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**THE EXERCISE OF POLICE POWERS IN ENFORCING PUBLIC
ORDER LEGISLATIONS IN MALAYSIA**

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Abstract

In a press release on 30th April 2012, the Asian Forum for Human Rights and Development (FORUM-ASIA) condemned the Malaysian government for the excessive police violence directed against protesters during the BERSIH 3.0 rally in Kuala Lumpur on 28th April 2012. FORUM-ASIA also called on the Human Rights Commission of Malaysia (SUHAKAM) to conduct a full public inquiry into the violence. Participants in the rally gathered to demand country-wide electoral reforms and an establishment of an Independent Police Complaints and Misconduct Commission (IPCMC) as a response to cases of police abuse. Tear gas and water cannons were used to disperse the crowds and 572 individuals were arrested. Nearly a month later, on 21st May 2012, Malaysian opposition leader Anwar Ibrahim was one of three people charged under the Peaceful Assembly Act for participation in the BERSIH 3.0 rally. The purpose of this paper is to conceptualize the concept of policing, public order and public disorder, the freedom to assemble and also the governance of peaceful assembly. This paper employs a doctrinal, content analysis and secondary data, of which the Peaceful Assembly Act 2012 and the penal Code are the primary sources. The secondary sources for this paper include articles in academic journals, books and online databases. This paper could be a useful source of information for the law enforcers, practitioners, academicians, policymakers and students in this particular area of crime. This paper contributes to a discourse on public order policing in the Malaysian context.

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Keywords: Policing, Public Order, Police Powers, Peaceful Assembly, Freedom to assemble, human rights.



1. Introduction

Following the tragedy on May 13, 1969, the condition of public order in Malaysia has been in a relatively quiet period. However, in recent time, there have been a series of public assembly occurrences in Malaysia. For instance, the public assembly events that have happened throughout the years in Malaysia are namely the series of “Bersih” Rally 1.0, 2.0, 3.0 and 4.0 which is held on 10th November 2007, 9th July 2011, 28th April 2012 and 29th & 30th August 2015 respectively. Bersih 1.0, 2.0 and 3.0 took place to call for a free and fair election in Malaysia. Bersih 4.0 was held to put pressure on the government to investigate on the 1MDB (1 Malaysia Development Berhad), as well as the corruption issues and the problem of mismanagement of the state funds. Most of the assemblies which initially began in a peaceful setting ended up emerging as a riot or an assembly in which violence or crime would occur (Whiting, 2011). It is apparent that mismanagement of crowd and improper policing led to the creation of several problems including nuisances in the form of obstructions of traffic on a street or a roadway, the halt in the operation of public transportation as well as the disruption to businesses within the related radius of the assembly (Faruqi, 2012).

Other consequences of not maintaining public order in the country are that an assembly could go affray, and this might lead to the act of violence which could pose a danger to the society and threat to the security of the nation (Othman, 2015). Additionally, the absence of the maintenance of public order could also lead to an act of vandalism such as the damage to public property and public transportation (Othman, 2015). Furthermore, an environmental pollution could also result out of the absence of proper public order policing whereby garbage or waste disposed of by the participants during the assembly would pollute the area or venue involved in the assembly (Human Rights Watch, 2014). The police are often regarded as, primarily, crime fighters (Human Rights Watch, 2014). But as soon as the police officers take an oath to preserve the sovereign's peace, the maintaining of such peace can be equated with maintaining of 'public order' as well (Human Rights Watch, 2014).

This paper attempts to highlight the prickly issues of the perilous threat in policing public order and freedom to assemble in Malaysia. The first part of this paper underlines the problem statement which generate the ground of this paper. Next the paper highlights the research question to address the issues in the problem statements. The paper follows with the purpose of the study and the methodology adopted by this paper. Subsequently the paper outlines the findings and end with a conclusion.

2. Problem Statement

Many jurisdictions have enforced and implemented statutes to provide for police powers in regulating public order. In the United Kingdom despite having the common law for the breach of the peace, the Public Order Act 1936 was the first public order law passed by the Parliament to control extremist political movements such as the British Union of Fascists in the 1930s (Rawnsley, 2012). The Act was later amended in 1986 for reasons to abolish the common law offences such as riot, rout, unlawful assembly and affray as well as to criminalise other new statutory offences relating to public order policing. Canada enacted the Public Order Temporary Measures Act in 1970 to provide for temporary emergency powers for the preservation of public order (Schmeiser, 2014). Australia's public order legislation began in the Peaceful Assembly Act 1992 of Queensland, Australia (O'neill, 2013).

Such legislations provide the police with specific powers to maintain and control peaceful assemblies as well as to uphold public order in the respective countries.

Despite the powers given by the law, there is a tendency for the police to abuse their powers under such legislations. For instance, in the United Kingdom, Waddington (2007) argues that protestors were both accommodated and coerced as police sought to balance various threats to public order. He further asserts that confrontational styles of policing in the wake of the Public Order Act 1986 are unfounded. In Malaysia, the police have abused their powers in their attempts to normalize intimidation towards the protestors and to punish them (Doraisamy, 2012). Such abuse should be rejected and is unacceptable in any democratic nation. This indicates that a significant constitutional issue has arisen as a result of the tendency of the police to abuse their power, which relates to the impingement of the human rights on the freedom to assembly. The state interference on the freedom of assembly must be prescribed by law, have a legitimate aim, be necessary in a democratic country and be applied in a non-discriminating way (Fenwick, 2012). Such interference and encroachment is justified on certain grounds. Similarly, Faruqi contends that the affirmation of the right to assembly goes hand in hand with the realization just as powers have to be surrounded by restraints, rights too must be qualified by restrictions (Faruqi, 2012).

These prior literatures were mainly concerned with the deficiency of the law and the encroachment of human rights aspect in the exercise of the police powers in enforcing public order legislations. However, there is a lack of local academic research on the extent of the use of police powers from the criminal justice aspect, which has inspired this research. As such, there is a significant gap in the body of knowledge on this matter that would justify the need for this research to be undertaken. This research would also replicate Waddington's research on the enforcement of police powers in maintaining public order in the United Kingdom.

3. Research Questions

Based on the above problem statement, the research question that this paper would address is: to what extent the police practice their powers in order to enforce public order legislations in Malaysia?

4. Purpose of the Study

This paper primarily aims at contributing to the local literature on the extent to which the police practice their powers in order to enforce public order legislations in Malaysia. Towards this objective, the article seeks to propose for some recommendations for amendment of the Peaceful Assembly Act 2012 in order to assist the police in enforcing effective and better approaches relating to policing public order. Additionally, this paper also suggests possible relevant theories that could be adapted by the law enforcers in order to improve the policing approaches relating to the public order enforcement in Malaysia.

5. Research Methods

This research adopts a qualitative methodology using library-based method to critically review the literature on the extent of the exercise of police powers in the enforcement of public order legislations in Malaysia. The primary and secondary data will be examined using the content analysis method. The former

relates to the Peaceful Assembly Act 2012. The latter refers to critical analysis on textbooks, journals, international and local reports, working papers, commentaries on case laws, articles, online resources from government, non-governmental organizations websites and academic websites, as well as on online data-base sources such as Hein Online, Lexis Nexis, Sage Publication and Emerald which is done to support the primary data.

6. Findings

The results of this study contribute namely to the literature review stage. The findings are as below:

6.1. Freedom to Assemble in Malaysia

The literature on the definition of freedom to assemble indicates a variation of the concept. Although there is no unambiguous single definition of freedom to assemble, Faruqi (2012) highlights that freedom to assemble has been defined differently by different writers and international bodies. For instance, the International Covenant on Civil and Political Rights 1966 states that the right of peaceful assembly shall be recognized, and no restrictions may be placed on the exercise of this right. However, the restrictions could be 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, the protection of public health or morals or the protection of the rights and freedoms of others (International Covenant on Civil and Political Rights, 1966).

“Peaceful Assembly” is defined as equivalent to the “Freedom of Association” in Article 11 of the European Convention on Human Rights. The Human Right Act 1988 protects freedom of peaceful assembly and association with others including the right to engage in peaceful protest and demonstration and to form and join trade unions and similar bodies; it is a qualified right (Wilson v UK, 2002). The state has a duty to protect protestors from those who wish to prevent their assembly or attack them (Platform Arzte fur des Leben v Austria, 1988).

According to Article 10 of the Malaysian Federal Constitution in which Article 10 (1) (b) provides that all citizens have the right to assemble peaceably and without arms (Federal Constitution of Malaysia, 1957). However, Article 10 (2) (b) provides that the Parliament may by law impose the rights to assemble peaceably and without arms such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order (Federal Constitution of Malaysia, 1957).

“Assembly” under the Peaceful Assembly Act 2012 is defined as an intentional and temporary assembly of some persons in a public place, whether the assembly is at a particular place or moving (Peaceful Assembly Act, 2012). Under the same Act, the rights, and freedoms of other persons includes the right to peaceful enjoyment of one’s possession, the right to freedom of movement, the right to enjoy the natural environment and also the right to carry on business (Peaceful Assembly Act, 2012).

6.2. Public Order Policing

The term "policing" is defined as the duty of a police force in maintaining law and order in or at an area or event (Public Order Act, 1986). “Public order policing” is being defined as ‘the use of police authority and capacity to establish a legitimate equilibrium between governmental and societal collective

and individual rights and interests in a mass demonstration of grievance' (Lint, 2005). On the other hand, "public order crime" as a crime which involves acts that interfere with the operations of society and the ability of people to function efficiently (Siegel, 2013). A more elaborated definition defines public order as a condition characterized by the absence of widespread criminal and political violence, such as kidnapping, murder, riots, arson and intimidation against targeted groups or individual (United States Institute of Peace, 1984). Essentially, the concept of public order denotes the absence of disorder and the quiet as well as the orderly behaviour of people in an open space (United States Institute of Peace, 1984). It involves people behaving sensibly and rationally as well as respecting others (United States Institute of Peace, 1984).

Other than that, "public order policing" is defined as "police is the function of that branch of the administrative machinery of government which is charged with the preservation of public order and tranquillity". Additionally, the Bar Council representative stated that the "expression 'public order' is not defined anywhere but a danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression" (Abdoolcader, 2012). Under Section 8 of the Malaysian Peaceful Assembly Act 2012 states the responsibilities of police. Such responsibilities include that a police officer may take such measures as he deemed necessary to ensure the orderly conduct of an assembly in accordance with this Act and any other written law (Peaceful Assembly Act, 2012).

6.3.Theorizing Peaceful Assembly

In order to facilitate the public under peaceful assemblies, the Human Rights-Based Policing Theory (HRBPT) will be a useful tool for the law enforcers to adapt. The theory suggests that the law enforcers in the preservation of policing public order must be guided by the human rights principles of legality, necessity, proportionality and non-discrimination and must adhere to applicable human rights standards (Redekop & Pare, 2010). In particular, the state has an affirmative duty to take reasonable and appropriate measures to enable peaceful assemblies to happen without participants fearing physical violence (Pollock, 2015). In the current scenario, the law enforcement officials must also protect members of a peaceful assembly from any person or group including agent provocateurs and counter-demonstrators that attempt to disrupt or inhibit the assembly in any way (Beggs et. al., 2012).

Under the HRBPT, the use of force must be regulated by domestic law, which should set out the circumstances that justify its use, including the need to provide adequate prior warnings and the level of force acceptable to deal with various threats (Faruqi, 2012). Furthermore, the model HRBPT suggests that a differentiated and proportional use of force should include the development of non-lethal incapacitating weapons for use in appropriate situations where other more peaceful interventions have failed (Faruqi, 2012). Additionally, the law or more force do not authorize the force used than necessary in the circumstances, law enforcement personnel should face civil and criminal liability, as well as disciplinary action (Faruqi, 2012).

Law enforcement officers should also be held liable for failing to intervene where such intervention might have prevented other officers from using excessive force (Howie, 2011). The HRBPT is also focusing on the civil and criminal liability of the law enforcement for causing physical injury or death to the participants of any public protest (Brown, 2014). The relevant regulatory authorities must

comply with their legal obligations to investigate such cases and should be accountable for any failure (procedural or substantive) to do so (Thomas, 2016). The liabilities of law enforcement officers should be gauged according to the relevant principles of administrative law and judicial review concerning the misuse of public power (Lynch, 2015).

In contrast to the above-mentioned HRBPT, the theory involved in policing public order could be understood from the Elaborated Social Identity Theory (ESIT) perspective. However, such theory has been criticized on several grounds. Firstly, the ESIT is a utilitarian (uniformalized) theory and not an individualistic one whereby an individual will be collectively responsible for the actions of the group or crowd (Reicher, 2001).

The second flaw of ESIT is the failure to rationalize and to reason the crowd psychology or the crowd dynamics (Durrheim, 2001). A comprehensive communication strategy based on the idea that some form of negotiation or deliberative communication with the group is possible (Foster, 2001). Thirdly, the essence of ESIT is to prepare the law enforcement with weapons in policing public order because of their perception that the crowds are inherently irrational or dangerous (Reicher, 2001). The police strategy in preventing public disorder tend to be based on that perception and that the conception of irrational crowds that would lead to escalating violence have been perpetrated by such perception (Stott, Scothern, & Gorringer, 2013).

Retrospectively, masses or groups are governed by the instinct of struggle which is the tendency to destroy anything that stands in the way of the satisfaction of other instincts (Le Bon, 1947). In particular, crowd members lose their unique and idiosyncratic identities and behave regarding a primitive animal substrate (Reicher, 2001). Crowd psychology ruptures both the link between society and character and that between identity and action (Allport, 1945). Such theory contrary to the human rights theory whereby an individual will be held accountable for his or her actions and not for society as a whole (Gillham, 2011).

6.4. Governance of Public Order Policing in Malaysia

Freedom of assembly is echoed very clearly in international human rights instruments as the right to freedom of peaceful assembly and association (Universal Declaration of Human Rights, 1948). A similar provision is found in the International Covenant on Civil and Political Rights 1966 which states that the right of peaceful assembly shall be recognized, and no restrictions may be placed on the exercise of this right. Such restrictions could be 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, the protection of public health or morals or the protection of the rights and freedoms of others. In Malaysia, the current statute which governs the right to assemble peaceably is the Peaceful Assembly Act 2012 as opposed to the previous Police Act 1967 (Patail, 2012).

The former Attorney General of Malaysia during the Opening of the Legal Year 2012 ceremony asserts that the enactment of the Peaceful Assembly Act 2012 assures individual's freedom to assemble peacefully. Such right is following Article 10 of the Malaysian Federal Constitution subject to certain restrictions and conditions that are considered necessary and expedient in the interest of the security and public order of Malaysia and its peoples (Patail, 2012). In other words, it is submitted that it is the

legislature that will determine how freedom of assembly is to be enjoyed by imposing certain sanctions on extreme behaviour (Baker, 2013). Hence, the most important aspect of the right of citizens to assemble peaceably is concerned with the issue of the degree of restrictions that can be imposed on the said right in the interests of preserving public order (Johnson, 2013).

As mentioned earlier, the significant difference contained in the Peaceful Assembly Act 2012 setting it apart from the previous provisions of the Police Act 1967 concerning public assemblies is concerned with the requirement of police permit (Whiting, 2011). Section 9 (1) of Peaceful Assembly Act 2012 only requires an organizer of a public assembly to notify the Officer in Charge of the Police District ten days prior the date of assembly (Peaceful Assembly Act 2012). The requirement of giving prior notice to the authorities of the time, place and purpose of the demonstration is imposed to avoid disruption of public order during the protest (Whiting, 2011). The requirement of notification provides ample time for the police to prepare and to give protection throughout the assembly and to avoid any provocation from different crowd groups (Aziz, 2012). It is asserted that this particular obligation is a common practice in many countries (Asoka & Rocca, 2009). Through Section 4 (1), the Peaceful Assembly Act 2012 has introduced categories of organizers and participants who could organize or participate in a peaceful assembly without arms. The said right does not extend to non-citizens and children below the age of fifteen and persons below the age of twenty-one if they are the organizers (Peaceful Assembly Act, 2012).

With regards to the procedure for appeal, the Peaceful Assembly Act 2012 provides that any organizer aggrieved by the imposition of restrictions and conditions by the officer in charge of the police district may appeal to the Minister (Whiting, 2011). The Peaceful Assembly Act 2012 also empowers the Minister by notification in Gazette to designate any location to be a designated place of assembly (Faruqi, 2012). The same Act defines designated places as exempted from the requirement of notification (Faruqi, 2012). However, the Minister has yet to declare any designated place of assembly (Whiting, 2011).

6.5.Recommendations for Amendments

It is apparent that neither the discretion of police powers in policing public order nor the rights of protestors to freedom of assembly is addressed in the Peaceful Assembly Act 2012 as an existing guideline on policing public order in Malaysia. As such, amendments to the state law is much needed to fill in the loopholes in the existing law and to balance the discretionary powers of the police officers in policing public order as well as the rights of protestors to freedom of assembly. In England and Wales, the public order enforcement approach in England and Wales is more advanced. The Public Order Act 1986 is a more comprehensive legislation as compared to the Peaceful Assembly Act 2012 in Malaysia that is still in an infancy state. Furthermore, the Public Order Act 1986 is a less restrictive legislation and a more flexible law than the Peaceful Assembly Act 2012.

The Public Order Act 1986 makes a distinction between processions and assemblies. A procession is said to be defined as people moving together along a route whereby a static protest is termed an assembly. In contrast, the term public procession is not defined in the Peaceful Assembly Act 2012. Without such distinction, the police officers would have a broad discretion to deal with such assemblies. Hence, there is a need to distinguish such terms because that definition could determine the police approach in handling public procession and assembly.

In the broader analysis, under Section 9(1) of the Peaceful Assembly Act 2012 only requires an organizer of a public assembly to notify the Officer in Charge of the Police District ten days prior the date of assembly. The requirement of giving prior notice to the authorities of the time, place and purpose of the demonstration is imposed to avoid disruption of public order during the protest. To address such deficiency, perhaps a complete and proper guideline to police officers on enforcement of their powers in policing public order as well as a more structured process to an application of an assembly should be created and provided to the police officers.

7. Conclusion

Some significant legal issues for the protection of the victims of crime in Malaysia, particularly under Section 4 and Section 9(1) of the Peaceful Assembly Act 2012 have been identified by this paper. It is apparent that the extent of the exercise of police powers in policing public order in Malaysia is rather unclear and provides room for improvements. Despite certain advantages and discretionary powers given to the police in policing public order in Malaysia, the same discretion may not be practiced the by protestors. The wide or vast discretionary powers given to the police officers as public order enforcers could lead to possible exposure to criminal justice violation issues and also possibility of encroachment to human rights of the protestors. In amending a proper guideline and framework for police powers in policing public order, it is recommended that such amendments should significantly provide a positive and proper balance between the discretion of police powers and the protestors' rights to freedom of assembly. Perhaps, in the long run, a comparative research on the extent of police powers in policing public order in Malaysia and the United Kingdom is imperative to shine light on this issue.

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