

Human Rights Council Working Group on the Universal Periodic Review
17th Session, 21 October to 1 November 2013

ADVOCACY/BRIEFING NOTE

ICJ suggested recommendations: Universal Periodic Review of Malaysia

This advocacy note is brought to the attention of all Permanent Missions to the United Nations Office in Geneva. It summarizes the March 2012 UPR Stakeholder Submission of the International Commission of Jurists (ICJ), available at <http://www.icj.org/icj-stakeholder-submission-on-the-universal-periodic-review-of-malaysia/> together with a comparison of ICJ recommendations with the corresponding first cycle recommendations and commitments.

1. Independence of the judiciary

A 1988 amendment to the Federal Constitution has led to concerns that the courts have been deprived of inherent jurisdiction, impairing judicial independence and preventing judges from doing justice if there is a perceived lacuna in the law. The 2009 law establishing the Judicial Appointments Commission (JAC) does not adequately secure independence of the judiciary; in practice the Prime Minister exercises decisive influence over the appointment of all members of the JAC. The appointment and promotion of judges lacks transparency and safeguards against external influence or pressure. Malaysia has not yet accepted the 2011 request by the Special Rapporteur on the independence of judges and lawyers, to visit Malaysia.

Suggested recommendations:

- i) Review and amend Article 121 of the Federal Constitution to bring it back to its pre-1988 position, ensuring the inherent powers of the judiciary to do justice;
- ii) Implement safeguards to guarantee that judicial appointment procedures are transparent and independent in practice and that decisions are based solely on objective criteria;
- iii) Establish an independent secretariat for the Judicial Appointment Commission to ensure that the management, activities and functions of the Commission are not administered by the Executive;
- iv) Establish guidelines under the law, including in the Constitution or in the Judicial Appointments Commission Act 2009, for the appointment of judges so as to ensure that there is no discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, linguistic or social origin, property, income, birth, sexual orientation, disability or other status; and
- v) Set out, in the Constitution or other law, procedures and grounds for the removal or impeachment of judges, consistent with international standards on judicial independence.

2. Freedom of peaceful assembly and of association

Parts of section 4(1) of the Peaceful Assembly Act 2012 (PAA) expressly deny non-citizens any right to organize or peacefully participate in assemblies, deny persons under 21 years of age the right to organise assemblies, and deny children the right to participate in all but a limited list of assemblies. Such organisation or participation constitutes a punishable offence under the PAA. This contravenes international standards including article 20 of the UDHR and article 15(2) of the CRC. Section 6 of the PAA imposes onerous legal responsibilities on organizers which are disproportionate. The PAA also increases police powers to change the conditions and restrictions on an assembly, despite Malaysian security forces' past record of committing human rights violations in suppressing assemblies, with impunity.

Suggested recommendations:

- vi) Amend the Peaceful Assembly Act 2012 (PAA) to provide for criminal liability of public officials, police officers and volunteers and officers from security forces for excessive or unlawful use of force and arbitrary arrests in peaceful assemblies;
- vii) Repeal Section 6 of the PAA, as well as the prohibitions in section 4 directed at non-citizens and children and other persons under 21; and
- viii) Increase human rights training and education of staff involved in handling assemblies.

3. Right to Freedom of Expression of LGBT Groups

In November 2011 police banned the Seksualiti Merdeka (Sexuality Independence) festival on the grounds that it was a threat to national security and public order. In August 2013 the Court of Appeal held that the ban was not subject to judicial review, stating that the police were acting within their powers under the Police Act, but also held that the ban in question applied only to the 2011 festival. Seksualiti Merdeka provides an important forum for the exercise of freedom of expression, association and assembly to discuss issues concerning sexual orientation and gender identity, matters fundamental to the personal identity and dignity of participants. The prohibition of the festival is inconsistent with the recognition these rights are given by the Universal Declaration of Human Rights articles 19 and 20.

Suggested recommendation:

- ix) Allow civil society groups to express themselves freely concerning sexual orientation and gender identity in Malaysia; prevent bans on future Sexualiti Merdeka festivals.

4. Security Offences (Special Measures) Act 2012 (SOSMA)

The SOSMA, enacted to replace Malaysia's 1960 Internal Security Act (ISA), still allows the police to detain persons suspected of involvement in security offences for up to 28 days for investigation purposes, without bringing formal charges. Arbitrary detention and torture and other ill-treatment remain a concern for detentions under the SOSMA. Moreover, in certain circumstances the Act permits the police to deny a detainee all access to legal representation for up to 48 hours. The public prosecutor has wide powers to authorize the police to intercept communications, without explicit provision for judicial control or supervision.

Suggested recommendations:

- x) Amend the SOSMA to provide criminal liability of public officials and superior or commanding police officers complicit in or instigating acts of torture or other ill-treatment;
- xi) Increase human rights training and education of staff involved in detaining persons;
- xii) Take steps to guarantee that detained persons are allowed prompt access to legal counsel even in exceptional situations, for instance by providing access to independent lawyers recommended by a bar association or other such body; and
- xiii) Repeal Sections 4, 5(2) and 6 of the SOMSA.

5. International Human Rights Instruments and Mechanisms

Malaysia has still not become a party to key human rights treaties. Malaysia has entered impermissible reservations to articles 15 and 18 of the CRPD, and article 37 of the CRC, including with respect to the absolute and non-derogable prohibition of torture and other ill-treatment. Malaysia also declared itself not bound by, among others, article 16 of the CEDAW, a core principle of the Convention. Malaysia has not adhered to periodic reporting deadlines to treaty bodies and has yet to accept pending requests for visits by nine Special Procedures.

Suggested recommendations:

- xiv) Become party to the: ICCPR and its two Optional Protocols (OPs), ICESCR and its OP, CAT and its OP, ICERD, ICPEd, the OP to CRPD, the OP to CEDAW and the third OP (on a communication procedure) to the CRC;
- xv) Withdraw its reservations to the CRPD, CEDAW and CRC;
- xvi) Accept requests of the Special Procedures to undertake official missions in Malaysia at the earliest possible opportunity, and extend to them all reasonable cooperation and assistance to facilitate timely and effective country missions, including the request of the Special Rapporteur on the independence of judges and lawyers;
- xvii) Provide without delay the overdue periodic reports to the CRPD and CEDAW;
- xviii) Present to the Council, as soon as possible after adoption of the outcome document for the UPR of Malaysia, a national plan of action for the implementation of accepted recommendations and voluntary pledges and commitments; and
- xix) Present to the Council, two years after adoption of the outcome document, a mid-term progress report on the status of implementation of recommendations and voluntary pledges and commitments.

The ICJ expresses to all Permanent Missions the assurances of its highest consideration.
