

IN THE HIGH COURT OF MALAYSIA AT KUALA LUMPUR  
(CRIMINAL DIVISION)

**PUBLIC PROSECUTOR**

*against*

**KARPAL SINGH**

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**FINAL REPORT BY *LAWASIA* OBSERVER MARK TROWELL QC  
ALSO REPRESENTING THE LAW COUNCIL OF AUSTRALIA, AUSTRALIAN  
BAR ASSOCIATION, AND CRIMINAL LAWYERS ASSOCIATION OF  
WESTERN AUSTRALIA**

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12 September 2002

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## **Introduction**

1. On the morning of 14 January 2002, the accused Karpal Singh appeared in the High Court at Kuala Lumpur before Justice Datuk Augustine Paul ready to resume his trial on a charge of sedition.
2. Karpal Singh had been charged with uttering seditious words during the sodomy trial of former Deputy Prime Minister Datuk Seri Anwar Ibrahim. He was alleged to have committed the offence while making a submission to the presiding Judge that the accused was being poisoned while in custody.
3. The trial had originally been listed to commence on 6 October 2001, but had been adjourned in circumstances where it clashed with a murder trial that had not been completed before the trial Judge. Given that the accused was in custody, it had been agreed that Mr Singh's trial be adjourned.<sup>1</sup>
4. At the time, a large number of local and international observers were obviously disappointed that the trial had been adjourned. It seemed to many that the delay had in some way been contrived in circumstances where the prosecution of Karpal Singh had increasingly become an embarrassment to the Government. There was considerable debate concerning the question of whether the matter would ever proceed to trial.
5. However, yet again the court had convened to hear the charge. The legal teams had assembled. A large number of observers (some from overseas, although less this time) had gathered to watch the proceedings in the small courtroom located off Jalan Raja in the lane way at the rear of the colonial High Court building. There was every indication that the matter would proceed that morning.

## **Counsel at Trial**

6. The Prosecution was represented this time by the newly appointed Attorney General, Datuk Abdul Gani Patail, together with deputy public prosecutors Yaacob Sam, B. K. Tan and Duncan Sikodol. Karpal Singh again appeared for himself from the dock assisted by his sons Jagdeep Singh Deo, and Ram Karpal Singh. Also appearing at the bar table on a "watching brief" for the Malaysian Bar Council was Bar Council Vice President Roy Rajasingham.

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<sup>1</sup> Refer to my First Report of 6 December 2001 for details of the adjourned proceedings.

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## **Observers**

7. After counsel had announced themselves to Justice Augustine Paul, Karpal Singh informed his Lordship that there were a number of observers who were also present in court including Richard Gibbs QC for the *Law Society of British Columbia*; Ms Gail Davidson for *Lawyers' Rights Watch Canada*; Gerald Gomez for the *Commonwealth Law Association*; Dato' Param Cumaraswamy, the *UN Special Rapporteur on the Independence of Judges and Lawyers* and myself representing *LAWASIA*, the *Law Council of Australia*, the *Australian Bar Association* and the *Criminal Lawyers Association of Western Australia*.
8. Other interested persons in court included representatives of the various embassies, namely John Marshall, Head of Political, Economic and Public Diplomacy Section of the *British High Commission*; Leslie James from the *Canadian High Commission* and Damian Miller, Third Secretary (Political) of the *Australian High Commission*. Opposition political parties were also represented including party leaders Lim Kit Siang, National Chairman of the *Democratic Action Party (DAP)* and *Parti Keadilan Nasional* President Datin Sri Dr Wan Azizah Ismail together with *DAP* members friends and supporters. Also in Court were Anwar's wife and his legal counsel Mr Sankara N. Nair.

## **The Trial**

### *Preliminary Issues*

9. Before the commencement of the trial, there was an animated and sometimes heated exchange between Karpal Singh and the trial Judge concerning various issues of procedure. Essentially, the Judge believed three issues needed to be resolved before the trial could proceed. They were:
  - (a) whether any official status should be granted to the foreign observers assembled at court;
  - (b) whether the Malaysian Bar Council should be entitled to attend the proceedings on a 'watching brief'; and
  - (c) whether Karpal Singh should be entitled to defend himself in circumstances where his sons were present as counsel assisting him.

### *Domestic and Foreign Observers*

10. The discussion concerning the status of observers became particularly acrimonious.
11. Karpal Singh submitted that legal observers should be officially recognised given the serious nature of the charge brought against him

and given also that it had allegedly been committed in circumstances where a lawyer had been carrying out his duties in court for and on behalf of a client. He submitted that not only was it in the interest of the legal profession to monitor proceedings, but that it was also in the public interest that the proceedings be seen to be transparent.

12. Justice Paul responded that the proceedings were open to be observed by anyone and would be reported by the press. Karpal Singh replied that observers should be there to ensure that "*nothing went amiss*" and that he be accorded his rights.
13. Referring to a recent Appeal Court decision, where the Court had observed that Justice Paul in another case had seemed to "*act more as a prosecutor than a judge*" in dealing with a contempt proceeding, Karpal Singh stated that in his case it was necessary that the Judge "be observed" to ensure he did his duty.<sup>2</sup> He went on to conclude that:

"...That remark from the Federal Court has created some fears and I am of the opinion that your Lordship should be observed and subjected to tribunal...our criminal justice system will be on trial. In fact, I have an application to disqualify your Lordship from hearing the trial"

14. Justice Paul was quick to reply that it was offensive to make such remarks and he considered it an attack on his independence as a judge and improper to suggest that he needed to be observed to carry out his duties properly. Such a submission, he said, bordered on contempt and it was professional misconduct to seek to use the observers to impose pressure on him.
15. For his part, the Attorney submitted that it was a matter for the Judge's discretion as to whether to allow observers at the trial, but he observed that the proceedings were open to any member of the public, including foreign visitors who may have an interest in the matter.
16. Having heard this submission, Justice Paul concluded that this application would be refused and the observers could sit in the public gallery like any member of the public and would not be accorded any special status at the trial.

#### *Watching Brief for Bar Council of Malaysia*

17. Although the watching brief procedure is not common to all legal systems, for some years it has been the convention that the Bar Council of Malaysia appears at cases thought important to its members. The right to appear has not always been granted, but is a matter of judicial discretion. Counsel appearing on behalf of the Council, usually the

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<sup>2</sup> *Zakaria v Public Prosecutor* [2001] 3MLJ

President or his nominee, will robe and appear at the bar table and if asked by the presiding judge may make submissions on matters of law.

18. The Bar Council relies on the *Legal Profession Act 1976 (Act 166)* to provide a basis for allowing it to appear in this capacity. Section 42(1)(e) describes one of the Council's functions as "... to represent, protect and assist any member of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia."
19. The Attorney General advised Justice Paul that he had no objection to the Bar Council taking a "*watching brief*", although it was his personal opinion that generally it was unnecessary.
20. Justice Paul stated that he did not substantially oppose the application so long as the representative of the Bar Council came to court with an "*independent mind*." He went on to observe wryly that he thought that might not be possible given the terms of the recent resolution of the Council, which had been highly critical of him. His Lordship also asked whether Mr Rajasingham was at court to represent the Bar Council or Karpal Singh?
21. Bar Council Vice President, Roy Rajasingham, hastened to assure his Lordship that his mind was open on the proceedings and he simply wanted to see "*justice done*". The Judge seized upon this later remark to suggest that it was made simply to impose some further pressure on him.
22. Mr Rajasingham quickly assured the Judge that his comment was not intended in any way to pressure him, but his Lordship would not relent and forced him to withdraw the comment.
23. Having extracted that concession, Justice Paul then gave every impression of reluctantly agreeing that the Bar Council could attend at the bar table and hold a watching brief over the proceedings. He said he was prepared to consent, but only on the basis that:
  - (a) Mr Rajasingham appeared with "*an independent mind and for the betterment of the Bar*";
  - (b) the comment relating to "*seeing justice done*" had been withdrawn; and
  - (c) there being no objection from the Attorney General.

#### *Representation of the Accused*

24. Justice Paul then asked whether it was appropriate for Karpal Singh to represent himself and still have counsel assisting him?
25. The point probably had some merit, for it will be recalled that at the bar table appearing for him were his lawyer sons Jagdeep Singh Deo and Ram Karpal Singh.

## **Attorney General Withdraws Charge**

26. Before this matter could be argued, the Attorney General rose to his feet and asked if he could make a statement. At the same time copies of the prepared statement to be read were given to Karpal Singh and the Judge. The courtroom fell silent as he proceeded to read from the one-page statement as follows:

“The office of the Public Prosecutor has received numerous representations from domestic and international legal bodies soon after En Karpal Singh was charged for the present offence seeking a reconsideration of the pending charge against En Karpal Singh. Various legal considerations have been, raised in support of the representations. The Public Prosecutor, apart from those representations, have (*sic*) reflected upon the tense atmosphere and circumstances at the time En Karpal Singh uttered those words (the subject matter of the charge) which was made in open court. It was very tense indeed and the then Public Prosecutor immediately stood up to express his grave concern and undertook to instruct the police to commence a thorough and swift investigation.

Reports from experts of international standing revealed that the arsenic content was within the permissible level and was caused by the food consumed by Dato' Seri Anwar bin Ibrahim whilst in prison. The tests and investigation showed that there was no impropriety attributed to the prison authority or anybody. The food was the same as provided to all people under detention. Thus the allegations made by En Karpal Singh were clearly baseless. The Public Prosecutor viewed that the allegations made by En Karpal Singh went beyond the limit of defending his client for the case in the trial. The complaint was entirely a different matter separate from the matter on trial.

Today, having reconsidered the circumstances and the representations, and taking into consideration the public interest, the Public Prosecutor is of the view that it is appropriate to exercise his discretion under Article 145 of the *Federal Constitution* to discontinue and withdraw the charge against En Karpal Singh under section 4(1)(b) of the *Sedition Act 1948*.”

Dated 14 January 2002

**Dato' Abdul Gani Patail**  
Public Prosecutor Malaysia

27. Mostly everyone in the Court seemed to be taken by surprise. As he resumed his seat, one could not fail to sense the Attorney's obvious mischievous delight in extracting all the necessary drama from the occasion.

28. An acquittal order should have come swiftly after that, however, Justice Paul would not be denied some retribution upon the person who had so defiantly challenged his authority. Karpal Singh stood up and tried to address the Court in response to the Attorney's statement, but the Judge would not listen to him.
29. Justice Paul then observed that should he accede to Karpal Singh's application and disqualify himself from the case, how then could he dismiss the charge? Karpal Singh replied that he intended to withdraw the application for disqualification, saying it would be more in the Judge's interest that he do so. That comment sparked a prickly response from Justice Paul, who said that he had no problem in proceeding with the application but demanded to know what "*interest*" Mr Singh was talking about.
30. The impasse was only broken when at the urging of the Attorney General, Justice Paul agreed to do what had been asked of him, but again his Lordship would not be denied.
31. In dismissing the charge, Justice Paul also directed that the Registrar of the Court refer Karpal Singh's earlier conduct to the Bar Council's *Advocates and Solicitors Disciplinary Board* for disciplinary action to be taken against him. His Lordship said:

“(these remarks were) an open and blatant attack on the judiciary. I find that statement to be contemptuous. It's an attack on my impartiality and the biggest insult to the judiciary. I cannot tolerate that.”

### ***The Aftermath***

32. To the considerable excitement and relief of the many friends and supporters in the Court, Karpal Singh was released. He told the assembled media waiting outside the Court:

“...(the withdrawal of the charge) is a credit to the new Attorney General...it's a relief after having this hanging over me for so long. This is a step in the right direction for Malaysia's legal system, but I am surprised that they decided to wait for such a long time before dropping the case.”<sup>3</sup>

33. *DAP* national chairman Lim Kit Siang also welcomed the decision saying that he hoped the decision would be the first step in the restoration of a professional and independent Attorney General's office. He said his Party had repeatedly called on the Attorney General to drop the charge since Karpal Singh's arrest on January 12, 2000, but the decision was a

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<sup>3</sup> *The Star*, Wednesday, January 16, 2002

“a total, but pleasant surprise”. Lim said the move had won the new Attorney General the “*grudging*” approval of the legal profession. He said also that:

“It is a good start for Gani as the new Attorney General, although I stand by every word I had said challenging the propriety and wisdom – but not his capabilities – of his appointment....The DAP had warned that the prosecution of a lawyer for comments in court will cause irreparable injury to justice.”<sup>4</sup>

34. The Bar Council's Vice President, Roy Rajasingham, told the media he was happy with the withdrawal of the charge and that the Attorney General's act “*augurs well*” for the legal profession because “*the Bar and the Attorney's Chambers would have to work together in the best interest of the public and justice*”.<sup>5</sup>

### **The Tactical Game?**

35. The adjournment of the trial in October 2001, really gave no indication of the Government's resolve to prosecute the charge of sedition against Karpal Singh. The parties had no choice other than to agree to a delay, given that the murder trial before the Judge was part-heard and the accused man was in custody.
36. However, there were factors that some optimists relied on to suggest that the Government was in fact looking for an excuse to withdraw from the proceedings without losing face.
37. First, it had been over two years since Karpal Singh had been charged. His comments had been made at a time when former Deputy Prime Minister Datuk Seri Anwar Ibrahim was standing trial. On any assessment, that was a politically volatile period. Anwar had since been convicted, imprisoned and was no longer a real political force. For all that time, Karpal Singh had been under substantial personal and professional pressure. In all probability, that was something that had undoubtedly curtailed his customary political outbursts against the Prime Minister and the Government. Given the change of circumstance, perhaps his prosecution now seemed less important.
38. Secondly, a large number of foreign observers had travelled to Kuala Lumpur to observe the first proceedings in October 2001. The number of observers attending must have caused the Government some concern, but an adjournment also meant that the prospect of returning again in January 2002 would impose a substantial financial burden on some organisations. There was every chance that some would not be able to afford to send observers back a second time. Some believed the

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<sup>4</sup> *New Straits Times*, Tuesday, January 15, 2002

<sup>5</sup> *The Star*, Wednesday, January 16, 2002

Government was content to employ a tactic to shake off foreign observers by finding reasons to adjourn the trial at the last moment. Undoubtedly, that would mean less international scrutiny if the prosecution finally abandoned the proceedings in January.

39. Finally, there had been some optimism that the charge would be withdrawn because of the appointment of a new Attorney General, Ainum Mohd Saaid. She was not the person who had brought the charge in 1999 and was said not to favour it.
40. However, these hopes seemed dashed when Ainum Mohd Saaid resigned supposedly on grounds of ill health on 31 December 2001. She was replaced by senior deputy public prosecutor Abdul Gani Patail. Gani's appointment was considered controversial due to his involvement as chief public prosecutor in ex-deputy prime minister Anwar Ibrahim's sodomy and corruption trials. The political opposition to Gani's appointment was substantial with claims that it had been unconstitutional. There was every expectation that he would be hostile to Karpal Singh.
41. Something else had also occurred which some believed might harden the Government's attitude towards Karpal Singh. On 17 November 2001, he obtained a ruling from the High Court declaring unconstitutional the order authorising his detention in 1987 under the *Internal Security Act*. The Home Minister, who had made the order unlawfully detaining him for over 10 months, was the current Prime Minister, Dr Mahathir. This ruling opened the way for what was anticipated to be a substantial award of damages against both Dr Mahathir and the Government.
42. In any event, speculation continued as to whether the Government would proceed with the prosecution. The Attorney General's Office gave no indication of any intention other than to proceed with the trial. Nothing was said by Attorney General Ganil until his shock announcement in Court on the morning of the trial.
43. It is difficult to say what caused the Attorney General to withdraw the charge on that morning. Many suggest that he would not have made that decision without obtaining the consent of the Prime Minister. Perhaps, as some had earlier suggested, the need to prosecute was less important given that Dr Mahathir had won his battle against Anwar and his supporters. Karpal Singh may not have been convicted, but certainly he had in a very public way been punished.
44. The Government had also come under considerable attack over the appointment of the Attorney General. Allowing Gani to withdraw the charge enabled the Government to enhance his image by portraying him as a moderate and independent Attorney General. The resulting publicity suggested that if this was intended, it worked with newspaper headlines

such as "Abdul Gani Now Seen in New Light" (*The Star*, January 16, 2002).

### ***The Prosecution of Justice Augustine Paul***

45. Four days after his acquittal, Karpal Singh appeared in the High Court in an entirely different capacity. This time he appeared to prosecute Justice Paul for contempt of court.
46. This was an unusual and controversial prosecution. Many suggested that it was not appropriate for Karpal Singh to prosecute Justice Paul in these circumstances. Others suggested that given Karpal Singh's representation of the complainant, the Judge should have disqualified himself from hearing the sedition charge against Karpal. The fact is that both men had become snared in the political squabble between the most senior members of the Government. It was a squabble that almost destroyed a principle fundamental to the effective operation of that country's legal system.
47. Lawyer Chris Fernando had brought a private prosecution against the presiding Judge for contempt for remarks made against him during the corruption trial of former deputy Prime Minister Anwar. After a particularly heated exchange with Fernando, Justice Paul was reported as later in the proceedings remarking:

"...if his (Fernando) way of speaking is like an animal, we can't tolerate it. We should shoot him. He should change".
47. The last hearing of the application had been on December 13, 2001. That was less than a month before Karpal Singh was to appear at his own trial to answer the charge of sedition. No wonder there was open hostility between the two men when they met that time in court.
48. On this morning, the courtroom was packed. Apart from the media, the spectators in the public gallery were mostly supporters of the imprisoned Anwar Ibrahim, including a number of the senior office bearers of the *Free Anwar Campaign*.<sup>6</sup>
49. Understandably, many of these people felt a strong sense of grievance against the judge who had presided over Anwar's first trial in such a controversial manner and who had ultimately convicted him and sent him to prison. Many of them had attended the Karpal Singh trial earlier that week. Their animosity towards Justice Paul was on that morning equally as palpable.

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<sup>6</sup> Refer to the website of the *Free Anwar Campaign*: [www.freeanwar.com](http://www.freeanwar.com)

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50. Justice Paul had not appeared at the earlier hearing in December, nor had he come to court this time. There had been some earlier indication that the Attorney General might intervene, but now counsel from his Chambers had appeared and sought leave to appear on the Judge's behalf.
51. Representing the Attorney's Chambers were senior Federal Counsel Datuk Abdul Aziz Abdul Rahim and his juniors. Appearing for the complainant were a large number of counsel. These included Karpal Singh, his three sons Gurbachan Singh, Gobind Singh Deo, and Ramkarpal Karpal Singh, Pawancheek Merican, S.N.Nair (Anwar's lawyer) and the complainant himself, Chris Fernando. Also in attendance were lawyers appearing on a watching brief for the *Malaysian Bar Council*, namely its President Mah Weng Kwai and Gerald Gomez (who had appeared as an observer for the *Commonwealth Law Association* at Karpal Singh's trial). *UN Special Rapporteur on the Independence of Judges and Lawyers*, Dato Param Cumaraswamy and I attended the proceedings as observers.
52. Karpal Singh immediately made application to the presiding Judge, Justice Datuk Hashim Mohd Yusof, that he issue a bench warrant to arrest Justice Paul for failing to appear. Then followed a lengthy submission in which lawyers for the complainant argued that the Attorney could not intervene to act for Justice Paul for he did not have the standing to do so. In reply, Abdul Aziz maintained that Article 145 of the *Federal Constitution* allowed the Attorney to represent any public officer or anybody who was performing functions under the Constitution.
53. Justice Yusof reserved his decision concerning the standing of the Attorney General to intervene to act of behalf of a judge. As for the application to issue a warrant for the arrest of Justice Paul, his Lordship said it was up to Paul whether to come to court pending his decision on the matter.
54. On 1 March 2002, Justice Yusof delivered his decision finding that the Attorney General could appear for Justice Paul. Chris Fernando immediately appealed against that decision and applied for a stay. The Court of Appeal granted the stay. At the time of writing this paper, this matter is still pending.
55. The point of describing these proceedings is to illustrate the suspicion and hostility that exists between the legal profession, the judiciary and the executive in Malaysia.

## **History of Conflict**

56. The political squabble between the Prime Minister and his deputy had been intensely bitter and ruthless. The strain on the Malaysian justice system was considerable involving lawyers and the judiciary equally.
57. There is no doubt that relations between the Malaysian Bar and the Government started to significantly deteriorate after 1986.
58. During that year, the Bar Council had been extremely critical of various statutory reforms introduced by the Government. When Vice President of the Bar Council, Dato Param Cumaraswamy, issued a press release criticising the Pardons Board for failing to commute the death sentence imposed on a poor worker who had been convicted of possessing a firearm contrary to the *Internal Security Act 1960*, he was arrested and charged with an act of sedition.<sup>7</sup>
59. In commenting on the case, he contrasted it with a similar conviction of a former Government Minister whose death sentence had been commuted. He drew attention to what may be seen as discrimination between rich and poor. Dato' Param said:
- “The people should not be made to feel that in our society today the severity of the law is meant only for the poor, the meek and the unfortunate whereas the rich, the powerful and the influential can somehow seek to avoid the same severity.”
60. The prosecution of Dato' Param Cumaraswamy obviously caused considerable concern within the legal profession that the executive had targeted the Bar in an attempt to silence it. The Dato' was ultimately acquitted, but the message was clear.<sup>8</sup>
61. The judiciary was next to come under attack. In 1988, the Government had been rebuffed by the higher courts in a series of decisions unfavourable to it. The Prime Minister reacted savagely, making strong and continuing public attacks on the judiciary coupled with threats that the government would ensure that the judiciary would comply in one way or another with his wishes.
62. Then followed a crackdown on the political opposition and the press. In what was known as *Operation Lalang*, over 100 persons were detained under the *Internal Security Act 1960*. These persons included the leader of the opposition and other senior opposition figures. Four newspapers were also suspended. Prime Minister Mahathir then also initiated a series

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<sup>7</sup> *Public Prosecutor v Param Cumaraswamy* [1986] 1 MLJ 512

<sup>8</sup> Distinguished Malaysian lawyer, Dato' Param Cumaraswamy has for some years now been the *United Nations Special Rapporteur on Independence of Lawyers and Judges*.

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- of constitutional and legislative amendments that severely circumscribed the role of the judiciary, including restricting the powers of judicial review.
63. These legislative amendments effectively removed from the Malaysian Constitution the separation of powers, conferring significant authority on the Attorney General and making the judiciary subject to the executive.
  64. The increasing tension between the judiciary and the government culminated in the unprecedented suspension in that year of six Supreme Court judges and the subsequent removal of three of them, including the Chief Justice (then known as the Lord President of the Supreme Court).
  65. The Bar Council's relationship with the remodelled judiciary became extremely strained after these events. In fact, the Council passed a vote of no confidence in the judiciary and socially ostracised the new Lord President.
  66. Communications were gradually restored after 1994, but below the surface were strong feelings of distrust and hostility. The legal profession generally regarded the judiciary as acting politically and more often than not in favour of the government. It also believed that on occasions some judges would use their judicial power against lawyers oppressively and unjustly. The government view was that the Bar Council had become a 'political' opposition whose activities must be curtailed, while the judges felt that lawyers were all too ready to attack the judiciary in the media and lower its prestige.<sup>9</sup>
  67. Since 1988, the executive has directly interfered with the administration of justice within Malaysia and has exerted considerable pressure on the legal profession.
  68. Politically, it has taken various forms. For example, amendments to the *Legal Profession Act (1976)* disqualified politicians from membership of the Bar Council. The Prime Minister and his various Attorneys General have constantly spoken critically of the Bar Council often issuing warnings to those who are critical of the executive that they risk prosecution under the *Sedition Act*.<sup>10</sup>
  69. Police officers have also on occasions exerted undue pressure on lawyers by attempting to seize confidential client documents and issuing threats to counsel.

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<sup>9</sup> "Justice in Jeopardy: Malaysia 2000", Report of the International Bar Association Joint Mission to Malaysia (in conjunction with the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (CIJL), the Commonwealth Lawyers' Association (CLA) and the Union of Internationale de Advocats (UIA), Journal of the Malaysian Bar, page 6

<sup>10</sup> "Justice in Jeopardy: Malaysia 2000" Report, page 11

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70. Within the legal process, judges have dealt with lawyers by using, or threatening to use, the contempt law. It is said that judges feel that the law of contempt has to be interpreted robustly in order to uphold professional standards amongst the legal profession. However, they are quick to use it to defend their dignity rather than prevent conduct that may prejudice the right to a fair trial. The *Sedition Act* has also been used against lawyers, of which Karpal Singh is only the most recent example. Defamation actions have also been used as a weapon against lawyers for statements made about cases before the courts. Generally, these types of responses can only be seen as designed to inhibit free speech and expression.
71. Is it any wonder that many senior lawyers appear to treat judges with an apparent lack of respect when appearing before them? It may also explain why counsel constantly call upon judges to *recuse* themselves in many of the high profile cases. It has been suggested that it would be more appropriate for the executive and the judiciary to regard such behaviour as a symptom of a lack of confidence in the true independence of the judiciary.<sup>11</sup>

### **What Was It All About?**

72. This paper is not meant to be a detailed study of the recent history of the Malaysian justice system. Others have written exhaustively on that topic.<sup>12</sup> However, some explanation was necessary to explain what occurred in the Karpal Singh case, for it was by no means an isolated or uncharacteristic incident. It is a case that illustrates the curious blend of politics and law that constantly threatens the integrity of the justice system in Malaysia.
73. Without doubt Karpal Singh had been provocative in suggesting that he suspected that "*people in high places*" were responsible for poisoning his client while in custody. Of course, there was a legitimate basis to complain about a possible poisoning of Anwar based on the test results of the blood samples taken from him. He also had a basis to blame the police or prison authorities, given that the accused was at the time within their custody and supposedly under their care.
74. However, in the context of Anwar Ibrahim's trial, there could be little doubt he was talking about Prime Minister Mahathir. Even if he had not meant Dr Mahathir, most people would think he had. Whatever the suspicion might have been, no evidence was ever presented that could have proved such an allegation.

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<sup>11</sup> "Justice in Jeopardy: Malaysia 2000" Report, page 25

<sup>12</sup> "Justice in Jeopardy: Malaysia 2000" Report

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75. There was also more 'fall-out' for other counsel appearing for Anwar Ibrahim.
76. During the corruption trial, one of Anwar Ibrahim's legal team, Zainur Zakaria, had made an application to the presiding judge to exclude two of the prosecutors (one of whom was the current Attorney General Abdul Gani Patail) on the ground they had attempted to fabricate evidence against the accused. Justice Augustine Paul refused to hear the application ruling that it was not only misconceived, but also an abuse of process amounting to a serious contempt of court. He sentenced Zakaria to three months imprisonment to be served immediately. Refusing an application to stay the sentence pending appeal, it was only some days later that such an order was obtained from the Court of Appeal.
77. Justice Paul also issued a bench warrant for the arrest of the lawyer acting for a colleague of Anwar Ibrahim, who had written the letter on which the application was based. He was also charged with contempt, but the prosecution was discontinued after he explained that his permission had not been obtained to use the document. He was also forced to apologise to the court for disrupting the trial. The Judge and the Attorney General accepted the apology.
78. Another of the defence legal team, Chris Fernando, was later to be involved in conflict with the Judge. I have already referred to the heated exchange between them and the subsequent remarks by Justice Paul that ultimately resulted in the contempt prosecution being brought against him.
79. Finally, members of Anwar Ibrahim's defence team were threatened with contempt when they refused to make final submissions in the case until the Judge had ruled on an earlier application that he *recuse* from continuing to hear the case. That application had been made because of a "*grave apprehension*" on the part of Anwar Ibrahim that the Judge was neither impartial, nor unprejudiced towards him. On this occasion, the Judge backed-off on the threat of contempt, but refused the application to disqualify himself.
80. Again this paper is not the appropriate vehicle to consider all the complaints about the Judge's behaviour and his rulings at the trial of former Deputy Prime Minister Datuk Seri Anwar Ibrahim. Concerns raised in Malaysia and by the international community seem fully justified, but the appeal brought on behalf of Anwar has since failed. It should be mentioned if only as a postscript.

### ***Anwar Appeal Rejected: Where Now?***

81. On 10 July, 2002, Chief Justice Mohamed Dzaidin Abdullah, Chief Judge of Sabah and Sarawak Steve Shim and Federal Court judge

Haidar Mohd Noor unanimously dismissed Anwar's appeal against his six years' jail sentence for four counts of corrupt practices for tampering with the police investigation into allegations of sexual misconduct. The Chief Justice reflected the view of the Appeal Court stating that:

"...We have considered all complaints made by the appellant, in particular the question of unfairness of the trial judge throughout the proceeding. Suffice for me to say here after reading, and studying the grounds of judgement of the court below, we are satisfied that the errors complained of have not occasioned a substantial miscarriage of justice and we have to plainly say so and to uphold the conviction. The appeal against the conviction is accordingly dismissed."

82. The Chief Justice also said that the court saw no reason to interfere with Justice Paul's decision to sentence Anwar to six years jail which he said "*was not excessively excessive*".

83. Anwar responded to the judgement with an impromptu speech from the dock condemning the Chief Justice for his "*charade of impartiality*" and dashing the hopes of the *rakyat* to see the judiciary rise again. According to observers, the Chief Justice sat stony faced as Anwar described the judgment as "*a self-indictment by the highest court of the nation, a blatant betrayal of the people's trust*" and "*a perversion of the rule of law*".

84. The public gallery was packed with Anwar supporters many of whom refused to stand as the Judges rose to leave. Some even heckled them as they left the Court. Turning to the press surrounding him at the dock, Anwar said he had expected the decision by a judiciary, which was under the control of Dr Mahathir. He also taunted the Prime Minister saying:

"Dr Mahathir has no guts to face me. He does not have any courage because he muzzles the media and the police. He should make a stand. Don't use last year's Sept 11 attacks on the US as a tool to continue oppressing the people."

85. One of lawyers appearing for Anwar Ibrahim on that morning was Karpal Singh. He told the media that the decision had contradicted the one made in the Zainur Zakaria appeal (against his conviction for contempt of court) in which Justice Paul's conduct as a judge was questioned by the Federal Court. He said the court should have at least found Justice Paul's order, that is to have the sentence start from the date of judgment, as irregular. He went on to say that:

"In that judgement, a federal court judgement had even said that he had acted like a prosecutor. His conduct as the trial judge was questioned. That fact alone should have at least warranted a re-trial if not an acquittal."

86. Other lawyers and observers had plenty of adverse comments to make about the refusal of the appeal. It prompted widespread responses from various national and international entities including the European Union, which condemned the decision expressing “*its disappointment that the verdict has been upheld on final appeal ... after recalling... its deep concern about the fairness of the trial*”.<sup>13</sup> The United States Department of State also expressed its obvious disappointment at the result urging the Malaysian Government to ensure that justice is done in Anwar’s case.<sup>14</sup> The judiciary was also denounced by various human rights organisations, including in Malaysia the *National Human Rights Society (Hakam)* and *Suaram*.
87. Well known journalist, James Wong Wing On, reported that the Federal Court rejection of the Anwar appeal means that politics in Malaysia has seen a great shift in power that may last for years to come. Writing for the *BBC World News Service* he wrote:
- “First and foremost is the reality that, barring extraordinary events or incidents, the former protege of Prime Minister Mahathir Mohamad will be physically kept away not only from his family, but from his supporters and sympathisers for a long time. For some, with the passage of time, the memory of Anwar Ibrahim, 54, will fade and his influence wane.”
88. Certainly, the *reformasi* (or reform) movement Anwar Ibrahim inspired has dissipated, with several of its leaders detained without trial under the draconian *Internal Security Act 1960 (ISA)* for allegedly promoting insurrections against the state. The once-dynamic alliance of opposition parties known as the *Barisan Alternatif (BA)* is in disarray.
89. The party forged in the heat of the *reformasi* movement, *Keadilan*, or the *National Justice Party*, is still led by Anwar Ibrahim’s wife, Dr Wan Azizah Ismail, but senior defections have severely dented its impact and morale. The momentum for political reform has also been unexpectedly reset by the 11 September attacks on New York and Washington in 2001.
90. Some observers cynically take the view that despite the Prime Minister’s theatrical announcement at a recent *Umno Party* conference, he has no intention of retiring and relinquishing the power he so firmly keeps as his own and uses so often to get his way.
91. Given Dr Mahathir’s public antipathy towards lawyers, there seems to be little prospect that the current pressure exerted by the executive on the legal profession will be relaxed at all. Lawyers will continue to be seen as a ‘political opposition’ because they will inevitably represent persons

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<sup>13</sup> Press Release “*European Union Condemns Anwar Ibrahim Verdict*”, 13 July 2002

<sup>14</sup> *Malaysiakini*, 5 Sept 2002

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opposed to the government or persons in some way affected adversely by the exercise of its legislative or political power.

92. So long as the legal profession believes the judiciary to be a puppet of the executive, the relationship between them will continue to be strained. Many senior lawyers simply do not accept that the judiciary can be impartial and independent. They point to the current method of appointment to the bench and the control exercised by the executive over judges by reason of that process.<sup>15</sup> Reference has earlier been made to the attitude of the judiciary towards the legal profession.
93. At the end of what had proved to be an eventful week, *Transparency International Malaysia* held a public policy forum on 19 January 2002 at the Royal Selangor Club.<sup>16</sup> Dato' Param Cumaraswamy spoke of the extent to which the Malaysian Constitution failed to measure up to minimum international and regional standards he believed were essential for an independent judiciary in a democracy.<sup>17</sup> He concluded by saying that:

“Unless these values are seen to be shared by the executive and legislative arms of the government and applied and implemented in good faith proposals for reversing the prevailing perceptions (of the judiciary) will be wishful thinking.”

94. What then are the prospects for reform? An essential requirement for the protection of human rights in Malaysia is an effective independent and impartial judiciary. It is suggested that so long as the current political leadership holds power, then the chance for the reformation of the judiciary is remote. So long as the executive continues to wield its power and influence within the justice system, the judiciary will continue to be seen as a body that is always too ready to protect the state, rather than the individual.

### **Postscript**

95. There is one matter I should deal with. In this paper, some of the persons who provided information or opinion are described as 'observers'. This is not a literary device to present my own views as that of others. These people asked that they not be named in any report that I might publish.

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<sup>15</sup> There is a high level of recruitment of judges, particularly from the subordinate courts, from the *Judicial and Legal Service*, which allows for the frequent interchange of judges and prosecutors. There is the perception that criminal justice is being dispensed by prosecutors and judges from the same legal service.

<sup>16</sup> During this week we had seen the prosecutions of both Karpal Singh and Justice Augustine Paul. I was fortunate enough to be invited to this very timely policy forum

<sup>17</sup> Paper delivered to a public policy forum for Transparency International Malaysia, "*The Malaysian Judicial System: Reversing the Negative Perceptions both Domestically and Internationally*", January 19, 2002 at Kuala Lumpur

Perhaps this might be seen as being overly dramatic, but they gave as a reason the current political situation in Malaysia. In other cases, the 'observers' are named in the footnotes.

96. Members should also be aware that Karpal Singh was extremely appreciative for the support and assistance that had been given to him by the various international organisations that appeared as observers at the various proceedings. He has since written to me in the following terms:

5 March 2002

Dear Mr Trowell,

I write to place on record my appreciation and gratitude for your assistance in my sedition trial. It was a privilege to have met you.

Please convey my thanks and appreciation to the Law Council of Australia, the Australian Bar Association and the Criminal Lawyers Association of Western Australia whom you represented and, of course, LAWASIA.

With kind and warm regards.

Yours sincerely,

Karpal Singh

97. Finally, may I take this opportunity of extending my deepest appreciation to the persons responsible for sending me to attend as an observer in Malaysia. Firstly, to the Executive Committee of LAWASIA for appointing me to represent it on this important mission. In particular, may I make special mention of the Hon. David K. Malcolm AC CitWA, Chairman, Judicial Section of LAWASIA and Chief Justice of Western Australia for his faith and support in proposing that I represent the organisation. Special thanks also to Janet Neville, Secretary-General LAWASIA (Acting), for her invaluable support and assistance.
98. Additionally, I should express my appreciation to those organisations that also asked that I represent their interests in Malaysia and that also provided financial assistance. These included Tony Abbott, President of the Law Council of Australia; Ruth McColl SC, Past-President *Australian Bar Association* (and her successor David Curtain QC) and Richard Bayley, President of the *Criminal Lawyers Association of Western Australia*. All of whom, together with LAWASIA, I was proud to represent.
99. There were also many persons who helped me on the ground in Kuala Lumpur. Special mention should be made of Dato' Param Kumaraswamy, *United Nations Special Rapporteur on the Independence*

of *Judges and Lawyers*, Mah Weng Kwai, President of the Malaysian Bar Council, and his Vice President Roy Rajasingham.

100. Finally, I should also make mention of the assistance of the Federal Minister for Justice and Customs, Senator Christopher Ellison for providing me with diplomatic support in Malaysia and to the staff of the Australian High Commission, including Damien Miller (Third Secretary Political) who assisted with valuable information and advice.
101. This report should not end without at least some mention of the person at the centre of this drama. Karpal Singh is a larger than life character. He is part rascal, part fearless advocate. For decades he has been a thorn in the side of the Malaysian Government. He has been an outspoken advocate of human rights and for over 28 years was an opposition member of parliament highly critical of the ruling party. Sometimes, the lawyer and the politician merge. In most other legal systems that would not be appropriate, but in Malaysia it is unavoidable. The political and legal systems constantly collide in Malaysia.
102. Some persons were critical of Karpal Singh for making what they believe was a political statement in court, even though he was appearing as an advocate. Obviously, he stretched the limits of political tolerance in Malaysia with his comments, but there was every basis to complain and it would have been wrong not to do so. However, in the context of that trial, once having made the remark about "people in high places" he immediately became a political target.
103. The advisability of making those comments may be debated endlessly, however, we should rather focus on the nature of the response. Some Malaysian lawyers have in the past been charged with sedition, but not for things said in court. As far as is known, the charging of Karpal Singh is the first instance anywhere in the world where a lawyer has been accused of sedition for words spoken in the defence of his client.
104. It has always been accepted that in various circumstances advocates may be dealt with for acts of contempt or professional misconduct, which have occurred in court. However, as I said in my earlier Report, to bring a criminal charge against an advocate for words spoken in the course of legal proceedings is an act capable of destroying the immunity of counsel, which public policy has determined should exist to ensure fairness within a justice system.
105. As I also mentioned in my first report, the provisions of the *Sedition Act 1948* have been used in the past by the Government not only to restrict freedom of speech within the Malaysian community, but also at times parliamentary privilege. In this case, it was used to restrict the freedom of a lawyer to speak openly in court on behalf of his client. For these (and other reasons) the trial of Karpal Singh had significant legal importance.

106. Karpal Singh remains an important member of that small band of Malaysian lawyers that is prepared to assert the principle of the rule of law and take on the executive and the judiciary to defend it. That does not mean as lawyers they always get it right or that their conduct is always appropriate in the traditional sense. It does mean that more often than not, they find themselves in conflict with a system that often fails the essential tests of independence and impartiality expected within a democratic nation.

*MARK TROWELL QC*