

Our Ref. :  
Your Ref :

Date: 24 April 2012

✓ **Mr. Frank La Rue**

Special Rapporteur on the promotion and protection  
of the right to freedom of opinion and expression

**Mr. Maina Kiai**

Special Rapporteur on the rights to  
freedom of peaceful assembly and of association

**Mme. Margaret Sekaggya**

Special Rapporteur on the situation of human rights defenders

Copy to:

**Mdm. Jane Connors**

Chief of Special Procedures Branch  
Office of the High Commissioner for Human Rights

Dear Sirs/Madam,

I wish to refer to the Joint Letter of Allegation ref: **AL G/SO 214 (67-17) Assembly & Association (2010-1) G/SO 214 (107-9) MYS 11/2011** dated 23 January 2012 (hereinafter known as "the Communication") concerning the banning of the fourth annual event of the *Seksualiti Merdeka* festival for the Lesbian, Gay, Bisexual and Transgender (LGBT) community in November 2011.

2. The Government of Malaysia wishes to firstly reaffirm and emphasise its longstanding commitment to continue the reinforcement of democratic practices, institutions and values including the freedoms of expression, of assembly, and of association.

3. Without prejudging the accuracy or otherwise of the allegation summarized in the Communication, I wish to present herewith the response to the Joint Communication by the Government of Malaysia.

OHCHR REGISTRY

24 AVR. 2012 ORIGINAL

Recipients : ...SLO.....  
.....P. Dizec.....  
.....  
.....

**Accuracy of the information cited in the summary contained in the communication**

4. The Government of Malaysia regrets that the allegations summarized in the Joint Communication were not entirely accurate and not reflective of the events that took place on 3 November 2011. The full facts relating to the matter are as follows:

- 4.1 *Kempen Seksualiti Merdeka* (SM) is an annual event with activities and programmes advocating the sexuality rights of the 'lesbians, bisexuals, gays, transgender, intersex and queer and questioning' (LBGTIQ) in Malaysia. The organizing committee of SM had scheduled its annual event for the year 2011 to be held from the 9 to 13 November 2011;
- 4.2 Prior to the event, SM was supposed to have a special programme scheduled to be held from 1 to 6 November 2011. The 'special programme' went along as planned on the first and second day. However, on 3 November 2011, which is the third day of the event, the Police had placed a ban on all programmes and activities of SM and had subsequently dispersed crowds gathered at the SM event at Annexe Gallery Kuala Lumpur pursuant to police reports made by NGOs and the public opposing the SM. It should be highlighted that the police received **a total number of 154 police reports**;
- 4.3 The 'First Information Report' i.e. Pantai Rpt 11490/11 was lodged by Mr. Mohd Khairul Anwar bin Ismail, representative of the 'Allied Coordinating Committee of Islamic NGOs' (ACCIN) (complainant). In the police report, the complainant stated his objection of the said event on the ground that "SM seeks to promote homosexual activities in Malaysia which is a taboo in Islam and also under Malaysian law";
- 4.4 Pursuant to the police reports received by the Police, an Investigation Paper (IP) on the matter was forwarded to the Attorney General's Chambers (AGC) on 6 December 2011. The Police conducted their investigation based on section 298A of the Penal Code [Act 574] which governs the offence of causing, etc. disharmony, disunity, or feelings of enmity, hatred or prejudicing etc., the maintenance of harmony or unity, on grounds of religion;
- 4.5 In order to determine whether there was an offence committed under section 298A of Act 574, the Police acted under the investigative powers granted by the Criminal Procedure Code [Act 593] and recorded statements from various parties including Datuk Ambiga A/P Sreenevasan, Maria Chin Binti Abdullah, Irene Fernandez, Pang Khee Teik, Datin Paduka Marina Mahathir, etc. However all of the above had exercised their rights under section 112 of Act 593 in refusing to answer questions advanced to them;

- 4.6 After perusal of the IP, the Prosecution Division, of the AGC instructed for views from all religions pertaining to LGBTIQ be obtained before ascertaining whether an offence under section 298A of Act 574 has been made out. Hence, the IP was forwarded to the Police on 16 January 2012 in order to execute the instructions given. Thus far, no prosecution has been initiated against any parties involved in the SM event;
- 4.7 In relation to the ban issued by the police on 3 November 2011, Mr. Pang Khee Teik, Ms. Angela Marianne Kuga Thas, Ms. Thilaga Socky Pillai a/p Sulathireh, Ms. Sitiabedah Binti Kassim and Mr. Md. Nor Ismat Bin Selamat (the Applicants) who were all members of the SM festival's organizing committee, filed an application for judicial review at High Court of Kuala Lumpur naming Datuk Seri Khalid Abu Bakar, Mr. Nor Azman Muhammad Yusuf and the Inspector General of Police as the Respondents;

The Applicants sought —

- (a) an order of Certiorari to quash the decision of the 1st Respondent declaring a ban on the functions and activities of '*Seksualiti Merdeka*';
  - (b) and/or in the alternative, a Declaration that the decision is null and void and of no effect;
  - (c) an order directed the 1st and/or the 3rd Respondent to disclose and/or deliver copies of all or any first information report made to the Police; and
  - (d) costs and any other directions, orders or writ for the enforcement of the rights conferred by Part 2 of the Federal Constitution.
- 4.8 During the hearing of the leave application, the AGC objected to the application and submitted that leave should not be granted as there is no arguable case that merits further investigation on a full inter-partes basis;
- 4.9 The objections were made on the grounds that —
- (a) the decision to ban is not 'amenable for review' as the decision is not an administrative decision but a decision in carrying out certain investigative functions by the Police as a result of various police reports lodged by various people/body; and
  - (b) the matter has now become academic as the evidence would show that the so called 'ban' refers to '*Seksualiti Merdeka 2011*', an event which lapsed and therefore may no longer be

the lawful recipient of any benefit of any declaration sought in the application;

4.10 The learned High Court Judge in her oral decision delivered on 1 March 2012 agreed with the objections made by the AGC. In Her Ladyship's decision, it was held, among others that from the facts as averred in the Applicants' affidavit-in-support, it is plain that the so-called 'decision' was made pursuant to few police reports lodged against SM, and the matter is now pending investigations by the Police under section 27A of the Police Act 1966 [Act 344] and section 298A of Act 574. Therefore such decision is not amenable or susceptible to judicial review as to do so would tantamount to a court exercising civil jurisdiction encroaching into the realm of the criminal court's jurisdiction;

4.11 The court was also in agreement with the principles propounded in Rv Sloan [1990] 1 NZLR 474 at page 478 where it was held that:

*"The first difficulty is that the statute does not confer the inspectors the power to decide whether an activity is unlawful. All they can do is form an opinion, and then, on the basis of that opinion, institute the necessary procedures for the decision to be made by the only competent authority, the court. The forming of an opinion of this kind is plainly not reviewable, simply it does not amount to a decision."*

and further at page 479 that:

*"Even if that be too restrictive a view, the inspector's conclusion on the legality of the operation does not decide, prescribe or affect Mr. Sloan's 'rights, powers, privileges, immunities, duties or liabilities',...That occurs only when a decision to prosecute is made; or perhaps until the Court gives judgment on the prosecution."*

#### **Whether or not a complaint has been lodged by or on behalf of Seksualiti Merdeka**

5. No official or unofficial complaints have been received by the Police by or on behalf of SM.

## **Full details of the legal basis for the banning of the fourth annual *Seksualiti Merdeka* LGBT festival**

6. Under section 27A of the Police Act 1967 [Act 344]<sup>1</sup>, the Police are vested with powers to regulate assemblies, meetings and processions. Section 27A of Act 344 provides the Police with the power to stop activities which take place on premises which do not constitute a public place if satisfied that the activity attracts the presence of twenty persons or more outside the land or premises, or that the activity is likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace.

7. As stated above, the Police had, on 3 November 2011 dispersed crowds gathered at the SM festival at Annexe Gallery Kuala Lumpur as the Police had a substantiated fear that the event would excite a disturbance of the peace based on the fact that a total of 154 police reports were lodged by various parties in opposition of the festival.

8. The Government notes, as rightly pointed out by the Special Rapporteurs in paragraph 5 of the Communication, that on the date of the SM festival only 28 police reports were lodged in opposition to the festival. In that regard, while 28 police reports by and of itself may be construed to be inadequate to be a threat to the security of the Federation, the Government would like to bring the attention of the Special Rapporteurs to the fact that several nationwide newspapers had also highlighted the fact that the SM festival had incited strong feelings of enmity, and disharmony among Malaysians prior to 3 November 2011<sup>2</sup>. Therefore, the police reports coupled with the newspaper reports of strong feelings of enmity, and disharmony among Malaysians triggered by the SM festival, justified the basis of concerns by the Police that if allowed to persist, the situation will cause or pose a threat to the security of the Federation.

9. The Government is always tolerant towards activities organized by members of society with a view to advancing the cause of human rights. In this regard, the Special Rapporteur should note that the previous three SM festivals were carried out in the country without any interference from the Government. The present SM festival was disbanded due only to the potential threat it posed to the security of the

---

<sup>1</sup> The Special Rapporteur would note that the Police resorted to its powers under section 27A of Act 344 as the Peaceful Assembly Act 2012 [Act 736] has not yet entered into force. Act 736 was passed by the House of Representatives of the Malaysian Parliament on 29 November 2011. It was subsequently passed by the Senate on 20 December 2011. With the coming into force of Act 736, section 27 of Act 344 which requires a license to be issued by the Police (Officer in Charge of a Police District -OCPD) in order to hold any assembly, meetings and processions and the related sections 27A, 27B and 27C will also be repealed. In its place, provisions are made in the PAB for a requirement of notification by the organiser to the OCPD of an assembly which is intended to be held. Act 736 is meant to facilitate the exercise of the right to assemble peacefully and without arms. The main duties of the Police are altered from previously policing assemblies without permits to facilitating the exercise of the right to assemble peacefully and without arms. The police are allowed under section 13 of Act 736 to call the organizer for a meeting to advise the organizer on the assembly. This would enable the police to advise the organizer if the police believes that the assembly would disturb public order or national security. The Police shall also maintain public order and security, public tranquility, facilitate the holding of peaceful assembly, whilst taking into consideration the rights and freedoms of other persons.

<sup>2</sup> [http://www.utusan.com.my/utusan/info.asp?y=2011&dt=1103&pub=UtusanMalaysia&sec=MukaHadapan&pg=mh\\_01.htm](http://www.utusan.com.my/utusan/info.asp?y=2011&dt=1103&pub=UtusanMalaysia&sec=MukaHadapan&pg=mh_01.htm)(accessed on 12 March 2012); <http://thestar.com.my/news/story.asp?file=/2011/11/4/parliament/9837064&sec=parliament>(accessed on 12 March 2012)

Federation. The preventive actions by the Police should be looked upon positively, in the context of Malaysian society.

10. Additionally, the Government would highlight to the Special Rapporteur that the Police undertook the action of dispersing the SM festival to ensure that the LGBT community was kept safe from any retaliatory acts by certain fractions of society which were unhappy with the message the festival carried.

11. With regard to the Police taking action under section 298A of Act 574, the Government wishes to impress upon the Special Rapporteurs that investigations are still on-going and that no prosecutions have been initiated against any individual associated with the SM festival.

12. The Special Rapporteurs should note that the Police had at all times acted within the confines of their powers under section 27A of Act 344 in dispersing the crowd that had gathered for the festival.

### **How the ban is compatible with international human rights standard**

13. The UDHR is not intended to exhibit a particular point of view. It is with the utmost regret that much misconception has been created in the on-going debate about human rights that would have been alien to the framers of the UDHR, namely that the UDHR mandates an exclusive model of human rights for countries to practice.

14. Article 29(1) of the UDHR 1948 enunciates that the individual has not only rights but also 'duties to the community in which alone the free and full development of his personality is possible.'

15. It is this duty that not only regulates the parameters of a human right but also determines the actual behaviour of a human being.

16. Consequently, how human rights are to be practised depends upon the vision of human communities to govern their exercise and manifestation.

17. In sum, the UDHR proclaims human rights, including the rights to freedom of opinion and expression in Article 19 as well as the 'right to freedom of peaceful assembly and association in Article 20, and at the same time embodies the notion of human duties as well as limitations or restrictions which are placed on the exercise and fulfillment of human rights.

18. The inextricable linkage between individual duties and the communal dimension of life is similarly reflected in the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), specifically Article 18 of the Declaration which states that '[e]veryone has duties towards and within the community, in which alone the free and full development of his or her personality is possible'. The scope of permissible limitations is further elaborated in Article 17.

19. The Government wishes to draw to the attention of the mandate holders to the clear guarantees pertaining to the exercise of freedom of expression and freedom of peaceful assembly and of association in Malaysia as enshrined respectively in Articles 10(1)(a) and 10(1)(b) the Federal Constitution of Malaysia which is the supreme body of law in the country.

20. Consistent with the international standards of human rights law as briefly discussed above, the exercise of such rights and freedoms are similarly subject to limitations which are also enshrined in the Federal Constitution Malaysia.

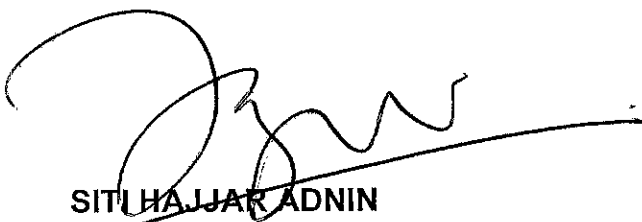
21. These limitations have long been judicially endorsed domestically on the premise that there cannot be any such thing as absolute or uncontrolled liberty, wholly free from restraint; for that would lead to anarchy and disorder.

### **Conclusion**

22. The Government remains committed to take necessary steps and measures to continuously guarantee the rights to freedom of expression and assembly, subject to such limitations as permitted by domestic law, and international norms and standards.

23. In conclusion, the Government wishes to reiterate that the actions taken pertaining to the *Seksualiti Merdeka* Festival by the relevant Malaysian authorities had been fair and in full compliance with domestic laws and regulations which in turn are consistent with international standards.

Please accept, Sirs/Madam, the assurances of my highest consideration.



**SITI HAJAR ADNIN**

(Charge d'affaires *ad interim*)