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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION  
TO THE UNIVERSAL PERIODIC REVIEW OF MALAYSIA**

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*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

## **ICJ SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW OF MALAYSIA**

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Malaysia. In this submission, the ICJ brings to the attention of the Human Rights Council's Working Group on the UPR (Working Group) and to the Human Rights Council (Council) issues concerning: (1) the independence and impartiality of the judiciary; (2) freedom of peaceful assembly and of association; (3) right to freedom of expression of LGBT groups; (4) the Security Offences (Special Measures) Act 2012; and (5) Malaysia's engagement with international human rights instruments and mechanisms.

### **Independence of the judiciary**

2. In 1988, Parliament amended Article 121(1) of the Federal Constitution, which originally provided that "the judicial power of the Federation shall be vested in two High Courts... and such inferior courts as may be provided by federal law". The new provision now reads: "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law".

3. The deletion of the term "judicial power" has apparently engendered the belief or misconception among some jurists that the courts: are powerless to address and do justice wherever there is a perceived lacuna in the law; are confined exclusively to interpreting and facilitating the implementation of acts of Parliament; are no longer able to develop common law; and are deprived of their inherent jurisdiction as well as their right to exercise judicial review over the decisions of public bodies and Executive functions.<sup>1</sup>

4. In 2009, a law was passed establishing the Judicial Appointments Commission (JAC), with the stated purpose of upholding the independence of the judiciary. A closer inspection of the functions of the JAC, however, reveals that it only serves to reinforce the power and influence of the Prime Minister over the judicial appointment process. To illustrate, it may appear that the Prime Minister only appoints five of the nine members of the JAC. In practice, however, the Prime Minister exercises decisive influence over the appointment of all of the members of the JAC.<sup>2</sup>

5. With regard to the appointment and promotion of judges in general, the process lacks transparency and is often carried out in an arbitrary manner. Judges have been known to be promoted from the High Court to the Court of Appeal without due regard to seniority and the Prime Minister may reject a recommendation made by the Chief Justice without providing any justification for it.<sup>3</sup> Hence, reading the provisions in both the JAC law and the Constitution on the appointments of judges, the Prime Minister has complete control over who will constitute the nominating body, and continues to be the main decision maker in the general appointment of judges.

6. The Human Rights Committee had expressed the view that clear and transparent procedures must be applied in judicial appointments and assignments in order to safeguard the independence and impartiality of the judiciary.<sup>4</sup> Selecting, recruiting, and appointing judges should ideally be conducted by a body of their peers, and independent of intervention from the executive, and the legislative branches of government.<sup>5</sup> While the political branches of Government may appoint judges, there are certain safeguards that should be adopted to avoid abuse or the perception of abuse.<sup>6</sup> The Committee has on several occasions drawn attention to the fragility of an independent judiciary where there is no independent mechanism responsible for the recruitment and discipline of judges which would serve to shield the judiciary from the manner pressures and influences from the executive.<sup>7</sup> In the case of Malaysia, the Prime Minister's great influence in the selection of the members of the JAC, as well as in the general appointment of judges clearly undermines the independence of the judiciary. Moreover, the procedure that is currently in place for appointing judges does not have any safeguards that can ensure that judges would be protected from influence and pressure by the Prime Minister.

7. In 2011, the Special Rapporteur on the Independence of Judges and Lawyers made a visit request to Malaysia. The Malaysian government has yet to accept this request.

### **Freedom of peaceful assembly and of association**

8. The Peaceful Assembly Act 2012 (PAA) was enacted in early 2012 and replaces sections 27, 27A, 27B and 27C of the Police Act 1967. The PAA, however, appears to be more restrictive than the provisions in the Police Act. *First*, the PAA expressly states that the right to organize an assembly or participate in an assembly peaceably does not extend to non-citizens<sup>8</sup> and persons below 21 years of age.<sup>9</sup> This contravenes article 20 of the Universal Declaration of Human Rights, article 21 of the International Covenant on Civil and Political Rights (ICCPR), and article 15(2) of the Convention of the Rights of the Child (CRC) that disallows any restrictions to be placed on the exercise of a child's freedom of association and freedom of peaceful assembly.<sup>10</sup> Although Malaysia is not a party to the ICCPR, it falls afoul of international standards if restrictions on this right go beyond the limitations permitted in article 21(2). As the Human Rights Committee has affirmed, non-citizens must be afforded the same right to peaceful assembly and association as citizens.<sup>11</sup> As Malaysia is also a party to the Convention on the Rights of Persons with Disabilities (CRPD), not permitting children with disabilities to participate in political and public life is also in violation of article 29 of CRPD. *Second*, The PAA also places undue onerous responsibilities on organizers of public assemblies. Section 6 requires organizers of assemblies to ensure that participants do not act or make any statement that could disturb public tranquility. They must also ensure that the assembly does not cause any inconvenience to the public at large, and bear the clean-up costs after the assembly.

9. In April 2012, at least 300,000 people took to the streets to call for fair elections. This assembly was organized by the Coalition for Clean and Fair Elections (Bersih). In June 2012, the Government filed a suit against ten members of the Bersih committee. The Government alleged that the assembly caused damage to 15 vehicles, mostly owned by the police, and repair of these vehicles cost up to RM122,000 (approximately €21,581). In his report to the Human Rights Council, the Special Rapporteur on the right to freedom of assembly and of association emphasized that "assembly organisers and participants should not be held responsible and liable for the violent behaviour of others".<sup>12</sup> Instead, States have a positive obligation to actively protect peaceful assemblies, which includes the protection of participants of peaceful assemblies from individuals or groups of individuals, including agent provocateurs and counter demonstrators, who aim at disrupting or dispersing such assemblies.<sup>13</sup>

10. The PAA also increases the powers of the police to change the conditions and restrictions of an assembly including the date, time, duration, venue, manner and conduct of the assembly, payment of clean-up costs, and other matters deemed necessary by the police.<sup>14</sup> This authority is clearly open to abuse in light of Malaysian security forces' past human rights violations in suppressing assemblies and the consequential impunity for such misconduct.<sup>15</sup> There is also a comprehensive list of prohibited places for an assembly, which includes petrol stations, land public transport terminals, piers, bridges, places of worship, schools and so on.<sup>16</sup> This creates unnecessary impediments on the enjoyment of peaceful assembly and such prohibitions must only be used only when a less restrictive response would not achieve the legitimate aim pursued by the authorities, pursuant to international standards.<sup>17</sup>

### **Right to Freedom of Expression of LGBT Groups**

11. Seksualiti Merdeka (Sexuality Independence) is an annual festival held since 2008 on sexuality rights held in Kuala Lumpur by individuals and Malaysian civil society groups, which include the Malaysian Bar Council, Suara Rakyat Malaysia (SUARAM), Empower, and PT Foundation. Seksualiti Merdeka also organizes workshops, talks, and film screenings throughout the year. In November 2011 police banned the Seksualiti Merdeka festival. The police justified the ban on the grounds that the festival was a threat to national security and public order. The organizing committee filed an application for judicial review, but in March 2012 the High Court of Kuala Lumpur rejected the application, stating that the police were acting within their powers to investigate under the Police Act and the matter was not open to review.<sup>18</sup>

12. Seksualiti Merdeka constitutes a form of expression to convey issues concerning sexual orientation and gender identity in Malaysia. Although Malaysia is not a State party to the ICCPR, it constitutes the primary and accepted international standard for both freedoms of expression and association and the corresponding permissibility of limitations.<sup>19</sup>

### **Security Offences (Special Measures) Act 2012**

13. The SOSMA was enacted to replace the Internal Security Act 1960 (ISA). Although SOSMA removes the ISA's power of detention without trial, there is little guarantee that an individual's human rights and constitutional rights will be any better protected under this new Act.

14. SOSMA has vested wide apprehension and surveillance powers in the police. The Act allows the police to arrest persons suspected of security offences, as defined under Chapters 6 and 6A of the Malaysian Penal Code. A suspected person may be detained for an initial period of 24 hours and thereafter, for purposes of investigation, this may be extended up to 28 days by the police.<sup>20</sup> While an improvement from the 60-day and two-year renewable detention under the ISA, the issues of arbitrary detention and torture and ill-treatment remain a concern under the SOSMA.<sup>21</sup> This extension is not subjected to judicial oversight<sup>22</sup> and has been identified by the UN Special Rapporteur on Torture as: "the most dangerous period is the period under police custody... from access to legal counsel to torture and forced confession".<sup>23</sup>

15. In addition, section 5 of SOSMA permits the police to deny a detainee's access to legal representation if it is considered that such access may interfere with evidence, lead to harm to another, lead to alerting a non-arrested suspect, or hinder the recovery of property. This threatens a person's due process, as the likelihood of "confessions" under ill-treatment or duress and abusive interrogations increases in cases where a person is not properly advised or legally represented. The Special Rapporteur on torture explains in his report that "[i]n exceptional circumstances, under which it is contended that prompt contact with a detainee's lawyer might raise genuine security concerns and where restriction of such contact is judicially approved, it should at least be possible to allow a meeting with an independent lawyer, such as one recommended by a bar association".<sup>24</sup> In the case of Malaysia, no such safeguard is present. A case that illustrates this is that of the arrest and detention of Yazid Sufaat, whose lawyers had to file a *habeas corpus* petition on his behalf since they were denied access to him even after more than 48 hours of being in the custody of police.<sup>25</sup>

16. Where information is considered related to the commission of a security offence, the public prosecutor can grant the police powers to intercept communications.<sup>26</sup> This includes postal articles, messages and conversations transmitted or received by way of any form of communication.<sup>27</sup> Should immediate action be required, the police may do so without seeking authorisation.<sup>28</sup> The Human Rights Committee has expressed the view that "the monitoring or censorship of correspondence should be subject to satisfactory legal safeguards against their arbitrary application, including judicial oversight and judicial remedy".<sup>29</sup>

17. The SOMSA also contravenes the right to liberty, since it is the general rule that bail cannot be granted. Even if the court allows bail, the accused will only be released with a monitoring device attached to him or her.<sup>30</sup>

### **International Human Rights Instruments and Mechanisms**

18. The Government of Malaysia has expressed its support to examine UPR first cycle recommendations to become party to the ICCPR, ICESCR,<sup>31</sup> CAT<sup>32</sup> and ICERD.<sup>33</sup> Although the Attorney General claims that Malaysia adheres to the principles laid down in these instruments, the Government of Malaysia has not yet signed nor ratified them.<sup>34</sup>

19. Despite the Government of Malaysia having ratified CRPD in 2010, impermissible reservations were made to article 15 on the prohibition of torture and other ill-treatment, and article 18 on the right to liberty of movement and nationality. Malaysia also maintains a reservation relating to torture under article 37 of the CRC. Under international law, the freedom from torture, inhuman or degrading treatment or punishment is an absolute and non-derogable right.<sup>35</sup>

20. Concerning CEDAW,<sup>36</sup> Malaysia has declared that it does not consider itself bound by articles 9(2), 16(1)(a), 16(1)(f) and 16(1)(g).<sup>37</sup> Since article 16 forms a core principle of the Convention, this reservation is not in line with the object and purpose of the Convention.<sup>38</sup>

21. The Government of Malaysia has not adhered to periodic reporting deadlines to the treaty bodies, namely: the initial report under the CRPD (due July 2012); and follow-up reports under the CRC (due March 2012) and CEDAW (due 2008). Malaysia has pending requests for visits by nine Special Procedures.<sup>39</sup>

### **Recommendations**

22. The ICJ calls upon the Working Group and the Council to recommend to the Government of Malaysia to:

#### *Concerning the independence of the judiciary*

- i). Review and amend Article 121 of the Federal Constitution to bring it back to its pre-1988 position;
- ii). Implement safeguards to guarantee that judicial appointment procedures are transparent and independent in practice and that decisions are not influenced by any reason other than those related to an 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;
- v). Enact guidelines in the Constitution or by law consistent with international standards on judicial independence for the removal or impeachment of judges;

#### *Concerning freedom of peaceful assembly and of association*

- vi). Insert a provision in Peaceful Assembly Act 2012 (PAA) to recognise criminal liability of public officials, police officers and volunteers and officers from security forces for the prevention of excessive or unlawful use of force and arbitrary arrests in peaceful assemblies;
- vii). Repeal Section 6 of the PAA;
- viii). Increase the human rights training and education of staff involved in handling assemblies;

#### *Concerning the right to freedom of expression of LGBT groups*

- ix). Withdraw the ban on Seksualiti Merdeka and allow civil society groups to freely express issues concerning sexual orientation and gender identity in Malaysia;

#### *Concerning the Security Offences (Special Measures Act) 2012 (SOMSA)*

- x). Insert a provision in SOMSA to recognise the criminal liability of public officials and superior or commanding police officers complicit in, or instigating, acts of torture and other ill-treatment;
- xi). Increase human rights training and education of staff involved in the detention of persons;
- xii). Take steps to guarantee that detained persons are allowed prompt access to legal counsel;
- xiii). Repeal Sections 14, 15 and 16 of the SOMSA.

#### *Concerning international human rights instruments and mechanisms*

- xiv). Become party to the: ICCPR, its two Optional Protocols, ICESCR and its Optional Protocol, CAT, OPCAT and ICERD, ICPED, the Optional Protocol to CEDAW and the third Optional Protocol (on a communication procedure) to the CRC;
- xv). Withdraw reservations from 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 periodic reports to the CRPD, CEDAW and CRC;
- 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.

## ENDNOTES

<sup>1</sup> Bar Council of Malaysia, 'The Malaysian Bar's Request for Amendment to Article 121(1) of the Federal Constitution' (23 February 2012), at URL: [http://www.malaysianbar.org.my/bar\\_news/berita\\_badan\\_peguam/the\\_malaysian\\_bars\\_request\\_for\\_amendment\\_to\\_article\\_1211\\_of\\_the\\_federal\\_constitution.html](http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/the_malaysian_bars_request_for_amendment_to_article_1211_of_the_federal_constitution.html).

<sup>2</sup> There are nine members of the JAC: the Chief of the Federal Court, President of the Court of Appeal, the Chief Judge of the High Court in Sabah and Sarawak, a Federal Court judge appointed by the Prime Minister, and four eminent persons appointed by the Prime Minister. Under the Constitution, three members of the JAC (the Chief of the Federal Court, President of the Court of Appeal, and the Chief Judges of the High Court of Sabah and Sarawak) are to be appointed by the King, acting on the advice of the Prime Minister. The King, however, does not possess genuine political power and as emphasized in the Constitution, he must "act in accordance with the advice" of the Cabinet or essentially the Prime Minister (article 40a(1) of the Constitution). Hence, in practice, it is still the Prime Minister who ultimately decides who will be appointed as Chief of the Federal Court, President of the Court of Appeal, and Chief Judges of the High Court of Sabah and Sarawak.

<sup>3</sup> The Malaysian Bar, 'The Appointment of Judges' (12 April 2008), at URL: [http://www.malaysianbar.org.my/general\\_opinions/comments/the\\_appointment\\_of\\_judges.html](http://www.malaysianbar.org.my/general_opinions/comments/the_appointment_of_judges.html)

<sup>4</sup> Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc CCPR/CO/73/AZE, para 14.

<sup>5</sup> European Charter on the statute for judges, doc. cit., operative paragraph 1.3.

<sup>6</sup> International Commission of Jurists, *International Principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' Guide no.1*, pp. 45, at URL: <http://www.icj.org/no-1-international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors/>.

<sup>7</sup> Concluding Observations of the Human Rights Committee on the Congo, UN Doc CCPR/C/79/Add.118.

<sup>8</sup> Peaceful Assembly Act 2012, section 4(1) (a).

<sup>9</sup> Peaceful Assembly Act 2012, section 4(1) (d).

<sup>10</sup> Article 15(2) of the CRC provides that: "No restrictions may be placed on the exercise of these Rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others".

<sup>11</sup> UN Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant (1986), paragraphs 4 & 7, at URL: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument).

<sup>12</sup> Statement by Maina Kiai at 20<sup>th</sup> session of the Human Rights Council, Agenda Item 3 (20 June 2012).

<sup>13</sup> *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Doc A/HRC/20/27 (2012), para 33.

<sup>14</sup> Peaceful Assembly Act 2012, section 15(1) and 15(2).

<sup>15</sup> Human Rights Watch, 'World Report 2013: Malaysia', at URL: <http://www.hrw.org/world-report/2013/country-chapters/malaysia>.

<sup>16</sup> Peaceful Assembly Act 2012, First Schedule, section 3.

<sup>17</sup> *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Doc A/HRC/20/27 (2012), para 39.

<sup>18</sup> Ding Jo Ann, The Nut Graph, *Seksualiti Merdeka: Threat to national security?*, 12 March 2012, available at URL: [http://www.malaysianbar.org.my/legal/general\\_news/seksualiti\\_merdeka\\_threat\\_to\\_national\\_security\\_.html](http://www.malaysianbar.org.my/legal/general_news/seksualiti_merdeka_threat_to_national_security_.html).

<sup>19</sup> The limitation of public order and national security is provided under articles 19 and 21 of the ICCPR as well as under article 10 of the Malaysian Federal Constitution. Nonetheless, it is unclear as to how the festival would fall under one of the national security or public order offences, such as offences against the state or of one relating to terrorism, as stipulated under Chapter 6 and 6A of the Malaysian Penal Code. The Human Rights Committee has also made it clear that when such restrictions are invoked, "the precise nature of the threat, and the necessity and proportionality of the specific action taken" must be established by the Government (General Comment 34, above, para 35). In the case of *Seksualiti Merdeka*, there is no indication whatsoever that the festival nor the activities conducted during the festival were meant to incite imminent violence nor was it shown that the activities were likely to incite violence. Although this infringement is not a breach of Malaysia's legal obligation, the ban of the festival is still nevertheless, an act not in line with international standards.

<sup>20</sup> Security Offences (Special Measures) Act 2012, section 4(4) and 4(5)

<sup>21</sup> Koh Jun Lin, 'New Security Offences Law More Dangerous' (*Malaysiakini*, 27 June 2012), at URL: <http://www.malaysiakini.com/news/202004>.

<sup>22</sup> Security Offences (Special Measures) Act 2012, section 4(5)

<sup>23</sup> Ibid.

<sup>24</sup> *Report of the UN Special Rapporteur on Torture*, UN Doc A/57/173 (2002), paras 16 and 17.

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<sup>25</sup> Alyaa Alhadjri, 'Outrage over denied legal access for Sosma detainee' (*The Sun Daily*, 15 February 2013), at URL: <http://www.thesundaily.my/news/613546>.

<sup>26</sup> Security Offences (Special Measures) Act 2012, section 6 (1).

<sup>27</sup> Ibid, section 6(1).

<sup>28</sup> Ibid, Explanatory Statement for section 6.

<sup>29</sup> *Concluding Observations of the Human Rights Committee on the United States of America*, UN Doc CCPR/C/USA/CO/3/Rev.1 (2006), para 21.

<sup>30</sup> Security Offences (Special Measures) Act 2012, section 13.

<sup>31</sup> International Covenant on Economic, Social and Cultural Rights.

<sup>32</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>33</sup> Convention on the Elimination of All Forms of Racial Discrimination.

<sup>34</sup> Official Portal of the Attorney General's Chambers of Malaysia, 'Human Rights', at URL: [http://www.agc.gov.my/index.php?option=com\\_content&view=article&id=408&Itemid=334&lang=en](http://www.agc.gov.my/index.php?option=com_content&view=article&id=408&Itemid=334&lang=en).

<sup>35</sup> Human Rights Council Resolution 8/8 (2008) *on Torture and other cruel, inhuman or degrading treatment or punishment*.

<sup>36</sup> Convention on the Elimination of all Forms of Discrimination against Women.

<sup>37</sup> United Nations: Treaty Collection, 'Convention on the Elimination of All Forms of Discrimination against Women', at URL: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec).

<sup>38</sup> Division for the Advancement of Women, Department of Economic and Social Affairs, 'Convention on the Elimination of All Forms of Discrimination against Women', at URL: <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.

<sup>39</sup> Namely, the the Special Rapporteur on human rights defenders, Special Rapporteur on freedom of religion, Special Rapporteur on migrants, Special Rapporteur on human rights and counter terrorism, Independent Expert on minority issues, Special Rapporteur on racism, Special Rapporteur on the independence of judges and lawyers, Special Rapporteur on food, and Special Rapporteur on freedom of association and assembly.