

**Guidelines on the approach
to the Public Order Ordinance
in relation to public meetings and public processions**

These Guidelines are not intended to be exhaustive. They are intended to assist enforcement officers and other persons in their understanding of the statutory scheme, including some of the terms, of the Public Order Ordinance (POO), Cap. 245, in the light of the constitutional right of peaceful assembly in relation to public meetings and public processions.

The Relevant Freedoms

2. The freedom or right to peaceful assembly and to peaceful public procession are fundamental rights guaranteed in the Basic Law (BL) of the HKSAR and the Hong Kong Bill of Rights Ordinance (BORO), Cap. 383. Article 27 of the Basic Law declares:

“Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions; and to strike.”

3. The BORO is the domestic enactment of the United Nations, International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. BL 39 has entrenched the ICCPR as applied to Hong Kong. The most relevant right recognized in BORO Article 17:

“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 the rights and freedoms of others.”

The right to freedom of expression, Article 16 of the BORO, is a right that has close association with the right to peaceful assembly.

‘Peaceful Assembly’

4. The POO is inter alia concerned with the regulation of public assemblies. The relevant freedoms envisage that only peaceful, intentional, temporary gatherings of groups of persons for a specific purpose are afforded the protection. Assemblies that are not peaceful or that lose their peacefulness

through force do not fall within the protective scope of the freedoms. As a result, the regulation of assemblies is, within limits, permissible.

‘Democratic Society’

5. BORO Article 17 permits restrictions to be placed on the exercise of the right of peaceful assembly if they are (amongst other things) necessary in a ‘democratic society’. This expression has a special meaning in regard to human rights that has been recognised at the United Nations (UN) in relation to the ICCPR. It refers to a society that recognises the Universal Declaration of Human Rights (UDHR) and the two Covenants of the UN, that is the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), a society, in short, that believes in pluralism and tolerance and the need for differing views to be reasonably and appropriately heard in a peaceful environment. The necessity for objections, prohibitions or conditions must be seen in that context. In particular, “a procession is a potent method of expression and is a common phenomenon in democratic societies including Hong Kong.”¹

Government’s Positive Duty

6. The right of peaceful assembly involves a positive duty on the part of Government to take reasonable and appropriate measures to enable lawful assemblies. This obligation is not absolute for the Government cannot guarantee that lawful assemblies will proceed peacefully and it has a wide discretion in the choice of the measures to be used. What are reasonable and appropriate measures must depend on all the circumstances in the particular case.

7. Organisers and participants should be aware of the need for the peaceful nature of public meetings and public processions, and the need for the police to ascertain that such assemblies are intended to be peaceful, and to have powers, to be exercised if necessary, to ensure that they remain so.

Conditions and Prohibitions

8. The Commissioner of Police has a discretionary power under the POO to prohibit, object to or impose conditions on public meetings and public processions if he reasonably considers it to be necessary.² However, he is restricted by law as to the conditions he may impose and the circumstances in

¹ Court of Final Appeal judgment in *Leung Kwok Hung & Others v. HKSAR* FACC Nos. 1 & 2 of 2005, at para. 3.

² Public Order Ordinance, Cap. 245, (POO) sections 9, 11, 14 & 15, section 6 is a discretionary power that applies to public gatherings as defined, when they are imminent or already underway.

which he may prohibit public meetings or processions. It is important to appreciate that these statutory powers are in place not to restrict the exercise of the relevant rights; but to enable Government to fulfil its positive duties. Without the power to impose conditions or to prohibit or object in certain circumstances, the peaceful nature of the assembly could not be reasonably assured or other important societal interests could be unnecessarily degraded.

The Criteria for Prohibition or Conditions

9. Terms used in the ICCPR and BORO relating to permissible restrictions have largely, although not wholly, been adopted in the POO. The terms used as criteria for prohibiting or restricting assemblies are broad and flexible so as to accommodate the wide variety of circumstances in which the relevant freedoms are exercised. They are as follows:

- (i) national security;
- (ii) public safety;
- (iii) public order; and
- (iv) protection of rights and freedoms of others

In everyday practice, the two most important criteria are public order and public safety.

National Security

10. In the context of the Commissioner's statutory discretion to restrict the right of peaceful assembly, the expression 'national security' is defined as the safeguarding of the territorial integrity and the independence of the People's Republic of China.³

Public Safety

11. In the context of the Commissioner's statutory discretion to restrict the right of peaceful assembly, the term 'public safety' refers to—

“[s]afety of persons (i.e., their lives, their physical integrity or health) or things.”⁴

³ POO, section 2(2).

⁴ *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Dr. Manfred Nowak, at p.380.

Public Order

12. The expression ‘public order’ in the law and order sense, means the maintenance of public order and prevention of public disorder.⁵

Protection of Rights and Freedoms of Others

13. In the context of the Commissioner’s statutory discretion to restrict the right of peaceful assembly, the term ‘the protection of the rights and freedoms of others’ refers to –

- the protection of the rights of passers-by, as well as those of the participants, to personal safety and physical integrity, which were dealt with in the context of public safety; and
- the protection of private property of others including private commercial interests.⁶

14. Scenarios upon which the Commissioner of Police may, in his discretion, limit the right to freedom of assembly on the ground of ‘rights and freedoms of others’ would, for example, be :

- (i) the procession will result in unreasonable disruption of normal business and mercantile operations along, or in the vicinity of, the proposed procession route; and
- (ii) the concentration of persons, vehicles or things at the formation and dismissal areas, along the procession route and in nearby areas, will prevent necessary fire and police protection or other emergency services.

Application of the Criteria

15. The above criteria must be approached and used in a manner recognised by the courts as being consistent with preserving the essentials of the relevant freedoms. At the same time, they should inform important practical decisions on how, for example, to preserve public order during the exercise of the relevant freedoms. The Commissioner has to approach the matter in a flexible manner and his discretion to object or to impose conditions is

⁵ Court of Final Appeal judgment in *Leung Kwok Hung & Others v. HKSAR* FACC Nos. 1 & 2 of 2005, at para 82.

⁶ *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Dr. Manfred Nowak, at p. 382-383.

constrained. In considering its exercise, the Commissioner must apply the proportionality test.

The Proportionality Test

16. In applying the proportionality test, one must ask is the potential restriction -

- (a) rationally connected with the purpose of public order; and
- (b) no more than is necessary to accomplish that purpose?

Both questions must be answered in the affirmative before the test is satisfied.

17. Factors to be taken into account in regard to (b) depend on the criteria relied on and all the factual circumstances. Using the example of public order, the Commissioner has to consider various facets of public order such as traffic conditions and crowd control. Depending on the case in question, factors that may be relevant include the date and time of the proposed procession, the topography of the route, the possible presence of rival groups and the reaction of members of the public.

Conditions before Prohibition or Objection

18. Wherever possible, conditions that can be justified as being reasonably necessary should be imposed on a proposed public meeting or procession, rather than the event being prohibited or objected to.⁷

Duty to Give Reasons

19. The Commissioner is under a statutory duty⁸ to give reasons when he decides not to accept shorter notice and when he reasonably prohibits or objects to or imposes conditions on a notified public meeting or procession. The duty is to give adequate reasons not merely a bald conclusion.⁹

Appeal Board

20. There is an Appeal Board on Public Meetings and Processions. This can be convened at short notice. The Appeal Board does not need to follow formal rules of evidence, and is intended to be ‘user friendly’ to the

⁷ POO section 9(4) & section 14(5).

⁸ POO e.g. section 15(2).

⁹ *Leung Kwok-hung & Others v. HKSAR*, supra, at para. 59.

public. The Appeal Board may, after hearing an appeal, confirm, reverse or vary the prohibition, objection or condition appealed against.¹⁰

Useful Background Materials

Cases

- (i) *HKSAR v. Ng Kung Siu & Another* (1999) 2 HKCFAR 442
- (ii) *Leung Kwok Hung & Others v. HKSAR* FACC Nos. 1 & 2/2005
- (iii) *Leung Kwok Hung & Others v. HKSAR (CA)* HCMA 16/2003
- (iv) *Auli Kivenmaa v. Finland* UN Human Rights Committee, Communication No. 412/1990

Texts

- (i) U.N. Covenant on Civil & Political Rights CCPR Commentary (Articles 18 & 21) by Dr. Manfred Nowak
- (ii) The International Bill of Rights, Editor: Professor Henkin, Chapter 12, Permissible Limitations on Rights by A.C. Kiss

¹⁰ POO, section 44(4).