

Malaysia: a worrying year for freedom of expression

In the first half of 2017, the rights to freedom of opinion, expression and information both on- and offline continued to be curtailed in Malaysia.

In April 2017, Malaysian Prime Minister Najib Razak, speaking at the WAN-IFRA 16th Asian Media Awards, stated that “free speech is thriving in Malaysia”, and appeared to lay blame on “foreign activists” for creating the “perception” of crackdowns on free speech in the country. However, much of the criticism of Malaysia’s violations of freedom of expression are based on concerns raised by civil society organisations, independent journalists and other members of the public at the national level. ARTICLE 19 has highlighted these concerns, as arrests and incidences of harassment against human rights defenders, journalists and Internet users continue.

This analysis reviews the situation as of the end of June 2017, reiterating ARTICLE 19’s recommendations for the government to address the situation in three priority areas: (i) human rights defenders, (ii) digital rights, and (iii) media freedom.

Freedom of expression in the law

Malaysia has not signed or ratified the International Covenant on Civil and Political Rights, which guarantees the right to freedom of expression under Article 19. Though this right is guaranteed under Article 10(a) of the Malaysian Constitution, those protections fall short of what is required by international human rights law. In practice, human rights defenders, journalists, opposition politicians, artists and social media users continue to face arrest, investigations (which often lead to no further action and can be viewed as harassment), criminal charges and protracted trials for merely exercising their right to freedom of expression.

No progress has been made towards ratification of the ICCPR, in spite of commitments made by the Malaysian government during its 2nd Universal Periodic Review (UPR) at the UN Human Rights Council in 2013. Likewise, commitments to repeal the Sedition Act 1948 (an Act which provides for the punishment of sedition) have not been fulfilled, and there has been backsliding on promises to improve the freedom of expression situation for bloggers and human rights defenders by reliance on other legislation.

While the Malaysian government consistently claims that its practices are in conformity with its international human rights obligations, requests for an official country visit from the UN Special Rapporteur on freedom of expression and opinion to make an independent assessment in this regard remain outstanding.

The increased use of the Communications and Multimedia Act 1998 (CMA) in 2017 is of particular concern, and has overtaken the Sedition Act 1948 as the major legal obstacle to freedom of expression in Malaysia. ARTICLE 19’s legal analysis of the CMA found that the Act contains overly broad content-related offences, and urged the Malaysian government to make amendments to the Act to ensure offences are narrowly defined and comply with international human rights standards.

Other legislation including the Sedition Act 1948, the Penal Code, the Printing Presses and Publications Act 1984, the Film Censorship Act 2002 and the Official Secrets Act 1972 continue to be utilised by Malaysian law enforcement authorities to silence legitimate expression.

Legal Harassment of Human Rights Defenders

Human rights defenders regularly face harassment, arrest, and criminal charges due to their work, particularly when defending the right to freedom of expression in Malaysia.

In previous years, the Sedition Act 1948 was regularly invoked against human rights defenders, but monitoring of cases in 2017 shows that recent charges have more often been brought under provisions of the Penal Code. Section 505 of the Penal Code was used to investigate three human rights defenders in May, who to date have not been arrested or charged and Section 186 of the Penal Code was invoked to charge a human rights defender in June.

In 2017, there have also been instances of human rights defenders barred from entering and leaving the country. It is deeply concerning that Deputy Home Minister, Nur Jazlan Mohamad has stated that “those that ridicule the government” can be barred from leaving the country as traveling overseas is “a privilege and not a right”.

Some of the most worrying cases of harassment of human rights defenders in 2017 include:

- **Lena Hendry**

In March 2017, human rights defender Lena Hendry was sentenced to a fine of RM10,000 or one year in prison under Section 6(1)(a) and (b) of the Film Censorship Act 1998 for possession or exhibition of a film not approved by the Film Censorship Board of Malaysia. Hendry paid the fine and the case is currently pending appeal. Hendry was originally charged in September 2013 for the screening of “No Fire Zone: The Killing Fields of Sri Lanka,” a documentary about the Sri Lankan armed conflict. In March 2016, the Magistrates Court of Kuala Lumpur dismissed the case, but the dismissal was overturned in September 2016 by the Malaysian High Court.

The judgment has set a dangerous precedent for the right to freedom of expression in Malaysia, where screening a film on a human rights issue considered sensitive to the government without their permission can be met with imprisonment or a serious fine several years after the screening took place. Hendry is the first human rights defender to be charged and convicted under the Film Censorship Act.

- **Rama Ramanathan, Sevan Doraisamy and Thomas Fann**

In May 2017, human rights defenders Rama Ramanathan (steering committee member of pro-democracy movement BERSIH 2.0), Sevan Doraisamy (Executive Director of human rights NGO, Suara Rakyat Malaysia – SUARAM) and Thomas Fann (Chairperson for human rights organization Engage), were investigated under Section 505(b) of the Penal Code for making statements with “intent to cause fear or alarm to the public”.

The investigations followed statements by the three activists referring to recent abductions in the country as “enforced disappearances”. The statements referred to the disappearances of Pastor Raymond Koh, Pastor Joshua Hilmy and his wife, as well as social worker Amri Che Mat.

The statements were made in their capacity as members of the newly established Citizen Action Group on Enforced Disappearances (CAGED), which has been vocal in calling for transparency over investigations into the enforced disappearances of the individuals. Malaysia’s Inspector General of police, Khalid Abu Bakar, has previously stated that the group has made “serious” and “baseless allegations” and that they should be investigated.

According to the activists, while they have not yet been charged, they were questioned over their individual roles as members of CAGED, why the coalition had been established, and if there was “foreign interference”. It demonstrates how vague provisions to prevent “public order” within the Penal Code, such as Section 505, can be abused to harass human rights defenders and grass-roots protest movements in an attempt to intimidate them into silence.

- **Siti Kasim**

In June 2017, charges were brought against lawyer and human rights defender Siti Kasim for “obstructing a public servant in discharge of his public functions” under Section 186 of the Penal Code, in connection with a transgender event she attended on 3 April 2016. The event was raided by the Federal Territories Islamic Religious Department (JAWI) based on allegations that it violated a 1996 fatwa prohibiting Muslim women from joining beauty pageants in Malaysia. Siti Kasim has been a staunch defender of human rights and in particular the rights of individuals belonging to minority groups, in particular the LGBT community and indigenous peoples in Malaysia. Siti was detained by JAWI officials at the event and taken to a police station after questioning the legality of the raid.

On 13 June 2017, more than a year after the event and arrest took place, Siti was notified of the charges under Section 186 of the Penal Code, which carry a penalty of two years imprisonment and/or a RM10,000 fine. In November 2016, Siti had filed a court order to ask for information relating to the raid, for the purpose of suing the government and JAWI officers for unlawful arrest.

Attacks on Digital Rights

ARTICLE 19 is concerned that the CMA has been invoked frequently in the past year, in particular Section 233(1)(a), which has been used to restrict social media users in Malaysia. Section 233(1)(a) criminalises the “improper use of network facilities or services”, creating an extremely vague offence. The provision has been regularly used by law enforcement authorities and the Attorney General of Malaysia to arrest, investigate and charge individuals expressing progressive or dissenting views.

At present, a constitutional challenge is being mounted against Section 233(1)(a) of the CMA at the Federal Court, on the basis that it violates the right to freedom of expression, which is guaranteed under Article 10(a) of the Federal Constitution.

In March 2017, the Report of the United Nations Special Rapporteur on the right to freedom of expression, added his voice to those criticizing the CMA as in violation of international human rights law. He highlighted the CMA as an example of vague legislation that does not meet the requirement of legality, and noted the broad powers given to the King to determine a state of emergency and thus require disclosure of communications under the law.

In April 2017, ARTICLE 19 highlighted concern over the targeting of four social media users in the space of just two days under the CMA for comments made on social media deemed insulting to national leaders:

- On 10 April 2017, an unnamed individual was arrested and charged under Section 233(1)(a) of the CMA and Section 505(b) of the Penal Code for a Facebook post deemed to have “the purpose of maligning the government”. The investigation was believed to be over a photograph showing the individual carrying a placard while wearing a yellow BERSIH T-shirt. The individual was remanded for four days after his arrest and his mobile phone, SIM card and other unnamed items were seized.
- On 11 April 2017, a second unnamed social media user was arrested and detained for a statement on Facebook deemed offensive to the Sultan of Johor, Sultan Ibrahim Almarhum Sultan Iskandar and the Johor Royal Institution. The woman was arrested and held in police custody for investigation under Section 233 (1)(a) of the CMA.

Cases of Section 233 (1)(a) of the CMA being invoked against social media users who allegedly posted comments deemed offensive to national leaders were also frequently reported in the subsequent months of May, June and July.

Attempts to co-opt Internet users as private censors

In May 2017, a new “advisory for group admins” released by the Malaysian Communications and Multimedia Commission (MCMC) appeared to seek to co-opt social media users to censor third-party content which the government considers “inappropriate”. The MCMC advisory is a clear reminder to Internet users that they are expected to abide by and enforce Malaysia’s tough restrictions on freedom of expression online, and expects them to act as private censors of other Internet users’ content.

The advisory is for “administrators” of group pages hosted on communication platforms such as Facebook, WhatsApp, Wechat, Viber, and Telegram, or on similar services, and advises them to take a proactive role in monitoring and removing content posted by others to their pages.

While not a legally enforceable regulation in itself, a warning on MCMC’s Facebook page accompanying the advisory stated that Internet users should “be wise in using social media for their own protection.” This implies that failure to comply with the advisory may make group admins liable for the posts of others, even though this type of liability for third-party content is not currently provided for in Malaysian law.

Undermining Media Freedom

Media personnel continue to face obstacles while performing their duties, particularly when reporting on public interest cases such as the government-linked corruption scandal, 1 Malaysia Development Berhad (1MDB), or other issues considered ‘sensitive’, such as religion.

Journalists reporting from Parliament have also faced restrictions with a new decision by Parliament speaker, Pandikar Amin Mulia prohibiting media from carrying out their work in the lobby of Parliament. Laws including the Printing Presses and Publications Act 1984 and the Sedition Act 1948 are regularly invoked against members of the press, as can be illustrated by the cases below in 2017.

- **Journalists barred from reporting at Parliament lobby**

In March 2017, Dewan Rakyat (Parliament) Speaker, Pandikar Amin Mulia, issued a decision prohibiting journalists from carrying out their work in the lobby of Parliament. The ban was supposedly issued to prevent MPs from being misquoted. It is deeply concerning that journalists are now prevented from accessing elected MPs at Parliament, and is a clear violation of the right to freedom of expression and the public’s corresponding right to information.

- **Malaysiakini – Charged under Communications and Multimedia Act 1998**

In May 2017, the CEO of the independent online news portal Malaysiakini, Premesh Chandran, was charged under Section 244(1) of the Communications and Multimedia Act 1998 (CMA) for posting footage of a July 2016 press conference critical of the Attorney General’s decision to clear Prime Minister Najib Razak of corruption allegations.

Section 244(1) criminalises offences by corporations. Earlier, on 18 November 2016, Editor-in-Chief Steven Gan was also charged for the same offence, while KiniTV Sdn Bhd was charged for “improper use of network facilities or services”, an offence under Section 233(1)(a) of the CMA.

- **Journalists from The Star – Investigated under Sedition Act 1948 and Penal Code**

In May 2017, five editors and a photographer from The Star newspaper were investigated under the Sedition Act and the Penal Code, after publishing a photograph of Muslims performing their Tarawih prayer (a prayer performed during Ramadan)

underneath the headline “Malaysian Terrorist Leader”. The newspaper immediately issued a formal apology on 28 May citing an “error of judgement”. Editors Rozaid Abdul Rahman, Brian Martin, Dorairaj Nadason, M. Shanmugam and Errol Oh and photographer Mohd Sahar Misni were investigated under Section 4 of the Sedition Act and Section 298(a) of the Penal Code. Section 298(a) of the Penal Code criminalises offences related to incitement of religious hatred, framed as “causing, [...], disharmony, disunity, or feelings of enmity, hatred or ill will, or prejudicing, [...]etc., the maintenance of harmony or unity, on grounds of religion”.

The Home Ministry also issued The Star a show-cause letter on 29 May calling for the newspaper to explain why its publication should not be suspended under the Printing Presses and Publications Act 1984. While no charges were brought as a result of the investigations, this Act seriously limits independence of the media and free expression, particularly given the broad power to the Home Minister to revoke or suspend a permit for any period he considers desirable.

Editors Rozaid Abdul Rahman, Brian Martin, Dorairaj Nadason, M. Shanmugam and Errol Oh and photographer Mohd Sahar Misni were called for questioning on 31 May at Bukit Aman police headquarters in Kuala Lumpur and investigated under Section 4 of the Sedition Act and Section 298(a) of the Penal Code. Section 298(a) of the Penal Code criminalises offences related to incitement of religious hatred, framed as “causing, [...], disharmony, disunity, or feelings of enmity, hatred or ill will, or prejudicing, [...]etc., the maintenance of harmony or unity, on grounds of religion”. They have not been formally charged with any offence.

Conclusion and Recommendations

As illustrated by the above cases, persons exercising their rights to freedom of expression in Malaysia continue to face significant obstacles in 2017. The space for dialogue and dissent both on- and offline is increasingly closing, most notably through the use of Section 233 of the Communications and Multimedia Act (CMA) 1998.

Frequent use of the CMA is part of a broader trend that must end and urgent amendments must be made to bring the Act into line with international freedom of expression standards. Provisions in legislation such as the Sedition Act, the Printing Presses and Publications Act, the Penal Code, the Film Censorship Act and the Official Secrets Act that conflict with the rights to freedom of expression must equally be reviewed and brought into line with international human rights standards.

ARTICLE 19 calls on the Malaysian government to immediately and without hesitation:

- Drop the charges against human rights defenders **Lena Hendry** and **Siti Kasim**, as well as the investigations into human rights defenders **Rama Ramanathan**, **Sevan Doraisamy** and **Thomas Fann**;
- Drop the charges against **Pramesh Chandran**, **Steven Gan** and **KiniTV Sdn Bhd**;
- Drop all investigations into **The Star** newspaper and its journalists under the Sedition Act and Penal Code;
- Drop all investigations and charges against **social media users** for exercising their rights to freedom of opinion and expression;
- **Repeal the Film Censorship Act 1998 and reform the Penal Code**, including Sections 186 and 505, to ensure that they are not abused to unjustifiably restrict the right to freedom of expression;
- **Reform the Communications and Multimedia Act 1998** to ensure it fully complies with international freedom of expression standards, in particular Section 233(1)(a);

- **Retract the MCMC advisory for group admins** and make clear to social media users that they cannot be held responsible for content created by third parties.
- **Repeal the Sedition Act 1948 and the Printing Presses and Publications Act 1984**, as neither serve a legitimate aim under international human rights law and both are routinely applied to violate the right to freedom of expression.
- **Reform the Penal Code provisions on incitement to religious hatred**, to ensure that they are consistent with international human rights law, in particular Articles 19(3) and 20(2) of the ICCPR and the Rabat Plan of Action.