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Gang Up with the Right Gangs – A Comparative Study on the Law of Unlawful Assembly in Hong Kong and Japan

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Abstract

Freedom of assembly is guaranteed in most if not all democracies, but it is not without limit and regulation under their public order laws. Hong Kong and Japan are two democratic regimes in East Asia with sound rule of law despite few studies have been conducted to compare the public order offences of the two jurisdictions. By studying the law of unlawful assembly and law of disturbance in Hong Kong and Japan respectively, this article aims at discovering the similarities and differences in criminalizing assemblies in the two jurisdictions. Issues on comparation of Hong Kong and Japanese public order offences, significance of the law of unlawful assemblies, and possible justification of differences in Hong Kong and Japanese jurisdiction on unlawful assembly will be discussed. This article further raises the concern of the law enforcement on unlawful assembly and its relationship with the severity of the offence itself. A conclusion is drawn that Japan might have a wider coverage of conduct constituting unlawful assembly but the

recent social and political movement in Hong Kong may have significant influence on the deterring effect imposed by the latter's jurisprudence.

Keywords: *Hong Kong, Japan, unlawful assembly, riot, public order ordinance, freedom of assembly, disturbance*

1. Introduction

"Liberate Hong Kong, revolution of our times" is a slogan chanted by protestors throughout the streets of Hong Kong during the 2019-2020 Anti-Extradition Law Amendment Bill Movement ("the 2019 Movement"). With this slogan now being declared by the Hong Kong government as connoting "Hong Kong independence", or "separating the Hong Kong Special Administrative Region ("HKSAR") from the People's Republic of China, altering the legal status of the HKSAR, or subverting the state power", the 2019 Movement has apparently become less vigorous on the streets. (Government of the Hong Kong Special Administrative Region, 2nd July 2020)

The aftermath of the 2019 Movement subsists. As of the first quarter of 2021, there were 10,250 arrests and 2,500 prosecutions linked to the 2019 Movement (*Hong Kong Free Press*, 17th May 2021). Some of the cases have been adjudicated while some are pending for trials. Nevertheless, the jurisprudence of offences relating to public order offences in Hong Kong has been vigorously developing. Hong Kong courts have also been taking references from other common law jurisdictions in adjudicating cases due to its long-term tradition.

However, Hong Kong lacks common law companions in East Asia and her neighboring countries are mostly civil law jurisdictions. Nevertheless, countries/regions such as Japan, South Korea and Taiwan have undergone vigorous democratic social movements and developed

unique jurisprudence in public order offences. Perhaps it is a high time for a comparative analysis to bring closer common law and civil law jurisprudence in East Asia. This paper therefore suggests by looking into public order offences (with a focus on unlawful assembly ("UA")) offered by Hong Kong and Japan, citizens in East Asia can benefit from understanding their Asian counterparts in the struggles for democracy.

This paper will first be structured with four legal issues to be answered:

1) What are the comparative public order offences between Hong Kong and Japan?
2) What is the significance in choosing unlawful assembly as the comparative offence?
3) What are the similarities and differences between Hong Kong and Japan in unlawful assembly?
4) Is there any justification in the differences identified on Issue 3?

At the end by answering these four legal issues, this paper will suggest that the strictness of the offence of UA depends on the actual enforcement by the law enforcement agency. The exercise in comparing the laws on UA can also shed light on future research in the broader question on comparing the whole legal regime of public order offences between Japan and Hong Kong (and common law versus civil law jurisdiction).

2. Issue 1: What Are the Comparative Public Order Offences between Hong Kong and Japan?

2.1. Freedom of Assembly as a Universal Right in Democratic Society

It is suggested that the right to assembly has its roots from traditional petitions made by individuals to demonstrate grievances to the

government, and it is a right essential to the practice and realisation of democratic governance and popular sovereignty (Chang *et al.*, 2014). This is also the case of Hong Kong and Japan being two democratic societies in East Asia.[1]

Article 21 of the International Covenant on Civil and Political Rights ("ICCPR") guarantees the right of assembly, which is put into effect in Hong Kong through article 39 of the of the Hong Kong Special Administrative Region ("BL") and article 17 of the Hong Kong Bill of Rights under the Hong Kong Bill of Rights Ordinance (Cap. 383). Article 27 of the BL also protects the freedom of assembly, of procession and of demonstration of Hong Kong residents. Similarly, the right of assembly is enshrined under article 21 of the 1947 Constitution of Japan. While this paper does not intend to bring into further discussion on the constitutionality of freedom of assembly, the above constitutional regimes do indicate that both Hong Kong and Japan share a notion of protecting freedom of assembly and it is worth to understand how it is being practiced (and being protected) under their legal systems.

2.2. Unlimited Freedom: Striking Balance between Public Order and Other Constitutional Rights

It is a cliché to state that the freedom of assembly is not unlimited, and balance must be struck with other interests and constitutional rights. Article 21 of the ICCPR did provide a "helpful guidance" requiring that restriction must be prescribed by law and to protect rights or interests that are necessary in a democratic society (Chang *et al.*, 2014: 742).

The Hong Kong Court of Final Appeal ("HKCFA") has accordingly in *Leung Kwok Hung v HKSAR* [2005]8 HKCFAR 229 at [16] ruled that freedom of peaceful assembly is a fundamental constitutional right. Nonetheless such right can be restricted when the two requirements ("prescribed by law" and "necessity requirement") are satisfied.[2]

Taking a similar but different approach,[3] the Supreme Court of Japan ("SCJ") in *Japan v Teramae* 1973 (A) 910 upheld that Article 3(3) of the Ordinance for Parading in a Group and Demonstrations (Ordinance of Tokushima City No.3 of 1952), which stipulates that the matter of "to maintain traffic order" as a matter to be observed for a parade does not contain an ambiguity that would lead to a violation of the Constitution of Japan. Therefore, both Hong Kong and Japan recognize that the right of assembly can be restricted legally. In the following sections, laws that function as such restriction will be analyzed.

2.3. Public Order Law in Hong Kong and Japan

The Public Order Ordinance (Cap. 245) ("POO") is the prominent statutory regime that regulates public order-related offences in Hong Kong. It codified numerous of common law offences, imposed licensing regimes and notification requirements of procession and meetings in public. To name several offences under POO which are often contested in Hong Kong courts, they include: behaving disorderly in public places,[4] prohibition of offensive weapons at public meetings and processions,[5] UA,[6] riot,[7] fighting in public[8] etc.

In Japan, the Penal Code ("JPC") stipulates several offences seemingly designed for public order offences: insurrection,[9] disturbance and failure to disperse,[10] UA with weapons[11] etc. Besides the JPC, the law enforcement agencies in Japan often utilize various statutes to prosecute cases involving assemblies. Similar to the said *Teramae* case, traffic-related statutes are examples where protestors often being charged with. Article 77 of the Road Traffic Act (as also the statute in concern in *Teramae*)[12] is a frequently cited statute to regulate protestors who protests in public road and violate the road use, i.e. to undertake an

activity that would have a serious effect on public traffic. Another statutory example is the Subversive Activities Prevention Act No. 240 of 21st July 1952 ("SAPA"). The SAPA is rather political and in fact Article 40 of the SAPA criminalized a person who has prepared, plotted, or induced crimes (such as disturbance under article 106 of JPC) with the intent to promote, support or oppose any political doctrine or policy.

On the other hand, there are numerous local legislations by prefectures. For example, both Tokyo and Niigata have local legislations in public safety and lay down the structure for regulating protests in specific place and time if necessary.[13]

Giving the limitation of this paper, the focus will be on the offence related to UA (as explained below) but nevertheless the above examples in Japan in regulating public order activities (both national and local) are important. Further research in the future may be helpful in understanding the complete jurisprudence in Japan on the matter (and when undertaking comparative analyses in other jurisdictions).

3. Issue 2: What is the Significance in Choosing Unlawful Assembly as the Comparative Offence?

3.1. The Uniqueness of Right of Assembly

The right to protest is essential to democracy. Sherr (1989) indicated that under the democratic theory, in a Western democracy the view of populace is observed and activated via the ballot box (Sherr, 1989: 9). Nevertheless, the right of protest is preserved for minority views to be taken into account, especially when the mass media are controlled by or subservient to those having power in society (*ibid.*: 10). In common law tradition, it is also the case that individual may do anything which is not proscribed by state or the common law; it is recognized the right of assembly is nothing more than a view seen by the court as individual

liberty (Marston and Tain, 1995: 110-111).[14] There has been a long history for people using streets and public places as venues to air grievances and complaints (Smith, 1987: 130). The policing of processions and demonstrations is also heavily interrelated to modern police resources (*ibid.*: 10). While maintaining good public order is important in democratic society at the same time, concern has arisen as to whether modern public order law "tilt the balance too far in favor of a nuisance-free, orderly society at the expense of the freedoms of expression and association" (Card, 2000: 6). Card is also concerned that public order law may sometime intrude too far into possibly criminalizing the lifestyle of people to assert their rights to expression and association (*ibid.*).

As mentioned in previous sections, the right of expression is not limited, and public order laws have developed into striking the balance between these fundamental rights in a democratic society and public order. Public order law is not limited to those related to UA; other offences such as possession of offensive weapon and behaving in a disorderly conduct in public also play a role. Indeed, it is still the law on UA that is concerned with the freedom of speech and the freedom of assembly in the most direct way under the public order jurisprudence. The law on UA has been developing in a sense as to ensure views (majority or minority) not being undermined in the society. In Japan, for instance, one of the first modern trial in Japan concerning assembly was the riot in the Bonin Island (Ogasawara Islands) in 1885, 18 years since the Meiji Restoration. In the tiny, isolated Bonin Island, it was alleged that a riot occurred and eight was convicted in the trial. The case was later appealed to the then Supreme Court of Judicature of Japan (大審院), and with an overturing ruling of all defendants being acquitted at the Felony Court of Yokohama (横浜重罪裁判所) after retrial (Tezuka, 1988). It was said that this case reflected the overreacted

report made by the local officials, which resulted in the law enforcement agency in Tokyo acted without appropriate information and led to wrongful conviction (*ibid.*: 39). Nevertheless, this case demonstrates that right of assembly and its related offences have been implanted in the Japanese jurisprudence soon after Japan's modernization.

The law of UA (or law of disturbance in Japan) also interrelates to the historical development of social context of a jurisdiction. It is suggested that the law of disturbance of Japan could be traced back to the Tokugawa period to suppress commoners, and it was inherited as one of the codified criminal regulations after Meiji Restoration (Hagiwara, 2001: 86-87). Post-war assemblies and protests such as the Hanshin Education Incident (1948) also led to the establishment of localized public order laws (e.g. the Osaka Public Safety Ordinance 1948) (Ghadimi, 2018: 277). In colonial Hong Kong, during the 1967 Leftist Riot, the British colonial government passed the Emergency (Prevention of Intimidation) regulations of 1967 under the power of the Emergency Regulations Ordinance (Cap. 241), the latter being still in force in Hong Kong today, in order to regulate demonstration if any one participant acted to cause alarm (Klein, 1997: 41-44).

Therefore, the law in regulating assemblies and in drawing a fine line between peaceful demonstration and UA (or disturbance) centers around the issue in balancing the exercise of freedom of assembly and the maintenance of public order in the course of political and societal development. The law of UA arguably also sheds light on the bigger issues on reflecting the nature of public order offences and facilitates cross-jurisdictional comparison exercises (e.g. Hong Kong vs Japan).

4. Issue 3: What are the Similarities and Differences between Hong Kong and Japan in Unlawful Assembly?

4.1. The Elements on the Offence of Unlawful Assembly

Section 18(1) of POO codified the common law offence on UA in Hong Kong as:

> "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."[15]

In the recent HKCFA combined judgement of *HKSAR v Lo Kin Man* and *HKSAR v Tong Wai Hung*, FACC No. 6 and 7, [2021]HKCFA 37 ("*HKCFA Lo and Tong* case"), the HKCFA further clarified that the law on UA has to take into account of Section 18(2) and 18(3) as shown below.

Article 106 of JPC defined the offense of disturbance as:

> "A person who assembles in a crowd and commits an act of assault or intimidation thereby commits the crime of disturbance…"[16]

For comparison, the elements of UA in Hong Kong and Japan are listed below and will be discussed respectively. The statute of JPC is shorter in length compared to that of the POO – some of the elements present in the section 18 of the POO are missing in the text of Article 106 of the JPC.

Section 18 of POO	*Article 106 of Penal Code*
[1] 3 or more persons	**A person**
[2] Assembled together	**who assembles in a crowd**
[3] Conduct themselves in a disorderly, intimidating, insulting or provocative manner	**commits an act of assault or intimidation**
[4] Intended or likely to cause	**?**
[4] any person reasonably fear	**?**
- the persons so assembled will commit a breach of the peace; or - the persons so assembled will by such conduct (i.e. disorderly, intimidating, insulting or provocative manner) provoke other persons to commit a breach of the peace	**?**
[5] Then these people are in an unlawful assembly [section 18(1)]	**thereby the person commits the crime of disturbance**
[6] It is immaterial that the original assembly was lawful if being assembled, they conduct themselves in such a manner as aforesaid. [section 18(2)]	**?**
[7] 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 ... [section 18(3)]	**?**

4.1.1. Number of people participating

In *HKSAR v Leung Tin Kei* [2020]1 HKLRD 263, [2018] HKCFI 2715 at [78], the Court of First Instance ("HKCFI") provided jury direction on the elements of UA – there shall be "at the time and place specified in the charge, the defendant and 2 or more others person assembled together".[17]

In contrast, the JPC obviously did not set a minimal number of people assembling together. So long as "a" person assembles in a crowd, he/she will satisfy the number requirement of the offence.

4.1.2. Assembling: the corporate nature

On its face, the wordings "assembled together" in the POO shared the same if not similar meaning with that "assembles in a crowd" with the JPC. Perhaps the issue turns on the meaning of "assemble". Neither the POO nor the JPC explained the term "assemble" – case law nevertheless provides some insights on this concept.

In *Secretary for Justice v Leung Kwok Wah* [2012]5 HKLRD 556 at [17], Lam JA indicated that there must be a requirement of joint responsibility. Lam JA explained this as the "corporate nature" of the offence of UA:

> "18. In other words, the unlawful assembly is made up of those conducting themselves in the prescribed manner. If there was only one person out of those assembled together who conducted himself in the prescribed manner, he could not be guilty of this offence.
>
> 19. Further, if more than three persons amongst those assembled together conducted themselves in the prescribed manner, it is still necessary to consider whether in so conducting themselves they could

be described as acting as an assembly. The sub-section provides for this consideration when it stipulates that these people "are an unlawful assembly". This view is reinforced by the third ingredient (the so-called breach of the peace ingredient, as elaborated below) of the offence. In one possible limb of this ingredient, the question that has to be asked is whether the conduct of the defendants is "likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace". Hence, the conduct of the defendants had to be assessed together to see whether this criterion can be satisfied. There must be a sufficient nexus between the conduct of these defendants to justify having them considered together. And the fear required is that such persons so assembled, viz acting together, will commit a breach of the peace.

20. I will call this the corporate nature of the offence under s.18. This corporate nature is one of the distinguishing features between this offence and the offence under s.17B of the POO.

21. Thus, if three persons in a lawful assembly committed acts of the prescribed nature at different parts of the place of assembly for different purposes, sparking off different incidents, involving and affecting an entirely different mix of persons, there would not be a sufficient nexus to turn these independent acts into an unlawful assembly of those three persons. If the event takes place at a public place, they may each be guilty of an offence under s.17B. But these would be separate offences, and the fact that they have been in the same lawful assembly prior to their respective commission of the s.17B offences would not, without the necessary nexus, turn those offences into one single offence of unlawful assembly under s.18.

> 22. This was highlighted by James LJ in *R v Jones* (1974) 59 Cr App R 120, 127:
>
> > 'The ingredients of the offence [of unlawful assembly under the common law] are (i) the *actus reus* of being or coming together — the assembly, and (ii) the *mens rea* involved in the intention of fulfilling a common purpose in such a manner as to endanger the public peace. Those ingredients have to be co-existent.'
>
> This was said in respect of the common law offence. In the context of an offence under s.18, there is a need to adjust the *mens rea* aspect to take account of the objective limb of the third ingredient discussed below. However, I consider that the requirement of having a common purpose in acting in the statutorily prescribed manner remains good law in dealing with a charge under s.18."[18]

In other words, Hong Kong court decided that a peaceful demonstrator will not become a criminal because of the unlawful act performed by other people in the group unless there is a proof of joint purpose (or corporate nature of the conduct of the accused). For instance, in *Leung Tin Kei* [2020]1 HKLRD 263, [2018] HKCFI 2715 at [78], the court indicate the purpose was that the defendant and those people assembling together at the material time was to obstruct police officers. In *HKCFA Lo and Tong* case, the HKCFA further clarified the law on common purpose at [43]-[46], suggested that the corporate nature of the offence entailed proof of a common purpose which the HKCFA suggested shall now be called "participatory intent". Further, at [11] the Court suggested that the *actus reus* is "taking part" which is the offence-creating provision. The Court explained "taking part" and "participatory intent" as follows:

"13. What then constitutes "taking part" in the unlawful assembly? What acts must the defendant perform? The sections do not spell out the meaning of those words. As a matter of textual analysis, it is implicit that if the defendant is one of the constituent offenders whose conduct falls within [3] and [4] he or she would "take part" since it is by such acts that the unlawful assembly is established, being of the essence of the offence. And if the defendant was not among the constituent offenders, but joined in and similarly did acts prohibited by [3] and [4], he or she would also be found to have "taken part".

14. However, the offence is not confined to such conduct. As a matter of language, "taking part" is a broad expression. In our view, those words also embrace conduct which does not itself fall within [3] and [4] but which involves the defendant facilitating, assisting or encouraging the performance of such conduct by others participating in the assembly. Such conduct would traditionally give rise to accessorial liability but, by offering such facilitation, assistance or encouragement, the defendant acts in furtherance of the prohibited conduct and may thus also be regarded as "taking part" in the unlawful assembly. In so doing, he or she may attract liability either as a principal offender under section 18 or an aider and abettor.

15. An important feature which emerges from the statutory language is that unlawful assembly is what might be called a "participatory offence". Thus, the offence requires the constituent offenders who are "assembled together" to "conduct themselves" in the prohibited manner so that the intended or likely fear of a breach of the peace is fear of what "the persons so assembled" will do. Element [6] draws the line between lawful and unlawful assemblies by reference to persons who "being assembled" engage in the prohibited conduct.

> The offence is committed by someone "taking part" in the unlawful assembly.
>
> 16. The defendant must therefore be shown not merely to have been engaging in disorderly conduct alone, but to have acted as part of an assembly with others who were also participants. The offence is "participatory" in that sense. Such participation is a requirement recognised by Lam JA (as Lam PJ then was) in *SJ v Leung Kwok Wah*, holding that the defendant's conduct has to be assessed to see if a sufficient nexus with other participants exists to justify regarding them as acting together. His Lordship held that their conduct has to justify the inference that they had what he called "a common purpose in acting in the statutorily prescribed manner"; i.e., a shared objective of engaging in the "prohibited conduct" forming elements [3] and [4].
>
> 17. The defendant must accordingly intend to take part in, that is, become part of, the unlawful assembly, being aware of the related conduct of other participants and intending, while assembled together with them, to engage in or act in furtherance of the prohibited conduct. The defendant must, in other words, have what we will call a "participatory intent"." (Original emphasis)

Although not expressly stated, the HKCFA at [17] arguably further distinguished "assembly together" and "taking part" as two different concepts. The former being probably physically assembling together (though not explained clearly in the judgment) and the latter required an extra step of participatory intent after the offender being aware of the conduct of other participants. Nevertheless, it is clear that the HKCFA emphasized that UA is a participatory offence in which the offender has to have knowledge as to other participants' conduct and intend to engage

in or act in further of the prohibited conduct together. How will the HKCFA suggest "participatory intent" be applied when deciding that one is assembling with others and taking part remains to be seen in future cases.

The concept of "joint purpose" (共同意思) can also be found under Japanese jurisprudence. However, the concept is less clear compared to that under Hong Kong law. Scholar suggested that the term "joint purpose" has been developed with multiple meanings with uncertainties and ambiguities (Masui, 2009: 2-3). "Joint purpose" can be interpreted as either "the will for the group as a whole" (集団全体としての意思) or "the will of individuals that form the group" (集団を構成する個々人の意思). The latter assesses the will of individuals and apparently resonates with the standard in Hong Kong. However, the Japanese court also interpreted joint purpose using the former meaning. In the *Shinjuku Riot* case, Tokyo High Court, 6th Criminal Division,[19] the Tokyo High Court had the following observation:

> "暴行・脅迫は、集合した多衆の共同意思に出たもの、いわば、集団そのものの暴行・脅迫と認められる場合であることを要するが、その多衆のすべての者が現実に暴行・脅迫を行うことまでは必要でなく、集団として脅迫を加えるという認識があれば足り …
>
> 右の共同意思は、集合した多衆が、多衆の合同力を恃んで自ら暴行・脅迫をなす意思ないし多衆をしてこれをなさしめる意思（主動的意思）を有する者と右の暴行・脅迫に同意を表しその合同力に加わる意思（受動的意思）を有する者とによつて構成されているときには、多衆の全体に共同意思があるものとなる …

> 共同意思は、共謀ないし通謀と同意義ではないから、多衆全部間における意思の連絡ないし相互認識の交換までは必ずしもこれを必要とするものではなく、事前の謀議・計画や一定の目的があることも必要ではない…”[20]

The *ratio decidendi* from the *Shinjuku Riot* case points out that the court is not concerned with whether the wills of individuals are interconnected or whether there is sufficient lexis among them. It is rather the will of the group as a whole that is important. When a person agrees with the will of the group, he/she will be deemed to be part of the assembly. Problem therefore arises: how shall the court access whether one agreed with the will of the group (and therefore share the joint intention of the group)? If it is simply by inferring from one staying in the group, then imagine this scenario: a person joined a peaceful demonstration (at least he/she thought that it is a peaceful one), but then this demonstration turned out to be unlawful (and he/she was the only person who shared this different view that the demonstration was peaceful), would he/she be charged? Perhaps also the more fundamental question is: how do we access the will of the group? The Japanese courts have yet to provide a definite answer. A possible situation will result: a person can be deemed to be part of the assembly because of his mere presence (or failure to leave the group) even if he/she subjectively does not share the same thought on the purpose (and/or function) of the demonstration with some others or the whole group.

4.1.3. Conduct: objective typicality / actus reus

To constitute a crime in Japanese law, there shall be “objective factors of typicality” and “subjective factors of typicality” (Pedriza, 2017: 251). These shall correspond to the well-established criminal legal principles of *actus reus* and *mens rea* in common law system respectively.

On objective typicality, the POO requires the group assembled to behave in a disorderly, intimidating, insulting or provocative manner. In contrast, the JPC indicates that either an actual act of assault or intimidation suffices. In this regard, apparently the JPC covers a broader kind of conduct in light of lack of actual assault requirement in the POO. It is self-explanatory that when an act of assault does occur the JPC will then penalize it. Whereas both the POO and the JPC include an act of intimidation,[21] the POO includes other acts that are "disorderly, insulting, or provocative".

Perhaps on its face the broadest term would be "disorderly". In *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [139]., the Tang PJ indicated:

> "I would reconcile these competing rights, adopting the language used in the cases cited above, and say that those affected are expected to take a balanced, rights sensitive view, conscious of the requirement of the Hong Kong Bill of Rights, and would not be unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage, particularly, when confronted by a protestor, but the exercise of such rights by protesters must not exceed "the bounds of what is reasonable in the circumstances, (but) such bounds must not be so narrowly defined as to devalue, or unduly impair the ability to exercise, the constitutional right." It is only when the conduct even when viewed against such a generous standard, "went well beyond what any citizen, public official or not, would have to tolerate", in the circumstances in which it occurred, that such conduct can properly be regarded as disorderly conduct within the meaning of s.17B(1) or (2)."

Tang PJ at [126] further pointed out that the conduct must be to "such an extent that it was beyond what could be expected to be

tolerated by other reasonable people in a democratic society". Litton NPJ also indicated at [193]:

> "What behaviour amounts to disorderly conduct, or when a situation constitutes a breach of the peace, or a threat thereof, depends on the circumstances of the time and place. The social context in which the events occur forms an important part of the picture..."

Therefore, the term "disorderly conduct" under Hong Kong law shall not be strictly construed and it is not a low threshold to meet. The court would take a holistic approach in finding whether one's conduct reaches the level that is not tolerable in a democratic society taking into consideration of relevant social context.

For "intimidating", "insulting" and "provocative" manners, despite these different terminologies they shall share the same interpretation legally. *Archbold Hong Kong 2021*[22] suggested that the definitions of "disorderly", "intimidating" and "provocative" manner are the same as that of "insulting manner" defined under *Brutus v Cozens* [1973] A.C.854. Lord Reid at 862E-G is concerned that the law to penalize behaviours which affront others and show evidence of disrespect or contempt of other's right:

> "I cannot agree with that. Parliament had to solve the difficult question of how far freedom of speech or behavior must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organizing or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behavior is permitted so long as it does not

> go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having a specially wide or a specially narrow meaning. They are all limits easily recognisable by the ordinary man. Free speech is not impaired by ruling them out. But before a man can be convicted it must be clearly shown that one or more of them has been disregarded."

In other words, the objective typicality under Hong Kong law shall not be widely constructed and mere distasteful or unmannerly behaviour would not satisfy the criminal element *per se*. It is, however, unclear whether the JPC will adopt the similar as that under Hong Kong law. There is a possibility that the Japanese courts treat intimidation different from "disorderly", "insulting" and/or "provocative" conduct. By eliminating these other alternate terms, the drafter of the JPC may consider conducts that are "disorderly", "insulting" and/or "provocative" to be different from intimidation. Again, the discussion in Japanese jurisprudence is lacking. It can also be possible that Japanese courts may adopt the same approach as those in Hong Kong and see intimidation no different from conducts that are disorderly, insulting and/or provocative.

4.1.4. Subjective typicality / mens rea

The POO states that the persons assembled shall intend to 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. The key is "intention" and "likely to cause" – it apparently suggests that either subjective element of the offender's intention or objective element of the consequences of one's conducts shall suffice. In *Leung Tin Kei*, however, the court ruled that at [78]:

> "when the defendant and those persons assembled together did one or more of the "prescribed acts", they:
>
> (a) intended to cause any person present at the scene:
>
> (i) reasonably to fear that the person so assembled will commit a breach of the peace; or
>
> (ii) reasonably to fear that they will by such conduct provoke other person to commit a breach of the peace; or
>
> (b) knew or were reckless as to such conduct being likely to cause any present at the scene:
>
> (i) reasonably to fear that the persons so assembled will commit a breach of the peace; or
>
> (ii) reasonably to fear that they will by such conduct provoke other persons to commit a breach of the peace"

Therefore, there is no "pure" objective element according to *Leung Tin Kei*, at least the defendant shall have knowledge or been reckless as to the consequences. However, *Leung Tin Kei*'s mental element of the likely limb is expressly overruled in the recent judgment of the HKCFA in *HKSAR v Leung Chung Hang Sixtus* [2021] HKCFA 24. The HKCFA decided, taking into consideration the critical factors such as the need to ensure prevention protection and the maintenance of public order, to dispense with any *mens rea* requirement in respect of the likely consequences of causing reasonable apprehension of a breach of the peace.[23] In particular, Fok PJ reiterated at [40] that:

> "An offence that is designed to deter conduct likely to cause any person reasonably to apprehend a breach of the peace, and thus to prevent breaches of the peace from happening, is not logically linked to whether the assembled persons do or do not foresee such reasonable apprehension as the consequence of their acts, but is

> focused on responding to the objectionable nature and quality of those acts. Unlawful assembly is a public order offence whose purpose is to protect the public from the harm of public disorder. Given this statutory purpose, the alternative of recklessness (as distinct from intention) contended for on behalf of the appellant can also be rejected as inappropriate in relation to the likely limb."

The "pure" objective element hence has now been restored and fortified in Hong Kong.

The requirement of subjective typicality in Japan is prescribed under article 38.1 of the JPC: "an act performed without the intent to commit a crime is not punishable; provided, however, that the same shall not apply in cases where otherwise specially provided for by law". There is no mention for the subjective typicality under article 106, so it is presumed that "intention" to commit the act for disturbance is necessary to constitute the crime. However, the JPC did not specify what the kind of intention is being referred to under article 106. Is it the intention for one to commit the conduct? Or is it the intention to produce any specific consequence? Or is it both? It is unclear under the Japanese law.

Therefore, the discussion on subjective typically is more thorough under Hong Kong law and more ambiguous in Japan. Nevertheless, the recklessness or causation requirement in Hong Kong law may eliminate the need for intention completely.

4.1.5. "any person reasonable to fear the person so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace" ("stipulated fear")

This element of stipulated fear has been completely lacking in the JPC but received large scale of discussion in the Hong Kong jurisprudence.

"Breach of peace" is an important concept for public order offences, but it is not a substantive offence under English law (Sherr, 1989: 111-112). In Hong Kong, the test in *R v Howell* is often cited and applied for breach of peace discussion:

> "…there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance…".[24]

One shall be aware that there is no need for a breach to have actually occurred under Hong Kong law. *Leung Kwok Wah* explained at [36]-[40] this element of stipulate fear in detail:

> "36. Second, the stipulated fear also has different limbs, either
>
> (a) the persons so assembled will commit a breach of the peace; or
>
> (b) the persons so assembled will by such conduct provoke other persons to commit a breach of the peace.
>
> Both limbs are relied upon in the charge in the present case.
>
> 37. In the context of the objective limb of the third ingredient, the statute refers to any person reasonably having such fear. It must be a person present at the scene. His fear has to be reasonable. It should be noted that the fear is not about fear as to the person's own safety or security. Rather, it is a fear that one way or another a breach of the peace will result. Thus, it is a fear of a deterioration of the event into a breach of the peace, a state of affairs which the common law provides that the power of arrest will become exercisable. In other words, the word "fear" in this context means an apprehension.

38. On the first limb of fear, s.18 refers to a breach of the peace committed by the persons who conducted themselves in the manner prescribed under the second ingredient. They are the persons "so assembled". As observed in *Campbell v Adair*, with reference to conduct which would constitute the second ingredient, the conduct need not amount to a breach of the peace. But it may be that in the circumstances of the case an objective bystander would reasonably fear that things might go for the worse and these persons would continue to behave so badly or rowdily as to become a breach of the peace.

39. On the second limb of fear, s.18 refers to a breach of the peace committed by another group of persons. Those persons are not the persons who originally conducted themselves in the manner prescribed under the second ingredient. It refers to other persons present at the scene and provoked by the conduct of "the persons so assembled". The fear is the reasonable fear of a third person that those provoked would respond by conduct which amounts to a breach of the peace. On this limb, three different categories of persons are involved: the original group who are "the persons so assembled" (there must be three or more of them); a second group (actually it could only be one person) who is provoked by the first group and may respond by actions which amount to a breach of the peace; a third person or group of persons who harboured the reasonable fear.

40. It must be emphasised that s.18 is very much a preventive measure. There is no need for a breach of the peace to have occurred. It is sufficient that a person present at the scene reasonably fears that it would occur if no action is taken in the meantime to prevent it. The law is there to put a stop to a deteriorating situation."

The lack of clarification as such in *Leung Kwok Wah* under JPC and related case raises concern as to how the Japanese court would determine whether a "fear" of breach of peace will suffice. Japanese cases on the offence of disturbance are often adjudicated when actual breach of peace had already occurred. For instance, in an unlawful assembly that occurred in Nagoya ("*Nagoya Riot* case"), the SCJ adopted the fact proved in the trial court which indicated that there were incidents of stone throwing and frame throwing against police officers, civilians and their cars and households respectively.[25] Similar fact if charged under common law will likely to be under "riot" (e.g. section 19 of the POO) instead. It is indeed unclear if missing the facts as those in *Nagoya Riot* case, whether the Japanese court will find who (if any) would be fear of breach of peace and on what standard.

4.2. Small Conclusion

The Japanese jurisprudence on disturbance is not as clear as that of Hong Kong's. Elements such as breach of peace and subjective typicality have not been fully addressed by the Japanese court. Nevertheless, the Japanese jurisprudence has created a larger leeway for future interpretation. Elements such as "corporate nature" and/or "joint purpose" are not fully settled, which if interpreted broadly could result in citizens being found guilty in participating in an unlawful assembly easier than one expects.

5. Issue 4: Is There Any Justification in the Differences Identified on Issue (3)?

The development of the jurisprudence of UA in Hong Kong has been vigorous since the 2019 Movement; the Hong Kong courts have been constantly clarifying the law on UA.[26] This is essential as to limit the

fundamental freedom of speech and/or assembly; the law must be prescribed and brought to the attention of the public.[27]

The scope of this paper does not allow a comprehensive review of both legal and non-legal reasons behind the rigorous and vigorous development of the UA jurisprudence in Hong Kong, but the case law streamed from the 2019 Movement certainly clarified issues on the substantive law. Tang (2020) suggested that recent judgments has assisted in the evolution of the law in areas including: inference drawing for lack of direct evidence, identifying degree of participation of offenders for sentencing purposes (pp. 1114-1122).

On the other hand, in Japan the jurisprudence of disturbance has not had much new development since the *Shinjuku Riot* case (Hagiwara, 2001: 85). There is lack of cases directly concerning the law on article 106 of the JPC. As aforementioned, often more cases concerning the public assemblies would be charged under local legislations in public safety and traffic regulation. Also given the lesser amount of big scale of social movement as the 2019 Movement in Hong Kong, the chance for Japanese courts to review the existing law on disturbance remains small.

5.1. Issues of Enforcement

Since the law under JPC is suggested to be possibly much wider than that of the POO, can one therefore conclude that a person is easier to fall into the pitfall of Japanese law than Hong Kong law based on the same set of conduct and circumstances? The answer is clearly a no: prosecution and conviction rate are closely related to different factors including the decision of law enforcement. The large number of arrests demonstrate that the Hong Kong government does not tolerate the offences relating to the 2019 Movement and the deterrence effect of case law has played a role in hindering protestors marching in the streets forever. In fact, observer said that many of the most ardent

demonstrators may be out of action, with many fleeing out of Hong Kong under the large scale of arrest (*The Economist*, 30th May 2020, p. 51).

5.2. The Problem of Joint Enterprise, Secondary and Inchoate Liability

Another potential concern is the applicability of the law of joint enterprise on UA in Hong Kong. In *Secretary for Justice v Tong Wai Hung* [2021] 2 HKLRD 399 at [56], the Court of Appeal ruled that the doctrine of joint enterprise ("JT") is applicable towards UA offence. In particular, the court listed out some examples of participants that could be considered as guilty under JT:

> "…They involve a myriad of participants playing various roles and sometimes with a rather sophisticated division of labour among them. Some physically participate in the unlawful assembly or riot at the scene. Some aid or abet the participants at the scene. Some may not even be present but are clearly participants under the doctrine of joint enterprise. Take the following examples:
>
> (1) A mastermind of the unlawful assembly or riot who remotely oversees the situation and gives commands or directions to the participants on the ground.
> (2) A person who funds or provides materials for the unlawful assembly or riot.
> (3) A person who encourages or promotes the unlawful assembly or riot by making telephone calls or spreading messages on social media.
> (4) A person who provides back-up support to the participants in the vicinity of the scene, such as collecting gear, bricks, petrol bombs, other weapons, and other materials to be used by the participants.

(5) A lookout stationed in the vicinity who alerts the participants to the advance or deployment of the police.
(6) A person who drives a getaway car to allow the participants to leave the scene.

The list is not exhaustive."

As one can see, this list is widely proposed and therefore raises concern as to whether innocent parties who were merely in presence at the scene will be charged or those who were merely advocating for others to join protest be found guilty.

Nevertheless, the question of whether the doctrine of joint enterprise applies to section 18 of the POO is resolved in the recent *HKCFA Lo and Tong* case.[28] In gist, the HKCFA decided that basic joint enterprise ("BJE") is not applicable under sections 18 and 19 of the POO on a proper construction of the statute. The Court's position is summarized at [63]:

"63. In our view:
(a) On a proper construction of sections 18 and 19 of the POO, the joint enterprise doctrine is not applicable as a basis for fixing a defendant with liability for the offences of riot or unlawful assembly as a principal if he or she was not present at the scene and was not taking part in the criminal assembly. ("The absence point")
(b) On their true construction, POO sections 18 and 19 leave no room for operation of the common law doctrine in its BJE form because the statutory language renders that doctrine otiose and its application would give rise to duplication and possible confusion regarding the central *actus reus* element of

> "taking part" in the criminal assembly. ("The taking part point")" (Original Emphasis)

What is more alarming, however, is the HKCFA indication of no legal lacuna being created because of the application of (i) accessory liabilities or inchoate offences, and (ii) extended joint enterprise ("EJE").[29] On (i), the Court is concerned about the fluid locations and scope of the assembly and the mastermind behind:

> "68. This analysis does not leave any gap. As was pointed out in *Chan Kam Shing*, while a principal carries out the prohibited conduct with the necessary *mens rea* and an aider and abettor is one who is present and renders assistance or encouragement to the principal in the commission of the offence, liability as a counsellor or procurer does not require the defendant's presence at the scene:
>
> > 'A person who counsels or procures an offence (referred to also as an accessory before the fact) is not present but provides assistance or encouragement prior to the commission of the offence. Such a person performs the *actus reus* of 'procuring' an offence 'by setting out to see that it happens and taking the appropriate steps to produce that happening'. A person 'counsels' an offence by soliciting or encouraging its commission.'
>
> Nor does a defendant who commits the inchoate offence of conspiracy or incitement have to be present at the scene where the principal offence is committed.[30]
>
> 69. …The "mastermind" who remotely oversees the situation and gives commands or directions to the participants on the ground would be guilty of incitement or as counsellor and procurer of the criminal

assembly. So would the persons who fund or provide materials for the unlawful assembly or riot; or who encourage or promote it on social media. Those who provide back-up support to the participants in the vicinity of the scene, collecting bricks, petrol bombs and other weapons; or who act as lookouts in the vicinity of the riot may either be "taking part" as principals under the POO or liable as aiders and abettors if present at the scene; or, if not present, liable as counsellors or procurers. The culpability of the person who drives a getaway car to help participants leave the scene is likely to include liability for assisting an offender under section 90 of the CPO.[31]

…

75. … unlawful assemblies and riots nowadays are highly fluid in nature… participants assuming different roles and communicating with each other using their phones and on social media. Offenders could not be expected to be assembled as a stationary group with a fixed membership in a single location. Participants would move around in varying groups along main thoroughfares, running into side streets and buildings, spreading out and re-coalescing whether in response to action by the police, in pursuit of different targets or for other reasons. Violence would periodically flare up and die down. Participants would often be in communication with each other, coordinating their activities.

76. It will be necessary in each case for the tribunal to determine where and when an unlawful assembly or riot took place and whether a defendant, if charged as a principal, was present and took part. However, the abovementioned fluidity should be taken into account and an overly rigid view should not be taken of what constitutes the assembly, its location and duration. Evidence regarding the geographical area affected, the conduct of and communications

> maintained among the participants and the duration of the disturbances should be considered as a whole. The defendant's role in the assembly, if any, should be considered for the purposes of assessing his or her potential principal, accessorial or inchoate liability."

In essence, the HKCFA decided that even if BJE is not applicable to offence of UA, the traditional notion of secondary liabilities or inchoate offences can be utilized to prosecute the same kind of offenders, especially if the law enforcement is concerned about prosecuting offenders not physically at the protest scene. They are two sides of the same coin.

On (ii), the HKCFA clarified that EJE is applicable to offence of UA:[32]

> "71. The difficulties associated with applying the BJE doctrine to unlawful assembly or riot do not arise in relation to EJE. There is no duplication or confusion since the liability based on the EJE doctrine relates to the further offence committed in execution of the plan and not just to taking part in the criminal assembly in question.
>
> 72. To take a hypothetical example, A, B and C may be among numerous other persons taking part in a riot (satisfying all the statutory elements of the offence) and C then proceeds to commit a further offence – say, of murder, by deliberately stabbing someone to death. If A and B are shown to have participated with C in the riot and foreseen that C might commit murder, meaning his assaulting a victim with intent to kill or with intent to cause grievous bodily harm as a possible incident of the execution of their planned participation in the riot, they could be found guilty of murder on the EJE basis.

> 73. The point does not arise in the present case since no EJE case is sought to be made against Lo. It is however not an unrealistic consideration. It might, for instance, be possible to prove that a group of persons agreed to take part together in a riot, intending to destroy public property and to erect barriers stopping traffic, while knowing that some amongst them would take along petrol bombs or potentially lethal weapons which they might use. If they proceeded with their plan and the petrol bombs or other weapons were then used to cause serious injury, the EJE doctrine might apply to fix the rioters who foresaw the intentional infliction of such injury as a possible incident of the execution of their agreed plan with liability for the more serious offence."

It is noteworthy that the HKCFA's hypothetical example concerns a riot but not a UA situation. If one takes part in a UA but then the situation worsens, that person will likely be charged directly with riot (and its secondary liabilities) instead of UA under EJE. Without further clarification from the Court, the possible application of EJE in UA appears to be paradoxical. Nonetheless, the HKCFA's determination certainly has great impact on law enforcement relating to the law of UA and on the development of the jurisprudence, though its application remains to be seen in future cases. Especially how the doctrine of EJE will be interpreted and applied in future public order offences concerning UA and riot is expected to be vigorously debated in future trials.

6. Future Implication

As at the preparation of this article, large-scale assemblies and riots in Hong Kong are suspended. This is partly due to the impact of COVID-19 and maybe also partly due to the legislation of National Security Law

("NSL") on 30th June 2020.[33] The verdict of the first NSL case was released on 27th July 2021 in *HKSAR v Tong Ying Kit*, HCCC 280/2020, [2021]HKCFI 2200. The defendant was convicted with two counts of offence: incitement of secession and commitment of terrorist activities. He was sentenced to 9 years of imprisonment on 30th July 2021.[34]

In *Tong Ying Kit* the court adjudicated the meaning of "Liberate Hong Kong, revolution of our times", and sparkled debates in the legal society of Hong Kong. The court in *Tong Ying Kit* HCCC 280/2020, [2021] HKCFI 2200 at [137] indicated that the issue was whether the said slogan "was capable" of inciting others to commit secession:

> "We should reiterate that what we are concerned with in this case is not whether the Slogan meant one and only one thing as contended by Mr Grossman but whether the Slogan, when taken as a whole after considering all the relevant circumstances, was capable of inciting others to commit secession. The authorities which we have examined did not speak in terms of "one meaning only". Instead, the focus was on whether the words/message/article/advertisement <u>was capable</u> of inciting others to commit the offence in question."

One may argue that the stretch of "capable" instead of orthodox test of "one and the only irresistible inference" for making inferences under common law criminal standard is *prima facie* to be inconsistent with the notion of common law's presumption of innocence and the standard of proof of beyond reasonable doubt for criminal cases. Nevertheless, it is too premature at this stage to squeeze on *Tong Ying Kit*'s jurisprudence. The potential appeal from the defendant and other coming NSL-related cases, nevertheless, are important in understanding the NSL regime and perhaps, its impact on the public order offences as a whole.

7. Conclusion

Due to the limited scope of this paper, the complete scope of public order-related offences between Hong Kong and Japan cannot be reviewed comprehensively. Nevertheless, this paper has focused on the law of UA of the POO and the law of disturbance under the JPC. By answering four stated issues, this paper proposes some preliminary review of public order offences between Hong Kong and Japan. The significance of choosing UA as the comparative offences is established and a detailed analysis of the elements on UA in Hong Kong and Japan is performed. The disturbance offence in Japan apparently is wider than the offence of UA in Hong Kong; there is a possibility that one may find himself/herself to be guilty under the JPC rather than that of the POO. However, this paper also discussed the rigorous and vigorous development of the UA jurisprudence in Hong Kong found upon the 2019 Movement, with a view from the court to propose deterrence effect on the illegal conducts in the social movement. The derivative issues surrounding the enforcement of the law, the applicability of doctrine of JT and the introduction of the NSL have been discussed – their developments will likely shed light on the future path of the UA law (and other public order offences).

It is the hope of the author that this paper can spark further research interest in the comparative analysis of the legal regime of public order offences between Japan and Hong Kong (and perhaps, the ultimate question of how common law and civil law jurisdictions view the law on public order offences respectively).

Notes

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1. There may be dissenting opinion as to whether Hong Kong is a true democracy under the "One Country, Two Systems" political system; this is outside the scope of discussion of this article and this paper will proceed on the assumption that Hong Kong nevertheless is a free society and/or at least not an authoritarian political regime.
2. *Leung Kwok Hung v HKSAR* [2005]8 HKCFAR 229 at [17]. In *Leung Kwok Hung*, the defendants were charged with holding (and assisting in the holding) of an unauthorized assembly, contrary to s. 17A(3)(b)(i) of the Public Order Ordinance (Cap. 245). The HKCFAR held that the Commissioner of Police's entitlement to prior notification of public meetings and processions under the statutory regime is constitutional.
3. The "prescribed by law" and "necessity requirement" are cited as they are by the Japanese Supreme Court.
4. POO, section 17B.
5. POO, section 17C.
6. POO, section 18.
7. POO, section 19.

8. POO, section 25.
9. JPC, art 77; Article 77(1) stipulated: "A person who commits an act of riot for the purpose of overthrowing the government, usurping the territorial sovereignty of the State, or otherwise subverting constitutional order, thereby committing the crime of insurrection shall be sentenced according…". Under article 80, one can be exculpated if he surrenders himself before the act of riot is performed. It is noteworthy that the term "riot" remained undefined under the JPC. This is very different from POO (or common law offence in general) in which the offence of riot is a separate offence. Article 77 seemingly presumed one can only commit an act of insurrection through riot. Question remains unresolved under the Japanese jurisprudence therefore is: can one still commit an act of insurrection without committing an act of riot?
10. JPC, articles 106 and 107.
11. JPC, article 208 – 3.
12. Road Traffic Act No. 105 of 1960; Article 77(1)(iv) indicates that permission must be obtained from the chief of the police station whereas: "a person, other than as set forth in the preceding items, seeking to undertake an activity such as holding a festival or filming on location on a road which would involve persons using the road by passing down it in a configuration or manner that would have a serious effect on public traffic, or seeking to undertake an activity that would cause people to gather and thereby have a serious effect on public traffic, if the public safety commission prescribes that activity as one for which a person must obtain permission, having found that this is necessary, based on area road or traffic conditions, in order to prevent road hazards or to otherwise ensure the safety and fluidity of traffic."
13. In Niigata, there is the "行列行進、集団示威運動に関する条例 昭和24年3月25日 条例第4号"; in Tokyo, it is "集会、集団行進及び集団示威運動に関する条例 昭和25年7月3日 条例第44号".

14. Referring also to Lord Hewitt in *Duncan v Jones* [1936] 1 KB 218.
15. POO, section 18: (in Chinese): "凡有 3 人或多於 3 人集結在一起，作出擾亂秩序的行為或作出帶有威嚇性、侮辱性或挑撥性的行為，意圖導致或相當可能導致任何人合理地害怕如此集結的人會破壞社會安寧，或害怕他們會藉以上的行為激使其他人破壞社會安寧，他們即屬非法集結".
16. JPC, article 106: (in Japanese) "多衆で集合して暴行又は脅迫をした者は、騒乱の罪とし …".
17. The case was subsequently on appeal: *HKSAR v Leung Tin Kei* [2020]4 HKLRD 428.
18. [18]-[22]; the concept of "corporate nature" is adopted in subsequent cases such as *HKSAR v Leung Hiu Yeung* (梁曉暘) [2017] 5 HKLRD 653, [130].
19. 昭和 52(う)2435 東京高等裁判所 第六刑事部 (Tokyo High Court, 6th Criminal Division).
20. Translation by the author: "The act of assault, intimidation must be a joint intention of the group. It is not necessary for all the members to implement the conduct, as long as there is a recognition that it will be performed as a group…

    The joint intention is the crowd assembled having the intention gathered to assault or intimidate in the wake of the joint power of the masses or to do this by doing as a mass; and when it is composed of those who agree with using the assault or threat and have the will to join the joint force (passive will), the whole mass has a joint intention…

    It is not the same as conspiracy or collusion. It is not necessary for communication of intention or exchange of recognition among members of the group; prior planning is not needed".
21. POO indicates the defendant conducting himself in an intimidating manner, while the JPC suggests committing an act of intimidation. It is submitted that they share the same meaning of indicating that the

defendant must have committed an act that is capable of being considered to be an intimidation.

22. Kemal Bokhary (editor-in-chief), *Archbold Hong Kong 2021: Criminal law, pleadings, evidence and practice* (Sweet & Maxwell, 2020), [31-7] – a leading practitioner text in Hong Kong.
23. *HKSAR v Leung Chung Hang Sixtus* [2021] HKCFA 24 at [37]-[41].
24. (1982)QB 416, 427E-F; cited in *Leung Kwok Wah* [41] and *Chow Nok Hang* [162].
25. 昭和 50（あ）787 最高裁判所第二小法廷 (Supreme Court No. 2).
26. Or if one takes a more radical view, he/she may consider that Hong Kong has been creating new jurisprudence for the law of UA.
27. BL, article 39.
28. The HKCFA heard this legal issue on 5th October 2021. Leave to the HKCFA was granted by the HKCFA and the Court of Appeal respectively in *HKSAR v Lo Kin Man* FAMC 12/2020, [2021] HKCFA 17; *Secretary for Justice v Tong Wai Hung* CASJ1/2020, [2020]HKCA 807.
29. The comprehensive discussion can be found in [64] to [70] of *HKCFA Lo and Tong* case. The author shall not prolong the article by reciting the paragraphs here.
30. Citing *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640 at [8]-[14].
31. Section 90(1) of Criminal Procedure Ordinance (Cap. 221): "If a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does, without lawful authority or reasonable excuse, any act with intent to impede his apprehension or prosecution shall be guilty of an offence."
32. The legal definition can be found at [53] of *HKCFA Lo and Tong* case: "The extended version of joint enterprise – EJE – addresses the situation where certain defendants (say A, B and C) agree on a certain BJE but, where in the course of carrying out the agreed plan (say, a burglary), one of

them (say A) commits a more serious offence (say, murder). The common law (as applied in Hong Kong) holds that B and C are equally guilty of A's crime on the basis of EJE if it is proved that A's commission of the further offence (if murder, meaning his acting with intent to kill or at least to cause grievous bodily harm) was foreseen by them as a possible incident of the execution of their planned joint enterprise."

33. The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, applied to the HKSAR on 30th June 2020.
34. HCCC 280/2020, [2021]HKCFI 2239.

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