Update on the Rule of Law for Human Rights in ASEAN: The Path to Integration
Malaysia

TABLE 1
SNAPSHOT BOX

<table>
<thead>
<tr>
<th>Formal Name</th>
<th>Malaysia²</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital City</td>
<td>Kuala Lumpur</td>
</tr>
<tr>
<td>Independence</td>
<td>31 August 1957</td>
</tr>
</tbody>
</table>

Historical Background
From the 19th century, the Malay Peninsula consisted of nine sultanates (Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Pahang, Johor, Terengganu, and Kelantan) and two British Straits Settlements (Penang and Melaka). Apart from Penang and Melaka, which were under direct British rule, the other nine states either had British Residences or Advisors to their Sultans. Theoretically, the states were sovereign, but in reality, the British Residences and Advisors had tremendous influence on all matters of governance, except religion and Malay customs. An attempt in 1946 by the British to unify the different states under one British-led system, the Malayan Union, was short lived. Eventually, after mass civil disobedience and negotiations between the political leaders of Malaya and the British, independence was obtained in 1957. In 1963, the British-controlled states of Singapore, Sabah and Sarawak were freed of British rule and merged with Malaya to create Malaysia. In 1965, Singapore was expelled from Malaysia.³

Size 328,550 sq km⁴

Land Boundaries
Malaysia consists of two parts, the Peninsular and Sabah and Sarawak on the island of Borneo. The Peninsular borders Thailand in the North and is connected to Singapore by a bridge and a causeway in the South. Sabah and Sarawak both have land borders with Brunei and Indonesia.⁵

Population 31.0 million⁶ (increase of 3.5 million since 2011)

Demography
70% of the population live in urban areas;⁷ 12% work in the agricultural sector⁸ (since 2011, the population living in urban areas increased by 10%)

Ethnic Groups
Malay, Chinese, Indian, indigenous communities

1 The Malaysian Centre for Constitutionalism and Human Rights would like to thank Seh Lih Long and K. Shanmuga for their contribution to the research.
2 Article 1(1) of the Federal Constitution.
### Malaysia

<table>
<thead>
<tr>
<th>Languages</th>
<th>Malay, Chinese (Mandarin and dialects), Tamil, Malayalam, and indigenous languages. English is widely spoken.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Religion</td>
<td>Islam, Buddhism, Christianity, Hinduism, Taoism, and indigenous religions</td>
</tr>
<tr>
<td>Adult Literacy</td>
<td>94.1% (increase of 2.1% since 2011)</td>
</tr>
<tr>
<td>Gross Domestic Product</td>
<td>US$338.1 billion (increase of US$146.5 billion since 2011)</td>
</tr>
<tr>
<td>Government Overview</td>
<td>There has been no change in the government structure since 2011. Malaysia practices a Federal system where there is a central government and 13 state governments. The state governments each have their own State Legislative Assemblies and Cabinet headed by a Chief Minister. The law making powers of the Federal Parliament and the State Legislative Assemblies are spelled out in Schedule 9 of the Federal Constitution. The ruling coalition, Barisan Nasional, won the last general election in 2013. The Federal Constitution has not been amended between the years 2011-2015.</td>
</tr>
<tr>
<td>Human Rights Issues</td>
<td>No change since 2011—the main human rights issues in Malaysia include, among others, freedom of expression and peaceful assembly, death in custody, detention without trial, and freedom of religion.</td>
</tr>
<tr>
<td>Membership in International Organizations</td>
<td>United Nations (UN), World Trade Organisation (WTO), World Health Organisation (WHO), Asia Cooperation Dialogue (ACD), Asian Development Bank (ADB), Association of Southeast Asian Nations (ASEAN), Asia-Pacific Economic Cooperation (APEC), Asian African Legal Consultative Organization (AALCO), Organisation of the Islamic Conference (OIC), Commonwealth of Nations, Non-Aligned Movement (NAM), and The Group of Fifteen (G-15)</td>
</tr>
</tbody>
</table>

---


---

2 [Update on the Rule of Law for Human Rights in ASEAN: The Path to Integration](#)
I. INTRODUCTION

Key Rule of Law Structures

There has been no change, since 2011, in the key rule of law structures—Part II of the Federal Constitution guarantees the liberty of the person, equality, freedom of movement, freedom of speech, assembly and association, freedom of religion, rights with respect to education, and rights to property; prohibits slavery, banishment, and forced labour; and protects against retrospective criminal laws and repeated trials.

The Constitution is the supreme law of the Federation and clearly sets out the role of the Head of State, the Head of the Government, the legislature, and the relations between them.15

The system of Parliamentary democracy has not changed either—the legislature is elected for at least five years, and Parliament is defined as consisting of the Yang di-Pertuan Agong (King), Dewan Negara (Senate), and Dewan Rakyat (House of Representatives).

Foundation & Evolution of Rule of Law

In 1970, the Rukunegara (National Principles) was pronounced as the national ideology and philosophy,16 and one of the tenets of the Rukunegara is the principle of the rule of law. It was envisaged that the five principles in the Rukunegara would be the foundational principles that would govern Malaysian society. The former Lord President Tun Salleh Abas went further to state that the “Rukunegara does not impose more obligations, nor does it confer more rights than what is already contained in the Constitution… the Rukunegara is a passport towards achievement not merely co-existence of the various races by the intermingling of the various races in this country harmoniously without danger of having to repeat an incident like May the 13th.”17

The five principles of the Rukunegara are: (1) Belief in God; (2) Loyalty to King and Country; (3) The Supremacy of the Constitution; (4) The Rule of Law; and (5) Courtesy and Morality.

While the rule of law was intended to be the foundation of Malaysia, over the years, the respect for the rule of law has been inconsistent. As will be seen below, the extent to which the rule of law remains a principle that is being respected by the executive, legislative, or the judiciary, remains unclear. Professor Shad Faruqi’s précis is perhaps the most apt, “there is rule of law, but an imperfect one.”18

---

**Human Rights Treaties**

In 2012, Malaysia acceded to two new international human rights treaties—the Optional Protocol to the CRC on the involvement of children in armed conflict, and the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.\(^\text{19}\)

Apart from the aforementioned new treaties, Malaysia is a party to three other main international human rights conventions, as follows:

<table>
<thead>
<tr>
<th>TABLE 2</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CORE HUMAN RIGHTS CONVENTIONS TO WHICH MALAYSIA IS A PARTY</strong></td>
</tr>
<tr>
<td>International Document</td>
</tr>
<tr>
<td>CEDAW</td>
</tr>
<tr>
<td>CRC</td>
</tr>
<tr>
<td>CRPD</td>
</tr>
</tbody>
</table>

Malaysia adopts a dualist approach to international law and requires an act of Parliament before international human rights treaties are directly applicable in Malaysia. There is no provision in any domestic legislation that expressly incorporates any of the aforementioned international human rights treaties into domestic law. However, the Child Act 2001 incorporates some parts of the CRC, and some provisions of the CRPD are similarly reflected in the Persons with Disabilities Act 2008.

As there is no legislation that specifically incorporates CEDAW, CRC, and CRPD into domestic law, the acceptance of these international treaties as a tool of interpretation has been inconsistent—the Malaysian courts have oscillated between a strict interpretation of the dualist system and a more nuanced use of these treaties as a legitimate source to interpret domestic law.

In two landmark cases of *Noorfadilla binti Ahmad Saikin v. Chayed bin Basirun and 5 others*,\(^\text{20}\) and *Indira Gandhi d/o Mutho v. Perak Registrar of Converts, Perak Islamic Religious Department, State Government of Perak, Ministry of Education, Government of Malaysia, & Patmanathan s/o Krishnan*,\(^\text{21}\) the High Court, for the first time, held that even though CEDAW has not been incorporated into domestic law, the court is compelled to interpret the principle of gender equality in article 8(2) of the Federal Constitution in light of Malaysia's international obligations under CEDAW. Further, in the *Indira Gandhi* case, the High Court held that ratification of CEDAW, public statements by government ministers, and the Bangalore principles meant that Malaysia is bound to give legal effect to the rights in CEDAW.

However, the Court of Appeal in *Air Asia Berhad v. Rafizah Shima Binti Mohamed Aris*\(^\text{22}\) and *Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals*\(^\text{23}\) has reverted to a more conservative approach with regard to the application of international norms and conventions, stating that international treaties do not form part of Malaysian law unless those provisions have been incorporated into domestic law.

---


\(^{20}\) [2012] 1 MLJ 832.

\(^{21}\) [2013] 7 CLJ 82 (HC).

\(^{22}\) Rayuan Sivil No/ B-02-2751-11/2012.

\(^{23}\) [2016] 1 CLJ 911.
Interpretation and Use of the ‘Rule of Law’

There seems to be a gap between the official commitment to the rule of law and how they (the authorities) seek to give it effect. The judiciary and the executive appear to refer to the rule of law in a positive manner—the Chief Justice, has on many occasions affirmed that the function and the duty of the judiciary are to enforce the rule of law; similarly, the Prime Minister has affirmed that the rule of law would always be upheld. Additionally, in these expressions of support for the rule of law in Malaysia, the judiciary seems to be in unanimity with Dicey’s concept of the rule of law and even went on to state that “the repeals of the infamous preventive laws certainly mark the return of the rule of law to the court.”

However, the situation of rule of law in Malaysia is a paradoxical blend of official adherence and violations of the principle of the rule of law. The Chief Justice’s speech in the Opening of the Legal Year 2016 exemplifies this perplexing relationship—on one hand, the Chief Justice reaffirmed the judiciary’s commitment to the rule of law, and in the same vein, the Chief Justice castigated the bar, stating that unwarranted criticism by members of the bar against the judiciary threatens the foundation of the rule of law.

Furthermore, a number of legislative developments in 2015 are incompatible with the rule of law. The Prevention of Terrorism Act 2015 (POTA 2015), the amendments to the Sedition Act 1948, and the Prevention of Crime Act 1959 (PCA 1959) contain provisions that allow for detention without trial and ouster clauses (removing the judicial check on wide discretionary powers of the government), and the National Security Bill 2015 contains wide executive powers, with no checks and balances.

It is unclear whether these violations of the rule of law are due to the authorities’ different understanding of what rule of law entails or a deliberate disregard of the rule of law.


**TABLE 3**

**ADMINISTRATION OF JUSTICE GRID**

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Figure</th>
</tr>
</thead>
</table>
| No. of judges in country<sup>28</sup>         | Federal Court: 10  
Court of Appeal: 23  
High Court: 57  
Judicial Commissioners: 40  
Sessions Court: No known official current statistics available.  
Magistrates: No known official current statistics available. |
| No. of lawyers in country<sup>29</sup>         | 16,113                                           |
| Annual bar intake (including costs and fees)  | MYR1,080 (approx. US$298)<sup>30</sup>           |
| Standard length of time for training/ qualification | Lawyers: 4 years  
Prosecutors: 4 years  
Judges: 10 years<sup>31</sup> |
| Availability of post-qualification training  | No known mandatory requirement for prosecutors and judges after entry into the profession. As for lawyers, the Bar Council recently passed a resolution making it mandatory for lawyers with less than five years experience, to obtain a minimum of 16 Continuing Professional Development (CPD) points per 24-month CPD cycle.<sup>32</sup> |
| Average length of time from arrest to trial (criminal cases) | No known official data or statistics available. |
| Average length of trials (from opening to judgment) | No known official data or statistics available. |
| Accessibility of individual rulings to public | Court decisions are made available to the litigants and the public. |

---


<sup>31</sup> Article 123 of the Federal Constitution states that, 'A person is qualified for appointment under as a superior Court Judge if he is a citizen; and for the ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another.

<sup>32</sup> 'Resolutions Adopted at the 70th Annual General Meeting of the Malaysian Bar Held at Renaissance Kuala Lumpur Hotel (Saturday, 19 March 2016)' <http://www.malaysianbar.org.my/malaysian_bar_s_resolutions/resolutions_adopted_at_the_70th_annual_general_meeting_of_the_malaysian_bar_held_at_renaissance_kuala_lumpur_hotel_saturday_19_mar_2016.html> accessed 11 April 2016. However, this resolution is being challenged by a group of young lawyers – Ida Lim, 'Young lawyers pushing for Bar EGM to reverse ‘unfair’ mandatory training, fine', the MalayMail Online, <http://www.themalaymailonline.com/malaysia/article/young-lawyers-pushing-for-bar-egm-to-reverse-unfair-mandatory-training-fine#sthash.GrPZTNoh.dpuf> accessed 11 April 2016.
### Appeal structure

| Federal Court | Court of Appeal |
| Sessions Court | Magistrates Court |

### Cases before the National Human Rights Institution

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>1,005</td>
</tr>
<tr>
<td>2011</td>
<td>1,232</td>
</tr>
<tr>
<td>2012</td>
<td>911</td>
</tr>
<tr>
<td>2013</td>
<td>624</td>
</tr>
<tr>
<td>2014</td>
<td>717</td>
</tr>
</tbody>
</table>

General types of complaints received since 2011 include, among others, police inaction in investigating reports lodged; excessive use of force or acts of brutality and abuse of power by the police; violations of right to liberty and security of persons; unlawful detention under preventive detention laws; violations of rights of indigenous peoples; violations of religious freedom; violations of right to work and mistreatment of migrant workers; violations of freedom of expression and right to peaceful assembly.

No official information found with regard to the speed of the disposition of the complaints.

### Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)

<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints filed against the police</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>721</td>
</tr>
<tr>
<td>2013</td>
<td>604</td>
</tr>
<tr>
<td>2014</td>
<td>388</td>
</tr>
<tr>
<td>2015</td>
<td>346</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints filed against the Ministry of Defence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>517 (80% resolved* within 15 days)</td>
</tr>
<tr>
<td>2013</td>
<td>543 (74.9% resolved within 10 days)</td>
</tr>
</tbody>
</table>

---


<table>
<thead>
<tr>
<th>Complaints filed against lawyers:</th>
<th>Received by Bar Council Secretariat’s Complaints and Intervention Department[^36]</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012: 611</td>
<td></td>
</tr>
<tr>
<td>2013: 567</td>
<td></td>
</tr>
<tr>
<td>2014: 782</td>
<td></td>
</tr>
<tr>
<td>Received by the Advocates and Solicitors Disciplinary Board[^37]</td>
<td></td>
</tr>
<tr>
<td>2012: 977</td>
<td></td>
</tr>
<tr>
<td>2013: 903</td>
<td></td>
</tr>
<tr>
<td>2014: 849</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Complaints filed against judges:</th>
<th>No known official data or statistics available</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Complaints filed against prosecutors:</th>
<th>No known official data or statistics available</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Complaints filed against other public officers and employees</th>
<th>Received by the Public Complaints Bureau (which investigates complaints made by the public towards any administrative action that is considered unjust, not in accordance with the existing laws and regulations, an abuse of power, a maladministration, and other similar acts by government agencies)[^38]</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012: 7,681 (92.9% resolved* within the same year)</td>
<td></td>
</tr>
<tr>
<td>2013: 6,183 (96.6% resolved within the same year; 54.4% resolved within 15 days)</td>
<td></td>
</tr>
<tr>
<td>2014: 7,199 (99.1% resolved within the same year; 61.9% resolved within 15 days)</td>
<td></td>
</tr>
<tr>
<td>2015: 6,408 (94.1% resolved within the same year; 71.4% resolved within 15 days)</td>
<td></td>
</tr>
</tbody>
</table>

* “Resolved” refers to providing feedback on the status of complaints, i.e., whether the complaints have been completed or require further investigation.


I. COUNTRY PRACTICE
IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW
FOR HUMAN RIGHTS

A. On Central Principle 1
(Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

There has been no change in the law with regard to the accountability of the government and its officials. Article 4 of the Federal Constitution states that the Constitution is the “supreme law of the Federation.” No one is above the law, including members of the Royal family as article 182 of the Federal Constitution provides for a Special Court to try all offenses and all civil cases against (and by) the King or the Ruler of any State.

Having said that, article 149 of the Federal Constitution remains problematic as it allows Parliament to make legislation to counter any action that causes fear of violence, excites disaffection against the King or any government, promotes ill-will and hostility between the different races, procures the unlawful alteration of anything established by law, prejudices the maintenance or the functioning of any supply or services, or prejudices public order or national security. There has been no change in article 149, and as stated in Rule of Law for Human Rights in the ASEAN Region: A Baseline Study (hereinafter, 2011 Rule of Law Baseline Study), the wide variety of circumstances allowed by article 149 to abrogate fundamental liberties remains a concern. Since 2011, this concern has manifested in the enactment of the Prevention of Terrorism Act 2015 (POTA 2015) and the Security Offences (Special Measures) Act 2012 (SOSMA). A large part of the POTA 2015 violates rule of law principles (discussed in greater detail below), and the SOSMA was used at the end of 2015 against two persons for lodging reports against 1Malaysia Development Berhad (1MDB). They were charged with attempted sabotage of the Malaysian economy and the country’s financial and banking system.39

Also, as stated in the 2011 Rule of Law Baseline Study, the selective enforcement of existing laws continues to be problematic in Malaysia. Many have criticized the unfair and unequal application of the Sedition Act 1948, with only human rights activists and dissenters bearing the brunt of these laws, while others who have uttered inflammatory religious or racial statements have not been investigated or castigated by the authorities.40


Amendment or Suspension of the Fundamental Law

There has been no change in the law with regard to amending or suspending the Constitution and/or laws on fundamental liberties. The procedures set out under the Federal Constitution are as follows:

Amendment to the Federal Constitution

Amendments to the Constitution can be made following the four procedures set out in the Federal Constitution:41

1. **Simple majority.** The following amendments to the Federal Constitution can be done by way of simple majority in both Houses of Parliament:
   - Amendments to Part III of the Second Schedule regarding supplementary provisions relating to citizenship and any consequential amendment thereof;
   - Forms of oaths and affirmations (Sixth Schedule of the Federal Constitution);
   - Election of Senators (Seventh Schedule of the Federal Constitution);
   - Incidental and consequential amendments to Parliament's legislative powers, other than powers relating to States under articles 74 and 76 of the Federal Constitution;
   - Matters relating to the admission of new States, other than in relation to Sabah and Sarawak.

2. **Two-thirds majority.** According to article 159(3) of the Federal Constitution, unless otherwise stated, the Constitution can only be amended42 if it is passed by two-thirds of the total number of members of both Houses of Parliament during the second and third readings of the amendment.

3. **Assent of the Conference of Rulers.**43 Amendments made to the following provisions of the Constitution require two-thirds majority and (emphasis added) the consent of the Conference of Rulers:
   - Provisions prohibiting the questioning of any matter, right, status, position, privilege, sovereignty, or prerogative established or protected by the provisions of citizenship, national language, special position of Malays and natives of Sabah and Sarawak, or the sovereignty, prerogatives, powers and jurisdiction of the Rulers [article 10(4) of the Federal Constitution];
   - Matters regarding the Conference of Rulers (article 38 of the Federal Constitution);
   - The exemption of the privileges of the Parliament and Legislative Assemblies under the Sedition Act 1948 and article 10(4) of the Federal Constitution [articles 63(4) and 72(4) of the Federal Constitution]; and
   - Precedence and rights of succession of Rulers (articles 70 and 71 of the Federal Constitution).

4. **Assent of Governors.** Amendments to the special rights of Sabah and Sarawak require two-thirds majority in both Houses of Parliament, assent of the King and (emphasis added) the consent of the Governors of Sabah and Sarawak.

---

42 This includes addition and repeal of the Constitution – article 149(6) of the Federal Constitution.
43 Article 159(5) of the Federal Constitution.
Suspension of fundamental liberties

The Federal Constitution permits the suspension or violation of some or all fundamental liberties (in Part II of the Federal Constitution) in two instances:

1. **To counter subversive activities.** The Parliament is given the power to enact laws to deal with subversive activities or any action prejudicial to public order or security. In this instance, article 149 of the Federal Constitution permits the Parliament to enact such laws that violate or suspend the right to personal liberty (article 5), freedom of movement (article 9), freedom of speech, assembly and association (article 10), and rights to property (article 13); and

2. **Emergency.** In a situation where the King is satisfied that a grave emergency exists whereby the security, economic life, or public order of the country, or any part thereof is threatened, article 150 of the Federal Constitution allows the King to issue a Proclamation of Emergency. Once a Proclamation of Emergency is declared, all provisions of the Constitution and all fundamental liberties, save for six areas—freedom of religion (article 11), citizenship, language, Islamic law, custom of the Malays, or any native law or customs in Sabah and Sarawak—can be suspended.

It should be noted that laws promulgated under articles 149 and 150 of the Federal Constitution must not violate safeguards for preventive detainees enshrined in article 151 of the Federal Constitution. Article 151 provides that a person detained under any preventive detention law should be conferred the right to be informed (as soon as possible) of the grounds of detention and the facts on which the detention order is based, the right to make representations to an independent Advisory Board, and the right not to be detained, unless the Advisory Board has considered any representations made by the detainee and made recommendations to the King within three months of receiving the representation. Having said that, the lack of provisions safeguarding the right to fair trial in POTA 2015, SOSMA 2012, and PCA 1959 is concerning (see below).

Laws Holding Public Officers and Employees Accountable

The Enforcement Agency Integrity Commission (EAIC) was established in April 2011 to enhance integrity among enforcement officers and law enforcement agencies. The functions of the EAIC are to:

- Receive complaints of misconduct from the public against enforcement officers or law enforcement agencies in general and investigate and hold a hearing on the complaints received;

---

44 Article 149(1) of the Federal Constitution states these includes any action that has been taken or threatened by any substantial body of persons that (a) causes a substantial number of citizens to fear, organized violence against persons or property; or (b) excites disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or (c) promotes feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or (d) to procures the alteration, otherwise than by lawful means, of anything by law established; or (e) is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or (f) is prejudicial to public order in, or the security of, the Federation or any part thereof.

45 The EAIC supervises 21 agencies - the National Anti-Drugs Agency, Malaysian Maritime Enforcement Agency, Ikatan Relawan Rakyat Malaysia (RELA), Department of Environment, Immigration Department of Malaysia, Royal Customs Department of Malaysia, Department of Occupational Safety & Health, National Registration Department, Civil Aviation Department, Road Transport Department, Industrial Relations Department, Fisheries Department, Department of Wildlife and National Parks, Labour Department, Ministry of Health (Enforcement Division), Ministry of Tourism Malaysia (Enforcement Unit of Licensing Division), Ministry of Domestic Trade, Co-operatives and Consumerism (Enforcement Division), Ministry of Housing and Local Government (Enforcement Division), Commercial Vehicles Licensing Board, Registrar of Businesses, and the Royal Malaysia Police.

46 Section 4(1) of the Enforcement Agency Integrity Commission Act 2009.
- Formulate and put in place mechanisms for the detection, investigation and prevention of misconduct by an enforcement officer;
- Provide for the auditing and monitoring of particular aspects of the operations and procedures of an enforcement agency;
- Promote awareness of, enhancement of, and education in relation to, integrity within an enforcement agency and to reduce misconduct amongst enforcement officers;
- Assist the government in formulating legislation, or to recommend administrative measures to the government or an enforcement agency, in the promotion of integrity and the abolishment of misconduct amongst enforcement officers;
- Study and verify any infringement of enforcement procedures and make any necessary recommendations relating thereto; and
- Make site visits to the premises of an enforcement agency, including visiting police stations and lockups in accordance with the procedures under any written law, and make any necessary recommendations relating thereto.

Since its establishment in 2011, the EAIC received a total of 1,461 complaints lodged against various enforcement agencies. The type of misconduct that the EAIC is empowered to investigate includes act or inaction by an enforcement officer that is contrary to a written law; is unreasonable, unjust, oppressive or improperly discriminatory; committed on improper motives, irrelevant grounds or irrelevant consideration; based on a mistake of law or fact; where grounds should have been given but were not given; failure of an enforcement officer to follow rules and procedures laid down by law or by the appropriate authority; or the commission of any criminal offence by an enforcement officer. Recently, the EAIC found that the death of Dharmendran a/l Narayanasamy on 21 May 2013 resulted from the use of physical force by the police and as such, they (the said police officers) were responsible for his death.

**Private gain**

General laws, such as the Malaysian Anti-Corruption Act 2009 (MACC Act 2009), which are applicable to all, criminalize corruption. Specific to public officers, section 23 of the MACC Act 2009 makes it an offense for an officer of a public body to use his office or position for any gratification for himself, his relatives or associates. In addition to the offenses under the MACC Act 2009, section 409 of the Penal Code specifically criminalizes the act of criminal breach of trust committed by any public servant or an agent who is entrusted with property in his capacity as a public servant; and section 165 of the Penal Code makes it a criminal offense to accept any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by a public servant.

---

48 Section 24(1) of the Enforcement Agency Integrity Commission Act 2009.
50 “Relative” is defined as “(a) a lineal ascendant or descendant of a spouse of the person; and (b) the uncle, aunt, cousin, son-in-law or daughter-in-law of the person.
51 “Associate” is defined as “(a) a nominee or an employee of such person; (b) a person who manages the affairs of such person; (c) an organization or a corporation controlled by such person or his nominee in the manner set out in the MACC Act; and (d) a trust created by such person or a trust in which such person has contributed not less than 20% of the value of the assets of such trust.
Other general offenses under the MACC Act 2009 include, among others, giving and accepting gratification,\textsuperscript{52} giving or accepting gratification by agent,\textsuperscript{53} corruptly procuring withdrawal of a tender,\textsuperscript{54} and offering gratification to an officer of public body.\textsuperscript{55} The penalty for these offenses is a term of imprisonment not exceeding 20 years and a fine not less than five times the sum or value of the gratification, which is the subject matter of the offense, if the same can be valued, or MYR10,000.00, whichever is higher.\textsuperscript{56}

It must be stated that the public appears to be unconvinced with the efficacy and credibility of the Malaysian Anti-Corruption Commission (MACC) and the 2009 Act. This is especially so after the deaths of the Democratic Action Party (DAP) political aide Teoh Beng Hock, when he was questioned by the MACC in July 2009, and immigration officer Ahmad Sarbaini Mohamad in July 2011, and the lack in the prosecution of high profile cases.

\textit{Acts that exceed a public officer’s authority}

As regards laws that hold public officers and employees accountable for acts that exceed their authority, the Penal Code enumerates a number of offenses, among others, disobeying a direction of the law, with the intent to cause injury to any person (section 166), incorrectly preparing or translating with the intent to cause injury (section 167), unlawfully engaging in a trade (section 168), and unlawfully buying or bidding for property (section 169 of the Penal Code).

\textbf{Special Courts and Prosecutors of Public Officers and Employees}

There are no known official information about dedicated courts and prosecutors that handle cases against public officers and employees.

\textsuperscript{52} Section 16 of the MACC Act 2009 states, “A person commits an offence if he by himself, or through or with any other person (a) corruptly solicits or receives or agrees to receive for himself or for any other person, or (b) corruptly gives, promises or offers to any person for the benefit of that person or another person, any gratification as an inducement to, or reward for, any person or any officer of a public body doing or forbearing to do anything in respect of any matter or transaction.

\textsuperscript{53} Section 17 of the MACC Act 2009 states, “An agent commits an offence if he corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself or any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act, or for showing or forbearing to show favour or disfavour to any person, in relation to his principal’s affairs or business. A person who gives gratification to an agent also commits an offence under this provision.”

\textsuperscript{54} Section 20 of the MACC Act 2009 states, “A person commits an offence if he, with the intent of obtaining any contract for the supply of product or services from any public body, offers any gratification to any person who has made a tender for the same contract as an inducement or reward for him to withdraw the tender. It is also an offence for a person to solicit for or receive any gratification for withdrawing his tender”.

\textsuperscript{55} Section 21 of the MACC Act 2009 states, “A person commits an offence if he offers to an officer of a public body any gratification as an inducement or reward for that officer to (a) vote or abstain from voting at any meeting in favour of or against any question submitted for approval by the public body; or (b) perform or abstain from performing or to assist in procuring, expediting, delaying, hindering or preventing the performance of any official act; or (c) assist in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or (d) show or forbear from showing any favour or disfavour in his capacity as an officer of a public body. An officer of a public body who solicits or accepts gratification on the grounds stated above also commits an offence under the MACC Act”.

\textsuperscript{56} Section 24 of the MACC Act 2009.


B. On Central Principle 2
(Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

**Publication of and Access to Criminal Laws and Procedures**

There has been no change since 2011—all criminal laws and procedures in Malaysia are published, generally accessible, and available in both Malay and English. The laws published are generally up to date.

**Accessibility, Intelligibility, Non-reactivity, Consistency, and Predictability of Criminal Laws**

Criminal laws and procedures in Malaysia are available, free, and accessible either online (through the website of the Attorney General’s Chambers and some Ministries), or in universities, or public libraries. These laws can also be purchased online through private companies such as Current Law Journal, Malayan Law Journal, Lexis Nexis, or hardcopy from bookstores.

There are no known official data or statistics to measure the level of understanding of these laws. As stated in the 2011 Rule of Law Baseline Study, the Bar Council has produced and distributes the “Red Book – Know Your Rights”\(^\text{57}\) and the “Rakyat Guides,”\(^\text{58}\) which contain information on constitutional rights and criminal law and procedures in simple language.

The guarantee against retrospectivity of laws has remained the same since 2011. It continues to be embodied in article 7(1) of the Federal Constitution, which states that “no person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.”

**Detention Without Charge Outside an Emergency**

The most notable change since 2011 is the repeal of the Internal Security Act 1960 (ISA) (a preventive detention law) in 2012. However, the positive development brought about by the repeal of the ISA was short-lived as the executive promulgated a number of laws that allow detention without trial outside a genuine state of emergency.

**Prevention of Terrorism Act 2015**

The first such law is the POTA 2015. Intended to tackle terrorist activities, concerns have been raised that the 2015 Act lacks fair trial safeguards:

1. **Right of access to a court or tribunal.** The POTA 2015 does not contain provisions that allow for a trial before a court. Instead, the determination of whether there are reasonable grounds for believing that a person, who is the subject of the inquiry, is engaged in the commission or support

---


of terrorist acts, falls within the purview of an inquiry officer and the Prevention of Terrorism Board (POTB). Section 10 of the POTA empowers an inquiry officer to procure and receive all evidence in whatever form, summon and examine witnesses, and require the production of any document relevant to the inquiry. The inquiry officer submits his report to the POTB, and upon receipt and review of the inquiry officer’s report, the POTB can either release the person, detain the person for a period not exceeding two years, or subject the accused person to a restriction order.

2. Right to a lawyer. The right of the person who is the subject of the inquiry or any witness to access a lawyer is not guaranteed, except when his/her own evidence is being taken and recorded by the inquiry officer;

3. Prohibition on the use of evidence obtained through unlawful means/treatment. The inquiry officer may procure evidence by any means; there is no provision for the POTB to inquire into the inquiry officer’s report or to request for further investigations;

4. Right to a public hearing. There is no requirement for the POTB hearings to be held in public or to allow the person, who is subject of the inquiry, to be present at the POTB hearing;

5. Right to full review. Judicial review of any order by the POTB is not allowed, except in regard to questions of procedural compliance; and

6. Lack of definitions. The words “engaged,” “commission,” “support,” and “involving” have not been defined in the POTA 2015, and the lack of definitions could be abused by the authorities.

The Malaysian Bar has commented that the POTA is unnecessary as there are ample substantive and procedural counter-terrorism laws in Malaysia.

**Amendments to the Prevention of Crime Act 1959**

Since 2011, a number of amendments were made to the PCA 1959; similar provisions (as those in the POTA), which supplanted court process, were also inserted into the PCA 1959:

1. Right to a public hearing. There is no requirement for the Prevention of Crime Board (PCB) to hold their hearings in public and the PCB does not have the power to inquire into or re-examine the findings of the inquiry officer.

2. Right to a lawyer. Section 9(5) does not allow a person access to legal representation;

59 Section 10 of the POTA 2015.
60 Section 12(2)(b) of the POTA 2015.
61 Section 13(1) and (2) of the POTA 2015.
62 Section 13(3) of the POTA 2015.
63 Section 10(6) of the POTA 2015.
64 Section 19 of the POTA 2015.
3. Prohibition on the use of evidence obtained through unlawful means/treatment. The inquiry officer, who is tasked to carry out the investigations and is appointed by the minister, is not bound by evidentiary rules and has sole discretion on the conduct of the inquiries;  
4. Right to reasoned judgment. The amendments to the PCA established a PCB that is empowered to issue a detention order against a person who has committed two or more serious offences, regardless of whether he has been convicted, and merely on the sufficiency of evidence;  
5. Right to full review. Judicial review is only allowed on procedural matters;  
6. Indefinite detention. The new section 19A of the PCA 1959 allows the PCB to “direct that any registered person be detained under a detention order for a period not exceeding two years, and may renew any such detention order for a further period not exceeding two years at a time if it is satisfied that such detention is necessary in the interest of public order, public security or prevention of crime.” This largely means that a person may be detained indefinitely, without the possibility of appeal or judicial review.

Rights of the Accused

*Freedom from Arbitrary or Extra-legal Treatment or Punishment, and Extra-Judicial Killing*

**Indefinite detention, Detention without charge or trial**

The POTA 2015 and the PCA 1959 allow the authorities to detain a person without trial, with the latter allowing for indefinite detention without trial (see discussion above on “Detention Without Charge Outside an Emergency”).

**Treatment in custody**

With regard to treatment in custody, there has been no improvement in the law or practice. Similar to the situation in 2011, Malaysia has yet to accede to/ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Penal Code does not define “torture” or “inhumane treatment.” There has been no change in the law with regard to confessions or statements made to the police, in that section 24 of the Evidence Act 1950 states that a confession made by an accused person is irrelevant if it has been caused by an inducement, threat or promise.

However, with the new laws (POTA 2015 and amendments to the PCA 1959), some have argued that the provisions allow an inquiry officer to procure or receive all evidence in any form without regard to any law relating to evidence or criminal procedure, and this wide power could be abused to inflict torture or inhumane treatment on any person. The protection afforded by section 24 of the Evidence Act 1950 could be lost.

68 The Prevention of Crime Act 1959 does not expressly state which Minister. As such, looking at the Interpretation Acts 1948 and 1967, any reference to “the Minister” is a reference to the Minister for the time being responsible for the matter in connection with which the reference is made.  
69 Section 7C of the PCA 1959.  
70 Section 15A of the PCA 1959.  
Right to habeas corpus

The right to habeas corpus, guaranteed in article 5(2) of the Federal Constitution, has since been considerably watered down with the coming into force of the POTA 2015 and PCA 1959. New provisions were inserted in both these laws72 to exclude judicial protective proceedings, such as applications for mandamus, prohibition, certiorari, declaration, injunction, and writ of habeas corpus.

Deaths in custody

Civil society organizations and SUHAKAM have continued to report deaths in custody and police brutality. In its 2014 Annual Report, SUHAKAM observed that since 2010, the number of deaths in custody increased from nine to 20 deaths in 2013.73 In 2012, SUHAKAM reported 34 complaints regarding the excessive use of force by the police, and in 2013 and 2014, SUHAKAM re-classified its complaints and recorded a total of 30 complaints of cruel/inhuman/degrading treatment or punishment. The SUHAKAM reports do not contain details of such complaints.

Extra-judicial killings

There are no known official data or statistics available.

Presumption of Innocence

There has been no change in the law since 2011—the principle of “innocent until proven guilty” continues to be guaranteed in the Criminal Procedure Code (CPC), with the prosecution proving a prima facie case before a trial can continue. As per the 2011 Rule of Law Baseline Study, a number of drug laws and the Sedition Act 194874 provide for the reversal of the burden of proof and are exceptions to the presumption of innocence.

One new provision on this issue is the amendment (in 2012) to the Evidence Act 1950. Under section 114A of the Act, a person is presumed to have published/re-published a publication if it originates from a network service that he/she is registered with and subscribed to, or from a computer which he/she has custody or control. In addition, any person whose name, photograph or pseudonym appears on any content is presumed to have posted or re-posted it via the internet.

72 Section 19 of POTA 2015 and section 15A of PCA 1959.
74 Section 37 of the Dangerous Drugs Act 1952 which presumes a person to be in possession of drugs if he is found to have custody of drugs and also presumes a person to be trafficking drugs if he is found to have possession of drugs, unless proven to the contrary; section 6 (2) of the Sedition Act 1948 states that ‘No person shall be convicted of any offence… if the person proves that the publication…was printed, published, sold, offered for sale, distributed, reproduced or imported without his authority, consent and knowledge and without any want of due care or caution on his part, or that he did not know and had no reason to believe that the publication had a seditious tendency.’
**Legal Counsel and Assistance**

There has been no change in the law since 2011. Article 5(3)-(4) of the Federal Constitution and section 28A of the CPC guarantee the right to access to a legal counsel. As previously cited in the 2011 Rule of Law Baseline Study, case laws have interpreted this right to mean that it cannot be exercised immediately after arrest where it would impede police investigations, and this right should only be given to the accused with “all convenient speed.” This right is available even to persons who have been detained under laws promulgated under article 149 of the Federal Constitution. However, as stated above, the POTA 2015 and the PCA 1959 contain provisions that erode the right to legal counsel for persons detained under these laws.

In practice, there have been some complaints of accused persons/detainees being denied access to a lawyer. SUHAKAM, in its 2013 Annual Report, stated that it received complaints of denial of access to lawyers by arrested persons (the SUHAKAM report did not contain a specific number of complaints received). Similar concerns were raised during the Universal Periodic Review Second Cycle for Malaysia, where civil society organizations urged the authorities to guarantee arrested persons the right to access to counsel at all stages of the criminal proceedings and to ensure that lawyers are able to consult their clients freely at all times.

**Knowing the Nature and Cause of the Accusation**

There has been no change in the law—article 5(3) of the Federal Constitution embodies this right. The case of *Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara & Ors*, where the police was only required to inform the arrested person that he has reason to believe there are grounds to justify the detention, and that there is no requirement for the police to go into sufficient particulars and material evidence, still holds water.

However, in SUHAKAM’s Annual Reports in 2013 and 2014, the commission noted that there have been complaints of failure by the police to inform accused persons of the grounds of arrest. The reports, unfortunately, did not state how many such complaints were received.

**Guarantees during Trial**

Save for the provisions in the POTA 2015 and the PCA 1959 (enumerated above), which are tantamount to a circumvention of an accused’s right to be tried before a court, there has been no change with regard to the right of an accused person to be tried in their presence, to defend themselves in person, and examine, or have counsel examine, the witnesses and evidence against them.

---

75 *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198.
76 *Public Prosecutor v Mah Chuen Lin & Ors* [1975] 1 MLJ 95.
78 SUHAKAM Annual Report 2013, 44.
82 Chapters XVIIA to XXVA of the Criminal Procedure Code (CPC).
As regards the right to be tried without undue delay, there has been no change in the law. This right was entrenched in 1992 when the High Court, in the case of *PP v. Choo Chuan Wang*, held that the right to a fair hearing within a reasonable time by an impartial court established by law is part of the right to life and personal liberty guaranteed in article 5(1) of the Federal Constitution. The Court went on to state that, “criminal work should be disposed of with the least possible delay in order to avoid hardship to the accused who may be in custody or who in any case has the right to have the criminal accusation against him determined as soon as possible.”

SUHAKAM’s 2013 Annual Report remarked that there were instances when the Police delayed the process of recording statements from accused persons.

**Appeal**

There has been no change in the law since 2011—the Courts of Judicature Act 1964 and Chapter XXX of the CPC lay down the right to appeal and the procedure and rules governing appeals. The procedures in these laws adequately afford the guarantee of the right to appeal.

**Freedom from Double Jeopardy**

There has been no change in the law since 2011—article 7(2) of the Federal Constitution provides protection against repeated trials.

**Remedy before a Court for Violations of Fundamental Rights**

No law guarantees the right to seek a timely and effective remedy before a competent court for violations of fundamental rights. For any violation of fundamental rights in Malaysia, a person alleging a human rights violation may bring a claim against the alleged perpetrator (through a writ or originating summons), or file a judicial review application, depending on the case. The available remedies are damages, declaration, *certiorari, mandamus* or other relief.

However, in some of the cases, particular those that involve a dispute between the jurisdiction of the Syariah and Civil Courts, applicants have been left without an effective remedy. In the cases of *Shamala Sathiyaseelan v. Dr. Jeyaganesh C. Mogarajah & Anor* and *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray*, the Civil Court (Federal Court) refused to hear the application of a Hindu mother in a custody battle where her estranged husband had converted to Islam and unilaterally converted their children to Islam. The applicant in the case was left without an effective remedy as the Civil Court did not have jurisdiction to hear the case.

---

85 Sections 26-29 of the Courts of Judicature Act, Chapter XXX of the CPC.
86 Article 7(2) of the Federal Constitution states, ”A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.”
88 [2007] 2 MLJ 705.
and the applicant did not have legal standing before the Syariah Court.89

Also, concerns have been expressed with regard to the right of indigenous women to seek effective remedy from the Native Courts. Due to social and cultural constraints, indigenous women have limited access to justice, and are disadvantaged by native customary law. In particular, for sexual offenses, both parties (regardless of whether the woman was raped) are liable to pay a fine.90

C. **On Central Principle 3:**
(The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

**Law Enactment**

**Openness and Timeliness of Release of Record of Legislative Proceedings**

There has been no remarkable change in this area since 2011—proceedings in both Houses of Parliament are open to the public. Members of Parliament are given notice of the dates of proceedings, and dates of proceedings are publicized on the Parliament website. However, members of the public who would like to visit Parliament must submit an application at least five working days prior to the date of visit, and an official application letter must accompany the application.92

**Timeliness of Release and Availability of Legislative Materials**

There has been no improvement in the law or procedure since 2011—draft laws and minutes of legislative proceedings are not made available to the public on a timely basis. The Hansard is only available in Malay and not easily accessible from the Parliament’s website.

Draft laws to be debated in Parliament are not made public by Parliament before the debate. Access to draft laws is through members of Parliament. Additionally, there has been some criticism with regard to the hurried manner in which bills are passed through Parliament. A number of members of Parliament and the Malaysian Bar criticized the sudden tabling of the new National Security Council Bill in December 2015.93 Also, in April 2015, similar concerns were raised with regard to the Prevention of Terrorism Bill 2015, and

---

amendments to the SOSMA and the Sedition Act 1948. The lack of transparency in the legislative process and the inadequate time for proper debate are concerning and could pave the way for abuse of these laws.

Law Enforcement

The unequal and unfair enforcement of the law continues to be a problem in Malaysia. Previously cited problems (in the 2011 Rule of Law Baseline Study) on the lack of procedural fairness, such as the arbitrary application of the Societies Act 1966 and the Official Secrets Act 1972, remain, with no significant improvement. Perhaps, the only improvement since 2011 is the elimination of the yearly requirement to renew the printing presses’ permit for publications. This requirement was often unequally enforced by the authorities to control the media, particularly media organizations that criticize the government.

In addition to the above, there appears to be an unequal and unfair application of the Sedition Act 1948, targeting only critics of the government and Islam. For example, civil society organizations have expressed concerns that the Attorney General refused to take action against Ibrahim Ali, President of PERKASA, when he called on all Muslims to seize and burn copies of the Bible that contain the word “Allah,” while those who criticized court cases or drew cartoons that disparaged the government were arrested and investigated under the Sedition Act 1948 or the Communications and Multimedia Act 1998. The Malaysian Bar remarked that the Sedition Act 1948 appears to be a “dressed-up legislative weapon to target critics of the government and dissidents in society.”

In November 2015, for the first time, the SOSMA was used against political dissenters when Khairuddin Abu Hassan and Matthias Chang were arrested and detained under the SOSMA for lodging reports about possible corrupt practices of law enforcement agencies in five foreign countries. It will be recalled that the SOSMA was enacted to tackle security offenses for purposes of maintaining public order and security.

Civil society organizations have called on the government to establish an “Independent Police Complaints and Misconduct Commission” as they felt that there have been selective police investigations, and investigations into abuse by law enforcement officers were rare.

100 Preamble to the Security Offences (Special Measures) Act 2012.
**Equal Protection of the Law and Non-Discrimination**

There has been no change in the law since 2011—article 8(1) of the Federal Constitution contains the guarantee that “all persons are equal before the law and entitled to the equal protection of the law.”

**Reparation for Crimes and Human Rights Violations’ Victims/Survivors**

There is no law that explicitly guarantees reparation for human right violations. General criminal and civil laws are applicable and does not make a distinction between crimes or civil wrongs and human rights violations.

Most victims gain access to relevant information on violations and reparation mechanisms through their legal counsel or through awareness activities conducted by SUHAKAM and civil society organizations in Malaysia. However, there are no known data or statistics to gauge the level of effectiveness of these awareness activities.

**D. On Central Principle 4:**

(Justice is administered by competent, impartial, and independent judiciary and justice institutions)

**Appointment and Other Personnel Actions in the Judiciary and among Prosecutors**

**Judiciary – Superior Courts**

Unfortunately, there has been no visible improvement in the situation of the appointment, reappointment, promotion, discipline, and dismissal of judges and judicial officers since 2011. The 1988 judicial crisis (which resulted in the sacking and replacement of Supreme Court judges) continues to mar the independence of the judiciary in Malaysia.

**Appointment**

The former United Nations Special Rapporteur on the Independence of Judges and Lawyers has urged the Judicial Appointments Commission (JAC),\(^{102}\) which has been in operation since 2009, to be more transparent and accountable in the elevation of judges. One particular recommendation to enhance the transparency and accountability of the JAC is to consult the Bar Council with regard to judicial appointments.\(^{103}\) This (consultation with the Bar Council) was the practice previously (i.e. prior to the establishment of the JAC) where the Chief Justice would seek the Bar Council’s feedback when appointments and promotions were made.\(^{104}\) Greater transparency in the judicial appointments process could alleviate concerns and

---

\(^{102}\) Members of the JAC include the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court of Malaya, Chief Judge of the High Court of Sabah and Sarawak, and five other judges, <http://www.jac.gov.my/index.php?option=com_content&view=article&id=65&Itemid=136&lang=en> accessed 21 Feb 2016.


perceptions that judges are not promoted or appointed based on merit or seniority. Additionally, civil society organizations felt that the composition of the JAC could compromise the appointment process, and in turn, the independence of the judiciary.105

Dismissal/suspension

There has been no change since 2011 with regard to the law on the dismissal or suspension of superior Court judges—article 125 of the Federal Constitution states that the Prime Minister or the Chief Justice, after consulting the Prime Minister, may represent to the King that a judge ought to be removed on the ground of any breach of any provision in the Code of Ethics 2009, or inability from infirmity of body or mind, or any other cause which affects his ability to properly discharge the functions of his or her office. In this instance, the King shall appoint a tribunal106 and refer the representation to the tribunal. The tribunal may recommend the removal or suspension of the judge from office.

If the Chief Justice is of the opinion that the breach does not warrant the judge being referred to a tribunal, section 14 of the Judges’ Code of Ethics 2009107 states that the Chief Justice may refer the complaint to the Judges’ Ethics Committee. The Judges’ Ethics Committee is then obliged to inform the judge in writing of the facts of the alleged breach of the Judges’ Code of Ethics and give the judge the opportunity to make a written representation within 30 days. After considering the written representation, the Judges’ Ethics Committee may dismiss the complaint if it feels it has no merit, or if there is merit in the complaint, invite the judge to appear before the Judges’ Ethics Committee. The judge is allowed legal representation during his appearance before the said Committee. After due consideration of the representation made by the judge, if the breach is not proven, the Judges’ Ethics Committee shall dismiss the complaint. If the breach is proven, the Judges’ Ethics Committee may record an admonition to the judge or suspend the judge for a period not exceeding one year.

Training, Resources, and Compensation

The Judicial Academy was established in December 2011 and is charged with the function of providing coherent training for Superior Court judges.108 It began providing six training sessions in 2012 on topics such as injunctions, admissibility of evidence in a civil trial, how to deal with cases under section 39B of the Dangerous Drugs Act 1952 and judicial review and appellate interventions. Since then, the Judicial Academy has continued to provide an average of seven training sessions per year for judges.

106 Article 125(4) of the Federal Constitution states that, “The tribunal appointed under Clause (3) shall consist of not less than five persons who hold or have held office as judge of the Federal Court, the Court of Appeal or a High Court, or, if it appears to the Yang di-Pertuan Agong expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth, and shall be presided over by the member first in the following order, namely, the Chief Justice of the Federal Court, the President and the Chief Judges according to their precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointments of the same date’).
107 P.U. (B) 201.
Judiciary – Lower Courts

Appointment

A Sessions Court judge must be a member of the Judicial and Legal Service before he or she can be appointed. His or her appointment is by the King, upon the recommendation of the Chief Judge. As regards the appointment of a magistrate, the State Authority may, on the recommendation of the Chief Judge in each case, appoint any fit and proper person to be a First Class Magistrate in and for the State, provided that he or she is a member of the Judicial and Legal Service.110

Other Personnel Actions

As members of the Judicial and Legal Service, the appointment, confirmation, promotion, transfer, and exercise of disciplinary control over Sessions Court judges and magistrates fall within the purview of the Judicial and Legal Service Commission.111

The Judicial Legal Service Commission comprises of the Chairman of the Public Services Commission, the Attorney General, and other members (who are or have been, or are qualified to be, a judge of the Federal Court, Court of Appeal, or the High Court), appointed by the King, after consultation with the Chief Justice and the Secretary of the Public Services Commission.112

Public Prosecutor/Attorney General

Appointment

As regards the appointment of the Attorney General, there has been no change in the law since 2011—article 145 of the Federal Constitution provides that the King, on the advice of the Prime Minister, appoints a person who is qualified to be a judge of the Federal Court, to be the Attorney General. Article 145(5) goes further to state that, “subject to Clause (6), the Attorney General shall hold office during the pleasure of the Yang di-Pertuan Agong (King) and may at any time resign his office…” Article 145(6) states that, “The person holding the office of Attorney General immediately prior to the coming into operation of this Article shall continue to hold the office on terms and conditions not less favourable than those applicable to him immediately before such coming into operation and shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court.”

Dismissal

There are no known legal provisions setting out the procedure for the removal of the Attorney General. For the first time, the issue of the dismissal of the Attorney General was brought out in the open when, in 2015,

109 To be a member of the Judicial and Legal Service, a person must register with the Public Service Commission of Malaysia (PSC) using the Registration Form (SPA8i), fulfilled the scheme of service and shortlisting requirements set by the Commission will be called for an interview either by the Attorney General’s Chambers of Malaysia or the Chief Registrar Office, Federal Court of Malaysia. Successful applicants will then be offered post of Legal Officer (Grade L41) on a contractual or permanent basis depending on the decision of the Commission. <http://www.spkp.gov.my/portal/eng/pelantikan.php> accessed 8 Mar 2016.
110 Sections 78 and 78A of the Subordinate Courts Act 1948.
111 Article 144 of the Federal Constitution.
112 Article 138(2) of the Federal Constitution.
Tan Sri Gani Patail (the then Attorney General) was suddenly dismissed. Tan Sri Gani Patail maintained that he was not aware of his dismissal. This incident raised a number of questions: whether his dismissal was in accordance with the principle of fairness, and whether a tribunal similar to the one required to remove a judge should have been convened. The Bar Council observed that the dismissal was unconstitutional as it violated article 135(2) of the Federal Constitution, which affords a person who has been dismissed from the judicial or legal service, the right to be heard.

Others have argued that the Prime Minister could terminate the Attorney General without convening a tribunal. This hypothesis is based on the 1963 amendments to article 145 of the Federal Constitution (which included an amendment to article 145(5) and the introduction of article 145(6) of the Federal Constitution). The previous article 145(5) provided that the Attorney General “shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court”; this provision was deleted and replaced with the current version where the Attorney General holds office “during the pleasure of the Yang di-Pertuan Agong.” According to the Explanatory Statement to the article 145 amendments and the first Malayan Attorney General Abdul Kadir bin Yusof, the rationale for the amendments were twofold: firstly to give greater latitude to the appointment of the Attorney General, i.e., the Attorney General could be a person from the public service or a political appointee; and secondly, given that the Attorney General could be politicians, the security of tenure akin to a judge was not necessary.

Deputy Public Prosecutors

Appointment

Section 376 of the CPC governs the appointment of Deputy Public Prosecutors (DPPs). The said section provides that the Attorney General may appoint “fit and proper persons to be DPPs who shall be under the general control and direction” of the Attorney General. DPPs are considered legal officers within the Judicial and Legal Service.

Members of the public service, including lower court judges and DPPs

The termination, promotion, and disciplinary control of lower court judges and DPPs are lodged with the government under the Public Officers (Appointment, Promotion and Termination of Service) Regulations.
2012\textsuperscript{118} and Public Officers (Conduct and Discipline) Regulations 1993,\textsuperscript{119} as they are considered members of the public service.

**Promotion**

The 2012 Regulations stipulate that promotion is based on merit, and in considering the merit for promotion, the Promotion Board shall take into consideration the efficiency and performance of the work of the officer; the qualifications, knowledge, skills, and experience of the officer; personal characteristics, including his suitability for the promotional post, integrity, potential, and leadership of the officer; the extramural activities and contributions of the officer to the country and society; and other aspects which the Promotion Board thinks relevant.\textsuperscript{120}

**Termination or reduction in rank**

A public officer may be terminated if he or she fails the security vetting,\textsuperscript{121} and for an unconfirmed officer, he or she may be terminated if the officer has concealed any information regarding his health in the medical examination form; made a false declaration in the statutory declaration; or amended or falsified any document relating to his appointment.\textsuperscript{122} Before any officer is terminated, he or she must be given the opportunity to show cause, within a period of not less than 14 days from the date of receipt of notice to show cause, why he or she should not be terminated.\textsuperscript{123}

If any public officer contravenes the Public Officers (Conduct and Discipline) Regulations 1993,\textsuperscript{124} he or she may be dismissed, or his or her rank reduced. If the disciplinary offense complained of warrants dismissal or reduction in rank, the appropriate Disciplinary Authority will hear the matter.\textsuperscript{125} If there is a \textit{prima facie} case against the said officer, then the charge (with the facts and the grounds on which it is proposed to dismiss the officer or reduce his rank) will be sent to the said officer and the officer will be given 21 days to submit a written representation.\textsuperscript{126} After considering the written representation, the Disciplinary Authority may dismiss or reduce the rank of the officer, impose a lesser sentence (if the complaint does not warrant a dismissal/reduction in rank), or establish an Investigation Committee to obtain further clarification.\textsuperscript{127}

\textsuperscript{118} P.U.(A) 1/2012.
\textsuperscript{119} P.U.(A) 395.
\textsuperscript{120} Section 39 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.
\textsuperscript{121} Section 49 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.
\textsuperscript{122} Section 48 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.
\textsuperscript{123} Section 52 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.
\textsuperscript{124} Prohibited conduct: 1) An officer shall at all times give his loyalty to the Yang di-Pertuan Agong, the country and the Government. (2) An officer shall not-(a) subordinate his public duty to his private interests; (b) conduct himself in such a manner as is likely to bring his private interests into conflict with his public duty; (c) conduct himself in any manner likely to cause a reasonable suspicion that- (i) he has allowed his private interests to come into conflict with his public duty so as to impair his usefulness as a public officer; or (ii) he has used his public position for his personal advantage; (d) conduct himself in such a manner as to bring the public service into disrepute or bring discredit to the public service (e) lack efficiency or industry; (f) be dishonest or untrustworthy; (g) be irresponsible; (h) bring or attempt to bring any form of outside influence or pressure to support or advance any claim relating to or against the public service, whether the claim is his own claim or that of any other officer; (i) be insubordinate or conduct himself in any manner which can be reasonably construed as being insubordinate; and (j) be negligent in performing his duties. Sexual harassment is also a prohibited conduct (section 4A).
\textsuperscript{125} Section 37 of the Public Officers (Conduct and Discipline) Regulations 1993.
\textsuperscript{126} Section 37 of the Public Officers (Conduct and Discipline) Regulations 1993.
\textsuperscript{127} Section 37 of the Public Officers (Conduct and Discipline) Regulations 1993.
However, this procedure is not applicable if there is a criminal charge proven against the said officer; the Disciplinary Authority is of the opinion that the procedure is not necessary; it is in the interest of national security that the procedure be dispensed with; or if an order of detention, preventive detention, supervision, restricted residence, banishment, deportation, or protection of women and girls, has been made against the said officer.128

Disciplinary action

If any public officer contravenes the Public Officers (Conduct and Discipline) Regulations 1993,129 he or she may be subject to disciplinary action/punishment. If the conduct warrants a lesser punishment than a dismissal or reduction in rank, the Disciplinary Authority is then obliged to inform the officer of the facts of the alleged disciplinary offence and the officer will be given 21 days to make a written representation. After considering the written representation, the Disciplinary Authority can either seek further clarification, find the officer guilty, or acquit the said officer.130 If an officer is found guilty of a disciplinary offence, the punishments that can be meted out by the Disciplinary Authority include, warning, fine, forfeiture of emoluments, deferment of salary movement, or reduction of salary.131

Training, Resources, and Compensation

There has been no significant change in the training, resources and compensation of prosecutors, judges and judicial officers in Malaysia. These components are generally adequate. The Malaysian Bar continues to provide training and workshops to lawyers through its Continuing Professional Development (CPD) program. CPD points, which were mandatory but removed in 2013,132 have been recently revived after the Bar Council passed a resolution requiring lawyers with less than five years experience to obtain a minimum of 16 CPD points per 24-month CPD cycle. As for judicial officers and prosecutors, the Judicial and Legal Training Institute (ILKAP) conducts judicial and legal training programs, colloquiums, seminars and workshops, with a view to enhancing the knowledge, competency, and professionalism of judicial and legal officers.133

As stated, the main problem with regard to prosecutors, judges and judicial officers is the lack of impartiality and independence.

128 Section 34 of the Public Officers (Conduct and Discipline) Regulations 1993.
129 Prohibited conduct: 1) An officer shall at all times give his loyalty to the Yang di-Pertuan Agong, the country and the Government. (2) An officer shall not—(a) subordinate his public duty to his private interests; (b) conduct himself in such a manner as is likely to bring his private interests into conflict with his public duty; (c) conduct himself in any manner likely to cause a reasonable suspicion that—(i) he has allowed his private interests to come into conflict with his public duty so as to impair his usefulness as a public officer; or (ii) he has used his public position for his personal advantage; (d) conduct himself in such a manner as to bring the public service into disrepute or bring discredit to the public service (e) lack efficiency or industry; (f) be dishonest or untrustworthy; (g) be irresponsible; (h) bring or attempt to bring any form of outside influence or pressure to support or advance any claim relating to or against the public service, whether the claim is his own claim or that of any other officer; (i) be insubordinate or conduct himself in any manner which can be reasonably construed as being insubordinate; and (j) be negligent in performing his duties. Sexual harassment is also a prohibited conduct (section 4A).
130 Section 36 of the Public Officers (Conduct and Discipline) Regulations 1993.
131 Section 38 of the Public Officers (Conduct and Discipline) Regulations 1993.
State’s Budget Allocation for the Judiciary and Other Principal Justice Institutions

The budget allocated to the judiciary and other principal justice institutions for the year 2016 is as follows:134

<table>
<thead>
<tr>
<th>Department/Agency</th>
<th>Budget allocation135</th>
<th>Percentage to the total government budget136</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney General’s Chambers</td>
<td>MYR185 million</td>
<td>0.069%</td>
</tr>
<tr>
<td>Superior Courts (High Court, Court of Appeal and Federal Court)</td>
<td>MYR90 million</td>
<td>0.034%</td>
</tr>
<tr>
<td>Syariah Judiciary Department</td>
<td>MYR47 million</td>
<td>0.017%</td>
</tr>
<tr>
<td>Syariah Court (Wilayah Persekutuan)</td>
<td>MYR17 million</td>
<td>0.006%</td>
</tr>
<tr>
<td>Judicial and Legal Training Institute (ILKAP)</td>
<td>MYR11 million</td>
<td>0.004%</td>
</tr>
<tr>
<td>Department of Legal Affairs</td>
<td>MYR125 million137</td>
<td>0.046%</td>
</tr>
<tr>
<td>Office of the Chief Registrar, Federal Court</td>
<td>MYR403 million</td>
<td>0.151%</td>
</tr>
</tbody>
</table>

Impartiality and Independence of Judicial Proceedings

Concerns over the independence of judicial proceedings have not abated since 2011, in particular in cases concerning leaders of the opposition party. In February 2015, when the Federal Court upheld the Court of Appeal’s ruling that Anwar Ibrahim (opposition leader) was guilty of sodomy, the court was criticized for its lack of independence and for pandering to government’s interference. The judgment in this case seems to entrench the public’s perception that the judiciary is not independent and that judicial fairness and the rule of law are principles that are not respected by the courts.138 This is the second time that Anwar Ibrahim faced charges of sodomy; in his first sodomy trial (late 1990s), the judiciary was equally criticized for its lack of independence in the handling of the said trial.139

---

135 Approximate number.
136 Total budget for 2016 is MYR267,224 million.
137 Of which MYR27 million is allocated to the Legal Aid Department.
In some cases, there have been assertions of influence by senior members of the judiciary on lower ranked judges.\textsuperscript{140}

**Provision of Lawyers or Representatives by the Court to Witnesses and Victims/Survivors**

Generally, the competence of lawyers is not a problem in Malaysia. The qualifications of an advocate and solicitor in Malaysia are set out in the Legal Profession Act 1976 and strictly regulated by the Legal Profession Qualifying Board, the Malaysian Bar, the Sabah Law Association, and the Advocates Association of Sarawak, the last two respectively in Sabah and Sarawak.

**Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public**

Safety and security of accused persons, prosecutors, judges, judicial officers, members of the public, and affected parties are generally not a problem in Malaysia. Save for one case, the murder of a Public Prosecutor in September 2015, which was allegedly linked to a case that he was prosecuting (the trial of which was ongoing),\textsuperscript{141} there has been no other significant reports of threats to the safety and security of these categories of persons.

In this regard, there are no known mechanisms that specifically deal with the safety of judges and/or prosecutors. However, one positive development since 2011 is the Witness Protection Act 2009, which sets up the Witness Protection Program, and any witness may apply to be included in the said Programme. According to the MACC, the Witness Protection Program has instilled confidence in the public to lodge reports of corruption as the said Program (together with the Whistleblower Protection Act 2010) affords necessary protection.\textsuperscript{142}

**Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing**

The law regarding *locus standi* has seen some progress recently. The case of *Government of Malaysia v. Lim Kit Siang & Another Case*,\textsuperscript{143} where the Supreme Court ruled that a taxpayer had no *locus standi* to question the policy of the government, has been somewhat corrected in the recent case of *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor.*\textsuperscript{144} In the *Malaysian Trade Union Congress case*, the Federal Court held that the test of substantive *locus standi*, as laid out in the *Lim Kit Siang* case, was not applicable when determining whether a person may apply for judicial review. The Federal Court preferred the Indian judicial approach on standing, which has “veered towards liberalisation of the *locus standi* as the courts realise that taking a restrictive view on this question will have many grievances

\begin{thebibliography}{99}
\bibitem{143} [1988] 1 CLJ 219.
\bibitem{144} [2014] 1 CLJ 525; see also Kerajaan Negeri Selangor & Ors v Pendaftar Pertubuhan Malaysia & Another Appeal [2014] 6 CLJ 471.
\end{thebibliography}
unremedied.” The Federal Court held that to establish *locus standi*, the applicant has to at least show that he has a real and genuine interest in the subject matter, and that it is not necessary for the applicant to establish infringement of a private right or the suffering of special damage, affirming the “adversely affected” test in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor.*

**Publication of and Access to Judicial Hearings and Decisions**

There is no change in the law since 2011—section 15(1) of the Courts of Judicature Act 1964 provides that all courts in Malaysia are open and public, to which the public generally may have access, with the necessary exception of “*in camera*” if it is in the interest of justice, public safety, public security, or propriety. Equally, Court decisions are made available to affected parties.

The only change is with regard to the hearings of the POTB and PCB where there is no requirement for the respective boards’ hearings to be public (see above).

**Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions**

There is no change in the law since 2011—court fees and administrative procedures are not obstacles to effective access to judicial institutions.

**Assistance for Persons Seeking Access to Justice**

There is no assistance provided to persons seeking justice apart from legal aid (see discussion below on “Available and Fair Legal Aid to All Entitled”).

**Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation**

There has been no change in the law and procedures regarding measures to minimize inconvenience to litigants, witnesses and their families since 2011. This is generally not a problem in Malaysia.

**Available and Fair Legal Aid to All Entitled**

Legal aid is available in Malaysia through four avenues:

1. **Legal Aid Department.** The Government, through the Legal Aid Act 1971, established the Legal Aid Department to provide legal advice and legal assistance to the lower income group, in relation to legal issues or matters, who cannot afford to pay private lawyers to represent them in courts. Services include legal aid in the areas of Syariah family matters; civil family matters; civil cases [workmen’s

---

145 [2006] 2 CLJ 532.
compensation, *padi* cultivators, small estate (distribution)]; road accident; moneylenders; hire-purchase; tenancy matters; probate and letters of administration, adoption, and consumer claims; criminal cases (to plead guilty to the charge and to make a plea of mitigation); offenses under the Child Act 2001; minor offences (does not include accused persons who intend to claim trial); legal advice in all legal matters; and mediation for Syariah and civil cases.\(^{147}\)

To be eligible for legal aid, a person's financial resources should be below MYR30,000 per annum, or between MYR25,000.00 and MYR30,000.00, per annum. If a person's financial resources are between MYR25,000.00 and RM30,000.00, a one-time monetary contribution of MYR300.00 is required. A person entitled to legal aid shall not be liable for any legal, administrative, or processing fee, except for a sum of RM2.00 for registration, a sum of RM300.00 as contribution (if applicable), and a nominal sum for disbursement (if the need arises). He or she shall not be liable for court fee, fees payable for service of process, and fees due to the sheriff in connection with the execution process. He or she shall be entitled to be supplied free of charge of a copy of the judge's notes of evidence in any proceedings. He or she shall not be liable for costs to any other party in any proceedings. He or she shall be entitled to costs of the proceedings as the court would have made in his/her favour had he/she not been an aided person.\(^{148}\)

The system seems to be fair, with no significant complaints with regard to the receipt of legal aid, save for the fact that only citizens of Malaysia are eligible to apply for legal aid from the Legal Aid Department, to the exclusion of the migrant population in Malaysia.\(^{149}\)

2. Bar Council Legal Aid. The Bar Council provides legal aid pursuant to section 42(h) of the Legal Profession Act 1976, which states that “the purpose of the Malaysian Bar shall be to make provision for or assist in the promotion of a scheme whereby persons may be represented by advocates and solicitors.” A person is qualified for legal aid if his/her monthly income (after deduction of monthly expenses) is less than MYR650 (for a single person) and MYR900 (for a married person). In addition, a person should not own property worth more than MYR45,000 (for a house), MYR20,000 (for a car), and MYR4,500 (for a motorcycle), and have not more than MYR5,000 in savings. Those qualified for legal aid are required to pay an administrative fee of MYR20.00.\(^{150}\)

A person entitled to legal aid, including those charged with criminal offenses who intend to claim trial, enjoys free representation in court and free legal advice.\(^{151}\) However, applicants are required to pay the expenses incurred by the lawyer.

The system seems to be fair, with no significant complaints with regard to the receipt of legal aid.

---

147 Second and Third Schedules of the Legal Aid Act 1971.
3. National Legal Aid Foundation. The National Legal Aid Foundation (NLAF) was incorporated on 25 January 2011 as a result of a decision made at a cabinet meeting on 3 March 2010.\textsuperscript{152} The NLAF provides free legal aid and advice on criminal matters, including Syariah criminal matters, to all Malaysian citizens at the stage of arrest, remand, charge, bail application, mitigation, hearing, and appeal. Offenses that carry the death penalty will not be covered by the NLAF as the court provides assigned counsel to persons so charged (see below).\textsuperscript{153}

In order to qualify for free legal representation and advice in criminal matters, a person must be a Malaysian citizen, with an income that does not exceed MYR36,000.00, per annum. No fee will be charged for a person whose income is less than MYR25,000.00, per annum. Persons whose annual income exceeds MYR25,000 but does not exceed MYR36,000 will be charged rates that will be determined by the NLAF’s Board of Directors.\textsuperscript{154}

4. Court Assigned Counsel. For persons accused of capital offenses, the judiciary, under the purview of the Chief Registrar of Malaysia, assigns a counsel to them. Counsels receive fees paid by the court based on the practice direction of the Chief Justice of Malaysia. The budget for this scheme is derived from the federal government.\textsuperscript{155}


Summary of legal aid services available in Malaysia:

<table>
<thead>
<tr>
<th>Name</th>
<th>Relevant legislation/ Governing body</th>
<th>Services provided</th>
<th>Eligibility</th>
<th>Fees levied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Aid Department</td>
<td>Legal Aid Act 1971/ Legal Aid Department</td>
<td>Free legal advice in all legal matters; mediation for Syariah and civil cases; Legal assistance in the areas of Syariah family matters; civil family matters; civil cases [workmen’s compensation, <em>padi</em> cultivators, small estate (distribution)]; road accident; moneylenders; hire-purchase; tenancy matters; probate and letters of administration, adoption, and consumer claims; criminal cases (to plead guilty to the charge and to make a plea of mitigation); offenses under the Child Act 2001; minor offences (does not include accused persons who intend to claim trial).</td>
<td>- Annual income &lt;MYR30,000 or between MYR25,000 - MYR30,000.</td>
<td>- MYR2.00 (registration fee); MYR300 if annual income is between MYR25,000 – MYR30,000; Nominal sum for disbursement.</td>
</tr>
<tr>
<td>Bar Council Legal Aid</td>
<td>Legal Profession Act 1976/ Bar Council</td>
<td>Free representation in court and free legal advice, including representation for those charged with criminal offenses who intend to claim trial.</td>
<td>- Monthly net income &lt;MYR650 (single person) and MYR900 (married person); Should not own property &gt;MYR45,000 (house), MYR20,000 (car), and MYR4,500 (motorcycle); and &lt;MYR5,000 in savings.</td>
<td>- MYR20.00 (administrative fee); Must pay expenses incurred by the lawyer.</td>
</tr>
</tbody>
</table>
General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

There are no known data and statistics that would be instructive in regards awareness of the general public of pro bono initiatives and legal assistance.

In 2014, the Bar Council’s legal aid program, which has 16 centers, handled 17,189 case files, and the NLAF handled 156,129 case files (through its 15 centers). As for awareness raising activities, the Bar Council and the NLAF carry out such activities to inform the public about legal aid services that they offer. Also, according to the Legal Aid Department, in the year 2013, it carried out 1,575 awareness programs in malls, carnivals, prisons, juvenile detention centres, the Islamic religious department, courts, and district offices.\(^\text{156}\)

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

Malaysia is a party to the 2004 Treaty on Mutual Legal Assistance in Criminal Matters (which includes rendering to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings). Malaysia takes part in the ASEAN Trade Repository (ATR) that documents trade and customs laws and procedures; the ATR is intended to facilitate the standardisation of customs regulations and practices in the ASEAN region.\(^\text{157}\)


Also, Malaysia hosted and took part in a few activities under the ASEAN University Network, namely, the 15th AUN and 4th ASEAN+3 Educational Forum & Young Speakers’ Contest (in January 2015), and AEC Forum “Fostering University Industry Partnership for the AEC” (in May 2015). Five universities in Malaysia (Universiti Kebangsaan Malaysia, Universiti Putra Malaysia, Universiti Malaya, Universiti Sains Malaysia, and Universiti Utara Malaysia) are part of the ASEAN University Network.

The judiciary participated in the Fourth ASEAN Chief Justices’ Roundtable on Environment (Hanoi, Vietnam, 12-14 December 2014) and hosted the 36th ASEAN Law Association Governing Council and the 2nd ASEAN Chief Justices’ Meeting in Kuala Lumpur in 2014, where it was agreed that an ASEAN Judicial Portal would be established with the broad objective of making and creating international presence for the ASEAN judiciaries. The Chief Justices also agreed to establish a working group on judicial education and training amongst ASEAN judiciaries on cross-border topics of common legal interest and create a standard and formatted mechanism as well as share best practices to facilitate the service of civil processes within ASEAN member states.158

In addition, within the private sector, CIMB (a Malaysian bank) established a CIMB ASEAN Research Institute (CARI) in 2011 as a regional public service in support of ASEAN’s programme of economic integration, the ASEAN Economic Community (AEC).

On Legislative and Substantive Changes Promoting the Rule of Law

There is no known official information on whether there have been any legislative and substantive changes in Malaysia that promote the rule of law in ASEAN. Information on this matter is inadequate.

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

Two laws were enacted to comply with the ASEAN community blueprint—the first is the enactment of the Competition Act 2010, which provides for the law and the regulatory body to protect the competitive process. The 2010 Act was also put in place to fulfil the goals of the ASEAN Economic Community Blueprint, which required that competition policy and law be put in place by 2015.

The second development is the amendment of the Legal Profession Act 1976. In June 2014, the Legal Profession (Amendment) Act 2013 came into force together with the Legal Profession (Licensing of International Partnerships and Qualified Foreign Law Firms and Registration of Foreign Lawyers) Rules 2014. These laws were enacted to promote the free flow of services and to substantially remove all restrictions on trade in legal services by 2015. This basically allowed foreign law firms and foreign lawyers to practice in Peninsular Malaysia, subject to certain requirements set out in the law.159

On Integration as Encouraging Steps toward Building the Rule of Law

There are no apparent links between ASEAN integration and the building of rule of law in Malaysia.

On the Contribution of ASEAN Integration to the Building of Stronger State Institutions

There are no apparent links between ASEAN integration and the strengthening of state institutions in Malaysia.

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

The lack of respect for the principle of separation of powers

Perhaps, the foremost challenge to the rule of law in Malaysia is the erosion of the principle of separation of powers. Separation of powers between the executive, legislative and judicial branches of a state is important as it serves the ends of the rule of law, as it checks unrestricted exercise of power by any of the branches of the state.160

In Malaysia, the interference and obstruction in the investigations into allegations of financial impropriety in the 1MDB case have projected the image of concentration of power in one branch of the government. The undue state intrusion, which came in the form of the removal of key officers leading/involved in the investigation; delaying the inquiry by the Public Accounts Committee (PAC) of the Dewan Rakyat; the raid of the offices and homes of MACC personnel; the abrupt transfer of senior officers of the MACC to the Prime Minister's Department (although subsequently rescinded); and the arrest and detention of officers of MACC, Attorney General's Chambers (AGC), and the Central Bank's officers, have contributed to the perception that the rule of law is an illusory concept in Malaysia.161

The Malaysian Bar, in its Extraordinary General Meeting on 12 September 2015, recommended that the government establish a Royal Commission of Inquiry to look into all of the aforementioned incidents to ensure that the rule of law and administration of justice are upheld. The Malaysian Bar felt that the interference into the investigation of these prosecutorial agencies, particularly that these investigations are allegedly connected to a person acting in an official capacity, is an affront to the prosecutorial agencies’ independence and impartiality.

A conservative interpretation of fundamental liberties

One of the challenges in the endeavour to strengthen the rule of law in Malaysia is the resistance to engage with international human rights norms, which has resulted in a rather conservative interpretation of fundamental liberties in Part II of the Federal Constitution. The use of international human rights law as a tool for interpretation can greatly strengthen the rule of law at the domestic level as the state is required to comply with higher norms, and international human rights treaties can act as a check to institutional backsliding.162 Many have opined that domestic courts which fail to act as vessels for international norms

and decisions are compromising international law.\textsuperscript{163}

The problem in Malaysia is the resistance to international human rights treaties, including treaties which Malaysia has acceded/ratified. In cases where the court is invited to look at Malaysia’s international obligations in the CEDAW and the CRC, or its adherence to the principles of the UDHR as a member of the United Nations, it (the court) has often disengaged, stating that Malaysia adopts the dualist system, and thus, any treaty requires an act of Parliament.

International human rights law is never meant to be adopted \textit{in toto} or without varying interpretations; rather, human rights norms almost always come with differential interpretations that would allow domestic courts to balance domestic conditions and international human rights law.\textsuperscript{164} As such, the petition here is not a complete and total acceptance that international law takes precedence over domestic law, rather that domestic courts, at the very least and in good faith, engage in a contestation of international human rights law that would develop critical reasoning of fundamental liberties in Malaysia.

The need to engage with international human rights law is imperative as maintaining the status quo (of a strict implementation of the dualist approach to international human rights norms) would mean that many aggrieved Malaysians would not be adequately provided with an avenue for redress of human rights violations, and this would not reflect positively on the rule of law dynamics.

\textbf{Corruption}

The struggle to uphold rule of law in Malaysia is made more difficult by the high level of corruption in government, particularly in enforcement agencies. In June 2015, the Special Branch (Intelligence Agency of the police) released a report that revealed that Malaysia is dealing with deeply entrenched institutionalized corruption, and that “80 per cent of the nation’s security personnel and law enforcement officers at Malaysian borders are corrupt.”\textsuperscript{165} The report, which was based on a 10-year surveillance and the intelligence gathering of the Immigration Department, the Malaysian Maritime Enforcement Agency, the Anti-Smuggling Unit, and the police’s General Operations Force, found that many of the personnel of these enforcement agencies were on the payroll of drugs and weapons dealers, and human smuggling syndicates.\textsuperscript{166}

It is disconcerting that Malaysia fell from the 50\textsuperscript{th} position (in 2014) to the 54\textsuperscript{th} position in Transparency International’s 2015 Corruption Perception Index.\textsuperscript{167} As corruption is linked to the rule of law, it is therefore unsurprising that Malaysia dropped from 35\textsuperscript{th} to 39\textsuperscript{th} place in the World Justice Project’s (WJP) World Rule of Law Index.\textsuperscript{168}


The causal link between the high level of corruption, particularly among enforcement agencies at Malaysian borders, and gross violations of human rights manifested quite clearly in May 2015 when 139 mass graves were found near the town of Wang Kelian, Perlis.\(^\text{169}\) In August 2015, the police further found 24 human skeletons in mass graves along the Thai border in the same state.\(^\text{170}\) All the bodies were believed to be victims of human trafficking. It is also believed that approximately 300 migrants were held in 28 illegal camps where the mass graves were found. This area is situated at the Thai-Malaysian border and is understood to be the transfer point for smugglers transporting people to Southeast Asia by boat from Myanmar and Bangladesh.\(^\text{171}\)

**Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights**

Malaysia is a signatory to the ASEAN Convention Against Trafficking in Persons, Especially Women and Children\(^\text{172}\) and the ASEAN Convention on Counter Terrorism. The ASEAN Convention Against Trafficking in Persons was signed by Malaysia months ago (as of the writing of this report), and it may be too soon to appreciate changes, if any. Malaysia enacted its own Anti-Trafficking in Persons Act in 2007, and it remains to be seen if the 2007 Act will be amended after the signing of the ASEAN Convention on the same subject matter.

Other initiatives by the government with regard to ASEAN-initiated commitments and declarations are not so pronounced. A look at the websites of the different ministries and the judiciary with regard to past initiatives reveals little information—for example, after the announcement that the ASEAN Judicial Portal, regional judicial training and education, and sharing of best practices within the ASEAN region will be established, not much information is now publicly available on these initiatives or other rule of law/human rights-related initiatives.

**IV. CONCLUSION**

**Nexus of the Changes to the Overall State of the Rule of Law for Human Rights**

The changes over the past few years have eroded the rule of law for human rights. Existing problems cited in 2011, such as the lack of independence of the judiciary, the lack of a transparent procedure for the appointment of judges and judicial officers, deaths in custody, police brutality, and the unavailability of draft laws to the public in a timely manner, have not seen any significant improvements. While these areas have not regressed, there have been no significant advances either. In addition, the problem of the unequal enforcement of the law continues to afflict the system of the administration of justice. The use of the Sedition Act 1948 to quell dissenters has increased in the past few years, and new laws, enacted in the name of national security and terrorism, appear to be used as a sword against dissidents instead of a shield against terrorist activities.


\(^\text{172}\) Malaysia has yet to ratify the ASEAN Convention Against Trafficking in Persons, Especially Women and Children.
Apart from the lack of improvement in the aforementioned problematic areas, the rule of law has taken a back seat in a number of legislation that was recently passed by the Parliament. Fundamental rights, such as the right to a legal counsel, right to fair trial and the right to *habeas corpus*, have all been expressly excluded in the POTA 2015 and the amendments to the PCA 1959. Judicial oversight of executive actions and powers has been significantly reduced in both these laws—instead of the courts dispensing judgment on the guilt or innocence of persons detained under the POTA 2015 or the PCA 1959, this has been replaced with a board, with no requirement for the board to hold its hearings in public. Except for the chairman of the board who is required to be a legally qualified person with at least 15 years of experience, the qualifications of other members of the board are not expressly stated. The laws are also silent with regard to the appointment process of the board, save for that the King appoints members of the board. In addition, the powers of the board are limited—it does not have the power to inquire into or re-examine the findings of the inquiry officer. The PCA 1959 goes further to allow the board to detain a person indefinitely.

Another area, which has regressed considerably, is the failure to preserve the separation of powers. The actions of the executive branch of government in removing the deputy prime minister, the attorney general, and officers leading/inolved in the investigation of the 1MDB allegations; delaying the inquiry by the Public Accounts Committee (PAC) of the *Dewan Rakyat*; the banning of any media site that reports on the issue; and the arrest and detention of the officers of the MACC, AGC, and the central bank have given rise to the perception of executive overreach.

The lack of improvement in the *status quo*, a significant regression in the area of fair trial rights, freedom of expression, and separation of powers, and the increase in corruption amongst law enforcement agencies, which has led to the perpetuation of a culture of impunity, are signs of deterioration of the rule of law in Malaysia.

**Contributing Factors**

**A deepening political crisis**

In the past year, allegations of corruption against the Prime Minister and the scandal surrounding the 1MDB issue have deepened the political crisis within the United Malays National Organisation (UMNO). The 1MDB allegations caused some within UMNO, the opposition and also the public, to question the Prime Minister on his alleged involvement. Many have posited that this crisis surrounding UMNO has meant that the ruling government would go to great lengths to maintain its political dominance, even at the expense of the rule of law. One of the most visible repercussions was the *Sodomy II* charge against Anwar Ibrahim. The case is perceived by many to be politically motivated, and the Court’s decision in finding him guilty raised serious concerns about the independence of the judiciary and the erosion of the rule of law, all in the name of politics.

Not only is the opposition a target, but the need to entrench position and power has led to the sacking of the Deputy Prime Minister and the Attorney General, who were critical of the 1MDB scandal. Media has also been a target of the backlash—the Ministry of Home Affairs and the Malaysian Communications

---


and Multimedia Commission banned publications, namely, The Edge, Sarawak Report, and recently, The Malaysian Insider, as well as a number of media websites for publishing articles on the 1MDB financial crisis. The dismissals, other undue interference into government agencies and officers investigating the 1MDB, and the shutting down of media websites have contributed to the erosion of the rule of law in the country and raised questions about regulatory transparency. \(^{175}\)

**The race divide**

Another factor that has contributed to the regression of the state of the rule of law is the politicization of the racial polarity within Malaysians. Immediately after the announcement of the results of the 13th general election, the Prime Minister attributed the smaller majority win by Barisan Nasional to a “Chinese tsunami.”\(^{176}\) While this was certainly not the first time that race was used to “divide and conquer,” this certainly fuelled a perhaps misplaced fear of the Malay majority of the dominance of the Chinese and the weakening of the Malays in Malaysia.

The three major races in Malaysia have always enjoyed a rather delicate harmony or tolerance, and racially divisive statements by leaders of the country have sent a message that the Malay race is under threat. Further, because article 160 of the Federal Constitution essentially equates a Malay to be a person who professes the religion of Islam, any perceived threat against the Malay race is seen as a threat against Islam. As a result, many problems, including court cases, have been framed in ethnic or religious terms.

This fear that Malay and/or Islam is/are under threat has manifested itself in a negative way at the expense of the rule of law—for example, in retaliation to Bersih 4.0,\(^ {177}\) UMNO organized and funded the red shirt demonstrations, and the Ministry of Home Affairs, in violation of freedom of expression, banned any yellow clothing with the word ‘Bersih 4’. This is also evident in the Court of Appeal judgment in the case of Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur\(^ {178}\)—the Court of Appeal upheld the ban on using the word “Allah” in the Malay version of the Herald as the court was of the opinion that the purpose of “peace and harmony” in article 3(1) of the Federal Constitution is to protect the sanctity of Islam and to insulate it against any threat faced by, or any possible and probable threat to, the religion of Islam.

**Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights**

There are no apparent links between the ASEAN Declaration on Human Rights and the changes in laws and policies in Malaysia.

---


\(^{177}\) Bersih 4 was a call for all Malaysians to gather peacefully at Merdeka Square, Kuala Lumpur from 29-30 August 2015, to demand institutional reforms in five areas: - clean elections; clean Government; right to dissent; strengthening Parliamentary democracy and saving Malaysia’s economy – Bersih Press Statement, ‘Pesta Demokrasi 34 Jam Bersih4’ (11 August 2015), <http://www.bersih.org/pesta-demokrasi-34-jam-bersih4/> accessed 7 April 2016.

\(^{178}\) [2013] 8 CLJ 890, 926.
BIBLIOGRAPHY


Criminal Procedure Code.

Dangerous Drugs Act 1952.


Enforcement Agency Integrity Commission Act 2009.


Federal Constitution.


Judges’ Code of Ethics 2009 P.U. (B) 201.


Kerajaan Negeri Selangor & Ors v Pendaftar Pertubuhan Malaysia & Another Appeal [2014] 6 CLJ 471.


Legal Aid Act 1971.


Malaysia


*Noorfadilla binti Ahmad Saikin v Chayed bin Basirun and 5 others* [2012] 1 MLJ 832.

*Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198.

*Pathmanathan Krishnan v Indira Gandhi Mutho & Other Appeals* [2016] 1 CLJ 911.


Prevention of Terrorism Act 2015.


Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.

Public Officers (Conduct and Discipline) Regulations 1993.

*Public Prosecutor v Mah Chuen Lim & Ors* [1975] 1 MLJ 95.

Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 P.U.(A) 1/2012.

Public Officers (Conduct and Discipline) Regulations 1993 P.U.(A) 395.

*QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532.

Rayuan Sivil No/ B-02-2751-11/2012.


*Shamala Sathiaseelan v Dr. Jeyaganesh C. Mogarajah & Anor* [2004] 2 CLJ 416.


Speech by Steven Thiru, President, Malaysian Bar at the Opening of the Legal Year 2016, Kuala Lumpur (8


Subashini a/p Rajasingam v Saravanan a/l Thangathoray [2007] 2 MLJ 705.

Subordinate Courts Act 1948.


SUHAKAM Annual Report 2012.


SUHAKAM Annual Report 2014.


