



## **MALAYSIA**

### **Mid-term Report - Review of the implementation of recommendations with respect to the role of human rights defenders accepted by Malaysia during the UPR in 2018**

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## **I. Introduction**

1. Lawyers for Lawyers (L4L) seeks to address the human rights performance of states with respect to the rule of law and the role of lawyers through the Universal Periodic Review (UPR). During the UPR in 2018, the Malaysian government partially accepted recommendations 151.19, 151.138, 151.145 and 151.146. Those recommendations cover the (human) rights of lawyers as well.<sup>1</sup> In this mid-term report, L4L assess the extent to which these recommendations have been implemented with regard to lawyers.

## **II. Executive summary**

2. During the 2018 UPR cycle, Malaysia partially accepted four (4) recommendations with respect to the freedom and safety of human rights defenders, including refraining from judicial and administrative harassment, guaranteeing the exercise of their rights to freedom of expression, association and peaceful assembly of human rights defenders, and amending certain laws to better protect human rights defenders.<sup>2</sup>
3. This submission outlines L4L's findings as to the extent to which Malaysia has implemented these recommendations. It illustrates that Malaysia has not adequately implemented the four recommendations with respect to human rights defenders. The Malaysian authorities have failed to respect the rights of human rights defenders, including lawyers<sup>3</sup>, by not adequately enabling them to perform their professional functions without intimidation, hindrance, harassment or improper interference.

## **Recommendations**

- a) respect the rights of lawyers to perform their professional functions without intimidation, hindrance, harassment or improper interference, and to guarantee that lawyers are not being subjected to contempt of court or criminal charges or other disciplinary measures on improper grounds, in line with Principle 16(a) and (c) of the Basic Principles;
- b) respect the rights of lawyers to exercise their freedom of expression, association and peaceful assembly in line with Principle 23 of the Basic Principles and reform provisions of the Penal Code, Sedition Act of 1948, Peaceful Assembly Act 2021, and Communications and Multimedia Act 1998 to provide better protection of lawyers' freedom of speech.

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<sup>1</sup> Compare art. 9.3 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998.

<sup>2</sup> Report of the Working Group on the Universal periodic Review of Malaysia, A/HRC/40/11, 7 January 2019, p. 17-19; Addendum 1: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review; A/HRC/40/11/Add.1, 18 February 2019.

<sup>3</sup> The Special Rapporteur on the Independence of Judges and Lawyers has stated that: "when acting on behalf of their clients in defending their human rights and fundamental freedoms, lawyers should also be regarded as human rights defenders". See: Report of the Special Rapporteur on the independence of judges and lawyers, 22 August 2016, A/71/348, par. 35.

### III. UPR recommendations (partially) accepted by Malaysia

4. During the 2018 UPR cycle, Malaysia received and partially accepted the following recommendations.<sup>4</sup>
  - a. Sign and ratify the International Covenant on Civil and Political Rights, bring its national law on communication and media into conformity with international human rights law and refrain from judicial and administrative harassment of journalists and human rights defenders (151.19 – Slovakia).<sup>5</sup>
  - b. Continue developing efforts in order to guarantee the freedoms and safety of human rights defenders (151.138 – Uruguay).
  - c. Review its legislation with the aim of ensuring that civil society, including human rights defenders and journalists, could freely exercise their rights to freedom of expression, both online and offline, association and peaceful assembly (151.145 – Lithuania).
  - d. Better protect journalists and human rights defenders, in particular by abolishing travel bans they are subject to and amending certain law, such as the Peaceful Assembly Act and the Penal Code (151.146 – Switzerland).
5. L4L welcomes the (partial) acceptance of the recommendations listed above, but L4L notes that the accepted parts of the recommendations have not been fully implemented at the time of submission of this report, which is in September 2021. This will be explained further below.

### IV. Effective mechanisms for the protection of human rights

6. The adequate protection of human rights and fundamental freedoms requires that every citizen has effective access to justice, legal assistance, and legal representation. Such assistance and representation can only be provided effectively in a judicial system where lawyers, along with judges and prosecutors, are able to carry out their professional activities independently and without external pressures and interference.<sup>6</sup> This follows from – amongst other international instruments - the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Basic Principles on the Role of Lawyers (hereinafter: Basic Principles).<sup>7</sup>

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<sup>4</sup> Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 18 February 2019, A/HRC/40/11/Add.1.

<sup>5</sup> There is no indication that Malaysia did not accept the part of the recommendation to refrain from judicial and administrative harassment of human rights defenders, which include lawyers that address human rights.

<sup>6</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, submitted in accordance with Human Rights Council resolution 8/6, 28 July 2009, A/64/181, par. 12: *'lawyers are not expected to be impartial in the manner of judges yet they must be as free as judges from external pressures and interference. This is crucial if litigants are to have trust and confidence in them'*.

<sup>7</sup> The UN Basic Principles on the Role of Lawyers provide a concise description of international norms relating to the key aspects of the right to independent counsel. The Basic Principles were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba on 7 September 1990. Subsequently, the UN General Assembly "welcomed" the Basic Principles in their 'Human rights in the administration of justice' resolution, which was adopted without a vote on 18 December 1990 in both the session of the Third Committee and the plenary session of the General Assembly.

7. In its task of promoting and ensuring the proper role of lawyers, the Malaysian government should respect the Basic Principles and take them into account within the framework of its national legislation and practice. Adherence to the Basic Principles is considered a fundamental precondition for fulfilling the requirement that all persons have effective access to legal assistance and representation.<sup>8</sup>
8. In response to recommendation 151.19 the Malaysian government noted that: “(...) *the Government of Malaysia has always adhered in principle to the fundamental values expounded in the core international human rights treaties. Notwithstanding that, the signing and ratification by Malaysia will be carried out after in-depth consultation with all relevant stakeholders*”.<sup>9</sup>
9. On recommendations 151.138, 151.145, and 151.146 the Malaysian government noted that: “*a Special Committee has been established to review several laws including the Sedition Act 1948, Printing Presses and Publications Act, POCA, SOSMA, Peaceful Assembly Act 2012 and POTA. the recommendations proposed by the Special Committee will be submitted to the Cabinet for consideration. The Government will take into account its international human rights obligations while making the necessary amendments to ensure that public order and security are safeguarded*”.<sup>10</sup>
10. The responses from Malaysia indicate some positive changes. However, reports gathered by L4L and information received from lawyers in Malaysia demonstrate that these accepted recommendations have not been adequately implemented and that in practice, the Malaysian authorities do not always uphold the necessary guarantees for the proper functioning of the legal profession. As a consequence, lawyers encounter difficulties in carrying out their profession independently and without external interference.

## **V. Judicial harassment and criminal prosecution of lawyers**

11. According to Principle 16(a) of the Basic Principles on the Role of Lawyers, governments must ensure that lawyers ‘*are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference*’. Moreover, according to Principle 16 (c) “*governments shall ensure that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics*”.
12. However, lawyers in Malaysia have been subjected to judicial harassment, and prosecution in connection to their professional duties. The right of lawyers to perform their professional activities without hindrance and the corresponding rights of their clients to a fair trial, such as the right to prepare an adequate defense are in some cases not respected in Malaysia.
13. Since the adoption of the UPR recommendations on the rights of lawyers in February 2019, new cases of harassment have come to the attention of Lawyers for Lawyers.

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<sup>8</sup> UN Basic Principles on the Role of Lawyers, Preamble and paragraph 8 in particular.

<sup>9</sup> Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 18 February 2019, A/HRC/40/11/Add.1, paragraph 9.

<sup>10</sup> Ibid, paragraph 16.

## a. Judicial harassment: misuse of the Contempt of Court Doctrine

14. L4L is concerned about the use of Malaysia's contempt of court doctrine to intimidate and judicially harass lawyers. The contempt of court doctrine is a common law doctrine that is not statutorily codified. This has reportedly led to a vague legal concept which can be subject to misuse, such as arbitrary and disproportional (custodial) sentences.<sup>11</sup> For those reasons, the Malaysian Bar Council raised concerns about the Malaysian contempt of court doctrine. The Malaysian Bar Council recommends the reform of the law of contempt by codifying the doctrine statutorily in order to have a clear and unequivocal legal concept.<sup>12</sup>
15. L4L has been informed that, since the adoption of the UPR recommendations in February 2019, the contempt of court doctrine has been used to intimidate and judicially harass lawyers.
16. This is demonstrated by the following examples:

### **Shankar Ram Asnani**

On 23 February 2021, lawyer Shankar Ram Asnani was found, in the course of a case management hearing by The Kuching High Court in Sabah and Sarawak, to have committed prima facie contempt in the face of court. He was further found guilty of obstruction of justice and compromising the integrity of the trial of the action. It was claimed that Mr. Asnani allegedly held back documents for one month in a case in which he acted as a lawyer, because he submitted a bundle of documents and bundle of pleadings later than on the date as given by the Court. On its own initiative, the High Court made those findings without giving a warning or any indication of the intention to commence contempt of court proceedings. The High Court also referred this situation to the Advocates Disciplinary Tribunal without hearing Mr. Asnani and dismissed the case of his client. The orders of the High Court have been set aside by the Court of Appeals on 18 March 2021. The Court of Appeals found that there was no evidence of any wrongdoing by Mr. Asnani.<sup>13</sup>

### **Charles Hector**

Charles Hector – lawyer and human rights defender – potentially faced contempt of court charges at the beginning of 2021, because he sent a letter to an officer of the Jerantut District Forestry Office in the context of his trial preparation for a civil lawsuit against two companies that conduct logging activities in the Jerantut Tambahan Forest Reserve.<sup>14</sup> His clients are eight villagers who are a few of many who protest against the logging. The Kuantan High Court granted an injunction order to stop the villagers from preventing the companies' workers from carrying out their activities, to not publish

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<sup>11</sup> See e.g. also: Amnesty International, 'Malaysia: Stop Intimidation of Human Rights Lawyer and Defenders', ASA 28/3948/2021; Lawyers' Rights Watch Canada, 'Malaysia: Judicial harassment of human rights lawyer Charles Hector | Letter, 24 March 2021: <https://www.lrwc.org/malaysia-judicial-harassment-of-human-rights-lawyer-charles-hector-letter/>.

<sup>12</sup> Malaysian Bar, "Press Comment | Codifying the Law of Contempt is a Step in the Right Direction", 5 August 2020: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-comment-codifying-the-law-of-contempt-is-a-step-in-the-right-direction>.

<sup>13</sup> See also Malaysian Bar, "Malaysian Bar welcomes appellate court decision to quash contempt of court order against lawyer", 26 March 2021: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-malaysian-bar-welcomes-appellate-court-decision-to-quash-contempt-of-court-order-against-a-lawyer>.

<sup>14</sup> Lawyers for Lawyers, "Contempt proceedings against Charles Hector", 6 April 2021: <https://lawyersforlawyers.org/contempt-proceedings-against-charles-hector/>.

alleged false information, and to not communicate/interact with the authorities to jeopardise the logging license. According to the companies, the sending of the letter by Mr. Hector to the District Forest Officer to seek confirmation and clarification of a letter allegedly sent by said officer is an infringement of the injunction order. Mr. Hector stated that the information he sought with the letter was needed preparation for the full trial. The companies filed an ex parte application for leave to commence contempt of court proceedings against the lawyer and his clients. The Kuantan High Court heard this ex parte application, but before the Court was scheduled to render its decision, the companies suddenly withdrew their application on 14 April 2021 without explanation.<sup>15</sup>

17. The Malaysian contempt of court doctrine has thus been used to intimidate and judicially harass lawyers. As shown by the above-mentioned incidents, lawyers can face contempt of court charges for activities that fall within a lawyer's regular practice. Since contempt of court charges have serious ramifications, such as the revocation of the license, (high) fines and/or imprisonment, such charges should not be put upon lawyers who are solely carrying out their professional duties.
18. Putting lawyers at risk of contempt of court charges for simply carrying out their work as lawyers, not only negatively effects the practice of the individual lawyer, but could possibly also have a negative impact on the Malaysian legal profession as a whole since it undermines the right to a fair trial and access to justice for victims of human rights violations.

#### **b. Criminal prosecution of lawyers**

19. In addition, L4L was informed that lawyers in Malaysia who work on sensitive cases can be the subject of improper interference, including arrests and even criminal prosecution.
20. This is demonstrated by the following example:

##### **Siti Kasim**

Lawyer Siti Kasim allegedly obstructed a civil servant – by demanding information on whether the officers had a warrant for a raid – during the Federal Territories Islamic Department (JAWI) raid on a private event held by the transgender community in 2016. This concerns activities of Siti Kasim to legitimate exercise her duties as a lawyer. On 21 August 2020, Siti Kasim was acquitted.<sup>16</sup> But the prosecution decided to appeal that decision on 27 August 2020. We have been recently informed that on the day Siti Kasim's case was called for case management, the judge decided to not continue to appeal since the prosecution allegedly failed to serve the summons to Siti Kasim personally. Siti Kasim confirmed that she has never been served in the appeal phase.

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<sup>15</sup> Lawyers for Lawyers, "Contempt of court action against Charles Hector withdrawn", 21 April 2021: <https://lawyersforlawyers.org/contempt-of-court-action-against-charles-hector-withdrawn/>.

<sup>16</sup> Lawyers for Lawyers, "Siti Kasim acquitted", 30 August 2020: <https://lawyersforlawyers.org/siti-kasim-acquitted>.

## **VI. Freedom of expression of lawyers**

21. Malaysia has been repeatedly condemned by international human rights groups for non-compliance with international standards of freedom of expression.<sup>17</sup> Malaysia has a propensity to use overly broad and vague provisions that are enshrined in its Penal Code, Sedition Act of 1948, Peaceful Assembly Act 2021, and Communications and Multimedia Act 1998. These broad vaguely worded provisions allow the police to investigate or arrest people for a wide range of activities or speech that the government disapproves of.
22. Lawyers, like any other individual, have the right to freedom of expression. In particular, they 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.<sup>18</sup>
23. The freedom of expression that lawyers enjoy in connection to 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.
24. Already in our 2018 UPR submission on Malaysia we highlighted that in some cases lawyers were subjected to harassment, improper interference or even criminal prosecution when exercising their right to freedom of expression.<sup>19</sup>
25. According to information received, since May 2021, the Malaysian authorities have failed to protect lawyers' right to freedom of expression and take part in public discussion of matters concerning the protection of human rights. Several lawyers have shared that as a consequence of laws such as the Sedition Act of 1948, many lawyers have gone silent on human rights issues, especially on social media, out of fear of intimidation, harassment or prosecution.

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<sup>17</sup> See for example, Human Rights Watch, "Malaysia: Free Speech Under Increasing Pressure", 19 May 2021: <https://www.hrw.org/news/2021/05/19/malaysia-free-speech-under-increasing-threat> and Article 19, "Malaysia: Authorities reverting to repressive tactics of former governments to throttle expression online", 10 June 2021: <https://www.article19.org/resources/malaysia-authorities-reverting-repressive-tactics-former-governments-throttle-expression-online/>

<sup>18</sup> UN Basic Principles on the Role of Lawyers, Principle 23.

<sup>19</sup> Lawyers for Lawyers, "UPR submission Malaysia", 15 March 2018: <https://lawyersforlawyers.org/upr-submission-malaysia/>.

## VII. Conclusion

26. During the 2018 UPR cycle, Malaysia partially accepted four (4) recommendations with respect to the freedom and safety of human rights defenders, including refraining from judicial and administrative harassment, guaranteeing the exercise of their rights to freedom of expression, association and peaceful assembly of human rights defenders, and amending certain laws to better protect human rights defenders.<sup>20</sup>
27. As in detail explained in this report, Malaysia has, to date, not adequately (partially) implemented recommendations 151.19, 151.138, 151.145 and 151.146.
28. L4L urges the Malaysian authorities to:
- respect the rights of lawyers to perform their professional functions without intimidation, hindrance, harassment or improper interference, and to guarantee that lawyers are not being subjected to contempt of court or criminal charges or other disciplinary measures on improper grounds, in line with Principle 16(a) and (c) of the Basic Principles;
  - respect the rights of lawyers to exercise their freedom of expression, association and peaceful assembly in line with Principle 23 of the Basic Principles and reform provisions of the Penal Code, Sedition Act of 1948, Peaceful Assembly Act 2021, and Communications and Multimedia Act 1998 to provide better protection of lawyers' freedom of speech.

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<sup>20</sup> Report of the Working Group on the Universal periodic Review of Malaysia, A/HRC/40/11, 7 January 2019, p. 17-19; Addendum 1: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review; A/HRC/40/11/Add.1, 18 February 2019.

### **About Lawyers for Lawyers**

*Lawyers for Lawyers (L4L) is an independent, non-political and not-for-profit lawyers' organization established in 1986. Our mission is to promote the independent functioning of lawyers and the legal profession across the world in accordance with internationally recognized norms and standards, including the Basic Principles on the Role of Lawyers. Our work to support lawyers who are at risk as a result of discharging their professional duties, seeks to protect them from threats, risks and reprisals, strengthens their international recognition and protection in laws, policies and practices, and empower them to fulfil their role as essential agents of the administration of Justice. Lawyers for Lawyers was granted special consultative status with the UN Economic and Social Council in July 2013.*