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The Human Rights Violations involved in The Policing of Demonstrations in Hong Kong

Man Nok HUI

Recently, the number of demonstrations in Hong Kong has been increasing.\(^1\) The arrest of protestors, use of force and termination of demonstrations by the police are also on the rise.\(^2\) This raises concerns on whether the policing of demonstrations has illegally limited the freedoms of expression and assembly. These freedoms are fundamental human rights.\(^3\) Freedom of expression enhances transparency and accountability in society, while freedom of assembly provides a forum for residents to form, express and implement political opinions.\(^4\) Organising and participating in demonstrations are the common ways to exercise these freedoms.

This essay examines the policing of demonstrations in Hong Kong, considers how they violate residents’ human rights in international standards and discusses whether such interferences can be legally justified. It will first analyse the relevant domestic and international human rights law. It looks into the relevant sources of law to analyse the extent of these rights and the legal requirements of any restrictions thereon. Second, this essay illustrates the ‘life’ of a Hong Kong demonstration. This section gives the general idea on how typical demonstrations are conducted in Hong Kong and how policing is involved. The third section analyse some common policing methods and their legality. The fourth section concerns the use of force on demonstrators. Finally, the author provides some recommendations to improve the current situation.

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2. Security Bureau, ‘Annex 3 to LCQ18 – Figures on Arrest and Prosecution during Public Order Events from 2004 to the first two months of 2013’ (27 March 2013) <http://gia.info.gov.hk/general/201303/27/P201303270454_0454_108852.pdf> accessed 3 February 2014: In 2004, 3 persons were arrested in public order events, within which 1 was prosecuted. In 2012, 56 persons were arrested in public order events, within which 31 were prosecuted.

3. HKSAR v Ng Kung Siu and Anor (1999) 2 HKCFAR 442 (CFA) (Li CJ).

I. THE DOMESTIC AND INTERNATIONAL HUMAN RIGHTS LAW ON THE FREEDOMS OF EXPRESSION AND ASSEMBLY

This section provides the legal basis for the following discussions. It looks into the relevant sources of law, the freedoms and their interferences.

A. Relevant sources of law

The freedoms of expression and assembly of Hong Kong residents are provided by the Basic Law (BL)\(^5\) and the Bill of Rights Ordinance (BORO).\(^6\) Article 27 of the BL provides that ‘Hong Kong residents shall have freedom of speech … of assembly, of procession and of demonstration … and to strike.’\(^7\) Article 39 states that ‘[the] provisions of the International Covenant on Civil and Political Rights (ICCPR) … as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.’\(^8\) The ICCPR is incorporated into the laws of Hong Kong by the BORO.\(^9\) Article 16(2) of the BORO guarantees residents’ freedom of expression and Article 17 guarantees resident’s right to peaceful assembly. They correspond to Articles 19(2) and 21 of the ICCPR respectively. Interpretations of these rights are provided mainly by criminal and judicial review cases.

Human rights protection should live up to international standards as what is domestically legal can be a violation of international rules. There are a number of international sources of human rights law. Primarily, the UN documents on the ICCPR are most authoritative. They include General Comments, comments on individual communications and concluding statements by the Human Rights Committee (HRC). Another source are the judicial decisions of the European Court of Human Rights (ECtHR). The ECtHR was established under the European Convention on Human Rights (ECHR), which is similar to the ICCPR. In particular, Articles 10 and 11 protects the freedoms of expression and assembly of residents of member states. Hong Kong courts have also applied ECtHR

\(^5\) The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China. It is the mini-constitution of Hong Kong.
\(^6\) Hong Kong Bill of Rights Ordinance (Cap 383).
\(^7\) The Basic Law (n 5) Article 27.
\(^8\) The Basic Law (n 5) Article 39 (Abbreviation added).
\(^9\) Bill of Rights Ordinance (n 6) Long Title; Articles 1 to 23 in Section 8 of the BORO duplicates various articles in the ICCPR verbatim.
cases. The third source are cases from other common law jurisdictions. According to Article 84 of the BL, local courts ‘may refer to precedents of other common law jurisdictions.’ Thus, persuasive authorities can be found in cases from Canada, the US, the UK, etc.

B. The freedoms and their interference

This sections discusses the protection and interference of (1) freedom of expression and the (2) freedom of assembly.

1. Freedom of expression

Article 16(2) of the BORO states

Everyone shall have the right to freedoms of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form or art, or through any other media of his choice.

Protection is given regardless of the type of substance expressed. The HRC, in *Ballantyne, Davidson and McIntyre v Canada*, commended that ‘Article 19, paragraph 2, [of the ICCPR] must be interpreted as encompassing every form of subjective ideas and opinions’. Professor Manfred Nowak also opined that ‘every communicable type of subjective idea and opinion … is protected by Art. 19(2)’.

This is also locally recognised. In *HKSAR v Ng Kung Siu and Anor*, Li CJ stated that residents have the ‘freedom to express ideas which the majority may find disagreeable or offensive’. Moreover, the guarantee is given regardless of the forms of communication. Both the HRC and the ECtHR confirmed that demonstration is an included form of communication.

Nonetheless, the freedom is subject to limitations. Article 16(3) of the BORO provides:

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10 For example, see *Leung Kwok Hung and Others v HKSAR* [2005] 3 HKLRD 164 (CFA) [24].
11 Nos 358 and 385/1989 [11.3].
12 Nowak (n 4) 443.
13 *Ng Kung Siu* (n 3) 455H (Li CJ) (emphasis added).
15 *Ng Kung Siu* (n 3) 456I (Li CJ); Nowak (n 4) 443.
The exercise of the [right to freedom of expression] carries with it special duties and carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-

…

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

Accordingly, there are three prerequisites for interfering with this freedom. First, the interference must be provided by law. It must be set down clearly in formal legislation or in common law. Second, the interference must serve one of the purposes listed in BORO Article 16(3)(b) above. Third, the interference must be necessary for achieving the purpose. The interference should be proportionate to the purpose intended to achieve.

2. Freedom of assembly

The first sentence of Article 17 of the BORO, referring to Article 21 of the ICCPR, states that ‘[the] right of peaceful assembly shall be recognized.’ This right covers both organisation and participation in assemblies. ‘Assembly’ covers both public meetings and public processions in Hong Kong. However, only ‘peaceful’ assemblies are protected. ‘Peaceful’ means the absence of violence. Thus, riots are not protected. Civil disobedience, including sit-ins and picketing, may be peaceful and protected.

Likewise, the freedom of assembly is not absolute. Article 17 of the BORO stipulates:

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16 Nowak (n 4) 458.
17 Nowak (n 4) 460.
18 Nowak (n 4) 458.
19 Ng Kung Siu (n 3) 461A.
20 Nowak (n 4) 483.
21 Public Order Ordinance (POO) (Cap 245), s 2(1): ‘meeting’ means any gathering or assembly of persons for the purpose of the discussion of issues; ‘procession’ means a procession organised for a common purpose.
23 Ibid.
24 Sarah Joseph et al (n 22) [19.04]
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.

Therefore, there are three similar prerequisites for interfering with the freedom of assembly: prescribed by law, serve a legitimate purpose, and necessary in a democratic society. In *Leung Kwok Hung and Others v HKSAR*, the CFA held that restrictions on the right of peaceful assembly must fulfil the ‘prescribed by law requirement’, which equals the first prerequisite, and ‘the necessity requirement’, which includes the second and third perquisites.

II. **The ‘Life’ of a Hong Kong Demonstration**

Demonstrations vary in different places. It is vital to observe and understand the ‘life’ of a Hong Kong demonstration. The ‘life’ means what could happen before, during and after a typical demonstration. It can be separate chronologically to prior restraints, demonstrations in progress and on-site policing, and terminations of demonstrations and subsequent law enforcements. All phases involve interactions between demonstrators and the police.

A. **Prior restraints**

Organisers of demonstrations must fulfil a number of requirements under the Public Order Ordinance (POO). They have to notify the police before public events. Public events can only take place where the Commissioner of Police (CP) is notified and has not prohibited it. If the CP does not object to the event, he would issue a ‘letter of no objection’. The CP can impose conditions. If the organiser does not accept prohibitions or conditions imposed, he can appeal to the Appeal Board on Public Meetings and Public Procession.

B. **Demonstration in progress and on-site policing**

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26 Public Order Ordinance (POO) (Cap 245).
27 POO (n 26) s 2: The POO provides two type of public events, namely public meetings and public processions.
28 POO (n 26) ss 7, 13.
29 POO (n 26) ss 11, 15.
30 POO (n 26) s 16.
During the demonstration, the police may control the movements of demonstrators. They can vary the route and place of the public events. They often set up cordon lines to prevent demonstrators from entering certain areas. Protest zones known as ‘designated public activity areas’ (DPAA) are usually set up at the destination of demonstrations. Section 36 of the POO allows the CE to declare that certain area be a ‘closed area’. The police can control residents’ entry and exit.

Protestors may use some objects to facilitate their expression. These objects vary in size and nature. Their use may be restricted by the police. Spontaneous protests were sometimes held after the authorized demonstration, which may happen beyond intended routes and durations.

Demonstrations in Hong Kong are peaceful. Still, slight confrontations between demonstrators and the police are observed. The common form of force used by the police includes physical removal of demonstrators, use of plastic strings and handcuffs to arrest, and use of pepper spray. In some occasions, the police used pepper spray in large canisters.

C. Terminations of demonstrations and subsequent law enforcements

The police have the power to disperse unauthorized and unlawful public events. Protestors may be arrested and prosecuted. The common charges include assaulting a police officer and obstructing a police officer, organising or taking part in unlawful assemblies and disorderly in public place. On the other hand, protestors can complain against the police to the Complaints Against Police Office (CAPO) or to the Independent Police Complaints Council (IPCC).

31 POO (n 26) s 17(2)(a).
33 POO (n 26) ss 37, 38, 38A.
35 POO (n 26) s 17.
36 Police Force Ordinance (‘PFO’) (Cap 232) s 63; Offences against the Persons Ordinance (Cap 212) (OAPO) s 36(b).
37 OAPO (n 36) s 36(b).
38 POO (n 26) s 18(3).
III. **Wrongful Interference with the Freedom of Expression and Assembly during Demonstrations**

Every stage of a demonstration involves police control, which restricts protesters’ freedoms of expression and assembly. This section analyses the on-site policing to see whether they fulfil the constitutional requirements for restrictions and are legally justified. Two specific forms of on-site policing are discussed, namely the designation of DPAAs and restricted zones.

**A. The designation of DPAAs**

DPAAs are areas in which demonstrators can protest. Their designation can hinder demonstrators’ expressions if they are too small and too far away from the demonstration targets, or surrounded by huge physical barriers.

Locations of demonstrations decide whether such events are meaningful. In *Mayor of London v Hall*, the English Court of Appeal stated that the freedoms ‘[extend] to … the location where they wish to express and exchange their views.’\(^{39}\) In *Berladir and Others v Russia*, judges Vajic and Kovler stated that:

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\text{[The] Court has … reiterated that where the location of the assembly is crucial to the participants, an order to change it may constitute an interference with their freedom of assembly under Article 11 of the Convention} …^{40}\]

Sufficient proximity between protestors and their targets is necessary for protestors to convey their messages effectively. In *Harlan Laboratories UK Limited and Ors v Stop Huntingdon Animal Cruelty and Ors*, the Court held that the protest area located opposite to the targeted premise was appropriate as ‘it allows protestors to offer leaflets to those entering or leaving the premises’ and ‘enables the protest to be seen and heard by those entering or leaving the premises’.\(^{41}\) Also, the locations may bear essential symbolic meanings. In *Tabernacle v The Secretary of State for Defence*, Laws LJ stated that the location of demonstrations ‘may constitute the actual nature and quality of

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\(^{39}\) [2010] EWCA Civ 817 [37]. See also *Regina (Gallastegui) v Westminster City Council* [2013] EWCA Civ 28 [26].

\(^{40}\) *Berladir and Others v Russia* (App no 34202/06) ECHR 10 July 2012 [15].

\(^{41}\) [2012] EWHC 3408 (QB) [70].
the protest; it may have acquired a symbolic force inseparable from the protestors’ message; it may be the very witness of their beliefs’. 42

As DPAAs confines the location of demonstrations, it interferes with freedoms of expression and assembly, and must be prescribed by law, serve a legitimate purpose and be necessary in a democratic society to achieve the purpose. 43 DPAAs have been challenged mostly for failing the third requirement.

Human right restriction must be ‘necessary in a democratic society’. It means that restrictions must satisfy the proportionality test. 44 The proportionality test requires the court to balance the rights of demonstrators with the rights of others. 45 This balancing exercise is fact-sensitive. 46 When accessing the interest of the parties affected by demonstrations, a ‘pressing social need’ 47 or ‘sufficient state interests’ 48 must be established. Where the interests of demonstrators are considered, their manner of protest must be taken into account. 49

In Westminster City Council, the court, quoting the ECtHR in Bergens Tidende v Norway, 50 stated that ‘in view of the importance of the right to freedom of expression, restrictions on it have to be “established convincingly”’. 51 In Director of Public Prosecutions v Jones, the defendants protested on the highway and were convicted of taking part in a trespassory assembly. 52 On appeal, Lord Irvine stated that the ‘starting-point is that assembly on the highway will not necessarily be unlawful’. 53 In Yeung May Wan and Ors v HKSAR, Bokhary PJ also stated that ‘a court must always

42 [2009] EWCA Civ 23 [37].
43 Ibid [28]; BORO (n 6) Arts 16, 17; ICCPR (n 9) Arts 19, 21.
44 Westminster City Council (n 39) [28].
45 Harlan Laboratories (n 41) [67].
47 Westminster City Council (n 39) [28]; Harlan Laboratories (n 41) [66]; City of London Corpn v Samede [2012] EWHC 34 (QB) [99].
48 American Civil Liberties Union of Colorado and Ors v City and County of Denver 569 F Supp 2d 1142 (6 August 2008).
50 (2000) 31 EHRR 430 [48].
51 Westminster City Council (n 39) [28] (emphasis added).
52 [1999] 2 AC 240 (HL).
53 Ibid 259E.
remember that preservation of the freedom in full measure defines reasonableness and is not merely a factor in deciding what is reasonable.’ These cases emphasize that any limitations have to be forcefully justified. A restriction would be proportionate only if it is the ‘least intrusive’ means needed to achieve the aim. In Ward v Rock Against Racism, the US Supreme Court also held that restrictions on the freedoms is reasonable only when they are narrowly tailored and leave open ample alternative channels of expression.

A number of cases illustrate how a correct balance is reached. In Harlan Laboratories mentioned above, the plaintiff sued protestors for nuisance. Evidence shows that the protestors’ action may cause injury to themselves or the targets. Albeit the Court allowed a restriction on the protest by way of protest areas, it ensured the protest areas are proximate to the entrance of the plaintiff’s premise so there would be sufficient channels for the defendants to express their messages. In Harrods Limited and Ors v Brendan McNally, the defendants’ protests caused serious obstructions to events held in the public area belonged to the plaintiffs. The Court allowed the restrictions of the protests to certain areas, but ensures that the defendants’ messages can be effectively communicated. It preserved the defendants’ access to the pedestrianized area next to the busiest entrance to the store.

In Hong Kong, locations define the meaningfulness of demonstrations. For instance, the Liaison Office of the Central People’s Government (LOCPG) is the representative of the Central Government of the PRC. Protesting in the front gate bears a symbolic meaning of protesting against Central Government policies. However, a huge planter occupied the area outside the gate, which creates huge difficulties for demonstrators to express their views effectively. The police have refused to expend DPAAs to Connaught Road West for two reasons. First, the road is with heavy traffic, and setting up a DPAA on it ‘may cause danger to demonstrators, other road users and the

54 Yeung May Wan and Ors v HKSAR (2005) 8 HKCFAR 137, 144 (Bokhary PJ).
55 Samede (n 46) [99].
57 Harlan Laboratories (n 41).
59 Ibid [32].
60 Press Release – LCQ20 (n 32).
61 Ibid.
Police."\(^{62}\) Second, a DPAA would affect the daily lives of people living in the area, and affect access of emergency vehicles. \(^{63}\) Indeed, these are legitimate purposes for human rights restrictions. However, the police failed to correctly balance such interests with protestors’ rights.

According to *Samede*, the police should consider the vitality of the location to protestors, the duration of the protest, and the extent of the actual impact to the other’s rights.\(^{64}\) In *Jones*, 21 people gathered and protested on a highway for less than an hour. At issue was whether this conduct constituted a trespassory assembly.\(^{65}\) The House of Lords held that a highway is a public place and can be used for any reasonable purposes, \(^{66}\) which include holding a peaceful assembly for a reasonable period.\(^{67}\) It considered the duration of the protest, and the size and nature of the highway to analyse the extent of the traffic obstruction, and concluded that the protest was reasonable and quashed the conviction.\(^{68}\)

Similarly, demonstrators in Hong Kong have the right to use any public roads to hold peaceful assemblies which do not cause unreasonable obstruction. The law does not require ‘zero obstruction’. Nonetheless, the police have refused to set DPAAAs on Connaught Road West to avoid the slightest impact on the traffic. They overlooked the demonstrators’ rights.

To balance parties’ interest, the police should facilitate the protest but avoid unreasonable obstructions. This can be achieved by closing down Connaught Road West for a limited period of time and taking necessary traffic control measures. Past experiences show that protests at the LOCPG generally last for less than an hour.\(^{69}\) The police can negotiate with the organiser. If the organiser agrees to limit the protests to a short duration, the police can set up a DPAA on Connaught

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62 Ibid.
63 Ibid.
64 *Samede* (n 49).
65 *Jones* (n 52).
66 Ibid 254G (Lord Irvine of Lairg LC).
67 Ibid 280H (Lord Clyde).
68 Ibid 257F (Lord Irvine of Lairg LC).
69 See, for example, ‘支聯會中聯辦示威求釋劉曉波’ (Hong Kong Alliance in Support of Patriotic Democratic Movements of China protested outside Liaison Office to request the release of Mr Liu Xiaobo) *Sing Tao Daily* (Hong Kong 2 January 2011): the demonstration outside the Liaison Office lasted for about 20 minutes.
Road West in return. Impacts on others’ rights would be temporary and limited. These measures also eliminate safety concerns as there would be no traffic during the demonstrations.

Demonstrations are meaningful only if they arouse the targets’ attention. Thus, proximity and absence of huge barriers between protestors and their targets are vital. In Harrods Ltd, Harlan Laboratories and Lee v Katz, the UK and US courts have emphasized that protestors must at least be seen and heard. However, DPAAs are often located a long distance away from the target. Sometimes, the DPAAs are even surrounded by huge barriers.

For example, in August 2011, the then Vice Premier of the People’s Republic of China (PRC), Mr Li Keqiang, visited Hong Kong. Li stayed in Grand Hyatt Hotel in Wan Chai and visited the University of Hong Kong (HKU). The Police designated ‘core security zones’ (CSZs) at the locations. Public entry was prohibited. DPAAs were set up outside these zones. After its investigation, the IPCC concluded that the DPAAs were too far away and protestors therein could not even see Li’s motorcade passing through. In 2012, Mr Hu Jintao, the then President of the PRC, visited Hong Kong and went to the Hong Kong Convention and Exhibition Centre (HKCEC) at Wan Chai. Protestors were only allowed to carry out their activities in a small DPAA designated outside, which was surrounded by two-meter-high water barriers.

The police justified these measures with their duty to protect political dignitaries. They claimed that the correct balance was struck between demonstrators’ rights and security concerns. Albeit the safety of political dignitaries is a ‘significant government interest’, the human right

70 Harrods Ltd (n 58).
71 Harlan Laboratories (n 41).
73 IPCC, ‘Final Report on Complaint Cases Arising from the Visit by the Vice-Premier Mr Li Keqiang’ (December 2012) [1.1].
74 Final Report (n 73) [3.15].
76 The Hong Kong Police Force, ‘Legislative Council Panel on Security – Police Review of Policing Arrangements during Visits of Political Dignitaries to Hong Kong’ LC Paper No CB(2)921/11-12(07) [98].
77 Citizens for Peace in Space v City of Colorado Springs 477 F 3d 1212, 1221 (10th Cir 2007).
restrictions were disproportionate as they failed to fulfil the requirements set out in Ward.\(^78\) They did not ‘[leave] open ample alternative channels of expression’ and were not ‘narrowly tailored’.\(^79\)

In Ward, the government sought to limit the volume and location of band shows with a guideline. The constitutionality of the guideline was challenged by a music event sponsor. The Court considered the restriction proportionate as the remaining avenues of communication were adequate.\(^80\) Thus, the designation of DPAAs must retain an adequate channel of expressions. DPAAs which are completely screened form the targets’ vision and hearing can never be an adequate channel.

Interference with demonstration freedoms must be narrowly tailored. In other words, the ‘least intrusive’ means must be used.\(^81\) The police have the burden to justify the highly intrusive restrictions during Li and Hu’s visits.\(^82\) They must show that the protests posed substantive and serious threats to the political dignitaries, therefore screening away or ‘caging’ protestors are necessary measures. Yet, the police stated ‘[the protestors’] presence in large number could have provided a target, cover or chaos for those with harmful intent.’\(^83\) The ‘potential threats’ were only speculative and is inadequate to justify their measures. Besides, less intrusive measures could achieve the same purpose. The police can conduct body searches on demonstrators. Having removed any potentially dangerous objects, enormous distances and barriers between protestors and political dignitaries are unnecessary.

\(^{78}\) Ward (n 56).

\(^{79}\) See part (C)(1)(b): It is also argued that the restrictions were not prescribed by law and were not content-neutral.

\(^{80}\) Ward (n 56) 802.

\(^{81}\) Samele (n 46) [99].

\(^{82}\) Tatár and Fáber v Hungary (App no 26005/08) ECHR 12 June 2012 [35].

\(^{83}\) Police Review of Policing Arrangements (n 76) [98] (emphasis added).
B. The designation of restricted zones

This sections concerns cordon lines, CSZs, closed areas and other restricted areas designated by the police, where entry of members of the public are prohibited. The analysis of DPAAs focuses on the requirement that human right restrictions must be ‘necessary in a democratic society’. The following discussion focuses on the conditions that restrictions must be ‘prescribed by law’ and ‘content-neutral’.

As mentioned above, the CE can designate ‘closed areas’.\textsuperscript{84} He must make a formal declaration,\textsuperscript{85} which must be published in the Gazette as soon as may be reasonably practicable.\textsuperscript{86} Then, the police have the power to control the entry and exit of the public.\textsuperscript{87} However, this power has only been applied to the Hong Kong Ministerial Conference of the World Trade Organisation in December 2005,\textsuperscript{88} but no other occasions. As mentioned, CSZs were designated around Li. Protestors were not allowed to demonstrate in these zones during the whole 24-hour period of the 3-day visit, whether or not Li was present in the vicinity.\textsuperscript{89} These CSZs were similar to the closed area during the WTO Conference in terms of duration, location and coverage. However, the CE and the police did not gazette the arrangement in accordance with Section 36 of the POO. The arrangement was criticized widely for lacking a legal basis.\textsuperscript{90}

The police justify the restricted zones with the same legal basis regardless of their sizes.\textsuperscript{91} They argue that they are authorised by Section 10 of the Police Force Ordinance (PFO) and Section 39(1) of the Interpretation and General Clauses Ordinance (IGCO).\textsuperscript{92} The former broadly provides

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84 POO (n 26) s 36(1).
85 POO (n 26) s 36(1).
86 POO (n 26) s 36(2).
87 POO (n 26) ss 36(3), 37.
88 ‘Closed Area (Hong Kong Ministerial Conference of World Trade Organization) Order’ (3 October 2005) LS No 2 to Gazette No 40/2005.
89 Final Report (n 73) [3.10].
92 Interpretation and General Clauses Ordinance (IGCO) (Cap 1).

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the ‘Duties of police force’. The latter provides that ‘[where] any Ordinance confers any power or imposes any duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires.’

Section 10 may justify the designation of small and temporary restricted zones but not the formation of massive CSZs. A restriction is not prescribed by law if an enacted law, on its face, does not extend to the situation at issue. In *Karademirci and Others v Turkey*, the applicant protested and read out a statement to the press. He was prosecuted under the Turkish Associations Act, which requires advance registration of an association’s ‘leaflets, written statements or similar publications’ to the public prosecutor’s office. The ECtHR held that the applicant’s statement does not fall under this wide term as such application of the Act was unforeseeable. Similarly, whether the police form restricted zones based on Section 10 of the PFO depends on whether it is foreseeable that the Section extends to confer that power.

In *Irwin Toy v Quebec (Attorney-General)*, the Canadian Supreme Court opined that a legal standard can never specify all instances in which it applies. The same view was adopted by the ECtHR. Admittedly, it is impossible to lay down every police power in the PFO. Also, the police should retain some flexibility to exercise their powers. For example, cordon lines are usually temporarily formed to cope with sudden situations. Their impact on human rights are limited. The application of Section 10 as legal basis for forming cordon lines is foreseeable.

However, the application of Section 10 to huge restricted zones is unforeseeable. As a rule of statutory interpretation, special provisions override general ones. Section 36 of POO is a more specific provision. It not only provides a power to designate closed areas, but also stipulates the

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93 IGCO (n 92) s 39(1).
95 *Karademirci and Others v Turkey* (Applications nos 37096/97 and 37101/97) ECHR (25 January 2005).
96 Law no 2908 (6 October 1983) (Turkey), ss 44, 82.
97 *Karademirci* (n 95) [42]-[43].
98 [1989] 1 SCR 927 [64].
99 *Karademirci* (n 95) [39].
necessary procedures. It is the legislators’ intention that, as a sizable closed area can greatly affect the public’s rights, the power can only be exercised by the highest authority in Hong Kong, the CE, and that the public must be notified through the Gazette. Thus, the designation of CSZs on the basis of Section 10 of the PFO was not foreseeable.

Moreover, human rights restrictions are reasonable only if they are content-neutral. An interference is content-neutral if it ‘serves purposes unrelated to the content of expression’. However, some Operational Orders to the frontline police officers required them ‘to take action where necessary to pre-empt embarrassment … to the VP … and to ensure … the events attended by the VP be conducted in a smooth and dignified manner.’ The Orders targeted the contents of the expressions. They were not content-neutral and did not serve a legitimate purpose.

IV. THE USE OF FORCE

In Hong Kong, protests are peaceful when compared to those in other countries. Casualties rarely happen. Common forms of force used are limited to pepper spray, handcuffs and physical removal. These forms, albeit belongs to a low level of force, interference with protestors’ rights and should not be used arbitrarily. However, the police has been criticised for the low level of tolerance, the lack of warnings before using force and the introduction of large canister of pepper spray. The fatal criticism is the police’s refusal to disclose the internal guidelines on the use of force.

The police and the Security Bureau (SB) have been requested to explain their principles of the use of force. They stated their general principle is to use minimum force, to give warnings before using force and to give protestors opportunities to obey orders. They claimed that they have internal safety regulations and guidelines, and that frontline officers are required to undergo suitable

101 Ward (56) 791.
102 Ibid.
103 Final report (n 73) [3.5] (emphasis added).
104 Save from the demonstration during the 2005 WTO Conference. The police deployed rubber bullets and water guns.
105 OSCE Office for Democratic Institutions and Human Rights, Guidelines on Freedom of Peaceful Assembly (Poland 2007) 141.
106 LC Paper No CB(2)1648/12-13(01).
trainings. They further stated that force is only use when protestors become aggressive. However, they refuse to disclose their ‘internal guidelines’ on the ground that the information concerns details of police operations. This practice does not live up to the international standard.

International standard requires use of force policies to be publicly accessible. The accessibility of use of force guidelines is vital for two purposes. First, it allows the public to know the threshold of the use of force and regulate their conducts accordingly. Second, the accessibility puts the use of force standard and power under the public scrutiny. In Leonidis v Greece, the ECtHR opined that clear guidelines concerning the use of force in peacetime is essential for the state authority to act responsibly. In the US, it has long been the practice of the police to disclose their use of force continuum. The Hong Kong police should do the same.

CONCLUSION

Although policing of demonstrations is necessary to ensure safety, order and a correct balance between interests, it should meet international human rights standards. Excessive policing hinder expression and violate human rights. Restrictions on demonstration rights must be prescribed by law, serve legitimate purposes and be necessary in a democratic society. Yet, common demonstration policing approaches in Hong Kong fall short of these requirements.

Some policing methods fail the prescribed by law requirement as the police interpret laws arbitrarily. Examples include the designation of huge restricted areas. Some policing conducts do not serve legitimate purposes. For instance, the Operational Order to the frontline officers during Li

108 Ibid [7].
110 The Police General Orders available to the public do not include the chapter on the use of force.
111 Letter from Mrs Millie Ng, for Secretary for Security, to Betty Ma, Clerk to Legislative Council Panel on Security (19 July 2013) LC Paper No CB(2)1648/12-13(01).
112 Guidelines on Freedom of Peaceful Assembly (n 105).
114 Leonidis v Greece (Application no 43326/05) ECHR (5 June 2009).
115 See, for example, the use of force policy of the Los Angeles County Sheriff’s Department <http://shq.lasdnews.net/content/uoa/EPC/force-policy.pdf> accessed 4 April 2014.
Keqiang’s visit was not content-neutral. Some policing methods also fail the necessity requirements as they are not the least intrusive. The designation of DPAAs which are often too far away from demonstration targets.

The police claim that they have evaluations after each demonstration. Yet, results of the evaluations are never disclosed. The non-disclosure issue also happens to their use of force. Protestors have complaint that the police deploy pepper spray randomly, and have requested disclosure of relevant guidelines. Regrettably, the request is refused. This is inconsistent with the international practices.

To improve the situation, the police should conduct a full review on their methodology and critically examine them under international standards. Also, the IPCC should take a more active role. The HRC, in its concluding observations on the third periodic report of Hong Kong, stated that

Hong Kong, China should take necessary measures to establish a fully independent mechanism mandated to conduct independent, proper and effective investigation into complaints about the inappropriate use of force or other abuse of power by the police and empowered to formulate binding decisions in respect of investigation conducted and findings regarding such complaints.116

The IPCC should be given real investigatory power to review police internal documents and provide binding judgments. Moreover, the police should change their attitude and be more willing to listen to the public. They should disclose their use of force guidelines. They should also engage with third parties like NGOs to understand their expectations and suggestions. Only by truly understanding what protestors and the public expect, can the police strike a correct balance between different parties’ interests when policing demonstrations.

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116 Human Rights Committee, ‘Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th section’ (29 April 2013) CCPR/C/CHN-HKG/CO/3.