

## **MALAYSIA**

### **LAWYERS FOR LAWYERS AND THE LAW SOCIETY OF ENGLAND JOINT SUBMISSIONS TO THE UN UNIVERSAL PERIODIC REVIEW (Second Cycle)**

**17th Session of the UPR Working Group of the UN Human Rights Council  
October 2013**

**Submitted March 2013**

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**LAWYERS FOR LAWYERS (L4L), THE LAW SOCIETY OF ENGLAND AND WALES,  
JOINT UPR SUBMISSION – MALAYSIA, MARCH 2013**

1. Lawyers for Lawyers (hereinafter ‘L4L’) and The Law Society of England and Wales submit this report on the state of human rights, especially those regarding the legal profession, in Malaysia, with recommendations to the OHCHR for the 17<sup>th</sup> session of the UPR Working Group in the UN Human Rights Council in 21 October – 1 November 2013.
2. L4L is an independent and non-political Dutch foundation, which was established in 1986 and is funded by lawyers’ donations. L4L promotes the proper functioning of the rule of law through a free and independent exercise of the legal profession.
3. The Law Society of England and Wales is the professional body representing more than 166,000 solicitors in England and Wales. Its concerns include the independence of the legal profession, the rule of law and human rights throughout the world.

**Introduction**

4. The adequate protection of human rights and fundamental freedoms requires that every citizen has effective access to justice and legal assistance. Legal assistance can only be provided effectively by an independent legal profession. This follows *inter alia* from the Charter of the United Nations (ratified by Malaysia on 17 September 1957) and the Universal Declaration of Human Rights and the ASEAN Human Rights Declaration (signed on 18 November 2012).
5. In its task of promoting and ensuring the proper role of lawyers, the Malaysian government should respect the UN Basic Principles on the Role of Lawyers (‘Basic Principles’)<sup>1</sup>, which provide a concise description of international standards relating to key aspects of the right to independent counsel. Adherence to the Basic Principles is considered a fundamental pre-condition to fulfilling the requirement that all persons have effective access to legal assistance.
6. However, reports gathered by the signatory organisations and information that they received from lawyers in Malaysia, demonstrate that the Malaysian government does not always uphold the necessary guarantees for the proper functioning of the legal profession as set out in the Basic Principles. As a consequence, lawyers encounter difficulties in carrying out their profession and see their personal life heavily impacted. This will be explained in more detail below, focussing on three main themes:
  - I Curtailment of the freedom of association and assembly;
  - II Limitation of access to lawyers and legal services;
  - III Interference with lawyers’ professional organisations; and
  - IV Harassment of individual lawyers.

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<sup>1</sup> Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

## **I Curtailment of the freedom of association and assembly**

7. According to Principle 23 of the Basic Principles, *'lawyers like other citizens are entitled to freedom of expression, association and assembly. In particular, they shall have the right to take part in public discussion and matters concerning the law, the administration of justice and the promotion and protection of human rights'*.
8. On April 28, 2012, Bersih 3.0., a coalition of civil rights organizations, organised a march and sit-in to demand clean and fair elections.<sup>2</sup> City and federal officials sought to prevent the sit-in by barring Bersih from using Dataram Merdeka (Independence Square) in central Kuala Lumpur and barricading the area. Nevertheless, marchers numbering in the tens of thousands walked peacefully toward the barricaded square and when the announcement came that the rally was over began a peaceful dispersal. However, a small group breached the barricades. The police reacted with excessive force in what became a four-hour onslaught of tear gas, water cannon, and indiscriminate beatings and arrests.<sup>3</sup>
9. The police also arrested lawyers who had peacefully participated in the public assembly. Whilst in the care and custody of the police, at least three of these lawyers were physically assaulted and beaten, and suffered serious injuries.<sup>4</sup>
10. The indiscriminate beatings and arrests of peaceful protestors, including lawyers, constitute a blatant violation of the right of freedom of association and assembly and cannot be tolerated. The signatory organisations request the Malaysian government to guarantee freedom of expression, association and assembly of all citizens, including lawyers.

## **II Limitation of access to lawyers and legal services**

11. According to Principle 1 of the Basic Principles, *'all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings'*. Furthermore, Principle 16 of the Basic Principles states that *'governments shall ensure that lawyers are able consult with their clients freely'*.
12. It has been reported that during the Bersih 3.0 rally and sit-in, between 388 and 513 persons were arrested and taken to Pusat Latihan Polis ("PULAPOL"), Jalan Semarak, Kuala Lumpur. The urgent arrest team of the Bar Council of Malaysia, comprising members of the Bar Council Legal Aid Centre (Kuala Lumpur) and volunteer lawyers, were present at PULAPOL to assist and represent the arrested persons. However, the police refused to allow them access to the arrested persons despite repeated requests by both the arrested persons and the lawyers present.<sup>5</sup>
13. The refusal to give lawyers' access to persons arrested during the Bersih 3.0 rally is but one of many instances of the Malaysian authorities undermining the right to legal counsel. Recently, Amnesty International posted an urgent action for Mohd Hilmi Hasim, who was detained without charge and denied access to a lawyer by the Malaysian authorities for approximately two weeks.<sup>6</sup> Hamza Kashgari, a Saudi Arabian lawyer who was prosecuted by the Saudi Arabian authorities following alleged statements he had posted on Twitter which they deemed to be insulting towards the Prophet Mohammed, met with the same

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<sup>2</sup> This was the third public rally to be organized by the Coalition to call for the conduct of clean and fair elections in the country, the first being held on 10th November 2007 and the second on 9th July 2011. The use of excessive force by the Police against peaceful protestors, to be discussed below, also occurred during the first two rallies.

<sup>3</sup> Human Rights Watch, World Report 2013, p. 331.

<sup>4</sup> Resolution adopted at the Extraordinary General Meeting of the Malaysian Bar held at Sunway Putra Hotel, Kuala Lumpur, 11 May 2012.

<sup>5</sup> Bar Council of Malaysia, Final Report of the Malaysian Bar on Bersih 3.0 rally held on 28 April 2012 in Kuala Lumpur, p. 4.

<sup>6</sup> Amnesty International, Urgent Action, ASA 28/001/2013 Malaysia.

fate when his Malaysian lawyer Muhammad Afiq Muhammad Noor was allegedly denied access to his client by the Malaysian authorities.<sup>7</sup>

14. The signatory organisations urge the Malaysian authorities to guarantee the right of arrested persons to receive assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings and to ensuring that lawyers are able consult with their clients freely at all times.

### III Interference with lawyers' professional organisations

15. A self-regulated and properly independent bar association with mandatory membership is regarded as essential to ensuring: the independence of lawyers, protection from state interference; the quality of legal services; and, the rule of law. According to Article 24 of the Basic Principles, *'lawyers shall be entitled to form and join self-governing professional associations to represent their interests. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference'*.
16. Malaysia has self-governing professional associations for lawyers. The most well-known association is the Bar Council of Malaysia. It is a corporate body established under the Legal Profession Act 1976 (the LPA). One of the objects of the Malaysian Bar is to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear of favour.<sup>8</sup> On 24 October 2012 it the Malaysian Bar was conferred with the United Nations (UN) Malaysia Award in recognition of its many years of invaluable, courageous and creative work in advancing the cause of democracy and human rights in Malaysia.
17. In May 2012, the Minister in the Prime Minister's Department Datuk Seri Mohamed Nazri Aziz announced that the government would look into reviving the Malaysian Academy of Law Bill, which was dropped in 2002, as part of its plan to create an alternative to the Malaysian Bar. The bill, first tabled in 2002 to provide for the setting up of a legal academy with functions overlapping that of the Bar Council, was subsequently dropped "out of respect for the Bar".
18. Mr. Nazri's announcement was followed after the Bar Council's extraordinary general meeting (EGM) passed a resolution condemning the use of excessive force by the police during the Bersih 3.0 rally discussed above. Mr. Nazri said that *"It (the Bar) is very partisan in its accusations, and I do not think it should be given the monopoly (to represent the legal community)."* Furthermore, he stated that a proposed law academy "can be an alternative" to the Bar, and that the Bar Council "should dissolve itself".<sup>9</sup>
19. The 2002 Malaysian Academy of Law Bill provides for the establishment of an Academy of Law with compulsory membership for lawyers. The Academy's executive body would consist of several government appointed representatives. Empowered to control the conduct of the legal profession, the "alternative" institution would usurp the functions and powers of the Bar Council under the act. The combined effect of the previous undermines the independence of the Malaysian Bar and other self-governing professional associations that currently exist.
20. The signatory organisations have been informed that the plan to revive the 2002 Malaysian Academy of Law Bill has recently been dropped, but may be put on the agenda again after the general elections. Creating a professional organisation for lawyers along the lines of the 2002 Malaysian Academy of Law Bill would clearly constitute a violation of Principle 24 of the Basic Principles. Therefore, the signatory organisations urge the Malaysian Government not to establish such an organisation and leave existing self-governing professional associations to represent the interests of lawyers without any interference.

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<sup>7</sup> See for instance Amnesty International, Urgent Action, ASA 28/002/2013 Malaysia.

<sup>8</sup> Article 42(1) under a LPA.

<sup>9</sup> Interview in the Sun daily, 15 May 2012.

#### IV Harassment of individual lawyers

21. According to Principle 16 of the Basic Principles, governments '*shall ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference*'. Furthermore, Principle 18 of the Basic Principles states that '*lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions*'. According to Principle 17 of the Basic Principles, '*where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities*'.
22. It has already been pointed out during the second cycle of the UPR that the protection of lawyers and human rights defenders generally is flawed in Malaysia. On 23 August 2006, the Special Representative of the Secretary-General on human rights defenders together with the Special Rapporteur on the independence of judges and lawyers sent a letter of urgent appeal concerning death threats against a lawyer representing a woman who had renounced Islam and embraced Christianity. Such threats were reportedly linked to his/her lawful activity as a lawyer and may represent an attempt to intimidate lawyers who take on cases in defence of the right to freedom of religion and belief.<sup>10</sup> On 27 December 2007, the Special Rapporteur on freedom of opinion and expression jointly with the Chairperson-Rapporteur of the Working Group on Arbitrary Detention and the Special Representative of the Secretary-General on human rights defenders wrote to the Government about the recent wave of arrests and detention of a number of ethnic Indian human rights defenders. Allegations related to the arrest and detention pursuant to ISA of five ethnic Indian human rights defenders following non-violent demonstrations. They were not presented with an arrest warrant, nor were they brought before a tribunal or given access to legal counsel.<sup>11</sup>
23. Furthermore, the government has continued its practice of intimidating lawyers by summoning them for questioning and to furnish documents and written statements on information relating to their clients in cases where their clients are under investigation. This has been done by both the police and the Malaysian Anti-Corruption Commission, in total disregard for solicitor-client privilege<sup>12</sup>.
24. Human rights non-governmental organization Suara Rakyat Malaysia (popularly known as "SUARAM") also faced intense investigations by various government authorities from July 2012 until February 2013 on the ground that it had 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 organization BERSIH 2.0, human rights law group Lawyers for Liberty and independent polling organization Merdeka Centre were all accused by the government controlled mainstream media of receiving foreign funding to finance activities which were designed to destabilize the Malaysian government.
25. There have been few improvements in the protection of lawyers in recent years. The signatory organisations were informed about several instances in which the Malaysian authorities failed to safeguard the secu-

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<sup>10</sup> A/HRC/4/37/Add.1, paras. 413-414.

<sup>11</sup> A/HRC/7/14/Add.1, para. 384.

<sup>12</sup> 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. On 19 March 2012, the MACC issued notices to 2 lawyers, Latheefa Beebi Koya and Murnie Hidayah Anuar, legal counsel for Shamsubahrain Ismail, to appear for questioning in the name of assisting the MACC in an investigation into 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 and 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. 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.

rity of lawyers in the performance of their professional functions. Categories of lawyers who are commonly targeted include lawyers who voice criticism against the government and the ruling party - such as those active in Bersih 2.0 and the Bar Council of Malaysia - and, lawyers who support clients in apostasy cases. Harassments are conducted by different means (face to face, by telephone, SMS, email) and sometimes even take form of death threats.

26. The signatory organisations emphasize that research into the aggressions directed at lawyers is the best means to prevent such threats in the future. They further indicate that crimes against lawyers that relate to the exercise of their profession, do not only touch those lawyers themselves and their family, but also obstruct the access to justice of their clients. For this reason investigation into such crimes should be given a high priority. The signatory organisations urge the Malaysian authorities to ensure that aggressions directed at lawyers are effectively investigated and perpetrators are brought to justice.

### **Recommendations**

27. L4L and the Law Society of England and Wales recommend that the Malaysian government take all legal and practical steps necessary to:
- I Fully comply with the Basic Principles on the Role of Lawyers;
  - II Guarantee freedom of expression, association and assembly and ensure that lawyers shall not suffer, or be threatened with, prosecution or sanctions for any action taken in accordance with recognized professional duties;
  - III Ensure that all persons can call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings and to ensure that lawyers are able consult with their clients freely at all times;
  - IV To recognize the independence of the Malaysian Bar as a statutory body in the exercise of its legally-mandated regulatory and representative functions;
  - V Ensure that crimes, harassments and other violations against human rights defenders and lawyers are effectively investigated and perpetrators of such acts are prosecuted;
  - VI Take all other measures needed to guarantee the proper functioning of the rule of law.