Outdated and Draconian: Hong Kong's Public Order Ordinance

"The Public Order Ordinance is one of Britain's worst legacies in Hong Kong and has repeatedly been criticised by the UN for excessively curtailing freedom of expression."

Paddy Ashdown, Financial Times, 13 June 2018

HONG KONG WATCH

Foreword

Freedom of peaceful demonstration is possibly the most powerful freedom the people of Hong Kong still possess in the face of an undemocratic government. As shown in the June protests against the extradition bill, it can be exercised to world-shaking effects. The greatest threat to this freedom is the Public Order Ordinance or "POO" as it is nicknamed. It is therefore most timely that Hong Kong Watch publishes the present study to call attention to the need for reform of this out-dated legislation.

The two main issues with the POO are the restrictions imposed on the holding of public meetings and processions, and the criminal offences of "unlawful assembly" and "riot". They are inter-connected. The former makes it difficult for an assembly to be held lawfully without accepting restrictions ordered by the police. The latter exposes an assembly, spontaneous or planned, and every participant in it, to long terms of imprisonment should the assembly result in, or threaten to result in a "breach of the peace" – an archaic term with a vague definition.

POO was passed in November 1967, in the wake of the most serious riots which was organized by the Communist Party in Hong Kong, lasted eight terrifying months, and threatened Hong Kong's security. Under its provisions, "riot" was deliberately given a broader definition than under the common law. Peaceful demonstrations could be held only by application to the police, and were subjected to tight control.

It was not atypical of colonial rule that draconian laws were passed to give the authorities wide powers, which were then exercised (hopefully) with caution and restraint by a benign and wise administration to avoid controversy and opposition in the community. Of course, even so, it is unacceptable in modern society for laws incompatible with human rights to remain in force, but in the hands of an autocratic government which does not believe in the rule of law, such laws can be applied to devastating effects for the rights and liberties of the people. China does not believe in the rule of law but only in the rule by law. In recent years, the Chinese leadership has openly directed the government not to be timid about using the law as a sharp weapon to protect the security and interests of the Nation. This appears to be followed by the SAR Government with respect to POO.

Section 19 of POO was intended to deal with the kind of riots experienced in the summer of 1967. It would appear from the record that, from 1967 to 2000, section 19 had been used, with rare exception [1], only to prosecute situations of extreme violence of the prison riot type. [2] However, in 2016, section 19 was invoked for the first time to prosecute at least 35 protesters for rioting, when a rally to support street hawkers in Mong Kok turned into a major clash between the police and the crowd gathered. No member of the public or private property was either targeted or hurt. To prosecute anyone for rioting was an abuse of the original function of the law. The sentences received ranged from 2 years and 10 months to 7 years. From then on, the shadow of prosecution for rioting and harsh prison sentence hung over every demonstration.

As discussed in the present study, POO is out of date and out of step with human rights law: in giving excessive power to the police; in the broad definition of public order offences; and in the imposition of harsh sentences on the offenders. A striking fact is the Hong Kong courts' reliance on the English case ***Caird*** [3] as basis of sentencing, but the elements of the common law offence of rioting held in that case were far more stringent than section 19 of POO, and the sentences actually upheld were far more moderate. In the Mong Kok case, Lo Kin-man received a sentence of 7 years imprisonment, and Edward Leung Tin-kei received a sentence of 6 years for far less violent acts than the appellants'

in ***Caird***. Their sentences are comparable to or heavier than the sentences passed in the detention centre riots referred to in the paragraph above. It is not surprising that it gave rise to a wide public perception that the protesters were punished for their political affiliation or sympathy.

POO gives the police wide discretionary powers to impose conditions before giving a notice of "no objection" for a demonstration so that it can be lawfully held. These powers can be abused with impunity, and have been more and more frequently used in recent years to restrict the freedom of assembly. Conditions can be imposed to make the demonstration ineffective or inaccessible to potential participants, or to create difficulties for its progress. Arguing with the police on the reasonableness of the conditions are usually futile. Conditions agreed beforehand may be changed on the spot, and refusal to obey would make the demonstration liable to become an "unauthorized assembly", and the organizers and participants are made vulnerable to criminal charges with a maximum sentence of 5 years imprisonment. This is completely out of step with other notification systems of the common law world.

Technology has been exploited to amplify the effect of this Draconian law. It is now routine for police to photograph demonstrations, including close-up shots of individual participants. This can have an immediate intimidating effect, and the photographs can be kept as potential evidence against them in case the demonstration becomes "unauthorized" or "unlawful". Many of the accused in the Mong Kok case were identified solely by video records of the event.

Five persons in the June protests are already charged with rioting, and more are likely to follow. It is high time to shine the spot light on POO, correctly described by the late Lord Ashdown as "one of Britain's worst legacies in Hong Kong".

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of the Hong Kong Legislative Council

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Executive Summary

After violent clashes between the police and protestors on 12 June 2019, Hong Kong's Chief Executive Carrie Lam and the Police Chief branded the demonstration a 'riot'. The designation of the gathering as a riot caused considerable consternation among Hong Kong's public, and was one of the reasons that 2 million gathered on the streets for the city's largest ever protest on 16 June 2019.

In order to understand why this caused such concern, it is important to consider the way that the city's public order legislation has been applied in recent years, and the potential consequences for young protestors of being tried in Hong Kong's courts for 'rioting' under Hong Kong's Public Order Ordinance.

Since the Occupy protests of 2014, more than one hundred people who have been involved in protests have been charged under the Public Order Ordinance, with many facing 'illegal assembly' or 'rioting' charges. The Public Order Ordinance (Cap. 245) is Hong Kong's major piece of public order legislation.

This report finds that the law under which they have been charged, the Public Order Ordinance, fails to comply with the international human rights standards that Hong Kong is signed up to. This conclusion is in line with the views of the United Nations Human Rights Committee who have expressed concern that the law could "be applied to restrict unduly enjoyment of the rights guaranteed in Article 21 of the International Covenant on Civil and Political Rights." [4] In view of this conclusion, it is not appropriate to charge young protestors with "rioting" unless the legislation is reformed and sentencing guidelines amended.

The report is split into three chapters. In the first chapter, we outline the human rights standards that the Hong Kong government have subscribed to through ratifying the International Covenant on Civil and Political Rights. Particular consideration is given to the obligations that this derives for the Hong Kong government to protect freedom of expression and assembly under Articles 19 and 21 of the Covenant.

The second chapter turns to the history of the application of the Public Order Ordinance, considering the noticeable increase in the use of the law since the Umbrella Movement of 2014. The final chapter analyses whether this application of the law conforms with international human rights standards.

The report makes a number of recommendations for the reform of the legislation.

Key findings

The report finds that:

1. The application of the Public Order Ordinance since the Umbrella Movement of 2014 has been unprecedented and punitive

Even though the Public Order Ordinance was a subject of criticism before the Umbrella Movement, the protests in 2014 were a watershed in the interpretation and application of the law. More than one hundred have stood in trials that have led to the evolution of the Public Order Ordinance, with harsher sentencing guidelines than ever before being enforced as a "deterrent", and an overly broad

understanding of what it means to participate in an "illegal assembly" or a "riot" becoming standard in the case law. This has had a chilling effect on protestors and stands as a great threat to freedom of expression and assembly.

2. The Public Order Ordinance's definition of 'illegal assembly' and 'rioting' is vague and ill-defined

The Public Order Ordinance acts to restrict the proper exercise of free assembly and association rights due to its broad, vague terminology, which could cause a chilling effect.

Judges appear to have interpreted the offences in the Public Order Ordinance in recent years using a simple approach: maximise the probability of conviction, minimise leniency.

Our analysis in chapter 3 by Dr Malte Kaeding explores this through an examination of the judgements of the cases of Baggio Leung and Yau Wai-ching, as well as the rioting trials of young protestors following the Mong Kok disturbances of February 2016.

The landmark Mong Kok case of Hui Ka-ki, Mak Tsz-hei and Sit Tat-wing is particularly relevant. The judgement concluded that Hong Kong University student Hui Ka-ki was a rioter by addressing three questions:

1. Was there a riot that night?
2. When arrested, was the defendant a participant of aforementioned riot?
3. What did they do in the riot?

What is striking about the conclusion is that the verdict did not show that Ms Hui committed any violent action. Even so, the judge decided that Ms Hui could still be accused of rioting. The fact that there was 'a riot on that night' and that 'Ms Hui was caught on the rioting spot, running' was considered enough evidence that she was a rioter. In the judge's view, it was irrelevant that Ms Hui was running away. Her presence meant that she was a rioter, and therefore was deserving of a three years imprisonment.

Such a broad and ill-defined terminology means that anyone present at an event defined as a "riot" might be found guilty. This undermines the rule of law, and has a chilling effect. Two young protestors, Ray Wong Toi-yeung and Alan Li were facing rioting charges and chose to seek asylum in Germany. They are currently living in Germany as Hong Kong's first political refugees.

3. The Public Order Ordinance has excessively punitive sentencing guidelines

Since the Umbrella Movement, the Public Order Ordinance's sentencing guidelines have been strengthened to act as a "deterrent".

The trial and retrials of Joshua Wong, Nathan Law and Alex Chow for "unlawful assembly" at Civic Square was a key turning point, as Rimsky Yuen sought a judicial review as he considered the original "community service" sentence insufficiently severe. The outcome of the case was that, although the Occupy Trio did not have their sentences increased, new severe sentencing guidelines were endorsed.

The implications of these new guidelines have been seen in the trial of the Mong Kok protestors of 2016. Protestors, whether by-standers or those involved with police clashes, have all found themselves facing years in prison. Edward Leung Tin-kei was jailed for 6 years, which was rightly widely

condemned as disproportionately punitive by human rights lawyers and political commentators.

4. The Public Order Ordinance gives police excessive powers to proscribe protests

The Public Order Ordinance requires that all protestors notify police of their intentions to protest and provides the Commissioner of Police with the right to object and bar protestors from protesting.

Reforms by the last governor of Hong Kong Chris Patten removed the notification requirement due to their incompatibility with human rights standards: in particular freedom of expression, assembly and association. The notification requirement was subsequently reintroduced and remains in violation of international standards.

The right of peaceful assembly or procession is a right guaranteed by law and should not be "the gift of a policeman or government". [5] Placing restrictions of these constitutionally guaranteed rights in the hands of the Commissioner of Police instead of a judge or a court is problematic and leaves the legislation open to abuse.

5. Rimsky Yuen, the former Secretary of Justice, a political appointee, abused his position in charge of prosecutions under CY Leung

The decision to prosecute criminal offences, including those under the Ordinance, is the responsibility of the Secretary for Justice, an appointed official.

Rimsky Yuen, the former Secretary for Justice, sought stronger sentences for pro-democracy activists, despite advice from top officials in the Department of Justice not to do so. [6] As a result, young protestors have been sentenced to disproportionate jail terms.

This is part of what has been dubbed a wider strategy of 'lawfare': the use of law as a weapon in the political battle to create conformity. [7] 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 the run-up to writing 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 at either the Umbrella Movement or the Mong Kong unrest of 2016.

The Hong Kong government's decision to label the protests of June 12, 2019 a "riot" was a political decision. The vague terminology and punitive sentencing guidelines mean that those who are charged could face years in prison. It is vital that the rioting charges against all these protestors are dropped, and that there is a full inquiry into the well-documented police brutality.

Recommendations

The Public Order Ordinance is a bad law which curtails freedom of association and expression and could have a serious chilling effect. Under the ICCPR, the Hong Kong SAR government have the positive duty to fulfil the rights laid out in the charter.

In view of this, the Hong Kong government should take these measures to comply with their obligations under the International Covenant on Civil and Political Rights:

1. Drop rioting charges against all protestors at the 12 June 2019 protest;

2. Tighten the sentencing guidelines and definitions in the Public Order Ordinance to ensure that the legislation is less open to abuse;

3. Remove the police notification requirement to bring the legislation in line with international human rights standards;

4. Initiate a government inquiry into the Umbrella Movement, Mong Kok unrest of 2016, and the police violence of 12 June 2019, which holds the police to account to de-escalate concerns that the Secretary of Justice has abused the law to pursue a political campaign and punish opponents of the government.

5. 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.

Chapter 1: Freedom of Assembly in Hong Kong and International Human Rights Law

The report begins with a consideration of the international human rights standards currently in force in Hong Kong. The International Covenant on Civil and Political Rights (ICCPR) was ratified by the United Kingdom government in Hong Kong in 1976, and then incorporated into the Basic Law and local legislation through the Hong Kong Bill of Rights Ordinance. This established a set of legal obligations to protect freedom of expression and freedom of assembly.

Hong Kong's Constitutional Commitments to uphold International Human Rights Law

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". [8]

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."* [8]

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 Bill of Rights Ordinance reproduces the guarantees of the ICCPR more or less verbatim.[10] Freedom of peaceful assembly and freedom of expression and association are therefore guaranteed protection in the Basic Law and the Bill of Rights Ordinance in Hong Kong.

Freedom of Expression and Freedom of Assembly in International Human Rights Law

Freedom of Expression and Freedom of Assembly are both fundamental rights enshrined in international law.

Freedom of Expression is established as a fundamental human right by Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant of Civil and Political Rights (ICCPR). Article 19 of the ICCPR states that:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
   a. *For respect of the rights or reputations of others;*
   b. *For the protection of national security or of public order 'ordre public', or of public health or morals.*

Similarly, Freedom of Assembly is protected by Article 20 of the UDHR and Article 21 of the ICCPR. Article 21 of the ICCPR states 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.

Article 19 (3) and Article 21 of the ICCPR outlines justifiable restrictions on these rights. Further guidance on the meaning of these articles is provided by the United Nations Human Rights Committee through General Comment No. 34 on freedom of opinion and expression. Paragraph 21 states that restrictions are necessary if they are enforced:

"to respect the rights or reputations of others or to the protection of national security or of public order (ordre public) or of public health or morals." [11]

On imposing limitation on these freedoms, Office of the High Commissioner for Human Rights stated 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…" [12]

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" [13] is not a justifiable ground for restrictions on the right.

Articles 16, 17 and 18 of the Hong Kong Bill of Rights Ordinance incorporate these standards into Hong Kong's domestic legislation. [14]

Chapter 2: History of the Public Order Ordinance, 1967-2019

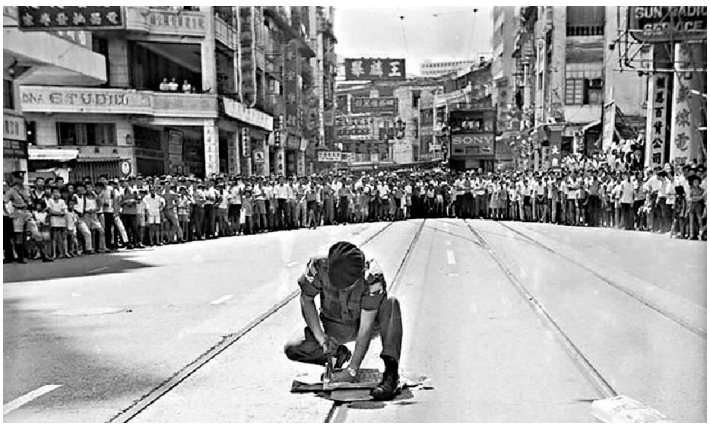
The ICCPR recognises that there are legitimate restrictions of the right to freedom of assembly as it is not an 'absolute right' and states may need to place limits on freedom of expression and assembly for the sake of public order and national security.

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. [15] The Police Guidelines, as well as those of the Legislative Council, refer closely to the ICCPR and Article 17 of the Hong Kong Bill of Rights Ordinance (BORO) which permits restrictions to be imposed on the right of peaceful assembly if these are "necessary in a 'democratic society'". [16]

However, despite close references to international human rights legislation, the constitutionality and compliance of the Public Order Ordinance with these internationally defined standards has been a subject of fierce debate. The Public Order Ordinance has come under sustained attack over decades from United Nations bodies, human rights groups, local legislators and activists. This chapter explores the history of the legislation since its inception.

History of the legislation

The British government introduced the Public Order Ordinance as a response to riots in 1967, the deadliest violence that the city had ever seen.



Rioters planting bombs in Hong Kong

Minor labour disputes in late April and early May 1967 led by the trade unions blew-up into large-scale demonstrations as 'Leftists' inspired by the Red Guards of the Cultural Revolution mobilised their followers to initiate a major anti-government demonstration. [17] Street protests escalated quickly into violence between the police and the leftist demonstrators. Homemade bombs filled with gunpowder, fragments of glass, nails and other metal components were planted across the city: killing civilians including children and police officers. [18] As public outcry against the violence grew, rioters began to target well-known figures in the media. On 24 August, Lam Bun, a radio commentator at Commercial Radio of Hong Kong, was attacked on his way to work and was burnt alive as his car was set ablaze.

Public dissatisfaction with the rioters eventually led to the riot subsiding by December, as it was widely denounced, including by then-premier Zhou Enlai. [19] The event claimed 51 lives, with 15 deaths caused by bomb attacks. A total of 1,936 people were convicted, of which 465 were jailed for 'unlawful assembly', 40 for possessing bombs and 33 for explosion-related offences. [20]

The legislation of the Public Order Ordinance and criticism of the law

In response to these events, the British colonial government enacted the Public Order Ordinance (Cap.245) in November 1967, implementing stricter controls on public meetings and processions in the future. 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…" [21]

Subsequent amendments to the Ordinance introduced a licensing system which required the organisers of any public meetings or processions to obtain a licence from the Commissioner of Police. [22] Wide discretionary powers were granted to the police, enabling them to object or order the discontinuance of any public gathering on grounds of public order and "arrest citizens for engaging in 'unlawful assembly' if police felt their behaviour could lead to a breach of the peace." [23]

As soon as it was enacted, there was wide-spread criticism of the law, with allegations that its draconian measures and broad scope breached international human rights standards including freedom of expression and freedom of assembly.

Despite the law being open to abuse, it was not used by the colonial government to arrest or prosecute organisers or participants in public gatherings once the response to the riots of 1967 had been dealt with. This ensured that for much of the 1960s and 1970s, criticism was fairly muted.

However, the looming handover of Hong Kong ensured that opposition to the legislation increased in the 1980s due to fears that the legislation put Hong Kong's civil liberties and fundamental freedoms in jeopardy after the handover. This reached its peak following the Tiananmen massacre in 1989.

The Patten Reforms

Following the events at Tiananmen Square, the British colonial government in Hong Kong enacted the Hong Kong Bill of Rights Ordinance (BORO) which incorporated the human rights provisions in the International Covenant on Civil and Political Rights (ICCPR) into the domestic law of Hong Kong.

The administration, led by the last Hong Kong governor Chris Patten, initiated a review of local legislation to ensure consistency with the provisions guaranteed in the BORO. Following this review, Chris Patten began to reform the Public Order Ordinance to bring it in line with the newly enacted BORO which incorporated the provisions of the ICCPR into domestic laws in Hong Kong.

Chris Patten has noted that the political situation in Westminster and internationally meant that the "antiquated and potentially repressive" legislation was by this point already more or less unusable by the British government:

"The truth is that no governor in the 1990s… could conceivable have used some of the powers theoretically available to him without provoking protest in Hong Kong, Westminster and well-beyond." [24]

However, Patten's reforms met significant opposition from Beijing during the negotiations, meaning they were passed unilaterally by the Governor without Beijing's consent.

The amendments resulted in the annulment of the licensing system for public processions in favour of simple notification. Under the new notification system, organisers of a public procession consisting

of more than 30 persons were only required to give a written notice to the commissioner of police 7 days before the commencement date of the procession. [25]

Commenting recently, Chris Patten, now Lord Patten of Barnes, said that: *"We attempted to reform the Public Order Ordinance in the 1990s and made a number of changes because it was clear that the vague definitions in the legislation are open to abuse and do not conform with United Nations human rights standards."* [26]

Pressure from Whitehall and Beijing ensured there were limits on the scope of reform. This meant that vague definitions of "illegal assembly" and "rioting" were left in their original form at the handover of Hong Kong. It would have been better for the legislation to have been struck off and a new law on protests which fully complied with international standards to have been introduced instead. Having said this, the Patten reforms made the legislation much more acceptable and were a significant step forwards for freedom of assembly.

Post-Handover

Shortly after the handover, the Chinese government immediately reversed the Patten reforms. The Legislative Council in Hong Kong was replaced by the "Provisional Legislative Council" for one year so that Beijing could reverse any changes to local legislation by Governor Patten which were deemed undesirable. The reforms of the Public Order Ordinance were among those to be reversed in 1997.

The amended Public Order Ordinance required the commissioner of police to issue "a notice of no objection" before any protest legally takes place. [27] This means that police permission is necessary every time someone convenes a public assembly and it effectively returned the legislation to the licensing system in the Public Order Ordinance of 1967. The Ordinance gives the Commissioner of police a wide margin of discretion in deciding when a public gathering constitutes a security threat, and this version of the law is still in operation today.

The United Nations Human Rights Committee (UNHRC) immediately expressed concerns over this. In its concluding observations on its first report on Hong Kong, the Committee stated "concerns that the Public Order Ordinance (Chapter 245) could be applied to restrict unduly enjoyment of the rights guaranteed in article 21 of the Covenant". In particular they raised concerns about the notification and notice of no-objection requirements in the legislation. The Committee recommended that "the HKSAR should review this Ordinance and bring its terms into compliance with article 21 of the Covenant". [28]

As stated by Lord Patten, the political environment in Hong Kong at the time of the handover meant that the more draconian measures in the legislation were not meaningfully usable by the government. This ensured that initially the legislation was not widely used. In fact, the first time it was used by the Hong Kong SAR government in June 2000, there was such a public backlash that charges were dropped. [29] The incident saw the first of a number of public debates about the issue and a motion in the Legislative Council to discuss the compatibility of the legislation with the rights to peaceful assembly and free expression guaranteed under the Basic Law and the ICCPR. The debate ended with the government insisting that the Public Order Ordinance is compliant with international human rights law and is a necessary piece of legislation which has found a balance between personal freedoms and government's duty to protect public safety. [30] [31]

One of the first people to be charged was veteran political activist Leung Kwok-hung (also known

as Long Hair) for organising an unauthorised peaceful assembly at Chater Garden in 2002, a public area, alongside two other activists Fung Ka-keung and Lo Wai-ming. All of them were convicted for organising an unauthorised public procession and for failing to notify the police under the Ordinance and were put on a three-month good-behaviour bond. [32] The Chief Magistrate of the case, while explaining his decision to give relatively light sentence to the defendants given the non-violence and peaceful nature of their processions, questioned whether the case was of a "political nature" and whether cases of this nature should have been handled by the court in the first place. [33]

Long Hair and the other activists lodged a judicial review to the Court of Final Appeal three years later in 2005 to challenge the constitutionality of the Public Order Ordinance delegating power to the police commissioner to restrict the right of peaceful assembly. The Court of Final Appeal upheld the convictions and ruled that the notification system was constitutional, but the judges remarked unanimously that the term *ordre public*, which is one of the grounds for the police to object to a procession, should be severed from the Ordinance before it could be considered fully constitutional. [34] In addition, the permanent judge of the Court of the Final Appeal Kemal Bokhary noted that the threat of a maximum 5 years' imprisonment constituted a violation of fundamental freedoms. He said that the power conferred on the police under the law allowed freedoms **to be governed by the police, rather than *"governed by law"*.[35]**

This was a clear Court of Final Appeal declaration of the constitutionality of the legislation at the time. However, none of the judges at the time could have anticipated the subsequent abuse of the law to the profound detriment of the right to peaceful assembly. The dissenting opinion of Court of Final Appeal judge Kemal Bokhary was prescient, anticipating the law's later abuse.

It was not until the year 2011 that the Government of Hong Kong started to regularly employ the Public Order Ordinance. In this year 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.[36] At the annual demonstration on 1 July 2011, police arrested more than 200 protestors for participating in unauthorised assembly under the Public Order Ordinance.

The most controversial case related to this demonstration was the retrospective arrest of Melody Chan two years later in 2013 for her involvement in organising and taking part in the demonstration in 2011. At the time of prosecution, Chan was a volunteer of the Occupy Central movement and the arrest was seen by the pro-democracy groups as a political prosecution. She was put on a one-year bond by the Eastern Court which would mean that she would be liable to pay HK$2,000 and spend up to six months in jail if she broke the law in the following 12 months.[37]

This spike led to further 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." [38]

Post-Umbrella Movement abuse of the Legislation

26 September 2014 marked a pivotal moment for Hong Kong. The outset of the Umbrella Movement changed the landscape of Hong Kong politics.[39] [40] The Movement involved protestors peacefully blocking thoroughfares in busy districts in Hong Kong and lasted 79 days, the longest-running demonstration in the city's history. The police's handling of the protestors stirred controversy and

drew international attention. While some criticised the unnecessary level of violence used by the police, others supported the firm response to 'unlawful assembly.'

Photo: Pasu Au Yeung/Flickr

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. [41] [42]

The 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 (see chapter 3).

The Mong Kok protests of February 2016

Photo: CNN

The connotation of these guidelines were clearly seen in the next case involving the Public Order Ordinance: the Mong Kok unrest of February 2016.[43]

On the first day of Lunar New Year in 2016, protest against attempts by the Food and Environmental Hygiene Department (FEHD) to remove illegal street hawkers from Mong Kok district escalated to violent clashes between the protestors and the police. It had been a tradition during Lunar New Year for unlicensed hawkers to set up stalls selling street food in Mong Kok and Sham Shui Po districts and in the past, and the FEHD has not taken action to clear the vendors off the street to allow people enjoy these as part of the celebration. However, over the years the FEHD has increasingly employed a zero-tolerance policy towards these vendors which was resisted by several local movement groups by supporting the street vendors and cleaning to streets to alleviate concerns over hygiene.

On the evening of the first Lunar New Year night, one of the most prominent "localist" groups, Hong Kong Indigenous, galvanised support online to help prevent the street hawkers from getting evicted. At least 300 people gathered in the street and after the police forcibly tried to clear the streets, the protests escalated as police and protestors clashed. [44] The stand-off between the protestors and the police officers led to unrest throughout the evening, and ended with at least 54 people arrested and hundreds admitted to hospital. [45]

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. [46] More than 90 people have been arrested, and the police are still in the process of arresting protestors. 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. [47] Court hearings over Mong Kok unrest cases began in April 2016 and remain ongoing.

In trials, protestors were sentenced to imprisonment, with standard starting sentence beginning at 3 years and ranging up to 6 years imprisonment. A further discussion of these sentences is found in Chapter 3. Hong Kong Watch have compiled a list of all those currently imprisoned under the Public Order Ordinance, which can be found here. [48]

Ray Wong and Alan Li fled Hong Kong because of the application of the Public Order Ordinance.

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, 31 and Sixtus "Baggio" Leung, 26, of the Youngspiration party tried to enter the Legislative Council on 2 November 2016 to take their oaths as legislators. [49] When trying to enter the legislative meeting, 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. [50] 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. Former Foreign Secretary 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. [51]

Anti-extradition law protests, 12 June 2019

In June 2019, a series of demonstrations have taken place in Hong Kong against proposals to amend the city's extradition law. This would allow extraditions to new areas such as Taiwan and Macau, but more importantly the People's Republic of China. [52] A peaceful mass demonstration on 9 June reportedly drew 1 million people to the streets, however the Hong Kong government refused to enter dialogue with protestors.
This led to further demonstrations. On Wednesday 12 June, tens of thousands occupied the streets

peacefully. Witnesses say it was initially like a recurrence of the peaceful 2014 Occupy protests and that a festive atmosphere prevailed until the police began to cordon off protestors and forcibly disperse the protest. [53]

Apparently, no attempt was made to isolate any perceived threat, with the police choosing instead to view the entire protest as a threat. During clashes, tear gas and pepper spray was used, and shotguns discharged into the air. There are reports of rubber bullets being fired, and that a student and driver for the news organisation RTHK were shot in the head: reports suggest that more people may have been shot.

One student, who attends a UK university and was at home in Hong Kong for recess, said this in an email to Hong Kong Watch: *"After 16:30, tear gas has been used and the new 'Raptors' police force were used to push back the protestors with batons. Then only minutes ago, around 17:05, plastic pellets were fired without warning, as protocol is normally to raise a black banner before using such lethal force. One teenager was shot in the eye and was bleeding on the ground, he is currently being treated as I write this."*

Amnesty International have verified 14 instances of police violence, including the dangerous use of rubber bullets, officers beating protestors who did not resist, aggressive tactics used by police to obstruct journalists and the misuse of tear gas and pepper spray. [54]

Later that day, the Hong Kong Chief Executive branded the demonstration a "riot". Although the Chief of Police subsequently retracted the claim that the entire demonstration was a riot, a number of protestors are still facing rioting charges. Some of these protestors were arrested while in hospital following police brutality.

The broad scope of the definition of "rioting" under the public order ordinance, combined with the severe sentences handed out to protestors in previous "riots", ensured that this caused considerable concern in Hong Kong. On 16 June 2019, up to 2 million took to the streets to call for Carrie Lam to retract the claim that the event was a riot. However, these calls have been ignored up to this point.

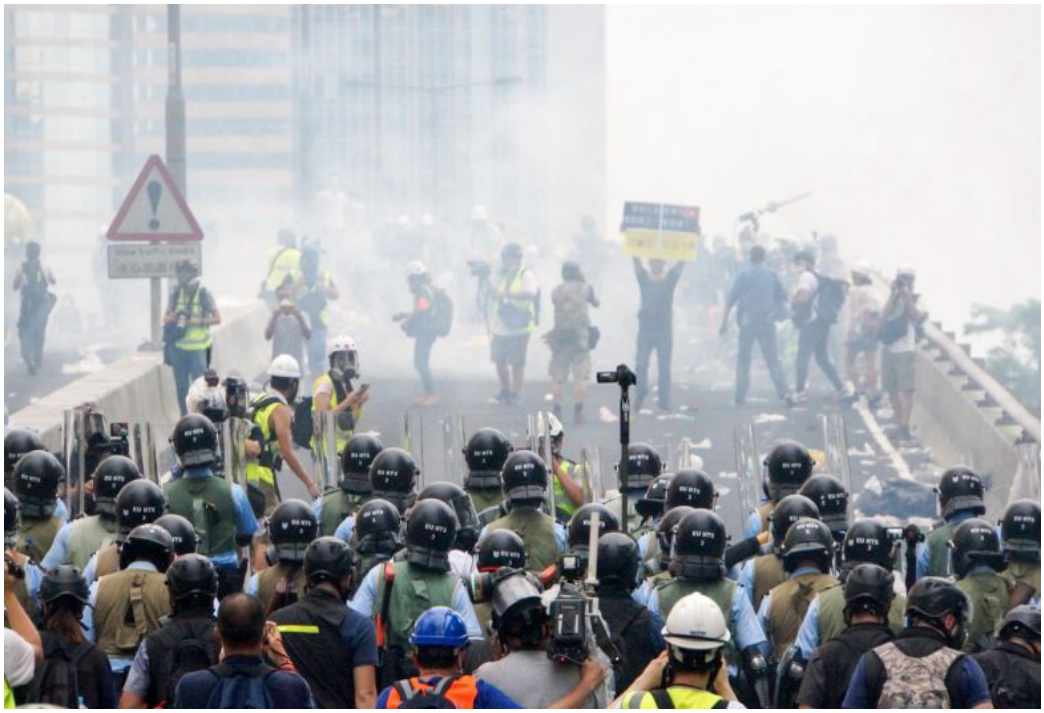


Photo: Sopa Images Via Zuma Wire

Chapter 3: Analysis of the Public Order Ordinance and International Human Rights Standards

The Public Order Ordinance has been a key tool in the crackdown on political protest since the Umbrella Movement. The Public Order Ordinance has been used in this way for two reasons. First, the politicised and punitive use of the legislation was only possible because of the Secretary of Justice's role as Chief Prosecutor: this leaves political opponents vulnerable to punitive sentencing. Secondly, the legislation gives excessive police powers, is sufficiently vague, and carries excessively punitive sentencing guidelines.

This chapter will suggest that there are three reasons that the legislation fails to meet the human rights standards outlined in the ICCPR and the BORO:

1. The Secretary of Justice, a political appointee, is currently in charge of prosecutions under the Public Order Ordinance.
2. The Public Order Ordinance gives police excessive powers to proscribe protests in breach of the right to peaceful assembly and freedom of expression, those that fail to comply with police instruction face punitive sentencing;
3. The Public Order Ordinance includes vague and ill-defined terminology.
4. The Public Order Ordinance has been interpreted so that it has excessively punitive sentencing guidelines.

Points 3 and 4 are inconsistent with the rule of law and have led to a chilling effect which forces protestors to self-censor, thereby indirectly inhibiting freedom of expression and peaceful assembly.

Politicised Prosecution and Lawfare: the Role of the Department of Justice

Since the Occupy protests, more than one hundred people who have been involved in protests have been charged under the 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.[55]

As noted in chapter 2, the government repeatedly has sought to maximise sentencing for activists, with many peaceful protestors receiving jail time. For example, with Joshua Wong, Nathan Law and Alex Chow, the Secretary for Justice sought to increase their sentences, leading to charges for 'illegal assembly', attracting imprisonment, rather than community service.

Not content with sending Edward Leung to jail for 6 years on contentious rioting charges, the Secretary of Justice sought a re-trial on one of the charges to extend his imprisonment further.

Similarly, the decision to prosecute Baggio Leung, Yau Wai-ching and their assistants for illegal assembly inside the Legislative Council, and to seek a jail sentence in this case, was another Department of Justice decision. The seemingly absurd application of the law was only possible because the Secretary of Justice sought to prosecute.

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. [56] 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 the run-up to writing 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 at 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 that are protected under Articles 19 and 21 of the ICCPR. Under the ICCPR, the Hong Kong SAR government have the positive duty to fulfil the rights laid out in the charter.

The Hong Kong government should take two measures to mitigate these. First, a government inquiry into the Umbrella Movement which holds the police to account would de-escalate concerns that the Secretary of Justice has just abused the law to pursue a political campaign and punish opponents of the government.

Additionally, the Secretary of Justice, should no longer be in charge of prosecutions.

The British system provides a better alternative. Prosecutions come under the Director of Public Prosecutions and the Crown Prosecution Service – the Secretary of Justice helps to guide the direction of policy, rather than deciding on who to prosecute. Hong Kong should consider this as an alternative to help improve the independence of the prosecuting system

Excessive Police Powers: The Notification and "Notice of No-Objection" Requirement

The Public Order Ordinance requires that all protestors notify police of their intentions to protest and provides the Commissioner of Police with the right to object and bar protestors from protesting.

The legislation in more detail: the notification and "notice of no objection requirements"

Section 8 of the Public Order Ordinance lays out rules for the notification of public meetings. It states that notice of the intention to hold a public meeting must be given to the Commissioner of Police at least one week before the event.

Section 13 of the Public Order Ordinance lays out similar rules on the notification of Public Processions, stating that notification must be given one week in advance in all cases except for funerals.

Section 9 and 14 of the Public Ordinance lays out the rights of the Commissioner of Police to object to public processions and prohibit the holding of any public meeting where he considers "such prohibition to be necessary in the interests of national security or public

safety, public order or the protection of the rights and freedoms of others". In the case of Public Processions, the Commissioner of Police issues a "notice of no objection".

Section 17 of the Public Order Ordinance lays out wide-ranging powers for the police to stop public processions which have not received the "notice of no objection" and includes potentially lengthy sentences for those protesting without permission.

Compliance with international human rights standards

The Patten reforms removed the notification requirement due to their incompatibility with human rights standards: in particular freedom of expression, assembly and association. The notification requirement was subsequently reintroduced and remains in violation of international standards.

The right of peaceful assembly or procession is a right guaranteed by law and should not be "the gift of a policeman or government". [57] Placing restrictions of these constitutionally guaranteed rights in the hands of the Commissioner of Police instead of a judge or a court is problematic and leaves the legislation open to abuse.

International human rights law is clear that restrictions on freedom of peaceful assembly or expression are only acceptable when they are necessary and justifiable. It follows that a law that enables a government or an enforcement authority to lay a criminal charge on a person exercising his/her right of peaceful assembly but failing to comply with "a procedural requirement" (i.e. giving advance notification to the police) is likely to unduly restrict freedom of peaceful assembly by adding unnecessary barriers to meeting publicly or taking part in processions.

Furthermore, the sentencing guidelines, which include the possibility of a peaceful participant of a public assembly being sentenced to five years in prison if the organisers fail to comply with the notification requirement, are extreme, unnecessary and open to abuse. [58]

Comparison with other jurisdictions

In order to illustrate the ways that the Hong Kong Public Order Ordinance is excessively restrictive, Hong Kong Watch conducted a comparative study into the public order laws of Hong Kong, the United Kingdom and New York.

Tables 1 and 2 compares the notification requirements for public meetings in Hong Kong's legislation with the legislation of the United Kingdom and the United States in New York. Tables 3 and 4 compare the notification requirements for public processions in the three areas. The comparison is helpful for two reasons. It is helpful to remember that all democracies have public order legislation and that it is necessary for the maintenance of order. However, the comparison also clearly exposes the ways that Hong Kong's notification system is draconian and regressive: leading to unnecessary restrictions on freedom of expression and assembly.

Regulations on public meetings

Hong Kong imposes stricter notification requirements for holding public meetings. In neither the UK nor New York is there either a notification requirement or are the police entitled to prohibit normal public meetings which are not trespassory. (See Table 1)

In addition, the sentencing guidelines under the Hong Kong Public Order Ordinance are

disproportionate: the Hong Kong Courts can sentence organisers and participants to up to 5 years imprisonment for failing to notify the police and a year for failing to comply with police conditions; by contrast, the US Courts in New York are only entitled to give out a fine. (See Table 2)

Regulations on Public Processions

All the jurisdictions require that the police are given notice for public processions, allowing the police to take the necessary measures to maintain public order, and to reject processions which are deemed to violate public order. (Table 3)

Where Hong Kong's law differs to the others is the sentencing guidelines (Table 4). While the United Kingdom has a maximum prison sentence of 3 months, and New York has a maximum sentence of 10 days, both the organisers and participants in protests in Hong Kong face a maximum sentence of 5 years. These excessive sentencing guidelines again mean that the law is open to abuse or politicised application.

Table 1: Comparison of Regulations on Public Meetings

	Hong Kong	UK	US – New York City
Legislation	Cap. 245 Public Order Ordinance (version 29 June 2017)	Public Order Act 1986 c.64	The New York City Administrative Code (15 August 2018)
Notice required	Yes, for meetings of more than 50 people	No	No, although there is a sound amplification permit system.
Notice period	7 days prior to meeting date	N/A	N/A – 3 days for sound permit
Can Police prohibit meetings?	Yes	Not unless the meetings are "trespassory"	No
Permissible grounds for prohibition	In the interests of: • national security • public safety • public order • the protection of the rights and freedoms of others	To prevent: • serious public disorder • serious damage to property • serious disruption to the life of the community • intimidation of others	No regulation on public meetings Grounds for sound permit requirement: • securing the health, safety, comfort and convenience and peaceful enjoyment of public places

Permissible nature of conditions	Any conditions necessary as the Commissioner of Police thinks fit in the interests of public order (s.6) For public meetings to be held in "designated public area", restriction on the time of the meeting only (s.11(2))	The senior police officer can impose conditions relating to • the place • maximum duration • maximum number of people of the public meetings if he "reasonably believes" that the meetings may result in disorder, damage, disruption or intimidation of others.	With regards to the use of sound devices: • specific location • exact period of time • maximum volume of sound • any others necessary
Notice required	Yes, for meetings of more than 50 people	No	No, although there is a sound amplification permit system.

2: Penalties for breaching regulations on Public Meetings			
	Hong Kong	**UK**	**US – New York City**
Legislation	Cap. 245 Public Order Ordinance (version 29 June 2017)	Public Order Act 1986 c.64	The New York City Administrative Code (15 August 2018)
Failure to meet notification requirement	**For Organisers** On conviction on indictment: 5 years' imprisonment On summary conviction: a fine of HK$5,000 (£500) and 3 years' imprisonment **For Participants** Same as for organisers. (s.17A(3))	N/A	N/A

Knowingly organizes or takes part in prohibited public meetings	**For Organisers** On conviction on indictment: 5 years' imprisonment On summary conviction: a fine of HK$5,000 (£500) and 3 years' imprisonment **For Participants** Same as for organisers. (s.17A(3))	N/A	N/A
Failure to comply with imposed conditions	**For Organisers** 12 months' imprisonment and a fine of HK$5,000 (£500) **For Participants** Same as for organisers. (s.17A(1A))	**For Organisers or any persons inciting others to commit this offence** On summary conviction: max. 3 months' imprisonment or max. £2,500 fine or both **For Participants** On summary conviction: a fine of max. £1,000	With respect to the use of sound amplification: max. fine of US$100 (£76) or imprisonment for 30 days or both

Table 3: Comparison of regulations on Public Processions

	Hong Kong	UK	US – New York City
Legislation	Cap. 245 Public Order Ordinance (version 29 June 2017)	Public Order Act 1986 c.64	The New York City Administrative Code (15 August 2018)
Notice required	Yes: for processions of more than 30 people, aside from funerals	Yes	Yes: a "parade permit" is required for processions with more than 25 participants. A sound permit is also required.

Notice period	7 days prior to procession date Shorter notice accepted at Police discretion	6 days prior to procession date unless it is not "reasonably practicable" to do so	3 days prior to procession date
Is Approval Required?	Yes - a notified public procession can only be held if the police commissioner has issued "a notice of no objection".	No	Yes – a permit is required
Can Police prohibit processions?	Yes If the Commissioner of Police "reasonably considers" necessary in the interest of national security or public safety, public order or the protection of the rights and freedoms of others.	Yes If the Commissioner of Police "reasonably believes" that imposing conditions is not sufficient to prevent serious public disorder resulting from the public processions. (s.13)	Yes By the police commissioner if he "has good reason to believe" that the procession will be "disorderly" or "tend to disturb the public peace". section 10-110(a)(1)
Permissible nature of conditions	Any conditions necessary as the Commissioner of Police thinks fit in the interests of public order. (s.6) The Commissioner of Police may also specify the route and time. (s.6(1))	Any conditions as the senior police officer considers necessary to prevent serious disorder, damage, disruption or intimidation. (s.12(1))	Any conditions as the police commissioner may "deem necessary". (s.10-110(3))

Table 4: Penalties for breaching regulations on Public Processions			
	Hong Kong	**UK**	**US – New York City**
Legislation	Cap. 245 Public Order Ordinance (version 29 June 2017)	Public Order Act 1986 c.64	The New York City Administrative Code (15 August 2018)
Failure to meet notification requirement	**For Organisers** On conviction on indictment: 5 years' imprisonment On summary conviction: a fine of HK$5,000 (£500) and 3 years' imprisonment **For Participants** Same as for organisers. (s.17A(3))	**For Organisers** A fine of max. £1,000 **For Participants** Nil	
Knowingly organizes or takes part in prohibited public meetings	**For Organisers** On conviction on indictment: 5 years' imprisonment On summary conviction: a fine of HK$5,000 (£500) and 3 years' imprisonment **For Participants** Same as for organisers. (s.17A(3))	**For Organisers or any persons inciting others to commit this offence** On summary conviction: max. 3 months' imprisonment or a fine of £2,500 or both (s.13(11) & 13(13)) **For Participants** A fine of max. £1,000 (s.13(12)	**For Organisers** max. 10 days' imprisonment or a fine of max. US$25 (£20) or both **For Participants** Same as for organisers.
Failure to comply with imposed conditions	**For Organisers** 12 months' imprisonment and a fine of HK$5,000 (£500) **For Participants** Same as for organisers. (s.17A(1A))	**For Organisers or any persons inciting others to commit this offence** On summary conviction: max. 3 months' imprisonment or max. £2,500 fine or both **For Participants** On summary conviction: a fine of max. £1,000	

Rioting and Illegal Assembly are Vaguely Defined

The Public Order Ordinance has been used to prosecute protestors using charges which are inconsistent with the rule of law, as they lack sufficient clarity and uncertainty. The following section will illustrate this through an in-depth analysis of two landmark cases. These demonstrate the broad definitions of key offences used in prosecutions and highlight their application to raise the costs of protest by politically undesired groups and individuals. [59] The offences 'unlawful assembly' and 'rioting' entail 'breach of the peace' as a central element and are closely connected in the Department of Justice prosecutions.

Unlawful Assembly and Breach of the peace

Unlawful assembly is defined in clause 18 of the Public Order Ordinance by three key components [60]:

1. When 3 or more persons, assembled together
2. Conduct themselves in a disorderly, intimidating, insulting or provocative manner
3. Intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace.

While the later comparative analysis will highlight the low threshold for the first component, it is nevertheless clearly defined and straightforward. This is not the case for components two and three which are subject to the analysis and interpretation of the judge. The verdict, which concluded the unlawful assembly case of disqualified lawmakers, Baggio Leung and Yau Wai-ching as well as their three assistants Yeung Lai-hong, Chung Suet-ying, and Cheung Tsz- lung (2017, no. 2035) provides a landmark interpretation of the second and third component.

Acting Kowloon City Principal Magistrate Wong Sze-lai's stated that the meaning of disorderly behaviour (component two) is contingent upon time, venue and situation. The spatial element stands out as crucial as the judge highlighted the 'narrowness and crowdedness' of the venue (p.51-52).

Keywords of the third components are 'fear' and the meaning of 'breach of the peace'. Magistrate Wong referred in his interpretation of 'breach of the peace' to the United Kingdom Court of Appeal case of Regina v Howell (1982). Regina v Howell focuses on the power of police officers to arrest without warrant and emphasises violence and threatened violence. The police officer making the arrest judges whether a 'breach of peace' is committed or anticipates that it will be committed in the immediate future. The law hence defines 'breach of peace' as 'whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance'. [61]

In his interpretation of 'fear that the persons so assembled will commit a breach of the peace', Magistrate Wong refers to an earlier case in post-handover Hong Kong (HKSAR v Leung Kwok Wah & Others [2012], HCMA 54/2012) concluded by Judge Johnson Lam Man-hon at the Hong Kong High Court. On the matter of taking part in unlawful assembly Judge Lam interprets that the conducts of defendants can generate both 'the stipulated fear (the subjective limb)' and 'objective fear', which means *'an apprehension [62]'*. [Italics by author] HKSAR v Leung Kwok Wah & Others states that the emotional state of 'apprehension' informs the judgement whether a 'breach of peace' could be committed could not only be felt by law enforcement personal but also private security personal. In a nutshell, the difference between Regina v Howell (1982) and HKSAR v Leung Kwok Wah & Others

(2012) is the question of *who can reasonably fear* the assembled will commit a breach of the peace: the police in the former case and a combination of police *and* security guards in the latter case.

Returning to the case of Baggio Leung, Yau Wai-ching and others, it was only the security guards in the Legislative Council who feared that the peace would be breached. In his verdict Magistrate Wong offers a landmark definition that is so broad that in theory any individual can fear an imminent 'breach of peace'. The juxtaposition of these three cases illustrates that subsequent verdicts in recent years now entitle any person to translate their 'fear' or 'apprehension' that peace will be breached into criminal charges of the defendants, *as long as that person is 'present at the scene'* as Magistrate Wong's verdict states. Since a breach of the peace' is a central element in the majority of prosecutions under the Public Order Ordinance in recent years, the definition of this offence in the case against disqualified lawmakers is of high significance. It offers a justification for the verdict against the defenders in a case of unlawful assembly inside the Legislative Council and ex post for the case selections in several rioting cases linked to the Mong Kok disturbances.

Rioting

Riot is defined in clause 19 of the Public Order Ordinance as 'when any person taking part in an assembly which is an unlawful assembly by virtue of section 18 (1) commits a breach of the peace, the assembly is a riot and the persons assembled are riotously assembled'. [63]

This definition highlights the constituting elements of unlawful assembly and breach of the peace, which are subject to the analytical and interpretative power of the judge in the case. The definition of riot also includes an implicit yet crucial spatial element.

The case against students Hui Ka-ki and Mak Tsz-hei, and cook Sit Tat-wing at the District Court sets a precedence in the definition of "riot" in Hong Kong. All three defendants convicted of rioting linked to the Mong Kok Lunar New Year disturbances after the District Court characterised the street violence as a riot. In his verdict Judge Sham Siu-man offered a very broad definition of riot: a riot is merely an unlawful assembly in conjunction with a breach of peace which already took place. Importantly no damage to property or injury to human lives is a necessary condition for a riot (p.6, para 18). [64]

The judge reached the conclusion that that Hong Kong University student Hui Ka-ki was a rioter by addressing three questions: 1) whether there was a riot on that night; 2) when arrested, whether the defendant was a participant of the aforementioned riot; and 3) what they did within the riot. What is notable is that the verdict did not show that Ms Hui undertook any violent action (throwing water bottles or objects towards the police). In fact, the judge decides that in the absence of the mentioned behaviours Ms Hui could still be accused of rioting. Crucial to the judgement is the fact that 'there is a riot on that night' and 'Ms Hui was caught on the rioting spot, running'.

Judge Sham's argument in case DCCC 710/2016 is that Hui Ka-ki was a rioter based on the fact that she was arrested by the police in proximity to the site of a riot, i.e. an unlawful assembly in breach of peace. Her concrete actions and intentions were of no consideration. Indeed, the judge argued that the fact that Ms Hui Ka-ki was moving rapidly away from approaching police forces and not moved towards the side of the site or stood still meant that she was part of the riot and not an observer or innocent bystander. Furthermore, the fact that she was not carrying any professional gear (e.g. camera), she could also not be qualified as a journalist or professional observer. In summary a person's spatial distance to what is defined as a riot (unlawful assembly with breach of peace) becomes the main criteria for a rioting charge.

Finally Judge Sham Siu-man's verdict also included interpretations of human behaviour and psychology that reveal a potential bias as he discounted the possibility of natural shortening reactions in a tense and frightening situation in Ms Hui's case. Overall case DCCC 710/2016 confirms the impression that judges interpreted offences in recent verdicts using the Public Order Ordinance following a simple approach: maximise the probability of conviction, 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.

Public Order legislation in other jurisdictions

The following section examines key elements of the Hong Kong Pubic Order Ordinance legislation in comparison with respective legislation in the United Kingdom and Singapore. As previously mentioned Hong Kong's Public Ordinance originated in the British colonial period, yet in the United Kingdom these laws were substantially reformed under the Public Order Act of 1986. The case of Singapore offers valuable insights, as the former British colony in the Asian region shares some broadly comparative historical and ethno-cultural elements. Furthermore, both entities have become increasingly closer in regard to their position on the annual Freedom in the World Index by Freedom House, Singapore scores an aggregate of 51/100 and Hong Kong dropped to 59/100. [65]

In Singapore rioting and unlawful assembly are covered in Chapter VIII of the Penal Code – Offences relating to unlawful assembly. Article 141 provides a very detailed definition of unlawful assembly which sets a threshold of "5 or more persons". It states that the unlawfulness of an assembly is strictly linked to the "means of criminal force, or show of criminal force". While there is equally significant room for interpretation of certain terms such as "resistance against execution of any law […]" it need to be emphasised that firstly the threshold for an unlawful assembly is higher with 5 instead of merely 3 persons in Hong Kong. Secondly there are no references to a concept such as "breach of the peace", which have strong contextual and cultural interpretation biases or the psychological state (fear) of persons in the vicinity of the assembly. Similarly the definition of rioting in article 146 is equally straightforward and void of references to a "breach of peace" and equally straightforward: "Whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting." The emphasis of criminal force as a necessary requirement for a rioting charge potentially limits its application.

In the United Kingdom unlawful assembly as an offence was abolished by the Public Order Act 1986. The United Kingdom hence has updated an outdated law and focuses its attention on regulating assemblies in general. Hence the Public Order Act under c. 64 Part II – Processions and Assemblies gives law enforcement officers the power to prohibit or pose conditions on public assemblies (defined as more than 20 persons). And section 14 C states that a person found guilty committing offences connection with trespassory assemblies "is liable on summary conviction to imprisonment for a term not exceeding 3 months […]". [66] It is important to note that only law enforcement officers ("constable in uniform") make assessments on the nature of assemblies and actions of persons involved, in the absence of concepts such as "breach of the peace" in this legislation. The clarity and restrictiveness of the UK law is finally echoed in the definition of riot. [67] It sets the high threshold of "12 or more persons who are present together" who "use or threaten unlawful violence". It restricts the fear element mentioned in Hong Kong law to "fear for his personal safety" of a "person of reasonable firmness present at the scene". Most importantly it limits itself to participants in a riot who commit an offence by stating that those guilty of riot are "each of the persons *using* unlawful violence". [Italics by author].

Overall the comparison clearly shows that the Public Order Ordinance is significantly more outdated

that the comparative legislation in the United Kingdom and more vaguely defined than the Singaporean case. It fails to comply fully with the rule of law, and the vague terminology has the potential to have a chilling effect which could undermine the full exercise of ICCPR rights.

Punitive Sentencing guidelines

The Umbrella Movement 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 (see above).

Photo: Joshua Wong via Facebook

The trial and retrials of Joshua Wong, Nathan Law and Alex Chow for "unlawful assembly" at Civic Square was a key turning point. The case drew worldwide attention, with human rights organisation criticising the government's use of the Public Order Ordinance to muzzle pro-democracy voices. [68] 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. [69]

However, the Hong Kong government were not satisfied with these sentences. The Department of Justice (DoJ) requested for 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 for an appeal to the Court of Appeal for another review of the sentence to seek harsher sentences in order to create a deterrent effect. [70]

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 has used to breach the barricades to enter the Civic Square. The Court concluded with new sentences, jailing the three leaders for between 6 to 8 months. [71] The new sentences would bar the activists from running for public office including the LegCo and District Council for election for the next 5 years. [72] 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. [73]

The Mong Kok unrest of February 2016

The connotation of these guidelines were clearly seen in the next case involving the Public Order Ordinance: the Mong Kok unrest of February 2016. [74]

The first conviction in relation to the Mong Kok unrest came in October 2016, when the localist group Civic Passion member Chan Pak-yeung was sentenced to jail for 9 months for resisting and assaulting police under the Offences against the Person Ordinance. [75] In March 2017, the District Court handed down the first rioting convictions against 3 protestors and sentenced each of them to 3 years in prison. While rioting under the Public Order Ordinance carries a maximum penalty of 10 years' imprisonment, the District Court can only impose a maximum sentence of 7 years. The presiding judge explained his decision on the punishment as necessary to serve as a deterrent for any violent acts. [76]

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. Leung was charged with two counts of rioting, one count of inciting a riot and a charge of assaulting police officers. [77] His case drew widespread attention as Leung ran as candidate for the first time in the New Territories East by-election subsequent to the Mong Kok clashes and received more than 15% of the votes. [78] Five months later in September 2016, Leung was barred from running in the Legislative Council election for his pro-independence stance. [79]

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. [80] 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. [81] 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 behind bars. 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. [82] 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 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". [83]*

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." [84]*

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 over where the jury failed to reach a majority verdict. The court found him not guilty on these charges.[85]

Conclusion

In a *Financial Times* article following Edward Leung's sentencing, the late-Lord Ashdown said: *"The Public Order Ordinance is one of Britain's worst legacies in Hong Kong and has repeatedly been criticised by the UN for excessively curtailing freedom of expression."* [86]

He was absolutely right. The Public Order Ordinance remains a damaging law that has been used punitively by the government of Hong Kong to crackdown on protestors. The law has facilitated the violation of the freedom of assembly and freedom of expression, and therefore the Hong Kong government must urgently reform the legislation in order to meet their commitments under the International Covenant on Civil and Political Rights.

The abuse of these laws has been a key source of division in Hong Kong's recent history, with talented young people being the collateral damage. The protests of recent weeks, and particularly the confrontation on June 12, have brought the issue back into the public's attention.

If the Hong Kong government are serious about their desire to reunite society, they should consider reforming the legislation and must immediately drop the rioting charges against participants of the 12 June 2019 protest.

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