

THE LOCAL JUDICIARY &
INTERNATIONAL HUMAN RIGHTS
PRINCIPLES:
SETTING THE STANDARD AND MOVING

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Preliminary

1. Titles assigned to Papers often do not state with clarity the subject matter to be discussed; but I am assuming that what is intended to be considered is the role of the Judiciary in relation to human rights.

2. In that context, the following preliminary observations are made:-
 - when one talks of human rights one is referring to the principles laid down in the Universal Declarations of Human Rights adopted by the United Nations on 10.12.1948;
 - human rights, like every other legal right, require protection to be meaningful; and the task of providing such protection falls upon the Judiciary;
 - many judges do not, however, seem able to look upon human rights in the same way they do other legal rights, and frequently show themselves to be reluctant or not prepared to confront, but prefer to evade, fundamental issues which arise from complaints of alleged human rights violations;
 - as a result, the public in this country cannot look with confidence to the Judiciary for the protection of their human rights.

International Human Rights Principles

- 3.. In spite of the fact that the Universal Declaration has existed for more than 60 years, many people still consider the international human rights principles stated in it as being irrelevant to them and,

consequently, do not appreciate the importance of upholding and protecting them. One reason for this is their failure to recognise that those human rights principles are intended to apply to all human beings, who include themselves.

4. It may, therefore, be helpful that we remind ourselves of the history of human rights to see how the principles now enumerated in the Universal Declaration came to be adopted by the United Nations.

5. The history of human rights, as gleaned from the extensive writings published on the subject, and summarised in this Paper,' shows that the idea that *every human being* has certain rights has existed since the early days of ancient Greece and Rome. In the beginning they were explained by reference to the "law of nature". Later on the liberal idea of freedom and equality was evolved. This was followed by the contentions of later philosophers that these rights existed because of the "state of nature", and that among them were the right to life, the right to liberty, i.e. freedom from arbitrary rule, and the right to property. These developed into the concept of the inalienable "rights of man" found in the American Declaration of Independence proclaimed on 4 July 1776, which states, "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".

6. But while the doctrine of human rights that we now have, evolved from the thinking of these philosophers, the *term human rights* itself is relatively new. It was used in a preamble to the Charter of the United Nations (signed at San Francisco on 26 June 1945), which states:

'WE THE PEOPLES OF THE UNITED NATIONS,
DETERMINED:

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in *fundamental human rights*, in the dignity and worth of the human person, in the equal rights of man and women and of nations large and small, and.....'

7. Efforts to lay down standards designed to promote and protect human rights had been made even before World War II. There had been the treaties to suppress slavery and the slave trade; the declarations and agreements to temper the conduct of hostilities, to protect the victims of war and to lay down a humanitarian law of war; and the conventions which regulated labour law and relations in such fields as industrial health, safety, and welfare, hours of work and annual paid holidays. But these efforts were aimed at specific human rights.

8. The idea of having a uniform standard of human rights to apply to all persons came about as a result of the atrocities committed by the Nazis, which shocked the world. The Universal Declaration of Human Rights reflected the world-wide condemnation not only of the Nazi persecution of European Jews and their near extermination but also of the cruelty which had been inflicted on prisoners of war in Asia and Europe.
9. Representatives from the many countries that gathered immediately after World II to assess the cause of the catastrophe came to the view that the terrible war was made possible by the denial of democratic principles of dignity, equality and mutual respect to be accorded to all *human beings*, and by the propagation, in their place, through ignorance and prejudice, of the *doctrine of the inequality of men and races*.
10. The Universal Declaration of Human Rights was adopted by the General Assembly on 10 December 1948 without dissent. It proclaimed "*a common standard of achievement for all peoples and all nations*". This standard is now 'the yardstick by which to measure the degree of respect for, and compliance with, international human rights standards.'
11. In essence, it contains fundamental principles such as the right to life; the right not be subjected to torture or to cruel or inhuman or degrading treatment or punishment; and the right not to be subjected to arbitrary arrest, detention or exile.

12. It deals with all the political and civil rights traditionally entrenched in national constitutions and legal systems, including equality before the law; protection from arbitrary arrest; the right to a fair trial; protection against retrospective criminal laws; the right to own property; the right to freedom of thought, conscience, and religion; freedom of opinion and expression; and freedom of peaceful assembly and association.
13. Also included are certain economic, social and cultural rights, such as the right to work, the right to form and join trade unions, the right to rest and leisure, the right to an adequate standard of living, and the right to education.
14. But the Universal Declaration of Human Rights was not a treaty.. To reinforce the moral and political impact of the Universal Declaration, the United Nations adopted a number of treaties. Two of these are the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, both adopted in 1966.
15. They incorporated almost all the rights proclaimed in the Universal Declaration, including the right to non-discrimination. To take just one example, Article 19 of the Universal Declaration, which reads:

" Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

was expanded in Article 19 of the Covenant on Civil and Political Rights, and reads:

"Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are prescribed by law and are necessary:
 - (a) for respect of the rights or reputations of others;

- (b) for the protection of national security or of public order, or of public health or morals."

- 16 Each party ratifying any of the Covenants undertakes to respect and to ensure to all individuals within its territory and who are subject to its jurisdiction the rights recognised in the Covenant *"without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*
16. But while all member States of the United Nations are taken to have recognised and accepted the universal standards of human rights stated in the *Universal Declaration*, many are reluctant to be legally bound to give effect to them and, therefore, to ratify the Covenants. They reason that the courts of a State are simply not bound by these documents unless they have been ratified by that State. Many, including Malaysia, have, accordingly, not ratified the two Covenants
17. The proposition that the courts of a country not ratifying the Covenants are not bound to give effect to international human rights principles has been questioned by human rights lawyers and activists, who generally believe that domestic courts can and should enforce international human rights norms.

18. The traditional view of common law countries has been that international law is not part of domestic law. But this has gradually been changing.
19. At the first Commonwealth judicial colloquium held in Bangalore, India, in 1988, *the relevance of international human rights standards to the task of national courts in interpreting and applying their constitutions and legislation and in developing the common law, was the central issue of legal policy discussed.*²
20. The statement of principles formulated at this Colloquium, known as the *Bangalore Principles*, are set out in the Annexure to this Paper and is to the effect that:-
 - (1) international law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries;
 - (2) such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare that the norms thereby established are part of domestic law;
 - (3) the judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty - even one ratified by their own country;

² *The Bangalore Cycle Of Commonwealth Judicial Colliquia in Retrospect* by the Rt Hon Lord Lester of Herne Hill, QC.

- (4) but if an issue of uncertainty arises (as by *a lacuna* in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and
- (5) from this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which then makes it part of domestic law.

Judges and Human Rights

21. Even though Malaysia was one of the ten participating countries in the first Colloquium mentioned, these principles have not been given any or due regard by Malaysian courts.
22. Human rights jurisprudence in this country has been quite dismal. A number of decisions made by the Court of Appeal to promote and uphold human rights principles have been struck down by the Federal Court on appeal.
23. In Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd,³ the Federal Court held the Court of Appeal to be wrong in finding that *"it is a principle of our law that every citizen has a right of unimpeded access to a court"* because, according to the Federal Court, *"access to justice shall be available only to the extent that the courts are empowered to administer justice. ...that the manner and extent of the exercise of the*

³ [2004] 2 MLJ 257 FC.

right of access to justice is subject to and circumscribed by the jurisdiction and powers of the court as provided by federal law."

24. In acknowledging that the jurisdiction of the courts may be *enlarged or curtailed* by federal law, the Federal Court was tacitly accepting the constitutionality of art. 121(1) of the Federal Constitution (which empowers Parliament to *remove or restrict the jurisdiction and power of the High Court*).
25. Accepting as valid art. 121(1), as amended in 1988, renders the capability of the courts to uphold human rights highly questionable. Where the independence and integrity of the Judiciary is compromised, the citizen is left at the mercy of a system which does not guarantee their protection against powers of the State; and that would seem to be the problem which has beset the judiciary when it comes to deciding issues involving human rights.
26. What is glaring to human rights advocates from a study of the cases is the apparent unwillingness of judges to grapple with fundamental issues. This has created great uncertainty on the value of these rights:
 - The right conferred on citizens to peaceably assemble without arms⁴ is now virtually non-existent; it is only exercisable with the permission of the police; it is the police and the politicians that determine the scope of the citizen's right to peaceably assemble.

- With regard to the citizen's right of freedom of speech, the courts have yet to lay down the parameters for determining the offence of sedition - the test often echoed that *freedom of speech ends where sedition begins* may sound good but does not say anything useful. It has become part of the standard public warnings that sensitive issues cannot be discussed except *behind closed doors*. Threats of prosecution for sedition are frequently issued not only by the police but also by politicians to discourage discussions and debates on certain unpalatable topics. The recent case of a young female journalist being detained under the Internal Security Act 1960 for reporting the *racial* statements of a politician, illustrates the extent of the chaos we can descend to if the courts continue to decline to discharge their role to uphold human rights.

- In the area of preventive detention, the courts are still applying the subjective test to detentions under s.8 of the Internal Security Act 1960, **when** *Liversidge v Anderson*⁵ has for some time been generally regarded as no longer good law.

- One particular human right which the courts appear deliberately to avoid to consider is the right to freedom of religion.⁶ The highly unsatisfactory state of affairs which have been created by different authorities making judicial pronouncements have to be resolved. To lawyers who believe that the Federal Constitution is the supreme law of the nation, the silence of the Judiciary on such a fundamental

⁵ [1942]

⁶ Art.11 of the Federal Constitution.

constitutional and human rights issue is inexplicable. However one may view the constitutionality of Art. 121(1) (which purports to arrogate to Parliament the power to control the jurisdiction of the courts), there is no question about the court's jurisdiction to determine issues of freedom of religion.

27. The courts do not appear to be moving in any clear direction when it comes to dealing with human rights issues generally.
28. If they are to move forward in tandem with the Judiciary of other established democracies, Malaysian judges must keep up with developments in the law of human rights, to see how various issues are considered. They need to engender a feeling for human rights and to have more sympathy for those who complain of violations of their rights. They need to recognise that any violation of human rights is as well the violation of their own rights.
29. The intention of this Paper is to stimulate discussion.

ANNEXURE

BANGALORE PRINCIPLES

(On Domestic Application of International Human Rights Norms)

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and

colleges, and for lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.

1 O. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

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