Claim nature:
A. Non-monetary claim only
B. Judicial Review

No. 86

Notice of application for leave to apply for judicial review

(O. 53 r. 3(2))

HCAL /2019

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. OF 2019

KWOK WING HANG	**1st Applicant**
CHEUNG CHIU HUNG	**2nd Applicant**
TO KUN SUN JAMES	**3rd Applicant**
LEUNG YIU CHUNG	**4th Applicant**
JOSEPH LEE KOK LONG	**5th Applicant**
MO, MAN CHING CLAUDIA	**6th Applicant**
WU CHI WAI	**7th Applicant**
CHAN CHI-CHUEN RAYMOND	**8th Applicant**
LEUNG KAI CHEONG KENNETH	**9th Applicant**
KWOK KA-KI	**10th Applicant**
WONG PIK WAN	**11th Applicant**
IP KIN-YUEN	**12th Applicant**
YEUNG ALVIN NGOK KIU	**13th Applicant**
ANDREW WAN SIU KIN	**14th Applicant**
CHU HOI DICK EDDIE	**15th Applicant**
LAM CHEUK-TING	**16th Applicant**
SHIU KA CHUN	**17th Applicant**
TANYA CHAN	**18th Applicant**
HUI CHI FUNG	**19th Applicant**
KWONG CHUN-YU	**20th Applicant**
TAM MAN HO JEREMY JANSEN	**21st Applicant**
FAN, GARY KWOK WAI	**22nd Applicant**
AU NOK HIN	**23rd Applicant**
CHARLES PETER MOK	**24th Applicant**

IN THE MATTER of an Application by the Applicant for Interim Relief in Judicial Review proceedings pursuant to Order 53, rule 8 of the Rules of the High Court, Cap.4A

And

IN THE MATTER of section 2 of the Emergency Regulations Ordinance, Cap 241 and the Prohibition on Face Covering Regulation

And

IN THE MATTER Article 33 and 66 of the Hong Kong Basic Law, and of s.5 of the Hong Kong Bill of Rights Ordinance, Cap. 383 and Articles 14, 15, 16, 17 and 21 of the Hong Kong Bill of Rights

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Notice of application for leave to apply for judicial review
(O.53 r.3(2))

This form must be read together with notes for guidance obtainable from the Registry.

To the Registrar, High Court, Hong Kong.

Name, description and address of applicant	KWOK WING HANG ("**1st Applicant**"), Room 813, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong CHEUNG CHIU HUNG ("**2nd Applicant**"), Room 1017, Legislative Council Complex, 1 Legislative Council Road,

	Central, Hong Kong TO KUN SUN JAMES ("**3rd Applicant**"), Room A1, 2/F, Rodeo Centre, 73-79 Larch Street, Tai Kok Tsui, Kowloon LEUNG YIU CHUNG ("**4th Applicant**"), Unit 7, G/F, Kwai Yan House, Kwai Fong Estate, Kwai Chung, New Territories JOSEPH LEE KOK LONG ("**5th Applicant**"), Room 25, 8/F, Hing Wan Commercial Building, 25-27 Parkes Street, Jordan, Kowloon MO, MAN CHING CLAUDIA ("**6th Applicant**"), Room 809, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong WU CHI WAI ("**7th Applicant**"), G/F, 6 Ngan Chi Path, Ngau Chi Wan Village, Ngau Chi Wan, Kowloon / Shop no. 104, G/F, Cheung On House, Wo Lok Estate, Kwun Tong, Kowloon CHAN CHI-CHUEN RAYMOND ("**8th Applicant**"), Room 1002, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong LEUNG KAI CHEONG KENNETH ("**9th Applicant**"),

	Room 918, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong KWOK KA-KI ("**10th Applicant**"), Room 812, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong WONG PIK WAN ("**11th Applicant**"), Room 912, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong IP KIN-YUEN ("**12th Applicant**), Room 919, Legislative Council Complex 1 Legislative Council Road, Central, Hong Kong YEUNG ALVIN NGOK KIU ("**13th Applicant**"), Room 810, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong / M/F, 117 Kwong Fuk Road, Tai Po, New Territories ANDREW WAN SIU KIN ("**14th Applicant**"), Room 911, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong CHU HOI DICK EDDIE ("**15th Applicant**"), Room 903, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong

	LAM CHEUK-TING (**"16th Applicant"**), Room 910, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong SHIU KA CHUN (**"17th Applicant"**), Room 1018, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong TANYA CHAN (**"18th Applicant"**), Room 814, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong HUI CHI FUNG (**"19th Applicant"**), Room 913, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong KWONG CHUN-YU (**"20th Applicant"**), Room 906, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong TAM MAN HO JEREMY JANSEN (**"21st Applicant"**), Room 811, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong FAN, GARY KWOK WAI (**"22nd Applicant"**), Room 905, Legislative Council Complex, 1 Legislative Council Road,

	Central, Hong Kong AU NOK HIN (**"23rd Applicant"**), Room 901, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong CHARLES PETER MOK (**"24th Applicant"**), Room 917, Legislative Council Complex, 1 Legislative Council Road, Central, Hong Kong (hereinafter collectively referred as "**the Applicants**")
Name and description of proposed respondent	1. Chief Executive in Council ("**CEIC**") 2. Commissioner of Police 3. Secretary for Justice
Judgment, order, decision or other proceeding in respect of which relief is sought	1. Emergency Regulation Ordinance (Cap. 241) ("**ERO**") 2. The Prohibition on Face Covering Regulation ("**PFCR**") made by the Chief Executive in Council under Section 2 of ERO
Interested Parties	1. President of the Legislative Council

Relief Sought

1. A declaration that the decision of the CEIC to invoke the ERO to make the PFCR is unlawful and unconstitutional for violation of section 5 of the Bill of Rights Ordinance ("**BORO**") and/or Article 17, 66 and 73 of the Basic Law;

2. A declaration that the PFCR is unlawful and unconstitutional for violation of Articles 8, 14, 16, 17 of the Hong Kong Bills of Rights ("**BOR**") and/or Article 21 of the International Covenant on Civil and Political Rights ("**ICCPR**");

3. An urgent oral hearing of this application under O. 53 r. 3(3) of Rules of the High Court (Cap. 4A) ("**RHC**") if leave is not granted on papers; and

4. Interim relief that, until further order, (a) the PFCR be suspended; (b) the Commissioner of Police and its officers be restrained from enforcing the PFCR;

5. Such further or other remedy, relief or order as the Court may provide; and

6. Costs of this application for leave to apply for judicial review and, if leave is granted, the application for judicial review be to the Applicant.

Name and address of Applicants' solicitors, or if no solicitors acting, the address for service of the applicant	Messrs. Ho Tse Wai & Partners, Room 1602, 16/F, South China Building, No. 1 Wyndham Street, Central, Hong Kong
Signed	Dated the 5th day of October 2019 HO Tse Wai

Grounds on which relief is sought

[X/Y/§Z]: [Exhibit/Internal Page No./Paragraph no. (if applicable)]

A. Factual Background

A.1 Protests and Escalation of Violence by Police and Protestors

1. Since 9 June 2019, more than 400 public protests and assemblies in opposition to the Government's Fugitive Offenders and Mutual Legal

Assistance in Criminal Matters Legislation (Amendment) Bill 2019 ("**Bill**") has taken place.

2. These protests and assemblies spontaneously surfaced in different districts of Hong Kong at frequent intervals every week, often in response to the actions or omissions of the Police Commissioner and his officers, or the perceived failure by the Chief Executive and her political appointees to respond to legitimate demands, i.e. a full withdrawal of the unpopular legislation in question, to set up an independent inquiry against excessive police use of force and/or methods to disperse participants, to resign and be accountable for their actions.

3. Subsequent to a substantial number of people (estimated to be a million) marching in a lawful assembly in protest on 9 June 2019, and upon the Government's refusal to acknowledge the widespread concern not only in terms of the substance of the proposed extradition legislation, but also the **process** whereby such legislation was being rammed through, there was a call on social media for a picnic to occur on Tamar Park on 12 June 2019 – the first of a series of civil disobedience actions organised by a leaderless collective, calling for concerned citizens to work to rule or to take time off to strike. On the same date, a public gathering organised by the Civil Human Rights Front which received a certificate of no objection from the Police was permitted to take place outside Citic Tower.

4. It was this picnic event that marked the first major escalation of physical violence, when in response to a very small minority conduct of throwing objects at the police, the police responded with overwhelming and excessive force to disperse several hundred thousand largely peaceful protestors, and using for the first time, non-lethal firearm projectiles (such as rubber baton, sponge grenades) together with multitudes of chemical irritant weapons including chemical smoke gas, pepper bombs, hoses and sprays. The entirely lawful and peaceful permitted protest outside Citic Tower was also tear-gassed without warning and without permitting the participants any route of dispersal. It is also understood that the certificate of no objection issued by the Police was subsequently retrospectively withdrawn close to midnight on 12 June.

5. The Government continued to maintain and justify the use of force and classified the gatherings as a "riot", citing even the desperate attempt of innocent members of the public in a panic to escape tear-gas by pushing into Citic Tower, that being the only available route of escape, as part of the violence.

6. Faced with this injustice and perceived insensitivity and total failure to understand and appreciate the public sentiment, the police conduct, together with the Government's response, encouraged 2 million protestors to march on 16 June 2019 which was completed in a peaceful manner.

7. Yet despite the above, the Government failed to respond at all to the protest on 16 June 2019. Worse, the policing strategy hardened and the Commissioner for Police sanctioned the removal of all forms of police identification which were previously on officers uniforms or warrant cards thereby creating a masked, anonymous and unaccountable force of enforcers.

8. In the leadup to 21 June 2019, the leaderless collective started to discuss alternative ways to conduct civil disobedience and the police headquarters in Wan Chai was surrounded. Subsequently, a pattern emerged whereby the police would respond to such spontaneous protests with force, that rightly or wrongly has been perceived as excessive and disproportionate, and the protestors responded by escalating their conduct.

9. As of the date of filing the Form 86 (5 October 2019), 2,199 protestors have been arrested and many have suffered serious injuries whether in the course of being arrested, after being arrested and during their time of incarceration under the care and supervision of the Commissioner of Police, with serious allegations of sexual assault, assault and torture of detainees emerging from reports of international human rights monitoring organisations such as Amnesty International.

10. Despite the arrest and charging of protestors, not a single police officer has been interdicted, suspended or is being subject to any investigation for abuse of their powers. Further, while complaints have been lodged with CAPO and the IPCC is looking into events over the early period, public

trust in the independence of these bodies is low to nil. The Chief Executive has steadfastly refused to establish an independent Commission of Inquiry with wide-ranging powers to gather evidence and to summon witnesses which is potentially the only avenue in which the majority of members of the public have hope of holding the police accountable.

A.2 The PFCR

11. On 4 October 2019, the Chief Executive, Carrie LAM CHENG Yuet Ngor ("**CE**"), announced in a press conference at 3 p.m. ("**Press Conference**"), and subsequently in a press release issued at 5 p.m., that the CE in Executive Council would put in place the PFCR to ban the use of facial covering in public meetings and processions regulated under the Public Order Ordinance (Cap. 245). The PFCR was published in the Gazette on the same day (I.e. 4 October 2019) and would go into effect on 5 October 2019, that is within less than 9 hours of its promulgation. Thus, members of the public including those who were at work up to and beyond midnight had no real opportunity to know of its contents and to adjust their conduct if necessary including obtaining doctors' certificates where required or to take legal advice putting them at risk of falling foul of the PCFR.

12. According to the CE, the power of enactment of PFCR arose from s.2(1) of the ERO as she had considered Hong Kong to be in an occasion of public danger ("**PD Ground**"). In the Press Conference, she clarified that by enacting PFCR under the ERO, the Government was not proclaiming that Hong Kong has entered the state of emergency.

13. In the Press Conference, the Government referred to protests arising from the Bill which had been staged with a significant number of events ending up in outbreaks of violence and that escalated protestor's violence had reached an alarming level. They considered that acts of radical and masked protesters had seriously breached public peace and posed widespread and imminent danger to the community.

14. The Government therefore took the view that the prohibition on facial covering is urgently needed for police investigation and collection of evidence, and for deterring violent and illegal behaviour. The prohibition is no more than what is necessary and proportionate to protect public order and safety in light of the escalating illegal and violent acts of the masked protesters at recent public order events.

15. The CE further represented that the PFCR will create a deterrent effect against masked violent protesters and rioters. In answer to questions from the Press, the CE expressly replied that she may resort to making further regulations under the ERO.

16. In the Legislative Council Brief for the PFCR dated 4 October 2019 ("**LegCo Brief**"), it was explained that public consultation prior to the enactment of the PFCR was not feasible due to the exigency of the situation.

A.3 LegCo Session 2019-2020

17. On 4 October 2019, the CE issued the Gazette G.N. 6157 titled "BEGINNING DATE OF THE 2019-2020 ORDINARY SESSION OF THE LEGISLATIVE COUNCIL OF HONG KONG SPECIAL ADMINISTRATIVE REGION" (the "**Gazette**").

18. In the Gazette, the CE specified that the ordinary session of LegCo is to begin on 16 October 2019. The CE has indicated on 4 October 2019 to all legislators an intention to formally withdraw the Bill upon the commencement of the next legislative session. Prior to this public announcement, the CE had behind closed doors invited certain persons and select legislators but excluding all of the Applicants to inform them of the intended withdrawal of the Bill.

19. Between 5 October 2019 and 16 October 2019 when the LegCo ordinary session resumes, there is a meeting of the Finance Committee of the LegCo scheduled on 11 October 2019.

A.4 The Applicants' Attempt to Request a LegCo Meeting

20. Prior to the enactment of the PFCR, the Applicants, who are LegCo members, were not informed of the plans of the Government in enacting any bills prohibiting facial covering. They were not consulted by the Government in relation to enacting regulations under the ERO either.

21. On 4 October 2019, the 1st Applicant sent a letter to the President of the LegCo and CEIC to request for an urgent LegCo meeting to be convened to discuss the PFCR under Rule 15 of Rules of Procedure of the LegCo (the "**Letter**"). However, neither the President nor the CEIC responded by the deadline prescribed in the Letter.

22. As a result, as of the day of filing the present Form 86, no LegCo Meeting (apart from the Finance Committee meeting referred to herein above) was scheduled to be convened from 5 October 2019 to 16 October 2019. The CE has the power to request the President of LegCo to call an emergency session during recess and there is a sufficient quorum of members of LegCo presently in Hong Kong. Yet, the CE does not consider it necessary to convene a meeting of LegCo despite apparently considering Hong Kong to be in an occasion of public danger.

B. The Legal/Policy Context

B.1 Basic Law ("BL") and HKBOR

23. BL 17 provides that:-

> "*The Hong Kong Special Administrative Region shall be vested with legislative power*
> ..."

24. BL 66 provides that:-

> "*The Legislative Council of the Hong Kong Special Administrative Region shall be the legislature of the Region.*"

25. BL 73 provides that:-

> "*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;*
> ..."

26. BORO s 5 provides as follows:-

> *"Public emergencies*
>
> *(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."*

27. BOR 14(1) relevantly provides as follows:-

> "***Article 14***
> ***Protection of Privacy, family, home, correspondence, honour and reputation***
>
> *(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.*
>
> ..."

28. BOR 16 provides that:-

"***Article 16***

Freedom of opinion and expression

(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 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 provided by law and are necessary –

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

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

29. BOR 17 provides that:-

"***Right of peaceful assembly***

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 freedom of others."

30. BOR 14(1), BOR 16 and BOR 17 mirror Articles 17, 19 and 21 of the ICCPR, which apply to Hong Kong by virtue of BL 39. Under BL39(2), no restrictions on the rights and freedoms enjoyed by Hong Kong residents shall contravene the provisions of BL39(1). Section 5 of the HKBORO mirrors Article 4 of the ICCPR.

B.2 ERO

31. S.2(1) of the ERO provides that:-

*"**2. Power to make regulations***

(1) On any occasion which the Chief Executive in Council may consider to be an occasion of emergency or public danger he may make any regulations whatsoever which he may consider desirable in the public interest."

32. S. 2(3) of the ERO provides that:

"Any regulations made under the provisions of this section shall continue in force until repealed by order of the Chief Executive in Council."

B.3 PFCR

33. Section 3(1) of the PFCR provides that:

"(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);
(b) an unauthorized 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
(ii) does not fall within paragraph (a) or (b)."

34. Section 3(2) of the PFCR, an offence creating provision, stipulates that anyone who contravenes Section 3(1) of PFCR is liable to maximum imprisonment of 1 year and a fine at level 4.

35. Section 5 of the PFCR empowers police officers to require removal in public place of facial covering. Section 5(2) allows the police officers to:

"(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"

36. Section 5(3) of the PFCR provides that anyone who contravenes Section 5(2) will be liable for a maximum imprisonment of 6 months and a fine at level 3.

37. With reference to the LegCo Brief, the PFCR will commence to take effect on 5 October 2019, and is scheduled to be tabled at the Legislative Council ("**LegCo**") on 16 October 2019 and pursuant to Section 2(3) of the ERO, the Regulation can only be repealed by the CEIC.

C. Grounds of Review

C.1 Ground 1: Ultra Vires: Section 3(2) of the Hong Kong Bill of Rights Ordinance, (Cap. 383) ("HKBORO") has repealed the ERO and/or repealed the ERO to the extent of such inconsistency with Section 5 of HKBORO

38. Section 5 of the BORO states that:

> "*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.*"

39. Section 5 of the BORO only permits derogation in the exceptional circumstances of a public emergency, namely where the life of the nation is at risk.

40. Section 5 of the HKBORO is therefore in contradistinction to Section 2(1) of the ERO which enables without any restriction, the CEIC to enact

legislation to derogate from fundamental rights on the ground of public danger, which is a vague and undefined concept.

41. Prior to 30 June 1996, the HKBORO provided under s.3(1)-(2) that:

> "*(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.*"

42. The operation of the repeal mechanism under Section 3(2) HKBORO was as a matter of law and automatic and deemed to take effect from the date of commencement of the HKBORO.

43. This is made clear in in *R v Sin Yau Ming* (unreported, CACC 289/1990, 30 September 1991), the CA in construing the operation of the implied repeal mechanism held as follows at §54:

> "54. It needs to be emphasised that the only ***duty of this, or any other court***, considering legislation ***is to decide whether that legislation is or is not inconsistent with the Hong Kong Bill. This, or any other court, does not repeal legislation. That is done by the Hong Kong Bill itself***. This, or any other court, does not redraft legislation or for that matter make suggestions for the form of future legislation. The content of the legislation is viewed, with what will be seen to be an entirely new jurisprudential view, and the court gives its opinion whether, bearing in mind Hong Kong circumstances, that legislation is inconsistent with the Hong Kong Bill. (emphasis added)"

44. In *AG of Hong Kong v Lee Kwong Kut* [1993] AC 951 the Board upheld the CA's approach to implied repeal, namely, that Section 3(2) repeals existing legislation to the extent of the inconsistency in question. In the CA Decision, Bokhary J (as he then was) held at §30 and §33:

> *"30. The rights conferred and confirmed - and I add the word "confirmed" because the values concerned are not novel to us in this Common Law jurisdiction - by the Bill of Rights are not only fundamental but entrenched. For, as we all know,* ***the Bill itself repeals all pre-existing legislative inroads into such rights****, while the Hong Kong Letters Patent 1917 to 1991 (Nos 1 and 2) prohibit any future legislative inroad into them.*
>
> ...
>
> *33. By the time when the trial commenced before the learned magistrate, the Bill of Rights was in force. And of course it would only be after the prosecution had established, at the trial, the existence of a reasonable suspicion of dishonesty on the part of the accused that any question of his having to dispel such suspicion arose.* ***By then the Bill was in force, and that onus, along with the section under which it arose, had gone****."* (emphasis added)

45. Therefore for the purpose of construing the *vires* of the ERO which was enacted in 1922, the Court must consider whether by 30 June 1997, the ERO was already repealed as a matter of law by virtue of its inconsistency with the HKBOR. If so, it does not form part of the "law previously in force in Hong Kong" under Articles 8 and 18 of the Basic Law. The mere fact that section 3 of the BORO was repealed in 1997 did not revive anything that has been repealed before that time: section 24, Interpretation and General Clauses Ordinance, Cap 1 ("IGCO").[1]

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[1] S.3(1) and (2) were repealed by a decision of the Decision of the Standing Committee of the National People's Congress on 23 February 1997, which came into effect on 1 July 1997 and it was explained in §§3-4:

> "3. Since some provisions of the ordinances and subordinate legislation, which are previously in force in Hong Kong and listed in Appendix II of this Decision, contravene the Basic Law, ***they shall not be adopted as provisions of laws of the Hong Kong Special Administrative Region.***
>
> ***4. The laws previously in force in Hong Kong***, which have been adopted as laws of the Hong Kong Special Administrative Region, ***shall be applied as of July 1, 1997 with such modifications,*** adaptations restrictions and exceptions as may be necessary for making them conform with the status of Hong Kong ***after the People's Republic of China resumes the exercise of sovereignty*** over it and with the relevant provisions of the Basic Law, for example, the New Territories Land

46. On any proper construction of Section 2(1) of the ERO:

(1) it provides the CIEC with unlimited powers to enact regulations that could derogate from all fundamental rights of persons protected under HKBOR Section 8 including the such rights that are specified as non-derogable under Section 5(2)(a) - (c) of the HKBORO.

(2) It provides the CIEC with the aforesaid powers, in situations that do not amount to public emergencies.

47. It therefore follows that Section 2(1) ERO was entirely repealed when the HKBORO came into force and therefore there is no power for the CEIC to invoke to make the Regulation in question.

48. Alternatively, insofar as Section 2(1) ERO is not entirely inconsistent with Section 5 of the HKBORO, it must be read as only enabling the CEIC to invoke the power in time of public emergency which threatens the life of the nation, and the existence of which is officially proclaimed.

49. The CE explicitly admitted that Hong Kong is not at a time of public emergency and the PFCR was made entirely on the ground of "public danger" (see Paragraph 12 above).

50. There is no room for the subjective, vague and undefined situation "on any occasion which the Chief Executive in Council **may consider to be an occasion of** public danger that would allow the derogation of fundamental rights. This is effectively unrestrained executive power to legislate given the breadth of the matters for which regulations may be made by the CEIC under section 2(2) of the ERO. Section 2 was plainly inconsistent with the

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(Exemption) Ordinance shall be applied in accordance with the principle mentioned above."

In other words, the aforesaid NPCSC decision crystallised the law previously in force but did not provide a mechanism to revive any laws that were repealed by operation of section 3(2) HKBORO.

BORO to the extent it permits widespread and unlimited derogation of fundamental rights on the ground of "public danger", and hence section 2 is to that extent unconstitutional and does not survive the change of sovereignty in 1997. It follows then that:

(1) the decision to enact PFCR based on the framework of the ERO is null and void;

(2) if not otherwise null or void, the power is restricted, and should not be read as on "any occasion" other than Section 5 HKBORO and subject to the restriction against derogation from the non-derogable rights therein.

C.2 Ground 2: Unconstitutionality: Section 2 of the ERO inconsistent with Art 48, 62 and 65 to the extent that it permits the CEIC to bypass the Legislative Council

51. BL 17 states that: "*The Hong Kong Special Administrative Region shall be vested with legislative power*".

52. BL 18 states that: "*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.*"

53. BL 66 states that: "*The Legislative Council of the Hong Kong Special Administrative Region shall be the legislature of the Region.*"

54. BL 73(1) states that: "*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;...*"

55. LegCo, as the legislature of HKSAR, is the legislative branch of the HKSAR tasked with the primary duty to enact law and to scrutinise executive conduct. The Government, as the executive branch, only enjoys

the power to draft and introduce bills, motions and subordinate legislation to the Legislative Council (BL 62(5)). The primary duty to make law is on the LegCo. Under BL 72(5) the President of the LegCo has the power/duty to call an emergency session of the LegCo on the request of the CE. This emphasises the division of powers between the executive authorities and the legislature. Under BL 73(1) the powers of the LegCo include the power to enact, amend, or repeal laws in accordance with the provisions of the BL and legal procedures.

56. The power of the CEIC to make general law with criminal consequences, if any, must be continued to be restricted to exceptional circumstances of a public emergency and when it is not possible to convene the legislature.

57. There is no evidence on any attempt by the CE to convene the LegCo. Although the LegCo is in recess, it is possible to convene an emergency session of the LegCo, see Rule 15 of the Leg Rule 15 of Rules of Procedure of the LegCo. Indeed the LegCo is ready, willing and able to convene such an emergency session.

58. There is no evidence that the exigency of the situation in Hong Kong is such that the CEIC could not wait for another 10 days when the new LegCo session will begin.

59. In addition, it is possible for the CE or President to convene an emergency session even though the LegCo is not in session. No such attempt has been made by the CE. Indeed, the LegCo is ready, willing and able to convene such an emergency session. Further, there are sufficient LegCo members presently in Hong Kong for a quorate LegCo to be immediately convened.

60. In any event, there is no evidence that the CEIC has considered requesting the convening of the LegCo and that it is impossible to do so, making it necessary to exercise any power under the ERO. Further, there is no evidence that the exigency of the situation in Hong Kong is such that the CEIC could not wait for another 10 days when the new LegCo session will begin.

61. Further, the first session of the LegCo is later than usual which will be on 16 October 2019. The effect is that the PFCR would be in effect without any scrutiny for 11 days (which in the current climate may lead to the arrest and incrimination of hundreds of people) and up to 39 days once LegCo reconvenes.

62. In the very recent UK Supreme Court case of *R (on the application of Miller) v the Prime Minister* [2019] UKSC 41, the Supreme Court held that the power to prorogue cannot be unlimited (§44). The Supreme Court further states that "the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model." (§48).

63. The Supreme Court further held that a longer than normal prorogation had the effect of frustrating or preventing the constitutional role of the British Parliament in holding the United Kingdom Government to account.

64. Furthermore, if section 2(1) to (3) of the ERO were to be read as if the CEIC, further without the involvement of the LegCo in any way at all, has the sole power to make and repeal regulations under the ERO and in the absence of any public emergency, this would be unconstitutional in that it violates the distribution of power between the Government and the LegCo under *inter alia* BL 62(5), 66 and 73(1).

65. However, the Government's position, as is apparent from their public statements, appears to be that a regulation made under the ERO would, as a piece of subsidiary legislation, be laid before the LegCo for negative vetting in accordance with the requirement in section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) **("IGCO").**

66. It may not be unconstitutional for the LegCo to delegate certain legislative powers to certain government ministers to make subsidiary legislation, while reserving for itself the power to amend or repeal such subsidiary legislation laid before it. Such delegation is commonplace in various ordinances of Hong Kong. Given the principle of continuity in the Basic Law, it would be difficult to think that the Basic Law had intended such a practice to be made unconstitutional.

67. There are however limits - to take an extreme example, if the LegCo enacts an Ordinance to delegate all its law-making powers to the CEIC, the LegCo would have abdicated its constitutional duty as the legislature of the HKSAR under BL 66. This cannot be the intention of the Basic Law. In such circumstances, it must be for the court as guardian of the rule of law and within the HKSAR the final arbiter of what is constitutional under the Basic Law to decide whether such delegation is lawful.

68. The existence of such a limit is also a necessary result of a contextual and purposive construction of the Basic Law including *inter alia* BL 62(5), 66 and 73(1). The Basic Law did not expressly grant any law-making power to the Government, and instead stipulated the LegCo as the legislature. The Basic Law expressly provides that the LegCo has the power to enact laws, whereas the Government only has the power to introduce subsidiary legislation. The LegCo does not have sovereign power and its power to delegate any law-making power must be exercised consistently with the separation of powers in the Basic Law.

69. The limits to such delegation has been expressed in the Common law in terms of the principle of legality as described in Ground 3 below. Indeed, the existence of a limit to the legislature's delegation power has also been recognised in other jurisdictions with comparable constitutional arrangements.

70. One such jurisdiction is Ireland, where there exists, like Hong Kong, a written constitution with express separation of powers, designating one specific body (the Oireachtas) as the legislature while recognising that delegated law-making powers are acceptable.

71. In ***Cityview Press Limited v An Chomhairle Oiluna*** [1980] 1 IR 381, O'Higgins CJ of the Supreme Court of Ireland described the test for the limit of the Oireachtas' delegating powers as follows:

> "*The giving of powers to a designated Minister or subordinate body to make regulations or orders under a particular statute has been a feature of legislation for many years. The practice has obvious attractions in view of the complex, intricate and ever-changing*

situations which confront both the Legislature and the Executive in modem State. Sometimes, as in this instance, the legislature, conscious of the danger of giving too much power in the regulation or order-making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. This retains a measure of control, if not in Parliament as such, at least in the two Houses. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated or permitted by the Constitution. In discharging that responsibility, the Courts will have regard to where and by what authority the law in question purports to have been made. In the view of this Court, the test is ***whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power****."

72. The applicable principles were recently further considered in ***Bederev v Ireland*** [2016] IESC 34 (22 June 2016) at §§21-29. In particular, it was held that:

"24. … ***There are two principles: legislation must set boundaries and a defined subject matter for subsidiary law-making and those affected by secondary legislation have an entitlement to know from the text of legislation where those boundaries are and what that subject matter is.*** *Otherwise, challenges by way of judicial review to the vires of subsidiary legislation become impossible. This is about what is in the contemplation of the enactment in enabling secondary law-making. ... Under the Constitution, the delegation of powers to a*

body to make any subsidiary instrument is only permissible where the objective to be achieved is discernible from the text of the primary legislation and the extent of the power to be exercised is delimited. ***An overly-wide objective might in itself be an abrogation of power by the Oireachtas, while a constricted purpose which is not sufficiently limited as to its scope and effect may similarly trespass beyond the boundaries*** *permitted by the Constitution. This is a matter of analysis as to degree.* ..."

73. The mischief must be sufficiently described in the parent legislation (§27) and, even if there is a policy discernible in the legislation, a failure to set boundaries will still amount to an abrogation of democratic power (§28). For example, ***Laurentiu v Minister for Justice*** [1999] 4 IR 26 concerned an Act giving a power to the Minister "whenever he thinks proper" to make an order "for the exclusion of the deportation and exclusion" of non-nationals. It was held that someone would search "*in vain to find principles and policies regarding deportation of aliens in the Act*" and this was therefore a case where the "*legislature grasped the power over aliens from the executive and then delegated [that power] inadequately to the Minister.*"

74. These observations are equally apposite to the ERO. The ERO has only four sections. Section 2 simply grants a general power to the CEIC to make *any* regulation whatsoever which he may consider desirable in the public interest. The descriptions of "emergency" and "public danger" are subjective, vague, and not defined. The powers under Section 2(1) are also general and wide. While Section 2(2) provides some specific examples, it is provided without prejudicing the generality of Section 2(1). Furthermore, there is no express restriction against derogation from fundamental rights even in the examples set out in Section 2(2).

75. In other words there is no limit to the areas of law or the type of laws that can be made.

76. One would indeed search in vain to find any guidance in the ERO itself as to what kind of subsidiary legislation cannot possibly be made under it.

77. As regards any argument that flexibility is in the nature of emergency powers, the following observations in ***Bederev*** at §25 are pertinent:

> *"While the State has argued urgency as a central factor justifying the delegation of legislative power, that cannot enable the abrogation of the power of the Oireachtas. The fact that a particular mischief, be it a financial crisis, the collapse of an insurance company or something similar, requires an urgent response does not justify any departure from the strict requirement that legislation is for the Oireachtas. As Denham J stated in Laurentiu v Minister for Justice [1994] 4 IR 26 at 61, to "abdicate would be to impugn the constitutional scheme."*

78. In the United States, sweeping delegations of legislative power by the Congress to the executive authorities have similarly been struck down as unconstitutional: see e.g. ***A. L. A. Schechter Poultry Corp. v. United States***, 295 U.S. 495 (1935). The principles are apparent from the Syllabus of ***Schechter*** and they also require that some policies and standards be laid down in the legislation delegating such powers. For example:

> *"1. Extraordinary conditions, such as an economic crisis, may call for extraordinary remedies, but they cannot create or enlarge constitutional power. P. 295 U. S. 528.*
>
> *2. Congress is not permitted by the Constitution to abdicate, or to transfer to others, the essential legislative functions with which it is vested. Art. I, § 1; Art. I, § 8, par. 18. Panama Refining Co. v. Ryan, 293 U. S. 388. P. 295 U. S. 529.*
>
> *3. Congress may leave to selected instrumentalities the making of subordinate rules within prescribed limits, and the determination of facts to which the policy, as declared by Congress, is to apply; but it must itself lay down the policies and establish standards. P. 295 U. S. 530."*

79. The contrast between the position on delegation of legislative powers in US and Ireland on the one hand, and that in Commonwealth jurisdictions with parliamentary supremacy on the other, was usefully surveyed by the

South African Constitutional Court in ***Executive Council of the Western Cape Legislature v President of the Republic of South Africa*** (Case No. CCT 27/95, 22 September 1995) at §§52-60 (*per* Chaskalson P) and at §§126-135 (*per* Mahomed DP).

80. In short, the ERO is unconstitutional as it involves an usurpation of the legislative powers of the LegCo when there is no justification as to why the LegCo could not be convened, and that the LegCo's delegation of its legislative powers to the Government is made on impermissibly vague circumstances and virtually unlimited terms, to the extent that it involves an abdication of the LegCo's duties as the legislature under BL 66 and BL 73 and a violation of the separation of powers between the Government and the LegCo under *inter alia* BL 62 and 73. Since the ERO is unconstitutional and void, the PFCR made under the ERO is also unconstitutional and void.

C.3 Ground 3: Ultra Vires: Principle of Legality: The Regulations are Ultra Vires the Emergency Regulations Ordinance

81. ERO are *ultra vires* if one construes it in light of the principle of legality.

82. The principle of legality requires that fundamental rights must be overridden by specific words and not general words.

83. In ***HM Treasury v Ahmed*** [2010] 2 AC 534 (UKSC) a case not unlike the present and concerning the legality of powers of the executive to make regulations that interfere with fundamental rights, the principle of legality was described by the various Supreme Court Justices as follows:-

    (1) Lord Hope referred (at §§44-46) from the now famous speech of Lord Hoffmann in ***R v Secretary of State for the Home Department, Ex p Simms*** [2000] 2 AC 115, 131 (which is quoted in the judgment of Lord Phillips in ***Ahmed*** at §111):

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. ***Fundamental rights cannot be overridden by general or ambiguous words****. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.* ***In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual****. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."*

(2) Lord Hope further explained how the principle of legality operated in relation to executive powers to enact regulations intruding into fundamental rights:

"45. It cannot be suggested, in view of the word "any", that the power is available only for use where the Security Council has called for non-military, diplomatic and economic sanctions to deter aggression between states. But the phrase "necessary or expedient for enabling those measures to be effectively applied" does require further examination. The closer those measures come to affecting what, in R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115 , 131, Lord Hoffmann described as the basic rights of the individual, the more exacting this scrutiny must become. If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive. ...

...

*47. **I would approach the language of section 1 of the 1946 Act, therefore, on the basis that Parliament did not surrender its legislative powers to the executive any more than must necessarily follow from the words used by it**."*

...

61. This is a clear example of an attempt to adversely affect the basic rights of the citizen without the clear authority of Parliament – a process which Lord Browne-Wilkinson condemned in R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539. As Lord Hoffmann said in R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115, 131, fundamental rights cannot be overridden by general or ambiguous words. The absence of any indication that Parliament had the imposition of restrictions on the freedom of individuals in mind when the provisions of the 1946 Act were being debated makes it impossible to say that it squarely confronted those effects and was willing to accept the political cost when that measure was enacted.

...

76. I would accept Mr Singh's proposition that, as fundamental rights may not be overridden by general words, section 1 of the 1946 Act does not give authority for overriding the fundamental rights of the individual. It does not do so either expressly or by necessary implication. ..."

(3) Per Lord Rodger at §185 (*"I have come to the conclusion that, by enacting the general words of section 1(1) of the 1946 Act, Parliament could not have intended to authorise the making of AQO 2006 which so gravely and directly affected the legal right of individuals to use their property and which did so in a way which deprived them of any real possibility of challenging their listing in the courts."*)

(4) *Per* Lord Mance at §§240 and 249 (*"The words of section 1(1) are general, but for that very reason susceptible to the presumption, in the absence of express language or necessary implication to the contrary, that they were intended to be subject to the basic rights of*

the individual: see Ex p Simms [2000] 2 AC 115 , per Lord Hoffmann").

84. As to the meaning of a *necessary* implication in this context, see the speech of Lord Hobouse in *Morgan Grenfell & Co Ltd) v Special Commissioner* [2003] 1 AC 563 at §45:

> *"45 It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428, 481. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included.* ***A necessary implication is a matter of express language and logic not interpretation***."

85. The aforesaid holdings have been adopted, approved and applied in Hong Kong, see e.g. *A v Commissioner of Independent Commission Against Corruption* (2012) 15 HKCFAR 362, at §§28-29, 67-71; *Competition Commission v Nutanix Hong Kong Ltd & Ors* [2019] HKCT 2 at §63.

86. It will be noted from the above that the principle of legality:
    (1) Is concerned with legislative language that is ambiguous or general; and
    (2) Insists that the Courts conclude that no abrogation of rights has been intended absent (i) express words, or (ii) a *necessary* implication; and
    (3) This is a hard-edged question of law and not a soft edged exercise of proportionality or weighing of the interests between competing interests or groups in society.

87. In the present case, Section 2(1) of the ERO provides general words that are ambiguous and wide (i.e. subsection (2) provides expressly for

"*Without prejudice to the generality of the provisions of subsection (1)*"), and therefore it cannot be conceivably construed as specific words to authorise any measure that restricts rights.

88. The prohibition against the wearing of facial coverings in public places involves a clear interference with rights under Article 14 (privacy), Article 15 (freedom of thought and conscience), Article 16 (freedom of opinion and expression), and Article 17 (right to peaceful assembly).

89. Residents may for example, wish to express their political opinions (i.e. Article 16) through public demonstrations without being identifiable (i.e. Article 14) by their employer, colleagues or friends, and more importantly those who are hostile to them.

90. Requiring them to attend without masks any lawful protest of a controversial matter (i.e. Extradition Bill) diminishes their ability to exercise their freedom of assembly and expression. This is just one example; many other ways in which the measure affects rights could be conceived of.

91. But the Court in this ground is required to answer the *a priori* question of whether the head legislation (i.e. the ERO) authorises this restriction on rights at all.

92. Section 2(1) of the ERO is framed in extremely general and wide terms and Section 2(2) confirms that it is to be read widely and without prejudice to its generality.

93. Read literally, it purports to delegate legislative authority to the executive to literally anything it considers expedient, including regulations to incarcerate all blue eyed babies for example.

94. The plain language of section 2(1) of the ERO is both insufficient to indicate an intention to restrict rights nor does it give rise to a *necessary* implication that this is objectively intended. (The antiquity of the legislation makes no difference to this analysis – the 1946 Act in **Ahmed** also long pre-dated the advent of modern human rights and judicial review).

95. In *Ahmed*, the Supreme Court was concerned with section 1 of the United Nations Act 1946 ("**the 1946 Act**") which Parliament authorised the Government to make regulations necessary to implement resolutions from the United Nations Security Council ("**UNSC**") in words almost identical to the ERO "*His Majesty may by Order in Council make such provision* ***as appears to Him necessary or expedient*** *for enabling those measures to be effectively applied, including* ***(without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order***."

96. The power of the UNSC to adopt binding resolutions under Article 41 of the UN Charter applies only where it has determined that there exists a threat to international peace and security. So in Ahmed, the UNSC promulgated regulations requiring Member States to freeze the assets of certain named individuals believed to be associated with Al-Qaeda and Osama bin Laden (*Ahmed* judgment at §§17-22). Pursuant to its obligations under that resolution, the UK had adopted regulations under section 1 of the 1946 Act (*Ahmed* judgment §§23-30). The claimants challenged the regulations *inter alia* on the basis that (1) they involved a restriction on rights, (2) nothing in the general words section 1 of the 1946 Act conferred authority to make regulations interfering with rights.

97. The Supreme Court upheld the challenge, finding the regulations *ultra vires*. As correctly summarised in the headnote, at (1):

> *"Held, (1) allowing the appeals of the applicants in the first case, that, since fundamental rights could only be overridden by express language or necessary implication, the general wording of section 1 of the 1946 Act did not empower the executive to override the fundamental rights of the individual"*

98. Applying the same, notwithstanding that section 2(2) of the ERO makes clear that certain interferences with rights have been contemplated and are authorised, nothing in those provisions expressly, or by necessary implication, evinces a legislative intention to restrict the rights in the manner and to the extent contemplated by the Regulations at issue.

99. When the ERO is correctly construed, in accordance with the principle of legality, regulations purportedly made by the Government under it are *ultra vires*.

C.4 Ground 4: Illegality: Failure to show that there is a "public danger" that justifies the exercise of power under the ERO in breach of s.2 ERO and s.5 HKBORO

No evidence of public danger

100. Alternatively, and if the ERO is valid or that it is constitutional to enact legislation under the ERO on the ground of public danger (which is not accepted), the term "public danger" has to be read down and be construed *sui generis* with emergency, given that upon an acknowledgement of "public danger", the CEIC can exercise a full range of legislative power with far reaching consequences. Section 2 is not intended to give the CEIC a general legislative power. A public danger refers to a situation when there is a real threat to the life and existence of the community and not just mere disorder, and it is necessary to be the last resort in the sense that there is no other reasonable alternatives or measures to contain the situation under existing law. After all, public danger cannot conceivably be equated with public disorder. Ultimately, it is for the Court to assess whether a state of "public danger" exists, see *Liversidge v Anderson* [1948] AC 206.

101. The evidence currently shows at best, there is a public disorder. It has not been shown that the full array of powers under the Public Order Ordinance etc is not sufficient to deal with the present situation of public disorder.

102. In other words, there was no legal or evidential basis (on their own reasoning and justification) for CEIC to invoke the power under the ERO.

103. Given the draconian nature of Section 2 of the ERO, it is for the Court to read in additional procedural safeguards so as to be compatible with Section 5 of the BORO, any public danger has to be publicly proclaimed and gazetted as such, such conditions exist and with evidence that can be

tested by a Court of law, and the measures adopted have to be strictly necessary and proportionate to the exigency of the situation, and should only last for a short period of time with the possibility of periodic review: *Brannigan v McBride* (Application no. 14553/89; 14554/89).

104. Thus and only in such circumstance can the CEIC bypass the LegCo.

105. In this case, no public emergency has been officially proclaimed, and there has been no indication by the Government as to whether there would be a periodic review (the legislation is indefinite and does not allow for LegCo to scrutinise on a periodic basis, nor for LegCo to repeal the Regulation).

C.5 Ground 5: PFCR is Unconstitutional

106. The PFCR amounts to a disproportionate restriction on liberty of a person, the freedom of expression, right of peaceful assembly and protection of privacy under Articles 5, 14, 15, 16 and 17 of the BOR and Article 27 of the BL.

107. The freedom of peaceful assembly is a fundamental right and is of cardinal importance for the stability and progress of society: *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229 at §§1-2.

108. The freedom of expression is also a fundamental right in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. This freedom includes the freedom to express ideas which the majority may find disagreeable or offensive and the freedom to criticise governmental institutions and the conduct of public officials: *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, per Li CJ at §41.

109. The Court must give such a fundamental right a generous interpretation so as to give individuals its full measure and on the other hand, restrictions on such a fundamental right must be narrowly interpreted: *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4.

110. In relation to any potential violent incident that may happen in a peaceful assembly, the ECtHR has repeatedly stated that an individual does not

cease to enjoy the right to freedom of peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intention or behaviour. Furthermore, the possibility of persons with violent intentions, not members of the organising association, joining the demonstration cannot as such take away that right: *Kudrevicius and others v Lithuania*, App. No. 37553/05, 15 October 2015, Grand Chambers at §94.

111. The Government has a positive duty to facilitate the realisation of the right of peaceful assembly and to take reasonable and appropriate measures, against the relevant circumstances in the particular case, to enable lawful assemblies to take place peacefully: *Leung Kwok Hung* at §22.

112. However, these rights are not absolute and may be subject to restrictions. Such restrictions must be prescribed by law and must be proportionate. The CFA set out the proportionality test in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §§134-135:-

(1) Whether the impugned Decision pursues a legitimate aim
(2) Whether the impugned Decision is rationally connected to the legitimate aim;
(3) Whether a less intrusive or drastic measure could have been used (in this case, as civil and political rights are engaged, the "no more than necessary" standard should be adopted);
(4) Whether a reasonable and fair balance has been struck between the societal benefits of the measure and the impact upon any constitutionally protected rights of the individual.

Not Rationally Connected

113. Under the second limb, the enactment of the PFCR is not rationally connected to a legitimate aim.

114. The legitimate aim appears, in the PR's case, to "protect public order and public safety" (§3 of the LegCo Brief) as a prohibition on facial covering in public assemblies would "effectively reduce act of violence and

facilitate police investigation and administration of justice" (§3 of the LegCo Brief).

115. However, the PFCR expressly covers an unlawful assembly, an unauthorized assembly, a public meeting s. 7(1) of the Public Order Ordinance ("**POO**") that is not prohibited by the Commission of Police ("**CP**") (s. 3(1)(c) of PFCR) and public procession under s. 13(1) of the POO that is not objected by the CP (s. 3(1)(d) of PFCR). In short, it covers all public meetings, lawful and unlawful.

116. The enactment of PFCR is not rationally connected to its aim of restoring public order as no such restoration is needed in an authorised procession or assembly. The PFCR assumes that whoever wears a mask wears it for an unlawful or an unreasonable purpose. There is no logical or rational relationship between wearing a mask and violent behaviour. Indeed, the large number of protesters who wore a mask did not take part in any violent confrontation.

117. Furthermore, if the legitimate aim is crime prevention, the anti mask law is not going to stop criminal activities. It cannot stop the violent protestors from continuing to resort to violence and continuing to cover their faces when doing so or in the preparation of doing so. If the police can catch them during the violent protests their identity would be revealed and there is no point in having additional offence that they are wearing a mask. If violent offenders cannot be caught, their identity will remain unknown (because they will still be covering their faces). Its effect is arguably only to deter the law abiding protestors to take part in lawful public meetings and assemblies.

118. One may in fact argue that not only is the means unable to achieve the aim, it actually leads us further away from it (ie it backfires, leading to further anger and hence violent protests).

119. There is simply no direct evidence that prohibition of mask would lead to less violence. Even if there were such effect, it would be at best, and indirect and therefore insufficient to meet the rational connection test.

Disproportionate Restriction

120. Second, the restriction under PFCR in face covering, not only in public assemblies that are rendered unlawful under POO, but also unprohibited public procession and meetings, is clearly more than necessary and therefore fail to satisfy the third stage of the proportionality analysis.

121. Under s. 3(c) and (d) of the PFCR, any public meeting that has not been prohibited by Commission of Police under the POO and any public procession with a notice of no objection fall within the ambit of the PFCR.

122. The provisions of PFCR are contrasted with English statutory provisions in the Criminal Justice and Public Order Act 1994, where Section 60(4A) empowers police officers to request any person to remove his/her mask. However, as held by the Court of Appeal in *Director of Public Prosecution v Avery* [2002] 1 Cr App R 31 409, the English provisions amount to a significant interference to the liberty of the subject (§17). The Court was only satisfied as to the legality of the provisions because the powers arise only in anticipation of violence and after deliberation and a decision of a senior police officer (§18(1)).

123. Thus, the PFCR amounts to a blanket prohibition of wearing facial covers in all public meetings, processions, and demonstrations and not more than necessary.

124. Third, the PFCR is a disproportionate intrusion of the rights of individuals under Articles 5, 15, 16 and 17 of the BOR and Article 27 of the BL, falling foul of stage four of the proportionality test.

125. Liberty of the person includes liberty to decide what to wear and where to go. Wearing a mask is not an unlawful act by itself. Attending a peaceful public assembly or demonstration is a fundamental right.

126. In *Villeneuve c. Montreal (City of)*, 2016 QCCS 2888, the Superior Court of Montreal held that a regulation prohibiting anyone who participates in a meeting, parade or other public gathering from having their faces covered

without reasonable cause was unconstitutional because it violated the freedoms of expression and peaceful meeting of those who would like to have their faces covered during a demonstration without any particular reasons.

127. The Court in *Villeneuve* further held that even if the Court restricts the scope of the regulation to meetings or demonstrations that hinder public roads, it would not provide police with adequate guidance. The risk of abuse exists even in the context where the event is peaceful.

128. In essence, the PFCR unjustifiably restricts the exercise of lawful rights without requiring even any reasonable suspicion of any unlawful behaviour. The burden is thus unjustifiably shifted to the protestors to prove the existence of an innocent reason under s. 4 of the PFCR for perfectly lawful activities.

129. There are a number of reasons for participants to wear mask in a public procession or public assembly other than concealing their identity to evade police investigation as stipulated in §3 of the LegCo Brief. Protesters may wear a mask to protect themselves from serious doxxing by those in support of the Government, or to protect themselves from retaliatory or hostile consequences on their career, studies, or even friends. See *K v Commissioner of Police* [2019] HKCFI 2307, at §2. These are real threats and the PFCR inhibits protesters to freely express their views in public assemblies or to even take part in peaceful demonstrations.

130. Nevertheless, not only the name and personal details of the Applicant appear online subsequently, but also the name and personal details of her family. In a press release published by the Privacy Commission of Personal Data dated 30 August 2019, it was reported that cases of doxxing involved not only the protesters themselves, but also their family members.

131. Furthermore, there is also overwhelming evidence of retaliation by employers for persons who are associated both for or against the protestors.

132. The Government has accepted that a lawful public meeting or public demonstration could be turned into an unauthorized or unlawful assembly

quickly with protesters deviating from the original location or route approved by the Police and some radical protesters resorting to violence. It is therefore all the more necessary for protesters who participate in a lawful public meeting or public assembly to wear protective masks to protect themselves if the public meeting or public assembly is turned into an unauthorized or unlawful assembly when they have no intention to take part in such unauthorized or unlawful assembly. The PFCR disproportionately restricts their right to participate even in lawful assembly and demonstrations.

133. There is no evidence to show that the police have not been able to maintain law and order because of protesters wearing masks. The police has arrested over 2,119 protesters since June 2019 and 269 protesters on 1 October 2019 alone, notwithstanding that many of them wore a mask.

134. The PFCR does not therefore achieve a fair balance. Those protesters who have engaged in violent behaviour are unlikely to be deterred by the PFCR; nor will they be likely to comply with the PFCR. The PFCR will not be able to achieve a reduction of violent behaviour; yet it would deter those who wish to exercise their lawful rights in a peaceful manner but do not wish to reveal their identity for legitimate reasons.

135. In response to the LegCo Brief §15, the Government opined that the rights to freedom of expression and peaceful assembly are not deprived as persons are free to participate in lawful assemblies without the use of facial covering.

136. However, simply being able to participate in lawful protests does not necessary lead to the conclusion that one's rights to freedom of expression and peaceful assembly are not deprived, such rights are nonetheless curtailed if one is unable to freely exercise that right without threats to their life, their livelihood, or their relationships.

137. More importantly, such interference is unjustified after weighing between the ineffectiveness in achieving the purpose of reducing violence and detrimental effect on depriving peaceful demonstrators to mask up for reasons set out above.

D. STANDING

138. All Applicants are Legislative Councillors. They are part of the Legislative Council which exercises the constitutional duty under BL 73. They all regularly organise and/or take part in public assembly and public procession.

139. All Applicants have "sufficient interest in the matter to which the application relates within the meaning of section 21K(3) of the High Court Ordinance (Cap. 4) and Order 53, rule 3(7) of the RHC.

E. Delay

140. This application has been made promptly and in any event within 3 months of the Decision.

F. Interim Relief

141. The Applicants are seeking both leave to commence the Judicial Review and the Interim Relief together. The PFCR is unconstitutional because it is a disproportionate restriction of fundamental rights. It is also illegal because the ERO is unconstitutional. Once implemented, it will affect the exercise of fundamental rights of many people in Hong Kong. It has also provoked large scale of protests as soon as it was announced. On the other hand, there is no reason to believe that the situation would be made worse than that before the PFCR was made.

142. Indeed, until 1 October 2019, the situation was still largely contained and the police were able to maintain law and order. There is no evidence that the police is unable to maintain law and order, as evidenced by the large number of arrests that were made in the past few days without the PFCR. On balance of convenience, a temporary suspension of its effect will not

pose greater risk to the community than what the risk has already been, whereas to allow it to take effect is likely to worsen the current situation and to allow derogation of fundamental rights that could not be justified or remedied, let alone the erosion of the rule of law.

143. Accordingly, it is appropriate to make an interlocutory order suspending the PFCR and/or restraining the police from relying on the PFCR until the court has an opportunity to properly consider the validity of the ERO and to the extent which it can be invoked by the CEIC to legislate, and the constitutionality of both the ERO and the PFCR. Further, it is still open to the CE, through the President, to request an immediate convening of an emergency session of LegCo to put for the purpose of putting the Regulation itself as a Bill. Under Rule 54 of the LegCo Rules of Procedure, LegCo is capable of passing legislation with three readings of a bill being conducted in one LegCo sitting on the same day.

144. If necessary, an early date of the full hearing for leave is asked.

G. Conclusion

145. For the reasons set out above, the Applicants respectfully asks the Court to allow their Application and grant the relief sought.

Dated the 5th day of October 2019

Gladys Li SC
Johannes Chan SC
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HCAL /2019

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

KWOK WING HANG	**1st Applicant**
CHEUNG CHIU HUNG	**2nd Applicant**
TO KUN SUN JAMES	**3rd Applicant**
LEUNG YIU CHUNG	**4th Applicant**
JOSEPH LEE KOK LONG	**5th Applicant**
MO, MAN CHING CLAUDIA	**6th Applicant**
WU CHI WAI	**7th Applicant**
CHAN CHI-CHUEN RAYMOND	**8th Applicant**
LEUNG KAI CHEONG KENNETH	**9th Applicant**
KWOK KA-KI	**10th Applicant**
WONG PIK WAN	**11th Applicant**
IP KIN-YUEN	**12th Applicant**
YEUNG ALVIN NGOK KIU	**13th Applicant**
ANDREW WAN SIU KIN	**14th Applicant**
CHU HOI DICK EDDIE	**15th Applicant**
LAM CHEUK-TING	**16th Applicant**
SHIU KA CHUN	**17th Applicant**
TANYA CHAN	**18th Applicant**
HUI CHI FUNG	**19th Applicant**
KWONG CHUN-YU	**20th Applicant**
TAM MAN HO JEREMY JANSEN	**21st Applicant**
FAN, GARY KWOK WAI	**22nd Applicant**
AU NOK HIN	**23rd Applicant**
CHARLES PETER MOK	**24th Applicant**

IN THE MATTER of an Application by the Applicant for Interim Relief in Judicial Review proceedings pursuant to Order 53, rule 8 of the Rules of the High Court, Cap.4A
and
IN THE MATTER of section 2 of the Emergency Regulations Ordinance, Cap 241 and the Prohibition on Face Covering Regulation
and
IN THE MATTER Article 33 and 66 of the Hong Kong Basic Law, and of s.5 of the Hong Kong Bill of Rights Ordinance, Cap. 383 and Articles 14, 15, 16, 17 and 21 of the Hong Kong Bill of Rights

NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (O.53, r.3(2))

Filed on the day of October 2019

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