**FACC No. 2 of 2017**

**IN THE COURT OF FINAL APPEAL OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

**FINAL APPEAL NO. 2 OF 2017 (CRIMINAL)**

(ON APPEAL FROM HCMA NO. 666 OF 2015)

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BETWEEN

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| **HKSAR** | **Respondent** |
| **and** |  |
| **FONG KWOK SHAN CHRISTINE（方國珊）(D1)** | **Appellant** |

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| Before: | Chief Justice Ma, Mr Justice Ribeiro PJ,  Mr Justice Fok PJ, Mr Justice Chan NPJ and  Lord Neuberger of Abbotsbury NPJ |
| Date of Hearing: | 4 September 2017 |
| Date of Judgment: | 4 October 2017 |

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**JUDGMENT**

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**Chief Justice Ma:**

1. I agree with the judgment of Mr Justice Ribeiro PJ.

**Mr Justice Ribeiro PJ:**

1. In this appeal, which arises out of demonstrations mounted in a public gallery during sittings of a subcommittee of the Legislative Council (“LegCo”), the validity of two Administrative Instructions regulating admittance to and conduct within LegCo’s precincts is challenged on the basis that they infringe the right to freedom of expression.

A. The relevant events

1. The facts are not in dispute. The appellant was a member of the Sai Kung District Council. Together with two of her assistants[[1]](#footnote-1) and several others, she attended meetings of LegCo’s Public Works Subcommittee held on 7 and 13 May 2014 respectively when a project for extending the South-East New Territories landfill was discussed. It was a project which she and fellow residents strongly opposed.
2. On each occasion, she was admitted to the public gallery above Conference Room 1 in the LegCo complex where the meeting was being held. At the first meeting, she removed her jacket so that the characters 保衛將軍澳 (“Defend Tseung Kwan O”) were displayed on the T-shirt that she was wearing. She also handed to Cheung Mei-hung, one of her assistants, a paper poster depicting a Nazi Swastika with the characters 毒氣集中營 – 堆填區 (“Poison Gas Concentration Camp – Landfill”) which he displayed by holding it against the glass panel which walled off the public gallery above the conference room. This led to a commotion as security guards sought to seize the sign, leading to one guard sustaining bruising on her left wrist. The incident caused the Subcommittee’s meeting to be prematurely adjourned.
3. At the second meeting, the appellant and several others in the public gallery chanted slogans opposing the project, causing the Subcommittee’s chairman to warn them that they would be ejected if they did not stop. As the warnings were ignored and as the appellant and others linked arms to resist ejectment, the meeting was stood down and reconvened in a different conference room about an hour later with the public excluded from attendance.[[2]](#footnote-2)

B. The charges and the decisions below

1. Section 8 of the Legislative Council (Powers and Privileges) Ordinance (“LCPPO”)[[3]](#footnote-3) regulates the admittance of persons to the LegCo complex. Section 8(3) provides that the President may:

“... for the purpose of maintaining the security of the precincts of the Chamber, ensuring the proper behaviour and decorum of persons therein and for other administrative purposes, issue such administrative instructions as he may deem necessary or expedient for regulating the admittance of persons (other than members or officers of the Council) to, and the conduct of such persons within, the Chamber and the precincts of the Chamber.”

1. By LCPPO section 20(b), contravention of such an administrative instruction or any direction given thereunder is made an offence punishable by a fine of $2,000 and imprisonment for 3 months.
2. Pursuant to section 8(3), the President issued the Administrative Instructions for Regulating Admittance and Conduct of Person[[4]](#footnote-4) (“Administrative Instructions”) which include the following provisions which are under challenge:

“Section 11: Requirement for orderly behaviour (‘AI section 11’)

Persons entering or within the precincts of the Chamber shall behave in an orderly manner and comply with any direction given by any officer of the Council for the purpose of keeping order.

Section 12: Conduct in galleries (‘AI section 12’)

(1) No person shall, in a press or public gallery, display any sign, message or banner.

(2) No person shall, in a press or public gallery, display any sign or message on any item of clothing.

(3) An officer of the Council may refuse admission to a press or public gallery to any person displaying any sign, message or banner, or to any person displaying any sign or message on any item of clothing, or to any person who, in the opinion of an officer of the Council, may so display any sign, message or banner, may so display any sign or message on any item of clothing or may otherwise behave in a disorderly manner. ...”

1. The appellant was charged jointly with Cheung Mei-hung with contravening AI section 12(1) at the 7 May 2014 meeting of the Subcommittee “in that they displayed sign and message in the public gallery”. They were also charged with contravening AI section 11 at the 13 May 2014 meeting “in that they failed to behave in an orderly manner within the precincts of the Chamber of the Legislative Council”.
2. The appellant was convicted after trial by the Magistrate[[5]](#footnote-5) and fined $1,000 on each charge. Her appeal was dismissed by Wong J[[6]](#footnote-6) who certified the following questions, reflecting the appellant’s constitutional challenge, as raising points of law of great and general importance, namely:

(1) Whether the enactment of section 11 of the Administrative Instructions for Regulating Admittance and Conduct of Persons pursuant to section 20(b) of the Legislative Council (Powers and Privileges) Ordinance (Cap 382) is inconsistent with the principle of freedom of speech guaranteed by article 27 of the Basic Law and article 16 of the Bill of Rights, which rendered section 11 unconstitutional?

(2) The same question ... in respect of section 12(1) of the Administrative Instructions for Regulating Admittance and Conduct of Persons.

1. Leave to appeal was granted by the Appeal Committee on the basis of the questions so certified.[[7]](#footnote-7)

C. The constitutional provisions

1. Article 27 of the Basic Law (“BL 27”),[[8]](#footnote-8) on which the certified questions are based, states:

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.

1. By BL 39, the Basic Law relevantly provides:
2. The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
3. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”
4. As is well-established,[[9]](#footnote-9) the Hong Kong Bill of Rights Ordinance (“HKBORO”)[[10]](#footnote-10) which enacts the Hong Kong Bill of Rights, implements the International Covenant on Civil and Political Rights (“ICCPR”) so that the Bill of Rights is given constitutional status by BL 39. Article 16 of the Bill of Rights (“BOR 16”) provides:

(1) Everyone shall have the right to hold opinions without interference.

(2) 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.

(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-

(a) for respect of the rights or reputations of others; or

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

1. This Court has held[[11]](#footnote-11) that there is no difference between the right of peaceful assembly guaranteed by BL 27 and that provided for in BOR 17.[[12]](#footnote-12) The same applies to freedom of speech under BL 27 and freedom of expression under BOR 16. The Court has also noted[[13]](#footnote-13) that the rights to freedom of expression, of public assembly and of procession and demonstration are closely related, making the case-law on these associated freedoms collectively relevant.
2. Accordingly, by the combined effect of BL 39 and BOR 16, if any purported restriction on the right of free expression is to be valid, it must have sufficient legal certainty to qualify as a restriction “prescribed by law”[[14]](#footnote-14) and must be “necessary for respect of the rights or reputations of others; or for the protection of national security or of public order (*ordre public*), or of public health or morals.” It is established that the requirement of necessity involves the application of a proportionality test[[15]](#footnote-15) and that the objectives listed in BOR 16 are exhaustive of purposes qualifying as legitimate aims to justify a purported restriction of the guaranteed right.[[16]](#footnote-16)

D. The issues in this appeal

1. The issues raised by Mr Hectar Pun SC[[17]](#footnote-17) fall within a relatively narrow compass.
2. On the charge relating to the first incident, he submits that “*the total and blanket prohibition* imposed by section 12(1) of the Administrative Instructions on the display of any ‘sign, message or banner’ in a press or public gallery in the LegCo fails to satisfy the third stage of the proportionality test.” He argues that the only legitimate purpose said to be pursued by AI section 12 is the protection of public order within the LegCo building and that “by ... rendering *all* forms of display of any ‘sign, message or banner’ a criminal offence *regardless of* its purpose, nature, manner and its impact (if any) on the public order in the LegCo”, the section is unjustifiably wide.[[18]](#footnote-18) He invites the Court to hold that AI section 12 is inconsistent with BL 27 and BOR 16 and thus unconstitutional. I shall call this the “blanket prohibition” argument.
3. As to the charge relating to the second incident, the appellant’s argument is that AI section 11 is invalid as a restriction on the guaranteed right because it is legally uncertain and does not constitute a restriction “prescribed by law”. Mr Pun SC submits that the section’s requirement for one to “ ‘behave in an orderly manner’ ... leaves a person entering or within the precincts of the Chamber of the LegCo *unclear precisely what he must avoid doing* in order to avoid committing a criminal offence under section 20(b) of the LCPPO”.[[19]](#footnote-19) I shall call this the “prescribed by law” argument. Mr Pun SC contends that the Judge wrongly treated the relevant offence as having as one of its elements, a failure to comply with a direction given by an officer of the Council – an erroneous approach based on a misconstruction of AI section 11 and postulating an offence with which the appellant was never charged.
4. In response, Ms Anna Lai SC[[20]](#footnote-20) begins by raising an important basic issue. She submits that members of the public, including the appellant, “do not have a right to exercise their freedom of expression in the public gallery” of LegCo so that “the constitutional challenges fail *in limine*.”[[21]](#footnote-21) This involves the proposition, by analogy (so it is argued) with decisions relating to demonstrations sought to be mounted on private property, that there is “no freedom of forum” and that the right to freedom of expression does not apply if sought to be exercised on government premises to which the general public has not been given free access.[[22]](#footnote-22) The contention is that on such properties, the guaranteed right simply does not arise so that there is no room for examining the aim, rationality or proportionality of the restriction. I shall call this the “rights not applicable” argument.
5. In the alternative, Ms Lai SC submits that if the right is engaged, the restrictions imposed by AI sections 11 and 12 are sufficiently certain and satisfy the test of proportionality, so that they are constitutionally valid. This responds to Mr Pun SC’s blanket prohibition argument and also to his prescribed by law argument.
6. Another issue raised by Ms Lai SC (although said to be “by no means determinative of the issue”[[23]](#footnote-23)) involves the submission that regulation of the admittance and conduct of persons within the precincts of LegCo is an internal matter for the legislature so that, applying self-restraint in accordance with the non-intervention principle, the Court should refrain from interfering. I shall call this the “non-intervention” argument.

E. The “rights not applicable” argument

E.1 The nature and basis of the argument

1. Since it involves the submission that the constitutional challenge fails *in limine*, I shall deal first with the “rights not applicable” argument.
2. Ms Lai SC submits that the right of free expression is not engaged in the present case because members of the public are not given free access to the LegCo complex and because those that are allowed in only enter subject to restrictions on their conduct. Since LegCo, in common with the Government in relation to government-owned properties, is entitled to exercise its property rights so as to deny or restrict access to the LegCo complex, no one (so it is argued) can assert a right to be admitted and if admitted, no one can object to restrictions being placed on their conduct by invoking the right to freedom of expression.
3. This argument was accepted by Wong J who held:

“Members of the public do not have the right to demonstrate in the Legislative Council Building, especially when meetings are in session. Having regard to the principle discussed in paragraphs 23 and 24 of this judgment,[[24]](#footnote-24) I take the view that the rights the appellants mentioned have not been infringed. Neither the Basic Law nor the Bill of Rights gives members of the public the freedom to exercise such rights inside the Legislative Council Chamber, especially when they in fact do not have the absolute right to enter the Chamber.”[[25]](#footnote-25)

1. A similar argument was made in the Canadian Supreme Court in *Committee for the Commonwealth of Canada v Canada*,[[26]](#footnote-26) a case in which the respondents had been distributing leaflets and engaging passers-by in discussion of the respondents’ political aims in the state-owned passenger terminal of Montreal’s Dorval Airport. The question was whether the respondents were entitled to rely on the right of free expression guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms[[27]](#footnote-27) so as to require the government to justify restricting their canvassing activities in accordance with section 1 of the Charter.[[28]](#footnote-28)
2. One line of argument which is echoed by Wong J’s judgment and the respondent’s submissions, is what L'Heureux-Dubé J called the “hard line” taken by the Canadian Government in that case, “submitting that as owner of property, the government has the right to exclude whomever it wants, and to impose conditions on invitees to its property without limitation by the Charter”.[[29]](#footnote-29) As McLachlin J explained, the Government’s position was that:

“...there is no constitutional right to use any of its property for purposes of public expression. Only with its permission and where it considers it appropriate should individuals and groups be permitted to speak and demonstrate. The government submits that as the owner of all such property, it has the absolute right to exclude the use of the property for public expression if it chooses. It relies on the fact that the owners of property are generally entitled to control who enters on it and how it is used, a right which extends to the right to control expression on their property. The Crown, it contends, should be placed in no worse position than a private property owner.”[[30]](#footnote-30)

1. In my view, for the following reasons, the “rights not applicable” argument cannot be accepted.

E.2 Fundamental rights not trumped by property rights

1. The argument takes as its premise the existence of an entitlement on the part of the Government (or LegCo in this case) as property owner to exclude the public. It reasons from that premise to the conclusion that the guaranteed right of freedom of expression is excluded. It therefore subjugates a fundamental constitutional right to property interests, leaving the applicability or otherwise of that right to the unfettered choice of a Government agency regarding the grant of access.
2. Such an argument is, in my view, wrong in principle. As BL 8 makes clear,[[31]](#footnote-31) an existing statutory or common law rule which comes into conflict with a constitutional requirement must give way. The “rights not applicable” argument inverts this principle.
3. For similar reasons, the Canadian Government’s “hard line” argument in the Montreal Airport case did not find favour with any of the judges. As Lamer CJ put it: “... the government’s right of ownership cannot of itself authorize an infringement of the freedom guaranteed by section 2(b) of the Charter.”[[32]](#footnote-32) And as McLachlin J stated:

“To accept the Crown's argument would be to restrict the freedom guaranteed by the Charter to limits much narrower than those with which it has traditionally been associated. Little would remain of the right. ... the state's property interest in a forum does not give it the absolute right to control expression on that forum.”[[33]](#footnote-33)

E.3 Other attempts at a priori exclusion of guaranteed rights

1. Examples can be found, including in *Committee for the Commonwealth of Canada v Canada*,[[34]](#footnote-34) where judges have endeavoured to develop an intermediate doctrine for screening out the application of the right to free expression on some, but not all, state-owned properties by virtue of the state’s right as property owner to deny access. It is not, with respect, an attractive line to follow since it shares the flaws afflicting the “hard line” argument in respect of excluded properties and because major difficulties arise in trying to draw a definitional line between the two categories of properties.
2. Thus, Lamer CJ proposed a rule based on compatibility of the exercise of free expression with the function of the state-owned property in question:

“In my opinion, the ‘freedom’ which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place. ... Accordingly, it is only after the complainant has proved that his form of expression is compatible with the function of the place that the justifications which may be put forward under s 1 of the Charter can be analysed.”[[35]](#footnote-35)

1. However, as McLachlin J pointed out, the appropriateness of this test may be questioned because of difficulties with the uncertain and relative concepts of “function” and “incompatibility”:[[36]](#footnote-36)

“... the concept of function presents difficulties. Does it mean normal function? Minimal or essential function? Optimum function? At what point does expression become incompatible with function? Presumably, only if the impairment of function were severe would s 2(b) be held inapplicable, with limitations relating to optimal (as opposed to minimal) function falling to be justified under s 1. Yet drawing this line may prove difficult in practice.”

1. The test which her Honour proposed for “defining what types of government property should *prima facie* be regarded as constitutionally available for forums for public expression”[[37]](#footnote-37) was to require the claimant to:

“... establish that the expression in question (including its time, place and manner) promote one of the purposes underlying the guarantee of free expression. These were defined in *Irwin Toy*[[38]](#footnote-38) (at p 976) as: (1) the seeking and obtaining of truth; (2) participation in social and political decision-making; and (3) the encouragement of diversity in forms of individual self-fulfilment and human flourishing by cultivating a tolerant, welcoming environment for the conveyance and reception of ideas. Only if the claimant can establish a link between the use of the forum in question for public expression and at least one of these purposes is the claimant entitled to the protection of s 2(b) of the Charter.”[[39]](#footnote-39)

1. With respect, I do not think that is a test that could or should be adopted in Hong Kong. BL 27 and BOR 16 guarantee the right to freedom of expression subject only to the specified permitted restrictions. It would not be appropriate for our courts to place hurdles in the way of a person claiming those rights where such rights are factually engaged, by requiring such person to show that the content, manner and form of the proposed expression promote the matters identified as the underlying purposes of free expression. As indicated in the discussion which follows, rather than imposing a burden on the claimant to prove that the proposed expression qualifies for constitutional protection, the burden is rightfully placed on the government to prove that its limitation of the guaranteed right is justified.
2. It also seems to me that an official trying to decide whether access to a venue should be granted or denied will find it hard to know beforehand whether the intended demonstration will meet the somewhat amorphous criteria articulated. Moreover, the criteria themselves appear debatable. It is well-established that, subject to permissible limitations, freedom of expression extends to views which may be “disagreeable, unpopular, distasteful or even offensive to others”.[[40]](#footnote-40) It is unclear whether the suggested criteria accommodate the expression of such views.
3. What the two approaches just discussed have in common is a search for some *a priori* basis for dis-applying fundamental rights on state-owned properties, without ever proceeding to examine whether exclusion of the right is justified in terms of the legitimacy and proportionality of such restriction. I think that a more orthodox approach is preferable.

E.4 Focussing on fundamental rights

1. In my view, the correct starting-point and the proper focus throughout is on the guaranteed right, adopting the assumption that it is universally applicable, subject to any constitutionally valid restriction. Thus, where the right to freedom of expression is invoked, one asks whether factually, that right is engaged. If so, the question becomes whether any restriction which purports to limit its exercise is valid, that is, whether it pursues a legitimate aim which falls within one of the permitted categories listed in BOR 16; and if so, whether it is rationally connected with accomplishing that aim; whether the restriction is no more than reasonably necessary for accomplishing that purpose; and whether a reasonable balance has been struck between the societal benefits of the encroaching measure on the one hand and the inroads made into the guaranteed right on the other.[[41]](#footnote-41)
2. A person exercising the right to free expression or the related freedoms of peaceful assembly, demonstration and procession has choices. As BOR 16 recognizes, communication may be made “orally, in writing or in print, in the form of art, or through any other media of his choice”. If the expression is communicated using the postal service or by transmissions in the traditional media or by internet postings, no physical activity on the ground may be involved. But where the choice is to exercise the right through seeking, receiving or imparting information or ideas in some physical location, the exercise will have various physical and temporal dimensions. Choices will be made (amongst other matters) as to when, where, by whom, in what form and for what duration the exercise of the freedom will take place.
3. That the right inherently involves various dimensions in its exercise was recognized in a series of English cases involving demonstrations which took the form of tented encampments on prominent or symbolically important sites. One such case[[42]](#footnote-42) involved the Aldermaston Women’s Peace Camp which had been going for some 23 years as a protest against nuclear weapons, with the women assembling on one weekend of each month on government land close to a weapons establishment. Laws LJ held that in some cases, including the case at hand:

“... this ‘manner and form’ may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protesters’ message; it may be the very witness of their beliefs. ... To them, and (it may fairly be assumed) to many who support them, and indeed to others who disapprove and oppose them, the ‘manner and form’ *is* the protest itself.”[[43]](#footnote-43)

1. Another such case is *Mayor of London v Hall*,[[44]](#footnote-44) which involved a demonstration by protesters who had, for over two months, set up a camp in Parliament Square Gardens bounded by the Palace of Westminster, Westminster Abbey and the United Kingdom Supreme Court. Lord Neuberger of Abbotsbury MR noted the importance of recognizing that the manner and location of the protest was part and parcel of the exercise of free expression:

“The right to express views publicly, particularly on the important issues about which the defendants feel so strongly, and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends to the manner in which the defendants wish to express their views and to the location where they wish to express and exchange their views. If it were otherwise, these fundamental human rights would be at risk of emasculation. Accordingly, the defendants' desire to express their views in Parliament Square, the open space opposite the main entrance to the Houses of Parliament, and to do so in the form of the Democracy Village, on the basis of relatively long-term occupation with tents and placards, are all, in my opinion, within the scope of articles 10 and 11.”[[45]](#footnote-45)

1. His Lordship favoured the approach which is espoused in this judgment, namely, treating the rights as generally available and then subjecting the validity of particular restrictions to scrutiny. As Lord Neuberger MR put it:

“... when freedom of assembly, and, even more, when freedom of expression, are in play, then, save possibly in very unusual and clear circumstances, article 11, and article 10, should be capable of being invoked to enable the merits of the particular case to be considered.”[[46]](#footnote-46)

1. In my view, a coherent analysis of the issues arising where access to property is denied to would-be protesters is facilitated by recognizing that the right of free expression encompasses as one of its dimensions, the location of its exercise. If access to that place is denied, such denial is properly viewed as a restriction imposed on the exercise of the right so that the legitimacy, rationality and proportionality of that restriction fall to be considered. This involves applying established constitutional principles for determining when fundamental rights may validly be limited, without being diverted towards a doctrine involving an *a priori* or presumptiveexclusion of such rights on the basis of a property owner’s interests in the proposed venue.
2. Arule presumptively excluding free expression at certain types of venues is too blunt an instrument. A proportionality analysis, on the other hand, enables the court to take into account the dimensions of any particular exercise of such rights and the exigencies of the intended venue.
3. A restriction may, for instance, be disproportionate in relation to a silent, orderly demonstration mounted by a limited number of protesters displaying placards for a few hours without unduly inconveniencing other members of the public. But the same restriction may be entirely justified in respect of a demonstration conducted in a manner or taking a form which is much more intrusive, affecting the rights of others or posing risks to public order, *ordre public*, or public health and morals, especially where more acceptable alternatives are open to the protesters. It was by application of a proportionality analysis, weighing up the manner, form and impact of each of the demonstrations at the sites concerned, that the English courts distinguished between the Aldermaston camp[[47]](#footnote-47) (which was held entitled to continue) on the one hand and the much more invasive camps in Parliament Square[[48]](#footnote-48) and around St Paul’s Cathedral[[49]](#footnote-49) (which were held to have been justifiably curtailed) on the other.
4. As Lord Neuberger MR stated in *The Mayor Commonalty and Citizens of London v Samede*,[[50]](#footnote-50) the case involving the camp around St Paul’s Cathedral:

“[Establishing the limits of the right of peaceful assembly and protest on the highway] is inevitably fact-sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.”

E.5 “Obvious cases” for restricting rights

1. There are many locations in which, as a matter of common sense, one would think it obvious that demonstrations and similar exercises of free expression should be excluded. One might therefore be tempted to conclude that there ought to be some principle excluding *in limine* engagement of the right in such places.
2. Such views can be found in *Committee for the Commonwealth of Canada v Canada*,[[51]](#footnote-51) where, for instance, L'Heureux-Dubé J stated:

“… the Charter’s framers did not intend internal government offices, air traffic control towers, prison cells and Judges’ Chambers to be made available for leafletting or demonstrations.”[[52]](#footnote-52)

1. Similarly, McLachlin J was of the view that:

“It would be difficult to contend that [the purposes she had identified as underlying the guarantee of free expression referred to above] are served by ‘public’ expression in the sanctum of the Prime Minister's office, an airport control tower, a prison cell or a judge's private chambers, to return to examples where it seems self-evident that the guarantee of free expression has no place.”[[53]](#footnote-53)

1. The examples given are all compelling and one can readily accept that in the vast majority of such cases, one would rapidly conclude that outsiders cannot validly assert a constitutional right to speak or demonstrate in such locations. However, the proper conclusion to draw in those cases is that the right to freedom of expression may validly be restricted and not that the Court should accept a presumptiverule excluding engagement of the right *in limine*,carrying with it the objections of principle and problems of definition that have been discussed above. A proportionality approach enables individualised and nuanced assessments and caters for the possibility that in exceptional circumstances such rights might be engaged even in such ostensibly improbable places.
2. Prisons are a good example. One might be inclined to think it obvious that for security reasons, demonstrations (say, against prison conditions) cannot be allowed to be mounted by outsiders within the precincts of a prison. However, other forms of exercising the right to free expression and other fundamental rights may have an important role to play. While prisoners necessarily forfeit their right to personal liberty as a consequence of their lawfully-imposed incarceration, the European Court of Human Rights (“ECtHR”) has held that generally, they otherwise continue to enjoy all the fundamental rights and freedoms subject to restrictions justified on principles of proportionality.[[54]](#footnote-54) Absolute and non-derogable rights against torture and cruel, inhuman or degrading treatment or punishment which do not raise proportionality issues clearly remain applicable.[[55]](#footnote-55) The Court of First Instance has held that the right to vote under BL 26 continues to apply and that a blanket exclusion of that right, regardless of the nature and gravity of the offence, the length and type of sentence, etc, is invalid as a disproportionate restriction of that right.[[56]](#footnote-56) Similarly, the right to confidential legal advice under BL 35 may also be expected to persist, subject to proportionate limitations, within prison precincts.[[57]](#footnote-57)
3. This approach is in principle applicable to the right of free expression. To take a hypothetical example, if the system of visits by Justices of the Peace,[[58]](#footnote-58) traditionally designed to inspect prison conditions and to allow prisoners to air their grievances, were to be abolished and the JPs denied access, a challenge might well be made on the basis that such denial infringes the prisoners’ and the visiting JPs’ rights to freedom of expression so that the validity of the restriction would have to be assessed on the basis of proportionality.
4. Within the framework of restrictions permitted under BOR 16, the principle of proportionality presents a coherent basis for judging whether and to what extent guaranteed rights may be excluded or limited in prisons or similarly restrictive locations. In the vast majority of “obvious cases”, exclusions or limitations of rights, especially rights sought to be exercised in forms incompatible with the maintenance of public order or *ordre public*,will be upheld as necessary and proportionate. But the proportionality principle permits flexibility to be retained. A presumptiveexclusionary rule is ill‑suited to the task.

E.6 Private property

1. The discussion so far has concerned the exercise of free expression on government-owned property. Is the position different regarding private property? As this did not receive full argument, my remarks must be taken to be tentative and subject to possible adjustment in a future case. But some discussion is merited here because the respondent seeks to derive support for the “rights not applicable” argument from what is said to be the analogous position regarding private property rights. It is therefore relevant to consider whether any such analogy exists.
2. It has been suggested that a bright line can be drawn to exclude any right to exercise one’s freedom of expression on someone else’s private property. This is sometimes put in terms of there being “no freedom of forum” or of the Government having no positive duty to secure access to private property for use as a forum for expression. This represents another *a priori* argument in which the fact of private ownership presumptively precludes engagement of the right and application of the proportionality test.
3. Thus, for example, in *Committee for the Commonwealth of Canada v Canada*,[[59]](#footnote-59) McLachlin J stated:

“Freedom of expression does not automatically comport freedom of forum. For example, it has not historically conferred a right to use another's private property as a forum for expression. A proprietor has had the right to determine who uses his or her property and for what purpose. Moreover, the Charter does not extend to private actions. It is therefore clear that s 2(b) confers no right to use private property as a forum for expression.”

1. In my view, where the guaranteed right is engaged, the orthodox approach of ascertaining whether any restriction of access is proportionate and valid remains applicable but with the qualification that elements of particular significance regarding private property must be given special weight in the proportionality analysis.
2. Such considerations flow from the existence of constitutional protections relating to private property and the right to privacy. Thus, BL 6 requires the Government to protect the right of private ownership in accordance with law; and BL105 mandates such protection for the rights of individuals and legal persons to the acquisition and use, etc, of property. Particular protection is conferred on the “homes and other premises of Hong Kong residents”, BL 29 stating that they “shall be inviolable” and prohibiting arbitrary or unlawful intrusion. Similarly, BOR 14 prohibits “arbitrary or unlawful interference with [a person’s] privacy, family, home or correspondence”.
3. Consequently, where a limitation on the right to freedom of expression involves denial of access to private property, justification of the restriction as a measure necessary for the protection of the rights of others has to be given very substantial weight in the proportionality balance.
4. Such weight is further enhanced where the property involves a resident’s home or other premises, since such “rights of others” comprehend both property rights and the right to privacy and inviolability of the home. This was noted by the New Zealand Supreme Court in *Brooker v Police*,[[60]](#footnote-60) in relation to section 14 of the New Zealand Bill of Rights Act 1990,[[61]](#footnote-61) where Blanchard J stated:

“The exercise of the s 14 right in the form of a protest is not confined to non-residential streets. However, what has to be borne by residents in an exclusively or predominantly residential area will be less than in areas where there is little or no residential character. This is because the common law has long recognised that men and women are entitled to feel secure in their homes, to enjoy residential tranquillity - an element of the right to privacy. They are justifiably entitled not to be subjected there to undue disturbance, anxiety or coercion.”

1. While “never say never” is “a wise judicial precept”,[[62]](#footnote-62) applying the orthodox test, it is exceedingly difficult to envisage a case where refusal of access to other persons’ private homes (or their curtilages or common areas) to be used as a forum for free expression would be ruled a disproportionate limitation on the right.
2. In *HKSAR v Au Kwok Kuen*,[[63]](#footnote-63) Andrew Cheung J[[64]](#footnote-64) had to consider “... the limits of the right of assembly and of the right to freedom of expression when they are sought to be exercised in private residential property without the permission of its owners or occupiers.”[[65]](#footnote-65) It involved 26 persons associated with a housing concern group forcing their way through a police cordon to enter and mount a demonstration in the common areas of a private residential development with the intention of delivering a petition to a person who resided in one of the flats. His Lordship noted that under our constitution, restrictions necessary for the protection of the rights of others are permitted[[66]](#footnote-66) and that where one is concerned with a private residential development, it protects home and privacy rights.[[67]](#footnote-67) He considered alternative possible locations for the demonstration and noted that ample opportunities exist to exercise the relevant rights in public places[[68]](#footnote-68) and concluded that:

“... the right of peaceful assembly and the right to freedom of expression stop, so far as physical or geographical limits are concerned, at the boundary of private residential property belonging to others, in the absence of any permission to enter.”[[69]](#footnote-69)

1. While the passage just cited might be read as espousing a private property-based presumptive exclusion of the right to freedom of expression, the better view seems to me to be that the judgment as a whole proceeds on the orthodox basis that the denial of access, involving as it did a private residential development, was legitimate and valid, applying proportionality principles.
2. The position may, however, be a little less obvious when it comes to privately owned commercial properties such as shopping malls and similar premises, to which the public are freely admitted in furtherance of the owners’ business interests. While it will no doubt still be rare for a refusal of access amounting to a restriction on the right to freedom of expression to be held to be constitutionally invalid, such an outcome could be reached in an exceptional case.
3. This was acknowledged by the ECtHR in *Appleby v United Kingdom*,[[70]](#footnote-70) where the applicants were prohibited from setting up stands at the entrance to a privately-owned shopping mall in the town centre when campaigning against the local authority’s decision to allow a playing field in the vicinity to be built upon, the complaint being that this would deprive their children of green areas for play.
4. The Court stated:

“... notwithstanding the acknowledged importance of freedom of expression, [Article 10 of the ECHR] does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example.”[[71]](#footnote-71)

1. The Court indicated that the outcome in any case depends on the principle of proportionality and a balancing exercise:

“In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.”[[72]](#footnote-72)

1. It follows from the foregoing discussion that there is only a limited and imperfect analogy between the approaches to freedom of expression as exercised in public versus private properties. In each case, assuming that the right is engaged, its limitation embodied by denial of access to the site is assessed on proportionality principles. But, where private property is concerned, special elements involving the constitutional protections of private property and privacy in the home enter the equation, weighing heavily in favour of validating restricted access although this may be subject to rare possible exceptions.

E.7 Conclusion as to the “rights not applicable” argument

1. As indicated in the foregoing discussion, there are, in my opinion, two main reasons for rejecting the “rights not applicable” argument. First, whether in its “hard line” version of excluding the right to freedom of expression on all government-owned properties or in its intermediate form of excluding the right only on some of them, it impermissibly seeks to subjugate fundamental rights to property interests, inverting the usual principle. Secondly, it fails to recognize that the proposed location of a demonstration or other form of expression is an intrinsic dimension of the right so that exclusion from that location is properly analysed as a restriction of the right which requires to be justified on orthodox proportionality principles. In short, the proper approach is to focus on the right instead of on property interests, and to examine the validity of any restrictions imposed on its exercise by applying the principle of proportionality within the framework of the permitted restrictions listed in BOR 16.

F. The “non-intervention” argument

1. Logically, the next argument to deal with is the respondent’s “non-intervention” argument which involves the suggestion that the Court should not interfere with LegCo’s decision to regulate conduct as set out in AI sections 11 and 12 because they represent aspects of the internal management of LegCo’s affairs. This can be dealt with briefly and must be rejected for two reasons.
2. The non-intervention principle was explained by this Court in *Leung Kwok Hung v President of the Legislative Council (No 1)*,[[73]](#footnote-73) as:

“... the principle that the courts will recognise the exclusive authority of the legislature in managing its own internal processes in the conduct of its business, in particular its legislative processes. The corollary is the proposition that the courts will not intervene to rule on the regularity or irregularity of the internal processes of the legislature but will leave it to determine exclusively for itself matters of this kind ...”

1. Thus, the first answer to the respondent’s argument is that regulation of the admittance and conduct of strangers who wish to enter the precincts of the Chamber falls outside the category of managing LegCo’s internal processes so that the principle simply does not apply.
2. Secondly, as this Court held in the abovementioned case:

“...it is important to recognise that the principle of non-intervention is necessarily subject to constitutional requirements. The provisions of a written constitution may make the validity of a law depend upon any fact, event or circumstance they identify, and if one so identified is a proceeding in, or compliance with, a procedure in the legislature the courts must take it under its cognizance in order to determine whether the supposed law is a valid law.”[[74]](#footnote-74)

1. Accordingly, even if such regulation *did* fall within the internal management category, the non-intervention principle would have to give way since the Court is duty-bound to examine the validity of AI sections 11 and 12 in so far as they impose restrictions on the exercise of a constitutional right, all the more so when a criminal offence is involved.

G. The “prescribed by law” argument

1. As we have seen,[[75]](#footnote-75) BL 39 and BOR 16 require any purported limitation of the right of free expression to have sufficient legal certainty to qualify as a valid restriction “prescribed by law”.[[76]](#footnote-76) In *Mo Yuk Ping v HKSAR*,[[77]](#footnote-77) this principle was summarised as follows:

“A criminal offence must be so clearly defined in law that it is accessible and formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, whether his course of conduct is lawful or unlawful. It is, however, accepted that absolute certainty is unattainable and would entail excessive rigidity. Hence it is recognised that a prescription by law inevitably may involve some degree of vagueness in the prescription which may require clarification by the courts.”

1. The appellant’s “prescribed by law” argument involves a challenge to the validity of AI section 11.[[78]](#footnote-78) Mr Pun SC submits that penalising a person for failing to “behave in an orderly manner” leaves him, because of the vagueness of those words, “unclear precisely what he must avoid doing” and so constitutes an invalid restriction on the guaranteed right.

G.1 The proper construction of AI section 11

1. I cannot accept that argument. To ascertain whether a provision is legally uncertain, it is necessary for it to be construed. And as the Court in *HKSAR v Lam Kwong Wai[[79]](#footnote-79)* emphasised:

“The modern approach to statutory interpretation insists that context and purpose be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity may be thought to arise.”

1. Mr Pun SC has not construed AI section 11. Instead, his argument merely focusses on the phrase “behave in an orderly manner” taken in isolation. When the section is properly construed in the light of its context and purpose, it is impossible to say that it lacks legal certainty or that it leaves a person “unclear precisely what he must avoid doing”.
2. In the first place, AI section 11 does not simply penalise a failure to “behave in an orderly manner” without more. The orderly behaviour is demanded only of persons who enter or are within precincts of the LegCo complex. The section also requires compliance with any directions given by an officer of the Council “for the purpose of keeping order”. The section is therefore self-evidently concerned with keeping order in those precincts.
3. As was pointed out in *HKSAR v Chow Nok Hang*,[[80]](#footnote-80) citing Gleeson CJ in *Coleman v Power,*[[81]](#footnote-81)“[concepts] of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs.” It was held that:

“Such concepts are best left to the trial judge to be applied in their ordinary meaning to the time, place and circumstances of the conduct in question.”[[82]](#footnote-82)

1. In the present situation, the clear purpose of AI section 11 is to set a standard of orderly behaviour on the part of visitors congruent with LegCo’s institutional and social importance. Its context shows that it is part of a statutory framework aimed at creating a secure and dignified environment in the LegCo complex conducive to the legislature carrying out its constitutional functions at its sittings without disruption or disturbance, while permitting members of the public to observe the proceedings within the Chamber as an open legislative process. The section’s context is provided by its mother Ordinance, the LCPPO, and the other sections of the Administrative Instructions.
2. Thus, the LCPPO’s Long Title states that it aims (among other things):

“... to secure freedom of speech in the Legislative Council; to make provision for regulating admittance to and conduct within the precincts of the Chamber of the Legislative Council ... and for offences *in respect of such proceedings* and related matters; and for purposes incidental to or connected therewith.”[[83]](#footnote-83)

1. In LCPPO section 2, “Chamber” is defined to mean:

“... the Chamber *in which the proceedings of the Council are conducted*, and any galleries and places therein provided for members of the public and representatives of the press, television and radio, and includes any lobbies, offices or precincts *used exclusively in connexion with the proceedings of the Council*.”

And “Precincts of the Chamber” is defined to mean

“... the Chamber and offices of the Council and any adjacent galleries and places provided for the use or accommodation of members of the public and representatives of the press, television and radio, and subject to any exceptions made by the President under subsection (2) includes, during the whole of any day *the Council or a committee is sitting*, the entire building in which the Chamber is situated and any forecourt, yard, garden, enclosure or open space adjoining or appertaining to such building and used or provided for the purposes of the Council.”

1. Protection of the core activity of free debate during proceedings in the Chamber is taken up in LCPPO section 3:

“There shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Council.”

1. Section 5(b) immunises members from arrest “for any criminal offence whilst attending at a sitting of the Council or a committee” and section 6(1) forbids the service of civil proceedings or the process of civil execution “within the precincts of the Chamber while the Council is sitting”.
2. Section 8 is especially important. Section 8(1) provides: “Subject to this section, sittings of the Council shall be open to the public.” The statutory intention is thus to admit the public into LegCo’s precincts so that they can observe the sittings of the Council. Regulation of such attendance is obviously needed, so section 8(3) empowers the President to issue Administrative Instructions:

“... for the purpose of maintaining the security of the precincts of the Chamber, ensuring the proper behaviour and decorum of persons therein and for other administrative purposes.”

1. Section 17(c) directly penalises interruptions of LegCo sittings:

“Any person who ... creates or joins in any disturbance which interrupts or is likely to interrupt the proceedings of the Council or a committee while the Council or such committee is sitting, commits an offence and is liable to a fine of $10000 and to imprisonment for 12 months, and in the case of a continuing offence to a further fine of $2000 for each day on which the offence continues.”

1. And similarly, as we have seen,[[84]](#footnote-84) section 20(b) penalises contravention of:

“... administrative instructions issued under section 8(3), or any direction given thereunder, regulating the admittance of persons to or the conduct of persons within the Chamber or the precincts of the Chamber”.

1. AI section 2 provides specifically for admittance to public galleries during LegCo sittings:

“Members of the public may be admitted to a public gallery whenever the Council or a committee is sitting in public in the Chamber or in a committee room.”

1. Taking into account the abovementioned provisions, there is nothing uncertain about AI section 11.[[85]](#footnote-85) In the light of the context and purpose illuminated by those provisions, anyone reading the section, with appropriate advice if necessary, would know that creating a disturbance by demonstrating in the public gallery while a LegCo subcommittee was sitting constitutes a contravention. Indeed, that is a conclusion any layman would have no difficulty reaching, exercising common sense.

G.2 The authorities relied on by the appellant

1. In support of his “prescribed by law” argument, Mr Pun SC relies on *Steel v United Kingdom*,[[86]](#footnote-86) and *Lau Wai Wo v HKSAR*,[[87]](#footnote-87) two cases concerning legal certainty regarding binding-over orders; as well as *Brooker v Police*,[[88]](#footnote-88) a New Zealand case involving the summary offence[[89]](#footnote-89) of behaving in an offensive or disorderly manner. These are clearly distinguishable authorities, involving as they do, an uncertainty argument relating to the requirement that someone “be of good behaviour” or the prohibition against “behaving in a disorderly manner” at large, without the contextual framework provided by a statutory scheme such as that applicable to AI section 11 just discussed.
2. Because of their open-endedness, binding-over orders have faced challenges on the ground that they lack legal certainty. Thus, in *Steel v United Kingdom*,[[90]](#footnote-90) certain protesters were ordered to be bound over “to be of good behaviour” with imprisonment to follow if they refused to be bound over, such orders having been made after they were found to have committed a breach of the peace. The ECtHR regarded the requirement that a person “be of good behaviour” to be vague and imprecise, but it held that the prior finding of a breach of the peace provided a sufficient context to rescue the order from failing the “prescribed by law” test. The Court stated:

“... the orders were expressed in rather vague and general terms; the expression ‘to be of good behaviour’ was particularly imprecise and offered little guidance to the person bound over as to the type of conduct which would amount to a breach of the order. However, in each applicant’s case the binding over order was imposed after a finding that she had committed a breach of the peace. Having considered all the circumstances, the Court is satisfied that, given the context, it was sufficiently clear that the applicants were being requested to agree to refrain from causing further, similar, breaches of the peace during the ensuing 12 months.”[[91]](#footnote-91)

1. *Hashman v United Kingdom*,[[92]](#footnote-92) is a contrasting case where fox hunting saboteurs disrupted a hunt and were bound over in the sum of £100 not to breach the peace and to be of good behaviour for 12 months, an order made solely on the basis of a finding that they had behaved in a manner *contra bonos mores*.[[93]](#footnote-93) Since that concept (which had been defined in the English courts as behaviour which is “wrong rather than right in the judgment of the majority of contemporary fellow citizens”) offered no more certainty than the broad “good behaviour” requirement, the ECtHR was unable to adopt the *Steel v UK* technique and held that the order prospectively binding over the protesters to be of good behaviour at large was uncertain.[[94]](#footnote-94) Distinguishing *Steel*, the Court stated:

“Whilst in the case of Steel the applicants had been found to have breached the peace, and the Court found that it was apparent that the bind over related to similar behaviour, the present applicants did not breach of the peace, and given the lack of precision referred to above, it cannot be said that what they were being bound over not to do must have been apparent to them.”[[95]](#footnote-95)

1. In *Lau Wai Wo v HKSAR*,[[96]](#footnote-96) this Court was concerned with a case where the defendant was acquitted of the charge of common assault on his brother but was bound over by the Magistrate in the sum of $1,000 to be of good behaviour for one year and to keep the peace. In deciding that that order did not pass the “prescribed by law” test, the Court did not approve the *Steel* technique of discovering certainty on the basis of prior findings made. Lord Scott of Foscote NPJ, writing for the Court, held that a prospective requirement to be of good behaviour at large failed the test and that the order would only be valid if it was made specific by its own terms:

“Although the traditional form of bind-over order is an order requiring the person concerned to keep the peace and be of good behaviour, without any greater precision, we do not think that an order simply in that general form should any longer be regarded as satisfactory. Nor do we regard an implied limitation by reference to the facts that prompted the making of the order to be satisfactory. We think the principle of legal certainty requires that the order spell out with precision, in the same way as would be expected of an injunction, what it is that the person must not do. For example, in the present case, if a bind-over order was to be made against the appellant, it should have been an order requiring him to keep the peace and be of good behaviour by abstaining from assaulting or threatening to assault his brother or by doing anything to give rise to a reasonable apprehension that he intended to assault his brother, or in some such terms. A guide to an acceptable formulation of a bind-over order would, in our opinion, be whether an injunction in those terms would be acceptable.”[[97]](#footnote-97)

1. *Brooker v Police*,[[98]](#footnote-98) posed a different problem. The appellant believed that a certain police constable had unfairly harassed him by obtaining a search warrant against him. He went to her home and knocked on her door, waking her up after a night shift, and then protested in the street outside, playing his guitar and singing songs critical of the constable. He was charged with a statutory offence of disorderly behaviour under section 4(1)(a) of the Summary Offences Act which provided:

“Every person is liable to a fine not exceeding $1,000 who ... In or within view of any public place, behaves in an offensive or disorderly manner.”

1. It was thus an offence defined in minimalist terms. It had only two elements: (i) behaving in an offensive or disorderly manner; (ii) while being in or within view of any public place. It lacked any contextual framework to provide guidance as to the kind of behaviour which would qualify as “offensive or disorderly” and the Supreme Court of New Zealand was primarily engaged in construing the section to provide such guidance. The majority held that “disorderly” had to involve disruption of public order. As Elias CJ put it:

“To constitute disorderly behaviour under s 4(1)(a) there must be an objective tendency to disrupt public order, by behaviour or because of the effect of words used. Whether behaviour is disorderly is not to be assessed against the sensibilities of individuals to whom the behaviour is directed or who are present to see and hear it, but against its tendency to disrupt public order.”[[99]](#footnote-99)

1. The “prescribed by law” test was therefore not directly relevant. It was only obliquely touched on when one of the reasons given by Elias CJ for adopting “[a] narrower interpretation of ‘disorderly behaviour’, anchored in disruption of public order” was that this would be “more consistent with the fundamental principle that criminal law must be predictable.”[[100]](#footnote-100)
2. These three authorities therefore had to grapple with issues that do not arise in connection with AI section 11 which has the benefit of a clear contextual focus and is not concerned with disorderly behaviour at large. Those authorities do not advance the appellant’s case and the “prescribed by law” argument fails.
3. Before leaving this argument, I should mention the criticism of the Judge’s construction of AI section 11 referred to in Section D above. With respect, I think that the Judge fell into error by eliding the two disjunctive strands in the Instruction and treating the offence as involving proof of both disorderly behaviour and a failure to comply with the direction of an officer of the Council.[[101]](#footnote-101) His Lordship also erred in so far as he considered a “remedial interpretation” warranted.[[102]](#footnote-102) The respondent does not seek to uphold the Judge’s approach on this matter. As the error does not affect the analysis or outcome, I will say no more about it.

H. The “blanket prohibition” argument

1. It will be recalled that Mr Pun SC’s argument is that:

“by ... rendering *all* forms of display of any ‘sign, message or banner’ a criminal offence *regardless of* its purpose, nature, manner and its impact (if any) on the public order in the LegCo”, [AI section 12] is unjustifiably wide.”[[103]](#footnote-103)

H.1 The proper construction of AI section 12

1. Just as the “prescribed by law” argument requires AI section 11 to be construed to decide whether it is legally uncertain, the “blanket prohibition” argument requires AI section 12 to be construed to see if it does indeed lay down a blanket prohibition.
2. It is once again important not to ignore material words in the section and to construe it in the light of its context and purpose. AI section 12 does not simply make “all forms of display of any ‘sign, message or banner’ a criminal offence”. It only does this with regard to displays “in a press or public gallery”, indicating its intended scope.
3. In considering AI section 12’s context and purpose, the exercise of construction undertaken regarding AI section 11 is equally applicable. For the reasons given in Section G.1 above, the purpose of the relevant rules in the LCPPO and the Administrative Instructions is to create a secure and dignified environment in the LegCo complex conducive to LegCo properly carrying out its constitutional functions at its sittings without disruption or disturbance. AI section 12 lays down certain prohibitions as a condition of allowing members of the public to observe legislative proceedings within the Chamber.
4. Thus, on a purposive construction, although couched in wide terms, the words of AI section 12 taken in context, do not render “all forms of display of any ‘sign, message or banner’ a criminal offence regardless of its purpose, nature, manner and its impact (if any) on the public order in LegCo” as the appellant alleges. On the contrary, the Administrative Instruction is issued very much with such impact in mind. The prohibitions are aimed at displays which entail the risk of disorder in public galleries and which may disturb LegCo sittings and the rights of others observing the proceedings.
5. This is a construction that receives support from AI section 12(3) which provides:

“An officer of the Council may refuse admission to a press or public gallery to any person displaying any sign, message or banner, or to any person displaying any sign or message on any item of clothing, or to any person who, in the opinion of an officer of the Council, may so display any sign, message or banner, may so display any sign or message on any item of clothing or may *otherwise behave in a disorderly manner*.”

1. The words I have italicised strongly indicate that the prohibition of signs, messages or banners, including signs or messages on items of clothing in a public or press gallery, is aimed at conduct which amounts to behaving in a disorderly manner, thus contextually limiting the scope of subsections (1) and (2). A person in a public gallery wearing a T-shirt which happens to bear an innocuous message unconnected with the legislature’s proceedings, not brandished intrusively, is not intended to be caught.
2. This construction is reinforced if one keeps in mind the terms of section 8(3) of the LCPPO, which authorized the issue of AI section 12. Section 8(3) specifies that the President is to exercise this power “for the purpose of maintaining the security of the precincts of the Chamber, [and] ensuring the proper behaviour and decorum of persons therein ...”.[[104]](#footnote-104) Thus, if he were to issue an Administrative Instruction laying down a blanket prohibition going far beyond that stated purpose, it would amount to an *ultra vires* exercise of the power and the rule of construction expressed in the maxim *ut res magis valeat quam pereat* would apply. That maxim is explained in Bennion on Statutory Interpretation[[105]](#footnote-105) as follows:

“... It is a rule of law that the legislator intends the interpreter of an enactment to observe the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void); so that he must construe the enactment in such a way as to implement, rather than defeat, the legislative purpose.”

1. The contextual and purposive construction limiting the scope of AI section 12 discussed above, avoids an *ultra vires* outcome and preserves the validity of the rule. I arrive at this conclusion applying ordinary common law principles of construction. If it had been necessary, I would not have hesitated to arrive at the same conclusion applying a remedial interpretation in accordance with the principles explained in *HKSAR v Lam Kwong Wai*.[[106]](#footnote-106)
2. I therefore conclude that properly construed, AI section 12 does not lay down the alleged “blanket prohibition” and the appellant’s argument advanced on that rejected basis fails.

H.2 Does AI section 12 create a valid restriction on the right to freedom of expression?

1. AI section 12 plainly catches the conduct of the appellant and her co-defendants. Their demonstration was noisy and caused a commotion in the public gallery largely caused by the display of the Swastika sign and the slogan on their T-shirts opposing the landfill extension. It led on both occasions to the session being interrupted and, on the second occasion, to the exclusion of the public from observing proceedings in the substituted conference room. The question is whether, in limiting the right to freedom of expression by prohibiting such demonstrations, AI section 12 imposes a constitutionally valid restriction.[[107]](#footnote-107)
2. This involves first examining whether the section operates as a restriction which is necessary for accomplishing one of the purposes listed in BOR 16. In my view, it clearly does. If not prohibited, demonstrations and interjections by persons in public galleries would inevitably interfere with debates and other proceedings on the floor of LegCo. A demonstration on a controversial issue is likely to be met with a counter-demonstration and a confrontation between the two camps in a public gallery would pose an obvious risk of conflict and public disorder. It would also interfere with the rights of persons who simply wish to observe the debate or other proceedings.
3. Given such prospects, the AI section 12 restrictions can be justified as necessary for respect of the rights of others and for the protection of public order or *ordre public.* The applicability of the categories of respect for the rights of others and the protection of public order is self-evident. However, the protection of *ordre public* as an aim may call for some elaboration.
4. *Ordre public* is a broad and flexible concept which, as Li CJ explained in *HKSAR v Ng Kung Siu*,[[108]](#footnote-108) and as the majority reiterated in *Leung Kwok Hung v HKSAR*,[[109]](#footnote-109)can be imprecise and elusive. It is much wider than “public order” in terms of the maintenance of law and order and “includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole” being “a function of time, place and circumstances.” Various formulations of the meaning of *ordre public* were considered by the Court. The concept has been described as “a basis for restricting some specified rights and freedoms in the interests of the adequate functioning of the public institutions necessary to the collectivity...” Another formulation, taken from the *Siracusa Principles*[[110]](#footnote-110) is that it “... may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.” In my view, a restriction on the right to freedom of expression to safeguard the proper functioning of the legislature comes within these formulations of the protection of *ordre public*.
5. The next question is whether the restrictions are rationally connected with accomplishing the aforesaid aim, the answer to which is obviously “Yes”. They directly operate to restrict intrusive or disruptive conduct in the legislative Chamber.
6. Does the restriction do no more than reasonably necessary for accomplishing that purpose? In my view, it clearly does pass this test. AI section 12 has a limited scope, applying only to persons who are in a press or public gallery. It targets intrusive behaviour to protect good order during a LegCo meeting. The appellant was not prohibited from exercising her freedom of expression in opposition to the proposed landfill extension in other venues, including in designated areas of the LegCo complex. She was free to canvass support from fellow residents and to lobby elected legislative councillors who were members of the subcommittee concerned. She was free to campaign for public support using social media and other forms of public communication. What she was prohibited from doing was confined to her mounting a disruptive demonstration in the public gallery during the subcommittee’s sessions.
7. A reasonable balance has plainly been struck between the benefit to society of enabling LegCo properly to carry out its constitutional functions on the one hand and the limited restriction on the guaranteed right of freedom of expression on the other. AI section 12 in my view is clearly a proportionate and valid restriction on the right.
8. Conclusion
9. Although the respondent’s arguments that the appeal should fail *in limine* have not been successful, the appellant’s arguments challenging the legal certainty of AI section 11 and the proportionality of AI section 12 must be rejected. I would accordingly dismiss this appeal.

**Mr Justice Fok PJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ.

**Mr Justice Chan NPJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ.

**Lord Neuberger NPJ:**

1. I agree with the judgment of Mr Justice Ribeiro PJ.

**Chief Justice Ma:**

1. The Court unanimously dismisses the appeal.

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| --- | --- | --- |
| (Geoffrey Ma)  Chief Justice | (R A V Ribeiro)  Permanent Judge | (Joseph Fok)  Permanent Judge |

|  |  |
| --- | --- |
| (Patrick Chan)  Non-Permanent Judge | (Lord Neuberger of Abbotsbury)  Non-Permanent Judge |

Mr Hectar Pun, SC, Mr Harrison Cheung, and Mr Anson Wong Yu Yat, instructed by Y. S. Lau & Partners, assigned by the Director of Legal Aid, for the Appellant

Ms Anna YK Lai, SC, DDPP and Mr Andrew Li, SPP of the Department of Justice, for the Respondent

1. Cheung Mei-hung and Fong Yu-ching. They were convicted as co-defendants at the trial but are not parties to this appeal. [↑](#footnote-ref-1)
2. Although a live video feed was arranged for the public. [↑](#footnote-ref-2)
3. Cap 382. [↑](#footnote-ref-3)
4. Cap 382A. [↑](#footnote-ref-4)
5. Mr Chu Chung Keung, ESCC 3792/2014 (7 October 2015). The other defendants were also convicted. [↑](#footnote-ref-5)
6. HCMA 666/2015 (19 May 2016). Wong J’s judgment was delivered in Chinese and references in this judgment are to the English translation. [↑](#footnote-ref-6)
7. Ribeiro, Tang and Fok PJJ, FAMC 29/2016 (8 February 2017). Enactment of AI sections 11 and 12 was of course pursuant to LCPPO section 8(3) rather than section 20(b) but the error is of no consequence. [↑](#footnote-ref-7)
8. In this judgment, Basic Law Articles are cited with the prefix “BL” followed by the number of the Article. [↑](#footnote-ref-8)
9. See eg, *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 at §53; and *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at §19. [↑](#footnote-ref-9)
10. Cap 383. Articles of the Bill of Rights are cited with the prefix “BOR” followed by the number of the Article. [↑](#footnote-ref-10)
11. *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at §20. [↑](#footnote-ref-11)
12. BOR 17: “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.” [↑](#footnote-ref-12)
13. *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at §12; and *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at §31. [↑](#footnote-ref-13)
14. Under BL 39(2), or, to the same effect, as a restriction “provided by law” under BOR 16(3): see *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at §18. [↑](#footnote-ref-14)
15. *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 461; and *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at §33. [↑](#footnote-ref-15)
16. *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at §35; *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at §36; and *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §49. [↑](#footnote-ref-16)
17. Appearing for the appellant with Harrison Cheung and Anson Wong Yu Yat. [↑](#footnote-ref-17)
18. Appellant’s Written Case §§43-45. Italics in the original. [↑](#footnote-ref-18)
19. Appellant’s Written Case §57. Italics in the original. [↑](#footnote-ref-19)
20. Appearing for the respondent with Mr Andrew Li. [↑](#footnote-ref-20)
21. Respondent's Written Case §9(a). [↑](#footnote-ref-21)
22. Respondent's Written Case §§17(a) and (b), 18-20. [↑](#footnote-ref-22)
23. Respondent's Written Case §§26-31. [↑](#footnote-ref-23)
24. Those paragraphs refer to the need to accord fundamental rights a generous interpretation and to accommodate annoying or offensive views, citing *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229. [↑](#footnote-ref-24)
25. Judgment §35. [↑](#footnote-ref-25)
26. [1991] 1 SCR 139. [↑](#footnote-ref-26)
27. Section 2(b): “Everyone has the following fundamental freedoms: ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...” [↑](#footnote-ref-27)
28. Section 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” [↑](#footnote-ref-28)
29. *Ibid* at 192. [↑](#footnote-ref-29)
30. *Ibid* at 229. [↑](#footnote-ref-30)
31. BL 8: “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.” [↑](#footnote-ref-31)
32. *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 at 155. [↑](#footnote-ref-32)
33. *Ibid* at 230. [↑](#footnote-ref-33)
34. [1991] 1 SCR 139. [↑](#footnote-ref-34)
35. *Ibid* at 156 and 158. [↑](#footnote-ref-35)
36. *Ibid* at 235. [↑](#footnote-ref-36)
37. *Ibid* at 237. [↑](#footnote-ref-37)
38. *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927. [↑](#footnote-ref-38)
39. *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 at 238-239. [↑](#footnote-ref-39)
40. *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at §2. [↑](#footnote-ref-40)
41. Applying the proportionality analysis discussed in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. [↑](#footnote-ref-41)
42. *Tabernacle v The Secretary of State for Defence* [2009] EWCA Civ 23. [↑](#footnote-ref-42)
43. *Ibid* at §37. [↑](#footnote-ref-43)
44. [2011] 1 WLR 504. [↑](#footnote-ref-44)
45. *Ibid* at §37. Articles 10 and 11 referred to are Articles in the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) which deal respectively with the rights to freedom of expression, to freedom of peaceful assembly and to freedom of association with others in terms very similar to the rights guaranteed by the Basic Law and HKBORO. See also *R (Gallastegui) v Westminster City Council* [2013] 1 WLR 2377 per Lord Dyson MR at §26: ““I accept that the importance of the right to express views publicly and to assemble for the purpose of expressing and discussing those views can extend to the manner in which it is wished to express the views and the location where they wish to express them...” [↑](#footnote-ref-45)
46. *Ibid* at §42. [↑](#footnote-ref-46)
47. *Tabernacle v The Secretary of State for Defence* [2009] EWCA Civ 23. [↑](#footnote-ref-47)
48. *Mayor of London v Hall* [2011] 1 WLR 504. [↑](#footnote-ref-48)
49. *The Mayor Commonalty and Citizens of London v Samede* [2012] EWCA Civ 160. [↑](#footnote-ref-49)
50. [2012] EWCA Civ 160 at §39. See also *R (Gallastegui) v Westminster City Council* [2013] 1 WLR 2377, for a proportionality analysis. [↑](#footnote-ref-50)
51. [1991] 1 SCR 139. [↑](#footnote-ref-51)
52. *Ibid* at 198. Although her Honour generally favoured the universal applicability of freedom of expression subject to justification under s 1 of the Charter. [↑](#footnote-ref-52)
53. *Ibid* at 241. [↑](#footnote-ref-53)
54. See *Hirst v UK (No 2)* [2005] ECHR 681 at §§69-71 and *Velyo Velev v Bulgaria*, Application No 16032/2007 (27 May 2014) at §30. Similar views have been expressed at common law: see eg, *Raymond v Honey* [1983] 1 AC 1 at 10 and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at §5. The question was addressed in *HKSAR v Wan Thomas* [2016] 5 HKLRD 656, but as an application for leave to appeal is pending before this Court, I say nothing about that decision. [↑](#footnote-ref-54)
55. See *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415; *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743. [↑](#footnote-ref-55)
56. Andrew Cheung J in *Chan Kim Sum v Secretary for Justice* [2009] 2 HKLRD 166. [↑](#footnote-ref-56)
57. Cf *Golder v United Kingdom* (1979-80) 1 EHRR 524. See Prison Rules, Cap 234A, r 52 for the rules relating to such visits currently in force. [↑](#footnote-ref-57)
58. See Prisons Ordinance (Cap 234) section 23 and Prison Rules, Part III, especially rules 226-229. [↑](#footnote-ref-58)
59. [1991] 1 SCR 139 at 228. [↑](#footnote-ref-59)
60. [2007] 3 NZLR 91 at §60. [↑](#footnote-ref-60)
61. Section 14: “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.” [↑](#footnote-ref-61)
62. Per Lord Nicholls of Birkenhead in a very different context: *In re Spectrum Plus Ltd (In Liquidation)* [2005] 2 AC 680 at §41. [↑](#footnote-ref-62)
63. [2010] 3 HKLRD 371. [↑](#footnote-ref-63)
64. As the Chief Judge of the High Court then was. [↑](#footnote-ref-64)
65. [2010] 3 HKLRD 371 at §1. [↑](#footnote-ref-65)
66. *Ibid* at §25. [↑](#footnote-ref-66)
67. *Ibid* at §26. [↑](#footnote-ref-67)
68. *Ibid* at §37. [↑](#footnote-ref-68)
69. *Ibid* at §53. [↑](#footnote-ref-69)
70. (2003) 37 EHRR 38. [↑](#footnote-ref-70)
71. *Ibid* at §47. [↑](#footnote-ref-71)
72. *Ibid* at §40. [↑](#footnote-ref-72)
73. (2014) 17 HKCFAR 689 at §28. [↑](#footnote-ref-73)
74. *Ibid* at §32. [↑](#footnote-ref-74)
75. Section C above. [↑](#footnote-ref-75)
76. Under BL 39(2) and “provided by law” under BOR 16(3): *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at §18. [↑](#footnote-ref-76)
77. (2007) 10 HKCFAR 386 at §61, citing *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381. [↑](#footnote-ref-77)
78. Set out in Section B above. [↑](#footnote-ref-78)
79. (2006) 9 HKCFAR 574 at §63. [↑](#footnote-ref-79)
80. (2013) 16 HKCFAR 837 at §67. [↑](#footnote-ref-80)
81. (2004) 220 CLR 1 at §12. [↑](#footnote-ref-81)
82. (2013) 16 HKCFAR 837 at §68. [↑](#footnote-ref-82)
83. In the citations of legislative provisions in this Section of the judgment, the italics are supplied. [↑](#footnote-ref-83)
84. Section B above. [↑](#footnote-ref-84)
85. There being no suggestion that AI section 12 suffers from uncertainty. [↑](#footnote-ref-85)
86. (1999) 28 EHRR 603. [↑](#footnote-ref-86)
87. (2003) 6 HKCFAR 624. [↑](#footnote-ref-87)
88. [2007] 3 NZLR 91. [↑](#footnote-ref-88)
89. Under section 4(1)(a) of the Summary Offences Act. [↑](#footnote-ref-89)
90. (1999) 28 EHRR 603 [↑](#footnote-ref-90)
91. *Ibid* at §76. [↑](#footnote-ref-91)
92. (1999) 30 EHRR 241. [↑](#footnote-ref-92)
93. *Ibid* at §§25, 27 and 35. [↑](#footnote-ref-93)
94. *Ibid* at §§38-41. [↑](#footnote-ref-94)
95. *Ibid* at §40. [↑](#footnote-ref-95)
96. (2003) 6 HKCFAR 624. [↑](#footnote-ref-96)
97. *Ibid* at §49. [↑](#footnote-ref-97)
98. [2007] 3 NZLR 91. [↑](#footnote-ref-98)
99. *Ibid* at §41. [↑](#footnote-ref-99)
100. *Ibid* at §38. [↑](#footnote-ref-100)
101. Judgment §§81-82, 88 and 94. [↑](#footnote-ref-101)
102. Judgment §§83-84. [↑](#footnote-ref-102)
103. Appellant’s Written Case §§43-45. Italics in the original. [↑](#footnote-ref-103)
104. As well as for “other administrative purposes”. [↑](#footnote-ref-104)
105. Rule 198, Lexis Nexis On-line edition. [↑](#footnote-ref-105)
106. (2006) 9 HKCFAR 574. [↑](#footnote-ref-106)
107. The appellant does not suggest that AI section 11 is disproportionate. [↑](#footnote-ref-107)
108. (1999) 2 HKCFAR 442 at 457-460. [↑](#footnote-ref-108)
109. (2005) 8 HKCFAR 229 at §§69-74. [↑](#footnote-ref-109)
110. The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, issued by the American Association for the International Commission of Jurists (1984) §22. [↑](#footnote-ref-110)