

UNIVERSITI TEKNOLOGI MARA

**A STUDY ON THE NON-
COMPLIANCE OF PEACEFUL
ASSEMBLY UNDER THE PEACEFUL
ASSEMBLY ACT 2012**

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Dissertation submitted in partial fulfilment
of the requirements for the degree of
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CONFIRMATION BY PANEL OF EXAMINER

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ABSTRACT

This paper is a study on the exercise of the right to the peaceful assembly after the enactment of Peaceful Assembly Act 2012, particularly on the non-compliance of the organiser and participants towards the Act. The Act provides a specific procedure along with the restriction and conditions for the organiser and participants to exercise their right and to ensure the assembly is peaceful. However, the experience shows the failure of the organisers and the participants to comply with the provisions of the Act resulting lots of damaged and consequently affecting freedom of right of the third party. The scope of this dissertation analyses and compare the effectiveness of the laws in Malaysia and United Kingdom and incorporate the factors contribute to the non-compliance of the organiser and participants with the law. To balance between the social right to assembly peacefully and public order, recommendations are proposed to review Peaceful Assembly Act 2012 using Public Order Act 1986 the United Kingdom as the source of reference.

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LIST OF ABBREVIATION/NOMENCLATURE

Abbreviations

PAA 2012	Peaceful Assembly Act 2012 (Act 736)
RMP	Royal Malaysia Police
POA 1986	Public Assembly Act 1986 (Chapter 64)
HRA 1998	United Kingdom Human Right Act 1998 (Chapter 42)
PAPPA 1959	Protected Area and Protected Place Act 1959
OCPD	Officer in Charge of Police District
OCPDJBS	Officer in Charge of Police District Johor Bharu Selatan
DBKL	Dewan Bandaraya Kuala Lumpur (Kuala Lumpur District Council)
LRT	Light Rail Transit
FRU	Federal Reserve Unit

CHAPTER ONE

INTRODUCTION

1.1 RESEARCH BACKGROUND

In Malaysia, the citizen is given the right to express his opinion under Article 10 of the Federal Constitution. However, the right is subject to any limitation imposed by any legislation enacted in Malaysia. As far as public assembly concern prior to the enforcement of Peaceful Assembly Act 2012 (PAA 2012), the law that govern matters pertaining to the public assembly was governed by the virtue of section 27 of the Police Act 1967 (Act 344). Nonetheless, section 27 of Police Act was repealed on 9th February 2012¹ and replaced by the PAA 2012. Basically, this new legislation is meant to regulate matters pertaining to a public assembly; therefore such assembly can be conducted peacefully.

The aim of this Act is to ensure that any public assembly must be conducted peacefully and for that purpose, this Act provide for the procedure in conducting the public assembly. The Act was enforced on 9th February 2012. Notwithstanding, the incident of Bersih 3.0 on 28th April 2012 shows that there were incidents of non-compliance on the restrictions and conditions imposed by PAA 2012 by the participants.² As a result, there were damaged made to properties of an individual and publics and to the government properties and also personal injuries. This illustrate that although PAA 2012 has provided a mechanism to ensure that public assembly conducted must be peaceful yet, based on several assemblies³ that was held, the non-compliance is still occurred. Based on this incident⁴ it shows that the non-compliance may lead to serious impact on the environment especially personal injuries, damage to property, economic and tourism will also be affected. If the issue of non-compliance of PAA 2012 is not appropriately addressed, it may leads to social unrest as experience during 13 May 1969 emergency. For that reason, there is a need to identify

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http://www.federalgazette.agc.gov.my/outputaktap/20120209_A1421_BM_JW001763%20Akta%20A1421-BM.pdf

² Sinar; 28 April 2012 Bersih 3.0 berakhir dengan 'hodoh' by Farah Zamira Farush Khan.

³ Perhimpunan Bersih 3.0, 4.0, Perhimpunan Merah etc.

⁴ See note no.2

the reason for non-compliance of the PAA 2012 especially during the assembly. Besides, a research also needed to identify the best mechanism practice from other jurisdiction on the legal framework of peaceful assembly.

1.2 PROBLEM STATEMENTS

Article 10 of the Federal Constitution provides for the freedom of speech, assembly, and association of the Malaysian citizen. However, the freedom is subject to the restriction imposed by a legislation enacted by the Parliament. One of the laws that were enacted to regulate an assembly in Malaysia is the PAA 2012. The main purpose of establishing the Act is to ensure that an assembly held is peaceful. For that reason, the Act requires the organiser and the participants to comply with the procedures laid out before permission is given to hold an assembly. But, the Bersih 3.0⁵ incident showed that non-compliance on the conditions during assembly did occur. The non-compliance includes participants acted violently, which is perverse to section 7 (a) (II) and (v) of PAA 2012. Besides, some had brought their children along during the assembly⁶ which is contrary to section 4(2) (e) and (f) of PAA 2012. The violent act resulted with persons were injured and properties damaged. Additionally, traders businesses were affected. Consequently, both the public and private sector suffered losses in person, properties and business. Not only that, this situation had turned into an unsecured environment for the public and tourist. Therefore, there is an urgent need to conduct a research on the factors contributing to the act of non-compliance and the way forward on the effective mechanism to adhere to the requirement under the PAA 2012 during assembly.

⁵ 28th April 2012

⁶ The meaning of assembly in this context is referring to the other assembly which is not listed in second schedule of PAA 2012.

1.3 RESEARCH QUESTIONS

In the light of the problem highlighted above, several questions have to be asked:

1. Why the current system weak in ensuring compliance of peaceful assembly under the PAA 2012?
2. How United Kingdom Public Order Act 1986 (Chapter 42) be viable model in sustaining public compliance with PAA 2012?
3. How do we reform to establish an effective legal framework in ensuring compliance of the procedural requirement under PAA 2012?

1.4 RESEARCH OBJECTIVES

The objectives of this study are: -

1. To examine the limitation and drawback of the existing PAA 2012 involving peaceful assembly.
2. To study and analyze the law governing peaceful assembly in United Kingdom.
3. To prepare an effective mechanism on the compliance toward the PAA 2012.

1.5 RESEARCH METHODOLOGY

In order to achieve research objectives, the research methodology of this study is qualitative in nature, which consists of non-doctrinal as primary and doctrinal as secondary data collection. Primary data were gathered through a semi-structured method of an interview while secondary data were collected through doctrinal. The doctrinal approach is based on collecting information throughout primary and secondary sources. The information gathered from PAA 2012 was used as a primary source, while information from library, statute, case law and news were used as a secondary source. This approach is the best way to understand the relationship between provision and legal issues related to the research topic. Conducting an interview mentioned above, Kuala Lumpur has been chosen as sampling area due to the frequency of rally held in Kuala Lumpur is more often compare to the other part of Malaysia. The response interviewed was selected using snowball sampling. The

reason on the approach is to explore the point of view from a people that directly involve in the event.

1.6 SIGNIFICANT CONTRIBUTION OF THE RESEARCH

The research conducted would come out with a proposed model, which provides for an effective legal framework for the implementation and enforcement of peaceful assembly under PAA 2012. This would benefit the government agencies that are involved in implementation and enforcement in a matter pertaining peaceful assembly under the PAA 2012. The research also involves literature on effective mechanism regarding peaceful assembly and this will provide extensive knowledge for academician on peaceful assembly.

1.7 SCOPE AND LIMITATION

The scope of this research is purposely on the procedural provision of the peaceful assembly under the PAA 2012. The analysis of non-compliance that involved the participants and the organizer of the assembly were focus on the incidents of public assembly conducted in Kuala Lumpur after the enforcement of this act.

There are several limitations in completing this research. One of limitations faced is the availability of the officers for the semi-structured interview. Other limitation includes the limitation of disclosed information and data for the actual method applied to ensure the compliance of the public with the PAA 2012. As the study is concern to the non-compliance of the public with the PAA 2012, it is understand that different states faced a different intensity of the assembly and the variety approached by the authority to ensure the compliance of the public to the PAA 2012. Due to the limited fund and source, this study is limited to an assembly held only in Kuala Lumpur as it near to the researcher.

CHAPTER TWO

LITERATURE REVIEW

2.1 CONCEPTUAL FRAMEWORK

Peaceful assembly is an aggregation of people, represented by a body or organization at some place with a specific intent. The right of assembly is implemented when a person or individual get together in the guild to share ideas among themselves or with others, to influence other or to symbolically express their individuality, yet mostly corresponding to group objectives.⁷ Malaysia provides the right to express a thought to its citizens with the enactment of PAA 2012. The Act was formulated with reference to a similar model from other jurisdiction with some modification to suit the local needs.⁸ The Act is an extension of the fundamental liberty enshrined in Article 10 of Federal Constitution that is in line with the United Nation Universal Declaration of Human Rights.⁹ According to Article 20(1) of the United Nation Universal Declaration of Human Rights:

“Everyone has the right to freedom of peaceful assembly and association”.

Fundamental liberties are rights and freedoms that are accorded to the human being. They are rights recognised by the world defended in the Constitution. The right is guaranteed and cannot be taken away unless the Constitution allows it. Judge Raja Azlan Shah in *PP v Ooi Kee Saik*¹⁰ explained that freedom of expression under the Federal Constitution is not absolute. According to the judge:

“There cannot be any such thing as absolute or uncontrolled liberty wholly free from restrain; for that would lead to anarchy and disorder. The possession and enjoyment of all human rights... are subject to such reasonable conditions as may be deemed to be...essential to the safety, health, peace and general order and moral of the community.what the Constitution attempt to do in declaring the rights of the people is to strike a balance between individual liberty and social control”¹¹

⁷ Rūta Petkuvienė, Asta Atraškevičiūtė, and Artūras Petkus (2012)

⁸ Jasri Jamal and Nor Shazana Sedek Shah (2013)

⁹ United Nation Universal Declaration of Human Rights GA Res. 217A (III), U.N. Doc. A/810 at 71 (1948)

¹⁰ [1971] 2 MLJ 108

¹¹ Faridah Jalil (2001)

Narrowed to the research topic, freedom of speech, assembly, and associate to the citizen is subject to the restriction by the Parliament for reasons permitted by the constitution.¹² (Ridzwan Ahmad & Mohammad Nizam Bin Abdul Kadir)¹³ explain that although the idea of establishing PAA 2012 is to allow Malaysian citizen to exercise their rights freely with some restriction compared to the section 27 of the Police Act 1967 (Act 344) that was repealed on 9th February 2012, the Act had failed to ensure the assembly is held peacefully due to the non-compliance of the condition imposed under the Act.¹⁴

(Twila Wingrove, Angela L. Korpas, & Victoria Weisz)¹⁵ enlisted four main factors that influenced the public not to comply with the law. The four factors that identified are deterrence, social norm, personal morality and perceived legitimacy of authority.

Deterrence is referring to the punishment that is imposed to the offender. According to (Tom R. Tyler),¹⁶ deterrence strategy is a primary factor that motivates human to obey the law due to the influence of risk assessment. A similar view was taken by (Levin Am., Dato-on, & Monalis)¹⁷ that states severity of punishment increased public compliance with the law.

To repeat, the second factors that contributed to the attitude of non-compliance by a person is the social norm. The social norm is defined as the perceptions of that one's family and friends have about committing illegal behaviour. (Berne)¹⁸ agreed with the definition of social norm. The former said that social norm includes hope and insistence made by close people such as peers, families and communities. According to him the surrounding people have great influence on someone, especially people close to them and the one that they trusted.

¹² The Malaysian Bar (Producer). (17 Feb 2011). My Constitution: Fundamental Liberties and Citizenship Retrieved from https://www.malaysianbar.org.my/constitutional_law_committee/my_constitution_fundamental_liberties_and_citizenship.html

¹³ Ridzwan Ahmad, & Mohammad Nizam Bin Abdul Kadir. (2013).

¹⁴ Peaceful Assembly Act 2012

¹⁵ Twila Wingrove, Angela L. Korpas, & Victoria Weisz. (2011)

¹⁶ Tom R. Tyler. (2006) p.1

¹⁷ Levin Am., Dato-on, M. C., & Monalis, C. (2007).

¹⁸ Berne, E. (1964).

As mentioned above, personal morality is the third factor that contributed to the behaviour of non-compliance. Personal morality is defined as an internal obligation to obey the law.¹⁹ The last factor that contributed to non-compliance is perceived legitimacy of authorities, which contrary to personal morality that represents external influence compliance. In general, authorities have legitimate right to govern the behaviour of the people they governed. If people trusted the authorities, they will comply with the law implemented by the authorities.²⁰ Conversely, if the trust is absent, they will not comply with the law and the system. According to (Tom R. Tyler)²¹ people evaluate authorities based upon their performance in implementing the law.

In respect of perceived legitimacy of authorities, United Kingdom has applied liaison based public order policing, to gain trust from the organizers and the participant of the assembly and later lead to self-regulate and self-compliance to the order given by the police liaison team (PLTs). It also helps improve the police department in making decision on matters relating to public assembly, correcting inaccurate assumption, emerging risk, mitigating police tendency to use force to arrest, disperse or contain a crowd as a whole.²² The PLTs will establish a contact and communication with the organizers and participants. The PLTs will emerge in the group of the protester and briefly explain the function of PLTs to the protestor, facilitate and negotiate their desire and intention which constitute the assembly. In short, the PLTs act as a mediator between police and protestor.

The PLTs is a police officer that wears a distinct uniform from regular police officers which will distinguish them from the regular police officers and adopt non-repressive approach before, during and after peaceful assembly. Applying the liaison based policing approach to an assembly which consist of a clear structural hierarchy is much easier and giving a better impact. As the point of contact is identified, it will generate information about underlying intentions and consequently increase police confidence that the protestor was not seeking an illegal act. Thus police would be able to respond appropriately. However, dealing with a protest group which does not have an explicit hierarchy of leadership, formal membership or organisation is much difficult. Such group tend toward a culture of loosening affiliation and consensus

¹⁹ See note no. 16

²⁰ See note no. 15

²¹ See note no. 16

²² Clifford Stott, Martin Scothern, and Hugo Gorringe (2013)

decision making, naturally transgressive and reticent to communicate with the police about their intentions.

There were assemblies in the past that used liaison based policing concept.²³ For example, in England assemblies conducted from May to September 2012 used the liaison policing concept and the outcome had a positive impact.²⁴ The application of the liaison policing concept had avoided the use of indiscriminating force, enhance human rights and facilitate democratic forms of protest during those assemblies.²⁵ Although the implementation of PLTs has a positive impact based on trusteeship relationship with the organizers and the participants, the deployment of PLTs members as a negotiator in the event of an assembly will erode the trust given to them by the participants and the organizer. Consequently, this will affect their role as trustee. Therefore, to keep the integrity, function and trusteeship for the PLTs officers, it is best for the PLTs established and focus on specific task to distinguish them from the ordinary police officers.

2.2 LEGAL FRAMEWORK

The effectiveness of PAA 2012 was tested for the first time during Bersih 3.0 rally.²⁶ Although PAA 2012 is meant to allow peaceful public assembly, yet many injuries to persons, damaged properties were reported during and after the incident. The not peaceful event was reported committed by both the participants and police.²⁷ The unwanted scenario occurred due to the non-compliance of the conditions and procedure imposed on the organizer and participants during the assembly. As a result, Government and individuals suffered losses of hundred thousands of ringgit in the event.²⁸ Consequently, the Government took an action against the organizer who had failed to ensure the rally conducted was peaceful throughout the event.²⁹ The rally

²³ 'Occupy' on Tuesday 15th May 2012; 'UKUncut' on Saturday 26th May 2012; UKUncut 'street party' on Friday 1st June 2012; 'Smash Edo on Monday 4th June 2012; Trade Union Council on 20th October 2012 and United Friends and Families Campaign on 27th October 2012;

²⁴ Ibid

²⁵ See note no. 22

²⁶ 28 April 2012

²⁷ See note no.2, see also Laporan Suruhanjaya Hak Asasi Manusia (SUHAKAM) 2012 p.24;

²⁸ Berita Awani Online (2016)

²⁹ The Malaysian Insider (2013)

that was supposed to be peaceful had turned riot.³⁰ Hence, the first issue this research intent to search on is the organizer's responsibility in keeping the assembly peaceful throughout the assembly as provided under Section 6(2) (a), (b), (c), (g) and (h) of PAA 2012. According to section 6 of PAA 2012:

- Section 6 (2) For the purpose of this subsection (1), the organizer shall –
- (a) Ensure that the organization and conduct of an assembly is not in contravention of this Act or any order issued under this Act or any other written law;
 - (b) Ensure that he or any other person at the assembly does not do any act or make any statement which has a tendency to promote feeling of ill-will or hostility amongst the public at large or do anything which will disturb public tranquillity;
 - (c) Ensure that he or any other person at the assembly does not commit any offence under any written law;
 - (g) Ensure that the assembly will not endanger health or cause damage to property or the environment;
 - (h) Ensure that the assembly will not cause any significant inconvenience to the public at large;

The second issue that needs attention is the responsibility of the participants during the assembly. Keeping the idea of peaceful assembly in mind, the Act urges the every member of the assembly to behave courteously while attending or following a rally. According to the section 7, a participant must not engage in any harmful behaviour as stated in section 7(a)(ii), (iii), (iv) and (v). Section 7 provides:

- Section 7 Participant shall –
- (a) Refrain from –
- ...
 - (ii) Behaving offensively or abusively towards any person;
 - (iii) Doing any act or making any statement which has a tendency to promote feeling of ill-will or hostility amongst the public at large or doing anything which will disturb public tranquillity;
 - (iv) Committing any offence under any written law at any assembly; and
 - (v) Causing damage to property;

“Refrain” in general means stopping yourself from doing something.³¹ Reading “refrain” in the context of section 7 means the participant's actions are restricted as stated under section 7(a) (ii), (iii), (iv) and (v). When applied to the theories that

³⁰ See note no.8

³¹ ("Oxford English Dictionary ") p.580

influence human behaviour, it refers to the personal morality factor. The provision is silent on the responsibility of the participant to hold or prevent other members from doing those restrictions. Concerning the factors that influence human behaviour namely as a social norm,³² unlawful act by some parties can affect and motivate others to do the illegal action. It shows that no preventive obligation by the participants to avoid wrongful act committed during peaceful assembly.

Meanwhile, section 7(a)(iii) refrained participants from acting or making any statement that has a tendency to promote ill feeling amongst the public as a whole. This provision prevents any provocation by the member of the assembly toward the public. However, it does not avoid any act of provocation towards authorities that carry out their duties to ensure that the assembly runs smoothly and peacefully by mean of section 8 and 21 of the Act. The role of the police in controlling an assembly is very significant in ensuring peace and stability in the country. Tun Dr. Mahathir Mohamad once said that:³³

“Government instability and weak will result in the occurrence of chaos, and chaos is not going to bring development and prosperity for developing countries. The political schism will affect the time and minds of every person, as can be seen in many developing countries”.

The third issue in this research is on the punishments impose to an offender under PAA 2012. The punishment provided under PAAA 2012 includes the imposition of penalties. The relevant provisions on penalties include section 4(3), section 15(3), section 4(4) and section 21(3) of PAA 2012.

Section 4(3) states that a person who commits an offence under section 4(2)(a),(b),(c),(d) and (e)³⁴ is punishable by a penalty of not more than ten thousand ringgit. Further, section 4(4) provides a penalty of not more than twenty thousand ringgit on a person who commits an offence under section 4(2) (f).³⁵

³² See note no.18

³³ (Tun Dr. Mahathir Mohamad (Disember 1994))

³⁴ Section 4(2) of the PAA 2012 specifically to waive the right to organize and participates if a) any non-citizen to organize or participates to any assembly governed by this Act. b) the location of assembly is within 50 meter from prohibited place; c) organize or participate in street protest; d) organizer age below 21 years old; e) child (age below 15 years old) participate in assembly other than specify in Second Schedule.

³⁵ Prohibition to any person from recruiting, bring along or allows any child aged below 15 years old participate in any peaceful assembly other than assembly specified in Second Schedule.

On the other hand, section 15(3) provides that if a person failed to comply with the conditions and restrictions imposed under section 15(2),³⁶ if convicted the person shall be liable to a fine not exceeding ten thousand ringgit.

Meanwhile, section 21(3) stipulates that if a person failed to comply with an order made under section 21(1), i.e., order to disperse from the assembly, the person could be fined to not more than twenty thousand ringgit if convicted.

If the amount on the imposition of the penalties provided under PAA 2012 is applied to the principle of the severity of punishment, the provision is not severe as the amount of the provision is not severe. The punishment imposed should provide a deterrent effect. A severe punishment may affect the potential offender weigh the consequences of their actions and conclude that the risk of punishment is too severe. To repeat, in deterrence theory, people will deter from committing an offence if the punishment is swift, certain and severe. In the view of aforementioned provision pertaining to the penalty impose to the offender under PAA 2012, it is essential to note that the punishment imposes for either offence are only fine. It also needs to observe and appreciate the prescriptive phrases use in the provision. Both provisions use the phrase “shall be liable to” which indicates that the judge has given absolute discretion in sentencing the offender in the range of fine provided or giving the order of binding over. In the recent judgement, the accused and other three persons who organize “Black Out 505” was failed to notify the OCPD pursuant section 9 of PAA 2012 and punished with a fine of RM 1,950.00 out of RM 10,000.00. To compare, the penalty imposed under the Act is much lesser to the loss that sustained by the government. The Act gives an absolute discretion power to the judge to fix a sentence, which in above example case imposed a lenient punishment to the offender. The penalty provides under the Act does not raise any apprehension in the back of the offender mind from committing an offence under PAA 2012. Since the number of non-compliance of the public to the PAA 2012 is continued over the years, hence, it failed to deter a person from committing an offence under the PAA 2012 which includes non-compliance during the assembly.

³⁶ A restrictions and conditions imposed by the Police, particularly OCPD after considering the interest of security, person who has interest at or vicinity of place of assembly in accordance to the Act.

Therefore, to assure compliance with the conditions and restrictions imposed under the PAA 2012 by organizers and participants, the penalty imposed under PAA 2012 must be increased. It is essential to note that there is no educational research to date in increasing the penalty under the PAA 2012.

2.3. CONCLUDING REMARKS

There are four known factors by scholars that influence the public to not comply with the law namely deterrence, social norm, personal morality and perceived legitimacy of authority. In the researcher view, each factor is interrelated to one another. The PAA 2012 enacted in the spirit of freedom of expression and assembly has provided a clear procedure to commence and regulates an assembly. In order to ensure each assembly held peacefully, the responsibility, restrictions and regulations have been provided by the Act and to be followed. Section 6 of PAA 2012 listed numbers of responsibility to the organizer not only to themselves but also onto participant and the conduct and manner of the assembly as a whole. Section 7, on the other hand, provides the responsibility to the participants toward police, organizer, and people appointed in the course of assembly and to the public at large. Although the PAA 2012 provides a penalty for the offenders under the Act, the punishment provided has failed to deter organizers or the participants from committing the same offence. In the other word, the penalty imposed has failed to adherence them with the Act due to lack of severity of punishment. It can be seen in a recent judgement by the Court and the continuity of non-compliance by the organizers and participants towards the Act ever since enacted.

CHAPTER THREE

PEACEFUL ASSEMBLY ACT 2012 (PAA 2012) IN MALAYSIA

3.1 INTRODUCTION / HISTORICAL DEVELOPMENT

Peaceful is an adjective which means free from disturbance or noise; not involving war or violence.³⁷ According to the section 3 of PAA 2012, assembly means “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”. Thus, a peaceful assembly can be defined as, an aggregation of people in a public place at a certain time, in a good manner without disturbance or violence and with a specific intention represent as a whole. In Malaysia, the law that governs peaceful assembly is Public Assembly Act 2012 (PAA 2012).

PAA 2012 was enacted by parliament and gazetted on 9th February 2012. This Act replaced and repealed section 27, 27A, 27B, and 27C of Police Act 1967 (Act 344) which regulate an assembly held in any part of Malaysia. Before the enactment of PAA 2012, any person or organisation intended to hold an assembly, must comply with section 27, 27A, 27B and 27C of Police Act 1967.

According to section 27(2) of the Police Act 1967, any person or organisation³⁸ intending to convene or collect any assembly or meeting or to form a procession in any public place shall obtain a license which permitted such action. Such license is subject to restriction and condition imposed by the Officer in Charge of a Police District and may be cancelled at any time on any ground.³⁹

The above-mentioned conditions of the Police Act 1967 were alleged to contravene Article 10 (1) (b) of Federal Constitution. The Article states:

- “(1) Subject to Clauses (2), (3) and (4)-
(a) Every citizen has the right to freedom of speech and expression;
(b) All citizens have the right to assemble peaceably and without arms;”

³⁷ "Oxford English Dictionary " 2006)

³⁸ By referring to section 27 (2D) of Police Act 1967 (Act 344), the organization means organization that must be registered or otherwise recognized under any law in force in Malaysia.

³⁹ Section 27(2) of Police Act 1967 (Act 344).

Meanwhile, section 27 (2D) of the Police Act 1967 provides the need of getting a license from the Police before assembly can be permitted.

On 4 February 2004, the Royal Commission was set up by the Yang Di-Pertuan Agong with the advice of Prime Minister to enhance the operation and management of the Royal Malaysian Police.⁴⁰ The establishment of the commission was a positive response by the government regarding the public concerns over reports of human rights violations, abuse of power, corruption and ineffective or unresponsive work practices that have affected the image of Royal Malaysia Police (RMP). Section 27 of Police Act 1967 in June 2008 was repealed due to the general criteria and guideline to the condition needed for permits to hold public.

The amendment of section 27 was recommended by the Police Commission. This led move towards the establishment of PAA 2012 the extent of fundamental liberty under Article 10 of Federal Constitution. The implementation of the Act is in line with the United Nation Universal Declaration of Human Rights.⁴¹ This move shows the efforts and intention of the government in response to the public complaint. With the enforcement of PAA 2012 on 9th February 2012, section 27 of the Police Act 1967 was immediately repealed. With the enforcement of PAA 2012, there is a procedural requirement on how the assembly should be held and the responsibility of parties involved. Contrary to the previous provision, in accordance with the PAA 2012, every citizen was allowed to assembly without any permitted license to make it a lawful assembly. In the other words, every assembly is permitted unless prohibited. In *Public Prosecutor v Yuneswaran a/l Ramaraj*,⁴² the Court of Appeal held that:

“The purpose of the PAA is to facilitate the exercise of the right granted by art 10(1)(b) of the FC and not to restrict it. The PAA is procedural in nature because nothing therein affects the substantive right to assemble peaceably. The PAA merely sets out a series of procedural steps to be taken to ensure and facilitate the exercise of a constitutional right.”

Even though the PAA 2012 is to regulate and providing procedures for conducting an assembly, not all assemblies are covered by the Act. For instance, PAA 2012 does not include election campaign, strike and lock-out or picket. The exclusion is mentioned under section 1(3)(a) and (b) of the PAA 2012. Section 1(3) stated that:

⁴⁰ Tun Abdullah Ahmad Badawi was the Prime Minister at the time.

⁴¹ See note no. 9

⁴² [2015] 6 MLJ 47

“This Act shall not apply to –

- a) An assembly which is an election campaign under the Election Offence Act 1952 (Act 5); and
- b) An Assembly which is a strike, lock-out or picket under the Industrial Relation Act 1967 (Act 177) and the Trade Union Act 1959 (Act 262)”.

Assemblies which not governed by the PAA 2012 are regulated by specific legislation. For example, situation whereby peaceful assembly subsequently turns into unpeaceful assembly or riot are not covered by PAA 2012 but by Chapter VIII of Penal Code (Act 574).⁴³

3.2 AIM AND OBJECTIVE

The primary purpose of this Act is to ensure an assembly conducted peacefully. According to the preamble of the PAA 2012:

“an Act relating to the right to assemble and without arms, and to provide restrictions deemed necessary or expedient relating to such right in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons, and to provide for related matters”.

The term “arms” is defined as “any firearms, ammunition, explosive, corrosive, injurious or obnoxious substance, stick, stone, or any weapon or object, which by its nature, can be used to incite fear or cause injury to persons or damage to property”.⁴⁴ Deriving insight from the preamble that the assembly conducted peacefully it is necessary to impose restrictions on the organizer and participants. The right and freedom of the third party include peaceful enjoyment of one’s possessions; freedom of movement; enjoy the natural environment and carry on business which may extend to citizen and non-citizen of Malaysia.

There are two important objectives of this Act which is to ensure the right of each citizen to organize or participate in the peaceful assembly and the exercise of such right is subject to restrictions imposed for the purpose of security, public order and right and freedom of the third party. Section 2 of PAA 2012 states the objective of the Act. According to section 2:

⁴³ Even though some offences govern by other written law, i.e.; Penal Code, as for the interest and objective of this study, it is best for the researcher to examine only on PAA 2012

⁴⁴ Section 3 of PAA 2012

“The objects of this Act are to ensure –

- a) So far as it is appropriate to do so, that all citizens have the right to organize assemblies or to participate in assemblies or to participate in assemblies, peaceably and without arms; and

- b) That the exercise of the right to organize assemblies or participate in assemblies, peaceably and without arms, is subject only to restrictions deemed necessary or expedient in democratic society in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons”.

3.3 TYPE OF ASSEMBLY

There are four types of assembly under the Act which are as follow:

- 1) Assembly under PAA 2012 procedures;
- 2) Assembly with notification;
- 3) Assembly allowing children participation; and
- 4) Assembly allows child to participating.

3.3.1. Assembly under PAA 2012 Procedures.

In order to embrace the right to a freedom of speech, assembly and association, ⁴⁵ the parliament has enacted PAA 2012 which provides the procedural provision to hold an assembly. Hence, any intended assembly must follow the procedures and restrictions governed by this Act. However, there are two types of assemblies that are not bound by PAA 2012. The related assembly is election campaign under the Election Offence Act 1954 (Act 5) and assemblies involving strike, lock-out or picket under the Industrial Relations Act 1967 (Act 177) and the Trade Unions Act 1959 (Act 262). This exemption is clearly stated under section 1(3) (a) and (b) of PAA 2012. ⁴⁶

⁴⁵ Article 10 of the Federal Constitution

⁴⁶ Section 1(3)(a) and (b) of POA 2012 was mentioned earlier in paragraph 3.1, pages 13

3.3.2. Assembly with Notification.

According to the PAA 2012, one of the essential pre-requisite to hold an assembly is to notify the OCPD 10 days prior to the date of the assembly. Every assembly that is intended to be held and governed by this Act must comply with the requirement. The purpose of this requirement is to ensure that every party involved is being notified and can make a preparation for the proposed assembly to be held and for the administrative purposes. The requirement is explicitly mentioned under section 9 of the POA 2012. Failure to comply shall be liable for punishment accordance to the same section of the Act.

3.3.3. Assembly without Notification.

Notwithstanding to the requirement aforementioned, there are two circumstances whereby such notification is exempted according to the Act. The assembly that exempted from the requirement of notification are; assembly held at the designated place, and assembly specified in the Third Schedule of the PAA 2012.⁴⁷ Referring to the Third Schedule, the specified assembly which does not requiring prior notification to the OCPD are; religious assemblies; funeral processions; wedding receptions; open house during festivities; family gathering; family day held by an employer for the benefit of his employees and their families; and general meeting of societies or associations. Even though it is not a mandatory for an assembly which for the purpose of religious assembly or funeral procession to notify the authority prior to the date of assembly, the organizer of such assembly may notify OCPD where the assembly or procession to be held and may with request for assistance from the police to maintain traffic or to control crowd.

⁴⁷ Section 9 (1); An organizer shall, ten days before the date of an assembly, notify the Officer in Charge of Police District in which the assembly is to be held.

(2); Subsection (1) shall not apply to –

(a) an assembly which is to be held at a designated place of assembly; and
(b) Any other assemblies as may be specified in the Third Schedule.

3.3.4. Assembly Allowing Children Participation.

The child is prohibited from participate in any assembly unless an assembly specified under Second Schedule of PAA 2012. ⁴⁸ Alluding to section 4(2) (e) and (f), any children who participated in an assembly or anyone who brings or allows or recruiting a child to participate in an assembly committed an offence under this Act. Any person who commit an offence under section 4 (2) (e) and (f), shall be liable to a fine not exceeding ten thousand and not exceeding twenty thousand respectively. PAA 2012, defined a child is as a person below the age of fifteen years. ⁴⁹

3.4 RIGHT OF ORGANIZING AND PARTICIPATING

Under article 10 of Malaysia Federal constitution, freedom of speech, assembly and association extend only to the citizen of Malaysia. By virtue of section 4 (1) (a) and section 4 (2) (a) of the PAA 2012 emphasised that only citizen of Malaysia is given the right to organize or participate in a peaceful assembly. Section 4 of PAA also provides the guideline on who is allowed to host or participates in the peaceful assembly, permission on location and nature of the assembly.

Besides being a citizen of Malaysia, an organizer must be at least age of twenty-one years old. Meanwhile, the participants must at reach the age of fifteen years old, except for the assembly specified in the Second Schedule. ⁵⁰ The assembly shall not be held at any prohibited place or within fifty meters from the limit of the prohibited place. According to section 3 of PAA 2012:

“Prohibited place” means –

- a) The protected areas and protected place declare under Protected Areas and Protected Place Act 1959 (Act 298); and
- b) The place as may be specified in the First Schedule” ⁵¹;

⁴⁸ Second Schedule: Children may participate in the assembly which is religious assemblies or funeral procession or assemblies related to custom and assemblies that approved by the Minister.

⁴⁹ Section 3 of the PAA 2012

⁵⁰ See note no. 48

⁵¹ First Schedule: Prohibited Places are; Dams, reservoirs and water catchment area; water treatment plants; electricity generating station; petrol stations; hospitals; fire stations; airports; railways; land

The nature of an assembly to be held shall not be a street protest. According to the section 3 of the Act, street protest means an open location assembly which involves a mass march at the beginning from a specific place to the gathering location with intention of objecting to or advancing a particular cause or causes. In *Dato' Seri Anuar bin Ibrahim v Public Prosecutor*,⁵² the applicant contended that street protest was a form of an assembly and section 4(1)(c) and 4(2)(c) of the PAA 2012 banning the street protest was ultra vires Art 10(2)(b) of the Federal Constitution. In dismissing the application, Kamardin Hashim J held that:

“Section 4(1)(c) and 4(2)(c) of the Act neither violated nor contravened art 10(1)(b) of the Constitution and therefore were not null and void. Article 10(1)(b) of the Constitution conferred right of an assembly peaceably without arms but subjected to restrictions necessary or expedient in the interest of the security of the Federation or any part or of public order. In other word, that freedom of assembly was not an absolute right... street protest or demonstration as its normally known is also not allowed in other jurisdiction. Banning street protest as one of the form of peaceful assembly without arms is necessary in a democratic society for the protection of morals and the rights and freedom of others...”

It is essential to note that, section 4 of PAA 2012 provides that it is an offence on the following:

- (a) If the participants are non-citizen or
- (b) Person under the age of fifteen years old that not specified under Second Schedule or
- (c) Participate in street protest or
- (d) Assemble in prohibited area or within fifty meters from prohibited area.
- (e) An organizer who is not citizen or
- (f) Citizen under the age of twenty-one years old or
- (g) Citizen aged above twenty years old but organize a street protest or assembly in prohibited area or within fifty meters from prohibited area.⁵³

public transport terminals; ports, canals, docks, wharves, piers, bridges and marinas; place of worship; kindergartens and schools.

⁵² [2013] 3 MLJ 103

⁵³ Section 4(2) of the PAA 2012

Any person who failed to comply with the restrictions imposed above shall be liable to a fine not exceeding ten thousand ringgit upon conviction.⁵⁴ Meanwhile, anyone recruits a child to an assembly other than specified in the Second Schedule,⁵⁵ shall be liable to a fine not exceeding two thousand ringgit if convicted.⁵⁶

3.5 ORGANIZER RESPONSIBILITY

PAA 2012 imposed high duties on the organizer of an assembly. There are two interpretations of the term “organizer” which is section 3 expressly define organizer as a person who is responsible for the organisation of an assembly, including the arranging, convening, collecting or forming of the assembly,⁵⁷ or who is responsible for the conduct of an assembly. In the case of *Yuneswaran Ramaraj v PP*,⁵⁸ the appellant signed the notice on behalf of Dato’ Chua Jui Meng. He was later charged by Session Court in the capacity as an organizer for failure to notify the OCPDJBS of the assembly ten-day before the date of assembly as required by section 9(1) of PAA 2012. On appeal to the High Court of Malaya, Johor Bahru, Mohd Sofian Razak J held that:

“The appellant was indeed the organizer of the assembly. Not only did the appellant submit the notice to the OCPDJBS, he had also periodically informed members about the progress of the assembly through his Facebook and Twitter, this tantamount to the appellant informing, arranging and being responsible for the conduct of the assembly which was consistent with his position as an executive secretary of PKR Johor, as prescribed in the definition of an organizer in s. 3 of the PAA.”

Also, section 19 provides a presumption that organizer includes any persons who contribute for the success of an assembly. According to section 19:

“If –

- a) An assembly is held at a designated place of assembly;
- b) An assembly is specified in the Third Schedule;
- c) A notification required under subsection 9(1) was not given; or

⁵⁴ Section 4(3) of the PAA 2012

⁵⁵ See note no. 48

⁵⁶ Section 4(4) of the PAA 2012

⁵⁷ Section 3 of the PAA 2012

⁵⁸ [2015] 9 CLJ 873

- d) A notification required under subsection 9(1) was given but the identity of the organizer stated in the notification is false;

Any person who initiates or leads, promotes, sponsors, hold or supervises the assembly, invites or recruits participants or speaker for the assembly, shall be deemed to be the organizer of the assembly”.

Section 6 of PAA 2012 draws guidelines on the responsibility of organizer. The primary responsibility of organizer is to ensure an assembly held is in accordance with PAA or any other written law. Thus, to achieve the main responsibility as an organizer, section 6(2) (a) to (j) of the PAA 2012 listed the duties of organizer explicitly. According to section 6(2)(a) to (j):

- “(2) For the purpose of subsection (1), the organizer shall –
- a) Ensure that organization and conduct of an assembly is not contravention of this Act or any order issued under this Act or any other written law.
 - b) Ensure that he or any other person at the assembly does not do any act or make any statement which has tendency to promote feelings of ill-will or hostility amongst the public at large or do anything which will disturb public tranquillity;
 - c) Ensure that he or any other person at the assembly does not commit any offence under any written law;
 - d) Ensure that the organization and conduct of an assembly is in accordance with the notification of assembly given under subsection 9(1) and any restrictions and conditions which may imposed under section 15;
 - e) Appoint such number of persons as he thinks necessary to be in charge of the orderly conduct of the assembly;
 - f) Co-operate with the public authorities;
 - g) Ensure that the assembly will not endanger health or cause damage to property or the environment;
 - h) Ensure that the assembly will not cause any significant inconvenience to the public at large;
 - i) Ensure the clean-up of the place of assembly or bear the clean-up cost of the place of assembly; and
 - j) In the case of simultaneously assemblies or counter assemblies, ensure that the organization of the assemblies are not intended to specifically prevent the other assembly from taking place or interfere with the organization of such assembly.”

This section explained that the organizer must ensure anyone involves in the assembly must follow specific conditions and restrictions imposed under the Act. Any personal involve in the assembly must follow any order issued under this Act. The meaning of “any order issued under this Act” includes restrictions and conditions

imposed under section 15 of the Act and any other order given by the authority during an assembly which includes the order made by the authority in part V of the PAA.⁵⁹

Under section 6(2)(b),⁶⁰ it prohibits any persons involve in the assembly to provoke orally or physically to any other persons in the assembly or near the assembly with the intention to promote ill-will or hostility or to disturb public tranquillity. To ensure that the assembly is held in a peaceful manner, section 6(2)(c) emphasise that any organizer or participants shall not commit any offence under any written law enforce in Malaysia during the assembly.

According to section 6(2)(d),⁶¹ the organizer must ensure that all particular in the notification under section 9 of the Act is valid and the conduct of the assembly shall be held in accordance with the restrictions and conditions imposed under section 15. The limitations and conditions imposed for an assembly vary from one to another. Besides the restrictions and conditions mention in the PAA 2012; other limitations may come from OCPD if it is necessary, to secure individual or property safety in the assembly area. Restrictions and conditions may also come from the person who has interests which are explained under section 3 of PAA 2012. Section 3 states:

“Person who has interests” means a person residing, working or carrying on business or having or owning residential or commercial property in the vicinity of or at the place of assembly”

Under PAA 2012, there is no restriction on a number of participants allowed to join an assembly. However, there is incident in the pass⁶² that peaceful assembly had turned unruly. In that situation, the organizer was not being able to control the mass. That would bring the negative impact to the security of the public. Consequently, for the purpose of security and safety, while ensuring the right of Malaysia citizen to their freedom of speech, assembly, and association, the PAA 2012 allows the organizer to appoint and allocate a number of people necessary to regulate the conduct of an

⁵⁹ Order made by any police officer pertaining for an arrest and dispersal of assembly.

⁶⁰ Section 6(2)(b); Ensure that he or any other person at the assembly does not do any act or make any statement which has a tendency to promote feelings of ill-will or hostility amongst the public at large or do anything which will disturb public tranquillity;

⁶¹ Section 6(2)(d)of PAA 2012 ; Ensure that the organization and conduct of an assembly is in accordance with the notification of assembly given under subsection 9(1) and any restrictions and conditions which may be imposed under section 15;

⁶² After the enforcement of the Act, i.e.: Bersih 3.0.

assembly.⁶³ To ensure the peaceful assembly, the organizer shall co-operate with public authority.⁶⁴ The public authority will assist an assembly in term of traffic and crowd control. The authorised personnel at any time may give orders to regulate the conduct of assembly and organizer shall comply with such orders.⁶⁵

Section 6(2)(g) of PAA specify that the organizer shall ensure that the assembly will not endanger the health and cause damage to property or the environment. Under this section, it prohibits any person taking part in the assembly to endanger health to any other person or cause any damage to property and the environment. Properties for the purpose of this Act extend to individual property, public property, and government property either the property is moveable property or non-moveable property.

Meanwhile, there is no interpretation of the meaning of “environment” in this Act and in the Interpretation Acts 1948 and 1967 (Act 388). Thus, to understand the meaning of “environment” in PAA 2012, the interpretation derived from Environmental Quality Act 1974 (Act 127) should be applied. An environment is anything under the sun. According to section 2 of the Environmental Quality Act 1974 (Act 127):

“environment” means the physical factors of the surroundings of the human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factor of animals and plants and social factor of aesthetics”;

Besides a broad meaning of environment applied to section 6(2)(g) of PAA 2012. By this provision, the organizer must ensure that the participants of the assembly will not cause any damaged to anything surrounding them during the assembly.

It is essential to note that the organizer must make sure that the assembly will not cause any significant inconvenience to the public.⁶⁶ The meaning of the term “any significant inconvenience” is broad and may extend to prior to the assembly, during the assembly and after the assembly was held. The term includes difficulty for public to exercise their right of freedom. In Malaysia, it is often seen that during the assembly, lots of roads were closed, traffic congested and even public transport such

⁶³ Section 6(2)(e) of PAA 2012- Appoint such number of persons as he thinks necessary to be in charge of the orderly conduct of the assembly;

⁶⁴ Section 6(2)(f) of PAA 2012- Co-operate with the public authorities;

⁶⁵ This condition is discuss earlier under section 6(2)(a), pg.19.

⁶⁶ Section 6(2)(h) of the PAA 2012

as monorails, LRT, commuter and trains were affected due to the high volume of users and order by authorities.⁶⁷ For instance, in the recent incident of peaceful assembly conducted by the organizer of “Bersih 5.0” and “Himpunan Merah 2.0” on 19th November 2016, roads were closed and disrupt traffic and daily activity of the public.

Another responsibility of the organizer is the cleanliness of location of an assembly during and after the assembly was held. Failure on the part of the organizer would lead to liability under section 6(2)(i). According to section 6(2)(i), the organizer is responsible for ensuring the place of assembly is cleaned up or bear the clean-up cost of the site of assembly. There were also incidents of vandalism, damaged to property and person.⁶⁸ Also in the past, the local municipal was the one who cleaned up the mess and bears all the expenses.⁶⁹

Although section 6 of the PAA 2012 specifically established to impose the responsibility of an organizer to ensure the assembly is peaceful, by literally reading the provision, there are two issues arises. First, according to section 6(2)(d) of PAA 2012, the organizer is subject to a penalty of if failure to comply with notification of the assembly under section 9(1) and any restrictions and conditions imposed under section 15. Second, any failure to comply with the responsibility of the organizers under section 6(2)(a) to (j) (except for section 6(2)(d)) is not tantamount as an offence. This issue was raised in *Kerajaan Malaysia v Ambiga Sreenevasan & Ors.*⁷⁰ The 15 defendants were the organizers of “Bersih 3.0” which was held on 28th April 2012. The government commenced suit against the defendants for their breach of obligation under section 6(2) of the PAA 2012 and causing damaged to government property. In dismissing the application, Varghese George JCA held that:

“The primary objective of s. 6(2) of the PAA was to provide for measure to regulate the citizen’s right to organize and participate in peaceful assemblies. The choice of word ‘ensure’ in s. 6 of the PAA did not connote that the carrying out of any particular responsibility was a ‘must’ or a legally binding and imperative obligation. If it was the intention of the Legislature to impose statutory civil liability or some penal sanction for

⁶⁷ <http://www.sinarharian.com.my/black505-punca-lalu-lintas-kl-sesak-1.174478>

⁶⁸ DBKL has been filing civil suit to the organizer of the assembly for the remedies of damage of property and cleanliness for Bersih 3.0 (RM 110,543.27), Bersih 4.0 (RM 61,840.00) and Bersih 5.0 (RM 27,373.66)

⁶⁹ Since the enactment of PAA 2012, DBKL has been claiming expenses for cleaning and damage done at the place of assembly; BHonline on 15th September 2015: DBKL hantar bil tuntutan penugasan, kerosakan hujung bulan ini. <http://www.bharian.com.my/node/82071>

⁷⁰ [2016] 5 MLJ 721

failure to comply with the assigned responsibilities on the defendants as the organizers of the assembly, this would have been specifically provided for within the PAA itself by the Legislature. However, it was clear that the provision of s. 6 and in particular s. 6(2)(g) of the PAA did not imposed a statutory duty or liability on the organizers, and no right of a private cause of action arose even if there was any violation or some failure to abide with the responsibilities on the part of the defendants.”

Section 6 of the PAA 2012 should be read together with section 21. Any failure of the organizer to comply with their responsibility which led to unruly assembly is subject to the discretion power of the police to disperse such assembly.

Section 17 of the PAA 2012, permits a simultaneous assembly. However, the same Act says that the Assembly shall be held independently. The matter is provided under section 6(2)(j) of PAA 2012. Referring to section 6(2)(j):

“In the case of simultaneous assemblies or counter assemblies, ensure that the organization of the assemblies are not intended to specifically prevent the other assembly from taking place or interfere with the organization of such assembly.”

Referring to the interpretation of section 3 of PAA 2012, simultaneous assemblies and counter assembly defines as:

“Simultaneous assembly means two or more assemblies held at the same time, date and place, but have no relationship to each other”

“Counter assembly means an assembly organized to convey disagreement with the purpose for which another assembly is organized, and held at the same time, date and place or approximately at the same time, date and place which to other assembly”.

Applying the meaning given above, the Act allows more than one assembly to be held in the same or approximately at the same date, time and location, even though such assembly is in disagreement to another assembly, so long as one assembly is not preventing or stop another assembly held.

3.6 PARTICIPANTS RESPONSIBILITY

PAA 2012 is not only emphasising the responsibility onto the organizer, but also to the participants. Section 7 of the Act specifically lists out the responsibility of the participants. Those who participate in the assembly are not allowed to disrupt or prevent any assembly. Any assembly mentions this section is referring to any kind of simultaneous assembly or counter assembly. Besides, the participants are also prohibited from behaving offensively or abusively towards any person. Offensively or abusive behaviour may extend to physically or orally or the use of signs. The provision states that participants are not allowed to make any statement or to promote any act which may disturb public tranquillity. According to section 7(a)(iii) of PAA 2012;

“A Participant shall –

a) Refrain from –

...

ix) A participant shall refrain from doing any act or making any statement which has a tendency to promote felling of ill-will or hostility amongst the public at large or doing anything which will disturb public tranquillity

...”

The participants are disallowed to commit any other offence under any written law. Referring to section 7(a)(IV) of PAA 2012;

“A Participant shall –

a) Refrain from –

...

iv) Committing any offence under any written law at any assembly

...”

By the virtue of this section, at any time during any type of assembly, ⁷¹ the participant is prohibited from commit any offence under any enforces written law at the time. The participant is also forbidden from causing damage to any property either individual, government or public property. The relation of responsibility imposes to the participant toward the police, organizer, or any person appointed by the organizer

⁷¹ An assembly covered by PAA 2012 as discussed earlier in the sub-topic Type of Assembly.

to regulate the conduct of assembly are stated under section 7(b) of PAA 2012. According to the provision:

“A participant shall –

...

- b) Adhere to the order given by the police, organizer or any person appointed by the organizer to be in charge of the orderly conduct of the assembly”

Only an assembly in a peaceful manner is allowed to hold. Thus, for the citizen to exercise their right of freedom in accordance with article 10 of Malaysia Federal Constitution and to ensure that an assembly maintains peacefully, an order given by the police as the authority to regulate an assembly is crucial. This provision indirectly shows the priority order to be followed. Therefore, the participant shall follow order by police as the priority over the order by the organizer.

3.7 ASSEMBLY NOTIFICATION

A peaceful assembly is permitted if it is conducted in the light of PAA 2012. Under the Act, two notifications shall be made before the assembly namely: notification to the OCPD and notification to the person who has interest.

3.7.1. Officer In Charge Of the Police District Notification.

To ensure an assembly is conducted and maintained peacefully and without interrupting another person of their right of freedom, it is necessary for the police to regulate the gathering. Thus, notification made by an organizer to the OCPD is one of the essential requirements for an assembly to be held according to the Act. Part IV of the PAA 2012 provides for the need for organising an assembly.

Per section 9⁷² of PAA 2012, the organizer shall not later than ten days before the date of assembly, notify the OCPD the intention of organising an

⁷² Section 9 (1); An organizer 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.;
(2) Subsection (1) shall not apply to:- (a) an assembly which is to be held at a designated place of assembly; and (b) any other assemblies as may be specified in the Third Schedule.;

assembly. Such notification is given by sending an acknowledgement of receipt registered post or courier or by hand. Failure to comply with the requirement may result in a penalty of not more than ten thousand ringgit if convicted. Notwithstanding the provision, such notification is exempt if; the assembly is held at the designated place; and the assembly as mentioned under Third Schedule of the PAA 2012. Even though religious assembly and funeral procession is exempted from preparing the notification in the light of section 9(1) of PAA 2012, the organizer may inform OCPD on the assembly to be held and if necessary, request for assistance to regulate the traffic or crowd control.

Assembly notification addressed to the OCPD as discussed above shall meet the requirement govern by section 10 of PAA 2012. Per section 10 of PAA 2012, the notification shall be in the form as formatted under Fourth Schedule and signed by the organizer.⁷³ Referring to section 10(e)(i) – (xi), such notification must contain;

“The notification made under subsection 9(1) shall –

...

- (e) Contain the following particulars:
 - i) The name and details of the organizer;
 - ii) The correspondence address of the organizer;
 - iii) The name and address of the speakers in the assembly, if any;
 - iv) The purpose of the assembly;
 - v) The date on which the assembly is to be held;
 - vi) The place at which the assembly is to be held;
 - vii) The time at which it is proposed that the assembly will begin and end;
 - viii) If the assembly is a procession –
 - (A) The proposed route of the procession;
 - (B) Any place which it is proposed that the procession will stop; and
 - (C) The length of time it is proposed that the procession will remain at each such place;
 - x) The expected number of participants;
 - xi) The person appointed by organizer to be in charge of the orderly conduct of the assembly; and

(3) if the assembly is religious assembly or a funeral procession, the organizer may inform the Officer in Charge of the Police District in which the assembly or procession is to be held; and may, if assistance is needed to maintain traffic or crowd control, request for such assistance.;

(4) The notification under subsection (1) shall be given to the Officer in Charge of the Police District in which the assembly is to be held by A.R. registered post or courier or by hand.;

(5) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

⁷³ Section 10(a) and (b) of PAA 2012.

- xii) A description of the sound amplification equipment or device proposed to be used, if any, during the assembly.”

A complete notification form shall be accompanied by a copy of consent by the owner or occupier of the place of assembly.⁷⁴ According to section 11 of PAA 2012,⁷⁵ such consent is exempted for any assemblies mention under section 9(2) (a) and (b) of the Act. Notification under section 9(1) of PAA 2012 shall be accompanied by any other additional document specified and deemed necessary by the OCPD.⁷⁶

Notwithstanding to the responsibility of the organizer to serve a ten-day prior to the commencing of peaceful assembly, there is a constitutional argument of section 9(1) of the PAA 2012 which will affect its validity. Muhamad Ariff JCA in *Nik Nazmi bin Nik Ahmad v Public Prosecutor*⁷⁷ decided:

“Section 9(1) of the PAA was constitutional. It could not be said that the said provision could not pass constitutional muster as a reasonable restriction... the court in testing the constitutionality of legislative action should not substitute their own view on what ought to be proper policy. The court domain was to determine the legality of an action judge against proper legal standards, principle and rules.”

To add, in recent case pertaining to the constitutionality and validity of section 9(1), Amelia Tee Abdullah J in *Mohd Rafizi Ramli & Anor v PP & Other Appeals*⁷⁸ held that:

“... The requirement under s. 9(1) of the PAA to give notice prior to the exercise of the right to assemble peacefully is not a ‘restriction’ within the meaning of art. 10(2)(b) of the Federal Constitution (‘Constitution’) ...”

The matter of constitutional of section 9 of PAA 2012 will be discussed further in sub-heading “Notification Period”.

⁷⁴ Section 10(c) of PAA 2012.

⁷⁵ The organizer of an assembly, other than a religious assembly or a funeral procession or an assembly held at designated place of assembly, shall obtain the consent of the owner or occupier of the place of assembly for it to be used for the purposed of the assembly.

⁷⁶ Section 10(d) of PAA 2012.

⁷⁷ [2014] 4 MLJ 157

⁷⁸ [2016] 7 CLJ 246; [2016] 1 LNS 473

3.7.2. Notification to the Person Who Has Interest.

Notification to the person who has an interest in the assembly is highlighted under section 12 of PAA 2012. The OCPD, not more than twenty-four hours upon receiving notification made under section 9(1) of PAA 2012 shall notify any person who has the interest for the place which an assembly to be held. The OCPD may notify to such person by either posting a notice prominently at various location at the expected area of an assembly; or with any reasonable method which deemed suitable or necessary so that such person may be informed.

If any concern or objection arises by any person who has interest, such person should submit in writing expressing their concern or objection to the OCPD. Any concern or objection by a person who has an interest shall be made within forty-eight hours upon the acknowledgement of notification made by OCPD. Such complaint shall take into consideration and OCPD may advise the organizer and may impose any restrictions or conditions regarding any concern and objection made by person who has interest.

3.7.3 Notification Of Simultaneously and Counter Assembly

Per section 17 of PAA 2012, OCPD upon receiving more than one notification from organizers to hold an assembly at the same time, date and place, such simultaneous assembly is allowed to hold subject to the restrictions and conditions imposed under section 15 of PAA 2012. However, if Officer in Charge of Police District determined such assembly cannot be held simultaneously, he shall decide either to give preference to the organizer whom first submitted the notification to hold an assembly; unless the traditional or contract use of such place are meant for the other assembly; or if more than one notification received at the same time, the priority will be given to the organizer whose name is extracted in a draw made by the OCPD.

Meanwhile, the counter assembly is governed by section 18 of PAA 2012. OCPD upon receiving notification from organizer and with an evident determined that such assembly will cause conflict between the participants of an assembly, he shall advise the organizer of such assembly to conduct the assembly at different time, date or place.

3.7.4. Notification Period.

Per section 9(1) of PAA 2012, an organizer must serve ten-day notice before the date of the assembly to the OCPD. Notification of an assembly shall in the form in the Fourth Schedule of PAA 2012. Any failure of the organizer to comply with the requirement is deemed to commit an offence under the Act and is liable to a fine not exceeding RM 10,000.00 if convicted.

Several arguments arise on the constitutional of section 9(5) of the PAA on the validity of the punishment imposed to an organizer who failed to comply with the requirement of notification. Mohamad Ariff JCA in *Nik Nazmi bin Nik Ahmad v Public Prosecutor*⁷⁹ held that:

“There is no provision in the PAA which stipulate that an assembly held without the giving of the requisite prior notice was per se unlawful. That which was fundamentally lawful could not, in the same breath, result in an unlawful act on the part of the organizer by reason of an administrative failure or omission. Such dichotomy was irrational in legal sense. The effect of holding s. 9(5) of the PAA valid would be to hold an organizer of an assembly criminally liable although the assembly itself was peaceful or there was fully compliance with the terms and conditions imposed. The legislative response was wholly disproportionate to the legislative objectives.”

In addition, Hamid Sultan JCA in *Nik Nazmi* case held that:

“The PAA gave the right to everyone to assemble whether notice was or was not given. To criminalise for not giving notice and penalising the organizer had no nexus to public order or interest of the security of the Federation unless the assembly was not peaceful. Section 9(5) failed the reasonable test as well as proportionality test as it had no nexus to public order, security of the Federation and/or an assembly was not peaceful.”

⁷⁹ [2014] 4 MLJ 157

The unconstitutionality of section 9(5) of the PAA 2012 has become *stare decisis* in the following cases. In *Pendakwa Raya v Badrul Hisham bin Shahrin & Ors*,⁸⁰ the Session Court Judge stated that section 9(1) and 9(5) of the PAA 2012 must read together not independently. Non-compliance with the requirement of notification in section 9(1) will culminate into an offence under section 9(5). Hence when the Court of Appeal declared section 9(5) to be unconstitutional, technically means section 9(1) is also unconstitutional. In delivering its ruling, Ahmad bin Bache SESSCJ held that:

“... as the Court of Appeal’s decision that binds this court is silent on the effective date of the declaration as to the unconstitutionality of section 9(5) of the PAA 2012, it is my considered opinion that it is effective *ab initio*. Had it wanted to have a prospective effect, it would have mentioned accordingly. Hence the unconstitutionality of section 9(5) which is *ab initio* is to have a similar effect in relation to the charge against the OKS now before court.”

The same doctrine followed by High Court of Malaya in *Yuneswaran Ramaraj v PP*⁸¹ when overruling the decision of Session Court Judge by set aside penalty RM6,000 liable to the appellant. Mohd Sofian Razak J held that:

“Based on the doctrine of *stare decisis*, the court was bound to follow the decision of *Nik Nazmi’s* case which held that s. 9(5) of the PAA was ultra vires art. 10 of the Constitution for criminalising a breach of restriction under s. 9(1) and therefore unconstitutional. The decision of SCJ was therefore set aside and the payment of fine of RM6,000 was to be refunded.”

However, the Court of Appeal in *Public Prosecutor v Yuneswaran a/l Ramaraj*⁸² the court has derived away from *stare decisis* in *Nik Nazmi’s* case. The Court held that:

“Nothing in art 10(2) of the FC could be construed as prohibiting the imposition of criminal sanction for non-compliance with a ten-day notice. There is no need for the power to impose criminal sanctions to be expressly provided in art 10 of the FC. Article 74 of the FC clothes Parliament with power to legislate. Internal security which includes public order, is within the legislative competence of Parliament under List I, item 3 of the Ninth Schedule of the FC. Read with s. 40(1) of the Acts, it is plain that Parliament may

⁸⁰ [2014] MLJU 412 -44

⁸¹ [2015] 3 CLJ 404; [2014] 1 LNS 1192

⁸² [2015] 6 MLJ 47

criminalise any act... Section 9(5) of the PAA does not run foul of art 10(2)(b) of the FC. Section 9(5) is entirely constitutional, valid and enforceable. The Court of Appeal thus departed from the earlier decision and the view taken by the Court of Appeal in *Nik Nazmi*.”

The decision made in *Public Prosecutor v Yuneswaran a/l Ramaraj*⁸³ has become stare decisis in the following cases thereafter. For an instance, the case in *Maria Chin bt Abdullah lwn Pendakwa Raya*,⁸⁴ where the appellant organize “Bersih 4.0” without advance notification to the OCPD of Brickfields. In dismissing the application on whether the section 9(5) is contravention with art 7(1) and 10(2)(b) of the Federal Constitution (‘Constitution’), Mohamad Sharif PK held that:

“Since there were two contrasting Court of Appeal decisions on the same issue relating to s. 9(5) of the Act, based on principle of stare decisis and the doctrine of judicial precedent, the decision of the Court of Appeal in the case *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 (‘Yuneswaran’) on the same issue prevailed against the precedent made by it in the case of *Nik Nazmi*. The decision of the Court of Appeal in the case of *Yuneswaran* relating the validity of s. 9(5) of the Act as not ultra vires art 10(2)(b) of the Constitution came into force, retrospectively...”

The same principle has been adopted in the case of *Mohd Rafizi Ramli & Anor v PP & Other Appeals*.⁸⁵ In this case, the appellant has informed the OCPD Dang Wangi but the appellant failed to comply with the condition imposed by the OCPD to obtain the consent from DBKL. In dismissing the application, Amelia Tee Abdullah J held that there is no issue on the constitutional of section 9(5) of the PAA 2012.

The necessity for ten days’ notice is to ensure such assembly can be conducted smooth and peacefully in the spirit of the right of freedom. Meanwhile, the prerequisite for ten days is also to ensure security and public order can be maintained. In *Public Prosecutor v Yuneswaran a/l Ramaraj*,⁸⁶ the Court of Appeal held that:

⁸³ [2015] 6 MLJ 47

⁸⁴ [2016] 9 MLJ 601

⁸⁵ [2016] 7 CLJ 246; [2016] 1 LNS 473

⁸⁶ [2015] 6 MLJ 47

“The requirement for the ten days notice in advance is crucial and reasonable to enable the police to make the ‘necessary plan and preparation’ to satisfy their legal obligation under the PAA, particularly to facilitate the lawful exercise of one’s right to assemble peaceably as well as to preserve public order and protecting the rights and freedoms of the other persons.”

According to the section 12(1)(a) of the PAA 2012, upon receiving notification from the organizer, within the first 24-hours will be used to inform the person who has interest by the OCPD. Such information may be delivered by mean of posting a notice conspicuously at various location of assembly⁸⁷ or by any reasonable means to make such information available to such person.⁸⁸

By method mentioned above, the information is deemed delivered to the person of interest. Upon receiving such information, the Act provided 48-hours for the person who has an interest in respond to the assembly. Within the prescribed time, the person who has an interest may put forward his concern or objection pertaining to the assembly with his reasons for concern or objection in writing to the OCPD.⁸⁹

The OCPD shall consider any concern and objection that was brought forward by a person of interest. Upon receiving and considering such concern and object, OCPD will determine restriction and condition imposed under section 15 of PAA 2012⁹⁰ to ensure that the assembly will be held in peaceful and without depriving others person freedom.

OCPD may if the circumstances warrant, at any time within ten days period prior to the date of the assembly to call upon the organizer for a meeting.⁹¹ The purpose of the meeting is for the OCPD to advise organizer on the assembly. Such meeting may also deem as a response to the notification of assemblies. OCPD shall within five days after receive notification made under section 9, inform the organizers the restriction imposed under section 15 of the PAA 2012. This provision accorded to the section 14(1) of the PAA 2012. According to section 14(1):

⁸⁷ Section 12(1)(a) of the PAA 2012

⁸⁸ Section 12(1)(b) of the PAA 2012

⁸⁹ Section 12(2) of the PAA 2012

⁹⁰ Section 12(3) of the PAA 2012

⁹¹ Section 13 of the PAA 2012

“The Officer in Charge of the Police District shall respond to the notification under subsection 9(1) within five days of the receipt of the notification and shall, in the response, inform the organizer of the restrictions and conditions imposed under section 15, if any.”

Respond from the OCPD is essential to ensure that the assembly will be held peacefully. Furthermore, this respond is to inform the organizer restriction and condition which they shall comply for the assembly to be legally conducted. Aside from that, such respond also to allow the OCPD to put forward and to discuss with the organizer pertaining the concern and object made by a person has interested. Notwithstanding, if the OCPD is not responding to the notification within the prescribed time, the OCPD is deemed to agreed with the proposed assembly and such assembly shall proceed as proposed in the notification without any restriction and condition imposed to the organizer.⁹² This provision is a presumption of an agreement made by this Act pertaining to the act of OCPD and provide under section 14(2) of PAA 2012. According to section 14(2):

“(2) If the Officer in Charge of Police District does not respond to the notification in accordance with subsection (1), the assembly shall proceed as proposed in the notification”

The ten days’ notification period prior to the date of assembly is including time for the appeal made by the organizer to the Minister⁹³ pertaining the restrictions and conditions imposed under PAA 2012. In this regard, taking into account the duration of all administration process, it is reasonable for the notification of assembly under section 9 of the PAA 2012 is made 10-days prior to the date of assembly.

⁹² Section 14(2) of PAA 2012

⁹³ Minister is define under section 3 of PAA 2012 as “Minister charged with the responsibility for home affairs”

3.8 RESTRICTION AND CONDITION

The restrictions and conditions under this act are enumerated under section 15 of the PAA 2012. The objective of having restriction and condition are explained under section 15(1). Per section 15(1):

“The Officer in Charge of Police District may impose restriction and condition on an assembly for the purpose of security or public order, including protection of the rights and freedom of the other person”

With regard the above mention provision and previous discussion in sub-topic at 3.7.4, the restriction and condition imposed for the purpose of this Act are made by the OCPD after considering the concern and object from the person who has interest on the assembly. In other words, the Act gives the discretion to the police to lay out any restrictions and conditions that deem necessary in achieving the objective of this Act. As stated in section 15(1), the objective is to ensure the security or public order during the assembly which extends to assure the protection of the right and freedom of the third party.⁹⁴

There are several matters that constitute to the restrictions and conditions imposed under section 15 of PAA 2012. According to section 15(2):

“The restrictions and conditions imposed under this section may relate to –

- a) The date, time and duration of assembly;
- b) The place of assembly;
- c) The manner of the assembly;
- d) The conduct of participants during the assembly;
- e) The payment of clean-up cost arising out of the holding of the assembly;
- f) Any inherent environmental factor, cultural or religious sensitivity and historical significance of the place of assembly;
- g) The concerns and objections of person who have interests; or
- h) Any other matters the Officer in Charge of the Police District deems necessary or expedient in relation to the assembly.

...”

⁹⁴ For the purpose of this Act, the third party may include citizen or non-citizen of Malaysia.

The restrictions and conditions imposed under PAA 2012 are essential and must be comply by any person organising and participating in the assembly. Failure to comply such restrictions and conditions, the offender commits an offence under the Act and liable to a fine not exceeding RM 10,000.00 if convicted.

Notwithstanding the above provision, the PAA 2012 allow for an organizer to make an appeal to the Minister of their dissatisfaction pertaining to the imposition of restrictions and conditions. An appeal must be brought to the Minister within 48-hours upon the information of such restrictions and conditions to him. Such clemency provides under section 16(1) of the PAA 2012. Section 16(1) provides:

“Any organizer aggrieved by the imposition of restrictions and conditions under section 15 may, within forty-eight hours of being informed of the restrictions and conditions, appeal to the Minister.”

Consequently, the restrictions and conditions imposed by the OCPD by virtue of section 15 of the PAA 2012 are not absolute and subject to amendment by the Minister. However as normally applied, the Minister will keep such restrictions and conditions due to the security or public order interest and the right of freedom of the third party. As the PAA 2012 provides a discretionary power to the Minister to amend restrictions and conditions imposed under section 15 of the PAA 2012, the Minister shall give his decision within 48-hours after the appeals were made. According to section 16(2):

“The Minister shall give his discretion within forty-eight hours of receipt of the appeal under subsection (1).”

3.9 ENFORCEMENT

Enforcement of the PAA 2012 is governed under part V of the Act. According to the PAA 2012, only police officers are given the power to enforce the provisions provides under the Act. The power to enforce the PAA 2012 includes the discretionary power to impose restrictions and conditions, power to maintain traffic or crowd control, power to arrest, power to disperse the assembly and power to use

reasonable force. The discretionary power to impose restrictions and conditions discussed earlier under paragraph 3.8.

Meanwhile, the PAA 2012 does not define police officer. Therefore, the definition of police officer retrieved from Police Act 1967 (Act 344). According to section 2 of the Police Act 1967 (Act 344):

“Police officer means any member of the Royal Malaysia Police”

By the above definition, police officer includes any officer through the appointment according to the Police Act 1967 (Act 344) regardless his rank in the force. This also extends to an extra police officer under section 8(1) of the Act.

3.9.1. Power to Maintain Traffic or Crowd Control.

The PAA 2012 allows the police officer to maintain traffic or crowd control. Section 9(3) states:

“If the assembly is a religious or a funeral procession, the organizer may inform the Officer in Charge of the Police District in which the assembly or procession is to be held; and may, if assistance is needed to maintain traffic or crowd control, request for such assistance.”

By the above provision, any request by such organizer to the OCPD for assistance to maintain traffic or crowd control, OCPD may provide such assistance. Aside from such provision, it is the objective of PAA 2012 to assure the security, public order and protection of the rights and freedoms of other persons. The rights and freedoms of other persons include the right to move freely throughout the Federation.⁹⁵ Hence, either with or without a request from organizer for an assistance to maintain the traffic or public order, it is known that such responsibility lies upon the police officer to ensure smooth traffic flow and the public order is maintained prior, during and after the assembly was held.

⁹⁵ Article 9(2) of Malaysia Federal Constitution

3.9.2. Power to Arrest.

Accordance to the PAA 2012, police officers is authorised to arrest without warrant any person who commits an offence under the Act. This authority is governed under section 20(1) of PAA 2012. Per section 20(1):

- “A police officer may, without warrant, arrest any organizer or participants –
- a) Who, during an assembly, refuse or fails to comply with any restriction and conditions under section 15;
 - b) Who, during an assembly, has in his possession any arms;
 - c) Who recruits or brings a child to an assembly other than an assembly specified in the Second Schedule.”

By the above-mentioned provision, an arrest in accordance to PAA 2012 is effective only during the assembly. In another word, there is no arrest prior to the commencement and participate in the assembly.⁹⁶ Notwithstanding authority to arrest without warrant as mentioned above, the police officer must take necessary measures to ensure voluntary compliance before making an arrest. According to section 20(2) of the PAA 2012:

“The police officer shall, before exercising the power of arrest under this section, take necessary measures to ensure voluntary compliance by the organizer or participant.”

3.9.3. Power to Disperse the Assembly.

Provided under section 21 of the PAA 2012, a police officer may issue an order for an assembly to disperse. There are six circumstances that empowered the police officer to disperse an assembly. Based on section 21(1) of the PAA 2012:

- “A police officer may issue an order to disperse in the following circumstances:
- a) The assembly is held at prohibited place within fifty meters 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 feeling of ill-will or hostility

⁹⁶ There is other provision pertaining for an arrest by police officer in accordance to PAA 2012 such as the CPC and the PC, which may affect an arrest prior participate in the assembly.

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;
- e) The participants did not or do not comply with the restrictions and conditions imposed under section 15; and
- f) The participants are engaging in, or about to engage in, unlawful or disorderly conduct or violence towards persons or property.

...”

By the virtue of section 21 of the PAA 2012, there are three circumstances that need to consider before an order to disperse is an issue by the police officer which are the location of the assembly, the manner of the assembly and the conduct of the participant during an assembly. According to PAA 2012, prohibited places are listed in First Schedule of the Act⁹⁷ and an assembly is remaining legally conducted at the prohibited places as long as it located not less than fifty meters from the limit of the prohibited area.

Pertaining to the manner of an assembly, according to the PAA 2012, street protest is prohibited.⁹⁸ The police officer may order the organizer and participants to disperse upon the assembly are or have become a street protest. However, a police officer has no right to arrest an organizer or participants in street protest assembly, unless it is specified in the restrictions and conditions under section 15 of the PAA 2012.

If a participant makes any provocation either orally or physically or by any means or commits any offence under any written law that is unlawful during the assembly or failure to comply with section 15 or become street protest the assembly may be dispersed.⁹⁹ Such conduct of an assembly is in contrary to the spirit of holding a peaceful rally in the light of Malaysia Federal Constitution and PAA 2012.

The organizer and the participants that hold an assembly that has been ordered to disperse by a police officer shall follow such order and disperse at once. Failing to comply with such order are committing an offence under this Act and shall liable with fine not exceeding RM 20,000.00 if convicted.¹⁰⁰

⁹⁷ Refer to note no. 51

⁹⁸ Section 4(1) of the PAA 2012

⁹⁹ Section 21 of the PAA 2012

¹⁰⁰ Section 21(3) of the PAA 2012

3.9.4. Power to Use Reasonable Force.

The PAA 2012 empowered the police officer to use reasonable force to dispersed any assembly in the circumstances under section 21(1)(a) to (f). According to section 21(2) of the PAA 2012:

“The police officers, in exercising the power to disperse an assembly under this section, may use all reasonable force.”

By the provision above, the police officers may use any force which they deemed necessary to ensure an assembly that being ordered to disperse, abided by such order. However, the Act is silent on the interpretation of reasonable force.

3.10. THE PAA 2012 SHORTCOMINGS

The PAA 2012 generally provides a procedure on how the peaceful assembly should be carried out. The procedure includes before, during and after the assembly is being held. Although the PAA 2012 stimulates the right of expression of the citizen in general, there are four weaknesses implicit in the Act.

According to the interpretation under section 3 of the PAA 2012, the assembly is defined as:

“an international and temporary assembly of a number of a persons in a public place, whether or not the assembly is at particular place or moving.”

The definition of ‘assembly’ interpreted by the Act is unclear. The meaning ‘number of persons’ is ambiguous. Besides, the Act is silent on the exact number of gathered persons that constitute as an assembly. Apart from that, it is essential to identify when the restrictions and conditions accordance to PAA 2012 commence. Further, it is necessary to note that the procedure under PAA 2012 is not enacted to specially regulate an assembly for political purposes or an assembly to express opinion or dissatisfaction, but it extends to any variation of assembly.

Also, the Act does not limit the number of persons that can participate in an assembly. The past event recorded that the non-compliance by the organizers and participants to the restrictions and conditions imposed under the Act were due to the mass assembly and failure on the part of the organizers to control the assembly. Although the limitation imposed on the organizer and participants in an assembly look like depriving the citizen right to expression and associate, it is the best practice to ensure the assembly is peaceful. This is because without arms and compliance with restrictions enable the organizers to have controlled the conduct of the participant and the assembly. It is not prohibiting the right of the citizen to participate in assembly per se, but it is more of the security interest and to protect the right of the third party.

Under section 9(1) advance notification to the OCPD is an essential requirement for an assembly (other than assembly states in Second Schedule) to be held in accordance to the PAA 2012. Failure to comply will be subject to a penalty under section 9(5) of the PAA 2012 or alternatively under section 15(3) of the Act. This provision creates a legal obligation to an organizer although there is no provision under the Act states that an assembly held without earlier notification tantamount to unlawful assembly. Mohamad Arif JCA in *Nik Nazmi bin Nik Ahmad v Public Prosecutor*¹⁰¹ held that:

“There is no provision in the PAA which stipulated that an assembly held without the giving of the requisite prior notice was per se unlawful...”

The requirement for advance notification is to submit the form in Fourth Schedule not less than ten days before the date of assembly. However, the requirement is only fitting for an assembly that was planned earlier and not for urgent and spontaneous assembly. The Act is silent on the requirement for urgent and spontaneous assembly and implicitly any person who organizes urgent and spontaneous assembly will undoubtedly liable for a punishment under section 9(5) or alternatively section 15(3) of the PAA 2012. Mah Weng Kwai JCA held the important statement for this argument in *Nik Nazmi bin Nik Ahmad v Public Prosecutor*.¹⁰²

“The restriction imposed by s. 9(1) and (5) of the PAA was not reasonable as it amounted to an effective prohibition against urgent and spontaneous assembly. It would

¹⁰¹ [2014] 4 MLJ 157

¹⁰² [2014] 4 MLJ 157

impossible for an organizer to organize a spontaneous assembly without being under threat of prosecution. There was no provision in the PAA for any exemption even if the need for the assembly was extremely urgent...”

The PAA 2012 lists the participants’ responsibility during the assembly under section 7 of the Act. However, there is vagueness on the penal sanction for any breach of the responsibility. If section 7 of the PAA 2012 is read together with the section 15 to make the participant liable for the breach of his responsibility and punishable under section 15(3) of the Act, there is missing of connection between both sections. Per section 15(3) of the Act:

“Any person who fails to comply with any restrictions and conditions under this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.”

Punishment provides under section 15 (3) is, of course, specific for any non-compliance with the restrictions and conditions under section 15. Scrutiny on section 7, there is no legal obligation imposed to the participant to comply with section 15. In contrary, the organizer is obliged under section 6(2)(d) to comply with section 15. According to section 6(2)(d):

“For the purpose of subsection (1), the organizer shall – ensure that the organization and conduct of an assembly is in accordance with the notification of assembly given under subsection 9(1) and any restrictions and conditions which may be imposed under section 15.”

To conclude, section 7 of the PAA is only listed the responsibility of the participant during the assembly, but any non-compliance to any of those responsibilities is not subject to any penal sanction. In short, failure to comply with section 7 of the PAA does not tantamount to an offence.

In the past, the government has failed in civil claims against the organizer of the assembly for a remedy of damaged property. In dismissing the application by the government, Varghese George JCA in *Kerajaan Malaysia v Ambiga Sreenevasan & Ors*¹⁰³ held that:

¹⁰³ [2016] 5 MLJ 721

“...If it was the intention of the Legislature to impose statutory civil liability or some penal sanction for failure to comply with the assigned responsibilities on the defendants as the organizers of the assembly, this would have been specifically provided for within the PAA itself by the Legislature. However, it was clear that the provision of s. 6 and in particular s. 6(2)(g) of the PAA did not imposed a statutory duty or liability on the organizers, and no right of a private cause of action arose even if there was any violation or some failure to abide with the responsibilities on the part of the defendants.”

It is noted from above statement by Court of Appeal Judge that even if there a violation of responsibility of the organizer, the organizer is not liable for private action for the breach of those duties. To compare, the damaged sustained by the government, in the above case is RM 110,543.27 (not include counterclaim by seven defendants RM15,000.00 each, granted by the Court of Appeal) while penal sanction onto the organizer is not exceeding RM 10,000.00. Comparatively, the criminal penalty on the organizer is much lower than the loss suffered by the government due to damage during the assembly. To deter an organizer from breaching his obligation under the PAA 2012, it is necessary to increase the liability of organizer to include liability in civil action too.

3.11. CONCLUDING REMARKS

The PAA 2012 is merely setting out a series of procedural and steps to be taken to ensure and facilitate the exercise of a constitutional right. Although it is a constitutional right for every Malaysian citizen to exercise their right of freedom of assembly, the assembly must be peacefully conducted. Hence, the assembly must be restricted to a peaceful assembly without arms and complies with all restrictions and the conditions specified under PAA 2012. The PAA 2012 also imposes the responsibility to the organizer, participant and the police in striking a balance between individual liberty and social control. Although the PAA 2012 stimulates the freedom of expression to the citizen, it is a statutory requirement for the organizers to notify the OCPD of their intention to hold an assembly ten days before the date of the assembly. However, most of the cases illustrate that failure in complying with the requirement of the notification by organizers is due to argument on the constitutionality of the requirement itself. It is essential to note that the requirement of

notification and penalty imposed if failure to comply with this requirement is both constitutional. The notification itself is a first step to ensuring the peaceful assembly and compliance to restrictions and condition imposed, and failure to comply will echo non-compliance to the Act. Hence, it is urgently needed to identify the best practice on the legal framework of a peaceful assembly from other jurisdiction as a benchmark to be adopted with some modification in Malaysia. More discussion and analysis on this issue is made in the ensuing chapter.

CHAPTER FOUR

PUBLIC ORDER ACT 1986 UNITED KINGDOM

4.1. INTRODUCTION

The preservation of fundamental rights and freedoms in the United Kingdom are constituted by the United Kingdom's Human Rights Act 1998 and the Public Order Act 1986.¹⁰⁴ The right of every person in the United Kingdom is governed by the United Kingdom's Human Right Act 1998 which came into force on 2nd October 2000. The Act provides that every person in the United Kingdom has some fundamental rights and freedoms.¹⁰⁵ This right includes the right of liberty of expression and the right to assemble peacefully and associate with others.¹⁰⁶ The purpose of this Act is to give further effect to rights and freedoms guaranteed under the European Convention on Human Right, to holders of certain judicial office who become judges of the European Court of Human Rights and for connected purposes. With the incorporation of most of the substantive provisions of the European Convention on Human Right (European Convention) into the domestic law of United Kingdom, the Human Right Act marks a dramatic shift on the conceptualised of an individual right under the British Law. The restriction may only be placed on the right if prescribed by law and necessary in a democratic society.¹⁰⁷ The Act also does not

¹⁰⁴ Public Order Act 1986 – Chapter 64

¹⁰⁵ First Schedule of Human Right Act 1998 – Chapter 42

¹⁰⁶ Article 10(1) in the First Schedule of Human Right Act 1998 – Chapter 42; “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference of public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprise”; Article 11(1) of the First Schedule of Human Right Act 1998 – Chapter 42; “everyone has the right to freedom of assembly and to freedom of association with others, including the right to form and to join trade unions for the perfection of his interest”.

¹⁰⁷ Article 10(2) in the First Schedule of Human Right Act 1998 – Chapter 42; “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of judiciary”; and Article 11(2) in the First Schedule of Human Right Act 1988 – Chapter 42; “No restrictions shall be placed on the exercise of this rights other than such as are prescribed by law and are necessary n a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of

prevent the police, armed forces or administrators of the State from imposing a legal restriction on the exercise of peaceful assembly and freedom of association.

However, the enactment of Public Order Act 1986 which was enforced on 7th November 1986 carried a distinction purposes. The Public Order Act 1986 is an Act to abolish the common law offences of riot, rout, unlawful assembly and affray and certain statutory offences relating to public order. The Act is also to create new offence relating to public order, to control public procession and assemblies. Aside from that, the provision in this Act covers other matters such as:

- 1) To control the stirring up of racial hatred;
- 2) To provide for the exclusion of certain offenders from sporting events;
- 3) To create a new offence relating to the contamination of or interference with goods; and
- 4) To confer power to direct individual trespassers to leave the land.

The enforcement of Public Order Act 1986 amended section 7 of the Conspiracy and Protection of Property Act 1875, section 1 of Prevention of Crime Act 1953, Part V of the Criminal Justice (Scotland) Act 1980 and the Sporting Event (Control of Alcohol etc.) Act 1985. The amendment is to repeal certain obsolete or unnecessary enactments and other connected purposes.

For the purpose of this research, the relevant provisions of United Kingdom Public Order Act 1986, particularly on peaceful assembly and related offences are analysed.

4.2. PUBLIC ORDER ACT 1986

POA 1986 came into force on 7th November 1986. Part I and II of the POA 1986 governs the procedural and offences on peaceful assembly in the United Kingdom. The definition of a public assembly is provided under section 16 of the POA 1986. The interpretation of section 16 of POA 1986 states that:

health or morals, for the protection of the reputation or rights of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these right by member of armed forces, of the police, or of the administration of the State”.

“Public Assembly means an assembly of 2 or more persons in public place which is wholly or partly open to the air.”

Meanwhile, public place under section 16 place means:

- “a) Any highway, or in Scotland any road within the meaning of the Roads (Scotland) Act 1984, and
- b) Any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission.”

Thus, according to POA 1968 public assembly means the gathering of two or more persons in public place, whether in open space or the building. The location of assembly also includes on the road or any other place which public or some of the public gain access to the place whether it’s free or on payment or by right or implied permission.

4.3. DELEGATED POWERS

The POA 1986 provides a level of authorisation to the authorities to assure assemblies that are governed by this Act is held peacefully in accord with the Act. Powers delegated by this Act to the authorities operates independently. It forms a check and balance within the authorities to prevent abuse of power. The three authorities concerned are the police, district council and Secretary of State.

According to the Act,¹⁰⁸ the police acquire vast discretionary powers to regulate and ensure the assembly will not cause any serious public disorder, damaged of properties, disruption and intimidating of others. Police officers too are empowered to impose conditions on public processions and public assemblies, prohibiting public procession and trespassing in assemblies. Notwithstanding, not every police officer are authorised to invoke such power. POA only allows the chief police officer to impose conditions in writing on the public procession and public assembly intended.¹⁰⁹ Also, chief of the police officer may apply for the prohibition of the public procession and trespassers assemblies, if he reasonably believes that although conditions are imposed, the conditions is not able to prevent serious public disorder

¹⁰⁸ Section 15(1) of the POA 1986

¹⁰⁹ Section 12(3) and section 14(3) of the POA 1986

damaged to property or disruption or intimidate others.¹¹⁰ Nevertheless, section 15 of the POA provides for delegation power by the chief officer of police. Per section 15:

“(1) The chief officer of police may delegate, to such extent and subject to such conditions as he may specify, any of his functions under sections 12 to 14A to an assistance chief constable; and references in those sections to the person delegating shall be construed accordingly.

(2) Sub-section (1) shall have an effect in the City of London and Metropolitan police district if “an assistance chief constable” read “an assistant commissioner of police.”

Meanwhile, senior police officer available at the scene may impose conditions orally during the public procession and public assembly.¹¹¹ However, a police officer with the rank of Commissioner is only empowered to prohibit the commencement of public procession and trespassers assemblies with the consent of Secretary of State.¹¹²

Also, the District Council has the power to order prohibition of the public procession and trespassers assemblies. But, the District Council may only order such prohibition upon application by the chief of the police officer and consented by Secretary of State.¹¹³ POA 1986 provides discretionary power to the Secretary of State either on consent to prohibit or not to prohibit public procession and the trespasser's assembly.¹¹⁴ Such consent is essential to invoke provision under this Act.

4.4 PROCEDURE ON ASSEMBLY

Part II of the POA 1968 provides the procedures for conducting an assembly. The Act provides three types of assemblies under the Act. The types are the public procession, public assembly and trespassers assembly. Section 16 of the POA 1968 states the definition of a public procession and public assembly. Section 16 says:

“Public Assembly means an assembly of 2 or more persons in public place which is wholly or partly open to the air”

“Public procession means a procession in a public place”

¹¹⁰ Section 13 and section 14A of the POA 1986

¹¹¹ Section 12(1)(b) and section 14(1)(b) of the POA 1986

¹¹² Section 13(4) and section 14A(4) of the POA 1986

¹¹³ Section 13(2) and section 14A(2) of the POA 1986

¹¹⁴ See note no. 110

Meanwhile, section 14A (1) states the meaning of trespassers assembly. According to the section, a trespasser assembly is an assembly held by public that has no right to access or only limited right of access and without the permission of the occupier or exceeding the permissible limit or right of access.

4.4.1 Advance Notification to the Police.

Notification is a notice to inform the authority the intention of the organizer in holding an assembly for a particular period and place. The notice is served to the police. Section 11(1) of the POA 1986 states:

“Written notice shall be given in accordance with this section of any proposal to hold a public procession intended –

- a) To demonstrate support or opposition to the views or actions of any person or body of person,
- b) To publicise a cause or campaign, or
- c) To mark or commemorate an event,

Unless it is not reasonably practicable to give any advance notice of procession.”

Notification must specify the date, time, the route to be used and the name and address of the organizer. Such information is delivered to the police station not less than six clear days prior to the commencement of a public procession. Section 11(4) says:

“Notice must be delivered to a police station –

- a) In the police area in which it is proposed the procession will start, or
- b) Where it is proposed the procession will start in Scotland and cross into England, in the first police area in England on the proposed route.”

The notice can be served either by post or by hand. If the notice is posted by recorded delivery service, section 7 of the Interpretation Act, 1978 does not apply. According to section 7 of the Interpretation Act 1978:

“Document sent by post is deemed to have been served when posted and to have been delivered in the ordinary course of post.”

Notwithstanding to the prescribed time, the POA 1986 provides a leniency in the submission of the notification to the police. Although it is a requirement for organizers to give an advance notice six clear days to the police before the date of assembly, the Act allows the notification to be submitted as soon as possible if it is by hand submission and reasonably practicable to do so.¹¹⁵ The Act even provides an exemption for if notification is unreasonably practicable. In addition, the notification is only applicable for the public procession. Such notification mentioned above is not required for the procession that is commonly or customarily held in police area or funeral procession organized by the funeral director in the ordinary course or his business or public assemblies.

Each of the organizers is deemed to commit an offence under this section if it failed to satisfy the requirement for advance notice or the procession does not comply with the time, date, place and route specify in the notice. Any person convicted under this section¹¹⁶ is liable to a fine not exceeding level 3 on the standard scale.¹¹⁷ However, POA 1968 make an exemption to the organizer on offence that relates to an advance notice. Section 11(8) and (9) provides:

"(8) It is a defence for the accused to proved that he do not know of, and neither suspect or had reason to suspect, the failure to satisfy the requirements or (as the case may be) the difference of date, time or route.

(9) To the extent that an alleged offence turns on a difference of date time or routine, it is a defence for the accused to prove that the difference arose from circumstances beyond his control or from something done with the agreement of a police officer or by his direction."

4.4.2. Imposing Conditions on Public Processions.

The POA 1986 empowered the senior police officer to impose conditions on the public procession. The senior police officer may impose conditions on time, place and route of the intended procession to secure security, public order and the right of freedoms of others. Section 12(1)(a) and (b) of the POA 1986 lists the circumstances that allowing the imposition of the condition to the public procession. According section 12(1)(a) and (b):

¹¹⁵ Section 11(6) of the POA 1986

¹¹⁶ Section 11(10) of the POA 1986

¹¹⁷ Level 3 fine on the standard scale is equal to £1,000

"(1) If the senior officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believe that –

- a) It may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
- b) The purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have right not to do,

He may give direction imposing on the person organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.”

The POA 1986 provides the discretionary power to a senior police officer to impose conditions to the public procession that he deemed necessary. The imposed conditions are needed to prevent the issue concern and may include restrictions on the route of processions or prohibitions on entering a public place. The definition of senior police officer varies in the rank subject to the circumstance of the public procession. Senior police officer means:

- "a) In relation to a procession being held, or to a procession intended to be held in the case where persons are assembling with the view to taking part in it, the most senior rank of the police officers present at the scene, and
- b) In relation to a procession intended to be held in a case where paragraph (a) does not apply, the chief of police...”

According to the section, the senior police officer may give his order toward organizer and participants either by oral or in writing. Per section 12(2)(b) of POA 1986 any order given by the chief officer of police must be in be recorded in writing.¹¹⁸ Meanwhile, an order made by a senior police officer with the senior rank available in the public procession may be given orally.

It is the responsibility of the organizers and participants to comply with the conditions imposed under section 12 of POA 1986. Failure to comply with the conditions imposed is an offence under this Act,¹¹⁹ and section 12(8) and (9) provide for the imposition the punishment. Per section 12(8) and (9):

- "(8) A person guilty of an offence under sub-section (4) is liable on summary conviction to imprisonment for a term not exceeding 3 months or fine not exceeding level 4 on the standard scale or both.

¹¹⁸ Section 12(3) of the POA 1986

¹¹⁹ Section 12(4) and (5) of the POA 1986

- (9) A person guilty of an offence under sub-section (5) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.”

Subsequently, the Act also provides that any person¹²⁰ who incites other participants to commit an offence under section 12(5) of the POA shall be guilty of an offence under the Act¹²¹ and if convicted shall be liable to an imprisonment not exceeding 3 months or fine not exceeding level 4 on the standard scale¹²² or both.

In addition, this section also provides an exemption to the organizers and the participants from convicted for an offence to organize or participate in assembly knowingly failed to comply with the condition imposed under the section. This exemption can be invoked if the organizers or participants can prove that failure to comply with the conditions imposed arise due to the circumstances beyond of his control.¹²³

4.4.3. Prohibiting Public Procession.

Public procession may be prohibited if the chief of police reasonably believes that due to the circumstances existing in the district or any part of the district may cause the condition imposed under section 12 of the POA 1986 is not effective as it should. The imposition of conditions under section 12 of the POA 1986 is purposely to prevent the holding of public processions from causing serious public disorder, damage to property or serious disruption to the life of the community and intimidation.¹²⁴ Any prohibition order made under section 13 of the POA 1986 shall be in writing or if not in writing, be recorded in writing as soon as practicable after the order being made.¹²⁵ The order made under section 13 of the POA 1986 may be revoked or varied by any subsequent order made in the same way.¹²⁶ Any organizers or participants keep on holding the public procession that he knew prohibition order are made under this section

¹²⁰ Persons may include the organizer, participant and other person that not participate in the public procession.

¹²¹ Section 12(6) of the POA 1986

¹²² Level 4 fine on the standard scale is equal to £2,500

¹²³ See note no. 119

¹²⁴ Section 12(1) of the POA 1986

¹²⁵ Section 13(6) of the POA 1986

¹²⁶ Accordance to the procedure discussed in paragraph 4.4.3.1 and 4.4.3.2.

is committing an offence¹²⁷ and if convicted; such organizers is liable on summary conviction to imprisonment for a term not exceeding 3 months or fine not exceeding level 4 on the standard scale or both;¹²⁸ and while the participants is liable on summary conviction to a fine not exceeding level 3 on the standard scale.¹²⁹ Any person is committing an offence under this section if he or she incites others to commit an offence under section 13(8) of the POA and if convicted may be liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale¹³⁰ or both.¹³¹

4.4.3.1. Procedure in prohibiting public procession other than city of London or metropolitan city.

A public procession held or intended to be held in a city other than the city of London or Metropolitan city with imposed conditions under section 12 of the POA 1986 on such procession. However if the chief of the police officer have a reasonable believe that conditions are not effective as it should, the Act allows the chief of the police officer to apply for a prohibition of such public procession. This provision stated under section 13(1) of the POA 1986. According to the section 13(1) of POA 1986:

“(1)... he shall apply to the council of the district for an order prohibiting for such period not exceeding 3 months as may be specified in the application the holding of all public processions (or of any class of public procession so specified) in the district or part concerned.”

In accordance with this section, police officers are allowed to impose conditions and restrictions to regulate the conduct and manner of the public procession and apply for the prohibition of such procession if necessary. However, the provision empowered district council for granting an order to forbidding such procession. Hence, for the procedure in

¹²⁷ Section 13(7) and (8) of the POA 1986

¹²⁸ Section 13(11) of the POA 1986 ; Level 4 fine on the standard scale is equal to £2,500

¹²⁹ Section 13(12) of the POA 1986; Level 3 fine on the standard scale is equal to £1,000

¹³⁰ Level 4 fine on the standard scale is equal to £2,500

¹³¹ Section 13(13) of the POA 1986

prohibiting the public procession at the city other than the city of London or Metropolitan city, this section does not empower only one party to regulate and prohibit public procession, which may lead to the abuse of power. Chief of the police officer may request public procession or any other procession specify on the application to be prohibited for the period not exceeding 3-months. Even though the district council govern with the power grant an order to prohibition public assembly with an application from the chief of police, it is not an absolute discretion power to the district council to grant such order. Such order may be granted with the consent of Secretary of State. The Secretary of the State upon giving his consents may agree with the terms of the application made by the chief of the police officer or on some modification made by the district council. Section 13(2) of the POA 1986 states that:

“On receiving such an application, a council may with the consent of the Secretary of State make an order either in the term of the application or with such modifications as may be approved by the Secretary of State.”

4.4.3.2. Procedure in prohibiting public procession in the city of London or metropolitan city.

A public procession held or intended to be held in the city of London or Metropolitan city with imposed conditions under section 12 of the POA 1986 on such procession. However, if the Commissioner of Police has a reasonable believe that conditions are not adequate as it should, the Act allows the Commissioner of Police to apply for the prohibition of such public procession. This provision stated under section 13(4) of the POA 1986. According to the section 13(4) of POA 1986:

"(4) If at any time the Commissioner of Police for the City of London or the Commissioner of Police of the Metropolis reasonably believes that, because of particular circumstances existing in his police area or part of it, the power under section 12 will not be sufficient to prevent the holding of public procession in that area or part from resulting in serious public disorder, he may with the consent of the Secretary of State make an order prohibiting for such period not exceeding 3 months

as may be specified in the order the holding of all public procession (or of any class of public procession so specified) in the area or part concerned.”

A different procedure is involved in prohibiting the public procession in the city of London or any Metropolis city. The Commissioner of Police may give prohibiting order not to hold the procession for a period not exceeding three months with the consent of Secretary of State. The prohibition order is due to the incapacity of conditions issued under section 12 from preventing severe public disorder, damage to property or serious disruption to the life of the community and intimidation of others. The Secretary of the State upon giving his consents may agree with the terms of application or to make some modification, which he deem necessary.

4.4.4 Conditions on Public Assemblies.

Section 14 of the POA 1986 empowered the senior police officer to impose conditions on public assembly under certain circumstances. Such conditions may be imposed prior to the organising of the assembly or during the assembly. The imposition of conditions may occur if the senior police officer after considering the time or place of public assembly, has a reasonable believed that the assembly may induce serious public disorder, damaged to property, infringement of the freedom to the life of others and intimidation. According to section 14(1):

- “(1) If the senior police officer, having regard to the time or place at which and the circumstance in which any public assembly is being held or is intended to be held, reasonably believes that –
- (a) It may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
 - (b) The purpose of the persons organizing it is the intimidating of others with the view to compelling them not to do an act they have a right to do, or to do an act they have right not to do.”

The condition imposed shall govern the organizer and the participants of the public assembly in the matter of the maximum time to hold an assembly, the maximum number of people participate in the assembly. Such conditions are

based on the contemplation of the senior police officer which is necessary to prevent disorder, damage, disruption or intimidation.¹³²

The definition of senior police officer in this section is defined under section 14(2) of the POA 1986. According to section 14(2):

“In Sub-section (1) “the senior police officer” means –

- a) In relation to an assembly being held, the most senior rank of the police officers present at the scene, and
- b) In relation to an assembly intended to be held, the chief officer of police”

This section provides that the conditions can be imposed on the public assemblies either orally or in writing. A condition delivered by police officer senior in rank available during the public assembly can be made orally. Meanwhile, a condition imposed prior to the assembly and made by the chief officer of police shall be made in writing.¹³³ According to section 14(3) of the POA 1986:

“A direction given by a chief officer of police by virtue of section 2(b) shall be given in writing”

Section 14 of the POA 1986 also provides the offence pertaining to the imposition of conditions on the public assembly. It is the responsibility of the organizers and the participants to abide by conditions made under this section. Hence, it is an offence under this Act if any organizers or participants failed to comply with the conditions made under this section.¹³⁴ Nevertheless, the section made exclusion liability against organizers or participants if they can prove that the failure to comply is due to the circumstances that are beyond their control.¹³⁵ This section does not only inflict the responsibility onto the organizers and the participants, conversely extend to any person¹³⁶ that incites the participants to commit an offence under section 14(5) of the POA. Such persons are deemed as committing an offence under this section.¹³⁷ Section

¹³² Section 14(1) of the POA 1986

¹³³ Section 14(3) of the POA 1986

¹³⁴ Section 14(4) and (5) of the POA 1986

¹³⁵ Ibid

¹³⁶ Section 14(6) of the POA 1986

¹³⁷ Section 14 of the POA 1986

14(8), (9) and (10) provides the punishment to any persons who commit an offence under this section. The provision states that:

“... ”

- 8) A person guilty of an offence under Sub-section (4) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both.
- 9) A person guilty of an offence under sub-section (5) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- 10) A person guilty of an offence under sub-section (6) is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both.”

4.4.5. Trespassory Assemblies.

Trespassory assembly is defined as an assembly held at a place on land which public has no right to access or with the only limited right to access to the place. To be exact, the assembly is held in the restricted area and such assembly is held either without the permission of the occupier of the land or exceed the limitation as permitted to access.¹³⁸ The matters pertaining to the trespass assembly is governed by section 14A, 14B and 14C of the POA 1986. In the purview of section 14A, 14B and 14C, it is essential to understand some of the interpretation which applies specifically to trespassory assembly. Per section 14A (9):

“In this section and section 14B and 14C –

- “assembly” means an assembly of 20 or more persons;
- “land” means land in the open air
- “limited” in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway of road) or is subject to other restriction;
- “Occupier” means –
 - a) In England and Wales, the person entitled to possession of the land by virtue of an estate or interest held by him; or
 - b) In Scotland, the person lawfully entitled to natural possession of the land,
- “public” includes a section of the public; and
- “Specified” means specified in an order under this section.”

¹³⁸ Section 14A (1)(a) of the POA 1986

It is essential to note that the number of persons participating in trespassory assemblies is different from the public procession and public assemblies. For instance, the number of participants in both public assembly and public procession is two or more persons. Meanwhile, for trespassory assembly, the participants consist of twenty or more persons.

4.4.5.1. Prohibited trespassory assemblies.

The prohibition of trespassory assemblies is governed by section 14A of the POA 1986. It is a new provision and the insertion of the section is made by section 70 of Criminal Justice and Public Order 1994 to control raves. This section provides discretionary power to the police officer to prohibit the trespassory assembly. Nevertheless, such discretionary power is not absolute and subject to the consent of Secretary of State. Additionally, the procedure to invoke provision under this section varies between cities, depending on the intention of assemblies held and the circumstances determined under this section.

If the intended trespassory assembly to be held in the city other than London or Metropolitan police district, the chief officer of police has discretionary power to apply prohibition of such assembly. The chief officer of police at any time has reason to believe that trespassory assembly will cause serious disruption to the life of the community¹³⁹ or cause significant damage to land, building or monument of its historical, architectural, archaeological or scientific importance,¹⁴⁰ may apply for an order to prohibit such assembly for a specific period. The application may be made to the district council where the trespassory assembly is intended to be held. Upon receiving such application, the district council may make an order prohibiting the assembly.¹⁴¹ Secretary of State may give his consent accordance to the application made by the chief officer of police or with some modification made before it.¹⁴²

¹³⁹ Section 14A (1)(b)(i) of the POA 1986

¹⁴⁰ Section 14A (1)(b)(ii) of the POA 1986

¹⁴¹ Section 14A (2)(b) of the POA 1986; applied in Scotland

¹⁴² Section 14A (2)(a) of the POA 1986; applied in England and Wales

However, if the intended trespassory assembly is to be held in the city of London or Metropolitan police district, the Commissioner of Police has the discretionary power to order prohibition of the trespassory assembly with the consent of Secretary of State for a specific period as he deemed necessary. Such order can be made at any time if the Commissioner of Police reasonably believes that trespassory assembly will cause serious disruption to the life of the community¹⁴³ or cause significant damage to land, building or monument of its historical, architectural, archaeological or scientific importance.¹⁴⁴

For the purpose of this provision that relates to the definition of trespassory assemblies or matters aforementioned, in relation to Scotland, “public right to access” does not include the right of public or member of public gained within the meaning of the Land Reform Act 2003.¹⁴⁵ In addition, “district” and “council of district” shall be construed as an area of regional or islands authority and to the authority in question¹⁴⁶ or a local government area or to the council for that area.¹⁴⁷ Meanwhile, in relation to Wales, “district” and “council of district” shall be construed as a country or country borough and to the council for that country or country borough.¹⁴⁸

The prohibition order made accordance to this section¹⁴⁹ shall be made in writing or if it is not made in writing, shall be made in writing as soon as practicable after the order has been made.¹⁵⁰ Order that has been made may be revoked or varied by the same order made thereafter.¹⁵¹ To add, an order made accordance with this section shall not prohibit the holding of assemblies for a period more than four days or exceeding five miles radius from a specific centre.¹⁵²

¹⁴³ Section 14A (4)(b)(i) of the POA 1986

¹⁴⁴ Section 14A (4)(b)(ii) of the POA 1986

¹⁴⁵ Section 14A(9A) of the POA 1986

¹⁴⁶ Section 14A(10)(a) of the POA 1986; for the application made before 1st April 1996

¹⁴⁷ Section 14A(10)(b) of the POA 1986; for the application made after 1st April 1996

¹⁴⁸ Section 14A(11) of the POA 1986; for the application made after 1st April 1996

¹⁴⁹ Section 14A of the POA 1986

¹⁵⁰ Section 14A(8) of the POA 1986

¹⁵¹ Section 14A(7) of the POA 1986; in accordance to procedure in section 14(1), 14(2) and 14(4) of the POA 1986

¹⁵² Section 14A(6) of the POA 1986

4.4.5.2. Offences in trespassory assemblies.

Section 14B of the POA 1986 provides the offences for failure to comply with an order made under section 14A of the POA 1986 and the liability for such offence. The section furnish that any person commits an offence if organize¹⁵³ or taking part in the assembly¹⁵⁴ or incite others to take part in the assembly¹⁵⁵ that prohibits by an order made accordance to section 14A of the POA 1986. Any person who organizes a trespassory assembly which he knew prohibited is liable on summary conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both.¹⁵⁶ Meanwhile, any person who participates in prohibited trespassory assembly is liable to a fine not exceeding level 3 on the standard scale.¹⁵⁷ In addition to that, any person who incites others to participate in prohibited trespassory assembly is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both.¹⁵⁸

4.4.5.3. Power to halt trespassory assemblies.

Section 14C of the POA 1986 authorised a constable in uniform to stop an assembly if he reasonably believes that such assembly is prohibited by an order made under section 14A of the POA 1986 and within the area to which the order applies.¹⁵⁹ Any person who failed to comply with the order¹⁶⁰ made by the police constable under this section commits an offence and liable on a summary conviction to a fine not exceeding level 3 on the standard scale.¹⁶¹

¹⁵³ Section 14B(1) of the POA 1986

¹⁵⁴ Section 14B(2) of the POA 1986

¹⁵⁵ Section 14B(3) of the POA 1986; applied in England and Wales; without prejudice to the application of any principle of Scots Law as respects art and part guilt to such incitement as mentioned in that section.

¹⁵⁶ Section 14B(5) of the POA 1986; Level 4 fine on the standard scale is equal to £2,500

¹⁵⁷ Section 14B(6) of the POA 1986; Level 3 fine on the standard scale is equal to £1,000

¹⁵⁸ Section 14B(7) of the POA 1986; Level 4 fine on the standard scale is equal to £2,500

¹⁵⁹ Section 14C(1)(a) and (b) of the POA 1986

¹⁶⁰ Ibid

¹⁶¹ Level 3 fine on the standard scale is equal to £1,000

4.5. OFFENCES

Part I of the POA 1986 furnish offences corollary explicitly by the commencing of an assembly. As stated in the preamble, one of the purposes of the POA 1986 is to create new offences relating to public order.

There are five offences in Part I of the POA 1986. The offences are the riot, violent disorder, affray, fear or provocation of violence and intentional harassment, alarm or distress. For the purpose of this part, it is essential to understand the definition of violence under section 8 of the POA 1986. According to section 8:

“Violence” means any violence conduct, so that –

- (a) Except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and
- (b) It is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or fall short).”

However, the Act exempts the act of offence if the offence was committed as a result of an impaired of awareness due to intoxication and such intoxication is a result from the consumption prescribed by medical treatment and not self-inducement. The intoxication can either be from a drink, drug or other means or any combination of means. Per section 6(5) of the POA 1986:

“For the purpose of this section a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment.”

Although Part I of the POA 1986 specifically provides for the offences relating to public order, it also conferred trial procedure for such offence. By section 7 of the POA 1986:

- (1) No prosecution for an offence of riot or incitement to riot may be instituted except by or with the consent of the Director of Public Prosecutions.
- (2) For the purpose of the rules against charging more than one offence in the same count or information, each of section 1 to 5 creates one offence.
- (3) If on the trial on indictment of a person charged with violent disorder or affray the jury find him not guilty of the offence charged, they may (without prejudice to section 6(3) of the Criminal Law Act 1967) find him guilty of an offence under section 4.

- (4) The Crown Court has the same power and duties in relation to a person who is by virtue of sub-section (3) convicted before it of an offence under section 4 as magistrates' court would have on convicting him of the offence."

The above explains that consent from Director of Public Prosecutions is needed to institute a proceeding for riot or incitement to riot. For charge purposes, the offence related to riot, violent disorder, affray, fear or provocation of violence and intentional harassment, alarm or distress, are deemed as one offence each. Section 7(3) of the POA 1986 creates a provision where an offence can be made legally liable at a time. For instance, any person who is charged with violent disorder or affray and found not guilty by the jury and without prejudice to section 6(3)¹⁶² of Criminal Law Act 1967, may be guilty for an offence of fear or provocation of violence. Other than that, section 7 of the POA 1986 also provides Crown Court with the same jurisdiction as Magistrate's Court for convicting an accused for an offence of fear or provocation of violence by section 6(3) of the POA 1986.

4.5.1. Riot

The definition and matters pertaining to riot are governed by section 1 of the POA 1986. An assembly is a riot when tumultuous disturbances of the public peace caused by twelve or more persons who gathered and use or threaten to use unlawful violence with common intent and results other person in the vicinity fear for his personal safety.¹⁶³ Per section 1:

“Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.”

¹⁶² Section 6(3) of Criminal Law Act 1967: Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

¹⁶³ Section 1(1) of the POA 1986

To repeat, it is noted that an assembly under this Act is the gathering of two persons or more.¹⁶⁴ For the purpose of this offence, it is material to show that each twelve persons or more has use or threat to use unlawful violence simultaneously¹⁶⁵ and their common purpose may be inferred from their conduct.¹⁶⁶ Riot may be committed at either in private or public places.¹⁶⁷ It is also immaterial to show that any person feared for his safety as a result of conduct by this group of twelve persons or more, is actually or likely to be present at the scene.¹⁶⁸ It suffices for that person to be present within the area of the scene.

A person is guilty for riot if he intends to use violence or aware that his conduct may be violent.¹⁶⁹ Notwithstanding, it does not affect the number of persons who use or threaten violence.¹⁷⁰ An offence of riot is triable on indictment only. Upon conviction on indictment for the offence of riot, the offender is liable to an imprisonment for a term not exceeding ten years or fine or both.¹⁷¹

4.5.2. Affray

Affray in general means a fight between two or more people in public place that disturb the peace. Per *Rafferty J in R v DPP*:¹⁷²

“... affray was a public order offence, aimed at protecting bystanders. There are other, more specific, offences designed to protect those whom the violence is aimed...”

The conduct must be such as would have caused a reasonable person to fear for his safety, although no such person need be present at the scene. For the purpose of POA 1986, the definition of affray is governed under section 3 of the POA 1986. Section 3 conferred that:

¹⁶⁴ Section 16 of the POA 1986

¹⁶⁵ Section 1(2) of the POA 1986

¹⁶⁶ Section 1(3) of the POA 1986

¹⁶⁷ Section 1(5) of the POA 1986

¹⁶⁸ Section 1(4) of the POA 1986

¹⁶⁹ Section 6(1) of the POA 1986

¹⁷⁰ Section 6(7) of the POA 1986

¹⁷¹ Section 1(6) of the POA 1986

¹⁷² [2010] EWHC 994

“A person is guilty of affray if he uses or threaten unlawful violence toward another and his conduct is such as would cause a person reasonable firmness present at the scene to fear for his personal safety.”

If two or more persons use or threaten the unlawful violence, their conduct as a whole is considered as affray according to the Act.¹⁷³ To repeat, the definition of violent for the purpose of this offence includes violent conduct towards property and persons, which is not restricted only to an act causing or intended to cause injury or damage but also includes any other violent conduct although not as planned.¹⁷⁴ Notwithstanding, a mere word does not amount to a threat for the purpose of this section.¹⁷⁵ It is essential to note that no person of reasonable fear to his safety needs to physically present at the scene.¹⁷⁶ Suffice for that person to be present within the area of the scene.

Affray can be committed either in private or public place.¹⁷⁷ A person is deemed guilty of affray if he intends to use or threaten violence or aware of his conduct may be violence or threatens violence.¹⁷⁸ *R v Smith*¹⁷⁹ held:

“The defendant must intend to use or threaten violence, alternatively, must be aware that his conduct may be violent or threaten violence.”

Subsequently, a person who is guilty of affray upon conviction on indictment is liable to an imprisonment for a term not exceeding three years or fine or both or on summary conviction to imprisonment for a term not exceeding six months of a fine not exceeding the statutory maximum or both.¹⁸⁰

¹⁷³ Section 3(2) of the POA 1986

¹⁷⁴ Section 8 of the POA 1986

¹⁷⁵ Section 3(3) of the POA 1986

¹⁷⁶ Section 3(4) of the POA 1986

¹⁷⁷ Section 3(5) of the POA 1986

¹⁷⁸ Section 6(2) of the POA 1986

¹⁷⁹ [1997] 1 Cr App R 14

¹⁸⁰ Section 3(7) of the POA 1986; statutory maximum of fine is tantamount to Level 5 fine on the standard scale which equal to £5,000

4.5.3. Offence of Provocative of Violence

Section 4 of POA 1986 provides that it is an offence if a person intentionally perpetrates a provocation or causing fear to anyone who believes or likely to believes that the person will instantly inflict unlawful violence to him or another person. Under the provision, the act of threatening, abusive or insulting by the perpetrator may in the form of words, behaviour, writing, sign or any other visible representation. According to section 4(1):

“A person is guilty of an offence if he –

- a) Uses towards other person threatening, abusive or insulting words or behaviour, or
- b) Distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting

With intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such will be provoked.”

It is essential to note that, a person who commits a provocation or fear of violence must come with the intention of such act or aware that such act may cause or likely to cause threatening or abusive or insulting.¹⁸¹ In *Liverpool v Director of Public Prosecutions*,¹⁸² it was held that:

“Combination of the hands gesture and the loud, threatening language provided ample jurisdiction for the conclusion reached by the justices at the trial. The court was of the view that the law was sufficiently clear insofar as the word ‘immediate’ does not have mean ‘instantaneous’. The court referred to the judgement of Watkins LJ in *R v Horseferry Road Metropolitan Stipendiary Magistrate, ex p. Siadatan*, where it was stated that ‘immediate’ connotes proximity in time and causation that makes it likely that violence will result within a relatively short period of time and without any other intervening event.”

The term of “immediate” which refer to the act and effect of provocation of violence in accordance to section 4(1) of the POA was defined as that the violence inflicted in a relatively short period of time and without any

¹⁸¹ Section 6(3) of the POA 1986

¹⁸² [2008] EWHC 2540 (Admin)

intervening event.¹⁸³ The term relatively short period of time has raised an issue in *DPP v Ramos*. The magistrate at first instance found that due to the lack of time-specific threat, there was no case to answer. Kennedy LJ on subsequent appeal stated that:

“It is the state of the mind of the victim which is crucial rather than the statistical risk of violence actually occurring within a very short space of time.”

An offence of fear or provocation of violence may be committed at any place either in public or a private place. But, there is an exception whereby if the act is performed inside a dwelling it does not tantamount to an offence under the shadow of section 4 of the POA 1986. For the purposes of section 4, 4A and 5 of the POA 1986, dwelling under section 8 of the POA 1986 is defined as:

“any structure occupied as a person’s home or as other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose “structure” includes a tent, caravan, vehicle, vessel or other temporary or movable structure.”

For a better insight on the meaning and the scope of a dwelling provided in section 8 of the POA, it is essential to refer to *Le Vine v DPP*.¹⁸⁴ According to this case dwelling exclude:

“The availability of the communal laundry facility in the basement does not make that room part of resident’s home or other living accommodation” (within the meaning of section 8 of the POA 1986).”

In *Rukwira v DPP*,¹⁸⁵ the defendants became involved in a fracas on the landing in a council block of flats where the access to the property was controlled by an entry phone system. Elias LJ held that:

“Communal room was actually open to a number of individuals within the building and while this may be only those who are in the flats or those who are connected with the people who live in the flats, nevertheless, it is sufficient not to be classed as dwelling even though access may only be available to a small section of public”

¹⁸³ *R v Horseferry* [1991] 1 All ER 324; [1990] 3 WLR 1006

¹⁸⁴ [2010] EWHC 1128

¹⁸⁵ [1993] Crim LR 882

Another unique situation is illustrated in the case of *R v CF*.¹⁸⁶ In this case, the accused was in the police custody and makes a racially obscene remark to one of the police officer. She was charged with intending to cause racially aggravated harassment alarm and distress. Moses LJ held that:

“A police cell is a place where a person is detained in custody and as such not home nor was it ‘other accommodation where a person lives’, even though someone detained in police cell may, from time to time, do the same things as they do in their own home or in the place where they live”

The above provision is expressly designed to exclude domestic dispute. Therefore, it can be inferred that a place which is not a permanent residential or part of permanent residential is disregarded as dwelling in the purview of this provision. Any person who is found guilty of causing fear or provocation of violence on summary conviction is liable to imprisonment not exceeding six months or a fine not exceeding level 5 on the standard scale or both. To repeat a person who is charged with violent disorder or affray on trial on indictment where the jury finds him not guilty of the offence charged, they may find him guilty of an infringement of this section. Hence, it can be inferred that a person who is discharged for offences of violent disorder, may be liable for an offence of fear or provocation of violence.

4.5.4. Intentional Harassment, Alarm and Distress

POA 1986 make further provision on other offences under the Act. Per section 4A:

“A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, if he –

- a) Uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
- b) Displays any writing, sign or other visible representation which is threatening, abusive or insulting

Thereby causing that or another person harassment, alarm or distress.”

¹⁸⁶ [2007] 1 WLR 1021

Anyone who commits the act mentioned above commits an offence. If found guilty the offender is liable to imprisonment for the term not exceeding six months or a fine not exceeding level 5 on the scale or both.

Notwithstanding aforementioned, section 4A of POA 1986 provides three exceptions for intentional harassment, alarm and distress. Conferred by section 4A, it is an exception if the offence is committed in the dwelling and the person who harassed, alarmed or distress is in the same dwelling or another dwelling. It is a defence for the perpetrator if he can prove that he had no reason to believe that the words or behaviour used or writing, sign or other visible representation displayed would be heard or seen by a person outside that dwelling or any other, or his conduct was reasonable.

4.5.5. Harassment, Alarm or Distress

Under section 5 of the POA 1986, a person in public place or private place deems to commits an offence if he uses threatening or abusive words or behaviour¹⁸⁷ or disorderly behaviour or writing, sign or visible representation within the hearing or sight of a person likely to be caused harassment, alarm or distress. According to section 5:

“A person is guilty of an offence if he –

- a) Uses threatening or abusive words or behaviour, or disorderly behaviour, or
- b) Displays any writing, sign or other visible representation which is threatening or abusive

Within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.”

This provision is to protect the right of others and to preclude crime and disorder towards others. It can be seen in the scope of this section whereby an act of threatening, abusive in a way mentioned above is tantamount to an offence even though it not intended specifically towards a certain person. To add, Auld LJ in *Norwood v DPP*¹⁸⁸ states that:

¹⁸⁷ Section 5(1)(a) of the POA 1986

¹⁸⁸ [2003] EWHC 1564 (Admin)

“Section 5 was itself a statutory provision that could protect the rights of others and to prevent crime and disorder...”

The term “a person” in section 5 of the POA 1986 is general. Hence, it may extend to the police officer as in the case of *DPP v Orum*.¹⁸⁹ In that case, Glidewell LJ held that:

“I find nothing in the context of the Act of 1986 to persuade me that a police officer may not be a person who is caused harassment, alarm or distress by the various kinds of words and conduct to which section 5(1) applies. I would, therefore, answer the question in the affirmative, that a police officer can be a person likely to be caused harassment and so on. However, that is not to say that the opposite is necessarily the case, namely, it does not mean that every police officer in this situation is to be assumed to be a person who is caused harassment. Very frequently words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom. It may well be that, in appropriate circumstances, justices will decide (indeed they might take a decision in the present case) as a question of fact that the words and behaviour were not likely in all the circumstances to cause harassment, alarm or distress to either of the police officers. That is a question of fact for the justices to be decided in all the circumstances, the time, the place, the nature of the words used, who the police officers are, and so on.”

A person is guilty for the offence under this section if his action intends to be threatening or aware that his action may be disorderly.¹⁹⁰ Upon summary conviction, a person is liable for a fine not exceeding level 3 on the standard scale.¹⁹¹ Notwithstanding the aforementioned, section 5 of POA 1986 provides four exceptions for the offence of harassment, alarm and distress. Conferred by section 5, it is an exception if the offence is committed in the dwelling and the person who harassed, alarmed or distress is in the same dwelling or another dwelling.¹⁹² It is a defence for the perpetrator if he can prove that he has no reason to believe that there is any person within hearing or sight who is likely to caused harassment, alarm or distress¹⁹³ or be heard or seen by a person outside that dwelling or other dwelling or his conduct is reasonable.¹⁹⁴

¹⁸⁹ [1988] 3 All ER 449

¹⁹⁰ Section 6(4) of the POA 1986

¹⁹¹ Section 5(6) of the POA 1986; Level 3 fine on the standard scale is equal to £1,000

¹⁹² Section 5(2) of the POA 1986

¹⁹³ Section 5(3)(a) of the POA 1986

¹⁹⁴ Section 5(3)(b) of the POA 1986

The relevant analogy of this is where the accused can provide a sufficiency of circumstances or motive; it relies upon the court to excuse the guilty conduct. The statute is silent on the scope of reasonable excuse. In *Clarke v DPP*,¹⁹⁵ it was held that:

“The question as to whether the conduct in question was reasonable can only be determined by objective standards of reasonableness as assessed by the finders of the fact in any tribunal, be they magistrates or the jury.”

Although in *Abdul v DPP*,¹⁹⁶ the appellant established a defence to their action on the ground that their action was reasonable. The appellant were complaint to the directions from the police and argue that there is no evidence the police tried to warn the protestor or confiscate their placards or PA system. The appellant also states that the police action as a whole gave a clear impression that his action was entirely lawful, and reasonable as the appellant hoped to raise awareness about the conduct of war and comply with the order from police to moderate their language, the court held:

“Compliance with the police was not enough to provide legitimacy for words that fell within the ambit of section 5”

Thus, it is the judge that will decide whether the conduct is reasonable or not, relying on the circumstances or evidence adduce by the accused. Although section 5 seems similar to the offence provided under section 4A of the POA 1986, there are minor differences between those offences. For instance, an offence under section 5 does not include an act which has elements of insult. The offence under section 4A, however, is carried out with the intention of causing harassment, alarm and distress to a particular person. Hence, an offence under section 4A of the POA 1986 is with an intense motive to cause harassment, alarm or distress compare to section 5 of POA 1986. This is seen particularly through the punishment imposed.

¹⁹⁵ (1992) 94 Cr App R 359

¹⁹⁶ [2011] EWHC 247

4.6. ADVANTAGES OF POA 1986

There are several advantageous of POA 1986 that safeguards the right of freedom of expression and association. POA 1986 provides the need for advance notification to the police officer six days before the date of an assembly. Although the Act requires the organizer to submit an advance notification, the Act gave leniency on the submission of the notification. For instance, advance notification is needed for a public procession under section 11 in part II of the POA 1986. However, the Act allows for notification to be submitted as soon as reasonably possible if the submission within the six days period is reasonably unpractical. The Act even allows for the notification not to be submitted if it is not reasonably practicable to give any advance notification. In the view of human right, the POA 1986 stimulates the right of expression and association of its citizen which are protected under Article 10 and 11 of Human Right Act 1998 (Chapter 42). In addition to that, the requirement for advance notification is expressly mentioned for the public procession.¹⁹⁷ The POA 1986 is silent on the requirement of advance notification to the police other than the public procession. Based on the above provisions, the POA 1986 allows an urgent and sudden procession to be held without any liability to criminal sanction.

Additionally, POA 1986 empowered the senior police officer to impose a restriction on the maximum number of persons who may constitute in the public assembly among for security interest. Although the limitation seems to deprive the citizen right to associate, by limiting the number of individuals in an assembly, it allows the organizers to manage the conduct and the manner of the assembly exceptionally. Further, no provision in the Act prohibits a repetitive assembly with the same intention or objective that constitute a small number of participants. Thus, limiting the number of participants is not depriving the right of association per se.

Another advantage of the POA 1986 is the implementation of the power of police officer to regulate the assembly. The Act itself does not provide an explicitly approach and technique for the police officer to control an assembly. But, by the power given under POA 1986 read together with relevant provisions from the Human Right Act 1998 (Chapter 42) to positively facilitate the rights of freedom of expression, consciousness and assembly, the police officer adopts the liaison base

¹⁹⁷ Section 11(1) of the POA 1986

public order policing to regulate the assembly in the United Kingdom. The method is drifted from traditional approach which is known as “escalated force” and applied “negotiate management”. Escalate force approach means the use of arrest, beating, tear gas, bullets and other weapons to quell the organizers and the participants by inflicting pain and suffering. The use of liaison base public order policing is to generate self-compliance among the organizers and the participants to law and order made upon them by the interaction of police officer whose act as mediator. Consequently, it helps to improve police decision, correcting inaccurate assumptions and pre-conceptions about emerging risks and mitigating police tendency to use force to regulate an assembly.

4.7. CONCLUDING REMARKS

The POA 1986 consist of two parts, namely part I and part II. Part I provides the elements that constitute the offences, including the penalty for the offences pertaining to the public order. The penalty imposed for offences concerned under this Act is severe and varied which includes the imprisonment, fine or both. This imposition of punishment is likelihood to deter the offender or potential offender from repeating the same offence. Part I of POA 1986 administer all the offences related to the public order. For an instance the offence of riot, violent disorder, affray, fear or provocation of violence, intentional harassment, alarm or distress and general harassment, alarm or distress.

Meanwhile, Part II makes a series of provisions on the procedure and steps to be taken to ensure and facilitate the exercise of a constitutional right. Although it is a constitutional right for the citizen, the Act empowers the senior police officer, district council and the secretary of the state to impose condition if it necessary for the interest of security. There are three types of assemblies which governed by POA 1986. They are public processions, public assembly and trespassory assembly. Any prohibition on the commencement of any assembly by the Act must get the consent of the Secretary of States. However, the procedure for applying for such prohibition varies from one metropolitan city to another. In London or metropolitan city, the prohibition is by the Commissioner of Police in the metropolitan city with the consent of Secretary of States. However, for the city other than London or Metropolitan, the prohibition is by

the district council by an application of the chief officer of police with the consent of Secretary of States.

Section 11, 12 and 13 of the POA 1986 deals with the public procession which includes the procedure for advance notification, imposition of restrictions and conditions by the police, the exception of restrictions and conditions, prohibition of the commencement of public procession (not more than 3 months) and offences constitute with the public processions.

Meanwhile, section 14 deals with the imposition of the condition of public assembly, an exception to the conditions, offences and punishment relating to the public assembly. The procedure in prohibiting trespassory assembly for not exceeding 4 days or not more than 5 miles radius from a specific centre is governed by section 14A of the POA 1986. Section 14B is on offences about trespassory assembly while section 14C empowered the police constable to stop a person from proceeding to trespassory assembly and legal obligation to the public to comply with the order given by police constable.

CHAPTER FIVE

COMPARATIVE ANALYSIS ON PEACEFUL ASSEMBLY IN MALAYSIA AND UNITED KINGDOM

5.1. INTRODUCTION

This chapter makes a comparative analysis between the PAA 2012 Malaysia and the POA 1986 United Kingdom. Both Acts are statutory procedural to regulate a peaceful public assembly. The comparative analysis makes reference to the procedural provision, the punishment imposed and the implementation of the Acts conducted in this research which contributes to the factors of non-compliance of the public with the law. As mentioned earlier, there are four factors that constitute to the non-compliance of the public to the law. The factors include deterrence, social norm, personal morality and perceived legitimacy of authority. The factors are elaborated more below.

5.2. DETERRENCE

There are two basic types of deterrence: general and specific.¹⁹⁸ A general deterrence is to prevent crime in the general population.¹⁹⁹ For that reason, the punishment imposed on offenders serves as an example for others who have not yet participated in criminal events.²⁰⁰ The main purpose of the punishment is to make the general public aware of the horrors of official sanctions in order to put them off committing crimes.²⁰¹

Meanwhile, specific deterrence is by the nature of the proscribed sanctions is to deter only the individual offender from committing that crime in the future.²⁰² In specific deterrence theory, it is believed that punishing offenders severely will make

¹⁹⁸ Deterrence Theory retrieved from <https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf>

¹⁹⁹ Ibid

²⁰⁰ Ibid

²⁰¹ Ibid

²⁰² Ibid

them unwilling to commit the crime again in future.²⁰³ Hence, in general, the severe the punishment, the more propensity for the public to comply with the law.

PAA 2012 provides the procedure in commencing and regulating an assembly. Besides, it also provides a penalty to whoever breached the restrictions and conditions imposed by the Act. However, PAA 2012 the punishment imposed is limited only to certain types of offences committed under the Act. As discussed earlier in Chapter 3, the punishment imposed under PAA 2012 includes punishment for non-compliance on the limitation on the right to organize and participate in the assembly,²⁰⁴ failure to comply the requirement for notification of the OCPD²⁰⁵ and failure to comply with restrictions and conditions during and after the assembly.²⁰⁶ The offences mentioned carry a punishment not exceeding RM10, 000.²⁰⁷ On the other hand, the penalty for inciting or allowing a child to participate in an assembly²⁰⁸ and failure to comply with an order made by the police to disperse upon conviction is fine not exceeding RM 20,000.00.²⁰⁹ The first issue on the imposition of punishment of the offences under PAA 2012 is the variation, and the severity of the penalty and secondly is the ambiguous provision and punishment imposed on the participants that failed to comply with the responsibility of a participant.²¹⁰

5.2.1. Severity of Punishment

As mentioned above, the penalty for non-compliance with the restrictions and conditions²¹¹ under PAA 2012 is punishable only by a maximum fine of RM 10,000.00 while offences on recruiting, bringing and allowing children to the assembly²¹² and failure to dispersed after ordered to do so²¹³, the fine are simply not more than RM 20,000.00. Those are the only two penalties for the offences under PAA 2012. Comparatively between the

²⁰³ See note no. 198

²⁰⁴ Section 4 of the PAA 2012

²⁰⁵ Section 9 and 10 of the PAA 2012

²⁰⁶ Section 15 of the PAA 2012

²⁰⁷ Section 4(3); section 9(5) and section 15(3) of the PAA 2012

²⁰⁸ Other than assembly stated in Second Schedule; Section 4(2)(f) of the PAA 2012

²⁰⁹ Section 21(3) of the PAA 2012

²¹⁰ Section 7 of the PAA 2012

²¹¹ See note no 206

²¹² See note no.208

²¹³ See note no. 209

sanctions imposed and the loss suffered by the government and the public at the vicinity of the assembly²¹⁴ the punishment imposed is not proportionate. Hence, the severity of the punishment imposed under PAA 2012 is relatively light compared to the loss sustained by the government and to the penalty for the offenders under PAA 2012.

Regarding the severity of punishment under PAA 2012 compared to the punishment under POA 1986, the latter imposed a more severe penalty. Under section 14 of the POA 1986, the sanction imposed is not exceeding 3 months imprisonment or fine not exceeding £2,500²¹⁵ or both to any organizer who failed to comply with restrictions by the Act. But, section 15 of the PAA 2012 only provides a penalty of not exceeding RM10, 000.00 for the same offence. Hence, comparatively, POA 1986 provide heavier punishment compared to sanction under PAA 2012.

The above shows that the sanctions on the offender under PAA 2012 are light compared to the loss suffered due to a loss in the public assembly that turned not peaceful. Further, the punishment enforced on the offender in accordance to PAA 2012 is relatively not as severe as compared to the penalty in accordance to POA 1986. The imposition of punishment by imprisonment or fine or both for an offence under POA 1986 provides for a severe penalty. Therefore, the Act is capable of creating fear in the mind of the public and deters them from committing any offence and made them become self-compliance to the provisions, restrictions and conditions under the Act. To add, (Dato'Abdul Hamid Mohd Ali)²¹⁶ stated that since the PAA 2012 imposing light sanctions to the offender, it's consequently reflecting the increasing of public depreciation to the Act and may lead to the non-compliance with the PAA 2012.

5.2.2. Ambiguous Liability of the Participants

Section 7 PAA 2012 provides the responsibilities of participants, pertaining to their conduct during the assembly. This provision creates a legal obligation to the participants to comply with the requirement of a peaceful

²¹⁴ Based on previous experience in Bersih 3.0 on 28th March 2012 (RM 110,543.27), Bersih 4.0 on 29th and 30th August 2015 (RM 61,840.00) and Bersih 5.0 on 19th November 2016 (RM 27,373.66)

²¹⁵ Until January 2017, £2,500 is equal to RM 13,822.46

²¹⁶ 22nd December 2016

assembly. However, section 7 is silent on the penalty for any non-compliance of responsibilities imposed under section 7. Hence, if the Act read literally, no penalty can be imposed if there is a failure to comply with the responsibilities provided under section 7. This is one of the weak provisions of PAA 2012 as the provision provides responsibilities of the participants but no penalty for any infringement under the section. This allows a person to take advantage of the lacuna in the law to act against the responsibilities. This is one of the factors that may influence participant not to comply with section 7 of the PAA 2012.

Conversely, POA 1986 states the liability to any persons who failed to comply with the restrictions and conditions throughout the Act. Since the Act generally imposes the punishment to the offenders, thus such punishment bound the organizers and the participants. Although POA 1986 provides the general imposition of the penalty to the offenders, there are several provisions under the Act that explicitly impose specific punishment for participants who failed to comply with the restrictions and conditions in accordance to the POA 1986. Any person who participates in the assembly knowingly fails to comply with the condition imposed where the assembly is a public procession²¹⁷ or public assembly²¹⁸ is an offense under this Act. Besides, it is also an offence to any person who participates in the assembly that is prohibited where the assembly is a public procession²¹⁹ or trespassory assembly.²²⁰ Each of offences upon conviction will be liable to a fine not exceeding £1,000.²²¹

The elaboration made above shows that the incorporation of the severity and the general imposition of the punishment on organizers and the participants under POA 1986, it is able to raise a fear of severe punishment in the mind of the public. Consequently, this will simulate self-compliance to the restrictions and conditions under the Act. As a result, it is capable of deterring the public from committing an offence under the Act.

²¹⁷ Section 12(5) of the POA 1986

²¹⁸ Section 14(5) of the POA 1986

²¹⁹ Section 13(8) of the POA 1986

²²⁰ Section 14A (2) of the POA 1986

²²¹ Until January 2017, the currency exchange for £1,000 is equal to RM5,528.98

Contrary with the PAA 2012, there is no penalty for non-compliance of responsibilities of participants under section 7. Therefore, no factor of fear on the severity of punishment will rise. Hence, it would not deter the participants to breach section 7 provisions.

5.3. SOCIAL NORM

To repeat scholars have identified social norm as one of the factors that influence people not to comply with the law. (Twila Wingprove et al.)²²² in why million of people not obeying the law has enlisted social norm as one of four factors that influence people not to comply with the law and was agreed by (Berne).²²³ Social norm, in general, means an expected form of behavior in a given situation.²²⁴ It forms rules of behavior that are considered acceptable in a group or society.²²⁵ Those who failed to follow these norms may suffer some consequence.²²⁶ Hence, social norms may influence a person to act due to hope or insistence by close people such as peers, families and communities. In short, people surrounding have great influence on someone, especially people close to them and the one that they trusted.

Reverting to the situation under PAA 2012, to date information reveals that 90% of the participants in public assemblies in Kuala Lumpur were peers in groups.²²⁷ The information shows that one of the factors that contribute to the participation of participants in a public gathering is the social norm. As the number of participants increases, the capability of the organizer to regulate the crowd will significantly reduce. One of the effects of social norm identified by Berne is surrounding people have great influence on someone behaviour. Since the capability of the organizer to regulate the assembly is reduced and a group of people behaviour will influence others in the vicinity, this situation will echoing the non-compliance of the public to the law. Therefore, it is vital for PAA 2012 to provide a preventive measure to avoid negative consequent of social norms while the assembly is taking place.

²²² See note no. 15

²²³ See note no 18

²²⁴ <http://www.dictionary.com/browse/social-norm> retrieved

²²⁵ <http://examples.yourdictionary.com/social-norm-examples.html> retrieved

²²⁶ Ibid

²²⁷ Gubinder Singh Mann (2016)

The POA 1986 take preventive measure to avoid social norms that would influence individuals to commit an offence under the Act by preventing individuals from participating in a certain assembly. The way POA 1986 do it is to make it an offence under the Act if participant invites others to participate in public procession or public assembly which is knowingly fails to comply with the restrictions and conditions imposed or which is knowingly prohibited.²²⁸ These provisions raise caution in the in the mind of potential offenders if he tries to influence others to commit such offence.

The PAA 2012 also provides the same prevention approach in the Act. These are illustrated under section 4(2)(f), section 6(2)(b) and section 7(a)(iii) of the Act. Section 4(2)(f) prevents any persons from recruiting a child to participate in an assembly other than assembly listed in the Second Schedule. On the other hand, section 6(2)(b) and 7(a)(iii) prevent any persons or participants from making any provocation which led to the non-compliance with the restriction and conditions under the PAA 2012.

Both statutes prevent influence by any persons towards the others from disobeying the restrictions and conditions imposed in public assembly. However, looking from a different perspective, the provision in POA 1986 also hinders a person from influencing others with the punishment imposed for each offence.²²⁹ Each of offence upon conviction is liable to imprisonment not exceeding 3 months or fines not more than £2,500²³⁰ or both. Meanwhile, PAA 2012 only imposed punishment for offences under section 4(2)(f)²³¹ whereby upon conviction, the offender is liable for fine not exceeding RM20,000.00. On the other hand, there is no punishment imposed for offences under section 6(2)(b) and section 7(a)(iii). Consequently, it is not deemed as an offence for a person to influence another person for making any provocation, which led to the non-compliance with the restriction and conditions under the PAA 2012.

²²⁸ Section 12(6), section 13(9) and 14(6) of the POA 1986

²²⁹ Ibid

²³⁰ Until January 2017, currency exchange for £2,500 is equal to RM 13,822.46

²³¹ Person who recruiting, bringing or allowing children to the assembly other than assembly listed in Second Schedule

5.4. PERCEIVED LEGITIMACY OF AUTHORITY

Perceived legitimacy of authority in shorts refers to the perception in the mind of the public towards the authority.²³² It is driven by the way the authority implied their power towards the public. Today, social media is one of the factors that greatly influenced public perception towards the authority. In Malaysia, there are several statutes that regulate and monitor the use of social media. For instance, the enactment of Sedition Act 1948 and Communication and Multimedia Act 1998 is used to supervise the social media activities. Although there are specific statutes that governed the use of social media, for the purposes of this research, the researcher focuses only on the PAA 2012. To elaborate more on the perceiving legitimacy of authority concept, the researcher also refers to POA 1986 and HRA 1998 in the United Kingdom.

United Kingdom has developed a liaison based public order policing in POA 1986 and HRA 1998 in the effort to adopt the perceiving legitimacy of authority concept. The liaison-based public orders policing are applied through the implementation of power by the police officer in both Acts. This approach used the method of negotiation and consultation between the police and organizers and participants in exercising their right of freedom of expression and assembly. By establishing a relationship and gaining trust, accompanied with less use of escalating force between the police, organizer and participants in an assembly, the approach has shown a positive result in several events in the United Kingdom.

The Malaysian position too has adopted a change in approach in handling matters on assembly. In the case of the enactment of the PAA 2012, the Act has changed its method from strategic incapacitation to negotiate management in handling public assembly.²³³ The application of this approach is seen by the decreasing numbers of arrested persons, the abolishment of the requirement for a permit to assemble and the need for the organizers to meet and discuss with the authority per section 13 of the PAA 2012 see the application of this approach. Nevertheless, the application of the new approach seems slow as there is a lack of understanding in implementing the concept into PAA 2012 by the police officers, the organizers and the participants. The fact that PAA 2012 was enacted only recently to replace section

²³² See note 16

²³³ See note no. 227

27 of the Police Act 1967 (Act 344), the spirit of the former was not clearly understood. Besides, in the latter, the police for decades had the power to prohibit an assembly through the requirement of a permit. Since that was the practice for decades, the attitude continued and hence, most of the officers have failed to appreciate the spirit behind the PAA 2012 and new approach introduced in the legislation.

To add more to the point, the organizers and the participants who had experience in the past incidents on the use of escalating force by the police officers as a result of retaliation in public assembly²³⁴ have generated a negative presumption over the police officers. For instance, in the Bersih,²³⁵ Hindraf 2007,²³⁶ Selangor State Water Issue,²³⁷ Bersih 2.0²³⁸ and Bersih 3.0²³⁹ assemblies, the presence of the police officer in the vicinity where the assembly took place had arrested and inflicted force onto organizer and participants to disperse and to stop the assembly. To end the negative impression and to improve the understanding on the true spirit of PAA 2012, measures must be taken to explain to the parties concerned on the new spirit implemented in PAA 2012.

It is also essential to take note that although the shifted approach adopted in Malaysia is almost similar to the method developed in the United Kingdom, they are slightly different. The approach applied in the United Kingdom is the concept called "the liaison based public order policing" where the police officer is the consultant to the organizers and participants during the assembly. To add, the liaison officers even walk together with the organizers and participants during the assembly. This attitude helps closed the gap of misunderstanding between the police and the organizers and participants of an assembly. This scenario is not practiced in the current Malaysian system. Hence, it is suggested that a similar method is adopted to end the negative thought on the police and a better understanding of the role of police or authorities in a public assembly in Malaysia.

²³⁴ 10th November 2007; 25th November 2007; 05th December 2010; 9th July 2011; 28th April 2012

²³⁵ Human Right Commission of Malaysia (SUHAKAM) (2007)

²³⁶ Ibid

²³⁷ Human Right Commission of Malaysia (SUHAKAM) (2010)

²³⁸ Human Right Commission of Malaysia (SUHAKAM) (2011)

²³⁹ Human Right Commission of Malaysia (SUHAKAM) (2012)

5.5. PERSONAL MORALITY

Personal morality is an internal obligation to obey the law. A person will act in compliance with the law if they hold the belief that committing the illegal act goes against their personal convictions. This factor is driven by other three factors namely deterrence, social norm and perceived legitimacy of authority. The consciousness of a person to evaluate the risk of punishment,²⁴⁰ the degree of appreciation and compliance to the law by social environment surround that person lived in and his perception to the authorities on their duties and legitimacy will constitute a person morality to adhere the law. In addition to that, the holistic enforcement of the law will stimulate personal appreciation to the law and consequently adhere it.²⁴¹

Relying solely on the statutes to determine whether the Act sufficiently influent a person morality to comply with the law will be seemingly surmised. However, to compare the provision available and the effectiveness of implementation between the two Acts, POA 1986 has a higher tendency to promote self-compliance to the law than PAA 2012. For instance, the POA 1986 have a harsh punishment imposed and has proven positively self-compliance to the law by adopting liaison based public order policy in several events.²⁴² The POA 1986 also established a clear responsibility to the organizers and participants with liability if the responsibility is breached. In addition, the Act also prevent any person from incite other to participate in an assembly which is knowingly prohibited or fail to comply with the conditions imposed under the Act.

5.6. CONCLUDING REMARKS

The four factors that influence the public on the compliance to the law are deterrence, social norm; perceive legitimacy of authority and personal morality. To compare, POA 1986 has severe punishment on the offender under the Act than PAA 2012. The former provides both fine and imprisonment for an offence under POA 1986, while PAA 2012 only imposed a fine for infringement under its Act. Additionally, there is no punishment imposed for the participants who has breached

²⁴⁰ Whether he will get caught and faced with harsh punishment or insignificant punishment or get away with the offence committed.

²⁴¹ Dato'Abdul Hamid Mohd Ali (2016)

²⁴² See note no. 23

his responsibility under section 7 of PAA 2012. Meanwhile, POA 1986 has a broad power in preventing a person from inciting others to commit an offence under the Act. However, PAA 2012 only provides an offence for a person from recruiting a child to the assembly. Meanwhile, provocation by organisers or participant towards others during assembly is not deemed an offence since there is no penal sanction if a person commits such act. The United Kingdom adopted liaison based public order policy in its legislation on public assembly while Malaysia applied negotiates management. Although both approaches have similarities to facilitate and provide guidelines to the organisers and participants on public assembly there are differences between the two. In the case of liaison based public order policy the liaison officer also a consultant to the organisers and participants during the assembly. The POA 1986 has highly tendency to nurturing personal morality into a person as a result of harsh punishment, preventing people incites another from committing an offence under the Act and applying liaison based policing to generate positive perceived legitimate of the authority. As the end result, encourage public to comply the restrictions and conditions during the assembly.

CHAPTER SIX

RECOMENDATIONS AND CONCLUSSION

6.1. SUMMARY

Peaceful assembly has become one of important matter as it involved particularly in security, economic and human right. There were 107²⁴³ assemblies so far held after the implementation of PAA 2012 related to matters of public interest. In Bersih 3.0,²⁴⁴ Perhimpunan Bantah GST,²⁴⁵ Bersih 4.0²⁴⁶ and Bersih 5.0²⁴⁷ the assemblies held dealt with issues on the dissatisfaction of some of the Malaysian communities against the act of the government. In those assemblies, the people were dissatisfied with the administration and that created tension environment during the assemblies. Worse, some other community opposes those assemblies and conduct a counter assembly, for instance, Perhimpunan Merah²⁴⁸ and Perhimpunan Merah 2.0.²⁴⁹ Failure to notify to the OCPD under section 9 of PAA 2012 and the intention to influence others to cancel the proposed assembly by making silat demonstration and threaten word, this situation has a tendency to resonate public unrest and disorder.

When the assemblies held were not carried out peacefully, it had an impact on others who were in the assemblies and the surroundings. Incidents in the past showed that the businesses in the assembly area were closed, and this affects the economy of the country. Besides, there was also a lack of understanding by the authorities and the persons involved in the assemblies of the genuine spirit of the enactment of PAA 2012. The organisers and participants always showed that they have an absolute fundamental right of expression without taking note of the right of the third party not to be injured or suffers any damaged for the activities conducted by the organisers and participants. Additionally, the organisers and the participants have negative the idea that the present of the police officer or any enforcement officers in the assembly is for

²⁴³ Taklimat sempena lawatan OCPD Dang Wangi ke Bahagian Keselamatan Dalam Negeri dan Ketenteraman Awam pada 22 Disember 2016

²⁴⁴ 28th April 2012

²⁴⁵ 1st May 2015

²⁴⁶ 29th -30th August 2015

²⁴⁷ 19th November 2016

²⁴⁸ 16th September 2015

²⁴⁹ 19th November 2016

the purposes of dispersing the assembly or would take harsh action against the participants. Although PAA 2012 adopted the negotiation approach in its legislation, this was not fully understood.

Conversely, in the United Kingdom, the liaison based public order policing applied in Public Act 1986 (Chapter 64) to assure peaceful public assemblies proved fruitful. The policy was successful as it encourages public self-compliance to the law during the assembly. In addition to that, the POA 1986 provides severe punishment towards the offenders under the Act which involve imprisonment or fine or both. To add, the liability of the organizers, participants and inciter is clearly mentioned under the Act which may deter the offender from committing an offence under this Act. In addition to that, the Act also empowered the authority to limit the number of participant to ensure the assembly held peacefully and for the interest of public safety and tranquillity.

With the weaknesses identified under PAA 2012 and the strength available under POA 1986 United Kingdom, this chapter makes recommendations on the way forward in improving the weaknesses highlighted under PAA 2012. This Chapter ends with the conclusion of the research.

6.2. RECOMMENDATION

In the light of weakness highlighted above and the previous chapters of this research, in particular, the responsibility imposed and the requirement to commencing an assembly, this research proposes the following.

6.2.1. Enhancing Responsibility and Penalties

The responsibility of organisers and participants are conferred by section 6 and 7 of the PAA 2012 respectively. Improving the responsibility of the organisers and participants means to broaden the responsibility of both the organisers and participants along with severe punishment if there is a failure on their part.

6.2.1.1. Enhancing organiser responsibility

To repeat, the responsibility of organiser is explicitly under section 6 of the PAA 2012. Reciting to Varghese George JCA in *Kerajaan Malaysia v Ambiga Sreenevasan & Ors*, the Court held:

“...word ‘ensure’ in S.6 of the PAA did not connote that the carrying out of any particular responsibility was a ‘must’ or legally binding and imperative obligation... however it was clear that provision of s.6 and in particular s.6(2)(g) of the PAA did not imposed statutory duty or liability on the organiser, and no right of a private cause of action arose even if there was any violation or some failure to abide with the responsibilities on the part of the defendants.”

Obviously, any breach of organiser responsibility under section 6 is not subject to any penal sanction or private action. It is essential to note that under section 6, there are no specific punishments that make the organiser liable if there is a failure on their part to comply with its responsibility. In shorts, no action can be taken if the organisers neglect his duty under the section. In the spirit of PAA 2012, any assembly is allowed to be organised if such assembly is peaceful. To guarantee the assembly held is peaceful, it is vital to impose restriction and conditions including the responsibility of organisers. Since section 6 of PAA 2012 is silence on sanction for any failure of non-compliance, this study suggested that the section 6 PAA 2012 be amended to include a penalty for any non-compliance under section 6 of PAA 2012.

On the note of punishment, it is essential to relate to the offence committed and its impact on the society or surrounding. In the case of public assembly, failure on the part of those who are involved with the restriction imposed may result in damage or injuries to persons and properties. Besides, it may also affect social and economic activities in the surrounding vicinity of the assembly. Further, it is also vital to take note that the severity of the punishment mentioned earlier in the previous chapter has an influence on the attitude of a person to comply with the law.

For the above reasons, it is suggested that a severe sanction such as imprisonment and fine not less than RM 20,000 needs to be included in section 6. That will influence organisers to observe their responsibility under section 6. With the compliance, there is a high likelihood that the assembly to be held is peaceful. Consequently, the daily social and economic activities can run normally. Thus, social, economic and political stability could be achieved.

6.2.1.2. Enhancing participants responsibility

Responsibilities of participants are governed by section 7 of the PAA 2012. Although responsibility is imposed on the participants during assembly, there is no penalty imposed if the participants fail to comply with their responsibility. Additionally, there is no legal obligation on the participants conferred by section 7 to make them comply with section 15 of PAA 2012, and to make them liable if they contravene with the restrictions and conditions under section 15. The only provisions that can make the participants liable for their actions that contravene with the Act is the offence under section 4(2)(f) PAA 2012²⁵⁰ and punishable under section 4(4)²⁵¹ of the same Act.

The provisions mentioned above²⁵² show that the Act does not impose any sanction on any participants in committing the followings:

- 1) Disrupt or prevent any assembly; or
- 2) Behave offensively or abusively towards any person; or
- 3) Make any provocation towards public at large and disturb public tranquillity; or
- 4) Commit any offence under any written law at any assembly; or
- 5) Cause any damage to property; or

²⁵⁰ A person who recruits, brings or allows a child to participate in an assembly other than an assembly specified under the Second Schedule.

²⁵¹ Upon conviction shall be liable to a fine not exceeding RM 20,000.00

²⁵² Section 7 of the PAA 2012

- 6) Fail to adhere to any order given by the police, organiser or person appointed to oversee the orderly conduct of the assembly liable to any type

It is important to highlight that in maintaining the objective of PAA 2012 to allow a peaceful assembly, the Act does not only focus on prohibiting aggressive action during an assembly, but it make certain that organisers and the participants are responsible for observation of the restrictions and conditions imposed throughout the Act. But, from the discussion made earlier, there is a missing link between participants' responsibility and punishment imposed for the breach of obligation such as under section 7 of the Act.

Conversely, under POA 1986, the Act provides a clear punishment imposed to any person who fails to comply with any restrictions and conditions imposed throughout the statute. It is important to note that such punishment imposed involves both imprisonment and fine. With such penalty, it acts as deterrence to the potential offender. On this note, this research recommends an amendment to insert punishment clause to section 7 of the PAA 2012. To ensure compliance with the provisions is achieved, a severe punishment must be imposed to deter any act on non-compliance of responsibility by the participants. The severity of the penalty should include imprisonment and fine. It is necessary for the fine to be set with a minimum amount so that any potential offenders will realise the gravity of the offence for breaching the participants' responsibility. Hence, this study suggested that the fine imposed shall not be less than RM 10, 000.00.

Also, it is essential to appreciate that section 7 is only to promote the conduct of the participants himself during the assembly. The inference is from the term "refrain" under the section means the participant should stopping himself from doing anything listed under section 7. In this context, the section has established personal morality²⁵³ to the participants. However, the same section is lack on promoting

²⁵³ See note 16; factors that influence person to comply with the law

social norm²⁵⁴ which obliged the participants to stop or prevent other participants from breaching their responsibility listed under section 7 of the Act. Thus, to ensure that the participants strictly comply with the requirement on assembly under the Act and to guarantee assembly is peaceful, this study recommends the insertion of penalty for failure to observe responsibility by the participants into section 7 of the Act by other participants.

6.2.2. Inciting Clause

In general, POA 1986 make it an offence for any person who incites others to commit an offence under the Act. The insertion of this provision is tantamount to preventing the influence of others not to comply with the law, namely social norm. Under POA 1986, any person who incites others received a grave penalty if found guilty²⁵⁵.

On the contrary, there is no such provision under the PAA 2012. It is essential to note that “any person” in this perspective means anybody which may have interest to the assembly. It can be the organisers, or the participants, or the authorities, or person who has an interest in the location of assembly or another person who has an intention to sabotage the assembly. On the aspect of the environment of the assembly, the peacefulness of the assembly does not depend solely on the conduct of the organisers and the participants. An external factor can influence the peacefulness of the assembly such an inciter. Therefore, inserting a clause making incite an offence under PAA 2012 is necessary as it can prohibit the organisers, participants and any person to become an inciter under the Act. Therefore, it is suggested that PAA 2012 needs to be reviewed to include the clause preventing the act of inciting.

Reverting to the position of POA 1986 on the punishment imposed for the inciter, the Act provides a harsh punishment as against the organisers. For example, the POA 1986 imposing punishment of imprisonment not exceeding 3 months, or fine not exceeding level 4²⁵⁶ on the standard scale or both²⁵⁷. Hence,

²⁵⁴ See note 16; factors that influence person to comply with the law

²⁵⁵ Section 12(10), 13(13), 14(10) and 14B (7) of the POA 1986

²⁵⁶ Until January 2017, the currency exchange for £2,500 is equal to RM 13,822.46

to assure that the insertion of inciter clause is useful under PAA 2012, it is recommended that the sanction imposed to any person for inciting should be the same as the proposed punishment for the organisers discussed above. The researcher suggests that the penalty must include the imprisonment and fine of not less than RM 20, 000.00.

6.2.3. Police Approaches

The responsibility of the police to arrest for an offence under PAA 2012 is under section 8. The Act permits an arrest without warrant. Although PAA 2012 does not make an express provision, it is implicit under the Act that the police are required to provide assistance for the citizen to exercise their right of freedom of expression and associate. To understand better on the transition change of approach from section 27 of Police Act to that of PAA 2012, an express provision leading to that desired intention is needed under the Act. With the explicit requirement, it mirrors clearly the police approach in regulating the assembly to maintain assembly conducted peacefully.

It needs to be highlighted too that although the police approach in regulating and ensuring the peaceful of assembly has been changed from the strategy of incapacitation (under section 27 Police Act) to negotiate management (under PAA 2012), the approach is not as efficient as the policy established in the United Kingdom. The reason is the Malaysian systems adopt the consultation approach before the commencement of the assembly. In the case of United Kingdom, it established a liaison based public order policing. One of the advantageous of this policy to the public is the consultation by the police is made prior and during the assembly. It also noted that the liaison officers who become a consultant walk side by side with the organisers and the participants during the assembly so that any issue arise are handled directly.

It is essential to note the present of Royal Malaysia Police (RMP) in the Malaysia system. The RMP has its unit that specialises in public order control and this unit is known as Federal Reserve Unit (FRU). This unit consists of several divisions, and for ground assessment for public order, the two units are

²⁵⁷ Section 12, 13,14 and 14B of the POA 1986

known as strike force team and crowd control team. They play a significant role in handling public assembly. Strike force team usually wear full operation suit complete with tear gas and assist by the FRU mobile truck (known as water cannon). They are always on a standby and will be deployed purposely to gain control over the crowd once the crowd becomes unruly or riot. This unit is always the last resort used by the police. Crowd control team, on the other hand, are used to separate the participants with the line of the policeman. They are deployed when the crowd try to breach human barricade made by the police officer in line and to avoid any injuries to parties in the assemblies.

Having regard to the function plays by FRU and approach adopted by RMP, it is evident that crowd control team does not play an active role as the liaison officer in the United Kingdom. Therefore, it is suggested that the RMP should adopt liaison based public control policing to encourage public self-compliance to the PAA 2012 during the peaceful assembly.

6.2.4. Revisit Conditions on Organising Public Assembly under PAA 2012

The weaknesses noted above shows that there are three matters on conditions in organising public assembly under PAA 2012 that need a revisit. The three conditions identified are on the interpretation of the term "assembly"; the limitation on the numbers of participants per assembly; and lastly the list of designated place for assembly.

6.2.4.1. Definition "assembly" and "public assembly"

Even though section 3 PAA 2012 defines the term "assembly" but the term failed to specify the nature and the number of participants involves in an assembly that is governed under PAA 2012. The section only described 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." The Act is silent on the minimum or the maximum number of person needed to qualify the assembly as public assembly under PAA 2012. As a result, an assembly can be considered

as a public assembly even with the attendance of at least two citizens at a gathered place.

The number of people per assembly must also be specified in PAA 2012. This is to help categorise different types of an assembly according to the figures of participants. For instance, under POA 1986, a public assembly is an assembly that consists of two or more person. Meanwhile, the trespassory assembly consists of twenty or more individuals per assembly. The clarifications of the different types of an assembly according to figures of the participant avoid unnecessary confusion and improve management of the assembly. Therefore this study suggests that there is an urgent need to insert a vibrant interpretation of meaning and the types of assembly under PAA 2012.

Further, there is uncertainty about the meaning and scope of the term "intentional". Thus, a gathering of at least two people at a place with any intention can be considered as public assembly governed under PAA 2012. To add, although the Act does provide an assembly that does not require the notification as per Third Schedule, the types of assembly listed does not explicitly covers other types of assembly such as friendly gathering. Hence a friend of two or more who gathered without prior notification can be penalised for an offence under PAA 2012. This is confusion to the public.

More to the point, the definition of the word "intentional" in section 3 PAA 2012 must be spelt out. This is to confirm that only the qualified "intentional" gathering recognised by PAA 2012 is managed by the Act. Hence, the researcher suggests that the Act needs to insert the meaning of "intentional" to mean an assembly with the intention to influence others to join in the assembly and its activities. Hence, any assembly that has no specific intention to influence others as above is exempted under this Act.

6.2.4.2. Limiting maximum number of participants.

Currently, there is no restriction on figures of participants in an assembly under PAA 2012. In the past, the number of participants has reached thousands. The mass aggregation of individuals causes difficulties for the organizers to manage the assembly. Eventually, the assembly became unruly and participants failed to comply with the restrictions and conditions imposed on the assembly.

On the contrary, Section 14 (1)(b) of the POA 1986 provides the limited figures on participants joining the public assembly if the senior police officer has reason to believe that such assembly may cause public disorder, serious damage to property or serious disruption to the life of the community. This restriction can be made prior to the assembly or during the assembly.

Therefore, in order to ensure the compliance of organizers and participants to the restrictions and conditions under PAA 2012, it is suggested by this study that PAA 2012 should adopt the same restriction into the Act. It is essential to note that such limitation of participants does not tantamount to the restrictions that deprived a citizen freedom of expression and association. The reason is the limitation is proportionate to the belief that if the number of participants of a public assembly is unlimited, there is a higher risk of an assembly turn unruly which may result in public disorder, serious damage to property or serious disruption to the life of the community. Besides, the limitation of figures on participants in an assembly is made for the best interest of security and public tranquillity as a whole.

It is also suggested that if the numbers participants have to be restricted for the mentioned reason, PAA 2012 need to make an allocation to allow assembly with the same intention to be conducted in smaller groups at a different time. This is to preserve the fundamental right of a citizen to freedom of expression and at the same time giving the opportunity to the citizen to exercise their right. This move can avoid any allegation of unconstitutionality. On another point, since the

assembly has the same intention as the earlier assembly, ten days notification from the OCPD as required by section 9 can be exempted.

6.2.4.3. Designation of location for the assembly.

Currently, there is no list of designated place listed under the PAA 2012 for the assembly to be held freely without the need of notification to the OCPD. Since the Act does not list down the designated place to hold an assembly, the organizers need to obtain consent from the owner or the occupier of the place in accordance with the Act. Analysis of the cases pertaining to the notification revealed that one of the issues in completing the notification form is to obtain the consent of the owner or occupier of the place of assembly.

In the event that no such consent is received, the organiser has no option but to proceed with the assembly without giving notification or with an incomplete to the OCPD. Due to the failure, the organiser is charged with non-compliance with the section 9 of the Act. This situation seems unfair to the organisers. In the same situation, if the owner or occupier does not give the proper consent, the authorities will choose a designated place for the assembly.

Additionally, PAA 2012 disallows assembly in prohibited place or within fifty meters from the limit of prohibited place. The prohibited place is defined as the protected areas and protected place declared under Protected Area and Protected Place Act 1959 (PAPPA 1959) and the place specified in First Schedule of PAA. With the prohibition on holding an assembly in prohibited areas and the difficulties in getting consent from the owner or occupier, it leaves the organiser with difficulties in holding the assembly. To add more to the point, the uncertainty of actual place designated to hold an assembly caused an inconvenience on the knowledge of the place of assembly and this caused unfairness to the organiser.

For the above reasons, this research recommends that PAA 2012 specify the designated place of assembly. This location can be common facilities building or place where every state ought to have such facilities.

6.3 CONCLUSION

Peaceful Assembly Act 2012 was enacted to allow Malaysian to exercise their fundamental rights on freedom of expression protected under Article 10 of the Constitution. To ensure the right is exercise rightly, the Act only permits an assembly that is peaceful. For that reasons PAA 2012 enact provisions that could regulate and manage a public assembly that is peaceful. To achieve the objective, PAA 2012 imposes conditions and restrictions that must be complied with by the organisers and participants in maintaining peaceful public assembly. The restrictions form a medium that guarantees that in the exercise of their rights to assembly no harm or damage are made to third party. More to the point, in giving the right to assembly, the organisers and participants must take charge that their activities related to the assembly must not give a negative impact on the social, economy and political impact on the state

Nevertheless, incidents in the past showed that there were cases on non-compliance on PAA 2012 that had caused disorder, damage to properties and injury to person.²⁵⁸ This has affected the social and economic activities of the people, particularly on the day of incident. Direct or indirectly it had negative impact on the state politics. For that reason, a research is needed to identify the cause of the non-compliance of PAA 2012 by organisers and participants and suggestion a propose solution to the weaknesses identified.

To start with, the research revealed that there is a missing link that contributed to the act of non-compliance of the organisers and the participants under the PAA 2012. The missing link form part of the factors influencing non-compliance of restrictions imposed on organisers and participants under PAA 2012. The factors include: no imposition of responsibilities of organiser and participant under section 6 and section 7 for non-compliance of the responsibilities under the respective sections;

²⁵⁸ Bersih 3.0 on 28th April 2012, Perhimpunan Bantah GST on 1st May 2015 and Bersih 4.0 on 29th – 30th August 2015, Perhimpunan Merah on 16th September 2015

light punishment on offences under the Act; inadequate understanding of the change of approach of handling public assembly from strategy of incapacitation to negotiate management approach as intended under the Act; unclear meaning to some terms under the Act such as “assembly”, “intentional” and lastly, the failure of the Act to list the designated place to hold an assembly so that the requirement for notification under the Act can be waived off.

To revamp the weaknesses highlighted, the way forward for improvement is to refer to the United Kingdom POA 1986 as the model. The strength under the POA 1986 mechanism has been discussed in Chapter 5 and the earlier part of this chapter. Using POA 1986 as bench mark and proposed model, the path of a better public assembly under PAA 2012 must start the soonest possible.

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APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F