INTRODUCTION: CENTRALITY OF THE HUMAN RIGHTS DOCTRINE

There is a time and tide for everything. This happens to be a time when the human rights quest is at high tide. All sections of society, including members of the exalted institution of the judiciary, must take note that freedom is on the march. The ardour for liberty is spreading. The quest for the inalienable rights of human beings has gained a universal appeal. The idea of fundamental rights forms part of the legal fabric of every society.

It is now recognized that though state sovereignty is a shield against external aggression, it cannot be used as a sword against one’s own nationals. Human rights abuses in any land deserve world-wide condemnation because, in the words of Martin Luther King, “injustice anywhere is a threat to justice everywhere”. Human rights issues have become globalised. All nations of the world are under massive political pressure to conform to the international law on human rights. There are nearly one hundred international treaties, covenants, declarations and protocols on human rights issues. Perhaps the most important from the human rights and police powers perspective are the following:

- The Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1976)
- International Covenant on Economic, Social and Cultural Rights (1976)
- Basic Treatment for the Treatment of Prisoners (1990)
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)
- Code of Conduct for Law Enforcement Officials (1979)
- Basic Principles for the Use of Force and Firearms by Law Enforcement Officials.
THE UDHR AND THE FEDERAL CONSTITUTION

A large number of provisions in the Universal Declaration of Human Rights (1948) find their correspondence in the Federal Constitution of Malaysia.

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HURDLES IN THE WAY OF ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW IN MALAYSIAN COURTS

1. Malaysia has not ratified most international human rights covenants and treaties.

2. Even the treaties that are ratified are not self executing. Unlike in the USA or Germany the Malaysian Constitution does not contain a clause to confer legal status on international treaties. As such, in Malaysia treaties that are signed by the executive are binding internationally but need incorporation by the national legislature to form part of the law of the land and to be enforceable in the courts: R v Chief Immigration Officer, Heathrow Airport ex p Salamat Bibi (1976) 3 All ER 843. A treaty signed by the executive cannot change the law of the land. If it were to be so, that would result in law making by the executive in derogation of the powers of the national legislature. That will be a serious violation of the doctrine of separation of powers.

3. International law, whether customary or contractual, is not law per se in municipal systems. The reception of international human rights law in national courts poses many legal problems.

- International law cannot override the supreme constitution of sovereign states. Witness e.g. section 4(4) of the Human Rights Commission of Malaysia Act 1999 (Act 597) which allows regard to be had to the UDHR 1948 to the extent that it is not inconsistent with the Federal Constitution.

- In case of conflict between international norms and national rules, courts of most countries adopt the rule that national law prevails.

- In the legal theory of Austinian positivism, law is a command of the sovereign and a product of state action. Extra-territorial laws cannot be granted the nomenclature of law unless they are authorized by the national legislative authority.

4. International law is not part of the definition of ‘law’ in Article 160(2) of Malaysia’s Federal Constitution.

5. Human rights jurisprudence in Malaysia is in its infancy. Far from enforcing human rights in international charters, we are slow to give life to our own charter on human rights in Articles 5-13 of the Federal Constitution.
Our legal links with the UK have not served us well in the area of human rights because of UK’s lack of a supreme Constitution; its lack of an entrenched chapter on human rights and absence there, till lately, of a separate human rights jurisprudence.

In constitutional law, Indian and American precedents are viewed with skepticism and, perhaps because of the Civil Law Act, British precedents are given preference.

The UK’s legal tradition of parliamentary supremacy is irrelevant here but seems to hold sway. In 52 years only about ten pieces of our legislation have been struck down by our courts as unconstitutional. A number of notorious laws with blatantly unconstitutional provisions remain part of our corpus juris.

We do not have a constitutional court.

For violations of human rights, there is no direct access to the apex court as in India.

Rules of locus standi are fairly strict and we do not permit public interest litigation.

The public law/private law dichotomy – a French obsession - prevents our courts from applying constitutional principles to contractual and “private law” relationships. Refer e.g. to the case of Beatrice Fernandez. It is submitted that violations of human rights are equally insidious whether in the public or private arena.

Our courts have rejected many helpful doctrines that can be used to tame absolute and uncontrolled executive discretion e.g. the promise of equality in Article 8 can be used to challenge laws that confer arbitrary powers or oust judicial review. Personal liberty in Article 5 can be interpreted in a generic way to encompass many other freedoms besides “freedom from unlawful arrest”. In the area of constitutional amendments we reject “the basic structure” doctrine. In matters of delegated legislation we refuse to embrace the “doctrine of constitutional trust” and “doctrine against excessive delegation”.

We regard each fundamental right as separate and self contained rather than as inter-connected in a broader and majestic scheme of things. For example: Loh Wai Kong

A number of our judicial doctrines do not assist our quest for human rights. In some counties like the USA and India courts have the power, under the due process clause, to examine the “reasonableness” of a law. Our attitude is that “law” is lex, not jus and recht. A law is valid if it meets the necessary qualification for validity. Its harshness, cruelty or unreasonableness do not affect its validity. Contrast this with India where the words “procedure established by law” are interpreted to mean that the procedure is right, fair and just and not arbitrary, oppressive or fanciful.
We do not have a developed jurisprudence of implied, un-enumerated and non-textual rights. A number of fundamental liberties have been specifically enumerated in the Constitution in Articles 5 to 13. But some of these entitlements may be rendered meaningless unless supported by other implied but un-enumerated rights. The doctrine of un-enumerated rights holds that if an activity is an integral part of a named fundamental right or partakes of the same basic nature and character as the enumerated right, then the citizen ought to have a constitutional right to make a claim for this activity. Rights corresponding to these activities are not expressly mentioned in the basic charter but they are implied in the promise of the constitutional text. These rights may be referred to as un-enumerated and non-textual rights. For example, the un-enumerated right to an expeditious trial is necessary to give meaning to Article 5’s promise of personal liberty. This liberty remains extinguished as long as a person languishes in a remand centre awaiting his day in court. The right to legal aid, the right to a speedy trial and protection to prisoners from degrading and inhuman treatment, though not specifically mentioned in the Constitution, ought to be treated as part of the fundamental right to personal liberty under Article 5 of the Constitution.

The right of an unrepresented accused to legal counsel ought to be seen as part of Article 8’s promise of equality before the law and equal protection of the law. This is the approach of the American and Indian Supreme Courts. In India, the courts have interpreted the “right to life” in India’s Article 21 to include the right to a healthy environment, to pure drinking water, pollution-free air and right to good roads etc. The expression ‘life’ no longer means mere animal existence or continued drudgery but includes the finer graces of human civilization. In Maneka Gandhi’s case, Beg J. held that to be a fundamental right it is not necessary that a right must be specifically mentioned in a particular Article. It is fundamental if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right or facilitates the exercise of the named fundamental right. In Maneka Gandhi the Supreme Court held that the combined effect of Articles 21 and 14 of the Indian Constitution (corresponding to Articles 5 and 8 of Malaysia) was to ensure that all administrative action be carried out with procedural fairness.

In both Irish and American constitutionalism, the Constitution, especially its chapter dealing with fundamental rights, is seen as “a living tree capable of growth and expansion”. Human rights provisions of the Constitution are not seen as an exhaustive catalogue of the rights of the population. It falls to the courts to determine which unenumerated rights the Constitution implicitly guarantees. Over the years the

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2 Hartodo v People of California 28 Led 212; Fox v New Hampshire (1941) 312 US 569
3 Maneka Gandhi v Union AIR 1978 SC 597; Sunil Batra (No. 1) v Delhi Administration AIR 1978 SC 1675; Sunil Batra (No. 2) AIR 1980 SC 1579; H S Haskot v Maharashtra AIR 1978 SC 1548; Hussainara Khatoon (No. 1) v Home Secretary AIR 1979 SC 1360; (No. 2) AIR 1979 SC 1369; (No. 3) AIR 1979 SC 1377
4 Maneka Gandhi v Union of India AIR 1978 SC 597
courts in Ireland have given constitutional protection to the following unenumerated rights: the right to strike\textsuperscript{5}, the right to disassociation\textsuperscript{6}, the right to privacy\textsuperscript{7}, the right to earn one’s living\textsuperscript{8}, the right to communicate\textsuperscript{9}, the right of access to the courts\textsuperscript{10}, the right to legal representation on criminal charges\textsuperscript{11}, the right to protection of one’s health\textsuperscript{12}, the right to travel\textsuperscript{13}, the right to marry and found a family\textsuperscript{14} and the right to fair procedures in decision-making\textsuperscript{15}.

There is some evidence that the superior courts of Malaysia, under the intellectual leadership of Gopal Sri Ram JCA (as he was then), are distilling from the chapter on fundamental liberties, rights which are not explicitly guaranteed but which are implicit in the Constitution’s promise of liberty and equality.

`Life' in Article 5(1): The courts are interpreting the word ‘life’ in Article 5 to include the right to livelihood. Employment is, therefore, a fundamental right within the expression of Article 5(1): *Tan Tek Seng v Suruhanjaya Perkhidmatan* (1996) 2 AMR 1617; *Kanawagi s/o Seperumaniam v PPC* [2001] 5 MLJ 433. In *Nor Anak Nyawai v Borneo Pulp* [2001] 6 MLJ 241 it was held that native customary rights can be considered as ‘right to livelihood’.


Another facet of personal liberty guaranteed by Article 5(1) is the liberty of an aggrieved person to go to court to seek judicial relief: *Sugumar Balakrishnan*.

Substantive fairness: In *Tan Tek Seng* and *Sugumar Balakrishnan*, the Court of Appeal supplied the constitutional basis for a doctrine of substantive fairness. Non-arbitrariness and reasonableness in decision-making and proportionality in the choice of punishments are the essence of the rule of equality before the law in Article 8.\textsuperscript{16} In *Sugumar Balakrishnan* the court held that the combined effect of Articles 5(1) and 8(1) is to demand fairness not just in procedure but also in

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\textsuperscript{5} Educational Co Ltd v Fitzpatrick (No 2) [1961] IR 345
\textsuperscript{6} Educational Co Ltd v Fitzpatrick (No 2) [1961] IR 345
\textsuperscript{7} McGee v AG [1974] IR 284
\textsuperscript{8} Landers v AG (1973) 109 ILTR 1; Murtagh Properties v Cleary [1972] IR 330
\textsuperscript{9} Kearney v Minister for Justice & AG [1987] ILRM 47
\textsuperscript{10} Macauley v Minister [1966] IR 345
\textsuperscript{11} State (Healy) v Donoghue [1976] IR 325
\textsuperscript{12} Ryan v AG [1965] IR 294
\textsuperscript{13} State (M) v Minister [1979] IR 73
\textsuperscript{14} Ryan v AG [1965] IR 294
\textsuperscript{15} Garvey v Ireland [1980] IR 75
\textsuperscript{16} Approved by the Federal Court in *Rama Chandran* and by the Supreme Court in *Kumpulan Perangsang*. Also referred to by the Court of Appeal in *Sugumar Balakrishnan*.
substance whenever a public law decision has an adverse effect on any of the facets of a person’s life.¹⁷

_Procedural fairness:_ In *Tan Tek Seng* the Court of Appeal provided the foundation for the requirement of procedural fairness. It held that the expression ‘law’ in Articles 5(1) and 8(1) covers not only substantive law but also incorporates procedural law. Secondly, the term ‘equality’ in Article 8(1) includes fairness. The combined effect of these two articles is that there is a constitutional right to procedural fairness.¹⁸

The right to equal protection under the law in Article 8 implies a fundamental right to procedural due process. Amongst other things, this entitles a person to know the reasons for an administrative decision. In *Hong Leong Equipment v Liew Fook Chuan* [1996] 1 MLJ 416 Gopal Sri Ram JCA restricted this duty to situations when fundamental rights enshrined in Part II of the Constitution were adversely affected. Later, in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1998] 3 MLJ 289 the learned judge extended the duty to all cases where the rights of a person are jeopardized by a public law decision.

_Natural justice:_ In *Sugumar Balakrishnan* the Court of Appeal elevated the status of the principles of natural justice. It held that the principles of natural justice are part of the constitutional guarantee of procedural fairness. These venerated principles are not just rules of common law (liable to being overridden by statute) but are derived from Articles 5 and 8 of the supreme Constitution.

6. **We cling to the conservative theory of English legal positivism that judges are law finders and not law makers.** This “declaratory theory” of the judicial function holds that it is not the function of the courts to add colours to the legal canvas in support of human rights, rule of law and constitutionalism. Most humbly it is submitted that we need to be honest with ourselves and to come to terms with the existentialist reality of judicial law-making. Judges do not merely interpret the law; often they make and mould the law. The role of a judge is not simply that of a midwife, discovering what is already existing. In some of the following ways a judge leaves the imprint of his personality on the law.

- The formal law is so full of ambiguities, gaps and conflicts that often the judge has to reach out beyond formal rules to seek a solution to the problem at hand. In novel situations he has to reach out into the heart of legal darkness where the flames of precedent fade and flicker and extract from there some raw materials with which to fashion a signpost to guide the law. When rules run out, as they

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¹⁷ See also *Hong Leong Equipment v Liew Fook Chuan* [1996] 1 MLJ 145; *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 
often do, the judge has to rely on principles, doctrines and standards to assist in the decision.

- When the declared law leads to unjust results or raises issues of public policy or public interest, judges around the world try (and ought to try) to find ways of adding moral colours or public policy shades to the legal canvas. When the enacted law leads to undesirable or unjust results, the judge may be persuaded to add moral or public policy shades to the legal canvas. One could note, for instance, the "public interest" interpretation of Article 5(3) of the Federal Constitution in *Ooi Ah Phua* [1975] 2 MLJ 198 in which the court held that the constitutional right to legal representation can be postponed pending police investigation. In *Teoh Eng Huat v Kadhi Pasir Mas* [1990] 2 MLJ 300 the "wider interest of the nation" prevailed over a minor's right to religion guaranteed by Article 11. In *Hajjah Halimatussaadiah v PSC* [1992] 1 MLJ 513 the court subjected a public servant’s claim of a religious right to wear *purdah* at the workplace to the need to maintain “discipline in the service”.

- No law can make time stand still. Statutes enacted in one age have to be applied in a time frame of the continuum to problems of another age. The judge has to cause them to leapfrog decades or centuries in order to apply them to the felt necessities of the times. A present time-frame interpretation to a past time frame statute invariably involves the judge in a time-travel from the past to the present.

- The interpretive task is, in its functioning if not in its form, virtually indistinguishable from the law creating task. As the great American jurist, Oliver Wendell Holmes, once said: “A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. It is for the judge to give meaning to what the legislature has said.” In interpreting pre-existing law the judge is not an automaton performing a slot-machine function. The interpretive task is, by its very nature, so creative that it is indistinguishable from law-making.: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law” (Holmes).

Even if it is accepted that a judge is bound by the intention of the legislature, it must be noted that such an intention is not always clearly defined. The formal law is so full of ambiguities, gaps and conflicts that often the judge has to reach out beyond the statute to seek a solution to the problem at hand. The judge may scrutinise preambles, headings and extraneous materials like explanatory statements that accompany Bills and parliamentary debates to help unravel the meaning of statutory formulae. The judge may lean on the interpretation clauses of a statute or on the Interpretation Act 1948/1967 to decipher the intention of the legislature. Or he may fall back on a wealth of rules of statutory construction to aid his task. So numerous and varied are these rules that judicial discretion to rely on one rule or another cannot be predicted. Sometimes the judge’s attention is drawn to foreign legislation and related precedents. He may declare the
overseas statute to be *pari materia* (similar) with local legislation and, therefore, relevant to the case. Alternatively, he may pronounce the local law to be *sui generis* (a class by itself) and therefore to be viewed in the local context without aid of foreign decisions.

A judge is not required to view a statute in isolation. He is free to view the entire spectrum of the law in its full majesty; to read one statute in the light of related statutes and relevant precedents; to understand law in the background of a wealth of presumptions, principles, doctrines and standards that operate in a democratic society. He is justified in giving effect to what is implicit in the legal system and to crystallize what is inherent. Such a holistic approach to legal practice is justified because “law” in Article 160(2) is defined broadly to include written law, common law and custom and usage having the force of law.

- Constitutional interpretation imposes additional responsibilities. In interpreting the Constitution, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallize what is inherent. His task is creative and not passive. This is necessary to enable the Constitution to be the guardian of people’s rights and the source of their freedom. For example Article 5(1) of the Constitution requires that “no person shall be deprived of his life or personal liberty save in accordance with law”. In *Tan Tek Seng* [1996] 2 AMR 1617 and *Hong Leong* [1996] 1 MLJ 46 the court held that the term ‘life’ does not refer to mere physical existence. It includes the dignity and necessities of life like employment and the right to live in a reasonably healthy and pollution free environment. In *Sugumar Balakrishnan* [1998] 3 MLJ 28 it was held that the term ‘personal liberty’ includes the liberty of an individual to seek judicial review. In the USA in *Roe v Wade* 410 U.S. 113 (1973) a woman’s personal liberty was interpreted to encompass a right to abortion.

In performing the interpretative task the judge may adopt a literal or a liberal approach.

**Literal approach:** The “strict constructionists” believe that the Constitution should be interpreted in accordance with the original intention of its framers. The “plain language” of the provision and its grammatical and ordinary sense should be given effect. Deference should be paid to the enactment’s history.

In this spirit it was observed in *Datuk Harun v PP* [1976] 2 MLJ 116 that the court is not “at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, ...for the purpose of supplying omissions or of correcting supposed errors.” Similarly, it was stated in *Jabar v PP* [1995] 1 SLR 617 that any law is valid and binding so long as it is validly passed. “The court is not concerned with whether it is also fair, just and reasonable...”

**Liberal approach:** On the other hand, the “activists” or “legal realists” argue that the interpretive task is unavoidably creative because legal words do not have a
self-evident meaning. Expressions such as ‘personal liberty’, ‘life’, ‘law’, ‘property’, ‘adequate compensation’, ‘religion’ and ‘emergency’ are not nicely cut up and dried. It is for judges to give life and meaning to the cold letters of the law.

Further, the glittering generalities of the Constitution need to be interpreted dynamically because a Constitution is not made merely for the generation that then existed but for posterity. The static clauses of a constitutional instrument cannot calculate for the possible change of circumstances. In the words of Woodrow Wilson the Constitution “is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.” Judges have a duty to determine, independently of any historical limitations, the contemporary, core, constitutional values that deserve protection.

A pragmatic rather than dogmatic approach to the interpretation of the basic charter’s provisions should be adopted. Judges should be receptive to the felt necessities of the times and their interpretations should show suppleness of adaptation to changing needs. They should adjust legal principles to changing social conditions and should assist in social engineering.

Ronald Dworkin, an Anglo-American jurist recommends that interpretation should be based on rights and principles. The provisions of the Constitution should be viewed holistically in the context of the entire system of laws and with regard to the moral principles, doctrines, standards and framework assumptions that are implicit in the basic law. Interpretation should be morally charged and constructive. Its fundamental purpose should be to safeguard textual as well as non-textual rights, and to enforce constitutional constraints on the power of government.

In this vein it was observed in the Singapore case of Ong Ah Chuan v PP [1981] 1 MLJ 64 that in a Constitution that purports to assure fundamental liberties, all references to “law” refer to a system of law which incorporates the fundamental rules of natural justice.

Instead of a literal construction, a purposive interpretation should be adopted. The central concern should be with purposes, not meanings. In Liyanage v R [1967] 1 AC 259 the Privy Council declared a statute unconstitutional not because it infringed any express constitutional provision but because it compromised judicial independence and was contrary to the constitutional scheme of things. Likewise in Dato’ Yap Peng v PP [1987] 2 MLJ 311 a provision of the CPC was invalidated because it conferred on the executive a power to transfer cases which the court regarded as being part of the “judicial function”.

A Constitution differs fundamentally in its nature from ordinary legislation passed by Parliament. Canons of construction applicable to ordinary statutes should not be applied rigidly to constitutional instruments. In Dato Menteri Othman Baginda [1981] 1 MLJ 29 the court expressed the view that on constitutional issues,
previous precedents need not be strictly followed. They must be subjected to a situation-sense. Further, “a Constitution being a living piece of legislation must be construed broadly and not in a pedantic way – with less rigidity and more generosity than other Acts.”

In Teh Cheng Poh [1979] 1 MLJ 50 it was observed that in applying constitutional law the court must look behind the label to the substance. Thus the government’s labelling or description of a law as a piece of subsidiary legislation could not camouflage the fact that it was an Ordinance promulgated by the Yang di-Pertuan Agong long after Parliament had come back to session and, therefore, unconstitutional.

- Under Articles 4(1) and 128, the superior courts have the momentous power to review the validity of legislative and executive actions by reference to norms of the basic law. If a legislative measure is found by the court to be unconstitutional, the court has a number of choices. It may condemn the entire statute as illegal or it may apply the doctrine of severability and invalidate only the sections that are unconstitutional and leave the rest of the statute intact. The court may declare the statute null and void ab-initio (from the day it was enacted) or only from the date of the ruling. For instance in Dato Yap Peng v PP [1987] 2 MLJ 31 the Supreme Court invalidated section 418A of the Criminal Procedure Code prospectively. Questions of constitutionality are fraught with political and policy considerations and decisions thereon can influence the course of legal and political development. For example in Faridah Begum v Sultan Haji Ahmad Shah [1996] 1 MLJ 617 the majority held that the 1993 constitutional amendment removing the immunities of the Sultans cannot apply to suits brought by foreigners.

- Article 162(6) allows judges to modify pre-Merdeka laws in order to make such laws conform to the Constitution. Modification is without doubt a legislative task.

- Operation of the doctrine of binding judicial precedent is not a mechanical task. In novel situations when there is no previous decision on point and the judge has to provide an “original judicial precedent”, the judge relies on the customs and traditions of the land and on standards, doctrines and principles of justice that are embedded in the life of the community to lay down an “original precedent” to assist the legal system. Admittedly, this fashioning of a new precedent is an infrequent occurrence but its impact on legal growth is considerable. When a previous precedent is overruled and thereby denied the authority of law, judicial creativity is clearly in play. The overruling may be retrospective or prospective. In either case a new principle is contributed to the legal system and a new direction is forged.

The doctrine of binding judicial precedent exists to promote the principle of justice that like cases should be decided alike. It also seeks to ensure certainty, stability and predictability in the judicial process. There can be no denying that
the existence of this doctrine imposes some rigidity in the law and limits judicial choices. But one must not ignore the fact that some flexibility and maneuverability still exist.

Though a superior court is generally reluctant to disregard its own precedents, it does have the power “to refuse to follow” its earlier decisions or to cite them with disapproval. The Federal Court has, on some occasions, overruled itself. High Court judges occasionally refuse to follow other High Court decisions. An inferior court can maneuver around a binding decision through a host of indirect techniques. It may distinguish the cases on facts. It may decide that the facts of the case at hand are dissimilar to the facts of the binding decision. It may rule that the principle being cited is obiter dicta and not ratio decidendi. Distinguishing between ratio and obiter involves creativity. It is rare to have only one binding precedent on a point. Sometimes there is a whole line of cases on an issue. The Court may read the binding principle in the context of prior and subsequent decisions and may induce the ratio from a basket of precedents. This is a creative task. Sometimes a decision has several “concurring judgements” and more than one ratio decidendi. The lower court has a choice as to which ratio to follow. Alternatively, the court may add its own gloss to the binding precedent by inducing from the concurring judgments a principle of law that bears the imprint of his construction.

It should therefore, be apparent that there are many possibilities for creative interpretation of a binding precedent. The doctrine of stare decisis does not reduce judges to automatons.

- Whether an agency has acted ultra vires (in excess or abuse of power or in violation of procedure) is a complex question of law that permits judicial creativity. Some statutes declare that discretion is absolute or that a decision is final and conclusive. Some statutory powers are conferred in broad and subjective terms. To statutory formulae of this sort, contrasting judicial responses are possible. The court may interpret them literally and give judicial sanction to absolute powers. Alternatively the court may read into the enabling law implied limits and constitutional presumptions of a rule of law society. This will restrict the scope of otherwise unlimited powers. Subjective powers may be viewed objectively. Purposive interpretation may be preferred over literal interpretation. When procedural violations are alleged, a decisive but discretionary issue is whether the procedure was mandatory or directory. Violation of a mandatory procedure results in nullity. Violation of a directory requirement is curable.

- Rules of natural justice are non-statutory standards of procedural fairness. They are not nicely cut up and dried and vary from situation to situation. Judges have wide discretion in determining when they apply and to what extent.

- Treating statutes as sui generis or pari materia: All strict constructionists as well as some liberals are agreed that every Constitution is *sui generis* – a class by itself. It must be interpreted within its own four walls and according to the nation’s
prevailing conditions. Context must determine content. In *Loh Kooi Choon* [1977] 2 MLJ 187 federal judge Raja Azlan Shah (as DYMM Sultan Perak was then) said: “Our Constitution now stands in its own right… (its) wording cannot be overridden by the extraneous principles of other Constitutions.” However, in contrast with the *sui generis* approach is the idea that if two statutes are *pari materia* or sufficiently similar in their materials, then the decisions in relation to one are relevant to the other.

Whether a statute is *sui generis* or *pari materia* with a similar statute is not always self-evident. Judges have a subjective choice and much depends on what result they wish to achieve.

**TAKING NOTE OF INTERNATIONAL HUMAN RIGHTS**

**Article 160(2):** Unlike Article VI of the American Constitution that gives primacy to those international treaties that are mandatory, Malaysia’s Article 160(2) defines ‘law’ and does not include treaties or other types of international laws within our definition of law. However, Article 160(2) is worded to say: “Law” includes …”.

This means that the definition of law in Article 160(2) is inclusive, not exclusive. There is scope for courage and creativity to import international law into our corpus juris.

**Common law:** Under Article 160(2) and the Civil Law Act, British common law is part of our law. There is a wealth of judicial decisions from the UK indicating that there is a rule of presumption that an Act of Parliament does not intend to violate the UK’s obligations under international law. Statutes must be interpreted as far as possible to accommodate international norms. Harmonious construction must be employed. Unless an Act of Parliament explicitly contradicts a rule of international law, the constitutional presumption is that the international rule is not displaced.

**Rule of presumption:** Though practices vary, in many countries like India, the UK and, to some extent, the USA, many courts are prepared to subject themselves to the presumption that their Parliaments could not have intended to violate international law unless such an intention is clearly expressed in the national statute.\(^{19}\)

Perhaps our Interpretation Act 1948/1967 should be amended to provide for a rule of construction that national legislation should be interpreted as far as possible to accord with Malaysia’s obligations under international law.

Human Rights Commission of Malaysia Act 1999, (Act 597): Ever since the passing of this Act, no doubts should exist about the applicability and enforceability of the UDHR to Malaysia. Act 597 has given a kiss of life and of validity to the UDHR by providing in section 4(4) that regard may be had to the UDHR 1948 “to the extent that it is not inconsistent with the Federal Constitution”.

Provisions of the UDHR could be classifiable into three categories. First are those provisions that are pari materia with our Articles 5 -13. These provisions are clearly relevant for the interpretation of Malaysian laws. Second category of UDHR provisions are those that are not provided for in Malaysian laws but are not inconsistent with our Federal Constitution either. We should regard ourselves free to refer to these provisions of the UDHR as they do not violate our Constitution. Third category of UDHR provisions are those that collide with our Constitution. On the present state of dualism, these provisions cannot be enforced in our courts.

UN Charter: Malaysia is a member of the United Nations. As such it is bound by the Charter’s six substantive provisions devoted to human rights [Preamble, Articles 1(3), 13(1)(b), 55(c), 56, 62(2), 76(c)]. Of these Article 56 is of vital importance as it directly imposes an obligation on member states “to take joint and separate action in cooperation with the organization for the achievement of the purpose set forth in article 55(c)”.

CONCLUSION

In order to promote the international law on human rights, we need to take our own Constitution seriously and to indulge in vigorous enforcement of the rights already consecrated in our basic law. International law could be employed to determine the horizons of our rights and duties.

All this requires courage and creativity and the overcoming of the psychological barriers that have prevented innovativeness. We need also to confront the philosophical assumptions and pre-conceptions that have prevented the imperatives of the Constitution from becoming the aspirations of the people.

The Interpretation Act 1948/1967 should be amended to provide for a rule of construction that national legislation should be interpreted as far as possible to accord with Malaysia’s obligations under international law.