

Litigation Developments in 2014: Southeast Asia

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JUSTICE FOR FREEDOM OF EXPRESSION in 2014

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1. What were the most important developments in 2014 as far as courts decisions on FoE are concerned? In your opinion, was it a “good” year as far as the Justice sector protection of FoE?

Malaysia

2014 has been a very troubling year for Malaysia. The government and the enforcement agencies have, used very liberally, the Sedition Act to quell freedom of expression and chill press freedom. Many politicians, and political activists continue to face harassment from Malaysia’s enforcement authorities. The answer to the question is no as it is clear that unless the Sedition Act is repealed, many more political activists will be subject to an investigation and charge under the Sedition Act.

The Malaysian Inspector General of Police (IGP) has personally taken to Twitter (since the middle of 2014) to monitor what is being said by individuals and then recommending that they be investigated and charged is clear sign that the use of the Sedition Act is a favoured instrument against freedom of expression.

Some examples of individuals charged under the Sedition Act or the Penal Code (for Criminal Defamation) include

Name	Background	Date of charge	Current status	Alleged seditious act
Teresa Kok	DAP Member of Parliament for Seputeh constituency	6 May 2014	Awaiting trial	Making a Chinese New Year greeting video posted on YouTube which allegedly included jokes on Malaysia being a dangerous country and on the recent Lahad Datu intrusion



Abdullah Zaik Abd Rahman	ISMA president	20 June 2014	Awaiting trial	Saying that Chinese migrants brought by the British to Malaya were trespassers
N. Surendran	PKR Member of Parliament for Padang Serai and one of Anwar Ibrahim's lawyer	19 August 2014	Awaiting trial; 28 August 2014 (second charge)	Criticising the judgment in the second of Anwar Ibrahim sodomy trials and saying that the proceedings was an attempt to put the Malaysian opposition leader behind bars
Mohammad Nizar Jamaluddin	PAS Perak state assemblyman for Changkat Jering and former Mentri Besar of Perak	25 August 2014	Awaiting trial; charged for criminal defamation (Section 500 Penal Code)	For a speech made in 2012 saying "I was informed that Najib will call all the army generals to do something if BN lost in the general election.
Khalid Abdul Samad	PAS Member of Parliament for Shah Alam constituency	26 August 2014	Awaiting trial	Questioning the executive powers of the Selangor Islamic Religious Department (JAIS)
RSN Rayer	DAP Penang state assemblyman for Seri Delima	27 August 2014	Awaiting trial	Saying "celaka UMNO" (damn UMNO)
Rafizi Ramli	PKR Vice President and MP for Pandan	28 August 2014	Charged for provocation of breach of peace (Section 504 Penal Code); Awaiting trial	Accusing UMNO of conspiring to instigate religious strife
Azmi Sharom	Universiti Malaya law professor and columnist for The Star newspaper	2 September 2014	Awaiting trial	For commenting in a newspaper column about the 2009 Perak constitutional crisis
David Orok	State Reform Party (STAR)'s politician in Sabah	3 September 2014	Awaiting trial	Accused for insulting Islam and Prophet Muhammad in Facebook.
Susan Loone	Malaysiakini journalist	4 September 2014	Arrested 4 September 2014; Awaiting charge	Publishing an interview with Penang state EXCO Phee Boon Poh in connection with the latter's arrest regarding PPS issue
Ali Abdul Jalil	Social activist affiliated with Anything But Umno (ABU) movement	8 September 2014	Awaiting trial	Belittling and calling for the abolishment of the Johor state monarchy

Other developments relating to Freedom of Expression

a) The “Allah” decision

In December 2009, the High Court allowed an application by the Catholic Church that they be allowed to use the word “Allah” in its Malay (national language) publication. This came after the Home Minister prohibited the Catholic Church from using “Allah” in its publication.

In October 2013, the Court of Appeal ruled that the High Court had erred in allowing the Catholic Church from using the word “Allah” and agreed with the Home Minister’s prohibition of the word “Allah”. The Catholic Church appealed to the Federal Court (highest appeals court in Malaysia). On 23 June 2014, a full panel of the Federal Court by a majority of 4-3, dismissed the Catholic Church's application for leave to appeal, saying that the Court of Appeal was right in its decision to ban the word in the Catholic weekly effectively bringing the issue to an end. No substantive arguments were raised at the Federal Court.

b) The curious incident of Nik Raina Nik Abdul Aziz, store manager of Berjaya Bookstore (formerly Borders Bookstore)

Nik Raina was charged with disseminating and distributing Irshad Manji’s controversial book (Allah, Liberty and Love) pursuant to Section 13 of the Syariah Criminal Offences (Federal Territories) Act 1997 for the offence of "disseminating and distributing" by way of selling the books deemed contrary to Islamic law.

She challenged the Federal Territory Islamic Religious Department's (Jawi)’s search and seizure of Irshad Manji’s books was unlawful as there was no prior notification (prohibitory order) that the books were banned from the Home Minister.

On 31 December 2014, the Court of Appeal ruled that the search and seizure of Irshad Manji's books at the Borders bookstore was unlawful and that Jawi’s actions were illegal and irrational.



Following the Court of Appeal decision, JAWI discharged (not amounting to an acquittal) Nik Raina

Thailand

1. 2014 has not been a good year insofar as Freedom of Expression in Thailand. Since the military coup on 22 May 2014, the state of press freedom and freedom of expression in general has been on a free-fall. Many individuals were charged under lese majeste laws for allegedly abusing or insulting the Thai monarch.
2. On May 20, 2014, Army chief Gen. Prayuth Chan-ocha announced that the Martial Law Act of 1914 would be enforced throughout Thailand. On May 22, 2014, General Prayuth staged a coup and arrested representatives of opposing political factions attending military-brokered negotiations at the Army Club in Bangkok after the caretaker government refused to resign. On August 21, 2014 - General Prayuth was appointed as Thailand's 29th prime minister while allowing him to retain his chairmanship of the National Council of peace and Order (NCPO) and the NCPO has broad authority to limit or suppress fundamental human rights, and is granted immunity for its actions.
3. Prior to the Military Coup, convictions under Thailand's lese majeste' laws were few. In fact the cases of the "unnamed seller of the Devil's Discus books" and Surapak, a computer programmer were dismissed by the Thai courts while the Bandit Aniya who distributed materials pertaining to political party law were suspended.
4. All of this changed after the military coup. The number of cases prosecuted under Thailand's lese majeste laws rose dramatically to 32. Most of them tried by the Military Court.
5. Notable Cases

- a) The case of Khatawut and 1 other

Here, Khatawut, and the person (whose identity had not yet identified) who used the pseudonym "Num lublae" jointly hosted an online radio show which its content deemed to be lese majeste. They were charged under Article 112 of the Criminal

Code and after a deposition examination, the Defendants “pleaded guilty” and were sentenced to 5 years in jail.

b) The case of Somyot Prueksakasemsuk

On September 19, the Appeals Court upheld the Bangkok Criminal Court’s sentence of 11 years against Somyot for publishing two articles in his magazine that made negative references to the monarchy.

- **What were the key issues or themes that Courts addressed?**

Malaysia

Insofar as the Sedition Act is concerned, the charges must be read in the context of Malaysia’s political system. The state (and its actors) prohibits any discussion relating to race, religion and royalty (the 3 Rs”). Ever so often, political decisions, transparency, accountability and corruption issues will also fall under the 3 Rs.

The Sedition Act, with its oppressive feature of not requiring the intent of the statement/maker be established means that so long as any statement, whether written or uttered, made with a view of causing, "seditious tendency", including that which would "bring into hatred or contempt or to excite disaffection against" the government or engender "feelings of ill-will and hostility between different races". It is broadly stated and is easy to establish by the state.

In the Allah decision, the Federal Court had a unique opportunity to determine the exclusivity of the word “Allah” and whether the use of the word “Allah” would cause confusion among the muslim population.

In the Nik Raina case, the decision must be viewed positively in that the civil courts ruled that the religious department has no basis in acting on a frolic of its own especially where procedure and policy had not been followed.

Thailand

The “NLA Sit In” case comes to mind. Here 10 prominent activists in Thailand were charged under, among others, Section 116 of the Criminal Code for collaborating to incite the public to violate the law through speech, writing, or other means outside the boundaries of constitutional rights or legitimate freedom of expression. There were protesting the 2006 military coup.

The court of first instance sentenced some of the Defendants to a year’s jail but all of these was overturned by the Court of Appeal in November 2014.

Positively, the Court stated that the defendants had intention to express their opinion against the unjust legislative procedure but did not create any form of public disorder. The Court also ruled that the objective of an assembly could be considered as an intention of the assembly. It does not mean that all types of assembly must be regarded as a violation causing public disturbance or a breach of the sedition law

- **What were the decisions with the greatest legal importance (eg cutting edge thinking, opening new perspective on key issues) and/or influence?**

Malaysia

The Allah decision (see above)

Thailand

The NLA Sit-In case (see above)

- **Was the international legal environment (e.g. decisions from other jurisdictions) taken into account or referenced?**

Malaysia

None in 2014

Thailand

None in 2014

- **What shall we watch out in 2015? What are the key cases on the agenda**

Malaysia

Dr Azmi Sharom, who was charged under the Sedition Act, filed a constitutional challenge where the following 2 questions have been referred to the Federal Court for determination:

- (a) whether the Sedition Act 1948 was in contradiction of Article 10(2) of the Federal Constitution i.e. a breach of freedom of speech and whether Parliament has the right to impose a limitation on that freedom; and
- (b) whether it was legal and enforceable.

Thailand

The decisions by the Military Court are something to look out for. Many of the individuals charged will most likely plead guilty because they firmly believe that the Military Court will not listen to any defence whatsoever.

The case of Siraphop comes to mind. He was accused of using an alias to write articles against the government and royal institution since 2010 and these articles were subsequently published on Prachatai.com. He has also been accused on publishing materials on his Facebook account “Rungsira”.

The Bangkok Military Court has ordered that Sirahop’s trial be held behind the closed door. The defendant's relatives and observers who were already in the courtroom on previous occasions were not allowed to be present in the court room.

The case will continue in April 2015.

Besides the Lese Majeste cases, the Military Court will also be hearing some 25 cases relating to the NCPO order No.7/2557 where a gathering of more than 5 people is deemed illegal.