3rd Universal Periodic Review of Malaysia 2018
Bar Council Malaysia Submission

Introduction

1. Malaysia received 232 paragraphs of recommendations during the 2nd UPR in 2013. 150 were accepted (116 in full, 22 in principle, 12 in part). 82 were not supported.

2. Due to dearth of officially-released information, actions taken by government in response to accepted recommendations are not readily accessible or easy to identify and assess. No mid-term implementation report was submitted by government. Engagement with civil society has focused on preparing government's own National Report. However government has released 3 important documents since 2nd UPR, namely 11th Malaysia Plan ("11MP"), Sustainable Development Goals ("SDGs") Voluntary National Review 2017 ("VNR"), and National Human Rights Action Plan ("NHRAP"). Government has also introduced and/or passed and implemented several significant pieces of legislation that have had, or will have, an adverse impact on the enjoyment of human rights in Malaysia.

11th Malaysia Plan

3. Government launched 11MP to cover development policies from 2016-2020. Its 6 strategic thrusts aim to enhance inclusiveness towards and equitable society, improve well-being for all, accelerate human capital development for an advanced nation, pursue green growth for sustainability and resilience, strengthen infrastructure to support economic expansion, and re-engineer growth for greater prosperity. Government's commitment to economic development is laudable. However 11MP does not acknowledge progress on human rights as an important and integral component of economic development, and how progressive realisation of human rights leads to greater economic attainment and benefits.

Sustainable Development Goals Voluntary National Review 2017

4. Government submitted VNR in July 2017, highlighting progress on SDG 1-3, 5, 9, 14-15 and 17. It has mapped the SDGs to 11MP, stating that for first phase of SDG (2016-2020), achievements of 11MP will meet SDGs as well. However there has been no mapping of 11MP and SDG to UPR recommendations. In fact, SDG was only mentioned in passing twice in the whole of NHRAP.

National Human Rights Action Plan

5. Government finally launched NHRAP on 1 March 2018, after 5 years of development (2012-2017). It is currently available only in the national language; an English-language text has yet to be released. The NHRAP sets out 5 thrusts: civil and political rights; economic, social and cultural rights; rights of vulnerable groups; indigenous peoples' rights; international obligations. It identifies 83 priority issues and 294 action plans to be achieved in the short-term (under 2 years), medium-term (2-5 years) and long-term (5-10) years.

6. NHRAP is unambitious in aims and unchallenging in aspirations. Many commitments made are vague or recite positions and policies already held or being pursued by government. No performance indicators are stipulated. NHRAP fails either to deepen or broaden the scope of human rights in Malaysia. For example, action plans on civil and political rights seek to

explain current practices and justify the need for preventive legislation, both of which do not conform to international human rights norms. Action plans on international obligations only commit to further study of 5 international human rights treaties, a position not significantly different from that taken in 2009. There is no commitment to advance the overall human rights environment in Malaysia.

Freedom of Information

7. The greatest challenge to the right to freedom of information in Malaysia is the proposed Anti-Fake News Bill that was presented to Parliament on 26 March 2018. It is expected to be passed by Parliament in its current sitting that ends on 5 April 2018. The Bill seeks to criminalise the malicious creation, offer, publication, distribution, circulation or dissemination of fake news or publication containing fake news. Fake news is defined as including "any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas". Parodies and poking fun, which by their very nature may involve some embellishment, would now constitute a criminal offence.

8. Providing or making available financial assistance knowing or having reasonable grounds for believing it would be used to commit an offence would itself be a criminal offence.

9. The proposed law will allow an aggrieved party to apply ex-parte for a court order to remove the fake news item. An order can be challenged. However an order obtained by the government, alleging prejudice or likely prejudice to public order or national security cannot be challenged.

10. The Bill, once passed and brought into force, will have extra-territorial jurisdiction and high criminal penalties: a maximum fine of RM500,000 and/or a jail sentence of up to 10 years. There is also a fine of RM100,000 for ignoring a court order to remove the fake news item, or for not removing an item that that person knows or has reasonable grounds for believing is fake. There are no public interest exceptions, nor exceptions for intermediate transmission. Failure to abide by a court order renders it a punishable contempt of court.

11. The proposed broad-based law to criminalise the dissemination of news, information, data and reports deemed to be "fake" amounts to legislative overkill. It is a restriction of the right to freedom to receive and disseminate information, since anything that is not 100% correct would be "partly false" and subject to prosecution. It also infringes the rights to freedom of expression and to freedom of thought, conscience or belief, since it is possible that "unacceptable" or "incorrect" views, opinions and/or beliefs could be attacked under the proposed legislation as being "false".

Law and Security

12. Although the government repealed the much-despised and severely-abused Internal Security Act 1960 ("ISA") on 31 July 2012, it brought into force an amended and expanded Prevention of Crime Act 1959 ("POCA") and Prevention of Terrorism Act 2015 ("POTA") on 1 September 2015. Both POCA and POTA re-introduced detention without trial. They give police the power to detain a person for an initial period of 60 days, without access to legal representation or family. Upon approval of a Prevention of Crime Board or Prevention of Terrorism Board, government can detain a person for up to 2 years at a time, renewable

indefinitely. Judicial review of such detention is only available on procedural matters. In practice and procedure mechanisms employed under POCA and POTA are not dissimilar to those under ISA, save that the authorising body is now the respective boards and no longer the Minister for Home Affairs. Nonetheless, the members of the POCA and POTA boards are not publicly known, and there is no automatic right of legal representation before these bodies. The number of people detained under POCA/POTA is not readily disclosed. As at mid-October 2017, 44 persons had been detained under POCA and 26 under POTA.[i]

13. Government continues to abuse its powers under the Security Offences (Special Measures) Act 2012 ("SOSMA") which contains an extremely wide definition of what constitutes a "security offence". It allows for initial detention of 24 hours by police to be extended for up to 28 days 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. The Prime Minister's public commitment for the Malaysian Bar to be involved in reviewing the 28-day period of detention under Section 4(5) of SOSMA pursuant to a "sunset clause" in Section 4(11) of SOSMA was not honoured.

Independence of lawyers and interference with human rights defenders

14. In March 2016, the Attorney-General of Malaysia publicly stated that the Prime Minister was not involved in any corrupt practice in relation to a financial scandal relating to the 1MDB affair, notwithstanding the fact that he had received the equivalent in Malaysian Ringgit of USD681 million in his personal bank accounts from a third party. The Prime Minister had stated that the money was a donation from a member of the Suadi Arabian royal family, and had no conditions attached to it. Under Malaysian law, the receipt of a donation can still constitute a corrupt act. In response to the Attorney-General's pronouncement, the Malaysian Bar, the professional body of lawyers in peninsular Malaysia, debated and passed a motion at their Annual General Meeting calling for the Attorney-General to resign. Subsequently, 4 members of the Malaysian Bar were called up by the police for questioning in relation to that meeting and the motion: the Secretary of the Malaysian Bar, the proposer and 2 seconders of the motion.

15. Lawyers continue to face difficulties accessing their clients, especially those detained under SOSMA, POCA and POTA. Lawyers and other defenders of the human rights of indigenous peoples have also faced intimidation and obstruction in access by those in authority or control, especially when indigenous peoples live in indigenous land reserves, forest reserves, or land over which a logging or other concession has been granted to a commercial enterprise.

16. Government has also launched an initiative to propose to amend the Legal Profession Act 1976 to change, inter alia, the manner in which elections for the office bearers and some members of the Bar Council (governing body of Malaysian Bar) are carried out. The proposals also include the appointment of 10 lawyers to be members of the Bar Council as nominees of the government. These proposals are at the initiative of the government and do not come from the Bar Council. They represent an uninvited and unwelcomed interference in the internal affairs of the Malaysian Bar and Bar Council and constitute a real and present threat to the independence of the legal profession. Malaysian Bar has also been accused of receiving foreign funding to finance activities which allegedly destabilise government. The proposals by government are viewed as acts of reprisals against the Malaysian Bar for its outspoken stand on human rights, rule of law and administration of justice.

Independence of judiciary

17. Malaysian Bar welcomes the Federal Court (apex court) decision in the Semenyih Jaya case[ii], which re-affirmed the doctrine of separation and powers and independence of the judiciary. However Malaysian Bar expresses deep concern over government's decision to appoint the soon-to retire Chief Justice of Federal Court and President of Court of Appeal as additional judges of the Federal Court and maintain them in their positions even after they reached mandatory extended retirement age of 66 years and 6 months.[iii] Malaysian Bar initiated a constitutional challenge to these appointments/extensions, with the Advocates Association of Sarawak joining proceedings. Hearing was on 14 March 2018, but decision has been reserved.

Freedom of Assembly

18. Concerns about the Peaceful Assembly Act 2012 ("PAA") persist. Foremost is the requirement that 10 days' prior notice of a planned assembly needs to be given to police. Failure to do so is a criminal offence under PAA. There are currently conflicting decisions in the Court of Appeal whether such criminalisation is constitutional. In any event, this requirement is not uniformly enforced. Organisers of spontaneous demonstrations related to issues that enjoy the support of government do not appear to face criminal action for non-compliance from police, whereas others are questioned after the event, have their statements recorded and, in some cases, are prosecuted and convicted.

19. Although the Child Act 2001 was amended in 2017, the civil and political rights of a child have not been legislatively protected. As such, PAA prohibits children below 15 years of age from taking part in a public assembly, and children below 18 years of age from organising a public assembly.

20. Despite PAA having been in force for almost 6 years, government has not utilised provisions under PAA to designate public venues at which assemblies may be held without the need for prior notification to the police. This shows government's lack of support for the exercise of the right to freedom of assembly.

Deaths in police custody

21. The latest case of death in police custody occurred on 17 March 2018 when a man was found hanged in his cell in a police station. Notwithstanding government establishing the Enforcement Agencies Integrity Commission ("EAIC") effective 1 April 2011, deaths in police custody remain a critical issue, with 257 people dead between 2002 and 2016. EAIC is tasked with receiving complaints relating to 20 government ministries, departments and agencies, in addition to police, yet more than 70% of complaints are in relation to police. Recommendations to establish a separate Independent Police Complaints and Misconduct Commission have been ignored by government. Very few police officers are ever prosecuted for deaths in police custody, and there is no information about disciplinary action taken against errant personnel. This has contributed to an environment where police commit flagrant abuses of power with impunity and egregious acts continue unchecked. Government has committed in NHRAP to "zero death" targets and strengthening standard operating procedures in detention.

Freedom of Religion

22. Court cases continue before the courts in Malaysia on the constitutional position of the use of the word "Allah", given that government holds the view that the use of the word is reserved exclusively for the religion of Islam, relying on the decision of the Court of Appeal in the "Herald" Roman Catholic newspaper case. Government ministries, departments and agencies seek to enforce that exclusivity. This has far-reaching repercussions for the right to freedom of religion, and freedom of speech and expression.

23. The Federal Court in the Indira Gandhi case[iv] clarified that unilateral conversion to Islam of children of a marriage solemnised according to secular law by one spouse who converts to Islam, without the consent of the other spouse, was unlawful. Civil courts had the power to judicially review adherence to laws and regulations, even if in relation to Syariah courts. However in a subsequent case, the Federal Court held that conversion out of Islam was a matter for the Syariah court. There is also an appellate court decision awaited on the right of a child to bear the name of its Muslim father notwithstanding illegitimacy of birth under Syariah law, notwithstanding National Registration Department's refusal. The divide between civil and Syariah jurisdictions, and whether religious fatwas should be followed by federal government departments, remain to be clarified.

24. The issue of freedom of religion also exists intra-religiously, with government religious authorities seeking to inhibit intra-Islam pluralism. The decision by Selangor state religious authorities to declare Sisters In Islam deviant awaits an appellate court outcome, as does another case involving the prosecution of a Muslim individual charged with publication of a book subsequently prohibited by federal Islamic authorities. There is also an appellate court decisions awaited on several book bans for being contrary to mainstream Sunni Islam. Members of minority Muslim groups face harassment and prosecution.

Indigenous peoples rights

25. Malaysian Bar views with concern continued challenges faced by Orang Asli of peninsular Malaysia and natives of Sabah and Sarawak in enjoying their fundamental rights as citizens possessing a privileged status under the constitution and, more broadly, human rights as indigenous peoples. Since 2nd UPR, Malaysian Bar continues to receive complaints of land encroachment from Orang Asli communities in respect of customary lands and resources. Other complaints relate to government's negligent management of Orang Asli schools and issues relating to freedom of religion.

26. Orang Asli land issue remains largely unresolved as there has been no effective executive and legislative steps to afford better legal recognition of Orang Asli customary land and rights as recommended by 2013 SUHAKAM Report on the National Inquiry into the Land Rights of Indigenous Peoples ("SUHAKAM Report"). Legally, Orang Asli are still wholly dependent on state governments to protect their lands by way of reservation. Recent figures indicate that only 32,779.37 (24.3%) of officially-acknowledged Orang Asli land has been legally protected.[v] Compounding matters, SUHAKAM Report observes that officially-acknowledged Orang Asli lands only account for 17% of total lands claimed by Orang Asli.

27. Despite setting up a Cabinet Committee to implement 17 of 18 SUHAKAM Report recommendations in 2015 to address indigenous land issues and NHRAP covering indigenous rights nationwide, federal government has yet to take concrete steps to effectively address this

long standing problem, including taking basic pre-emptive action of introducing a moratorium on indigenous-claimed lands until final implementation of SUHAKAM Report recommendations and NHRAP.

28. Malaysian Bar also notes with concern recent appellate decisions from Sarawak including *TR Sandah AK Tabau* and *TR Nyutan AK Jami* that severely limit spatial extent of native customary rights recognisable under law and regularises wrongful extinguishment of prior native customary rights by way of monetary compensation respectively. These adverse judicial developments and seriousness of indigenous land issue behove federal/state governments to expeditiously implement SUHAKAM Report recommendations which include, amongst others, effective recognition of indigenous land and resource rights and legal application of the principle of indigenous free, prior and informed consent in matters affecting their land, territories and resources.

International human rights treaties and international cooperation

29. The Malaysian Bar continues to be concerned about the extreme reluctance of government to accede to more international conventions on human rights, in particular ICERD, ICCPR, ICESCR and CAT, and to the Convention on the Status of Refugees and Rome Statute of the International Criminal Court. Despite having convened working groups to study the first 4 instruments, little or no progress has been noted in public.

30. In NHRAP, government has only committed to yet more study of possible readiness and implications of further accession, and of withdrawal of existing reservations to CRC, CEDAW and CRPD. Government has repeatedly stated that further accession must await changes in domestic law, but does not make required domestic law changes. Government has also stated accession needs to take into account constitutional provisions and Syariah law. Government's continued vocalisation of commitment to international law yet refusal to accede and give effect to international human rights treaties amounts to hypocrisy.

Bar Council Malaysia
29 March 2018

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[i] https://www.channelnewsasia.com/news/asiapacific/surge-in-malaysia-s-islamic-state-linked-arrests-official-9324112

[ii] Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat [2017] 3 MLJ 561.

[iii] https://www.malaysiakini.com/news/391048, accessed on 12 March 2018. The Chief Justice continues in office for 3 years with effect from 5 August 2017 while President of the Court of Appeal continues for 2 years with effect from 27 September 2017.

[iv] Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak [2018] 1 MLJ 545.

[v] 'Ismail Sabri: 80 pc of needs of Orang Asli community fulfilled', *Malay Mail Online*, 4 March 2018 <http://www.themalaymailonline.com/malaysia/article/ismail-sabri-80pc-of-needs-of-orang-asli-community-fulfilled>