

2007年6月16日
資料文件

《2007年成文法(雜項規定)條例草案》委員會

就《公安條例》(第245章)及《社團條例》(第151章)的修訂

目的

在法案委員會2007年6月7日的會議上，部分委員要求當局就以下事項提供書面回應—

- (a) “public order” 及“public order (*ordre public*)”的不同概念；以及
- (b) 香港終審法院(終審法院)在2005年7月8日就“梁國雄及其他人對香港特別行政區”案(案件)作出判決後，警方根據《公安條例》就公眾集會及遊行的通知的處理有否轉變；以及就此而言，警方反對社會民主連線在2007年2月就其計劃於2007年3月10日舉行的公眾遊行所發出的通知，是否因為把“public order”一詞在法律與秩序上的涵義與《公安條例》有關條文中的“public order (*ordre public*)”分開詮釋所致。

“Public order”和“public order (*ordre public*)”

2. “Public order (*ordre public*)”一詞在《公安條例》和《社團條例》的英文文本中出現。在中文文本中，有關字眼是“公共秩序”，當中沒有就“*ordre public*”相應地附加規範語句。終審法院在案件的判詞中曾解釋“public order”和“public order (*ordre public*)”的概念。有關的摘要載於附件。簡言之，根據終審法院，“public order”的概念是指“公共秩序在法律與秩序上的涵義，即是維持公眾秩序和防止擾亂公眾秩序”。“Public order (*ordre public*)”的概念包括公共秩序在法律與秩序上的涵義，但不以此為限。這是一個不明確和難以表達的概念。它的

涵義並不能明確列明。它包括一切就整體上保障集體利益而有需要的事情。

3. 根據《公安條例》，“公共秩序”(英文文本為“public order (*ordre public*)”)是其中一個理由，警務處處長可藉以行使酌情權反對公眾集會及遊行。刪除英文文本中對“*ordre public*”的提述，有助增加對市民和平集會的權利的保障，因為這樣做能夠在法律上把警務處處長的酌情權規限於“public order”(“公共秩序”)在法律與秩序上的涵義。然而，警方在日常運作中已一直採用“public order (*ordre public*)”(“公共秩序”)在法律與秩序上的涵義。因此，刪除英文文本中對“*ordre public*”的提述，對警方運作並無實際影響。

警方根據《公安條例》處理公眾集會及遊行通知

4. 警方向來致力便利和平的公眾集會及遊行的舉行，在處理通知的程序方面一直沒有重大改變。不過，警方已發出更詳盡的行動指引，例如強調需要與主辦人士多加溝通及多些向主辦人士解釋警方關注的事項。對於 2007 年 2 / 3 月社會民主連線的個案，警方以相同方式處理。

保安局
香港警務處
律政司
2007 年 6 月

**Extracts from the CFA Judgment on
Leung Kwok Hung & Others v HKSAR
(FACC Nos. 1 & 2 of 2005)
Paragraphs 68 to 72**

68. The concept of “public order (ordre public)” operates at the constitutional level in Hong Kong. This is because art. 39(2) of the Basic Law requires any restriction of rights and freedoms to comply with the ICCPR as applied to Hong Kong, and the concept is specified in a number of ICCPR articles as a legitimate purpose for the restriction of rights, including the right of peaceful assembly.

69. There is no doubt that the concept of “public order (ordre public)” includes public order in the law and order sense, that is, the maintenance of public order and prevention of public disorder. But it is well recognised that it is not so limited and is much wider. See for example, *Ng Kung Siu* at 457 F-H, *Police v. Beggs* [1999] 3 NZLR 615 at 630; *Nowak* on art. 19 at p. 355-6 (para. 45), and on art. 21 at p. 380-1 (para. 24).

70. But the concept is an imprecise and elusive one. Its boundaries beyond public order in the law and order sense cannot be clearly defined. *Ng Kung Siu* at 459I-460A. “[It] is a concept that is not absolute or precise and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances”: Chapter 12 by Kiss on “Permissible Limitations on Rights” in Henkin (ed.): *The International Bill of Rights* (1981) 290 (“*Kiss*”) at 302.

71. The Siracusa Principles state that it :

“may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).” (para. 22)

The Principles also state that it must be interpreted in the context of the purpose of the particular human right which is limited on this ground (para. 23). The discussion by *Kiss* strikes the same chord in referring to

what is necessary to the collectivity. He concludes his discussion in the following terms (at 302) :

“In sum: [public order (*ordre public*)] may be understood as a basis for restricting some specified rights and freedoms in the interest of the adequate functioning of the public institutions necessary to the collectivity when other conditions, discussed below, are met. Examples of what a society may deem appropriate for the *ordre public* have been indicated: prescription for peace and good order; safety; public health; esthetic and moral considerations; and economic order (consumer protection, etc). It must be remembered, however, that in both civil law and common law systems, the use of this concept implies that courts are available and function correctly to monitor and resolve its tensions with a clear knowledge of the basic needs of the social organisation and a sense of its civilised values.”

The other conditions referred to in this passage relate to the requirement of legal certainty (with expressions such as “provided by law”, “prescribed by law”, “in conformity with law” and “in accordance with law” found in the ICCPR) and the requirement of “necessary in a democratic society”. *Nowak* is to similar effect in stating:

“... in addition to the prevention of disorder and crime, it is possible to include under the term *ordre public* all of those ‘universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based’”. (at 356, para. 45; see also at 381 para. 24)

72. It may readily be appreciated that notions such as “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded”, “in the interest of the adequate functioning of the public institutions necessary to the collectivity” and “universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based” are notions which by their nature are somewhat vague.