KEYNOTE SPEECH

THE LAWYER AND CONSTITUTIONALISM

Datuk Seri Gopal Sri Ram

Retired Judge of the Federal Court, Malaysia

I begin by thanking the organisers of today's event for including me as a keynote speaker. I am deeply touched by this honour. The major contribution that HELP University has made towards legal education is already a milestone in the history of our legal education. Your contribution is of particular significance because you impart the English common law to your students. The importance of this comes into sharp focus in the context of our constitutional law. We have, as you all know, a written constitution which houses principles of high constitutional importance that form the very foundation of the largely unwritten British Constitution. And the realisation of this fact is of fundamental importance at a time when there are omnipresent destructive intellectual forces that insist that ours is not a secular Constitution but is Islamic in nature. And the danger becomes more pronounced when at least in one of our local Universities students are taught that the Federal Constitution is Islamic and when some Government Ministers and bureaucrats insist that Islam is the official religion when there is no such declaration in our Constitution. Fortunately, the majority of our local Law Schools do not subscribe to that erroneous philosophy. Therefore, should the time ever come for you to teach our Constitution to your students please remind them that it is secular and that it is based on principles that are universally accepted by international constitutional documents, such as the Universal Declaration of Human Rights.

With these general remarks, I now turn to address the topic assigned to me today. It is a very wide topic and covers many aspects of constitutional law in which lawyers participate. But for the purpose of today's lecture, I propose to limit myself to only some areas of importance to a constitutional lawyer.

Now, a commercial lawyer when confronted with a statute will ask the question: how does it apply to the facts of my case? But a constitutional lawyer similarly circumstanced will ask: does this statute violate the Constitution given the context of the present case? Reliance is therefore placed on the interpretive process. And that, then, is the starting point.

The interpretation of a written constitution has engaged lawyers at least since 1789 when the Supreme Court of the United States was formed. Two examples may be cited.

In *United States v Cruickshank*,[1] Waite CJ delivering the opinion of the Supreme Court recognised the existence of rights before their express incorporation in the Constitution. He said:

> The right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford it protection, existed long before the adoption of the Constitution.

Similarly, in *Calder v Bull*,[2] decided in 1798, Chase J subscribed to the view that what framers of the Union and State Constitutions intended were governments having limited powers in the sense that they could not act contrary to the constitutions and what he described as "fundamental law" or "first principles of the social compact", i.e., natural law. So, there is here once again recognition of a higher law conferring certain basic rights on persons. This is how Chase J put it:

> I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: the nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorise manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

[1] 92 US 542 (1875).
[2] 3 US 386 (1798).

The early Commonwealth constitutional instruments did not contain any chapter guaranteeing its citizens fundamental rights. Even today, the Constitution of the Commonwealth of Australia does not contain such a chapter. But that has not fettered the Australian judges who have implied certain fundamental rights into the Constitution. In *Lange v Australian Broadcasting Corporation*[3] the High Court of Australia implied into the Constitution, the freedom of speech in the absence of an express constitutional guarantee in that respect.

The very first written Constitution in the Commonwealth that had a chapter on fundamental rights was India. From the very outset, the Indian Supreme Court adopted a strict and literal interpretation of the Constitution, including the fundamental rights provisions. Two examples are readily available.

The first is *AK Gopalan v State of Madras*.[4] It reflects the lowest ebb in the field of interpretation of human rights guaranteed by a written Constitution. It was a case of first impression as the fundamental rights provisions of the Indian Constitution had never been tested before.[5] The facts of the case are not difficult. Gopalan was convicted and sentenced under the ordinary criminal law. But his convictions were quashed on appeal. While under detention, he was served with an order made under section 3(1) of the Preventive Detention Act 1950. He petitioned for habeas corpus, challenging the Act of 1950 as offending several articles of the Indian Constitution, including article 21 which is in the following terms:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

This Article is a reproduction of Article 31 of the Japanese Constitution.

Gopalan raised a number of arguments in support of his claim anchored on article 21. The Supreme Court rejected all of them. In the event, the following (among other) propositions were laid down.

(i) The expression "law" in article 21 does not encompass the rules of natural justice. According to Kania CJ[6] the argument that "law" meant law in the abstract sense and including the rules of natural justice was "not proper and indeed is misleading". He said:

> To read the word 'law' as meaning rules of natural justice will land one in difficulties because the rules of natural justice, as regards procedure, are nowhere defined and in my opinion the Constitution cannot be read as laying down a vague standard.

[3] (1997) 189 CLR 520, 560.
[4] AIR 1950 SC 27.
[5] Kania CJ acknowledged this to be the case in paragraph 2 of the reported judgment.
[6] Patanjali Sastri, Das, and Mukherjea JJ agreed with the Kania CJ on this point.

(ii) Following from the first proposition, the expression "law" in article 21 means enacted law. To quote Patanjali Sastri J:

> …I am unable to agree that the term 'Law' in Art. 21 means the immutable and universal principles of natural justice. 'Procedure established by law' must be taken to refer to a procedure which has a statutory origin, for no procedure is known or can be said to have been established by such vague and uncertain concepts as 'the immutable and universal principles of natural justice'. In my opinion, 'law' in Art. 21 means 'positive or State made law'.

Mukherjea J was of the same view:

> It does not appear that in any part of the Constitution the word 'law' has been used in the sense of 'general law' connoting what has been described as the principles of natural justice outside the realm of positive law.

Das J added:

> ...the word 'law' must mean State made law and cannot possibly mean the principles of natural justice, for no procedure can be said to have ever been 'enacted' by those principles.

(iii) To come within the article, the supplicant must show a complete loss of personal liberty. A partial violation of the right is insufficient. According to Kania CJ:

> Deprivation (total loss) of personal liberty, which inter alia includes the right to eat or sleep when one likes or to work or not to work and when one pleases and several such rights sought to be protected by the expression 'personal liberty' in Art. 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Art. 19(1)(d). Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India.

Gopalan's case was decided by judges with a predilection to the so-called rule of literal interpretation. Hence, they adopted a restrictive approach when construing article 21 of the Indian Constitution. But even at the time the judgments in *Gopalan* were written there were already pronouncements calling for a liberal interpretation.

In *James v The Commonwealth*,[7] had to do with section 92 of the Australian Constitution. That section provides that trade, commerce, and intercourse among the States shall be "absolutely free". The question was whether it bound the federal Parliament as well as the States. James was a grower and processor of dried fruits. He sent his produce from Port Adelaide to Sydney. The Federal Government seized the goods pursuant to the Dried Fruits Act, 1928, which was a Federal statute. James brought suit against the Federal Government claiming that the Act in question was ultra vires section 92 the Constitution. The High Court of Australia struck out the suit. On appeal, the Privy Council found for James and restored the writ to file. *James* was, therefore, a case of a contest between Federal legislative power and the Constitution in the context of inter-state trade and commerce. Even in that context, Lord Wright made the following

[7] [1936] AC 578.

observation:

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that 'in interpreting a constituent or organic statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted': British Coal Corporation v. The King.[8]

Almost 70 years later, in *Boyce v The Queen*,[9] Lord Hoffmann said more or less the same thing:

> The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a 'living instrument' when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life.

The second example of a literal approach to constitutional interpretation lies in the previous approach of our Apex Court to the basic structure doctrine as laid down by the Indian Supreme Court in *His Holiness Shri Kesavananda Bharati v The State of Kerala*[10] that the Court held the basic structure doctrine as applicable to the Indian Constitution. As to what forms part of the basic structure is to be decided on a case by case basis. So, in *Minerva Mills v Union of India*[11] and *Sampath Kumar v Union of India*[12] the Court held that the power of judicial review vested in the judiciary is part of the basic structure of the Constitution so that an Act of Parliament that put any law beyond the power of judicial review is null and void and of no effect.

Before turning to a discussion of the approach of Malaysian courts to constitutional interpretation it is necessary to make some general observations about the type of Constitutions that exist in Commonwealth countries. The first general observation is this. All these are negotiated Constitutions, unlike the Constitution of the United States, which is a revolutionary Constitution. The second has to do with the structure of these Constitutions. They are all that is referred to as Westminster modelled. They are based on the largely unwritten British Constitution. All of them are Parliamentary democracies. All of them contain a chapter on fundamental rights or liberties. In all of them, there is an

[8] [1935] A. C. 500, 518.
[9] [2004] UKPC 32.
[10] AIR 1973 SC 1461.
[11] AIR 1980 SC 1789.
[12] AIR 1987 SC 386.

effective separation between the Executive and Legislature on the one hand and the Judiciary on the other thereby rendering the latter effectively independent of the former. All of them are based on the Rule of Law which, in the case of the Malaysian Constitution is to be found in the first limb of Article 8(1) which reads:

> All persons are equal before the law and entitled to the equal protection of the law.

Pausing for a moment, it is now settled that the first limb of this constitutionally guaranteed right expresses Dicey's second Rule of Law and that the second limb is taken from the 14th Amendment to the US Constitution. The Article requires fairness in all forms of State Action and strikes down any arbitrary Executive or Legislative action, that is to say, State Action that fails to meet the test of proportionality which is housed in the second limb. The wide sweep of Article 8(1) requires other relevant provisions of the Constitution to be interpreted with the Article in mind. Accordingly, the ordinary canons of statutory interpretation do not apply when interpreting the fundamental rights provisions.

Like their Indian counterpart, the Malaysian Courts also interpreted the Constitution literally during our early constitutional history. In *Government of Malaysia v Loh Wai Kong,*[13] in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*,[14] and *Public Prosecutor v Kok Wah Kuan*,[15] the Apex Court interpreted constitutional provisions literally. Also, in *Loh Kooi Choon v Government of Malaysia*,[16] in *Phang Chin Hock v Public Prosecutor*,[17] and in *Mark Koding v Public Prosecutor*,[18] the Apex Court held that the basic structure doctrine did not apply to the Federal Constitution.

By contrast, from about 1980 to the present day – with the exception of a few instances – the trend has been to abandon the literal rule of interpretation in favour of a liberal or prismatic approach. It can all be traced to the case of *Minister of Home Affairs v Fisher*.[19] Deprecating what Professor de Smith has described as "tabulated legalism", Lord Wilberforce described a written constitution as a document *sui generis*, calling for its own canons of interpretation. As for fundamental rights, he called for a generous interpretation of these. His exhortation was taken up by our Federal Court in *Dato Menteri Othman Baginda v Dato Ombi Syed Alwi*.[20] In a trilogy of cases decided in 2009 and 2010, namely, *Lee Kwan Woh v Public Prosecutor*,[21] *Shamim Reza bin Abdul Samad v Public Prosecutor*,[22] and *Sivarasa Rasiah v Badan Peguam Malaysia*,[23] the Federal Court laid down the following principles that were applicable when interpreting our Constitution. These principles are as follows:

[13] [1979] 2 MLJ 33.
[14] [2002] 3 MLJ 72.
[15] [2008] 1 MLJ 1.
[16] [1977] 2 MLJ 187.
[17] [1980] 1 MLJ 70.
[18] [1982] 2 MLJ 120.
[19] [1979] 3 All ER 21.
[20] [1981] 1 MLJ 29.
[21] [2009] 5 MLJ 301.
[22] [2011] 1 MLJ 471.
[23] [2010] 2 MLJ 333.

(i) The fundamental rights provisions in Part 2 of the Constitution are to be read liberally and in a prismatic fashion. When light passes through a prism it reveals its constituent colours. Similarly, when a guaranteed right is viewed through a constitutional prism it will reveal the other rights submerged within the concept. So, the expression "life" when prismatically interpreted includes within it the right to livelihood and the right to live in a reasonably pollution free environment. Likewise, the concept of "personal liberty" when interpreted in a prismatic fashion will be found to include the right to travel abroad. So too, the right to free speech includes the right to receive information.

(ii) Conjunctions appearing in a guaranteed right are to be read as creating more than one right in the same provision. For example, Article 8(1) which says: "All persons are equal before the law and entitled to the equal protection of the law" creates two separate rights. First, the right to equality and second the equal protection of the law. This second and separate right houses within it the doctrine of proportionality. This doctrine requires all State action not to impede a guaranteed right more than absolutely necessary and to have a rational nexus with the object sought to be achieved. It is sometimes referred to as the "sledgehammer principle". You do not use a sledgehammer to swat a fly. In other words, the State response must be proportionate to meet the harm intended to be addressed.

(iii) Restrictions or derogations upon a right are to be read restrictively. Our Constitution in Article 10 confers rights of freedom of speech, association and assembly without arms. At the same time, it empowers Parliament to impose restrictions on those rights in the interest of the security of the country or public order. These restrictions or derogations must be read narrowly while reading the right generously. In other words, the Parliamentary response must be proportionate.

(iv) When interpreting the other right conferring provisions of the Constitution, the court must have regard to the humanising and all-pervading provisions of Article 8(1). So, for example, Article 69(2) which says that the Federation may sue or be sued must be interpreted to mean that all the remedies that are available to parties in private litigation must also be available in suits against the Government. Any law that restricts the right is invalid on the ground that it violates the equality clause in Article 8(1).

At this point in the discussion, it is important to refer to a few cases on either side of the divide. The first is *Government of Malaysia v Loh Wai Kong*[24] where the plaintiff brought mandamus under section 44 of the Specific Relief Act 1950 to compel the Government to issue him a passport that had been refused him. Part of his case was that the right to travel abroad was a fundamental right within the personal liberty clause in Article 5(1). That Article provides that: "No person shall be deprived of his life or personal liberty save in accordance with law." Gunn Chit Tuan J who heard the application refused it because one of the conditions set out in section 44 had not been satisfied. He, therefore, dismissed the application. But in the course of his judgment, he

[24] [1979] 2 MLJ 33.

expressed the view that the right to travel was a fundamental right within the personal liberty clause. Although it won the case, the Government purported to appeal to the Federal Court against the views expressed by the judge in his judgment. Under the law, only a person against whom an order is made may appeal. Besides, only a lunatic will appeal against an order in his favour. The Federal Court had no jurisdiction to entertain the appeal. Yet it purported to reverse the judge's views and allow the appeal. Since it is a judgment of a court without jurisdiction, any views it expresses is worthless as precedent. The point was not drawn to the Court by counsel for the respondent. The case found itself in the law reports. And without realising that the views expressed were that of a court bereft of jurisdiction, all and sundry started applying it. The danger lies in the fact that in the course of the judgment the court held that personal liberty was to be narrowly construed by applying canons of statutory interpretation which the Privy Council in *Hinds v The Queen*[25] held was a misleading exercise. *Loh Wai Kong* is, therefore, a case which falls on the wrong side of the divide. By contrast the decision in *Dato Menteri Othman Baginda v Dato Ombi Syed Alwi*[26] is a case on the right side of the divide because it held that fundamental rights should be widely interpreted. *Public Prosecutor v Gan Boon Aun*[27] is another case on the right side of the divide. There, the Federal Court held that the rights guaranteed by Article 5(1) are to be interpreted generously.

Now for a very recent case on the wrong side of the divide. In *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia*[28] the Court of Appeal in blatant defiance of binding precedent purported to follow *Loh Wai Kong* that had already been held to have been wrongly decided and held that the personal liberty clause is to be narrowly interpreted and does not include the right to travel. The Court of Appeal, without a proper discussion on the jurisdiction point, purported to criticise *Lee Kwan Woh v Public Prosecutor*[29] where the Federal Court unanimously declared the decision in *Loh Wai Kong* to be worthless as precedent. Perhaps the Court of Appeal considered the judgments in *Lee Kwan Woh* and *Gan Boon Aun* to be a piece of grandmotherly advice that could be disregarded at whim. What is clear is that the decision of the Court of Appeal in *Pua Kiam Wee* is an act of wilful disobedience of the rule of precedent which is the sheet anchor of our legal system.

With that, I now turn to another aspect of constitutionalism. It has to do with the doctrine of the basic structure of the constitution. It is also known as the basic fabric doctrine. The doctrine is this. The power to enact a law, including a law that amends a constitution, does not extend to enacting a law that violates or cuts across the basic structure or fabric of the constitution. What constitutes a basic feature or is part of the basic fabric is a matter of interpretation that is dependent upon the particular content of a given constitution. It must be worked out on a case by case basis. For example, in *Sivarasa*,[30] the fundamental liberties in Chapter 2 of our Constitution were held to form part of the basic structure. The doctrine has its origins in Germany. However, Professor Dieter Conrad in his lecture titled "Basic Structure of the Constitution and Constitutional Principles (European Antecedents) delivered at the Indian Law Institute on 2 April 1996

[25] [1997] AC 195.
[26] [1981] 1 MLJ 29.
[27] [2017] 3 MLJ 12.
[28] [2017] MLJU 902.
[29] [2009] 5 MLJ 301.
[30] [2010] 2 MLJ 333.

identified the Indian Supreme Court as the modern exporter of the doctrine.

Early in our constitutional history, our courts in two cases held that the doctrine did not form part of our law. They are *Loh Kooi Choon v Government of Malaysia*[31] and *Phang Chin Hock v Public Prosecutor*.[32] They are authority for the proposition that the "Federal law" referred to in Article 159 (which contains the amending power) is not the "law" referred to in Article 4(1) which is our vires provision. This latter provision declares the constitution as the supreme law and declares that any law passed after Merdeka Day, that is to say, 31 August 1957, which is inconsistent with "this Constitution" shall be void to the extent of the inconsistency. The former refers to the ability of federal law to amend "any of the provisions" of the Constitution. Clearly, the expression "provisions of this Constitution" provides a meaning that is very different from the expression "this Constitution".

In arriving at their conclusion, the court in both cases relied upon two decisions of the Indian Supreme Court, namely, *Shankari Prasad Singh Deo v The Union of India*[33] and *Sajjan Singh v State of Rajasthan*.[34] The danger of applying Indian cases on the point is that their vires provision which is housed in Article 13 of their Constitution is very different from our Article 4(1) as is their amending power that is housed in Article 368 which refers to Parliament's constituent power. That is because the Indians held a Constituent Assembly on 26 January 1950 at which they gave themselves a Constitution as they did not want the British to give them one. Hence the reference to Parliament's constituent power in their Article 368. But as already said, our Constitution makes no reference to a Constituent power. The expression "law" used in our Article 4(1) includes Federal law, that is to say, law passed by Parliament. Since there is a critical error in the very basis of the reasoning in the two Malaysian cases already referred to, they are not good authority that may be relied upon. To complete the picture, it must be added that in the later case of *Mark Koding v Public Prosecutor*[35] also held that the doctrine is not part of our law.

However, in two recent cases decided by the Federal Court, it has been held that the basic structure doctrine is part of our law. These cases are *Semenyih Jaya Sdn Bhd v Land Administrator of the District of Hulu Langat*[36] and *Indira Gandhi v Director of Islamic Affairs, Perak*[37]. The credit for these decisions must go entirely to Justice Zainun Ali and the Bench that agreed with her. The effect of these two decisions is correctly far-reaching. That effect may be stated as follows.

(i) An Act of Parliament, including an Act amending any provision of the Constitution, may be struck down by the courts on the ground that it violates the basic fabric or basic structure of the supreme law.

(ii) There are number of facets that form the basic structure of the Constitution. Among them are the doctrine of separation of powers; the judicial power that is vested in the courts established by the Constitution; the power of judicial review

[31] [1977] 2 MLJ 187.
[32] [1980] 1 MLJ 70.
[33] AIR 1951 SC 458.
[34] AIR 1965 SC 845.
[35] [1982] 2 MLJ 120.
[36] [2017] 3 MLJ 561.
[37] [2018] 1 MLJ 545.

vested in the superior courts under Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 which is *totidem verbis* Article 226 of the Indian Constitution; and the fundamental rights housed in Part 2 of the Constitution which include in them the Rule of Law.

(iii) Article 121(1) which as it stood on Merdeka Day vested the judicial power of the Federation in the High Court is part of the basic structure. Therefore, the Constitutional amendment in 1988 which removed the expression "judicial power" from Article 121 is a nullity.

The impact of the decisions is to restore the Constitution to its proper place and not in the mangled form it has existed at least since 1977. One important consequence is that ouster clauses in statutes, despite the decision of the two-member Bench of the Federal Court in *Sugumar Balakrishnan* and that of the Court of Appeal in *Pua Kiam Wee* are unconstitutional and null and void. It is therefore imperative for a lawyer – in whichever sphere he functions – whether as an advocate, a teacher, a prosecutor or a judge to ensure that the latter decisions are forever respected and that the Constitution prevails. And that, as the future members of the legal profession in the widest sense, is the relationship between the lawyer and constitutionalism.

Ultimately, an offender who did not fully comprehend the gravity of his actions should not be made to pay with his life – something that is irrevocable. As the Latin maxim goes *dum inter homines sumum, colamus humanitatem* – 'as long as we are among humans, let us be humane,' let not the quest for purported justice blind us to the very humanity that makes us human.