

## **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 provides:

“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 BOR is the domestic enactment of the 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 BOR is Article 17 which provides:

“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, BOR 16, is a right that has close association with the right to peaceful assembly. The rights of peaceful assembly and freedom of expression are not absolute but may be subject to restrictions provided that the restrictions are provided by law and are necessary to pursue one of the legitimate purposes specified in the two articles.

### **‘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. Thus, assemblies involving disorderly conduct causing unreasonable obstruction to others are not protected.<sup>1</sup> In exceptional circumstances, an exercise of the right of peaceful assembly may have to be curtailed to prevent an imminent breach of the peace not to be committed by the participants themselves but by others who are provoked by the

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<sup>1</sup> *HKSAR v Pearce* [2007] 5 HKLRD 1.

behavior of the participants. Alongside with the positive duty to take measures to enable lawful assemblies to take place peacefully, Police also have the duty to take lawful measures for preserving the public peace and have to strike the right balance between the two duties.<sup>2</sup> The regulation of assemblies, if within limits, is permissible.

### **‘Democratic Society’**

5. BOR 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 and the two Covenants of the UN, that is the ICCPR and International Covenant on Economic, Social and Cultural Rights, 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<sup>3</sup> of expression and is a common phenomenon in democratic societies including Hong Kong.”

### **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.<sup>4</sup>

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 CP 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.<sup>5</sup> However, he is restricted by law as to the conditions he may impose and the circumstances in 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

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<sup>2</sup> *Chan Hau Man Christina v Commissioner of Police* [2009] 4 HKLRD 797.

<sup>3</sup> Court of Final Appeal judgment in *Leung Kwok Hung & Others v. HKSAR* [2005] 8 HKCFAR 229., at para. 3.

<sup>4</sup> *Ibid*, para. 22.

<sup>5</sup> 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.

rights; but to enable Government to fulfill 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 BOR 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 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 CP'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.<sup>6</sup>

### **Public Safety**

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

“safety of persons (i.e., their lives, their physical integrity or health) or things.”<sup>7</sup>

### **Public Order**

12. The expression 'public order' in the law and order sense, means the maintenance of public order and prevention of public disorder.<sup>8</sup>

### **Protection of Rights and Freedoms of Others**

13. In the context of the CP's statutory discretion to restrict the right of peaceful assembly, the term 'the protection of the rights and freedoms of others' refers to:

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<sup>6</sup> POO, section 2(2)

<sup>7</sup> U.N. Covenant on Civil and Political Rights CCPR Commentary, Manfred Nowak, at p.380

<sup>8</sup> Court of Final Appeal judgment in *Leung Kwok Hung & Others v. HKSAR*, op cit, at para 82.

- i) 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
- ii) The protection of private property of others including private commercial interests.<sup>9</sup>

It should be noted that the law also calls on organizers and participants to accommodate other people's right. For that purpose, organizers and participants have to tolerate some interference with their own freedom to demonstrate. Such tolerance is expected of organizers and participants in a democratic society however strongly they feel about their course.

14. Scenarios upon which the CP 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 CP has to approach the matter in a flexible manner and his discretion to object or to impose conditions is 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:

- i) rationally connected with the purpose of public order; and

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<sup>9</sup> U.N. Covenant on Civil and Political Rights CCPR Commentary, Manfred Nowak, at p. 382-383. See also *HKSAR v Au Kwok Kuen & Others* [2010] 3 HKLRD 371, at para. 53 where the court held that property right and the right to privacy at one's home are also constitutionally protected rights and the right to demonstrate stops, so far as physical and geographical limits are concerned at the boundary of private residential property belonging to other, in the absence of any permission to enter.

- ii) 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 (ii) depend on the criteria relied on and all the factual circumstances. Using the example of public order, the CP 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.<sup>10</sup>

### **Duty to Give Reasons**

19. The CP is under a statutory duty<sup>11</sup> 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.<sup>12</sup>

### **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 public. The Appeal Board may, after hearing an appeal, confirm, reverse or vary the prohibition, objection or condition appealed against.<sup>13</sup>

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<sup>10</sup> POO section 9(4) & section 14(5).

<sup>11</sup> POO e.g. section 15(2).

<sup>12</sup> *Leung Kwok Hung & Others v. HKSAR*, op cit, at para. 59.

<sup>13</sup> POO, section 44(4).

## Useful Background Materials

### Cases

- a) *R v To Kwan Hang* [1995] 1 HKCLR 251;
- b) *HKSAR v. Ng Kung Siu & Another* (1999) 2 HKCFAR 442;
- c) *Leung Kwok Hung & Others v. HKSAR* [2005] 8 HKCFAR 229;
- d) *Leung Kwok Hung & Others v. HKSAR (CA)* HCMA 16/2003;
- e) *Yeung May Wan & Others v HKSAR* [2005] 2 HKLRD 212;
- f) *Chan Hau Man Christina v Commissioner of Police* [2009] 4 HKLRD 797;
- g) *HKSAR v Au Kwok Kuen & Others* [2010] 3 HKLRD 371; and
- h) *Auli Kivenmaa v. Finland*, UN Human Rights Committee. Communication No. 412/1990.

### Texts

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