

A. Introduction

1. Lawyers for Lawyers (hereinafter 'L4L') submits this report on the state of human rights, especially in respect of the legal profession in Malaysia, with recommendations to the OHCHR for the 31st session of the UPR Working Group in the UN Human Rights Council in October/November 2018.
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 around the world and has special consultative status with ECOSOC since 2013.

B. Executive Summary

3. This submission highlights L4L's key concerns regarding Malaysia's compliance with its international and national human rights commitments to guarantee the right to independent counsel as set out in the UN Basic Principles on the Role of Lawyers¹ ('Basic Principles') and other international human rights instruments. The submission focuses on the following main themes: (i) the lack of effective guarantees for the functioning of lawyers; (ii) impediments to the freedom of expression of lawyers; and (iii) the independence of the Malaysian Bar. Non-compliance with the Basic Principles undermines the proper functioning of the judicial system and the right to fair trial in particular.
4. Recommendations to the government:
 - (a) **to take all measures necessary to prevent the harassment of lawyers and attempts to impede or interfere on improper grounds with their defence of clients, in accordance with article 16(a) of the Basic Principles on the Role of Lawyers;**
 - (b) **to take all necessary measures to prevent that lawyers suffer or be threatened with prosecution, disciplinary action or other sanctions on improper grounds, in accordance with article 16(c) of the Basic Principles on the Role of Lawyers;**
 - (c) **to take measures to guarantee the effective protection of the right of freedom of expression of lawyers as set out in article 23 of the Basic Principles on the Role of Lawyers, in particular their right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights, without suffering professional restrictions by reason of their lawful action; and**
 - (d) **to ensure that the independence of the Malaysian Bar and its governing body, the Bar Council are maintained in accordance with Article 24 of the Basic Principles, in particular the right of a bar association to exercise its functions without external interference.**

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

C. Normative and institutional framework of the State

5. 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 in a judicial system where lawyers, along with judges and prosecutors, are free to carry out their professional duties independently. This follows from the Charter of the United Nations and the Universal Declaration of Human Rights.
6. On 22 June 2017, the Human Rights Council (HRC) passed a resolution condemning in general “the increasingly frequent attacks on the independence of [lawyers], in particular threats, intimidation and interference in the discharge of their professional functions”. The HRC expressed its deep concern “about the significant number of attacks against lawyers and instances of arbitrary or unlawful interference with or restrictions to the free practice of their profession” and called upon States “to ensure that any attacks or interference of any sort against lawyers are promptly, thoroughly and impartially investigated and that perpetrators are held accountable”.²
7. In its task of promoting and ensuring the proper role of lawyers, the government of Malaysia should respect and take into account the Basic Principles within the framework of its national legislation and practice. The Basic Principles 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 independent legal assistance.³
8. However, reports gathered by L4L and information that we have received from lawyers in Malaysia, demonstrate that Malaysia 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 independently. This also undermines the proper functioning of the judicial system, including the right to fair trial.

² UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers A/HRC/RES/35/12, 22 June 2017, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/L.20

³ During its 29th session (from 15 June – 3 July 2015), the Human Rights Council adopted without a vote a resolution on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers. While recalling the Basic Principles on the Role of Lawyers and condemning the increasingly frequent attacks on the independence of lawyers, in particular threats, intimidation and interference in the discharge of their professional functions, the Human Rights Council reminded all States of their duty “to uphold the integrity of [lawyers] and to protect them, as well as their families and professional associates, against all forms of violence, threat, retaliation, intimidation and harassment resulting from the discharging of their functions, and to condemn such acts and bring the perpetrators to justice”. See UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers A/HRC/RES/29/6, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/L.11

D. Promotion and protection of human rights

(i) Lack of effective guarantees for the functioning of lawyers⁴

9. 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'. L4L was informed that lawyers in Malaysia who work on sensitive cases can be the subject of improper interference, arrests and even criminal proceedings. This is for example illustrated by the case of human rights lawyer Siti Kasim:

On 3 April 2016, the Federal Territories Islamic Department (JAWI) carried out a raid on a private event held by a group of members of the transgender community. Siti Kasim, a lawyer and human rights defender was present at this event in her capacity as lawyer and, in that capacity, questioned the legitimacy of the raid since the religious authorities conducted the raid without a warrant and were not accompanied by the police, as required under Malaysian law.

On 7 April 2016, Siti Kasim was arrested and investigated for "criminal intimidation" and for allegedly "obstructing a public servant" after she demanded to know if JAWI officers had a warrant to conduct the raid. She was subsequently released and decided to initiate a civil action for unlawful arrest. Shortly after having initiated her civil case, Siti Kasim was informed that she was going to be charged at the Kuala Lumpur Magistrates' Court for "obstructing a public servant" under the Penal Code. The case is currently at trial. If convicted, Siti Kasim faces up to two years in prison, a maximum fine of RM10,000 (USD 2,331) or both.⁵

10. Recommendations:

- (a) **to take all measures necessary to prevent the harassment of lawyers and attempts to impede or interfere on improper grounds with their defence of clients, in accordance with article 16(a) of the Basic Principles on the Role of Lawyers;**
- (b) **to take all necessary measures to prevent that lawyers suffer or be threatened with prosecution, disciplinary action or other sanctions on improper grounds, in accordance with article 16(c) of the Basic Principles on the Role of Lawyers;**

(ii) impediments to the freedom of expression of lawyers

9. The Basic Principles provide that "lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and

⁴ Basic Principles on the Role of Lawyers, principles 16, 17, 18, 19, 20, 21, 22.

⁵ <http://www.advocatenvooradvocaten.nl/12840/malaysia-criminal-prosecution-of-human-rights-lawyer-siti-kasim/>

*attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. [...]*⁶.

10. The freedom of expression that lawyers enjoy in connection with their professional functions should not only be guaranteed in light of the rights of the lawyer, but also in protection of the rights of their clients. The lawyer should be enabled to effectively protect the rights and interests of his or her client.
11. L4L has been informed by lawyers in Malaysia that they are in some cases subjected to harassment, improper interference and in some cases even criminal prosecution when exercising their right to freedom of expression. According to our information, the 1948 Sedition Act is used increasingly to obstruct legal professionals and lawyers who express their views on matters concerning the law, the administration of justice and the promotion and protection of human rights. This is illustrated by the following cases:

Karen Cheah, Charles Hector Fernandez, Francis Pereira and Shanmugam Ramasamy

In March 2016, four Malaysian lawyers – Karen Cheah (secretary of the Malaysian Bar at the time), Charles Hector Fernandez, Francis Pereira and Shanmugam Ramasamy – were questioned by the police and subsequently investigated under the 1948 Sedition Act.

The charges stemmed from a motion tabled at the Annual General Meeting of the Malaysian Bar calling on Attorney General Mohamed Apandi Ali to resign over his handling of a corruption case involving Prime Minister Najib Razak. The case concerned the misappropriation of hundreds of millions of US dollars from the state-owned investment company 1Malaysia Development Berhad (1MDB). The motion was approved by 744 members of the Bar who voted in favour, whilst 62 voted against and 12 abstained.

*It is our understanding that, following the motion, on 31 March 2016, the four lawyers were picked up by the police to record their statements.*⁷

Eric Paulsen

*In 2015, Malaysian human rights lawyer Eric Paulsen was charged under the Sedition Act on two occasions. The first charges stemmed from a tweet posted by Paulsen on 9 January 2015 that accused the Malaysian Islamic Development Department (Jakim), the main federal agency managing Islamic affairs, of promoting extremism in its Friday sermons. Then, on 22 March 2015, Paulsen was again taken for questioning in relation to statements made on Twitter in which he had made critical comments regarding a proposal to introduce religion-based criminal offences and punishment in Kelantan.*⁸

⁶ Basic Principles on the Role of Lawyers, principle 23.

⁷ <http://www.advocatenvooradvocaten.nl/11549/malaysia-sedition-investigations-against-four-lawyers/>

⁸ <https://www.icj.org/malaysia-icj-condemns-the-arrest-of-lawyer-reiterates-call-for-repeal-of-sedition-act/>

N. Surendran

In August 2014, two separate sedition charges were brought against N. Surendran, a Malaysian lawyer. It is our understanding that both charges were connected to critical comments made by Surendran in the context of the case of his client Datuk Seri Anwar Ibrahim, whom he represents in a criminal appeal against sodomy charges. The first sedition charge relates to a press statement issued by Surendran, claiming the decision of the Court of Appeal in this case was 'flawed, defensive and insupportable', while the second charge concerns comments on the court decision in a video that was uploaded to YouTube. Surendran's lawyers filed their appeal against the decision of the High Court on 27 June 2016 to the Court of Appeal.⁹

12. Recommendation:

- (c) **to take measures to guarantee the effective protection of the right of freedom of expression of lawyers as set out in article 23 of the Basic Principles on the Role of Lawyers, in particular their right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights, without suffering professional restrictions by reason of their lawful action; and**

(iii) [The Independence of the Malaysian Bar Association](#)

13. The Basic Principles state that the adequate protection of the human rights and fundamental freedoms to which all persons are entitled, requires that all persons have effective access to legal services provided by an independent legal profession.¹⁰ Bar associations play a vital role to guarantee that lawyers can act as essential agents of the administration of justice by exercising their professional activities freely and independently.
14. 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'.
15. The Bar Council of Malaysia 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.¹¹
16. In 2016, amendments to the LPA were proposed by the Malaysian government. These amendments would, amongst other things, have allowed the Minister of legal affairs to appoint two members of the Bar Council.¹² The proposed amendments were dropped following widespread protest from within the Malaysian legal community and abroad.

⁹ <http://www.advocatenvooradvocaten.nl/11824/malaysia-sedition-charges-against-lawyer-surendran/>

¹⁰ The UN Basic Principles on the Role of Lawyers. Preamble.

¹¹ Article 42(1) under a LPA.

¹² <https://www.hrw.org/news/2016/04/10/malaysia-ensure-independence-bar>

17. It is our understanding that the Malaysian government now has initiated a new process intended to make comprehensive amendments to the LPA. A special consultative committee, led by de facto law minister Azalina Othman, is formulating a "holistic blueprint" for the legal profession in Malaysia. As at March 2018, the proposal is in public consultation.¹³
18. Various concerns have been raised regarding the process of drawing up the reform proposals and the composition of the special committee, as these proposals may include changes to the internal management of the Bar Council and its election process.
19. It is against this background that L4L wishes to stress the importance of guaranteeing the independence of the Malaysian Bar and refraining from adopting any legislation which may interfere with such independence.
20. Recommendation:
 - (d) to ensure that the independence of the Malaysian Bar and its governing body, the Bar Council are maintained in accordance with Article 24 of the Basic Principles, in particular the right of a bar association to exercise its functions without external interference.**

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http://www.malaysianbar.org.my/notices_for_members/update_information_of_a_special_consultative_committee_to_formulate_a_holistic_blueprint_for_the_legal_profession_and_proposed_comprehensive_amendments_to_the_legal_profession_act_1976_26_feb_2018.html