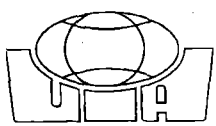
Justice in Jeopardy: Malaysia in 2000

REPORT OF A MISSION

17-27 April 1999

International Bar Association

ICJ Centre for the Independence of Judges and Lawyers



Union International des Avocats

Commonwealth Lawyers Association

International Bar Association (IBA)

The IBA is the world's leading international legal organisation. 181 Bar Associations and Law Societies, themselves representing over 2,5 million lawyers, have joined the IBA, together with in excess of 16,000 individual member lawyers from 183 countries.

In 1995, IBA established its Human Rights Institute (HRI) which now has over 7,000 members in 149 countries. Its objects are:

- The promotion, protection and enforcement of human rights under a just rule of law;
- The promotion and protection of the independence of the judiciary and of the legal profession world-wide;
- The world-wide adoption and implementation of standards and instruments regarding human rights accepted and enacted by the community of nations;
- The acquisition and dissemination of information concerning issues related to human rights, judicial independence and the rule of law.

HRI seeks to advance these objects by:

- Examining legal systems in operation world-wide and making recommendations for change;
- Providing independent trial observers to monitor and report upon legal proceedings where there are grounds for concern;
- Making representations on behalf of lawyers, judges, officials of lawyer's associations or others involved in the legal system when they are threatened, detained or abused, or where the independence of the legal profession is jeopardised;
- Organising international and regional conferences and developing course material for training lawyers and judges in human rights;
- Publishing newsletters, papers, surveys and books on human rights issues.

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Centre for the Independence of Judges and Lawyers (CIJL)

Established in 1978 by the International Commission of Jurists in Geneva, the CIJL:

- Promotes world-wide the basic need for an independent judiciary and legal profession;
- Organises support for judges and lawyers who are being harassed or persecuted.

In pursuing these goals, the CIJL:

- Works with the United Nations in setting standards for the independence of judges and lawyers. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers endorsed by the UN General Assembly;
- Organises conferences and seminars on the independence of the judiciary and the legal profession;
- Sends missions to investigate situations of concern, or the status of the bar and judiciary, in specific countries;
- Provides technical assistance to strengthen the judiciary and the legal profession;
- Publishes a Yearbook in English, French and Spanish. It contains articles and documents relevant to the independence of judiciary and the legal profession;
- Publishes a yearly report on "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers world-wide."

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JUSTICE IN JEOPARDY:
MALAYSIA IN 2000

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Report of a mission on behalf of

The International Bar Association

The ICJ Centre for the Independence of Judges and Lawyers

The Commonwealth Lawyers' Association

The Union Internationale des Avocats

Contents

Introduction 9

Background 11

Structure of the courts and the judiciary 11
Malaysian Bar Council 14
International obligations 14
Restrictive legislation 14

Part I – Relationship between Bar and Executive 16

Legal Profession Act 1976 16
Opposition to statutory reform 19
Public Prosecutor v Param Cumaraswamy (1986) 19
Government statements 20
Bar Council campaigning 20
Police pressure on lawyers 21
Contempt law 21
Conclusions 22
Recommendations 22

Part II – Relationship between Bar and Judiciary 24

Crisis of 1988 24
Contempt cases 26
Attorney General, Malaysia v Manjeet Singh Dhillon [1991]1 MLJ 167 26
MBf Capital Bhd & Anor v Tommy Thomas & Anor [1999]1 MLJ 139 27
Skrine & Co's plea for recusal 29
Zainur Zakaria case 31
Disciplinary Board 35
Sedition cases 36
Lim Guan Eng v Public Prosecutor [1998] 3 MLJ 14 36
Karpal Singh 41

Claims for damages in defamation cases 41
Dato' Param Cumaraswamy's case v MBf Capital Bhd [1997] 3 MLJ 300 and [1997] 3 MLJ 824 42
Trial of Anwar Ibrahim 45
Irene Fernandez's case 55
Recommendations 58

Part III – Relationship between Judiciary and Executive 61
Background 61
Conclusion 66
Recommendations 66

Part IV – Role of Legislative Power 69
Federal Constitution of Malaysia 71
Article 121 71
Articles 149 and 150 72
Part IX – The Judiciary 74
Article 160 74
Internal Security Act 1960 75
Printing Presses and Publications Act 1984 76
Sedition Act 1948 (revised 1969) 78
Restricted Residence Act 1933 (revised 1989) 78
Emergency (Public Order and Prevention of Crime)5 Ordinance 1969 79
Dangerous Drugs (Special Preventive Measures) Act 1985 79
Conclusion 79
Recommendations 80

Conclusion and Summary of Recommendations 82

Summary of recommendations 83
Part I – Relationship between Bar and Executive 83
Part II – Relationship between Bar and Judiciary 84
Part III – Relationship between Judiciary and Executive 88
Part IV – Role of Legislative Power 91

Appendices

Appendix 1
Basic Principles on the Independence of the Judiciary 95
Appendix 2
Basic Principles on the Role of Lawyers 99
Appendix 3
Persons with whom the Delegation had Meetings 106
Appendix 4
Part IX of the Federal Constitution of Malaysia 107
Appendix 5
Press Statement by the President of the Malaysian Bar 116
Appendix 6
Comment on the Use of the Contempt Power in Malaysia in the Context of International Human Rights Law 118
Appendix 7
Article 149 of the Federal Constitution 122
Appendix 8
Memorandum on the Repeal of Laws relating to Detention without Trial by the President of the Malaysian Bar 123

Introduction

The International Bar Association (IBA), the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (CIJL), the Commonwealth Lawyers' Association (CLA) and the Union Internationale des Avocats (UIA) decided to send a joint mission to Malaysia following reports that the independence of the judiciary was under threat and that lawyers were facing difficulties in carrying out their work freely and independently. The high profile trial of Mr Anwar Ibrahim, former Deputy Prime Minister, highlighted some of these problems.

The mission, which visited Kuala Lumpur from 17-27 April 1999, was headed by the Honourable Lord Abernethy, Judge of the Court of Session (Supreme Court), Scotland, immediate Past President of the IBA's Judges' Forum. Other members were the Honourable Mr Justice N J McNally, Appellate Judge of the Supreme Court, Zimbabwe and Dr Rajeev Dhavan, Senior Advocate, India, and a Commission member of the International Commission of Jurists.

The mission was asked to examine:

(1) The legal guarantees for the independence of the judiciary in Malaysia and whether these guarantees are respected in practice. The mission was to use the 1985 UN Basic Principles on the Independence of the Judiciary as a yardstick.

(2) The ability of lawyers to render their services freely. The mission was to use the 1990 UN Basic Principles on the Role of Lawyers as a yardstick.

(3) Any impediment, either in law or in practice, that jeopardises the proper administration of justice.

The 1985 UN Basic Principles on the Independence of the Judiciary and the 1990 UN Basic Principles on the Role of Lawyers are printed in full in Appendix 1 and Appendix 2 respectively.

The mission met a wide variety of persons concerned with the administration of justice in Malaysia (see Appendix 3). Repeated attempts were also made to arrange meetings with Datuk Seri Dr Mahathir bin Mohamed Iskandar, the Prime Minister, Tan Sri Mohtar Abdullah, the Attorney-General for Malaysia, Datuk Syed Hamid bin Syed Jaafar Albar, Minister of Foreign Affairs, and Datuk Abdullah Ahmad Badawi, Deputy Prime Minister, but without success. This was unfortunate. The mission had also hoped to meet with Dr Chandra Muzzaffar, former President of the reform non-governmental organisation (NGO), Aliran, but he was abroad at the time of the mission's visit.

This is a joint report of the organisations based on the findings and conclusions of the mission. The views of the four organisations are expressed in the first person plural 'we', 'us' or 'our view'. 'The mission' refers to the three persons who visited Kuala Lumpur on behalf of the organisations. The organisations gratefully acknowledge the work of these members of the mission.

On 17 February 2000, we sent a letter to the Government of Malaysia through its Permanent Mission in Geneva enclosing two copies of the report. We indicated to the Government that we welcome any comments it may wish to make on it. We said that subject to their length, we would incorporate the comments into the published version of the report. We indicated as well that we would prefer to publish the response verbatim, requesting that the comments be received by 15 March 2000 and be limited to 5,000 words. Regrettably, no comments were received from the Government of Malaysia.

Background

Malaysia has a population of 22.71 million. It is a federation with a parliamentary system of government based on periodic multiparty elections in which the ruling coalition of political parties – the Barisan Nasional – has held power since the independence of Malaysia in 1957. Dr Mahathir Mohamed has been Prime Minister since 1981. The principal party within the coalition is UMNO – the United Malays National Organisation.

The hereditary rulers of the Malay states elect one from among themselves to be the Yang di-Pertuan Agong (Supreme Head of the Federation) who holds office for five years. The Yang di-Pertuan Agong appoints a cabinet headed by the Prime Minister.

Structure of the courts and the judiciary

Malaysia is a federation of 13 states – Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu – and the two Federal Territories of Kuala Lumpur and Labuan. The supreme law of the Federation is the Federal Constitution. The Constitution provides for the exercise of judicial power in the Federation. The relevant sections of the Constitution are Articles 121 to 131A inclusive. They are printed in full in Appendix 4.

The judicial system, as provided for by these Articles and the Federal law, may be described as follows. Malaysia, although federally constituted, has a single-structure judicial system consisting of two parts – the superior courts and the subordinate courts. The subordinate courts are the Magistrates' Court and the Sessions Court while the superior courts are the two High Courts of coordinate jurisdiction and status (one for Malaya, or Peninsular or West Malaysia as it is sometimes called, and the other for the states of Sabah and Sarawak), the Court of Appeal and the Federal Court.

Both the Magistrates' Court and the Sessions Court have wide criminal and civil jurisdiction. In civil cases, a First Class Magistrates' Court has jurisdiction to try all actions where the amount in dispute does not exceed RM25,000.00. In criminal cases, it has jurisdiction to try all offences where the maximum term of imprisonment provided by law does not exceed ten years.

So far as the Sessions Court is concerned, in civil cases, there is jurisdiction to try all actions where the amount in dispute does not exceed RM250,000.00. In criminal cases, there is jurisdiction to try all offences other than offences punishable with death.

As would be expected, the High Court has civil and criminal jurisdiction. It also has appellate or revisionary jurisdiction in respect of criminal matters decided by a Magistrates' Court, a Sessions Court and hears appeals in civil cases from the Magistrates' Court and the Sessions Court.

The Court of Appeal has appellate jurisdiction to hear both civil and criminal cases originating from the High Court or, in criminal cases, from the Sessions Court. In addition, it may, with leave, hear an appeal against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but only on questions of law.

The Federal Court has jurisdiction to determine appeals of decisions of the Court of Appeal and the High Court or a judge thereof. It also has certain original or consultative jurisdiction as specified in Articles 128 and 130 of the Federal Constitution and also such other jurisdiction as may be conferred by or under Federal law (Article 121 (2) of the Federal Constitution).

None of the above-mentioned courts has jurisdiction in respect of any matter within the jurisdiction of the Sharia (Islamic law) Court.

The Federal Court consists of a President who is the Chief Justice (formerly called the Lord President), the President of the Court of Appeal, the two Chief Judges of the High Courts in Malaya and Sabah and Sarawak (formerly called Chief Justices) and, at present, three Federal Court judges. At present, there are ten Court of Appeal judges excluding the President of the Court of Appeal, 49 judges (including

Judicial Commissioners) for the High Court in Malaya and a further six (including Judicial Commissioners) for the High Court in Sabah and Sarawak. At the subordinate court level, there are 60 Sessions Court judges of whom 52 are in Malaya and four each in Sabah and Sarawak. At the Magistrates' Court level, 151 posts have been approved, comprising 122 posts in Malaya, ten posts in Sabah, one post in Labuan and 18 posts in Sarawak.

The Chief Justice is the head of the Malaysian judiciary. His appointment, like those of the President of the Court of Appeal, the two Chief Judges, judges of the Federal Court, the Court of Appeal and the High Court, are made by His Majesty the Yang di-Pertuan Agong on the advice of the Prime Minister (after consulting the Conference of Rulers made up of some of the hereditary rulers of the states of Malaysia.

As to the appointment of a judge to the Federal Court, the Court of Appeal and High Courts, the Constitution provides that the Prime Minister, before tendering his advice, shall consult the Chief Justice, the President of the Court of Appeal and the two Chief Judges. On the advice of the Chief Justice, the Yang di-Pertuan Agong may also appoint a person who has held high judicial office in Malaysia to be an additional judge of the Federal Court. The Chief Justice may also, if the interests of justice so require, nominate a Court of Appeal judge to sit as a judge of the Federal Court. All judges of the superior courts retire at the age of 65.

Normally, cases before the Federal Court of Malaysia are heard and disposed of by a full court comprising three judges. However, in certain special cases, the Chief Justice may convene a larger panel of five or even seven judges to deal with the matter. The principal seat of the Federal Court is in Kuala Lumpur. However, it also travels on circuit to the major State capitals of Penang, Ipoh, Kota Bahru, Johor Bahru, Alor Setar, Kuantan, Malacca, Kuching and Kota Kinabalu.

Article 122B of the Federal Constitution provides for the appointment of the judges of the superior courts. These judges, in practice, are appointed either from the Bar or from those who have made a career in the Judicial and Legal Service. In the terms of Article 132(1) of the Federal Constitution, the Judicial and Legal Service is a public service answerable to the Judicial and Legal Service Commission of which the

Attorney-General, or in some circumstances the Solicitor-General, is a member (Article 138). The mission was informed that at present, some 70-75 per cent of the judges in the superior courts were appointed from those who had made a career in the Judicial and Legal Service. This is, at least in part, due to the fact that those appointed from the Bar are likely to suffer a substantial reduction in remuneration and there is a reluctance among senior practitioners to accept this. This is particularly so since usually the initial appointment is as Judicial Commissioner and this position is subject to assessment for one to two years before any confirmation as a judge. Although most (about 80 per cent, the mission was told) Judicial Commissioners are subsequently confirmed, a significant minority are not.

As it is understood, judges in the subordinate courts are drawn almost entirely from the Judicial and Legal Service. Indeed, to serve as a magistrate is considered part and parcel of employment in that Service. The system is that an employee of the Judicial and Legal Service will spend time in each of its departments, changing from one department to the next from time to time. The Service has many departments, including the magistracy, prosecution, public works, the anti-corruption agency and the drafting and revising of legislation. Accordingly, an employee could be a prosecutor one day and a magistrate the next, or vice versa, but in either capacity, would still be part of the Judicial and Legal Service and would therefore be at least in one sense, answerable to the Judicial and Legal Service Commission.

Malaysian Bar Council

The Malaysian Bar has approximately 11,000 lawyers (advocates and solicitors). Some 8,500 of these are located in West Malaysia. West Malaysian lawyers are professionally organised by the Legal Profession Act 1976 (LPA 1976) which, under section 152, repealed the Advocates and Solicitors Ordinance 1947 for West Malaysia. Lawyers in Sabah and Sarawak are professionally organised by the Advocate Ordinance of Sabah and the Advocate Ordinance of Sarawak. The LPA 1976 deals with professional legal education and training of advocates and solicitors, their admission as advocates and solicitors of the High Court and their privileges (Parts II, III and IV), the establishment of the Bar (of which all advocates and solicitors of the High Court are members) and of the Bar Council (Part V), professional practice, etiquette, conduct and

discipline (Part VI), disciplinary proceedings (Part VII), remuneration (Part VIII) and recovery and taxation of costs (Part IX).

In terms of the LPA 1976, the Bar is an autonomous body created by statute and with statutory purposes, the first of which is 'to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour'.

Over the years, the LPA 1976, the amendments to it and its use have been the subject of some controversy.

International obligations

Malaysia has not acceded to some important international treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Malaysia is, however, a party to the Convention on the Rights of the Child (although with reservations), the Convention on the Elimination of All Forms of Discrimination against Women (again, with reservations), the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Restrictive legislation

There are a number of laws in Malaysia which impose restrictions on individual rights and freedoms and which have been widely criticised within Malaysia and internationally. These include the Sedition Act 1948, the Internal Security Act (ISA) 1960, Emergency (Public Order and Prevention of Crime) Ordinance 1969, the Dangerous Drugs Act (Special Preventive Measures) 1985, the Restricted Residence Act 1933 and the Printing Press and Publications Act 1984. These are examined in Part IV of the Report.

Part I
Relationship between Bar and Executive

The Malaysian Bar Council has played a useful and important role in promoting and defending human rights in Malaysia over the years. It has spoken out publicly against the Government over actions which the Bar perceives threaten fundamental rights and the rule of law and takes seriously its statutory purpose 'to uphold the cause of justice'. This has brought it into conflict with the Government on many occasions.

Legal Profession Act 1976

As has been said, over the years, the content and use of the LPA 1976 and its amendments have been the subject of some controversy. Two examples, in particular, were drawn to the attention of the mission.

In 1978, an amendment (section 46A) disqualified, among others, Members of Parliament or State Legislative Assemblies and officers of trade unions, political parties, or any other political organisations, whether inside or outside Malaysia, from becoming members of the Bar Council or State Bar Committee or any sub-committee of them. Whether an organisation is political can be construed by reference to the nature, character or effect of its objectives or activities; or it might be declared to be political by order of the Attorney-General. If the Attorney-General makes such an order it 'shall not be reviewed or called in question in any Court'. No instance was brought to the attention of the mission of any use or abuse of these provisions. But the sweeping nature of them seems a clear invasion of the autonomy of the Bar by the executive. The mission was not made aware of any proper justification for these provisions. As in many countries, some distinguished members of the Malaysian Bar are politicians. For that reason, they should not be excluded from the management of the affairs of the Bar, nor should lawyers who engage in their right to freedom of association, which is one of the fundamental liberties enshrined in the Federal Constitution.

In 1977, the Bar protested against certain statutory Regulations, the Emergency (Essential) Security Cases Regulations (ESCAR), which they believed to be inimical to civil liberties because they increased the possibility of detention without trial in a manner considered to be inconsistent with the rule of law. The Bar passed a Resolution boycotting cases involving the operation of these Regulations. The government of the day responded by introducing Part IIA (sections 28A-E) of the LPA 1976 which authorises the Attorney-General to issue 'Special Admission Certificates' to a wide range of persons, including legal practitioners from foreign jurisdictions and persons employed in any legal or judicial capacity of any foreign government. Such persons may apply for admission and enrolment as an advocate or solicitor to a judge of the High Court who must grant the application subject to being satisfied only as to the genuineness of the certificate granted by the Attorney-General and the identity of the applicant. All other enquiry is foreclosed and the admission and enrolment are not subject thereafter to judicial review.

If these provisions were extensively used, the Malaysian Bar could find itself transformed overnight at the instance of the Attorney-General.

This radical amendment to the LPA 1976 was defended on the basis that if Malaysian lawyers would not appear in cases of this kind, lawyers from other jurisdictions would have to be brought in to defend detainees. In fact, however, the boycott by the Bar was never fully implemented and these changes in the LPA 1976 were not brought into force. Other amendments were made and the LPA 1976 (as amended) continues to be the constitutive statute for the Bar.

Threats to amend the LPA 1976 remain. In 1996, the present Attorney-General made a speech at the Annual Dinner of the Medico-Legal Society of Malaysia in which he stated:

> *'because the Bar Council comprises only private practitioners, the Bar Council often forgets that it is a body corporate created by statute . . . It frequently speaks as if it is a private law association, or an NGO, or an opposition political party. It does not understand, nor seek to understand the various sensitive issues facing the Government . . . My Chambers are presently preparing a paper with recommendations to the Government to reform the legal profession and, hopefully, with proper medication, a few minor surgeries, implantations and*

transplantations here and there, the legal body will be cured of its many ills and live a long and healthy life, contributing to the well-being of our Nation!'

Such threats lead the Bar to believe that if it is not considered by the Government to be behaving responsibly, the LPA 1976 could be amended or repealed. The Bar would then be left to consider whether it wants to register itself as an ordinary 'society' or association of persons under the general societies registration legislation, under which the Government exercises a very strong supervisory role.

Such a change in the legislation constitutive of the Bar would precipitate many difficulties. For example, admissions to, and disciplinary actions in respect of, the Bar would have to be dealt with elsewhere. Many schemes of insurance and the compensation fund would have to be reworked. In short, the institutional autonomy of the Bar would be seriously undermined and that would be a serious blow to the democratic life of the nation.

On 1 February 1999, government provisions of Part IIA of the LPA 1976 (which had lain fallow for over 20 years) were brought into effect in order, according to the Government, to fulfil Malaysia's obligations under the General Agreement on the Trade in Services (GATS) component of the World Trade Organisation (WTO) Treaty. This report would not wish to be seen to criticise in any way a government that considers it appropriate to extend the opportunity for foreign lawyers to practise subject to the relevant provisions. The Bar, however, sees the renewal of the use of these provisions, not as a fulfilment of treaty obligations, but as an attempt to intimidate it, to add government-chosen persons to it and to coerce it into being more compliant with and less critical of the Government, both in the general statements and resolutions of the Bar Council and in the discharge by members of the Bar of their professional duties. Certainly, the arbitrary powers placed in the hands of the Attorney-General, and therefore the executive, by these provisions are unusual and extremely wide. Their widespread use would radically alter the composition of the Bar. It could also have other consequences which would impinge on its autonomy and have an adverse impact on its ability to function efficiently and effectively.

Given the concerns arising from the actions of a very strong executive, together with the timing of this renewal, we consider that there is some

justification for the Bar's attitude. If the Bar's view is correct, then the use of these provisions puts at risk the ability of lawyers in Malaysia to render their services freely and without fear or favour.

Opposition to statutory reform

In the 1980s, Bar Council opposition to other statutory reforms by the Government, in the form of the Printing Presses and Publications Act 1984, the Dangerous Drugs Act (Special Preventive Measures) 1985 and others, further strained its relationship with the executive.

Public Prosecutor v Param Cumaraswamy (1986)

The prosecution in 1986 of the then Vice-President of the Bar, Dato' Param Cumaraswamy, under the Sedition Act, led to concern that the executive was attempting to silence the Bar and was overlooking the statutory purpose of the Bar 'to uphold the cause of justice'.

The case ([1986] 1 MLJ 512 and [1986] 1 MLJ 518) was brought under section 3(1) of the Sedition Act, which provides that a tendency 'to raise discontent or disaffection amongst the subjects of the Yang Di-Pertuan Agong or of the ruler of any State or amongst the inhabitants of Malaysia or of any State' is a 'seditious tendency'. The defendant, in his capacity as Vice-President of the Bar, issued an open appeal to the Pardons Board to reconsider the petition of an applicant for commutation of his death sentence. The applicant had exhausted all possible remedies in the courts. In the appeal, Dato' Cumaraswamy drew attention to the fact that the applicant had been tried for possession of a firearm without a licence under the Internal Security Act 1960. There was no suggestion that the applicant was involved in any subversion or any organised violence for which the Internal Security Act was enacted to prevent and suppress. And yet the offence of which he was convicted carried a mandatory death sentence. On the other hand, Mokhtar Hashim, a former government minister, was found guilty of discharging a firearm and killing another person. However, he was tried under different statutory provisions as he possessed a licence for his firearm. He was sentenced to death but the sentence was commuted. In contrasting these two cases and drawing attention to what might reasonably be seen as discrimination between the rich and the poor by the Pardons Board, Dato' Cumaraswamy said: 'The people should not

be made to feel that in our society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity'.

And he appealed to the Pardons Board to review the applicant's petition 'on humanitarian grounds and in the name of justice and good conscience and commute his sentence'.

The case was tried in the High Court and Dato' Cumaraswamy was eventually acquitted. The judge held that the appeal was directed at the Pardons Board. There could therefore be no question of a breach of the relevant section of the 1948 Act.

Government statements

Recent pronouncements by the Attorney-General against the Bar Council strengthen the widely held belief that the executive is attempting to, *inter alia*, stifle criticism from the Bar, among others. Shortly after the mission was in Malaysia, the Attorney- General was reported in the press as warning that those who criticise him by alleging selective prosecution risk prosecution under the Sedition Act. This drew strongly worded responses from the Chairman of the Bar Council and the current President of the NGO Aliran, Mr P Ramakrishnan. The press statement issued by the President of the Bar Council is printed in full in Appendix 5. If the press report is correct, it is deeply disturbing that the Attorney-General should act in this way.

Bar Council campaigning

The Malaysian Bar Council has been at the forefront of campaigning on legal and other matters of public importance which has brought it into disagreement with the Government. The 1986 prosecution of Dato' Param Cumaraswamy, the then Vice- President of the Bar Council, deepened the problems, as the Council became apprehensive that its members were vulnerable to prosecution at the whim of the executive under circumstances that would stifle their obligation to speak out on matters of civil liberties and justice. Dato' Cumaraswamy was used because he made a public statement criticising the death sentence imposed on a poor worker who was tried for sedition.

Police pressure on lawyers

The Bar Council has also had occasion to speak out when the police have exerted undue pressure on lawyers. During the investigation of Ms Irene Fernandez – whose case is dealt with in more detail later in this report – the police asked her to produce certain documents under section 51 of the Criminal Procedure Code. Her counsel wrote, on two occasions, to the police asking for extensions of time so that they could advise their client. Nevertheless, a separate police report was filed arising out of Ms Fernandez's 'refusal' to comply with the request and the matter was taken up by the Criminal Investigation Department. The matter did not end there, however. One night, three police officers went to the house of one of her lawyers' secretaries, woke him and his family and told him to ask the lawyer, Mr Puravalen, to come to the police headquarters to make a statement under section 112 of the Criminal Procedure Code at 2 pm the following day. Mr Puravalen did go but declined to make a statement on the ground that a lawyer's communications with a client are privileged under section 126 of the Evidence Act. He then informed the Bar Council as to what had happened. On receiving this information, the Bar Council, in a strongly worded statement, confirmed that the actions of the police were in violation of the privilege that existed between lawyers and clients, and added, 'The police must be advised that a lawyer is duty-bound under the law to protect the confidentiality of all communications with his client and should not be coerced or pressed to disclose any part of it to anyone'.

Contempt law

The increased use, or threat of use, of the contempt law (discussed further in Part II) has led to further tension between the Government and the Bar Council. It has led to the Bar submitting a memorandum on contempt of court to the Goverment, including a proposal of alternatives of its own (see *New Sunday Times*, 21 March 1999). Judges feel that the law of contempt has to be interpreted robustly in order to uphold professional standards among the legal profession. For the reasons given in Part II of this report, the mission does not accept this. The Government's view also appears to be that strong and firm measures are required to deal with the Bar. The Bar has responded to this criticism by emphasising the role of the judiciary in the Bar's disciplinary machinery

and providing statistical data to demonstrate that disciplinary standards are rigorously enforced.

Conclusions

That relations between the Government and the Bar Council have become increasingly strained over the past 15 years or so cannot be doubted. The Bar Council believes the executive is threatening its right to be independent. For its part, the Government feels that the Bar Council has become a political body whose actions should be monitored and restricted.

The apparent closeness between the Government and judiciary, as perceived by the Bar Council (discussed in Part III), only heightens its suspicion of the Government's motives, and thus aggravates the problem.

It is essential that the executive respects the role of the Bar Council to fulfil its objectives freely and independently. Regular meetings should be held between the two bodies to discuss matters of mutual interest.

Recommendations

1. The autonomy of the Bar Council should not be threatened or diminished and the right of lawyers to freedom of association must be permitted. Sections 46A and 28A-E of LPA 1976 should be repealed.

2. The Bar Council should be allowed to render its services freely and without fear or favour so as to enable it to fulfil its statutory purposes. This includes the right to provide constructive criticism of government action and to make such views public.

3. The Government should refrain from speaking out publicly against the Bar Council and its members. It should recognise and respect the role of the Bar Council and its right to fulfil its objectives independently which is guaranteed by Article 24 of the UN Basic Principles on the Role of Lawyers: 'Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and

protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference'. Article 18 of the IBA's Standards on the Independence of the Legal Profession, adopted in 1988, states that it is the role of bar associations and law societies to: '(a) promote and uphold the cause of justice, without fear or favour and ... (g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation'.

4. Regular meetings between the Bar Council and the executive should take place to discuss matters of mutual interest and concern. The mission was pleased to learn during its visit that such meetings were planned to start shortly.

5. The police should be fully trained regarding the role of the lawyer and refrain from exerting undue pressure on lawyers when the latter are acting in their professional capacity. The police should be advised that lawyers are duty bound under the law to protect the confidentiality of all communications with their client and should not be coerced or pressed to disclose any part to anyone.

6. Guidelines should be established on police behaviour in relation to lawyers consistent with the 1990 UN Basic Principles on the Role of Lawyers. Clear rules should be incorporated in such guidelines, and introduced as part of police training.

Part II
Relationship between Bar and Judiciary

Crisis of 1988

Until 1988, the Malaysian Federal Constitution provided for the separation of powers within the Government. Increasing tension between the judiciary and the Government culminated in 1988 in the suspension of six Supreme Court judges and the subsequent removal of three of them, including the then Lord President of the Supreme Court (now known as the Chief Justice of Malaysia). The role that jurists played in defending the independence of the judiciary during the 1988 crisis is highly valued. The dispute arose out of a series of decisions of the higher courts unfavourable to the Government. The Prime Minister, Dr Mahathir Mohamed, responded by publicly criticising the judiciary. The Government then initiated a series of constitutional and legislative amendments which severely circumscribed the role of the judiciary. These are referred to in more detail in Parts III and IV below.

The judicial power which was vested in the two High Courts was removed by a constitutional amendment. Instead, the High Courts now have such jurisdiction and powers as may be conferred by or under federal law. This means that the extent of the court's jurisdiction may be determined by the legislature rather than the courts themselves. The amendment allows Parliament to enact legislation limiting or prohibiting judicial review. A second amendment to Article 145 allows Parliament to enact laws which permit the Attorney-General to determine which court will hear a particular criminal case, or to transfer a case from one court to another. According to the amended provision, such legislation may 'confer on the Attorney-General power to determine the courts in which, or the venue at which, any proceedings which have power . . . to institute, shall be instituted, or to which such proceedings shall be transferred'.

Other amendments also affect the grounds for the removal of judges.

The Bar Council's relationship with the judiciary became extremely strained after these events. It passed a vote of no confidence and refused to have any relationship with the new Lord President. After 1994, communicative relations were restored, but amidst unease. At least one former president of the Bar Council, Ms Hendon Mohammed, told the mission that there had been difficulty from judicial quarters in restoring effective working relations. Her successor, Dr Cyrus Das, sought to enlarge the scope of this communication, but apparently without much success.

The mission found that many judges still find it hard to come to terms with the Bar Council's actions during 1988-1994. As social ostracism of the head of the judiciary is unprecedented, it therefore creates unprecedented problems. Although the judges emphasised that channels of communication with the Bar Council should always be kept open, they are wary that this may lead to situations of public controversy. They felt that it was difficult to exchange views in circumstances under which respect is not shown for the dignity of the judges and discussion takes place under a blaze of pre-meditated publicity. The Bar Council also welcomed the need for sustaining an ongoing consultation; but prominent and important members of the Bar Council are concerned about recent events and decisions taken by judges against members of the legal profession.

What has now emerged is a situation which engenders distrust and hostility. The Government feels that the Bar Council has become a 'political' opposition whose activities must be curtailed. The judges feel that there is a decline of standards in the Bar and that members of the Bar are often unmindful of the position of the judges and are all too ready to lower the prestige of the judiciary through unwarranted publicity in the media. The Bar Council feels that threats by the Government to amend the LPA 1976 in order to control the Bar curtail the independence of lawyers and that some judges appear to be not just impervious to the need for an independent Bar, but political also as they are using judicial power against lawyers by means of interpretation of the law, which is repressive and unjust. The cases outlined below highlight these concerns.

Contempt cases

The use and threatened use of the contempt power in certain cases in Malaysia has given concern as to the true independence of the judiciary. It also gives concern as to the ability of lawyers to render their services freely.

Attorney-General, Malaysia v Manjeet Singh Dhillon [1991] 1 MLJ 167

It may reasonably be said that this was the first case of the chain which has led to the present situation. The Supreme Court, by a 2-1 majority, found the defendant, a lawyer, guilty of contempt of court. The case arose out of the crisis of 1988, at the time when the then Lord President had been suspended. There was an Acting Lord President in place who, by the time of the case, had been appointed Lord President. The defendant affirmed an affidavit on behalf of the Bar Council in his capacity as secretary. The affidavit was filed in support of an application for leave for an order of committal to prison of the Acting Lord President. It was alleged that he was guilty of contempt of the Supreme Court by attempting to prevent, frustrate and interfere with a sitting of the Court, thus abusing his official position. The defendant, who admitted that he had affirmed the affidavit in his representative capacity, was found guilty of contempt of court. Although it was noted that similar criticisms of the Acting Lord President were made by the Malaysian Bar, no proceedings were initiated against the Bar. The fact that the defendant's responsibility was vicarious was no defence to the charge, but was regarded as a mitigating factor. For these reasons, a fine of $5,000 (in default of three months' imprisonment) was thought appropriate as a sentence. Irrespective of the merits of this decision, the judgment conveyed the hint that the real culprit was not the defendant himself but the Malaysian Bar Council. The warning having been given, judicial sentiment and apprehensions were satisfied in the circumstances by a fine. But, as messages go, the message was clear. The term 'contempt of court' acquired a new significance for lawyers in relation to their work.

Further cases followed. Three of the more recent ones were brought to the attention of the mission and are as follows.

MBf Capital Bhd & Anor v Tommy Thomas & Anor [1999] 1 MLJ 139

In November 1995, David Samuels wrote an article entitled 'Malaysian Justice on Trial' in a legal journal called *The International Commercial Litigation*. The article examined recent cases and legal incidents in Malaysia and quoted from various lawyers, including Mr Tommy Thomas, the then Secretary of the Bar Council and a partner of Skrine & Co, a firm of advocates and solicitors. Profiled for special discussion in this article were (1) the *Ayer Molek* case (*Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors*) which concerned an ultimately successful court action to bring to force a rectification of Ayer Molek's share register; and (2) the case of *Malaysia Borneo Finance Holdings (MBFH) v East Asiatic Company (EAC)* which concerned multiple actions simultaneously brought before the Civil and Commercial Divisions of the High Court and two different judges of the Commercial Division. The comments quoted in the article by Mr Tommy Thomas, among others, had been critical of certain aspects of each of these cases. The publication of these remarks in the article gave rise to a number of separate actions for defamation including against Mr Thomas and Skrine & Co. The total sum claimed was over RM200 million, which by Malaysian standards, was a huge sum. The action, however, gave rise to further controversies of more direct concern at this point.

Before the action could proceed to trial, the insurers of the defendants brokered a settlement whereby the latter agreed to retract their statements, offer unconditional apologies and settle payment of a substantial undisclosed sum to the plaintiffs. On 21 October 1998, judgment was handed down in terms of a settlement with the judge further chastising the defendants for making false statements. Mr Thomas, however, felt strongly that he had been pressured into the settlement by his insurers and he made a statement to the press in which he said that the settlement 'was initiated, brokered and insisted upon entirely by the insurers. The actions were settled despite my express objections'. This statement was published on 22 October 1998 in the same newspaper report that reported on the settlement. No sooner had it been published, than Mr Thomas realised his mistake and retracted his statement. The retraction was published on 24 October 1998. The Court, however, issued Mr Thomas with a notice to show cause why he should not be cited for contempt. At the hearing which

followed, Mr Thomas did not oppose the notice but sought only to mitigate sentence. He filed an affidavit tendering an unconditional apology to the court and an explanation that his remarks were not intended in any way to embarrass or offend the court, but were directed towards the insurers and the way in which the settlement of the various defamation actions had been reached. Despite a plea by his counsel that given the immediate apology, a custodial sentence should not be imposed, Mr Thomas was sentenced to six months' imprisonment.

In his judgment, Mr Justice Kamalanathan Ratnam rejected in unequivocal terms the apology and explanation which Mr Thomas had given. Despite the fact that remorse and contrition had been expressed, the judge found that Mr Thomas:

> *'has not been honest with the court. He has, in my view, not come clean. His explanation that the press statement which said that "the actions were settled despite my express objections" was meant for the insurers, rang so hollow that it was almost an insult to the intelligence of the court to expect this court to be so gullible as to accept that explanation.'*

He continued that it was:

> *'patently clear that by making an immediate statement in the press that the settlement was effected despite his express objections, Mr Tommy Thomas intended to portray to the world at large that he was never a willing party to the settlement. . . . (He) was a besotted adversary who would not sheath his sword until he had had the last say . . . Even to the very end, he is not prepared to come clean, bare his soul and then seek the court's compassion.'*

This decision was appealed. The IBA observed the proceedings. The final verdict is awaited.

This report has explored this case because it raises a number of different issues. In addition to the issue of contempt, during the hearing there had been a long and protracted discussion about whether the Bar Council could have a watching brief in light of its general duties under section 42 of the LPA 1976. The judge took the view that the Bar Council did not have sufficient interest and a watching brief might cause a conflict of interests if the Bar Council was called on to take disciplinary proceedings against Mr Thomas. It is unfortunate that the judge denied the Bar Council intervention in this case. Although the watching brief

procedure is not common to all legal systems, it is a useful tool in controversial and difficult cases.

The arguments regarding the mitigation of sentence were also significant in this case. Although Mr Thomas offered what could be considered a full apology, the judge did not accept it. He expressed his view forthrightly in the words quoted above. Furthermore, Mr Thomas had not sought mercy from the Attorney-General. This was considered to be a factor in light of the case of *Anthony Ratos s/o Domingos Ratos v City Specialist Centre Sdn Bhd (a City Medical Centre) (Attorney-General, Intervene)* [1996] 3 MLJ 349. This highlights the active role played by the Attorney-General's office in such cases.

Skrine & Co's plea for recusal

This was another matter which developed from the defamation cases referred to above. In December 1997, at an earlier hearing in the case the judge, Mr Justice Kamalanathan Ratnam, had declined to frame a preliminary issue on the liability of the partners of the firm of Skrine & Co because it was his:

> *'finding that the alleged defamatory words spoken and published by the first defendant Mr Tommy Thomas, one of the partners of Skrine & Co, are both intrinsically and inextricably linked and knotted with the second defendants' (Skrine & Co) ordinary course of business, so much so that the first defendant and the second defendant are to my mind joint and several defendants to this action.'*

Mr Chin Yoong Chong, a partner in Skrine, filed an application for an order that the judge 'be disqualified from presiding over all further proceedings in this action including the trial of this action' because he had:

> *'made what is in effect a pre-judgement of the most pivotal issue affecting the second defendant at a stage when he was not called upon to decide the issue. . . (and) there would be a reasonable suspicion of, or alternatively a real likelihood that a fair trial of this action before the Honourable Mr Justice Kamalanathan Ratnam will no longer be possible and that therefore there is an appearance of, though not actual, bias, however much the Honourable Judge may judiciously strive to avoid it.'*

It was averred that the judge's 'finding' undermined the substantive defence of the partners of Skrine & Co under sections 7 and 12 of the Partnership Act 1961. Broadly, the affidavit of the answering defendants in reply to the application disputed the interpretation given to the 'finding' made by the judge and alleged that 'there has been inexorable and inordinate delay in making this application and it was not made in good faith'.

On 30 March 1998, the judge accepted that the delay in making the application for his recusal was inordinately long, especially as he had conducted two case managements since the order of 15 December 1997 had been passed. He dismissed the application with costs, adding that he had left the defences available to the applicants under sections 7 and 12 of the Partnership Act intact, obviating any suggestion of bias. He took the view that the delay, the fact that senior counsel's advice was taken and that the applicant had toyed with whether the application should be filed showed that it lacked *bona fides*. The judge said that he felt baffled that 'senior and leading counsel who were ... adroit in the art of pleading' had simultaneously alleged bias and expressed confidence in the court. Lawyers who spoke to the mission felt that the issue was not a personal one, but simply whether a judge who had, perhaps, prejudged a critical issue should continue with the case. The contrary argument was that refusal to frame a preliminary issue was not a prejudgment but a deferment until the trial of the issues. In any event, those acting for Skrine & Co decided to appeal.

The judges of the Court of Appeal took the view that if the application was not immediately withdrawn, notices for contempt would follow because the application was misconceived and intemperate. The lawyers appearing before the Court of Appeal said that they felt a sense of panic at this. They met over lunch and the decision was made to withdraw the appeal. In the course of discussions, the mission was invited to examine the memorandum of appeal in this case. It did so and its view was that, with respect to the Court of Appeal, whatever may be said as to whether the application was misconceived, it was at a loss to see how it could be said to have been couched in intemperate language. On the contrary, it seemed to the mission that it was couched in entirely appropriate language.

Whether the application was misconceived is not the issue in the present context. However, the threatened use of the contempt power has to be taken seriously. So seriously, in fact, that instructions had to be sought and taken over lunch from Mr Chin with the result that a decision was taken not to proceed with the action because of the threat which had been made. The appeal was therefore withdrawn. We are in no doubt that as a result of this case, lawyers may have just cause to be apprehensive that the contempt power may be used if they make an application, even in appropriate language, for a judge to recuse himself. That amounts, in our view, to real cause for concern that in such cases lawyers may not be able to render their services freely.

Zainur Zakaria case

Mr Zakaria was one of the lawyers defending the former Deputy Prime Minister, Datuk Seri Anwar Ibrahim, whose case will be considered later. Mr Anwar's trial had started on 2 November 1998. On 29 November, an application was made to the court on behalf of Mr Anwar by Mr Zakaria to have two of the prosecutors excluded from the case on the ground that they had attempted to fabricate evidence against him. In support of the allegation, Mr Anwar had lodged an affidavit alleging that they had tried to persuade a colleague of his to fabricate evidence against him. The affidavit itself was based on a letter written by the colleague's lawyer in which he protested that his client was being prevailed upon by the prosecutors to give information about Mr Anwar in exchange for dropping a capital charge against him (the colleague) in favour of a charge carrying a lesser sentence. Declining to consider this application on its merits, the trial judge not only ruled that the application was misconceived but that it was also an abuse of process of the kind that interfered with the due administration of justice. It amounted to a pre-emptive step to undermine the integrity of a trial in progress and amounted to a serious contempt of court. The judge decided that he had to act with all urgency. After announcing that he proposed to cite Mr Zakaria for contempt, he added that Mr Zakaria could put an end to the proceedings by giving an unconditional apology to the court, the Attorney-General and the two prosecutors. He refused to adjourn the matter for the preparation of any defence for more than half an hour. Moreover, the judge refused to allow the lawyer who had written the letter to be called as a witness and he refused to allow the President of the Bar Council a watching brief.

During the half-hour recess, Mr Zakaria consulted other members of Mr Anwar's defence team. He came to the conclusion that to apologise to the court and admit that the application was without foundation would be contrary to the interests of his client. On the following day, the judge sentenced Mr Zakaria to three months' imprisonment for contempt. He ordered that the sentence run from 4.00 pm on that day. An application made by Raja Aziz Addruse, who was the leader of Mr Anwar's defence team, for a stay of execution of sentence pending appeal was refused. So was an application for a stay of execution until the next day to enable Mr Zakaria to sort out his personal affairs. Raja Aziz Addruse and his colleagues immediately went to see the President of the Court of Appeal and there obtained a temporary stay of execution until a formal application for a stay pending appeal could be made. On 4 December, Mr Zakaria appeared in the dock before three judges of the Court of Appeal to appeal against the refusal by the trial judge to grant a stay of execution of sentence pending appeal. After hearing submissions, this appeal was allowed subject to bail being posted by Mr Zakaria at RM10,000 in one surety. The appeal against the finding of contempt and sentence is still pending.

Meanwhile, on 1 December, the judge also issued a warrant for the arrest of the lawyer acting for Mr Anwar's colleague, who had written the letter on which the application was based. That lawyer also had to face contempt proceedings on account of the use of the letter and the accompanying statutory declaration in Mr Anwar's application. On 3 December, the lawyer explained that his consent had not been sought to use his statutory declaration to support the application and he apologised to the court for the disruption of the trial. The court and the Attorney- General accepted the apology. The warrant of arrest was therefore quashed by the court. It is to be noted, however, that although he apologised, the lawyer did not – and was not required to – retract the truthfulness of the facts alleged by him in his letter.

It is not surprising that this case has attracted widespread criticism. See, for example, a memorandum entitled *Justice on Trial: Malaysia's Assault on Lawyers* by the Lawyers' Committee for Human Rights and CIJL (April 1999). CIJL also expressed deep concern at the treatment of Mr Zakaria, questioning whether the accused could have a fair trial under these circumstances.

The *Zakaria* case has troubled lawyers greatly. It is no one's case that Mr Zakaria did not act *bona fide*. This was not a case of wilful contempt. Nor does it become one simply because he refused to apologise for the *bona fide* reason of not wanting to jeopardise his client's interest to save himself. Therefore, quite apart from the intricacies of the law of contempt, the decision puts lawyers in a professional dilemma. If they are to defend their client's interest without 'fear or favour' and feel that they have enough material to make good an application, plea or argument, should they refrain from doing so for fear that a judge may find a discrepancy in the argument or an insufficiency in the evidence? The decision was ultimately for the judge. If lawyers, as a profession, feel that the *bona fida* discharge of their duty would result in action and imprisonment for contempt, they would be justified in seeking a change in the law of contempt.

The law of contempt of court in Malaysia is a law of strict liability. In order to establish contempt of court as a result of a publication interfering with the course of justice or 'scandalising the court', intention or *mens rea* on the part of the alleged contemnor is not an essential ingredient. It is no defence for the perpetrator to show that he did not know that the behaviour or conduct in question constituted contempt of court. The test is whether the matter complained of had the tendency or was calculated to interfere with the due administration of justice or to 'scandalise the court', not whether the perpetrator intended that result. Intention on the part of the contemnor is irrelevant. This was reaffirmed in the recent case of *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240.[1] This law, however, is no different from that which applies in many jurisdictions.

A detailed opinion from leading contempt lawyer, Andrew Nicol QC, is reproduced in Appendix 6. He examines the use of the contempt power in Malaysia. He states, *inter alia*, that:

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[1] Mr Hiebert was summoned for contempt of court in an application moved by the plaintiff in a civil suit brought by the wife of a prominent judge. He wrote an article implying that she had received preferential treatment in obtaining an early trial date for her civil suit for damages, brought on behalf of her son, against two teachers in a local school for dropping her son from the school's debating team. The suit was settled by issuance of a statement by the teachers. Yet, subsequently, the plaintiff was able to successfully move the court for a finding of contempt against the journalist and he was sentenced to three months' imprisonment.

'There can be no fair hearing and legal presentation cannot be effective unless a party's advocate is free to advance all arguments and lead admissible evidence which can reasonably be said to support the client's case. It is the recognition that lawyers must have this freedom which lies behind the absolute privilege which they enjoy (in the common law system at least) against actions for defamation for anything said or done in court.

The same concept of a fair trial will also mean that the judge must be able to conduct the case in an orderly manner. This cannot be done if advocates and litigants do not observe the judge's rulings. A power to enforce such rulings is not necessarily incompatible therefore with the guarantee of a fair trial. However, national appellate courts which have had to consider the matter have consistently warned of the dangers of judges being too ready to make use of contempt power.... Where professional lawyers are considered to have over-stepped the mark, it will often be sufficient to allow the disciplinary body of the profession to investigate and, if necessary, to impose a penalty.'

However, given the way in which the Malaysian courts have interpreted what amounts to or may amount to contempt, there are well-founded grounds for concern that in certain circumstances, the ability of lawyers to render their services freely is adversely affected by the use, or threatened use, of the contempt power.

Some of the senior judges whom the mission met saw the contempt power as necessary to fill a gap which they saw in the procedures designed to maintain the professional standards of younger lawyers who appear in court. That was a view supported and underlined to the mission by the Deputy Minister in the Prime Minister's Department. We do not accept this view. While it may be that on some occasions, lawyers have been overzealous in the pursuit of their functions, to conclude that that is the reason, or even a significant part of the reason, for the present situation is, in our view, fanciful and self-deluding. In any event, the use and threatened use of the contempt power have not been confined to cases involving younger lawyers. On the contrary, they have been used against senior and respected lawyers when dealing with sensitive situations in high-profile cases. It would be more appropriate for the executive and the judiciary to regard such behaviour as a symptom of a lack of confidence in the true independence of the judiciary.

The real purpose of the law of contempt is to prevent conduct which prejudices the right to a fair trial, and not actions which individual judges perceive offensive to their dignity. Unprofessional conduct should be dealt with by the professional bodies after the conclusion of the hearing except in cases where the continuation of the process in a fair manner is impossible. Furthermore, the use of contempt has a direct impact on the ability of lawyers to provide effective legal counsel – a guarantee of the right to a fair trial.

Disciplinary Board

There are, in any event, procedures in existence for dealing with professional misconduct by a Disciplinary Board set up in the terms of the LPA 1976 and we do not see any reason why the Board is not capable of dealing with such matters. The Board is headed by a High Court judge appointed by the Chief Justice and, in addition, comprises the President of the Bar Council and 15 senior members of the Bar, also appointed by the Chief Justice. It is noted that in the *Ayer Molek* case, which was mentioned earlier, the present Chief Justice stated that that was the way to deal with such matters: [1995] 2 MLJ 833 at page 846.

An advocate or a solicitor may be suspended in circumstances which amount to malpractice or where he is incapable of performing his functions (section 88A of LPA 1976). Although the Bar Council has to make an application to the Chief Justice to effect such a suspension, in the public interest, it is the Chief Justice (subject to an appeal to the Supreme Court) who orders the suspension. Again, the LPA 1976 provides for renewal of practising certificates annually (section 29). To facilitate this, the Bar Council issues a Sijil Annual and the Registrar issues a practising certificate – both after duly examining statutory requirements. A dissatisfied advocate may apply to a judge to seek redress 'for refusal, neglect or delay' to issue a Sijil Annual. There has been some concern that these annual renewals are cumbersome. However, they ensure compliance with important statutory requirements to protect clients and the public interest.

The statistics and tabular data supplied by the Bar Council show that for the period 1993-1999, there were suspensions in 59 out of 361 cases, of which 119 cases related to Sijil non-renewals and 183 cases to misconduct. Of these 316 cases, 124 files have been closed and 237 are

still active (including 28 involving suspension, 105 on denial of Sijil relating to Sijil Annual non-renewals and 104 cases of misconduct. The data suggest that there is considerable scrutiny by the Bar and the Board.

It is generally recognised that when lawyers act for their clients, they must do so fairly and, perhaps, vigorously, in an independent, balanced and dignified manner. It may well be that in the course of the discharge of their professional functions, they sometimes appear to be overzealous. When they do so, an informal process of judicial caution is usually enough to bring their zest back within acceptable bounds. It rarely becomes necessary for the courts to use, or even threaten to use, the awesome power of contempt of court to discipline lawyers or to dissuade or force lawyers not to pursue their client's cause with the full confidence of their independent judgment. In this, the independence of lawyers is no less important than the independence of judges, both forming the pillars on which the due administration of justice rests.

It is clear that the problem may extend to persons other than lawyers. In the case of *Chandra Sri Ram v Murray Hiebert*, referred to above, for example, the defendant was a foreign journalist working in Malaysia, and while Tommy Thomas is a well-known lawyer, it appears that Mr Thomas was convicted in his capacity as a litigant, not as a lawyer.

Sedition cases

The case of the *Public Prosecutor v Param Cumaraswamy* (1986) has already been outlined in Part I. As was said there, that case led to concern that the executive was attempting to silence the Bar. The charge in that case was that there was a suggestion that there had been discrimination on the part of the Pardons Board which was chaired by the King. It was alleged that this suggestion raised disaffection against the King and was therefore seditious under the Act. The charge, however, failed and the defendant was acquitted.

Lim Guan Eng v Public Prosecutor [1998] 3 MLJ 14

This case raises a somewhat wider point and there was a different outcome. It has led to concern that the judiciary is attempting to silence, not just the Bar, but anyone who criticises the legal system. The charges arose out of an allegation of selective prosecution but, as will be seen,

the Court of Appeal appeared to see the case as one of criticism of the justice system. It therefore serves as a stern warning to those who criticise the legal or judicial process and raises a suspicion of closeness between the Government and the judiciary. The case is also illustrative of the problems arising out of the wide interpretations of the words 'seditious tendency' under the Sedition Act and 'false news' under the Printing Presses and Publications Act.

The following summary, taken from the case report, adequately sets out the facts, save perhaps in one respect to which reference is made below:

'Tan Sri Rahim Tamby Chik ("Rahim"), the former Chief Minister of the state of Melaka, was charged with having sexual relations with a girl below the age of 16, ("the minor"). However, there was inadequate evidence to proceed with the case against him and the charges were withdrawn. The evidence showed that at one point in time the minor was detained by the police. However, according to her own evidence, she was not placed in a lock-up. She was then placed in protective custody pursuant to an order made by a magistrate's court.

The appellant, Lim Guan Eng, is the Member of Parliament for Kota Melaka, as well as the Deputy Secretary-General of the Democratic Action Party (the principal opposition party in parliament). He published 5,000 copies of a pamphlet which contained the words "Victim imprisoned, criminal free". The appellant was first charged on grounds that the words "Mangsa dipenjarakan" ("Victim imprisoned") amounted to false news that had been maliciously published, contrary to s 8A(1) of the Printing Presses and Publications Act 1984 ("the PPPA"). The appellant was alleged to have made a speech in which he said that he was dissatisfied with the laws of Malaysia because of the double standard which resulted in the rape case involving Rahim not being brought to court. While the court ordered the minor to be detained for three years Rahim, who should have been imprisoned for violating the law, was instead set free. These two comments resulted in the second charge against the appellant, that he had committed sedition contrary to s 4(1)(b) of the Sedition Act 1948 ("the second charge").

The trial judge found the appellant guilty on the first charge and sentenced him to a fine of RM 10,000, in default six months' imprisonment. The judge also convicted the appellant on the second charge and imposed a fine of RM 5,000, in default three months' imprisonment. The appellant appealed against both convictions and sentences passed upon him. At the same time, there were two cross-

appeals by the Public Prosecutor who complained that the sentence passed upon the appellant in respect of each proved offence was inadequate.'

The one aspect of the case to which reference is not made is that we understand that a number of other men were charged with, and convicted of, statutory rape in respect of the same girl.[2] That was, no doubt, why she was placed in 'protective custody'. The appeal judgment records that:

'There was then an attempt by her grandmother to have her set at liberty. However, the habeas corpus *proceedings instituted for that purpose failed, the minor having filed an affidavit stating that she did not wish to be removed from the protective custody in which she had been placed. After the dismissal of the* habeas corpus *application, a final order was made under s 8(4) of the aforesaid Act (Women and Girls Protection Act, 1973). We may add that this final order was made at the instance of the minor.'*

In the appeal proceedings in relation to the first charge, the learned judges of appeal unanimously held that:

'The words (victim imprisoned) convey the meaning that the minor had been imprisoned despite her innocence . . . Further, the facts established at the trial show that it was the appellant's intention to convey (the) false impression to the ordinary man in the street that the minor, though innocent, had been sent to prison.'

The appeal was dismissed.

The second charge was by reference to section 3(1)(c) of the Sedition Act, which is quoted briefly below in Part IV. It was alleged that the appellant had committed an offence against section 4(1)(b) of the Act. That section provides that any person who 'utters any seditious words' shall be guilty of an offence.

The words uttered which were the subject of the second charge were summarised as follows (the words originate from the body of the

[2] See the report of the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union (IPU) as a result of its visit to Malaysia, 30 November-2 December 1998.

judgment because the indictment or charge sheet was not available to the mission):

> *'(1) that he was dissatisfied with the laws of Malaysia because of the double standard which resulted in the rape case involving Rahim not being brought to court and the Attorney-General had stated that Rahim was not involved in a rape case involving the minor; and*
>
> *(2) that he was dissatisfied with the fact that the court had ordered the minor to be detained for three years whereas Rahim, who should have been imprisoned for violating the law, was instead set free.'*

In relation to this second charge the defence conceded, on the basis of previous decisions by the same court, that if these words were uttered, they were seditious within the meaning of the Act. It was found that they were uttered. A conviction followed.

The appellant's appeal against sentence was also dismissed.

It appears to us that this, in itself, demonstrates the undue severity of the legislation or alternatively of the courts' interpretation of it.

There was a cross-appeal on both counts in relation to sentence by the Attorney-General. The Court of Appeal increased the sentence to 18 months' imprisonment on each count, to run concurrently.

This episode shows, in fact, that anyone who dares to criticise the legal or judicial process may have to pay a very high price, as did Lim Guan Eng.

With regard to the first charge in his case, the Court of Appeal purported to decide the matter on the particular facts of the case 'and the requirement of deterrence'. It is said that a fine would be 'a mere tap on the wrist because it plainly lacks any deterrent effect'. With regard to the second charge, the court stressed that it was 'of vital importance that the public enjoys confidence in the administration of justice' but then added 'of which the courts form an integral part'. Indeed, it appears that the court viewed what happened in the context of this charge as 'an unwarranted attack on the judiciary'. The Court accepted that it was not judicial policy to muzzle criticism of judges or their judgments but stated

that 'when the criticism exceeds its legitimate bounds and becomes proscribed conduct', the courts will intervene. This part of the judgment is difficult to understand. Whatever the appellant did in making the speech he made, he was not attacking the judiciary.

This case and the sentences imposed have attracted widespread criticism. We are not surprised. The view has already been expressed that either the legislation or the courts' interpretation of it demonstrates undue severity. Later in the report, in Part IV, the repeal of the Act is called for. With regard to the sentences imposed by the Court of Appeal, frankly, we were dismayed. Having regard to all the circumstances of the case, it is difficult to see how they could possibly be justified.

The case has left us with relatively harsh laws which censor public opinion about the working of the legal and judicial system and which merit re-examination. The decision in Lim Guan Eng's case strengthens rather than mitigates the law relating to publications and seditions. This feeling was reinforced in the mission's discussions with the various persons it was privileged to meet.

The appellant appealed from the Court of Appeal to the Supreme Court but his appeal was dismissed, for some reason, without a reasoned judgment. This case leaves us with a number of deep concerns.

The mission has since learnt of another case in which a judge granted an injunction preventing the Bar Council from debating a motion criticising the state of the administration of justice. This causes concern on two grounds. First and foremost, it is another example of the apparent willingness of some members of the judiciary to try to stifle public comments on the state of the justice system. Robust criticism is often unwelcome. Nevertheless, in a democratic society governed by the rule of law, it is important that there should be freedom to express such views and the best response to them is a strong and healthy justice system which can withstand such criticisms. The second concern is that, in advance of statements being made, an injunction should be granted on the grounds that these statements might constitute contempt of court. It is understood that this decision may be under appeal.

Karpal Singh

As this report was being drafted, Mr Karpal Singh, a lead defence counsel for Anwar Ibrahim was charged with sedition on 12 January 2000 with respect to statements made in court on 10 September 1999 in the defence of Anwar Ibrahim. The statements were 'It could well be that someone out there wants to get rid of him ... even to the extent of murder' and 'I suspect that people in high places are responsible for the situation'. Mr Singh was charged under section 4(1)(b) of the Sedition Act 1948 which carries a RM5,000 fine or a maximum of three years' imprisonment. The case was transferred to the High Court on 27 February 2000 and has been fixed to begin on 18 July 2000.

Claims for damages in defamation cases

Concern was expressed to the mission about a number of recent cases in which powerful business brought actions for defamation in which they claimed huge amounts in damages. The defamation cases against Tommy Thomas, Skrine & Co, and Dato' Param Cumaraswamy, a past President of the Bar Council and now UN Special Rapporteur on the Independence of Judges and Lawyers, were cited as further examples of these.

The mission was informed that, historically, it was not the normal practice in defamation cases in Malaysia to claim a particular sum in damages. But in these and other cases brought by large business entities, sums in millions of ringgits were claimed. It was suggested to the mission that claims of this magnitude were designed to stifle free speech and expression.

In our view, there is nothing inherently unjust in allowing those who raise defamation actions to quantify the damages they seek. Indeed, it may sometimes be of assistance. But the courts should discourage the making of exorbitant claims and should be circumspect in the amounts they award. They should be aware that such claims and awards may be a means of stifling legitimate free speech and expression. The Bar Council recently drew attention to this in a resolution dated 20 March 1999 in which reference was made to the *Tolstoy* case (1995) HRLJ 295, which was decided by the European Court of Human Rights.

In commenting on the cases which follow, it is not our intention to express any view on the correctness, truth or otherwise of any of the alleged statements which are the subject of libel proceedings.

Dato' Param Cumaraswamy's case v MBf Capital Bhd [1997] 3 MLJ 300 and [1997] 3 MLJ 824

As with *Tommy Thomas*'s case, which is dealt with earlier in this report, this was another action which arose out of the publication in November 1995 of the article by David Samuels entitled 'Malaysian Justice on Trial' in *The International Commercial Litigation.* Dato' Param Cumaraswamy is a distinguished Malaysian lawyer. As noted earlier, he was Vice-President of the Bar Council at the material time in the prosecution brought against him for sedition in 1986. He later became President of the Bar Council. In 1994, he was appointed UN Special Rapporteur for the Independence of Judges and Lawyers. As such, he has a worldwide role. In the article by David Samuels, he is alleged to have said, in relation to a case known as *Malaysia Borneo Finance Holdings (MBFH) v East Asiatic Company (EAC),* a case decided after the *Ayer Molek* case, that the case looks like:

> *'a very obvious, perhaps even glaring example of judge-choosing. . . Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice. But I do not want any of the people involved to think I have yet made up my mind.'*

These words were spoken in his capacity as UN Special Rapporteur. The plaintiffs raised an action of defamation against Dato' Cumaraswamy in respect of these words quoted. They claimed very large sums in damages – RM30 million. When he was sued, Dato' Cumaraswamy claimed immunity as a UN expert on a mission. He invoked section 22 of the Convention on the Privileges and Immunities of the United Nations 1946. Section 22 provides, *inter alia,* that:

> *'Experts . . . performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded:*

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind . . .'

As Special Rapporteur, Dato' Cumaraswamy was an expert on a mission within the meaning of section 22. The Convention was adopted by the UN General Assembly in 1946 and acceded to by Malaysia in 1957. Dato' Cumaraswamy accordingly claimed immunity from the plaintiff's claim. He raised the matter as a preliminary issue in the case. The Minister of Foreign Affairs issued a certificate under the relevant legislation, stating, however, that Dato' Cumaraswamy was 'to enjoy the privileges and immunities as are necessary for the independent exercise of his functions . . . only in respect of words spoken or written and acts done by him in the course of the performance of his mission'. The term 'only' in the certificate opened room for interpretation of whether Dato' Cumaraswamy was acting in his official UN capacity, although the UN Secretary-General affirmed that he was.

Both the High Court and the Court of Appeal decided that the question of immunity could only be resolved after all the evidence had been given. They refused to deal with it as a preliminary issue. The effect of this, of course, was to defeat the purpose of any immunity and subject Dato' Cumaraswamy to a trial before the immunity issue could be determined.

The decision of the High Court was dated 28 June 1997. That of the Court of Appeal was dated 20 October 1997. In each court, costs were awarded against Dato' Cumaraswamy. Thereafter, taxation of costs proceeded with, the mission was told, unusual speed. The amount of costs sought was also considerable, totalling RM267,000. Dato' Cumaraswamy raised the matter directly with the UN and in July 1998, a special envoy was appointed to deal with the situation. In spite of that, an application to stay all proceedings, including taxation of costs, was initially refused, although eventually granted for a limited period by the Court of Appeal.

The question of Dato' Cumaraswamy's immunity as Special Rapporteur was referred for an Advisory Opinion to the International Court of Justice in The Hague by the UN Economic and Social Council on the request of the UN Secretary-General. According to the UN Convention

on Privileges and Immunities, this opinion is binding on the two parties: Malaysia and the United Nations. On 29 April 1999, the World Court decided in Dato' Cumaraswamy's favour. The court found Malaysia in violation of its international obligations because it failed to inform its domestic courts of the assertion of the UN Secretary-General that Dato' Cumaraswamy was immune from legal process. The court also opined that the Malaysian courts, by not expeditiously giving effect to the immunity were 'nullifying the essence of the immunity rule ...'. In this regard, the Court said:

> *'When national courts are seized of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any findings by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.'*

We appeal to the Malaysian Government to heed the World Court's Advisory Opinion by affirming the immunity of Dato' Cumaraswamy.

The way in which this case was handled by the courts gives some cause for concern. The plaintiffs represented large business interests. The defendant was an individual who, over the years, was well known for his fearless advocacy of what he considered to be just causes and, in the process, was sometimes critical of those in positions of power and influence. The Malaysian judicial system had, for some time, been under international scrutiny. Concerns had been expressed about it. Against this background, the defendant now held an important position in the UN and, in that capacity, was being sued for a huge amount of damages for alleged defamation. It was inevitable, therefore, that his case would attract a good deal of international attention. At best, it appears to us that the case was handled by the courts with an unfortunate lack of awareness and sensitivity. But given the present situation in Malaysia, there remains an uneasy feeling that it is another example of the strong and powerful attempting to silence unwelcome criticism of public administration.

Trial of Anwar Ibrahim

It would be impossible not to give some expression of our views on this trial in the context of the terms of reference for this report. Widespread concerns were expressed to the mission about the fairness of the trial and the independence and impartiality of the trial judge. The concerns have come not just from the defence lawyers in the trial but from every practising lawyer that the mission spoke to and from passing discussions with members of the public. There has also been concern expressed by others around the world.

The following factual account of the trial is taken from the Anwar Ibrahim organisation website on the internet. It should, therefore, be treated with some caution but is wholly consistent with accounts the mission received from other sources and from speaking with his defence lawyers. The mission has no reason to doubt its essential accuracy.

It is not necessary for the purposes of this report to narrate in detail the circumstances which led to this trial. It is sufficient to say that Anwar Ibrahim was dismissed as Deputy Prime Minister and Minister of Finance of Malaysia on 2 September 1998 and from his position as Deputy President and member of the leading political party in Malaysia, the United Malays National Organisation (UMNO), on 3 September. On 20 September, he was arrested. He was initially told by the police that he was being arrested under the Penal Code, which provides for due process. The next day, however, he was told that he was being detained under the Internal Security Act 1960, which allows for detention without charge or trial for a period of 60 days. In fact, he was not detained under that statute for very long. The mission was informed that in view of concerns expressed abroad, the Prime Minister had given an assurance that Mr Anwar would be charged at an early date. On 29 September 1998, he was brought to the Sessions Court in Kuala Lumpur and charged with five counts of corruption under the Emergency (Essential Powers) Ordinance No 22 1970 and five counts of sodomy under section 377B of the Penal Code. When he was brought to court on that date he was seen to have suffered obvious injuries to the left side of his face and, in particular, to his left eye. Sustained public pressure eventually led, on 30 December 1998, to the Attorney-General accepting that the police were fully responsible for the injuries. On 7 January 1999, the Inspector-General of Police (IGP) announced his resignation, stating that, as

IGP, he assumed responsibility for the injuries suffered by Mr Anwar while in police custody. On 27 January, the Prime Minister announced that a Royal Commission of Inquiry would be set up to look into the assault on Mr Anwar. The Commission held an open inquiry, sitting for a total of seven days between 22 February and 4 March 1999. In the course of the hearing, the former IGP admitted committing an assault on Mr Anwar on the evening of 20 September 1998. In its report, the Commission recommended that the former IGP be charged in connection with the assault. On 22 April, he was so charged.

In the meantime, the prosecution had proceeded with four of the five corruption charges against Mr Anwar.[3]

The judge selected for the trial was Justice Augustine Paul. The Chief Justice told the mission that great care had been taken by himself in consultation with his senior colleagues in deciding that Justice Paul was the appropriate judge to try the case. He had only recently been confirmed as a High Court judge and had only very recently been transferred to the Criminal Division. On the other hand, he had been a

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[3] '(1) That you from August 12, 1997 to August 18, 1997 at the official residence of the Deputy Prime Minister at No.47, Jalan Damansara, in the Federal Territory of Kuala Lumpur, while being a member of the administration, that is being the Deputy Prime Minister and Finance Minister, had committed *corrupt* practice wherein you had directed Datuk Mohd Said Awang, Special Branch Director and Amir Junus, Special Branch Deputy Director II, *to obtain a written confession* from Azizan Abu Bakar to *deny sexual misconduct and sodomy committed by you* for the purpose of protecting yourself from any criminal action or proceedings and as a result Azizan Abu Bakar gave a written confession dated August 18, 1997 to the Prime Minister as directed, and therefore you have *committed an offence* punishable under Section 2(1) of the Emergency (Essential Powers) Ordinance No.22, 1970.

(2) That you from August 12, 1997 to August 18, 1997 at the official residence of the Deputy Prime Minister at No.47, Jalan Damansara, in the Federal Territory of Kuala Lumpur, while being a member of the administration, that is, being the Deputy Prime Minister and Finance Minister, had committed *corrupt* practice wherein you had directed Datuk Mohd Said Awang, Special Branch Director and Amir Junus, Special Branch Deputy Director II, *to obtain a written confession* from Azizan Abu Bakar to *deny sexual misconduct and sodomy committed by you* for the purpose of protecting yourself from any criminal action or proceedings and as a result Azizan Abu Bakar gave a written statement as ordered, and therefore you have *committed an offence* punishable under section 2 (1) of the Emergency (Essential Powers) Ordinance No. 22, 1970.

Sessions Court judge for many years before his elevation to the High Court and, in that capacity, had presided over many criminal trials. Accordingly, while his selection surprised Mr Anwar's defence lawyers, no legal objection was taken to his appointment.

The trial commenced on 2 November 1998 at the High Court in Kuala Lumpur. The defence had previously asked for more time to prepare their case but that was refused. An application for Mr Anwar to be allowed bail had also been refused. The defence team consisted of nine lawyers led by the highly respected Raja Aziz Addruse, a former President of the Malaysian Bar Council. The prosecution team consisted of six Deputy Public Prosecutors led by Datuk Abd Ghani Patail. In the course of the trial, the Attorney-General himself joined and took over as leader of the prosecution team and, later still, the Solicitor-General also joined the team.

There was intense interest in the trial both within Malaysia and globally. Representatives from a number of international bodies and also the Malaysian Bar Council sought to be admitted into court as official

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(3) That you from August 12, 1997 to August 18, 1997 at the official residence of the Deputy Prime Minister at No.47, Jalan Damansara, in the Federal Territory of Kuala Lumpur, while being a member of the administration, that is, being the Deputy Prime Minister and Finance Minister, had committed *corrupt* practice wherein you had directed Datuk Mohd Said Awang, Special Branch Director and Amir Junus, Special Branch Deputy Director II, to *obtain a written confession* from Ummi Hafilda Ali to *deny sexual misconduct and sodomy committed by you* for the purpose of protecting yourself from any criminal action or proceedings and as a result Ummi Hafilda Ali gave a *written confession* dated August 18, 1997 to the Prime Minister as directed, and therefore you have *committed an offence* punishable under section 2 (1) of the Emergency (Essential Powers) Ordinance No.22, 1970.

(4) That you from August 12, 1997 to August 18, 1997 at the official residence of the Deputy Prime Minister at No.47, Jalan Damasara, in the Federal Territory of Kuala Lumpur, while being a member of the administration, that is, being the Deputy Prime Minister and Finance Minister, had committed *corrupt* practice wherein you had directed Datuk Mohd Said Awang, Special Branch Director and Amir Junus, Special Branch Deputy Director II, to urge Ummi Hafilda Ali to give a written statement to *deny sexual misconduct and sodomy committed by you* for the purpose of protecting yourself from any criminal action or proceedings and as a result Ummi Hafilda Ali gave the written statement August 29, 1997 as directed, and therefore you have *committed an offence* punishable under section 2 (1) of the Emergency (Essential Powers) Ordinance No.22 1970.'

observers. In the past, the Malaysian Government had not been adverse to admitting trial observers officially, but on this occasion observers were only admitted as members of the public.

The evidence led by the prosecution lasted for many weeks and was, to a large extent, directed at proving that Mr Anwar had committed sexual misconduct and sodomy. This evidence was strongly challenged by the defence.

On 12 January 1999, at the close of the prosecution evidence, the prosecution applied to the court to amend the four charges.[4] The new charges did not require the prosecution to prove the underlying facts of sexual misconduct and so denied the defence the opportunity to rebut the earlier evidence given by prosecution and witnesses. It therefore prevented the defence lawyers from defending the accused to the best of their ability and from adding any evidence which may have attempted to restore his reputation.

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[4] '(1) That you from August 12, 1997 to August 18,1997 at the official residence of the Deputy Prime Minister, No.47, Jalan Damansara, in the Federal Territory of Kuala Lumpur, while being a member of the administration, that is, being the Deputy Prime Minister and Finance Minister, and in such a capacity had committed *corrupt* practice in that you:

- Directed the Datuk Mohd Said Awang, Director of the Special Branch, and Amir bin Junus, Deputy Director II of the Special Branch, Royal Malaysian Police, *to obtain a written statement* from Azizan Abu Bakar addressed to YAB Prime Minister *denying his allegation of sodomy* as contained in his "Pengakuan Bersumpah" dated 5 August 1997, for your advantage, to wit, to save yourself from embarrassment;
- And you thereby committed an *offence punishable* under section 2 (1) of the Emergency (Essential Powers) Ordinance No.22, 1970.

(2) That you from August 12, 1997 to August 18, 1997 at the official residence of the Deputy Prime Minister, No.47, Jalan Damansara, in the Federal Territory of Kuala Lumpur, while being a member of the administration, to wit, being the Deputy Prime Minister and Finance Minister, and in such a capacity had committed *corrupt* practice in that you:

- Directed the Datuk Mohd Said Awang, Director of the Special Branch, and Amir bin Junus, Deputy Director II of the Special Branch, Royal Malaysian Police, to *obtain a written statement* from Azizan Abu Bakar *to deny the allegation of sodomy* as contained in his "Pengakuan Bersumpah" dated 5 August 1997, which they obtained as directed, in the form of Kenyataan Umum, for your advantage, to wit, you used it for the purpose of protecting yourself *against any criminal action;*
- And you have thereby committed an *offence punishable* under section 2 (1) of the Emergency (Essential Powers) Ordinance No.22, 1970.

The defence objected to the amendments, arguing that it was unjust and prejudicial for the prosecution to amend the charges at that late stage. The judge, however, allowed the amendments. When giving his ruling he said:

> *'Having considered the old charges and proposed amendment, I am of the view that apart from terminology, there is no substantive change. The elements are still the same and the major change, if any, refers to the commission of the sexual misconduct and sodomy, which on the reading of the old charges is not really a substantive element to be proved. I rule that the amendments do not cause any prejudice to the accused and would allow the amendment.'*

There then followed arguments on whether the evidence concerning sexual misconduct and sodomy against Mr Anwar remained relevant in the light of the amendments to the charges. The judge ruled that such

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(3) That you from August 12, 1997 to August 18, 1997 at the official residence of the Deputy Prime Minister, No.47, Jalan Damansara, in the Federal Territory of Kuala Lumpur, while being a member of the administration, to wit, being the Deputy Prime Minister and Finance Minister, and in such a capacity had committed *corrupt* practice in that you:
- Directed the Datuk Mohd Said Awang, Director of the Special Branch, and Amir bin Junus, Deputy Director II of the Special Branch, Royal Malaysian Police, to obtain a written statement from Ummi Hafilda Ali addressed to YAB Prime Minister *denying the allegations of sexual misconduct and sodomy* as contained in her confidential report entitled 'Perihal Salah Laku Timbalan Perdana Menteri' dated 5 August 1997, for your advantage, to wit, to save yourself from embarrassment;
- And you have thereby committed an *offence punishable* under section 2(1) of the Emergency (Essential Powers) Ordinance No.22, 1970.

(4) That you from August 12, 1997 to August 18, 1997 at the official residence of the Deputy Prime Minister, No 47, Jalan Damansara, in the Federal Territory of Kuala Lumpur, while being a member of the administration, to wit, being the Deputy Prime Minister and Finance Minister, in such a capacity committed *corrupt* practice in that you:
- Directed Datuk Mohd Said Awang, Director of the Special Branch, and Amir bin Junus, Deputy Director II of the Special Branch, Royal Malaysian Police, to obtain written statements from Ummi Hafilda Ali *denying the allegations of sexual misconduct and sodomy* as contained in her confidential report entitled "Perihal Salah Laku Timbalan Perdana Menteri" dated 5 August 1997, which they obtained as directed, in the form of a Kenyataan Umum dated 29 August, for your advantage, to wit, you used it for the purpose of protecting yourself against any criminal action.
- And you have thereby committed an *offence punishable* under section 2(1) of the Emergency (Essential Powers) Ordinance No.22, 1970.'

evidence was now irrelevant. He explained that the amended charges did 'not bring into focus their truth and/or falsity which therefore does not become a constituent element of the charges'. He further directed that any such evidence which had been led be expunged from the record. Of course, that could not affect the fact that over the preceding weeks, the evidence had been widely reported both in Malaysia and to the world at large.

A submission of no case to answer was then made by the defence. That submission was rejected. In his decision, the judge referred again to the relevance of the truth or falsity of the evidence concerning sexual misconduct and sodomy on the part of Mr Anwar. He said:

> *'It is to be noted that the amended charges merely refer to allegations of sodomy and sexual misconduct and not to the actual commission of sodomy and sexual misconduct. The truth or falsity of the allegations are therefore not an issue in this trial. Any evidence or argument that has or is to be directed on this matter is irrelevant and therefore inadmissible. Therefore, the evidence proposed to be elicited to meet the* prima facie *case made out by the prosecution must be confined to the issues raised in the amended charges.'*

The defence proceeded to lead evidence, including that of Mr Anwar himself. In the course of his evidence, the judge ruled that evidence of 'political conspiracy' was irrelevant, although evidence of police conspiracy was allowed subject to certain restrictions. At this, Mr Anwar protested and said: 'Your Lordship has said don't touch on political conspiracy. I do not know what to do with my defence because they are so inter-related. The police conspiracy cannot stand alone. I am helpless'. At that, the judge asked the defence lawyers to 'control their client'. On a number of occasions in the course of his evidence, Mr Anwar sought to give evidence of his disagreements with the Prime Minister but the judge repeatedly held such evidence irrelevant. He also barred the press from publishing the evidence which was given of Mr Anwar's conversations with the IGP and the Prime Minister on the ground that it was hearsay.

In the course of the defence evidence, numerous objections were taken to the evidence sought to be led. The defence team told the mission that these objections were invariably decided in favour of the prosecution. After one particular clash with a defence lawyer, the judge ruled that

'the relevance of any witness to be called from now onwards must be shown before the witness is allowed to be asked to take the stand'. After this ruling, five witnesses were sought to be led by the defence. The judge called for summaries of their evidence. After considering these summaries and the submissions of counsel on each side, the judge held that their evidence was irrelevant and refused to allow them to give evidence. When one of the defence lawyers argued that the defence would be impeded and hindered if the proposed evidence was excluded, the judge said that this was 'an irresponsible statement with absolutely no legal flavour or colour'. He took exception to the words 'impeded and hindered', saying that they 'bordered on contempt of court'.

On 16 March 1999, Mr Anwar filed an application seeking to disqualify Justice Paul from continuing to hear the case. The Notice of Motion and affidavit in support of the application were filed by Mr Anwar's leading counsel, Raja Aziz Addruse, on 15 March. This was after the defence had closed its case. The basis of the application was that Mr Anwar had not received a fair trial and that there was 'grave apprehension' on the part of Mr Anwar that the judge might not bring an impartial and unprejudiced mind to the issues before him when deciding the case. This was based on the judge's rulings in the course of the trial which, it was alleged, prejudged the issues, precluded the defence from presenting Mr Anwar's case in full, expunged evidence in Mr Anwar's favour and applied different standards to the prosecution and defence when admitting evidence. It was also alleged that the judge had kept 'interfering' during his lawyers' questioning of witnesses 'to the extent of himself taking on the mantle of the prosecution'.

When the case was called, on 23 March, for the parties to sum up their cases, the defence refused to do so until the application had been dealt with by the judge. The judge insisted that the case continue. When the entire defence team maintained their refusal to do so, they were held by the judge to be in contempt of court.

On 25 March, however, the defence lawyers were informed that the judge would hear the application to remove him as judge on Saturday 27 March. After hearing arguments from both sides, the judge dismissed the application. Following that decision, closing submissions commenced on 30 March. In the course of the submissions on behalf of

the prosecution, one of the defence lawyers, Christopher Fernando, interjected on a point of fact and there followed a heated exchange involving the two lawyers and the judge. The following day, when Mr Fernando was not in court, Raja Aziz Addruse agreed with the judge that although what Mr Fernando had said was correct, it was said in the wrong way. He added: 'I will inform Mr Christopher Fernando to be more polite. I am sure he didn't mean to be impolite. That's his way of speaking'. To that, the judge replied: 'If the way of speaking is like an animal, we can't tolerate it. We should shoot him. He has to change'. Later, when Christopher Fernando sought to cite the judge for contempt of his own court in respect of those remarks, the judge indicated that he did not intend to liken Mr Fernando to an animal.

The closing submissions were completed on 3 April. The trial had been the longest High Court criminal trial to have taken place in Malaysia, having lasted for 78 days. On 14 April, the judge gave his verdict. He found Mr Anwar guilty of all four amended charges. In support of his verdicts, he issued a 394-page judgment. Instead of the normal plea in mitigation, the judge allowed Mr Anwar himself to make a short statement. The judge then passed sentence. He sentenced Mr Anwar to six years' imprisonment on each charge, the sentences to run concurrently from the date of conviction. He refused to backdate the sentences to take account of the period Mr Anwar had already spent in jail from the time of his arrest. This was apparently contrary to normal practice in Malaysia. The defence then applied for a stay of execution and bail pending an appeal to the Court of Appeal. After hearing submissions from both sides, the judge dismissed the application. The sentences passed are widely seen as harsh.

We should also record that before the trial, although after Mr Anwar's arrest, the Prime Minister was reported in the media to have commented on the case in such a way as to indicate that he believed Mr Anwar was guilty of the conduct with which he was later charged. In particular, on 22 September 1998, he was reported to have issued a press statement in which he said, after explaining that it took him years to believe the allegations made against Mr Anwar, 'I had concrete proof that it was true . . . I actually interviewed the people who were sodomised, the women whom he had sex with, the driver who brought the women to the place . . . We also have proof of his corruption'. On 21 October 1998, the Prime Minister was reported to have said that the Government would

not entertain any application by foreigners to be observers at Mr Anwar's trial 'as the presence of foreign observers will put pressure on the country's judges'.

Early in the trial, Justice Paul had warned that anyone commenting on the guilt or innocence of Mr Anwar outside the court would be committing contempt and would be punished by the court.

The Prime Minister was on the list of witnesses for the prosecution but was not called either by the prosecution or by the defence. On 15 March 1999, however, while the trial was still in progress, in a television interview which was broadcast over Malaysia's satellite television, the Prime Minister apparently commented on the questions put to him by the defence lawyers prior to their deciding whether to call him as a witness, explaining that he would have liked to have given evidence so that he could explain 'what actually happened and how he became convinced' by the allegations.

The case is now subject to appeal and it is essential, therefore, to be careful in case anything that this report says may in itself be thought to put some pressure on the independence of the appellate judiciary. In the mission's discussions with the senior judges, it was careful to avoid discussing the case in any detail for these reasons.

From our consideration of the case and the surrounding circumstances, we are of the view that the concerns raised in Malaysia and by the international community are fully justified. Without in any way going into the merits of particular points that arose in the case, which is now a matter for the appellate courts, we consider that there is legitimate concern on the following points:

(1) The appointment of Justice Paul as trial judge. The fact that the most junior judge in the Criminal Division of the High Court was chosen above more senior colleagues was bound to cause surprise in such a highly charged case which inevitably had a very important political dimension reaching to the heart of the Government. That surprise naturally escalated into concern in the light of events that took place as the trial progressed.

(2) The judge's decisions on important points of dispute arising in the course of the trial. In particular, his decisions on:
   (i) the amendment of the charges at the end of the prosecution case;
   (ii) the relevance thereafter of evidence concerning misconduct and sodomy on the part of Mr Anwar coupled with the expunging from the record of the prosecution evidence on these matters;
   (iii) the relevance of evidence of political conspiracy, which was known to be at the heart of Mr Anwar's case, coupled with the treatment of Mr Anwar's own evidence;
   (iv) the decision to determine the relevance of defence witnesses before they were allowed to take the stand and, following that decision, the determination that in every case a witness whom the defence wished to call was not allowed to take the stand;
   (v) the decision to allow the Attorney-General to take over the leadership of the prosecution team well after the case had started, notwithstanding the fact that he was deeply implicated, both personally and by reason of his position in the Government, by the defence allegations of political conspiracy and police conspiracy;
   (vi) the judge's use and threatened use of his contempt powers against the defence lawyers coupled with his use of language in relation to what he regarded as unacceptable behaviour by defence lawyer Christopher Fernando;
   (vii) the outspoken public comments by the Prime Minister on the merits of the case both before and during the trial, which were widely reported in the media, and the judge's failure to react to them;
   (viii) the judge's decisions in relation to sentence.

In raising these matters, the difficulty of the task facing the trial judge is not in anyway to be underestimated. This was bound to be a difficult trial for any judge. The eyes of the entire country and, indeed, of the world were upon him. Whatever the actual charges, the fact that they were widely seen to reflect a power struggle in which the Prime Minister himself was deeply involved cannot be overlooked. The fact that the Prime Minister had felt free to comment publicly and so forcefully as he did before the trial started, and then in the course of the trial, underlines

this. In all these circumstances, it was and is, in our view, essential to take particular care at every stage to show not only that justice is done but is clearly seen to be done. Otherwise, it is almost inevitable that concerns of the kind mentioned above will arise.

Irene Fernandez's case

This case demonstrates some of the problems faced by NGOs in their interface with law and justice.

Ms Irene Fernandez is the Director of an NGO called Tenaganita, which is concerned with the welfare of female migrant workers, of whom there are many in Malaysia. In 1995, Tenaganita published a document entitled 'Memorandum on Abuse, Torture and Dehumanised Treatment of Migrant Workers at Detention Camps', in which it alleged that migrant workers were being ill-treated in the manner indicated in the title. Ms Fernandez was charged with an offence under section 8A of the Printing Presses and Publications Act 1984, which makes it an offence to publish 'false news' maliciously (section 8A(1)). Malice is presumed in default of evidence showing that prior to publication, the accused took reasonable measures to verify the truth of the news (section 8A(2)). These provisions are referred to in Part IV in comments on certain pieces of legislation.

The circumstances in which this case arose were as follows. There were reports from detainees in various migrant worker camps which suggested that food, water and medical care were being denied to the workers in the camps, resulting in illness and a number of deaths. Tenaganita accordingly began to enquire into these reports. Shortly thereafter, *The Sun* newspaper stated that they would publish an article on 'Death Camps'. That article, however, did not appear. *The Sun* newspaper is owned by Mr Vincent Tan, a well known businessman who is mentioned again in Part III. Tenaganita accordingly prepared the memorandum. Later, *The Sun* published its article, which was to the same effect as Tenaganita's memorandum. On 27 July, Ms Fernandez held a press conference in which she gave the information which is contained in the memorandum. On 15 August, Ms Fernandez sent the memorandum to the relevant agencies. A press release was issued. Following this, there was considerable publicity in the media and, from 18 to 20 August, a debate in Parliament. On 23 August, opposition Members of

Parliament were allowed to visit the camps. The Government admitted that 46 deaths had taken place – later it admitted that the correct figure was 98. On 25 August, the crime editor of the *New Straits Times* telephoned Ms Fernandez saying that his newspaper had not done justice to the issue and wanted to do more. Ms Fernandez said that the memorandum gave more information than had been contained in the press release and she gave him a copy of the memorandum. On 1 September 1995, the *New Straits Times* published an article based on the memorandum. It is this article which is the basis of the charge preferred against Ms Fernandez. It is to be noted that *The Sun* newspaper was not charged, nor was the crime editor of the *New Straits Times*, although in his evidence in Ms Fernandez's trial, he said that he had asked for the memorandum for the purposes of publication in his newspaper.

Following her arrest, Ms Fernandez was subjected to a number of tactical manoeuvrings by the authorities which almost had the effect of her initially being unable to obtain bail. The trial started in the Magistrates' Court in June 1996. Ms Fernandez expressed many misgivings about the manner in which her case was investigated, the manoeuvres to 'ambush' her application for bail, the fact that the prosecuting counsel was senior in the legal service to the magistrate before whom she appeared, the dismissal of Ms Fernandez's application for the internal investigation reports and post-mortem reports on migrant workers under section 81 of the Criminal Procedure Code, the pressure brought to bear on her lawyers, the removal of crucial migrant worker witnesses by a use of the power of deportation, the selective prosecution of her report which had been published in newspapers and discussed in Parliament and the inordinate delays in a trial that continues to this day. She has been charged under section 8A of the Printing Presses and Publications Act 1984. She claims that following her prosecution, she has also been harassed in respect of possible minor alleged lapses in the placing of returns relating to her NGO which is registered as a company under the Companies Act. She does not know when the ordeal of the trial will be over and may face three years' imprisonment, a fine or both if convicted.

During the investigation of this alleged offence, the police asked Ms Fernandez for the names of those who had given Tenaganita information in the course of its research and for a number of documents. Ms Fernandez refused. The police told her that if she did not comply, she

would be obstructing justice. They wrote with a similar request to her lawyers which was accompanied by a similar threat. They also informed them that they were giving Ms Fernandez wrong advice and, for that reason, they also were obstructing justice. They attempted to obtain a statement from one of her lawyers and also from his secretary. All these requests were refused on the basis of agent/client privilege. As a result of these actions by the police, a complaint was made by the lawyers to the Bar Council as discussed in Part I. The mission was told that the press then began to take an interest, after the statement by the Bar Council, in what had been going on and that the police thereafter did not pursue the matter.

At the time of the mission's visit to Malaysia, the trial was far from complete. It had already lasted 148 days. There had, of course, been a number of adjournments since it started in June 1996. By April 1999, the defence case had just began. Thirty-five witnesses, mainly police officers in the camps, had been called to give evidence for the prosecution. Thirty-six detainees were also on the prosecution list of witnesses. None, however, was called by the prosecution. When the defence said that they wanted to call these witnesses, they were not produced and, ultimately, in March 1999, the defence were informed that they had all been deported. In the course of the prosecution case, the defence applied to the magistrate to obtain a report of an internal investigation by the Ministry for Home Affairs into conditions in the camps, as well as post-mortem reports of those who had died in them. The application was refused as being premature. When it was renewed at the end of the prosecution case, the magistrate ruled that it was for the prosecution to decide what information to produce and not for her to call for information. That decision came as a surprise to Ms Fernandez's lawyers.

It is deeply disturbing that instead of enquiring into and responding to the allegations in the memorandum, the authorities reacted by prosecuting Ms Fernandez under section 8A of the Printing Presses and Publications Act 1984.

But it goes much further than that. If the account that the mission has been given is essentially correct, every aspect of the case that we have mentioned gives the impression of an executive, through its various branches, seeking to stifle criticism, however justified and however much

in the public interest, from those whom it considers to be its opponents. Moreover, if any such criticism is made, those who make it are subjected to prolonged and continuous harassment. The fact of this prosecution, its selective nature, the statute under which it was taken, the manoeuvrings of Ms Fernandez's bail application, the attempt to pressure her, her lawyers and the secretary into giving privileged information, the juxtaposition of a junior magistrate and a senior prosecutor from the same Judicial and Legal Service, the failure to produce witnesses and documentation which might be of benefit to the defence, the very length of the trial with a possible sentence of three years' imprisonment, all serve to raise a real concern as to the proper administration of justice in Malaysia in relation to NGOs. Apparently, however, it does not even end there. Ms Fernandez told the mission that Tenaganita continues to be harassed in respect of possible minor lapses in the returns it makes under its governing statute. The trial, however, is not yet complete. There is, therefore, still time for the negative impressions which it has created to be rectified. It is to be hoped that they will be.

Recommendations

1. Both judges and lawyers should be careful to treat each other with mutual respect and courtesy; particularly when in court or in front of the media where their activities are subject to public view.

2. Regular meetings between the Bar Council and the senior judiciary should take place to discuss matters of mutual interest. There was a certain reluctance for such meetings, resulting, to some extent, from the personalities involved. This was yet another symptom of the present unhappy situation. Every effort should be made to overcome any reluctance for these meetings. Only by having them and conducting them in a positive and mutually respectful manner will the proper relationship eventually be restored. Social contacts between the Bar Council and the judiciary should also be resumed with the aim of restoring them to their pre-1988 level.

3. Steps should be taken to ensure that judges and lawyers are trained so as to be in no doubt as to the true nature and meaning of the independence of the judiciary.

4. The courts should act with great forbearance and restraint in the use and threatened use of the contempt power in respect of lawyers who are acting in their professional capacity. The power should be used only as a last resort when all other means of achieving the proper result have failed.

5. When considering whether contempt proceedings against lawyers practising their profession are appropriate, due regard should be paid by the court to the sometimes delicate and difficult situations lawyers, in practice, have to face. These considerations should also apply to sentence for contempt.

6. Unprofessional conduct by lawyers should be dealt with by the Disciplinary Board after the conclusion of the hearing, except in cases where the continuation of the process fairly is impossible.

7. Imprisonment of lawyers for contempt when practising their profession should be treated as a last resort applicable only in the most extreme situations.

8. Failing restraint, the contempt law should be reformed in order to remove the adverse effect it has on the ability of lawyers to render their services freely. It should be examined with a view also to ensuring that it is not based on strict liability, the sentencing is fixed and the law of constructive contempt is not used to stifle *bona fide* criticism of judges and the courts.

9. At all times, members of the legal profession should act with due regard for the requirements of professional practice and conduct in court as set out in Part VI of the LPA 1976 and the relevant rules. These rules should be observed to the letter and also in their spirit.

10. The Bar Council should be granted a watching brief in controversial and difficult cases, if it so requests. This is in accordance with its duties under section 42 of the LPA 1976.

11. The Government and courts should heed the opinion of the International Court of Justice by affirming the immunity of Dato' Cumaraswamy.

12. Courts should not allow claims for or awards of damages in defamation cases to be of such magnitude as to be a means of stifling free speech and expression.

13. The executive should refrain from speaking publicly about a trial before judgment has been delivered.

14. NGOs should be able to carry out non-violent activities freely without harassment and be able to exercise their right to freedom of expression.

15. A mechanism for mediation of disagreements between lawyers and the judiciary should be available. One or more of the organisations involved in this report would be available to assist in arranging suitable mediators.

Part III
Relationship between Judiciary and Executive

Background

It can be seen from the structure of the judiciary as described in the Background to this report that problems could arise with regard to the true independence of the judiciary from the executive unless the former are not only independent but are also seen to be truly independent. The proprieties of the separation of powers must be strictly observed by the latter. Otherwise, it is easy to see how it could at least be perceived that, by one means or another, the executive might be interfering with the independence of the judiciary. This is true of all levels of the judiciary up to and even including, the Federal Court, but perhaps particularly so at the more subordinate levels. We believe there is merit in a system of appointment of judges which allows some input by the legal profession. We suggest that a Judicial Services Commission be established with the function of recommending judicial appointments. We recommend this despite the fact that the present system has remained substantially the same since Malaysia gained its independence from the United Kingdom in 1957 and, with the exception of a few recent cases, has not given rise for concern. The universal view expressed to the mission was that in the vast majority of cases which come before the courts, at whatever level in Malaysia, there was no complaint about the independence of the judiciary. Of course, in the vast majority of cases, the executive is not likely to be interested in interfering with that independence. The test, which must be an objective test, usually arises only in those cases which are considered of political or economic importance to the executive. And it is in cases which fall within that category, which have already been mentioned in this report, that the concerns which led to our mission have arisen.

In order to assess whether these concerns have any substance, it is necessary to go back in time a little and to consider events against the political background in the country. Ever since independence in 1957, the country has been governed by a coalition of which United Malays

National Organisation (UMNO) is, and always has been, the dominant partner. The leader of UMNO has, by reason of his leadership of the party, been Prime Minister. Moreover, the coalition has, ever since independence, had a two-thirds majority in both Houses of Parliament and has, therefore, always been in a position to amend the Federal Constitution, in terms of Article 159, if it so desired. In these circumstances, the position of the Prime Minister, which is, in any event, powerful in terms of the Federal Constitution, is even more powerful.

Since 1957, the Federal Constitution has been amended a number of times. At no stage, however, did the mission hear any suggestion of interference by the executive with the independence of the judiciary during the term of office of the first three Prime Ministers, that is from independence in 1957 until 1981. Dr Mahathir has been Prime Minister since 1981 and is seen as having been a strong Prime Minister, largely credited with the greatly increased prosperity which Malaysia has enjoyed in recent years.

The mission heard no complaint of interference by the executive in the independence of the judiciary in the early years of Dr Mahathir's premiership. After the *Cumaraswamy* case in 1986, however, a major change took place. The events in question were mentioned briefly in Part II of the report and there is no need to narrate them in detail here. The *Asian Wall Street Journal*, or *Berthelsen* case (*J P Berthelsen v Director General of Immigration, Malaysia and Others* [1987] MLJ 134)[5] was followed by strong and continuing public attacks on the judiciary by the Prime Minister coupled with threats that the Government would ensure that the judiciary would comply in one way or another with its (the Government's) wishes. The result was Operation Lalang, in which over 100 persons, including the leader of the opposition and other senior opposition figures, were detained and four newspapers suspended under the Internal Security Act 1960. In what became known as the *UMNO 11* case, further restrictions on the freedom of the press and, perhaps most serious of all, the amendment of Article 121 of the Federal

[5] In the Berthelsen Case, the Court of Appeal upheld an appeal by Mr Berthelsen, a staff correspondent of the *Asian Wall Street Journal*, for judicial review of a decision to cancel his employment pass (on which was based an order for his removal from the country) on the ground that natural justice required that he should have been given the opportunity to be heard before the decision to cancel was made.

Constitution, which in conjunction with amendment to statutes such as the Internal Security Act 1960, the Printing Presses and Publications Act 1984 and the Dangerous Drugs (Special Preventive Measures) Act 1985 (all of which we comment on in more detail later in this report) severely restricted the powers of judicial review of the High Courts and, therefore, the Court of Appeal and Federal Court also, were milestones along the way. Scarcely less serious, because of their lasting consequences, and perhaps most shocking, were the extraordinary events in 1988 leading up to the suspension and subsequent removal from office of the Lord President, Tun Mohamed Salleh Abas, and the two most senior judges of the Supreme Court, followed by the appointment of Tan Sri (now Tun) Abdul Hamid Omar as Lord President.

This assault on the judiciary, as it was described to the mission, resulted in a situation from which Malaysia has not recovered. Different reasons were offered but the fact remains that there is a widespread perception among senior members of the legal profession and among NGOs that in those cases in which the Government has an interest, the judiciary is not independent. This is either because it is leaned on directly or indirectly by the Government or because it knows what the Government wants and is simply too intimidated in the light of past experiences. It seems that this perception is also held by members of the general public.[6]

The mission had two lengthy meetings, lasting in all some five hours, with the Chief Justice and other senior members of the judiciary, who received them with great courtesy. The discussions were full and frank on the independence and impartiality of the judiciary. The judges were adamant that they were both independent and impartial. We do not believe that senior members of the executive actually instruct members of the senior judiciary how to decide cases. The problem is more subtle. It usually is when judicial independence is threatened. Malaysia is a small country and, as in many small countries, people in the upper

[6] The mission did not speak to many members of the general public about these matters, but it is of interest to note that on one occasion when being taken to the central market, one of its members, without disclosing who he was or why he was there, asked a Sikh businessman in his 30s what he thought of the verdict in the trial of Anwar Ibrahim. His reply was instantaneous: 'What do you expect with a judiciary like ours?' The mission was told that this was a typical reaction.

echelons of the establishment will know each other personally or, at least, know of each other. In that situation, it is natural for those in the executive to discuss matters of common interest with members of the judiciary but great care must be taken not to cross the boundaries, whether inadvertently or not, of what is proper with regard to the separation of powers. The mission got the impression that members of the executive did not always do that. An example was given where a judgment of the Court of Appeal had been adverse to the Government. The Minister responsible telephoned a member of the court, who happened to be an old friend, to ask him why they had come to that decision. The judge replied that that was not an appropriate question to ask. The story was told to illustrate that the judiciary was independent, but it was significant also for the fact that a member of the executive felt it appropriate to approach a judge in the way he did.

Suspicions have also been raised by the close links between prominent lawyer, Dato' V K Lingam, the Chief Justice and powerful businessmen (including Vincent Tan, mentioned earlier in this report, who is said to be close to the Prime Minister). As counsel, Dato' Lingam has acted, for example, for the plaintiffs in the defamation cases to which we have referred. It is quite likely, therefore, that in time he will be representing them before a court presided over by the Chief Justice. In these circumstances, for the Chief Justice and his wife to be seen and photographed with Dato' Lingam and his wife on holiday together, as has happened, even if they did not actually go on holiday together, was bound to excite adverse comment. Indeed, it has not only done so but has led to accusations of corruption on the part of the Chief Justice. At the mission's meeting with him he adamantly denied these accusations, pointing out that they had been investigated by the anti-corruption agency, which had cleared him. The anti-corruption agency, however, is part of the Judicial and Legal Service, answerable to, among others, the Attorney-General.

There is a further point which was stressed to the mission time and again and which is alluded to above. There is no need for the Prime Minister or other senior members of the Government to tell the judiciary directly what to do; they know already from what has been reported in the media or by the actions already taken in the case, for example, by the police and/or the Attorney-General. The cases involving Lim Guan Eng, Anwar Ibrahim, Irene Fernandez and the defamation case against

Param Cumaraswamy were cited as illustrations, as was the willingness of the judiciary to use, or to threaten to use, its contempt powers.

In this context, it is appropriate to note the position of the Attorney-General and also of the police. Article 145(3) of the Federal Constitution provides as follows: 'The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Sharia court, a native court or a court-martial'.

Under the terms of Article 140, the police are under the jurisdiction of a Police Force Commission whose chairman is the minister, for the time being, charged with the responsibility of the police. That minister is the Minister for Home Affairs. Until recently, Dr Mahathir was the Minister for Home Affairs as well as the Prime Minister.

The high level of recruitment of judges, particularly to subordinate courts, from the Judicial and Legal Service gives cause for concern. The Service, which allows for the frequent interchange of judges and prosecutors, creates perceptions that criminal justice is being dispensed by prosecutors and judges from the same legal service. Their interdependence could raise doubts as to their independence. We believe there is a strong case for separating the prosecution service from the judicial service.

There should also be a significantly greater recruitment from the Bar, the members of which should be prepared to accept posts in the judiciary.

The choice of judges in some of the high profile cases outlined above has been surprising. The Chief Justice assured the mission members that the choice of Justice Augustine Paul as judge for the Anwar Ibrahim trial was properly and most carefully considered. We would only say, with respect, that to select Justice Paul was, in the circumstances, almost bound to give rise to concern. He was the most junior judge in the Criminal Division of the High Court. He had only recently been confirmed as a High Court judge and only very recently been transferred to the Criminal Division. On the other hand, he had been a Sessions Court judge for many years before his elevation and, in that capacity, had presided in many criminal trials. Moreover, his essential fairness as

a judge had not been questioned. Accordingly, while his selection caused some surprise, Anwar Ibrahim's defence lawyers raised no objection to his selection. So it may be that some of the concern as to his true independence which has since been expressed in the context of his selection as the trial judge has an element of hindsight in it. Nevertheless, what happened in the trial has only served to increase that concern. Although perhaps less internationally famous, the situation in the Irene Fernandez case is no less important. To have a magistrate of only three years' standing, while the prosecutor has 16 years' standing from the same Judicial and Legal Service, is hardly an example of transparent independence of the judiciary when confidence in that independence is so low.

Conclusion

It was obviously not possible to examine every aspect of the cases which have given rise to concern. But the accumulation of concerns that they produce has a weight of its own, so does the perception of senior and respected lawyers in the country. When these matters are looked at together with the historical background of the last 13 years, the conclusion is irresistible – the concern that has been expressed repeatedly in the years since the events of 1987 and 1988 as to the independence of the judiciary in Malaysia is well-founded.

Recommendations

1. All parties involved – the executive, the judiciary and the legal profession – should recognise that the problem is a genuine one. As is often the case, recognition that a problem exists is, in itself, a major step towards solving it. In particular, the executive should recognise the root causes of the problem, namely, a blatant assault on the judiciary by the executive in 1987-1988 and a continuing perception that the executive continues, either directly or indirectly, to influence the judiciary.

2. The executive should recognise the independent, constitutional position of the judiciary and have a proper understanding of what that involves. The failure, by a very powerful executive, to understand that has been by far the single most important factor in bringing about the present unsatisfactory position.

3. The executive should conduct its business so as not to interfere with the independence of the judiciary in any way. Equally importantly, it should be careful to conduct its business in such a way so as not to be seen by the reasonable observer to be interfering in the independence of the judiciary. Reasonable perception is every bit as important as the truth in a matter of this kind.

4. The judiciary should act, and be seen to act, with complete independence from the executive. The decision-making and reasoning of the judiciary in the recent cases of Lim Guan Eng and Anwar Ibrahim have, quite understandably, given real cause for concern in this regard.

5. Senior members of the judiciary should be astute to protect the more junior judges from anything that is, or appears to be, executive interference in their independence.

6. The judiciary should do all in its power, in the wider interests of justice, to counter the harshness of repressive legislation and overbearing actions on the part of the executive. That is the role of the judiciary when faced with repression, no matter where it comes from. The burden will fall mainly on senior members of the judiciary, who must take the lead. In the present situation, and in light of the experiences in 1988, that will require great courage but it is essential if the reputation of the judicial system in Malaysia is to be restored to what it was and what it should be.

7. The choice of judges for high profile cases should be carefully considered.

8. A Judicial Services Commission should be established with the function of recommending judicial appointments. Representatives from the legal profession should be invited to participate as full members of this Commission.

9. There should be a significantly greater recruitment to the judiciary from the Bar, the members of which should be prepared to accept such posts.

10. The interchangeability of lawyers and judges under the combined Judicial and Legal Service should come to an end to ensure the separation of powers and independence of the judiciary.

11. An independent prosecution system should be established.

12. Members of different branches of the establishment should be very careful about how they are seen in public and by the public.

13. An international conference on the independence of the judiciary and training sessions on human rights law for its members should be organised.

Part IV
Role of Legislative Power

As a member of the United Nations, Malaysia is required to uphold the principles of the Universal Declaration of Human Rights under which everyone has the right to life, liberty and security of person, to equality before the law without discrimination and to a fair and public trial. It states, further, that no one shall be subject to torture or cruel, inhuman or degrading treatment or punishment or be subject to arbitrary arrest, detention or exile. It is now generally accepted that the norms codified in the Universal Declaration constitute customary international law that is binding on all states.

As was stated earlier, Malaysia has not acceded to the main international human rights treaties that codify and elaborate on rights in the Universal Declaration. These include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Most countries of the world have acceded to these treaties and accept them as a valid framework for their legislation and practice.

The independent observer, thus, cannot but be struck by certain provisions within Malaysian legislation that are excessively restrictive and well outside the ambit of international standards. The executive makes use of these laws with the effect of stifling fundamental rights, such as free expression and political dissent.

While the mission was in Kuala Lumpur, the Foreign Minister announced that a Bill was to be tabled at the July 1999 sitting of the Federal Parliament to set out the powers of a proposed National Human Rights Commission. This is to be welcomed but there is concern that this alone may not be adequate. Our understanding is that the powers of this Commission will include holding inquiries into complaints, visiting places of detention, issuing statements as needed and advancing

the awareness of human rights (*New Sunday Times*, 25 April 1999). Reports in which the Minister has stated that the Commission will have to recommend ways in which Malaysia can work towards ratifying human rights instruments are particularly welcome. It is essential that it works as an autonomous and independent body in a manner consistent with the Paris Principles Relating to the Status of National Institutions, the Commission on Human Rights Resolution 1992/54, 3 March 1992, General Assembly Resolution 48/134 of December 1993.

Nonetheless, while applauding these developments and trusting that they come to fruition, we have become convinced that it is the pressure of restrictive and, we think, needlessly repressive legislation that has impacted crushingly on the agencies of the law – the judiciary, the legal profession and the police. The true spirit of justice under the law has been weakened. In such a climate, authoritarian personalities flourish, libertarians are frustrated, practitioners are reduced to increasingly frenzied posturing and the police wield extensive and largely unchecked power that, in Lord Acton's famous words, 'tends to corrupt'.

The establishment of an independent Law Commission to review existing legislation and propose amendments is therefore recommended. The Bar Council must be allowed to be involved in this process and to comment on the substance of existing and proposed legislation.

So long as this legislative framework remains unchanged, however, proposals to improve the positions of the judiciary and the profession can be no more than palliative. This does not mean that the judiciary should continue to act as it does now. The judiciary also has an important role to play in softening the effect of the laws through interpretation and application of the principles of justice and equity. We urge the judges to have the courage to rise up to this challenge. Otherwise, judges will continue to be considered as a tool to quell political dissent and free expression.

This part summarises the main difficulties as we see them with the Constitution and certain statutes. The Government is urged to consider seriously the recommendations made. The list below is not intended as exhaustive. There is also, for instance, section 59A of the Immigration

Act which excludes the power of judicial review. The list should therefore be considered as illustrative.

Federal Constitution of Malaysia

Part II of the Constitution sets out what are described as fundamental liberties. It is in effect a bill of rights. Articles 5 to 13 guarantee personal liberty, prohibit slavery and forced labour, provide protection against retrospective criminal laws and repeated trials; guarantee equality before the law among all persons and prohibit discrimination against Malaysians on the grounds of religion, race, descent or place of birth; prohibit banishment and guarantee freedom of movement; guarantee freedom of speech, assembly and association; guarantee freedom of religion, provide certain rights in respect of education and guarantee the right to property.

Four articles of the Constitution negate the essence of these rights, however, and affect judicial power in enforcing them. These are the following.

Article 121

Part IX of the Constitution describes the place and power of the judiciary in Malaysia's Constitutional system. Insofar as the judiciary is the guardian of the liberty set forth in the Constitution, this would make Malaysia a 'constitutional democracy' rather than a 'parliamentary democracy'. However, the provisions of Part IX ('The Judiciary') seem ambivalent, particularly with regard to judicial power. An amendment to Article 121 (1) of the Constitution, which was effective from 10 June 1988, has since caused much controversy. The full text of these provisions is reprinted in Appendix 4.

As was mentioned earlier, Article 121 was amended in a fundamental way in 1988. The original provision provided that 'the judicial power of the Federation shall be vested in three High Courts of co-ordinate jurisdiction and status' (the third was Singapore, which is now independent). Now it reads 'there shall be two High Courts of co-ordinate jurisdiction and status . . . (which) shall have such jurisdiction and powers as may be conferred by or under Federal Law.' It seems to us that this amendment has had the effect of eliminating the inherent

powers and jurisdiction of the courts. It therefore fundamentally disturbs the concept of the separation of powers and affects the ability of the judiciary to enforce fundamental rights. It tends to make the judiciary an arm of the legislature and an instrument of the executive.

Articles 149 and 150

Part XI of the Constitution, which has articles for special powers against subversion, undermines the fundamental liberties expressly provided for in Part II of the Constitution. Specifically, Article 149 (reprinted in full in Appendix 7) allows laws to be passed by Parliament that negate Articles 5, 9, 10 or 13 of the Constitution provided only that Parliament recites the formula contained in Article 149, which is, in effect, that the law is passed in order to deal with serious subversion or the threat of it. This can be done without declaring an emergency. Article 5 of the Constitution guarantees personal liberty including due process rights; Article 9 prohibits banishment and guarantees freedom of movement; Article 10 guarantees freedom of speech, assembly and association; Article 13 guarantees the right to property.

This is an extraordinarily wide-ranging provision. By virtue of this provision, at least two statutes were enacted and drawn to the attention of the mission. They are the Internal Security Act 1960 and the Dangerous Drugs (Special Preventive Measures) Act 1985.

The reality is that this article turns the rights embodied in Articles 5, 9, 10 and 13 into mere privileges removable at the whim of Parliament. The whole purpose of a bill of rights (or declaration of fundamental liberties) is that the individual can look to the judiciary for protection against any abuse of power by the executive or the legislature in respect of such rights and liberties. But by virtue of Article 149, however, this central role of the judiciary is usurped. The executive and the legislature become judges in their own cause.

Article 150 provides for a Proclamation of Emergency in situations where 'a grave emergency exists whereby the security, or economic life, or public order in the Federation or any part thereof is threatened ...'.

The domestic laws of many countries set strict conditions for the proclamation of a state of emergency. International human rights law

sets strict requirements for this purpose. Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR), for instance, provides that:

> *'in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law, and do not involve discrimination solely on the ground of race, colour, language, religion or social origin.'*

International human rights law also considers that there are certain rights that cannot be derogated from even in such exceptional circumstances. Article 4(2) of the ICCPR gives an indication of these rights. It lists articles that deal with rights that cannot be subject to derogation. These include provisions on the right to life (while allowing the death penalty with certain restrictions 'in the countries which have not abolished the death penalty'); torture, cruel, inhuman or degrading treatment or punishment; slavery; imprisonment for inability to fulfil a contractual obligation; retroactive incrimination and punishment; recognition as a person before the law; freedom of thought, conscience and religion. Article 150 of the Malaysian Constitution fails to protect any rights in times of emergency.

The Emergency (Public Order and Prevention of Crime) Ordinance was proclaimed in Malaysia in 1969 when there were serious racial disturbances in the country. This Ordinance remains in place. After a brief ten-day visit, spent entirely in Kuala Lumpur, the mission was not best placed to make judgmental remarks about the need for a state of emergency. But everything the mission saw, heard and read suggested that Malaysia is a stable and prosperous country. The continuation of the Emergency Ordinance after the need for it has passed can have an insidiously brutalising effect on the administration of justice in any country. We suspect that the Malaysian malaise may be due in no small measure to the gradual acceptance of a state of emergency as the norm of government. It is time for this Ordinance to be repealed.

Part IX – The Judiciary

According to this part of the Constitution, the appointment of judges to the Federal Court, the Court of Appeal and the High Courts is made by Yang Di Pertuan Agong (the King) acting on the advice of the Prime Minister who, in turn, consults with the Conference of Rulers and usually one or more of the senior judges. The lower judiciary and the state legal services are selected by the existing Judicial and Legal Services Commission which, according to Article 138 of the Constitution, is chaired by the Chairman of the Public Services Commission with either the Attorney-General or the Solicitor-General as a member and one or more other members appointed by the King.

While the mission received no serious complaints about this method of appointment, we believe that there is merit in a system of appointment that is more transparent and allows some input by the legal profession. This can be achieved by instituting a Judicial Service Commission independent from the executive on which the Bar Council has representation as well.

Article 160

This provision concerns the interpretation of the Constitution. It contains discrimination inherent in the definition of the term 'Malay'. A Malay is defined in the following terms:

> *'"Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and:*
>
> *(a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or*
> *(b) is the issue of such a person; ...'*

This definition, which partly defines the Malay in terms of his or her religion, has the effect of denying certain privileges under the Bumiputra policy to those ethnic Malays who are Christians, Hindus, etc. We appreciate that this is a sensitive area but believe it is inappropriate and contrary to international law to discriminate between ethnic Malays on the ground, solely, of their religion. The principle of

non-discrimination has become an integral part of customary international law. International law requires states to prohibit such forms of discrimination and bring them to an end. Such forms of discrimination are also contrary to Article 2 of the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, which states, 'No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief'.

Internal Security Act 1960

This statute is a survivor of the colonial era and the communist insurgency. It survives only by virtue of Article 149 of the Constitution. As a reminder, Article 149, mentioned above, allows a law to be passed by Parliament, 'notwithstanding that it is inconsistent with' Articles 5, 9, 10 or 13 of the Constitution on personal liberty issues, including due process rights; the prohibition of banishment and guarantee of freedom of movement; freedom of speech, assembly and association guarantees; and right of property guarantees.

The Act gives wide power to the executive. Section 8(1) and (7) gives the Minister the power to detain persons, without trial, for two years, a period which can be renewed indefinitely. Section 8(5) and (6) further allows the Minister to restrict the movement and activities of persons, without trial, for similar periods. Sections 8A, 8B and 8C remove from the courts the power of judicial review, save in certain limited procedural respects. These provisions were enacted in 1988 and 1989 by way of amendment to the original Act. Section 73 gives the police power to arrest and detain any person suspected of 'acting in a manner prejudicial to Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof' for up to 60 days, without trial or production before a magistrate.

It also contains a host of other powers in Parts II and III concerning:

- the prohibition of organisations and associations of a political or quasi-military character and uniforms, etc (Chapter I);
- special powers reacting to subversive publications, etc (Chapter III);
- control of entertainment and exhibitions (Chapter IV);
- other powers for the prevention of subversion, including powers relating to appointments, to close schools and educational institutions,

to control admissions to institutions of higher education, etc (Chapter V);
- proclamation of security areas and wide powers relating to the preservation of public security in such areas (Chapters I and II – Part III).

These are wide powers that frustrate the fundamental rights guaranteed by the Constitution. The considerations set out in the memorandum, signed by the then President of the Bar, Dato' Dr Cyrus V Das, following the resolution of the Malaysian Bar dated 10 October 1998, should be borne in mind. The memorandum is printed in full in Appendix 8. We recommend that the Internal Security Act 1960 should be repealed.

Printing Presses and Publications Act 1984

This Act was enacted without relying on Article 149 of the Constitution (that allows law to be passed by Parliament 'notwithstanding that it is inconsistent with' Articles 5, 9, 10 or 13). This is presumably because it has been considered not to be in contravention of Article 10 of the Constitution, on the freedom of speech, assembly and association. It has been argued that subsection (2) of Article 10 of the Constitution permits the enactment of such an act. This provision allows for the restriction of rights in:

> *'the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.'*

Article 4(2)(b) of the Constitution confirms these limitations.

The Act gives the Minister quite extraordinary powers 'in his absolute discretion' (section 3(3), section 6(1), section 7(1), section 12(2)) to grant, refuse or revoke a licence for a printing press or permit to print and publish a newspaper or other publication. It represents a very serious erosion of the freedom of the press such as would be intolerable in a democratic society save in highly exceptional circumstances.

It also creates, in section 4(1)(b), an offence of printing or producing any publication or document which 'contains an incitement to violence

against persons or property, counsels disobedience to the law or to any lawful order or which is or is likely to lead to a breach of the peace or to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity'.

The latter part of the provision is capable of very wide interpretation.

It further makes it an offence to publish 'false news' maliciously (section 8A(1)) and malice is presumed in default of evidence showing that prior to publication, the accused took reasonable measures to verify the truth of the news (section 8A(2)). These provisions were enacted by way of amendment that came into effect early in 1988.

Section 13A(1), which was also enacted by amendment and came into effect early in 1988, provides that any decision of the Minister to refuse to grant or to revoke or to suspend a licence or permit is final and 'shall not be called in question by any court on any ground whatsoever'. Furthermore, section 13B of the Act, which also was enacted by amendment and came into effect early in 1988, provides that no person shall be given an opportunity to be heard with regard to his or her application for a licence or permit, or relating to the revocation or suspension of the licence or permit granted to him or her under this Act.

Section 24 provides that legal proceedings on account of loss or damage sustained as a result of seizure, detention, confiscation, destruction and return, or delay in delivery or return of anything, are barred.

These are severe restrictions on the freedom of expression. While several international human rights conventions embody limitations on certain rights, including the freedom of expression, limitations are interpreted in a strict manner so that the essence of the recognised right is preserved. What further causes concern is the serious limitations imposed on the ability of courts to rectify abuse. A society living under the rule of law cannot function with such serious restrictions on essential freedoms, such as expression and assembly, especially without the possibility of adequate judicial review. The Act should be repealed or extensively amended.

Sedition Act 1948 (revised 1969)

This Act was enacted without relying on Article 149 (of the Constitution that allows laws to be passed by Parliament 'notwithstanding that it is inconsistent with' Articles 5, 9,10 or 13 as was stated earlier.) This is presumably because it is considered not to be in contravention of Article 10 of the Constitution, on the freedom of speech, assembly and association.

The definition of 'seditious tendency' that is at the heart of section 3(1) (a) of the Act is extremely wide. It might be interpreted as rendering unlawful any political campaigning against the ruling party. Section 3(1) (c) has been applied in relation to criticism of certain prosecutions or failures to prosecute. These provisions read as follows:

'3.(1) A "seditious tendency" is a tendency –

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

(b) . . .

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any state.'

Needless to say, these are broad and wide terms that can be easily abused. Reference is made particularly to the cases of the *Public Prosecutor v Param Cumaraswamy* and *Lim Guan Eng v Public Prosecutor* mentioned earlier. The Act contains severe restrictions on the freedom of expression and should be repealed.

Restricted Residence Act 1933 (revised 1989)

Section 2 of this Act gives the Minister power to order a person to reside in a particular area, not to enter a particular area or to be under police supervision for a period of up to five years. This is renewable thereafter for up to one year at a time.

Although Article 9 of the Constitution prohibits banishment and restrictions on freedom of movement, Article 9(2) makes this right subject to the security laws, 'public order, public health, or the punishment of offenders'. These exceptions and their vague terms refute the purpose of this constitutional prohibition of banishment as

well as the guarantee of freedom of movement. This Act should be repealed.

Emergency (Public Order and Prevention of Crime) Ordinance 1969

This Ordinance depends, for its validity, on the continued existence of a proclamation of emergency in terms of Article 150, mentioned above. The Ordinance was promulgated at the time of serious racial disturbances in 1969. It has apparently continued in force because the proclamation of emergency has never been revoked or annulled as provided for in Article 150(3).

It gives the Minister and the police wide powers to arrest and detain persons for 60 days (in the case of the police) and two years (in the case of the Minister). As stated earlier, the Ordinance should be repealed.

Dangerous Drugs (Special Preventive Measures) Act 1985

Like the Internal Security Act, this Act relies, for its validity, on the formula in Article 149 of the Constitution. It would otherwise be inconsistent with the Constitution. The Act allows for the use of detention without charge or trial for an extensive period of time.

Conclusion

Although the Malaysian Constitution guarantees important rights, these rights are often deprived of their meaning and force by constitutional restrictions, many of which also deny judicial review of the executive action. A body of restrictive legislation exists in Malaysia that requires major change if Malaysia is to be ruled in accordance with a just rule of law.

Recommendations

1. Malaysia should become a party to:

   - the International Covenant on Civil and Political Rights;
   - the International Covenant on Economic, Social and Cultural Rights;
   - the International Convention on the Elimination of All Forms of Racial Discrimination;
   - the Convention against Torture and other Cruel, Inhuman or DegradingTreatment.

2. The National Human Rights Commission, the establishment of which is welcomed, should work as an autonomous and independent body in a manner consistent with the Paris Principles Relating to the Status of National Institutions, the Commission on Human Rights Resolution 1992/54, 3 March 1992 and General Assembly Resolution 48/134 of December 1983.

3. An independent Law Commission should be established to review existing legislation and recommend amendments that are consistent with international human rights law. The Bar Council must be involved in this process and be allowed to comment on the substance of existing and proposed legislation.

4. The judiciary should play its role in softening the effect of restrictive laws through interpretation and by applying the principles of justice and equity. This will prevent judges from being considered as tools to quell political dissent and free expression.

5. Original Article 121(1) of the Constitution, amended to provide for only two High Courts, should be restored.

6. Article 149 of the Constitution should be repealed.

7. The proclamation of emergency should be revoked or annulled under the provisions of Article 150(3) of the Constitution.

8. Malaysia should immediately adhere to the provisions of the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief and should consider the appropriateness of discriminating against ethnic Malays on the grounds solely of their religion.

9. The Internal Security Act 1960 should be repealed.

10. The Printing Presses and Publications Act 1984 should be repealed or extensively amended to lessen restrictions on freedom of expression and assembly. Restrictions on judicial review should be removed.

11. The Sedition Act 1948 (revised 1969) should be repealed.

12. The Restricted Residences Act 1933 (revised 1989) should be repealed.

13. The Emergency (Public Order and Prevention of Crime) Ordinance 1969 should be repealed as it essentially overlaps with other legislation, particularly since the serious situation which gave rise to it has long since passed.

14. Rights of due process for persons detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 should be restored by the repeal of section 11C which was inserted by way of amendment in 1989. The rights of due process should be guaranteed for persons detained in terms of the Act.

15. The right of judicial review should be restored in respect of all legislative enactments.

16. Due process, including the right to be given reasons, to be legally represented and to be brought before the courts, should be uniformly introduced into laws involving arrest and detention.

Conclusion and Summary of Recommendations

In this report, we have commented only on those matters which were brought to the attention of the mission and which came within its terms of reference. During the mission's discussions, certain other matters were raised which it considered were outside its terms of reference. We have not commented on these. Also, it may be that there are other matters which would have come within the terms of reference but were not raised with the mission. Obviously, we cannot speculate on that.

Overall, however, our clear impression is that there are well-founded grounds for concern as to the proper administration of justice in Malaysia in cases which are of particular interest, for whatever reason, to the Government. Plainly, this is only a small proportion of the total number of cases which arise, but they are of vital importance to the well-being of the entire system of justice in Malaysia. The central problem appears to lie in the actions of the various branches of an extremely powerful executive, which has not acted with due regard for the other essential elements of a free and democratic society based on the just rule of law. Such due regard requires both a clear grasp of the concept of the separation of powers and also an element of restraint by all branches of the executive. These have not always been evident. There must be a truly independent judiciary, fully prepared at all times to do justice for all, whether strong or weak, rich or poor, high or low, politically compliant or outspoken. There must be an autonomous Bar which is allowed to render its services freely so as to enable it to fulfil the purposes set out in its governing statute. Repression of fundamental liberties should be maintained only if and to the extent that it is absolutely necessary. There is real cause for concern in all of these areas.

Summary of recommendations

Part I – Relationship between Bar and Executive

1. The Bar Council has spoken out publicly against the Government over actions which it perceives threaten fundamental rights and the rule of law. The Council takes seriously its statutory purpose 'to uphold the cause of justice'. Actual and proposed amendments to the LPA 1976 threaten the institutional autonomy of the Bar. These issues, public statements about the Bar by government figures and criticism of some legislation by the Bar have brought the Bar into conflict with the Government on many occasions. The Government feels that the Bar Council has become a political body whose actions should be monitored and restricted.

   We recommend

   (a) The autonomy of the Bar Council should not be threatened or diminished and the right of lawyers to freedom of association must be permitted. Section 46A of the LPA 1976 and sections 28A-E should be repealed.

   (b) The Bar Council should be allowed to render its services freely without fear or favour, so as to enable it to fulfil its statutory purposes. This includes its right to provide constructive criticism of government action and to make such views public.

   (c) The Government should refrain from speaking out publicly against the Bar Council and its members. It should recognise and respect the role of the Bar Council and its right to fulfil its objectives independently which is guaranteed by Article 24 of the UN Basic Principles on the Role of Lawyers:

   > *'Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.'*

Article 18 of the IBA's Standards on the Independence of the Legal Profession, adopted in 1988, states that it is the role of Bar Associations and Law Societies to:

> *'(a) promote and uphold the cause of justice, without fear or favour and (g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation.'*

(d) Regular meetings between the Bar Council and the executive should take place to discuss matters of mutual interest and concern. The mission was pleased to learn, during its visit, that such meetings were planned to start shortly.

2. The police have exerted undue pressure on lawyers and not respected client-lawyer confidentiality.

We recommend that the police should be fully trained regarding the role of the lawyer and refrain from exerting undue pressure on lawyers when the latter are acting in their professional capacity. The police should be advised that lawyers are duty-bound under the law to protect the confidentiality of all communications with their client and should not be coerced or pressed to disclose any part to anyone. Guidelines should be established on police behaviour in relation to lawyers consistent with the 1990 UN Basic Principles on the Role of Lawyers. Clear rules should be incorporated in such guidelines and introduced as part of police training.

Part II – Relationship between Bar and Judiciary

3. The Bar Council's relationship with the judiciary has become extremely strained since the 1988 crisis. Judges feel that there is a decline of standards in the Bar and that members of the Bar are often unmindful of the position of the judges and are all too ready to lower the prestige of the judiciary through unwarranted publicity in the media. The Bar Council feels that judges appear to be, not just impervious to the need for an independent Bar, but are also using the judicial power against lawyers by means of interpretation of the law which is repressive and unjust.

We recommend

(a) Both judges and lawyers should be careful to treat each other with mutual respect and courtesy, particularly so in court or in front of the media where their activities are subject to public view.

(b) Regular meetings between the Bar Council and the senior judiciary should take place to discuss matters of mutual interest. There was a certain reluctance for such meetings, resulting, to some extent, from the personalities involved. This was yet another symptom of the present unhappy situation. We recommend that every effort should be made to overcome any reluctance for these meetings. Only by having them and conducting them in a positive and mutually respectful manner will the proper relationship eventually be restored. Social contacts between the Bar Council and the judiciary should also be resumed with the aim of restoring them to their pre-1988 level.

(c) A mechanism for mediation of disagreements between lawyers and the judiciary should be available. One or more of the organisations involved in this report would be available to assist in arranging suitable mediators.

(d) Steps should be taken to ensure that judges and lawyers are trained to be in no doubt as to the true nature and meaning of the independence of the judiciary.

4. There can be no fair hearing and legal presentation cannot be effective unless a party's advocate is free to advance all arguments and lead admissible evidence which can reasonably be said to support the client's case. There are well-founded grounds for concern that in certain circumstances, the ability of lawyers in Malaysia to render their services freely is adversely affected by the use and threatened use of the contempt power.

We recommend

(a) The courts should act with great forbearance and restraint in the use and threatened use of the contempt power in respect of lawyers when practising their profession. The power should be used only as a last resort when all other means of achieving the proper result have failed.

(b) When considering whether contempt proceedings against lawyers practising their profession are appropriate, due regard should be paid by the court to the sometimes delicate and difficult situations lawyers have to face in the execution of their professional duties. These considerations should also apply to sentences for contempt.

5. The real purpose of the law of contempt is to prevent conduct which prejudices the right to a fair trial rather than actions which individual judges perceive to be offensive to their dignity. It should rarely be necessary for the courts to use, or even threaten to use, the awesome power of contempt of court to discipline lawyers or to dissuade or force lawyers not to pursue their client's cause with the full confidence of their independent judgment. Satisfactory procedures are in existence for dealing with professional misconduct by the Disciplinary Board after the conclusion of the hearing.

We recommend

(a) Unprofessional conduct by lawyers should be dealt with by the Disciplinary Board after the conclusion of the hearing, except in cases where the continuation of the process fairly is impossible.

(b) Imprisonment of lawyers for contempt when practising their profession should be treated as a last resort, applicable only in the most extreme situations.

(c) Failing restraint, the contempt law should be reformed in order to remove the adverse effect it has on the ability of lawyers to render their services freely. Further, it should be examined

with a view to ensuring that it is not based on strict liability, the sentencing is fixed and the law of constructive contempt is not used to stifle *bona fide* criticism of judges and the courts.

(d) At all times, members of the legal profession should act with due regard for the requirements of professional practice and conduct in court as set out in Part VI of the LPA 1976 and the relevant rules. These rules should be observed to the letter and also in their spirit.

6. The Bar Council has a right to be granted a watching brief should it so request. On occasions, the Bar has not been permitted to do so.

We recommend that the Bar Council be granted a watching brief in controversial and difficult cases, if it so requests. This is in accordance with its duties under section 42 of the LPA 1976.

7. In April 1999, the International Court of Justice in The Hague found Malaysia to be in violation of its international obligations because it failed to inform its domestic courts of the assertion of the UN Secretary-General that Dato' Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers, was immune from legal process in respect of actions taken in his capacity as UN Special Rapporteur. This Advisory Opinion is binding on Malaysia.

We recommend that the courts should heed the opinion of the International Court of Justice by affirming the immunity of Dato' Cumaraswamy.

8. Individuals in Malaysia have been sued for enormous amounts of damages for alleged defamation.

We recommend that courts should not allow claims for or awards of damages in defamation cases to be of such magnitude so as to be a means of stifling free speech and expression.

9. There have been instances when members of the executive have made outspoken public comments on the merits of a case both before and during a trial. Such comments could influence the outcome of the trial.

   We recommend that the executive should refrain from speaking publicly about a trial before judgment has been delivered.

10. There is evidence that the executive seeks to stifle criticism from those whom it judges to be its opponents. NGOs are subject to prolonged and continuous harassment.

    We recommend that NGOs should be able to carry out non-violent activities freely, without harassment, and be able to exercise their right to freedom of expression.

Part III – Relationship between Judiciary and Executive

11. In the vast majority of cases which come before the courts in Malaysia, at whatever level, there is no complaint about the independence of the judiciary. However, in cases which are considered of political or economic importance to the executive, there are serious concerns that the judiciary is not independent, either because it is leaned on directly or indirectly by the Government or because it knows what the Government wants and is simply too cowed in the light of past experiences. This perception is also held by members of the general public.

We recommend

(a) That all parties involved – the executive, the judiciary and the legal profession – should recognise that the problem is a genuine one. As is often the case, recognition that a problem exists is in itself a major step towards solving it. In particular, the executive must recognise what the root causes of the problem were and continue to be, namely, a blatant assault on the judiciary by the executive in 1987-1988 and a continuing perception that the executive continues, either directly or indirectly, to influence the judiciary.

(b) The executive should recognise the independent constitutional position of the judiciary and have a proper understanding of what that involves. The failure, by a very powerful executive, to understand that has been, by far, the single most important factor in bringing about the present unsatisfactory position.

(c) The executive should conduct its business in such a way so as to not interfere with the independence of the judiciary in any way. Equally important, it should be careful to conduct its business in such a way as not to be seen by the reasonable observer to be interfering in the independence of the judiciary. Reasonable perception is every bit as important as the truth in a matter of this kind.

(d) The judiciary should act and be seen to act with complete independence from the executive. The decision-making and reasoning of the judiciary in the recent cases of Lim Guan Eng and Anwar Ibrahim have, quite understandably, given real cause for concern in this regard.

(e) Senior members of the judiciary should be astute to protect the more junior judges from anything that is or appears to be executive interference in their independence.

12. The rigour of harsh and draconian legislation has not been mitigated by judicial interpretation.

We recommend that the judiciary does all in its power, in the wider interests of justice, to counter the harshness of repressive legislation and overbearing actions on the part of the executive. That is the role of the judiciary when faced with repression no matter where it comes from. The burden will fall mainly on senior members of the judiciary, who must take the lead. In the present situation and in light of the experiences of 1988, this will require great courage. Even still, we consider it essential if the reputation of the judicial system in Malaysia is to be restored to what it was and what it should be.

13. The choice of judges in some of the high profile cases outlined in the report has been surprising and has raised further doubts about the independence of the judiciary.

    We recommend that the choice of judges for high profile cases should be carefully considered.

14. The executive currently plays an important role in the matter of appointment to the higher judiciary. The system of appointments to the judiciary and the manner in which discussions about appointments take place needs more transparency.

    We recommend that a Judicial Services Commission should be established with the function of recommending judicial appointments. Representatives from the legal profession should be invited to participate as full members in this Commission.

15. There is a preponderance of 'professional' judges drawn from the legal services of the state as compared with judges drawn from the Bar. This gives the impression of the possibility of a pro-Government judiciary.

    We recommend that there should be a significantly greater recruitment to the judiciary from the Bar, the members of which should be prepared to accept posts in the judiciary.

16. The high level of recruitment of judges, particularly to subordinate courts, from the Judicial and Legal Service is a great cause for concern. The Service, which allows for the frequent interchange of judges and prosecutors, creates perceptions that criminal justice is being dispensed by prosecutors and judges from the same legal service. This interdependence could raise doubts about their independence. The prosecution service should be separated from the judicial service.

We recommend

(a) That the interchangeability of lawyers and judges under the combined Judicial and Legal Service should come to an end to ensure the separation of powers and independence of the judiciary.

(b) An independent prosecution system should be established.

17. There is no reason to doubt that senior members of the executive do not actually instruct members of the senior judiciary on how to decide cases. The problem is more subtle and care should be taken not to cross the boundaries, whether inadvertently or not, of what is proper with regard to the separation of powers.

We recommend that members of different branches of the establishment should be very careful about how they are seen in public and by the public.

18. Discussions within the Malaysian judiciary focusing on the independence of the judiciary from an international perspective would be useful.

We recommend that an international conference on the independence of the judiciary be held and training sessions on human rights law be organised for its members.

Part IV – Role of Legislative Power

19. Malaysia is required, as a member of the United Nations, to uphold the principles of the Universal Declaration of Human Rights and should accede to the main international human rights treaties.

We recommend that Malaysia becomes a party to:

(a) the International Covenant on Civil and Political Rights;

(b) the International Covenant on Economic, Social and Cultural Rights;

(c) the International Convention on the Elimination of All Forms of Racial Discrimination;
(d) the Convention against Torture and other Cruel, Inhuman or Degrading Treatment.

20. The establishment of a National Human Rights Commission is welcome.

We recommend that the National Human Rights Commission should work as an autonomous and independent body in a manner consistent with the Paris Principles Relating to the Status of National Institutions, the Commission on Human Rights Resolution 1992/54, 3 March 1992 and General Assembly Resolution 48/134 of December 1983.

21. We are convinced that the pressure of restrictive and needlessly repressive legislation has impacted crushingly on the agencies of the law – the judiciary, the legal profession and the police. The true spirit of justice under the law has become enfeebled. In such a climate, authoritarian personalities flourish, libertarians are frustrated, practitioners are reduced to increasingly frenzied posturing and the police wield extensive and largely unchecked power.

We recommend

(a) An independent Law Commission should be established to review existing legislation and recommend amendments that are consistent with international human rights law. The Bar Council must be involved in this process and be allowed to comment on the substance of existing and proposed legislation.

(b) With regard to the Constitution:

(i) The original Article 121(1) of the Constitution, amended to provide for only two High Courts, should be restored.
(ii) Article 149 of the Constitution should be repealed.

(iii) The proclamation of emergency should be revoked or annulled under the provisions of Article 150(3) of the Constitution.

(iv) Malaysia should immediately adhere to the provisions of the UN Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief and should consider the appropriateness of discriminating against ethnic Malays on the grounds solely of their religion.

(v) The Internal Security Act 1960 should be repealed.

(vi) The Printing Presses and Publications Act 1984 should be repealed or extensively amended to lessen restrictions on freedom of expression and assembly. Restrictions on judicial review should be removed.

(vii) The Sedition Act 1948 (revised 1969) should be repealed.

(viii) The Restricted Residences Act 1933 (revised 1989) should be repealed.

(ix) The Emergency (Public Order and Prevention of Crime) Ordinance 1969 should be repealed as it essentially overlaps with other legislation and particularly since the serious situation which gave rise to it has long since passed.

(x) Rights of due process for persons detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 should be restored by the repeal of section 11 which was inserted by way of amendment in 1989. The rights of due process should be guaranteed for persons detained in terms of the Act.

(xi) The right of judicial review should be restored in respect of all legislative enactments.

(xii) Due process, including the right to be given reasons, to be legally represented and to be brought before the courts, should be uniformly introduced into laws involving arrest and detention.

22. The judiciary can lessen the effect of draconian laws and judges should have the courage to rise up to this challenge.

We recommend that the judiciary should play its role in softening the effect of restrictive laws through interpretation and application of the principles of justice and equity. This will prevent judges from being considered as tools to quell political dissent and free expression.

Appendix 1

Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its Resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Appendix 2
Basic Principles on the Role of Lawyers

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest, the Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction,

without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.
10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.
11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
13. The duties of lawyers towards their clients shall include:
    (a) advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
    (b) assisting clients in every appropriate way, and taking legal action to protect their interests;
    (c) assisting clients before courts, tribunals or administrative authorities, where appropriate.
14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance

with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.
20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.
27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.
28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

Appendix 3
Persons with whom the Delegation had Meetings

The Chief Justice of Malaysia

The President of the Court of Appeal of Malaysia

The Chief Judge of the High Court in Malaya

The Chief Judge of the High Court in Sabah and Sarawak

Court of Appeal Judge Gopal Sri Ram

Datuk Ibrahim Ali, Deputy Minister, Prime Minister's Department

The Officers of the Bar Council of Malaysia

The Members of the Bar Council of Malaysia

Tun Mohamed Suffian Hashim, Lord President of the Supreme Court 1974-1982

Tun Haji Mohamed Salleh Abas, Lord President of the Supreme Court 1984-1988

Lim Kit Siang (Member of Parliament and Parliamentary Opposition Leader)

Dato' Param Cumaraswamy (UN Special Rapporteur on the Independence of Judges and Lawyers)

Karpal Singh, Opposition Member of Parliament and Counsel for Lim Guan Eng

Dr Dato' Cyrus Das, immediate past-Chairman of the Bar Council of Malaysia

Tommy Thomas

Members of the Defence Team in the trial of Datuk Seri Anwar Ibrahim
- *Raja Aziz Addruse*
- *Zainur Zakaria*
- *Christopher Fernando*
- *Anwar Ibrahim*
- *Pawancheek Marikan*
- *Kamar Ainiah*

Irene Fernandez, Director, Tenaganita (NGO)

Ahmad Faiz Abdul Rahman, Assistant Director, International Movement for a Just World (NGO)

Officers of Suaram (NGO)
- *Elizabeth Wong*
- *Lee Siew Hwa*

Appendix 4

Part IX of the Federal Constitution of Malaysia

Part IX
The Judiciary

121. (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely–

(a) one in the States of Malaya, which shall be known as the High Court of Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court of Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (*Repealed*)

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1_A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

(1_B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry in Kuala Lumpur, and the Court of Appeal shall have the following jurisdiction, that is to say–

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law.

(2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say–
   (a) jurisdiction to determine appeals from decision of the Court of Appeal, of the High Court or a judge thereof;
   (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
   (c) such other jurisdiction as may be conferred by or under federal law.

(3) Subject to any limitations imposed by or under federal law, any order, decree, judgment or process of the courts referred to in Clause (1) or of any judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.

(4) In determining where the principal registry of the High Court in Sabah and Sarawak is to be, the Yang di-Pertuan Agong shall act on the advice of the Prime Minister, who shall consult the Chief Ministers of the States of Sabah and Sarawak and the Chief Judge of the High Court.

122. (1) The Federal Court shall consist of a president of the Court (to be styled 'the Chief Justice of the Federal Court'), of the President of the Court of Appeal, of the Chief Judges of the High Courts and, until the Yang di-Pertuan Agong by order otherwise provides, of *four other judges and such additional judges as may be appointed pursuant to Clause (1_A).

* Now 'seven' – see P.U. (A) 114/82.

(1_A) Notwithstanding anything in this Constitution contained, the Yang di-Pertuan Agong acting on the advice of the Chief Justice of the Federal Court may appoint for such purposes or for such period of time as he may specify any person who has held high judicial office in Malaysia to be an additional judge of the Federal Court:

Provided that no such additional judge shall be ineligible to hold office by reason of having attained the age of sixty-five years.

(2) A judge of the Court of Appeal other than the President of the Court of Appeal may sit as a judge of the Federal Court where the Chief Justice considers that the interests of justice so require, and the judge shall be nominated for the purpose (as occasion requires) by the Chief Justice.

122_{A}. (1) The Court of Appeal shall consist of a chairman (to be styled the 'President of the Court of Appeal') and, until the Yang di-Pertuan Agong by order otherwise provides, of ten other judges.

(2) A judge of a High Court may sit as a judge of the Court of Appeal where the President of the Court of Appeal considers that the interests of justice so require, and the judge shall be nominated for the purpose (as occasion requires) by the President of the Court of Appeal after consulting the Chief Judge of that High Court.

122_{AA}. (1) Each of the High Courts shall consist of a Chief Judge and not less than four other judges; but the number of other judges shall not, until the Yang di-Pertuan Agong by order otherwise provides, exceed–

(a) in the High Court in Malaya, forty-seven; and

(b) in the High Court in Sabah and Sarawak, ten.

(2) Any person qualified for appointment as a judge of a High Court may sit as a judge of that Court if designated for the purpose (as occasion requires) in accordance with Article 122_{B}.

122_{AB}. (1) For the despatch of business of the High Court in Malaya and the High Court in Sabah and Sarawak, the Yang di-Pertuan Agong acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may by order appoint to be judicial commissioner for such period or such purposes as may be specified in the order any person qualified for appointment as a judge of a High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as

appear to him to require to be performed; and anything done by him when acting in accordance with his appointment shall have the same validity and effect as if done by a judge of that Court, and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of that Court.

(2) The provisions of Clauses (2) and (5) of Article 124 shall apply to a judicial commissioner as they apply to a judge of a High Court.

122_B. (1) The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122_C) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.

(2) Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice of the Federal Court, the Prime Minister shall consult the Chief Justice.

(3) Before tendering his advice as to the appointment under Clause (1) of the Chief Judge of a High Court, the Prime Minister shall consult the Chief Judge of each of the High Courts and, if the appointment is to the High Court of Sabah and Sarawak, the Chief Minister of each of the States of Sabah and Sarawak.

(4) Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice, President or a Chief Judge, the Prime Minister shall consult, if the appointment is to the Federal Court, the Chief Justice of the Federal Court, if the appointment is to the Court of Appeal, the President of the Court of Appeal and, if the appointment is to one of the High Courts, the Chief Judge of that Court.

(5) This Article shall apply to the designation of a person to sit as judge of a High Court under Clause (2) of Article 122_{AA} as it applies to the appointment of a judge of that court other than the Chief Judge.

(6) Notwithstanding the dates of their respective appointments as judges of the Federal Court, of the Court of Appeal or of the High Courts, the Yang di-Pertuan Agong, acting on the advice of the Prime Minister given after consulting the Chief Justice, may determine the order of precedence of the judges among themselves.

122_C. Article 122_B shall not apply to the transfer to a High Court, otherwise than as Chief Judge, of a judge of another High Court other than the Chief Judge; and such a transfer may be made by the Yang di-Pertuan Agong, on the recommendation of the Chief Justice of the Federal Court, after consulting the Chief Judges of the two High Courts.

123. A person is qualified for appointment under Article 122_B as a judge of the Federal Court, as a judge of the Court of Appeal or as a judge of any of the High Courts if–

(a) he is a citizen; and

(b) for the ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another.

124. (1) The Chief Justice of the Federal Court shall before exercising the functions of his office take and subscribe the oath of office and allegiance set out in the Sixth Schedule, and shall do so in the presence of the Yang di-Pertuan Agong.

(2) A judge of the Federal Court, the Court of Appeal or a High Court, other than the Chief Justice of the Federal Court, shall before exercising the functions of a judge take and subscribe the oath of office and allegiance set out in the Sixth Schedule in relation to his judicial duties in whatever office.

(3) A person taking the oath on becoming Chief Judge of a High Court shall do so in the presence of the senior judge available of that High Court.

(4) Subject to Clause (3), a person taking the oath on becoming a judge of the Federal Court shall do so in the presence of

the Chief Justice or, in his absence, the next senior judge available of the Federal Court.

(5) A person taking the oath on becoming a judge of the Court of Appeal or a High Court (but not Chief Judge) shall do so in the presence of the Chief Judge of that Court or, in his absence, the next senior judge available of that Court.

125. (1) Subject to the provisions of Clauses (2) to (5), a judge of the Federal Court shall hold office until he attains the age of sixty-five years or such later time, not being later than six months after he attains that age, as the Yang di-Pertuan Agong may approve.

(2) A judge of the Federal Court may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong but shall not be removed from office except in accordance with the following provisions of this Article.

(3) If the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Federal Court ought to be removed on the ground of any breach of any provision of the code of ethics prescribed under Clause (3_A) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with Clause (4) and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.

(3_A) The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, may, after consulting the Prime Minister, prescribe in writing a code of ethics which shall be observed by every judge of the Federal Court.

(4) The said tribunal shall consist of not less than five persons who hold or have held office as judge of the Federal Court, the Court of Appeal or a High Court or, if it appears to the Yang di-Pertuan Agong expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth, and shall be presided over by the member first in the following order, namely, the Chief Justice of the Federal Court, the President

and the Chief Judges according to their precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointments of the same date).

(5) Pending any reference and report under Clause (3) the Yang di-Pertuan Agong may on the recommendation of the Prime Minister and, in the case of any other judge after consulting the Chief Justice, suspend a judge of the Federal Court from the exercise of his functions.

(6) Parliament shall by law provide for the remuneration of the judges of the Federal Court, and the remuneration so provided shall be charged on the Consolidated Fund.

(6_A) Subject to the provisions of this Article, Parliament may by law provide for the terms of office of the judges of the Federal Court other than their remuneration.

(7) The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantage after his appointment.

(8) Notwithstanding Clause (1), the validity of anything done by a judge of the Federal Court shall not be questioned on the ground that he had attained the age at which he was required to retire.

(9) This Article shall apply to a judge of the Court of Appeal and to a judge of a High Court as it applies to a judge of the Federal Court, except that the Yang di-Pertuan Agong before suspending under Clause (5) a judge of the Court of Appeal or a judge of a High Court other than the President of the Court of Appeal or the Chief Judge of a High Court shall consult the President of the Court of Appeal or the Chief Judge of that High Court instead of the Chief Justice of the Federal Court.

(10) The President of the Court of Appeal and the Chief Judges of the High Courts shall be responsible to the Chief Justice of the Federal Court.

125$_A$. (1) Notwithstanding anything contained in this Constitution, it is hereby declared that–

(a) the Chief Justice of the Federal Court and a judge of the Federal Court may exercise all or any of the powers of a judge of the Court of Appeal and of a judge of a High Court;

(b) the President of the Court of Appeal and a judge of the Court of Appeal may exercise all or any of the powers of a judge of a High Court; and

(c) a judge of the High Court in Malaya may exercise all or any of the powers of a judge of the High Court in Sabah and Sawarak, and *vice versa.*

(2) The provisions of this Article shall be deemed to have been an integral part of this Constitution as from Malaysia Day.

126. The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

127. The conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

128. (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction–

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any other question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction

(subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

(3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

129. (*Repealed*)

130. The Yang di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it.

131. (*Repealed*)

131_A. (1) Any provision made by federal law for the functions of the Chief Justice of the Federal Court or the President of the Court of Appeal or the Chief Judge of a High Court to be performed, in the event of a vacancy in the office or of his inability to act, by a judge of the Federal Court may extend to his functions under this Constitution.

(2) Any provision made by federal law for the functions of the President of the Court of Appeal or the Chief Judge of a High Court to be performed, in the event of a vacancy in the office or of his inability to act, by another judge of the Court of Appeal or the High Court, as the case may be, may extend to his functions under this Constitution other than functions as judge of the Federal Court.

Appendix 5

Press Statement by the President of the Malaysian Bar

The Attorney-General's statement, widely reported in the press on 12 May 1999, that those who allege 'selective prosecution', or make any such allegations, against him risk prosecution shows a lack of respect or understanding of the concept of democracy and the Rule of Law.

Being the first law officer of the nation and entrusted with the duty to protect the Constitution and public interest, he ought to constantly keep in mind the well-known advice of Lord Denning:

'To every subject of the land, however powerful, I would use Thomas Fuller's words over three hundred years ago, "Be ye never so high, the law is above you".'

'He ought also not to forget that the Prime Minister had, during the constitutional crisis involving the immunity of the Rulers in 1992, also affirmed his belief that "No one is above the law".'

If one truly believes that no one is above the law, then one cannot possibly accept the Attorney-General's argument that 'to allege double-standards against the Public Prosecutor in deciding which cases ought to be brought before the courts ... amounts to denigrating and undermining the administration of justice'. However widely the passage which the Attorney-General quoted from the judgment in the *Lim Guan Eng* case may have been put, it cannot have been intended by the Court of Appeal to have the effect of holding the Attorney-General ever so high as to be above the law. Whether the allegation of 'selective prosecution' or 'double-standards' constitutes an offence would depend on whether the Attorney-General had, indeed, acted wrongly.

The reason given for the proposition that the Attorney-General cannot be criticised for deciding whether or not to prosecute is that it is in him alone that the discretion to make such a decision is conferred by Article 145(3) of the Federal Constitution. That is undeniably so. But

in a democracy, no discretion can ever be taken to be absolute. As Raja Azlan Shah FJ (as he then was) said:

'Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship ... In other words, every discretion cannot be free from legal restraint ...'

The prevention of the abuse of discretionary power is inherent in the concept of the Rule of Law. The authority charged with dealing with such abuse is the courts. As with every question of abuse, the courts must try to strike a balance between the competing interests posed by the need for a fair and efficient administration of justice and the need to protect the citizen against the arbitrary exercise of power, in this case, by the Attorney-General. It is the courts that must determine whether a criticism of the Attorney-General with regard to his performance of his duties under Article 145(3) amounts to an abuse of power.

It is, therefore, not in keeping with his office for the Attorney-General to warn citizens that they could be prosecuted for sedition, if they criticised him. So long as he exercised his discretion properly he should not fear any criticism. If he is criticised for any alleged failure, he must justify his decision by explaining his action. Ignoring the criticism by threatening prosecution is not the way to solve the problem.

The Attorney-General, above all others, must take the lead in showing that public officers, especially those holding high office, subscribe to the principle of accountability and transparency. His statement, sadly and regrettably, is gravely wanting in that respect.

R R Chelvarajah
President, Malaysian Bar

Dated: 14 May 1999

Appendix 6

Comment on the Use of the Contempt Power in Malaysia in the Context of International Human Rights Law

Andrew Nicol QC

The enthusiastic use of the power to punish for contempt described in this report conflicts with two vital principles which are universally recognised in international human rights instruments – the right to a fair trial and the right to freedom of expression.

Article 14(1) of the International Covenant on Civil and Political Rights guarantees 'a fair and public hearing by a competent, independent and impartial tribunal' in the determination of rights and obligations. A criminal defendant has an express right to defend himself through a legal representative of his own choosing and the same is implicitly contained in the right of civil litigants to a fair hearing (see the position under the comparable provisions of Article 6 of the European Convention of Human Rights[1]). There can be no fair hearing and legal representation cannot be effective unless a party's advocate is free to advance all arguments and lead admissible evidence which can reasonably be said to support the client's case. It is the recognition that lawyers must have this freedom which lies behind the absolute privilege which they enjoy (in the common law system at least) against actions for defamation for anything said or done in court.

The same concept of a fair trial will also mean that the judge must be able to conduct the case in an orderly manner. This cannot be done if advocates and litigants do not observe the judge's rulings. A power to enforce such rulings is not necessarily incompatible, therefore, with the guarantee of a fair trial. However, national appellate courts which have had to consider the matter have consistently warned of the dangers of judges being too ready to make use of the contempt power. As Lord

Atkin said in *Ambard v Attorney-General for Trinidad and Tobago*[2]: 'Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even outspoken, comments of ordinary men'. An advocate who is properly conducting himself may sometimes need to argue that the judge has been guilty of unjudicious conduct, but this is not to be automatically equated with contempt of court.[3] Likewise, it must be open to a litigant or advocate to make reasoned submissions as to why a particular judge will either be actually biased or why there may be the appearance of bias. Without this, there would be no effective remedy for a potential infringement of the right to an 'impartial tribunal'.

It is far too sweeping to suggest therefore that the imputation of partiality or lack of integrity is always a contempt of court. The Judicial Committee of the Privy Council has recently had to consider the offence of 'scandalising the court'. It decided that this remained part of the law of Mauritius and was not incompatible with the Mauritian Constitution. However, as Lord Steyn said[4]:

> *'It must be borne in mind that the offence is narrowly defined, it does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the right of criticising, in good faith in private or public, the public act done in the seat of justice... The classic imputation of such an offence is the imputation of improper motives to a judge. But so far as* Ambard *'s case may suggest that such conduct invariably be an offence, their Lordships consider that such an absolute statement is not nowadays acceptable. For example, if a judge descends into the arena and embarks on extensive and plainly biased questioning of a defendant in a criminal trial, a criticism of bias may not be an offence. The exposure and criticism of such conduct would be in the public interest. On this point, their Lordships prefer the view of the Australian courts that such conduct is not necessarily an offence:* R v Nicholls *(1911) 12 CLR 280.'*

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[1] Eg *Pelladoah v Netherlands* (1994) 19 EHRR 81.

It remains a controversial matter as to whether 'scandalising the court', even with the restrictions which Lord Steyn described, should continue to be an offence. As the Privy Council noted, no successful prosecution has been brought in England for 60 years, a period which has seen ample examples of vituperative criticism of the courts and the judiciary. The Privy Council took into account 'that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom'. Again, this is a matter of controversy since it might also be said that the risk of judicial impropriety does not decrease with the size of the jurisdiction and it is in small jurisdictions in particular that the active existence of an offence of scandalising the court is likely to cast a chilling effect on freedom of speech.

A further reason why scandalising the court is so controversial is that it is often invoked by the summary procedure whereby the judge acts as prosecutor and judge in a more or less immediate trial of the accused contemnor. It is very difficult to reconcile this situation with the guarantees of fairness and impartiality in Article 14 of the ICCPR and Article 6 of the ECHR. At the very least, it adds substantial force to the exhortations which have been made in the past for judges to exercise the greatest restraint in the use of this power and stimulate appellate courts to extra vigilance, when hearing appeals against its exercise.

The ICCPR and regional human rights instruments such as the European Convention on Human Rights recognise the fundamental importance of freedom of expression in a democracy. While there are occasions when speech can be curbed or punished or restricted, three cardinal principles must be observed: the restriction must pursue a legitimate aim; the measure must satisfy the requirement of legal certainty; the measure must be necessary in a democratic society which, in turn, imports the principle that any restriction must be proportionate. The legitimate aim must be found in the text of the international instrument itself. The European Convention expressly permits restrictions whose aim is maintaining the authority or the impartiality of the judiciary. The ICCPR has no direct parallel although Article 19(3) does permit restrictions which are necessary for the protection of the rights and reputations of others or public order. Legal certainty is difficult to achieve with an offence such as contempt which has a protean capacity to develop and expand in the case of scandalising the court. The age of some precedents and their jurisdictional origin mean that

they make an unpredictable contribution to the present state of the law. However, the importance of the third principle is particularly great. The use of the contempt power to stifle good faith criticism of the judiciary could not possibly be necessary in a democratic society and would, on the contrary, be antithetical to it. The use of the contempt power in a manner that obstructed the measured and reasonable presentation of a litigant's case likewise could not be justified. Even were there a combination of circumstances which would allow the court to conclude that action was necessary to protect the authority or impartiality of the judiciary or public order, care would need to be taken to see that the response was proportionate. Where professional lawyers are considered to have overstepped the mark, it will often be sufficient to allow the disciplinary body of the profession to investigate and, if necessary, to impose a penalty. Thus, the European Court of Human Rights recently held that Article 10 had not been violated when a Swiss lawyer's professional association fined him 500 Swiss francs because he had held a press conference at which he had criticised the public prosecutor in a pending case.[5] The Court confirmed that lawyers were free to comment on the administration of justice, but because of their special role in the administration of justice, it was legitimate to expect them to observe greater discretion. The Court noted that the lawyer in this case had addressed his remarks at a press conference and had not exhausted available remedies for his grievances within the pending case and the judicial process. A further factor which influenced the Court was the modest amount of the penalty. If the court is entitled to, and does impose punishment itself, it also must observe the proportionality principle.

The history of contempt across the common law world is littered with examples of judges who, in the heat of the moment, imposed a penalty which an appellate court has overturned as too severe.

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[5] *Schopfer v Switzerland* (1999) 4 BHRC 623, ECHR.

Appendix 7

Article 149 of the Federal Constitution

149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation–

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of the Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

Appendix 8

Memorandum on the Repeal of Laws relating to Detention without Trial by the President of the Malaysian Bar

Purpose

The purpose of this Memorandum is to urge the Government to repeal all laws relating to detention without trial, in particular the Internal Security Act 1960 (ISA).

This is in keeping with Malaysia's pledge to uphold positive universal values in all aspects of national development and for the promotion of the rule of law, international human rights standards and established religious values and norms.

The Malaysian Bar at its general meeting on 10 October 1998 attended by some 2,480 lawyers adopted unanimously a resolution calling for the repeal of all laws for detention without trial and for the Bar Council to take all necessary steps to work towards the realisation of this resolution.

Scope

Currently, there are three major laws in force in Malaysia which provide for detention without trial:

(1) the Internal Security Act 1960 (ISA) [1];
(2) the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) [2];
(3) the Dangerous Drugs (Special Prevention Measures) Act 1985 (DSPMA). [3]

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[1] See, in particular, sections 8, 8B and 73.
[2] See especially sections 3, 4, 7A and 7C.
[3] Please refer to sections 3, 6, 11A and 11C.

Under these laws, the Minister of Home Affairs may detain a person for a period not exceeding two years on the suspicion or belief that the detention of that person is necessary in the interest of public order or security. It is significant to note that in law, this is an executive detention order and not a detention pursuant to a judicial decision.

The detention orders may be renewed from time to time.

Further, under section 73 of the ISA, the police are also empowered to detain a person for up to 60 days pending inquiry into the belief that he has acted in a manner prejudicial to security.

In addition to these three laws, there are 11 other pieces of legislation that curtail and/or marginalise civil rights. These are:

(1) Restricted Residence Act 1933[4];
(2) Sedition Act 1948[5];
(3) Public Order (Preservation) Act 1958[6];
(4) Prevention of Crimes Act 1959;
(5) Trade Unions Act 1959;
(6) Police Act 1967[7];
(7) Societies Act 1966[8];
(8) Universities and Universities Colleges Act 1971[9];
(9) Official Secrets Act 1972[10];
(10) Essential (Security Cases) Regulations 1975[11];
(11) Printing Presses and Publications Act 1984.[12]

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[4] It is by way of administrative order without trial: see in particular sections 2, 7 and 8.
[5] Sections 3(3) and 11 are particularly severe.
[6] The severe provisions are contained in sections 13, 14(2) and 17.
[7] Sections 27 and 27A(3) are an encroachment on the freedom of assembly under the Federal Constitution.
[8] Sections 18B and 18C seek to completely exclude any legal remedy for an aggrieved member.
[9] Sections 15, 15B and 15D are harsh and impose restrictions on students as regards their liberty.
[10] See sections 15 and 18.
[11] Particularly objectionable is section 27 which provides for the rearrest of an acquitted person pending appeal.
[12] This Act contains numerous unfair restrictions, eg sections 13, 13A, 13B, 20 and 24.

History

Laws such as the Restricted Residence Act and the ISA are either relics of British colonialism or adapted from war-time legislation employed in the United Kingdom.

Section 8 of the ISA, for instance, is akin to regulation 18B of the Defence of the Realm Act 1939 in the United Kingdom.

Further, the Parliamentary debates in the Dewan Rakyat in June 1960 reflect that the ISA was enacted in this country for the sole purpose of fighting the communist insurgency and it was intended as a temporary measure until that threat was removed.[13]

It has, therefore, outlived its purpose as there has been no armed insurgency within or without the country since the Malaysian Communist Party laid down its arms and gave up its struggle officially after the signing of the Bangkok Accord on 24 December 1989.[14]

Further rationale for repeal

Besides the fact that detention without trial is the very antithesis of the rule of law, two compelling reasons why these statutes should be repealed are:

(1) *Sufficient legislation to meet any threat to law and order.* There is already sufficient legislation to deal with every conceivable eventuality relating to public order and security. Apart from the offences listed under the Penal Code and the Police Act relating to public order, there is also the Sedition Act and the Printing Presses and Publications Act relating to statements and publications. In addition, there are also emergency laws under the Emergency Powers Act 1979 made under Article 150 of the Federal Constitution.

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[13] The sole purpose for enacting the ISA was to deal with communist insurgency. This was repeated by various speakers at the parliamentary sitting concerned. The then Deputy Prime Minister, Tun Abdul Razak said; 'It is necessary to have this legislation to make provisions for our efforts to continue this fight against communist terrorists. This is why we have this Internal Security Bill'. The Government at the relevant time gave 'a solemn promise to Parliament and the nation that the ISA would never be used to stifle legitimate opposition and silence lawful dissent'.

[14] See Dato' Dr Rais Yatim, *Freedom Under Executive Power in Malaysia* (1955 edn), p 293.

(2) *Absence of safeguards against abuse of discretionary power under preventive detention laws.* A notable feature of preventive detention laws is the discretionary power of detention conferred on the authorities. Our highest court, the Federal Court, had once cause to comment on discretionary powers generally that 'unfettered discretion is a contradiction in terms ... it is a stringent requirement that discretion must be exercised for a proper purpose ...' (the Sri Lempah decision [1979] 1 MLJ 135 at 148). The wording of the ISA, in particular, lends itself to possible abuse in the hands of overzealous authorities involved in the detention process. It has been noted that the ISA is sought to be applied to circumstances and occasions not contemplated when the statute was enacted.[15] For example, in the recent past, the ISA has been invoked or threatened to be invoked in respect of those alleged to have spread rumours, forged passports, cloned handphones, breached copyrights, etc.

All these alleged law-breakers should properly be charged under existing legislation as has been done in some of the cases above.

Conclusion

The power of detention without trial remains an exception to the norms of any fair, just, equitable and democratic society. As our Prime Minister Dato' Seri Dr Mahathir Mohamed is quoted in a book as having once stated: 'no one in his right senses likes the ISA. It is in fact a negation of the principles of democracy'.[16]

In a democratic society like Malaysia, it does not augur well for the future of the rule of law, if laws allowing for detention without trial remain in our statute books.

The abolition of the ISA (and all legislation that provides for detention without trial) is therefore imperative for the advancement of the rule of law and for the full realisation of that objective in our society.

Dato' Dr Cyrus V Das
President, Malaysian Bar

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[15] Extracts from three affidavits (by Tunku Abdul Rahman, Tun Hussein Onn and Tan Sri Tan Chee Khoon).
[16] See Dato' Dr Rais Yatim, *Freedom Under Executive Power in Malaysia*, p 258.

Commonwealth Lawyers' Association (CLA)

The Commonwealth Lawyers' Association exists to maintain and promote the rule of law throughout the Commonwealth by ensuring that the people of the Commonwealth are served by an independent and efficient legal profession.

The CLA objectives are to maintain and promote the rule of law in the Commonwealth by:

- Ensuring that a common bond of Commonwealth is preserved and fostered;
- Strengthening professional links between members of the legal profession;
- Maintaining the honour and integrity of the profession and promoting uniformity in the standards of professional ethics;
- Supporting improved standards of education and promoting exchanges of lawyers and students.

CLA seeks to achieve these goals by:

- Engaging CLA member associations in a variety of human rights initiatives through advocacy and legal aid;
- Playing a leading role, as founding member and trustee on its governing council, in the Commonwealth Human Rights Initiative;
- Bringing in experts from legal, governmental and non-governmental agencies to conferences to discuss topical issues on human rights;
- Providing a forum for debate and information on topical human rights issues through its journal "The Commonwealth Lawyer", and newsletter "Clarion".

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Union Internationale des Avocats (UIA)

UIA is the oldest association of bar associations and law societies. It has among its main objectives:

- The promotion of the basic principles of the legal profession as a defender of citizens' rights
- The defence of the profession in the national and international context, in support of an international order based on the principles of human rights and justice between nations, through the rule of law and in the cause of peace;
- The defence of the interests of members of the legal profession and study of the problems arising in the practice of the legal profession on an international level.

To achieve these objectives, the UIA:

- Co-operates, through its consultative status and otherwise with national or international organisations with similar objectives;
- Provides advice to the Council of Europe and UN, as a Category II Non Governmental organisation, and in connection to the establishment of an International Criminal Court and the ad hoc tribunals for the former Yugoslavia and Rwanda;
- Adopts resolutions of a general nature for the defence of human rights and seeks to ensure that these charters are given effect through its action within the framework of international organisations and by the nearly 300 bar associations and law societies which hold collective membership of the Association;
- Intervenes to defend lawyers who may be imprisoned or persecuted in the practise of their profession.

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The decision to send a joint mission to Malaysia by four international legal organisations in April 1999, followed reports that the independence of the judiciary was under threat and that lawyers were facing difficulties in carrying out their work freely and independently.
The high profile trial of former Deputy Prime Minister, Datuk Seri Anwar Ibrahim, highlighted some of these problems.

"Justice in Jeopardy: Malaysia in 2000", the report of the International Bar Association, the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, the Commonwealth Lawyers' Association and the Union Internationale des Avocats examines the relationship between the Executive, judiciary and legal profession in Malaysia, as well as the role of legislative power in that country. It makes a number of recommendations for change.