

The Role of Courts in Balancing Rights and Security: the Malaysian Experience

A. Overview of constitutional arrangement

1. A former British colony, the independent Federation of Malaya was established in 1957 as a constitutional monarchy (the Yang di-Pertuan Agong (King) is the head of state). The nation became known as Malaysia in 1963 with the inclusion of North Borneo (now Sabah), Sarawak and Singapore into the federation (Singapore left in 1965).
2. Its system of government is modelled on the Westminster model. Federal Parliament is bicameral. A cabinet, headed by the Prime Minister, advises the King.
3. It has had the same written constitution since 1957 (it has been amended numerous times though).
4. The constitution, known as the Federal Constitution (FC), is the supreme law of the land (Article 4(1)). All laws passed after independence are void to the extent of any inconsistency (A4(1)). Executive and judicial actions are also to be tested against it.
5. Part II, FC provides for fundamental liberties. Of relevance:
 - A8(1) guarantees the equal protection of the law and equality before the law
 - A5(1) guarantees life and liberty save where not otherwise deprived by law
 - A9 prohibits banishment and guarantees the freedom of movement save in accordance with law
 - A10(1)(a)-(c) guarantee the freedom of expression, assembly and association, which however can be denied by Federal Parliament where it is deemed “necessary or expedient” in the “interest of the security of the Federation or any part thereof, public order or morality” (Legislative encroachment further permitted: *in the interest of* friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence)

NB: The courts (now) apply proportionality principles

- A11(1) guarantees the freedom to profess and practice religion
- A13 guarantees rights to property

6. The power to prosecute is exclusively vested in the Attorney General, wearing the hat of the Public Prosecutor (A145). The AG does not have security of tenure. He holds office at the pleasure of the King (who acts on the advice of the Cabinet (A40), and as such the Prime Minister)
7. The Judiciary is made up of the Superior Courts (the High Court, the Court of Appeal and the Federal Court) and the subordinate courts (the Magistrates Court and the Sessions Court). A parallel Islamic court system operates in tandem on matters of Islamic personal law including limited criminal law (offences against the precepts of Islam).
 - Judicial power of the Federation was vested in Judiciary. In 1988, amendment to A121(1) to limit jurisdiction of High Court to the extent vested by Federal law. Suborning of the Judiciary to Parliament.
 - Judges of the Superior Courts have security of tenure (with the exception of Judicial Commissioners). Judges can only be removed from office by the King on the recommendation of a tribunal of enquiry (whose members are appointed by the King on the advice of the Prime Minister) (A125).
 - The appointing authority of superior court judges is the King who acts on the advice of the Prime Minister (the King is obliged by law to act on advice).
 - The Chief Justice (then Lord President) and 2 Supreme Court judges were controversially removed in 1988 by tribunals. Widely perceived as politically driven by Mahathir Mohammad. Government under subsequent PM Abdullah Badawi apologised in 2009.
 - Since 2009 (with the enacting of the Judicial Appointments Commission Act (the JAC Act), recommendations for appointments are made by the Judicial Appointments Commission (JAC) (made up of Senior Justices, the Attorney General and “four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister”) to the Prime Minister who has the discretion to tender the recommendations, or not, to the King. Recommendations of the JAC and rejections by the Prime Minister are not made public.
 - Subordinate judges are appointed by the Judicial and Legal Services Commission, of which the AG is a member. They are members of the public services and can be removed in like manner.

B Overview of security laws

8. The King is empowered to declare a state of emergency where “the security, or the economic life, or public order in the Federation or any part thereof is threatened” and may promulgate ordinances (and Parliament, if sitting can make laws) designed to curb the threat notwithstanding their contravening the FC (A150). These laws cease to exist 6 months after a proclamation of emergency is revoked.
9. Under Article 149, Parliament is permitted to enact laws against subversion and action prejudicial to public order where “action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation –

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof”

notwithstanding such laws being inconsistent with any of the provisions of Article 5, 9, 10 or 13.

10. Article 149 laws of relevance include:

10.1 Internal Security Act 1960 (ISA)

- Came into force on 01.08.1960 (West Malaysia) and 16.09.1963 (East Malaysia)
- Allowed, amongst other things, preventive detention by the police (up to 60 days) and the Home Minister (renewable periods of up to 2 years)
- Introduced as legislation aimed exclusively at dealing with the guerrilla insurgency (that resolved in 1989) but came to be used to stifle dissent (notoriously under PM Mahathir Mohammad)
- In 1989, ouster provision was introduced (s.8B)
- Repealed on 31.07.2012

10.2 Security Offences (Special Measures) Act 2012

- Came into force on 31.07.2012
- “to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters”
- applies to “security offences”. This includes:
Penal Code [[Act 574](#)]:
(a) Offences under Chapter VI

- Offences against the State
- Waging war
- Activity contrary to parliamentary democracy (s.124B) and associated activity (s.124C to F) including publication, dissemination etc of a “document or publication detrimental to parliamentary democracy”

“activity carried out by a person or a group of persons designed to overthrow or undermine parliamentary democracy by violent or unconstitutional means”

“any document or publication having in part or in whole a tendency-

(a) to excite organized violence against persons or property in Malaysia;

(b) to support, propagate or advocate any act prejudicial to the security of Malaysia or the maintenance or restoration of public order therein or inciting to violence therein or counselling violent disobedience to the law thereof or to any lawful order therein; or

(c) to invite, request or demand support for or on account of any collection, subscription, contribution or donation, whether in money or in kind, for the direct or indirect benefit or use of persons who intend to act or are about to act, or have acted, in a manner prejudicial to the security of Malaysia or to the maintenance of public order therein, or who incite to violence therein or counsel violent disobedience to the law thereof or any lawful order therein”

- Sabotage (s.124K)
- Espionage (s.124M) – “an activity to obtain sensitive information by ulterior or illegal means for the purpose that is prejudicial to the security or interest of Malaysia”

"sensitive information" means any document, information and material-

(a) relating to the Cabinet, Cabinet committees and State Executive Council; or

(b) that concerns sovereignty, national security, defence, public order and international relations,

whether or not classified as "Top Secret", "Secret", "Confidential" or "Restricted" by a minister, the Menteri Besar or Chief Minister of a State or any public officer appointed by a minister, the Menteri Besar or Chief Minister of a State.

(b) Offences under Chapter VIA

- Terrorism related offences (s.130B to s.130TA)
- Definition (see annexure)

(c) Offences under Chapter VIB

- Organised crime (s.130OU to s.130ZC)
- Preventive detention of up to 28 days by police
- Consultation with legal counsel can be delayed by 48 hours
- No bail. Accused kept in custody until exhaustion of final appeal by prosecution (if acquitted) on application to court
- Special measures for giving evidence by prosecution witnesses – in camera, in secret (for the protection of identity)
- Effective suspension of Evidence Act

10.3 National Security Council Act 2016

- Came into force on 01.08.2016
- Establishes the National Security Council, chaired by the Prime Minister – “the Government’s central

authority for considering matters concerning national security.”

- The “Council shall have the power to do all things necessary or expedient for or in connection with the performance of its functions including—
(a) to control and coordinate Government Entities on operations concerning national security; and
(b) to issue directives to any Government Entity on matters concerning national security.”
- Amongst other things, advises PM on the declaration of security areas which the PM has the discretion to do
- Such a declaration gives the Director of Operations And Security Forces wide ranging “emergency” powers contrary to constitutional protections (s.22 to s.36)
- Ouster (s.38) – “No action, suit, prosecution or any other proceeding shall lie or be brought, instituted or maintained in any court against the Council, any committee, any member of the Council or committee, the Director of Operations, or any member of the Security Forces or personnel of other Government Entities in respect of any act, neglect or default done or omitted by it or him in good faith, in such capacity.”

10.4 Sedition Act 1948 (Revised 1969)

- Came into force - West Malaysia (19.07.1948); Sabah (28.05.1964); Sarawak (20.11.1969)
- Allows for prosecution of publication (in wider sense) of seditious words – “when applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency”

“A “seditious tendency” is a tendency -

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.”

- Intention of limited relevance (s.4(2) –

“For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.”

10.5 Printing Presses And Publications Act 1984

- Regulates publications
- Printing presses – “letterpress, Lithography, Gravure, Intaglio or any other process of printing capable of printing at a rate of 1,000 impressions per hour or more” - can only be used with a licence (s.3)
- (S.5) It is an offence to print, import, publish etc a newspaper without a permit – “any publication containing news, intelligence, reports of occurrences or any remarks, observations or comments, in relation to such news, intelligence or occurrences, or to any other matter of public interest, or any magazine, comic or other forms of periodical printed in any language for sale or free distribution at regular or irregular intervals, but does not include any publication published by or for the Federal or any State Government or the Government of Singapore”

10.6 Societies Act 1966 (Revised 1987)

- Requires all societies to be registered (s.6)
- “Society” “includes any club, company, partnership, or association of seven or more persons whatever its nature or object, whether temporary or permanent, but does not include-
 - (a) any company registered under the provisions of any written law relating to companies for the time being in force in Malaysia;
 - (b) any company or association constituted under any written law;
 - (c) any trade union registered or required to be registered under the provisions of any written law relating to trade unions for the time being in force in Malaysia;
 - (d) any company, association or partnership formed for the sole purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof;
 - (e) any co-operative society, registered as such, under any written law;
 - (f) any organization or association in respect of which there is for the time being in force a certificate (which may be granted, refused or cancelled at his discretion) by a person or authority appointed under the provisions of the written law for the time being in force relating to the registration of schools that such organization or association forms part of the curriculum of a school; or
 - (g) any school, management committee of a school, parents’ association or parent-teachers’ association registered or exempted from registration under any law for the time being in force regulating schools;

C. The need for checks and balances

11. The need is evident. The Executive has increasingly arrogated to itself power since the constitutional crisis of 1988.
12. Prior to the events 1988, the level of public confidence in the key institutions, in particular the AG and the Judiciary.
 - The Malaysian Judiciary was recognised as a leading institution in the Commonwealth

- Though the Judiciary was conservative, there was steadfast adherence to the notion of constitutional supremacy
13. However, the events of 1988 and the manner in which the Executive conducted, and was allowed to conduct itself, thereafter has led to declining public confidence. It is widely perceived that the institutions have not played the role they are required to in order to maintain balance.
- Selective prosecution
 - Decisions of the courts on civil liberties have, to a large extent, merely paid lip service to the fundamental liberties, the courts tending to defer to the subjective perspectives of the Executive and its agencies – it is a commonly held view that even if the High Court or the Court of Appeal rules in favour of a challenge, the Federal Court will reverse in favour of the Executive.
14. To the extent that this perception is correct, this is generally viewed as having been caused/furthered/made possible by:
- The curtailing of the independence of the Judiciary
 - Removal of the inherent power to review by the 1988 constitutional amendment and ouster clauses. Despite legal challenges, the Judiciary has been reluctant to strike down the amendment as unconstitutional.
 - Interference with the judicial appointments process.
 - The 2009 JAC Act was enacted in response to outrage over revelations about the manner in which judges were appointed post-1988 during a 2008 Royal Commission of Enquiry into a video clip of a prominent lawyer purportedly discussing promotions and factionalism among senior judges over the phone with the Chief Justice (the clip was made public in late 2007 by Anwar Ibrahim, the then leader of the Opposition)
 - The JAC Act is deficient in that it vests the PM with the discretion to reject. Further, there is no transparency to the process (the Bar has consistently argued in favour of the English model being appointed).

- A fraught relationship between Bench and Bar since 1988 (when the Bar took up the cause of the Chief Justice and the Judges who were removed) and subsequent campaigns by the Bar in favour of the Rule of Law has resulted in insufficient consultation with the Bar as to the appointment of judges
- Tendency to appoint judges from the public services including the Attorney Generals Chambers, many of whom have graduated from local institutions (whose standards have declined substantially over the years). The situation is made more challenging by ethnic quotas in education and public service appointments. Questions have arisen as to the competency of judges in the superior courts (in 2009, the PM conceded that the judges were not the best possible choices).
- Appeals to the Privy Council were abolished in 1978 (Criminal and Constitutional matters) and 1985 (Civil matters). No independent monitoring of judicial standards
- The “presence” of the Executive in the internal workings of the Judiciary has had its impact
- Has led to an embracing of relativism, the so called Asian Values, as a basis for the interpretation of human rights
- The limiting of the freedom of expression
 - Print newspapers regulated
 - Internet now policed
 - Selective use of sedition laws
 - The invoking of SOSMA and threatened prosecutions for activity contrary to parliamentary democracy
 - No freedom of information legislation and the unwillingness of the Judiciary to recognise a free standing
- The regulating of associations
- An unduly wide official secrets framework and an illusory freedom of information. Judicial reluctance to allow for direct recourse to the fundamental liberties.

- A lack of considered and critical commentary on the conduct of the Executive, government agencies, and the decisions of the courts. Coupled with the limits on expression, this has led to a lack of accountability.
- The regulating of the right to peacefully assemble. Though the requirement of a police permit to assemble has been replaced with a need to inform the police, the courts have interpreted this need as amounting to a need to secure the approval of the police. Demonstrations are suppressed, directly or indirectly.
- Gerrymandering, the apparent subversion of the electoral process, the narrow and highly technical avenues for challenge in courts, and the lack of accountability on the part of the Election Commission have made it nearly impossible to ensure that there are free and fair elections.

D. Striking a balance

15. This is not to say that the courts have been entirely unhelpful. Though far and few between, there have been decisions that have helped maintain some balance in some areas.

- Habeas corpus decisions in connection with ISA detentions, Anisminic principles applied to circumvent ouster. The impact of SOSMA and the NSC are yet to be fully appreciated as is the manner in which the Judiciary will approach these laws.
- Freedom of expression challenges, book banning etc. Proportionality principles applied.
- Some protection to the right of to peacefully assemble.
- Police misconduct. Civil claims allowed.

16. This has been driven by several factors.

- Judges who are prepared to withstand scrutiny for their decisions
 - More usually appointed from the Bar (though not necessarily the case)
 - Have the support of the Bar, the press (to the extent possible, more so where there are sympathetic editors)

and the on-line unregulated media. Increasing internet penetration

- The support of regional associations which interact with the superior court judges – legal professional bodies (Law Council of Australia etc), law associations (LAWASIA)
- Judicial training programmes, national and international and increased interaction between Malaysian judges and international judges
- Active Bar and NGO and INGO efforts and campaigns and greater calls for accountability
- Increased interaction between the Bar, NGOs and law students

Malik Imtiaz Sarwar
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ANNEXURE

Definition of terrorist act, section 130B, Penal Code

(2) For the purposes of this Chapter, "[terrorist act](#)" means an act or threat of action within or beyond Malaysia where-

(a) the act or threat falls within subsection (3) and does not fall within subsection (4);

(b) the act is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the act or threat is intended or may reasonably be regarded as being intended to-

(i) intimidate the public or a section of the public; or

(ii) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organization to do or refrain from doing any act.

(3) An act or threat of action falls within this subsection if it-

(a) involves serious bodily injury to a person;

(b) endangers a person's life;

(c) causes a person's death;

(d) creates a serious risk to the health or the safety of the public or a section of the public;

(e) involves serious damage to property;

(f) involves the use of firearms, explosives or other lethal devices;

(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or a section of the public to-

(i) any dangerous, hazardous, radioactive or harmful substance;

(ii) any toxic chemical; or

(iii) any microbial or other biological agent or toxin;

(h) is designed or intended to disrupt or seriously interfere with, any computer systems or the provision of any services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;

(i) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services such as police, civil defence or medical services;

(j) involves prejudice to national security or public safety;

(k) involves any combination of any of the acts specified in paragraphs (a) to (j), and includes any act or omission constituting an offence under the Aviation Offences Act 1984 [[Act 307](#)].

(4) An act or threat of action falls within this subsection if it-

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended-

(i) to cause serious bodily injury to a person;

(ii) to endanger the life of a person;

(iii) to cause a person's death; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.