

**For information
1 November 2005**

Legislative Council Panel on Security

**The Court of Final Appeal's Judgment on
Leung Kwok Hung & Others v. HKSAR**

Purpose

The paper sets out the background to the case of *Leung Kwok Hung & Others v. HKSAR*, the effect of the judgment delivered by the Court of Final Appeal (CFA), and the way forward.

Background

2. In February 2002, more than 30 people gathered at Chater Garden and marched to the Police Headquarters in Wan Chai. At the peak of the procession, there were over 90 participants. There was a suspected breach of the requirement of the Public Order Ordinance (POO) (Cap. 245) regarding prior notification of a public procession comprising more than 30 persons. The Police gave warnings to the group for failing to notify the Police and invited them to so notify. They declined the invitation.

3. In May 2002, three men were charged under the POO: one for holding an unauthorized assembly and two for assisting in the holding of an unauthorized assembly. They were subsequently convicted (by the Chief Magistrate) in November 2002, and were each bound over in a sum of \$500 for three months.

4. The three men lodged an appeal in December 2002 on the grounds that the provisions in the POO requiring prior notification were unconstitutional. In November 2004, the Court of Appeal (C of A) dismissed the appeal. The three people then filed an appeal to the Court of Final Appeal (CFA).

5. The CFA handed down its judgment and dismissed the appeal on 8 July 2005. A summary of the judgment prepared by the Judiciary is at **Annex**.

The CFA Judgment

The Notification Scheme

6. In this case, the prosecution and appeal were chiefly centred on the notification scheme whereby it is a statutory requirement to notify the Commissioner of Police (CP) of a proposed public procession consisting of more than 30 persons on a public highway or thoroughfare or a public park, and that the CP has a statutory discretion to restrict the right of peaceful assembly by objecting to it or by imposing conditions (“the discretion to restrict”). In this regard, the CFA noted that the Government fully accepts that the right of peaceful assembly involves a positive duty on the part of the Government to take reasonable and appropriate measures to enable lawful assemblies and demonstrations to take place peacefully. The court affirmed that notification is required to enable the Police to fulfil this positive duty. The CFA therefore held that the statutory requirement for notification is constitutional and upheld the criteria fettering the CP’s discretion to restrict the right of peaceful assembly for the purpose of “public order” provided in sections 14(1), 14(5) and 15(2) of the POO. The CFA also noted that a legal requirement for notification is in fact widespread in jurisdictions around the world.

“Public Order (Ordre Public)”

7. One of the grounds of the appellants was that CP's statutory discretion to restrict the right of peaceful assembly by objecting to a notified public procession or by imposing conditions for the purpose of “public order (*ordre public*)” was too wide and uncertain to satisfy the requirements of constitutionality.

8. The CFA noted that “public order (*ordre public*)” is specified in the International Covenant on Civil and Political Rights (ICCPR) as a legitimate purpose for the restriction of the right of peaceful assembly. The CFA accepted the concept of “public order (*ordre public*)” as a constitutional norm. However, on the deployment of that concept at the statutory level, the Court was of the view that, while it is important for the CP 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 sections 14(1), 14(5) and 15(2) of the Ordinance does not give an adequate indication of the scope of that discretion. Hence, the CFA ruled that CP’s discretion to restrict the right of peaceful assembly for the purpose of “public order (*ordre public*)” does not satisfy the constitutional requirement of “prescribed by law” which mandates the principle of legal certainty. The

appropriate remedy was the severance of “public order” in the law and order sense from “public order (*ordre public*)” in the relevant statutory provisions. After severance, CP’s discretion to restrict the right in relation to “public order” in the law and order sense under the relevant provisions was held to be constitutional.

9. The CFA found that the offences for which the appellants were convicted did not relate to the statutory provisions conferring on CP the discretion to object or to impose conditions on a public procession where he considered it reasonably necessary in the interests of “public order (*ordre public*)”. Hence, the CFA by a majority of four to one (with Mr Justice Bokhary PJ dissenting) dismissed the appeal and upheld the convictions.

The Dissenting Judgment of Mr Justice Bokhary PJ

10. Mr Justice Bokhary PJ found that CP’s entitlement to prior notification of public meetings and processions to be constitutional. But, in his view, this entitlement should not be enforceable by the criminal sanctions in section 17A. He also found CP’s powers of prior restraint and the related criminal sanctions to be unconstitutional. Accordingly, in his view, the appeal should have been allowed.

11. Mr Justice Bokhary PJ’s view is a minority view and is *obiter dictum* and not *ratio decidendi*. In other words, a considerable part of his judgment covers matters not directly forming the rationale behind the court’s judgment. The dissenting judgment is not the opinion of the court and, in that light, not a decision in the case.

Effects of the Judgment and Way Forward

12. As can be seen from the above, the CFA has ruled that, after severance of “public order” from “public order (*ordre public*)”, the provisions of the POO that the CFA considered are constitutional. Therefore, the POO can and will continue to operate, subject to the CFA’s judgment, in order to achieve its objectives of assisting to provide for the freedom of procession and assembly, yet protecting public order and other public interests.

13. As regards the severance of “public order” from “public order (*ordre public*)”, it should be noted that the term “(*ordre public*)” has ceased to apply for all practical purposes in the context of the relevant sections following the handing down of the CFA’s judgment on 8 July 2005. In these sections, the term “public order (*ordre public*)” is now taken to mean “public order” in the

law and order sense. The Administration will take the necessary steps in due course to formally amend the relevant provisions in the POO.

Conclusion

14. The Administration respects the CFA's judgment, which has provided useful guidance to the Police on the handling of notifications of public meetings and processions. The relevant provisions of the POO reflect a proper balance between protecting and facilitating individuals' right to freedom of expression and right of peaceful assembly, and the broader interests of the community at large. We will continue to work to protect the fundamental rights of the people in Hong Kong as guaranteed by the Basic Law and the Hong Kong Bill of Rights Ordinance. The Police will also continue to deal with notifications of public meetings and processions in accordance with the law.

**Security Bureau
Hong Kong Police Force
Department of Justice
October 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.