Borneo Akademika *Volume 6* (1) June 2022, 25-31
UiTM Cawangan Sabah

MOBILITY AND MOVEMENT RIGHTS IN MALAYSIA: THE CONSTITUTIONAL ULTIMATUM

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ABSTRACT

The Constitution of Malaysia protects freedom of movement. However, national security, public order, public health, punishment of offenders, subversion, emergency and special immigration rules in Sabah and Sarawak restrict mobility rights under the Constitution. The purpose of this article is to examine the scope and characteristics of freedom of movement under the Malaysian Constitution, as well as the reasons for restricting such rights. The freedom of movement in Malaysia is limited because of the extensive exclusions that can be used to deny such rights. This article concludes that individual movement rights should be balanced against competing goals to maintain national security, public health, offender punishment, subversion, and emergency.

Keywords: Freedom of movement; mobility rights; restrictions; Federal Constitution

1. The Constitutional Features of Freedom of Movement

Article 9(1) of the Federal Constitution prevents citizens from being expelled from the Federation. In addition, Article 9(2) establishes the right to free movement (Jewa, Buang & Merican, 2007). The justification for Article 9 was articulated in *Assa Singh v Menteri Besar, Johor,* by the late Sultan Azlan Shah, who declared that the Article showcased the Federation's factual unity by allowing citizens to move and reside in any part of Malaysia freely. However, the mobility right is not unfettered. In the interests of national security, public order, health and criminal punishment, Parliament has the authority to limit freedom of movement under Article 9(2). Furthermore, Article 9(3) authorizes the Parliament to establish immigration restrictions concerning Sabah and Sarawak.

Mobility rights in Malaysia are unique in that they only apply to citizens. Non-citizens are unable to exercise this freedom. As a result, the party filing a complaint regarding a breach of freedom of movement must first prove that he is a Malaysian citizen (Faruqi, 2019). In *PP v Narogine Sookpavit & Ors*, the importance of citizenship to freedom of movement is highlighted. Several Thai fishermen were arrested for fishing in Malaysian waters in violation of the Fisheries (Maritime) Regulations of 1967. Despite the Magistrate's Court acquitting them, the High Court overturned the decision. According to the court, one of the goals of establishing territorial borders for waters is to protect citizens' freedom of movement in Malaysian waters. Citizens have exclusive access to this right.

Another feature of Malaysian freedom of movement is that it only applies to movement within its borders. The Federal Court concluded in *Government of Malaysia v Loh Wai Kong* that the authority's refusal to provide a passport to the respondent did not infringe Article 9. Article 9 is subjected to special immigration laws in Sabah and Sarawak and other legal restrictions. In contrast, the right to travel is included in the ambit of the right to life and personal liberty, according to the Federal Court in *Lee Kwan Woh v PP.* According to the court, Article 5(1) should be interpreted prismatically to cover rights such as livelihood and quality of life. However, in the latest case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor,* the majority of the Federal Court took the view that the travel ban imposed on the appellant was lawful as it complied with the Immigration Act 1959.

For many in the legal fraternity, the majority decision of the Federal Court in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Ors*. ('Maria Chin') delivered a fatal blow to the core constitutional concept that has been vigorously and steadily developed in other previous Federal Court cases. Some may attempt to distill Maria Chin's ratio and separate the obiter. On the surface, Maria Chin has the following effects on the constitutionalism of Malaysia. It should be recalled that Maria Chin's articulation of the rule of law doctrine is riddled with contradictions. On the one hand, the Federal Court chose a textual and pedantic interpretation of the Federal Constitution, while on the other, it introduced the rule of law doctrine, which is not found in the text of the Federal Constitution. The Federal Court further emphasized how the rule of law is intrinsically incompatible with parliamentary sovereignty while also stating that there is "no difference in principle" between Malaysia and the United Kingdom (UK). Despite this, the rule of law theory offers a compelling alternative for litigants seeking to overturn parliamentary expulsion clauses; the essential structure concept has been demolished and is currently in ruins. The travel ban imposed on political activists may be interpreted as unjustified political meddling.

2. Constitutional Grounds in Restricting Freedom of Movement in Malaysia

In Malaysia, the freedom to move and travel is restricted. Security, public order, public health, and the punishment of offenders are all grounds for limiting rights under Article 9(2). Furthermore, Article 9(3) effectively delegated power over immigration to the East Malaysian States. Similarly, Articles 149 and 150 might restrict freedom of movement on the grounds of subversion and emergency. This section discusses the constitutional limits of freedom of movement in Malaysia.

2.1 Security

The first legal rationale for restricting freedom of movement under Article 9(2) is security. Security can be interpreted in various ways, including military security and non-military dimensions such as political stability, economic interests, and food security (Romm, 1993). The term 'security' refers to the absence of physical damage and issues that could jeopardize the State's vitality and stability (Delaet, 2014). S 18(1) of the National Security Act 2016 does not define clearly about national security. Nonetheless, it states that national security is significantly disrupted if someone threatens or causes serious harm to Malaysians, territories, economy, essential national infrastructure, or any other interest that necessitates immediate action.

For instance, after the Lahad Datu’s incident, which involved a military standoff with terrorists, the government established the Eastern Sabah Security Command (ESSCOM) and the

Eastern Sabah Security Zone (ESSZONE) (Dollah, Wan, Peters, & Othman, 2016). Among measures taken to improve the security in ESSZONE was the imposition of curfew from 6.00 pm to 6.00 am on 16 July 2014 in Sandakan, Kunak, Tawau, Lahad Datu, Semporna and Kinabatangan.

A curfew was imposed following a spate of kidnappings and terrorist attacks in those areas. (Dollah et al., 2016). As of 23rd February 2022, according to Sabah Police Commissioner, the curfew was extended until 11th March 2022. The curfew prohibits people from venturing out into the waters during the curfew hours.

2.2 Public Order

Generally, public order refers to preventing disorder and crime, maintaining law and order, public peace, safety, tranquility, and the absence of violence (Jayawickrama, 2002). In Malaysia, several statutes refer to public order. For instance, Public Order (Preservation) Act 1958 (Revised 1983) aims to maintain and restore public order in Malaysia. The Act does not define "public order". It leaves the interpretation to the Minister as S 3(1) empowers the Minister to declare any area to be in a state of danger if he opines that a public area is seriously disturbed or threatened. The Security Offences (Special Measures) Act 2012 also does not define public order, but the Preamble states that one of the purposes of the Act is to maintain public order. Meanwhile, S 15(1) of the Peaceful Assembly Act empowers the Officer in Charge of the Police District to control peaceful assembly on the ground of public order.

The definition of public order was considered in *Reapplication of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*. The court observed that public order involves “the tranquility and security which every person feels under the protection of the law, a breach of which is an invasion of the protection which the law gives”. It includes both violent and non-violent acts which would cause danger to human life, safety, and public tranquility. In conclusion, the court held that drug trafficking is an activity that strikes the very core of public order.

2.3 Public Health

Public health is another well-founded ground to restrict freedom of movement (Junevičius & Daugėlienė, 2016). Public health means “the science and art of preventing disease, prolonging life and promoting health through the coordinated efforts of society” (Acheson, 1988). In Malaysia, public health, sanitation, and the prevention of diseases fall under the Concurrent List (List III) of the Ninth Schedule, Federal Constitution (Sheila Lingam, 2020). Meanwhile, medicine and health matters, including hospitals, clinics and dispensaries, and the medical profession, fall under the Constitution’s Federal List (List I).

The Prevention and Control of Infectious Diseases Act 1988 (PCIDA) is the primary legislation regarding public health control. S 11(2) permits the Health Minister to make any regulations to control or prevent the spread of the infectious disease. Due to the COVID-19 infection, the Minister has published several subsidiary legislations to restrict freedom of movements, such as the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas - Movement Control) Regulations 2021, Prevention and Control of Infectious Diseases (Measures within Infected Local Areas - Conditional Movement Control) Regulations

2021, and Prevention and Control of Infectious Diseases (Measures within Infected Local Areas 2021). The regulations contain provisions that restrict the movement of people from one infected area to another area and penalties for non-compliance.

2.4 Punishment of Offenders

Another justification for restricting the right to movement is for the punishment of offenders. Imprisonment is one of the widespread penalties imposed on criminals to remove them from society and hinder them from committing further crimes while incarcerated (Barbarino & Mastrobuoni, 2014). The interest of justice requires sending a man to prison to show the court's disapproval of the criminal conduct on behalf of society (Lee, Mansoor & Hassan, 2014). Another strong support for an imprisonment sentence is due to the gravity of the offence and how it was committed (Lee, Mansoor & Hassan, 2014). In the case of *PP v Mustapha bin Abdullah,* the High Court set aside the initial penalty of a fine and substituted it with four months of imprisonment. The High Court was satisfied that the accused used an iron chain to injure a pregnant woman following a dispute over a minor traffic accident warranted a deterrent sentence of imprisonment.

A police supervision order is another type of punishment that restricts the offender's freedom of movement. Under S 295 of the Criminal Procedure Code (CPC), a court may direct a convicted person to be subjected to police supervision. Supervision ensures that police can exert some control over people with known bad characteristics, such as thieves, robbers and repeat offenders (Lee et al., 2014). In *Hussain bin Mohamed v PP,* the court justified the police supervision order in cases where a man is a habitual criminal who commits offences of burglary or housebreaking or theft due to the rampancy of those offences and his threat to the society. In cases where conviction is for sexual offences, S 295(1A) of the Criminal Procedure Code makes it a mandatory order. This is because sex offenders are seen as undesirable characters that should be removed from the public space.

Another custodial sentence that seeks to restrict freedom of movement is detention at drug rehabilitation centres under the Drugs Dependents (Treatment and Rehabilitation) Act 1983. S 10 of the Act empowers the Minister to establish rehabilitation centres for admitting drug dependents and their rehabilitation. In *Rajasegaran v Pusat Pemulihan Serenti Raub & Anor,* the High Court is satisfied that a person who takes drugs once a month is drug-dependent because it is periodic and consistent. Therefore, the Magistrate's order to admit him to the rehabilitation centre was upheld.

2.5 Restriction under Emergency Laws

The Yang di-Pertuan Agong can declare an emergency under Article 150(1) of the Federal Constitution if there is a grave threat to the country's security, economy, or public order (Osman, Ahmad, Mohamad & Awang @ Ali, 2021). However, as stated in Article 40, His Majesty must exercise such power on the advice of the Cabinet (Faruqi, 2021). Emergency law confers enormous legislative powers that infringe on fundamental freedoms, such as freedom of movement (Faruqi, 2021). Although Article 4(1) of the Constitution upholds constitutional supremacy and declares that any inconsistent law with the Constitution is *null* and *void,* Article 150(6) states that an emergency law will not be declared invalid because it is inconsistent with

any provision of the Constitution. Thus, during an emergency, the Parliament or the *Yang diPertuan Agong,* on the advice of the Cabinet, may enact legislation to contravene almost the entire Constitution, including fundamental liberties (Shad, 2019). This has been affirmed in the case of *Osman v PP* where the court, quoting Article 150(6), rejected the appellant's contention that the Emergency (Essential Powers) Act 1964 was unconstitutional as it infringed Article 8 of the Federal Constitution. Nevertheless, there is a constitutional safeguard provided under clause 6A, where emergency legislation shall not touch on Islamic law, Malay customs, native law and customs of Sabah and Sarawak, religion, language, and citizenship.

It must be noted that the Malaysian Constitution places priority on social stability, security, and public order over individual liberties. Thus, legislation to combat an emergency may suspend all fundamental liberties except freedom of religion and other matters provided under Article 150(6A) (Faruqi, 2019). The emergency law can suspend freedom of movement too. However, as highlighted by the Federal Court in *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors,* it is a settled principle that any emergency powers which restrict the fundamental liberties are to be read narrowly, rigidly, and strictly. This is to ensure that the limits are restricted and not abused. In *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases*, the Federal Court once again emphasised that the provisions of the Federal Constitution and laws which promote and protect fundamental liberties must be construed broadly. In contrast, those which restrict or derogate from the same must be construed narrowly.

Furthermore, Article 150(8) prohibits judicial review of emergency legislation. This effectively puts an end to any legal challenges to emergency law. An "ouster clause" is another name for this. Article 150(8) specifically states that the Yang diPertuan Agong's proclamation of emergency, as well as any ordinances issued under clauses (1) and (2B), are final and conclusive and cannot be contested in any court on any grounds. The provision goes even further, stating that no court has authority to hear any application challenging the legitimacy of the proclamation and ordinance issued under clauses (1) and 2(B), as well as their continuous operation.

This principle was discussed in a 2021 case, *Hassan bin Abdul Karim v Perdana Menteri, Tan Sri Dato' Hj Mahiaddin bin Md Yasin & Anor*, where the High Court dismissed the petition for a judicial review of several provisions under a 2021 ordinance by the applicant, on the ground that the insertion of Article 150(6) and 150(8) are meant to shut the doors of the court from any challenge of the law made during an emergency proclaimed by the *Yang diPertuan Agong*. On a different note, in *Dato' Seri Anwar Ibrahim v Tan Sri Dato' Hj Muhyiddin bin Hj Md Yassin (Prime Minister of Malaysia) & Anor*, one of the issues discussed was whether Article 150(6) and 150(8) were valid as they were against the doctrine of separation of power. The court concluded that both provisions were valid as they did not in any way violate the said doctrine.

Based on the discussion of Article 150(6), 150(8), as well as some decided cases, any ordinance promulgated by the *Yang diPertuan Agong* during an emergency that restricts freedom of movement can be done even if it is inconsistent with provisions under Federal Constitution, except matters provided under clause 6A of the same Article.

2.6 Immigration Laws of Sabah and Sarawak

Article 9(3) of the Federal Constitution empowers the Parliament to impose restrictions on the rights of West Malaysians to move to or reside in Sabah and Sarawak. To this effect, Part VIII of

the Immigration Act 1959/1963 provides for Special Provisions for East Malaysia. The case of *Datuk Syed Kechik v Government of Malaysia* demonstrates that a citizen from Peninsular Malaysia may only enter East Malaysia at the discretion of the appropriate State Authority. Similarly, in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor*, the majority of the Federal Court concluded that section 3(2) of the Immigration Act 1959/1963 gives the Director-General broad authority over all immigration affairs, including the power to impose travel bans on specific individuals.

In *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah*, the Court of Appeal held that the Immigration Department's decision to revoke the appellant's entry permit was held to be unfair and disproportionate. However, the Federal Court overruled the decision in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*. The Apex Court held that the executive discretion of the State Authority on immigration matters is not open to judicial review. The Court of Appeal took the same approach in *Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors.* The court upheld the legality of S 59A(1) of the Immigration Act 1959/1963, which excludes judicial review on immigration matters relating to decisions of the State Authority.

3. Conclusion

Although Article 9 of the Federal Constitution bans people from expulsion from the Federation and recognises their right to freedom of movement, these rights are not absolute in Malaysia. It may be limited for reasons of security, public order, public health, and offender punishment. Moreover, Article 9(3) effectively delegated power over immigration to the East Malaysian states. Furthermore, emergency law has the potential to restrict freedom of movement because there is no judicial review in such instances.

The conferment of the right to free movement and its exceptions can be regarded as an attempt by the Constitution to strike a balance between people's right to move within the Federation freely and conflicting interests like the national security, public peace, public health, criminal punishment, emergency and East Malaysia's autonomy. Generally, the court has the final say on whether the restrictions on freedom of movement are valid, reasonable, and employed for a lawful and proper purpose. As the constitutional auditor of Executive and Legislative acts, the court has the authority to declare that any actions or decisions that fail the reasonableness test are unconstitutional.

However, as previously stated, Articles 150(6) and 150(8) effectively allow for the infringement of the right to free movement on emergency grounds, potentially closing the door to judicial review. In addition, regarding the immigration matters of Sabah and Sarawak, the ouster clause under S 59A of the Immigration Act 1959/1963 excludes the court's jurisdiction to entertain any judicial review application. The court could still use its inherent authority to evaluate legislative and executive actions to ensure that both arms of government follow the law, according to the argument. The court should not fold its judicial arms and apply the ouster clause literally when it comes to public law authorities and alleged human rights violations. The court must be convinced that restrictions on freedom of movement are only imposed for good reasons and are backed up by compelling evidence.

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