

FREEDOM OF EXPRESSION & THE RIGHT TO PEACEFUL PROTEST

A MALAYSIAN PERSPECTIVE



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Article 10 of the Federal Constitution:

Freedom of Speech, Assembly and Association

- Art 10(1) provides that, in general, **every citizen has the right to freedom of speech and expression, to assemble peaceably and without arms**, and to form associations.
- However Arts 10(2) – (4) qualify these rights, empowering Parliament to impose restrictions deemed "necessary or expedient" in the interest of:
 - national security;
 - friendly relations with other countries;
 - public order and morality;
 - protecting parliamentary privilege, or against contempt of court, defamation or incitement;
 - prohibiting the questioning of certain protected matters/privileges (citizenship, the status of the Malay language, position of the royals).

Article 10 of the Federal Constitution:

Freedom of Speech, Assembly and Association

- *"...art.10 rights may only be restricted on specific grounds. The permissible restrictions on the freedom of speech and right of association must relate to grounds of national security, public order or morality; whereas the restrictions on the right of assembly is limited to national security or public order."* – Datuk Seri Anwar Ibrahim v PP [2021] 8 CLJ 511 (FC).
- Furthermore, the guarantees under Article 10 may also be derogated by legislation enacted pursuant to:
 - Article 149, which allows for legislation against subversion, action prejudicial to public order etc.; and
 - Article 150, which allows for the proclamation of emergency and executive promulgation of emergency ordinances

Acts of Parliament which Impose Restrictions

FREEDOM OF SPEECH

- Sedition Act 1948
- Official Secrets Act 1972
- Printing Presses and Publications Act 1984
- Communications and Multimedia Act 1998
- Film Censorship Act 2002
- Penal Code

RIGHT TO PEACEFUL PROTEST

- Peaceful Assembly Act 2012
- Penal Code

A. Recent Cases Involving Freedom of Speech and Expression

Lim Lip Eng v Ong Ka Chuan [2022] 4 MLJ 454 (FC) – a political party sought to sue for defamation

*"...A political party relies on the public to get their votes to be in power. The political party puts itself forward for office or to govern and be responsible for public administration. **It is not right nor is it in the public interest to put the public in fear of a defamation suit and prevent them from expressing their views or making criticisms or voicing out opinion. To allow this to happen definitely goes against the true value of democracy...** We agree with the appellant that in a free democratic society in Malaysia, MCA as a political party must not be thinned-skinned and must always be open to public criticism."*

A. Recent Cases Involving Freedom of Speech and Expression

Arrest of secondary school boys under S. 233(1) Communications and Multimedia Act 1998 (improper use of network facilities or network service, etc) (2023)

- Two schoolboys had posted a viral video on the social media app TikTok allegedly insulting a history paper they sat for in the Malaysian Certificate of Education (SPM) national exams, where they expressed their dissatisfaction with the paper.
- They were reportedly arrested and are being investigated under Section 233 of the Communications and Multimedia Act 1998 and Section 14 of the Minor Offences Act 1995 (which punishes "insulting behaviour").
- Hulu Selangor OCPD Supt Suffian Abdullah confirmed that they had raided a house and arrested the two schoolboys, and confiscated the phone believed to be used for the making of the video (*The Star*, 25.02.2023).

B. Recent Jurisprudence on Right to Peaceful Assembly

Nik Nazmi bin Nik Ahmad v Public Prosecutor [2014] 4 MLJ 157 – accused was charged with organizing a public assembly without giving the mandatory 10 days notification required under s. 9(1) of the Peaceful Assembly Act 2012

- The constitutionality of the penal sanction under the Act was questioned, and the Court of Appeal held that non-compliance with the notification requirement should not attract criminal penalties as it would be inconsistent with Article 10(2).
- “[140] ... The court is duty bound and entrusted to protect the sacrosanct right of the public in relation to fundamental guarantees and it is an important part of the constitutional oath of a judge... The court needs to balance whether the restrictions imposed on the constitutionally guaranteed freedoms are proportionate to the legitimate aims as set out in the constitution...”

B. Recent Jurisprudence on Right to Peaceful Assembly

Public Prosecutor v Yuneswaran a/l Ramaraj [2015] 6 MLJ 47 – the Court of Appeal held that s.9(5) PAA 2012 is constitutional, departing from the decision made in Nik Nazmi.

"[81] To recap, the whole purpose of the PAA was to enable the right to assemble peaceably and without arms. To that end, the PAA contains procedural provisions that are regulatory in nature. **The non-compliance with those procedures does not stop a citizen from exercising his right to assemble peaceably and without arms.** In other words, **there is really no restriction on the right to assemble peaceably and without arms in the framework of the PAA...**

[83] In this instant appeal, the respondent was not charged for being a participant the peaceable assembly. Rather he was charged for the failure to obey a federal law... Indeed, in no way was his right to assemble peaceably and without arms thereby affected."

Malaysian Bar's Walk for Peace and Freedom (2014)

- In 2014, the Malaysian Bar resolved to hold a peaceful assembly to protest a recent spate of arrests, charges and investigations under the Sedition Act 1948.
- The Walk for Peace and Freedom 2014 was conducted on October 16th, 2014 – approximately 1,000 participants (lawyers, civil society representatives, activists, and laypersons) convened near the Parliament building in Kuala Lumpur.
- The Walk continued until the front of Parliament, where representatives from the Malaysian Bar were allowed through a police barricade to deliver an Open Memorandum to the Prime Minister.



Coalition for Clean and Fair Elections (BERSIH 3.0) Rally (2012)

- In 2012, the largest democratic protest to date was organised by BERSIH (an organisation working towards clean and fair elections) and other activist organisations such as the Human Rights Commission of Malaysia and the Malaysian Bar.
- The objective of the rally was to protest against recent electoral reforms where none of the demands made by BERSIH was met, a decision seen as showing the Election Commission's insincerity in enacting electoral reform.
- An estimated 300,000 people gathered for the rally. However, State response against this was abysmal: 512 people were reportedly arrested, and tear gas was used against the protestors.



The Walk for Judicial Independence (2022)

- The Malaysian Bar organized a peaceful protest against the investigation conducted on Judge Nazlan by the Malaysian Anti-Corruption Commission, contrary to the doctrine of separation of powers.
- Approximately 500 lawyers gathered to march to the Parliament to hand over the Malaysian Bar's memorandum to the Deputy Prime Minister.
- However, due to heavy police presence and the formation of barricade around the area of assembly, protestors were prevented from making their way to the Parliament.
- Police investigated the organizers of the protest for possible breaches under the PAA 2012 and Prevention of Control of Infectious Diseases (Measures within Infected Local Areas) Regulations 2022.

