

CPPS Policy Factsheet: Judiciary

CPPS is pleased to bring to you its “CPPS Policy Fact Sheet” on the judiciary. In this factsheet, we will look at the state of the judiciary and our legal system, and the relationship they have with our system of politics and governance.

BACKGROUND

Malaysia has a **unified judicial system**, and all courts take cognizance of both federal and state laws. The legal system is founded on **English common law**. Most cases come before magistrates and sessions courts. **Religious courts** decide questions of Islamic law and custom. The **Federal Court**, the highest court in Malaysia, reviews decisions referred from the High Court of Peninsular Malaysia, the High Court of Sabah and Sarawak, and subordinate courts. The Federal Court has original jurisdiction in disputes among states or between a state and the federal government. The Federal Court consists of the chief justice, the two chief judges from the High Courts, and seven other judges. **Administrative detention** is permitted in security cases, in which certain other **guarantees of due process are suspended**.

The judiciary has traditionally functioned with a **high degree of independence**. Most civil and criminal cases are **fair and open**. The accused must be brought before a judge within 24 hours of arrest. Defendants have the right to counsel and to bail. **Strict rules of evidence** apply in court and appeal is available to higher courts. Criminal defendants may also appeal for clemency to the paramount ruler or to the local state ruler. Severe penalties, including the death penalty, are imposed for drug-related offenses.

High courts have jurisdiction over all serious criminal cases and most civil cases. The sessions courts hear the cases involving landlord-tenant disputes and car accidents. Magistrates' courts hear criminal cases in which the maximum sentence does not exceed 12 months. The Court of Appeals has jurisdiction over high court and sessions court decisions.



FLASH POINTS

- The civil court system has its **roots in the English common law**, while the Syariah courts have jurisdiction to apply **Islamic law** on Muslims in cases of family law or Muslim tradition.
- Previously by an agreement with the United Kingdom, it was possible to **appeal a ruling of the Federal Court to the Privy Council** in the UK. This right was **abolished** for cases involving criminal and constitutional law in 1978, followed by civil cases in 1985. With no further appeals possible, the Federal Court was renamed the Supreme Court.
- In Penang and Melaka before independence, all questions of fact in a criminal case were **decided by a jury**. In the rest of the country, jury trials were extended to criminal cases involving capital punishment after independence, except in East Malaysia, where a judge sitting with two lay assessors heard criminal cases. In 1978, jury trials in Penang and Malacca were restricted to criminal cases involving capital punishment. Finally in 1995, the **jury system was completely abolished**.
- In 1988, the Prime Minister suspended the Lord President of the Supreme Court, Tun Salleh Abas; the top judge was later sacked by a tribunal for misconduct. Several other Supreme Court judges also were **sacked or suspended** for defending Tun Salleh Abas. Many in the legal establishment, not only at home but around the world, perceived the case as the government removing judges which did not as a matter of habit rule in its favour. The affair cast a cloud on the integrity and independence of the judiciary, which was now seen to be **subject to government interference**.
- In 1988, the government **amended the Constitution** to remove reference to the “judicial power of the Federation”, which previously was vested in the courts. Till today, the **Constitution does not specify where the judicial power in Malaysia lies**.
- In 1994, the government amended the Constitution to establish a **Court of Appeal**. At this time, the Supreme Court was again renamed the Federal Court, and the Lord President was now known as the Chief Justice of Malaysia.
- In 1996, High Court judge Syed Ahmad Idid Iyed Abdullah wrote to Chief Justice Mohd Eusoff Chin **alleging corruption** amongst several senior judges; he later resigned. A decade later, he claimed he was **forced to quit** for his whistleblowing.
- It is common practice to appoint **judicial commissioners** to act in lieu of judges in the High Courts; however, they are not given the same protection and privileges as judges, and only have a tenure of two years, rendering them **susceptible to the threat** of not having their term renewed.
- Senior **judicial appointments are often decided by the Prime Minister**; although the Chief Justice recommends candidates, it is up to the Prime Minister to confirm the appointment and submit the names to the Yang di-Pertuan Agong.
- In 2007, a videoclip was released showing prominent lawyer V. K. Lingam **fixing judicial appointments** with what appeared to be the then Chief Justice, Tun Ahmad Fairuz Sheikh Abdul Halim. A Royal Commission formed to investigate the clip recommended the **investigation of six prominent individuals**, including Fairuz, former Chief Justice Eusoff Chin and former Prime Minister Mahathir Mohamad for a variety of charges, including obstruction of justice.
- In 2008 senior High Court judge Ian Chin alleged that ten years previously judges had been subject to attending “boot camps” where they were instructed to consistently rule in the government’s favour.



STRUCTURE OF THE JUDICIARY

- Three **superior courts**: the **Federal Court** has original jurisdiction over disputes between the states and the federation, and hears criminal and civil appeals from the Court of Appeal. The **Court of Appeal** hears criminal and civil appeals from the High Court; it is also the court of final jurisdiction on all cases from the subordinate courts. The **High Court** generally hears all civil cases where the claims exceed RM250,000, in addition to many cases involving family and contract law. It also has unlimited jurisdiction on all crimes except those involving Islamic law, and original jurisdiction over all crimes where the sentence is capital punishment.
- Three **subordinate courts**: the **Sessions Court** hears civil cases with claims between RM25,000 and RM250,000, and also has unlimited jurisdiction over motor accidents, leasehold estates and distraint. It also has unlimited jurisdiction over all crimes except those punishable by death. The **Magistrates' Court** hears all civil matters worth less than RM25,000 and crimes punishable by not more than ten years in jail or a fine; it also hears appeals from the **Penghulus' Courts**, which hear civil claims worth less than RM50 and criminal offenses punishable by a fine of less than RM25.
- The **Court for Children** hears cases involving minors, unless the crime carries the death penalty, in which case the High Court has jurisdiction.
- The **Special Court** hears cases involving the Malay rulers, and comprises a panel of current and former judges from the superior courts.
- The **Syariah Courts** have jurisdiction over Muslims only, and enforce Islamic law.



WEAKENED JUDICIARY

- There are 10 Federal Court judges, 20 Court of Appeal judges, 48 High Court judges and 16 judicial commissioners qualified to sit in lieu of a judge at a High Court. Overall, including junior judges from subordinate courts, Malaysia has about **2.4 judges per million citizens**, as opposed to 10.5 in India and 51 in the United Kingdom.
- According to the President of the Court of Appeal, Tan Sri Zaki Tun Azmi, there are over **10,000 civil cases waiting to be heard** and 900 criminal cases left to be disposed of. As of 2006, there were **13,000 defendants in jail who had yet to be tried**. According to the Chief Registrar of the Federal Court, judicial backlogs in all areas have been **steadily worsening**.
- The repercussions of the 1988 judicial crisis can be felt until today. Lord President Tun Salleh Abas's dismissal came after he wrote to the Yang di-Pertuan Agong and criticised then Prime Minister Tun Mahathir Mohamad's **public outbursts against the judiciary**. However, he had also recently convened a panel comprising all 9 Supreme Court judges to hear allegations of corruption in the Umno party elections. Tun Salleh's sacking, followed shortly by the suspension of over half of the Supreme Court, was widely seen as an attempt to **curb judicial independence** and **protect Umno** from falling into further disarray.
- The 1988 amendments to Article 121(1) of the Federal Constitution have not only muddied the waters with respect to where the judicial power of the federation is vested, but also led to **confusion in the jurisdictions of the civil and Syariah courts**. The subsequent wording has led to the civil courts frequently and controversially disclaiming jurisdiction in cases involving Islam, even where a party to the case is non-Muslim and thus not subject to Syariah law. Notably, **R Subashini** had her marriage dissolved and lost custody of her children in a Syariah hearing; the **civil courts refused to intervene**, citing her husband's conversion to Islam, which they stated placed the case under the Syariah courts' jurisdiction. The non-Muslim family of Maniam Moorthy, who had reportedly converted to Islam, saw their application to halt his burial as a Muslim dismissed for similar reasons.
- The Royal Commission investigation into the V.K. Lingam scandal found evidence that several individuals, including the former Prime Minister and two former Chief Justices, were involved in the **fixing of judicial appointments and judicial decisions**. Other judges accepted gifts and bribes from Lingam and other key individuals. Shockingly, in one case, a judge's judgment was completely written by Lingam himself, who was a counsel for the plaintiff, Vincent Tan.
- Public confidence in the judiciary is mixed; a late 2007 survey by the Merdeka Centre found that less than half of respondents had a favourable opinion of the judiciary, with **36% stating they had an unfavourable view**. A July 2008 poll found that half the respondents were **not confident** the judiciary would handle the allegations of sodomy against opposition leader Anwar Ibrahim in a fair and independent manner.

WHAT THEY SAY

- "When I am asked what I thought, my usual reply is that **I wouldn't like to be tried by today's judges**, especially if I am innocent." - Former Chief Justice Tun Suffian
- "It is sufficient for us to state here that the collective and cumulative actions of the main characters concerned, had the effect of **seriously undermining and eroding the independence and integrity of the judiciary** as a whole. For the moment, we would state that there is sufficient cause to invoke the Sedition Act 1948, the Prevention of Corruption 1961, the Legal Profession Act 1976, the Official Secrets Act 1972 and the Penal Code against some of the principal individuals involved." - Lingam Tape Royal Commission
- "Are we just going to **ignore what the judges have said** and pretend the incidents never happened? Are we to allow this matter to be swept under the carpet without giving all those concerned a fair chance to be heard? Should we not be alarmed by the chilling disclosure of a 'boot camp' which strikes at the very heart of the independence of the judiciary and separation of powers?" - Bar President Ambiga Sreenevasan
- "I am **not suggesting that we re-open the case** [of 1988]. I am saying that it's clear to everyone, to the world, that **serious transgressions had been committed by the previous administration**. And I believe that the prime minister is big enough and man enough to say that we had done wrong to these people and we are sorry." - Zaid Ibrahim, Law Minister
- "For many, the events of 1988 were an upheaval of the nation's judicial system. Rightly or wrongly, many disputed both the legality and morality of the related proceedings. For me, personally, I feel it was **a time of crisis from which the nation never fully recovered**." - Abdullah Ahmad Badawi, Prime Minister
- "... the Government is proposing the setting up of a **Judicial Appointments Commission** to identify and recommend candidates for the judiciary to the Prime Minister. While **the constitutional prerogative of the Prime Minister to put forward names to the Yang di-Pertuan Agong will remain**, the Commission will help to evaluate and vet candidates in a systematic and credible manner for the Prime Minister, based on clearly defined criteria." - Abdullah Ahmad Badawi, Prime Minister

NEW REFORMS

- The government has acknowledged the **deep imprint of the 1988 judicial crisis** on the nation, and its long-lasting effects on the judiciary. **Ex gratia (goodwill) payments** have been made to the judges sacked or suspended during the crisis, albeit without any apology.
- The government has **empowered the Anti-Corruption Agency** to investigate charges of corruption at all levels — this includes the judiciary and legal establishment. The ACA no longer needs to go through the Attorney General to prosecute, and the government has promised to soon make it independent from the Prime Minister's Office.
- The government has ordered a **full investigation** by the Attorney General's office into the key individuals named in [the report of the Royal Commission on the Lingam Tape](#), and has said they may be charged accordingly.
- The government has promised in principle an **independent Judicial Appointments Commission** to vet judges for appointment to the superior courts; however, the **final discretion to appoint judges will still rest with the Prime Minister**.
- The government is **reviewing the remuneration and terms of service of judges** to attract legal talent and protect judicial independence.
- The government is **considering restoring the wording of Article 121(1)** to its pre-1988 version.



POLICY RECOMMENDATIONS

- The independence of the Judiciary should be protected by establishing an **independent Judicial Commission** on the appointment and promotion of Judges for the High Court, Court of Appeal and Federal Court.
- The **Rule of Law** and the fundamental rights enshrined in the Federal Constitution should be upheld, protected, instituted and enforced.
- The Judiciary should have the **exclusive authority** to decide whether an issue submitted for its decision is within its competence as defined by law.
- All executive decisions should be **subject to judicial review** to limit excessive executive influence over the judiciary.
- Support should be given to the Bar Council's efforts at conducting its judicial **review of the 1988 judicial crisis**.
- The subordinate courts should be **fully separated from the civil service**; the interchangeability between the functions of judge and prosecutor should be abolished.
- A National Commission should be established to **clarify the roles and jurisdictions of the Syariah Court and Civil Court**, where some confusion currently exists.

PARTY POSITIONS

Barisan Nasional

- *Ex gratia* payment to wronged judges of 1988; no apology or investigation into the events
- Supports independent judicial appointments commission in principle, but final authority will rest with PM; the Cabinet has reportedly not been keen on the proposal
- Supports restoring the wording of Article 121(1) to its pre-1988 version; this has also reportedly met with a lukewarm response from the Cabinet
- No official position on the separation of powers; various leaders have made statements for and against

Pakatan Rakyat

- Full investigation, apology and compensation to those affected by the judicial crisis of 1988
- Supports independent judicial appointments commission
- Supports restoring the wording of Article 121(1) to its pre-1988 version
- Supports the separation of powers
- Supports investigation into those named by the Royal Commission on the Lingam Video Clip