

## 12 Peaceful Assembly

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HONG KONG is widely perceived as a quintessentially capitalist society whose members channel in a single-minded fashion their considerable energies and talents towards strictly materialistic goals. Arguably, however, this perception no longer fully corresponds to political reality. Whether through a process of natural evolution, or as a result of several painful shocks administered by the People's Republic of China, most notably the events of Tiananmen Square in June 1989, local people have grown increasingly assertive and more willing to resort to confrontational tactics in pursuit of their interests and values.

While there is reluctance in Beijing, London, and the corridors of bureaucratic power in the territory to acknowledge this change, Hong Kong residents are not only responding keenly to opportunities spawned by the gradual political reform process but attempting to stretch the limits of quasi-democracy when strategic issues are at stake. One should not perhaps exaggerate this trend, yet it is evident that an attitudinal quantum leap has taken place and that the community is more conscious than ever of its rights and capabilities.

Given the shift from passive to active politics, it is reasonable to assume that the question of freedom of assembly will assume even greater importance in the future. Indeed, one of the aims of the present chapter is to speculate about likely government responses to the changing socio-political circumstances and to suggest possible legislative reforms. One cannot, however, proceed to deal with future contingencies without a discussion of past and present trends — particularly in Hong Kong where policy tends to evolve incrementally over a long period of time. Therefore observations about the future are preceded by a brief historical survey and a detailed analysis of the existing law.

### A. Historical Background

Perhaps the most significant turning-point in the history of legislation pertaining to the freedom of assembly in Hong Kong was the year

1967, in which there was an attempt to 'consolidate and amend the law relating to the maintenance of public order, the control of organizations, meetings, places, vessels and aircraft, unlawful assemblies and riots and matters incidental thereto or connected therewith'.<sup>1</sup> The same year was also marked by the worst civil unrest that Hong Kong has experienced and, consequently, the Public Order Bill 1967 encountered little opposition, passing swiftly and with only a few minor amendments. In view of the strong emphasis placed by the Bill's presenters on 'prevention and control of disorder' while avoiding any reference to the right of members of the public to dissent or express their opinions by means of peaceful assembly, it is particularly noteworthy that no fundamental objections were raised. The Bill was projected as a measure erring on the side of safety and justified as a necessary response to the turmoil experienced in the preceding months.<sup>2</sup>

In an effort to deflect potential criticisms, the government signalled that if the 'balance between citizen and state' changed or the implementation of the Bill disclosed 'gaps or provisions which proved unfair or oppressive', it would be 'ready and willing to consider suitable amendment'.<sup>3</sup> Such an opportunity presented itself in 1970 with the enactment of the Public Order (Amendment) Ordinance, following the 'recognition that some of the provisions of the Ordinance confer unnecessarily wide powers in ordinary times and that, in a few instances, there may be a risk that innocent persons may become involved in offences'.<sup>4</sup> The 'need for [further] review of the provisions of the Public Order Ordinance [specifically]<sup>5</sup> relating to public meetings and processions in the light of [new] circumstances' was acknowledged again nine years later.<sup>6</sup>

As indicated, the main purpose of the architects of the 1967 Ordinance was that of 'strengthening the law dealing with public order'. To this end, they conferred wide powers on the relevant executive organs. Thus, the Commissioner of Police was granted the authority to prohibit the holding or continuance of any public gathering in any particular area or premises or on any particular day if he considers it necessary or expedient in the interests of public order to do so (section 15); the Governor in Council was provided with the power to ban all public gatherings for up to three months if he considers it necessary to do so in order to prevent serious public disorder (section 16); a police officer of or above the rank of inspector was authorized to prevent the holding of, stop or disperse, or vary the place or route of any public meeting, public procession, or public gathering other than meetings exclusively for religious purposes (section 3); authority

was also extended to such an officer to enter and search premises without warrant, search persons found in premises, and stop and search vessels and vehicles in which such an officer knows or has reasons to suspect that there is evidence of an offence under the ordinance (section 49); all police officers of any rank were given the power to prevent the holding of, and to stop or disperse an unlicensed public meeting or public procession (section 11); and their coercive ability was further buttressed by an array of ancillary powers such as the authority to issue orders and use necessary force (section 11); finally, section 50(1) accorded members of the Hong Kong Auxiliary Police Force on duty greater powers and immunities than they had previously held, placing them on a par with police officers of equivalent ranks.

Nor was it just a matter of enhancing the control potential of law enforcement officers. The Public Order Ordinance 1967 also substantially expanded the scope of relevant offences to replace what had been regarded as the 'technical and ill adapted' and generally 'inadequate' common law on the subject of unlawful assembly and riot.<sup>7</sup> To be more explicit, according to the Ordinance (section 18), if three or more persons assembled together conducted themselves in a manner intended or likely to cause anybody reasonably to fear a breach of the peace, regardless of whether they shared a 'common purpose', they would constitute an 'unlawful assembly'. The latter, in turn, would amount to a riot as soon as any party present committed a breach of the peace (section 19). Furthermore, an unlawful assembly might be deemed an 'intimidating' one under the new provisions (sections 27–30) which introduced into the permanent law the substance of the Emergency (Prevention of Intimidation) Regulations 1967.

As the impact of the 1967 disturbances started to dissipate, criticism intensified against powers granted to the police that were deemed to be 'unnecessary' or 'unjustifiable', and the likelihood of 'morally innocent persons'<sup>8</sup> falling within the broad terms in which some sections in the Public Order Ordinance were expressed. While admitting no actual abuse of the powers conferred by the Ordinance or the unreasonable prosecution or wrong conviction of persons, the government proceeded to 'clarify some provisions about which doubt has been expressed and to relax others in order to give better protection to the public against any misuse of powers or against the possible conviction of persons innocently involved in circumstances which constitute offences under the Ordinance'.<sup>9</sup>

Specifically, the term 'meeting' was redefined to include any meetings in which a degree of organization is exhibited, whether

before or during the meeting, thus excluding a casual gathering of persons in a public place, hitherto regarded as a meeting subject to the requirement of a licence. Also excluded were meetings for any statutory purpose, such as creditors' meetings or sittings of courts. Exempted additionally<sup>10</sup> from the need to obtain a licence were meetings held for social or business purposes in licensed restaurants and funeral meetings. Amendments were introduced not only to narrow the ambit of the Ordinance's application but also to restrict the exercise by police officers of the power to prevent the holding, stopping, and dispersing of public meetings (section 11), as well as the powers to prohibit the public display of flags and banners (section 3) to occasions where these could be believed to be reasonably necessary (rather than on the basis of the officer's opinion). Similarly curtailed were the wide powers of search and entry granted to police officers under the 1967 Ordinance (section 49); they retained merely the qualified authority to require a person to identify himself if this was considered necessary for the purpose of preventing or detecting a crime.

Perhaps even more significant was the attempt to circumscribe the liabilities and offences under the Ordinance. In such a vein, the strict obligation imposed on the licensee to be present from the first assembly of the meeting to its final dispersal was amended to enable him the defence of absence by reason of illness or other unavoidable cause. By the same token, a person responsible for the organization, promotion, direction, or management of a meeting which was prohibited by the Commissioner of Police under section 15 would, under the new provisions, be guilty of an offence only *after* the issue of the prohibition order. The defence of 'lawful authority or reasonable excuse' was also guaranteed by the 1970 amendment to 'participants' (as distinct from organizers) charged with taking part in an unlicensed assembly (section 12) who could demonstrate that they had been innocent bystanders and had become involved unintentionally. The plea of lawful authority or reasonable excuse was extended in like manner to persons charged with having an offensive weapon in their possession at a public meeting or procession (section 14), in the light of the wide definition of 'offensive weapon' which includes articles that are in common use (such as choppers or knives). Of particular importance were the amendments of the offences of unlawful assembly (section 18) and riot (section 19), requiring a disorderly, intimidating, insulting, or provocative element in the conduct of an assembly before it became unlawful. As a result of these amendments, the offence of 'intimidating assembly' became superfluous, since a person taking

part in an intimidating assembly could be prosecuted for taking part in an unlawful one.

The attempt of 1970 to strike a better balance between the values of public authority and individual liberty notwithstanding, the implementation of the provisions in the Public Order Ordinance which imposed constraints on freedom of assembly continued to provoke criticism, the most grave of which entailed allegations of the arbitrary exercise of police power and selective enforcement of the law.<sup>11</sup> A series of events in 1979<sup>12</sup> and, in particular, an important Supreme Court judgment<sup>13</sup> served to highlight the anomalies within the existing legislation and appear to have prompted the government to convene a working party (in May 1979) with a view to recommending possible refinements and improvements in the law relating to the licensing and control of public meetings and processions.<sup>14</sup> The working party's efforts culminated the next year in the Public Order (Amendment) Ordinance 1980 which sought primarily to replace the established licensing procedures pertaining to public meetings with a simplified system of police notification in the context of substantially redefined 'meetings' and 'processions', thus arguably paving the way for a variety of public meetings to be held without official permission.

The shift towards a less sweeping form of monitoring public meetings was justified by the government on the ground that there was a 'sufficiently stable' Hong Kong with a 'sufficiently responsible' population.<sup>15</sup> Be that as it may, the further liberalization of the law undertaken in 1980 was still heavily influenced by considerations of public order and security. The then Attorney General shed light on the cautious attitude displayed by the authorities more than a decade after the eruption of the 1967 disturbances by portraying the territory as a potentially volatile place. As he put it in a statement to the Legislative Council:

Although Hong Kong today is stable, and its population, with very few exceptions, responsible it was not always so, and — who knows — in the future issues unforeseen by us today may arise which could lead to the expression of strongly opposing views supported perhaps by different groups or different factions in society. And it is to be remembered too that in all societies and in all places it happens sometimes that those who hold strong and controversial views may, through misguided enthusiasm or indeed sometimes perhaps through malice, attempt to insist upon the expression of their views in places and at times when to do so may risk or even be actually designed to cause unrest.<sup>16</sup>

Given the lingering fear that the communication of opinions in the public domain poses the danger of escalating into political conflict and destabilizing the precarious social order, the importance of the 'right to demonstrate' as an integral part of the freedom of expression was — again — not accorded full recognition by local lawmakers in 1980. In this respect, the latter have not departed from the British tradition which denies a positive legal principle supporting the right to demonstrate and gives greater weight to the imperatives of political order.<sup>17</sup> However, even in jurisdictions in which no such denial prevails, some form of regulation of public meetings and processions is considered legitimate. The specific regulatory measures adopted by the Hong Kong government are therefore of interest, despite the intellectual rejection of the right to demonstrate in principle. These measures and the law which incorporates them are described and evaluated in the following section.

## **B. Survey of Existing Legal Provisions**

The local authorities have opted to regulate the freedom of assembly in the territory by a variety of means ranging from 'prior restraint', through 'subsequent punishment', to 'dispersal powers'. The first type of measure includes three 'pre-assembly' methods of vetting made available under the Public Order Ordinance, namely, licensing, notification, and banning orders.<sup>18</sup>

### **1. Regulation by Prior Restraint**

#### *a. Licensing*

The licensing procedure is detailed in section 13 of the Public Order Ordinance which stipulates that public processions consisting of more than 20 people and taking place on public highways, public thoroughfares, or public parks must be authorized by a licence issued in writing by the Commissioner of Police. The licence — once given — is subject to such conditions relating to the forming, conduct, route, times of passing and dispersal of the procession as the Commissioner of Police may impose, as well as a general condition that the licensee be 'present at the public procession from the first assembly thereof to the final dispersal thereof' in order to ensure the 'due performance and compliance with the conditions of the licence and the maintenance of public order throughout the period of assembly, conduct, and dispersal of the public procession' (section 15). Furthermore, the

Commissioner of Police enjoys wide discretionary power to grant or withhold the necessary permit and is guided merely by the elastic formula that he be 'satisfied that the public procession is not likely to prejudice the maintenance of public order or to be used for any unlawful purpose'. The Commissioner may thus refuse a licence to hold a public procession, unless for the sole purpose of a funeral, and is constrained in this respect only to the extent that '[t]he applicant or any person or society associated directly or indirectly with the application or likely in the opinion of the Commissioner of Police to be concerned with the organizing, convening, forming or conduct of the public procession has, in relation to any public gathering, at any time contravened the provisions of [the Public Order Ordinance] or any other law or any other condition of a licence, issued under [the] Ordinance or any other law'; or that 'the public procession has been advertised or otherwise publicized prior to the determination of the application' (section 13(6)).

A right of appeal to the Governor is none the less granted (under section 16) to an aggrieved person whose application for a licence is rejected or whose licence is cancelled or amended. On the other hand, a procession to which the licensing requirement applies, and which is held without a licence or in breach of its terms, is deemed to be an 'unauthorized assembly' and the organizers and participants alike are guilty of an offence (section 17A).

#### *b. Notification*

The notification requirement applies under the present system to public meetings which involve — or are expected to involve — more than 30 people in a public place or more than 200 people in private premises, excluding, however, meetings held in schools or accredited educational establishments with the consent of the management (section 7). Failure to give such notification renders the meeting 'unauthorized' and carries with it criminal liability and a heavy penalty (section 17A). By contrast, meetings preceded by a notification in accordance with the prescribed procedure — that is, seven working days in advance and providing the Commissioner of Police with full details — may take place, although subject to strict conditions (section 11). The freedom to hold public meetings is further circumscribed by the extensive powers granted to the Commissioner of Police to prohibit intended meetings notice of which has been given (section 9), though section 16 provides for a right of appeal to the Governor to rescind the prohibition order.

### *c. Banning Orders*

The Hong Kong authorities have at their disposal banning powers both of a general and a specific nature. Thus, a general ban on all, or a class, of public gatherings in the territory for a period not exceeding three months may be imposed by the Governor in Council 'if he is satisfied that by reason of particular circumstances existing in Hong Kong or in any part thereof, it is necessary for the prevention of serious public disorder' (section 17E). In addition, the Commissioner of Police is empowered to place a specific ban on public gatherings 'if it appears to him to be necessary or expedient in the interests of public order so to do' and regardless of whether the gathering is disorderly or violent (section 17D).

## 2. Subsequent Punishment

Tight control over public assemblies may also be exercised in the territory through provisions regulating the conduct of participants. The principal legal tool of controlling conduct is section 18 of the Public Order Ordinance which defines the offence of 'unlawful assembly' as the assembly together of three or more persons who conduct themselves in a 'disorderly, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace'. More disruptive forms of assembly are dealt with by invoking the offence of 'riot' (section 19), which may be described as any unlawful assembly turned violent. Also subject to prosecution under the Ordinance (section 26) is a person who 'without lawful authority, at any public gathering makes any statement or behaves in a manner which is intended or which he knows or ought to know is likely to incite or induce any person' to engage in acts of violence. More specific restrictions are imposed in the Public Order (Public Meetings) (General Conditions) Order 1981 with regard to the duty to maintain good order at a public meeting; the requirement to notify the date, location, and duration of the meeting; the use of amplification devices; the display of banners; advertising arrangements; the burning of national emblems; the collection of money; stage performance; the removal of litter at the conclusion of meetings; and the dispersal of crowds.

Another cluster of offences which reinforces the punishment system directed at restraining public gatherings concerns picketing. Thus, while it is 'lawful for one or more persons, acting on their behalf or



on behalf of a registered trade union or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend at or near a place where a person works or carries on business, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working', it is an offence to 'so attend in such numbers, or otherwise in such manner, as to be calculated to intimidate any person in that place or to obstruct the approach thereto or egress therefrom or to lead to a breach of the peace' (section 46, Trade Unions Ordinance).<sup>19</sup> Indeed, such a gathering would under the same ordinance be tantamount to 'watching and besetting' of that place, conduct which constitutes the offence of 'intimidation and annoyance' (section 47).

The array of punitive measures that may be employed by the Hong Kong authorities to enjoin public assemblies is further buttressed by statutes proscribing public nuisances,<sup>20</sup> obstruction of public places,<sup>21</sup> incitement to disaffection,<sup>22</sup> criminal damage to property,<sup>23</sup> or obstruction of police officers in the execution of their duty,<sup>24</sup> and supplemented by common law offences<sup>25</sup> and statutory instruments.<sup>26</sup>

### 3. Dispersal Powers

Considerable dispersal powers have been conferred upon police officers (in the case of both lawful and unlawful gatherings) if they reasonably believe that such activities are 'likely to cause or lead to a breach of the peace' (section 17, Public Order Ordinance). In addition, to facilitate the enforcement of dispersal orders, police officers may use such force 'as may reasonably be necessary' to enter any premises in which persons are gathered or to close specific places to the public (section 17). Failure to comply with dispersal orders is a criminal offence which is severely penalized (section 17A).

## C. Evaluation

There is a dearth of judicial pronouncements on the subject of freedom of assembly in Hong Kong. Thus an assessment of the extent to which this freedom is preserved must inevitably focus primarily on statutory provisions and government policy reflected in them. The criteria of evaluation, however, mirror international norms and legal practice in other jurisdictions. Equipped with such external yardsticks, but not without regard to local conditions, one may endeavour to ascertain the appropriateness and justiciability of the limits imposed on the

exercise of the freedom of assembly in the territory, and particularly whether it exists only in so far as the regulating authorities allow it to exist.

At the outset, reference should be made to international guarantees of the freedom of assembly which are applicable in Hong Kong. Of special relevance here are Article 20 of the 1948 Universal Declaration of Human Rights,<sup>27</sup> which states that '[e]veryone has the right to freedom of peaceful assembly and association', and Article 21 of the 1966 International Covenant on Civil and Political Rights,<sup>28</sup> which stipulates that '[t]he right of peaceful assembly shall be recognized'. This right, however, is not absolute and it is acknowledged that restrictions may be imposed 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'.<sup>29</sup> The key issue, therefore, is the proper balance between competing rights, interests, and values, or, more specifically, to reconcile the inherent conflict<sup>30</sup> between the freedom of individuals to attend public meetings or participate in public processions on the one hand, and societal needs for peace and order, on the other.

Achieving such a balance often eludes government decision-makers, for they tend to gravitate towards the public security and public order end of the value spectrum, thereby stifling individual freedom. Indeed, as the preceding survey of the law in the territory suggests, the Hong Kong bureaucracy has displayed a disquieting proclivity to seek to minimize environmental disturbances at the possible cost of impeding individual expression. While the authorities pay lip service to the ideal of striking a 'fair balance' between these competing rights, the right to a stable environment<sup>31</sup> invariably carries greater weight.

Whether a fair balance is struck depends in the first instance on the mechanism adopted for the regulation of public gatherings. It is possible to argue, for example, that prior restraint of any kind dilutes to a certain extent the freedom of assembly. On the other hand, some form of prior restraint may be necessary to ensure proper control of traffic and allow optimal deployment of traffic control resources. Early notice may also be necessary whenever complex decisions concerning priorities between competing public uses are faced.<sup>32</sup> The key issue, therefore, is not the justiciability of prior restraint as such but the appropriateness of the specific method employed for this purpose.

As outlined previously, the procedures devised by the Hong Kong government encompass a wide range of prior restraint measures, some

aspects of which appear acceptable, or even essential, but which tend on the whole to restrict excessively freedom of assembly in the territory.

Perhaps the most conspicuous restraining technique applied locally is the licensing of public processions. While possibly facilitating more efficient traffic planning, and reassuring 'risk averters' who may prefer to have prior knowledge of the areas within which they can operate without exposing themselves to the risk of committing traffic or similar offences, the licensing system inhibits the freedom of expression and discourages those who may be seeking public channels through which to exercise their voice option and are willing to risk the consequences.

In general, the 'costs' associated with mandatory licensing schemes of the type relied upon in Hong Kong are thought to outweigh the benefits. Thus, from a theoretical standpoint, subjecting the right to peaceful assembly to the requirement of a licence substantially devalues that right and reduces it to a limited privilege granted at the discretion of the authorities. More tangible costs are identified by Baker in his recent study.<sup>33</sup> They include a cost in the form of what amounts to a proscription of valuable means of expressive conduct such as 'spontaneous' demonstrations.<sup>34</sup> Another concrete cost imposed by licensing systems manifests itself in the notion of being 'licensed to demonstrate', a notion which implies State paternalism, or what Baker refers to as 'compelled symbolic affirmation of allegiance'. Strong exception is taken particularly to the fact that 'government requires the permit in order to do what one already has a right to do'<sup>35</sup> and that licensing 'forces ... dissidents to acknowledge, by requiring them to act out, the authority and dominance of the very government against which they protest'.<sup>36</sup> An even more significant cost attributed to licensing procedures is their vulnerability to arbitrary or biased decision-making on the part of the officials involved. According to one writer, 'common experience is sufficient to show that [licensors'] attitudes, drives, emotions and impulses all tend to carry them to excesses'.<sup>37</sup> Baker adds that licensing methods are often used to harass and suppress dissidents and other advocates of minority opinions unacceptable to the authorities or the mainstream community.<sup>38</sup> The institutional dynamics in which licensing is embedded also tend to encourage officials to circumscribe the rights of unpopular groups. ('Saying "yes" creates more trouble, more work, potential problems, and accompanying criticisms.')<sup>39</sup>

It could be argued that the record of the police shows a propensity towards granting approval to applications for licences.<sup>40</sup> Be that as it

may, the relatively modest number of applications may in itself be indicative of the repressive nature of licensing, and the existing scheme remains open to potential abuses. Such abuses cannot be ruled out since the present system lacks built-in safeguards against violations of civil liberties.<sup>41</sup>

The lack of safeguards is not the only questionable feature of the licensing procedures. Equally problematic is the provision under which a procession held without a licence or in breach of its terms is deemed an 'unauthorized assembly' rendering any participant guilty of an offence. Given that the law requires those who desire to hold, organize, and convene a procession to apply for a permit, fairness dictates that the sanction for non-compliance be directed against such people alone.

Similar objections may be raised in relation to another form of 'prior restraint' currently applied in Hong Kong with respect to public meetings, namely, notification. Like licensing, it also has the undesirable effect of placing the onus on the person wishing to exercise his right to assemble, and does not allow for the possibility of semi-organized or spontaneous protest. In addition, the far-reaching decision to make a failure to notify the Commissioner of Police of the intention to hold a public meeting a criminal offence subject to a heavy penalty is hardly compatible with liberal notions of freedom of assembly and association; nor is there any tangible evidence to suggest that it is conducive to the promotion of the objectives normally served by criminal law. As Fisse and Jones have contended, 'demonstrations of highly radical persuasion are unlikely to be influenced, and may even favour the creation of new targets of disobedience'.<sup>42</sup>

Furthermore, while an argument could possibly be put forward in support of some form of notification, under specific conditions, with regard to 'moving assemblies' or processions,<sup>43</sup> no such argument may legitimately be offered where the problem of allocating scarce resources to competing uses does not arise and the mass movement of people does not take place (that is, where no police supervision is required). The instrumental value of notification is also dubious, for the police tend to learn about most public gatherings through informal channels such as their own intelligence network and prior publicity, which calls into question the practical need for imposing a statutory objection to notify the authorities unless the purpose is to cause 'embarrassment to law abiding citizens'.<sup>44</sup>

Equally questionable are banning orders whose statutory rationale is not grounded in actual disorderly or violent behaviour, but in the

subjective belief of the Commissioner of Police that it is 'necessary or expedient in the interests of public order'. Although broadly similar banning orders exist in other jurisdictions — for example, some European countries have adopted banning procedures in conjunction with a notification requirement for the purpose of restraining unruly processions — they generally do not apply to gatherings other than processions, are reserved for circumstances involving serious public disorder which the authorities are ill-equipped to contain, and are drafted with a view to minimizing abuses.<sup>45</sup> Even the banning powers granted under British legislation, which have attracted considerable criticism, are confined to processions, and are contingent on the inability of the police to prevent serious public disorder by means of control mechanisms that enable the attachment of specific conditions as to time, area, and route.<sup>46</sup>

While the British system is marginally superior to the local one in so far as banning is concerned, it constitutes an inadequate model in that its 'blanket' nature has apparently inspired Hong Kong lawmakers to confer upon the Governor in Council the authority to impose general bans on public gatherings in the territory. The lack of discrimination between peaceful and violent assemblies is particularly disturbing in this respect, because the powers at issue extend to public gatherings of any type, strengthen unduly the capacity of the Governor in Council to exercise political control, and leave limited scope for judicial review.

In addition to the problems stemming from reliance on mechanisms such as licensing, notification, and banning orders, the local system for regulating public gatherings exhibits deficiencies that may be attributed to the fact that the standards which feature in the relevant provisions are very elastic and place too much discretion in the hands of the decision-making body. As indicated, the 'maintenance' of public order or the 'interests of public order' may justify the Commissioner of Police in refusing to permit the holding of public meetings or to grant a licence for a procession, and can provide him with sufficient grounds to prohibit any public gathering. No systematic attempt is made to formally delineate or carefully define the conditions under which such restrictions on the freedom of assembly may be imposed. An insight into the government's perception of the notion of 'public/good order' has recently been provided in the Hong Kong Report to the United Nations Human Rights Committee.<sup>47</sup> Listed therein are the 'main factors which the Commissioner of Police will take into account'. These include most questionable considerations, such as speculation with respect to the participants' state of mind or

feelings ('so concerned, so angry or so volatile that there is a danger that emotions will take over so the participants lose control of themselves and riot') and the vulnerability to the disruptive tactics of opposing groups.<sup>48</sup> The legitimacy of such considerations aside, they are not comprehensive in nature, nor do they offer a coherent framework for preventing abuse and arbitrary application.

Another problematic factor which enters into local regulatory decisions concerning freedom of assembly pertains to the past behaviour of potential organizers. Thus, if a person or a collective body associated with the organization of a public meeting has been convicted of an offence under the Public Order Ordinance, this conviction allows the Commissioner of Police to proscribe the holding of such a meeting. An even greater power is given to the Commissioner in the exercise of his discretion in the context of public processions, authorizing him to deny a licence to applicants who have at any time violated provisions of any law or permit relating to public gatherings. The unfairness inherent in depriving persons of the freedom to voice their views publicly in an organized manner on account of the prior conviction of the leaders of the planned event has been emphasized by several writers.<sup>49</sup> Their criticism is rooted in the assumption that the past conduct of organizers is merely one of several variables which impinge on the outcome, peaceful or otherwise, of group activity, and that it is not a particularly reliable predictor in this respect. They also express misgivings about the denial of civil liberties to persons who have already suffered punishment for their unlawful conduct.

The employment of ill-defined and dubious standards is not confined to 'pre-gathering' measures alone, but also extends to the regulation of gatherings 'in progress'. Considerable ambiguity, for instance, characterizes the 'breach of the peace' criterion which guides decisions regarding the public display of objects such as flags in gatherings, police powers to stop and disperse, and the offences of disorder in a public place, unlawful assembly, and riot. No definition of the concept of 'breach of the peace' is provided in any ordinances, nor is it in fact possible to find a 'modern and authoritative definition' in English and Commonwealth jurisprudence.<sup>50</sup> Moreover, '[t]he quest for an all-embracing definition might, perhaps, be an illusory one.' For 'what amounts to a breach of the peace sufficient to justify or require a policeman's prophylactic intervention in one context (rowdiness on the streets after a party) might be of a different order from the threats to the peace that can be tolerated in the course of a picket or demonstration.'<sup>51</sup> The multidimensional nature of the concept of

'breach of the peace' has been highlighted by Bevan,<sup>52</sup> who has attributed to it at least five different shades of meaning, each with different ramifications in so far as the freedom of association and assembly is concerned. To illustrate, if the notion of 'breach of the peace' is interpreted to encompass any public disturbance, police officers in Hong Kong may be permitted to prevent public gatherings merely on the ground that would-be speakers might express views likely to offend some listeners or that their noisy behaviour could disrupt the tranquillity of the neighbourhood. Indeed, an interpretation along these lines is likely to be favoured by the Hong Kong decision-makers who have construed a related amorphous term, 'good order', as involving the issue of 'whether the views the participants wish to express are so unpopular that those opposing them may wish to mount a counter-demonstration with the possibility of conflict between the two sides ensuing'.<sup>53</sup>

Such an approach — in the absence under the Public Order Ordinance of any distinctions with respect to the source of disturbance — fails to give recognition to the fundamental democratic principle that under normal circumstances<sup>54</sup> the right to assemble freely should never be revoked or controlled because of threatened violence by unreceptive spectators.<sup>55</sup> It is furthermore inconsistent with the duty imposed on governments to ensure that peaceful protests can proceed without disruption.<sup>56</sup>

Nor is it desirable to make criminal liability for offences such as lawful assembly and riot largely dependent on an ambiguous concept like 'breach of the peace' and the mere likelihood that some people might be stirred into hostile reaction. As Bevan contended, the key element in ascribing criminal liability in the context of freedom of expression must be intention on the part of the speaker to incite violence or recklessness. The law should 'only punish the speaker who intentionally or recklessly sets out to provoke violence whilst acquitting the speaker whose opponents are the real source of disorder'.<sup>57</sup> At the same time, the use of 'fighting words' which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace'<sup>58</sup> may engage the speaker in criminal activity subject to punishment. The existing legal provisions in the territory with regard to disorder in public places and unlawful assembly, although incorporating some reference to intention, omit the critical elements of the imminence and seriousness of the anticipated violence, placing excessive discretionary power in the hands of the police and injecting ambiguity into a domain which is in need of certainty.

The problem is compounded by the fact that the objects of regulation themselves, namely, meetings and processions, are not carefully defined. Consequently, borderline cases may proliferate, further detracting from the value of the law as a mechanism for reducing uncertainty. It is not clear, for instance, which issues qualify as 'matters of interest or concern to the general public or a section thereof' in relation to public meetings.<sup>59</sup> Similarly, the loose expression 'common purpose' which furnishes the basis for the definition of procession<sup>60</sup> can hardly be said to promote clarity.

The deficiencies of the present legislation do not manifest themselves in the prevalence of ambiguous phrases alone. Another factor is the appropriateness of the vesting of public officials with such an extensive authority to make crucial decisions concerning the freedom of assembly. As Lord Scarman noted, '[a]t the end of the day standards of police conduct and the proper use by the police of their powers mean more to society than the theoretical state of the law'.<sup>61</sup> In his view, the answer lies in better organization, accountability, training, and supervision of the police,<sup>62</sup> but the question still remains as to whether police officers should exercise such wide-ranging controls over the freedom of assembly in Hong Kong. It is, for instance, legitimate to query whether police officers whose principal function is the maintenance of peace and order are likely to be sufficiently sensitive to the importance of citizens' rights to peaceful assembly. Furthermore, there is a danger that the Commissioner of Police, given his prominent position within the executive branch of government, may be subject to improper political influences in discharging his responsibilities as the official controlling public gatherings.

The great latitude enjoyed by police officers is of particular concern to civil libertarians in the territory in view of the fact that no neutral, non-political, independent reviewing body is assigned to check police discretion. The Hong Kong legislation provides for appeals against refusals to allow public meetings and against denials of licences to hold public processions. The appeals are, however, to another administrative authority which, although theoretically capable of a more strategic grasp of social problems, is not free from executive bias. As in the United Kingdom, the legislation does not provide for appeal to the courts, and a test case brought before the European Commission on Human Rights lends support to the conclusion that no such remedy is available.<sup>63</sup> Yet, as Brownlie observed,<sup>64</sup> there is no reason why courts could not review the exercise of the powers at issue on the basis of the 'ordinary principles of administrative law'.



Nevertheless, in the absence of clearly and narrowly defined criteria, and given the subjectively phrased legislation, an effective challenge to the wide discretionary powers granted to the relevant authorities is not a realistic prospect.

#### **D. Suggestions for Reform and Future Prospects**

Whether the freedom of assembly in the territory is actually abused by the law enforcers because of legislative loopholes cannot be established with sufficient certainty, yet reliance on the good faith and self-restraint of officials hardly provides a solid foundation for the protection of civil liberties. There are also grounds for the concern that — since public meetings and proceedings are at most ‘lawful’ within the existing legal framework — the freedom to assemble may be entirely abrogated if brought into conflict with a competing right or obligation. It is desirable, therefore, to ‘carve out [for such a freedom] a protected status’<sup>65</sup> or at least elevate it above ‘the interstices of the substantive law’<sup>66</sup> which it occupies in the Hong Kong legal system. This would allow it to play a greater and more definite role in legislative, executive, and judicial decision-making.<sup>67</sup>

The importance of the right of assembly cannot be overemphasized. Indeed, as Macfarlane noted in *The Theory and Practice of Human Rights*:

[t]here is a tight correlation between the existence of an effective right of association and assembly, exercising the associated right of freedom of expression and the general recognition and protection of other fundamental human rights. This is not surprising, since without effective and operative rights of association, assembly and expression ... there is no possibility of taking action to draw attention to and secure redress for the invasion of other rights.<sup>68</sup>

Moreover, the exercise of these rights is thought, according to another writer, to be conducive to social stability in the light of the ‘escape valve’ theory.<sup>69</sup> Thus ‘citizens who are politically active, who spend their energies on social protest, meeting, parading, picketing and petitioning are releasing the pressures of modern society before the revolutionary elements can reach critical mass.’<sup>70</sup> As this writer concludes: ‘It is surely better to have the discontented campaigning and litigating, perhaps achieving legal and social reform, than to sow the seeds of a terrorist underground.’<sup>71</sup> Distinguished members of the judiciary have also recognized the ‘undoubted right of Englishmen

to assemble together for the purpose of deliberating upon public grievances'.<sup>72</sup>

The notion that such a right should find formal legislative expression has none the less been disputed by some legal authorities. Lord Scarman, for instance, considered it 'unnecessary' to enact a 'positive right to demonstrate' since in his opinion the right already exists, 'subject only to limits required by the need for good order and the passage of traffic',<sup>73</sup> and his position was supported by the Select Committee charged with the Review of the Public Order Act and Related Legislation.<sup>74</sup> The extent to which the right of assembly may be said to exist in the above sense has, however, been questioned by Wallington, who regards it as tantamount to a mere perception of lawfulness in specific circumstances.<sup>75</sup>

The need for and the value of codification in the context of public processions and meetings have been stated with particular conviction by Bevan. He maintains that 'a right of procession would afford the protester clear legal protection',<sup>76</sup> 'provide a means of regulating municipal controls',<sup>77</sup> and 'bring the liberty which underlies protest into sharper relief and hinder the possibilities of its gradual, and sometimes, hidden erosion'.<sup>78</sup> Similarly, 'a statutory right of assembly would force the law to recognize assembly as a legitimate usage of many public places'<sup>79</sup> and allow restrictive local by-laws to be tested judicially.<sup>80</sup> American courts have acknowledged such advantages,<sup>81</sup> and the 'right to expressive usage of public places' is firmly established in American legal practice.<sup>82</sup>

Both the Hong Kong Bill of Rights Ordinance 1991 and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (promulgated on 4 April 1990) provide respectively for the 'right of peaceful assembly' and the 'freedom of assembly, procession and of demonstration'.<sup>83</sup> Yet no 'preferred status' within the system of laws is guaranteed to the right of peaceful assembly under either of these constitutional documents.<sup>84</sup> They may none the less raise the status of this freedom to that of a 'softer'<sup>85</sup> legal principle which might shift the emphasis currently placed on public order objectives to the protection of civil liberties.

Indeed, a shift in a less authoritarian direction is urged as a reaffirmation of democratic values in a period characterized by the gradual emergence of a participative culture and a quest for more effective communication between the grass roots periphery and the bureaucratic centre.<sup>86</sup> As Baker contends:

When conditions and events so strongly offend people's political and ethical consciousness that they are moved to take non-violent, disruptive steps, the situation has usually become one in which it is more important for the community to have its normal routines broken and people's everyday activities disrupted in order to awaken the government and the community to the deep dissatisfaction, than it is for the community to avoid the inconveniences of the disruption.<sup>87</sup>

Baker's view seems to apply with even greater force to contemporary Hong Kong society, the relative stability and homogeneous nature of which militate against large-scale social disruption.

Closely related to the demand for a shift in emphasis from authoritarian to libertarian values, and contingent upon a greater recognition of the importance of the freedom of assembly within the legal system, is a possible reform in the allocation of the burden of action between those seeking to exercise this right and officials entrusted with the power to regulate it. Specifically, rather than compelling the former to challenge restrictions imposed on the freedom of association and assembly, the law should require the latter to demonstrate that such restrictions are warranted. A reform along these lines would, one hopes, also result in the removal of licensing, bans, and similar prior-control mechanisms.<sup>88</sup>

The abolition of prior controls need not, however, entail the jettisoning of other means of regulation. For instance, regulation of the time, place, and manner of a public gathering would not amount to an abridgement of the freedom of assembly provided it did not prevent the exercise of this highly valued liberty, particularly where a range of equivalent channels or opportunities exists. Indeed, the government ought to assume the formal responsibility for ensuring that adequate facilities for public expression are available.<sup>89</sup>

Needless to say, apart from restrictions pertaining to conduct and manner, the ordinary criminal law could also be relied upon in appropriate circumstances, and use could be made of specific offences in respect of participants in public gatherings who are personally involved in violations of the law while taking part in the activities of such societies or gatherings. However, the ambit of the relevant offences must be narrowly defined and strictly interpreted, and adequate defences ought to be built into the prohibitions thought necessary.<sup>90</sup> Furthermore, as a general rule the government's view should be informed by the 'least restrictive alternative' approach,<sup>91</sup> and the authorities should be permitted to impose restrictions on the freedom

of assembly only when other alternatives have been exhausted or have proved ineffective and such a step is unavoidable in the face of serious public disorder, personal injury, and significant damage to or destruction of property.

Protection of the citizen's right to assemble freely would none the less remain inadequate as long as the factors which justify the circumscription of this right are not meticulously defined.<sup>92</sup> Moreover, law enforcement officials or judges should, in weighing such factors, follow a stringent test along the lines of the 'reasonableness'<sup>93</sup> or 'clear and present danger' criteria.<sup>94</sup> The adoption of criteria of this type would arguably result in the exclusion of prohibitions on the freedom of assembly which are susceptible to arbitrary and discriminatory application and help limit restriction to cases in which evidence is available with respect to the seriousness and imminence of a social disturbance.

Equipped with such tools the courts ought to assume a greater role in the protection of the freedom of assembly, using their existing authority to interpret the relevant statutes while giving more careful consideration to libertarian values than can be expected of executive authorities.<sup>95</sup> The scope for judicial involvement should be extended through provisions allowing both the Commissioner of Police and the organizer of an assembly or procession to approach the courts for a determination as to whether such gatherings may take place.<sup>96</sup> The provision of a firm basis for substantive judicial review of executive acts that impose restraints on the freedom of assembly would also reinforce the courts' position as the forum in which the individual can obtain redress from the excesses of government or government-sanctioned authority.

It is expected that Hong Kong's public order law will be amended to curb police powers with regard to the control of public assemblies.<sup>97</sup> Yet the preoccupation of both the authorities and the economic establishment with the twin objectives of 'prosperity' and 'stability' militates against any radical departures from the status quo in this particular domain during the transition period before 1997. Although there is a general recognition of the need to close legislative loopholes in so far as civil liberties are concerned well in advance of that critical date, there is perhaps an even greater reluctance in official and unofficial quarters to encourage individual and group activities which are construed as posing a challenge to the bureaucracy and detracting from its ability to govern efficiently. The China dimension is also

relevant in this context for it has been alleged that the government may be 'clamping down on dissent [in order] to appease Beijing'.<sup>98</sup>

The prospects of reform will to all appearances be even poorer after 1997. For, while the People's Republic of China seems favourably disposed towards the notion of capitalist Hong Kong, it will in all probability endeavour to place the territory's market economy within a more, rather than less, authoritarian political framework. Given the experience of Singapore, South Korea, and Taiwan,<sup>99</sup> the Chinese may not be inclined to acknowledge the existence of a strong positive correlation between political freedom and economic performance in the Asian context; in fact, there is evidence to suggest that they believe that the relationship between these variables tends to be negative.<sup>100</sup> As a corollary, it would be unrealistic to expect them to lend support, before as well as after 1997, to attempts to liberalize the laws concerning the freedom of association and assembly.<sup>101</sup>

Nor it is just a matter of the effect of political freedom on economic performance. The Chinese leadership apparently subscribes to 'unitary' theories of the public interest (where the whole may be conceived as a single set of ends which pertain equally to all members of society) rather than 'individualistic' ones (where the ends of the plurality as a whole are simply the aggregate of ends entertained by individuals).<sup>102</sup> It may consequently experience genuine difficulties in reconciling itself to the idea of a political community in which individuals and groups are free to assemble in pursuit of objectives other than those of the social 'organism' of which they are a part. In other words, the freedom of assembly may suffer erosion because it hinges on philosophical assumptions which do not dovetail with the conception of the public good prevailing in the Mainland.

Limited progress should not of course be equated with a retrogression to a less enlightened legal state. It would doubtless be inappropriate to leave the reader with the impression that the freedom of assembly will inevitably be curtailed rather than extended. The purpose of the note of caution sounded at the end of this chapter is not to suppress liberal hopes but to dispel unrealistic expectations. The objective of more progressive laws with respect to the right to assemble is achievable. Yet such laws are likely to be introduced, if at all, only following an intense dialogue within Hong Kong and between the territory and China. The freedom of assembly will have to be won. It will not be granted willingly by those who exercise control over the rights of others.

## Notes

1. Public Order Ordinance No 64 of 1967, cap 245. Prior to its consolidation the law dealing with public order was to be found in the Public Order Ordinance, the Peace Preservation Ordinance, the Summary Offences Ordinance, and in the common law.

2. *Legislative Council Proceedings 1967* (1 November 1967) 442 (cited hereafter as *LegCo. Proc.*).

3. *LegCo. Proc. 1967* (15 November 1967) 476.

4. *LegCo. Proc. 1970* (11 February 1970) 334.

5. Note that minor amendments not directly pertaining to the question of freedom of assembly and association were introduced in the intervening years. See Ordinances 29 of 1969, 98 of 1970, 5 of 1971, 24 of 1972, 75 of 1972, 45 of 1973, 20 of 1975, 40 of 1977, and 27 of 1978.

6. *LegCo. Proc. 1979* (9 May 1979) 831; leading to the legislation of the Public Order (Amendment) Ordinance No 67 of 1980.

7. *LegCo. Proc. 1967* (1 November 1967) 440, 444 respectively.

8. See references in *LegCo. Proc. 1970* (11 February 1970) 333–4.

9. *LegCo. Proc. 1970* (11 February 1970) 338.

10. Exemptions had been previously accorded to religious meetings and meetings for entertainment or in theatres, cinemas, and similar places.

11. See, for example, S. H. Chan and others, *Putting Justice and Human Rights in Focus*, a report submitted to the United Nations Human Rights Committee, August 1980. For a ‘milder’ form of criticism, see the letter addressed to the Attorney General by JUSTICE (Hong Kong Branch) dated 11 July 1979.

12. See accounts of the ‘Yaumati Boat People Case’, January 1979; the ‘Trotskyite Case’, April 1979; and the ‘Lok Chuen Case, May 1979’ in Chan and others (1980), pp. 4–19, see note 11 above.

13. *Chow Shui and Others v The Queen* [1979] HKLR 275. The conclusion of Cons J that the appellants’ activities, in the form of boarding two motor coaches at a public place in Kowloon and being conveyed thereon through the cross-harbour tunnel to Hong Kong island, constituted an ‘unlawful assembly’ enraged members of the legal profession. See, for example, B. Downey, ‘Public Gatherings’ (editorial) (1979) *Hong Kong Law Journal* 114–15. Critics regarded as equally objectionable the narrow construction imposed by the judge on the defence of ‘reasonable excuse’ as excluding purposes such as the presentation of a petition to the Governor in support of a campaign for the rehousing of boat people. See Downey (1979), above.

14. See Report of the Working Group on Review of Provisions of the Public Order Ordinance Relating to Meetings and Processions, 2 February 1980.

15. *LegCo. Proc. 1980* (23 July 1980) 1065.

16. *LegCo. Proc. 1980* (23 July 1980) 1064–5.

17. See the discussion in M. Supperstone (ed.), *Brownlie’s Law of Public*

*Order and National Security* (London, Butterworths, 2nd edition, 1981), pp. 42–50.

18. Note that the prior restraint measures of ‘binding over’ and ‘injunction’ can also be exercised by the Hong Kong courts but no authorities may be adduced to support a contention that these powers have been utilized to curtail public expressive activities.

19. Cap 332, LHK 1971 ed.

20. Summary Offences Ordinance, cap 228, LHK 1977 ed, s 4.

21. Summary Offences Ordinance, cap 228, LHK 1977 ed, s 4A.

22. Crimes Ordinance, cap 200, LHK 1984 ed, s 7.

23. Crimes Ordinance, cap 200, LHK 1984 ed, s 7.

24. Offences Against the Person Ordinance, cap 212, LHK 1981 ed, s 36.

25. For example, public nuisance, public mischief, incitement, conspiracy, criminal libel, and blasphemy.

26. Such as the Country Parks and Special Area Regulations, cap 208, LHK 1978 ed.

27. For the argument that the Declaration may be enforceable in Hong Kong by virtue of its incorporation into the common law, see W. S. Clarke, ‘Messrs. Wong and Ng and the Universal Declaration of Human Rights’ (1985) 15 *Hong Kong Law Journal* 137.

28. The Covenant has been extended to Hong Kong by United Kingdom ratification on 20 May 1976. See J. Wilson (ed.), *Multilateral Treaties Applicable to Hong Kong* (Hong Kong, Attorney General’s Chambers, 7th edition, 1984).

29. Covenant, Art 21.

30. ‘Demonstrations, rallies and pickets which are entirely peaceful may nonetheless disrupt traffic, shopping, and other community activities and may be expressive to the police ... Novel forms of protest, such as occupation or sit-ins of university buildings, factories or foreign embassies, may be and usually are entirely peaceful, but they challenge property rights.’ P. Hewitt, *The Abuse of Power* (Oxford, Martin Robertson, 1982), p. 108.

31. *LegCo. Proc. 1980* (23 July 1980) 1064.

32. See V. Blasi, ‘Prior Restraints on Demonstrations’ (1970) 68 *Michigan Law Review* 1481, 1485.

33. C. E. Baker, ‘Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations’ (1984) 78 *Northwestern University Law Review* 937, 1013ff.

34. Clearly, ‘a society committed to a popular expression and involvement in public life must highly value the opportunity to engage in this type of immediate expression’, Baker (1984), p. 1014, see note 33 above.

35. Baker (1984), p. 1017, see note 33 above.

36. Baker (1984), pp. 1017–18, see note 33 above.

37. T. I. Emerson, ‘The Doctrine of Prior Restraint’ (1955) 20 *Law and Contemporary Problems* 648, 658.

38. Baker (1984), p. 1018, see note 33 above.

39. Baker (1984), p. 1019, see note 33 above.

40. According to government records, 31, 83, 169, 172, 199, and 290 applications for public procession licences were received in the years 1984–9 respectively and only 4, 1, 4, 2, 5, and 3 were refused in the respective years. Quoted in F. Wong, 'Sharp Increase in Street Protests', *South China Morning Post*, (cited hereafter as *SCMP*), 14 April 1990, p. 4.

41. See the discussion below concerning the applicable standards and reviewing facilities.

42. W. B. Fisse and J. B. Jones, 'Demonstrations: Some Proposals for Law Reform' (1971) 45 *Australian Law Journal* 591, 596.

43. See the brief submitted by local civil libertarian organizations in South Australia, referred to in Fisse and Jones (1971), pp. 594–6, see note 42 above.

44. Report of the Inquiry by Lord Scarman into the Red Lion Square Disorder of June 15, 1974 (1975) Cmnd. 5919 (hereafter cited as the Scarman Report), para. 129.

45. See references to practices by Austria, Germany, and the Netherlands in D. Kretzmer, 'Demonstrations and the Law' (1984) 19 *Israel Law Review* 47, 80–1.

46. See Public Order Act 1936, s 3.

47. *Third Periodic Report by Hong Kong Under Article 40 of the International Covenant on Civil and Political Rights* (October 1989), paras 64–6.

48. See the discussion below on the issue of 'hostile audience'.

49. See Blasi (1970), pp. 1515ff, note 32 above; Fisse and Jones (1971), p. 599, see note 42 above; and R. Mushkat, 'Balancing Freedom of Expression and Public Order in Hong Kong' (1981) 11 *Hong Kong Law Journal* 62, 67–8.

50. See V. T. Bevan, 'Protest and Public Order' (1979) *Public Law* 163, 181.

51. A. T. H. Smith, 'Breaching the Peace and Disturbing the Public Quiet' (1982) *Public Law* 212, 213.

52. Bevan (1979), pp. 181–2, see note 50 above.

53. *Hong Kong Periodic Report*, para. 64, see note 47 above.

54. 'Only if imminent spectator violence cannot be satisfactorily prevented or curbed by means of crowd control techniques and if the speech itself is the apparent cause of the impending disorder may otherwise constitutionally protected speech be suppressed.' L. G. Tribe, *American Constitutional Law* (1978), cited in *Brownlie's Law of Public Order* (1981), p. 92, see note 17 above.

55. Such a principle was expressed as early as 1882 in the case of *Beatty v Gillbanks* [1882] 9 QBD 308. See also A. V. Dicey, *The Law of the Constitution*, E. C. S. Wade (ed.) (London, Macmillan, 1961), p. 276. Generally on the problem of hostile audience, see D. G. Barnum, 'Freedom of Assembly and the Hostile Audience in Anglo-American Law' (1981) *American Journal of Comparative Law* 59–96.



56. See *Platform 'Arzte fur das Leben' v Austria* (Case No. 5/1987/128/179), European Court of Human Rights, judgment of 21 June 1988. The court held that State parties to the European Convention on Human Rights were required to take positive measures to enable lawful demonstrations to proceed peacefully.

57. Bevan (1979), p. 186, see note 50 above.

58. *Chaplinski v New Hampshire*, 315 US 568, 62 SCt 766 (1942) 769.

59. Under section 2 of the Public Order Ordinance "'meetings" means any gathering or assembly of persons convened or organized for the purpose of the discussion of issues or matters of interest or concern to the general public or a section thereof, or for the purpose of the expression of views on such issues or matters ...'.

60. 'Procession' is defined in section 2 of the Public Order Ordinance as 'a procession organized as such for a common purpose'.

61. Lord Scarman, 'The Conflict in Society: Public Order and Individual Liberty', in *Papers of the 7th Commonwealth Law Conference* (Hong Kong, 7th Commonwealth Law Conference Ltd., 1983), pp. 201, 203.

62. A similar approach is taken by A.D. Grunis, 'Police Control of Demonstrations' (1978) *The Canadian Bar Review* 393-439.

63. See *CARAF v UK* (Application 8440/78) (1978) 21: *Decisions and Reports of European Commission of Human Rights*, 138. The case is summarized and discussed in Kretzmer (1984), pp.82-3, note 45 above.

64. See *Brownlie's Law of Public Order* (1981), p. 57, see note 17 above.

65. See Hewitt (1982), p. 149, see note 30 above.

66. This expression is used by P. Wallington to describe the place of the liberty of the subject under the English law: 'Injunctions and the right to Demonstration' (1976) 35 *Cambridge Law Journal* 82, 94.

67. Such an approach is applied, for example, in Israel. See Kretzmer (1984), pp. 64-7, see note 45 above.

68. L. J. Macfarlane, *The Theory and Practice of Human Rights* (New York, St. Martin's Press, 1985), pp. 91-2.

69. See B. Hodge, 'Civil Liberties in New Zealand: Defending Our Enemies' (1980) 4 *Otago Law Review* 457.

70. Hodge (1980), p. 458, see note 69 above.

71. Hodge (1980), p. 458, see note 69 above.

72. Lord Denning in *Hubbard v Pitt* [1975] 3 WLR 201, 212-13; see also the statement by Forbes J at first instance that there is 'a democratic right to public assembly' [1975] 2 WLR 254, 266.

73. The Scarman Report, para. 134, see note 44 above.

74. See Green Paper, Cmnd. 7891, cited in I. N. Stevens and D. C. M. Yardley, *The Protection of Liberty* (Oxford, Basil Blackwell, 1982), p. 50.

75. Wallington (1976), p. 94, see note 66 above.

76. Bevan (1979), p. 174, see note 50 above.

77. Bevan (1979), p. 175, see note 50 above.

78. Bevan (1979), p. 175, see note 50 above.

79. Bevan (1979), p. 176, see note 50 above.

80. Bevan (1979), p. 185, see note 50 above.

81. See particularly *Fred Shuttlesworth v City of Birmingham* 394 US 147, 89 SCt 935 (1969).

82. See discussion in *Brownlie's Law of Public Order* (1981), pp. 101–2, note 17 above. See also D. G. Barnum, 'The Constitutional Status of Public Protest Activity in Britain and the United States' (1977) *Public Law* 310, 314–18, 324–33.

83. Article 17 of the Bill of Rights Ordinance stipulates: 'The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.'

Article 27 of the Basic Law stipulates: 'Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.'

84. On the Bill of Rights' lack of primacy over other laws, see N. Jayawickrama, 'The Content of the Bill of Rights', in R. Wacks (ed.), *Hong Kong's Bill of Rights. Problems and Prospects* (Hong Kong, Faculty of Law, University of Hong Kong, 1990), pp. 39–48. Note, however, that under an amendment to Hong Kong's Letters Patent — The Hong Kong Letters Patent 1991 (No. 2), L. N. 226 of 1991 — no law which restricts the rights and freedoms of persons in the territory could be validly enacted by the Governor and Legislative Council if the law is inconsistent with the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong.

In contrast, Article 39 of the Basic Law stipulates that: '[t]he rights and freedoms enjoyed by Hong Kong residents shall not be restricted *unless as prescribed by law*' and that 'such restrictions shall not *contravene* the provisions' of the international covenants and other human rights conventions as applied to Hong Kong [emphasis added].

85. For an elaboration of the concept of 'soft' legal principles, see Kretzmer (1984), pp. 64–5, see note 45 above, and references therein.

86. See J. Y. S. Cheng, 'Preliminary Suggestions on the Political System of the Hong Kong Special Administrative Region', in J. Y. S. Cheng (ed.), *Hong Kong in Transition* (Hong Kong, Oxford University Press, 1986), pp. 52–66.

87. Baker (1984), pp. 980–1, see note 33 above.

88. If some form of notification is to be retained — possibly with respect to processions — it should be carefully circumscribed. In particular, failure to notify should not be made a criminal offence, but providing a notice would

confer on participants an immunity from traffic control offences. For further discussion of proposed reform in the notification system, see R. Mushkat (1981), pp. 71–2, see note 49 above.

89. On the advantages of such a duty, see Bevan (1979), p. 185, note 50 above. For support of such reform, see H. Street, *Freedom, the Individual and the Law* (Harmondsworth, Penguin Books, 5th edition, 1982), p. 56; Lord Scarman also accepted that there was a case 'for the specific provision of public meeting places' and that '[p]ublic meeting places whether they be a speaker's corner in the centre of a great city or a village green are essential to civilized life ...'. The Scarman Report, para. 123, see note 44 above. Note that certain public areas have been designated as such by the Governor under the Public Order Ordinance (Designated Public Areas) (Consolidation) Order of 8 May 1981, cap 245, 1982 ed, although the general laws with respect to public meetings and processions are applicable therein as well.

90. A reform in this area could benefit from the work of the Law Commission in the United Kingdom, especially its Report No 123, Criminal Law Offences Relating to Public Order, HC 85 of 1983; summarized at (1983) 127 *Solicitors Journal* 725; the Commissioner's recommendations were incorporated in the White Paper published in May 1985 by the Home Office and Scottish Office on the Review of Public Order Law — see 'Summary of Proposals' (1985) 129 *Solicitors Journal* 397. Particularly interesting in this connection are the definitions of newly created statutory offences of 'violent disorder' and 'conduct intended or likely to cause fear or provoke violence'; these replace the problematic concept of 'breach of the peace' with the easier to operationalize concept of 'violence' and incorporate the essence of the principle of *Beatty v Gillbanks* (hostile audience), namely that criminal liability should only ensue when the speaker intentionally or recklessly sets out 'to cause another person to fear immediate unlawful violence, or to provoke the immediate use of unlawful violence by others'. Draft Criminal Disorder Bill, cited in D. G. T. Williams, 'Public Order and Common Law' (1984) *Public Law* 12, 15. The attention of law reformers in Hong Kong should none the less be drawn to certain difficulties and ambiguities contained in the White Paper which are aptly pointed out by A. T. H. Smith, 'Public Order Law: The Government Proposals' (1985) *Public Law* 533–42.

91. See F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge, Cambridge University Press, 1982), pp. 205–6; see also Note, 'Less Drastic Means and the First Amendment' (1969) 78 *Yale Law Journal* 464; and E. Barendt, *Freedom of Speech* (Oxford, Clarendon Press, 1985), pp. 192–213.

92. In the absence of case law, recognized limitations under the various human rights instruments — which are expressed in a very general manner — offer limited guidance.

93. The test considers whether prohibitions imposed on fundamental freedoms can be administered capriciously or discriminately. The *locus classicus* in this area is the American case of *Hague v CIO*, 307 US 496 (1939). See, however, criticism of this test in Hewitt (1982), p. 150, see note 30 above.

94. This test was first formulated by Holmes J in *Schenck v United States* 249 US 47 (1919); for a discussion of its applicability in the context of the freedom of peaceful assembly, see E. Vogt, 'Dupond Reconsidered: or the "Search for the Constitution and the Truth of Things Generally"' (1982) *University of British Columbia Law Review*, Charter Edition 141, 160–1.

95. One is reminded in this connection of Lord Atkin's dictum in *Liversidge v Anderson* [1942] AC 206, 244 expressing his apprehension that when facing claims involving the liberty of the subject, judges show themselves to be 'more executive-minded than the executive'.

96. The courts must be under a mandate to decide the application with the greatest expedition possible so as to ensure that the application is not frustrated by reason of the decision of the court being delayed until after the date on which the gathering is proposed to be held. See for example, the Public Assemblies Act 1979 (NSW) ss 6–8.

97. The law is currently under review by a working group set up by the government.

98. See A. Quon, 'Grim Message to Liberals "to Behave"', *South China Morning Post*, 26 July 1990, citing a series of 'politically motivated prosecutions' such as the conviction of an Anglican priest of collecting funds without permission and failing to produce his identity card; the charging of members of the April 5th Action Group with unlawful assembly during a China National Day celebration; and the trial of five leading members of the United Democrats in Hong Kong for using loud hailers and collecting donations without permission from the relevant authorities. To these one might add the government's refusal on 30 May 1990 to permit the Hong Kong Church Renewal Movement to use a government stadium for a [prayer] meeting to commemorate the June 4th massacre. As of particular significance in this connection commentators note the government's own admission that it was sensitive to China's interests and concerns. In a letter sent in October 1989 to the New China News Agency Foreign Affairs Department, the territory's Political Adviser reaffirmed that the Hong Kong government had 'no intention of allowing Hong Kong to be used as a base of subversive activities against the PRC'. The letter recounted several events to reinforce this point, including the arrest of members of the April 5th Action Group who had demonstrated outside the NCNA National Day reception; the 'low-key way' in which the October 10 celebration for Taiwan's national day passed off; and the rejection of a proposal for the provision of a permanent home for a replica of the statue known as the Goddess of Democracy (an image of the American Statue of Liberty) which was erected in Tiananmen Square in June 1989. See Quon above; N. Jayawickrama, 'An Old Law with a New Purpose', *South China Morning Post*, 28 July 1990, p. 17.

99. See in this connection C.A. Johnson, *MITI and the Japanese Miracle* (Stanford, Stanford University Press, 1982); and C.A. Johnson, 'Political Institutions and Economic Performance', in R. A. Scalapino, S. Sato, and J. Wanandi (eds.), *Asian Economic Development — Present and Future*

(Berkeley, Institute of East Asian Studies, University of California, 1985), pp. 63–89.

100. See B. B. de Mesquita, D. Newman, and A. Rabushka, *Forecasting Political Events* (New Haven, Yale University Press, 1985).

101. Note in this connection that Mainland officials have expressed fear that the repudiation of certain laws deemed inconsistent with the proposed Bill of Rights would bring about social instability and jeopardize prosperity. See C. Yeung, 'Alarm at Fate of Laws Under Bill of Rights', *South China Morning Post*, 22 May 1990, p. 2.

Reference may also be made to the laws recently introduced by China which severely restrict the right 'of assembly, of association, of procession and of demonstration' which are theoretically guaranteed to all Chinese citizens by Article 35 of the PRC Constitution. Under the Assembly and Demonstration Law of the People's Republic of China [*Zhonghua renmin gongheguo jihue youxing shiweifa*] promulgated by the National People's Congress Standing Committee on 31 October 1989 [Gazette of the State Council of the PRC, No 22, 1989, p. 803], assemblies, rallies, and demonstrations must not be staged in contravention of the interests of the State and society as determined under the Constitution, and must not oppose the CPC leadership and socialist system, advocate national separatism, or endanger national unity; limits are imposed on the rights of personnel in State administration to take part in demonstrations that involve conflicts with the responsibilities of their positions; procedures for obtaining permits to hold public assemblies are extremely restrictive (demonstration organizers must apply for a permit at least five days before the event, specifying the purpose, type of demonstration, slogans to be used, the number of participants and vehicles, the routes and times of the march, the number and type of audio equipment, and the names, addresses, and occupations of the organizers); local officials retain the right to change the time, location, and route of a demonstration even after giving approval, requiring only that they promptly notify the organizers; considerable constraints are imposed on the conduct of assemblies; when a demonstration is not legal and participants do not disperse when ordered to do so, the police and authorities at the demonstration site are empowered to use any means necessary to disperse the demonstrators forcibly.

102. See, in this connection, M. Meyerson and E. C. Banfield, *Politics, Planning and the Public Interest* (Glencoe, Free Press, 1955); and V. Held, *The Public Interest and Individual Interests* (New York, Basic Books, 1955). See also A. J. Nathan, *Chinese Democracy* (New York, Knopf, 1985).