

Malaysia

The Malaysian judiciary, although it generally acts independently, was widely seen to be complicit in political prosecutions by the government, particularly in the trial of former Deputy Prime Minister, Anwar Ibrahim. There were continuing tense relations between the judiciary and the legal profession and there were sustained attacks on the independence of the legal profession by the government. The government instituted sedition proceedings against Karpal Singh, Anwar Ibrahim's defence lawyer, for statements he made in court in the defence of his client. Malaysia continues to act in defiance of the International Court of Justice, by not granting the Special Rapporteur for the Independence of Judges and Lawyers immunity from prosecution.

Malaya gained independence from the United Kingdom in 1957. In 1963 the areas of Malaya, Sabah, Sarawak and Singapore joined to form the Federation of Malaysia. Singapore left the Federation in 1965. The Federation of Malaysia currently consists of thirteen states: the eleven states of peninsular Malaysia and the two states of Sabah and Sarawak on the island of Borneo.

Malaysia is a constitutional monarchy, headed by the Yang di-Pertuan Agong, who is elected by the Conference of Rulers for a term of five years. The Conference of Rulers consists of the hereditary rulers of the states of peninsular Malaysia. The current Yang di-Pertuan Agong is Salahuddin Abdul Aziz Shah who was elected in April 1999.

The Constitution embodies the principle of the separation of powers. The legislative power of the Federation is vested in a bicameral parliament consisting of the Senate (Dewan Negara) and the House of Representatives (Dewan Rakyat). The Senate consists of 26 members elected by state assemblies and 43 appointed by the Yang di-Pertuan Agong. The members of the House of Representatives are directly elected by the public for a period of five years. The National Front (Barisan Nasional), a coalition of twelve parties dominated by the United Malays National Organisation (UMNO) has held power since independence.

The executive authority is vested in the Yang di-Pertuan Agong and is exercisable by him or by the Cabinet, or any other minister authorised by the Cabinet. Section 40 of the Constitution requires that the Yang di-Pertuan Agong act in accordance with the advice of the Cabinet or the Prime Minister. The Cabinet is appointed by the Yang di-Pertuan Agong and is collectively responsible to the parliament.

Each of the thirteen states of Malaysia has its own constitution and legislative assembly. The federal Constitution delineates the respective legislative competences of the federal and state parliaments.

Concurrent federal and state elections were held in November with the ruling National Front Coalition maintaining its two thirds majority. The UMNO lost twenty seats including those of five cabinet ministers. Dr Mahathir bin Mohamed Iskandar continued as Prime Minister for his fifth consecutive term.

The International Bar Association, the Centre for the Independence of Judges and Lawyers, the Commonwealth Lawyers Association and the Union Internationale des Advocats conducted a joint mission to Malaysia from 17-27 April 1999. The mission examined the legal guarantees for the independence of the judiciary and whether they are respected in

practice; the ability of lawyers to render their services freely and whether there were any impediments to the proper administration of justice. The report, entitled *Justice in Jeopardy*, was published in April 2000.

Human Rights Background

Human rights continue to be routinely violated in Malaysia. The trial of former Deputy Prime Minister, Anwar Ibrahim, highlighted the repressive measures that the Malaysian Government uses against what it perceives as actions prejudicial to Malaysia or as representing a lack of understanding of sensitive issues facing the government.

Anwar Ibrahim was found guilty on 14 April 1999, on four charges of corruption under the Emergency (Essential Powers) Ordinance 1970 No. 22 and sentenced to six years imprisonment. The trial was widely seen to be unfair, and was criticised by NGO's and the governments of Australia, the Philippines, the United States of America and the European Union.

During the trial allegations were made of coerced confessions, torture and police brutality. Anwar Ibrahim himself was subject to a beating by the Inspector-General of Police, Abdul Rahim Noor. Peaceful public protests in support of Anwar Ibrahim were the subject of excessive force by the police, with the use of tear gas, water cannons and mass arrests.

The trial itself was considered to be unfair, with the prosecution being permitted to alter the charges after the completion of their evidence; the Attorney General being permitted to head the prosecution team despite being implicated in Anwar Ibrahim's defence of political conspiracy; the determination of the relevance of defence witnesses before they had given evidence; and finally, the defence of political conspiracy being ruled irrelevant by the presiding judge.

International Obligations

Malaysia is party to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, both with reservations, and the Convention on the Prevention and Punishment of the Crime of Genocide. It is not a party to the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, citing the reason that they do not properly reflect Asian values.

Domestic Obligations

Part II of the Federal Constitution of Malaysia protects certain fundamental liberties. These include the right to life, freedom from slavery, equality before the law, freedom of religion and the freedom of movement, speech, peaceful assembly and association. However, the Constitution allows the derogation from these rights as is deemed necessary or expedient in the interest of the security of the Federation or public order and morality.

Sections 149 and 150 allow the derogation from the provisions of Part II of the Constitution. Section 149 allows the parliament to promulgate a law in response to actions taken or

threatened by a substantial body of persons that, inter alia, excite disaffection against the government. This law can be inconsistent with the provisions regarding the freedoms of speech, assembly and association and the due process of law, including the right to be represented by a lawyer. Section 150 allows the declaration of a state of emergency by the Yang di-Pertuan Agong where the security or economic life of the Federation is threatened.

A declaration of a state of emergency was made in 1969 and has not been revoked by the Yang di-Pertuan Agong, or by a resolution of both houses of parliament as required by the Constitution.

Restrictive Legislation

Various pieces of legislation have been enacted under the exceptions provided by the Constitution which allow the government to violate human rights with impunity. The Internal Security Act 1960, based on Section 149, allows the executive to detain persons for two years without trial, renewable indefinitely and not subject to judicial review, except on procedural matters. The act also provides the police with the power to detain a person suspected of "acting in a way prejudicial to Malaysia" for up to 60 days without trial. The Dangerous Drugs (Special Preventive Measures) Act 1985, and the Emergency (Public Order and Prevention of Crime) Ordinance 1969 also allow for administrative detention for periods of two years without trial.

The Sedition Act 1948 defines a "seditious tendency" as a tendency to bring hatred or contempt, to excite disaffection against any ruler or any government, or to excite disaffection against the administration of justice. The government invokes this act against criticism of the government, in particular criticism related to the Attorney General's perceived political and selective prosecutions. The Printing Presses and Publications Act 1984 also severely limits the freedom of the press and of free speech. It grants the Minister absolute discretion to grant, refuse or revoke a licence for a printing press or for publishing a newspaper. It also makes an offence the production of a publication that, inter alia, is likely to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity. The use of these acts contributes to a large degree of self-censorship by publishers, further institutionalising limits on freedom of expression.

In July 1999, a bill was passed by the Malaysian parliament for the creation of a National Human Rights Commission. The Commission will have the power to advise the government on human rights issues and have a limited power to investigate allegations of infringements of human rights. However, the Commission's investigation powers will be limited only with respect to those rights contained in the Malaysian federal Constitution. As previously outlined, these are deprived of force by extensive exceptions and other restrictive legislation.

The Judiciary

The Malaysian legal system is based on the English common law and is enforced through a unified court system. Section 121 vests the judicial power of the Federation in the High Court. Separate Syariah Courts exist to deal with disputes involving Islamic religious law, and indigenous people in Sabah and Sarawak have a system of customary law. The Constitution is the supreme law of the land, and any law which is inconsistent with it shall be void to the extent of the inconsistency. Section 145(3) of the Constitution grants the Attorney

General complete discretion to institute, conduct or discontinue any proceedings for an offence.

The Court System

The court system is divided into the superior and subordinate courts. The Federal Court, Court of Appeal and High Courts are the superior courts and are established by the federal Constitution. The Session and Magistrate Courts are the subordinate courts and are established by federal law.

At the head of the court system is the Federal Court (Mahkamah Persekutuan), situated in Kuala Lumpur. Section 121(2) of the Malaysian federal Constitution grants the court jurisdiction to determine appeals from the Court of Appeal, the High Court or a judge thereof, as provided by federal law. The court also has original and consultative jurisdiction to determine the validity of actions of the states; disputes between the states or between the states and the Federation; and any question regarding the interpretation of the federal Constitution that arises in proceedings or is referred to it by the Yang di-Pertuan for its opinion. The Federal Court also has such other jurisdiction as federal law may confer. The court consists of the President of the Court (the Chief Justice), the President of the Court of Appeal, the two Chief Judges of the High Courts of Malaya and Sabah and Sarawak, and presently three other judges.

The Court of Appeal (Mahkamah Rayuan) has jurisdiction to determine appeals in any matter from decisions of the High Court or a judge thereof, and can also hear appeals in criminal matters directly from the Sessions Court. The Courts of Judicature Act 1964 provides that the Court of Appeal can grant leave to appeal, on a matter of law, against any decision of a High Court where it exercised its appellate or revisionary jurisdiction in respect of criminal matters from the Magistrates Court. The federal Constitution in Section 122A(1) states that the court shall consist of a President of the Court and ten other judges, until the Yang di-Pertuan Agong otherwise provides.

Section 121(1) creates two High Courts of co-ordinate jurisdiction and status situated in the state of Malaya and in the states of Sabah and Sarawak. These courts have such jurisdiction and powers as may be conferred by federal law. In criminal cases the High Court has jurisdiction to hear cases that involve the death penalty, and can exercise an appellate or revisionary jurisdiction on questions of law from criminal cases heard by Magistrate Courts. In civil cases the court has jurisdiction to hear matters involving, inter alia, divorce, bankruptcy and probate. There are currently 49 judges on the High Court of Malaya and 6 judges on the High Court in Sabah and Sarawak.

Under Section 121(1) of the federal Constitution two inferior courts have been created. The Sessions Court has jurisdiction to hear all criminal matters involving offences other than those punishable with death and civil cases where the claim does not exceed 250,000 ringgit. Magistrate Courts have the jurisdiction to hear criminal cases where the maximum sentence does not exceed 10 years imprisonment and civil cases where the value of the claim does not exceed 25,000 ringgit. Currently there are 52 Session Court judges and 122 Magistrate Court posts in Malaya and 8 Session Court judges and 19 Magistrate Court posts in Sabah and Sarawak.

A special court was established in 1993 with jurisdiction over cases involving the rulers of the states of Malaysia and the Yang di-Pertuan Agong. The court hears all criminal cases involving alleged offences committed by the rulers or the Yang di-Pertuan Agong and all civil cases involving them. The court is constituted by the Chief Justice of the Federal Court, the two Chief Judges of the High Courts and two other persons appointed by the Conference of Rulers who hold or have held office as a judge.

The formulation of Section 121 of the Constitution makes the High Court's, jurisdiction and powers dependent upon federal law, i.e. the court has no constitutionally entrenched original jurisdiction. This undermines the separation of powers and presents a subtle form of influence over the exercise of judicial power. This makes the operation of the High Court dependent upon the legislature and is a threat to the structural independence of the judiciary.

Judges

Appointment

The appointment of judges to the Federal Court, the Court of Appeal and the High Court is governed by the Constitution. Section 122B(1) vests the power of appointment in the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consultation with the Conference of Rulers. The Prime Minister, before giving his advice regarding the appointment of any judge apart from the Chief Justice, must consult the Chief Justice. For appointments to particular courts the Prime Minister is also required to consult the respective heads of the court, i.e. the Chief Justice, the President or the Chief Judge, as applicable.

For appointment as a judge to any of the superior courts a person must be a citizen and have acted as an advocate in any of those courts or have been a member of the judicial and legal service of the Federation or of a state. In practice most appointments are made from the judicial and legal service.

Appointments to subordinate courts come almost entirely from the judicial and legal service. Members of this service spend time in the various departments, such as public works, prosecution, revision of legislation and magistracy. Therefore it is possible that a person can be both a prosecutor and a magistrate in a court at various times during their career. This interchangeability of functions seriously threatens the independence of persons appearing as magistrates and creates an inherent conflict of interest in their position. It is difficult to see how a person who must change between representing the interests of the state in the prosecution of crime and an independent application of the Rule of Law, can exercise judicial power in an independent and impartial manner free from direct or indirect interference from the executive.

Further, promotion through the judicial and legal service is entirely dependent on the executive and allows the executive to exert direct or indirect influence over a magistrate's decision making. Promotion to the superior courts is also dependent upon a person's performance in the judicial and legal service.

Conditions of Service

The conditions of service of judges of the superior courts is guaranteed by Section 125 of the federal Constitution. They hold office until the age of sixty-five and their remuneration and other terms of office cannot be altered to their detriment during service.

Magistrates' conditions of service, as members of the judicial and legal service, are governed by the rules that apply generally to the public service. These rules are specified by federal law and can be altered by an act of parliament. A Judicial and Legal Commission is created by Section 138 of the federal Constitution and is responsible for appointment, placement, promotion, transfer and the exercising of disciplinary control. The Commission consists of the chairman of the Public Service Commission, the Attorney General or Solicitor General, and one or more other members appointed by the Yang di-Pertuan Agong after consultation with the Chief Justice of the Federal Court.

Discipline and Removal

Superior court judges can only be removed from office according to the provisions of Section 125 of the federal Constitution. If the Prime Minister or the Chief Justice, after consulting the Prime Minister, is of the opinion that a judge ought to be removed from office, they can represent this to the Yang di-Pertuan Agong who will constitute a tribunal to consider the matter. If the tribunal recommends that the judge be removed, the Yang di-Pertuan Agong may remove the judge. The tribunal consists of not less than five persons who have held office as a judge in a superior court, and if it appears to the Yang di-Pertuan Agong to be expedient, other persons who hold or have held equivalent office in any other part of the Commonwealth. The grounds for removal are:

- any breach of any provision of a code of ethics promulgated by 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, after consultation with the Prime Minister;
- inability, resulting from infirmity of body or mind or any other cause, to properly discharge the functions of his office.

Section 125(5) provides that pending a recommendation of the tribunal a judge may be suspended by the Yang di-Pertuan Agong on the recommendation of the Prime Minister after consultation with the Chief Justice.

Lawyers

There is continuing tension between lawyers, the government and the judiciary. This stems from the belief by the government that the Bar Association behaves irresponsibly without seeking to understand the various sensitive issues facing the government. Tension between the Bar and judges also continues, stemming from the Bar Association's vote of no confidence during the events of 1988, despite the restoration of normal relations in 1994.

Lawyers are regulated by the Legal Profession Act 1976, which establishes an independent Malaysian Bar Council with the primary purpose to "uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour." The Bar Council consists of 36 members elected by members of the Malaysian Bar Association or nominated by state bar committees.

In January 2000 the independence of lawyers was seriously threatened by the government with the charging of Karpal Singh with sedition due to statements he made in court whilst representing a client (see cases). The charging of a lawyer in respect of statements made in court clearly breaches Principle 20 of the 1990 Basic Principles on the Role of Lawyers. This guarantees lawyers civil and penal immunity for statements made in good faith in oral or written proceedings before a court. It is a basic duty of a lawyer to properly represent the interests of a client and provide a full and adequate defence. The charging of a lawyer for statements made in court improperly associates a lawyer with his client's cause and represents an unjustified interference in the performance of a lawyer's professional duties.

Amendments to the Legal Profession Act

On 2 February 1999 the Attorney General notified the Malaysian Bar Association that Part IIA of the Legal Profession Act 1976 had come into effect on 1 February 1999. This part allows the Attorney General to issue Special Admission Certificates to a range of persons, including legal practitioners from foreign jurisdictions and those that have been employed in a legal or judicial capacity by any government or any authority, organisation or body, constituted under any law. These certificates are issued for a specific time period, determined by the Attorney General, and subject to confirmation by a judge of the High Court on the criteria of genuineness. The granting of a Special Admission Certificate is not subject to judicial review.

This part had been enacted by parliament in 1978 in response to a boycott by the Bar Association of cases involving the Emergency (Essential) Security Cases Regulations, but had never been brought into effect. The Bar Association initiated the boycott due to the violations of the accused's human rights that occurred in these cases. The government asserts that these provisions have now been brought into effect in order to fulfil Malaysia's obligations under the General Agreement on the Trade in Services (GATS). This requires that foreign lawyers be allowed to practice in Malaysia subject to certain considerations.

The executive promulgated guidelines for the granting of a certificate in August 1999. These stated that the Bar Association would be consulted before the issuing of a certificate, but not on renewal, and that those admitted under these provisions would be subject to the rest of the Legal Practitioners Act 1976. The guidelines did not specify how long a certificate would be issued for. The enactment of these provisions are of concern as they were drafted to deal with a situation where the Bar Association was in conflict with the executive. As a result they are not properly drafted to deal with GATS obligations and if abused, would allow the executive to bypass the Bar Association, threatening its independence and its duty to uphold the cause of justice.

Contempt of Court

There have been several cases of excessive use of the contempt of court power against lawyers who have questioned a judge's impartiality. In Anwar Ibrahim's trial, his defence lawyers filed an affidavit alleging that two prosecutors had attempted to fabricate evidence and requesting that they be excluded from the proceedings. The court ruled that this was an abuse of process and amounted to a serious contempt of court. After allowing half an hour for the preparation of a defence the court convicted the lawyer of contempt. In another case, contempt was threatened after an application was made to have a judge removed on the basis of prejudgement of an issue. After the initial application was dismissed the Court of Appeal

ruled that if the application for appeal was not immediately withdrawn notices of contempt would be issued as the action was misconceived and intemperate.

The power of contempt is an essential part of the justice system. It ensures that all participants in the court system and those commenting on the administration of justice properly respect the procedures of, and maintain the confidence of the public in, the courts. This power cannot be used too broadly otherwise it will stifle proper criticism of the court, or deny court participants the right to a fair and impartial tribunal. The current use of this power is excessive and has the effect of restricting bona fide actions by lawyers attempting to represent their client's interests.

Cases

Dato' Param Cumaraswamy (lawyer, member of the Executive Committee of the International Commission of Jurists and the CIJL Advisory Board and United Nations Special Rapporteur on the Independence of Judges and Lawyers): On 29 April 1999 the International Court of Justice issued a binding advisory opinion stating that Malaysia had violated the 1946 Convention on the Privileges and Immunities of the United Nations. (see Attacks on Justice 1998). This was because it failed to inform its domestic courts of the UN Secretary-General's finding that Dato' Param Cumaraswamy was immune from legal process, which was confirmed by the court. Dato' Param Cumaraswamy had been subject to several defamation suits from Malaysian businessmen amounting to US\$25,000,000. The Malaysian Government conveyed the decision of the International Court of Justice, but the High Court, on 18 October 1999, ruled in interlocutory proceedings that the issue of immunity could only be decided at a full trial, as the court was bound by the previous Court of Appeal decision regarding the Special Rapporteur's immunity.

The Special Rapporteur appealed that decision which was partly heard on 19 January 2000. The court there observed that there were two conflicting points in the opinion and queried whether it had to be bound by a decision that is conflicting in itself. Further hearing of the matter has been postponed until 11 May 2000. It is a well-recognised principle of international law that the act of an organ of state is an act of the state itself. The Malaysian Government is obliged to certify to the courts of the immunity of the Special Rapporteur, thereby removing the need for the matter to be heard at trial. Therefore, Malaysia is still acting in breach of its obligation to apply the decision of the court and must grant Dato' Param Cumaraswamy immunity from legal process.

During the meeting of the Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights in February 2000, the Malaysian Government used technical arguments in an attempt to limit the tenure of the Special Rapporteur to the completion of his current term in April 2000. This, and a further effort at the 56th Session of the Commission on Human Rights, failed and the Special Rapporteur's mandate was extended for a further three year term.

Karpal Singh (lawyer, lead defence counsel for Anwar Ibrahim): Mr Singh 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 be well 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 5,000 ringgit fine or a maximum of three years

imprisonment. The case was transferred to the High Court on 27 February 2000 which has yet to fix a date for trial.

Tommy Thomas (lawyer, former Secretary of the Malaysian Bar Council): Tommy Thomas had been the subject of several defamation actions by Malaysian businessmen resulting from comments he made in an article entitled "Malaysian Justice on Trial." The cases were settled out of court in November 1998, but Mr Thomas made a statement that the cases had been settled despite his express objections. The court issued a notice of contempt, irrespective of his unconditional apology, and he was sentenced to six months imprisonment in December 1998. He appealed this decision, the proceedings of which were observed by the International Bar Association. As at the time of writing, 1 April 2000, the decision was still pending.

Zainur Encik Zakaria (lawyer, member of Anwar Ibrahim's defence team and former President of the Bar Council of Malaysia): Mr Zakaria was sentenced to three months imprisonment for contempt on 30 November 1998. He had made an application for the exclusion of two prosecutors on the basis that they had attempted to fabricate evidence. The court ruled that this application was an abuse of process and interfered with the due administration of justice. (see *Attacks on Justice 1998*). Mr Zakaria appealed to the Court of Appeal, and as of 1 April 2000, the decision was still pending.