

# ATTACKS ON JUSTICE – MALAYSIA

## *Highlights*

The Malaysian government frequently asserts that the judiciary is free from external control, pressure or influence. However, contrary to this statement, the judiciary appears to be plagued with a serious and ongoing credibility crisis. Since the removal of the Lord President of the Federal (“Supreme” since 1985) Court of Malaysia, Tun Mohamed Salleh Abbas, in 1988, the judiciary’s image has suffered considerably and has been struggling to live up to the doctrine of the separation of powers and to function as an independent pillar of a democracy. This situation has been aggravated by a series of high-profile political trials over the years, most recently the controversy-ridden Anwar Ibrahim corruption and sodomy cases. The appointment and promotion of judges continues to lack accountability and transparency. In August 2004, the Malaysian judiciary released its first annual public ‘report card’, a self-assessment exercise aimed at demonstrating the judiciary’s greater transparency. This initiative, although welcomed as a positive development, has done little to meet the requests of the public. Legal amendments meant to combat terrorism have put at risk effective due process and fair trial rights. In the absence of true judicial independence, legislators in Malaysia are free to draft laws that run contrary to the spirit of the country’s Federal Constitution.

## BACKGROUND

Malaysia ushered in its fifth Prime Minister, Abdullah Ahmad Badawi, in October 2003, marking a much-anticipated leadership change following 22 years of Mahathir Muhammad’s authoritarian rule.

Fuelled by the anxiety following the events of 11 September 2001, the Malaysian Government led by Mahathir Muhammad found new impetus in justifying repression, bypassing the rule of law, curtailing human rights and arbitrarily detaining people in the name of national security. More than one hundred persons said to be religious extremists and linked with terrorist groups Jemaah Islamiah (JI), and Kumpulan Militan/Mujahiddin Malaysia (KMM) have since been detained without trial under this act.

Former Deputy Prime Minister Anwar Ibrahim, dismissed from government in 1998, served six years in prison for corruption and sodomy charges until a landmark Supreme Court [judgment](#) in September 2004 released him unconditionally. His adopted brother, Sukma Darmawan, was also charged with sodomy and of ‘aiding’ Anwar in committing crimes. He was eventually sentenced to six years’ imprisonment and four strokes of the *rotan* (cane).

Anwar’s supporters, political party activists and leaders of the *reformasi* movement were harassed and detained on many occasions. Ten of them were detained without

trial under the [Internal Security Act](#) for alleged militant activities and intending to overthrow the government through street demonstrations.

Using archaic laws such as the sedition act, printing laws and the [Official Secrets Act](#), the Mahathir government continued to control freedom of speech and expression. New amendments were made to the *Penal Code* to include anti-terror provisions. The police continued to act with impunity and deaths in custody rose at an alarming rate. Official statistics from Parliament revealed that, in 2002, 237 deaths were recorded in prison; in 2003 the number rose to 279 and in 2004 the figure stood at 262 deaths.

Thousands of undocumented persons, including refugees and asylum seekers, were arrested, harassed and deported. Students, civil servants and university staff were forced to sign 'good conduct' pledges to refrain from activities regarded as undesirable by the government.

Given the above situation, the change in leadership in October 2003 was met with cautious optimism. Prime Minister Abdullah Badawi pledged to put the fight against corruption at the heart of his administration's priorities. In the closing days of 2003, he announced the formation of a Royal Commission of Inquiry to examine the conduct and management of the Royal Malaysia Police (RMP) (see section on police powers, under [Access to Justice](#) below, for details).

In early 2004, at a meeting he held with judges, the new Prime Minister gave assurances that he would respect the independence of the judiciary. In March 2004, Abdullah Badawi's National Front coalition won 90 per cent of Parliamentary seats in the country's tenth general election. However, despite numerous promises of reform, word has not yet clearly translated into deed.

## THE JUDICIARY

The legal system in Malaysia is based on the [Federal Constitution](#) together with the constitutions of the 13 states comprising the federation and legislations enacted by the Parliament and state assemblies.

The Sharia law is an important component of Malaysia's justice system, although applicable only to the Muslim population and administered by a separate system of courts. Customary laws exist mainly in east Malaysia, where indigenous communities represent the majority of the population.

The Malaysian Constitution provides for the exercise of powers by the legislature, the executive and the judiciary. Article 121(1) of the Federal Constitution outlines two high courts of coordinate jurisdiction, namely the High Court of Malaya and the High Court of Borneo, along with inferior courts.

The Supreme Court, with its principal registry in Kuala Lumpur, is the Supreme Court in the country. The head of the judiciary is the Chief Justice.

## **Judicial reforms**

The first public “report card” of the judiciary, entitled “Palace of Justice: Inaugural Report of the Superior and Subordinate Courts in Malaysia”, an internal self assessment exercise released in August 2004, was welcomed as a starting point in enhancing the transparency of the judiciary. It claimed that the judiciary was independent and that public confidence had increased, despite contrary views from others. The report admitted a problem in the backlog of cases and promised to expedite the clearing of cases.

The Chief Justice announced that the judiciary was further studying inquisitorial, Islamic, socialist and communist legal systems as possible alternatives to common law. This proposal was immediately shut down by the Bar Council, who held the view that the more pressing issue was not the system itself, but the need to reform and establish proper procedures for the selection and promotion of judges, free from political bias.

## **Legal Reform and Counter-terrorism Measures**

From August to November 2004, a special Parliamentary Select Committee on the Criminal Procedure Code (CPC) and the Penal Code was formed to receive feedback from the public on two specific pieces of legislation. These were as follows:

### *Penal Code*

- i. Section 130B(2). This clause outlines broad definitions of terrorist acts. Listed offences in this section are covered in the existing penal code. Human rights groups have expressed concern that the definitions are not substantive, the vagueness of this clause is ripe for abuse and that legitimate political dissent can be easily construed as terrorist acts.
- ii. Section 130C concerns how a terrorist act can be determined. Under Clause 2 the designation of ‘sufficient evidence’ is very disturbing. It is stated that ‘a certificate purporting to be signed by an appropriate authority to the effect that the item or substance described in the certificate is a weapon, a hazardous, radioactive or harmful substance, a toxic chemical or a microbial or other biological agent or toxin shall be sufficient evidence of the facts stated in it’.

### *Criminal Procedure Code*

- i. Section 106B provides a policeman with the power to arrest without warrant persons whom he has reasonable grounds for suspecting to have committed or to be committing a terrorist offence.
- ii. Section 106C provides the public prosecutor with unfettered authority to intercept private communications so long as he considers it ‘likely to contain any information relating to the commission of a terrorism offence’.
- iii. Section 272B allows for live video evidence to be admitted in court at the minister’s discretion. This section would make those who are detained without trial under the *Internal Security Act* (ISA) in danger of providing forced testimony while in custody. Section 107A permits an informant to ‘request a report on the status of the investigation of the offence complained of’.

The proposed amendments under the *Penal Code* were rushed through Parliament,

leaving little room for public feedback. Human rights groups expressed concern that these amendments will only feed into the existing arsenal of laws, and are open to abuse.

The National Human Rights Commission (SUHAKAM) commented that these proposed amendments came in response to its earlier report released in March 2003, calling for the *Internal Security Act* (ISA) to be abolished. The report, entitled “Review of the ISA”, called for the ISA to be repealed and replaced with a more comprehensive new security law to redress a situation that is “disproportionately weighted against national security”.

The new law proposed by SUHAKAM would state that specific offences must be spelt out, and in order to avoid abuse of power the law should be valid for no more than 12 months, with its renewal thereafter to be determined by Parliament. Detention for investigation purposes would be no more than 29 days. Remand orders would have to be obtained from the High Court. The government has adopted none of the recommendations in the SUHAKAM report.

### **Government statements relating to the judiciary**

In June 2004, Nazri Abdul Aziz, Minister in the Prime Minister’s Department in charge of legal affairs and judicial reform, stated that the concept of separation of powers was “too idealistic” to be implemented in Malaysia. This comment came in response to a maiden speech made by ruling party parliamentarian, Zaid Ibrahim, who took the position that the amendments made to the Federal Constitution in 1988 seriously impaired the powers of the court and limited them to merely making decisions on matters related to the law. The whole exercise, he added, ensured that the executive was granted excessive power.

On another occasion, Pahang State Chief Minister Adnan Yaakob urged judges to be sensitive to the interests of the nation when making their judgments, as this could affect the country’s political and social stability.

Former Prime Minister Mahathir Muhammad reasserted that the government saw no need to set up an independent commission to deal with the appointment and promotion of judges.

### **Cases**

In early 2002, a High Court judge, **Muhammad Kamil Awang**, revealed that he had received a telephone call from a superior who had instructed him to strike off the election petitions he was to try. Much to public disbelief, the Chief Justice at the time, Eusoff Chin, owned up to being the person who had made the phone call but denied that he had given the alleged directive. Dr Rais Yatim, then Minister in the Prime Minister’s Department, criticized Muhammad Kamil for dragging the judiciary into public controversy.

### **Internal independence and security of tenure**

The Malaysian judiciary is divided into two categories: judges of the superior courts

and judges of the lower courts.

The Judicial and Legal Service Commission is established under Article 138 of the Federal Constitution. This commission exercises jurisdiction over judicial and legal officers in all matters governing their service, promotion and discipline, including removal from office. Being a fused system, both judicial and legal officers belong to the same service, with transfers between departments becoming a common practice.

Judges of lower courts hear and decide cases, administer the law and dispense justice. However, judges of the lower courts do not enjoy the security of tenure accorded to judges of superior courts, who are protected by constitutional guarantees. They are also subject to disciplinary proceedings by the Legal and Judicial Service Commission and can be removed from office without being awarded any compensation.

### **Appointment and promotion of judges**

In 2003, the Malaysian Bar Council called for an extraordinary meeting to discuss the lack of confidence in procedures for the appointment and promotion of judges. The controversy at the time surrounded the promotion of three judges, all of whom presided in the highly controversial Anwar Ibrahim trial. The Bar Council felt that more senior and competent lawyers were overlooked in these promotions. Chief Justice Ahmad Fairus defended the promotion of the three judges and argued that other factors, including ability, integrity and experience, were taken into account, and it was in no way a 'reward' for their role in the Anwar trials.

Two judges convicted Anwar of corruption and sodomy charges respectively. Both were promoted from the High Court to the Court of Appeal. Pajan Singh Gill, who headed a three-member panel that rejected Anwar's sodomy appeal, was promoted to the Federal Court.

In February 2005, the first woman judge was sworn in as Chief Justice.

## **LEGAL PROFESSION**

The legal profession in Malaysia has approximately 12,000 members with an annual increase of 10–15 per cent. Every advocate and solicitor with a valid practising certificate is automatically a member of the Malaysian Bar.

The Malaysian Bar Council is a statutory body comprising 36 members elected annually to manage the affairs and execute the functions of the Malaysian Bar. The council consists of a president, vice-president, the former president, the chairman of each of the 11 state bar committees, one member elected by each of the 11 State Bars to be its representative to the Bar Council and 12 members elected from throughout Peninsular Malaysia by postal ballot. The members serve on a part-time voluntary basis, as the *Legal Profession Act* prohibits payment of fees or remuneration.

Since mid-2003 onwards, the young lawyers of the Malaysian Bar have launched an effective and concerted campaign to abolish Section 46A of the [\*Legal Profession Act\*](#).

Advocates for the repeal of section 46A believe this clause is a violation of fundamental freedom of association rights, as it prevents lawyers who have practised for less than seven years, members of parliament, of state legislatures or of a local authority and officer-bearers in trade unions and political parties from being elected as members of the Bar Council.

The matter was recently highlighted in Parliament and the Minister in the Prime Minister's Department, Nazri Aziz, spoke out in support of the repeal of this clause from the Legal Profession Act.

### **Anti-terrorism legislation**

The *Anti Terrorism Act* came into force in January 2002, following the implementation of the recommendations of the Financial Action Task Force on money laundering in Malaysia.

The amendments were gazetted as law in December 2003, together with amendments to the *Penal Code* to deal with terrorism financing. Section 130(o) of the *Penal Code* states that lawyers and accountants would be committing an offence if they provided financial services or facilities to any terrorist, terrorist entity or group where they know or have reasonable grounds to believe that the services or facilities will in whole or in part be used by or will benefit any terrorist. The penalty is death if the act results in a death and, in any other case, imprisonment for a term not less than seven years but not exceeding 30 years in addition to a fine.

A new amendment to the [Anti Money Laundering Act 2001](#) provides for the freezing of all assets of certain persons or entities deemed to be terrorists in the hands of reporting institutions.

The Bar Council, with the assistance of Bank Negara Malaysia (the Central Bank), has set up a special task force to spread awareness among members of the new amendments and make recommendations on how the legislative provisions can best be implemented with minimum inconvenience to lawyers.

### **Cases**

On 14 January 2002, the Malaysian Attorney General's office withdrew its sedition charge against **Karpal Singh**, a prominent lawyer, on the grounds of 'public interest'. The charge had been laid against him two years earlier for comments he made as legal counsel in the course of the trial of former Deputy Prime Minister and Minister of Finance Anwar Ibrahim. During the sodomy trial, all of Anwar's lawyers were threatened with contempt proceedings. One of them, Zainur Zakaria, was sentenced to three months in jail for contempt after he had filed an affidavit alleging that two public prosecutors had attempted to fabricate evidence against Anwar.

On 10 September 1999 while in court representing Anwar, Karpal Singh had expressed a concern that someone might be trying to murder his client. He had uttered the following words in the course of his submission: "It could well be that someone out there wants to get rid of him [...] even to the extent of murder. [...] I suspect that people in high places are responsible for the situation" (see, "Attacks on Justice

2002”). In the history of the Commonwealth, this is the only known instance of a charge of sedition being brought against a lawyer for remarks made in open court in the defence of a client.

In January 2003, lawyer **P. Uthayakumar**, a vocal critic on police abuse cases, was arrested outside the Sepang Magistrates’ court in Selangor after attending an inquest. Uthayakumar was charged under section 506 of the *Penal Code* for criminal intimidation after he had allegedly said “You watch out, I will fix you. We fix you.” (See, [ICJ Report of Criminal Proceedings against P. Uthayakumar before Sepang Magistrate's Court on 8 April 2003](#)) He was also charged under Section 228 for intentionally insulting the magistrate on duty, Norazmi Mohd Narawi. In May of the same year, the Shah Alam High Court declared the charges of criminal intimidation to be groundless and discharged the lawyer from the accusation.

In May 2004, Uthayakumar alleged that he was attacked and threatened at gunpoint by three men as he was returning home. His car was surrounded and blocked, and three men smashed his car windscreen with a sledgehammer. The lawyer jumped out of the car but was attacked by the three men and suffered injuries to his face, hands, legs and back. He managed to escape and immediately lodged a police report. He claims that the police were behind the attacks and that they were warning him to back off from the latest death in custody case of Francis Udayappan, where Uthayakumar was the lead counsel.

Uthayakumar continues to refuse to provide a statement to the police to assist their investigations. Wishing to protect himself, he applied for a firearms permit, but his application was denied. Fearing for his life, he left for the United Kingdom to seek asylum. He returned in June 2005, but only after a minister guaranteed his safety. In September the police arrested Uthayakumar for failing to cooperate with their investigations. He then filed an application at the Kuala Lumpur High Court seeking to have the warrant declared null and void. The application is still pending.

The Court of Appeal dismissed an appeal by the **Malaysian Bar** to overturn a ruling that the Bar’s 59th general assembly meeting in March 2005 – which had been held in the absence of a quorum – was invalid. The Bar had appealed against a High Court ruling on 27 April which had declared that the meeting held on 19 March 2005 was “completely abortive, null and void and all acts or decisions that have been done, taken or made at the meeting are accordingly nugatory and invalid”. The High Court had also declared that the election of the 2005/2006 officers of the Bar Council was “invalid” and that a new General Assembly meeting should be held within 30 days from the date of the judgment.

## ACCESS TO JUSTICE

### Police powers

The Royal Commission of Inquiry to examine the conduct and management of the Royal Malaysia Police made public its landmark report on 16 May 2005. The unprecedented report listed 125 recommendations to enhance and improve the Royal Malaysia Police force and ensure greater access to justice. However, although it fell

short of calling for a total repeal of the *Internal Security Act*, it won praise for preparing a draft bill for an Independent Police Complaints and Misconduct Commission. Answerable directly to Parliament, the commission's main task would be to probe complaints against the police force, in particular corruption and other serious forms of misconduct.

### **The Internal Security Act and other preventive detention laws**

A major blot in Malaysia's justice system is the existence and active use of detention without trial laws. The most well known among them, the Internal Security Act 1960, first established to end alleged Communist threats, remains today one of the executive's most effective tools for silencing critics and political opponents. Thousands have been detained in the name of national security. The ambiguity of the term "national security" has led to widespread abuses over the last four decades, with a wide range of groups becoming targets of ISA arrests, the latest being suspected Muslim terrorists.

Detainees are first held for 60 days in secret police cells, with no judicial order required, and are denied access to both lawyers and family members during this time. Testimony from detainees has shown high elements of coercion and widespread psychological and physical torture by the authorities.

At the end of the 60-day period the Internal Security Ministry may issue detainees with a further two-year detention order. Detention orders are renewable for a further two years, for an indefinite period. There is no judicial review at all during the entire detention period. An internal review board, set up to review the status of detentions and make recommendations to the government, has been rendered ineffective, especially so after their recommendations to release the six *reformasi* detainees were ignored by the government.

The High Court has turned down all 15 habeas corpus applications filed over the last two years. Appeals have since been made to the Federal Court. Interestingly, five detainees who had withdrawn their applications were consequently released, albeit with restrictive residence orders.

Under two other laws that allow detention without trial, the Emergency Ordinance and the [Dangerous Drugs Act](#), hundreds of persons continue to be detained without recourse to a fair trial.

### **Official Secrets Act**

The [Official Secrets Act](#) (OSA) of 1972, based on the British OSA of 1911, was intended to curb the flow of information and communication to foreign agents that might be detrimental to national security. However, under it many acts and forms of speech are made offences in the name of protecting "state secrets".

The acquittal of Mohd Ezam Mohd Nor, Youth Chief of the National Justice Party, was an important landmark in the use of repressive legislation in Malaysia. He was initially found guilty of breaching the OSA in 2002 and sentenced to two years imprisonment for reading out secret documents relating to investigations by the Anti

Corruption Agency (ACA) into former Malacca Chief Minister Rahim Tamby Chik and Minister of International Trade Rafidah Aziz. Justice K.N. Segara criticized section 16A of the OSA, which clearly poses a threat to legitimate freedom of expression, as “obnoxious, archaic, draconian and oppressive”. Section 16A allows any authorised government official complete discretion to certify that certain documents had been classified.

### **Immigration laws**

The *Immigration Act* was amended in mid-2002 to include stiffer penalties for illegal immigrants. Anyone found guilty of being in the country without the appropriate legal documentation faces a mandatory sentence of up to five years’ imprisonment and up to six strokes of the cane. Previously, caning was applicable only to repeat offenders.

Employers who hire illegal immigrants are liable to fines of between M\$10,000 and M\$50,000 per employee and a jail term not exceeding one year, while employers who hire more than five illegal immigrants are liable to mandatory whipping and jail terms up to a maximum of five years. Thousands of asylum seekers face increased risks of detentions and deportations.

### **Remand prisoners**

The abuse of remand orders has become an increasing area of concern in Malaysia’s justice system. Section 117 of the *Criminal Procedure Code* allows for remand orders to be granted for not more than 14 days, if investigations cannot be completed during the first 24 hours. Magistrates often grant remand orders more from an administrative standpoint, without fully scrutinizing the desirability of this extended period of investigation. Often, remand procedures are carried out without the proper participation of the suspect or the presence of a lawyer. Access to the suspect and details as to when the suspect is to be brought to court for a remand order or to be charged are often denied.

A common problem arising from this lax system is a repeated extension of remand, for different charges or in different jurisdictions. For example, after the initial 14-day period is completed, the police can inform a magistrate that the detainee is being investigated for another offence and a second remand order can be easily obtained. Alternatively, a suspect may be brought to another location, where a presiding magistrate may be ignorant of the suspect’s history of detention and grant yet another remand order for the same offence.

Human rights groups have actively objected to this situation of grave police abuse. Both the National Human Rights Commission (SUHAKAM) and the Royal Police Commission have also made strong recommendations for the reform of the remand system.

## LEGAL REFORMS DURING THE PERIOD

**July 2002:** *Immigration Act*

**2002:** *Money Laundering Act*

**End 2003:** Anti-terror provisions of *Penal Code*