

Amnesties in Hong Kong: Preliminary Discussion Paper

Amnesty saved Hong Kong once in the 1970s. Forty years later, it can once again play a crucial role in ending a crisis.

Executive summary

This preliminary discussion paper presents a case for the use of amnesties to address the current civil conflict in Hong Kong. Amnesty here includes both immunity (a guarantee that persons accused or under investigation for a crime will not be prosecuted) and pardon (releasing a person or category of persons who have been convicted from guilt or commuting their sentences).

The past few months have seen the most divisive events in Hong Kong's postcolonial history. Amnesty is an immediate, short-term solution that seeks to de-escalate and calm a volatile or violent situation. Amnesties have been used throughout Chinese history, in Hong Kong and all over the world as a way to bring conflicting parties to the negotiating table, cease hostilities, and to promote reconciliation.

Amnesty provides a way to deal with exceptional cases in extraordinary times in pursuit of the goal of peace. Peace benefits everyone – protesters, police, government and the public. The severity of the situation, as well as the lack of short-term alternatives, justifies special measures. Any proposal that can quell the current turmoil and restore trust between the people, government and police should not be viewed as a concession. Rather, negotiated and implemented in the right way, amnesty can be a win-win deal that is fair to both sides.

Granting amnesties is not contrary to the rule of law. Amnesty is feasible and permitted under Hong Kong law. Effects similar to amnesty are commonplace and widely accepted. The spirit of amnesty is also consistent with the Confucian rule by virtue principle. Properly designed and implemented, amnesties can support peace, good governance, justice and the rule of law.

Global comparative experience offers a range of choices for the design of amnesty. This paper suggests some options for design, tailored to meet the current needs of Hong Kong, covering questions such as: Whom should an amnesty cover? What offences should be included (or excluded)? What time period should the amnesty cover? What conditions might be attached to an amnesty? What procedure might be adopted for assessing and granting amnesty?

Deeper societal reconciliation is promoted when amnesty is implemented alongside other strategies to rebuild trust and restore communal relationships. If amnesty is to work to defuse conflict, it is important that all sides take ownership of the amnesty and work to make it effective and sustainable. Ownership is fostered by the inclusive involvement of all major groups in negotiations.

We hope this paper is the first step towards a serious consideration of granting amnesty for the purposes of peace and reconciliation, goals that every single person in Hong Kong must cherish.

I. Introduction

Amnesty is a promise to not prosecute or punish those accused or convicted of certain crimes. The concept of amnesty is broadly defined in peacebuilding contexts and may encompass:

- Immunity – a guarantee that certain crimes or persons accused or under investigation for a crime will not be prosecuted.
- Pardon – releasing a person or category of persons who have been convicted from guilt or commuting their sentences.

Amnesty is a common element in peace building worldwide. It is used in relation to armed conflict, as well as in response to political crises that have not reached conflict thresholds.¹ It is one of many tools available to foster peace and reconciliation during and after civil conflict. An amnesty might be designed to pursue a range of different objectives, including to encourage a de-escalation or cessation of violence, bring opposing groups to the negotiating table, and foster long term reconciliation in divided societies. Amnesties are commonly used in combination with other strategies, such as a truth commission, independent inquiry, new accountability structures for the police, and formal dialogue on broader socio-economic reforms.

This paper considers how an amnesty could help to address the current civil conflict in Hong Kong. It draws on insights from experiences in other parts of the world, as applicable to the particular context of Hong Kong.

The need for amnesty in Hong Kong

Since June 2019, Hong Kong has witnessed months of escalating conflict between protesters, police and civilians. Calls from the government for an end to protests have failed, partly because the government failed to adequately respond to the issues that motivated peaceful protests, and partly because the government is generally considered to have used excessive violence.

So far, the strategies proposed by the government to restore peace are socio-economically themed, such as housing reform and creating employment opportunities. These are important policy goals and have the appearance of being apolitical, but do not resolve the current crisis. Socio-economic reform is an important long-term strategy, however, its observable impact might take years. More importantly, effective implementation of such policies requires a cooperative and peaceful social atmosphere.

A hard-line approach serves to delegitimise other proposed reforms and concessions from all parties. Currently, any sudden escalation, which might be triggered again, can easily delegitimise other concessions. Trust and reconciliation require time, and the current situation does not offer this luxury.

¹ Louise Mallinder, 'Amnesties and Inclusive Political Settlements' (Political Settlements Research Programme 2018) 22. Armed conflict is defined in the literature as the use of armed force between two parties, of which at least one is the government of the state, and results in at least 25 battle deaths per annum: *ibid* 20.

In this context, we suggest that an immediate amnesty would help to secure a ‘narrow peace’, that is, an end or at least a break from the immediate conflict, akin to pressing the ‘reset’ button, a circuit breaker to allow Hong Kong society to breathe again.

Our focus in this paper is on amnesties for an immediate, ‘narrow peace’ to provide space for real dialogue. In pursuit of this goal, amnesty can – and should – be implemented now. In the longer term, amnesty can be used alongside efforts at communal reconciliation, restoration of relationships and rebuilding trust in institutions. While important, these efforts at deeper reconciliation are not our focus here.²

Benefits of amnesty

1. Amnesty is applicable to both ‘sides’ of the conflict – police and protesters. It therefore requires concessions from both sides, demonstrating good faith commitment to end conflict.
 - Amnesty is consistent with one of the five demands – the release and exoneration of arrested protesters. Granting amnesty will be perceived as a sincere gesture by the government to engage in dialogue and work towards peace.
 - Amnesty can also reassure the police. As the violence has escalated, police have been accused of excessive use of force, police brutality and professional misconduct. Some of the allegations do not seem baseless, especially given that several police officers were convicted for offences during the Occupy Central movement in 2014.³ Internal investigations into police conduct are currently underway and an independent inquiry into the police is one of the five demands. Amnesty, properly designed, will not undermine such an inquiry and may defuse police resistance to it.
2. Amnesties foster inclusion. A large cross-section of Hong Kong society has been affected by current events; and all will be affected by the outcome. Amnesties can ensure that groups of people are not excluded from discussions around a political settlement.
3. Many of those arrested and charged belong to the younger generation. This generation will be the pillars of society sooner or later, the professionals, workers and leaders of the future. The aim of the government should not only be deterrence, but also rehabilitation. Amnesty, if used properly, can be an important part of a rehabilitation process that seeks to integrate a currently disaffected younger generation into all levels of society. Amnesty can also remove the barrier that criminal conviction may have to access to employment, public office and political participation.

² For comparison of the different goals of amnesty see Table 1: Criteria for evaluating ‘success’ or ‘failure’ of amnesties in Louise Mallinder, ‘Amnesties’ in M Cherif Bassiouni (ed) *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia, 2010) 805.

³ Seven policemen were charged with assault occasioning actual bodily harm for beating an activist on 15 October 2014. All were convicted at the District Court and sentenced to imprisonment; two had their convictions quashed on appeal: *HKSAR v Wong Cho Shing (黃祖威)* [2019] 4 HKC 401. Then-superintendent Frankly Chu was convicted of assault occasioning actual bodily harm for striking a baton at a pedestrian on 26 November 2014. He was sentenced to imprisonment. His appeal to the Court of Final Appeal was rejected: *HKSAR v Chu Frankly* (2019) 22 HKCFAR 1.

4. Amnesty is a versatile and flexible tool that can be used to support other strategies for peace. It can be used to gain time to implement long-term solutions. It can be granted on conditions tailored to specific needs and objectives. It comes with some costs to put into effect, but is low risk in that the worst outcome would be repeat offending by those granted amnesty. But, if implemented correctly, the benefits are high: providing a platform for resetting the current dynamic of conflict and rebuilding trust in public institutions and society.

II. Addressing objections to amnesty

Amnesty and the rule of law

It is sometimes claimed that amnesty is contrary to the rule of law. This claim is based on two concerns:

- i. That the law must be enforced against all persons who commit crimes
- ii. That amnesties will encourage others to commit crimes in the belief they have impunity or might easily obtain impunity in the future.

It is helpful to deal with each of these concerns separately.

Objection i: The rule of law requires that laws be enforced

Response: As it will be show in Part III, amnesty, if properly designed, is constitutionally permitted. In different ways, effects similar to amnesty are commonplace and produced by:

- Exercise of prosecutorial discretion under the *Prosecution Code* para 5.9, which sets out the grounds for whether a prosecution is in the public interest.
- The presumption in the statute of limitations that some crimes cannot be prosecuted after a certain period of time.
- Schemes where people can voluntarily disclose information (eg tax disclosure) or relinquish unlicensed or illegal goods (eg firearms) without facing prosecution.

These laws acknowledge that sometimes the public interest is best served by *not enforcing the law*.⁴

The power of pardon exists in almost *every constitution in the world*. Further, amnesty is widely used in peace-building contexts such as in post-conflict Northern Ireland, South Africa and Colombia.⁵ In these cases, amnesty is a way of dealing *precisely with exceptional cases in extraordinary times* in pursuit of the goal of peace. The past few months have been the most divisive period in Hong Kong's postcolonial history. The severity of the situation, as well as the lack of short-term alternatives, justifies special measures such as amnesty.

Objection ii: Amnesties encourage crime and legitimise violence

Response: This concern can be addressed by clearly framing the amnesty. If amnesty is clearly framed as exceptional and confined in time and place to past events, then there is limited

⁴ Amanda Taub, 'The Word May Be Toxic, but Amnesty Is Everywhere' *New York Times* (11 October 2017) <<https://www.nytimes.com/2017/10/11/upshot/the-word-may-be-toxic-but-amnesty-is-everywhere.html>>.

⁵ Mallinder, above n 1, 6.

incentive to continue to engage in criminal activity. Amnesties can also include conditions to prevent perverse incentives and to discourage repeat offending (some options are discussed below in Part IV).

A related objection is how can amnesty for serious crimes, such as murder, attempted murder and rape, be justified? Again, this can be addressed in the design of the amnesty, which could expressly exclude amnesties for specified serious crimes. Comparative experiences tell us that it is not uncommon for amnesties to exclude serious crimes against individuals, such as rape and murder.⁶

Amnesty and virtuous government

A different kind of objection relates to the standing of the government if it is seen to be 'giving in' to protesters' demands. It might be said that the local and national governments might lose face if they concede to the demands of the protesters.

On the contrary, responsiveness is sign of good government. One of the demands has already been met – the withdrawal of the bill. Far from delegitimizing the governments, the withdrawal actually helped them gain support locally and internationally. Responding to another demand is a positive sign, a sign that the government is listening to the people and open to constructive solutions.

Confucianism, an ideology to which the Chinese Communist Party regularly refers, supports the spirit of amnesty. Rule by virtue is a highly valued principle of governance in Confucianism.⁷ It is believed that society will only be harmonious when its citizens are virtuous. Laws alone, however, are believed to be insufficient. Citizens will eventually learn to game the rules under a rule-by-law regime. Morality, education, rehabilitation and forgiveness are instead the keys to a peaceful and orderly society.⁸

Throughout ancient Chinese history, emperors have granted amnesties on more than two thousand occasions.⁹ Traditionally, amnesty had several functions, including appeasing the public and ministers, easing administrative pressures on the judicial and prosecutorial branches, and demonstrating to the people that the ruler was a virtuous ruler.¹⁰

⁶ For comprehensive comparative data of the kinds of crimes excluded from amnesties at different stages of a peace process see *ibid* 35.

⁷ E.g. 子曰：「道之以政，齊之以刑，民免而無恥；道之以德，齊之以禮，有恥且格。」（《論語·為政》）。The Master said, "If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good."

⁸ E.g. 季康子問政於孔子曰：「如殺無道，以就有道，何如？」孔子對曰：「子為政，焉用殺？子欲善而民善矣。君子之德風，小人之德草，草上之風，必偃。」（《論語·顏淵第十二》）。Ji Kang asked Confucius about government, saying, "What do you say to killing the unprincipled for the good of the principled?" Confucius replied, "Sir, in carrying on your government, why should you use killing at all? Let your evinced desires be for what is good, and the people will be good. The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend, when the wind blows across it."

⁹ 劉令輿，〈中國大赦制度〉，收入《中國法制史論文集》，台北：中國法制史學會，1981年，129。

¹⁰ Brian E McKnight, *The Quality of Mercy: Amnesties and Traditional Chinese Justice*, University of Hawaii Press, 1981.

The Communist Party in recent years has emphasized the importance of both law and virtue in governance.¹¹ Since 1949, the Communist Party has granted amnesty on nine occasions. The first seven occasions were during the nascency of the People's Republic of China and directed mainly to political offences. The eighth and ninth amnesties coincided with the seventieth anniversary of the end of the Second Sino-Japanese War in 2015 and the seventieth anniversary of the founding of the People's Republic of China in 2019 respectively. Commentators described the 2015 amnesty as reflective of humanitarianism¹² and the rule by virtue principle,¹³ and the chairman of the Standing Committee of the National People's Congress said that the 2019 amnesty would "temper justice with mercy, maintain social stability and uphold the judicial protection of human rights."¹⁴

These examples show that Chinese society is no stranger to amnesty, and that amnesty, *per se*, is consistent with long-held Chinese principles.

Peace benefits everyone, including the protesters, police and government. The lives of many people – protesters, police, residents and others – have been severely disrupted over the months. Any proposal that can put an effective stop to the turmoil should *not* be viewed as a concession, but as a part of a political and peaceful resolution for the benefit of Hong Kong society.

III. Options and Legal Basis for Amnesty in Hong Kong

Amnesty can be put into effect in different ways with different legal outcomes. This part presents a preliminary assessment of the options.¹⁵

Immunities (before a prosecution or conviction)

1. A Policy not to prosecute issued by the Department of Justice

Article 15(1) of the *Criminal Procedure Ordinance* (Cap 221) states that 'The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.' An amnesty, agreed in the current circumstances, might provide the necessary 'interests of public justice'. The way in which a policy of this kind is implemented, however, must avoid being an unlawful interference in prosecutorial discretion. Article 63 of the *Basic Law* provides that the Department of Justice shall control criminal prosecutions free from any interference. An agreement not to prosecute by the Department of Justice in relation to amnesty would not be an unlawful interference in prosecutorial discretion. Rather, it would be a valid exercise of prosecutorial discretion. A policy of this kind

¹¹ 〈學習貫徹黨的十八屆四中全會精神，全面推進依法治國〉，載中國人大網，2014年11月20日。

<http://www.npc.gov.cn/zgrdw/npc/xinwen/2014-11/20/content_1886726.htm>

¹² 彭鳳蓮：〈依法特赦：法治與德治之結合〉，《馬克思主義與現實》，2016年第2期。

¹³ 劉俊武：〈重啟特赦制度開啟法治文明新篇章〉，載《中國黨政幹部論壇》，2015年9月。

¹⁴ Cao Yin, 'Special pardons issued for PRC's 70th anniversary' *China Daily* (1 July 2019)

<<https://www.chinadaily.com.cn/a/201907/01/WS5d194852a3103dbf1432b159.html>>

¹⁵ For discussions on the legality of different options, see Johannes Chan, 'The Power of the Chief Executive to grant an Amnesty: A Possible Solution to the Extradition Bill Controversies' 49(3) *Hong Kong Law Journal* (Forthcoming); Esther Mak and Jason Fee, 'Amnesty in Hong Kong?' 49(3) *Hong Kong Law Journal* (Forthcoming).

may not be legally binding, but might be regarded as creating a legitimate expectation in administrative law.

2. Executive Order or Direction by the Chief Executive to the Police

The Commissioner of Police, under s.4 of the *Police Force Ordinance* (Cap 232), is charged with the supreme direction and administration of the police force. The Commissioner of Police is subjected to the orders and control of the Chief Executive. The Chief Executive may direct or order the Commissioner of Police not to investigate certain cases relating to the protests. This may be a particularly suitable option since the vast majority of the cases have not entered the prosecutorial stage yet.

Pardon (after conviction)

3. Pardon or Commutation of Sentence by the Chief Executive

Article 48(12) of the *Basic Law* provides that the power of pardon is vested in the Chief Executive. This provision provides for the power to pardon or commute the penalties of convicted persons. It also does not offer guidelines regarding how this power should be exercised, leaving it to the discretion of the executive.

4. Expungement of Criminal Record

Generally, a pardon does not expunge the finding of guilt by the court. Rather it releases the person from serving the sentence. The question of whether the power of pardon includes the power to expunge a person's criminal record is unclear in Hong Kong. As a matter of practice, criminal records are managed by the Criminal Records Bureau of the police under the Police Operational Nominal Index Computer System. The Police Force has a policy not to record every conviction, but the policy of which offence is recordable is not publicly available and it is unclear what the most updated policy regarding recording offences is.¹⁶ Under s. 59 of the *Police Force Ordinance* (Cap 232), the police's power to retain identifying particulars of a person who has been arrested for or convicted of an offence is discretionary. Even if the power of pardon does not come with the power of expungement, criminal record can seem to be erased by either changing the police's policy, an order or direction from the Chief Executive, or even through legislation.

5. Legislation for conditional release

Legislation with the effect of immunity may be inconsistent with prosecutorial independence under Article 63 of the *Basic Law* and the principle of separation of powers. Legislation could however provide for the conditional release of persons

¹⁶ Simon Young 'Do you have a criminal record? Scheme set in law needed to ensure certainty in Hong Kong' *South China Morning Post* (14 December 2015) <<https://www.scmp.com/comment/insight-opinion/article/1891082/do-you-have-criminal-record-scheme-set-law-needed-ensure>>.

convicted of specified offences.¹⁷ In addition, the process of legislating provides an opportunity to include and consult stakeholders.

IV. Implementation

To be effective, an amnesty must be, and be seen to be, accepted and owned by all relevant stakeholders; fair and unbiased; and properly implemented. In this Part, we discuss the importance of the process for negotiating an amnesty; the design of the amnesty; and combining amnesty with other peace building strategies.

The process for negotiating an amnesty

If amnesty is to work to defuse conflict, it is important that all sides take ownership of the amnesty and work to make it effective and sustainable. Ownership is fostered by the inclusive representation of all major groups in negotiations. In Hong Kong, this could include government officials, police and local party representatives. It must also include protesters, those who support them, and civil society. In negotiations to end an armed conflict, inclusion is arguably easier, as there are usually identifiable groups and leaders for the government to negotiate with. Hong Kong might be a distinctive case, in that the protest movement encompasses many groups has no formal leader(s). This is not a reason to not consult over the form of an amnesty. For a “leaderless” movement, Hong Kong’s protest movement has been remarkably clear in articulating its concerns, its demands and its reaction to government proposals such as the anti-mask regulations. It is a movement with a large groundswell of support, as demonstrated in the results of the district council elections in November 2019.

There are a range of mechanisms for consultation: the government can propose and seek formal responses to an amnesty through dialogues – both face to face and in online forums; it can use deliberative polling, non-binding referendums or other survey techniques; and it can use both traditional and social media. The government could open the door to those who are engaged in the movement, including recently elected district councillors of the opposition camp, civil society organisations, student leaders and respected members of society, who could share the range of insights into the motivations of the protest movement and its effects on the wider society.

Support for amnesty in the wider public is also important. Information in this paper could serve to set the scene for broader discussions in society, which can be followed up with seminars, discussion groups and focus groups.

Design of the amnesty

Global experience shows that there is a range of choices for the design of amnesty. The design of amnesties for Hong Kong should take account of:

¹⁷ The design might be similar to the *Prisoners (Release under Supervision) Ordinance* (Cap 325). One foreign example of how legislation can be used to implement conditional release is the *Northern Ireland (Sentences) Act 1998* (c.35). For analysis of the Act, see Daniel F Mulvihill, ‘The Legality of the Pardoning of Paramilitaries under the Early Release Provisions of Northern Ireland’s Good Friday Agreement’ 34 *Cornell International Law Journal* 227.

- i. The context for amnesty, namely an ongoing civil conflict.
- ii. The objectives of amnesty, which, in the immediate context, is to de-escalate and calm a volatile situation, and lay the groundwork for peaceful political discussions.

Careful design also helps to avoid future controversy and litigation arising from ambiguous provisions.

It is therefore necessary to clearly define the scope of amnesty, in relation to who will be covered, for what kinds of offences, and offences committed during a defined time period.¹⁸

Who will be covered by the amnesty?

To serve its purpose, the amnesty could cover four categories of person:

1. Persons convicted;
2. Persons charged but not yet convicted;
3. Persons arrested but not yet charged;
4. Persons under investigation.

Members of the police force are most likely to fall in the fourth category. As far as we are aware, no police have been arrested or convicted. However, CAPO is currently processing the complaints of misconduct and allegations of police brutality, and IPCC is monitoring the complaint process.

It is important to note that amnesties would not undermine these investigations or any additional independent investigations into police conduct. A commitment not to pursue criminal or civil charges against a member of the police force in association with conduct in policing the protests (on similar conditions that would apply to others regarding repeat offending or serious crimes) preserves a key objective of an inquiry, that is, fact finding and institutional reform. In other words, a distinction can be made between individual liability of a police officer and institutional liability of the police force. If desired, amnesty can be designed to the effect of shielding police officers from individual liability, while maintaining institutional liability based on the findings of public inquiry and investigatory institutions.

What kinds of offences could the amnesty cover?

A non-exhaustive list of offences that may have arisen in the events of the past months include: common assault, assault resulting in grievous bodily harm, assaulting a police officer, obstructing and resisting a police officer, possession of a dangerous weapon, theft, unlawful assembly, rioting, criminal damage, arson, attempted murder, manslaughter and murder. Such offences have been alleged against protesters and police. Charges such as perverting the course of justice have been laid against members of the public who are alleged to have provided assistance to protesters.

¹⁸ For a comprehensive global comparative study and discussion of options for design see Mallinder, above n 2; for guidelines see Belfast Guidelines on Amnesty and Accountability (2013) https://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf.

One objective of an amnesty – which we have characterised as the immediate objective – is to de-escalate civil conflict and rebuild sufficient trust between the people and the government to provide the environment for discussion to resolve the political issues. Given the broad cross section of the community who have been engaged in protests and who have offered support to protesters, a generous rather than narrow approach to amnesty may be called for.

Drawing the line around which offences to include and exclude is likely to be highly contested. It might therefore be helpful to set out some principles that could guide decision-making on this question. While these principles are not intended to be directive, they may help to ground a consistent and fair approach to amnesty for all parties. The procedure for granting amnesty and the possibility of imposing conditions on amnesty can also be relevant in this assessment.

Principles arising from the nature of the offence

Criminal offences can be categorised according to the immediate ‘victim’ of the offence:

- Crimes against individuals (for example homicide, assault)
- Crimes against property (for example criminal damage, theft, arson)
- Crimes against public order (for example riot, unlawful assembly)
- Crimes against the state (for example treason, abuse of public power – such as police brutality and corruption)

One way of defining a boundary around amnesties is to consider the kinds of offences that have been committed in relation to the protest movement by protestors, police and members of the public. It might be that crimes against public order in which people have sought to advocate political and social change to a government that has at best not listened and at worst sought to repress opposition might more readily be amenable to amnesty. Crimes against property – to the extent that damage to property such as graffiti and targeted damage was used as a form of protest rather than for personal gain (cf theft or looting) might also be connected to crimes against public order in these circumstances.¹⁹

Crimes against individuals present particularly difficult issues. One is that serious crimes against the person – such as murder, rape and serious assault - might be regarded as particularly serious and less easily forgivable. Crimes of this nature have been alleged against protesters, but, importantly, also against the police. To date (and to the best of our public knowledge), however, only protesters and members of the public have been investigated and charged.

There are ways to address the seriousness of such offences in the design of the amnesty. One option might be that the amnesty take the form of pardon, conditional release or commutation of the penalty, rather than an immunity, so that the offences are properly tried and proven.

Principles arising from the characteristics of the offender

Another principled ground on which to determine the offences to be excluded and included from amnesty is the identity of the alleged offender or convicted person. Age is often

¹⁹ For examples of this latter kind, see examples from Colombia and Uruguay, discussed in Mallinder, above n 2.

understood to be a mitigating factor in sentencing, for example, and could also inform the availability of amnesties. For example, amnesties might be more readily available to persons who are under 18 (or even older to encompass students at undergraduate level). The logic here is consistent with the rehabilitation theory in criminal law. In contrast, those who hold public office (such as police) who have committed offences might be regarded as more culpable and less deserving of amnesty, especially where the abuse of public powers is alleged.

Principles arising from the motivation for the offence

The inclusion and exclusion of particular offences might also be guided by an understanding of the motivations for the offending conduct. The protest movement began as a peaceful protest against a government policy, which, when unheeded and met with the use of force by the government, escalated into more violent conflicts between protesters and police.

In this context an amnesty recognises— implicitly or explicitly — that the protests were a legitimate expression of public and political dissent, and that their escalation into violence was — at least in part — a reaction to the excessive use of force and repression by the government. A parallel might be made with the amnesties applied in other contexts to political offences, which criminalise dissent and opposition to the state and or its government.

Amnesties to this end could target those persons and offences related to the public protests, ranging from those who have been charged with simply being present at an unlawful assembly or providing assistance, to potentially those more directly involved in assemblies, targeted damage to property and rioting.

What period of time could be covered?

In many cases, amnesties are stated to cover a particular period of time. For example, in South Africa, the amnesty was available only for acts that had taken place between 1 March 1960 and 10 May 1994 (the date of President Nelson Mandela's inauguration).²⁰

For Hong Kong, the time period might cover the date of the first protest on 9 June 2019 to the actual date of implementing the amnesty.

Conditions

Depending on the objectives of the amnesty, amnesties could be subject to conditions, or a combination of conditions.

For example, in East Timor, the proposed amnesty law called for ‘forgiveness, not forgetting, in the spirit of national reconciliation’.²¹ In Hong Kong, this objective might be achieved by making an amnesty conditional upon the person or group making an apology to the victims or wider community affected by their actions.

²⁰ Shorthand Social, ‘Understanding Amnesty in South Africa: What Really Happened at the TRC?’ *SABC News Online* (17 November 2015) <<https://social.shorthand.com/SABCNewsOnline/nyCsx09gnf/understanding-amnesty-in-south-africa>>.

²¹ *Draft Law No. 24/1/2a on Amnesty and other Clemency Measures* (East Timor) Preamble. For discussion of the context, see Mallinder, above n 2, 861-7.

If there are concerns about impunity and reoffending, pardon and immunity can be conditional.

For example, prisoners released under an amnesty in Northern Ireland, were released on condition that they would not commit further offences, associate with proscribed organisations or become a danger to the public.²² In Hong Kong, amnesties could be granted on condition that the person not re-offend within a certain period of time. Breaching the condition can lead to the continuation of the previous sentences and/or the prosecution of new crimes. These conditions can be used to correct perverse incentives discussed above.

Community service is also worth considering, as either a condition of early release or a commutation of penalty. Community service serves the aims of recognising the criminality of an offence, and communal restitution and reconciliation. Convicted protesters, for instance, can clean up graffiti in affected neighbourhoods.

Specific conditions could also attach to amnesties for particular offences. For example, if an amnesty is provided for offences relating to possession of an offensive weapon, then a condition of the amnesty might be that the person surrender or decommission the weapon.

Procedure for granting amnesty

There are also variations in the way in which amnesties are granted. Some amnesties are automatic and blanket, applying across all offences. For example, in peace building following the conflict in the region of Bougainville in Papua New Guinea, the government undertook to ‘grant amnesty to persons involved in crisis-related activities on all sides’ and ‘recommend pardons for persons convicted of crisis-related offences’.²³

In other cases, such as South Africa, amnesties might be available upon application. A special committee of South Africa’s Truth and Reconciliation Commission was established to consider applications for amnesty for gross human rights violations, using defined criteria.²⁴

The procedure for granting amnesty can be used to counter-balance some of the concerns about the offences included in an amnesty. For example, if there are particular concerns about amnesties for serious offences, a process whereby a person must apply for an amnesty, rather than an automatic immunity, can recognise the seriousness of the offence, the impact on the victim(s) and the specific context of the offending. In Colombia, automatic amnesties were applied to offences obviously related to rebellion (where the motivation was political rather than motivated by profit or personal gain), but in cases of doubt, the amnesty was to be considered by the court.²⁵

²² *Northern Ireland (Sentences) Act 1998* s 9(1).

²³ *Lincoln Agreement on Peace, Security and Development on Bougainville* (signed 10 October 1997) UN Doc S/1998/287.

²⁴ Shorthand Social, above n 12.

²⁵ Nelson Camilo Sánchez, ‘Post-Conflict in Colombia: Amnesty and Pardon in the Peace Process’ *democraciaAbierta* (22 September 2016) <<https://www.opendemocracy.net/en/democraciaabierta/post-conflict-in-colombia-18-amnesty-and-pardon-in-peace-pro/>>.

In all cases, the procedural mechanisms used to implement an amnesty must be efficient and unbiased. If amnesties are provided by application, an independent and impartial body might be established to consider and grant amnesties.

Using amnesty in combination with other measures

Amnesty is often only one part of a package directed to restoring peace. This means that amnesty is not a complete solution. Even with amnesty, there might be a resurgence of protesters going to the streets. This does not mean that amnesty is not effective, as it is the first and crucial step in changing social atmosphere. The de-escalation effect of granting amnesty is maximized when it is implemented alongside other strategies such as a public inquiry, reform proposals, psychological rehabilitation, socio-economic policies and meaningful dialogue. Amnesty can provide breathing space for consultations and mark the transition to peaceful government. Success also depends, however, on a host of factors, including timing and the willingness to come together and settle differences. It is not uncommon for multiple rounds of amnesty to be negotiated over several years.

V. Conclusion

Amnesty saved Hong Kong once in the late 1970s, when official corruption was rampant and the ICAC was in its nascency. Forty years later, we suggest that amnesty can play a key role in resolving another crisis, a crisis that began with peaceful protests against an extradition bill and became a wide-scale conflict between protesters and the police force.

This paper has outlined the range of issues that might arise in relation to amnesty in the current circumstances of Hong Kong. It has argued that amnesty, far from being inconsistent with the rule of law and virtuous governance, can, in principle, support those values. It has identified a range of options for the design of an amnesty, and the legal avenues for implementation in Hong Kong. All of these issues require further consideration. Our purpose in this Discussion Paper has been to identify and canvas the issues as a basis for further discussion by different groups in Hong Kong, including politicians and officials, protesters and opposition parties, lawyers, academics, students and the public.

Amnesty is a feasible de-escalation strategy. We, as Hong Kong society, need both creative solutions and political will to resolve the current crisis and lay the groundwork for a strong political community in the future. This may be uncharted territory for Hong Kong, but comparative and historical experiences also tell us that we are not alone. We hope this paper provides a basis for serious consideration of amnesty for the purposes of peace and reconciliation, goals that every single person in Hong Kong must cherish.

Prepared by

Dr. Anna Dziejic

dziejic@hku.hk

Associate Director, Centre for Comparative and Public Law, University of Hong Kong
Global Academic Fellow, University of Hong Kong

Mr. Julius Yam

yamj@hku.hk

Lecturer (part-time), University of Hong Kong
Research Associate, Programme for the Foundations of Law & Constitutional Government,
University of Oxford

Acknowledgement

We thank Cora Chan, Herman Chan, Johannes Chan, Yu-Jie Chen, Henry Litton, Yau Ning Ng, Po Jen Yap and Simon Young for their help and comments. All errors are our own.

*The Chinese version is translated by Yau Ning Ng.