

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST  
NO 2945 OF 2019**

IN THE MATTER of the Emergency  
Regulations Ordinance, Cap 241 and  
the Prohibition on Face Covering  
Regulation, Cap 241K

and

IN THE MATTER of Articles 17, 27,  
28, 33, 39, 48, 56, 62, 66 and 73 of the  
Hong Kong Basic Law, and of  
section 5 of the Hong Kong Bill of  
Rights Ordinance, Cap 383 and  
Articles 5, 14, 16 and 17 of the Hong  
Kong Bill of Rights

BETWEEN

KWOK WING HANG	1 <sup>st</sup> Applicant
CHEUNG CHIU HUNG	2 <sup>nd</sup> Applicant
TO KUN SUN JAMES	3 <sup>rd</sup> Applicant
LEUNG YIU CHUNG	4 <sup>th</sup> Applicant
JOSEPH LEE KOK LONG	5 <sup>th</sup> Applicant
MO, MAN CHING CLAUDIA	6 <sup>th</sup> Applicant
WU CHI WAI	7 <sup>th</sup> Applicant
CHAN CHI-CHUEN RAYMOND	8 <sup>th</sup> Applicant
LEUNG KAI CHEONG KENNETH	9 <sup>th</sup> Applicant
KWOK KA-KI	10 <sup>th</sup> Applicant

A	WONG PIK WAN	11 <sup>th</sup> Applicant	A
B	IP KIN-YUEN	12 <sup>th</sup> Applicant	B
C	YEUNG ALVIN NGOK KIU	13 <sup>th</sup> Applicant	C
	ANDREW WAN SIU KIN	14 <sup>th</sup> Applicant	
D	CHU HOI DICK EDDIE	15 <sup>th</sup> Applicant	D
	LAM CHEUK-TING	16 <sup>th</sup> Applicant	
E	SHIU KA CHUN	17 <sup>th</sup> Applicant	E
F	TANYA CHAN	18 <sup>th</sup> Applicant	F
	HUI CHI FUNG	19 <sup>th</sup> Applicant	
G	KWONG CHUN-YU	20 <sup>th</sup> Applicant	G
H	TAM MAN HO JEREMY JANSEN	21 <sup>st</sup> Applicant	H
	FAN, GARY KWOK WAI	22 <sup>nd</sup> Applicant	
I	AU NOK HIN	23 <sup>rd</sup> Applicant	I
	CHARLES PETER MOK	24 <sup>th</sup> Applicant	

and

K	CHIEF EXECUTIVE IN COUNCIL	Putative 1 <sup>st</sup> Respondent	K
L	SECRETARY FOR JUSTICE	Putative 2 <sup>nd</sup> Respondent	L

M	_____	HCAL 2949/2019	M
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N	<b>IN THE HIGH COURT OF THE</b>	N
O	<b>HONG KONG SPECIAL ADMINISTRATIVE REGION</b>	O
	<b>COURT OF FIRST INSTANCE</b>	
P	<b>CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST</b>	P
Q	<b>NO 2949 OF 2019</b>	Q

R	<b>IN THE MATTER of the Emergency</b>	R
S	<b>Regulations Ordinance, Cap 241</b>	S

and

T		T
U		U
V		V

IN THE MATTER of the Prohibition  
on Face Covering Regulation,  
Cap 241K

BETWEEN

LEUNG KWOK HUNG (梁國雄)

Applicant

and

SECRETARY FOR JUSTICE

1<sup>st</sup> Putative Respondent

CHIEF EXECUTIVE IN COUNCIL

2<sup>nd</sup> Putative Respondent

(Heard together)

Before: Hon G Lam and Chow JJ in Court

Dates of Hearing: 31 October and 1 November 2019

Date of Judgment: 18 November 2019

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		<i>The Court:</i>	
M			
	A.	<i>Background</i>	
N	1.	These proceedings raise questions of the constitutionality and	
O		legality of the Emergency Regulations Ordinance (Cap 241) (“ <b>ERO</b> ”) and	
P		the Prohibition on Face Covering Regulation (Cap 241K) (“ <b>PFCR</b> ”) made	
		thereunder.	
Q	2.	The ERO is a law of some antiquity, dating back to 1922, but	
R		the PFCR is a very recent creature, made by the Chief Executive in Council	
S		(“ <b>CEIC</b> ”) on 4 October 2019 following months of protests and civil unrest	
T		and against the background of scenes of escalating violence and danger on	
		the streets of Hong Kong not seen in half a century. The protests began in	
U			
V			

opposition to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (“**Bill**”), which was proposed for the purpose of amending the Fugitive Offenders Ordinance (Cap 503) as well as the Mutual Legal Assistance on Criminal Matters Ordinance (Cap 525). The unrest has however continued notwithstanding the Government’s decision in June 2019 to suspend the legislative process for the Bill, the acknowledgement since 9 July that the Bill was “dead”, the announcement on 4 September that the Bill would be formally withdrawn, and the actual withdrawal of the Bill in the Legislative Council of Hong Kong (“**LegCo**”) on 16 October.

3. From 9 June to 4 October 2019, according to the Government’s records, over 400 “public order events” (referring to public assemblies or processions) arising out of the Bill and other matters had been held, with a significant number of them ending up in outbreaks of violence.

4. The degree of violence had escalated and, in particular, on 29 September and 1 October, gatherings took place in many districts in which certain protesters blocked major thoroughfares, vandalised Mass Transit Railway stations and facilities, government offices and selected shops, and hurled petrol bombs at police officers, vehicles and police stations.

5. The use of facial covering was not prohibited in Hong Kong before the PFCR. Having regard to the widespread and escalating danger posed by the situation, the Security Bureau recommended to the CEIC that there was an urgent need to introduce the PFCR to facilitate police investigation and to serve as a deterrent against the violent and illegal acts of masked perpetrators.

6. On 4 October 2019, the CEIC, at a special meeting of the Executive Council, formed the view that the violence and rampage had placed Hong Kong in a state of public danger and that it was necessary in the public interest for the PFCR to be made with a view to restoring law, order and public peace. Accordingly, the PFCR was made on that day pursuant to the ERO, was gazetted on the same day,<sup>1</sup> and came into operation about nine hours later at midnight on 5 October 2019.

7. Also on 4 October 2019, the Chief Executive, the Secretary for Justice and the Secretary for Security spoke at a press conference to explain the Government's decision and the operation of the PFCR. The Government made clear that the power under the ERO was being invoked on the "public danger" ground only, not the "emergency" ground and that Hong Kong was not being proclaimed to be in a state of emergency.

8. The PFCR has led to a number of applications to the court for leave to apply for judicial review filed between 4 and 10 October 2019.

9. On 11 October 2019, the PFCR was considered by the House Committee of the LegCo and a subcommittee on the PFCR was appointed. At the LegCo meeting of 16 October 2019, the PFCR was laid on the table of the LegCo.

*B. The Applications and Grounds for Judicial Review*

10. The application in HCAL 2945/2019 ("**HCAL 2945**") is one made by 24 Members of the LegCo, first lodged in draft on 5 October. The

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<sup>1</sup> LN 119 of 2019.

putative respondents are the CEIC and Secretary for Justice.<sup>2</sup> On 6 October, directions were given for an early “rolled-up” hearing<sup>3</sup> of that application for leave and (if leave be granted) the judicial review itself. The application in HCAL 2949/2019 (“**HCAL 2949**”), filed on 8 October, is an application made by Mr Leung Kwok Hung, a former LegCo Member, with the same putative respondents. On 11 October, directions were given for a rolled-up hearing of his application (but limited to two of the grounds thereof<sup>4</sup>) at the same time as HCAL 2945. The conjoined hearing of these two matters took place before us on 31 October and 1 November. We shall refer to the putative respondents below simply as the “**respondents**” or “**Government**”. Four recent applications by other applicants relating to the ERO and PFCR have been directed to await the outcome of these proceedings.<sup>5</sup>

11. In summary, the grounds that have been put forward<sup>6</sup> as the basis for judicial review and argued at the hearing may be broadly identified as follows:

- (1) **Ground 1** — The ERO is unconstitutional because it amounts to an impermissible grant or delegation of general legislative power by the legislature to the CEIC and contravenes the

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<sup>2</sup> Another putative respondent in the original Form 86, the Commissioner of Police, was removed by amendment.

<sup>3</sup> For an explanation of the nature of a “rolled-up hearing”, see the Court of Appeal’s judgment in *Chee Fei Ming & Another v Director of Food and Environmental Hygiene & Another* [2016] 3 HKLRD 412 at paras 5-7.

<sup>4</sup> Corresponding to Ground 3: the “prescribed by law ground”, and Ground 5B: the “section 5 proportionality ground”, as described below.

<sup>5</sup> Namely, HCAL 2929/2019, HCAL 2930/2019, HCAL 2942/2019 and HCAL 2993/2019. HCAL 2993/2019 has since been withdrawn with leave of the court.

<sup>6</sup> In the Amended Form 86 in HCAL 2945 and in the Amended Form 86 in HCAL 2949.

constitutional framework under the Basic Law. We shall refer to this as the “**delegation of legislative power ground**”.

(2) **Ground 2** — The ERO was impliedly repealed in 1991 by s 3(2) of the Hong Kong Bill of Rights Ordinance (Cap 383) (“**HKBORO**”) either entirely or to the extent it is inconsistent with s 5 of that latter Ordinance; alternatively, it was impliedly repealed in 1997 by Art 4 of the ICCPR as applied through Art 39 of the Basic Law. We shall refer to this as the “**implied repeal ground**”.

(3) **Ground 3** — The ERO, to the extent that it empowers the CEIC to make regulations restricting fundamental rights protected by the Basic Law and the Hong Kong Bill of Rights (“**Bill of Rights**”), falls foul of the “prescribed by law” requirement in Art 39 of the Basic Law. We shall refer to this as the “**prescribed by law ground**”.

(4) **Ground 4** — By reason of the principle of legality, the general words in s 2(1) of the ERO are not to be read as allowing the Government to adopt measures that infringe fundamental rights of the individual in circumstances far removed from emergency situations. The PFCR is therefore *ultra vires* — beyond the power conferred on the CEIC by the ERO. We shall refer to this as the “**principle of legality ground**”.

(5) **Ground 5A** — Section 3 of the PFCR amounts to a disproportionate restriction of a person’s liberty and privacy, freedom of expression and right of peaceful assembly under Arts 5, 14, 15, 16, 17 of the Bill of Rights and Art 27 of the Basic Law. We shall refer to this as the “**section 3 proportionality ground**”.



(6) **Ground 5B** — Section 5 of the PFCR constitutes a disproportionate interference with the rights and freedoms protected by Art 27, 28 and 31 of the Basic Law and Art 5(1), 8, 14 and 16 of the Bill of Rights. We shall refer to this as the “**section 5 proportionality ground**”.

12. At the hearing, Ms Gladys Li, SC addressed us on Ground 1 and Mr Johannes Chan, SC addressed us on Grounds 2 to 5B on behalf of the applicants in HCAL 2945; Mr Hectar Pun, SC addressed us on Grounds 3 and 5B on behalf of the applicant in HCAL 2949; and Mr Benjamin Yu, SC addressed us on behalf of the respondents on all the grounds argued in both applications.

13. As can be seen, Grounds 1 to 3 seek to impugn the ERO itself, whereas Grounds 4, 5A and 5B attack the validity of the PFCR. All of the grounds are targeted at the constitutionality and validity of the ERO or the PFCR; none of them seeks to impugn the good faith of the Government in invoking the ERO to enact the PFCR or the reasonableness of the decision to do so in the classic administrative law sense. We shall discuss these grounds separately in turn below, after examining the provisions of the ERO and the PFCR. We shall deal with each ground without assuming that the others have been established. We bear in mind the duty of the court to adjudicate in accordance with the law including the Basic Law as we find them, and to exclude politics from our consideration.

*C. The Emergency Regulations Ordinance*

14. The ERO is a short Ordinance with only three substantive sections, which provide as follows:

A			A
	<b>“ 2. Power to make regulations</b>		
B	(1) On any occasion which the Chief Executive in		B
C	Council may consider to be an occasion of emergency		C
	or public danger he may make any regulations		
D	whatsoever which he may consider desirable in the		D
	public interest.		
E	(2) Without prejudice to the generality of the provisions		E
	of subsection (1), such regulations may provide		
F	for—		F
G	(a) censorship, and the control and suppression of		G
	publications, writings, maps, plans, photographs,		
H	communications and means of communication;		H
I	(b) arrest, detention, exclusion and deportation;		I
J	(c) control of the harbours, ports and waters of Hong		J
K	Kong, and the movements of vessels;		K
L	(d) transportation by land, air or water, and the		L
	control of the transport of persons and things;		
M	(e) trading, exportation, importation, production and		M
	manufacture;		
N	(f) appropriation, control, forfeiture and disposition		N
O	of property, and of the use thereof;		O
P	(g) amending any enactment, suspending the		P
Q	operation of any enactment and applying any		Q
R	enactment with or without modification;		R
S	(h) authorizing the entry and search of premises;		S
T	(i) empowering such authorities or persons as may		T
U	be specified in the regulations to make orders and		U
	rules and to make or issue notices, licences,		
V	permits, certificates or other documents for the		V
	purposes of the regulations;		
	(j) charging, in respect of the grant or issue of any		
	licence, permit, certificate or other document for		
	the purposes of the regulations, such fees as may		
	be prescribed by the regulations;		
	(k) the taking of possession or control on behalf of		
	the Chief Executive of any property or		
	undertaking;		
	(l) requiring persons to do work or render services;		

A			A
B	(m)	payment of compensation and remuneration to persons affected by the regulations and the determination of such compensation; and	B
C	(n)	the apprehension, trial and punishment of persons offending against the regulations or against any law in force in Hong Kong,	C
D			D
E		and may contain such incidental and supplementary provisions as appear to the Chief Executive to be necessary or expedient for the purposes of the regulations.	E
F	(3)	Any regulations made under the provisions of this section shall continue in force until repealed by order of the Chief Executive in Council.	F
G			G
H	(4)	A regulation or any order or rule made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any enactment; and any provision of an enactment which may be inconsistent with any regulation or any such order or rule shall, whether that provision shall or shall not have been amended, suspended or modified in its operation under subsection (2), to the extent of such inconsistency have no effect so long as such regulation, order or rule shall remain in force.	H
I			I
J			J
K			K
L	(5)	Every document purporting to be an instrument made or issued by the Chief Executive or other authority or person in pursuance of this Ordinance or of any regulation made hereunder and to be signed by or on behalf of the Chief Executive or such other authority or person, shall be received in evidence, and shall, until the contrary is proved, be deemed to be an instrument made or issued by the Chief Executive or that authority or person.	L
M			M
N			N
O			O
P	<b>3. Penalties</b>		P
Q	(1)	Without prejudice to the powers conferred by section 2, regulations made hereunder may provide for the punishment of any offence (whether such offence is a contravention of the regulations or an offence under any law applicable to Hong Kong) with such penalties and sanctions (including a maximum penalty of mandatory life imprisonment but excluding the penalty of death), and may contain such provisions in relation to forfeiture, disposal and retention of any article connected in any way with such offence and as to revocation or cancellation of any licence, permit,	Q
R			R
S			S
T			T
U			U
V			V

pass or authority issued under the regulations or under any other enactment as to the Chief Executive in Council may appear to be necessary or expedient to secure the enforcement of any regulation or law or to be otherwise in the public interest.

- (2) Any person who contravenes any regulation made under this Ordinance shall, where no other penalty or punishment is provided by such regulations, be liable on summary conviction to a fine of \$5,000 and to imprisonment for 2 years.

#### **4. Declaratory provision as to effect of an amending Ordinance**

For the purpose of removing doubts it is hereby declared that the words in subsection (1) of section 2 “he may make any regulations whatsoever which he may consider desirable in the public interest” shall be deemed always to have included power to make such regulations as are mentioned in paragraph (g) of subsection (2) of section 2 and it is further declared that the provisions of subsection (4) of section 2 shall be deemed always to have been incorporated herein.”

15. The ERO<sup>7</sup> was placed before the LegCo as the Strike Legislation Bill and enacted in the course of one sitting of the LegCo on 28 February 1922 during the height of a general strike called in support of seamen in their dispute with shipping companies over wages. One of the first regulations made under the new law was to criminalise trade unions as unlawful societies. An amendment to the ERO to provide for more severe punishment was passed in one sitting on 15 July 1925.

16. More substantial amendments to the ERO were made in March 1949,<sup>8</sup> including the removal of three paragraphs under s 2(2) and the addition of paragraphs (g) to (n) as well as s 2(4) and (5). The limit on

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<sup>7</sup> The history of the ERO and more generally of emergency powers in Hong Kong has been described in two academic articles: Norman Miners, *The Use and Abuse of Emergency Powers by the Hong Kong Government* (1996) 26 HKLJ 47 and Max W L Wong, *Social Control and Political Order — Decolonisation and the Use of Emergency Regulations in Hong Kong* (2011) 41 HKLJ 449.

<sup>8</sup> By the Emergency Regulations (Amendment) Ordinance 1949, (Ord No 8 of 1949).

penalties in s 3 was increased from a fine of \$1,000 and imprisonment for one year to a fine of \$5,000 and imprisonment for two years. In quick succession, on 31 August 1949, the ERO was amended again,<sup>9</sup> by the substitution of a new s 3 and s 4, to empower regulations to be made with such penalties and sanctions as appear to the Governor in Council necessary or expedient, including the death penalty subject to the LegCo's approval.

17. After the Bill of Rights came into operation, the ERO was amended in 1993,<sup>10</sup> when the death penalty in s 3(1) was substituted by mandatory life imprisonment.<sup>11</sup>

18. As part of the general adaptation exercise for pre-existing laws, amendments were made in 1999 to the terminology used in the ERO, with, for example, the substitution of "Chief Executive in Council" for "Governor in Council".<sup>12</sup>

19. In the course of the many years since its enactment, various regulations had been made under the ERO, such as in the 1920s during general strikes, in 1929 during a severe drought, in 1931 during the anti-Japanese riots, in the 1930s during an outbreak of cholera, in 1935 when there was a case of rabies, in the late 1930s to mid-1940s during the Second World War, in 1950 to impose the death penalty for the possession of any bomb, grenade, mine, or like apparatus, in 1950 to deal with the shortage of small coins, in 1956 during the Tsuen Wan riots, and in 1967 during the widespread riots in Hong Kong. By the 1940s most of the then

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<sup>9</sup> By the Emergency Regulations (Amendment) (No 2) Ordinance 1949, (Ord No 40 of 1949).

<sup>10</sup> By the Crimes (Amendment) Ordinance 1993, (Ord No 24 of 1993), section 24.

<sup>11</sup> Section 3(3), which required the LegCo's approval for the death penalty, was also repealed at the same time.

<sup>12</sup> Adaptation of Laws (No 32) Ordinance 1999, (Ord No 71 of 1999), Schedule 8.

existing regulations were consolidated into the Emergency (Principal) Regulations.

20. Before the making of the PFCR, the ERO had not been invoked to make any new regulation since the 1970s, although some very old regulations continued to be in the statute books. In 1995, all the remaining extant regulations made under the ERO, including the Emergency (Principal) Regulations, several regulations relating to deportation and detention, and regulations relating to requisition of land for use by British military forces, were revoked by the Governor in Council.<sup>13</sup>

*D. The Prohibition on Face Covering Regulation*

21. The PFRC is a short piece of regulation, with six sections. Section 2 contains the definitions, and s 6 provides for the time in which prosecution may be brought.

22. Section 3 of the PFCR imposes a prohibition on the use of and makes it an offence to use facial covering in certain circumstances. It reads:

“(1) A person must not use any facial covering that is likely to prevent identification while the person is at-

(a) an unlawful assembly (whether or not the assembly is a riot within the meaning of section 19 of Cap 245<sup>14</sup>);

(b) unauthorised assembly;

(c) a public meeting that-

(i) takes place under section 7(1) of Cap 245; and

(ii) does not fall within paragraph (a) or (b); or

(d) a public procession that-

(i) takes place under section 13(1) of Cap 245; and

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<sup>13</sup> LN 251-255 of 1995.

<sup>14</sup> Cap 245 means the Public Order Ordinance (Cap 245).

(ii) does not fall within paragraph (a) or (b).

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 4<sup>15</sup> and to imprisonment for 1 year.”

23. “Facial covering” is defined in s 2 to mean a mask or any other article of any kind (including paint) that covers all or part of a person’s face.

24. Section 3 prohibits the use of facial covering likely to prevent identification in four specified situations. These situations require some elaboration.

25. The first, referred to in s 3(1)(a), is an “unlawful assembly” (非法集結). This has the same meaning as in s 18 of the Public Order Ordinance (“**POO**”). Section 18(1) & (2) provide:

“ (1) When 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly.

(2) It is immaterial that the original assembly was lawful if being assembled, they conduct themselves in such a manner as aforesaid.”

26. Secondly, s 3(1)(b) refers to “unauthorised assembly” (未經批准集結). This has the same meaning as in s 17A(2) of the POO, which provides:

“ (2) Where—

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<sup>15</sup> This means \$25,000: see s 113B of and Schedule 8 to the Criminal Procedure Ordinance (Cap 221).

- (a) any public meeting<sup>16</sup> or public procession<sup>17</sup> takes place in contravention of section 7 or 13;
- (b) 3 or more persons taking part in or forming part of a public gathering<sup>18</sup> refuse or wilfully neglect to obey an order given or issued under section 6; or
- (c) 3 or more persons taking part in or forming part of a public meeting, public procession or public gathering, or other meeting, procession or gathering of persons refuse or wilfully neglect to obey an order given or issued under section 17(3),
- the public meeting, public procession or public gathering, or other meeting, procession or gathering of persons, as the case may be, shall be an unauthorized assembly.”

27. Paragraph (a) of this definition refers to ss 7 and 13 of the POO. Under s 7 of the POO, a public meeting may take place if the Commissioner of Police is notified of the intended meeting and has not prohibited it, but a meeting of not more than 50 persons, a meeting in private premises (whether or not the public are permitted to attend) with no more than 500 persons, and certain meetings in schools, are exempted. Similarly, under s 13 of the POO, a public procession may take place if the Commissioner of Police is notified of the intended procession and does not object to its taking place, but a public procession consisting of not more than 30 persons and a public procession not on a public highway or thoroughfare or in a public park are exempted. Paragraphs (b) and (c) of the definition refer to ss 6 and 17(3). These provisions allow the police to give orders to regulate, stop or disperse public gatherings, public meetings and public processions in specified circumstances or for specified purposes.

<sup>16</sup> “Public meeting” means any meeting held or to be held in a public place.

<sup>17</sup> “Public procession” means any procession in, or from a public place.

<sup>18</sup> “Public gathering” means a public meeting, a public procession and any other meeting, gathering or assembly of 10 or more persons in any public place.



28. The third situation is set out in s 3(1)(c). It essentially refers to a public meeting (公眾集會) which has been notified to and not prohibited by the Commissioner of Police and which is not an unlawful or unauthorised assembly. Since meetings of no more than 50 persons, meeting in private premises with no more than 500 persons, and certain meetings in schools do not have to be notified, they also fall outside s 3(1)(c).

29. The fourth situation, set out in s 3(1)(d), essentially means a public procession (公眾遊行) which has been notified to and is not objected to by the Commissioner of Police and which is not an unlawful or unauthorised assembly. Public processions of no more than 30 persons and public processions not on a public highway or thoroughfare or in a public park, which do not have to be notified, fall outside s 3(1)(d).

30. In short, broadly speaking, the prohibition in s 3(1) applies to persons at unlawful assemblies, unauthorised assemblies, public meetings notified and not prohibited, and public processions notified and not objected to, and does not *prima facie* apply to public meetings or processions that do not need to be notified, although such meetings or processions may turn into *unauthorised* assemblies (eg if 3 or more persons taking part in them refuse or wilfully neglect to obey an order given under ss 6 or 17(3) of the POO) or *unlawful* assemblies.

31. Section 4 of the PFCR sets out a defence to the offence under s 3(2). It provides:

“(1) It is a defence for a person charged with an offence under section 3(2) to establish that at the time of the alleged

offence the person had lawful authority or reasonable excuse for using a facial covering.

(2) A person is taken to have established that a person had lawful authority or reasonable excuse for using a facial covering if-

(a) there is sufficient evidence to raise an issue that the person had such authority or reasonable excuse; and

(b) the contrary is not proved by the prosecution beyond reasonable doubt.

(3) Without limiting the scope of the reasonable excuse referred to in subsection (1), the person had a reasonable excuse if, at the assembly, meeting or procession concerned-

(a) the person was engaged in a profession or employment and was using the facial covering for the physical safety of the person while performing an act or activity connected with the profession or employment;

(b) the person was using the facial covering for religious reasons; or

(c) the person was using the facial covering for a pre-existing medical or health reason.”

32. In other words, the defence is one of lawful authority or reasonable excuse. An *evidential* burden is placed on an accused to raise the defence but it is the prosecution’s legal burden to disprove the defence. The scope of reasonable excuse is not exhaustively defined, but three grounds are specifically included, namely, professional or employment reasons, religious reasons and pre-existing medical or health reasons.

33. Section 5 concerns police powers in relation to facial covering.

“ (1) This section applies in relation to a person in a public place who is using a facial covering that a police officer reasonably believes is likely to prevent identification.

(2) The police officer may-

(a) stop the person and require the person to remove the facial covering to enable the officer to verify the identity of the person; and

(b) if the person fails to comply with a requirement under paragraph (a)– remove the facial covering.

(3) A person who fails to comply with a requirement under subsection (2)(a) commits an offence and is liable on conviction to a fine at level 3<sup>19</sup> and to imprisonment for 6 months.”

34. “Public place” (公眾地方) has the meaning given by s 2(1) of the POO, that is to say:

“ any place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise, and, in relation to any meeting, includes any place which is or will be, on the occasion and for the purposes of such meeting, a public place.”

*E. Ground 1 — the delegation of legislative power ground*

*(1) The parties’ contentions*

35. Under Ground 1, the argument of the applicants in HCAL 2945 is in essence this. The constitutional order of Hong Kong is founded on the Basic Law. Under the Basic Law, the LegCo is the legislature of the Hong Kong SAR in which the region’s legislative power is vested. The CE and the Executive Branch are given executive powers and in addition the power to make subordinate legislation. On a proper understanding and construction of the framework of the Basic Law, the LegCo is constitutionally precluded from granting or delegating general

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<sup>19</sup> This means \$10,000: see s 113B of and Schedule 8 to the Criminal Procedure Ordinance (Cap 221).

legislative power to the CEIC. The ERO purports to do this and is therefore inconsistent with the Basic Law and unconstitutional.

36. The respondents submit that there is nothing in the Basic Law which provides whether expressly or by implication that the LegCo cannot authorise the CEIC to make regulations during an occasion of public danger or emergency. The ERO was in force before 1997 and was therefore part of the laws that were carried over into the Hong Kong SAR under Art 8 of the Basic Law, unless it contravenes the Basic Law. The ERO had been twice held to be valid by the Full Court. There is nothing that indicates any intention that the arrangements in relation to the ERO were to change upon the resumption of exercise of sovereignty by the People's Republic of China over Hong Kong. Regulations made under the ERO are not intended to be permanent and are subject to negative vetting by the LegCo.

37. Our decision below is confined to the public danger ground in the ERO and to the powers it confers when the CEIC considers there to be an occasion of public danger, which is the ground on which the PFCR has been made. There may be considerations of necessity arising from real emergencies that may affect the proper analysis on which we do not think we have been fully addressed and on which therefore we should express no concluded opinion.

*(2) Provisions of the Basic Law*

38. We shall first turn to the relevant provisions of the Basic Law that are relied on in this context. In Chapter I on General Principles, Art 2 makes clear that the executive, legislative and judicial power exercised in Hong Kong is by authority from the National People's Congress ("NPC")

and is enjoyed in accordance with the provisions of the Basic Law.<sup>20</sup> Art 8 provides for continuity of the laws previously in force in Hong Kong (ie before 1 July 1997) subject to any amendment by the legislature.<sup>21</sup>

39. In Chapter II, which concerns the relationship between the Central Authorities and the Hong Kong SAR, Art 17 states that the Hong Kong SAR “shall be vested with legislative power” and that laws enacted by the legislature of the Hong Kong SAR must be reported to the Standing Committee of the National People’s Congress (“NPCSC”) for the record. Under prescribed conditions, the NPCSC may return the law, which becomes invalidated.

40. Art 18 provides:

“ The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

...

In the event that the Standing Committee of the National People’s Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state

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<sup>20</sup> Art 2 provides: “The National People’s Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.”

<sup>21</sup> Art 8 provides: “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”

of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region."

41. Chapter IV deals with political structure. Section 1 (Arts 43 to 58) concerns the CE. Art 48 sets out the CE's powers and functions (行使下列職權) as follows:

**" Article 48**

The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

- (1) To lead the government of the Region;
- (2) To be responsible for the implementation of this Law and other laws which, in accordance with this Law, apply in the Hong Kong Special Administrative Region;
- (3) To sign bills passed by the Legislative Council and to promulgate laws;  
To sign budgets passed by the Legislative Council and report the budgets and final accounts to the Central People's Government for the record;
- (4) To decide on government policies and to issue executive orders;
- (5) To nominate and to report to the Central People's Government for appointment the following principal officials: Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise; and to recommend to the Central People's Government the removal of the above-mentioned officials;
- (6) To appoint or remove judges of the courts at all levels in accordance with legal procedures;
- (7) To appoint or remove holders of public office in accordance with legal procedures;
- (8) To implement the directives issued by the Central People's Government in respect of the relevant matters provided for in this Law;

A			A
B		(9) To conduct, on behalf of the Government of the Hong Kong Special Administrative Region, external affairs and other affairs as authorized by the Central Authorities;	B
C		(10) To approve the introduction of motions regarding revenues or expenditure to the Legislative Council;	C
D		(11) To decide, in the light of security and vital public interests, whether government officials or other personnel in charge of government affairs should testify or give evidence before the Legislative Council or its committees;	D
E		(12) To pardon persons convicted of criminal offences or commute their penalties; and	E
F		(13) To handle petitions and complaints.”	F
G			G
H	42.	Section 2 (Arts 59 to 65) of Chapter IV concerns the Executive Authorities, and contains the following provisions among others:	H
I			I
J		“ <b>Article 59</b>	J
K		The Government of the Hong Kong Special Administrative Region shall be the executive authorities of the Region.	K
L		<b>Article 60</b>	L
M		The head of the Government of the Hong Kong Special Administrative Region shall be the Chief Executive of the Region. ...	M
N		...	N
O		<b>Article 62</b>	O
P		The Government of the Hong Kong Special Administrative Region shall exercise the following powers and functions:	P
Q		(1) To formulate and implement policies;	Q
R		(2) To conduct administrative affairs;	R
S		(3) To conduct external affairs as authorized by the Central People’s Government under this Law;	S
T		(4) To draw up and introduce budgets and final accounts;	T
U		(5) To draft and introduce bills, motions and subordinate legislation; and	U
V			V

- (6) To designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government.”

43. In relation to the making of laws, therefore, the powers and functions of the Executive Authorities under the Basic Law are to draft and introduce bills, (in the case of the CE) to sign bills after they are passed by the LegCo and to promulgate laws, and to make and introduce subordinate legislation. Art 56 states that except for the adoption of measures in emergencies, the CE shall consult the Executive Council before, *inter alia*, introducing bills to the LegCo and making subordinate legislation.

44. Section 3 (Arts 66 to 79) of Chapter IV deals with the Legislature. Art 66 states:

“The Legislative Council of the Hong Kong Special Administrative Region shall be the legislature of the Region.”

45. Art 72 sets out the powers and functions of the President of the LegCo:

“The President of the Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

- (1) To preside over meetings;
- (2) To decide on the agenda, giving priority to government bills for inclusion in the agenda;
- (3) To decide on the time of meetings;
- (4) To call special sessions during the recess;
- (5) To call emergency sessions on the request of the Chief Executive; and
- (6) To exercise other powers and functions as prescribed in the rules of procedure of the Legislative Council.”



46. Art 73 sets out the powers and functions (行使下列職權) of the LegCo itself:

“The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

- (1) To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures;
- (2) To examine and approve budgets introduced by the government;
- (3) To approve taxation and public expenditure;
- (4) To receive and debate the policy addresses of the Chief Executive;
- (5) To raise questions on the work of the government;
- (6) To debate any issue concerning public interests;
- (7) To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;
- (8) To receive and handle complaints from Hong Kong residents;
- (9) If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision; and
- (10) To summon, as required when exercising the above-mentioned powers and functions, persons concerned to testify or give evidence.”

47. In addition, Arts 49, 50 and 52 contain provisions that deal with, *inter alia*, conflicts between the CE and the LegCo in relation to bills.

(1) Under Art 49, if the CE considers that a bill passed by the LegCo is not compatible with the overall interests of Hong Kong, she may return it to the LegCo within three months for reconsideration. If the LegCo passes the bill again by not less than a two-thirds majority, the CE must sign it or dissolve the LegCo under Art 50. By Art 52(2), if the new LegCo again passes the bill by a two-thirds majority, the CE must resign if she still refuses to sign it.

(2) Conversely, under Art 50, if the LegCo refuses to pass an important bill introduced by the government, and if consensus cannot be reached after consultation, the CE may dissolve the LegCo. If the new LegCo still refuses to pass the bill, the CE must resign under Art 52(3). The CE may dissolve the LegCo only once in each term of her office (Art 50(2)).

(3) *The powers of the LegCo and the CEIC*

48. This examination of the Basic Law shows that the LegCo is constituted as *the* legislature of the Hong Kong SAR. It is given not only the power but also the function to enact, amend and repeal laws “in accordance with” the Basic Law and “legal procedures” (Art 73(1)). These procedures would seem to include the rules of procedure of the LegCo which it is empowered by Art 75 to make on its own, provided they do not contravene the Basic Law. Legislative procedures, characterised by the exchange and interaction of different points of view visible to the public, generally include consultation with the relevant Panel of the LegCo,<sup>22</sup> the introduction of bills (generally a function of the Executive (Art 62(5)) though certain bills may be introduced by Members of the LegCo (Art 74)),

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<sup>22</sup> See s 22(q) of the House Rules of the LegCo.

the readings of and votings on the bills including committee stage proceedings, and, finally, the signing of the bills (which is a function of the CE under Art 48(3) but regulated by Arts 49, 50 & 52), and the promulgation of the laws.

49. Although not expressly set out amongst the powers of the LegCo, the existence of the power for the LegCo by statute to authorise subordinate legislation to be made is necessarily implied, not only because it had long been the custom and usages of the system previously in place, without which the multitudinous matters that need to be legislated for would be beyond the work capacity of the LegCo, but also because the Basic Law expressly includes as part of the powers and functions of the Executive the making of subordinate legislation. This necessarily envisages the Executive being authorised by the LegCo by statute to make subordinate legislation, although, as is well known, other bodies may also be so authorised in relation to specific matters, such as the Rules Committee which is authorised to make rules of court.

50. In relation to the making of laws, the Executive is not vested with any general legislative power or the general power to enact, amend or repeal laws, but only the power to sign or refuse to sign bills (with the attendant consequences as between the CE and the LegCo in the case of refusal) and the power to make subordinate legislation.

51. The legislative power enjoyed by the Hong Kong SAR (Arts 2 & 17) is thus allocated by the Basic Law. The relevant provisions of the Basic Law show a marked contrast with the pre-1997 position where the Governor, “by and with the advice and consent of” the LegCo, was empowered to “make laws for the peace, order, and good government of the

Colony”<sup>23</sup> — a formula recognised as conferring a plenary legislative power, and where the colonial legislature was regarded as having “plenary powers of legislation, as large, and of the same nature, as those of [the Imperial] Parliament itself” (*R v Burah* (1878) 3 App Cas 889, 904). Under the new constitutional order, the LegCo has the powers and functions vested in it by the Basic Law expressly or by implication. The legislature can no longer claim supremacy but is subject to the Basic Law. Art 2 lays down that legislative power is to be exercised “in accordance with” the provisions of the Basic Law. Art 73(1) gives the LegCo the function to enact, amend or repeal laws “in accordance with” the provisions of the Basic Law.

52. It has been argued by the respondents that there is nothing in the Basic Law expressly preventing delegation of legislative powers. It has to be recalled, however, that the LegCo is designated as *the* legislature and is given not only powers but *functions* which in Chinese is “職” in the phrase “職權” and connotes that it is LegCo’s “job” in common parlance. It seems to us that this constitutional scheme does not permit the LegCo to grant and the CEIC (or, for that matter, any other body) to receive and be vested with what is essentially the LegCo’s own constitutional power and function as the legislature of the Hong Kong SAR to enact, amend or repeal laws, except for an authorisation of subordinate legislation. The question is whether the ERO should be regarded as thus contravening the Basic Law. If it contravenes the Basic Law, then being a law previously in force in Hong Kong, it did not become the law of the Hong Kong SAR through Art 8 of the Basic Law.

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<sup>23</sup> Letters Patent, Art VII.

(4) *Nature of the ERO and regulations made thereunder*

53. If, as we think to be the case, a line is to be drawn between general legislative power and the power to make subordinate legislation, it is necessary to turn to the question of what subordinate legislation means. The term “subordinate legislation” is used in Arts 8, 56(2) and 62(5) of the English version of the Basic Law but not defined. The equivalent Chinese term used is not uniform: Art 8 refers to “附屬立法”; Arts 56(2) and 62(5) both refer to “附屬法規”, but no party has suggested that there is any significance in the difference between the two Chinese terms.

54. According to s 3 of the Interpretation and General Clauses Ordinance (Cap 1) (“**IGCO**”), “subsidiary legislation” and “subordinate legislation” (附屬法例、附屬法規、附屬立法) mean any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect. However, the provisions of the IGCO apply to Ordinances and to instruments made or issued under or by virtue of any Ordinance (see s 2(1) of the IGCO). They do not directly apply to the Basic Law. Indeed, the phrase “subordinate legislation” and the equivalent Chinese terms (附屬法規、附屬立法) were only added to the above definition in s 3 of the IGCO in 1998, after the Basic Law had come into effect.<sup>24</sup> The previous version<sup>25</sup> defined the terms “subsidiary legislation” (附屬法例) and “regulations” (規例) only. The meaning of the expression “subordinate legislation” in

<sup>24</sup> Adaptation of Laws (Interpretative Provisions) Ordinance (26 of 1998), s 4.

<sup>25</sup> The previous version provided: “ ‘subsidiary legislation’ (附屬法例) and ‘regulations’ (規例) mean any proclamation, rule, regulation, order, resolution, notice, rule of court, by-law or other instrument made under or by virtue of any Ordinance and having legislative effect.”

A the Basic Law must depend on an autonomous interpretation rather than on  
B the subsequent definitions in the IGCO.

C 55. It would be a simplistic approach to say that, since any  
D regulations made under the ERO are made by the CEIC as “regulations”  
E pursuant to the power conferred by the ERO, the ERO does no more than  
F permit the CEIC to make subordinate legislation and is therefore wholly  
G unobjectionable. If that were correct, an Ordinance that delegated power  
H to the CEIC to make regulations generally for the peace, order, and good  
I government of Hong Kong would be valid as authorising no more than  
J subordinate legislation even though it would in truth enable government by  
K proclamation generally. Instead, it seems to us the matter has to be  
L approached in substance rather than by labels: *Yau Kwong Man v Secretary*  
M *for Security* [2002] 3 HKC 457, §43 & §67. Approached as a matter of  
N substance, there is in our view very little that characterises the regulations  
O made under the ERO as subordinate legislation and much to indicate that  
P the ERO confers general legislative powers on the CEIC.

M 56. The first thing that strikes one is that the ERO is not a statute  
N that legislates on a subject matter in principle leaving another body to devise  
O the detailed legal norms that elaborate or put flesh on the broad matters laid  
P down in the primary legislation. The long title of the ERO specifies that  
Q its object is to confer on the CEIC power to make regulations on occasions  
R of emergency or public danger. But it gives no shape or direction of what  
S the regulations that may be made are to be about. For example, the PFCR  
T was enacted under the ERO not to work out and fill in the details for certain  
U broad norms established by primary legislation, but as the very first piece  
V of legislation in Hong Kong that has anything to do about face covering.

This is fundamentally different from one's ordinary conception of subordinate legislation.

57. Secondly, associated with the above point is that the powers conferred by the ERO are, without any doubt, of the widest possible nature. The authority under s 2(1) is to make *any regulations whatsoever* the CEIC may consider desirable in the public interest. There is no limit on the subject matter or the field of legislation. While a large number of matters are enumerated in s 2(2)(a) to (n) — which are very broad in themselves — for which provisions may be made by regulations, the *chapeau* in s 2(2) states that they are without prejudice to the generality of s 2(1). That generality is subject only to the phrase “which he *may consider desirable* in the public interest”. The touchstone notably is “desirable”, not “necessary”. That this hardly sets out any limit at all on the power may be seen from the decision of the Full Court in *R v To Lam Sin* (1952) 36 HKLR 1 and *R v Li Bun & Others* [1957] HKLR 89.

58. In *To Lam Sin*, the court said (at p 11):

“ In the present case, there is power to make regulations if the Governor in Council is of a certain opinion upon two matters. Does not the fact that the regulations were made, and expressed to be made under that particular power, equally imply that the Governor in Council considered that an occasion of emergency or public danger had arisen and that the regulations were desirable in the public interest? Both are essentially matters of opinion and whether in fact such an occasion had arisen is no concern of the Courts. ... [T]here being nothing on the face of the regulations to indicate that the proper matters have not in fact been considered the Court feels ... that as a matter of construction it is a necessary implication that they have.”

59. In *Li Bun*, Hogan CJ also stated (at p 105):

“ I think that in the absence of bad faith ... It would be virtually impossible to separate in one’s mind the decision to make these regulations from a conclusion that they were desirable in the public interest.”

60. Thirdly, the powers may be invoked on any occasion which the CEIC “may consider to be an occasion of emergency or public danger”, neither of which is defined in the statute. In making the PFCR, the CEIC proceeded on the basis of an occasion of public danger and not emergency having arisen in Hong Kong, but the meaning of public danger can potentially be very broad. The statute does not state a “reasonable grounds” test and the words used have been construed by the Full Court to confer a wide and virtually unreviewable discretion, as shown in the passage from *To Lam Sin* quoted above. In *Li Bun*, Hogan CJ did not regard the mere making of the regulations as necessarily implying a conclusion that there is a state of emergency or public danger (see p 105), but thought that it provided *prima facie* proof that the Governor in Council considered that there was an occasion of emergency or public danger (p 109). Gould J considered that the very enactment of the regulations implied that the mind of the Governor in Council had been addressed to the consideration concerning emergency or public danger as well as to the desirability of the regulations (p 113). Reece J took a similar view (at pp 117-120). Further, Hogan CJ held (at p 112), with the agreement of the other two judges:

“ If the Governor in Council came *bona fide* to the conclusion that such an occasion existed, then that is an end of the matter. Whether the conclusion was justified is not a matter into which the Courts can inquire.”



61. Even if one were to inquire into the question, with the strict confidentiality and public interest immunity attaching to information placed before the CEIC, the scope of that inquiry is necessarily highly limited.

62. We shall presently return to these two cases, but it may be noted here that the width of the power as evidenced by these passages leaves precious little room for the doctrine of *ultra vires* to operate.

63. Fourthly, by s 2(2)(g), regulations made under the ERO may amend or suspend the operation of any enactment or apply any enactment with modification. It is not disputed that “enactment”, as defined in the IGCO, means “Ordinance”, and that “amend” includes “repeal, add to or vary”. By s 2(4), a regulation made under the ERO, and even an order or rule made in pursuance of such a regulation, has effect notwithstanding anything inconsistent with it contained in any enactment. The relevant provision in such enactment, to the extent of the inconsistency, shall “have no effect” so long as the regulation, order or rule remains in force.

64. As we have seen above, there is no provision in the Basic Law that authorises the CEIC by herself to amend or repeal primary legislation. That power and function is given to the LegCo, to be exercised “in accordance with the provisions of [the Basic] Law and legal procedures” (Art 73(1)). By these provisions, the ERO not only gives such power to the CEIC to be exercised by regulation, but also gives the power to unspecified bodies through an “order or rule” made in pursuance of a regulation for so long as such order or rule remains in force.

65. The respondents submit that such provisions as s 2(2)(g) of the ERO, conferring power on the Executive by regulation to repeal or alter

primary legislation (sometimes known as “Henry VIII clauses”), are not regarded in the United Kingdom and Australia as impermissible or unconstitutional: see *Thoburn v Sunderland City Council* [2002] 4 All ER 156, §13; *R (on the application of the Public Law Project) v Lord Chancellor and Secretary of State for Justice* [2016] UKSC 39, §28; *The Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 125; *ADCO Constructions Pty Ltd v Goudappel* (2014) 308 ALR 213, §61; *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 66 ALJR 794, 798. It seems to us, however, that the foundation of the validity of such clauses (albeit treated as exceptional) is Parliamentary sovereignty. As Laws LJ said in *Thoburn* at §13: “by force of its very sovereignty, Parliament may delegate the power of amendment or repeal.” In *Public Law Project* at §20, Lord Neuberger referred to the UK system of “parliamentary supremacy”, in which “it is not open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so”.

66. Quite apart from the fact that the LegCo does not enjoy such supremacy in the Diceyan sense<sup>26</sup> under the Basic Law, such clauses are antithetical to the norm of subsidiary legislation as understood in Hong Kong under s 28(1)(b) of the IGCO, which provides that “no subsidiary legislation shall be inconsistent with the provisions of any Ordinance” — a provision in place since the coming into operation of the Interpretation and General Clauses Ordinance 1966.<sup>27</sup> In the ordinary case, a piece of subsidiary legislation that is inconsistent with a primary statute, such as where it purported to remove a right arising under a statute, would be *ultra*

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<sup>26</sup> AV Dicey, *The Law of the Constitution* (1885), pp 39-40.

<sup>27</sup> No 31 of 1966.

vires as being contrary to s 28(1)(b): *Gohind Mohan & Anor v Brian Shane McElney & Others* [1983] HKLR 308, 312; *Mita Kogyo Kabushiki Kaisha v Mitac Inc* [1993] 2 HKLR 466, 470.

67. Fifthly, s 3(1) confers the widest powers for regulations made under the ERO to provide for the punishment of any offence with up to mandatory life imprisonment, in addition to forfeiture of articles and revocation or cancellation of licences and permits. This again contradicts the norm for subsidiary legislation as set out in s 28(1)(e) of the IGCO, according to which subsidiary legislation may provide that its contravention is an offence punishable by a fine not exceeding \$5,000 or imprisonment for up to 6 months.

68. Sixthly, there is no time limit on the validity and force of the regulations made under the ERO, nor any mechanism for constant review. The regulations made simply become part of the general law and by s 2(3) they “shall continue in force until repealed by order of the [CEIC]”. We shall come to the question of “negative vetting” below, but it is to be noted here that once vetted and passed, the regulations would continue until they are repealed by order of the CEIC. We assume that the regulations may also be repealed by an Ordinance subsequently enacted, but bills introduced by Members of the LegCo are subject to special limitations and voting procedures (see Art 74 and Annex II of the Basic Law).

69. Seventhly, the respondents submit that despite the power given to the CEIC to make regulations under the ERO, the LegCo retains a role through the “negative vetting” of any regulations so made. Section 34(1) of the IGCO provides that all subsidiary legislation has to be laid before the

LegCo at its next sitting after its publication in the Gazette. Section 34(2) provides:

“ Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution.”

While the period of vetting is 28 days, under s 34(4) the LegCo may by resolution extend it by 21 days.

70. As defined in s 3 of the IGCO, to “amend” includes to “repeal, add to or vary”. However, the applicants contend that s 2(3) of the ERO precludes repeal of any regulations by negative vetting (and therefore precludes even amendment because amendments are mostly carried out by repeal and substitution). In *To Lam Sin, surpa*, at p 14, the Full Court seemed to think that any regulation made under the ERO could be amended or repealed by the LegCo through negative vetting. In *Li Bun, supra*, at p 97, however, Hogan CJ, with whom Gould J agreed,<sup>28</sup> was reluctant to place reliance on the negative vetting procedure as ensuring the control of the Legislature over regulations made under the ERO, because he took the view that it could be said that the then equivalent of s 34 of the IGCO had been “*pro tanto* repealed” by s 2(3) of the ERO.

71. Section 2(3) of the ERO was included in the original Ordinance as enacted in 1922. The procedure of negative vetting by the

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<sup>28</sup> Except on one point which is not material for present purposes; see p 113.

*LegCo* was not introduced until 1937,<sup>29</sup> although it appears that regulations made under the ERO had in practice been tabled in the LegCo since the earliest days. At the time in 1922, s 41 of the then Interpretation Ordinance<sup>30</sup> provided for vetting of subsidiary legislation *by the Governor in Council*. It could not therefore have been the purpose of s 2(3) to exclude *the LegCo's* negative vetting. Nor could it have the purpose of laying down the *only* way in which a regulation may cease to have effect, for, first, s 2(3) uses the word “until”, not “unless and until”, and, secondly, as is common ground, an Ordinance can be passed at any time to repeal a regulation made under the ERO (and indeed the ERO itself). Rather, it would appear that the purpose of s 2(3) was to specify when the regulations made under the ERO would come to an end, perhaps to avoid any doubt as to whether they would cease to be in force when the occasion of emergency or public danger relied upon for their enactment had vanished.

72. Thus analysed, s 2(3) should in our view be construed to mean that regulations made under the ERO continue in force — in the sense that they do not lapse — until repealed by the CEIC. That section does not itself prevent such regulations from repeal by resolution of the LegCo during negative vetting under s 34 of the IGCO or from repeal by a subsequent Ordinance.

73. There may be a question as to whether negative vetting under s 34 is applicable if the regulations made under the ERO are not properly regarded in substance as subordinate or subsidiary legislation. We have

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<sup>29</sup> Ordinance No 26 of 1937.

<sup>30</sup> Ordinance No 31 of 1911.

not, however, been addressed on this point and we shall therefore, for present purposes, assume that s 34 applies to such regulations.

74. In any event, negative vetting is available (if at all) only insofar as it is left intact by the exercise of power under the ERO, for it is open to the CEIC, as part of the regulation made, to amend or suspend the operation of s 34 of the IGCO or to render it inapplicable to the regulation in question, as long as the CEIC considers that to be desirable in the public interest. In this regard the ERO may be contrasted with the legislation considered in *Dignan, supra*, which empowered the making of regulations subject to the Acts Interpretation Acts.

75. Furthermore, despite negative vetting, a regulation made under the ERO can come into operation immediately upon being made (as the PFCR did within 9 hours of its enactment). Even if a resolution for the amendment or repeal of a regulation is passed by a majority vote of both the Members of the LegCo returned by functional constituencies and those returned by geographical constituencies (as is required under Annex II of the Basic Law for such a resolution), as set out in s 34(2) that resolution only takes effect prospectively from the date of gazettal of the resolution. Such repeal does not operate to unwind the legal effect the regulation has already brought about. In particular, where a regulation has upon its commencement amended or repealed existing legislation, the subsequent repeal of that regulation by resolution does not “undo” the regulation’s effects and revive the original legislation. In other words, the “Henry VIII power” of a regulation is unchecked by negative vetting.

76. A number of authorities from overseas jurisdictions on this area of the law have been drawn to our attention in the course of

submissions, but both sides accept that one must be exceedingly careful before placing reliance on overseas jurisprudence in the present context because they are based on those jurisdictions' constitutional set-up and their conception of separation of powers which cannot be simply transplanted to Hong Kong. The differences in the language and structure of the constitutional provisions, as well as in the social, historical and political contexts, require caution, as advised by Sir Anthony Mason NPJ in *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong* (2007) 37 HKLJ 299, 304-305.

77. We also bear in mind the counsel of A Cheung J (as Cheung PJ then was) in *Luk Ka Cheung v The Market Misconduct Tribunal & Anor* [2009] 1 HKC 1 at §36, concurred in by Hartmann JA, that the traditions of Hong Kong and the theme of continuity may call for “a flexible and realistic, as opposed to an idealistic, approach to the doctrine of separation of powers, and a purposive and contextualised interpretation of the scope and meaning of ‘judicial power’ in the Basic Law”. There are cases illustrating both sides of the line in relation to judicial power. Thus, the determination of a fixed minimum term of imprisonment for young persons convicted of murder and made subject to an indefinite sentence has been held to be a judicial power which could not be vested in the CE, so that a statutory provision that purported to do so<sup>31</sup> was unconstitutional and invalid: *Yau Kwong Man, supra*.<sup>32</sup> On the other hand, the vesting in an administrative tribunal of the function of determining whether insider dealing had taken place and imposing sanctions therefor was held to be within the Basic Law;

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<sup>31</sup> Namely, s 67C of the Criminal Procedure Ordinance (Cap 221).

<sup>32</sup> An appeal from the decision of Hartmann J to the Court of Appeal was dismissed but without consideration of the merits: see CACV 377/2002, 2 July 2003.

the function in question involved neither a determination of criminal guilt nor civil liability: *Luk Ka Cheung, supra*.

78. In Australia, which takes a relatively broad view of the power to delegate legislative authority, there are nevertheless limits to such delegation. In *Dignan, supra*, section 3 of the Transport Workers Act 1928-1929 conferred power on the Governor-General of Australia to make regulations, not inconsistent with that Act, with respect to the employment of transport workers, and in particular for regulating the engagements, service and discharge of transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers. While Dixon J held that such a conferment of power was not unconstitutional, his Honour said (at p 101):

“ This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority.”

Earlier in that case (at pp 95-96), Dixon J also drew attention to *R v Burah, supra*, and *In re The Initiative and Referendum Act* [1919] AC 935, saying it should be noticed that the Privy Council had held that a general power of legislation belonging to a legislature constituted under a rigid constitution does not enable it by any form of enactment to create an arm with general legislative authority and new legislative power not created or authorised by the instrument by which it is established. It seems to us that nothing in *Dignan*, which illustrates the more generous approach in Australia on this



subject, suggests that a devolution of legislative power as complete and unfettered as in the ERO would be permissible.

79. In *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 66 ALJR 794, Brennan, Deane and Toohey JJ (whose decision together with Gaudron J's was the majority) said (at p 800) that although s 122 of the Australian Constitution "confers on the Parliament a power not expressly limited as to its subject matter, it does not follow that that power authorises the Parliament to vest a general legislative power in a legislature created to receive and exercise it."

80. By arming the CEIC with such general legislative power, the ERO, once invoked, seems to us to create in Hong Kong a separate source of laws that are primary legislation in all but name, but which are not made by the legislature in accordance with legal procedures (Art 73(1)) or reported to NPCSC (Art 17), and are not subjected to the scrutiny concomitant with the normal legislative process. Whenever the CEIC considers an occasion falling within the ERO has arisen, the CEIC becomes a legislature. Instead of the Government drafting and introducing bills (Art 62(5)) and the LegCo (by passing such bills) enacting, amending or repealing laws (Art 73(1)), the CEIC enacts, amends or repeals laws by the power given under the ERO. The LegCo, without bills introduced by the government, is left with a diminished role.

81. The conclusion seems to us to be inevitable that by the ERO, powers to make laws generally rather than merely subordinate legislation are conferred on the CEIC, unless one takes the view that subordinate legislation means no more and no less than laws made pursuant to powers

conferred by a primary statute — a view to which we are unable to subscribe.

(5) *The two Full Court's decisions and the theme of continuity*

82. The ERO had come before the courts of Hong Kong before 1997, particularly in two cases in the 1950s. In *To Lam Sin, supra*, a person was indicted for being in possession of hand grenades in contravention of reg 116A of the Emergency (Principal) Regulations 1949 made under the ERO. The offence created was punishable with death. The accused moved to quash the indictment on the ground, *inter alia*, that the ERO was *ultra vires* the LegCo. The Full Court (Howe CJ, Gould and Scholes JJ), to which the relevant point of law was referred, did not find the “effacement” test used in *Ping Shek & Anor v The Canossian Institute* (1949) 33 HKLR 66 — which asked whether by the delegation the Legislature had wholly or partly effaced itself — to be of assistance (p 12). They considered that the trend of modern opinion was “to regard a Colonial legislature as being, not mere delegates of Imperial power, but supreme within their own limits, and within the powers conferred by the Letters Patent”. They relied on the Privy Council’s decision in *Hodge v The Queen* (1883) 9 App Cas 117, where it was said at p 132 that a colonial legislature was conferred “powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 [of the British North America Act 1867] as the Imperial Parliament in the plenitude of its power possessed and could bestow”. At p 14 the Full Court held:

“...The power of a colonial legislature to delegate is a full one, limited only by the necessity not to go outside the powers conferred by or contravene the rights reserved by the Letters Patent or other constitutional document. As is well known,

delegation of powers almost parallel with those given by the Emergency Regulations Ordinance has been resorted to frequently in England under the various Emergency Powers Acts. If the legislature of Hong Kong is supreme (subject to its constitution) in its own area there can be no reason why it should not act similarly — it is not and cannot be suggested that the law is not one for the ‘peace, order, and good government’ of the Colony.

Even by the ‘effacement’ test, we would not hold that the delegation of the powers is *ultra vires*. Wide though the powers may be, the Legislative Council retains a very firm and close control by virtue of Section 14 of the Interpretation Ordinance (Cap. 1). No regulation involving the imposition of the death penalty can become of force or effect without the prior approval of the Legislative Council — this is provided specifically by the Emergency Regulations Ordinance as well. All other regulations must be laid on the table at the first meeting of the Legislative Council after their publication in the Gazette and the Council may repeal or amend any of them. There is in addition the overriding power to repeal or amend the Ordinance itself. We see nothing there which can be called effacement as we understand it.”

83. Pausing here, we note that an examination of the (UK) Emergency Powers Act 1920, for example, shows that it was in fact far narrower than the ERO. It deals with situations where action has been taken or is threatened of such a nature and scale as to be calculated to deprive the community of the essentials of life by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion. It provides for the Monarch to declare, by proclamation, a state of emergency which can be in force for no more than a month (unless proclaimed again), whereupon Parliament has to be summoned to meet within five days. It enables the Executive during a proclaimed emergency to make regulations for “securing the essentials of life to the community”. Any regulation so made shall immediately be laid before Parliament, and shall not continue in force after the expiration of seven days therefrom unless a resolution is passed by both Houses for its continuance. In short,

A we do not think it provides support for the validity of the ERO beyond  
B showing that a sovereign parliament may by legislation confer on the  
C executive government some sort of regulation-making power to cope with  
D emergencies.

E 84. The other case is *Li Bun, supra*, which was an appeal by way  
F of case stated against convictions for attempting to export motor vehicles  
G without a licence contrary to the Importation and Exportation Ordinance, as  
H amended by the Emergency (Importation and Exportation) (Amendment)  
I Regulations 1953 and 1954 made under the ERO. Specifically, those  
J regulations sought to amend the Importation and Exportation Ordinance by  
K making a particular contravention an offence and imposing the attendant  
L penalty. The question submitted to the Full Court was whether the  
M regulations themselves were *ultra vires* the Governor in Council, but it was  
N treated as involving the question whether the ERO was *ultra vires* the  
O legislature of Hong Kong. The Full Court (Hogan CJ, Gould and Reece JJ)  
P again held that it was not.

Q 85. Like the Full Court in *To Lam Sin*, Hogan CJ also did not find  
R it useful to approach the question by reference to the effacement test.  
S Instead, having referred to *R v Burah, supra*, and *In re The Initiative and*  
T *Referendum Act, supra*, he examined the question whether the legislature  
U had created a co-ordinate legislative power of a concurrent or alternative  
V character. He considered that the ERO did confer, but for one limitation,  
“general legislative powers” on the CEIC (p 100), and that although the  
position of the LegCo was not directly affected by the ERO, “it ha[d] not ...  
an effective role to play in the enactment of Emergency Regulations which  
may range over virtually the whole field of legislation” (p 102). Although

his Lordship was plainly much exercised by the width of the power given to the Governor in Council, he eventually concluded:

“ It seems to me that a significant difference [from the case of *In re The Initiative and Referendum Act*] lies in the fact that the powers conferred by the Hong Kong Ordinance are limited to those occasions which in the opinion of the Governor in Council are occasions of public danger or emergency. This, it seems to me, is the one factor or at any rate the principal factor which prevents them from being regarded as that arming, by a dependent Legislature, of another authority with general legislative authority similar in complexity to its own, on which the Privy Council has frowned.

It may be argued that to hold so ample a power as falling below the line which cannot be crossed by the Legislative Council, is to push that line so high as to make it almost meaningless; nevertheless it is a real limitation and since it is the principal reason for not treating the ordinance as *ultra vires ab initio*, a limitation which must, I think, be strictly observed and strictly enforced, since any tendency to regard it as a mere formality would tend to diminish the importance of the principal, if not indeed the only, factor which saves this ordinance from being *ultra vires*.”

86. Gould J concurred in the reasoning and conclusions of Hogan CJ except on one matter which is not relevant for present purposes (see p 113). Reece J agreed with the Full Court’s decision in *To Lam Sin* (see pp 117, 125). Like the court in that case, he placed emphasis on the fact that the LegCo was “invested with the fullest powers of making laws” and had been “held to be, within its limits, ... a sovereign body” (p 126) and that “subject to the limitations imposed by the Letters Patent or other constitutional documents, the Legislative Council has full power to delegate its powers” (p 127).

87. On behalf of the respondents, Mr Yu has understandably placed reliance on these two cases and on the “theme of continuity” (*Luk Ka Cheung, supra*, at §32). The theme of continuity is of course an

important theme in the Basic Law. This is particularly prominent in its provisions relating to the courts and the legal system: Art 8 provides that subject to exceptions, the laws previously in force in Hong Kong shall be maintained (see also Art 18); Art 81 provides that the judicial system previously practised in Hong Kong shall be maintained subject to changes consequent upon the establishment of the Court of Final Appeal; Art 87 provides that in criminal or civil proceedings, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained; Art 91 states that the previous system of appointment and removal of judicial officers shall be maintained; Art 94 provides for the admission of lawyers based on the system previously operating in Hong Kong.

88. On the other hand, there is also obviously a change in the constitutional order brought about by the resumption of exercise of sovereignty by the People's Republic of China over Hong Kong and the coming into effect of the Basic Law as the foundation of the Hong Kong SAR's constitutional and legal system. As Ms Li points out on behalf of the applicants in HCAL 2945, under Art VII of the Letters Patent, it was the Governor who, by and with the advice and consent of the LegCo, might make laws for the peace, order, and good government of colonial Hong Kong. Under Art X, the Governor had a discretion to assent or refuse assent to a bill passed by the LegCo or reserve it for the Crown's signification; and if the Governor refused to give assent, there was nothing the LegCo could do about it. Under the Basic Law, the LegCo alone is the legislature of Hong Kong (Art 66), and while a bill passed by the LegCo may take effect only after it is signed and promulgated by the CE (Art 76), there are carefully calibrated provisions requiring the CE either to sign bills or refuse to do so in which case a chain of events would be set in motion

that could result in the resignation of the CE (Arts 49, 50 & 52). There is basis for the observation in *A Companion to the history, rules and practices of the Legislative Council of the Hong Kong Special Administrative Region* at §2.6 that the law-making power of the LegCo under the Basic Law is “in substance different from that enjoyed by the pre-1997 Legislative Council whose constitutional role was to provide advice on, and give consent to, bills which the Governor then enacted into law in exercise of the law-making powers conferred on him under the Letters Patent”.

89. Further, the notion that the colonial legislature was sovereign and supreme within its province, which underpinned the reasoning of the Full Court in *To Lam Sin* and *Li Bun* (especially Reece J), is no longer an apt description of the LegCo. The legislature was conceived by the court in *To Lam Sin* as supreme in its own area in the way the Imperial Parliament was treated under English law as having power that was “absolute and without control”.<sup>33</sup> But under the new constitutional order, within the Hong Kong SAR it is the Basic Law that is supreme, and even the legislature cannot act contrary to a requirement under the Basic Law: *Chief Executive of the HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460, §§24-25, 86-87. The legislature no longer has the plenary power enjoyed by the Imperial Parliament but that which is conferred expressly or by implication on it under the Basic Law. The Basic Law devotes 14 articles (Arts 66-79) in Chapter IV to the LegCo and specifies the method of its formation and its voting procedures in an annex (Annex II). The method for forming the first LegCo (1997-1998) was separately the subject of a decision of the NPCSC dated 4 April 1990. The LegCo is constituted by and subject to the Basic Law, derives its powers from the

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<sup>33</sup> Blackstone’s Commentaries on the Laws of England, vol I, p 157.

Basic Law and has to exercise them in accordance with the provisions of the Basic Law.

90. In our opinion, there is a difference between a constitutional order which prescribes the legislature's authority to make certain laws and binds the legislature to legislate according to certain procedures, and one which treats the legislature as supreme: see *The Executive Council of the Western Cape Legislature & Others v The President of the Republic of South Africa & Others* 1995 (4) SA 877, §59.

91. The theme of continuity has also to be assessed in the context of the constitution of the bodies in question. The ERO was enacted at a time when the LegCo consisted of the Governor, the Official Members (ie members that were officials of the Government) and not more than six Unofficial Members, and was presided over by the Governor.<sup>34</sup> Even by the 1950s, at the time when *To Lam Sin* and *Li Bun* were decided, there were ten Official Members and only eight Unofficial Members, and the Unofficial Members were then of course appointed by none other than the Governor. This had enabled a submission to be made in *Ping Shek, supra* (which was recorded at p 72 and not expressly rejected by the court), that the Governor in Council was a body that "had actually, through its members, a controlling voice in the Legislature itself". As Evatt J said in *Dignan, supra*, at p 114, in dealing with the "separation" of legislative and executive powers, the underlying framework of government needs to be borne in mind. In Australia there is the notion of the British system of an Executive which

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<sup>34</sup> Art XIII and XXI of the Royal Instructions 1917.



is responsible to Parliament. In the United Kingdom the Executive is represented in and usually control the majority of the Parliament.

92. Now under the Basic Law, the transfer of general legislative power by the ERO has to be examined in the context of a constitutional framework that seeks to ensure that laws are enacted, amended or repealed by a legislature which is constituted by election and whose composition is carefully prescribed (Art 68 and Annex II). The LegCo, moreover, is quite separate from the Government. There may be overlap in the Executive Council in that Members of the LegCo may be appointed to serve on the Executive Council (Art 55), but it should be noted that under the Basic Law (Art 56), the CE need only consult the Executive Council and is not obliged to accept its majority opinion provided the specific reasons are put on record.

93. The reasoning of Hogan CJ in *Li Bun, supra*, at pp 100 & 102 actually supports the conclusion that inasmuch as the ERO confers “general legislative powers” on the CEIC (subject only to a limitation as to the occasions of public danger or emergency), the LegCo is deprived of any “effective role” to play in the making of regulations which may range over virtually the whole field of legislation. His Lordship’s ultimate conclusion that the ERO did not cross the fine line under the then constitutional set-up is in our view not applicable to the constitutional order under the Basic Law.

(6) *Art 160 of the Basic Law*

94. Mr Yu also placed reliance on Art 160 of the Basic Law. That article makes provision for the NPCSC to declare any laws previously in force in Hong Kong to be in contravention of the Basic Law and therefore to be excluded from the laws to be adopted as laws of the Hong Kong SAR.

A It is submitted that the constitutionality-check was conducted prior to 1997  
B and the NPCSC did not consider the ERO to be in contravention of the Basic  
C Law. The respondents only rely on this as a factor in favour of validity,  
D and do not submit that the absence of rejection by the NPCSC has the effect  
E of precluding any future finding that the ERO contravenes the Basic Law.  
F Indeed, Art 160 envisages that laws may *subsequently* be discovered to be  
G in contravention of the Basic Law. In the absence of any further  
H information about that screening process and the reasoning and materials  
I involved, however, we are respectfully unable to place overriding weight  
J on this factor.

I (7) *Arts 18(4) and 72(5) of the Basic Law*

J 95. The respondents have stressed that the ERO is intended to deal  
K with occasions of emergency or public danger, and that regulations made  
L thereunder are intended to be temporary measures necessitated by the  
M exigencies of the situation. In response, the applicants point to the  
N existence of provisions in the Basic Law that deal with emergencies,  
O including Art 18(4) which provides for the application of relevant national  
P laws and Art 72(5) which enables the President of the LegCo to call  
Q emergency sessions on the request of the CE. It is fair to say, however, that  
R Art 18(4) does not cater for all emergencies but only for situations where a  
S state of war is declared or where there is such turmoil within Hong Kong as  
T to endanger *national* unity or security and to be beyond the control of the  
U local government. As to legislation by the LegCo in an emergency, while  
V there were examples in the past (the last of which took place on 9 July 1997  
in the Provisional LegCo) where a bill went through all three readings to  
become law within a single day, there are in practice and reality likely to be  
difficulties that stand in the way of swift and decisive action. Yet as a

broad statement of approach, we agree with the view of the Supreme Court of Ireland in *Bederev v Ireland* [2016] IESC 34 (at §25) that the need for an urgent response is no justification for departing from or impugning the constitutional scheme.

96. Having said this, we do not wish it to be thought to be our opinion that the Basic Law categorically precludes any emergency powers from being given to the Executive. Rigidity is not a virtue in constitutional interpretation, and one recalls the adage that a constitution that will not bend will break. We have not been addressed on the possibility that states of emergency necessitating urgent action can occur from which an implication can arise out of necessity that the LegCo can in wide terms authorise the Executive authorities to take necessary action: see eg *The Executive Council of the Western Cape Legislature*, *supra*, §§62, 140; *Cheng Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555 at §203, and consequently we ought not to express any view on it.

(8) *Conclusion*

97. It is the power and function of the LegCo as the designated legislature of the Hong Kong SAR to legislate. Other bodies cannot consistently with the constitutional framework be given general legislative power but only the power to make subordinate legislation. It may be a matter of degree whether a power granted is in truth general legislative authority rather than the acceptable power to make subordinate legislation. But insofar as the public danger ground is concerned, the ERO is so wide in its scope, the conferment of powers so complete, its conditions for invocation so uncertain and subjective, the regulations made thereunder invested with such primacy, and the control by the LegCo so precarious,

that we believe it is not compatible with the constitutional order laid down by the Basic Law having regard in particular to Arts 2, 8, 17(2), 18, 48, 56, 62(5), 66 and 73(1) of the Basic Law. We do not consider that, within the proper limits of remedial interpretation as set out in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at §66 and *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372 at §97, the ERO in relation to the public danger ground could be made compatible with the Basic Law without introducing changes that the court is ill-equipped to decide on or producing something wholly different from what the legislature originally intended.

*F. Ground 2 — the implied repeal ground*

98. Section 3(1) and (2) of HKBORO provided, prior to July 1997 (when they were not adopted as part of the laws of the Hong Kong SAR), as follows:

- “ (1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.
- (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.”

99. Section 5 of HKBORO provides:

- “ (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with law.
- (2) No measure shall be taken under subsection (1) that—
  - (a) is inconsistent with any obligation under international law that applies to Hong Kong (other than an obligation under the International Covenant on Civil and Political Rights);

- (b) involves discrimination solely on the ground of race, colour, sex, language, religion or social origin; or
- (c) derogates from articles 2, 3, 4(1) and (2), 7, 12, 13 and 15.”

100. This section reflects, *mutatis mutandis*, the provisions of Art 4 of the ICCPR.<sup>35</sup>

101. The argument on this Ground, advanced by the applicants in HCAL 2945, is in summary as follows.

- (1) Section 5 of the HKBORO permits derogation from the Bill of Rights only in the exceptional case of a public emergency, where the “life of the nation” is at risk, and puts such power of derogation under strict control, for example, by requiring an official proclamation of a public emergency.
- (2) Section 2(1) of the ERO, which empowers the CEIC to make regulations that derogate from fundamental rights not in times of public emergency and without any safeguards, is inconsistent with s 5 of the HKBORO and, therefore, is to be treated as having been automatically repealed by s 3(2) of the

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<sup>35</sup> Art 4 of the ICCPR provides:

“1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

HKBORO when the HKBORO came into effect on 8 June 1991.<sup>36</sup>

(3) Having been thus repealed, the ERO is not a law previously in force in Hong Kong as referred to in Art 8 of the Basic, that is to say, in force as at 30 June 1997: see *HKSAR v Ma Wai Kwan David & Others* [1997] HKLRD 761, 777B.

(4) Notwithstanding that s 3(1) and (2) of the HKBORO was in turn effectively repealed on 1 July 1997 as previous laws not adopted as provisions of laws of the Hong Kong SAR,<sup>37</sup> the ERO was not thereupon revived: see s 24 of the IGCO.<sup>38</sup>

(5) Accordingly, s 2(1) of the ERO was repealed either in its entirety, or insofar as it enabled the CEIC to make regulations other than in times of public emergency which threatens the life of the nation, and the existence of which is officially proclaimed.

102. There is an alternative, but materially identical, argument that the ERO is inconsistent with Art 4 of the ICCPR and was therefore likewise implicitly repealed when the Basic Law commenced operation on 1 July 1997. As this argument adds nothing, we shall concentrate on the argument based on s 5 of the HKBORO.

103. We acknowledge that a public emergency threatening the life of a nation is a much narrower concept than “public danger” in the ERO.

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<sup>36</sup> The doctrine of automatic repeal is not in dispute: see *R v Sin Yau Ming* (CACC 289/1990, 30 September 1991).

<sup>37</sup> Pursuant to the Decision of the NPCSC on 23 February 1997, which came into effect on 1 July 1997.

<sup>38</sup> This provides: “Where any Ordinance repealing in whole or in part any former Ordinance is itself repealed, such last repeal shall not revive the Ordinance or provision previously repealed, unless provision is made to that effect”.

The phrase has been said in the *Syracusa Principles on the Limitation and Derogation Provisions in the ICCPR*, at §39, to refer to “a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the state; and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.”

104. The ERO is by its terms intended to apply not only in emergencies that fall within the meaning of s 5 of HKBORO. But we do not accept there is therefore any incompatibility with s 5. With respect, the flaw in the applicants’ argument is the conflation of the concepts of derogation from the Bill of Rights itself and restriction of non-absolute rights under and in compliance with the Bill of Rights. Derogation provisions such as found in s 5 of the HKBORO and Art 4 of the ICCPR allow for a state lawfully to *suspend* the human rights guarantees in order to respond to extraordinary circumstances that threaten the life of the nation: see R Burchill, *When does an Emergency threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism* (2005) 8 Year of New Zealand Jurisprudence 99, at 99-100. They are to be distinguished from provisions within the human rights norms that do not suspend such norms but instead permit proportionate restrictions or limitations of the rights in question in accordance with law.

105. The respondents accept, rightly, in our view, that except in times of public emergency officially proclaimed as referred to in s 5 of the HKBORO, the powers under the ERO may not be exercised with the effect

of derogating from — or, in other words, suspending — the Bill of Rights. But this does not mean that, in situations not amounting to a public emergency within the meaning of s 5, measures may not be taken under the ERO which have an effect of restricting the rights protected by the Bill of Rights, provided the restriction is prescribed by law and compliant with the principle of proportionality.

106. The distinction between derogation in an emergency on the one hand and restriction or limitation of non-absolute rights in ordinary situations on the other is explicitly drawn, in relation to the ICCPR, in *UN Human Rights Committee, CCPR General Comment No 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, at §4:

“Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers.”

107. Indeed, numerous laws enacted by the LegCo itself both before and after the HKBORO, not in any emergency, make provisions that impinge upon fundamental rights — see, for example, the POO and Defamation Ordinance (Cap 21). These laws do not thereby “derogate from the Bill of Rights” and violate s 5 of the HKBORO and became impliedly repealed in June 1991. Instead, they continue in force subject to the Bill of Rights and, if challenged, will have to be tested by reference to the usual principles.



108. Thus analysed, the proper approach to the ERO is that:

(1) In times of a public emergency officially proclaimed and in accordance with the other requirements of s 5 of the HKBORO, measures may be adopted under the ERO which derogate from the Bill of Rights (even so, excepting the specified non-derogable provisions and discrimination on the prohibited grounds). Subject to the conditions of s 5 (including that the derogations are limited to those strictly required by the exigencies of the situation), this may have the effect of temporarily suspending the relevant human rights norms.

(2) In other situations, measures adopted under the ERO may not derogate from the Bill of Rights, which means that if any such measure has the effect of restricting fundamental rights, then like any other restriction in normal times, it has to satisfy the twin requirements that the restriction is prescribed by law and meets the proportionality test: *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, §§16-17.

109. Accordingly, the challenge based on Ground 2 is rejected.

*G. Ground 3 — the prescribed by law ground*

110. The second sentence of Art 39 of the Basic Law provides:

“ The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.”

The phrase “prescribed by law”, and the cognate concepts of “provided by law” in Art 16 and “in conformity with the law” in Art 17 of the Bill of Rights, import the same principle. The principle is that of legal certainty

and accessibility: *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, §30.

111. As understood in Hong Kong law, this principle not only requires the restriction to have a basis in law but entails two further requirements, namely, that (1) the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case; and (2) the norm is formulated with sufficient precision to enable the citizen to regulate his conduct so that he is able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail: see *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, §§62-63; *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, §27; *Hong Kong Television Network Ltd v Chief Executive in Council* [2016] 2 HKLRD 1005, §84; *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, §§30-32.

112. The argument of the applicants in both HCAL 2945 and HCAL 2949 is this. The ERO contemplates and enables the making of regulations which can severely curtail fundamental rights. Section 2(1) is, however, couched in wide terms and lacks any express limit or guidance on the exercise of the power by the CEIC in making regulations that may affect fundamental rights. As such, s 2(1) of the ERO violates the principle of legal certainty mandated by Art 39 of the Basic Law. What the argument focuses on is the certainty (or the lack of it) in the regulation-making power in the ERO, rather than that in respect of any regulations made under the ERO.

113. We do not accept this argument. Legal certainty is not a notion existing in the abstract and in a vacuum. Art 39 of the Basic Law provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force, and states that those rights and freedoms shall not be restricted unless as prescribed by law. As such, the “prescribed by law” requirement applies to the restraints on the rights and freedoms of the individual. It is the “norms” which purport directly to restrict the citizen’s freedom that must be sufficiently precise to enable the citizen to conduct himself accordingly. This is how the requirement has been applied in the decisions of the Court of Final Appeal. Thus in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 and *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386, the requirement was applied to the common law offence of misconduct in public office and conspiracy to defraud respectively. In *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, it is the statutory scheme in the POO restricting the right of assembly and procession that was called into question by reference to the requirement of “prescribed by law”. In *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, the point made was that property rights are to be protected by clear and accessible laws. In *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, the question was whether a provision in the administrative instructions issued by the President of the LegCo to regulate behaviour within the precincts of the LegCo’s chamber was sufficiently certain. See also *Hong Kong Television Network Ltd v Chief Executive in Council* [2016] 2 HKLRD 1005 (CA), §90.

114. In contrast, the ERO does not *itself* purport to limit any fundamental rights. It does not lay down any norms that curtail any right of an individual. Although regulations enacted under it may purport to do so, it seems to us that it is those regulations, if and when enacted, that have

A to meet the principle of legal certainty, not the enabling Ordinance in itself  
B which has no direct effect on any individual right or freedom. If such  
C regulations are themselves laws of general application, accessible to all  
D residents, and sufficiently well defined, then they cannot be said to fall foul  
E of the requirement of accessibility and foreseeability which is the essence  
of the principle.

F 115. The ERO, as the source of power for making regulations,  
G cannot be attacked on its own under the “prescribed by law” requirement.  
H This is not to say that it can never be a matter of concern that executive  
I authorities are given ill-defined powers to make laws that may restrict  
J fundamental rights, but this seems to us to raise the analytically separate  
K and different point in relation to delegation of legislative power, which we  
L have dealt with under Ground 1 above. In addition, the laws thus made  
will themselves have to possess the quality of accessibility and to afford  
sufficient safeguards against arbitrary application by indicating with  
sufficient clarity the scope of any discretionary power conferred.

M 116. The case of *Leung Kwok Hung & Another v Chief Executive of*  
N *the Hong Kong SAR* (HCAL 107/2005, 9 February 2006) relied on  
O by the applicants can be readily distinguished.<sup>39</sup> There, s 33 of the  
P Telecommunications Ordinance (Cap 106) provided that the Chief  
Q Executive or authorised public officers could order that any message or any  
R class of messages should not be transmitted or should be intercepted or  
detained or disclosed to the Government. It was therefore a law that  
directly authorised executive measures which had the effect of directly

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S <sup>39</sup> The case went on appeal to the Court of Appeal (CACV 73 & 87/2006, 10 May 2006) and Court  
T of Final Appeal (2006) 9 HKCFAR 441, but there was no appeal by the respondents from the declaration  
U that s 33 of the Telecommunications Ordinance was unconstitutional in so far as it authorised access to or  
disclosure of the contents of any message or any class of messages.

restricting the freedom and privacy of communication protected by Art 30 of the Basic Law and Art 14 of the Bill of Rights, and was found to be unconstitutional for falling foul of the principle of legal certainty. In our view, the case provides no support for suggesting that an empowering statute for making subsidiary legislation without itself purporting to limit any rights can be struck down under the “prescribed by law” requirement. The same may be said in relation to *Malone v United Kingdom* (1984) 7 EHRR 14 which concerned the lawfulness of interception of communications effected by the UK police with reference to the right to respect for private life and correspondence.

117. As to the case of *Dawood & Anor v Minister of Home Affairs & Others* 2000 (3) SA 936, Mr Pun for the applicant in HCAL 2949 relies on footnote 74 in paragraph 54 of the judgment of O’Regan J (with which the other members of the court agreed). Her Honour there referred to s 56(1)(f) of the Aliens Control Act 96 of 1991 which provided that the Minister “may make regulations relating to ... the conditions subject to which such permits or certificates may be issued ...”, and said that affording the Executive power to regulate such matters is not sufficient; the Legislature must take steps to ensure that appropriate guidance is given. With respect, Mr Pun’s reliance on that sentence is misplaced as it involves taking a footnote completely out of context. What was in issue in that case was that the discretionary power under s 25(9)(b) of the Act to issue a permit for a person to temporarily sojourn in South Africa engaged fundamental rights but was too vague and without guidance. It was in this context that the court said that guidance must be given and that it was not sufficient that s 56(1)(f) stated regulations *may* be made to provide guidance, if they were not in fact made. Properly read, the footnote provides no assistance to the applicants on this Ground.

118. Mr Chan submits that the restriction on rights must be prescribed by laws passed and scrutinised by elected representatives in the legislature. The only authority cited is *Advisory Opinion OC-6/86* (9 May 1986) of the Inter-American Court of Human Rights on the word “Laws” in Art 30 of the *American Convention on Human Rights* (at §22). We are unable to accept this contention. The Advisory Opinion was given in the context of a very different instrument in a very different region with certain assumptions about the member States’ constitutions including the existence of representative democracy. Such an approach cannot be mechanistically transplanted to Hong Kong, where many of our statutes were enacted in an era with no elected representative in the legislature at all. It could not have been the intention in enacting the Bill of Rights and the Basic Law that restrictions placed upon fundamental rights under those statutes are, for that reason alone, not to be regarded as prescribed by law.

119. Furthermore, it is well established that for the purpose of the requirement of “prescribed by law”, law does not necessarily mean only statute law. In *A v Director of Immigration* [2008] 4 HKLRD 752, the Court of Appeal plainly considered that an accessible and sufficiently certain *policy* on detention would be sufficient to satisfy the requirement under Art 5 of the Bill of Rights that no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law (see §§16, 33-37, 42-43, 63), although the Director of Immigration failed in that case because he did not have an adequately accessible and complete policy on detention. Similarly, in *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, where the question was whether guidance given by the Secretary of State and written guidelines given by a hospital were sufficient to justify certain interference with the right to private life in accordance with law, Lord Bingham said that the requirement

of “in accordance with the law” is directed to substance and not form (§34); Lord Hope said that “law” in this context is not limited to statutory enactment or to measures that have their base in a statute (§91); and Lord Scott also said that the “law” for the purposes of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) does not consist only of statutes, directives, statutory codes and the like (§103). The cases of *Shum Kwok Sher, supra*, and *Mo Yuk Ping, supra*, show that common law offences can also constitute the “law” that prescribes an acceptable restriction on fundamental rights. It is plain from all these authorities that “prescribed by law” does not refer only to laws passed and scrutinized by elected representatives in the legislature.

120. For the above reasons, Ground 3 is rejected.

*H. Ground 4 — the principle of legality ground*

121. The fourth ground impugns the PFCR as being *ultra vires* the ERO. The essence of the argument is that, properly construed in accordance with the principle of legality, the ERO does not, either expressly or by necessary implication, empower the CEIC to make regulations that impose restrictions on fundamental rights of the kind and to the extent found in the PFCR.

122. The principle of legality, supported by overseas authorities such as *R v Secretary of state for the Home Department, ex p Simms* [2000] 2 AC 115, 131 and *Coco v The Queen* (1994) 179 CLR 427, 437, has been acknowledged by the Court of Final Appeal in *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362 at §§28-29, 67-71 as applicable in cases where the question arises as to

whether certain legislation is intended to override or constrain fundamental rights. It is a principle of statutory construction which requires that any abrogation or restriction of fundamental rights by statute should be done unmistakably, ie expressly or by necessary implication. In other words, the court has to be satisfied that the legislature had its attention properly drawn to the abrogating provision and consciously enacted legislation to such effect: *HKSAR v Yeung Ka Sing Carson* (2016) 19 HKCFAR 279, §54.

123. The applicants in HCAL 2945 argue that s 2(1) of the ERO is broad and general and does not advert to any specific fundamental right. Neither s 2(1) nor s 2(2) deals specifically with the subject of assemblies and processions, let alone facial covering during such activities. Further, the examples in s 2(2) do not show a general intention to interfere with fundamental rights in any circumstances. Instead, they are restricted to a number of strategic areas in time of emergency. Section 2(1) should not be construed to confer power to legislate wider than in those areas.

124. In response, the respondents contend that it is plain that the legislature must have had the restriction of the freedom of individuals in mind when enacting the ERO. Section 2(2) refers to censorship, arrest, detention, appropriation and forfeiture of property, entry and search of premises, taking of possession or control of any property or undertaking, and requiring persons to do work or render services. Section 3(1) enables the regulations made to provide for the punishment of offences. Reading the ERO as a whole, the respondents say, there can be no doubt that the legislature did have in mind the potential restriction of rights and freedoms by the making of regulations, including but not limited to the specific measures set out in s 2(2)(a) to (n).



125. A tension can be detected between Ground 1 and Ground 4 as advanced by the applicants. Under Ground 1, the applicants submit that s 2(1) of the ERO is of the widest scope, essentially conferring an unrestricted and unfettered legislative power. Ground 4, as we see it, is essentially an alternative ground, contending instead that s 2(1) is to be read as not authorising any regulation to be made that would restrict fundamental rights. Having upheld the applicants' contention on Ground 1, it is not necessary for us to deal with Ground 4.

*I. Ground 5A — the section 3 proportionality ground*

*(1) The rights engaged*

126. Section 3 of the PFCR has been set out in §22 above. Essentially it prohibits a person at the types of gatherings specified from using any facial covering that is likely to prevent identification, and makes it an offence punishable with a fine of \$25,000 and imprisonment for 1 year.

127. There is no dispute that a number of rights are engaged by the restrictions imposed by s 3 of the PFCR, including the freedom of assembly, procession and demonstration (Art 17 of the Bill of Rights;<sup>40</sup> Art 27 of the Basic Law<sup>41</sup>), the freedom of speech or expression (Art 16 of the Bill of Rights<sup>42</sup>; Art 27 of the Basic Law), and the right to privacy (Art 14 of the

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<sup>40</sup> Art 17 of the Bill of Rights provides: "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".

<sup>41</sup> Art 27 of the Basic Law provides: "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike".

<sup>42</sup> Art 16(2) of the Bill of Rights provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

Bill of Rights<sup>43</sup>). These rights are not absolute and may be subject to lawful restrictions.

128. There is equally no dispute that whether or not the restrictions are legally valid is to be determined by a 4-step proportionality analysis, asking: (1) does the measure pursue a legitimate aim; (2) if so, is it rationally connected with advancing that aim; (3) whether the measure is no more than reasonably necessary for that purpose; and (4) whether a reasonable balance has been struck between the societal benefits promoted and the inroads made into the protected rights, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual: *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, §§134-135; *HKSAR v Choi Wai Lun* (2018) 21 HKCFAR 167, §68.

129. We shall analyse the restrictions imposed by s 3 and s 5 of the PFCR separately.

(2) *Step (1): legitimate aims*

130. On behalf of the Government, Mr Yu submits that the aims sought to be pursued by the PFCR are two-fold, namely: (i) deterrence and elimination of the emboldening effect for those who may otherwise, with the advantage of facial covering, break the law, and (ii) facilitation of law enforcement, investigation and prosecution. It cannot be disputed that these are legitimate aims which the Government may lawfully pursue, both of which would serve to promote the interests of public order and public

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<sup>43</sup> Art 14 of the Bill of Rights provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.

safety. In this regard, it is relevant to note that many of the provisions of the Bill of Rights expressly permit restriction or limitation of the relevant rights for the purpose of protection of public order and/or public safety: see Art 15(3) (freedom of thought, conscience and religion), Art 16(3)(b) (freedom of opinion and expression), Art 17 (right of peaceful assembly), and Art 18(2) (freedom of association), of the Bill of Rights.

131. In *SAS v France* (2015) 60 EHRR 11, the law in question provided that: “No one may, in public places, wear clothing that is designed to conceal the face”. The Grand Chamber of the European Court of Human Rights held that the right to respect for private life and the freedom to manifest one’s belief under Arts 8 and 9 of the ECHR were engaged.<sup>44</sup> The court also accepted that in adopting the ban, the State sought to advance the legitimate aim of “public safety” within the meaning of the Convention.<sup>45</sup> We shall come back to this case later in our discussion of whether the restrictions imposed by s 3 of the PFCR are proportionate to the pursuit of the legitimate aims as identified by the Government.

132. In this connection there is evidence before us of the enormity of the damage and danger created by some of the protesters. In the few months leading to 4 October 2019, Hong Kong has witnessed numerous instances where certain protesters charged police cordon lines with weapons, blocked public roads and tunnels with a variety of large and heavy objects, attacked drivers who voiced complaints at such blockades, vandalised public facilities and buildings, burned public property, hurled inflammable liquid bombs at the police and at and inside Mass Transit

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<sup>44</sup> Paras 107 and 108.

<sup>45</sup> Para 115.

Railway stations, damaged shopping malls, shops, banks and restaurants (with reports of looting and theft in some of the damaged shops), damaged residential quarters of the disciplined forces, crippled the operations of transport infrastructure, and harassed and attacked ordinary citizens holding different political views. These acts of violence and vandalism had increased in intensity and frequency, with the incidents on 1 October 2019 being especially serious. The more violent protesters were often all suited up and masked by facial covering such as surgical masks, balaclavas and gas masks which concealed their identity. A particularly worrying trend is the apparent increasing number of young persons and students taking part in what appear to be riotous gatherings and criminal acts of violence and vandalism. By 4 October 2019, a total of 223 persons below the age of 18 had been arrested out of a total of 2,135 persons arrested in these events, compared to 67 out of 1,110 as at 1 September 2019.

*(3) Step (2): rational connection*

133. As we understand it, the Government's arguments that the measure adopted under s 3 of the PFCR promotes or advances the first legitimate aim (ie deterrence and elimination of the emboldening effect for those who may otherwise, with the advantage of facial covering, break the law) run along the following lines:

- (1) Protesters are able to avoid identification by wearing masks. Those protesters who are bent on resorting to violence rely in substantial part on the support of other protesters. Even though the hardcore radical and violent protesters may continue to flout the law, those protesters who are not prepared to break the law may comply with the PFCR and this would generally result in lessening the support for the more radical

and violent protesters. The making of the PFCR will signal a clear disapproval by the law, not merely of acts of violence and vandalism, but also of the illegitimate use of face covering to conceal one's identity while breaking the law.

(2) Face covering clearly emboldens protesters to engage in violent or unlawful acts which they may not otherwise perform without concealment. Masked protesters mix themselves into larger groups and instigate violence and vandalism. Presence of non-violent protesters also wearing facial coverings in such circumstances makes identification of the violent protesters much harder because they can easily slip away amid chaos aroused by them. Their clean getaways embolden and allow them to redouble their efforts to break the law.

(3) The prohibition of face covering will help ensure peaceful protests and demonstration will stay that way. Non-radical protesters will be less likely to be influenced by or emulate their violent peers and will think twice before emulating them when they know their identity is not concealed. While there is no guarantee that the PFCR will stop all acts of violence and vandalism, it is incorrect to assume that the PFCR will definitely be ignored. At least some protesters will be discouraged from instigating or joining violent or riotous behaviour.

(4) In view of the alarming surge in the number of students participating in unlawful activities, the PFCR can act as an effective deterrent against at least some students from wearing masks when joining a protest (lawful or unlawful), which thereby substantially reduces the chance that they will be induced to break the law.

134. In relation to the second legitimate aim (ie facilitation of law enforcement, investigation and prosecution), the Government's arguments are as follows:

- (1) Violent protesters often deploy what has been described as the "black bloc" tactic<sup>46</sup> to make it harder for them to be identified, arrested, and successfully prosecuted, and prohibition of face covering would make such tactic much less effective.
- (2) The PFCR provides an extra tool to the Police in maintaining law and order (including making necessary arrests), particularly in relation to groups of masked radical and violent protesters who might have mingled with non-radical protesters or otherwise dispersed into the crowd, thereby making it harder to distinguish between violent and non-violent protesters at the scene, and thus harder to make arrests.
- (3) Police officers need to be able to identify the protesters engaged in unlawful or criminal activities to make arrests and restore public order amid chaos, but the concealment of identity by face covering is a major impediment to law enforcement. As police officers are unable to quickly and effectively identify the protesters, those who manage to escape from the scene may change their clothes soon afterwards and remove their facial coverings in order to avoid arrest.
- (4) Identification based on the evidence collected at the scene or in the vicinity (like CCTV footage) is crucial in subsequent investigation and prosecution. The "black bloc" tactic and

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<sup>46</sup> In para 9 of the Affirmation of Cheung Tin Lok, the "black bloc" tactic is explained to mean protestors appearing in groups and wearing black clothing with little or no distinguishing feature and covering the whole or a substantial part of their faces with sunglasses, goggles, masks, respirators, etc, which not only prevent identification of those who commit criminal acts but also shield them from tear gas and pepper spray deployed by the Police.

face covering make identification difficult. Prohibiting face covering will help identification of the violent protesters.

- (5) The PFCR also aims to make the crowd dispersal tools of the Police, such as tear gas and pepper spray, more effective. Past experience shows that masks are being worn by protesters to shield themselves from the effect of tear gas and pepper spray, rendering those measures much less effective, with the result that the Police encountered much more difficulty in dispersing crowds.

135. The question of whether a particular measure is rationally connected to an identified aim is essentially a matter of logic and common sense. The fact that the measure may subsequently prove to be ineffective to achieve the aim does not in itself disprove rational connection, although it would have a bearing on the issue of whether a measure adopted is proportionate to the pursuit of a legitimate aim, and also the issue of reasonable balance.

136. At the rolled-up hearing, Mr Chan made it clear that he would be concentrating on steps (3) and (4) of the proportionality analysis, and did not make any oral submissions on step (2). Nevertheless, for the sake of completeness, we shall briefly deal with the arguments raised in the written submissions of the applicants in HCAL 2945 that the restrictions under s 3 of the PFCR are not rationally connected to the legitimate aim of the protection of public order and public safety. Essentially, four arguments are raised:<sup>47</sup>

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<sup>47</sup> Paras 6.12 to 6.15 of the Skeleton Submissions dated 24 October 2019.

(1) Section 3 covers all public meetings, lawful and unlawful, and peaceful or otherwise, and thus it does not in fact pursue the legitimate aim of reducing violence (because in peaceful assemblies there is no violence), or facilitate police investigation and administration of justice (because there is no violence to investigate to begin with).

(2) Insofar as authorised and unauthorised but peaceful assemblies or processions are concerned, there is no reason why wearing a mask would turn them into something other than lawful or peaceful that calls for restoration of peace and order.

(3) The suggestion that because a lawful and peaceful assembly or demonstration can develop into an unlawful one by the acts of some violent protesters, all law-abiding citizens should not wear masks in the first place is based on the logical fallacy or false equivalence that because all violent protesters wear masks, all masked protesters are violent.

(4) The suggestion that the wearing of a mask would encourage or embolden protesters to engage in unlawful activities that they would otherwise not be willing to without a mask is not supported by evidence.

137. As rightly submitted by Mr Yu, the first argument fails to take into account the evidence that many public assemblies or processions in the past months which took place lawfully and peacefully at the beginning turned into unauthorised or unlawful ones with some radical protesters resorting to violence. In such cases, the prohibition of face covering would deter some protesters, without the advantage of face covering, from committing acts of violence or breaking the law, and facilitate law enforcement, investigation and prosecution for the reasons given by the



Government. In our view, the argument is in truth an objection to the width of the measure, which is a matter for consideration under steps (3) and (4) of the proportionality analysis. The fact that a measure may be wider than is reasonably necessary to achieve a legitimate aim does not mean that it is not rationally connected to that aim. Thus, while s 3 of the PFCR may be objected to for its width in that it would also criminalise protesters wearing facial coverings in peaceful and lawful assemblies, it does not mean that the measure adopted under s 3 does not pursue the legitimate aims of deterring violent protests, or facilitating law enforcement, investigation and prosecution of violent protesters.

138. The second argument can be disposed of shortly on the ground that it is no part of the Government's argument that mask-wearing would necessarily turn a peaceful assembly or procession into an unlawful or violent one. The Government's case is that many recent public assemblies or processions which took place lawfully and peacefully at the beginning turned, as a matter of fact, into unlawful or violent ones, and the prohibition of face covering at such initially lawful and peaceful assemblies or processions would, or at least may, reduce the risk or likelihood of them being turned into unlawful or violent ones. There is force in Mr Yu's criticism that the applicants have presumed a simple dichotomy of peaceful and violent protesters. Human nature being what it is, there is likely to be a range of attitudes and predispositions among different people. Furthermore, people's behaviour may change depending on the circumstances and the influence from others around them. There is no real challenge from the applicants that face covering makes law enforcement, investigation and prosecution more difficult. As has been observed by Fish J (dissenting in the result) in *R v Cornell* [2010] 2 SCR 142 at §118 (cited in *Villeneuve v Montreal (City of)*, 2016 QCCS 2888 at §486): "Just

as anonymity breeds impunity, so too does impunity breed misconduct”. The court in *Villeneuve* (which is described in greater detail below) also took the view (at §489) that “[l]ogic and common sense suggest that [prohibiting facial covering] has a deterrent effect on persons who choose to cover their faces in order to engage in acts of violence and vandalism under the cover of anonymity during demonstrations” and that “a reasonable inference may be drawn that the measure will aid in realising the objective being pursued”.

139. The above comments apply equally to the third argument. Again, it is no part of the Government’s argument that all masked protesters are violent.

140. In so far as the fourth argument is concerned, the Government has produced an affidavit by Dr Tsui Pui Wing Ephraem, a clinical psychologist, dated 23 October 2019 to explain how the wearing of facial covering affects a person’s psychology and emboldens the wearer to commit acts which he or she might otherwise not commit. In his affidavit, Dr Tsui made clear that he had not personally conducted any study or research on the emboldening effect of face covering, but had carried out a search of the relevant literature bearing on the issue that he was asked to opine on, using online databases such as Google Scholar and the Electronics Resources of The University of Hong Kong Libraries. He identified three papers to be of particular relevance, and presented his literature review on them in his affidavit. At paragraph 17 of the affidavit, Dr Tsui set out his conclusion as follows:

“ People make rational decisions or intention about wearing a mask or not or a particular mask. It maybe for physical protection, psychological protection of their identities, or to display their

identification with a particular group. An individual wearing a mask may provide him or her a stronger sense of safety or group identification, but that alone does not lead to a loss of self-awareness or loss of self-regulation as proposed by Silke (2003). It seems that it is when the person joins a group which uses wearing masks as group identification that triggers the deindividuation effect. Research has shown that the larger the group size, the stronger the deindividuation feeling becomes (see Postmes & Spears (1998)). The person will identify more with the group values, situation norms and behaviour, and will begin to set his own values and self-regulations aside. He is not relinquishing his own values and self-regulation permanently because they can return to him after the group action. Mask functions as a facilitator of anonymity. When anonymity joins with group action, participants' responsibilities become easily diffused or shared. Individuals tend to feel they are being supported by a lot of people. This has an emboldenment effect. If the dominant group value or purpose in the situation is pro-social, the individual will conform to it and act pro-socially. However, if the dominant group value or purpose in the situation is anti-social, the individual will conform to that and be more likely to act antisocially. The word 'antisocial' refers to acting against larger social norms which, within the group, can be their own emerging group norm. It implies that the person is not really losing his self in the group, but is just following to the group norm."

141. The applicants in HCAL 2945 object to the admission of the evidence of Dr Tsui on the grounds of:

- (1) irrelevance;
- (2) lack of expertise; and
- (3) procedural unfairness, and invites the court to exercise its case management power to exclude the evidence.

142. On the issue of relevance, it seems to us that Dr Tsui's evidence supports the proposition that face covering would, or at least could, embolden protesters to commit violent or unlawful acts which they might not otherwise commit without concealment of their identities. The

evidence of Dr Tsui is, in our view, relevant to the issue of rational connection between the measure adopted under s 3 of the PFCR and the first legitimate aim relied upon by the Government. For the purpose of showing rational connection, it is not necessary for the Government to prove that face covering would necessarily have the emboldenment effect contended for. It suffices for the Government to show that it could have such effect.

143. On the question of Dr Tsui's expertise, the applicants in HCAL 2945 argue that Dr Tsui is in no position to offer anything more than comment, and point to the fact that Dr Tsui has not performed any research on the psychological profile specific to Hong Kong and the extent of any emboldening effect in Hong Kong with masks and protesters. In our view, it is not necessary for an expert to have personally carried out some study or research on an issue before he can give expert evidence on it. One of the skills possessed by an expert which the court or an ordinary lay person does not have is the ability to look for and identify relevant research papers and literature in his field of expertise, and explain, interpret and comment on the findings and conclusions in plain language. The fact that an expert may not have personally carried out the relevant study or research is a matter going to the weight (rather than admissibility) of the opinion given by the expert.

144. Lastly, in so far as procedural fairness is concerned, the question of the need for evidence on the issue of the emboldening effect of face covering was mooted at the hearing on 6 October 2019, and the Government took out a summons for admission of Dr Tsui's evidence on 23 October 2019. In view of the urgency of this application and the short time frame between the commencement of the proceedings and the date of

A the rolled-up hearing, we do not consider the Government to have delayed  
B in producing the affidavit of Dr Tsui. The applicants in HCAL 2945 have  
C not put forward any evidence of their own to counter the evidence of  
D Dr Tsui or to support the proposition that face covering does not produce  
E any emboldening effect. While they complain about the absence of any  
F opportunity to cross-examine Dr Tsui, they did not make any application to  
the court for cross-examination. Overall, we see no reason, from the  
perspective of procedural fairness, to exclude the evidence of Dr Tsui.

G 145. For the above reasons, we would admit Dr Tsui's affidavit as  
H evidence in these proceedings. As earlier mentioned, we consider  
I Dr Tsui's evidence to be supportive of the proposition that face covering  
J would, or at least could, embolden protesters to commit violent or unlawful  
K acts which they might not otherwise commit without concealment of their  
L identities. In any event, we consider this proposition to be a matter of  
common sense which we would readily accept even without the evidence  
of Dr Tsui.

M 146. In all, we are satisfied that the measure adopted under s 3 of  
N the PFCR is rationally connected to the two legitimate aims identified by  
O the Government mentioned in paragraph 130 above.

P (4) *Steps (3) and (4): no more than reasonably necessary and reasonable*  
Q *balance*

R 147. The following principles are relevant in step (3) of the  
proportionality analysis.

- S (1) The test is one of "reasonable necessity", not "strict necessity".  
T This is plain from the judgment of Ribeiro PJ in *Hysan*  
U  
V

*Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, at §§83-88 and §§119-122. The question is whether there is “a reasonable relationship of proportionality between the means employed and the aim sought to be realised” (*James v United Kingdom* (1986) 8 EHRR 123, at §§50-51). While the court should consider whether “some less onerous alternative would have been available without unreasonably impairing the objective” (*R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945, at §34), it does not mean that “the restriction must be the very least intrusive method of securing the objective which might be imagined or devised” (*Official Receiver v Zhi Charles* (2015) 18 HKCFAR 467, at §53).

(2) The yardstick of reasonable necessity is not a strict, bright line, but occupies a continuous spectrum which should be viewed as a “sliding scale” in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference (*Hysan*, at §§83 and 86).

(3) A wide margin of discretion should be given to the Government in the assessment of the necessity in taking measures to restrict unlawful and/or violent conduct disrupting the ordinary life and activities of the majority, law-abiding, citizens in Hong Kong (*Kudrevičius v Lithuania* (2016) 62 EHRR 34, at §156), just as the Government is afforded a wide margin of discretion in the choice of reasonable and appropriate measures to enable lawful assemblies to take place peacefully, which, the respondents emphasise, has been said to be a positive duty on the part of the Government (*Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, at §22).

148. The importance of the rights and freedoms in question hardly needs elaboration. Freedom of expression “lies at the heart of civil society and of Hong Kong’s system and way of life” and its constitutional guarantee must be given a generous interpretation, even where the majority of people find the ideas expressed disagreeable or offensive: *HKSAR v Ng Kung Siu & Anor* (1999) 2 HKCFAR 442, 455H. As the Court of Final Appeal stated in *Leung Kwok Hung v HKSAR, supra*, at §2, the freedom of speech and the freedom of peaceful assembly are “of cardinal importance for the stability and progress of society”. As regards the extent of the interference with these rights and freedoms, it will be noted that the PFCR does not restrict public assemblies and processions as such, but only the use of facial covering at such gatherings. Nevertheless, there is no dispute that the freedom of peaceful assembly extends to the manner of its exercise, and that a restriction such as that imposed by the PFCR is an inroad into the relevant right. As has been recognised in many jurisdictions and is, we believe, common ground, some participants in demonstrations may wish to wear facial covering for legitimate reasons, such as to avoid retribution. The restriction imposed by the PFCR is therefore not to be trivialised as a minor inhibition on mask-wearing during demonstrations but, depending on the context, can have a significant impact on the freedom of expression in peaceful public meetings and processions. The question here is whether the inroad made by the PFCR is proportionate.

(a) *Section 3(1)(a) of the PFCR*

149. At the rolled-up hearing, Mr Chan informed the court that the applicants in HCAL 2945 do not challenge the lawfulness of s 3(1)(a) of the PFCR under Ground 5A (without prejudice to the other grounds of judicial review concerning the constitutionality or lawfulness of the ERO

A and PFCR). It will be recalled that s 3(1)(a) prohibits any person from  
B using any facial covering that is likely to prevent identification while that  
C person is at an “unlawful assembly”, which expression is defined, by  
D reference to s 18 of the POO to mean the following –

E “ When 3 or more persons, assembled together, conduct themselves  
F in a disorderly, intimidating, insulting or provocative manner  
G intended or likely to cause any person reasonably to fear that the  
H persons so assembled will commit a breach of the peace, or will  
I by such conduct provoke other persons to commit a breach of the  
J peace.”

K 150. We consider Mr Chan’s concession to be rightly made. It is  
L well established that there is a clear distinction drawn between peaceful  
M assemblies and those which threaten life and physical integrity of the person  
N or involve damage to property. In *Kudrevičius*, the Grand Chamber of the  
O European Court of Human Rights states that Art 11 of the ECHR, which  
P concerns the right to freedom of peaceful assembly, does not cover a  
Q demonstration where the organisers and participants have violent intentions,  
R and that the guarantees of Art 11 do not apply to those gatherings where the  
S organisers and participants have such intentions, incite violence or  
T otherwise reject the foundations of a democratic society (§92). The Hong  
U Kong Court of Appeal has also emphasised, in its recent judgment in  
V *Secretary for Justice v Wong Chi Fung* [2018] 2 HKLRD 699, the  
importance of preserving public order as the foundation for the exercise and  
enjoyment of fundamental human rights by the ordinary citizens of Hong  
Kong. At §118 of the judgment of the Court of Appeal, Poon JA states as  
follows:

S “ Society is prone to descend into anarchy if public order is not  
T preserved; once such a situation arises, the harm done to both the  
U society and its citizens cannot be understated. For the society as  
V a whole, preserving public order is indispensable to societal  
safety and public peace. Lawlessness in anarchic situations



undermines social stability and hampers continuous development of a society. 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 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 the public order in Hong Kong is not under threat. That does not mean that the law is only concerned about public order, or that it will ignore the rights and freedoms enjoyed by citizens in accordance with law, lest the society is likely to descend into a suppressed state, which would impede Hong Kong's development and progress and deprive its citizens of their various freedoms and rights. The law must give consideration to both, and to strike a balance between the right of assembly and the need to preserve public order. That balance is embodied in the basic premise that assemblies must be held peacefully without disrupting or threatening to disrupt public order, or without involving any violence or threat to use violence."

151. Such being the importance attached to the preservation of law and order in Hong Kong, we consider that the prohibition against the use of facial covering by any person who is at an unlawful assembly (which, by definition, would not be a peaceful assembly) imposed by s 3(1)(a) of the PFCR falls within the wide margin of discretion that the law affords to the Government to devise and implement measures to restrict unlawful and/or violent conduct. We also do not consider that the pursuit of the societal interest of law and order by the measure adopted under s 3(1)(a) would result in an unacceptably harsh burden on the individual. No person should take part in an unlawful assembly in the first place, it being a criminal offence to do so under s 18(1) of the POO, and the additional prohibition against the wearing of facial covering by a person at such assembly cannot be said to be unduly harsh on that person. In relation to an assembly which

is initially lawful and peaceful but subsequently develops into an unlawful or violent one, we consider Mr Yu's submission to have force that in such a case, the participants should distance themselves from the assembly as soon as possible rather than to continue to participate in it and seek refuge behind the facial covering.

*(b) Section 3(1)(b), (c) and (d) of the PFCR*

152. Different considerations, however, apply to the prohibition against the use of facial covering in the situations under s 3(1)(b), (c) and (d) of the PFCR. When considering whether the restrictions of rights imposed by s 3(1)(b), (c) or (d) of the PFCR are proportionate to the legitimate aims sought to be achieved by the Government, the following features of the prohibition imposed by these sub-paragraphs are of note.

153. First, s 3(1)(c) and (d) relate to public meetings and processions which may remain authorised and peaceful from beginning to end, and in which the participants behave lawfully and in good order throughout. The prohibition against the use of any facial covering imposed by s 3(1)(c) and (d) would directly interfere with these participants' right of privacy and/or freedom of expression while taking part in perfectly lawful activities in the exercise of their right of peaceful assembly.

154. Second, s 3(1)(b) relates to "unauthorised" assemblies as explained in §§26 and 27 above. An assembly which is "unauthorised" may yet be entirely peaceful, without any violence being used or threatened by anyone participating in that assembly, eg a large scale public procession may become an unauthorised procession as a result of the failure by some participants to comply with a condition as regards the route of the

procession imposed by the Commissioner under s 15(2) of the POO but the participants may continue to proceed with the procession in an entirely peaceful and orderly manner.

155. Third, the prohibition applies to any assembly, meeting or procession for whatever causes; it is not restricted to assemblies, meetings or processions arising from the now withdrawn Bill. Many assemblies, meetings or processions for different causes, such as LGBT, labour or migrant rights, take place in different parts of Hong Kong throughout the year, and traditionally these gatherings have been orderly and peaceful. It cannot be disputed that participants in such gatherings may have perfectly legitimate reasons for not wishing to be identified, or seen to be supporting such causes. Nevertheless, the effect of s 3(1)(b), (c) or (d) is to impose a near-blanket prohibition against the wearing of facial covering by the participants, without any mechanism for a case-by-case evaluation or assessment of the risk of any specific gathering developing or turning into a violent one such as would make it desirable or necessary to impose the prohibition in relation to that gathering only.

156. Fourth, the prohibition applies to any person while he or she is “at” any unauthorised assembly, public meeting or public procession referred to in s 3(1)(b), (c) or (d). It is not clearly stated whether, to be caught by the prohibition, the person must be a participant in the relevant gathering, or whether it suffices for that person to be merely present at the gathering, eg a person who goes to the scene for the purpose of taking photographs, or giving first-aid to persons in need of help, or even a mere passer-by who has stopped to observe the gathering. The wording of s 3(1) may be contrasted with (i) s 17(3) of the POO, which makes it an offence for any person who, without lawful authority or reasonable excuse,

“knowingly takes or continues to take part in or forms or continues to form part of” any unauthorized assembly, and (ii) s 18(3) of the POO, which makes it an offence for any person who “takes part in” an unlawful assembly. It is uncertain whether the restrictions imposed by s 3(1)(b), (c) or (d) cover not only participants of the types of gathering referred to in those sub-paragraphs, but also any person who is physically present (other than perhaps for a fleeting moment) at the gathering in question.

157. Fifth, the prohibition applies to facial covering of any type and used for whatever reason, including those worn for religious, cultural, aesthetic or other legitimate reasons, for example, to avoid reprisals or unpleasant consequences as a result of being seen to support some particular cause. There is no requirement that the facial covering is used by a person for the purpose of preventing identification, or is designed to have that effect. It suffices that the facial covering is “likely” to prevent identification. Although s 4(1) of the PFCR provides for a “lawful authority or reasonable excuse” defence to a charge under s 3(2), the scope of the defence is not clearly defined. A non-exhaustive list of situations deemed to be reasonable excuses is given in s 4(3), namely, (i) a person engaging in a profession or employment and using the facial covering for the physical safety of that person while performing an act or activity connected with the profession or employment, (ii) a person using the facial covering for religious reasons, and (iii) a person using the facial covering for a pre-existing medical or health reason, leaving other situations to be argued or determined on a case-by-case basis.

158. In *SAS v France*, mentioned in §131 above, the prohibition in question (namely, anyone wearing clothing that was designed to conceal the face in public places) was held by the European Court of Human Rights to

engage the right to respect for private life under Art 8, and the right to freedom of thought, conscience and religion and to manifest one's religion or belief under Art 9, of the ECHR. Furthermore, the prohibition was held to be disproportionate to the legitimate aim of prevention of danger for the safety of persons and property and the combat of identity fraud, because it was not shown that the prohibited conduct constituted a general threat to public safety. At §139 of the judgment of the European Court of Human Rights, it was stated that the blanket ban imposed could not be said to be necessary, in a democratic society, for public safety within the meaning of Arts 8 and 9 of the Convention when "the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud". The ban was, however, saved as being proportionate to another legitimate aim sought to be pursued by the French Government (not relevant to our present case), namely, to ensure the observance of the minimum requirements of life in society, or the preservation of the conditions of "living together" as an element of the protection of the rights and freedoms of others (see §§140-142 and 157 of the judgment).

159. In *Yaker v France*, Communication No 2747/2016 (17 July 2018), the United Nations Human Rights Committee had occasion to consider the same ban that was considered in *SAS v France*. The Human Rights Committee considered that the ban constituted an infringement of the complainant's freedom of thought, conscience and religion protected by Art 18 of the ICCPR (corresponding to Art 15 of the Bill of Rights) which could not be justified. The reasoning for this conclusion was set out in §§8.7 and 8.8 of the decision, as follows:

“ 8.7 With respect to protection of public order and safety, the State party contends that it must be possible to identify all individuals when necessary to avert threats to the security of persons or property and to combat identity fraud. The Committee recognizes the need for States, in certain contexts, to be able to require that individuals show their faces, which might entail one-off obligations for individuals to reveal their faces in specific circumstances of a risk to public safety or order, or for identification purposes. The Committee observes, however, that the Act is not limited to such contexts, but comprehensively prohibits the wearing of certain face coverings in public at all times, and that the State party has failed to demonstrate how wearing the full-face veil in itself represents a threat to public safety or order that would justify such an absolute ban. Nor has the State party provided any public safety justification or explanation for why covering the face for certain religious purposes — i.e., the niqab — is prohibited, while covering the face for numerous other purposes, including sporting, artistic, and other traditional and religious purposes, is allowed. The Committee further observes that the State party has not described any context, or provided any example, in which there was a specific and significant threat to public order and safety that would justify such a blanket ban on the full-face veil. No such threats are described in the statement of purpose of Act No. 2010-1192 or in the National Assembly resolution of 11 May 2010, which preceded the adoption of the Act.

8.8 Even if the State party could demonstrate the existence of a specific and significant threat to public safety and order in principle, it has failed to demonstrate that the prohibition contained in Act No. 2010-1192 is proportionate to that objective, in view of its considerable impact on the author as a woman wearing the full-face veil. Nor has it attempted to demonstrate that the ban was the least restrictive measure necessary to ensure the protection of the freedom of religion or belief.”

160. It can be seen that the Human Rights Committee reached its conclusion that the ban constituted a disproportionate interference with the complainant’s right under Art 18 of the ICCPR for essentially the same reasons relied upon by the European Court of Human Rights. For the sake of completeness, we should point out that, unlike the European Court of Human Rights, the Human Rights Committee further held that the ban could

not be justified by the aim of preserving or promoting the values of the Republic and the requirements of “living together”.<sup>48</sup>

161. In *Villeneuve v Montreal (City of)*, 2016 QCCS 2888, the relevant law (Art 3.2 of the Regulation for the Prevention of Disturbances of the Peace, Public Safety and Public Order) provided that: “No person who participates in or attends an assembly, parade or gathering on public property may cover their face without a reasonable motive, namely, using a scarf, hood or mask”.<sup>49</sup> The target of this provision was the phenomenon of masked persons engaging in acts of vandalism and violence during demonstrations on public roads.<sup>50</sup> Its objective was to prevent disturbance of public order, in particular to reduce the risks that legitimate parades or demonstrations taking place on public roadways would degenerate because of acts of vandalism and violence committed under the cover of anonymity, and also to promote the freedom of expression and assembly by aiming at preserving the peaceful nature of such parades or demonstrations, and the protection of peaceful participants.<sup>51</sup> The Superior Court of Quebec accepted that the above objectives were important, real and urgent on the evidence before it, and also that there was rational connection between those objectives and the measure adopted.<sup>52</sup> However, the restriction was held not to satisfy the “minimum infringement” requirement, or “what was necessary” to achieve the objectives because the measure adopted went far beyond the context of demonstrations that blocked public roads, but would prohibit face covering on the occasion of any assembly, parade or gathering

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<sup>48</sup> See §§8.9-8.12 of the decision.

<sup>49</sup> See §263 of the judgment of Superior Court of the Quebec. The original judgment is in French; the references here are to an unofficial translation provided by the applicants in HCAL 2945.

<sup>50</sup> See §§481-483 of the judgment.

<sup>51</sup> See §§484-485 of the judgment.

<sup>52</sup> See §§487-489 of the judgment.

on public property, including innocent activities (such as moving about in a group during Halloween or a group of people in a park throwing snowballs on a cold winter day).<sup>53</sup> Further, even if Art 3.2 were to be read down to restrict its application to only those demonstrations that blocked vehicular traffic, the provision would still not pass the minimum infringement test because (i) it permitted police officers to question a person exercising his freedom of political expression without requiring that there be reasonable grounds to believe that the person intended to disturb the peace or wished to disguise his or her identity from police officers, (ii) Art 3.2 had the effect of a near-absolute, if not absolute prohibition giving police wide latitude and leading to risks of abuse, and (iii) persons having the face covered for perfectly legitimate reasons, including that of expressing themselves without fear of reprisals, saw their freedoms of expression and assembly violated by Art 3.2, even in the case of peaceful assemblies.<sup>54</sup> In the result, Art 3.2 was declared null and void as being incompatible with the freedoms of expression and assembly protected by both the Canadian Charter and the Quebec Charter.

162. As rightly pointed out by Mr Yu, one cannot directly apply the judgment of the Quebec court in *Villeneuve* to the present case because the test of proportionality applicable in that jurisdiction appears to be different from that adopted in Hong Kong. At §§441-442 of that judgment, the test of proportionality applicable in Quebec was explained as follows (footnotes omitted):

“ [441] In essence, this is the test set forth in *R v Oakes*. In analysing proportionality, the courts must exercise some deference to the position of the legislature, proportionality

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<sup>53</sup> See §§490-491 of the judgment.

<sup>54</sup> See §§493-495 of the judgment.



not requiring perfection but only that the limits placed on the rights and liberties be reasonable.

[442] Thus, in connection with the criterion of minimal infringement, for example, it is sufficient for the challenged measure to lie within a range of reasonable measures, and the courts will not conclude that it is disproportional solely because a better-suited alternative solution can be envisaged. However, a strict standard of justification should be applied when the freedom of political expression is infringed upon or when the State plays the role of unique adversary of the individual, principally in criminal matters.” [emphasis added]

163. This having been said, the reasoning of the Quebec court in coming to the conclusion that Art 3.2 was disproportionate to the pursuit of the legitimate aims of prevention of disturbance of public order as well as the promotion of the freedom of expression and assembly and the protection of peaceful participants seems to us to have force even for the application of the “reasonable necessity” test in step (3) of the proportionality analysis in Hong Kong.

164. As regards the effect of the PFCR, Mr Yu argues that although there is no guarantee that it will stop all acts of violence and vandalism, it is incorrect to assume that the PFCR will definitely be ignored; that at least some protesters will be discouraged from instigating or joining violent or riotous behaviour; and that it is believed that the PFCR can act as an effective deterrent against at least some students from wearing masks when joining a protest (lawful or unlawful) thereby substantially reducing the chance that they will be induced to break the law. On the other hand, Mr Chan points to the fact that there has been and continues to be massive defiance of the law since the coming into effect of the PFCR, and argues that the PFCR has not deterred violent protesters, but instead has caused further confusion and led to more outbursts of violent protests; he submits

A that in short the PFCR has not been shown to be effective in achieving its  
B justification of reducing violence and crimes but has caused  
C disproportionate adverse effect and restrictions on the rights of the freedom  
D of the person, freedom of expression and freedom of peaceful assembly, and  
E generated widespread uncertainty and resentment in a large number of  
F law-abiding citizens. We consider it to be self-evidently correct that the  
G court should not assume that a law will not be observed or will be flouted  
H with impunity. Nevertheless, the evidence before us is far from clear that  
I the PFCR has achieved to any substantial degree the intended aims of  
deterrence and elimination of the emboldening effect for those who may  
otherwise, with the advantage of facial covering, break the law, or  
facilitation of law enforcement, investigation and prosecution.

J 165. Mr Yu has impressed upon us the grave public danger that the  
K recent violence used by some protesters has caused to Hong Kong and its  
L inhabitants and the dire situation in which Hong Kong has currently found  
M itself. These are matters of which the court can readily take judicial notice.  
N However, we consider that even in these challenging times, and particularly  
O in these challenging times, the court must continue to adhere to and decide  
P cases strictly in accordance with established legal principles.

Q 166. In our view, having regard to the reach of the impugned  
R restrictions to perfectly lawful and peaceful public gatherings, the width of  
S the restrictions affecting public gatherings for whatever causes, the lack of  
T clarity as regards the application of the restrictions to persons present at the  
U public gathering other than as participants, the breadth of the prohibition  
V against the use of facial covering of any type and worn for whatever reasons,  
the absence of any mechanism for a case-by-case evaluation or assessment  
of the risk of violence or crimes such as would justify the application of the

restrictions, the lack of robust evidence on the effectiveness of the measure, and lastly the importance that the law attaches to the freedom of expression, freedom of assembly, procession and demonstration, and the right to privacy, we do not consider the restrictions of rights imposed by s 3(1)(b), (c) and (d) to be proportionate to the legitimate aims sought to be achieved by the imposition of those restrictions.

167. Having reached this conclusion, it is not necessary for us to consider step (4) of the proportionality analysis. If it is necessary to do so, we would conclude, for essentially the same reasons, that s 3(1)(b), (d) and (d) have failed to strike a reasonable balance between the societal benefits sought to be promoted and the inroads made into the aforesaid protected rights having regard in particular to the burden placed on those who wish for wholly legitimate reasons to wear facial covering at peaceful assemblies.

#### *(5) Conclusion*

168. For the above reasons, we consider that while the measures introduced by s 3(1) of the PFCR are rationally connected to the pursuit of legitimate societal aims, sub-paragraphs (b), (c) and (d) of s 3(1) go beyond what is reasonably necessary and therefore do not pass the proportionality test.

#### *J. Ground 5B — the section 5 proportionality ground*

##### *(1) The rights engaged*

169. We can deal Ground 5B more briefly. Art 28 of the Basic Law provides:

“ The freedom of the person of Hong Kong residents shall be inviolable.

No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited...”

170. Similarly, Art 5(1) of the Bill of Rights provides:

“ Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

171. Section 5 of the PFCR has been set out in §33 above. Its effect is to empower a police officer to stop any person in any public place who is using a facial covering and to require that person to remove it so that his or her identity may be verified, if the officer reasonably believes the facial covering is likely to prevent identification. If the person fails to remove the facial covering pursuant to the police officer’s requirement, the officer may remove it and the person commits an offence punishable by a fine of \$10,000 and imprisonment for 6 months.

172. It is clear that s 5 engages the freedom of the person or right to liberty protected by Art 28 of the Basic Law and Art 5 of the Bill of Rights. In *DPP v Avery* [2002] 1 Cr App R 31, the English Divisional Court had to consider the legality of s 60(4A) of the *Criminal Justice and Public Order Act* 1994, which conferred on any police constable in uniform the power to (a) “require any person to remove any item which the constable reasonably believes that person is wearing wholly or mainly for the purpose of concealing his identity” and (b) “seize any item which the constable reasonably believes any person intends to wear wholly or mainly for that purpose” in certain specified circumstances which we shall further discuss

below. Newman J considered that subsection (4A) created a significant power to interfere with the liberty of the subject and was thus required to be justified.<sup>55</sup>

173. Some other protected rights are also relied upon by the applicants to challenge the legality of s 5 of the PFCR, including the right to privacy (Art 14 of the Bill of Rights), the freedom of expression (Art 27 of the Basic Law and Art 16 of the Bill of Rights), and the freedom of movement (Art 31 of the Basic Law and Art 8 of the Bill of Rights). None of these rights are absolute. Since the analysis for considering the proportionality of the restriction imposed by s 5 on (i) the freedom of the person or right to liberty protected by Art 28 of the Basic Law and Art 5 of the Bill of Rights on the one hand, and (ii) the other rights relied upon on the other hand are effectively the same, it is not necessary to separately consider those other rights for the purpose of the present discussion.

(2) *Step (1): legitimate aim*

174. According to the Government, the aim of s 5 of the PFCR is to assist in law enforcement, investigation and prosecution by enabling police officers to verify the identity of all masked individuals not only during assemblies or processions but also in public places in the prevailing circumstances of public danger in Hong Kong. The aim of law enforcement, investigation and prosecution of offenders is undoubtedly a legitimate aim in itself.

175. Mr Pun argues, however, that this is not what the Government stated to be the aim of s 5, and relies on paragraph 16 of the LegCo Brief

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<sup>55</sup> See §18 of the judgment of the Divisional Court.

(File Reference: SCBR 3/3285/57) titled “Emergency Regulations Ordinance (Cap 241) Prohibition on Face Covering Regulation” dated October 2019 as “exhaustively” setting out the Government’s case on justification.<sup>56</sup> Paragraph 16 states as follows:

“ As regards the proposal on the Police’s power to remove facial covering in a public place, it is only reasonable that a police officer should be empowered to require a person to remove the person’s facial covering in order to verify the person’s identity, as a police officer is authorized under various laws to demand proof of identity. The person in question will only be stopped and asked to remove the facial covering for a short period of time, and may wear the facial covering after the officer has completed the verification process. Such minor interference with the person’s right to privacy guaranteed by Article 14 of the BOR is justifiable. It is also a proportionate measure to make non-compliance with the requirement an offence, given that refusal to comply with the requirement in such circumstances may, under existing law, amount to the offence of resisting or obstructing a police officer in the due execution of the officer’s duty.”

176. Based on this paragraph, Mr Pun argues that the Government’s aim of enacting s 5 is merely to “verify a person’s identity”, which he submits cannot by itself be a legitimate aim.<sup>57</sup> In our view, this is a distorted way of reading the LegCo Brief. The Government’s purposes or aims of the measures adopted by the PFCR are spelt out in paragraph 3 of the LegCo Brief, under the heading “Justifications”, as follows:

“ Due to the widespread and imminent public danger posed by the violent and illegal acts of masked protesters, there is an urgent need to consider introducing legislation to prohibit face covering to enable the Police to investigate into such acts and to serve as a deterrent against such behaviour. To restore public order, prohibition on facial covering in public assemblies, lawful and unlawful, would be necessary as it would effectively reduce act of violence and facilitate police investigation and administration of justice. The prohibition would be essential in public interest

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<sup>56</sup> See §55 of the Skeleton Argument of the applicant in HCAL 2949 dated 24 October 2019.

<sup>57</sup> See §56 of the Skeleton Argument of the applicant in HCAL 2949 dated 24 October 2019.

in restoring public peace, and is rationally connected to protecting public order and public safety.”

177. Paragraph 4 of the LegCo Brief goes on to explain why further powers are required by the Police to handle the illegal and violent acts of radical protesters:

“ We have critically considered the existing powers of the Police and relevant laws. We are of the view that legislation has to be enacted urgently to enable the Police to handle further illegal and violent acts of radical protesters more effectively so as to restore law and order, and to prevent serious public disorder, as well as to apprehend the offenders and bring them to justice. The proposal has taken into account the regulatory tools required to protect public safety and order having regard to the practical experience in handling protests in the past few months, with due regard for fundamental rights even in times of public danger.”

178. It is clear that the Government’s aims or purposes in adopting the measures under the PFCR are all to do with law enforcement, investigation and prosecution in the light of the prevailing circumstances in Hong Kong. Section 5 of the PFCR forms part of the measures brought in by the PFCR with a view to achieving such aims or purposes. Paragraph 16 of the LegCo Brief goes to explaining why the Government considers that the obligation imposed on a person in a public place, by requiring that person to remove his or her facial covering to enable a police officer to verify his or her identity, constitutes only a minimal interference of that person’s right and is a proportionate measure.

179. In any event, as submitted by Mr Yu, correctly in our view, the question of whether a measure which restricts a fundamental right is lawful or not lawful is a question of law for the court. The relevant question is not whether the decision-maker had properly considered whether the measures served a legitimate aim and was rationally connected to that aim

and did not constitute a disproportionate interference. In short, the question is not whether the decision-maker thought the decision was lawful, but whether it is in fact lawful (see *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, at §§88-90).

(3) *Step (2): rational connection*

180. As we understand it, the Government's case on rational connection is that, at this time of public danger when the use of face covering is prevalent among vandals and violent protesters, for the purposes of law enforcement, investigation and prosecution, police officers have a heightened need to see a person's face in order to verify his or her identity not only during assemblies or processions but also in public places.

181. Under the existing law, police officers already have various powers to demand verification of a person's identity, in particular:

- (1) Section 54(1)(a) of the *Police Force Ordinance* (Cap 232) empowers a police officer, if he finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, who acts in a suspicious manner, to stop the person for the purpose of demanding that he produces proof of his identity for inspection;
- (2) Section 49 of the POO empowers a police officer, if he reasonably believes that it is necessary for the purpose of preventing, detecting or investigating any offence for which the sentence is fixed by law or for which a person may (on a first conviction for that offence) be sentenced to imprisonment, to require any person to produce proof of his identity for inspection; and



(3) Section 17C(2) of the *Immigration Ordinance* (Cap 115) empowers (*inter alios*) any police officer who is in uniform or who produces, if required to do so, documentary identification officially issued to him as proof of his appointment as a police officer, to demand that any person, who is required under subsection (1) to have with him proof of his identity, produce the same for inspection. Although this sub-section does not stipulate any condition for the exercise of the power by a police officer to demand proof of identity, it would appear, from the context of the provision, that the power could only be exercised for purposes connected with immigration control under the Immigration Ordinance.

182. It is unclear whether these powers are wide enough to authorise a police officer to require a person to remove any facial covering for the purpose of inspection or verification of that person's identity. The applicants in HCAL 2945 contend that, by necessary implication, police officers already have such power. Be that as it may, the evidence suggests that, without a specific power authorising the police to require persons to remove their facial covering, police officers would face practical difficulties, including verbal challenges and insults, when exercising the power of checking identity under the existing law.<sup>58</sup>

183. Mr Yu submits that the measure adopted by s 5 of the PFCR is rationally connected to the legitimate aim of law enforcement, investigation and prosecution of violent protesters in that:

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<sup>58</sup> See §26 of Cheung Tin Lok's Affirmation dated 18 October 2019.

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- (1) The aim and effectiveness of the PFCR should be considered as a whole. In view of the fact that many radical protesters committing criminal acts wear face covering when attending both lawful and unlawful meetings and processions, as well as in public places before joining such meetings or processions, if the police has power to require a person in a public place to remove his/her facial covering to verify that person's identity, it would have a deterrent effect against that person subsequently committing violent or other criminal acts, knowing that his or her identity may already have been revealed or exposed.
- (2) The information obtained from verification of identity of persons wearing face covering in public places would assist the police in identifying the persons who committed criminal acts during lawful or unlawful meetings or processions wearing the same or similar face covering.
- (3) The measure under s 5 of the PFCR would help "water down" the emboldening effect of face covering. Many protesters wear face covering at all times in public, including in public places prior to and after joining public meetings or processions. If the protesters know that they can be asked to remove their face covering in public places, this would minimise the sense of anonymity created by the wearing of face covering at all times in public.
- (4) Lastly, in situations where it is not clear-cut if a person is attending a public meeting or procession, the police can at least exercise the power under s 5 of the PFCR to identify the person, as a precursor to exercising further powers where appropriate

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or required in the circumstances. This gives more flexibility and options to the police in enforcing the PFCR as a whole.<sup>59</sup>

184. We consider Mr Yu's submission to have force, and accept that the measure adopted under s 5 of the PFCR is rationally connected to the legitimate aim identified by the Government.

(4) *Steps (3) and (4): no more than reasonably necessary and reasonable balance*

185. The following features of s 5 of PFCR are notable:

- (1) It applies to any public place, which, as stated above, broadly means any place to which the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise — not necessarily one where a public meeting or public procession is taking place or about to take place or even a neighbouring area. Nor is there any provision for a senior police officer to designate particular places where the section applies, based on actual circumstances.<sup>60</sup>
- (2) The power may be exercised by any police officer, not only by or with the authorisation of an officer of or above a certain rank.
- (3) It applies to facial covering of any type.
- (4) The only condition for the exercise of the power is that the officer reasonably believes that the facial covering is likely to prevent identification. There is no requirement that the person is using the facial covering for the purpose or with the

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<sup>59</sup> See §143(4) of the Skeleton Submissions for the Putative Respondents dated 28 October 2019.

<sup>60</sup> Cf s 60 of the Criminal Justice and Public Order Act 1994 (as amended), considered in *Director of Public Prosecutions v Avery* [2002] 1 Cr App R 31.

intention of preventing identification. There is equally no requirement for the officer to believe that it is necessary to exercise the power for the purpose of preventing, detecting or investigating any offence.

- (5) It applies to any person who is using a facial covering. It does not require that the officer should have any suspicion or ground for suspicion that the person has committed or is about to commit an offence or is acting in a suspicious or otherwise objectionable manner.

186. A similar, but much more limited, power exists in the UK in the form of s 60(4A) of the *Criminal Justice and Public Order Act 1994*. Under that subsection, a police constable may require any person to remove a face covering which the constable reasonably believes is worn by that person wholly or mainly for the purpose of concealing his identity. However, such power can only be exercised where a police officer of or above the rank of inspector reasonably believes (i) that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence, or (ii) that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason, and has given an authorisation that the powers conferred by the subsection are to be exercisable at any place within that locality for a specified period not exceeding 24 hours.<sup>61</sup> In *DPP v Avery, supra*, Newman J held that the interference with the liberty of the subject sanctioned by subsection (4A) was justified for the following reasons:

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<sup>61</sup> See s 60(1) of the Criminal Justice and Public Order Act 1994.

“ (I) The powers conferred by section 60, of the 1994 Act arise only in anticipation of violence and after deliberation and a decision of a senior police officer.

(II) It is well recognised that the wearing of masks to conceal identity in the course of violent demonstrations serves two aims for an offender and could serve to defeat two legitimate objectives of the enforcement of the law:

(i) to impede arrest and to facilitate escape from the commission of an offence in the course of a demonstration;

(ii) to impede proper measures by way of control in connection with future demonstrations. The control of the movement of troublemakers and offenders as a preventative measure is a legitimate objective.

(III) The common law has not upheld an unconditional right to be informed of the reason for an interference with liberty. It is not a rote or incantation which is required but a reason, which gives rise to an opportunity to decline the request...

A request to a person to remove a mask is, for all material purposes, self explanatory.

(a) It is a request to the person to reveal his physical identity. Nothing material would be gained by the person being told by a constable that he believed the person was concealing his identity.

(b) The existence of a requirement for a subjective belief on the part of a constable is a legislative restraint upon the power being exercised oppressively or arbitrarily.”<sup>62</sup>

187. It seems to us to be clear that the limitation of the circumstances and period in which the power to require removal of a facial covering could be exercised by a police constable was an important consideration which led the court in that case to come to the conclusion that the interference with the liberty of the person was justified.

188. As earlier noted, in *SAS v France*, the European Court of Human Rights considered that the legitimate aim of prevention of danger

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<sup>62</sup> See §18 of the judgment of the Divisional Court in that case.

for the safety of persons and property and the combat of identity fraud “could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, and where particular circumstances entail a suspicion of identity fraud”.<sup>63</sup> Similarly, in *Yaker v France* (discussed in §§159-160 above), the Human Rights Committee also recognized “the need for States, in certain contexts, to be able to require that individuals show their faces, which might entail one-off obligations for individuals to reveal their faces in specific circumstances of a risk to public safety or order, or for identification purposes”.<sup>64</sup> These cases support the view that, to be proportionate, the power to require an individual to show his or her face should not be exercisable generally, but only where the circumstances pertaining to any specific case give rise to a risk of public safety or order.

189. The remarkable width of the measure under s 5 of the PFCR has already been explained in §185 above. There is practically no limit on the circumstances in which the power under that section can be exercised by a police officer, save the requirement that (i) the person is in a public place, and (ii) the facial covering used by that person is reasonably believed by the police officer to be likely to prevent identification. The power can be exercised irrespective of whether there is any public meeting or procession taking place in the vicinity, and regardless of whether there is any risk of outbreak of violence or other criminal acts, at the place where the person is found, or in the neighbourhood, or indeed anywhere else in Hong Kong. The power may, on its face, be used by a police officer for random stoppage of anyone found wearing a facial covering in any public

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<sup>63</sup> See §139 of the judgment.

<sup>64</sup> See §8.7 of the decision.

place. We consider it to be clear that the measure adopted by s 5 of the PFCR exceeds what is reasonably necessary to achieve the aim of law enforcement, investigation and prosecution of violent protesters even in the prevailing turbulent circumstances in Hong Kong, and that it fails to strike a reasonable balance between the societal benefits promoted and the inroads made into the protected rights.

190. We should mention that the applicant in HCAL 2949 also contends that s 5 of the PFCR infringes the “prescribed by law” requirement in that it authorises a police officer to interfere with fundamental rights arbitrarily. In our view, this argument is in truth part of the argument on the proportionality of s 5. It adds nothing and requires no separate treatment.

#### *(5) Conclusion*

191. For the above reasons, while there are legitimate societal objects to the pursuit of which the measure introduced by s 5 is rationally connected, s 5 represents a more serious inroad into protected rights than is reasonably necessary, and therefore fails the proportionality test.

192. We have considered whether s 3(1)(b), (c) and (d) and/or and s 5 could be saved by a process of “reading in” or “reading down” of the relevant provisions so as to make them proportionate to the interferences with the protected rights. Mr Yu has not made any relevant submission on this point. Having given this matter careful thought, we consider that any such “reading in” or “reading down” would require a substantial re-writing of the legislation in a manner which would effectively be a fresh legislative exercise involving fundamental changes to the substance of the provisions,

A and is a task which ought to be undertaken by the legislature itself rather  
B than by the court. We should also make it clear that it is not our judgment  
C that “anti-mask” law is generally objectionable or unconstitutional. Its  
D validity must, however, depend on the details of the legislation and the  
E particular societal aims sought to be pursued by the measure being brought  
F in through the legislation. Generalisation is neither possible, nor  
appropriate, in this matter.

G *K. Conclusion and Disposition*

H 193. In summary, our conclusions on each of the grounds of judicial  
I review may be briefly stated as follows:

- J (1) The ERO, insofar as it empowers the CEIC to make  
K regulations on any occasion of public danger, is incompatible  
L with the Basic Law, having regard in particular to Arts 2, 8,  
M 17(2), 18, 48, 56, 62(5), 66 and 73(1) thereof. We leave open  
the question of the constitutionality of the ERO insofar as it  
relates to any occasion of emergency.
- N (2) The ERO was not impliedly repealed by s 5 of the HKBORO.  
O Insofar as it is invoked in situations not falling within the kind  
P of public emergency referred to in the HKBORO, the Bill of  
Rights is not suspended and the measures adopted will have to  
Q comply with it.
- R (3) The ERO does not in itself fall foul of the “prescribed by law”  
S requirement (ie the principle of legal certainty). Where  
T regulations and measures are adopted under the ERO that  
curtail fundamental rights, the entire relevant body of law  
U including the regulations and measures have to be taken  
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together to see whether they meet the requirement of sufficient accessibility and certainty.

(4) It is not necessary to deal with the argument based on the principle of legality.

(5) The provisions in s 3(1)(a), (b), (c) and (d) of the PFCR are rationally connected to legitimate societal aims that the respondents intend by those measures to pursue but the restrictions that sub-paragraphs (b), (c) and (d) impose on fundamental rights go further than is reasonably necessary for the furtherance of those objects.

(6) The measure introduced by s 5 of the PFCR is rationally connected to the legitimate societal aims pursued but the restrictions it imposes on fundamental rights also go further than is reasonably necessary for the furtherance of those objects.

194. We have not heard submissions on the question of relief and the respondents have asked for an opportunity to address the court should that question arise. In the light of our conclusions above, we shall convene a hearing on the appropriate relief and costs.

195. As to the procedural applications, the applicants in both proceedings have applied to amend their Form 86. The amendments are not opposed. We give leave for the proposed amendments to be made. We also grant leave for the applicants in HCAL 2945 to file the 2<sup>nd</sup> affidavit of Kwok Wing Hang dated 23 October 2019, for the applicant in HCAL 2949 to file the 2<sup>nd</sup> affirmation of Leung Kwok Hung dated

29 October 2019, and for the respondents to file the affidavit of Dr Tsui Pui Wang Ephraem dated 23 October 2019.

(Godfrey Lam) (Anderson Chow)  
Judge of the Court of First Instance Judge of the Court of First Instance

Ms Gladys Li SC, Mr Johannes Chan SC (Hon), Mr Earl Deng, Mr Jeffrey Tam, Mr Geoffrey Yeung and Ms Allison Wong, instructed by Ho Tse Wai & Partners, for the 1<sup>st</sup> to 24<sup>th</sup> Applicants in HCAL 2945/2019

Mr Hectar Pun SC, Mr Lee Siu Him and Mr Anson Wong Yu Yat, instructed by JCC Cheung & Co, assigned by the Director of Legal Aid Department, for the Applicant in HCAL 2949/2019

Mr Benjamin Yu SC, Mr Jenkin Suen SC, Mr Jimmy Ma and Mr Mike Lui, instructed by the Department of Justice, for the Putative Respondents in both HCAL 2945/2019 and HCAL 2949/2019