



# Rights of Online Peaceful Assembly in Malaysia

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**Abstract.** In light of the COVID-19 outbreak, Malaysia imposed the Movement Control Order (“MCO”) in order to contain and restrain the spread of the virus. Even with the recent announcement that Malaysia is moving towards the endemic phase, life would never be the same as how it was in the pre-COVID era. As a result of this, the article discusses on the viability of exercising freedom of peaceful assembly in the context of online platforms in view of Article 10(1)(b) of the Malaysian Federal Constitution, the Peaceful Assembly Act 2012, Article 21 of the International Covenant on Civil and Political Rights (ICCPR), and the Human Rights Committee’s drafting of General Comment No.37 on Article 21. This paper will consider the need for a specific legislation governing freedom of online peaceful assembly, freedom of expression and its relation to freedom of peaceful assembly online, the characteristics of online peaceful assembly, and the challenges to the exercise of the enjoyment of freedom of peaceful assembly and association online.

**Keywords:** Right of Online Peaceful Assembly · Article 21 ICCPR · General Comment No.37 · Article 10(1)(b) Federal Constitution

## 1 Introduction

Article 10(1)(b) of Malaysia’s Federal Constitution [1] recognises the significance of the right to assemble peacefully and to associate, to the full exercise of civil and political rights, as well as economic, social, and cultural rights. To assemble means that a number of people would come to gather for a purpose. The Federal Constitution, however, is silent on whether the assembly can take place in the form of an online basis.

All Malaysians are guaranteed the freedom to assemble peacefully without the use of force and without arms. Peaceful assemblies are essential for advancing ideas and aspirational goals in the public arena and determining the extent to which support or resistance to these ideas and objectives is widespread among participants [2].

A substantial influence has been brought to the whole globe by the 2019-nCoV infection (“COVID-19”) pandemic, not just on the economy and health of the population but also on various aspects of social development of the people. First sporadic case of COVID-19 in Malaysia was reported on March 12th, 2020, and the Movement Control Order (“MCO”) was subsequently established on March 18th, 2020, limiting the movement of individuals in order to contain COVID-19 [3].

Despite the fact that on April 1st, 2022, Malaysia began the transition to the endemic phase of COVID-19 [4], it is agreeable that life will never return to its pre-pandemic state. It is quite probable that COVID-19 will have a long-term impact on the way we conduct businesses, live our lives, and socialise. Changes we make today will have enduring impacts as the globe recovers from the COVID-19 pandemic, which has expedited the transformation to a more digital environment. One example would be the freedom to online peaceful assembly.

However, the real problem to be highlighted is that even though Malaysia did not explicitly say no to online peaceful assembly or prevented online assembly, there is no specific law governing online peaceful assembly. The law is silent on this specific area and this has formed a lacuna.

Article 21 of the International Covenant on Civil and Political Rights (ICCPR) embodies the right to peaceful assembly online, and its clarification comes at a critical time given the Human Rights Committee's writing of General Comment No.37 on Article 21. An assembly is described as an international gathering of two or more individuals with the objective of safeguarding it, whether in private, online, or virtual venues [2]. It is worth noting, however, that Malaysia has not yet joined the ICCPR [5]. Also on April 16th, 2014, the Council of Europe endorsed the Committee of Ministers' Recommendation to Member States on a Guide to Human Rights for Internet Users to promote the right to peacefully gather and associate with people via the Internet [6].

The European Convention on Human Rights (ECHR), ICCPR, and other international instruments apply to both online and offline assemblies. When it comes to the right to peaceful assembly, the Internet and social media are becoming more important. With the recent development in recognising online peaceful assembly in other legal regimes, perhaps Malaysia could follow in their footsteps and widen the scope of peaceful assembly.

Even though Malaysia is not a signatory of the treaty, it is important to make reference to the specific part of ICCPR that recognises the right of online peaceful assembly. It is suggested that Malaysia could adopt something similar to it and perhaps come out with our own laws governing such areas.

This paper is concerned with the doctrinal legal research in which the analysis of the legal doctrine of having the rights of online peaceful assembly is carried out to determine how it was developed and applied in other international instruments. With the analysis, a clearer picture would arise as to the viability of having such a right being exercised in Malaysia.

In addition, this paper seeks to discuss the need for freedom of online peaceful assembly, freedom of expression and its relation to freedom of peaceful assembly online, the characteristics of online peaceful assembly and the challenges to the exercise and enjoyment of freedom of online peaceful assembly.

## **2 Recognising the Need for a Specific Legislation Governing Freedom of Online Peaceful Assembly**

Disagreement has grown increasingly difficult to express with the COVID-19 pandemic. People all across the world have found new and inventive methods to make their views

heard, whether they do it individually or collectively, offline or online. As a consequence, activists have converted freedom of expression and assembly into living rights in the aftermath of this long-lasting pandemic, in a nod to human rights treaties as living instruments [7].

Crowds had been dispersed as of the year 2020 in order to battle a pandemic. Some of the most apparent measures taken by governments in the last two years to fight COVID-19 have been lockdowns and restricting movement of the people. Human rights and democracy are under risk, and no one should take this lightly. Silencing individuals prevents them from making smart policy decisions. Government policy and legislation cannot be evaluated by them, nor can they provide suggestions for solutions to problems involving the economy, health, and well-being [8].

People migrated from offline and physical protest to internet ones in situations when physical protest was too tough. A variety of protest methods were used at the same period. Activists in Rostov-on-Don and Russia used a phone app in 2020 to protest against lockdown restrictions. An online protest was staged on Yandex Navigator, an app for drivers that allows them to report traffic bottlenecks. In the app's virtual map, people identified themselves near government buildings and added words of protest in the comments rather than traffic reports [9].

Another way to show support for the protesters is to use hashtags on social media. For example, in support of those who have been victimised by sexual assault and harassment, the #MeToo movement continues to stand today [10].

In Malaysia, online petitions are also a popular form of protest. As a low-cost and simple-to-organise method of fighting for a cause, the internet petition has gained popularity. In the case of Sam Ke Ting, who was sentenced to six years in jail for the 2017 deaths of seven teens on "basikal lajak", more than 700,000 people have signed online petitions calling for justice [11]. In another example, the Women's Aid Organisation Malaysia was able to deliver its online petition for the introduction of seven days of paternity leave to the government in 2019. M. Kula Segaran (the then Malaysia's Human Resources Minister), who received the petition, consented to present it before parliament [12].

Since Malaysia does not have a specific law governing the rights of online peaceful assembly, this would open a Pandora box for the Government to charge those who assembled online under other legislations such as the Security Offences (Special Measures) Act 2012 (SOSMA 2012) and the Communications and Multimedia Act 1998 (CMA 1998). Very often, the ambit of security laws such as SOSMA and preventive detention laws are often interpreted widely and the Government may claim that the act of assembling online would be detrimental to national security, or prejudicial to the security of the federation, or is likely to excite the disturbance of the peace.

If there is a specific law governing the right of online assembly, then the people who adhere to the conditions and stipulations under the law can not simply be charged under some other legislations for the act of assembling peacefully online.

As seen above, these online protests would fall within Article 21 of ICCPR for people to exercise their rights to assemble peacefully. Perhaps it is time that Malaysia march towards recognising new ways for people to gather and come out with a specific legislation governing such rights.

### 3 Freedom of Expression and Its Relation to Freedom of Peaceful Assembly Online

The Internet and social media may be utilised as a platform for peaceful assembly. Online and social media connections are essential for planning and promoting offline assemblies. It's a good way to express one's displeasure and demonstrate one's support for issues of public concern. Freedom of speech and peaceful assembly thus play an important role in this area.

Freedom of expression comprises the right to express one's thoughts and views without interference from the government and regardless of borders. [13] Consequently, the European Court of Human Rights has acknowledged that the right to peaceful assembly and freedom of expression are frequently linked in reality. A case in point is *Ezelin v France* [14], in which it was ruled that the right to think and voice one's mind is essential to discovering and spreading political truth. Discussion would be pointless without the right to free speech and assembly. The biggest threat to freedom is an inactive population, and meeting is usually an effective defence against the spread of poisonous ideas. There is a strong connection between the right to peaceful assembly and the right to express one's opinions on a particular subject, and in many cases, the European Court of Human Rights has interpreted and applied the right to peaceful assembly in conformity with the right to free speech [13].

Freedom of speech and expression is guaranteed by Article 10(1)(a) of the Federal Constitution [15]. It might be difficult to tell the difference between online freedom of expression and peaceful assembly. Both serve as pillars of a free society. If you share a message that criticises the government's policies, you're exercising your right to express and the right to peaceful assembly online since you are working towards a shared goal with your protesting activities. When it comes to distinguishing communication from expression or assembly, the physical world is simpler to navigate than the digital one. The most obvious distinction is between their social structures. While freedom of speech may be practised on an individual basis, freedom of association and assembly often entails a feeling of shared purpose or interest, as well as a sense of togetherness [16].

A positive deed that may be seen as more generally defined as "expression" is required in the online world. People may join online communities in order to connect with others, but they may not necessarily want to share their own thoughts with other members of the community. However, despite their comparable bounds, the topic of how to distinguish between the freedom of speech and the right of peaceful assembly on the internet is more problematic. Both identification must be recognised so that their equivalents may be afforded the same legal protection and status [17].

Article 10(1)(b) of the Federal Constitution safeguards the right to assemble in peace in Malaysia. As for whether or not it may be utilised for online assembly, the legislation is silent [1]. We believe that the lawmakers who drafted the act did not anticipate the prospect of online assembly, particularly in light of COVID-19, and so did not intend the statute to extend to online assembly. According to Article 10(1)(b) of the Federal Constitution, the peaceful assembly must take place without the use of arms. As a result, if the rule is strictly followed, it will deprive any peaceful online gathering of its right to exist. Such deprivation is contentious in view of the principle that human rights should be protected online in the same way they are protected offline. Depending on the nature

of the conduct, the safeguards afforded by the freedom of speech would likely apply. Hence, we may conclude that the online freedom of speech is broader than the online freedom of peaceful assembly.

## **4 Characteristics of Online Peaceful Assembly**

### **4.1 The Goal**

Online peaceful assembly's first goal is to bring people together in a safe environment. Online peaceful assembly shares the ideal of collective expression and participation in creating society which is similar to physical peaceful assembly. Since it safeguards people's freedom to express individual autonomy in solidarity with others, peaceful assembly is a fundamental human right. Many more rights may be recognised and realised as a result of this social instrument. Aside from serving either expressive or associational purposes, the right of peaceful assembly is sometimes portrayed in instrumental terms [18]. For this, the online peaceful assembly is almost identical to a physical peaceful assembly.

In addition, it is acknowledged that Peaceful Assembly Act 2012 regulates public protests and it is applicable to physical peaceful assembly. It is basically an act that complements well with the Federal Constitution, and hence striking a balance to secure the rights of the people and cutting unlawful assembly. It was discussed earlier that the lawmaker who drafted the Federal Constitution did not anticipate that peaceful assembly would also cover online peaceful assembly. However, if given its widest interpretation, there is still a chance that online peaceful assembly would be governed under the Federal Constitution. It is our view that an act specifically governing online peaceful assembly should be passed or the mode of exercising the right of online peaceful assembly in the Peaceful Assembly Act 2012 should be included.

Hence, it is clear that the aim of online assembly and physical assembly are similar. There must be clear laws to protect a person's right to peaceful assembly, be it online or physically. The definition of online assembly should be widened and the mode and how it is done should be governed, in order to prevent the authorities from violating the fundamental rights of the citizens by charging them under other laws which can be interpreted widely.

### **4.2 The Domain**

Secondly, the domain where the online peaceful assembly would be held. Article 21 of the ICCPR states that all forms of peaceful assembly, whether in person, online, in a public or private location, or a mix of all three, are entitled to equal protection under the law. There are regulations in effect in these locations. As an example, Section 15 of the Peaceful Assembly Act 2012 [19] provides for considerable limits and requirements on the date, time, and location of a physical peaceful gathering. As a matter of fact, the legislation itself only permits people to organise and join assemblies peacefully and without weapons.

When it comes to peaceful online assembly, social media platforms are the most appropriate domain. Due to the fact that online spaces are often based on private rather

than public ownership, there may be interference with the nature and modalities of assemblages, as well as the generation, transmission, and reception of any communicative components [20]. Some of these online locations are exclusive to their owners, while others are held privately but made available to the general public. Still others could include some kind of public visibility with the ability to conduct private discussions. On the internet, encumbrances take many forms, ranging from advertising algorithms to site administrators' interventions, and from platform-specific limits to user data collection. However, if we are used to thinking about gatherings only in terms of public demonstrations and marches, conjuring an image of analogous encounters online may be challenging. It is not implausible to picture assemblies occurring over the internet if one adopts the current definition of 'assembly' as a scheduled meeting of two or more persons. Lockdown limitations imposed in reaction to the COVID-19 outbreak have heightened people's desire to connect with others online. As a result, it might be seen as an act of gathering [21].

### 4.3 The Manner

Thirdly, the manner in which one is present and participating. Defining what constitutes participation or presence in an online peaceful gathering is critical. In our opinion, such interpretation should be construed as narrowly as possible to ensure that all those in need of protection are protected. As a result, everyone who shares, likes, uses a hashtag, changes their profile image, signs or shares a petition online to show their support should be safe from repercussions [22].

### 4.4 The Nature

Fourthly, the nature of peaceful assembly in an online environment. It is important to take note that everything that was uploaded on the internet is going to be there in perpetuity. Things are difficult to remove from the internet after they have been made public [23]. Physical peaceful assemblies, on the other hand, are usually only in place for a few days to a few months at a time. Individuals have a right to congregate online regardless of the durability of online assemblies, according to our perspective. However, this might potentially lead to hacktivism which are based on cyber-protests and civil disobedience that are similar to those that take place in the real world. Denial of service attacks and scribbling political messages on targeted websites are used to overload a website with traffic and cause it to collapse [24]. When it comes to online assemblies, the Communication and Multimedia Act of 1998 comes into play to set boundaries and enforce caution. However, authorities must not interfere with online peaceful assemblies by censoring, filtering, or eliminating information, unless they have a legitimate need to do so. For an instance, the State of Haryana in India has suspended mobile cell services in various locations near Delhi where farmers are on a hunger strike [25].

While there are dangers associated with online peaceful assembly, it is crucial to remember that these risks may be lessened or managed by the application of legislation.

## 5 Challenges in Exercising Freedom of Peaceful Assembly Online

### 5.1 Restrictions of Internet Access, Filtering and Blocking of Content

States should protect individuals' right to hold their assemblies "within sight and sound" of their target audience [2]. Protecting online assemblies would necessitate countries to refrain from interfering when individuals organise assemblies over the internet. For example, unless someone is encouraging others to violence by utilising Facebook, Instagram, Twitter, or a mailing list to plan a gathering, the authorities should not intervene.

However, censorship, outright blocking of content and restriction of internet access are encouraged by the tightening of laws on freedom of expression, association and assembly.

A UK-based technology website rated Malaysia 7 out of 10 on the censorship scale, with 10 being the most censored for the year of 2021, and this is owing to restrictions on social media and political reporting, among other factors [26].

The state tends to filter and block the content to prevent online users from accessing or disseminating information at key political moments especially during elections or times of social unrest. For instance, recently the Chinese government has banned the lyrics of their own China's national anthem, "March of the Volunteers" on their social media like Weibo, Douban and so on, after people used it to vent frustration about the government's oppressive COVID-containment lockdown [27].

In Malaysia, the financial scandal of 1MDB that involved the then Prime Minister in 2015 led to a precipitous intensification in the censorship of online news media, involving the blocking of the websites of Sarawak Report, Asia Sentinel, and The Malaysian Insider [28].

Internet shutdown is also one of the tactics that governments use to avoid further demonstrations in blocking access to the Internet [29]. For example, in 2019, the Indian government suspended broadband, mobile data, and also voice calling services, when there was an online and physical protest to the implementation of a controversial legislation for its alleged religious discrimination [30].

### 5.2 Mass Surveillance and Right to Privacy

The government surveillance is not a secret, and it is understandable that public posts are subject to surveillance. However, it has also been suggested that private communications are also monitored.

Inspector-General of Police Khalid Abu Bakar revealed in January 2016 that the police will monitor messaging apps such as WhatsApp, which he claimed were "widely used by Malaysians to disseminate inaccurate and fake information." [31].

Table 1 reveals the Malaysian government's requests for user account data from Facebook. Since the number of accounts per request is not provided, and Facebook only publishes the percentage of requests where some data is produced to the government, it is unclear how many user accounts have been surrendered. However, as can be shown, the government has increased its data collection success rate [33].

**Table 1.** Malaysian government’s requests for user account data from Facebook [32].

| Period         | Total requests | % of requests where some data produced |
|----------------|----------------|--|
| Jan - Jun 2021 | 48             | 79%                                    |
| Jul - Dec 2020 | 53             | 60%                                    |
| Jan - Jun 2020 | 39             | 74%                                    |
| Jul - Dec 2019 | 32             | 56%                                    |
| Jan - Jun 2019 | 37             | 41%                                    |

In the case of *Big Brother and others v. U.K.* [34], it was held that the state’s surveillance of electronic communications violates their constitutional right to privacy under Article 8 of the European Convention on Human Rights. In this case, they were using electronic communication to organise campaigns, hence, this case does not only involve the right to privacy, but also freedom of association and assembly.

Law enforcement actions to obtain or might obtain communications data and intercept telecommunication signals rings an alarm. Techniques like metadata analysis of an indefinite number of people may cause a person to be associated with particular organisations against his or her desire or knowledge [35]. Individuals should be informed when their data has been accessed or when they are under surveillance.

### 5.3 Addressing the Right Inadequately

The idea of “assembly” can be seen in Article 10(1)(b) of our Federal Constitution and also the Peaceful Assembly Act 2012. Section 2 of Peaceful Assembly 2012 defines “assembly” as “*an intentional and temporary assembly of a number of persons in a public place, whether or not the assembly is at a particular place or moving*” [36]. If the literal interpretation is applied strictly in the online space, it would definitely deprive the protection to right of online peaceful assembly, because it raises a doubt as to whether this right is applicable to online assemblies as well, and whether the requirements which would traditionally apply to a peaceful assembly in the physical world like permission from authorities or notification of the assembly to the authorities will be applicable to the online assemblies [35].

Since Malaysia upholds the doctrine of rule of law, our law should be sufficiently clear to allow a person to know whether his action might breach the law, and to know the possible consequences of such breach [37]. It is crucial for our legislation to be consistent with international human rights standards to define and regulate the powers and discretion of public authorities and law enforcement officials [4].

### 5.4 Prosecution for Online Activities

The right to peaceful assembly is not absolute as it is subjected to the restriction of parliament. Parliament has the authority to enact laws that impose limits if it deems them essential or expedient in the interests of the Federation’s security or public order [38].



The Peaceful Assembly Act is the primary law that governs peaceful assemblies in Malaysia. Besides the Peaceful Assembly Act, the individuals who participate in online peaceful assembly may also be charged under SOSMA, the Penal Code or the Communications and Multimedia Act 1998 (CMA).

SOSMA gives power to the police officers to arrest a person suspected of security offences without warrant and detain them for up to 28 days without charge [39].

Section 186 of Penal Code states that one, if convicted of obstructing a public servant in discharge of his public functions, may be liable to a punishment of up to 2 years' imprisonment [40]. This section has been frequently used to prosecute individuals who are involved in peaceful assembly. Moreover, Section 505(b) of the Penal Code also states that it is an offence for making statements conducting public mischief [41].

Also, Section 233 of the CMA has an over-broad definition which comes with heavy punishment that might infringe on the right to online peaceful assembly. A person who posts offensive content that annoys another person may be imprisoned for up to 1 year and fined up to RM50,000 [42].

These provisions have been applied by the law enforcement officials and courts in prosecuting individuals who are involved in online peaceful assemblies. The broad concepts of the laws we have may increase the chances of restraining the freedom of peaceful assembly, relying on the interpretation given.

#KitaSemuaPenghasut was an unplanned campaign that went viral, which featured a clown caricature to criticise the crackdown on civil society in the wake of high-level corruption allegations. Fahmi Reza shared a caricature of Prime Minister Najib Razak as a clown on Twitter on January 31st, 2016, with the caption "*In 2015, the Sedition Act was used 91 times. Tapi dalam negara yang penuh dengan korupsi, kita semua penghasut.*" [43].

Fahmi Reza was arrested by the police a few weeks after the first photo was posted, under Section 233 of the Communications and Multimedia Act 1998 and Section 504 of the Penal Code [44].

It is worth pondering whether this was a result of not having a specific law governing the rights of online peaceful assembly. Those who assembled online, like Fahmi Reza, can still be charged under other legislations such as SOSMA and CMA because these legislations can be interpreted widely and the Government may claim that the act of assembling online would be detrimental to national security, public order or is likely to excite the disturbance of the peace.

As such, it is vital that there must be clear laws to protect a person's freedom of assembly be it online or physically, though it is undeniable that laws may often also limit one's freedom, in this case, to assemble. For example, under the Peaceful Assembly Act, the police can stipulate all types of conditions even though technically a license is not needed, and one who fails to comply with the conditions can be punished. However, at the very least the existence of clear laws will protect the organisers and the participants and if the organisers and the participants of assemblies adhere to the ambit of the laws and follow the stipulated conditions, they cannot simply be charged under some other laws for assembling. After all, laws should be prospective, open and clear.

## 5.5 Online Civil Disobedience

Hactivism is the act of temporarily disrupting free traffic in order to draw attention to and express dissatisfaction with a certain action or policy. These actions, it could be argued, shall be protected by freedom of expression and peaceful assembly [31]. In Andreas-Thomas Vogel's case [45], the attempted collective blockade of a corporate website in the context of a political event was recognised by the Frankfurt Higher Regional Court as a lawful technique of influencing public opinion, rather than violence or force. When the goal of the act is to protest and the objective/intent has very particular motivations, such as expressing political or social discontent, this technique should also be considered [45].

Interference with computer operation, on the other hand, might be caught by Malaysia's Communications and Multimedia Act 1998.

## 6 Conclusion

People shifted from offline, physical locations to online platforms when physical protest was too difficult, risky, or completely prohibited due to the pandemic. As a result, people around the world creatively used their existing human rights for a better future [7].

Our Malaysian government must be reminded that rights that are safeguarded offline must also be protected online. Governments should act on ICCPR and Council of Europe recommendations to improve human rights practices by repealing harsh laws or provisions and ratifying the core international human rights treaties.

Any restrictions on online and offline freedom of expression and assembly should be enforced only within the bounds of international human rights standards and with adequate judicial scrutiny.

Since the law is silent on online peaceful assembly, it is important to give reference to SOSMA, Penal Code and CMA as there is a risk that a person may be charged under these legislations when the act is interpreted widely just to stop the right of online peaceful assembly from being exercised.

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