

The Public Order Ordinance

The followings are the comments by the Law Society of Hong Kong:

1. The International Covenant on Civil and Political Rights ("ICCPR")

The right of peaceful assembly is recognised by Article 21 of the ICCPR and is part of the laws of HKSAR by virtue of Article 39 of the Basic Law ("BL") and Article 17 of the Hong Kong Bill of Rights Ordinance ("BORO"). Article 21 of ICCPR reads:-

"The right of 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 democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

2. The text of Article 21 of ICCPR makes it clear that:-

- (a) only peaceful assemblies are protected; and
- (b) the right to peaceful assembly is not an absolute right and restrictions are permissible but:-
 - (i) *they must be imposed in conformity with law; and*
 - (ii) *are necessary in a democratic society for protection of one or more of the listed interests, namely, national security, public safety, public order (ordre public), the protection of public health or morals, and the protection of the rights and freedoms of others.*

The latter limit imports the democratic principles of proportionality and minimum standard of demonstrating a pressing social need for any restrictions to a guaranteed right or freedom. In The Law Society's Response to the Consultation Document on

“Civil Liberties and Social Order” published on 30 April 1997 (“the Law Society’s Response”) it was pointed out under Article 17 of BORO, the words “*necessary in a democratic society*” qualified the restrictions. Principles of proportionality and minimum standard are part of the laws of HKSAR. The Administration acknowledged that administrative guidelines would be issued to the Commissioner of Police on the application of the “*national security*” consideration which must be consistent with what is “necessary in a democratic society”.

3. Advance Notification:

The Public Order Ordinance (“POO”) imposes advance-notification requirements for public processions and public meetings. Notice of an intention to hold a public procession (other than for the purposes of a funeral) or a public meeting must be given to the Commissioner of Police 7 days in advance as required by s.13A(1)(b) and s.8(1) of POO. The Commissioner has the discretion to accept shorter notice but he must accept shorter notice where he is reasonably satisfied that earlier notice could not have been given. A typical example is the case of a spontaneous protest by dismissed employees where a business has suddenly closed down and earlier notice could not have been practicably given. There is no statutory minimum notice in the law.

4. Part III of POO empowers the police to prohibit the holding of a public meeting and to object to a public procession to be held if the Commissioner reasonably considers that the prohibition or objection is necessary in the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedoms of others. But the Commissioner of Police is required by law not to exercise the power of prohibition or objection when he reasonably considers that the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedom of others could be met by the imposition of conditions for a public meeting or a public procession (s.9(4) and s.14(5) of POO).
5. The Commissioner can only exercise the power to prohibit a public meeting or to object to the holding of a public procession within the time limits stipulated in s.9(3) and s.14(3) of POO. If the Commissioner does not object to a public procession being held, he must within the time limits stipulated for objection give his notice of

no-objection. If neither a notice of objection nor a notice of no-objection is given by the Commissioner within the stipulated time limits, he is *deemed* to have issued a notice of no-objection for the public procession (s.14 (4) of POO). In the Law Society's Response, it was pointed out the requirement for a notice of no-objection from the Commissioner would in effect be a requirement for a notice of approval to hold a public procession.

Deeming approach

The Government has indicated that:

"In the event that a "Notice of No Objection" has not been issued for whatever reasons, it will have been deemed to have been issued:

a) where the organizer who has given not less than seven days' notice, did not receive any objection 48 hours before the procession; or

b) where an organizer who has given less than three days notice , did not receive any objection 24 hours before the procession."

The Law Society notes the Government did address the Law Society's observations on notification and introduced the "deeming" provisions. However, the amendments as drafted continue to give cause for concern as the procedure of notification in practice causes uncertainty. For example, if a notice of objection is issued by the Commissioner but not received the applicant will erroneously believe that he can take advantage of the deeming provision whereas he will unknowingly be breaking the law. The possibility that an applicant does not know that he is in breach causes uncertainty. It is also difficult for solicitors to advise their clients properly.

6. Grounds for restrictions

The Law Society accepts that the statutory definition of "*national security*" in POO states the constitutional reality of Hong Kong as a Special Administrative Region of the People's Republic of China.

Of the permissible grounds of restriction, the expressions "*public safety*", "*public order (ordre public)*", and "*the protection of rights and freedoms of others*" are

interpreted in the same way as under ICCPR as applied to Hong Kong.

“*National Security*” means the safeguarding of the territorial integrity and the independence of the People’s Republic of China (S.2(2) of POO). In the Law Society’s Response, it was pointed out that the term “*national security*” was too wide when applied in the imprecise context of domestic legislation.

7. The Law Society is of the view that as a matter of law the advance notification requirements for public processions and public meetings in POO are compatible with Article 21 of ICCPR as applied to HKSAR.

Firstly, in the major decision on Article 21 of ICCPR by the Human Rights Committee in Kivenmaa v Finland (412/90), it was noted that “*any restriction upon the right to assemble must fall with the limitation provisions of Article 21*”. “A requirement to pre-notify a demonstration would normally be for reasons of national security, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”

Secondly, Article 17 of BORO requires that the exercise of the power by the Commissioner to restrict the right to public procession or public meeting must not only be reasonable but is necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

Thirdly: The right to appeal against the decision of the Commissioner to the Appeal Board satisfies the requirements of Article 14 of ICCPR as applied to Hong Kong. This provides that in determining a person’s rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This requirement is met by s.16 POO. There is a right of appeal by a person, society, or organization aggrieved by a decision of the Commissioner to an appeal board known as the “Appeal Board on Public Meetings or Processions” chaired by a retired judge. This Appeal Board is under the statutory obligation to consider and determine the appeal with the greatest expedition possible and without delay (s.44 A(6) of POO).

8. Apart from the issue of compatibility with ICCPR, the recent incidents of “*civic disobedience*” and public debates on the provisions of POO governing public processions and public meetings have raised issues of social and political concern to Hong Kong and its image in the international community. These issues include:-
- (a) The justification or the appropriate length of the advance-notification requirements - Since 1997, it has been announced that out of some 6,000 demonstrations, over 400 demonstrations were held without notification to the police. there is the perception that there is an unequal application of the law which does give rise to concern on the "Rule of Law".
 - (b) The appropriateness of the grounds of restrictions to the right of peaceful assembly in the context of HKSAR;
 - (c) The proportionality of the criminal penalties in certain offences under POO gives cause for concern, as for example, not only the organizer of the event but also participants would be subject to heavy criminal sanctions.

Is the requirement in s.17A (1)(d), namely that the media shall not propagate or announce a public assembly where the organizer had failed to give notification to the Commissioner contrary to common sense? The organizer is not in a position to provide an accurately estimate of the participants without announcements via the media?

(See the appendix containing a schedule of the offences under Part III of the POO)

- (d) The link between the ground of "national security" and Article 23 of the Basic Law. The Constitutional Affairs committee notes that reference to "National Security" in the POO has not been discussed in the context of the provisions of BL 23 which states:

"The HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion, against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

There is a link between the provisions of the POO and BL 23 which requires debate.

- (e) Whether the Commissioner of Police is the appropriate body to administer the POO subject to the direction of the Chief Executive. It is noted that in many jurisdictions the responsibility for authorizing public demonstrations or meetings lies with the local council or with the judiciary and it is queried whether the police is the appropriate organ to deal with this given the potential for conflict with the demonstrators. But it must be accepted that the police have the resources to administer public order and the flow of traffic when a demonstration takes place.

In addition, it is noted that s.51 POO was amended in 1999 granting the Chief Executive the authority to give "*such directions as he thinks fit with respect to the exercise or performance by the Commissioner of Police....of the functions or duties conferred or imposed on him*"

Why is it necessary for the Chief Executive to have this authority when the Commissioner for Police would have the necessary information to enable him to exercise the discretion under the POO?

- 9. The Law Society considers that given the concern expressed by a cross section of the community and that the areas of concern are not merely regulatory as outlined in paragraphs 5 and 8 above, these issues should be examined fully, preferably by the Law Reform Commission. This proposal enables the community to be consulted and a full debate of the areas of concern to take place.

**The Law Society of Hong Kong
November 2000**

(44129)