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Public Order Ordinance Cap 245

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1. Members will be familiar with the provisions of the HKSAR Basic Law and the HK Bill of Rights which reaffirm and promise protection for Hong Kong residents' rights of freedom of peaceful assembly, procession and demonstration.

2. However, the combined effect of the provisions of Part III of the Public Order Ordinance is inconsistent with the affirmation and protection of such rights. Rather they reduce the freedom of peaceful assembly, procession and demonstration to something more in the nature of a privilege or licence, to be enjoyed at the discretion of the administration (particularly but not exclusively the police) but not otherwise. The long title of the Ordinance, the opening words of sections 7(1) and 13(1), indeed the whole structure of the Public Order Ordinance strongly suggest that this was at least the original legislative intention. Given the history of the Public Order Ordinance, this is not surprising but that does not make the provisions of the ordinance either constitutionally valid, Bill of Rights consistent or politically wise.

3. In a system which purports to give full rights status to the freedoms of peaceful assembly, procession and demonstration, the existence of any form of prior restraint must be both theoretically and practically problematic. In theory, the very nature of a right means at the very least that a person wishing to exercise that right does not need to ask permission from anyone else before doing so. As for practice, history shows only too clearly, where there is a machinery for prior restraints in place, attempts at deliberate content control of anti-government or otherwise unpopular views will be made. Likewise, unnecessarily heavy handed stifling of the peoples' various voices due to excessive concern for public order or public safety on the part of authorities specifically trained to view all social activity from those perspectives has been commonplace.

4. Even prior restraints which are open to judicial review (such as those required to be objectively reasonable) are potentially dangerous to these forms of public participation in government. Judicial review may take so much time that even if the applicant is successful the opportunity for meaningful contribution has passed. Court proceedings may also be so expensive as to make the remedy of judicial review more theoretical than real. Appeal Boards are similarly problematic. They may be less costly but there could still be problems of time. And, unless very carefully constituted in total good faith, Appeal Boards may also be less insulated from the authorities' law and order perspectives.

5. That is not to deny the public interest in some regulation of time, manner and place of public gatherings. A simple notice procedure, designed to give public order and public safety authorities adequate opportunities to negotiate and/or organise appropriate crowd and traffic controls, by itself is unobjectionable. On the contrary, the existence of such notice procedures can positively facilitate the exercise of peaceful assembly, procession and demonstration rights whilst in no way inhibiting the powers of the law enforcement authorities from preserving the national security, public order etc as required. Such a procedure is used with apparent success in parts of Australia.

6. A notice procedure coupled with tightly defined powers to prohibit the proposed assembly, procession or demonstration, at least in the form, at the time or in the place proposed, may not be incompatable with rights of peaceable assembly, procession and demonstration in a democratic society either but the emphasis must be upon 'tightly defined' powers. Broad subjective discretionary powers of prohibition, such as were originally enacted in section 6, 7, 8, 1115 and 16 of the Public Order Ordinance 1967 and are still evident in section 17E today, are only consistent with a privilege or licence to assemble, process or demonstrate. However exercised in practice, the existence of such broad subjective discretionary powers is fundamentally inconsistent with a true right of freedom of assembly, procession or demonstration.

7. However, if real content is given to the words "reasonably considers...necessary" wherever they now appear in the Public Order Ordinance, relatively small scale meetings and processions are exempt and the Commissioner has a reviewable duty to consider and use conditions rather than prohibitions wherever possible, the powers to prohibit or object to public meetings or processions in sections 9 and 14, and to impose conditions in sections 11 and 15, may just be rights consistent. Certainly, since generally the provisions use the terminology of the International Covenant of Civil and Political Rrights, and are to be interpreted in the same way as those terms have been interpreted under the ICCPR, any argument to the contrary in a HKSAR court of law, or indeed in this Council, is unlikely to succeed in the near future.

8. But the terms of the prior restraints themselves are not the only means by which rights of freedom of peaceful assembly, procession and demonstration can be turned into privileges or mere licences. Criminalisation of the organisation of or participation in such activities in violation of those prior restraints, that is:

> - solely on the ground of a failure to comply with a notice procedure, or of disobedience to any prohibition or objection order made or conditions imposed after notice was given -

may have the same effect.

This is particularly so when the criminalisation is supported by substantial penalties.

9. It is in this way that the combined effects of sections 6, 17 and 17A and Part III of the Public Order Ordinance generally are radically inconsistent with any rights based approach to freedom of assembly, procession and demonstration in the HKSAR. Since

these or comparable provisions have been a part of the Ordinance for a very long time, it is interesting that it is only in recent times that their full effect has been widely appreciated and become a matter of concern.

10. Section 6(1) of the Public Order Ordinance gives the Commissioner of Police powers 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." The power is limited by the usual phrase "reasonably considers it to be necessary in the interests of national security.[etc]..." but is otherwise very wide. The term 'public gathering" is defined in the Ordinance to include public meetings (i.e meetings to be held in a public place), public processions (any procession to or in or from a public place) and 'any other meeting, gathering or assembly of 10 or more persons in any public place". It follows that these powers are given even with respect to public meetings or processions for which no notice is required and with respect to any other public gatherings of any kind provided only 10 or more persons are involved. They are in addition to any existing powers relating to a prevention of a breach of the peace or obstruction of traffic.

11. Section 17(1) permits any police officer of any rank to prevent, stop or disperse any public meeting or public procession with respect to which notice has not been given in accordance with sections 7 or 13 or conditions imposed pursuant to sections 11 or 15 have not been complied with.

12. Section 17(2) gives these powers (and others) to a police officer of the rank of inspector with respect to all public gatherings, whether subject to notice requirements or not, as well as powers to stop or disperse any gathering or procession at all (including those not on public premises) "if he believes that the [gathering or procession] is likely to cause or lead to a breach of the peace."

13. Section 17(3)(4) give very wide powers to a police officer of the relevant ranks to achieve these ends including, in the case of an inspector, a power to close public places.

14. Then, section 17A creates various offences. Refusal or even wilful neglect (a relatively rare basis for liability in our criminal law outside regulatory offences) to obey orders given under sections 6 or 7(3), knowing contravention (or suffering or permitting another person to knowingly contravene) conditions imposed on meetings and even the announcement or advertisement of meetings or processions which have not been properly notified or which have been prohibited or objected to (such prohibition or objection not reversed on appeal) are all offences punishable by fines of up to $10,000 and 12 months imprisonment. **NOTE that none of these offences requires proof of threat of any breach of the peace or other harm done by persons who are alleged to have committed these offences. They are simple disobedience offences only.** Note also that they are in addition to existing offences relating to the obstruction of a police officer in the execution of his duty (maximum sentence *), or assaulting a police officer in the execution of his duty (maximum sentence *) or obstruction of public highways generally (available with other people are inconvenienced by the defendant's actions, maximum

sentence *), noise control legislation and so forth.

15. Then there are the offences built around the concept of an "unauthorized assembly" created by section 17A(2)(3).

16. The drafting of section 17A is very confusing but the following propositions seem correct:
- any public meeting or procession which takes place without the relevant notice having been given under section 7 or 13 respectively is for that reason alone an "unauthorized assembly"
- any public gathering at which 3 or more persons taking part in or forming part of that public gathering 'refuse or wilfully neglect to obey an order given or issued under section 6' is an "unauthorized assembly"
- any gathering of persons at which 3 or more persons taking part in or forming part of the gathering refuse or wilfully neglect to obey an order given or issued under section 17(3) is an "unauthorized assembly."

NOTE that in the latter two cases, it is not merely the three persons themselves who form an unauthorized gathering but the whole meeting, procession or gathering including everyone in it.

17. Section 17A(3) then makes it an offence for any person to:
- without lawful authority or excuse (eg?)
- knowingly (i.e. being aware of the facts which has made the gathering an unauthorised assembly such as failure to give relevant notice, or relevant disobediance by at least three relevant people?)
- take part in, continue to take part in, form part of or continue to form part of an unauthorised assembly.

It is also an offence for any person to:
- hold, convene, organize, form or collect, or assist or be concerned in holding, convening organinzing, forming or collecting any public meeting or public procession for which the relevant notice has not be given under section 7 or 13 (no requirement of knowledge here or is this implied by virtue of the activity?)
- continue to hold, or attempt to continue to hold, or conduct, or to direct otherwise that for the purpose of securing obedience to any order given under sections 6 or 17(3) which has become an unauthorized assembly.

18. These offences relating to unauthorized assemblies are punishable by:
- imprisonment for up to 5 years if tried on indictment
- a fine of $5000 and imprisonment for up to 3 years if tried summarily.

19. These offences are again, disobedience offences. They do not require proof of even any threatened breach of the peace or disorder, let alone actual disorder or breach of the peace.

20. Note that if 3 or more persons conduct themselves in a "disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace" those three or more persons are an unlawful assembly and participation in an unlawful assembly is punishable in the same terms as participation in an unauthorized assembly. (See section 18)

21. Note also that if an actual breach of the peace is committed by a member of an unlawful assembly, that unlawful assembly becomes a riot with possible sentences of up to 10 years imprisonment if tried on indictment, 5 years in the magistrates courts so that even if the unauthorized assembly offences were removed, the authorities would be far from powerless in the face of organized or spontaneous disturbances or violence. (Section 19 and following)

22. It is said that these very severe maximum sentences for non violent, non property damaging, civil disobedience offences, are necessary for deterrent purposes and, in any case, have been in place for so many years that there can be said to be a public concensus as to their merits. As to the latter, public reaction to the recent arrests under these provisions did not indicate any such concensus. As to the need for deterrence, more must be said.

23. In the first place, deterrence must always be tempered by desert and proportionality since the logical extension of the argument would be the death penalty for all offences at all levels including parking offences. Our present maximum sentences for assault occasioning actual bodily harm, or subjectively reckless but unintentional causing of grievous bodily harm are 3 years imprisonment. In the absence of even a risk of a breach of the peace, are there any circumstances in which we could truthfully argue that persons attending a meeting or procession held without the requisite notice having been given are as deserving of punishment as someone who deliberately or recklessly causes physical harm to another person? What would be the likely public reaction if any such persons, especially persons who had no other criminal convictions and were not hardened activists, were sent to prison for more than a nominal period for such disobedience? Or even at all? In what circumstances would we ever feel that peaceful demonstrators deserved to be sent to prison for five years? I say peaceful demonstrators because if they were being charged with section 17A offences when the real reason for their arrest was that it was alleged they were not 'peaceful' demonstrators at all, the prosecution should undertake the burden of proving the more serious, violent or threatened violence offences. Punishment should fit the offence charged and proved. It should not generally be on the basis that actually some other more serious offence was also committed but it was thought too difficult or too troublesome to prove that offence.

24. If the answers to the above questions are that there are no circumstances in which we as a community would feel that peaceful demonstrators, however irritating and inconvenient, deserved to be sent to prison for five years - or even three years - or even one year - solely on the basis of disobedience to Part III orders, we should remove those intimidating and

inappropriate maximum sentences from our statute book.

25. The above are general principles of good penal policy. In the special case of the enforcement of prior restraints on the exercise of the fundamental democratic freedoms of peaceful assembly, procession and demonstration, there are additional factors to be considered. A rights based approach to these freedoms would require the subordination of even the usual deterrence functions of the criminal law to the very real need to avoid unduly chilling or intimidating laws. It is an insufficient answer to say that people wishing to exercise these rights have nothing to fear since all they need do is give notice of their intentions (effectively seek permission) which permission will not be unreasonably withheld. If they have a right to assemble and process and demonstrate, why should they need to seek permission at all? And if they do need to seek permission surely this can only be justified upon the basis of administrative convenience in balancing this right of assembly with the rights of passage and perhaps freedom from noise of others. Breach of such notice requirements might, perhaps, properly be made a minor regulatory offence. Certainly it could be taken as a ground for denying special immunities (legal or practical) as to offences or torts relating to obstruction of traffic or even incidental property damage.

26. **But if the people of Hong Kong have a right of peaceful assembly, procession and demonstration, respect for that right demands that its exercise should not be made a crime punishable by 5years or 3years or even 12 months imprisonment, solely on the ground that notice requirements, themselves only justified on the grounds of administrative convenience, or subsequent orders or conditions, have not been complied with.**

27. This is a position which requires no sacrifice from the public in terms of their perfectly reasonable desire for social stability and public order. The repeal of the unauthorized assembly offences, or the drastic reduction of existing penalties for those offences, would not mean that the police would be powerless to prevent obstructions to traffic or intolerable inconvenience to other road or park users or occupiers of nearby businesses or residences. The truth is that quite apart from these unauthorized assembly offences, the police would still have a more than adequate arsenal of offences to protect public order, private persons and property.

28. Public order in Hong Kong would not collapse if the unauthorized assembly offences were removed from the statute books or reduced to the level of administrative offences. On the contrary. With the removal of such an obvious target for those at home and abroad who see themselves as defenders of democracy in the HKSAR, domestic stability might actually be promoted. The Hong Kong police would then be free to establish good working relationships with would-be peaceful demonstrators here, similar to those reportedly developed by the police in London in recent years. Co-operation between police and protesters is likely to be a far better protection against public order disturbances than section 17A style offences could ever be. But establishing such co-operation requires mutual trust. Sudden unexplained uses of legislation like section 17A,

or even the possibility of such use is likely to be a serious impediment.

29. If participants in **peaceful** assemblies, processions and demonstrations in the HKSAR could come to be viewed by residents, administrators and law enforcement personel alike, simply as ordinary residents of the HKSAR acting in public mode, rather than as nuisances, radicals or troublemakers, I venture to think that the inappropriateness and potential harm of section 17A style offences in a democratic society would become obvious.

30. Finally, it might be useful to look very briefly at appraoches taken to this problem in the public order provisions of two other large cities with which Hong Kong is sometimes compared.

31. **New York**: section 10-110 of the New York City Administrative Code establishes a permit system for processions, parades and races to be held in the streets or public places of New York city. Thirty-six hours written notice is required. Paragraph c provides that every person "participating in any procession, parade or race, for which permit has not been issued when required by this section, shall be liable for a civil penalty in an amount not exceeding twenty-five dollars ($25) for each violation, which may be recovered in a proceeding before the environmental control board." (Emphasis added)

Section 10-110 is currently facing constitutional challenge in the US federal courts for reasons unrelated to the magnitude of the penalty involved.

32. **London**: processions and assemblies are generally controlled by national rather than city level legislation in England. Pursuant to section 11 of the Public Order Act 1986 written notice six clear days in advance must be given of many public processions in England and Wales. Organising a procession in violation of such notice requirements and knowingly deviating from the dates, time or routes indicated in the notice are summary criminal offences but are only punishable by fines not exceeding level 3 on the standard scale. Organising a public procession and knowingly failing to comply with conditions imposed on that procession by a senior police officer is also a criminal offence, punishable by imprisonment not exceeding four months and a level 4 fine. For knowing participants, a level 3 fine is the maximum. Similar penalties apply to violations of orders prohibiting public processions or assemblies.

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