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## THE RIGHT TO ASSEMBLE IN MALAYSIA: THE SWORD AND THE SHIELD OF THE PEACEFUL ASSEMBLY ACT 2012

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#### ABSTRACT:

The freedoms to assemble, to picket and to parade are vital characteristics of a liberal democratic set-up. In reality, the exercise of the right to assemble by some groups of people may cause the threat to public order. Striking a balance between the shield of promoting the freedom to assemble and the sword of maintaining public order is a problem faced by the regulators. In Malaysia, this conflict is evidenced by a series of arrests and charges against few influential people. The introduction of the Peaceful Assembly Act 2012 (PAA) is anticipated to provide a shield for the citizens and to improve the status quo under section 27 of the Police Act 1967. This paper argues that the Malaysian legal approach for freedom to assemble still raised concerns of the infringement of the right to freedom of assembly under the new scheme and that such concern requires the urgent attention and action from the relevant authorities. The paper aims to examine the extent of the promotion of the right to assemble and the instrumental aspects of the PAA. The paper also discusses the constitutional perspective of the right to assemble in Malaysia, the historical position of section 27 of the Police Act 1967 and the normative facets of the PAA. Based on a qualitative and doctrinal research method, the paper analyses the secondary data of which the PAA is the primary source. The secondary sources for this article include decided cases, articles in academic journals, books and online databases.

**KEYWORDS:** *Right to Assemble, Peaceful Assembly, Public Order*

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#### INTRODUCTION

On 15 September 2011, the Prime Minister Datuk Seri Najib Tun Razak made an announcement to repeal the peaceful assembly provision under section 27 of the Police Act 1967 and to replace the said provision with the Peaceful Assembly Act 2012 (hereinafter 'the PAA').<sup>1</sup> Whilst some praised the government's intention to promote the right to freedom of assembly amongst the citizens, the human rights activists have taken extra efforts in protesting the enactment of the PAA by organising illegal gatherings and rallies including the Bar Council's walk for the freedom

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<sup>1</sup> The Malaysian Bar. (2012, December 12). *Malaysia- Assembling the Peaceful Assembly Act*. <[http://www.malaysianbar.org.my/legal/general\\_news/malaysia\\_assembling\\_the\\_assembly\\_act.htm](http://www.malaysianbar.org.my/legal/general_news/malaysia_assembling_the_assembly_act.htm)>. The announcement was made during the Prime Minister's Malaysia Day address as a 'gift' for the Malaysian.

2011.<sup>2</sup> Many argue that the newly enacted PAA granted unfettered powers to the executive, particularly dealing with conditions and restrictions, and this development is maintaining the previous regime's status quo. In addition, the introduction of the PAA is at the peak of the political demands organised by groups of Malaysians consisting of representatives of non-governmental organisations, oppositions of political parties and influential lawyers of the Malaysian Bar Council for clean and fair general elections through demonstrations and mass gatherings known as 'BERSIH'.<sup>3</sup> Ironically, the organisers of the rallies have been brought to court for the offence of organising illegal assemblies and breach of conditions of a licence under the previous and current regime.<sup>4</sup> There were 572 participants and organisers arrested on the day of the BERSIH 3.0 rally.<sup>5</sup> These incidents are argued to weaken the promotion of the right to freedom of assembly.<sup>6</sup>

This paper aims to examine the instrumental and normative aspects of the PAA. The paper commences with a brief discussion on the concept of an assembly and the theory of freedom of assembly. The paper further examines the constitutional perspectives of the right to assemble in Malaysia. A brief instrumental analysis of section 27 of the Police Act 1967 (hereinafter 'the PA') is provided in the next part. Few similar instrumental and normative aspects of the earlier reviews are replicated in the following examination of the PAA. The paper encapsulates the normative discussions in the last part of the paper. Prior to the enactment of the PAA, the right to assemble is mainly controlled by section 27 of the PA and is supplemented by few laws including the Penal Code,<sup>7</sup> Public Order Preservations Act 1958,<sup>8</sup> Internal Security Act 1960/Security Offences (Special Measures) 2012<sup>9</sup> and Societies Act 1966.<sup>10</sup> The supplementary laws are not within the scope of this paper and given passing reference where relevant.

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- <sup>2</sup> Wee, L.C. (2011, November 25). *Walk for Freedom 2011: Peaceful Assembly Bill Cannot and Must Not Become Law!*. Retrieved from the Malaysian Bar website: <[http://www.malaysianbar.org.my/notices\\_for\\_members/walk\\_for\\_freedom\\_2011\\_peaceful\\_assembly\\_bill\\_cannot\\_and\\_must\\_not\\_become\\_law.html](http://www.malaysianbar.org.my/notices_for_members/walk_for_freedom_2011_peaceful_assembly_bill_cannot_and_must_not_become_law.html)>. It is interesting to note that the PAA has been passed in the absence of opposition Member of Parliaments during the short period for the debate of the PAA. The Member of Parliaments walked out in protest of the enactment of the PAA. Furthermore, a group of people had promised to gather every week until the PAA has been amended. Assemblies have been organised in a park in Kuala Lumpur with a picnic concept of gathering including recitation of poetries by national poet laureate A Samad Said. See Amanda Whiting, *Malaysia-Assembling the Peaceful Assembly Act*, (New Mandala) 12 December 2011 <<http://www.themalaymailonline.com/malaysia/article/assembly-law-cannot-criminalise-public-gatherings-court-rules>>
- <sup>3</sup> SUARAM.(2012). *Malaysia: Civil & Political Rights Report 2012: Suara Rakyat Malaysia (SUARAM)*. Retrieved from SUARAM website: <<http://www.suaram.net/wordpress/wp-content/uploads/2012/12/Malaysia-HRR-Overview-2012.pdf>>.
- <sup>4</sup> *Dato' Ambiga Sreenevasan & Ors v Menteri Dalam Negeri & Ors* [2012] 5 MLRH, *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660 and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2013] 3 MLJ 103.
- <sup>5</sup> SUARAM, 2012.
- <sup>6</sup> Lakshana, M. (2012, June 15). *Peaceful Assembly Act Challenged*. Retrieved from the Malaysian Bar website: <[http://www.malaysianbar.org.my/legal/general\\_news/peaceful\\_the\\_assembly\\_act\\_challenged.html](http://www.malaysianbar.org.my/legal/general_news/peaceful_the_assembly_act_challenged.html)>.
- <sup>7</sup> See sections 141-160 of the Penal Code on an offence of organising and attending unlawful assemblies.
- <sup>8</sup> See section 5(1) of the Public Order Preservations Act 1958 on powers of executives on prohibition and dispersal of assemblies.
- <sup>9</sup> See section 4(1) of the Security Offences (Special Measures) Act 2012 (hereinafter 'the SOSMA') on power of a police officer to detain a person suspected to be involved in security offences. The Internal Security Act 1960 has been repealed in 2012 and replaced by the SOSMA.
- <sup>10</sup> See section 2 of the Societies Act 1966 on an offence of organising a meeting of an unlawful society.

## THE CONCEPT OF AN ASSEMBLY

The term assembly 'be given its ordinary meaning ... the coming together of two persons or things; a gathering of persons'<sup>11</sup> exercising their rights.<sup>12</sup> The right is an independent individual right and it is not a collective right for a group of people, in which comparable to the right of corporation or trade union.<sup>13</sup> On a similar note, Brod highlights that an assemble involved face-to-face meetings of individuals getting together regardless of associational ties.<sup>14</sup> Brod further explains that 'assemble' does not encompass acts of forming, establishing or maintaining a group. Hence, this concept of an assembly develops the protection of the right to freedom of assembly in the form of occasional and temporal gathering that often takes the form of a protest, a parade or demonstration whether that physical gathering has anything to do with association or not.<sup>15</sup>

## THE THEORY OF FREEDOM OF ASSEMBLY

The right to assemble is commonly associated with the right to freedom of speech and expression. In a democratic society, a right to freedom of assembly, to picket and to parade is essential features of a liberal democratic set-up.<sup>16</sup> This notion is echoed by majority of the Western philosophers emphasising on universalism and individualism. However, an Asian country such as Malaysia embraces the communitarian values and collectivism.<sup>17</sup> The tensions between the Western approach and the Eastern approach provide seven conflicts and differences on matters related to human rights and freedom to assemble.<sup>18</sup> First, many countries of the West are inspired by the notion of secularism that denies any significant place for religious considerations in the human right discourse. On the contrary, most Asian societies acknowledge the religious basis of human rights.<sup>19</sup> The right to picket, to parade and to demonstrate are subjected to religious and ethical considerations. Second, the Western version of human rights tends to highlight the individualism doctrine and his or her rights against society. The Asian version subjects individual rights to collectivism doctrine. The right to public protest is not merely based on each concerned asserting his or her rights but on the basis of the collective interest of the community. Third, the Western theory on human rights is deeply influenced by market capitalism, political liberalism and individualism. In contrast, the Asian countries argue that socio-economic entitlements to necessities are more important than the protection of civil and political liberties.

The fourth aspect is the emphasis on the universal values by the Western philosophers. The Asian nations such as China, Singapore and Malaysia have been quite articulate in arguing for value pluralism and relativism. The right to parade and to public protest is based on country's social context. Fifth, the Western political theory is rights-based.<sup>20</sup> The Asian thinking is that rights must go hand in hand with duties to one's family, to one's community and to society at large. The right to freedom of assembly requires a shared understanding of limits and entails assumption of responsibility for the consequences of one's action. Sixth, Western philosophers uphold the jurisprudence of human rights and democracy principles. Asian scholars highlight the principle of human dignity over the right of self-determination. The right to public protest generates duties

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<sup>11</sup> *Public Prosecutor v Ismail bin Ishak & 59 others* [1976] 1 MLJ 183, 184.

<sup>12</sup> Irving, 1996.

<sup>13</sup> Irving, 1996.

<sup>14</sup> Brod, 2013.

<sup>15</sup> Inazu, 2010.

<sup>16</sup> Faruqi, 2008, 186-187.

<sup>17</sup> Huat, 2004.

<sup>18</sup> Faruqi, 2008, 186-187.

<sup>19</sup> Faruqi, 2008 186-187.

<sup>20</sup> Faruqi, 2008, 187-187.

both to others and to oneself. Seventh, in the Western theory, the State is seen as the main violator of the rights of citizens.<sup>21</sup> In Asia, the threat to human dignity comes from private agencies and public authorities. The right to freedom of assembly is not totally about principles, methods and institutions for the protection of individual against the power of the state.

The above distinctions are reflected in the work of Kaminski criticising the law on controlling incitement to riot, flash mob and the relation to social media,<sup>22</sup> in the article of Inazu emphasizing on the right to peaceful assembly as part of constitutional substitute for revolution relevant,<sup>23</sup> and in the writing of Brod suggesting a more liberal approach by the judiciary to respect individuals whose assembly rights are burdened by law, and they have a realistic opportunity to express their message.<sup>24</sup>

In Malaysia, a balanced approach needs to be formulated in upholding the principles of human rights and democracy. As such, this paper is fundamental in examining the extent of the constitutional and statutory protection in promoting the assembly rights.

### **THE CONSTITUTIONAL PERSPECTIVE OF THE RIGHT TO ASSEMBLE**

The right to assemble is well-recognised at the international level. The fundamental right is guaranteed under Article 20(1) of the Universal Declaration of Human Rights 1948 and article 21 of the International Covenant on Civil and Political Rights 1966.<sup>25</sup> In Malaysia, the right to assemble is enshrined under article 10 of the Federal Constitution. Article 10 is divided into three parts consisting of the right to freedom of speech, the right to assemble and the right to associate. Each part encompasses of different protections and limitations. In other jurisdictions, the right to assemble is extended from the right to freedom of speech and expression. In Malaysia, the constitutional approach is confined to the following text of article 10(1)(b) of the Federal Constitution:

10. Freedom of speech, assembly and association.

(1) Subject to Clauses (2), (3) and (4)-

(b) all citizens have the right to assemble peaceably and without arms

The essential elements for the right to assemble are 'peaceably' and 'without arms'. In this context, gatherings turned violence, and aggressive are not covered under the constitutional protection. A parade or a picket with arms is also not within a similar protection.

The right to assemble is not absolute as the Federal Constitution provides the following restraints in light of article 10 (2)(b):

10. Freedom of speech, assembly and association.

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

The constitutional limitations under the above-mentioned provision highlight two essentials basis and they are maintaining national security and preserving public order. In addition, articles 149 and 150 may impose further restrictions on the freedom to assemble. Article 149 is meant to

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<sup>21</sup> Faruqi, 2008, 186-187.

<sup>22</sup> Kaminski, 2012.

<sup>23</sup> Inazu, 2010.

<sup>24</sup> Brod, 2013.

<sup>25</sup> Malaysia is not a signatory to the International Covenant on Civil and Political Rights 1966. However, this international mechanism has been regarded as a customary international law and may apply to Malaysian jurisdiction.

combat subversive activities including communist insurgency and terrorist attacks, in which under these grounds, the Parliament is allowed to breach the fundamental rights embedded under the Federal Constitutions in introducing the laws. Article 149 gave birth to security laws such as Security Offences (Special Measures) Act 2012 as a replacement to the controversial Internal Security Act 1960.<sup>26</sup> Article 150 confers powers to the YDPA to enact laws during the state of emergency and the YDPA may also deny the civil and political rights enshrined under the Federal Constitution in exercising the unfettered powers. The legislature (the Parliament) and the executive (the YDPA) are impliedly granted powers to interfere with the constitutional right to assemble. Furthermore, the Parliament is given extra responsibility or 'sword' to deal with the 'judicial review' of article 10 (2) of the Federal Constitution. The Parliamentary privilege is stated in the following article 4(2)(b) of the Federal Constitution:

4. Supreme law of the Federation.

(2) The validity of any law shall not be questioned on the ground that-

(b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

Article 4(2)(b) of the Federal Constitution denies judicial reviews dealing with the issue of restraints on the freedom of speech, assembly and association on the grounds not provided in light of article 10(2) of the Federal Constitution.

In short, the constitutional right to assemble is governed primarily by articles 10(1)(b) and 10(2)(b) of the Federal Constitutions. The grounds of maintaining security and preserving public order become the sword to impose limitations on the citizens' right to assemble. These nexuses are made more complicated with the wide powers of enacting laws under articles 149 and 150, in which may infringe the shield of the human rights of the people. To add to this complication is the denial of the judiciary functions to review the enacted laws. The sharpness of the sword and the 'lightness' of the shield perhaps reflect the Asian communitarian values and collectivism initiatives that are accepted as constitutional in the eyes of the law and the highest law of the land in Malaysia. This principle has led the way to the enactment of the PAA in 2012.

## **THE HISTORICAL POSITION OF SECTION 27 OF THE POLICE ACT 1967**

### **Spirit of the Law**

The old regime was governed under section 27 of the Police Act 1967 (hereinafter 'the PA'). The system required an organiser of the intended assembly to apply for a licence or known as police permit. Section 27 of the PA does not clearly include the protection of the rights and freedoms of other persons. Persons who have interests are not consulted. The law is regulatory in nature and applies the concept of prohibited until permitted.

### **Procedural Features**

An organiser of a meeting or an assembly or a procession with three or more persons taking part in a public place must apply for a licence 14 days before the intended meeting or assembly or procession.<sup>27</sup> The organiser must be a registered organisation or a combination of three individuals.<sup>28</sup> The issuance of a licence is subject to the satisfaction of the Officer in Charge of a Police District (hereinafter 'the OCPD') that the assembly is not likely to be prejudicial to public order or to excite a disturbance of the peace.<sup>29</sup> These are the grounds for the refusal of a

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<sup>26</sup> See Masum, A. (2010) Freedom of Assembly-it is a Question of Right or Privilege in Malaysia?. *Malayan Law Journal Articles 5*, MLJ liv. Retrieved from Lexis Nexis website: <http://www.lexisnexis.com>.

<sup>27</sup> Section 27(2) of the PA.

<sup>28</sup> Section 27(2A) of the PA.

<sup>29</sup> Section 27(1) of the PAA.

licence and the cancellation of a licence at any time.<sup>30</sup> The OCPD was given power to determine the time of the assemblies, the route for the processions and other conditions for a licence.<sup>31</sup> If the application is rejected, the organiser may appeal within 48 hours of such rejection. An appeal by the aggrieved party is made to the Chief Police Officer or Commissioner by virtue of section 27(7) of the PA.

### Enforcement and the Power of the Police

A breach of licence condition or no licence is dealt with under section 27 (3) of the PA. This section conferred powers to the police to stop and to disperse any assembly, meeting or procession.<sup>32</sup> A legal assembly can easily be converted into an unlawful gathering if any three or more persons are taking part neglect or refuse to obey a police order.<sup>33</sup> Under the old regime, the mere presence at an unlawful assembly is considered as 'taking part' and this created the difficulty to distinguish between a genuine participant or an innocent passer-by.<sup>34</sup>

Activities that were organised at private places were exempted from the application of a licence.<sup>35</sup> However, the police were granted powers to end activities at private places under certain situations.<sup>36</sup> First, when the activity was directed to or participated in by, persons outside the private places.<sup>37</sup> Second, when the activity has attracted 20 or more persons to gather outside the premise.<sup>38</sup> Third, when the activity is likely to be prejudicial to the Malaysian security or to excite disturbance of the peace.<sup>39</sup>

### Prosecution and Offences

Section 27 of the PA requires the consent of the Public Prosecutor to prosecute. The offences provided under section 27 are a breach of the licence or has no licence.<sup>40</sup> Section 27 (4)(1) of the PA criminalised the act of disobeying a police order on how to conduct the assembly, meeting or procession and police instruction to stop or disperse the gatherings.

The old regime allowed an improper condition in a licence. In the case of *Chai Choon Hon v Ketua Polis Daerah Kampar and Government of Malaysia*, an application for a licence to conduct a solidarity dinner and lion dance in a public place was refused.<sup>41</sup> The court held that conditions limiting the number of speakers at the assembly and restricting subject matter of the speeches were invalid. This development was considered as restraining freedom of speech.

Under the old system, there were also incidents of improper or lack of ground for refusal of licences. Some of the cases involved an application to organise the talk on Prophet Muhammad's Birthday at a private premise in Muar and a forum entitled 'Towards Democracy'

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<sup>30</sup> Section 27(2)-(3) of the PA.

<sup>31</sup> Section 27(1)-(2) of the PA.

<sup>32</sup> Section 27(3) of the PA.

<sup>33</sup> Section 27(5) of the P A.

<sup>34</sup> Masum, 2010, lxii.

<sup>35</sup> Section 27A(1) of the PA.

<sup>36</sup> Suhakam. (2000). *Freedom of Assembly*. Retrieved from the Suhakam website: <[http://www.suhakam.org.my/wp-content/uploads/2013/12/FREEDOM\\_-OF\\_-ASSEMBLY.pdf](http://www.suhakam.org.my/wp-content/uploads/2013/12/FREEDOM_-OF_-ASSEMBLY.pdf)>.

<sup>37</sup> Section 27A(1)(a) of the PA.

<sup>38</sup> Section 27A(1)(b) of the PA.

<sup>39</sup> Section 27A(1)(c) of the PA.

<sup>40</sup> Section 27 (4)(A) of the PAA stipulated that it was an offence to contravene any condition of a licence. Section 27 (5)(a) of the PAA stated that any assembly, meeting or procession without a licence is an offence.

<sup>41</sup> *Chai Choon Hon v Ketua Polis Daerah, Kampar and Government of Malaysia* [1986] 2 MLJ 203

at a Caring Society Complex in Penang.<sup>42</sup> The grounds for refusal were threat to public order and national security and caused disturbance to the public in a public place.<sup>43</sup>

## THE PEACEFUL ASSEMBLY ACT 2012

### Spirit of the Law

The PAA objective is to establish a legal framework guaranteeing that all citizens have the right to organise or to participate in assemblies, peaceably and without arms, and to restrict such right to the extent of maintaining security and public order, including the protection of the rights and freedoms of the other persons.<sup>44</sup> The law seems to provide both the shield of promoting the freedom to assemble and the sword of maintaining public order. The right of person who has interest is stipulated under section 5 of the PAA where that person has the right to raise his concerns or objections. The law is facilitative in nature. The PAA also embraces the notion of permitted until prohibited.

### Procedural Features

The PAA introduces a licence or permit free system and replaces them with a prior notification scheme. The responsibility of organiser is to notify the police of a proposed assembly. Notice must be submitted to the OCPD, ten days before the date of assembly by virtue of section 9(1) of the PAA. The police have no authority to reject the assembly at a public place neither to waive the requirement of the 10-day notice. However, section 9(1) of the PAA has been subjected to heavy criticism and has been argued in the court of law as unconstitutional. In the case of *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157, the court of appeal held that section 9(1) of the PAA was constitutional and did not render that an assembly held without the giving of the requisite prior notice was per se unlawful.<sup>45</sup> Nik Nazmi was charged for not notifying the Petaling Jaya police district chief 10-days prior to the Black505 rally on 8 May 2013 held at Stadium Majlis Bandaraya Petaling Jaya. The court refused to deal with the procedural issue of the 10-day notification period. The length of days is a normative matter ultimately legislative policy. The critical provision that was declared unconstitutional is the following section 9(5) of the PAA:

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

The chilling effect of section 9(5) of the PAA is to regard an organiser of an assembly criminally liable although the assembly itself was peaceful or there was full compliance with the terms and conditions imposed. In the above-mentioned case, the learned judge, Hamid Sultan JCA stated the following decision:<sup>46</sup>

The PAA gave a right for everyone to assemble whether notice was or was not given. To criminalise for not giving notice and penalising the organiser had no nexus to public order or interest of the security of the Federations unless the assembly was not peaceful. Section 9(5) failed the reasonable test, as well as proportionality test, ... The burden was on the State to satisfy the court that the imposition of the restrictions was not only in the interest of the security of the Federation or of public order but also satisfied the test of reasonableness and fell within the parameters or framework of arts 10(2) of the Constitution.

Hence, the *Nik Nazmi's* case highlights the sharpness of the sword of maintaining public order and preserving the security of the Federation as embedded in the provision of the PAA that calls for the judiciary to decide section 9(5) of the PAA as null and void.

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<sup>42</sup> See Suhakam, 2000.

<sup>43</sup> Preamble to the PAA and section 2 of the PAA.

<sup>44</sup> Suhakam, 2000.

<sup>45</sup> *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157, 158.

<sup>46</sup> *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157, 158-159.

There are few exceptions for the requirement of the 10-day notice under section 9(2) and Schedule 3 of the PAA. Section 9(2) exempts the organiser from notifying the police if the place of the intended assembly is a 'designated place of assembly'. The Minister of Home Affairs is yet to designate a place of assembly in the government gazette as a 'designated place of assembly' under sections 3 and 25 of the PAA. However, until the date of writing, no action has been taken to designate a place as such. Schedule 3 of the PAA provides a list of domestic gatherings including funeral processions, wedding receptions, religious assemblies and general meetings of societies or associations.

In the United Kingdom, the Public Order Act 1986 does not require notification for a static assembly. A six days prior notice need to be submitted for a proposed moving assembly or street protest.<sup>47</sup> An exception is allowed if it is unreasonable to do so and this provision provide for flexibility to the enforcement of the notification requirement.<sup>48</sup>

### **Enforcement and the Power of the Police**

Section 15 of the PAA confers power to the authorities to limit on the manner of which the assembly is to be conducted. The OCPD is given five days to respond to the notification from an organiser of an intended assembly.<sup>49</sup> In the reply, the OCPD must inform the organiser the conditions and restrictions that will be imposed for the proposed assembly<sup>50</sup> including the date, time, duration, place and manner of the assembly as well as the concerns or objections of persons who have the interest.<sup>51</sup> In cases of counter assemblies and simultaneous assemblies, the OCPD has the authority to control the matters.<sup>52</sup> Whilst section 20(1) of the PAA grants power of arrest upon the OCPD in situations involving the breach of restrictions and conditions and armed, section 21 of the PAA gives power to disperse upon the OCPD.

### **Prosecution and Offences**

There are two primary types of offences under the PAA. The first type deals with an active act of organising and participating in an assembly. Section 4(2) of the PAA provides a list of restraint to the right to assemble. The provision restricts a non-citizen to organise and to participate in an assembly and a citizen to hold or to involve in an assembly at any prohibited place and within 50 metres from the limit of prohibited place including utilities and petrol station.<sup>53</sup> Furthermore, an act of organising or participating in a street protest is an offence under this provision.<sup>54</sup> The provision also creates an offence for a child to attend an assembly or an adult to bring a child to the assembly.<sup>55</sup> Under the PAA, a child is defined as a person below the age of fifteen years old.<sup>56</sup> In addition, this provision prohibits a Malaysian citizen below the age of 21 years old to organise an assembly.<sup>57</sup>

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<sup>47</sup> Section 11 of the Public Order Act 1986.

<sup>48</sup> Section 11(1)(c) of the Public Order Act 1986.

<sup>49</sup> Section 8 of the PAA.

<sup>50</sup> Section 14 of the PAA.

<sup>51</sup> Section 15 of the PAA.

<sup>52</sup> Sections 17 and 18 of the PAA.

<sup>53</sup> Section 4(2)(a)-(b) of the PAA.

<sup>54</sup> Section 4(2)(c) of the PAA.

<sup>55</sup> Sections 4(2)(e)-(f). Section 4(4) of the PAA provides that the fine is not exceeding RM20,000. This is the highest amount compared to other offences which carries the penalty of a fine not exceeding RM10,000.

<sup>56</sup> Section 3 of the PAA.

<sup>57</sup> Section 4(2)(d) of the PAA.

The second type relates to a passive act of failure to comply certain conditions. As mentioned earlier, section 9(5) of the PAA criminalises an organiser who failed to notify the OCPD 10 days prior to the intended assembly. Furthermore, section 15(3) of the PAA creates an offence for the organiser who failed to comply with the conditions and restrictions imposed by the OCPD. Additionally, a person who fails to abide by an order to disperse an assembly is committing an offence in the light of section 21(3) of the PAA. Unlike the old regime, the PAA does not require the consent of Public Prosecutor to prosecute.

Under the PAA system, there were incidents that organisers and participants were arrested and prosecuted but there were also events where no further action has been taken. This inconsistency led to the criticism that the authorities are being biased and abusing of power.<sup>58</sup> The BERSIH 3.0 rally is an example of action taken by the police against the protestors. In 2012, on the contrary, organisers or participants of assemblies such as rally to demand the abolition of PTPTN at Dataran Merdeka and the 'Himpunan Hijau' 300 kilometre walk from Kuantan to Kuala Lumpur that gathered 20,000 participants at Dataran Merdeka to protest against environmental issues faced no action or detention by the police.<sup>59</sup>

### Extra Features

The PAA is provided with extra features on certain matters relating to the police, the media and the Minister that are not stated under the old system. The OCPD is required to maintain a register containing the record of notifications received.<sup>60</sup> The police have authority to record an assembly.<sup>61</sup> Furthermore, the media representatives are given reasonable access to a place of assembly under section 24 of the PAA. The Minister has the power to amend Schedules and to make regulations for better carrying out of the PAA.<sup>62</sup> The Minister may also designate a designated place of assembly as mentioned earlier.<sup>63</sup> In addition, the PAA requires an organiser to notify the person who has the interest and to allow him to raise concerns or objections to the assembly. They are those who reside, work or carrying on business or owner of residential or commercial premises in the vicinity of the assembly.<sup>64</sup> This feature is also new compared to the previous system.

## RECOMMENDATIONS AND CONCLUSION

There are a number of recommendations to improve the shield of the right to assemble in light of the PAA. First, an increase of the age limits to organise and participate in an assembly. Organiser below 21 years old and a child below 15 years old is not allowed to join the assembly under section 3 of the PAA. The purpose is to protect children. However, this move is considered as inconsistent with the University and University Colleges Act 1971 (hereinafter 'the UUCA) amendment 2012 and the judicial decision to declare the provision of the UUCA, restraining students of higher learning to participate in political party activities as unconstitutional.

Second, allowing street protests peaceably and without arms. Street protests become unlawful under section 4 of the PAA, whereas they were permitted under the old regime. Whilst a street protest is defined as open air assemblies and walking in marches or rallies to advance a particular cause, an assembly is described as a temporary assembly of a number of persons, in a

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<sup>58</sup> SUARAM, 2012.

<sup>59</sup> SUARAM, 2012.

<sup>60</sup> Section 22 of the PAA.

<sup>61</sup> Section 23 of the PAA.

<sup>62</sup> Sections 26 and 27 of the PAA.

<sup>63</sup> Section 25 of the PAA.

<sup>64</sup> Section 5 of the PAA.

public place, whether or not the assembly is at a particular place or moving.<sup>65</sup> The definition of an assembly with the moving character is not clear and may depict an act of street protest.

Third, the PAA need to provide a clear definition and guideline for the authorities or executives to exercise their power. This guideline is to ensure no arbitrary exercise of police power dealing with matters such as imposing conditions and restrictions to an assembly, arresting without warrant any person failing to follow a condition or restriction and to order the assembly to disperse. It is hope that history is not about to repeat itself by permitting an improper condition in a licence under the newly enacted PAA.

Fourth, the Minister need to expedite the process of naming and gazetting designated places so that the chilling effect of section 9(5) of the PAA can be avoided. The assembly can be conveniently carried out and the police can arrange ahead of time for all the plans for a proposed assembly.

Hence, a lawful assembly should not be criminalised as the right to assemble enshrined under the Federal Constitution. The communitarian values and collectivism do not provide a total rejection of the human rights. The sword of maintaining security and preserving public order need to be utilised with responsibility by the government and police department to protect the shield of promoting freedom to assemble. The authorities need to apply the least intrusive ways of achieving a legitimate objective in light of the PAA.

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<sup>65</sup> Section 3 of the PAA.

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