



# Freedom of Assembly and Protest Policing

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[The Guardian](#)  
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▲ 'Vast numbers still turn out for unauthorised protests, wearing masks to taunt the administration and underscore its impotence.' Photograph: Tyrone Siu/Reuters

“Is there any way that [Hong Kong](#) can avoid becoming another Northern Ireland?”



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

*Paddy Ashdown, Financial Times, 13 June 2018*

Hong Kong Watch, [Outdated and Draconian: Hong Kong’s Public Order Ordinance](#) (July 2019)

[See further, Paddy Ashdown, [Britain’s shameful legacy in Hong Kong](#)]

# The UN Human Rights Committee & the Hong Kong Public Order Ordinance

- ▶ ‘With regard to freedom of assembly ... the Committee is concerned that the Public Order Ordinance could be applied to restrict unduly enjoyment of the rights guaranteed in article 21 of the Covenant.’
- ▶ ‘The HKSAR should **review** this Ordinance and bring its terms into compliance with article 21 of the Covenant.’

[CCPR/C/79/Add.117](#), 15 November 1999, para 19.

# The UN Human Rights Committee – Concluding Observations 2013

10. The Committee is concerned about

- a) the application in practice of certain terms contained in the Public Order Ordinance, inter alia, “disorder in public places” or “unlawful assembly”, which may facilitate excessive restriction to the Covenant rights,
- b) the increasing number of arrests of, and prosecutions against, demonstrators, and
- c) the use of camera and video-recording by police during demonstrations (arts. 17 and 21).

Hong Kong, China, should ensure that **the implementation** of the Public Order Ordinance is in conformity with the Covenant.

It should also establish clear guidelines for police and for records for the use of video-recording devices and make such guidelines accessible to the public.

# The drafting of General Comment 37 on Article 21 ICCPR

See further:

- the [Half-Day discussion](#) in March 2019 and written submissions, including:
  - [Democratic Party \(Hong Kong SR\)](#)
  - [Demosisto](#)
  - [Hong Kong UPR Coalition](#)
  - [Hong Kong NGOs](#)
- the [first draft](#) of General Comment 37.

## HUMAN RIGHTS COMMITTEE



### **Draft General Comment No. 37 on Article 21 (Right of Peaceful Assembly) of the International Covenant on Civil and Political Rights**

The Human Rights Committee, in accordance with article 40, paragraph 4, of the International Covenant on Civil and Political Rights, and Rule 76 of its Rules of Procedure, is mandated to prepare general comments on the various articles and provisions of the Covenant with a view to assisting States parties in fulfilling their obligations under the Covenant.

The Human Rights Committee decided at its 124th session (8 October – 2 November 2018) to develop a General Comment on article 21 of the International Covenant on Civil and Political Rights, in the light of experience obtained in the review of State reports and communications on this right.

# General Obligation regarding the legal framework

## Draft General Comment 37, para 28:

- ▶ The obligation to respect and ensure also means that States parties and their agents must facilitate and promote an **enabling environment** for the exercise of assembly rights. States thus also have positive obligations to assist participants, where needed, to achieve their legitimate objectives ...These positive obligations also entail putting into place **a legal framework within which these rights can be exercised effectively...**



# The remainder of this talk:

- 1) State obligations and the *role* of the police
- 2) s.18 Public Order Ordinance ('Unlawful Assembly')
- 3) The ban on face coverings introduced under the 1922 *Emergency Regulations Ordinance*
- 4) Protections for journalists and monitors/observers (noting also the recent anti-doxing injunction)

# Some other noteworthy points (beyond the scope of this evening's talk) include:

## s.7 Public Order Ordinance

Draft GC37, para 77 – **Regulation of unnotified assemblies:**

‘A failure to notify the authorities of an assembly should not render *participation* in the assembly unlawful, and should not in itself be used as a basis for dispersing the assembly or arresting the participants, or charging them with a criminal offence. It also does not absolve the authorities from the obligation, within their abilities, to facilitate the assembly.’

## s.17A(1)(d) Public Order Ordinance

Draft GC37, para 37 – **Protection for advance publicity of unnotified assemblies:** ‘... publicity for an upcoming assembly before notification has taken place cannot be penalized in the absence of a specific indication of what dangers would have been created by the early distribution of the information.’

For example: s.3(3); s.17A; s. 18(3); s.19 (2) Public Order Ordinance (plus the sentencing Guidelines set out in *Secretary of State for Justice v Wong Chi Fung and others* [2017] HKCU 2171, paras 107-109)

Draft GC37, para 73 – ‘Where **criminal or administrative sanctions** are used against participants for violating the law, they should not be excessive.’

# 1) State obligations and the role of the police: the importance of terminology

- ▶ s.6 Public Order Ordinance: if the Commissioner of Police believes it to be necessary, ‘... he may in such manner as he thinks fit, **control and direct** the conduct of all public gatherings ...’
- ▶ Draft General Comment 37 (updated October 2019):
  - ▶ ‘Respect and Ensure’ (the *overarching* obligation)
    - ‘No unwarranted interference’ (the *negative* obligation)
    - ‘Facilitate and protect’ (the *positive* obligation)
  - ▶ Para 11 – obligation to protect other rights even where an assembly ceases to be peaceful

# Escalated Force

- ▶ '[A] repertoire of tactics revolving around the use of arrests, beatings, tear gas, bullets and other weapons meant to quell protests by inflicting pain and suffering.'

Patrick Gillham, Bob Edwards and John Noakes, 'Strategic incapacitation and the policing of Occupy Wall Street protests in New York City, 2011' 23(1) *Policing and Society* 81-102 (2013) at 82

- ▶ Public Order as 'the quietism imposed by successful repression' (Lord Scarman)



# Negotiated Management

- Prioritizes early and continuing communication between protesters and police;
- Ostensibly emphasizes policing by consent and the joint planning of assemblies;
- Notification enables collection of information and may trigger negotiations
- Working relationships lead to trust and increased predictability
- But risks of routinization and co-option – a subtle form of ‘management’



# 'Strategic Incapacitation'

- ▶ Zoning, Surveillance & Information Control
  - ▶ Lack of communication/diminished trust leads to pre-emptive strategies to neutralize possible risks

# 'Command and Control'

- ▶ Micro-management of demonstrations to prevent disorder and the disruption of everyday life;
- ▶ Derives from 'broken windows' philosophy of policing;
- ▶ Emphasizes:
  - ▶ Zero-tolerance of disorder
  - ▶ Hierarchical micro-management of demonstrations

# Styles of Protest Policing

- ▶ These four policing styles ('escalated force'; 'negotiated management', 'strategic incapacitation', 'command and control') are not mutually exclusive;
- ▶ The 'Be Water' strategy is itself an attempt to resist both 'command and control' and 'negotiated management';
- ▶ There might be scope for empirical research to explore, for example:
  - ▶ Whether, and to what extent, negotiation is taking place;
  - ▶ To what extent any such negotiation depends on prior notification;
  - ▶ What are the outcomes of any negotiation that occurs.

# United Nations Human Rights Guidance on Less- Lethal Weapons in Law Enforcement

- Independent police oversight mechanisms
- Use of force during assemblies
  - Tear Gas
  - Kinetic Impact Projectiles
  - Water Canon
- See also: UNODC, [Resource book on the use of force and firearms in law enforcement](#) (2017)

Geneva, August 2019



# UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement

- ▶ The fundamental human rights of the participants shall be respected and protected, even if an assembly is considered unlawful by the authorities.

Para 6.3.1 (citing *Joint report of Special Rapporteurs*, [A/HRC/31/66](#), 4 February 2016, paras. 13–17 and 25)

- ▶ “In an assembly in which certain individuals are behaving violently, law enforcement officials have **a duty to distinguish** between those individuals and the rest of the assembly participants, whose individual right to peaceful assembly should be unaffected.”

## 2) s.18(1) & (3) Public Order Ordinance: 'Unlawful Assembly'

(1) When 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, 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, they are an unlawful assembly.

....

(3) Any person who takes part in an assembly which is an unlawful assembly by virtue of subsection (1) shall be guilty of the offence of unlawful assembly and shall be liable -

- a) on conviction on indictment, to imprisonment for 5 years; and
- b) on summary conviction, to a fine at level 2 and to imprisonment for 3 years.

# The incompatibility of s.18 with international standards

1. Emphasizes unlawfulness rather than non-peacefulness;
2. Fails to require an *individualized* assessment of peacefulness (mere presence at an unlawful assembly will suffice);
3. Low threshold of 'insulting' or 'provocative' conduct covers activities that ought to be protected;
4. Establishes a heckler's veto ('provoke other persons to commit a breach of the peace');
5. In light of the above, the maximum sentences are manifestly excessive.

# Peacefulness rather than lawfulness

- ▶ **European Court of Human Rights:** a situation of unlawfulness, such as ... the staging of a demonstration without prior notification, does not necessarily (that is, by itself) justify an interference with a person's right to freedom of assembly ... In other words, the absence of prior notification and the ensuing "unlawfulness" of the event, which the authorities consider to be an assembly, do not give *carte blanche* to the authorities; the domestic authorities' reaction to a public event remains restricted by the proportionality and necessity requirements of Article 11 of the Convention.

[Novikova v Russia](#) [2016] para 163

[Primov v Russia](#) [2014] para 119

# Individualized Assessment of Peacefulness

- ▶ **General Comment 37, para 23:** ‘isolated incidents will not suffice to taint an entire assembly as violent’
- ▶ **European Court of Human Rights:** “an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.”

*Ziliberberg v Moldova* (admissibility decision, 2004)

# Potential disorder arising from a hostile audience

- “[T]he possibility of violent counter-demonstrations, or the possibility of extremists with violent intentions, not members of the organising association, joining the demonstration cannot as such take away that right. Even if there is a real risk of a public procession resulting in disorder by developments outside the control of those organising it, such procession does not for this reason alone fall outside the scope of Article 11(1).”

*Christians Against Racism and Fascism v UK* (1980).

# Low threshold of 'insulting' / 'provocative' conduct

- Freedom of speech “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that **offend, shock or disturb** the State or any sector of the population.” *Handyside v UK*, 1976, para 49.
- “It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that **call into question the way a State is currently organised.**” *Eg. Socialist Party and Others v Turkey*, 1998, para 47.
- General Comment 34 – freedom of speech:
  - ‘embraces even expression that may be regarded as **deeply offensive**’ (11)
  - ‘the mere fact that forms of expression are considered to be **insulting** to a public figure **is not sufficient to justify the imposition of penalties**’ (38)

# Rejecting the ‘Heckler’s Veto’

- ▶ *Vajnai v Hungary* (2008) para 57:  
“A legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. **To hold otherwise would mean that freedom of speech and opinion is subjected to a heckler’s veto.**”



Attila Vajnai



**Section 3**

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**3)**

- 3. Use of facial covering in certain circumstances is an offence**
- (1) A person must not use any facial covering that is likely to prevent identification while the person is at—
- (a) an unlawful assembly (whether or not the assembly is a riot within the meaning of section 19 of Cap. 245);
  - (b) an unauthorized assembly;
  - (c) a public meeting that—
    - (i) takes place under section 7(1) of Cap. 245; and
    - (ii) does not fall within paragraph (a) or (b); or
  - (d) a public procession that—
    - (i) takes place under section 13(1) of Cap. 245; and
    - (ii) does not fall within paragraph (a) or (b).
- (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 1 year.



### 3) Face coverings

- ▶ Memorandum by the Council of Europe's Commissioner for Human Rights, Dunja Mijatovic (paras 40, 43 and 49)
  - ▶ French proposal to increase penalties for intentional hiding of one's face (all or in part) in the vicinity of a demonstration 'without a legitimate reason'.
  - ▶ This provision may 'undermine freedom of assembly' (para 40)
  - ▶ The 'without legitimate reason' clause 'does not seem to constitute sufficient protection against possible abuses' (para 43)
  - ▶ 'Liable to result in disproportionate infringements of the freedom of peaceful assembly and the freedoms of movement and expression.' (para 49)



## OSCE Guidelines on Freedom of Peaceful Assembly (Draft 3<sup>rd</sup> ed.)

- ▶ **No blanket or routine restrictions on the wearing of masks and face-coverings.** The wearing of masks and face coverings at assemblies for expressive purposes is a form of communication protected by the rights to freedom of speech and assembly. It may occur in order to express particular viewpoints or religious beliefs or to protect an assembly participant from retaliation. The wearing of masks or other face coverings at a peaceful assembly should not be prohibited where there is no demonstrable evidence of imminent violence. An individual should not be required to remove a mask unless his/her conduct creates probable cause for arrest and the face covering prevents his/her identification.

## Draft General Comment 37, para 67

- ▶ 67. The wearing of face coverings or other disguises by assembly participants, such as hoods or masks, may form part of the expressive element of a peaceful assembly or serve to counter reprisals, also in the context of new surveillance technologies. Assembly participants should not be prohibited from wearing face coverings where there is no demonstrable evidence of imminent violence or a probable cause for arrest. Blanket bans can only be justified in extreme cases.

# Police videotaping of public demonstrations

- ▶ 17.1 It may be necessary for the Police to make video recordings, such as recording the activities and movement of the crowd participating in public processions, during public order events to facilitate internal review and assessment on policing strategy so that the management of public order events and contingency plans can be improved continuously.
- ▶ 17.2 Under the internal guidelines of the Police, the recording of public order events should not target individual participants. Nevertheless, if a breach of the peace or public order has occurred or is likely to occur, the Police officer recording the event may target the behaviour of those individuals who are suspected of causing or involved in that breach. The recording in these circumstances is necessary for the collection of evidence. If the recordings contain personal data, they will be properly dealt with in accordance with the relevant legislation, including the PDPO.

- ‘[T]he blanket, opportunistic and indiscriminate processing, even for short periods, of biometric data belonging to thousands of individuals in order to identify a few minor suspects or persons of interest is much less likely to meet the high bar [of strict necessity] contemplated by the DPA 2018’
- Government should ‘introduce at the earliest opportunity a statutory binding code of practice to ... further inform competent authorities within the law enforcement sector about how and when they can use LFR (and potentially other biometric modalities) in public spaces ...’

Information Commissioner’s Opinion:

# The use of live facial recognition technology by law enforcement in public places

31 October 2019

Reference: 2019/01

# Guidelines on Freedom of Peaceful Assembly

SECOND EDITION

Peaceful assembly and demonstration are essential elements of a democratic society. The exercise of these rights will be protected.

right of peaceful assembly and demonstration. The exercise of these rights will be protected in the exercise of these rights.

the right of association with others for the promotion of their interests. The exercise of these rights will be protected.



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# Handbook on Monitoring Freedom of Peaceful Assembly



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## 4) Protections for journalists & monitors

- ▶ 'It is incumbent on the press to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. This undoubtedly includes ... **reporting on opposition gatherings and demonstrations which is essential for the development of any democratic society.**'

ECtHR, [Najafli v Azerbaijan](#), 2012, para 66

## 4) Protections for journalists & monitors

- ▶ ‘[U]ninhhibited reporting on demonstrations is as much a part of the right to free assembly as the demonstrations are themselves the exercise of the right to free speech.’

OSCE Representative on Freedom of the Media, *[Special Report: Handling of the media during political demonstrations – Observations and Recommendations](#)*, 21 June 2007

- ▶ ‘[T]he right of peaceful assembly covers not only the right to hold and to participate in a peaceful assembly but also ... further protects those monitoring peaceful assemblies.

*[A/HRC/20/27](#)*, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, UN Human Rights Council, 21 May 2012

# Every person shall enjoy the right to observe, monitor and record assemblies

68. All persons enjoy the right to observe, and by extension monitor, assemblies. This right is derived from the right to seek and receive information, which is protected under article 19(2) ICCPR.

...

71. Everyone — whether a participant, monitor or observer — shall enjoy the right to record an assembly, which includes the right to record the law enforcement operation.

Joint report, Special Rapporteur on the rights to freedom of peaceful assembly and of association, and the Special Rapporteur on extrajudicial, summary or arbitrary executions [A/HRC/31/66](#), 4 February 2016



‘8.6. ... **All persons** have the right ... to observe and independently monitor public assemblies without fear of reprisal. This includes **civil society organisations, human rights defenders, monitors, journalists and other media workers.**’

[Policing Assemblies in Africa: Guidelines for the Policing of Assemblies by Law Enforcement Officials](#) (ACHPR, April 2017)

## Draft General Comment 37, para 34

- ▶ 34. The role of journalists, human rights defenders, monitors and others engaged in observing, documenting and reporting on assemblies is of special importance, and **is protected under article 21**. They may not be prohibited from recording assemblies or from otherwise reporting on them, including on the actions of law enforcement officials. The equipment they use in fulfilment of their duties may not be confiscated or damaged. **Even if the assembly itself is declared unlawful and is dispersed, that does not terminate the right of monitors to cover it**. No-one should be harassed as a result of their attendance at demonstrations ...

# Non-differentiation: police failing to distinguish monitors from participants

- ▶ A key problem in many countries is the failure by police and law enforcement officials to distinguish between assembly participants and non-participant monitors/observers.
- ▶ Here are just two examples (from the UK and the US):
  - ▶ [Green & Black Cross Legal Observers \(Liverpool, June 2017\)](#):
    - ▶ One officer told a legal observer: “I can identify you **as being a protester** by what you are wearing and I have seen you previously in the day”.
  - ▶ [US Department of Homeland Security Field Operations Manual, p.100](#):
    - ▶ **Legal Teams.** Legal personnel, who **are part of the protest** and subject to arrest, document protester-responder interaction through note-taking and photographs. Often wearing pink or green colored hats and clothing as identifiers, these legal personnel demand access to the scene and attempt to intimidate law enforcement by telling them the tactics they are using are illegal. Many legal teams indicate they are neutral observers there to protect the rights of both protesters and law enforcement.



# Assembly Monitoring: Motivations & Mandates

- ▶ provide a visible third-party presence during demonstrations with a pacifier/deterrent effect, helping to defuse tension and moderate police responses;
- ▶ offer a form of counter-surveillance which seeks to challenge asymmetries of visibility;
- ▶ correct media misrepresentations of public assemblies and their policing;
- ▶ serve as a systematic 'public watchdog', capable of identifying trends over time and improving understanding of how the legal framework operates in practice;
- ▶ provide evidential resources in court proceedings;
- ▶ provide a platform for engagement between human rights defenders and domestic authorities.

# Some conclusions

## ▶ General Comment 37

- ▶ A window of opportunity to shape the rules by which State reports and individual communications will be assessed

## ▶ Reform of the Public Order Ordinance

- ▶ Creating a space for dialogue and engagement
- ▶ A means of extricating the police from a crisis of legitimacy?