

THE FUNDAMENTAL FREEDOM OF ASSEMBLY AND PART III OF THE PUBLIC ORDER ORDINANCE

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Part III of the Public Order Ordinance is now the main source of prior restraints applicable to public assemblies in Hong Kong. It is also an important source of “at the scene” control and dispersal powers. Non-compliance with the prior restraints or disobedience of “at the scene” orders is punishable according to the criminal provisions contained in Part III. However, since the reunification of Hong Kong and China in 1997, some of the prior restraint provisions have been widely disregarded. Their consistency with the fundamental freedom of peaceful assembly demanded by the International Covenant on Civil and Political Rights (ICCPR) and the Basic Law of the Hong Kong Special Administrative Region has also been questioned. In this article, the author first sets out the fundamental freedom approach by which it is suggested that the consistency of Part III with the ICCPR can best be tested. Then the substance of fundamental freedom of peaceful assembly and its significance in a democratic society is explained. Finally, using a fundamental freedom approach, the ICCPR standard for the fundamental freedom of assembly is applied to the terms of Part III.

Introduction

Following their discussions concerning the first post-1997 report¹ on the Hong Kong Special Administrative Region (HKSAR) under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee (HRC) concluded:

“With regard to freedom of assembly, the Committee is aware that there are very frequent public demonstrations in HKSAR and takes note of the delegation’s statement that permission to hold demonstrations is never denied. Nevertheless, the Committee is concerned that the Public Order Ordinance could be applied to restrict undue enjoyment of the rights guaranteed in article 21 of the Covenant.”²

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¹ Initial Report (Hong Kong): China. 16 June 1999. CCPR/C/HKSAR/99/1 (State Party Report).

² Concluding Observations on the 5th Periodic Report of the Hong Kong Special Administrative Region. CCPR/C/Sg/Add 117.

No further details were given. No changes to the Public Order Ordinance (POO) have been made or proposed by the HKSAR Government in response. On the contrary, in the middle of a vigorous public debate precipitated by the August / September 2000 arrests of some students for earlier alleged offences under Part III of the POO, the Secretary for Security sponsored a motion in the Legislative Council endorsing the relevant POO provisions. That motion was eventually passed on 21 December 2000.³

After that, public discussion of the POO died down for a while. However, the POO has returned to public prominence again in 2002. Early in the year, the public learned that the Police Commissioner had imposed a general ban on all protests in the open space in front of the Central Government Offices, a popular demonstration venue for many protest groups. The ban was said to be necessary in order to control the sometimes emotional protests of disappointed right of abode seekers and their supporters, but other groups' protests were also affected.⁴

In April, the day after a number of right of abode seekers and supporters surrounded and detained the Secretary for Security's car outside the Legislative Council Building, about 300 police officers dispersed a long term, authorised sit-in by a group of abode seekers and supporters in the nearby Chater Gardens.⁵ In May, three political activists were charged with offences relating to organising an unauthorised assembly, in that case a public procession for which advance notice had not been given to the police as required by the POO.⁶ If continued, these prosecutions will be the first of their kind since the reunification of Hong Kong and China in 1997.⁷

It was then noticed that the police were using large banners and placards warning participants in some of Hong Kong's numerous unauthorised assemblies that they could be prosecuted.⁸ Almost immediately, a public procession along Nathan Road was organised to protest against the POO, protesters making their point by taking care to ensure that their numbers stayed just within the POO's numerical exemption from notification.⁹ Finally, a "June 4th" protest group was successful in having the police rejection of their planned protest

³ Legislative Council Minutes No 13 for the meeting 20 and 21 Dec 2000, 2000 Legislative Council Proceedings 2154–2356. Available at <http://www.legco.gov.hk/english/index.htm> under "Meetings", year 2000–2001.

⁴ Ng Kang-chung, "Police chief defends confining protests", *South China Morning Post (SCMP)*, 8 Mar 2002, p 7; Stella Lee, Jimmy Cheung, "Police chief defends ban on protesters", *SCMP*, 13 May 2002, p 1. Police prohibited a 1 May labour demonstration and a "June 4th" memorial demonstration planned for 26 May pursuant to this policy. See <http://www.scmp.com>.

⁵ Stella Lee and Shirley Lau, "Police swoop on abode seekers", *SCMP*, 26 Apr 2002, p 1.

⁶ Alex Lo, Patrick Poon and Klaudia Lee, "Landmark case launched over 'illegal protest'", *SCMP*, 10 May 2002, p 3.

⁷ The students whose arrest was noted above were not actually prosecuted.

⁸ Stella Lee, "Police banners heighten fears of crackdown", *SCMP*, 18 May 2002, p 3.

⁹ Felix Chan, "Street-march protesters play it by numbers", *SCMP*, 21 May 2002, p 4.

in front of the Central Government Offices overturned by an Appeal Board set up under the POO.¹⁰

Clearly the legitimacy of the Part III public assembly provisions in the POO is still an issue for debate in the HKSAR. Equally clearly, the Secretary for Security's motion cannot therefore be the HKSAR's final response to the HRC's concerns. There are two reasons why this is so. First, domestic and international law, and the HKSAR's own special interests, strongly compel the adoption of a fundamental freedom¹¹ approach to the relevant issues by all official institutions in the HKSAR. The Secretary for Security's motion does not adopt such an approach. Second, if the restrictions imposed upon the expressive freedoms¹² by the terms of Part III of the POO are assessed using a fundamental freedom approach, it is submitted that significant aspects of those restrictions will be found to be inconsistent with the ICCPR and hence with the Basic Law and the Hong Kong Bill of Rights Ordinance 1999 (BORO).¹³ An in-depth discussion of the second of these reasons is the main focus of this article, but it is first necessary to explain the meaning of the term "fundamental freedom approach" as used in this article and also to establish the truth of the first reason stated.

A Fundamental Freedom Approach Explained

The phrase "fundamental freedom approach" is this author's shorthand for the approach by which, it is submitted, the compliance of Part III of the POO with international human rights norms expressed in the ICCPR ought to be assessed. The elements of a fundamental freedom approach may be stated in five propositions. The first two propositions each correspond to different uses of the word "fundamental". In legal contexts, "fundamental" is used in conjunction with "law" to refer to the law that "determines the constitution of a government ... and prescribes and regulates the manner of its exercise".¹⁴ More specifically, in modern times at least, "fundamental law" means a law

¹⁰ Ambrose Leung, "Police ban on CGO rally overruled", *SCMP*, 22 May 2002, p 6. This was the "June 4th" demonstration referred to in n 4 above. The police subsequently stated that applications to use the space in front of the Central Government Offices would be reviewed on a case-by-case basis. A "right of abode seekers" application was rejected and the rejection upheld on appeal in June 2002. See Stella Lee, "'Radical' abode seekers stopped from staging anniversary march", *SCMP*, 26 June 2002, p 5; Stella Lee, "Appeal over abode march rejected", *SCMP*, 27 June 2002, p 3.

¹¹ "Freedom" is used throughout this article but "fundamental right approach" could have been used just as well.

¹² Used here to include the freedoms of expression, assembly, demonstration and association.

¹³ Enacted as s 8 of the BORO, not directly entrenched. Arts 16 and 17 of the BORO are identical to Arts 19 and 21 of the ICCPR. For convenience, apart from direct quotes, only the ICCPR and Basic Law provisions are referred to in this article.

¹⁴ *Black's Law Dictionary* (St Paul, Minnesota: West Publishing Co, 6th edn, 1990), p 674. In this sense "fundamental" is synonymous with "basic" and "constitutional". See, for example, the preamble to the 1999 Constitution of the People's Republic of China.

that even a democratically elected legislature may not violate on pain of having its legislation struck down or declared void by a relevant court.¹⁵ Hence the first proposition: a freedom that is guaranteed to the people of a polity in such a way that any legislative, executive or judicial act or omission that violates that freedom may be declared void by a relevant court is a fundamental freedom.

In ordinary usage, “fundamental” means “of or serving as a foundation or core; of central importance”.¹⁶ Hence the second proposition: a freedom that is an essential part of the foundation or core of, and is of central importance to, the evolution and maintenance of a free and democratic society, is a fundamental freedom.

However, a fundamental freedom is not necessarily an absolute freedom in the sense that it will “trump” all other freedoms or interests all of the time. The third proposition is that the character and maintenance of a democratic society may themselves require that the exercise of a particular fundamental freedom be subject to limits or restraints. The fourth proposition is that any limits or restraints imposed pursuant to the third proposition must not exceed what the character and maintenance of a democratic society necessarily require.

The fifth proposition has two related parts. When determining whether a proposed or actual limitation on a fundamental freedom does or does not exceed what the character and maintenance of a democratic society necessarily require, a fundamental freedom approach demands (i) a profound commitment to ensuring that the democratic core of each of the previous four propositions is fully respected in a sensitive and principled way and (ii) an insistence that the necessity for any proposed or imposed limitation in a democratic society can only be established by credible empirical evidence¹⁷ and principled, rational and, where possible, authoritative argument of the highest standard.¹⁸

¹⁵ For excellent discussions of this narrower concept of “fundamental law” and the related concepts of “judicial review” and “parliamentary supremacy” see Larry D. Kramer, “The Supreme Court 2000 Term Forward: We the Court” (2001) 115 *Harvard Law Review* 4 and Lord Irving of Lairg, “Sovereignty in Comparative Perspective: Constitutionalism in Britain and America” (2001) 76 *New York University Law Review* 1.

¹⁶ *Concise Oxford Dictionary* (Oxford: Oxford University Press, 10th edn, 1999), p 573.

¹⁷ For the crucial importance of “a detailed and penetrating examination of the facts” for effective human rights protection, see Richard Clayton, “Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle” (2001) 5 *European Human Rights Law Review* 525.

¹⁸ Note that this article does not claim that a fundamental freedom approach will enable or compel the user to reach one single “best possible” answer or solution as to the necessity or otherwise of a limitation on every occasion. But a fundamental freedom approach would enable a user to reach a principled and defensible answer or solution on every occasion and the “best possible” answer or solution, or one of a relatively narrow range of “best possible” answers or solutions, in most. In this context, “best possible” means “the maximum extent of fundamental freedom challenged consistent with the level of protection of other legitimate aims necessary in a democratic society”.

The Need for a Fundamental Freedom Approach to the Freedom of Assembly in the HKSAR

The application of each of the first four propositions to the freedom of assembly in the HKSAR is easily established.

As to the first proposition, the status of the Basic Law as a fundamental law of the HKSAR that binds the legislature as well as the executive and the judiciary is not in doubt.¹⁹ Article 4 of the Basic Law provides that “[t]he Hong Kong Special Administrative Region shall safeguard the rights and freedoms of the residents of the Hong Kong Special Administrative Region and of other persons in the Region in accordance with law”. Article 27, included in that part of the Basic Law entitled “Fundamental Rights and Duties”, provides: “Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration ...”. In addition, the first paragraph of Article 39 states that the ICCPR “... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region...”. The relevant term of the ICCPR, Article 21, reads, in part, as follows: “The right of peaceful assembly shall be recognised.”

As to the second proposition, both the HRC and the European Court of Human Rights (ECHR) have stated that the freedom of assembly is a fundamental freedom in the second sense.²⁰ The Hong Kong Court of Final Appeal (CFA) has begun²¹ to appreciate this with respect to freedom of expression. In *HKSAR v Ng Kung Siu*,²² known as the “flag case”, Chief Justice Li began his analysis of the issues with the words:

“Freedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong’s system and way of life. The courts must give a generous interpretation to its constitutional guarantee. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticize governmental institutions and the conduct of government officials.”²³

¹⁹ Art 11 expressly provides: “No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law.” See Yash Ghai, *Hong Kong’s New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd edn, 1999), pp 305–307.

²⁰ See, for example, HRC decisions *Gauthier v Canada* (633/95), *Mukong v Cameroon* (458/91); ECHR decisions *Ezelen v France* (1992) 14 EHRR 362, *Vogt v Germany* (1996) 21 EHRR 205; and the European Commission’s decision in *Rassemblement Juraissees v Switzerland* (1980) 17 DR 93, p 119.

²¹ “Begun” because Li CJ’s only reference in his judgment to the implications of the nature of a democratic society for the freedom of expression other than the quote below was to note that a number of other democratic societies also punish desecration of national flags with imprisonment – relevant but not of itself very profound.

²² [2000] 1 HKC 117.

²³ *Ibid.*, p 135.

There is every reason to believe that the CFA will recognise that freedom of assembly is also “a fundamental freedom in a democratic society” when the opportunity arises.

As to the third and fourth propositions, again, both the Basic Law and the ICCPR are clear. Although Article 27 of the Basic Law is itself stated in unqualified terms, the second paragraph of Article 39 provides:

“The rights and freedoms enjoyed by the 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.”²⁴

Article 21 of the ICCPR further provides:

“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.”

See also Article 5(1) of the ICCPR:

“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”

As to the fifth proposition, it is submitted that the institutions of the HKSAR should embrace it and hence embrace a fundamental freedom approach to the expressive freedoms. There are three reasons why this should be done. First, experience has shown that acceptance of the first four propositions “in a general way” is typically characterised by statements of principle followed by assertions of necessity or proportionality unconnected by any or no more than cursory explanation and reasoning, and unsupported by empirical, as distinct from anecdotal, evidence. Such an approach leaves the doors to compromise, convenience and convention so wide open, “fundamental” and “freedom” are then constantly at risk.²⁵ Taking the obligation to justify any restrictions upon fundamental

²⁴ That is, shall not contradict the terms of the ICCPR as it applies to the HKSAR.

²⁵ See Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000), para 18.19, p 392.

freedoms with empirical evidence and principled, reasoned and authoritative argument very seriously is the only way of ensuring that the “fundamental” part of “fundamental freedom of assembly” really means something; that it really makes a difference.

Second, the Basic Law imposes a duty upon HKSAR institutions to develop, nurture and protect a form of liberal democracy hitherto unknown here. This must be done without the (immediate) safeguards of universal suffrage, strong local government, or the assistance of established official or cultural practices / traditions of freedom of political expression and active public participation in government, all widely regarded as important characteristics of liberal democracies. There is also the burden of a legislature, executive and judiciary trained in the residual rights thinking of Hong Kong’s colonial common law past²⁶ and the indirect influences of a vastly larger, illiberal sovereign. It is submitted that the consistent and rigorous adoption of a fundamental freedom approach to the interpretation and implementation of the expressive freedoms by all official HKSAR institutions would both provide a counterbalance for the present weaknesses in the HKSAR’s formal democratic structures and promote the development of the vibrant, diverse, interconnected and publicly engaged type of polity that best facilitates the growth and maturity of democratic institutions and democratic consciousnesses.²⁷

Third, although the HRC’s judgments are not always models of detailed reasoning,²⁸ they, and the HRC’s comments on state reports concerning the expressive freedoms, do at least demonstrate a striving towards a fifth proposition level of commitment to the dual fundamental character of those freedoms, that is to the first part of the fifth proposition.²⁹ Since the Basic Law provides that the standards of the ICCPR are also to be the standards of HKSAR law, it follows that HKSAR institutions should strive for that level of commitment too.

²⁶ The Hong Kong legal system incorporated the common law principle that people in Hong Kong are free to do anything the law did not prohibit. See Peter Wesley-Smith, “Protecting Human Rights in Hong Kong,” in Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), pp 17, 30. But subject to inapplicable colonial constraints, the relevant legislative powers could choose to prohibit anything they choose so that the freedom of Hong Kong people to assemble was the residue of freedom their rulers decided to leave them.

²⁷ See Summary Record of the 1803rd Meeting of the Human Rights Committee: China, 5 Nov 1999. CCPR/C/SR.1803 (Summary Record), para 63, per Mr Lallah: “Freedom of expression was central to the flourishing of democracy. The law must be interpreted by the police and the administering authorities in such a way as to further the nascent democracy in Hong Kong.” Being relatively difficult to dominate and hence relatively difficult to suppress from the outside, such a policy could also play a significant part in safeguarding the HKSAR’s prized autonomy.

²⁸ Joseph, Schultz and Castan (n 25 above), paras 1.44–1.45, p 18. Comments on state reports may also be short on detail, for example that made with respect to the HKSAR’s POO quoted above.

²⁹ *Ibid.*, para 18.53, p 423, although the HRC’s interpretation of Art 22 has been less encouraging: *ibid.*, paras 19.22–19.24, pp 438–439. See n 109 below.

The Secretary for Security's Motion

The terms of the Secretary for Security's motion put to the Legislative Council in 2000 were as follows:

"That this Council considers that the POO's existing provisions relating to the regulation of public meetings and public processions reflect a proper balance between protecting the individual's right to freedom of expression and right of peaceful assembly, and the broader interests of the community at large, and that there is a need to preserve these provisions."³⁰

The terms of the motion do not explicitly or implicitly acknowledge freedom of expression and assembly as having any greater status in HKSAR law than any other right or freedom accepted by the law for the time being, for example, the freedom to carry on lawful commerce. Nor do they point to any standard for evaluating limitations on those freedoms other than the collective good judgement of the HKSAR Legislative Council. That is consistent with the position at common law, but inconsistent with the proven status of the freedoms as protected by means of a fundamental law, that is the HKSAR Basic Law.

The use of the concept of the balance between the two freedoms and undefined "broader interests of the community at large" to determine the necessity of the existing POO provisions reinforces the point. Admittedly, the use of the language of "balance" and "balancing" is common amongst legislators, academics and jurists, even in fundamental rights contexts.³¹ However, whilst "balancing" is unexceptional in the context of competing freedoms of equal status, there is a real difficulty with the concept of "balancing" two potentially conflicting freedoms if one should be recognised as more important, more fundamental, than the other. Given the objective of achieving equilibrium inherent in the concept of balance, there is always the danger that in the process of balancing the primacy of the fundamental right will be lost.³²

Thus, during the consideration of the HKSAR's report to the HRC, one member of the HRC, Mr Scheinin, "took particular issue with the reference in paragraph 381(a) of the [HKSAR] report to striking a balance between

³⁰ Legislative Council Proceedings (n 3 above), pp 2154–2155.

³¹ For example, Hong Kong's *Lee Kwong-kut* [1993] AC 951, p 966, adopted by the House of Lords in *R v DPP ex parte Kebilene & Others* [2000] 2 AC 326, p 386; [2000] HRLR 93, p 121, and *Wong Yeung Ng v SJ* [1999] 2 HKC 24, p 51H, per Mayo JA. The ECHR in particular uses the term frequently, for example, *Doorson v The Netherlands* (1996) 22 EHRR 330, para 70; *Chassagnou and Others v France* (2000) 29 EHRR 615, para 112.

³² Andrew Ashworth, "Criminal Proceedings after the Human Rights Act: The First Year" [2001] *Crim LR* 855.

civil liberties and social order, which was not the philosophy underlying the Covenant. The Covenant embodied rights, and any infringement of its provisions must be scrupulously justified.”³³

It is noteworthy that the CFA avoided any talk of “balance” in *Ng Kung Siu*.

Of course if the concept of balance, when analysed, gives real priority to fundamental freedom, the use of the term may not be important.³⁴ Even so, it is submitted, the language of balance should be avoided. What is crucial is the need to keep the dual fundamental character of the relevant freedom prominently in mind throughout the whole process, a need the old language of balancing can only serve to threaten or, at the very least, obscure.

Finally, the Secretary for Security’s motion characterises freedom of assembly as an “individual right of assembly” in actual or potential conflict with “broader interests of the society at large”. A fundamental freedom approach would reject the “single monolithic community”³⁵ view of society implicit in this formulation as incompatible with democratic pluralism. Instead, it would employ a multifaceted community approach in which many communities are seen to co-exist and interact within a society, with particular individuals typically belonging to several different communities at any one time. It would recognise assemblies of all kinds as “intrinsicly communal” activities and “getting together”, sometimes privately, sometimes in public spaces, as a vital part of community life. In addition, it would recognise the protection of freedom of assembly for all communities as a very valuable interest of a democratic society at large at least as broad as any other. Finally, it would reject any limitation on a fundamental freedom in the name of anything as vague as the “broader interests of society at large”. It would insist upon a much more precise identification of any threatened social interest.

³³ Summary Record of the 1805th Meeting of the Human Rights Committee (Hong Kong): China, 8 Nov 1999. CCPR/C/SR.1805, para 11: “Striking a proper balance between civil liberties and social order” was listed in the HKSAR report as the first of three guiding principles followed by the Chief Executive (Designate)’s Office when drafting amendments to the POO. See also *Sunday Times v United Kingdom* (1979) 2 EHRR 245, pp 280–281, in which the court rejected the House of Lords’ balancing approach and said: “The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.” Cf Aileen McHarg, “Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights” (1999) 62 MLR 671, 693–694.

³⁴ See, for example, *S v Makwanyane and Another* (1995) BCLR 665, p 708D–G; [1995] 3 SA 391, p 436, per Chaskalson P of South African Constitutional Court; *Duft v Communications* [1996] 2 NZLR 89; Richard Clayton (n 17 above).

³⁵ Helen Fenwick and Gavin Phillipson, “Public Protest, the Human Rights Act and Judicial Responses to Political Expression” [2000] *Public Law* 627, 649–650. The content of this paragraph owes much to this article and to Eric Barendt’s chapter (n 36 below).

The Fundamental Freedom of Assembly in the ICCPR

The Scope of the Fundamental Freedom of Peaceful Assembly

Freedom of assembly and freedom of expression

The first step in any fundamental freedom approach to the freedom of assembly in the HKSAR must be an examination of the accepted scope of that freedom under the ICCPR.³⁶ In the interests of brevity, the freedom of assembly is here considered independently of its undoubted overlap with the freedoms of expression, protected by Article 19 read in conjunction with Article 20, and association, protected by Article 22. However, the fact that these overlaps exist and will be extremely important in many cases must at least be acknowledged. The ECHR has experienced some difficulties in deciding how that overlap should be approached.³⁷ But the drafters of the ICCPR were adamant that freedom of assembly needed its own Article.³⁸ Some scholars have increasingly realised that the freedom does have a life and character of its own.³⁹ In the only reported HRC decision involving a demonstration, both freedom of expression and freedom of assembly were separately considered.⁴⁰ It is submitted that in all public assembly cases, the possibility of separate freedom of expression issues should be actively considered. The expressive character of such assemblies is likely to be both one of their prominent features and a compelling reason for their protection.⁴¹

³⁶ Eric Barendt, "Freedom of Assembly," in J. Beatson and Y. Cripps (eds), *Freedom of Expression and Freedom of Information – Essays in Honour of Sir David Williams* (Oxford: Oxford University Press, 2000), p 173: "The most important general consequence of incorporation of the ECHR [into English law via the Human Rights Act 1998] is that ... [c]ourts must now consider the scope of the right to freedom of peaceful assembly before they determine the legality of restraints imposed by public order (or other) legislation and the common law powers of the police to preserve the peace." See also, Andrew S. Butler, "Interface between the Human Rights Act 1998 and other Enactments: Pointers from New Zealand" (2000) 3 EHRLR 249, 258.

³⁷ Barendt, *ibid.*, pp 162–163. Cf Helen Fenwick, "The Right to Protest, the Human Rights Act and the Margin of Appreciation" (1999) 62 MLR 491, 496–497.

³⁸ Karl Josef Partsch, "Freedom of Conscience and Expression, and Political Freedoms," in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp 209, 231, although the debate apparently centred upon separating assembly from association.

³⁹ Barendt (n 36 above), pp 163–172. For recent doctrine see the ECHR decision in *The Case of Refah Partisi (Prosperity Party) and Others v Turkey* Application 00041342, 31 July 2001, para 44.

⁴⁰ *Kivenmaa v Finland* UN Doc CCPR/C/50/D/412/1990, but see Therese Murphy, "Freedom of Assembly," in Harris and Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995), pp 439, 444.

⁴¹ *The Case of Refah Partisi (Prosperity Party) and Others v Turkey* (n 39 above), para 44.

“The right of peaceful assembly shall be recognised”

“Peaceful” in this context typically means “without violence”,⁴² that is, without the use of unlawful⁴³ physical force, in relation to people and property belonging to others, and possibly also “non threatening”, at least in terms of threatening immediate violence towards specific persons or property.⁴⁴ Four points should be noted.

First, the use of some force in politics, especially passive force directed against governments or established / protected economic interests, is not always so clearly “wrong” or “without social utility” as the use of force in other contexts. Admittedly, active protests,⁴⁵ especially those that interfere with the lawful conduct of third parties, can raise difficult competing interests and public order issues. Even so, in the special context of politically significant / public interest assemblies, the qualification “peaceful” should not be drawn too widely.⁴⁶

Second, “peaceful” was intended to refer only “to the circumstances under which the assembly is held ... [not] the object for which the assembly is called or to the opinions which may be expressed on that occasion”.⁴⁷

Third, a participant in an assembly whose conduct and intentions are at all relevant times peaceful remains within the freedom of assembly, notwithstanding the violent conduct or intentions of other participants in the same assembly⁴⁸ or participants in a counter-assembly or hostile audience.⁴⁹

Fourth, a peaceful assembly is entitled to Article 21 protection, notwithstanding that it is said to be unlawful by some domestic law, at least where the sole basis for the characterisation is a failure to notify relevant authorities as required or some similar reason.⁵⁰

⁴² Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: NP Engel, 1993), p 375.

⁴³ That is, force used other than within the recognised boundaries of self defence, crime prevention or necessity.

⁴⁴ Partsch (n 38 above), p 233 and Nowak (n 42 above), p 374 refer to the expression “without uproar, disturbance, or the use of arms” used by a delegate during the drafting process.

⁴⁵ See Helen Fenwick (n 37 above), pp 494–495 and 497 for an interesting classification of types of protest and their implications.

⁴⁶ *G v Federal Republic of Germany* (1989) 60 DR 256, p 263. Compare the conclusions of the ECHR in *Steele v United Kingdom* (1999) 28 EHRR 603 with the reasoning and conclusions of the German Federal Court of Justice (*Bundesgerichtshof*) in *Bundesgerichtshof* (Sixth Civil Senate) 4 Nov 1997, 1998 NJW 377 available at <http://www.iuscomp.org/gla.html>, the German Law Archive maintained by the University of Oxford, Institute of European and Comparative Law.

⁴⁷ Partsch (n 38 above), p 231.

⁴⁸ *Ezelin v France* (1992) 14 EHRR 362, *Christians against Racism and Facism v United Kingdom* (1980) 21 DR 138, 148.

⁴⁹ See Nowak (n 42 above), pp 375–376, also *Plattform “Arzte fur das Leben” v Austria* (1991) 13 EHRR 204, para 32; *Christians against Racism and Facism v United Kingdom*, *ibid*. This accords with some 19th century and recent English precedents concerning breach of the peace discussed below, see *Beatty v Gillbanks* (1882) 9 QBD 308; *Redmond-Bate v DPP* (1999) 163 JP 789; [1999] Crim LR 998; and dictum of Bokhary JA in *R v To Kwan Hang* [1994] 2 HKC 293, p 307F–H.

⁵⁰ *G v Federal Republic of Germany* (n 46 above).

As to “assembly”, the Basic Law refers to “freedom ... of assembly, of procession and of demonstration”. The ICCPR uses the single word “assembly”, but there is no doubt that this includes processions and demonstrations. It is the intentional joining together for a common purpose of at least two persons for a limited duration that is the essence of an assembly, not its form.⁵¹

The phrase “shall be recognised” could be read as imposing a lesser obligation on a state than the more common “shall have the right”, but commentators have suggested that it is unlikely any difference was intended.⁵²

Positive obligations: access to public space

All assemblies need physical space. Access to that space can be a serious practical impediment to the effective enjoyment of freedom of assembly. Large, affordable, enclosed venues and strategically located open air spaces in particular are likely to be in relatively short supply and much sought-after. Coexistence with other activities might not always be possible. The exclusionary rights of private landowners and the similar rights claimed for some types of public ownership may cause additional problems.⁵³

It is submitted that a fundamental freedom approach to freedom of assembly would mean taking the resource implications of assemblies seriously. As a barest minimum this must mean that those with authority over public spaces, whether enclosed or open air, cannot be permitted to prohibit all public assembly activity or subject all public assemblies therein to a content-sensitive permit system as if they were private owners.⁵⁴ There are strong arguments for going further and imposing a positive obligation on governments to open up public spaces specifically for assemblies and to facilitate reasonable use of other public spaces such as parks, open spaces strategically proximate to politically, socially or economically significant buildings or structures, roads

⁵¹ *Kivenmaa v Finland* (n 40 above), per dissent of Mr Kurt Herndl, para 2.6. The majority offered no alternative meaning. Nowak (n 42 above), pp 373–374, quoted with apparent approval in Joseph, Schultz and Caston (n 25 above), para 19.02, p 426, has suggested that Art 21 is “specifically directed at assemblies concerned with the discussion or proclamation of information and ideas”. The ECHR reached a similar conclusion in *Anderson v United Kingdom* [1998] EHRLR 218, but see comment in Ben Emmerson QC and Andrew Ashworth QC, *Human Rights and Criminal Justice* (London: Sweet & Maxwell, 2001), para 8–75, p 253.

⁵² Partsch (n 38 above), pp 231–232; Nowak (n 42 above), pp 372–373.

⁵³ Francesca Klug, Keir Starmer and Stuart Weir, *The Three Pillars of Liberty: Political Rights and Freedoms in the United Kingdom* (London: Routledge, 1996), pp 188–193 graphically illustrate the consequences of private and public controls on space for the real as distinct from the theoretical freedom of assembly. See also Therese Murphy (n 40 above), pp 445–448.

⁵⁴ Nowak relates this to obligations not to discriminate on the grounds of political or other opinion (n 42 above), pp 382–383.

and footpaths.⁵⁵ The opening up of privately owned spaces that serve quasi-public purposes, such as shopping malls and housing estates, also requires sensitive consideration.⁵⁶

None of the international institutions mentioned in this article has yet addressed these points directly.⁵⁷

Positive obligations: protection from hostile audiences

Nowak records that the drafters of Article 21 of the ICCPR specifically envisaged a positive state obligation to protect members of assemblies from outside interference.⁵⁸ The European Commission and the ECHR have interpreted Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as imposing positive government obligations to protect people exercising their freedom of assembly from intimidation, disruption or physical attacks by others. In *Plattform "Arzte fur das Leben"*, the Commission said:

"[T]he Convention does not merely oblige the authorities of the Contracting States to respect for their own part the rights and freedoms embodied in it, but in addition it requires them to secure the enjoyment of these rights and freedoms by preventing and remedying any breach thereof ... Also, the Convention is intended to guarantee rights that are practical and effective and not rights that are theoretical or illusory ... The obligation to secure the effective exercise of Convention rights may therefore involve positive obligations on the State in a number of areas ... Accordingly, in the Commission's view, the right to freedom of assembly as guaranteed by Article 11 para 1 must include the right to protection against counter-demonstrators, because it is only in this way that its effective exercise can be secured to social groups wishing to demonstrate for certain principles in highly controversial issues."⁵⁹

⁵⁵ For a limited recognition of a common law right of assembly with respect to public highways, see *DPP v Jones* [1999] 2 AC 240, discussed at length in Fenwick and Phillipson (n 35 above). The US constitutional theory of the public forum could be a useful starting point for a wider viewpoint. See *Hague v CIO* (1939) 307 US 496; 59 S Ct 954; *Perry Education Association v Perry Local Educators' Association* (1983) 460 US 37; 103 S Ct 948; and Barendt (n 36 above), pp 169–172. Note also Barendt's reference to the German constitutional position at p 171.

⁵⁶ Nowak (n 42 above), p 383, suggests a very narrow obligation. The English Court of Appeal gave almost absolute rights to property owners in *CIN Properties Ltd v Rawlins and others* [1995] 2 EGLR 130, CA, discussed in K. Gray and S. F. Gray, "Civil Rights, Civil Wrongs and Quasi-Public Space" [1999] 1 EHRLR 46, 47–49. The US courts are inconsistent, see Stanley H. Friedelbaum, "Private Property, Public Property: Shopping Centers and Expressive Freedom in the States" (1999) 62 *Albany Law Review* 1229; Jennifer Niles Coffin, "The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property" (2000) 33 *University of Michigan Journal of Law Reform* 615. For related Canadian views see *K Mart Canada Ltd v U.F.C.W. Local 1518* (1999) 99 Canadian Labour Law Cases 220, S Ct of Canada.

⁵⁷ *Mark Anderson v United Kingdom* [1998] EHRLR 218 could have been decided on this ground, but was not.

⁵⁸ Nowak (n 42 above), p 376.

⁵⁹ *Plattform "Arzte fur das Leben" v Austria* (1985) 44 DR 65, pp 72–73. For the ECHR decision see (1991) 13 EHRR 204, para 32.

Of course, this does not impose an absolute obligation on a state to commit all possible resources or even to adopt the single most effective course to protect people taking part in assemblies. It does mean that restricting a peaceful demonstration can only be justified “if disorder arising as a consequence of violent counter-demonstrations cannot be prevented by other less stringent measures”. It also means that the right to the taking of those less stringent measures is a part of the substantive right.⁶⁰

Legitimate Restrictions on the Freedom of Assembly

The burden of proof

Once a complainant has established the official restriction of a fundamental freedom as a live issue, it is for the government to prove either “no restriction” in fact or the legitimacy of any admitted restriction.⁶¹ The CFA has already accepted this point.⁶² This is so even where the issue is raised in the context of an application for judicial review.⁶³ The importance of this allocation of the burden of proof for a fundamental freedom approach cannot be overstated and so it is mentioned first.

“No restrictions ... other than those imposed in conformity with the law”

Hong Kong courts have implicitly accepted the ECHR’s interpretation of the phrase “prescribed by law” in Article 10 of the ECHR in *Sunday Times v United Kingdom* as an appropriate interpretation of the words “provided by the law” in Article 19 of the ICCPR.⁶⁴

“In the Court’s opinion, the following are two of the requirements that flow from the expression ‘prescribed by law’. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁶⁵

⁶⁰ *Ibid.*

⁶¹ For an exceptional discussion of evidence and burden of proof issues, see Emmerson and Ashworth (n 51 above), paras 1–117 to 1–125, pp 43–45.

⁶² *Ng Kung Siu* (n 22 above), p 136H.

⁶³ Richard Gordon QC and Tim Ward, *Judicial Review and the Human Rights Act* (London: Cavendish Publishing Limited, 2000), para 3.146, p 82.

⁶⁴ *AG v Cheung Kim Hung* (1997) 7 HKPLR 295, p 303, per Rogers J, adopted in *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKC 24, pp 52–53.

⁶⁵ *Sunday Times v United Kingdom* (n 33 above), p 271.

However, some commentators have suggested that “in conformity with the law” implies a lesser standard than “provided by law”, perhaps permitting more administrative discretion when imposing limits on the rights. Partsch describes “in accordance with the law” as a less strict form, “doubtless in order to allow wider discretion to administrative authorities acting under general authorisation. Presumably, the police may act on the basis of a general clause authorising them to act in the interest of public safety”.⁶⁶ But it is always the objective “to avoid arbitrary restrictions on rights by requiring that the limitation be established by a general rule”.⁶⁷ The detailed rules controlling the exercise of the discretion might be contained in a document not having the status of a law, such as Police General Orders perhaps,⁶⁸ at least if the detailed rules are nevertheless generally applied.⁶⁹

“Necessary in a democratic society”: the nature of a democratic society

Kiss records both that (i) the words “in a democratic society”⁷⁰ in Article 21 were insisted upon by some who expressed the opinion that “freedom of assembly could not be effectively protected unless the limitation clause was applied according to the principles recognized in a democratic society” and (ii) the drafters were unable to agree upon a definition of the term.⁷¹ But the concept is so central to the whole notion of a fundamental freedom approach that some attempt to analyse it must be made. For this purpose, it is submitted, it should be sufficient to note some minimal characteristics about which there can be no good faith debate. More detailed analysis can be left to the HKSAR institutions as the need arises.

⁶⁶ Note 38 above, p 232. See also Nowak (n 42 above), pp 377–378; Joseph, Schultz and Castan (n 25 above), pp 426–427; and Therese Murphy (n 40 above), p 443. Cf A. H. Robertson and J. G. Merrills, *Human Rights in Europe: A study of the European Convention on Human Rights* (Manchester: Manchester University Press, 3rd edn, 1993), p 196 taking a contrary position with respect to a similar diverse collection of expressions in the European Convention.

⁶⁷ Alexandre Kiss, “Permissible Limitations on Rights,” in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia U Press, 1981), pp 290, 304.

⁶⁸ Assuming the orders are binding directives and are truly accessible to the public.

⁶⁹ *Silver v United Kingdom* (1983) 5 EHRR 347, para 33. But Home Office guidelines, neither legally binding nor directly accessible to the public, were not sufficient for the ECHR in *Khan (Sultan) v United Kingdom* [2000] Crim LR 684; 8 BHRC 310 or *Govell v UK* [1998] EHRLR 438 cited therein. For an extremely lax decision on this point, see *Rai, Allmond and “Negotiate Now”* 19 EHRR CD 93, p 97. See generally Emmerson and Ashworth (n 51 above), paras 2–80 to 2–91, pp 86–90; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford: Oxford University Press, 2000), paras 6.126–6.143, pp 322–330.

⁷⁰ Through the incorporation of the ICCPR into HKSAR law, the HKSAR has accepted the standards of democratic societies as the yardstick by which to measure permissible limits on the expressive freedoms irrespective of whether the HKSAR is or is not a democratic society itself.

⁷¹ Alexandre Kiss (n 67 above), p 305f. See also Partsch (n 38 above), p 232 and Nowak (n 42 above), pp 378–379.

A common beginning for such an analysis in recent years has been all or part of the following extract from the ECHR's judgment in *Handyside v the United Kingdom*:

"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."⁷²

The ECHR has recently reiterated its view that pluralism is central to a democratic society.⁷³ The same must be true of tolerance and broadmindedness. Accrediting members of a specific society with these democratic attitudes should have important consequences for a fundamental freedom approach to disruptions caused to one part of the society by the assembly activities of another part in particular, and to the tolerance of difference in general.⁷⁴ But democracy is not only about attitudes and values. It is also about a form of governance, the three being closely interrelated. Hence to the *Handyside* characteristics must be added (i) formal and informal public participation as of right in the processes and decision making of government,⁷⁵ and, at least in the context of the ICCPR, (ii) real limitations on the power of the institutions of government to restrict such participation or to impinge on other fundamental rights and (iii) real limitations on the power of others to infringe the fundamental rights of individuals, whether as individuals or as members of a minority.⁷⁶ Of course, there is room for substantial diversity in implementation, but not to the point where the core of any of these three characteristics is lost.

⁷² [1976] 1 EHRR 737, para 49, p 754. Nowak (n 42 above), p 379 suggests the "minimum democratic standard" may be lower in a "universal international treaty than in a regional one", but that the criteria in *Handyside* "may be deemed valid as a general standard for democratic societies".

⁷³ *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121, para 43.

⁷⁴ Fenwick and Phillipson (n 35 above), pp 649–650.

⁷⁵ See Art 26 of the Basic Law, which protects formal participation in elections, and the wider Art 25 of the ICCPR, which protects the right to participate in public life. The UK initially entered a reservation to Art 25 to the effect that Art 25 "does not require the establishment of an elected Executive or Legislative Council in Hong Kong". See s 13 of the BORO. However, election of the Chief Executive and the Legislative Council by universal adult suffrage, at least by 2008, are stated objectives of the Basic Law, Arts 45 and 68 respectively.

⁷⁶ See Kiss (n 67 above), pp 307–309; Nowak (n 42 above), p 379. For discussion of the rather narrow ECHR models of democracy, see Susan Marks, "The European Convention on Human Rights and its 'Democratic Society'" (1995) 66 *The British Year Book of International Law* 209; A. Mowbray, "The Role of the European Court in the Promotion of Democracy" [1999] *Public Law* 703.

“Necessary in a democratic society”: the functions of the freedom of assembly in a democratic society

A fundamental freedom approach to freedom of assembly requires a sensitive appreciation of the functions of that freedom in a democratic society that may be adversely affected by any actual or proposed limitation. Much has been written about the functions of freedom of assembly in recent times.⁷⁷ The functions include all the functions of freedom of expression commonly referred to in US texts as “the argument from truth”, “the marketplace of ideas”, “the checking of government” and “self fulfilment”.⁷⁸ But freedom of assembly is more than simply one possible mode of expression: it has its own additional functions.

Popular participation in the processes of government at all levels is of the essence in democracy as a form of government. Barendt points to the historical connections between public assemblies and the ancient rights of petition,⁷⁹ and concludes that even today, “meetings and demonstrations ... amount to an active engagement in the life of the community ...”.⁸⁰ It is a participation potentially supplementary to, or quite separate from, the formal ballot box, and within or outside the constraints of political parties or any form of organised politics. Public assemblies enable people who feel strongly to express and demonstrate the depth of their feelings to themselves and others, perhaps discovering the empowering experience of realising they are not alone, perhaps just letting off steam. They are relatively cheap, accessible and perhaps uniquely effective at getting a target audiences’ attention, always a prerequisite for communication. As such they are particularly suited to minorities and relatively economically, socially or politically disadvantaged majorities. These are the groups most often at risk of being deliberately, or for lack of money / expertise / contacts or willingness / ability to conform to dominant rules of the organised political game, excluded from, or misrepresented and distorted by, other modern means of mass communication. Public assemblies can also be a useful wake up call, alerting non-participants to the problems of those whose lives do not directly touch theirs, or to some consequences of choices or administrative action not otherwise seen.

Freedom of assembly also protects private assemblies, politically significant or otherwise.⁸¹ These are normally left out of the discussion, but must be mentioned here because the terms of the POO would include some of

⁷⁷ Fenwick (n 37 above), pp 492–494; Barendt (n 36 above), pp 165–169.

⁷⁸ For example, Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (St Paul, Minnesota: West Group, 3rd edn, 2000), pp 252–256.

⁷⁹ Note 36 above, p 167.

⁸⁰ *Ibid.*, p 168.

⁸¹ See n 51 above for arguments to the contrary.

them. The political, social and personal significance of such assemblies in any society cannot be over-estimated.⁸²

“Necessary in a democratic society”: necessary and proportional

The HRC,⁸³ the European institutions⁸⁴ and the CFA⁸⁵ have all accepted that determining what is “necessary” imports a requirement of proportionality, although the HRC often does not use the term “proportionality” specifically. The Privy Council recently approved an approach that treats proportionality as the wider term.⁸⁶ Whatever terminology is used, in every case it must be determined, taking account of the particular circumstances of the relevant society and the facts of any actual incident, but always applying the measure of a democratic society, (i) whether there was a need to limit the fundamental freedom of assembly to some degree in order to achieve a specific permissible objective and (ii) if there was such a need, whether what was done or proposed was not more than was required to achieve that specific objective. The first question may conveniently be expressed in terms of necessity, the second in terms of proportionality, but terminology is not crucial. What is crucial is that the factual and normative components of each issue are rigorously and not merely superficially probed.

As to the meaning of necessity, the Hong Kong courts have “gone it alone”. In *Handyside*, the ECHR said, “whilst the adjective ‘necessary’ ... is not synonymous with ‘indispensable’ [here the court contrasted the use of the phrases ‘absolutely necessary’ and ‘strictly necessary’ in Articles 2(2) and 6(1) respectively] neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’”.⁸⁷ The court then added: “Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.”⁸⁸ This seems unexceptional. It is difficult to see how an interference with a fundamental right could be necessary, as distinct from merely useful, reasonable or desirable, in a democratic society if it was only required for the purpose of achieving a not really pressing or important social need.

⁸² For a strong argument as to the individual apolitical importance of the expressive freedoms see Sir John Laws, “Meiklejohn, the First Amendment, and Free Speech in English Law,” in Ian Loveland (ed), *Importing the First Amendment: Freedom of Expression in American, English and European Law* (Oxford: Hart Publishing, 1998), p 123.

⁸³ *Faurisson v France* 550/93 cited in Joseph, Schultz and Caston (n 25 above), para 18.18, p 392.

⁸⁴ Authorities are legion, beginning with *Handyside* (n 72 above), para 49, p 754. Note that the ECHR’s application of proportionality is greatly influenced by its doctrine of a margin of appreciation: Fenwick and Phillipson (n 35 above), pp 641–643; Aileen McHarg (n 33 above), pp 687–688.

⁸⁵ *Ng Kung Siu* (n 21 above), p 140G.

⁸⁶ *De Freitas v Permanent Secretary of Ministry of Agriculture and Fisheries, Lands and Housing* [1999] 1 AC 69, 80 per Lord Clyde. Lord Steyn adopted the approach in *de Freitas*, though only in a general way, in *R v A (No 2)* [2002] 1 AC 45, p 65F–H. The passage has been cited in many recent cases.

⁸⁷ Note 72 above, para 48, p 754.

⁸⁸ *Ibid.*

The Hong Kong courts have not yet cited the first part of the *Handyside* discussion of necessity, but they have consistently refused to embrace what they have interpreted as the substitution of “necessary” by the phrase “pressing social need” in the second part, labelling the phrase “unhelpful”. Instead, they have insisted that “necessary” must be given its ordinary meaning, but without explaining the normal meaning.⁸⁹ The Concise Oxford Dictionary defines “necessary”, when used as an adjective, as “required to be done, achieved, or present; needed”.⁹⁰ Provided the full import of this meaning of the word is rigorously maintained, no harm will come from the departure from *Handyside*, particularly if the court takes the trouble to explain precisely why restriction of the freedom of assembly was necessary in a particular case.⁹¹

As to proportionality, the court in *Handyside* explained that the concept of a democratic society meant “amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere [the sphere of freedom of expression and, it is submitted, of freedom of assembly as well] must be proportionate to the legitimate aim pursued”.⁹²

Again it is essential to realise that a low level of scrutiny of this issue could permit the fundamental freedom of assembly to be “proportionalised” away. A fundamental freedom approach would not allow that. In this context it is highly significant that the House of Lords has recently concluded:

“There is a material difference between the *Wednesbury* and *Smith* grounds of review [of administrative action] and the approach of proportionality applicable in respect of review where [European] convention rights are at stake ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality ... But the intensity of review is somewhat greater under the proportionality approach ... First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable grounds. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened test developed in *R v Ministry of Defence, ex p. Smith* is not necessarily appropriate to the protection of human rights ... This

⁸⁹ *Ng Kung Siu* (n 22 above), p 140C–D and cases cited therein.

⁹⁰ Note 96 above, p 953.

⁹¹ It is crucial that Lord Jauncy of Tullichettle’s reliance on *James v United Kingdom* [1986] 8 EHRR 123 in *Ming Pau Newspapers Ltd and Others v AG of HK* [1996] 2 HKLR 239 is not repeated. *James* was a Protocol 1, Art 1 case which even the Commission recognised does not involve a necessity test at all, but rather contemplates a much larger margin of appreciation to the states than Arts 8–11(2) could tolerate, together with a mere reasonableness standard. See Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague: Kluwer Law International, 1996), p 149 at n 378.

⁹² Note 72 above, para 49, p 754.

does not mean that there has been a shift to merits review. On the contrary, and Professor Jowell has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so.⁹³

Here mention must be made of the European notion of “margin of appreciation”⁹⁴ and the more familiar common law “deference to the legislature”. As to the former, it is submitted that the European doctrine of a “margin of appreciation” should have no place in Hong Kong domestic jurisprudence. The HRC has rejected the margin of appreciation approach, even as between different states.⁹⁵ The House of Lords has stated that the doctrine has no place in domestic courts.⁹⁶ The CFA made no mention of the “margin of appreciation” in the flag case judgments. It is submitted that references to the doctrine by the Privy Council in *Ming Pao*⁹⁷ were misleading and misplaced. Actual decisions of the European institutions which refer to the doctrine must therefore be approached with care. They may mislead local courts into adopting too low a level of scrutiny.⁹⁸

Judges trained in a tradition of parliamentary supremacy must also treat the concept of “deference to the legislature” with care. Where questions as to the compatibility between the ICCPR and the common law or judicial sentences arise, the courts as primary decision makers need defer to no one. Where legislative or executive action is to be reviewed, the position may be otherwise. In *Ng Kung Siu*, Liu CJ said that “due weight” should be given to the views of the National People’s Congress and Legislative Council as to the appropriateness of enacting the “flag protection” legislation in question.⁹⁹ Bokhary PJ said, “When a matter of the present kind comes before the courts, the question is not which approach the judges personally prefer. It is whether the approach chosen by the legislature is one permitted by the constitution.

⁹³ *R (Daly) v Home Secretary* [2001] 2 WLR 1622, pp 1634–1636. References for texts within the quote are *R v Ministry of Defence, ex parte Smith* [1996] QB 517, p 554 and Professor Jeffrey Jowell QC, “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] PL 671, 681. See also Richard Clayton (n 17 above).

⁹⁴ The doctrine whereby a “state is permitted a certain measure of discretion, subject to supervision by the competent international monitoring body, when it takes legislative, administrative, or judicial action in the area of a guaranteed right”. David Harris, “The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction,” in Harris and Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995), pp 1, 13.

⁹⁵ Harris and Joseph, *ibid.*, pp 13–14; Joseph, Schultz and Castan (n 25 above), para 18.21; and n 27 above, p 394 and paras 1.65–1.73, pp 24–28, re cultural and economic relativism.

⁹⁶ See *R v DPP, ex parte Kebilene* [2000] 2 AC 326, p 380E, dictum of Lord Hope of Craighead. Cf use of the phrase in *R v Chief Constable of Sussex, ex parte International Ferry Traders Ltd* [1999] 1 All ER 129, pp 137, 157, per Lords Slynn and Cooke respectively, when reviewing and deferring to the expertise of a Chief Constable seeking a ban on processions from a local authority.

⁹⁷ [1996] 2 HKLR 239, pp 244–246.

⁹⁸ Emmerson and Ashworth (n 51 above), pp 103–104. See Fenwick, “The Right to Protest” (n 37 above), pp 500–505 as to approaches local courts could take to ECHR cases affected by the margin of appreciation factor.

⁹⁹ Note 22 above, p 140D–E.

This does not involve deference to the legislature. It is simply a matter of maintaining the separation of powers.”¹⁰⁰

However, it is essential to a fundamental freedom approach that the judiciary not be intimidated by “the counter-majoritarian argument” in its defence of fundamental freedoms against encroachment by the legislature or the executive. The expressive freedoms in particular are intimately involved in preserving the democratic nature of the political process itself. The judges, steeped in the values of the rule of law and relatively immune from crass political influence, are the Basic Law’s “last stop” guardians of the democratic character of that political process, and the minimal rights of the losers within and without it. It is an awesome responsibility that should not be surrendered lightly.¹⁰¹ A weak judiciary is as much a threat to the separation of powers as an overactive one.

“Necessary in a democratic society”: content neutrality

Acceptance of the above analyses of the burden of proof, the nature of democratic society, the functions of freedom of assembly in such a society and the restrictive term “necessity” has important consequences in a fundamental freedom approach for the legitimacy of limitations on the fundamental freedom of assembly based on content or in the form of prior restraints.

Given the pluralist and tolerant character of a democratic society, and the function of assemblies as a means of participation in public life, restrictions on freedom of assembly expressly or implicitly related to the content (eg the purpose, personnel or message) of the assembly can rarely be justified as necessary in a democratic society to achieve any legitimate aim. However, such restrictions are attractive to legislators, executive officers, administrators and peace keepers wishing to inhibit or prevent expression of a particular point of view or by the members of a particular community. Therefore, a fundamental freedom approach would require all overtly content related restrictions, restrictions that facilitate the making of content related decisions and even disparate impact provisions, to be scrutinised very carefully.

That does not mean, however, that all content related restrictions would be rejected.¹⁰² Both the HRC and the ECHR have accepted significant restrictions on the expressive freedoms relating to obscene material, defamation

¹⁰⁰ *Ibid.*, p 147E–G. See also *R v DPP ex parte Kebilene* (n 31 above), p 381 wherein Lord Hope of Craighead observed that it would be easier to recognise an area of judgment within which the judiciary should defer on democratic grounds “... where the issues involve questions of social policy or economic policy, much less so where the rights are of high constitutional importance ...”.

¹⁰¹ *RJR-McDonald v Canada (Attorney-General)* [1993] 3 SCR 199, paras 133–137, cited in Clayton, “Regaining a Sense of Proportion” (n 17 above), pp 520–521.

¹⁰² See generally, David Feldman, “Content Neutrality,” in Ian Loveland (ed), *Importing the First Amendment: Freedom of Expression in American, English and European Law* (Oxford: Hart Publishing, 1998), p 138.

of private individuals and judges, national security, reckless incitement of imminent violence, inciting the abolition of institutions of democracy¹⁰³ and racial or religious invective.¹⁰⁴ In order to ensure the maintenance of public order (*ordre public*), restrictions in the last four categories might be necessary in the context of public assemblies, notwithstanding that restriction of the same content in published material only would not be justifiable.

“Necessary in a democratic society”: prior restraints

Types of prior restraints or pre-emptive strikes include court injunctions and official notification¹⁰⁵ or permit¹⁰⁶ requirements, condition-imposing powers and prohibition or banning powers. Many societies use some or all of these types in a variety of mixes. Their purpose is to facilitate the shutting of the stable door before any undesired expressive activity can bolt, that is before the expressive activity gets any chance to be seen or heard. Fear of the prospect of subsequent punishment would have to exceed the organisers / participants desire for the expressive activity to take place according to their plans before a subsequent punishment provision alone could suppress the activity as effectively as an efficient prior restraint. But this is precisely why prior restraints must be seen as an exceptional threat to the expressive freedoms. The need for the users of prior restraints to make predictions about the public order or public safety consequences of proposed expressive activities also increases the risk of unnecessarily impeding, limiting or preventing such activity due to excessively cautious public order decisions. In addition, the discretion built into most prior restraints facilitates illegitimate content

¹⁰³ See ICCPR, Art 5; European Convention, Art 17; and Jochen Abr. Frowein, “Incitement Against Democracy as a Limitation of Freedom of Speech,” in David Kretzmer and Francine Kershman Hazan (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague: Kluwer Law International, 2000), p 33.

¹⁰⁴ See ICCPR, Art 20. The United Kingdom’s reservation concerning this term applied in Hong Kong. No equivalent term appears in the BORO. But see the HRC’s ICCPR General Comment 24 concerning Issues Relating to Reservations made upon ratification of accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Art 41 of the Covenant in which it is suggested there is an obligation to punish racial hate speech under customary international law. See also *JRT and the WG Party v Canada* 104/81 and *Faurisson v France* 550/93 in Joseph, Schulz and Caston (n 25 above), paras 18.47, 18.48, pp 415–423, both decided under Art 19, though Art 20 was referred to; *Felderer v Sweden* (1986) 8 EHRR 91, p 92, decided on Art 10 principles alone. Offences punishing “insulting” behaviour could be used here, for example, POO, s 17B.

¹⁰⁵ That is, a duty to provide information only, with or without penalties for failure to do so, but without rendering the unnotified assembly unlawful for that reason alone, as with the Public Order Act 1986, s 11 relating to processions in England. See John Marston and Paul Thain, *Public Order Offences* (London: FT Law & Tax, 1995), p 112 and Richard Card, *Public Order Law* (Bristol: Jordan Publishing Limited, 2000), para 6.7, pp 212–213.

¹⁰⁶ That is, any system by which assemblies are unlawful unless permission to hold them has been given by a relevant public authority. New York City’s Administrative Code, Title 10, para 10 may fall into this category, but the constitutional status of the provision is in doubt: *McDonald v Safrir* 206 F 3d 183 (2d Cir 2000). A system whereby failure to notify makes the assembly itself unlawful would sit uncomfortably in between.

ensorship. Alternatively, resort to prior restraints that are content neutral because universally applied typically burdens, distorts or prevents a great deal of expressive activity outside the mischief of the ban. Finally, prior restraints often have the practical effect of forcing would-be protestors to choose between the “taming and institutionalising” of their expressive activity or civil disobedience.¹⁰⁷ A fundamental freedom approach would therefore require the form and impact of all prior restraints to be scrutinised with special care.

If prior restraints are treated with suspicion so too must significant penalties for violations of those restraints, again because of their chilling effects.

In *Kivenmaa*, the HRC commented that “a requirement to notify police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant”.¹⁰⁸ However, the HRC nevertheless found for the applicant. One commentator has suggested that “the majority decision may be rationalized as a condemnation, albeit poorly executed, of blanket advance notice requirements for public meetings”.¹⁰⁹ A number of criticisms of such “blanket” notice requirements in various of the HRC’s concluding comments were cited in support.¹¹⁰ These and other comments suggest the HRC would fairly readily accept narrowly drawn notice requirements for open air assemblies, at least assemblies of a significant size, but would need convincing

¹⁰⁷ Barendt (n 36 above), p 176.

¹⁰⁸ Note 40 above, para 9.2.

¹⁰⁹ Joseph, Schulz and Castan (n 25 above), para 19.10, p 432.

¹¹⁰ Concluding Comments on Mauritius (1996) UN doc CCPR/C/79/Add 60, para 28 read in the light of CCPR/C/SR.1477, paras 39, 49, 53, 69 and CCPR/C/SR/1478, paras 20, 28, disapproving of a law requiring seven days notice and permission from the Commissioner of Police for any public meeting; Concluding Comments on Belarus (1997), UN doc CCPR/C/79/Add 86, para 24, declaring incompatible with Art 21 a permit requirement with a 15 day minimum application period for demonstrations; Concluding Comments on Morocco (1999) UN doc CCPR/C/79/Add 113, para 24, expressing concern about “the breadth of the requirement of notification for assemblies and that the requirement of a receipt of notification of an assembly is often abused, resulting in de facto limits of the right of assembly” and concluding that the “requirement of notification should be restricted to outdoor assemblies and procedures adopted to ensure the issue of a receipt in all cases”. See also Concluding Observations of the HRC: United Republic of Tanzania CCPR/C/79/Add 12, para 11, recommending that the United Republic of Tanzania take steps “to guarantee freedom of assembly without the requirement for pre-permission or such other restrictions as may jeopardize the freedom in question without necessarily being a threat to public order”; Concluding Comments on the Netherlands re Netherlands Antilles CCPR/CO/72/Net, para 20, regretting that “the legal rules on the right of peaceful assembly [in the Netherlands Antilles] contain a general requirement of prior permission from the local police chief”; Concluding Comments on Cyprus CCPR/C/79/Add 88, para 15, and see CCPR/C/94/Add 1, paras 241–244, expressing concern about the conditions which appropriate authorities may impose on the conduct of assemblies and processions in Cyprus and noting that the advance notice to be given was too early and might unduly curtail freedom of assembly; Concluding Comments on Belgium CCPR/C/79/Add 99, para 23, read with CCPR/C/SR 1707, para 74, disapproving of mandatory prior authorisation for outdoor meetings, establishing prohibition as the norm instead of recognition of rights; Concluding Comments on Mongolia CCPR/C/79/Add 7, para 5, finding requirements for prior permission for holding public meetings and the criteria for refusing permission for such meetings too broad.

before it would accept at least a general permit system.¹¹¹ In addition, it would subject any general ban even on open air assemblies to serious scrutiny.¹¹²

The European Commission, on the other hand, apparently found the notification and permit prerequisites for open air public assemblies and demonstrations, even the geographically limited, short-term general bans of such assemblies, actually brought before it entirely unproblematic,¹¹³ readily accepting government assurances of public order dangers and sometimes not seriously exploring the possibilities of less restrictive means.¹¹⁴

It is submitted that the European Commission's approach to prior restraints, characterised by a wide margin of appreciation granted to states dealing with the public order issues generally said to be involved,¹¹⁵ is not a good guide for those intending to adopt a fundamental freedom approach to these issues. However, a recent decision of the ECHR is more promising, at least with regard to refusal of permission.¹¹⁶

"[I]n 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 of others" Section 2(2) of the POO expressly provides that the terms "public safety", "public order (*ordre public*)", "the protection of public health", and "the protection of rights and freedoms of others" are "[to be] interpreted in the same way as under the [ICCPR] as applied to Hong Kong". "[N]ational security" is given its own definition: "the safeguarding of the territorial integrity and the independence of the People's Republic of China." Kiss argues that "national security" means "the protection of territorial integrity and political independence [of a state] against foreign force or threats of force",¹¹⁷ but Nowak accepts as sufficient a threat of violent overthrow from within.¹¹⁸ During the HRC

¹¹¹ Cf Nowak (n 42 above), p 381: "Although the legal systems of many States distinguish between a licensing system and a mere notification system and often consider only the latter compatible with freedom of assembly, it is possible to interpret *ordre public* so broadly as to permit a general licensing system".

¹¹² CCPR/C/79/Add 78, para 26, rejecting a wholesale ban on demonstrations in Lebanon in 1997 as incompatible with the right to freedom of assembly under Art 21.

¹¹³ As to permits: *Rune Anderson v Sweden* (1989) 59 DR 165 (objection to fee for permit granted); *F v Austria* (1993) 15 EHRR CD 68; *H v Austria* (1993) 15 EHRR CD 70; *J v Austria* (1993) 15 EHRR CD 74. As to bans: *A Association and H v Austria* (1984) 36 DR 187 (a contents ban upheld, an exceptional case); *Christians against Racism and Fascism v United Kingdom* (1980) 21 DR 138; *Rassemblement Jurassien v Switzerland* (1979) 17 DR 93; *Rai, Allmond and "Negotiate Now" v United Kingdom* (1995) 81 DR 146; 19 EHRR CD 93; *Chappell v United Kingdom* (1988) 10 EHRLR 510; *Pendragon v United Kingdom* [1999] EHRLR 223.

¹¹⁴ Although the availability of alternative sites for the protests sometimes played an important part in the decisions, eg the availability of Hyde Park as an alternative to Trafalgar Square in *Rai, Allmond and "Negotiate Now"* (n 113 above), pp 96, 98.

¹¹⁵ Fenwick and Phillipson (n 35 above), p 641–643.

¹¹⁶ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria Applications Nos 29221/95 and 29225/95* (2 Oct 2001).

¹¹⁷ Note 67 above, p 297.

¹¹⁸ Nowak (n 42 above), p 380.

discussion of the HKSAR's report, one member of the Hong Kong delegation explained: "The [CP] had, in reaching his decision [as to assemblies] to take special account of the declared purpose of the demonstration, particularly if it advocated separation from China or independence for Tibet."¹¹⁹ But the ECHR has said, "... the fact that a group of persons calls for autonomy or even requests session of part of the country's territory ... cannot automatically justify a prohibition of its assemblies".¹²⁰

As to public safety, Kiss suggests:

"Rights guaranteed by the Covenant may be restricted if their exercise involves danger to the safety of persons, to their life, bodily integrity, or health. The need to protect public safety could justify restrictions resulting from police rules and security regulations tending to the protection of the safety of individuals in transportation and vehicular traffic; for consumer protection, for ameliorating labor conditions, etc."¹²¹

The term "public order (*ordre public*)"¹²² is more problematic. In *Ng Kung Siu*,¹²³ the Chief Justice concluded that the concept incorporated in the phrase, read as a whole, though clearly wider than simple law and order, could not be "precisely defined". It "includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole" and remains "a function of time, place and circumstances".¹²⁴ With respect, this formulation, though owing much to Kiss's analysis repeatedly cited by the Chief Justice, is defective in that it omits two crucial aspects of that analysis: a concentration on protecting the "adequate functioning of the public institutions" necessary in democratic society and an insistence that "... the concept itself reflects the principle that there are limitations on the state's powers, especially as far as human rights are concerned ... [and] may itself demand respect for human rights as an element in the exercise of the public authority".¹²⁵ Any explanation of *ordre public* should emphasise that what was envisioned by the drafters was a democratic, human rights-conscious *ordre public*, not merely a regimented and well ordered one.

¹¹⁹ CCPR/C/SR 1804, para 38, per Ms Yau.

¹²⁰ *Stankov* (n 116 above), para 97.

¹²¹ *Ibid.*, p 298.

¹²² There must be serious doubt as to the wisdom, if not the lawfulness, of including a foreign term of uncertain meaning in an HKSAR ordinance that has significant impact on ordinary HKSAR citizens.

¹²³ Note 22 above, pp 137–140, per Li CJ; p 144, per Bokhary PJ.

¹²⁴ The Chief Justice listed as examples, "prescription for peace and good order; safety; public health; aesthetic and moral considerations and economic order (consumer protection, etc)", clearly borrowed directly from Kiss (n 67 above), p 302.

¹²⁵ Note 67 above, p 302.

As to the protection of the rights and freedoms of others, given the breadth of the other terms, this must surely be confined to the “fundamental” rights and freedoms of others only.¹²⁶ But there is as yet no HRC or even ECHR authority to this effect.

Freedom of Assembly Under the ICCPR and PART III of the POO¹²⁷

Obligations / Powers to Facilitate Meetings

Access to appropriate space

The bottom line is that access to public spaces for the purposes of assemblies remains a matter of executive, public authority and / or police sufferance in the HKSAR. The power of the Chief Executive to “designate any area as a designated public area for the purposes of this Part [of the POO]” does not change that.¹²⁸ There are currently 16 such “designated public areas” throughout the HKSAR. None are near politically significant sites in Central or Wanchai. None are part of a public road.¹²⁹ Furthermore, the practical advantages of designation for would-be assemblers are limited. Notice requirements still apply, although the only type of condition that may be imposed with respect to meetings (not processions) in such areas relates to time,¹³⁰ and the power to prohibit proposed assemblies is retained. Thus, though indicating some official recognition of the space needs of public meetings, as a purported discharge of the positive obligation to provide access to appropriate space advocated above, the terms and current implementation of section 10 are radically inadequate.

The recent repeal of numerous by-laws and rules that required written permission from relevant local government “directors” before a public assembly could be held in or on public space under their general jurisdiction may be more significant.¹³¹ Again, however, ample powers to deal with undesired

¹²⁶ David Feldman, “Freedom of Expression,” in Harris and Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995), pp 391, 412. Nowak (n 42 above), pp 382–383 asserts a contrary view, listing as illustrations the “rights of passers-by, as well as those of participants, to personal safety and physical integrity”, but then relates these to public safety.

¹²⁷ The original Part III was totally replaced by the Public Order (Amendment) Ordinance 1980. Further substantial amendments were made to the replaced version in 1995 and 1997. For commentary on the pre-1995 versions, see Roda Mushkat, “Peaceful Assembly,” in Raymond Wacks (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), p 410. Mushkat also raised many of the general problems with the POO discussed below.

¹²⁸ POO, s 10.

¹²⁹ See POO (Designated Public Areas)(Consolidation) Order (Cap 245F). Designated areas are identified in a schedule with reference to maps and plans signed by the Secretary for Security and lodged in the Secretary’s office.

¹³⁰ POO, s 11(2), at least “insofar as the interests of public order are concerned”.

¹³¹ See Provision of Municipal Services (Reorganization) Ordinance (Cap 552), schedule 3, repealing the Public Health and Municipal Ordinance (Cap 132), ss 105R–105T. Cf the Country Parks and Special Areas Regulations (Cap 208A), regs 10, 11 and 12; Airport Authority By-Laws (Cap 483), s 17(2); Public Cemeteries Regulations (Cap 132(BI)), s 11(1)(c).

assemblies were retained, for example through general powers to make rules governing use of facilities and conduct therein as well as specific obstruction,¹³² disorderly behaviour and noise-creating offences, prohibitions on fixing or distributing bills or placards without the permission of a relevant official,¹³³ and, of course, the POO itself.¹³⁴

Control of hostile audiences

Section 17B(1) provides that any person “who at any public gathering acts in a disorderly manner for the purpose of preventing the transaction of the business for which the public gathering was called or incites others to do so” commits an offence.¹³⁵ This provision, together with other public order powers in the POO and common law powers relating to breach of the peace, discussed below, as well as disorderly conduct offences in other legislation, at least enable the HKSAR police to act to protect peaceful assemblies from hostile audiences and small numbers of violent participants if they so choose. Whether these powers are actually used in this way merits further study.

Content restrictions¹³⁶

“Procession” is defined in section 2(1) as meaning “a procession organized as such¹³⁷ for a common purpose, and includes any meeting held in conjunction with such a procession”. Assuming “common purpose” includes purposes of all kinds including social ones, this definition is content neutral. “[P]ublic procession” is defined as “any procession in, to or from a public place” and a public place is “any place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise ...”. These and other provisions concerning notice procedures for public processions are also content neutral¹³⁸ and, again, to that extent unproblematic.

¹³² Civil Centres Regulations (Cap 132F), s 12, Pleasure Grounds Regulations (Cap 132BC), s 21.

¹³³ Pleasure Grounds Regulations (Cap 132BC), s 15.

¹³⁴ See also Public Health and Municipal Services Ordinance (Cap 132), s 137A which provides: “Any part of a stadium, museum, library or civic center to which from time to time the public has access ... shall, during such time, be deemed to be a public place for the purposes of ... the [POO]” and the Airport Authority Ordinance (Cap 483), s 44 to like effect.

¹³⁵ The words “preventing the transaction of the business” betray the public meetings origins of this provision, but “public gathering” as defined includes processions.

¹³⁶ See also Part IV, s 26, which penalises statements or conduct at a public gathering intended or known to be likely, or which the offender ought to have known to be likely, to incite or induce others to kill or physically injure people, or destroy, damage or deprive others of property. As noted above, the ICCPR does not protect incitement of imminent violence, perhaps of any violence, but the merits of criminalising negligent incitement or inducement of violence by others should be queried when negligent infliction of violence itself is not a crime.

¹³⁷ Even spontaneous processions require a minimal amount of organisation.

¹³⁸ Except for funeral processions: see ss 13A(1)(a) and 17(2)(a).

The same is not true for static meetings. A “meeting” is defined as:

“any gathering or assembly of persons convened or organized for the purpose of the discussion of issues or matters of interest or concern to the general public or a section thereof, or for the purpose of the expression of views on such issues or matters ... but does not include any gathering or assembly of persons convened or organized exclusively –

- (a) for social, recreational, cultural, academic, educational, religious or charitable purposes, or as a conference or seminar bona fide intended for the discussion of topics of a social, recreational, cultural, academic, educational, religious, charitable, professional, business or commercial character;
- (b) for the purpose of a funeral;
- (c) for the purposes of any public body; or
- (d) for the purpose of carrying out any duty or exercising any power imposed or conferred by any Ordinance.”

Meetings initially within this exclusion may subsequently come within the definition if during the course of the meeting “any person assumes or attempts to assume control or leadership thereof for any such purpose”.

It is submitted that this is not a content neutral definition because it targets only public interest or political meetings.¹³⁹ Since “public meetings” are defined as “any meeting held or to be held in a public place”, it follows that public meetings are also defined with reference to content. If a fundamental freedom approach is adopted, any additional burdening of such meetings, the very kind of meeting the drafters of Article 21 were most anxious to protect, would require very strong justification indeed. Whether the additional burdens imposed by Part III of the POO can be so justified is considered below.¹⁴⁰

Prior restraints: banning powers

On first examination the allocation of POO banning powers amongst officials appears to have been carefully tailored to ensure the assignment of higher impact powers to officials of higher status (and hence presumably higher political sensitivity and accountability). Thus, a specific power to prohibit the

¹³⁹ See *Barendt* (n 36 above), p 174. Cf *Bynum v US* 93 F Supp 2d 50; *Lederman v US* 89 F Supp 2d 29; 2000 US Dist Lexis 4244 where a regulation using the phrase “supporting or opposing a point of view” was said to apply to all demonstrations in the area irrespective of content. However, the regulation was struck down as too broad.

¹⁴⁰ The definition, added by the Public Order (Amendment) Ordinance 1980, was seen as a positive reform at the time since it replaced an “all-embracing definition” in the original ordinance, see Roda Mushkat, “Balancing Freedom of Expression and Public Order in Hong Kong” (1981) 11 HKLJ 62, 73, although Mushkat was well aware of the deficiencies of the definition and denied any need for a licensing system for meetings at all.

holding of all or any class of public gatherings,¹⁴¹ Part III's widest category of assembly, in all or part of the HKSAR for any period not exceeding three months is given to the highest ranking official, the Chief Executive in Council, with very limited possibilities for anything other than political review.¹⁴² The power to ban specific public meetings and public processions is given to the Commissioner of Police (CP). The CP's exercise of this power is subject to relatively independent appeal procedures, themselves in turn subject to judicial review. However, on closer inspection, the correlation between power and status is illusionary. First, section 51 of the POO provides that the Chief Executive "may give such directions as he thinks fit with respect to the exercise or performance by the [CP] or any other police officer of the powers, functions or duties conferred or imposed on him by or under this Ordinance, either generally or in any particular case". So the Chief Executive could legally direct the CP to prohibit a particular assembly. The section specifically provides that the CP must comply with such directions. How the Appeal Board would be expected to deal with decisions by the CP made in obedience of such directions is a very interesting, but unanswered, question. Secondly, the CP can use the prohibition powers, alone or in combination with sections 6(1), 11 and 15 powers, to impose conditions considered below, to effectively ban all or certain types of assembly activity from a particular area, at least for a limited period. Thirdly, the power to ban individual assemblies is not even confined to the Chief Executive and the CP. Section 52 permits the CP to delegate his powers to prohibit a notified meeting or object to a procession to "any police officer of the rank of inspector or above".¹⁴³

Nor have the banning powers been carefully or narrowly drawn. The Chief Executive may only exercise the general banning power if "it is necessary for the prevention of serious disorder", but the judge of that necessity is the Chief Executive himself. The CP's powers to ban specific assemblies under sections 9 and 14 look relatively circumscribed. For example, the powers cannot be exercised at all within 48 hours of a notified commencement time; all bans must be in writing and accompanied by reasons; and, most significantly, there is a relatively independent appeal procedure, presumably on the merits since there is no other indication of the standard or criteria the Board should apply.¹⁴⁴ But

¹⁴¹ Defined in s 2(1) as "a public meeting, a public procession and any other meeting, gathering or assembly of 10 or more persons in a public place".

¹⁴² Meaning the Chief Executive acting after having received the advice of the Executive Council, though not necessarily in accordance with that advice.

¹⁴³ Section 17(2)(a), which gives inspectors or above powers to "prevent the holding of public gatherings", amongst other things, may go even further, but the exact meaning of this provision is in doubt. See discussion of s 17(2) generally below. Cf the very much narrower English delegation powers discussed in Richard Card (n 105 above), para 6.93, pp 253-254.

¹⁴⁴ Section 44A provides that the Appeal Board must consider and determine any appeal "with the greatest expedition possible so as to ensure that the appeal is not frustrated by reason of the decision of the Appeal Board being delayed ...".

again, in reality the powers are very wide. First, the section 9 power applies to “public meetings notified under section 8”. As defined, “public meeting” includes not only open air or public hall meetings open to all the public but extends also to meetings on enclosed private premises for which admission is charged, provided “a section of the public” may attend and matters of public interest are on the agenda.¹⁴⁵ The section 14 power to object to processions appears to apply to all public processions, notifiable or not and irrespective of whether they begin or end with a meeting. Secondly, the powers may be exercised if the CP “reasonably considers” that the prohibition or objection is “necessary in the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others”. Although this terminology is obviously borrowed from the ICCPR, there is no mention of a “democratic society” as part of the standard to be applied.¹⁴⁶ Nor is there any mention of the degree of threat the various interests, rights or freedoms must be facing, although it is provided that the CP shall not exercise the powers if he “reasonably considers” those interests, rights and freedoms “could be met by imposing conditions”.¹⁴⁷

Can these broad, ill-drafted, overlapping powers nevertheless be defended as necessary in a democratic society for the achievement of legitimate aims? It is submitted that they cannot.

It is submitted that a fundamental freedom approach to freedom of assembly must view general bans on assemblies as the antithesis of a fundamental freedom of assembly. If acceptable at all, general bans on assemblies must be rigorously confined to only what is strictly needed. The starting point, and usually the ending point, should then be that the real dangers presented by each proposed public assembly should be separately considered. At the very least, large numbers of manageable assemblies should not be sacrificed in order to make certain of catching a small number of unmanageable ones.

Is there then any credible evidence to show that Hong Kong is, from time to time, so vulnerable, unstable and uncontrollable a society that a general ban on

¹⁴⁵ In the context of meetings, “public place” is further defined to include “any place which is or will be, on the occasion and for the purposes of such a meeting, a public place”. The meaning of this phrase becomes more and more obscure upon examination, but for present purposes it is sufficient to note that it was certainly intended to extend “public place” even further beyond any ordinary usage of the term and to extend the net of “public meeting” as far as possible without losing sight of the “public” element altogether.

¹⁴⁶ An omission noticed with concern by at least one member of the HRC during the discussion of the HKSAR report, CCPR/C/SR1804, para 51, per Lord Colville.

¹⁴⁷ What if the CP unreasonably considers that conditions are enough, or, more problematically, unreasonably considers that conditions are not enough? The provision does not really impose an objective reasonableness standard. See also ss 8(2) and 13A(2) in the same style. What is needed is an obligation on the CP to use conditions rather than banning, or accept shorter notice, unless the CP has reasonable grounds for believing that conditions alone or the shorter notice period will not be sufficient to protect the relevant legitimate object, using as always the standard of a democratic society.

all or some gatherings would sometimes be necessary for the prevention of serious disorder here? Perhaps, but then the question must be asked whether, applying the standard of a democratic society, the section 17E power is proportional to that need. As written, section 17E would permit the banning of all gatherings of any kind of 10 or more people even in enclosed public places such as restaurants, village halls or shopping malls. It is noteworthy that the scope of this power far exceeds any non-emergency banning powers applicable to London¹⁴⁸ or New York City.¹⁴⁹ Of course, that by itself proves nothing, but it should give pause for thought. Giving full weight to the disturbances of the 1960s and early 1970s, and remembering that the section 17E power does not purport to be an emergency or wartime power,¹⁵⁰ it is submitted that no person, applying a fundamental freedom approach, could ever find a banning power of such all-encompassing breadth to be necessary in a democratic society. Certainly, the HRC would not find it so.

Of course, it may be possible to adduce credible evidence that a much narrower banning power, perhaps confined to open air assemblies of significant size or within a narrow geographical area, is necessary for the occasional prevention of serious disorder in Hong Kong and, applying the standards of a democratic society, is proportional to that need.¹⁵¹ But that would be another ordinance.

As to the various powers to prohibit specific public processions, the starting point must be that any such power facilitates illegitimate content based or simply over-cautious suppression of assembly activity. However, public processions in particular can create exceptionally difficult traffic control and other public order problems, so that a narrow prohibition power probably could be shown to be necessary for the protection of one or more legitimate objectives in Hong Kong. As to proportionality, it is submitted that if the CP's section 14 power to object to processions stood alone, given the real safeguards imposed, the power would be very close to acceptable. But the grounds upon which the power can be exercised remain wide and vague and must be narrowed. At the very least,

¹⁴⁸ Public Order Act 1986, s 13, confined to processions; s 14A, confined to open air trespassory assemblies; City of London Police Act 1839, s 52; and Metropolitan Police Act 1839, s 52, giving the relevant commissioners extensive powers to issue directives to prevent obstruction and maintain the peace in public streets; and powers relating to specific sites such as the Trafagar Square Regulations 1952 (1952 SI 776). That said, bans on processions actually imposed under these provisions in the last 20 years have far exceeded anything done by the Hong Kong police, for example bans on processions covering many square miles of London. See the extensive discussion in Richard Card (n 105 above), Ch 6.

¹⁴⁹ The author was unable to find any general banning power relating to public forums, although permits for specific processions or parades may be refused, in particular for congested business streets between 9.00 am and 6.00 pm, see NYC Administrative Code, s 10-110. As to attempts to control assembly activities at specific public sites such as the spaces in front of City Hall, see *Housing Works Inc v Howard Saffir Commissioner of New York City Police Department, the City of New York and Rudolph Giuliani, Mayor of City of New York* 10 F Supp 2d 163.

¹⁵⁰ The POO also contains provisions relating to the imposition of curfews and restricted areas. A pragmatist looking at the HKSAR's unique circumstances might argue it is better for the HKSAR to rely on the POO than to enact specific emergency powers legislation, but that is a topic for another article.

¹⁵¹ The European Commission accepted the English powers. See cases cited in n 113 above.

the power should be confined to processions similar to those that now require notification and the standard restated as something like “necessary in a democratic society for the prevention of serious threats to national security, public safety, public order or the fundamental rights or freedoms of others”. The CP’s discretion should be further circumscribed by binding directives incorporating the priority to be given to the exercise of the fundamental freedom of assembly, the use of the power as a last resort, a commitment to content neutrality¹⁵² and the *Plattform “Arzte fur das Leben”* principle. The Chief Executive’s power to direct the CP’s actions in this and other matters under the POO should be removed and the power of the CP to delegate the banning power should be restricted to higher ranking officers.¹⁵³

As to the section 9 power relating to public meetings, it is submitted that the content bias and wide range of the definition of “public meetings” are fatal. Defence of the content bias in the power would require credible evidence:

- 1 that public meetings on matters of public interest in the HKSAR typically, or at least fairly often, cause public order or public safety problems that are different in kind, magnitude or intensity to those caused by recreational, religious, sporting or cultural gatherings of comparable size and location; and
- 2 that such different problems cannot be handled by the reasonable deployment of public resources, including public safety resources, or the imposition of permissible conditions or other arrangements.

Even if this could be done with respect to open air meetings in true public spaces, defence of the present power would require the government to prove its case with respect to public interest meetings held in enclosed premises or on private premises with the consent of the owner as well. The enormity of this task only becomes clear when the full implications of a banning power such as this, but without the public interest bias, are carefully considered.¹⁵⁴ Surely such a threat to our fundamental freedom of assembly would be intolerable.

Is there any circumstance in a democratic society in general or the HKSAR in particular that could ever make such a power necessary? Perhaps a content neutral power¹⁵⁵ confined to open air assemblies on public / quasi-public land, at least above a certain size, could be defended as necessary in a democratic

¹⁵² Subject to standard ICCPR exceptions, see previous discussion.

¹⁵³ No particular rank is suggested here, but certainly the rank of inspector, which is one of the points of entry into the force in Hong Kong, is too low.

¹⁵⁴ See Barendt (n 36 above), p 176.

¹⁵⁵ Except, perhaps, for powers to ban open air assemblies in support of direct and immediate national security issues or imminent violence, although the ordinary criminal law could be applied to the latter.

society for a legitimate purpose¹⁵⁶ – but it is difficult to see how even the distinctive characteristics of the HKSAR could justify anything more.

Prior restraints: notice prerequisites

Section 7(1) provides that:

“Subject to this Ordinance, a public meeting may take place if, but only if,
(a) the [CP] is notified under section 8 of the intention to hold the meeting; and
(b) the holding of the meeting is not prohibited by the [CP] under section 9.”

Section 13 provides that:

“a public procession may take place if, but only if –
(a) the [CP] is notified under section 13A of the intention to hold the procession;
(b) the [CP] has notified under section 14(4) the person that he has no objection to the procession taking place or is taken to have issued a notice of no objection [because the time limit for this has passed]”

These provisions mean exactly what they say. Meetings or processions that ought to have been notified, but were not, are actually unlawful. Organisation of or participation in such assemblies is a serious criminal offence. In this way, the fundamental freedom of assembly is stood on its head. It is no longer a freedom or a right, oftentimes a crime, and at best a privilege for which would-be assemblers must seek permission. The HKSAR Government has consistently denied that either of these notice processes amounts to a licensing or permit system. But, irrespective of the terminology¹⁵⁷ used, the bottom line is that a relevant public meeting or procession will be unlawful unless proper notice has been given and the CP has not prohibited or objected to that meeting or procession. The absence of any need for a piece of paper called a licence, permit or notice of no objection does not change that.

¹⁵⁶ It would be necessary to ensure that such a power was not used, by means of a general policy of denial of permission, to institute a general ban with respect to a specific area, something that appears to have been done in early 2002 with respect to the open area outside the Central Government Offices, see citations in n 4 above. General bans should be imposed under specific statutory banning powers only, publicly acknowledged and defended as such.

¹⁵⁷ The differences in format of these two provisions is confusing and misleading. It suggests a more liberal regime for meetings, but in practice, at least with respect to meetings that require notification, this is not really so since neither meetings nor processions may lawfully take place before the notified time and the CP may prohibit / object to either at any time up until, but not after, 48 hours before the notified time and on the same grounds. Neither meetings nor processions may be advertised until 24 hours after notice has been given.

Can these procedures nevertheless be defended as necessary in a democratic society for achieving a legitimate objective? It is submitted that they cannot. It is true that the notice prerequisites do not apply to public meetings of less than 50 persons anywhere, or 500 persons if on private premises, or any number of people in certain educational establishments with the consent of relevant authorities,¹⁵⁸ nor to public processions of not more than 30 people or which do not take place on a public highway or thoroughfare or in a public park.¹⁵⁹ It is also true that, although the general notice period is “not later than 11 a.m. on the same day of the week in the preceding week as the day on which the [public meeting or procession] is intended to be held”,¹⁶⁰ the CP “may, and shall in any case where he is reasonably satisfied that earlier notice could not have been given, accept shorter notice ...”.¹⁶¹ Also, the CP is required to give written reasons for any decision not to accept shorter notice, thus facilitating judicial review so that, apart from the fact that a refusal to accept shorter notice is not explicitly appealable to the Appeal Board (it should be), all appears fairly moderate and reasonable.

But, as previously shown, the HRC opposes general permit requirements for public assemblies. Notwithstanding the exemptions discussed above, that is what these provisions essentially are. Even for the ECHR, the bottom line is that mere participation in a peaceful assembly should not be penalised. These provisions make such participation *prima facie* unlawful. And, of course, the notice requirement for public meetings is open to the same objections arising from the content bias and extraordinary breadth of the term “public meeting” as defined as the CP’s section 7 banning power.

It might be possible to prove that time-flexible notice requirements for processions of more than, say, 30 persons and meetings of more than, say, 50 persons,¹⁶² to be held in public parks, on public highways or other open air public places within a high density modern city are necessary in a democratic society and proportional to that need, so as to enable content neutral management of scarce space resources, traffic regulation and preparations for any

¹⁵⁸ POO, s 7(2).

¹⁵⁹ POO, s 13(2). The CP also has an unqualified discretion to exempt any public procession “of a nature or description” of the CP’s choice. With respect, such an uncontrolled discretion, inviting content bias, cannot be consistent with a fundamental freedoms approach.

¹⁶⁰ POO, ss 8(1), 13A(1)(b), but funeral processions only require 24 hours notice, s 13A(1)(a).

¹⁶¹ POO, ss 8(2), 13A(2). As to the curious use of “reasonably satisfied”, see n 147 above. In practice, the commissioner has frequently accepted very short notice, and even no notice at all, at least to the extent of not prosecuting offenders.

¹⁶² In this context, the ICCPR cannot be read as stipulating minimum numbers below which notice or permits should not be required, but governments must be able to justify any numbers they do choose. If it is not possible to show that there is good reason for a cut off point at 30 rather than 40, for example, then a fundamental freedom approach would require the least intrusive option to be chosen. The final choice will, however, always be arbitrary to some degree. There are also very real problems surrounding the application of numerical limits in particular cases where numbers may fluctuate or be much larger than predicted. These problems with numbers are an additional reason for avoiding criminal sanctions for failing to notify.

anticipated public order problems. But unnotified assemblies should be neither unlawful nor subject to dispersal because of the failure to notify alone. Nor should participants in unnotified assemblies be harassed with criminal charges such as obstruction, breach of the peace or other petty offences in circumstances where participants in a notified assembly would have been left alone.¹⁶³

Prior restraints: powers to impose conditions

At first sight, and subject as always to the indefensible content biased and overly broad definition of “public meeting”, sections 11 and 15, which grant the CP the power to impose, and amend, such conditions with respect to notified public meetings and public processions respectively as “he reasonably considers . . . necessary in the interests of national security or public safety, public order (*ordre public*) or for the protection of the rights and freedoms of others” appear reasonable, especially as the exercise of their powers is also subject to appeal to the Appeal Board.

There is also section 6(1), which provides that if the CP “reasonably considers it to be necessary” for any of the usual reasons, he has the power “in such manner as [the CP] thinks fit” to “control and direct the conduct of all public gatherings and specify the route by which, and the time at which, any public procession may pass”.¹⁶⁴ There is no mention of a right of appeal here and “public gathering” reaches far beyond public meetings and processions. Apparently, the sections 11 and 15 powers are subject to the section 6(1) power, which may or may not be confined to the giving of general directions.¹⁶⁵

It is submitted that a grant of power to the CP to impose one or more of a stipulated range of possible types of conditions¹⁶⁶ on specific open air processions or meetings where the CP reasonably considers it necessary to do so for a legitimate purpose, always applying the standard of a democratic society, could be justified, the more so where the exercise of that power is subject to independent appeal. A section 6(1) style power, specifically limited to traffic control or other specified aspects of open air assemblies generally, might also be accepted as necessary. But given the breadth of the definition of “public

¹⁶³ The important word here is “harassed”. It may be legitimate to give extra leeway to properly notified assemblies as an incentive to notify.

¹⁶⁴ Section 6(1). The CP must first reasonably consider such action necessary in the interests of national security, etc.

¹⁶⁵ Again, general orders like these should be readily available to the public. Section 52, the delegation section, refers to s 6(a)(b) and (c), which do not exist. If s 6(a) could be interpreted to mean s 6(1), the power can be delegated to a chief superintendent or above.

¹⁶⁶ The need for a stipulated range of legitimate types of conditions is well demonstrated by the recent controversial break-up of an “abode seekers” demonstration, perhaps on the ground of breach of a probably unlawful condition that no illegal “over stayers” be permitted to participate, see Ng Kang-chung and Sophia Chu, “Chater Garden crackdown may have been unlawful”, SCMP, 28 Apr 2002, p 2.

gathering” and the vagueness of “control and direct”, the present section 6 (1) power can not be justified. The question whether this power should be delegable to inspectors should also be reconsidered.¹⁶⁷

Regulation of meetings, processions and gatherings in progress

Sections 11(1) and 15(1) of the POO require the organisers of public assemblies covered by the notice prerequisites, or their nominated deputies, to be present throughout. They declare that “[g]ood order and public safety shall be maintained” and amplification devices surrendered to the police if so requested.¹⁶⁸ Each of these deserves a comment on its own, but for reasons of space they will not be discussed here.

As to powers, section 17(1) gives any police officer the power to prevent, stop or disperse public meetings or processions that ought to have been notified but have not been, or which are contravening or have contravened the conditions imposed under sections 11 or 15. Obviously, if that part of the notification process that purports to make the peaceful, but unnotified, exercise of the fundamental freedom of assembly unlawful is removed, this power must also be removed. It is submitted that it is in any case objectionable and unwise that the decision to prevent, stop or disperse a peaceful exercise of the fundamental freedom of assembly can, even in theory, be made by a police constable.¹⁶⁹

Section 17(2) gives inspectors or above powers “... to prevent, stop, disperse or vary the place or route of any public gathering ...”,¹⁷⁰ or “stop and disperse ... any meeting convened or held in any premises or place which is not a public place or any gathering or procession whatsoever or wheresoever ...”¹⁷¹ if the inspector “reasonably believes that the [relevant gathering] is likely to cause or lead to a breach of the peace”.¹⁷² It is not clear whether these powers are intended to be in addition to or to replace common law and statutory powers, said to extend to all police officers, to interfere at any time to do what is necessary to prevent or stop a breach of the peace.¹⁷³ If the former, the purported safeguards in the legislation are illusory, since the broader

¹⁶⁷ The comment at n 169 below is apt.

¹⁶⁸ As to amplification devices, see also s 6(2).

¹⁶⁹ See General Comment on Mauritius, CCPR/C/SR.1477, para 53, per Mr Bhagwati: “In paragraph 1.3 under the section on article 21 the report stated that a police officer had the power to interrupt a public gathering if he believed that the continuance of the gathering was prejudicial to public safety or public order. In such cases it was necessary to specify the rank of police officer since it would be wrong to give that power to all police officers.”

¹⁷⁰ Except public gatherings exclusively for religious purposes.

¹⁷¹ Including public gatherings exclusively for religious purposes.

¹⁷² There are also supplementary provisions authorising the giving of orders necessary or expedient for the purposes of s 17(1) and (2), including the use of force, entry into premises [for meetings] and closing access to public places.

¹⁷³ Section 17G provides that Part III is “in addition to and not in derogation of” any ordinance, but says nothing about the common law. As to common law powers to disperse an assembly on the grounds of a feared breach of the peace, see Richard Card (n 104 above), para 2.17, pp 35–37; Marston and Tain (n 105 above), pp 23–24.

and looser common law powers contain none of them.¹⁷⁴ It would also mean that a person who disobeyed an inspector acting under this power would be liable to a much more severe penalty than a person who disobeyed a sergeant or constable in similar circumstances.¹⁷⁵ If the latter, *prima facie* the alternative more consistent with a fundamental freedom approach, the breadth of the powers, extending to any gathering of any number of persons in any place wheresoever, would mean the powers of police officers below the rank of inspector to deal with low-level small group disorder totally unconnected with the expressive freedoms would be far more limited than commonly believed. Neither result makes good sense in respect of criminal law, public order or freedom of assembly.

Another source of difficulty is the incorporation of “breach of the peace” into the threshold standard. As to the meaning of “breach of the peace”, the ECHR has said that English case law¹⁷⁶ has “sufficiently established” that a breach of the peace is “committed only when an individual causes harm, or appears likely to cause harm, to persons or property or acts in a manner the natural consequence of which would be to provoke others to violence”.¹⁷⁷ That definition, though arguably confusing “breach of the peace” as a state of disorder with a statement of responsibility for that disorder, and not entirely in accord with the *Howell*¹⁷⁸ definition, has been quoted without disapproval by an English Divisional Court in *Redmond-Bate*.¹⁷⁹ Applied to “breach of the peace” as a state of disorder, it suggests that a breach of the peace occurs whenever harm is done or appears likely to be done by someone to some other person or their property (in their presence). With respect, whilst a real possibility of harm being done by one person to another is a sufficient reason for the law to intervene between them, it is surely not a sufficient reason for preventing, stopping, dispersing or even rerouting an otherwise peaceful exercise of a fundamental freedom of assembly by other persons. Yet that is what section 17(2) would allow, at least in theory. It is submitted that a fundamental freedom approach would require the threshold for this very invasive power to be raised to something more like “actual or serious risk of significant / serious public disorder”.¹⁸⁰ A fundamental freedom approach would also

¹⁷⁴ For discussion of the difficulties this raises in England, see Therese Murphy (n 40 above), pp 458–463.

¹⁷⁵ As to penalties for breach of the peace and obstruction in Hong Kong, see Magistrates Ordinance (Cap 227), s 61; Offences Against the Person Ordinance (Cap 212), s 41; and n 182 below.

¹⁷⁶ The court relied on *R v Howell* [1982] 1 QB 416; *Percy v DPP* [1995] 1 WLR 1382; *Nicol and Selwanayagam v DPP* [1996] JPR 155; [1996] Crim LR 318 (D Ct), since followed in later decisions. See n 179 below.

¹⁷⁷ *Steel v United Kingdom* (1998) 28 EHRR 603, paras 25–28, 55.

¹⁷⁸ [1981] 3 All ER 383.

¹⁷⁹ *Redmond-Bate v DPP* [2000] HRLR 249, p 255. See also *Lesley Edward Bibby v The Chief Constable of Essex Police* (2000) 164 JP 297; 2000 WL 345165.

¹⁸⁰ Of course, individuals could always be arrested for their own offences.

require that the lawful exercise of the power be explicitly subject to the *Plattform "Arzte fur das Leben"* principle. This would be in keeping with recent English decisions that have held that police officers who reasonably apprehend an imminent breach of the peace may only lawfully act against a person who would be responsible for that breach of the peace and, most significantly in this context, that a person who was properly exercising their freedom of assembly, demonstration or free speech would never be responsible for the unlawful and unreasonable violence that conduct might arouse in others.¹⁸¹ The only qualification would be where the inspector reasonably believed significant / serious public disorder could not (reasonably) be prevented by any other means.

Enforcement and subsequent punishment

Sections 17A and 17E(2) create numerous offences punishing every conceivable form of disobedience *by individuals* to every form of official order possible under Part III, including conditions imposed under sections 6, 11 and 15 and orders given under section 17(3) for the purpose of carrying out the prevention, stoppage and dispersal powers in section 17(1)(2). Section 17A(1)(d) creates various advertising offences. Section 17B(2) creates a very widely drawn offence of individual misconduct in a public place and section 17C creates an offence of having an offensive weapon "at any public meeting or on the occasion of any public procession". All are in addition to other obstruction and disorderly behaviour offences.¹⁸² Maximum sentences are typically 12 months, towards the maximum for obstruction offences.¹⁸³

But it is the offence of unauthorised assembly that demands special scrutiny here.¹⁸⁴

¹⁸¹ *Nicol and Sevanayagam v DPP* (n 176 above); *Redmond-Bate v DPP* (n 179 above); *Bibby v Chief Constable of Essex Police* (n 179 above); and see Richard Card (n 105 above), paras 2.21–2.23, pp 39–43.

¹⁸² See Therese Murphy (n 40 above), pp 458–461 as to the consequences of the concurrent existence of these offences in England as well.

¹⁸³ The general obstruction offences in other ordinances typically have maximum sentences of six months' imprisonment, eg Road Traffic Ordinance (Cap 373), s 62; ICAC Ordinance (Cap 204), s 13A; Immigration Service Ordinance (Cap 331), s 19; Police Force Ordinance (Cap 232), s 93 (assaulting / resisting police officer in the execution of his duty); Summary Offences Ordinance (Cap 228), s 23 (resisting / obstructing public officers including police officers). But cf Offences Against the Person Ordinance (Cap 212), s 36, re assaulting, resisting or wilfully obstructing a police officer in the due execution of his duty, maximum two years' imprisonment. The maximum sentence for the s 17C offensive weapons offence is two years. Cf POO, s 33 ("Any person who ... has with him in any public place any offensive weapon", mandatory custodial sentences for defendants 14 years and over for a maximum of three years); POO, s 32 (carries or has in his possession in an area under curfew, maximum three years); and Summary Proceedings Ordinance (Cap 228), s 17 (possession of offensive weapon with intent to use the same for any unlawful purpose, fine or maximum two years).

¹⁸⁴ The offence dates from the original ordinance. The term "unauthorised assembly" replaced "unlawful assembly" and the element of "knowingly" was added in 1980.

Section 17A states:

“(2) Where –

- (a) any public meeting or public procession takes place in contravention of section 7 or 13;
- (b) 3 or more persons taking part in or forming part of [any public gathering] refuse or wilfully neglect to obey an order given or issued under section 6; or
- (c) 3 or more persons taking part in or forming part of [any gathering] refuse or wilfully neglect to obey an order given or issued under section 17(3),

the [relevant type of assembly] ... shall be an unauthorized assembly.

(3) Where any [type of assembly] ... is an unauthorized assembly by virtue of section (2) –

- (a) every person who, without lawful authority or reasonable excuse, knowingly takes or continues to take part in or forms or continues to form part of any such authorized assembly; and
- (b) every person who –
 - (i) holds, convenes, organizes, forms or collects, or assists or is concerned in the holding etc of any public meeting or procession referred to in subsection 2(a); or
 - (ii) continues or attempts to continue to hold or conduct, or to direct otherwise than for the purpose of securing obedience to an order given or issued under section 6 or 17(3), [any gathering referred to in subsection (2)(b) or (2)(c)],

after the same has become an unauthorized assembly as aforesaid, shall be guilty of an offence and shall be liable –

- (i) [on indictment to imprisonment for five years]
- (ii) [on summary conviction to a fine of HK\$5,000 and imprisonment for three years].”

Participants in an unauthorised assembly who did not know that proper notice had not been given, conditions violated or orders disobeyed, even if only because they had given no thought to these things or did not care whether they had occurred or not, could not be guilty of this offence. But if they did know one of these things, any willing participant would be guilty of this offence and liable to penalties of three or five years' imprisonment even if they did nothing else, and even if neither they nor other participants presented any kind of threat to the public peace. With respect, no fundamental freedom approach could find even the possibility of the imposition of such severe penalties on persons exercising their freedom of peaceful

assembly, or assisting others to do so, necessary in a democratic society for any legitimate purpose, failure to comply with notice requirements or other disobedience notwithstanding. Certainly, the actual imposition of penalties anything like these could never be accepted as proportionate.¹⁸⁵ The disparity between the penalties available for these offences and public order / obedience offences in other legislation would be an additional negative factor.¹⁸⁶

The Secretary for Security and the Secretary for Justice both defended even the five years maximum penalty.¹⁸⁷ They argued that organisers of and participants in peaceful demonstrations had not been and never would be sentenced to anything like five years' imprisonment; a severe maximum sentence may serve as a useful deterrent; higher maximum sentences are required where groups rather than individuals are involved; and a severe sentence may be merited in the worst possible cases. The first of these reasons is an acknowledgement that such a penalty would never be justified with respect to orderly assemblies – but these are the only kinds of assemblies the offence really targets. Individual or collective conduct that is not peaceful or orderly is covered by other offences such as disorderly conduct, unlawful assembly and riot. The consequence is an offence that is either truly draconian or openly not enforced. As to the second reason, deterrence only works if the public believes the law will be enforced. In any case, it is widely accepted that deterrence must be subordinated to proportionality, both cardinal and ordinal, lest it be permitted to prove too much and lest even petty crimes be punished by execution.¹⁸⁸ As to the third reason, it is true that the communal character of assemblies is the source of both their greatest value and their greatest threat. But the threat posed by a peaceful assembly, even a very large peaceful assembly, is very different from the threat posed by violent groups. A fundamental freedom approach to freedom of assembly would require both the law and decision makers to keep that distinction in the forefront. As to the worst possible case, the two Secretaries put forward two examples: an organiser who (secretly) assembled a large crowd in the confined space of Lan Kwai Fong on a wet slippery Saturday night to protest against laws relating to “rave parties”; and groups supporting and groups opposing the POO, each with strong feelings,

¹⁸⁵ Cf *Ezelin* 14 EHRR 362 in which the ECHR found the sanction of a professional reprimand unacceptable where the conduct objected to did not go beyond participation in a peaceful assembly. The European Commission and HRC cases only involved fines. The periods of detention or imprisonment in the activist cases in *Steele* were short and controversial.

¹⁸⁶ See nn 174 and 182 above. Three years is the maximum sentence for a wide range of offences, including assault occasioning actual bodily harm and wounding: OAPO, ss 39, 19 respectively. Five years is the maximum sentence for banking, financial and company fraud and consensual sexual offences.

¹⁸⁷ Legislative Council Minutes No 13 (n 3 above), pp 2165–2168, 2177–2178.

¹⁸⁸ See Andrew Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 3rd edn, 1999), pp 20–21 and sources cited therein.

confronting each other somewhere in the HKSAR. People were hurt or killed in each case. Suppose such consequences could have been avoided had the organiser and rival groups notified the CP, as required, or obeyed the instructions of police officers at the scene. Shouldn't they be liable for the full consequences of their wrongs? Wouldn't a fine alone be inadequate? Perhaps. But the first question should not be answered in the context of a disobedience offence. It should be answered in the context of a discussion of the merits of punishing people for the reckless endangerment of the lives, safety, or property of others, or the reckless endangerment of the public peace or the reckless causing of death,¹⁸⁹ injury, destruction of property or breach of the public peace, and the relationship of such offences to our existing recklessness rules. And, of course, the second question can easily be answered in the affirmative without endorsing a maximum sentence of five years' imprisonment, or even three.

Conclusion

The POO is all about the maintenance of control over and order in a society by a government, not the facilitation of public participation in governance or the free expression of the views and characteristics of a society's communities. It was adopted at a time when the Mainland was in the throws of the Cultural Revolution and public participation in the governance of Hong Kong threatened the colonial order as well as temporary order on the streets, and it has retained its principal characteristics since that birth. Even Governor Patten's amendments left a piece of legislation far more intrusive upon and circumscribing of the freedoms of public procession and public and private assembly than anything English governments or courts have thought necessary (or politically acceptable) in order to maintain the peace in their own country, even in their most populous city. With respect, the POO and its premises belong to Hong Kong's history. The HKSAR has a new set of premises and needs a new public order law to match, one that starts and ends and is consistent with a fundamental freedom approach as demanded by the Basic Law. We might then have a law, perhaps called something like a Freedom of Assembly law, which begins with statements of principle and includes express acknowledgement of the obligation of the police to provide reasonable protection for peaceful processions and assemblies and of the state to provide adequate access to public spaces, always on the basis of strict content neutrality. There might follow

¹⁸⁹ Causing death by dangerous driving, punishable on indictment by imprisonment for five years, otherwise by imprisonment for two years: Road Traffic Ordinance (Cap 374), s 36. See also OAPO, ss 26, 27; Mass Transit Railway Ordinance (Cap 556), s 30; Crimes Ordinance (Cap 200), ss 60, 63; and common law manslaughter.

a limited number of tightly drawn restrictions, such as notification procedures for public processions and open air assemblies above a certain size, police powers to negotiate and if necessary impose conditions strictly for the purposes of traffic, public safety and public order control, very circumscribed banning powers in times of serious social disorder, and appeal procedures. There would also be facilitating provisions, perhaps expressly providing that participants in public processions and open air assemblies that comply with relevant notification procedures and conditions cannot be arrested for or charged with obstruction.¹⁹⁰ Penalties for not observing notification procedures, if any, would be small and comparable to those in other jurisdictions. Penalties for other forms of non-violent disobedience, obstruction or disorderliness would also be kept low, certainly no higher than those imposed for similar non-violent conduct outside public processions or public meetings. Provisions in other legislation, for example legislation relating to traffic, the police, summary offences and specific public areas, would all be brought into line.

In addition, every effort would be made to make the relevant legal provisions simple, straightforward and accessible, so that lay people seeking to organise public activities could easily find and understand their legal rights, obligations and liabilities. The present law is unnecessarily complex, verbose and difficult to understand.

Then it would be the turn of residents, the CP and subordinates to make use of and to implement the law, again using a fundamental freedom approach, and, if necessary, for the executive, the Legislative Council and the courts to play their parts to ensure this is done. It is to the credit of post-1995 CPs in particular, and the police in general, that, at least in the short term, most of the scenes we could then expect to see on HKSAR streets and in the parks and other public places might not be radically different from those we see now. But in law and in political reality there would be an enormous difference, because the freedom of assembly that those within the HKSAR now enjoy still largely as a matter of grace would then be enjoyed, both in law and in practice, as a matter of fundamental right.

¹⁹⁰ See, for example, the Peaceful Assembly Act 1992, Queensland, Australia.