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From Civic Space to the Internet: Legislating rights to peaceful assembly during pandemic

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Abstract

With the social distancing measures implemented during Pandemic Covid 19, many peaceful assemblies have attempted to restructure, equip, and empower themselves creatively for online gathering. This incident emphasises the importance of digital tools, such as the Internet and ICTs, in exercising online rights to peaceful assembly and association. Given the above, this article attempts to deliberate on transforming rights to the peaceful assembly from offline to online and the legal challenges attached. The authors argue that the right to peaceful assembly and association is vital to ensuring enhanced transparency and accountability in implementing human rights policies within countries.

Keywords: Online; Peaceful Assembly; Fundamental Rights; Pandemic, Covid 19; International Law.

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1.0 Introduction

With social distancing measures in place due to pandemic Covid 19, many peaceful assemblies have sought to creatively restructure, equip, and empower themselves for physical and online survival throughout the pandemic. Physical assemblies and associations have taken on unique forms of meaningful civic engagement, from automobile and bicycle protests to applauding, dancing, and shouting for essential employees outside windows and balconies. In a similar vein, Covid 19 has highlighted the importance of digital tools, such as the Internet and ICTs, in exercising peaceful assembly and association online. The recent incident by climate activist Greta Thunberg, for example, encouraged young activists to join in a "digital strike" instead of real public gatherings to keep public pressure on governments to tackle climate change. Greta has urged fellow climate campaigners to avoid mass protests and listen to local authorities. Her suggestion comes as the number of coronavirus cases around the world increases.

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The term digital strike used the Internet and digital media as key platforms for mass mobilization and political action. From early 1980s experiments to modern "smart mobs" and blogs, activists and computer experts have used digital networks to take action. Initially, online activists used the Internet to disseminate information to large audiences across borders. Earl and Kimport (2011) note that a more sophisticated form of digital activism used the Internet to mirror and amplify offline protests. Email and social media campaigns, virtual sit-ins, and "hacktivism" are examples of the digital strike.

On the other hand, Fominaya (2014) concurred that digital activism or digital strike has proven to be a powerful tool for mobilizing grassroots politics and engaging protesters. Online auctions are also crucial in countries where public spaces are heavily regulated or militarised. In such cases, online actions are preferable to potentially hazardous "live" actions. Online protests can target global institutions. While much of digital activism falls under the umbrella of electronic civil disobedience, some activists insist that the motifs and agents of such actions be made public to distinguish them from acts of cyberterrorism or criminal hacking.

Though the digital strike is a relatively new concept, however, in Malaysia the Human Rights Watch observed that the UNDI 18 rally has been the recent incident within the country. Overall, the Covid 19 pandemic has shown that the world is no longer connected exclusively by physical gatherings (Amin,2021). Instead, when faced with enormous challenges, the public congregates and joins online to voice ideas, call for action, and express solidarity. Given the ongoing problem, this paper looks at the rising of digital strikes and their impediments compared to traditional assembly. Also, this paper attempt to investigate the adequacy of international law and the relevant provision of local law in governing the digital strike or assembly. The first part of the paper reviews the applicable international laws governing freedom of assembly. The second segment examines national laws on the right to peaceful assembly. The third portion is the crux of the paper, discussing the rise of digital assembly and the legalities underpinning such issues. The fourth section's argument outlined the methodology adopted by this article. The next part discusses the findings that include the rising challenges of the traditional and digital right of peaceful assembly and how to deal with the issues. This final part concludes the paper.

2.0 Literature Review

2.1 Peaceful Assembly and International Law

Alexander (2018) rightly argues that freedom of expression, association, and peaceful assembly are often inextricably linked. When people come together for an expressive purpose, freedom of expression is frequently a necessary component of the rights to assembly and association. All three are protected by international and regional human rights instruments and are considered essential for a pluralistic and democratic society.

The concept of universalizing fundamental human rights was presented for the first time in the Universal Declaration of Human Rights (UDHR), which the United Nations General Assembly proclaimed in Paris on 10th December 1948. The Proclamation became a universal standard of achievement for all peoples and nations because of this proclamation. Article 20 of the document establishes the right to peaceful assembly. Although the Declaration is not a law, it serves as a guideline for international human rights standards to be respected and adhered to (Alves, 2000). Additionally, Article 21 of the International Covenant on Civil and Political Rights (ICCPR) recognized the right to peaceful assembly. The first sentence of Article 21 of the ICCPR provides: "The right of peaceful assembly shall be recognized." Such Covenant protects peaceful assemblies wherever they occur: outdoors, indoors, and online; in public and private spaces; or a combination thereof. Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils, and flash mobs. They are protected under article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches. (UN Assembly,2020)

Recognizing the human rights convention entails certain obligations. Such rights include rights to demonstrate peacefully and the rights of others to live in harmony and safety. The government has duties and responsibilities under international law to ensure that its citizens benefit from such freedoms at the state level. Simultaneously, the State is obligated to protect other citizens from any danger or public disorder that may arise because of demonstrations. Therefore, the State may reasonably restrict the right to assemble following the law. Article 29 of the UDHR affirms that such rights are exercisable and can be limited by rules solely to ensure and respect other people's rights and freedoms, and only for moral, public order, and general good in a democratic society (Glendon,1997).

International law preserves peaceful assembly and association rights, whether practiced in person via current or future technology. Therefore, the current international human rights standards and principles should serve as the framework for digital technology businesses' creation, control, and governance of digital technologies (UN Report, 2020).

Currently, many States have utilized technology to silence, monitor, and harass dissidents, political opposition, human rights defenders, activists, and protestors during the last decade and manipulate public opinion. Governments increasingly impose Internet shutdowns and restrict websites and platforms to advance critical democratic occasions like elections and protests. Increased legislation and regulations geared at combating cybercrime have also paved the way for prosecuting and surveillant activists and protestors in many countries worldwide. While the role of technology in spreading terrorism, instigating violence, and influencing elections is a legitimate and grave worldwide issue, such dangers are frequently used as an excuse to oppose the new digital civic society (UN General Assembly, 2021). While the digital age has created new opportunities for peaceful assembly and organization, it has also introduced a slew of new dangers and risks to these fundamental rights. For example, severe legal constraints and government policies in digital surveillance risk obliterating the space in which civil society can collectively promote or defend a shared interest. Moreover, the acts and inaction of digital technology corporations have exacerbated these concerns or created complicated new obstacles for individuals and organisations seeking to exercise their right to assembly and association online and offline. These difficulties will likely become more acute in an increasingly digitized future (UN Report, 2020).

2.2 Law Governing Peaceful Assembly in Malaysia

Malaysia became a member state of the United Nations on September 17th, 1957. Although Malaysia has been a member of the United Nations for a long time, only five out of eighteen human rights instruments have been ratified despite persistent pressure from domestic human rights institutions and organisations. Currently, Malaysia has not ratified or signed the ICCPR, another international legal instrument that deals with the enforcement of human rights (Omar, 2017; Rahmat, 2019).

The right to peaceful assembly is a constitutional right connected to other freedom of expression and religion. This right is referred to as 'freedom of speech,' and people need to assemble peacefully and share their privileges. This is because citizens usually agree on the importance of assembly rights, which became a justification for Malaysians to exercise their assembly rights by congregating in specific locations to express their rights on particular issue. This type of right is guaranteed under Article 10(b) of Malaysia's Federal Constitution. The condition stated that for people to assemble peacefully without weapons, it is one of the fundamental rights guaranteed to each person that no one, including the government, should violate. However, while the purpose of such a gathering is to reclaim one's rights, it often results in confusion, financial loss, and in severe cases, inflicts injuries to the innocent, in addition to the numerous other disadvantages suffered by multiple parties. In short, it may pose a danger to the government's ability to carry out its responsibilities and to the public at large. One must bear in mind that the nation will descend into chaos by endowing people with such absolute rights, mainly when the assembly discusses sensitive issues such as religion, race, and language. This became the primary justification for parliament to enforce certain limitations on citizens' ability in their right to assembly based on legally permissible grounds related to national security and public order, as specified under Article 10(2), Article (3), and Article 149 of the Federal Constitution.

The restriction imposed by the Malaysian government comes in the form of criminal law, in which such laws are used to arrest, interrogate, and prosecute individuals for exercising their right to free speech and assembly. The laws used to criminalize public assemblies are the Peaceful Assembly Act 2012 (PAA 2012), Penal Code, Police Act 1967, the Communications and Multimedia Act 1998 (CMA 1998), and the Security Offences (Special Measures) Act 2012 (SOSMA 2012). The statistics have risen dramatically in the year after Human Rights Watch published a report on *Creating a Culture of Fear: Malaysia's Criminalization of Expression* in October 2015. It has been observed that the Malaysian authorities have brought charges against a number of those listed in that report and have continued to harass, arrest, and sanction those who criticize the government or members of Malaysia's royal families using the report's overly broad and poorly worded criminal laws (Mohd Saufi & Omar, 2017).

The application of digital strike can also be seen in the Malaysian context whereby On May 3, 2020, Malaysians used the hashtag #MigranJugaManusia, which means "migrants are also human to start with digital strike. The series of posts vilifying the widespread detention of migrants and refugees raged on social media, especially Twitter. Global pandemic and social distancing measures emptied the streets and shifted civil disobedience online, using increasingly creative ways. This showed how social media has evolved from a communication tool to a critical channel for social justice movements organizing larger forms of activism. In a world of ephemeral content, compelling and thought-provoking calls to action have risen. Individuals from all walks of life are gathering to address and uncover issues that would otherwise go unnoticed. As the new normal persists, protesters are mobilizing for far more than a single issue. On the one hand, they demand freedom of speech; on the other, they question the status quo, especially racial inequities (Subramaniam, 2020).

Regarding Digital Assemblies, though such incidents of digital assembly or digital strikes are rarely reported, the issues on the rights to peaceful assembly are still problematic even after the law related to such assembly was amended in 2019. Among the issues related to rights to peaceful assembly in Malaysia is the current law, the Peaceful Assembly Act 2012 lacks provisions allowing for an exemption from the notice requirement for spontaneous assemblies where advance notice is impractical. Protests organized in response to an unexpected event that, in the view of participants, should not be postponed should not be subject to prior notice procedures under international law (Amnesty, 2020). Additionally, the law's continuous application of sanctions under Section 4(2) of PAA 2012 is also problematic. Furthermore, the law continues to criminalize persons under 21 to organise an assembly and for children to attend an assembly. This is contrary to the Federal Constitution, which contains no age restriction on the right to freedom of assembly, and the Convention on the Child's Rights (CRC), Malaysia is a state party. Rather than that, the government should ensure that all participants in peaceful gatherings, regardless of their age, are protected (SUHAKAM, 2020).

2.2 Covid 19 and the Rise of Digital Peaceful Assembly

Governments worldwide have responded to the Covid 19 coronavirus pandemic by imposing broad-ranging, necessary, and temporary restrictions on people's fundamental human rights, including the right to peaceful assembly. The restrictions were set through a variety of legal mechanisms, but it is critical that both the restrictions and their implementation remain proportionate as the pandemic's context changes and that they are lifted as quickly as possible as part of a transition to more normal daily routines (EU Centre NPO, 2021).

The right to assemble, demonstrate, protest, and congregate in a public space is critical to democracy because it enables people to express their views and needs collectively, contribute to social, cultural, and political discourse, and hold authorities accountable. However, globally, both in the physical and online realms, the right to peaceful assembly is under attack. As citizens take to the streets or gather online to protect rights and build a better society, they face an excessive and discriminatory use of police force, as well as novel and varied forms of artificial intelligence and technological controls. (EU Centre NPO, 2021).

While the public has generally accepted limitations on their rights, this is not necessarily that they have abandoned all forms of protest and assembly. While public assembly may be restricted temporarily, people have developed innovative forms of collective expression, both in-person and online. This demonstrates that such rights are fundamental to human society and congregate despite physical separation.

The rise of peaceful digital assembly is linked to General Comment 37 on Article 21 of the ICCPR. Unveiling new protest practices like online and private assemblies, the UN document condemns negative trends like disproportionate force, internet disruptions, and attacks on media, watchdogs, or vulnerable groups. Moreover, the UN Human Rights Council adopted a resolution (44/20) to improve the protection of peaceful protesters, mainly through new technologies, preventing invasive surveillance, and enabling online protests (Solomina, 2021).

3.0 Methodology

This research adopts doctrinal research methodology; this type of methodology is a systematic means of legal reasoning. The first stage is the literature review stage (Bell, 1987), in which all the relevant literature on fundamental rights to peaceful assembly and its governance and relevant literature on freedom of expression are analysed. The primary sources are International Law, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The national laws that will be referred are the Peaceful Assembly Act 2012 (PAA 2012), Penal Code, Police Act 1967, the Communications and Multimedia Act 1998 (CMA 1998), and the Security Offences (Special Measures) Act 2012 (SOSMA 2012). The secondary sources include textbooks, academic journal articles, government reports, newspaper articles, and online databases such as Hein online, emerald, and Lexis Nexis.

4.0 Findings

As rightly notes by Richard (2019), the primary rationale of providing civilians of their rights to freedom of assembly is to enable various and opposing viewpoints to be expressed and heard, predominantly minority or opposition organisations. The rights are crucial for historically discriminated populations that lack influence over broadcast media or are disenfranchised. Additionally, recognizing the rights to peaceful assembly will enable the facilitation of public debate on political, economic, social, and environmental issues. Also, it will demand accountability, asking questions, and demanding answers between the government and the citizens. The protests catalyze change to improve public health, education, economics, and income equality by making the government accountable to citizens (SUHAKAM, 2016).

The Human Rights Foundation observes that Governments frequently violate the right to the assembly by silencing dissenting voices. The right to peaceful assembly includes the right to peaceful protest. Often, peaceful protestors face arrest, violence, threats, or intimidation. Some legal provisions criminalise organisers and participants in peaceful assemblies, while others allow for the arrest of peaceful protestors. These intimidation tactics often foster a culture of self-censorship. They were forcing a public, open and pluralistic dialogue in repressing one of the essential tools used by civil society to challenge authority. Also, the governments are trying to block social media and communication tools to prevent protests. No such limitations should exist. The States must not abuse the national security measures to restrict the right to protest. Instead, they should ease public access and ensure peaceful protests without excessive force by law enforcement agencies. The limitations on the right to protest should be a last resort in countries' legal frameworks (Robert, 2021; Amnesty, 2021).

Pinckey (2020) rightly notes that despite the COVID-19 pandemic spreads, many social movements have had to change their tactics. The quarantine restrictions have forced movements off the streets or forced movements to end public protests to protect public health. But fewer public protests does not mean movements are gone. Most of the movements have shifted to online activism, and it harms in numerous ways. He observed that the Internet is tightly regulated in many autocracies. As in China's famous "Great Firewall," they can more easily monitor and censor information flow through digital networks or selectively deny activists internet access. These constraints make starting movement actions more difficult.

Similarly, surveillance is much easier and less expensive online than in person when repressive governments don't block internet access or censor content. Even when activists take precautions against surveillance, repressive governments can quickly gain a comprehensive picture of activists' online activities, as in Bahrain, where the government used social media pictures to target and arrest activists, or Syria, where greater internet access directly correlated with more targeted violent repression from the government.

Finally, regimes can spread false information or government propaganda online. In early April, a nonviolent action campaign against the government prompted Twitter to remove tens of thousands of fake accounts associated with government or pro-government parties. It is cheaper to flood the Internet with false information than to create and distribute accurate information. A single Honduran government employee created over 3,000 accounts included in the Twitter takedown. Even if people don't believe government propaganda, bombarding them with it can erode trust and coordination among activists (Pinckey, 2020).

Last but not least, he noted that while social media can benefit governments, it can also harm social movements by encouraging non-organized forms of mobilisation. People may be willing to participate in online activities or even be mobilised to act in person by an online call, but digital action alone is unlikely to build the strong networks of mutual trust required to sustain a movement. Movements lacking solid organizational structures are more prone to repression and ultimately failure (Pinckey, 2020).

5.0 The Way Forward

This research highlighted that states had guaranteed the rights to peaceful assembly, and association is in line with international law through national legal frameworks, policies, and practices. However, with the rise of the digital age and pandemic, the rights have transcended to the online platform and thus requiring the service providers in the digital technology sector must commit to respecting the

rights to peaceful assembly and association and exercise due diligence to avoid causing, contributing to, or being complicit in violations of these rights. Furthermore, states and digital technology businesses should adhere to well-established values of non-discrimination, pluralism of viewpoints, transparency, multi-stakeholder participation, and access to justice when carrying out their respective tasks, such as self-regulating their services. Additionally, this study has highlighted a new type of peaceful assembly as well as numerous contemporary, technology-driven challenges to traditional interpretations of human rights and the right to peaceful assembly. The study is limited to the time of Pandemic Covid 19 and the rise of digital assemblies. Future research from this paper could include theoretical engagements on publicly accessible but privately-owned spaces, presence and participation, temporality, and peacefulness in online assemblies, as well as providing a range of empirical evidence to inform these debates.

6.0 Conclusions and Recommendations

In conclusion, the rights to peaceful assembly and association are critical efforts to eliminate inequality. These fundamental freedoms are essential for strengthening social cohesion and democratic government because they allow for productive communication and alliance-building among communities and actors involved in such initiatives. The right to peaceful assembly and association can also help promote more inclusive development by bringing the issues and views of those minorities and targeted groups and those left behind in policy deliberations and planning in most countries, including Malaysia. Furthermore, the right to peaceful assembly and association is critical for ensuring increased openness and accountability in executing the development and poverty-eradication policies and initiatives, particularly concerning better services and resource allocation. Unfortunately, the Pandemic Covid 19 has caused the closure of civic space, and it is notably evident that the states are restricting civil society, impairing individuals and groups' rights to peaceful assembly, association, and expression. Over the years, mandate holders have reported countless instances in which both State and non-State entities have violated their rights, including Malaysia. Therefore, the rise of the digital age has created new opportunities to exercise the rights to peaceful assembly and association. Numerous instances exist throughout the world that highlight the power of digital technology in the hands of those seeking to collaborate to achieve democracy, peace, and development. On the other hand, the digital revolution has introduced many new perils and disputes to these fundamental rights.

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Paper Contribution to Related Field of Study

This paper will contribute to the body of knowledge and the body of literature in constitutional law especially on the fundamental rights to freedom of expression and assembly. Furthermore, this paper discusses on the challenges post to the rights of freedom of expression and assembly during pandemic.

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