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2017 년 8 월

Doctoral Thesis

A Comparative Study on the Freedom of Peaceful Assembly in the Republic of Korea and Malaysia

한국과 말레이시아에 있어서 평화적 시위의 자유에 관한 비교연구

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Department of Law

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Omar

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Advisor: Professor Doo Jin Choi

A thesis submitted in partial fulfilment of the requirements for Doctoral thesis

2017 년 8 월

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ABBREVIATIONS

ADA	Assembly and Demonstration Act (Korea)
BERSIH	*Gabungan Pilihan Raya Bersih dan Adil* or Coalition for Clean and Fair Election
BHEUU	*Bahagian Hal Ehwal Undang-Undang, Jabatan Perdana Menteri* or Legal Affairs Division of Prime Minister's Department
BN	*Barisan Nasional* or National Front
DAP	Democratic Action Party
FC	Federal Constitution
FTA	Free Trade Agreement
GANHRI	Global Alliance of National Human Rights Institutions
ICC	International Coordinating Committee
ICCPR	International Covenant on Civil and Political Rights
IMF	International Monetary Fund
ISA	Internal Security Act
KC	Korean Constitution or Constitution of Republic of Korea
KCTU	Korean Confederation of Trade Unions
KNPA	Korean National Police Agency

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KRW	Korean Won
LPA	Legal Profession Act 1976
MCA	Malaysian Chinese Association
MCMC	Malaysian Communications and Multimedia Commission
MIC	Malaysian Indian Congress
NHRI	National Human Rights Institution
NGO	Non-Governmental Organization
NHRCK	National Human Rights Commission of Korea
NSA	National Security Act (Korea)
OCPD	Officer in Charge of Police District
PAA	Peaceful Assembly Act 2012
PAS	Pan-Malaysian Islamic Party
PKN	*Parti Keadilan Nasional* or National Justice Party
PKR	*Parti Keadilan Rakyat* or People's Justice Party
Police Act	Police Act 1967
POPA	Public Order (Preservation) Act 1958
PRM	Malaysian's People Party
PSM	*Parti Sosialis Malaysia* or Socialist Party of Malaysia
RM	Ringgit Malaysia

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SA 1966	Societies Act 1966
SA	Sedition Act 1948
SNAP	Sarawak National Party
SUARAM	*Suara Rakyat Malaysia* or Voice of Malaysian People
SUHAKAM	Human Rights Commission of Malaysia or *Suruhanjaya Hak Asasi Manusia Malaysia*
UDHR	Universal Declaration of Human Rights
UMNO	United Malays National Organization
UN	United Nation
UPP	Unified Progressive Party or 통합진보당
USD	United States Dollar

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ABSTRACT

A Comparative Study on the Freedom of Peaceful Assembly in the Republic of Korea and Malaysia

Anie Farahida Omar
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The purpose of this research is to examine the operation of laws that regulate the right to freedom of assembly in the Republic of Korea and Malaysia. It commences with the discussion on the nature and importance of the freedom of assembly, and the incorporation of such freedom into the international treaties. The study will also scrutinize on the implementation of the Assembly and Demonstration Act in Korea which came into force in 1963. Whereas in Malaysia, there are two sets of laws; the provisions of the Police Act 1967 which was enforced until 2012, and the Peaceful Assembly Act 2012 that came into effect in the same year so as to replace the former laws. It will prove that the two iconic factions, the Reformasi and the BERSIH movements, together with the involvement of SUHAKAM have made major contributions to the transformation of those laws. It will also analyze the former and the current laws in the light of their constitutionality. Subsequently, a comparative legal study will be conducted between these two countries wherein the constitutional insights will be provided based on the legal cases from both countries and from other jurisdictions. The discussion on the Korean laws in this study is important to support the arguments that; notwithstanding the Malaysian laws have made a significant amendment on expanding the right to freedom of assembly, some provisions are either unconstitutional or contain unclear provisions, and therefore must be modified based on the approach used by the Korean law.

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요 약

한국과 말레이시아에 있어서 평화적 시위의 자유에 관한 비교연구

애니 파라히다 오마르
지도 교수: 최두진 교수
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대학원, 조선대학교

이 연구의 목적은 대한민국과 말레이시아에서의 집회의 자유를 규율하는 법의 운영을 검토하는 데 있다. 이 연구는 집회의 자유의 종류과 중요성에 대한 논의와 그러한 자유의 국제 조약에의 편입으로부터 시작된다. 또한 1963 년 발효 된 한국의 집회 및 시위에 관한 법률의 시행에 대해서도 면밀히 조사 할 예정이다. 반면에 말레이시아는 두 개의 법률이 있어왔다; 1967 년부터 2012 년까지 운영된 Police Act 의 관련조항과 이 법률조항을 대체하기 위하여 2012 부터 시행 된 Peaceful Assembly Act 2012 가 그것이다. 이 논문은 REFORMASI 운동, BERSIH 운동 및 SUHAKAM 의 참여가 이러한 법의 변화에 큰 공헌을했다는 것을 증명할 것이다. 또한 합헌성에 관한 말레이시아의 종전과 현행법률을 분석할 것이다. 그 후에 양국간 비교법적 연구가 진행될 것이며 그 안에는 양 국 및 다른 국가의 판례들을 토대로 한 헌법적 고찰이 이루어질 것이다. 이 연구에서 한국 법에 대한 논의는 다음과 같은 저자의 주장을 뒷받침하는 데 중요하다: 말레이시아의 법률은 시위의 자유에 대한 권리를 확대하는 큰 수정을 하였슴에도 불구하고 여전히 몇몇 조항은 위헌적이며 몇몇 조항은 그 의미가 명백하지 않다, 따라서 한국 법이 취하는 접근법에 따라 수정되어야한다.

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CHAPTER 1:

THE RESEARCH FRAMEWORK

1.1 INTRODUCTION

This is a legal research which studies on the right to freedom of peaceful assembly in the Republic of Korea and Malaysia. In this chapter, it clarifies the rationale of the study, the objectives of this research, the methods of the study, and the sources which have been used to elaborate and support the points, and also the composition of the study. Finally, this chapter includes the challenges I have been through during this study.

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1.2 THE RESEARCH FRAMEWORK

RATIONALE OF THE STUDY

The enforcement of laws that regulate the right to freedom of assembly is among controversial human rights issues in Korea and Malaysia. Both countries profoundly guarantee the right of citizens to protest in peace. Theoretically, through its domestic laws, the rules are set with the purpose to facilitate people's right to demonstrate and protect them from engaging unlawful demonstrations. However, in practice, the laws are exploited to curb the exercise of such right, especially against the government critics. The basis of this study is to explore what are the underlying principles of the freedom of peaceful assembly in Korea and Malaysia and examine the implementation such principles into their domestic laws, and also to what extent the principles are accurately applied in practice.

However in Malaysia, the former laws, the **Police Act 1967** used to severely constrict such right. The allowance to have a gathering and protest is treated as an exception, rather than as a protection. The circumstances were changed after the new enactment was created in 2012 i.e. the **Peaceful Assembly Act in 2012** (see Chapter 3.3). Yet several provisions are still unclear and carry ambiguities, and thus must be fixed where it is necessary. A comparison is made between these two countries to find similarities and differences from the legal perspectives. Several approaches employed in the Korean laws can also be applied to augment the exercise of the freedom of peaceful assembly in Malaysia. Having said that, it is important to note that Korea is also not free from the controversy of the authorities violated this right, in which further discussions are available in Chapter 3.2.

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RESEARCH OBJECTIVES

In this study, I will highlight what are the nature and the importance of the freedom of peaceful assembly, and the significant roles played by the protest movements in democratizing Korea and Malaysia. The inclusion of the protest movements' history in this study is crucial in order to understand the evolvement of laws, especially in Malaysia. Following to that, I will examine the general principles and the restrictive laws that policing the exercise of the right to freedom of peaceful assembly. In Korea, the main legislation is called the **Assembly and the Demonstration Act (ADA)** which came into effect in 1963. While in Malaysia, there are 2 sets of laws, the repealed **Section 27** and **Sections 27A, 27B, 27C of the Police Act 1967** and the **Peaceful Assembly Act (PAA)**. These 3 laws will be examined thoroughly for the purpose to find the efficacy of these laws by discussing the legal cases and reports of the competent authorities. Most of all, after conducting a comparative study between the **ADA** and the **PAA** in Chapter 4, the discussion is extended to discover the constitutionality of provisions in the **PAA**, which are the main focus of this study.

METHODOLOGY AND SOURCES

This study is based on the doctrinal research where its main focus is to review the operating laws that facilitate the fundamental right to assemble in Korea and Malaysia. Both laws will be critically analyzed based on the primary sources of all relevant statutes and the court cases. The secondary sources such as refereed journals, academic articles, the reports from the competent human right bodies either local or international based, and newspaper articles are certainly important in illustrating my points. While conducting a comparative study between Korea and Malaysia, the principles and guidelines laid down by the United

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Nation will be used as a measurement tool to examine its constitutionality, as well as the judgment of legal cases from other countries.

THE STRUCTURE OF THE STUDY

Chapter 1: Framework of the Study

Chapter 2: International Treaties

Chapter 2 covers the framework of the study and explains the nature and the importance of the freedom of peaceful assembly. The general principles of freedom of peaceful assembly as set out by the United Nations are also discussed in this chapter.

Chapter 3: The Right to Freedom of Assembly in the Republic of Korea and Malaysia

In Chapter 3.2, it begins with the provision that establishes the right of assembly under the Constitution of the Republic of Korea. The historic events sparked by the protest movements in Korea are also discussed and followed by detail analysis of each provision of the law that regulates the right to assemble. It ends with the challenges faced by the citizens in exercising this right, and the condemnation and achievement by the local and international human rights organizations posed to the government and the police.

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Similar study approach in Chapter 3.2 also will be applied in Chapter 3.3. The beginning of the chapter, it talks about the recognition of the freedom of peaceful assembly under the Federal Constitution. Afterward, the emergences of the Reformasi Movement and the BERSIH Movement, as well as the institution of SUHAKAM are discussed in order to analyze the impacts they have made to the transformation of laws, and to the political scenes in Malaysia. Subsequently, the former and the present laws which regulate the right to assemble are analyzed in details and end up with the criticism and commendations on both laws.

Chapter 4: A Comparison on the Right to Freedom of Peaceful Assembly between Two Countries

In this chapter, I examine the similarities and differences of laws between Korea and Malaysia and extend the study on the constitutionality of the provisions in the **PAA**, by using the international human rights instruments and the provisions of the **ADA** as the yardsticks.

Chapter 5: Conclusion

In this chapter I presented the summary of each chapter and the final outcome I have found in this research.

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CHALLENGES

The starting point that triggered me to conduct a study of demonstrations was back in December 2010 during the revolutionary wave of the Arab Spring. This Revolution was sparked by the tragic incident when a Tunisian street fruit vendor, Mohamed Bouazizi, set himself on fire on 17 December 2010, after his wares were confiscated and a municipal official harassed and embarrassed him in the public[1]. He proceeded to the governor office to complain and beg for his fruit scales back. Frustrated by the governor's neglect and refusal to listen to him, Bouazizi poured a can of gasoline on him and lit a fire. He suffered 90% burns injury and died 18 days later. This incident became the catalyst for the Tunisia Revolution (also known as Jasmine Revolution) where a series of street demonstrations condemning the high unemployment, government corruptions, and social inequalities and demanding for the then President Zine El Abidine Ben Ali to step down from the 23 years tenure of his presidency. Eventually, after almost 4 weeks of street protests and persistent pressure from the people, the President stepped down in January 2011. The protests also successfully have led to a free and democratic election. The successful protests in Tunisia have inspired other Arab countries to take the same steps and urged their respective head of the country to stand down. Algeria, Jordan, Egypt, Libya, and Yemen were among the earliest countries to follow Tunisia Uprising. From 2010 to 2012, the world has witnessed the downfall of the powerful leaders of the Arab countries, and eventually, they were ousted from their posts by the people's power[2]. However, not all demonstrations were ended up successfully. In Syria for example, the demonstrations against the authoritarian regime of the President Bashar al-

[1] Mohammad-Mahmoud Ould Mohamedu, *"The Arab Spring in Historical Perspective"*, Lecture at the ICP Summer Academy 2011: The Arab Uprisings: A Conflict Transformation Perspective", Institute for Conflict Transformation and Peacebuilding, 2012, p. 3.

[2] Ibid. p.3

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Assad in 2011, has turned the country into a full scale of civil war. Till present, the ongoing war between the government and the armed rebellions has led to the millions of casualties and millions of Syrians fled the country.[3]

The fact is, the historic demonstrations in Malaysia were already begun in 1998 after the dismissal of the then Deputy Prime Minister, Anwar Ibrahim. He quickly formed the Reformasi Movement (Reform Movement) and became the leader of the alliance of political oppositions for many years (before he was convicted for sodomy conviction and has to serve 5 years imprisonment since 2015). Later on, inspired by the Arab Spring, Anwar has made a call to his supporters during the campaign of the General Elections in 2013, that the Malaysian Spring could also be realized through a free and clean election. However, the government maintained its majority seats in the Parliament, but the oppositions won the popular votes with 50.87%. After the general elections, Anwar insisted that, "My dream was to have a Malaysian Spring that would be unique in the sense that we would do it through votes, not in the streets – a peaceful transition into a vibrant democracy in Malaysia"[4]. The emergences of BERSIH Movement was also significant in Malaysian history as the movement pushed the government for fair and clean elections through a series of streets demonstrations.

Hence, the decision to conduct a further study on this topic was made long before I pursued my doctorate in Korea. However, little did I know, the competent academic sources on the freedom of peaceful assembly in Malaysia are scarce to be found. Although the issues relating to this right were constantly highlighted by the human rights watchers, the extension of the study in the legal field is scanted. The academic debates were mostly focused on the freedom of speech and expression, in which the freedom of assembly is considered as part or

[3] Ibid. p.7.

[4] Thomas Fuller, *"Disputed Elections Sends Malaysian Politician Back To Fight on the Streets"*, the New York Times, May 18, 2013. Accessed on June 19, 2017.

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derived from the freedom of speech itself. Likewise in the United States, Inazu (2010) explained the reason the freedom of assembly has been reduced to a historical footnote in the political theory and law is that it has been considered as part of the rights of speech and association, and thus, those two rights confer sufficient protection to the protestors. Otherwise, the studies were mainly discussed on the impacts of the Malaysian movements from social or political perspectives.

Apart from that, most of the Malaysian journals and cases which are relevant to my study are either not available in the university's library, or the online journals were not subscribed by the university. I was also hampered by the language barrier while finding the sources for Chapter 3 since the articles and journals were all written in the Korean language. Hence, the search for reliable sources was made by scouring through hundreds of the international or local reports, books, newspapers articles, videos, and news. Afterwards, I read every single articles or journal which have been quoted by these collections, then made further readings on the articles which were also cited by another article. The exploration to find the relevant and competent sources for this study was indeed a Herculean task.

Nevertheless, given the advantage that the freedom of assembly is part of the fundamental liberties guaranteed by the United Nation's instruments, multiple references have been made to other jurisdictions, as the majority of the democratic countries also incorporate such freedom into the constitutions. Regardless of the differences of the provisions in the domestic laws, basically each country applies the same principles and standard test to prescribe all statutes that affect the human rights. And therefore, several legal precedents and principles from other countries were borrowed to support the study.

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CHAPTER 2

INTERNATIONAL TREATIES

2.1 INTRODUCTION

Chapter 2 describes the nature and importance of the freedom of peaceful assembly and then followed by the universal recognition of this freedom at the international level. Three important human rights instruments are also presented in this chapter, and finally it talks about the brief description of the establishment of the national human rights institutions as has been recommended by the United Nation.

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2.2 NATURE AND IMPORTANCE OF THE FREEDOM OF PEACEFUL ASSEMBLY

Every human being shall have the right to freedom of assembly. This freedom is an important medium of many other civil, cultural, economic, political and social rights[1]. History has proven it has become the essential key for the progress of social or political movements long before it is formally established in the human rights instruments of the United Nation, although it often portrayed in a negative way.

In the United States, for example, the earliest recorded strike was occurred in the 18th century, when the New York journeyman tailors protested over salary reduction in 1768[2]. Subsequently in 1794, the first labour strike case was reported in American law history, after shoemakers in Philadelphia formed the Federal Society of Journeymen Cordwainers for the purpose to secure stable wages after the master cordwainer repeatedly threatened to reduce their income. The Philadelphia Mayor's Court held the striking workers were guilty as illegal conspirators and each was fined for $8[3]. During that time, a protest to seek for better earnings was considered unlawful.

In contrast, the historical origin of the right to protest or to assemble in the United Kingdom is more difficult to trace[4]. For instance, in 1936 there was an implied right to protest mentioned in the case of **Duncan v. Jones**[5] where the learned judge decided, "English law does not recognize any special right of public meeting for political or other purposes".

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1 United Nation, *"What are the Rights to Freedom of Peaceful Assembly and of Association?"*. Accessed on June 1, 2017.

2 John D. Inazu, "The Forgotten Freedom of Assembly", TULANE Law Review, Vol. 84, 2010, p.565.

3 **Commonwealth v. Pullis, 3 Doc. Hist. 59 (1806).**

4 David Mead, *"The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era",* Hart Publishing, 2010, p.4.

5 **Duncan v. Jones [1936] 1 KB 218, 222.**

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On the other hand, the entry of freedom of peaceful assembly into the legal and judicial course in Korea and Malaysia is clear upon the establishment of its Constitution respectively in 1948 and 1957. Both countries enforced their first national laws regulating the right to assembly in the 1960s. One of the classic examples of the protest movement in Korea is the Gwangju Democratic Movement which became the cornerstone of the government transformation from a dictatorship into democracy system (see Chapter 3.3). While in Malaysia, in February 1946, 15,000 individuals have gone to the streets protesting over the decision of Malayan Union (under the British rule) for reducing the Malay Ruler's sovereignty and Malay privileges. Eventually, Malaysia obtained independence in 1957 upholding its own laws.

Freedom of assembly also acquainted by other names such as the right to peaceful assembly, the right to peaceful protest, the right to demonstrate which closely correlated with the freedom of speech and of association. These freedoms are among the earliest human rights that have been embodied in the constitution of many democratic countries, and also recognized at the international level. An assembly – a protest – a demonstration without the attachment of word 'freedom' or 'right' to it, it may attribute to a negative denotation.

A protest or demonstration is typically linked with violence and rowdy, time wasting and intruding one's peace. Indeed, a protest may turn into an obstruction to road users, affect someone's businesses or daily life, and cause damage to public or personal properties which if it is allowed to continue uncontrollably, a national threat will ensue. Then why it is important for a protest to be given a right? The powerful quote by **Martin Luther King Jr.** on the unruly clashes between black and white communities in America was right on point

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for those who seek to understand why those individuals have taken to the streets[6], *"Riot is the language of the unheard. They are socially destructive and self-defeating. I am still convinced that the non-violence is the most potent available to oppressed people in their struggle for freedom and justice, --so I continue to condemn riot. But at the same time, it is necessary for me to be as vigorous, in condemning the conditions which call persons to feel that they must get engaged in riotous activities, as it is for me to condemn riots"*. Riots (read: street protest and demonstration) can never be the best method to achieve one's goal, but they are always people who choose riots as a resort to letting the whole world know what their hearts desire; they want to be heard. Rather than criticizing, the ones who see (or hear) should acknowledge and fix the conditions that cause them to riot.

Maina Kiai[7] on his official visit to South Korea explicated that the rights to freedom of peaceful assembly "*are among the best tools to address social conflict. They allow underrepresented groups to amplify their voices; they give dispossessed people a channel for engagement and a stake in society; and above all they allow us to thrash out our disagreements in a peaceful—even if messy—manner"*[8]. In other words, individuals should be given a liberty to express their disagreements in a peaceable manner notwithstanding their opinions are opposed to majority's views.

The truth is the people who get together to the streets, shouting their grievances out loud, are the people feel they are neglected by those superiors who control the power; in this context, it usually refers to the government and its agencies. Although it can be argued that

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6 Lily Rothman, *"What Martin Luther King Jr. Really Thought About Riots"*, Time, April 28, 2015. Accessed on June 3, 2017.

7 Maina Kiai was the United Nations Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association. From 20 to 29 January 2016, he undertook an official mission to Asia and concluded his visit to Seoul, South Korea.

8 United Nations Special Rapporteur, "*Statement by the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association at the Conclusion of His Visit to the Republic of Korea",* 2016. Accessed date: 1 May 2016.

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the government has provided various channels through assorted government agencies to take notice of people's complaints, for example, the police, courts, community service centres, or district or State representatives, however, to get through to the channels are backbreaking, and some might be disappointing. Due to bureaucracies, the government's responses can be time or money consuming. But what's more disappointing is when such complaints are taken lightly and without due consideration. Appalled by such neglects, in the end, those people take their matters to the streets and convey their dissatisfactions to unreachable governments in provocative ways.

In **Kameshwar Prasad and Ors. v. The State of Bihar and Anor.**[9], the Indian Supreme Court profoundly described the importance of the freedom of assembly, "*–a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others to whom it is intended to be conveyed. It is in effect, therefore, a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech. …–It is needless to add that from the very nature of things a demonstration may take various forms. It may be noisy and disorderly, for instance, stone-throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within Art. 19(1) (a) or (b). It is equally peaceful and orderly such as happens when the members of the group merely wear some badge drawing attention to their grievances.*"

That is to say, a protest tends not to be a solitary activity[10]. Because it contains strong feelings about an issue, and the ideas it brings are contagious, therefore any democratic governments would normally absorb a protest into the constitution and make it as part of the

9 **1962 AIR 1166 SC**

10 David Mead, Op. cit, p.12.

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fundamental rights. Such establishment sends a significant message that every citizen of the country have room to speak his mind publicly without having fear, regardless the substance of his expression is negative or vice versa, and what's more to express it as a collective entity. But the recognition of protest as a right also impliedly means, the government has also the right to control it. In the human rights era (the post-World War II), the right to protest was introduced as a right to freedom of assembly.

It is important to note that as far as the freedom of assembly is concerned, the laws will only protect if it is performed in peace and without arms. Otherwise, it will exert a pull on the penal sanction under the relevant laws of the country. Lord Denning in **Hubbard v. Pitt** explained the features of the assembly that are protected by the law, *"Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority – at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St. Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. At least 12 were killed and hundreds injured. Afterwards, the Court of Common Council of London affirmed "the undoubted right of Englishmen to assemble together for the purpose of deliberation upon public grievances." Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern.* ***As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction in traffic, it is not prohibited".***

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2.3 THE FREEDOM OF PEACEFUL ASSEMBLY UNDER THE UNITED NATIONS' INSTRUMENTS

In the modern era i.e. after the Second World War, the universalization of the fundamental human rights idea for the very first time was presented in the **Universal Declaration of Human Rights** (**UDHR**) which was proclaimed by United Nations[11] in the General Assembly in Paris on 10 December 1948. Through this proclamation, the Declaration became a common standard of achievements for all peoples and all nations. Included in the document, the right to assemble peaceably was set out in **Article 20 (1)** whereby such rights must be inalienable to every person: *"Everyone has the right to freedom of peaceful assembly and association"*[12]. The Declaration though is a not a law, it becomes a benchmark by which to measure the degree of respect for, and compliance with, international human rights standards[13].

The acknowledgment of human rights entails obligations as well. Everyone is entitled to exercise their right to demonstrate in peace, but they also under the obligation to respect other's freedoms to go through their daily life in harmony and safe. Whilst at the State level, the government have the obligations and duties under the international law to ensure its citizens can enjoy the benefits of such freedoms. At the same time, the State is also obligated to protect other citizens from any elements of danger or public disorder that may occur from demonstrations. And that's when the right to assemble may be restricted reasonably conforming to the law by the State. In **Article 29 of UDHR**, it affirms that such rights can

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[11] The official website of the Human Rights Office of the High Commissioner can be accessed at: http://www.ohchr.org/EN/pages/home.aspx

[12] United Nations, **The Universal Declaration of Human Rights**, 1948. Accessed date: 20 February 2016

[13] **International Bill of Human Rights**, which consists of **UDHR**, the **ICCPR**, **ICESCR** and its two **Optional Protocols**.

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only be limited by laws exclusively for the purpose to secure and to respect the rights and freedoms of other people, and only by reason of morality, public order and the general welfare in a democratic society[14]. In addition to that, any rights which have been recognized by the Declaration cannot be exercised opposing to the purpose and principles of the UN[15], neither it is performed with the aim to destroy any other rights and freedoms in the Declaration[16].

Followed by the **International Covenant on Civil and Political Rights (ICCPR)**[17]**, Article 21** also points out that the right to assemble in peace must be justified without limits as long as it does not transgress the public tranquillity, *'The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others'*[18].

The Article points out that the general principle in this provision is, the freedom of assembly must be allowed. The exceptions can only be applied if there are reasonable grounds to limit such freedom such as a case in point, for the interest of security and to protect the public health, moral and the freedom of others. Other than these reasons, no laws can be enforced to constrict such right. For example, preventing a peaceful gathering that supports the opposition political party without a valid ground.

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14 **Article 29 (2) of the UDHR**
15 **Ibid. Clause (3)**
16 **Article 30 of the UDHR**
17 **ICCPR** was adopted by the United Nations General Assembly on 16 December 1966.
18 United Nations, **The International Covenant on Civil and Political Rights**, 1966. Accessed date: 20 February 2016.

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Malaysia was admitted into the UN as a member state on September 17, 1957, whilst Korea became a member state 34 years later, exactly on the same date as Malaysia, September 17, 1991[19]. In the past, South Korea has been recognized by the UN in the same year of its formation, 1948, but stayed only as an observer in the General Assembly[20]. Albeit Malaysia was a long time State party to the UN, only 5 out of 18 human rights instruments have been ratified despite constant pressures by the local human right institutions and organizations. Currently, the ICCPR is not part of the human right instruments ratified or signed by Malaysia. In Korea the situation is quite the opposite, Korea has shown its commitment when 11 instruments have been ratified, including the **ICCPR**. The (non) ratification instruments are provided in the following table[21]:

Human Rights Instruments **Date into force**	**South Korea** **Date of** **Ratification**	**Malaysia** **Date of** **Ratification**
International Convention on the Elimination of All Forms of Racial Discrimination: 1969	1978	-
International Covenant on Civil and Political Rights: 1976	1990	-
Optional Protocol to the International Covenant on Civil and Political Rights: 1976	1990	-
Second Optional Protocol to the International	-	-

[19] Under the recommendations of Security Council Resolution 702 and admitted by the General Assembly under the Resolution 46/1.

[20] Chi-Young Pak, *"Korea and the United Nations"*, Kluwer Law International, 2000, page 73.

[21] The Korean and Malaysian status of ratification of the United Nations' instruments is available at its official website: http://indicators.ohchr.org/

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Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty: 1991		
International Covenant on Economic, Social and Cultural Rights: 1976	1990	-
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: 2013	-	-
Convention on the Elimination of All Forms of Discrimination against Women: 1981	1984	1995
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: 2000	2006	-
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 1987	1995	-
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 2006	-	-
Convention on the Rights of the Child: 1990	1991	1995
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: 2002	2004	2012
Optional Protocol to the Convention on the	2004	2012

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Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography: 2002		
Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: 2014	-	-
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: 2003	-	-
International Convention for the Protection of All Persons from Enforced Disappearance: 2010	-	-
Convention on the Rights of Persons with Disabilities: 2008	2008	2010
Optional Protocol to the Convention on the Rights of Persons with Disabilities: 2008	-	-

There is an assumption when a State ratifies one of the international human rights treaties; there is a legal obligation to implement the rights in the domestic level. To put it differently, the legislation regarding with human rights must be compatible with their treaty obligations. The State is also required to submit regular reports presenting the progress of the human rights which have been implemented to the monitoring committee. An independent expert appointed by the Human Rights Council, a Special Rapporteur, will hold a mandate for an initial period of 3 years and has a duty to examine and report back on a specific human rights theme or country situation.

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2.4 PARIS PRINCIPLES: THE NATIONAL HUMAN RIGHTS INSTITUTIONS

During the international Workshop of National Human Rights Institutions (NHRI) in Paris in 1991, a set of international standards which frame and guide the work of NHRI was drafted. In 1993, during the UN General Assembly in Vienna, the draft proposal was adopted and called the Paris Principles[22]. The Paris Principles defines the role, composition, status, and functions of the NHRIs. The NHRI is neither a non-governmental organization (NGO) nor it belongs to legislative, executive or judiciary branches of State government. Notwithstanding the NHRI is funded by the State, it is an independent body which acts as a bridge between civil societies and the government[23].

The NHRI is vested with competence to promote and protect human rights[24], and has the responsibilities to submit to the government, Parliament or any other competent body, its opinions, recommendations, proposals and reports relating to [25] (i) any legislative or administrative provisions, (ii) any situation of violations of human rights, (iii) drawing the government's attentions to the situation of violations of human rights. The NHRI is also responsible; to promote and ensure the harmonization of national laws and practices with the international human rights instruments[26], to encourage the ratification of the international human rights instruments[27], to contribute to the reports which State is required to submit to the UN bodies and committees[28], to cooperate with the UN and any other organization in the UN's systems[29], to assist in the formulation of human rights educational programmes in

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22 Also known as the Principles Relating to the Status of National Institutions

23 United Nations, *"Paris Principles: 20 years Guiding the Work of National Human Rights Institutions",* Human Rights Office of the High Commissioner. Accessed on June 2, 2017.

24 **Article 1 of the Paris Principles**

25 **Article 3 (1) (a) of the Paris Principles**

26 Ibid. **Clause (b)**

27 Ibid. **Clause (c)**

28 Ibid. **Clause (d)**

29 Ibid. **Clause (e)**

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school, universities and professional circles[30], and to publicize human rights and efforts to combat all forms of discrimination by increasing public awareness[31]. Other important principles which have been set out are the NHRI may be authorized to hear and consider complaints and petitions of individuals, and to find an amicable settlement or making a recommendation to the competent authorities. As of August 5, 2016, 75 out of 117 institutions were accredited with 'A' status for their achievement to comply with Paris Principles by the Global Alliance of National Human Rights Institutions (GANHRI)[32].

Pursuant to the adoption of Paris Principles, the National Human Rights Commission of Korea (국가인권위원회) was established on May 24, 2001[33], as promised by the President Kim Dae-Jung during the presidential election campaign in 1997. From 2004 to May 2016, the Commission was accredited an 'A' status by the GANHRI for 5 times.

In the meantime, the Human Rights Commission of Malaysia familiarly known as SUHAKAM came into an operation on September 9, 1999[34]. The idea of its establishment began when the ex-Deputy Prime Minister, Musa Hitam was appointed as the leader of Malaysian delegation to the UN Commission on the Human Rights in 1994. Due to the change of political climate in 1998 i.e. the emergence of Reformasi Movement, the establishment of SUHAKAM was greatly welcomed by the civilians and NGOs. In Chapter 3.3.2, the SUHAKAM's role and contributions in transforming the laws that regulate the right to freedom of peaceful assembly in Malaysia will be further discussed.

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30 Ibid. **Clause (f)**

31 Ibid. **Clause (g)**

32 GANHRI is established in 1993 in Tunis, with the aim to coordinate the activities of the NHRI network. Formerly it was known as the International Coordinating Committee (ICC).

33 The institution was established under the **National Human Rights Commission of Korea Act**.

34 The institution was established under the **National Human Rights Commission of Malaysia Act 1999.**

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2.5 CONCLUSION

Hundred years long before the establishment of the freedom of assembly under the **UDHR** and **ICCPR**, demonstrations have become the important vehicle for under-represented people. The power of people can bring down the whole regime in one day, and change the direction of one's country in many aspects in the next day. For that reason, it is necessary to recognize the people's power as a right rather than to repress it. The acknowledgment of the freedom of assembly under the UN is the starting point for South Korea and Malaysia to incorporate it into the domestic laws. However, it turned out the application of the laws has sparked criticisms and condemnation by many concerned parties, in which it will be further discussed in Chapter 3.

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CHAPTER 3:

THE RIGHT TO FREEDOM OF ASSEMBLY IN THE REPUBLIC OF KOREA AND MALAYSIA

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3.1 INTRODUCTION

Korea and Malaysia have acknowledged the freedom of peaceful assembly since the commencement of its Constitution, i.e. 1948 and 1957 respectively. Both countries have also introduced their own version freedom of assembly by introducing **the Assembly and Demonstration Act** in 1963 in Korea, and **Section 27** and **Sections 27A-C of the Police Act 1967** in Malaysia**.** Nevertheless, many were not happy as it was claimed that both laws have been misused by the government to control their critics. The requirement of the prior notice issued by the police authority before an assembly can take place, received the most backlashes as it is exploited by the government to stop their opponents from gathering on the streets and sharing opinions with like-minded participants. Without police permission, the consequence is grave. The assembly may become unlawful and the people who join may be criminalized. Due to that, the **Assembly and Demonstration Act** has been revised several times in order to meet the international and constitutional standards. Likewise, **Section 27** and Sections **27A-C of the Police Act 1967** in Malaysia was repealed and replaced by the **Peaceful Assembly Act** in 2012. Yet, the public censures are unstoppable since the enforcement of the laws still does not in conformity with the new amendment. In this chapter, I will analyze the provisions in the **Assembly and Demonstration Act, the Police Act 1978** and the **Peaceful Assembly Act 2012** then further discuss on the implementation and challenges of these laws.

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3.2 FREEDOM OF ASSEMBLY IN THE REPUBLIC OF KOREA

After the Japanese occupation from 1910-1945, the Republic of Korea (Korea) was established on August 15, 1948, whereby its constitution was promulgated on July 17, 1948. **The Constitution of the Republic of Korea (KC)** has been amended for 9 times wherein the fundamental liberties also were enshrined since its first creation. At the moment, the latest constitutional reference was made amended on October 29, 1987, and entered into force on February 26, 1988.

The fundamental liberties were formally established under the **Chapter II** of the **Constitution.** There are 27 provisions in **Chapter II** which profoundly recognize the human rights, and in each provision, supplementary related human rights are also have been established. Since there are numerous fundamental liberties are guaranteed in the Korean Constitution, therefore it is worth to mention them in general so to give an idea to what scope of human rights are considered important for the Korean nation. Basically, **Chapter II** protects or provides:

a) **Article 10** – Right to be assured of human dignity and to pursue happiness;
b) **Article 11** – Right of equality before the law;
c) **Article 12** – Right to enjoy personal liberty;
d) **Article 13** – Protection from ex post facto laws and prohibition of double jeopardy;
e) **Article 14** – Freedom of movement;
f) **Article 15** – Right to choose occupation;

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g) **Article 16** – Protection from unwarranted search and seizure in one's residence;

h) **Article 17** – Right to privacy;

i) **Article 18** – Right to privacy of correspondence;

j) **Article 19** – Freedom of conscience;

k) **Article 20** – Freedom of religion;

l) **Article 21**- Freedom of speech and press, and freedom of assembly and association;

m) **Article 22** – Freedom of learning and arts;

n) **Article 23** – Right to own property;

o) **Article 24** – Right to vote;

p) **Article 25** – Right to hold a public office;

q) **Article 26** – Right to petition;

r) **Article 27** – Right to be tried under the law and speedy trial;

s) **Article 28** – Right for compensation in case of false imprisonment;

t) **Article 29** – Right to be compensated by public officials;

u) **Article 30** – Right to receive from the State in bodily injury or death case;

v) **Article 31** – Right to receive an education;

w) **Article 32** – Right to work and safe work environment;

x) **Article 33** – Right to join trade union;

y) **Article 34** – Right to reasonable standard of living;

z) **Article 35 –** Right to healthy and pleasant environment;

aa) **Article 36 –** Right to health care and protection for matrimonial equality;

Nonetheless, should the freedoms and rights of the citizens are not specified in the above list, the Constitution still guarantees that no citizens shall be neglected from such right

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as provided in **Article 37 (1)**. However unlike Malaysia constitution which separately and expressly provide authorization to create restrictive laws in each provisions, the permission grants to the National Assembly to make restrictive laws is only available in **Article 37 (2)** whereby, *"The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated"*. Hence, by virtue of this provision, the lawmakers are allowed to enact laws that limit any freedoms that are recognized by the Constitution solely on the ground of national security, or to maintain the law or order, or for the purpose of public welfare.

The classic example of restrictive legislation in Korea is the **National Security Act** (**NSA**) or 국가보안법 which received backlash from the human rights watchers, including its long time critic, the Amnesty International. The **NSA** was created on December 1, 1948, just 3 months after the establishment of the republic. Historically, this anti-treason Act was enacted for the purpose[1] to tackle down the anti-State group such as the People's Committees and due to the threat of subversion from North Korea. For these reasons, the rationale for the **NSA** is understandable. However, many concerned parties criticized when the NSA has been used as a tool to suppress and silence the opposition politicians. The call for its abolishment has also been made by the Korean presidents, Kim Dae-Jung and Roh Moo-Hyun[2]. The Amnesty International, for instance, urged for the repeal for the entire **NSA** especially **Article 7** whereby any person who praises, incites, or propagates the activities of an anti-government organization or its members, will be imprisoned not more than 7 years. Due to

[1] **Article 1 (1) of the NSA**: *"The purpose of this Act is to secure the security of the State and the subsistence and freedom of nationals, by regulating any anticipated activities compromising the safety of the State"*.

[2] Diane B. Kraft, *"South Korea's National Security Law: A Tool of Oppression in an Insecure World",* Wisconsin International Law Journal, Vol. 24, 2006, pp.627-636.

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this provision, members of the Capitalism Research Society were investigated and arrested for handling an academic debate on the study of North Korean issues[3]. Even though the **NSA** is still enforced until now, the provisions were amended frequently in order to limit the government from exploiting this law for its own purpose. For example, **Article 1 (2)** was inserted in 1991 where it says,*"In the construction and application of this Act, it shall be limited at a minimum of construction and application for attaining the purpose as referred to in paragraph (1), and shall not be permitted to construe extensively this Act, or to restrict unreasonably the fundamental human rights of citizens guaranteed by the Constitution"*. Hence, the use of the NSA should not be applied arbitrarily.

Apart from that, another law that is permissible to encroach one's constitutional right is the **Assembly and Demonstration Act** which is the main subject in this chapter. In Chapter 3.2.1, I will discuss on the general provisions of the Constitution which guarantee the right of Korean citizen to enjoy their freedom to assemble and to associate. Before we go to the main topic, the historic events enthused by the protest movements in Korea will be covered in Chapter 3.2.2. Next, in Chapter 3.2.3, the focus will be on the provisions of the **Assembly and Demonstration Act** i.e. the main law that regulates and restricts such freedom. From here, I will touch on the implementations of the law at the execution level and the constitutionality of some provisions, and supported with the legal cases. The criticisms by the concerned parties are included in this chapter. Chapter 3.2.4 concludes the efficacy of the ADA based on my observation.

[3] Amnesty International, *"The National Security Law: Curtailing Freedom of Expression and Association in the Name of Security in the Republic of Korea"*. Amnesty International Publication, 2012, p.10.

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CHAPTER 3.2.1

FREEDOM OF ASSEMBLY UNDER THE CONSTITUTION

In the past, there are 6 versions of provisions which assured the right to freedom of assembly under the **Korean Constitution**. The said provision has been revised for 5 times and relocated in a different article of the **KC**. The original provision (1948) was available in **Article 13** whereby the general rule was set out in a plain expression: *"The citizens' freedom of speech and the press, and freedom of assembly and association shall not be restricted unless pursuant to the law"*.

Later on, the Constitution was revised on June 15, 1960 preserved the original provision, but the direction in restricting the human rights has been clarified further in detail under **Article 28 (2)**: *"Citizens' freedom and rights may be restricted when it is deemed necessary for the public order and welfare under the law. However, the restriction shall not harm the essence of the freedom and rights and it shall not regulate the permit and pre-censorship of speech, the press, assembly, and association"*. The second amendment expressly proscribed the permit rule so to ensure that all citizens can enjoy their right to make a gathering and express their opinions without having fear of police disturbance during the assembly. Nevertheless, such rights may be constricted on the ground of public order or public welfare.

2 years later, again the Constitution was amended on December 26, 1962. This time the general rule and its restriction were combined in one article, **Article 18 (1)** articulates: *"All citizens shall enjoy the freedom of speech and the press, and freedom of assembly and*

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association". While in **Clause 2 and 4** it says:

> *"(2) Permit and pre-censorship of speech and the press, and licensing of assembly and association shall not be allowed. Yet, the pre-censorship of movie and entertainment may be allowed for the purpose of the public morals and societal ethics.*
>
> *(3) (omitted)*
>
> *(4) The time and place of an outdoor assembly may be regulated by law."*

Although the term 'permit' was no longer used in the Article, the term 'license' that replaced the former still have the same implication; the right to assemble shall not be restricted by the issuance of a license. However, **Clause 4** added the law may control the right to assemble as to time and place of outdoor assembly.

In the fourth version which was revised on December 27, 1972, **Article 18** was amended similar to its original text, *"Citizens' freedom of speech and the press, and freedom of assembly and association shall not be restricted unless pursuant to law"*. Subsequently, for the fifth time, **Article 18** was again re-altered and changed to **Article 20 (1)** but this time, the provision came in the simplest version, *"All citizens shall enjoy the freedom of speech and the press, and freedom of assembly and association"*.

Finally, the latest provision relating to freedom of assembly was amended on October 29, 1987, and the general principles contained in **Article 21** are used as main references hitherto. It is should be noted that **Article 21 of the KC** is almost comparable to the 1962 version, where it says:

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(1) All citizens shall enjoy the freedom of speech and the press, and freedom of assembly and association.

(2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be permitted.

It is important to note that the historical revisions of article relating to the freedom of assembly as I pointed out above are taken from the description delivered by the judge in the case of **2008Hun-Ka25**[4]. As cater by the Constitution, all citizens of Korea are guaranteed to exercise their collective rights to speech and press, and the right to assemble and associate. **Clause 2** further strengthened such rights where to regulate these freedoms through licensing system is absolutely forbidden. However, as has been mentioned earlier, the exercise of these freedoms is conditional, subject to **Article 37 (2)**:

"The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated".

Therefore, based on this proviso, the National Assembly may make law to regulate the right to freedom of assembly with the objective to protect the country and its citizens from any kind of crisis, or to preserve the law and order or in the interest of the society. The national law that corresponds to this objective is the **Assembly and Demonstration Act** (**ADA**) which was enforced on January 1, 1963. Hence, after third amendment of the Constitution relating the freedom of assembly came into effect, the **ADA** was also introduced soon after.

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[4] Constitutional Court of Korea, *"Constitutional Court Decisions"*, Volume II (2005-2009), (Kim KM, Shin MY, Kim IT, Ye SY, Cho SH, Choi JU & Kim MJ Trans), 2010, pp. 144-145.

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3.2.2 HISTORIC EVENTS BY THE PROTEST MOVEMENTS

Korea has remarkable histories in 'overthrowing' the autocratic and corrupted leaders or fought against the tyranny government through the street protests, either peacefully or aggressively. Undeniably, some were tragic and ended up with great loss, but their sacrifice was not in vain. Indeed, their loss in the 'battle' has brought great changes for the country in many aspects. Conversely, some protests have achieved astounding success without turned into violence. It is agreed by local and international community that "the energy behind the collective mobilization of citizens was instrumental in shifting the country from authoritarian rule to democracy"[5]. The best 2 examples are the Gwangju Uprising 1980 and the series of street demonstrations during the presidency of Park Geun-Hye in 2015 and 2016 which has pulled the world community's attention to Korea. Few legal cases relating to freedom of peaceful assemblies will be extracted from these events.

1. GWANGJU UPRISING 1980

Gwangju Democratization Movement (광주 민주화 운동) indisputably is one of the most unforgettable civil resistances and the most tragic ever occurred in South Korea history, yet has been renowned as the symbolic model for democratization movements in Asian countries[6]. Gwangju Uprising, colloquially among locals as the 5.18 (May 18; 오일팔)

[5] United Nations, General Assembly, *"Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association on His Mission to the Republic of Korea"*, (A/HRC/32/36/Add.2), November 17, 2016, p.3.

[6] George Katsiaficas, Na Kahn-Chae, *"South Korean Democracy: Legacy of the Gwangju Uprising"*, Routledge, 2006, preface.

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referring to the date of the movement commenced. The dreadful event has led to 150 deaths and 3,000 wounded citizens as a result of violence and repression by Korean armies[7].

The cause of these casualties was traced back to the assassination of President Park Jeong-hui (or Park Chung-hee) on October 26, 1979, by the director of the Korean Central Intelligence Agency, Kim Jae-Gyu. Despite the uncertain reason and conspiracy theories behind Kim Jae Gyu's[8] action, Park's 18 years of military dictatorship and his oppressive economic policies (known as Yushin system) are not alien to Korean people. Under the Yushin Constitution, Park guaranteed his tenure as a president without term limit and fundamental rights and freedom of citizens, such as freedom of speech, press, assembly, and association, continued to be denied. Notwithstanding upon the death of Park, the discontentment among citizens continued to grow as Chun Doo Hwan took over the rule through coup d'état on May 17 and December 12, 1979, and declared to expand the martial law. Among the expansion of martial law were; the closing of universities and limited press. The people were so dismayed with such decisions, so they (mostly they were university students) decided to convey their grievances on the roads, calling for democracy. Subsequently, thousands of combat troops were sent to large cities, especially to Gwangju and terrorized the demonstrators in barbaric ways; they were stripped naked, cracked their heads with bayonets, kicked on faces, dead bodies were piled into trucks, many were arrested and reported as missing person. The protests finally ended after the troops defeated the Citizen's Army.

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7 *"The May 18: Gwangju Democratic Uprising"*, (Park O'borg & Gregory Lanza Trans), 5:18 Archives, December 2015, p.47.

8 However Kim claimed his act was motivated by patriotism.

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Even though the citizens tragically lost in their battles, people unanimously agreed the Gwangju Uprising is a cornerstone which dictatorship was transformed into democracy in South Korea[9]. In 1994, a campaign was launched to bring the criminals to trial for Gwangju Massacre[10] and following by the establishment of May 18 Memorial Foundation on June 30, as a symbol of Korean people's spirit and solidarity[11]. The Korean government has officially acknowledged the Gwangju Democratization Movement and the date May 18 is designated as a national commemoration day in 1997[12].

2. THE CANDLELIGHT REVOLUTION DURING PARK GEUN-HYE'S PRESIDENCY IN 2015 AND 2016

The aftermath of Gwangju massacre has led the government to take radical actions to conceal the truths; government records were destroyed, thousands were arrested and tortured. The Korean society again reached its peak after Lee Jae Eui (이재의)[13] revealed the truth about the government's cruelty in his book, *Kwangju Diary: Beyond Death, Beyond the Darkness of the Age*[14] in 1985. George Katsiaficas in *Remembering Gwangju Uprising* once wrote, "Korean civil society is so strong that when the truth about military's brutal killing of so many citizens and subsequent suppression of the facts finally became known, the

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9 George Katsiaficas, *'Remembering the Gwangju Uprising"*, South Korean Democracy: Legacy of the Gwangju Uprising, Routledge, 2006, p.85.

10 In 1997, Chun Doo-hwan and 17 other accomplices were convicted and received their sentences accordingly for various offences, namely; slush funds, coup d'état on December 12, 1979 and Gwangju massacre.

11 The May 18 Memorial Foundation website can be accessed at http://eng.518.org/

12 Park O'borg and Gregory Lanza Trans, Op. cit p.150.

13 During its first publication, the publisher publicised a dissident novelist, Hwang Sog Yong as the author of the book after he agreed to take credit for marketing purposes and many years later, it changed to the original author's name. Lee Jae-Eui during that time was a reporter at Chonnam Ilbo (presently known as Gwangju Ilbo).

14 The original title of the book in Korean is 광주 5 월 민중항쟁의 기록:죽음을 넘어 시대의 어둠을 넘어.

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government quickly fell"[15]. This refers to the unity of Korean society in pressuring the government to institute democratic reforms through protests after the Gwangju Uprising has ended. Eventually, the voice of people was heard when the first democratic presidential election was held in 1987. Then 3 decades later, the Korean society still did not stop to amaze the international community with their solidarity to tumble down the corrupted leaders in a peaceful way, unlike many other countries. Such incidents have occurred during the time of President Park Geun-hye in 2015 and 2016.

During the presidency of Park Geun-Hye[16]; the first female president of South Korea and the 11th president of the country[17], 2 major protests had taken place at Gwanghwamun Square, Seoul and attracted the worldwide attention. The first protest which occurred on November 14, 2015, was sparked due to the announcement of the government to enforce all secondary schools to only use history textbook issued by the state, starting from 2017. Many academics and opposition parties sternly criticized the plan as it may distort the history- to whitewash the past dictators, and infringe the independence and political neutrality of education guaranteed by the Constitution[18]. Apart from the students, the massive rally was also led by labour, civic and farmer's groups to express their disagreement over the decision of the government to reform the labour policies which give more flexibility for the employers to dismiss their employees. It was estimated ten of thousands have participated which makes it one of the country's biggest street demonstrations in recent years. During the demonstration, the police set up 3 layers of barricades to stop the demonstrators from moving forward to the

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15 Georgy Katsiaficas, Op. cit. p.86.

16 Park Geun-Hye is the eldest child of Park Jeong-Hui (Chung-Hee), the 3rd President of South Korea. Park held an office as a president on February 25, 2013 until December 9, 2016 after the Parliament suspended all her powers and duties over political scandals.

17 Barbara Demick & Jung Yoon-Choi, *"South Korea Elects First Female President"*, Los Angeles Times, December 19, 2012. Accessed on March 3, 2016.

18 *"South Korea To Control History Textbooks Used In Schools"*, BBC News, December 12, 2015. Accessed on 4 March 2016.

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Blue House. Additionally, tear gas and water sprays were fired into them which caused an old farmer critically injured. These actions had triggered violent brawls between the police and the demonstrators. In return, the crowd who were devastated by the police and security forces' action aggressively broke the barricades and damaged the police buses. Unfortunately, the elder protestor called by the name of Baek Nam-Gi, suffered brain damage after was directly hit by the water sprays. He stayed in a coma for almost a year and eventually passed away in September 2016. The rally aftermath had led to the injury of hundred crowds, the arrest of 51 participants, the damage of 50 police buses, and 113 policemen were also wounded. It was reported, South Korea's police decided to sue the groups for almost to KRW 400 million (US$331,000) in compensation[19].

Secondly, a year later in late October 2016, a series of protests were held with an aim at forcing President Park Geun-Hye to resign after the revelation of a corruption and political scandals. The scandals also have involved her long-time friend, Choi Soon-Sil who allegedly, among others, using her ties with Park to coerce local firms to donate million dollars into charitable foundations she ran then used for her personal expense[20]. This protest movement, also known as the Candle Revolution had an impressive record in South Korea history when the cumulative numbers of protesters who have attended at 60 locations across the nation since October was 10 million[21]. Indeed, the largest weekly protest of all on December 31, 2016, alone has brought 1 million people to the street while holding candles, unswervingly demanded for Park's removal and pushed the Parliament to cast ballots to impeach her[22]. By

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[19] Park Tae-Woo & Bang Jung-Ho, *"South Korean Police To Sue Groups That Organized Nov. 14 Popular Indignation Rally"*, The Hankyoreh, February 1, 2016. Accessed on March 3, 2016.

[20] *"Profile: South Korean President Park Geun Hye"*, BBC News, March 10, 2017. Accessed on June 17, 2017.

[21] Jo He Rim, *"10 Millions Participate in 2016 Rallies"*, The Korea Herald, January 1, 2017. Accessed on June 17, 2017

[22] Ock Hyun Ju, *"Candle Revolution: How Candles Led to Park's Impeachment"*, The Korea Herald, December 9, 2016. Accessed on June 17, 2017.

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this day, according to Gallup Korea poll[23], Park's approval rating has dropped to 5 percent for the third straight week, including approval from her die hard supporters[24]. Finally, on December 3, 2016, a joint impeachment motion by the members of the National Assembly was set against Park and the vote took place on December 9, 2016 with 234 out of 300 members voted in favour of impeachment of Park. The Candlelight rallies and assemblies were extended to 2017 where the pro-Park rallies often occurred on the same days and place. On March 10, 2017, the Constitutional Court unanimously delivered a decision to remove Park from her presidential office, on the grounds she had violated the Constitution and the law in the performance of duties[25]. Apart from the intervention of Choi Soon-Sil in state affairs, the Court also pointed out that Park's failure to faithfully perform her specific obligation to protect the lives and safety of the people during Sewol tragedy[26] was one of the reasons for her removal[27].

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[23] Gallup Korea official website is available at: http://www.gallup.co.kr/english/main.asp

[24] Jeong Woo Sang, *"Park's Approval Rating Fades Further"*, Chosun Ilbo, November 28, 2016. Accessed on June 17, 2017.

[25] Case: **2016Hun-Na1**

[26] Sewol Ferry Disaster or 세월호 침몰 사고 is a tragic incident involving 304 passengers and crew members casualties after the Sewol Ferry sunk into the ocean when the crew of the ferry made an unreasonably sudden turn, as a result the ferry was turned turtle.

[27] Ibid. **2016Hun-Na1**.

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3.2.3 THE ASSEMBLY AND DEMONSTRATIONS ACT

집회 및 시위에 관한 법률

The **Assembly and Demonstration Act** was first introduced back in 1962 and came into operation on January 1, 1963. Historically, the Act was amended for 13 times in which the current edition is based on the amendment made in December 2007 and was enforced on September 9, 2008[28]. Pursuant to **Article 21 (2)** and **Article 37 (2)** of the **Korean Constitution**, this Act becomes the main legislation of the country to regulate the right to assemble and demonstrate.

1. PURPOSE: ARTICLE 1

The function of this Act is *"to achieve an appropriate balance between the guarantees of the right to assemble and demonstrate and public peace and order by guaranteeing the freedom of lawful assemblies and demonstrations and protecting citizens from unlawful demonstrations"*. The article does not explicitly use the terms like 'restriction', 'limitation', or exclusion clause such as 'proviso' to describe the conditional freedom of assembly, rather it used the phrases 'to achieve an appropriate balance' to tell the citizens that the right to assemble and demonstrate is not absolute. That is to say, whilst a group of like-minded people may be allowed to gather and demonstrate their opinions in public at large, the interests of the public shall also be protected.

[28] The history records of the amendment of the **ADA** is available at the official website of the Statutes of the Republic of Korea: http://elaw.klri.re.kr/eng_service/lawView.do?hseq=17771&lang=ENG

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2. DEFINITION: ARTICLE 2

An **organizer** is a person or organization who holds an assembly or stage a demonstration under his/ its name and with his or its own responsibility. The organizer also may appoint a general supervisor to entrust with the management of the conduct of such assembly or demonstration. In such cases, the general supervisor shall be treated as the organizer in so far as he performs duties within the limitations of the entrusted responsibility. Meanwhile a **moderator** is a person appointed by the organizer in order to assist the organizer in conducting an assembly or demonstration in an orderly manner.

A **demonstration** is illustrated as an act of a group of persons associated with common objectives parading along, or displaying their will or vigorous determination in, public places available for the free movement of the general public, such as roads, plazas, parks, etc., with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them.

Even so, not in any single provision in the **ADA** the term **'assembly'** is depicted, hence the definition of 'assembly' is borrowed from the Supreme Court cases where it says, "*the temporarily gathering at a certain place of a group specific or unspecified persons who have formed a common opinion for the purpose of expressing that opinion*"[29]. Whilst, the Constitutional Court in the case of **2011Hun-Ba174** defines the term 'assembly' as "*a temporary gathering of a group of people in a specific place with specific objectives, and the 'formation of inner tie' can be sufficient to be the common objectives*".[30]

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[29] Supreme Court Case: **2007Do1649,** decided on July 9, 2009.

[30] Constitutional Court of Korea, *"Constitutional Court Decisions (2014)"*, 2015, p.110, decided on January 28, 2014.

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3. PROHIBITION TO OBSTRUCT AN ASSEMBLY OR DEMONSTRATION: ARTICLE 3

Albeit the **ADA** prescribes the right of public interests shall be protected, especially from unlawful demonstrations, that does not mean the public (read: non-participants) can interfere and cause threat to a peaceful assembly[31], nor can they obstruct an organizer and moderator of the assembly from performing their duties[32]. Moreover, an organizer may notify the police to request for a protection if he fears violence might occur during the assembly. The police must not refuse such request without justifiable reason[33].

4. EXCLUSION FROM PARTICIPATION: ARTICLE 4

An organizer and a moderator of the assembly may exclude a specified person or organization from participating from such assembly, however, a free access must be given to a reporter who displays his identification card and wears an armband.

5. ADVANCE REPORT FOR OUTDOOR ASSEMBLY: ARTICLE 6 CROSS REFER WITH SECTIONS 7, 8, 10, 11, 12 AND 13

Outdoor assembly is defined as 'an assembly in a place that has no roof or covering or is in an open space with none of its four sides closed"[34]. In other words, an assembly which is held inside a building compound does not fall under this definition.

Even though **Article 21 (2) of the KC** prohibits imposing the permit rule for an assembly, an organizer is still required, under **Article 6 (1)**, to submit a report to the authority

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31 **Article 3 (1)**
32 Ibid. **Clause (2)**
33 Ibid. **Clause (4)**
34 **Article 2 - Definition**

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from 720 to 48 hours (approximately from 30 to 2 days) before the assembly is to be held in the open air: *"Any person who desires to hold an outdoor assembly or to stage a demonstration shall, from 720 to 48 hours before such assembly or demonstration is held, submit a report ---to the chief of the competent police station"*. **Clause 2 adds**: *"Upon receipt of the report --- the chief of the competent police station or the commissioner of the competent regional police agency shall forthwith issue a certificate of receipt specifying the date and time of receipt to the person submitting the report"*.

In the report, the provision entails the organizer to inform the objective of the assembly, date and time (including its duration), the place, the details of organizer, the estimation of participants that will come and the method of demonstration including a route map[35]. Upon the submission of the report, the authority will issue a certificate of receipt[36]. And if the assembly is decided to be cancelled, the organizer is still required to inform the police[37]. When the authority found the required details in the report are inadequate[38], the organizer or his in charge liaison must be informed in writing to complement the required details[39] within 24 hours. The police may also, upon the acknowledgment of the report, to set up a police line if it is indispensable to protect the assembly or to maintain the public order and must notify the organizer or a person in charge of liaison[40]. **Article 6** is also known as 'the instant provision'.

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35 **Article 6 (1)**
36 Ibid. **Clause (2)**
37 Ibid. **Clause (3)**
38 **Article 7 (1)**
39 Ibid. **Clause (2)**
40 **Article 13**

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However, if the assembly falls under category of **Article 8**, the police must issue a notice of ban[41] within 48 hours after the receipt of the report[42], unless if such assembly poses a danger to the public, the ban notice can be issued even the 48 hours has lapsed. Now **Article 8** proscribes an assembly to be held if:

(i) An assembly falls under

a) **Article 5** that is to support a dissolved political party as declared by the Constitutional Court.

b) **Article 10** that is the assembly is to be held during night time.

c) **Article 11** that is the assembly is to be held at prohibited places.

(ii) The requisite details in the report under **Article 7** have not been complemented.

(iii) The assembly may cause obstruction to the smooth flow of traffic, as provided in **Article 12**.

From this provision, we could see that the **ADA** make a distinction between outdoor assemblies and indoor assemblies where the outdoor assemblies are far greater restricted than the latter. The reason was explained by the justices of the Constitutional Court in the consolidated cases of **2000Hun-Ba67** and **2000Hun-Ba83** that, *"- there is a greater danger in the case of outdoor assemblies of clashes against other legal interests due to the possibility of direct contact with the holders of other fundamental rights, therefore it is required to regulate in further detail the manner and the procedure of the exercise of the freedom of assembly in the case of outdoor assemblies"*[43]. While the **ADA** allows every person to substantively exercise their freedom to assemble, at the same time it has to protect the legal interests of a third party which in conflict with the freedom of assembly.

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41 **Article 6 (4)**

42 **Article 8 (1)**

43 Constitutional Court of Korea, *"Decisions of the Korean Constitutional Court (2003)"*, 2005, p.3, decided on October 30, 2003.

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The Constitutionality of Advance Report of Outdoor Assembly and the Penal Provisions

Case 1: 2007Hun-Ba22[44]

The petitioner was indicted for having an assembly without a report. He challenged that both report provision, **Article 6 (1)** where it mandates advance report duty for outdoor assembly, and the penal provision, **Article 19 (2)** are unconstitutional as they infringed his freedom of assembly. It is important to note here that formerly before 2007; the penal provision of the **ADA** was provided **in Article 19 (2)**. Therefore, **Article 19 (2)** in this case does not refer to the current **Article 19 (Access by Police Officer)**. The former **Article 19 (2)** is the penal provision for any person of who violates **Article 5 (1) or 6 (1)** or who sponsors an assembly against the notice of ban which has been issued under **Article 8** shall be punished by imprisonment for not more than 2 years or a fine not exceeding 2 million won.

7 Justices of the Constitutional Court voted in favour that the report provision does not against **Article 21 (2) of the Korean Constitution**. The honourable judges in their judgment held that the advance report cannot be construed as ad advance permit. The purpose of such report is to ensure the assembly is held peaceably and effectively while at the same time to protect public safety with a legitimate purpose. The report increases the communication and cooperation between the organizer and the relevant administrative agency (the police). Such requirement is not excessive as it is not impossible to make and thus, it is not against the least restrictive means[45]. Besides, the reporting requirement meets the balancing test between restricted private interest from the disturbance caused by the

[44] Constitutional Court of Korea, Op. cit. No.42, pp.283.-287. Summary opinions decided on May 28, 2009.
[45] Ibid. p.285.

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organizer and the protected public interest. So, it neither infringes the freedom of peaceful assembly nor it violates the principle of excessive restriction[46].

However, one Justice was in the opinion that **Article 6 (1)** is against the **Article 37 (2)**[47] of the KC because, *"It mandates the duty of report only because an assembly is held outside without questioning whether it may threaten public safety, whether it is to be held in a public place, or whether it is a spontaneous or an emergency one"*[48]. Nonetheless, the learned Justice held it as incompatible as it is the work of the legislature to repeal the unconstitutional portion of a law and to enact a new constitutional provision.

The Court also touched on the issue of penal provision, whether the violation of an administrative rule should be treated as the violation of the administration goal and the public interest, and if it does how the sentencing guideline should be set under what category. 6 Justices were of the opinion that there is a high probability an unreported outdoor assembly could threaten the administrative goal and the public interest. For this reason, the penalty provision does not infringe the freedom of assembly nor is it excessive[49].

On the contrary, 2 Justices held that the reporting requirement is a simple administrative measure which intends to cooperate with 2 parties. Hence, the administrative sanction such as fine is sufficient. When the Act imposes imprisonment penalty it causes chilling effects on the constitutional freedom of assembly. The imprisonment penalty has changed the report system to a licensing system and treats the organizer as guilty as the

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46 Ibid. p.286.

47 The clause is regarding with the authorization for lawmakers to create restrictive laws on the grounds of national security, the maintenance of law and order, or for public welfare.

48 Ibid. p.286.

49 Ibid. p.287

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organizer who holds a violent assembly. And for this reason, the penalty provision enforces an excessive punishment and therefore it is against the Constitution[50].

Case 2: 2011Hun-Ba174[51]

Complainants, Mr. Kim and Mr. Lee were indicted at Seoul District Court for holding an unreported assembly at Gwanghwamun Square on May 10, 2010, protesting for Freedom of Speech on the Internet. Both were charged with violating **Article 6 (1)**, for failure to submit a report to the police authority before the assembly took place. As a result, if found guilty, both may be charged for imprisonment not exceeding 2 years or a fine not exceeding 2 million as per **Article 22 (2)**. They filed a constitutional complaint requested for a constitutional review for both provisions (also known as the Instant Provision).

It was held that the provision that punishes the organizer who fails to report in advance for arranging an outdoor assembly and demonstration does not violate **Article 21 (1)** of the Korean Constitution. The learned judge explained the requirement under **Article 6 (1)** connotes a duty to cooperate with administrative agencies such as police to prepare necessary steps for the smooth and safe running of the assembly. And also, by reporting in advance for such assembly, it can prevent multiple assemblies from overlapping with each other and give the police to take appropriate measures to preserve the public safety. The law gives an ample time to the organizer to report at least 48 hours before the assembly takes place. For that reason, the Instant Provisions cannot be regarded as an excessive restriction nor does it impose excessive punishment[52].

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50 Ibid. p.287.
51 Constitutional Court of Korea, Op. cit. No.68, pp.108-112.
52 Ibid. pp.110-111.

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6. TYPES OF PROHIBITED OR RESTRICTED ASSEMBLIES

Basically, under the **ADA**, the bans or restrictions can be classified with 5 grounds where the right to freedom of assembly is permitted to be encroached by the authority. Based on these 5 grounds, the assembly may be banned or restricted by reason of the objectives of the assembly, or due to the unsuitable time the assembly plans to be held, or the location of assembly is nearby the government's buildings, and for the purpose to protect the operations of society. The total prohibition of assemblies is one of the most important issues under the **ADA** as it has been challenged numerously for its constitutionality. The cases which dealt with the charges against persons who violated these prohibitions were ended up at the Constitutional Court. I elucidate my points as below:

i. Ban as to the objective of the assembly: Article 5

Article 5 stipulates:

(1) No one shall hold any assembly, or stage any demonstration, which falls under any of the following subparagraphs:

1. An assembly held or a demonstration staged in an attempt to obtain the achievement of objectives of a political party that has been dissolved by the decision of the Constitutional Court; and

2. An assembly or demonstration which clearly poses a direct threat to public peace and order by inciting collective violence, threats, destruction, arson, etc.

(2) No one shall conduct any propaganda campaign for such assembly or demonstration as is banned under paragraph (1) or incite people to hold such assembly or stage such demonstration.

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The law imposes a total ban on an assembly when a person intends to hold an assembly or a demonstration for the purpose (a) to obtain the achievement of objectives of a political party which has been dissolved by the Constitutional Court, and (b) that cause direct threats to public peace and order, such as inciting a destruction or arson[53]. And a person is also proscribed from making a campaign or incites people to hold an assembly for these purposes[54].

The case of **2013Hun-da1 is the** perfect example to illustrate **Article 5 (1) (1)**. On December 19, 2014, a political party by the name of Unified Progressive Party (UPP) (통합진보당) was disbanded by the Constitutional Court with votes 8-1, after the Korean government filed a petition due to their pro North Korean views. The UPP disbandment became the pilot case when **Article 8 (4) of the Korean Constitution** was first invoked[55]. Chief Justice Park Han-Chul described the UPP was in quest of to 'undo South Korea's democratic order' and bring the country under the 'North Korea-style socialism', *"The activities of the respondent party, which include assemblies to discuss insurrection with the hidden objective of realizing North Korean style socialism, is in violation of the basic democratic order. In order to eliminate the specific danger of the respondent to cause substantial threat to society, there exists no less measure than to dissolve the said party"*.[56]

Therefore, following to this case, if any person organizes an assembly to obtain the achievement of the objectives of UPP or to conduct any propaganda or to incite anyone to hold such assembly, may be found guilty and convicted under **Article 22 (2)**.

ii. Ban or restricted as to time: Article 10

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53 **Article 5 (1)**

54 **Article 5 (2)**

55 Constitutional Court of Korea, *"Constitutional Court Decision: Dissolution of the Unified Progressive Party"*, (Korea Legislation Research Institute Trans), 2016.

56 The summaries of opinions are available at the official website of the Constitutional Court of Korea: http://english.ccourt.go.kr/cckhome/eng/introduction/news/newsDetail.do?bbsSeq=23

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This provision imposed a conditional outdoor assembly if it to be held at night-time, which specifically refers to the time before sunrise or after sunset. The night-time assembly may be allowed conditionally, if the head of the police authority satisfies with the report submitted by the organizer who can assign moderators during the course of the assembly, and attest to the police that to hold it at night-time is the best hour to achieve their goal. The full provision is mentioned as below:

> *"No one may hold any outdoor assembly or stage any demonstration either before sunrise or after sunset: Provided, That the head of the competent police authority may grant permission for an outdoor assembly to be held even before sunrise or even after sunset along with specified conditions for the maintenance of order if the organizer reports the holding of such assembly in advance with moderators assigned for such occasion as far as the nature of such event makes it inevitable to hold the event during such hours".*

Constitutionality of Night-Time Outdoor Assembly Ban Case

Case: 2008Hun-Ka25[57]

Petitioner was charged with organizing an outdoor assembly from 19:35 to 21:47 on May 9, 2008. The petitioner filed a motion to request for the constitutional review of **Article 10** and its penal provision, **Article 23 (1)** on the argument that the instant provisions allow the advance permit for assembly which is clearly prohibited by **Article 21 (2) of the Korean Constitution**. In this case, the Court decided to declare **Article 10** as unconstitutional and

[57] Constitutional Court of Korea, Op. cit. No. 42, pp.140-178, decided on September 24, 2009.

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shall be invalid as of July 1, 2010. The Constitutional Court has ordered this provision to be amended accordingly. The judgments in this case can be read as followed:

It is important to note, during the time of appeal, the Court was referred to a different version of **Article 10** which was revised in May 11, 2007. The **previous Article 10** was provided as follow:

> *"No person shall not be engaged in outdoor assembly and demonstration before sunrise and after sunset. However, if an assembly should be held at night-time due to its nature, the head of district police department may allow it before sunrise and after sunset as long as the report of the assembly is made in advance after securing a person in charge of keeping the public order"*[58].

The 5 Justices which voted for the unconstitutionality of both provisions explained that the permit system refers to the power of administrative authority to permit assemblies in certain cases by reviewing the contents, the time and the place of reported assemblies. When comparing the permit description with the night-time assembly under **Article 10 of the ADA**, the resemblance is too close. This is because, under **Article 10**, the general rule is the night time the outdoor assembly is prohibited with an exception the authority may decide not to ban it based on the review of the contents of an assembly before it takes place. Therefore **Article 10** provides a permit system and so the entire **Article 23 (1) of the ADA** is against the Constitution. The majority of the Justices ruled out that the resemblance between the permit system and the conditional permissible night-time assembly in **Article 10** was too close, and for this reason, it shall be unconstitutional[59].

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58 Ibid. p.146
59 Ibid. pp. 147-156

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The other 2 Justices in the opinion that both **Article 10** and **Article 23 (1) of the ADA** are incompatible with the Korean Constitution. In general, under the Constitution, the lawmakers may restrict the outdoor assembly as to time, place and manner, and such restriction does not amount to an advance permit. The objective of the prohibition of night-time assembly is due to the difficulty in maintaining the public order and thereby approved. However, such difficulty to maintain the public order is focusing on the late night, considering we are living in the city and industrialized modern society. The existing provision bans the wide range of time frame, making the freedom of assembly can only be accessed fully at day time. Hence, the provision imposes an excessive restriction and infringes the freedom of assembly, but the unconstitutionality is not in **Article 10** itself. It should be left to lawmakers, at what night time frame the assembly should be restricted to guarantee the freedom of assembly in the least restrictive manner. Therefore, the lawmakers must revise by June 30, 2010, and if no action is taken, it will be invalid as of July 1, 2010[60].

While 2 Justices took a different turn by voting both provisions as constitutional since **Article 10** is a content neutral restriction on time and place, it is concrete and clear, and so it does not amount to a permit system. Additionally, since the night time outdoor assembly has a high probability violating the public order, therefore to ban the assembly is an appropriate means to achieve the legislative goal. Practically speaking, it is difficult to restrict the night time assembly by making it more details. Thus, **Article 10** and **Article 23 (1) of the ADA** does not infringe the Constitution[61].

In my opinion, it is undeniable that to hold an assembly during night-time may cause disruption of peace to people who reside nearby considering it is a rest time for most people, and also may contribute to the commission of other offence which is likely to happen after

60 Ibid. 156-160
61 Ibid. pp 160-172.

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sunset. However, to impose a blanket restriction and presume all night-time assemblies are not peaceful is a wrong approach to maintain the public order. In view of the fact that **Article 10 of the ADA** has been declared as unconstitutional and was ordered to be amended accordingly in 2009, instead of amending the provision, the **Enforcement Decree of the ADA** in **Article 11** points out that:

> *(1) Anyone who intends to hold an outdoor assembly either before sunrise or after sunset pursuant to the proviso to **Article 10** of the Act shall file a report stating the reasons therefore and present any supporting material.*
>
> *(2) Where the head of the competent police authority permits an outdoor assembly to be held either before sunrise or after sunset pursuant to the proviso to **Article 10** of the Act, he/she shall specifically point out the conditions for maintaining order in a written notice to the organizer".*[62]

Up to now, since **Article 10 of the ADA** has not been revised by the National Assembly as has been ordered by the Constitutional Court, this provision will remain its unconstitutionality. This means, theoretically **Article 11 of the Enforcement Decree of the ADA** has no place to take effect since the lawmakers fail to amend **Article 10 of the ADA** in accordance with the Court's order. Therefore, the ban on the night-time assembly has been lifted and it will be regulated under **Article 6** (the duty to submit an advance report) and **Article 8** (the notice of ban or restrictions issued by the police.

iii. Ban as to Places: Article 11

[62] Presidential Decree No. 25488, July 21, 2014.

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Article 11 prevents an outdoor assembly to take place in these areas:

a) The buildings of the National Assembly, all courts, and Constitutional Court.

b) The residence of the President, Speaker of the National Assembly, Chief Justice of the Supreme Court and Chief of the Constitutional Court.

c) The residence of the Prime Minister unless for parade or procession.

d) The diplomatic offices or residence of heads of diplomatic missions in Korea. Unless if the assembly is not directed at the diplomatic offices or residence of heads of diplomatic missions, or the assembly would not turn to large scale assembly or demonstration, and the assembly takes place during the holiday.

Constitutionality of the Prohibition of Assemblies as to Places

Case 1: 2006Hun-Ba20·59[63]

The petitioners were charged for holding assemblies within 100 metres boundaries of National Assembly building. They filed a constitutional complaint argued that the **Article 11 (1)** violates the freedom of assembly and the Constitution. The Constitutional Court voted 5 to 4 and ruled that **Article 11 (1) of the ADA** does not violate the Constitution.

According to the Court, the National Assembly impose psychological pressure through threats or cause difficulty in the access to the Assembly and that's why the absolute prohibition is needed to ensure free access and the safety of its facilities[64]. Since the National Assembly requires special and sufficient protection, the general regulations under the **ADA**

63 Constitutional Court of Korea, Op. cit. No. 42, pp. 411-414, decided on December 29, 2009.

64 Ibid. p.425.

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and ex-post regulations under the **Criminal Act** cannot serve as the effective means to defend the competence of it. Due to that, it fits the legitimate purpose to impose absolute prohibition.

The learned justices also added since the competence of the National Assembly is important in representing the democracy, the balance of interest between the safety of the building and the freedom of assembly is not found to be disrupted. Therefore, neither it violates the least restrictive means nor the rule against excessive restriction[65].

The dissenting judgments on the other hand in the view that there is no constitutionality-justified need to prohibit assembly which sends political expressions on the members of National Assembly. The establishment of the no-assembly zone without inquiring the practical danger or possibility of violence of assemblies near the building is inadequate means to fulfil the legislative purpose. The legislative purpose of protecting the National Assembly's functions can still be served even without prior restriction on the freedom of assembly. Thus, to design an absolute prohibited area from assemblies is an excessive regulation and violates the rule of least restrictive means. There is no balance between 2 conflicting interests when there is an imposition of absolute prohibition even on the peaceful assemblies. For that reason, it is in violation of the Constitution[66].

However, during the Gwanghwamun Protest against Park Geun-Hye in late 2016, for the first time ever, an exception has been made to **Article 11 (2) of the ADA** when the Seoul

65 Ibid. p.425.
66 Ibid. p.426

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Administrative Court has lifted the ban and allowed the Candlelight protestors to march near the Blue House (the presidential residence)[67].

Case 2: 2000Hun-Ba67 and **2000Hun-Ba83** (consolidated cases)[68]

In these cases**,** the Court held that **Article 11** which prohibits an outdoor assembly to be held in the entirety within 100 meters from the facilities intended for diplomatic institutions is unconstitutional. In the first case, the complainant was a civil organization known as the National Alliance for Democracy and Reunification of Korea which was found in December 1991 with the purpose to realise the democratic reformation and the peaceful reunification of Korea. The complainant planned to hold an outdoor assembly at an empty lot of Yulinmadang Park, Seoul on February 23, 2000. The title of the assembly was 'Appeal for Truth-Finding Inquiry into the Civilian Massacre by the United States Army during the Korean War'. The complainant submitted a report on February 21 to the police but was denied on the next day, on the ground that the proposed assembly is within 97 meters from the boundaries of United States Embassy and 35 meters from the boundary of the Consulate Division of the Japanese Embassy. Accordingly, the Complainant filed an administrative proceeding and with the Seoul Administrative Court to seek for a declaration that the notice of prohibition under Article 11 is unconstitutional and a petition for constitutional review. As the request was denied, the complainant proceeded with a constitutional complaint to the Constitutional Court[69].

In the second case, the complainant was the Committee of Fighting for the Reinstatement of Former Employees of Samsung. This organization was formed for the

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67 Case No: **2016AI2248** (decided on November 5, 2016) (Suspension of execution) and **2016A 12308** (decided on November 12, 2016).

68 Constitutional Court of Korea, Op. cit. No. 81, pp. 90-119, decided on October 30, 2003.

69 Ibid. p.96.

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purpose to seek for reinstatement of individuals who were laid off by the Samsung Company. The complainant planned to hold an outdoor assembly for 5 consecutive days under the title of the 'Conference to Pulverize Nepotism by the Samsung Family and Achieve Reinstatement of Employment'. They intended to hold the assembly on the sidewalk in front of the former Korean Daily News Corporation then march to the Korea Chamber of Commerce and Industry. The report was submitted on April 20, 2000, and responded by the police with the suggestions either the complaint has to cancel the march or to change their route of march, on the ground that the proposed assembly was within the 100 meters boundaries of Singaporean Embassy and El Salvadorian Embassy. Since the complainant refused to follow the proposal, the police have issued a notice of prohibition. Accordingly, the Complainant filed a constitutional complaint to the Constitutional Court after the first request was denied at the Seoul Administrative Court[70].

The Court explained that the freedom of assembly serves dual constitutional functions as an element of the consummation of a personality of the individuals and as an element that constitutes democracy. The dignity of every human beings are regarded as ultimate values and has the basic right of the independent decision-making, and at the same time, the citizens may be affected by the public opinions which are expressed collectively made through the assembly. As far as the Constitution, it protects the assembly which is peaceful. So long it is peaceful, everybody can enjoy the right to autonomously determine the time, place, manner, purpose of assembly and including the activities such as preparation, organization, supervision, and participation. Therefore, the authority is prohibited from interfering with the individual's participation that would affect the exercise of such freedom.[71]

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70 Ibid. p.97.
71 Ibid pp.90-91.

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The Court added that the choice of the place of assembly in many occasions determines the achievement of the assembly, would the outcome be a success or a failure. This is because the proposed venue holds a symbolic meaning for the very purpose and effect of the assembly. On the other hand, the diplomatic institutions have a higher probability of causing conflicts with the legally protected interests as compares to other places. Such legally protected interests are to guarantee of free entry and exit to and from the diplomatic institutions and to guarantee the smooth performance of activities and the bodily safety of the diplomats. Therefore to prohibit any assemblies for the purpose to protect such interests cannot be deemed to be manifestly wrong.[72]

However, when the law puts a general assumption that to hold an assembly at a particular location may cause a direct threat to the legally protected interests, the lawmakers should provide an exception clause to the general prohibition, as to the meet the standard the principle of the least restrictive means. The preventive judgment upon the presumptive danger can be seen in the first exception of **Article 11** where if the object of the protest that coincidentally exists in the prohibited place to assemble, then there is a less danger of conflicts. According to the learned judges, this exception poses an issue of over-inclusiveness where it creates no-assembly to those assemblies which are held for other purposes within that zone. The second exception is an assembly is a less danger if it is relatively held in a small scale. The third is if the assembly is held on a holiday, it is presumed there is a generally less danger of intrusion upon such legally protected interest.[73]

Although in principle the lawmakers may prohibit all assemblies on certain locations, there should be at the same time those provisions provide exceptions to such general

[72] Ibid. p.92.
[73] Ibid. p.92.

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prohibition "*in order to mitigate the possibility of excessive limitation upon the basic right that may result out of such general and abstract provision of law"*. However, the provision at issue, in this case, does not provide exceptions where no specific danger exists. This is clearly an excessive limitation beyond the necessary to achieve the legislative purpose. For this reason, **Article 11** is unconstitutional as it excessively limits the freedom of assembly and violates the principle of the least restrictive means.[74]

At the end of the judgment, the translator of the judgments in this case clarified the status of **Article 11** after the declaration of the Court, whereby, *"The National Assembly, based on the holding of the Constitutional Court, revised the provision at issue in this case effective January 29, 2004, to permit assemblies as an exception in cases where an assembly is not targeting diplomatic institutions, where an assembly does not tend to turn to a large-scale assembly, or where an assembly is held on a holiday on which diplomatic institutions are closed for official business and services and if found that it does not threaten functioning or safety of such diplomatic institutions"*.

iv. Restriction as to Public Order: Articles 8 (3), 12 and 14

An assembly may also be constricted when a resident in the proposed place of assembly area or an administrator of facilities, apply for the place or the facilities to be protected[75]. Yet, the grounds of restriction based on their complaints may be granted only when:

i. The assembly is likely to cause serious damage to properties or facilities, or to seriously affect the privacy of the residents,

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74 Ibid. pp.93-94

75 **Article 8 (3)**

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ii. The proposed place of assembly is within the surrounds area of school and hence is likely to infringe the right to learning, and

iii. The proposed place of assembly is in within the surrounds area of military installation and hence is likely to cause serious damage to military installation or affect the conduct of the military operations.

The police authority may ban or restrict an assembly on the main road in major city on the ground to ensure the smooth flow of the traffic[76]. However, if an organizer assigns the moderators to parade along the road with surety it won't obstruct the smooth traffic course, then no ban shall be imposed[77].

An organizer of assembly is not permitted to use any audible equipment such as loudspeaker, drum or gong which are harmful to others and beyond the noise levels declared by the **Presidential Decree**. Failure to abide by the restriction, the police may order the organizer to reduce such noise levels, or to suspend the use of such equipment, or may take any necessary method including seizing the equipment temporarily[78].

v. Restrictions as to Counter Assemblies: Article 8 (2)

If the authority accepts two or more reports on assemblies which plan to hold at the same place and time but both have conflicting objectives or even mutual objectives, the preference must be given to the first submitter, and hence the latter submitter will receive notice of ban.

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76 **Article 12 (1)**
77 Ibid. **Clause (2)**
78 **Article 14 (2)**

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Special Rapporteur on his special mission to Korea, highlighted that **Article 8 (2)** may create room for abuse. For instance, in June 2015, the police have banned the assembly of lesbian, gay, bisexual, transgender and intersex persons due to counter-demonstrators who had lodged their notification first. It was alleged that the earlier notification was solely to thwart the assembly. The States have a responsibility to protect and facilitate simultaneous assemblies, including counter-demonstrations[79].

The call for the removal of **Article 8 (2)** has also been pointed by the **National Human Rights Commission of Korea** (**NHRCK**) on the ground that to allow the banning of the later notified assembly would contribute to the abuse that clause[80].

7. RIGHT TO COMPLAINT: ARTICLE 9

If the organizer is dissatisfied with the ruling made by the police, he may file a complaint to the head of next superior authority within 10 days after he accepts the ban notice. Subsequently, the head of police must make a ruling within 24 hours after the receipt of such complaint. Should there is no ruling made within that time, the police's silence is deemed as consent and the assembly may proceed as per plan.

8. ASSEMBLIES EXEMPTED FROM REQUIREMENT OF ADVANCE: ARTICLE 15

Any assemblies in relation to events of study, arts, sports, religion, ceremony, friendship promotion, recreation, wedding, funeral or memorial service and national holiday

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79 United Nations, General Assembly, Op. cit. No. 43, p.7.
80 Ibid, p.8.

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are exempted from submitting a report to the police authority. Therefore, given to its ordinary meaning, one may hold a show of a choir group singing in a park, or a group of Muslims men may perform mass Friday prayer without going through all the hindrance giving a report to the police. However, in one Supreme Court's, the court decided that a performance of flash mob criticising the government does not fall under the exemptions of **Article 15**.

Supreme Court Case: 2011Do2393[81]

In this case, the Defendant was charged with for organizing an un-notified outdoor assembly as prescribed by **Article 6 (1).** The defendant, as the administrator of the online community, with other 10 members or more, had performed a flash mob at a center of Myeongdong district, expressing their grievance over the Ministry of Employment and Labor's rejection to set up a labor union. A set of mourning uniform, graduations caps, and protest signs saying "Fix Youth Employment" and slogans like "Young People Want To Work Too" and "The Government Must Fix The Youth Unemployment" could be seen and heard during the course of assembly. The Defendant argued such assembly in question was part of their art performances and therefore the requirement to notify the police are exempted as provided in **Article 15**. The court was in the opinion, although the gathering was taking in the form of flash mob performance, apparently, the gathering was held with the intention to widely promote its political and social slogans by criticizing the government's policy. And owing to that reason, such gathering was under the duty of prior notification as mentioned in **Article 6 (1).** Accordingly, the appeal is dismissed.

[81] Decided on March 28, 2013. The summary opinions is available at the official website of the Supreme Court Library of Korea: http://library.scourt.go.kr/SCLIB_data/decision/16-kh2013.3.28.2011Do2393.htm

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9. RESPONSIBILITIES OF ORGANIZERS, MODERATORS, AND PARTICIPANTS: ARTICLES 16, 17 AND 18

An organizer must conduct an assembly in an orderly manner[82], in which the moderator, who is 18 years and above[83], must assist to maintain the order as has been directed by the organizer[84] by ensuring the participants comply with the directions given[85]. Should the organizer fail to keep up such order, he must pronounce for the conclusion of the assembly[86]. Whilst the police have the power to appoint more moderators with the consultation of the organizer, in order to ensure the maintenance of the order[87]. Throughout an assembly, the moderators are obliged to wear armbands, caps, shoulder belts or coats so to tell them apart from the participants[88].

Article 16 (4) expressly entails the organizer must also avoid from committing any act that (i) may cause danger or harm to the life of other persons by using or asking other persons to use weapons or dangerous items, (ii) causing disturbance by way of violence, threat, or arson, (iii) violating the reports details, and (iv) attracting non-participant to join including by using the audible equipment[89].

82 **Article 16 (1)**
83 Ibid. **Clause (2)**
84 **Article 17 (1)**
85 **Article 18 (1)**
86 **Article 16 (3)**
87 **Article 17 (4)**
88 Ibid. **Clause (3)**
89 **Article 16 (4)**

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10. ACCESS BY POLICE: ARTICLE 19

An organizer must cooperate with the police officers who appear in uniform and give them an access to the assembly for performing their duties.

11. DISPERSAL OF ASSEMBLY: ARTICLE 20

If an assembly falls under any 5 types of restrictions or bans as have been mentioned above, and including an assembly that has been concluded by the organizer in **Article 16 (4),** the police may demand a voluntary dispersion within a reasonable time. If the participants refuse to comply with such demands, an order of dispersion shall be made with 3 times or more[90] and upon the pronouncement of the order, all participants must leave the scene without delay[91]. It is important to highlight that the order of dispersal must strictly be applied only if the circumstances mentioned in **Article 20 (1)** have occurred, in which the police is obligated to notify specifically the ground of dispersion in such order. It has been ruled out that if a specific dispersion ground is not notified in the order, or if the order was made without a legitimate ground, non-compliance with such an order cannot be held as a violation of **Article 20 (2)** of the Act. The landmark case decision can be read in the following case:

Supreme Court Case: 2012Do14137[92]

The Defendant was charged for participating in an unreported demonstration on August 27, 2011, and also has obstructed the traffic flow by occupying the road for 3 hours, then finally failed to

90 **Article 17 (3) of the Enforcement Decree of the ADA**.
91 **Article 20 (2)**
92 Decided on March 13, 2014.

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comply with the dispersal order, along with 2,500 college students and the Korean Confederation Trade Unions members. The record showed the Korea Metal Workers Union has submitted the report on August 23, providing the information of the routes the march would take place. In response, on August 25, the police notified them of the prohibitions as to 43 locations. However, it was alleged the Defendant has deviated from the scope of reported assembly and hence was charged with participating in an instant demonstration and was ordered to leave the place in which the Defendant refused to comply. The Court held that although dispersion was ordered on the ground of failure to report, the Court did not hold the non-compliance with such a dispersion order as an offense of crime violating the Act. There were no material facts showing the Defendant had changed the route from what has been reported by the Union. Therefore, the lower court judgment holding for the defendant's guilt is reversed.[93]

12. ADVISORY COMMITTEE: ARTICLE 21

The **ADA** also allows the police authority to establish an advisory committee consists from 5-7 members of lawyers, professors, persons recommended by civic organizations, and representative of residents in that area for the term of 2 years. The purpose of its establishment is to assist police by advising them on matters such as the notice of ban, the complaint made by the organizer, or any necessary issues relating to assemblies.

[93] The summary opinions is available at the official website of the Supreme Court Library of Korea: http://library.scourt.go.kr/SCLIB_data/decision/2012Do14137.htm

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13. PENAL PROVISION: ARTICLES 22, 23 AND 24

A person may be sentenced to imprisonment or subject to a fine if he is found guilty for breaching the law in the **ADA**. The following are the penal sentences arranged according to the gravity of the punishment:

i. Not exceeding than 3 years imprisonment or fine of KRW 3 million

A person is guilty when he violates **Article 3 (1) and (2)** that is for interfering or obstructing the peaceful assembly by causing violence or threat. However, the punishment is graver if he is a member of armed forces, public prosecutor or public officer, where he shall be punished with imprisonment not more than 5 years.[94]

ii. Not exceeding than 2 years imprisonment or fine of KRW 2 million.

A person is guilty if he holds an assembly with the object to support a dissolved political party as declared by the Constitutional Court[95], or when he disobey the restriction imposed by the police[96].[97]

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94 **Article 22 (1)**
95 **Article 5 (1)**
96 **Article 6 (1)**
97 **Article 22 (2)**

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iii. Not exceeding than 1 year imprisonment or fine of KRW 1 million

(a) A person is guilty when he holds an assembly that poses direct threat to the public peace by means of violence, threat, destruction or arson[98], or when the assembly is breaching the bounds of its own report.[99]

(b) An organizer is guilty if he holds an outdoor assembly during night-time or at the prohibited places or violates the ban that as regard to the smooth flow of the traffic.[100]

iv. Not exceeding 6 months imprisonment, fine of KRW 500,000, penal detention or minor fine

(a) A person is guilty if he participates in an assembly that is held for the purpose to support a dissolved political party as declared by the Constitutional Court.[101]

(b) A moderator is guilty if he holds an outdoor assembly during night-time or at the prohibited places or violates the ban that as regard to the smooth flow of the traffic.[102]

(c) A person is guilty if he joins the assembly which has been excluded on him by the organizer or moderator.[103]

(d) A person is guilty if he holds an assembly by making a report in false manner.[104]

(e) A person is guilty if he cross the police line without justifiable reason, or cause damages, conceals moves, eliminates or does harm to the police line.[105]

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98 **Articles 5 (2)** and **16 (4)**
99 **Article 22 (3)**
100 **Article 23 (1)**
101 **Article 22 (4)**
102 **Article 23 (2)**
103 **Article 24 (1)**
104 Ibid. **Clause (2)**

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(f) A person is guilty if he use audio equipments which is beyond the guideline, or attract outsiders to join an outdoor assembly[106], or a moderator and participant which violates Article 16 (4), and participants who refuse to leave an assembly after the order of dispersal has been made.[107]

v. Not exceeding a fine of 500,000 won, penal detention or a minor fine.

A participant is guilty if he joins and has knowledge of the fact that it is an outdoor assembly during night-time or at the prohibited places or violates the ban that as regard to the smooth flow of the traffic.[108]

14. PRESUMPTION OF ORGANIZER: ARTICLE 25

If an organization holds an assembly, the law will presume its representative as the organizer of such assembly for the purpose of applying the penal provisions.

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105 **Article 24 (3)**
106 Ibid **Clause (4)**
107 Ibid **Clause (5)**
108 **Article 23 (3)**

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3.2.4 CHALLENGES AND ACHIEVEMENTS

Generally, the formation of the **ADA** in many aspects were made in conformity with **Article 21 (1)** and **(2) of the Korean Constitution** and in consistent with the purpose of its enactment in **Article 1**, that is to achieve balance between a like minded group of people's right to enjoy the freedom of peaceful assembly and the other people's right to be protected from an unlawful assemblies, in which if such assemblies are not administratively controlled, the public peace is likely to be interrupted and violence might be occurred. The law also reassure the right of the participants during the assemblies by entailing the police to protect their freedom from the interference of outsiders and criminalise such acts. Also, notwithstanding the police have the power to restrict or issue a notice of ban on assembly, the **ADA** prescribes such grounds of restrictions or ban must be strictly be followed, as every grounds to impose a restriction on the assembly are provided in detail. In consonance with the government statistics, the rate of issuing of ban notices is nominal. It is said, between 2011 and 2015, the issuance of banned notice was an average of 0.18 per cent, and however other NGOs denied the figures and claimed the figure was higher[109].

Despite the fact that the provisions in this Act are positively helpful to both citizens (participants and non participants of an assembly) and to the police authority, in reality the enforcement of the **ADA** has received tonnes of negative responses and condemnations by many concerned parties. The death of Baek Nam-gi, a protestor during the Gwanghwamun Protest in 2015 was just one of the tragic examples of unnecessary use of force by the police in dispersing the crowds.

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[109] United Nation, General Assembly, Op. cit. No. 43, p.7.

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PARK LAE-GOON PRE TRIAL DETENTION ARREST

Park Lae-goon is a steering committee member of the People's Committee for the Sewol Ferry Tragedy and the Coalition 4.16 on the Sewol Disaster, and also a director general for Human Rights Center (SARAM). On July 30, 2015 Park was charged by the Seoul District Court for various offences including for organizing illegal protest and for refusing to disperse as provided in **Article 6** and **21 of the ADA**, for violating general obstruction of traffic, the special obstruction of public duty, invalidity of public documents and destruction of public goods as proscribed by **Article 141**, **144** and **185 of the Criminal Act**. However his arrest was made on earlier on July 17, 2015 and the case would be heard only on October 14, 2015. His pre trial detention raised objections by human rights watchers as the arrest was made earlier without legitimate grounds and no application bail was provided[110]. On September 8, 2016, the Appeal Court upheld the decision of the Seoul District Court for the sentence of 3 years imprisonment, 4 years of probation and 160 hours of community service, together with his friend who received lesser punishments. Both defendant made an appeal to the Supreme Court and were released after the trial[111].

BAEK NAM-GI CASE

Baek Nam-gi, 69, a member of the Catholic Farmer Association had participated in People's Rally on November 14, 2015 (see Chapter 3.2.2). After the dispersal orders were made, the buses barricades and police line were set up to stop the protestors from marching to the Blue House (the Presidential Residence). Additionally, tear gas and jet sprays of water

[110] Forum Asia, *"Bail Application of Mr. Lae-goon Park"*, Asia Forum for Human Rights and Development, September 16, 2015. Accessed on June 8, 2017.
[111] Front Line Defenders, *"Lae-goon Park Sentenced to 3 Years in Prison"*, September 8, 2016. Accessed on June 8, 2017.

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cannons were fired into them including Baek Nam-gi which instantly gets critically injured[112]. These actions had triggered violent brawls between the police and the demonstrators. In return, the crowd who were devastated by the police and security forces' action aggressively broke the barricades and damaged the police buses[113]. As a consequence, he stayed in coma for 317 days due to suffering of brain damage (traumatic subdural haemorrhage). He passed away on September 25, 2016.The doctors reported his brain injury was caused by the water cannon, which eventually led to kidney failure while he was still in a coma. Unsatisfied with the report, the police made an initial request for an autopsy warrant, but was rejected by the Seoul Central District Court. The police and Prosecutor's Office resubmitted the warrant, which was then issued by the same court that initially deemed the request was unnecessary and unjustifiable. Since the autopsy demand was against the wishes of his family the police even blocked the hospital exits to prevent his body being sent to a funeral home. The court finally granted to let the police to take out Baek's medical records from the hospital, and perform an autopsy. The police was criticised for eagerly pursuing the autopsy but lack of enthusiasm in examining the way that the authorities deployed high-pressure water cannons against protesters on November 14[114]. According to Baek's family, they have filed a criminal complaint against 7 alleged perpetrators but regrettably, no action has been taken so far[115].

Local and international observers questioned the tactics and technology used by the police to handle large-scale protests, as it was reported 182 tons of water was blasted and 651 litres of tear liquid was sprayed. A hearing held by the Security and Public Administration Committee of the National Assembly on September 12, 2016 has confirmed there were

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112 Amnesty International, Urgent Action, *"Protestor Seriously Injured by Water Cannon"*, (ASA 25/4503/2016: South Korea), July 28, 2016. Accessed on May 31, 2017

113 Forum Asia, *"South Korea: Stop Using Excessive Force to Crackdown Demonstration"*, Asian Forum for Human Rights Development, November 15, 2015. Accessed on May 31, 2017.

114 Phil Robertson, *"South Korea Activist Dies after Water Cannon Attack",* Human Rights Watch, September 29, 2016. Accessed on May 31, 2017.

115 Forum Asia, *"South Korea: Respect the Will of Nam-gi Baek's Family, Put an End to Impunity for the Use of Excessive Force against Peaceful Protestors",* Asia Forum for Human Rights and Development, October 3, 2016. Accessed on May 31, 2017. .

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excessive uses of force by the police on the day of incident, including against Baek. In the police defence, they argued the water cannon operator had to rely on a very small screen inside the vehicle. As a result, it limited his ability to see the crowd while discharging the jet sprays.

The Constitutionality on the Usage of Water Cannon

Previously, the constitutionality of use of water cannon as method to disperse the crowd has been challenged in the Constitutional Court in 2011. In the case of **2011Hun-Ma815**[116] the Korean Alliance held a rally in front of the Korea Development Bank in Yeouido, protested against the Korea-US Free Trade Agreement (FTA). Later on, the rally tried to enter the National Assembly building after occupied 4 traffic lanes at 2 different places. This attempt and the roads occupations has exceeded beyond the reported assembly place. The respondent (police) stopped the participants from such occupation but none were observed. The respondents decided to turn on the water cannons and fired on the participants, including the complainants, Mr. Park and Mr Lee. Consequently, Mr. Park was injured for traumatic membrane perforation and Mr. Lee suffered for concussion. Both complainants filed a constitutional complaint, claiming the use of water cannon has infringing their basic rights to assemble. The court dismissed the suit due to its lack of justifiable interests for constitutional review[117].

However, the dissenting opinions of 3 judges had taken the opportunity to clarify the standard of the use of water cannons in this case. The judges were in the opinion since there is a likely this issue might be recurring in the future and there has been no constitutional

[116] Constitutional Court of Korea, Op. cit. No. 68, pp. 221-223. Summary opinions decided on June 26, 2014.
[117] Ibid. pp.221-222.

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review so far, the justifiable interest can be exceptionally sustained. The learned judges directed that since the former **Act on the Performance of Duties by Police Officers** does not have any provision relating to the usage of water cannon, the statute should stipulate the significant substances on ground of usage and its standard. This is because an excessive use of it can cause danger to the life of others. Since there is no express provision touches on the usage of water cannon, this case has violated the principle of statutory reservation. This case also violated the principle of due process since it fails to follow the proceedings for dissolution order. Evidence also showed that the respondent excessively had used the 3 direct waters sprays for total of 14 minutes whereas there were no sign of violence or dangerous objects were used during rally. The judges added, *"direct watering of water cannon should be the last resort only when there is a direct and clear danger to interests of others or public safety and order because direct watering may cause serious effects, regardless of whether it was intentional or accidental. Because we cannot find any grounds to justify direct watering of water cannon in this case, the freedom of assembly was violated".*[118]

Finally, on June 17, 2017, the KNPA's Commissioner General, Lee Chul-sung made an official apology for Baek's family members after the Seoul National University Hospital verified his cause of death was due to an external injury caused by the hit from the water cannon. That is to say, the earlier report which declared his death was natural and affected by illness was corrected. With regard to the use of force when dealing with the protestors, Lee accentuated, "there should never be a repetition of police excessively exerting their authority and harming the people" and in the future, the use water cannons shall never be dispatched to the site of regular rallies and can only be used for strict purpose[119].

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[118] Ibid. p.223.

[119] Sarah Kim, *"Police Reform Starts With Apology"*, Korea Joongang Daily, June 17, 2017. Accessed on June 20, 2017.

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SELECTIVE INVESTIGATION: HAN SANG-GYUN'S CONVICTIONS

The noticeable contrast between the delay in investigating the Baek Nam-gi's injuries and death, and the conviction of Han Sang-gyun was severely condemned by the Amnesty International[120] and the Special Rapporteur of the United Nation. The Korean Confederation of Trade Unions (KCTU), led by Han Sang-gyun who was the organiser of the Sewol ferry protests in April and May 2015, is the organization which is committed to advance the worker's empowerment through economic, social and political reform, including the democratisation of the country. Han San-gyun was convicted at Seoul Central District for multiple charges against him, including the offences under the **ADA**. He was found guilty, among others, for organizing illegal protests, refusing to disperse and inciting illegal actions in 13 rallies including the Gwanghwamun Protest on November 14, 2015 which eventually led to big chaos between police and protestors. He was also convicted under the **Criminal Act** for causing an injury to a public official and obstructing the discharge of duties by a public official[121], and also for obstructing the traffic[122] and was sentenced for 5 years imprisonment and a fine of KRW 500, 000.[123]

As the punishment was seen to light for Han, the prosecutor had appealed to the ruling seeking for stringent punishment considering his major roles in various demonstrations

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120 Amnesty International, *"Amnesty International Report 2016/17: The State of the World's Human Rights",* Amnesty International Ltd., 2017, page 222.

121 **Article 144 of the Criminal Code**

122 **Article 185 of the Criminal Code.**

123 Forum Asia, *"South Korea: Unjust Convictions Given to Trade Union Leader Han Sang-gyun"*, Asian Forum for Human Rights and Development, July 11, 2016. Accessed on May 20, 2017.

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between 2014 and 2015[124]. However, the sentence was reduced to 3 years after the appeal. While waiting for final appeal from the Supreme Court, Han wrote a letter to the Amnesty International addressing on the issues of labour and youth unemployment. He concluded the letter with the saying, "It's a reality that if you form a union in South Korea or exercise your right to strike, not only can it lead to you being fined, imprisoned, or having your family torn apart, you may even put your life at risk. ...When I am released, I will visit farmer Baek Nam-Gi's grave and hope to take with me a public apology from the government. I will make an offering of rice wine and report to him that his struggle has awakened a better world"[125]. On May 31, 2017, the Supreme Court confirmed his 3 year imprisonment sentence and ordered him to pay KRW 500,000[126].

For comparison, during the administration of President Kim Dae-jung, the riot police have stopped using the tear gas against the protestors in 1999. The rationale for its cease was clarified by the Commissioner General of Korean National Police Agency (KNPA), Lee Moon-young that 'when the police fired tear-gas canisters, Molotov cocktails always follow". Owing to that reason, the use of tear gas has been a 10 year suspension. Nonetheless it was replaced with 2 types of fire extinguishers; halons based and dry powder. Notwithstanding the police claimed they were non toxic, the Environment Agency in UK based have warned the extreme usage may affect the brain and heart.

It is deplorable to see water cannon and tear gas was used once more against demonstrators during the time of President Lee Myung-Bak in 2008. In 2008, large scale series of protests under the Candlelight Movement took place in Seoul protesting against the

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124 Front Line Defenders, *"Prosecutor Appeals for a More Stringent Punishment Against Human Rights Defender Sang-gyun Han",* July 11, 2016. Accessed on May 31, 2017.

125 Amnesty International, *"Hope Within Prison Walls: A Letter From Imprisoned Korean Labour Leader Han Sang-gyun"*, April 25, 2017. Accessed on May 31, 2017.

126 **High Court Case: 2016n02017** and Supreme Court Case**: 2016do21077.**

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government's decision to resume the import of US beef despite of the fear of 'mad cow disease' arose. The demonstrations were held almost daily for over 2 months. The turmoil was at its peak on May 31-June 1 and June 28-29 when the government's announced to resume the US beef imports. Violence sparks when 'some protesters used violence against the police, wielding steel pipes and wooden sticks, pulling police buses with ropes, throwing projectiles at police, and vandalising buses', while the police fired the water cannons and fire extinguishers in response. The incident has lead to the resignation of all 14 members of KNPA's human rights committee[127]. Such decision was crucial because its use continues to this day.

In contrast, the demonstrations against Park Geun-hye's corruption scandals in late 2016 until the impeachment decision was affirmed by the Constitutional Court, were one of the most successful and 'almost' entirely peaceful protests ever recorded in Korean history. Both police and protestors cooperated well although the demonstrations were held at night-time for months. This proved the right to exercise peaceful protest can actually be realised even though it takes in large scale and provocative in nature.

[127] Amnesty International, *"Policing the Candlelight Protests in South Korea"*, Amnesty International Publication, 2008, pp.1-17.

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3.2.5 CONCLUSION

Baek Nam-gi has rapidly become a prominent symbol of victimization[128] due to the continuance of abuse of power by the police authority, particularly under the President Park Geun-hye's reign. The history already taught us, if the government greets the nations with terror that would only create more terror, in fact the consequences may turn into catastrophe. In order for the authority to achieve the tenet of the **ADA** and **Article 21 of the Korean Constitution**, the right to assemble peacefully should be treated as a rule, not an exception. It is important for the police to comprehend that they are carrying the facilitative role to uphold such right, not an authoritatively. Should the **ADA** is enforced conforming to the provisions within, Korea certainly will be a great exemplar to other Asian countries.

[128] Phil Robertson, Op. cit.

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CHAPTER 3.3

FREEDOM OF PEACEFUL ASSEMBLY IN MALAYSIA

3.3 FREEDOM OF PEACEFUL ASSEMBLY IN MALAYSIA

Despite of its pivotal role in shaping Malaysia as a democratic country and of the controversies surrounding it, freedom of assembly is not often discussed in academic debates as compared to freedom of speech and expression. Looking back at the history of Malaysia's independence, it appears that the peaceful assembly had been a fundamental agent of change and good long before the right to assemble in peace was formally established in the Federal Constitution[1]. In February 1946, the first demonstration movement was assembled and attended by 15,000 individuals, objecting over the establishment of the Malayan Union and taking exception to the Malay rulers and Malay privileges. The procession was among the most successful efforts that eventually led to Malaysia's independence. For the past 6 decades

[1] Lim Chee Wee, "*An Open Letter to Wakil Rakyat (Members of Parliament) on Peaceful Assembly Bill"*, the Malaysian Bar, 2011. Accessed date: April 1, 2016.

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after its formal adoption into the Constitution, the right to peaceful assembly has experienced dynamic changes. The enactment of the **Peaceful Assembly Act 2012** also illustrated some of the worst and yet the most encouraging aspects of law and the legal culture in Malaysia[2], particularly after it replaced the former legislation.

In Malaysia, the fundamental liberties were formally recognized and adopted for the first time when our Federal Constitution of Malaysia came into force in 1957. The recognition came at the same time when Malaysia declared its first independence on August 31, 1957 from the colonialism of British since 18th century, with the interference of Japanese occupation from 1942 until 1945, then came back as the British Military Administration and ruled again the multi-racial Federation of Malaya[3]. Since then, the Federal Constitution became the supreme law[4] of the 13 states[5] and 3 territories[6]. There are 9 civil rights and political rights have been established under the Federal Constitution, in Part II, namely;

a) **Article 5**: The prohibition to deprive one's life or personal liberty saves in accordance to the law.

b) **Article 6**: The prohibition to hold a person in a slavery or forced labour.

c) **Article 7**: The protection against retrospective criminal laws and repeated trials (double jeopardy).

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2 Amanda Whiting, *"Malaysia- Assembling the Peaceful Assembling Act"*, New Mandala, 2011. Accessed date: April 1, 2016.

3 Malaysia was formerly known as Federation of Malaya and later adopted its present name, Malaysia on September 16, 1963, after Sabah, Sarawak and Singapore (now independent) joined the Federation.

4 **Article 4 of the Federal Constitution**: "*This Constitution is the supreme law of the Federation and any law passed after Independence Day (Merdeka Day) which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void"*.

5 Johore, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu – **Articles 1 (2) of the Federal Constitution**.

6 Federal Territory of Kuala Lumpur, Federal Territory of Putrajaya and Federal Territory of Labuan – **Article 1 (4) of the Federal Constitution**.

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d) **Article 8**: The equality clause; *all persons are equal before the law and entitled to the equal protection of the law.*

e) **Article 9**: Prohibition of banishment and freedom of movement.

f) **Article 10**: The rights to freedom of speech, assembly and association.

g) **Article 11**: The rights to freedom of religion.

h) **Article 12**: The rights in respect of education.

i) **Article 13**: The rights to property

The main focus of this thesis and particularly in this chapter, will be on **Article 10 (1) (b) of the Federal Constitution (FC)**, i.e. the right to assemble peaceably and without arm. Basically, the main laws that regulate this right are divided into 2 periods; (i) before 2012, it was the **Police Act 1967** and several restrictive laws, and (ii) starting from April 2012 until present, the **Peaceful Assembly Act 2012** is the functioning law of the country. Observably, the changes in the application of the laws have not just brought major impacts, arguably, on the improvement of the human rights in Malaysia, but also on legal aspects. Shad Faruqi accurately depicted the difference between the two as "Previously, everything was prohibited unless permitted. Now, everything is permitted unless prohibited. This is a significant shift in civil rights thinking"[7].

However, before we go deep to the discussion of these two laws in this chapter, it is necessary to explain in brief the relevant human rights issues in Malaysia which will be covered in Chapter 3.3.1. And the discussion on the right to peaceful protest in Malaysia is

[7] Shad Saleem Faruqi, *"Learn More about the New Assembly Act"*, Reflecting On the Law, the Star, June 27, 2012. Accessed on May 13, 2017.

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incomplete without talking about the iconic protest movements of the country; the Reformasi Movement and BERSIH Movement, and the significant role of the Human Rights Commissions of Malaysia or better known as SUHAKAM. This topic will be covered in Chapter 3.3.2. Meanwhile in sub-chapter 3.3.3, 3.3.4 and 3.3.5 I will be focusing on the relevant laws which regulate the right to freedom of peaceful assembly and supported my arguments with the landmark cases and the commentaries and criticism by the concerned parties.

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3.3.1 FREEDOM OF PEACEFUL ASSEMBLY UNDER THE FEDERAL CONSTITUTION

Freedom of peaceful assembly is enshrined together with freedom of speech and expression, and freedom of association in which these freedoms are respectively subject to restrictions in **Clause 2, 3** and **4**. The freedom of speech, expression, peaceful assembly and association in Malaysia are formally guaranteed under the **Article 10 (1) of the FC**. It provides: ***Subject to Clause (2), (3) and (4)-***

(a) every citizen has the right to freedom of speech and expression;

However, the Parliament may by law impose: restrictions for the interest of national security, diplomatic relations, public order or morality and also restrictions to protect the privilege of Parliament or Legislative Assembly members, or to provide against contempt of court, defamation or incitement to any offence[8]. Parliament may also pass law to prohibit the questioning of any matter[9] relating to the citizenship[10], Malay language as the national language[11], reservation of quotas for Malays and natives of Sabah and Sarawak and Ruler's sovereignty[12].

8 **Article 10 (2) (a) of the FC**
9 **Article 10 (4) of the FC**
10 **Part III, of the FC**
11 **Article 152 of the FC**
12 **Article 181 of the FC**

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

However the Parliament may impose: restrictions in the interest of national security, public order of morality[13].

(c) all citizens have the right to form associations.

However, Parliament may impose: restrictions in the interest of national security, public order or morality[14], or relating to labour or education[15].

Looking at the lists above, it is not surprising that these rights are one of the most controversial and restricted rights in Malaysia. By virtue of this article, several restrictive laws have been introduced and being used as a tool to repress the conduct and opinions of government critics and politicians from the opposition parties. Here are some of the examples:

i. The Sedition Act 1948

Prior to Malaysia's independence, the **Sedition Act 1948** was initially enacted during the British Malaya colonial rule in order to silence dissent against colonialism and British rule[16], and to contain resurrection of Communist Party of Malaya. However, it remained to date as the powerful tool for the government to harass, arrest and prosecute the politicians

13 **Article 10 (2) (b) of the FC**
14 **Article 10 (2) (c) of the FC**
15 **Article 10 (3) of the FC**
16 Article 19: Global Campaign for Free Expression, *"Memorandum on the Malaysian Sedition Act 1948"*, London, July 2003, p.1.

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from opposition parties and the government critics[17]. The **Sedition Act** has been through a series of amendments especially on the description of 'seditious tendency" in **Section 3**. Originally, seditious tendency is defined under **Section 3 (1)** as any act, speech, words, publication[18] that bring into hatred or contempt or to excite disaffection against any Ruler, the government or the administration of justice in Malaysia[19]. The definition was expanded after the 13 May 1969 incident when the racial conflicts occurred between Malay and Chinese people. This incident has led into two consequences; (i) the government's declaration of the State of Emergency on May 15, 1969 which continued until February 1971 and, (ii) the new insertion of *"tendency to promote feelings of ill will hostility between different races or classes of the population of Malaysia"*, and *"tendency to question any matter, right, status, position, privilege, sovereignty or prerogative"* of making Malay as the national language, special quotas for Malay and native of Sabah and Sarawak, and preserving Ruler's sovereignty was also considered as seditious tendency under **Section 3**[20].

ii. Printing Presses and Publications Act 1984

Under this Act, the Minister of Home Affairs holds the power to grant a license to all printing presses which is renewed every year. This law became controversial as it is used by the government to suppress the freedom of speech by revoking the licence or ban the publications of any printing press that seems vocal in criticising the government.

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17 Human Rights Watch, "*Creating a Culture of Fear: The Criminalization of Peaceful Expression In Malaysia"*, October 2015, p.31.

18 **Section 2 of the Sedition Act** interprets 'seditious' as *"when applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency"*.

19 **Section 3 (1) (a), (b)** and **(c) of the Sedition Act**.

20 Human Rights Watch, Op.cit. p.32.

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iii. Section 27, Sections 27A-C of the Police Act 1967

These provisions were enacted in pursuant to **Article 10 (2) (b)** of the Constitution in which the police held powers to issue or refuse a licence to convene an assembly. This has been repealed in 2012 and was replaced with the **Peaceful Assembly Act 2012**. Further discussions of these Acts are available in Chapter 3.3.3 and 3.3.4.

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3.3.2 THE REFORMASI MOVEMENT, BERSH MOVEMENT AND SUHAKAM

The discussion on the right to assemble in peace in Malaysia is not complete without talking about the involvement of 2 iconic protest movements in Malaysia, that are; the Reformasi Movement and the BERSIH Movement. Being the target groups by the government, these 2 movements have not just changed the Malaysian political scenes for the past 20 years ago, but they also have great influence over the transformation of human rights laws. Meanwhile the role played by the Human Rights Commission of Malaysia, colloquially known as SUHAKAM[21] in proactively criticising and assessing the implementation of the human rights laws cannot be disregarded. It should be noted that to bring these 3 figures into discussion is essential as when it comes to the issues on the right to peaceful protest in Malaysia, the Reformasi, BERSIH and SUHAKAM will always be in the spotlight. Nonetheless, other important bodies also will be referred starting from this chapter onwards.

(a) REFORMASI MOVEMENT

The first event where the demonstration in Malaysia truly received the worldwide attention was triggered by the Reformation movement in 1998. The right to assemble peaceably became a hot debate among the politicians, legal practitioners, human rights defenders and even citizens when Anwar Ibrahim was sacked by the then Prime Minister, Mahathir Mohamad on September 2, 1998 from his 6 years tenure as the Deputy Prime Minister of Malaysia and Finance Minister on the allegation of corruption and homosexual activity. On the other side of story, it rooted back to the disagreement between Mahathir and Anwar Ibrahim in handling the Asian Financial Crisis in 1997, especially on the issue whether to receive funds from International Monetary Fund (IMF) and bailing out the

[21] SUHAKAM stands for *Suruhanjaya Hak Asasi Manusia Malaysia*.

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companies owned by Mahathir's cronies, while most of the nation's businesses have collapsed[22].

This incident was a jumping-off point to public protests since immediately after his dismissal, Anwar Ibrahim and his supporters set off a group famously known as Reformasi (Reform) movement. The movement took its name after the Reformasi movement in Indonesia which held a campaign against Suharto over his authoritarian rule for 30 years, which was very much similar to Mahathir's ruling regime, demanded for his resignation, government transparency, accountability and integrity[23]. Under this movement, several mass rallies had taken place to express the people's disagreement over the government's ruling party, the National Front, or famously known as BN[24].

Since the emergence of Reformasi movement, numbers of people that joined the political rallies were arrested notwithstanding the freedom to peaceful assembly and freedom of expression is essentially protected by the Constitution. Various reports by human rights bodies proved that police and violence were no strangers towards marchers who were publicly expressed their non-conformity with the government's decisions or actions. For instance, Amnesty International in its document reported the police violently dispersed a 7,000-strong demonstration of Anwar's supporters, who were marching peacefully towards Prime Minister Mahathir's residence, by shooting water cannons and teargas at the crowd and announced the gatherings as unlawful. Hundreds of demonstrators were beaten during and

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22 Hafiz Isa, *"The Reformasi Movement and Environmental Non-Governmental Organizations in Malaysia"*, (Master Dissertation), Nagoya University, March 2012, p.9. Accessed on June 17, 2017.

23 Ibid. p.9.

24 BN (Barisan Nasional) is a far right political party consist of 13 component parties and dominate Malaysian Parliament ever since it was created in 1973. There are 3 major parties under BN that represent 3 major races in East Malaysia; (i) United Malays National Organization (UMNO), (ii) Malaysian Chinese Association (MCA) and, (iii) Malaysian Indian Congress (MIC). Further information on BN can be accessed at its website: www.barisannasional.org.my/en

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after the arrests. In the same month, the strong supports shown by the citizens finally led to Anwar and his 17 political associates' arrest and detention without charge under the draconian **Internal Security Act 1960 (ISA)**[25]. On that day alone, it was estimated 30,000 people went to street to demonstrate, making it the largest protest in decades[26]. Later on, Anwar faced 5 charges of sexual impropriety (sodomy)[27] and five charges of corruption[28]. Anwar was found guilty for corruption (1999) and sodomy (2000) for 6 years and 9 years imprisonment respectively. Nonetheless, Anwar's convictions did not reflect a victory to Mahathir, instead as Pandian said, it was just the starting point to gain more votes and supports in the 1999 general election[29].

The Impact of Reformasi Movement

(i) A coalition of opposition political parties from diverse ideologies and ethnicities

Prior to Reformasi, the government's strong opponents such as Pan-Malaysian Islamic Party (PAS)[30] and Democratic Action Party (DAP)[31] moved separately. During the heat of Reformasi, a new party was formed and led by Anwar's wife, Wan Azizah Wan Ismail, called National Justice Party (PKN: *Parti Keadilan Nasional*) and for the first time ever, the biggest opposition political parties from different ideologies and ethnicities were joined together and formed a coalition known as Alternative Front (BA: *Barisan Alternatif*)[32], timely coincide with the general election which was held in 1999. Despite of the continuous

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25 Amnesty International, *"Malaysia: The Arrest of Anwar Ibrahim and his political associates: An Update",* (AI Index:ASA 28/39/98), 1998, p.2. Accessed on June 17, 2017.

26 Sheila Nair, *"The Limits of Protest and Prospects for Political Reform in Malaysia"*, Critical Asian Studies, Vol. 39:3, 2007, p.351.

27 **Section 377B of the Penal Code**

28 **Section 2 (1) of the Emergency (Powers) Ordinance No. 22. 1970**.

29 Sivanurugan Pandian, "*1999 Malaysia's General Elections: Does Voting Consist of a Single Factor or Several Factors?",* The Social Sciences Vol. 7 (1), Medwell Journals, 2012, p.101.

30 Mostly joined by Malay Muslims community.

31 Mostly joined by Chinese and Indian communities

32 The Malaysian People's Party was the 4th one who joined the Alternative Front. .

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victory of government ruling party[33], the 1999 general election witnessed the behaviour and perception of the public experiencing and dramatic change. The emergence of Anwar's new party had not only successfully brought people of different ethnics and religions background in one formation, but 'its performance also proved far better than several other parties which had stood for elections previously' (Pandian, 2012). Without doubt, Anwar was a singularly important figure and a critical factor in the protest against state power and its excesses in post crisis Malaysia[34]. The political discourse which once was race-based now has changed to a more multicultural perspective[35].

The Alternative Front was succeeded by the People's Pact (*Pakatan Rakyat*) in 2008 then dissolved in 2015. The latest political coalition among opposition parties are known as the Hope's Pact (*Pakatan Harapan*) which was formed in 2015. Since 2015, Anwar has to serve 5 years imprisonment sentence as the Federal Court upheld his sodomy conviction. The People's Justice Party (PKR: *Parti Keadilan Rakyat*) found by him is presided by his wife, Wan Azizah binti Wan Ismail.

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(ii) Constant violation of the human rights

Anwar arrest was part of series where the fundamental liberties in Malaysia have been violated. In SUARAM[36] report[37], from 1998 to 2000, the Legal Aid Centre of Kuala Lumpur Bar Council showed a record that 787 arrests were made nationwide at various assemblies.

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33 In 1995, BN won 162 seats from 192 seats contested. Meanwhile in 1999, BN still governed the country with 2/3 majority, but it was reduced to 148 seats out of 193 seats contested. 45 seats in 1999 general election were swept clean by the Alternative Front.

34 Sheila Nair, Op. cit. p.351.

35 Abdul Rashid Moten, "*2004 and 2008 General Elections in Malaysia: Towards a Multicultural, Bi-Party Political System?",* Asian Journal of Political Science, Vol. 17 (2), August 2009.

36 SUARAM, abbreviated from Suara Rakyat Malaysia, (Voice of Malaysian People) is the non-governmental organization established in 1989 with the aims to monitor and advocate for the respect of human rights in Malaysia. Among the campaigns highlighted by SUARAM are the right to trial, right to justice, to provide assistance and protection to refugees and asylum seekers and campaigning for local democracy and good governance. Its official website can be accessed at: www.suaram.net

37 SUARAM, "*Malaysian Human Rights Report 2001: Civil and Political Rights",* SUARAM Kommunikasi, 2001, pp. 75-89.

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Out of the total, 70% were found not guilty, signifying that such arrests were made without concrete evidence or due process[38].

Many politicians and NGOs activists were arrested and detained without warrant under the **Internal Security Act**, in which it led to another protests demanded for its repeal. Due to that, any gatherings which were not conform to government's actions or opinions, have been considered as unlawful and led to more arrest of the participants under the **Police Act 1967** or **Penal Code**. On top of that, the authorities have also threatened to invoke the **Societies Act 1966**, declaring certain NGOs as illegal, and to use the **Universities and University Colleges Act 1974** to prevent students from participating the Reformasi and other similar protests. In addition, the **Sedition Act** and the **Printing Presses and Publications Act** were also used to curb the freedom of speech and expression. For example, the government interpreted the actions below as seditious when: [39]

- Zulkifli Sulong, editor of the opposition newspaper Harakah, and Chia Lim Thye, who held the permit for Harakah's printing company, were charged under the Sedition Act in January 2000 for an article relating to the Anwar Ibrahim sodomy trial allegedly written by Chandra Muzaffar, deputy president of the National Justice Party (PKN). The article alleged that there was a government conspiracy against Anwar.

- Karpal Singh, lead counsel for Anwar Ibrahim and deputy chairman of the Democratic Action Party (DAP), was arrested on 12 January 1999 and charged for sedition for statements he made in court during Anwar's sodomy trial when

[38] SUARAM, Op. cit. p.72.
[39] Article 19: Global Campaign For Free Expression, Op. cit. p.12.

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he told the court that Anwar might have been poisoned, adding "I suspect that people in high places are responsible for the situation."

Although Reformasi ended in 1999 after the general election, its implications on wide range of issues in Malaysia were significant and the peaceful protests against state hegemony continue until now. The separation of multiracial community in Malaysia since then was politically oriented and divided into two; pro-government or pro-opposition. Additionally, its impact on the formation and abolition of the human rights laws was also crucial and must not be excluded. Hence, it leads to further discussion on the Bersih movement.

(b) BERSIH MOVEMENT

After Mahathir's retirement in 2003[40] from Prime Minister's office, the post was taken over by Abdullah Ahmad Badawi[41], also known as Pak Lah (Uncle Lah), handpicked by himself. Under Pak Lah's rule, during Malaysian 2004 general election, the government's ruling party, the National Front scored a resounding victory in the history of Malaysian electoral politics. In the 11th general election, the National Front splendidly won 198 of the 219 parliament seats which equivalent to 90.4% of all seats in the parliament, which made them as the highest parliament's domination ever[42]. It is said the landslide victory of National Front was greatly contributed by Pak Lah factor. He came with different persona from his predecessor which was seen as a religious leader, decisive in tackling high level corruptions[43],

[40] Mahathir Mohamad held in office as a Prime Minister from July 16, 1981 until October 31, 2003.
[41] Abdullah Ahmad Badawi held in office as a Prime Minister from October 31, 2003 until April 3, 2009.
[42] Francis Loh, *"Understanding the 2004 Election Results: Looking Beyond Pak Lah Factor"*, Aliran Monthly,Vol. (3), 2004. Accessed on May 5, 2017.
[43] Joseph Chinyong Liow, *"A Brief Analysis of Malaysia's Eleventh General Election"*, UNISCI Discussion Papers, IDSS-Nanyang Technological University, Singapore, October 2004, p.2.

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well known with the concept he introduced as Islam Hadhari (Civilizational Islam) which acceptable to all Malaysians[44] and appeared with a softer approach.

The Controversy During the General Election in 2004

However, Pak Lah's outstanding profile had a catch. The pre general election was hampered with controversies when the Election Commission of Malaysia (EC)[45] came with several policies, amongst are[46]:

i) The campaign period was the shortest in Malaysian general election's history i.e. 8 days

ii) The chairman of EC had disqualified several top opposition leaders from contesting due their court convictions.

iii) Late announcement of polling locations had caused the ballots were scattered to different places.

iv) The extension of voting hours without authorization.

v) Gerrymandering; the increase of seat allocations in pro-government states such as Johor and Sabah. In contrast, no seat allocations in pro-opposition states, such as in Terengganu, Kedah and Perlis.

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44 Khoo Ying Hooi, *"Electoral Reform Movement in Malaysia: Emergence, Protest, and Reform"*, SUVANNABHUMI Vol. 6 (2), December 2014, p.92.

45 In a national language, it is known as *Suruhanjaya Pilihan Raya Malaysia*. Its official website is available at: http://www.spr.gov.my/

46 Joseph Chinyong Liow, Op. cit. p.4.

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The Emergence of BERSIH

Originally, BERSIH came into the political frame as a group of 26 civil society organisations and 5 political parties which was formed in July 2005 and started its journey under the name of the Joint Committee for Electoral Reform. The 5 political parties were none other than Anwar's and his alliance parties; People's Justice Party (PKR)[47], PAS, DAP, Socialist Party of Malaysia (PSM: *Parti Sosialis Malaysia*) and Sarawak National Party (SNAP).

The name was later changed to the Coalition for Clean and Fair Elections, more colloquially referred as BERSIH[48] and officially re-launched on 23 November 2006 in the Malaysian Parliament building lobby and with the objective was to push for a thorough reform of the electoral process in Malaysia through rallies and demonstrations. Then again in 2010, this movement was re-launched as BERSIH 2.0[49] that comprised of 89 non-governmental organisations (NGOs), a coalition of civil society organizations unaffiliated to any political party. Yet, it maintains the parallel objective; to reform a clean and free corruption government through general elections and use the street demonstration as one of the mediums to reach the Malaysian citizens. Hence, it is important to note that that BERSIH and BERSIH 2.0 are two different entities despite of their similar objectives. However for the reader's convenience, BERSIH 2.0 will be referred as BERSIH from now on.

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47 PKR is unification between Anwar's former party, National Justice Party with Malaysian People's Party in 2003. Previously both parties allied together for general election in 1999.

48 Its Malay name is *Gabungan Pilihan Raya Bersih dan Adil*. BERSIH literally means clean.

49 Further information about Bersih 2.0 is available at: http://www.bersih.org/

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Triggered by the unfair general election in 1999[50] and frustrated over irregularities during 2004 general election[51], in attaining its objective of campaigning for clean and fair elections in Malaysia, BERSIH maintained its 8 demands through three mass rallies, (a) BERSIH on November 10, 2007, (b) BERSIH 2.0 (known as Walk for Democracy rally) on July 9, 2011, and (c) Bersih 3.0 (known as Sit-In rally) April 28, 2012, namely:

(i) Clean the electoral roll;

(ii) Reform postal ballot;

(iii) Use of inedible ink;

(iv) Minimum of 21 days campaign period;

(v) Free and fair access to media;

(vi) Strengthen public institutions;

(vii) Stop corruption; and

(viii) Stop dirty politics.

Since the beginning of its establishment, BERSIH faced a lot of pressures from the authorities throughout the rallies and campaigns organized by them. For instance, when BERSIH announced to proceed their plan to organize the first BERSIH rally in November 2007, notwithstanding the police refusal to issue a permit, the government and police have warned the public against joining the 'illegal assembly' and threatened to arrest anyone who participate. On that day, all major roads and highways were blocked and even at some locations, the police were reported to use tear gas and water cannons to disperse the

[50] Khoo Ying Hooi, "*Mobilization Potential and Democratization Processes of the Coalition and Fair Elections (Bersih) in Malaysia: An Interview with Hishamuddin Rais"*, ASEAS, Vol. 7(1) 2014, pp.111-120.

[51] Khoo Ying Hooi, Op. cit. no. 192, p.90.

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gatherings. The rally which was attended by 40,000-60,000 participants has led to 29 arrests and 17 of them were charged for various violations[52].

Declaration of BERSIH as Unlawful Organization

The movement was also declared as an illegal society by the Home Minister, a week before BERSIH 2.0 rally in 2011 took place. In the case of **Dato' Ambiga Sreenevasan & Ors v. Menteri Dalam Negeri & Ors**[53], the government's effort in policing and curbing any unlike-minded political rallies can be seen when an order was made to declare that BERSIH movement was an illegal society. Prior to the order, BERSIH 2.0 planned to organise a rally on 9 July 2011. However about a week before the scheduled date, the Home Minister issued an order to declare BERSIH as an unlawful society pursuant to **Section 5 (1) of the Societies Act 1966**[54] (**SA 1966**). Such declaration was made on the on the ground that the Bersih movement is *'being used for purposes prejudicial to the interest of the security of Malaysia and public order'*. Plus it was also splashed in the main and electronic media that BERSIH 2.0 has been moving actively and creating a situation of unrest and worry among the community; spreading propaganda to incite the people for the purpose of toppling the Government by distributing certain brochures; and giving the country a bad image through its activities which could also threaten public order, security, economy prosperity, sovereignty and harmony among the races. In response to the respondents' arguments, among of assertions in the affidavit made by the Applicants was Bersih 2.0 is a non-partisan movement

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[52] Lee Hock Guan, *"Malaysia in 2007: Abdullah Administration under Siege"*, Southeast Asian Affairs, Yusof Ishak Institute, Vol. 2008, p.198.

[53] **Dato' Ambiga Sreenevasan & Ors v. Menteri Dalam Negeri & Ors [2012] 5 MLRH 181**

[54] **Section 5 (1) of the Societies Act 1966** provides: "*It shall be lawful for the Minister in his absolute discretion by order to declare unlawful any society or branch or class or description of any societies which in his opinion, is or is being used for purposes prejudicial to or incompatible with the interest of the security of Malaysia or any part thereof, public order or morality"*.

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free from any political affiliation and did not represent the former BERSIH. Nevertheless, despite the declaration Order, BERSIH 2.0 rally was proceeded as scheduled. Afterwards, an application was made by Ambiga Sreenevasan (co-chairperson of BERSIH 2.0) with eleven other applicants for an *order of certiorari* to remove the Order and proclaim it to be null and void. The High Court judge then overturned the Home Minister's decision declaring BERSIH 2.0 as an illegal organization.

Justice Rohana Yusuf in her judgment viewed that the Minister had acted within its power under Section 5 to declare the illegality of BERSIH 2.0 as it was an association within the definition of 'society' under **Section 2 of the SA 1966**. However the learned judge differed in opinion to sustain the Minister's order the decision as it tainted with irrationality and it would impinge on the rights guaranteed under the Federal Constitution to outlaw BERSIH 2.0. Her further reasoning can be read as follows, *'The conduct of the respondents in dealing and handling BERSIH soon after it had been outlawed did not reflect BERSIH as an unlawful society. It did not reflect the conduct of persons who found the society to be used for purposes prejudicial to the interest of the security of Malaysia and public order. It was difficult to reconcile how a society found to be used for purposes of threatening public security on 1 July 2011 could be allowed to organise a peaceful assembly on 9 July 2011. The decision to declare BERSIH unlawful therefore was questionable. Thus, the decision in finding BERSIH unlawful was tainted with irrationality. Having analysed the background against which the impugned order was made in its entirety, the impugned order was liable to be quashed on this ground*'. Accordingly, BERSIH 2.0 retained its status as a lawful organization.

The new amendment of the **Peaceful Assembly Act 2012** was also employed for the first time, when the government filed a suit against BERSIH claiming compensation for damages to property during their Sit-In Rally in 2012 (further discussion in sub chapter 4.5).

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While, on July 29, 2015, BERSIH announced their fourth rally after the exposure of a massive corruption scandal i.e. the 1MDB crisis, involving Najib Razak, the sixth Prime Minister of Malaysia to the public. The rally was held for 2 days consecutively from August 29-30, and ended up at midnight August 31 with the singing of national anthem, signified the celebration of Independence Day on that day. The rally had an impressive attendance of 500,000 local people and co-joined by Malaysian supporters in 65 cities worldwide, including in Seoul and Busan[55]. In contrast with their previous rallies, BERSIH 4 went in with new objectives; (i) free and fair elections, (ii) a clean government (iii) the right to dissent (iv) strengthening the parliamentary democracy (v) resignation of the Prime Minister, Najib Razak. Nevertheless, it is said that those objectives were outshined by citizens' desire for a new national leadership[56].

Meanwhile on April 21, 2016, **the May 18 Memorial Foundation** in South Korea announced BERSIH movement as the co-winner of the 2016 Gwangju Prize for Human Rights[57], recognizing their tireless efforts in advancing electoral reforms notwithstanding the difficulties they faced. However on May 15, 2016, Maria Chin Abdullah, BERSIH chairperson who was scheduled to accept the award, was barred from leaving the country while she was passing the immigration gate for a flight to Busan. According to Maria, "No explanation given except that it was Putrajaya's instruction"[58] [59].

The incident did not stop BERSIH from moving forward by declaring their demands of institutional reforms are still remained and continued with the fifth rally which was held on

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55 BERSIH, "*BERSIH 4 (29-30 August 2015)".* Accessed on May 5, 2017.

56 Lin MM, Azlee A, & Kumar K, "*Three Things We Learnt From Bersih 4",* the Malay Online, August 31, 2015. Accessed on April 4, 2016.

57 The news on *'2016 Gwangju Prize for Human Rights Recipients'* can be accessed at the May 18 Memorial Foundation official website: http://eng.518.org/sub.php?PID=0301

58 Alyaa Azhar, "*BERSIH Chief Barred From Leaving Malaysia, Cannot Accept South Korean Award"*, Malaysiakini, May 15, 2016. Accessed on May 11, 2017.

59 Putrajaya is the federal administrative centre of Malaysia.

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November 9, 2016. Under the tagline "Combine our energy, new Malaysia", BERSIH 5 rally came up with 5 old and new goals;

i) Free and fair elections;

ii) Clean government;

iii) Right to dissent;

iv) Strengtening the Parliamentary Democracy; and

v) Empowering Sabah and Sarawak (two states in East Malaysia).

The annoucement was responded by the Red Shirts, the pro government supporters who pledged to hold a counter assembly in order to confront BERSIH 5 rally. Although the decision was neither supported nor stopped by UMNO, the government's ruling party, but they were reminded that "those who participate must bear the consequences"[60]. On top of that, 24 hours before the rally, Malaysian Communications and Multimedia Commission (MCMC) raided the BERSIH office and arrested Maria Chin and BERSIH secretariat member, Mandeep Singh then were brought to the police station nearby[61]. It is reported, the organization was investigated under **Section 124C of the Penal Code** for an attempt to commit activity detrimental to parliamentary democracy[62]. Furthermore, several opposition politicians were also arrested in separate places prior to the rally. During the rally, the police estimated about 15,000 protestors turned up in Kuala Lumpur for protest[63].

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[60] Haikal Jalil, *"UMNO Will Not Stop Its Members From Joining Red Shirts Group"*, the Sun Daily, November 6, 2016. Accessed on May 5, 2017.

[61] *"Police arrest Maria Chin after Bersih raid"*, Free Malaysia Today, November 18, 2016. Accessed on May 11, 2017.

[62] If a person is found guilty, he shall be punished with imprisonment for a maximum of fifteen years.

[63] Melissa Goh & Sumisha Naidu, *"More Than 15,000 Turn Up For Bersih 5 Rally In KL"*, Channel News Asia, November 19, 2016. Accessed on May 11, 2017.

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The Impact of BERSIH Movement

The efforts poured by the concerned people and BERSIH constant demands were not in vain. Finally, several reforms in electoral process have been made during the 2008 general elections, for example: (i) the use of transparent ballot boxes; (ii) full electoral rolls for checking and verification are available; (iii) serial numbers on ballot papers are excluded; and (iv) the employment of polling agents during the casting of postal ballots. The use of inedible ink was also approved by the Election Commission, but its implementation was postponed to the 2013 general election[64].

Welsh elaborated BERSIH indubitably played an important role in the democratisation process in Malaysia, firstly by strengthening the opposition forces, and secondly, by renewing the importance of calls for political reform. The keys of its success were based on (i) the exploitation of the social media as the platform to distribute information, and to mobilize and organize its supporters, after the mainstream media were strictly controlled by the government, and (ii) its influence expanded to every ethnic, racial and religious demographics in Malaysia[65]. She added, "BERSIH has brought to the surface deep seated insecurities among Malaysia's incumbent elite who have held onto power since 1957"[66].

Due to the extensive acceptance by Malaysians over BERSIH calls to express their disagreement on the streets, it is not a surprise that BERSIH rallies and its alike assemblies were strictly controlled and received heavy pressures by the government. BERSIH

64 Khoo Ying Hooi, Op. cit. No. 192, p.101.

65 Sandra Smeltzer & Daniel J. Paré, "*Challenging Electoral Authoritarianism in Malaysia: The Embodied Politics of the BERSIH Movement*", A Journal For and About Social Movements, Vol. 7 (2), November 2015, p.121.

66 Bridget Welsh, "*People Power in Malaysia: BERSIH Rally and Its Aftermath"*, Asia Pacific Bulletin No. 128, East West Center, August 10, 2011, p.1.

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demonstrations are notably the most outstanding protest events in Malaysian history[67]. Also, BERSIH and its allies had indirect major influences over the abolishment of provisions in the **Police Act** and the amendment of the **PAA** when many concerned parties voiced out the repetitious violation of fundamental liberties as set out in **Article 10 of the Constitution**, including the Human Rights Commissions of Malaysia, also known as SUHAKAM. In the next paragraph, I will discuss the important roles and duties of SUHAKAM which led to the development of human rights in Malaysia, and specifically the right to freedom of peaceful assembly.

(c) THE HUMAN RIGHTS COMMISSION OF MALAYSIA aka SUHAKAM

The calls for the establishment of Malaysian national human rights institution has been made since the early 1990s, but it only came into realisation in 1999 when encroachment of human rights were increased during the Reform Movement. It was Musa Hitam who actively pushed for its creation after he has been served as Malaysian's special envoy from 1990 to 1992 and became the Chairman of the Malaysian delegation to the UN Commissions on Human Rights. Prior to that, Musa Hitam was the ex Deputy Prime Minister serving under Mahathir but resigned after disagreements occurred between his superior and him. Thus, it was not surprising the set up of SUHAKAM took a long time to realise as Mahathir was constantly against the idea[68]. Finally, in 1999, SUHAKAM[69], abbreviated from the Suruhanjaya Hak Asasi Manusia, was established under the **Human Rights Commission Act 1999**, chaired by Musa Hitam and held its inaugural meeting on April 24, 2000.

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67 Khoo Ying Hooi, Op. cit No. 198, p.86.

68 Ken Marijtje Prahari Setiawan, *"Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia",* Leiden University Press, 2013, p.115.

69 The official website of SUHAKAM can be accessed at: http://www.suhakam.org.my/

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Under the **Human Rights Commission Act 1999**, **Section 4 (2)** provides four functions of the Commission in furtherance of the protection and promotion of human rights:

(a) To promote awareness and to provide education in relation to the human rights;

(b) To advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;

(c) To recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and

(d) To inquire into complaints regarding infringements of human rights referred to in Section 12 (the power to inquire on its own motion or on complaint).

It is also important to mention the SUHAKAM is vested with 6 powers to execute its duties, which are:

(a) To promote awareness of human rights and to undertake research by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research;

(b) To advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken;

(c) To study and verify any infringement of human rights in accordance with the provisions of this Act;

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(d) To visit places of detention in accordance with procedures as prescribed by the laws relating to the places of detention and to make necessary recommendations;

(e) To issues public statements on human rights as and when necessary; and

(f) To undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.

Since the beginning of its operation, SUHAKAM was vocal in criticising the government's actions for transgressing the freedom of expression, movement, assembly and association of the Reformasi activists and the government critics. Throughout its operation, countless petitions and complaints over the violations of the human rights by the government were submitted to SUHAKAM. Upon the complaints' receipt, the public inquiries were formed to investigate such claims human rights violations and the reports were tabled in the Parliament or submitted to the government for further action. In 2016 alone, 879 complaints were lodged alleging various human rights violations including the right to nationality; native customary land rights; right to seek asylum and refugee status; arbitrary arrests, detention and exile[70]. SUHAKAM on its own motion and on the complaints had conducted series of public inquiry and investigations when there were allegations on the violations of the freedom of assembly during Reformasi and BERSIH rallies by the government, for example: the Kesas

[70] SUHAKAM, *"SUHAKAM Annual Report 2016"*, Human Rights Commission of Malaysia, 2017, p.4.

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Highway Incident[71], The Incident at KLCC[72], the Public Inquiry of BERSIH 2.0 Rally[73] and the Public Inquiry of BERSIH 3.0 Rally[74].

SUHAKAM has not just played a major role for highlighting the freedoms the Reformasi and BERSIH activists should deserved, but also repeatedly requested for the repeal of the **Police Act 1967** and proposed for the amendment, in which some of the recommendations will be discussed in the next chapter. To conclude, coordinator of SUARAM once portrayed SUHAKAM has legitimised the human rights concepts in Malaysia by providing space for activism, *"... and we (human rights NGOs) finally had a public institution that was on our side"*.[75]

[71] The full title is the *"Inquiry2/200: Inquiry on Its Own Motion into the November 5th Incident at the Kesas Highway"*

[72] The full title is the *"Report of SUHAKAM Public Inquiry into the Incident at KLCC on 28 May 2006"*.

[73] The full title is the *"Report of the Public Inquiry into the Infringement of Human Rights including the Use of Excessive Force Prior to and During Assembly on July 9, 2011"*.

[74] The full title is the *"Report of SUHAKAM Public Inquiry into the Incidents During and After the Public Assembly of 28 April 2012"*.

[75] Ken Marijtje Prahari Setiawan, Op. cit. p.121.

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3.3.3 THE POLICE ACT 1967 AND OTHER RESTRICTIVE LAWS PRIOR TO 2012

Before the **Peaceful Assembly Act 2012** was enforced in 2012, there are several laws that limit the right to freedom of peaceful assembly in Malaysia, that is: (i) **the Police Act 1967**, (ii) **Public Order (Preservation) Act 1958,** and (iii) **Sections 141 and 142 of the Penal Code**. Pursuant to **Article 10 (2) (b) of the Federal Constitution**, a law may be imposed to restrict the right to assemble in peace and without arms, if the Parliament deems it necessary and expedient to protect the security of Malaysia and its states, or for public order.

i. THE POLICE ACT 1967

The **Police Act 1967** (hereinafter is referred as the **Police Act**) was one of the most controversial laws in Malaysia due to its almost absolute prohibitive provisions against the right to assemble peaceably without arms. The relevant provisions that gave the authorities the power of crowd control were provided in **Sections 27, 27A, 27B,** and **27C**. The main provision is **Section 27** where it prescribes:

> *(1) Any Officer in Charge of a Police District or any police officer duly authorized in writing by him may direct, in such manner as he may deem fit, the conduct in public places in such Police District of all assemblies, meetings and processions, whether of persons or of vehicles and may prescribe the route by, and the time at, which such assemblies or meetings may be held or such procession may pass.*
>
> *(2) Any person intending to convene or collect any assembly or meeting or to form a procession in any public place aforesaid, shall before convening, collecting or forming such assembly, meeting or procession make to the Officer in Charge of the Police District in which such assembly, meeting or procession*

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is to be held an application for a licence in that behalf, and if such police officer is satisfied that the assembly, meeting or procession is not likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace, he shall issue a licence in such form as may be prescribed specifying the name of the licensee and defining the conditions upon which such assembly, meeting or procession is permitted:

Provided that such police officer may at any time on any ground for which the issue of a licence under this subsection may be refused, cancel such licence.

(2A) An application for a licence under subsection (2) shall be made by an organization or jointly by three individuals.

(5) Any assembly, meeting or procession—
(a) which takes place without a licence issued under subsection (2); or
(b) in which three or more persons taking part neglect or refuse to obey any order given under subsection (1) or subsection (3), shall be deemed to be an unlawful assembly, and all persons attending, found at or taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no licence has been issued, all persons attending, found at or taking part or concerned in convening, collecting or directing such assembly, meeting or procession, shall be guilty of an offence.

To summarise, **Section 27** immensely vested the power to any Officer in Charge of Police District (OCPD) to authorize in writing any assemblies, meetings and processions in

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public places, upon any applications by an organization or jointly by three individuals[76]. This authoritative power covered individuals, vehicles, route, time and venue of the assemblies or meetings may be held, or procession may pass. Furthermore, the OCPD may specify any conditions on the license, and also at any time on any ground to refuse or cancel the issuance of licence if the assembly is likely cause threats to the national security or public order[77]. Nonetheless, in the case of **Chai Choon Hon,** the Court ruled that Police cannot impose limitations on the number of speakers at assembly nor to restrict the subject matter of the speeches[78].

In fact, as provided by **Clause 5**, a person may be found guilty by merely present at the assembly which has not been issued with the police permit. Prior to 1988, the law required a strict element of '*taking part*' in the unlawful assembly before a person can be charged under the **Police Act.** However, looking at difficulties to prove such elements, the Parliament has amended the provision by adding the phrase '*being found*' as part of the elements of **Section 27**, unless he can prove that his presence has came about through innocent circumstances and that he had no intention to be associated with the assembly[79]. This discussion is also available in the next sub-chapter, in the case of **Cheah Beng Poh**.

The crowd control's power that given to the police is so vast that any assembly, meeting or procession that convene without the police permit shall be considered as unlawful and may be stopped by the police[80] and be arrested without warrant[81]. In addition, **Section 27A** extended the police's power where, under certain circumstances the Police may stop the

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76 **Section 27 (2A)**
77 Ibid. **Clause (2)**
78 **Chai Choon Hon v. Chief of Police District, Kampar and Government of Malaysia [1986] 2 MLJ 203**
79 **Section 27 (5B)**
80 **Section 27 (3)**
81 **Section 27 (6)** and **Section 27A (5)**

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assemblies which are held on private properties and order the participants to disperse. In consequence, any person who is guilty under **Section 27 and Section 27A**, as an organizer or participant, shall be liable on conviction to a fine between RM 2,000 and RM 10,000, and imprisonment for a term not exceeding one year[82]. **Section 27B** further allowed the police to use force as is reasonably necessary if persons are refused to disperse after they are ordered to do so. An there was only one sub section which allowed an organiser to appeal in writing if the application for license is refused, and the decision of the higher authority thereon shall be final[83].

ii. THE PUBLIC ORDER (PRESERVATION) ACT 1958

Another relevant law that also restricts the right to assemble can be found in the **Public Order (Preservation) Act 1958 (POPA)**. **Section 3 (1)**, for example, grants the power to the Minister to proclaim any area of a state of danger to public order if in his opinion such area is seriously disturbed or is seriously threatened. Subsequently, **Section 4** further restricts that in any proclaimed area, the police may regulate, restrict, control or prohibit the use of or close any road, street, path, waterway or any public place. This provision is also extended to the use of any vehicle or vessel. Whilst **Section 5 (1)** expressly prohibits absolutely or conditionally any procession, meeting or assembly of five or more persons in any proclaimed area. And if it is necessary for the public security, any police officer is authorized to use such force to disperse any processions, meeting or assembly in which the force may extend to the use of lethal weapon. To date, the **POPA** is still available to be used by the Minister.

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82 **Section 27 (8)**
83 Ibid **Clause 7**

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iii. PENAL CODE

The **Penal Code** is the only legislation that legally defines the term 'unlawful assembly'. From **Section 141** to **Section 158**, **Chapter VIII of the Code** specifically deals with the offences relating to the unlawful assembly. The provisions in this Code are however, hardly ever applied in the context of the right to assemble due to the then provisions in the **Police Act**. For instance, **Section 141** states that:

> *"An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is—*
>
> *(a) to overawe by criminal force, or show of criminal force, the Legislative or Executive Government of Malaysia or any State, or any public servant in the exercise of the lawful power of such public servant;*
>
> *(b) to resist the execution of any law, or of any legal process;*
>
> *(c) to commit any mischief or criminal trespass, or other offence;*
>
> *(d) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or*
>
> *(e) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.*
>
> *Explanation—An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly."*

Section 142 adds, *"Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member*

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of an unlawful assembly". Any person, who is found guilty being as a member of the unlawful assembly, will be sentenced to maximum 6 months imprisonment or be fined, as provided by **Section 143**.

While the rest of the provisions in this Chapter, are the variation of offences pertaining to the unlawful assembly. Those offences are: **Section 144** deals with an offence of possessing weapons at the unlawful assemblies; **Section 145** is an offence of continuing to join the unlawful assembly which has been commanded to disperse; **Sections 146, 147** and **148** are the offences for causing a riot at the unlawful assembly; **Section 149** presumes every member is guilty when an offence is committed by any member of the unlawful assembly; **Section 150** punishes whoever hires or promotes any person to join the unlawful assembly; **Section 151** requires at least 5 person of the unlawful assembly who are likely to cause a disturbance of the public peace, before they can be convicted under this section; **Section 152** penalizes any person who assault or obstruct to any public servant in the discharge of his duty to disperse the unlawful assembly; **Section 153** also punish any person who wantonly giving provocation to any person with the intention to cause riot; **Sections 154, 155** and **156** turn an owner of the land as an offender if he allows the unlawful assembly to be held on his land, or when he receives any benefits from such assembly. The same liability is also applied to the agent of the owner of the land; **Section 157** criminalizes any conduct of harbouring, receiving, or assembling any persons who are about to join the unlawful assembly in any premises; and **Section 158** punishes any person who is hired to join the unlawful assembly in **Section 141** with the maximum 2 years imprisonment or fine.

For comparison, the offences and punishments under the **Penal Code** are apparently graver than the **Police Act** and the **Peaceful Assembly Act 2012** as well, as the provisions

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requires the *men rea* and more complex *actus rea* elements before someone could really be convicted. Given to its elements which are harder to be proved, the prosecution were usually resorted to the **Police Act** whereby the absence of the police permit to hold the assembly was a sufficient ground to declare it as an unlawful. Therefore, there is generally less scope for spontaneous protest due to the numerous legal prohibitions and the policy requiring police permits for any public gathering (Sani, 2008)[84].

THE IMPLEMENTATION OF LAWS UNDER THE POLICE ACT

Relying on these two laws above, the definition of unlawful assembly certainly has a significant difference before the law was amended in 2012, given that it depends entirely on the existence of the police permit. The police had sole power to issue, refuse or cancel the license, and to arrest anyone who takes part in assemblies without licence, even though what seems threat to the police was unclear and unjustifiable. Therefore, a mere presence in assembly for which no license had been issued does not amount to guilty of an offence under **Section 27**.

This contention was affirmed in the appeal case of **Ismail b. Ishak**[85] where sixty accused persons were charged under **Section 27 (5) (a) of the Police Act** for taking part in an unlawful assembly in the compound of National Mosque, Kuala Lumpur. The accused were originally charged under **Section 143 of the Penal Code** on the ground being "members of an unlawful assembly" and "had common object of which show criminal force against the police in dispersing the assembly". Afterwards, the charge was altered to the **Police Act** for

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84 Mohd Azizudin Mohd Sani, "*Freedom Of Speech And Democracy In Malaysia",* Asian Journal of Political Science, Vol. 16:1, 2008, p.91.

85 **Public Prosecutor v. Ismail b. Ishak & 59 Ors. [1976] 1 MLJ 183**

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"did take part in an unlawful assembly for which no license has been issued" in the compound of National Mosque. On the date of the incident, there were demonstrations at 3 places where the first two gatherings were dispersed then reassembled at, or driven to the National Mosque. The learned judge elaborate in his judgment where there is a distinction between "taking part" under the **Police Act** and "being member of or is found at an unlawful assembly" under the **Penal Code**. Taking part in an unlawful assembly calls for a more active part than the mere presence, for example the person carry the banners, distribute pamphlets, use the loud hailers to address the crowd or shout their approval at the speeches. He further added "*it was not the intention of the legislature that all persons who are merely found at an assembly for which no license had been issued under* ***Section 27 of the Police Act*** *shall be guilty of an offence*" and the prosecution might succeed should the charge was made under the **Penal Code**. Hence, the order of acquittal and discharge was upheld, and appeal was dismissed.

Further description of unlawful assembly under **Section 27** was illustrated in the landmark case of **Cheah Beng Poh**[86] where an assembly, meeting or procession is deemed in law to be 'unlawful assembly' if three or more persons taking part disobey any order of the police officer to disperse, and also if it takes place without licence. The learned judge added, "*An assembly is complete, as it were, by collection or aggregation; no form or object in coming together is required*"[87], therefore it is a question of fact whether there is a participation. In this case, a group of lawyers and others who participated in the 1981 Lake March Club were marched from the club to the Parliament in order to protest the amendments of the **Societies Act 1966**, as the enactments were rushed through the legislature with little

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86 **Public Prosecutor v. Cheah Beng Poh & 42 Ors. [1984] 2 MLJ 225**

87 In this case, the learned judge adopted the definition of "assembly" from Brownlie's Law of Public Order and National Security, 2nd edition p.31.

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consultation and curb more the freedom of expression, assembly and association[88], where eventually 42 lawyers were arrested and charged under **Section 27**.

The judge in his view decided that the fact the accused persons went to the gate of Parliament at the material time for 'various reasons', then they were in law taking part in the assembly, for if they went there to assemble which already formed and remained there. And thus it is a clear finding of participation for the purpose of **Section 27 (5) of the Police Act**. In this case, the court held that the prosecution had proved a prima facie against all the appellants and they were correctly called upon to make their defence. Accordingly, the appeal against the finding of guilt is also dismissed. As said by Whiting, the **Cheah Beng Poh**'s case is still considered as an important case on freedom of assembly, whereby "the lawyer-defendants enjoyed their time in the dock, considering it a badge of professional pride and achievement to be prosecuted for insisting upon constitutional liberties in the face of unconstitutional statutes".

Historically, based on the case law before 1988, to find a person "taking part" in an unlawful assembly" is a difficult element to prove. Therefore, the Parliament took a bad decision by amending **Section 27 (5)** permitting an arrest of without warrant if a person is merely present in an unlawful assembly, even though that person is an innocent bystander[89]. Although the innocent person may use **Section 27B** as a defence, however he has to prove no intention whatsoever on his part to join the assembly. As we can see, prior to the 2012 amendment, the legislative bodies had used their power to constrict people's freedom to assemble and express their disagreement on the streets, and even the courts too took a

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88 Amanda Whiting, Op. cit. p.3.

89 SUHAKAM, "*A Report By The Human Rights Commission Of Malaysia: Freedom Of Assembly",* Human Rights Commission of Malaysia, 2001, p.12. This report was released on August 2, 2001 and has been presented in the Parliament on November 7, 2001.

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restrictive approach to distinct the (un)lawful assembly and define the extension of its freedom within the legal provisions ambit only.

THE CONSTITUTIONALITY OF SECTION 27 OF THE POLICE ACT 1967

The constitutionality of the police permit has been challenged quite abundantly, however the courts through all the cases were adamant in keeping **Section 27** within the constitutional ambit. In the case of **Datuk Yong Teck**[90], the plaintiff, a member of Sabah Legislative Assembly faced 2 charges for participating in illegal procession in Kota Kinabalu. He filed suits which one of the two was seeking declaration of Section 27 is beyond the scope of power given by the Federal Constitution:

> *"A declaration that **Sections 27(2)** and **(5) of the Police Act, 1967** are ultra vires the **Federal Constitution** in that they contravene **Article 10(1)(b)** as the stated sections are prohibitive and not restrictive in nature".*

It was held that the requirement to apply a license to assemble in **Section 27 (2)** is not prohibitive, rather it is designed to facilitate and regulate to meet the requirement of **Article 10 (2) of the Federal Constitution**. If the police satisfy such assembly is not harmful to the national security or public peace, the police will and must issue a license.

The decision was also reaffirmed in (probably) the final **Section 27** constitutional challenge case of **Nik Noorhafizi b. Nik Ibrahim**[91] as the appeal decision was delivered after the **Peaceful Assembly Act 2012** came into force for a year. In 2001, the 5 appellants were charged and convicted under **Section 27(5) of the Police Act** after being found in

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90 **Datuk Yong Teck Lee v. Public Prosecutor [1993] 1 MLJ 295**

91 **Nik Noorhafizi b. Nik Ibrahim & 4 Ors. v. Public Prosecutor [2013] 6 MLJ 660.**

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unlawful assembly in the National Mosque compound. The issue on the provision's constitutionality came in after the High Court dismissed their appeal to be discharged.

Again, the honourable judges in the Court of Appeal upheld the decision on **Cheah Beng Poh** and **Siva Segara**[92] where the issuance of permit by the police and its penal provision do not amount to total prohibition of a freedom of peaceful assembly and hence the **Article 10 (2) of the Federal Constitution** was not violated. The judges further raised a question *"is it a reasonable restriction to require any person intending prior to convening or collecting any assembly or meeting or forming any procession in any public place to make an application for a licence under* ***Section 27 (2) of the PA 1967****?"* The learned judge further added *"The powers to be exercised by the OCPD (police) are canalized and are not naked and potentially not arbitrary nor disproportionate. Quite clearly our system places more trust on the police in their management of national security and public order issue".*

The objective of such restriction was solely for the purpose to evade any threat that may likely breach the national security and above all the concern should be on public order and for public's protection. Since the public assembly, meeting, procession and its kind are potentially can be the spark of chaos, riot and disorder, the licensing requirement is needed to allow the police to make an intelligent assessment of the situation that will likely to happen. Therefore, the court found itself bound to follow the decision in **Siva Segara.**

92 **Siva Segara v. Public Prosecutor [1984] 2 MLJ 212.**

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CRITICISM

Notwithstanding the Malaysian laws permitted to limit the scope of right to protest peacefully, the government and police were still not free from public censures and human rights watchers. The criticisms against these restrictions were increased especially throughout the Reformasi and BERSIH period. SUHAKAM since its earliest establishment had been constantly highlighted the applications for permits were either turned down or were seen to be selectively given to certain groups[93]. The occasions below are examples where the police permits were denied and excessive force used by the police to disperse the assemblies.

The SUHAKAM's report in 2001 alone recorded numeral cases where police refused to issue a permit without proper or lack of grounds. For instance[94],

(i) A religious talk organized by PAS on the occasion of the Prophet Muhammad's birthday at private premises was considered as threat to public order and national security, and hence the application for license was refused.

(ii) PAS's applications to hold a gathering were rejected for 13 times on the ground that the place was not suitable, despite they changed the locations.

(iii) The police had also acted in arbitrary manner when an application made by the opposition political party, Malaysian's People Party (PRM) to hold a talk on private land but was refused on the ground the owner had not given permission. In fact, the owner who was away in Australia had given a permission including in writing, but the application was denied twice.

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93 SUHAKAM, *"Annual Report 2010"*, Human Rights Commission of Malaysia, 2011, p.13.
94 SUHAKAM, Op. cit. No. 237, pp.5-9.

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(iv) An application to hold a forum on the water crisis organized by an NGO was granted at first, but later was cancelled one day before forum should take place on the ground of security. This caused the NGO to suffer financial loss.

On December 5, 2010, a peaceful assembly at National Mosque to tender a memorandum on the water crisis issue in Selangor state to Yang di-Dipertuan Agong (the King and head of state of Malaysia) was dispersed with the use of tear gas and water cannons. Despite of the earlier advice made by the SUHAKAM for the police to facilitate the traffic flow during the assembly, the police on the other hand, had erected roadblocks along the roads entering the capital city which eventually caused inconvenience and traffic jams to the road users[95].

On July 9, 2011, a peaceful rally organized by BERSIH was held in Kuala Lumpur demanding for fair and clean elections. Days ahead of the rally, the Home Ministry announced BERSIH as an illegal organization and the rally that will take place is unlawful due to the absence of police permit. In addition to that, the pro government medias made a biased coverage by describing BERSIH 2.0 Rally as a threat to national security and would spark a chaos. On top of that, the police managed to obtain the court orders to prohibit 91 individuals to enter into Kuala Lumpur, while several person related to BERSIH were also arrested. Despite of many obstacles occurred, the rally went on as per planned. Subsequent to the rally, SUHAKAM decided to form a Public Inquiry upon the allegation of human rights violations by the police during the peaceful rally was held. Throughout the rally, the police had used the tear gas to disperse the crowd and arrested the participants who insisted to stay remain. One BERSIH member also has suffered a fractured bone on his face, however the

95 SUHAKAM, Op. cit. No. 241, p.144.

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Inquiry Panel could not decide if the police had used excessive of force while arresting the member. Such serious injury, according to the panel, was most probably struck by the tear gas cartridge fired by the police. Also, the water cannons and tear gas which were shot from opposite directions had pinched the participants into one place, made them difficult to disperse[96].

SUHAKAM repetitively pinpointed the police permit issue in all its reports[97] and made few short term recommendations to improve the legislations on assemblies, amongst are;

(a) The applications for permits to hold static assemblies (as opposed to processions) in premises such as stadiums, halls and private properties, to be approved as a general rule, without restrictions on freedom of expressions.

(b) The procedure for applying for permits to be simplified by using a standard form to be issued to organisers.

(c) To have a minimum number of organisers signing a declaration to assume responsibility for the assembly to be peaceful, orderly, clean and to appoint marshals to ensure orderliness.

For the long term measures, SUHAKAM made propositions[98]:

(a) To decriminalise peaceful assembly without license under **Section 27 of the Police Act** and to allow peaceful assemblies to be held without license.

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96 SUHAKAM, *"A Report Of The Public Inquiry Into Allegations Of Human Rights Violations Including Excessive Use Of Force Before And During The Rally On July 9, 2011",* Human Rights Commission of Malaysia, May 4, 2012, pp.1-38. The medium language used in the original document is the Malay language.

97 SUHAKAM, Op. cit. No. 237, pp.12-13.

98 SUHAKAM, "*Press Statement: SUHAKAM's Concern On The Incident Of Batu Burok, Terengganu"*, October 12, 2007. Accessed on June 17, 2017.

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(b) To amend or repeal all provisions relating to the prerequisite of the application permit i.e. to require only notification to the police on the part of the organizers, rather than application for permit to hold assemblies[99].

(c) A meeting should set up between the people intending to organize a peaceful assembly and police officer in charge so as to confirm the practical arrangements for the assembly.

(d) Any persons who rights might be affected by the assembly or the arrangement should be allowed to make urgent application to the High Court for intervention.

Besides, SUHAKAM stated since some political parties had been allowed to hold assemblies without permit and disturbance by the police (referred to government ruling parties), same rules should be equally applied to other individuals or organizations.

With regard to the **Public Order (Preservation) Act 1958** (POPA), once more, SUHAKAM in its report reviewed that it has imposed an undue restriction on the right to freedom of assembly. Therefore, it is recommended that necessary amendments should be made to bring it in line with the proposed amendments to the **Police Act**. In the "Memorandum on the Repeal of Laws Relating to Detention without Trial", the Malaysian Bar supported this contention as well; **POPA** is one of the legislations that curtail and marginalise the civil rights[100]. Yet, after many years, several legislations have been repealed and replaced, but **POPA** remains until now.

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99 SUHAKAM, Op. cit. No. 237, pp.13-17.

100 Malaysian Bar, *"Memorandum on the Repeal of Laws Relating to Detention Without Trial"*, December 10, 1998. Accessed on June 17, 2017.

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3.3.4 THE PEACEFUL ASSEMBLY ACT 2012

Evidently, these issues protracted for a decade when Legal Affairs Division of Prime Minister's Department (BHEUU)[101], in response to SUHAKAM Annual Report 2010, gave its feedback[102] that it was not in the government's intention to repeal **Sections 27 and 27A of the Police Act**. As per asserted by BHEUU, this legislation is among the restraining provisions that are important to ensure this right is not being misused by group of individuals and to guarantee the public's security and tranquillity all at once. Hence, the suggestion to annul the police permit was not a wise decision as uncontrolled assemblies might detrimental to such security and tranquillity. Therefore, the government in the opinion that to sustain these provisions is a wisest step so far.

Even so, due to repeatedly pressures pointed out by the concerned parties, despite of the government's stands up for the decision to sustain the provisions in the **Police Act**, finally the new law was introduced as the **Peaceful Assembly Act 2012** (**PAA**) which came into effect on April 23, 2012 to govern the right to assemble in more specific manner. With 27 provisions, the new amendment replaced all related provisions in the **Police Act**. Currently, the **PAA** becomes the principal legislation that regulates the right to freedom of peaceful assembly in Malaysia, replacing the former law; the **Police Act**[103].

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[101] The official website of the Legal Affairs Division of the Prime Minister's Department is available at: http://www.bheuu.gov.my/index.php/en/

[102] BHEUU, *"The Feedback on SUHAKAM's Annual Report 2010",* Prime Minister's Department, 2010, pp.10-13. This annual report will be presented during every first session of the Parliament members' sitting where the Legal Affairs Division of the Prime Minister's Department is responsible to obtain feedbacks on every issues mentioned by the SUHAKAM in its Annual Report. The medium language used in the original report is the Malay language.

[103] By virtue of **Section 3 of the Police (Amendment) Act 2012**, **Section 27**, **27A**, **27B** and **27C** were deleted and took effect on February 9, 2012.

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In the beginning of legal systems was introduced, the aim was to keep the peace, and in the human rights era, it has changed towards the balancing between the rights of state and the right of citizen. *"Previously, everything was prohibited unless permitted. Now everything is permitted unless prohibited. This is a significant shift in civil rights thinking. No field better exemplifies the difficulty of achieving this fair balance than Malaysia's law relating to assembly and procession*" [104]. The most significant change after 2012 is, the police no longer have an authoritative power to ban or reject the application to hold an assembly. To put it differently, the law at present only requires a person to notify the police 10 days before the assembly is held, and the police shall accept upon the submission of the notification[105]. Hence the power is considerably moved from authoritative to administrative. However, notwithstanding the police are unable to outright the freedom of assembly, they still have the power to impose restrictions on an assembly if it may cause threat to the security, public order or to protect other people's rights[106]. Below are the elaborations of each provision.

1. EXEMPTED CLAUSE

Section 1 (3) (a) and (b) declares that the **PAA** does not apply to an assembly which holds for an election campaign[107] or an assembly which is a strike, lock-out or picket under the **Industrial Relations Act 1967** and the **Trade Unions Act 1959**.

104 Shad Saleem Faruqi, Op.cit.
105 **Section 9**
106 **Section 15**
107 An election campaign that falls under the **Election Offences Act 1954**.

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2. OBJECTIVE: SECTION 2

The right to freedom of peaceful assembly and without arm is established under the **Section 2(a)** which elucidates, *'The objects of this Act are to ensure- so far as it is appropriate to do so, that all citizens have the right to organize assemblies, peaceably and without arms.* Similar to the Federal Constitution, **Section 2 (b)** also put the limitations "*where the exercise of the right to organize assemblies or to participate in assemblies, is subject only to restriction deemed necessary or expedient in a democratic society, in the interest of national security or public order, including the protection of the rights and freedoms of other persons"*.

The word 'assembly' is defined in **Section 3** as *'an intentional and temporary assembly of a number persons in a public place, whether or not the assembly is at a particular place or moving'*. While public place is illustrated as (i) a road, (ii) a place open to or used by the public as of right, or (iii) a place that is open to or used by the public whether or not (a) the place is ordinarily open to or used by the public, (b) by the express or implied consent of the owner or the occupier, or (c) on payment of money.

Therefore, even though the right to peaceful protests are allowed to be exercised in Malaysia, the participants are still subjected to restrictive laws which were pursued for the interest of national security or public order, and they are obliged to guard themselves from transgressing other person's right. Now whose right that the Act wants to protect while permitting other people to express their opinions or grievance through assemblies? **Section 3** further elaborates the 'right and freedoms of other persons' are; (a) the right to peaceful enjoyment of one's possession; (b) the right to freedom of movement; (c) the right to enjoy the natural environment; and (d) the right to carry on business.

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3. PROHIBITION OF ASSEMBLY: SECTION 4

The Act starts with stipulation of the right to assemble in terms of individual, place and the nature of the assembly. **Section 4 (1) (a) and (e)** prohibits a non citizen and a child from participating in an assembly. This section is in accordance with **Article 10 (1) (b)** which confers this right available to citizens only. Meanwhile, a child whom is referred as a person below 15 years of age[108] may join in if the assembly is specified in the Second Schedule, namely; (i) Religious assemblies, (ii) funeral processions, (iii) assemblies related to custom, and (iv) assemblies approved by the Minister. Previously, the Police Act did not put any age limitation but the new rule has been brought under the **PAA**. Although it is uncertain why a child is almost prohibited to participate in an assembly, the reason might be for the safety of the child. To date, it still not clear what kind of assemblies that are likely will be approved by the Minister, but one may assume a march or procession during the Independence Day or Children's Day which are joined by the children might not be an issue to get the approval (or not at all).

Section 4 (1) (b) proscribed to hold an assembly within 50 metres from the limit of the prohibited place, they are; dams, reservoirs and water areas, water treatment plants, electricity generating stations, petrol stations, hospitals, fire stations, airports, railways, land public transport terminals, ports, canals, docks, wharves, piers, bridges, marinas, places of worship, kindergarten and schools and also place which have been declared under **Protected Areas and Protected Places Act 1959**[109]. From here we could see that the Act prohibits to hold an assembly at common places for the public.

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108 **Section 3 – Interpretation.**

109 **Section 3 - Interpretation**

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A street protest[110] is an absolute forbidden assembly under the Act. A street protest is defined as *"an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes"*[111]. This is a new assertion of prohibitive clause since the former laws never criminalized a street protest unless it is carried out without permit. Moreover, the definition of street protest under the Act is tad confusing as a procession is mentioned in the Act as well but has not been defined. How one can distinguish between illegal street protest and illegal procession or march or rally if they are all carried out in similar manner? Besides usually, the purpose to hold an assembly is driven by a group of people who has grievance (read *objection* as in the same manner of street protest's definition) against someone or something. And should someone send a notification to hold a gathering to the authority, based on the details given, on what criteria the police may label it as a street protest or not? Faruqi also posed an issue that if the street protest is engaged with the use of vehicles instead of '*walking in a mass march or rally'*, the police authority have to resort to the **Section 268 of the Penal Code**[112] or some other provisions in the **Road Traffic Act 1987**[113].

In December 2015, 7 individuals including 2 opposition Parliament members were charged under **Section 4 (1) (2)** and **(2) (c)** for organising and participating in a street protest in the Sessions Court. They challenged the constitutionality of these provisions arguing both are inconsistent with the **Article 10 of the Federal Constitution** which guarantees the right to freedom of speech, assembly and association to all citizens. However, on October 12, 2016,

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110 **Section 4 (1) (c)**

111 **Section 3 – Interpretation**

112 **Section 268 (1) of the Penal Code** provides "*A person is guilty of a public nuisance, who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public, or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right".*

113 Shad Saleem Faruqi, Op. cit.

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the Federal Court ordered the trial in the Sessions Court must be carried out first before the issue of constitutionality is brought before the Federal Court[114]. It is interesting to know in the future, what would be the outcome of the Sessions Court's trial and the Federal Court's judgment on the issue of street protest since it's been debated from the beginning it was inserted in the **Bill of the PAA.**

Whereas in relation to the organization of an assembly, **Section 4 (1) (e)** disallows a person below 21 years old to be an organizer.

4. RESPONSIBILITIES: SECTIONS 6, 7 AND 8

An organizer is a person who is responsible for the organization of an assembly, including the arranging, convening, collecting or forming of the assembly or the conduct of the assembly[115]. Under this Act, the organizer now bears huge responsibilities to keep an assembly conforming to the law, which are[116]:

(a) To ensure the conduct of an assembly does not contravene with the Act, the restrictions imposed by the police or any other law;

(b) To ensure no enmity or hostility feelings are done either physically or verbally amongst the public at large;

(c) To ensure himself and the participants of an assembly do not commit any offence under any laws;

(d) To ensure an assembly is carried out in compliance with the restrictions imposed by the police;

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114 Amnesty International, *"Court Decision on PAA Challenge, Another Blow for Freedom of Peaceful Assembly"*, Malaysiakini, October 12, 2016. Accessed on May 28, 2017.

115 **Section 3 – interpretation**

116 **Section 6 (2)**

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(e) The organizer may appoint person in charge to ensure the smooth flow of the assembly;

(f) To co-operate with the public authorities is a must;

(g) To ensure the assembly will not endanger health or cause damage to property or to the environment;

(h) To ensure no convenience to the public is caused;

(i) To ensure the place of assembly is cleaned up or bear the clean-up cost; and

(j) In the case of simultaneous or counter assemblies, to ensure that such assemblies are not made for the purpose to prevent his own assembly by taking place or interference.

The Pilot Case: Government of Malaysia v. Ambiga Sreenevasan & 14 Ors.[117]

Section 6 (2) (g) became the first provision of the **PAA** brought before the court after the Government filed a civil suit against BERSIH steering committee for damage to public property during BERSIH 3 rally on April 28, 2012, just few months after the Act came into effect. At the High Court, the Government seek for a declaration where the BERSIH, as an organizer had failed in its duty to ensure the assembly will not endanger the health or cause damage to public facilities. Therefore, the Government had sought for special damages including to repair the police vehicles with an amount of RM 110,543.27 from the ex chairperson of BERSIH, Ambiga Sreenevasan with other 14 committee members. Justice Louis O'Hara was in the opinion the BERSIH was not responsible for the claim since the damages occurred after Ambiga had called off the rally. On top of that, there was no evidence to show that the culprits were the legitimate participants of the rally or an independent

117 **Civil Appeal No.: W-01(NCVC)(W)-48—2/2015**

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agent[118]. The decision was reaffirmed by the Court of Appeal when Justice Rohana Yusuf held that the responsibilities of the organizer in **Section 6 (2)** did not give the Government a right to claim. Additionally, the Government also does not entitle to sue for negligence or claim damages under the common law as provided in **Section 3 of the Government Proceedings Act 1956**[119]. Subsequently, the Government made its final attempt to the Federal Court just to find it lost its bid to overturn the landmark judgment of the Appeal Court. The final appeal was dismissed with no cost[120].

Meanwhile **Section 7** sets out the participants are responsible to refrain themselves from disrupting or preventing any assembly, behaving abusively towards any person, doing any physical or verbal ill will feelings or hostility amongst public at large or disturbing public tranquillity, committing any offences of any laws and causing damages to property. The participants are also obliged to stick adhere with authority, organizer or person in charge's order. In **Section 8,** the police are permitted to take any necessary measures in order to guarantee the conduct of an assembly runs in conformity with the law.

5. PRIOR NOTIFICATION: SECTION 9 CROSS REFER WITH SECTIONS 10, 13, 14, 15 AND 25

Section 9 is the most debatable and contentious provision so far among academics and in the courts. Prior to the **PAA**, **Section 27 of the Police Act** was condemned by local and international human rights watchers for its sternness in curbing the opposition political

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118 Pathma Subramaniam, *"Putrajaya Loses Bid To Claim Damages From Bersih Over 2012 Rally"*, Malay Mail, January 30, 2015. Accessed on May 27, 2017.

119 M.Mageswari, "*Landmark Decision: Court Cannot Claim Damage Caused By Protestors Under PAA"*, the Star Malaysia, August 24, 2016. Accessed on May 27, 2017.

120 M.Mageswari, *"Government's Appeal Dismissed"*, the Star Malaysia, January 20, 2017. Accessed on May 27, 2017.

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figures or their supporters' rights to hold and participate in an assembly. The authoritative power vested to the police has now changed to administrative power as provided by **Section 9** of the Act:

> *(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*
>
> *(3) If the assembly is a 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.*

In **Section 9 (1)** it requires the organizer of an assembly to submit a notification 10 days before the assembly is to be held, either by A.R Registered post, courier or by hand[121]. However, an assembly is exempted from a notification requirement if it is to be held at a

[121] **Section 9 (4)**

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designated place of assembly[122], in which it is subject to the declaration of the Minister in the Gazette[123] (up to now, no place has been designated as a place of assembly). It is important to note that even though such assembly is excluded from notifying the police, both organizer and participant are still obligated to carry the same responsibilities under **Section 6 and 7**[124]. Assemblies are also exempted if they fall under the **Third Schedule** category[125], which are: religious assemblies, funeral processions, wedding receptions, open house during festivities, family gatherings, Family Day organized by an employer for his employees and their families, or general meetings of societies or association. And even though a religious assembly or funeral procession are not needed to submit a notice, the organizer may still inform the police to request assistance for the maintenance of traffic or crowd control[126]. The standard form of the Notification is provided in the Fourth Schedule.

In this provision we could see, nothing can be inferred that the police has the right to refuse an application to hold an assembly, except to respond to the notification within 5 days after the submission of the notice[127]. If no response to the notification by the authority, the assembly can proceed as per planned[128]. Hence, one may organize or join the assembly without being bothered by polices' refusal. However, the **PAA** still maintains the right of police to control by imposing restrictions and condition on an assembly relating to: date, time and duration of assembly, the venue, the manner of the assembly, the conduct of participants. Restrictions may also be compelled with reference to acquiring payment of clean-up costs after the assembly ends, to preserve the environment, cultural or religious sensitivity, historical significance of the place of assembly and any objections raise by the person who

122 **Section 9 (2) (a)**
123 **Section 25 (1)**
124 Ibid **Clause (2)**
125 **Section 9 (2) (b)**
126 Ibid **Clause (3)**
127 **Section 14 (1)**
128 Ibid **Clause (2)**

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have interests. Or the authority may limit the assembly on the ground of any matters he deems necessary or expedient to the assembly[129].

This means, the police may use their extensive power for example, to shorten an assembly to 1 hour instead of 5 as opposed to the organizer's plan, or to forbid the participants from wearing yellow shirts or carrying the protest signs during an assembly. An assembly may be held as per intended but the police still have the power to regulate it. Yet, in **Section 13**, the organizer may be called for a meeting and be advised prior it is to be held. Hence should there is a difference of opinion between the two parties, there is a still a room for discussion to achieve mutual agreement as how an assembly should be organized properly

Another issue that must be highlighted is, does an assembly is considered as unlawful if an organizer holds an assembly without notifying the authority or submitting a late notification? Is the organizer or participant liable for organizing or participating in un-notified assembly? Does the **PAA** prohibit a spontaneous assembly? **Section 9** has been used by the government against the organizers who held assemblies without notifications and accordingly, at the same time was challenged several times for its constitutionality.

Case 1: The Penal Provision under Section 9 (5) Is Unconstitutional

In the landmark case of **Nik Nazmi Bin Nik Ahmad**[130], the Court of Appeal had delivered a pioneering judgment on the constitutional right of freedom of assembly in Malaysia. The Appellant, an opposition party State Assemblyman was charged in the Sessions Court for having organised a public assembly at an indoor stadium without having

129 **Section 15 (2)**
130 **Nik Nazmi Bin Nik Ahmad v. Public Prosecutor [2014] 4 MLJ 157**

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notified the police officer ten days before the aforesaid event. Under the **PAA**, **Section 9 (1)** requires the organizer to notify the police officer in charge 10 days before the assembly, in which failure to do so shall lead the organizer on conviction of **Section 9 (5)**. Nonetheless, on the very day it was held, the appellant had notified them. Accordingly, the appellant challenged the constitutionality of **Section 9 (1)** and **(5)** as null and void and hence the charge against him should be struck out. The application was dismissed in the High Court. On plea, the Court of Appeal had reversed the decision, allowing the appeal and discharging the appellant from the charge. Notwithstanding the appeal was unanimously allowed, the three presiding judges had delivered different grounds of judgment in setting aside the charge.

According to Justice Mohammad Ariff Yusof, in his famous saying, *'that which is fundamentally lawful cannot be criminalised'*. The 10 day notice requirement is a reasonable restriction under **Section 9 (1)** and therefore shall be considered as a constitutional. The learned judge added that there was no provision in the **PAA** that stipulates the assembly per se as unlawful if the organizer fails to comply the 10 days notice. Meanwhile, to convict the organizer criminally liable by reason of an administrative failure or omission was irrational in the legal sense. Such dichotomy could be severed since both provision were not incontrovertibly intertwined and therefore would render **Section 9 (5)** unconstitutional and the said provision was struck down.

Concurred the abovementioned judgment, Justice Hamid Sultan Abu Backer held that **Section 9(1)** was lawful and not excessive however the **PAA** gave a right for everyone to assemble whether the requisite of 10 days prior notice is fulfilled or not. To criminalise for the non compliance had no nexus to 'public order' or 'interest of security of the Federation' as stated in **Article 10 (2) of the FC** unless the assembly itself was not peaceful. Furthermore, **Article 10** does not say that if there was breach of the restriction there must be penal sanction.

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Thus His Lordship found that **Section 9 (5)** to be unconstitutional as the penal provision was conflicting with **Article 10(2) of the FC**.

On the other hand, Justice Mah Weng Kwai declared that both provisions as unconstitutional. The Lordship in his judgment opined that the word 'restrictions' in **Article 10 (2) of the FC** does not imply power to criminalise any breach of those restrictions. His Lordship further added that **Section 9 (1)** and **(5)** created inconsistent and incongruous position as participants in a peaceful assembly held without the 10-day notice committed no wrong while the organiser of the assembly would be criminally liable under **Section 9 (5)** for not having given the 10-day notice. The right to peaceful assembly ought to include the right to organize a peaceful assembly. Such restriction in **Section 9 (1)** and **(5)** was not reasonable since it circumvents an organizer to hold a spontaneous assembly. Therefore both provisions were struck down for being unconstitutional.

In summary, it is unconstitutional to criminalise spontaneous public assemblies in breach of the 10-day notice as per requisite under the **PAA**. Owing to the landmark ruling in this case made it the first time since independence that the freedom to assemble was given full effect.

Case 2: Section 9 (1) and (5) Are Constitutional

However the period of this precedence did not uphold for too long where in 1 October 2015, the Court of Appeal in **Yuneswaran a/l Ramaraj**[131] departed from the earlier decision in **Nik Nazmi's case**. The respondent was the executive secretary of People Justice Party (PKR; *Parti Keadilan Rakyat*) of Johor Bahru, and was charged in his capacity as an

[131] **Public Prosecutor v Yuneswaran a/l Ramaraj 6 MLJ [2015] 47**

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organizer of an assembly in 2013 aka Black 505 rally. The respondent failed to comply **Section 9 (1)** where no notification was submitted to the police officer in charge 10 days before the day of assembly. The three panel member of the court unanimously held that **Section 9 (5)** is constitutional and enforceable.

Presided the chairs, Justice Tan Sri Md Raus Sharifin ruled out that nothing in **Article 10 (2) of the FC** could be construed as prohibiting the imposition of criminal sanctions for non compliance with ten day notice. Such requirement is crucial and reasonable as it is to facilitate one's right to organize and assemble peaceably lawfully and at the same time to preserve public order and protecting the rights and freedom of other persons, not to restrict it. The 10 days notice requirement, according to Lordship, is not a 'restriction' within the meaning of **Article 10 (2) (b)** [132] of the Constitution and the imposition of criminal sanction under **Section 9 (5)** is not *ultra vires* with and does not run foul of **Article 10 (2) (b)**. Hence, the Court of Appeal allowed the appeal and affirmed the conviction and sentence imposed by the Sessions court.

In addition to the above cases, on December 20, 2016, Jannie Lasimbang, an organizer of BERSIH 4 rally in Sabah was acquitted from the charge under **Section 9 (2),** failing to submit a prior notice to the authority, by the Magistrate's Court. She was also alternately charged under **Section 15 (3)** for the failure of fulfilling all instructions ordered by the police. The 2 days rallies were held along the Esplanade Likas Bay while Jannie and the BERSIH supporters were stopped by the police as on their way to the Kota Kinabalu City Hall building to hand over a memorandum requested for the right to hold a peaceful assembly. The learned Magistrate in her judgment ruled out that the prosecution failed to establish the

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132 **Article 10 (2) (b) of the FC***: Parliament may by law impose on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order.*

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Kota Kinabalu City Hall was the owner of the land where the assembly took place. Furthermore, a 10-day notice was not required if the gathering is held at 'designated place of assembly'[133].

The third case was a charge against the PKR (the opposition political party) vice president, Rafizi Ramli and 3 others for failure to submit a prior notification 10 days before the Black 505 Rally took place on June 22, 2013. Nevertheless, since all defendants were pleaded guilty, they were fined RM 1,950 each by the Sessions Court[134].

6. PERSON OF INTERESTS: SECTION 5 CROSS REFER WITH SECTION 12

The **PAA** prescribes the authority to inform within 24 hours to a person who has interests upon the receipt of the notification either by posting a visible notice at the surround area of place of assembly or by any reasonable means to inform such persons. Should the person are not happy with the assembly, the person may express a concern or objection to the police within 48 hours he/ she are informed, in writing. A complaint lodged by the person may be a ground for the police to impose restrictions on the assembly. Who is the person that has interests in an assembly or in other words, who has the right to make a complaint? **Section 3** illustrates them as *'a person residing, working, or carrying on business or having residential or commercial in the vicinity of or at the place of assembly'*.

7. CONSENT OF OWNER OR OCCUPIER: SECTION 11

[133] Julia Chan, *"Sabah Bersih Organiser Beats Unlawful Assembly Charge"*, the Malay Mail, December 20, 2016. Accessed on May 28, 2017.

[134] Bernama, *"Blackout 505 Rally: Court Fines Rafizi Ramli RM 1,950",* the Malay Mail. November 1, 2016. Accessed on June 8, 2017.

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The Act also requires the organizer to acquire consent from an owner or occupier if the place of assembly will be held on his land.

8. APPEAL: SECTION 16

If the organizer is not happy with the restrictions or conditions imposed, he may make an appeal to the Minister within 48 hours after he is informed of such limitations. Similarly, the Minister must deliver his decision within 48 hours as well. Previously under the **Police Act**, when a person is aggrieved by the refusal of police to issue a license, he may appeal to the Commissioner or Chief Police Officer where the decision made shall be final[135]. Unlike the **Police Act**, the **PAA** has changed the appeal medium from one executive authority (police) to a different type of executive authority (Minister), but none in this provision expressly mentioned the decision made by the Minister is conclusive. Therefore, since there is no ouster clause in this provision or any part thereof, we can assume the appeal may proceed for a judicial review.

9. SIMULTANEOUS AND COUNTER ASSEMBLIES: SECTION 17 AND 18

Simultaneous assemblies are illustrated as *two or more assemblies to be held at the same time, date and place, but which have no relationship to each other*[136]. The police may

135 **Section 27 (7) of the Police Act 1967**
136 **Section 3 – Interpretation**

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allow for assemblies to be held simultaneously which subject to restrictions as well or otherwise must give preference to the organizer who submits his notification first[137].

On the other hand, the authority shall give alternative time, date or place to the organizer, if his assembly will cause conflict between participants from the earlier assembly [138]. Counter assembly is construed as *an assembly organized to convey disagreement with the purpose for which another assembly is organized, and held at the same time, date and place approximately at the same time, date and place as the other assembly*[139].

Prior to BERSIH 5 rally which was held around Merdeka Square on November 5, 2016, the Red Shirts (the pro government ruling party's supporters) made announcement to hold counter assemblies on the same date and places. The announcement alarmed the traders who run businesses around the proposed area of assembly. 3 groups representing more than 1000 traders sought an interim injunction at the High Court against BERSIH and the Red Shirts to prevent the rallies at the said area claiming it would cause loss of revenue. The High Court judge, S. Nantha Balan held that there was no merit in the application. He further states, *"**Section 18 of the PAA** operate as a safety valve to avert a clash of conflict. The power to do this lies with the police and not the traders. I agree it is for the authorities who are allowed to regulate or place such restriction while at the same allow time for freedom of assembly (as enshrined under the Constitution)"*. The injunction was accordingly dismissed[140].

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137 **Section 17**

138 **Section 18**

139 **Section 3**

140 *"Court Dismissed Trader's Injunction Application",* the Sun, November 18, 2016. Accessed on June 8, 2017.

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10. PRESUMPTION AS TO ORGANIZER: SECTION 19

The Act presumes a person is an organizer when he initiates, leads, promote, sponsors, holds or supervises the assembly, or invites or recruits participants or speakers for the assembly if such assembly is:

(a) Held at designated place of assembly (refer to **Section 25** for definition),

(b) Specified in the Third Schedule (refer to **Section 9 (2) (b)**),

(c) Not given a notification to the police, or

(d) Given a notification to the police but his identity in the notice is false.

11. POWER OF ARREST: SECTION 20

The **PAA** maintains the power to arrest without warrant as was granted in the **Police Act**, when an organizer or a participant refuses or fails to observe the restrictions, or possess any arms during an assembly or recruits or bring a child to an assembly which does not fall under the Second Schedule exemptions. Such arrest may be made provided a necessary measures has been taken to make sure an organizer or participant to comply with the law willingly. For instance, an ample reasonable time should be given to the organizer or participants to abide by the rules through a clear announcement order.

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12. POWER TO DISPERSE: SECTION 21

Likewise with the **Police Act**[141], the police may use reasonable force to disperse an assembly, but only in the following circumstances:

(a) the assembly is held at or within 50 metres of a prohibited place,

(b) the assembly is or has turned into a street protest,

(c) a person physically or verbally promotes ill-will feelings or hostility amongst public at large,

(d) non compliance with the restrictions or conditions in the notifications, or

(e) the participants are engaging in unlawful conduct or violence towards a person or property.

That is to say, if an assembly is in contravene with the **PAA** on other ground but does not fall under the above circumstances, such as the participant brings children to the assembly, the power to disperse does not apply in this situation. However, the participant may be arrested without warrant as stated in **Section 20**. And once more, the **PAA** fails to elaborate what are the clear indications to label an assembly as a street protest, whilst its definition in **Section 3** is not helpful.

13. RECORDINGS AND MEDIA ACCESS: SECTIONS 23 AND 24

The **PAA** allows a police officer to make any form of recording in an assembly. Whereas, any media representative also has the right to have reasonable access to the assembly place and make a report by using any equipment.

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141 **Section 27B**

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14. MINISTER: SECTIONS 26 AND 27

The Minister has the power to amend the Schedules or make regulations for the better carrying out the provisions of the Act.

15. PENAL PROVISIONS: SECTIONS 4, 9, 15 AND 21

Basically, any violations of restrictions or prohibition enforced by the **PAA** will be penalised if found guilty. The major difference in term of punishment between the **PAA** and the **Police Act**, the jail sentence has been deleted and the amount of penalty was multiplied in certain provisions. The following are the offences and penalty under the **PAA**:

i. **Section 4 (3):** A non citizen, an organizer or participant of an assembly at or within 50 metres of prohibited place, an organizer or participants of a street protest, an organizer of an assembly below 21 years old, and a child participating in an assembly other than the **Second Schedule**, on conviction shall be liable to a fine not exceeding RM 10,000 (approximately USD 2400).

ii. **Section 4 (4):** Any person who recruits or brings a child to an assembly other than the **Second Schedule**, on conviction shall be liable to a fine not exceeding RM 20,000 (approximately USD 4,700).

iii. **Section 9 (5):** An organizer who fails to notify the police 10 days before the assembly is to be held, on conviction shall be liable to a fine not exceeding RM 10,000 (approximately USD 2400).

iv. **Section 15 (3):** Any person who fails to comply with any restrictions imposed by the police, on conviction shall be liable to a fine not exceeding RM 10,000 (approximately USD 2400).

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v. **Section 21(3):** Any person who fails to comply with the order to disperse from an assembly, on conviction shall be liable to a fine not exceeding RM 20,000 (approximately USD 4,700).

MIXED RESPONSES

Although the repeal of **Section 27** and **Sections 27A**, **27B** and **27C of the Police Act** were greatly welcomed, and the new **PAA** has removed the authoritative power of the police to turn down the application to hold an assembly, many were still sceptical on its effectiveness in guarding the right to assemble. It is argued, notwithstanding the **PAA** seems liberative by concept and it brought major changes, still there is a doubt if the Act might be used by the government to seek avenue for its restriction.

Due to these many restrictive provisions in the **PAA**, the Malaysian Bar indeed made early objection months before the Act was passed in the Parliament. The Bar was adamant that the Bill imposes unreasonable and disproportionate fetters on the freedom of assembly and it is far more restrictive than the current law[142]. On November 29, 2011, during the Parliament's meeting to vote for the **Peaceful Assembly Bill**, the Malaysian Bar organized a walk for the 'Freedom to Walk' as a sign of protest over its unconstitutionality.

Meanwhile, SUHAKAM indeed lauded Najib Razak, the Prime Minister's announcement to review, amend or repeal several laws that inconsistent with constitutional right including **Section 27** and **27A of the Police Act**, especially when the prerequisite of police permit had been abolished. Despite the fact that certain aspects of the **PAA** are

142 Lim Chee Wee, Op. cit.

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welcomed, however the Commission was of the opinion that extensive consultations should have taken place with the public, as the new law may not reflect their wishes for open and free society and a more robust democracy.

In addition to the SUHAKAM's commendation, in 2015, the Commission also has monitored 6 assemblies which 2 of them were BERSIH 4.0 Rallies. Following to the new **PAA**, the smooth flow of the rallies was highly praised and successfully brought some positive changes, particularly on the conducts of the police plus the organizers and participants during the assemblies[143]. However the opinion of the Commission in 2016 was quite the opposite. During the course of the year, although all 4 monitored assemblies went smoothly, there were unjustifiable arrests made before and after the BERSIH 5 rally and disciplinary actions also had been taken against the students by the universities. The Commission of the view that, in its Annual Report 2016, certain provisions should be reviewed specifically the strict requirement of 10 days notification, the total ban of street protest and prohibited places, and the limit age requirement of the organizer of an assembly[144].

As for the Human Rights Watch[145], prior to the enactment of the **PAA**, the **Police Act** was described as 'severely restricts' and 'remain tightly constrained' despite the guarantee of aforesaid rights in the constitution of **Article 10**. In surveys conducted by the organization in 2011, 2012 and 2013, the reports maintained the view that notwithstanding the new amendment of **PAA**, the right to freedom of expression and freedom of assembly in Malaysia are constantly violated and still restricted for government critics.

143 SUHAKAM, *"Annual Report 2015"*, Human Rights Commission of Malaysia, 2016, p.2.
144 SUHAKAM, Op. cit. No. 218, pp.61-62.
145 Human Rights Watch official website is available at: https://www.hrw.org/

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3.3.5 COMMENTARY AND CONCLUSION

Excessive Punishment under the Penal Code

Unlike the **Police Act** and the **Penal Code**, the indication of an 'unlawful assembly' has not been defined by the **PAA.** However, since the **PAA** penalizes an organizer who fails to submit a prior notification 10 days before he wants to convene an assembly as prescribed by **Section 9 (1)**, it is deemed that such assembly may become unlawful. The assembly may also become unlawful if the organizer fails to comply the restrictions imposed by the authority as provided in **Section 15**. Should the organizer is found guilty under **Sections 9** or **15;** he shall be liable to a maximum fine of RM 10,000. In the meantime, a participant of the 'unlawful assembly' may be charged under the **PAA** when he joins a street protest, or the assembly is held at the prohibited area, or when he recruits or brings a child to the assembly, or when he fails to leave the place of assembly when the order of dispersal has been made, or he himself is a child.

Even though the **PAA** is the main statute that regulates the right to peaceful assembly, it is important to note that until now, the provisions in the **Penal Code** are still enforced and can be employed as an alternative to charge a person who engages with the unlawful assembly. That is to say, even if the participants of the assembly may not be charged under the **PAA** when the organizer fails to accomplish the duties under **Sections 9** and **15**, they are still can be subjected to the offences under the **Penal Code**. To recap, **Section 143 of the Penal Code** states, "W*hoever is a member of an unlawful assembly, shall be punished with imprisonment for a term which may extend to six months or with fine or with both*". Meanwhile **Section 141** interprets an 'unlawful assembly' as an assembly consists of 5 or more person with a common object to overawe any public servants by criminal force; or to

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resist the execution of any legal process; or to commit any mischief; criminal trespass or other offence; or to take any property or deprive someone's right of way or use of water or incorporeal right by means of criminal force; or compel any person to do what he is not legally bound to do or to omit to do what he is legally entitled to do by means of criminal force. This means, if the organizer is found guilty under the **PAA**, the participants may be subjected to criminal sanctions under the **Penal Code** being as the member of an unlawful assembly, as a matter of fact with heavier punishment. As I have clarified in the previous sub chapter, although the provisions of the **Penal Code** are rarely applied in the context of freedom to convene a peaceful assembly that does not omit a person who joins such assembly from being charged under this Code.

The right to assemble in peace are fundamentally protected by the Constitution, in which the **PAA** was enacted for the purpose to facilitate such right. The jail punishment under the **Police Act** has been deleted and was replaced with the monetary sanctions by the **PAA** if a person does not comply with the administrative requirements. Therefore, should a person is charged under the **Penal Code** and accordingly convicted due to the failure of the organizer to submit a prior notice to the police, that would be amounted to an excessive punishment and violated his constitutional right to assemble in peace. For this reason, a clear distinction should be made either in the **PAA** or in the **Penal Code** that the offences under the Code shall not be applied when the issues under the **PAA** comes into a picture. Every citizen is entitled to enjoy their constitutional rights without having fear of being subjected to unjustifiable criminal sanctions.

Excessive Punishment for the Child Participant

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Other than an assembly in the **Second Schedule**, **Section 4 of the PAA** explicitly constricts the right of a child to participate in an assembly. Even though one may argue that such restriction is reasonable as to protect the child from an unlawful assembly which involves violence or the use of weapons, but to presume the average assemblies are dangerous to the child is a drastic restriction which is not tally with the spirit of the **Article 10 (1) (b) of the Constitution**. Furthermore, if it is said that such restriction is made for the interest of the child's safety, the child should not be liable of an offence under the **Section 4 (2)** and subject to a fine not exceeding RM 10,000, under **Clause 3**. To penalize a person for participating in a peaceful assembly due to his age factor alone is indeed an excessive restriction and punishment. It is recommended that the provision must save for an exemption clause for the child to be allowed to participate, if the police satisfy the organizer can prove an assembly to be held is safe enough for the child.

As a conclusion, the right of protest is one aspect of the right of free speech[146], thus the denial of such rights particularly to express disagreements over government's administration may leave the government unchecked and facilitate the abuse of power and corruption[147]. As asserted by Sedley LJ[148], *"restricting free speech and protest rights is censorship by any other name, a 'state control of unofficial ideas'—and so allows someone else to judge what I can see or hear or view or say"*.

Regardless of its nature to be provocative, the right to protest in peace certainly is one of the most important human rights that should be possessed by individuals and upheld in democratic nations. In addition to the existing channels, such as filing complaints to the

146 Lord Hewart CJ in **Hubbard v. Pitt [1976] 1 QB 142 (CA)**
147 Mohd Azizudding Mohd Sani, Op. cit. p.88.
148 **Redmind –Bate v DPP (1999) 7 BHRC 375 (DC).**

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authorities or bring the issues to the Parliament through the people's representatives, it is through demonstrations the people can convey their grievances and bring them to the knowledge of those in authority with the anticipation to gain a remedy. The right to assemble and protest should be allowed without hurdle so long it does not disrupt the public safety and transgress other's individual rights. It is worth to highlight here as per Lord Denning said, *"As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction in traffic, it is not prohibited"*[149].

Even though the new amendment of the **PAA** stirred public outcries and censures as it is claimed in many ways stricter than the former legislation, plus now the organizer of assembly has to bear extensive responsibilities, the **PAA** has also brought positive reforms into the improvement of freedom of peaceful assembly. Although it took a slow progress to reform, the efforts made by various parties had produced to the desired results where the power given to the police as decision maker and the power to authorize an assembly via the police permit had been abolished. Moreover, the courts, as final and ultimate determinants, have shown more tendencies to protect this freedom as provided in the **FC** rather than to restrict it[150]. As emphasized by the Lordships in **Nik Nazmi'**s case*, "it is well established that the freedom guaranteed by the **Federal Constitution** under **Article 10** is not absolute in terms and subject to restriction - save to say it is the Constitutional duty of the court to ensure that enshrined freedom is not violated by retrogressive legislation which attempts to alienate ourselves from international norms practiced by civilized nation without meaningful grounds consistent with the Federal Constitution*.

149 **Hubbard v Pitt [1976] QB 142**, Op. cit.

150 Anie Farahida Omar, *"The Freedom of Peaceful Assembly in Malaysia: Pre and Post The 2012 Amendment"*, Chosun Law Journal Vol. 23, No. 3, the Legal Studies Institute of Chosun University, December 2016, p.269.

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Up to this point, the provision which needs the Minister to utilise his power at its best is **Section 25** that is to designate any place as place of assembly. If a place is declared as a place of assembly by the Minister, provided the area does suit its function for gathering purpose, and that is when a person can literally exercise their right to assemble in peace and freely without going through the hassles of procedures in **Section 9** and **10**. Should the designated place of assembly is occupied for another assemblage, only then the organizer is required to apply the **PAA**. And that is also where the **PAA** actually construes the true meaning of the right to freedom of peaceful assembly as set out in **Article 10 (1) (b) of the Federal Constitution**. This would correspond to the guideline of international standard, which is to consider the freedom of assembly as the rule, and its restriction as the exception.

In a nutshell, there are still hopes for the freedom of peaceful assembly in Malaysia to expand better in the future. Retrospectively, all efforts made by SUHAKAM and BERSIH, as well as other concerned parties were not futile. Notwithstanding many parties were in the opinion the **PAA** continues to block the exercise of the right to assemble in peace which have been decades, it is not exaggerated to say that the **PAA** is also the right tool to safeguard such right. It is undeniable that the **PAA** has brought major changes in expanding the freedom of peaceful assembly in Malaysia. However the discrepancies in this Act as has been highlighted in this chapter must be amended immediately by the Parliament.

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3.4 CONCLUSION

In Korea, the **ADA** is the main law which facilitate and control the freedom of assembly. The **ADA** is consisting of 4 important elements; (i) the police (ii) the organizer, moderator and participants, (iii) the advance report, and (iv) the penal provisions. The **ADA** introduces an advance report system which requires any outdoor assembly, if it does not fall under the exemption in **Article 15**, must be reported to the police at least 48 hours before the assembly takes place. Meanwhile, the police serve dual functions under the **ADA**; the first one is to facilitate and ensure an assembly will be operating efficiently. For example, the police must provide a protection when there is a reasonable ground that an outsider may cause a disruption or interfere with a peaceful assembly, as prescribed by **Article 3**, and also to set up the police line if the head of the competent police authority deems it necessary, as provided by **Article 13**. At the same time, the police are also under the duty to protect other citizens from the unlawful demonstrations which may cause a disturbance to the maintenance of public order. Through the issuance of the advance report, the police may carry out their duty by imposing certain restrictions and even to impose a total ban if the assembly does not meet the requirements under the **ADA**. However, throughout the implementation of the **ADA** since 1963, certain provisions were challenged and argued for being inconsistent with the Korean Constitution. For instance, the prohibition of assembly during the night-time or near the diplomatic institutions has been declared as unconstitutional.

The **ADA** also imposes imprisonment sentence and fine as a penalty if a person is found guilty. Notwithstanding in theory, the **ADA** is generally a good law, I have presented the challenges faced by the participants especially during the course of assemblies where the police employed an excessive use of force to disperse the assembly. I supported my contention with the legal cases and the reports by the human rights bodies.

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Similarly in Malaysia, there are 4 essential components of the **PAA**, namely (i) the police, (ii) the organizer and participants, (iii) the prior notification, and (iv) the penal provision. Prior to the **PAA**, the **Police Act** had used a permit system to severely control the freedom of assembly. However, with the enactment of the **PAA**, the permit system was abolished and was replaced by the prior notification requirement. **Section 9 (1)** entails the organizer to submit a notice at least 10 days before the assembly is held. Under the new law, the police can no longer refuse the notice and must act accordingly by informing other people who might be affected with such assembly. Unlike the **ADA**, the **PAA** does not contain any provision which demand the police to give protection to the assembly and its participants. Under the Act, **Section 15** allows the police to impose any type of uncertain restrictions for the purpose of security or public order. Likewise, despite the positive changes brought into the **PAA**, I also have discussed on the challenges faced by the citizens and the constitutionality issues brought to the Courts.

In this chapter, I have found that albeit both laws have great differences in regulating the freedom of assembly, they meet at one identical problem; the exploitation of laws by the State governments to curb their critics. The law may look perfect in theory, but its implementation to a practice is another issue that must be tackled seriously.

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CHAPTER 4:

A COMPARISON ON THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY BETWEEN TWO COUNTRIES

4.1 INTRODUCTION

It is generally understood and has been accepted by the international norm a law may be reasonably enforced to limit one's fundamental rights if in the course of exercising such right, it violates other persons' liberties. No one should honour his own personal matter higher in the name of freedom by degrading another people's right. And that's why the **Assembly and Demonstration Act of Korea (ADA)** and the **Peaceful Assembly Act 2012 (PAA)** of Malaysia came into existence.

In this chapter, each provision of the **ADA** and the **PAA** will be evaluated comparatively. The purpose is to draw any differences and similarities, then to observe the practical application of both laws as well as the interpretation of laws from judicial

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perspective. Accordingly, relevant legal cases and reports will be referred to support the analysis. Finally, the constitutionality issues also will be discussed from the standpoint of both countries, with the guidelines set out by the **ICCPR**, **Siracusa Principles** and also the standard test to determine the legality of the restrictive laws.

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4.2 A COMPARATIVE STUDY BETWEEN THE ASSEMBLY AND DEMONSTRATION ACT AND THE PEACEFUL ASSEMBLY ACT 2012

1. PURPOSE OF ENACTMENT

In the Republic of Korea, the guarantee of the enjoyment of right to assemble is strengthened with the absolute prohibition of licensing of assembly as proscribed by the **Constitution of the Republic of Korea** under **Article 21 (2)**. While in the **ADA**, **Article 1** states that the purpose for the enactment is *"to achieve an appropriate balance between the guarantees of the right to assemble and demonstrate and public peace and order by guaranteeing the freedom of lawful assemblies and demonstrations and protecting citizens from unlawful demonstrations"*. The **ADA** contains positive purpose in upholding the right to assemble in Korea.

While in Malaysia, the forewarning clauses are directed to the citizens who wish to demonstrate, where they are clearly written in the **Federal Constitution of Article 10 (1)** – *'Subject to clause 2'* and also in **Section 2 (a) (b) of the PAA** – *'as far as it is **appropriate to do so**"* and *"is subject to only restrictions*". So, the stipulation clauses indicate the right to freedom of peaceful assembly is conditional. Likewise with the **ADA**, the **PAA** gives directions to the authority in concern that the conditions to restrict must be solely to fit the purpose of national security or public order including the protection of the rights and freedom of other persons.

The key word in both Acts is 'appropriate'. It signifies that when a group of like minded citizens want to use their right to gather in peace and express their opinions, such right must be exercised suitable to the social situation. To put it differently, it must be carried

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out in well mannered or socially correct. However, socially incorrect does not make a person liable under the law, hence for that reason, the **ADA** and the **PAA** are created to make someone legally responsible for his act. Now, since there is no clear local guideline in identifying the legitimate objectives of the Acts in Korea and Malaysia, it is worth to apply the Siracusa Principle to seek better understanding.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[1] is a set of uniform interpretation of limitation on rights enunciated in the **ICCPR**. This principle was made as a response to the repeated calls by the UN when the governments often abuse the applicable domestic laws to suppress people fundamental rights under the pretext of 'threats to its national security' or 'public emergency which threatens the life of the nation'. Therefore, in 1984, a colloquium consist of 31 notable experts in international law was held in Siracusa, Italy to make the UN calls into realisation. **Article 21 of the ICCPR** prescribes: *"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others"*.

The article highlights that the only way the right to peaceful assembly can be interfered with must be based on the legitimate objectives, namely for (i) the national security or public safety, (ii) public order, (iii) the protection of public health or moral, (iv) the protection of the rights and freedoms of others. I summarise the guiding principles below as

[1] UN Commission on Human Rights, *"The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights"*, (E/CN.4/1985/4), September 28, 1984.

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set out by the **Siracusa Principle** which is to be followed by any State Party in enacting the restrictive laws:

i. In the Interests of National Security

The national security may be invoked only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force and not merely to prevent moderate threat. That means, the authority cannot use it as an excuse to impose arbitrary limitations.

ii. In the Interest of Public Safety

Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

iii. In the Interest of Public Order

It is defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society are founded. Therefore, to respect for human rights is part of public order. The State organs or agents (in our context is the police) who are responsible for the maintenance of public order, must be subject to control in the exercise of their power through the parliament, courts, or other competent independent bodies.

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iv. For the Protection of Public Health

The State may only invoke this ground to limit the right to assemble when it deals with a serious threat to the health of the population or individually. The measures taken must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

v. For the Protection of Public Morals

Public morality is differed over time and from one culture to another. If the State wants to invoke public morality as a ground for restricting the freedom of assembly, it shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

vi. For the Protection of Rights and Freedom of Others

In order to protect the rights and freedom of others, the scope of such protection to limit the freedom of assembly may extend beyond the rights covered in the **ICCPR**. When a conflict exists between a right protected in the **ICCPR** and one which is not, recognition and consideration should be given to the fact that the **ICCPR** seeks to protect the most fundamental rights and freedoms.

Since all the legitimate grounds for restriction are provided by the international human rights instrument, the States must not add additional grounds in the domestic legislation. As for **the ADA** and **PAA**, the legitimate grounds to control the exercise of the right to peaceful assembly are in accordance to the **ICCPR** guidelines.

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2. THE RIGHT TO PARTICIPATE IN AN ASSEMBLY

Under the **ADA**, although there are no provisions states to whom the right to protest may apply, **Article 22 (1) of the KC** provides that such right is only applicable for citizens. In addition, the **ADA** does not impose any penal provision to foreigners if they are found participating in assemblies. However, under the **Immigration Control Act of Article 17** it says:

> *"(2) No foreigner sojourning in the Republic of Korea shall engage in any political activity.*
>
> *(3) If a foreigner sojourning in the Republic of Korea is engaged in any political activity, the Minister of Justice may order him/ her in writing to suspend such activity or may take other necessary measures."*

Even though it does not expressly prohibit foreigner from joining an assembly, in principle the phrase 'any political activity' may include any sorts of assemblies that are politically motivated. As a consequence, their visa may be refused for renewal or will be sending for deportation. This prohibition nonetheless, does not apply to a foreigner who has the right to vote in local election as permitted under the **Public Official Election Act**.

Meanwhile, the **PAA** imposes a total ban to non-citizens from organizing or participating an assembly in Malaysia. If anyone is found guilty, they will be liable to a fine not exceeding RM 10, 0000 (approximately USD 2330). In addition, a child under the age of 15, other than the list in the Second Schedule, is also not allowed to join assemblies. This prohibition is in contradiction with the **Convention on the Rights of the Child** which has been ratified by Malaysia in 1995, whereby **Article 15** provides:

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"1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

Even though the Convention permits to impose restrictions on the right to assemble in the same way as the **ICCPR** and the **PAA** does, the total prohibition for a child to join the assemblies defies the objective of the restrictive laws. An absolute ban without based on the legal grounds as provided in the **PAA** is amount to a blanket restriction. On top of that, a child who is found guilty for joining the assemblies can be penalized with a fine not exceeding RM 10,000 (approximately USD 2330). In the meantime, a person who brings a child to an assembly will be penalised to a fine not exceeding RM 20,000 (approximately USD 4,670).

3. ORGANIZER

i. Age Requirement

Under the **ADA**, an organizer can either be an individual or organization, but there is no express provision as to what age a person organizer should be. However, in **Article 16 (2**), an organizer (person or organization) may designate persons who are 18 years old or above. In **Article 3 of the Enforcement Decree of the ADA** further requires, if the police are not able to submit an instruction for complementing the non-detail report directly to the person

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organizer, such instruction must be handed over to the householder or an adult family member or the person in charge in liaison. And if there is no adult family member of organizer is available, it may be served to the custodian of the residence place of the organizer[2]. Relying on above provisions, it is presumed that the organizer also must at least be 18 years of age. In Malaysia, the age minimum requirement of an individual to be an organizer is 21 years of age[3]. The organizer may also appoint number of persons in charge to ensure the assembly is conducted in orderly manner[4].

ii. Duties of Organizer

Both the **ADA** and the **PAA** have identical provisions which entail the organizer with obligations to ensure himself and the participants of an assembly to follow their own report/ notice details, the restrictions in the report/notice (if any) and to conduct the assembly in accordance with the Acts or any other written law, for instance not to strike a demonstration with violence or threat. In Korea, should the organizer find the assembly is in violation of the laws or restrictions, he has a duty to declare a conclusion of the assembly. In the case of Han Sang-gyun for example, the Court of Appeal upheld his conviction of 5 years imprisonment and a fine of KRW 500,000 due to his failure to maintain the peace of the assemblies he conducted, including the big mass Gwanghwamun protests in 2015 (see Chapter 3.2.4).

However in Malaysia, the **PAA** impose additional duty where to ensure the cleanup or to pay bear the cleanup cost of the place the assembly is upon the organizer. In the case of **Ambiga Sreenevasan**[5], several months after the **PAA** was newly enforced, the Government

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2 **Article 3 (2) of the Enforcement Decree of the ADA**

3 **Article 4 (d) of the PAA**

4 **Article 6 (e) of the PAA**

5 **Government of Malaysia v. Ambiga Sreenevasan & 14 Ors.**, **Civil Appeal No: W-01(NCVC)(W)-48—2/2015,** Op. cit.

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had filed a suit against the BERSIH organizer, Ambiga Sreenavasan and 14 other committees for failing in their duty to ensure the assembly will not endanger the health or cause damage to public facilities[6]. Therefore, the Government had sought for special damages including repairing the police vehicles with an amount of RM 110,543.27 (approximately USD 25,800) which occurred during BERSIH 3.0 Rally. In the final appeal, the Federal Court rejected the claim on the ground that there was no evidence to show that the persons who caused such damage were BERSIH participants. Besides, the damage was done after the organizers concluded the rally (see Chapter 3.3.4). This case points out that to put a liability on the organizer to clean up the messes in a place of assembly is not an easy task for the police (and the prosecution) to prove especially in a large scale demonstration or in big mass procession.

4. TOTAL BAN

Under the Korean and Malaysian laws, naturally both Acts forbid any sort of assemblies that may cause harmful to public peace and tranquillity either verbally by promoting hostility, or physically by carrying any types of weapons. However other than that both countries have different objectives in imposing a total ban based on the place and objective of the assembly. For instance in Korea, to hold a demonstration within the area of National Assembly's building is totally forbidden. On the contrary in Malaysia, subject to prior notification, any person can demonstrate within the Parliament compound, but not near the bridge. Further comparisons can be seen as follows:

6 They were charged under **Section 6 (g) of the PAA**

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i. Places

In Korea, to hold an outdoor assembly within a 100 meters radius of some key government or diplomatic compounds are an absolute prohibition[7]. As has been criticised by the Special Rapporteur, Maina Kiai, in his special mission to Korea in 2016; when the law impose bans on the time or location of assemblies as the rule, then permitting it as exceptions, this overturn the relationship between the freedom and restrictions[8]. Whoever dwells in that areas are now possessed the right to privilege. However, during the Gwanghwamun Protest against Park Geun-hye in late 2016, for the first time ever, an exception has been made to **Article 11 (2) of the ADA** when the Seoul Administrative Court has lifted the ban and allowed the Candlelight protestors to march near the Blue House (the presidential residence)[9].

Meanwhile in Malaysia, the **PAA** prohibits totally different types of places as compared to the **ADA** whereby no assembly within 50 meters shall take place at these public common places[10]: dams, reservoirs and water areas, water treatment plants, electricity generating stations, petrol stations, hospitals, fire stations, airports, railways, land public transport terminals, ports, canals, docks, wharves, piers, bridges, marinas, places of worship, kindergarten and schools, and places which have been declared as a protected places.

ii. Objective of Assembly

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7 **Article 11 of the ADA**

8 United Nation, General Assembly, Op. cit. No.43, p.7.

9 Case No: **2016AI2248** (decided on November 5, 2016) (Suspension of execution) and **2016A 12308** (decided on November 12, 2016), Op. cit.

10 The **First Schedule of the PAA**

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In Korea, the **ADA** provides an overt prohibition for citizens to hold an assembly with the intention to achieve the objectives of any political party that has been dissolved by the Constitutional Court. For example, a political party by the name of Unified Progressive Party (UPP) (통합진보당) was disbanded in the case of **2013Hun-da1**by the Constitutional Court with votes 8-1, on December 19, 2014 after the Korean government filed a petition due to their pro North Korean views. The UPP disbandment became the pilot case when **Article 8 (4) of the Korean Constitution** was first invoked[11]. Chief Justice Park Han-chul described the UPP was in quest of to 'undo South Korea's democratic order' and bring the country under the 'North Korea-style socialism', *"The activities of the respondent party, which include assemblies to discuss insurrection with the hidden objective of realizing North Korean style socialism, is in violation of the basic democratic order. In order to eliminate the specific danger of the respondent to cause substantial threat to society, there exists no less measure than to dissolve the said party"*. The ruling was criticised by the Amnesty International raising serious concern over the authorities' commitment to freedom of expression and association[12].

The Malaysian **PAA** is rather confusing when a street protest is considered as unlawful[13] but was permitted in the previous law, the **Police Act**. The definition in **Section 3** makes it more difficult to distinguish a street protest with other types of assemblies, such as march, procession, rally or street demonstration, *"an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes"*. As per the definition, a mass march or rally can become a street protest if the aim is to object or advance particular causes. As we know, the innate characteristics of assemblies are usually provocative or opposite of the majority's opinions, regardless how peaceful they are. Hence, this prohibition is

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11 Constitutional Court of Korea, **Op. cit. No.93.**

12 Steve Borowiec, *"In Unprecedented Move, South Korea Bans 'Pro-North' Political Party"*, Los Angeles Times, December 19, 2014. Accessed on June 5, 2017.

13 **Section 4 (1) (c) of the PAA**

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perplexing as no one can really know when a rally or march turns into street protest based on its vague objective.

5. ADVANCE REPORT OR PRIOR NOTIFICATION

In South Korea and Malaysia, both laws impose a 'mandatory' requirement for the organizer to submit an advance report (in Korea), or prior notification (in Malaysia) before an assembly can take place (hereinafter will be referred interchangeably as prior notice for both countries). The prior notice requirement is the core issue in defining the extension of the freedom of peaceful assembly in a country. As demonstrated in the previous chapters and also in this chapter, the Constitution allows the government to interfere with the right to peaceful protest in accordance to the law when it deems necessary to pursue its objectives. Simply put, restrictive laws may be imposed to limit the right to assemble peaceably. The prior notice holds the key to such restrictions. This is because; the police are vested with vast power either to impose any restrictions in the notice, such as time, place or manner, or to refuse at all a submission of the notice. Without it, an organizer is not allowed to hold an assembly. And if the assembly is held without the prior notice, the legal consequence may cause the assembly to be unlawful and anyone who involve may be subjected to penal provision.

Due to its powerful authorisation, it is said that the government and the police has utilized the prior notice for their own interests, which is to silent the government's opponents, without breaking the law. The existence of prior notice seems to oppose the general principle on freedom of peaceful assembly as enshrined in the Constitution, and at the same time, deviate its function to facilitate such rights.

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Therefore, **a proportionality test** is used to determine whether the objective of the restrictive laws to interfere the right to freedom of peaceful assembly is legit. As has been explained before, the main reference to find such legitimate objectives are derived from the **ICCPR**, namely for: (i) the interest of national security or public safety, (ii) public order, (iii) the protection of public health or morals, or (iv) the protection of the rights and freedom of others[14]. Conforming to the **ICCPR**, the freedom of assembly may be constricted in order to pursue these objectives.

Restrictions may also be pursued with the objective to allow the protestors to protest in peace and also to protect them from unlawful demonstrations, for example the requirement of prior notice before the assemblies may prevent the protestors from the police's or outsiders' disturbance. By delivering a proper notifications and details, the police may help them to execute their right to express opinions smoothly in the assemblies. Although both the **ADA** and the **PAA** contain similar restrictions, however the specifications of such restrictions are varied. The following are the types of restrictions which are provided in the **ADA** and the **PAA**. For convenience, the provisions relating to advance report and prior notification are presented here again.

[14] **Article 21 of the ICCPR**

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i. Advance Report under the ADA

Article 6 (1) requires an organizer of the assembly to submit report from 30 to 2 days before such assembly is held: *"Any person who desires to hold an outdoor assembly or to stage a demonstration shall, from 720 to 48 hours before such assembly or demonstration is held, submit a report ---to the chief of the competent police station"*. **Clause 2** adds: *"Upon receipt of the report --- the chief of the competent police station or the commissioner of the competent regional police agency shall forthwith issue a certificate of receipt specifying the date and time of receipt to the person submitting the report"*. That means, if the police satisfy the report contains all details as per required in **Clause 1**, the police must issue a certificate of receipt to the submitter. However **Clause 4** permits the police to issue a notice of ban if the assembly falls under **Article 8**. **Article 8** lists down 7 grounds for the police authority to ban or restrict an assembly, which are:

i. When an assembly is held to obtain the achievement of a political party that has been dissolved by the Constitutional Court or to incite people to hold such assembly, and an assembly that clearly pose a direct threat to public peace an order (**Article 5**).

ii. When an outdoor assembly is held either before sunrise or after sunset i.e. night-time assembly. Unless the police authority grants permission along with specified conditions for the maintenance of order (**Article 10**).

iii. When an assembly is held at the building of the National Assembly, all levels of courts and the Constitutional Court; or residence of the President, Speaker of National Assembly, Justice of Supreme Court and the Chief of Constitutional Court; or residence of Prime Minister (except for parade or

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procession); or diplomatic offices or residence of heads of diplomatic missions in Korea (see number 4, the exception is discussed under the Total Ban issue) (**Article 11**).

iv. When the details in the report are not complemented as per required by the police (**Article 7**).

v. When an assembly is held on a main road of a major city, the police may specify the conditions for the maintenance of traffic order if it is deemed necessary for smooth flow of traffic, unless sufficient numbers of moderators are assigned to parade along the road (**Article 12**).

vi. When there are counter assemblies which are proposed to take place in the same place, the first submitted report will be given a priority (**Article 8 (2)**).

vii. When there are requests for the proposed place of assembly or facilities to be protected by the resident of the such place or an administrator of facilities on the ground of (**Article 8 (3)**):

a. An assembly is likely to cause serious damage to its properties or facilities or to seriously affect the privacy of residents.

b. An assembly is held in an area surrounding school and therefore is likely to seriously violate the right to learning.

c. An assembly is held in the vicinity of a military installation and therefore is likely to cause serious damage to the military installation or to seriously affect the conduct of military operations.

ii. 10 Days Notifications under the PAA

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In Malaysia, **Section 9 (1) of the PAA** requires an organizer to submit notification to the police 10 days before the date of assembly, *"An organizer shall, ten days before the date of assembly, notify the Officer in Charge of the Police District in which the assembly is to be held"*. Upon the receipt of the notification, the police authority must respond within 5 days and inform the organizer if there are any restrictions or conditions as imposed under **Section 15**[15]. If the police do not correspond to the notification, silence implies consent[16]. Unlike the **ADA** which demarcates all restrictions in clear directions, the grounds of restriction or ban of an assembly in the **PAA** somehow are non specific.

Article 15 (1) emphasizes that the police authority may impose restrictions on an assembly only for the purpose of security or public order, including the protection of the rights and freedoms of other persons. As 'security; and 'public order' are not defined by the PAA, **Section 3** construes the 'rights and freedoms of other persons' as (a) the right to peaceful enjoyment of one's possession, (b) the right to freedom of movement, (c) the right to enjoy the natural environment, and (d) the right to carry on business. While **Clause 2** sets out 8 grounds to impose restrictions or conditions on an assembly:

i. The date, time and duration of assembly.

ii. The place of assembly.

iii. The manner of assembly.

iv. The conduct of participants during the assembly.

v. The payment of clean up costs arising out of the holding of the assembly.

vi. Any inherent environmental factor, cultural or religious sensitivity and historical significance of the place of assembly.

vii. The concerns and objections or persons who have interests.

15 **Section 14 (1) of the PAA**

16 Ibid. **Clause 2**

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viii. Any other matters the police deems necessary or expedient in relation to the assembly.

The major difference between these 2 laws is the Korean police possess an authoritative power to make a total rejection on the advance report if an assembly meets the criteria in **Article 8 of the PAA**. Therefore, a submission of the report does not guarantee an organizer can proceed with his plan to hold the assembly. On the other hand, Malaysian police authority acquires an administrative power to facilitate an assembly once the organizer submits a 10 days notification to hold an assembly. Which means, once a person submit a notification 10 days before the assembly is held, the Malaysian police cannot outright the organizer by saying 'no'. Instead, the police must assist by posting notices to the area of assembly to inform persons who might be affected by the assembly

Secondly, even though the Korean authority has huge power to authorise and even to ban the assembly, such power is limited by **Article 8**. In order for the Korean police to ban the assembly, they must precisely follow the grounds that are provided in the Act. For example, if the Korean police want to ban the assembly due to unsuitable time, the proposed assembly must satisfy the conditions that it is to be held as an outdoor assembly during night-time. Let say the Korean police want to ban the assembly based on the places, they have to ensure such assembly is projected to hold at the official residence of head of government, or government buildings or diplomacy offices. Another example is when the Korean police want to ban due to the objection of other people, they must verify that such objection comes from the resident of the proposed assembly or the administrator of the facilities. Also, the objections must be based on out fear if the assembly may cause danger, or near the military installation or near school area. Hence, notwithstanding the vast power the Korean police have, they cannot blatantly ban the assembly without solid reason.

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In contrast, although the Malaysian police cannot refuse the submission of prior notification, the authority has vast power to control the progress of the assembly. For instance, if the participants are planning to hold an assembly for 1 whole day in a public park while lifting up the protest signs, the Malaysian may restrict the duration of the assembly to only 1 hour at one small space in a public park without moving and lifting up their protest signs – which turn it into a statue protest. On top of that, the provision adds more power when the police may impose restrictions based on any other matters that deemed necessary as mentioned in **Section 15 (2) (h) of the PAA**. For this reason, even though the assembly is assured to proceed, no one can know what type of interference might be imposed by the police.

The Constitutionality of Prior Notice and the Constitutionality of Assembly without Prior Notice

Albeit the constitutionality of the prior notice was often challenged arguing it is in contravene with the Constitution, the Courts were in tendency to declare it as constitutional. In Korea, in the case of **2007Hun-Ba22,** the Constitutional Court Justice explained the purpose of advance report is to ensure the assembly is held peaceably and effectively while at the same time to protect public safety with legitimate purpose. The report increases the communication and cooperation between the organizer and the relevant administrative agency (the police). Such requirement is not excessive as it is not impossible to make and thus, it is not against the least restrictive means[17].

[17] Constitutional Court of Korea, Op. cit. No. 42

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Additionally, in the case of **2011Hun-Ba174**[18]**,** the Constitutional Court held that the provision that punishes the organizer who fails to report in advance for arranging an outdoor assembly and demonstration does not violate **Article 21 (1) of the Korean Constitution**. The report requirement under **Article 6 (1)** connotes a duty to cooperate with administrative agencies such as police to prepare necessary steps for the smooth and safe running of the assembly. And also, by reporting in advance for such assembly, it can prevent multiple assemblies from overlapping with each other and give the police to take appropriate measures to preserve the public safety. The law gives an ample time to the organizer to report at least 48 hours before the assembly takes place. For that reason, the Instant Provisions cannot be regarded as an excessive restriction nor does it impose excessive punishment. (see Chapter 3.2.4 for further reading)

Whereas, in Malaysia, the Federal Court had 2 different opinions in 2 separated cases on the constitutionality of the 10 days prior notification of assembly. In the case of **Nik Nazmi Bin Nik Ahmad**[19]*,* the Court of Appeal had delivered a pioneering judgment on the constitutional right of freedom of assembly in Malaysia. The Appellant had notified the police on the very day it was held, but still was charged as the requirement imposes the organizer to submit 10 days notification before it takes place. The Court of Appeal declared prior notification requirement is unconstitutional; however the three presiding judges had delivered different grounds of judgment in setting aside the charge.

According to Justice Mohammad Ariff Yusof, in his famous saying, *'that which is fundamentally lawful cannot be criminalised'*. The 10 day notice requirement is a reasonable restriction. He added that there was no provision in **the PAA** that stipulates the assembly per se as unlawful if the organizer fails to comply the 10 days notice. Meanwhile, to convict the

18 Constitutional Court of Korea, Op. cit. No.68.
19 **Nik Nazmi Bin Nik Ahmad v. PP [2014] 4 MLJ 157**

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organizer criminally liable by reason of an administrative failure or omission was irrational in the legal sense. Such dichotomy could be severed since both provision were not incontrovertibly intertwined and therefore would render **Section 9 (5)** unconstitutional and the said provision was struck down.

Concurred the abovementioned judgment, Justice Hamid Sultan Abu Backer held that the prior notification was lawful and not excessive. The **PAA** gave a right for everyone to assemble whether the requisite of 10 days prior notice is fulfilled or not. To criminalise for the non compliance had no nexus to 'public order' or 'interest of security of the Federation'.

On the other hand, Justice Mah Weng Kwai declared that the prior notice requirement and its penal provision are unconstitutional. The Lordship in his judgment opined that the word 'restrictions' in **Article 10 (2) of the FC** does not imply power to criminalise any breach of those restrictions. His Lordship continued that both provisions created inconsistent and incongruous position as participants in a peaceful assembly held without the 10-day notice committed no wrong while the organiser of the assembly would be criminally liable for not having given the 10 days notice. The right to peaceful assembly ought to include the right to organize a peaceful assembly. Such restriction was not reasonable since it circumvents an organizer to hold a spontaneous assembly. Therefore both provisions were struck down for being unconstitutional.

On the contrary, the Court of Appeal in **Yuneswaran**'s case departed from the earlier decision in the case of **Nik Nazmi.** The respondent was charged in his capacity as an organizer of the assembly in 2013 where no notification was submitted to the police, 10 days before the day of assembly. The three panel member of the court unanimously held that the prior notice provision is constitutional and enforceable.

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The honourable Justice ruled out that nothing in **Article 10 (2) of the FC** could be construed as prohibiting the imposition of criminal sanctions for non compliance with ten day notice. Such requirement is crucial and reasonable as it is to facilitate one's right to organize and assemble peaceably lawfully and at the same time to preserve public order and protecting the rights and freedom of other persons, not to restrict it. The 10 days notice requirement, according to Lordship, is not a 'restriction' within the meaning of **Article 10 (2) (b)**[20] of the Constitution and the imposition of criminal sanction under **Section 9 (5)** is not *ultra vires* with and does not run foul of **Article 10 (2) (b)**. Hence, the Court of Appeal allowed the appeal and affirmed the conviction and sentence imposed by the Sessions court. As for now, the latter case will be precedent case in Malaysia.

Further discussion focusing on the constitutionality of **Sections 9** and **15 of the PAA** is available in sub-chapter 4.3.

6. APPEAL AGAINST THE BAN OR RESTRICTIONS OF PRIOR NOTICE

Both the **ADA** and the **PAA** provide a room for the organizers to appeal if they are not happy with the restrictions or ban compelled by the police. In **Article 9 (1) of the ADA**, the organizer may file a complaint with the head of the next superior authority of the police who received the advance report. And if the police fail to make a ruling within 24 hours after received the complaint, the ban of prior notice shall be void, which mean the complainant can proceed to hold the assembly. Meanwhile in **Section 16 (1) of the PAA**, the organizer may appeal within 48 hours after being informed, to the Minister if he is aggrieved by the

[20] **Article 10 (2) (b) of the FC**: *Parliament may by law impose on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order.*

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restrictions. Since there is no ouster clause in both Acts, that means if the second appeal is still rejected, the organizer may apply for a judicial review at the court.

7. ASSEMBLIES EXEMPTED FROM PRIOR NOTICE

In Korea, assemblies relating to study, arts, sports, religion, ceremony, friendship promotion, recreation, wedding, funeral or memorial service, and national holiday are exempted from the requirements to submit an advance report[21]. However, a protest expressing grievances against the Ministry of Employment and Labor for rejecting to set up labor union and youth unemployment by way of flash mob performance does not fall under an art assembly[22] (see Chapter 3.2.3).

Meanwhile in Malaysia, the 10 days notification does not apply to (i) assembly which is to be held at a designated place of assembly as declared in the Gazette by the Minister, (ii) any assemblies specified in the **Third Schedule**, which are: Religious assemblies, funeral procession, wedding, open house during festivities, family gatherings, family day by employer, general meetings of societies or associations[23]. That is to say, a mass general meeting organized by opposition political party is also excluded from the 10 days notification prerequisite.

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21 **Article 15 of the ADA**

22 Supreme Court Case: **2011Do2393**, Op. cit.

23 **Section 9 (2) of the PAA.**

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8. POWER TO DISPERSE

Under **Article 20 (1) of the ADA**, the police may order dispersion of an assembly if it is in contravene with any 7 grounds of restrictions or bans as have been discussed above, or the assembly is not reported, or the assembly has been concluded by the organizer, or the participants are bearing weapons or disrupting the order by means of violence, or the assembly is breaching the bounds of the details in the report. As for **the PAA**, **Section 21** permits the police officer to issue an order to disperse when the assembly is held at prohibited place, or the assembly becomes a street protest, or any person does any act or makes any statement which promotes ill-will or hostility, or any person commits an offence under any laws, or the participants do not comply the restrictions under **Section15** and the participants are engaging unlawful conduct or violence towards person or property. **Clause 2** also allows the police to use any reasonable force to exercise their power to disperse.

In addition to that, the Malaysian police also have, in which the Korean police do no, the power to arrest without warrant when the any person violates the provisions in the Act, including those who bring a child to an assembly[24].

9. PENAL PROVISIONS

The main difference between both laws, the **PAA** only provides monetary fine from RM 10,000- 20,000 (approximately from USD 2,400 to USD 4,700)[25]. Under the new amendment, the **PAA** does not maintain the imprisonment sentence when a person violates any provision of the Act. However, after the **PAA** came into effect, there were 2 landmark cases which decided on the constitutionality of the penal provision in **Section 9 (5)** when an organizer of the assembly fails to tender 10 days prior notice to the police. In the case of **Nik**

[24] **Section 20 of the PAA**

[25] The penal provisions are scattered under **Sections 4, 9, 15 and 21 of the PAA**.

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Nazmi Bin Nik Ahmad, the Court of Appeal had delivered a pioneering judgment when the Appellant sent a notice to a police exactly on the day the assembly was held. The judges had 3 different opinions in declaring **Section 9 (5)** as unconstitutional. I quoted here one of the 3 judgments delivered in this case (see Chapter 3.3.4). According to the learned judge held "*that which is fundamentally lawful cannot be criminalised"*. The 10 day notice requirement is a reasonable restriction under **Section 9 (1)** and therefore shall be considered as a constitutional. He added that there was no provision in the **PAA** that stipulates the assembly per se as unlawful if the organizer fails to comply the 10 days notice. Hence, to convict the organizer criminally liable by reason of an administrative failure or omission was irrational in the legal sense. Such dichotomy could be severed since both provision were not incontrovertibly intertwined and therefore would render **Section 9 (5)** unconstitutional and the said provision was struck down.

In the second landmark case of **Yuneswaran a/l Ramaraj**, the 3 panel member of the court unanimously held that **Section 9 (5)** is constitutional and enforceable. It was ruled out that nothing in **Article 10 (2) of the Federal Constitution** could be construed as prohibiting the imposition of criminal sanctions for non compliance with ten day notice. Such requirement is crucial and reasonable as it is to facilitate one's right to organize and assemble peaceably lawfully and at the same time to preserve public order and protecting the rights and freedom of other persons, not to restrict it. The 10 days notice requirement, according to Lordship, is not a 'restriction' within the meaning of **Article 10 (2) (b)** of the Constitution and the imposition of criminal sanction under **Section 9 (5)** is not *ultra vires* with **Article 10 (2) (b)**. Thus, the Court of Appeal has affirmed the conviction and sentence which was imposed by the Session Court.

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Whereas in Korea, it imposes heavier punishments for those who violate the **ADA** where the heaviest imprisonment sentence is 3 years, followed by 2 years, 1 year, 6 months and penal detention. Otherwise, the offender may be fine as high as KRW 3 million to 2 million, 1 million, 5 hundred thousand or minor fine (approximately from USD 2,700 to USD 450)[26].

With regard to the constitutionality of the penal provisions under **Article 6 (1) of the ADA** which mandates an advance report duty for an outdoor assembly, the Constitutional Court in **2007Hun-Ba22**[27] has raised an issue whether the violation of an administrative rule should be treated as the violation of the administration goal and the public interest, and if it does how the sentencing guideline should be set under what category. Majority of the Justices were of the view that there is a high probability an unreported outdoor assembly could threaten the administrative goal and the public interest. Therefore, the penalty provision does not infringe the freedom of assembly nor is it excessive[28]. On the contrary, 2 Justices held that the reporting requirement is a simple administrative measure which intends to cooperate with 2 parties. Hence, the administrative sanction such as fine is sufficient. When the Act imposes imprisonment penalty it causes chilling effects on the constitutional freedom of assembly. The imprisonment penalty has changed the report system to a licensing system and treats the organizer as guilty as the organizer who holds a violent assembly. And for this reason, the penalty provision enforces an excessive punishment and therefore it is against the Constitution[29].

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26 **Articles 22, 23 and 24 of the ADA.**
27 Constitutional Court of Korea, Op. cit. No. 42, pp. 283-287.
28 Ibid. p.286
29 Ibid. p.287

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Similarly, in the consolidated cases of **2011Hun-Ba174** and **2012Hun-Ba39**[30], it was held that the provision that punishes the organizer who fails to report in advance for arranging an outdoor assembly and demonstration does not violate **Article 21 (1)** of the Korean Constitution. The learned judge explained the requirement under **Article 6 (1)** connotes a duty to cooperate with administrative agencies such as police to prepare necessary steps for the smooth and safe running of the assembly, and also, it can prevent multiple assemblies from overlapping with each other and give the police to take appropriate measures to preserve the public safety. The organizer has been given an ample time to report at least 48 hours before the assembly takes place. Therefore, both provisions cannot be regarded as an excessive restriction nor does it impose excessive punishment[31].

10. ASSORTED PROVISIONS IN THE ADA

i. Advisory Committee

There are several provisions that are only available in the **ADA** but not in the **PAA**. Some provisions are commendable to be adopted into the Malaysian **PAA**, for instance, the establishment of Advisory Committee on Assemblies or Demonstrations. **Article 21 (1) of the ADA** provides, *"In order to balance the freedom of assembly and demonstration with a need to maintain public peace and order, they may be established in each police authority of different levels an advisory committee on assemblies or demonstrations that provides the head of such police authority with advice.."*. According to **Article 21**, the Committee which consist of lawyers, professors, persons recommended by civic organizations, representative of

30 Constitutional Court of Korea, Op. cit. No.68, pp. 108-112.
31 Ibid. p.111

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the residents in the particular area, may advise the police authority on issues pertaining to (i) notice of the ban or restriction on the assembly, (ii) a ruling on the complaint made by the residents of the proposed assembly area or the administrator of the facilities, (iii) examination of cases on assemblies, and (iv) any matters that are necessary to deal with the assemblies affairs. The establishment of this Committee would offer a great help for the police in determining the best way to handle assemblies especially on the issue of notice of ban or restriction. In principle, since the Malaysian police have more power as compared to Korean authority, the institution of the advisory committee may assist the Malaysian police with proper advices and suggestions in dealing with the assemblies.

ii. Protection for the Assemblies

There are 3 provisions under the **ADA** that expressly confer protections to the organizer and the participants to ensure the smooth flow of an assembly. In **Article 3** of the **ADA**, a person who interfere with a peaceful assembly or obstruct the organizer's duties can be convicted for 3 years imprisonment or be fine for KRW 3 million. The organizer may also request a protection from the police if there is a reasonable ground that the assembly may be interfered with. The organizer may also exclude a specific person or organization from joining the assembly as mentioned in **Article 4**. Furthermore **Article 13** adds, the police line may be set up for the purpose to protect the assembly or for the maintenance of public order.

These 3 provisions are good examples to enhance the enforcement of the provisions in the **PAA**. For example, prior to BERSIH 5 rally which was held on November 5, 2016, the Red Shirts (supporters of government ruling party) has declared to make a counter demonstration against the BERSIH 5 rally. The group also has submitted a prior notice to the

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police which was clearly it was intended to create a chaos between these 2 groups[32]. In line with **Section 18 of the PAA**, if the police receive a notification of a counter assembly which evidently will cause conflict between participants of the assemblies, the second submitter must be given an alternative to reorganize at another time, date or place. Unfortunately, the counter assembly went on as planned as the BERSIH rally has no legal standing to request the police protect them from the Red Shirt's interference on the said event. The power to stop the assembly in fact is on the discretion of the police.

11. NATIONAL HUMAN RIGHTS COMMISSION

Apart from **the ADA**, another important step that can be followed by Malaysia is to expand the power of SUHAKAM as much as the National Human Rights Commission of Korea (NHRCK) has. Also, the establishment of SUHAKAM as *amicus curiae* in Malaysia is very crucial in order to allow the SUHAKAM to bring any human rights matter to the court on its own capacity or to represent on behalf of other people, and to present its opinion in court.

Under the **Article 19 of National Human Rights Commission of Korea Act**, the NHRCK is vested with 10 duties, which are (i) to investigate and conduct a research with respect to Acts and the subordinate statutes and accordingly recommend for their improvement, (ii) to investigate the cases of human rights violations, (iii) to investigate the cases of discriminatory acts, (iv) to investigate on actual conditions of human rights, (v) to educate matters relating to human rights, (vi) to present and recommended the guidelines relating to human rights violations, the standard to identify the human rights violations and the preventive measures, (vii) to cooperate with organization and individuals engaged in human rights activities for the purpose of protection and improvement, (ix) to exchange and

[32] Natasha Joibi, *"Red Shirt Plan to Counter-Protest against Bersih 5"*, the Star, October 27, 2016. Accessed on June 7, 2017.

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cooperate with international or foreign organizations for human rights protection, and (x) other matters deemed necessary to guarantee and improve the human rights. Due to the vast scope of the tenth sub-clause in this Act, it grants the NHRCK to take any necessary actions to accomplish their duties, for example, to participate in legal proceedings as amicus curiae.

Additionally, **Article 28** also provides in the case proceedings that deal with the protection and improvement of human rights, the NHRCK may present its opinions on *de jure* matter to any courts. Similarly, in the case proceedings pertaining to matters investigated by the Korean Commission under **Chapter IV (Investigation On Human Rights Violations And Discriminatory Acts, And Remedy)**, the Commission may present its opinions on *de facto* and *de jure matters* to any courts[33].

SUHAKAM has been proactive and played very significant role in improving the human rights standards in Malaysia, particularly the rights to freedom of peaceful assembly. However, due to its limited functions, the public investigations carried out by SUHAKAM are not legally binding, nor SUHAKAM can bring the matter to the court on its own capacity. Therefore, it is essential for the Parliament to follow the step in Korea and expand the power of SUHAKAM. The wish to obtain the status of *amicus curiae* was expressed by the SUHAKAM in its annual report as well, *"Such role is deemed important for the Commission as it will be an opportunity for the promotion of human rights within the judicial process. The*

[33] **National Human Rights Commission of Korea Act, Article 28 provides,**
"(1) In case proceedings liable to affect the protection and improvement of human rights are pending, the Commission may, if requested by a court or the Constitutional Court or deemed necessary by the Commission, present the opinions on de jure matters to the competent division of the court or the Constitutional Court.

(2) In case proceedings with respect to matters investigated or dealt with by the Commission under the provisions of Chapter IV are pending, it may, if requested by a court or the Constitutional Court or if deemed necessary by the Commission, present the opinions on de facto and de jure matters to the competent division of the court or the Constitutional Court."

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National Human Rights Commission of countries such as Indonesia, Thailand, the Philippines, Australia, Fiji and Ireland are already undertaking such role in their national court systems as mandated under their governing legislation"[34].

[34] SUHAKAM, Op. cit. No. 241, p.60.

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4.3 CRITICAL POINTS OF THE STUDY

In the previous chapters, we have explored what are the general principles of freedom peaceful assembly under the international treaties and under the national laws of the Republic of Korea and Malaysia. We have understood that the right to assemble in peace is the right of persons to meet together with common objective either privately or in a public space. The methods of assemblies can be done in many ways such as procession, march, rally, sit-in protest and demonstration as long as it is carried out peacefully. We also have discovered that the freedom of assembly is conditional, whereby regardless of how peaceful the assembly is, it is still depending on the permission of the authorities, in this context the police. Such permission has been reduced into the restrictive laws i.e. the **Assembly and Demonstration Act** and the **Peaceful Assembly Act 2012**. As has been clarified before, in order for the authority to restrict such right within the legal boundaries, such restrictions must first meet the test of necessity and proportionality.

Up to this point, I will focus only on the theory of the constitutionality of the **PAA**. The discussions of the **ADA** in the previous chapter and this chapter are essential to support my theory and bring us to a different perspective on the legal approach to dealings with the freedom of assembly from a different jurisdiction. There are 2 suppositions I will highlight in this chapter, which are:

(I) Section 9 of the Peaceful Assembly Act 2012 is constitutional

(II) Save for Clause 2 (g), Section 15 of the Peaceful Assembly Act 2012 is unconstitutional.

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PRINCIPLE OF PROPORTIONALITY

Before I elaborate more on these theories, I will discuss on the standard principle in determining the constitutionality of a particular statutes or provisions, that is to say, the principle of proportionality. The origin of the proportionality concept was found in the jurisprudence of Prussian administrative court when the principle of necessity was developed in the police law. It was after the case of **Kreuzberg**[35] in the late of 19th century, the Prussian Supreme Administrative Court had examined whether the measures adopted by the police went beyond what was considered necessary for attaining a relevant objective[36], after the police invoked a provision 'as are necessary for the maintenance of public order' to justify their measures[37]. In this case, the Court overturned a police order which prohibit the construction of buildings that could obstruct the view of, or from, the Kreuzberg national monument in Berlin, on the grounds that the police power could not be used to promote aesthetic goals[38].

Later on, the Federal Constitutional Court of Germany has developed the proportionality principle and subsequently it was adopted by all jurisdictions across the country. For example, in the common law systems, the principle of proportionality or also known as 'principle of reasonableness', lays down that all statutes which affect human rights should be proportionate or reasonable.

Meanwhile, as introduced by the Germany court, Cianciardo (2010) says the analysis of proportionality comprises of three sub principles: (i) adequacy, (ii) necessity, and (iii) proportionality *stricto sensu* (strict sense).

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35 Decided on June 14, 1882, ProVG 9, 353.

36 Yutaka Arai-Takahashi, *"Proportionality - a German Approach"*, Amicus Curiae, Issue 19, July 1999, p.11.

37 The Focus, "*The Principle of Proportionality and the Concept of Margin of Appreciation in Human Rights Law"*, Basic Law Bulletin, Issue 15, December 2013, p.2. Accessed on July 6, 2017.

38 Jud Mathews, *"Proportionality Review in Administrative Law"*, p.7. Accessed on July 7, 2017.

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i. Adequacy/ Suitability

The statutes which have an effect on the human rights must be suitable to achieve the purpose that was sought by the lawmakers. This means the interpreter has to identify what the aim is and the means which have been created by the lawmakers. And once it is identified, the interpreter has to prove that the means are capable of achieving such aim.

ii. Necessity

And then, through all means capable of achieving such aim, the interpreter has to evaluate the one which is the least restrictive of the human rights. It will only pass if it is the one among those similar in efficacy which is the least restrictive of the rights. In other words, the less restrictive means should be used if it is equally effective[39].

iii. Proportionality *stricto sensu*

Once both sub-principles are established, the interpreter should determine whether it is reasonable in a strict sense or not. Which means the measure should not be disproportionate to the objective[40].

39 The Focus, Op. cit. p.2.
40 The Focus, Op. cit. p.2.

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Application of the Test

I have observed that although it is agreeable to apply the principle of proportionality as standard test to measure the legality of all state organs, however there are slight differences of approaches that have been used by the Court from different jurisdiction, particularly in Malaysia.

I would like to intricate this principle more through the landmark ruling in the case of **Sivarasa Rasiah**[41]. *Badan Peguam Malaysia* or the Malaysian Bar is a professional body which regulates the advocates and solicitors in Malaysia. The appellant, Sivarasa, was an advocate and solicitor who was also a politician and a Member of the Parliament. The Appellant wished to run for the Bar Council election which was the governing body of the Malaysian Bar. However, **Section 46A (1) of the Legal Profession Act 1976** (the **LPA**) prohibited him from doing so:

> *(1) A person shall be disqualified for being a member of the Bar Council or a Bar Committee, committee of the Bar Council or a Bar Committee –*
>
> *(a) If he is a member of either House of Parliament, or of a State Legislative Assembly, or of any local authority, or*
>
> *(b) If he holds any office in –*
>
> (i) *Any political party.*

The Appellant challenged the constitutionality **of Section 46A (1)** on 3 grounds (i) that **Section 46A** violates his rights of equality and equal protection guaranteed by **Article 8 (1) of the FC**; (ii) that the section violates his right of association as guaranteed by **Article 10**

41 **Sivarasa Rasiah v. Badan Peguam Malaysia & Anor. [2010] 3 CLJ 507.**

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(1) (c) of the FC; (iii) the section violates his right to personal liberty guaranteed by **Article 5 (1) of the FC**. Should any of these rights was found to be violated; the section must be declared void and inconsistent with the Constitution.

With regard to the second ground raised by the Appellant, the Court set off two significant tests, firstly, whether the restriction imposed is in **Section 46A** is reasonable. **Article 10 (1) (c)** and **(2) (c)** of the Constitution says,

> *"(1) Subject to Clauses (2), (3) and (4)—*
>
> *(c)* all citizens have the right to form associations.
>
> *(2) Parliament may by law impose—*
>
> *(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality."*

The Court has adopted the judgment of the Court of Appeal in the case of **Dr. Mohd Nasir Hashim v. Minister of Home Affairs, Malaysia**[42] whereby although the article in the Constitution stipulates 'restriction', the word 'reasonable' should be read into the provision to qualify the width of the proviso.

Gopal Sri Ram FCJ explained the Court was of the view that restrictions in **Section 46A (1)** are reasonable because they are justifiable on the ground of morality. As morality is not defined by the FC, the Court borrowed the opinion in **Manohar v. State of Maharashtra**[43] that the morality in equipollent **Indian Article 19 (2) (4)** – *"is in the nature*

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42 **Dr. Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19**

43 **Manohar v. State of Maharashtra AIR [1984] Bom 47**

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of public morality and it must be construed to mean public morality as understood by the people as a whole". He added that the Bar Council as the professional body the matter of discipline and its regulation do form part of the public morality. For the purpose of public interest, the lawyers must behave professionally, act honestly and independent from any political influence. The absence of political influence protects the independence of the Bar Council. Therefore, the challenge based on **Article 10 (1) (c)** was dismissed[44]. For this reason, therefore, **Section 46A** has met the first reasonable test.

The second test is whether the restriction imposed in **Section 46A** is proportionate or otherwise. The Court has dealt with the first and the third grounds submitted by the Appellant under this test. As the 'personal liberty' under **Article 5 (1)** includes the right to privacy, thus the right to be a member of the statutory body i.e. the Malaysian Bar is also protected as the personal liberty. The Court asked whether there has been a deprivation of that right in accordance with law. The Court straightaway answered this question negatively. The reason was, **Section 46A** does prevent the appellant's to be a member of the Malaysian Bar. The restriction, however, referred to prohibition to serve on a distinctly separate body i.e. the Bar Council. The restriction does not completely prohibit him, as a member, from taking part of the Bar Council decision making, therefore such restriction is reasonable.

As for the first ground which quoted the right of equality and equal protection under **Article 8 (1)**, the Court made it clear that **Section 46A** classifies advocates and solicitors who hold office in a political party and those who are not. This is a reasonable classification to permit the lawyers from having a say in the governance of the profession. The policy is fair and just in order to ensure the Bar Council will not create an insight of having political leanings. And thus **Section 46A** is in conformity with the equality clause of **Article 8 (1)**. In answering the issue whether **Section 46A** violates the equal protection clause, the Court

[44] **Sivarasa**'s case, Op. cit. p.518.

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states the test here is whether the legislative state action is disproportionate to the object it seeks to achieve. In other words, the state action must not be arbitrary. The objective of such restriction is to keep the Bar Council free from political influence. Even so, the provision does not prohibit the Appellant, not any member from attending and speaking at a general meeting of the Bar to express their opinions and influencing the Bar Council accordingly. Hence, the legislative measure imposed by the Act is proportionate and meets its objective. For this reason, **Section 46A of the LPA** does not violate **Articles 5 (1), 8 (1)** and **10 (1) (c)** of the Constitution. Consequently, the appeal was dismissed.

The same proportionality test has also been adopted by the Court of Appeal in another landmark case of **Mat Shuhaimi bin Shafiei**[45]**.** In this case, the Appellant seeks for a declaration that **Section 3 of the Sedition Act 1948** (the **SA**) read together with the **Section 4** of the same Act, was in violation of or inconsistent with **Article 10 (1) (a) of the FC**, that is the right to freedom of speech and expression. Prior to this application, the Appellant, a Legislative Assembly member of Selangor state, has been charged under **Section 4 (1) (c)** for publishing an online article with the title of "My Opinion Based on the Constitution of Selangor, 1959". The Appellant sought for certain orders for the charge against him to be struck off on the grounds of the inconsistency **of Section 4** with **Article 10 of the FC**. His appeal against the Public Prosecutor was dismissed by the Court of Appeal.

For clarification, **Section 3 (1)** defines the types of act, speech, words, and publications that fall under the meaning of 'seditious tendency', for example *"to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government"*[46]. **Section 3 (2)** is an exemption clause, and **Clause (3)** was the provision which has been

45 **Mat Shuhaimi bin Shafiei v. Government of Malaysia W-01(A)-115-04/2015**
46 **Section 3 (1) (a) of the SA**

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challenged as unconstitutional in **Mat Shuhami'**s case. Whereas, **Section 4** provides the punishment to whoever is found guilty under **Section 3**.

Unlike the first suit, the Appellant filed an Originating Summon against the Government of Malaysia as an opposite party, with a particular request of declaring **Section 3 (3) of the SA** as unconstitutional, where it disregard the requirement of *mens rea* as an element of proofs to convict someone under this provision. For convenience, **Section 3 (3) of the SA** is presented here:

> *"For the purpose of proving the commission of any offence against this Act* ***the intention of the person charged*** *at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing* ***shall be deemed to be irrelevant*** *if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency".*[47]

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[47] Whereas, **Section 3 (1) of the SA** provides: '" '*A seditious tendency' is a tendency—*
(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;
(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;
(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;
(e) to promote feelings of ill will and hostility between different races or classes of the population of Malaysia; or
(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution".

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Varghese George JCA pointed out that it is not a dispute anymore that when it relates to the operational issue of the fundamental liberties under the Constitution, apart from the criteria of 'reasonable or rational classification' and the law does not 'render the liberty to be ineffective and merely illusory', it also has to meet the test of proportionality. This is especially when such fundamental liberty is qualified, in our context, the freedom of assembly under **Article 10**. Affirming the approach used in the cases of **Sivarasa Rasiah, Dr. Mohd Nasir Hashim,** and **Azmi Sharom** (also a constitutional challenge case against the Sedition Act)[48]**.** The learned Justice added the proportionality test is indeed a further check against the infringement of fundamental rights guaranteed under the Constitution.

The extract of judgment in the case **Dr. Mohd Nasir Hashim** was well adopted by many cases whereby *"–not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as the 'doctrine of rational nexus'"*. To put it differently, the imposition of the restrictive means must have a reasonable connection with the objective set out by the law. Thus, should the State action is disproportionate to the object sought to be achieved, the Court is entitled to strike it down.

Back to **Mat Shuhaimi'**s case, with regard to freedom of speech, **Article 10 (1) (a)** provides, "*—every citizen has the right to freedom of speech and expression"*. However, the Parliament may by law impose; restrictions for the interest of national security, diplomatic relations, public order or morality and also restrictions to protect the privilege of Parliament or Legislative Assembly members, or to provide against contempt of court, defamation or incitement to any offence[49]. Parliament may also pass law to prohibit the questioning of any

48 **Public Prosecutor v. Azmi Sharom [2015] 8 CLJ 921**
49 **Article 10 (2) (a) of the FC**

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matter[50] relating to the citizenship[51], Malay language as the national language[52], reservation of quotas for Malays and natives of Sabah and Sarawak and Ruler's sovereignty[53].

The Court posed a question whether the restriction under **Section 3 (3) of the SA** could pass the test of proportionality to be held as sustainable within the permissible restrictions or legislative measure allowed in **Article 10 (2) (a) of the Constitution**. **Section 3 (3)** did not just remove the very core ingredient (the *mens rea*) to be proved in criminal proceedings, but it also not in the terms of a rebuttable presumption, unlike in other criminal statutes. The Court rejected the Respondent's contention that **Section 4** was a strict liability offence and thus it did not require *mens rea*. If it is true **Section 4** was a strict liability offence, then **Section 3 (3)** should not be included by the Parliament in the first place.

Although it is agreed that the limited legislative inroad was permitted to meet the objectives under **Article 10 (2) of the FC**, the Court held that **Section 3 (3) of the SA** did not meet the test of proportionality. There is no valid justification for such provision was imposed for the purpose to preserve the national security, or public order, or to prevent the incitement of an offence. The Court has compared to the drug abuse and drug trafficking offences under the **Dangerous Drug Act 1952**, or the corruption case under the **Malaysian Anti-Corruption Act 2009**, that even such heinous crimes under those Acts have created a rebuttable presumption. For this reason, when **Section 3 (3)** totally dislocate the criminal intent, such provision was entirely unsustainable and breach the freedom of equality.

Additionally, **Section 3 (3)** was also in conflict with **Section 505 of the Penal Code** (**Statement Conducing to Public Mischief**). **Section 505** stipulates:

"Whoever makes, publishes or circulates any statement, rumour or report—

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50 Ibid. **Clause (4)**
51 **Part III, of the FC**
52 **Article 152 of the FC**
53 **Article 181 of the FC**

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(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Malaysian Armed Forces or any person to whom section 140B refers, to mutiny or otherwise disregard or fail in his duty as such;

(b) with intent to cause, or which his likely to cause, fear or alarm to the public, or to any section of the public where by any person may be induced to commit an offence against the State or against the public tranquillity; or

(c) with intent to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community of persons,

shall be punished with imprisonment which may extend to two years or with fine or with both.

Exception—It does not amount to an offence within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid".

Although **Section 505 of the Penal Code** is very much similar to the objectives under the **Article 10**, but the intention of the perpetrator is part of the fundamental elements. Undoubtedly, any accused person charged under **Section 3** would be clearly disadvantaged and eventually discriminated.

Hence, the Court unanimously held **Section 3 (3) of the SA** was a disproportionate restriction to meet the objectives explicated in **Article 10 (2) of the FC** and violated the right of equality as enshrined in **Article 8 (1) of the FC.** Should there is a rebuttable presumption, this provision would have passed the proportionality test and the accused would be given an

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opportunity to disprove such intent. For this reason, as **Section 3 (3) of the SA** is in contravention with **Article 10 of the FC**, it shall be invalid and declared it as no effect in law. Accordingly, the Appellant will still face the charge under **Section 4 of the SA**, but the prosecutor now has to prove the element of criminal intent of the seditious act.

In the light of the above cases, we can conclude that the basic structures in the Constitution can only be interfered with through the legislative inroad if it meets the proportionality test. However, from my observation, notwithstanding the Courts did loosely mention the 3 elements of suitability, necessity and proportionality as explained by Cianciardo, none of the Courts were strictly followed such principles to determine the constitutionality of the provisions in question. Rather, the courts have followed the standard based on the precedent cases. Apart from that, although I am in agreement with decision in **Sivarasa** and **Mat Shuhaimi**, however I insist that the Court, in the future, should also explain the term 'necessary and expedient' as mentioned in **Article 10 (2) of the FC**. Under this provision, it allows the Parliament to impose restrictions "*as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order"* or morality so hence so forth. So far, all the landmark rulings have only agreed that the proper way to read **Clause 2** is to insert 'reasonable' restriction in deciding the legality of such restrictive laws. As much as the Parliament and the State authority are under the responsibility to enforce the restrictive laws only when it is necessary or expedient to do so, the Court is also under the duty to interpret the law whether it is implemented necessarily or expediently to achieve the legitimate objectives.

I. Section 9 of the Peaceful Assembly Act 2012 is Constitutional

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Section 9 which requires an organizer to submit a prior notification 10 days before the assembly is planned to be held, is probably the most provision which has been challenged for its constitutionality. I reproduced the entire of **Section 9** here:

> *(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*
>
> *(3) If the assembly is a 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.*

Previously, before the **PAA** came into force in 2012, the right to assemble was severely curtailed by **Section 27**, **Sections 27A**, **27B**, and **27C of the Police Act**. As prescribed by the **Police Act**, any assembly which was held without the authorisation of the police in charge would be unlawful, regardless of how peaceful and safe the assembly was.

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Through the legal cases and the reports by the local and international human rights watchers, the **Police Act** has been used to curb the freedom of the government critics' to express their opinions in large or small scale gathering. It is not exaggerated to say that the issuance (or non-issuance) of the police permits were politically motivated. The police also have huge power to impose additional conditions on the proposed assembly even it is held on the private land. Without the police permit, an organizer and participants of the assembly may be subjected to the imprisonment or fine sentence.

Section 9 of the PAA is totally the opposite of the repealed provisions of the **Police Act**. When any person intents to hold an assembly, he is required by the Act to tender a prior notice to the police 10 days before the date of the proposed assembly. The Act further imposes an obligation on the police in **Section 12 (1)** where upon receiving such notice, the authority must inform the persons who have interests either by posting a notice at various locations at the place of assembly or by any reasonable means.

Article 10 (2) (b) stipulates that the Parliament may by law impose on the right to assemble in peace, such restrictions as it deems necessary or expedient in the interest of the national security or public order. To elaborate, in order for the State to pursue its objectives, which is for the safety of the country and for the protection of public order, the restriction must be reasonable and proportionate. The restriction in question here is the requirement of the 10 days prior notification. The 2 important tests in **Sivarasa's** case will be reapplied here.

The first test is whether the restriction of 10 days prior notice imposed in **Section 9 (1)** is reasonable. My answer is, the requirement of the prior notification to be submitted to the police 10 days before the assembly is to be held is reasonable on the ground of public order. The notice holds an important key considering the nature of the assembly which usually takes place in the public place and in a large scale, it may interfere with the daily

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operations of the society and affect the ability of other people to function efficiently. Every person who might be affected by such assembly has the right to be informed and should not be left to face any difficulties caused by a spontaneous assembly. An example of a person who might be affected by the assembly is the people who hold a business in that area.

In addition, the restriction impose in **Section 9 (1)** is also in conformity with the purpose of the **PAA** as mentioned in **Section 2 (b)**: *"**The objects of this Act are to ensure** – **that the exercise of the right to organize assemblies or to participate in assemblies,** peaceably and without arms, **is subject only to restrictions** deemed necessary or expedient in a 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**"*. The rights and freedoms of other persons are defined as the right to peaceful enjoyment of one's possession, the right to freedom of movement, the right to enjoy the natural environment, and the right to carry on business[54].

The second test in determining the constitutionality of **Section 9 (1)** is whether the restriction of the notifying requirement is proportionate. The answer is affirmative yes. Nothing in this provision or any part of the **PAA** allows the police to refuse such notification. Instead, the law requires the police to notify promptly other persons of interest within 24 hours, upon receiving such notice. The authoritative power which was possessed by the police in the **Police Act** has now become the administrative power. Rather than to deny the right to assemble in peace, the police are now has a duty to facilitate such right. Although an organizer is obligated to submit a notification before the assembly could be held, neither the organizer nor the participants have deprived of the rights to organize or to participate in the peaceful assembly.

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[54] **Section 3 of the PAA**

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This provision is also in agreement with **Article 8 (1) of the Constitution** where it says, *"All persons are equal before the law and entitled to the equal protection of the law"*. Everybody can still enjoy their right to join the peaceful assembly notwithstanding the Act prescribes the prior notification. The period of 10 days given also provides an ample time to the police to take any necessary action, and to entertain any objections from the people who have interests and consequently to inform the organizer.

For these reasons, the restriction in **Section 9 (1) of the PAA** meets the test of proportionality as it is reasonable and proportionate, and accordingly is constitutional.

The Penalty Issue in Section 9 (5)

The second issue I would like to highlight is whether the penalty provision in **Section 9 (5)** imposes an excessive punishment for those who submit a prior notification to the police but less than 10 days. As far as **Section 9 (1)** is concerned, I am in agreement with the monetary sanction to be imposed against an organizer who totally disregards the requirement to submit a prior notice. Without the prior notification, it would obviously defeat the purpose of the Act in providing protection to the rights and freedoms of other persons.

However, should the organizer submit the prior notice of assembly less than 10 days as per required by the law, to punish the organizer with the same sanction imposed against the organizer who fails to submit the prior notice at all would be amounted to an excessive punishment. Even if the notice is late in submission, when the assembly satisfies the conditions to be peaceful, it must be allowed. Additionally, the law must provide that any peaceful assemblies which are held at the common place of assembly also should not be penalised if the prior notice is not tendered, for example when the assembly is held at the

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stadium. This is because nothing in the provisions of the **PAA** has rendered any assembly as unlawful on the ground it is un-notified. I concur my argument with a landmark case, **Nik Nazmi**'s case which is available in Chapter 3.3.4 and 4.2. In this case, the learned judges have considered **Section 9 (5)** as a criminal sanction, rather than as administrative sanction.

In **Nik Nazmi**'s case, the Court of Appeal had delivered a pioneering judgment on the constitutional right of freedom of assembly in Malaysia. The Appellant, an opposition party State Assemblyman was charged in the Sessions Court for having organised a public assembly at an indoor stadium without having notified the police officer ten days before the aforesaid event. Nonetheless, on the very day it was held, the appellant had notified them. Accordingly, the Appellant challenged the constitutionality of **Section 9 (1) and (5)** as null and void and hence the charge against him should be struck out. His appeal was unanimously allowed and the charge was set aside.

According to Justice Mohammad Ariff Yusof, in his famous saying, *'that which is fundamentally lawful cannot be criminalised'*. The learned judge stated that there was no provision in the **PAA** that stipulates the assembly per se as unlawful if the organizer fails to comply the 10 days notice. Meanwhile, to convict the organizer criminally liable by reason of an administrative failure or omission was irrational in the legal sense. Such dichotomy could be severed since both provisions were not undeniably intertwined and therefore would render **Section 9 (5)** unconstitutional and the said provision was struck down.

Concurred the abovementioned judgment, Justice Hamid Sultan Abu Backer held that **Section 9 (1)** was lawful and not excessive however the **PAA** gave a right for everyone to assemble whether the requisite of 10 days prior notice is fulfilled or not. Therefore, to criminalise for the non-compliance had no nexus to 'public order' or 'interest of the security of the Federation' as stated in **Article 10 (2) of the FC** unless the assembly itself was not

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peaceful. Furthermore, **Article 10** does not say that if there was a breach of the restriction there must be a penal sanction. Thus His Lordship found that **Section 9 (5)** to be unconstitutional as the penal provision was conflicting with **Article 10 (2) of the FC**.

Hence, I maintain the statement that notwithstanding **Section 9 (5)** is constitutional, to inflict the same sanction against the organizer who submits a late notice is an excessive punishment, provided the assembly is conducted in peace and without arms. It is important to note, although an assembly may still be lawful even without the notice, the imposition of a monetary sanction against the organizer who does not submit the notice is fair in order to achieve the objective of the Act i.e. to protect the rights and freedom of another person. Without such imposition, it will open the floodgates of uncontrollably spontaneous assemblies.

Finally, in order to maximise the exercise of freedom of assembly, spontaneous assembly should not be criminalised as long as it is carried out in a peaceful way and at the place which is common for the assemblage. The States have the primary responsibility to ensure every citizen can enjoy such the right to protest with or without the restrictions.

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(II) Save for Clause 2 (g), Section 15 (2) of the Peaceful Assembly Act 2012 Is Unconstitutional.

Section 15 is a dominant section which provides the police for limiting the right of peaceful assembly. As I mentioned before, the prior notice requirement is the core issue in defining the extension of the freedom of peaceful assembly in a country. The Constitution allows the State to interfere with the right to peaceful protest through the course of restrictive laws in order to pursue its objectives, and the prior notice holds the key to such restrictions. In the notice, the police may impose any restrictions as to time, place or manner and even to the conduct of the participants. Failure to comply with the restrictions or conditions imposed may cause the assembly to be unlawful and anyone who involves may be liable to a fine not exceeding RM 10, 000. I present the whole **Section 15** here:

(1) The Officer in Charge of the Police District may impose restrictions and conditions on an assembly for the purpose of security or public order, including the protection of the rights and freedoms of other persons.

(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 costs arising out the holding of the assembly;

(f) Any inherent environmental factor, cultural or religious sensitivity and historical significance of the place of assembly;

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(g) The concerns and objections of persons who have interests;

(h) Any other matters the Officer in Charge of the Police District deems necessary or expedient in relation to the assembly.

(3) 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.

Firstly, in determining the validity of the restrictions in **Section 15**, the test of proportionality is employed here. The first test is whether the restrictions imposed in **Clause 2** are reasonable**. Clause 1** states that the police authority may impose restrictions for the purpose to secure the nation from any dangerous threat or public order, including the rights and freedom of other persons. Such restrictions are provided in **Clause 2**. I argue here that the scope of **Clause 2** is so broad, vague and ambiguous that it may lead to the abuse of power, particularly **sub-clause 2 (h)** where the restrictions may be imposed on any other matters the police deems necessary or expedient in relation to the assembly. Obviously, the boundless power given to the police in **Section 15** has made **Section 9**, which guarantees the right to assemble in peace upon the submission of the notice, becomes toothless. It is important to note that when it comes to the legislation which is made to limit the fundamental liberties under the Constitution, such legislation must not be left to the discretion of the authority.

This is because, even though the police is obliged to accept a prior notice in **Section 9 (1)** and can no longer decline such notice, the police still have vast power to limit an assembly according to their terms. And no one knows how the assembly would turn up. For instance, if an organizer of the assembly tenders a notice to hold a demonstration on Saturday

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for a whole day in a stadium, and the police have accepted such notice, they may add limitations by reducing the time of assembly into one hour, switch it on Sunday and prevents the use of audio equipment on the ground of public order, regardless of the factor that the assembly is held in a stadium. The police can also use their power to prohibit the participants from bringing any placards or signboards or to wear certain cloth which has the logo of the opposition political party on it since **Section 15** allows them to restrict the manner of assembly and conduct of the participants. This power would defy the very purpose of the notice requirement which originally is needed for the police to facilitate such rights and as a mean to communicate with the police and the organizer. The restrictions of the basic rights cannot be based on the arbitrary power of the authorities. Therefore, restrictions in **Section 15 (2)** fail to meet the reasonable test. And consequently, the second test whether the restrictions are proportionate would also be failed.

The ADA – Restriction as to Time

For comparison, it is worth to bring the approach used in the **ADA** whereby the Act does not simply allow the police to refuse the advance report once it is tendered. In my opinion, even though the **ADA** is much way stricter than the **PAA**, the police must strictly follow the provisions before they can turn down the advance report. For example, the **ADA** also has a provision which limits the right to hold an assembly as to time i.e. **Article 10**. However, **Article 10** explicitly states that in order for the assembly to be limited to the time factor, first, the assembly must be an outdoor assembly, and secondly it is to be held either before sunrise or after sunset. **Article 10** also contains an exception where in certain situations, the head of competent police authority may grant permission during the said period with specified conditions for the maintenance of order.

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And even so, **Article 10** still has been challenged for its constitutionality and was declared as unconstitutional with the Korean Constitution by the Constitutional Court in **2008Hun-Ka25'**s case[55]**.** The majority of the Justices ruled out that the resemblance between the permit system and the conditional permissible night-time assembly in **Article 10** was too close, and for this reason, it shall be unconstitutional.

But I would like to share the opinions of the 2 Justices who have declared **Article 10** as an incompatible with the **KC**. According to the Justices, the objective of a prohibition of night-time assembly is due to the difficulty in maintaining the public order. However, such difficulty to maintain the public order is focusing on the late night, considering the Korean society are living in the city and industrialized modern society. The existing provision bans the wide range of time frame, making the freedom of assembly can only be accessed fully at day time. Hence, the provision imposes an excessive restriction and infringes the freedom of assembly, but the unconstitutionality is not in **Article 10** itself. It should be left to lawmakers, at what night time frame the assembly should be restricted to guarantee the freedom of assembly in the least restrictive manner.

The ADA – Restriction as to the Maintenance of Traffic Order

In another example of restriction as to public order, **Article 12 of the ADA** permits the police to ban an assembly or to restrict it, for the purpose of the maintenance of traffic order when it is deemed necessary for the smooth flow of the traffic. However, the ban cannot be imposed if the organizer manages to assign the moderators to parade along the road in order to avoid any obstruction to the smooth run of the traffic.

55 Constitutional Court of Korea, Op.cit. No. 95.

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The ADA – Restriction as to Places

With regard to the restriction as to place, it is almost prohibited to hold an outdoor assembly within a 100 meters radius of some key government or diplomatic compounds proscribed by **Article 11 of the ADA,** for example, the buildings of the National Assembly. In the Constitutional Court case of **2006Hun-Ba20.59**[56] it is held that that **Article 11 (1)** does not violate the Constitution on the ground that the National Assembly impose psychological pressure through threats or cause difficulty in the access to the Assembly and that's why the absolute prohibition is needed to ensure free access and the safety of its facilities. Furthermore, since the competence of the National Assembly is important in representing the democracy, the balance of interest between the safety of the building and the freedom of assembly is not found to be disrupted. Therefore, neither it violates the least restrictive means nor the rule against excessive restriction.

However, in the case of **2000Hun-Ba67**[57] the Court held that **Article 11** which prohibits an outdoor assembly to be held in the entirety within 100 meters from the facilities intended for diplomatic institutions is unconstitutional. The Court was in the opinion that when the law puts a general assumption that to hold an assembly at a particular location may cause a direct threat to the legally protected interests, the lawmakers should provide an exception clause to the general prohibition, as to the meet the standard the principle of the least restrictive means. The provision at issue, in this case, does not provide exceptions where no specific danger exists. This is clearly an excessive limitation beyond the necessary to achieve the legislative purpose. For this reason, **Article 11** is unconstitutional as it

56 Constitutional Court of Korea, Op. cit. No. 101, pp. 411-414.

57 Constitutional Court of Korea, Op. cit. No. 81, pp. 90-119.

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excessively limits the freedom of assembly and violates the principle of the least restrictive means[58].

The main point that I would like to highlight is, in spite of the Court has varied opinions on the constitutionality of the provisions in the **ADA**, the restrictive means to pursue the objectives of the **ADA** are perspicuous and specific, unlike the restrictions in **Section 15 of the PAA.** If the police issue a notice of ban outside the sphere of their power, it is obvious the right of assembly has been interfered with illegally. But if the notice of ban is issued in accordance with the specific terms of the **ADA**, then its validity is still challengeable and will be left for the Court to decide.

I would also like to borrow the guiding principles set out in the United State's case which is very relevant to the discussion here. The Supreme Court in **Ward v. Rock Against Racism**[59] held that the government officials cannot use their own discretion to prohibit a public assembly, but instead can impose the restriction on the time, place and manner of the assembly as long as it satisfies all the constitutional safeguards. Restrictions are justified if they are contents neutral without reference to the content of the regulated speech and are narrowly tailored to serve a significant governmental interest. To put it differently, in order to achieve the authority's (the police) objective, it must be done specifically without affecting the right to assemble. For example in this case, when the New York City imposed a regulation to use the city's sound systems and technicians to control the volume of concerts in the Central's Park, it fits the city's interest to protect the citizens from unwelcome and excessive noise. Besides, it lets the citizens enjoy the benefits of the park at its best since inadequate amplification had resulted in the inability of some performances. The Court

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58 Ibid. p.94

59 **Ward v. Rock Against Racism 491, U.S. 781 (1989)**

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confirmed that the city has used the least intrusive means to achieve their legitimate objectives.

Secondly, **Section 15 (2) (b)** is excessively stringent when it permits the police to impose restrictions relating to the place of assembly. This is because **Section 4 (b)** has already proscribed an assembly within 50 metres from the limit of the prohibited place as listed in the **First Schedule**, the places are: dams, reservoirs and water areas, water treatment plants, electricity generating stations, petrol stations, hospitals, fire stations, airports, railways, land public transport terminals, ports, canals, docks, wharves, piers, bridges, marinas, places of worship, kindergarten and schools and also place which have been declared under **Protected Areas and Protected Places Act 1959**[60].

From here we could see that the Act prohibits to hold an assembly at places which are common to the public. In addition to that, if the police use their power to restrict the place of assembly other than the list in the **First Schedule**, the aim of the assembly to convey the messages to the public may not be achieved. Thus, the restrictive means in this provision are ambiguous, unreasonable and disproportionate to the object sought to be achieved. A proportionate legislative action should be able to restrict notification only to certain types of assemblies and not a blanket requirement for all assemblies. Therefore, save for **Clause 2 (g)**, **Section 15 (2)** is unconstitutional.

Section 15 (g) Is Constitutional

With regard to **Clause (g)**, it says the police may impose restrictions and conditions on an assembly when there are concerns and objections of persons who have interests.

[60] **Section 3 - Interpretation**

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Section 3 describes that 'person who has interests' is 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. Also, **Section 5** provides that a person who has interests shall have the right to be informed of the details of an assembly so as to allow him to raise his concerns or objections to the assembly. The question is whether the restriction by mean of the concerns or objections from a person who has an interest is a reasonable restriction. **Section 15 (1)** clearly stipulates that an assembly may be constricted for the purpose of the public order, including to protect the rights and freedoms of other persons. As much as a person has the right to exercise his freedom of assembly, a person who might be affected by such assembly has also the right to carry out his daily activities in peace. Moreover, if the assembly is held in a large scale demonstration or rally in a public place, naturally the daily operations in the surrounding area of assembly on that day will be different than usual, for instance the main roads may be occupied by the participants of rally or the tranquillity of such place may be intruded with the noise of loudspeakers. As a result, persons who run businesses in that area may lose their potential buyers and suffer profit loss. Thus, if the authority imposes a restriction to pursue the objective in **Clause (g)**, such restriction is reasonable.

For example, when BERSIH movement made an announcement to hold its fifth rally, i.e. BERSIH 5 at the Merdeka Square on November 5, 2016, the Red Shirts group (the pro-government ruling party's supporters) instantly has made announcement to hold counter assemblies on the same date and places The announcement alarmed the traders who run businesses around the proposed area of assembly. 3 groups representing more than 1000 traders sought an interim injunction at the High Court against BERSIH and the Red Shirts to prevent the rallies at the said area claiming it would cause a reduction in revenue.

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Unfortunately, the High Court judge, S Nantha Balan held that there was no merit in the application. He added that *"**Section 18 of the PAA** operates as a safety valve to avert a clash of conflict. The power to do this lies with the police and not the traders. I agree it is for the authorities who are allowed to regulate or place such restriction while at the same allow time for freedom of assembly (as enshrined in the Constitution)"*. The injunction was accordingly dismissed[61].

The second question is whether the **Clause (g)** is a proportionate restriction or not. In **Section 14**, it requires the police to respond to the notification submitted to them and accordingly to inform the organizer if there are restrictions and conditions imposed in pursuant to **Section 15**. While in **Section 16**, the provision states that if the organizer is aggrieved by the imposition of such restrictions or conditions, he may make an appeal to the Minister within 48 hours after being informed. Therefore, even though it is reasonable to restrict the assembly based on the objection of the people who have interest, there is an opportunity for the organizer to proceed with his plan by making an appeal to the Minister. And even if the appeal is rejected, since the **PAA** does not have an ouster clause, any person can bring a matter to the Court for a final decision.

For this reason, **Clause (g) of Section 15 of the PAA** has met the proportionality test and shall be constitutional.

61 "*Court Dismissed Trader's Injunction Application",* Op. Cit.

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4.4 RECOMMENDATIONS AND CONCLUSION

All through the study, firstly, I have found that the legislations in both countries have achieved immense progress in meeting the international standards as set out by the **ICCPR**. I have argued that under the **ADA,** the police authority cannot simply ban the assembly relying to their discretions. The Korea authority must abide with the stringent requirements before the notice of ban or restrictions can be imposed on the advance report. And even the ban or restriction is imposed, the organizer may still seek for an appeal to the next superior authority or to the court if they are not happy with such decision. We have seen that notwithstanding **Article 11 of the ADA** imposes a total prohibition of assembly at the heads of governments' residences, the Courts and the National Assembly buildings, and an almost ban at the diplomatic offices and residences, in practice, the Courts have exercised their discretionary powers to lift the ban. It can be seen when the Seoul Administrative Court had lifted the ban in favour of the Candlelight Revolution to march towards the Blue House (the presidential residence) during the protest against Park Geun-Hye in the late 2016. This is a major step to protect the freedom of assembly from an unnecessary restriction when such assembly is naturally peaceful. Nonetheless, the standard on use of force by the Korean force in handling the protestors is another issue that must be tackled seriously by the government. The death of Baek Nam-Gi should be a lesson for the government to apply the use force in strictly necessary circumstances. No one should lose a life while exercising their fundamental right to assemble.

As for Malaysia, although the law transformations were brought into the **PAA** are plausible, certain tricky provisions are advised to be amended immediately to give full legal effect on the assemblage. Several provisions that can improve the execution of the **PAA** may

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be taken from the provisions in the **ADA**. I put forward 6 recommendations below that can be adopted into the **PAA**.

Firstly is to include the definition of an outdoor assembly in **Article 2 of the ADA**. Through this definition, the **ADA** has entailed different kind of restrictions upon the indoor and outdoor assembly. In other words, if the assembly is held in the building, such assembly is not subjected to the requirement of advance report or any restriction which is imposed on outdoor assembly. This distinction should also be incorporated into the **PAA**. The rationale behind this distinction is when it comes to the laws which limit the fundamental liberties, it must apply the least restrictive means as possible to achieve the objectives laws i.e. to safeguard the national security or for the public order. Since the indoor assembly is unlikely will disturb the people who reside or own a business nearby the place of assembly, the law should also impose lesser restrictions on this type of assembly. Therefore, the distinction between outdoor and indoor assembly should also be included into the **PAA**.

Secondly, in order to fully preserve the course of an assembly, the **PAA** may include an obstruction of the assembly as an offence, as provided by **Article 3 of the ADA**. In the same article, the participants of the assembly are also entitled for a protection by the police if there is a reasonable ground that the assembly may be interfered with. This provision suits one of the objects the **PAA** in **Section 2 (a)**, whereby all citizens shall have the right to organize or to participate in assemblies peaceably and without arms. I insist that a peaceful and weapon-less assembly does not form by the people who involve in the assembly alone, but also it shapes by the non-interference of an outsider. Therefore, to prevent the outsider from obstructing the organization of the assembly and to inflict such conduct as an offence is a justifiable mean to keep a serenity of the assembly.

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The third way that may enhance the smooth running of the assembly is to allocate the set up police line upon the request of an organizer of the assembly, as provided by **Article 13 of the ADA**. In the second recommendation above, I suggested that **Article 3 of the ADA** may be adopted into the **PAA**. However, this post regulation alone is not sufficient to maintain the safety of the assembly as it will only takes effect if, and only if, the intruder is charged and convicted by the court. Hence, a law provision which protect during the course of assembly is held must be added in the **PAA**. Under **Section 9 (3) of the PAA**, the assistance of police is only available for a religious assembly or a funeral processions in order to maintain a traffic or a crowd control. Borrowing the provision in **Article 13 of the ADA**, it is highly recommended that the assistance of police under **Section 9 (3)** is extended to the assembly which is regulated by the **PAA** as well.

Fourthly, the **PAA** may also follow the establishment of the Advisory Committee as mentioned in **Article 21 of the ADA**. This Advisory Committee may be a great help for the police authority in advising the type of restrictions that can be imposed and what not. Besides, it will also help the police to communicate effectively with the organizer of an assembly as the third opinion's view may see the best means to achieve a balance between the right of persons to an assembly and the rights of other persons.

The fifth one is relating to the penal provision. Unlike the **PAA**, the **ADA** contains an imprisonment sentence and a monetary fine. The heaviest sentence of 3 years imprisonment and KRW 3 million is imposed on a person who interferes with a peaceful assembly or the organizer's duty by means of violence (or 5 years imprisonment if the offender is an armed forces, public prosecutor or police officer) (see **Article 12** and **3 of the ADA**).

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Understandably, this heavy sentence is necessary to alarm any outsider from not disrupting a peaceful assembly and at the same time to preserve the safety of the people who lives or owns a business near the place of assembly.

On the contrary, I have pointed out that the Malaysian Parliament has made the right decision in deleting the imprisonment punishment. So far, the only penalty available in the **PAA** is the monetary sanction. This is because, for instance, to convict a person with a jail punishment just because he fails to submit a notice as required in **Section 9 (1)** is clearly an excessive punishment and does not tally with the administrative duty of the organizer of an assembly. However, at the same time, I am in the opinion that a new provision should be enacted to deal an assembly which has turned into a violent protest. Although, the Malaysian **Penal Code** has coped with the offences relating to 'unlawful assembly' from **Section 141** to **Section 158**, the provisions are hardly ever applied in the context of the freedom of assembly (see Chapter 3.3.3). Thus, it is recommended for the lawmakers to enact a new provision with a precise definition of 'unlawful assembly' and a heavier punishment from a context of **Article 10 of the FC**.

Finally, apart from the **ADA** and the **PAA**, another step that may be followed by Malaysia is to increase the power of SUHAKAM and establish it as *amicus curiae*. The establishment is essential in order to allow the SUHAKAM to bring any human rights matter to the court on its own capacity or to represent on behalf of other people, and to present its opinion in court. Furthermore, other countries like Korea, Indonesia, Thailand, Philippines, Australia, Fiji and Ireland are already undertaking such role in their national court systems. Therefore, in no time the Malaysian government must take the same step as well.

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As a conclusion, it is agreeable that the police, as the administrative agent, should be able to restrict the citizen's right to assemble in peace. However such restrictions can only be pursued based on the legitimate objectives, namely for the interest of national security and public order, or for the maintenance law and order, and for the interests of other persons. Both Korea and Malaysia impose similar legal objectives which are in accordance with the **ICCPR**, although Malaysia is not a State party to the Convention. However, the specifications of such restrictions between both countries are varied. The prior notice is the important element in determining whether its existence is either to facilitate the exercise of freedom of assembly or to restrict it.

From my observation, the **ADA** is much way stricter than the **PAA**. There is a stark contrast between these two legislations, as the standards of restrictions under the **ADA** are very specific and detailed, and give little room for the Korean authority to use their own judgment to interfere with the right to assemble. On the contrary, the Malaysian authority has a vast discretionary power to limit such right due to the ambiguity of the provisions in the **PAA**. It grants the police to impose restrictions on an assembly arbitrarily. For this reason, certain provisions of the **PAA** must be amended soonest possible to protect the citizen's right to assemble peacefully.

For comparison, the Korean authority holds the power to fully ban the application to organize an assembly, but has little power to use their own judgment to restrict the assembly as the grounds of limitations are specifically mentioned in the **ADA**. On the side note, the total prohibitions to assemble near the government's buildings in **Article 10**, and the night-time assemblies in **Article 10**, are the blanket restrictions since there is no room for an exemption to hold assemblies in that area. Pursuant to the decision in the case of **2008Hun-**

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Ka25, the total ban night-time ban is declared as unconstitutional by the Constitutional Court. **The Article 11 of the Enforcement Decree of the ADA** shall be followed accordingly. Except under the certain circumstances, assemblies can be held near the diplomatic buildings. The law presumes in advance that any assemblies which are held near the government buildings or at night time are not peaceful and cause a threat to public order. Such presumption is not a legit objective that can be pursued by the authority. And hence, must be revised accordingly. As has been decided by the Constitutional Court in **2008Hun-Ka25'**s case, the resemblance between the permit system and the conditional permissible night-time assembly in **Article 10** was too close, and hence, it shall be unconstitutional.

As for Malaysian authority, they do not have the power to refuse any assemblies upon the tender of the prior notice. Unlike the Korean police authority, they cannot turn down the notice. However, they are given wide discretions to put any restrictions and conditions that deemed necessary for the interest of national security or to protect public order. I have argued that the wide discretionary power to impose restrictions on an assembly in **Section 15 of the PAA** is not constitutional, excluding **Clause (g)**. The power may be abused to a selective group of people by imposing the excessive restrictions. In order to prove (un)constitutionality of the provisions in the **PAA**, I have used the proportionality test and support my arguments with legal cases and the approach used by the **ADA**. On the other hand, despite **Section 9 (1) of the PAA** has been challenged for its constitutionality, I firmly with the stand that the provision in consistent with **Article 10 of the FC** and meet the proportionality test. Therefore, as far as the legality of the **PAA** is concerned, **Section 15** is the most critical provision that must be amended immediately in order to protect the right of a person to assemble in peace, and at the same time to guarantee the police can carry out their duties within the Constitution and the **PAA**'s ambit.

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Even so, the transformations brought by the lawmakers in the **PAA** are laudable. For 45 years, the right to freedom of assembly in Malaysia was severely curtailed by the **Police Act 1967** (see Chapter 3.3.3.). Indeed, although not entirely, the amendments of the **PAA** is more in line with the international human right standards and practices. Yet, the efficacy of the **PAA** can be further improved if the loopholes and the ambiguity of the Act are altered accordingly, by using some provisions of the **ADA** as the examples.

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CHAPTER 5

CONCLUSION

This chapter summarises all discussions I have presented in this thesis. In Chapter 2, I have examined the nature of the freedom of peaceful assembly and explained why it is important to protect this freedom, even though the demonstrations are usually provocative in nature. The public display of group opinion has been traced long before it was recognized, for example, in the United States, when the shoemakers formed a labour strike in 1794 demanding for stable wages from their employers, it was held that the striking workers were guilty as illegal conspirators.

The establishment of freedom of peaceful assembly as part of the fundamental liberties finally came into realisation when it was incorporated into the **UDHR** as proclaimed by United Nations in 1948. This step was later followed by the Republic of Korea and Malaysia after both countries achieved their independence in 1948 and 1957 respectively and inserted it into their Constitutions. In 1966, the United Nation adopted the **ICCPR** where the State parties are obliged to respect the civil and political rights of individuals including the freedom of assembly. This Convention was ratified by Korea in 1990, but to date, Malaysia is not a signatory party to **ICCPR**.

In Chapter 3.2, I have discussed the basic structures of the Constitution of the Republic of Korea and touched on the historical insertion and the amendments of the freedom of assembly in the Constitution. I also talked about the notable event of the Gwangju Uprising in 1980 and the Gwanghwamun Protests during the presidency of Park Geun-Hye in 2015 and 2016, which is also known as the Candlelight Revolution. The incidents in the latter protests are connected with the discussion of the implementation of the **ADA**. Later on, in

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1962, Korea introduced the **ADA** as a legislation which specifically regulates the right of assembly. The Korean Constitution expressly prohibits the licensing system to control the assembly but allows such right to be restricted for the purpose of national security, the maintenance of law and order, or for public welfare. Under this Act, the restrictions mainly come under the issuance of an advance report. Under **Article 6**, the Act obligates an organizer of the outdoor assembly to submit a report which must be tendered 720-48 hours before the assembly is to be held and has to wait for an approval of the police. The police have the power to completely ban the assembly if it does not meet requirements in the **ADA**. However, the police must strictly adhere to the provisions of the **ADA** in order to justify the prohibitions. **Article 8** vests the power to the police to completely ban or impose restrictions on the assembly if (i) the purpose of the assembly is to achieve the objectives of a political parties which has been dissolved by the Constitutional Court, (ii) it is held at night-time and does not obtain approval by the head of the police, (iii) it is held within the radius of 100 metres of the prohibited areas and does not obtain approval by the head of police, (iv) it may obstruct the smooth flow of the traffic in a major city, (v) there are simultaneous assemblies which have conflicting objectives, or (vi) there is a request to protect the place of assembly by the a resident or the administrator of the facilities. I also have examined all provisions in the **ADA** and then elaborated more with the legal cases from the jurisdictions of the Supreme Court and the Constitutional Court. In the last 2 sub-chapters, I presented and argued that albeit the **ADA** is generally is a good legislation, the implementation of it has sparked lots of controversial issues in the local and international headlines, especially the methods use by the police to disperse the assemblies. I supported my contention with the reports by the UN Special Rapporteur, the Amnesty International, the Asia Forum for Human Rights and Development and the legal cases.

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Subsequently, Chapter 3.3 deals with the legal development of the freedom of peaceful assembly in Malaysia. I started the discussion with the recognition of this freedom in the Federal Constitution in 1957, followed by the history of the Reformasi Movement, the BERSIH Movement, and the establishment of the National Human Rights Commission of Malaysia i.e. SUHAKAM. I have argued that the inclusion of these 3 iconic entities in my thesis have brought major changes in the expansion of the freedom of peaceful assembly in Malaysia. Previously, from 1967 until February 2012, the **Police Act** controlled the crowd through a permit system, as provided by **Section 27**. This Act received many backlashes as it severely constricted the right of assembly. Due to the heavy pressures by many concerned parties, the **PAA** was introduced in April 2012 to replace the **Police Act**. Yet, the **PAA** still was not free from the criticisms. It is said that the **PAA** was stricter than the former law. However, I disagreed with such claim and maintained the freedom of assembly in Malaysia has greatly improved after the enactment of the **PAA**. Indeed, the efforts made by concerned parties were highly commendable. Nonetheless, certain provisions in the **PAA** caused confusion either due to the vagueness of the terms, or they impose new restrictions which never existed in the **Police Act** before. For instance, the ambiguity of the definition of the street protest must be further clarified by the lawmakers. Apart from that, **Section 9 (1),** an organizer has a duty to notify in writing the police 10 days before an assembly takes place. Under this new amendment, the police have lost their power to refuse the prior notice and have a responsibility to inform persons who might be affected by the assembly. Although the police cannot decline the notice, however **Section 15** empowers the police to impose restrictions or conditions relating to the date, time, duration of assembly, place, manner, conduct of participant, payment of clean-up costs after the assembly, any inherent environmental factor or cultural or religious sensitivity and historical significance at the place of assembly, the objections by persons who have interests, and any other matters the police

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deems necessary or expedient in relation to the assembly. This provision may lead to an abuse of power as the police can curtail the assembly with any kind restrictions under the name of security or public order. Accordingly, I have recommended the provisions must be amended to achieve the true purpose of the Act.

Chapter 4 is the main focus of this study. I began Chapter 4 with the application of **Siracusa Principle** which is a set of interpretation of limitation on rights enunciated in the **ICCPR** into the freedom of assembly. Subsequently, I examined both the **ADA** and the **PAA** comparatively to find the similarities and the differences between these two legislations. This examination is important to facilitate my arguments in the next sub chapter. I have used the approach in the **ADA** in order to verify the constitutionality of **Section 9 and 15 of the PAA**. I have also employed the proportionality test into these two sections and clarified with the landmark rulings in Malaysia. In the end of my study, I found that the requirement of 10 days prior notice in **Section 9** is constitutional. However, the penalty provision in **Section 9 (5)** under the certain circumstances may impose excessive punishment, and therefore it needs further alteration by the Parliament. And finally, save for **clause 2 (g),** I argued that the entire **Section 15 (2)** is unconstitutional as it fails to meet the proportionality test.

In the same chapter, I have also suggested that the **PAA** may follow several provisions in the **ADA** in order to improve the development of the freedom of the assembly to one step higher. For instance, the **PAA** may include the definition of outdoor assembly as provided in **Article 2 of the ADA**, in order to achieve the least restrictive mean when the assembly is held at indoor area. The **PAA** may also include the obstruction of an assembly as an offence, as provided by **Article 3 of the ADA** since the participants of the assembly are also entitled for a protection by the police if there is a reasonable ground that the assembly may be interfered with. And then, to allocate the set up police line upon the request of an

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organizer of the assembly, as provided by **Article 13 of the ADA** is also recommendable to be included in the **PAA** so it may enhance the smooth running of the assembly. Fourthly, I suggested that the **PAA** may also follow the establishment of the Advisory Committee as mentioned in **Article 21 of the ADA** as it may help the police to decide on any issues pertaining to the right of assembly. I also have pinpointed that the deletion of an imprisonment sentence was the right decision made by the Parliament punishment. Nevertheless, a new independent provision must be enacted to deal with an assembly which has turned into a violent protest. Last but not least, I second the SUHAKAM's proposal to establish it as *amicus curiae,* in order to allow the SUHAKAM to bring any human rights matter to the court on its own capacity or to represent on behalf of other people.

As a conclusion, the freedom of peaceful assembly is an important medium of other existing human rights. Without the recognition of the right to peaceful protest, the rights of persons to speech and to express his opinion are also denied. Not limited to that, the right of citizens to form an association and convey their discontentment will be deprived of. This would amount to oppressions against people who have little influence to be heard. The **ADA** has generally respected the right to freedom of assembly, but not as to the implementation of it. Overall, the Act has functioning clauses that equally protect the rights of people who want to protest and the rights of other people who might be affected by such protest. As for Malaysian laws, the **PAA** has brought significant change by expanding the right to assemble in peace. Indeed, the improvement went to one step higher when the permit system has been abolished. Nevertheless, several provisions are still ambiguous, thus need to be clarified by the Parliament or by the Minister's declaration.

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Above all, in the end, it is pointless to have a good piece of law if the execution of its theory fails to do it justice. I am hopeful that this study would give benefits to all people by helping them to understand, appreciate and respect the right to freedom of assembly more than they used to be. I also look forward seeing this study will be further explored by the prospective researchers, and together with my study, it can enhance the freedom of assembly to a higher level, and not just treated it as part of the freedom of speech and expression or the extension of it.

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