Submission of Bar Council Malaysia for the Universal Periodic Review of Malaysia 2013

Introduction

Malaysia received 103 recommendations during the 1st UPR in February 2009. 62 were accepted, 22 rejected. Malaysia issued an addendum to address the remaining 19. 15 accepted recommendations requested Malaysia to share its experiences or best practices. Approximately 23 others encouraged Malaysia to continue existing efforts in respect of some area of human rights. These included continuing the path towards accession to further international human rights covenants and removing reservations to those already acceded to; ccontinuing to exercise its sovereign right of adopting national legislation and the penal code, including the application of the death penalty; continuing to promote and protect human rights according to international commitments and religious and cultural specificities; and continuing to promote human rights in accordance with the values of the country.

The actions taken by Malaysia in response to accepted recommendations have been difficult to identify and assess as there has been an absence of official information from the government. No mid-term implementation report was submitted by Malaysia, and no public engagement with civil society has been undertaken to-date on details of any implementation activities or programmes by the government. Apart from one meeting with civil society in March 2010, government has not publicly engaged with civil society in respect of the UPR 1st round. This lack of meaningful engagement with civil society is a most significant and regrettable omission on the part of the Malaysian government.

Law and Security

The government, to its credit, repealed the much-despised and severely-abused Internal Security Act 1960 ("ISA 1960") on 31 July 2012. However in an interview published on 18 February 2013, the Minister of Home Affairs stated that 23 people are still being detained under ISA 1960; 7 for terrorism, and 16 for human trafficking.[i] It was replaced in the main by the Security Offences (Special Measures) Act 2012 ("SOSMA 2012") which contains an extremely wide definition of what constitutes a "security offence". It allows for an initial detention of 24 hours by the police to be extended for up to 28 days[ii] if authorised by a police officer above the rank of superintendent, without any supervision by the courts. In addition, detainees can be denied access to legal counsel for up to 48 hours after arrest. On 7 February 2013, the government arrested 3 people under SOSMA 2012.[iii] All 3 were eventually charged and are now awaiting trial.[iv] 2 were charged within a day, but a third person was detained for 11 days before being granted access to legal counsel.

Further provisions of SOSMA 2012 and amendments to the Penal Code, Criminal Procedure Code and Evidence Act 1950 introduced in July 2012 have significantly weakened fair trial protections by permitting evidentiary presumptions against an accused to be made by the courts and shifting the evidential burden to the accused to prove innocence. Interception of communications can be undertaken by the police without court supervision, and prosecutors may introduce evidence in trials without having to disclose their sources. Further, even if a suspect is acquitted, detention can now be ordered pending disposal of appeals. Provisions now exist for use of electronic monitoring devices.

Amendments to the Penal Code criminalise activities or attempts to commit activities detrimental to parliamentary democracy, and make it an offence to print, publicise, sell, issue, circulate, reproduce, be in possession of or import any document or publication detrimental to parliamentary democracy. It imposes duties on recipients to deliver the document or publication to a police officer, and criminal liability for the failure to do so. An "activity detrimental to parliamentary democracy" is defined as "an activity carried out by a person or group of persons designed to overthrow or undermine parliamentary democracy by violent or unconstitutional means".[v] A document or publication which has a tendency to excite organised violence against persons or property in Malaysia, or to support, propagate or advocate any act prejudicial to the security of Malaysia or the maintenance or restoration of public order or incite to violence or counsel violent disobedience of the law or to any

lawful order is deemed to be a "document or publication detrimental to parliamentary democracy".[vi] Amendments to the Evidence Act 1950, in particular Section 114A, create a presumption that any registered user of network services is presumed to be the publisher of a publication sent from a computer which is linked to that network service, unless the contrary is proved. The section also provides that any person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who is any manner facilitates to publish or republish the publication is presumed to have published or republished the contents of the publication unless the contrary is proved. When taken together, SOSMA 2012 together with the various amendments create an even stricter legislative framework under which the freedom of assembly and expression are severely curtailed.

The current conflict occurring in the Malaysian state of Sabah on the island of Borneo, where it is alleged that 79 persons have been detained under SOSMA 2012, gives cause for concern. No information has been forthcoming from the government as to the identities of these individuals, and whether they have been accorded due process of the law in terms of access to legal representation.

Interference with lawyers and human rights defenders

The government continues its practice of intimidating lawyers by summoning them for questioning and to furnish documents, written statements and information relating to their clients in cases where their clients are under investigation. This is done by both the police and Malaysian Anti-Corruption Commission ("MACC"), in total disregard for solicitor-client privilege.[vii] On 19 March 2012, MACC issued notices to 2 lawyers, Latheefa Beebi Koya and Murnie Hidayah Anuar, legal counsel for Shamsubahrain Ismail, to appear for questioning to assist MACC in investigating an alleged bribery offence involving the director of a private company (who was the husband of a then cabinet minister) which had received a RM250 million government loan. The notices were challenged. On 30 January 2013 the High Court (Appellate and Special Powers Division) quashed them on the grounds that such notices were wrong, invalid, could not be enforced, and were an abuse of power.

Lawyers also face difficulties accessing clients who are potential refugees and asylum seekers. Defenders of the human rights of indigenous peoples have also faced intimidation and obstruction by being denied entry into aboriginal areas.[viii] This is to prevent them meeting with indigenous peoples.

Human rights non-governmental organisation Suara Rakyat Malaysia (known as "SUARAM") also faced intense investigations by various government authorities from July 2012 until February 2013 on the grounds that it received foreign funding for some of its activities, which in itself is not against Malaysian law. SUARAM, together with clean, free and fair elections campaign organisation BERSIH 2.0, human rights law group Lawyers for Liberty and independent polling organisation Merdeka Centre were all accused by the government controlled mainstream media of receiving foreign funding to finance activities which were designed to destabilise the Malaysian government.

In reprisal against the Malaysian Bar's report that police had acted with brutality and had used excessive force on journalists and participants at the BERSIH 2.0 public assembly on 28 April 2012, senior members of government threatened to introduce legislation to establish an alternative bar council and academy of law that would dilute the strength and independence of the Malaysian Bar.

Freedom of Assembly

The government brought into force the new Peaceful Assembly Act 2012 ("PAA 2012") on 23 April 2012, and repealed Sections 27, 27A, 27B and 27C of the Police Act 1967. The Malaysian Bar led civil society opposition to the government's initial proposed Peaceful Assembly Bill, the details of which were made public in November 2011. Although some amendments were made to the bill as a result of the protest by the Malaysian Bar, several significant drawbacks remain. Principal is the fact that the new legislation outlaws street demonstrations, and allows the police to lay down extensive

terms and conditions for the holding of peaceful assemblies. While these may be appealed against to the Minister for Home Affairs, the ability of the police to impose such a wide range of terms and conditions unnecessarily and unacceptably interferes with the freedom to assemble (and also, as can be seen in the terms and conditions which have been laid down to-date, that prohibit the use or carrying of banners and placards, the freedom of expression). Second, it outlaws the holding of public assemblies within 50 metres of certain types of buildings and structures, referred to as "prohibited places", which has the effect of making it difficult to hold a public assembly within any reasonably built-up city or town in Malaysia.[ix] Children under 15 years of age are prohibited by PAA 2012 from taking part in a public assembly, whilst children under 18 years of age are prohibited by PAA 2012 from organising a public assembly. A person who merely spreads or shares information about a public assembly can be deemed to be an organiser, upon whom many responsibilities consequently attach. The PAA 2012 has provisions for the government to identify public places at which assemblies may be organised without notifying the police, but despite PAA 2012 having been in force for nearly 11 months, the government has not done so. However the government has instead been quick to arrest and charge several individuals for breaches of PAA 2012. Notwithstanding its name, therefore, the legislation appears purposely designed to limit or frustrate the exercise of the right to freedom of assembly.

While the government was careful to allow a public assembly known as "Himpunan Kebangkitan Rakyat", organised by opposition political parties in the federal parliament, to take place on 12 January 2013, the organisers were nonetheless investigated for breaching the terms and conditions imposed by the police. This was in stark contrast to an earlier public assembly organised by the Coalition for Clean and Fair Elections, known as BERSIH 2.0, on 28 April 2012. An otherwise peaceful public assembly ended up in violence due to, on the one hand, certain participants breaching police barriers, and on the other hand to a wholly disproportionate response by the police, who then used tear gas and water cannon to disperse the participants. Monitors from the Malaysian Bar documented numerous examples of police brutality, against journalists and participants. Despite the many reported and recorded (by video, even by the police themselves) cases of violence and brutality and instances of injuries suffered that were recorded that day, attributed to members of the police force, only 2 policemen were charged in court; they were acquitted for lack of sufficient evidence.

Prior to the coming into force of PAA 2012, the police had allowed several public assemblies to take place around the country, so-called "in the spirit of SOSMA 2012". However similar excessive terms and conditions were stipulated and organisers were questioned regarding breaches of them.

Deaths in police custody

The police in Malaysia have come under a very dark cloud of suspicion not just for committing acts of violence and brutality, but also for causing the death of persons held in their custody, mainly at police stations. Based on statistics disclosed by the Ministry of Home Affairs, 156 persons died in police custody between 2000 and February 2011. The death of K. Nagarajan on 24 December 2012 was the 6th incident of death in police custody in 2012. This was followed by the custodial death of Chang Chin Te on 14 January 2013, who had been arrested by the police 4 days earlier. On 23 January 2013 C. Sugumar died after being allegedly beaten by 4 policemen after they had handcuffed him and smeared him with turmeric.[x]

This issue is made worse by the failure of the government authorities to swiftly hold inquests into these deaths and identify the circumstances surrounding them. Despite a specific provision in the law making it mandatory for an inquest to be held by a magistrate in cases of custodial deaths, many cases go without such an inquest. The lack of willingness on the part of government authorities to undertake their legal responsibility has contributed to an environment where the police commit flagrant abuses of power with impunity and egregious acts continue unchecked. Despite the establishment by the government of an Enforcement Agency Integrity Commission ("EAIC"),

incidents of custodial death and police violence and brutality continue unabated. The ability of the EAIC to supervise police conduct is seriously doubted, since under its establishing law[xi] the EAIC is responsible for oversight of 18 other law enforcement agencies. This has to be done by 7 part-time commissioners and their staff. Further, the EAIC only has recommendatory powers and not powers of enforcement. Ultimately, discipline of the police force is still in the hands of the force itself. There is a serious and urgent need to revamp the structure of supervision of the police and to place it in the hands of an independent and civilian-led body.[xii]

The current conflict occurring in the Malaysian state of Sabah on the island of Borneo, where 8 Malaysian police personnel have been killed by an armed group from the Philippines, raises concerns about the need for the police to operate in conformity with accepted international human rights norms. Given the police deaths, there are fears (and news reports which have not been independently verified) of revenge attacks and retaliatory measures being inflicted on the local population.

Freedom of Religion

Malaysia continues to experience controversy over whether the word "Allah" may be used by the Christian community, especially amongst those who speak Bahasa Malaysia.[xiii] The Federal Government-ordered prohibition on the use of the word "Allah" by non-Muslims is currently still in place, despite the High Court decision striking down the ban as unconstitutional.[xiv] The government's appeal is scheduled for case management at the Court of Appeal shortly. The fact that it has taken more than 3 years for the case to reach this stage is reflective of the concerns that the decision in this case would have for Malaysian society.

The prohibition on the use of the word "Allah" by non-Muslims is also the reason why 2 shipments of bibles in Bahasa Malaysia were held up at 2 different ports in Malaysia. The shipments were compounded pending a resolution of the matter. However the government subsequently took unilateral action to imprint all the compounded bibles with a block print stating that it was a Christian publication, and to give a serial number to each copy so as to be able to keep track of each copy. The owners of the 2 shipments, the Bible Society of Malaysia and the Gideons organisation, reluctantly took possession of their respective shipments, but have refused to distribute or sell the bibles on the ground that they had been desecrated by the government.

Inter-religious feelings were also put in some stress by the controversy surrounding a Muslim Member of Parliament, Nurul Izzah Anwar's, public statement that all citizens are afforded the right to freedom of religion, including Muslims.[xv] It implied that she was of the view that Muslims could also change their religion, i.e. leave the faith, a view that is not shared by the government. Religion in Malaysia is a state matter, i.e. it comes within the jurisdiction of each state. 5 states in Malaysia - Perak, Malacca, Sabah, Terengganu and Pahang – currently criminalise apostasy. Further, it is an offence (and restricted under Article 11(4) of the Federal Constitution) to propagate other religious doctrines to Muslims. However, there is no restriction on Muslims proselytizing to non-Muslims.[xvi]

Because of the existence of a separate Syariah legal system in Malaysia, as provided by the Federal Constitution, non-religious civil court decisions such as those in the cases of Lina Joy, Ravatho Massosai and Kamariah Bte Ali exist – where the non-religious civil court has given way to decisions by the Syariah court on matters relating to the religion of Islam. The question may be revisited again when the High Court hears the case of *Zaina Abdin @ Balachandran* and his family, which involves members of a Muslim family who were nonetheless raised as Hindus.[xvii]

The government also banned 2 books, one published by Sisters In Islam and another by Canadian writer Irshad Manji entitled "Allah, Liberty and Love", for being "prejudicial to morality and public order"[xviii] The ban on the Sisters In Islam book was overturned by the High Court because it had been in circulation for some time and had not caused any controversy. The second ban is also being

challenged by the bookshop responsible for local distribution of the book. This book ban raises important questions whether rights of non-Muslims are violated if laws on morality of publications are enforced based on religious perspectives.[xix] This will have to await the outcome of the case.

Peninsular Malaysia *Orang Asli* land rights
The current protection and recognition by the government of *Orang Asli*[xx] customary land rights is far from adequate.[xxi] Limited statutory recognition of *Orang Asli* customary lands and the poor performance of both the Federal and State governments in protecting these lands have contributed to the gradual erosion of Orang Asli rights to their customary lands.[xxii] In essence, protection of *Orang Asli* customary lands under the Aboriginal Peoples Act 1954 ("APA 1954") is by way of land reservations held in trust for a Government-designated *Orang Asli* community.[xxiii] Under APA 1954, *Orang Asli* do not have statutory rights over their lands save for those expressly granted by the individual State Authority.[xxiv] Degazetting of *Orang Asli* lands is not an uncommon phenomenon.[xxv] With perhaps the exception of Selangor, ungazetted *Orang Asli* lands are usually regarded by the State Government as land available for infrastructure projects and the creation of interests in favour of non-*Orang Asli*. Contrary to international human rights standards for free, prior and informed consent and consultation, *Orang Asli* are rarely effectively consulted or adequately compensated in respect of matters affecting their lands and resources. Further recent efforts by the Perak and Pahang State Governments to gazette *Orang Asli* land as reserves under Section 62 of the National Land Code 1965 ("NLC") rather than the APA affords lesser protection against the creation of other interests if compared to Sections 6(2) and 7(2) of the APA. On a more positive note, the apex court of Malaysia, namely the Federal Court, has recognised the continuance of pre-existing rights of *Orang Asli* to their customary lands at common law.[xxvi] These rights cannot be extinguished unless there are plain and obvious words in legislation and if taken away, must be adequately compensated. Nevertheless, the Federal and State governments have yet to give statutory effect to the judicial recognition of Orang Asli customary land rights. This omission directly contradicts the Malaysian government's unequivocal votes in favour of the United Nations Declaration on the Rights of Indigenous Peoples 2007 ("UNDRIP"). Existing laws affecting *Orang Asli* customary lands do not consider the rights to culture and elimination of discrimination as set out in the International Covenant on Civil and Political Rights ("ICCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), which the government had agreed to consider ratifying at the last UPR. Prevailing land policies for mainstreaming or developing *Orang Asli* pay scant regard for the need to effectively recognise *Orang Asli* customary land rights as a part of *Orang Asli* right to culture and overall well-being. Land use policies seem more geared towards the use of customary lands for economically productive activities such as palm oil and rubber cultivation at the cost of *Orang Asli* customary lands. Currently, government policies are yet to satisfactorily integrate respect for and recognition of customary lands into socio-economic programmes involving *Orang Asli*. For example, current policies towards the issuance of individual titles in favour of *Orang Asli*[xxvii] pay little regard to communal arrangements of *Orang Asli*.[xxviii]

International responsibility and conduct
The Malaysian Bar is concerned about the slow pace of accession by the government to international conventions on human rights, in particular ICCPR, ICERD, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture, the Convention on the Status of Refugees, and the Rome Statute. Despite having convened working groups to study the first 4 instruments, little or no progress has been noted in public. In the present climate, and especially taking into account the current conflict occurring in the state of Sabah on the island of Borneo, there is a stronger and greater need for Malaysia to recommit itself to the observance of international humanitarian law and international human rights standards and norms.

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11 March 2013

[i] www.malaysianbar.org.my/legal/general_news//protecting_democracy_civil_rights.html. Malaysia has separate legislation dealing with terrorism and human trafficking.

[ii] As compared with 60 days under ISA 1960. Upon the expiry of the 28 days, a detainee must either be charged with an offence or released. The 2-year detention orders under the ISA 1960 which could be renewed indefinitely have been abolished, but do not affect those detained prior to the coming into force of SOSMA 2012.

[iii] One of those arrested, Yazid Sufaat, had been previously detained for 7 years under the ISA 1960.

[iv] Yazid Sufaat was charged for promoting acts of terrorism in Syria, contrary to Section 130G(a) of the Penal Code. Halimah Hussein and Mohd Hilmi Hasim were similarly charged, and were additionally charged under Section 109 of the Penal Code with abetting Yazid.

[v] The new Section 130A(a) of the Penal Code.

[vi] The new Section 130A(b) of the Penal Code.

[vii] In April 2010, lawyer Zainul Rijai Abu Bakar was served with a notice under Section 111 of the Criminal Procedure Code to present himself for questioning and subsequently underwent 4 hours of interrogation on a Syariah matter he filed on behalf of his client, who was also questioned. In October 2012, lawyer Chan Weng Keng, acting for human rights defender SUARAM, was served with a written order by the police to produce documents relating to SUARAM, which was under investigation by various government authorities. These instances clearly breach Article 16 of the United Nations Basic Principles on the Role of Lawyers.

[viii] Authorities have relied on Section 14 of the Aboriginal Peoples Act 1954, entitled "Exclusion of persons from aboriginal areas and aboriginal reserves" and which reads as follows: "14(1). The Minister may, if he is satisfied that having regard to the proper administration of the welfare of the aborigines in any aboriginal area or aboriginal reserve or aboriginal inhabited place it is desirable that any person or class of person should be prohibited from entering or remaining in the area, reserve or place, make an order to that effect in the form prescribed in the Schedule." Further, subsection 14(4) provides: "Any person on whom an order has been served in accordance with this section who is found within any aboriginal area, aboriginal reserve or aboriginal inhabited place mentioned in the order and any person who is a member of any class of persons which has been prohibited from entering or remaining in any aboriginal area, aboriginal reserve or aboriginal inhabited place who is found within the area, reserve or place shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit." Also, in subsection 14(5): "Any person found committing an offence under subsection (4) may be arrested without warrant by the Director General or any police officer."

[ix] Under Section 3 and the First Schedule of the PAA 2012, the "prohibited places" are dams, reservoirs and water catchment areas; water treatment plants; electricity generating stations; petrol stations; hospitals; fire stations; airports; railways; land public transport terminals; ports, canals, docks, wharves, piers, bridges and marinas; places of worship; kindergartens and schools.

[x] www.malaysiakini.com/news/220009

[xi] The Enforcement Agency Integrity Commission Act 2009.

[xii] The government had previously received a recommendation to establish an Independent Police Complaints and Misconduct Commission ("IPCMC"), which would focus solely on the Royal Malaysian Police. This was raised in the previous UPR of Malaysia in 2009. The government instead responded by setting up the EAIC.

[xiii] http://www.malaysia-today.net/mtcolumns/newscommentaries/53516-dap-pas-send-mixed-messages-on-allah-issue

[xiv] *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor [2010] 2 CLJ 208*

[xv] http://www.theborneopost.com/2012/11/08/nurul-izzahs-statement-unwarranted-muhyiddin/

[xvi] For example, Section 5 of the Syariah Criminal Offences (Federal Territories) Act 1997.

[xvii] http://www.themalaysianinsider.com/litee/malaysia/article/federal-court-avoids-deciding-on-right-to-religion-of-choice/

[xviii] http://www.hrw.org/news/2012/05/31/malaysia-reverse-book-ban

[xix] http://www.themalaysianinsider.com/sideviews/article/is-piggy-back-riding-an-indecent-act-lim-sue-goan

[xx] They are the indigenous people of Peninsular Malaysia.

[xxi] The Government's response in paragraph 49 of the Report of the Working Group on the Universal Periodic Review that the land rights for indigenous people, natives and aborigines were *adequately protected under existing laws*, including the right to compensation is at the very least, misleading.

[xxii] During the recently completed National Inquiry on the Land Rights if Indigenous Peoples undertaken by the National Human Rights Commission of Malaysia ('SUHAKAM') in 2012, *Orang Asli* lodged 289 complaints in connection with their customary lands.

[xxiii] However, the statutory power for gazettal and degazetting of *Orang Asli* lands lies in the hands of the State Authority (sections 6 and 7 of APA 1954). "Adequate" compensation for the loss of such lands under APA 1954 is not regarded by the Government as a "right" but is at the discretion of the State Authority (section 12 of APA 1954). Mandatory compensation is limited to fruit and rubber trees belonging to *Orang Asli* but not in respect of their lands (section 11 of APA 1954).

[xxiv] As at 31 December 2010, only 14.21 percent of officially-acknowledged *Orang Asli* lands had been gazetted. Jabatan Kemajuan Orang Asli, Pelan Strategik Jabatan Kemajuan Orang Asli 2011-2015 [Department of Orang Asli Development Strategic Plan 2011-2015] (Planning and Research Section, Department of Orang Asli Development, 2011) (translated from the Malay language), p. 55.

[xxv] For instance, 76 per cent of gazetted *Orang Asli* lands were degazetted in the state of Selangor between 1990 and 1999. Colin Nicholas, The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia (IWGIA, Center for Orang Asli Concerns, 2000), pp. 36-7.

[xxvi] *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677, 689-98 (Federal Court, Malaysia); *Kerajaan Negeri Johor* v *Adong bin Kuwau* [1998] 2 MLJ 158, 162-4 (Court of Appeal, Malaysia).

[xxvii] Jabatan Kemajuan Orang Asli, Pelan Strategik Jabatan Kemajuan Orang Asli 2011-2015 [Department of Orang Asli Development Strategic Plan 2011-2015] (Planning and Research Section, Department of Orang Asli Development, 2011) (translated from the Malay language), pp. 68-9.

[xxviii] The attempted introduction of *Orang Asli* land titles and a development policy in December 2009 ("the land titles policy") for the alienation of individual titles of between 2 to 6 acres each to each *Orang Asli* head of household for cash crop cultivation was met with strong resistance from the *Orang Asli*. On 17 March 2010, more than 2,500 *Orang Asli* gathered at the nation's administrative capital, Putrajaya, to deliver a protest memorandum against the land titles policy to the Prime Minister. Among the complaints against the land titles policy were the potential loss of customary land and communal arrangements, lack of free, prior and consent and engagement and selective consultation.