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

Defining terms

In the international context, the expression "human rights" encompasses a multitude of express rights. Some of these are to found in the Universal Declaration of Human Rights, 1948. Others may be found in the International Covenant on Economic. Social and Cultural Rights, 1966. Yet others in the International Covenant on Civil and Political Rights, 1966. The rights are clearly spelled out in these documents. For example, the Article 13 of the Covenant on Economic. Social and Cultural Rights recognises the right of everyone to education.

In the local context, the Human Rights Commission of Malaysia Act 1999 defines human rights as the fundamental liberties as enshrined in Part II of the Federal Constitution. And the Act in section 4(4) directs that "regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution."

So, when we come to define as to what is meant by "human rights" in the Malaysian context, there is only one inquiry that needs to be made. And that is to determine whether it is a right that comes within Part II of the Constitution. Part II contains about thirteen separate rights expressly set out therein. The question then arises

whether there are other rights to be derived from within these express rights. This takes one into the realm of interpretation.

Interpreting fundamental rights

There are two ways in which you can interpret a written law. One is to interpret it literally – adopting a chewing gum wrapper approach. This approach to interpretation asks the reader to confine oneself to the actual words used. Take article 5(1) which prohibits the deprivation of life and personal liberty otherwise than in accordance with law. To the literal interpreter life means mere animal existence. And personal liberty means freedom from arrest otherwise than in accordance with law. More importantly, law means enacted law. It follows from the point of view of the literal judicial interpreter that so long as there is an enacted law – no matter how unfair or unjust it may be – that is sufficient. It matters not that that law authorises the arrest, detention and trial of an individual in an unfair or unjust fashion. It matters not that that law authorises harsh and cruel treatment in custody. These are matters in respect of which the literal interpreter imitates Nelson at Trafalgar.

In the early history of constitutional interpretation the literal approach prevailed. The thinking was that the norms or canons of construction employed by judges to interpret ordinary statutes applied with equal force to written constitutions.[1] Judges who were trained under a system in which Parliament was supreme found themselves in

[1] See, Gwyer CJ in *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation Act* AIR 1939 FC 1,

unfamiliar terrain when faced with constitutional documents. Since Commonwealth constitutions were the product of a Statute of Westminster or an Order in Council, the early jurists applied the canons of statutory construction when interpreting the Constitutions of former colonies. Also, if you look at those early cases in which it was said that a written Constitution should be read in a pedantic fashion[2] you will find them to have dealt with the division of legislative powers between the central and state or provincial legislatures of the particular Dominion. None of them had to do with the interpretation of fundamental rights provisions. This is because the only disputes that came before the Privy Council for interpretation or were those of Canada and Australia. Canada, at that time, had no Charter of Rights as it now has and Australia has none even today.

The first independent country in the Commonwealth that had to deal with the interpretation of fundamental rights was India. Indian judges, influenced by their earlier training interpreted Part III of their Constitution as if it were an ordinary statute[3]. And where it concerned a challenge under Article 14 (the equality protection clause), they proceeded on a basis largely influenced by the jurisprudence established by the Supreme Court of the United States in regard to the equal protection clause of the Fourteenth Amendment. When it came to the turn of our courts they followed Indian precedent to a large extent[4]. No one stopped to think for a moment that the US

[2] See, James v The Commonwealth [1936] AC 578
[3] See Mukherjee J in AK Gopalan v State of Madras AIR 1950 SC 27
[4] See, Datuk Haji Harun Idris v Public Prosecutor [1977] 2 MLJ 155

Constitution does not contain an equality provision and that the Indian and Malaysian Constitutions do.

These early hiccups in constitutional interpretation left a deep scar on the constitutional jurisprudence of our country which remained in a state of stunted growth. Attempts by the Court of Appeal[5] to adopt a broad, generous and prismatic approach to constitutional interpretation were thwarted[6]. The apex court went so far as to say that: "We therefore disagree with the Court of Appeal that the words 'personal liberty' should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life."[7] The literalists had won: at least for a time.

Then, in 2008 the trend changed[8]. The apex court held that constitutional provisions should be read generously and that provisos or derogations on rights should be read restrictively. This trend continues[9] with some exceptions[10].

Regard to international norms

There is a strong line of authority that supports the use of international documents to interpret constitutional provisions[11].

[5] See Tan Tek Seng [1996] 1 MLJ 261
[6] See Sugumar Balakrishnan [2002] 3 MLJ 72
[7] (Ibid)
[8] See Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521; [2008] 2 MLJ 285
[9] See, Lee Kwan Who v Public Prosecutor [2009] 1 LNS 778; Shamim Reza v Public Prosecutor [2009] 1 LNS 887
[10] See, Public Prosecutor v Kok Wah Kuan [2007] 6 CLJ 341, where it was held that an Act of Parliament could not be struck down as unconstitutional on the ground that it violated the doctrine of separation of powers.
[11] See, Minister for Immigration and Ethnic Affairs v. Teoh, 128 Aus LR 353; State of West Bengal v Kesoram Industries Ltd AIR 2005 SC 1646; R v Secretary of State for Home Department ex parte Mohammed Hussain Ahmed [1998] EWCA (Civ) 1345.

Indeed, as earlier mentioned, section 4(4) mandates reference to the Universal Declaration of Human Rights. Unfortunately, despite the compelling language of the section, our apex court has held that a court is not bound to have regard to the Declaration[12]. This rather regrettable decision must be corrected when the opportunity arises. Of course, one accepts that a treaty, unlike an Act of Parliament, is not self-executing. But where, as here an Act of Parliament directs that regard shall be to an international instrument, a court is bound to adhere to that direction. Compare this with Hong Kong where the courts take into account the impact of international documents, including opinions of the International Court of Justice when interpreting municipal legislation in judicial review proceedings[13].

The present position

Some of the more important human rights junctions that should be highlighted from the lawyer's point of view are as follows:

(i) Under article 5(3) of the Constitution, an individual who is arrested has two rights: to be informed of the grounds of his arrest and be permitted to consult counsel of his choice. If the first of these guaranteed rights is violated then habeas corpus will lie to secure his release[14]. However, if he is not permitted to consult counsel of his choice, habeas corpus does not lie[15]. Also, whether a detainee should be permitted to consult a counsel of his choice is something that

[12] See, Mohd Ezam v Ketua Polis Negara [2002] 4 CLJ 309
[13] Society for the Protection of the Harbour Ltd v Town Planning Board [2003] HKCFI 220
[14] Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor [1988] 2 MLJ 638; Lee Siew kai v Menteri Dalam Negeri Malaysia [1990] 1 MLJ 42.
[15] See Mohd Ezam (supra)

> "should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of Article 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the Article."[16]

This approach renders the protection given by article 5(3) a mere rope of sand.

(ii) It is now established that the expressions life and personal liberty in article 5(1) are to be read liberally and include in them other rights[17].

(iii) Where a person is detained under the Internal Security Act 1960, the satisfaction of the Minister under section 8 of that Act that the detention is necessary is beyond judicial review as it refers to his personal satisfaction[18].

(iv) Access to justice is not a right guaranteed by the Constitution[19]. It follows that Parliament may by an Act deprive an individual of his life or personal liberty and at the same time oust the court's jurisdiction to hear any complaint about the deprivation.

The short point to be made is that while there have been some major changes in our human rights jurisprudence there is still room for

[16] Theresa Lim Chin Chin v Inspector General of Police [1988] 1 MLJ 293; see also Mohd Ezam (supra)
[17] Lee Kwan Who v Public Prosecutor [2009] 1 LNS 778; Shamim Reza v Public Prosecutor [2009] 1 LNS 887
[18] See, Kerajaan Malaysia v Nasharuddin Nasir [2004] 1 CLJ 81
[19] See, Sugumar Balakrishnan (supra); Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd [2004] 1 CLJ 701

improvement.

Dated: 9 October 2009

Gopal Sri Ram, Judge, Federal Court