FACC Nos. 1 & 2 of 2005

Leung Kwok Hung & Others v. HKSAR

Summary of Judgment
This summary is prepared by the Judiciary.
It is not part of the judgment and has no legal effect.

The Court

1. The Court (with Mr Justice Bokhary PJ dissenting) dismissed the appeal and upheld the convictions.

The judgment of Chief Justice Li, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ

2. The freedom of peaceful assembly and the freedom of speech are fundamental rights. They lie at the foundation of a democratic society and are of cardinal importance for a number of reasons. The resolution of tensions and problems through open dialogue is of the essence of a democratic society. Such a society is one where the market place of ideas must thrive. These freedoms enable citizens to air grievances and seek redress. Tolerance is the hallmark of a pluralistic society. Through these freedoms, minority views which may be disagreeable can be ventilated. A procession is a potent method of expression and is a common phenomenon.

3. The Public Order Ordinance ("the Ordinance") is of limited scope in regulating public processions. It only regulates public processions consisting of more than 30 persons on a public highway or thoroughfare or in a public park.

4. The right of peaceful assembly involves a positive duty on the part of Government to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully. The statutory requirement to notify the Commissioner of Police ("the Commissioner") of a proposed public procession consisting of more than 30 persons on a public highway or thoroughfare or in a public park is constitutional. A legal requirement for notification is in fact widespread in jurisdictions around the world.

5. In the present case, the offences arose out of the holding of a public procession without complying with the legal requirement for notification, notwithstanding a warning by the police.

6. The focus of the challenge in this appeal is on the contention that the Commissioner's statutory discretion to restrict the right of peaceful assembly by objecting to a notified public procession or by imposing conditions ("the discretion to restrict") for the purpose of "public order (ordre public)" is too wide and uncertain to satisfy the requirements of constitutionality.

7. The International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong has been implemented by the Bill of Rights. It provides for the concept of "public order (ordre public)" as a constitutional norm. The concept is an imprecise

and elusive one. Its boundaries beyond public order in the law and order sense, that is, the maintenance of public order and prevention of public disorder, cannot be clearly defined. A constitutional norm is usually and advisedly expressed in relatively abstract terms. There is no question of challenging a constitutional norm which must be accepted. The Court applied "public order (ordre public)" as a constitutional norm in holding that the concept includes legitimate interests in the protection of the national and regional flags.

8. In contrast to the use of the concept at the constitutional level, different considerations apply to its deployment at the statutory level. Adopting an unusual technique, the concept of "public order (ordre public)" used in the ICCPR has been incorporated into the Ordinance in relation to the Commissioner's discretion to restrict the right of peaceful assembly. Although it is important for the Commissioner to have a considerable degree of flexibility, his statutory discretion to restrict the right of peaceful assembly for the purpose of "public order (ordre public)" provided for in ss. 14(1), 14(5) and 15(2) of the Ordinance does not give an adequate indication of the scope of that discretion. This is because of the inappropriateness of this concept taken from the ICCPR as the basis of the exercise of such a discretion vested in the executive authorities. The Commissioner's discretion to restrict the right of peaceful assembly for the purpose of "public order (ordre public)" does not therefore satisfy the constitutional requirement of "prescribed by law" which mandates the principle of legal certainty.

9. Public order in the law and order sense, that is, the maintenance of public order and prevention of public disorder is sufficiently certain. The appropriate remedy is the severance of public order in the law and order sense from "public order (ordre public)" in the relevant statutory provisions.

10. After severance, the Commissioner's discretion in relation to public order in the law and order sense is constitutional. It satisfies (i) the constitutional requirement of "prescribed by law" and (ii) the constitutional requirement of "necessary in a democratic society" for the relevant constitutional legitimate purpose.

11. It must be emphasised that the Commissioner must, as a matter of law, apply the proportionality test in exercising his statutory discretion to restrict the right of peaceful assembly. He must consider whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes and whether it is no more than is necessary to accomplish such purpose. His discretion is thus not an arbitrary one but is a constrained one. This test is well recognized internationally as appropriate in relation to the protection of fundamental rights. The legal requirement to apply it in this context ensures the full protection of the fundamental right of peaceful assembly against any undue restriction.

The dissenting judgment of Mr Justice Bokhary PJ

12. Mr Justice Bokhary PJ held that the Commissioner's entitlement to prior notification of public meetings and processions is constitutional. This entitlement is enforceable in the various ways indicated in his judgment, but not by the criminal sanctions in s.17A. The Commissioner's powers of prior restraint are unconstitutional. And the criminal sanctions follow the fate of those powers so as to be unconstitutional too. Accordingly, he would allow this appeal so as to quash the convictions and set aside the binding-over orders on the ground that the penal provisions under which the appellants were convicted are unconstitutional.

FACC Nos. 1 & 2 of 2005

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NOS. 1 & 2 OF 2005 (CRIMINAL)
(ON APPEAL FROM HCMA NO. 16 OF 2003)

Between:

LEUNG KWOK HUNG	**1st Appellant**
FUNG KA KEUNG, CHRISTOPHER	**2nd Appellant**
LO WAI MING	**3rd Appellant**
- and -	
HONG KONG SPECIAL ADMINISTRATIVE REGION	**Respondent**

Court:	Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ
Dates of Hearing:	3, 5-6 & 10 May 2005
Date of Judgment:	8 July 2005

J U D G M E N T

Chief Justice Li, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and
Sir Anthony Mason NPJ:

1. The freedom of peaceful assembly is a fundamental right. It is closely associated with the fundamental right of the freedom of speech. The freedom of speech and the freedom of peaceful assembly are precious and lie at the foundation of a democratic society.

2. These freedoms are of cardinal importance for the stability and progress of society for a number of inter-related reasons. The resolution of conflicts, tensions and problems through open dialogue and debate is of the essence of a democratic society. These freedoms enable such dialogue and debate to take place and ensure their vigour. A democratic society is one where the market place of ideas must thrive. These freedoms enable citizens to voice criticisms, air grievances and seek redress. This is relevant not only to institutions exercising powers of government but also to organizations outside the public sector which in modern times have tremendous influence over the lives of citizens. Minority views may be disagreeable, unpopular, distasteful or even offensive to others. But tolerance is a hallmark of a pluralistic society. Through the exercise of these freedoms minority views can be properly ventilated.

3. A peaceful assembly may consist of a procession, as it did in the present case. A procession is an effective means of communication because it involves an expression of the views of the participants as they move from one place to another. A procession has been aptly called an assembly in motion.

The message the participants are seeking to communicate may have a wide exposure. A procession is a potent method of expression and is a common phenomenon in democratic societies including Hong Kong.

4. This appeal concerns a challenge to the constitutionality of the statutory scheme for the regulation of public processions contained in the Public Order Ordinance, Cap. 245 ("the Ordinance"). The focus of the challenge is on the contention that the statutory discretion conferred on the Commissioner of Police ("the Commissioner") to restrict the right of peaceful assembly for the purpose of "public order (ordre public)" is too wide and uncertain to satisfy the requirements of constitutionality.

The convictions

5. On 25 November 2002, the Chief Magistrate (Mr Patrick Li) convicted the 1st appellant of the offence of holding an unauthorized assembly and the 2nd and 3rd appellants of the offence of assisting the holding of such unauthorized assembly. These were offences under s. 17A(3)(b)(i) of the Ordinance. The offences were in respect of a public procession on 10 February 2002. Each appellant was bound over on his own recognizance for $500 for a period of three months.

The facts

6. The facts can be shortly stated. In the late morning of Sunday 10 February 2002, a number of persons gathered at Chater Garden for a procession to protest against the conviction of an activist for assault and obstruction of a public officer. The 2nd appellant, using a loudhailer, called on the participants to get ready. Police officers were at the scene since there was a demonstration concerning the right of abode at Chater Garden at that time. The 1st appellant, a well known activist, was the person in charge of the

procession. A police officer invited him to go through the statutory notification procedure. He refused and was warned by the police officer of the consequences of his failure to comply before the procession started.

7. The procession comprising some 40 people then set off from Chater Garden in the direction of Police Headquarters at Arsenal Street proceeding along Queensway. Ignoring police advice to use the pedestrian pavement, they used the left traffic lane of the road. As the procession proceeded, others joined in so that the number swelled to about 96 persons.

8. On arrival outside Police Headquarters, again ignoring police advice not to use the North Gate where space was limited, the participants proceeded to that Gate. They stayed on the pavement there for about an hour when speeches were made. The procession was at all times peaceful.

Court of Appeal

9. The appellants appealed to the Court of First Instance which directed the appeal to be heard by the Court of Appeal. The Court of Appeal (Ma CJHC and Yeung JA, Stock JA dissenting) upheld the convictions: *HKSAR v. Leung Kwok Hung & Others* [2004] 3 HKLRD 729.

Leave to Appeal

10. The Appeal Committee granted leave to appeal, certifying the following question of law: Is the scheme which the Ordinance lays down for notification and control of public processions constitutional?

Representation

11. In considering this important appeal, the Court is indebted to Mr Martin Lee SC for the 2nd and 3rd appellants and Mr Gerard McCoy SC for the

respondent, the Government, and their respective teams for their research and presentations which were of considerable assistance. The Court also wishes to thank the 1st appellant, who appeared in person, for his written submissions and his measured address.

The Basic Law

12. It is necessary, first, to set out the relevant constitutional provisions. Article 27 of the Basic Law in so far as relevant provides :

> "Hong Kong residents shall have freedom of speech …; freedom of association, of procession and of demonstration …"

As has been discussed, the freedom of assembly is closely associated with the freedom of speech. It is also closely related to and indeed overlaps with the freedoms of association, procession and demonstration. The freedom of assembly is of course a right to peaceful assembly. Obviously, the scope of the right does not extend to an assembly which is not peaceful.

13. Article 39 of the Basic Law in so far as relevant provides :

> "[1] The provisions of the International Covenant on Civil and Political Rights … as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> [2] The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

14. In accordance with Article 39, the Hong Kong Bill of Rights Ordinance Cap.383 ("BORO") incorporates the provisions of the International Covenant on Civil and Political Rights ("the ICCPR") as applied to Hong Kong. However, it should be noted that although Article 20 of the ICCPR has been applied to Hong Kong, it has not been incorporated into BORO. Article 20 provides :

> " 1. Any propaganda for war shall be prohibited by law.

> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

BORO

15. Article 17 of BORO which corresponds to Article 21 of the ICCPR guarantees the right of peaceful assembly as follows :

> "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 public health or morals or the protection of the rights and freedoms of others."

The approach

16. As has been emphasized at the outset of this judgment, the freedom of peaceful assembly is a fundamental constitutional right. It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 at 28-9. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480 at para.24. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.

The constitutional requirements for restriction

17. The exercise of the right of peaceful assembly, whether under the Basic Law or under BORO, may be subject to restrictions provided two requirements are satisfied :

(1) The restriction must be prescribed by law ("the 'prescribed by law' requirement").

(2) The restriction must be 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 ("the necessity requirement"). It will be convenient to refer to the specified purposes as "the legitimate purposes".

It will be convenient to refer to these requirements as "the constitutional requirements for restriction".

18. As far as the right of peaceful assembly in BORO is concerned, the constitutional requirements for restriction are laid down in Article 17 itself. In relation to the first requirement, although Article 17 uses the expression of "in conformity with the law" rather than the expression of "as prescribed by law" found in Article 39(2) of the Basic Law, the principle involved is the same. See *Shum Kwok Sher v. HKSAR* (2002) 5 HKCFAR 381 at para.60 where the expression "according to law" in Article 11(1) of BORO, providing for the presumption of innocence in the trial for a criminal offence, was held to incorporate the same principle as that of "as prescribed by law" in Article 39(2).

19. As regards the right of peaceful assembly under the Basic Law, Article 39(2) provides that any restriction must not contravene Article 39(1), that is, the ICCPR as applied to Hong Kong, which has been implemented by BORO. In relation to the right of peaceful assembly, Article 39(2) provides that any restriction must comply with the two constitutional requirements for restriction in Article 21 of ICCPR, namely, (i) the requirement of "in conformity with the law" which is the same as the requirement of "as prescribed by law" in Article 39(2); and (ii) the necessity requirement.

20. There is no difference between the right of peaceful assembly guaranteed by the Basic Law and that provided for in BORO and no distinction will be made between them in this judgment except where necessary.

21. In the present case, the statutory scheme contained in the Ordinance provides for restrictions on the right of peaceful assembly. Having regard to the focus of the challenge, the crucial question which the Court must consider is whether the Commissioner's discretion to restrict the right of peaceful assembly for the purpose of "public order (ordre public)" satisfies the constitutional tests for restriction.

Positive duty on the Government

22. Before discussing the constitutional requirements for restriction, it must be pointed out that the right of peaceful assembly involves a positive duty on the part of the Government, that is the executive authorities, to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully. However, 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.

23. The existence of this positive duty is acknowledged by the Government. In the "Second Report on the Hong Kong Special Administrative Region of the People's Republic China in the light of the [ICCPR]" to the Human Rights Committee, the Government stated :

> "… essentially, the Police need advance notice of demonstrations so that, among other things, proper arrangements can be made to minimise any disruption to traffic and

> inconvenience caused to other members of the public. *The HKSAR has an obligation to assist and provide for the right of peaceful public assembly and demonstration* and cannot do so in Hong Kong's condition without prior notice of large peaceful processions and assemblies." (emphasis added)

See para.221 in the section dealing with the right of peaceful assembly. The reference to "Hong Kong's condition" in this passage presumably includes its density of population and its relatively narrow streets and roads in urban areas. Before this Court, Mr McCoy SC for the respondent, fully accepts and indeed relies on the fact that Government has this positive duty.

24. The recognition of this positive duty is consistent with the position under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"). Article 11 of that Convention guarantees the right of peaceful assembly. In *Plattform 'Ärzte für das Leben' v. Austria* (1991) 13 EHRR 204, the European Court of Human Rights interpreted Article 11 to impose a duty on the state to take positive measures to enable lawful demonstrations to proceed. The case concerned anti-abortion demonstrations held by the applicant association and the allegedly insufficient protection given by the Austrian police against attempts at disruption by pro-abortion groups. The Court observed that a demonstration may give offence to those with opposing views and demonstrators must be able to proceed without fear of physical violence by opponents; such a fear would have a deterrent effect (para.32). It held that in a democracy, the right to counter-demonstrate cannot extend to inhibit the exercise of the right to demonstrate.

> "Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere : a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8 [right to respect for private and family life], Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be." (para.32)

But the Court recognized that the obligation to take positive measures is not

absolute.

> "While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved". (para.34)

The "prescribed by law" requirement

25. The "prescribed by law" requirement in Article 39(2) of the Basic Law was considered by this Court in *Shum Kwok Sher*. In that case, the Court held that the common law offence of misconduct in public office was sufficiently precise to satisfy the criteria of "prescribed by law".

26. In his judgment in *Shum Kwok Sher*, Sir Anthony Mason NPJ, taking into account a range of comparative materials, held that, consistently with international human rights jurisprudence, the expression "prescribed by law" in Article 39(2) mandates the principle of legal certainty (at para.60).

27. To satisfy this principle, certain requirements must be met. It must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct. As pointed out by Sir Anthony Mason NPJ (at para.63), the explanation of these requirements in the often quoted passage in the majority judgment of the European Court of Human Rights in *Sunday Times v. United Kingdom (No.1)* (1979 – 80) 2 EHRR 245 (at para.49, p.271), the "thalidomide" case, is of assistance :

> "First, the law must be adequately accessible : the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct : he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty : experience shows this

> to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

28. There is an inevitable tension between requiring a law to be formulated with sufficient precision and the desirability of avoiding excessive rigidity in the law. The appropriate level of precision must depend on the subject matter of the law in question. See *Shum Kwok Sher* at para.64.

29. A law which confers discretionary powers on public officials, the exercise of which may interfere with fundamental rights, must give an adequate indication of the scope of the discretion. The degree of precision required of the law in this connection will depend upon the particular subject matter of the discretion. *Malone v. United Kingdom* (1984) 7 EHRR 14 at para.68. See also *Silver v United Kingdom* (1983) 5 EHRR 347 at para.88 and *Sunday Times v. United Kingdom* at para.49. In *Malone v. United Kingdom*, the police had tapped the applicant's telephone conversation in the course of a criminal investigation. The European Court of Human Rights held that this was an interference with his right to respect for his "private life" and "correspondence" under art. 8 of the European Convention (para.64). The issue was whether the interference was "in accordance with law" as required by art. 8(2), which mandates the principle of legal certainty. The Court held that English law did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities in the field of interception of communications. Accordingly, the interferences with his right under art. 8 were not "in accordance with law" (paras.79 and 80).

The necessity requirement

30. Turning to the constitutional requirement of necessity, any

restriction on the right of peaceful assembly must be 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.

31. As the Court has held, the word "necessary" in this requirement should be given its ordinary meaning and no assistance is to be gained by substituting for "necessary" a phrase such as "pressing social need". *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442 at 460 F-G; *Ming Pao Newspapers Limited v. Attorney-General* [1996] AC 907 at 919 G-H.

32. The Siracusa Principles on the limitation and derogation provisions in the ICCPR agreed to in 1984 by a group of experts ("the Siracusa Principles") state that, while there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting the definition of a democratic society. This view is consistent with that of the European Court of Human Rights that the hallmarks of a democratic society include pluralism, tolerance and broadmindedness. *Handyside v. United Kingdom* (1976) 1 EHRR 737 at para.49; *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493 at para.87.

The proportionality test

33. The Court has accepted that the constitutional requirement of necessity involves the application of a proportionality test. *Ng Kung Siu* at 461 A-B. See also *Ming Pao Newspapers Ltd v. Attorney-General* [1996] AC 907 at 917 D-E. In *Ng Kung Siu*, the Court considered the constitutionality of the statutory prohibition of desecration of the national and regional flags with criminal sanctions. The Court, applying the proportionality test, examined

whether the limited restriction by such prohibition on the guaranteed right to freedom of expression is proportionate to the aims sought to be achieved thereby. The Court answered that question in the affirmative. *Ng Kung Siu* at 461.

34. The use of a proportionality principle in examining whether a restriction of a fundamental right is necessary in a democratic society is consistent with the approach to constitutional review in many jurisdictions. See for example : *Handyside v. United Kingdom* at para.49; *Sunday Times v. United Kingdom* at para.62; *Norris v. Ireland* (1991) 13 EHHR 186 at para.41 (the European Court of Human Rights); *R (Daly) v. Home Secretary* [2001] 2 AC 532 at para.27; *R v. Shayler* [2003] 1 AC 247 at paras.60 and 61 (United Kingdom); *R v. Oakes* (1986) 26 DLR (4th) 200 (Canada); *De Freitas v. Ministry of Agriculture* [1999] 1 AC 69 (Privy Council); *S. v. Makwanyane* 1995 (3) SA 391 (South Africa). See also Dr M Nowak : *UN Covenant on Civil and Political Rights : CCPR Commentary* (1993) ("*Nowak*") at 379. Although the terms in which the proportionality test is formulated for application may vary from one jurisdiction to another, having regard to matters such as the text of the constitutional instrument in question and the legal history and tradition informing constitutional interpretation in the jurisdiction concerned, the nature of the proportionality principle is essentially the same across the jurisdictions.

35. By applying a proportionality test for considering any restriction on the right of peaceful assembly, a proper balance is struck between the interests of society on the one hand and the individual's right of peaceful assembly on the other. In formulating the terms of the proportionality test in the Hong Kong context, it is of critical importance to bear in mind that the legitimate purposes for restriction of this right have been set out in the relevant constitutional text. It must be emphasised that the legitimate purposes

specified in Article 21 of the ICCPR are the only legitimate purposes. This list is exhaustive. There cannot be a restriction for any other purpose. This is in contrast to constitutional instruments where the test for restriction is formulated only as a general formula, for example, by reference to what is necessary in a democratic society, without any specification of the purposes that may legitimately be pursued by a restriction.

36. As the legitimate purposes that may be pursued by any restriction on the right of peaceful assembly have been constitutionally specified in Hong Kong, the proportionality test should be formulated in these terms : (1) the restriction must be rationally connected with one or more of the legitimate purposes; and (2) the means used to impair the right of peaceful assembly must be no more than is necessary to accomplish the legitimate purpose in question.

37. In *De Freitas v. Ministry of Agriculture*, the Privy Council was concerned with the constitutionality of a statute restricting civil servants' freedom of speech in relation to any information or expressions of opinion on matters of political controversy. One of the requirements for restriction specified in the constitutional instrument in question was that it must be reasonably justifiable in a democratic society. See p.74 B and p.80 C. In relation to this requirement, the Privy Council adopted a three stage test which has been extensively cited in many jurisdictions :

> "whether : (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." (at p.80 G)

38. Compared to the proportionality test formulated above for Hong Kong, the *De Freitas* test has incorporated an extra requirement, namely whether the legislative objective is sufficiently important to justify limiting a

fundamental right. The Privy Council considered this extra requirement appropriate in *De Freitas* as the relevant constitutional instrument prescribed only the general formula of what is reasonably justifiable in a democratic society without specifying the permissible purposes for which a restriction could be imposed. In contrast, in the Hong Kong context, in relation to the right of peaceful assembly, the legitimate purposes for which a restriction may be imposed on the right are constitutionally set out in a comprehensive manner. That being so, the extra requirement, whatever its relevance may be in other situations, is unnecessary in the present context.

39. Having discussed the relevant constitutional provisions and the constitutional requirements for restriction, one can turn to the statutory scheme for the regulation of public processions contained in the Ordinance.

Background of the Ordinance

40. The Ordinance assumed its present form after enactment by the Provisional Legislative Council of the Public Order (Amendment) Ordinance (No. 119 of 1997), coming into effect on 1 July 1997.

41. The previous version of the Ordinance was the 1995 version after the amendments of that year. Under that version, the purposes for which the Commissioner could restrict the right of peaceful assembly were limited to public safety or public order. On 23 February 1997, the Standing Committee of the National People's Congress of the People's Republic of China adopted its Decision on treatment of the laws previously in force in Hong Kong in accordance with Article 160 of the Basic Law. By this Decision, the Standing Committee decided that major amendments to the Ordinance since 27 July 1995 were in contravention of the Basic Law and those provisions were not adopted as the laws of the Hong Kong Special Administrative Region.

42. It was to fill the lacuna resulting from the Standing Committee's Decision which would arise on 1 July 1997 that the Public Order (Amendment) Ordinance was enacted. This was done after a public consultation exercise with the issue of the Consultation Document on Civil Liberties and Social Order by the Chief Executive's Office in April 1997. As Mr McCoy for the respondent submits, the statute enacted in 1997 represented a sincere effort to comply with the ICCPR as applied to Hong Kong and there has been no suggestion that the law has in practice been abused, with countless public processions having taken place since it came into effect on 1 July 1997. However, the Court's duty is of course to adjudicate on the constitutionality of the scheme as a matter of law.

The statutory scheme

Limited scope

43. At the outset, it is important to appreciate the limited scope of the Ordinance in regulating public processions. The statute only regulates public processions consisting of more than 30 persons on a public highway or thoroughfare or in a public park. Section 13(2)(a) and (b). It will be convenient to refer to such a public procession as "a public procession subject to the statutory scheme". A public procession is defined as a procession in, to or from a public place organized as such for a common purpose and includes any meeting held in conjunction with such a procession. Public place is defined as any place to which the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise. Section 2(1).

44. It follows that (i) a public procession consisting of not more than 30 persons, even though it is on a public highway, or thoroughfare or in a public park, or (ii) a public procession consisting of more than 30 persons, but not on a

public highway or thoroughfare or in a public park, is not subject to the statute. A public procession of the kind in (i) or (ii) may freely take place without the need to observe the statutory requirements for a public procession subject to the statutory scheme.

45. A public procession subject to the statutory scheme may take place if and only if: (a) the Commissioner has been notified of the intention to hold the procession ("the notification requirement"); (b) the Commissioner has notified that he has no objection to the procession taking place or is taken to have issued a notice of no objection ("the no objection requirement"); and (c) the requirements under s. 15 of the Ordinance are complied with ("the s. 15 requirements"). Section 13.

(a) The notification requirement

46. The features of the notification requirement may be summarised as follows:

(1) Notice of the intention to hold the public procession must be given in writing to the Commissioner. Section 13A(1). The notice is usually given by the organizer.

(2) Notice must be given one week before the intended date for the procession. Section 13A(1)(b).

(3) The Commissioner has a discretion to accept shorter notice and must do so where he is reasonably satisfied that earlier notice could not have been given. Section 13A(2). If he decides not to accept shorter notice, he must inform the organizer in writing as soon as practicable and state the reasons why shorter notice is not acceptable. Section 13A(3).

(4) The written notice must be delivered to the officer in charge of a police station and must contain particulars of (a) the name, address

> and telephone number of (i) the organizer and any society or organization promoting or connected with the holding of the procession and (ii) a person able to act, if necessary, in place of the organizer for the purpose of s.15(1)(a) (which requires the organizer, or a person nominated by him to act in his place, to be present throughout the procession); (b) the purpose and subject matter of the procession; (c) its date, precise route, time of commencement and duration; (d) the location, time of commencement and duration of any meeting to be held in conjunction with the procession and (e) an estimate by the organizer of the number of people expected to attend the procession. The Commissioner must issue a written acknowledgement of receipt of the notice. Section 13A(4) and (5).

(b) The no objection requirement

47. Upon notification of the intention to hold a public procession, the statute confers on the Commissioner a discretion to object to the public procession being held

> "if he reasonably considers that the objection is necessary in the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedom of others." Section 14(1).

It will be convenient to refer to the interests of national security or public safety, public order (ordre public) and the protection of the rights and freedoms of others collectively as "the statutory legitimate purposes". It should be noted that compared to the legitimate purposes set out in art. 21 of the ICCPR, the statutory legitimate purposes are more limited in that the purpose of "the protection of public health or morals" found in art. 21 has been omitted. Section 2(2) contains a direction as to how the statutory legitimate purposes

should be interpreted. It relevantly provides :

> "In this Ordinance 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 [the 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."

48. If the Commissioner objects, he must do so as soon as practicable and in any event within the statutory time limits. His objection and the reasons must be notified in writing to the organizer. Section 14(2). The time limit varies depending on when notification is given: (a) where one week's notification is given, the time limit is not later than 48 hours before the notified commencement time of the procession; (b) where shorter notice of 72 hours or more has been accepted by the Commissioner, it is not later than 24 hours before the notified commencement time; (c) where shorter notice of less than 72 hours has been accepted by the Commissioner, it is not later than the notified commencement time. Section 14(3).

49. If the Commissioner does not object, he must notify the organizer in writing as soon as practicable and in any event within the statutory time limit. In the absence of notification of objection within the time limit, the Commissioner is taken to have issued a notice of no objection. Section 14(4).

50. Under the statutory scheme, the Commissioner is obliged not to object if he reasonably considers that the relevant statutory legitimate purpose could be met by imposing conditions. Section 14(5). The test for the exercise of his discretion to impose conditions is in identical terms to that of his discretion to object, namely "where [the Commissioner] reasonably considers it necessary in the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedoms of others", that is, for the statutory legitimate purposes. As has been noted, the statutory legitimate

purposes of “public safety”, “public order (ordre public)” and “the protection of the rights and freedoms of others” must be interpreted in the same way as under the ICCPR in accordance with the direction in s.2(2). Where the Commissioner decides to impose any condition, he must give written notice to the organizer and state the reasons why such condition is considered necessary. Section 15(2). The Commissioner may later amend any condition imposed. As with the imposition of the earlier condition, he must similarly give written notice and state the reasons. Section 15(3).

51. Although the statute does not specify the time limits within which the Commissioner must give notice of the conditions imposed, as a matter of statutory interpretation, he must do so within a reasonable time. What is a reasonable time in a particular case would depend on all the circumstances, including when the proposed procession was notified, when the proposed procession is to take place and the subject matter of the condition imposed. In this connection, the statutory time limits for objection may be considered as a useful reference point. Where the Commissioner imposes a condition, in order to avoid any misunderstanding, his notice to the organizer should clearly state the condition imposed and should distinguish it from other matters (not being conditions), such as advice on practical matters or reminders of statutory provisions, which he may consider it appropriate to put in the notice.

52. The Commissioner’s discretion to object and his discretion to impose conditions are only delegable to police officers at a senior level, that is, of the rank of inspector or above. Section 52.

(c) The s.15 requirements

53. At every public procession subject to the statutory scheme:

(a) the organizer must be present throughout the procession or if he is

not present, there must be a person nominated by him to act in his place;

(b) good order and public safety must throughout be maintained; and,

(c) the control of any amplification device that is used in such a manner that it causes noise that would not be tolerated by a reasonable person must be surrendered to a police officer, if so required, for the duration of the procession. Section 15(1).

The Commissioner's discretion to restrict

54. The Commissioner's discretion to object to a notified public procession and his discretion to impose conditions are expressed in identical terms and will simply be referred to collectively as "the discretion to restrict". The test for its exercise is if the Commissioner reasonably considers that the objection or the condition is necessary for the statutory legitimate purposes, including "public order (ordre public)" ("the statutory test of necessity"). The test imposed is an objective test.

55. The provenance of the statutory test of necessity is immediately recognizable. It incorporates the necessity requirement in art. 21 of the ICCPR (corresponding to art. 17 of BORO). And s.2(2) of the Ordinance directs that the statutory legitimate purposes of "public safety", "public order (ordre public)" and "the protection of the rights and freedoms of others" must be interpreted in the same way as under the ICCPR as applied to Hong Kong. This technique of incorporating the ICCPR into a statute is an unusual one.

56. Although the direction on interpretation in s.2(2) does not specifically cover the expression "necessary" and the statutory test of necessity does not refer to the expression "in a democratic society" found in art. 21 of the ICCPR, the clear legislative intent, evident from the incorporation of the ICCPR

necessity requirement into the statute, is that the statutory necessity test should be interpreted and approached in the same way as the necessity requirement found in art. 21.

57. As the ICCPR necessity requirement involves the application of a proportionality test, it follows that that test must also be applied in relation to the statutory necessity test. The Commissioner has a discretion to restrict the right of peaceful assembly, by objecting to or by imposing conditions on a notified public procession. In deciding whether and if so what restriction to impose in the exercise of his discretion, the Commissioner must consider: (1) whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes; and (2) whether the potential restriction is no more than is necessary to accomplish the legitimate purpose in question.

58. As discussed above, the conclusion that the proportionality test must be applied is based on the incorporation of the ICCPR necessity requirement into the Ordinance. As has been observed, this is an unusual technique. Even if this technique had not been used, although it is unnecessary to decide the point, the position would appear to be that, by virtue of art. 39(2) of the Basic Law, the proportionality test would in any event have to be applied in exercising a statutory discretion that may restrict the right of peaceful assembly. That Article provides that, in addition to the "prescribed by law" requirement, any restriction must not contravene the provisions of the ICCPR as applied to Hong Kong. As the ICCPR necessity requirement contained in art. 21 involves the application of a proportionality test, that test would have to be applied by virtue of art. 39(2).

Duty to give reasons

59. As has been stated, the Commissioner is under a statutory duty to

give reasons where he decides not to accept shorter notice and where he objects to or imposes conditions on a notified procession. The duty is to give adequate reasons. Plainly, the bald assertion of a conclusion would not be sufficient. Where the Commissioner decides to object or to impose conditions, the reasons given must be sufficient to show that he has properly applied the proportionality test in making his decision.

Appeals

60. The statutory scheme provides for an appeal to an Appeal Board against a decision by the Commissioner to object to a public procession or to impose conditions. A person, society or organization (i) named in the notice of intention to hold a public procession; or (ii) to whom a notice of objection is given, who is aggrieved by such a decision, is entitled to appeal. Section 16(1).

61. The Chief Executive appoints a Chairman and a panel of 15 persons, including two Deputy Chairmen, for a term of not more than two years and they may be reappointed. The Chairman must be a retired Judge of the High Court or the District Court or a retired magistrate who has served for more than 10 years. Sections 43(2), 43(3) and 43(4). The Appeal Board for an appeal consists of four members; the Chairman (or a Deputy Chairman) and three persons selected in rotation in accordance with the alphabetical order of their surnames from the panel. Section 44(1). Decision is by majority, with the Chairman (or Deputy Chairman) having a casting vote in the case of an equality of votes. Section 44(2).

62. The Appeal Board must consider and determine an appeal "with the greatest expedition possible so as to ensure that the appeal is not frustrated" by reason of its decision being delayed until after the date on which the public

procession is proposed to be held. Section 44A(6). It may receive and consider any material, whether or not admissible in a court of law. Section 44(3). The appeal is an appeal on the merits. The Appeal Board may confirm, reverse or vary the objection or condition appealed from. Section 44(4). Although not expressly stated in the statute, the Appeal Board is under a duty implied by law to give reasons.

Police powers and criminal offences

63. The Ordinance confers various powers on the police and provides for various criminal sanctions. See s.17 and s.17A. The powers of the police include preventing the holding of, stopping or dispersing any public procession which takes place in contravention of the notification, the no objection or the s.15 requirements or where any condition imposed by the Commissioner has been contravened. For present purposes, two criminal offences should be referred to. First, if a public procession subject to the statutory scheme takes place without complying with the notification or the no objection requirement, the public procession becomes an unauthorized assembly. Section 17A(2)(a). Every person who holds or assists in holding a public procession after the same has become an unauthorized assembly is guilty of an offence. The maximum penalty is five years' imprisonment on conviction on indictment or a fine of $5,000 and three years' imprisonment on summary conviction. Section 17A(3)(b)(i). The appellants were summarily convicted of this offence. In spite of the warning by the police, the notification requirement was not complied with and the public procession in question became an unauthorized assembly. Secondly, every organizer of a public procession (or any person acting in place of such person for the purpose of the requirement in s.15(1)(a) of having to be present throughout) must comply forthwith with a police officer's direction for ensuring compliance with or performance of the requirements in s.15(1) or any condition imposed by the Commissioner. Section 15(4). Any

person who without reasonable excuse fails to comply with such a direction commits an offence. The maximum penalty is a fine of $5,000 and 12 months' imprisonment.

Judicial review

64. As has been noted, the Commissioner's decision to object to or to impose conditions on a notified public procession is subject to appeal to the Appeal Board. Assuming it is confirmed by the Appeal Board, the Commissioner's decision as so confirmed, is of course subject to judicial review. The Commissioner is bound to apply the proportionality test in the exercise of his discretion to restrict the right of peaceful assembly. On judicial review, the court will consider whether the Commissioner has properly applied this test.

Focus of challenge

65. It was not seriously argued that the mere statutory requirement for notification is unconstitutional. Plainly, such an argument would be untenable. Apart from anything else, notification is required to enable the Police to fulfil the positive duty resting on Government to take reasonable and appropriate measures to enable lawful demonstrations to take place peacefully. The statutory requirement for notification is constitutional. A legal requirement for notification is in fact widespread in jurisdictions around the world.

66. As has been noted, the focus of the constitutional challenge is on the contention that the Commissioner's discretion to restrict the right of peaceful assembly for the purpose of "public order (ordre public)" fails to satisfy the two constitutional requirements for restriction : (1) the "prescribed by law" requirement; and (2) the necessity requirement, on the ground that the concept of "public order (ordre public)" is too wide and uncertain.

(1) The constitutional requirement of "prescribed by law"

67. In considering whether the Commissioner's discretion in relation to "public order (ordre public)" satisfies the constitutional requirement of "prescribed by law", it is essential to distinguish between the use of the concept at the constitutional level on the one hand and its use at the statutory level on the other.

The constitutional level

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.

73. A constitutional norm is usually and advisedly expressed in relatively abstract terms. There is no question of challenging a constitutional norm and the concept "public order (ordre public)" as a constitutional norm must be accepted.

74. Indeed, in Hong Kong, the courts have dealt with the concept at a constitutional level and have determined whether a particular matter falls within the concept. In *Ng Kung Siu*, the Court considered the concept in the context of a restriction on the freedom of speech under art. 19 of the ICCPR (corresponding to art. 16 of BORO). It held that the concept includes the legitimate interests in the protection of the national and regional flags. In *Secretary for Justice v. Oriental Press Group Ltd* [1998] 2 HKLRD 123, the Court of First Instance held that the contempt of court offences under the common law of scandalising the court and the interference with the administration of justice as a continuing process constitute permissible restrictions on the freedom of expression. The decision was upheld by the Court of Appeal [1999] 2 HKLRD 293. The Court of First Instance held that the due administration of justice is within the concept of "public order (ordre public)". This was conceded in the Court of Appeal (at 307I).

The statutory level

75. As has been observed, adopting an unusual technique, the concept of "public order (ordre public)" used in the ICCPR has been incorporated into the Ordinance in relation to the Commissioner's discretion. The question therefore arises whether the Commissioner's discretion to restrict the right of peaceful assembly for the purpose of "public order (ordre public)" satisfies the constitutional requirement of "prescribed by law".

76. In contrast to the use of the concept which is relatively abstract at the constitutional level, different considerations apply to its deployment at the statutory level. A statutory discretion conferred on a public official to restrict a fundamental right must satisfy the constitutional requirement of "prescribed by law". Such a discretion must give an adequate indication of the scope of the discretion with a degree of precision appropriate to the subject matter. The public official is part of the executive authorities which of course stand in a fundamentally different position from that of an independent Judiciary.

77. Here, the subject matter of the discretion is the regulation of public processions subject to the statutory scheme. As the situations that may arise for his consideration are of an infinite variety and would involve many different circumstances and considerations, it is important for the Commissioner to have a considerable degree of flexibility. But even taking this into account, the Commissioner's discretion to restrict the right of peaceful assembly for the statutory purpose of "public order (order public)" plainly does not give an adequate indication of the scope of that discretion. This is because of the inappropriateness of the concept taken from the ICCPR as the basis of the exercise of such a discretionary power vested in the executive authorities. That being so, the Commissioner's discretion to restrict the right for the purpose of "public order (ordre public)" falls foul of the constitutional requirement of "prescribed by law". Compare *Gurung Kesh Bahadur* at para.34. Accordingly, the Commissioner's discretion in relation to the purpose of "public order (ordre public)" in ss. 14(1), 14(5) and 15(2) of the Ordinance must be held to be unconstitutional.

78. It should be noted that apart from the provisions dealing with public processions subject to the statutory scheme, there are provisions in the

Ordinance conferring on the Commissioner the discretion to restrict the right of peaceful assembly in other contexts where he reasonably considers it necessary in the interests of "public order (ordre public)"; for example in relation to public meetings subject to the scheme. Although the question does not arise in this appeal, having regard to the above conclusion, the validity of the discretion in relation to the purpose of "public order (ordre public)" in such contexts must be regarded as doubtful.

Remedy

79. Having regard to the above conclusion on the issue of constitutionality, the question as to the appropriate remedy must now be addressed.

80. Mr McCoy SC for the Government submits that "public order (ordre public)" should be read down to mean "serious disruption to the life of the community". This is an expression found in the *Public Order Act 1986* in England; see s.12(1). There is no basis for reading down in this way and this submission must be rejected.

81. Mr McCoy SC advances the alternative submission that "public order (ordre public)" should be read down to mean the matters covered by art. 20 of the ICCPR. As has been noted, this Article is part of the ICCPR as applied to Hong Kong, although it was not incorporated into BORO. Article 20 requires prohibition by law of any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. There is no basis for reading down "public order (ordre public)" in this way and this submission must also be rejected. It may well be argued that specific legislation providing for the restriction of the right of peaceful assembly for the purpose of enforcing the art. 20 prohibitions may be

justified not only on the basis of the specific requirement of that Article, but also on the basis that society has legitimate interests in such prohibitions and that such interests may be regarded as within "public order (ordre public)" as a constitutional norm. Whether such an argument is correct does not need to be decided. But even if correct, it does not provide a basis for reading down "public order (ordre public)" as suggested.

Severance

82. As has been held, the Commissioner's discretion with "public order (ordre public)" as a purpose does not satisfy the "prescribed by law" requirement. But there is no doubt that it covers public order in the law and order sense, that is, the maintenance of public order and prevention of public disorder. Public order in this sense will simply be referred to as "public order" as distinguished from "public order (ordre public)".

83. As public order is sufficiently certain, the Commissioner's discretion to restrict the right of peaceful assembly for this purpose would give an adequate indication of its scope. It would satisfy the constitutional requirement of "prescribed by law" and would be constitutionally valid. That being so, the essential question is whether the appropriate remedy is to sever public order from "public order (ordre public)". With such severance, one would only be left with public order. The part which is constitutionally valid remains after the severance of the part which is constitutionally invalid.

84. In *Ming Pao Newspapers Ltd v. Attorney-General* at 921E, the Privy Council adopted the following approach on severance which had been stated in *Attorney-General for Alberta v. Attorney-General for Canada* [1947] AC 503 at 518:

"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

Ng Ka Ling at 39D-F; *De Freitas v. Ministry of Agriculture* 79D-81B; *Independent Jamaica Council for Human Rights v. Marshall-Burnett* [2005] 2 WLR 923 at para. 22. See also *Vriend v. Alberta* (1998) 156 DLR (4th) 385 at para. 167; *Schachter v. Canada* (1992) 93 DLR (4th) 1 at 13-14.

85. Applying this approach, the constitutional part remaining after severance, namely public order, can independently survive. It can be said with confidence that had the Legislature appreciated the unconstitutionality of the rest of "public order (ordre public)" in the context of the Commissioner's discretion to restrict the right of peaceful assembly, it would nevertheless have enacted the statute only with public order. Accordingly, the proper remedy is to sever public order from "public order (ordre public)" in ss. 14(1), 14(5) and 15(2) of the Ordinance.

The protection of the rights and freedoms of others

86. Article 21 of the ICCPR (corresponding to art. 17 of BORO) provides that the protection of the rights and freedoms of others is a legitimate purpose for restricting the right of peaceful assembly. Using the unusual technique which has been referred to, the statute has incorporated it as a purpose in relation to the Commissioner's discretion to restrict the right and has directed in s.2(2) that it should be interpreted in the same way as under the ICCPR. As with "public order (ordre public)", it is important to distinguish its function as a constitutional norm in the ICCPR from its use at the statutory level.

87. As Mr Martin Lee SC for the 2nd and 3rd appellants fairly accepts, full arguments have not been addressed on the question whether the Commissioner's statutory discretion in relation to the purpose of the protection of the rights and freedoms of others complies with the constitutional

requirement of "prescribed by law" and it would not be appropriate for any concluded view to be expressed on this question.

88. However, it must be pointed out that in the context of the ICCPR, the rights and freedoms of others are not limited to those found in the ICCPR. *Nowak*: Article 21 p.382 (para.28) and art. 19 p.354 (para.41). The scope of the additional rights and freedoms that are covered may be debatable. As the meaning of the expression in the ICCPR has been incorporated into the Ordinance by s.2(2), it can be seriously argued that in the context of the Commissioner's statutory discretion to restrict the right of peaceful assembly, a purpose based on a notion of such wide and imprecise import does not satisfy the constitutional requirement of "prescribed by law".

(2) The constitutional requirement of necessity

89. After severance, it would not be meaningful to deal with the question whether the Commissioner's statutory discretion in the state which it was before severance satisfies the constitutional requirement of necessity. It is the position after severance which should be considered.

The proportionality test

90. As has been discussed in relation to the constitutional requirement of necessity, the proportionality test has to be applied, that is: (a) whether the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of public order is rationally connected with the wider constitutional legitimate purpose of "public order (ordre public)"; and (b) whether such a statutory discretion is no more than is necessary to accomplish that constitutional purpose.

91. The first limb of the proportionality test is obviously satisfied. The constitutional purpose of public order within "public order (ordre public)" is incorporated into the statute and the statutory discretion is of course rationally connected with the legitimate purpose laid down at the constitutional level.

92. In considering the second limb, the following matters must be taken into account :

(1) The right of peaceful assembly involves a positive duty on the part of Government to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully.

(2) The statutory scheme is limited to the regulation of public processions consisting of more than 30 persons on a public highway or thoroughfare or in a public park.

(3) Upon being notified of a public procession, the Commissioner would have 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. The Commissioner has to approach the matter in a flexible manner but his discretion to object or to impose condition is constrained: In considering its exercise, the Commissioner must apply the proportionality test: Whether the potential restriction (i) is rationally connected with the purpose of public order; and (ii) is no more than is necessary to accomplish that purpose.

(4) If the Commissioner objects to the proposed public procession, he must do so within the statutory time limits. And where he imposes conditions, he must do so within a reasonable time.

(5) If the Commissioner objects or imposes conditions, he is under a duty to give reasons which must be adequate.

(6) His decision is subject to appeal to the Appeal Board. And his decision, assuming it is upheld by the Appeal Board, is subject to judicial review.

93. Taking into account all these matters, the Commissioner's discretion to restrict the right in relation to public order should be held to be no more than is necessary to accomplish the constitutional legitimate purpose of "public order (ordre public)". It is limited to public processions consisting of more than 30 persons on a public highway or thoroughfare or in a public park. The discretion is of assistance in enabling Government to fulfil its positive duty. It is a limited discretion, constrained by the proportionality test. Adequate reasons have to be given for any objection or imposition of conditions. There is a right of appeal and a right of recourse to judicial review.

94. Accordingly, the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of public order must be held to satisfy the proportionality test and therefore the constitutional necessity requirement.

Summary

95. In summary, the conclusions reached on the question of constitutionality are :

(1) The Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of "public order (ordre public)" provided for in ss. 14(1), 14(5) and 15(2) of the Ordinance does not satisfy the constitutional requirement of "prescribed by law" and is unconstitutional.

(2) The appropriate remedy is the severance of public order (in the law and order sense, that is, the maintenance of public order and prevention of public disorder) from "public order (ordre public)" in such provisions.

(3) After severance, the Commissioner's discretion in relation to public order satisfies the constitutional requirements of "prescribed by law" and necessity and is constitutional.

96. In relation to the exercise of his statutory discretion to restrict the right of peaceful assembly, it must be emphasised that the Commissioner must, as a matter of law, apply the proportionality test. He must consider whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes and whether the potential restriction is no more than is necessary to accomplish the legitimate purpose in question. His discretion is thus not an arbitrary one but is a constrained one. The proportionality test is well recognized internationally as appropriate in relation to the protection of fundamental rights. The legal requirement to apply it in this context ensures the full protection of the fundamental right of peaceful assembly against any undue restriction.

Disposal of appeal

97. The offences for which the appellants were convicted did not relate to the statutory provisions conferring on the Commissioner the discretion to object or to impose conditions on a public procession where he considers it reasonably necessary in the interests of "public order (ordre public)". The offences arose out of the holding of a public procession without complying with the statutory notification requirement. The holding that "public order (ordre public)" in the relevant statutory provisions is unconstitutional and that public order should be severed from it does not affect the convictions. Accordingly,

the appeal must be dismissed and the convictions upheld.

Costs

98. The parties should respectively provide in writing within 14 days any submissions as to the appropriate costs order.

Mr Justice Bokhary PJ:

99. This appeal arises out of a prosecution which the appellants deliberately brought upon themselves in order to advance the cause of free assembly by challenging the constitutionality of our statute law regulating public gatherings. Such law consists of two schemes. Each permits prior restraint backed by criminal sanctions. One entitles the Commissioner of Police to notification of public processions and empowers him to object to or control them. The other is a similar scheme for public meetings. In regard to public meetings the statute speaks in terms of prohibition. Objection and prohibition come to the same thing, namely a ban.

100. The processions challenge is direct in that the public gathering giving rise to the prosecution was a procession. But the meetings challenge is consequential. It is a consequence of the two schemes being so similar that a judgment striking down or reading down one scheme or part of it would similarly impact upon the other scheme.

Freedoms engaged

101. By its nature each of those schemes engages the freedoms of assembly, procession and demonstration. Article 27 of our constitution the Basic Law guarantees these freedoms for Hong Kong residents. And art. 41 extends the guarantee to persons in Hong Kong other than residents. Neither article specifies any restriction that can be placed on the freedoms which it

guarantees. What these freedoms entail is a matter of interpretation. The courts always interpret fundamental rights and freedoms generously so as to ensure their enjoyment in full measure.

102. That interpretative approach is in no way diminished by the permissible restrictions specified in the Hong Kong Bill of Rights which is based essentially on the International Covenant on Civil and Political Rights albeit with some modifications. To illustrate what I mean by modifications, I would point to art. 21 of the Bill of Rights and art. 25 of the International Covenant on Civil and Political Rights. They confer the same right to participate in public life. But the former confers that right on permanent residents in Hong Kong while the latter confers it on citizens in their country. In the indigenous villagers case of *Secretary for Justice v. Chan Wah* (2000) 3 HKCFAR 459 we applied the former. We could not have applied the latter. Previously the Bill of Rights was entrenched by the Letters Patent (which together with the Royal Instructions constituted Hong Kong's pre-handover constitutional instruments). The Bill of Rights is now, as we said in the arbitration appeal case of *Swire Properties Ltd v. Secretary for Justice* (2003) 6 HKCFAR 236 at p.258 I, entrenched by art. 39 of the Basic Law.

103. Taken word-for-word from art. 21 of the International Covenant on Civil and Political Rights, art. 17 of the Bill of Rights provides that:

> "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 public health or morals or the protection of the rights and freedoms of others."

That is to be read side-by-side with arts 27 and 41 of the Basic Law. Article 27 provides that:

> " 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."

And art. 41, which appears in the same chapter of the Basic Law, provides that:

> " Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter."

104. Article 27's specific reference to demonstrations displays particular insight into the practical aspects of free assembly. It exemplifies the skill of the Basic Law framers of which Lord Cooke of Thorndon spoke in "The Judge in an Evolving Society" (1998) 28 HKLJ 145 at p.145. Traditional rights and freedoms are better understood when the constitutional text itself goes some way towards identifying their day-to-day uses. As an example of this, I would point to art. 31 of the Constitution of the Russian Federation. That article (as given in English in S E Finer, V Bogdanor and B Rudden: *Comparing Constitutions* (1995) at p.254) speaks of "the right to assemble peacefully without weapons and to hold meetings, rallies and demonstrations, processions and pickets".

105. The Basic Law speaks of *freedom* of assembly while the Bill of Rights speaks of the *right* of assembly. Rights connote benefits derived from duties owed by others while freedoms connote benefits derived from the absence of restraint upon oneself. Free assembly consists essentially of an absence of restraint but includes, as the European Court of Human Rights held in *Plattform Arzte für das Leben v. Austria* (1991) 13 EHRR 204, the right to positive protection by the state of one's exercise of this freedom.

Challenged schemes

106. Each of the challenged schemes is contained in the Public Order Ordinance, Cap. 245. This Ordinance is one of the two statutes containing post-handover amendments criticised by Prof. Yash Ghai in the rights chapter of his valuable book *Hong Kong's New Constitutional Order*, 2nd ed. (1999). At p.454 he said that "[t]here has been no serious restrictions on rights since [the handover] save for the amendments to the Public Order and Societies Ordinances". Reference was made in the Court of Appeal to what the United Nations Human Rights Committee said. In para. 19 of its *15 November 1999 Concluding Observations on Hong Kong*, CCPR/C/79/Add.117 the Committee expressed its concern that the Public Order Ordinance could be applied to "restrict unduly" enjoyment of freedom of assembly. This concern of the Committee's was noted in the United States Department of State's *2000 Country Reports on Human Rights Practices* at p.804. The State Department pointed out that this Court has not yet had the opportunity to rule on the matter. This appeal is the first such opportunity.

107. Save where otherwise indicated, all my references to statutory provisions will be to those of the Public Order Ordinance. Public gatherings are of two types: public meetings and public processions. The scheme for public meetings is contained essentially in sections 7, 8, 9, 10, 11 and 12. It applies to most public meetings of more than 500 persons in private premises or of more than 50 persons elsewhere. The scheme for public processions is contained essentially in sections 13, 13A, 14 and 15. It applies to most public processions of more than 30 persons. Sections 6, 17 and 17A cover both public meetings and public processions. Each provision of the Ordinance must of course be read in the context of the Ordinance as a whole. As we said in the restoration to the medical register case of *Medical Council v. Chow* (2000) 3

HKCFAR 144 at p.154 B-C, "it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting."

108. Section 11 lays down certain requirements in regard to public meetings. These requirements concern: the presence of the organiser or his representative; the maintenance of good order and public safety; and the control of amplification devices. Section 15 lays down similar requirements in regard to public processions.

109. As for sections 7 and 8, their effect is that the Commissioner of Police is entitled to notification of most outdoor public meetings and that notifiable public meetings may take place only if he has been notified of them. Sections 13 and 13A have a similar effect in regard to most public processions.

110. Turning to the Commissioner of Police's powers under the challenged schemes, the position can be summarised as follows. His general powers under s.6 are, in such manner as he thinks fit, to control and direct the conduct of all public gatherings and specify the route by which, and the time at which, any public procession may pass. These general powers of his are followed by an elaborate set of specific powers conferred on him. Section 11 empowers him to impose conditions in respect of a public meeting. If he reasonably regards that as insufficient, s.9 empowers him to prohibit the meeting. Section 15 empowers him to impose conditions in respect of a public procession. If he reasonably regards that as insufficient, s.14 empowers him to object to the procession.

111. Total prior restraint is involved in the Commissioner of Police's powers under the challenged schemes to

- prohibit a public meeting (under s.9) and
- object to a public procession (under s.14).

Partial prior restraint is involved in his powers under the challenged schemes to

- control and direct the conduct of a public gathering (under s.6),
- specify the route by which, and the time at which, a public procession may pass (under s.6),
- impose conditions in respect of a public meeting (under s.11) and
- impose conditions in respect of a public procession (under s.15).

Prior restraint is still prior restraint even if it is only partial.

Powers over meetings and processions under s.17

112. Section 17 empowers the police to: vary the place or route of public gatherings; prevent the holding of public gatherings; stop or disperse public gatherings; give or issue orders that they consider necessary or expedient for the exercise of such powers; and use reasonable force to exercise them. These powers are exercisable on the grounds of: non-notification; contravention of s.11 or s.15 requirements; contravention of conditions; or reasonable belief that a breach of the peace is likely. Also, reasonable belief that entry into a public place in contravention of s.7 or s.13 is likely empowers the police to bar access thereto, close it and use reasonable force to prevent entry or remaining.

Delegation

113. The references to what the Commissioner of Police is empowered to do have to be read together with his powers of delegation under s.52. Inspectors and above can be delegated the powers under sections 6(1), 6(3), 9, 11, 14 and 15. Chief Superintendents and above can be delegated the powers under s.6(2). Superintendents and above can be delegated the other powers

under the Ordinance.

Appeal Board

114. By sections 43, 44 and 44A, the Ordinance creates, constitutes and lays down the procedure for an Appeal Board. And s.16 provides for an appeal to the Appeal Board against decisions of the Commissioner of Police to prohibit a public meeting, to object to a public procession or to impose conditions on the holding of a public meeting or procession.

Criminal offences created

115. Section 17A arms each challenged scheme with a formidable set of teeth capable of biting down with a maximum force of five years' imprisonment.

This procession, these charges and the court proceedings

116. The charges in the present case were laid under s.17A(3)(b)(i) (for which the maximum penalty is five years' imprisonment upon conviction on indictment or three years' imprisonment upon summary conviction). They were brought in respect of a public procession which took place on the morning of Sunday 10 February 2002. The procession consisted initially of about 40 persons and ultimately of about 96 persons. Starting at Chater Garden, it proceeded along Queensway and up to Police Headquarters in Arsenal Street. There the participants demonstrated for about an hour. The demonstration took the form of a protest against the conviction — for obstructing and assaulting a police officer in the due execution of his duty — of a person described in the judgment of the Chief Judge of the High Court as an "activist". No s.13A notification of the procession had been given to Commissioner of Police. The 1st appellant was charged with holding, while the 2nd and 3rd appellants were charged with assisting in the holding of, an unauthorized

assembly. To these charges they pleaded not guilty.

117. Holding the meetings scheme constitutional, the Chief Magistrate (Patrick Li, Esq.) convicted the appellants, and bound them over in their own recognisance of $500 for three months. Their appeal to the High Court was referred by Pang J to the Court of Appeal. By a majority, the Court of Appeal (Ma CJHC and Yeung JA, Stock JA dissenting) upheld the constitutionality of that scheme and affirmed the appellants' convictions. By leave of the Appeal Committee, the appellants now appeal to us asking that their convictions be quashed on the ground that they were based on unconstitutional provisions. Mr Martin Lee SC and Mr Erik Shum appear for the 2nd and 3rd appellants. The 1st appellant, who appears in person, has, in addition to addressing us, handed us a note on the law prepared for him by Prof. Eric Cheung.

Free assembly: its nature and purpose

118. When deciding whether a scheme permitting restrictions on free assembly is or is not constitutional, one must bear in mind that this freedom is closely allied to freedom of expression and freedom of the media. If it falls, that could bring them down too. I adopt here what I recently said in the obstruction case of *Yeung May Wan v. HKSAR* [2005] 2 HKLRD 212, adding this.

119. Free assembly, as Lord Denning has noted judicially and extra-judicially, is a hard-earned freedom not to be taken for granted. In his book *Landmarks in the Law* (1984) at p.133 he wrote: "This freedom has only been won after much pain and anguish. It is bound up with the right to demonstrate … History shows how much Governments have disliked these demonstrations." He spoke to similar effect in the English Court of Appeal case of *Hubbard v. Pitt* [1976] QB 142. Dissenting in favour of the picketing

tenants, he said (at p.178 E-G) that "the right to demonstrate and the right to protest on matters of public concern … are rights which it is in the public interest that individuals should possess" and that "history is full of warnings against suppression of these rights".

120. As it happens, there is nothing new about Hong Kong residents gathering in public to discuss grievances and seek redress. We know that such a public gathering was held on 4 January 1849. It is referred to in James William Norton-Kyshe: *The History of the Laws and Courts of Hong Kong* (1898), vol. I at pp 217, 222, 224 and 257. That gathering seems to have been a somewhat elitist affair. But these things have become far more broadly based since then. In today's Hong Kong street demonstrations, both stationary and moving, form a significant and even potent element of public discourse. As long as they are peaceful, there is ample scope for such demonstrations under our constitutional arrangements. A peaceful demonstration is a sign of freedom and can have a legitimate effect on policy.

121. That is not to say that the law cannot regulate free assembly in the public interest. The law can do so. And in doing so it can cater for the vulnerability of which Lord Radcliffe spoke in "*The Law and its Compass*" (1960) at p.75. He said that "modern societies are so vulnerable to disturbance, because they are so far from the security of bare earth and grass roots". But a sobering thought is raised in Richard Rudgley: *Lost Civilisations of the Stone Age* (1998) at p.7. There it is suggested that "the average Stone Age individual may have enjoyed greater freedom than … the average citizen of a modern democratic state". Whenever the advantages of living in an organised society have to be paid for by a diminution of individual freedom or autonomy, it is the business of the judiciary to see that the price is not too high. Nor should it ever be thought that only individuals are protected when freedoms are preserved.

The state itself, too, is protected. This was clearly explained by Hughes CJ when delivering the opinion of the United States Supreme Court in *De Jonge v. Oregon* 299 US 353 (1937). At p.365 he said:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."

Trigger for the challenged powers

122. The powers of prior restraint under the challenged schemes are exercisable when it is reasonably considered "necessary in the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others" to exercise them.

123. Those words quoted from sections 6, 9, 11, 14 and 15 form the trigger for those powers of prior restraint. They are, with three omissions, lifted from the formula used in art. 17 of the Bill of Rights to specify the restrictions which it permits. Article 17 permits restrictions 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 promotion of public health or morals or the protection of the rights and freedoms of others".

124. One of those omissions, namely the omission of the words "the promotion of public health or morals" is not a matter for complaint. It reduces the power to restrict freedom. But the other two omissions, namely of the words "in conformity with the law" and of the words "in a democratic society", have the opposite effect. If they were countenanced, these two omissions would weaken the brakes on the power to restrict freedom.

Conformity with law

125. Expressions like "in conformity with law" are used to underline the need for legal certainty as opposed to arbitrariness. What is one to think when such an expression is used in a constitutional guarantee of freedom but is omitted in a statutory provision that permits restrictions on the freedom concerned? It would be wise to examine such a statutory provision with particular care to see if it is sufficiently certain. I will deal with legal certainty in due course.

Necessity in a democratic society

126. First, I will say something in particular about the concept of necessity in a democratic society. One element of this concept is the inability of an official to do his public duty without imposing a restriction on freedom. This is illustrated by the Irish case of *O'Kelly v. Harvey* (1883) 14 LR Ir 105. Orangemen had threatened to attack a public meeting called by supporters of the Land League. To avoid that attack, a magistrate dispersed the meeting. Was he justified in doing so? The Irish Court of Appeal said (at p.112) that he would be justified in dispersing the meeting if he had reasonable grounds for his belief that there were "no other possible means" by which he could perform his duty of preserving the public peace. That is necessity.

127. Next, it has to be a freedom-friendly standard of necessity. Introducing the standard of a democratic society safeguards liberty. It means that even where a fundamental right or freedom is derogable, its exercise cannot be subjected to any limitation unless the limitation is necessary in a democratic society. A famous expression of this idea is found in art. 29 of the Universal Declaration of Human Rights 1948, its general limitation provision. The learned authors of Lockwood, Finn and Jubinsky, "Working Paper for the

Committee of Experts on Limitation Provisions", Vol. 7, No. 1, Feb. 1985 *Human Rights Quarterly* 35 deal with the term "necessary in a democratic society". Citing the *travaux preparatoires* for the International Covenant on Civil and Political Rights, they say (at p.51) that "[t]he term was considered to be a guarantee against the risks of arbitrary treatment". We can look at the *travaux* for the Covenant. The House of Lords did so *R (Mullen) v. Home Secretary* [2005] 1 AC 1 when considering an English statutory expression drawn from that Covenant.

128. In *Rassemblement Jurassien and Unité Jurassienne v. Switzerland* (1980) 17 DR 93 at p.119 the European Commission of Human Rights stated its view of free assembly. It is, they said, "a fundamental right [in] a democratic society and, like the right to freedom of expression, is one of the foundations of such a society". This dovetails with what Lord Nicholls of Birkenhead spoke of in *Wilson v. First County Trust Ltd (No. 2)* [2004] 1 AC 816 at p.835E as "the proper role of courts in a democratic society."

129. Demonstrations are constitutionally protected whether they are held in majority causes or minority ones. If there is any difference between those two situations, it is that demonstrations are especially important to minority groups. This is because, as pointed out in Helen Fenwick, "The Right to Protest" (1999) 62 MLR 491 at p.493:

> "These methods may provide the only avenue available to such groups if they wish to participate in the democracy and it is of crucial importance that they should be able to take it since by its very nature the democratic process tends to exclude minorities with whom the majority may be out of sympathy."

I note with interest that in *Huntingdon Life Sciences Ltd v. Curtin* [1997] TLR 646 at p.647 Eady J referred to the rights of protest and public demonstration as part of a "democratic tradition". The expression "democracy's inherent requirements" is employed by Prof. Jeffrey Jowell QC in *Judicial Review and*

the Constitution (ed. CF Forsyth) (2000) at p.335 when discussing the adjudication of constitutional claims. There may be some tension between human rights and what is merely majoritarian, but there is no tension between human rights and what is truly democratic.

130. That is so not only under a written constitution but also at common law. In his article "Law and Democracy" [1995] PL 72 at p.84 Sir John Laws explains:

> "The democratic credentials of an elected government cannot justify its enjoyment of a right to abolish fundamental freedoms. If its power in the state is in the last resort absolute, such fundamental rights as free expression are only privileges; no less so if the absolute power rests in an elected body. The byword of every tyrant is 'My word is law'; a democratic assembly having sovereign power beyond the reach of curtailment or review may make just such an assertion, and its elective base cannot immunise it from playing the tyrant's role."

And in their article "Public Law" (1995) 48 Current Legal Problems 187 at p.188 J Jowell, R Austin, H Reece and S Hall cite the English Court of Appeal's decision in *R v. Home Secretary, ex p Leech (No. 2)* [1994] QB 198 to show that the common law "is prepared explicily to recognise fundamental rights, deriving from [an] unwritten constitution". I mention these matters to show that Hong Kong's tradition of fundamental rights and freedoms took root long before the Bill of Rights was enacted and entrenched in 1991.

131. The 8th (2000) edition of HWR Wade and CF Forsyth: *Administrative Law* was written before the Human Rights Act 1998 came fully into force on 2 October 2000. In anticipation of that event, the learned authors raised the question (at p.184) of how the courts would "establish objective standards of democratic necessity." Now in the latest i.e. the 9th (2004) edition they discuss democratic necessity in connection with proportionality. These are areas of the law in which the courts' task can be as difficult as their responsibility is heavy. So be it. What matters is that people can be

confident of enjoying their fundamental rights and freedoms in full measure. It would help if they received an assurance that those rights and freedoms cannot be restricted except in conformity with an objective standard of democratic necessity established and enforced through an independent judicial process.

Prior notification

132. Schemes involving prior notification of public gatherings are not the only means by which things like national security, public safety, public order (*ordre public*) and the rights and freedoms of others can be protected in public places. Let us not forget the other such means. For example, where public gatherings are not peaceable, there is room for arrest and prosecution for unlawful assembly or riot under sections 18 and 19 respectively. And to take the most extreme example, the advent of an emergency might even lead to the imposition of a curfew by the Chief Executive in the exercise of his powers under s.31.

133. As for crowd safety, the police regularly devise and implement crowd control measures in the interests of safety. In so doing they are able to act pursuant to s.10 of the Police Force Ordinance, Cap. 232, which provides that, their "duties shall be to take lawful measures for", among other things, "preserving the public peace" and "preventing injury to life and property". Such crowd control measures are often devised by estimating, rather than by receiving notification of, crowd size. That is what happens at festivals for example. One sees this from, for example, paras 4.7 and 4.8 of the *Final Report on the Lan Kwai Fong Disaster* dated 23 February 1993 which is included in the Brandeis Brief materials put in by the respondent.

134. That having been said, it should be made clear that notification requirements are not inherently inimical to the freedoms of assembly, procession and demonstration. In this connection I would mention the decision of the Supreme Court of Zambia in *Mulundika v. The People* [1996] 2 LRC 175. That case concerned a legislative provision under which a public assembly, meeting or procession required a police permit. Such a permit would be issued only if the police were satisfied that the assembly, meeting or procession is unlikely to cause or lead to a breach of peace. Not surprisingly, that provision was held to be inconsistent with freedom of assembly and struck down accordingly. At the same time Ngulube CJ saw (at p.190 a-f) nothing wrong with a requirement that the police be given prior notice of such an assembly, meeting or procession in order that they may issue directions and conditions for the purposes of preserving public peace and order.

135. In Hong Kong, as in many other places around the world, pavements are often crowded and vehicular traffic is often heavy. The vehicles liable to be affected by traffic congestion include ambulances and fire engines. As enjoyed peaceably and without causing intolerable interference with free passage along the highway or jeopardising crowd safety, the freedoms of assembly, procession and demonstration can be facilitated rather than hindered by reasonable arrangements made by the police. And the ability of the police to make such arrangements is of course greatly enhanced by receiving reasonable notification. Reasonableness is a two-way street. So the requirements have to be reasonable both from the point of view of those who have to give notification and from the point of view of those who are to receive it. Speaking of reasonableness, it may well be that many organisers of public gatherings would choose to notify the police of their plans even if there were no law requiring such notification.

136. Of course where prior notification is part of a scheme which permits prior restraint, then it is necessary to remember the point which Prof. AL Goodhart made in an article prompted by the decision of the Divisional Court of the King's Bench Division in *Thomas v. Sawkins* [1935] 2 KB 249. In this article, "Thomas v. Sawkins: a Constitutional Innovation" (1938) 6 CLJ 22, Prof. Goodhart said (at p.30) that "it is on [the] distinction between prevention and punishment that freedom of speech, freedom of public meeting, and freedom of the press are founded". Let us recall what was said in the Court of King's Bench in *The Dean of St Asaph's Case* (1784) 3 Term Rep 428 (note); 100 ER 657 at p.661. Lord Mansfield CJ regretted what he saw as excesses on the part of the press. But he did not regret — rather did he proclaim for the ages — the liberty of the press to print "without any previous licence".

137. In *Hashman v. United Kingdom* (2000) 30 EHRR 241 at p.256, para. 32 the European Court of Human Rights said that "prior restraint on freedom of expression must call for the most careful scrutiny". The same is true where any prior restraint on the freedoms of assembly, procession and demonstration is concerned. This makes certainty all the more important.

Certainty, necessity and proportionality

138. Some fundamental rights and freedoms are secure by virtue of being non-derogable. Others are derogable. To be secure they have to be kept free from any restriction that is repugnant to them or renders their due enjoyment uncertain. While extremely important, the freedoms of assembly, procession and demonstration are not non-derogable. So they can be restricted. But freedoms would be insecure indeed if they can be restricted to serve an elusive purpose. The concept of *ordre public* is, as the Chief Justice observed in the flag desecration case of *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442 at

p.459I, “an imprecise and elusive one”. What about the concepts of national security, public safety, public order and the protection of the rights and freedoms of others? They are not elusive but are very wide.

139. Disputing the appellants’ contention that the challenged schemes badly fail the test for constitutional certainty, Mr Gerard McCoy SC leading Mr Gavin Shiu and Mr David Leung for the respondent submits that a law permitting restrictions on fundamental rights and freedoms is sufficiently certain unless it is hopelessly vague. Dealing with this submission of the respondent’s calls for a careful examination of the cases decided in a number of jurisdictions. I begin by looking at the restriction which the United States Supreme Court held constitutional in *Cox v. New Hampshire* 312 US 569 (1940). Under the state statutory scheme there in question, the holding of a procession required a licence from the municipal authorities. As can be seen at pp 575-576, the scheme was upheld by giving it an interpretation which limited the licensing conditions to “time, place and manner so as to conserve the public convenience [by] giving the public authorities notice in advance so as to afford opportunity for proper policing”.

140. That statutory scheme is to be contrasted with the one which the General Division of the Supreme Court of Ciskei was concerned with in *African National Congress (Border Branch) v. Chairman, Council of State of Ciskei* 1992 (4) SA 434. Under the Ciskei scheme, most public gatherings of more than 20 persons required authorisation from a magistrate. And such authorisation could be refused if the magistrate “is satisfied that such refusal is necessary in the interests of national security or public safety or for the safeguarding of public health, the preservation of public morals, the prevention of crime or disorder or the protection of the rights of others”. Noting (among other objections) the wide powers of prohibition under the scheme, the court

held that the scheme was inconsistent with freedom of assembly as conferred by Ciskei's constitution.

141. Geoffrey Lane LJ (later Lord Lane CJ) had spoken to much the same effect in the English Court of Appeal case of *R v. Chief Immigration Officer, ex parte Salamat Bibi* [1976] 1 WLR 979. He did so when dealing with the argument that immigration officers had a discretion in the matter and that they had to have regard to art. 8 of the European Convention of Human Rights when exercising that discretion. Article 8 reads:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

At p.988 D-F Geoffrey Lane LJ said that even if (which he did not accept) immigration officers had a discretion, "[o]ne only has to read … article 8(2), to realise that it would be an impossibility for any immigration officer to apply a discretion based on terms as wide and as vague as those in that sub-article".

142. I am aware that in *Nova Scotia Pharmaceutical Society v. R* (1992) 74 CCC (3d) 289 at p.313b Gonthier J of the Supreme Court of Canada issued a warning against insisting upon a degree of precision to which the subject-matter "does not lend itself". While respectfully agreeing with that, I do not think it amiss to add a counter-balancing caveat against failing to insist upon the degree of precision which the subject-matter requires.

143. In *Sabapathee v. The State* [1999] 1 WLR 1836 at p.1843E Lord Hope of Craighead who delivered the Privy Council's advice spoke of the law "as explained by its operation in practice through case law". Writing in *The*

Oxford Companion to the High Court of Australia (eds Blackshield, Coper and Williams) (2001) Sir Gerard Brennan observed (at p.118, col. 1) that the common law "must conform with the Constitution, but is itself the legal matrix of the Constitution and informs its construction." The judicial process not only operates within the boundaries of the constitution but also plays a role in identifying them. After a statute has been passed, there is often much scope for its clarification by the courts. But where any statutory restriction on entrenched rights and freedoms is concerned, the restriction should be enacted along sufficiently circumscribed lines in the first place. As to this, I would cite a decision of Germany's federal constitutional court the Bundesverfassungsgericht. This is the *Mutlangen Military Depot Case* 73 BVerfGE, 206 (1986). (I proceed on a translation into English provided by University College London's Institute of Global Law). At B II 1 the court said that "[w]hat is first and foremost relevant for the certainty of a penal provision is that the individual at whom the law is addressed be able to recognize and understand the *wording* of the statutory elements of the offence." (Emphasis supplied).

144. Judicial recognition of the constitutionality of a restriction on entrenched rights and freedoms should be witheld unless the restriction was enacted along sufficiently circumscribed lines in the first place. A body of case law informs the answer to the question of what "sufficiently" means in this context.

145. Delivering the opinion of the United States Supreme Court in *Shuttlesworth v. City of Birmingham* 394 US 147 (1968) Stewart J said (at pp 150-151) that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional". The constitutional

provision concerned there, namely the First Amendment to the United States Constitution, reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or *the right of the people peaceably to assemble*, and to petition the Government for a redress of grievances." (Emphasis supplied).

146. *Shuttlesworth's* case concerned a city code which proscribed participation in any parade or procession on city streets or public ways without first obtaining a permit from the City Commission. The code empowered the commission to refuse a permit if its members believed that "the public welfare, peace, safety, health, decency, good order, morals or convenience" required its refusal. In 1963 Reverand Shuttlesworth led an orderly civil rights march without a permit. Prosecuted under the code for parading without a permit, he was convicted. His conviction was quashed by the Alabama Court of Appeals. But in 1967 it was reinstated by the Alabama Supreme Court which interpreted the code to authorise no more than the objective and even-handed regulation of traffic on the city's streets and public ways. Observing that only a clairvoyant would have known in 1963 how the code would eventually be read down in 1967, the United States Supreme Court allowed Reverand Shuttlesworth's appeal and quashed his conviction.

147. In the *Brokdorf Atomic Power Station Case* 69 BVerfGE, 315 (1985) the Bundesverfassungsgericht discussed the extent to which public gatherings can be regulated in conformity with a constitutional freedom of assembly. This discussion is to be found at II 2(b). (I again proceed on a translation into English provided by University College London's Institute of Global Law). It was pointed out that even though the concepts of public order and public safety had been explained, those explanations were not enough on their own to guarantee that regulating public gatherings by reference to those

concepts would conform with the constitution. This is how the court put it:

> "These explanations of the concepts on their own still admittedly do not guarantee an application of statute law which is in conformity with the Constitution. For the constitutional law assessment, two limitations are significant which are found in the statute itself and which have as a consequence that bans and dispersals can in essence only be considered for the protection of elemental legal interests. A mere endangering of the public order will not in general suffice."

148. As to the first limitation, the court said:

> "Bans and dispersals presuppose firstly as their ultima ratio that the less severe method of imposing conditions has been exhausted. That is based on the principle of proportionality. But this limits the discretion not only in the choice of methods, but also in actual decision by the competent authorities. The freedom of assembly protected by the basic right must only take second place when a balancing of interests which takes into consideration the importance of the freedoms shows that this is necessary for the protection of other legal interests of equal value. Accordingly, a limitation of this freedom will definitely not be justified by just any interest; inconveniences which inevitably arise from the large scale on which the basic right is exercised, and cannot be avoided without disadvantages for the purpose of the event, will generally have to be born by third parties. It will be just as inappropriate to consider banning of meetings on the basis of mere technical traffic grounds, since juxtaposition of the use of the highway by demonstrators and moving traffic is as a rule attainable by conditions."

149. And as to the second limitation, the court said:

> "Secondly, the power for authorities to intervene is limited by the fact that bans and dispersals are only permitted when there is a 'direct endangering' of public safety or order. The prerequisites for intervention are more severely restricted by the necessity for directness than in general police law. In each actual case a prognosis of the dangers is necessary. It is true that this will always contain a judgement about probability; but its basis can and must be shown. Accordingly the statute provides that it must be based on 'recognisable circumstances', and therefore on facts, situations, and other particulars; mere suspicion or assumptions cannot suffice. Taking into consideration the fundamental importance of freedom of assembly the authority may not, in particular when issuing a preventative ban set too low a standard for the prognosis of the dangers, especially as the possibility of a later dispersal still remains open to it when the situation has been incorrectly assessed. What standards are required in the individual case must be determined first of all by the specialist courts. They can hardly be prescribed independently of the actual circumstances because of the Constitution. They can however depend in relation for instance to large demonstrations on how far a preparedness by the organisers to make co-operative preparations exists and whether disturbances are feared only from third parties or from a small minority. § 15 of the Meetings Act as a whole is in any case reconcilable with Art 8 GG when it is interpreted and applied so that the guarantee remains that bans and dispersals will only take place for the protection of important community interests; and the principle of proportionality must be adhered to and there must be an endangering of these legal interests which is direct and capable of being deduced

> from recognisable circumstances."

By "Art 8 GG" is meant art. 8 of Germany's basic law the Grundgesetz. This is the article which confers freedom of assembly in that country.

150. In *Sunday Times v. United Kingdom* (1979) 2 EHRR 245 at p.271, para. 49 the European Court of Human Rights acknowledged that "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice". I do not read that as support for vagueness in regard to how fundamental rights and freedoms can be restricted. The Strasbourg jurisprudence on the need for certainty in that regard is to be found in the case of *Malone v. United Kingdom* (1984) 7 EHRR 14.

151. *Malone's* case concerned a system for the interception of postal and telephone communications on behalf of the police. Article 8 of the European Convention on Human Rights provides that there shall be no interference with a person's right to respect for his private life and correspondence save on certain specified conditions. One of these conditions is that the interference is necessary in a democratic society. The European Court of Human Rights said (at p.45, para. 81) that the interference could not satisfy the condition of democratic necessity unless it contained "adequate guarantees against abuse."

152. On the question of certainty in these matters, what was said in *Dawood, Shalabi and Thomas v. Minister of Home Affairs* 2000 (3) SA 936 is worthy of notice. In a judgment with which the other members of the Constitutional Court of South Africa agreed, O'Regan J said this (at p.969 D-E):

> "It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient

> for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution."

It is succinctly put thus in ECS Wade, "Police Powers and Public Meetings" (1938) 6 CLJ 175 at p.179: "[t]he vagueness of a power increases the discretion of those to whom it is entrusted".

153. The principle of legal certainty has undergone considerable development recently. And I daresay there is still room for its further development. But insistence on certainty is in truth an integral part of a long constitutional tradition. Prof. AV Dicey made it the first of the three meanings which he famously attributed to the rule of law. One sees this in his lectures first published in 1885 and now to be found in AV Dicey: *The Law of the Constitution*, 10th ed. (1961) (ed. ECS Wade). He said (at p.202 of that edition) that the rule of law "means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government." And long before that, Sir Edward Coke (in *4 Inst.* 41) made the point in language as memorable as it is picturesque. He recommended it as "[a] good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law, and not to the uncertain and crooked cord of discretion". This is not to be dismissed as an early common lawyer's mistrust of equity. There is much more to it than anything of that kind. After all, Coke also pointed out (in *Co. Litt.* 24b) that "*[b]onus judex secundum aequum et bonum judicat, et aequitatem stricto juri praefert*" (a good judge decides according to justice and right, and prefers equity to strict law).

154. Legal certainty is not hostile to purposive rather than literal statutory interpretation. It does not deprive the common law of its capacity for development. Nor is it hostile to the amelioration of the common law by equity. John Selden's 17th century jest or jibe about the Chancellor's foot (which the modern reader finds in *The Table Talk of John Selden* (1927, ed. Sir Frederick Pollock) at p.43) was answered by Lord Eldon LC in *Gee v. Pritchard* (1818) 2 Swans. 402; 36 ER 670. There the Lord Chancellor spoke (at p.414; p.674) of "laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case." Legal certainty does not take away the flexibility needed to do justice under private and public law in the myriad circumstances of life. But it has its proper place. And in that place it is indispensable to the rule of law. Nowadays there are many things that the law properly leaves to discretion, but the maintenance of constitutional rights and freedoms is not among them.

155. It having been said that legal certainty is part of a long constitutional tradition, the same should be said of free assembly itself. It is a part of the common law, being that part of it which Lord Radcliffe discusses in *The Problem of Power* (1958) at pp 105-107. At the end of that discussion he refers to "the tradition that there are a citizen's rights standing between him and despotic power", saying

> "… certainly they exist, and exist by a very ancient tenure which brave men have had to vindicate in the past. Those rights are said to have this peculiarity, that they have been, in the main, won in the courts of law; they have been upheld by Judges as rights which exist by immemorial custom of the country under the common law and they have not been created by any deliberate act of constitution making."

156. The learned author of Francis Bennion: *Statutory Interpretation*, 4th ed. (2002) draws attention (at p.721) to Dicey's statement that the right of assembly is nothing more than a view taken by the courts of individual liberty. And he observes that Dicey might have added that it is also nothing less.

Constitutions can create new rights and sometimes do so. But many old rights are, as Lord Cooke of Thorndon said in the House of Lords case of *R (Daly) v. Home Secretary* [2001] 2 AC 532 at p.548 F-G, "inherent and fundamental to democratic civilised society" so that constitutions "respond by recognising rather than creating them". Essentially fundamental rights are after all "the basic rights of individuals". That is how Lord Hoffmann described them in *R v. Home Secretary, ex parte Simms* [2000] 2 AC 115 at p.131 F. In that case the House of Lords was concerned with free speech as exercised by prisoners through the media.

157. The Basic Law's reach, as I said in the land resumption case of *Director of Lands v. Yin Shuen Enterprises Ltd* (2003) 6 HKCFAR 1 at p.8D, "extends beyond preserving old rights and includes conferring new ones". Article 27 of the Basic Law does the former while shading into the latter by referring in terms to processions and demonstrations. Those references underline the contemporary function and importance of the ancient right of free assembly. Of course the Basic Law's greatest contribution to human rights is to their enforcement rather than to their content. While much can be done by way of construction, the common law ultimately acquiesces in the majoritarian belief described by Prof. Dawn Oliver in the opening sentence of "Democracy, Parliament and constitutional watchdogs" [2000] Public Law 553. This is "the belief that a government with a majority ought to be able to push any measure through Parliament". Entrenched constitutions like the Basic Law do not subscribe to that belief. Basic Law rights and freedoms are beyond our legislature's power to undo.

158. Various expressions have been used in other cases to describe the extreme uncertainty of the provisions concerned in those cases. Among these are the expression "incomprehensible" used in the Supreme Court of Canada by

L'Heureux-Dubé J in *Committee for Commonwealth of Canada v. Canada* at p.438a and the expression "uncontrolled" used in the Supreme Court of Zimbabwe by Gubbay CJ in *Re Munhumeso* [1994] 1 LRC 282 at p.294a. Of course the fact that a provision is condemned as extremely uncertain cannot be taken to mean that any lesser degree of uncertainty would necessarily be acceptable in a provision of that or any other kind. Adjectives can be convenient. But a proper appreciation of why certainty is necessary provides a better indication of the degree of certainty required than any adjective can provide.

159. As to why certainty is necessary, the decision of the United States Supreme Court in *Grayned v. City of Rockford* 408 US 104 (1971) is instructive. In a passage drawing on a number of their Honours' past decisions, Marshall J who delivered the opinion of the court said this (at pp 108-109):

> " It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' 'Uncertain meanings inevitably lead citizens to ' 'steer far wider of the unlawful zone'… than if the boundaries of the forbidden areas were clearly marked.' "

160. That is the point which I had in mind in the noise control case of *Noise Control Authority v. Step In Ltd* [2005] 1 HKLRD 702. Agreeing with the judgment of Sir Gerard Brennan NPJ, I added the following observations on legal certainty (at pp 706G-707A):

> "*Objection can be taken on constitutional grounds to any law, regulation or administrative action that creates a state of uncertainty in which persons are inhibited from enjoying their fundamental rights and freedoms in full measure.* But

> playing loud music is not a fundamental right or freedom. And the law does not accord it precedence over the peace and quiet that people can reasonably expect to enjoy. This case is about low frequency noise transmitted through the structure of a building so as to disturb the sleep of occupants. The uncontradicted evidence is that such noise cannot be effectively controlled through a decibel-based noise limit. So the protection of occupants requires inaudibility at the nearest noise sensitive receiver. *To ensure that he complies with such a requirement, a noise-maker may have to steer well away from the line between legality and illegality. That is unfortunate. But it is unavoidable. And it is acceptable since no constitutional right or freedom is adversely affected in any way*." (Emphasis supplied).

161. The proposition that vague laws inhibit the exercise of constitutional rights and freedoms goes to the core of what we have always acknowledged as our duty in respect of Basic Law rights and freedoms, namely to give them such application as ensures their enjoyment in full measure. Not everyone is prepared to risk being prosecuted on criminal or disciplinary charges. Nor does everyone relish having to bring a constitutional challenge in order to vindicate his or her beliefs. My express reference to disciplinary charges owes itself to *Ezelin v. France* (1992) 14 EHRR 362. That case involved a reprimand by the French Bar Council against a legal practitioner in relation to his participation in a public assembly. The European Court of Human Rights said (at pp 388-389) that necessity in a democratic society involved proportionality. And, the court continued, the balance had to be struck in such a way as to avoid discouraging persons from exercising their fundamental rights and freedoms.

162. Viewed in perspective, the loss of the Commissioner of Police's power to ban public meetings and processions could well prove to be a far smaller loss to him than might appear at first sight. This is, I think, well illustrated by the decision of France's Conseil d'Etat in *Benjamin's Case* CE 19 May 1933, Rec 541. There a right-wing speaker was due to address a public meeting. The mayor banned the meeting because some left-wing groups threatened public disorder if the proposed speaker addressed the meeting. That

ban, the Conseil d'Etat held, was unjustified. As translated into English in Nicholas Emiliou: *The Principle of Proportionality in European Law* (1996) at p.98, the words used by the Conseil d'Etat include these:

> "The examination shows that the possibility of disturbances did not present such a degree of seriousness that he could not, without prohibiting the conference, have maintained order by issuing policing measures that it was [the mayor's] duty to take."

That was said in the context of one sort of situation, but it involves an idea of general application.

163. There is nothing to show that policing measures short of banning a public meeting or procession can never be effective. Being less drastic than a ban, such measures are inherently less vulnerable to a constitutional challenge.

164. Where the state acts to curtail a fundamental right or freedom, it bears the burden of justifying such curtailment. So if it asserts the existence of circumstances which it relies upon, it must prove the existence of those circumstances. As Acting President Steyn of the Court of Appeal of Lesotho put it in *Seeiso v. Minister of Home Affairs* 1998 (6) BCLR 765 (LesCA) at p.777 G-H, a "vigilant court" would not sustain such assertions unless they are supported by evidence which "can be evaluated" by the court.

165. That reference to judicial evaluation reminds me of Lord Atkin's insistence in *Liversidge v. Anderson* [1942] AC 206 at p.232 upon "a condition which, if necessary, can be examined by the courts". The other members of the House of Lords hearing that appeal saw it differently. But the move away from their view which the Privy Council began in *Nakkuda Ali v. Jayaratne* [1951] AC 66 can, I think, be regarded as having been completed by the House of Lords itself in *R v. IRC, ex parte Rossminster* [1980] AC 952. It was not until 1966 that the House of Lords announced its willingness to depart from its

previous decisions. Otherwise I would be disposed to regard the move as having been completed in *Ridge v. Baldwin* [1964] AC 40. There Lord Reid, discussing the safeguard of an objective test the application of which the courts can examine, said at p.73: "I leave out of account the very peculiar decision of this House in *Liversidge v. Anderson*".

166. Even where the existence of the circumstances relied upon is proved, there still remains the question of proportionality. *R v. To Kwan-hang* [1995] 1 HKCLR 251 was a case decided by the Court of Appeal under the Bill of Rights. In that case there was a risk that, unless prevented from doing so by a police cordon, a large crowd of demonstrators would press right up against a building and that injury would result. At p.259 I said that the cordon which the police established was a "proportionate response" to that risk.

167. Proportionality was addressed by the Court of Justice of the European Communities in *X v. Commission of the European Communities* [1994] ECR I-4737. At 4790 the court said that "restrictions may be imposed on fundamental rights provided that they in fact correspond to objectives of general public interest and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected".

168. Lord Diplock put the point more shortly in the House of Lords when he said in *R v. Goldstein* [1983] 1 WLR 151 at p.155B that "[y]ou must not use a steam hammer to crack a nut, if a nutcracker would do." Especially, I would add, when what you are doing impacts upon fundamental rights and freedoms. This can be seen in two recent decisions of the House of Lords. One is *R v. A (No. 2)* [2002] 1 AC 45. The other is *R v. Shayler* [2003] 1 AC 247. *A's* case was about a legislative measure which impacted upon the

guarantee of a fair trial. Lord Steyn said (p.65H) that the question was whether the measure "makes an excessive inroad into the guarantee". In *Shayler's* case Lord Bingham of Cornhill cited *Daly's* case on the difference between the approach laid down by the English Court of Appeal in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 and the proportionality approach. And at p.272 E-F Lord Bingham said that "in any application for judicial review alleging an alleged violation of a Convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible".

169. Proportionality has perhaps been dormant but is not really new. *Magna Carta* (sealed in 1215 and put on the statute roll in 1297 as 25 Edw. I) had catered for it by providing that amercement be "after the manner of the fault". More recent are two valuable statements in the House of Lords by Lord Nicholls of Birkenhead. In *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 at p.200F he stated that the means employed to curtail freedom of expression "must be proportionate to the end sought to be achieved." And in *Polanski v. Condé Nash Publications Ltd* [2005] 1 WLR 637 at p.642B he noted the direction in which the relevant case law is moving, pointing out that "the courts increasingly recognise the need for proportionality".

170. Certainty, necessity and proportionality operate in unison. Like certainty, proportionality prevents arbitrariness. *Hentrich v. France* [1994] 18 EHRR 440 concerned an exercise of a right of pre-emption by the revenue. Did it breach the guarantee under Article 1 of Protocol No. 1 of the European Convention on Human Rights that "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law"? Holding that it did, the European Court of Human Rights said (at p.470) that "[i]n order to assess

the proportionality of the interference, the Court looks at the degree of protection from arbitrariness that is afforded." Then there is the House of Lords case of *Attorney General v. Guardian Newspapers (No. 2)* [1990] 1 AC 109. At pp 283H-284A Lord Goff of Chieveley said that necessity implies proportionality.

171. As to the ill effects of uncertainty, it is well to remember what Brennan J said when delivering the opinion of the United States Supreme Court in *National Association for the Advancement of Colored People v. Button* 371 US 415 (1963). He said (at p.433) that "[t]he threat of sanctions may deter [the exercise of freedoms] as potently as the actual application of sanctions." The passage in which he said that was cited by the Privy Council in *de Freitas v. Ministry of Agriculture* [1999] 1 AC 69 at p.79 A-C. Their Lordships were concerned with a restriction on free speech. And they cited Brennan J's statement for the principle on which they acted in condemning that restriction as too wide in its scope and possible application. I would mention that *de Freitas's* case was among those which informed our decision in the misconduct in public office case of *Shum Kwok Sher v. HKSAR* (2002) 5 HKCFAR 381. By that decision we saved the common law offence of misconduct in public office from unconstitutionality for uncertainty. We did that by demonstrating that the offence's full definition included elements of limitation not fully articulated in the past.

172. Another decision which we looked at in *Shum's* case is that of the Privy Council in *Ahnee v. Director of Public Prosecutions* [1999] 2 AC 294. No one would be able to repose suitable confidence in any constitutional right or freedom in the face of an uncertain law purporting to permit restriction of that right or freedom. Thus Lord Steyn who delivered the Privy Council's advice in *Ahnee's* case spoke (at p.306 H) of "the implied constitutional

guarantee of certainty". This is the guarantee of all the other guarantees.

173. *Shum's* case is not the only one in which our decision was based on the principle of legal certainty. Our decision in the biding-over case of *Lau Wai Wo v. HKSAR* (2003) 6 HKCFAR 624 was also so based. At p.648 F-H Lord Scott of Foscote NPJ said:

> "Although the traditional form of bind-over order is an order requiring the person concerned to keep the peace and be of good behaviour, without any greater precision, we do not think that an order simply in that general form should any longer be regarded as satisfactory. Nor do we regard an implied limitation by reference to the facts that prompted the making of the order to be satisfactory. We think the principle of legal certainty requires that the order spell out with precision, in the same way as would be expected of an injunction, what it is that the person must not do."

174. The specified purpose of each of the challenged schemes is, as we have seen, to serve "the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others". Subject to the problem that *ordre public* is imprecise and elusive, each of those concepts is a good one in itself. But that alone is not a sufficient safeguard. The mere fact that a concept is of value does not justify an undefined or ill-defined power to restrict a freedom in its name. Such a power would imperil the freedom and breed suspicion for the concept.

175. So it is not enough that a statute specifies the purposes to be served. The statute must also specify the means which it provides for serving those purposes. Presiding in the High Court of Australia, Mason CJ said in *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 at p.29 that "a reasonable proportionality must exist between the designated object or purpose and the means selected by the law for achieving that object or purpose".

176. Where a measure impacts upon a constitutional guarantee, the purposes which that measure is meant to serve has to be examined with anxious

care. So will the means provided for achieving those purposes. To meet a constitutional challenge, the executive must "demonstrate, under rigorous scrutiny," that the means selected are necessary because nothing of less impact than means of that kind would be adequate. The words within quotation marks are borrowed from the opinion of the United States Supreme Court in *C & A Carbone, Inc. v. Clarkstown* 511 US 383 (1994) delivered by Kennedy J. He used them (at p.392) when explaining what a municipality has to do in order to justify discrimination against interstate commerce in favour of local business or investment. That approach of rigorous scrutiny is matched by the one taken in the House of Lords by Lord Nicholls of Birkenhead in *R (ProLife) v. BBC* [2004] 1 AC 185 concerning a restriction on a fundamental freedom, namely free speech. Such restrictions, Lord Nicholls said at p.224 C, "need to be examined rigorously by all concerned, not least the courts … as independent and impartial bodies … charged with a vital supervisory role."

177. As Dixon CJ and Fullagar, Kitto and Taylor JJ of the High Court of Australia said in *Collier Garland Ltd v. Hotchkiss* (1957) 97 CLR 475 at p.486, "law and administrative practice must not be confused". No matter how piously such a power is expressed, the safety of fundamental rights and freedoms cannot be entrusted to a mere hope or expectation that a power to restrict their exercise would never be misused. In the limit of stay case of *Prem Singh v. Director of Immigration* (2003) 6 HKCFAR 26 the statutory provision under constitutional challenge purported to make a constitutional right subject to an administrative discretion. We struck down the challenged provision.

178. Whenever there is a power by which the exercise of a fundamental right or freedom is liable to be restricted, a constitution properly protective of human rights requires that such a power be clearly and carefully limited to

avoid the danger of it being exercised arbitrarily or disproportionately. The rule of law so demands. It so demands for the purpose of preserving what Marshall CJ of the United States Supreme Court famously described in *Marbury v. Madison* 5 US 137 (1803) at p.163 as "a government of laws, and not of men". As explained in *Salmond on Jurisprudence*, 12th ed. (1966) at p.65, "a government of laws is preferable to one of men not simply by virtue of being less uncertain but by reason of releasing the citizen from the mercy of other human beings." In *Law Making, Law Finding and Law Shaping* (ed. Basil S Markesinis) (1997) at p.161 President Limbach of the Bundesverfassungsgericht said that the Grundgesetz has "resolved the age-old tension between power and law in favour of the law". That offers, I think, a good way of describing what the rule of law has done and the courts must preserve. If a freedom is not an absolute one, then it may be governed. Even so, it will not be a freedom governed by men or women. It will be, as Lord Wright said (at p.627) when delivering the advice of the Privy Council in *James v. Commonwealth of Australia* [1936] AC 578, a "freedom governed by law".

179. The vital importance of the foregoing comes into particularly sharp focus in regard to free assembly. For this freedom, as I have pointed out earlier in this judgment, is typically resorted to for the purpose of advancing points of view opposed to the policies and practices of the executive. Free assembly must be put beyond — and be seen to lie beyond — the executive's temptation to suppress. Uncertainty's natural tendency would be to stimulate such temptation, its inevitable effect to facilitate such suppression. The Ghanaian case of *New Patriotic Party v. Inspector General of Police* [1996] 1 CHRLD 5 concerned a statutory scheme under which public meetings and processions required a permit. Holding that it did not subject the permit system to adequate guidelines or effective control and pointing to the danger of it being used to suppress fundamental rights, the Supreme Court of Ghana

struck down the scheme.

180. All courts are aware of the difficulties that the police face. As to this, I refer to the case of *Redmond-Bate v. DPP* [2000] HRLR 249. In that case the Divisional Court of the Queen's Bench Division quashed a conviction for obstructing a police officer in the execution of his duty. The obstruction consisted of disobeying his order to stop preaching to a hostile crowd in front of a cathedral. At p.259 Sedley LJ said:

> "Police officers in a situation like this have difficult on-the-spot judgments to make. Because they are judgments which impinge directly on important civil liberties and human rights, the courts must in their turn scrutinise them with care."

181. A free society cannot avoid making heavy demands on the patience and other positive qualities of its police officers. Some difficult police decisions have to be made on-the-spot. Others can be made at comparative leisure. Some are made by a junior officer, perhaps a constable. Others are made by a senior officer, perhaps the Commissioner of Police himself. Legal certainty helps the police. I had that in mind in *To Kwan-hang's* case. At p.258 I said that "[w]hile police officers are required to exercise judgment, it is necessary that the powers within the ambit of which they are to exercise their judgment be carefully defined." Having to preserve freedom while maintaining order, the police would be in a very awkward position otherwise.

182. The opinion of the United States Supreme Court in *Smith v. Goguen* 415 US 566 (1974) is perhaps most remembered for the expression "standardless sweep" used by Powell J (at p.575). But for present purposes the passage which I would cite from that opinion is this one (at p.581):

> "There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area, requiring as it does an on-the-spot assessment of the need to keep order."

Great precision may not always be possible, but *some* precision is needed. And it should be backed by a freedom-friendly standard of reference.

183. What they aptly call a "problem of modern democracy" is identified by the learned authors of AW Bradley and KD Ewing: *Constitutional and Administrative Law*, 13th ed. (2003). This is, they say at p.456, the problem posed by "a need to ensure that the police have adequate measures to protect the public without at the same time conferring powers that undermine the very freedom which the police are employed to defend". It is not by vague laws that this objective can be attained. Its attainment requires laws that are fully and plainly stated so that they can be clearly understood. If a more graphic description of legal certainty is desired, one is to be found in the argument presented to the Court of Common Pleas in *Colthirst v. Bejushin* (1550) 1 Plowden 23 at p.25; 75 ER 36 at p.40 by Serjeant Pollard. He said that "certainty is the mother of repose, and incertainty the mother of contention, which our wise and provident law has ever guarded against and prevented all occasions thereof." Legal certainty is an integral part of the means by which freedom is preserved while order is maintained and harmony is sought. For this purpose, it is — as this Court said in the born in Hong Kong case of *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211 at p.223 I — "important both that the law should be certain and that it should be ascertainable by the citizen." The citizen's entitlement to "an adequate indication" of the legal position was insisted upon by European Court of Human Rights in *Halford v. United Kingdom* (1997) 24 EHRR 523 at p.544.

184. In *SW v. United Kingdom* (1996) 21 EHRR 363 at p.399, para. 36/34 the European Court of Human Rights saw no objection to "the gradual clarification of the rules of criminal liability through judicial

interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen". The demand for certainty made by that proviso is directly in point since the schemes under challenge in the present case are backed by penal sanctions. Having said that, it is necessary to guard against giving the impression that certainty is unimportant in other areas of the law. In *Shaw v. Director of Public Prosecutions* [1962] AC 220 at p.282 Lord Reid concluded his dissent by strongly objecting to a criminal offence lacking "the certainty which we rightly prize in other branches of [the] law". This is not to deny that the need for certainty, and the degree of certainty needed, is greater in some situations than in others.

185. If there is one type of law more in need than any other of being clearly and carefully circumscribed, it is the type that places or permits restrictions on the exercise of fundamental rights and freedoms and criminalises exercising them beyond those restrictions. The laws containing the challenged schemes are of this type.

186. I had that type of law in mind when I said this in *Shum Kwok Sher's* case at p.390 A-D:

> " As Sir Anthony Mason NPJ points out, the degree of certainty required will depend on the context of the law in question. In agreeing that the offence of misconduct in public office is sufficiently certain, I am crucially influenced by the fact that it is not the type of offence which criminalises conduct in such a way as to limit the exercise of a fundamental freedom eg free speech. Where any offence of that type is concerned, I think that an exceptionally high degree of certainty of definition would be required if, quite apart from any other objection, it is not to be open to objection as unconstitutional for uncertainty. For in the absence of such a degree of definitional certainty, the whole question of what is left of the fundamental freedom concerned would be thrown into doubt. It is not by countenancing such a state of affairs that the courts discharge their duty of protecting fundamental freedoms."

187. The materials placed before us include Headquarters Order No. 45 of 1997, Part One issued by the Commissioner of Police on 1 July 1997 and marked "For Police Use Only". It deals with the operation of the schemes now under challenge. Let us assume that it makes the position clearer to police officers for whose guidance it is issued and offers insights to prosecutors and judges to whom it is shown. But what about the rest of the population? The challenged schemes are backed by criminal sanctions. So it is well to remember the advisory opinion given by the Permanent Court of International Justice in the *Danzig Legislative Decrees Case* PCIJ, Ser. A/B, No. 65, 1935, p.41. At p.53 the court noted that under the decrees in question

> "… a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused."

"It must", the court said at p.57, "be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment."

188. As good a portrait of legal certainty as any is, I think, the one painted by Lord Mansfield CJ in the Court of King's Bench when speaking about outlawry in the forensic saga of *R v. Wilkes* (1763-70) 19 State Trials 1075. Giving judgment on 8 June 1768, he said (at p.1102, column 1) that "[t]he rules and method of proceeding are wisely calculated to prevent ignorance and surprise."

189. Mr Lee said that the question why cannot people do together what a person can do alone is what free assembly is all about. When that question is asked in respect of a restriction on free assembly, the answer must, in my view, be a wholly convincing one before the restriction can be upheld.

190. The idea that whatever is not hopelessly vague is therefore sufficiently certain finds its home in the law of contract, not in the law of the constitution. Once a court is satisfied that the parties intended to enter into a contract, it will strive to preserve their bargain. The books are full of the techniques by which that can be done. But where restrictions on fundamental rights and freedoms are concerned, the courts will protect the fundamental right or freedom concerned. The last thing the courts should do is to strive to uphold the restriction.

191. For the foregoing reasons I reject Mr McCoy's submission — which he ably argued but is far too bold — that a law permitting restrictions on fundamental rights and freedoms is sufficiently certain unless it is hopelessly vague. Greater certainty than that is needed.

To be sufficiently circumscribed so as to be constitutional

192. There is a large body of jurisprudence on the question of what restrictions can be placed on fundamental rights and freedoms. So much so that one must guard against drifting into a tendency to treat fundamental rights and freedoms as merely what is left after seemingly innocuous restrictions have been imposed. That would invert the priorities. The correct approach is to ascertain the nature of the fundamental right or freedom concerned and the purposes which it serves in a free society. And then to focus on keeping that right or freedom beyond any restriction that runs counter to its nature or stands in the way of it serving — and being seen to serve — its purposes in full measure. Powers to restrict fundamental rights or freedoms must therefore be clearly and carefully circumscribed.

193. In the course of the argument, I ventured an observation. The challenged schemes involve police powers of prior restraint, backed by criminal

sanctions, on a fundamental freedom, namely free assembly, which is cognate to free speech and free press, which is important to the operation of democracy and which history shows has often been viewed with hostility by the executive. Is there any other category of power, I asked Mr McCoy, which it is more important to circumscribe with care? Mr McCoy is far too good a constitutional lawyer to have answered otherwise than he did, which was to say that the powers of prior restraint under challenge in the present case are "at the top of the range" in that regard. Indeed they are.

194. The case of *Mtikila v. Attorney General* [1996] 1 CHRLD 11 decided by the High Court of Tanzania illustrates the importance which courts around the world have attached to safeguarding free assembly. Not surprisingly the Bar Council cited that case in its 23 April 1997 Submission in response to the Office of the Chief Executive Designate's April 1997 Consultation Document on Civil Liberties and Social Order. That was the consultation document which ushered in what are now the challenged schemes. The Tanzanian statute contained a power to control assemblies. It also contained a safeguard, namely a provision that the power comes into play only when an assembly was "imminently likely" to cause a breach of the peace or to prejudice public safety or the maintenance of public order. In a constitutional challenge to that statutory power of prior restraint, the Tanzanian court applied the decision of the United States Supreme Court in *Saia v. New York* 334 US 558 (1948) and that of the Supreme Court of Pakistan in *Shariff v. President of Pakistan* PLD 1993 SC 473. Applying those decisions, it held that the power in question complied with the "clear and present danger" test under which, to be reasonably required in the interests of public order, the substantive evil must be extremely serious and the degree of imminence extremely high. In contrast s.17 treats reasonable belief that a breach of the peace is likely as sufficient to justify preventing the holding of, stopping or dispersing a public gathering.

The contrast does not favour s.17.

195. I should mention the April 1997 consultation document refers to restrictions "which [the International Covenant on Civil and Political Rights] places on the rights under Articles 21 and 22". Stock JA rightly noted the inaccuracy there. Neither the Covenant nor the Bill of Rights places any restriction on free assembly. Rather do they limit the concepts for the protection of which free assembly may be restricted. That leaves the crucial question of what other safeguards must attend any restriction on free assembly for that restriction to be constitutional.

196. Statutory schemes for regulating the freedoms of assembly, procession and demonstration can take many different forms. So there is a limit to how prescriptive one can usefully be in regard to the ways in which such schemes should be circumscribed. Nevertheless there are a number of points that can and should be made, including these:

(a) The purposes which the scheme is meant to serve should be specified. Such purposes must not be — and must be seen not to be — repugnant to free assembly. For example, the suppression of peaceable political opposition would be a repugnant purpose.

(b) When providing that scheme powers are triggered by necessity to act in the service of the specified purposes, the statute should also provide that it has to be necessity by a freedom-friendly standard of reference (such as, for example, that of a democratic society).

(c) Public meetings and processions are the lifeblood of free assembly. Powers to ban or control them involve prior restraint on free assembly which is a freedom of very great importance. So the circumstances in which such powers can be used should be limited to those in which prior restraint is a proportionate response.

Suppose, for example, the Commissioner of Police reasonably suspects, for stated reasons which the courts can ascertain are good, that a meeting or procession would lead to an unreasonable obstruction or a serious threat to public safety. And suppose he reasonably fears, for stated reasons which the courts can ascertain are good, that the obstruction or threat would be more than ordinary policing could cope with adequately. In that scenario prior restraint would be proportionate. But in many other circumstances it would not.

(d) Where a scheme contains powers to impose conditions in respect of a public meeting or procession, the scheme should specify the sort of conditions that can be imposed rather than leaving them at large. The wider the concepts in the service of which conditions may be imposed, the more clearly and carefully must the scheme circumscribe the conditions that may be imposed.

(e) I would not rule out the possibility that a scheme can be devised so as constitutionally to empower the Commissioner of Police to ban a public meeting or procession. But judicial decision-making is attended by procedural safeguards absent from administrative decision-making. A possible arrangement is one under which the Commissioner of Police may apply to a court for a banning order. All other things being equal, the constitutionality of a banning power given to a court would be inherently easier to defend than the constitutionality of a banning power given to the Commissioner of Police himself.

Powers of prior restraint are unconstitutional

197. Having examined the challenged schemes and considered the relevant law, I will now give my answer to the question whether the

Commissioner of Police's powers of prior restraint under those schemes are sufficiently circumscribed to be constitutional. Such is the similarity between the meetings scheme and the processions scheme that there is no distinction to be drawn between them on this question.

198. None of the purposes which the Commissioner of Police's powers under the challenged schemes are meant to serve can be said to be repugnant to free assembly. Nor, apart from *ordre public*, can any of those purposes be condemned as elusive. But a concept may be wide even though it is not elusive. It is natural and appropriate to confer rights and freedoms in wide terms, but permitting wide restrictions on rights and freedoms endangers them. As Lord Devlin so neatly put it in his memoirs *Taken at the Flood* (1996) at p.64, concepts of this kind have a " potentiality as a suppressive of free speech". Similarly, I would add, of free assembly.

199. National security, public safety and public order are very wide concepts. The protection of the rights and freedoms of others is a particularly wide concept. For there are so many rights and freedoms that others have, and the challenged schemes do not say which of these may be protected by police powers restricting free assembly. This is a serious omission. After all, even some of the rights and freedoms under the Bill of Rights (eg. the right under art. 7 not to be imprisoned for breach of contract) are not obvious candidates for such an exercise.

200. Despite the width of the concepts concerned and the inclusion of banning powers, the challenged schemes omit to specify that the necessity to act in the service of those concepts must be necessity by a freedom-friendly standard. Nor is there any indication in the challenged schemes that the powers of prior restraint which it confers can only be used where ordinary

policing cannot be relied upon to accomplish the necessary objective. Coming on top of all of that, the challenged schemes are open to this further objection. They contain powers to impose conditions in respect of public meetings and processions. But they do not specify the sort of conditions that can be imposed. Instead they leave them at large.

201. Striking down legislation is a course of last resort. The first thing for a court to do when faced with a vague statutory provision is as stated by Cooke J (now Lord Cooke of Thorndon) when delivering the judgment of the Court of Appeal in New Zealand in *Transport Ministry v. Alexander* [1978] 1 NZLR 306. This is, as he said at p.311, to try to solve the problem by interpretation. Sometimes the problem can be solved in that way. But sometimes, as in the *Transport Ministry* case itself, the provision cannot be saved by interpretation and has to be declared invalid.

202. Sometimes words can be read into a statute. We recognised that in the common law conspiracy case of *Chan Pun Chung v. HKSAR* (2000) 3 HKCFAR 392. But as Lord Camden CJ of the Court of Common Pleas so memorably put it in *Entick v. Carrington* (1765) 19 State Trials 1029 at p.1067, for the judges "to mould an unlawful power into a convenient authority, by new restrictions … would be, not judgment, but legislation." It is for the judiciary to declare the constitutional limits within which derogable rights and freedoms can be restricted by statute. Within the limits so declared, it is for the legislature to decide what (if any) statutory restrictions should be enacted. So the Commissioner of Police's powers of prior restraint under the challenged schemes cannot be saved by supplying the necessary safeguards through interpretation.

203. Nor are those powers saved by the fact that their exercise is subject to an appeal to an appeal board. The availability of an appeal does not supply the missing certainty. At most it merely transfers the exercise of the uncertain powers from the Commissioner of Police or his delegate to the Appeal Board. In this connection, reference can usefully be made to the recent decision of the House of Lords concerning indefinite detention subject to an appeal to an appeals commission, *A v. Home Secretary* [2005] 2 WLR 87. Lord Nicholls of Birkenhead said this at p.132C:

> " Nor is the vice of indefinite detention cured by the provision made for independent review by the Special Immigration Appeals Commission. The commission is well placed to check that the Secretary of State's powers are exercised properly. But what is in question on these appeals is the existence and width of the statutory powers, not the way they are being exercised."

204. Finally I come to judicial review. This, too, cannot save the Commissioner of Police's powers of prior restraint under the challenged schemes. The judiciary protects constitutional rights and freedoms by circumscribing powers to restrict them, not by transferring such powers to itself. For, as Lord Shaw of Dunfermline said in *Scott v. Scott* [1913] AC 417 at p.477, "[t]o remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand".

205. For the foregoing reasons, I regard the Commissioner of Police's powers of prior restraint under the challenged schemes as insufficiently circumscribed. So I would declare that those powers — being his powers to

(i) control and direct the conduct of a public gathering (under s.6,

(ii) specify the route by which, and the time at which, a public procession may pass (under s.6),

(iii) prohibit a public meeting (under s.9),

(iv) impose conditions in respect of a public meeting (under s.11),

(v) object to a public procession (under s.14) and

(vi) impose conditions in respect of a public procession (under s.15) —

are unconstitutional. And I would strike them down accordingly.

206. Even in the absence of those powers, the Commissioner of Police can always offer advice to organisers of public meetings and processions. They may often think it wise to accept such advice. Among the things which accepting such advice could avert are: the risk of crowd disasters; circumstances in which strong police action is needed to prevent such disasters; and the commission of public place obstruction offences. These are just some examples. I should add that some of the "conditions" which we were shown look more like advice than anything else.

Amplified sound

207. No argument at all has been directed to the Commissioner of Police's power under s.6(2). This is his power in regard to the extent to which music may be played or to which music, human speech or any other sound may be amplified, broadcast, relayed or otherwise reproduced by artificial means. I say no more about s.6(2) than this. It may be appropriate to read it down to the sort of power which the Privy Council considered acceptable in *Francis v. Chief of Police* [1973] AC 761. By that I mean a power to protect unwilling listeners from what Lord Pearson terms (at p.773A) "aural aggression" reaching "unbearable intensity".

Entitlement to notification is constitutional

208. That still leaves the Commissioner of Police's entitlement to notification of public meetings and processions. Sections 8(4)(b) and 13A(4)(b) provide that the particulars to be delivered to the Commissioner of Police are to include the "purpose and subject-matter" of the public meeting or procession of which notification is being given. I have given this requirement

anxious consideration. Does it mean that the demonstrators' message is to be vetted? Ultimately, I have come to the conclusion that the "purpose and subject-matter" requirement serves the purposes of proper policing. It helps the police to assess matters such as the number of interested onlookers that the public meeting or procession is likely to attract and whether it might provoke violent opposition with which they, the police, have to cope. On the basis that the purpose and subject-matter only have to be notified in general terms, this requirement is acceptable.

209. One problem remains. On one reading of the notification requirements for public meetings and processions, they operate to preclude spontaneous demonstrations. That would be incompatible with due enjoyment of free assembly. But this problem can be solved by reading those requirements — as I would read them — not to cover spontaneous demonstrations. If this is reading down, so be it. This problem having been solved, no problem with notification remains.

210. Notification of public meetings and processions enables the Commissioner of Police to make proper arrangements to police them. Proper policing is in the legitimate interests of organisers, participants and the general public. It keeps people safe in situations which could otherwise turn lethal. Even if I were capable of forgetting that fact, my memory of it would have been revived when Mr Shiu took us through the *Lan Kwai Fong Report*. The Commissioner of Police's entitlement to notification of public meetings and public processions is not unreasonable or otherwise objectionable. Accordingly sections 8 and 13A are constitutional. It follows that s.7 is constitutional in so far as it provides that a public meeting may take place only if the Commissioner of Police is notified under s.8 of the intention to hold the meeting. And it likewise follows that s.13 is constitutional in so far as it

provides that a public procession may take place only if he is notified under s.13A of the intention to hold the procession.

211. Section 17 contain effective means by which the Commissioner of Police's entitlement to notification can be enforced. Those parts of s.17 which are tied to the Commissioner of Police's unconstitutional powers of prior restraint fall with them. But there are parts of s.17 which are sufficiently independent of those powers to remain on foot. And, in the various ways explained below, these independent parts of s.17 can play a role in the enforcement of the Commissioner of Police's entitlement to notification.

212. Having regard to the construction which I place on s.17, I am of the view that non-notified public meetings and processions contravene sections 7 and 13 respectively within the meaning of s.17. The construction which I place on s.17 is to read down the powers thereunder so that they arise only if non-notification renders proper policing of a public meeting or procession impracticable without resorting to s.17 powers. Where non-notification does that, s.17 has the following effect. First, it empowers the police to prevent the holding of, stop or disperse non-notified public meetings and processions. Secondly, it empowers them to give or issue necessary or expedient orders and use reasonable force to exercise those powers of prevention, stoppage and dispersal. Thirdly, it empowers them to bar access to and close public places in order to prevent non-notified public meetings or processions taking place there. And finally, it empowers them to use reasonable force to prevent any person from entering or remaining upon a public place thus closed to him. These are not powers of prior restraint. They arise when non-spontaneous public meetings or processions are held without notification and non-notification renders proper policing otherwise impracticable. And they are constitutional as being compatible with free assembly.

213. Suppose notification of a public meeting or procession is given, and the police make arrangements for the meeting or procession to be policed properly in the legitimate interests of organisers, participants and the general public. Wilfully obstructing the implementation of those arrangements could amount to the offence of wilfully obstructing a police officer in the due execution of his duty, contrary to s.36(b) of the Offences against the Person Ordinance, Cap. 212. So could wilfully obstructing the police in their exercise of s.17 powers forced upon them by non-notification.

Section 17A (the criminal offence creating section) is unconstitutional

214. As explained above, there are constitutional means of enforcing the Commissioner of Police's entitlement to notification. But I would not include s.17A among them. Going by nothing more than linguistic considerations alone, there are parts of s.17A which might possibly be read as creating what are in effect non-notification offences independent of the Commissioner of Police's unconstitutional powers of prior restraint. But as the Privy Council said in *Attorney General for Alberta v. Attorney General for Canada* [1947] AC 503 at p.518:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

Describing that as the "familiar test", the Privy Council recently applied it in *IJCHR v. Marshall-Burnett* [2005] 2 WLR 923 at pp 934H-935A. And at p.935B their Lordships cited a similar test articulated in the Supreme Court of Ireland by Fitzgerald CJ in *Maher v. Attorney General* [1973] IR 140 at p.147:

> "But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity."

215. In my view s.17A is too bound up with the Commissioner of Police's unconstitutional powers of prior restraint to have any life independent of those powers attributed to it. Putting it in the words used in the right of abode case of *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 at p.37D, s.17A is not "distinct from" those powers. Quite apart from anything else, who can say that the legislature, realising that those powers are unconstitutional, would nevertheless enact the offences and penalties found in s.17A? In my view, s.17A falls together with the Commissioner of Police's unconstitutional powers of prior restraint. I would declare s.17A unconstitutional and strike it down.

Conclusion

216. I thank all concerned for the arguments which they have prepared and presented.

217. For the reasons which I have given, I hold as follows in regard to the challenged schemes. The Commissioner of Police's entitlement to prior notification of public meetings and processions is constitutional. This entitlement is enforceable in the various ways which I have indicated, but not by the criminal sanctions in s.17A. The Commissioner of Police's powers of prior restraint are unconstitutional. And the criminal sanctions follow the fate of those powers so as to be unconstitutional too. Accordingly I would allow this appeal so as to quash these convictions and set aside these binding-over orders on the ground that the penal provisions under which the appellants were convicted are unconstitutional. As to costs, I would order legal aid taxation of the 2nd and 3rd appellants' costs, and make an order *nisi* awarding all three appellants their costs here and in the courts below.

Chief Justice Li :

218. The Court (with Mr Justice Bokhary PJ dissenting) dismisses this appeal and upholds the convictions. The parties should respectively provide in writing within 14 days any submissions as to the appropriate costs order.

(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(R.A.V. Ribeiro)	(Sir Anthony Mason)
Permanent Judge	Non-Permanent Judge

1st appellant in person

Mr Martin Lee SC and Mr Erik Shum (instructed by Messrs Ho, Tse, Wai & Partners and assigned by the Legal Aid Department) for the 2nd & 3rd appellants

Mr Gerard McCoy SC (instructed by the Department of Justice), Mr Gavin Shiu and Mr David Leung (of that Department) for the respondent