



透過聯合國普遍定期審議機制於香港推動人權
Advancing human rights in Hong Kong through
the UN Universal Periodic Review process

Submission to the United Nations Human Rights Committee for General Comment on Article 21 (Right of Peaceful Assembly)

March 2019

Introduction

The Hong Kong Universal Periodic Review Coalition ('the Coalition') greatly appreciates the opportunity to provide a submission to the United Nations Human Rights Committee ('the Committee') for the General Comment on Article 21 of the International Covenant on Civil and Political Rights ('ICCPR').

The Coalition consists of 45 civil society organisations and was established to advance human rights in Hong Kong through the United Nations Universal Periodic Review process. The Coalition has been engaging with civil society, the international community, the United Nations and the government of the Hong Kong Special Administrative Region (HKSAR) for almost two years. This includes a comprehensive consultation process to produce a submission to the United Nations Human Rights Council, over 200 meetings with various stakeholders, social media engagement, roundtable events and 24 fact sheets. The Coalition's work is facilitated by Justice Centre Hong Kong and guided by a Steering Committee.¹

The Coalition has had limited capacity to prepare a response. As such, the comments cover the following points briefly:

- added value for Article 21, especially in the context of a jurisdiction that is not a fully-fledged democracy, such as the HKSAR;
- use of the term 'peaceful assembly' in the context of Article 21;
- accountability for the violation of rights during assemblies and misuse of legislation which places restrictions on Article 21 rights; and
- intersection between Article 21 and the United Nations Universal Periodic Review (UPR).

The Coalition greatly appreciates the assistance of Hong Kong Watch in drafting this submission.²

Added Value and Rationale for Article 21

The HKSAR operates in a unique international law setting, reflective of the Hong Kong Basic Law and the "one country, two systems" principle. Article 39 of the Basic Law states:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

¹ More information on the work of the Coalition is available at:
<http://www.justicecentre.org.hk/policy-advocacy/universal-periodic-review/>

² More information on the work of Hong Kong Watch can be found at: <https://www.hongkongwatch.org/>.



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The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

In total, 15 United Nations human rights treaties apply to Hong Kong, with seven of those entailing a reporting requirement. This includes the ICCPR, which has been incorporated into the Hong Kong Bill of Rights Ordinance. Article 21 in the ICCPR has been replicated word for word in Article 17 of the Bill of Rights Ordinance. Meanwhile, the ICCPR has been signed by the People's Republic of China (PRC), but never ratified.

Articles 45 and 68 of the Basic Law stipulate universal suffrage as the ultimate method of electing the Chief Executive and Members of the Legislative Council (LegCo). Currently, the Chief Executive is elected by a committee of 1,200 members, which favours pro-establishment and business interests. It includes representatives from catering, industrial and commercial backgrounds, including members of the PRC National People's Congress. Additionally, half of LegCo is made up by functional constituency members, formed and voted on by professional and special interest groups. This leads to pro-establishment and pan-democrats receiving seats disproportionate to their votes. In recent years, LegCo has increasingly lost its capacity to monitor government actions and misuse of power. This has been due to the rise in political screening of candidates, removal of elected legislators through their irregular vow taking and limitations on scrutiny mechanisms through LegCo rule changes.

Within this climate, the capacity to exercise Article 21 rights is critically important and closely intersects with Article 25, especially the capacity for people to participate in public affairs without distinction. The HKSAR is not a democracy. As such, public assemblies are an essential tool to ensure that the government is aware of public views and are regularly used by civil society organisations.³ For example, every year on 1 July, pro-democracy supporters hold a march to mark the handover of the HKSAR to the PRC and call for universal suffrage, which is required under the Basic Law.

Peaceful Assembly under Article 21 and Compliance with the ICCPR

The Coalition is of the view that the right of peaceful assembly or procession is a right guaranteed by law and should not be “the gift of a policeman or government”.⁴ Placing restrictions of these constitutionally guaranteed rights in the hands of a Commissioner of Police instead of a judge or a court is problematic and, in the experience of the HKSAR, can leave legislation open to abuse.

Article 21 is clear that restrictions on freedom of peaceful assembly or expression are only acceptable when they are necessary and justifiable. It follows that a law which enables a government or an enforcement authority to lay a criminal charge on a person exercising his/her right of peaceful assembly but failing to comply with “a procedural requirement”, such as giving advance notification to the police, is likely to unduly restrict freedom of peaceful assembly by adding unnecessary barriers to meeting publicly or taking part in processions.

Of additional concern in the HKSAR is the impact of sentencing guidelines. In the HKSAR, they can lead to a peaceful participant of a public assembly being sentenced to five years in

³Hong Kong Council of Social Service, No. of public order events (1986 to 2016), available at: https://www.socialindicators.org.hk/en/indicators/political_participation/2.5.

⁴Hong Kong Bar Association, ‘The Bar’s Submissions on the Right of Peaceful Assembly or Procession’, 25 November 2000, available at: <https://hkba.org/zh-hant/node/14200>.



prison if the organisers fail to comply with the notification requirement. This is extreme, unnecessary and open to abuse.⁵

Accountability of the organisers of assemblies

The Coalition is worried with the HKSAR government's approach towards the accountability of assembly organisers for the actions of individual protestors. We are concerned that relatively minor incidents, where there is no direct responsibility attributable to organisers, may be used over time to justify refusals to organise assemblies. Such cases are likely to intersect closely with Article 19 rights.

A recent example helps to illustrate our concerns. On 1 January 2019, Civil Human Rights Front, a member of the Coalition, organised a pro-democracy assembly. At the assembly, an individual held up a sign which said "only with two countries will there be two systems". In response the HKSAR government issued a press release stating:

At the public meeting organised by Civil Human Rights Front at the CGO East Wing Forecourt (the Forecourt) this afternoon (January 1), there were individual participants carrying placard with slogan advocating "independence of Hong Kong".

...

In handling the application for conducting the public meeting at the Forecourt today, the Administration Wing has reminded the organiser to abide by the laws in force in the Hong Kong Special Administrative Region (HKSAR) and appeal to the participants not to conduct any activity that contravenes the laws in force in the HKSAR, including the Basic Law.

...

The spokesman expressed deep regret that the organiser has not appealed to participants not to conduct any activity that contravenes the laws in force in the HKSAR, including the Basic Law.⁶

The Coalition is concerned with potential legalist approaches by the HKSAR government to restrict the ability of civil society organisations to organise assemblies, especially in situations where actions are consistent with Article 19 rights.

Accountability for violations of rights during assemblies and misuse of legislation

In the HKSAR, vague colonial era-legislation including the Public Order Ordinance and the common law crime of public nuisance, which have been critiqued by the Committee for "facilitating excessive restriction to covenant rights".⁷ They have been the major legislative tool used to clampdown on activists and protestors involved in the 2014 Umbrella Movement and the February 2016 Mong Kok unrest.

⁵ Ibid.

⁶ Government of the Special Administrative Region of Hong Kong, 'HKSARG reiterates its zero tolerance on HK independence', 1 January 2019, available at: <https://www.info.gov.hk/gia/general/201901/01/P2019010101012.htm>.

⁷ OHCHR, 'Concluding observations on the third periodic report of Hong Kong, China', 11-28 March 2013.



Since the Umbrella Movement protests, more than one hundred people involved in protests have been charged under the Public Order Ordinance, with many facing ‘illegal assembly’ charges.⁸ The decision to prosecute criminal offences, including those under the Ordinance, is the responsibility of the Secretary for Justice, an appointed official. Rimsky Yuen, former Secretary for Justice, sought stronger sentences for pro-democracy activists, despite advice from the Department of Justice not to do so.⁹

The HKSAR government sought to maximise sentencing, with many peaceful protestors receiving jail time. For example, with Joshua Wong, Nathan Law and Alex Chow, the Secretary for Justice sought to increase their sentences, leading to charges for ‘illegal assembly’, attracting imprisonment, rather than community service. The imprisonment sentence by the Court of Appeal was later overturned by the Court of Final Appeal. Such attempts by the Secretary of Justice were widely criticised by civil society organisations on the grounds that they amounted to political prosecution. Another example involved one of the Occupy Movement leaders Professor Benny Tai Yiu-ting. In a bid to maximise Professor Tai’s sentencing, he is facing charges of ‘incitement to incite public nuisance’, ‘incitement to public nuisance’ and ‘conspiracy to public nuisance’. Professor Tai is awaiting sentencing, which will take place in April 2019, and could face years in jail.

Prosecutors have used the Public Order Ordinance to charge 51 protestors with rioting following clashes with police in Mong Kok in February 2016. Under section 19 of the Public Order Ordinance, a riot is “an unlawful assembly” where someone commits a “breach of the peace”, the assembly is “a riot” and the persons assembled are “riotously assembled”. Prosecutors have wide discretion to define an act as a “riot”. HKSAR government officials have misused the word. In the Mong Kok cases, prosecutors sought sentences of between 3 and 10 years as a deterrence. The majority of those charged are young people with no criminal record. Trials are ongoing, but more than 30 have been found guilty, with the longest sentence lasting for 7 years.

The result of this is a significant chilling effect on protestors in Hong Kong. Vague legislation combined with the harsh sentencing guidelines deters people from attending protests. This has frustrated and diminished the impact of the pro-democracy movement, especially at a time when the ability to utilise LegCo is increasingly constrained. It is critical that clear guidelines are provided on how public order legislation should be framed to meet international human rights standards. This would greatly assist in highlighting the ongoing problems with the HKSAR’s legislation and in advising how it can be appropriately amended.

Intersection of Article 21 and the United Nations Universal Periodic Review Process

The Coalition has used the UPR process as a mechanism to raise concerns with the compliance of the Hong Kong government with rights protected under Article 21. With the HKSAR government failing to abide by concluding observations from the Committee to reform legislation that is inconsistent with Article 21, such as the Public Order Ordinance, the Coalition

⁸Hong Kong UPR Coalition, Fact Sheet: Freedom of Assembly and the Public Order Ordinance, October 2018, available at: <http://www.justicecentre.org.hk/framework/uploads/2018/11/HKUPR-Coalition-Fact-Sheet-Freedom-of-Assembly-Rights-and-Public-Order-Ordinance.pdf>.

⁹ David Kaye, Special Rapporteur on the promotion and protection the right to freedom of opinion and expression; and Michel Forst, Special Rapporteur on the situation of human rights defenders, ‘Hong Kong should respect human rights of democracy activists during appeal – UN experts’, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22359&LangID=E>.



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has found the UPR a useful mechanism to give greater attention to international human rights breaches.

The Coalition notes that during the third cycle of the UPR, 12 countries used the UPR process to make recommendations, statements and issue questions in advance. This was a substantial shift from the second cycle, due in large part to the collective effort of civil society actions through the Coalition. One of those recommendations was from France, which called for the PRC to:

“Guarantee freedom of speech, assembly and association, including in Hong Kong, and remove restrictions on freedom of information on the internet, in particular for human rights defenders.”¹⁰

In response to that recommendation, the Coalition was pleased to see that the PRC government accepted the recommendation. The Coalition and other civil society organisations will be using the response in the coming years to help hold the HKSAR government accountable to their international human rights law commitments, including with respect to Article 21 rights.

Recommendations

With respect to General Comment 21, the Coalition recommends:

- commentary is provided on the intersection between the value of Article 21 with respect to Article 25, particularly in jurisdictions where the right to take part in public affairs is restricted;
- clear guidelines should be provided on how public order legislation should be framed to ensure that it is consistent with Article 21, especially with respect to protecting Article 19 rights; and
- commentary should identify issues of proportionality in sentencing guidelines with respect to the exercise of Article 21 rights.

For further information please contact Simon Henderson, Spokesperson, Hong Kong UPR Coalition and Senior Policy Advisor, Justice Centre Hong Kong (simon@justicecentre.org.hk).

¹⁰United Nations Human Rights Council, Report of the Working Group on the Universal Periodic Review, 26 December 2018, A/HRC/40/6.