

A TOOL OF LAWFARE: THE ABUSE OF HONG KONG'S PUBLIC ORDER ORDINANCE SINCE 2014

SUMMARY

On 22 May 2019, Ray Wong Toi-yeung and Alan Li publicly announced that they were granted refugee status by the government of Germany in May 2018.ⁱ Undoubtedly one of the key reasons that the German government made the bold step of granting political asylum to two young Hong Kongers is because of the punitive way that the Public Order Ordinance has been used to crackdown on, and imprison, protestors from across Hong Kong's political opposition. Mr Wong and Mr Li were facing trial under this law, and therefore could not be guaranteed a fair trial.

Hong Kong Watch will publish an in-depth report on this subject in the coming months. This briefing summarises one key argument: that the legislation has been a key tool in the Hong Kong government's campaign of "lawfare" against Hong Kong's political opposition.

Since the Umbrella Movement, more than 100 democracy activists and protestors have been prosecuted under the Public Order Ordinance, a law which has been repeatedly criticised by the United Nations Human Rights Committee for curtailing freedom of assembly.

Following pressure from the government to increase the 'deterrence effect' of the legislation in 2017, judges have interpreted offences in recent verdicts using the Public Order Ordinance following a simple approach: maximise the probability of conviction and minimise leniency. This not only further raises the costs of protest and has detrimental effects on civil liberties and political freedoms, it also sets a dangerous precedent for the rule of law.

RECOMMENDATIONS

To the Government of Hong Kong:

- immediately reform the Public Order Ordinance, in particular by tightening sentencing guidelines, to ensure that the legislation is less open to abuse.
- conduct a government inquiry into the Umbrella Movement in 2014 and the Mong Kok unrest in 2016 which holds the police to account for violence in order to de-escalate concerns that the Secretary of Justice has abused the law to punish opponents of the government.
- the Secretary of Justice, who is a political appointee, should no longer be in charge of prosecutions. In Britain, for example, prosecutions come under the Director of Public Prosecutions and the Crown Prosecution Service – the Secretary of Justice shapes the policy, not the prosecutions.

ABOUT THE PUBLIC ORDER ORDINANCE

The Public Order Ordinance (Cap. 245) is Hong Kong's major piece of public order legislation. Its short title states that it is "an ordinance to consolidate the law relating to the maintenance of public order, the control of organisations, meetings... unlawful assemblies and riots..."ⁱⁱ

THE PUBLIC ORDER ORDINANCE AND INTERNATIONAL HUMAN RIGHTS STANDARDS

In 1976, the United Kingdom Government ratified the ICCPR with certain reservations and extended the covenant to Hong Kong. The Sino-British Joint Declaration of 1984 then stated that the "the provisions of the ICCPR ... as applied to Hong Kong shall remain in force".ⁱⁱⁱ

The ICCPR was subsequently incorporated into the Basic Law. Article 39 of the Basic Law states that:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

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."^{iv}

In view of these commitments made in the Basic Law and the Joint Declaration, the Hong Kong government adopted the Hong Kong Bill of Rights Ordinance (Cap. 383) in June 1991.

The ICCPR recognises that there are legitimate restrictions of the right to freedom of assembly as it is not an 'absolute right' and states may need to place limits on freedom of expression and assembly for the sake of public order and national security.

In their published guidelines on the approach to the Public Order Ordinance, the Hong Kong Police Force (the 'Police') emphasise that the Public Order Ordinance is a necessary piece of legislation in order to safeguard public order and safety.^v The Police Guidelines, as well as those of the the Legislative Council, refer closely to the ICCPR and Article 17 of the Hong Kong Bills of Rights (BORO) which permits restrictions to be imposed on the right of peaceful assembly if these are "necessary in a 'democratic society'".^{vi}

However, the United Nations Human Rights Committee state that a State party “...may not put in jeopardy the right itself” by ensuring that the restrictions must “conform to the strict tests of necessity and proportionality...”^{vii} The Committee continues to state that “effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression” should be implemented by the State parties and any limitation imposed for the “muzzling of any advocacy of multi-party democracy, democratic tenets and human rights”^{viii} is not a justifiable ground for restrictions on the right.

Despite close references to international human rights standards within the legislation, the constitutionality and compliance of the Public Order Ordinance with these international standards has been a subject of fierce debate. The Public Order Ordinance has come under sustained criticism over decades for being draconian from United Nations bodies, human rights groups, local legislators and activists.

There are two reasons for this. Firstly, the vague terminology, and stringent notification requirements, in the legislation are onerous. In addition, the increasingly severe sentencing in the legislation is already having a chilling effect on protest and political participation, as the cost of protest has increased.

HOW HAS IT BEEN USED TO CLAMPDOWN ON POLITICAL OPPONENTS?

It was not until the year 2011 that the Government of Hong Kong started to regularly employ the Public Order Ordinance as a tool to crackdown on dissent. In 2011 alone, 45 protestors were charged under the legislation. Only a combined total of 39 protestors had been prosecuted under this law between 1997 and 2010.^{ix} At the annual demonstration on 1 July 2011, police arrested more than 200 protestors for participating in unauthorised assembly under the Public Order Ordinance.

This spike led to criticism of the legislation by the United Nations. The Human Rights Committee raised concerns in 2013 about “(a) the application in practice of certain terms contained in the Public Order Ordinance, inter alia, ‘disorder in public places’ or ‘unlawful assembly’, which may facilitate excessive restrictions to the covenant rights, (b) increasing numbers of arrests of and prosecutions against demonstrators; and (c) the use of camera and video-recording by police during demonstrations.”^x

The Umbrella Movement

However, the legislation remained unreformed, and the Umbrella Movement ended up being a watershed moment in its interpretation and use by the Hong Kong government. The police arrested a total of 955 people during the Umbrella Movement and another 48 people after the Movement

had ended for various offences. While many were immediately released after their arrest, 30 percent of those on trial were convicted for “assaulting officers”, “criminal damage”, “unlawful assembly” and other crimes.^{xixii}

These trials have led to the evolution of the Public Order Ordinance, with harsher sentencing guidelines than ever before being enforced as a “deterrent”, which has had a chilling effect on protestors and stands as a great threat to freedom of expression and assembly.

The trial and retrials of Joshua Wong, Nathan Law and Alex Chow for “unlawful assembly” at Civic Square represented a key turning point. The case drew worldwide attention, with human rights organisations criticising the government’s use of the Public Order Ordinance to muzzle pro-democracy voices.^{xiii} The trio were convicted in August 2016, with Joshua Wong and Nathan Law sentenced to 80 and 120 hours of community service respectively while Alex Chow was given a three-week jail sentence, with one year suspension.^{xiv}

However, the Hong Kong government were not satisfied with the severity of these sentences. The Department of Justice (DoJ) requested a review of the sentences, in which the magistrate ruled that the original sentencing and reasoning was sufficient. At the same time, the DoJ filed an appeal to the Court of Appeal for another review of the sentence to seek harsher sentences in order to create a deterrent effect.^{xv}

The Judge of the Court of Appeal ruled in August 2017 that the original sentences were not heavy enough to act as a deterrent of future similar incidents from happening. The Court added that the magistrate did not take into adequate consideration the level of “violence” the student leaders used to breach the barricades to enter the Civic Square. The Court imposed new sentences, jailing the three leaders for between 6 to 8 months.^{xvi} The new sentences would bar the activists from running for public office including the Legislative Council and District Councils for election for the next five years.^{xvii} The judgement was highly controversial for many reasons, including:

1. The fact that the Department of Justice, as part of the administration, had the right to pursue multiple retrials in high-profile case involving pro-democracy activists led to allegations that this was political prosecution and politically motivated.
2. The fact that the three student leaders had already completed the required hours of community service in their original sentence at the time of this decision, and therefore the resentencing breached the legal principle of double jeopardy.
3. Imprisonment as the starting point of sentencing would mean that the leaders would not be eligible to run for elections in the future; the timing of the judgement after Nathan Law had been elected was highly contentious.

All three filed for appeal on their jail sentences and in February 2018, the Court of Final Appeal quashed the sentences of imprisonment imposed by the Court of Appeal. At the same time, the Court of Final Appeal endorsed the stricter sentencing guidelines proposed by the Court of Appeal for future unlawful protests. These guidelines, although not applied retrospectively to the trio, meant that tougher punishments became the norm in Public Order Ordinance cases: with profound consequences for the exercise of the fundamental right of freedom of assembly.^{xviii}

The Mong Kok protests of February 2016

The consequences of the new guidelines were seen at the sentencing of the protestors in the Mong Kok unrest of February 2016.^{xix} The Hong Kong government condemned the individuals involved in the unrest in Mong Kok and called the incident “rioting”. Commentators criticised the use of the term before these cases went through the courts.^{xx} More than 90 people have been arrested following the incident. These defendants were charged under the Public Order Ordinance with rioting and unlawful assembly charges, with some facing separated charges for arson and assaulting police officers.^{xxi} Court hearings over Mong Kok unrest cases began in April 2016 and remain ongoing.

In March 2017, the District Court handed down the first rioting convictions against three protestors and sentenced each of them to three years in prison. While rioting under the POO carries a maximum penalty of 10 years’ imprisonment, the District Court can only mete out a maximum sentence of seven years. The presiding judge explained his decision on the punishment as necessary to serve as a deterrent for any violent acts.^{xxii}

The most high-profile case in relation to the Mong Kok clashes involved Edward Leung Tin-kei, the former spokesperson of the localist group Hong Kong Indigenous. Ray Wong and Alan Li were also part of this group. Leung was charged with two counts of rioting, one count of inciting a riot and a charge of assaulting police officers.^{xxiii}

In the first trial of Leung’s case in January 2018, Leung pleaded guilty to assaulting police officers during the Mong Kok clashes and denied all three counts of rioting charges.^{xxiv} On 18 May 2018, a nine-person jury found Leung guilty of one rioting charge but not guilty of inciting a riot, while the jury could not reach a majority verdict on the second rioting charge.^{xxv}

Leung was sentenced to jail for six years for his participation in a riot by Judge Anthea Pang of the High Court on 11 June 2018, while another defendant in the same trial, Lo Kin-man, was handed down the heaviest penalty of rioting convictions relating to the Mong Kok clashes to-date and was sentenced to seven years in prison. In her judgement, Judge Pang emphasised that political motives were not taken into consideration in the sentencing decision, but rather the degree of violence and disruption of order in accordance with case law.^{xxvi} However, there was widespread criticism of the seemingly excessive nature of the sentence.

Sir Geoffrey Nice QC, the barrister who prosecuted Slobodan Milosevic at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague, said:

“The sentencing today, clearly designed as a deterrent to mute further protest, will not help this bright, able and penitent young man who deserves a second chance. It is easy to think that imprisonment in this case is simply unjustified. It may be seen as a mean but dangerous act by those in this delicate world who still believe in the values of democracy. Sentencing politically troublesome young men to achieve collateral objective rarely works and often backfires - in the end.”^{xxvii}

Similarly, Lord Patten said: “It is disappointing to see that the legislation is now being used politically to place extreme sentences on the pan-democrats and other activists.”^{xxviii}

Mr Leung has applied for appeal on both his conviction and jail sentence. He also faced a retrial, as a result of the Department of Justice seeking a conviction on charges where the jury failed to reach a majority verdict. The court found him not guilty on these charges.^{xxix} 11 international parliamentarians, as well as the Chair of the German Bundestag Human Rights Committee, condemned the decision to retry Mr Leung as a sign of a Hong Kong government ‘vendetta’ against the young activist, and commented on the impact that these sentences are having on Hong Kong’s politics:

“These convictions are designed by the government to intimidate protestors, and they are having the desired chilling effect: young people are increasingly demoralised at the lack of justice.”^{xxx}

Edward Leung is not alone. Hong Kong Watch have compiled a list of all those currently imprisoned under the Public Order Ordinance, which is available on our website.^{xxxi}

Illegal Assembly inside the Legislative Council

Another example of the stricter guidelines was the decision of the Hong Kong government to seek to prosecute two lawmakers and their three assistants for illegal assembly while inside the Legislative Council.

Yau Wai-Ching, aged 26 and Sixtus “Baggio” Leung, aged 31, of the Youngspiration party tried to enter a Legislative Council on 2 November 2016 to take their oaths as legislators.^{xxxi} When trying to enter the Legislative Council meeting in November, the group clashed with security guards. At the time, Yau and Leung had been banned from such meetings and were facing judicial review after staging an anti-China protest at a previous swearing in ceremony in October. However, they were still technically legally elected lawmakers, and it was unprecedented for the Hong Kong government to seek to prosecute a lawmaker for their actions inside LegCo.

They were already set to be disqualified and the disciplinary matter could have been dealt with internally. However, the Secretary of Justice chose to take the case to criminal court, charging them

with 'illegal assembly' under the Public Order Ordinance. The judge subsequently not only found them guilty but sentenced them to one-month in jail. Sir Malcolm Rifkind described the prison sentence as “deeply disturbing”. Lord Alton of Liverpool called the sentence a “major over-reaction”. “Imagine if a Member of Parliament were sent to jail for staging a protest inside the Parliament”, he said.^{xxxiii}

CONCLUSION: LAWFARE

Since the Occupy protests, more than one hundred people who have been involved in protests have been charged under the Public Order Ordinance, with many facing ‘illegal assembly’ charges. The decision to prosecute criminal offences, including those under the Ordinance, is the responsibility of the Secretary for Justice, an appointed official. Rimsky Yuen, former Secretary for Justice, has sought stronger sentences for pro-democracy activists, despite advice from top officials in the Department of Justice not to do so.^{xxxiv}

This is part of what has been dubbed a wider strategy of ‘lawfare’ – the use of law as a tool in the political battle to create conformity.^{xxxv} One in three pro-democracy lawmakers have faced prosecution on an array of charges since the Umbrella Movement in 2014.

Allegations of politicised abuse of law are strengthened by the failure of the Secretary of Justice to pursue or investigate allegations of police violence. Hong Kong Watch has had conversations with many young activists in preparation for this report, and many share the view that the polarisation of politics and increasing animosity towards the government is a result of the impunity with which police and members of triad gangs were allowed to take violent action against protestors. There has been no inquiry into the actions of the police during either the Umbrella Movement or the Mong Kong unrest of 2016.

The result of this is that recent application of the Public Order Ordinance is having a chilling effect, intimidating many into stopping attending protests, which has negative implications for the exercise of the right of freedom of assembly and expression.

The Hong Kong government should take three measures to mitigate this chilling effect. First, they should immediately reform the Public Order Ordinance, in particular by tightening sentencing guidelines, to ensure that the legislation is less open to abuse.

Second, a government inquiry into the police response to the Umbrella Movement of 2014 and Mong Kok unrest of 2016 which holds the police to account would de-escalate concerns that the Secretary of Justice has abused the law to pursue a political campaign and punish opponents of the government.

Finally, the Secretary of Justice, who is a political appointee, should no longer be in charge of prosecutions. In Britain, for example, prosecutions come under the Director of Public Prosecutions and the Crown Prosecution Service – the Secretary of Justice shapes the policy, not the prosecutions.

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ⁱⁱⁱ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 1399 UNTS 33, (1984) 23 ILM 1366

^{iv} Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 1991, Article 39.

^v Hong Kong Police Force, 'Guidelines on the Approach to the Public Order Ordinance in Relation to Public Meetings and Public Processions', Paragraph 9, accessed 23 May 2019, <https://www.police.gov.hk/info/doc/licensing/general/en/poop08.pdf>

^{vi} Bill of Rights Ordinance (BORO) 1991 (Cap. 383); Legislative Council of Hong Kong, 'Guidelines on the approach to the Public Order Ordinance in relation to public meetings and public processions', accessed 23 May 2019 here: <https://www.legco.gov.hk/yr05-06/english/panels/se/papers/se1101cb2-1224-1e.pdf>

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