

## MALAYSIA

**The Government of Malaysia continued its repression of political opponents and further restricted freedom of expression, assembly and association. Detentions under the Internal Security Act (ISA) continue. However, a number of developments indicate that there has been a positive change towards a more independent judiciary. The Federal Court quashed the sentence of Anwar Ibrahim's defence lawyer Zainur Encik Zakaria; a judge criticised the ISA and released two detainees; the High Court struck down one of the suits against the UN Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy, and the plaintiffs withdrew the remaining suits. The government-appointed National Human Rights Commission called for a wide review of Malaysia's strict laws on freedom of assembly and expression; and Justice Muhammad Kamil Awang defied a "telephoned directive" from his superior and annulled a victory for the Prime Minister's ruling coalition in a state assembly election.**

The former territory of 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 and three Federal Territories. These are the eleven states of peninsular Malaysia, the two states of Sabah and Sarawak on the island of Borneo, and the Federal Territories of Kuala Lumpur, Labuan and Putraya.

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 and, for certain matters, the *Yang di-Pertua-Yang di-Pertua Negeri* of States not having a ruler. 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 the Parliament. The Parliament consists of the *Yang di-Pertuan Agong* and two *Majilis* (Houses of Parliament), which are the Senate (*Dewan Negara*) and the House of Representatives (*Dewan Rakyat*). The Senate consists of 26 members elected by the legislative assemblies of the states 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. Article 40 of the Constitution requires that the *Yang di-Pertuan Agong* act in accordance with the advice of the Cabinet or of a Minister authorised by the Cabinet. 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 competence of the federal and state parliaments.

The tenth general elections were held on 29 November 1999. The Barisan Nasional coalition retained the two-thirds majority needed to amend the constitution. However, the UMNO lost twenty seats, including those of five cabinet ministers. In simultaneous assembly elections held in 11 states, the UNMO lost two states to the Pan-Malaysian Islamic Party (PAS). 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 report, entitled Justice in Jeopardy, was published in April 2000. It concluded that the powerful Executive in Malaysia had not acted with due regard for the essential elements of a free and democratic society based on the rule of law. The report examined the relationship between the executive, the Bar Council and the judiciary and found that in politically and economically sensitive cases the judiciary was not independent. It found that the autonomy of the Bar had been threatened by the government and that the relationship between the Bar and judiciary was strained. It noted that in politically sensitive defamation cases, awards of damages were so great that they stifled free speech and expression. It also noted that the use of contempt proceedings against practising lawyers constituted a serious threat to their ability to render services freely. The four organisations urged Malaysia, *inter alia*, to recognise the independence of the judiciary, not to threaten or diminish the autonomy of the Bar Council, to ensure that the choice of judges in sensitive cases be carefully considered and to establish a Judicial Services Commission that would recommend appointments to the judiciary.

### **Human Rights Background**

The human rights situation in Malaysia has not improved over the course of the period covered by this report. Malaysia's government has continued its repression of political opponents by further restricting freedom of expression, assembly and association. The use of the Internal Security Act (ISA), which allows for indefinite detention without trial, resulting in arbitrary detentions, continued. There were reports of police brutality in several cases.

The police repeatedly broke up peaceful demonstrations by the opposition and on 25 March 2000 banned public rallies in the capital for an indefinite period. A demonstration held in Kuala Lumpur on 15 April 2000 by supporters of the Parti Keadilan Nasional (PKN) to mark the anniversary of Anwar Ibrahim's conviction on corruption charges in April 1999 was broken up with tear gas and water cannons by the police. At least 48 PKN activists, among them Tian Chua, the vice-president of the party, were arrested on 15 - 16 April 2000 and charged with illegal assembly. On 1 March 2000 the government restricted publication of the largest opposition newspaper, *Harakh*, to only two times per month instead of two times per week and banned the publication from news-stands. The pro-opposition publications and critical magazines *Detik*, *Al Wasilah*, *Tamadun* and *Ekslusif* were also banned throughout the year.

In April 2001 ten political activists were arrested under the ISA. Six were given two-year detention orders in June 2001. The other four were either released through *habeas corpus* petition or by the police. In late July 2001 two students were also arrested under the ISA. On 16 July 2001 one student was released unconditionally, while the other remained under ISA detention at the time of writing. The six people that were ordered to be detained for two years without charge or trial under

the ISA by the Minister of Home Affairs are Tian Chua, Vice-President of the PKN, Mohd Ezam Mohd Noor, the National Youth Chief of the PKN, Haji Saari Sungip, PKN activist, Hishamuddin Rais, media columnist and social activist, Dr. Badrul Amin Baharom, PKN Youth Leader and Lokman Nor Adam, Executive Secretary of the PKN Youth Wing.

In a positive development, judge Datuk Mohamed Hishamudin ordered the release of two of the 12 activists held under the ISA in late June 2001 on the grounds that the police had acted in bad faith in detaining them. Reportedly, he also questioned whether the ISA was relevant in the present situation and suggested that in order to prevent or minimise abuse the provisions of the ISA needed to be thoroughly reviewed.

The apparently politically motivated six-year prison term imposed on former Deputy Prime Minister Anwar Ibrahim for corruption charges on 14 April 1999 was upheld by the Court of Appeal in April 2000. Anwar Ibrahim appealed to the Federal Court. His lawyers requested a postponement of the trial because Anwar Ibrahim is currently treated in the hospital for a slipped disk in his back. His spinal injury has not responded to treatment and independent medical experts recommended that Anwar Ibrahim should undergo endoscopic microsurgery. The best prognosis for recovery would be for the operation to be conducted at a specialised spinal surgery available outside Malaysia. Although his condition continues to deteriorate, the Malaysian authorities so far have not permitted him to seek medical treatment abroad.

On 8 August 2000 the High Court in Kuala Lumpur convicted Anwar Ibrahim and his adopted brother Sukma Darmawan of sodomy and sentenced them to nine and six year's imprisonment which, for Anwar Ibrahim would commence after the completion of his six-year sentence for corruption. The fairness of this second trial has been widely questioned by observers. In a Presidency statement on behalf of the European Union on 10 August 2000 the EU "notes with deep concern the verdict announced on 8 August 2000 (...) and regrets that several aspects of the proceedings in the second trial, as was the case with the first, raise serious doubts about its fairness." The ICJ issued a Press Release on 8 August 2000 condemning the sentencing as wholly disproportionate to the alleged offences committed and voicing its concern about the prosecution's amendment of the date of the alleged offences, the (in)admissibility of certain evidence, the failure to permit the calling of some defence witnesses and the (im)partiality of the presiding judge. Moreover the ICJ criticised comments made by Prime Minister Mahathir during the trial as prejudicial and entirely inconsistent with a free and independent judiciary. In both cases Anwar Ibrahim was refused bail, pending the appeal.

On 23 February 2001 the Federal Court upheld the rulings of two lower courts in August 1999 and December 2000 and dismissed Anwar Ibrahim's attempt to sue Mahathir for 100 million ringgit for slandering him in a speech in September 1998 in which Mahathir had given descriptions of alleged acts of sodomy.

Anwar Ibrahim was beaten by the former police chief Abduhl Rahim Noor while in police custody after his arrest in September 1998 and a doctor had testified to an earlier inquiry that Anwar had been fortunate to survive the assault. Abduhl Rahim Noor was sentenced to two months' imprisonment and a fine of 2,000 ringgit on 15 March 2000 after the charge was reduced from "attempting to cause grievous hurt", which carried a maximum sentence of three-and-a-half years, to "causing hurt". After his appeal against the sentence Noor was released on 5,000 ringgit bail. The outcome of the appeal is still pending.

The term of the Chief Justice of the Federal Court, Eusoff Chin, was extended for another six months from 20 June 2000, the date on which he was to have retired, despite a public controversy over his conduct. Allegedly he had travelled to New Zealand with a lawyer in 1995 and subsequently sat on appeals where that lawyer appeared and had ruled in favour of the lawyer.

In December 2000 the former Vice-President of the Malaysian Bar and judge of the Federal Court, Tan Sri Mohamad Dzaiddin Abdullah was sworn into office as the new Chief Justice. He stated that his first and main agenda would be to restore the public's confidence in the judiciary by making changes in respect of seeing justice done, reducing the numerous citations for contempt and fostering a better relationship with the Bar. His appointment was welcomed inside and outside of Malaysia. The Malaysian Bar in a Press Statement on 20 December 2000 called his appointment "most welcome" and found him "eminently suited to this task." The UN Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, in his 2001 report to the 57th Commission on Human Rights, called his appointment "a positive development, which was enthusiastically welcomed by all."

On 1 January 2001 Dato' Ainum Mohd Saaid became the first woman in Malaysia to be appointed (new) Attorney-General. Her appointment was also widely welcomed. She will act as principal legal adviser to the Government and public prosecutor empowered to institute, conduct or discontinue any criminal proceedings, oversee the drafting of legislation for the Federal Government and act as advocate on behalf of the Government in any court matter.

#### *National Human Rights Commission of Malaysia (Suhakam)*

In April 2000 the National Human Rights Commission (Suhakam) was established, pursuant to the Human Rights Commission of Malaysia Act 1999, adopted by the Parliament in July 1999. The 13-member Commission is chaired by former Deputy Prime Minister Tan Sri Musa Hitam (1981 - 86) of the ruling party. The twelve other members include retired judges, academics and consumer activists. The functions and powers of the Commission are, *inter alia*, to promote awareness of human rights, to assist the Government in drafting legislation and administrative directives concerning human rights, to advise the Government with regard to the accession to international treaties and instruments in the field of human rights, to inquire into complaints regarding infringements of human rights, to visit places of detention and make the necessary recommendations, to issue public statements and hear witnesses and to receive evidence on human rights matters. In May 2000 the Commission established the Working Group on Education, the Working Group on Laws Reform, the Working Group on Accession to Treaties and International Instruments and the Working Group on Complaints Inquiry. As of 27 July 2000 the Working Group on Complaints Inquiry had already received a total of 175 complaints.

Commission Chair Musa Hitam publicly supported the right of citizens to assemble peacefully outside the courthouse at which the verdict in the sodomy trial of Anwar Ibrahim was announced. Throughout the year 2000 the Commission met with human rights NGOs, government ministries, representatives from the ruling, and opposition parties. In December 2000 the Commission opened an inquiry about police misconduct during a rally organised by the opposition on 5 November 2000.

In April 2001 the Commission published its first annual report. The report called for a wide-ranging review of Malaysia's strict laws on freedom of assembly and expression. It made several recommendations, *inter alia*, that Malaysia's police force, which has been accused of brutality at political demonstrations, should maintain a discreet presence at rallies and stay away from the

assembly site; that the judiciary should consider human rights to be an integral part of the common law of Malaysia and enforce them accordingly; and that Malaysia should immediately ratify several international agreements on human rights.

Unfortunately, the scope of the Commission is rather limited, as the Act defines human rights as “the fundamental liberties provided for” in the federal Constitution and restricts the application of the Universal Declaration of Human Rights to those provisions consistent with the Constitution. Section 12 of the Act furthermore limits the powers of the Commission by stipulating that it shall not inquire into any allegations that are the subject matter of any proceedings in any court or which are finally determined by any court, and that it shall immediately cease the inquiry if the allegations of an inquiry become the subject of proceedings in any court.

#### *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 other principle human rights treaties including 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, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as these treaties are seen to 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 freedom of movement, speech, peaceful assembly and association. However, the Constitution allows for the derogation from some of these rights as is deemed necessary or expedient in the interest of the security of the Federation or public order and morality.

Articles 149 and 150 allow for the derogation from the provisions of Part II of the Constitution. Article 149 provides that the parliament may promulgate legislation in response to actions taken or threatened by a substantial body of persons that, *inter alia*, excite disaffection against the government. Such legislation may 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. Article 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.

During a state of emergency, the power of the *Yang di-Pertuan Agong* is broadened considerably. He can promulgate any ordinance he deems necessary in relation to any matter, regardless of the required procedures in Parliament. These ordinances have the same effect as an Act of Parliament. The proclamation of a state of emergency extends the executive authority of the Federation over matters within the legislative authority of the States. Furthermore, during the state of emergency no provision of any ordinance, nor of any Act of Parliament, which is required by reason of the emergency can be challenged on grounds of inconsistency with the federal constitution. No court has jurisdiction to determine the validity of the Proclamation of Emergency.

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*

The Malaysian Constitution guarantees a number of important rights. However, these rights are often deprived of their meaning and force by the enactment of various pieces of restrictive legislation under the exceptions provided by the Constitution. The Internal Security Act 1960, enacted pursuant to Article 149, allows the executive to detain persons for two years without trial, detention 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 Act (Special Preventive Measures) 1985 also based upon Article 149 of the Constitution, and the Emergency (Public Order and Prevention of Crime) Ordinance 1969, which depends for its validity on the continued existence of a proclamation of emergency also allow for administrative detention for a period of two years without trial.

The Seditious Act 1948 (revised 1969) 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. Officials sometimes invoke this act in response to 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. This Act also provides that issuing a publication that, inter alia, is likely to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity is a punishable offence. The use of these Acts contributes to a large degree of self censorship by publishers, further institutionalising limits on freedom of expression. These two Acts were enacted without relying on Article 149 because they are presumably considered not to be in contravention of Article 10 of the Constitution, on the freedom of speech, assembly and association.

In the report “Justice in Jeopardy” published in April 2000 the IBA, CIJL, CLA and UIA conclude that all of the above Acts constitute a body of restrictive legislation that requires major revision if Malaysia is to be governed in accordance with a just rule of law.

### **The Judiciary**

The Malaysian legal system is based on English common law and is enforced through a unified court system. Article 121 vests the judicial power of the Federation in the two High Courts of coordinate jurisdiction. 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 to resolve matters such as land disputes between tribes. 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. Article 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 superior and subordinate courts. The Federal Court, Court of Appeal and High Courts are superior courts and are established by the federal Constitution. The Session and Magistrate Courts are 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. Article 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, at present, three Federal Court 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 Session Courts. In addition, the Court of Appeal 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 Magistrate Court, but only on questions of law. The federal Constitution in Article 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.

Article 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. The High Courts have civil and criminal jurisdiction. They also have appellate or revisionary jurisdiction in respect of criminal matters decided by a Magistrate Court or a Session Court, and hear appeals in civil cases from Magistrate Courts and Session Courts. There are currently 49 judges on the High Court of Malaya and six judges on the High Court in Sabah and Sarawak.

Under Article 121(1) of the federal Constitution two inferior courts have been created. Both the Magistrate Courts and the Session Courts have wide criminal and civil jurisdiction. The Session Courts have 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 eight Session Court judges and 29 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 Article 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 arrangement 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 so constitutes a fundamental 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. Article 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 advice regarding the appointment of any judge apart from the Chief Justice, is required to consult the Chief Justice. For appointments to particular courts the Prime Minister also must 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 for the ten years preceding his appointment. 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 an official may be both a prosecutor and a magistrate in a court at various times during his or her career. Repeated interchangeability of functions may threaten the independence of persons appearing as magistrates by creating an inherent conflict of interest.

Further, promotion through the judicial and legal service is entirely dependent upon the executive and allows the executive to exert direct or indirect influence over a magistrate's rulings. 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 Article 125 of the federal Constitution. Judges 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, created pursuant to Article 138 of the federal Constitution, 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 in accordance with the provisions of Article 125 of the federal Constitution. If the Prime Minister or the Chief Justice, after consulting the Prime Minister, believes that a judge ought to be removed from office, such officials may represent

this opinion 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 the *Yang di-Pertuan Agong* considers it 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.

Article 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

The Malaysian Bar has approximately 11,000 lawyers, including 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). In addition, practice standards are governed by the Legal Profession (Practice and Etiquette) Rules 1978, the Bar Council Rulings 1997, and the Conveyancing Practice Rulings. Lawyers in Sabah and Sarawak are professionally organised by the Advocate Ordinance of Sabah and the Advocate Ordinance of Sarawak.

The LPA 1976 establishes the Bar, of which all advocates and solicitors of the High Court are members, and the Bar Council. The Malaysian Bar Council is an autonomous body created by statute, whose primary purpose is 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.

There has been continuous tension between lawyers, the government and the judiciary. The Malaysian Bar Council has been in conflict with the Government on many occasions; *inter alia*, the LPA 1976 and the amendments to it over the years have been the source of some controversy. Tension between the Bar and judges also remains prevalent, stemming from the Bar Association’s vote of no confidence during the events of 1988, despite the restoration of normal relations in 1994.

In June 2000 the High Court granted an injunction to restrain the Malaysian Bar Council from convening an Extraordinary Meeting to discuss improprieties in the Malaysian judiciary. It held that the conduct of judges and lawyers cannot be discussed save in parliament. The Court of Appeal dismissed the appeal against this judgement in July 2000 and leave to appeal against that decision was refused by the Federal Court on 29 November 2000. “Therefore, in Malaysia today,” as the Special Rapporteur on the Independence of Judges and Lawyers states in his 2001 report to the 57th Commission on Human Rights, “the conduct of judges cannot be discussed by anyone, not even the legal profession, in a closed-door meeting, except in parliament.”

The Malaysian Bar Council has noted that there has been a dramatic improvement in the relationship between the Bench and the Bar with the appointment of the new Chief Justice, Tan Sri Dato’ Paduka Mohamed Dzaidin Abdullah on 20 December 2000. They stressed that he has taken

positive steps to improve the administration of justice and to strengthen ties with the Malaysian Bar.

Furthermore, the Bar Council has called for an independent law commission to undertake law reform towards a more just legal system. It was proposed that such a commission should make the legal system more efficient, economical and accessible by reviewing laws to bring them in line with current conditions, remove obsolete laws and simplify existing legislation. At present Malaysia's law revision is handled by the Attorney General's Chambers, but the relevant department does not focus on law reform or development of laws which involve considerations of other issues, such as the socio-economic and technological environment, policy issues and the evolving needs of the country. The proposal is for a permanent commission to continually assess how laws should be modernised. The Council has prepared a draft Law Commission of Malaysia Act which will be forwarded to the Government. This draft law is based on laws from other jurisdictions. It is envisioned that the Commission would comprise judges, senior lawyers and legal academics as well as individuals with specialised knowledge.

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 Anwar Ibrahim (*see cases*). The prosecution of a lawyer in respect of statements made in court breaches Principle 20 of the 1990 Basic Principles on the Role of Lawyers. This principle 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.

### *Contempt of court*

The increased use, or threat of use, of the contempt law has led to further tension between the Government and the Bar Council. There have been several cases of excessive use of the contempt of court power against lawyers who have questioned a judge's impartiality. In its judgement on 5 September 2000, the Court of Appeal dismissed lawyer **Zainur Zakaria's** (*see cases*) appeal against a three-month jail sentence for "contempt of court" and drew attention to "an increase in contempt offences being committed by advocates and solicitors." The Court remarked "(a)s such we feel that the time is now ripe for imposition of custodial sentences in contempt offences."

Although the power of contempt is an essential part of the justice system, if this power is used too broadly there are well-founded grounds for concern that in certain circumstances, the ability of lawyers to render their services freely is adversely affected. Andrew Nicol QC examined the use of the contempt power in Malaysia and stated that: "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 lawyer's 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."

### **Cases**

**Dato' Param Kumaraswamy** {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}: Several businessmen filed

four lawsuits in Malaysian courts against Mr. Param Cumaraswamy, alleging that he used defamatory language during an interview published in the November 1995 issue of *International Commercial Litigation* and seeking damages in a total amount of US \$ 112 million. The UN Secretary-General asserted that Mr. Cumaraswamy had spoken in his official capacity of Special Rapporteur and was thus immune from legal process on account of the 1946 Convention on the Privileges and Immunities of the UN. Nevertheless, the Malaysian courts failed to uphold the immunity granted to the UN Special Rapporteur under international law. Thereafter the ECOSOC requested a binding advisory opinion from the International Court of Justice (ICJ). On 29 April the ICJ ruled in favour of the Special Rapporteur. It held that the Malaysian government should have informed its domestic courts of the UN Secretary-General's findings that Dato' Param Cumaraswamy was immune from legal process.

The Malaysian government conveyed the decision of the International Court of Justice, but the Registrar of the High Court, on 18 October 1999, dismissed the Special Rapporteur's application to strike out the fourth suit, ruling that his court was not bound by the opinion of the ICJ. The Special Rapporteur appealed that decision and made applications to strike out the second and third suits and submit the first suit for case management. The appeal was partly heard by a judge of the High Court on 19 January 2000. The Court there observed that there were two conflicting points in the opinion of the ICJ and queried whether it had to be bound by a decision that is conflicting in itself. Delivering the final judgement on 7 July 2000 the judge held that the Court was bound by the advisory opinion of the ICJ and accordingly struck down the suit. Furthermore, he ruled that "each party ought to bear its own costs." In a press release the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists welcomed the decision to uphold the immunity of the Special Rapporteur but also noted that it is "disturbed by the failure of the Court to award costs to Mr. Cumaraswamy." The statement noted "(t)hat decision is based on the judge's assertion, amongst others, that this would best serve the interest of justice." That assessment appears partisan rather than judicial.

In a positive development in May and June 2001 the plaintiffs withdrew the remaining three defamation suits some five years after the commencement of the four suits and more than two years after the delivery of the advisory opinion by the ICJ.

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 in resolution 2000/42 of 20 April 2000.

**Karpal Singh** {lawyer, lead defence counsel for Anwar Ibrahim}: Mr Singh was charged with sedition in 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. His trial is now fixed for hearing on 16 - 31 October 2001.

**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. He publicly retracted that statement the day after it was published. Irrespective of this, the court issued a notice of contempt and Tommy Thomas was sentenced to six months imprisonment in December 1998. He appealed the decision and was released on bail. On 23 April 2001 the Court of Appeal dismissed the appeal against his conviction. The appeal against the sentence was allowed. The sentence of imprisonment was set aside and substituted with a fine of RM 10,000 in default of three months imprisonment and Mr. Thomas was allowed stay of execution.

**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*). After the Court of Appeal dismissed Zainur Zakaria’s appeal on 5 September 2000 he appealed to the Federal Court. On 27 June 2001 the Federal Court ruled in favour of Mr. Zakaria and quashed the contempt of court conviction and the prison sentence.

**Justice Muhammad Kamil Awang {judge in the eastern state of Sabah}:** In early June 2001 Justice Muhammed Kamil Awang reported that one of his superiors had instructed him by telephone to drop a case involving electoral irregularities. The judge ignored this instruction and annulled a victory for Prime Minister Mahatir’s ruling coalition in a constituency in state assembly elections in Sabah, on Borneo island in 1999. He ruled that the electoral roll included names of non-existent, or phantom voters, and foreigners. Justice Muhammad reported the matter to Chief Justice Mohamed Dzaidin Abdullah. He also reportedly said that other judges in Sabah and neighbouring Sarawak had told him they had come under similar pressure. However, the Government accepted the judge’s verdict and as a result, a by-election will be held.