

*The Bar's Submissions On The Right Of
Peaceful Assembly or Procession*

Need For The Ordinance

1. The Bar notes with regret that the recent debate on the **Public Order Ordinance**, Cap. 245 (“the Ordinance”) has been at times emotive and divisive.
2. The Bar recognises the need for a legal regime to regulate the orderly exercise of a citizen’s right to take part in peaceful assemblies or processions. At the same time, it is a matter of fundamental importance that such legal regime should not be so overbearing as to have the effect of stifling or threatening any exercise of such a right.

Legal Framework

3. It is important to note that Article 27 of the Basic Law provides that “Hong Kong residents shall have freedom of speech freedom of association, of assembly, of procession and of demonstration”
4. Article 39 of the Basic Law further confirms that the provisions of the International Covenant on Civil and Political Rights (“ICCPR”) apply to Hong Kong and that “the rights and freedom enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law” and such restrictions “shall not contravene the provisions of [the ICCPR].”
5. Article 17 of the ICCPR provides that “the right to peaceful assembly shall be recognised. 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”

6. It follows that any restrictions on the right of assembly must be “necessary”. That is not the same as “convenient” or “expedient”. Furthermore, there is a fundamental distinction between restriction and suppression of a right.

Basic Constitutional Right

7. It is a matter of first principle that a constitutionally guaranteed right, such as the right of peaceful assembly or procession, is not a gift of a policeman or government. It is a right guaranteed by law. It follows that such a right, although not an absolute right, cannot be negated or effectively suppressed by severe restrictions.
8. The right of peaceful assembly or procession guaranteed by the Basic Law under Article 27 and Article 39 is deeply rooted in the common law which itself is guaranteed by the Basic Law.
9. In **R v. Londonderry Justices** (1891) 28 LR Fr. 440, decided over a hundred years ago, **O’Brien J.** said, at pg. 450 of the report, “If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent the result, not the legal condemnation of those who exercise those rights.
10. In **Hubbard v. Pitt** [1976] QB 142, **Lord Denning**, one of the most revered Judges in modern English legal history said at pg. 178G-H of the report, “[It is] the undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances.’ Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern.”

11. In these circumstances, it may be confusing and perhaps even misleading if undue emphasis is laid on a need to “balance competing interests” or “strike a balance”. To do so assumes that the right can be postponed or that it can yield to other interests. That is incompatible with the notion of a constitutionally protected right.
12. It follows that a law that enables the state to impose heavy criminal sanctions on a person simply on account of him exercising the right peacefully but having failed to comply with a procedural requirement which may be convenient or expedient to have will thus be incompatible with the first principle set out above.
13. In this respect, s. 17A of the Ordinance comes very close to offending this basic principle. The net effect of s. 17A is that it is possible for a peaceful participant of a public assembly or procession to be convicted of an offence simply because the organizers failed to comply with the notification requirement and be sentenced to up to 5 years imprisonment.
14. This is an unusually heavy deterrent when one considers that:-
 - (a) A person who behaves in a noisy and disorderly manner or uses abusive or insulting words with intent to provoke a breach of the peace will only receive a penalty of up to 12 months imprisonment if convicted under s.17B;
 - (b) A person who carries an offensive weapon will only be imprisoned, upon conviction, up to 2 years under s. 17C;
 - (c) A person who behaves in a disorderly, intimidating, insulting or provocative manner intended or likely to provoke other persons to commit a breach of the peace or cause any person reasonably to fear that a breach of the peace will be committed will only be punishable by imprisonment up to 5 years under s. 18;

- (d) A rioter will only be punishable by imprisonment up to 3 years under s. 22;
- (e) A person who enters any premises in a violent manner or by force will only receive a penalty of up to 2 years imprisonment under s. 23;
- (f) A person who is in unlawful possession of premises is punishable by imprisonment up to 2 years under s. 24;
- (g) A person who fights in a public place is punishable by imprisonment up to 12 months under s. 25; and
- (h) A person who incites or induces anyone to kill, to do physical injury to anyone, to destroy or damage any property will only receive a penalty, upon summary conviction, of imprisonment up to 2 years and, upon conviction on indictment, 5 years of imprisonment under s. 26.

Limit Of Restriction To Enjoyment Of Right

- 15. Proper enjoyment of such a constitutional right will not be an infringement of other laws. So long as the assembly or procession is peaceful and orderly, there can be no complaint. If the assembly or procession degenerates into a wrongful act contrary to other laws, then the common law and other statutory provisions will be a sufficient safeguard, for example, the law against breach of the peace, public nuisance and criminal damage, *etc.*
- 16. It is not unconstitutional, however, to *restrict*, as oppose to stifle, the exercise of the right in certain circumstances. Such restrictions may be imposed for the sake of public order or the rights of third parties. They have to be necessary and therefore go no further than is absolutely required to cater for public order and the interests of third parties.
- 17. Reasonable restrictions relating to the manner, time and place of public assembly or procession would not have the effect of negating the right.
- 18. The question of a restriction on a constitutionally guaranteed right, however, is

probably something that is far too important to be left to a policeman. That is something best left, ultimately to a judge under clearly defined legislation that addresses the issue in an objective way.

Relevance Of Foreign Examples

19. Since we are considering a constitutional right of the people of Hong Kong, foreign examples are rarely relevant considerations. But it may be instructive to consider a few foreign examples to see how the issue is approached in other countries if only to gauge the current standard in other modern societies.
20. In 1937, the U.S. Supreme Court held in **De Jonge v. Oregon** 299 U.S. 353 that a state could not make it a crime for a person to participate in a lawful assembly and the relevant state statute was held to be unconstitutional. It was said (at pg. 365), “The holding of the meeting for peaceful political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score.”
21. In **Knuz v. New York** 340 US 290 (1951), a city ordinance made it unlawful to hold public worship meetings on the street without first obtaining a permit from an administrative official. It further permitted the official to exercise his discretion to deny a permit application on the ground of the applicant’s past conduct. The US Supreme Court held that the ordinance was clearly unconstitutional.
22. Similarly, in **Shuttlesworth v. City of Birmingham** 394 US 147 (1969), the US Supreme Court held that the Ordinance of the State of Alabama which made it an offence to participate in any parade or public demonstration without having first obtained a permit from city authorities unconstitutional. The ordinance authorised the city commission to refuse a permit on the ground of ‘public welfare, peace,

safety, health, decency, good order, morals or convenience.’ The US Supreme Court struck down the ordinance since it subjected the exercise of the right to free speech to the prior restraint of a licence without narrow, objective and definite standards to guide the licensing authority.

23. In the U.S., each city has different legislations concerning public assembly. Most of these legislations impose minimal restrictions: *e.g.*, in New York City, applicants are encouraged to apply for a permit more than 2 business days in advance. Permits can be denied on clearly defined situations such as when the covered activity presents a “clear and present danger to the public safety, good order or health.”
24. In Seattle, written notification should be delivered to the Chief of Police at least 48 hours before the intended activity but such time limit can be waived by the Chief of Police.
25. In Canada, there is no requirement to seek permission before a public protest is to be staged. For traffic control purposes, the applicant can notify the police beforehand for assistance.
26. In the U.K., the **Public Order Act 1986** provided that only a local authority, which is controlled by democratically elected representatives, may prohibit a public procession. Special provisions apply in London enabling the Secretary of State to impose a ban. The penalty for participating in a prohibited procession is punishable by a fine only.
27. It is worth noting that the White Paper preceding the **Public Order Act 1986** proposed that the law be amended to allow a specified procession be banned. This recommendation was not accepted by Parliament on the ground that ‘it would

place the police in a situation where they would be subject to allegations of political motivation and partiality whenever they exercised the power to seek a ban on a particular march.’ (Bailey, Harris & Jones, *Civil Liberties: Cases and Materials*, Butterworths, 3rd edn., 1991 at pg. 182)

28. In an European Commission decision concerning the U.K. called **Christians against Racism and Fascism v. UK** (1980) 21 D.R. 138, it was said “Under Article 11(1) of [the European Convention on Human Rights], the right to freedom of peaceful assembly is secured to everyone who has the intention of organizing a peaceful demonstration A general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures.”
29. In Australia, public assembly is governed by state law. In general, the power to prohibit a public assembly or to impose conditions on the holding of the public assembly is vested in the Magistrates Court and not in the police.
30. Indeed, the requirement to apply for approval from the police for holding any public assembly was abolished in Queensland in 1992 pursuant to the recommendation of the Electoral and Administrative Review Commission (Report on Review of Public Assembly Law, Feb. 1991). This Commission concluded that it would not provide adequate protection for the fundamental right (of peaceful assembly) if one is to rely upon police discretion not to prosecute the demonstrators (para. 3-166 of the Report 1991). The **Queensland Peaceful Assembly Act 1992** provided that the organizer of a public assembly has to give notice to the Police Commissioner. If the Commissioner wishes to prohibit or specify conditions to the holding of the public assembly, he has to apply to the Magistrates Court for such an order, provided that 5 days’ advance notice has been given to the Commissioner. If less than 5 days’ notice is given, the organizer may

apply to the Court for authorisation if the holding of the public assembly is opposed by the police. Similar legislative regime exists in New South Wales.

31. In Germany, spontaneous demonstrations do not need application. In other cases, demonstrators can seek permission in writing 48 hours before the intended demonstration. Permission to demonstrate must be given.
32. In Norway, failure to notify will only result in a fine which is in any event rarely imposed.

The Model Regime

33. It will be seen from a study of the above and other experience in other world class cities that a Model Regime in the regulation of peaceful assembly and procession aspired to by all modern societies should contain the following:-
 - (a) A statement of constitutional principle recognizing that, although the law makes provision for restricting the right to peaceful assembly or procession, such restrictions cannot negate it. It should acknowledge the fact that limitations can only be justified by reference to the “time, manner and place” principle.
 - (b) A statement requiring the police to positively facilitate the exercise of the right to peaceful assembly and procession.
 - (c) A scheme for encouraging people who are minded to exercise the right to notify the police of their intention. The incentive for prior notification will be immunity from liability under the relevant common law and other laws that otherwise might come into play. (The most important would be laws relating to obstruction of the highway.)
 - (d) A requirement that upon the police being notified of a proposed public assembly or procession the only objections to the same should relate to time, manner and place.

- (e) Some provision that identifies objective criteria which may be relied upon to restrict the exercise of the right. Decision-making must be by reference to objective criteria and the existence of identified reasonable grounds said to give rise to a belief that the criteria exist. Pure value judgments will not do.
- (f) In the event that the police attach conditions to the place, manner and time of an assembly or procession and the organizers consider that the police have erred in their application of the criteria, there should be a right to have the decision reviewed by a judge immediately.
- (g) A provision making it clear the police will have the burden of showing that the decision to apply restrictions was necessary.
- (h) In the interest of maintaining the integrity of a notification system some sanctions may be applied to the organizers, but not participants, of public assemblies or procession who failed to give the required notification. In common with many other regulatory offences, the crime should be punishable only with a fine.
- (i) The time for notifying the police of a proposed assembly or procession should not be unduly long in advance. There is no reason why 48 hours before the event is not a sufficient notice. If the police wishes to impose conditions on the assembly, the police must do so either with the consent or the organizer or by applying to a judge for an order.
- (j) A provision for waiver by the police of notification in spontaneous assemblies or processions or peaceful assemblies or processions which do not call for significant change of public or traffic control.
- (k) A provision that a public assembly or public procession with less than 100 people should be exempt from restriction as such small scale protests are unlikely to affect members of the public.

Recommendations

34. For these reasons, the Bar respectfully recommends the following:-
- (a) It is unconstitutional to criminalize a peaceful assembly or procession simply on the ground of failure to give notice. To this extent, the constitutionality of section 17A of the Ordinance is seriously in doubt. In any event, the heavy custodial penalty imposed by this provision is at odds with the spirit and intent of Articles 27 and 39 of the Basic Law and plainly unreasonable when viewed in the context of other provisions of the Ordinance.
 - (b) The requirement to give 7 days' notice under sections 8 and 13A of the Ordinance is an unnecessary restriction and out of step with other modern societies. We suggest a notice period of 48 hours with a provision for waiver in spontaneous demonstrations will be more in line with the spirit and intent of Articles 27 and 39 of the Basic Law;
 - (c) Insofar as sections 9, 14 and 17 of the Ordinance which empowers the Commissioner of Police or the police to *prohibit* a peaceful assembly or procession on the ground of public order as understood in the French term *ordre public* (which has a special meaning under European Human Rights law) or the protection of the rights and freedom of others is unnecessary and likely to lead to an abuse of power;
 - (d) The appeal procedure under Part IX of the Ordinance is unlikely to work in practice since the constitutional rights concerned are matters of legal right which can best be determined by a judge.
 - (e) The SAR Government should seriously consider and enact, as soon as practicable, such additional provisions as to bring the Ordinance more in line with the Model Regime referred to above.

Dated this 23rd day of November 2000.

Hong Kong Bar Association