted under Article 149 of the Federal Constitution




**SOVERIGNTY AND  
SECURITY**

**FUNDAMENTAL  
LIBERTIES**



## Public Prosecutor v. Ooi Kee Saik & Ors

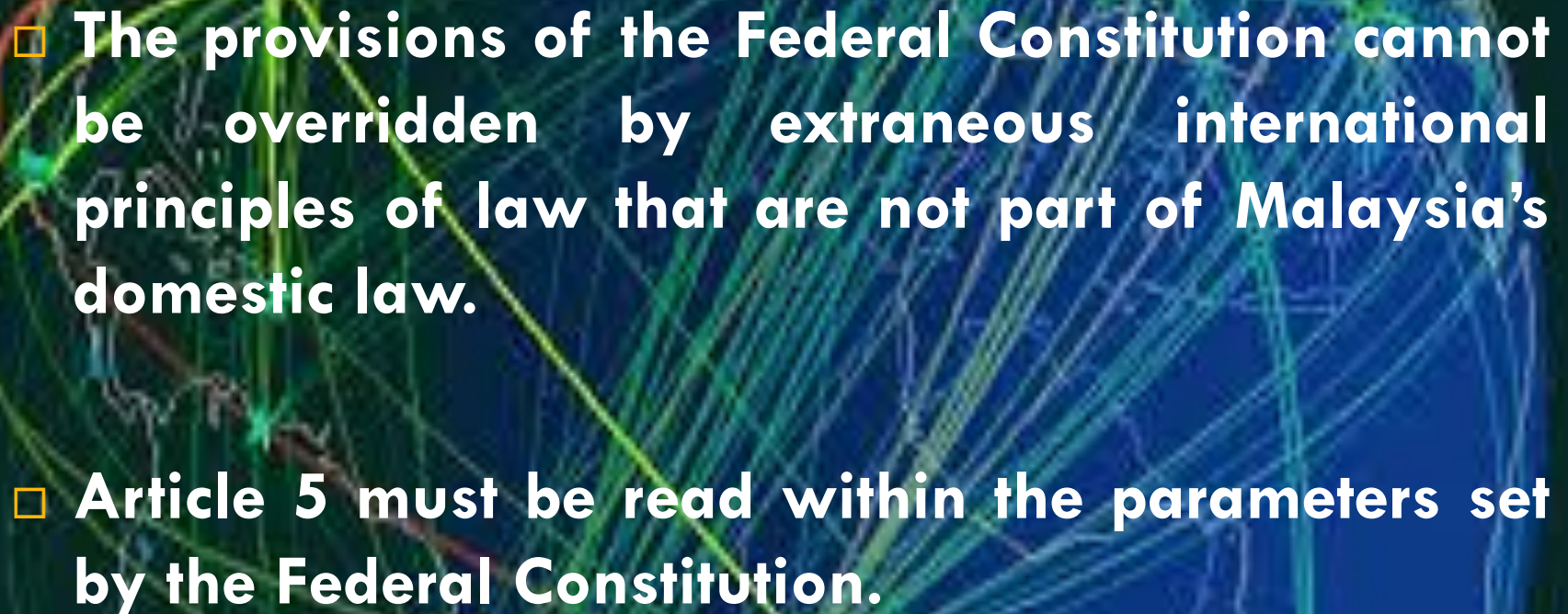
*“...no constitutional state has seriously attempted to translate the ‘right’ into an absolute right”.*


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- Security Offences (Special Measures) Act 2012 (SOSMA)
  - Prevention of Crime Act 1959 (POCA)
  - Prevention of Terrorism Act 2015 (POTA)
  - Special Measures against Terrorism in Foreign Countries Act 2015
  - Dangerous Drugs (Special Preventive Measures) Act 1985 (DDSPM)

# GUIDELINES ISSUED BY AGC

- Guideline on the Enforcement of the Power of Arrest and Detention under the Security Offences (Special Measures) Act 2012;
- Guideline for the Implementation of Electronic Monitoring Device under the Security Offences (Special Measures) Act 2012;
- Guideline for Notification to Next-of-Kin relating to the Arrest and Detention as well as Consultation with Legal Practitioner under the Security Offences (Special Measures) Act 2012;
- Guideline on Access to Detainees or Prisoners Who Police Officers Have Reason to Believe To Be Involved in a Security Offence under Section 29 Security Offences (Special Measures) Act 2012.

# FACING UP WITH THE CHALLENGES

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- ❑ **The provisions of the Federal Constitution cannot be overridden by extraneous international principles of law that are not part of Malaysia's domestic law.**
  - ❑ **Article 5 must be read within the parameters set by the Federal Constitution.**



***“Malaysia should not bow down nor lower our gaze to those fierce judgmental eyes that are constantly staring at how we chart the destiny of our country. Of course, the basic principle of rule of law and fundamental rights need to remain intact in our conscience. However, no one should have the upper hand to tell us what to do and how to do it, as it is us who knows what is best to protect our beloved country, Malaysia.”***

**-Tan Sri Mohamed Apandi Ali**

**THANK YOU**



# Q&A SESSION