



**MALAYSIA
HUMAN RIGHTS
REPORT 2016**

**CIVIL AND
POLITICAL
RIGHTS**

MALAYSIA HUMAN RIGHTS REPORT 2016

Suara Inisiatif Sdn Bhd (562530-P)

B-G-15, 8 Avenue Business Centre
Jalan Sungai Jernih 8/1
46050 Petaling Jaya
Selangor Malaysia

Tel: + 603 7954 5724 / +603 7954 5726
Fax: + 603 7954 5725

E-mail: suaram@suaram.net
Website: www.suaram.net
Facebook: [facebook.com/suararakyatmalaysia](https://www.facebook.com/suararakyatmalaysia)
Twitter: twitter.com/suaramtweets

Cover design by Fahmi Reza
Typesetting by Fasrul Ramly

Printer:
Vinlin Press Sdn Bhd (25680-x)

ISBN: 978-967-14263-3-3

SUARAM © 2017

All rights reserved. No part of this publication may be produced, stored in a retrieval system, or transmitted in any form, or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior permission of the publisher.

TABLE OF CONTENTS

<i>Acknowledgements</i>	iv
<i>Foreword</i>	v
<i>Executive Summary</i>	vii
Chapter 1: Detention without Trial	1
Chapter 2: Police Abuse of Power	14
Chapter 3: Freedom of Expression	26
Chapter 4: Freedom of Assembly	46
Chapter 5: Freedom of Religion and Belief	62
Chapter 6: Free & Fair Election	68
Chapter 7: Refugees & Asylum Seekers	106
Chapter 8: Migrant Workers	116
Chapter 9: Law and the Judiciary	132
Chapter 10: Gender & Sexuality	150
Chapter 11: Death Penalty	172
Chapter 12: SUHAKAM	178
Special Feature 1: Sarawak	184
Special Feature 2: Indigenous Peoples	218
Special Feature 3: Freedom of Movement	222

ACKNOWLEDGEMENTS

The publication of the Malaysia Human Rights Report 2016 involves the efforts and contributions of numerous individuals and organizations.

SUARAM would like to take this opportunity to extend our warmest regards and gratitude to the following individuals for their contribution.

- **Dr. Wong Chin Huat** for his contribution on the chapter on **Free & Fair Election**
- **Ms. Thilaga** for her contribution of the chapter on **Gender & Sexuality**
- **Mr. Andrew Khoo** for his contribution on the chapter on **Law and the Judiciary**

SUARAM would also like to extend our gratitude to our esteemed editors

- **Dr. Kua Kia Soong**
- **James Lochhead**

SUARAM extend our gratitude to **Fahmi Reza** for the inspiring design for Malaysia Human Rights Report 2016.

SUARAM also would like to extend our highest regards for **Taiwan Foundation for Democracy** who graciously sponsored the publication of this report.



www.tfd.org.tw

Last but not least, SUARAM would like to express our appreciation and gratitude to all individuals and organizations who has tirelessly supported the human rights cause and supported SUARAM over the years. Thank you.

FOREWORD

Every year, I would look forward to reading SUARAM's Human Rights Report. Through it, SUARAM always attempts to provide an honest and critical examination of the concerns, progress and opportunities with regard to Malaysia's human rights situation. It keeps those affected by human rights violations at the heart of the narrative. It gives voice to those who lack a voice.

The Report assists the Government, civil society actors and our peoples to take stock of the challenges that face our nation, and provides key information for human rights advocates to further the cause of the rights project. It also sets the baseline for engagements between stakeholders to formulate policies and good practices to improve Malaysia's human rights record.

Around the world, the very existence of what we know as 'human rights' today is being threatened on an unprecedented scale. Rights standards we thought were once settled by international consensus are now being diluted. The link between human rights and the progressive development of world civilisation is being downplayed.

The full realisation of human rights can only transpire within the framework of an effective and functioning democracy; and in spite of its many imperfections and failures. But democracy is being co-opted by popular leaders – in the name of the 'will of the majority' – to spout messages of hate and intolerance. This development is worrying. And harks back to the days when some groups viewed others who held different religious beliefs or were of different ethnic origins as inferior or subhuman worthy to be tortured or killed.

In Malaysia, we have undergone decades of human rights activism. What we see taking shape globally provides much cause for concern. Locally, we see incremental instances of freedom erosion in tandem with international developments. Fortunately, the leaders of our independence signed us the Federal Constitution as a protective measure to meet new threats to our liberties. With this in mind, efforts to expand civil space to allow for dissenting and minority views, and to ensure that our laws and policies protect everyone without discrimination must continue. We need to defend our Constitution, and use it constructively to uphold our rights.

I therefore welcome the 2016 Report. Those holding the reins of power should not be defensive about its contents. Rather we should treat the Report as an invaluable monitoring and evaluation exercise to learn of gaps that need to be filled. It is better to know more than less, and to know so that we can collectively ideate ways to improve the rights delivery model of our country. We should approach the task positively.

We live in interesting times of what some say is a new world order. The 'older ways' of human

rights advocacy must change. Civil society organisations can no longer stay comfortable in doing the same things without adopting more innovative methods to engage the powerholders. Unfortunately, I have seen organisations that have yet to fully evolve to embrace the new rights challenges facing us. Heavy strategic searching and planning is needed for otherwise some will be left behind.

I am glad that SUARAM has remained steadfast in the human rights struggle. The Report is also evidence of SUARAM's tenacity and dedication in making Malaysia a better place for all of us. SUARAM's Report has demonstrated what Malaysia has achieved, but also serves to remind us how much more we have to do ahead. It must be read.

Dated this 11th day of May 2017



Edmund Bon Tai Soon

*Representative of Malaysia to the ASEAN
Intergovernmental Commission on Human Rights (ICHR)*

EXECUTIVE SUMMARY

As a beleaguered government tried to deflect international criticisms of the 1MDB scandal throughout 2016, human rights violations have continued. Detention without trial remained an area of concern while police shootings saw an alarming increase. Freedom of expression was seriously constrained while the freedom of assembly has been usurped by neo-fascist groups with state connivance. The freedom of movement of some Malaysians has been taken away on federal and state government orders while the freedom of religion was under threat by a private member's bill on hudud in parliament. Meanwhile, free and fair elections are seriously threatened by an on-going re-delineation exercise that reeks of gerrymandering and malapportionment. The LGBTIQ community remain under siege and harassment by state religious authorities, the indigenous peoples still suffer infringement of their native customary lands by state-sanctioned loggers while refugees and asylum seekers still live under threat of harassment by enforcement agencies.

Documented cases of **detentions** under SOSMA and POCA continue to rise in 2016. In 2016, SUARAM has recorded 189 cases of detention under SOSMA. In comparison with the same period in 2015, SUARAM only recorded less than 50 cases of SOSMA detention. Several cases involving the use of POCA came to light in 2016 raising concern with regard to the manner POCA is being used against first time offenders. While POCA tends to be used against 'organized crime', in some of the cases documented, it was used against crimes unrelated to organized crime or syndicates. POTA was also used in 2016 following disclosure at a conference on National Security Council Act in Kuala Lumpur. While the number of POTA detentions is relatively low, it should be noted that terror suspects can be and are still detained under POCA.

While there was a relative improvement in the number of cases of **torture and ill treatment** by the Royal Malaysian Police, several high-profile cases alleging police brutality and torture came to light in 2016. Furthermore, the practice of 'chain remand' continued unabated with notable cases documented by SUARAM in March, April, May, June and July 2016. Before the answer in Parliament in March 2017, there were only two known cases of **deaths in police custody**. In the Parliamentary reply, it was revealed that at least 15 individuals died in police custody in 2016. Alongside the sharp rise in deaths in police custody, **police shootings** have been steadily increasing over the years with 57 reported cases of police shooting with 54 fatalities reported.

Freedom of Expression remained constrained by the Malaysian government. The positive development in 2016 was the sharp decline in the use of the Sedition Act 1948. Unfortunately, this re-

strained use of the Sedition Act was accompanied but several convictions and failed constitutional challenges. The Communications and Multimedia Act 1998 became the Government's primary method to stifle dissent and criticism in 2016 with more than 30 cases documented and more than 60 investigations conducted in the first half of 2016 alone. The Printing Presses and Publications Act 1984 (PPPA) remained an obstacle to the freedom of expression with more books joining the list of banned publications. In 2016, 'deviant' religious publications were the main victims of the PPPA. The social movement Bersih once again fell prey to the PPPA in 2016 when organisers of the Bersih convoy were arrested in Sabah in 2016.

There has been more **freedom of assembly** in Malaysia in 2016 with substantially fewer arrests at peaceful assemblies. Although state harassment has not been as severe as in previous years, organizers and participants are still harassed by police investigations for non-existent crimes. The rise of the neo-fascist 'Red Shirts' has raised new concerns in relation to the freedom of assembly in Malaysia. The state appears to have outsourced its harassment to non-state actors such as the so-called 'Red Shirts' who have resorted to violence to disrupt the Bersih convoy and to issue threats against Bersih and media personnel.

Restrictions on **freedom of movement** in Malaysia was highlighted during the Sarawak state election in 2016 when a long list of opposition politicians and human rights activists were barred from entering Sarawak during the campaign period. Some controversial right-wing individuals from the peninsula were also barred from entering Sarawak. Maria Chin was barred from travelling when she was attempting to leave Malaysia to receive the 2016 Gwangju Prize for Human Rights. She was allegedly barred from travelling for 'ridiculing' the government abroad. A minister tried to justify the government action by claiming that freedom of movement is a privilege and not a right.

As for the **freedom of religion**, the issue of unilateral conversions continued to be an issue in Malaysia with no remedy in sight. The Malaysian government's promised law amendment that would supposedly provide a remedy for families caught in the legal tussle over unilateral conversion had still not been tabled as of 31st October 2016. Religious minorities perceived as 'deviants' remained under threat in 2016 with publications banned under the PPPA and arrests of alleged syiah practitioners. The issue of the controversial Hudud amendment bill was once again headline news in Malaysia following the Malaysian Government's facilitation of the Pan Islamic Party's private member's bill. While even component parties of the ruling coalition were openly critical of the move by the government, no concrete action has been taken to defer the bill. While the opposition coalition is apparently opposed to the proposed amendments, their component party AMANAH has proposed its own Hudud amendment draft to the controversial PAS bill.

Free and fair elections were once again under grave threat in 2016. In the by-elections that were held during the year, election offences committed by politicians from both sides of the political divide were at an all-time high. The re-delineation exercise that started in Sarawak in 2015 was extended to the rest of Malaysia. As of 31st October 2016, Bersih had raised substantial concerns regarding gerrymandering and malapportionment in the redelineation exercise in many constituencies.

As for **Law & Judiciary in Malaysia**, several constitutional challenges that hold significant impact in Malaysia remained unanswered in 2016. Laws such as the Peaceful Assembly Act 2012 re-

main in limbo with divergent court of appeal decisions. Anwar Ibrahim's last attempt to challenge his sentence in the Federal Court was heard in October 2016 and dismissed by the Federal Court on 14 December 2016.

Gender and Sexuality issues remained problematic in 2016. There was little improvement for gender equality in Malaysia. Sexist remarks were still made with impunity by politicians from both sides of the political divide. The LGBTIQ community remained under siege in 2016 with an increase in documented cases of arrests and harassments. Persecution of the community by the respective state religious authorities continued across Malaysia with little to no room for productive discussion and engagement.

The National Human Rights Commissions of Malaysia (SUHAKAM) was left ineffectual until June 2016 after the previous SUHAKAM commissioners' term concluded in April 2016. The delay in appointment of new commissioners and the reduction of funds in 2015 gave the impression that the government was punishing SUHAKAM for its defence of human rights in 2015. Fortunately, the new budget for 2017 has raised SUHAKAM's budget back to its previous allocation of RM10 million. Soon after their appointment, the new chairperson made statements that contravened recognized human rights values and sparked a barrage of criticism by civil society. Since then, the newly appointed chairperson has adopted a more accommodating stance on human rights and has expressed clear support on many issues in line with international human rights values.

The plight of the **indigenous peoples** of Malaysia worsened in 2016 with new challenges faced by the community in Kelantan as government-sanctioned loggers threatened to destroy their homes and way of life. In a desperate bid, the indigenous community there have set up a blockade and called on the state government to negotiate a settlement on the community's terms. Elsewhere, the indigenous people achieved success when the courts decided on their rights to customary land. Another important victory for indigenous people was the cancellation of the Baram Dam in Sarawak in March 2016.

For refugees and asylum seekers, the Malaysian government's refusal to recognize their rights meant that they remained under constant threat and exposed to systemic exploitation. In some cases, the threat experienced by refugees and asylum seekers was posed by none other than the Malaysian government itself. A notably different treatment was given to the Syrian refugees in 2016 when a minister pointed out that the Syrian refugees accepted by Malaysia were not taken in as refugees but as migrants.

Death Penalty remained a serious violation of human rights in Malaysia in 2016 with nine cases of executions reported by the Law Minister in Parliament. Out of these, only four cases were publicly known. As of 2016, more than 1,000 prisoners remain on death row with no clemency in sight.



**DETENTION
WITHOUT TRIAL**

DETENTION WITHOUT TRIAL

Malaysia continues to have laws that permit detention without trial. The Security Offences (Special Measures) Act 2012 (SOSMA), the Prevention of Crime Act 1959 (POCA), the Prevention of Terrorism Act 2015 (POTA) and the Dangerous Drugs (Special Preventive Measures) Act 1985 (DDA) have been invoked by the government to combat the threat of terrorism, organized crime and the drug trade respectively.

The latest addition to the long list of laws permitting detention without trial, the National Security Council Act 2016 (first tabled in December 2015) officially came into force in 2016 although it has not yet been applied. It remains to be seen how the Act will be used against those seen as a threat to the security of Malaysia. The notable development in relation to the National Security Council was the establishment of the new National Special Operation Force (NSOF)¹ under the National Security Council.

Statistics on detentions without trial from SUARAM's documentation in 2016²

	Terrorism	Trafficking/ Immigration	Other criminal offences	Total
SOSMA	102	39	45	189
POCA	1	28 ³	249	278
POTA	15	-	-	15 ⁴
Total	118	67	294	475 ⁵

1 Sumisha Naidu 'Malaysia launches 'world first' integrated security force' (Channel News Asia, 27 October 2016) <<http://www.channelnewsasia.com/news/asiapacific/malaysia-launches-world-first-integrated-security-force/3240342.html>> accessed 30 March 2017

2 In contrast with 2015, Chief Justice has released no information on the amount of cases under SOSMA being heard in court. Neither did the Inspector General of Police provide any insight as to the usage POCA and the status of those detained. Most statistics gathered are based on SUARAM's media monitoring in collaboration in cases received whenever possible.

3 Trafficking is a crime under ATIPSOM which usually utilizes SOSMA for remand, however in this case, suspected human traffickers were arrested under POCA in Kuala Lumpur; 'Actor's wife nabbed in human trafficking probe' (The Star Online, 29 July 2016) <<http://www.thestar.com.my/news/nation/2016/07/29/actors-wife-nabbed-in-probe/>> Accessed 31 October 2016

4 Numbers of known detainee from case files sighted by lawyers

5 Numbers are from cases documented by SUARAM through media monitoring

Security Offences (Special Measures) Act 2012

SOSMA is a procedural law that operates in lieu of the Criminal Procedure Code when an individual is detained for suspicion of offences under Chapter VI and VII of the Penal Code or for offences under Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM). Under SOSMA, an individual can be detained for no more than 28 days. As an added measure, anyone detained can be denied access to legal counsel and access to family for up to 48 hours. In practice, it is not uncommon for individuals to be denied legal counsel and access to family for the whole 28 days. Furthermore, detainees cannot be granted bail and would be subjected to incarceration until the conclusion of their trial. Individuals detained would remain in detention until conclusion of ALL legal proceedings including appeals. Even when they are acquitted, the Deputy Public Prosecutor can choose to file for further remand pending appeal.

Out of all the laws allowing detention without trial, SOSMA differs in that a trial does take place after the initial remand. Due to its 'unique' nature requiring suspects to be brought before a court for a trial, reported cases in which individuals were detained under SOSMA provides insight into how these laws are apparently used to protect Malaysia against security threats and reveal possible misconduct by the police.

While the application of SOSMA against alleged terror suspects and those who allegedly expressed support for terrorism remain relatively consistent in 2016, SUARAM has documented an expansion of application of SOSMA against alleged human traffickers and immigration officers and renewed application of SOSMA against members of civil society.

In July 2016, one of the first few known cases where SOSMA is applied against suspects of organized crime surfaced. Eight individuals were arrested and charged for allegedly being leaders and members of Gang 21 Japan. They were charged under Section 130V6. In October 2016, a group of nine were detained in Penang for an attempted kidnapping with a number of those detained subjected to investigation under SOSMA⁷. Presumably, they were investigated for offences under Chapter VIb of the Penal Code.

Then on 9 December 2016, Minister for Home Affairs, Ahmad Zahid Hamidi revealed that 37 immigration officers were detained in 2016 under SOSMA for 28 days. Of the 37, 4 were charged for human trafficking activities in court; 6 were further detained for 60 days under POCA and sentenced to 2 years detention order; 11 were further detained for 60 days under POCA and sentenced to 2 years restriction order; 12 others were held pending decision by POCA board; and 4 were still under POCA detention in December 2016⁸.

6 Member of an organized criminal group

7 'Woman among nine remanded over kidnapping of moneychanger' (The Star Online, 5 October 2016) <<http://www.thestar.com.my/news/nation/2016/10/05/tables-turned-on-abductors-woman-among-nine-remanded-over-kidnapping-of-moneychanger/>> accessed 20 January 2017

8 Reena Raj, 'Cops: Immigration staff worked with human traffickers' (Malay Mail Online, 9 December 2016) <<http://www.themalaymailonline.com/print/malaysia/cops-immigration-staff-worked-with-human-traffickers>>

Based on Parliamentary reply in 2017, the Home Ministry reported that since SOSMA came into force in 2012, 989 individuals have been detained under SOSMA. Out of that figure, 376 have been released, 139 are still in trial and 502 have been sentenced.

Case Profiles:

Nor Azmi Jalani

A 28-year-old military man from the Royal Malaysian Air Force, Nor Azmi Jalani was arrested on suspicion of involvement in a conspiracy to procure firearms and kidnap VVIPs. He alleged that he was tortured whilst in police custody for alleged involvement in terrorism related activities.

He was charged under S130g and S120B of the Penal Code. The prosecution described him as a member of a wicked conspiracy that seeks to promote terrorism in Malaysia. He has been detained since April 2015 and remains in detention at Sungai Buloh.

As of December 2016, Nor Azmi Jalani remains in detention at Sungai Buloh with family members reporting that he has been transferred to solitary confinement. The only reason given for his transfer was an offhand comment by prison officers that suggests that it was his punishment for 'challenging' authority.

Siti Noor Aishah

A 29-year-old postgraduate student, Siti Noor Aishah was arrested for alleged possession of 12 books that were purportedly tied to terrorism. The authority claims that the books were on Jemayaah Islamiyah (JI), Islamic State (IS) and Al-Qaeda, all faith-based terror groups.

She was charged under S.130JB (1)(a) Penal Code for the alleged offence. One month after her arrest on 19 April 2016, she was charged with the offence at the Kemaman Magistrate's Court. She entered a plea of not guilty at the High Court on 25 July 2016. On 29 September 2016, she was discharged of the offence and acquitted when the trial judge found that there was no evidence to suggest that the offence had been committed. The court ruled that the prosecution had failed to prove a prima facie case.

Her freedom was short lived as Noor Aishah was re-arrested on the same day for a 'new' offence. The details of her new charges can be considered irrelevant as POCA does not specify a need for a formal criminal charge. She was then detained under POCA at Pusat Pemulihan Akhlak, Machang. As of December 2016, she has been sentenced to house arrest and subjected to an Electronic Monitoring Device. Her case continues in 2017.

Maria Chin Abdullah

On 18 November 2016, the chairperson for Bersih 2.0 was arrested at Bersih office in Petaling Jaya. Bersih office was raided by a dozen police officers in the late afternoon and Mandeep Singh9 and Maria were arrested after the confiscation of all electronic devices and financial documents.

accessed 20 January 2017

9 Manager of Bersih 2.0

Lawyers were informed on 19 November 2016 that Maria was detained under SOSMA for offences under Section 124C of the Penal Code.

She was released after 10 days of solitary confinement and gruelling interrogation. More information on the events preceding and after her arrest and detention can be found in detail in Chapter 4 of this report.

The cases documented in 2016 show a clear trend of SOSMA being utilized beyond what it was initially legislated for and are no longer just a tool to combat terrorism. Despite being mooted as a law to be utilized to safeguard national security, the application of SOSMA has encroached into the realm of crime and public safety. While the existence of a trial grants a degree of transparency and accountability for the use of SOSMA, the widespread use with little evidence to substantiate a case such as in the case of Siti Noor Aishah raises substantial concerns that the Royal Malaysian Police have a tendency to use SOSMA without substantive preliminary investigation.

Furthermore, the detention of Maria Chin Abdullah under SOSMA for offences under Section 124c affirms the concerns that SOSMA will continue to be abused against dissidents and members of civil society. Though there was no other political detention under SOSMA in 2016, Section 124c was invoked against other individuals such as Mandeep Singh and a media organization, the Malaysian Insider (prior to its winding up). In the past, it was invoked against members of civil society, journalists and politicians. The application of SOSMA against Maria Chin Abdullah affirms the possibility that future investigations under Section 124C may be conducted through provisions of SOSMA as opposed to the procedures under criminal procedure code.

Prevention of Crime Act 1959

POCA was a law introduced to prevent organized crimes especially by triads, secret societies and repeat offenders. It has been amended in recent years to include offences involving terrorism and it is intended to be used if SOSMA is deemed inadequate. POCA grants the Royal Malaysian Police powers to arrest and detain an individual for up to 60 days with the approval by senior police officers. After the initial 60 days' detention period, detainees must be produced before a 'Prevention of Crime Board' at which they would either be discharged, subjected to house arrest and electronic monitoring or serve a two years' detention order that can be renewed indefinitely by the Board.

In 2016, there were occasional announcements of successful sting operations that led to 'mass' detentions under POCA. In July 2016, POCA came to prominence in the Malaysian news following the arrest and detention of R. Sri Sanjeevan under POCA10.

The numbers of arrest and detention remain startling with the police in Selangor revealing that 174 individuals had been detained under POCA in Selangor between January and August 2016¹¹. Police in Perak also reported 75 detentions under POCA within the same period¹². Unfortunately, at the time of publication, no nation-wide statistics for arrest and detention under POCA and POTA have been made available. However, from the cases that SUARAM worked on covering the detention of more than 40 individuals under POCA, the trend of indiscriminate mass arrests remains prevalent.

¹⁰ Refer to case brief below

¹¹ '24 Gangsters picked up under POCA this year' (The Star Online, 7 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/07/24-gangsters-picked-up-under-poca-this-year/>> accessed 31 October 2016

¹² T. Avineshwaran, 'Perak cops arrest 71 suspected gangsters' (The Star Online, 25 August 2016) <<http://www.thestar.com.my/news/nation/2016/08/25/perak-cops-arrest-71-suspected-gangsters/>> accessed 31st October 2016

The case of Letchumanan Naidu and Vikram Naidu is one of the best examples of this in which two brothers were arrested along with more than 20 other youths for alleged gangsterism.

As noted earlier, POCA continues to be used by the police whenever SOSMA is found to be inadequate. In 2015, SUARAM reported that this practice was confirmed by a police officer during one of SUARAM's case. In 2016, the practice is no longer 'secret' but is openly acknowledged by the Minister for Home Affairs, Zahid Hamidi¹³. The reason behind this practice remains largely unexplained by the Royal Malaysian Police and inquiries regarding the practice have been ignored.

The transfer of detainees from SOSMA to POCA represents an egregious breach of human rights and a clear abuse of these provisions. This is seen in cases like those of Siti Noor Aishah who was acquitted due to the lack of evidence against her but she was immediately rearrested by the Royal Malaysian Police under POCA. On top of the human rights violations caused by such practices, the transfer of detention in this manner suggests that there was inadequate evidence to prosecute alleged offenders in open court and raises substantial questions regarding the reasons behind their initial arrests in the first place.

Raid on 'Tontos'

In May 2016, Ops Khas Cantas Tonto saw 16 *tontos* arrested and their vehicles confiscated. The suspects, who were between the ages of 20 to 40, were detained under POCA. Their arrests involved the deployment of substantial show of force by enforcement agencies that cornered the *tontos* using helicopters and land vehicles¹⁴.

Tonto is the name given by the Road Transport Department to those who assist transport operators in evading enforcement agencies by shadowing Road Transport Department officers in their vehicles and tipping off their whereabouts in exchange for a fee.

N. Letchumanan and N. Vikram

These two brothers were remanded for investigations into an attempted murder in a gang fight. Despite their young ages (17 and 19 respectively) and with no prior criminal records, they were detained under POCA. The teenage boys were alleged to be members of secret society 'Kongsi Gelap 36'. They were subsequently ordered to be detained at the Special Rehabilitation Centre in Kluang, Johor by the Crime Prevention Board. During the remand period, the boys submitted complaints of alleged abuse by the investigating officers. However, the police have vehemently denied the allegations.

As of December 2016, the two brothers were under restraining orders and subjected to house arrest at their home in Temerloh.

13 Reena Raj, 'Cops: Immigration staff worked with human traffickers' (Malay Mail Online, 9 December 2016) <<http://www.themalaymailonline.com/print/malaysia/cops-immigration-staff-worked-with-human-traffickers>> accessed 20 January 2017

14 Hariz Mohd, 'Cop bust 'Tonto' gangs in 'Hollywood' operation' (New Straits Times Online, 28 April 2016) <<http://www.nst.com.my/news/2016/04/142125/cops-bust-tonto-gangs-hollywood-operation>> accessed 28 October 2016

R. Sri Sanjeevan

The NGO MyWatch chairman, Dato' Seri R. Sri Sanjeevan and his family went through an ordeal when he was arrested a total of nine times within a span of two months. More than 15 charges were laid on him during this period and he was even remanded under POCA for a period of 21 days. He eventually won a writ of habeas corpus that rendered the remand null and void. He is now facing various charges of extortion and also charged with insulting the Inspector-General of Police.

While the attempts to chain remand him have ceased, Sanjeevan still has to answer for the charges against him and his Indian national driver remains in immigration detention.

Furthermore, in many of the cases of detention under POCA handled by SUARAM, a large proportion of the detainees are ethnic Indians of middle or lower social class background. It remains to be seen whether this trend is a mere coincidence or the result of racial profiling in the application of POCA. This trend bears resemblance to the clear racial profiling in the use of Emergency Ordinance in the past when more than 50% of those detained were ethnic Indians.

Prevention of Terrorism Act 2015

POTA is one of the more recent additions to the number of laws permitting detention without trial. This law was introduced in 2015 for the purpose of combating the rising threat posed by Islamic State and terrorism¹⁵. Similar to POCA, POTA grants the police powers to arrest and detain an individual for 60 days. After the initial detention, the detainee must be produced before the 'Prevention of Terrorism Board' which can discharge the detainee, subject them to house arrest and electronic monitoring or sentence them to two years' detention order which can be renewed indefinitely by the Board.

In a presentation made by Dr. Fathul Bari Mat Jahya at a conference on the National Security Council Act 2016 (NSC), it was reported that there are 11 individuals charged and detained under POTA¹⁶. Unfortunately, the clandestine manner in which POTA cases are dealt with leaves little information available to the public regarding its use. Furthermore, as there are still reported cases of POCA being used for alleged terrorism offences, it is unclear what the exact role of POTA is.

Apart from the numbers of detention reported by Dr. Fathul Bari, information from lawyers practicing in the area suggests that there were at least 15 detainees under POTA as of December 2016. So far as it can be identified, detainees under POTA are held at Simpang Renggam. It is unclear whether there is any credible or effective rehabilitation programme being conducted despite assurance by the Home Ministry. Conditions of detention under POTA are also difficult to ascertain as the law has not been often used by comparison to SOSMA and POCA and conditions of detention are difficult to obtain.

Dangerous Drugs (Special Preventive Measures) Act 1985

The Dangerous Drugs (Special Preventive Measures) Act 1985 (DDA) is yet another law that permits detention without trial in Malaysia. Compared to the other laws allowing detention without

¹⁵ 'Pota is needed now, say Barisan MPs' (The Star Online, 8 April 2015) <<http://www.thestar.com.my/news/nation/2015/04/08/pota-is-needed-now-say-barisan-mps/>> accessed 1 November 2016

¹⁶ 'Important to widen our view on terror' (The Star Online, 11 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/11/important-to-widen-our-view-on-terror/>> accessed 1 November 2016

trial, the use of DDA has of late been shrouded in secrecy with little to no media coverage and public announcements. DDA differs from POCA and POTA in that the detention order is signed by the Home Minister rather than an appointed 'board'. Nevertheless, this is only a technical detail as there is still a board that exercises the power to issue detention orders on behalf of the minister. Individuals arrested under DDA can be detained for 60 days by the police and can be sentenced to two years' detention orders that are renewable.

Detention under the DDA remains sporadic in SUARAM's documentation and monitoring. In cases received by SUARAM, detention under DDA often occurs under dubious situations where there is no clear evidence implicating the detainee in a drug offence. While detention without trial is intrinsically unjust and should have no place in a modern democracy, when we bear in mind that selected drug offences are punishable by death in Malaysia¹⁷, indefinite detention under DDA can and is sometimes viewed as a 'lighter' sentence. Furthermore, challenging detention under DDA may be academic as any person charged for drug offence under the Dangerous Drugs Act 1952 would be denied bail and detained in prison pending trial.

Chain Remand and Arbitrary Detention

The practice of chain remand remained prevalent in 2016. Chain remand occurs when police re-arrest the same individual for a similar offence immediately upon the conclusion of his or her remand order. For the most part, the practice of chain remand usually takes place within the scope of the Criminal Procedure Code (CPC).

In addition to R. Sri Sanjeevan's case, SUARAM has also documented cases where individuals were detained for investigations for close to 90 days using such practices. The practice does not discriminate and has also been applied against minors and youth. While there is some degree of protection in the Criminal Procedure Code (CPC), the protection embedded in the Code is often undermined by the fact that re-arrests take place under the ambit of a different police report or investigation file.

Apart from chain remand for petty crimes, the practice has also been applied to alleged terror suspects and individuals who are seen as security threats. As mentioned earlier in this chapter, the common practice for detainees under SOSMA to be transferred to detention under POCA was indirectly affirmed by a member of the police force in the past but is now affirmed by the Home Minister. This practice effectively allows an individual to be detained close to 90 days on the sole discretion of the police.

It is noted that in some limited circumstances, the act of re-arresting an individual for investigation of a different offence may be based upon legitimate investigation needs. However, in many of the documented cases, the practice of chain remand is often tainted with elements of torture and other abuses by the police. In many of these cases, the repeated arrest and remand orders on these individuals can only be described as arbitrary detention.

Furthermore, if we adhere to the standards and definition established by the United Nations Working Group on Arbitrary Detention, it is almost a certainty that SOSMA, POCA, POTA and DDA would fall under Category III of the working group's definition of arbitrary detention¹⁸ as these laws

¹⁷ Section 39B of the Dangerous Drugs Act 1952

¹⁸ UN Working Group on Arbitrary Detention complaint criteria <<http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>> accessed 30 March 2017

in their own way undermine the notion of fair trial¹⁹. While arbitrary detention of activists and politicians remain rare, the cases of SOSMA being used against Khairuddin Abu Hassan, Matthias Chang and Maria Chin Abdullah raises concerns that Malaysia could very well be on the road back to the days of the ISA when politicians and activists were subjected to arbitrary detention.

Conclusion and Recommendations

With the growing threat of international terrorism and lone-wolf attacks, it is of paramount importance for there to be an effective mechanism for prevention in order to minimize and mitigate any harm that may be caused by terrorism. All the same, it is of paramount importance for policymakers and enforcement agencies to be able to draw a distinction between preventive measures, detention for the purpose of investigation²⁰ and detention as a punitive measure. At this point, the Government of Malaysia still seems confused about the purpose of these detention-without-trial laws. On some occasions, the government claims that the detention under these provisions is intended to prevent crime and on other occasions, claim that prolonged detention is necessary for investigation.

While the Government of Malaysia continues to justify the use of punitive measures such as SOSMA, POCA and POTA as necessary for our safety and security, SUARAM believes that the justifications for these laws do not hold water. Firstly, while the Royal Malaysian Police and the Government of Malaysia continue to insist that these laws are preventive in nature and their existence is crucial to protect national security, they conveniently ignore the presence of Section 105 in the Criminal Procedure Code that provides for preventive arrest. There is still no credible evidence by the advocate of these laws that the existing provisions in the Criminal Procedure Code and common law framework present in the criminal justice system are inadequate for addressing terrorism.

Furthermore, the use of detention without trial, specifically the use of POCA and POTA effectively hides all information of the alleged offences from public scrutiny. Considering the nature of the crimes covered by these provisions, the public needs to be informed about how these crimes take place in order to gauge whether the existing provisions are suitable for prevention and mitigation and form their own opinions as a member of a democratic society. 'Hiding' away offenders under POCA and POTA makes it impossible for this to take place and the motivation behind each offender and the implications for society are denied to the public.

The existence of the Prevention of Crime Board and Prevention of Terrorism board with quasi-judicial roles also raises questions as to the inherent integrity and supremacy of the criminal justice system under the Judiciary's purview. At this point, it would not be wrong for us to describe Malaysia as a country with four parallel criminal justice systems that are to an extent segregated based on the alleged crime committed. If an individual is sentenced to house arrest under POCA or POTA with an on-going trial under SOSMA, it would be difficult to ascertain which sentence or detention order has priority.

To make matters worse, the 'chain-remand' whereby an individual's detention is extended through rearrests or under POCA or other provisions following 28 days detention under SOSMA raises substantial concerns with regard to the wellbeing and rights of those detained. The extended period of detention when there would be little to no way for most detainees to meet their families and

¹⁹ POCA, POTA and DDA by default denies a detainee any right to a trial

²⁰ Which should not occur as investigation should have taken place prior to arrest. Without any investigation, it is difficult to see how any investigator would be able to establish a reason for arrest

in some cases lawyers, raises concerns that they may be subjected to torture in detention²¹. The use of POCA or POTA after a 'failed' case in court such as the case of Siti Noor Aishah suggests that the police and/or the Attorney-General Chambers hold no qualms in undermining the role of judiciary in the criminal justice system and continue detaining an individual in spite of a clear judicial decision against their detention.

Reflecting on the abuses that surfaced throughout 2016, the Government of Malaysia should reflect on the promises made by the Prime Minister Najib Razak when the Act was tabled in 2012 when he said that no one would be detained solely for their political beliefs or activities; that a person who is released from SOSMA would not be re-arrested and reinvestigated for the same offence; and that there would be a committee whose membership would compromise government agencies, President of the Bar Council and SUHAKAM to review SOSMA from time to time²².

Combatting terrorism is not inherently unique to Malaysia. With the rising threat posed by Islamic State and other radicalized group and the growing trend of lone-wolf attacks, Malaysia needs to develop and advance its existing mechanisms and legislations for combatting terrorism to be on par with our international peers. The advancement cannot be limited to only advancement in 'ease of detention' but should be advancement based on effectiveness in prevention of religious radicalization and that does not contravene international human rights.

In countries with robust democratic system of governance, individuals are afforded rights and avenues to challenge their detentions in court and the courts are afforded substantial powers to provide oversight on detention or remand orders.

At the moment, POCA, POTA and DDA deprive our judiciary of these powers as the courts are not allowed to intervene or object to any detention or sentence meted by the respective board hearing cases of detention except for *habaes corpus* applications that only apply to limited circumstances. SOSMA on the other hand, does not allow for the courts to decide on the initial remand of 28 days and power to deny bail lies not in the hands of the court but in the hands of the public prosecutor. If any of these laws are to be permitted at all, the power for extended remand or detention MUST fall under the judiciary's purview and not according to the whims of police officers tasked with investigation or the public prosecutor tasked with initiating proceedings. Reflecting on the concerns raised in this chapter, SUARAM calls for:

1. The abolishment or amendment of all security laws which are incompatible with international human rights principles;
2. The Royal Malaysian Police to cease its practice of transferring detainees from SOSMA to POCA;
3. Rehabilitation programmes and modules for terror suspects to be made public and made available for scrutiny by relevant independent experts;
4. A transparent and publicly accessible report of the total number of individuals detained under these provisions and the status of their detention;
5. The formation of a committee that would review SOSMA as promised by the Prime Minister in 2012;
6. Electronic Monitoring Devices (EMD) to be applied in lieu of prolonged detention whenever possible.

21 An issue that would be covered in more details in Chapter 2

22 Hansard DR 16.04.2012 <<http://www.parlimen.gov.my/files/hindex/pdf/DR-16042012.pdf>> accessed 21 March 2017

If the Government of Malaysia can show clear evidence that the existing provisions under the Criminal Procedure Code are inadequate for combatting terrorism and additional measures are required, SUARAM recommends:

1. Amendments to the Criminal Procedure Code to provide for extended remand period of no more than 28 days for offences that falls under Chapter VII of the Penal Code²³;
2. Provisions for remand order must be re-applied at least every 7 days for no more than 28 days in total;
3. For Judiciary to have power to decide on all remand orders and discretion for granting bail for terrorism related cases;
4. For these provisions to be subjected to a renewal by Parliament annually;
5. And, for a committee inclusive of SUHAKAM, EAIC, the Malaysian Bar and Member of Parliament from both sides of the political divide to be formed to advice and provide on any extension of such provisions.

SUARAM's Brief to Parliament on SOSMA Extension

Recognizing the need for additional security measures and corresponding laws in the light of growing threats posed by the Islamic State and other terrorist groups operating locally, in the region and internationally;

Reiterating that human rights remain inviolable even in times of emergency or national crisis;

Reiterating that any alleged terrorist suspect must be afforded due process that is in line with internationally recognized standards of human rights and rule of law,

Suara Rakyat Malaysia (SUARAM) is opposed to the use of any laws that permit detention without trial. Laws such as the Security Offences (Special Measures) Act 2012 (SOSMA), Prevention of Crime Act 1959 (POCA), Prevention of Terrorism Act 2015 (POTA) and the Dangerous Drugs (Special Preventive Measures) Act 1984 (DDA) remain a blemish on Malaysia's human rights records.

Through the years, SUARAM has documented countless abuses by the Executive in the use of detention-without-trial laws such as the Internal Security Act 1960 (ISA) and Emergency Ordinance (Public Order and Crime Prevention) Ordinance 1969 (EO). We therefore doubt that the Executive and enforcement agencies can be trusted with such draconian laws.

The abolishment of ISA and EO heralded a new era for Malaysia for we believed that Malaysians no longer have to live with the constant threat of arbitrary detention and torture under these laws. The subsequent introduction of SOSMA and POTA as well as the amendment to POCA has removed any doubt that the government of the day has opted to re-establish detention-without-trial laws as substitutes for the ISA.

Since the enactment of SOSMA, SUARAM has documented substantial evidence of abuses. In

²³ Existing offences that is also subjected to procedures outlined in SOSMA such as the Anti Trafficking in Persons and Smuggling of Migrants Act 2007 and others can if necessary be subjected to these provisions if found necessary by a court

2015 and 2016, SUARAM exposed allegations of torture in detention²⁴ by the Royal Malaysian Police and other forms of abuse similar to those documented under the ISA.

In November 2016, the systematic use of torture was confirmed following the detention of Maria Chin Abdullah under SOSMA for alleged ‘threat to parliamentary democracy’. Solitary confinement and gruelling interrogation was confirmed by Maria Chin Abdullah and inadvertently affirmed by the Inspector-General of Police.

The systematic use of torture includes solitary confinement of 28 days; lack of basic amenities such as bedding²⁵; constantly lighted and air conditioned room; subjecting detainees to gruelling hours of interrogation; denying legal access to detainee; forcing detainees to stand in uncomfortable positions and threatening them or their family with violence or death.

The Home Minister, Zahid Hamidi himself proudly proclaimed that SOSMA is used in conjunction with POCA. He reported that 37 former immigration officers who had been detained were subjected to 28 days detention under SOSMA with four going to trial under SOSMA procedures; the rest were detained further under POCA and subjected to different forms of punishment by the Prevention of Crime Board.

The case of Siti Noor Aishah Atam reveals how this practice is open to abuse by the Executive and undermines the role of the judiciary in Malaysia’s criminal justice system.

Siti Noor Aishah was arrested for an alleged offence under Section 130JB (1) (a) of the Penal Code and was detained under SOSMA on 22 March 2016. After half a year of pre-trial detention, her case was heard at Kuala Lumpur High Court and she was acquitted and discharged due to the lack of prima facie evidence against her²⁶. Upon her release, she was immediately re-arrested under POCA and subsequently sentenced to two years of house arrest after her 60 days detention under POCA. In spite of her detention and subsequent sentence under POCA, the deputy public prosecutor appealed against the findings of the High Court and placed her under SOSMA detention yet again.

SUARAM strongly condemns the use of these laws which allow arbitrary detention and call for their immediate abolishment. The narrative by the government of the day does not hold water as the Criminal Procedure Code²⁷ has ample berth for the prevention of crime and terrorism. The continued detention of individuals without opportunity for bail even when they have been acquitted can be described as punitive in nature and seeks to punish an individual with incarceration without avenue of redress by the Judiciary.

24 Koh Jun Lin ‘Sosma detainees allege torture, sexual humiliation in custody’ (MalaysiaKini, 18 January 2016) <<http://www.malaysiakini.com/news/327255>> accessed 30 March 2017

25 Zurairi Ar ‘IGP: Maria could have asked for mattress but did not’ (Malay Mail Online, 23 November 2016) <<http://www.themalaymailonline.com/malaysia/article/igp-maria-could-have-asked-for-mattress-but-did-not>> accessed 30 March 2017

26 Trial Judgment for Siti Aishah Case <http://kl.kehakiman.gov.my/sites/kl.kehakiman.gov.my/attachments/11._Trial_Judgment__SITI_AISHAH.pdf> accessed 30 March 2017

27 Section 105 of CPC allows for preventive detention without the draconian aspects enshrined in SOSMA, POCA and other similar laws

Contrary to the claims by the government of the day, Malaysia's security from terrorism is not protected by these laws. The abuses perpetrated by the executive with these laws only serve to undermine our enforcement agencies' capacity to combat terrorism and other violent crimes.



#BebasMaria solidarity vigil for Maria Chin after her detention.



Memorandum to Bukit Aman on R. Sri Sanjeevan's detention under POCA.



**POLICE ABUSE
OF POWER**

POLICE ABUSE OF POWER

Police abuse of power remains one of the prevalent issues in Malaysia throughout 2016. The manner in which abuse of power takes place and the context in which officers abuse their powers cut across a variety of crimes and human rights defenders have also fallen victim to these abuses. Documented cases include allegations of torture, abuse of the remand process, failure to comply with known procedures during detention and failure to communicate key information in a timely manner.

Overall Statistic on Death in Custody

Jurisdiction	Police	Prison Department	Immigration	Total
2014	14	-	-	-
2015	12	252	82	345
2016	15	269	35	319 ¹
Total	41	521	117	-

Detention facilities under police jurisdiction includes, police lock-ups and remand centres. Detention facilities under Prison Department encompasses rehabilitation centres and prisons for detainees who were sentenced after conviction or held on long-term remand (for offences which are unbailable or bail was denied) whereas immigration detention encompasses immigration detention centres for those detained for immigration related offences.

Deaths in Custody

Death in Prison

On 26 May 2016, it was reported that from 2013 to 30 April 2016, 721 prisoners had died in custody in the previous 40 months². This figure evens out to an average of 18 deaths in custody a month

1 Numbers of death in prison and immigration can be found in SUHAKAM's Annual Report 2016, 'SUHAKAM Annual Report 2016', Page 61 <<https://drive.google.com/file/d/0B6FQ7SONa3PRLVfYOHoyODc0eDg/view>> accessed 12 April 2017

2 Lee Choon Fai, 'Home Ministry: 721 prisoner deaths in past 40 months' (The Sun Daily, 26 May 2016) <<http://www.thesundaily.my/news/1816265>> accessed 1 November 2016

from 2013 to April 2016. Out of those deaths in police custody, 427 were Malay, 104 Chinese, 91 Indian, 10 others and 89 foreign citizens³. According to the government, the primary cause of death was through diseases such as HIV, cancer, cardiac arrest, blood problems, tuberculosis and asthma. While some of these diseases may be considered to be incurable, diseases such as tuberculosis and asthma can be treated with modern medication and should not have to result in death.

Logeswary A/P Baskaran

Logeswary was imprisoned for a period of two weeks for failure to pay a fine to the court. She was initially arrested for alleged theft of a bar patron's monies. She was later charged and found guilty of not carrying her identity card. The circumstances surrounding her death in the week following her imprisonment are unclear.

She was transferred to Kajang prison on 13 July 2016 at which point she informed prison officials that she was suffering from Tuberculosis (TIBI) and needed medication. Despite her complaints of a worsening condition on 14 July 2016, it was not until 18 July 2016 that any action was taken. On 18 July, a prison officer contacted Hospital Kuala Lumpur (HKL) requesting for details of her medical condition. Despite the call, the medical staff at HKL did not respond with the details required. On 22 July 2016, Logeswary was brought to Hospital Kajang at 5am due to her deteriorating condition. She died at 6am from a severe chest infection.

Death in Police Custody

In 2016, SUARAM documented only two cases of deaths in police custody⁴. The two reported deaths in police custody were unfortunately only the tip of the iceberg. A question on the matter of death in police custody was posed to the Home Ministry in the March 2017 parliamentary session. The Home Ministry's answer in Parliament showed that between 2000 to 2016, there were 284 deaths in police custody (11 female and 273 male)⁵ and that only two deaths were attributable to police. From the numbers given, it was clear that there was more than 2 death in custody (15 death in 2016 derived from data from previous years) The answer also listed the ethnicity of those who died in custody which can be broken down into: 117 ethnic Malay, 63 Indian, 59 Chinese, 9 'other races' and 36 foreigners⁶.

3 FMT Reporters, 'Surendran: 18 prison deaths monthly 'shocking', unacceptable' (Free Malaysia Today, 27 May 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/05/27/surendran-18-prison-deaths-monthly-shocking-unacceptable/>> accessed 1 November 2016

4 Cases documented are through media reports which was verified by SUARAM or cases directly received by SUARAM

5 'DPM: Most lock-up deaths due to health reasons' (The Star Online, 4 April 2017) <<http://www.thestar.com.my/news/nation/2017/04/04/dpm-most-lockup-deaths-due-to-health-reasons/>> 4 April 2017

6 'Zahid: Only two out of 284 custodial deaths caused by cops' (MalaysiaKini, 4 April 2017) <<https://www.malaysiakini.com/news/377936>> accessed 4 April 2017

Deaths in police custody for 2016

Name	Detention Centre	Date of Death	Cause of Death
Mohd Razali bin Aris ⁷	IPD Sg Siput	5 May 2016	Suicide
Azri Mohamed ⁸	Pengkalan Chepa	14 September 2016	Damage to intestine and infection

Deaths in Police Custody from 2011 to 2016 according to cause of death:

Year	Medical	Suicide	Accident	Blunt force (assault)	Unknown	Total
2011	3	2	1	-	11	17
2012	3	1	1	-	15	19
2013	9	1	-	1	2	13
2014	10	1	-	1	2	14
2015	7	1	-	1 ⁹	2	11
2016	1	1	-	-	-	2 (15 ¹⁰)
Total	33	7	2	3	32	89

Deaths in Police Custody from 2011 to 2016 according to ethnicity:

Year	Malay	Chinese	Indian	Others	Foreigners	Total
2011	11	3	1	-	2	17
2012	4	4	6	2	3	19
2013	1	3	5	-	4	13
2014	3	3	8	-	-	14
2015	4	-	4	-	3	11
2016	2	-	-	-	-	2 (15)
Total	25	13	24	2	12	89

⁷ Although detained in police lockup, detainee was arrested and investigated by the National Drug Agency: Muhammad Apendy Issahak, 'Tahanan mati tergantung dalam lokap' (Harian Metro, 5 May 2016) <<http://www.hmetro.com.my/node/135515>> accessed 31 October 2016

⁸ Adila Sharinni Wahid, 'Mayat banduan dibedah kali kedua' (Sinar Online, 15 September 2016) <<http://www.sinarharian.com.my/semasa/mayat-banduan-dibedah-kali-kedua-1.562870>> accessed 31 October 2016

⁹ Death was not caused by Royal Malaysian Police. Victim succumbed to injuries caused by vigilante before official police arrest

¹⁰ Calculated based on available data collected by SUARAM and verified with SUHAKAM's report

When compared to statistics maintained by SUARAM with reference to official statistics by SUHAKAM in its report on death in police custody, there are at least 13 deaths in custody that were unaccounted for in 2016 alone¹¹. While it may be possible that records from the earlier years (2015 and before), the cases of death in custody in 2016 based on available information marks a sharp increase in comparison to 2015 and the preceding years.

Despite the sharp increase in 2016 and the notable number of deaths in police custody in the past few years, the Minister's answer maintains that only 2 deaths¹² were attributable to the police which indicates that in government's record, all other deaths reported in the recent years were attributed to health, suicide or other causes. Furthermore, due to the ambiguity and broadness of the answer, it is difficult to ascertain whether the death of Syed Mohd Azlan¹³ and others (when death occurred during arrest or transit as opposed to during detention) has been factored into the statistics. If they are, then why were they not attributable to the police despite clear evidence of excessive violence or abuse by the police?

Death in Immigration Detention

For most part, information on death in immigration detention is not available to public. Only information available for 2015 and 2016 is sourced from information received by the human rights commission, SUHAKAM. While information on specific cases of abuses remains elusive, news on the conditions of immigration detention remain pessimistic with consistent stories of overcrowded detention and lack of adequate basic amenities.

The conditions of immigration detention surfaced again in August 2016 when two Cambodian women who were in detention claimed that they saw prisoners subjected to severe abuses that led to death in the Juru detention centre¹⁴. Subsequent surprise visit conducted by the Enforcement Agency Integrity Commission shortly after was unable to confirm or verify the claims by the two Cambodian but they did verify several deaths due to health reasons and that the detention centre was overpopulated¹⁵.

Torture and Ill Treatment in Detention

Following SUARAM's exposure of the use of torture against SOSMA detainees in late 2015, the situation appears to have improved for those detained under SOSMA. Cases relating to SOSMA received by SUARAM in 2016 have generally been free of excessive torture and other forms of ill treatment. Unfortunately, the improvement did not extend to other detainees and there were several severe cases of abuse and torture reported to SUARAM in 2016.

It should also be noted that the report by the Enforcement Agency Integrity Commission (EAIC)

11 SUHAKAM 'Kematian Dalam Tahanan Polis: Satu Kaji Selidik Mengenai Keadaan Lokap dan Faktor-Faktor Penyumbang Kepada Kematian', First Edition 2016 available at <<http://www.suhakam.org.my/ms/death-in-police-custody/>> accessed 4 April 2017

12 One in 2009 and another in 2013

13 Syed Mohd Azlan died on the way to police station after getting injured excessive force used during arrest in 2014 – 'EAIC says Johor man's 2014 death in custody was murder' (Malay Mail Online, 30 October 2015) <<http://www.themalaymailonline.com/malaysia/article/eaic-says-johor-mans-2014-death-in-custody-was-murder>> 30 March 2017

14 'Cambodian maids claim fatal abuses at Juru immigration centre' (MalaysiaKini, 17 August 2016) <<http://www.malaysiakini.com/news/352572>> accessed 18 April 2017

15 'EAIC: Juru deaths due to disease not torture' (Malay Mail Online, 26 August 2016) <<http://www.themalaymailonline.com/malaysia/article/eaic-juru-deaths-due-to-disease-not-torture>> accessed 18 April 2017

regarding the death of N. Dharmendran revealed that there is an Inspector-General Standing Order which forbids the use of violence against all detainees as well as an order by the Police Chief of Selangor that forbids the use of force against detainees¹⁶.

Nonetheless, the existence of these orders has not eradicated the use of torture and other forms of ill treatment in detention. In SUHAKAM's report on deaths in police custody, their survey of 369 detainees under remand notes that almost 10% of detainees alluded that they had witnessed, heard or suffered physical violence by police officer in detention centres¹⁷. Some of the notable cases in 2016 include:

Nor Ros Syidi's Torture Case, Parit Buntar

On 18 February 2016, a labourer named Nor Ros Syaidi bin Abidin was detained at the Bagan Serai's police station for investigation under Section 392 of the Penal Code for robbery. His mother was subsequently arrested for not cooperating with the on-going investigations and was remanded for 4 days. They were both subjected to varying degrees of abuse and torture during their remand.

The mother alleged that she was electrocuted and beaten by the police officer in charge. Similarly, Ros Syaidi was allegedly beaten and tortured during investigation. In court, Ros Syaidi pleaded guilty to the charges and was imprisoned for 3 years and 3 lashes at the Jawi Prison Complex, Seberang Perai, Penang. Motion filed by lawyers to halt the sentence pending a review and further investigation into alleged misconduct and forced confession was rejected.

Bandar Baru Nilai Torture Case

Muhammad Izzatuddin B. Marzuki reported that he was beaten by the police during his arrest at Bandar Baru Nilai. He alleged that he was beaten before being taken to the Nilai Police Station on 25 May 2016. In the police station, he alleged that he was beaten again by police officers with a rubber pipe and baseball bat. Izzatuddin was warned by the police who had beaten him and he was subsequently drugged.

He later woke up in the High Dependency Ward at Hospital Seremban after a 9-hour surgery. He had 50 stitches around his neck and his wrists. He was also found with traces of drugs found in his system. The police alleged that he attempted suicide when he was on the police transport to the magistrate court.

¹⁶ EAIC Dharmendran Report pg 103

¹⁷ SUHAKAM, 'Kematian Dalam Tahanan Polis: Satu Kaji Selidik Mengenai Keadaan Lokap dan Faktor-Faktor Penyumbang Kepada Kematian', page 108 – report can be accessed at <<http://www.suhakam.org.my/ms/death-in-police-custody/>>

Sexual Assault by the police at the Jinjang Lockup

On April 2016, Lance Korporal Mohd Khairul Hisham bin Azis was remanded for a period of six days under S377 D of the Penal Code. He had allegedly committed acts of indecency towards three teenagers at the Jinjang lockup on the same date that the victims lodged a police report in the early hours of the morning. The victims lodged a police report concerning the assault. Although CCTV has been installed at the lockup since February 2016, no footage was available to show the commission as the assault had allegedly taken place at a blind spot.

Even social activists and notable individuals are not spared from such treatment in detention. During his detention, Dato R. Sri Sanjeevan's lawyer reported that he was not given food and was physically abused and tortured during his detention under POCA¹⁸. Maria Chin Abdullah was kept in solitary confinement with no bedding and was subjected to gruelling hours of questioning and interrogation. The allegations were not disputed by the Deputy Home Minister and the Inspector-General of Police who challenged the notion that Maria was tortured in detention and claimed that the treatment received by Maria was in accordance with lock-up rules and standard operating procedures¹⁹.

The accounts by Maria Chin Abdullah and other detainees show that solitary confinement, prolonged interrogation and deprivation of basic necessities is a norm when an individual is detained without trial under SOSMA and similar provisions. The allegation of systematic use of torture by alleged terror suspects detained under SOSMA has been verified to an extent with these revelations and affirmation by Ministers and the Inspector-General of Police.

The reported incidence of torture makes it abundantly clear that rules against ill treatment of prisoners are often disregarded with little or no consequences. The absence of any disciplinary actions and criminal prosecutions makes the existence of these orders irrelevant. In addition, the accounts by R. Sri Sanjeevan and Maria Chin Abdullah suggest that the standard operating procedures may contain systemic use of torture that the police force refuses to acknowledge as torture or inhuman treatment.

Furthermore, despite the findings by the Coroner Court and the Civil Courts in several cases including A. Kugan²⁰, N. Dharmendran²¹ and P. Chandran²², the Attorney-General Chamber has been laggard in initiating criminal proceedings against the police officers responsible. The police constables who physically assaulted Kugan were only charged with causing hurt and not for murder or culpable homicide despite the death of Kugan resulting from the assault.

18 Yiswaree Palansamy 'Lawyer claims crime watch NGO chairman physically abused, tortured in prison' (Malay Mail Online, 19 July 2016) <<http://www.themalaymailonline.com/malaysia/article/lawyer-claims-crime-watch-ngo-chairman-physically-abused-tortured-in-prison>> accessed 3 February 2017

19 Kow Gah Chie, 'IGP brushes off abuse claims, says no hotel comforts for Maria' (Free Malaysia Today, 25 November 2016) <<http://www.malaysiakini.com/news/364120>> accessed 5 February 2017

20 'Ex-cop in Kugan custodial death jailed three years', (The Malay Mail Online, 23 May 2015) <<http://www.themalaymailonline.com/malaysia/article/ex-cop-in-kugan-custodial-death-jailed-three-years>> accessed 27 February 2017

21 Mayuri Mei Lin, 'EAIC: Police Officers beat Dharmendran to death during violent interrogation' (Malay Mail Online, 28 April 2016) <<http://www.themalaymailonline.com/malaysia/article/eaic-police-officers-beat-dharmendran-to-death-during-violent-interrogation>> accessed 27 February 2017

22 'In lock-up death, court rules cops responsible by withholding medicine' (Malay Mail Online, 16 January 2015) <<http://www.themalaymailonline.com/malaysia/article/in-lock-up-death-court-rules-cops-responsible-by-withholding-medicine>> accessed 27 February 2017

Chain Remand²³

A chain remand takes place when an enforcement agency, usually the police, abuse their power to arrest and repeatedly re-arrest an individual after an individual's remand or after their 24 hours' detention period under the Criminal Procedure Code has lapsed. While in some cases an individual may be re-arrested for genuine investigation purposes, SUARAM has documented cases involving individuals who were detained for close to three months using chain remand²⁴.

In 2016, SUARAM has documented multiple cases of chain remand. In March 2016, 6 individuals were detained for almost 3 months at various police stations and subsequently 5 of them were detained under POCA and some of them have now been released under restraining orders. One of these detainees who was not placed under POCA detention alleged that he was physically and psychologically abused during detention and was forced to confess to a crime²⁵. Around the same period, a group of youth were detained in Yan, Kedah and they were subjected to varying degrees of torture while they were on chain remand. This group of youth were detained for almost 3 weeks in various police stations in Kedah.

80 Days in Remand

Six men²⁶ were arrested by the police in Tapah on suspicion of involvement in a robbery on 11 December 2015. Throughout the period of their arrest, they were taken to 14 different police stations²⁷ where fresh remand applications were made so that they could be detained for longer periods. They claimed to have been beaten with shoes and cables wrapped in black tape and were forced to strip, dance, drink water from an ashtray as well as urine, and to sign a confession by the police. The families and lawyers of the accused were only informed of their arrest two months later.

One of the accused was finally released after 80 days of arrest on 28th February 2016 and the rest continued to be detained under POCA and subsequently placed under electronic monitoring on 22 April 2016.

Police Shootings

The incidence of police shootings went into decline following the high-profile case of Aminulrasyid Amzah in 2010. Unfortunately, in recent years the incidence of police shootings has been on a steady rise again. Reports of police shootings often involve situations of self-defence on the part of the police. While there has been no sign of foul play in most of the cases documented by SUARAM, family and friends of the recent shooting along the Selayang highway have approached SUARAM suspecting foul play on the part of the police.

23 Additional information can be found in Chapter 1

24 Refer to case study under POCA

25 FMT Reporters 'Six men allege torture during 80-day remand' (Free Malaysia Today, 15 March 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/03/15/six-men-allege-torture-while-in-80-day-remand/>> accessed 30 March 2017

26 Rishikumar A/L Kuppusamy, Khrishnamurthy A/L Kuppusamy, Jegan A/L Selvaraja, Sathiskumar A/L Navindren, Udesan A/L Muthayah & Thinakaraj A/L Renggopan

27 Sungai Buloh, Klang Utara, Petaling Jaya, Kajang, Klang Selatan, Nilai, Port Dickson, Seremban, Teluk Intan, Tapah, Gombak, Ampang Jaya, USJ and Kuala Selangor.

Statistics on Police Shootings in 2016

Month	Date	Names	Injured	Deaths	Total
January	1-Jan	N/A ²⁸	0	4	4
February	21-Feb	Joshua Beti Chong, Awie Ningan	0	2	2
March	11-Mar	N/A	0	1	3
	14-Mar	N/A	0	1	
	20-Mar	Jusili Dasin	0	1	
April	4-Apr	N/A	1	0	7
	8-Apr	N/A	0	3	
	12-Apr	N/A	0	3	
May	15-May	Unnamed 40-year-old and 41-year-old	0	2	6
	26-May	N/A	0	4	
June	13-Jun	Herman	0	1	3
	16-Jun	N/A	0	1	
	29-Jun	N/A, 37 yr old	0	1	
July	14-Jul	Chung Chun Wah	0	1	1
August	8-Aug	N/A	1	0	4
	12-Aug	N/A	0	1	
	20-Aug	Uvarajan & Mohammad Shahril	0	2	
September	6-Sep	N/A	0	3	10
	9-Sep	Khor Hock Yong	0	1	
	13-Sep	N/A	0	1	
	22-Sep	Ronald Engliong	0	1	
	23-Sep	N/A	0	4	
October	8-Oct	N/A	0	1	6
	16-Oct	N/A	0	2	
	18-Oct	N/A	0	1	
	19-Oct	N/A	0	1	
	29-Oct	N/A	0	1	

²⁸ Names of the deceased are usually left out by the police

November	13-Nov	N/A	0	1	2
	27-Nov	N/A	1	0	
December	9-Dec	N/A	0	3	9
	12-Dec	N/A	0	2	
	17-Dec	N/A	0	3	
	17-Dec	Muhammad Asharaf Jamaluddin	0	1	
	18-Dec	Samri Samsul & Others	0	0	
Total			3	54	57

Selayang Police Shooting along the Selayang-Kepong Highway

On 19 August 2016, two alleged members of a secret society ‘Gang 36’, Mohammad Shahril Sugumaran B. Abdullah and Uvaeahan A/L Santhanasamy were shot dead by the police at the Selayang-Kepong Highway near the Forest Research Institute of Malaysia (FRIM). The family of the two individuals is currently filing for an inquest as they suspect that the firefight did not take place.

The police statement claimed that the deceased had refused to comply with police instruction to stop their vehicle which led to a car chase and then to a shootout between them and the police on duty. The family on the other hand, has obtained evidence to show that the autopsy reports given by the Hospital Kuala Lumpur and Hospital Selayang show a different time of death and they claim to have seen signs of bruises and handcuff marks on the deceased.

Enforcement Agency Integrity Commission (EAIC)

EAIC published its report on the death of N. Dharmendran in April 2016. Despite the detailed and irrefutable finding of misconduct, the Royal Malaysian Police was slow in implementing the recommendations made by EAIC. With limited power to act against misconduct and the absence of a legal requirement for enforcement agencies to report back on the findings and recommendations made by EAIC, it is not surprising that the EAIC is seen as another toothless tiger by the enforcement agencies.

Furthermore, EAIC’s chairperson Datuk Yaacob Md Sam has revealed that enforcement agencies often fail to provide adequate explanations for the misconduct by errant personnel²⁹. The chairperson also revealed that the recommended punishments or sanctions are often disregarded with lighter sentence meted out by agencies in question. Further inquiries as to why the recommended sanctions were not adhered to were also reported to be ignored.

The inaction by enforcement agencies when it comes to EAIC’s recommendations raises questions with regard to the effectiveness of EAIC as a statutory body tasked with providing oversight on enforcement agencies’ abuse of powers. While the lack of disciplinary and criminal actions against

²⁹ FMT Reporters, ‘90% of complaint to enforcers go unheeded, says EAIC’ (Free Malaysia Today, 25 July 2016), <<http://www.freemalaysiatoday.com/category/nation/2016/07/25/90-of-complaints-to-enforcers-go-unheeded-says-eaic/>> accessed 25 February 2017

errant officers is disappointing, the existence of a thorough and extensive report by EAIC still serves as a good basis to support families of victim in initiating civil suits against any misconduct by enforcement agencies.

Apart from comprehensive reports by EAIC that would likely be useful for pursuing redress and justice for victims and their families, the existence of an external oversight body can potentially mitigate some degree of abuse by enforcement agencies. While its effectiveness as a deterrent factor is difficult to gauge, an inquiry by EAIC compels the enforcement agency in question to respond in writing which puts additional pressure upon the enforcement agency in question to cease its abuse or at least attempt to stop further abuse.

Conclusion and Recommendations

The events in 2016 makes it clear that the existing system of oversight and criminalization of police abuse of power is highly inadequate and the current institutions and mechanisms need to be improved and strengthened to ensure justice for the victims of human rights violations and to eliminate abuse of powers among enforcement agencies.

Systemic changes must also be implemented by relevant authorities including the Royal Malaysian Police, the Prison Department and the Immigration Department to ensure that any lock-up, prison or detention centre complies with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela rules)³⁰. Reforms should contain substantive changes that would outlaw the use of torture in detention and improve healthcare in detention to eliminate death through criminal misconduct or negligence on the part of public authorities.

Furthermore, detention without trial and the absence of judicial scrutiny often provides substantial room for abuse and torture. With no access to detainees by families, lawyers and no oversight by a member of the judiciary, it is not surprising that many detainees attest to experiencing torture or other inhuman treatment during their initial remand phase under SOSMA and POCA.

To reform the failing system of protection from torture, the government should ratify the United Nations Convention against Torture, engage with the Committee against Torture (CAT Committee) and re-evaluate the objections and reservations that Malaysia holds with regard to United Nations Convention against Torture. Once a domestic law on torture is implemented in Malaysia, it would provide a stronger foundation for criminalizing torture and outlawing the use of torture in all its forms in Malaysia and narrow down the scope through which the perpetrator can escape justice under the current legal mechanisms.

The developments documented in recent years and the apathy shown towards EAIC reports and recommendation suggest that the Government of Malaysia has no intention of subjecting its enforcement arms to any sort of tangible oversight and that the establishment of EAIC may just be another watchdog body formed with no power to provide effective remedy and justice but useful for the Government of Malaysia to deflect domestic and international pressure. With the widespread and sustained reports of abuse by the Royal Malaysian Police, SUARAM reiterates the demand for an Independent Police Complaints and Misconduct Commission (IPCMC) to address the on-going police abuse of power that cannot be adequately addressed by EAIC in its current capacity.

30 The United Nations Standard Minimum Rules for the Treatment of Prisoners, <https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf>

SUARAM's recommendation to the Royal Malaysian Police includes:

1. The suspension of all officers responsible in the event of death in custody;
2. For officers in charge of station to be placed under investigation in the event of death in custody;
3. For timely updates on investigations and relevant information to be publicly announced through press statements or press conferences.

SUARAM's recommendation to the Attorney-General's Chamber includes:

1. For criminal action to be initiated against members of Royal Malaysian Police or other enforcement agencies who have been found guilty of misconduct or who have committed a criminal offence as and when necessary;
2. To ensure appropriate charges are made against officers found to have committed a criminal offence through his or her misconduct if found liable by the coroner's court.



**FREEDOM OF
EXPRESSION**

FREEDOM OF EXPRESSION

Crackdown on freedom of expression was still prevalent in Malaysia in 2016. The notable change between 2015 and 2016 can be seen in the government's utilization of different provisions in restricting and curtailing freedom of speech. Another trend that has continued from 2015 is the Royal Malaysian Police's active monitoring of social media postings. This took the form of the Inspector-General of Police publicly calling on the Royal Malaysian Police to trace and investigate social media posts on his twitter¹ account and warnings from the Police Cyber Investigation Response Centre (PCIRC)².

PCIRC first raised concerns when it ticked off Fahmi Reza for his postings but it has substantially toned down its activities online. For the most part, PCIRC has been issuing warnings to users and responding to the Inspector-General of Police's twitter posts calling for investigations³. It remains to be seen whether PCIRC will have any notable impact on freedom of expression online.

The Sedition Act 1948

The application of the Sedition Act 1948 eased in 2016. There were no new reported cases of individuals being prosecuted under the Act in 2016. However, this does not discount the possibility that some prosecution cases may not be publicly known or reported. Although there may not be any new cases of prosecution under the Sedition Act 1948, there were several arrests made under the Act and these individuals were called for questioning for possible offences under the Act.

Statistics comparing the use of the Sedition Act 1948 in recent years

	2013	2014	2015	2016
Convicted	1	3	3	4
Charged	7	12	11	0
Investigated	10	29	206	9 (7) ⁴
Total	18	44	220	12

1 'IGP arah siasat tweet "sweet deal" dengan Najib' (MalaysiaKini, 23 August 2016) <<http://www.malaysiakini.com/news/353351>> accessed 17 October 2016

2 Link to PCIRC twitter: <https://twitter.com/officialpcirc> - though it is noted that PCIRC has seemingly stop with its public monitoring and call out in 2016

3 Posting by IGP calling for Zaid Ibrahim to be investigated and PCIRC responding - <https://twitter.com/OfficialPcIRC/status/796970069867663360>

4 In some cases, individuals were detained and remanded for investigation. Total case of those arrested and detained are listed in brackets

Summary of sedition cases for 2016

No	Name	Background	Status
1	Ahmad Shukri Kamarudin	Former Solidariti Mahasiswa Malaysia (SMM) activist	Arrested on 1 April 2016 for a police report against him under the Sedition Act in 2014.
2	Shazni Murni	Amanah Youth Vice Chief	Arrested on 4 April 2016 for alleged statement urging people to topple the government through mass demonstration.
3	Azrul Mohd Kalib	Social Policy Strategist at Institute for Democracy and Economic Affairs (IDEAS)	Called for questioning on 20 th April 2016 for initiating a petition calling for the Prime Minister of Malaysia to step down on change.org ⁵ .
4	Zhafran Muhammad Zuhdi	Activist	Arrested on 2 April 2016 and investigated under the Sedition Act for posting a sticker on a police car; subsequently charged for other offences.
5	Unnamed	Factory Worker	Arrested on 26 April 2016 for Facebook posting that allegedly insulted a religion using vulgar words ⁶
6	Fahmi Reza and others ⁷	Activists	Arrested on 4 June 2016 at Publika for selling #KitaSemuaPenghasut t-shirts

5 Several others were called for questioning for similar reasons. List of those called for questioning is not disclosed for privacy concerns.

6 Opalyn Mok, 'Cops arrest factory worker for posting seditious remarks on social media', (Malay Mail Online, 27 April 2016) <<http://www.themalaymailonline.com/malaysia/article/cops-arrest-factory-worker-for-posting-seditious-remarks-on-social-media>> accessed 27 October 2016

7 Other arrested includes Pang Khée Teik, Lew Pik-Svonn and Arif Rafhan Othman

7	Vivian Lee		Convicted and sentenced on 27 May 2016 for facebook posting. Sentence was stayed pending appeal [6 months' imprisonment]
8	Tian Chua	Member of Parliament for Batu	Convicted and sentenced on 28 September 2016 for statement made in a forum in 2013 [RM1,800 fine and 3 months' imprisonment]
9	Mohd Fakhruhazi Mohd Mokthar	Former PAS Youth Treasurer	Convicted and sentenced on 25 August 2016 under the Sedition Act 1948 for #KitaLawan rally in 2015 [8 months' imprisonment]
10	Abdullah Zaik Abd Rahman	President of ISMA	Convicted and sentenced on 30 August 2016 for his alleged statement labelling Chinese as 'trespassers' in the country [RM2,000 fine]
11	Haris Ibrahim	Activist	Convicted and sentenced on 14 April 2016 for making seditious remark in 2013 that allegedly called for people to take to the street and topple the government [8 months imprisonment]
12	Adam Adli	Student Activist	Jail sentence set aside following appeal at High Court on 18 February 2016 [RM5,000 fine]
13	Hishamuddin Rais	Activist	Jail sentence set aside following appeal at the Court of Appeal on 16 May 2016 [RM5,000 fine]
14	Zaid Ibrahim	Politician	Called for investigation on 16 November 2016 ⁸
15	Koay Chee Hock	Political Party Member	Arrested on 30 December 2016 for attempting to put up a #BebasAnwar banner ⁹

8 Astro Awani, 'Zaid Ibrahim gives statement to Bukit Aman police' (Astro Awani, 16 November 2016) <<http://english.astroawani.com/malaysia-news/zaid-ibrahim-gives-statement-bukit-aman-police-122802>> accessed 27 February 2017

9 'PKR man arrested for putting up 'seditious free Anwar' banner' (MalaysiaKini, 30 December 2016) <<http://www.malaysiakini.com/news/367711>> accessed 27 February 2017

Mat Shuhaimi's constitutional challenge was heard on 1 June 2016. The High Court denied the constitutional challenge by Member of Parliament, N. Surendran's as the issue was supposedly resolved through Azmi Sharom's case. While the initial challenge was rejected, Surendran has an appeal challenging the non-reference of constitutional challenge and another appeal on striking out the charges against him pending. Both appeals are scheduled to be heard in early 2017.

Though the overall situation remained grim, there was some positive development with regards to the Sedition Act 1948. In November 2016, the Court of Appeal declared that section 3(3) of the Act that dismisses the need for prosecution to prove intent was unconstitutional. In December, Safwan Anang's conviction under the Act was set aside by the Court of Appeal which ruled that the prosecution had failed to prove a prima facie case against Safwan.



Fahmi Reza charged in Ipoh under Section 233 of CMA

Communications and Multimedia Act 1998

In contrast to the Sedition Act 1948 which has been used predominantly against human rights defenders or politicians, the Communication and Multimedia Act 1998 (CMA) has largely been used against the general public. The main section utilized to restrict the freedom of expression is Section 233 of the CMA which criminalizes online and network communications that are considered 'obscene, indecent, false, menacing or offensive in nature with intent to annoy, abuse, threaten or harass another person'.

With such a broad definition, it is not surprising that SUARAM has documented a wide variety of statements and comments which resulted in the arrest of the authors of these statements. They have ranged from perceived rude remarks regarding football teams to cases in which individuals have allegedly insulted Islam.

Apart from the broad ambit of ‘crimes’ falling under CMA, another concern is the new trend of arrests under CMA. In recent months, enforcement agencies have made ‘cross border’ arrests, detaining individuals in their respective home states and then bringing them to Johor Bahru for investigation. The justification given by the police was that a police report had been lodged at a police station in Johor Bahru which required the detainee to be brought to and subsequently detained at the said location despite the police report clearly stating that the alleged offence had been committed elsewhere.

Then there are reports filed by members of the Royal Malaysian Police or other enforcement agencies which are based in every state. A recent example is the report lodged by the Malaysian Anti-Corruption Commission (MACC) in Johor Bahru over the viral video of a MACC officer beating up a ‘police officer’ in Selangor¹⁰. Another example is the charge against Fahmi Reza which was heard in Ipoh, Perak although the alleged offence had been committed in Kuala Lumpur.



Memorandum to Attorney-General Chamber on use of Sedition Act 1948

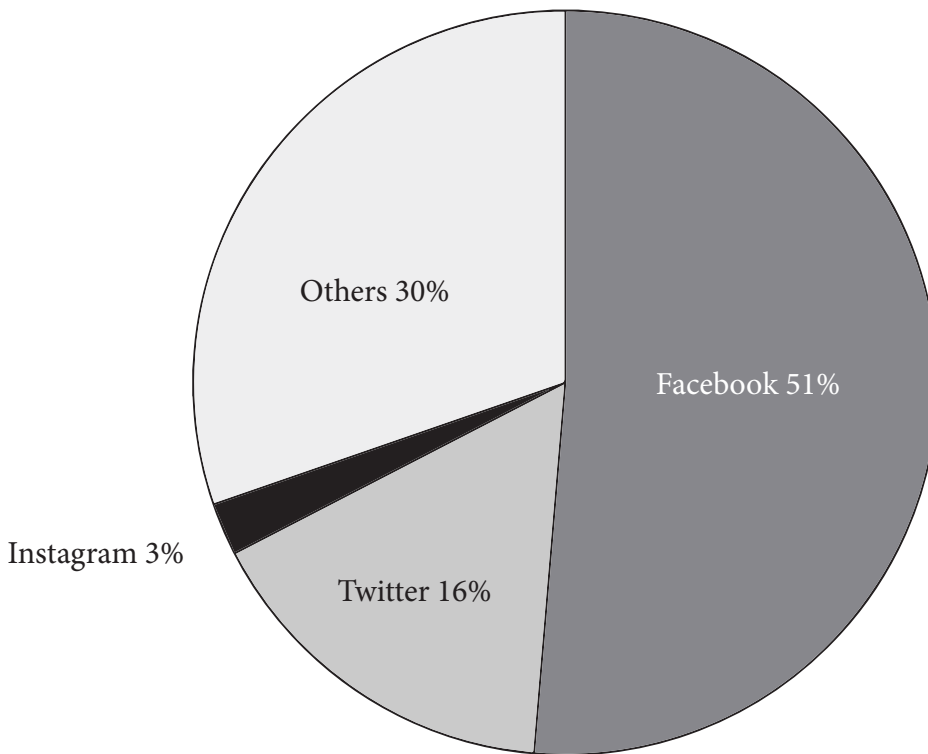
¹⁰ Farik Zolkepli, 'Bukit Aman: 'Cop' on receiving end in viral video actually a motorcycle thief', (The Star, 13 October 2016) <<http://www.thestar.com.my/news/nation/2016/10/13/bukit-aman-cop-on-receiving-end-in-beating-video-actually-a-car-thief/>> accessed 14 October 2016

Statistics on the use of the Communications and Multimedia Act 1998

	2015	2016
Investigated (Questioned)	23	4
Arrested and/or detained	10	20
Charged	3	7
Sentenced	1	2
Total	37	42 [181*] ¹¹

Breakdown of cases documented by SUARAM according to media channels¹²

No. Of Cases



¹¹ *Numbers in brackets denotes the cases reported by MCMC and not documented by SUARAM - Cases documented by SUARAM is significantly lower than the numbers reported by the Malaysia Communication and Multimedia Commission due to unreported arrests and convictions – 'MCMC blocks over 5,000 websites for various offence – Jailani' (Bernama, 14 December 2016) <<http://www.bernama.com/bernama/v8/newsindex.php?id=1311610>> accessed 27 February 2017> accessed 27 February 2017

¹² Others includes blogs, news websites, whatsapp, etc

Summary of cases under CMA

No	Name	Reason	Status
1	Khairul Nizam	Alleged comment against member of royal family	Arrested on 8 January 2016 at his home in Kota Bahru and investigated in Johor Bahru
2	Unnamed	Offensive and insulting offence against Prime Minister of Malaysia	Arrested on 28 March 2016 to facilitate investigation
3	Sivarasa Rasiah	Allegedly sent two fake images through Facebook	Charged on 15 April 2016 with two offences for sharing two satirical images using 'TIME' magazine cover. ¹³
4	Muhammad Isyraf Shamsuddin	Allegedly insulted member of royal family on Facebook.	Surrendered himself on 20 April 2016, remanded for investigation, charged on 27 April 2016 and claimed trial. Case was heard in Johor ¹⁴
5	Muhamad Amirul Azwan Mohd Shakri	Allegedly insulted member of royal family on Facebook	Arrested on 28 April 2016 and convicted on 8 June 2016. Sentenced to 14 years' imprisonment to be concurrently served. Sentence subsequently amended to attend Henry Gurney school until 21 years' old. Case was heard in Johor
6	Abdul Muhamin Mohd ¹⁵	Allegedly uploading a picture of Prime Minister behind bars on Facebook	Charged in Kuala Lumpur on 18 May 2016

13 Astro Awani, 'R. Sivarasa pleads not guilty over fake 'TIME' photo' (Astro Awani, 15 April 2016) <<http://english.astroawani.com/malaysia-news/r-sivarasa-pleads-not-guilty-over-fake-time-photo-102555>> accessed 23 March 2017

14 Junita Mat Rasid 'Remaja didakwa hina Sultan Johor' (Berita Harian Online, 27 April 2016) <www.bharian.com.my/node/147909> accessed 27 February 2017

15 Nur Athirah Nabilah Musa 'Penulis blog didakwa muat naik gambar palsu PM' (Utusan Online, 18 May 2016) <<http://www.utusan.com.my/berita/mahkamah/penulis-blog-didakwa-muat-naik-gambar-palsu-pm-1.331688>> accessed 23 March 2017

7	Masyhur Abdullah	Allegedly insulted member of royal family on Twitter	Arrested on 25 May 2016 and remanded for 2 days in Johor
8	Arrasyiddin Mohd	Allegedly insulted member of royal family	Arrested on 28 May 2016 and remanded for 11 days in Johor
9	Muhd Salman Zakaria	Allegedly insulted member of royal family	Arrested on 30 May 2016 and remanded for 11 days in Johor
10	Effie Amron	Allegedly insulted member of royal family	Called for investigation on 30 May 2016
11	Nik Pa	Allegedly insulted member of royal family	Arrested on 31 May 2016 and remanded for 12 days
12	Nik Azwa	Allegedly insulted member of royal family	Arrested on 31 May 2016 and remanded for 12 days
13	Unnamed	Alleged posting on Facebook alleging that police accepted bribe to cover up criminal activity in the city	Arrested on 5 June 2016 and investigated under Section 233 of CMA and Section 507 of the Penal Code ¹⁶
14	Chong Chun Hau	For his comments on the series of arrests under CMA	Arrested on 17 June 2016
15	Fahmi Reza	For his satirical images on #KitaSemuaPenghasut posting using MCMC's warning logo	Charged at Kuala Lumpur on 6 June 2016 and subsequently at Ipoh on 10 June 2016
16	Unnamed (25-year-old woman)	Alleged fake religious statement under Permaisuri Johor Raja Zarith Sofiah Sultan Idris Shah on Facebook	Arrested on 21 July 2016 ¹⁷

¹⁶ 'Housewife who made allegations against Miri police on Facebook arrested' (Malay Mail Online, 6 June 2016) <<http://www.themalaymailonline.com/malaysia/article/housewife-who-made-allegations-against-miri-police-on-facebook-arrested>> accessed 27 October 2016

¹⁷ Nabila Ahmad, 'woman nabbed for fake religious statement on FB' (The Star Online, 21 July 2016) <<http://www.thestar.com.my/news/nation/2016/07/21/woman-nabbed-for-fake-religious-statement-on-fb/>> accessed 27 October 2016

17	Mohamad Ariff Fadila Arabin	Insulting the Prime Minister in Twitter	Arrested on 28 July 2016 after failing to attend his charge in court. ¹⁸
18	Syarul Ema Rena Abu Samah	Facebook posting on picture taken from Prime Minister Hari Raya open house in Pekan	Raided by MCMC on 2 August 2016 and summoned to MCMC office for questioning on the same day ¹⁹
19	Unnamed	Alleged racist statement	Police officer attached to Desa Cemerlang police station was arrested on 6 August 2016 and investigated for alleged racist post on Facebook ²⁰
20	Unnamed	Allegedly insulted member of royal family	Detained on 22 August 2016 in Penang ²¹
21	Unnamed	Allegedly insulted member of royal family	Detained at Batu Tiga on 12 August 2016 ²²
22	Pa Ya	Uploaded photo on WhatsApp that allegedly insulted the Prime Minister of Malaysia	Arrested on 2 July 2016 ²³
23	Lim Cheng Lam	Allegedly insulted Islam in relation to Haron Din's death	Arrested on 19 September 2016
24	Sidek Kamiso	Allegedly insulted Islam in relation to Haron Din's death	Arrested on 19 September 2016 and subsequently rearrested on 29 September 2016 under Section 298A of Penal Code ²⁴

18 Yap Tzu Ging, 'Youth charged with insulting PM on twitter, arrested after no-show in court' (Malay Mail Online, 28 July 2017) <<http://www.themalaymailonline.com/malaysia/article/youth-charged-for-insulting-pm-on-twitter-arrested-after-no-show-in-court>> accessed 23 March 2017

19 Minderjeet Kaur, 'Ratu Naga questioned by MCMC over Facebook posting' (Free Malaysia today, 2 August 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/08/02/ratu-naga-questioned-by-mcmc-over-facebook-posting/>> accessed 27 October 2016

20 'Policemen detained over racist Facebook post' (The Star Online, 6 August 2016) <<http://www.thestar.com.my/news/nation/2016/08/06/policeman-detained-racist-comments/>> accessed 27 October 2016

21 'Man held over 'offensive statement' against Johor Sultan' (The Star Online, 23 August 2016) <<http://www.malaysiakini.com/news/353305>> accessed 27 October 2016

22 'Police arrest man for insulting Tunku Mahkota Johor' (The Star Online, 13 August 2016) <<http://www.thestar.com.my/news/nation/2016/08/13/man-arrested-insulting-tmj/>> accessed 27 October 2016

23 'Elderly man arrested for posting insulting photo of Malaysia PM Najib Razak on Whatsapp' (Straits Times, 3 July 2016) <<http://www.straitstimes.com/asia/se-asia/elderly-man-arrested-for-posting-insulting-photo-of-malaysia-pm-najib-razak-on-whatsapp>> accessed 27 October 2016

24 Causing religious disharmony

25	Unnamed	Allegedly insulted Islam in relation to Haron Din's death	Arrested on 19 September 2016 ²⁵
26	Jeff Ooi	Tweet in relation to death of Haron Din	Submitted for questioning on 20 September 2016 ²⁶
27	Abdul Rahim Thamby Chik	Offensive remark against member of royal family on Facebook	Convicted and sentenced on 21 September 2016 [RM1,900 fine] ²⁷
28	Unnamed	Allegedly insulted member of royal family	Arrested on 27 September 2016 ²⁸
29	Idris Md Nasir	Allegedly insulted police on Facebook	Charged on 21 September 2016 for a post allegedly made on 23 April 2015 ²⁹
30	Syarul Ema Rena Abu Samah	Alleged defamatory posting against Rosmah Mansor	Brought in for questioning on 21 September 2016 ³⁰

25 Natasha Joibi & Victoria Brown, 'Two arrested over postings on Haron Din's death' (The Star Online, 19 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/19/haron-din-post-arrested-facebook/>> accessed 27 October 2016

26 R. Sekaran, 'Jeff Ooi turns himself in for questioning over tweet' (The Star Online, 20 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/20/jeff-ooi-turns-himself-in-for-questioning-over-tweet/>> accessed 27 October 2016

27 'Ex-Melacca CM fined RM1,900' (The Star Online, 21 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/21/exmalacca-cm-fined-rm1900-abdul-rahim-ordered-to-pay-up-for-facebook-remark-about-royalty/>> accessed 27 October 2016

28 'Another FB user nabbed for 'insult to Johor royal' (MalaysiaKini, 27 September 2016) <<http://www.malaysiakini.com/news/357045>> accessed 27 October 2016

29 'Baker charged with insulting police on Facebook' (Malay Mail Online, 21 September 2016) <<http://www.themalaymailonline.com/malaysia/article/baker-charged-with-insulting-police-on-facebook>> accessed 27 October 2016

30 Rahmah Ghazali, 'Cops question 'Ratu Naga' over Facebook posts on Rosmah' (the Star Online, 21 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/21/cops-question-ratu-naga-over-facebook-posts/>> accessed 27 October 2016

31	Unnamed (account Shammeer Akhter)	Alleged derogatory remarks against royal family	Arrested on 26 September 2016 ³¹
32	Rosmin Mohamed Noor	Allegedly insulting comment against the Inspector-General of Police	Charged on 29 September 2016 ³² and subsequently pleaded guilty on 11 November 2016, fined RM5,000 and 2 months imprisonment in default ³³
33	Unnamed	Alleged offensive remark against member of royal family	Arrested 4 October 2016 ³⁴
34	Unknown (auxiliary policeman)	Arrested for his viral post on Facebook claiming a gang fight at his work place resulted in one death	Arrested on 12 October 2016 ³⁵
35	Jamal Md Yunus	Unknown	Arrested on 19 October 2016, arrested for investigation under the Sedition Act 1948, Section 500 and 503 of the Penal Code and Section 233 of CMA ³⁶
36	R. Sri Sanjeevan	Allegedly insulting the Inspector-General of Police	Charged on 27 October 2016 ³⁷
37	Jufazli Shi Ahmad	Investigated for slander, sedition and under CMA, actual allegation unclear	Arrested on 9 th November and subsequently transferred to Sabah for investigation ³⁸

31 'Man held for insulting Johor royalty on Facebook' (The Sun Daily, 27 September 2016) <<http://www.thesundaily.my/news/1984139>> accessed 27 October 2016

32 Maizatul Nazlina, 'Man claims trial to insulting IGP on Facebook' (The Star Online, 29 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/29/man-claims-trial-to-insulting-igp-on-facebook/>> accessed 27 October 2016

33 Shanti Gunaratnam, 'Man fined RM5,000 for insulting IGP on Facebook' (New Straits Times, 11 November 2016) <<http://www.nst.com.my/news/2016/11/187767/man-fined-rm5000-insulting-igp-facebook>> accessed 23 March 2017

34 Bernama, 'Man detained for offensive remark on TMJ's daughter' (MalaysiaKini, 5 October 2016) <<http://www.malaysiakini.com/news/357885>> accessed 27 October 2016

35 'Auxiliary cop nabbed for false viral post' (Borneo Post Online, 12 October 2016) <<http://www.theborneopost.com/2016/10/12/auxiliary-cop-nabbed-for-false-viral-post/>> accessed 23 March 2017

36 'Red shirts leader Jamal released on police bail' (The Sun Daily, 20 October 2016) <<http://www.thesundaily.my/news/2010489>> accessed 23 March 2017

37 FMT Reporters, 'Sanjeevan charged with 'insulting' IGP' (Free Malaysia Today, 27 October 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/10/27/sanjeevan-charged-with-insulting-igp/>> 27 October 2016

38 Aedi Asri 'Activist sent back to Sabah for further investigations' (Free Malaysia Today, 11 November 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/11/11/activist-sent-back-to-sabah-for-further-investigations/>> accessed 23 March 2017

38	Zaid Ibrahim	Tweet questioning integrity of country's executive and principal of public prosecutor	Investigated on 16 November 2016 ³⁹
39	MalaysiaKini's editor in chief Steven Gan & director, Premesh Chandran	For video of press conference covering Khairuddin Abu Hassan	Charged on 18 November 2016 ⁴⁰ , two charges each for press conference video uploaded on MalaysiaKini
40	Unnamed	Suspected for posting an offensive statement against the Sultan of Johor on a website	Arrested on 23 November 2016 by Johor Police ⁴¹
41	Puan Sri Shariffa Sabrina Syed Akil, Norhayati Shahrom & another unnamed individual	Alleged offensive statement against Sultan of Johor	Arrested 22 December 2016 ⁴²
42	Azmin Ali	Speech calling for investigation into IGP's daughter for ownership of firearm firm	Investigated on 29 December 2016 ⁴³

While cases documented under CMA have been on a steady rise, there is still no conclusive evidence that the Royal Malaysian Police or other government agencies has deployed any systematic means of monitoring and tracking 'comments' that can be criminalized under Section 233 of CMA.

39 Astro Awani, 'Zaid Ibrahim gives statement to Bukit Aman police' (Astro Awani, 16 November 2016) <<http://english.astroawani.com/malaysia-news/zaid-ibrahim-gives-statement-bukit-aman-police-122802>> accessed 27 February 2017

40 Yiswaree Palansamy, 'MalaysiaKini editor-in-chief charged with airing offensive video' (Malay Mail Online, 18 November 2016) <<http://www.themalaymailonline.com/malaysia/article/malysiakini-editor-in-chief-charged-for-airing-offensive-video>> accessed 25 February 2017

41 'Cops detain man over offensive statement against Johor Royalty' (Malay Mail Online, 24 November 2016) <<http://www.themalaymailonline.com/malaysia/article/cops-detain-man-over-offensive-statement-against-johor-royalty>> accessed 23 March 2017

42 'Three detained for allegedly insulting Johor royalty' (The Star, 23 December 2016) <<http://www.thestar.com.my/news/nation/2016/12/23/three-detained-for-allegedly-insulting-johor-royalty/>> accessed 27 February 2017

43 Mikha Chan, 'Firearms license for IGP's daughter: Azmin called in for questioning' (Free Malaysia Today, 29 December 2016) <<http://www.freemalaysiatoday.com/category/frontpage/2016/12/29/firearms-licence-for-igps-daughter-azmin-called-in-for-questioning/>> accessed 25 February 2017

Football Arrest

In May and June, several football fans were charged under section 233 of the Communications and Multimedia Act 1998. Muhammad Mashyur Abdullah, Arrasyidin Mohamad, Muhd Salman Zakaria and “Minah Pendek⁴⁴” are four additional victims of CMA. They were alleged to have made online comments about the sport and football officials. The police did not provide conclusive evidence that the accounts used to make the online statements were related to the individuals arrested and they were not charged.

14 Years for Alleged Insult Online

19-year-old Muhammad Amirul was found guilty of 14 counts of offence under s.233 of the Communications and Multimedia Act 1998. He was arrested on 28 April 2016 in Kelantan. He was later handed over to the Johor police after spending two nights at the Tumpat lockup. The 19-year-old was arrested for allegedly insulting a member of the royal family on Facebook. He spent four months in jail following his arrest. He pleaded guilty to all 14 charges and was initially sentenced to 12 months’ imprisonment (1-year imprisonment per charge to be served concurrently). The sentence was subsequently reviewed after challenges by lawyers and substituted with Muhammad Amirul being sent to Henry Gurney reform school for a period of two years.

Sidek Kamiso

The death of PAS spiritual leader Haron Din on 16 September 2016 elicited a slew of mixed reactions from the Malaysian public. Among those who expressed their views via social media included former journalist, Sidek Kamiso. His tweet on 15 September 2016 was as follows: “*Someone who made his career selling air jampi for any illnesses succumbed to his illness in a modern hospital in San Francisco. #irony*”. The tweet was deemed to be insulting to Islam.

Following the discovery of the tweet, the police on 19 September 2016 raided and arrested Sidek Kamiso at his home in Shah Alam. He was then brought to Johor Bahru on remand. Fortunately, the remand application was rejected. When the legality of his arrest and the raid was questioned, the Inspector-General of Police, Tan Sri Khalid Abu Bakar replied that under s.233 of the CMA, no warrant was required for any arrest. Unfortunately, ten days after the initial arrest, Sidek was arrested again, only this time it was under s.298 of the Penal Code for ‘causing religious disharmony’. Sidek was arrested immediately when he turned up at the Dang Wangi police station for questioning over his allegedly insulting tweet. He has since been released on police bail.

According to Deputy Communication and Multimedia Minister Datuk Jailani Johari, MCMC has blocked 5,044 websites for various offences under CMA between 2015 and October 2016. Out of the 5,044 websites blocked, 4277 were in relation to pornographic materials; 767 displayed elements of gambling and other vices; and 72 websites related to Islamic State. In the same statement, the Minister also stated that there were 181 cases of social media and internet abuse⁴⁵ which were presumably filed under Section 233 of CMA.

44 Minah Pendek was the online handle used. It was later discovered that 2 individuals detained in relation to the handle was Nik Pa and Nik Azwa

45 ‘MCMC blocks over 5,000 websites for various offence – Jailani’ (Bernama, 14 December 2016) <<http://www.bernama.com/bernama/v8/newsindex.php?id=1311610>> accessed 27 February 2017> accessed 27 February 2017

In contrast, a reply in Parliament revealed that 154 cases of internet and new media abuse cases were investigated by MCMC between January to September 2016.⁴⁶ This marks a sharp increase when we compare this figure to the statement by MCMC on 3 June 2016 that stated there were 62 cases of abuse on social media between January to May 2016.⁴⁷

Internet Censorship

Under CMA, the Malaysia Communications and Multimedia Commission (MCMC) is granted substantial powers to regulate contents available to Malaysia's internet users. While the powers granted to MCMC can be challenged, there has been few if any challenges by owners of websites that had been blocked by MCMC. Some of the websites that were blocked in 2016 included Malaysian Insider,⁴⁸ Medium and AsiaSentinel.

Apart from these websites, websites that are usually blocked by MCMC include pornography and internet gambling websites. Websites promoting extremist group such Islamic States are also reported to be blocked by MCMC.⁴⁹

Printing Presses and Publications Act 1948 (PPPA)

The list of banned publications continued to grow in 2016. As listed below, most of the books banned were religious publications that are deemed to be deviant compared to the mainstream religious teachings. Other types of publications banned included those that are considered 'inappropriate' for the average Malaysian reader.

PPPA was once again invoked against the social movement Bersih in 2016. During the Bersih 5 Convoy in Sabah, Maria Chin Abdullah was briefly detained for questioning under Section 11 of PPPA for allegedly handing out leaflets that did not include the name and address of the printer.⁵⁰

Overall, the process for banning publications seems haphazard, with the widespread yet erratic choice of publications banned, raising concerns about the process and procedure that takes place behind the application of subsection 7(1) of PPPA. As an example, it is unclear why or how a book on pop psychedelic art can be deemed to be 'prejudicial to morality'.⁵¹

46 'MCMC probes 154 cases of internet abuse from Jan-Sept' (Astro Awani, 10 November 2016) <<http://english.astroawani.com/malaysia-news/mcmc-probes-154-cases-internet-abuse-jan-sept-122094>> accessed 27 February 2017

47 'MCMC Siasat 62 Aduan Salah Guna Media Sosial Setakat Mei Tahun Ini' (MCMC, 3 June 2016) <<http://www.skmm.gov.my/Mobile/Tools/ViewMobile.aspx?datapath=/Media/Press-Releases/MCMC-Siasat-62-Aduan-Salah-Guna-Media-Sosial-Setak&classname=SKMM.CustomArticles&csrt=18099981513749567319>> accessed 27 February 2017

48 Malaysia Insider has since shut down its operation for commercial reasons

49 'MCMC blocks over 5,000 websites for various offence – Jailani' (Bernama, 14 December 2016) <<http://www.bernama.com/bernama/v8/newsindex.php?id=1311610>> accessed 27 February 2017

50 Olivia Miwil & Naim Zulklifi, 'Bersih's Maria Chin released on police bail' (New Straits Times Online, 29 October 2016) <<http://www.nst.com.my/news/2016/10/184273/bersih-maria-chin-released-police-bail>> accessed 31 October 2016

51 'Printing Presses and Publications (Control of Undesirable Publications) (No.31) Order 2016', <http://www.federalgazette.agc.gov.my/output/pua_20161230_PERINTAH%20MESIN%20CETAK%20NO%20%2031.pdf>

List of banned publications in 2016

No	Name of Book	Author or Editor	Order Issued
1	Rasulullah Saw: Sejak Hijrah Hingga Wafat	Dr. Ali Syariati & Dr. Afif Muhamad	5th February 2016
2	Tafsir Ayat-Ayat Kematiaan	Muhamad Husain al-Hasani al-Husaini ath-Thabathaba'I (Alamah Thabathaba'i/Irwan Kurniawan)	5th February 2016
3	Sinema Spritual: Dramatugi dan Kritikan	Faisal Tehrani	5th February 2016
4	Israk Mikraj: Tinjauan Saintifik Di Sebalik Kontroversi	Armansyah/Yusammir Yusuf	18th February 2016
5	Ajaran Makrifat Syekh Siti Jenar	Abu Fajar Al-Qalami	18th February 2016
6	Grey (Fifty Shades of Grey As Told by Christian)	E L James	8th March 2016
7	Sex, Pork, And Prosecution: How One Young Man's Fight against Conformity Led to Imprisonment and Vilification	Alvin Tan	8th March 2016
8	The Koran: A Very Short Introduction	Michael Cook	16th March 2016
9	Torture In Malaysia Prisons: Who you didn't know and need to know to act	Varatharajoo Murugan	16th March 2016
10	Malaysia And The Club of Doom: The Collapse of The Islamic Countries	Syed Akbar Ali	16th March 2016
11	Pergolakan Pemikiran Islam: Catatan Harian Ahmad Wahib	Ahmad Wahib	16th March 2016
12	Ibnu Taimiyah; Rekam Jejak Sang Pembaharu	Sha'ib Abdul Hamid	18th April 2016
13	Kitab Berlian Syahadat	Kh Syeh Muhammad Yusuf MR	18th April 2016
14	Sejarah Syekh Abdul Wahab Tuan Guru Babussalam	H.Ahmad Fuad Said	18th April 2016
15	Primbon Wanita dan Tafsir Mimpi (Lengkap)	Ny. Ninik Happianti	18th April 2016

16	Mencontoh Para Wali	M.Z Hasan Amruhi	18th April 2016
17	Syi'ar Manifestasi Tuhan Dalam Wanita		18th April 2016
18	Mereka Adalah Teroris (Sebulan Tinjauan Syari'at)	Al Ustadz Luqman bin Muhammad Ba'abduh	18th April 2016
19	Lesbian Sex Positions 100 Passionate Positions from Intimate and Sensual to Wild and Naughty	Shanna Katz	18th April 2016
20	Sexual Intimacy for Women A Guide for Same Sex Couples	Dr. Glenda Corwin	18th April 2016
21	The Whole Lesbian Sex Book A Passionate Guide For All of Us	Felice Newman	18th April 2016
22	Kissing Cousins? Christians and Muslims Face to Face	Bill A. Musk	18th April 2016
23	A Treasury of Asian Literature	John D. Yohannan	18th April 2016
24	What Went Wrong? The Clash Between Islam and Modernity in the Middle East	Bernard Lewis	18th April 2016
25	1000 Hikmat	Ali Zulfakar	18th April 2016
26	Senjata Mukmin	Abu Mazaya Al-Hafiz	18th April 2016
27	Sabda Rasulullah S.A.W : Mahdi Aku Ada Dua Tanda	Mohd Zain Bin Hassan	18th April 2016
28	Nomad : from Islam to America A Personal Journey Through the Clash of Civilizations	Ayyan Hirsi Ali	18th April 2016
29	Misteri Alam Arwah: Persiapan Menjelang Ajal dan Kisah-Kisah Mayat	Abu Sulaiman Ad Darani	18th April 2016
30	Nabiyuhrahmah Min Minzoril Qurani Wa Ahli Bayt	Muhammadurriy Sahri	18th April 2016
31	Islam And Homosexuality Volume 1	Samar Habib	18th April 2016
32	Isu Semasa Dalam Risalah: Kahwin Campur Antara Muslim Dengan Non Muslim	-	18th April 2016

33	Revenge of the Sarong Party Girl	Jim Aitchison & Theseus Chan	6th December 2016
34	Hidup Bagaikan Sungai Mengalir Kisah 16 Orang Wanita Dalam Gerakan Anti-Jepun, Anti-penjajah Dan Kemerdekaan Di Malaysia-Singapura (1938-1989)	Agnes Khoo/Inderajaya (Anas)	6th December 2016
35	Fifty Shades of Bliss: The Ultimate Guide To Spicing Up Your Sex Life	Lexie Sutton	6th December 2016
36	Kamasutra & Kecerdasan Seks Modern	Ki Guno Asmoro	6th December 2016
37	Nikmatnya Melayari Bahtera Malam Pertama	Mazlan B. Yahya	6th December 2016
38	Pelacur Kelas Pertama	Melati Rahim	6th December 2016
39	Maxim (Vol 18, No. 9 November 2014) (USA Edition)	-	6th December 2016
40	Al-Fatihin: Surat Kabar Bagi Muhajirin Berbahasa Melayu Di Daulah Islamiyyah	-	6th December 2016
41	Pop Psychedelic	Melissa Lin	6th December 2016
42	Only Two Can Play	Tim Brown	6th December 2016
43	Bila Anak-Anak Bertanya Tentang Allah Dan Alam Ghaib Inilah 48 Jawapannya...	Muhammad Muhyidin	6th December 2016
44	Nazi Goreng	Marco Ferrarese	6th December 2016
45	Black Men Special Edition	-	6th December 2016
46	The Loving Touch	Consultant Dr Andrew Stanway	6th December 2016
47	Tafsir Al-'Ushr Al-Akhir dari Al-Quran Al-Karim Juz (28, 29, 30) Disertai Hukum-Hukum Penting bagi Seorang Muslim	-	6th December 2016
48	The Gospel of Ali Penghargaan Islam atas Yesus	Mehdi Montazer Qaem (Mahdi Muntazhir Qaim) / Satrio Pinandito	6th December 2016

49	The Book of Loving Sex	Nitya Lacroix	28th December 2016
50	Manifesto Komunis	Karl Marx & Friedrich Engels/ Manya	28th December 2016
51	Maxim (Vol 18, No. 5 Jun 2014) (Edisi Amerika Syarikat)	-	28th December 2016

Official Secrets Act 1972

Official Secrets Act 1972 (OSA) remains an obstacle to the freedom of information in Malaysia. Notable incidents relating to the use of OSA in 2016 included the arrests of Member of Parliament Rafizi Ramli at the Parliament gates after exposing documents that had been classified under OSA⁵²; former Finance Minister II, Datuk Seri Ahmad Husni Hanadzlah and several other former ministers including Tan Sri Muhyiddin Yassin and Datuk Seri Shafie Apdal. They were investigated under the Official Secrets Act 1972 for their speeches on 1 Malaysia Development Berhad in Parliament.⁵³

Other violations of the freedom of expression

Two reporters from ABC's Four Corners, Linton Besser and Louie Eroglu were briefly detained after posing several thorny questions to Malaysia's Prime Minister when they approached him at a press conference.⁵⁴ They were threatened with charges under Section 186 of the Penal Code for obstructing a public official from conducting his or her duties. Fortunately for the duo, they were released and deported and were not charged.

Rapper Namewee was arrested when he returned to Malaysia on 21 August 2016. He was remanded to facilitate investigation into his music video 'Oh My God', subsequently investigated under Section 295 of the Penal Code for defiling a place of worship with intention to insult the religion.⁵⁵

Conclusion and Recommendation

The situation pertaining to freedom of expression in Malaysia in 2016 was still unacceptable. In several areas, the freedom of expression was curtailed way beyond the accepted international norm. The Sedition Act 1948 and the Communications and Multimedia Act 1998 remained the obstacles to the freedom of expression both online and offline. While the decline in the use of the Sedition Act 1948 was welcomed by civil society, the continued use of the Act still meant a continuing trend of curtailment of the freedom of expression and limiting space for public discourse. More

52 Zikri Kamarulzaman & Zulaikha Zulklifi, 'Rafizi arrested at Parliament gates for exposing OSA document' (MalaysiaKini, 5 April 2016) <<http://www.malaysiakini.com/news/336624>> accessed 31 October 2016

53 'Report: Husni summoned for police questioning over Parliament speech' (Malay Mail Online, 31 October 2016) <<http://www.themalaymailonline.com/malaysia/article/report-husni-summoned-for-police-questioning-over-parliament-speech>> accessed 31 October 2016

54 'Four Corners reporter Linton Besser describes frightening detention in Malaysia' (ABC News, 16 March 2016) <<http://www.abc.net.au/news/2016-03-15/four-corners-reporter-describes-arrest,-detention-in-malaysia/7249174>> accessed 14 October 2016

55 Opalyn Mok, 'Rapper Namewee remanded four days in Penang over 'Oh My God' music video' (Malay Mail Online, 22 August 2016) <<http://www.themalaymailonline.com/malaysia/article/rapper-namewee-taken-to-penang-courthouse-in-cuffs>> accessed 27th October 2016

alarming, the government has shown no inclination to fulfill its promise to repeal the Act and the amendment that was passed through Parliament remains on hold pending its official gazetting.

The increasing use of the Communications and Multimedia Act 1998 represents the shift in the manner of repression of freedom of expression. With its broad definition under Section 233, CMA has become the main tool used by the state to punish those who make comments online. Considering the widespread use of social media in the country, it would seem that the current trend of prosecution under CMA will only increase in the future as the mechanism for criminal action is routinized under the current enforcement framework.

Although there are concerns over false news, fraudulent messages and hate speeches, harsh criminal measures may not necessarily be the ideal solution. Furthermore, as the use of internet and social media grow ever more common with existence of budget smartphones and affordable data services by telecommunication companies, it is inevitable that the spread of false news and other objectionable material will abound. Rather than embarking on a solitary mission to ‘safeguard’ the Internet against those who wish to abuse the Internet to cause hurt to others, the Malaysian Communication and Multimedia Commission should engage stakeholders including civil societies to discuss and develop road maps and plans for educating and challenging objectionable contents.

In the general trend of website blocking, the lack of public transparency in the websites blocked and the lack of accountability for the implementation of these policies creates grounds for potential abuse. With no mechanism for accountability, the principles, processes or procedures for blocking a website are similar to the principles applied to the banning of publications under Printing Presses and Publications Act 1984.

The Malaysian government should fulfil its promise to repeal the Sedition Act 1948. This was also one of the accepted recommendations in Malaysia’s 2013 Universal Periodic Review. It should also clarify and amend the scope of Section 233 of CMA and other subsections prejudicial to freedom of expression to be in line with international norms.

Recognizing the need for some degree of control over harmful publications or content both offline and online, any provisions or laws established to regulate items of legitimate concern should be in line with Rabat Plan of Action⁵⁶ which outlines substantive recommendations on combatting hate speech and other speeches that could incite hatred. Apart from the principles laid down in Rabat Plan of Action, Malaysia should adopt recommendations made by United Nations for the freedom of expression and comply with recommendations by United Nations’ experts and general comments⁵⁷ by the Human Rights Council.

⁵⁶ Rabat Plan of Action <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 21 March 2017

⁵⁷ General Comment No 34, Human Rights Committee 102nd Session <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>



**FREEDOM OF
ASSEMBLY**

FREEDOM OF ASSEMBLY

Compared to 2015, 2016 was a relatively good year for the freedom of assembly in Malaysia. There was a growing acceptance by government agencies that the public have a right to peaceful assembly. While there were still challenges in organizing a public assembly, the situation improved as the year progressed. The previous years' practice of crackdowns involving mass arrests and detention of activists and participants of assemblies were greatly reduced in 2016. The notable exception was the Bersih 5 rally that took place in November 2016.

Although there were no major crackdowns on participants and organizers, the new trend of repression involved calling for questioning individuals identified as organizers after a rally or an assembly. The first documented case of arrest relating to a peaceful assembly in 2016 was the arrest of SUARAM's coordinator after the #BantahTPPA protest that took place in Kuala Lumpur in January 2016 with subsequent sporadic arrests and detentions throughout the year.

It should be noted that despite the improvements on the ground, the status of the Peaceful Assembly Act 2012 remains in limbo following the decision by the Court of Appeal declaring Section 9 of the Peaceful Assembly Act 2012 (PAA) as constitutional. Furthermore, the Inspector-General of Police is adamant that peaceful assemblies that take place without notice are illegal and warned that action would be taken against those who fail to adhere to PAA requirement of 10 days' notice¹.

The PAA charges against Maria Chin for Bersih 4 was struck out by the Court of Appeal. The Court of Appeal agreed with the counsel's argument that the PAA was unconstitutional at the point of time and thus no offence was committed by Maria Chin when she did not submit a 10-day notice under PAA². The victory in Maria's case was short lived as the prosecution filed an appeal to the Federal Court on the matter³. On a brighter note, Jannie Lasimbang's case for organizing Bersih 4 under PAA concluded in December 2016 when the court discharged and acquitted her of the charges under PAA as the court found that there was no prima facie case against her⁴.

1 Kelly Koh, 'IGP: some rally organizers intent on flouting the law' (New Straits Times, 28 October 2016) <<http://www.nst.com.my/news/2016/10/184096/igp-some-rally-organisers-intent-flouting-law>> accessed 31 October 2016

2 V Anbalagan, 'Appeals Court strikes out Maria Chin's charge' (Free Malaysia Today, 7 September 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/09/07/appeals-court-strikes-out-maria-chins-charge/>> accessed 31 October 2016

3 V Anbalagan, 'Maria has to deal with earlier charge before next rally' (Free Malaysia Today, 27 October 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/10/27/chin-has-to-deal-with-earlier-charge-before-next-rally/>> accessed 31 October 2016

4 Stephanie Lee 'Lasimbang acquitted of organizing Bersih rally without permit' (The Star Online, 20 December 2016) <<http://www.thestar.com.my/news/nation/2016/12/20/lasimbang-acquitted-of-organising-bersih-rally-without-permit/>> accessed 27 February 2017

The pending constitutional challenge by seven individuals charged for participating in KitaLawan rally in 2015⁵ at the Federal Court was sent back to the sessions court for trial after the court decided the challenge posed by the seven accused was academic as the prosecution had not proved that there was a street protest⁶.

Besides the PAA, other laws are still being invoked as part of investigation against organizers of protests. Some of the laws that were mentioned as part of investigation include Section 505(b) of the Penal Code for public mischief, Section 124B of the Penal Code for activities detrimental to parliamentary democracy, the Sedition Act 1948 (for speeches given at rallies) and others.

Non-Governmental Organizations and Foreign Funding

Non-Governmental Organizations (NGOs) were once again victim of government (and government backed) harassment in 2016. Several NGOs and other entities including SUARAM and Bersih, the Malaysian Bar and MalaysiaKini were targeted for media attack after a document by Wikileaks highlighted Open Society Foundation (OSF) support for promoting free and fair elections in Malaysia. Despite the innocuous contents of the leak, right-wing NGOs⁷, non-state actors and the government of Malaysia and its ministers used it as a justification to kick-off a witch hunt against these NGOs.

The leaked document did not make any mention of Bersih, SUARAM and others who were highlighted by the Malaysian Government and did not contain anything that could remotely be considered to threaten parliamentary democracy or challenge the sovereignty of Malaysia⁸. Nevertheless, despite the absence of any substantive evidence and Bersih's transparent accounting of its budget and source of funds^{9,10}, the Royal Malaysian Police used this leaked document as a basis to arrest Maria Chin Abdullah and questioned many others in conjunction with foreign funding for Bersih.

On 3 November 2016, Jamal Yunus led a group of protestors to MalaysiaKini office demanding an explanation for the grant received by MalaysiaKini from OSF. The editor-in-chief, Steven Gan cordially invited Jamal Yunus and his delegation into MalaysiaKini's grounds to discuss the matter. Jamal Yunus claimed that the group he gathered that day was for peaceful discussion but then threatened to hold a bigger rally to demolish ('runtuh')¹¹ a portion of the building.

On 28 November, Persatuan Kesedaran Komuniti Selangor (EMPOWER)'s office was raided by

5 Those charged includes: Adam Adli, Mohd Fariz Abd Talib, Maria Chin, Mandeep Singh, MP Sim Tze Tzin, MP Chong Chien Jen and MP Julian Tan.

6 'Federal Court orders trial for seven before hearing PAA challenge' (Malay Mail Online, 10 October 2016) <<http://www.themalaymailonline.com/malaysia/article/federal-court-orders-trial-for-seven-before-hearing-paa-challenge>> accessed 31 October 2016

7 'NGO lodges report over Bersih's alleged foreign funding' (The Star Online, 2 November 2016) <<http://www.thestar.com.my/news/nation/2016/11/02/ngo-lodges-report-over-bersih-s-alleged-foreign-funding/>> accessed 22 February 2016

8 'Leaked doc: Soros has 'personal interest' M'sian GE' (MalaysiaKini, 31 October 2016) <<http://www.malaysiakini.com/news/361091>> accessed 22 February 2017

9 Shannon Teoh, 'Bersih reveals bank accounts of donors' (The Straits Times, 7 October 2015) <<http://www.straitstimes.com/asia/se-asia/bersih-reveals-bank-accounts-of-donors>> accessed 22 February 2017

10 Bersih, 'Presentation of BERSIH's Income and Financial Statement Call for Contribution' (Bersih, 27 October 2016) <<https://www.bersih.org/akauns16/>> accessed 22 February 2017

11 A Malay word that can be broadly translated as collapse, though in context can be interpreted as demolish or destroy, which Jamal Yunus denied saying – 'Malaysiakini editors explain OSF grant to Jamal over coffee' (MalaysiaKini, 3 November 2016) <<http://www.malaysiakini.com/news/361543>> accessed 22 February 2017

police with officers claiming that they were conducting investigations under SOSMA and refused the two staff members held inside access to any lawyers. EMPOWER was formerly the secretariat for Bersih 2.0 but were no longer serving in that capacity ever since Bersih 4¹².

Later in December, at the United Malay National Organization (UMNO) Annual General Meeting, Deputy Prime Minister Zahid Hamidi gave a rousing speech claiming that he was tasked by Prime Minister Najib Razak to deal with foreign elements trying to spark a revolution in a country. The foreign elements in his speech included SUARAM, Bersih, the Bar Council, MalaysiaKini and Sarawak Report¹³.

Following the visit by UN Special Rapporteur on right to freedom of peaceful assembly and of association Maina Kiai and his comments about the situation in Malaysia, Deputy Home Minister, Nur Jazlan described his statement and comment as ‘interfering in Malaysia’ and reaffirmed the claim that Maina’s actions gave grounds for the police to investigate groups or NGOs that receive foreign funding.¹⁴

Following these statements by the ministers, no further investigations or arrests took place with regard to the issue of foreign funding of Malaysian NGOs.

List of individuals called for questioning or arrested¹⁵ in relation to peaceful assemblies in 2016

No	Names	Event	Investigated On
1	Amir Abdul Hadi ¹⁶	Anti-TPP Rally	23 January 2016
2	Sevan Doraisamy ¹⁷	May Day Rally	19 May 2016
3	S. Arutchelvan	May Day Rally	19 May 2016
4	V. Selvam	May Day Rally	19 May 2016
5	Nadzirah Yaakop ¹⁸	Solidarity for Khalid Ismath	26 May 2016
6	Anis Syafiqah Mohd Yusof ¹⁹	Tangkap MO1	1 September 2016

12 ‘Police raid Empower office and take copies of financial records’ (The Star Online, 29 November 2016) <<http://www.thestar.com.my/news/nation/2016/11/29/police-raid-empower-office-and-take-copies-of-financial-records/>> accessed 23 February 2017

13 ‘At Umno AGM, Zahid steers task force from 1MDB to ‘yellow revolution’ (MalaysiaKini, 3 December 2016) <<http://www.malaysiakini.com/news/365081>> accessed 22 February 2017

14 Kow Gah Chie, ‘Nur Jazlan: UN rep’s ‘meddling’ justifies foreign funding probe’ (MalaysiaKini, 6 December 2016) <<http://www.malaysiakini.com/news/365282>> accessed 23 February 2017

15 Arrests are denoted in shaded cell

16 ‘Activist freed after arrest at anti-TPP rally’, (Malay Mail Online, 23 January 2016) <<http://www.themalaymailonline.com/malaysia/article/activist-freed-after-arrest-at-anti-tpp-rally>> accessed 14 October 2016

17 Ram Anand, ‘Cops question organisers over May Day rally’ (Malay Mail Online, 19 May 2016) <<http://www.themalaymailonline.com/malaysia/article/activist-freed-after-arrest-at-anti-tpp-rally>> accessed 14 October 2016

18 Yiswaree Palansamy, ‘Candlelight vigil for hubby lands activist’s wife in soup with cops’ (Malay Mail Online, 26 May 2016) <<http://www.themalaymailonline.com/malaysia/article/candlelight-vigil-for-hubby-lands-activists-wife-in-soup-with-cops>> accessed 14 October 2016

19 M. Kumar, ‘Police quiz 9 over ‘Tangkap MO1’ rally (The Star Online, 1 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/01/police-quiz-9-over-tangkap-mo1-rally/>> accessed 14 October 2016

7	Aqilah Zainuzi	Tangkap MO1	1 September 2016
8	Luqman Hakim	Tangkap MO1	1 September 2016
9	Luqman Nul Hakim	Tangkap MO1	1 September 2016
10	Suhail Wan Azahar	Tangkap MO1	1 September 2016
11	Asheeq Ali	Tangkap MO1	1 September 2016
12	Teo Kok Seong	Tangkap MO1	1 September 2016
13	Nik Nazmi Nik Mat	Tangkap MO1	1 September 2016
14	Amir Abdul Hadi	Tangkap MO1	1 September 2016
15	Khairul Najib	Tangkap MO1	1 September 2016
16	Isiah Jacob	Tangkap MO1	1 September 2016
17	Howard Lee ²⁰	Tangkap MO1	1 September 2016
18	Maria Chin Abdullah	Tangkap MO1	6 September 2016
19	Hishamuddin Md Rais	Tangkap MO1	6 September 2016
20	A Samad Said	Tangkap MO1	6 September 2016
21	Rozen Azen Mat Rasip	Tangkap MO1	6 September 2016
22	Adam Adli	Tangkap MO1	6 September 2016
23	Tian Chua	Tangkap MO1	6 September 2016
24	Salleh	Bersih 5 Convoy ²¹ (Johor Bahru)	11 October 2016
25	Terrance Naidu	Bersih 5 Convoy (Teluk Intan)	13 October 2016
26	Azwan Ramli	Bersih 5 Convoy (Teluk Intan)	13 October 2016
27	Anida Osman	Bersih 5 Convoy (Teluk Intan)	13 October 2016
28	Maria Chin ²²	Bersih 5 Convoy (Sabah)	29 October 2016
29	Maria Chin	Bersih 5 Eve	18 November 2016
30	Mandeep Singh	Bersih 5 Eve	18 November 2016
31	Anis Syafiqah	Bersih 5 Eve	18 November 2016

20 Chris Lau, 'DAP Rep Howard Lee quizzed on organisation of TangkapMO1 rally' (MalaysiaKini, 5 September 2016) <<http://www.malaysiakini.com/news/354719>> accessed 14 October 2016

21 Unfortunately, due to the scale of investigations that took place as part of Bersih 5 Convoy, Full list of those investigated throughout Bersih 5 Convoy is difficult to ascertain

22 NOTE: Maria Chin was arrested for questioning under the Printing Presses and Publications Act 1984: FMT Reporters, 'Bersih Leader Maria freed on police bail' (Free Malaysia Today, 29 October 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/10/29/bersih-leader-maria-arrested-under-press-law/>> accessed 31 October 2016

32	Anthony Loke	Bersih 5 Eve	18 November 2016
33	Ronnie Liu	Bersih 5 Eve	18 November 2016
34	Jimmy Wong	Bersih 5 Eve	18 November 2016
35	S. Arutchelvan	Bersih 5 Eve	18 November 2016
36	Luqman Nul Hakim	Bersih 5 Eve	18 November 2016
37	Lee Khai Ming	Bersih 5 Eve	18 November 2016
38	Safwan Anang	Bersih 5 Eve	18 November 2016
39	Razali Zakaria	Red Shirt @ Bersih	18 November 2016
40	Ariffin Abu Bakar ²³	Red Shirt @ Bersih	18 November 2016
41	Hishamudin Rais ²⁴	Bersih 5	19 November 2016
42	Fahmi Reza	Bersih 5	19 November 2016
43	Tian Chua	Bersih 5	19 November 2016
44	Zuraida Kamaruddin	Bersih 5	19 November 2016
45	Howard Lee	Bersih 5	19 November 2016
46	Tony Siew Teck Choon	Bersih 5	19 November 2016

Other arrests that took place during peaceful assemblies in 2016 included:

No	Names	Event	Investigated On	Offence
1	Zhafran Muhammad Zuhdi	Anti-GST Rally	2 April 2016 ²⁵	Section 504 Penal Code
2	5 Individuals ²⁶	Cheras Hartamas Pylon	9 August 2016 ²⁷	Section 186 Penal Code
3	Tony Siew Teck Choon	Bersih 5	19 November 2016	Section 143 of Public Aviation Rules

²³ 'More arrests on Bersih 5 eve, Maria and Mandeep may miss rally, Red shirts leader missing' (Malay Mail Online, 18 November 2016) <<http://www.themalaymailonline.com/malaysia/article/more-arrests-on-bersih-5-eve-red-shirts-leader-missing>> accessed 22 February 2017

²⁴ 'Tian Chua, Zuraida nabbed after Bersih 5 rally' (Malay Mail Online, 19 November 2016) <<http://www.themalaymailonline.com/malaysia/article/tian-chua-zuraida-nabbed-after-bersih-5-rally>> accessed 22 February 2017

²⁵ Zhafran was remanded for 2 days.

²⁶ 'Cheras residents arrested after 'human shield' against TNB Pylon' (MalaysiaKini, 9 August 2016) <<http://www.malaysiakini.com/news/351691>> accessed 14 October 2016

²⁷ Released on the same day.

#BantahTPPA Rally

In January 2016, one of the first public rallies of the year took place in Kuala Lumpur. Two groups with different political and ideological stances took a stand together (though at different locations) against the Trans-Pacific Partnership Agreement (TPPA). Both groups gathered peacefully in Kuala Lumpur calling for the Malaysian Government to reject the TPPA.

After the conclusion of the rally, SUARAM's coordinator, Amir Abd Hadi who was invited on stage to say a few words was arrested by the police for suspicion of being a member of the anarchist group and inciting members of the public. He was released later in the evening with no further actions taken against him.



Amir Abd Hadi (right), SUARAM's coordinator confronted by police after #BantahTPPA [Mandeep Singh (left) reaching out for help for Amir]

Marxism Kilat

In February 2016, the event organized by Socialist Party of Malaysia (PSM) and the Malaysian Left Coalition (MLC) on Marxism titled 'Kursus Kilat Marxisme' was cancelled after it was challenged by the Royal Malaysian Police with the Inspector-General of Police calling it an effort to promote communist ideology²⁸.

28 Victoria Brown, 'IGP: No to Marxism course' (The Star Online, 28 February 2016) <<http://www.thestar.com.my/news/nation/2016/02/28/igp-no-to-psm-marxism-course/>> accessed 22 February 2017

May Day Celebration

The 2016 May Day celebration took place with little action by the Royal Malaysian Police. Despite the absence of any objections during the meeting between the police and organizers, three individuals who were identified as organizers of the celebration were called for questioning. The three included, Sevan Doraisamy, Executive Director of SUARAM, S. Arutchelvan and V. Selvam. No further action was taken against them after the summons for questioning.

Artist Protesting the Demolition of Puncak Purnama

On 16 August 2016, a group of artists came together to protest against the demolition of the iconic Puncak Purnama (Lunar Peaks) sculpture. As part of their submission of memorandum to SUHAKAM, the group marched from SOGO to Menara TH Perdana in Kuala Lumpur. The demand by the group includes the ratification to the International Covenant on Economic Social and Cultural Rights and the formation of a special advisory board related to arts by the city council²⁹.



Artists protesting demolition of Puncak Purnama

Cheras Hartamas Pylon Debacle

The community of Taman Cheras Hartamas had been protesting the construction of high voltage pylons that envelope their residential estate. Their attempts to negotiate a solution with relevant state authorities and Tenaga Nasional Berhad (TNB) came to nought and the the community were forced to protest the construction of the pylons. They called for the work to be halted pending further negotiation and discussions.

²⁹ Rahmah Ghazali, 'Art activists slam demolition of Puncak Purnama' (16 August 2016, The Star Online) <<http://www.thestar.com.my/news/nation/2016/08/16/art-activists-protest-against-demoliton/>>accessed 10 April 2017

On 9 August 2016, despite complying with police instructions, five members of the community were detained for allegedly obstructing a public official under Section 186 of the Penal Code. Due to the close proximity between the pylons and the local residences, the community members were effectively arrested in their own backyard. Subsequently all five community activists were called for questioning by the Forestry Department for alleged trespass. After a few months, five of them were charged in Kajang Magistrate Court for offences under Section 186³⁰ of the Penal Code.



Executive Director of SUARAM, Sevan Doraisamy (centre) and PSM Secretary General, A. Sivarajan (right) speaking with TNB contractor on the construction of Cheras Hartamas Pylon

MICCC rally against Astro

Following Astro's (a popular local satellite TV operator) failure to respond to the request by Malaysian Indian Creative Content Council (MICCC) to increase screening of locally made Tamil contents, the council organized a small rally in front of Astro headquarters in Bukit Jalil³¹ to protest against Astro for its resistance to screening more local-made Tamil films. Despite providing due notice as obliged under the PAA, there was a moment of tension when the police officer in charge at the scene deployed the Light Strike Force and threatened to arrest participants of the rally if they did not disperse. The tension was defused following successful negotiation by activists at the scene.

30 'Five residents of Taman Cheras Hartamas charge with obstructing public officers' (Malay Mail Online, 6 December 2016) <<http://www.themalaymailonline.com/malaysia/article/five-residents-of-taman-cheras-hartamas-charged-with-obstructing-public-off>> accessed 20 December 2016

31 Chris Lau 'Protestors want more local Tamil content; Astro says already investing heavily' (MalaysiaKini, 2 September 2016) <<http://www.malaysiakini.com/news/354425>> accessed 20 February 2016



Light Strike Forced deployed in front of Astro headquarters during protests by content creators

#TangkapMO1 Rally

The #TangkapMO1 rally was led by several student activists across the country. The rally was called following the revelations by the United States Department of Justice³² that a Malaysian Official Number 1 was complicit in the siphoning of funds from 1 Malaysian Development Berhad (1MDB).

The protest concluded after a short march from SOGO to Dataran Merdeka. Minor scuffles occurred following a minor misunderstanding between participants and a pick-up truck owner parked near the final gathering point. After the event, almost all of the student activists³³ who were at the rally were called for questioning. Individuals and politicians who commented during the rally were also called for questioning.

While none of the alleged organizers or speakers were prosecuted, some of the students who were identified as leading or participating in the #TangkapMO1 rally have been subjected to disciplinary actions by their respective universities. Anis Syafiqah, Mohd Luqman Hakim Fazil and Mohamad Luqman Nul Haqim Zul Razali were found to be in breach of the University rules and regulations and were suspended for one semester and fined. Suhail Wan Azhar, another student from University Malaya was also found in breach of the regulations but was only punished with fines³⁴.

32 Department of Justice, 'United States Seeks to Recover More Than \$1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund' (Department of Justice, 20 July 2016) <<https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign>> accessed 1 March 2016

33 Refer to table above

34 Ariv Chelvam 'Anis suspended one semester, fined for 'Tangkap MO1' rally' (MalaysiaKini, 15 December 2016) <<http://www.malaysiakini.com/news/366245>> accessed 27 March 2017

Bersih 5 Convoy

The start of the Bersih Convoy on 1st October 2016 marked a change in the Malaysian government's strategy toward peaceful assemblies. Throughout the Bersih 5 convoy, the far-right 'Red Shirts' led by Jamal Yunus harassed and physically harmed participants of the Bersih 5 convoy. On the media front, Jamal Yunus portrayed himself as an independent agent unrelated to the ruling party UMNO although he acknowledged the fact that he is the Sungai Besar UMNO division chief and that many of his supporters are UMNO members³⁵.

Actions by the 'Red Shirts' included the clash between Bersih 5 convoy participants and members of the 'Red Shirts' following Jamal Yunus attempt to grab a Bersih banner which resulted in minor scuffles³⁶ in Teluk Intan; assaulting a Bersih 5 convoy participant at Sabak Bernam³⁷; threats to start a racial riot in response to Bersih's planned activity on the 19th November³⁸; making accusations that Bersih has links to the Islamic State³⁹; and making scathing remarks against the Royal Malaysian Police for safeguarding the Bersih 5 convoys.⁴⁰

Maria Chin Abdullah, chairperson of Bersih 2.0 was also threatened by Mohd Ali Baharom for organizing Bersih 5 rally.⁴¹ Apart from the open threats mentioned above, Maria Chin (and her family members), Ambiga Sreenevasan and Mandeep Singh were sent death threats via messaging services. Maria Chin's family also had red paint splashed onto their car⁴². On top of the harassment by non-state actors, on 28 October Maria Chin Abdullah, chairman of Bersih 2.0 was detained at the Kota Marudu police station in Sabah for distributing leaflets but was fortunately released after questioning.⁴³

The leader of the 'Red Shirts' Jamal Yunus was arrested and remanded for a period of two days over an alleged Facebook post under his account that incited racial disharmony between the Malay and Chinese communities. He was subsequently released and no reports of further investigations have been made known to the public⁴⁴.

35 'Many 'Red Shirts' supporters from Umno, Jamal Yunus admits' (Malay Mail Online, 13 October 2016) <<http://www.themalaymailonline.com/malaysia/article/many-red-shirts-supporters-from-umno-jamal-yunos-admits>> accessed 14 October 2016

36 Geraldine Tong, 'Bersih and red shirts clash in Teluk Intan' (MalaysiaKini, 1 October 2016) <<http://www.malaysiakini.com/news/357586>> accessed 14 October 2016

37 'Red Shirts wanted for alleged assault', (The Star Online, 9 October 2016) <<http://www.thestar.com.my/news/nation/2016/10/09/red-shirts-wanted-for-alleged-assault/>> accessed 14 October 2016

38 Hani Shamira Shahrudin, 'IGP slams Jamal Yunus' May 13 pledge, says police will take action' (New Straits Times Online, 9 October 2016) <<http://www.nst.com.my/news/2016/10/179198/igp-slams-jamal-yunos-may-13-pledge-says-police-will-take-action>> accessed 14 October 2016

39 Sumisha Naidu, 'Malaysia's Red Shirts leader says IS elements in Bersih', (Channel News Asia, 4 October 2016) <<http://www.channelnewsasia.com/news/asiapacific/malaysia-s-red-shirts-leader-says-is-elements-in-bersih/3178560.html>> accessed 14 October 2016

40 'Jamal Yunus: Police treating Red Shirts like 'anjing kurap' (Malay Mail Online, 9 October 2016) <<http://www.themalaymailonline.com/malaysia/article/jamal-yunos-police-treating-red-shirts-like-anjing-kurap>> accessed 14 October 2016

41 Ali Tinju claims misquoted over 'threat against Maria' (MalaysiaKini, 21 September 2016) <<http://www.malaysiakini.com/news/356377>> accessed 14 October 2016

42 FMT Reporters, 'Maria Chin unafraid of death threats', (Free Malaysia Today, 18 October 2016) <<http://www.freemalaysiatoday.com/category/videos/2016/10/18/maria-chin-unafraid-of-death-threats-2/>> accessed 31 October 2016

43 Ruben Sario, 'Maria Chin released after arrest in Sabah' (The Star Online, 29 October 2016)

44 Bernama, 'Red Shirts leader Jamal released on police bail' (The Sun Daily, 20 October 2016) <<http://www.thesundaily.my/news/2010489>> accessed 23 November 2016

The response by the Royal Malaysian Police to the Red Shirts and their threats against Bersih 5 Convoy has been fairly positive and commendable⁴⁵. Police on duty have on many occasions prevented the Red Shirts' attempts to physically confront Bersih 5 convoy participants and provided escorts to the Bersih 5 convoy. Nevertheless, there is room for improvement for in some cases, police intervention only came after overt attempts to assault and cause harm by the 'Red Shirts'. The lack of further actions and the absence of any criminal prosecutions against the 'Red Shirts' is lamentable. This tolerance of the violence and threats by the 'Red Shirts' puts the credibility of the police force and the Attorney General Chamber into doubt and creates the impression that the state is supportive of the actions of Jamal Yunus and his Red Shirts.

Bersih 5 Main Event

One of the largest peaceful protests in Malaysia took off after a rocky start following the arrest of Maria Chin Abdullah under SOSMA on the day prior to Bersih 5⁴⁶. Mandeep Singh, the manager for Bersih was also arrested although he was only subjected to detention under the Criminal Procedure Code. All Bersih 2.0 computers were confiscated during the raid on its office on 18 November 2016.⁴⁷ Furthermore, contrary to established practice, no search list⁴⁸ was provided after the raid and lawyers representing Maria and Mandeep were ousted from the office during the search. In the press conference that took place almost a week after Maria's detention, the Inspector-General of Police claimed that Maria Chin Abdullah was detained for possessing documents that were detrimental to parliamentary democracy.⁴⁹

After the arrest and detention of Maria and Mandeep, the police went on to detain 13 other individuals⁵⁰. Some were detained at their homes in the evening while others were detained on their way to other events. Other activists were subjected to police raids and their identifications recorded⁵¹. Those arrested includes personalities⁵² who supported Bersih 5 as well as the Red shirts leader Jamal Yunos and one his supporters.

The Bersih 5 rally

The rally itself went on without any serious incidents. Despite the pre-rally crackdown, a crowd of over 40,000 protesters gathered around Kuala Lumpur and eventually congregated at Kuala Lumpur City Centre (KLCC) to demand free and fair elections. The Red Shirt supporters were estimated at around 4,000 but was fortunately prevented from engaging with or harassing Bersih 5 participants. The professional conduct of the Royal Malaysian Police (PDRM) was commendable

45 An exception in Sabah where participants distributing leaflet had their identity recorded by the police

46 Hani Shamira Shahrudin 'Maria Chin arrested on eve of Bersih 5 Rally' (New Straits Times, 18 November 2016) <<http://www.nst.com.my/news/2016/11/189867/maria-chin-arrested-eve-bersih-5-rally>> accessed 30 January 2017

47 Mandeep Singh's cellphone remains in police possession - footnote

48 Borang Bongkar or search list is produced at the end of the raid in order to ascertain the items that have been seized. The search list also serves as an important piece of evidence before the court to render the items seized as admissible evidence.

49 'Full press conference by IGP on Maria Chin's arrest' (The Star Online, 24 November 2016) <<http://www.thestar.com.my/videos/2016/11/24/full-press-conference-by-igp-on-maria-chins-arrest/>> accessed 15 January 2017

50 Listed in table earlier in the chapter

51 Curiously, they were not arrested after their identification cards were taken and recorded.

52 'Jamal finally nabbed with 12 others in pre-rally arrests' (Malaysiakini, 18 November 2016) <<https://www.malaysiakini.com/news/363368>> accessed 23 November 2016

as they successfully prevented any untoward incidents.⁵³ Road blocks were set up all over Kuala Lumpur but this did not stop the supporters from taking alternative routes to reach the final point of the rally. Five individuals were arrested during the rally itself.⁵⁴

Immediately after the rally ended, Fahmi Reza, political graphic designer was arrested⁵⁵. PKR MPs Tian Chua, Zuraida Kamarudin and several other members of opposition were also arrested during and after Bersih 5⁵⁶. Tian Chua was arrested under section 147 of the Penal Code for rioting while Zuraida's charge was not known. Those who were arrested were remanded and subsequently released in stages after their remand period ended. Maria Chin Abdullah was unfortunately not released with the other activists and remained under SOSMA detention until 28 November 2016.

#BebasMaria campaign

In response to Maria's detention under SOSMA, civil society held nightly vigils at Dataran Merdeka calling for Maria's release. Initial response by city council, DBKL was accommodating but this was short-lived as the Mayor of Kuala Lumpur closed off Dataran Merdeka from public access after the first night of candlelight vigil. On the second night, the vigil was allowed to take place on the main road by Dataran Merdeka, while on the third night onwards, the vigil was forced to take place around the intersection between Dataran Merdeka and Royal Selangor Club⁵⁷.

The Inspector-General of Police soon issued a statement on the vigil and stated that the police would '... take action against any rallies that go against the laws of the country including the group burning candles at Dataran Merdeka.'⁵⁸ His warning was ignored by the protesters so the Inspector-General of Police issued another statement, warning those attending the vigil to be prepared for police action.⁵⁹ Fortunately, the threats were not carried out and the vigils carried on with minimal interference until Maria's release.

On 22 November 2016, Member of Parliaments staged a march from Parliament to Bukit Aman demanding the release of Maria and for Parliamentarian's rights to be safeguarded⁶⁰. Women rights groups and activists also organized a women's march for Maria on 24th November 2016.⁶¹ The group's representative, Datuk S. Ambiga, Ivy Josiah and Datuk Noor Farida Ariffin were allowed to enter and submit a petition to Minister Shahidan Kassim.

53 Unfortunately, the professionalism shown during the Bersih 5 rally is overshadowed by the crackdown against human rights defenders and activists the night before.

54 Based on SUARAM Urgent Arrest Records. Included in table earlier in the chapter

55 Dina Murad, 'Bersih 5 : Fahmi Reza detained at the end of rally' (The Star Online, 19 November 2016) <<http://www.thestar.com.my/news/nation/2016/11/19/bersih-5-fahmi-reza-detained-at-end-of-rally/>> accessed on 23 November 2016

56 FMT Reporters 'Tian Chua and Zuraida arrested'(Free Malaysia Today, 20 November 2016). <<http://www.freemalaysiatoday.com/category/nation/2016/11/20/tian-chua-and-zuraida-arrested/>> accessed on 23 November 2016

57 Koh Jun Lin, 'DBKL arah peserta gesa bebas Maria kosongkan Dataran Merdeka' (MalaysiaKini, 23 November 2016) <<http://www.malaysiakini.com/news/363811>> accessed 22 February 2017

58 Mohamad Fadli, 'IGP: Burning candles at night also requires notice' (Free Malaysia Today, 23 November 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/11/23/igp-burning-candles-at-night-also-requires-notice/>> accessed 22 February 2017

59 Lee Choon Fai, 'Police to crackdown on candlelight vigils' (The Sun Daily, 25 November 2016) <<http://www.thesundaily.my/news/2074020>> accessed 22 February 2017

60 Terrance Tan, 'MPs in protest march from Parliament to Bukit Aman' (Free Malaysia Today, 22 November 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/11/22/mps-march-to-bukit-aman-demanding-marias-release/>> accessed 22 February 2017

61 'Women march to Parliament 'For Maria' (The Star Online, 24 November 2016) <<http://www.thestar.com.my/news/nation/2016/11/24/women-march-to-parliament-for-maria/>> accessed 20 February 2017

Fortunately, Maria was released on 28 November 2016. The police declined to elaborate on her early release and the release of Maria prior to the 28th day was previously unheard of in SUARAM's documentation of SOSMA cases. The day after her release, Maria received another death threat (though the letter could have been sent prior to her arrest) from an anonymous sender, and another threat of arrest was made by the Inspector-General of Police for possible investigation under PAA.

Orang Asli Blockade at Gua Musang, Kelantan

The struggle of the indigenous peoples in Northern Malaysia escalated in late 2016 following the decision by the state forestry department in Kelantan to dismantle by force the blockade preventing logging activities. The first hint of violence occurred in September 2016 when activists manning the blockade were assaulted by thugs who claimed to be police officers. Firearms were used to intimidate the activists manning the blockade. The same group of thugs subsequently used chainsaws to cut through the barricade while the activists were still holding on to the blockade.⁶²

After rebuilding the blockade, subsequent clashes led by the forestry department and other public authorities resulted in the arrest of 47 activists from the indigenous community. They were detained at Simpang Petei and Pos Bihai. Seventeen of the activists detained were remanded for two days and the rest were remanded for three days. They were arrested for alleged offences under Section 32, Section 47 and Section 81 of National Forest Act 1984 for trespassing and occupying forest reserve without permission.⁶³ Despite the arrests, Kelantan Police Chief claimed that the activists had not been arrested but were held to have their statements taken.⁶⁴ The state forestry department similarly claimed that there were no 'untoward incidents' when they removed the barricades.⁶⁵

Barely a few days after, another seven indigenous activists were detained at another blockade. On 7 December, the Youth Wing of PAS Kelantan lodged a police report against Siti Kassim, an activist well known for advocating and supporting activists from the indigenous communities for allegedly inciting the community to hate and oppose the federal and state governments.⁶⁶ The struggle for the communities' right to livelihood continued unabated until the end of the year and has continued into 2017.

Conclusion and Recommendations

One could arguably describe the overall situation relating to the freedom of assembly in 2016 as an improvement from previous years although that cannot be said for the situation faced by the indigenous peoples especially in Kelantan. The change in approach by the Royal Malaysian Police in engaging with civil society over peaceful assemblies is a welcome change. The Police

62 Danial Albakri, 'Orang asli activists lodge police report following 'arrest' by thugs' (The Star Online, 29 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/29/orang-asli-activists-lodge-report/>> accessed 23 February 2017

63 Akmaliah Razak, '47 Orang Asli ditahan reman' (Sinar Online, 30 November 2016) <<http://www.sinarharian.com.my/semasa/47-orang-asli-ditahan-reman-1.592697>> accessed 23 February 2017

64 Bernama '16 Orang Asli Activists detained, blockade dismantled' (Berita Daily, 30 November 2016) <<http://www.beritadaily.com/16-orang-asli-activists-detained-blockade-dismantled/>> accessed 23 February 2017

65 Ashley Tang & Syed Azhar '41 orang asli arrested in operation at Gua Musang barricades' (The Star Online, 29 November 2016) <<http://www.thestar.com.my/news/nation/2016/11/29/orang-asli-gua-musang-arrested/>> accessed 23 February 2017

66 'Kelantan PAS Youth wants Siti Kasim arrested for 'inciting' Orang Asli blockade' (Malay Mail Online, 23 March 2017) <<http://www.themalaymailonline.com/malaysia/article/kelantan-pas-youth-wants-siti-kasim-arrested-for-inciting-orang-asli-blockade>> accessed 7 December 2016

should continue developing a non-violent approach in engaging with civil society over peaceful assemblies. They should put an end to the new trend of ‘investigating’ and questioning organizers or those perceived to be organizers at the conclusion of peaceful assemblies.

Public authorities such as the DBKL must put an end to its ‘claim’ over its ownership of Dataran Merdeka as a venue for peaceful assemblies. Dataran Merdeka and other public locations are not the ‘private’ property of the city council but belong to the people. The arbitrary closing of Dataran Merdeka at the whim of the Mayor of Kuala Lumpur is an affront to freedom of assembly and is nothing more than an attempt to derail peaceful assemblies at the location.

The government of Malaysia should take note of the commentaries and observations by UN Special Rapporteur, Maina Kiai during his visit to Malaysia in 2016. He highlights Malaysia’s obligation to protect all human rights defenders; that the access to funding is vital to freedom of association; and that human rights work such as those conducted by Bersih and Suaram is not political but arresting and harassing such NGOs is political.⁶⁷

Furthermore, the actions by state forestry departments against indigenous communities and the Cheras Hartamas community for alleged trespass into forest reserve highlight the fact that the obligation to protect and promote freedom of assembly does not only fall under the Federal Government and its agents. State based authorities such as the state forestry department have disrupted peaceful assemblies and violated human rights. Thus, State governments must ensure that their local enforcement agencies and state level laws and regulations comply with international human rights standards and norms.

⁶⁷ ‘UN Experts call on Malaysia to stop targeting human rights defenders under national security legislation’ (United Nations Human Rights Office of the High Commissioner, 9 December 2016) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21005&LangID=E>> accessed 23 February 2017



**FREEDOM OF
RELIGION**

FREEDOM OF RELIGION

Freedom of religion and belief in Malaysia continued to be challenged and suppressed in 2016. The unexpected support for PAS's private member bill on Hudud law by the ruling party reignited the old controversy between political parties on the issue of hudud amendments. The new challenge posed by the possible amendment and strengthening of Sharia provisions in Malaysia also threatens to further aggravate the current predicament of those Malaysians who are faced with unilateral conversion of minors, freedom to choose their own faith and criminalization of marginalized communities or vulnerable groups by religious authorities.

Unilateral Conversion

The case of unilateral conversion by M. Indira Gandhi continued into 2016 following a successful appeal to the Federal Court in May 2016 which allowed her to challenge the validity of the unilateral conversion of her three children.

Similar cases include that of Rosliza Ibrahim who was born out of wedlock to a Muslim father but lived her life as a Buddhist while being registered as a Muslim¹, and the case of Lee Chang Yong and Teng Wai Yee in which the mother unilaterally converted her child to Islam during the divorce proceedings².

On the issue of unilateral conversion, Tourism and Culture Minister Nazri Aziz intimated that there would be a bill to amend the Law Reform (Marriages and Divorce) Act 1976 that would supposedly resolve the issue of unilateral child conversions. To date, the proposed amendment has yet to be tabled in Parliament.

1 Zurairi Ar, 'Born out of wedlock to a Muslim father, woman refuses to be subject to Shariah laws' (Malay Mail Online, 11 October 2016) <<http://www.themalaymailonline.com/malaysia/article/born-out-of-wedlock-to-a-muslim-father-woman-refuses-to-be-subject-to-shari>> accessed 14 October 2016

2 Ho KitYen, 'Court to decide on child conversion custody case on Oct 11' (Free Malaysia Today, 4 October 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/10/04/court-to-decide-on-child-conversion-custody-case-on-oct-11/>> accessed 14 October 2016

Conversion from Islam

On 24 March 2016, the High Court in Kuching allowed a Bidayuh man, Roneey Rebit who had been converted to Islam as a child to renounce Islam and be recognized as a Christian. In this case, the judge based her decision on Article 11 of the Federal Constitution which guarantees the freedom of religion. This has repercussions for Muslims who had previously been prevented from leaving Islam³. In this case, the National Registration Department (NRD) posed no further challenges or appeal following the intervention by the Chief Minister of Sarawak⁴. It so happened that this case occurred during the Sarawak State election which might have influenced the Chief Minister's decision not to appeal.

Unfortunately, not all quarters were happy with the intervention by the Chief Minister and the Prime Minister. While this development is certainly welcome by many in Malaysia, the reality remains that the case was heard in Sarawak with a markedly different political climate of tolerance and acceptance. The unique circumstances surrounding the case of Roneey Rebit makes it questionable for the success to be replicated elsewhere in Malaysia.

Intolerance against Minority Groups

Persecution of religious minorities in Malaysia such as Shia Muslims continued in 2016. As noted in the section on Freedom of Expression above, many of the books banned were labelled as 'deviationist' teachings. Faisal Tehrani's writings which are alleged by the Home Ministry to be spreading Shia teachings⁵ remain banned.

In October 2016, Selangor religious authorities (JAIS) arrested 50 Pakistan nationals who are believed to be Shia Muslim at Batu Caves⁶. Two more were also arrested in Malacca for allegedly displaying a banner with the word 'Hussain' inscribed on it.

On 20 November 2016, the Religious Affairs Department of Melaka arrested 29 individuals who were alleged members of Al Ansar Imam Mahdi group. The leader of the group who is allegedly a follower of the Shia teaching was also detained as part of this operation⁷. Most of them were released on bail on 21 November⁸ and they were investigated under Section 63 of the Melaka's Syariah Criminal Offences Enactment 1991 which stipulates that those convicted of insulting Islam can be sentenced to 3 years' imprisonment or RM5,000 fine.

Apart from the sporadic arrests, detention and harassment of the Shia' community, the Kedah mufti proposed that the Security Offences (Special Measures) Act 2012 - a law that was supposed

3 Anasathia Jenis, 'High Court allows convert to renounce Islam' (Borneo Post, 25 March 2016) <<http://www.theborneopost.com/2016/03/25/high-court-allows-convert-to-renounce-islam/>> accessed 14 October 2016

4 FMT Reporters, 'Adenan: NRD to withdraw appeal on Roneey Rebit case' (Free Malaysia Today, 2 May 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/05/02/adenan-nrd-to-withdraw-appeal-on-roneey-rebit-case/>> accessed 14 October 2016

5 Hidir Reduan, 'Novelist Faisal Tehrani seeks to overturn book ban' (New Straits Times Online, 23 December 2015) <<http://www.nst.com.my/news/2015/12/118685/novelist-faisal-tehrani-seeks-overturn-book-ban>> accessed 14 October 2016

6 Aedi Asri 'Jais arrests 50 Pakistani Shia Muslim' (Free Malaysia Today, 12 October 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/10/12/jais-arrests-50-pakistani-shia-muslims/>> accessed 14 October 2016

7 Nurul Fhatihah Zakinan, 'JAIM serbu markas Syiah, 29 ditahan' (Berita Harian, 20 November 2016) <<http://www.bharian.com.my/node/215022>> accessed 15 April 2017

8 Oleh Fairuz Zaidan, '16 anggota 'Al Ansar Imam Mahdi' dibebas' (Berita Harian, 21 November 2016) <<http://www.bharian.com.my/node/215288>> accessed 15 April 2017

to be for combatting the security threat and terrorism - should include provisions that can tackle individuals suspected of the teaching and spreading of Shia in Malaysia⁹. The statement was made at the National Security Dialogue Session at Home Ministry Hall in Alor Setar. The mufti in question, Sheikh Marwazi said the state mufti department was studying the matter of curbing the teaching of Shia as the Shia extremist movement could lead to Muslims joining militant groups but he claimed that the spread of Shia teaching was under control in Kedah.

Introduction of the Hudud Bill

The controversial Hudud bill which was introduced in the May 2016 parliament sitting with the support from the ruling party raised concerns about the possibility that the proposed amendments could be passed. Immediately after the introduction of the Hudud Bill, parties from both sides of the political divide voiced concerns over the proposed amendments¹⁰.

The Pan Islamic Party (PAS) president, Datuk Seri Abdul Hadi Awang maintains that the private member's bill he has tabled in Parliament is merely intended to expand the range of punishments by the Shariah courts and is not meant to introduce Hudud law in Kelantan. He reiterated that the proposed amendment concerns only Muslims and that non-Muslims will not be affected by it¹¹.

The support shown by UMNO for the bill in the May 2016 Parliament sitting was again reflected in the October 2016 Parliament sitting. While the controversial amendment was presented in Parliament, debate was halted by the speaker right before the conclusion of the March 2017 Parliament sitting.

Interfaith Activities

In July, a catholic church in Petaling Jaya cancelled an interfaith 'buka puasa' (breaking of fast) event after an alleged complaint had been made to the police. It was reported that a police officer notified the church that a police report had been made against the event and advised the church to be on guard¹². While the event was officially cancelled by the church, the breaking of fast continued with a smaller crowd in the evening¹³.

A few days later, the Inspector-General of Police (IGP) said that the police force was not involved in the cancellation of the event and claimed that there was no police report filed against the church. According to the IGP, the Selangor police contingent did not send any police officer to the church and suggested that police would not have discouraged the church from proceeding with the event¹⁴.

9 'Kedah Mufti department recommended an amendment on SOSMA' (Astro Awani, 19 August 2016) <<http://english.astroawani.com/malaysia-news/kedah-mufti-department-recommended-amendment-sosma-114440>> accessed 15 April 2017

10 Sumisha Naidu, 'UMNO backing PAS an 'act of desertion' against BN parties: MCA President (Channel News Asia, 27 May 2016) <<http://www.channelnewsasia.com/news/asiapacific/umno-backing-pas-an-act/2821492.html>> accessed 14 October 2016

11 Ram Anand, 'Hadi clarifies Bill not for hudud' (Malay Mail Online, 28 May 2016) <<http://www.themalaymailonline.com/malaysia/article/hadi-clarifies-bill-not-for-hudud>> accessed 14 October 2016

12 Ida Lim, 'PJ church nixes interfaith 'buka puasa' after police report lodged' (Malay Mail Online, 1 July 2016) <<http://www.themalaymailonline.com/malaysia/article/pj-church-nixes-interfaith-buka-puasa-after-police-report-lodged>> accessed 15 April 2017

13 'Interfaith buka puasa at church continues despite police report' (MalaysiaKini, 1 July 2016) <<http://www.malaysiakini.com/news/347403>> accessed 15 April 2017

14 Ida Lim 'No reason for cops to stop PJ church's 'buka puasa' event, IGP says' (Malay Mail Online, 4 July 2016) <<http://www.themalaymailonline.com/malaysia/article/no-reason-for-cops-to-stop-pj-churchs-buka-puasa-event-igp-says>> accessed 15 April 2017

Growing intolerance

Reflecting on the overall trend in 2016, there is a growing intolerance among conservative groups. While there has been no overt call for violence against members of religious minorities or against alleged 'deviants', the state indifference to this intolerance and the increasingly racialized and religious-based politics threatens to further restrict and compromise freedom of religion in Malaysia.

Furthermore, the incidence of individuals and organizations filing police reports for the alleged offence of insulting Islam seems to be getting more common. Notable cases include¹⁵, the police report filed by the Majlis Perundangan Pertubuhan Islam Malaysia (MAPIM) against a couple who allegedly insulted Islam through Facebook¹⁶ in May, the arrest of Namewee in August¹⁷ 2016, the series of arrest following the passing of Datuk Dr. Haron Din in September¹⁸, investigation against a woman who allegedly insulted Islam on Facebook in December¹⁹.

While these incidents have not resulted in any overt violence or conflict, the growing intolerance exhibited by these actions marks a dangerous decline that would only lead to growing tension in Malaysian society.

15 Details of some cases can be found in Chapter 2 on Freedom of Expression

16 'Hina Islam: Mapim buat laporan polis' (Sinar Harian, 19 May 2016) <<http://www.sinarharian.com.my/semasa/hina-islam-mapim-buat-laporan-polis-1.523099>> accessed 15 April 2017

17 Royce Tan, 'Namewee arrested' (The Star Online, 21 August 2016) <<http://www.thestar.com.my/news/nation/2016/08/21/namewee-arrested-klia/>> accessed 15 April 2017

18 'Hina Islam: Jeff Ooi diminta serah diri' (Utusan Online, 19 September 2016) <<http://www.utusan.com.my/berita/jenayah/hina-islam-jeff-ooi-diminta-serah-diri-1.384691>> accessed 15 April 2017

19 Zulhisham Isahak, 'Polis siasat wanita hina Islam' (Utusan Online, 20 December 2016) <<http://www.utusan.com.my/berita/jenayah/polis-siasat-wanita-hina-islam-1.422167>> accessed 15 April 2017



**FREE AND FAIR
ELECTIONS**

FREE AND FAIR ELECTIONS

By Wong Chin Huat (fellow, Penang Institute)

Introduction

Key to the maintenance of the electoral one-party state in Malaysia is the constituency redelineation process which enables excessive malapportionment and gerrymandering. This results in vast vote-seat disproportionality between the ruling coalition Barisan Nasional (BN) and the opposition, way more than what one would expect in a First-Past-The-Post (FPTP) system. In the last national election in 2013, the BN retained its power by winning 60% of parliamentary seats with a mere 47% of votes while the opposition coalition Pakatan Rakyat could only win 40% of seats with 51% of votes.

This chapter focuses on the constituency redelineation exercise for the states of Malaya and Sabah, which commenced on September 15, 2016 when the Election Commission (EC) published its Notice for such exercise. The redelineation exercise for Sarawak has already been completed on 19 December 2015 when the EC's final recommendations came in force. As the states of Malaya and Sabah are two separate "units of review", the exercises are being carried out through different paces as they encounter different challenges. Encountering very few challenges, the Sabah exercise finished its second round of display by December 21¹. In contrast, the exercise for the states of Malaya was held back by the legal challenge in the state of Selangor. The inquiry process was stopped for Selangor – incidentally the last state in the EC's schedule – first by an interim stay on November 28² which was extended on December 16 when the High Court granted the state's application for a judicial review on the redelineation process.³ As the Selangor suit which seeks to annul the EC's notice on the main ground that its recommendations are unconstitutional is still on trial, the stay continues. This has basically prevented the EC from completing the first round of inquiries and proceeding to the second display.

The exclusive focus on the Redelineation hence allows us to scrutinise the Redelineation process in detail. Those who are interested in manipulation of the electoral process – instead of electoral system – are advised to consult the same chapter for the previous years.

1 The Star, 2016. "EC agrees to amendments to Sabah's redelineation", The Star, November 20, 2016. <http://www.thestar.com.my/news/nation/2016/11/20/ec-agrees-to-amendments-to-sabah-redelineation/>

2 The Borneo Post, "Selangor government gets interim stay on proposed redelineation", the Borneo Post, November 29, 2016. <http://www.theborneopost.com/2016/11/29/selangor-government-gets-interim-stay-on-proposed-redelineation/>

3 The Star, 2016. "Selangor govt gets stay on EC local inquiries", The Star, December 17, 2016. <http://www.thestar.com.my/news/nation/2016/12/17/selangor-govt-gets-stay-on-ec-local-inquiries-state-govt-complied-with-provisions/>

The Purposes of Constituency Redelineation – Equal and Meaningful Representation

Constituencies are delineated to facilitate equal and meaningful representation. It should be guided by the principle of “one person, one vote, one value” as political equality of citizens is a hallmark of democracy. As demographic changes and settlement pattern over time may render constituencies vastly unequal in size or deviating from meaningful boundaries, redelineation becomes important to restore equal and meaningful representation.

In exact opposition to the equal and meaningful representation are two malpractices called malapportionment and gerrymandering.

Malapportionment creates constituencies that are significantly unequal in the size of electorate, under-representing voters in over-crowded constituencies and over-representing voters in thinly-populated constituencies. Malapportionment can be objectively identified by comparing the electorate sizes of individual constituencies against the average size. The greater the deviation from the average, the worse is the malapportionment. In Malaysia, seats in national legislature are allocated to the states/territories first before actual constituencies are carved out. In other words, malapportionment may happen in two ways: inter-state and intra-state.

In contrast, gerrymandering manipulates the composition – instead of size -- of constituency electorates by drawing up constituencies that systematically disadvantage certain parties. Therefore, gerrymandering can happen with or without malapportionment. In the First-Past-The-Post (FPTP) elections, all it takes to win a constituency in a straight fight is a simple majority, or 50% of votes plus one. Hence, if the disadvantaged party’s supporters can be divided into several constituencies to prevent them forming majority in any of them, the disadvantaged party is outright denied representation. This tactic is called “cracking”. On the other hand, if the disadvantaged party’s supporters are unnecessarily concentrated in their strongholds way beyond a comfortable majority, then the disadvantaged party will be winning fewer constituencies than what its vote share warrants. This second tactic is called “packing”.

Unlike malapportionment which can be mathematically determined by comparing sizes of individual constituency electorates and their average, gerrymandering has no cut-and-dry rules to determine the ideal boundaries. The ideal or overarching boundaries instead lie in the eyes of beholders. They can be administrative (states, municipalities, etc), physical (rivers, mountains, etc), infrastructural (road, railway, etc), economical (industrial, agricultural, etc) or socio-cultural (ethnic, religious, linguistic, etc). Gerrymandering is normally found from its consequence – the shift of electoral strengths between parties – or from its symptom – the emergence of odd-shaped constituency defying reasonable expectations. In fact, the term “Gerrymandering” owes its origin to [Elbridge Gerry](#), a 19th Century Governor of Massachusetts and a “salamander-shaped” constituency he created.

Constituency redelineation exercises in Malaysia are governed by the 13th Schedule of the Federal Constitution. While it does not explicitly state equal and meaningful representation as the goal of such exercises, its Section 2 in Part 1 lists down four principles. It reads,

“The following principles shall as far as possible be taken into account in dividing any unit of review into constituencies pursuant to the provisions of Articles 116 and 117 -

(a) while having regard to the desirability of giving all electors reasonably convenient opportunities of going to the polls, constituencies ought to be delimited so that they do

not cross State boundaries and regard ought to be had to the inconvenience of State constituencies crossing the boundaries of federal constituencies;

(b) *regard ought to be to the administrative facilities available within the constituencies for the establishment of the necessary registration and polling machines;*

(c) *the number of electors within each constituency in a State ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies;*

(d) *regard ought to be had to the inconveniences attendant on alterations of constituencies, and to the maintenance of local ties.”*

While sub-section 2(b) may be purely driven by administrative need and hence willingly observed, sub-sections 2(a) and 2(d) can be seen as safeguards against gerrymandering and sub-section 2(c) as safeguard against intra-state malapportionment.

Sub-section 2(a) spells out the neatly-nested nature of Malaysia’s electoral-political units: States consist of parliamentary constituencies, which in turn consist of state constituencies. There has never been any violation of this provision in the legal sense. However, for the Borneo states of Sabah and Sarawak which joined Malaya and Singapore as equal partners to form Malaysia in 1963, the question arises over whether their “Divisions” should be politically treated like the “States” in Malaya such that constituency boundaries cannot cross divisional boundaries. During the colonial time, Malayan states and Borneo divisions were administered by British officers of the rank of Resident. Respecting the divisional boundaries is thus a recognition of the uniqueness of the Borneo states and their parity with Malaya.

The phrases “inconveniences attendant on alterations” and “maintenance of local ties” in Sub-section 2(d) are the main safeguard against gerrymandering. Although both are undefined in the Federal Constitution, the Election Commission has in its documentations and processes recognised the relevance of administrative, physical, infrastructural, economical and socio-cultural boundaries as bases of political representation.

Sub-section 2(c) provides the clearest safeguard on paper against corrupt practice in constituency redelineation. It spells out two guidelines: first, that the rule is for all constituencies within any state to be “approximately equal” in electorate size; and, second, that exceptions may be made for low-density rural constituencies on the basis of “area” or landmass which naturally poses transportational challenges. It is important to note that “a measure of weightage for area” once had its bounds, until the clause *“to the extent that in some cases a rural constituency may contain as little as one half of the electors of any urban constituency”* was deleted in the 1973 Constitutional Amendment. Mathematically, that means the largest and the smallest constituencies must not deviate from the average by more than 33.33%. The original allowance on deviation was provided in the Article 116(4), which was deleted with the insertion of the 13th Schedule: *“... the allowance to be made shall not increase or reduce the number of electors in any constituency to a number differing from the electoral quota [average] by more than fifteen per cent.”* The original provision was stricter in two senses: (a) the band of permissible deviation was narrower, 15% instead of 33.33%; (b) the scope of constituencies for which the average is calculated was wider, ie. nationwide instead of statewide.

While the caps on deviation were loosened over time and eventually eliminated, it is undeniable that sub-section 2(c) still provides for equal apportionment as a rule and exception only on the ground of “area”. It cannot be construed as a deliberate classification of constituencies on the degree of urbanisation. In the last round of constituency redelineation exercises in 2003 and 2005, the Election Commission (EC) however deliberately misinterpreted sub-section 2(c) and produced its own five-tiered guideline of malapportionment. (Table 1)

Table 1: The Election Commission’s guidelines on Malapportionment of Electoral Constituencies in the Constituency Redelineation Exercises in 2003 and 2005

Class	2003 (Malayan States including Labuan)		2003 (Sabah)		2005 (Sarawak)	
	Parliamentary Constituency	State Constituency	Parliamentary Constituency	State Constituency	Parliamentary Constituency	State Constituency
Metropolitan	70,000 - 90,000 voters	30,000 - 49,000 voters	40,000 - 50,000 voters	18,000 - 25,000 voters	60,000 - 69,000 voters	25,000 - 35,000 voters
	8 - 26 km ²		8 - 60 km ²		11 - 26 km ²	
Town/ Town centre	50,000 - 69,000 voters	25,000 - 29,000 voters	30,000 - 39,000 voters	15,000 - 18,000 voters	50,000 - 59,000 voters	20,000 - 25,000 voters
	27 - 49 km ²		61 - 500 km ²		27 - 49 km ²	
Semi-urban	40,000 - 49,000 voters	15,000 - 24,000 voters	25,000 - 29,000 voters	10,000 - 14,000 voters	40,000 - 49,000 voters	15,000 - 20,000 voters
	50 - 99 km ²		501 - 1000 km ²		50 - 90 km ²	
Semi-rural	30,000 - 39,000 voters	10,000 - 14,000 voters	20,000 - 24,000 voters	8,000 - 10,000 voters	30,000 - 35,000 voters	10,000 - 15,000 voters
	100 - 250 km ²		1001 - 1500 km ²		100 - 250 km ²	
Rural/Inland	20,000 - 29,000 voters	7,000 - 9,000 voters	<=20,000 voters	<=8,000 voters	20,000 - 29,000 voters	7,000 - 10,000 voters
	>250 km ²		>1500 km ²		>250 km ²	

Source: *The Election Commission’s Reports on Constituency Redelimitation, 2003 and 2005*

Malaysia’s constitutional provision on inter-state apportionment of parliamentary seats is much more problematic. Initially, Article 116(3) of Malaya’s Federal Constitution in 1957 stipulated the allocation of seats based on the percentages of both electorate and population. The mathematical formula was however eliminated in a 1962 amendment. From 1963 onwards, the matter is governed by Article 46, which spells out the absolute number of parliamentary constituencies allocated to each region or state. Instead of dividing a total of constituencies across the states, the Malaysian Parliament would add up constituencies allocated to the states to get its total. This started in 1963 with the formation of Malaysia, when federal seats were allocated in absolute numbers for Malaya,

Singapore, Sabah and Sarawak to deliberately over-represent Sabah and Sarawak (together, 25% of seats with 12% of population) and under-represent Singapore (9% of seats with 17% of population). With the 1973 constitutional amendment, even individual Malaysian states were given parliamentary seats in absolute numbers.

This additive approach to inter-state representation has two problems: first, there is no guiding principle to check against inter-state malapportionment; second, this facilitates continuous increase of parliamentary seats, for states and overall. In fact, seat increase has become the convenient vehicle to worsen inter-state malapportionment. In 2003, 21 parliamentary constituencies were added for West Malaysia, with its total jumping from 144 (out of 193 seats) to 165 (out of 219 seats). The allocation of these 21 seats however has worsened -- rather than mitigated -- inter-state malapportionment. The severely under-represented Selangor was given only five additional seats instead of 10, while the already over-represented Pahang was given three additional seats.

A further twist to the problem is the unscrupulous practice by the EC to commence the redelineation exercise based on some new number of seats it decided, even though there was no change to Article 46. Once its redelineation proposal was adopted by the Parliament, “retrospective” amendment to Article 46 to increase seats as per its proposal became a ‘fait accompli’ and the entire issue of inter-state malapportionment easily escaped the scrutiny of both the parliamentarians and the public.⁴

The EC planned to repeat the scheme for the new round of constituency redelineation⁵ and even some opposition parliamentarians were in favour for such an increase⁶. However, the Coalition for Clean and Fair Elections 2.0 (Bersih 2.0) threatened to challenge such unconstitutional practice in court.⁷ This has forced the BN to play by the constitutional rule on seat increase. There was no seat increase for the federal lower house (Dewan Rakyat) and all state assemblies in Malaya, eight of which are controlled by the BN. While the number of seats in Sarawak and Sabah were respectively increased from 71 and 60 to 82 and 73, the state ordinance⁸ and state constitution⁹ were first amended before the EC released its proposals.

4 This complicated scheme is easier to comprehend with actual specifics. The last redelineation exercise for West Malaysia commenced on August 8, 2002 and the EC’s recommendation was approved by the Dewan Rakyat (Lower House of the Parliament) on April 8, 2003. The recommendation was based on 165 parliamentary seats in West Malaysia. Throughout this period, Article 46 was not amended and constitutionally West Malaysia had only 144 seats. The constitutional amendment bill to increase the seats were passed by Dewan Rakyat only on June 19, 2003 and gazetted on August 14, 2003.

5 Shahanaz Habib, 2014. “EC in bid to increase Parliament seats by up to 20%”, The Star, February 23, <http://www.thestar.com.my/news/nation/2014/02/23/ec-in-bid-to-increase-parliament-seats-by-up-to-20/>, as accessed on March 13, 2016.

6 Meena Lakshana, 2014. “Pakatan MPs say yes to increasing parliamentary seats in delineation exercise”, FZ.com, April 20, 2014, URL: <http://www.fz.com/content/paktan-mps-say-yes-increasing-parliamentary-seats-delineation-exercise>, as accessed on April 24, 2014.

7 Melati A. Jalil, 2014. “Bersih to challenge EC if delineation exercise ‘illegally’ increases seats” The Malaysian Insider, 15 December 2014. <http://webcache.googleusercontent.com/search?q=cache:EsYQ0XvrTLQJ:www.themalaysianinsider.com/malaysia/article/bersih-to-challenge-ec-if-delineation-exercise-illegally-increases-seats+&cd=7&hl=en&ct=clnk&gl=us>

8 Free Malaysia Today, 2016. “Sarawak assembly seats increased to 82”, Free Malaysia Today, November 11, 2014 <http://www.freemalaysiatoday.com/category/nation/2014/11/11/sarawak-assembly-seats-increased-to-82/>

9 Stephanie Lee, 2016. “13 new state seats for Sabah approved”, The Star, 9 August 2016 <http://www.thestar.com.my/news/nation/2016/11/20/ec-agrees-to-amendments-to-sabah-redelineation/>

The Process of Constituency Redelineation

The process of constituency redelineation – officially “delimitation review” -- is governed by Articles 113, 116, 117 and the Thirteenth Schedule of the Federal Constitution.

Redelineation exercise can be triggered in three situations: (a) non-compliance with the provisions of the Thirteenth Schedule [Article 113(2)]; (b) change in the composition of the Federation under Article 2 [Article 113(3)]; (c) change in the membership size of the federal or state legislatures [Article 113(3A)]. Different timelines are stipulated for them. The first type – the default -- can only be done after an eight-year gap and must be completed within two years. No deadline is spelled out for the second type. For the third type, the redelineation exercise must be completed within two years from the date of seat change. However, if seat change comes after the lapse of the eight-year period and the EC intends to carry out review of the first type, then it would be a first-type review.

As the last review exercises were carried out for Malaya and Sabah in 2003 and for Sarawak in 2005, well after the eight-year gap, the reviews for all three units in 2015 and 2016 were carried out under Article 113(2) despite seat increases in Sabah and Sarawak. For such reviews, the real start of the process is stipulated by Article 113(2)(i):

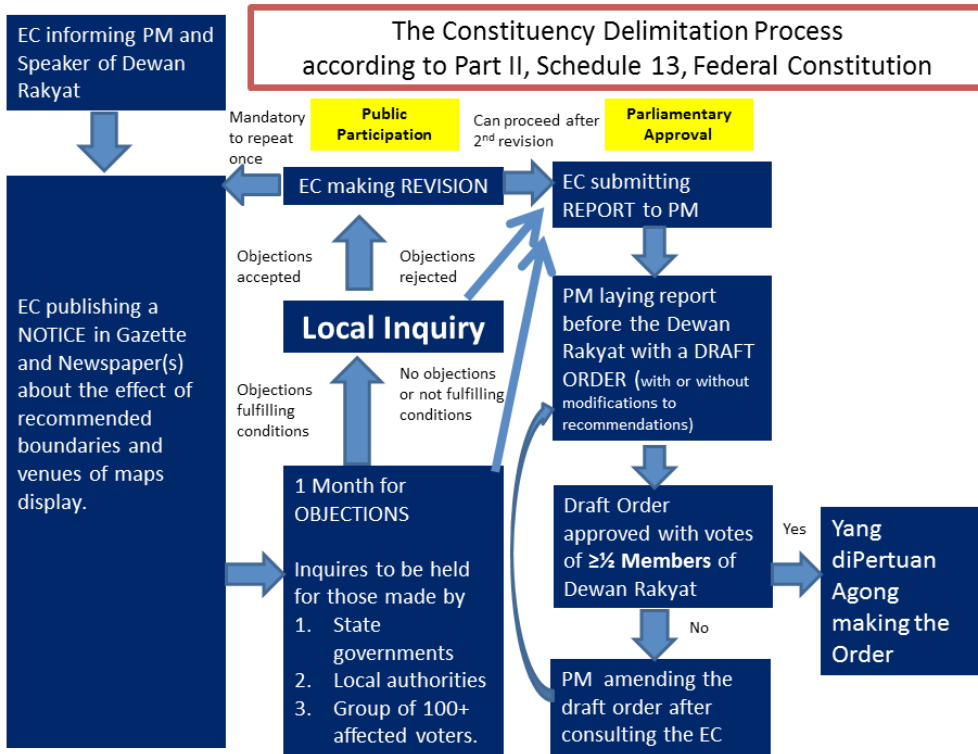
Subject to paragraph (ii), the Election Commission shall, from time to time, as they deem necessary, review the division of the Federation and the States into constituencies and recommend such changes therein as they may think necessary in order to comply with the provisions contained in the Thirteenth Schedule;...

This means that the EC must first ascertain instances of non-compliance with the Thirteenth Schedule, or precisely, its Section 2, before it enters the formal process stipulated by its Part II. (Illustration 1)

The exercise consists of two parts: the delimitation review and the parliamentary process that brings the changes into force. These two parts demonstrates a clear division of labour: recommendations by the EC and local objections by the public in the review, and, unit-wide scrutiny by the Parliament.

As per Article 113(3A)(i), (9) and (10), a review must be completed between two years, starting from the publication of the first notice announcing the EC’s proposal on the Gazette and ending with the submission of the EC’s report to the Prime Minister. Before the first notice, the EC should inform the Prime Minister and the parliamentary speaker of its intention to conduct a review.

Illustration 1: The Redelimitation Process as per Part II of the Thirteenth Schedule, Federal Constitution



Source: Wong (2016)

The review consists of two cycles of display-objection-enquiry. Sections 4 and 5 of the Thirteenth Schedule stipulates how the first cycle should begin:

4. ... [The Election Commission] ..shall publish in the Gazette and in at least one newspaper circulating in the constituency a notice stating—

(a) the effect of their proposed recommendations, and (except in a case where they propose to recommend that no alteration be made in respect of the constituency) that a copy of their recommendations is open to inspection at a specified place within the constituency; and

(b) that representations with respect to the proposed recommendations may be made to the Commission within one month after the publication of such notice,

and the Commission shall take into consideration any representations duly made in accordance with any such notice.

5. Where, on the publication of the notice under section 4 of a proposed recommendation

of the Election Commission for the alteration of any constituencies, the Commission receive any representation objecting to the proposed recommendations from—

(a) the State Government or any local authority whose area is wholly or partly comprised in the constituencies affected by the recommendation; or

(b) a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question,

the Commission shall cause a local enquiry to be held in respect of those constituencies.

The EC is to repeat this cycle once— “... it shall not be necessary to hold more than two local enquiries in respect of any such recommendations” [Section 7] – if it makes any changes to its original proposal.

After the second round of inquiries, the EC may finalise its recommendations and submit a report to the Prime Minister [Section 8], which ends the review and starts the parliamentary approval process. The Prime Minister is to lay the report before the Dewan Rakyat (lower house of the Parliament) with a draft Parliamentary Order to make the EC’s recommendations come in force, with or without modifications by him/her. [Section 9] The parliamentarians are then to vote on the draft order which requires only “one-half of the total number of members” to pass. [Section 10] In the unlikely event that the draft order is voted down, the Prime Minister may, after consulting the EC, modify the draft Order and lay it again in the House for approval. [Section 11] Once passed in the House, the draft order will be submitted to the King who has no veto power [Section 10] for the EC’s recommendations to come into force [Section 12].

It is obvious that the system gives the Prime Minister – as long as s/he leads a majority government with party discipline -- almost absolute power to push through the EC’s recommendations, with modifications by her/him if necessary. Unlike federations like the US where constituency redelineation process is decentralised and carried out by states, state governments have no power to determine even the boundary of state constituencies. States are only given the same right with local governments and groups of 100 or more affected voters to be heard in local inquiry, which is unfortunately reduced to a formality as the EC does not abide by the constitutional provisions. In its final report on constituency redelineation in Sarawak submitted to the Parliament, it blatantly rejected objections 11 times based on the 13th Schedule or against excessive deviations from the average.

This makes legal challenges to the EC’s recommendations the best hope to secure a constitutional process and outcome. Two cases were filed and heard before 2016 ended. Maria Chin Abdullah, chairperson of electoral reform lobby Coalition for Clean and Fair Elections 2.0 (Bersih 2.0) filed to ask for landmass information for constituencies in Selangor to see if the under-sized constituencies are constitutionally qualified for “a measure of weightage for area” in sub-section 2(c) of the Thirteenth Schedule. Such information is provided to the Parliament in the EC’s report but insidiously denied to the stakeholders in the public participation stage. Her application for judicial review on the matter was however rejected on November 24¹⁰ by Judicial Commissioner

10 M. Mageswari, 2016. “Maria Chin’s Judicial Review bid fails”, The Star, November 24, 2016. <http://www.thestar.com.my/news/nation/2016/11/24/maria-chin-judicial-review-bid-fails/>

Azizul Azmi Adnan who believed that he was bound by the Court of Appeal's decision in 2015¹¹ that rejected challenge on the ground of insufficient information. The Selangor State Government filed a judicial review application to quash the entire notice on four grounds: violation of sub-sections 2(c) and 2(d), failure to use the current electoral roll for redelineation, the lack of address for 136,272 voters in electoral rolls and insufficient information. The application was approved on December 16 by Judicial Commissioner Azizul Azmi Adnan, which extended the interim stay granted on November 28.¹²

The EC's recommendations for the States of Malaya

Excluding the Federal Territories of Labuan and Putrajaya each with one parliamentary constituency but no state constituencies, the redelineation exercise in States of Malaya covers a total of 164 parliamentary constituencies and 445 state constituencies. Tables 2 and 3 show the electorate sizes and the consequent malapportionment of these parliamentary and state constituencies as proposed by the EC in its first proposal.

The electorate ratio of the largest and smallest constituencies is a straightforward indicator of whether the proposal complies with the "approximately equal" apportionment demanded by sub-section 2(c) of the Thirteenth Schedule. A value of 1 represents absolute equality while a value of 2 meets the 1962 constitutional standard of "approximately equal" apportionment (deviation within the +/- 33.33% band). The greater the number, the greater the non-compliance. For parliamentary constituencies, only Perlis, Terengganu, Kuala Lumpur and Penang return a ratio below 2, followed by Negeri Sembilan and Malacca with values slightly larger than 2. The remaining states range from 2.42 (Kelantan) to a whopping 4.05 (Selangor). If we compare all these 164 proposed parliamentary constituencies within the states of Malaya, the largest to smallest ratio rises to 5.39, between 150,439 in P106 Damansara to 27,892 in P078 Cameron Highlands.

The stark disparity between the parliamentary constituencies is not due purely to intra-state malapportionment in the redelineation exercise, but is also caused by inter-state malapportionment caused by the number of seats disproportionately allocated to the states in Article 46. (Table 4) For example, Perlis has only 1.21% of electorate but was given 1.51% of parliamentary seats, yielding an average electorate of 45,699 (see Table 2) and a relative vote value of 1.51 time for its voters. Other over-represented states are Pahang (52,859 voters, 1.31 times in vote value), Perak (58,647 voters, 1.18 times in vote value) and Johor (63,428 voters, 1.09). On the other hand, Selangor loses out hugely with average 94,469 voters per constituency and only 0.73 times of the rightful vote value. Other losers are Terengganu (83,693 voters, 83% in vote value) and Malacca (76,108 voters, 91% in vote value). The inter-state malapportionment is not mitigated because seats are not taken away from Perlis, Pahang and Perak and given to Selangor, Terengganu and Malacca. As legislative seats mean both lucrative careers for politicians and patronage opportunities for voters, the party state would not cut seats in any state to avoid offending the locals. Instead, seats were added to the Parliament in every delineation exercise in the past as they were added to the state legislatures of Sabah and Sarawak. As discussed in the previous part, unregulated by any principle of proportionality, seat increase was used to worsen malapportionment favouring the ruling coalition's stronghold states.

11 The Court of Appeal judgement can be downloaded from https://www.academia.edu/23438958/COA_judgement-20150807-JR_on_Sarawak_Redelineation page 12.

12 The EC published its second proposal for the States of Malaysia excluding Selangor on March 9, 2017. The Notice and its detailed recommendations and information can be found here at http://www.spr.gov.my/media/BeritaSemasa/Notis2_Persempadanan_TM_Kecuali_Selangor_8.3.2017.pdf. The constitutionality of such move is however highly questionable. See my critique on this, Wong, Chin Huat, 2016, "How can EC lawfully take S'gor from Malaya?", *Malaysiakini*, March 10, 2017, URL at <https://www.malaysiakini.com/news/375201>.

The intra-state malapportionment is even greater for state constituencies than for parliamentary constituencies. Only Perlis has a largest-to-smallest ratio below 2:1 and can be accepted as “approximately equal” by the 1962 constitutional standard. The worst malapportionment is found in Selangor with a ratio of 4.39, where the largest proposed constituency N31 Subang Jaya would have 66,059 voters while the smallest would have only 15,033 voters. This is followed closely by Johor with a ratio of 4.38 and three other states with a ratio of 4 or above, Perak (4.24), Pahang (4.08) and Negeri Sembilan (4.00). Two states have a ratio between 3 and 4 and the remaining four states have one between 2 and 3.

Although Article 113(2)(i) stipulates that ordinary redelineation exercises like this one should be carried out only to reduce or correct instances of constitutional non-compliance which the EC should first identify, Table 5¹³ shows that the EC’s first proposal has actually sustained severe over-representation in 16 parliamentary constituencies, sustained severe under-representation in 18 others, and even turned three average-sized others into severely under-represented ones, measured by the 1962 constitutional standard. Similarly, Table 6 shows the same proposal sustaining severe over-representation in 48 state constituencies and sustaining severe under-representation in 41 others. It would also turn respectively one and six average-sized constituencies into severe over-representation and severe under-representation. In other words, the EC’s first proposal would make 37 out of 164 parliamentary constituencies (22.56%) and 97 out of 445 state constituencies non-compliant with the demand of “approximately equal” apportionment, by the 1962 constitutional standard.

The high percentage of sustained severe deviation is partly caused by the EC’s decisions to recommend “no alteration” to the constituency boundaries in as many as 75 out of 164 parliamentary constituencies (45.73%) and 213 out of 445 state constituencies (45.73%). Out of these excluded constituencies, 29 parliamentary constituencies and 59 state constituencies are indeed in the severe over-representation or severe under-representation categories. The most ridiculous case is Penang, where the entire state was excluded from the EC’s first proposal.¹⁴ This results in the state’s largest state constituency N33 Paya Terubong having 41,707 voters or 3.27 times as many as voters as the state’s smallest N23 Ayer Putih (12,752). Although these two constituencies are neighbour, the EC adamantly refused to propose boundary change to reduce their disparity. Most outrageously, the EC even rejected objections on the ground that objections can only be made if it proposes changes.¹⁵

13 Tables 5 excludes parliamentary constituencies in Kuala Lumpur because the entirely urbanised federal territory should be examined with the more stringent 1957 constitutional standards, which only allowed deviations up to 15%. When this standard is applied, the EC’s first proposal again does not meet the demand of “approximately equal” apportionment. The smallest constituency, P119 Titiwangsa (currently 22% below average) was proposed to be even smaller (29% below average).

14 The EC in its first notice claimed that two parliamentary constituencies, P041 Kepala Batas and P053 Balik Pulau, were redelineated but no empirical evidence of any boundary change is found.

15 Zairil Khir Johari, MP for P048 Bukit Bendera, whose objection was rejected filed for judicial review. The application was heard on February 23, 2017 and the decision would be made on March 13.

Table 2: The Average Size and Proposed Malapportionment of Parliamentary Constituencies by State as per the 2016 Redelineation Proposal

State	Total Electorate	Average Electorate	Average +33%	Average -33%	Largest Constituency	Electorate
Perlis	137,098	45,699	60,932	30,466	P002 Kangar	50,751
Kedah	1,044,444	69,630	92,839	46,420	P015 Sungai Petani	101,829
Kelantan	940,591	67,185	89,580	44,790	P019 Tumpat	101,318
Terengganu	669,546	83,693	111,591	55,796	P036 Kuala Terengganu	101,875
Penang	867,748	66,750	89,000	44,500	P051 Bukit Gelugor	84,755
Perak	1,407,529	58,647	78,196	39,098	P063 Tambun	96,437
Pahang	740,023	52,859	70,478	35,239	P085 Pekan	81,647
Selangor	2,078,311	94,469	125,959	62,979	P106 Damansara	150,439
Kuala Lumpur	788,413	71,674	95,565	47,783	P124 Bandar Tun Razak	79,245
Negeri Sembilan	557,137	69,642	92,856	46,428	P128 Seremban	99,752
Malacca	456,645	76,108	101,477	50,738	P138 Kota Melaka	105,067
Johor	1,649,131	63,428	84,571	42,285	P162 Gelang Patah	112,081
States of Malaya excluding Putrajaya and Labuan	11,336,616	69,126	92,168	46,084	P106 Damansara	150,439

Smallest Constituency	Electorate	Largest to Smallest Ratio	N, Constituencies			
			within +/-33% bands	above average +33%	below average -33%	Total
P001 Padang Besar	42,293	1.20	3	0	0	3
P004 Langkawi	37,645	2.70	11	2	2	15
P032 Gua Musang	41,894	2.42	11	1	2	14
P038 Hulu Terengganu	70,956	1.44	8	0	0	8
P049 Tanjong	50,324	1.68	13	0	0	13
P055 Lenggong	28,078	3.43	14	5	5	24
P078 Cameron Highlands	27,892	2.93	10	1	3	14
P092 Sabak Bernam	37,126	4.05	13	5	4	22
P119 Titiwangsa	50,926	1.56	11	0	0	11
P126 Jelebu	45,719	2.18	5	2	1	8
P134 Masjid Tanah	47,972	2.19	4	1	1	6
P143 Pagoh	36,387	3.08	13	6	7	26
P078 Cameron Highlands	27,892	5.39	116	23	25	164

Source: Wong, et al. (2017b)

Table 3: The Average Size and Proposed Malapportionment of State Constituencies by State as per the 2016 Redelineation Proposal

State	Total Electorate	Average Electorate	Average +33%	Average -33%	Largest Constituency	Electorate
Perlis	137,098	9,140	12,187	6,093	N06 Bintong	10,886
Kedah	1,044,444	29,012	38,683	19,342	N34 Lunas	44,938
Kelantan	940,591	20,902	27,869	13,935	N08 Tanjong Mas	29,335
Terengganu	669,546	20,923	27,898	13,949	N13 Wakaf Mempelam	31,674
Penang	867,748	21,694	28,925	14,463	N34 Paya Terubong	41,707
Perak	1,407,529	23,856	31,808	15,904	N23 Manjoi	50,812
Pahang	740,023	17,620	23,493	11,746	N13 Semambu	33,365
Selangor	2,078,311	37,113	49,484	24,742	N31 Subang Jaya	66,059
Negeri Sembilan	557,137	15,476	20,635	10,317	N25 Paroi	31,081
Malacca	456,645	16,309	21,745	10,873	N16 Bukit Baru	25,773
Johor	1,649,131	29,449	39,265	19,633	N48 Skudai	69,132
States of Malaya excluding Putrajaya and Labuan	10,548,203	23,704	31,605	15,803	N48 Skudai	69,132

Smallest Constituency	Electorate	Largest to Smallest Ratio	N, Constituencies			
			within +/-33% bands	above average +33%	below average -33%	Total
N04 Mata Ayer	6,479	1.68	15	0	0	15
N02 Kuah	18,753	2.40	32	2	2	36
N42 Dabong	10,881	2.70	38	3	4	45
N25 Bukit Besi	12,557	2.52	28	3	1	32
N23 Air Putih	12,752	3.27	33	5	2	40
N04 Kota Tampan	11,990	4.24	42	7	10	59
N05 Benta	8,175	4.08	31	5	6	42
N1 Sungai Air Tawar	15,033	4.39	36	7	13	56
N17 Senaling	7,766	4.00	26	4	6	36
N05 Taboh Naning	8,198	3.14	18	5	5	28
N07 Bukit Kepong	15,795	4.38	31	14	11	56
N04 Mata Ayer	6,479	10.67	330	55	60	445

Source: Wong, et al. (2017b)

Table 4: Inter-state Malapportionment of Parliamentary Constituencies in the States of Malaya

State	Total Voters	Electorate %	Total Parliamentary Seats	Seat %	Vote Value (Seat %/ Electorate %)
Perlis	137,098	1.21%	3	1.83%	1.51
Kedah	1,044,444	9.21%	15	9.15%	0.99
Kelantan	940,591	8.30%	14	8.54%	1.03
Terengganu	669,546	5.91%	8	4.88%	0.83
Penang	867,748	7.65%	13	7.93%	1.04
Perak	1,407,529	12.42%	24	14.63%	1.18
Pahang	740,023	6.53%	14	8.54%	1.31
Selangor	2,078,311	18.33%	22	13.41%	0.73
Kuala Lumpur	788,413	6.95%	11	6.71%	0.96
Negeri Sembilan	557,137	4.91%	8	4.88%	0.99
Malacca	456,645	4.03%	6	3.66%	0.91
Johor	1,649,131	14.55%	26	15.85%	1.09
States of Malaya excluding Putrajaya and Labuan	11,336,616	100.00%	164	100.00%	1.00

Table 5: Two Patterns of Non-Compliance with Sub-section 2(c) for Parliamentary Constituencies in the States of Malaya (Excluding Kuala Lumpur) as per the 2016 Redelineation Proposal

State	Sustaining severe over-representation	Sustaining severe under-representation	Causing severe over-representation	Causing severe under-representation
	Pre-Recommendation (Exceeding Average by >-33.33%)	Pre-Recommendation (Exceeding Average by >33.33%)	Pre-Recommendation (Deviation within 15% from average)	Pre-Recommendation (Deviation within 15% from average)
	Post-Recommendation (Exceeding Average by >-33.33%)	Post-Recommendation (Exceeding Average by >33.33%)	Post-Recommendation (Exceeding Average by >-33.33%)	Post-Recommendation (Exceeding Average by >33.33%)
Perlis	0	0	0	0
Kedah	2	2	0	0
Kelantan	2	1	0	0
Terengganu	0	0	0	0
Penang	0	0	0	0
Perak	0	3	0	0
Pahang	2	1	0	0
Selangor	3	1	0	3
Negeri Sembilan	1	1	0	0
Malacca	1	0	0	0
Johor	6	8	0	0
Total	16	18	0	3

Source: Wong, et al. (2017b)

Table 6: Two Patterns of Non-Compliance with Sub-section 2(c) for Parliamentary Constituencies in the States of Malaya as per the 2016 Redelineation Proposal

State	Sustaining severe over-representation	Sustaining severe under-representation	Causing severe over-representation	Causing severe under-representation
	Pre-Recommendation (Exceeding Average by >-33.33%)	Pre-Recommendation (Exceeding Average by >33.33%)	Pre-Recommendation (Deviation within 15% from average)	Pre-Recommendation (Deviation within 15% from average)
	Post-Recommendation (Exceeding Average by >-33.33%)	Post-Recommendation (Exceeding Average by >33.33%)	Post-Recommendation (Exceeding Average by >-33.33%)	Post-Recommendation (Exceeding Average by >33.33%)
Perlis	0	0	0	0
Kedah	1	2	0	0
Kelantan	3	2	0	0
Terengganu	0	2	0	0
Penang	2	5	0	0
Perak	7	5	0	1
Pahang	6	4	0	0
Selangor	10	1	0	4
Negeri Sembilan	6	3	0	0
Malacca	5	3	0	1
Johor	8	14	1	0
Total	48	41	1	6

Source: Wong, et al. (2017b)

Table 7: Parliamentary and State Constituencies Excluded from the 2016 Redelineation Proposal, by State

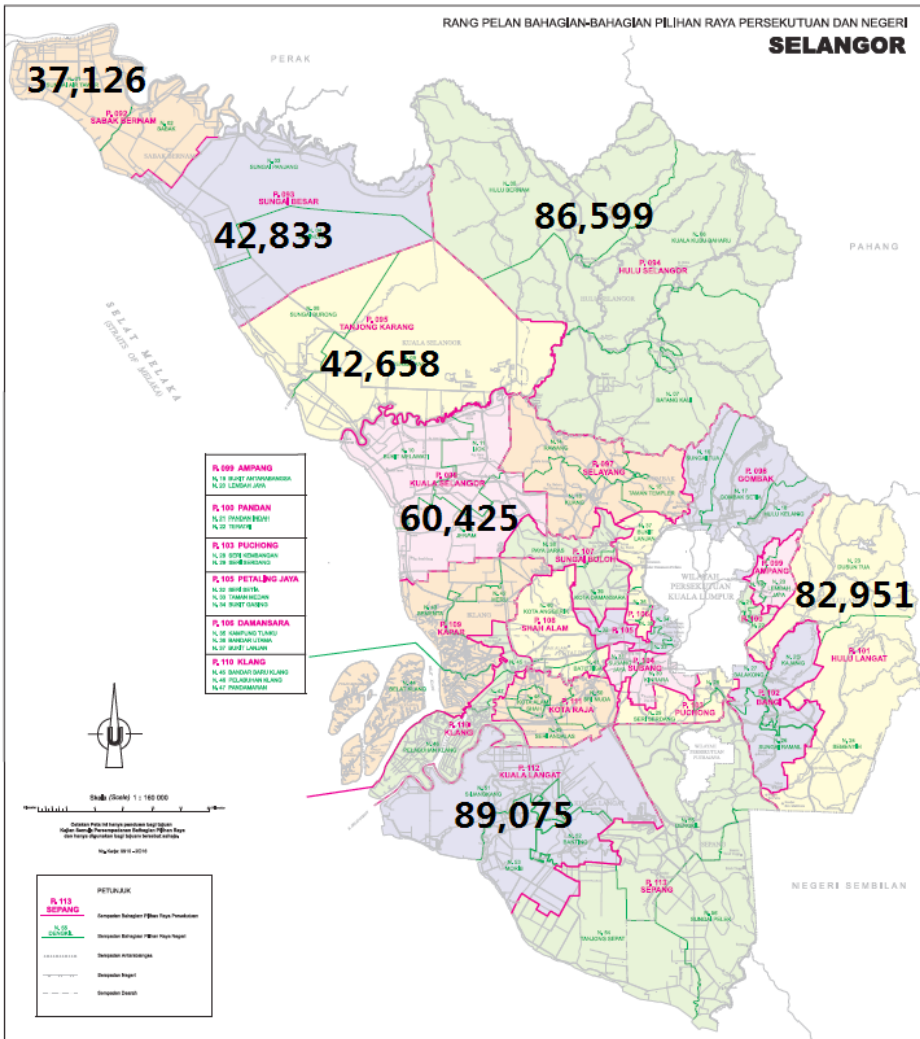
State	Number of Parliamentary constituencies completely excluded, as per EC's declaration	Parliamentary Constituencies			State Constituencies		
		Total in the State	Excluded from De- limitation Proposal	% of Ex- clusion	Total in the State	Excluded from De- limitation Proposal	% of Ex- clusion
Perlis	3	3	3	100.00%	15	15	100.00%
Kedah	8	15	10	66.67%	36	23	63.89%
Kelantan	2	14	4	28.57%	45	15	33.33%
Terengganu	0	8	3	37.50%	32	14	43.75%
Penang	11	13	13	100.00%	40	40	100.00%
Perak	7	24	9	37.50%	59	21	35.59%
Pahang	8	14	10	71.43%	42	29	69.05%
Selangor	4	22	5	22.73%	56	10	17.86%
Kuala Lumpur	0	11	0	0.00%	NA	NA	NA
Negeri Sembilan	2	8	4	50.00%	36	22	61.11%
Malacca	1	6	3	50.00%	28	9	32.14%
Johor	5	26	11	42.31%	56	15	26.79%
Total	51	164	75	45.73%	445	213	47.87%

Source: Wong, et al. (2017b)

How many of the 37 parliamentary constituencies and 97 state constituencies' proposed severe over-representation or severe under-representation may be justified? First of all, the area weightage can at most justify severe over-representation, absolutely not severe under-representation in 19 parliamentary constituencies and 47 state constituencies. In other words, while thinly populated rural constituencies may be given leniency for their transportation challenge, urban constituencies are not to be punished for their urbanisation. Second, Negeri Sembilan and Malacca are too small to have any rural constituencies that are transportationally challenged. Finally, while parliamentary constituencies like P032 Gua Musang (Kelantan), P054 Gerik (Perak), P081 Jerantut (Pahang) and some of their state constituencies are certainly qualified for "area weightage", the same cannot be said of P004 Langkawi, N02 Kuah, (Kedah), P078 Cameron Highlands, P079 Lipis, N16 Inderapura, (Pahang), P141 Sekijang, P142 Labis, P155 Tenggara, P157 Pengerang, N14 Bukit Nanning, N25 Rengit, (Johor), N34 Bukit Chandan and N38 Belanja (Perak).

Often there is no direct relationship between area size and electorate size, as shown by Map1. Selangor's largest constituency by landmass would be P094 Hulu Selangor but its proposed electorate 86,599 just falls short of the state's average 94,469 by 10.45%, meeting the "approximately equal" requirement even by the more stringent 1957 standard. This shows that the EC does not believe that "the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies" does not apply to large-area rural constituencies in the well-developed Selangor like P094 Hulu Selangor, or P101 Hulu Langat (82,951) or P121 Kuala Langat (89,075). However, for the much smaller P092 Sabak Bernam, P093 Sungai Besar and P095 Tanjong Karang, the EC has no qualm in applying "area weightage" and allocating these constituencies electorates as small as 43%-49% of P094 Hulu Selangor.

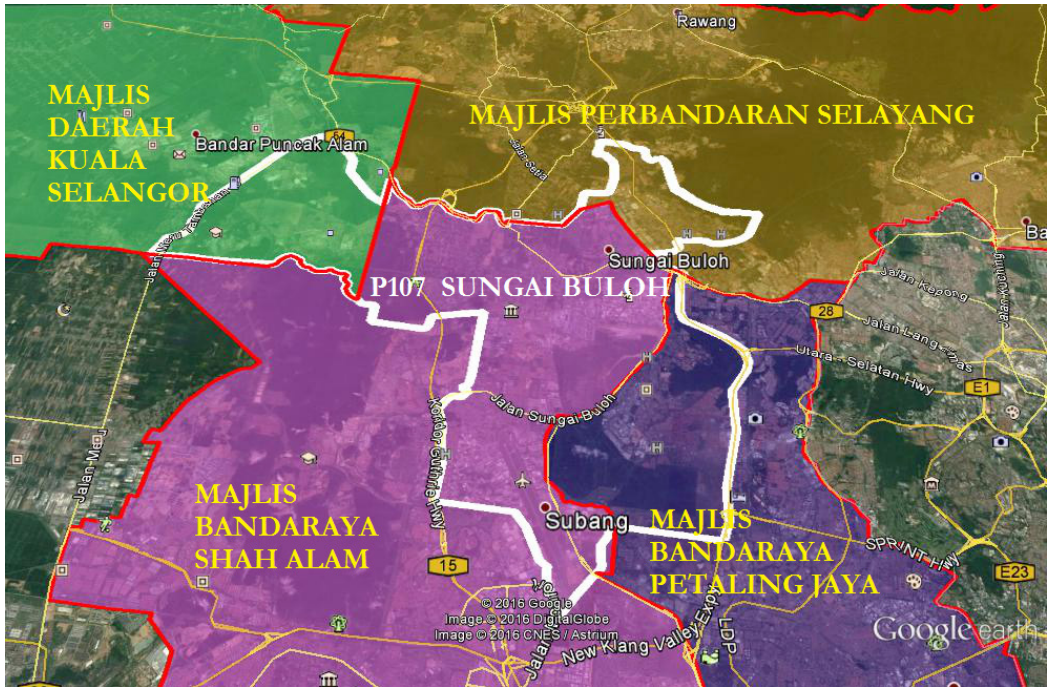
Map 1 Selected Parliamentary Constituencies in Selangor with Electorate Size Labelled as per the 2016 proposal



Source: *The Election Commission (2016); Wong (2016)*

Besides the “approximately equal” apportionment required by sub-section 2(c) in the Thirteenth Schedule, the EC’s proposal violates sub-section 2(d) which stipulates that “*regard ought to be had to the inconveniences attendant on alterations of constituencies, and to the maintenance of local ties.*” Breaking local ties has turned out to be a key feature in urbanised states like Selangor. Seven out of 22 parliamentary constituencies and 13 out of 56 state constituencies in Selangor are proposed to span across local authority areas, hampering representation and aggregation of local interests and causing inconveniences for voters, elected representatives and also local authorities. The most absurd examples are the parliamentary constituency of P107 Sungai Buloh spanning across four local authorities (Map 2) and the state constituencies of N38 Paya Jaras and N41 Batu Tiga spanning across three local authorities.

Map 2 P107 Sungai Buloh: One Parliamentary Constituency Spanning across Four Local Authorities



Source: Wong (2016)

The EC recommendations also often break up local communities. One illustrative example is the boundary between N42 Meru and N43 Sementa in Selangor which would crudely partition the town of Kapar. Most dramatically, the proposed boundary on the east which was based on Jalan Kapar suddenly switched to Jalan Keretapi Lama to snatch a long stretch of shophouses (opposite Taman Sungai Kapar Indah) into N42 Meru. (Map 3)

The EC has also no qualm about creating constituencies with little local ties between them. In Selangor, the proposed N44 Selat Klang consists of 85% urban dwellers on the western suburb of Klang and 15% folk from the fishing community in Pulau Ketam and neighbouring islands, with little common interests except the sea that connects them.¹⁶ In the southwestern tip of Perak, the EC proposed to create N59 Mualim (30,796 voters) consisting of two unconnected parts, separated by the state of Selangor. The enclave is the polling district of Felda Gunung Besout V (1,491 voters) which should have been joined with the rest of Felda Gunung Besout in N58 Besout with only 17,094 voters. The move to gerrymander by severing the Felda Gunung Besout community cannot be clearer. (Map 4)

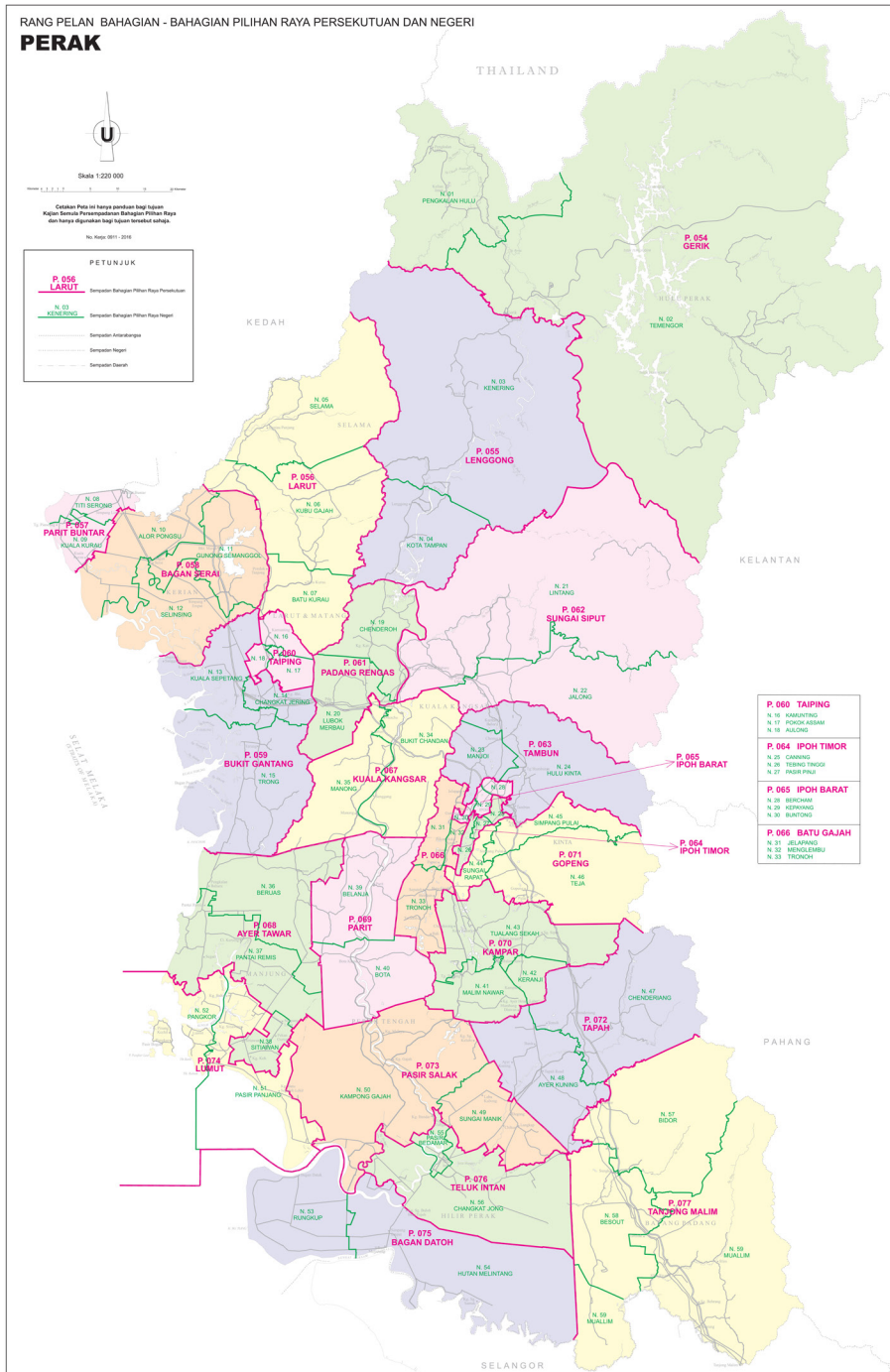
¹⁶ Ironically, this is an improvement as the suburb part is currently an enclave not even connected to the islands.

Map 3 Breaking Up of Local Ties in Kapar



Source: Wong (2016)

Map 4 N59 Muallim: A State Constituency with an Enclave separated by Another State



Source: The Election Commission (2016)

The EC's Recommendations for Sabah

Since the redelineation exercise in Sabah has progressed to the second display, this allows us to assess the compliance or non-compliance with the Thirteenth Schedule of both the first and second proposals by the EC.

Table 8 shows the changes in electorate size for the existing and proposed parliamentary constituencies. The cells are coloured to signify their relative size to the state average based on the 1957 and 1962 standards: red (exceeding average by more than 1/3), orange (exceeding average by more than 15% but less than 1/3), yellow (deviating from average by not more than 15%), light green (falling short of the average by more than 15% but less than 1/3) and dark green (falling short of the average by more than 1/3). All but three of 25 constituencies stay in the same category, not surprising as the EC proposed no changes for 18 constituencies. The proposed changes would improve disparity between P168 Kota Marudu and Kota Belud, but also worsen the severe under-representation of P172 Kota Kinabalu and P171 Sepanggar. Amongst constituencies excluded by the EC are the severely over-sized P190 Tawau (138% of average) and severely undersized P181 Tenom (64% of average), P183 Beluran (63% of average) and P187 Kinabatangan (64% of average).

Can these cases of extreme over-representation or under-representation be justified by “area weightage”? The case cannot be convincingly proved in Map 5. While P187 Kinabatangan and P183 Beluran may qualify for “area weightage”, why should P188 Siram have 52,343 voters when P183 Beluran with about the same landmass has only 24,916? Why does P178 Sipitang (29,439) with a larger landmass have more voters than P181 Tenom (25,309) when both are landlocked? Why should P171 Sepanggar have 55,294 voters when its tiny neighbour P173 Putatan has only 39,123? It is obvious that the electorate of most constituencies are not related to their landmass but arbitrarily determined. The EC's proposal is hence violating both the “approximately equal” requirement and the “area weightage” exceptional clause. The unconstitutionality of the proposal is most obvious with the high largest:smallest ratio of 2.22:1, although the existing level is worse at 2.40:1.

Table 8: Electorate Sizes of the Current and Proposed Parliamentary Constituencies in Sabah

Parliamentary Constituency	Electorate Size in Status Quo (A)	Proposed Electorate Size in the First Display (B)	Proposed Electorate Size in the Second Display (C)	Proposed Change in the First Round (B-A)	Proposed Change in the Second Round (C-B)
P167 Kudat	47,410	47,410	47,410	0	0
P168 Kota Marudu	59,757	42,477	42,477	-17,280	0
P169 Kota Belud	34,487	51,767	51,767	17,280	0
P170 Tuaran	48,993	48,993	48,993	0	0
P171 Sepanggar	55,124	55,294	55,294	170	0
P172 Kota Kinabalu	49,810	53,451	53,451	3,641	0
P173 Putatan	38,002	39,123	39,123	1,121	0
P174 Penampang	44,960	41,319	41,319	-3,641	0
P175 Papar	39,175	37,884	37,884	-1,291	0
P176 Kimanis	26,941	26,941	26,941	0	0
P177 Beaufort	30,177	30,177	30,177	0	0
P178 Sipitang	29,439	29,439	29,439	0	0
P179 Ranau	39,432	39,432	39,432	0	0
P180 Keningau	44,221	44,221	44,221	0	0
P181 Tenom	25,309	25,309	25,309	0	0
P182 Pesiangan	26,837	26,837	26,837	0	0
P183 Beluran	24,916	24,916	24,916	0	0
P184 Libaran	41,281	41,281	41,281	0	0
P185 Batu Sapi	30,422	30,422	30,422	0	0
P186 Sandakan	37,749	37,749	37,749	0	0
P187 Kinabatangan	25,348	25,348	25,348	0	0
P188 Silam	52,343	52,343	52,343	0	0
P189 Semporna	42,375	42,375	42,375	0	0
P190 Tawau	55,126	55,126	55,126	0	0
P191 Kalabakan	46,095	46,095	46,095	0	0
Total	995,729	995,729	995,729		
Average	39,829	39,829	39,829		
Largest as % of average	150.03%	138.83%	138.83%		
Smallest as % of average	62.56%	62.56%	62.56%		
Largest:Smallest Ratio	2.40	2.22	2.22		
As % of state average	>33.33%	>15% to 33.33%	-15% to 15%	<-15% to -33.33%	<-33.33%

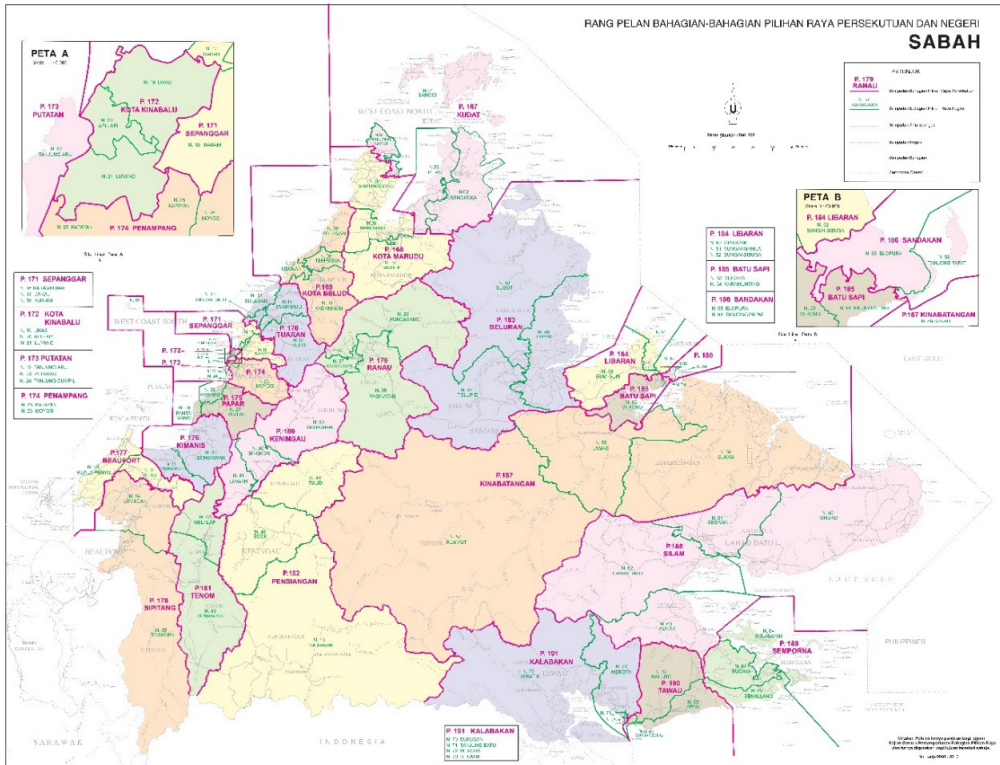
Table 9: Electorate Sizes of the Current and Proposed State Constituencies in Sabah

Current State Constituency	Electorate Size in Status Quo (A)	Proposed State Constituency	Proposed Electorate Size in the First Display (B)	Proposed Electorate Size in the Second Display (C)	Proposed Change in the First Round (B-A)	Proposed Change in the Second Round (C-B)
N01 Banggi	9,996	N01 Banggi	5,485	5,485	-4,511	0
		N02 Bengkoka	10,032	10,032	10,032	0
N03 Pitas	14,925	N03 Pitas	9,404	9,404	-5,521	0
N02 Tanjong Kapor	22,489	N04 Tanjong Kapor	22,489	22,489	0	0
N04 Matunggong	20,189	N05 Matunggong	14,817	14,817	-5,372	0
		N06 Bandau	13,798	11,812	13,798	-1,986
N05 Tandek	22,288	N07 Tandek	13,862	15,848	-8,426	1,986
		N08 Pintasan	9,864	9,864	9,864	0
N06 Tempasuk	17,280	N09 Tempasuk	11,014	11,014	-6,266	0
N08 Usukan	18,785	N10 Usukan	15,187	15,187	-3,598	0
N07 Kadamaian	15,702	N11 Kadamaian	15,702	15,702	0	0
N10 Sulaman	20,113	N12 Sulaman	10,496	10,496	-9,617	0
		N13 Pantai Dalit	13,659	13,659	13,659	0
N09 Tamparuli	17,157	N14 Tamparuli	14,998	14,998	-2,159	0
N11 Kiulu	11,723	N15 Kiulu	9,840	9,840	-1,883	0
N12 Karambunai	30,261	N16 Karambunai	15,854	15,854	-14,407	0
		N17 Darau	16,552	16,552	16,552	0
N13 Inanam	24,863	N18 Inanam	22,888	22,888	-1,975	0
N14 Likas	15,008	N19 Likas	15,008	15,008	0	0
N15 Api-Api	14,451	N20 Api – Api	14,451	14,451	0	0
N16 Luyang	20,351	N21 Luyang	23,992	23,992	3,641	0
N17 Tanjong Aru	22,489	N22 Tanjung Aru	15,114	15,114	-7,375	0
N18 Petagas	15,513	N23 Petagas	10,939	11,963	-4,574	1,024
		N24 Tanjung Dumpil	13,070	12,046	13,070	-1,024
N19 Kapayan	27,414	N25 Kapayan	23,773	23,773	-3,641	0
N20 Moyog	17,546	N26 Moyog	17,546	17,546	0	0
		N27 Dambai	11,654	11,654	11,654	0
N21 Kawang	20,162	N28 Kawang	12,747	12,747	-7,415	0
N22 Pantai Manis	19,013	N29 Pantai Manis	13,483	13,483	-5,530	0
N23 Bongawan	14,957	N30 Bongawan	14,957	14,957	0	0
N24 Membakut	11,984	N31 Membakut	11,984	11,984	0	0
N25 Klias	15,427	N32 Klias	15,427	15,427	0	0
N26 Kuala Penyu	14,750	N33 Kuala Penyu	14,750	14,750	0	0
N27 Lumadan	13,960	N34 Lumadan	13,960	13,960	0	0

N28 Sindumin	15,479	N35 Sindumin	15,479	15,479	0	0
N29 Kundasang	13,434	N36 Kunsadang	13,434	13,434	0	0
N30 Karanaan	12,489	N37 Karanaan	12,489	12,489	0	0
N31 Paginatan	13,509	N38 Pagingatan	13,509	13,509	0	0
N32 Tambunan	13,946	N39 Tambunan	13,946	13,946	0	0
N33 Bingkor	15,803	N40 Bingkor	15,803	15,803	0	0
N34 Liawan	14,472	N41 Liawan	14,472	14,472	0	0
N35 Melalap	12,088	N42 Melalap	12,088	12,088	0	0
N36 Kemabong	13,221	N43 Kemabong	13,221	13,221	0	0
		N44 Tulid	7,564	7,564	7,564	0
N37 Sook	16,753	N45 Sook	9,189	9,189	-7,564	0
N38 Nabawan	10,084	N46 Nabawan	10,084	10,084	0	0
		N47 Telupid	6,990	6,990	6,990	0
N39 Sugut	9,720	N48 Sugut	9,720	9,720	0	0
N40 Labuk	15,196	N49 Labuk	8,206	8,206	-6,990	0
N41 Gum-Gum	11,604	N50 Gum-Gum	11,604	11,604	0	0
		N51 Sungai Manila	10,726	10,726	10,726	0
N42 Sungai Sibuga	29,677	N52 Sungai Sibuga	18,951	18,951	-10,726	0
N43 Sekong	14,643	N53 Sekong	14,643	14,643	0	0
N44 Karamunting	15,779	N54 Karamunting	15,779	15,779	0	0
N45 Elopura	23,327	N55 Elopura	23,327	23,327	0	0
N46 Tanjung Papat	14,422	N56 Tanjung Papat	14,422	14,422	0	0
N47 Kuamat	15,345	N57 Kuamat	8,217	8,217	-7,128	0
		N58 Lamat	8,752	8,772	8,752	20
N48 Sukau	10,003	N59 Sukau	8,379	8,359	-1,624	-20
N49 Tungku	14,860	N60 Tungku	10,790	10,790	-4,070	0
		N61 Segama	14,059	14,059	14,059	0
N50 Lahad Datu	25,353	N62 Lahad Datu	15,364	15,364	-9,989	0
N51 Kunak	12,130	N63 Kunak	12,130	12,130	0	0
N52 Sulabayan	12,782	N64 Sulabayang	12,782	12,782	0	0
N53 Senallang	13,213	N65 Senallang	13,213	13,213	0	0
N54 Bugaya	16,380	N66 Bugaya	16,380	16,380	0	0
N55 Balung	13,119	N67 Balung	13,119	13,119	0	0
N56 Apas	16,903	N68 Apas	16,903	16,903	0	0
N57 Sri Tanjung	25,104	N69 Sri Tanjung	25,104	25,104	0	0
		N70 Kukusan	11,938	11,938	11,938	0
N58 Merotai	18,163	N71 Merotai	12,562	12,562	-5,601	0
N59 Tanjung Batu	21,285	N72 Tanjung Batu	13,174	13,174	-8,111	0
N60 Sebatik	6,647	N73 Sebatik	8,421	8,421	1,774	0

Total	995,729		995,729	995,729		
Average	16,595		13,640	13,640		
Largest as % of average	182.34%		184.05%	184.05%		
Smallest as % of average	40.05%		40.21%	40.21%		
Largest:Smallest Ratio	4.55		4.58	4.58		
As % of state average	>33.33%	>15% to 33.33%	-15% to 15%	<-15% to -33.33%	<-33.33%	

Map 5 Parliamentary and State Constituencies for Sabah as per the 2016 Proposal



Source: The Election Commission (2016)

Table 9 shows the corresponding changes in electorate size for state constituencies. On a first glance, there seems to be much improvement as many cells are changed from light green to yellow or from dark green to light green.

Much of this improvement is however the result of adding 13 legislative seats and consequently reducing the average electorate size from 16,595 to 13,640 and by extension, all the markers of categories. (See Table 10) As a result, even though the EC has proposed no changes to 33 out of the current 60 constituencies, those with an existing electorate between 11,594 to 14,105 (such as the cluster from N36 Kundasang to N39 Tambunan) would change from light green to yellow, while those with an electorate between 9,093 and 11,593 (such as N46 Nabawan and N48 Sugut) would change from dark green to light green. However, those with an existing electorate between 15,687 to 16,595 (N07 Kadamaian, N20 Moyog and N33 Bingkor) would change from yellow to orange. For those with an existing electorate larger than 22,127, even though they cannot change to a darker colour than red, the degree of malapportionment would still soar for some proposed constituencies, such as N02 Tanjong Kapor (from 136% of the average to 165%), N55 Elopura (from 141% to 171%) and N72 Tanjong Batu (from 151% to 184%).

Table 10: Seat Total and Average Change

Seat Total	Before Seat Increase	After Seat Increase
		60
Average +33.33%	22,127	18,187
Average +15%	19,084	15,686
Average	16,595	13,640
Average -15%	14,106	11,594
Average -33.33%	11,063	9,093

The flaws of the EC's recommendations lie not only in its decision to exclude more than half of the state constituencies, but also where the 13 new constituencies are "created". New constituencies should be carved out of over-crowded constituencies so that the entire cluster of constituencies would be equalised to have near-average electorate size. For example, the proposed N06 Bandau is to be carved out from the moderately over-sized N05 Matunggong and the severely over-sized N07 Tandek, resulting in three near-average constituencies in the first proposal. However, more often the EC proposed to split some small constituencies into two, for example, splitting the near-average N40 Labuk (15,196) into two severely under-sized constituencies of N49 Labuk (8,206) and N47 Telupid (6,990), or splitting the near-average N37 Sook (16,753) into the moderately under-sized N45 Sook (9,189) and the severely under-sized N44 Tulid (7,594).

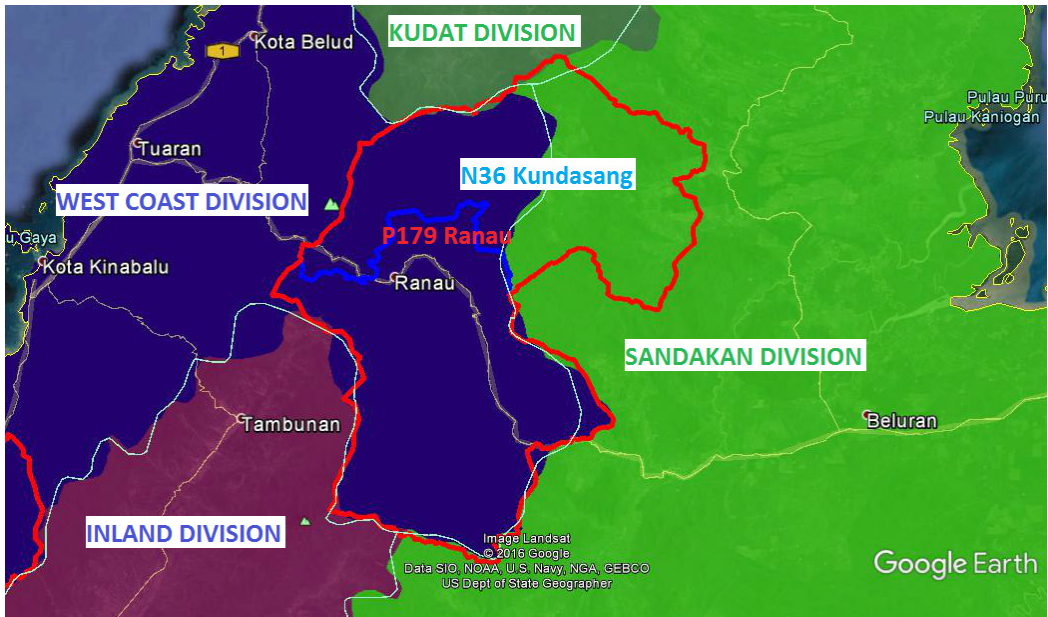
The EC's proposed changes are often inadequate to make the constituencies "approximately equal" because the EC has apparently decided to alter boundaries of those state constituencies only within the same parliamentary constituency – this explains why boundaries remain the same for 18 of the 25 parliamentary constituencies.

Given these flaws, it is then not surprising at all the state's largest state constituency is 4.58 times the state's smallest with the EC proposal, even higher than the current 4.55:1 ratio. Although the EC proposes six changes in the second display, the severe malapportionment remains unchanged. The EC's proposal is also not compliant with sub-section 2(d) of the Thirteenth Schedule which stipulates that "*regard ought to be had to the inconveniences attendant on alterations of constituencies, and to the maintenance of local ties.*"

First, Sabah is first divided into five divisions before sub-divided into districts. During the colonial time, the divisions were governed by Residents, much like the Federated Malay States. As divisions in Sabah (and Sarawak) are like states in Malaya, the continued presence of divisions hence has great political significance as a reminder that the Borneo states are equal partners with Malaya, and not its states, in the Federation of Malaysia. The EC has however created at least three parliamentary constituencies that span across the division boundaries: P176 Kimanis (West Coast Division and Inland Division), P179 Ranau (West Coast Division and Sandakan Division) and P188 Silam (Sandakan Division and Tawau Division). Besides the letter and spirit of sub-section 2(d), one may argue that such cross-division constituencies have also violated the spirit of sub-section 2(a) which stipulates that "*constituencies ought to be delimited so that they do not cross State boundaries*". Map 6 shows both the proposed P179 Ranau and N36 Kundasang span across two divisions.

This researcher also found at least 9 suspicious cases of township being cut apart rather arbitrarily by electoral boundaries: (1) Kota Marudu between N06 Mangaris and N07 Tande; (2) Kota Belud between N09 Tempasuk, N10 Usukan and N11 Kadamaian; (3) Tuaran between N12 Sulaiman, N13 Pantai Dalit and N14 Tamparuli; (4) Putatan between N22 Tanjung Aru, N23 Petagas and N26 Moyog; (5) Papar between N27 Dambai, N28 Kawang and N29 Pantai Manis; (6) Beaufort between P177 Beaufort and P178 Sipitang; (7) Ranau between N37 Karanaan and N38 Paginatan; (8) Keningau between N40 Bingkor and N41 Liawan; (9) Lahad Datu between N61 Segama and N62 Lahad Datu.

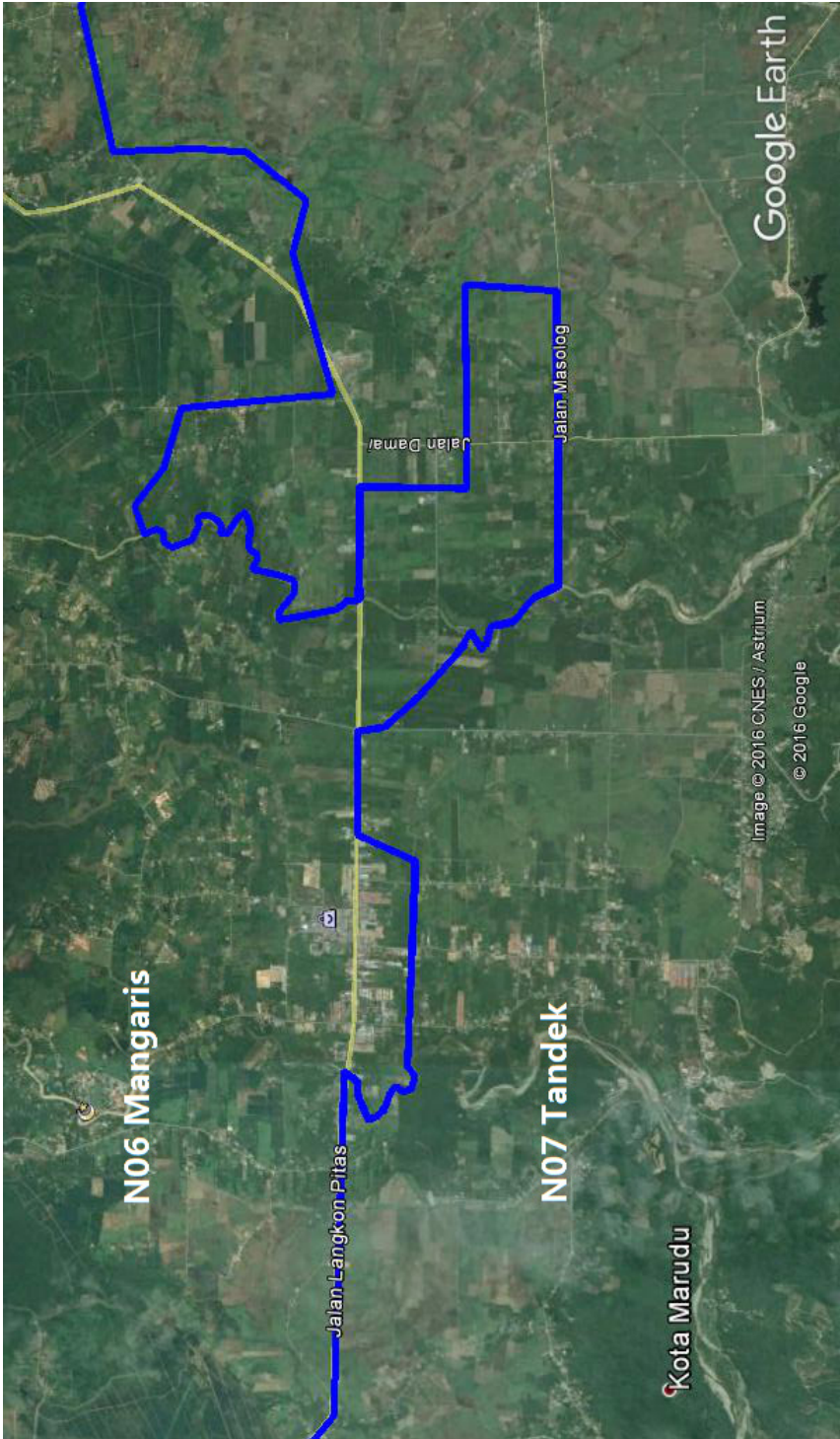
Map 6 P179 Ranau and N36 Kundasang Spanning Across Two Divisions



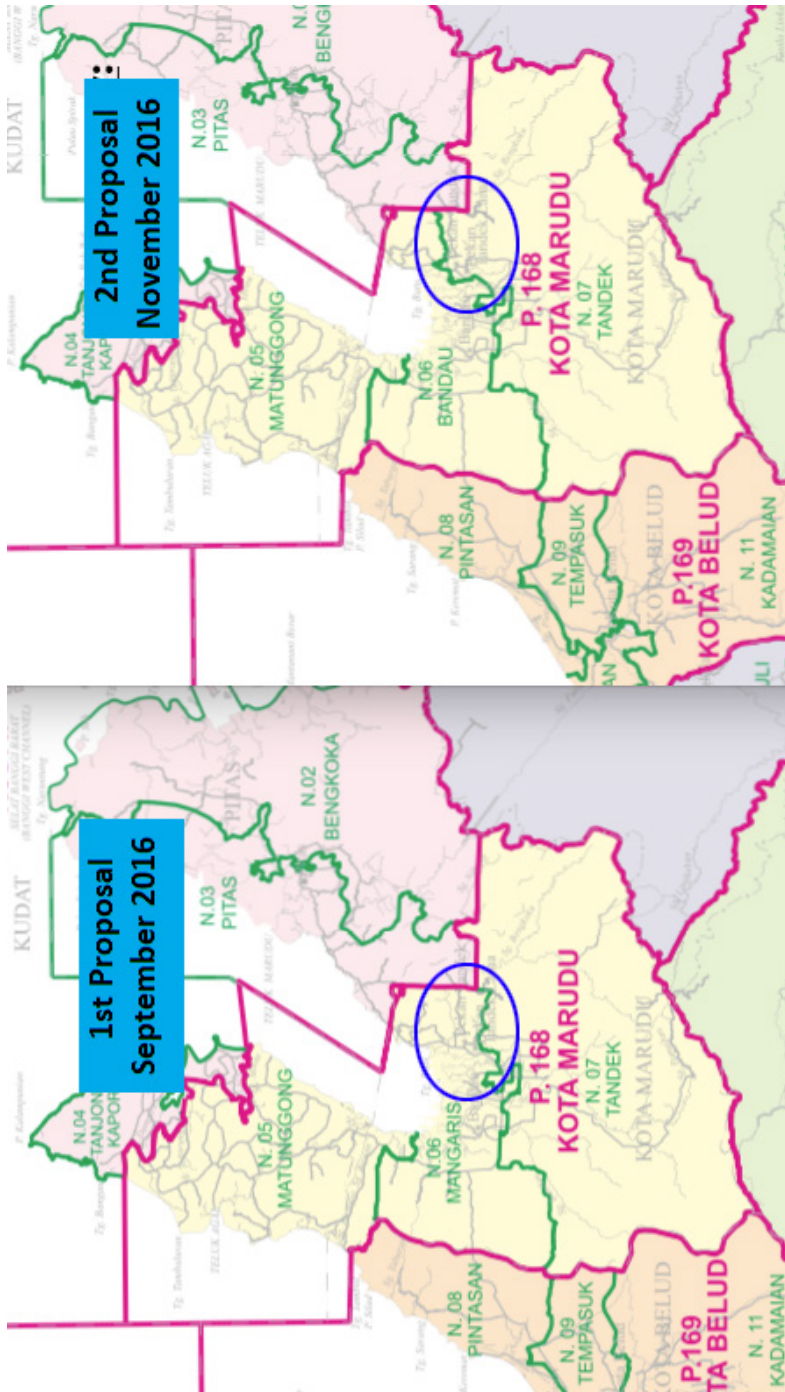
The second proposal made only three corrections, one of which is to place the entire Kota Marudu township in N07 Tande. (See Maps 7 and 8). The second change will swap in net 1,024 voters between N23 Petagas and N24 Tanjung Dumpil, both within P173 Putatan, but the partitioning of local neighbourhood identified by this researcher was not corrected. The last proposed change is to switch two polling districts: Batu Puteh (1,644 voters) and Suan Lamba (1,624 voters) between N58 Lamag and N59 Sukau, resulting in a net change of 20 voters. The very small number of changes is likely due to the small number of objections heard in the first round of inquiry, about 12. It is important to note that objections from excluded constituencies like N71 Sri Tanjung were completely denied the chance to be heard in inquiries.

Map 7

Local Ties in Kota Marudu Broken by Boundary between N06 Mangaris and N07 Tandek



Map 8 Change in Proposed Boundary between N06 Mangaris and N07 Tandek in Kota Marudu



Source: The Election Commission (2016)

7 Recommendations

Taking the lesson from the redelineation exercises in Malaya, Sabah and previously Sarawak, we recommend the following:

A. Principles

1. The phrase “approximately equal” in Sub-section 2(c), Part 1, the 13th Schedule of the Federal Constitution, should have its deviation bounds – for example 15% or 33.33% more or less -- from the state average explicitly spelled out.
2. Article 46 of the Federal Constitution should be amended to state only the total number of parliamentarians and the Inter-state allocation of parliamentary seats should be determined mathematically based on the proportion of electorates in states/territories.

B. Procedures

1. The EC should be compelled to reveal all relevant information pertaining to “the effects of their [the EC] proposed recommendation” as per Section 4, Part II, the 13th Schedule of the Federal Constitution. Information on the “effects” should include
 - a. At the macro/regional level, a full list of all changes to constituency boundaries in Malaya/Sabah/Sarawak and the grounds – if certain constituencies are excluded, grounds should be provided.
 - b. At the micro/constituency level, electoral rolls and constituency maps organised by the latest list of polling districts.
2. All information provided by the EC to the Parliament should be made available to the stakeholders in the public participation stage. Such information should include:
 - a. The landmass information for all constituencies
 - b. The grounds for the EC decisions in the inquiries, in explicit reference to the principles in Section 2 of the Thirteenth Schedule – interim reports should be issued within 14 working days after each round of local enquiries is concluded.
3. The local enquiries should be open to all concerned citizens and media such that an objecting party gets to listen to the cases made by other projectors. Legal representation and audio/video recording must be allowed for enquiry participants.

C. Long-term Changes

1. Malaysia should consider changing its electoral system to a proportional one such as Mixed Member Proportional (MMP) or Party-List Proportional Representation (List-PR) to eliminate the incentives for malapportionment, gerrymandering and voter transfer.
2. If the First-Past-The-Post (FPTP) system is to be retained, then Malaysia should consider either or both of these reforms:
 - a. Constituency redelineation to be managed by an independent Boundary Commission independent from the EC;
 - b. Constituency redelineation to be decentralised that federal and state constituencies are delineated at the state level.

References

Malaysia, 2016, “P.U.(B) 410/2016 The Notice of Proposed Recommendations for the Federal and State Constituencies in the States Malaya”, downloadable at [http://www.federalgazette.agc.gov.my/output/pub_20160915_P.U.\(B\)410-2016-NotisKSPTanahMelayu.pdf](http://www.federalgazette.agc.gov.my/output/pub_20160915_P.U.(B)410-2016-NotisKSPTanahMelayu.pdf)”

Election Commission, 2016. “Persempadanan Semula 2016.zip” (including Delimitation Notice, Recommendations, Maps and List of Electorate by Polling District) downloadable at http://www.spr.gov.my/media/persempadanan_semula_2016/persempadanan_semula_2016.zip

Wong, Chin Huat, 2016. “The Effects of the 2016 Delimitation Exercise on the State of Selangor”, [Selangor Report], downloadable at https://www.academia.edu/attachments/52112589/download_file?st=MTQ4OTMxMTc1NSwxODIuNTQuMjIwLjIyNiw5MDU2Njk%3D&s=profile

Wong, Chin-Huat, Kin-Woon Toh, Pey-Jung Yeong, Nidhal Mujahid and Kok-Hin Ooi. 2017a. “Hard Evidence on Electoral Commission Sustaining and Worsening Malapportionment: The States of Malaya in the 2016 Recommendations”, downloadable at https://www.academia.edu/31812520/Hard_Evidence_on_Electoral_Commission_Sustaining_and_Worsening_Malapportionment_The_States_of_Malaya_in_the_2016_Recommendations_Hard_Evidence_with_Charts

Wong, Chin-Huat, Pey-Jung Yeong and Kok-Hin Ooi. 2017b. “Malapportionment of Constituencies: Analysis of the 2016 Redelineation Proposal (First Display) for the Peninsula and Sabah and the 2015 Redelineation Exercise for Sarawak Version 2.0, last updated on March 8, 2017”, downloadable at https://www.academia.edu/31816693/Malapportionment_of_Constituencies_Analysis_of_the_2016_Redelineation_Proposal_First_Display_for_the_Peninsula_and_Sabah_and_the_2015_Redelineation_Exercise_for_Sarawak_Version_2.0_Malapportionment_Report_with_Charts



**REFUGEES AND
MIGRANT WORKERS**

REFUGEES AND MIGRANT WORKERS

By James Lochhead

The profound challenges relating to the human rights and protection of refugees, asylum seekers and migrant workers continued to provide a major context for the lives of these women, men and children in Malaysia in 2016. The thousands of refugees and asylum seekers in Malaysia, and millions of especially undocumented migrant workers, continued to be denied basic status and were given scant protection against considerable abuses. This prevailed despite some positive commitments made, for example, in the government's 11th Malaysia Plan (2016-2020) and implicit in the rhetoric surrounding the Malaysian government's reaction to the situation facing the Rohingya in Rakhine state in Myanmar at the end of the year. The lack of recognition and protection of basic human rights is a godsend for human traffickers, modern day slavers, colluders and others who prey and make profit from groups like these. It is a situation that continues to be compounded by the xenophobia or indifference found in the Malaysian host communities.

As in our previous Reports, we devote separate sections to refugees and to migrant workers, despite the fact that some of the general contexts are shared, as is their direct experience of detention camps. Many of the recommendations are specific and so are also separately presented.

REFUGEES

The Malaysian government recognises no rights for refugees and asylum seekers. This means that the thousands who have fled to Malaysia from situations of horror and persecution still found themselves living in a highly precarious environment throughout last year, subject to arbitrary and humiliating treatment by the authorities and others in the host community. They faced daily harassment, extortion, threats, abuse, violence, and possible detention and even deportation. To earn a livelihood, they were forced to work in the black economy, as 'undocumented workers', with all the vulnerabilities this brings. Of course they had little or no right to redress when things went wrong.

Numbers

As of end February 2017, there were 149,500 refugees and asylum-seekers registered with UNHCR in Malaysia, a small drop compared to 158,510 reported a year earlier. 133,263 of these are from Myanmar, made up of 56,458 Rohingyas, 39,684 Chins, 10,454 Myanmar Muslims, 4,611

Rakhines & Arakanese, together with other ethnicities from Myanmar¹. 16,233 were from other countries, including 3,058 Pakistanis, 2,626 Sri Lankans, 2,008 Yemenis, 1,878 Syrians, 1,858 Somalis, 1,456 Iraqis, 844 Afghans, and 687 Palestinians. 67% of refugees and asylum-seekers are men, while 33% are women (the 2015 ratio was 70:30). The numbers also include 35,144 children below the age of 18, a small rise on the 33,640 reported in December 2015.

Besides the officially registered women, men and children are thousands more unregistered: estimates vary, but probably between 25,000 and 50,000. In addition, the UNHCR have reported their concern with certain 'stateless' populations in Malaysia, not least the many thousands in Sabah.

Registration

Registration is important for a refugee, since it is the first step towards the attainment of a UNHCR Card. While in no way giving them legal status, this card at least gives refugees theoretical protection against arbitrary detention, theoretically means hospitals and clinics will not report them to the authorities when they seek healthcare, and puts them in the resettlement queue.

The first visit to UNHCR should get an asylum seeker on the first step of the registration process; they will then later be called to an interview which will be the substantive part of their verification as bona fide refugees. But past chapters in this Report have highlighted the very real difficulties asylum seekers have faced. Thousands (estimated at anything between 25,000 and 50,000) have not yet been registered at all. And until now, the gap between first registration and the interview could be at least two years and in many cases much longer. During this time asylum seekers are completely vulnerable and without any protection. This gap inevitably gave a ready market to forged UNHCR cards, which simply added to the suspicion and antagonism of the authorities and others to the presence of refugees in the country, and in countries potentially offering resettlement². In 2016, the UNHCR took some significant steps towards rationalising this system. In June, it launched a new biometric UNHCR Card, complete with sophisticated and enhanced security features which makes it as forgery-proof as possible³. It also introduced a new referral and registration system, which gives priority to certain groups and aims to fast-track the issuance of the card, meaning waiting times will be hugely reduced for many asylum seekers.

In another major development, the UNHCR was also able to present and discuss these and other steps with a new Joint Task Force (JTF) instituted by the Malaysian government, at which key government agencies are represented. This has created a formal channel of exchange which had hitherto been lacking. The Malaysian government has always maintained that Malaysia is just a transit country for refugees, with no reason to encourage them to stay by, for example, recognising their rights. Resettlement was seen in this scenario as the solution.

The fact is however that the numbers have not backed this up. Only a small fraction of refugees gets to be resettled, with the vast majority staying and living in a country where they have no status and no rights. In 2016, an estimated 8,106 refugees were resettled, down from 12,547 in

1 Corresponding figures from a year earlier were 53,700 Rohingyas, 44,870 Chins, 12,220 Myanmar Muslims, and 7,150 Rakhines, Arakanese and other ethnicities. See https://www.unhcr.org/my/About_Us-@-Figures_At_A_Glance.aspx

2 <http://www.nst.com.my/news/2016/03/133277/battling-unhcr-card-fraud>; and on-going worries like those expressed in <https://refugeeresettlementwatch.wordpress.com/2014/12/29/what-is-going-on-with-the-unhcr-in-malaysia-and-why-are-we-taking-all-these-refugees/>

3 <http://www.thestar.com.my/news/nation/2016/06/20/unhcr-malaysia-to-launch-new-identity-cards/#Y386OtBA02zTBxJG.99>

2015, which was one of the highest figures recorded in recent times⁴. The majority are taken by the United States, and there is every concern that it will be hard to match even this number, given the refugee situation globally and given the new administration's apparent determination to cut numbers anyway.

With the government and with other partners, UNHCR have been exploring alternatives to resettlement. In 2016, this included the idea that some of the non-Rohingya refugees from Myanmar are coming towards the end of a cycle for their need for refugee protection: the environment in their original home may be conducive enough to allow return. In floating this idea, UNHCR also noted any return would have to be handled carefully and may involve a change of status in Malaysia to documented employment⁵.

UNHCR and some civil society groups, including refugee groups, have also been exploring possibilities for greater community-based work in refugee communities in Malaysia. And, following on-going proposals repeated over many years, the idea of giving refugees a right to work again was repeated by different agencies and civil society groups, in 2016⁶.

But there is still considerable opposition within government quarters to any notion of a change in status, let alone the granting of rights. Deputy Home Minister Datuk Nur Jazlan Mohamed, for example, lambasted UNHCR for daring to suggest that Malaysia should be a "country of destination" for refugees, and warned it against "blackmailing" Kuala Lumpur⁷.

This outright opposition may be wavering a little in the light of the government response to the Rohingya situation, but it remains a major challenge to persuade the government to make fundamental policy changes that would give all refugees rights⁸. Past Reports have noted that Malaysia is not a signatory to the 1951 UN Convention on Refugees or its 1967 Protocol. Nor has it signed other key international conventions and treaties, including the International Convention on the Elimination of all Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The signing of these would at least establish some commitment to principles relating to the acceptance and treatment of refugees and asylum-seekers. Without any such principles, and in its persistent refusal to recognise any rights for refugees or asylum seekers, the Malaysian government is confining the thousands of refugees to a lifetime of limbo in this country.

4 <http://reporting.unhcr.org/node/2532>

5 <http://www.thestar.com.my/news/nation/2016/03/23/unhcr-believes-considerable-opportunities-for-refugees-to-return-home/> The article quotes the UNHCR representative as saying: "What we are trying to do at the moment is encourage the government of Malaysia to provide a transitional period for these groups to work lawfully here in Malaysia. If they are registered here in Malaysia lawfully and can work lawfully for a temporary period, this will give all sides the breathing room to negotiate a more durable solution including returns."

6 See for example <http://www.freemalaysiatoday.com/category/nation/2016/12/29/allow-refugees-to-work-says-amnesty-malaysia>; Employing refugees a Win-Win situation June 20 2016 New StraitsTimes; Mercy lauds move to let refugees work November 24 2016 The Sun

7 <http://www.nst.com.my/news/2016/06/153628/nur-jazlan-warns-unhcr-do-not-blackmail-malaysia> June 22 2016 He is quoted as saying: "UNHCR is publicly pressuring Malaysia to take responsibility and accept these people. We have accommodated the refugees based on their (UNHCR's) request, but only on the understanding that Malaysia is a transit country. It is not fair to force Malaysia's hand to take responsibility for them (the refugees). Malaysia is a transit country, but suddenly, they want us to be a final destination? This is totally irresponsible... I would appreciate it if they would stop making announcements like this."

8 We still recall the statement in June 2015, where the Human Resources Deputy Minister said that "if we allow them to work, they will start demanding other needs, such as educational and medical facilities. We understand and empathise with them. As human beings, our responsibility is to help, but not by giving jobs". <http://www.theantdaily.com/Main/Wasted-chance-for-win-win-solution-to-refugee-issue>."

Insecurity and Detention

It is hard to understate the impact this lack of rights and protection has on the lives of the thousands of refugees and asylum seekers here in Malaysia. It is utterly traumatic. And it did not change in 2016. And one of the very real fears faced on a daily basis is the fear of detention.

In the next section, we describe in more detail the abuse of rights which the experience of detention means for refugees, asylum seekers and migrant workers. For refugees and asylum seekers, the fear of detention is very real. Thousands experience detention each year. The UNHCR devote considerable resources to attempting to identify those detainees who would qualify as genuine asylum seekers, and secure their release⁹. But this does not always happen. In Belantik detention camp, one year after being ‘rescued’ from the boats afloat in the Andaman Sea, the majority of those Rohingya so identified by UNHCR as genuine refugees still languished throughout 2016. As the UNHCR Representative stated: “These people have undergone traumatic experiences at the hands of smugglers and traffickers, and are in need of specialised care. The best option for them is to be released into UNHCR’s care where we can assess their protection needs and help find support for them within the refugee communities in Malaysia”¹⁰.

The extent of detention is a glaring example of the consequence of basic human rights being withheld from refugees. In rounding-up ‘undocumented’ migrants, the enforcement agencies make no distinction about whether a person or child is a refugee or asylum seeker or migrant worker. If documents can be shown, which include a UNHCR Card, the person may (not always) be allowed to go free. But otherwise, detention awaits, for men, women and children. The cost to the Malaysian taxpayer is considerable; the cost to UNHCR is considerable; and, more to the point, the cost to the refugee(s) detained is to add further trauma and uncertainty to a life already defined by trauma and uncertainty. All because they have no recognition and no rights.

Access to Employment

Lack of status and lack of basic rights also means refugees and asylum seekers have no rights to employment, health, or education. The lack of a right to employment means refugees and asylum seekers, by necessity, are forced to take whatever work they can find. This is likely to be low-paid, highly insecure, and possibly in an environment which is unhealthy and hazardous. Being undocumented, they share with undocumented migrants the very real possibility of being exploited by unscrupulous employers or agents. Abuses include the non-payment of wages, the lack of any health and safety provision (meaning if they get injured at work, they are unlikely to get any compensation), long hours, no rest periods or rest days or holidays, arbitrary work schedules, no overtime payments, physical or sexual abuse, arbitrary termination and even extortion. Women may be especially susceptible to sexual harassment and gender based violence. Having no rights or status, refugees and asylum seekers cannot access legal remedies and have no social protection. They are also vulnerable to the frequent street controls and raids which occur in areas known to host large number of undocumented workers.

All this despite the numerous declarations and commitments made by governments across the globe. In 2016, these included the pledges made by Ministers of Bali Process countries, to take a comprehensive regional approach to managing mixed migration flows by strengthening cooperation

⁹ It reports that it secured the release of 9,563 persons of concern from detention in 2015. <http://reporting.unhcr.org/node/2532>

¹⁰ <http://www.thestar.com.my/news/nation/2016/05/27/rohingya-resettled-america/#uq3G6j0d9JYIDkb1.99> Among the hundreds being detained are women and children.

on search and rescue at sea, predictable disembarkation, temporary protection and legal pathways for refugees and migrants¹¹. They also included the UN New York Declaration on Refugees and Migrants, launched in September¹². Amidst all the fanfare, little or nothing changed on the ground for refugees and asylum seekers in Malaysia.

With no right to earn an income it is also then a fact that many families rely on contributions from their children. Teenage or younger children may take on jobs to help support their families, in a situation where they remain unprotected. And younger children are often used (often by syndicates) to beg.

Access to health

The situation in the 2015 report continues to hold true. Access to health for refugees in Malaysia is significantly defined by two major factors: the very real fear of detention because of one's presentation to a healthcare facility, and the prohibitive cost. For some living in more rural locations, actual access to an appropriate healthcare facility may also be a factor, and language may also be a difficulty. Access to any mental health¹³ support is extremely hard to find, especially outside the Klang Valley.

The only difference is that again in 2016, the government increased the cost for foreigners seeking healthcare in Malaysia, affecting refugees, asylum seekers and migrant workers equally. A further increase is scheduled for 2017. This may particularly impact women, especially relating to pre- and post-natal care and delivery, as well as anyone needing an operation or longer term treatment, including TB, cancer, diabetes and so on. The regular concern expressed by Malaysian politicians and others about the possibility that communicable diseases (like tuberculosis) are being imported by migrants (including refugees) must be placed against a policy where the majority of these people are rendered unlikely to present themselves for check-ups or treatment.

Some efforts have been made over the years to reduce the exclusion from healthcare faced by refugees and asylum seekers because of their lack of rights and income. In October, a nationwide programme to provide affordable primary healthcare services for refugees was launched, in a partnership between UNHCR and primary healthcare provider Qualitas. Hopefully this will allow some refugees access to much needed healthcare, but cannot be a substitute for the recognition and protection of basic rights to affordable healthcare for all.

11 https://www.unhcr.org/my/News_Views-@-UNHCR_welcomes_Ministerial_Declaration_in_Bali,_calls_for_new_compact_to_absorb_refugees_in_region.aspx

12 This contains 'bold statements' to protect the human rights of all refugees and migrants, regardless of status. It covers many aspects but will it make any difference? See <http://refugeesmigrants.un.org/declaration>

13 The refugee populations in Malaysia of course face particular mental health challenges, including panic attacks, severe depression or other conditions deriving from their continuous security threats (of arrest, detention and deportation); loss of loved ones; inability to work and meet their basic living needs; uncertainty or problems with regard to registration; rape and sexual violence; exploitation by employers in terms of unpaid wages; inability to access health care services; past trauma including being subject to torture or witnessing torture and death of loved ones; human trafficking at the border; and whipping.

Children: Access to education and statelessness

Malaysia is a signatory to the United Nations' Convention on the Rights of the Child, meaning it is duty-bound to protect and enhance the rights of all children including refugee children. This includes ensuring they have access to health; it also should ensure they have access to education. But children of refugees are still not allowed to enrol in government schools in Malaysia: they still have no right to education. Their only access is to alternative schools run either by the local refugee community or by local NGOs, or a partnership of both. UNHCR offers some limited support, but in 2016 estimated that out of over 21,000 refugees and asylum-seekers of school-going age in Malaysia, less than half are enrolled at the primary level, while only one-fifth are enrolled at the secondary level¹⁴. It is long overdue that the Malaysian government's commitment to the Convention was realised through its granting of the right of education without discrimination to all children in the country, including to children of refugees.

Because they have no rights, children of refugees also continue to face difficulties accessing child protective services. They remain excluded from the national prevention and response systems; they may not know where to go to report and/or may be fearful of reporting, especially where they have no UNHCR card. This holds true for registration of births: many do not, for fear of report and arrest by authorities. There is particular concern over the situation in Sabah, where these issues are highly prevalent amongst Filipino refugees and their children.

Rakhine state

In October, the killing of government and military personnel in Rakhine state in Myanmar sparked a reaction by the Myanmar authorities that is continuing at the time of writing. The targeting of the Rohingya population with alleged atrocities ranging from outright murder to rape, torture, burnings, forced displacements, looting and arbitrary arrest, led to urgent humanitarian needs and has led to demands for an independent UN-led enquiry to investigate potential crimes against humanity. In December, the Malaysian Prime Minister departed from normal diplomatic protocol by attending and addressing a rally in Kuala Lumpur, attended by thousands of Malaysians together with Rohingya refugees, to protest the alleged state-endorsed brutality against the Rohingya and pledge solidarity with the Muslim minority group¹⁵. Many saw this as little more than political opportunism (cultivating the Malay (Muslim) vote in the country as election year looms), especially given the fact that for forty years and more, the same Malaysian government has been steadfastly denying any refugee, including Rohingya fleeing from atrocities in Rakhine state, any semblance of welcome, let alone rights. But the rally and subsequent speeches generated considerable media coverage and debate, and at least drew public attention to some of the circumstances leading to why people might be fleeing their homelands to seek refuge elsewhere¹⁶. The attention generated by the rally and the very public promises made may well have to translate into some concrete policy changes, although probably specifically for only the Rohingya. We shall see¹⁷.

14 https://www.unhcr.org/my/News_Views-@-Rohingya_all_rounder_shines_at_Malaysia_learning_centre.aspx

15 <http://www.straitstimes.com/asia/se-asia/mass-rally-in-malaysia-calling-for-support-of-myanmar-rohingya-muslims>

16 A very small sample: <https://www.theguardian.com/world/2016/dec/04/malaysia-pm-urges-world-to-act-against-genocide-of-myanmar-rohingya>; <http://www.malaysiakini.com/letters/365458>; Unite to stop Rohingya persecution: December 28 2016 New Straits Times; <https://www.forbes.com/sites/realspin/2017/01/23/the-rohingya-exodus-is-malaysia-in-a-catch-22-situation/#517944903667>; Clear refugee Policy Needed 20 December 2016 New Straits Times;

17 There has long been talk of pilot employment projects for Rohingya, mentioned for example in November 2015, but at the end of 2016 there was a serious proposal for a project involving just 300 Rohingya.

Human Trafficking

The pervasiveness of human trafficking amongst refugee, asylum seeker and migrant worker communities has long been recognised. The discovery of the trafficking camps at Wang Kelian in 2015 was a grim reminder of this reality. Few responsible for running and allowing these camps have been brought to justice: a continuing blot on the record of the Malaysian government. The US annual Trafficking in Persons Report continues to highlight the connection between the vulnerability of refugee and migrant worker populations coming to Malaysia and human trafficking activities. But it is still questioned how far the authorities in Malaysia are working systematically and directly with refugee and migrant populations to take evidence of the experience and identify and prosecute criminals. More often than not, it is people from these communities who are criminalised, arrested and detained rather than enlisted as allies in the fight against the syndicates. The Report also continues to highlight child trafficking for the purpose of forced begging among the refugee population, mostly Rohingya children¹⁸. Further, attention is increasingly focussing on the situation relating to the smuggling or trafficking of child brides.

Conclusion

Life for refugees and asylum seekers in Malaysia continues to be a rather desperate struggle.

Without rights, it is exceptionally difficult to survive with any dignity or hope. SUHAKAM has continued to urge the Government “to accede to the Convention Relating to the Status of Refugees 1951 and its 1967 Optional Protocol in order to accord adequate protection to, and to respect the rights of refugees and asylum seekers in Malaysia.”¹⁹ But the antipathy to giving even the most basic of recognition to refugees remains clearly entrenched in this present government, despite the recent rhetoric surrounding the Rohingya, and it is difficult to see what will fundamentally change. While there are some specific initiatives to support specifically the Rohingya population in Malaysia, almost certainly the challenge for basic rights, and for the recognition, protection and status of other asylum seekers and refugees will remain.

RECOMMENDATIONS

As reported year on year, a number of initiatives need to be undertaken with urgency if the situation facing refugees and asylum-seekers is not to continue to place so many thousands of them in unprotected situations where physical, sexual and mental abuse is a daily occurrence.

There is still huge scope for progressing discussions on more cohesive and effective cross-border cooperation and initiatives as the ASEAN community. The ASEAN Convention on human trafficking provides a potential for ASEAN government and enforcement agencies to really work together to tackle the scourge of trafficking in persons. There is also plenty of scope to make concrete the Bali Process and other commitments to promote positive harmonisation within ASEAN countries with regard to the recognition of the status and rights of refugees and asylum-seekers.

18 Report of the Special Rapporteur on trafficking in persons, especially women and children. Mission to Malaysia, 2015. Maria Grazia Giammarinaro. United Nations A/HRC/29/38/Add.1. Paras 19, 20, 21

19 Keynote address at the Roundtable on Challenges and Opportunities for Refugees in an Urban Environment organised by the UNHCR, November 2015, <http://www.thestar.com.my/news/nation/2015/11/27/suhakam-urges-malaysia-to-recognise-rights-of-refugees/>

More specifically, the Malaysian government should:

- become a signatory to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol;
- become a signatory to all other major United Nations treaties and protocols, including the International Convention on the Elimination of all Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- embrace and adopt the proposals outlined in the 2008 document “Developing a Comprehensive Policy Framework for Refugees and Asylum-seekers”, submitted by the Bar Council after extensive consultations with stakeholders. This includes putting into place a legal and administrative framework for dealing with refugees and asylum-seekers which will provide a more humane, appropriate and less arbitrary environment;
- fully uphold the principle of non-discrimination, and to ensure that this is extended to all non-citizens within the jurisdiction of Malaysia;
- raise awareness about the status and special circumstances of refugees and asylum-seekers amongst government workers, in particular those serving refugees and/or asylum-seekers and their children;
- provide a right to work for all refugees and asylum-seekers so that they have the basic right to earn a livelihood free from worry of exploitation or recruitment by human traffickers and modern day slavers;
- implement a determined, proactive strategy to combat human traffickers and the criminal syndicates who apparently so easily exploit these communities, not least by the police and other authorities working closely and respectfully with refugee and asylum-seeker communities to identify, arrest, and prosecute criminals;
- develop a legislative framework for the protection of asylum-seeking and refugee children, particularly unaccompanied children, in line with international standards, which will include the provision of their right to education and that any detention of children is used only as a last resort and fully complies with international standards and guidelines;
- change its policy with regard to healthcare access for refugees and asylum-seekers, to ensure affordability and access is free from fear of arrest and detention;
- act decisively on reports of sub-standard conditions in detention camps. Adopting the recommendations of the 2008 Suhakam report would be a good start, which include the respect and implementation of the provisions of the Standard Minimum Rules for the Treatment of Prisoners (1957 & 1977); the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (1988); the Basic Principles for the Treatment of Prisoners (1990) and Rules for the Protection of Juveniles Deprived of their Liberty (1990);
- respect and adhere to the principle of non-refoulement;
- stop the practice of whipping.



MIGRANT WORKERS

MIGRANT WORKERS

By James Lochhead

Over the years, similar to that on refugees and asylum seekers, the situation facing migrant workers in Malaysia has been a depressing and repetitive catalogue of arbitrariness, abuses and denigration. 2016 has been somewhat the same, but with some small gleams of light. There are plenty of examples of arbitrariness and abuses; the suspicion, outright xenophobia and racism continue, but there have been announcements and indeed published commitments which if implemented will begin to tackle some of the challenges.

Generally, the approach to labour migration and migrant workers up to now has been informed by concerns about ‘security’ and by appreciation of easy profit. A rights-based approach, advocated by many groups for several years, has been conspicuous by its absence. Policy priorities presented by the Barisan Nasional over many years have rarely centred on the advantages of recognition, protection and promotion of basic rights for workers, including migrant workers. Instead, we have been appalled by the way that agents, labour outsourcing companies, employers, human traffickers and modern day slavers have been operating at the expense of (migrant) workers’ rights, with little monitoring or enforcement or apparent concern by the authorities. Instead it has been the migrant workers themselves who have more often than not been the ones criminalised in this scenario.

Now, however, perhaps encouraged by the prospect of the signing of the Trans-Pacific Partnership Agreement (TPPA), there are some ‘commitments’ by the government to change things¹. As part of the TPPA process, Malaysia’s record on eliminating forced labour, abolishing child labour, prohibiting discrimination in employment, safeguarding freedom of association, and the right to collective bargaining for migrant workers came under increased scrutiny. Laws such as the Employment Act 1955, Private Employment Agencies Act 1981, Trade Unions Act 1959, Industrial Relations Act 1967, Sabah Labour Ordinance (Chapter 67), Sarawak Labour Ordinance (Chapter 76), Minimum Standards of Housing and Amenities Act, 1990, and the Children and Young Persons (Employment) Act 1966 were included in this assessment.

One positive response can be seen in the commitments carried in Malaysia’s 11th Malaysia Plan², covering the five years from 2016-2020. This commits the government to ensure that the Ministry of Human Resources (MOHR) will assume full and sole responsibility for regulating the recruitment of migrant workers, eliminating the role of outsourcing companies and other intermediaries in the recruitment of such workers. The Plan also aims to make employers take full responsibility for the recruitment process and all the expenses involved; for the welfare of their workers, including their

1 The Labour Chapter requires states to adopt and implement laws in accordance with the ILO Declaration on Fundamental Principles and Rights at Work.

2 <http://www.epu.gov.my/en/rmk/eleventh-malaysia-plan-2016-2020>

housing and basic amenities, until the worker returns home; and for the payment of any levy. The government undertakes to establish a One Stop Centre under the Ministry that will determine the requirement of migrant workers by sector, verify and approve applications for migrant worker, and monitor and respond to all matters related to the welfare of migrant workers. This will help the Plan realise its attack on the issue of excessive numbers of workers being imported by agents and labour outsourcing companies, by stating that the ratio of foreigners in the country's labour market must not exceed 15 per cent, or 2.1 million, by 2020.

A comprehensive policy to guide all important decisions about labour migration is long overdue and, if implemented, will reverse the present scenario of ad hoc decision making, frequent policy reversals, and decisions that clearly neither benefit the workers, or the country, but allow certain people to make considerable profit³.

Like the pronouncements about the Rohingya described in the previous section, it is a little difficult to know whether these intentions of the government represent a sea change in attitude which will translate into substantial policy innovations and meaningful change in practice. If we are sceptical, we may note that the proposals may have been designed to appease TPPA processes, and now that the TPPA would appear dead in the water, they may quickly be forgotten. We can also point to the continued, unchanging kind of policy flip-flopping over sourcing, recruitment, levy, attitudes and responsibilities with regard to migrant workers, epitomised by the fiasco that is the Bangladesh deal, reported below. If we are more hopeful, we may note that both the concerns and the proposed solutions are actually shared across the board – by employers, workers, some government agencies and civil society groups. This was exemplified in 2016 through the four roundtables organised by the Migrant Right to Redress Coalition, also reported below.

Whatever the outcome, what is certain is that millions of migrant workers continue to exist in hugely vulnerable situations, often without legal status and with few if any avenues to find protection of any rights. Thousands are in detention camps which themselves are subject of major concern (in terms of conditions and treatment of the women, men and children who are detained). There is considerable work still to be done.

Numbers

The situation was becoming ever more pressing because the numbers of migrant workers in Malaysia showed no signs of diminishing in 2016: indeed, they were increasing. Estimates do fluctuate. In November, it was stated in a parliamentary reply that there were a total of 1,854,684 foreign workers officially holding work permits issued by the Malaysian immigration department. The highest number of legal migrants were from Indonesia (749,226), followed by Nepal (411,364), Bangladesh (237,991), Myanmar (140,259), India (121,430) and others (194,374)⁴.

This is slightly lower than a regular claim that there are some 2.1 million registered foreign workers, with the number of undocumented ones probably twice that many, meaning that there are possibly 6 million migrant workers in the country, accounting for over 30% of the workforce. This is the

3 Private companies used and paid by the government to help process and manage migrant workers include NERS, MyEG, Synerflux and FOMEMA. Who actually runs and benefits from these companies has long been a subject of discussion, as has the apparently excessive charges and therefore excessive profits made by these and other companies. See for example Steven Sim's article in <http://penangmonthly.com/the-political-economy-of-malysias-migrant-worker-business/>

4 <http://www.thedailystar.net/backpage/malaysia-bangladeshis-are-3rd-largest-legal-migrants-1312927> 11 November 2016

Malaysian Employers Federation (MEF) estimate⁵. This would mean that, despite its relatively small size and population of 31.5 million, Malaysia would have the fourth-largest migrant worker population in the world⁶.

Migrant workers are described as doing especially the dirty, dangerous and demeaning jobs, but are found now in all major sectors, including manufacturing, agriculture, construction and the services sector. Possibly 250,000 women work as domestic workers, with women also working in manufacturing and services.

We must not forget that for millions of these workers the experience of their time in Malaysia is a productive one, working out their contracts with minimum of fuss and trouble, able to earn enough to support themselves and their families back in their homeland. But for millions of others, the experience is not so good, and the environment quickly proves to be lacking in support and commitment for even the basic rights and enforcement of the law where migrants experience abuse. The kind of comprehensive review set out by the 11th Malaysia Plan would be a very welcome step towards changing the environment to being one where human rights are central: recognised, promoted and enforced.

Recruitment and MOUs

On February 18th, the Human Resources Minister Richard Riot Jaem travelled to Dhaka to sign a memorandum of understanding with the Bangladeshi government for an additional 1.5 million Bangladeshi workers to work in Malaysia over the next three years⁷. The news was greeted with considerable shock by many quarters. There was immediate widespread speculation over who was involved in the company appointed to handle the workers. There was considerable questioning of the need for these extra workers at a time when there was already acknowledgement that Malaysia had too many migrant workers, millions of whom were undocumented⁸.

However, the very next day came an announcement that Malaysia had suspended recruitment of foreign workers from all source countries including Nepal⁹. Deputy Prime Minister Datuk Seri Ahmad Zahid Hamidi was quoted encouraging employers to hire locals rather go for international recruitment of foreign labours¹⁰.

In the ensuing confusion, Ahmad Zahid attempted to control further discussion on the topic. In a parliamentary reply, he explained that a contract with the company handling the management of Bangladeshi workers was still on-going, and referred to the need for privacy and referred to the 1972 Official Secrets Act¹¹. He did not explain the contradiction between this and the commitments of the 11th Malaysia Plan. This flip-flopping provides a clear example of the lack of any principle driving government policy regarding labour migration.

5 <http://www.straitstimes.com/opinion/the-dilemma-of-having-foreign-workers-in-malaysia> 17 September 2016

6 <http://www.politifact.com/global-news/statements/2016/apr/12/bernie-s/sanders-right-migrant-laborers-malaysia-are-forced/> 12 April 2016

7 <http://www.malaysiakini.com/news/330889>

8 <http://says.com/my/news/government-to-bring-in-1-5-million-bangladeshi-workers-to-malaysia>; <http://www.channelnewsasia.com/news/asiapacific/malaysia-downplays-foreign-worker-controversy-8185762>

9 <http://kathmandupost.ekantipur.com/news/2016-02-21/malaysia-puts-temporary-ban-on-new-migrant-workers.html>

10 <http://www.thesundaily.my/news/1705373>

11 <http://www.forbes.com/sites/lorienholland/2016/03/22/malaysia-grapples-with-1-5-million-extra-migrant-workers/#3e252c85a9cc>

Further, it gave rise to an exhibition of the public sentiment, much of which was xenophobic in the extreme. This is epitomised by a group called *Pertubuhan Rapat Malaysia*, which held a news conference to warn of the dire consequences of admitting such an influx of foreign workers, from serious crime to disease and terrorist attacks akin to those committed by the Islamic State. “It has become a norm for them to rape local women,” the organization’s president, A. Rajaretinam, said. He went on to accuse foreign workers of spreading disease and “conquering everywhere.”¹²

The signing of the deal with Bangladesh was just one of several initiatives during the year relating to government-to-government dialogue and deals relating to migrant workers. Labour migration is an absolutely crucial part of regional and national economies. For sending countries, remittances make critical contributions to the national coffers and local economies. For host countries like Malaysia, the cheap and ready labour now available fuels the national economy and is critical in its turn to national development.

So for many of the less rich countries in the region, sending workers to Malaysia may be a highly important strategy for economic growth. This is exemplified by the appeal of Cambodian Prime Minister Hun Sen to the Malaysian government to boost its intake of Cambodian migrant workers on his official visit in June¹³. This despite the memory of the fate of Cambodian workers like Mey Sichan¹⁴ which had given rise to a three year moratorium, and reports of horrific treatment in Malaysian detention camps, which included accusations of torture and deaths¹⁵.

Government to government policies may also be part of political expediency. In December, Myanmar suspended the sending of migrant workers from Myanmar to Malaysia¹⁶, which was widely interpreted as part of the diplomatic fallout from Malaysia’s outspoken opinions on the ongoing violence in Rakhine State.

Government to government policies may also be driven by concern for the rights and protection of the worker, as was the case in 2016 for Indonesia. In November, it was reported that the Indonesian government, in addition to its concerns regarding the safety and security of its workers (not least domestic workers¹⁷) had expressed its reservations about the way costs had escalated through the use of private companies to handle Malaysia processes for migrant workers¹⁸. The worry was that the new costs would be passed on to the migrant workers; the Ministry was asking Malaysia to ensure that it was the employers who would absorb the costs. It was pointed out that the cost now is some RP1.15 million (RM479) to arrange visas for one person, compared to the previous rate of RP50,000. This is the sort of profiteering by privatised companies which was reported in our 2016 Report and which the 11th Malaysia Plan commits to eradicating. Clearly not everyone in the government is paying attention.

12 <http://www.themalaymailonline.com/malaysia/article/putrajayas-pro-bangladeshi-worker-policy-will-open-floodgates-to-terrorism#sthash.SHXL21IV.dpuf>; <http://www.freemalaysiatoday.com/category/nation/2016/02/17/ngo-influx-of-foreign-workers-will-lead-to-more-rape-cases/>

13 <http://www.sandiegouniontribune.com/hoy-san-diego/sdhoy-hun-sen-asks-malaysia-to-accept-cambodian-workers-2016jun06-story.html>

14 <http://www.freemalaysiatoday.com/category/nation/2015/02/24/couple-starved-maid-to-death-court-told/>

15 <https://www.cambodiadaily.com/news/maids-claim-fatal-abuse-malaysian-depot-116653/>

16 See <http://www.mmtimes.com/index.php/national-news/24139-labour-official-upbeat-on-migrants-to-malaysia-restart-but-no-date-set.html> 09 December 2016 It was said at the time it will be lifted when political conditions in the latter improve and the safety of labourers can be better assured.

17 <http://www.straitstimes.com/asia/se-asia/indonesia-plans-to-stop-sending-new-live-in-maids-abroad>

18 <http://www.themalaymailonline.com/malaysia/article/indonesia-wants-malaysian-hirers-to-pay-new-migrant-workers-costs> 09 November 2016

But where one takes a stand, others may be prepared to fill in. Almost immediately Indonesia had expressed concerns about its domestic workers, the government of Timor Leste was reported to have shown interest in supplying domestic workers to Malaysia.¹⁹ Again, driven by the hope of economic returns. This in turn gave rise to civil society groups condemning the ‘trawling’ for migrant workers, and emphasising that the overriding concern should be the protection and enforcement of, in this scenario, migrant workers’ human rights²⁰.

Employment conditions in Malaysia

Ironically, 2016 was a year when remittances were significantly and adversely affected by the depreciation of the Malaysian ringgit. The fall in the value of one’s work may undermine a major reason that keeps migrant workers here. Currency depreciation affects the value of remittances sent back to families dependent on the support from the migrant worker; it may also affect the ability to pay off debts incurred to come to Malaysia in the first place. In Nepal, for example, remittances from Malaysia were one-third of the Rs 617.27 billion received the year before²¹. Cambodian migrant workers in Malaysia reportedly were taking home about \$100 less per month than they did two years ago²².

The ringgit depreciation added to the concerns faced on a daily basis by many migrant workers, in relation to their daily existence and the terms and conditions of their employment in Malaysia. The concerns have been enumerated over and over again, many times, and continued to be documented throughout 2016.

For example, a report compiled by MTUC/GEFONT documented abuses faced by Nepali workers. These included being forced to work 16 hour days; no rest days; non-payment or partial payment of wages; women being sexually assaulted; injuries being commonplace; and deaths at work also far too common²³.

For example, a Finnwatch follow-up report to conditions in oil palm plantations found migrant workers still pay enormous recruitment fees; are still too often misled about what to expect, during recruitment; and many workers are still not paid the minimum wage. The Report also notes a multitude of shortcomings in the way workers’ rights are being monitored and supply companies certified. One principal problem highlighted is that certifications do not currently take sufficient steps to intervene in the human rights risks apparent in recruitment²⁴.

For example, a media investigation found that in the electronic industry²⁵, workers were still being asked to work long hours without guaranteed rest days and with forced overtime. Passports were retained and complaint mechanisms non-existent²⁶. In the background is still the Verite report on

19 <http://www.nst.com.my/news/2016/05/147545/timor-leste-prepared-send-maids-malaysia>

20 <http://www.tenaganita.net/news-and-press-releases/press-releases/address-root-causes-of-abuse-and-exploitation-stop-whirling-to-poorer-countries-to-recruit-domestic-workers/>

21 <http://myrepublica.com/society/story/36293/300-000-nepalis-in-malaysia-wish-to-return-dofe.html#sthash.L7klqN7A.dpuf> 03 February 2016

22 <http://www.phnompenhpost.com/national/migrant-workers-malaysia-feel-pinch-ringgit> 28 November 2016

23 <http://www.solidaritycenter.org/16-hour-days-for-migrant-workers-at-malaysia-factory> 19 January 2016

24 <https://www.finnwatch.org/en/news/419-a-year%27s-wage-the-price-for-a-job>

25 <https://www.theguardian.com/global-development/2016/nov/21/malaysia-forced-labour-casts-dark-shadow-over-electronics-industry> 21 November 2016

26 <http://www.nst.com.my/news/2016/12/196510/migrant-workers-issue-samsung-terminates-contract-labour-supply-company-malaysia>

this sector from 2015, documenting the extent of abuses and conditions meeting definitions of modern day slavery²⁷.

For example, the situation facing migrant workers in McDonald's, where they had complained that their labour supply company had deceived them over wages, cheated them of payments and had confiscated their passports unlawfully. The McDonald's' response was typical: "We sometimes work with established recruitment agencies which employ foreign workers, and sub-contract a number of them to McDonald's in Malaysia. These staff members are employees of the recruitment agency, not McDonald's."²⁸

"The work is extremely difficult. You get only 45 minutes in a 12-hour shift to eat and seven minutes every two hours to drink water."

"Even when it is time to go, the company does not return your passport. I don't know why ... I asked to go home, but the company said they will not send me back."

"Malaysia is one huge assembly plant. The who's who of the electronics industry is here, yet the labour supply companies and subcontracting companies are a law unto themselves. There is no minimum wage, no overtime rate and no inspection. They operate under the radar." (Bruno Pereira, Malaysian Trades Union Congress)

These are just some examples of the kind of abuses perpetrated against migrant workers. They highlight, among other things, the on-going concern of many groups about the extent of human trafficking and modern day slavery in Malaysia, and the effectiveness of government action in combatting these.

They were among the issues aired at a series of four roundtables organised throughout the year by the Migrant Right to Redress Coalition, a grouping of migrant worker groups and local NGOs. These roundtables brought together a range of key stakeholders, including government representatives, key government agencies, employers' associations, workers' groups including migrant worker groups, and civil society groups, to discuss the issues relating to recruitment, employment rights, undocumented labour, arrest and detention, social security, health and housing, family, children, and socio-cultural rights. One of the outcomes was the widespread agreement about the challenges and the potential solutions.

The Roundtables were just one forum which brought attention to the many issues that have been reported by so many organisations and researchers throughout the years, including ILO, worker groups, regional groups, trades unions and civil society groups across the region.

They include the widespread ignorance or flouting of labour legislation, including the provisions of the Employment Act; the widespread practice of retaining worker passports, despite this being against the law; the lack of accountability of employers or agents or labour outsourcing companies in providing payslips and/or details of often arbitrary or illegal deductions; the disregard often shown relating to prompt and accurate payment of wages; the lack of regard to statutory provisions for overtime, rest days and holidays; the disregard of the right to unionisation, to the point where some contracts outlaw this despite it being an enshrined right; the lack of protection against sexual

27 <http://www.labourbulletin.com/2016/11/expose-on-exploitation-of-migrant.html?spref=fb>

28 <https://www.theguardian.com/global-development/2016/nov/28/workers-for-mcdonalds-malaysia-claim-labour-exploitation> 28 November 2016

harassment and sexual violence at workplaces; a host of health and safety inadequacies; and the lack of an effective right to redress. The fact that so many migrant workers are ‘managed’ by labour outsourcing companies or agents rather than employers has exacerbated the situation where migrant workers are dependent on often unscrupulous paymasters whose activities go largely unmonitored.

Despite general agreement amongst participants, and the kind of systematic and clear approaches mapped out by the 11th Malaysia Plan, the year continued to be marked by a lack of effective action on most if not all these areas, and more government flip flopping, introducing apparently ad hoc decisions on things like the levy²⁹ or fines on employers, which then provoke a backlash and are rescinded or put on hold. For example, the September announcement of the intention to freeze the assets and bank accounts of employers hiring undocumented foreign workers provoked huge and effective outcry from almost all trade groups, including the Federation of Malaysian Manufacturers and the Associated Chinese Chambers of Commerce and Industry of Malaysia (ACCIM)³⁰.

Undocumented Migrant Workers

We do need to remind ourselves that there are very many migrant workers whose time in Malaysia passes without controversy and with satisfaction. But for very many others, this is not the case. And this is particularly true for the millions of undocumented migrant workers, who have no status and very little protection against any abuse. As noted above, there are literally millions of such persons in Malaysia.

Workers become undocumented in a situation of over-supply, and also in situations where there is so little enforcement of basic rights in so many workplaces employing migrant workers. Many will have started working as documented workers, but have run away, for reasons which might include forced or arbitrary dismissal, physical or sexual abuse, cheating or other abrogation of basic employment rights. The fact that so many employers or agents/labour sourcing companies hold, in defiance of the law, passports and work permits means that when women or men migrant workers leave in unhappy circumstances, they become without documents. The fact that the authorities seem to ignore the abuses perpetrated by employers and/or companies and agents, but instead concentrate their efforts on catching and criminalising the migrant workers, does not help. We might add that also working as ‘undocumented workers’ are refugees.

There have been regular attempts at amnesty and legalisation by the government. 2016 saw such an exercise, launched in February. It was an online scheme, which required employers to pay RM1,200 per worker for registration and administrative charges, plus any fines for immigration offences, levy, visa, processing fee and foreign worker work permits. In total, employers were paying between RM1,395 and RM3,485 for each worker. Inevitably, this was to a privatised company appointed by the government to handle this. Once again, the exercise had limited impact, because employers objected to the high processing fees. This and the fact that a significant portion of undocumented workers are working in sectors that are not meant for foreign labour³¹. This

29 For example, the Government announced new levy rates in February, revised them in March, and then indicated that they would be put on hold till 2017. See: <http://www.thestar.com.my/news/nation/2016/02/01/foreign-labour-levy-doubled-revision-to-ensure-better-management-of-workers-says-dpm/#HHlVfstBA0aBYasQ.99> and www.thestar.com.my/news/nation/2016/03/18/foreign-worker-levies-penisular-malaysia/#6SAvuc2zTiHXPHoq.99

30 <http://www.thestar.com.my/news/nation/2016/09/17/foreign-worker-issue-needs-intervention-technically-there-is-full-employment-for-malaysians-and-ther/> ACCIM commented that the way to resolve an issue like this “is not to throw a nuclear bomb at the industry.”

31 <http://networkofactionformigrantsnam.blogspot.my/2016/02/registration-of-undocumented-migrant.html> 15 February 2016 The Immigration Department made clear that these were charges set not by the government but by the private companies appointed by the government to handle the exercise. Again, an exercise in easy profiteering which

includes within SMEs, whose Association president stated that companies hired undocumented workers because the cost of rehiring foreign workers is too high and the procedures too rigid³².

Undocumented migrant workers are particularly vulnerable to the activities of human traffickers and modern day slavers. They may feel powerless and have little idea of where to go for help, if things go wrong. The United States of America's Department of State's 2016 Trafficking in Persons Report noted (not for the first time) that migrant workers on agricultural and palm oil plantations, at construction sites, in the electronic industry, and in domestic work may be subjected to labour practices indicative of forced labour, such as restrictions on movement, withholding of wages, contract substitution, confiscation of passports and debt bondage³³. This repeats some of the exposures by worker groups, civil society and the media quoted above. Areas highlighted as needing action by the Roundtables (also mentioned above) included proactive control of numbers recruited for the country; the monitoring and strict enforcement of the Passport Act and all other work-related legislation; the banning of private companies/agents engaged in outsourcing migrant labour; the recognition of the right to employment for refugees, and the establishment of a clear right to redress for all migrant workers, including for undocumented migrant workers³⁴.

Detention

For millions who remain without documents, their vulnerability to modern day slavery and human trafficking is supplemented by their vulnerability to harassment, extortion, arrest and detention by the authorities. At any one time, thousands are in detention centres, the conditions of which have for long been subject of immense concern. This vulnerability they share with refugees and especially asylum seekers.

Documentation over many years has repeatedly highlighted the serious problems relating to detention camps in Malaysia. The National Human Rights Commission (SUHAKAM) is one of many who describe how detainees in immigration detention centres live in overcrowded cells with little room to move or sleep. Conditions are often insanitary; food may be in short supply and nutritionally deficient; access to sufficient drinking water may be challenging; the chance for exercise and for contact with the outside world may be minimal. "Not only is the human dignity aspect of detainees eroded, but their mental, emotional and physical health sometimes deteriorates further.... More and more women and children are being held in places of detention without many of the necessary changes in infrastructure... Unfortunately, there is this feeling that there is little interest in the human rights of detainees, sometimes even regarding them as having lost all of their human rights by virtue of their detention. This attitude, in our view, is reflected in Government budgetary priorities and the resources made available for the running and upkeep of all places of detention in the country"³⁵.

directly contributed to the failure of the exercise.

32 <http://www.themalaymailonline.com/malaysia/article/smes-admit-hiring-illegal-workers-but-say-asset-freeze-would-harm-economy>

33 <https://www.state.gov/documents/organization/258876.pdf> p255

34 Towards a Comprehensive National Labour Migration Policy, Migrant Right To Redress Coalition Report, forthcoming

35 The Human Rights Commission of Malaysia (SUHAKAM) Annual Report, 2016

Women Migrant Workers

Women migrant workers face particular difficulties in addition to facing the sort of issues already described above. For those working as domestic workers in Malaysia, numbering possibly 250,000 - 300,000, their conditions continue to be of major concern.

Partly because they are excluded from significant provisions of the labour legislation, partly because of their isolation and invisibility, any abuses are hard to identify. But year on year reports draw attention to how employers may have the women workers on call 24 hours a day, 7 days a week; refuse to honour days off or holidays; may not even have a contract; withhold passports; force workers to work in different homes; expect the worker to undertake what in many countries is recognised as highly skilled and highly paid work: childcare, care of the elderly, and care of the sick; are exposed to hazardous chemicals that are manually handled; face health problems because of the long hours standing and possibly lifting; are banned from communicating to the outside world and banned from having boyfriends; and are threatened by agents if there are complaints³⁶. The vulnerability and isolation has of course led to many cases of serious and sustained sexual and physical violence, in some cases leading to death.

Tenaganita and other groups have long campaigned for the rights and protection of domestic workers to be properly recognised and enforced. A proposed legislation has been under review by the government for some time. But little has happened. This unwillingness to address the human rights and gendered violations of one of the most vulnerable and invisible groups of workers in our country has been condemned. “The policies and practices of the government has institutionalised a culture of abuse, violence and slavery-like conditions for domestic workers”.³⁷

Throughout 2016, worker groups and other organisations continued to draw attention to the ongoing vulnerability to sexual violence faced by women generally in Malaysia, and women migrant workers in particular³⁸. Migrant women workers also continue to face abuse of their rights in relation to reproductive and family rights. For example, pregnancy continues to be listed as an illness under the FOMEMA scheme, and those who become pregnant face deportation. It is argued that pregnancy is not a disease but a fundamental human right. No contract should make pregnancy a reason for dismissal and this should be protected and enforced by the government. Potential targeting of migrant women in terms of breaking abortion laws has been challenged: it is argued that women migrant workers should have the same rights to abortion as Malaysian women. Contracts or actions by employers or companies/agents stopping (women) migrant workers from getting married further infringe on a basic human right and should not be tolerated³⁹.

36 One such 2016 report is: Worker, helper, auntie, maid? Working conditions and attitudes experienced by migrant domestic workers in Thailand and Malaysia Bridget Anderson ILO/UN Women 2016

37 <http://www.tenaganita.net/news-and-press-releases/press-releases/address-root-causes-of-abuse-and-exploitation-stop-whirling-to-poorer-countries-to-recruit-domestic-workers/>

38 <http://globalnation.inquirer.net/149239/most-women-ofws-in-malaysia-in-vulnerable-occupations-attache>

39 Towards a Comprehensive National Labour Migration Policy, Migrant Right to Redress Coalition Report, forthcoming

Housing

The adoption of the Guidelines on the Minimum Standards of Housing for Foreign Workers in January was an indication that at last some attention is being given relating to the very poor living conditions many migrant workers are forced to endure⁴⁰. The majority are housed in accommodation provided by their employers or agents or outsourcing companies. Often exorbitant deductions may be made from their wages to cover housing which may be overcrowded, unhygienic, poorly maintained, substandard, and with few facilities. There is negligible monitoring of housing conditions for migrant workers by either federal or local authorities, despite the fact that there have been standards laid down in, for example, the Minimum Standards of Housing and Amenities Act (Act 446) passed in 1990 by the Ministry of Human Resources for certain sectors. The denial of the basic right to decent housing, and the neglect of the consequence of substandard housing on the health and welfare of the migrant workers may be reduced if the Guidelines are truly adopted and enforced without fear or favour⁴¹.

Healthcare

In June, the Nepalese Embassy reported 461 Nepalis had died at work in Malaysia in 2015, representing a 32% increase from the 348 deaths in 2014⁴². That is an average of nine deaths per week. This was a glimpse into an issue that was also highlighted by the International Labour Organisation (ILO). In a 2016 Report, it attributed the cause of the high fatality among migrant workers to “poor working conditions, high-levels of occupational stress and lack of adequate medical care.”⁴³

The neglect of protection of a worker’s basic right to health is also exemplified through the fact that so many employers, agents and outsourcing companies either are ignorant of, or ignore, obligatory responsibilities with regard to health and safety. Adequate insurance for their workforce, or compliance to the various legislation including the Workmen’s Compensation Act, is uneven across employers. For undocumented workers, of course, there is little or no protection. Accidents at the workplace may then remain uncompensated, and in cases of serious injury or death, there may be little benefits paid either to the worker or the family.

Where migrant workers need to seek health treatment outside the workplace, they face the very high charges at government hospitals and clinics, charges which again rose in 2016⁴⁴. As is the case with asylum seekers and refugees, these high charges combine with a fear of arrest and detention, especially for those without documents, since government health providers are duty bound to report undocumented clients to the authorities.

A review of the right to health is an essential component of the sort of comprehensive overhaul of the whole context of labour migration called for by the ILO and implied in the commitments of the 11th Malaysia Plan. Adequate insurance, clear information made available to all migrant workers as to their rights to health and compensation, affordable charges and sound and enforced workplace practices relating to health and safety are key aspects that need dealing with. And there needs also

40 <http://www.thesundaily.my/news/1800189>

41 <http://www.themalaymailonline.com/malaysia/article/the-root-of-poor-workers-housing>

42 <http://www.freemalaysiatoday.com/category/opinion/2016/06/24/malaysia-becoming-death-camp-for-migrant-workers> 24 June 2016; see also <http://nepalitimes.com/article/nation/disproportionate-number-of-deaths-of-Nepali-workers-in-Malaysia,2812>

43 Review of Labour Migration Policy in Malaysia, ILO, February 2016

44 <http://www.thestar.com.my/news/nation/2015/10/26/medical-fees-for-noncitizens-to-increase-by-70/>

to be some positive steps taken to include migrant workers in social protection schemes, from which they are presently excluded.

Conclusion

There are at last some signs that there is some concern within government circles for a national labour migration policy which is both coherent and inclusive of rights-based proposals. But there is still a long way to go. The competing interests of those making easy and considerable profits out of the migrant worker industry still exert extensive influence and continue to endure. This helps explain the ad hoc, often chaotic policy decisions of which several examples were related for this year. The fact that the government, in contradiction to its own statement of intent carried in the 11th Malaysia Plan, continues to contract private companies to handle the recruitment, registration, processing and mandatory health checks for migrant workers, at highly inflated prices, may indicate a continuing confusion between policy decisions and vested interests. Where profit considerations continue to drive policy, human rights inevitably suffer, and this has been the story for migrant workers for far too many years. It is difficult to see what will break it.

RECOMMENDATIONS:

If we are to protect and enhance the human rights of migrant workers, tackle modern day slavery, and combat human trafficking, there is a huge amount to be done. Attitudes must change and the Malaysian government and its agencies commit to protecting the rights of all workers, to put people before profit.

To start with, the Malaysian government needs **to fully commit to and implement its own policies outlined in the 11th Malaysia Plan**. These include:

- recognition of the need for a foreign workforce and to develop and review existing safe migration pathways, acknowledging that the current approach to migration management, especially the recruitment of foreign labour via unscrupulous employment agencies, may favour human trafficking and modern day slavery;
- to work closely with country-of-origin governments to fine-tune the recruitment system to ensure that migrant workers are recruited in a regular manner and are equipped with the necessary skills in tandem with the employment as well as knowledge on their labour rights and obligations⁴⁵;
- to phase out third-party agents dealing with migrant workers⁴⁶ as quickly as possible, and meantime strengthening the regulation of employment agencies, and to take immediate action to revoke their licence and prosecute them where abuses have taken place;

45 These recommendations include recommendations presented by the Malaysian Bar in conjunction with International Migrants Day 2015, on December 18th 2015; recommendations from the Malaysian government's National Human Rights Commission (SUHAKAM); recommendations from earlier major reports like that of Amnesty International; and recommendations carried year after year by local groups and unions. Nothing much has changed in 2016, sadly.

46 This is a recommendation from the 2015 World Bank Report on Malaysian Migrant Workers. *'The role has to be taken by the employer; the responsibility has to lie with the employer'*. Quoted by World Bank senior economist Rafael Munoz Moreno: <http://www.straitstimes.com/asia/migrant-labour-helps-malaysia-world-bank>

It also needs to ratify, adopt, implement and enforce the provisions of major international and regional Conventions and Declarations with regard to labour migration and the protection and enhancement of core labour standards. These include:

- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- the two ILO Conventions on Migrant Workers (Convention 97 and Convention 143), that set the standards for the rights of migrant workforces;
- the unanimously adopted United Nations General Assembly Declaration of the High-level Dialogue on International Migration and Development⁴⁷;
- the ASEAN Instrument on the Promotion and Protection of Migrant Workers, pursuant to Article 22 of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers adopted in 2007;
- the UN Declaration for Refugee and Migrants, New York, 2016.

On strengthening monitoring and enforcement of labour regulations

- amend the Employment Act in order to provide greater protection for migrant workers, including domestic workers, in accordance with international legal standards;
- ensure an effective right to redress exists for all workers in Malaysia, including migrant workers, which includes the right to stay, the right to work for the duration of the investigation and court process, and the right to timely and adequate compensation;
- extend the enforcement of the minimum wage to all workers in Malaysia;
- substantially increase resources and capacity in order that more rigorous and regular workplace inspections can take place, the primary focus of these inspections to be on abusive practices in the workplace rather than individual workers' immigration status. Compliance to all aspects of the Employment Act needs to be rigorously checked; prosecution of employers and agents flouting the law must follow;
- strengthen the capacity of the Department of Occupational Safety and Health in their administration and enforcement of legislations in order to ensure a conducive working environment and to avoid any more unnecessary injury or casualty. Prosecution of employers flouting the law must follow;
- address as a matter of urgency the situation facing domestic workers, through enforcing basic employment standards and prosecuting agents and employers who breach basic rights (including forcing the worker to work long hours; withholding passports; denial of a day off; and underpayment of wages). A clear avenue for complaint for domestic workers must be established and respected;
- extend the coverage of the Employees' Social Security Act 1969 to include migrant workers, or amend the Workmen's Compensation Act 1952 to be in tandem with the benefits accorded under the Employees' Social Security Act 1969;

⁴⁷ As SUHAKAM puts it: *This Declaration reaffirms the need to promote and protect the human rights and fundamental freedoms of all migrants, reiterates the commitment to fight human trafficking, and strongly condemns manifestations of racism and intolerance towards these group of persons.*

- shift the foreign employees' levy payments to the employers (in line with the Government's ruling in 2009);

On basic facilities including health

- recognise and include provision for the millions of migrant workers in any planning at federal or state level, relating to the planning of services and basic amenities, including housing;
- establish and enforce basic minimum standards for housing, including formulation of proper housing guidelines to ensure that migrant workers have adequately sized, clean, hygienic and secure accommodation; set and enforce standards of building use regarding the number of people permitted to share space and facilities. Where deductions are made for housing and other costs, such deductions need to be clearly shown on payslips and complaints about such deductions investigated;
- review the situation relating to healthcare costs for migrant workers, including a review of how any present insurance scheme(s) works or not, how compensation is paid or not to workers who are killed or injured and whether it is sufficient; and the consequences of excessive health charges on public health and the health of migrant workers. At the same time to review policy with regard to undocumented migrants, to ensure access is both affordable and free from fear of harassment and/or arrest;

On children

- develop a legislative framework for the protection of all migrant children, particularly unaccompanied children, in line with international standards. This would include complying with provisions of the CRC relating to the right to education and to ensure that no child is deprived of his or her right to healthcare services; and ensuring any detention of children complies to international standards and guidelines;
- investigate the situation of economic exploitation of migrant children on plantations and "take measures to ensure and protect the best interests of the child, as required under article 3 of the UN CRC" as recommended by the UN Special Rapporteur on the Right to Food. This would include replacing the piece-rate system on plantations with salaried payment schemes to discourage parents from bringing their children with them to work;
- ensure that the on-going revision of the Child Act (2001) provides further protection for children victims of trafficking;

On the accountability of authorities

- promptly investigate all complaints of ill-treatment, extortion or other misconduct by police or others acting under the ambit of the law, including RELA agents;
- ensure that places of detention, including immigration depots, comply with minimum international standards and honour commitments to international treaties and standards;

On combatting trafficking

There are many steps that need to be taken at many levels to tackle human trafficking. They of course include the cross-border collaboration and solidarity needed to break human trafficking and associated criminal syndicates. But among the steps are:

- commit the necessary resources and determination to tackle human trafficking and modern day slavery, following a strategy which will be effective and unwavering in identifying, arresting, and prosecuting those involved in human trafficking, whoever they might be. Part of this is to fully monitor and act against employers and labour outsourcing companies abusing their workers and subjecting them to forced labour and more.
- tackle the culture of corruption that permeates enforcement and other agencies in Malaysia (as it does in other countries), by investigating and prosecuting those responsible for colluding with human traffickers and their syndicates without fear or favour.
- work closely with refugee and migrant communities in Malaysia and elsewhere to positively support the identification, arrest, prosecution and incarceration of the human traffickers and modern day slavers. These are the communities that have direct experience of being trafficked and enslaved, but instead of the authorities working closely and positively with them, their attitude conversely is to harass, extort, arrest and criminalise migrant workers, refugees and asylum seekers.

On combatting xenophobia

- present positive imaging of migrant workers, including full recognition of their contribution to the Malaysian economy, to ensure they are welcomed in this country as full participants in our present and our future, rather than marginalised and unfairly targeted as responsible for a variety of social ills.



LAW AND JUDICIARY

LAW AND JUDICIARY

By Andrew Khoo

Every year since 2009, the Malaysian legal community has commemorated the official opening of the legal year. This is a ceremony in January of each year that marks the beginning of the new year for the administration of justice in Malaysia.

2016's Opening of Legal Year speech by the Chief Justice of the Federal Court of Malaysia¹ was especially noteworthy for the views on the rule of law and human rights that were expressed by him, which will be reviewed below.

The Chief Justice started by observing:

“There is no doubt that the coming year will bring its own unique challenges to be faced by our legal community. In meeting these continuous challenges, it is of paramount importance that, regardless of external opinion, we continue to enforce the law without fear or favour. That is the cornerstone of the rule of law, which is the foundation of our society. It is the foremost insignia of good governance.”

He acknowledged that defining the rule of law was difficult:

“A uniform or cohesive definition of the rule of law has proved elusive, notwithstanding attempts by many great legal minds to grapple with this concept. My preferred definition/explanation of the concept is that of the late HRH Sultan Azlan Shah:

“The Rule of Law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to it. The ideal of the Rule of Law in this sense is often expressed by the phrase ‘government by law and not by men.’”

Turning to the application of the rule of law, he said:

“Ours is a nation and society which is unique in terms of its multi-racial constituency and diversity.

1 http://www.malaysianbar.org.my/speeches/speech_by_yaa_tun_arifin_bin_zakaria_chief_justice_of_malaysia_at_the_opening_of_the_legal_year_2015_8_jan_2016.html

We are now a nation of thirty-one million people, all of whom seek to attain a reasonable standard of living with dignity for themselves and their families. In the course of doing so, the very differing interests of the population are likely to clash and priorities to differ. It is here that the rule of law steps in to provide guidance and cohesiveness. The rule of law ensures that these varying interests are balanced, such that there is respect for fundamental rights as well as the rights of the community. How then is this achieved? To answer this question I shall attempt to encapsulate the core values that comprise the rule of law in Malaysia.”

The Chief Justice then went on to outline five characteristics of the rule of law in Malaysia:

1. “[T]he cognizance and acceptance of the absolute supremacy or predominance of our Federal Constitution, particularly well-articulated in Article 4(1), namely that the Federal Constitution reigns supreme over Parliament, the executive and the judiciary. This ensures that we are governed by laws and not arbitrarily by the whims and fancies of the ruling government. It comprises a cornerstone of democracy.”
2. “[T]he concept that all are equal before the law. Or put another way that every man is subject to the ordinary law of the country. No one can claim to be above the law or entitled to preferential treatment in our courts.”
3. “[T]he independence of the judiciary - namely not simply that the institution of the judiciary subsists in a society, but that it operates as an institution to enforce fearlessly the law, without interference or independently of extraneous influences, albeit the executive, the public or any section of the public or for that matter any particular individual who seems to be advocating his or her own perception of human right. This constitutional role of the judges is set out in the provisions of the Federal Constitution dealing with judicial function.”
4. “[T]hat the law is clear and accessible and applied predictably. This envisages that a citizen should be able to comprehend the nature of his or her obligations, as well as his individual rights and entitlements. This limb encompasses the twin pillars of natural justice and envisages that there should be due process and the presumption of innocence.”
5. “[T]hat there is access to justice for the public. This involves ensuring that legal costs are not prohibitive, the legal process is simplified or abridged, and that cases are disposed of without undue delay. It also encapsulates the concepts of moderation and proportionality in the construction and enforcement of our laws.”

He went on to say that, “These key features comprise the utopian ideal of the rule of law in Malaysia and would appear to be straightforward enough. However, the practical reality is that constant vigilance, particularly on the part of the judiciary, is required to uphold the rule of law. There are several aspects about the rule of law and its application in Malaysia that require elaboration.”

For one thing, “The law was expected to accommodate and meet the needs of its indigenous population in this developing nation, rather than meet standards prescribed by the First World countries, which enjoy a different climate and degree of economic, political and social development and cultural background, not to mention, urbanization and progress. This is a reality particularly when applied to the rule of law. It has been noted that the application of Eurocentric jurisprudential concepts to places with different legal traditions must be undertaken with caution, and the rule of law must always be placed in its historical and political context. In our multiracial, multi-religious nation, this is particularly true. The application of Western norms which are not always in accord

with the values of Malaysian society do not allow for a direct comparison of standards emanating from the West. By contrast Malaysia with its multi-cultural population, and diversity of legal and cultural traditions and economic and political structures, has evolved over centuries a value system, which differs considerably from the traditions of the West.”

Borrowing from an idea of the development of the “national mind” espoused by former 19th-century British Prime Minister Benjamin Disraeli, he went on to propound that, “The national mind of a Malaysian necessarily therefore differs from that of his counterparts elsewhere. The existence of this gulf needs acknowledgement, in order that the rule of law is adapted to meet our own circumstances, and not blindly applied as if we were still in nineteenth century England. The rule of law as then expounded in nineteenth century Britain, extols the rights of association and expression, of assembly and peaceful demonstration, without limitation, as it were. Such unabridged rights are not necessarily feasible in a diverse, multi-racial and multireligious country such as ours. These rights are, of course, of fundamental importance even today, but they do not subsist without limitation. The need for such limitation in our society is expressly provided for in our Federal Constitution. Ultimately the rule of law must deliver good governance, which meets the needs of the individual and civil society, as well as actively improves and protects the lives of Malaysians.”

The Chief Justice went on to say that, “The rule of law is today facing numerous challenges. Over the course of time we saw the rise of sporadic unlawful activities. Many of these activities saw their proponents put forward civil disobedience as justifiable means for conduct which was in breach of the law. While the majority of the nation supports and condones the importance of freedom of speech and assembly, it is of equal importance that these values are propagated within the ambit of the law. This is fundamental to preserve the rule of law. Any constitutional development in these freedoms must be consistent with the provisions of our Federal Constitution. So long as laws are promulgated in accordance with, or *intra vires* the Federal Constitution they should be adhered to. If indeed these laws encroach upon the fundamental rights set out in the Constitution, then the requisite steps should be taken to facilitate the adjudication of these laws by the judiciary. The members of the judiciary are bound, by constitutional oath, to ensure that these laws are effectively measured against the anchor of our Federal Constitution.”

He went on to warn that, “Resorting to unlawful means for the purposes of pursuing fundamental freedoms of expression and assembly without limitation is therefore unjustifiable, especially when the use of such unlawful means prejudices other people’s rights and disrupts social order. It should be made clear that I am by no means opposing the right of individual citizens to dispute government policies, acts and omissions when they feel that genuine wrongs are being perpetrated. However this does not validate the use of unlawful means to correct perceived wrongs. This would in effect encourage the populace to disregard the law as and when they see fit, which is converse to the letter and spirit of the rule of law.”

Let us now review some legal cases decided in 2016 to see how well they reflect the legal philosophy enunciated above by the Chief Justice.

Security Offences

As 2016 drew to a close, the Court of Appeal held that the Security Offences (Special Measures) Act 2012 (“SOSMA”) could not be used in a charge of attempting to sabotage the country’s banking and financial services under Section 124L of the Penal Code. The Court of Appeal ruled that such a charge was not a security offence and procedures under SOSMA did not apply.² In so doing, the Court of Appeal affirmed the decision of the High Court in releasing Datuk Seri Khairuddin Abu Hassan and his lawyer Matthias Chang. The two had been arrested under SOSMA for lodging reports with anti-corruption officials in France, the U.K., Switzerland, Hong Kong and Singapore in relation of possible acts of corruption allegedly involving funds belonging to 1 Malaysia Development Berhad (“1MDB”).

On the other hand, the ability of the courts to fully act as a check and balance against the actions of the executive is somewhat limited. In the case of university student Siti Noor Aishah Atam, the court’s acquittal of her of a charge of having committed an offence under Section 130 JB of the Penal Code in relation to terrorism was frustrated by her subsequent detention under the Prevention of Crime Act 1959 (“POCA”), followed by a restricted residence order and the fixing of an electronic monitoring device. The oversight of the courts under POCA is extremely limited.³

According to national news agency Bernama, the courts have been active in increasing the penalties imposed on individuals convicted for terrorist-related activities.⁴ They have highlighted the following:

- Muamar Gadaffi Mohamad Shafawi, sentenced to five years’ jail for training individuals to participate in terrorist activities. On 25 April 2016, the Court of Appeal increased the jail term to 15 years;
- Rohaimi Abd Rahim and Muhamad Fauzi Misrak, sentenced to three years’ jail for soliciting contributions for IS. On 21 June 2016, the Court of Appeal enhanced their jail term to 15 years; and
- Muhammad Kasyfullah Kassim, sentenced to five years’ jail for supporting IS terrorists in Syria. On 10 August 2016 the Court of Appeal increased the jail term to 12 years.

The article also highlighted the case of:

- Policewoman Corporal Jusninawati Abdul Gani, found guilty on 6 December 2016 of failing to divulge information on a terrorist group and sentenced to the maximum seven years’ jail provided for under Section 130M of the Penal Code; and
- Nine Filipinos, found guilty on 26 July 2016 of waging war against the Yang di-Pertuan Agong in the armed intrusion into Lahad Datu in Sabah, and sentenced to life imprisonment after finding them guilty.

² <http://www.thestar.com.my/news/nation/2016/12/14/khairuddin-and-chang-cant-be-charged-under-sosma/>, accessed on 30 April 2017.

³ <http://www.malaysiakini.com/letters/366680>, accessed on 26 April 2017.

⁴ <http://www.malaysiakini.com/news/366292>, accessed on 26 April 2017.

Freedom of expression and sedition

On 19 February 2016, Associate Professor Azmi Sharom was acquitted of the charge of committing an offence under Section 4(1)(b) of the Sedition Act 1948.⁵ Azmi Sharom had been accused of committing sedition in an article on the law published in his column in a local newspaper. The acquittal came after the Attorney General announced that the charge against him would be withdrawn. His trial had been scheduled to proceed after he had lost his challenge against the constitutionality of the Sedition Act 1948 at the Federal Court.

Another person benefitting from a withdrawal of the charge by the Attorney General was lawyer and opposition politician, Hassan Karim. He was charged on 16 November 2015 under both the Sedition Act 1948 and the Communications and Multimedia Act 1998 for remarks made against the Sultan of Selangor. He was granted a discharge not amounting to an acquittal.⁶

In a landmark decision in November 2016, the Court of Appeal ruled that Section 3(3) of the Sedition Act was unconstitutional because there was no requirement to prove intention. This was contrary to Article 10 of the Federal Constitution, which protected the freedom of expression.⁷ Naturally, the government has stated that it intends to appeal this decision.

This decision has affected many cases currently on-going, and even past ones which were decided on the basis that proof of intention was not required.

So, for example, the trial of cartoonist Zulkiflee Anwar Ulhaque, better known as Zunar, on nine counts of sedition in respect of nine tweets which he made about the judiciary in connection with the Anwar Ibrahim guilty verdict by the Federal Court on 10 February 2015 was postponed several times in the course of 2016, and had still not proceeded at the end of the year. The main reason for the postponements was to await a final decision by the Federal Court on the constitutionality of certain aspects of the Sedition Act 1948, which had been called into question in another case involving the Sedition Act 1948. Meanwhile, however, Zunar was prohibited from leaving Malaysia on 17 October 2016.⁸ Further, on 26 November 2016, Zunar was arrested and subsequently charged for sedition and breach of the peace for displaying satirical cartoons depicting Prime Minister Najib Razak during the George Town Literary Festival.⁹

Another trial affected was that of opposition Member of Parliament S. Sivarasa, who was charged on 16 October 2015 with sedition for a speech he gave during a “KitaLawan” rally.

Likewise, the trial of S Arutchelvan, a member of the central committee of Parti Sosialis Malaysia who was charged in the Kuala Lumpur Sessions Court on 23 November 2015 for an offence under Section 4(1)(c) of the Sedition Act 1948 in respect of a comment he posted on 10 February 2015 on Facebook in relation to the Court of Appeal’s decision to find Anwar Ibrahim guilty of sodomy, was also deferred on 12 June 2016.¹⁰ He faces an alternative charge under Section 233(1)(a) of the Communications and Multimedia Act 1998 for abuse of network facilities.

5 <http://www.thestar.com.my/news/nation/2016/02/19/court-acquits-azmi-sharom-of-sedition-charge/>, accessed on 1 May 2017.

6 <http://www.freemalaysiatoday.com/category/nation/2016/02/17/lawyer-hassan-karim-freed-of-sedition-charge/>, accessed on 1 May 2017.

7 <http://www.thestar.com.my/news/nation/2016/11/26/intent-must-be-proven-court-of-appeal-rules-section-33-of-sedition-act-invalid/>, accessed on 30 April 2017.

8 <https://www.amnesty.org/en/latest/news/2016/10/malaysia-drop-charges-against-zunar/>, accessed on 30 April 2017.

9 <http://www.dw.com/en/malaysian-cartoonist-zunar-arrested-at-literary-festival-charged-with-sedition-again/a-36536985>

10 <https://www.facebook.com/partisosialis.org/videos/1005740429461729/>, accessed on 1 May 2017.

The case against blogger Lawrence Jayaraj Edwin John who was charged on 13 November 2015 with posting an article on the Federal Court's decision in Anwar Ibrahim's second sodomy trial that was said to be seditious was also pending at the end of the year.¹¹

Prosecutions and convictions have proceeded where the affected party has been the Malay Rulers or the administration of government.

In August 2016 the trial commenced of activist Khalid Ismath, who was charged on 13 October 2015 with 11 counts under the Communications and Multimedia Act 1998 and three counts under the Sedition Act 1948.¹² The charges were in respect of alleged social media postings regarding the Johor royal family. The trial had not concluded at the year end.

On 20 September 2016, former Melaka Chief Minister Abdul Rahim Thamby Chik was fined RM1,900 by the Sessions Court after he pleaded guilty to an alternative charge under Section 233(1)(a) of the Communications and Multimedia Act 1998 in respect of a comment he made about the alleged apostasy of the Raja Muda (Crown Prince) of Selangor on a Facebook posting.¹³ On 5 October 2015 he had originally been charged with sedition, but this charge was withdrawn when he pleaded guilty to the alternative charge.

Two further convictions should also be noted, namely:

- Muhamad Hafzan, convicted on 20 January 2016 under Section 233(1)(a) of the Communications and Multimedia Act 1998 for insulting the Sultans of Johor and Pahang on Facebook and fined RM14,000;¹⁴ and
- Muhammad Amirul Azwan Mohd Shakri, convicted on 7 June 2016 under Section 233(1)(a) of the Communications and Multimedia Act 1998 for insulting the Crown Prince of Johor and sentenced to 1 year's jail for each of the 14 charges, to be served concurrently.¹⁵ Subsequently, he was re-sentenced to a reform school until he turned 21 years old.¹⁶

On 15 January 2016 the High Court at Kuala Lumpur sentenced social activist Hishamuddin Rais to 9 months' jail for calling for street demonstrations to be held to overthrow the government in remarks made at the Kuala Lumpur and Selangor Chinese Assembly Hall on 13 May 2013.¹⁷ He had originally been found guilty on 9 January 2015 by the Kuala Lumpur Sessions Court for an offence under the Sedition Act 1948, and was fined RM5,000. The prosecution successfully appealed for an enhanced punishment. However he was released on bail pending an appeal to the Court of Appeal.

Altogether 6 people were charged for speeches that they made on that day. For his speech, student activist Adam Adli was fined RM5,000. He was initially sentenced to 1 year's jail in 2014, but that

11 <http://www.nst.com.my/news/2016/01/120741/activist-could-mount-constitutional-challenge-against-sedition-act-over-fb>, accessed on 1 May 2017.

12 <https://www.facebook.com/bebaskhalid/photos/pb.508461662655257.-2207520000.1472051075./637040143130741/?type=3&theater>, accessed on 1 May 2017.

13 <http://www.mstar.com.my/berita/berita-mahkamah/2016/09/20/rahimy-thamby-chik-didenda/>, accessed on 30 April 2017.

14 <http://www.malaysiakini.com/news/327598>, accessed on 1 May 2017.

15 <http://www.malaysiakini.com/news/344372>, accessed on 1 May 2017.

16 <http://www.freemalaysiatoday.com/category/nation/2016/09/15/jailed-labourer-who-insulted-tmj-sent-to-reform-school/>, accessed on 2 May 2017.

17 <http://www.thestar.com.my/news/nation/2016/01/15/hishamuddin-rajs-jailed/>, accessed on 30 April 2017.

was reduced to the fine on appeal, which was decided by the High Court on 18 February 2016.¹⁸ On 6 December 2016 the Court of Appeal fixed 2 February 2017 to hear both the appeal and the cross-appeal by the prosecution.¹⁹

For his speech on the same day, Haris Ibrahim was sentenced to 9 months in jail on 14 April 2016.²⁰ He was released on bail pending an appeal to the Court of Appeal.

Opposition Member of Parliament Tian Chua was also convicted for sedition in respect of his speech on that same day. He was sentenced to a fine of RM1,800 and 3 months in jail on 28 September 2016. Sentence was stayed pending an appeal.²¹

Civil society activist Muhammad Safwan Anang @ Talib was another person charged for making a speech on that same day. On 20 December 2016 he won his appeal against his conviction for an offence under Section 4(1) of the Sedition Act 1948 and was acquitted.²² Earlier on 16 December 2015 his initial sentence of 10 months' jail had been reduced to a RM5,000 fine.

Former Member of Parliament Tamrin Ghafar failed on 27 May 2016 in his attempt to challenge the constitutionality of the Seditious Act 1948, and his trial for allegedly uttering seditious words during a speech on that same day will now proceed.²³

Another aspect of freedom of expression is the right to criticize public officials without fear of a lawsuit for defamation. On 21 December 2016, the Court of Appeal ruled that the Chief Minister of the state of Penang, Lim Guan Eng, could not sue the media for defamation in his official capacity. The Court of Appeal made the ruling following an earlier decision that it had made.²⁴ In that earlier case, the Court of Appeal on 1 March 2016 had ruled that the Menteri Besar of the state of Pahang, Adnan Yaakob, could not sue Utusan Melayu (M) Bhd for comments that it had made about him, as public officials could not sue the media for defamation in their official capacity.²⁵

Restrictions on printed publications

Attempted restrictions on printed publications received mixed treatment in the courts in 2016. On 19 February 2016, the High Court at Shah Alam ruled that the Government ban on any publication that contained the words “BERSIH 4”, including any t-shirts, gazetted on 27 August 2015, was lawful. However, on appeal, the Court of Appeal ruled on 29 August 2016 that the ban was unreasonable and therefore invalid.²⁶

The more complex situation where there is an attempt by the religious authorities to prohibit books

18 <http://www.themalaymailonline.com/malaysia/article/youth-activist-adam-adli-gets-rm5000-fine-in-place-of-jail-term-in-sedition>, accessed on 1 May 2017.

19 <http://www.malaysiakini.com/news/365375>, accessed on 26 April 2017.

20 <http://www.themalaymailonline.com/malaysia/article/activist-jailed-eight-months-over-seditious-call-to-change-government>, accessed on 1 May 2017.

21 <http://www.thestar.com.my/news/nation/2016/09/28/courts-tian-chua-defamation/>, accessed on 1 May 2017.

22 <http://www.themalaymailonline.com/malaysia/article/appellate-court-frees-student-activist-safwan-anang-from-sedition-charge>, accessed on 1 May 2017.

23 <http://www.thesundaily.my/news/1817108>, accessed on 1 May 2017.

24 <http://www.malaysiakini.com/news/366849>, accessed on 26 April 2017.

25 <http://www.themalaymailonline.com/malaysia/article/pahang-mb-cannot-use-public-office-position-to-sue-utusan-for-defamation-co>, Accessed on 2 May 2017.

26 <http://www.thestar.com.my/news/nation/2016/08/29/courts-bersih-tshirts-ban/>, accessed on 1 May 2017.

deemed contrary to Islamic teachings and to punish their publishers continued to be argued before the courts in 2016.

The legal case against Borders bookshop and its manager Nik Raina Nik Abdul Aziz ended in 2015, with the Federal Court ruling that the raid on the bookshop by the Federal Territories Islamic Religious Department was unlawful. However the Federal Court had held on 28 September 2015 that the publisher of the book, Ezra Zaid and the publishing company ZI Publications, would still have to face charges brought by the Selangor state religious authorities for having published the book as the relevant Selangor state legislation was validly enacted and not unconstitutional. Because of this ruling, the High Court had on 6 September 2016 refused to grant Ezra Zaid and ZI Publications permission to challenge the Selangor Islamic Religious Department's confiscation of the Malay translation of Canadian Muslim author Irshad Manji's book in 2012.²⁷ The decision was being appealed.

On 8 August 2016, the High Court at Kuala Lumpur upheld the government's banning in 2015 of four books alleged to contain Shia Islam teachings by author Mohd Faizal Musa, on the basis that the Minister in charge had acted within his powers to proscribe the books on the basis of national security.²⁸

The Government also continued to restrict freedom of expression via films by proceeding with the prosecution of Lena Hendry, accused of screening a documentary film about allegations of genocide in the civil war in Sri Lanka without the film being approved for public screening by the Film Censorship Board. At the end of the year, the trial had not yet concluded.

The government also proceeded with its prosecution of Bilqis Hijjas, who was charged under Section 14 of the Minor Offences Act 1955 for "insulting behavior" with intent to provoke a breach of the peace by releasing yellow balloons in a mall at which the Prime Minister and his wife were present. On 1 July 2016, the magistrate's court freed her without her defence being called, finding that the prosecution had not proven a prima facie case.²⁹ Not satisfied with the decision, it was reported on 7 August 2016 that the government would appeal.³⁰

Compensation for abuse of security laws

As though to indicate its disapproval of the abuse of security legislation, in October 2016 the Court of Appeal awarded Member of Parliament Teresa Kok the sum of RM350,000 in damages for wrongful arrest under the now-repealed Internal Security Act 1960. Kok, the Vice Chairman of the opposition Democratic Action Party, was detained on 12 September 2008 and held for one week for allegedly taking part in activities that could cause racial tension. The Court of Appeal held that the authorities should have investigated the allegations against her properly before detaining her.

27 <http://www.themalaymailonline.com/malaysia/article/publisher-of-allah-kebebasan-dan-cinta-fails-civil-court-challenge-against>, accessed on 1 May 2017.

28 <http://www.nst.com.my/news/2016/08/163975/novelist-faisal-tehrani-fails-challenge-ban-his-books>, accessed on 1 May 2017.

29 <http://www.nst.com.my/news/2016/07/155971/court-frees-bilqis-hijjas-yellow-balloons-charge>, accessed on 1 May 2017.

30 <http://www.freemalaysiatoday.com/category/nation/2016/08/07/govt-files-appeal-against-balloon-woman-bilqis/>, accessed on 1 May 2017.

Other compensation cases

On 23 August 2016, the Court of Appeal upheld the decision of the High Court at Kuala Lumpur in rejecting a claim for damages to property filed by the government of Malaysia against members of the BERSIH 2.0 Steering Committee who organised the BERSIH 3.0 rally in 2012. An award of damages in favour of one of the members was affirmed, although the amount of damages was reduced.³¹ The government indicated that it would appeal.

On 24 March 2016, the High Court at Shah Alam awarded the family of teenager Aminulrasyid Amzah damages amounting to RM414,800 for his unlawful death at the hands of a police officer. Corporal Jenain Subi was found liable for acting in an excessive and reckless manner and in breach of the Inspector General's Standing Orders, which resulted in the death.³²

Freedom of religion

Change of religion

In March 2016, the High Court at Kuching allowed an application by Azmi Mohamad Azam Shah @ Roneey, who had been converted to Islam as a child, to be declared a Christian.³³ The case attracted noteworthy attention in respect of the upholding of the freedom of religion in Malaysia. The High Court took note of the fact that the applicant, who went by the name Roneey Anak Rebit, was born into a Bidayuh Christian family in 1975 but became a Muslim when his parents converted to Islam when he was 8 years old. The court found that his conversion to the Muslim faith was not of his own volition but was by virtue of his parents' conversion when he was a minor. Having now passed the age of majority, he was at liberty to exercise his right of religious freedom. It should be noted that the application to convert out of Islam and into Christianity was not opposed by the Islamic religious authorities in the state of Sarawak. The reason the case had come to the civil court was because of the refusal of the National Registration Department ("NRD") to register the change of name and religion. The NRD had insisted that Roneey obtain an order from the Syariah Court. The High Court held that he did not need a Syariah court order to release him from Islam because freedom of religion was his constitutional right and only he could exercise that right.

The approach adopted by the court there is to be contrasted with the situation in the case of Mohd Sharif Abdullah. Mohd Sharif Abdullah was one of the four adult sons of Jamilah Jan Vasanthegokelam. The latter had in 2015, together with the four adult sons, unsuccessfully applied for judicial review of a decision by the National Registration Department (NRD) to refuse to amend its records to change their names and to state that they are non-Muslims. The court had accepted that according to the records of the NRD, Jamilah's second husband Mohd Baser a/l Kalakan was registered as a Malaysian citizen professing the religion of Islam and as such, there was no error in the NRD's records. An appeal to the Court of Appeal in 2015 also failed as the Court of Appeal found that the applicants had identified themselves as being Indian Muslim and professing the religion of Islam, and that their contention that the religion was mistakenly stated in the official record was not supported by any cogent evidence. Mohd Sharif Abdullah applied to the Federal Court for leave to appeal against the decision of the Court of Appeal, but this was

31 <http://english.astroawani.com/malaysia-news/bersih-3-0-governments-appeal-over-damages-public-property-dismissed-114901>, accessed on 1 May 2017.

32 <http://www.thesundaily.my/node/356914>, accessed on 1 May 2017.

33 <http://www.thestar.com.my/news/nation/2016/03/24/court-sarawak-muslim-convert-has-right-to-be-christian/>, accessed on 30 April 2017.

refused on 13 May 2016.³⁴ The Federal Court told Mohd Sharif Abdullah to seek an order from the Syariah court, and then use that order to apply to the NRD for a change in his religious status.

Unilateral conversion of minors

Deepa Subramaniam is one of two cases concerning a couple who were married under civil law and where subsequent to the marriage and the birth of children, the husband converted to Islam. Under existing law, the conversion of one spouse to Islam will give the non-converting spouse the right to petition for a divorce, as Malaysian law does not permit a mixed marriage between a Muslim and a non-Muslim. In this case, husband N Viran @ Izwan Abdullah had converted to Islam, and in April 2012 had obtained a custody order from the Syariah court over their two children. Notwithstanding this, on 7 April 2014 the Seremban High Court had granted custody of the couple's two children, a daughter and a son, to Deepa. On 9 April 2014 Izwan forcibly removed the son from Deepa's custody. Based on the custody order obtained from the High Court, Deepa obtained a recovery order in respect of her son from the High Court. However the Royal Malaysian Police refused to execute the recovery order given that Izwan also had a custody order. The matter was heard at the Court of Appeal, where Izwan's appeal against the custody order from the civil court was dismissed on 17 December 2014. The Court of Appeal also affirmed the recovery order. On 14 January 2015 leave (permission) to appeal to the Federal Court was granted to Izwan to raise the question of which court had jurisdiction over the matter, and whether a recovery order could be granted when there was a custody order given by the Syariah court. Oral argument was heard on 25 June 2015, but on 22 February 2016, the date the Federal Court had scheduled to give its decision, the two children were interviewed by the Federal Court. Consequently, the Federal Court awarded custody of the daughter to Deepa and custody of the son to Izwan.

In the second case involving the unilateral conversion of minor children to Islam by a converting spouse in a marriage, the case of M Indira Gandhi and her husband K Pathmanathan @ Muhammad Ridhuan Abdullah was heard by the Federal Court in November 2016. An application for leave to appeal had been filed in January 2016.³⁵ On 30 December 2015, the Court of Appeal had in a 2-1 majority decision reversed a decision of the High Court at Ipoh and ruled that whether the three children of a non-Muslim marriage between the parties had been properly converted to Islam by their Muslim-convert father was a question that was within the exclusive jurisdiction of the Syariah court, and not the civil court. This was so notwithstanding that the three children were unilaterally converted by their father, in contravention of various requirements under Section 96 of the Administration of the Religion of Islam (Perak) Enactment 2004. The dissenting judge held that the conversion was void from the beginning because of non-compliance with the relevant legislation, and that this was a matter of administrative law, and therefore within the purview of the civil court. On 30 November 2016, the Federal Court reserved its decision after hearing the case in the absence of the husband, who failed to appear.³⁶ The husband had earlier been found in contempt of court for failing to produce the daughter that was in his custody and the Inspector General of Police had been ordered to locate and arrest him.³⁷ To-date, this has not been done.

In the course of the year, a third case arose, this time involving the unilateral conversion to Islam

34 <https://www.pressreader.com/malaysia/the-borneo-post-sabah/20160513/281711203867328>, accessed on 1 May 2017.

35 <http://www.malaysiakini.com/news/328625>, accessed on 30 April 2017.

36 <http://www.thestar.com.my/news/nation/2016/11/30/apex-court-reserves-judgement-on-indira-gandhi-case/>, accessed on 1 May 2017.

37 <http://www.themalaymailonline.com/malaysia/article/federal-court-orders-igp-to-arrest-indira-gandhis-ex-spouse-for-contempt>, accessed on 1 May 2017.

of minors by the converting mother. In this case, Lee Chang Yong is challenging the conversion of his eight-year-old daughter and four-year-old son by his wife Teng Wai Yee, now known as Aleena Abdullah. Proceedings in this case on 7 September 2016 were stayed pending the outcome of the Indira Gandhi case.³⁸

Freedom of use of religious terms

Freedom of religion must include the freedom to use religious terms. In the first part of the Jill Ireland case, the Court of Appeal ordered the government to return to her 8 compact discs of Christian material containing the word ‘Allah’ which had been confiscated from her possession. The CDs were finally returned to her on 17 September 2015. In the second part of her case, Jill Ireland has asked the court to declare that she has a constitutional right to use the word “Allah”. Both the Federal Territories Islamic Religious Council (MAIWP) and the Selangor Islamic Religious Council (MAIS) have filed applications to intervene in the matter. On 11 August 2016, Jill Ireland applied to postpone the hearing of the case pending the outcome of the decision of the Court of Appeal in a similar confiscation of Christian material containing the word “Allah” involving the Sidang Injil Borneo church.³⁹ [On 30 September 2016, the Court of Appeal refused the application of MAIWP to be an intervener in the Sidang Injil Borneo case.⁴⁰ MAIWP eventually decided not to appeal against this decision, and withdrew its application to intervene in the Jill Ireland matter.] On 16 December 2016, the High Court therefore set 19 January 2017 to hear the remaining application by MAIS to intervene in the case.⁴¹

Freedom to practice Syariah law

The case of Victoria Martin involved an appeal by a non-Muslim lawyer against the denial of the right to practice Syariah law in the Syariah courts of the Federal Territories. On 25 March 2016, the Federal Court by a split 3-2 majority decided that only Muslims could practice Syariah law in the Syariah courts of the Federal Territories. The minority were of the view that it was not the intention of Parliament when passing the law to prevent academically-endowed non-Muslims having sufficient knowledge of Islamic law to appear in any Syariah court. However the majority were of the view that someone who was not a Muslim would not be able to perform duties to the Syariah court with full conviction of the Muslim belief.⁴²

Kassim Ahmad was an 82-year old former academic and Islamic scholar charged by the Federal Territory Islamic Department for deriding Islam and disobeying a fatwa under Sections 7 and 9 of the Syariah Criminal Offences (Federal Territories) Act 1997. In 2015 the High Court at Kuala Lumpur refused judicial review on the basis that the charge was outside the jurisdiction of the civil court. However the Court of Appeal ruled that his arrest had been unlawful because it had breached several constitutional protections. More importantly, however, the Court of Appeal held that the civil High Court had supervisory jurisdiction over the Syariah court when it had erred in

38 <http://www.nst.com.my/news/2016/09/171561/court-postpones-conversion-case-pending-outcome-indira-gandhis-appeal>, accessed on 1 May 2017.

39 <http://www.malaysiakini.com/news/351965>, accessed on 1 May 2017.

40 <http://www.themalaymailonline.com/malaysia/article/as-deadline-nears-maiwp-yet-to-decide-on-intervener-bid-in-churchs-case>, accessed on 1 May 2017.

41 <http://www.nst.com.my/news/2016/12/197363/mais-files-application-be-intervenor-jill-irelands-judicial-review-over-allah>, accessed on 1 May 2017.

42 <http://www.thestar.com.my/news/nation/2016/03/25/its-failure-for-victoria-federal-court-rules-that-only-muslims-can-be-syariah-lawyers/>, accessed on 1 May 2017.

law. On 29 July 2016 the Federal Court fixed 22 September 2016 to hear the appeal against the Court of Appeal's decision.⁴³ However, as at the year end, the Federal Court had not heard the appeal.

Freedom of assembly

Prosecutions for breaches of the Peaceful Assembly Act 2012 continued in 2016, together with legal challenges thereto. The lack of clarity in the law, arising from conflicting decisions as to whether the provision that criminalises a failure to comply with the requirement to give a minimum of 10 days' advance notice of an assembly, pursuant to the Peaceful Assembly Act 2012 ("PAA"), is constitutional or not, was not resolved in 2016.

In the run-up to the BERSIH 5 public assembly on 19 November 2016, several leading civil society activists and politicians were detained by the police. Among them were BERSIH 2.0 Chairperson, Maria Chin Abdullah, who was arrested under SOSMA on 18 November 2016. She filed a habeas corpus application which was scheduled to be heard by the court on 29 November 2016. However the government released her on 28 November 2016.

On 10 October 2016, the Federal Court declined to consider a challenge to the constitutionality of the PAA by seven human rights activists and parliamentarians from an opposition party. The Federal Court ordered that the seven face trial for participating in peaceful protests in 2015 and then decide whether to file challenges to the PAA. The seven were opposition parliamentarians Chong Chieng Jen and Julian Tan Kok Ping, charged with participating in a Bersih 4 rally on 29 August 2015 in Kuching, and opposition parliamentarian Sim Tze Tzin and human rights activists Maria Chin Abdullah, Mandeep Singh, Fariz Musa and Adam Adli Abdul Halim, charged with participating in the #KitaLawan Rally on 28 February 2015 at the Sogo shopping mall and KLCC Esplanade.⁴⁴⁴⁵

In 2015 Maria Chin Abdullah faced a further charge in the Sessions Court of organising the BERSIH 4 rally on 29 and 30 August 2015 without giving 10 days' notice of the same. In April 2016 she applied to the High Court for the charge to be struck off as being unconstitutional, but this was refused. On 7 September 2016 the Court of Appeal reversed the decision, holding that at the time of the rally the state of the law did not make it a criminal offence not to give a 10-day notice.⁴⁶

Also acquitted in 2016 was Jannie Lasimbang, then Deputy Chair of BERSIH 2.0 Sabah, who had been charged for breaching the PAA. On 20 December 2016 the Magistrate's Court held that the prosecution had failed to establish a prima facie case.⁴⁷

43 <http://www.themalaymailonline.com/malaysia/article/government-case-against-kassim-ahmad-set-for-sept-22-hearing>, accessed on 1 May 2017.

44 <http://www.freemalaysiatoday.com/category/nation/2016/10/10/court-orders-mps-activists-to-be-tried-for-participating-in-street-protests/>, accessed on 2 May 2017.

45 <http://www.themalaymailonline.com/malaysia/article/activists-get-permission-to-challenge-peaceful-assembly-act-at-federal-court>, accessed on 2 May 2017.

46 <http://www.themalaymailonline.com/malaysia/article/court-of-appeal-strikes-out-bersih-chiefs-illegal-assembly-charge>, accessed on 2 May 2017.

47 <http://www.borneotoday.net/lasimbang-not-guilty-of-breaching-paa-2012-no-case-says-magistrate/>, accessed on 2 May 2017.

However on 9 December 2016 state assemblyperson Niz Nazmi Nik Ahmad pleaded guilty to a charge of failing to give 10 days' prior notice under Section 9(1) of the Peaceful Assembly Act 2012 in relation to a "Black 505" rally in May 2013. The charge had initially been held to be unconstitutional by the Court of Appeal, but after a subsequent panel of the Court of Appeal held that this charge (in another case) was lawful, his trial proceeded.

Another aspect of freedom of assembly deals with the right of university students to participate in political activity. On 18 December 2016, it was reported that student leader Asheeq Ali Sethi Alivi was taking his university, the National University of Malaysia ("UKM") to court because of his suspension for one semester and fine of RM200 by UKM for his involvement in the "Tangkap MO1" rally.⁴⁸

On 27 December 2016, it was further reported that four students of University Malaya ("UM") filed a lawsuit against their university for disciplinary action that was taken against them for participating in a rally known as "Tangkap MO1" in August 2016.⁴⁹ Anis Syafiqah Md Yusof, Mohamad Luqman Nul Haqim Zul Razali, Suhail Wan Azhar, and Muhammad Luqman Hakim Mohd Fazli, have filed an originating summons seeking a declaration that UM's (Discipline of Students) Rules 1999 is unconstitutional.

Freedom of association

On 24 June 2016, the High Court at Shah Alam denied Sisters in Islam's application for judicial review of the fatwa declared by the Selangor Islamic Affairs Council that the organisation had deviated from Islamic teachings. The court held that this was not within the jurisdiction of the civil court.⁵⁰ The decision is under appeal.

Freedom of movement

As was mentioned earlier, cartoonist Zulkiflee Anwar Ulhaque, better known as Zunar, was prohibited from leaving Malaysia on 17 October 2016.⁵¹

In addition, ahead of the elections for the State Assembly in Sarawak on 7 May 2016, a number of politicians representing opposition parties based in peninsula Malaysia and other individuals were placed on a list of those prohibited from entering Sarawak.^{52 53} Few legal challenges have been made against such prohibitions, and none has been successful.

Maria Chin Abdullah, the Chairperson of BERSIH 2.0, was prohibited from leaving Malaysia on 17 May 2016. She was stopped on her way to board a flight to South Korea to accept the 2016 Gwanju Human Rights Award on behalf of BERSIH 2.0.

48 <http://www.freemalaysiatoday.com/category/nation/2016/12/18/student-leader-takes-ukm-to-court/>, accessed on 2 May 2017.

49 <http://www.nst.com.my/news/2016/12/199803/tangkap-mo1-students-take-universiti-malaya-court>, accessed on 2 May 2017.

50 <http://www.malaysiakini.com/news/346498>, accessed on 2 May 2017.

51 See footnote 8.

52 <http://www.themalaymailonline.com/malaysia/article/pkr-lawmakers-latest-addition-to-sarawaks-list-of-banned-leaders-ahead-of-s>, accessed on 2 May 2017.

53 <http://www.theborneopost.com/2016/04/13/cm-its-our-right-to-bar-unsavoury-characters-from-entering-sarawak/>, accessed on 2 May 2017.

Right to vote

While the Malaysian Federal Constitution makes provisions for the right to vote, a crucial area of contention is the way the boundaries of constituencies for Parliament and the state assemblies are determined. Under the Federal Constitution, constituency boundaries can be reviewed at a minimum of eight years after the conclusion of the previous review.

A review of the constituency boundaries for the States of Malaya and Sabah was begun in 2016. On 15 September 2016, the Election Commission published its proposals for redelineation.⁵⁴ On 16 December 2016, the Selangor State Government was granted a stay by the High Court on all local inquiries to be convened to hear objections to the proposals. The stay would remain until the hearing of the case scheduled for 20 January 2017.⁵⁵

Right to citizenship

On 6 April 2016, it was reported that M. Navin, who had been born to a Malaysian father and Filipina mother (who were not married to each other) was finally declared a Malaysian citizen and issued with a Malaysian identity card.⁵⁶ He had applied for citizenship and the issuance of an identity card on several earlier occasions, but all his applications were rejected by the National Registration Department (“NRD”). In proceedings in 2014, the High Court had granted his application and had ordered the NRD to issue him a Malaysian identity card within 30 days. The National Registration Department appealed against the order, and on 29 July 2015 the Court of Appeal upheld the findings of the High Court with variation, ordering the Ministry of Home Affairs and the NRD to reconsider M. Navin’s application for citizenship and the issue of a Malaysian identity card pursuant to Article 18 of the Federal Constitution.

On 13 December 2016, another Malaysian parent, Liew Yee Hong, was granted leave (permission) by the High Court for a judicial review in respect of the citizenship of his 10-year-old daughter by his Filipino wife.⁵⁷

High profile cases

Najib Razak

On 26 January 2016, the Attorney General of Malaysia announced that in his opinion Prime Minister Najib Razak had not committed any wrongdoing with regard to allegations of corrupt practice relating to a sum equivalent to RM2.6 billion that had been deposited into his personal bank accounts.⁵⁸ As a result of this, no charges would be brought against him. On 3 February 2016, Khairuddin Abu Hassan filed a judicial review to challenge the Attorney General’s decision not to prosecute the Prime Minister.⁵⁹ Subsequently, former Minister in charge of Law Zaid Ibrahim also filed an application for judicial review of the same decision.⁶⁰ On 15 March 2016, the Bar

54 <http://www.themalaymailonline.com/malaysia/article/election-commission-changes-names-for-12-parliamentary-34-state-seats>, accessed on 2 May 2017.

55 <http://www.malaysiakini.com/news/366316>, accessed on 26 April 2017.

56 <http://www.thestar.com.my/news/nation/2016/04/06/stateless-teen-now-a-citizen/>, accessed on 2 May 2017.

57 <http://www.malaysiakini.com/news/366005>, accessed on 26 April 2017.

58 <http://www.malaysiakini.com/news/328667>, accessed on 30 April 2017.

59 <http://www.therakyatpost.com/news/2016/02/03/khairuddin-challenges-a-gs-decision-not-to-prosecute-najib/>, accessed on 2 May 2017.

60 <http://www.thestar.com.my/news/nation/2016/02/23/zaid-ibrahim-courts-challenge-decision-not-to->

Council also filed an application for judicial review.⁶¹ The applications were separately heard on 29 July 2016, 12 August 2016 and 25 August 2016 respectively.⁶² On 11 November 2016, the High Court dismissed all 3 applications, saying that the Attorney General had absolute discretion under Article 145(3) of the Federal Constitution in relation to commencing prosecutions, and that that discretion could not be challenged.⁶³ It was not clear whether any appeal against this decision would be lodged.

Altantuya Shaaribuu

The civil lawsuit filed by Altantuya Shaaribuu's father in respect of her death had a positive development when the amended statement of claim was finally served personally on Corporal Sirul Azhar Omar at the Villawood Immigration Detention Centre in Sydney, Australia.⁶⁴ The case remained outstanding at the end of the year under review.

Anwar Ibrahim

The application for review by the Federal Court of the sodomy prosecution of former Deputy Prime Minister Anwar Ibrahim was heard on 12 October 2016.⁶⁵ The Federal Court dismissed the application for review in a decision handed down on 14 December 2016.⁶⁶

A. Kugan

On 28 June 2016, the Federal Court reserved its decision on the appeal by the Inspector General of Police and the government of Malaysia against the decision of the High Court, upheld by the Court of Appeal, which held the Royal Malaysian Police and the government of Malaysia liable for his wrongful death.⁶⁷ The appeal centred on three questions of law: whether Section 8(2) of the Civil Law Act 1956, which bars the awarding of exemplary damages in an estate claim, is applicable where the death of the deceased is a result of breach of his constitutional right to life; whether, for the purpose of an estate claim under Section 8 of the Civil Law Act 1956, the acts that make up the tort of misfeasance in public office must be acts that occurred before the death of the deceased; and whether a separate award for misfeasance in public office can be made in favour of the estate when the injury caused to the deceased is the exact injury for which an award for assault and battery had already been made to the estate. The case remained outstanding at the end of the year under review.

[prosecute-najib/](#), accessed on 2 May 2017.

61 <http://www.freemalaysiatoday.com/category/nation/2016/03/15/bar-council-seeks-judicial-review-on-ag-clearing-najib/>, accessed on 2 May 2017.

62 <http://www.freemalaysiatoday.com/category/nation/2016/07/29/ags-powers-not-immune-to-being-challenged-in-court/>, accessed on 2 May 2017.

63 <http://www.mysinchew.com/node/116038>, accessed on 2 May 2017.

64 <http://www.freemalaysiatoday.com/category/nation/2016/10/20/altantuyas-killer-finally-served-courts-paper-in-australia/>, accessed on 2 May 2017.

65 <http://www.thesundaily.my/news/2000321>, accessed on 2 May 2017.

66 <http://www.malaysiaoutlook.com/federal-court-rejects-anwars-sodomy-judicial-review-remains-in-prison/>, accessed on 2 May 2017.

67 <http://www.themalaymailonline.com/malaysia/article/federal-court-reserves-judgment-in-appeal-on-award-to-kugans-kin>, accessed on 2 May 2017.

Nisra Nisran Angit

The trial of the Deputy Director General of the Orang Asli (indigenous people of Peninsular Malaysia) Development Department in the Sessions Court over bribery allegations involving RM74,000 had yet to be concluded at the end of the year under review.

MH370

The application by the government of Malaysia, Malaysia Airlines Berhad (“MAB”), the Malaysian Civil Aviation Department and the Royal Malaysian Air Force to strike out the suit filed against them by the two children of parents who disappeared along with Malaysia Airlines flight MH370 was heard on 4 March 2016.⁶⁸ On 30 March 2016, the High Court at Kuala Lumpur dismissed the lawsuit.⁶⁹ However the court declined to dismiss the suit against MAB which the plaintiffs had argued was the successor company to Malaysia Airlines System Berhad. MAB subsequently appealed and on 7 October 2016 the Court of Appeal agreed that there was no case against MAB, holding that the legislation that placed the previous company under administration provided that the new company would not take over the liabilities of the previous company.⁷⁰ This legislation was introduced by the Malaysian Government and passed in Parliament in 2015.

Conclusion

Once again, what seems clear from the cases reviewed above is that court decisions have been varied. However, with the Chief Justices words serving as a framework to guide our understanding of the various decisions, it may be argued that the courts have indeed acted as a check against the excesses of the executive in acting against civil society activists. Whilst convictions have been handed down in respect of speech-related offences, a majority of the decisions on appeal have been to do away with custodial sentences. In some cases, convictions have even been overturned once cases reached the level of the Court of Appeal. This, however, is to be contrasted against the strong action taken against those convicted of proven terrorist support or activity, to the extent of giving strong or enhancing custodial sentences.

In terms of freedom of assembly, we still await a resolution of the conflicting decisions of the Court of Appeal in 2015 by the Federal Court. However the Federal Court does not appear to be in a rush to decide on this issue, preferring prosecutions for breaches of the Peaceful Assembly Act 2012 to proceed. In the meantime, the prosecutions continue.

In other instances of dissent, some leeway for non-violent expression of disagreement appears to be permissible, so long as no disruption, violence or public disorder has been caused.

In religious freedom cases, the results have been mixed. On the one hand, civil courts have been ready to judicially review decisions made by the Syariah court when it comes to issues that can be classified as administrative, rather than jurisdictional. Even in terms of jurisdiction, it could be argued that the civil courts did not deny the freedom of an individual to change one’s religion, but preferred that previously-decided procedures for such a change be followed, namely, for Muslims, an order from the Syariah court. Where unilateral conversion was concerned, the courts seem to be

68 <http://www.malaysiakini.com/news/328571>, accessed on 30 April 2017.

69 <https://www.yahoo.com/news/court-dismisses-malaysia-airlines-bid-strike-mh370-suit-094205416.html>

70 <http://www.themalaymailonline.com/malaysia/article/appeals-court-strikes-out-malaysia-airlines-as-defendant-in-mh370-lawsuit>, accessed on 1 May 2017.

leaning in favour of disallowing them, but those decisions remained to be made in 2017. However, the more difficult decisions on freedom of religion, regarding the use of the word "Allah" by non-Muslims, have yet to be decided, and it remains to be seen what position the courts will take.

The Chief Justice had indicated that court decisions would be based on the provisions of the Federal Constitution. That however begs the question of how those provisions ought to be interpreted. Conflicting interpretations, even within the courts, exist, and these will need to be resolved. More importantly, relatively conservative interpretations of the provisions of the Federal Constitution may stymie the development of a more robust application of human rights, especially with regard to issues of accountability (whether discretions can be challenged) and transparency (whether pro-status quo approaches will be adopted).

We can see the outlines of the ever-present challenge facing the judiciary with respect to the rule of law: whether the courts will favour the non-Western idea of freedoms exercised within limits in a multi-racial and multi-religious society that was expressed by the Chief Justice, thereby applying the rule of law in such a way so as to ensure that the varying competing interests of different segments of society are balanced and produce a predictable outcome. Respect for fundamental rights on the one hand and the rights of the wider community on the other are indeed finely balanced.



**GENDER AND
SEXUALITY**

GENDER AND SEXUALITY

By Thilaga

2016 saw an increase in state endorsed and funded activities in relation to LGBT persons, centered on rehabilitation of LGBT persons led by the Department of Islamic Development Malaysia (JAKIM) and state religious departments. In July 2016, JAKIM launched the **Pelan Tindakan Menangani Gejala Sosial Tindakan Perlakuan LGBT** (Action Plan to address Social Ills LGBT behavior), which involves 22 strategic partners including Ministry of Health, Ministry of Sport and Youth, Ministry of Women, Development and Community, state religious departments and other state agencies.

Nevertheless, state agencies, particularly JAKIM have been consistently carrying out activities targeted at LGBT persons, and some are directly and explicitly aimed at curbing ‘LGBT activities’. Some of these activities, which started in 2011, have been expanded and intensified, and inform the newly released action plans. In the 17th parliament session in 2012, the then deputy minister at the Prime Minister’s Department, Dr. Mashitah Ibrahim shared some strategies and two approaches adopted by JAKIM and the state religious department to ‘curb LGBT’ through the use of prevention and enforcement laws.

Some of the prevention strategies include:

1. Tarbiah and dakwah through the KAFA Programme, Program Takmir Masjid dan Surau all over Malaysia, Strengthening of Akidah courses and understanding of Islam courses that target all ages and at levels;
2. Program Dakwah via mainstream media and dialogues with experts;
3. Program Jelajah BEST! that focuses on HIV/AIDS and homosexuality;
4. Mukhayyam programme with trans women.

Dr Mashitah further elaborated that the department had studied the experiences and research from other countries, including the *National Research and Therapy for Homosexuals* in Australia. Dr Mashitah also shared that transgender persons, particularly trans women despite operational status would not be allowed to change the gender marker in their identification cards and legal documents due to the fatwa from the Fourth Muzakarah in 1983, which declared gender affirmation surgery for trans women as *haram* based on syarak.

“A person born as a male, is still a male even if he managed to transform his gender

through surgery. A person who is born as a woman, is still a woman even if she successfully transformed her gender through surgery. ... So in this case, the registration department had to conform to the decision of the Fatwa Council who had already made law on this matter”¹

On 5 January 2017, the Court of Appeal overturned a decision by Justice Nantha Balan in 2016, which instructed the National Registration Department to change the name, gender marker and last digit of the serial number in identification card in accordance with the application by a trans man. The decision by Justice Nathan, similar to the decision by Justice James Foong in 2005 sees the distinction between sex and gender, and appreciates new evidence. The decision also affirms the right to live with dignity guaranteed under Article 5 of the Federal Constitution, which includes the right of trans people to live with dignity based on self-determined gender identity.

Arrest and detention of transgender women continued in 2016. At least 63 cases of arrests were documented via community data gathering and media monitoring. The first quarter of 2016 also witnessed a murder of trans woman, and the media sensationalization that followed suit. While there are changes in the media, there is a lack of consistency. In addition, the fact that articles sourced by Bernama cannot be amended results media outlets reproducing articles with inaccurate and discriminatory terms and language in the media.

The use of pejorative terms such as ‘pondan’² to attack, ridicule or patronize others persisted in 2016. In a press conference held by Kasthuri Patto, a member of parliament (MP) in November 2016 to address the on-going insults towards female MPs in the Parliament, she also called out fellow MP Tajuddin Abdul Rahman for his consistent use of the word ‘pondan’ towards her and other MPs, as well as the lack of action in relation to the use of insulting terms in Parliament.³

DEFINITIONS

Sex refers to a combination chromosome, internal and external reproductive organs, hormones and secondary sex characteristics. Sex is usually assigned based on genitals at birth.

Gender identity refers to how we see ourselves and identify ourselves. Gender identity is not determined by our sex. Research shows that our brain determines gender identity.

Gender expression refers to the way we express our gender identity through various forms, including but not limited to mannerism, clothing, speech, etc.

Sexual orientation refers to our romantic and sexual attraction towards other people. Sexual orientation is not limited to sexual intercourse or activities.

1 Dewan Rakyat Parlimen Kedua Belas Penggal Kelima Mesyuarat Kedua, Bil 28, 19 June 2012 <http://www.parlimen.gov.my/images/webuser/jkuasa%20lamp/DR-19062012.pdf>

2 pondan is a colloquial term, largely used as a catchall term to describe persons assigned male at birth whose gender expressions are feminine. In the 1980s, transgender women groups and community in Malaysia came up with the term mak nyah, a combination of the word mak (mother) and nyah (derived from nyonya, a cultural reference due to similarities in characteristics, demeanor and gender expression) to create distinction between trans women and gay men. This distinction was important to squash the assumption that trans women were men who were exhibiting feminine characteristics.

3 Opposition: Pandikar is protecting ‘foul mouth’ Tajuddin <http://www.freemalaysiatoday.com/category/nation/2016/11/22/opposition-pandikar-is-protecting-foul-mouth-tajuddin/>

Lesbian refers to a person who identifies as a woman who is romantically and/or sexually attracted to people who identify as women

Gay refers to a person who identifies as a man who is romantically and/or sexually attracted to people who identify as men

Bisexual refers to a person who is romantically and/or sexually attracted to people who identify as women and men

Transgender refers to people whose lived experiences or gender identity ‘do not match’ the sex assigned at birth

Trans woman refers to a transgender person who identifies as a woman

Trans man refers to a transgender person who identifies as a woman

Cisgender refers to people whose lived experiences or gender identity ‘match’ the sex assigned at birth

Gender queer/fluid refers to people whose lived experiences or gender identity ‘do not match’ the sex assigned at birth. Gender queer/fluid people tend to exist outside of the gender binary (the idea of being a woman or a man)

Intersex refers to people who are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies⁴

Queer can refer to both sexual orientation and gender identity. In terms of sexual orientation,

Pansexual refers to a person who is romantically and/or sexually attracted to people who identify women, men, gender queer/fluid or people who identity with other gender categories

Asexual refers to a person who has limited or no sexual attraction towards others.

State funded and endorsed anti-LGBT activities

1. Action Plans

In July 2016, JAKIM launched the **Pelan Tindakan Menangani Gejala Sosial Tindakan Perlakuan LGBT**⁵ (Action Plan to address Social Ills LGBT behavior) in Putrajaya, which aims to facilitate a more proactive and effective role in curbing “social ills”, particularly gender confusion that involves LGBT persons. The Plan also aims to:

1. enable dissemination of latest information in relation to strategies to curb social ills, particularly gender confusion (kecelaruan jantina)

⁴ What is intersex? <https://oii.org.au/18106/what-is-intersex/>

⁵ <https://islam.gov.my/berita-semasa/34-bahagian-keluarga-sosial-komuniti/48-pelan-tindakan-menangani-gejala-sosial-kecelaruan-gender>

2. capacitate officers to effectively carry out programmes that curb social ills gender confusion that is critical at this time
3. align programmes and collaboration between JAKIM, state religious departments, state agencies, higher learning institutions, and NGO in addressing issue in relation to gender confusion

While the action plan is unavailable on JAKIM's website, the **Pelan Tindakan Menangani Gejala Sosial Perlakuan LGBT** involves 22 strategic partners at the federal and state levels, including:

1. Jabatan Kehakiman Syariah Malaysia
2. Kementerian Pembangunan Wanita, Keluarga dan Masyarakat
3. Lembaga Penduduk dan Pembangunan Keluarga Negara (LPPKN)
4. Kementerian Kesihatan Malaysia
5. Kementerian Pelajaran Malaysia
6. Kementerian Belia dan Sukan Malaysia
7. Institut Kefahaman Islam Malaysia
8. Yayasan Dakwah Islamiah Malaysia
9. Jabatan Agama Islam in Malaysia

Between 2014 and 2016, the *Bahagian Pembangunan Keluarga, Sosial dan Komuniti*, under the *Sektor Pembangunan Insan* in JAKIM held meetings with the Jawatankuasa Bertindak (Focal Point) Menangani Gejala Sosial (Working committee (Focal Point) to Address Social Ills) with state religious departments, public universities, and relevant NGO to develop **Pelan Tindakan Rawatan dan Pemulihan Kepada Golongan Kecelaruhan Jantina (LGBT) or Action Plan on Treatment and Rehabilitation of Gender Confused individuals (LGBT)**.

Additionally, there is also the **Pelan Tindakan Menangani Gejala Sosial Kecelaruhan Gender** (Action Plan to Address Social Ills Gender Confusion) drafted by the Islamic Affairs Officer (PHEI) at JAKIM, state Islamic departments (JAIN), state Islamic Councils (MAIN), Ministry of Women, Development and Community, LPPKN, Ministry of Health, academics, and Islamic NGOs. It is unclear, however, if this plan is different from the other two plans.

In early 2017, the Ministry of Health released a guideline, 'Garis panduan Pengendalian Masalah Kesihatan Gender di Klinik Kesihatan' or 'Guideline on dealing with gender health issues at health clinics'.⁶ The guidelines mix up intersex, transgender, lesbian, gay, and bisexual persons, and provides irrelevant and inaccurate strategies and tips for parents and healthcare providers.

2. Rehabilitation camps and activities, including Mukhayam

The Mukhayyam programme was introduced by JAKIM in 2010 or 2011 as a strategy to reduce prevalence of HIV among key affected population, namely the trans women population who are Muslims.⁷ The programme aims to create awareness about Islam and HIV and offers job placement, namely with GiatMARA and Dagang Halal. The programme, which falls under the 4th

6 Garispanduan pengendalian masalah kesihatan gender di Klinik Kesihatan. <https://plu.mx/iium/a/IAaezY8uuWP6Xawc6U4m3cRShMcXKVCsr0P02-CV5Y/>

7 Government stakeholders <http://www.mac.org.my/v3/partners-donors/government/>

Pillar of JAKIM's Strategic Plan is a 3 days camp that offers basic HIV/AIDS education, religious and spiritual lesson, and professional skills development training through a series of interactive talks and workshops conducted by trained facilitators.⁸ The programme also provides micro credit assistance to selected participants of the programme, and some content of the camp comes from the Islam and Mak Nyah manual by JAKIM.

The Mukhayyam programme has been acknowledged as a rehabilitation programme by state agencies, including JAKIM and ministers. In the Global AIDS response report 2012: country progress report January 2010-December 2011, the mukhayyam programme reviewed as 'positive outcome could be seen through the changes in physical appearance and increased in spiritual awareness among some of them.'⁹ The Global AIDS Response Progress Report 2016 noted that "Many who attended this program have reported change in behaviour to less risky or risk free but there has been no data to support this claim."¹⁰ During a parliament session on 19 June 2012, then minister from the prime minister's department, Dr Mashitah Ibrahim claimed that the programme has received good feedback, and many have repented and gone back to the right path. Additionally, JAKIM has stated in the media that it has managed to rehabilitate 1,000 transgender women through the programme.¹¹

Due to the rehabilitative nature of the programme, a number of transgender women, and some who have attended the mukhayyam programme have expressed their objections of the programme. The Human Rights Watch report, *I am Scared to be a Woman* and some media reports include a few testimonies of trans women

We don't want [Mukhayyam] here. We saw that in Penang and Selangor, they were using it to try to change people. ... Their approach is not relevant. We are not men, and can't be changed into men. If you ask me to wear a military uniform, I'm still a transgender.¹² "I am tired of their games ... It was like they were manipulating us. They would say one thing in front of us, but another thing in front of others,"¹³

Their intention is to brainwash us. They do cross-country running, climbing hills, trying to change us—to them we are sissies who haven't done any physical activity. They think this will toughen us up. Like I'll climb to the top of the hill and suddenly become Alexander, or Peter. They don't understand what gender identity is.¹⁴

Indeed the programme fails to understand that gender identity cannot be changed, and gender identity is not determined by one's genitals. While the programme provides micro credit assistance, the mukhayyam programme does not address the systemic and structural discrimination faced by transgender persons, including rejection and lack of inclusion of religion of gender diversity.

8 Mukhayyam Programme: employment training programmes for Muslim transgender in Malaysia <http://pag.aids2012.org/abstracts.aspx?aid=17839>

9 Global AIDS response report 2012: country progress report January 2010-December 2011, Malaysia, page 44 http://moh.gov.my/images/gallery/Report/GLOBAL_AIDS_Endorsed_DG.pdf

10 Global AIDS Response Progress Report 2016, page 17 http://www.aidsdatahub.org/sites/default/files/publication/Malaysia_Annual_Report_2016.pdf

11 Lebih 1,000 golongan transgender berjaya dipulihkan menerusi program Mukhayyam <http://www.bharian.com.my/node/16804>

12 Human Rights Watch, *I am Scared to be a Woman: Human Rights Abuses against Trans People in Malaysia*, (September 2014), page 59

13 Jakim's 'spiritual camp' tried to 'change' us, lament Muslim transgenders <http://www.themalaymailonline.com/malaysia/article/jakims-spiritual-camp-tried-to-change-us-lament-muslim-transgenders>

14 Human Rights Watch, *I am Scared to be a Woman: Human Rights Abuses against Trans People in Malaysia*, (September 2014), page 59

Laws and policies that criminalize gender identity and expression have an overarching impact on all areas in the lives of trans people - increased vulnerability of trans women to arrest, stigma and stereotypes in relation to trans women, limited options and access to employment, education, housing as well as basic rights and opportunities, increased poverty among the transgender population, etc. Ultimately, these structural discrimination cause long term economic and health impact amongst others on the individual as well as the state.

Rehabilitation of trans women in particular, and LGBT persons in general has become a core area of focus for the Islamic departments. Sofea Ilias, a transgender woman and businessperson, who briefly de-transitioned became the poster child of rehabilitation of transgender women. Sofea, in April 2016 underwent medical surgeries and announced her decision to identify as a man. Sofea also publically vowed to preach to change other trans women.¹⁵

Her decision made national news and was even applauded by Jamil Khir Baharom, Minister in the Prime Minister's Office. He further advised trans women to follow in the footsteps of Sofea and 'return to the right path'.¹⁶ Anecdotal evidence and media reports show that Sofea's brief de-transition increased pressure for some trans women to 'change', including those with accepting and tolerating parents or family members. Case in point, Nur Sajat, a fellow businessperson was pressured by online users to follow in the footsteps on Sofea,¹⁷ which compelled Nur Sajat to release a statement on her social media page to explain her identity as an intersex woman.¹⁸

Five months following her initial announcement, in September 2016, Sofea announced her decision to identify as a woman again, and that she feels 'calmer, at ease and less burdened' following her decision.¹⁹ Unlike her earlier announcement, her announcement to transition back and identify as a woman again did not receive as much attention in the media. In her announcement released on her social media platforms, she pleaded to be allowed to be herself, and shared that she missed herself during her brief period of de-transition.²⁰

The Sofea Ilias case offers many lessons and exposes many gaps in terms of information and services among others. Access to accurate and affirming information on gender, sexuality and related healthcare information and services must be available to allow people to make informed decision and reduce harm on the self. In the case of Sofea, her decision to undergo multiple surgeries not only has an impact on her health and well-being, but it also has an economic impact. At the same time, it is also extremely important to create an environment that allows people to explore their gender and sexuality without pressure and judgment.

It is also imperative to understand that systemic discrimination, laws and policies that criminalize and discriminate trans people based on gender identity, societal pressure, lack of information, rejection by religion among others create a hostile environment for trans people to be themselves and to access basic rights. These factors also compel some trans people to 'change' themselves in order to survive, appease loved ones, among others. Her case also shows the impact on mental

15 <http://english.astroawani.com/lifestyle/i-want-help-other-mak-nyah-change-safey-ili-as-103294>

16 Transgenders should emulate Safey Ilias in returning to the right path <http://www.bernama.com/bernama/v8/newsindex.php?id=1238512>

17 <https://mforum.cari.com.my/portal.php?mod=view&aid=26724>

18 <http://www.astroawani.com/berita-malaysia/mak-nyah-nur-sajat-dedah-beliau-sebenarnya-dilahirkan-khunsa-103474>

19 Safey: Saya lebih tenang jadi mak nyah kembali, 6 September 2016. <http://www.malaysiakini.com/news/354849>

20 Masih dihina 'jadi lelaki', Sofea Ilias tenang kembali mak nyah. <http://www.themalaymailonline.com/projekmmo/berita/article/masih-dihina-jadi-lelaki-sofea-ili-as-tenang-kembali-mak-nyah>

health and wellbeing when gender identity is suppressed. In her announcement, she noted feeling ‘at ease, calmer and less burdened’ following her decision to identify as a woman again.

Good practices

The World Transgender Association of Transgender Health (WPATH) Standard of Care 7 and APTN’s Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific provide guidelines and information on trans specific healthcare needs.

The APTN’s Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific is a tool designed based on input by trans persons from Asia and the Pacific. The blueprint includes comprehensive information on care, prevention, and support, including chapters on addressing stigma, counselling for HIV testing, and guidance on hormone administrations for health providers.²¹

WPATH Standard of Care 7 (SOC 7) for the Health of Transsexual, Transgender, and Gender-Nonconforming People, published in 2011, is a tool design “based on the best available science and expert professional consensus to provide clinical guidance for health professionals to assist transsexual, transgender, and gender-nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment.”²²

In 2015, *Tangerine Community Health Centre* in Bangkok, Thailand by the Thai Red Cross AIDS Research Centre became the first clinic in Asia to provide a full range of health-care and counselling services specifically for transgender people.²³ The clinic offers gender-affirming integrated healthcare, including general health check-ups, psychosocial support and counseling, hormone administration and monitoring, vaccination for hepatitis B and human papillomavirus, testing for HIV, other sexually transmitted infections, and hepatitis B and C, Pap smears, pre-exposure prophylaxis (PrEP), and other health referrals.²⁴

3. Seminars

The Dakwah Division of the Selangor state Islamic department (JAIS) in collaboration with JAKIM, University Technology Malaysia (UiTM), Intec Education College (INTEC) and Yayasan Ihtimam Malaysia (YIM) hosted a seminar titled, ***Seminar Pemahaman Ummah; LGBT: Apa Yang Anda Perlu Tahu?*** (*Community Understanding Seminar; LGBT: What You Need to Know?*) on 15 November 2016 in INTEC in Shah Alam, Selangor.²⁵ The seminar featured a guest speaker from Yayasan Peduli Sahabat, Agung Sugiarto and was attended by counselors, students and parents.²⁶ Two videos²⁷ titled LGBT: Apa Yang Anda Perlu Tahu (LGBT: What You Need to Know) were also released on 14 November 2016 online.

21 The Asia Pacific Trans Health Blueprint in Action <http://www.weareaptn.org/asia-pacific-trans-health-blueprint-in-action/>

22 The Standards of Care http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351

23 Advances in health services for transgender people in Thailand. http://www.unaids.org/en/resources/presscentre/featurestories/2016/june/20160621_thailand_transgender

24 The Tangerine Clinic: Leading the Way on Transgender Health Care. <http://amfar.org/The-Tangerine-Clinic.aspx>

25 <http://puspanita.selangor.gov.my/wp-content/uploads/2016/11/SURAT-JEMPUTAN-SEMINAR-PEMAHAMAN-UMMAH-LGBT.pdf>

26 Golongan LGBT boleh diubah <https://www.bharian.com.my/node/227009>

27 LGBT : Apa Yang Anda Perlu Tahu(1) https://www.youtube.com/watch?v=2vfOUGW_0NA

According to the media reports, the seminar attributed lack of presence of a father figure or absent father, dominant and overprotective mother, pornography, tension or problems in the family household, environmental factors and bullying as contributing factors for someone ‘becoming or turning gay, lesbian, bisexual, transgender.’²⁸ Speakers expressed that children who are involved in LGBT activities should not be abandoned and isolated; instead they should be assisted. This includes referrals to experts and religious teaching. In addition, the speakers emphasized the role of society in bringing back ‘wayward’ people back to the right path by showing them love and openness.

There is no evidence to support the claim that childhood trauma, experiences of abuse in childhood, parenting skills, absent father and domineering mothers or tension in the family are factors that cause one to be gay, lesbian, bisexual, transgender, queer, or anything outside of the cisgender heterosexual notion. In fact these are myths that have been debunked.²⁹ The American Psychological Association (APA) removed homosexuality from the Diagnostic Statistical Manual (DSM) in the 1975, as “research has found no inherent association between any of these sexual orientations and psychopathology” and “heterosexual behavior and homosexual behavior are normal aspects of human sexuality.”³⁰

While gender dysphoria³¹ is in the current DSM 5, it has undergone major revisions to provide further clarification and guidance to healthcare providers as well as to remove stigma in relation to trans persons. This includes the replacement of “gender identity disorder” with “gender dysphoria” in DSM 5, and the explanations that ‘gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with gender dysphoria’³²

The gender dysphoria diagnosis also includes “a post-transition specifier for people who are living full-time as the desired gender (with or without legal sanction of the gender change). This ensures treatment access for individuals who continue to undergo hormone therapy, related surgery, or psychotherapy or counseling to support their gender transition.”³³ However, it is important to note that people are able to determine their own gender identity without a diagnosis by healthcare providers. The diagnosis of gender dysphoria facilitates access to hormone replacement therapy and other trans specific healthcare services. In many countries, including Malta and India, medical evidence, including diagnosis by mental health professional of gender identity is not required in order to change the details in legal documents. The changes are made based on self-determined gender identity, as individuals are capable of recognizing and identifying their own gender identity based on their lived experiences.

All major national mental health organizations have rejected and expressed concerns regarding therapies that aims to correct or change gender identity, gender expression and sexual orientation³⁴,

28 <http://www.utusan.com.my/rencana/agama/kekang-lgbt-secara-berhemah-1.411644>

29 10 Anti-Gay Myths Debunked . <https://www.splcenter.org/fighting-hate/intelligence-report/2011/10-anti-gay-myths-debunked>

30 <http://www.apa.org/topics/lgbt/orientation.pdf>

31 Gender dysphoria is a diagnosis for people whose gender at birth is contrary to the one they identify, including but not limited to transgender persons.

32 Gender Dysphoria - American Psychiatric Association. https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf

33 *ibid*

34 WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction, and Behaviours http://www.wpanet.org/detail.php?section_id=7&content_id=1807

as there is a lack of evidence that support the efficacy of these efforts or therapies.

In 2009, the American Psychological Association (APA) issued a report concluding that the risks of conversion therapy practices include: depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidal tendencies, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviours, a feeling of being dehumanised and untrue to self, a loss of faith, and a sense of having wasted time and resources.

The World Health Organization (WHO) in 2012 stated that therapy to change sexual orientation brings ‘a serious threat to the health and well-being—even the lives—of affected people.’³⁵ In the same year, Dr. Robert L. Spitzer, a former advocate of conversion therapy, issued a public apology, and retracted his support for conversion therapy.³⁶

Specifically to the context of Malaysia, the special rapporteur on health during his visit to Malaysia in November 2014 expressed concerns over the “so-called “corrective therapies” by the state agencies.

Such therapies are not only unacceptable from a human rights perspective, but they are also against scientific evidence, and have a serious negative impact on the mental health and well-being of adolescents. State-led programs to identify, “expose”, and punish LGBT children have contributed to a detrimental educational environment where the inherent dignity of the child is not respected, and discrimination on the basis of sexual orientation and gender identity is encouraged.”³⁷

35 http://www.paho.org/hq/index.php?option=com_content&view=article&id=6803&Itemid=1926

36 http://www.nytimes.com/2012/05/19/health/dr-robert-l-spitzer-noted-psychiatrist-apologizes-for-study-on-gay-cure.html?_r=0

37 Preliminary observations and recommendations by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health Mr. Dainius P'ras Country Visit to Malaysia, 19 November to 2 December 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15370&LangID=E>

4. Publications and videos

A series of publications, including flyers, booklets, manual, have been published by JAKIM in collaboration with Islamic NGOs and academics. Below are three publications that are available online

Title	Pages	Language	Year	Key content
Memahami Lesbian, Gay, Biseksual dan Transgender (LGBT) dari perspektif seorang muslim (Understanding Lesbian, Gay, Bisexual and Transgender (LGBT) from a Muslim Perspectives)	18	BM	n/a	<ol style="list-style-type: none"> 1. Test or fate? 2. Changing same-sex attraction (SSA) 3. Know an LGBT person? What should you do?
Hadith on LGBT related behaviour. <i>Hadis-hadis sahih berkaitan perlakuan (lesbian, gay, biseksual)</i>	28	BM and English	2015	
Manual Islam and Mak Nyah	218	BM	2013	<p>Included 5 modules and 4 chapters.</p> <p>Modules:</p> <ol style="list-style-type: none"> 1. Introduction of mak nyah 2. Mak Nyah from an Islamic perspective 3. Profile, demographic and issues faced by mak nyah 4. Treatment and support 5. Action plan – outreach <p>Chapters:</p> <ol style="list-style-type: none"> 1. Mukayyam mak nyah (basic) 2. Kelas pemantapan - 3. Daie programme – offers strategies for ex-transgender preachers

In 2015, JAKIM distributed flyers titled, 10 myths about homosexuality on Valentine’s Day to “promote healthy living and reduce the spread of HIV among Muslims”. The content of the flyer was adopted from the 2010 Family Research Council (FRC) brochure titled “ The top 10 myths about homosexuality.”³⁸

5. Sermons that include anti-LGBT messages or undertones

In May 2016, a sermon by JAWI for mosques in Kuala Lumpur claimed that the paradise is closed to transgender persons, and men who appear as women and vice versa is cursed by Prophet Muhammad.³⁹

At least five sermons on LGBT persons have been recorded via media monitoring between 2013 and 2017. Three out of the five sermons were released by state religious departments, namely JAWI and JAIS while the two other sermons were released JAKIM. The content of the sermons include human rights being a front for LGBT rights, and the LGBT movement being an attack on the family institution amongst others. These efforts change public perception, create confusion in terms of facts on sexual orientation, gender identity and gender expression, and intensifies discrimination, rejection and violence faced by LGBT persons.

Arrest and detention based on sexual orientation and gender identity

Arrest and detention of transgender women

Between January and May 2016, 63 cases of arrest of transgender women by police and state religious departments were gathered via media monitoring and community data gathering.

Number of transgender women arrested by the authorities, namely police and state religious departments according to states in Malaysia between January and May 2016

State/Month	January	February	March	April	May	Total
Penang	-	-	13	-	3	16
Kuala Lumpur	4	6	5	11	9	35
Malacca	-	-	-	-	4	4
Kedah	-	-	-	1	-	1
Pahang	-	-	-	-	7	7
Total	4	6	18	12	23	63

Source: <https://justiceforsisters.wordpress.com/2016/06/03/justice-for-sisters-calls-for-dialogues-to-dispel-myths-end-violence-against-transgender-persons/>

38 Valentine’s Day anti-gay flyers ours, says Jakim. <http://www.freemalysiatoday.com/category/nation/2015/02/18/valentines-day-anti-gay-flyers-ours-says-jakim/>

39 <http://www.themalaymailonline.com/malaysia/article/paradise-closed-to-crossdressers-and-transgenders-jawi-says-in-sermon>

One notable case based on the statistics involved the arrest of a group of transgender women in Penang by the police. In this case, transgender women who are Muslim were passed on to the state religious departments, although the police conducted the arrests. The Human Rights Watch report, *I am Scared to be a woman* also includes cases where trans women were handed over to the state Islamic departments to be processed. This trend shows the abuse of the state shariah laws that subject transgender women to arbitrary arrest and detention.

Beauty pageants

Another noteworthy case in 2016 included the raid at a hotel in Kuala Lumpur by Federal Territories Islamic Department (JAWI) of an event, allegedly a beauty pageant organized by transgender women on April 2016. The organizer of the event was arrested, detained for almost 24 hours and investigated under Section 9 Contempt or defiance of religious authorities⁴⁰ and Section 35. Encouraging vice⁴¹ of the Shariah Criminal Offences (Federal Territories) Act 1997.⁴²

A human rights lawyer, Siti Kassim, who was present at the event requested for an arrest warrant and questioned the grounds of the raid. Her request and questions quickly escalated into a confrontation. Nonetheless, JAWI did not provide a warrant, and the organizer of the event was arrested.

Siti Kassim was later arrested at a police station while following up on a statement in relation to the event under Section 186. Obstructing public servant in discharge of his public functions⁴³ and Section 506⁴⁴ of the Penal Code for criminal intimidation. She was released on police bail the same day.⁴⁵

Human rights defenders who visibly support LGBTIQ persons also face reprisals from state and non-state actors alike. On the Record: Violence against LGBT persons in Malaysia, media reports and anecdotal evidence show experiences of human rights groups and individuals who have lost job promotions, been terminated or fired, lost program funding or donations, denigrated, confronted, intimidated, questioned and verbally attacked for supporting LGBT persons and speaking up on issues in relation to LGBT persons.⁴⁶

40 Section 9. Contempt or defiance of religious authorities. Any person who acts in contempt of religious authority or defies, disobeys or disputes the orders or directions of the Yang di-Pertuan Agong as the Head of the religion of Islam, the Majlis or the Mufti, expressed or given by way of *fatwa*, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

41 Section 35. Encouraging vice. Any person who promotes, induces or encourages another person to indulge in any vice shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both. (http://www2.esyariah.gov.my/esyariah/mal/portalv1/enakmen2011/Eng_act_lib.nsf/858a0729306dc24748257651000e16c5/bced11b697691518c8256826002aaa20?OpenDocument)

42 Transgender at 'beauty pageant' to be charged with encouraging vice, group says <http://www.themalaymailonline.com/malaysia/article/transgender-at-beauty-pageant-to-be-charged-with-encouraging-vice-group-says>

43 Obstructing public servant in discharge of his public functions. 186. Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment for a term which may extend to *two years or with fine which may extend to * ten thousand ringgit or with both.

44 Punishment for criminal intimidation. 506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment for a term which may extend to two years or with fine or with both; if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both

45 Siti Kasim arrested for obstruction, criminal intimidation. <http://www.freemalaysiatoday.com/category/nation/2016/04/08/siti-kasim-arrested-for-obstruction-criminal-intimidation/>

46 KRYSS & Outright International, *On the Record: Violence against lesbian, bisexual and trans people in Malaysia*, (New York: 2014), page 30

Events, particularly beauty pageants organized by trans women are vulnerable to raids by the state religious departments. I am scared to be a Woman by the Human Rights Watch includes three interviews with people who were arrested at a raid. One of the interviewees reportedly lost her job following reports of the arrest in the media

Because of that I lost my job. [My arrest] was published in the newspaper, with a blur on my face, but my statement was there. ... My colleagues at work spread around the story. My manager got the newspaper, and he said, 'I don't agree with that.' My manager knew I was a mak nyah, but he was upset that I was in the paper, so he fired me.⁴⁷

Based on available statistic in the Pelan Strategik JAKIM (JAKIM Strategic Plan) and Manual Islam dan Mak Nyah (Islam Manual and Mak Nyah), a total of 746 cases of arrests have been carried out under the 'male person posing as a woman' state shariah laws between 2008 and 2012. Cases of arrest in 2010 were significantly higher with 218 cases of arrest that year. Despite the dip in 2011, the statistics show steady increase of arrest between 2008 and 2012.

Source: *Pelan Strategik JAKIM 2015-2019 & Manual Islam dan Mak Nyah*

Year	Cases of arrest
2008	92
2009	114
2010	218
2011	131
2012	191
Total	746

Musahaqah (women who have sex with women (WSW)), liwat (sodomy) and other state shariah laws

The Pelan Tindakan JAKIM 2015-2019 provides statistics of arrest in relation to liwat and musahaqah between 2009 and 2012.

Cases of arrest in relation to liwat and musahaqah between 2009 and 2012 in Malaysia

Type of offence	2009	2010	2011	2012
Musahaqah	3	1	6	3
Liwat	2	0	8	0

Source: *Pelan Strategik JAKIM 2015-2019*

⁴⁷ Human Rights Watch, *I am Scared to be a Woman: Human Rights Abuses against Trans People in Malaysia*, (September 2014), page 31

On 31 August 2014, the Johor Islamic Religious Department (JAIJ) arrested two students, identified as women, in a hotel in Johor during a raid on the eve of the Merdeka.⁴⁸ Both were investigated under Section 26 of Johor's Syariah Criminal Offences Enactment 1997.⁴⁹

Section 377B of the Penal Code

In January 2017, a prisoner who was set to be released in two weeks was sentenced to nine years' jail and three strokes of the cane by the Ayer Keroh Sessions Court for allegedly having sex with 19-year-old fellow inmate at the Jasin Correctional Centre. The element of consent is crucial in this case, and the conviction of the prisoner under 377B⁵⁰ as opposed to 377C further raises questions regarding consent. Unlike 377B, 377C of the Penal Code prohibits carnal intercourse against the order of nature without consent.

<p>377B. Punishment for committing carnal intercourse against the order of nature</p>	<p>377C. Committing carnal intercourse against the order of nature without consent, etc.</p>
<p>Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.</p>	<p>Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.</p>

Transgender women in prison

In November 2016, the Ministry of Home Affairs responded to YB Fuziah who had posed a question regarding transgender prisoners. The Ministry of Home Affairs noted that as of October 2016, seven transgender women prisoners were serving time in women's prison. However, they are separated from the cisgender women inmates due to security reasons, which were not specified.⁵¹

To clarify, the current practice of assignment of prison facilities is based on operative status of trans women. Transgender women, who are post-operative, are placed in female prisons.

48 Mohd FirdausYon, [Dua siswi bernafsu songsang dicekup](#), *Sinar Harian*, 1 September 2014

49 Section 26. Musahaqah. Any female person who commits *musahaqah* shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof. (see: Enactment No. 4 Of 1997. Syariah Criminal Offences Enactment 1997 Part Iii - Offences Relating To The Sanctity Of The Religion Of Islam And Its Institution <http://www.esyariah.gov.my/portal/page/portal/Portal%20E-Syariah%20BI/Portal%20E-Syariah%20Carian%20Bahan%20Rujukan/Portal%20E-Syariah%20Undang-Undang/Portal%20E-Syariah%20Undang%20Johor>)

50 January 26, 2017, Convict to remain in jail for unnatural sex. <http://m.themalaymailonline.com/malaysia/article/convict-to-remain-in-jail-for-unnatural-sex>

51 **Ram Anand** November 24, 2016 Special cells for transgenders at women's prisons, Parliament told <http://m.themalaymailonline.com/malaysia/article/special-cells-for-transgenders-at-womens-prisons-parliament-told>

Meanwhile, many of those who have medically transitioned (on hormone replacement therapy, have undergone some gender affirming procedures and surgeries, etc.) are placed in the male prisons. This effectively places a large section of transgender women at risks, including sexual violence, emotional and psychological violence, and humiliation, among others.

The Human Rights Watch report, *I am Scared to be a Woman* includes four cases of sexual violence by prison wardens and fellow prisoners in male prisons. *On the Record: Violence against LGBT persons in Malaysia*, a report by KRYSS and OutRight Action International released in 2014 includes a case a trans woman had been arrested over 30 times under various charges including Section 21 of the Minor Offences Act. She was also sentenced to eight months in prison.⁵²

They sentenced me to prison for eight months. In prison they bullied me a lot. The prison officers told me, 'We will put [you] in the cells with boys.' They abused me a lot in prison ... they would ask us to run to a Saroja Devi (Indian female movie star) song. They would play some old songs and make us run from a distance to the flagpole make the boys laugh at us. They would take the flag and wrap it around us ... they would twist our hands ... make us sit in the sun. ... The warden would insult us ... would ask us, 'How about if I come to your cell? There are only two of you there. Can I do you?' They would talk to us in a very vulgar manner ... Once I got out, the police in court asked me, 'Where are you going to go once you are released, where are you going to sleep? Do you want me to come along to keep you company?' ... I was asked by a police officer, the officer who handcuffed me and brought me to court, he was an Indian man ... about 45 years old. He asked me, 'Shall I come along?'⁵³

The assignment of prison facilities should be based on gender identity, and not limited to the current practice that is based on the operative status of transgender women, especially given the safety and security issues that trans women experience in men's prison.

At this juncture, it is important to understand that our gender, which refers to the way we feel and see ourselves, is determined by our brain, not genitals. Not all trans people want, can afford or have access to healthcare services to medically transition. In addition, transition is unique and personal to each individual. Some can choose to have some types of surgeries, some may not want any surgery, some may want to have all-related gender affirming surgeries. There is no end goal in transitioning, and this is entirely up to the individual and gender dysphoria experienced.

In Malaysia, transgender persons lack access to trans-specific healthcare services, including gender-affirming surgeries. A fatwa introduced in 1983 prohibits gender-affirming surgeries for transgender women. Following the fatwa, gender affirmation surgeries, which were provided in University Hospital in the 80s, were shut down. As a result, trans persons are forced to access basic access to healthcare in other countries, and face serious health gaps due to the lack of information and services. It is also important to note that gender affirming surgeries have a profound impact in reducing gender dysphoria experienced by some trans persons.

52 KRYSS & OutRight Action International, *On the Record: Violence against lesbian, bisexual and trans people in Malaysia*, (New York: 2014), page 17

53 *ibid*, page 17

Violence against transgender persons

Hate crime and murder

On 9 March 2016, a 21-year-old transgender woman from Sabah was found dead in Subang Jaya, Selangor. She was reported to have ‘fallen’ from the third floor of an apartment building following an argument she had with a man living in the building. The man was later apprehended by the police to assist with the investigation. The outcome of the case is unknown.⁵⁴

The murder was reported in a sensationalist manner with excessive attention to her clothing, body, and gender identity as opposed to details of the case. A Malay language daily, *Kosmo* in one of its articles included an unverified photo allegedly of the trans woman before she had transitioned, presenting herself in men’s attire. The *Malaysian Digest*, an online media portal included a photo of a trans woman with pixelated breasts.

The media also used discriminatory terms to describe the woman. Based on a brief media analysis by Justice for Sisters of 22 articles, the trans woman was described as ‘*lelaki berpakaian atau berbaju wanita*, ‘*pondan*’, man in women’s clothes or clothing or man dressed as woman, and transvestite in the articles.

Six out of the 25 articles analysed in the media brief were sourced from *Bernama*, and articles sourced by *Bernama* cannot be amended or edited. Consequently, media outlets reproduce discriminatory terms due to these barriers. Nonetheless, one media outlet, *Malaysiakini* changed the gender identity in its article to reflect her authentic gender identity although the article did not use the correct gender pronoun.

There have been no known follow up news articles in the media regarding the investigation and outcome of the case.

Some of these practices changed with Sameera Krishnan’s tragic and violent murder in February 2017. Her case is still under investigation.

Between 2007 and 2017, at least 11 cases of murder of transgender women have been reported in the media. In most of the cases, the victims were subjected to extreme forms of violence and ‘over kill’. For example, in most of the cases, the women were stabbed multiple times, gagged, physically bruised and more. In a case in 2011 in Penang, a 53 year old trans woman was beaten repeatedly to death by a motorcyclist with a hammer following an argument. In 2009, a 42 year old trans woman was found dead in a water retention facility in Kuala Lumpur with multiple stabs on her body. Most of these cases show high level of violence experienced by the victims, and this correlates with the lack of protection, perception of trans people, stigma and discrimination experienced by trans people. This ultimately allows perpetrators to violate trans people with impunity.

Online gender and moral policing

In 2016, a video of a trans woman’s impromptu performance with a group of buskers in a mall in Kota Kinabalu, Sabah went viral, and culminated into an investigation by the police.⁵⁵ During the performance, she had a wardrobe malfunction or a nip slip to be specific, an accidental disclosure

54 Brief media analysis – media reports on the violent death of a young trans woman on 9 march 2016 in Subang Jaya, Malaysia. <https://justiceforsisters.wordpress.com/2016/03/10/brief-media-analysis-media-reports-on-the-violent-death-of-a-young-trans-woman-on-9-march-2016-in-subang-jaya-malaysia/>

55 Sexy crossdresser not a busker, say Sabah police <https://www.malaysiakini.com/news/328053>

of nipples. Although her attempts to adjust her top and cover the exposed areas were clear, the accidental act was deemed as an ‘indecent act and exhibition’ according to a statement by the mall

“It is very, very sad that the lady in the photo/video took advantage of the circumstances and popped in with such indecent attire and exhibition and created a negative image of the mall, the performing band, and LKNS. Our management strictly does not support such indecent act and exhibition.”

The police later publicly called for the person in the video to report to the Kota Kinabalu or nearest police station to assist with the investigation of the case⁵⁶ under Section 294⁵⁷ of the Penal Code for obscene performance.⁵⁸ The trans woman surrendered herself at the police station accompanied by her father, where she was detained for her statement to be taken before being released on police bail.⁵⁹ No further information is available.

The media used discriminatory terms and language to describe the woman, including crossdresser, transvestite, pondan, and other pejorative terms. Some media also sexualized her by calling her a sexy crossdresser. The media also paid scant regard to her right to privacy, as some papers disclosed her name as per facebook account and legal documents.

This case exposes gender and moral policing in multiple spaces by state and non-state actors alike, and the overlap of violence and harassment in online and offline spaces.

Gender recognition – change of name, gender marker and other details in legal documents

In July 2016, an application filed by a trans man to change his name, gender marker and last digit of the serial number in his identification card (IC) was granted by the Kuala Lumpur High Court presided by Justice S. Nantha Balan.⁶⁰ Justice Nantha Balan in his decision stated that the applicant ‘has a precious constitutional right to life under Article 5 (1) of the Federal Constitution of Malaysia and the concept of “life” under Article 5 (1) must necessarily encompass the plaintiff’s right to love with dignity as a male and be legally accorded judicial recognition as a male.’”

The courts in Malaysia rely on the Corbett and Bellinger’s cases for cases in relation to change of gender marker in legal documents, including IC, and applicants are required to fulfil four criteria in order to make the changes.

- (1) Chromosomal factor;
- (2) Gonadal factor (presence of testes or ovaries);
- (3) Genital factor (including internal sex organs);

56 Wardrobe malfunction unintentional, says Sabah transsexual <http://www.thestar.com.my/news/nation/2016/01/22/wardrobe-malfunction-unintentional/>

57 Obscene songs. 294. Whoever, to the annoyance of others—
(a) does any obscene act in any public place; or
(b) sings, recites or utters any obscene song, ballad or words in or near any public place, shall be punished with imprisonment for a term which may extend to three months or with fine or with both.

58 ‘Transvestite’ performing at Suria Sabah told to report to police station <http://www.theborneopost.com/2016/01/22/transvestite-performing-at-suria-sabah-told-to-report-to-police-station/>

59 Wardrobe malfunction unintentional, says Sabah transsexual <http://www.thestar.com.my/news/nation/2016/01/22/wardrobe-malfunction-unintentional/>

60 She is a he – even on paper. <http://www.thestar.com.my/news/nation/2016/08/21/she-is-a-he-even-on-paper-posters-for-transgender-rights-often-read-some-men-are-born-in-their-bodi/>

(4) Psychological factor.

In this case, however, Judge Nantha Balan followed the approach by the Family Court in Australia in *Attorney General For the Commonwealth v Ken and Others* 2003, where “the court emphasized on the importance of abandoning the chromosomal factor and highlighting the imperative need to view the matter from the *physiological and psychological perspective*” (*direct quote from the text; most likely meant psychological*). The Family Court in Australia held,

We are in any event much more attracted by the reasoning of Thorpe LJ. We have difficulty in understanding how *Corbett* test can continue to be applied in face of the evidence, not only as to brain sex, but also as to the importance of psyche in determining sex and gender. The fact that these issues cannot be physically determined at birth seems to us to present a strong argument: first, that a child’s sex cannot be finally determined at birth; and second, that any determination at that stage is not and should be immutable.

In addition, Justice Nantha Balan added, “The male XY and female XX chromosome will remain static throughout the individual’s natural life. To insist on the “chromosomal requirement is to ask for the impossible.”⁶¹

The decision was, however, overturned by the Court of Appeal in January 2017 following an appeal by the National Registration Department.⁶²

Between 2004 and 2016, at least 7 known applications have been filed at the High Court in relation to change of details in the IC and other legal documents. In 2005, a trans woman’s application to change the details in her legal documents was granted. However, the precedence by Justice James Foong was not used in the subsequent cases.

Year	Cases	Outcome
Nov 2004	<p>Wong Chiou Yong vs NRD (trans man)</p> <ul style="list-style-type: none"> - Case was heard before Ipoh High Court - <i>Change name & gender on birth certificate and national identification card</i> 	Application dismissed

61 Media release: uphold right to identity of transgender persons <https://justiceforsisters.wordpress.com/2017/01/11/media-release-uphold-right-to-identity-of-transgender-persons/>

62 NRD wins appeal bid to stop transgender from changing IC details. <http://www.themalaymailonline.com/malaysia/article/nrd-wins-appeal-bid-to-stop-transgender-from-changing-ic-details>

Nov 2005	<p>JG vs NRD (trans woman)</p> <ul style="list-style-type: none"> • Case was heard in KL high court before Justice James Foong • Change name & gender on birth certificate and national identification card 	Successful. Allowed to change name, gender marker, and last digit on IC
2011	<p>Aleesha Farhana vs NRD (trans woman)</p> <ul style="list-style-type: none"> • Case was heard at the Terengganu High Court before Justice Datuk Mohd Yazid Mustafa 	Application dismissed
Jan 2011	<p>Kristie Chan vs NRD (trans woman)</p> <ul style="list-style-type: none"> • Case was heard before Judicial Commissioner Ridwan Ibrahim in Ipoh High Court. Ruling was made in chambers. 	Dismissed with costs (high court)
Oct 2015	<p>Kristie Chan vs NRD (trans woman)</p> <ul style="list-style-type: none"> • Case was heard before Judicial Commissioner Ridwan Ibrahim in Ipoh High Court. Ruling was made in chambers. 	Dismissed, no costs (court of appeal)
Sept 2014	<p>Kelvin Fau vs NRD (trans man)</p> <ul style="list-style-type: none"> • Case was heard in KL high court before Justice Zaleha Yusof • Change name, gender & last digit in national identification card • To quash the rejected application 	Application dismissed with cost
June 2015	<p>Maha Laksmi Rajoo vs NRD (trans woman)</p> <ul style="list-style-type: none"> • Case was heard in KL high court before Justice Asmabi Mohamad 	Application dismissed with cost
July 2016	<p>Tan vs NRD (trans man)</p> <ul style="list-style-type: none"> • Case was heard in Kuala Lumpur High Court before Justice Nathan Balan • Change of name, gender marker and last digit of the serial number in IC 	Successful. Decision was overturned in January 2017 following an appeal by the National Registration Department

Conclusion

Discrimination, exclusion and violence against LGBTIQ persons do not only cause personal harm on LGBTIQ persons on an individual level, but also create broader short and long-term impact on multiple actors, including the private sector and state. Some long-term impacts on the growth and development of the state include poverty, increased burden on healthcare, increased lack of safety and security due to rise of vigilante groups and violence, increased migration, among others. In addition, the activities rolled out by the state agencies comes out of the state budget, which should be reallocated for public health, education and programmes that address immediate gaps in society. Thus, it is important for the government to reassess the state funded activities, and analyze the long-term costs of discrimination and exclusion of LGBTIQ persons. In addition, overwhelming facts and evidence affirm that diversity in terms of sexual orientation, gender identity, gender expression and sexual characteristics is a normal and natural occurrence.



DEATH PENALTY

DEATH PENALTY

In Malaysia, those sentenced to death are usually sent to the gallows. While executions do not always make the news in Malaysia, criminal offences that can result in the death sentence are relatively common in news channels. The mandatory death penalty is usually reserved for the crime of murder under Section 302 of the Penal Code or possession of drugs under section 39B of the Dangerous Drugs Act 1985. Other offences that could carry the death penalty include the crime of kidnapping with intent to murder, act of terrorism resulting in death and rape¹. There are several other concerns relating to capital punishment in Malaysia.

Firstly, criminal cases could take years to conclude if the accused appeal against the decisions up to the Federal Court. In many cases, it could easily take up to 10 years before an individual concludes his or her final appeal or appeal for clemency following the initial conviction. As an example, Shahrul Izani who was arrested for possession of 622 grams of cannabis in 2003 was sentenced to death in 2009 and his clemency was only granted in 2017³. The long ‘waiting’ period often results in the death row phenomenon which causes severe mental trauma and physical deterioration which can be considered as torture⁴.

There is also the concern for whether those charged for any offences with the death sentence are given adequate legal representation and whether the existing criminal justice system is sufficiently robust to ensure those on death row are treated justly. The findings by Malaysian Against Death Penalty & Torture (MADPET) in the case involving Gunasegar Pitchaymuthu and two others suggests that in some circumstances, there may be flaws that could result in potential miscarriage of justice⁵.

1 Section 376(4) of Penal Code

2 List of offences printed that carries death penalty is not a conclusive list

3 Rashvinjeet S. Bedi ‘Sultan saves man from the gallows’ (The Star, 28 February 2017) <<http://www.thestar.com.my/news/nation/2017/02/28/sultan-saves-man-from-the-gallows-ruler-approves-his-clemency-appeal/>> accessed 18 April 2017

4 Para 41 to 51, page 9, ‘Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/458/12/PDF/N1245812.pdf?OpenElement>> accessed 17 April 2017

5 Charles Hector, ‘Opinion – Looking at Judgment of 3 Executed on Good Friday 2016 – Miscarriage of Justice?’ (MADPET, 21 April 2016) <<https://madpet06.blogspot.my/2016/04/opinion-looking-at-judgements-of-3.html>> accessed 28 October 2016

Furthermore, the clemency process for death row inmates is often shrouded in secrecy. As there is no known official legal process in place for the clemency appeal, families of death row inmates and activists are often left in the dark with regard to the appeals filed by them. While there is an accepted norm that death row inmates who are waiting for their clemency appeals would not be executed, there is no guarantee that those waiting for possible clemency would be spared.

In 2015, the Malaysian government was reported to be considering abolishing mandatory death sentence for drug related offences. The initiative to abolish mandatory death sentence was announced by Minister Nancy Shukri when she was the de-facto law minister. Following a cabinet reshuffle, she no longer holds the said portfolio. As of 2016, progress on the abolition of mandatory death sentence for drug related offences seems to have been put on hold.

Malaysia has held on to its reportedly unofficial moratorium on the death penalty for drug related crimes. The four reported executions in 2016 were all for offences under Section 302 of the Penal Code. As noted in the statistic below, the total number of execution in 2016 was reported to be 9. While SUARAM can ascertain the 4 individuals executed in 2016, the other 5 remains unknown. This marks the highest number of known executions in the last five years⁶.

As of 16 May 2016, there were 1,041 death row prisoners in Malaysia⁷. It should be noted that the prison department does not readily disclose information on the number of executions that are scheduled to take place or have taken place. Numbers and information on death sentence or death row inmates are only made available through Parliamentary replies or minister's announcements.

Statistics on death sentences and executions⁸

Year	Number of Executions in Malaysia	Number of individuals sentenced to death ⁹
2010	-	135
2011	-	151
2012	0	141
2013	At least 2	112
2014	6	183
2015	1	65 ¹⁰

6 Based on reported numbers

7 'Nancy Shukri: Over 1,000 inmates on death row' (The Star Online, 17 May 2016) <<http://www.thestar.com.my/news/nation/2016/05/17/parliament-nancy-shukri-over-1000-inmates-on-death-row/>> accessed 28 October 2016

8 <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=malaysia#f10-2>

9 Oral question in Parliament – 18 June 2015, Reference 8001, Question 79 <<https://partisialis.org/node/3503>>; Parliament answers can also be found at <<http://pardocs.sinarproject.org/>>

10 Between January 2015 to to 30 April 2016

2016	9 ¹¹	_12
Total	16¹³	829¹⁴

Reported executions in 2016

No.	Name	Age at date of death (years)	Charge	Date of Conviction	Date of Execution
1.	Gunasegar Pitchaymuthu	35	Murder	2005	25 March 2016
2.	Ramesh Jayakumar	34	Murder	2005	25 March 2016
3.	Sasivarnam Jayakumar	37	Murder	2005	25 March 2016
4.	Ahmad Najib Aris	40	Murder	2003	23 September 2016

The threshold of ‘most serious crimes’

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) outlines that death penalty may only be imposed for ‘the most serious crime’. As mentioned earlier in the chapter, in Malaysia the death sentence is usually meted out to those convicted of drug trafficking under Section 39B of the Dangerous Drugs Act 1952 or for murder under Section 302 of the Penal Code. While the severity of the crime of murder is undeniable, the application of the death sentence to those found guilty of drug offences flouts international standards.

While Malaysia may not be a signatory to the ICCPR, the principles enshrined in the ICCPR through findings by the special rapporteur has elevated the principles from a covenant to basic international human rights laws and norms. In general, the standard of ‘most serious crimes’ encompasses intentional crimes with lethal or other extremely grave consequences. This strict interpretation effectively excludes the imposition of death penalty for economic or victimless crimes, crimes relating to moral values, and activities of religious or political nature¹⁴.

11 No exact figure given in Parliament answer

12 Based on Parliament answer in March 2016: Oral question in Parliament – 29 March 2016, Reference 8665, Question 20 <<https://partisosialis.org/node/3595>>; Parliament answers can also be found at <<http://pardocs.sinarproject.org/>>

13 Up to 22nd February 2016; in May it was reported in Parliament that there were 1041 inmates on death row - ‘Nancy Shukri: Over 1,000 inmates on death row’ (The Star Online, 17 May 2016) <<http://www.thestar.com.my/news/nation/2016/05/17/parliament-nancy-shukri-over-1000-inmates-on-death-row/>> accessed 30 March 2017; in March 2017, Parliament answer has increased to 1,122 – Minderjeet Kaur, ‘Over 1,000 sentenced death’ (Free Malaysia Today, 27 March 2017) <<http://www.freemalaysiatoday.com/category/nation/2017/03/27/over-a-1000-sentenced-to-death-since-2014/>> 4 April 2017

14 Para 114, E/CN.4/2002/74

Furthermore, in the report by the Special Rapporteur on extrajudicial, summary or arbitrary execution in 2007, Philip Alston the special rapporteur highlighted the fact that the application of mandatory death penalty is prohibited under international human rights law. In the report's finding, even if an offence meets the threshold of 'most serious crimes', there would be other factors in each individual case that is relevant to the determination of whether death sentence would be consistent with upholding the defendant's human rights¹⁵. As such, the special rapporteur found that the imposition of mandatory death sentence would infringe upon human rights.

Use of Death Penalty & Torture

Similar to how the legality and status on the use of corporal punishment in detention centre and schools has evolved the recognition of torture or other cruel and inhuman treatment as part of death penalty has shifted over the years. It is now internationally accepted that even if the imposition of death penalty is legal and valid under international human rights law, the manner in which death penalty is utilized essentially violates a detainee's rights. The concerns of rights violation in this regard is largely attributable to the conditions of detention for death row inmates.

With limited access to death row inmates in Malaysia, it is often difficult to ascertain the conditions of death row inmates and provide a conclusive description of the situation. While there are no reports that suggest death row inmates are systematically mistreated in detention, the nature of the sentence awaiting them often leave them in mental torment.

For the most part, most death row inmates are not given any information with regards to the execution of their sentence until the eve of the execution. Family members of death row inmates are often similarly left in the dark. In the case of Gunasegar Pitchaymuthu, Ramesh Jayakumar and Sasivarnam Jayakumar, families of the death row inmates were only notified of the execution two days prior to their execution¹⁶. While the practice is rooted in the possibility of self-harm by inmates, it is indisputable that such practice causes substantial trauma to the family of detainees.

The Right to Fair Trial & Death Penalty

The questions and concerns pertaining to the right to fair trial play a substantive role in ensuring that the use of death penalty complies with international law. As noted in Chapter 2, physical and mental abuses, torture and other inhuman or degrading treatment is prevalent in detention centres throughout the country.¹⁷ The reason for their occurrence could be attributed to the aim of obtaining a confession from detainees. While forced confessions can be challenged in court, abuses that lead to a guilty plea tend to by-pass the need for a full trial. As the practice of torture remains prevalent in the Criminal Justice System, it is difficult to establish that detainees have been accorded the right to a fair trial.

This practice is not exempted for cases related to drug offences and other offences that carry the death sentence. With this in mind, it is likely that the requirement for fair trial for the implementation of death penalty would not be met.

¹⁵ Page 15, A/HRC/4/20

¹⁶ Oliver Homes 'Malaysia hangs three men for murder in 'secretive' execution' (Guardian, 25 March 2016) <<https://www.theguardian.com/world/2016/mar/25/malaysia-hangs-three-men-for-in-secretive-execution>> accessed 4 April 2017

¹⁷ Refer Chapter 2

To Abolish or Not to Abolish?

International human rights stand on the use of death penalty is clear. Death penalty in all its form should be abolished and prohibited. More and more countries are looking to abolish the use of death penalty, or at the very least, maintain a moratorium on the use of death penalty.

Unfortunately, Malaysia is not keeping pace with the growing trend of abolition. With the expansion of the Penal Code (Chapter VI and VII specifically), there is a wide array of offences related to terrorism in which the death sentence can be imposed. The positive development in recent years when the government claimed that it would look into abolishing mandatory death sentence for drug offences has proven to be a pipe dream. The status of the supposed moratorium¹⁸ on execution for drug offences has been left in ambiguity¹⁹. With all these ambiguities, it is difficult for Malaysia to justify the continued existence and application of mandatory and non-mandatory death sentences.

To this end, SUARAM strongly reiterates our stand for the abolition of death penalty and recommend:

1. A moratorium on any execution of death row inmates;
2. Amending the existing criminal law to abolish all mandatory death penalties and ensuring that the judiciary holds the power to decide on the merits of a sentence without restrictions;
3. Examining the necessary legal amendments necessary for abolishing the use of death penalty (both mandatory and non-mandatory sentence) and bringing Malaysia into parity with the international human rights community.

¹⁸ Originally mentioned by Edmund Bon in July 2015. MADPET ‘Secret’ Moratorium on executions in M’sia must be made public’ (MalaysiaKini, 15 July 2016) <<http://www.malaysiakini.com/letters/348722>> accessed 7 April 2017

¹⁹ There is supposed to be an unofficial moratorium on execution for drug offences; however with the secrecy on those executed, it is impossible to ascertain whether this moratorium is in practice.



**NATIONAL HUMAN
RIGHTS COMMISSION OF
MALAYSIA (SUHAKAM)**

NATIONAL HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM)

The establishment of Human Rights Commission of Malaysia (SUHAKAM) in 1999 is often perceived as a means by the Government to placate the domestic and international pressure for a national human rights institution. Since its inception, SUHAKAM has gone through several changes of commissioners and so has its emphases over the years.

The usual criticism that SUHAKAM lacks clout in the human rights discourse in Malaysia despite being a statutory body and a national human rights institution still arises whenever a human rights issue surfaces in the Malaysian news. While it is irrefutable that SUHAKAM still lacks any legal bite that should have been afforded to them as a human rights institution, SUHAKAM's efforts have resulted in some changes over the years.

SUHAKAM still adheres to the following functions:

1. To promote awareness and provide education relating to human rights;
2. To advice and assist the government in formulating legislation and procedures and to recommend necessary measures;
3. To recommend to the government the subscription to, or accession of, treaties and other international instruments in the field of human rights; and
4. To inquire into complaints on infringement of human rights.

After the conclusion of the terms for the commissioners led by Tan Sri Hasmy Agam in 2016, new commissioners led by Tan Sri Razali Ismail were appointed in June 2016¹ (more than two months following the end of the terms of the previous set of commissioners). In one of his interviews shortly after his appointment, the newly appointed chairperson, Tan Sri Razali Ismail's comments were perceived as adverse to human rights and in some cases, in direct contradiction to international human rights principles. Some of those comments included his views on the Bersih rally in which he was perceived to have belittled participants of Bersih 4 and suggested that Bersih 4 had caused property damage.² He also made the offhand suggestion that legal representation should

1 'Announcement on the Appointment of the New Commission Members for the term 2016-2019' (SUHAKAM, 22 June 2016) <<http://www.suhakam.org.my/announcement-on-the-appointment-of-the-new-commission-members-for-the-term-2016-2019/>> accessed 17 October 2016

2 Shahanaaz Habib, 'Don't take to the streets, new Suhakam chief tells Bersih' (The Star Online, 31 July 2016) <<http://www.thestar.com.my/news/nation/2016/07/31/dont-take-to-the-streets-new-suhakam-chief-tells-bersih-a-diplomatic-approach-to-human-rights/>> accessed 17 October 2016

be restricted for terror suspects³. Since his controversial interview in July 2016, the chairperson has retracted his previous stance on some issues and clarified his support for Bersih 2.0's right to peaceful assembly⁴.

Soon after the appointment of the new commissioners, SUHAKAM organized meetings with members of civil society and non-governmental organizations in September 2016 to discuss the current human rights issues in Malaysia.

SUHAKAM has also been increasingly proactive in engaging publicly on human rights issues with occasional media statements. Some of the notable statements included one emphasising the need to protect rights of religious minorities following the arrest and detention of 50 Shiite Pakistanis by the Selangor Religious Authority⁵. Other notable statements included SUHAKAM's call for the formation of a mechanism to review the National Security Council Act⁶ and call for police to be defenders of civil liberties in Malaysia⁷.

In the protection for human rights defenders, SUHAKAM has shown good initiative and was swift to respond to the arrests and detention of R. Sri Sanjeevan and Maria Chin Abdullah when they were detained under POCA and SOSMA respectively. Although there was limited intervention in both cases, the effectiveness of SUHAKAM's initiative has been mixed with Sanjeevan being subjected to further abuses after a visit by commissioners. Even with the improved engagement by SUHAKAM on this front, the issue pertaining to SUHAKAM's power to intervene in any violation of human rights remains situational due to the lack of any overarching legal power to intervene and to put an end to violation of rights.

Engaging with the Government

SUHAKAM's report for 2015 was not tabled throughout the Parliament sessions in 2016. This makes it the 15th year that SUHAKAM's report has not been tabled or debated in Parliament. This failure to table and debate the report in Parliament was even noted by Gerakan which is part of the ruling coalition⁸. With the current state of affairs in the Malaysian Parliament, it is unlikely that SUHAKAM's report will be an item on Parliament's Agenda in the foreseeable future.

While SUHAKAM's engagement at Parliament may be well beyond their means at this juncture, engagement with other arms of the government has been more encouraging. SUHAKAM's policy division assisted the Prime Minister Office in the preparation of the Cabinet paper on national action plan on business and human rights.

3 Shahanaaz Habib, 'A diplomatic approach to human rights' (The Star Online, 31 July 2016) <<http://www.thestar.com.my/news/nation/2016/07/31/a-diplomatic-approach-to-human-rights-we-didnt-fight-the-british-to-become-independent-so-that-we-ca/>> accessed 17 October 2016

4 Syed Jaymal Zahiid, 'I support Bersih's right to protest, Suhakam chief clarifies' (Malay Mail Online, 5 August 2016) <<http://www.themalaymailonline.com/malaysia/article/i-support-bersihs-right-to-protest-suhakam-chief-clarifies>> accessed 17 October 2016

5 'Suhakam reminds of religious freedom after Jaisarrest 50 Shiite Pakistanis' (MalaysiaKini, 13 October 2016) <<http://www.malaysiakini.com/news/358958>> accessed 17 October 2016

6 FMT Reporters, 'Suhakam wants mechanism to review NSC Act' (Free Malaysia Today, 18 August 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/08/18/suhakam-wants-mechanism-to-review-nsc-act/>> accessed 17 October 2016

7 Ram Anand, 'Suhakam: Police must not be "face of intimidaton"' (Malay Mail Online, 21 September 2016) <<http://www.themalaymailonline.com/malaysia/article/suhakam-police-must-not-be-face-of-intimidation>> accessed 17 October 2016

8 'Debate Suhakam's annual report in Parliament, says Gerakan' (MalaysiaKini, 25 April 2016)

While the acknowledgement of SUHAKAM's expertise in this area is much welcomed, it is curious why SUHAKAM was not given a similar role in the drafting of new laws that would have an impact on human rights. Furthermore, the commissioning of a separate body to undertake research for establishing the National Human Rights Action Plan (NHRAP)⁹ raises questions in relation to the government's perception of SUHAKAM and the supposed role of SUHAKAM¹⁰.

Toothless Tiger, Watch Dog or Listening Post?

Reflecting on SUHAKAM's engagement with various arms of government, there is a growing concern with a new stance that the Government of Malaysia seems to be adopting. On several occasions, government agencies would meet with SUHAKAM for supposed consultations when the sessions can only be described as one-directional briefings. Following the briefings, government agencies and ministers would cite that SUHAKAM has been consulted and informed of the proposals. In 2015, this was observed when the Prevention of Terrorism Act 2015 was passed¹¹.

This habit of claiming that SUHAKAM has been consulted again occurred when their budget was slashed in late 2015. At that time, the de-facto minister for human rights claimed that SUHAKAM had agreed to the budget cut¹² despite opposition by the latter and repeated attempts by SUHAKAM to re-negotiate their budget.

Engagement on Human Rights Issues

SUHAKAM remains proactive in engaging with issues pertaining to peaceful assembly in Malaysia. They have assigned monitoring teams (which includes commissioners) to various rallies throughout the year. SUHAKAM has also taken some actions in addressing the violations of freedom of assembly. These included statements on the rights of students, civil servants and all Malaysians to attend public assemblies¹³; objection to the detention of Maria Chin Abdullah under SOSMA; and promptly organizing a visit to Maria in detention¹⁴.

Other notable contributions by SUHAKAM include its advocacy on issues relating to Business and Human Rights; addressing the issue of statelessness and land rights in Sabah; investigations into detention without trial under SOSMA and POCA; use of torture by enforcement agencies; conditions of detention; indigenous rights as well as cultural rights.

It is also noted that SUHAKAM's collaboration with EAIC continued in 2016 with several

9 The announcement of Malaysian government's implementation of NHRAP was made with no mention of SUHAKAM and any role to be played by SUHAKAM – 'Nancy: National Human Rights Action Plan to be implemented' (The Sun Daily, 8 September 2015) <<http://www.thesundaily.my/news/1546741>> accessed 30 March 2017

10 SUHAKAM only holds one spot in the working group on NHRAP - <http://nhrap.bheuu.gov.my/index.php/ms/info/struktur-organisasi>

11 Christine Cheah, 'Suhakam: We were not consulted', The Star Online, <<http://www.thestar.com.my/news/nation/2015/04/16/suhakam-we-were-not-consulted-hasmy-no-consultation-on-pota/>> accessed 18th April 2016

12 Nawar Firdaus 'Reduced budget sees Suhakam confined to Klang Valley' (Free Malaysia Today, 17 May 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/05/17/reduced-budget-sees-suhakam-confined-to-klang-valley/>> accessed 30 March 2017

13 SUHAKAM 'Press Statement No. 28 of 2016 (Public Assembly)' (SUHAKAM, 17 November 2016) <<http://www.suhakam.org.my/press-statement-no-28-of-2016-public-assembly/>> accessed 30 March 2017

14 SUHAKAM 'Press Statement No. 31 of 2016 (Security Offences (Special Measures) Act 2012 (SOSMA))' (SUHAKAM, 21 November 2016) <<http://www.suhakam.org.my/press-statement-no-31-of-2016-the-security-offences-special-measures-act-2012-sosma/>> accessed 30 March 2017

investigations. The investigation on the allegation of torture by SOSMA detainees is still in progress at this point. There was also collaboration between SUHAKAM and civil society such as the Act4CAT campaign throughout the year.

In terms of defending human rights defenders, SUARAM has covered the issue in detail in the 2016 ANNI Report on the Performance and Establishment of National Human Rights Commission. In brief, SUHAKAM has on most occasions conducted swift investigations into the reported human rights violations. Nevertheless, there was still room for improvement in the manner in which some complaints were dealt with. The report can be found at - <https://www.forum-asia.org/?p=21790> (Malaysia: Undermining NHRI through Budget Cut).



Civil Societies memorandum to SUHAKAM on abuse of security laws for political purposes

Conclusion and Recommendation

While SUHAKAM has shown its willingness to collaborate with Civil Society and Non-Governmental Organizations, there is still room for improvement. While there is collaboration between SUHAKAM and other stakeholders, this is still conducted in a relatively small scale. Considering the potential benefit for SUHAKAM and other stakeholders, we recommend that SUHAKAM extends its efforts to further collaborate and cooperate with community or grassroot organizations.

With regard to SUHAKAM's engagement with government agencies and ministries, the increased engagement especially with civil society in tow is a positive development that should be sustained. Such engagement should be exercised with caution in the light of the government's tendency to misrepresent the stand and views adopted by SUHAKAM during such 'consultations'.

With regard to proactive defence of human rights, it cannot be denied that SUHAKAM has advanced substantially when compared to its early years. While this development is commendable, there is room for improvement. For starters, SUHAKAM does not need complaints for investigations or

intervention to be initiated. In situations of grave human rights violations and threat of violence by government, SUHAKAM's commissioners should initiate immediate intervention and conduct field visits to ascertain the situation and mitigate the human rights violations.

Last but not least, it is paramount for the Government of Malaysia to officially acknowledge the role and responsibilities of SUHAKAM as a national human rights institution. By curtailing SUHAKAM's budget for 2016 and repeatedly failing to table SUHAKAM's report for Parliamentary debate, the Government of Malaysia has contributed to SUHAKAM's shortcomings.



SARAWAK

SARAWAK

Introduction

In this report, SUARAM takes an in-depth look at the human rights situation facing the East Malaysian state of Sarawak, where documented accounts of human rights violations have up until now not easily been available in the public domain. The vast size of the state and its often unforgiving terrain have previously made it difficult to gather information on a consistent basis. On top of that, human rights defenders are often barred from entering the State, through the abuse of local immigration powers. This chapter is not exhaustive but aims to provide an insight into the types of human rights violations in the State.

Over the course of 2016, SUARAM documented and monitored serious violations to native customary rights, accounts of gangsterism and violence against native communities, violations to freedom of expression, freedom of peaceful assembly, freedom of movement and freedom of religion and belief, as well as accounts of large numbers of stateless individuals, intimidation of media personnel and serious election offences during the 11th State Election. Voices calling for greater autonomy and self-determination in the state were also overwhelming, with locals feeling that their rights enshrined under the Malaysia Agreement 1963 have been greatly eroded.

Native Customary Rights

Throughout 2016, conflict over native land ownership continued to infringe upon the rights of indigenous communities in the state, where an estimated 400+ cases are currently progressing through the courts. Over the course of the year, SUARAM monitored grave human rights violations related to indigenous land disputes, with instances of human rights defenders, native communities and land rights lawyers facing threats, intimidation, arrest, violence and even murder for taking the front line in defending ancestral lands. The infringement was finally, to the grave concern of native communities, ‘cemented’ by the recent Federal Court decision on the Iban customs of ‘*Pemakai Menoa*’ (territorial domain) and ‘*Pulau Galau*’ (communal forest reserve), both of which are now considered to have ‘*no force of law*’ in Malaysia.

Sarawak’s indigenous communities have for years struggled to have their rights to land recognised by the state, where corruption and abuse of power is rife and where the right to free, prior and informed consent (“FPIC”) and the right to self-determination (enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”)) is regularly ignored. Hundreds of native communities in Sarawak continue to take their land cases to court (often taking years to be

exhausted), finding it to be the only real mechanism for redress. For other communities who are unable to raise finances for legal support or who are unable to find transport for long journeys on unforgiving terrain to reach court, fighting for native rights through the judicial process is often not even a possibility.

“The unsavoury truth is that the government refuses to recognize the full native customary rights lands of the people” - Baru Bian - Native rights lawyer and opposition politician for Ba’kelalan¹

1. Challenging Native Rights Through the Courts

The recent Federal Court ruling² against the rights of indigenous communities to their ‘*Pemakai Menoa*’ and ‘*Pulau Galau*’ can be seen as the biggest obstacle to the future recognition of native lands, resources and territorial domains in Sarawak. The controversial three-to-one judgement on 20th December 2016 held that since the indigenous terms ‘*Pemakai Menoa*’ and ‘*Pulau Galau*’ are not found in the statutes or written laws in Sarawak they could not have the ‘*force of law*’, therefore only recognising native land claims to ‘*Temuda*’ (farmland) or land cleared for farming before 1958 without permit. The year 1958 is considered a benchmark as that was the year that the Sarawak Land Code was published.



Indigenous protesters demand their rights to ‘Pulau Galau’ and ‘Pemakai Menoa’ at the Kuching High Court in December 2016 (Photo credit – Sulok Tawie, The Malay Mail Online)

¹ Baru: *No clarity from Land and Survey Dept’s ‘clarification’*, The Borneo Post, published on 18/04/2016, accessed at: <http://www.theborneopost.com/2016/04/18/baru-no-clarity-from-land-and-survey-depts-clarification/>

² 1. Director of Forest, Sarawak, 2. State Government of Sarawak vs 1. TR Sandah Ak Tabau, 2. TR Lanjang Ak Lang, 3. Samawi Ak Paong, 4. Semungah Ak Janda, 5. Muli Ak Paong, 6. Bonyoi Ak Jawa, 7. Suluk Ak Paong, Bajing Anak Apong and 22 ors. In the Federal Court of Malaysia - Civil Appeal Number: 01-27-04/2015(Q), accessed at: [http://www.kehakiman.gov.my/directory/judgment/file/01\(f\)-27-04-2015_\(Q\)-Majority.pdf](http://www.kehakiman.gov.my/directory/judgment/file/01(f)-27-04-2015_(Q)-Majority.pdf)

To understand the severity of the Federal Court decision, we have to look at the definitions of the Iban customary terms of ‘*Pemakai Menoa*’ and ‘*Pulau Galau*’, which are intrinsic to the cultural survival of Malaysia’s Indigenous Peoples. ‘*Pulau Galau*’ is defined as primary forest from which food, medicine, wildlife and other forest produce is derived, whereas ‘*Pemakai Menoa*’ includes natural resources such as native farmland, fruit orchards or groves, primary and secondary forests and forest products (timber and wild vegetables, edible ferns and palm shoots, rattan, herbs, medicinal plants, fruit trees and bamboo), rivers and streams that run through a territory and water catchment areas. More clearly, ‘*Pemakai Menoa*’ is considered the ‘territorial domain’ of the Dayak Iban and within the territorial domain, is where they find their ‘*Pulau Galau*’.

The Federal Court decision came as a shock to the Iban communities of Rumah Sandah, Rumah Lanjang and Ulu Machan, Kanowit. They were the Respondents who had won against Sarawak Forestry and the State Government of Sarawak at the High Court in 2011, and later at the Court of Appeal in 2013. According to the Federal Court decision, the communities led by Tuai Rumah Sandah Ak Tabau, claimed native customary rights over a total area of 5639 hectares, “*as land which they and their ancestors had acquired or inherited. They averred that they were descendants of two persons, namely Jarop and Anggit Ak Mut, and that their ancestors had been occupying the claimed area since early 1800s to this day.*” The land in dispute comprises of 2,712 hectares of land under primary forest and 2,802 hectares of Temuda land (cleared and cultivated land).

The High Court in 2011 held that “*the natives in the respective cases had acquired native customary rights over the claimed area through the Iban customs of ‘Pemakai Menoa’ and ‘Pulau’.* According to the trial judge, the mere fact that the Iban customs of ‘*Pemakai Menoa*’ and ‘*Pulau*’ **were not codified, did not mean that such a custom was no longer a custom, unless there were clear unambiguous words to repeal or reject the customs. It is her view [the judge] that the native’s custom of ‘Pemakai Menoa’ and ‘Pulau’ was native customary rights having the recognition of law within the meaning of Article 160 of the Federal Constitution.**” [emphasis ours]

The State of Sarawak and Sarawak Forestry appealed against the High Court decision to the Court of Appeal. However, in 2013, the Court of Appeal affirmed the decision of the High Court stating that: “*We conclude in the absence of clear and unambiguous words to repeal or reject pre-existing native customary rights established under pre-existing native custom, common law applicable in Sarawak recognises the native customary rights inherited by the Respondents from their ancestors who established the rights in the early 1800s over the 2712 hectare area set aside in their Pemakai Menoa under the native custom of Pulau, and that right cannot be taken away without compensation.*”

The earlier rulings were dramatically overturned in 2016 however, when the Federal Court held that “*the native customs of ‘Pemakai Menoa’ through the establishment of ‘Pulau’ falls short of the prerequisites as provided for under Section 5(2) of the Sarawak Land Code⁴ and thus, do not have the force of law as envisaged under Article 160 of the Federal Constitution.*” The Federal Court shocked the communities when it decided that “*the pre-existence of rights under native laws and custom which the common law respects does not include rights to land in the primary forest which natives, like the Respondents or their ancestors, had not felled or cultivated but were forests which they reserved for food and forest produce.*” The judgement therefore concluded that the indigenous communities only had claims to land which had been cleared and cultivated, also known as

3 Article 160 of the Federal Constitution – ‘*custom or usage having the force of law in the Federation or any part thereof.*’

4 Section 5(2) of the Sarawak Land Code 1958 – The methods by which native customary rights may be acquired are: (a) the felling of virgin jungle and the occupation of the land thereby cleared; (b) the planting of land with fruit trees; (c) the occupation or cultivation of land; (d) the use of land for a burial ground or shrine; (e) the use of land for any class for rights of way; and (f) any other lawful method.

'*Temuda*'. This runs contrary to the indigenous peoples' way of living since time immemorial especially since farming and cultivation has never been the main source of livelihood for indigenous communities as compared to hunting and foraging. Problems are further exacerbated by the lack of investment in rural infrastructure so many of the aforementioned farmers are still subsistence farming with no real access to markets. In effect, this limits their resources and infringes upon the indigenous peoples' fundamental right to life, food and dignity.

The damning decision has set a dangerous precedent for all current and future native customary rights cases progressing through the courts, with all '*native*' peoples of the State as defined by Chapter 61 of the Interpretation Ordinance 2005 (the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs - including Sabups and Sipengs, Kajangs - including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits, Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits) now facing risk of dispossession.

Sarawak Dayak Iban Association (SADIA) Secretary, Nicholas Mujah Ak Ason, told SUARAM that he '*expects more native rights cases as a result of the judgement*'. This is rightly so due to the fact that communities are now left without their rights to "*Pemakai Menoa*" and "*Pulau Galau*".

The Federal Court decision garnered fierce opposition from indigenous groups⁵ who view the judgement as a '*[threat to] the major source of livelihood, socio-economic wellbeing, political identity and dignity of the Indigenous Peoples in Malaysia*' and will only serve to '*create further conflict among the indigenous communities, private sector and authorities*'.⁶ Civil society members also expressed regret that the Federal Court judges originated from Peninsular Malaysia and say they lack an understanding of the importance of '*Adat*' and Customary Law in Sarawak. At the time of reporting, native rights lawyers are applying for a review of the Federal Court's decision, citing Section 137 of the Federal Court Rules as a basis.⁷

1.(1) Violations of United Nations Instruments

The Federal Court decision clearly contravenes the UNDRIP, which Malaysia is a signatory of and the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"), the Convention on the Rights of the Child ("CRC") and the Convention on Biological Diversity ("CBD"), to which Malaysia is bound.

UNDRIP

- **Article 8.2b** - '*States shall provide effective mechanisms for prevention of, and redress for: Any action which has the aim or effect of dispossessing them of their lands, territories or resources*'

- **Article 24.1** - '*Indigenous peoples have the right to their traditional medicines and to maintain*

5 1. Jaringan Tanah Hak Adat Bangsa Asal Sarawak (TAHABAS), 2. Jaringan Orang Asal SeMalaysia (JOAS), 3. Save Sarawak Rivers Network (SAVE Rivers), 4. Gerakan Anak Sarawak (GASAK), 5. Sarawak Dayak Iban Association (SADIA), 6. Borneo Resources Institute, Malaysia (BRIMAS), 7. Sarawak Indigenous Lawyers Alliance (SILA), 8. Communities Information and Communication Centre (CICOM), 9. Baram Protection Action Committee (BPAC) and 10. Integrated Development for Eco-friendly and Appropriate Lifestyle (IDEAL).

6 Joint Statement of Sarawak Civil Society Organisations on the Decision of The Federal Court on the case of Tuai Rumah Sandah Anak Tabau v Director of Forest & State Government of Sarawak.

7 Rule 137 of Federal Court Rules - '*For the removal of doubts, it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.*'

their health practices, including the conservation of their vital medicinal plants, animals and minerals.'

- Article 26.1 – *'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.'*

- Article 26.2 – *'Indigenous peoples have the right to own, use, develop and control the land, territories and resources that they possess by reason of traditional ownership or other traditional occupation or user, as well as those which they otherwise acquired.'*

- Article 26.3 – *'States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure system of the indigenous peoples concerned.'*

- Article 32.1- *'Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.'*

- Article 32.2 - *'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'*

- Article 32.3 - *'States shall provide effective mechanisms for just and fair redress for any such activities and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.'*

CEDAW

- Article 14.1 - *'States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.'*

CRC

- Article 2.1 - *'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'*

- Article 2.2 - *'States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'*

- Article 4 - *'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum*

extent of their available resources and, where needed, within the framework of international co-operation.’

- **Article 6.1** - ‘States Parties recognize that every child has the inherent right to life.’

- **Article 6.2** - ‘States Parties shall ensure to the maximum extent possible the survival and development of the child.’

- **Article 30** - ‘In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.’

(CBD)

- **Article 8(j)** - “respect, preserve and maintain indigenous peoples’ knowledge, innovations and practices relevant for conservation and sustainable use of biodiversity.”

- **Article 10(c)** - “protect and encourage customary use of biological resources in accordance with traditional cultural practices compatible with conservation or sustainable use.”

2. Violence Against Human Rights Defenders

Indigenous communities are not just facing struggles in the Sarawak courts. SUARAM have previously documented examples of gangsters believed to be working in cahoots with logging and plantation companies, violently harassing communities that protest against land grabbing.⁸

The use of hired gangsters is not new, as illustrated by a reported incident at Balai Ringin, Melikin in 2013. One indigenous spokesperson for Balai Ringin lamented “*The company disturbed the peace in our villages after they hired gangsters who resorted to violence using firearms to oppress and provoke villagers. Some of us were threatened while those who had stood against them were assaulted*”⁹

Acknowledging the use of gangsters by companies, Sarawak Deputy Chief Minister Tan Sri Datuk Amar Dr James Masing stated in 2016 that, ‘*Sarawak must be very serious and strict about it, and stop it once and for all, or the problem of gangsterism in plantations will never end.*’ Local independent political party, Parti Bansa Dayak Sarawak Baru (PBDS) also noted that ‘*the companies involved always resorted to hiring gangsters who intimidate, harass, assault and bully rural Dayak people*’.¹⁰

In 2016, the tragic murder of Parti Keadilan Rakyat (PKR) Miri Branch Secretary and native rights activist Bill Kayong @ Mohd Hasbie Abdullah by gangsters, illustrates the risks facing anyone

8 ‘Human rights abuses affecting the indigenous peoples of Malaysia’, NGO Briefing Statement for United Nations Human Rights Council, 03/09/2013, accessed at: https://www.ecoi.net/file_upload/1930_1379674034_g1316670.pdf

9 ‘Villagers Living In Fear of Gangsters’, The Borneo Post, published on 05/11/2013, accessed at: <http://www.theborneopost.com/2013/11/05/villagers-living-in-fear-of-gangsters/>

10 ‘Suspend firms that hire thugs’, The Borneo Post, published on 27/10/2016, accessed at: <http://www.theborneopost.com/2016/10/27/suspend-firms-that-hire-thugs/comment-page-1/>

who protests land encroachment in Sarawak. Kayong, (43) was brutally shot and killed in broad daylight at the Kuala Baram bypass while waiting at an intersection in a PKR branded Toyota Hilux on 21st June 2016.¹¹

The late Kayong, who was also Secretary of the grassroots NGO Persatuan Dayak Sarawak (PEDAS) had been vocal on the long-running land dispute between Iban communities in Bekelit (Rumah Jeli, Rumah Rajit, Rumah Jambai, Rumah Edward Ekau and Rumah Duat) and the company Tung Huat Pelita Niah Plantation. It is alarming to note that Kayong's mafia-style murder followed years of police reports and complaints (allegedly ignored by authorities)¹² from affected community members, local NGOs and opposition politicians, who were concerned that violent threats and attacks against the community had been escalating.

On 14th December 2016, Datuk Stephen Lee Chee Kiang (a Director of Tung Huat, who had been on the run for six months), his aide Chin Wui Ching and pub owner Lie Chang Loon were charged at the Miri Magistrates (which was later registered in the Miri High Court on 30th December 2016) with abetting nightclub bouncer Mohamad Fitri Pauzi in Kayong's murder. Lee, who was identified as *'the main suspect'* by police, was charged under Section 109¹³ and Section 302¹⁴ of the Penal Code and faces a mandatory death sentence if convicted.¹⁵ Police had earlier seized seven firearms from Lee's house, which were licensed under Tung Huat, comprising of one Glock pistol, five shotguns and a Ruger Mini 14 Ranch Rifle together with 623 bullets.¹⁶

11 *'PKR Miri branch secretary Bill Kayong shot dead in drive-by'*, The Borneo Post, published on 21/06/2016, accessed at: <http://www.theborneopost.com/2016/06/21/pkr-candidate-bill-kayong-shot-dead-in-drive-by/>

12 *'Village head details 'beating' on Radio Free S'wak'*, Free Malaysia Today, published on 03/12/2015, accessed at: <http://www.freemalaysiatoday.com/category/nation/2015/12/03/village-head-details-beating-on-radio-free-swak/>

13 Penal Code: Section 109 - *'Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment'*

14 Penal Code: Section 302 - *'Punishment for murder'*

15 *'Datuk' charged with abetment in Bill Kayong's murder'*, Malaysiakini, published on 14/12/2016, accessed at: <https://www.malaysiakini.com/news/366137>

16 *'Shotgun licence under purview of state govt - acting SS'*, The Borneo Post, published on 21/09/2016, accessed at: <http://www.theborneopost.com/2016/09/21/shotgun-licence-under-purview-of-state-govt-acting-ss/>



Friends and family surround the burial site of PKR opposition politician and indigenous rights advocate Bill Kayong who was laid to rest at Lambir Cemetery on 24th June 2016.¹⁷ Kayong was brutally murdered by gangsters for protesting against native land encroachment in Sarawak. (Photo credit – The Borneo Post)

Kayong's brutal slaying was believed to be the pinnacle of violence emanating from years of threats and intimidation against the five Iban communities in Bekelit, local headman Tuai Rumah Jambai Ak Jeli and their native customary rights lawyer Abun Sui Anyit. Below we lay out the previous attacks and harassment faced by the Bekelit community, arguably during Kayong's most vocal days.

On 22nd December 2014, Tuai Rumah Jambai's car was mysteriously torched outside his house by unknown persons and two days later, on Christmas Eve, Miri District Police Chief, ACP Gan Tian Kee led a force of 80 police personnel consisting of Light Strike Force (FRU), General Operations Force (GOF) and other police to dismantle the community's long defended blockade at Sungai Bekelit, Sibuti.¹⁸ The villagers had been blockading against Tung Huat for 'trespassing into their native customary rights land situated at Sungai Bekelit, Sungai Serunggut and Sungai Kelintang'.

Following that, the community lodged eight police reports against ACP Gan for demolishing the said blockade and dismantling huts erected at the site together with their ritual offerings ('piring'). Ancient skulls which are considered priceless by the Iban community were also destroyed in that arbitrary police operation. After videos of the event went viral on social media, ACP Gan threatened to use the Sedition Act 1948 against anyone who 'continues to exploit the issue to disrupt the existing racial and religious harmony in the state'.¹⁹

¹⁷ 'Bill Kayong laid to rest', Star TV, published on 24/06/2016, accessed at: <https://www.youtube.com/watch?v=APQejPPtz2U>

¹⁸ 'Miri Police Chief disregards Iban adat and demolishes 'piring' and blockade', Press Statement from Tuai Rumah Jambai Ak Jeli, published on 03/02/2015, accessed at: <http://www.sarawakreport.org/campaign/miri-police-chief-disregards-iban-adat-and-proceeded-to-demolish-piring-and-blockade/>

¹⁹ 'Police warn Opposition not to incite racial tension', The Borneo Post, published 09/02/2015, accessed at: <http://www.theborneopost.com/2015/02/09/police-warn-opposition-not-to-incite-racial-tension/>

Three months later, on 22nd March 2015, Tuai Rumah Jambai was again attacked. His house at Taman Jelita, Miri was set on fire by alleged hired gangsters. Three broken bottles were found at the scene of the crime in a suspected case of arson. Witnesses alleged that a white Toyota Vios with tinted windscreens was seen moving around the vicinity of Tuai Rumah Jambai's house before the fire and immediately accelerated out of the area once the fire started. The same Toyota Vios was also seen at Sungai Bekelit and Tung Huat's office previously, leading to the suspicion of the company's involvement in the arsons.²⁰

Consistent in their harassment, late in November 2015²¹, Tuai Rumah Jambai was again victimised when he was ran off the road in Miri by two gangsters travelling in two vehicles, (one of the vehicles is believed to belong to Tung Huat).²² According to Jambai, his car was followed, rammed, forced off the road and overturned by the assailants. As Jambai, his wife and his niece lay inside the vehicle, the gangsters beat the car windshield with baseball bats and violently attacked him with a samurai sword.²³



*Left photograph shows Tuai Rumah Jambai who sustained injuries after being run off the road and attacked with a samurai sword by alleged gangsters in central Miri. Right photograph shows Tuai Rumah Jambai's car, which was overturned in the violent incident.
(Photo credit – Radio Free Sarawak)*

20 'Second Suspected Arson Linked To An Oil Palm Plantation Company', BRIMAS Press Statement, published on 23/03/2015, accessed at: <http://www.sarawakreport.org/campaign/brimas-press-statement-second-suspected-arson-linked-to-an-oil-palm-plantation-company/>

21 'Slashed with a sword in central Miri', Radio Free Sarawak, published on 27/11/2015, accessed at: <https://radiofreesarawak.org/2015/11/slashed-with-a-sword-in-central-miri/>

22 'Village head details beating on Radio Free Swak', Free Malaysia Today, published on 03/12/2015, accessed at: <http://www.freemalaysiatoday.com/category/nation/2015/12/03/village-head-details-beating-on-radio-free-swak/>

23 'How Protecting Native Forests Cost a Southeast Asian Activist His Life' –Yale E360, published on 07/03/2017, accessed at: <http://e360.yale.edu/features/how-protecting-native-forests-cost-a-malaysian-activist-his-life-bill-kayong>

Native rights lawyer Abun Sui Anyit informed SUARAM that he too had faced intimidation from Tung Huat for representing the community. Police reports were lodged against him by representatives of Tung Huat for being ‘*behind the community*’ and for trying to ‘*instigate*’ them to oppose Tung Huat.

Perhaps being vocal and being at the frontline of opposition to land encroachment cost Kayong his life, as native rights activist Adrian Banie Lasimbang put it:

“Like other indigenous activists in Malaysia, he [Kayong] actively conducted paralegal activities to raise rights awareness in communities facing land grabbing by big oil palm or timber companies. [Kayong] was always on the frontline, making him and maybe other activists a target of companies that employ thugs or gangsters to intimidate the communities and activists alike²⁴”

The use of gangsters and violent means employed by companies has resulted in losses to both sides of the dispute, causing animosity and bloodshed in otherwise peaceful communities. One such documented instance came just four months after the murder of Kayong. One casualty from a clash between an armed group (believed to be hired thugs) and the Iban community at Ulu Sungai Arip, Balingian was reported.

The prelude to the above incident started when five out of nine longhouses in Sungai Arip set up a blockade on 4th October 2016 in protest to demand for adequate compensation from a company which owns an oil palm plantation on the community’s lands. After 20 days of peaceful resistance, a group of ten men (believed to be hired thugs) forced their way through the said blockade before a violent encounter ensued. The incident ended after the shooting of one armed member of the group. Fabian Janti Lebau (26) was found dead at the blockade site by police, he was lying face down with a machete in one hand and two spent shotgun cartridges scattered nearby.

On 27th October 2016, at 12.30PM, nine men (aged between 18 to 45 years old) surrendered themselves to the police in Miri, following which, police Crime Investigation Department team (D9) arrested their ‘*main suspect*’, Iban community member, Galang Imbang (54) at 2.30PM from a longhouse in Sungai Arip. State police Commissioner Datuk Mazlan Mansor, informed the public that 22 persons were detained in connection with the case including ten residents of a longhouse and 12 persons from Miri.²⁵ On 8th November 2016, Galang Imbang was tentatively charged under Section 302 of the Penal Code, which deals with ‘*punishment for murder*’ and provides for mandatory death sentence if convicted. Also charged were a further three Ibans, Lasa Lusau under Section 307 of the Penal Code²⁶ and Section 8 of the Firearms Act²⁷, Kusau Bugek under Section 8 of the Firearms (Increased Penalties) Act and Kasi Dennis under Section 427 of the Penal Code²⁸. Imbang was further remanded by the Sibu Magistrates court, while the other three were freed on bail.²⁹

24 ‘*Malaysian land rights activist Bill Kayong murdered in broad daylight*’, Mongabay, published on 24/06/2016, accessed at: <https://news.mongabay.com/2016/06/malaysian-land-rights-activist-bill-kayong-murdered-in-broad-daylight/>

25 ‘*Ulu Sg Arip murder solved with arrest of main suspect*’, The Borneo Post, published on 28/10/2016, accessed at: <http://www.theborneopost.com/2016/10/28/ulu-sg-arip-murder-solved-with-arrest-of-main-suspect/>

26 Penal Code: Section 307 - ‘*Attempt to murder*’

27 Firearms (Increased Penalties) Act: Section 8 - ‘*Penalty for unlawful possession of firearms*’

28 Penal Code: Section 427 - ‘*Committing mischief and thereby causing damage to the amount of twenty-five ringgit*’

29 ‘*Prime suspect in Mukah murder case due for a re-mention*’, The Borneo Post, published on 25/11/2016, accessed at: <http://www.theborneopost.com/2016/11/25/prime-suspect-in-mukah-murder-case-due-for-a-re-mention/>

“This time, the victim appears to come from the company’s side but the issue here is that lives are being lost unnecessarily because of government policies which impact the life and livelihood of the native community.” Baru Bian, Native rights lawyer and opposition politician for Ba’kelalan³⁰

The use of violence and gangsters have also impacted on the police in carrying out their duties as there is a real risk and threat to their lives. It is concerning to note that there have been allegations of police fearing for their own safety and therefore not acting on reports of gangsterism highlighted by communities. One example in 2015, was highlighted by DAP’s Meradong State Assemblywoman, Ting Tze Fui, who lodged a police report against illegal logging in the Mador area of her constituency and found that the police *“backed off [fearing that the] gangsters were armed with parang (machete)”*.

Similarly, communities are often fearful of lodging police reports related to land disputes after receiving open threats of harm from gangsters. According to Ting, local communities have also complained of gangsters encroaching onto their rubber plantations and illegally tapping the rubber. Fearing for their safety and reprisals from the said gangsters, Ting said *“farmers or land owners did not dare lodge police reports as the gangsters had threatened to harm them”³¹*

3. Peaceful Protest

Frustrated by insufficient policies by the government to tackle native land disputes, indigenous communities continue to find alternative methods to seek redress, including sending letters, petitions, memoranda, setting up blockades and holding peaceful demonstrations to air their demands. It is disheartening to note that the majority of these actions noted below continue to be ignored by the state and Federal governments.

In April 2016, the Penan from the upper reaches of the Baram River penned a letter to the late Sarawak Chief Minister, Tan Sri Datuk Amar Haji Adenan bin Satem, calling for a moratorium on logging and plantations on their native lands, now at risk from notorious logging giant Samling. Former Penan Penghulu, James Lalo Kesoh, from Long Lamai opined that they have managed to conserve some areas of primary forest in the Selungo area and that the areas are some of the last remaining primary forest areas in Sarawak outside of already protected areas. Kesoh also referred to satellite images of their native land in Ba Jawi, which are now *‘severely degraded’* as a result of logging activities. The letter signed off with Kesoh’s fingerprint. At the time of reporting, no such moratorium has been put in place.³²

30 *‘Baru: Death resulting from suspected land dispute shocking’*, The Borneo Post, published on 26/10/2016, accessed at: <http://www.theborneopost.com/2016/10/26/baru-death-resulting-from-suspected-land-dispute-shocking/>

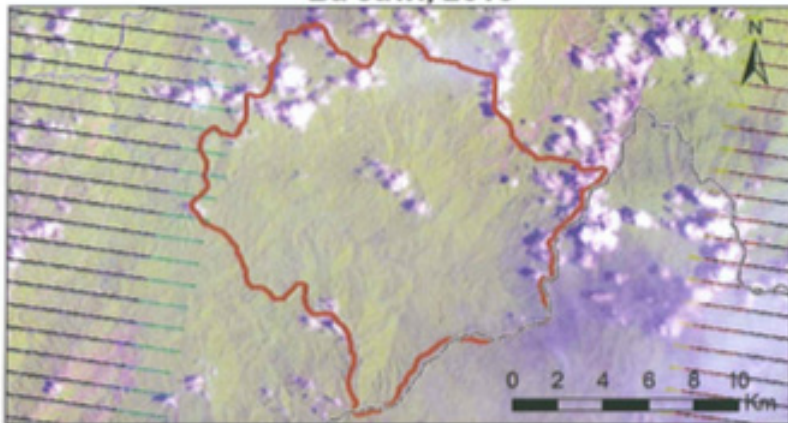
31 *‘Illegal logging in Meradong an open secret’*, The Borneo Post, published on 27/06/2015, accessed at: <http://www.theborneopost.com/2015/06/27/illegal-logging-in-meradong-an-open-secret/>

32 Letter to former Chief Minister Adenan Satem – *‘Re: Request for a moratorium on logging in the area of the potential ‘Community Managed Protected Area in the Upper Baram’* – sent on 27/04/2016.

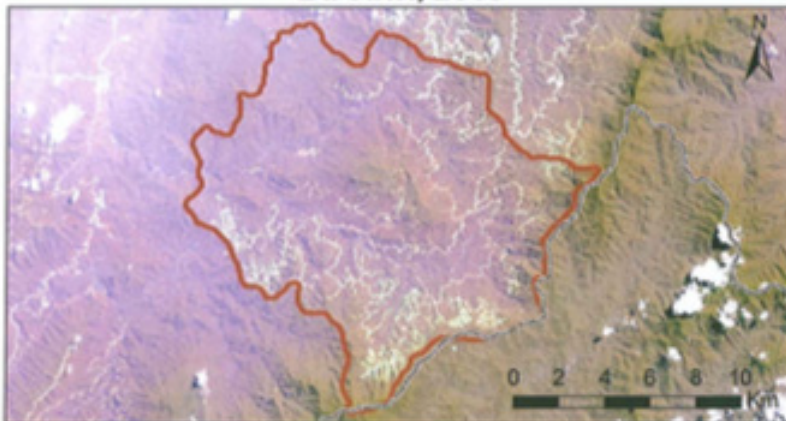
Logging activities within Ba Jawi NCR land



Ba Jawi, 2010



Ba Jawi, 2015



Map showing forest degradation from 2010-2015 as a result of logging on native customary rights land in the Ba Jawi area of Upper Baram, Sarawak. Top photo shows Ba Jawi area predominantly green, while bottom photo shows Ba Jawi left barren and ridden with logging roads (Photo credit – Bruno Manser Fonds)

On 24th October 2016, residents from 20 longhouses in Bawang Assan, Sungai Lengan and Sungai Tebelian, Sibu held a peaceful protest to call for an immediate end to encroachment by a plantation company on their native lands at Sungai Teras Communal Forest reserve. The said company was issued a provisional lease by the state government in 2011 and paid RM1,000 compensation to each of the 394 affected households, but the community found the remuneration insufficient compared to the profits that the company would later gain and initiated a suit against the company, Land and Survey Department and Sarawak Government in 2013. In July 2015³³, nine plaintiffs representing 16 longhouses filed an application for an injunction to prevent the company from continuing further activities in the area. Dissatisfied with the lackadaisical approach by the authorities, the longhouse folk staged a peaceful protest against the company. According to Tuai Rumah Abell Mang, despite the community lodging several police reports on the encroachment, the company continued to carry out activities at the forest reserve.³⁴

The only moratorium placed by the State government was on the proposed Baram Dam in 2015 after years of peaceful resistance from locally affected communities and it was warmly welcomed. However, concerns by locally affected communities of further encroachment at the proposed dam site still saw villagers and civil society members continuously man their blockades at Long Lama and Long Keseh throughout 2016.

Local NGOs continue to campaign on behalf of those at risk of large-scale dam construction in the state, calling for an end to all mega-dam construction and for alternative energy sources, that are more ‘*people-centred*’ and ‘*environmentally friendly*’ (such as solar power, biomass and micro-hydro), to be considered in state planning initiatives. The best was summed up by SAVE Rivers Chairman Peter Kallang who told SUARAM that ‘*until the government announces that the Baram Dam has being cancelled, no one can say for sure what will happen next*’.

To echo Peter Kallang, no one is sure what will happen next with regard to native customary rights in Sarawak. The Tuai Rumah Sandah judgement has left many communities uncertain of future claims to ancestral lands. The increase in violent confrontations and cases of gangsterism leaves many indigenous communities fearful of standing up for their rights. Many are looking towards the recently appointed Chief Minister Datuk Amar Abang Abdul Rahman Zohari bin Tun Abang Haji Openg to ensure that native rights are sufficiently protected at a government level.

Recommendations

SUARAM calls upon the Sarawak State Government and the Federal Government of Malaysia to:

- Bring all existing legislation dealing with indigenous rights to land into accordance with international human rights standards;
- Meet with a broad range of indigenous community representatives and native rights experts to inform the government ahead of the upcoming review of the Federal Court judgement on ‘Pemakai Menoa’ and ‘Pulau Galau’;
- Abide by all articles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of which Malaysia is a signatory;
- Abide by all relevant articles of the United Nations Convention on the Elimination of

33 ‘*Longhouses up in arms against devt of communal reserve*’, The Borneo Post, published on 02/07/2015, accessed at: <http://www.theborneopost.com/2015/07/02/longhouses-up-in-arms-against-devt-of-communal-reserve/>

34 ‘*Bawang Assan, Sg Lengan, Sg Tebelian longhouse folk stage peaceful protest against forest reserve takeover*’, The Borneo Post, published on 29/10/2016, accessed at: <http://www.theborneopost.com/2016/10/29/bawang-assan-sg-lengan-sg-tebelian-longhouse-folk-stage-peaceful-protest-against-forest-reserve-takeover/>

- Discrimination Against Women (CEDAW) by which Malaysia is bound;
- Abide by all relevant articles of the United Nations Convention on the Rights of the Child (CRC) by which Malaysia is bound; and
- Abide by all relevant articles of the United Nations Convention on Biological Diversity (CBD) by which Malaysia is bound.

Calls for Greater Autonomy

*'We, the people of Sarawak, and more importantly, our representatives have allowed our rights to go unclaimed.'*³⁵ - Peter John Ak Jaban - Sarawak For Sarawakians (S4S) spokesperson

Sarawak remains as one of the poorest states in Malaysia with many rural communities continuing to air their grievances over access to basic amenities such as healthcare³⁶, education³⁷, clean water³⁸, infrastructure³⁹, electricity supply as well as the denial of their native lands (bringing with them serious social issues including loss of culture, livelihood, income and the fundamental right to food). In a pre-state election poll conducted by Merdeka Center in 2016, the largest concerns of Sarawakian voters were economic (33.2%), followed by development and infrastructure (27.7%), while a majority felt *'that Sarawak is not treated fairly by Putrajaya'*.⁴⁰ With regular accounts of broken government promises on development⁴¹ and inadequate financial allocations under the 2016 Federal Budget⁴², it is not surprising that Sarawak has begun to focus attention on calls for greater autonomy.

Over the past number of years, Sarawak has witnessed a growing awareness at a grassroots level on the basis for which the nation was formed. Led predominantly by pro-autonomy movement *'Sarawak for Sarawakians'* (S4S), many groups and individuals in the state are increasingly calling for the *'restitution of rights'*⁴³ as outlined under the 1963 Malaysia Agreement, considering their rights to have been eroded over the past number of decades. Calls for greater autonomy include issues such as economic management, education, oil royalty, religion, security and language. Merdeka Center calculated that 85% of those surveyed in 2016 agreed that Sarawak should have more autonomy, while 47% of those surveyed support the *'Sarawak for Sarawakians'* movement.⁴⁴

35 *'State DUN must stay firm and soldier on forward'*, S4S Press Statement, published on 10/12/2015, accessed at: <http://asklegal.my/p/press-statement-by-sarawak-for-sarawakians-state-dun-must-stay-firm-soldier-on-forward-c4d45745-d6f7-4649-b537-ccd3021e84ea>

36 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Puras'*, United Nations, published 01/03/2015.

37 *'S'wak stateless kids can't go beyond primary level'*, Free Malaysia Today, published 07/09/2016, accessed at: <http://www.freemalaysiatoday.com/category/nation/2016/09/07/swak-stateless-kids-cant-go-beyond-primary-level/>

38 *'Sungai Asap folk fuming over incessant dirty water'*, The Borneo Post, published on 09/06/2015, accessed at: <http://www.theborneopost.com/2015/06/09/sg-asap-folk-fuming-over-incessant-dirty-water/>

39 *'Sebauh folk clamouring for more development'*, The Borneo Post, published on 28/06/2016, accessed at: <http://www.theborneopost.com/2016/06/28/sebauh-folk-clamouring-for-more-development/>

40 *'Sarawak State Public Opinion Survey 2016'*, Merdeka Center, published on 26/01/2016, accessed at: <http://www.merdeka.org>

41 *'Broken Promises: Displaced By Dams'*, The Borneo Project, published on 12/06/2015, accessed at: <https://vimeo.com/130516168>

42 *'Sarawak tables budget deficit for first time'*, The Star, published on 22/11/2016, accessed at: <http://www.thestar.com.my/news/nation/2016/11/22/sarawak-tables-deficit-budget-for-first-time-adenan-this-will-be-after-14-consecutive-years-of-surpl/>

43 *'Adenan urged to lead Sabah, Sarawak's claim for rights'*, The Borneo Post, published on 18/10/2016, accessed at: <http://www.themalaymailonline.com/malaysia/article/adenan-urged-to-lead-sabah-sarawaks-claim-for-rights>

44 *'Sarawak State Public Opinion Survey 2016'*, Merdeka Center, published on 26/01/2016, accessed at: <http://www.merdeka.org>

1. Freedom of Expression

In a clear response to frustrations from Sarawak (as well as its East Malaysian neighbour Sabah), initial proposed amendments to the Sedition Act (1948) in May 2015, included an illustration for the punishment of ‘the *act of exciting any person or any group of persons to demand for the secession of any State from Malaysia*’⁴⁵ but this was quickly withdrawn after condemnation at the Dewan Negara. Activists who have taken the frontline in defending the rights of the state regularly face obstacles such as intimidation, arrest, investigation and detention by the police.

However, shortly after the Sedition amendments were passed, which excluded the proposed illustration on secession and in contrast to the Dewan Negara’s passage, Inspector General of Police (IGP), Tan Sri Khalid Abu Bakar responded to a tweet, which mentioned the term ‘secession’ and asked for the Police Cyber Investigation Response Centre (PCIRC) to arrest and investigate the user under the Sedition Act 1948. Khalid’s tweet stated “*PCIRC @PDRMsia kesan twit handle di bawah, siasat dan tahan di bawah Akta Hasutan,*” [Translation: *PCIRC, please trace the Twitter handle below, investigate and arrest under the Sedition Act*]. The tweet in question, posted by the user @Swakheadhunter read, ‘*SECESSION is not up to you Malaysians to decide. It is up to us Sarawakians.*’ followed by another tweet that said ‘*WE certainly won’t stop you Malaysians if you decide to secede*’. It remains unclear if the Twitter user was later questioned.⁴⁶

In another incident, a few days later on 22nd July 2015, human rights advocate and S4S spokesperson Peter John Ak Jaban was questioned for six hours and investigated in connection to an autonomy speech he made at a peaceful rally attended by about 10,000 individuals at Song Kheng Hai Ground, Kuching in celebration of Sarawak Independence Day. No charges were brought against Jaban however.⁴⁷ In November 2016, activist Yeu Bang Keng was arrested and remanded for four days and also investigated under the Sedition Act 1948, as well as the Communications and Multimedia Act 2012 in connection to comments on the Facebook page ‘*Sarawak Keluar Malaysia 2021*’ (‘*Sarawak Get Out of Malaysia 2021*’).⁴⁸

45 ‘*The Bill of Amendments*’ - https://www.cljlaw.com/files/bills/pdf/2015/MY_FS_BIL_2015_17.pdf

46 ‘*IGP orders arrest, sedition probe on Twitter user for suggesting Sarawak secession*’, The Malay Mail Online, published on 22/07/2015, accessed at: <http://www.themalaymailonline.com/malaysia/article/igp-orders-arrest-sedition-probe-on-twitter-user-for-suggesting-sarawak-sec>

47 ‘*Sarawak for Sarawakians rally organiser Peter Jaban probed for Sedition*’, The Star, published on 24/07/2015, accessed at: <http://www.thestar.com.my/news/nation/2015/07/24/sarawak-for-sarawakians-rally-organiser-peter-jaban-probed-sedition/>

48 ‘*Arrested S4S activist plans to form party*’, Free Malaysia Today, published on 15/11/2016, accessed at: <http://www.freemalaysiatoday.com/category/nation/2016/11/15/arrested-s4s-activist-plans-to-form-party/>



'S4S 722' (Sarawak For Sarawakians, July 22nd) is spelt out in a human formation during the 2015 Sarawak Independence Day celebration at Song Kheng Hai Ground, Kuching. (Photo credit – The Star)

2. Freedom of Peaceful Assembly

“None of us are criminals. None of us are terrorists. I think the people can judge for themselves what the police response has been like.” - Karen Shepherd, S4S spokesperson

On 22nd July 2016, a 100-strong police force, including policemen dressed in riot gear, broke up a peaceful Sarawak Independence Day event attended by 1,000 people (including children) in Serian that had been organised by SADIA and S4S in conjunction with other parades in Kuching, Sibul and Miri.⁴⁹ In a clear abuse of power, the police proceeded to remove flags, cordoned off roads intended to block individuals from accessing the location of the celebration and detained three individuals.

According to SADIA⁵⁰, the purpose of the parade had been:-

1. A celebration of Sarawak Independence Day as a new public holiday;
2. A celebration of Sarawak spirit and its customs, practices and traditions;
3. A show of appreciation for the drive by the Sarawak government under [former] Chief Minister Adenan Satem to pursue greater autonomy for Sarawak and safeguards for the special rights of Sarawak as enshrined under the Malaysia Agreement (1963); and
4. To raise awareness of Sarawak's history among the rural and semi-rural population of the state.

⁴⁹ 'Police break up S4S event, organisers cry foul', Free Malaysia Today, published on 22/07/2016, accessed at: <http://www.freemalaysiatoday.com/category/nation/2016/07/22/police-break-up-s4s-event-organisers-cry-foul/>

⁵⁰ SADIA Letter – 'Re: Police Notification of procession and gathering on 22 July 2016', sent on 04/07/2016

According to an official complaint against OCPD of Serian, DSP Chung Aik Peng, three individuals were detained in the early hours of the morning, prior to the celebration.

“At 5.30AM two individuals, were taken into police custody by DSP Chung himself and detained at the police station for six hours without legitimate cause.... Their harassment by DSP Chung on the basis of flags and T-shirts is entirely unacceptable and unreasonable”.

“A further individual was also taken into police custody, again by DSP Chung himself and detained at the police station for 5 hours without legitimate cause.”

There were also further allegations of intimidation against participants;

“...a Serian resident went to the coffee shop under KC Inn to meet with other group members before attending the event. DSP Chung arrived on the scene and openly threatened [the individual], pointing at him directly and stating in Mandarin: I know who you are; I know you are a Serian local. I know where your shop is. You better take down all your flags.”⁵¹

According to S4S representatives, after complaints to the police, DSP Chung was removed from his position in Serian.



*Sarawakians celebrate State Independence Day in Serian. The peaceful demonstration was met with riot police presence, removal of flags and arrests - 22nd July 2016
(Photo credit – Free Malaysia Today)*

51 SADIA Complaint Letter – ‘Re: Request for investigation regarding disciplinary action against DSP Chung Aik Peng, OCPD Serian’, sent on 26/07/2016

Organisers argue that they had followed the rules as stipulated under Section 9(1) of the Peaceful Assembly Act (2012) and had notified the police well in advance (notification letter dated 4th July 2016)⁵² of their intended celebration at Serian Stadium. Representatives say they had initially been given written consent by the Serian Municipal Council, but that the consent from the Council was withdrawn (verbally and later in writing) just days before the event. Concerned that rent for the venue had been paid, banners printed, invitations sent out and equipment booked, the organisers decided to go ahead with their celebration at an alternative location, not expecting the heavy-handed backlash (in the form of arrests, intimidation and police presence) they received.⁵³

Recommendations

SUARAM calls upon the Sarawak State Government and the Federal Government of Malaysia to:

- Review and restore all rights for Sarawakians as enshrined in the Malaysia Agreement 1963;
- Immediately repeal all legislation that violates the right to Freedom of Opinion and Expression. In relation to this chapter we draw attention to, the Sedition Act 1948 and the Multimedia and Communications Act 1998; and
- Immediately repeal all legislation that violates the right to Freedom of Peaceful Assembly. In relation to this chapter we draw attention to, the Peaceful Assembly Act 2012.

Freedom of Religion and Belief

2016 witnessed numerous individuals challenging state law with regard to apostasy from Islam. Reasons for apostasy included individuals who were converted when they were children and therefore did not have the capacity to make an informed decision to embrace Islam, to individuals who wished to revert back to their original faith after divorce, or upon the death of a spouse.

Indigenous communities in Sarawak are also facing threats against their rights to their beliefs. Traditional belief systems, intrinsic to indigenous culture are increasingly at risk with logging, plantation and dam-building companies threatening the desecration of indigenous sites of worship and unsettling the spirits of the forest, the spirits of their ancestors and spirits of other living beings.

1. Threats to Indigenous Belief Systems

With the increase of resource extraction in Sarawak, through logging, plantation expansion, mining and dam building, comes the violation of rights to indigenous belief systems. Sarawak's indigenous communities have a long-held traditional belief in appeasing spirits through ritual ceremonies, if environmental disharmony occurs (for example deforestation). Many of the forest products and important plant species used for such appeasement ceremonies are at risk of desecration due to the aforesaid activities. Areas such as burial grounds ('*Pendam*') are also considered spiritually sacred. According to Iban traditional belief, the damage or destruction of sacred sites are considered

52 SADIA Letter – '*Re: Police Notification of procession and gathering on 22 July 2016*', sent on 04/07/2016

53 '*S4S to proceed with Independence Day do despite denied use of Stadium*', The Borneo Post, published on 15/07/2016, accessed at: <http://www.theborneopost.com/2016/07/15/s4s-to-proceed-with-independence-day-do-despite-denied-use-of-stadium/>

serious offences. Section 188 of the Adat Iban Order 1993 specifically states that, “Whoever fells any tree within the area designated as a cemetery or damages a graveyard shall be fined” and must perform a spiritual offering (*‘Pelasi Menua’*).⁵⁴

Worried about how indigenous community’s will be able to continue their traditional belief systems and ritual ceremonies once the forests are gone, SADIA Secretary, Nicholas Mujah, told SUARAM that, “Traditional features such as monuments, cemeteries, sacred trees and sacred sites, which are all places of spiritual offering for indigenous peoples, will be eliminated to make way for palm oil plantations.”

Expert witness on indigenous rights and former *Majlis Adat Istiadat* (Mais) Deputy Chairman, Nicholas Bawin Anggat, also informed SUARAM that “When our environment such as *‘Pemakai Menoa’*, *‘Pulau Galau’*, burial grounds, sacred sites, *‘Tembawai’* (old sites of houses) are encroached, destroyed, damaged or desecrated, these will cause the wrath of the spirits. According to our traditional belief, the spirits of the dead and the spirits of other living beings are disturbed and this causes disequilibrium or a state of imbalance in the surrounding area. The forest spirits, the spirits of our ancestors become very angry and will cause some possible disasters such as sickness or crop failures. Whenever there is destruction or damage caused to the environment, our people will perform important rituals such as *‘Bebuling ka Menua’*⁵⁵ or *‘Pelasi Menua’* to appease the spirits. Many times, the NCR landowners, whose lands including their sacred sites have been destroyed by logging or plantation companies ask for compensation to buy items for ritual ceremonies. Again, the purpose is to appease the spirits. According to our *‘Adat’*, we, the indigenous peoples are custodians of our forests, rivers and all living things therein. Of course we hunt animals for food, catch fish for food as well, but we are not allowed to waste or destroy them indiscriminately. If anybody is found to have done such a thing, he or she will be dealt with according to the *‘Adat’* of each respective community.”

54 Adat Iban Order 1993 - “*Melasi Menua*” means providing propitiatory offering to cleanse the territory of evil forces, epidemic and calamities that may befall the community as a result of the commission of certain offences such as incest or any other serious crimes in a particular area.

55 Adat Iban Order 1993 - “*Bebuling ka Menua*” means cleansing of an area. It is a ritual ceremony to cleanse the territorial area to eradicate evil forces which were thought to have caused failure to crops or brought epidemic and other forms of calamities to the community.



Indigenous community members and anti-dam campaigners worship at a Christian burial site along the Baram river, which would be submerged and destroyed if plans for the Baram Dam were to go ahead. (Photo credit – The Borneo Project)

2. Apostasy

In 2016, SUARAM documented a landmark High Court decision in Sarawak that set the precedent for Muslim child converts to embrace the religion of their choice in adult life. On 24th March 2016, a judicial review at the High Court of Sarawak ruled that Azmi B Mohamad Azam Shah @ Roneey (39), a Bidayuh who was converted to Islam at 10 years old, but grew up in a Christian environment for most of his life was to be officially recognised as a Christian individual. Judge, Datuk Yew Jen Kie, held that the High Court recognised ‘*The Applicant is a Christian*’ and ordered the National Registry to change his ‘*name from Azmi B Mohamad Azam Shah @ Roneey to Roneey Anak Rebit*’ as well as to ‘*drop the Applicant’s religion Islam in his identity card/and or the records and/or particulars of the Applicant’s religion held at the National Registry to that of Christian.*’ Datuk Yew referred specifically to Article 11(1) of the Federal Constitution, which states that ‘*Every person has the right to profess and practice his religion and, subject to Clause 4, to propagate it*’. Clause 4 refers to State law in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.⁵⁶ An appeal by the State Government was later withdrawn.

Human rights lawyer for the case, Simon Siah told SUARAM that, ‘*The decision by the High Court is a step forward for religious freedom in Sarawak. When Sarawak formed Malaysia together with Malaya, Sabah and Singapore, our ancestors had always wanted religious freedom for Sarawak and that was what was promised to our forefathers.*’ Commenting on the need for more concrete action, Siah said ‘*Although the State Government by instruction from the late Tan Sri Adenan Satem withdrew their appeal in the Court of Appeal, more needs to be done to address this issue. As of now, the process is tedious and most of these people are faced with numerous roadblocks from the National Registration Department, the Jabatan Agama Islam, the Syariah Court and even the Civil Court.*’

⁵⁶ 1. Azmi B Mohamad Azam @ Roneey Vs 1. Director of Jabatan Agama Islam Sarawak, 2. Majlis Agama Islam, 3. Director-General of National Registration Malaysia and 4. State Government of Sarawak. In the High Court in Sabah and Sarawak. Judicial Review Number – KCH-25-7/12-2014

A further decision in 2016 however was described by lawyer and PKR Ba'kelalan Assemblyperson, Baru Bian, as a 'setback for freedom of religion in the state'. In August 2016, the Court of Appeal dismissed an appeal by three individuals, Jenny Peter @ Nur Muzdhalifah Abdullah, Tiong Choo Ting @ Mohd Syafiq Abdullah and Salina Jau Abdullah who wanted to renounce Islam. The issue facing the High Court and the Court of Appeal was whether the Syariah Court or the Civil Court has jurisdiction in 'murtad' (apostates) cases.

The Court of Appeal decision stated that the, 'Judicial Commissioner dismissed the application and held that the appellants were still Muslims on papers, thus the Syariah Court would have the jurisdiction to deal with their conversion out of Islam under Item 1, List II, Ninth Schedule of the Federal Constitution.' All three appellants had originally converted to Islam through marriage, with Jenny and Salina divorcing their Muslim partners and returning to Christianity and Mohd Shafiq practicing Christianity after the demise of his Muslim wife. All three swore in their statutory declarations that they were no longer practicing the Islamic faith.⁵⁷ Lawyer for the case, Baru Bian argued that the Syariah Court Ordinance (2001) of Sarawak is 'silent on the issue of jurisdiction over apostasy or 'murtad' matters'. The three are appealing to the Federal Court.⁵⁸

Referring again to Malaysia's international obligations, Articles 2.1 and 2.2 of the United Nations Convention on the Rights of the Child (CRC) state that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, **religion**, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or **beliefs** of the child's parents, legal guardians, or family members." [emphasis ours] Article 14 states that "States Parties shall respect the right of the child to freedom of thought, conscience and religion."

Recommendations

SUARAM calls upon the Sarawak State Government and the Federal Government of Malaysia to:

- Bring all existing legislation dealing with freedom of religion and belief into accordance with international human rights standards;
- Abide by all relevant articles of the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) for which Malaysia is bound; and
- Abide by all relevant articles of the United Nations Convention on the Rights of the Child (CRC) for which Malaysia is bound.

57 1. Jenny bt Peter @ Nur Muzdhalifah Abdullah Vs 1. Director of Jabatan Agama Islam Sarawak & Ors and other appeals. In the Court of Appeal, Putrajaya. Civil Appeal Numbers – Q-01(NCVC)(A)-344-10 of 2015, Q-01(NCVC)(A)-345-10 of 2015 and Q-01(NCVC)(A)-352-10 of 2015.

58 'Court rejects appeal by trio who want to leave Islam', Malaysiakini, published on 17/08/2016, accessed at: <http://www.malaysiakini.com/news/352686>

Sarawak State Election

‘Without the freedom to listen to differences in political views and opinions on issues which affect the Rakyat, this places Sarawakians at a severe disadvantage when it comes to making informed decisions on the best candidate to vote for.’⁵⁹ - Rise of Sarawak Efforts (ROSE)

Sarawak’s 11th State Election held on 7th May 2016, was once again marred by allegations of electoral offences including bribery, intimidation, treating, the use of government machinery and failings by the Election Commission (EC). It was far from free or fair. PEMANTAU observers for Electoral reform group BERSIH 2.0 stationed in five areas of the state (Telang Usan, Senadin, Bawang Assan, Tasik Biru and Batu Kitang) documented and monitored numerous violations under the Election Offences Act (EOA).⁶⁰

1. Travel Ban

The election once again saw the State Government abusing their immigration powers by barring further individuals from other parts of Malaysia, (including opposition politicians and activists) from campaigning or visiting the state during election time, violating the fundamental constitutional right to freedom of movement as per Article 9 of the Federal Constitution.

The list of individuals barred prior to the election and during the campaign period include; BERSIH 2.0 Secretariat member Mandeep Singh, Parti Amanah Negara President Mohamad Sabu, PKR Selangor Menteri Besar Datuk Seri Mohamed Azmin Ali, PKR Vice-Presidents Nurul Izzah Anwar and Rafizi Ramli, PKR MP Sim Tze Tzin, Democratic Action Party (DAP) MP for Batu Chua Tian Chang, DAP MP for Puchong Gobind Singh Deo, DAP MP for Kulai Teo Nie Ching, Selangor DAP lawmaker Hannah Yeoh, Penang Councillor Datuk Abdul Malik Kassim and UMNO Sungai Besar Division Chief Dato Jamal Yunos.

The individuals listed above join a long list of other activists, journalists and opposition politicians who have found themselves ‘blacklisted’. It is worth noting however, that Parti Islam Se-Malaysia (PAS) President, Datuk Seri Abdul Hadi Awang, was allowed by the immigration to enter Sarawak prior to the election. His unhindered entry flew in the face of the State Government’s fear when he publicly in a *ceramah* said that *‘The Chinese, the Indians and other races are our leaders too, but they need to be led by a Muslim. That is why PAS wants Sarawak to be governed by the Muslim bumiputra, not other races’*.⁶¹

In retrospect, the reasons of the travel ban of “outsiders” into Sarawak, was indeed a violation of the right to freedom of movement, if not an abrupt about turn. In December 2015, after complaints from civil society members, the late Sarawak Chief Minister, Tan Sri Adenan Satem, told anti-corruption NGO, *‘Centre to Combat Corruption and Cronyism (C4)’* that he was willing to review entry bans on politicians and activists in the state on a case-by-case basis.⁶² In April 2016, however

59 *‘ROSE Slams Barring of Politicians As Illegal and Undemocratic’*, ROSE Press Statement, published on 15/04/2016, accessed at: http://www.sarawakrose.org/sarawak_ngo_slams_barring_of_politicians_as_illegal_and_undemocratic

60 *‘11th Sarawak State Election marred by vote-buying, treating and illegal campaigning’*, BERSIH Media Statement, published on 13/05/2016, accessed at: <https://www.bersih.org/media-statement-13-may-2016-11th-sarawak-state-election-marred-by-vote-buying-treating-and-illegal-campaigning/>

61 *‘Sarawak polls: ‘Only bumiputra Muslim can be chief minister, says Hadi Awang’*, The Star, published on 05/05/2016, accessed at: <http://www.thestar.com.my/news/nation/2016/05/05/sarawak-polls-only-bumiputera-can-be-chief-minister-says-pas/>

62 *‘Group says Sarawak CM willing to review entry bans on politicians, activists’*, The Malay Mail Online, published on

he told Malaysians that the State Government wanted to ‘*protect the interest of Sarawak from unsavoury elements, whether political of otherwise*’ and that opposition politicians were welcomed to the State only after the election.⁶³ Absurdly, just days after the election, Parti Sosialis Malaysia (PSM) Secretary-General S Arutchelvan was barred from entering Miri, where he had been invited to hold a human rights workshop with indigenous anti-dam campaigners.⁶⁴

2. Harassment Of Media Practitioners

Local and international journalists covering the election also faced threats and obstruction to their work. On 21st April 2016, Malaysiakini journalist Kow Gah Chie attended an Islamic forum in Sibu, where she wrote that ‘*Muslims in Sarawak should vote BN in the state election on May 7 so that a Muslim leader can continue to lead the Sarawak government, incumbent Nangka assemblyperson Dr Annuar Rapae suggested*’ in an article originally titled “*Vote BN to keep Muslim CM, S’wak Muslims told*”, which was later edited to read “*Don’t squander opportunity to lead S’wak, minority Muslims told*”. According to Malaysiakini, the headline was amended to reflect the exact quotes of Dr Rapae.⁶⁵ Dr Rapae said his statements had been taken out of context and six police reports were lodged against the said journalist. Malaysiakini nevertheless stood by their article and uploaded an audio file from the event. Fearing for the journalist’s safety, Malaysiakini recalled Kow from covering the election after photographs of Kow were circulated on social media without her permission. An investigation against Kow was opened under Section 505(c) of the Penal Code, which deals with offences of criminal intimidation, insult and annoyance⁶⁶.

On Election Day, UK Journalist Jonathan Miller and his cameraman, from Channel 4 News were barred from entering a press conference at Wisma Bapa Malaysia, Kuching after they attempted to pose questions to Prime Minister Najib Razak over his alleged involvement in the 1 Malaysia Development Berhad (1MDB) scandal. The Channel 4 team had been in Kuching to cover Malaysian corruption issues in the context of the Sarawak election, including allegations of vote buying (“*envelopes stuffed with cash*”) and native land rights disputes, including indigenous land destroyed by palm oil in the rural Iban community of Kampung Mentu Tapu, Serian.⁶⁷

The above case was reminiscent of the incident where ABC Four Corners journalist Linton Besser and his cameraman Louie Eroglu who also attempted to question the Prime Minister over 1MDB in Kuching in March 2016. They were arrested, detained for 6 hours and were threatened to be charged under Section 186 of the Penal Code for obstructing a public servant in discharge of his public functions. After being detained and questioned, they were escorted out of the country without any charges.⁶⁸

09/12/2015, accessed at: <http://www.themalaymailonline.com/print/malaysia/group-says-sarawak-cm-willing-to-review-entry-bans-on-politicians-activists>

63 ‘*Entry bans show the true face of Adenan Satem*’, Malaysiakini, published on 14/04/2016, accessed at: <http://www.malaysiakini.com/news/337800>

64 ‘*Arutchelvan first to be barred from Sarawak after polls*’, Free Malaysia Today, published on 12/05/2016, accessed at: <http://www.freemalaysiatoday.com/category/nation/2016/05/12/arutchelvan-first-to-be-barred-from-sarawak-after-polls/>

65 ‘*Don’t squander opportunity to lead S’wak, minority Muslims told*’, Malaysiakini, published on 21/04/2016, accessed at: <http://www.malaysiakini.com/news/338689>

66 Section 505(c) of the Penal Code - ‘*Whoever makes, publishes or circulates any statement, rumour or report with intent to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community of persons, shall be punished with imprisonment which may extend to two years or with fine or with both.*’

67 ‘*Najib Razak Corruption Allegations: Malaysian government accused of media clampdown*’, Channel 4 News, published on 12/05/2016, accessed at: <https://www.youtube.com/watch?v=pxS9Rt46-A>

68 ‘*Four Corners reporter describes frightening detention in Malaysia*’, ABC, published on 15/03/2016, accessed at: <http://www.abc.net.au/news/2016-03-15/four-corners-reporter-describes-arrest,-detention-in-malaysia/7249174>

“This is aimed at bringing a chilling effect on media ahead of the state polls. We should not bow to such harassment”⁶⁹ – Steven Gan, Editor-in-Chief of Malaysiakini

3. Election Offences

Examples of allegations of vote buying and bribery, (an offence under Section 10 of the Election Offences Act) were monitored by PEMANTAU election observers throughout the election period. Following questions in Parliament by PKR Leader, Datuk Seri Dr Wan Azizah Wan Ismail on the number of projects and programmes announced by Federal Ministers during the campaign period, Minister in the Prime Minister’s Department Azalina Othman Said, stated that the Federal Government had approved 409 projects and programs worth over RM792.3 million during in the run up to the State election⁷⁰. The allocations were mainly used for the construction or upgrading of infrastructure development projects such as bridges, roads, water supply, schools, mosques, sports venues and civic halls. No concrete evidence or proof of the approved 409 projects was provided.

On 3rd May 2016, former Chief Minister Tan Sri Adenan Satem handed RM10 million to 235 landowners from Balai Ringin to Pantu junction as ‘compensation’ for the pending Pan Borneo Highway. And on polling day, voting slips with the Barisan Nasional (BN) logo were handed to voters in various constituencies including Telang Usan, Asajaya, Stakan, Kalaka, Tasik Biru and Batu Kitang. The slips, printed from the BN Headquarters in Kuching were later exchanged for money ranging from RM16.00 to RM70.00⁷¹. ‘Treating’ was also widespread (an offence under Section 8 of the EOA) and free food and drink at campaign events were carried out by both sides of the political divide.



Voting slip handed out in Asajaya by BN and later exchanged for money during the 11th Sarawak State election. (Photo credit – PEMANTAU Report 2016)

69 ‘Malaysiakini recalls reporter from Sibiu for safety reasons’, Malaysiakini, published on 24/04/2016, accessed at: <http://www.malaysiakini.com/news/338991>

70 ‘Gov’t approved projects worth RM792.3m during S’wak polls’, Malaysiakini, published on 24/05/2016, accessed at: <http://www.malaysiakini.com/news/342666>

71 The PEMANTAU Report for the 11th Sarawak State Election 2016. See page 24 <https://www.globalbersih.org/2016/09/02/the-pemantau-report-for-the-11th-sarawak-state-election-2016/>

In Bawang Assan⁷², lucky draw prizes were awarded, which included smartphones and hampers and in Long Bemang, Telang Usan, five groups were given RM2000.00 each to prepare food while they were waiting for the arrival of BN candidate Dennis Ngau⁷³.

Voter ferrying (an offence under Section 20(1)(a) of the EOA) and the widespread use of government machinery by BN was also noted. In Miri, owners of 4-wheel drive cars were offered RM1400.00 to transport BN voters to Telang Usan⁷⁴. Other Telang Usan voters were similarly told that they could claim RM200.00 in transport allowance from the BN Miri office in exchange for their vote. According to observers, all BN candidates used Federal and State government property, branding, logos and funds to campaign in the election. In addition, the same logos were frequently spotted on BN banners⁷⁵ and government vehicles were also used to transport candidates and individuals campaigning on their behalf.

Examples of intimidation were also recorded. On 14th April 2016, BN's Simanggang candidate Francis Harden Anak Hollis sent letters to the District Education Officer of Sri Aman using the Sarawak United People's Party (SUPP) letterhead, identifying teachers that were allegedly supporting the Opposition and asking for them to be transferred to other constituencies.



Banner hung across a road in Bukit Goram. Banner with BN logo: Message translated as 'Barisan Nasional Village. Opposition Parties Do Not Enter' (Photo credit – PEMANTAU Report 2016)

72 The PEMANTAU Report for the 11th Sarawak State Election 2016. See page 29 <https://www.globalbersih.org/2016/09/02/the-pemantau-report-for-the-11th-sarawak-state-election-2016/>

73 The PEMANTAU Report for the 11th Sarawak State Election 2016. See page 22 <https://www.globalbersih.org/2016/09/02/the-pemantau-report-for-the-11th-sarawak-state-election-2016/>

74 The PEMANTAU Report for the 11th Sarawak State Election 2016. See page 42 <https://www.globalbersih.org/2016/09/02/the-pemantau-report-for-the-11th-sarawak-state-election-2016/>

75 The PEMANTAU Report for the 11th Sarawak State Election 2016. See page 31 <https://www.globalbersih.org/2016/09/02/the-pemantau-report-for-the-11th-sarawak-state-election-2016/>

In Tasik Biru, voters were informed by the Minister of Tourism, Nazri Aziz that if they did not vote for the local BN candidate then he would refrain from promoting tourism in their area.⁷⁶ A similar occurrence happened in Pelawan, Sibü where voters were told that if the BN candidate lost then they would be denied much needed development funds.

Local headmen were also involved in threatening their communities. In Telang Usan, Long Tebangan, the Tuai Rumah (headman) told his village that those who went against BN in the election would not get allocations for their houses in the future,⁷⁷ violating Section 9 of the EOA, which deals with undue influence.

There were also cases of failures by the Election Commission including at SK Garland, (Batu Kitang) where indelible ink was applied to the wrong hand of voters (a violation of Section 19(4) of the Elections (Conduct of Elections) Regulations). PEMANTAU observers also reported that the Returning Officer of Bawang Assan was unaware of his duty under Section 27H of the EOA, (which deals with complaint[s] to the returning officer) to ensure laws relating to elections are complied with.⁷⁸

The above cases illustrate that the Election Commission and the state and Federal governments have continued to ignore the complaints of past elections. Politicians and activists were consistently barred from exercising their rights to campaign in the election along with violations to their right to freedom of movement. Media practitioners were likewise barred from press conferences and obstructed from carrying out their public duties as reporters and the voting public were threatened and intimidated if they didn't vote in a specific way.

“The Election Commission, like a meek puppet of those in power, did nothing to stop the violations” - Maria Chin Abdullah⁷⁹ – BERSIH Chairperson

Recommendations

PEMANTAU calls upon the Sarawak State Government and the Federal Government to:

- Introduce a moratorium on financial handouts, land titles and other financial benefits once Parliament and State Assemblies have been dissolved; and
- Establish an independent and fair caretaker government prior to election period and set out guidelines, roles and responsibilities for implementation.

PEMANTAU calls upon the Election Commission to:

- Promote and develop international and domestic observation through an open and transparent process and establish election observation as an integral part of the election processes;

76 The PEMANTAU Report for the 11th Sarawak State Election 2016. See page 18 <https://www.globalbersih.org/2016/09/02/the-pemantau-report-for-the-11th-sarawak-state-election-2016/>

77 The PEMANTAU Report for the 11th Sarawak State Election 2016. See page 18 <https://www.globalbersih.org/2016/09/02/the-pemantau-report-for-the-11th-sarawak-state-election-2016/>

78 The PEMANTAU Report for the 11th Sarawak State Election 2016. See page 44 <https://www.globalbersih.org/2016/09/02/the-pemantau-report-for-the-11th-sarawak-state-election-2016/>

79 ‘Maria Chin slams appalling practices in Sarawak elections’, Free Malaysia Today, published on 08/05/2016, accessed at: <http://www.freemalaysiatoday.com/category/nation/2016/05/08/maria-chin-slams-appalling-practices-in-sarawak-elections/>

- Take responsibility to provide clear and precise information on roles and responsibilities of polling and counting agents; and
- Carry out thorough trainings for political parties and local officers, in particular the returning officers, presiding officers and enforcement officers for each constituency.

PEMANTAU calls upon political parties and candidates to:

- Make public declarations of election expenditure, including donations received and spent; and
- Adhere to fair and ethical standards in campaigning.

Stateless in Sarawak

Undocumented Sarawakians regularly complain of obstacles when trying to register themselves for 'MyKad' (*identity card*) or registering their children for birth certificates with the National Registration Department (NRD). Rural communities that live deep in the interior, without easy access to public information, electricity or transport are often denied access to documentation. Statelessness not only affects one generation, but continues onto subsequent generations, rendering entire families uncertain of their future. Despite that, the authorities do not reveal the figure relating to the number of individuals who are without identity cards (MyKad) in Sarawak. Without a systematic government drive to ensure documentation of all Sarawakians, especially in rural indigenous communities, these individuals are some of the most at risk and vulnerable people residing in the country.

Risks faced by undocumented Sarawakians range from obstacles accessing facilities, services or even entitlement as Malaysians such as healthcare, education, employment, voting rights, to more extreme risks of trafficking and even the risks of enforced disappearance or death without a trace.

It is worth noting again that women and children are affected by statelessness and that Malaysia is bound by the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). These are both violated when it comes to stateless individuals in Sarawak. Some examples below:

CEDAW

Article 9.1 of CEDAW states that “*States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.*” or

CRC

Article 7 of the CRC states that “*the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents. State Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*”

1. Obstacles to Obtaining MyKad

What is a fundamental right has become a luxury and privilege in Sarawak. Currently, applications for MyKads tend to be dealt with on a case-by-case basis or are approved through government programs that are targeted at selected locations on selected dates (often without wide publication or sufficient notice). This is often difficult if not impossible and costly for rural communities to access. Cases documented as follows:

On 18th April 2016, 150 applicants from Baram and Miri peacefully protested at the Urban Transformation Centre (UTC) in Miri, calling for the issuance of their MyKads. The group was led by Miri MP Dr Michael Teo and former Kapar MP S. Manikavasagam who handed a memorandum to the NRD.⁸⁰



150 MyKad applicants protest at the Urban Transformation Centre (UTC) on 18th April 2016 in Miri, demanding their rights to documentation. (Photo credit – The Borneo Post)

On 7th September 2016, Destiny for Children Centre (DFC) Chairman, Chris Tang Tiong Kin informed State Welfare, Women and Community Wellbeing Minister Fatimah Abdullah that 38 ‘stateless children were facing trouble in pursuing their education after completing Standard 6’ at their education centre in Sibul. According to Tiong, the children had become homeless (due to a lack of documentation as their mothers could not be found, or because they were foreigners) and this had resulted in some of the children being involved in theft and glue-sniffing. In response, Fatimah Abdullah informed Tiong that the government had ‘requested the Home Ministry to speed up the process of application for children or individuals below age 21, and the Home Minister has agreed’.⁸¹

80 ‘MyKad applicants rally at UTC demanding issuance of identification cards’, The Borneo Post, published on 18/04/2016, accessed at: <http://www.theborneopost.com/2016/04/18/mykad-applicants-rally-at-utc-demanding-issuance-of-identification-cards/>

81 ‘Swak stateless kids can’t go beyond Primary level’, Free Malaysia Today, published on 07/09/2016, accessed at:

On 18th October 2016, Mujan Jok, a representative of more than 10,000 indigenous people from Baram who are without MyKads tested lawmakers from both divides by questioning why the government's pre-election promise to process more than 20,000 MyKad applications for indigenous peoples had not materialised. *"Before the elections, we were offered easy processing of our ICs. But after the elections, there has been no follow up on the matter"* she said. Handing over a memorandum addressed to Opposition Leader Wan Azizah Wan Ismail and Prime Minister Najib Razak at the Dewan Rakyat, she lamented, *'We can't travel abroad, even to the Peninsular [Malaysia] and have to bear high medical cost, denied the right to go to school and can't enjoy the privilege of being a Malaysian. We as Sarawakian Orang Asal demand birth certificates and ICs be given to us immediately...for the process of obtaining them to be eased....'* According to Jok, the memorandum was the second to be sent after the election (the first on 28th June 2016), adding that Baram representatives had previously met with the NRD, but that too had been unproductive.⁸² This reported case illustrates that the issue of identity cards must go beyond mere election promise and requires genuine attention from lawmakers.

Financial burdens also pose a problem to rural applicants who find it difficult, if not impossible to find a job (due to their statelessness), let alone raise money to travel to the NRD in order to process their MyKad application. According to Jok, the costs for rural communities can be as high as RM1,500.00 per person and even then that does not guarantee an applicant will receive the MyKad.

At a forum discussing 'Statelessness' in Sarawak held on 20th October 2016 in Kuala Lumpur, Jok lamented⁸³ that *"a one-way journey from the interior to Miri costs RM150 per person. Applicants also need to bring along the village head to attest that they live in the village, costing another RM300 in return fares. Additionally, the applicant would need to perform a DNA test with a relative to prove familial ties, costing RM1,000 at a public medical facility or RM1,500 at a private clinic. They [applicants] have to spend between RM1,500 to RM2,000."* Jok emphasised that only those who are at least 70 years old are allowed to attest that an individual is native to a village, but pointed out that many natives do not survive up to the age of 70.

2. Challenging Government Agencies

Frustrated at the lack of enforcement by the government, civil society members and human rights lawyers banded together in 2016 to advocate and challenge the law on behalf of stateless individuals in Sarawak. The campaign group led by SADIA and S4S claim to have uncovered hundreds of individuals without MyKads in the State (mainly found in Long Lama, Long Bedian and in the interior of Kapit.)⁸⁴

In October 2016, lawyer Simon Siah announced that he would be taking the Home Ministry and the NRD to court for refusing to issue MyKad to Rika Herline anak Jiin (17), from Kampung Mongkos whose parents had been married 18 years in accordance with the *Dayak Bidayuh Adat* (Dayak customs).

<http://www.freemalysiatoday.com/category/nation/2016/09/07/swak-stateless-kids-cant-go-beyond-primary-level/>

82 'They promised us MyKad before S'wak elections', Berita Daily, published on 18/10/2016, accessed at: <http://www.beritadaily.com/they-promised-us-mykad-before-s%E2%80%8Bwak-elections/>

83 'Sarawak natives have to fork out at least RM1,500 to get IC', Malaysiakini, published on 20/10/2016, accessed at: <http://www.malaysiakini.com/news/359729>

84 'S4S to help stateless individuals to get MyKads', The Borneo Post, published on 03/11/2016, accessed at: <http://www.theborneopost.com/2015/11/03/s4s-to-help-stateless-individuals-get-mykads/>

Herline, born to a Malaysian father, Ji-In Ngampu (a 40-year-old farmer) and an Indonesian mother, had initially been issued with a Malaysian birth certificate but when she applied for her MyKad at the age of 12, an NRD officer destroyed her birth certificate and replaced it with another one without reason, which stated that she was a non-Malaysian citizen.⁸⁵

According to S4S spokesperson Peter John Ak Jaban, Herline's parents had been in a committed relationship for 18 years, which under the 'Adat' means that they are married. Furthermore, Herline's parents had a certificate from their Tuai Rumah, but this was not accepted by the Jabatan Pendaftaran Negara (JPN) as it was not in the correct format or registered at the District Office. The couple later married for a second time in a civil ceremony at the NRD to try and help their daughter, but unfortunately that did not help with Herline's application. In 2015, Herline was forced to stop her Form 4 education as the NRD had refused to issue her with a MyKad. However, her younger brother had been issued a MyKad at the age of 12 without a problem.



*Human rights lawyer Simon Siah and Bidayuh MyKad applicant Rika Herline anak Jiin standing outside the Federal Government administrative building in Kuching.
(Photo credit – Sulok Tawie, The Malay Mail Online)*

The group's campaigning efforts finally bore fruit in December 2016, when Herline was finally granted her MyKad along with a further six individuals who had Indonesian mothers, (Rozianna Akui, Heliana Akui, Emirozy Rosli, Shera Senga, Isabella Kuin and Ica Kuin) for whom the group had also been campaigning. The group who pressured government agencies (including JPN and Welfare, Women and Community Wellbeing Minister Fatimah Abdullah) to recognise and register the citizens, are hopeful that these cases, although not dealt with in court, have set a precedent for future applications. Herline herself hoped that she would be able to sit for her Sijil Pelajaran

⁸⁵ 'Lawyer to challenge Home Ministry, NRDs refusal to issue IC to Dayak teen', The Malay Mail Online, published on 6/10/2016, accessed at: <http://www.themalaymailonline.com/malaysia/article/lawyer-to-challenge-home-ministry-nrds-refusal-to-issue-ic-to-dayak-teen>

Malaysia (SPM) examination and thereon pursue a better future for herself and her family as a result of obtaining her MyKad.

Recognising a shortfall in the government's approach to registration however, lawyer Simon Siah said *'it would be better if Majlis Adat Istiadat and the district offices – the agencies tasked with the care of Dayak Adat and rural communities – carry out a proper drive, at community level, to register all existing 'Adat' – validated marriages.'* Siah also pointed out that in each case, the parents were properly married under 'Adat' meaning that they should *'enjoy the force of law in Sarawak'*.⁸⁶

The above cases illustrate that if one does not challenge the Welfare Department, NRD and other agencies, more often than not it would be extremely difficult to be documented. But the question lies in whether or not all aggrieved parties share the same fate, opportunity and support including legal advice that Herline had. The right to and recognition of an individual's citizenship is not a privilege, it is a fundamental right. The problem of statelessness in Sarawak therefore lies in the recognition of the 'Adat' and the understanding and awareness of the said agencies to deal with the identification of all Sarawakians.

Recommendations

SUARAM calls upon the Sarawak State Government and the Federal Government of Malaysia to:

- Systematically visit and register every stateless Sarawakian as a matter of urgency and importance. Any government drive to register stateless individuals must ensure the complete registration of all rural communities;
- Abide by all relevant articles of the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) for which Malaysia is legally bound; and
- Abide by all relevant articles of the United Nations Convention on the Rights of the Child (CRC) for which Malaysia is legally bound.

Conclusion

The core problem linked to the human rights issues in Sarawak as highlighted above is one of self-determination. Self-determination covers the Sarawakians' inherent right as persons to determine their identity, history, heritage, beliefs, customs, culture and representation. The Indigenous Peoples' right to land has to be restituted; more so with the Federal Court decision on Tuai Rumah Sandah, which basically suggests that Indigenous Peoples' history and heritage on their land for generations, even before the Sarawak Land Code was codified is insufficient to prove their ownership in the absence of written laws.

Next is the determination of citizenship or rather, the access to such determination. Lack of access to identification causes statelessness. Statelessness is so deeply intertwined with a plethora of violations of fundamental rights and enjoyment of basic life such as access to education, healthcare, social welfare, employment, right to vote and the right to citizenship.

Sarawakians campaigning for the restitution of rights under the Malaysia Agreement have been

⁸⁶ *'No more stateless status for new MyKad recipients'*, The Borneo Post, published on 24/12/2016, accessed at: <http://www.theborneopost.com/2016/12/24/no-more-stateless-status-for-new-mykad-recipients/>

arrested, investigated and charged under the Sedition Act 1948, as well as the Peaceful Assembly Act 2012 to hinder any effort of Sarawakians to assemble in the first place.

Resistance to encroachment of lands have likewise been met by repression, with two deaths reported. The use of hired gangsters by companies have been the response to the Indigenous Peoples' uprising.

Human rights violations in Sarawak are a blemish on the country's record, leaving us with the question, Where is Sarawak in the grand scheme of Malaysian nationhood?



**INDIGENOUS
PEOPLES' RIGHTS**

INDIGENOUS PEOPLES' RIGHTS

The key issues faced by indigenous peoples in 2016 were the on-going deforestation and encroachment on Orang Asli customary lands in Kelantan, the struggle for recognition of native customary lands in Perak and lack of basic amenities including access to clean water, electricity, internet and roads.

Customary Land Rights in Perak

The fight for recognition of native customary land in Perak has been largely successful despite the state government's appeal against the High Court ruling made in 2015. The Court of Appeal in a unanimous decision rejected the state government's appeal and allowed a cross appeal by the indigenous community. The decision further reinforced the previous finding that upholds and recognizes customary land rights under common law and challenged the High Court decision that customary lands can be alienated if compensation is paid for.

Customary Land Rights in Johor

While the indigenous community in Perak may have experienced success in their quest for recognition of customary land rights, the indigenous community in Johor is still struggling with their case. In July 2016, the Johor Bahru High Court heard oral submission from all parties in the case of the *Orang Seletar of Danga Bay*¹. Their woes began in 2013 when communities from Kampung Bakar Batu and Kampung Sungai Temun witnessed land reclamation work which threatened their livelihood and rights to customary land.

Another case of *Saling v Kanawagi* involving the *Jakun* tribe in Johor Bahru High Court remains unresolved as the trial judge decided that he needed more time to go through the submitted documents related to the case and would deliver his decision in December at the Ipoh High Court (the trial judge's new station)². In December, the High Court decided in favour of the indigenous community and awarded RM 37 million in damages to the community³.

1 Centre for Orang Asli Concern (COAC), 'Decision for the Orang Seletar case set for 27 October 2016' (COAC Facebook, 28 July 2016) <<https://www.facebook.com/notes/center-for-orang-asli-concerns-coac/decision-for-the-orang-seletar-case-set-for-27-october-2016/1167414519969139>> accessed 31 October 2016

2 Centre for Orang Asli Concerns (COAC), 'Decision Day for Recovery of Lost Millions Postponed to December' (COAC Facebook, 18 October 2016) <<https://www.facebook.com/notes/center-for-orang-asli-concerns-coac/decision-day-for-recovery-of-lost-millions-postponed-to-december/1234874509889806>> accessed 31 October 2016

3 Manjit Kaur, 'Landmark win for orang asli' (The Star Online, 23 December 2016) <<http://www.thestar.com.my/news/nation/2016/12/23/landmark-win-for-orang-asli-high-court-awards-them-rm37mil-in-battle-against-their>>

Customary Land Rights in Pahang

Seven individuals from the *Jahut* community who represents the communities living around Sungai Mai village in Jerantut, Pahang filed their case against the Pahang state government in December 2016 in an attempt to secure their ancestral lands and push for recognition of the rights of indigenous peoples. Their application involves a 5,000ha of land in Pahang and Krau Wildlife Reserve⁴.

Customary Land in Sarawak

On 20th December 2016, the long struggle for the recognition of customary land was dealt a blow following the decision by the Federal Court to set aside previous decisions by the Court of Appeal and High Court recognizing the native custom of '*pemakai menoa*' and '*pulau galau*'⁵.

Baru Bian, the counsel for the community stated that the decision would affect 10 other cases decided by the Court of Appeal, 20 other cases in the same court and more than 100 cases pending at High Court. At this point, the community affected is seeking a review of the decision at the Federal Court⁶.

On a more positive note, the long battle against the Baram Dam in Sarawak ended in a victory for the local community with the plans for Baram Dam being cancelled. While the project has been suspended since the Sarawak's Chief Minister's announcement in 2015, activists remain vigilant against possible resumption of the project by the state government.⁷

Illegal Logging Issue in Kelantan

The protest against the encroachment of customary land by logging companies in Kelantan reached another flashpoint in late 2016. As the *Temiar* peoples' previous plea to the state government had fallen on deaf ears, the indigenous community in the region formed a blockade to halt the logging activities that are threatening their livelihood. Although the government and the companies in question have not taken any overt steps to force through the blockade, thugs claiming to be police officers have arrested indigenous activists and community members manning the blockade and taken down the blockade with chainsaws⁸. Soon after, the forestry department of Kelantan put up their own blockade, restricting access to the indigenous peoples' blockade, preventing supplies and lawyers from reaching the community there⁹.

exlawyers/> accessed 15 April 2017

4 FMT Reporters, 'Orang Jahut take on Pahang govt to claim ancestral land' (FMT News, 15 December 2016) <<http://www.freemalaysiatoday.com/category/nation/2016/12/15/orang-jahut-take-on-pahang-govt-to-claim-ancestral-land/>> accessed 15 April 2017

5 Jonathan Chia, 'Federal Court rules no NCR over 'pemakai menoa', 'pulau galau' (Borneo Post, 21 December 2016) <<http://www.theborneopost.com/2016/12/21/federal-court-rules-no-ncr-over-pemakai-menoa-pulau-galau/>> accessed 15 April 2017

6 COAC, 'Federal Court deals a blow to Orang Asal over customary territories' (COAC, 18 December 2016) <<https://www.facebook.com/notes/center-for-orang-asli-concerns-coac/federal-court-deals-a-blow-to-the-orang-asal-over-customary-territories/1302306039813319/>> accessed 15 April 2017

7 Geryl Ogilvy Ruekeith, 'Baram Dam project halted indefinitely' (Borneo Post, 19 November 2016) <<http://www.theborneopost.com/2015/11/19/baram-dam-project-halted-indefinitely/>> accessed 31 October 2016

8 Danial Albakri, 'Thugs posing as police break up Orang Asli blockade in interior of Kelantan' (The Star Online, 28 September 2016) <<http://www.thestar.com.my/news/nation/2016/09/28/thugs-attack-orang-asli-blockade/>> accessed 31 October 2016

9 Forestry's entry ban choking Gua Musang Orang Asli' (MalaysiaKini, 30 October 2016) <<http://www.malaysiakini.com/news/361034>> accessed 31 October 2016

Then on 7 December, the Kota Bharu High Court dismissed the application by seven defendants in the Pos Balar-Dakoh 'Ladang Rakyat' case to have the case filed by the *Temiar* people struck out. The defendants who include loggers, Perbadanan Ladang Rakyat Negeri Kelantan, Forestry Department and Kelantan State Government had applied for the dismissal on 29 November 2016¹⁰.

Thus the struggle by the indigenous peoples of Malaysia for their ancestral land and cultural rights continue into 2017¹¹.

10 COAC, 'Pos Balar Temiars get green light from court to hear their land rights case' (COAC, 7 December 2016) <<https://www.facebook.com/notes/center-for-orang-asli-concerns-coac/pos-balar-temiars-gets-green-light-from-court-to-hear-their-land-rights-case/1286219894755267/>> accessed 15 April 2017

11 COAC, 'Kelantan Forest Department takes down a blockade; Arrests 5' (COAC, 23 January 2017) <<https://www.facebook.com/notes/center-for-orang-asli-concerns-coac/kelantan-forest-department-takes-down-a-blockade-arrest-5/1335697223140867/>> accessed 15 April 2017



**FREEDOM OF
MOVEMENT**

FREEDOM OF MOVEMENT

The travel restriction imposed on human rights defenders and politicians remained a prevalent issue in 2016. These travel restrictions included the prevention of individuals from Peninsular Malaysia from entering East Malaysia (Sabah & Sarawak) as well as preventing individuals from travelling abroad. A statement by the Director-General of Immigration Department, Datuk Sakib Kusmiin in May 2016 alarmed many when he said that those who ridiculed the government would be prevented from travelling abroad as the Malaysian passport was a privilege and not a right¹.

The Sarawak State Election saw an extensive application of the Sarawak State Government's power to restrict opposition politicians and civil society activists from entering Sarawak. The Chief Minister, Tan Sri Adenan Satem claims that it is the autonomous right of Sarawak to ban 'unsavoury elements' from entering the state. In his zeal to protect Sarawak from such 'unsavoury' elements, the Chief Minister has built an increasing list of Malaysians who have been banned from entering Sarawak.

Individuals who have been banned from entering Sarawak or travelling abroad

No	Name	Reason / Background	Restriction
1	Maria Chin Abdullah	Chairperson of Bersih 2.0	International
2 ¹	Abdul Malik Abul Kassim	PAS	Sarawak
3	S. Ambiga	Former Chairperson of Bersih 2.0	Sarawak
4	Andrew Khoo	Human Rights Committee of the Malaysian Bar	Sarawak
5	Clare Rewcastle Brown	Sarawak Report	Sarawak
6	Colin Nicholas	Activists from Center for Orang Asli Concerns (COAC)	Sarawak

1 'Immigration D-G: Those who badmouth Putrajaya can be stopped from leaving Malaysia' (Malay Mail Online, 14 October 2016) <<http://www.themalaymailonline.com/malaysia/article/immigration-d-g-those-who-badmouht-putrajaya-can-be-stopped-from-leaving-ma>> accessed 14 October 2016

2 Peter Sibon, Liang Cheng and Karen Bong, 'CM: It's our right to bar unsavoury characters from entering Sarawak' (Borneo Post, 13 April 2016) <<http://www.theborneopost.com/2016/04/13/cm-its-our-right-to-bar-unsavoury-characters-from-entering-sarawak/>> accessed 14 October 2016

7	Cynthia Gabriel	Executive Director of C4	Sarawak
8	Fahmi Reza	Human Rights Activists	Sarawak
9	Harris Ibrahim	Activist Lawyer	Sarawak
10	Mohamad Sabu	President AMANAH	Sarawak
11	Hew Kuan Yau	Former DAP	Sarawak
12	Jannie Lasimbang	Bersih Sabah	Sarawak
13	Jerald Joseph	Director of Pusat Komus	Sarawak
14	Kua Kia Soong	Director of SUARAM	Sarawak
15	Mandeep Singh	Manager of Bersih 2.0	Sarawak
16	Maria Chin Abdullah	Chairperson of Bersih 2.0	Sarawak
17	N Gobalakrishnan	Former PKR MP	Sarawak
18	Nurul Izzah Anwar	Vice President of PKR	Sarawak
19	Ooi Leng Han	DAP Mascot Designer	Sarawak
20	Rafizi Ramli	Secretary General of PKR	Sarawak
21	Ridhuan Tee Abdullah	Columnist, Public Icon	Sarawak
22	Saifuddin Nasution Ismail	PKR Chief of Staff	Sarawak
23	Sivarasa Rasiah	PKR Member of Parliament	Sarawak
24	Shamsul Iskandar Mohd Akin	Vice President of PKR Youth	Sarawak
25	Syed Ibrahim Syed Noh	Ketua Penerangan PKR	Sarawak
26	Teo Nie Ching	DAP Member of Parliament	Sarawak
27	Teresa Kok	DAP Member of Parliament	Sarawak
28	Tian Chua	Vice President of PKR	Sarawak
29	Tony Pua	DAP Member of Parliament	Sarawak
30	P. Waythamoorthy	Hindraf	Sarawak
31	Wong Chin Huat	Bersih 2 Steering Committee	Sarawak
32	Zuraida Kamaruddin	PKR Member of Parliament	Sarawak
33	Sim Tze Tsin	PKR Strategy Director	Sarawak
34	Ibrahim Ali	Perkasa	Sarawak
35	Zunar	Cartoonist	International

Reflecting on the developments in 2016, there is substantial concern that individual rights to freedom of movement is abused by the executive and utilized as a punitive tool against members of civil societies, dissenters and political opponents. Thus far, many of the travel embargo imposed against these individuals are arbitrary in nature with no good reasons given for the travel ban imposed.

As noted in the chapter on Law and the Judiciary, most of the challenges posed against the travel ban has been unsuccessful in 2016. It remains to be seen whether the use of restriction of freedom of movement as a punitive tool would be curtailed by judicial reviews that would be heard in 2017.