

THE PUBLIC'S RIGHT TO PROTEST: A CRITICAL ANALYSIS ON THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY IN MALAYSIA AND THE UNITED KINGDOM



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Introduction

The right to freedom of assembly - being a fundamental, universal and an inalienable right in general - is the individual right of the people to assemble for the furtherance of the cause they advocate and defend. This essentially includes the right to organise or participate in public demonstrations which are commonly known as street protests. However, one must bear in mind that such a right is not only limited to street protests - the scope extends further to cover the right to hold meetings and other public gatherings. It is worth pointing out that the right to assemble is often read alongside with the right of freedom of expression, as noted in the case of *Ezelin v France*.¹

Historically, street protests or public demonstrations have been the engines of change. Notably, there are a number of significant protests that have happened in the world, such as the Protestant Reformation, Gandhi's Salt March, the Tiananmen Square Protest, the Iraq War Protest and the Arab Spring, all of which have functioned as catalysts of change towards the

¹ (1992) 14 EHRR 362 [37].

democratic process and betterment of society. Tolerance of public protests, according to Helen Fenwick, is a hallmark of a democratic and free society.²

This paper presents a comparative analysis on the right to freedom of assembly in Malaysia and the UK, with a particular focus on the controversial Peaceful Assembly Act 2012 (hereinafter referred to as “PAA 2012”).

The Definition of Right to Freedom of Assembly

Article 10(1)(b) of the Federal Constitution of Malaysia (which falls under Part II below the heading titled ‘Fundamental Liberties’)³ guarantees all Malaysian citizens the right to assemble peaceably without arms. The provision reads that ‘all citizens have the right to assemble peaceably and without arms’. That being said, this also means that the Constitution only protects peaceful assemblies and this right is subject to restrictions in the interest of national security and public order. Article 10(1)(b) is subject to the proviso found in Article 10(2)(b) which reads:

...on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order...

The definition of the word “assembly”, on the other hand, is provided for in the controversial PAA 2012, enacted to replace section 27 of the Police

² Helen Fenwick, *Civil Liberties and Human Rights* (3rd edn, Cavendish Publishing 2002) 419.

³ For full text of the Federal Constitution of Malaysia, see <[http://www.agc.gov.my/images/Personalisation/Buss/pdf/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/images/Personalisation/Buss/pdf/Federal%20Consti%20(BI%20text).pdf)>.

Act 1967. In section 3 of the PAA 2012, it is defined 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.’⁴ It is however noted that the term “street protest” carries a different definition in the PAA 2012 and such protests are banned under section 4(1)(c). It is defined to mean an assembly in motion that involves the elements of objection or advancement of a particular cause or causes.

This is quite different from the position in the UK. The word “public assembly” is defined under section 16 of the Public Order Act 1986 as ‘an assembly of twenty or more persons in a public place which is wholly or partly open to the air’. Several cases decided in the European Court of Human Rights (hereinafter referred to as ‘ECtHR’) also showed that it includes marches⁵ demonstrations⁶ and sit-ins.⁷ This differs from the definition of ‘assembly’ in Malaysia which does not cover “street protest”. Another word given to “marches” or “assemblies in motion” in the UK is “public processions”. Despite there being no attempt in defining “procession” in the Public Order Act 1986, Lord Goddard in the case of *Flockhart v Robinson*⁸ stated that a procession is a body of persons moving along a route. The similarity between the right to assembly in Malaysia and the UK is that both clearly indicate that the freedom of assembly is not an absolute right as it can be restricted on the grounds of national security and public order.

⁴ For full text of the PAA2012, see
<[http://www.federalgazette.agc.gov.my/outputaktap/20120209_736_BI_JW001759%20Act%20736%20\(BI\).pdf](http://www.federalgazette.agc.gov.my/outputaktap/20120209_736_BI_JW001759%20Act%20736%20(BI).pdf)>.

⁵ *Christians against Racism and Fascism v UK* (App No 8440/78) (1980) 21 DR 138,148.

⁶ *Oya Ataman v Turkey* (App No 74552/01) ECHR 2006-XIV [38].

⁷ *G v FRG* (App No 13079/87) (1989) 60 DR (Decisions & Reports) 256, 261-263.

⁸ [1950] 2 KB 498 [502].

The Law on the Right to Peaceful Assembly in Malaysia

The Old Law – Police Act 1967

Prior to the PAA 2012, the power to regulate rallies or assemblies in Malaysia was accorded to the police under section 27 of the Police Act 1967.⁹ This provision had long been criticised by lawyers as being unconstitutional¹⁰ in relation to the requirement of applying for a permit to hold an assembly. In addition, SUHAKAM (the Malaysian Human Rights Commission) and Human Rights Watch also criticised the application of this provision on the improper grounds to refuse a permit,¹¹ the granting of power to arrest without warrant under Article 27(6) and the use of force to disperse an assembly should orders not be promptly obeyed.¹² In essence, any assembly that takes place without a police permit is deemed unlawful. In addition, those who disobey police directions in relation to the assembly can be fined between RM2000 to RM10000 and be jailed for up to a year.

PAA 2012 – An Act of Change?

The change that surprised all Malaysian citizens took place on the eve of Malaysia Day (which fell on 16 September 2011) when Prime Minister Datuk Seri Najib Razak announced in the national address that ‘The

⁹ For full text of Police Act 1967, see

<<http://www.agc.gov.my/Akta/Vol.%207/Act%20344.pdf>>.

¹⁰ Boo Su-Lyn, ‘Permits for assembly unconstitutional, says lawyer’ *The Malaysian Insider* (Kuala Lumpur, 1 July 2011)

<<http://www.themalaysianinsider.com/malaysia/article/permits-for-assembly-unconstitutional-says-lawyer>> accessed 2 January 2012.

¹¹ SUHAKAM, ‘Report on Freedom of Assembly’ at Section 1

<http://www.suhakam.org.my/c/document_library/get_file?p_l_id=10408&folderId=26470&name=DLFE-649.pdf> accessed 27 December 2012.

¹² Human Rights Watch, ‘World Report 2012: Malaysia’ under Freedom of Expression, Assembly and Association’

<<http://www.hrw.org/world-report-2012/world-report-2012-malaysia>> accessed 27 December 2012.

Government will also review section 27 of the Police Act 1967, taking into consideration Article 10 of the Federal Constitution regarding freedom of assembly in order to be in line with international norms on the same matter.¹³ In general, the Bill contained several controversial provisions that attracted criticisms from lawyers, the public and civil society groups. This area will be discussed below.

Differences between Malaysia's PAA 2012 and the UK position

Despite the objections, the Bill was nevertheless passed and came into operation on 23 April 2012.¹⁴ Notably, the main difference between the current law and the previous one is that the requirement of police permit has been abolished. Assembly organisers merely need to inform the police of the holding of an assembly with an advance notice of 10 days before the day of the said assembly as per Section 9(1) of the PAA 2012 which reads that:

An organiser shall, ten days before the date of an assembly notify the Officer in Charge of the Police District in which the assembly is to be held.

A similar position can be found in the UK in section 11 of the Public Order Act 1986 (extends to England and Wales by virtue of section 42) which provides that the organisers of a march must provide a 6 day notice in advance from the date of the intended assembly. Both sections require the

¹³ 'PM's speech on eve of Malaysia Day' The Edge Malaysia (Kuala Lumpur, 15 September 2011) paragraph 26
<http://www.theedgemalaysia.com/index.php?option=com_content&task=view&id=193046&Itemid=27> accessed 18 November 2011.

¹⁴ See 'Federal Government Gazette – Appointment of Date Coming into Operation' <http://malaysianlaw.my/attachments/PUB-147-Date-Peaceful-Assembly-Act_15138.pdf> accessed 4 December 2012.

organisers to specify the date, time and venue. Both provisions impose conditions that need to be fulfilled.¹⁵

The notice requirement however, does not apply if it was not reasonably practicable to give any advance notice.¹⁶ In other words, a spontaneous assembly (which is not covered in the PAA 2012 in Malaysia) is exempted from the requirement to provide advance notice. Failure to comply with the notice requirement under the Public Order Act 1986 would only give rise to liability on the part of organisers under section 11(7) similar to PAA 2012, where section 9(5) imposes a fine of not exceeding RM10000. It must be pointed out that the PAA 2012 has also done away with the penalty of imprisonment, which is a positive reform from the old law.

Controversial Provisions

Having demonstrated the main differences between the old law and the new law with reference to the approach in the UK, the focus now shifts to several controversial provisions found in the PAA 2012.

Street Protest

Firstly, one of the most controversial provisions criticised is section 4(1)(c) which serves as a blanket ban on street protests.

In *Public Prosecutor v Ismail bin Ishak & 59 others*,¹⁷ the court held that the term assembly ‘be given its ordinary meaning ... the coming together of two persons or things; a gathering of persons,’ which essentially includes

¹⁵ Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish 2007) 702.

¹⁶ Public Order Act 1986, s 11(1).

¹⁷ [1976] 1 MLJ 183.

street protests or processions. What is more important is that Article 10(2)(b) of the Federal Constitution only provides for “restrictions” on the right to peaceful assembly, rather than “prohibitions”. In other words, the Federal Constitution only permits a limited condition to be imposed on assembly, rather than a complete rejection of the assembly as a whole.

In *Cheah Beng Poh & Ors v Pendakwa Raya*,¹⁸ at the High Court, Judge Hashim Yeop Sani opined that whilst the right to assemble peaceably without arms is not an absolute right as the Federal Constitution permits restrictions in the interest of national security and public order, the court must nevertheless ensure that such restrictions do not amount to a total abolition. Moreover, it is also the writer’s submission that the definition of “street protest” is to some extent confusing with the word “processions” which is permitted under the meaning of “assemblies”. In a closer analysis, both “street protest” and “procession” involve the gathering of a group of people at one place which moves towards another place. This leaves the police with the discretion to decide if an assembly of a group of person moving from point A to point B is a “street protest” or merely a “procession”. In the event that the decision is to classify it as a “street protest”, it will be banned. It is therefore submitted that section 4(1)(c) contradicts Part IV of the Act itself in relation to the notice requirement which recognises assembly in the form of a “procession”.

¹⁸ [1983] 1 LNS 65.

The Najib administration sought to justify the PAA 2012 by claiming that the Act is in fact in line with international norms after a study was made on 12 legislations used by 12 other countries respectively,¹⁹ and that a “street protest” is not part of the Malaysian culture.²⁰ Ironically, it was the famous protest against Malayan Union on 1 March 1946 that led to the Federation of Malaya. Such a prohibition has rendered the right enshrined in the Federal Constitution meaningless as the new law is in fact more restrictive than the Police Act 1967, bearing in mind that street protest was formerly allowed.

Article 10(1)(b) of the Federal Constitution should be construed ‘with less rigidity and more generosity’²¹ so as to protect and promote rather than merely restrict and control individual rights. Whilst restriction is essential in light of national security and public order, it should never be the only and primary purpose.

The Use of Force

The Royal Malaysian Police is also empowered to disperse assemblies under section 21 of the PAA2012. An order to disperse can be issued in one of the

¹⁹ ‘Public assembly law follows international rules’ *The Star Online* (Kuala Lumpur, 29 November 2011)
<<http://thestar.com.my/news/story.asp?file=/2011/11/29/nation/9990590&sec=nation>>
accessed 4 December 2012.

²⁰ ‘Street demos and mooning not our culture, says Najib’ *The Star Online* (Kuala Lumpur, 12 September 2012)
<<http://thestar.com.my/news/story.asp?file=/2012/9/12/nation/12009807&sec=nation>>
accessed 4 December 2012.

²¹ See *Dato Menteri Othman Bin Baginda & Anor v Dato Ombi Syed Alwi Bin Syed Idrus* [1981] 1 MLJ 29 Raja Azlan Shah Judgment; see also *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21, Lord Wilberforce judgment: “...A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.”

six circumstances stated in section 21(1)²² and failure to comply with the order is an offence which carries a fine of not exceeding RM20000.

Prior to the PAA 2012, the power to use force was provided for under section 27B of the Police Act 1967 in which the police may ‘do all things necessary’ and use force which is reasonably necessary should a person resist. With the passing of the PAA 2012, such power is now provided for under section 21(2) in which the police may use all reasonable force to disperse assemblies. Closer analysis shows that such power has not undergone any substantial change. This is because the extent of the exercise of the use of force is not clearly identified. The question remains as to what amounts to the use of reasonable force. That being said, what can be confirmed is that the use of force must meet the test of proportionality, failing which the use of force would be deemed disproportionate.

The present test of proportionality is laid down in the landmark case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*²³ where the Federal Court Judge Gopal Sri Ram commented that:

All forms of state action that infringe a fundamental right must:

- (i) have an objective that is sufficiently important to justify limiting the right in question;

²² The six circumstances are as follows: (a) the assembly is held at a prohibited place or within fifty metres from the limit of a prohibited place; (b) the assembly is or has become a street protest; (c) any person at the assembly does any act or makes any statement which has a tendency to promote feelings of ill-will or hostility amongst the public at large or does anything which will disturb public tranquillity; (d) any person at the assembly commits any offence under any written law; (3) the participants did not or do not comply with the restriction and conditions imposed under section 15; or (f) the participants are engaging in, or about to engage in, unlawful or disorderly conduct or violence towards person or property.

²³ [2010] 3 CLJ 507.

- (ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and
- (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

To obtain a clearer picture on the analysis of proportionality, we can look at the recent events on the use of force by the Malaysian Police in the BERSIH 2.0 and BERSIH 3.0 rallies.

In the BERSIH 2.0 rally held on 9 July 2011, approximately 20000 or more protesters gathered in the capital of Malaysia to demand for a free and fair election. As the rally was held prior to the passing of the PAA 2012, the law applicable at the time was section 27 of the Police Act 1967. It was reported that the police had confirmed 1667 arrests,²⁴ inclusive of pre-rally arrests wearing yellow t-shirts with the word “BERSIH” printed on the front.

The use of force by the police in the BERSIH 2.0 rally does not satisfy the test of proportionality by applying the *Sivarasa* case. Firstly, as the protesters had remained peaceful, the use of force was unnecessary. Secondly, the purpose of the use of force was to disperse the crowd. As such, the excessive firing of tear gas and water cannons amounted to an attack on the crowd, rather than dispersing them. Similarly, the beating, hitting and

²⁴ ‘Officer’s death unrelated to Bersih, police confirm’ *The Malaysian Insider* (Kuala Lumpur, 29 April 2012)

<<http://www.themalaysianinsider.com/malaysia/article/officers-death-unrelated-to-bersih-police-confirm>> accessed 3 January 2013.

kicking of the protesters by the police surely fell short of the objective and were an act of police brutality.²⁵

A similar crackdown was also seen in the BERSIH 3.0 rally that took place on 28 April 2012, 5 days after the PAA 2012 had come into operation. The police arrested a total of 512 people, far lesser than that in BERSIH 2.0. In spite of this fact, the Malaysian Bar at its Extraordinary General Meeting adopted a resolution condemning the Royal Malaysian Police for the excessive use of water cannons and tear gas against participants in the BERSIH 3.0 rally.²⁶ It was reported that the police fired tear gas and water cannons directly at the unarmed protesters, even as the crowd retreated. There were also arrests of members of the public and media professionals, including the reporters and members of the Malaysian Bar.²⁷

The use of force during an assembly is to disperse the protesters. As such, the firing of tear gas and water cannons should have ceased, as soon as the protesters began to retreat, as the objective had been achieved. The continued firing of tear gas and water cannons constituted an attack and therefore did not meet the test of proportionality. It was reported in the resolution that some protesters provoked the police by throwing stones and bottles as well as referring to them in derogatory terms such as “anjing” (dog in the Malay language). The provocation by the protesters should never be the justification for the use of force as the police should have been trained

²⁵ Malaysian Bar ‘Report by BC monitoring team on the public rally held on 9 July 2011 in Kuala Lumpur’ 12 July 2011
<http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/report_by_bc_monitoring_team_on_the_public_rally_held_on_9_july_2011_in_kuala_lumpur.html>
accessed 3 January 2013.

²⁶ Malaysian Bar ‘Extraordinary General Meeting of the Malaysian Bar’ 11 May 2012
<http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/extraordinary_general_meeting_of_the_malaysian_bar_11_may_2012.html> accessed 4 January 2013.

²⁷ *ibid.*

professionally to handle such provocations. Moreover, the unwarranted arrest of the members of public and media professionals was clearly illegal as they were present merely for their duties. They should have been protected instead of being arrested as they were not part of the protest and they were present in order to carry out their function and duty of reporting a national-level incident to the public.

In the UK, dispersal orders can be issued by the police pursuant to section 30 of the Anti-Social Behaviour Act 2003. However, in order to exercise this power, the police must possess reasonable grounds of belief that the public might be intimidated, harassed or distressed as a result of the behaviour of the offender. The use of force, on the other hand, is governed under section 117 of the Police and Criminal Evidence Act 1967, must be reasonable. There is no case law that deals with the degree of reasonableness. That being said, those who claim that the force used was unreasonable may apply for judicial review on the ground of *Wednesbury*²⁸ unreasonableness. In addition, all force used must also satisfy the test of proportionality adopted by Lord Steyn in the case of *ex parte Daly*.²⁹

It appears that, in the UK, it is not the behaviour of the police that is controversial. Instead, it is the approach of the police in using force, namely the approach of containment, commonly known as “kettling” that has proved controversial.³⁰ The purpose of applying this approach is obvious – to control large crowds during public demonstrations. Protesters that are being contained within a limited area are either left with one choice of exit or are

²⁸ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

²⁹ *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532.

³⁰ Julian Joyce, ‘Police ‘kettle’ tactic feels the heat’ *BBC News* (London, 16 April 2009) <<http://news.bbc.co.uk/1/hi/uk/8000641.stm>> accessed 4 January 2013.

completely prevented from leaving at all. This is essentially why such an approach is controversial as it involves detention of ordinary bystanders.

Nevertheless, in the case of *Austin and Saxby v Commissioner of Police of the Metropolis*³¹ which involved the May Day protest in 2001 at the G20 summit in London, the House of Lords upheld the decision of the Court of Appeal and held that kettling was lawful. On 15 March 2012, the European Court of Human Rights held that containment used in the protest was lawful.³²

Whilst such a policy is controversial, it is nevertheless an effective way to use force in ensuring that an assembly is held in a peaceful manner, compared to the tactics used by the Malaysian police in cracking down on peaceful assemblies. The police could act to contain the crowd within a limited area, without the use of tear gas and water cannons fired and therefore allowing the protesters to continue their assembly peacefully.

Conclusion

In conclusion, having analysed the right to peaceful assembly between Malaysia and the UK, it can be said that the PAA 2012 is contradictory to Article 10(1)(b) of the Federal Constitution. Instead of safeguarding and promoting the right of freedom of assembly, the PAA 2012 is in fact undermining it, in particular by banning street protests which were formerly permitted in the Police Act 1967.

³¹ [2009] UKHL 5.

³² 'European court says "kettling" tactics in 2001 lawful' *BBC News* (London, 15 March 2012)

<<http://www.bbc.co.uk/news/uk-17378700>>accessed 4 January 2013. See *Austin and Others v The United Kingdom* App nos. 39692/09, 40713/09 and 41008/09 (ECHR, 15 March 2012).