

24 April 2023

YAB Dato' Seri Anwar bin Ibrahim
Prime Minister, Office of the Prime Minister of Malaysia
Main Block, Perdana Putra Building
Federal Government Administrative Centre
62502 Putrajaya, Malaysia

The Honourable Tan Sri Idrus bin Harun
Attorney General of Malaysia, Attorney General's Chambers (P4)
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Dear Prime Minister and Attorney General,

The investigation of Justice Nazlan by the Malaysian Anti-Corruption Commission – threats to the independence of the Malaysian judiciary and the administrative of justice

The Law Association for Asia and the Pacific (**LAWASIA**), is writing to you to express grave concerns about the serious threats to the independence of the Malaysian judiciary and the administration of justice, arising out of, *first*, the Malaysian Anti-Corruption Commission's (**MACC**) investigation of Justice Mohd Nazlan bin Mohd Ghazali (**Justice Nazlan**), a current serving judge of the Court of Appeal and, *secondly*, the criminal proceedings against the former Prime Minister, Mohammad Najib bin Tun Haji Abdul Razak.

The criminal proceedings against Mr Razak

Justice Nazlan was the trial judge who presided and convicted, in 2020, Mr Razak on all seven charges of abuse of power, criminal breach of trust and money laundering in relation to SRC International Sdn Bhd. That decision was upheld by the Court of Appeal of Malaysia on 8 December 2021 and subsequently by the Federal Court of Malaysia on 23 August 2022. On 31 March 2023, by a 4-1 majority, the Federal Court (differently constituted) dismissed Mr Razak's application for review of the Federal Court's earlier decision. Mr Razak intends to rely upon the dissenting judgment of Justice Abdul Rahman Sebli in support of his application for a royal pardon pursuant to Art 42 of the Federal Constitution of Malaysia.

LAWASIA is concerned about views being expressed in relation to the dissenting judgment that it may justify a future attempt to review an already decided review application or even a re-litigation or retrial of a matter in its entirety. That view is not correct. A dissenting judgment does not give grounds for a retrial or a right to a "further" review under the inherent powers of the Federal Court under r 137 of the Rules of the Federal Court 1995. This view is expressed in the Malaysian Bar 3 April 2023 Press Release with which LAWASIA agrees. A dissenting judgment is merely an expression of a disagreement or difference of judicial opinion that does not become a part of case law or have any binding

precedential value. That is not to say that a dissenting judgment is not to be respected. Indeed, dissenting judgments are a healthy feature of a well-functioning legal system that upholds the rule of law. They can instigate robust debate on important issues the subject of the judgment. That should not be inhibited or stymied in a democracy.

However, the majority judgment of the Federal Court, which is the highest court in Malaysia, is that which ultimately prevails and determines the rights and liabilities of parties. The majority judgment is final, and is to be treated as such, as to the correctness and legal validity of Mr Razak's convictions. The dissenting judgment does not detract away from the final and determinative nature of the majority judgment. In this connection, LAWASIA is concerned that any action that seeks to either misrepresent the dissenting judgment as prevailing over the majority judgment or confuse the public about the finality of the majority judgment will undermine public confidence in the judiciary and the administration of justice in Malaysia. It is important that the Malaysian Government, through the Attorney General, takes steps to ensure that the effect of the judgment of the Federal Court is not the subject of misrepresentation or confusion.

The investigation by the MACC and the "leaked" documents

Separately, on 28 April 2022, the MACC issued an unprecedented public statement announcing that it had commenced an investigation of a judge. Although Justice Nazlan was not named, it was clear from the context that the investigation concerned him

[<https://www.sprm.gov.my/admin/uploads/media/pdf/MACC%20PRESS%20STATEMENT%2028.04.20221005220713.pdf>]. This investigation was commenced in the period that Mr Razak appealed his convictions in the Federal Court. Earlier this month, the media published a "leaked" MACC report dated 20 February 2023 and "leaked" letter by a Minister in the Prime Minister's Department dated 20 March 2023. Those documents concerned "findings" by the MACC that Justice Nazlan had committed ethical breaches contrary to the Judges' Code of Ethics 2009 by reason of having a conflict of interest whilst presiding over the trial of Mr Razak. These documents have been widely circulated on social media.

The above raises three issues of serious concern.

First, LAWASIA is deeply concerned by the public manner that the MACC has announced its investigation of Justice Nazlan, the public "leak" of sensitive and confidential documents concerning that investigation, and the timing of when such documents were "leaked" (being a few days after the Federal Court's decision dismissing the review application on 31 March 2023). These actions have not only called into question the reputation of Justice Nazlan but are also deleterious to the image and good standing of, and public confidence in, the judiciary as a whole. To the extent that these actions have been carried out to colour public opinion on the correctness of Mr Razak's convictions, they must cease because the Federal Court has dismissed Mr Razak's appeal against convictions and his review application. The actions have undermined public confidence in the judiciary and the administration of justice, and exacerbated by the extensive media and public interest in both Mr Razak's case and the MACC's investigation.

Secondly, LAWASIA holds grave concerns about the significant adverse impact that the MACC's investigation of Justice Nazlan has had on judicial independence. The MACC's decision to investigate Justice Nazlan has been the subject of determination by the Federal Court in **the Haris Fathillah** case.

In its decision handed of 24 February 2023, the Federal Court found that “on a cursory reading of the facts and upon examining the documentary evidence on record, it is blatant that any investigations commenced against Justice Nazlan were done without regard to judicial independence as none of the...protocols appeared to have been followed”. Those protocols include that:

- a criminal investigative body such as the MACC must first seek leave from the Chief Justice to investigate any judge;
- a criminal investigative body must not publicise or advertise the fact of an investigation or the contents of an investigation of a superior court judge, without approval of the Chief Justice; and
- the entire contents of any investigation against a judge must remain confidential at all times.

As the Federal Court held, the rationale for these protocols is the fact that: *(i)* any investigation into judges by a criminal investigative body amounts to judicial interference; *(ii)* the Federal Constitution implies a higher standard on criminal investigative bodies when investigating a serving superior court judge so as to not violate the doctrine of judicial independence; and *(iii)* even the mere accusation of a judge of a crime is sufficient to affect their reputation and the reputation of the judiciary as a whole. All criminal investigative bodies must comply with the law and any abuse of power by it for a collateral purpose may constitute a criminal offence.

Finally, LAWASIA is concerned by the MACC’s “findings” of an alleged breach by Justice Nazlan of the Judges’ Code of Ethics 2009. It is our view that any such finding is not within the remit or competence of the MACC’s functions as an independent and anti-corruption body set up under the Malaysian Anti-Corruption and Commission Act 2009. An investigation by the MACC on matters concerning judicial ethics is, therefore, an overreach and amounts to judicial interference that too undermines public confidence in the judicial system. Moreover, the allegation of ethical violations was also raised by Mr. Razak in his appeal in the Federal Court and in the subsequent review application. On both occasions, the Federal Court found the allegation to be baseless.

Accordingly, LAWASIA urges your Government to take steps to protect the independence of the judiciary. This includes ensuring that executive agencies do not take steps that tend to undermine that independence or interfere with the functions of the judiciary. This ensures that public confidence in the judiciary is not compromised and that it continues to uphold the rule of law, which is fundamental to a democratic country such as Malaysia.

Yours sincerely

The Law Association for Asia and the Pacific (LAWASIA)

Yours sincerely



Melissa Pang

President, LAWASIA