LEUNG KWOK HUNG AND OTHERS THROUGH THE HONG KONG COURTS

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This article tracks the prosecution of Leung Kwok Hung and Others through the Hong Kong courts, from the magistracy to the CFA, for offences of holding and assisting in the holding of an unauthorised assembly. The six judgments, spanning three courts and as many years, illustrate at least three very different approaches to the issues in the case. Each has, in addition, distinctive and important points of interest. Together they form a fascinating collage. For this reason, after a brief description of the legislative provisions and established legal background for constitutional challenge to legislation in the HKSAR, each judgment is given separate attention, with a particular emphasis on the CFA judgments, and the practical implications of that decision. The final part of the article deals with the "rightness" of the CFA decision. Although the CFA majority did make an important contribution to an understanding of this area of the law, the author concludes that, with regard to Part III of the Public Order Ordinance, the court missed the opportunity to deal with some of the most important issues.

Introduction

On Sunday, 10 February 2002, Leung Kwok Hung, assisted by Fung Ka Keung, Christopher and Lo Wai Ming, led between 40 and 100 persons in a pre-planned peaceful procession from Chater Gardens along Queensway, a public highway, to the then Police Headquarters on nearby Arsenal Street.

By virtue of section 13(1) of the Public Order Ordinance (POO), a public procession of at least 30 people along a public highway may take place in Hong Kong "if, but only if" notice has been given to the Commissioner of Police (the Commissioner) as required by section 13A,[1] and the Commissioner has issued, or is taken as having issued,[2] a notice of "no objection"

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1 Notice must generally be given by 11:00 am, one week before the intended date of the procession or a lesser period if the Commissioner decides to accept it (a discretion) or if the Commissioner is "reasonably satisfied the earlier notice could not have been given" (mandatory).

2 POO, s 14(2)(3) requires the Commissioner to notify his objections in one of several specified ways, "as soon as is reasonably practicable" and in any case no later than 48 hours before the notified commencement time, 24 hours if notice of less than 7 days, but at least 72 hours was given. Section 14(4) provides that if the Commissioner does not notify an objection in the prescribed manner within the prescribed time limits, the Commissioner is taken to have issued a notice of "no objection".

in accordance with section 14. Section 14 empowers the Commissioner to object to a procession being held "if he reasonably considers that the 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 . . . [unless] the Commissioner reasonably considers that the relevant interest could be met or protected by imposing conditions."[3] Section 15(2) empowers the Commissioner to impose conditions on the assembly where he "reasonably considers it necessary in the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others." The terms of and reasons for the conditions must be notified in writing.[4] The Commissioner's decision to object or impose conditions may be appealed to an Appeal Board.[5] Section 17 empowers any police officer to "prevent the holding of, stop or disperse" any public procession that "takes place in contravention of section 13" for that reason alone.[6] No additional risk of breach of the peace or obstruction need be apprehended.

Leung, Fung and Lo chose not to comply with the notice procedures. The police allowed the procession to continue but this did not prevent the procession from being an unauthorised assembly by virtue of section 17A(2).[7] Section 17A(3) makes the holding, and assisting in the holding, of an unauthorised assembly criminal offences.[8] Maximum sentences provided are three years' imprisonment and a fine of HK$5,000 on summary conviction, and five years' imprisonment if convicted on indictment. Leung, Fung and Lo were eventually arrested and charged with these offences.

It is noteworthy that these prosecutions were the first to be brought for the offence of unauthorised assembly since the POO was amended as of 1 July 1997. This was so notwithstanding the fact that very large numbers of

3 POO, s 14(1)(5), and *see* s 2(2) which in part provides: "In this Ordinance the expressions 'public safety', 'public order (*ordre public*)', 'the protection of public health', and 'the protection of rights and freedoms of others' are interpreted in the same way as under the International Covenant on Civil and Political Rights as applied in Hong Kong."

4 POO, s 15(2). *See* also s 51 as to the power of the Chief Executive to instruct the Commissioner as to the use of the s 14 and s 15 powers, and s 52 as to delegation by the Commissioner of those powers to officers of the rank of inspector or above.

5 POO, s 16. *See* also ss 43–44A.

6 POO, s 17(1)(b). The same power extends to notified processions in which "any requirement [as to the presence of designated persons, maintenance of good order and safety and control of amplification devices], or any condition imposed, under section 15 is being or has been contravened."

7 POO, s 17A(2) in part provides: "Where – (a) any . . . public procession takes place in contravention of section 13 . . . the . . . public procession . . . shall be an unauthorized assembly."

8 "Where any . . . public procession . . . is an unauthorised assembly by virtue of subsection (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 unauthorized assembly; and (b) every any person who (i) holds, convenes, organizes, forms or collects, or assists or is concerned in the holding, convening, organizing, forming or collecting of, any . . . public procession referred to in subsection (2)(a) . . . after the same has become an unauthorized assembly as aforesaid, shall be guilty of an offence . . ."

unauthorised assemblies had taken place every year since then.[9] The arrests came 15 months after the Government had taken the unusual step of securing the passage of a motion in support of the POO in the Legislative Council,[10] three months after the procession took place, more than two months before the actual trials began, at a time when the implementation of POO powers by the Commissioner had again become controversial.[11]

From the beginning all three defendants maintained that the relevant statutory provisions of the POO were void for inconsistency with the fundamental freedom of peaceful assembly guaranteed by Articles 27[12] and 39[13] of the Basic Law of the Hong Kong Special Administrative Region (the HKSAR Basic Law), Article 21[14] of the International Covenant on Civil and Political Rights (ICCPR) and Article 17[15] of the Hong Kong Bill of Rights (BOR). This form of challenge, sometimes called a facial constitutional challenge,[16] alleges that the legislation itself[17] creates an unacceptably high risk of inhibition, suppression or restriction of a fundamental freedom. Such a risk might be caused by: (i) overly broad or excessively vague coverage, penalising or regulating much more protected fundamental freedom activity than the legitimate purpose of the regulation requires; (ii) delegation of an overly broad or excessively vague discretion to a case by case decision maker; or (iii) the imposition of grossly disproportionate sanctions for law infringements in the course of exercising the fundamental freedom. The POO notification system, combining notification and receipt of "no objection" prerequisites for the legality of any peaceful exercise of the freedom of procession in groups of 30 or more, delegation to the Commissioner of allegedly broad and vague powers to object to and impose conditions upon processions and the threat of serious criminal

9 The government figure disclosed in the case was 344 rallies staged since 1 July 1997 for which no notice of "no objection" had been obtained, *see* Sophia Chu, "Activists are found guilty over illegal rally" *South China Morning Post*, 26 Nov 2002, p 2.

10 Legislative Council Minutes No 13 for the meeting 20 and 21 Dec 2000, 2000 Council Proceedings 2154–2356.

11 *See* Janice Brabyn, "The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance" (2002) 32 *HKLJ* 271 at p 272 for description of events and references.

12 "Hong Kong residents shall have freedom of speech . . . freedom of assembly, . . . of procession and of demonstration . . ."

13 "(1) The provisions of the International Covenant on Civil and Political Rights . . . as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. (2) The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

14 "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

15 BOR, Art 17 is in the same terms as Art 21 of the ICCPR.

16 Cf an "as applied" challenge which alleges invalid exercise of powers in specific cases.

17 Including subordinate legislation and even some executive orders such as Local Proclamation of Civil Emergency Order No 3 that was the subject of dispute in *Victor Menotti et al v City of Seattle et al* 409 F 3d 1113; 2005 US App LEXIS 10040 (CA 9th Cir 2005).

sanctions for peaceful non-compliance in section 17A, was said to be objectionable on all three grounds.

Chief Magistrate Li (Li CM) rejected all aspects of the constitutional challenge and convicted all three defendants.[18] The defendants appealed to the Court of First Instance. On 23 June 2003, Pang J ordered that their appeals should be heard directly by the Court of Appeal (CA). The CA, Stock JA dissenting, likewise rejected all aspects of the constitutional challenge and dismissed the appeal.[19] The Court of Final Appeal (CFA), Bokhary PJ dissenting, accepted the defendants' constitutional challenge as to the broad and vague powers given to the Commissioner but only to the extent of severing the term "*ordre public*" from the expression "public order (*ordre public*)" when used in the conferment of those powers.[20] The CFA majority upheld the defendants' convictions. For the dissenters, Stock JA would have found the Commissioner's prior restraint powers in POO sections 14 and 15, and consequently the notice prerequisite and related parts of the section 17A offences, unconstitutional. Bokhary PJ would also have struck down the Commissioner's prior restraint powers and all section 17A offences but thought that the notification requirement could survive.

The six judgments, spanning three courts and as many years, illustrate at least three[21] very different approaches to the issues in the case. Each has, in addition, distinctive and important points of interest. Together they form a fascinating collage. For this reason, aspects of all the judgments are considered in the next part of this article, though with particular emphasis upon the CFA judgments. The practical implications of the CFA decision are the subject of the third part. The "rightness" of the CFA decision is the subject of the fourth and final part. But first, in the interests of brevity and for the convenience of the reader, a summary of the local legal environment relevant to the determination of the issues and common to all three courts is set out below.

The Local Legal Environment

By the time *Leung Kwok Hung* reached the Hong Kong courts, the local legal framework for, and general approach to, the judicial review of legislation on the ground of alleged incompatibility with constitutionally protected fundamental

[18] *HKSAR v Leung Kwok Hung & Others* [2002] 4 HKC 564.
[19] *HKSAR v Leung Kwok Hung & Others* [2004] 3 HKLRD 729.
[20] *Leung Kwok Hung & Others v HKSAR* [2005] 3 HKLRD 164.
[21] The deferential approach (Ma CJHC and Yeung JA); the pragmatic–reasonableness approach (the Chief Magistrate and CFA majority); the strict scrutiny approach (Stock JA and Bokhary PJ). Labels and classifications are the author's own. The different judgments might also be viewed as occupying points on a continuum between "extreme deference to legislative / executive choices" at one end (Yeung JA would be closest to this end, then Ma CJHC) through pragmatic (the Chief Magistrate) and reasonableness (the CFA majority) towards more stringent degrees of scrutiny (Bokhary PJ to Stock JA).

rights had been established by cases such as *Ming Pao Newspapers v AG of Hong Kong*,[22] *Ng Ka Ling & Others v Director of Immigration*[23] and, in particular, *HKSAR v Ng Kung Siu*,[24] the "Flag Case". Between the Chief Magistrate's decision and the hearing in the CA, the CFA decided *Gurung Kesh Bahadur v Director of Immigration*[25] and *HKSAR v Shum Kwok Sher*.[26] Read together with the terms of the HKSAR Basic Law, the ICCPR and the BOR noted above, these decisions provided a common foundation upon which all the courts built their judgments. The core elements of that foundation, supplemented with material specific to freedom of assembly, is summarised here.

Article 39(1) of the Basic Law provides that the ICCPR "as applied in Hong Kong . . . shall be implemented through the laws of the" HKSAR. The BOR implements the ICCPR as previously applied in Hong Kong in the HKSAR. By virtue of Article 39(2) of the Basic Law, any restrictions upon the rights and freedoms of Hong Kong residents, whether grounded in the Basic Law or the BOR, must be "prescribed by law" and consistent with the ICCPR. All fundamental rights and freedoms must be given a generous interpretation. Restrictions upon fundamental rights and freedoms must be narrowly construed. If challenged, the burden is on the Government to justify any such restriction. As noted by the CFA in *Leung Kwok Hung*, "[t]his approach to constitutional review involving fundamental rights . . . is consistent with that followed in many jurisdictions.'[27]

The phrase "prescribed by law" in Article 39(2) incorporates the requirement of legal certainty. The HKSAR courts have repeatedly adopted the explanation of this term by the European Court of Human Rights in *Sunday Times v United Kingdom*:[28]

> "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. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing

[22] [1996] AC 907 (PC).
[23] (1999) 2 HKCFAR 4.
[24] (1999) 2 HKCFAR 442.
[25] [2002] 2 HKLRD 775.
[26] [2002] 2 HKLRD 793.
[27] Note 20 above, para 16.
[28] (1979–80) 2 EHRR 245, 271.

> circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

The requirement of legal certainty extends to the grant of discretionary powers to public officials. The scope of such powers must be adequately defined and specific guidance as to their exercise provided. In *Gurung Kesh Bahadur* it was said that: "The requirement that restrictions must be 'prescribed by law' could not be satisfied by the existence of general discretionary powers . . . vested in . . . officials . . . and by their undertaking administratively the exercise of considering the imposition of restrictions on . . . constitutional rights . . . on a case by case basis."[29]

The level of precision required will in any case be relative to the subject matter of the law or discretion in question.

As to compliance with the terms of the ICCPR, with respect to freedom of assembly in particular, Article 21 of the ICCPR and Article 17 of the BOR stipulate that any restriction upon the right of freedom of assembly must also be "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." In similar contexts, the Hong Kong courts have repeatedly asserted that "necessary" is to be given its ordinary meaning. There is no advantage in substituting the phrase "pressing social need" favoured by the European Court. The courts have also accepted that the implementation of the necessity requirement requires the application of a proportionality test.

In Hong Kong the proportionality test requires that any restriction must satisfy two criteria:

(1) The restriction must be rationally connected with one or more of the legitimate purposes for such restrictions set out in the relevant ICCPR provision,[30] and
(2) The means used to restrict the right must be "no more than is necessary to accomplish" that legitimate purpose.

The only legitimate purpose to have been extensively considered in Hong Kong at the time of the *Leung Kwok Hung* case was that of "public order (*ordre public*)". In the Flag Case, the Government argued that the laws prohibiting

[29] Note 25 above, para 34. Quoted by Ma CJHC and Stock JA, applied by the CFA majority.

[30] It is because an exhaustive list of legitimate purposes for restrictions is spelt out in the relevant article that the first stage of the three part test set out in *De Freitas v Ministry of Agriculture* [1999] 1 AC 69, 80 (PC) need not be separately addressed in Hong Kong, *see Leung Kwok Hung* (n 20 above), para 37.

defacing the PRC and HKSAR flags were restrictions upon freedom of expression that were "necessary for the protection of public order (*ordre public*)". So the CFA had to determine the meaning of "public order (*ordre public*)" *as used in the ICCPR*. As noted above, the meaning of "public order (*ordre public*)" as used in the POO was at the centre of *Leung Kwok Hung*. Since all the courts in the latter case directly or indirectly drew extensively upon the materials cited by Li CJ in the earlier case, as well as the conclusions Li CJ reached on this issue, it is useful to catalogue both materials and conclusions here. Li CH first noted that "public order (*ordre public*)" is "wider than the common law notion of law and order".[31] In further explanation, he drew extensively upon the work of Professor Kiss,[32] citing a passage earlier cited in *Secretary for Justice v Oriental Press Group Ltd*,[33] Professor Kiss's comment that "public order (*ordre public*)" ". . . is not absolute or precise, and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances"[34] and Professor Kiss's own stated summary,[35] as well as paragraphs 22, 23 and 24 of the Siracusa Principles,[36] before himself concluding:[37]

[31] Note 22 above, p 457E–H.

[32] 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), p 290.

[33] [1998] 2 HKLRD 123 at p 161B–H. The passage from Kiss (n 32 above), p 301 was as follows: "*ordre public* includes the existence and the functioning of the state organization, which not only allows it to maintain peace and order in the country but ensures the common welfare by satisfying the collective needs and protecting human rights."

[34] Kiss (n 30 above), p 302.

[35] *Ibid.*, p 302: "In sum: 'public order' may be understood as a basis for restricting some specified rights and freedoms in the interest of the adequate functioning of the public institutions necessary to the collectivity when other conditions, discussed below, are met. Examples of what a society may deem appropriate for the *ordre public* have been indicated: prescription for peace and good order; safety; public health; esthetic and moral considerations; and economic order (consumer protection, etc). It must be remembered, however, that in both civil law and common law systems, the use of this concept implies that courts are available and function correctly to monitor and resolve its tensions with a clear knowledge of the basic needs of the social organization and a sense of its civilized values." The "other conditions" referred to in this summary are the requirement of legal certainty and the requirement of "necessary in a democratic society"; *see Leung Kwok Hung* (n 20 above), para 71.

[36] That is, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1984), the product of a gathering of experts convened by the International Commission of Jurists, the International Association of Penal Law and others in Siracusa, Italy. Paragraphs 22–24 read as follows:

> "22. The expression 'public order (*ordre public*)' as used in the Covenant may be defined as the sum of the rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (*ordre public*).
>
> 23. Public order (*ordre public*) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.
>
> 24. State organs or agents responsible for the maintenance of public order (*ordre public*) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies."

See (1985) 7 Human Rights Quarterly 3–14. This extract was quoted in full by Ma CJHC and Stock JA, parts of paras 22 and 23 only by the CFA majority.

[37] Note 22 above, pp 459I–460A.

> "The following points can be drawn from the materials referred to above. First, the concept is an imprecise and elusive one. Its boundaries cannot be precisely defined. Secondly, the concept includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole. Examples include: prescription for peace and good order; safety; public health; aesthetic and moral considerations and economic order (consumer protection, etc). Thirdly, the concept must remain a function of time, place and circumstances."[38]

In the same judgment, Li CJ also dealt with another important aspect of the overall approach – the appropriate attitude of the courts to the fact that legislation is the manifestation of the elected legislature's choice of means to protect a legitimate public interest. Li CJ recognised that, notwithstanding the difficult political context of the legislation in the Flag Case, if the restriction on freedom of expression created by the offences at issue in that case could not be shown to be necessary within the terms of the ICCPR, "the statutory provisions would be unconstitutional as contravening the Basic Law and the courts have the power and the duty so to declare."[39] Nevertheless, Li CJ was also clear that, "[i]n considering the question of necessity, the Court should give due weight to the view of the HKSAR's legislature that the enactment of [the two offences] . . . is appropriate."[40]

The Judgments

The Magistracy[41] *(November 2002)*

Chief Magistrate Li was acutely aware of the "political nature" of the case.[42] He nevertheless grappled with the issues, demonstrating the robust pragmatism one would expect of the head of the magistracy. As to legal certainty, the Chief Magistrate was concerned that "[a] provision that was too strict would make the law too rigid and unable to respond to change, and would not allow the courts to have flexibility in interpretation."[43] As to necessity, he noted that the police power to prohibit or impose conditions was needed in order to

[38] This passage was cited in full in all the judgments except that of Bokhary PJ. Note the omission of the concepts of "necessary in a democratic society" and "respect for human rights as an element in the exercise of the public authority", so crucial to Professor Kiss's analysis and also the Siracusa Principles.

[39] Note 22 above, p 447H.

[40] *Ibid.*, p 460H–I. Cf Bokhary PJ's concurrence at p 467E–F.

[41] Chief Magistrate Li delivered his judgment in Cantonese. The following is taken from the English head note to the report, read in conjunction with the extensive footnotes, all reproduced in English in the otherwise Chinese text.

[42] Chu (n 9 above).

[43] Note 18 above, Headnote para 4.

assist the police in traffic control and to minimise the impact on others – legitimate societal interests within the concepts "public safety" and "public order (*ordre public*)". It was a limited restriction, only applicable to public processions of more than 30 people "on a highway, main road, or public park".[44] The Commissioner and the Appeal Board were expressly required to exercise their powers "expeditiously". There was no evidence of unreasonable hindrance or targeting of any person or group.[45] The Commissioner was subject to checks and balances including the need to give reasons, the need to use conditions where possible, the Appeal Board mechanism. The provisions were content-neutral. As to section 17A(3), the subsection prescribed maximum penalties. "The punishment should be commensurate to the criminality and judges and magistrates had the power to impose the appropriate sentence."[46] The Chief Magistrate found all relevant provisions constitutional.

Ma CJHC in the CA (November 2004)

This is a disturbing judgment, not only because of the conclusion that all challenged aspects of the POO are constitutional, but also and indeed primarily because of the conceptual errors and extremely restricted approach to judicial constitutional review evident throughout. True, the opening is unexceptional. There is the conventional statement about the importance of freedom of assembly in a "truly free society", which freedom must be "jealously guarded",[47] and a clear identification of the general issues. As to the latter, Ma CJHC noted that the defendants challenged the constitutionality of the notification system and, more specifically, the prior restraint powers of the Commissioner as part of that system.[48] The challenge to the section 17A offences was said to be dependent upon these challenges.[49] Ma CJHC explained that the appellants could legitimately attack the Commissioner's powers and the notice procedure, notwithstanding they had not used the procedure themselves because, if their objections to the Commissioner's powers were found to be valid, the notification procedure must fall with the Commissioner's powers – and objection to those powers was their reason for not giving notice.[50] This position as to standing was also the position taken

[44] The phrase in the POO s 13 is "public highway or thoroughfare or in a public park". "Thoroughfare", defined in the Concise Oxford Dictionary (9th edn) as "a road or path open at both ends, esp for traffic", is a considerably wider term than "main road", which adds nothing to "public highway".

[45] Note 18 above, Headnote para 5: "The Ordinance did not require advance provision of content of the activity . . ." but s 13A(4)(b) includes "the purpose and subject-matter of the procession" as one of the particulars to be included in the notice.

[46] Note 18 above, Headnote para 5 at p 568B. Each defendant was bound over on his own recognisance of HK$500 for 3 months.

[47] Note 19 above, para 15.

[48] *Ibid.*, para 37.

[49] *Ibid.*, para 39.

[50] *Ibid.*, para 41.

by the CA and the CFA dissenting judges. It accords with the position taken in similar circumstances by the Supreme Court of the United States[51] and, it is submitted, with logic and principle. Were it otherwise, the self-censoring effects of an unconstitutional requirement for permission to speak might continue indefinitely without challenge and the opportunities for a facial challenge, the most effective form of challenge for vagueness or unrestricted discretions, would be minimised.

But what follows next is a series of related conceptual errors, all favouring an extremely minimalist approach to judicial scrutiny of legislative encroachments upon fundamental freedoms.[52] First there is the proposition that "the ICCPR itself *provides* limits to the freedom of assembly"[53] rather than a recognition that the ICCPR provides standards against which the lawfulness of legislative restrictions on the freedom are to be tested. This error, and the implications of the CA majority's consequential willingness to find legislative or executive restrictions upon the exercise of freedom of assembly in terms of the language of the ICCPR provision itself sufficiently certain, was well answered by Stock JA as set out below. There was also a failure to appreciate the distinction between the use of "public order (*ordre public*)" in an international convention setting out permissible objectives for restrictions on a fundamental right and domestic legislation actually creating an executive power to restrict fundamental freedom activity,[54] a distinction strongly emphasised by the CFA majority, and a serious misreading of a passage in *Ng Kung Siu*.[55]

[51] *City of Lakewood v Plain Dealer Publishing Co* 486 US 750 (1988), citing *Thornhill v Alabama* 310 US 88, 97 (1940); *Shuttlesworth v Birmingham* 394 US 147, 151 (1969); *Lovell v Griffin* 308 US 444, 452–453 (1938) and *see Robert MacDonald v Howard Safir* 206 F. 3d 183, 189 (2nd Cir, 2000).

[52] In the context of "vagueness" *see*, for example (n 19 above) para 50 point (6) in which it was said that the "threshold for a finding of vagueness is high", the tests used being "so unintelligible that insufficient guidance is given for legal debate" from *R v Nova Scotia Pharmaceutical Society* 74 CCC (3d) 289 and "so vague as to be incomprehensible" from *Committee for the Commonwealth of Canada v Canada* (1991) 77 DLR (4th) 385 (the latter decision was explained by Bohkary JA in the CFA, para 158). As to executive discretion specifically, Ma CJHC, at para 53, said the objection cannot be merely to the granting of a broad power to the police but rather to a power the arbitrary exercise or abuse of which can go unchecked. He approved of the term "unfettered", again citing *R v Nova Scotia Pharmaceutical Society*, *ibid* at p 308 and also *Malone v United Kingdom* (A/82)(1984) 7 EHRR 14. As to *Nova Scotia* see Stock JA's more complete explanation in (n 19 above), para 80. As to *Malone*, *see* CFA majority judgment as noted below. As to proportionality, Ma CJHC does *formally* concede the need for the government to satisfy the necessity / proportionality tests, but with minimal *practical* effect, the application of the tests being effectively determined by the same criteria that had determined the "prescribed by law" requirement, (n 19 above) paras 58–59.

[53] Note 19 above, para 44 (emphasis added). See also para 18 "These limitations . . ." and para 22. The same statement was made in the Consultative Document entitled "Civil Liberties and Social Order", issued by the Chief Executive's Office in April 1997, relied upon by Government in *Leung Kwok Hung* and quoted with disapproval on this point by Stock JA (n 19 above), paras 111–112 and Bokhary PJ (n 20 above), para 195.

[54] *See*, for example para 56(2)(3).

[55] Note 19 above, para 57. *See* rebuttal of Stock JA at para 94.

The analysis culminated in the following statements:

(a) "I am of the view that the present POO reflects the legislator's wish to have as much flexibility as is permitted under the Basic Law. The powers given to the police are not excessive and indeed are strictly within those boundaries expressly marked out in the Basic Law and the ICCPR themselves. The legislation is in my view both rational and proportionate to its aims."[56]

(b) (As to the weight to be given by the judiciary to "the way the legislature has considered the legislation in question and exercised its judgment"):

> "Quite apart from those aspects already gone into, a strong case can be made out that in choosing to adopt the same terms [as those contained in the ICCPR itself] . . . the legislature has sought to avoid any problems that can arise through the use of different terminology."[57]

Both statements may well be true as a matter of history. The drafters of the 1997 amendments to the POO were constrained by the Decision of the Standing Committee of the National People's Congress on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted by SC of the Eighth National People's Congress at its 24th Session on 23 February 1997) to the effect that amendments made to the POO in 1995 were in contravention of the Basic Law and would not become part of the law of the HKSAR on 1 July 1997.[58] They were also bound by the command of Article 39 of the Basic Law that all Hong Kong laws had to be consistent with the ICCPR. So, in all probability the provisional authorities were seeking as much flexibility for the Commissioner as permitted under the Basic Law so as to conform with the perceived spirit of the SCNPC statement and did take the highly unusual step of resorting to the language of the ICCPR in a good faith attempt to comply with that convention – all of which was, with respect and as recognised by both Stock JA[59] and the CFA,[60] *as a matter of law*, at best one factor a court might take into account in the assessment. It could certainly never be decisive. Legislative compliance with

[56] Note 19 above, para 59.
[57] Note 19 above, para 60.
[58] The history of the POO was set out in the CFA majority judgment (n 20 above) paras 40–42.
[59] Note 19 above, para 101.
[60] Note 20 above, para 42.

the standards of legal certainty and necessity in a democratic society is not merely a matter of the lawmakers' intent.

Yeung JA in the CA

Yeung JA delivered a concurring judgment, largely devoted to an explanation of the Chinese term corresponding to "public order (*ordre public*)" but also including similarly problematic statements.[61]

Stock JA's Dissenting Judgment

Stock JA addressed the conceptual errors noted above and applied much more rigorous "fundamental freedom centred" scrutiny to the POO. Four aspects of his analysis deserve special attention.

First, Stock JA's judgment has the clearest explanation of the functions of, and relationships between, ICCPR / constitutional provisions and domestic legislation. He said:

> "[T]he Covenant and [any similar agreements and any constitutional provisions that echo them] . . . are but statements of fundamental rights and standards *against which* the acceptability of particular domestic measures to give effect to specific rights, and which may limit those rights, are gauged . . . [T]he Covenant does not absolve the States Parties from their duty to ensure that limitations of fundamental rights [in domestic legislation] go no further than is necessary to achieve the legitimate objective of a particular piece of subject-specific legislation . . . that laws are certain, that discretions . . . [given to the executive] are so defined as to prevent or minimize the arbitrary exercise of power. . . . It is for such reasons the Covenant does not envisage the mere incantation, without more, in standard domestic legislation, of the phrases of the Covenant or parts thereof."[62]

Second, Stock JA cautioned against the common tendency to treat the famous final words in the *Sunday Times* extract quoted above[63] as "a passport to vagueness".[64] On the contrary, "legal certainty . . . must be reinforced where an essential freedom is at stake and where the power of limitation is backed by sanction of the criminal law . . ." Not only must the citizen know the extent and limits of his rights with certainty. The official must know the extent and limits of his restrictive powers as well.[65]

61 Note 19 above, paras 164, 179.

62 Note 19 above, para 66 (original emphasis). *See* also para 69 and paras 111–112. Note the illustration of the full impact of the government's argument in a different context – a powerful tool for explanation – at paras 122–125.

63 Note 48 above, quoted by Stock JA at para 79.

64 Note 19 above, para 80.

65 *Ibid.*, para 80.

But the relevant provisions of the POO ". . . do little more than say that a police officer of appropriate rank may prohibit or impose conditions upon a procession or assembly in circumstances permitted by the [relevant] articles of the ICCPR . . ."[66] Stock JA found this radically deficient, a deficiency that could not on principle or in practice be corrected by requiring relevant officers and legal advisers to consult the CFA's judgment in *Ng Kung Siu* for guidance.[67] Noting also reservations about the width of "rights and freedoms of others",[68] Stock JA would have upheld the challenge to the police powers to prohibit and impose conditions on processions as not in accordance with law on the basis of the unqualified use of the phrase "*ordre public*" alone.[69]

Third, in the context of a necessity analysis, Stock JA asked "[W]hat is the demonstrable need for, or the demonstrable problem which *requires* curtailment of the freedom [of assembly] on the most extensive grounds possible?" Surely, only "wholly unusual and special circumstances" or "unique problems" could necessitate such powers in a democracy.[70] Since the question was not answered in the POO itself, Stock JA reviewed evidence of the POO's legislative history and the Government's case for the 1997 POO amendments, put to the people in April 1997 in the Consultative Document "Civil Liberties and Public Order", as well as the Government's defence of the POO in the Legislative Council in 2000.[71] Stock JA concluded, on the basis of the evidence offered: "[T]he respondent has not demonstrated the need to import the width of restrictions insofar as they go beyond public order, public safety, and national security and insofar as they permit curtailment of the freedom of assembly in the interests of the rights of others, regardless of the nature of the right and without reference to the extent of any infringement of such right."[72]

Stock JA was the only judge to use legislative history and official comments in this way.[73] *Wilson v First Country Trust Ltd (No 2)*,[74] cited by Stock JA, is a persuasive House of Lords authority for the use of such material, particularly parliamentary material, to assist in determining both legitimate object and proportionality issues. Provided only that the evidence is relevant, it is admissible. Nor does the approach necessarily confine the government to the

[66] *Ibid.*, para 90.
[67] *Ibid.*, paras 85–90. Cf Ma CJHC (n 19 above) at para 56 at point (8).
[68] *Ibid.*, paras 96–97.
[69] *Ibid.*, paras 97–98.
[70] *Ibid.*, para 120 (original emphasis).
[71] *Ibid.*, para 101.
[72] *Ibid.*, para 121.
[73] Ma JCHC specifically declined to do so, *see* n 19 above, para 58. None of the CFA judges apparently felt the need.
[74] [2004] 1 AC 816.

objectives and circumstances of the past where there has been significant change in the interim, but such change was not suggested in this case.[75]

Fourth, Stock JA refused to "read down" the legislation so that "*ordre public*" was deleted.[76] He found the Commissioner's powers under sections 14(1)(5) and 15(2) inconsistent with Articles 27 and 39 of the Basic Law[77] and agreed with the government's concession that the section 17A offences could not then survive.[78] Once the Commissioner's powers were gone, most of the point of the notice requirement and an important part of the concept of "unauthorized assembly" were gone too – leaving an offence with a maximum penalty of up to five years' imprisonment for failing to notify the Commissioner of a procession the Commissioner had no power to prohibit in any case. Stock JA evidently found that it had not been shown that such an offence was necessary in a democratic society, or even specifically in Hong Kong, and would have quashed the defendants' convictions.[79]

CFA Majority Opinion (July 2005)

Preliminary points

This judgment has an interesting anatomy. The underlying assumption is that, contrary to the opinions of the CA judges, the notification requirement and the Commissioner's powers to restrict processions have no necessary connection. Their constitutionality could be evaluated quite separately. Curiously, that position was only made clear in the penultimate paragraph.

As to the constitutionality of the notification requirement, that was summarily dealt with much earlier in paragraph 65 of the judgment. There the majority wrote that any argument that the "mere statutory requirement for notification is unconstitutional" was "untenable", that is, practically impossible to make. The court explained that the police needed to be notified of impending public assemblies in order to be able to carry out their duty to facilitate them. The court then wrote, "The statutory requirement for notification is constitutional." This was at least a clear statement that the "mere" notification requirement, that is, the notification requirement on its own, was constitutional.[80] Was it also something more? Was the move from "mere notification requirement" to "notification requirement" in the determinative sentence intentional? This question is important because the notification requirement in the POO does not stand alone. It is enforced

[75] Ma CJHC's concern here with future mischief is closely connected with his misreading of *Ng Kung Siu*, see text at n 64 above.
[76] Note 19 above, paras 126–128.
[77] *Ibid.*, para 130.
[78] *Ibid.*, para 133.
[79] *Ibid.*, paras 131–137.
[80] This was also the view of the dissenting judge, Bokhary PJ, see n 20 above, paras 208–210.

by means of the section 17A offences, the declared illegality of unauthorised processions and associated powers to prevent, stop and disperse such processions. Was the CFA majority meaning to declare that the section 17A offences, the illegality of unauthorised assemblies and the associated powers were constitutional too? The court's upholding of the defendants' convictions suggests the answer to this question is "yes" but the issues were not expressly addressed.

Instead, the CFA majority immediately turned to the validity of the defence contention that "the statutory discretion conferred on [the Commissioner] to restrict the right of peaceful assembly *for the purpose of 'public order* (ordre public)' is too wide and uncertain to satisfy the requirements of constitutionality."[81] They found the contention justified. But the majority did not, like Stock JA and Bokhary PJ, consequently find sections 14 and 15 of the POO unconstitutional. Instead they first severed "*ordre public*" in its "law and order sense" from "public order (*ordre public*)", then held that the Commissioner's powers in relation to public order alone were sufficiently certain to be "prescribed by law" and sufficiently proportional to their purpose to meet the requirement of necessity.

Finally, the majority explained that the defendants' convictions did not relate to the Commissioner's prior restraint powers. The defendants' offences were characterised as having arisen out of holding a public procession without complying with the notification requirements. The severing of public order from the unconstitutional "public order (*ordre public*)" was said to have had no effect on the notification offences. Consequently, the appeal was dismissed and the convictions confirmed.[82]

So, strictly speaking, much of the judgment is about an issue the CFA said was irrelevant to the ultimate decision in the case and issues that were undoubtedly central to that decision, the constitutionality of the notice, plus the "no objection" prerequisite for the legality of a public procession and of the section 17A offences, were essentially ignored.

It is worth noting another interesting feature of the judgment at this stage: apart from noting the results in each instance, the CFA majority said nothing about the content of any of the judgments in the courts below, neither identifying error nor acknowledging common ground, although the differences between their judgment and that of the CA majority and the common ground with the CA dissenting judgment are both substantial.[83]

[81] Note 20 above, para 65. (Emphasis added so as to make clear the narrow extent of the issue.) *See* also para 4.

[82] *Ibid.*

[83] Cf the judgment of the court in *Yeung May-Wan and Others v HKSAR* [2005] 2 HKLRD 212, an "as applied" challenge to obstruction and assault charges also in a public assembly context, in which the court made repeated references to the CA judgments, also written by Ma CJHC and Stock JA, with a short concurrence by Woo JA, agreeing in part and disagreeing in part with each.

The constitutionality of the Commissioner's power to object to or impose conditions on processions when he considers it reasonably necessary *in the interests of "public order (*ordre public*)"*

The majority's treatment of this issue followed the basic pattern established by *Ng Kung Siu*: a statement of the nature and importance of the relevant fundamental freedom; an acknowledgment that the freedom is not absolute; a statement of the constitutional requirements for any valid restriction, in the present case, that the restriction is "prescribed by law" and "necessary in a democratic society" for one or more of the legitimate purposes specified in Article 21 of the ICCPR; amplification of the meaning of "prescribed by law", "necessity" and "proportionality"; a description of the challenged laws and an application of the constitutional tests to those laws. Important features of each stage of the argument will be considered here.

(i) The nature and importance of the fundamental freedom of assembly

The CFA majority particularly stressed the "positive duty on the part of the Government . . . to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully."[84] This duty was accepted by the Government and the court as an important basis for the notice requirement.[85]

(ii) Limits on the types of restrictions

The CFA firmly asserted the traditional interpretation of the second sentence in Article 21 of the ICCPR[86] that the right of peaceful assembly *may* be subject to restriction but only if the specific restriction satisfied two requirements:

> "1. The restriction must be prescribed by law (the 'prescribed by law' requirement).
> 2. The restriction must be 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 (the necessity requirement)"

The specified purposes were referred to as "the legitimate purposes".[87]

(iii) "As prescribed by law"

The CFA made clear that the phrase "in conformity with law" in Article 21 of the ICCPR, involved the same legal certainty requirement as the phrase "as

[84] Note 20 above, paras 22–24.
[85] *Ibid.*, paras 23 and 65.
[86] *Ibid.*, para 17. The Court said there was no difference between the right of peaceful assembly recognised in and protected by the Basic Law and BOR, see para 20.
[87] *Ibid.*

prescribed by law" in Article 39 of the Basic Law.[88] Later, in addition to the usual points noted above, the court cited the ECHR case of *Malone v United Kingdom*,[89] arguably misrepresented by the CA,[90] for the propositions that:

(a) "A law which confers discretionary powers on public officials, the exercise of which may interfere with fundamental rights, must give an adequate indication of the scope [and manner] of the discretion" and
(b) "The degree of precision required of the law in this connection will depend upon the particular subject matter of the discretion."[91]

(iv) "necessary in a democratic society"

The Court chose the terminology "the necessity requirement" rather than "the necessary in a democratic society requirement" as a convenient reference phrase for the second part of the constitutional test. But in paragraph 56 of the judgment, the majority expressly stated that, notwithstanding the absence of "necessary" from section 2(2) of the POO[92] and of "in a democratic society" from the statutory test of necessity, "the clear legislative intent, evident from the incorporation of the ICCPR necessity requirement into the statute, is that the statutory necessity test should be interpreted and approached in the same way as the necessity requirement found in Article 21." So, although not expressly included, the words "in a democratic society" must be read into the relevant POO texts, in particular into the limits upon the Commissioner's powers to restrict public assemblies.

As to the meaning of "necessary", the CFA reiterated the *Ng Kung Siu / Ming Pao* Hong Kong interpretation noted above. As to the meaning of a democratic society, the court referred to statements in the Siracusa Principles that "while there is no single model of a democratic society, a society which recognises and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting the definition of a democratic society."[93] This was said to be consistent with the ECHR statement that "the hallmarks of a democratic society include pluralism, tolerance and broadmindedness."[94]

88 Note 20 above, para 19.
89 (A/82)(1985) 7 EHRR 14.
90 Note 19 above, para 53, in which a single phrase was quoted out of context and without reference to its application to the facts which actually led to the executive discretion in question being found not to be in accordance with law.
91 Note 20 above, para 29.
92 Note 3 above for text of this subsection.
93 Note 20 above, para 32.
94 *Ibid.*, para 32. The ECHR quote is from *Handyside v UK* (A/24) (1979–1980) 1 EHRR 737 and is frequently cited.

(v) Proportionality[95]

The CFA saw the function of proportionality as enabling "a proper balance [to be] struck between the interests of society on the one hand and the individual's right of peaceful assembly on the other."[96]

The court noted that:[97]

> "The use of a proportionality principle in examining whether a restriction of a fundamental right is necessary in a democratic society is consistent with the approach to constitutional review in many jurisdictions . . . Although the terms in which the proportionality test is formulated for application may vary from one jurisdiction to another, having regard to matters such as the text of the constitutional instrument in question and the legal history and tradition informing constitutional interpretation in the jurisdiction concerned, the nature of the proportionality principle is essentially the same across the jurisdictions."

In Hong Kong the proportionality test should be:

> "(1) the restriction must be rationally connected with one or more of the legitimate purposes; and
> (2) the means used to impair the right of peaceful assembly must be no more than is necessary [in a democratic society] to accomplish the legitimate purpose in question."[98]

(vi) The statutory scheme

In their detailed description of the notification scheme, the CFA majority made the important point that the Commissioner's discretions were based upon objective tests, presumably by virtue of the inclusion of the word "reasonably".[99] The majority also stressed that the statutory necessity tests should be interpreted and approached in the same way as the ICCPR Article 21 tests, including the test of proportionality.[100] So, "[i]n deciding whether and if so what restriction to impose in the exercise of his discretion, the Commissioner must consider: (1) whether a potential restriction is rationally connected

[95] Note 20 above, paras 33–39.
[96] *Ibid.*, para 35.
[97] *Ibid.*, para 34.
[98] *Ibid.*, para 36.
[99] *Ibid.*, para 54. The comment referred to both the Commissioner's powers to impose conditions and the power to prohibit.
[100] Both because that was the clear legislative intent and also by virtue of Basic Law Art 39(2), *see* n 20 above, paras 56, 58.

with one or more of the statutory legitimate purposes; and (2) whether the potential restriction is no more than is necessary [in a democratic society] to accomplish the legitimate purpose in question."[101]

(vii) Application of "prescribed by law" to the Commissioner's powers: "public order (*ordre public*)"[102]

Relying heavily upon the discussion and authorities in *Ng Kung Siu* noted above, the CFA first explored the meaning of "public order (*ordre public*)" at the constitutional level. The Court accepted that the concept was "somewhat vague" but constitutional norms are "usually and advisedly expressed in relatively abstract terms"[103] and are in any case not open to judicial challenge.[104]

But, at the statutory level an executive discretion must be defined with "a degree of precision appropriate to the subject matter."[105] A public official, "part of the executive authorities", stands in a "fundamentally different [position] from that of an independent Judiciary."[106] The majority concluded:

> "Here, the subject matter of the discretion is the regulation of public processions subject to the statutory scheme. As the situations that may arise for his consideration are of an infinite variety . . . it is important for the Commissioner to have a considerable degree of flexibility. But even taking this into account, the Commissioner's discretion to restrict the right of peaceful assembly for the statutory purpose of 'public order (*ordre public*)' plainly does not give an adequate indication of the scope of that discretion."[107]

Consequently, the discretion was not "prescribed by law" and was unconstitutional.[108] The validity of similarly worded discretions elsewhere in the ordinance was said to be doubtful.[109]

Rejecting more creative suggestions put forward by the Government, the majority's solution was to sever "(*ordre public*)" from the Commissioner's discretion, leaving "public order" in its "law and order sense". In justifying

[101] Note 20 above, para 57.
[102] *Ibid.*, paras 68–74.
[103] *Ibid.*, paras 72–73.
[104] A clear answer to Ma CJHC's concerns at para 56 point 3.
[105] Note 20 above, para 76.
[106] *Ibid.*
[107] *Ibid.*, para 77.
[108] *Ibid.*
[109] *Ibid.*, para 78.

this position the Court invoked the standard test for severance set out in *Attorney-General for Alberta v Attorney-General for Canada*:[110]

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair view of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

The majority declared their confidence that "had the Legislature appreciated the unconstitutionality of the rest of 'public order (*ordre public*)' in the context of the Commissioner's discretion to restrict the right of peaceful assembly, it would nevertheless have enacted the statute only with public order."[111]

As to the constitutionality of the remaining provision, the Court simply asserted that "public order" in its law and order sense was sufficiently certain for the "prescribed by law" test.[112]

(viii) "Rights and freedoms of others"

The Court expressed doubts about whether the Commissioner's discretion to restrict the right of freedom of assembly for the purpose of "the rights and freedoms of others", described as "a notion of wide and imprecise import", satisfied the requirement of "prescribed by law". In the absence of full argument, the Court expressed no concluded view, but did take the trouble to point out that the corresponding term in the ICCPR was not limited even to those rights and freedoms in the ICCPR itself.[113]

(ix) Application of the constitutional proportionality test to the Commissioner's powers after severance

As to "whether the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of public order is rationally connected" with the constitutional legitimate purpose of maintaining "public order (*ordre public*)", the court concluded the answer was self evidently "yes".

As to whether the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of public order "is no more than is

[110] [1947] AC 503, 518 as quoted in n 20 above, para 84. The Court noted that the decision had previously been adopted in *Ming Pao Newspapers Ltd* (n 22 above), p 921E, *Ng Ka Ling* (n 23 above), p 39D–F, *Independent Jamaica Council for Human Rights v Marshall-Burnett* [2005] 2 WLR 923, para 22 and the Canadian cases of *Vriend v Alberta* (1998) 156 DLR (4th) 385 at para 167, *Schachter v Canada* (1992) 93 DLR (4th) 1, 13–14.

[111] Note 20 above, para 85.

[112] *Ibid.*, para 83. The CFA majority explained this term as "the maintenance of public order and the prevention of public disorder." *See* n 20 above, 69.

[113] *Ibid.*, paras 86–88.

necessary to accomplish" that constitutional purpose, the court listed six factors that had to be taken into account:[114]

- the Government's positive duty with respect to freedom of assembly
- the limited scope of the notification requirement[115]
- the need for flexibility in connection with traffic conditions and crowd control – together with the restraining effect of the fact the Commissioner too must apply the proportionality test
- objection must be made within statutory time limits, conditions imposed within a reasonable time
- the Commissioner is under a duty to give adequate reasons for objection / conditions
- the Commissioner's decision may be appealed to the Appeal Board and, if upheld, is also subject to judicial review.[116]

Perhaps regarding the significance and relative weights of these factors as self evident, apart from stating that the discretion was "of assistance in enabling Government to fulfil its positive duty" to facilitate public assemblies, the court made no attempt at further analysis or explanation before concluding that the "Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of public order" satisfied the proportionality test and was constitutional.[117]

Since, as previously indicated, the court held that the finding that the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of "public order (*ordre public*)" was unconstitutional was irrelevant to the defendants' offences, *a priori* this conclusion also had no effect on the defendants' fate.

Bokhary PJ's Dissent

It is not possible to do justice to the swirling breadth of Bokhary PJ's judgment here. His analysis ranges over both public meetings and public processions and extends to sections 6 and 17, none of which were more than mentioned in any other of the six judgments. Even with respect to public processions

[114] *Ibid.*, para 92.

[115] All the judges make this point but, with respect, although the baseline of 30 persons is a real limitation, where else would such a procession go except upon a public road or thoroughfare or in a public park? Processions, as distinct from meetings, seldom occur on private premises. The phrase does not even exempt a procession confined to the roads within the HKU campus since these are certainly thoroughfares. What would be excluded? A march past of athletes in a private park perhaps? Or daily processions of school children within their school grounds? The annual children's Halloween parade at Sha Wan Drive?

[116] Note 20 above, paras 92–93.

[117] *Ibid.*, para 94.

alone the discussion is complex and comprehensive. In this article, discussion must be restricted to those points that most fervently go further than or actively disagree with the majority judgment. This means sacrificing coverage of the reasoning and authorities set out in those parts of the judgment dealing with the nature and purpose of free assembly[118] (by far the most extensive discussion in any of the judgments), "necessity in a democratic society" in which the need for a "freedom-friendly" standard of necessity is explained,[119] an explanation of the character of prior notification *per se* and facilitating prior restraint[120] and a lengthy argument under the title "Certainty, necessity and proportionality"[121] in which Bokhary PJ justifies his rejection of the Government's argument, successful in the CA, that legal certainty requires only that a law, even a law restricting a fundamental freedom is not "hopelessly vague".[122] Legislators, members of the executive, law enforcement personnel, practitioners, students and interested citizens should nevertheless read those parts carefully. They are replete with intellectual and authoritative gold that would reward careful mining. However, this article concentrates on later parts of the judgment in which Bokhary PJ, bringing together and building upon the previous segments, sets out the approach he believes should be applied and the implications of that approach for the POO.

The constitutionality of the Commissioner of Police's POO powers of prior restraint

Bokhary PJ begins his exposition of the law with a warning against treating fundamental rights and freedoms as:[123]

> ". . . merely what is left after seemingly innocuous restrictions have been imposed . . . The correct approach is to ascertain the nature of the fundamental right or freedom concerned and the purposes which it serves in a free society. And then to focus on keeping that right beyond any restriction that runs counter to its nature or stands in the way of it serving – and being seen to serve – its purposes in full measure."

This is a much stronger statement of the relationship between the fundamental freedoms and their permissible restrictions than the rather perfunctory repetitions of standard doctrine that rights are to be interpreted generously

[118] *Ibid.*, paras 101–105; 118 –121.
[119] *Ibid.*, paras 126–131
[120] *Ibid.*, paras 132–137.
[121] *Ibid.*, paras 138–190.
[122] *Ibid.*, paras 139 and 191.
[123] *Ibid.*, para 192.

and restrictions narrowly found in the other judgments. It is the only approach that gives "fundamental" any real meaning.

Acknowledging room for diversity, Bokhary PJ lists five points that should be made in any discourse about how a scheme for regulating freedom of assembly should be circumscribed:[124]

(a) "The purposes which the scheme is meant to serve should be specified. Such purposes must not be and must be seen not to be repugnant to free assembly . . ."
(b) The statute should expressly provide that scheme powers are triggered not merely by "necessity" but by "necessity as measured by a freedom-friendly standard of reference" – "necessary in a democratic society" is such a standard.
(c) "Powers to ban or control [public meetings and processions] involve prior restraint on free assembly . . . [They should be limited to circumstances] . . . in which prior restraint is a proportionate response. . . . for example, [when] the Commissioner reasonably suspects, for stated reasons which the courts can ascertain are good, that a [proposed] meeting or procession would lead to an unreasonable obstruction or serious threat to public safety . . . that . . . would be more than ordinary policing could cope with adequately. . . . [I]n many other circumstances [prior restraint] would not [be proportional]."
(d) The sorts of conditions that can be imposed should be specified. "The wider the concepts in the service of which conditions may be imposed, the more clearly and carefully . . ." the range of possible conditions must be circumscribed.
(e) It may be possible to devise a constitutionally valid banning power for the Commissioner "[b]ut judicial decision-making is attended by procedural safeguards absent from administrative decision-making." Constitutionally, a judicial banning power exercisable upon application by the Commissioner would be "inherently easier to defend" than a banning power given to the Commissioner.

Bokhary PJ then applied these points to the Commissioner's POO prior restraint powers.

None of the purposes for which the powers may be exercised were "repugnant to free assembly", only *ordre public* was "elusive" but the others, particularly "the protection of the rights and freedoms of others' were "very wide

[124] *Ibid.*, para 196.

concepts".[125] There was no express[126] requirement that the need to act in service of those purposes "must be necessity by a freedom-friendly standard" or that powers of prior restraint "can only be used where ordinary policing cannot be relied upon to accomplish the necessary objective." The sorts of conditions that could be imposed were not specified.[127] Although "[s]triking down legislation is a course of last resort . . ." it would not be in accordance with the judicial function for the court to save an unlawful power by "supplying the necessary safeguards through interpretation."[128] Neither the appeal procedure nor subsequent possibility of judicial review could save the power when it is the existence of the power itself and not the way it is being exercised that is challenged.[129]

Bokhary PJ concluded that the Commissioner's prior restraint powers were "insufficiently circumscribed" and therefore unconstitutional.[130]

The Commissioner's "entitlement to notification is constitutional"

Bokhary PJ's argument at this point was very specific and needs to be reported in detail. The learned judge acknowledged the advantages of prior notification for the "proper policing" of public meetings and processions – which proper policing is in the "legitimate interests of organizers, participants and the general public."[131] Subject to two qualifications, Bokhary PJ concluded that the notification provisions in sections 13A and 13 were constitutional to the extent that they provide that public processions can take place only if the notification requirements have been complied with. Those qualifications were: (i) the requirement that "purpose and subject-matter" be included in the notification is met by a description in general terms for the purpose of assisting policing decisions and not to enable content "vetting"[132] and (ii) the notice requirements do not apply to spontaneous demonstrations.[133]

Likewise, the police powers in section 17 that are not tied to the unconstitutional prior restraint powers of the Commissioner would be a constitutional means of enforcing the notice requirement if read down so that they "arise when non-spontaneous . . . processions are held without notification and non-notification renders proper policing [of the procession] otherwise impracticable."[134]

[125] *Ibid.*, para 198.
[126] The CFA majority's finding that such a requirement was implicit was evidently insufficient.
[127] Note 20 above, para 200.
[128] *Ibid.*, paras 201–202.
[129] *Ibid.*, paras 203–204.
[130] *Ibid.*, para 205.
[131] *Ibid.*, para 210.
[132] *Ibid.*, para 209.
[133] *Ibid.*, para 208.
[134] *Ibid.*, paras 210–212. Note para 213 as to the possible use of standard obstruction offences.

Section 17A – the criminal offences

Like Stock JA, Bokhary PJ conceded that, as a matter of language only, parts of the section 17A offences could survive the loss of the Commissioner's unconstitutional powers of prior restraint. But then, using the same test as that relied upon by the CFA majority when considering the possible severance of "(*ordre public*)",[135] Bokhary PJ concluded that it could not be assumed that the legislature would have enacted section 17A, including the range of penalties, without enacting the part relating to the Commissioner's prior restraint powersl."[136] In his view, "section 17A is too bound up with the Commissioner of Police's unconstitutional powers of prior restraint to have any life independent of those powers attributed to it."[137] Therefore, section 17A was also unconstitutional. On this basis, Bokhary PJ would have allowed the defendants' appeals against their convictions.

The Implications of the CFA Decision

Practical Implications for Would-Be Assemblers and the Police

The administration has indicated to the Legislative Council in general that the CFA decision will be implemented, perhaps by means of a "Miscellaneous Amendments" ordinance. In the meantime, the administration will interpret "public order (*ordre public*)" as meaning "public order" in its "law and order sense".[138]

The practical benefits of the CFA decision for people planning an assembly, that is, its practical effect on restrictive powers of the police, may be small. The notice and "no objection" prerequisites for legality remain in force. Organisers, assistants to organisers and knowing participants in unauthorised or banned public processions still face the possibility of prosecution and at least the threat of very substantial penalties. Authorised processions may still be subject to unspecified types of conditions. All section 17 powers remain intact. And, the diminution in the Commissioner's prior restraint powers

[135] But citing only *IJCHR v Marshall-Burnett* (n 110 above), 934H–935A applying *Attorney General for Alberta v Attorney General for Canada* (n 110 above) and also *Maher v Attorney General* [1973] IR 140, 147 *per* Fitzgeral CJ of the Supreme Court of Ireland.

[136] Note 20 above, para 215.

[137] *Ibid.*

[138] *See* LC Paper No CB(2)192/05-06(05), para 13, prepared by the Security Bureau of the Hong Kong Police and the Department of Justice for the Legislative Council. This intention was repeated by the Permanent Secretary for Security when appearing before the Legislative Council Panel on Security on 1 Nov 2005. The PSS also indicated that the Government would also review the issue raised by the CFA in para 88 of the judgment concerning "the rights and freedoms of others" and that the police were reviewing their internal guidelines in light of the decision, LC Paper No CB(2)755/05-06, paras 41–42.

brought about by the reading down of "public order (*ordre public*)" is minimal. It is extremely unlikely that either protesters or the police gave serious thought to the extra breadth of "(*ordre public*)". "Public order" by itself remains a very broad concept – even if restricted to a law and order sense. The Commissioner should not in practice have significantly more difficulty justifying any content-neutral or even good faith content-based restrictions he might choose to make without "(*ordre public*)" as a possible object.

For the government, at the trifling cost of the loss of a legitimate objective they did not need and the perhaps greater but surely manageable cost of an express demand that the Commissioner must, as a matter of law, apply the proportionality test with reference to what is necessary in a democratic society, the basics of their control over public processions have now been declared facially constitutional, not merely by a pro-government legislative majority but by the Region's highest court.[139] Prosecutions of procession organisers who do not give the requisite notice may now be less controversial. Certainly the inhibiting, dissent-taming power of the legislation has been reinforced. Many would-be assemblers may now feel more compelled to abide by the law.[140] At least those who choose not to give notice cannot claim an expectation that the requirement is never actually enforced. So, the real risk of prosecution, especially for unpopular activists, even the risk of a short term of imprisonment for repeat offenders, must have increased – though it is true that there has not yet been any report of a rash of prosecutions.

Implications for future approaches to fundamental freedom issues

The CFA majority judgment has a multifaceted character. It includes a strong reiteration of the importance of freedom of assembly in a democratic society and a strong affirmation of the importance of the ICCPR in Hong Kong's legal environment, both intrinsically and in connecting Hong Kong with an evolving international human rights jurisprudence.

At the same time, the judgment also reiterates Hong Kong's independence from that jurisprudence as evidenced by the court's continued insistence upon Hong Kong's home-grown interpretation of "necessary" – although it is not at all clear that the ordinary meaning of "necessary" differs from the international test, especially as the CFA has put "in a democratic society" back into

[139] ". . . the CFA has ruled that, after severance of 'public order' from 'public order (*ordre public*)', the provisions of the POO that the CFA considered are constitutional. Therefore, the POO can and will continue to operate, subject to the CFA's judgment, in order to achieve its objectives of assisting to provide for the freedom of procession and assembly, yet protecting public order and other public interests . . .", *ibid*, para 12. This view was reiterated by the PSS when appearing before the Panel for Security, *ibid*.

[140] As Bokhary PJ (n 20 above), para 161 observed, "Not everyone is prepared to risk being prosecuted on criminal or disciplinary charges. Nor does everyone relish having to bring a constitutional challenge in order to vindicate his or her beliefs."

the POO test.[141] Of course, how either test is applied in practice is another matter.

The judgment strikes down the inclusion of the vague "*ordre public*" as a legitimate objective at the statutory level and makes the Commissioner's obligations to adopt a full "necessary in a democratic society" proportionality test for all his decisions very clear. But the actual necessity / proportionality analysis of the Commissioner's statutory powers to restrict processions in the interest of public order is no more rigorous than that of the Chief Magistrate – in fact the basic similarities between the two analyses are striking.[142] There was no exploration of the limits of public order as an objective. The refusal to engage the vagueness of "the rights and freedoms of others" was also highly questionable. Making every allowance for the fact that this was a facial challenge to the legislation, the level of scrutiny actually applied to the extent of the Commissioner's powers by the CFA majority was at best at the level of reasonableness and balance, not the level of necessity and priority for a fundamental freedom.

In this context it is significant that, notwithstanding that the Human Rights Committee (HRC) has warned Hong Kong of the dangers of an approach that seeks to strike "a balance between civil liberties and social order" in the context of the POO,[143] as noted above, the CFA majority still identified the function of proportionality as enabling "a proper balance" to be "struck between the interests of society on the one hand and the individual's right of peaceful assembly on the other."[144] I have discussed the possible diluting effects of the concept of "balancing" elsewhere.[145] The CFA's phrase also incorporates the risk of dilution caused by the characterisation of the balancing task as between the "interests of society" and an "individual's right". Why are we members of society when we use to roads to get to work or the parks to look at flowers but mere individuals when we join together in a group to use the same spaces to exercise the fundamental freedom of procession?

Of equal concern is the CFA's artificial separation of the notice system from the Commissioner's restrictive powers, the perfunctory scrutiny of the notice requirement and the total failure to scrutinise the statutory offences and "no objection" prerequisite at all.

[141] *See* discussion in Brabyn (n 11 above), pp 288–289.

[142] Of course, there are some differences. The Chief Magistrate refers to the possibility of proportional sentencing, content neutrality and absence of evidence of abuse. The CFA majority refers to the absence of abuse in para 42 but also notes its legal irrelevance. The Commissioner's duty to apply a full proportionality test to his decisions, so crucial to the CFA, is not mentioned by the Chief Magistrate.

[143] *See* Comment of Mr Scheinin, Summary Record of the 1805th Meeting of the Human Rights Committee (Hong Kong): China, 8 Nov 1999, CCPR/C/SR/1805, para 11.

[144] Note 20 above, para 35.

[145] Brabyn (n 11 above) pp 278–279.

Future courts will no doubt value the CFA decision for its guidance on matters of law. For guidance as to how particular legislation should be scrutinised when applying that law, it is hoped that law enforcement, judges, legislators and activists will also look to the much more demanding level of scrutiny in the dissents, including Stock JA's judgment in the CA. The latter's approach to the use of evidence beyond the terms of the legislation in order to assess proportionality should be remembered. It is also imperative that the CFA majority's rigidly formalistic approach as to what is in issue and open to decision in a particular case does not become general practice.

Even so, there is some room for cautious optimism. First, it must be remembered, the Hong Kong judiciary are on a steep learning curve. Judicial review of legislation as incompatible with fundamental rights and freedoms was totally unfamiliar territory in 1991 when the BORO first introduced the possibility – an anathema to their common law training in Parliamentary sovereignty and colonial public order. In *Leung Kwok Hung*, we see evidence of their progress. It is submitted that, notwithstanding what is written above, the recognition that "public order (*ordre public*)" is too vague for inclusion as domestic legislative standards for executive action or even judicial review is significant.

Second, the CFA majority's extremely narrow approach to the issues in the case does mean that a facial challenge to the Commissioner's powers to restrict processions in order to protect "the rights and freedoms of others" is still possible. The CFA has suggested such a challenge may well succeed. Unfortunately, the CFA's separation of the notice requirements and the Commissioner's discretion may have the practical effect in the future of ensuring only a person who has received a notice of objection has standing to make it – but perhaps not, if Hartmann J's expansive approach to *locus standi* to challenge legislative provisions is accepted.[146]

Thirdly, and somewhat ironically given this was a facial challenge, the CFA judgments might actually have more impact upon "as applied" challenges with respect to specific decisions by the police not to authorise, to impose conditions on or to prevent, stop or disperse a peaceful procession – even, it is submitted, unauthorised assemblies. In the context of "as applied" challenges, rigorous scrutiny of the Commissioner's decisions by the Appeal Board and the courts so as to ensure full compliance with the legal duty to

[146] *See Leung TC William Roy v Secretary for Justice* HCAL 160/2004 in which a homosexual male of 20 was able to obtain a declaration as to the unconstitutionality of certain provisions of the Crimes Ordinance notwithstanding the executive had never sought to prosecute him under those provisions and *Leung Kwok Hung and Koo Sze Yiu v Chief Executive of HKSAR* HCAL 107/2005 in which the applicants obtained judicial review of an executive order purporting to legitimise covert surveillance notwithstanding there was not evidence the applicants had even been the subjects of such surveillance, although, admittedly, the applicants were not in a position to know.

apply a full "necessary in a democratic society" proportionality test and the statutory obligations to give substantive reasons – both stressed by the CFA majority – could provide really significant protection for the fundamental freedom of assembly at street level.[147] Bokhary PJ's argument that a proportionality approach would require the Commissioner (or his delegates) to have reasonable grounds to fear that ordinary policing would not be able to cope with expected unreasonable obstruction or serious threats to public safety, before objecting to, imposing conditions upon or preventing, stopping or dispersing a peaceful procession is relevant here. Prosecution for section 17A offences would still be possible but an argument that a police order that does not satisfy the proportionality test is not a legal order and disobeying such an illegal order does not amount to an offence might well succeed.[148] Even for failure to give notice offences, for which such an argument would not be available, universal adoption of the Chief Magistrate's insistence upon proportional sentencing would provide some protection.

The "Rightness" of the CFA Decisions

The CFA majority's decision is effective authority for the following propositions. First, the notification requirement (probably including the section 17A notification offence and "no objection" prerequisite) is no more than is necessary in a democratic society to accomplish the legitimate purpose of protecting "public order (*ordre public*)". Second, a "statutory discretion to restrict the right of peaceful assembly for the purpose of 'public order (*ordre public*)'" did not give an adequate indication of the scope of the discretion and was facially invalid. Third, the Commissioner's post-severance statutory power to restrict the right of peaceful assembly for the purpose of maintenance of public order is sufficiently certain to be "prescribed by law" and is no more than is necessary in a democratic society "to accomplish the legitimate constitutional purpose of 'public order (*ordre public*)'."[149]

That was all the CFA decided.

[147] The CFA saw the requirement that the Commissioner must apply the proportionality test the "full protection of the fundamental right of peaceful assembly against undue restriction." (n 20 above), para 96. Cf the CFA's very rigorous scrutiny of actual obstruction and assault charges in *HKSAR v Yeung May Wan* (n 91 above) and the recent English Court of Appeal decision in *R (On the application of Laporte) v Chief Constable of Gloucestershire Constabulary* [2004] EWCA Civ 1639; [2005] HRLR 6 and cases cited therein.

[148] Cf *Yeung May-wan and Others v HKSAR* [2005] 2 HKLRD 212, in which the CFA held that protesters were not required to comply with arbitrary orders given by the police and might even use force to resist them.

[149] Note 20 above, para 93.

It is submitted that there can be no doubt that the CFA's decision as to the unconstitutionality of the Commissioner's power to restrict public procession for the purpose of "public order (*ordre public*)" was correct for the reasons given. The CFA's reservations as to the constitutionality of other provisions in the POO that confer powers upon the Commissioner in similar terms are also valid.

The decision that the Commissioner's power to restrict public processions for the maintenance of public order is sufficiently certain to be "prescribed by law" and is not more than is necessary in a democratic society for that purpose leaves a very wide area of discretion for the Commissioner but that discretion may be ICCPR compliant and hence constitutional if the application of a full proportionality requirement is also accepted.

The decision as to the notification scheme is, with respect, problematic.

Suppose a law that, subject to exceptions for spontaneous or near spontaneous processions, requires seven days prior notification of public processions of at least 30 people to be held in public places expressly for the purposes of facilitating related traffic, space and crowd management by responsible authorities. Suppose the law imposes a proportionate (low-level) penalty upon procession organisers who do not comply with notification requirements. It also empowers responsible authorities to restrict or, as a last resort, prohibit a proposed procession when this is necessary in order to avoid incompatible clashes with earlier notified events or disorder or chaos of a kind or magnitude that would be beyond the resources or abilities of ordinary / reasonable law enforcement to control, taking the needs of a democratic society as the standard. The law does not make un-notified processions unlawful per se and does not permit the prevention, stopping or dispersal of the procession merely because the notification requirements were breached.

It is submitted that, subject to a possible finding that seven days is too long,[150] such a law would be accepted as compatible with ICCPR, European Convention and US First Amendment stipulations almost without question. The reasons for such acceptance would be the very reasons advanced in both CFA judgments for the constitutionality of the POO public procession notification scheme. But the POO is not such a law.

The POO scheme differs from this hypothetical law in five fundamental ways.

First, the POO scheme makes only very limited provision for spontaneous processions, requiring the Commissioner to accept shorter notice where the

[150] An identical period was the subject of adverse comment by the HRC in their Concluding Comments on Mauritius (1996) UN doc CCPR/C/79/Add 60, para 28 read with CCPR/C/SR/1477, paras 39, 49, 53, 69 and CCPR/C/SR/1478, paras 20, 28 but the requirement was for public meetings. Kevin Francis O'Neill, "Disentangling the Law of Protest" (1999) 45 Loy L Rev 411, 473, claims that US courts "have consistently rejected advance registration requirements beyond two days" for parades and demonstrations.

Commissioner is "reasonably satisfied that earlier notice could not have been given."[151] Bokhary PJ suggests that the notice scheme could be read so as to exclude spontaneous demonstrations.[152]

Second, the maximum penalties for holding or assisting in the holding of, or even knowingly participating in, an un-notified assembly are not proportional. Maximum penalties of three years' imprisonment or a fine of HK$5,000 – let alone five years' imprisonment – are much in excess of maximum penalties for comparable offences in any democratic society anywhere in the world.[153] Within Hong Kong, these maximum penalties are comparable to those available for inflicting grievous bodily harm[154] and dangerous driving causing death,[155] that is, really serious criminal offences. The Government has supported these maximum sentences as necessary to deal with worst case scenarios where failure to give notice meant law enforcement officials were given insufficient time to prepare for large crowds in difficult conditions or confrontations between hostile groups resulting in injuries, property damage, even deaths that might otherwise have been avoided. The suggestion is that in such circumstances the organisers should bear some responsibility for the consequences.[156] It has been argued elsewhere in this article that if this is so, such responsibility ought to be determined according to the general principles of criminal liability applicable in Hong Kong, including those relating to causation of, and recklessness as to, consequences.[157] The section 17A offences completely fail to address those principles. Furthermore, the section 17A offences are not confined to organisers and their assistants.

With respect, the Chief Magistrate's solution, that the courts can be trusted to impose an appropriate sentence commensurate to the actual criminality, presumably a relatively minor sentence if the sentences he imposed in the

[151] POO, s 13A(2).

[152] Note 20 above, para 209. *See* Helen Fenwick, *Civil Liberties and Human Rights* (3rd edn) (London: Cavendish Publishing 2002) 457 for discussion of English provisions on this point. Strasbourg jurisprudence is said to require exemption for notification requirements for spontaneous demonstrations, Hannes Tretter, "Austria" in Robert Blackburn and Dr Jorg Polakiewicz (eds) *Fundamental Rights in Europe* (Oxford: Oxford University Press 2001)104 at p 127.

[153] *See*, for example, Public Order Act 1986 (UK), which provides for fines only or up to 3 months'; imprisonment for some aggravated offences; Serious Organized Crime and Police Act 2005 (UK), s 132(1) providing for fines and / or imprisonment not exceeding 51 weeks for aggravated offences in a designated area around parliament; Administrative Code of the City of New York, provides for fines of HK$25 and / or imprisonment not exceeding 10 days (NY); Miscellaneous Offences (Public Order & Nuisance Act) (Cap 184) (Singapore) s 5(4) provides penalties of fines up to HK$10,000 and / or imprisonment not exceeding 6 months for organisers, fines up to HK$1,000 for participants only.

[154] Offences Against the Persons Ordinance (Cap 212), s 19.

[155] Road Traffic Ordinance (Cap 374), s 36 – only 2 years if prosecuted summarily. Actually, very few Hong Kong offences have a 5 year maximum sentence. Most have less, some have more.

[156] *See* Legislative Council Minutes No 13 for the meeting 20 and 21 Dec 2000, 2000 Legislative Council Proceedings , pp 2165–2168, 2177–2178.

[157] Brabyn (n 11 above), pp 309–322.

present case are any indication, is no answer to a facial claim.[158] Would we make a law punishing driving a vehicle without a certificate stating that the vehicle is fit to drive with a maximum sentence of five years' imprisonment because, although most offenders would deserve only a fine, a few who knowingly or at least recklessly drove seriously defective vehicles and thereby caused injury or even death might deserve such a penalty, trusting to the judiciary to "get it right"? I suggest not. Rather, we would create an offence of driving without a certificate of fitness with a proportional maximum sentence and ensure the separate offence of dangerous driving covers driving seriously defective vehicles.[159] People who fail or refuse to notify the police of their intention to hold a procession and people who in addition create serious public order or public safety problems deserve to be distinguished in the same way.

In truth, the extreme maximum sentences in section 17A amount to intimidation of people wishing to exercise what is said to be a fundamental freedom without first asking permission of the authorities – perhaps the very authorities to whose conduct the person wishes to object or at least the authorities who answer to the government to which the person wishes to object. If the intimidation is lessened because people come to expect that the sentences actually imposed will be relatively light, almost nominal, that only holds the law up to contempt – whilst leaving in place a dormant weapon that can be reactivated at the judiciary's choice. Perhaps really the executive's choice since a decision to prosecute on indictment would send a pretty clear message to the presiding judge that a substantial prison sentence was expected. There are no cases directly on point since penalties in other liberal democracies do not approach the POO's levels. But some indication of the probable view of the ECHR to the POO's maximum penalties for non-notification can be obtained from their reasoning in *Ezelin v France*.[160] In that case the ECHR found even the professional penalty of reprimand to be excessively discouraging of lawyers wishing to express their beliefs in a peaceful assembly. The imposition of the penalty could not be justified as necessary in a democratic

[158] *See* the interesting comments concerning the avoidance of disproportionate sanctions of a judge of the German Federal Constitutional Court in the *Mutlangen Military Depot Case* 73 BVerfGE 206 (1986), translated by University College London's Institute of Global Law, available at http://www.ucl.ac.uk/laws/global_law and cited by Bokhary PJ on a different point at para 143. The judge notes that according to German constitutional law even a "threatened sanction must be in fair proportion to the seriousness of the offence and the liability of the offender." Normally, reliance upon judicial choice from a relevant range of punishments is sufficient but "[t]he possibility of imposing milder punishments would, however, not simply be enough if the broad formulation of the elements of a criminal offence were to result in conduct also being penalized for which the threatened sanctions were disproportionate in kind and extent."

[159] Road Traffic Ordinance (Cap 374), ss 36(5), 37(5) provide: "A person is also to be regarded as driving dangerously within the meaning of subsection (1) if it would be obvious to a competent and careful driver that driving the motor vehicle concerned in its current state would be dangerous."

[160] (A/202) (1992) 14 EHRR 362.

society. Admittedly, since the assembly in which Ezelin participated was a lawful assembly, it is not possible to make a direct analogy between that case and participation in an unauthorised assembly. Nevertheless, the case is worth mentioning since it is inconceivable that the ECHR would treat the failure to notify the Commissioner in advance alone as sufficient justification for a leap in discouragement of peaceful assembly activity to anything like three let alone five years in prison. The extreme maximum sentences in section 17A cannot be justified as necessary in a democratic society for any legitimate purpose and are facially unconstitutional.

Third, the Commissioner's prior restraint powers to prohibit or impose conditions upon even notified public assemblies are extremely broad, even if "public order (*ordre public*)" is read as "public order" only, indeed, even if the "protection of the rights and freedoms of others" is excluded as well. In common law jurisdictions, "maintaining public order" is all too likely to be equated with "preventing a breach of the peace", and "breach of the peace" is a very minimalist standard.[161] It is true that the Commissioner is only entitled to exercise these powers if "reasonably necessary in a democratic society" – the CFA majority makes it clear the Commissioner must apply a full proportionality test. It may be that this requirement is another way of saying that a public procession can only be prohibited or conditions imposed if no more than necessary to deal with an "imminent" or a "clear and present danger" of violence, chaos or public safety that is otherwise beyond the control of ordinary policing, that is, serious disorder. But the CFA majority did not say so and Bokhary PJ clearly thought the point unclear. Would the Commissioner, or the inspectors to whom the Commissioner may delegate these powers, appreciate that this was so? Furthermore, there is no list of permissible conditions or types of conditions the Commissioner or inspectors may impose. In a domestic law that is to be understood by ordinary people in the context of one of their fundamental freedoms, the executive's restrictive powers should be made as clear as is practicably possible, not shrouded in a standard about the meaning of which judges and academics, let alone police officers and dissidents, could have lengthy debates.

Fourth, under the POO scheme, public processions for which the law requires notification but for which no notification was given are, for that reason

[161] *See* extracts from *Brokdorf Atomic Power Station Case* 69 BVerfGE, 315 (1985) quoted by Bokhary PJ, n 20 above, paras 47–49 as to the inadequacy of "public order" as an effective check on executive discretion in this area. *See* also Bokhary PJ's comments about the inadequacy of breach of the peace at n 20 above, para 94; *Steel v United Kingdom* (1998) 28 EHRR 603 and recent UK decisions using a breach of the peace related standard for review of executive decisions *Margaret Catherine Jones v WMS Carnegie; Jane Tallents v W. Gallacher; Gaynor Barrett v W. M. S. Carnegie; Frank James Carberry v Anne M. B. Currie; John Park v K. Frame* 2004 SCCR 361; *R (on the Application of Laporte) v Chief Constable of Gloucestershire Constabulary* [2004] EWCA Civ 1639; [2005] HRLR 6.

alone, unlawful. Such processions may be prevented, stopped or dispersed at the will of any police officer without any need for apprehension of public disorder or even inconvenience but simply because they are un-notified and hence unauthorised assemblies. Organisers of and even mere knowing participants in an un-notified procession commit a serious criminal offence. This is so even though their conduct is entirely peaceful, the obstruction caused is no more than would have been acceptable if the procession had been notified and the law enforcement personnel on hand are sufficient to deal with any traffic, crowd management or even public order problems.

Fifthly, even properly notified public processions are illegal and organising or participating in them is a serious criminal offence *unless* the procession has been *authorised* by the Commission / Commissioner's delegate or is deemed to have been *authorised* because the official response has not been made within the required time. *This is the POO bottom line*. The POO system means that organising or knowingly participating in a peaceful public assembly of at least 30 people in a public park or on a public road is a serious criminal offence unless an appropriate police officer has authorised, or is taken as having authorised, that procession – and even then, only so long as not more than two people participating in that procession do not refuse or wilfully neglect to obey certain orders given by the police.

With respect, considered alone, any one of the last four of these differences between the POO and the hypothetical law should cause concern. Considered together, that is, approaching the POO as a whole,[162] and taking full account of the tolerance in many international tribunals and national constitutional courts for tightly drawn permit schemes for open air public processions by which unlicensed public processions of a certain size would be unlawful, it is submitted that the constitutionality of the POO bottom line is sufficiently doubtful that it deserves the CFA's full and express scrutiny. It did not receive that full and express scrutiny from the CFA majority in this case.

[162] As the Government urged it should be taken: *see* Stock JA (n 19 above), para 133.