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A Review of Hong Kong's Jurisprudence on the Offences of Unlawful Assembly and Riot in the Context of the Anti-Extradition Bill Movement[+]

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Abstract

The Anti-Extradition Bill Movement presents new challenges to the criminal justice system in Hong Kong. While courts in Hong Kong repeatedly stress that they do not take political considerations into account when making their rulings, it is almost inevitable that their decisions will be closely scrutinized by all sides of the political spectrum. This paper examines the development of case law relating to unlawful assembly and riot under the Public Order Ordinance in the context of the Movement. In particular, this paper will focus on the implication of the updated sentencing guideline on public order offences proposed by the Court of Appeal in *Secretary for Justice v Wong Chi Fung* in 2018 and how the unique features of the Movement shall develop future case law.

Keywords: *Anti-Extradition Bill Movement, Public Order Ordinance, unlawful assembly, riot, rule of law, freedom of assembly, Hong Kong Bill of Rights Ordinance, civil liberties, human rights*

1. Introduction

On 9th October 2019, black-clad protesters gathered outside Hong Kong's High Court Building.[1] While the building is one of the many stops along the city's traditional route for mass demonstration, it is the destination this time. The protesters were there in solidarity with Edward Leung Tin-kei, who is considered by some as the "spiritual leader of the city's months-long unrest"[2] Leung was attending the Court that morning for his court hearing to appeal against his sentence in relation to the Mongkok Riot in 2016. In some way, the scene at the court building is nothing out of the ordinary since the Anti-Extradition Bill Movement ("Anti-ELAB Movement") began. Young protesters, equipped with surgical masks, were chanting "Liberate Hong Kong, Revolution of Our Times" as they await the Correctional Services Department's vehicle to bring Leung to the building.

The scene above is a clear indication that, inevitably, the Hong Kong courts are and will remain one of the many points of contention in the Anti-ELAB Movement. The courts have already made a wide range of decisions from granting interim injunction to restrict demonstrations in metro stations[3] and airport[4] to ruling that the regulation to ban face masks during public gathering is constitutional[5]. But as the number of arrests goes up, it is only a matter of time before a substantial number of protesters are brought before the courts to face criminal charges. Some of the criminal charge brought are offences under Hong Kong's Public Order Ordinance (Cap.245) (the "POO"). All eyes will be on the Hong Kong Courts as the judges make their determination.

As a result of the Anti-ELAB Movement, the number of cases in relation to unlawful assembly and riot have risen drastically. It is therefore useful to examine the exiting case law of the two offences and pinpoint the issues that will likely arise in cases of Anti-ELAB Movement.

In fact, back in 2018, in the case of *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, the Court of Final Appeal ("CFA") has indicated its updated stance on the Offence. The CFA's judgement is worth closer examination as it reveals the Court's attitude toward offence committed under the context of large-scale social movement.

This essay will be divided into the following sections, Section 2 provides a brief review on the case law on unlawful assembly and riot, Section 3 outlines the characteristics of the Anti-ELAB Movement and Section 4 will evaluate how the said characteristics shape recent case law.

2. The Offences of Unlawful Assembly and Riot: Application and Limitation

2.1. Elements of the Unlawful Assembly

Section 18 (1) of the POO provides that a group consisting of 3 or more persons assembled together shall be deemed to be an unlawful assembly if they "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" (emphasis added). Section 18(2) clarifies that the fact that the original assembly was lawful is immaterial. As soon as the participants in the assembly conduct themselves in the manner as described in S.18(1), they are an unlawful assembly.

Given the wide ambit of the wordings of S.18(1), it is essential to look into how the court interprets the various elements of the offence.

In *Secretary for Justice v Leung Kwok Wah* [2012] 5 HKLRD 556 at [16], the Court of Appeal ("CA") set "three ingredients" of the offence:

(a) assembled together;
(b) conduct themselves in a disorderly or provocative manner; and
(c) intended or likely to cause any person reasonably to fear 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.

Drawing on the three ingredients in *Leung Kwok Wah*, A Wong J in *HKSAR v Leung Tin Kei* [2018] HKCFI 27156 ruled that the appropriate directions to be given to the jury in relation to the charge of unlawful assembly were as follows:

(1) At the time and place specified in the charge, the defendant and 2 or more other persons assembled together; and
(2) The common purpose of the defendant and those persons assembling together at that time was to obstruct police officers in the execution of their duties; and
(3) The defendant and those persons assembled together at that time, with that common purpose, wilfully:
    (a) conducted themselves in a disorderly manner; or
    (b) conducted themselves in an intimidating, insulting or provocative manner; (the acts in (a) and (b) above, hereinafter referred to as "the prescribed acts"); and
(4) 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 persons so assembled would commit a breach of the peace; or
        (ii) reasonably to fear that they would by such conduct provoke other persons to commit a breach of the peace; or

(b) knew of or were reckless as to such conduct being likely to cause any person present at the scene:
  (i) reasonably to fear that the persons so assembled would commit a breach of the peace; or
  (ii) reasonably to fear that they would by such conduct provoke other persons to commit a breach of the peace.

2.1.1. "Assembled together"

For the first ingredient, Lam JA in *Leung Kwok Wah* (2012) at [17] stressed that in there must be a requirement of joint responsibility for the disorderly or provocative conduct under the second ingredient. Drawing on Macdougall VP's ruling in *R v To Kwan Hang* [1995] 1 HKCLR 251[7], he accepted that only the three or more persons who conducted themselves in a disorderly or provocative manner would become an unlawful assembly. Other members of the same group who did not conduct themselves in such manner would not become an unlawful assembly.

The conduct of the defendants must also be closely connected. In *Leung Kwok Wah* (2012) at [19], Lam JA stated that the court must consider whether or not "there is a sufficient nexus between the conduct of the defendants to justify having them considered together" and that whether or not they could be described as "acting as assembly". In other words, there must be a common purpose among the defendants.

2.1.2. "Conduct themselves in a disorderly, intimidating, insulting or provocative manner"

When taking into consideration the conduct of the defendant, the court shall look into the character of the conduct itself instead of purpose of

the conduct (*ibid.*: 24). The legality of the actions by law enforcement is irrelevant.

The court recognizes that adjectives such as disorderly, intimidating, insulting or provocative can have a wide variety of meanings. Discussion in case law focuses heavily on disorderly conduct. In *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837[8], Chan ACJ affirmed that "disorderly behavior" were to be treated as words in ordinary everyday use. The disorderly conduct does not necessarily involve violence or amount to a breach of peace. It is sufficient to show that "there is a real or imminent risk that others would breach the peace or resort to violence as a result of the accused's disorderly conduct".

As such, when or not the defendant's action amounts to "disorderly conduct" will be a question of fact to be determined at trial. For example, in *HKSAR v Wong Yuk Man* [2015] 1 HKLRD 132, at [110], Derek Pang J held that "the conduct of a group of people chanting numbers, marching arm in arm towards a police cordon, ignoring the sign raised up and verbal warnings given by the police will not fail to meet the definition of disorderly conduct".

2.1.3. "Intended or likely to cause any person reasonably to fear 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 third ingredient of the charge deals with the consequence of the prescribed conduct. In *Leung Kwok Wah*, the court identified two limbs under the third ingredient. The subject limb comes into play when the intention of the conduct of defendant is to "generate the stipulated fear" while the objective limb kicks in when the said conduct "causes any person reasonably to have" the stipulated fear.

The court in *Leung Kwok Wah* further held that the stipulated fear itself had two limbs, namely:

(a) the persons so assembled would commit a breach of peace; or
(b) the persons so assembled would by such conduct provoke other persons to commit a breach of peace.

The court clarified that it is not necessary for the person at the scene to be in fear of his or her safety. The only reason needed to give rise to the power of arrest was a fear that the "deterioration of the event into a breach of the peace"[9].

In *HKSAR v Leung Tin Kei* [2018] HKCFI 2715, A Wong J, upon reviewing the relevant authorities, ruled that the objective limb (i.e. causing the stipulated fear by an objective standard) was not of absolute liability and the requirement of *mens rea* was not displaced. The prosecution had to prove that "the defendant knew of or was reckless as to the "prescribed act or acts" being likely to cause "the stipulated fear[10]". In other words, the defendant, "knowing that his act or acts would be in a disorderly, intimidating, insulting or provocative manner, he nevertheless did "the prescribed act or acts" of his own free will[11]".

It is worth noting the law on the objective limb has not been settled. Leave was granted to the Court of Final Appeal to determine whether or not the *mens rea* requirement is displaced[12]. Wilson Chan J in *HKSAR v Leung Chun Hang Sixtus* [2020] HKCFI 2152 stated that he disagreed with the ruling by A Wong J in *Leung Tin Kei*. In this regard, he sided with the prosecution's approach in *Leung Tin Kei* at [13] that even if the "causing the stipulated fear by an objective standard" limb is of absolute liability, it did not undermine the other safeguards provided in the elements of the offence, and the reasons why the defendant committed a certain "prescribed act" and why he and other persons assembled did

cover to a large extent the defence of honest and reasonable belief raised by the defence.

2.2. Elements of Riot

The offence of riot builds upon the participation in an unlawful assembly. Section 19(1) of POO provides that "when any person taking part in an assembly which is an unlawful assembly by virtue of section 18(1) commits a breach of the peace, the assembly is a riot and the persons assembled are riotously assembled."

The trial judge in *HKSAR v Leung Tin Kei* (HCCC 408/2016), when giving written direction to the jury, stated that breach of the peace indicated that "deliberate use of or threat of violence is involved". Such breach, drawing on the test in *R v Howell* [1982] QB 416[13], occurred where "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".

In *Leung Tin Kei* (2018), A Wong J ruled that prosecution, besides proving all elements of unlawful assembly, had to prove that the defendant committed a breach of the peace by showing that he or she:

(1) used deliberate violence or threatened to use violence

and

(2A) intended to cause

(i) harm to be actually done to a person present at the scene, or
(ii) harm to be done in his presence to that person's property, or
(iii) that person to be in fear of harm being actually done to his body or his property through an assault, an affray, a riot, unlawful assembly or other disturbance.

or

(2B) knew of or was reckless as to

(i) harm being likely to be done to a person present at the scene, or

(ii) harm being likely to be done in his presence to that person's property, or

(iii) whether that person is in fear of harm being likely done to his body or his property through an assault, an affray, a riot, unlawful assembly or other disturbance.

2.3. The Engagement of Relevant Human Rights in the Context of POO

Concerns regarding POO's restriction on civil liberties have been frequently raised. When the United Nation's Human Rights Committee published their first report on Hong Kong after the transfer of sovereignty, they expressed concern that the POO could be applied to restrict unduly enjoyment of the rights guaranteed in article 21 of the International Covenant on Civil and Political Rights.

Various challenges on the constitutionality of the offence of unlawful assembly were made. The Freedom of Assembly is safeguarded by both domestic and international instruments. Article 27 of the Basic Law protects Hong Kong residents' freedom of assembly while article 17 of the Bill of Rights Ordinance (Cap. 383) provides that "the right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

In *Chow Nok Hang* (2013), Riberio PJ recognized at [31-32] that the right to demonstrate lies at the heart of Hong Kong's system and such right "is of cardinal importance for the stability and progress of society — freedoms which promote the resolution of conflicts, tensions and problems through open dialogue and debate." As such, it "must be given a generous interpretation so as to give individuals their full measure, and that restrictions on such rights must be narrowly interpreted."

That being said, the court has repeatedly asserted that the freedom of assembly is not absolute. In *Leung Kowk Hung & Ors v HKSAR* (2005) 8 HKCFAR 229 at [17], the majority, while recognizing freedom of assembly as one of the fundamental civil liberties, stressed that the restriction on such right could be justified if it was "prescribed by law" and "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". Earlier, in *To Kwan Hang* (1995), the Court of Appeal held that the offence of unlawful assembly was consistent with article 17 of BORO. And in *Leung Kowk Hung* (2005), the majority held that the Commissioner of Police's discretion to restrict the right of peaceful assembly in the name of the above-mentioned requirements was constitutional after the severance of public order (in the law and order sense, that is, the maintenance of public order and prevention of public disorder) from "public order (ordre public)" contained in s.14(1), s.14(5) and s.15(2) of POO.

The court in *Leung Kwok Wah* (2012), at [57 -58] stressed that the purposes of the offense of unlawful assembly were to "address situations which, unless preventive actions are taken, are likely to develop into a breach of the peace" and "to stop a deterioration of an often highly emotionally charged assembly into a serious disruption of law and order".

It is also worth noting that both BL and BORO only protects Hong Kong residents' right to exercise the freedom of assembly peacefully. In *Leung Kowk Hung* (2005), Bokhary PJ at [132] affirmed that "where public gatherings are not peaceable, there is room for arrest and prosecution for unlawful assembly or riot under ss.18 and 19 [of POO] respectively". His lordship went one step further to state that "the advent of an emergency might even lead to the imposition of a curfew by the Chief Executive in the exercise of his powers under s.31 [of POO]".

2.4. Sentencing of the Offences

It is accepted that there is no universal sentencing guideline for the offences. In this regard, the Court of Final Appeal's ruling in *Secretary for Justice v Wong Chi Fung* [2018] 21 HKCFAR 35 is significant in sentencing of the offences.

In *Wong Chi Fung* (2018), the 1st to 3rd appellants faced the following charges:

Charge(s)	**Appellants**
Inciting others to take part in an unlawful assembly, contrary to s.18 of the POO and s.101I of the Criminal Procedure Ordinance ("CPO") ("the Inciting Charge")	1st and 2nd appellants
Taking part in an unlawful assembly contrary to s.18 of the POO	1st and 3rd appellants

The appellants pleaded not guilty to all charges and were tried before Ms. June Cheung Tin Ngan in the Eastern Magistracy ("the Magistrate") on various dates in 2016. Eventually, the 1st appellant was acquitted of the Inciting Charge, but was convicted for taking part in an unlawful assembly. The 2nd and 3rd appellants were convicted of their respected charges. As such, the Magistrate sentenced the 1st appellant to an 80-hour community service order, 2nd appellant a 120-hour community service order and the 3rd appellant to a term of imprisonment of 3 weeks, suspended for 1 year.

2.5. The Court of Appeal's Ruling

The Secretary for Justice ("SJ") made application to the Magistrate under s.104 of the Magistrates Ordinance to review the sentences and was refused by her. The SJ then apply for a review of sentence s.81A of the Criminal Procedure Ordinance and was heard by the Court of Appeal ("CA")

The CA allowed SJ's application and set aside the Magistrate's sentences in *Secretary for Justice v Wong Chi Fung & Ors* [2018] 2 HKLRD 699. Immediate custodial sentences were imposed on all the appellants. CA's judgement is worth closer examination.

In essence, CA ruled that a large-scale unlawful assembly involving violence had occurred. Poon JA, in making such determination, formed the view that the appellants' acts were premeditated, and, being the planners of the assembly, it was within their reasonable contemplation that their act was illegal and there was a risk that participants would clash with the security guards and police officers outside the Civic Square. Further, the number of participants, the duration in which they were able to enter Civic Square and the relatively minor injuries suffered by the security guards at the scene were also taken into account.

When discussing the interplay between the relevant rights engaged and the offence of unlawful assembly, CA stressed that "acts done in the name of the free exercise of rights, but which are in substance acts which undermine public order and breach the peace, will throw society into chaos, impact seriously and adversely on its progress and development, and prevent others from exercising and enjoying the rights and freedoms to which they are entitled." The goal of the Court is to stop such acts effectively so that "all discussion about freedom and the rule of law" will not become empty talk."

With reference to the boarder social context that led to the Assembly, Yeung JA remarked in a widely publicized passage at [6]:

> "In recent years, an unhealthy wind has been blowing in Hong Kong. Some people, on the pretext of pursuing their ideals or freely exercising their rights conferred by law, have acted wantonly in an unlawful manner. Certain people, including individuals of learning, advocate "achieving justice by violating the law" and, under this slogan, they encourage others to break the law. These people openly flout the law. Not only do they refuse to admit their lawbreaking activities are wrong, but they even go as far as regarding such activities as a source of honour and pride. It is unfortunate that such arrogant and conceited ways of thinking have influenced some young people and have caused them to engage as they please in activities that are damaging public order and disruptive of the peace at assemblies, processions or demonstrations."

In light of above, the CA laid down new sentencing principles in cases of unlawful assembly involving violence:

(a) The starting point of the court is that "public order must be maintained". To achieve such aim, the "factor of deterrence" must be taken into consideration. The weighting given will depend on the circumstances of each case;
(b) in cases of a relatively minor nature (i.e. when the unlawful assembly was unpremeditated, small in scale, involving very little violence, and not causing any bodily harm or damage to property), more weight may be given to "personal circumstances of the offender, his motives or reasons for committing the offence and the sentencing factor of rehabilitation"; and
(c) in cases of a serious nature (i.e. when large-scale and/or serious violence is involved), punishment and deterrence will be the two paramount sentencing factors while other factors will be given little and no weight.

2.6. The CFA's Decision

The appellants obtained leave to appeal to the CFA on, *inter alia*, the following issue:

> To what extent should a sentencing court take into account the motives of a defendant in committing the crime of which he or she has been convicted, particularly in cases where it is asserted that the crime was committed as an act of civil disobedience or in the exercise of a constitutional right?

2.6.1. Acceptance of CA's sentencing principles

The most significant impact of CFA's decision in *Wong Chi Fung* is its acceptance of the new sentencing principles regarding unlawful assembly laid down by CA. Their Lordships started by stating that CA was fully entitled to "take much stricter view where disorder and any

degree of violence" were involved in unlawful assembly and that note should be taken accordingly. Hong Kong, according to their Lordships, is a "peaceful society" and elements such as disorder and violent behaviour should be deterred.

The Court stressed that, at [144], "it was right for the Court of Appeal to send the message that unlawful assemblies involving violence, even the relatively low degree of violence that occurred in this case, will not be condoned and may justifiably attract sentences of immediate imprisonment in the future, given the gravamen of the offence involving the instigation of a risk and fear of a breach of the peace by virtue of the number of protesters involved."

2.6.2. Civil disobedience as mitigating factor

Wong Chi Fung also deals with whether or not civil disobedience is a relevant mitigating factor. At the onset, the CFA recognized motive is a relevant consideration. The Court affirmed (at [67]) that "an offence arises out of an occasion when constitutional rights to assemble and protest are being exercised is relevant to the background and context of the offending, particularly when those rights have been exercised peacefully and in accordance within the law up to the point when the offence was committed".

Their Lordship, however, stated the contention that the exercise of constitutional rights could be used as a mitigating factor had little merit. Drawing on *Chow Nok Hang* (2013), the Court ruled that once violence or the threat of violence came into play, such "unlawful activity" will be subject to "legal sanctions and constraints". As such, "there is no constitutional justification for violent unlawful behavior".

In determining whether or not civil disobedience could be a mitigating factor, the CFA started by proclaiming that "the concept of civil disobedience is one which is recognisable in any jurisdiction

respecting individual rights, including Hong Kong". The court is entitled to take into account that the offender is taking part in civil disobedience when deciding the appropriate sentence. However, there are many more factors that are also relevant such as "the facts of the offending and its consequences and the need for deterrence and punishment."

In line with its stance to differentiate peaceful protest and violent behaviour, the CFA remarked at [74]:

> "Where, therefore, in furtherance of an ostensibly peaceful demonstration, a protester commits an act infringing the criminal law which involves violence and is therefore not peaceful and non-violent, a plea for leniency at the stage of sentencing on the ground of civil disobedience will carry little (if any) weight since by definition that act is not one of civil disobedience."

2.6.3. Different degree of culpability?

While the CFA's judgement stressed the line separating lawful protest and unlawful assembly, it also seemed to separate the degree of culpability among the participants of unlawful assembly. The Court, at [125], ruled that "culpability of the offender may vary depending on his degree of participation in the unlawful assembly and the violence in question". As such, "a distinction must be drawn between a participant in an unlawful assembly who remains peaceful and one who himself engages in or encourages violence."

The CFA's conclusion was based on its earlier ruling in *Chow Nok Hang* (2013) where Tang PJ cited, with approval, passages from the "Guidelines on Freedom of Peaceful Assembly" (2010) ("the Guide") published by Organization for Security and Co-operation in Europe/Office for Democratic Institution and Human Rights.

It is worth noting that the Guide's definition of peaceful assembly is wide and includes "conduct that temporarily hinders, impedes or obstructs the activities of third parties". It also stressed that "an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour".

On the issue of differentiating peaceful and non-peaceful demonstrations, the Guide stressed that "the use of violence by a small number of participants should not automatically lead to the categorization as non-peaceful of an otherwise peaceful assembly".

While the CFA in *Wong Chi Fung* (2018) did not specifically touch upon the issues contained in the cited passages of the Guide, it accepted that the considerations in the cited passages are relevant.

2.9.4. Application of the new sentencing guideline

One obvious implication of *Wong Chi Fung* (2018) above is that stricter sentence will be applied to defendants convicted of unlawful assembly in connection with the Anti-ELAB Movement. It has been recognized by the courts that a tariff approach towards sentencing is not appropriate for the offence given the diverse circumstances involved.[14]

CFA recognized that, in the past, "a wide range of types and severity of sentence have been imposed for the offence". Their Lordships proceeded to discuss seven cases each with difference severity of sentence imposed. It is worth nothing that among the cases discussed, immediate custodial sentence was only imposed in two cases. The 18 months' custodial sentence was imposed in *Cham Sam v R* [1968] HKLR 401 as the defendant used a chair to attack a police officer in a 200-person protest relating to the 1967 riots. And in *HKSAR v Tai Chi Shing* [2016] 2 HKC 436, the CA accepts that "custodial sentences based

on a starting point of six months' imprisonment" can be imposed on a first-time offender if the defendant committed acts with "riotous" nature.

An early indication of how *Wong Chi Fung* (2018) was applied in cases relating to the Anti-ELAB Movement can be seen from the case of *HKSAR v Sin Ka Ho* [2020] HKDC 337. The defendant pleaded guilty to taking part in a riot on 12th June 2019, the date that the second reading of the Bill was scheduled to resume, outside the Legislative Council Complex.

Woodcock J, at [44], giving her reason to impose an custodial sentence with a starting point of 6 years, stressed that "deterrence overrides the sentencing principle of rehabilitation in the prevailing circumstances including the increasing incidents of unrest and a rising number of large-scale public protests involving violence". Her Honour's position is in line with *Wong Chi Fung* (2018) and *HKSAR v Leung Tin Kei* that the sentence should be punitive and sufficiently deterrent.

3. Characteristics of the Anti-ELAB Movement

To understand the likely legal issues that will arise in public order cases regarding the Anti-ELAB Movement, it is essential to identify some of the key characteristics of the protests. While the movement itself has many faces, this section will offer a brief overview on 3 aspects that are relevant to the public order offences.

3.1. Fluidity of the Protest Movement

Ku (2020: 114) observed that the participants adopted a wide variety of protest actions and that such activities "often assumed a spontaneous character and transformed a variety of everyday micro-spaces into sites of civic resistance ranging from streets to shopping malls and from metro stations to the airport."

Unlike the Umbrella Movement in 2014 which focused on several occupied areas, the Anti-ELAB Movement features diverse protest activities in a wide variety of locations. As such the alleged unlawful assembly and/or riot will also take place in diverse areas. From the public entrance of the Legislative Council Building to university campus, the locations of the protest activities present unique legal issues as demonstrated below.

3.2. Integration of Peaceful Protest and Violent Confrontation

Another key feature of the Anti-ELAB Movement is the strong solidarity amongst the moderate and radical flanks. Empirical research conducted by Lee (2020) confirmed that the significant number of younger protesters with relatively little knowledge about the previous conflicts between the two flanks "made the body of protesters as a whole even more predisposed to a more positive relationship among various movement factions." Further, "direct, indirect, and mediated shared experiences of indiscriminate police actions during the protests has produced among many Hong Kong citizens an experiential basis for solidarity." And in the words of Ku (2020): "Through participating in the movement, protesters established a sense of solidarity and a political subjectivity that binds them together, in what has been called 'a community of common destiny' (命運共同體 mingyun gongtongti)."

Besides its ideological implication, the solidarity among protesters also means that violent confrontation can occur during peaceful protest activities.

3.3. Anonymity of Protest Movement

The Anti-ELAB Movement has been described as a largely leaderless movement (Ku, 2020). While prominent activists and pressure groups

may organize rallies or marches, none identifies itself as the leader of the movement.

Participants of the movement also prefer to be faceless. To avoid identifying themselves, the protesters equipped themselves "with simple surgical masks to safety goggles and construction helmets, to full-body protective gear, sometimes including full-face gas masks" (Holbig, 2020). The protesters often form a black bloc with umbrellas put upon the front during confrontation with the police.

4. Public Order Offences in the Context of the Anti-ELAB Movement

The law on unlawful assembly and riot is quickly developing as a result of the Anti-ELAB Movement. A number of recent judgements from the Court of Appeal and the District Court shed light on how case law evolves as a result of the movement.

4.1. The Importance of Inference

As one would have expected, the prominent use of the above techniques to conceal the protesters' identity lead to issues in relation to identification at trial. Direct evidence indicating the accused has committed the prescribed act(s) may be hard to come by in unlawful assembly and/or riot cases relating to the Anti-ELAB Movement. This is the result of the combination of the technique adopted by the protesters to conceal their identities and the fluidity of the protest activities.

The lack of direct evidence itself, however, does not mean that the defendant will not be convicted. In this regard, Direction 21 of the Specimen Directions in Jury Trials issued by the Hong Kong Judiciary provides that "circumstantial evidence can be powerful evidence, indeed, it can be as powerful as, or even more powerful than, direct evidence".

The fact-finder of the trial (i.e. the jury or the trial judge) are also entitled to draw inferences "to infer the existence of other facts" but can only do so if the "inference is the only reasonable inference to draw from the proved facts".

The importance of inference can be illustrated in the case of *HKSAR v Tong Wai Hung & Others* [2020] HKDC 588. The prosecution accepted that they did not have any direct evidence at all to prove that the 1st and 2nd defendants were present at the scene of the riot (i.e. Des Voeux Road West) [102-103]. Instead, the prosecution argued that there was strong circumstantial evidence that indicated the 1st and 2nd defendants directly participated in the riot in Des Voeux Road West and later escaped to an alleyway nearby. The following circumstantial evidence was relied on by the prosecution:

(1) CCTV footage indicating the defendants' presence in an alleyway near Tung Chi Commercial Centre ("the Alleyway");
(2) the equipment and clothing of the defendants;
(3) the defendants' demeanor and behavior in the said CCTV footage;
(4) the defendants were fleeing in Sai Yuen Lane.

As such, it became the trial judge's task to determine whether or not the only reasonable inference of circumstantial evidence relied on by prosecutions was that the 1st and 2nd defendants participated in the riot on Des Voeux Road West.

The trial judge's ruling on the aforementioned circumstantial evidence is a good illustration on the court's approach towards inference.

The prosecution sought to argue that as the CCTV footage indicated that the 1st and 2nd defendants first appeared in the Alleyway just when a large number of protesters entered Ki Ling Lane, a nearby road

connecting the Alleyway, from Des Voeux Road West. As no other footage showed that the 1st and 2nd defendants entered the Alleyway from other directions, the prosecution submitted that it was reasonable to infer that they had participated in the riot on Des Voeux Road West.

Such submission was rejected by the trial judge. He accepted the defence's submission that relevant CCTV footage did not show that the 1st and 2nd defendants were among the protesters who rushed from Des Voeux Road West to Ki Ling Lane. Given that the 1st and 2nd defendants could have entered the Alleyway from many other locations, the trial judge ruled that prosecution's above assertion was mere speculation instead of the only reasonable inference.

The prosecution also argued that given that the clothing of and equipment carried by the 1st and 2nd defendants matched those of the protesters, the court should rule out the possibility that they were merely bystanders. The court in *Tong Wai Hung* recognized that the protesters of the Anti-ELAB Movement did not belong to a particular group or organization and that they did not have standardized uniform or equipment. The trial judge recognized that "the court should exercise caution and avoid making adverse inference to the 1st and 2nd Defendants who wore black clothing or held equipment in black" simply because some portion of society label protest activities and protesters as "black violence" or "rioters in black". The trial judge further stressed in [119] that the court would disregard the labelling effect of clothing and focus on the acts of the defendants.

First-aid supplies were also found on the 1st and 2nd defendants. The trial judge, rejecting the prosecution's contention that such supplies reinforced the conclusion that they participated in the riot, ruled that there was a reasonable possibility that the 1st and 2nd defendants were present at the scene at first-aiders. The trial judge further raised another possibility that the 1st and 2nd defendants could be assisting any person

at the scene. At such, it could not be shown that the only irresistible inference was that the 1st and 2nd defendants had intention in common with the protesters.

As there are other reasonable inferences regarding the 1st and 2nd defendants' appearance near the scene, the court held that defendants' demeanor and behavior were of less evidential value. As for the fleeing of the 1st and 2nd defendants, the fleeing point failed due to similar logic as the judge concluded that there were other reasonable inferences to explain why the 1st and 2nd defendants were rushing away from the arresting police officers.

The court's approach indicates a large degree of uncertainty as to whether or not the defendants will be convicted of the public order offences. While there is no dispute that the decision of each case will depend on its circumstances, the sole reliance on inference could create different result subject to the determination of different judges. While the judge in *Tong Wai Hung* ruled that black clothing was insufficient to draw adverse inference, Magistrate Cheng Lim Chi Andy in *HKSAR v Siu Ho Yin & Ors* [2020] HKMagC 11 invoked the clothing (e.g. white hamlet and plastic wraps around the legs) and equipment, including a respirator, of the 4th defendant to infer that she must have participated in an unlawful assembly on Nathan Road. And in the case of the 10th defendant, even the act of wearing a black scarf was taken into account by the Magistrate to infer her guilt.

It is entirely possible that the Court of Appeal or the Court of Final Appeal will laid down guidelines on how inference should be drawn in cases without direct evidence of the defendant's participation in the unlawful assembly and/or riot. As of now, however, how such inference will be drawn will largely depend on the facts of the case and, to a certain extent, the determination of the trial judge.

4.2. Different Degree of Participation

As a result of the strong solidarity amongst the moderate and radical flanks, the protesters will have different levels of participation even during the same protest. The courts have been repletely affirmed that the conduct of the defendant should not be looked at in isolation. In this regard, the Hong Kong courts frequently cited the ruling of LJ Sachs in *R v Caird and others* [1970] Cr App R 499:

> "Any participation whatever, irrespective of its precise form, in an unlawful or riotous assembly of this type derives its gravity from becoming one of those who, by weight of numbers, pursued a common and unlawful purpose. … In the view of this court, it is a wholly wrong approach to take the acts of any individual participator in isolation. They were not committed in isolation and, as already indicated, it is that very fact that constitutes the gravity of the offence."

Caird has been applied in *HKSAR v Leung Tin Kei* (HCCC 408/2016) and recently in *HKSAR v Sin Ka Ho* [2020] HKDC 337. In *Sin Ka Ho*, the defendant pleaded guilty to taking part in a riot outside the public entrance of the Legislative Council Complex on 12th June 2020, a landmark date of the Anti-ELAB movement. A J Woodcock J, when deciding the culpability of the defendant, also took account of scene leading up to the riot. As such, she concluded that "the violence was large in scale and very serious" and that "it can be seen to escalate". Following the approach of the Court of Appeal in *Wong Chi Fung*, the trial judge stressed, at [44], that deterrence was the supreme sentencing principle and that "a deterrent sentence will reflect the fact that the defendant joined in an attempt to overpower police performing protective duties". As such while "it is not an inconsiderable task to

impose a punitive and deterrent sentence on a young man with a previous good character", the judge stressed that "mitigation and personal circumstances are not mitigating factors of any significant weight".

In essence, once all elements of the offences have been proven against an accused, his or her individual act(s) during the unlawful assembly or riot is not that significant when it comes to sentencing. In *HKSAR v Tang Ho Yin* [2019] 3 HKLRD 502, a case relating to the Mongkok Riot in 2016, the Court of Appeal affirmed: "firstly, the gravity of the offence of riot is not to be judged merely by what the individual did (or did not do), but by what the group to whose number he lent his support did; secondly, the offence may be aggravated by the commission of other crimes during the course of the riot; thirdly, those who resort to the company and association of others in order to inflict widespread violence and destruction must be strongly deterred". The court's view is that once the accused has been ruled to be in support of the disorderly event, his degree of participation will not be relevant at all. The relevant considerations as stated in *HKSAR v Yeung Ka Lun* [2019] 1 HKC 296 would be:

(1) the number of offenders;
(2) the nature and level of violence;
(3) the duration of the offence;
(4) the nature and extent of the nuisance caused to the public; and
(5) the damage done to society.

The sentencing principles above have been applied in cases relating to the Anti-ELAB Movement. Besides *Sin Ka Ho* above, H.H. Judge AJ Woodcock also gave similar judicial reasonings in *HKSAR v Leung Pak Tim & Ors* [2020] HKDC 838. *Leung Pak Tim* concerns the incidents

outside the Sha Tin Town Plaza on 14th July 2019. Police officers were injured when attempting to clear the protesters inside the shopping centre. The court similarly held at [72] that it was a "wholly wrong approach to take the acts of any individual participator in isolation". The court's view was that the number of protesters "gave them support and encouragement from being together with so many to riot". As such, all protesters were "equally culpable". The Court, at [62] echoing *Caird*, proclaimed that it was "the sheer number with the defendants that gave them support and encouragement from being together with so many to riot"

It is worth nothing that the court in *Sin Ka Ho* at [48] considered the event outside the Legislative Council Complex more serious than the Mongkok Riot in 2016. The court held that the appropriate starting point for taking part in the riot was 6 years. And in *Leung Pal Tim*, the Court stressed that a deterrent sentence was imposed to reflect that the riotous conducts took place in a public place and that there were "direct attacks on police officers holding a shield".

While the lower courts closely followed the CA's updated sentencing principle in *Wong Chi Fung* and frequently imposed deterrent sentences in unlawful assembly and riot cases, one aspect of the CFA's judgement in *Wong Chi Fung* is seldom discussed. The CFA, while endorsing the updated sentencing principles be the Court of Appeal, also stressed at [125] that "culpability of the offender may vary depending on his degree of participation in the unlawful assembly and the violence in question". Their Lordships, drawing on Tang PJ's dictum in *Chow Nok Hang*, further remarked that a "distinction must be drawn between a participant in an unlawful assembly who remains peaceful and one who himself engages in or encourages violence".

As such, contrary to the lower court rulings, it appears that there will be situation in which the individual act of the defendant will be

relevant in determining his or her culpability. Besides considering the relevant factors as stated in *Yeung Ka Lun* regarding the nature of the unlawful assembly or riot, the CFA left open a possibility where a peaceful participant's culpability will be differently considered.

As for the reason why the CFA's dictum above is seldom applied to any of the unlawful assembly or riot cases in connection with the Anti-ELAB Movement, it can be argued that the defendants in *Sin Ka Ho* and *Leung Pak Tim* all admitted to having participated in some forms of disorderly conduct. As such, they cannot be considered as participants who remained peaceful.

However, case law has indicated that the prescribed acts under sections 17 and 18 of POO can be widely constructed. In *HKSAR v Mok Ka To* [2018] HKDC 225, H.H. Judge K.H Kwok held that moving in an intimidating manner could be counted as the individual activity in furtherance of the riot. More importantly, by being in the scene of riot, the defendant would be considered as taking part in a riot by supporting and/or encouraging others to participate in the riot. In other words, as long as the court considers that the conduct of the defendant can embody, encourage and reinforce the acts of other protesters, they will have the same degree of culpability as the so-called "violent protester".

In *Secretary for Justice v CMT & Anor* [2020] HKCA 939, a case concerning two defendants who were both 14-year-olds, the CA allowed the SJ's review of sentence and imposed sentences that would leave criminal records on the defendants. It is worth nothing that the Magistrate at the lower court did rule that the two defendants were relatively passive during the protest and were never seen doing violent acts. As such, applying Tang PJ's dictum in *Chow Nok Hang*, the Magistrate considers that the level of participation of the two defendants were "more akin" to protesters who remained peaceful in an unlawful assembly.

The CA disagreed with the Magistrate's finding. Poon CJHC stated that such finding was "flatly contradicted by evidence" as both defendants were seen in the front, one of them "used an umbrella to shield other protesters" and another "gave hand signals to the protesters behind him, gesturing to them to halt or back off". As such, CA held that the Magistrate's reliance on *Chow Nok Hang* dictum, and to a certain extent, the CFA's dictum, was misplaced as his finding on the defendants' level of participation was plainly wrong.

While the CFA's approach in differentiating the level of participation of protesters has not been rejected, the case of *CMT* indicates that such principle will only be applied in narrow circumstances. Given the courts' readiness to identify conduct that will embody, encourage and reinforce the acts of other protesters, it is extremely difficult for a protester to be considered as peaceful during an unlawful assembly.

5. Conclusion

The Hong Kong Court in the past has stressed that it had no interest in taking a political stance. The CFA in *Wong Chi Fung* (2018) stressed that its role was to "administer the law of the HKSAR, including the Basic Law, and to adjudicate on the legal issues raised in any case according to the law" instead of engaging in a political debate. The Court proclaimed: "In reaching a decision in any given case, a court exclusively applies the applicable legal principles to the relevant facts and thereby reaches a decision on the appropriate disposition of the case, explaining its reasons in its judgment. That is the sole task of this Court in these appeals."

That being said, the Court is well aware of the implication of its judgements on Hong Kong society. As demonstrated by the discussion

above, once the court ruled that the defendant is guilty of the public order offences, there is little room for mitigation. The political implication is that the Court considers that imposing deterrent sentence on young defendants with previous good character is essential to uphold public interest.

In *HKSAR v Yeung Ka Lun* [2018] HKCA 146, a case in which a university student was convicted of riot and arson during the Mongkok Riot in 2016, the Court of Appeal remarked:

> "Impose a long custodial sentence on a young person is a tragedy on himself, his family and even society [as a whole], but this court must curb the criminal activities, as shown in this case, that disregard the law, public order and law enforcement officers."

H.H. Judge AJ Woodcock in *Leung Pak Tim* shares the same degree of compassion towards the young defendants by stating: "It is not an inconsiderable task to impose a punitive and deterrent sentence on young men and those with previous good characters but this present case requires me to give proper weight to public interest."

In making the determination above, the court has consistently made it clear that once the protesters become involved in violence or the threat of violence, the court will be perfectly entitled to impose legal sanctions on them. Poon JA remarked in CA's decision in *Wong Chi Fung*:

> "For the general public, preserving public order helps create a safe and stable social environment to enable individuals to exercise their rights (including human rights of which the freedom of assembly and expression is one), express their views and pursue their goals. In fact, the above-mentioned rights themselves will be lost in a situation of anarchy if public order is not preserved. That is exactly the rationale

> underlying Article 17 of the Hong Kong Bill of Rights in only safeguarding peaceful assembly: the legal protection of the right of assembly is effective only in a society where public order is preserved. Because preserving public order is so important to the society and the general public, the law must always remain vigilant to ensure that public order in Hong Kong is not under threat."

It is worth noting that the Court did not address the underlying causes behind the Anti-ELAB Movement. Hong Kong courts has repeatedly avoid taking a political stance as indicated by the discussion above. In an unprecedented statement, Chief Justice Ma warned judges and judicial officers against "unnecessarily expressing in public, including in their judgments, any views on matters that are controversial in society or may come before the courts for adjudication".

That being said, it can be argued that the Court is operating under the presumption that Hong Kong citizens still fully enjoy the constitutional rights and freedoms. The protesters of the Anti-ELAB Movement do not echo such views. The two parties are operating under different sets of presumptions.

Observers such as Yap (2007) pointed out that the CFA will defer to the Central People's Government when deciding cases that concern the validity of National People's Congress Standing Committee. Further, Yap (2019) argued that by genuflecting to Beijing's core interest, the Hong Kong Court "gained political space to rule decisively against the HKSAR government on constitutional issues of vital significance in Hong Kong" which does not affect Beijing's interest.

And yet, there is evidence that such political space maybe diminishing. Pro-Beijing legislators criticized the decisions to acquit the defendants in public order cases and there have been calls for judicial reform. It is anticipated that the Hong Kong courts will be in a

difficult position. As cases relating to the Anti-ELAB Movement reach the higher courts, the way the Hong Kong courts develop the case law on unlawful assembly and riot will definitely be viewed as their response to the Movement itself and, to a larger extent, the increasingly polarized political climate.

Notes

[+] The law discussed in this paper is rapidly developing. The contents of this paper cannot be relied on as legal advice.

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1. 「光復香港，時代革命」三年後響遍香港　梁天琦在囚車裡聽得見 ["Liberate Hong Kong, Revolution of the Times" resounded throughout Hong Kong three years later, Leung Tin-kei could hear it in the prison car]. (Reported by 莊曉彤。) *CitizenNews* (眾新聞), 9th October 2019 (updated 10th October 2019). <*https://www.hkcnews.com/article/24070/*梁天琦－旺角衝突－光復香港，時代革命*-24078/*「光復香港，時代革命」三年後響遍香港－梁天琦在囚車裡聽得見>

2. Hillary Leung (2019). Edward Leung. *Time* (TIME 100 next 2019). <*https://time.com/collection/time-100-next-2019/5718822/edward-leung/*>
3. *MTR Corporation Ltd v. Persons Unlawfully and Willfully Obstructing or Interfering with the Proper use and operation of the Railway as defined in the Mass Transit Railway Ordinance (Cap 556) & Ors.* [2019] 4 HKLRD 446.
4. *Airport Authority v. Persons Unlawfully and Willfully Obstructing or Interfering with the Proper use of the Hong Kong International Airport* [2020] 5 HKLRD 483.
5. *Kwok Wing Hang and 23 Ors. v. Chief Executive in Council & Anor.* [2020] HKCFA 42.
6. *HKSAR v Leung Tin Kei* [2018] HKCFI 2715 at [78].
7. *R v To Kwan Hang* [1995] 1 HKCLR 251 at p. 254.
8. *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at p. 849.
9. *Secretary for Justice v Leung Kwok Wah* [2012] 5 HKLRD 556, p. 573.
10. Note 3 at [73].
11. *Ibid.* at [73].
12. See *HKSAR v Leung Chung Hang Sixtus* [2020] HKCFI 2401.
13. *R v Howell* [1982] QB 416, p. 427.
14. *Wong Chi Fung* (2018) (CFA) at [94] & [124].

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HKSAR v Leung Pak Tim & Ors [2020] HKDC 838

HKSAR v Mok Ka To [2018] HKDC 225

HKSAR v Sin Ka Ho [2020] HKDC 337

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