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Written Submissions to LegCo Panel on Security on the Public Order Ordinance

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Introduction

1. The existing provisions in Part III of the Public Order Ordinance ("the POO") regulating public meetings and public processions have attracted much public debate. As I see it, **the key question that one has to decide at this stage is whether there are sufficient justifications to call for a more comprehensive review of the relevant provisions of the POO.** Whether and how the POO should be amended should be left to a second stage after detailed and comprehensive research has been done and informed views of the public and professional bodies have been sought.

2. **My firm view is that there are good and compelling justifications for such a comprehensive review to be carried out.** I shall explain my view below.

Danger to Follow the "Majority" View

3. The Secretary for Security has recently mentioned that the majority of Hong Kong people support the retention of the existing provisions of the POO. It is not clear whether there is any objective evidence to justify such a view. But more importantly, one must bear in mind the danger of following the "majority" view in deciding whether certain statutory restrictions on the freedom of assembly should exist. Freedom of assembly is not a freedom that can be enjoyed only with the consent or indulgence of the majority. Indeed, very often freedom of assembly is to be exercised by people holding views which may offend the majority or the Government.

4. Indeed freedom of assembly has a close association with freedom of expression, in that it protects the freedom to propagate opinions publicly, thereby fostering public debate, the search for truth and participation in the democracy. In practice, most public protests involve an intertwining of speech and conduct, whether shown through the medium of pure speech accompanied by conduct (shouting, waving banners) or through conduct amounting to symbolic speech (wearing uniforms or conducting a silent march).

Correct Approach to be Adopted

5. At the outset, it seems that Government has approached the issue from a wrong perspective. The motion recently tabled by Government for endorsement in the Legislative Council reads: *"that this Council considers that the Public Order Ordinance's existing provisions relating to the regulation of public meetings and public processions reflect a proper balance between protecting the individual's right to freedom of expression and right of peaceful assembly, and the broader interests of the community at large, and that there is a need to preserve these provisions"*.

6. It is wrong to approach the issue by asking an abstract question whether the law reflects a proper balance between protecting the right of peaceful assembly and the *"broader interests of the community at large"* as if the two conflict with each other. In ***Sunday Times v United Kingdom*** (1979-80) 2 EHHR 245, the European Court of Human Rights rejected an approach by the English House of Lords which had attempted to balance conflicting interests. The European Court stressed that: *"The Court is not faced with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted"* (at para 65)

7. The freedom of assembly is guaranteed by Article 27[1] of the Basic Law. The freedom is also enshrined in Article 21[2] of the ICCPR. As held by the Court of Final Appeal[3], the ICCPR is incorporated into the Basic Law by its Article 39.

8. The ICCPR places primary importance on the recognition of the basic rights and freedoms of individuals and seeks to define and limit the scope of restrictions that may be imposed by the State on such rights and freedoms. In this connection, the ICCPR focuses not so much on the permitted grounds of restrictions (which have to be set out in general terms given the differing circumstances of each State), **but on the means and manner by which rights and freedoms are to be restricted and the necessity of such restrictions**.

9. The ICCPR will be complied with only if, apart from being within the permitted grounds, the restrictions are:-

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[1] Article 27 reads: "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."

[2] Article 21 reads: "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 national 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."

[3] See HKSAR v Ng Kung Siu (1999) 2 HKCFAR 442

(1) Necessary in a democratic society and to be oriented along the basic democratic values of pluralism, tolerance, broad-mindedness and people's sovereignty);

(2) Proportionate to the aims sought to be achieved thereby (in the sense that the restriction on or impairment of the rights and freedoms must be kept to a minimal extent necessary to achieve the aims);

(3) Rationally linked to the objective sought to be achieved by the prohibitive power;

(4) Prescribed or provided by law which requires not only the existence of a legal basis for the restrictions but also that the restrictions be set out with sufficient precision or clarity to enable the citizen --*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*; and

(5) NOT to be designed in such a way as to derogate from the general substance of, or completely suppress, the right in question.

AND the onus is on the government to show, with cogent and persuasive evidence on the preponderance of probability, that the restrictions are justified in all the abovementioned respects.

10. Hence the approach that should be adopted is to avoid asking the abstract question as to whether the existing provisions in the *POO "reflect a proper balance between protecting the individual's right to freedom of expression and right of peaceful assembly, and the broader interests of the community at large"*, as proposed by Government. **The correct approach is to examine carefully each and every restriction on freedom of assembly as stipulated in the POO to see whether there is sufficient evidence to demonstrate that the restriction is not only necessary (instead of being desirable or convenient) to protect a recognised interest but is also kept to the minimal extent necessary to achieve the recognised aim.**

11. Accordingly, one needs to:

(1) First, identify the recognised aim(s) of each and every restriction in the POO and see whether the aim(s) fall within any of the permitted grounds of restriction under the ICCPR;

(2) Second, consider whether the means and manner of the restriction imposed are rationally linked to the aims sought to be achieved by the prohibitive power;

(3) Third, consider whether the restriction is kept to the minimal extent necessary to achieve the recognised aim(s).

Specific Issues Requiring Comprehensive Review

A Aims of Prior Notification

12. Hence, the issue is not simply whether mandatory prior notification to the police is necessary. Insofar as the writer is aware, Government has not made clear what the exact aim(s) of such a requirement are, though it has kept on saying that this requirement is necessary for balancing the interests. It is necessary to first ask Government to identify clearly the specific aim(s) it intends to achieve so that an informed analysis can be made regarding the necessity of the specific method(s) employed to achieve the aim(s).

13. Subject to further input from Government, it appears that the perceived aims of such a requirement are that the police should be given sufficient advanced notice so that they can better allocate the resources necessary to control the traffic flow and to co-ordinate different groups of protesters (just in case more than one group intend to assemble at the same place at the same time). Another possible aim is to enable the police to have sufficient time to decide whether to object to such an assembly taking place or to impose certain conditions.

14. As regards the perceived aims, the writer accepts that there may be permissible aims justifying a need for prior notification, though one must bear in mind that mere administrative convenience is not an aim falling within any of the permitted grounds of restriction under the ICCPR. However the key issue is not the justiciability of prior notification as such but the necessity of the consequences stipulated in the POO for failure to abide by the notification requirement.

B Consequences of Failure to Notify

15. Under the POO, the mere failure to abide by the notification requirement will have the following consequences:

(1) The public procession or meeting, even if peacefully conducted, shall automatically be treated as an "unauthorised assembly"[4] (see s 17A(2)(a))

[4] If the assembly is not peaceful, there are other provisions in the POO to penalise the organisers or the participants (whether or not notification has been given).

(2) Any organisers or knowing participants shall be guilty of a criminal offence liable to a maximum imprisonment for 5 years (see s 17A(3))

(3) Any police officer may, without further reason, stop or disperse any such unauthorised assembly, even if it is conducted peacefully[5] (see s 17(1))

(4) Any person who in any manner advertises or publicizes any unauthorised assembly shall be guilty of a criminal offence liable to a maximum imprisonment for 12 months[6] (see s 17A(1))

16. The above-stated far-reaching consequences for failure to notify can hardly be compatible with the notion of freedom of peaceful assembly. **One should ask whether all these dire consequences are proportionate to the recognised aim(s) sought to be achieved.** In particular, the instrumental value of notification appears to be dubious, for the police in practice would have learnt about the details of such public assemblies through other channels such as their own intelligence network or from the media. **The legislature should perhaps require Government to produce evidence and data from the police as to the information they had obtained in advance of the over 400 unauthorised assemblies since the handover and the exact problems, if any, experienced by the police as a result of the failure to give formal notification.**

17. Moreover, one should also ask why a person's right to join a peaceful assembly be taken away simply because the organisers do not comply with the notification requirement. As the law requires only the organisers to give advanced notification, fairness dictates that the sanction for non-compliance be directed against such organisers alone, but not the participants. This is the approach adopted in England under the Public Order Act 1986.

18. Furthermore, it is highly questionable whether rendering the organisers (and participants) guilty of a criminal offence subject to a heavy penalty is proportionate to the recognised aim(s) sought to be achieved. In England, non-compliance with such a notification requirement is only treated as a minor regulatory offence (similar to illegal parking or jay-walking),

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[5] One may note that under s 17(2), there is already a power for the police officer of or above the rank of inspector to stop or disperse any assembly (whether notified or not) if he reasonably believes that the same is likely to cause or lead to a breach of the peace. One may actually question whether the stipulated threshold is too low and confers the police with too wide a power.

[6] One may note that even if notification is made, it is still an offence to advertise or publicise any such assembly unless and until after 24 hours of such notification. One may query the necessity of such a requirement given that the vast majority of notified assembly were not objected to by the police since the last 3 years (according to the police, the police only objected to 5 out of over 6,000 assemblies since the handover).

rendering the organisers liable to a modest fine. In a number of States in Australia, failure to notify is not an offence at all but would disentitle the organisers/participants to enjoy any immunity that would otherwise be granted for a notified assembly.

C Rigid Manner of Notification

19. Another issue is the required manner of notification.

20. Under the POO, notification must be given in writing and handed in person to the police officer in charge of a police station (see s 8 and s 13A). Whilst there is a discretion for the police to accept less than 7 days' advance notice, **there is no discretion for the police to dispense with the written notice requirement**. Hence, in effect no "spontaneous" demonstrations can be legally carried out under the POO since in practice the organisers would not reasonably be expected to have the time to fill out the form in writing and hand it to the police at a police station.

21. By way of comparison, under the English Public Order Act 1986, the notice requirement under s 11 does NOT apply at all if it was not reasonably practical to give any advance notice.

D Size of Assembly

22. A further issue is the size of assembly which should trigger off the notification requirement.

23. Under the POO, the prescribed number of participant is 30 for public procession and 50 for public meeting. Whether it is necessary to fix it so low is highly questionable. In particular, in Hong Kong a procession or meeting of less than 100 persons can hardly cause any traffic or other problems (indeed it is hardly noticeable by the public). Even when a bus stops during rush hours, there will be tens of people rushing to the street. Given that the police have had vast experience in handling thousands of public assemblies since the handover, I therefore suggest that concrete information should first be sought from the police in this connection before deciding the appropriate size of assembly which should trigger off the notification requirement.

E Power of Objection: Police or Court?

24. One should also consider whether the power of objection should be rested with the police. As stated at paragraph 7.22 of the Report of the Electoral and Administrative Review Commission of Queensland (Report on Review of Public Assembly Law, Feb. 1991), *"the principle to be followed in the*

objection process should be the one where the onus is on those who object to a proposal for an assembly to bring a case before the court, rather than those who are wishing to claim the right of assembly. It would be inconsistent with the right of peaceful assembly to require those who wish to exercise the right to justify it. Rather the burden of justifying the restriction should be on those who wish to restrict the right." Accordingly, the Commission recommends that in general the power to object to the holding of an assembly for a justifiable cause be vested in the Court instead of the police.

25. Under our system, it is not uncommon to require the police to apply to the Court for an order which may have the effect of affecting a person's rights or liberty (eg obtaining search warrant or other restraining orders). The police in practice would have no difficulty in gathering sufficient information and making an urgent application before the court at short notice.

26. Indeed as noted at paragraph 7.33 of the Queensland Report, since the New South Wales has shifted the objection power from the police to the court in 1979, its *"police force has not experienced any major difficulties, but rather an environment of co-operation between police and organisers of assemblies has developed"*.

F Necessity of "Notice of No Objection"

27. Another issue is the need for the "Notice of No Objection" from the police in relation to public procession. Under the POO, a "Notice of No Objection" is required only for public procession but not public meeting. One therefore needs to ask why it is necessary to draw such a distinction, in particular past experience shows that the police had no objection to the vast majority of the over 6,000 public processions and meetings held since the handover.

28. In any event, the introduction of the requirement of a "Notice of No Objection" does not serve to help in any rational manner the better discharge of the perceived objective as the police are still given the same time and information to assess the implications of the event.

29. On the other hand, **the requirement to issue a "Notice of No Objection" will convey a message that holding a public procession is only a privilege to be granted by the police by issuing a "Notice of No Objection" but NOT a right generally exercisable by the citizen (subject to some narrow restrictions) as conferred by the Basic Law and the ICCPR.**

30. For example, Article 17 of the Basic Law provides that laws enacted by the legislature of the HKSAR *"must be reported to the Standing Committee of the NPC for the record"* but that the Standing Committee may invalidate the law by returning it if it considers that the law is not in conformity with the provisions of the Basic Law regarding affairs within the responsibility of the Central Authorities etc. Just imagine what one may feel about the high legislative autonomy of the HKSAR if this reporting system for newly enacted law is changed to one where the Standing Committee must in every case issue a "Certificate of No Objection" even though the permitted ground for objection still remains the same (ie contravention of certain provisions of the Basic Law).

G Vague Grounds of Objections

31. One may also wish to review the stipulated grounds of objection under the POO.

32. At present, the Commissioner of Police may prohibit the holding of a public assembly if he "reasonably considers such prohibition to be necessary in the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others." Whilst these are all permitted grounds of restriction under the ICCPR, it is too vague and general to give concrete guidance as to when and how the freedom of assembly may be restricted in practice.

33. In particular, to empower the Commissioner of Police to prohibit the procession ***"if he reasonably considers"*** the same is not in the interests of the permitted grounds set out in the ICCPR is to shift the burden of showing the necessity for the restrictions by cogent and objective evidence to that of a ***"reasonable belief"*** of a public official and to ask a public official to do that which Article 21 of the ICCPR requires the legislature to do by clearly defined law.

34. One should therefore consider adopting some more specific formula as in the case of, say, England where the requirement is a reasonable belief that *"serious public disorder, serious damage to property or serious disruption to the life of the community"* may be caused by the procession.

H National Security

35. Moreover, the reference to the "national security" ground appears to be unnecessary since it can hardly imagined how a peaceful public procession or meeting may endanger national security. In particular, the definition of "national security" under s 2 as "*the safeguarding of the territorial integrity and the independence of the People's Republic of China* is vague and falls

far short of the requirement under the ICCPR and international human rights law.

36. Whilst there is no concluded interpretation of the term *"national security"* under the ICCPR, the famous *Siracusa Principles* (which represent consensus of influential international jurists) show that "*national security*" should be confined to those situations where *"the existence of a nation or its territorial integrity or political independence is endangered by force or threat of force"*. Even if we adopt the so-called wider definition contained in a *Special Rapporteur's Study* as referred to by the Government when introducing the legislation in 1997, the activity concerned must still *"endanger or threaten the existence of the State"* (N.B. It is hard to imagine how this could possibly happen without the use of force or threat of force so that the two definitions are in our view indeed similar). The reference to mere *"safeguarding"* is clearly too vague and not sufficient and may be open to abuse.

37. Hence, without prejudice to my primary position that the additional ground of restrictions based on *"national security"* is unnecessary, I believe at the very least the proposed definition clause must be amended along the lines of the *Siracusa Principles* or the *Special Rapporteur's Study to read: "the reference to 'national security' in this Ordinance shall be confined to situations where the existence of the People's Republic of China or its territorial integrity or political independence is endangered [by force or threat of force]."*

Non-Enforcement/Selective Enforcement of the POO

38. Experience since the handover also demonstrates the need to carry out a comprehensive review of the POO. It is a fact that many protesters have chosen to deliberately flout the existing law and it is a fact that the Government has chosen not to strictly enforce the law. This is contrary to the Rule of Law.

39. In particular, recently Government has decided to arrest some protesters of 2 (out of over 400) unauthorised assemblies (though it has subsequently decided not to prosecute). No reason has however been given as to why Government has targeted some protesters in the first place and why it has subsequently changed its mind and decided not to prosecute (apart from the vague and general reference that the Secretary for Justice has taken into account the evidence and all relevant factors). This raises the issue of selective enforcement of the law.

40. At the same time, Government still maintains that it may consider prosecuting other people for engaging in similar activities (i.e. organising or

participating in an unauthorised assembly) in future. But Government refuses to explain clearly under what specific circumstances it would decide to prosecute a person organising or participating in an unauthorised assembly (though there is some general reference that Government would consider whether a breach of the peace or public order has resulted). It is an important aspect of the Rule of Law that the law or its enforcement is predictable so that people know how to regulate their conduct.

41. Indeed if existence of the breach of the peace is the yardstick in deciding whether to prosecute organisers/participants of an unauthorised assembly, it would mean that it is not necessary to have the existing s 17A. It is because if the activities result in a breach of the peace, there are other provisions in the POO criminalizing the participants, whether or not notification of the assembly has been duly given. **It would not provide adequate protection for the fundamental right of peaceful assembly if one is to rely upon police discretion not to prosecute the demonstrators.**

Lack of In-Depth Study By Government

42. It appears that so far Government has not carried out any in-depth study of the issues highlighted above and of the experiences in other democratic countries.

43. In particular, it seems apparent that the information previously gathered by the Secretary for Security and made public on 24 October 2000 is scratchy and outdated. The source of the information stated therein is normally from a lawyer or an official of that particular country, but there is no reference to the exact piece of legislation concerned (so that one cannot possibly check the details of the legislative requirements). Moreover there is no study as to whether any of the stated legislative requirements have been judicially challenged and affirmed.

44. For example, there is a reference in that document of 24 October 2000 that "according to a US lawyer, the City Hall Access Law limits demonstrations on the actual steps of New York city's main government buildings to 150 people for a maximum three hour period". The Administration however does not state that that particular piece of New York legislation was struck down by the US Court in April 2000 as being unconstitutional for infringing the US First Amendment (see *Housing Works, Inc v Safir, Commissioner of the New York City Police Department and others* 98 Civ. 4994; 6 April 2000).

The Way Forward

45. For the reasons stated above, **I firmly believe that there are good and compelling justifications for a comprehensive review of Part III of the POO to be carried out.** Given that the review requires an in-depth study of the relevant laws and practices (both in Hong Kong and in other overseas jurisdiction) and the gathering of informed views from the community and various bodies concerned, **I believe the Law Reform Commission is the appropriate body to carry out such a review.**

46. Pending a comprehensive and in-depth review of the existing law by the Law Reform Commission (or other appropriate body), I think **it is premature for the legislature to debate on the Government's motion and/or to decide whether to retain the relevant provisions of the POO by a majority vote.** The right to peaceful assembly is such a fundamental right that one should not seek to curtail without a full and comprehensive study.

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2000 年 11 月 11 日　星期六　論壇

張達明：六大質疑 請葉劉淑儀回答
——就公安法向保安局挑戰

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政府一再強調毋須檢討現行《公安條例》，並將動議要求立法會確認有關條文有需要保留。筆者過往因以律師身分代表被捕學生，故在調查期間不就事件公開評論，現律政司已表示不會檢控，筆者對現行《公安條例》的不合理及不完善之處實有不吐不快之感，故特提出以下六項質疑，望能引發更多理性討論。

筆者大膽向保安局作出挑戰，若其堅持現行《公安條例》毋須作出檢討，可否就筆者以上六大質疑一一作出直接回應？

集會與公眾利益不對立

一、　政府在動議中提出《公安條例》在保護言論及集會自由及保障社會大眾利益之間取得適當平衡。並以此引伸出有需要保留有關條文的結論。明顯地，上述思維違反了《公民權利和政治權利國際公約》就保護和平集會權利的有關規定及

原則。首先要清楚明白，和平集會權利和社會大眾利益絕不是相互對立，故在觀念上是不應在兩者間尋求適當的平衡。反之，公約的原則是去確立市民享有和平集會自由乃社會大眾利益的重要部分。故公約規定任何限制和平集會權利的法律，必須能被證明有其必要性，否則會被視爲無效。

簡而言之，問題不在於抽象地尋求集會權利和大眾利益之間所謂「適當」的平衡點，而在於有關限制集會權利的法律條文是否有必要存在。

依靠酌情權保障不足

二、　據政府透露，自九七年臨立會通過有關條例以來，有超過四百次未經批准的遊行集會，但當局從未根據公安法有關條文提出檢控。既然如此，爲何政府仍堅稱有關法例有必要存在及毋須作出檢討？正如澳洲昆士蘭省就檢討該地集會權利法律的檢討委員會在九一年二月發表的報告書指出：「依靠警方行使酌情權於檢控示威者並不能爲（和平集會）這基本權利提供足夠保障。」（報告書第三、一百一十六段）。該地在九二年根據報告書建議，制訂「和平集會法」，刪除過往向警方事先申請遊行集會牌照的規定，明文確認和平集會的權利，並將過往由警方決定是否批准集會的權力，改爲要求警方向法庭申請，讓法庭審視警方所提理據是否充分獨立及持平地決定是否有足夠理由阻止該集會進行。報告書長達一百三十八頁，並羅列了過百篇有關的法律文獻，甚具參考價值。爲何政府當局不肯將有關課題提交法

律改革委員會，進行深入研究及作廣泛諮詢，然後才就《公安條例》應否修訂作出結論？

外國罰款香港入獄？

三、　保安局日前片面地引述其他國家就公眾集會及遊行是否需要事先通知或申請，以支持保留本港的《公安條例》，實有誤導之嫌。舉例說，英國八六年公安法雖有規定舉辦公眾遊行須六日前知會警方，但即使沒有任何合理原因而違反這規定，參與遊行者亦無須負上任何刑事責任，而對主辦者的最高刑罰也只是罰款而已。本港的《公安條例》卻規定參與或組織未經批准集會的人士均須負上刑事責任，最高刑罰爲入獄五年。保安局卻從未有解釋爲何《公安條例》要嚴懲參與未經批准集會的人士。要知道公約另一規定，就是任何限制集會權利的法律，除要有必要存在外，亦要與所保障的認可利益成正比。政府一再強調，要求示威者事先通知警方，主要目的是讓警方就交通及其他措施可作有效安排，及方便調配人手及作其他協調動作。若是如此，對違反這事先通知的規定的人定下這麼重的最高罰則，又是否合理？

不接受口頭通知？

四、　《公安條例》硬性規定有關遊行集會的通知必須以書面提出，並要到警署交付主管的警員。條例並無賦予警方任何酌情權去接受口頭或其他方式的通知（如電郵、傳真或郵遞），試問政府又是否堅持有關條文毋須修訂？特別是遇上一些突發事件（如北約炸中國使館）而

引發的遊行示威，主辦者根本就沒可能滿足法例所訂的要求作出書面通知。政府或許會說在這些特殊情況下當局會行使酌情權不提出檢控，但在法治社會，我們絕不能滿足於政府不檢控的承諾，解決辦法在於修訂有關法律條文，使之變得合理。

傳媒刊登消息亦違法？

五、 《公安條例》亦規定，若未作出法定通知或作出通知後未滿二十四小時，任何人以任何方式宣傳或公布有關集會遊行，即屬違法，最高刑罰爲監禁一年。試問政府又是否堅持這條文有必要保留呢？事實上，當各傳媒刊登有關未作通知的集會的消息時，技術上已觸犯有關法例。即使就主辦者而言，這規定是否有存在必要亦有商榷之處。實際上，若主辦者事前不先作宣傳或公布，往往很難準確預計參與的人數，故亦無法給予警方有關參與人數的準確資料。這「先通知，後宣傳」的規定，反過來可能會導致警方虛耗警力。

要上訴的是警方非示威者

六、 《公安條例》賦予警方否決遊行集會的權力，雖然若不服警方的決定，理論上可以提出上訴，由一獨立委員會作最後決定。但實際上在收到警方否決通知至集會原定日期往往只有很短時間，根本就不可能讓上訴委員會有足夠時間安排聆訊及作出決定。這上訴機制在實際上往往形同虛設。再者，正如昆士蘭報告書指出，讓警方先否決後容許主辦者上訴的安排，違反了一個重要原則，就是行使和平集會權利

的人是不應被迫透過上訴機制去提出理據支持爲何可以行使這權利，責任應在於反對者去說服法庭（或獨立委員會）爲何要否決該集會。報告書亦引述新南威爾斯省自七九年修改法例要求警方須向法庭申請否決集會遊行後，該地警方「並沒有遇到任何重大困難，反而警方與集會主辦者的合作氣氛得以發展。」試問本港爲何不應參考這些外國經驗，檢討《公安條例》有關規定，以改善警方與示威者的合作關係？

最後，筆者大膽向保安局作出挑戰，若其堅持現行《公安條例》毋須作出檢討，可否就筆者以上六大質疑一一作出直接回應？

明報新聞網 Mingpao.com

2000 年 11 月 24 日　星期五　論壇

張達明：遊行早張揚 塞車非因不守法
回應特首及保安局長公安法言論

作者爲：香港大學法律學院助理教授

特首董建華日前談及大嶼山居民慢駛遊行，引致島上交通嚴重擠塞，由此證明公安法有關規定需要保留。這說法驟耳聽來似乎頗具說服力，但若細心分析，反而突顯出特首根本不清楚問題的核心，對公安法亦缺乏理解。

傳媒早已公布遊行消息

誠然，這次慢駛遊行未有根據公安法有關規定事先書面知會警方，但它所引致的交通擠塞，卻與此無關。事實上，警方事前已知悉這抗議行動的有關資料。在遊行前一天，政府已發出新聞稿，指出在翌日中午時分將會有慢駛抗議行動，「由嶼南經東涌道往東涌。屆時沿東涌道的交通或會受到影響，而巴士服務亦會因此而延誤或暫停。」傳媒亦事前報道有關消息。交通擠塞是因慢駛行動本身所引致，與參與者有否根據公安法事先書面知會警方完全無關。

事實上，這次慢駛遊行反而可以證明公安法中有些條文需要作出檢討及修訂。例如根據公安法第十七 A 條，任何人以任何方式宣傳或公布未經通知的集會遊行，即屬違法，最高刑罰爲監禁一年。條例並無引入任何豁免條文，因此各傳媒應政府要求，事前知會公眾該慢駛行動，技術上已觸犯法律。政府發出新聞稿，本亦屬違法，幸好公安法對政府沒有約束力。但事件卻帶出一些基本問題：爲何有關法例「只許州官放火，不許百姓點燈」？爲何公布未經通知的集會遊行，要負上刑事責任？

此外，公安法第十四條規定，警務處處長如合理地認爲，爲維護國家或公共安全或公共秩序等原因而有需要反對舉行某公眾遊行，可禁止該遊行。第十七條更進一步授權任何警務人員毋須任何理由便可阻止舉行未經通知的集會遊行。因此，若特首認爲這次慢駛遊行所造成的交通問題是不合理及無法容忍的話，理論上他應該譴責警務處處長或有關警務人員不引用有關法律履行職務，阻止該慢駛遊行進行。

政府若反對交法庭裁決

當然筆者真正的意思，並非想將責任歸咎警方，而是想指出現行條文將反對集會遊行的權力賦予警方，反令警方處於兩難之間，影響有效執行法律。試想這次慢駛行動矛頭直指政府，參與者民怨沸騰，若警方以嚴重影響交通爲理由去禁止該遊行，必被指摘背後有政治動機，企圖壓抑反政府行動。

既然如此，何不考慮澳洲的做法，

將反對遊行集會的權力交由法庭或一個獨立委員會行使，若警方真的認爲基於交通或其他合理原因有需要阻止某遊行，便可無畏無懼地向該獨立機構提出反對，讓其作出獨立持平的決定，各方均須尊重。正如新南威爾斯省自七九年條例將否決權由警方移交法庭後的經驗顯示，此舉反而令「警方與集會主辦者的合作氣氛得以發展。」

特首未弄清問題核心

保安局局長日前聲稱大多數市民都支持保留現行公安法，認爲需要多一點規管的制度也是合情合理。筆者無法印證這是否大多數人的意見。但若特首及有關主要官員亦未能弄清公安法問題的核心，又怎能期望所謂「大多數市民」的意見是基於對法例充分了解後理性及客觀地作出？

更重要的，就是要明白行使言論及集會自由等基本權利，往往是與社會大眾的看法相違背。因此決定公安法是否需要修改，不能單以「少數服從多數」的原則去考慮，而是需要根據有關國際公約的規定，詳細審視每一項限制集會自由的法律條文就香港社會而言是否必須存在，限制的具體措施又是否與所保障的認可利益成正比。

或許在保安局局長眼中，要求修訂公安法的意見是過分偏激，但在法律角度來說，單以所謂「大多數市民」的意見去支持限制和平集會遊行這基本權利，確實是「偏激」的說法。

最後，筆者希望無論支持或反對修

訂公安法的人士都應放下成見，弄清實際問題所在，才下定論。筆者反對立法會在現階段表態支持或反對政府提出的有關議案，因爲目前就公安法發表的意見雖多，卻未有就有關課題作出深入及全面的研究及分析。筆者謹建議政府先撤回議案，將有關課題交由法律改革委員會作出獨立、客觀及深入的研究，並作廣泛諮詢，然後才就公安法應否修訂作出結論。

明報新聞網 Mingpao.com

2000 年 12 月 7 日　星期四　論壇

張達明：《公安條例》完美無瑕？

作者爲：香港大學法律學院助理教授

筆者喜見保安局局長上周四於本版撰文，回應筆者於上月十一日在本報發表文章，就《公安條例》提出的六點質疑。這是負責任的表現，亦開啓了政府與民間理性討論公安法的渠道。筆者相信真理會愈辯愈明，亦希望政府與各界都能抱着理性開放的態度處理有關的爭議。

筆者細閱局長文章，發覺當中未有正面回應筆者提出的不少問題及論據，亦沒有處理爭議問題的核心。爭議問題不在於集會遊行是否需要受到一些規管，亦不在於要求主辦者事先通知警方是否合理合法，而在於現行條例每一項限制集會自由的條文就香港社會而言是否必須存在，限制的具體措施又是否與所保障的認可利益成正比。

爲使政府及公眾更清楚掌握問題的核心，筆者謹就局長文章提出一系列問題，望局長能正面地逐一回應。

集會與公眾利益

局長一再強調公眾集會遊行會對大

眾造成不便，故要「平衡」集會與公眾利益。

問一：局長是否同意市民享有和平集會自由乃社會大眾利益的重要部分？

問二：集會遊行實際上確會對大眾造成不便，是否表示政府有權抽象地「平衡」利益，限制集會自由？

局長舉例指出，有些遊行多達數千或數百人，若主辦者毋須遵守規定，便容易造成混亂，但現行法例規定只有三十人或以上的遊行均要事先通知警方及得到「不反對通知書」，否則不能合法地舉行。以香港而言，教師帶一班小學生出外也有四十人，巴士停站也即時有數十人下車湧到街上。

問三：局長有否諮詢警方，三數十人的遊行，在香港是否「容易造成混亂」，必須事先書面通知警方，警方才有能力有效管理人流？局長又是否願意多蒐集數據資料，檢討這不合理的人數上限呢？

酌情權

局長指出如果未經依法通知的集會遊行牽涉破壞社會安寧，警方會跟進調查，考慮檢控。但《公安修例》第十八條已規定無論集會事前有否依法通知，若破壞社會安寧，便屬違法。

問四：若集會牽涉「破壞社會安寧」警方才會考慮檢控，爲什麼不引用第十八條？現行條例第十七條甲規定組織或參與未經通知的集會遊行，即使和平地進行，也屬違

法。

問五：若集會和平地進行，警方便不考慮檢控，爲何仍要堅持保留這條文？

罰則

局長指出監禁五年只是最高刑罰。

問六：未依法通知警方有關集會，充其量只會造成警方不便，影響有效維持秩序，是否有需要將最高刑罰定爲五年監禁？

英國有關法例訂明，違反通知規定，只是主辦者需要負責，參與者無罪。

外國資料

問七：爲何主辦者不依法通知，參與者便無權進行和平集會，更要負上刑責，最高可被判監五年？

局長指出早前發布的資料只是簡介，有其局限性。

問八：政府有否就此進行詳盡研究？若有的話，可否將詳盡資料公開？若沒有的話，又是否願意將有關課題交由法改會作出獨立、客觀及深入的研究，並作廣泛諮詢，才下定論呢？

通知及宣傳

局長指出突發的集會遊行，警方可接受少於七日的通知。但卻沒有正面回應爲何法例不容許警方酌情接受口頭或其他方式的通知。

問九：以北約炸中國使館爲例，若集會遊行於事件發生後即晚舉行，

局長是否仍堅持主辦者必須根據法例，將書面通知直接交到警署，並在遞交通知二十四小時內不得以任何方式宣傳或公布集會遊行？

問十：若答案是「否定」的，局長又是否願意考慮參照英國做法，在法例上訂明若主辦者有合理原因無法作出有關通知，便可合法地豁免通知。

問十一：局長是否仍堅持，只要警方運用酌情權不加檢控，便可就和平集會這基本權利提供足夠的保障呢？

上訴機制

局長堅持現行讓警方先否決，後由主辦者上訴的機制運作良好，毋須改變。筆者謹說出一個親身經驗，以資參考。記得去年六月三十日法律界就人大釋法舉行了一個沉默大遊行，當時筆者以主辦者身分按照規定向警方作出書面通知，在遊行前約四、五日收到有條件的「不反對通知書」，當中規定主辦者「必須確保遊行人數不得超過六百人」，遊行亦「不可對行人或交通造成阻礙」。筆者即時回信表示不能接受有關條件，因爲遊行必會造成某程度的阻礙，而筆者只會歡迎更多法律界同業參加遊行，不願承諾限制遊行人數。筆者信中表明，除非警方同意撤銷有關條件，否則筆者便考慮提出上訴。在遊行前一兩天，筆者接到負責警務督察來電，表示這些是「標準條件」，故不會撤銷，但言談間卻表示警方不會嚴格執行。基於時間短促及要安排遊行細節，當時筆者雖不滿有關

條件，亦無時間提出上訴。

問十二：局長是否堅持在上述事件上訴機制運作良好？

結問

最後，筆者想問：局長是否真的堅持現行公安法對集會遊行的每一項限制都要原封不動的保留？是否公安法真的完美無瑕，毋須檢討？爲什麼不願意將課題交由法改會進行全面而深入的研究，才作定論呢？