Legislative Council Panel on Security

The Administration's Response to Submissions to LegCo on the Public Order Ordinance

Limitation of constitutional right

We have heard it being argued that it may be confusing and perhaps even misleading if undue emphasis is laid on a need to 'balance competing interests' or 'strike a balance' because that would assume that the right can be postponed or that it can yield to other interests.

2. Few if any of the human rights recognised in the ICCPR are absolute. Many of them are subject to derogation in time of public emergency. Many are subject to limitation in the public interest at any time. Some rights may be limited if they conflict with the rights of others. The right of peaceful assembly recognised by Article 21 is subject expressly to restrictions permissible for the protection of the following interests i.e. national security, public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others (Alexandre Charles Kiss, Permissable Limitations on Rights, The International Bill of Rights, Louis Henkin (ed.) 290).

3. The importance to maintain the balance between the individual and the society as a whole was emphasised by Lord Woolf in the Privy Council judgment in the *Attorney General v Lee Kwong-kut (1993) 3 HKPLR72*, which involved the Hong Kong Bill of Rights.

> "While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. **In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime.** It must be remembered that

> questions of policy remain primarily the responsibility of the legislature."

4. Lord Hope of Craighead in a recent House of Lords decision in *R v Director of Public Prosecutions ex parte Kebeline [1999] 3 WLR 972* discussed the margin of appreciation doctrine at the international level and its implication on domestic courts. The case related to the European Convention for the Protection of Human Rights and Fundamental Freedoms as incorporated by the Human Rights Act 1998.

> "This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.
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> **In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society.** In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

5. Limitations are of course to be construed and applied strictly and not so as to swallow or vitiate the right itself. The number of public demonstrations held in Hong Kong in the past few years demonstrates that the exercise of the right has not been stifled, negated or suppressed.

6. Over 6000 demonstrations have been held since Reunification. The vast majority of those organising these demonstrations complied with the prior notification requirement and effectively exercised the right of peaceful assembly. Even those who did not give prior notification still exercised that right. There is therefore no basis for saying that undue emphasis has been laid

on a need to balance competing interests, or that the current law suppresses the right of peaceful assembly.

Criminal Sanction on participants of peaceful assemblies

7. JUSTICE and the Law Society accept that legitimate interests in preserving public order and protecting the rights of others justify a prior notification system for public meetings and public processions. The Bar Association accepts that 'in the interest of maintaining the integrity of a notification system some sanctions may be applied to the organisers, but not participants, of public assemblies or procession who failed to give the requirement notification'.

8. If it is accepted that a prior notification system is consistent with the exercise of the right under Article 21 and that the integrity of this notification system may be maintained by some sanctions, it should follow that the sanction of an unauthorised assembly and those who fail to comply with the statutory requirement is not a restriction of the right itself but a punishment for failure to comply with the law. What is being criminalised is the failure to comply with a reasonable statutory requirement, not the peaceful assembly or procession. This is necessary and proportionate to uphold the integrity of the notification scheme.

9. Many commentators have argued that participants of peaceful assemblies who, unlike organisers, have no duty to comply with the notification requirement, should not be penalised for the organisers' failure to comply with the notification requirement. It is argued that s.17A of the Public Order Ordinance, which imposes a maximum of 5 years imprisonment on indictment on a participant, may be unconstitutional. It is also argued that 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 provision of the Ordinance.

10. It should be pointed out that apart from the organisers, only those individuals who 'without lawful authority or reasonable excuse, knowingly' participate in all unauthorised assembly are guilty of an offence under s.17(A)(3). In the interest of upholding the integrity of the notification system, it is reasonable to apply a sanction to those individuals who participate in an assembly, knowing it to be unauthorised. They should not be treated as if they were innocent bystanders. Besides, it must be pointed out that the maximum penalty would only be imposed in the worst examples of the offence. It is inconceivable that participants of an unnotified, but entirely trouble free, public assembly would receive penalties anywhere near the maximum provided for.

11. It is also necessary to apply the sanction to participants from the law enforcement perspective. It may be difficult or impossible to identify the organisers if no prior notice was given to the police.

12. At paragraph 14 of the Submission, the Bar Association compares the penalties under s.17A with other penal sanctions under the Ordinance. However, it should be pointed out that the reference to a rioter being punishable by imprisonment up to 3 years under s.22 is wrong. The correct reference is s.19 of the Ordinance and a rioter is punishable by imprisonment for 10 years on conviction on indictment and, for summary conviction, 5 years.

13. Further, many of the offences set out in paragraph 14 of the Submission are not comparable to the offence of participating in an unauthorised assembly. Most relate to the conduct of a single individual, whereas the offence of unauthorised assembly aims to deal with unnotified or prohibited group activities which have a potential to cause serious disorder or serious harm to public safety, if not conducted properly.

14. Some commentators continue to express concern over the notice of no objection procedure. We must point out that after the Commissioner of Police receives a notice of intention to hold a public procession, he must issue a notice of no objection unless he objects to the procession. If he does <u>not</u> issue either a notice of no objection or a notice of objection within the specified time limit, he is taken to have issued a notice of no objection. The procession can therefore take place.

15. In other words, if the police do not issue a notice of objection, the procession can go ahead. This is clearly not a licensing or permit scheme.

Power to restrict right given to the police

16. Our law does not vest the power to restrict a constitutionally guaranteed right in the police as suggested by some commentators. First, the police do not have an unfettered discretion, nor can they act on the basis of subjective criteria. The Commissioner of Police may only prohibit a public meeting if he reasonably considers such prohibition to be necessary in the interests of public order etc. Section 2(2) of the Public Order Ordinance requires that the expressions “public safety”, “public order” etc. be interpreted in the same way as under the ICCPR as applied to Hong Kong. In other words, the Commissioner must objectively apply criteria that are set out in the ICCPR, and that are to be interpreted in accordance with international jurisprudence.

17. Secondly, the Commissioner cannot object to a public procession or prohibit a public meeting if he reasonably considers that the criteria could be

met by imposing conditions.

18. Thirdly, the Commissioner of Police must give reasons for any prohibition. An example of reasons given for objecting to a public procession in the past is as follows :

> "The Central District is the busiest business area in Hong Kong and the vehicle procession will cause serious disruption to vehicular traffic in the area, as well as other parts of Hong Kong Island."

19. Fourthly, an appeal lies against any such prohibition or objection to an independent, impartial board. This statutory appeal board consists of members from various sectors of the community. No public officer is on the Board. The Chairman is a retired judge. The Board can reverse or confirm the Commissioner's prohibition or objection. The appeal mechanism has functioned effectively since its establishment in 1995. The propriety of the Board's proceedings is subject to judicial review. So is the exercise of the Commissioner's power.

20. Fifthly, the Administration cannot agree that the power to prohibit a meeting should vest in the Judiciary as advocated by some commentators. We consider that it appropriate for the police, who have first-hand experience of maintaining law and order, to be the initial decision-maker in respect of proposed public assemblies.

Enforcement

21. The above principles underpin the Police's enforcement policy that the Police are to facilitate, as far as possible, all peaceful public meetings and public processions. One should note, however, it is also the Police's statutory duty to preserve public safety and public order. To achieve this dual purpose, it is important for the Police to establish contact with the organisers, from the time the Police become aware of any impending public events. A responsible police officer will initiate and maintain dialogue with the organisers. The officer is to offer advice and assistance to the organisers on procedures and explain the law; and, where necessary, explain the rationale behind any conditions that may be imposed.

22. The 7-day notice allows sufficient time for the necessary liaison with organisers and for the organisers to respond to recommendations by the Police, should routes or locations be impractical or clash with other known events and some adjustments are necessary.

23. On the other hand, day-to-day manning arrangements in police

districts can handle public meetings of not more than 50 persons or public processions of not more than 30 persons. In order to manage larger events, additional manpower is often required. Without the ability to make arrangements in advance, police personnel may need to be redeployed from normal duties, and this could impact on beat coverage and police ability to respond to emergency calls.

24. However, the Public Order Ordinance provides that the Police is authorised to accept shorter notice if they are satisfied that earlier notice could not reasonably have been given. Reasons in writing must be given by the Commissioner of Police if he refuses to accept shorter notice.

25. In regulating public order events, the Police always seek to strike a balance between the rights of the participants to express their views freely and the need to ensure public safety while avoiding undue inconvenience to the public who wish to carry on their daily lives.

26. Decisions as to what appropriate action to take in regulating public order events are made by the Police Commander at the scene in accordance with the law and having regard to the circumstances of each case.

27. At a peaceful event with a minor, technical or unplanned breach of the Public Order Ordinance, the Police Commander will give a verbal warning to the person in charge of the event. Details will be recorded and the event allowed to proceed. No further action will be taken against the person in charge.

28. At a peaceful event where the organiser has deliberately breached the law or disobeyed lawful orders given by the Police, the Police Commander will give a verbal warning to the person in charge of the event. The latter will be informed that the Police will consider possible prosecution action. If the person in charge cannot be identified, a general verbal warning will be given to all the participants. The event will be allowed to proceed under police supervision. Evidence of offences committed will be collected and presented to Department of Justice for advice.

29. At an event where a possible or actual breach of the peace occurs, the Police Commander will give a verbal warning to the person in charge and the participants of the event directing immediate cessation of any unlawful activity. If the warning is ignored, the Police Commander will consider peaceful dispersal or physical removal of the crowd or arrest action as appropriate. Evidence of any unlawful activity will be collected and legal advice will be sought after the event with a view to prosecution.

30. Police action is aimed at facilitating the event without causing a breach of the peace or unnecessarily curtailing the rights of freedom of expression, assembly and demonstration.

Relevance of Foreign Examples

31. Our law relating to the freedom of assembly must comply with the Basic Law and the ICCPR as applied to Hong Kong, as the Bar Association has pointed out, foreign examples are rarely relevant. Nevertheless, the Bar Association relied heavily on cases decided in the USA. Those cases are not relevant to the interpretation of our own constitutional order, which differs significantly from the US constitution. In particular, we do not accept that the 'time, manner and place' principle that has been developed in the USA is necessarily applicable to Hong Kong.

32. The Bar relied on three US Supreme Court cases to demonstrate the protection offered to the right of public assembly in that country.

33. *De Jonge v Oregon 299 U.S. 353* was relied on as deciding that a state could not make it a crime for a person to participate in a lawful assembly, and that such an offence was unconstitutional.

34. The Appellant in that case was convicted of assisting in the conduct of a meeting which was called under the support of the Communist Party which advocated **criminal syndicalism** (use of unlawful means to effect political or industrial changes) under a State statute, even though the meeting itself was **orderly** and **lawful** and **no "criminal syndicalism"** was advocated or taught at the meeting. The provision was held repugnant to the due process clause of the 14th Amendment, which safeguards Freedom of speech and the right of peaceful assembly. On the facts of the case, it is not surprising that the Supreme Court held that "peaceful assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceful political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score". However, that case was not concerned with any statutory requirement to notify the police of a public meeting or procession. The above quotation must be read in context. It cannot be right to say that in no circumstances can a peaceful assembly for lawful discussion be made a crime. Laws making reasonable provision for public safety or for preventing obstruction of the highway can legitimately criminalise such an assembly. And there are examples of US laws that make it an offence to hold a public meeting without obtaining a permit.

35. In the case of the *Kunz v New York 340 US 290 (1951)* the US Supreme Court held that a city ordinance making it unlawful to hold public

worship meetings on the streets without first obtaining a permit from a Police Commissioner which **makes no mention of reasons for which a permit application can be refused** unconstitutional as a prior restraint on the exercise of First Amendment rights. Again, that decision has no relevance to the restrictions found in the Public Order Ordinance, which are no wider than is permitted by the ICCPR.

36. The Bar referred to *Shuttlesworth v City of Birmingham 394 US 147 (1969)* to demonstrate that the US Supreme Court struck down the ordinance in question 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. It should be pointed out that the ordinance in issue authorised the City Commission to refuse a permit on the ground of '**public welfare**, peace, safety, health, **decency**, good order, **morals** or **convenience**'. 'It conferred upon City Commission virtually unbridled and absolute power to prohibit any parade, procession or demonstration on the city's street or public ways' (at p150). Again, this decision has no relevance to the restrictions in the Public Order Ordinance.

37. The reference to the European Commission decision *Christians against Racism and Facism v U (1980) 21 DR 138* is also not appropriate as that case concerns a **general ban** on demonstrations.

38. The Bar did not in their Submission refer to the Human Rights Committee's decision in *Auli Kivenman v Finland, Communication No. 412/1990* which upheld a Finnish statutory requirement for prior notification of public meetings as being a legitimate form of restriction under Article 21 of the ICCPR.

39. At paragraph 10 of their Submission, the Bar quoted Lord *Denning's judgment in Hubbard v Pitt [1976] QB 42*. It is unfortunate that the quotation was not complete for Lord Denning went on to say "**As long as all is done peacefully and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited … I stress the need for peace and good order. Only too often violence may break out, and then it should be firmly handled and severely punished.** But so long as good order is maintained, the right to demonstrate must be preserved" (per Lord Denning MR at 178, 179)." The reason why prior notification of public meetings and processions is required is to minimise the possibility of such problems arising. The requirement does not take away the right to demonstrate.

40. Reference was made in the Bar's Submission to laws in several other cities in the world. However, the 'Model Regime' proposed by the Bar

at paragraph 33 of the Submission does not emerge from its own review of the law in other jurisdictions. For example, in New York City the exercise of the right to public assembly is subject to a permit system, involving an application to the Police Commissioner.

41. The Bar's reference to the German system in paragraph 31 of the Submission is again over-simplified. From what we know to be the position in Berlin, 'spontaneous assemblies' are distinguished from 'urgent assemblies'. No notice is required of 'spontaneous assemblies'. In other public outdoor assemblies, 48 hours notice, given prior to the public announcement of the assembly, is normally required. However, for assemblies which have an organiser, but the decision to hold the assembly or process is made less than 48 hours it is to start, shorter notice can be given. Upon notification, the authority can issue administrative orders or if the assembly poses an immediate danger to public safety and order, can prohibit it.

42. Some commentators regard the Queensland Peaceful Assembly Act 1992 as the best model to follow. However, we do not accept that there is a case for copying it. Our law must reflect what is best for Hong Kong and the most important thing is that it must respect the human rights of the people and any restrictions on those rights must be compatible with the international covenants as applied to Hong Kong and the Basic Law.

Conclusion

43. We do not accept that our current legal regime is simply "convenient or expedient", or that s.17A of the POO comes "very close to offending" the right of peaceful assembly, or that its constitutionality is "seriously in doubt" We consider that our notification requirement is necessary to protect national security, safety, public order and the rights and freedoms of others, and is consistent with human rights guarantees.

Security Bureau
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