THE MALAYSIAN PERSEPECTIVE ON HUMAN RIGHTS AND FREEDOM IN 21ST CENTURY AND THE ROLE OF COURT

By The Rt. Hon. Tan Sri Arifin Zakaria
Chief Justice of Malaysia

It is an honour for me to be invited to address you on this important topic.

Human Rights

1. I would begin by stating briefly what I understand by human rights. To me, human rights are the rights that every one of us as human being is endowed with from the day we were born into this world of ours until we leave this world. These rights cannot be taken away, nor derogated or denied based on colour, religion, age or other personal factors. Human right is meaningless without freedom.

2. Central to the concept of human rights and freedom are the protection of human dignity. To quote Kofi A. Annan, the former Secretary General of the United Nations “Human rights are the foundation of human existence and co-existence; that human rights are universal, indivisible and interdependent; and that human rights lie at the heart of all that the United Nations aspires to achieve in peace and development. Human rights are what made us human.
They are the principles by which we create the sacred home for human dignity.  

3. Human rights are universally recognised around the globe. They have been incorporated into the constitution of various states. They have also been the aspiration for various movements and organizations around the world.

4. In my jurisdiction Malaysia, they have been incorporated in Part II of our Federal Constitution comprising of Articles 5 to 13 of the Constitution. The Federal Constitution guarantees certain fundamental liberties namely:

   (i) Personal liberty (Article 5);
   (ii) Prohibition against slavery and forced labour (Article 6);
   (iii) Protection against retrospective criminal laws and repeated trials (Article 7);
   (iv) Equality before the law and the rights to equal protection of the law (Article 8);
   (v) Prohibition of banishment and freedom of movement (Article 9);
   (vi) Freedom of speech, assembly and association (Article 10);
   (vii) Freedom of religion (Article 11);
   (viii) Rights in respect of education (Article 12); and
   (ix) Right to property (Article 13).

---

1 Excerpt taken from a message of 5 December 1997, addressed by the former Secretary-General of the United Nations Kofi A. Annan on the beginning of the 50th Anniversary year of the Universal Declaration of Human Rights.
5. Malaysia, is a federation consisting of 13 states. It practises the system of parliamentary democracy with a written constitution. It is headed by Yang Di-Pertuan Agong (H.R.H. the King) who is a constitutional monarch. The system of government in Malaysia is closely modelled on the Westminster Parliamentary system with a difference that the Constitution is supreme and not Parliament as in the United Kingdom. Article 4 of the Federal Constitution provides that any law which is inconsistent with the Constitution shall to the extent of such inconsistency, be void.

6. Individual rights and freedoms as enshrined in the Constitution are not without limitations as peace and security of the country must take centre stage. Therefore, the Federal Constitution provides for the limitations to those fundamental rights and freedoms. These are contained in the relevant Articles itself and the written law made thereunder.

The Court's Role

7. The judiciary in Malaysia consists of the Federal Court as the highest court of the land. Below the Federal Court, we have the Court of Appeal and the High Courts. These constitute the superior courts. Below that, we have the subordinate courts namely the Sessions Court and the Magistrate's Court. The jurisdiction of the courts are prescribed in the Constitution and the federal law.
8. In Malaysia, we do not have a constitutional court. The Federal Court plays a dual role; as the final court of appeal as well as the interpreter of the Constitution. Constitutional issue may be referred direct to the Federal Court for its decision, and the ruling of the Federal Court on the issue is final and binding on the courts below.\(^2\) Therefore, the Federal Court can be regarded as the constitutional court.

9. As the protector of the Constitution, the Malaysian courts have a role to play, to protect the rights of the individual \textit{vis a vis} the State and between the States and the Federation. It ensures that State actions are within their allocated authority including to ensure the rights and freedoms provided under the Federal Constitution are not infringed. The redress for any infringement is by way of judicial review. Under this mechanism, the High Court is empowered by section 25 of the Courts of Judicature Act 1964 to order for \textit{habeas corpus, mandamus, quo warranto, certiorari} and prohibition or any others for the enforcement of the fundamental rights provided in Part II of the Federal Constitution. Any appeal lies to the Court of Appeal and the Federal Court.

10. By way of example, the fundamental right of association under Article 10 of the Federal Constitution came for consideration by the Federal Court in the case of \textit{Dewan Undangan Negeri Kelantan v Nordin Salleh [1992] 2 CLJ 1125}. In that case, the State Legislature of Kelantan had passed an amendment to the State Constitution which provided for an anti-hopping law. Under the

\(^2\) See Article 4 of the Malaysian Federal Constitution
amendment, it was provided that any members of the State Legislature who is a member of a political party, resigns or is expelled from or ceases to be a member of such party, he shall cease to be a member of the State Legislature and his seat shall be vacant. The amendment was challenged as being contrary to the right of association in Article 10 of the Federal Constitution. The Federal Court in declaring the amendment as void being *ultra vires* the Federal Constitution, accepted the liberal principles of constitutional interpretation and held that any state action which makes the exercise of human rights ineffective or illusory would be unconstitutional and thus void. This is a very important decision in so far as the right of association is concerned.

11. Meanwhile Article 5 of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. Upon application by way of writ of *habeas corpus*, the High Court shall inquire into any detention complained of and if satisfied that the detention is unlawful shall order for the detainee to be produced before the court and release him forthwith.

12. The mechanism of *habeas corpus* is an effective role played by the court in cases where a statute permits for preventive detention without trial, for example under the Internal Security Act 1960 and Emergency (Public Order and Prevention of Crime) Ordinance 1969. Under this mechanism, if the court is satisfied that there exists procedural non-compliance in the detention process, under the law as it stood. The court shall order for the release of the detainee. The detainee can only challenge the procedural aspects
of his detention but not on the merits upon which his detention was ordered. However, as I will explain later, this piece of legislation has recently been overhauled by the government.

13. In the case of **Abdul Ghani Haroon v Ketua Polis Negara and Another Application [2001] 2 MLJ 689**, the court granted *habeas corpus* and released all the detainees on the grounds reflecting Article 5 of the Universal Declaration on Human Rights and Article 7 of the International Covenant on Civil and Political Rights (ICCPR). The court found that the denial to the detainees under arrest, of legal advice and access to their families, where they had no information as to when they might be granted access, amounted to “cruel, inhuman and oppressive” acts. Even though the right not to be subjected to “cruel, inhuman or degrading treatment” is not explicitly provided in the Federal Constitution, the Malaysian court was prepared to invoke the standards of the Universal Declaration of Human Rights.


**Movements on Rights and Freedom in Malaysia**
15. The Internal Security Act 1960 and the Emergency (Public Order and Prevention of Crime) Ordinance 1969 are among the legislations which strike at the fundamental liberties enshrined under the Federal Constitution. Much criticism had been levelled against these legislations. Many organizations and movements in the country have urged the government to repeal these legislations.

16. In response, the government has launched the “Political Transformation Plan” (PTP). Under PTP, the government pledged that the era where the government imposed excessive controls and adopted the attitude of ‘government knows best’ is over. The government saw and heard the desire of its people for renewal and change and responds accordingly. The government now is more open and receptive to criticisms and suggestions from the people. This has brought above a new benchmark on the law relating to freedom of expression in Malaysia.

17. This prompted many quarters and organizations to express their view including the Malaysian Bar and the Commission of Human Rights of Malaysia (SUHAKAM). Much criticism had been levelled against the Internal Security Act 1960 and the laws made under the proclamation of emergencies that allows preventive detention without trial such as the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The critics contend that these legislations are draconian, obsolete, open to abuse and against the human rights.

---

18. The government believes that the Internal Security Act 1960 has served the nation well, but it has outlived its purpose. The country now needs a new framework of national security legislation in the increasingly complex contemporary era with emphasis on human rights, but at the same time without compromising national security and public order.

**Recent Transformation by the Government**

19. The government believes that after more than half a century of practising democracy since its Independence, Malaysians have now reached a high level of maturity. In view of this, Malaysia is now ready to enter into a new era where the function of the government is no longer seen as limiting freedom of the individual but, instead, of ensuring that the basic rights as enshrined in the Federal Constitution are well protected. The government believes that a balance could be reached between freedom of the individual and national security.

20. In line with this aspiration, the government has just recently rescinded all three emergency proclamations and consequently all the laws made under those proclamations will automatically lapse effective June this year.

21. The government has also taken other reformative steps in upgrading the human rights and freedom to its people. Major amendment to several legislations has been tabled in the
Parliament and several other Bills are already on the list to be tabled soon.

22. The biggest step is to repeal the Restricted Residence Act 1933, Banishment Act 1959 and Internal Security Act 1960. In place, the government has introduced a new law, the Security Offences Bill (Special Measures) 2012, which would ensure that the authorities have adequate legal weaponry not only to combat global terrorism and defend parliamentary democracy in Malaysia, but at the same time to protect human rights and freedom of its citizens.

23. Under the new law, the Home Minister would no longer have the power to impose preventive detention without trial. Further, the detention under the new law is purely for investigation of an offence against national security. The period of detention without trial is shortened to only 28 days unlike the old Act where it may go up to 2 years. Once the investigative detention lapses, the detainee must either be prosecuted or released but shall not be further detained. The power of judicial review will be fully returned to the courts. Any detainee may challenge in the court by way of *writ of habeas corpus* on both the merits and procedure of the detention, unlike under the old law, where only the procedure can be challenged but not the merits. If released by the court, the detainee is further guaranteed not to be re-arrested. The new law further guarantees that no one can be detained because of his political beliefs or activities. The most important feature of this new law is that, it is a pure legislation on national security and not for any political usage.
24. To ensure that cases under the new law are expeditiously disposed of, a number of judges will be specially assigned to hear these cases. They will be selected from among experienced judges and will be given training in security laws and human right issues.

25. The government has also formulated the Peaceful Assembly Act 2011 which deals with rights of peaceful assembly. It also introduced an amendment to the Universities and University Colleges Act 1971 which will allow the tertiary students to engage actively in political activities. The Sedition Act 1984 is also in the midst of amendment that will support more freedom of speech.

26. Also in the pipeline, is the amendment to replace the current Printing Presses and Publications Act 1984 to give more freedom to the press. Under the new law, the press is not subjected to the requirement of annual licence anymore, nor subjected to the governmental control. Instead, the press will be regulated by a media council.

27. All these amendments are made with the ultimate goal, to create a nation where the Federal Constitution and the rule of law as the guardian of the people that will protect each individual so that he is free to voice out his opinion, criticize, support, have differing views or become a member of any organization. In short, no one will be punished in exercising his rights guaranteed by the Federal Constitution and the rule of law.
Human Rights Commission of Malaysia


29. Besides, the international attention on human rights as a result of the success of the 1993 World Conference on Human Rights in Vienna where the participating governments including Malaysia, have agreed that human rights are universal and indivisible and recognised the importance of setting up of national human rights institution.

30. The changing political climate in Malaysia, with more politically conscious electorates among the dynamic multiracial society also influences the Malaysian government to set up SUHAKAM.

31. Section 4 of the Human Rights Commission of Malaysia Act 1999 set out the functions of SUHAKAM as follows:-

\(^5\) www.suhakam.org.my
(a) to promote awareness of and providing education relating to human rights;
(b) to advise and assist the government in formulating legislation and procedures and recommend the necessary measures to be taken;
(c) to recommend to the government with regard to subscription or accession of treaties and other international instruments in the field of human rights; and
(d) to inquire into complaints regarding infringement of human rights.

32. The function of inquiring into complaints about human rights infringement is however subject to the conditions that such complaint is not a subject matter of any proceedings pending in the court of law or which have been finally decided by the court. Such inquiry has to cease if the complaint inquired is brought before the court. Thus the court continues to play an important role in the protection of human rights notwithstanding the setting up of SUHAKAM. It is important, therefore, for both SUHAKAM and the court to complement each other in shaping the future landscape of human rights in Malaysia.

33. The Human Rights Commission of Malaysia Act 1999 has tremendous impact in Malaysia in one important respect. It has imported the international law on human rights enshrined in the Universal Declaration of Human Rights 1948 into our domestic constitutional law.

---

6 Section 12 of the Human Rights Commission of Malaysia Act 1999
34. This means that whatever rights and liberties not mentioned in the Human Rights Commission of Malaysia Act 1999 but referred to in the Universal Declaration of Human Rights 1948 must still be considered provided that there is no conflict with the Federal Constitution.\(^7\)

35. It may be thus be argued that the provisions on human rights enshrined in the Human Rights Commission of Malaysia Act 1999 are an extension to the fundamental liberties provided in the Federal Constitution. Therefore, there is no doubt that the Human Rights Commission of Malaysia Act 1999 has a constitutional status.

36. On the international level, Malaysia is currently party to six instruments, five of which have been ratified, these are:-

(i) Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar Slavery. Adopted in Geneva on 7\(^{th}\) September 1956, ratified on 18\(^{th}\) November 1957;


(iii) Convention on the Elimination of all Forms of Discrimination against Women (with reservations). Adopted by the General

\(^7\) Section 4(4) of the Human Rights Commission of Malaysia Act 1999
Assembly of the United Nations on 18th December 1979, ratified on 5th July 1995.

(iv) Convention on the Rights of the Child (with several reservations, in particular to Article 13 which provides the right to freedom of expression). Adopted by the General Assembly of the United Nations on 20th December 1989, ratified on 17th February 1995; and


37. Ratification of these conventions marks an explicit acceptance by Malaysia that it does share with the global community common standards and values on human rights regardless of cultural and geographical origins. Furthermore, following upon the 1993 Vienna Conference on Human Rights, Malaysia had advanced the principle of the indivisibility and interdependence of all human rights thereby also purportedly supported the Vienna declaration that reads:-

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

Conclusion

38. As against the above background, the Federal Court as the final court of appeal has a crucial role to play in the protection of the fundamental rights and freedoms as embodied in the Federal Constitution and the Universal Declaration of Human Rights. I am proud to say that the court has played its part well in protecting, enhancing and advancing human rights and this is all the more important in the light of changing political and legal landscape now taking shape in the country.

TAN SRI ARIFIN ZAKARIA

CHIEF JUSTICE
MALAYSIA

cj@kehakiman.gov.my

Dated : 18th April 2012