Press Summary (English)

Press Summary (Chinese)

CACV 541, 542 & 583/2019

[2020] HKCA 192

CACV 541/2019

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 541 OF 2019

(ON APPEAL FROM HCAL 2949/2019)

BETWEEN

LEUNG KWOK HUNG (梁國雄)	Applicant
and	
SECRETARY FOR JUSTICE	1st Respondent
CHIEF EXECUTIVE IN COUNCIL	2nd Respondent

CACV 542/2019

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 542 OF 2019

(ON APPEAL FROM HCAL 2945/2019)

BETWEEN

KWOK WING HANG	1st Applicant
CHEUNG CHIU HUNG	2nd Applicant
TO KUN SHUN 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

and

CHIEF EXECUTIVE IN COUNCIL	1st Respondent
SECRETARY FOR JUSTICE	2nd Respondent

CACV 583/2019

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 583 OF 2019

(ON APPEAL FROM HCAL 2945/2019)

BETWEEN

KWOK WING HANG	1st Applicant
CHEUNG CHIU HUNG	2nd Applicant
TO KUN SHUN 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
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FAN, GARY KWOK WAI	22nd Applicant
AU NOK HIN	23rd Applicant
CHARLES PETER MOK	24th Applicant

and

CHIEF EXECUTIVE IN COUNCIL	1st Respondent
SECRETARY FOR JUSTICE	2nd Respondent

(heard together)

Before: Hon Poon CJHC, Lam VP and Au JA in Court

Dates of Hearing: 9 and 10 January 2020

Date of Judgment: 9 April 2020

J U D G M E N T

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The Court:

A. INTRODUCTION

1. Since June 2019, Hong Kong has experienced serious social unrests and public disorders marked by protests, escalating violence, vandalisms and arsons across the territory. It is a dire situation that has not been seen in the last 50 years.

2. The increasing violence has resulted in widespread property damage, assaults on persons, serious damage and interruptions to major public transport facilities and highways. The violence and damage are mostly caused by protestors wearing masks and dressed in black outfits. At the same time, it is a common phenomenon that many other protestors participating in public assemblies and processions who are *not* involved in violence are also wearing masks and dressed in black outfits.

3. To tackle the dire situation, on 4 October 2019, the Chief Executive-in-Council ("the CEIC"), in the exercise of the power under section 2 of the Emergency Regulations Ordinance (Cap 241) ("the ERO"), announced the enactment of the Prohibition on Face Covering Regulation (Cap 241K) ("the PFCR") on the basis that there was an occasion of "public danger" in Hong Kong.

4. In gist, the PFCR makes it an offence for anyone without reasonable excuse wearing a mask that will prevent identification at public assemblies or processions, and empowers the police to demand any person to remove the mask and, if that person refuses to do so, to remove it with force if necessary. The PFCR took effect at midnight on 5 October 2019.

5. Soon thereafter, the applicants under HCAL 2945/2019 (collectively, "KWH") and the applicant under HCAL 2949/2019 ("LKH") brought these judicial review proceedings to challenge the PFCR on the basis that it is unlawful and invalid as (a) the ERO is itself (i) unconstitutional (Ground 1); (ii) was impliedly repealed (Ground 2); (iii) falls foul of the "prescribed by law" requirement (Ground 3); and (b) in any event, the PFCR (i) is *ultra vires* by reason of the principle of legality (Ground 4); and (ii) amounts to disproportionate infringement on the protected fundamental rights to freedom of expression, assembly, movement and the right to privacy (Ground 5A on section 3 and Ground 5B on section 5).

6. The rolled-up hearing of these judicial reviews were heard before G Lam and Chow JJ (collectively, "the Judges") on 31 October and 1 November 2019. By the judgment ("the Judgment") and decision ("the Decision") handed down respectively on 18 and 22 November 2019, the Judges allowed the applicants' judicial reviews under Grounds 1, 5A and 5B, and declared that:

> (1) The ERO insofar as it empowers the CEIC to make regulations on "any occasion of public danger" is unconstitutional as it is incompatible with the Basic Law ("BL").
>
> (2) The PFCR is therefore also invalid and of no effect.
>
> (3) In any event:
>
> > (a) sections 3(1)(b), (c) and (d) of the PFCR are incompatible with BL27 and Articles 14, 16 and 17 of the Hong Kong Bill of Rights ("BOR") and are therefore null, void and of no effect;

(b) section 5 of the PFCR is also incompatible with BL28 and BOR5, and is therefore null, void and of no effect.

7. By way of the Notices of Appeals filed on 25 November 2019[1], the respondents appeal against the Judgment and the Decision.

8. In response, KWH filed a Notice of Cross Appeal ("KWH-NoCA") under CACV 583/2019 seeking to cross-appeal against the Judges' decision of rejecting Grounds 2 and 3 of their judicial review. They also filed a Respondent's Notice ("KWH-RN") in CACV 542/2019 seeking to affirm the Judges' decision on additional grounds, in particular on Ground 4.

9. On 16 December 2019, LKH also filed a Notice of Cross Appeal and Respondent's Notice ("LKH-NoCA") under CACV 541/2019 against the Judges' decision seeking to challenge:

(1) the Judges' holding on "legitimate aims" and "rational connection" in the proportionality analysis of section 5 of the PFCR under Ground 5B: LKH-NoCA, [1] - [3];

(2) the Judges' rejection of Ground 3: LKH-NoCA, [4]; and

(3) the Judges' purported refusal to grant him leave to apply for judicial review on Ground 1 and Ground 5A: LKH-NoCA, [5] - [8].

10. On 17 December 2019, this Court directed that [5] - [8] of LKH-NoCA would not be entertained in these appeals. In other words, LKH is only permitted to make submissions in relation to Ground 3 and Ground 5B as set out in the LKH-NoCA.

B. BACKGROUND

11. The recent months of protests and social unrest leading to the unprecedented scenes of escalating violence and danger on the streets of Hong Kong were triggered in February 2019 when the Government introduced the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 ("the Bill") to the Legislative Council ("the LegCo").[2] The Bill was very controversial. Many members of the public, different organisations and professional bodies had expressed grave concerns about it. Many different public assemblies and processions had since been held to urge the Government to amend, delay or withdraw the Bill.

12. After proposing further amendments to the Bill, the Government indicated that it would seek to have the Bill debated and passed by the LegCo before the end of the LegCo session in July 2019. This only led to even more massive protests and public processions.

13. At [2] - [4] of the Judgment, the Judges pointed out that:

> (1) Although the protests began in opposition to the Bill, the unrest had continued notwithstanding the Government's decision in June 2019 to suspend the legislative process for the Bill, the acknowledgement since 9 July that the Bill was "dead", the announcement on 4 September that the Bill would be formally withdrawn and the actual withdrawal of the Bill in the LegCo on 16 October.
>
> (2) Since 9 June to 4 October 2019, according to the Government's records, over 400 "public order events" (referring to assemblies and processions) arising out of the Bill and other matters had been held, with a significant number of them ending up in outbreaks of violence.

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

14. Most pertinently, the uncontested evidence shows that the outbreaks of violence are escalated by the more radical and violent protestors employing the "black-bloc" tactics[3] to avoid identification and arrests, who are to a certain extent supported or at least condoned (and hence emboldended) by protestors who participate in initially peaceful public assemblies or processions. Such tactics is facilitated in light of the following[4]:

(1) Public order events are highly fluid in nature. A public meeting or procession that is initially lawful and peaceful can quickly turn into an unauthorized or unlawful assembly.

(2) The most violent and radical protestors are those who have their faces covered and therefore their identities concealed. They are also often equipped with gas masks and refuse to disperse even when the police deploy tear gas.

(3) These radical and violent protestors with their faces covered often mix themselves into a larger group of protestors (taking part in a largely peaceful public meeting or procession) who are also wearing masks. This has rendered identification most difficult when the violent protestors with their faces concealed can easily slip away amidst the chaos they have aroused.

(4) The more radical and violent protestors are often supported by many less violent protestors (also wearing facial covers to avoid recognition) by, for example, the provision of resources (such as food and water), tools and even weapons, as well as free rides when the police are taking actions of dispersal and arrests.

(5) Moreover, the more radical and violent protestors committing criminal conducts are encouraged by and find it essential to regard that they have the support or back-up of those peaceful protestors who themselves are also wearing face covering masks and present at the public assemblies or processions.

(6) In this respect, as the expert evidence shows[5], mask functions as a facilitator of anonymity. When anonymity joins with group function, participants' responsibilities become easily diffused or shared. Individuals tend to feel they are being supported by a lot of people. This is an emboldenment effect. If the dominant group value or purpose in the situation is anti-social, the individual will conform to that and more likely to act antisocially[6].

15. Large scale incidents of breach of peace in Hong Kong ensued. In blatant defiance of the law, the more radical and violent protestors have perpetrated widespread criminal conducts ranging from unlawful assembly to serious property damage, assault on persons, arsons and use of lethal weapons.

16. The unchallenged evidence shows that from 9 June to 4 October 2019, violent and radical protestors had[7]:

(1) forcefully and repeatedly charged police cordon lines with the use of weapons whilst protected by body armour, and blocked roads and tunnels (including main thoroughfares) with various objects which had resulted in persons trapped with or in their vehicles and, on some occasions, attacked on drivers who voiced displeasure at such blockages;

(2) vandalised and wrecked serious damage to public facilities (such as pavements, roadside fences and barriers, signages, dust bins, lamp posts, traffic lights, street lights and CCTV cameras, etc) and Government buildings (such as the Legislative Council Complex, Police Headquarters, Cheung Sha Wan Government Offices, etc), set fire by burning public properties outside or at police stations and on the streets in multiple districts, and hurled inflammable liquid bombs at police vehicles, police stations and even police officers and at and within the MTR stations;

(3) damaged private shopping malls, shops and restaurants, etc; there were also reports of looting and theft in some of the shops that were damaged;

(4) damaged residential quarters and harassed residents of the same;

(5) crippled the operations of critical transport infrastructure including the Hong Kong International Airport, a large number of the MTR stations and tracks (notwithstanding and in breach of relevant injunctive orders in place, and at the same time causing massive, serious and repeated destruction of facilities in the MTR stations resulting in the closure of multiple MTR stations due to safety concerns and the need for urgent repair as well as taking deliberate acts to stop or delay MTR trains from operating during morning rush), and the Cross-Harbour Tunnel, etc;

(6) harassed and attacked ordinary citizens and police officers holding different political views by a range of objects and lethal weapons, such as high-powered laser pointers (which were sometimes shone directly into the eyes of the victim from a short distance), slingshots and catapults to launch a variety of projectiles, sharp or sharpened objects (including box cutters and sharpened bamboo poles), bricks and inflammable liquid bombs etc, causing numerous injuries of various degree; and

(7) stopped vehicles and threatened drivers with damage to their vehicles to force them to yield up their mobile telephones for examination or to pay the protestors a sum of money.

17. The evidence therefore has shown that by the beginning of October 2019, the above acts of radical and violent protesters had seriously breached public peace, and posed a grave and genuine danger to the police and other members of the public. Normal functions of the Hong Kong community had been severely disrupted. More importantly, there were signs of and even declared intent by violent protestors to procure further escalation in the degree of violence and vandalism in unlawful assemblies which might as a result turn into riots, pushing Hong Kong to a most perilous situation[8].

18. As acknowledged by the Judges[9], it was under this "dire situation" of Hong Kong, that the CEIC on 4 October 2019 enacted the PFCR under the ERO.

19. In announcing the reasons and basis for enacting of the PFCR at the press conference on 4 October 2019, the Chief Executive ("the CE") emphasized that the decision to invoke the ERO as Hong Kong was in "an occasion of serious danger" and was a necessary one in the public interest[10]. In particular:

(1) In relation to the current situation, the CE mentioned that:

"Protests arising from [the Bill] have continued for nearly four months now. Over this period, protesters' violence has been escalating and has reached a very alarming level in the past few days, causing numerous injuries and leading Hong Kong to a chaotic and panic situation. We are particularly concerned that many students are participating in these violent protests or even riots, jeopardising their safety and even their future. As a responsible government, we have the duty to use all available means in order to stop the escalating violence and restore calmness in society."[11]

(2) In relation to the PFCR, the CE mentioned that:

"… [the PFCR] will create a deterrent effect against masked violent protesters and rioters, and will assist the Police in its law enforcement…

…

… the objective of [the PFCR] is to end violence and restore order, and I believe this is now the broad consensus of Hong Kong people.

> … [the PFCR] targets rioters or those who resort to violence. That's why [the PFCR] contains defence and exemptions to cater for legitimate needs to wear a mask, and we believe that by so doing we have struck the necessary balance."[12]

C. THE ERO AND THE PFCR

20. The ERO is a short piece of legislation with only three substantive sections. They provide as follows:

> "**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.
>
> (2) Without prejudice to the generality of the provisions of subsection (1), such regulations may provide for—
>
> (a) censorship, and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;
>
> (b) arrest, detention, exclusion and deportation;
>
> (c) control of the harbours, ports and waters of Hong Kong, and the movements of vessels;
>
> (d) transportation by land, air or water, and the control of the transport of persons and things;
>
> (e) trading, exportation, importation, production and manufacture;
>
> (f) appropriation, control, forfeiture and disposition of property, and of the use thereof;
>
> (g) amending any enactment, suspending the operation of any enactment and applying any enactment with or without modification;
>
> (h) authorizing the entry and search of premises;
>
> (i) empowering such authorities or persons as may be specified in the regulations to make orders and rules and to make or issue notices, licences, permits, certificates or other documents for the purposes of the regulations;
>
> (j) charging, in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the regulations, such fees as may be prescribed by the regulations;
>
> (k) the taking of possession or control on behalf of the Chief Executive of any property or undertaking;
>
> (l) requiring persons to do work or render services;

(m) payment of compensation and remuneration to persons affected by the regulations and the determination of such compensation; and

(n) the apprehension, trial and punishment of persons offending against the regulations or against any law in force in Hong Kong,

and may contain such incidental and supplementary provisions as appear to the Chief Executive to be necessary or expedient for the purposes of the regulations.

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

(4) A regulation or any order or rule made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any enactment; and any provision of an enactment which may be inconsistent with any regulation or any such order or rule shall, whether that provision shall or shall not have been amended, suspended or modified in its operation under subsection (2), to the extent of such inconsistency have no effect so long as such regulation, order or rule shall remain in force.

(5) Every document purporting to be an instrument made or issued by the Chief Executive or other authority or person in pursuance of this Ordinance or of any regulation made hereunder and to be signed by or on behalf of the Chief Executive or such other authority or person, shall be received in evidence, and shall, until the contrary is proved, be deemed to be an instrument made or issued by the Chief Executive or that authority or person.

3. Penalties

(1) Without prejudice to the powers conferred by section 2, regulations made hereunder may provide for the punishment of any offence (whether such offence is a contravention of the regulations or an offence under any law applicable to Hong Kong) with such penalties and sanctions (including a maximum penalty of mandatory life imprisonment but excluding the penalty of death), and may contain such provisions in relation to forfeiture, disposal and retention of any article connected in any way with such offence and as to revocation or cancellation of any licence, permit, pass or authority issued under the regulations or under any other enactment as to the Chief Executive in Council may appear to be necessary or expedient to secure the enforcement of any regulation or law or to be otherwise in the public interest.

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

4. Declaratory provision as to effect of an amending Ordinance

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

21. The history of the enactment of the ERO and its use since its enactment in 1922 has been summarized at [15] - [20] of the Judgment. We will elaborate on it when we deal with the submissions pertaining to the ERO below.

22. The PFCR is also a short piece of regulation with six sections. The substantive provisions relevant for the present purposes are as follows[13].

23. Section 3 of the PFCR imposes a prohibition on the use of and makes it an offence to use facial covering in certain circumstances by providing:

> "(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[14]);
>
> (b) unauthorised assembly;
>
> (c) a public meeting that—
>
> (i) takes place under section 7(1) of Cap. 245; and
>
> (ii) does not fall within paragraph (a) or (b); or
>
> (d) a public procession that—
>
> (i) takes place under section 13(1) of Cap. 245; and
>
> (ii) does not fall within paragraph (a) or (b).
>
> (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 4[15] and to imprisonment for 1 year."[16]

24. Section 3 therefore prohibits the use of facial covering likely to prevent identification in four specific situations:

(1) Under section 3(1)(a) – at an "unlawful assembly" (非法集結) [17].

(2) Under section 3(1)(b) – at an "unauthorised assembly" (未經批准集結)[18].

(3) Under section 3(1)(c) – at a public meeting (公眾集會) which has been notified to and not prohibited by the Commissioner of Police ("the Commissioner") and which is not an unlawful or unauthorised assembly[19].

(4) Under section 3(1)(d) – at a public procession (公眾遊行) which has been notified and is not objected to by the Commissioner and which is not an unlawful or unauthorised assembly[20].

25. In short, the prohibition in section 3(1) applies to persons at unlawful assemblies, unauthorised assemblies, public meetings notified and not prohibited, and public processions notified and not objected to, and does not *prima facie* apply to public meetings or processions that do not need to be notified, although such meetings or processions may turn into *unauthorised* assemblies or *unlawful* assemblies.

26. Section 4 of the PFCR sets out a defence to the offence under section 3(2) of lawful authority or reasonable excuse. The accused thus bears the *evidential* burden to raise the defence but it is the prosecution's legal burden to disprove the defence. The scope of reasonable excuse is not exhaustively defined, but three grounds are specifically included, namely, professional or employment reasons, religious reasons and pre-existing medical or health reasons.

27. Section 5 concerns police powers in relation to facial covering:

> "(1) This section applies in relation to a person in a public place who is using a facial covering that a police officer reasonably believes is likely to prevent identification.
>
> (2) The police officer may—
>
> (a) stop the person and require the person to remove the facial covering to enable the officer to verify the identity of the person; and
>
> (b) if the person fails to comply with a requirement under paragraph (a) – remove the facial covering.

> (3) A person who fails to comply with a requirement under subsection (2)(a) commits an offence and is liable on conviction to a fine at level 3[21] and to imprisonment for 6 months."

28. "Public place" (公眾地方) has the meaning given by section 2(1) of the POO:

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

D. PROCEEDINGS BELOW

D1. Grounds of judicial review

29. The Judges at [11] of the Judgment summarized the grounds of judicial review that were allowed to be advanced by KWH and LKH and considered by them at the rolled-up hearing. There is no suggestion that the summary is incorrect. We will respectfully adopt them for the purpose of this judgment:

> (1) Ground 1: the ERO is unconstitutional because it amounts to an impermissible grant or delegation of general legislative power by the legislature to the CEIC and contravenes the constitutional framework under the BL.
>
> (2) Ground 2: the ERO was impliedly repealed in 1991 by section 3(2) of the Hong Kong Bill of Rights Ordinance (Cap 383) ("the HKBORO") either entirely or to the extent it is inconsistent with section 5 of that latter Ordinance; alternatively, it was impliedly repealed in 1997 by Article 4 of the ICCPR[22] ("ICCPR4") as applied through BL39.
>
> (3) Ground 3: the ERO, to the extent that it empowers the CEIC to make regulations restricting fundamental rights protected by the BL and BOR, falls foul of the "prescribed by law" requirement in BL39.

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

(5) Ground 5A: section 3 of the PFCR amounts to a disproportionate restriction of a person's liberty and privacy, freedom of expression and right of peaceful assembly under BOR5, 14, 15, 16, 17 and BL27.

(6) Ground 5B: section 5 of the PFCR constitutes a disproportionate interference with the rights and freedoms protected by BL27, 28 and 31 and BOR5(1), 8, 14 and 16.

30. When considering these grounds, it is important to note that [23] :

(1) The challenge of the constitutionality of the ERO is confined to the "public danger" ground in the ERO and to the powers it confers when the CEIC considers there to be an occasion of public danger (which is the ground on which the PFCR has been made).

(2) All the applicants do *not* seek to impugn the good faith of the CEIC in invoking the ERO to enact the PFCR.

(3) All the applicants do *not* seek to challenge the CEIC's decision to enact the PFCR as *Wednesbury* unreasonable.

D2. The Judgment

31. By their comprehensive and detailed Judgment, the Judges allowed the judicial reviews on Grounds 1, 5A and 5B, but rejected all the other grounds. We will look at their reasons in greater details later. For the present purposes, those reasons can be summarised as follows.

32. In allowing Ground 1, the Judges found essentially that:

(1) On a proper construction of the BL as a whole, and in particular BL2, 8, 17(2), 18, 48, 56, 62(5), 66 and 73(1), the constitutional order established by the BL after 1997 vests *only* in the LegCo the general legislative power of the HKSAR. The BL has expressly provided the LegCo to be *the* legislature of the HKSAR. The CEIC is therefore *not* given any *general* legislative power under the BL even though she would have the power to make subordinate legislation. See [38] - [52] of the Judgment.

(2) However, on a proper reading of the ERO, and given the widest possible scope and nature of "regulations" that the CEIC can enact under it when the CEIC is "satisfied" that there is any occasion of "public danger" (which by itself is an undefined but very wide term covering many plausible situations), the CEIC is in substance granted or delegated with a general legislative power by the ERO to enact what are in nature primary legislations. This is impermissible under the BL. See [53] - [81] of the Judgment.

(3) The theme of continuity and all the relevant authorities decided *before* 1997 which concluded that the ERO was constitutional and valid do not assist the respondents to uphold the constitutionality of the ERO. This is so as the authorities were premised on the specific constitutional order of Hong Kong *before* the enactment of the BL and the view that the Hong Kong legislature at that time could be regarded as "supreme" in that respect. These reasons and bases are no longer valid *after* the enactment of the BL. Under the BL, the LegCo is no longer sovereign and supreme within its province and the constitutional order is that the LegCo *is the* legislature of Hong Kong. These authorities are therefore distinguishable and no longer applicable. For the same reasons, the ERO also did not become the law of Hong Kong after 1997 through BL8 because the BL does not permit the LegCo to grant to the CEIC "*what is essentially the LegCo's own constitutional power to enact, amend or repeal laws*". See [52] and [82] - [93] of the Judgment.

(4) In the premises, the ERO, insofar as it empowers the CEIC to make regulations on any occasion of public danger, is incompatible with the BL. See [37] and [97] of the Judgment.

(5) The court leaves open the question of the constitutionality of the ERO insofar as it relates to any occasion of emergency. See [96] of the Judgment.

33. In rejecting Ground 2, the Judges explained at [98] - [109] of the Judgment that:

(1) The applicants' case in support of the implied repeal ground is premised on the argument that the ERO by its terms applies not only in emergencies that fall within the meaning of section 5 of the HKBORO. It therefore allows derogation from the fundamental rights protected by the BOR or ICCPR other than in the exceptional case of "public emergency" specifically defined and permitted under section 5 of the HKBORO or ICCPR4. The ERO is therefore incompatible with section 5 of the HKBORO and, by section 3(2) of the HKBORO, is repealed before 1997. Alternatively, it is inconsistent with ICCPR4 and thus implicitly repealed when the BL commenced operation on 1 July 1997 under BL39[24].

(2) Although accepting that the ERO by its terms is intended to apply not only in emergencies that fall within the meaning of section 5 of the HKBORO[25], the Judges find that the applicants' argument of compatibility is flawed as it has conflated the concepts of derogation from the BOR itself and restriction of non-absolute rights under and in compliance with the BOR.

(3) As rightly accepted by the respondents, the powers of the ERO may not be exercised with the effect of derogation from the BOR *except* in times of emergency officially proclaimed in accordance with section 5 of the HKBORO. In other occasion of emergencies, measures may be taken under the ERO which have an effect of *restricting* the rights protected by the BOR, provided the restriction is prescribed by law and compliant with the proportionality test. These are two different concepts.

(4) Hence, the proper approach to the ERO is that:

(a) *Only* in times of emergency officially proclaimed and in accordance with the other requirements of section 5 of the HKBORO, measures may be adopted under the ERO which derogate from the BOR.

(b) In other situations, measures adopted under the ERO may not derogate from the BOR, and any measure that has the effect of restricting fundamental rights, it has to satisfy the dual requirements that the restriction is prescribed by law and meets the proportionality test.

34. In relation to Ground 3, the Judges rejected the argument that the ERO falls foul of the prescribed by law requirement due to the wide scope of power and the undefined meaning of "public danger". They concluded that the ERO by itself does not and does not seek to limit any fundamental rights. In the premises, the requirement of legal certainty should be applied to the actual regulations that are enacted under the ERO but not generally to the enabling ERO. See [110] - [120] of the Judgment.

35. Ground 4 seeks to impugn the PFCR itself. Under it, the applicants argued that, properly construed in accordance with the principle of legality, the ERO does not, expressly or by necessary implication, empower the CEIC to make regulations that impose restrictions on fundamental rights of the kind and to the extent found in the PFCR. The Judges found that this ground is inconsistent with Ground 1. Since they had allowed Ground 1, they therefore did not find it necessary to deal with this ground. See [121] - [125] of the Judgment.

36. In allowing Ground 5A, in adopting the 4-step proportionality test laid down in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at [134] - [135][26]:

> (1) The Judges found that the restrictions imposed by section 3 of the PFCR engage the fundamental rights of the freedom of assembly[27], the freedom of speech or expression[28], and the right to privacy[29]. These rights are however not absolute and may be subject to lawful restrictions satisfying the proportionality test. See [127] - [128] of the Judgment.
>
> (2) They concluded that sections 3(1)(a) - (d) of the PFCR satisfy the legitimate aims test[30] and the rational connection test. See: [130] - [146] of the Judgment.

(3) Applying the reasonable necessity standard, the Judges also found that section 3(1)(a) (ie, in prohibiting the wearing of facial cover at an unlawful assembly) satisfies steps 3 and 4, in that the restriction is no more than reasonably necessary and strikes a reasonable balance in restricting the relevant fundamental rights and achieving the legitimate aims. They further explained that prohibiting the use of facial cover at *unlawful* assembly falls within the wide margin of discretion afforded to the Government to devise and implement measures to restrict unlawful and violent conduct. This would not result in an unacceptably harsh burden on the individual. They hold the view that no person should take part in an unlawful assembly in the first place, it being a criminal offence under section 18(1) of the POO. The Judges, therefore concluded that section 3(1)(a) meets the proportionality test and is lawful. See [149] - [151] of the Judgment.

(4) However, they did not find that the restrictions under sections 3(1)(b) - (d) satisfy step 3 (and hence not necessary to deal with step 4). They came to that view after considering the following five distinguishing features relating to these provisions[31]:

> (a) Sections 3(1)(c) and (d) relate to public meetings and processions which may remain authorised and peaceful from beginning to end. The prohibition therefore directly interferes with these participants' right of privacy or freedom of expression while *taking part in perfectly lawful activities in the exercise of their right of peaceful assembly*.
>
> (b) Although section 3(1)(b) relates to unauthorised assemblies, such assemblies may yet be entirely peaceful, without any violence being used or threatened by anyone participating in them.

(c) The prohibition applies to any assembly or procession for whatever causes, but is not restricted to them arising from the Bill. Such assemblies or processions may be taking place for many and different causes, such as LGBT, labour or migrant rights, and traditionally, these gatherings have been orderly and peaceful. Participants in these assemblies or processions may have perfectly legitimate reasons for not wishing to be identified or seen to be supporting such causes.

(d) The prohibition applies to any person while he or she is "at" any unauthorised assembly, public meeting or public processions. It is uncertain whether the restrictions imposed by these provisions cover not only participants of the types of gathering referred to in those provisions, but also any person who is physically present at the gathering in question.

(e) The prohibition applies to facial covering of any type and used for whatever reasons, even if they are worn for religious, cultural, aesthetic or other legitimate reasons. It catches anyone wearing a facial covering which is "likely" to prevent identification.

(5) In the premises, having regard to (a) the reach of the impugned restrictions to perfectly lawful and peaceful public gatherings, (b) the width of the restrictions affecting public gatherings for whatever causes, (c) the lack of clarity as regards the application of the restrictions to persons present at the public gathering other than as participants, (d) the breath of the prohibition against the use of facial covering of any type and worn for whatever reasons, (e) the absence of any mechanism for a case-by-case evaluation or assessment of the risk of violence or crimes such as would justify the application of restrictions, (f) the lack of robust evidence on the effectiveness of the measures, and (g) the importance that the law attaches to the freedom of expression, freedom of assembly, procession and demonstration, and the right to privacy, the Judges did *not* find the restrictions imposed under sections 3(1)(b) - (d) to be proportionate to the legitimate aims sought to be achieved by imposing those restrictions[32]. See [166] - [167] of the Judgment.

37. In allowing Ground 5B:

(1) The Judges found that section 5 engages the non-absolute right of the freedom of the person or right to liberty protected by BL28 and BOR5, and that the measures adopted under it are rationally connected to the legitimate aims to assist in law enforcement, investigation and prosecution by enabling police officers to verify the identity of all masked individuals not during assemblies or processions but also in public places in the prevailing circumstances of public danger in Hong Kong. See [169] - [184] of the Judgment.

(2) They however considered that measures provided under section 5 are of a remarkable width:

(a) There is practically no limit on the circumstances in which the power under that section can be exercised by a police officer, save that (i) the person is in a public place, and (ii) the facial covering used is reasonably believed by the police officer to be likely to prevent identification;

(b) The power can be exercised irrespective of whether there is any public meeting or procession taking place in the vicinity and regardless of whether there is any risk of outbreak of violence or other criminal acts, at the place where the person is found, or in the neighbourhood or anywhere else in Hong Kong;

(c) The power may on the face of it be used by a police officer for random stoppage of anyone found wearing a facial covering in any public place. See [185] - [188] of the Judgment.

(3) Given this remarkable width, the Judges were of the view that the measures adopted under section 5 exceed what is reasonably necessary to achieve the legitimate aims even in the prevailing turbulent circumstances in Hong Kong, and that they fail to strike a reasonable balance between societal benefits promoted and the inroads made into the protected rights. See [189] - [190] of the Judgment.

38. For all the above reasons, after hearing further submissions on the relief that should be made, the Judges by the Decision, allowed the judicial reviews and declared, among others, that:

(1) The ERO, insofar as it empowers the CEIC to make regulations on any occasion of public danger, is incompatible with the BL, and consequently, the PFCR made pursuant to it on an occasion of public danger is also invalid and of no effect.

(2) Sections 3(1)(b), (c) and (d) of the PFCR is inconsistent with BL27 and BOR14, 16 and 17, and is therefore null, void and of no effect.

(3) Section 5 of the PFCR is inconsistent with BL 28 and BOR5 and is therefore null, void and of no effect.

39. They further ordered that the above declarations be suspended so as to postpone its coming into operation until the end of 29 November 2019 or further order of the court. Given there is no further order later, the declarations eventually took effect on 30 November 2019.

40. The main appeals are brought by the respondents challenging the Judges' rulings in relation to Grounds 1, 5A and 5B. It is therefore convenient for us to consider these grounds first.

E. GROUND 1

E1. Jurisdiction to examine constitutionality

41. Ground 1 involves the court's scrutiny of the constitutionality of the ERO, a pre-1 July 1997 law adopted as laws of the HKSAR. The fact that the court has jurisdiction to do so is and should not be controversial. However, given its immense importance, we consider it appropriate to elaborate the point against the relevant framework of the BL as follows.

42. Under BL8, the laws previously in force in Hong Kong, including ordinances, shall be maintained except for any that contravenes the BL, and subject to any amendment by the legislature of the HKSAR. BL18 further provides that the laws in force in the HKSAR shall be the BL, and laws previously in force in Hong Kong as provided for in BL8 and, the laws enacted by the legislature of the Region. BL8 and BL18 are supplemented by BL160(1), which provides that:

> "Upon the establishment of the [HKSAR], the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress ('the NPCSC') declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law."

43. In its Decision dated 23 February 1997 ("the NPCSC's Decision"), the NPCSC pursuant to BL160 declared that those laws previously in force in Hong Kong listed in Appendixes I and II were in contravention of the BL and were not adopted as the laws of the HKSAR. Other than those laws, all laws previously in force were adopted as laws of the HKSAR. Paragraph 6 of the NPCSC's Decision repeats the last sentence in BL160(1) with respect to the laws previously in force adopted as laws of Hong Kong.

44. Both BL160 and the NPCSC's Decision ensure the preeminence of the BL over all pre-1 July 1997 laws, even after being adopted as laws of the HKSAR upon its establishment.

45. The ERO was enacted in February 1922. It was an ordinance previously in force in Hong Kong prior to 1 July 1997. As it was not included in either Appendix I or II to the Decision, it has been adopted as laws of the HKSAR. It is however not the respondents' case that the NPCSC's Decision is final or conclusive on the constitutionality of the ERO. The respondents accept that the constitutionality of the ERO is still subject to judicial scrutiny. The respondents' position must be correct. For the law on this point is well settled.

46. In *HKSAR v Hung Chan Wa & Another* (2006) 9 HKCFAR 614, the Court of Final Appeal refused to make a "prospective overruling" in respect of a certain provision which was previously in force but was, after judicial scrutiny on its constitutionality, remedially interpreted to make it constitutionally compliant. Li CJ at [9] said:

> "[BL 160(1)] supplements articles such as [BL8 and BL18] in making it clear that laws previously in force shall be adopted except for those which the [NPCSC] declares to be in contravention of the Basic Law. Apart from the laws so declared to be in contravention, [BL160] recognizes that there may be laws which are discovered after 1 July 1997 to be in contravention. In relation to them, [BL160(1)] provides that 'they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.'…"

47. Li CJ then went on to hold at [11] - [15] that BL160 does not apply to judicial procedure and that the reference of "shall be amended or cease to have force" in BL160(1) connotes a legislative procedure. At [11], Li CJ specifically referred to a judicial declaration of contravention of the BL in relation to a pre-1 July 1997 law. Evidently, the judicial power to make such a determination derives from BL19(1) and BL80: see *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4, *per* Li CJ at p25G-J.

48. Another ready example of the court scrutinizing the constitutionality of a pre-1 July 1997 law is *W v Registrar of Marriage* (2013) 16 HKCFAR 112. There, the Court of Final Appeal, by majority, held that sections 20(1)(d) and 40 of the Marriage Ordinance, underpinned by the common law criteria in *Corbett v Corbett (otherwise Ashley)* [1971] P 83, for determining who was a "woman" for the purpose of marriage, were unconstitutional because, having regard to the contemporaneous jurisprudence, they failed to give proper effect to the constitutional right to marry under BL37 and article 19(2) of the BOR and impaired the very essence of the right to marry.

49. As BL160(1) and the NPCSC's Decision both envisage, there may be laws which were previously in force and adopted as laws of the HKSAR but are later found to be in contravention of the BL. Under the framework of the BL, the constitutionality of such a law can be dealt with either by legislative procedure or judicial process when a challenge is mounted in court whereupon the court has the jurisdiction and indeed the constitutional duty to deal with the constitutionality issue and, if found to be the case, to declare such a law to be in contravention of the BL.

50. In so doing, the court does not act contrary to BL160 or in any way diminish the authority of the NPCSC's Decision. As said, both BL160 and the NPCSC's Decision maintain the preeminence of the BL over all pre-1 July 1997 laws, even after adoption as laws of the HKSAR upon its establishment. When law develops, as it must, to cater for the changing needs of the society, it is not inconceivable that a pre-1 July 1997 law which was formerly constitutional compliant might be found in contravention of the BL later when examined against the context of the current societal circumstances and by reference to the contemporaneous jurisprudence. If and when it happens, the court will declare that law, which is no longer constitutional compliant, to be in contravention of the BL, thereby safeguarding the preeminence of the BL as a living constitutional instrument over all pre-1 July 1997 laws even after adoption as laws of the HKSAR. This is entirely consistent with the purpose of BL160 and the NPCSC's Decision.

E2. Core issue and the parties' main submissions

51. For Ground 1, the core issue is whether the emergency regulations made under the ERO are subordinate legislation or primary legislation. If the former, it is acceptable. If the latter, it contravenes the BL, rendering the ERO an unconstitutional delegation of general legislative powers by the LegCo to the CEIC.

52. Mr Yu SC, together with Mr Suen SC, Mr Ma and Mr Lui, for the respondents, complained that in reaching the ruling that the ERO is unconstitutional, the Judges disregarded the theme of continuity which remains despite the change in constitutional order. He submitted that central to the Judges' reasoning is the erroneous finding that because the constitutional order in Hong Kong has changed, the functions and powers of the LegCo and the Executive have changed so fundamentally under the BL framework that the ERO should be held to be inconsistent with the BL.

53. Further and irrespective of the theme of continuity, Mr Yu argued that the Judges erred in its construction and application of the constitutional order under the BL including BL56(2) which recognizes and reinforces the power of the LegCo to delegate (*a fortiori* in emergency regulations). He complained that the Judges failed to appreciate the true nature of emergency regulations and the ground of pubic danger, and to examine the same in its analysis and erroneously treated the ERO merely as a piece of legislation authorizing the making of subordinate legislation, having no regard to the true nature of emergency regulations under the ERO. He contended that the Judges erred in ruling that emergency regulations made by the CEIC on the public danger ground are not subordinate legislation referred to in BL56(2).

54. Mr Yu submitted that the real question raised by Ground 1 is whether the ERO contravenes the BL. He argued that there is no such contravention and the Judges erroneously adopted a narrow or rigid approach in construing the BL, and therefore failed to appreciate that the delegation of powers to the CEIC to make subordinate legislation on occasion of public danger is reasonably required and implied under the BL, quite apart from and irrespective of express provisions such as BL56(2) and 62(5).

55. Ms Li SC, with Mr Chan SC, Mr Deng, Mr Tam, Mr Yeung and Ms Wong, for KWH, accepted that the CE has the constitutional power to take emergency measures which can be provided for by suitable legislation catering for the limited circumstances in which derogation from the HKBORO/ICCPR rights are permitted except in the case of non-derogable rights and/or other circumstances of emergency where no such derogation is permitted and the HKBORO/ICCPR rights as applied to the HKSAR through BL39 must not be infringed.

56. On the theme of continuity, Ms Li emphasized that the Judges did not hold the concept of emergency regulations as no longer constitutional after 1997. The problem is the impermissible and general terms on which this conferment of legislative power was done in the ERO. She argued that the theme of continuity does not operate as a presumption of constitutionality for any particular piece of pre-1997 legislation. Continuity depends on subject matter. The overriding principle is that nothing shall contravene the BL and the principle of continuity must be subject to this overriding principle. There exists core powers and functions that are exclusively reserved to the LegCo as prescribed by the BL which may not be conferred to the CEIC in the manner as the ERO has. She also argued that BL160 does not assist the respondents.

57. Next, Ms Li argued that vague notions of emergency cannot impugn the constitutional scheme. The ERO is exceptionally wide even as an emergency power. The legislative power conferred by the ERO is on the whole general legislative power in substance for the reasons given by the Judges.

E3. Theme of continuity

58. In our view, the analysis of the constitutionality of the ERO is informed by the theme of continuity.

59. The theme of continuity is an essential and indeed indispensable policy underlying the BL. In *HKSAR v Ma Wai Kwan David & Others* [1997] HKLRD 761, Chan CJHC (as he then was) at p774E-F emphasized its utmost importance in these terms:

> "In my view, the intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key to stability. Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system, except those provisions which contravene the Basic Law, has to continue to be in force. The existing system must already be in place on 1 July 1997. That must be the intention of the Basic Law."

60. Continuity of course does not mean stagnation of the systems then in place on 1 July 1997: see *Chan Yu Nam v Secretary for Justice* [2012] 3 HKC 38, *per* Stock VP (as he then was) at [44]. The systems can further develop to suit the contemporaneous needs and circumstances of our society as Hong Kong progresses as long as they operate within the confines of the BL.

61. That said, Ms Li is correct in submitting that the theme of continuity is not a presumption of interpretation in favour of constitutional compliance when a pre-1 July 1997 law is challenged. That is not Mr Yu's argument any way. The significance of the theme for interpreting the BL in this regard is this.

62. As Lord Hoffmann observed in *Matadeen v Minister of Education and Science* [1999] 1 AC 98 at p108, cited with approval by Stock VP in *Chan Yu Nam*, at [32]:

> "… The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. ..."

Thus, as one of the main policies underlying the BL, the theme of continuity may, depending on the circumstances, relevantly and powerfully inform the interpretation of the provisions of the BL in a challenge against the constitutionality a pre-1 July 1997 law which has been adopted as part of the laws of the HKSAR after 1 July 1997, such as the ERO.

E3.1 History of the ERO in the colonial era

63. In the colonial years, the ERO had been invoked on numerous occasions to cover a host of varying emergencies and public danger. There was a debate in the colonial Legislative Council ("the Pre-97 LegCo") in 1936 to abrogate one of the emergency regulations made under the ERO. It later survived two challenges before the Full Court in the 1950s.

(a) Invocations

64. In *The Use and Abuse of Emergency Powers by the Hong Kong Government* (1996) HKLJ 47, Norman Miners at pp51 - 55 briefly described the ERO's legislative history and its invocations since enactment. According to this article, the ERO was not modelled on the then English Emergency Powers Act 1920. Unlike other laws enacted by the Pre-97 LegCo, the emergency regulations made under the ERO were not required to be submitted to London, which meant that they were not subject to the check or censure from London.

65. Over the years, the then Governor in Council ("the GIC") had made various emergency regulations under the ERO for, *inter alia*:

(1) the general strike and boycott of the colony nearly ruining its economy between June 1925 and October 1926;

(2) the fear of subversion by prescribed organizations in 1927;

(3) the severe drought in 1929;

(4) the prevention and mitigation of cholera in 1932;

(5) the outbreak of World War II in 1939;

(6) the communist advance to the border in 1949;

(7) the banking crisis in 1965;

(8) the outbreak of the cultural revolution and riots in 1967; and

(9) the oil crisis in 1974.

66. In June 1995, all emergency regulations which were still in force were revoked by the GIC.

(b) A failed attempt to abrogate the regulations made under the ERO

67. On 26 August 1936, the Pre-1997 LegCo debated a motion moved by a member seeking to abrogate an emergency regulation made under the ERO to provide censorship of the Chinese press[33]. The regulation had been made for some 11 years and had not been repealed by the GIC. One of the arguments advanced in support of the motion was that there could not be an existence of emergency or public danger as envisaged under the ERO for so many years. The Government's position was that the public danger still existed and would continue until a definitely stable government existed in China and in particular, the danger must be admitted to remain while civil war in China was threatening in one of the neighbouring provinces. In the end, the motion was defeated by a majority of 14 to 2.

(c) Two challenges in the court

68. The ERO and the emergency regulations made thereunder were challenged in the court in *R v To Lam Sin* (1952) 36 HKLR 1 and *R v Li Bun & Others* [1957] HKLR 89.

69. In *To Lam Sin*, the accused was convicted of being in possession of hand grenades, contrary to regulation 116A of the Emergency (Principal) Regulations made under the ERO. The offence was punishable by death. One of the grounds that the accused sought to quash the conviction was that the ERO was *ultra vires* the Pre-97 LegCo. While counsel for the accused conceded that the Pre-97 LegCo had the power to delegate, he contended that in the case of the ERO, the delegation to the Governor went far beyond the ordinary power of making by-laws. Counsel argued that it had by the delegation effaced itself, citing *Ping Shek and another v The Canossian Institute* (1949) 33 HKLR 66 where the Chief Justice at p71 referred to the effacement test.

70. The Full Court (Howe CJ, Gould and Scholes JJ, Howe CJ giving the judgment) apparently did not prefer the effacement test, noting at p12 its limitations:

> "The word 'effaced' may have different shades of meaning. If in the context it is meant to indicate a complete and final parting with legislative authority, we agree that that would be ultra vires, as it would involve an alteration of the Colony's constitution. That is clearly beyond the powers conferred by the Letters Patent and is clear law. Again, if 'partial effacement' means a final parting with legislative authority in some limited sphere the same reasoning applies. But beyond that, the word appears to be of little assistance."

71. Howe CJ then went on to state that according to the modern judicial view of the colonial legislature as seen from some recent authorities, a colonial legislature was supreme within their own limits and within the powers conferred by the instruments creating it. Based on that modern view, Howe CJ at p14 said:

> "… the power of a colonial legislature to delegate is a full one, limited only by the necessity not to go outside the powers conferred by or contravene the rights reserved by the Letters Patent or other constitutional document. As is well known, delegation of powers almost parallel with those given by the [ERO] has been resorted to frequently in England under the various Emergency Powers Acts. If the legislature of Hong Kong is supreme (subject to its constitution) in its own area there can be no reason why it should not act similarly – it is not and cannot be suggested that the law is not one for the 'peace, order and good government' of the Colony."

72. Returning to the effacement test, Howe CJ at p14 held that it would not hold that the delegation of the powers was *ultra vires* because:

> "Wide though the powers may be, the Legislative Council retains a very firm and close control by virtue of Section 14 of the Interpretation Ordinance (Cap.1). No regulation involving the imposition of the death penalty can become of force or effect without the prior approval of the Legislative Council – this is provided specifically by the [ERO] as well. All other regulations must be laid on the table at the first meeting of the Legislative Council after their publication in the Gazette and the Council may repeal or amend any of them. There is in addition the overriding power to repeal or amend the Ordinance itself. We see nothing there which can be called effacement as we understand it."

73. In *Li Bun*, an appeal by way of case stated was brought against convictions for attempting to export motor vehicles without a licence contrary to the Importation and Exportation Ordinance, as amended by the Emergency (Importation and Exportation) (Amendment) Regulations 1953 and 1954 made under the ERO. Two questions of law were raised. The first was whether the ERO was *ultra vires* the Governor. The second was whether the Emergency (Importation and Exportation) (Amendment) Regulations 1953 and 1954 were *ultra vires* the ERO.

74. The Full Court (Hogan CJ, Gould and Reece JJ) treated the first question as involving the decision if the ERO was *ultra vires* the Pre-97 LegCo. Hogan CJ acknowledged the modern view of a colonial legislature as mentioned in *To Lam Sin* but at p96 observed that the supremacy of a colonial legislature, even within its own limits, could not be taken to be altogether unqualified.

75. Hogan CJ referred to the effacement test and noted the ERO survived the test in *To Lam Sin*. He agreed with *To Lam Sin* but would not place the same reliance on section 14 of the Interpretation Ordinance, as ensuring the control of the legislature over regulations made under the ERO since that section itself was liable to be repealed by the GIC under section 2(3) of the ERO.

76. Hogan CJ next derived from *R v Burah* 3 AC 889 and *In re The Initiative and Referendum Act* (1919) AC 935 the proposition that a colonial legislature could not appoint a coordinate or alternative legislative body. Applying it to the ERO, he said at pp101 - 104:

> "That it may be desirable for the sake of 'peace, order and good government' to have, on occasions of emergency or public danger, a delegated power to legislate speedily and effectively in order to meet any and every kind of problem is, I think, obvious. That such power should, as the Attorney General has argued, extend to all existing legislation seems equally apparent, since otherwise its capacity to make adequate provision for some unexpected danger or emergency might be hampered or limited by its inability to alter an existing Ordinance and that, possibly, at a time when the ordinary legislature could not, as a result of the emergency of state of public danger, be brought into session or meet.
>
> But however desirable these powers can they be conferred in this way by the Legislature of Hong Kong or should they have been sought by an amendment of the Letters Patent or a similar alteration in the constitution?
>
> …
>
> … the fact that the powers conferred by the [ERO] are limited to those occasions which in the opinion of the Governor in Council are occasions of public danger or emergency. This, it seems to me, is the one factor or at any rate the principal factor which prevents them from being regarded as that arming, by a dependent Legislature, of another authority with general legislative authority similar in capacity to its own, on which the Privy Council has frowned.

> It may be argued that to hold so ample a power as falling below the line which cannot be crossed by the Legislative Council, is to push that line so high as to make it almost meaningless; nevertheless it is a real limitation and since it is the principal reason for not treating the ordinance as ultra vires ab initio, a limitation which must, I think, be strictly observed and strictly enforced, since any tendency to regard it as a mere formality would tend to diminish the importance of the principal, if not indeed the only, factor which saves this ordinance from being ultra vires.
>
> The decision as to whether an emergency exists is conferred on the Governor in Council and it is of course contemplated that any such decision will be reached bond fide. But it is a decision which must be taken on each occasion that these powers are exercised and to that extent the power thus conferred may be more closely linked with the occasion that gave rise to it than those expressed to be dependent, like so many 'emergency' powers, on some formal proclamation and to continue so long as such proclamation remains in force. Indeed, in pursuance of the principle enunciated by Romer J in *Land Realisation Co v Postmaster General* (1950) Ch 439 when he said:-
>
> 'The legislature in conferring powers … is conferring them on a person who will presumably use those powers bona fide … in furtherance of the objects for the attainment of which the powers were conferred.'
>
> such a power might well be thought to be more closely confined to the purpose of abating the emergency which gave rise to its use than would those powers which are expressed to be exercisable so long as a particular proclamation remains operative."

Hogan CJ therefore agreed that the Full Court in *To Lam Sin* was right in concluding that the ERO was not *ultra vires*.

77. Hogan CJ then examined the second question if the Emergency (Importation & Exportation) (Amendment) Regulations were *ultra vires* the ERO. For the reasons that he set out, he held that they were not.

E3.2 Important points to draw from the history

78. From the above history a number of important points arise. They concern (a) the then constitutional arrangements for legislative powers; (b) the Pre-97 LegCo's role over the emergency regulations made under the ERO; (c) the judicial reasoning in upholding the validity of the ERO; and (d) the varying circumstances of emergency and public danger in which the ERO was invoked with one common feature. They are all highly relevant to the analysis at hand.

(a) Constitutional arrangements for general legislative powers

79. We derive from *To Lam Sin* and *Li Bun* the following propositions concerning the constitutional arrangements for the exercise of general legislative powers in the colonial era.

80. First, the Pre-97 LegCo was vested with general legislative powers exclusively. The Governor did not have such powers.

81. Article VII of the Letters Patent appeared to have designated the Governor as the law making authority by providing that:

> "The Governor, by and with the advice and consent of the Legislative Council, may make laws for the peace, order, and good governance of the Colony."

However, the correct understanding of Article VII was that it conferred the general legislative powers on the Pre-97 LegCo. Thus in *Li Bun*, Hogan CJ at p92 observed that the powers of the Pre-97 LegCo to make laws have their source in Article VII. (Indeed, had the Governor been vested with general legislative powers under Article VII, the question if the ERO was an impermissible delegation of legislative powers by the LegCo to the GIC would not have arisen at all.) Simply put, pursuant to the constitutional arrangement in the Letters Patent on legislative powers, however wide and extensive the powers the Governor otherwise enjoyed under the Letters Patent, and despite the fact the colonial government was very much executive-led, he did not have general legislative powers as the Pre-97 LegCo did. The Governor only had limited legislative power to make subordinate legislation as delegated by the Pre-97 LegCo: see the third proposition below.

82. Second, the Pre-97 LegCo as a colonial legislature was subject to the Letters Patent and other constitutional requirements which established it as the legislature of Hong Kong. Within its constitutional confines, the Pre-97 LegCo was autonomous or "supreme" in exercising is powers and performing its functions and had the authority as plenary and as ample as the Imperial Parliament in the plenitude of its powers possessed and could bestow.

83. Third, under the common law, the Pre-97 LegCo must not act in a manner which effectively abdicated its exclusive general legislative powers, whether completely or partially, by effacement; or divesting itself of such exclusive powers, again whether completely or partially, by creating a co-ordinate legislative authority of a concurrent or alternative character. Subject to this restriction, it could delegate its legislative powers to the Governor to make subordinate legislation. The corollary is that the Governor only had limited legislative powers as properly delegated to him by the Pre-97 LegCo to make subordinate legislation.

84. We pause to add that as a matter of fact, the Pre-97 LegCo had by numerous enabling provisions in various principal ordinances delegated to the GIC and other executive authorities to make regulations in respect of a wide range of matters[34] and even to the Chief Justice to make rules for practice and procedure of court and tribunal[35].

85. Fourth, an ordinance by which the Pre-97 LegCo delegated to the GIC and other branches of the Government the power to make regulations was subject to judicial scrutiny to see if it was *ultra vires* the Pre-97 LegCo. The regulations made, like those made under the ERO, were likewise subject to judicial scrutiny to see if it was *ultra vires* the enabling ordinance.

86. In sum, under the pre-1 July 1997 constitutional arrangement, the Pre-97 LegCo was vested with general legislative powers exclusively by the Letters Patent. The Governor was not. The Pre-97 LegCo was bound by the Letters Patent and other constitutional requirements in exercising its general legislative powers. Under the common law, subject to the restriction that it could not abdicate its general legislative powers, the Pre-97 LegCo could delegate to the Governor limited legislative power to make subordinate legislation by virtue of a specific enabling ordinance. That was the extent of the Governor's legislative power. When called upon, the courts would examine the enabling ordinance and the regulations made thereunder to see if they were *ultra vires* the Pre-97 LegCo or the enabling ordinance, as the case might be.

(b) Pre-97 LegCo's control over emergency regulations

87. Although the attempt to abrogate the emergency regulations in 1936 failed, the whole process of involving a member putting forward of the motion to abrogate the emergency regulations concerned, the ensuing debate and vote by the Pre-97 LegCo as a whole against the motion, clearly showed that despite section 2(3) of the ERO, the Pre-97 LegCo still considered that it had control over the emergency regulations made thereunder and could, if necessary, abrogate it.

(c) Judicial reasoning

88. The reasoning of the Full Court in *To Lam Sin* and *Li Bun* in holding that the ERO was *intra vires* the Pre-97 LegCo merits closer attention. Relevantly, the Full Court held:

> (1) Delegating by the Pre-97 LegCo to the GIC the power to legislate speedily and effectively in cases of emergency and public danger was obviously desirable for "the peace, order and good government of the Colony", thereby falling within the mandate given to the Pre-97 LegCo under Article VII of the Letters Patent.
>
> (2) The GIC's delegated power to legislate to cater for emergency and public danger should extend to all existing legislation so as not to hamper his capacity to make adequate provision for some unexpected danger or emergency or limit his inability to alter an existing ordinance, possibly, at a time when the Pre-97 LegCo could not, as a result of the emergency of state of public danger, be brought into session or meet.
>
> (3) However, the ERO could only be invoked in the limited circumstances where the GIC considered to be occasions of emergency or public danger. The ERO was not a blanket delegation by the Pre-97 LegCo to the GIC to make any laws under any circumstances. That limitation was not a formality but must be strictly observed and strictly enforced.

(4) The GIC must act *bona fide* in invoking the ERO. He must exercise the powers conferred on him under the ERO for the furtherance of its objects and purposes.

(d) Emergency and public danger varied but with one common feature

89. There is no definition of emergency or public danger in the ERO. Based on the past invocations, what constituted, in the opinion of the GIC, emergency or public danger within the meaning of the ERO, warranting the making of the corresponding emergency regulations covered a host of varying circumstances. They ranged from a state of war, which threatened the very existence of Hong Kong; to widespread and serious breaches of public order and security, which threatened the law and order of the entire community; to outbreak of epidemic disease and natural disaster, which threatened life and health of the public; and to financial and other crisis fundamentally rocking Hong Kong's economy and jeopardizing its citizens' livelihood. They reflected a broad concept of emergency and public danger with the commonality of serious and immediate threats to Hong Kong and its citizens as a whole subsisting for a period of time. Correspondingly, the provisions of the ERO were wide and flexible enough for the GIC to legislate speedily and effectively to meet all and every kind of emergency and public danger that he had to specifically grapple with at the time.

E3.3 After 1 July 1997

90. We first look at the constitutional arrangement for general legislative powers under the BL.

(a) Constitutional arrangement for general legislative powers

91. Under the BL, the constitutional arrangement for general legislative powers on the whole mirrors the past subject to the necessary modifications to reflect the change in the constitutional order.

92. First, under the design of the BL, the Government is very much an executive-led government (BL59 - 65): see the observation of Sir Anthony Mason in *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong* (2007) 37 HKLJ 299, at p304. The CE is constituted the head of the HKSAR (BL43) and enjoys wide and extensive powers: see in particular BL48. However, the CE simply does not have general legislative powers.

93. Second, BL56(2) acknowledges that CE may, in consultation with the Executive Council introduce bills and make subordinate legislation. However, as Mr Yu has fairly accepted, BL56(2) is not an enabling provision conferring on the CE the legislative power to make subordinate legislation. The source of such power can only come from the delegation by the LegCo to the CE.

94. Third, BL66 establishes the LegCo as the legislature of the Region to exercise the general legislative powers vested in the HKSAR under BL17(1). BL73 further mandates the LegCo to exercise the powers and functions as prescribed, including, under sub-paragraph (1), to enact, amend, repeal laws in accordance with the provisions of the BL and legal procedures. Importantly, BL11(2) provides that no law enacted by the LegCo shall contravene the BL.

95. Further, as held by this Court in *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLRD 460, *per* Cheung CJHC (as he then was) at [24] - [25] and *per* Poon JA (as he then was) at [87], the LegCo is subject to the BL and all other constitutional requirements. Within those confines, the LegCo is otherwise a sovereign body under the BL: *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, *per* Hartmann J (as he then was) at [10]; *Cheung Kar Shun v Li Fung Ying* [2011] 2 HKLRD 555, *per* A Cheung J (as he then was) at [217].

96. Fourth, the BL does not create a new legislature out of a vacuum: *Cheng Kar Shun v Li Fung Ying*, supra, *per* A Cheung J at [121]. In our view, subject to the BL and other constitutional requirements, the common law principles governing the Pre-97 LegCo continue to apply under the theme of continuity. Thus, the principle of delegation in the colonial era under which the Pre-97 LegCo could delegate to the executive branch of government or any person or body to make subordinate legislation continues to apply after 1997, as suitably modified to reflect the change in the constitutional order. Insofar as the CE is concerned, the power to make subordinate legislation pursuant to such delegation is expressly acknowledged in BL56(2).

97. As a matter of fact, the various ordinances by which the Pre-97 LegCo authorized the executive branch of the Government and the Chief Justice to make regulations referred to above remain in force. After 1 July 1997, the LegCo has enacted further ordinances to empower the executive branch and the Chief Justice to make regulations[36]. It demonstrates that the common law principle of delegation continues to thrive in the post-1 July 1997 era.

98. Fifth, it is settled law since the establishment of the HKSAR that our courts, in exercising their independent judicial power vested with them by BL19(1) and BL80, have a constitutional duty to enforce and interpret the BL and to examine whether legislation enacted by the legislature and executive acts are consistent with the BL and, if found to be inconsistent, to hold them to be invalid: *Ng Ka Ling & Others v Director of Immigration,* supra, *per* Li CJ at p25G-J.

99. In sum, the constitutional arrangement under the BL for the exercise of legislative power broadly resembles the past before 1 July 1997. The LegCo is the only institution vested with general legislative powers exclusively. Neither the CE nor, for that matter, other branches of the Government has the general power to legislate. In exercising its functions and powers, the LegCo is bound by the BL and other constitutional requirements. Within the constitutional confines and under the common law principle of separation of powers, the LegCo is autonomous. Like the Pre-97 LegCo, the LegCo can under the common law delegate its legislative powers to the CE and other branches of the Government to make subordinate legislation by enacting specific enabling ordinances. Correspondingly, that is the limited extent to which the CE and other branches of the Government can legislate. When a challenge is made, the court can examine the constitutionality of the enabling ordinance, and the constitutionality and *vires* of the subordinate legislation made thereunder, as the case may be.

100. It follows that under the constitutional framework of the BL, the LegCo can delegate to the CEIC legislative powers by way of an enabling ordinance to make emergency regulations provided that they are subordinate legislation. As we understand the parties' submissions, they do not differ on this point.

101. This brings us to the ERO. At this juncture, we look at it in the overall context of continuity.

(b) The ERO as an integral option for emergency measures

102. The BL contemplates a wide range of options available to the NPCSC and the Government, as the case may be, allowing different and specific measures to be made to address the varying exigencies of emergency or public danger generally.

103. The first option is vested with the NPCSC alone. In the most extreme case of a state of war as declared by the NPCSC or turmoil endangering national unity or security beyond the control of the Government, BL18 enables the Central People's Government (the "CPG") to issue an order applying the relevant national laws in Hong Kong. Other than this dire scenario which necessitates the NPCSC's action, how to tackle emergency and public danger is basically left with the Government.

104. It is worth noting that where there is an official proclamation of public emergency under section 5 of the HKBORO, measures may be taken derogating from the BOR to the extent strictly required by the exigencies of the situation save and except non-derogable rights: section 5(2)(c)[37]. Those measures must be taken in accordance with law: section 5(1).

105. The second option involves the CPG and garrison upon the request of the Government. Under BL14(3), for maintenance of public order or disaster relief, the Government may ask the CPG for assistance from the garrison.

106. Plainly, other occasions of maintenance of public order or disaster relief where the Government does not need to ask the CPG for assistance from the garrison under BL14(3), and many other cases of emergency and public danger, not limited to maintenance of public order of disaster relief, may happen. To cope with those situations, the BL provides the CE with three further options.

107. The CE may adopt executive and administrative measures in emergencies under BL56(2)[38]. The power to do so, it would appear, comes from the general executive powers of the Government[39], of which the CE is the head[40].

108. If emergency legislative measures are required, the CE may make a request to the President of the LegCo under BL72(5) to convene an emergency session of the legislature to pass the necessary laws.

109. There is another option which the CE can resort to if emergency legislative measures are required, that is, invoking the ERO to make emergency regulations. As explained above, BL56(2) recognizes that the CE can make subordinate legislation under an enabling ordinance pursuant to the common law principle of delegation by the LegCo, including emergency regulations. In respect of emergency and public danger, as at 1 July 1997, the only ordinance, upheld twice by the court, which delegated to the CEIC the power to make emergency regulations was the ERO. So both the ERO and the CEIC's power to invoke it to make subordinate legislation to deal with emergency and public danger were clearly within the contemplation of the drafters of the BL. They must have regarded the ERO to be compatible with the BL so that it would remain in our statute book after 1 July 1997.

110. Based on the past invocations, the ERO is powerful and versatile enough to enable the CEIC to legislate speedily and effectively to meet all and every kind of emergency and public danger that imposes serious and subsisting threats to Hong Kong and its citizens[41].

111. In sum, under the theme of continuity, the BL contemplates that the ERO under which the CE has the power to make emergency regulations is one of the integral options for tackling emergency and public danger. The theme of continuity strongly suggests that the ERO is constitutionally compliant and should remain as part of the laws of Hong Kong. If the ERO were held to be unconstitutional, it would leave a significant lacuna in the law for dealing with emergency and public danger generally. The CE would be deprived of the power to respond swiftly, flexibly and sufficiently by making the necessary emergency regulations even though the circumstances clearly warrant it and it is in the public interest to do so.

E3.4 The Judges' views

112. At [82] - [93] of the Judgment, the Judges dealt with the theme of continuity and *To Lam Sin* and *Li Bun* in some details. They took the view that the theme of continuity did not assist the respondents for a number of reasons.

113. First, the Judges noted that there was a fundamental change in constitutional order before and after 1997. Before 1997, under Article VII of the Letters Patent, it was the Governor who, by and with the advice and consent of the Pre-97 LegCo, might make laws for the peace, order, and good government of colonial Hong Kong. Further under Article X, the Governor had a discretion to assent or refuse assent to a bill passed by the Pre-97 LegCo or reserved it for the Crown's signification. And if the Governor refused to give assent, there was nothing the Pre-97 LegCo could do about it. Under the BL, the LegCo is the legislature of Hong Kong (BL66). While a bill passed by the LegCo may take effect only after it is signed and promulgated by the CE (BL76), there are carefully calibrated provisions requiring the CE either to sign bills or refuse to do so in which case a chain of events would be set in motion that could result in the dissolution of the LegCo or resignation of the CE (BL49, 50 and 52). The Judges concluded that the law-making power of the LegCo under the BL is in substance different from that enjoyed by the Pre-97 LegCo whose constitutional role was to provide advice on, and give consent to, bills which the Governor then enacted into law in exercise of the law-making powers conferred on him under the Letters Patent[42].

114. However, as we have explained above, properly understood, Article VII vested the general legislative powers not with the Governor but with the Pre-97 LegCo. The Pre-97 LegCo was not a mere advisory body assisting the Governor in making laws. It was the legislature of colonial Hong Kong. Had it not been the case, the judicial discussions in *To Lam Sin* and *Li Bun* based on the notion that a colonial legislature was sovereign and supreme within its province and how it could permissibly delegate its law making powers to the GIC in the context of the ERO were quite meaningless. And the Full Court would have decided the challenge that the ERO was *ultra vires* the Pre-97 LegCo on a totally different basis. The references to the difference before and after 1997 regarding the process after passage of a bill do not detract from the fact that the Pre-97 LegCo was the legislature of colonial Hong Kong under the Letters Patent before 1 July 1997, just is the case of the LegCo for HKSAR under the BL after 1 July 1997.

115. Second, the Judges held that the notion that the colonial legislature was sovereign and supreme within its province, which underpinned the reasoning of the Full Court in *To Lam Sin* and *Li Bun*, is no longer an apt description of the LegCo. For the BL is now supreme and even the LegCo cannot act contrary to a requirement under the BL. The LegCo no longer has the plenary power enjoyed by the Imperial Parliament but that which is conferred expressly or by implication on it under the BL[43]. They opined that there is a difference between a constitutional order which prescribes the legislature's authority to make certain laws and binds the legislature to legislate according to certain procedures, and one which treats the legislature as supreme, citing *The Executive Council of the Western Cape Legislature & Others v The President of the Republic of South Africa & Others* 1995 (4) SA 877, at [59][44].

116. As we have explained, the Pre-97 LegCo was always subject to the Letters Patent and other constitutional requirements. It was "supreme" or, as what we would prefer, autonomous, within the constitutional confines. That is the same for the LegCo. It is subject to the BL and all other constitutional requirements. Under the constitutional arrangement in the BL and further based on the common law doctrine of separation of powers, it is autonomous within the constitutional confines. The reference to the South African case does not take the analysis any further.

117. Third, the Judges noted that the ERO was enacted at a time when the Pre-97 LegCo consisted of the Governor, the Official Members and not more than six Unofficial Members which were appointed by the Governor, and was presided over by the Governor. They seemed to have endorsed a submission made in *Ping Shek and another v The Canossian Institute*, supra, at p72 that the GIC was a body that had actually, through its members, a controlling voice in the Pre-97 LegCo itself[45]. They then pointed out under the BL, the transfer of general legislative power by the ERO has to be examined in the context of a constitutional framework that seeks to ensure that laws are enacted, amended or repealed by a legislature constituted by election and whose composition is carefully prescribed. The LegCo is quite separate from the Government. There may be overlap in membership between the LegCo and the Executive Council, but under BL56, the CE need only consult the Executive Council and is not obliged to accept its majority opinion[46].

118. In our view, the fact that politically the Governor was in control of the Pre-97 LegCo when the ERO was enacted or indeed at any other time does not detract from the fact that constitutionally and legally the Pre-97 LegCo remained the legislature of colonial Hong Kong. The Governor could not make laws on his own without proper delegation by the Pre-97 LegCo. How he was able to secure such delegation politically is irrelevant in terms of legal analysis.

119. Finally, the Judges considered that the reasoning of Hogan CJ in *Li Bun*, at pp100 and 102 supports the conclusion that inasmuch as the ERO confers "general legislative powers" on the CEIC (subject only to a limitation as to the occasions of public danger or emergency), the LegCo is deprived of any effective role to play in making of regulations which may range over virtually the whole field of legislation. Hogan CJ's ultimate conclusion that the ERO did not cross the fine line under the then constitutional set-up is not applicable to the constitutional order under the BL[47].

120. For reasons which we will develop below, we disagree that under the existing constitutional framework the LegCo cannot exercise any real or meaningful control over the emergency regulations made under the ERO. That Pre-97 LegCo, according to Hogan CJ, could not do so because of the restraints under the then constitutional order, is quite beside the point. Further, as will be seen, under the existing constitutional framework the court can also exercise effective control over the CEIC in exercising the powers under the ERO and the emergency regulations made. This is a crucial point in considering the constitutionality of the ERO in the overall constitutional context but was not considered by the Judges.

121. In consequence, the Judges erred in failing to give sufficient weight to the theme of continuity and to *To Lam Sin* and *Li Bun* in their analysis.

E4. Principal features of the ERO

122. The ERO being constitutionally compliant is not only supported by the theme of continuity. Upon a proper construction by a closer and updated analysis of its principal features with reference to the relevant contemporaneous jurisprudence, the ERO only confers limited legislative power on CEIC to make subordinate emergency regulations, and not primary legislation, on an occasion of emergency or public danger.

E4.1 True nature of the ERO and emergency regulations

123. First and foremost, it is imperative to bear in mind the true nature of the ERO and the emergency regulations made thereunder as a matter of substance.

124. There are many reasons for a legislature to delegate to the executive branch of the Government, or any other person or body, by way of an enabling primary legislation, legislative power to make subordinate legislation, as the editors in *Bennion on Statutory Interpretation* (7th edn), at section 3.1, enumerate:

> "(a) Modern legislation requires far more detail than Parliament itself has time or inclination for. For example, Parliament may not wish to concern itself with minor procedural matters.

> (b) To bring a complex legislative scheme into full working operation, consultation with affected interests is required. This can best be done after Parliament has passed the outline legislation, since it is then known that the new law is indeed to take effect and what its main features are.
>
> (c) Some details of the overall legislative scheme may need to be tentative or experimental. Delegated legislation provides an easy way of adjusting the scheme without the need for further recourse to Parliament.
>
> (d) Within the field of a regulatory Act new developments will from time to time arise. By the use of delegated legislation the scheme can be easily altered to allow for these.
>
> (e) If a sudden emergency arises it may be essential to give the executive wide and flexible powers to deal with it whether or not Parliament is sitting." (emphasis supplied)

125. Scenarios (a) to (d) involve essentially the same legislative technique. The enabling primary legislation legislates on a subject matter in principle usually with a board framework, leaving the subordinate legislation to elaborate by filling in the details as and when required.

126. For scenario (e), the legislative approach can be different for a number of reasons. By nature, emergency or public danger is not capable of exhaustive definition, which means that usually a general or board definition is used. It ordinarily requires an urgent and effective response to avoid an imminent threat, prevent a worsening of the situation or mitigate the effects of the emergency. The executive needs wide and flexible powers to deal with every and all exigencies expeditiously and effectually. It follows that emergency regulations which the primary legislation delegated to the executive to make are necessarily wide and extensive in scope. They may even by virtue of the so-called "Henry VIII Clauses" dis-apply or amend a primary legislation. A ready example of adoption of such legislative approach is the English Civil Contingencies Act 2004. The editors of *Wade and Forsyth on Administrative Law*, (11th edn), at pp730 - 731 observe:

> "… [The] definition of an emergency in the 2004 Act is very wide. It comprises 'serious threats' to the welfare of any part of the population, the environment, the political, administrative or economic stability or, the security of the United Kingdom. There is no requirement that an emergency be declared, but Her Majesty may by Order in Council make emergency regulations for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency if satisfied that an emergency is occurring or about to occur, that the regulations are necessary and the need is urgent. Practically anything may be required to be done, or prohibited, by the regulations. … The full plenary powers of Parliament have been given to the maker of the regulations for they 'may make any provision of any kind that could be made by Act or Parliament' including disapplying or modifying an Act."

127. As dictated by the considerations peculiar to emergency and public danger, the nature of emergency legislation, both primary and subordinate, differs quite considerably from ordinary primary and subordinate legislations. One must constantly bear this in mind when approaching the constitutionality of the ERO. That is, with respect, what the Judges had failed to do.

128. At [56] of the Judgment, in giving the first reason why, in their opinion, the ERO conferred primary legislative powers on the CEIC, they highlighted the fact that the ERO was not an ordinary piece of primary legislation that legislated on a subject matter in principle leaving another body to devise the detailed legal norms that elaborated or put flesh on the broad matters laid down in the primary legislation. But such a difference always exists and is exactly the reason why the ERO and emergency regulations should be treated differently from ordinary primary and subordinate legislations. In citing that as a reason against the ERO's constitutionality, the Judges had failed to sufficiently appreciate the true nature of the ERO and emergency regulations.

E4.2 Section 2(1)

129. As the main power conferring provision, section 2(1) provides:

> "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."

130. Two main points arising from section 2(1) need to be addressed.

131. First, there is no definition for public danger[48]. It is a matter for the CEIC to consider if an occasion of public danger exists. The Judges were understandably concerned. At [60] of the Judgment, they observed that the meaning of public danger could potentially be very broad. They held that since the ERO did not state a "reasonably grounds" test, the discretion conferred by the ERO could be virtually unreviewable. They at [61] went on to query the utility of any review because of the strict confidentiality and pubic interest immunity attaching to information placed before the CEIC. Relying on certain passages in *Li Bun*, they at [62] noted that the width of the powers left precious little room for the doctrine of *ultra vires* to operate.

132. In our view, there is nothing objectionable in itself to task the CEIC to determine if an occasion of public danger exists. After all, it is a grave decision with immense consequences which affect the entire community. As the head of the HKSAR, the CE, with the advice of the Executive Council, is evidently the only suitable person to make the call.

133. That said, it does not follow that the CE could act freely without any rein as she wishes. She is subject to close judicial scrutiny. She can only invoke the ERO when there is a public danger. That condition must be strictly adhered to. Although there is no statutory definition for public danger, whether such a state exists at any given time can be objectively gauged by the prevailing circumstances. The past invocations in the colonial era are good examples. As said, they all involved serious and immediate threats to Hong Kong and its citizens as a whole which subsisted for a period of time. In the present instance, the parties do not dispute that a state of public danger arising from the recent ongoing and large-scale social unrest often associated with serious and prevalent violence did exist at the time when the PFCR was made. The present state of affairs shares the same commonality with the past instances of emergency and public danger. In any event, if necessary, the court may provide an interpretation to the meaning of public danger to fill the lacuna, if there is really one, as appropriate[49]. The CE's decision to invoke the ERO can then be subject to judicial scrutiny by reference to such interpretation. Further, the CE's decision that an occasion of public danger existed is reviewable under the *Wednesbury* principle too. She must also act *bona fide* in furtherance of the statutory purpose of the ERO according to the Padfield principle: *Padfield v Minister of Agriculture Fisheries and Food* [1968] AC 997.

134. The Judges' concern that only very limited information is available making a legal challenge against the CE's decision to invoke the ERO difficult, if not impossible, is misplaced. As will be seen in a while, emergency regulations made under the ERO are subject to the negative vetting procedure. For that procedure, the Government will ordinarily present a LegCo Brief, a public document, to explain the background, the underlying policy, the justification and various matters pertaining to the emergency regulations. The LegCo can also ask the Government for further relevant information. So even assuming that the papers placed before the CEIC are confidential or subject to immunity (which presumably may be waived), the LegCo Brief and any such further information will provide the necessary materials to facilitate the mounting of the legal challenge[50].

135. The Full Court might have said something in *Li Bun* suggesting that there was little room for the doctrine of *ultra vires* to operate. But *Li Bun* was decided almost 60 years ago. The law has moved on since then. We do not see how *Li Bun* could have inhibited the application of the doctrine of *ultra vires* nowadays in any significant way.

136. In any event, all emergency regulations made under the ERO must not contravene the BL. As illustrated by our discussion on the PFCR below, this already provides adequate basis for the court to scrutinize their validity.

137. The second point arising from section 2(1) is this. The powers conferred by section 2(1) on the CEIC are undoubtedly wide and extensive. As explained above, given the nature of the ERO and emergency regulations, such powers are necessary. That the Judges failed to appreciate when they at [57] of the Judgment cited it as a reason for ruling against the constitutionality of the ERO.

E4.3 Section 2(2)(g)

138. This is the so-called "Henry VIII Clause":

> "Without prejudice to the generality of the provisions of subsection (1), such regulations may provide for–
>
> …
>
> (g) amending any enactment, suspending the operation of any enactment and applying any enactment with or without modification;"

139. As Hogan CJ observed in *Li Bun*, at p101, it is necessary to confer on the CE such power, otherwise her capability to make adequate provisions for some unexpected danger or emergency might be hampered or limited by the inability to alter any existing ordinance, especially, when the LegCo could not, for one reason or another, be brought into session or meet.

140. The Judges disagreed for two reasons.

141. At [64] of the Judgment, they first said that there is no provision in the BL that authorizes the CEIC by herself to amend or repeal primary legislation. That must be true. But the CEIC does not derive the power to amend or repeal primary legislation from the BL. She does so from the delegation by the LegCo under the common law. This leads to their second point.

142. At [65] - [66] of the Judgment, the Judges observed that validity of Henry VIII Clauses is based on parliamentary sovereignty which the LegCo does not enjoy and that such Clauses are antithetical to the norm of subsidiary legislation as understood in Hong Kong under section 28(1)(b) of the Interpretation and General Clauses Ordinance (Cap 1) ("the IGCO") that "no subsidiary legislation shall be inconsistent with the provisions of any Ordinance".

143. While it is true that the LegCo does not enjoy supremacy in the Diceyan sense, it is wrong to say that it cannot as a matter of Hong Kong common law delegate to the CE the power prescribed by section 2(2)(g) of the ERO in cases of emergency or public danger. There is nothing in the BL or anywhere else to indicate that such common law principle contravenes the BL and has not migrated to the post-1997 era.

144. The Judges' reliance on section 28(1)(b) of IGCO is misplaced. Pursuant to section 2(1) of the same Ordinance, the application of the provisions of the IGCO is subject to the contrary intention that appears from the context of any ordinance. Given the context of the ERO, there is definitely a contrary intention to dis-apply section 28(1)(b) to emergency regulations made thereunder.

E4.4 Penalties

145. As part of the powers conferred on her, section 3(1) of the ERO enables the CEIC to make regulations to provide for a contravention as a criminal offence with associated penalties up to a maximum of mandatory life imprisonment. This is evidently part and parcel of the wide and extensive powers that the CEIC needs to effectively tackle emergency or public danger, especially when it involves a serious, prevalent and subsisting breach of law and order.

146. The Judges' only criticism is that it is contrary to the norm for subsidiary legislation under section 28(1)(e) of the IGCO, which specifies the maximum sentence for an offence based on contravention of a subsidiary provision to be a fine of HK$5,000 or six months' imprisonment. Again, the Judges erred in failing to see that because of the context of the ERO, section 28(1)(e) must have been dis-applied.

E4.5 Negative vetting and repeal

147. According to section 2(3) of the ERO, the emergency regulations made shall continue in force until repealed by order of the CEIC.

148. As the Judges rightly held at [69] - [72] of the Judgment, section 2(3), properly construed, does not itself prevent such regulations from repeal by resolution of the LegCo during negative vetting under section 34 of the IGCO or from repeal by a subsequent ordinance. The latter appears to be consistent with what the Pre-97 LegCo did in 1936 in the failed attempt to abrogate the emergency regulations in question.

149. At [74] of the Judgment, the Judges said that it is open to the CEIC, as part of the regulations made under the ERO, to amend or suspend the operation of section 34 of the IGCO. In our view, when the ERO is properly construed, it does not allow the CEIC to do so. Pursuant to section 2A(1) of the IGCO, all laws previously in force in Hong Kong shall be construed with such modifications, adaptions, limitations and exceptions as may be necessary so as not to contravene the BL. Thus the ERO must now be construed to make it compatible with the BL. And under BL73(1), the LegCo's legislative power to amend or repeal laws in accordance with the provisions of the BL and legal procedures must include the power to scrutinize, and if found necessary, to amend or even repeal, subordinate legislation made by other branches of the Government. So on a proper interpretation to make it in line with BL73(1), the ERO does not empower the CEIC to amend or suspend the operation of section 34, thereby depriving the LegCo the control over the emergency regulations by the negative vetting procedure.

E4.6 Check on duration of regulations

150. Despite the point on negative vetting, the Judges at [68] of the Judgment said that there is no time limit on the validity and force of the regulations, nor any mechanism for constant review. However, in accordance with the negative vetting procedure under section 34 of the IGCO, there is a first phase of scrutiny whereby the regulations may take effect pending expiry of the time limit of 28 days, which may be extended for 21 days. If repealed during negative vetting, the regulations will not last beyond such time limit. Further, even if the regulations continue to take effect despite negative vetting, there is a second phase of scrutiny whereby the LegCo can further review them. Nothing can stop the LegCo from stepping in to put an end to the emergency regulations by way of primary legislation. Further, as Mr Yu has rightly accepted, the duration of the emergency regulations is open to challenge by way of judicial review if the CE fails to repeal them when the state of public danger no longer exists.

151. The Judges at [75] - [79] of the Judgment were concerned that once promulgated, the emergency regulations immediately become part of the general law. Even if repealed later, it would not "un-do" the regulation's effects and revive the original legislation if it was repealed by the regulations. We need not dwell on the point. For such scenario happens whenever a piece of legislation is repealed. By itself it does not operate against the ERO.

152. In our view, when properly analyzed, the emergency regulations which the ERO authorizes the CEIC to make is subordinate legislation. The ERO does not confer on the CEIC general legislative power to make primary legislation.

E5. Conclusion

153. In our discussion above, we have not dealt with each and every single point taken by counsel. We consider what we have set out above is sufficient for the present purpose. And for the foregoing reasons, we hold that the ERO does not confer on the CEIC general legislative power to make primary legislation. It does not contravene the BL.

154. In KWH-RN, KWH seek to further support the Judges' conclusion under Ground 1 on the basis of the principle of legality[51]. In gist, it is submitted that the principle of legality averts a construction of BL17(2), 66 and 73(1) that the drafters intended that the LegCo could enact laws that would have the effect of conferring unlimited and general law-making power on the CEIC, or conversely that the CEIC could constitutionally rely on BL56(2) and 62(5) to usurp the role of the LegCo. In our views, the principle of legality contention does not add anything further to the applicants' other contentions that we have considered above. Thus, for the same reasons, we would also reject such contention.

155. In the premises, we would respectfully differ from the Judges and reject Ground 1. We would allow the respondents' appeal in this regard.

F. GROUNDS 5A AND 5B

F1. Standard of scrutiny

156. It is not disputed that the PFCR imposed restrictions on fundamental rights protected by the BL and the BOR and must, in addition to being prescribed by law, satisfy the proportionality test in order to be valid. The rights engaged were identified at [127] (BL27 and BOR14, 16 and 17 rights in respect of section 3 of the PFCR) and [169] - [173] (BL27, 28 and 31 and BOR5, 8, 14 and 16 rights in respect of section 5) in the Judgment.

157. The proportionality test involves a four-step examination:

> (1) whether the restrictions pursue a legitimate aim, and in respect of rights under BOR16 and 17, the legitimate aim must come within the scope of specified purposes set out in those articles;
>
> (2) whether the restrictions are rationally connected with such legitimate aim(s);
>
> (3) whether the restrictions are no more than necessary for achieving the legitimate aim(s);
>
> (4) whether a fair balance has been struck between the societal benefits pursued by the restrictions and the inroads made to the rights of the individuals.

158. In our judgment, notwithstanding that the PFCR touches upon matter of public order and measures which are necessary for the restoration of law and order in Hong Kong and to meet the challenges to the stability of our society presented by the recent turmoil, the appropriate standard that the court should adopt in carrying out the proportionality analysis in this instance should be the stricter standard of "no more than necessary" as submitted by Mr Chan instead of the "manifestly without reasonable foundation" standard advocated by Mr Yu.

159. In *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353, Ma CJ explained at [37] - [46] the considerations which guide the Court in deciding the standard to be adopted in the proportionality analysis. Three facets were mentioned in particular: the nature of the right in question and the degree to which it has been encroached upon; the identification of the relevant decision-maker; and the margin of appreciation.

160. The Chief Justice also highlighted the separate constitutional and institutional responsibilities of the judiciary and other organs of the Government. In assessing the extent to which margin of appreciation should be accorded to the decision maker, the court should consider if the decision maker is institutionally likely to be better placed than the court to make an assessment in relation to the particular issue in question.

161. Though we agree with Mr Yu that the provisions in the PFCR do not prohibit the exercise of the rights engaged, *viz* freedom of expression, right to assembly and demonstration and right to privacy, we also bear in mind that section 3 imposes restrictions which curtail the exercise of these fundamental rights in a substantial manner. In some circumstances (and we recognize that they are real possibilities) the measures may discourage some people from exercising their right of demonstration and even bar them from a particular form or manner of demonstration.

162. Whilst we would not underestimate the onerous and difficult responsibility on the CEIC in deciding whether the prevalent public danger called for measures in the PFCR, as illustrated by previous cases like *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, the court is constitutionally and institutionally well-placed to make proportionality assessment in respect of legislation (including subsidiary legislation) relating to the maintenance of law and order in our society. The court is also institutionally tasked with the constitutional duty to strike a balance between conflicting societal interest and fundamental rights of individuals in public order matters.

163. Hence, we respectfully agree with the Judges that the appropriate standard should be the "no more than necessary" standard.

164. Like the Judges, we shall address the proportionality of section 3 and that of section 5 separately.

F2. Section 3

F2.1 Legitimate aims and rationality

165. At [130] of the Judgment, the legitimate aims of the PFCR were identified as follows:

> (1) deterrence and elimination of the emboldening effect for those who may otherwise, with the advantage of facial covering, break the law;
>
> (2) facilitation of law enforcement, investigation and prosecution.

166. Mr Yu submitted that these legitimate aims are to be considered against the background of the crisis of public disorder that Hong Kong had experienced in the past few months and that the exercise of the power under the ERO to make the PFCR was deemed necessary by the CEIC in order to restore the stability and to maintain the law and order in the society.

167. Counsel referred to the speech of the CE on 4 October 2019 when she announced the promulgation of the PFCR at a press conference. To recap, the CE recounted the frequent and widespread violent behaviours of some rioters in the course of demonstrations and processions since June 2019 and the escalation in such violence resulting in serious damage (including damage to private properties) and injuries to citizens and law enforcement officers. She also highlighted that lethal weapons were being used by rioters to attack police officers. A high proportion of these violent protesters were students and many of them wore masks and other protective gears to hide their identities in order to escape from criminal responsibilities.

168. In the Judgment, the Judges also alluded to the dire situation facing Hong Kong at [132], reiterating the disorder and violence experienced and witnessed by all those in society incessantly and the development of such violence on an escalating scale. At [137] and [138], the Judges agreed with Mr Yu that many public assemblies or processions which initially took place lawfully and peacefully were turned into unauthorized or unlawful ones with some radical protesters resorting to violence.

169. The Judges found that there could not be a simple dichotomy between peaceful and violent protesters as people's behaviour may change depending on the circumstances and the influence from others around them. They further accepted that facial covering makes law enforcement, investigation and prosecution more difficult.

170. Against such background, the Judges held that the PFCR served legitimate aims and they are rationally connected with the same.

171. Before us, Mr Chan did not challenge these conclusions of the Judges. He also accepted that the restriction under section 3(1)(a) (prohibition in respect of unlawful assembly) is no more than necessary and strikes a fair balance between individuals' right and the societal benefit served by the restriction. Mr Pun SC on behalf of LKH likewise did not challenge these conclusions in relation to section 3 (though he challenged the same in respect of section 5, which we shall deal with below). Counsel also accepted section 3(1)(a) is proportionate.

172. Hence, in these appeals, we shall focus on the proportionality of sections 3(1)(b), (c) and (d), in particular, for each of those restrictions whether it is no more than necessary to achieve the legitimate aims and whether a fair balance has been struck.

173. Before we address that key issue, we should first examine the precise scope of operation of section 3(1)(b) (which involves the examination of the concept of unauthorized assembly under the POO and its significance in terms of public order management) and the extent to which it interferes with the fundamental rights of demonstration and freedom of expression.

F2.2 Permissible restrictions and scope of section 3(1)(b)

174. We start the analysis by reminding ourselves some relevant authorities on the permissible restrictions on the fundamental rights of demonstration and freedom of expression.

175. The right of demonstration and freedom of assembly are not absolute. In *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837, the Court of Final Appeal highlighted the limits in section B.3 of the judgment. In particular, Ribeiro PJ said at [38] - [40]:

> "38. Article 17 allows a line to be drawn between peaceful demonstrations (where, as noted above, full rein is given to freedom of expression) and conduct which disrupts or threatens to disrupt public order, as well as conduct which infringes the rights and freedoms of others. In *Leung Kwok Hung v HKSAR,* having recognized that the interests of 'public order (*ordre public*)' are listed by Article 17 as a legitimate purpose, the Court held that there is no doubt that such concept 'includes public order in the law and order sense, that is, the maintenance of public order and the prevention of public disorder'. It concluded that a statutory scheme giving the Commissioner of Police discretion to regulate public processions with a view to maintaining public order was constitutionally valid after severance of certain objectionably vague words.
>
> 39. Once a demonstrator becomes involved in violence or the threat of violence – somewhat archaically referred to as a 'breach of the peace' – that demonstrator crosses the line separating constitutionally protected peaceful demonstration from unlawful activity which is subject to legal sanctions and constraints. The same applies where the demonstrator crosses the line by unlawfully interfering with the rights and freedoms of others.
>
> 40. The law therefore imposes bounds on the constitutionally protected activity of peaceful assembly. The need for such limits is sometimes dramatically illustrated in situations involving demonstrations and counter-demonstrations. It is not uncommon for one group, demonstrating in favour of a particular cause, to find itself confronted by another group demonstrating against that cause. The situation may be potentially explosive and the police will generally try to keep them apart. Obviously, if both remain within their lawful bounds, all will be well. But often, conflict and public disorder may result. Sometimes, both sides will have broken the law. But in some cases, the disruption of public order is caused only by one side. The task of the law enforcement agencies and the courts is then to identify the source of such disruption by identifying the demonstrators who have crossed the line into unlawful activity. They thereby avoid curtailing or punishing the constitutionally protected activities of the innocent group." (emphasis supplied)

And at [42]:

> "42. Lines also have to be drawn where a demonstrator's conduct impinges unacceptably upon the rights of others (which may or may not be constitutionally protected rights). Such a line had to be drawn, for instance, in *Yeung May Wan v HKSAR*, where the Court had to decide whether the offence of obstructing a public place was properly applied so as to curtail a static, peaceful demonstration by a small group of Falun Gong protesters which obstructed only part of the pavement, on the basis that they were interfering with the rights of other users of the public highway. To take another example, the Court of First Instance recently had to decide whether the right to demonstrate entitled protesters to take their demonstration into a private residential development without the consent of the owners, or whether that right was constrained by the need to respect the private property rights of the residents."

176. In the more recent case of *Kudrevicius v Lithuania* (2016) 62 EHRR 34, the Strasbourg Court considered if the criminal convictions of the applicants were compatible with the right to freedom of assembly. The applicants did not engage in any acts of violence. The regional court found that they had organised a gathering with the aim of seriously breaching public order, *viz* organising the blockade of a highway. They were convicted of criminal offences and were sentenced to 60 days' imprisonment which were suspended. The Strasbourg Court held that the criminal conviction was justified as being necessary for pursuing the legitimate aims of prevention of disorder and protection of the rights and freedoms of others and found no violation of the freedom of assembly.

177. In respect of the breach of public order occasioned by blockage of road, the Court observed at [97] (omitting the footnotes):

> "However, the applicants' conviction was not based on any involvement in or incitement to violence, but on the breach of public order resulting from the roadblocks. The Court further observes that, in the present case, the disruption of traffic cannot be described as a side-effect of a meeting held in a public place, but rather as the result of intentional action by the farmers, who wished to attract attention to the problems in the agricultural sector and to push the government to accept their demands. In the Court's view, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by Article 11 of the Convention …"

178. The Court characterized the conduct of the applicants as "reprehensible" (see [101]). Such finding was important because on the facts of the case the demonstration was initially authorized and under Strasbourg case law, a person cannot be subject to a sanction for participation in a demonstration which has not been prohibited so long as that person does not himself commit any reprehensible act on such an occasion, see [149]. The Court further explained the concept of "reprehensible act" at [173] and [174] (omitting the footnotes):

> "173. As can be seen from the above case-law, the intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a 'reprehensible act' within the meaning of the Court's case-law. Such behavior might therefore justify the imposition of penalties, even of a criminal nature.
>
> 174. The Court considers that, even though the applicants had neither performed acts of violence nor incited others to engage in such acts, the almost complete obstruction of three major highways in blatant disregard of police orders and of the needs and rights of the road users constituted conduct which, even though less serious than recourse to physical violence, can be described as 'reprehensible.'"

179. In this respect, the concurring speech of Judge Wojtyczek at O1-3 pinpointed the rationale for finding such conducts reprehensible:

> "… The effects of such roadblocks go far beyond the usual disruptions caused by demonstrations in public places. They also go well beyond the idea of a sit-in protest organised around certain specific places for the purpose of blocking access to them. The applicants took these actions to promote their opinions, not by strength of argument, but by directly undermining the legitimate individual economic interests of a significant number of third parties, and by disrupting the economic life of their country – and thus, more by argument of strength. The demonstrators' message was meant not only to be heard but also to directly affect their fellow-citizens. In that context, the reasoning of the judgment rightly describes the applicants' acts as reprehensible …"

180. The Court also reiterated that any measures interfering with freedom of assembly other than in cases of incitement to violence must be subject to careful scrutiny. In particular, at [94] and [146], the Court had these to say:

> "94. In this connection, it is not without interests to note 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 intentions or behaviour. The possibility of persons with violent intentions, not members of the organising association, joining the demonstration cannot as such take away that right. Even if there is a real risk that a public demonstration might result in disorder as a result of developments outside the control of those organising it, such a demonstration does not as such fall outside the scope of paragraph 1 of Article 11, and any restriction placed thereon must be in conformity with the terms of paragraph 2 of that provision.
>
> ...
>
> 146. … Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification. A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction, and notably to deprivation of liberty. Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence."

181. For demonstration which has not been authorized, the Court made some general observations at [150] - [153]. Whilst acknowledging that it is essential to have a system of prior notification, the absence of prior authorization does not give carte blanche to the authorities in taking enforcement actions. Such actions would still be subject to proportionality requirement. The Court highlighted that though there could be special circumstances which justify the holding of spontaneous demonstrations without prior notification, such exception must not be extended to the point where the absence of prior notification of a spontaneous demonstration can never be a legitimate basis for crowd dispersal.

182. Thus, the proportionality analysis has to be applied on two different levels:

(1) examining the systemic proportionality by reference to the legislation or rules in question;

(2) examining the operational proportionality by reference to the actual implementation or enforcement of the relevant rule on the facts and specific circumstances of a case at the operational level.

183. In these appeals, it should be emphasized that we are only concerned with the first level of challenges. It remains for the court to assess the proportionality on the second level on the facts and circumstances in a particular case if a charge is brought against person.

184. The Strasbourg Court continued at [155] - [157] in *Kudrevicius v Lithuania*, supra, to identify the need to have measures to restrict conducts causing disruption to ordinary life to a degree exceeding that which is inevitable for peaceful demonstration and assembly. At [155], the Court alluded to two important mindsets for striking the balance:

> (1) on the one hand, the public authorities have to show a degree of tolerance;
>
> (2) on the other hand, demonstrators should comply with the regulations in force.

185. At [156], the Court said:

> "The intentional failure by the organisers to abide by these rules and the structuring of a demonstration, or of part of it, in such a way as to cause disruption to ordinary life and other activities to a degree exceeding that which is inevitable in the circumstances constitutes conduct which cannot enjoy the same privileged protection under the Convention as political speech or debate on questions of public interest or the peaceful manifestation of opinions on such matters. On the contrary, the Court considers that the Contracting States enjoy a wide margin of appreciation in their assessment of the necessity in taking measures to restrict such conduct."

186. The rationale for imposing necessary restrictions was explained at [157]:

> "Restrictions on freedom of peaceful assembly in public places may serve to protect the rights of others with a view to preventing disorder and maintaining an orderly flow of traffic. Since overcrowding during a public event is fraught with danger, it is not uncommon for State authorities in various countries to impose restrictions on the location, date, time, form or manner of conduct of a planned public gathering."

187. We shall now turn to consider the effective scope of section 3(1)(b).

188. Section 3(1)(b) prohibits the use of any facial covering that is likely to prevent identification while a person is at an unauthorized assembly. Unauthorized assembly has the meaning ascribed to it as set out in section 17A(2) of the POO. There are three different scenarios:

(1) Any public meeting or public procession taking place in contravention of section 7 or 13 of the POO, *viz* either those without requisite notification being given to the Commissioner or those with notification and the Commissioner does not issue a notice of no objection, or processions not complying with the requirements under section 15. For public meeting, section 7 only applies in respect of a meeting of more than 50 persons. For public procession, section 13 only applies to public procession on public highway or thoroughfare or in a public park which consists of more than 30 persons.

(2) Three or more persons taking part in or forming part of a public gathering refuse or wilfully neglect to obey an order given by Commissioner of Police under section 6 of the POO. Under section 6, the Commissioner can control and direct the conduct of all public gatherings and specify the route by which and the time at which any public procession may pass. He may also regulate the playing of music or amplification of human speech or other sound in public places.

(3) Three or more persons taking part in or forming part of a public meeting, public procession or public gathering or other meeting, procession or gathering refuse or wilfully neglect to obey an order given under section 17(3) of the POO. Under section 17(3), a police officer may give an order for the purpose of section 17(1) to prevent the holding of, stop or disperse any public meeting in contravention of section 7 or any public procession in contravention of section 13. Also under section 17(3), a police officer of or above the rank of inspector may issue an order for the purpose of section 17(2) to prevent the holding of, stop, disperse or vary the place or route of any public gathering if he reasonably believes that the same is likely to cause or lead to a breach of the peace. Similar orders can be made in respect of public gathering for religious purposes.

189. Public gathering is defined in section 2 of the POO to mean a public meeting, a public procession and any other meeting, gathering or assembly of 10 or more persons in any public place.

190. It should also be noted that:

(1) under section 17A(1), any person who refuses or wilfully neglects to obey an order given under section 6 or 17(3) commits an offence; and

(2) under section 17A(3), every person who, without lawful authority or reasonable excuse, knowingly takes or continues to take part in or forms or continues to form part of any such unauthorized assembly shall be guilty of an offence.

191. Further, in respect of the conditions imposed for a public meeting which is subject to the requirement of notification under section 7, the conditions would be imposed under section 11(2) instead of section 6. For public procession which is subject to the requirement of notification under section 13, conditions imposed for the same would be issued under section 15(2) instead of section 6. These conditions (unlike conditions imposed under section 6) are subject to the appeal procedure under section 16.

192. Since section 7 applies to public meeting of more than 50 persons and section 13 applies to public procession of more than 30 persons, they cover most public gatherings of a large scale in Hong Kong.

193. The provisions in the POO have to be construed (insofar as it is possible to do so) in a manner which is compatible with the fundamental rights of demonstration and procession: see *R v Home Secretary Ex p Simms* [2000] 2 AC 115 at p131. They must also be applied in a manner compatible to such fundamental rights. Though section 17A(2)(a) provides that a public meeting or procession taken place in contravention of section 7 or 13 would be an unauthorized assembly, in light of the principle of tolerance and proportionality on the operational level as discussed in *Kudrevicius v Lithuania*, supra (see [180] - [184] above) as well as a matter of practicality in view of the number of persons present at such gatherings, unless there are violent or other reprehensible conducts on the part of some demonstrators posing serious and imminent risk to public order and safety which requires immediate actions on the part of police, there should be prior warnings and the issuance and announcement of an order under section 17(3) before more drastic actions like arrests and dispersals are taken.

194. For gatherings which are not subject to notification requirement, the Commissioner would not have any advance notice and it is rather unusual for conditions to be imposed by the Commissioner under section 6 for such gatherings. Given that the Commissioner would be unlikely to be present at the scene of gathering, it is also unlikely that a condition will be imposed under section 6 in the course of such gathering. Further, in the context of an unauthorized assembly under section 17A(2)(b), the principle of tolerance and requirement of proportionality on operational level are also engaged. Like the case under section 17A(2)(a), unless there are violent or other reprehensible conducts on the part of some demonstrators posing serious and imminent risk to public order and safety which requires immediate actions on the part of police, there should be prior warnings and the issuance and announcement of an order under section 17(3) before more drastic actions.

195. In cases where conditions are imposed under section 11(2) or 15(2), when there are persons taking part in or forming part of the public meeting or public procession acting in breach of a condition (eg, the routes prescribed under conditions imposed), if the circumstances so required, the proper procedure under the statutory scheme of the POO is for the police to exercise the discretionary power under section 17(1)(a) and (b) with the giving of an order under section 17(3) to prevent the holding of, stop or disperse the gathering.

196. The power to order the stopping and dispersal of a gathering under section 17(3) must be exercised for the purpose of maintenance of public safety, public order and the protection of the rights and freedoms of others since the conditions under sections 11(2) and 15(2) can only be legitimately imposed for such purposes. The purpose of section 17 has to be ascertained by reading all relevant provisions together and in the context of the whole statute: see *Medical Council of Hong Kong v Chow Siu Shek* (2000) 3 HKCFAR 144. Thus, with the application of the *Padfield* principle as discussed at great length in *Chee Fei Ming v Director of Food and Enviromental Hygiene* [2019] HKCA 1425, the power under section 17 cannot be exercised arbitrarily.

197. Further, in terms of unauthorized assembly by virtue of non-compliance with the notification requirements or the no objection requirement under section 7 or 13, before more direct enforcement actions like actual dispersal or arrest are taken by the police, the proportionality requirement on the operational level (see the discussion at [181] - [184] above by reference to *Kudrevicius v Lithuania,* supra, prior warnings should have been given about the unauthorized nature of the gathering and an order for stop and dispersal should have been made under sections 17(1) and (3).

198. After such order has been given, the gathering should be discontinued. Otherwise, those without lawful authority or reasonable excuse, knowingly takes or continues to take part in the unauthorized assembly would commit an offence under section 17A(3).

199. Another possibility is that during the course of a public procession or public meeting, the conducts or behaviours of some persons taking part in the gathering lead a police officer of or above the rank of inspector to reasonably believe that it is likely to cause or lead to a breach of the peace. In that case, the police officer may exercise the power under sections 17(2)(a) and (b) in conjunction with the giving of an order under section 17(3) to prevent the holding of, stop or disperse the gathering.

200. Thus, under all these scenarios referred to at [188] above, when it is necessary for the police to take drastic actions like arrests and dispersal in respect of an unauthorized assembly, unless there are violent or other reprehensible conducts on the part of some demonstrators posing serious and imminent risk to public order and safety which requires immediate actions on the part of the police, an order should have been made under section 17(3) and there are at least three or more persons refuse or wilfully neglect to obey the order.

201. There cannot be a refusal or wilful neglect to obey an order unless the persons concerned were aware of the order.

202. Also a person cannot be regarded as knowingly taking part in an unauthorized assembly unless he was aware of the unauthorized nature of the gathering or the order under section 17(3) and that there are three or more persons refusing or wilfully neglecting to comply with such order.

203. The compatibility of the statutory scheme under the POO (in respect of public procession) was examined by the Court of Final Appeal in *Leung Kwok Hung & Others v HKSAR*, supra. The defendants in that case were convicted of offences under section 17A(3)(b)(i) for holding and assisting in the holding of unauthorized assembly. The assembly in question was a peaceful procession of between 40 and 96 people and it was unauthorized because the defendants refused to give prior notification.

204. At [47], [50] and [54] - [57], the majority of the Court of Final Appeal highlighted that the discretionary powers of the Commissioner must be exercised for the statutory legitimate purposes, *viz*, he reasonably considers that the restriction is necessary in the interests of national security or public safety, public order or the protection of the rights and freedom of others. The Commissioner must himself apply the proportionality test in that consideration, see [57].

205. Though the Court of Final Appeal held that the statutory scheme under the then POO (regulating the discretion of the Commissioner by reference, *inter alias*, to the concept of *order public*) did not satisfy the "prescribed by law" requirement, the majority held that such reference to *order public* could be severed and the remaining concept of public order (in the law and order sense, *viz*, the maintenance of public order and prevention of public disorder, see [82] and [83]) is sufficiently certain. The majority of the Court of Final Appeal also held that the Commissioner's statutory discretion to restrict the right of peaceful assembly for the purpose of public order is no more than is necessary to accomplish the legitimate purposes: see [92] - [94]. The convictions were upheld accordingly.

206. In this connection, though on the facts of the case the conviction was due to the failure to give notification, the Court of Final Appeal also examined the full range of discretionary powers that the Commissioner and the police could exercise in restricting the freedom of assembly and procession: see the analysis of the statutory scheme and the statutory discretion at [43] - [63]. In light of that, it would be surprising if after the severance of *order public* from the relevant provisions, the majority of the Court of Final Appeal still regarded some aspects of the statutory discretion concerning unauthorized assembly other than the requirement to give notification to be unconstitutional and made no comment on the same.

207. As explained by the Court of Final Appeal, the public order considerations are not confined to cases where violent confrontations would entail. They also embrace traffic conditions and crowd control. Presence of rival groups and reaction of members of the public are also relevant: see [92(3)].

208. To sum up, there are valid and serious public order concerns for unauthorized assembly:

> (1) for those gatherings held without complying with the requisite notification requirement, the justification for imposing criminal sanctions against the same has been explained by the majority in *Leung Kwok Hung & Others v HKSAR*, supra;

(2) for those gatherings involving breach of conditions (including conditions imposed under sections 6, 11(2) and 15(2)), the conditions are imposed in the first place as being necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others (and subject to the criteria of proportionality, see *Leung Kwok Hung & Others v HKSAR*, supra) and in the case of sections 11(2) and 15(2) where a police officer considers that it is necessary to make a further order under section 17(3) to prevent the holding of, stop or disperse the gathering (the making of such order can also be subject to assessment of proportionality on the operational level, see *Kudrevicius v Lithuania*, supra, as discussed above);

(3) for those gatherings involving an order by a police officer of or above the rank of inspector under sections 17(2) and (3), the situations are those where the police officer reasonably believes that the same is likely to cause or lead to a breach of the peace.

209. Unlike the offence of unlawful assembly under section 18 (which is the situation addressed under section 3(1)(a) of the PFCR), there is no specific requirement of an unauthorized assembly under section 17A(2) that the persons assembled conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that they will commit a breach of the peace.

210. Such distinction was regarded by the Judges as significant in assessing if the restriction under section 3(1)(b) is no more than necessary in the proportionality analysis. Thus, at [154] of the Judgment, they observed:

> "Second, s 3(1)(b) relates to 'unauthorized' assemblies as explained in §§26 and 27 above. An assembly which is 'unauthorized' may yet be entirely peaceful, without any violence being used or threatened by anyone participating in that assembly, eg a large scale public procession may become an unauthorized procession as a result of the failure by some participants to comply with a condition as regards the route of the procession imposed by the Commissioner under s 15(2) of the POO but the participants may continue to proceed with the procession in an entirely peaceful and orderly manner."

211. With respect, in so holding, the Judges failed to have regard to the pre-emptive nature of the provisions in imposing sanctions against unauthorized assemblies under the POO and their significance in the context of the maintenance of public order, particularly in the context of the current public danger which, as explained above, the PFCR as a piece of regulations promulgated under the ERO is meant to address.

212. Further, the Judges failed to take account of the actual operation of the statutory scheme as explained above, in particular the circumstances under which an order under section 17(3) of the POO would be made. If it is only a small number of participants deviating from the approved route of procession without any conducts or behaviour causing serious disruption to public order, an order for the stop and dispersal of the gathering will not be compatible with the principle of proportionality on an operational level.

213. As explained above, under the scheme of the POO, in respect of the designation of the route as a condition imposed for a procession under section 15(2), such condition is set because the Commissioner regards it as being necessary and proportionate in the interests of national security or public safety, public order or the protection of the rights and freedoms of others. It follows that deviation from the designated route would have ramifications on the maintenance of public order even though such deviation does not entail violence or threat of violence.

214. Even so, such deviation would not *per se* turn the procession into an unauthorized assembly. Police officers could give warnings against deviations or take other steps to restore order or to prevent disorder. It is a matter of discretion and judgment on the part of the police officers present at the scene, guided by the principles of law set out in this judgment (in particular the importance of proportionality on the operational level discussed at [180] - [184] and [193] - [197] above), to assess what steps are necessary to redress the disruption to public order occasioned by a deviation. Under section 17(2), a police officer of or above the rank of inspector may vary the route of any public gathering if he reasonably believes that the same is likely to cause or lead to a breach of the peace. There are also other measures that can be taken under sections 17(4) and (6).

215. It is only when a police officer forms a judgment that due to the conducts and behaviours of some participants in breach of conditions imposed for the gathering, such gathering has to be stopped and dispersed and the officer issues an order to that effect under section 17(3) the implications for unauthorized assembly under section 17A(2)(c) (including the application of section 3(1)(b) of the PFCR) kick in. As explained at [201] and [202] above, the persons concerned must have the requisite knowledge before he could be found guilty of the offence under section 17A(3).

216. In this connection, the analysis of the statutory scheme under the POO (and thus the scope of section 3(1)(b) of the PFCR) discussed at [188] - [202] and [212] - [215] above must be borne in mind. In particular, the prerequisite of an order under section 17(3) in cases other than those involving violent or other reprehensible conducts on the part of some demonstrators posing serious and imminent risk to public order and safety which requires immediate actions on the part of the police (see [193] above) and the proportionality on the operational level are safeguards against unjustified interference with the rights of peaceful demonstration and assembly.

217. Thus, the scenario postulated by the Judges that a procession which proceeded peacefully and orderly would by virtue of a deviation of a minor scale turn the whole gathering into an unauthorized assembly is, with respect, rather unreal.

218. At this juncture, we should address the submission that because the use of the word "at" in section 3 of the PFCR, a person could be found guilty simply by virtue of his presence at and wearing a mask in an unauthorized assembly even if he does not participate in the acts occasioning an order being made under section 17(3) and has no knowledge of such order.

219. To recap, section 3(1)(b) of the PFCR provides:

> "A person must not use any facial covering that is likely to prevent identification while the person is at unauthorized assembly."

220. A contravention of section 3(1), including subparagraph (1)(b), is an offence by virtue of section 3(2). At the same time, section 4 provides a defence:

> "(1) It is a defence for a person charged with an offence under section 3(2) to establish that, at the time of the alleged offence, the person had lawful authority or reasonable excuse for using a facial covering.
>
> (2) A person is taken to have established that the person had lawful authority or reasonable excuse for using a facial covering if-
>
> > (a) there is sufficient evidence to raise an issue that the person had such lawful authority or reasonable excuse; and
> >
> > (b) the contrary is not proved by the prosecution beyond reasonable doubt.
>
> (3) Without limiting the scope of the reasonable excuse referred to in subsection (1), a person had a reasonable excuse if, at the assembly, meeting or procession concerned-
>
> > (a) the person was engaged in a profession or employment and was using the facial covering for the physical safety of the person while performing an act or activity connected with the profession or employment;
> >
> > (b) the person was using the facial covering for religious reasons; or
> >
> > (c) the person was using the facial covering for a pre-existing medical or health reason."

221. The problem arising from the word "at" was alluded to by the Judges at [156] of the Judgment:

> "Fourth, the prohibition applies to any person while he or she is 'at' any unauthorized assembly, public meeting or public procession referred to in s 3(1)(b), (c) or (d). It is not clearly stated whether, to be caught by the prohibition, the person must be a participant in the relevant gathering, or whether it suffices for that person to be merely present at the gathering, eg a person who goes to the scene for the purpose of taking photographs, or giving first-aid to persons in need of help, or even a mere passer-by who has stopped to observe the gathering. The wording of s 3(1) may be contrasted with (i) s 17(3) of the POO, which makes it an offence for any person who, without lawful authority or reasonable excuse, 'knowingly takes or continues to take part in or forms or continues to form part of' any unauthorized assembly, and (ii) s 18(3) of the POO, which makes it an offence for any person who 'takes part in' an unlawful assembly. It is uncertain whether the restrictions imposed by s 3(1)(b), (c) or (d) cover not only participants of the types of gathering referred to in those sub-paragraphs, but also any person who is physically present (other than perhaps for a fleeting moment) at the gathering in question."

222. In his submissions, Mr Yu did not shrink from the position that section 3(1)(b) of the PFCR (as indeed sections 3(1)(a), (c) and (d) also) is applicable when a person is present at the place where the gathering takes place. Counsel submitted that the test of taking part is inappropriate in this context because it has an element of knowingly associated or identified with the unlawful or unauthorized assembly, citing *R v Wolfgramm* [1978] 2 NZLR 184 and *R v Cook & Ors* (1994) 74 A Crim R 1. Further, the disorder occurred in the current public danger often arises from gatherings attended by a large number of people. Given the number of people present and the fluidity of the potentially explosive situations, it is more important to require all people taking off facial coverings to minimise the shielding and emboldening effect. This is against the background that one of the legitimate aims of section 3 is to deter the "more peaceful" protestors or bystanders from continuously giving tacit support to the continued challenge of law and order by those radical and violent protestors and shielding the latter from effective police actions and arrests.

223. In our judgment, the taking part in a gathering has to be examined at different stages. It is true that for unlawful assembly, taking part in it requires the proof of knowing association or participation. Apart from the authorities cited by Mr Yu, the same point was made in *Secretary for Justice v Leung Kwok Wah* [2012] 5 HKLRD 556 at [17] - [22], citing the dicta of Macdougall VP in the earlier case of *R v To Kwan Hang* [1995] 1 HKCLR 251 at p254.

224. However, in the context of unauthorized assembly, as discussed at [193] above, other than cases involving violent or other reprehensible conducts on the part of some demonstrators posing serious and imminent risk to public order and safety which requires immediate actions on the part of the police, there should be an order issued and announced under section 17(3) of the POO for the stopping or dispersal of the gatherings before further conducts (by way of refusal or wilful neglect to comply) on the part of those at the assembly rendering the assembly unauthorized under section 17A(2)(c). An order of dispersal necessarily requires people at the assembly to leave the scene. If a person remains at the scene notwithstanding the order, he will be acting in defiance of the order. By virtue of section 17A(1)(a), all the persons in the vicinity who are aware of the stop and dispersal order should not remain at the scene.

225. As regards unauthorized assembly held without compliance with section 7 or 13, any person who is at such assembly would be participating in the unauthorized assembly. It is all the more so when such person does not leave the scene after the police announces that an order for stop and dispersal has been made under section 17(3). In this connection, the following observations made by Chantal Masse JCS in the Superior Court of Quebec in *Villeneuve v Montreal (City of)*, 2016 QCCS 2888 at [477] and [478] on demonstration without notification as required by law are pertinent:

> "[477] Likewise, the fact that police officers may have stated to the representatives that they used the powers conferred on them by Regulation P-6 only when the demonstration involved risks to the safety of citizens does not make it possible to conclude that the provision is not justified. The evaluation of such 'risks' necessarily takes into consideration the fact that there is no itinerary. Furthermore, as the organisers and participants have placed themselves in an unlawful situation, they cannot expect that the demonstration cannot be dispersed if it is not peaceful.
>
> [478] Moreover, in the context of a demonstration that occurs unlawfully but following a decision to tolerate it, it is not to be expected that the same degree of violence or disturbance is required before it can be dispersed, compared to what would be necessary before ending a demonstration that was taking place legally."

226. Subject to the requirement of awareness of such person of the unauthorized nature of the assembly and reasonable opportunity being given to those present to disperse and leave the scene, we do not see any fundamental objection to holding him liable for his continued presence at an unauthorized assembly. It is necessary to stress that the maintenance of the rule of law in Hong Kong should be the duty of all citizens who treasure the rule of law as a core value in our society. In the wake of an order for stop and dispersal of a gathering and direction being issued by police to leave the scene, a responsible law-abiding citizen should follow the direction instead of remaining there in defiance of such order and direction. Given the potential for rapid deterioration of the situation and the serious ramifications for the maintenance of law and order and safety of those at the scene in gatherings involving large number of persons, a person who refuses to disperse and leave an assembly after the order is publicly announced perpetuates a state of affairs which disrupts public order and gives rise to a serious threat of breach of the peace. By remaining at the assembly, even without the commission of further act of violence or threat of violence, such person perpetuates the worsening situation which can potentially escalate to serious violent confrontations and frustrates the statutory scheme under the POO for crowd control which is essential to the facilitation of peaceful demonstration and gathering. In short, those choose to remain at the gathering in defiance of an order to stop and dispersal actually participate in the unauthorized assembly.

227. In *Secretary for Justice v Leung Kwok Wah*, supra, the court observed that section 18 (which deals with unlawful assembly) has a pre-emptive effect and the design of the law is to put a stop to a deteriorating situation. The same observation can be made with regard to the provisions in sections 17 and 17A in relation to unauthorized assembly. The purpose of empowering the police to order a stop and dispersal of a gathering under section 17(3) is to prevent the escalation of confrontation and disorder when a gathering has given rise to imminent threats to the peaceful enjoyment of the right of demonstration and the rights and safety of other citizens. It is essential for effective crowd control and the due performance of the positive duty on the part of the police to facilitate lawful assemblies to take place peacefully (as explained in *Leung Kwok Hung & Others v HKSAR*, supra) that the police could bring a gathering to a halt when there are signs of such imminent threats.

228. The pre-emptive nature of these provisions is of particular significance in view of the unchallenged evidence on the worrying phenomenon recently witnessed in Hong Kong where the situations were often highly fluid (with peaceful demonstrations rapidly developed into unlawful riots with wanton and reckless violence causing serious damage to properties and even serious injuries to others). The evidence also shows that there were many instances where less radical protestors remaining at the scene to provide moral and actual support (in terms of shielding the identities of those violent protestors). Instead of condemnation of violent acts committed or the public disorder occasioned by the radical protestors, some other protestors provide assistance to the perpetuators of violent and destructive acts.

229. In this connection, it is noteworthy that in the case of *Austin v United Kingdom* (2012) 55 EHRR 14, the Grand Chamber of the Strasbourg Court had made these observations at [55] and [56] (omitting the footnotes):

> "55. … In connection with Article 11 of the Convention, the Court has held that interferences with the right of freedom of assembly are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engage in acts of violence. It has also held that, in certain well-defined circumstances, Articles 2 and 3 may imply positive obligations on the authorities to take preventive operational measures to protect individuals at risk of serious harm from the criminal acts of other individuals. When considering whether the domestic authorities have complied with such positive obligations, the Court has held that account must be taken of the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.
>
> 56. As the Court has previously stated, the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to information and intelligence not available to the general public, will usually be in the best position to make them. Moreover, even by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale. Police forces in the contracting states face new challenges, perhaps unforeseen when the Convention was drafted, and have developed new policing techniques to deal with them, including containment or 'kettling'. Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness."

230. *Austin v United Kingdom,* supra, was a case about the "kettling" or containment of a group of people carried out by the police on public order grounds. The Strasbourg Court upheld the validity of such measure in the circumstances of that case and rejected submissions that such containment constituted deprivation of liberty. The Court also examined the implications on Article 2 of Protocol No 4 to the European Convention for Protection of Human Rights and Fundamental Freedoms which guarantees the right to liberty of movement. Article 2 §3 of the said Protocol permits restrictions to be placed on the right to liberty of movement where necessary, *inter alia*, for the maintenance of public order, the prevention of crime or the protection of the rights and freedoms of others. The above observations on maintenance of public order and protection of the rights of others were made in such context.

231. As discussed earlier, there are legitimate public order concerns for unauthorized assembly. In light of the public danger facing Hong Kong with peaceful assemblies or processions by large number of persons wearing masks having a propensity of being hijacked by radical protestors and the rapidity of the worsening of situations, these public order concerns should be accorded with greater weight. Against such background, a deliberate defiance of the regulations against unauthorized assembly which are designed for the maintenance of public order and safety and protection of the rights of others is no less reprehensible than conducts which can be regarded as unlawful assembly.

232. On the other hand, we do not regard bystanders or passer-by as people "at the assembly" notwithstanding that they happened to be at the scene when the assembly becomes an unlawful assembly. Adopting a purposive construction and giving due regard to the principle of legality discussed at *R v Home Secretary Ex p Simms* [2000] 2 AC 115 at p131 as applied to the basic right of freedom of movement, we are of the view that such bystanders or passer-by cannot be regarded as being "at the assembly" when they are not part of the assembly in the first place nor do they take any steps to join the assembly at some stage. For such persons, a section 17(3) order cannot be directed against them. A person must have joined an assembly at some point in time before he could properly be regarded as "at the assembly" for the purpose of section 3(1) of the PFCR. The Chinese version of "at" in the relevant part of section 3(1) is "身處以下活動時", not "身處以下活動發生的地點或場所". In other words, there is a distinction between a person present at the scene or place where the assembly takes place and a person actually present at the assembly.

233. As we shall explain below, we are not minded to uphold the prohibition under section 3(1)(c) and (d) of the PFCR. Thus, there will be cases where a person lawfully wears facial coverings in a lawful public meeting or procession which is somehow hijacked by some people participating in the same gathering. For those persons, we are of the view that the defence of reasonable excuse under section 4 should be applicable when they are not aware of any order made under section 17(3) of the POO; or when they have not had a reasonable opportunity to leave the scene after becoming so aware.

234. As a matter of construction, the scenarios specified under section 4(3) are not exhaustive of the defence of reasonable excuse. By virtue of the potential adverse impact on the right of peaceful demonstration stemming from section 3 of the PFCR, the defence of reasonable excuse should be given a liberal interpretation. As held in *R v Home Secretary Ex p Simms,* supra, at p131, the principle of legality requires statutes to be interpreted insofar as possible in a manner compatible with fundamental rights. Thus, in cases where there is sufficient evidence to raise an issue of lawful use of facial covering (eg, in the participation of lawful assembly or gathering) and the court cannot be satisfied beyond reasonable doubt that a person remains at the scene (after reasonable opportunity to leave has been given) and persists in wearing such facial covering notwithstanding having made been aware of a section 17(3) order and the breach of the same by others leading to the unauthorized continuation of the assembly or gathering, a defence under section 4 can be made out.

235. In considering sections 3(1)(b), (c) and (d) together (the effect of which is to ban facial coverings from all public demonstrations, processions and gatherings), the Judges found the reasoning in *SAS v France* (2015) 60 EHRR 11, *Yaker v France*, Communication No 2747/2016 (17 July 2018) and *Villeneuve v Montreal (City of)*, supra, to be applicable. Those authorities addressed legislations or regulations banning facial coverings in public or public gatherings without distinction as to the nature of the gatherings and their public order significance. For reasons further canvassed below, we agree with them that a total ban of facial coverings from all public demonstrations, processions and gatherings cannot pass the test of reasonable necessity even in the context of the public danger in which the PFCR is meant to address.

236. However, the imposition of such restriction in some defined circumstances can be justified provided that law enforcement officers are not given unduly broad discretionary power to give rise to potential for arbitrariness. In the *Guidelines on Freedom of Peaceful Assembly* published by a panel of human rights expert, cited by the court in *Villeneuve v Montreal (City of)*, supra, at [496], there is the following commentary:

> "Restrictions imposed during an assembly: The role of the police or other law-enforcement personnel during an assembly will often be to enforce any prior restrictions imposed in writing by the regulatory body. No additional restrictions should be imposed by law-enforcement personnel unless absolutely necessary in light of demonstrably changed circumstances. On occasion, however, the situation on the ground may deteriorate (participants, for example might begin using of inciting violence), and the authorities may have to impose further measures to ensure that other relevant interests are adequately safeguarded. In the same way that reasons must be adduced to demonstrate the need for prior restrictions, any restrictions imposed in the course of an assembly must be just as rigorously justified. Mere suspicions will not suffice, and the reason must be both relevant and sufficient. In such circumstances, it will be appropriate for other civil authorities (such as an ombudsman's office) to have an oversight role in relation to the policing operation, and law-enforcement personnel should be accountable to an independent body. Furthermore … unduly broad discretionary powers afforded to law-enforcement officials may breach the principle of legality, given the potential for arbitrariness…"

237. There is no reason why each limb of section 3(1) should not be considered separately. Considering the ban under section 3(1)(b) on its own, given the public order concerns discussed above in respect of unauthorized assembly amidst the fluidity in terms of the rapid deterioration of many large scale processions and demonstrations into violent riots with most of the rioters adopting the black bloc strategy to escape from responsibility for very serious criminal acts, we are of the view that such ban (as interpreted above) is no more than necessary to achieve the legitimate aims. As we have seen, most people who choose to remain at the assembly despite their awareness of the unauthorized nature of the gathering (either because of the issue and notice of an order to stop and disperse made under section 17(3) or warnings given by police that the gathering is unauthorized on account of other reasons) should also be aware that they are at risk of being prosecuted for offences under sections 17A(1)(a) and (3)(a). The need to deter people from wearing facial coverings to frustrate the legitimate aims of the statutory scheme under the POO applies with equal force in the context of unlawful assembly as well as unauthorized assembly.

238. In coming to the above conclusion, we take account of the above analysis as to the scope of section 3(1)(b) of the PFCR (including our construction of the defence of reasonable excuse under section 4) and its potential effects on the right of demonstration and freedom of expression and the background leading to the promulgation of the PFCR and the legitimate aims served by the same. We summarize below the main considerations leading to our conclusion on necessity:

(1) The PFCR is intended to operate as an emergency measure when the public danger arising from the events since June 2019 continues to affect Hong Kong. Once the public danger subsides and the overall threat to law and order disappears, it is expected that CEIC would make an order under section 2(3) of the ERO to repeal the same.

(2) A significant contributing factor to the current public danger is the impediment to effective law enforcement and efforts to restore law and order in the wake of large scale riots employing the black bloc tactics by the radical rioters backed up by less radical protestors who also wore facial coverings to shield the violent rioters from arrests and criminal sanction.

(3) Insofar as section 3(1)(b) is concerned, it only bars the use of facial coverings at unauthorized assemblies. This measure should be assessed against the public danger experienced in Hong Kong from June 2019 onwards. It does not bar the exercise of the right of demonstration or freedom of expression generally. In other words, peaceful demonstration and assembly could still be held and the participants could adopt the wearing of facial coverings as a form of protest provided that the gatherings are authorized and held in accordance with the conditions imposed.

(4) The liberty to wear facial coverings is only curtailed when a person remains at an unauthorized assembly and an order to stop and disperse had been made by a police officer under section 17(3) of the POO or in circumstances where violent or other reprehensible conducts on the part of some demonstrators posing serious and imminent risk to public order and safety which requires immediate actions on the part of police. As analysed above, a section 17(3) order could only be made when there is serious public order and safety concerns or immediate need to protect the rights and freedom of other citizens. The enforcement action itself would be subject to proportionality test.

(5) Further, the defence of reasonable excuse under section 4 of the PFCR as construed above provides adequate protection to innocent protestors who are unaware of the section 17(3) order or have no reasonable opportunity to leave the scene.

(6) As explained above, the refusal to disperse from an unauthorized assembly after a person at the assembly has been notified of the assembly being unauthorized or an order to stop and disperse under section 17(3) being made by itself is an offence. In other words, the persons participating in the unauthorized assemblies are taking part in an unlawful act, liable to be arrested and subject to potential penalty of imprisonment.

(7) Even assuming such persons can still be regarded as exercising the right of peaceful demonstration, the wearing of facial coverings for demonstration under such circumstances is not at the core of such right.

(8) Given the circumstances under which a section 17(3) order would be issued and the underlying public order significance for the POO regime to regulate and facilitate public processions and gatherings effectively, any non-compliance with such regulations by way of participating in an unauthorized assembly gives rise to a substantial risk of breach of the peace. This is particularly so in light of the propensity of such gatherings being hijacked by some radical protestors turning them into violent confrontations and the adoption of the black bloc tactics by such protestors in the current climate of public danger.

(9) The wearing of facial coverings at unauthorized assemblies substantially impedes the effective law enforcement in terms of the identification and arrest of the radical and violent protestors who have crossed the line, which was the task of the police as highlighted in the judgment of Ribeiro PJ in *HKSAR v Chow Nok Hang*, supra. The inability of the police to pinpoint in a timely manner such radical and violent protestors and to segregate them from other demonstrators by arrests seriously impairs the power of the police to defuse potentially explosive situations and to exercise effective crowd control. The police became seriously handicapped in the performance of their duty to facilitate peaceful demonstration.

(10) Such handicap also put the right of peaceful demonstration at serious risk because the Commissioner must take account of the practical difficulties stemming from mass facial coverings in crowd control and prevention of hijacking of lawful assembly or procession in deciding if objection should be made and the conditions to be imposed under sections 11 and 15 of the POO. At the same time, the timely and effective identification and segregation of violent protestors from the other peaceful demonstrators can avoid unnecessary police actions against the latter by virtue of mistaken identifications, thus facilitating the continuation of peaceful demonstrations or processions.

(11) In this connection, the observations made by Poon JA (as the Chief Judge then was) in *Secretary for Justice v Wong Chi Fung* [2018] 2 HKLRD 699 at [118] are pertinent, in particular:

> "… For the general public, preserving public order helps create a safe and stable social environment to enable individuals to exercise their rights (including human rights of which the freedom of assembly and expression is one), express their views and pursue their goals. In fact, the above-mentioned rights themselves will be lost in situation of anarchy if public order is not preserved. That is exactly the rationale underlying Article 17 of the Hong Kong Bill of Rights in only safeguarding peaceful assembly: the legal protection of the right of assembly is effective only in a society where public order is preserved …"

(12) In light of the above analysis on the operation of the POO regime in respect of unauthorized assembly in conjunction with the common law principles as discussed at [180] - [184], [188] - [202] and [212] - [215] above, there are sufficient safeguards to prevent arbitrariness in the exercise of discretion by the police and the courts in Hong Kong can provide adequate redress in the event of abuses.

239. In such context, *SAS v France*, supra, and *Yaker v France*, supra, (concerning legislation which prohibits the wearing of clothing that is designed to conceal the face in public places all the time) are of little relevance. As evidenced by the reasoning set out in those cases, the finding of disproportionality in the cases stems from the absolute ban instead of limiting it to situations where there is a general threat to public safety (see [139] in *SAS v France* and [8.7] in *Yaker v France*). These cases did not examine the matter in the context of public order and safety where there had been riots emerging repeatedly from mass demonstrations leading to the state of public danger which the PFCR is meant to tackle.

240. We are also satisfied that on a systemic level the prohibition under section 3(1)(b) of the PFCR strikes a fair balance between the societal benefits pursued by the restriction and the inroads made to the rights of the individual subject to the same.

241. We would therefore reverse the Judges' holding with regard to the proportionality of section 3(1)(b). Accordingly, we shall set aside the declaration of unconstitutionality in respect of this subsection.

F2.3 Sections 3(1)(c) and (d)

242. The position is different in relation to sections 3(1)(c) and (d) of the PFCR. These provisions prohibit the wearing of facial coverings at either a lawful public meeting that takes place under section 7(1) of the POO or a lawful public procession that takes place under section 13(1) of the POO. The holding of such meeting or procession would have been notified to the Commissioner and also not prohibited by the Commissioner. For public procession, the requirements of section 15 were complied with. One of the requirements is that good order and public safety of the procession is maintained.

243. Thus, so long as those meeting and procession proceed in accordance with sections 7(1) and 13(1), there cannot be any serious public order or safety issues which warrant additional restrictions being placed on the same by way of prohibition to wear facial coverings. As we have seen, when such meeting or procession were hijacked by protestors with violent or disorderly disposition, there is ample power on the part of the police under the POO regime to issue an order under section 17(3) including an order to stop and disperse. Disobedience to such an order would turn the meeting or procession into an unauthorized assembly.

244. On the other hand, if the meeting and procession remain peaceful and orderly, it is difficult to see the justification for imposing a restriction on the freedom of demonstration by way of prohibition of wearing facial coverings.

245. Mr Yu submitted that such prohibition is necessary because demonstrators wearing facial coverings would provide a shield to the radical violent protestors and facilitate the black bloc tactics which frustrate the effective policing when violent or criminal acts were committed.

246. However, as we have analysed above, a peaceful demonstration would have already degenerated into an unauthorized assembly or unlawful assembly before actual violence begins. For those fluid situations where such degeneration occurs rapidly, there is still sufficient powers under the POO regime to regulate the same in a proportionate manner. Thus, we have highlighted that there are cases where a lawful assembly can become an unauthorized one without a section 17(3) order when violent or other reprehensible conducts on the part of some demonstrators pose serious and imminent risk to public order and safety which requires immediate actions on the part of the police. For those scenarios, an offence under section 17A(2)(a) and (3) can be committed without an order made under section 17(3).

247. Even taking account of the propensity of mass demonstrations turned violent in the recent turmoil, we are not persuaded that it is necessary to extend the prohibitions under section 3(1) beyond the situations stipulated under subsections (a) and (b).

248. Thus, in respect of the prohibitions in sections 3(1)(c) and (d), we respectfully agree with the Judges that they cannot satisfy the proportionality test.

F3. Section 5

249. To recap, section 5 of the PFCR confers power on police officer to require a person using facial covering in a public place to remove such covering to enable the officer to verify the identity of the person. If that person fails to comply with the request, the police officer can remove the covering. It further provides that the failure to comply with the request is an offence and liable to a maximum sentence of imprisonment for six months.

250. The Judges held that the provisions in section 5 engage freedom of the person and the right to liberty under BL28 and BOR5. Freedom of expression, freedom of movement and right to privacy were also relied upon and the Judges regarded that the proportionality analysis would be the same. Though they accepted that section 5 serves legitimate aims of law enforcement, investigation and prosecution and it is rationally connected with such aims, the Judges held that in light of the width of the measure (as explained at [185] of the Judgment), it exceeds what is reasonably necessary to achieve the aims even in the prevailing turbulent circumstances in Hong Kong. They also held that section 5 fails to strike a reasonable balance between the societal benefits derived from the measure and the inroads made to the protected rights.

251. By LKH-NoCA, LKH challenged the finding of the Judges that law enforcement, investigation and prosecution are legitimate aims. He also challenged the conclusion that section 5 is rationally connected with such aims.

252. The main argument of Mr Pun regarding the first challenge is that those aims were too broadly stated so that it could not afford a framework for evaluating the importance of such objectives. He also submitted that for an aim to be legitimate, a genuine need must be established.

253. With respect, we cannot accept these submissions. As demonstrated by the Judgment, the Judges were able to apply the proportionality analysis by reference to these legitimate aims. We do not see any difficulties in the evaluation on proportionality of the measures against these objectives. On the evidence, there is a genuine and pressing need to facilitate effective policing to counter the black bloc tactics. We also agree with the Judges that section 5 is rationally connected with these objectives for the reasons given at [183] and [184] of the Judgment.

254. The other points raised by Mr Pun had sufficiently been addressed by the Judges at [174] - [179] of the Judgment.

255. We would dismiss the cross-appeal in these respects.

256. Coming back to the holding on reasonable necessity, Mr Yu submitted that the Judges erred in holding that section 5 is disproportionate when it involves minimal intrusion to an individual's right but serves important functions of removing practical difficulties in identification and early intervention in times of public danger.

257. Counsel also submitted that section 5 of the PFCR should be construed together with section 54(1)(a) of the Police Force Ordinance (Cap 232) ("the PFO") (which empowers a police officer to stop and demand proof of identity of a person acting in a suspicious manner in any street or other public place), section 49(1) of the POO (which empowers a police officer to require any person to produce proof of identity for inspection if he reasonably believes that it is necessary for prevention, detection or investigation of any offence) and section 17C(2) of the Immigration Ordinance (Cap 115) ("the IO") (which empowers police officer to demand a person to produce proof of identity for inspection).

258. Applying the principle discussed in *Medical Council of Hong Kong v Chow Siu Shek,* supra, Mr Yu submitted that we should take all these statutory provisions together in construing the limits of the power under section 5. Alternatively, as a fallback position, Mr Yu submitted that the Court can declare that the power under section 5 can only be exercised in conjunction with these other statutory powers.

259. Mr Yu also relied on the decision of the European Commission in *Reyntjens v Belgium* Application No 16810/90 to support his argument that the restriction on personal liberty under section 5 is minimal. In that case, the European Commission held that a routine identity check did not violate the liberty of the person protected under article 5 and the right to respect for private life under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

260. The decision in *Reyntjens v Belgium*, supra, was made in 1992. The Commission did not regard a check of identity card by the police as an interference in a person's private life. The identity card carried information as to the bearer's name, sex, date and place of birth, main address, and his spouse's name. The Commission took the view (somewhat surprising, if we may say so, in light of the more up-dated jurisprudence) that such identity card did not contain information relating to private life.

261. In *DPP v Avery* [2002] 1 Cr App R 31, the Divisional Court held that the exercise of the powers conferred by section 60 of the Criminal Justice and Public Order Act 1994 (which provided a police constable upon authorisation being given by an inspector under certain conditions could require any person to remove any item which were worn for the purpose of concealing his identity and to seize such item) was an interference with the liberty of the subject (see [17] and [18] of the judgment). The court also held that the exercise of those powers did not involve the power of search, see [16] and [24].

262. The interference was found to be justified for the reasons set out at [18]. An important consideration in that case was that the power under section 60 arose only in anticipation of violence and after a decision of a senior police officer was made to authorize the conferment of such power on the specific occasion. At the same time, Newman J also acknowledged at [17] that wearing of apparel to the head and face can be required by custom or religion and wearing of mask can be a potent means of demonstrating in a lawful manner.

263. The Judges in the present case contrasted that provision with section 5 under [185] - [187] and footnote 60 of the Judgment. They, in our view quite rightly, took account of the width of the power under section 5 in assessing the proportionality of the same.

264. The modern European approach was discussed by the European Court of Human Rights in *Gillan and Quinton v United Kingdom* Application No 4158/05 (which were reiterated in the more recent case of *Beghal v United Kingdom* Application No 4755/16). *Gillan and Quinton v United Kingdom,* supra,concerned the stop and search power under section 44 of the Terrorism Act 2000. On the interference with the right to liberty of a person, the Strasbourg Court had these observations at [56] and [57] (omitting the footnotes):

> "56. The Court recalls that Article 5 § 1 is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4, which has not been ratified by the United Kingdom. In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.
>
> 57. The Court observes that although the length of time during which each applicant was stopped and search did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1. In the event, however, the Court is not required finally to determine this question in the light of its findings below in connection with Article 8 of the Convention."

265. On the right to respect for private life, the court discussed the relevant principles and approach at [61] - [63] (omitting the footnotes):

"61. As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. The notion of personal autonomy is an important principle underlying the interpretation of its guarantees. The Article also protects a right to identity and personal development, and the right to establish relationships with other human beings and the outside world. It may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'. There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. In this connection, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive, factor. In *Foka*, at [85], where the applicant was subjected to a forced search of her bag by border guards, the Court held that 'any search effected by the authorities on a person interferes with his or her private life.'

62. Turning to the facts of the present case, the Court notes that sections 44-47 of the 2000 Act permit a uniformed police officer to stop any person within the geographical area covered by the authorisation and physically search the person and anything carried by him or her. The police officer may request the individual to remove headgear, footwear, outer clothing and gloves. Paragraph 3.5 of the related Code of Practice further clarifies that the police officer may place his or her hand inside the searched person's pockets, feel around and inside his or her collars, socks and shoes and search the person's hair. The search takes place in public and failure to submit to it amounts to an offence punishable by imprisonment or a fine or both. In the domestic courts, although the House of Lords doubted whether Article 8 was applicable, since the intrusion did not reach a sufficient level of seriousness, the Metropolitan Police Commissioner conceded that the exercise of the power under section 44 amounted to an interference with the individual's Article 8 rights and the Court of Appeal described it as, 'an extremely wide power to intrude on the privacy of the members of the public'.

63. The Government argues that in certain circumstances a particularly intrusive search may amount to an interference with an individual's Article 8 rights, as may a search which involves perusing an address book or diary or correspondence, but that a superficial search which does not involve the discovery of such items does not do so. The Court is unable to accept this view. Irrespective of whether in any particular case correspondence or diaries or other private documents are discovered and read or other intimate items are revealed in the search, the Court considers that the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life. Although the search is undertaken in a public place, this does not mean that Article 8 is inapplicable. Indeed, in the Court's view, the public nature of the search may, in certain cases, compound the seriousness of the interference because of an element of humiliation and embarrassment. Items such as bags, wallets, notebooks and diaries may, moreover, contain personal information which the owner may feel uncomfortable about having exposed to the view of his companions or the wider public."

266. Coming back to section 5 of the PFCR, even though it does not involve a power of search, the exercise of the power would inevitably impose a temporary restriction on the liberty of the person who is subject to the request. Further, the section imposes a coercive sanction to back up a request for removal of facial coverings. Another facet of section 5 is the empowerment of a police officer to remove a facial covering worn by a person if that person fails to comply with a request for such removal. Though the extent of bodily contact for removal of facial coverings may not be as substantial as a detailed search of a person, it nonetheless authorizes bodily contacts which, from the point of view of a person subject to such treatment, is unwelcome and may even be offensive. Acts and conducts on the part of a person to deflect or resist such removal could be taken as obstruction to due execution of duties and thus bring serious consequences upon such person.

267. We are therefore unable to agree that the interference occasioned by an exercise of section 5 power on the liberty of the person and the right to privacy is minimal.

268. Subject to the situations addressed by sections 3(1)(a) and (b), it is not an offence to wear facial coverings in public place. As we have already held, wearing facial coverings during a peaceful and lawful demonstrations would not be an offence. Yet section 5 confers power to the police to make a request to remove facial coverings in an entirely uneventful situation.

269. As noted by the Judges at [181] of the Judgment, there are other statutory provisions in our statute books empowering police officers to demand proof of identity for inspection under specified circumstances. We alluded to these provisions at [257] above. As explained at [182], there are good public order and immigration control justifications for such powers.

270. In our view, these statutory powers are already sufficient to address the law enforcement objectives, particularly when sections 3(1)(a) and (b) of the PFCR are in place and they could be relied upon in conjunction with the exercise of the power under section 54(1)(a) of the PFO or section 49(1) of the POO. Insofar as necessary, these provisions should be read with section 40(1) of the Interpretation and General Clauses Ordinance (Cap 1) which states:

> "Where any Ordinance confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing."

271. In order to have meaningful inspection of a proof of identity under these provisions, the police officer must be able to compare the photograph on the identity document with the face of the subject person. Thus, if the person wears facial covering, he must remove the same to facilitate the inspection by the police officer. Failure to remove the facial covering under such circumstances is a failure comply with the demand and it would be an offence under section 49(1) of the POO.

272. Any challenges to such implied power should be laid to rest after this judgment.

273. In any event, there is no justification for such wide power as laid down in section 5 of the PFCR. In this connection we are in full agreement with the Judges' observations at [189] of the Judgment. We cannot accept the submissions of Mr Yu that section 5 could be construed in a manner to confine its application to circumstances set out in section 54(1)(a) of the PFO or section 49(1) of the POO or section 17C(2) of the IO. There is simply nothing in section 5 itself to suggest that these provisions should be read together. The mere references to "prevent identification" under section 5(1) and verification of identity under section 5(2)(a) do not provide the basis for holding that section 5 should only be applicable in circumstances where section 54(1)(a) of the PFO or section 49(1) of the POO or section 17C(2) of the IO are applicable.

274. In *Medical Council of Hong Kong v Chow Siu Shek*, supra, Bokhary PJ referred to the following principle of construction at p156B:

> "It is well-established that the context in which a statute is to be interpreted includes other statutes *in pari materia* i.e. other statutes dealing with comparable matters."

275. Even if we were to accept that section 54(1)(a) of the PFO or section 49(1) of the POO can be regarded as dealing with comparable matters, those statutory provisions have different scopes of operation. We cannot distil any common limitations on the exercise of the powers under these statutory provisions and transpose the same to confine the scope of section 5.

276. Bearing in mind the objective for section 17C(2) of the IO as explained by the Judges at [181(3)] of the Judgment, it is plain that it cannot be regarded as dealing with a comparable matter as the PFCR the genesis of which is the public danger brought about by the recent turmoil. In this connection, we are aware that in *R v Fung Chi Wood* [1991] 1 HKLR 654 Bewley J held that the power under section 17C could be used for purposes unrelated to immigration control. That case was apparently not cited to the Judges. However, that was a decision before the HKBORO came into effect on 8 June 1991. Further, in light of the modern approach to the construction of the scope of statutory power by reference to its legislative purpose as discussed recently in *Chee Fei Ming v Director of Food and Environmental Hygiene,* supra, it is doubtful if that decision could remain good law today. As there is no appeal against the holding of the Judges in this respect and no submission has been advanced in that light, we are not going to resolve finally the applicable scope of section 17C(2). Suffice to say that we would proceed on the basis that there is no challenge before us to the view of the Judges.

277. Another general principle of construction discussed by Bokhary PJ in *Medical Council of Hong Kong v Chow Siu Shek*, supra, can be found at p154B:

> "When the true position under a statute is to be ascertained by interpretation, it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting."

278. The obvious contextual background for section 5 is the other provisions in the PFCR itself. However, it is plain that the CEIC did not intend to confine the operation of section 5 to cases where an offence has been committed under section 3. Otherwise, section 5(1) would be drafted differently. And there is actually no need to have section 5 to cover situations where the person is arrested or stopped for enquiry in respect of suspected commission of an offence under section 3. Such need has already been provided for under section 54(2)(a) of the PFO which provides:

> "If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence, it shall be lawful for the police officer to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer."

279. As explained above, the power under section 54(2)(a) impliedly confers the power to demand the subject person to remove facial coverings for verification of identity. Thus, there is no need for a further power to be conferred by way of section 5 to cater for such situation. We do not see any need for this Court to apply a remedial interpretation to section 5 by reading down its scope of operation.

280. As regard the submission of Mr Yu that section 5 can facilitate early intervention against the background of public danger, for the reasons given at [261] - [268] above, we do not find it proportionate to confer a wide power to the police to demand removal of facial coverings to verify the identity of a person in the absence of any ground for public order concern against the person in question.

281. Further, the conferment of such wide and unqualified power is against the concept of law providing proper safeguard against arbitrary interference of fundamental rights. The relevant principle was reiterated by the European Court of Human Rights in *Beghal v United Kingdom* Application No 4755/16 at [88]:

> "For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise (*Rotaru v. Romania* [GC], no. 28341/95, § 55, ECHR 2000-V; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 4, ECHR 2000-XI; *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I; see also, amongst other examples, *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 77, ECHR 2010 (extracts)). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see, for example, *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII; *S. and Marper, cited above*, § 96; *Gillan and Quinton*, cited above, § 77; and *Ivashchenko v. Russia*, no. 61064/10, § 73, 13 February 2018)."

282. For the above reasons, we would dismiss the appeal by the CEIC in respect of section 5 of the PFCR.

G. OTHER GROUNDS

283. In the KWH-NoCA and KWH-RN, they contend that the Judges were wrong in rejecting Grounds 2, 3 and 4. They are effectively seeking to advance the arguments made under these grounds again in these appeals.

284. In the LKH-NoCA, he contends that the Judges were wrong to reject Ground 3 and to hold under Ground 5B that the PFCR serves legitimate aims and the measures thereunder are rationally connected to those aims. Effectively, he is seeking to reargue those submissions that have been rejected in the court below.

285. We will deal with them in turn as follows[52].

G1. Ground 2

286. Mr Chan's submissions in support of this ground are premised fundamentally on the provisions under sections 3 and 5 of the HKBORO. It is therefore useful to set them out first.

287. Section 5 of the HKBORO (which incorporates and is identical to ICCPR4) provides:

"(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken in accordance with law.

(2) No measure shall be taken under subsection (1) that—

(a) is inconsistent with any obligation under international law that applies to Hong Kong (other than an obligation under the International Covenant on Civil and Political Rights);

(b) involves discrimination solely on the ground of race, colour, sex, language, religion or social origin; or

(c) derogates from articles 2, 3, 4(1) and (2), 7, 12, 13 and 15." (emphasis supplied)

288. Section 3 provides:

"(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."

289. Given these provisions, Mr Chan essentially submitted:

(1) Section 5 of the HKBORO prohibits any derogation from the fundamental rights provided in the ICCPR save in the circumstances specified therein and save except for non-derogable rights. The circumstances specified are detailed and elaborate[53].

(2) On the other hand, the CEIC can make any regulations of the widest scope and nature under the ERO under any occasion of emergency or public danger. The regulations so made *can* be of such measures that suspend or limit the protected rights under the BOR (and ICCPR). In other words, the regulations made by the CEIC under the ERO can derogate from the protected fundamental rights.

(3) However, the occasion of emergency or public danger provided under the ERO are not defined and undisputedly could cover situations other than "public emergency" as provided under section 5 of the HKBORO. In the circumstances, the ERO permits or allows derogation from the protected fundamental rights other than in the circumstances as specified and in accordance with section 5 of the HKBORO (and ICCPR4).

(4) In this respect, Mr Chan has further pointed out that section 2(4) of the ERO allows regulations to suspend or repeal existing laws[54], which must include the entire HKBORO or its section 5 specifically. In the premises, the ERO also permits or allows derogation from even non-derogable rights.

(5) The ERO is therefore inconsistent with the provisions in the HKBORO, and thus was already impliedly repealed under section 3(2) of the HKBORO before 1 July 1997.

(6) Alternatively, even if the ERO was not repealed before 1 July 1997, it is in any event impliedly repealed or has become unlawful *after* 1 July 1997 as it is inconsistent with BL39 (which constitutionalised ICCPR as it is incorporated into the domestic law under the HKBORO).

290. Mr Chan further submitted that the Judges were therefore wrong to reject this ground thinking that KWH has somehow conflated the concepts of derogation from the BOR itself and restriction of non-absolute rights under and in compliance with the BOR. He emphasised that his above arguments do not involve any conflation of concepts. His fundamental premise is that the ERO itself permits or allows such derogation to be implemented.

291. With the greatest respect, we think the Judges were clearly right in rejecting this ground. We hope we could be forgiven for not dealing with every aspect of Mr Chan's very comprehensive and detailed submissions, as we think the proper analysis and approach to this question is this.

292. First, as pointed out by Lam VP at the hearing, it is provided expressly at section 3(1) of the HKBORO that "[a]ll pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction". Hence, one must first seek to construe the ERO in a way to be consistent with the HKBORO. It is only when this is not possible that one should resort to section 3(2) to find that the ERO is repealed.

293. However, as rightly pointed out by the Judges at [108] of the Judgment, such a construction is not only permissible but a proper one (given section 3(1) of the HKBORO): the ERO should simply be read subject to section 5 of the HKBORO (which has been fairly accepted by Mr Yu to be the case both before the Judges as well as before this Court).

294. In other words, as explained by the Judges, the ERO should be construed as:

> (1) In times of a public emergency officially proclaimed and in accordance with the other requirements of section 5 of the HKBORO, measures may be adopted under the ERO which derogate from the BOR (even so, excepting the specified non-derogable provisions and discrimination on the prohibited grounds). Subject to the conditions of section 5 of the HKBORO (including that the derogations are limited to those strictly required by the exigencies of the situation), this may have the effect of temporarily suspending the relevant human rights norms.
>
> (2) In other situations, measures adopted under the ERO may not derogate from the BOR, which means that if any such measure has the effect of restricting fundamental rights, then like any other restriction in normal times, it has to satisfy the dual requirements that the restriction is prescribed by law and meets the proportionality test: *Leung Kwok Hung & Others v HKSAR*, supra, at [16] - [17].

295. Mr Chan however argued that such a construction is inappropriate and unworkable, since the court will have to read too much into the provisions of the ERO to meet the elaborate and detailed scheme and safeguards provided under section 5 of the HKBORO (and thus also ICCPR4) to permit derogation from the protected rights. For example, Mr Chan said in relation to the requirement of a proclamation of a "public emergency", such a construction would further require to be read into the ERO details such as to how the proclamation is to be made, what procedures are to be followed, and how many days of notice should be given to the public, etc. He therefore said the proposed construction is not only unworkable, but would also create uncertainties.

296. We are unable to accept this submission. All that section 5 of the HKBORO (and ICCPR4) has provided for are those criteria that have been set out therein before a derogation from the protected rights is permitted. The ERO is only required to be read to be subject to those broad criteria to make it consistent with section 5. All the so-called details that Mr Chan has suggested are simply *not* provided for by section 5 (or ICCPR4). They are therefore *not* specific requirements or criteria prescribed by section 5 of the HKBORO that need to be read into the ERO to make it compatible.

297. This conveniently takes us to the next reason why we find that the Judges were correct in rejecting this ground.

298. As observed by the Judges, although the ERO gives the CEIC the *potential* power to enact regulations that may result in derogation from the protected rights if she finds it necessary to do so, it is plain from the provisions of the ERO that they *do not by themselves* provide for any derogation from the protected rights as submitted by Mr Chan.

299. In the premises, the fundamental basis for the systemic challenge made against the ERO to say it is incompatible with BOR5 is incorrect in the first place.

300. *If* in the circumstances where a regulation enacted by the CEIC under the ERO does have the effect of derogating from any of the protected fundamental rights, that regulation will have to be subject to the dual tests of "prescribed by law" and "proportionality" as provided under section 5 of the HKBOR[55]. This however does not support a systemic challenge against the ERO to say that it is incompatible with section 5 of the HKBOR.

301. This is where and why the Judges were rightly of the view that KWH's contentions under Ground 2 conflate with the concepts of derogation from right and the restriction of non-absolute rights under and in compliance with the BOR.

302. The ERO is therefore not impliedly repealed before 1 July 1997 for being incompatible with section 5 of the HKBORO.

303. Mr Chan's alternative contention that the ERO should in any event be repealed *after* 1 July 1997 (as it is inconsistent with BL39 which incorporates ICCPR4 through the HKBORO) is in all material aspects based on the same arguments considered above. For the same reasons, we will reject it.

304. The Judges were correct in rejecting Ground 2. We would therefore dismiss KWH's ground of cross-appeal in this respect.

G2. Ground 3

305. Under this ground, both Mr Chan and Mr Pun (for LKH) [56] submitted that section 2(1) of the ERO is unconstitutional as it confers practically unlimited power on the CEIC to make regulations that are *capable* of severely restricting fundamental rights, but the scope of the power and the manner of its exercise is so wide and undefined that it falls foul of the legal certainty test under the prescribed by law requirement.

306. Mr Chan's submissions can be summarised as follows:

(1) The section 2(1) power can be invoked on a most vague ground of a self proclaimed "public danger" (which is not defined in the ERO). In other words, whenever and however.

(2) There is also no restriction on the scope of regulations to be made. It is *contemplated* that these regulations *could* impose restrictions on liberty of the persons, the right to a fair hearing, freedom of communication, right to private property, and conscription for services.

(3) In the premises, it is not possible to reasonably foresee, even with proper legal advice, the limits or the possible consequences of the existence of these powers. There are therefore no independent safeguards against abuses or excesses.

307. Other than relying on Mr Chan's submissions, Mr Pun further emphasised that the ERO falls foul of the prescribed by law requirement as:

(1) Given the widest possible scope of regulations that the CEIC is empowered to make under it, section 2(1) of the ERO confers an "*unfettered power*" on the CEIC and constitutes "*arbitrary interference*" in Hong Kong people's rights and freedom.

(2) The unfettered nature of the power (and hence the arbitraries of the interference that would result from it) is underlined by the fact that the ERO does not set out any "*guidance*" on the way in which the CEIC exercises the power, and only provides for a "*purely subjective and inherently vague and uncertain criterion*" (ie, the undefined "*public danger*" ground consideration as a basis for the CEIC to invoke the power).

308. It can be seen from the above that KWH and LKH's fundamental complaint under this ground is that section 2(1) of the ERO does not meet the prescribed by law requirement as it is uncertain in law as to the scope of the power conferred on the CEIC and the manner in which she should exercise that power.

309. The Judges rejected this ground for the main reasons set out at [112] - [115] of the Judgment as follows:

> "112. The argument of the applicants in both HCAL 2945 and HCAL 2949 is this. The ERO contemplates and enables the making of regulations which can severely curtail fundamental rights. Section 2(1) is, however, couched in wide terms and lacks any express limit or guidance on the exercise of the power by the CEIC in making regulations that may affect fundamental rights. As such, s 2(1) of the ERO violates the principle of legal certainty mandated by Art 39 of the Basic Law. What the argument focuses on is the certainty (or the lack of it) in the regulation-making power in the ERO, rather than that in respect of any regulations made under the ERO.
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> 113. We do not accept this argument. Legal certainty is not a notion existing in the abstract and in a vacuum. Art 39 of the Basic Law provides that the provisions of the ICCPR as applied to Hong Kong shall remain in force, and states that those rights and freedoms shall not be restricted unless as prescribed by law. As such, the 'prescribed by law' requirement applies to the restraints on the rights and freedoms of the individual. It is the 'norms' which purport directly to restrict the citizen's freedom that must be sufficiently precise to enable the citizen to conduct himself accordingly. This is how the requirement has been applied in the decisions of the Court of Final Appeal. Thus in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 and *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386, the requirement was applied to the common law offence of misconduct in public office and conspiracy to defraud respectively. In *Leung Kwok Hung & Others v HKSAR* (2005) 8 HKCFAR 229, it is the statutory scheme in the POO restricting the right of assembly and procession that was called into question by reference to the requirement of 'prescribed by law'. In *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, the point made was that property rights are to be protected by clear and accessible laws. In *HKSAR v Fong Kwok Shan Christine* (2017) 20 HKCFAR 425, the question was whether a provision in the administrative instructions issued by the President of the LegCo to regulate behaviour within the precincts of the LegCo's chamber was sufficiently certain. See also *Hong Kong Television Network Ltd v Chief Executive in Council* [2016] 2 HKLRD 1005 (CA), §90.
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> 114. In contrast, the ERO does not itself purport to limit any fundamental rights. It does not lay down any norms that curtail any right of an individual. Although regulations enacted under it may purport to do so, it seems to us that it is those regulations, if and when enacted, that have to meet the principle of legal certainty, not the enabling Ordinance in itself which has no direct effect on any individual right or freedom. If such regulations are themselves laws of general application, accessible to all residents, and sufficiently well defined, then they cannot be said to fall foul of the requirement of accessibility and foreseeability which is the essence of the principle.
>
> 115. The ERO, as the source of power for making regulations, cannot be attacked on its own under the 'prescribed by law' requirement. This is not to say that it can never be a matter of concern that executive authorities are given ill-defined powers to make laws that may restrict fundamental rights, but this seems to us to raise the analytically separate and different point in relation to delegation of legislative power, which we have dealt with under Ground 1 above. In addition, the laws thus made will themselves have to possess the quality of accessibility and to afford sufficient safeguards against arbitrary application by indicating with sufficient clarity the scope of any discretionary power conferred." (emphasis supplied)

310. Mr Chan and Mr Pun both submitted that the Judges had erred in their reasons.

311. With respect to Mr Chan and Mr Pun, we see no substance in this ground.

312. Most recently in *Chee Fei Ming v Director of Food and Environmental Hygiene,* supra, after reviewing a long line of authorities, this Court explained at [38] - [50] and [52] - [58] the applicable principles under the prescribed by law requirement.

313. Relevant for the present purpose concerning a complaint of lack of sufficient clarity as to the scope of the authority's statutory power and the manner of its exercise, the principles can be summarised as thus:

> (1) The requirement stems from BL39(2)[57] and BOR16 and 17. It entails two limbs: (a) the requirement as to the accessibility of the law, and (b) the requirement of foreseeability.
>
> (2) The second limb requires that "*a norm must be formulated with sufficient precision to enable a citizen to regulate his conduct so that he is able, with legal advice if necessary, to foresee the consequences which a course of action will entail*". This requirement is to be assessed by examining if there is sufficient clarity to protect an individual against arbitrary interference of his rights and freedoms.
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> (3) The crucial question in such context is whether there is sufficient clarity as to the scope of the authority's power and the manner of which its exercise and whether the law provides adequate safeguards against abuse. If these tests are met, there would be legal protection against arbitrary interference by the authority with the subject freedoms and rights in question.
>
> (4) At the same time, under the prescribed by law requirement, absolute precision or certainty is not achieved or required. It only requires that the "*core*" of the norm should be sufficiently formulated, and "*the mere existence of debatable issues surrounding the settled core does not make the norm legally uncertain*".

(5) For the purpose of determining what the "*law*" is for the prescribed by law doctrine, the court should adopt a "*holistic approach*". In assessing in a particular case whether foreseeability requirement is satisfied, the court can take into account not only the statutory provision in question, but also unwritten law, including the common law. Under the holistic approach, the court will also examine how the law is actually administered, including the effectiveness of judicial supervision through judicial review.

314. Having regard to these principles, the Judges were clearly correct in rejecting this ground.

315. As explained by the Judges, the ERO itself does not provide for any restriction or limitation of the protected fundamental rights. This is implicitly (if not expressly) acknowledged by Mr Chan in his above submissions[58] (see the *italicised words* at [306] above). In any event, this must be plain from the fact that the ERO itself cannot be enforced or does not impose any penalty.

316. In the premises, given that it does not by itself restrict or limit any fundamental rights, the Judges were right to conclude at [113] - [115] of the Judgment that the ERO is *not* subject to the prescribed by law scrutiny as a basis of a systemic challenge. Rather, it is the actual regulation that has been enacted, and *if* it has the effect of restricting or limiting fundamental rights, that has to meet the prescribed by law requirement. As observed by the Judges, legal certainty "*is not a notion existing in the abstract and in a vacuum*" and "*it is the 'norms' which purport directly to restrict the citizen's freedom that must be sufficiently precise to enable the citizen to conduct himself accordingly*".

317. In this respect, Mr Yu was also correct to point out that KWH is wrong to say that "The differences between [the Judges] and [KWH] is whether a source empowering statute itself is susceptible to such a challenge [for lack of legal certainty]". The Judges have not held as a general proposition that "a source empowering statute" can never been so challenged. Reading [115] of the Judgment in its proper context, the Judges' ruling is directed specifically at the ERO where they rightly held that it does not purport to limit fundamental rights or restrict any freedom.

318. Mr Pun however argued that the Judges' reasoning is wrong as the ERO even as a power conferring statute engages the prescribed by law requirement under BL39(2).

319. First, counsel contended that there is no principle of law that a discretionary power itself is not open to challenge as being in violation of fundamental rights merely because such power has not been actually exercised whether against a particular applicant or the public in general.

320. This submission is misconceived. BL39(2) provides expressly that Hong Kong residents' rights and freedoms *cannot* be restricted unless prescribed by law. Hence, it is only when the individuals' rights and freedoms *are or are sought to be restricted* that the prescribed by law requirement needs to be met. But as explained above, the CEIC's exercise of discretionary power under the ERO to make a regulation is *not* an exercise of power that will necessarily violate any fundamental right. It is only when there is a regulation that has indeed been enacted under the ERO which provides for the restriction of fundamental rights that an individual's relevant fundamental rights or freedoms are or are sought to be restricted. In such a case, the regulation itself has to meet the prescribed by law requirement and that would *not* be dependent upon whether or not the power under the regulation has in fact been exercised or not.

321. Second, Mr Pun cited three authorities to support his above contention. They are: *Charles v Philips and Sealey* (1967) 10 WIR 423, *Herbert v Phillips and Sealey* (1967) 10 WIR 435 and *AG v Reynolds* [1980] AC 637.

322. These authorities are distinguishable and do not help him.

323. In *Charles*, the Governor of St Christopher, Nevis and Anguilla made the Emergency Powers Regulations 1967 ("the Regulations") pursuant to the Leeward Islands (Emergency Powers) Order in Council 1959 ("the Order in Council"). Charles was detained pursuant to the Regulation 3. He challenged the lawfulness of the Regulation 3.

324. Glasgow J refused the application. The Court of Appeal of West Indies Associated States allowed his appeal. However, the issue raised in the challenge that the court was concerned with is whether Regulation 3 was consistent with sections 3 and 14 of the Constitution itself. This is made clear by Lewis CJ (with whom other members of the court agreed) at p430A-B as follows:

> "The crucial question in this case is whether, having regard to ss 3 and 14 of the Constitution, the Governor was empowered to make reg 3 of the Emergency Powers Regulations 1967 and to order the detention of [Charles] thereunder. This calls for a close comparison of [the Order in Council] with the relevant provisions of the Constitution."

325. The Court of Appeal held that the Regulations were invalid as (a) they were not in conformity with the Constitution, and (b) it was impossible to construe them to be in conformity with the Constitution even by way of modification, adaptation, qualification or exception. Thus, the case was not concerned with the doctrine of prescribed by law, but rather with a conflict between the empowering Order in Council and the Constitution. This cannot be an authority to support Mr Pun's proposition that in relation to a prescribed by law analysis, the court should examine the ERO which by itself does not seek to limit or restrict any rights and freedoms.

326. *Herbert* was delivered immediately after *Charles* and was decided in the same way. As acknowledged by Mr Pun, its factual and legal background are in substance the same as in *Charles*. For the same reason above, this authority does not further Mr Pun's submission.

327. *Reynolds* concerns another challenge by the plaintiff there (who was also arrested under Regulation 3) against the Attorney-General seeking damages for false imprisonment and compensation for unlawful detention under section 3 of the Constitution. The High Court gave judgment in favour of the plaintiff. On appeal by the Attorney-General and cross-appeal by the plaintiff as to the amount of damages, the Court of Appeal held that (as in *Charles* and *Herbert*) Regulation 3 was not in conformity with the Constitution, and therefore the Regulations were void and the plaintiff's detention was unlawful. It dismissed the Attorney-General's appeal and increased the damages awarded to the plaintiff. The Attorney-General appealed to the Privy Council.

328. The Privy Council dismissed the appeal on the primary basis that on the facts of the case, there was an irresistible presumption that no reasonable grounds existed to detain the plaintiff pursuant to Regulation 3. The detention was therefore unlawful. However, relevant for the present purpose, the Privy Council indeed overruled *Charles* and *Herbert* in part and held that the Regulations could be interpreted (by way of modification, adaptation, qualification or exception) to be in conformity with the Constitution and thus the Governor did have the power to enact the Regulations under the Constitution.

329. Despite this, Mr Pun relied on this authority only to purportedly show that the Privy Council did agree in part with *Charles* and *Herbert* that, save with the remedial construction, the regulation-making power under section 3 of the Order in Council was on the face of it "not in conformity with" the Constitution[59]. Even for this limited purpose, for the same reason we have explained above in relation to *Charles* and *Herbert*, this authority again does not take Mr Pun's submission any further.

330. Given that the ERO itself does not seek to limit fundamental rights, the question of whether it meets the prescribed by law requirement simply does not arise. Mr Chan and Mr Pun's principal submissions about the width or unlimited scope of the ERO or lack of safeguards are therefore irrelevant under this context.

331. In the premises, KWH and LKH's challenge against the ERO under this ground is misconceived.

332. But in any event, for the reasons we have given above under Grounds 1, 5A and B and the principles on the prescribed by law requirement we have highlighted above, the ERO cannot be said to have conferred "*unfettered and unlimited*" power on the CEIC and there are "*no independent safeguards against abuses or excesses*". We will explain why.

333. As explained in our discussion under Ground 1 above, given the true nature of emergency regulations and the ground of public danger, very wide powers have to be given to the CEIC to address occasions of emergency or public danger which cannot be exhaustively defined in advance, and the situations which the ERO is intended to tackle with must be varied and unpredictable. It is therefore necessary for section 2(1) of the ERO to have a wide scope.

334. In this respect, a general enactment does not necessarily mean that it falls foul of the legal certainty test under the prescribed by law requirement. It has been repeatedly stated that the prescribed by law requirement does not require absolute precision or certainty. It only requires that the "*core*" of the norm should be sufficiently clearly formulated.

335. For this, it is illuminating to remind ourselves again the judgment of Justice Gonthier in the Supreme Court of Canada in *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 to highlight the relationship between the scope of precision required and the need for general enactment in the modern world[60]:

(1) At pp638 - 640, the learned judge said:

> "Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Sematic arguments, based on perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective…

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible … and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary…"

(2) At pp641 - 643, he further observed:

"… Often the State attempts to realize a series of social objectives, some of which must be balanced against one another, and which sometimes conflict with the interests of individuals. The modern State, while still acting as an enforcer, assumes more and more of an arbitration role.

This arbitration must be done according to law, but often it reaches such a level of complexity that the corresponding enactment will be framed in relatively general terms. In my opinion the generality of these terms may entail a greater role for the judiciary …

… One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights…

What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion…"

336. Further, and importantly, the exercise of power under the ERO and the emergency regulations is subject to negative vetting by the legislature and judicial supervision by way of judicial review. Any eventual restriction on fundamental rights must also meet the proportionality test and the prescribed by law requirement.

337. Given the above, under a holistic analysis, the exercise of the power granted under section 2(1) of the ERO is sufficiently formulated under a "*core*" of the norm which is governed and guided by the "law" prescribed by legislative negative vetting, the common law and judicial scrutiny, considered against the above background and context of the ERO.

338. In other words, when the CEIC seeks to exercise her power pursuant to section 2(1) of the ERO to enact a regulation under which certain rights and freedoms would be restricted, she must exercise it in a manner that conforms with what the "law" has prescribed for to render such a restriction to be lawful, and that proper exercise of power will be supervised and checked by judicial supervision and legislative scrutiny under negative vetting as we have explained under Ground 1 above. This constitutes sufficient safeguards in the law against arbitrary interference of freedoms and rights.

339. For all the above reasons, the Judges were correct in rejecting Ground 3, and KWH and LKH fail under this ground of their cross-appeal.

G3. Ground 4

340. Under paragraphs 1(2) and 3 of KWH-RN, KWH asks the court to uphold the Judgment also on the principle of legality ground. This is raised in support of both Ground 1 (to challenge the ERO) and Ground 4 (to challenge the validity of the PFCR).

341. Insofar as the principle of legality is relied on in additional support of Ground 1, we have already dealt with it above.

342. Insofar as the principle is relied on in support of Ground 4, Mr Chan's submissions are in essence these[61].

343. Under the principle of legality as a principle of construction, if a statute does not expressly or by necessary implication override or restrict fundamental rights, it will not be construed as doing so[62]. In this respect, necessary implication is said to be "*a matter of express language and logic not interpretation*"[63].

344. Applying this principle, Mr Chan contended that:

> (1) Section 2(1) of the ERO (even read together with the opening sentence of section 2(2)[64]) is only a generally worded provision. It therefore only confers a general power but is not to be taken to authorise the CEIC to enact regulations which will interfere with or adversely affect the legal rights of citizens in the absence of clear words. In the premises, on a proper construction, the examples listed under sections 2(2)(a) - (n) should and could only be construed as general words and *not* words (whether expressly or by necessary implication) permitting abrogation from or interfering with fundamental rights.
>
> (2) Alternatively, other than in those areas analogous to those *specifically* referred to under sections 2(2)(a) - (n), in the absence of clear words to the contrary, section 2(1) of the ERO does not confer an unfettered power on the CEIC to make regulations that interfere with fundamental human rights other than those expressed or necessarily implied from the examples in sections 2(2)(a) - (n). In this respect, it can only be necessarily implied from these specified examples[65] that restriction can be imposed only on these fundamental rights: (i) freedom of expression restricted to reception and broadcast of communication (under section 2(2)(a)); (ii) freedom of liberty, fair trial, and freedom of movement (under sections 2(2)(b), (c), (d) and (n)); (iii) property rights and privacy of the home (in the sense as provided for by BL29 but does not include private life as provided for by BOR14) (under sections 2(2)(f), (h) and (k)); and (iv) freedom of occupation (under sections 2(2)(e) and (l)).

(3) As a result, the PFCR are *ultra vires* the ERO because, either:

> (a) the PFCR adversely affects or interferes with fundamental rights by section 3 (in restricting freedom of expression and freedom of assembly), and section 5 (in restricting right to privacy); or alternatively,
>
> (b) the fundamental rights that the PFCR adversely affects or interferes with are *not* covered by section 2(2)(a) - (n) of the ERO.

345. We are not persuaded by these submissions.

346. Under the principle of legality, whether or not the general wording of section 2(1) of the ERO (read with the opening sentence of section 2(2)) expressly or by necessary implication gives the CEIC a wide power to enact regulations that may impose restrictions on fundamental rights and freedoms is a matter of proper construction. The authorities do not suggest as a general principle that general wording can never be so interpreted.

347. It is now well established that the court adopts purposive construction in interpreting a statutory provision, and in construing statutory provisions, the court does not merely look at the relevant words. It construes the relevant words having regard to their context and purpose. The context of the relevant statutory provision should be taken in its widest sense and will of course include the other provisions of the statute. It may also be relevant in any given case to look at the history of the relevant provision. See: *Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196 at [29] *per* Ma CJ.

348. In our views, the general wording of section 2(1) and the opening sentence of section 2(2), when interpreted in its proper context, expressly or by necessary implication provides for the making of regulations imposing restrictions on rights and freedoms, including but not limited to the specific instances set out in sections 2(1)(a) - (n).

349. As examined and analysed under Ground 1 above, the ERO was enacted by the legislature to provide the CEIC with a wide power to enact regulations to implement measures to deal with occasions of emergency and public danger. These occasions by their own nature are wide ranging, varied and could not be exhaustively envisaged or defined at the time of the enactment of the ERO. In this context, the wide and general wording used by the legislature is therefore intended and catered by the legislature for the purpose of vesting in the CEIC all the necessary and flexible power to enact all necessary regulations to deal with those wide ranging, unforeseen and unpredictable occasions as and when they occur.

350. At the same time, as submitted by Mr Yu, it is also clear from the ERO when read as a whole that the legislature did have the imposition of restrictions on rights and freedoms in mind when enacting the ERO. Section 2(2) provides that, without prejudice to the generality of section 2(1), regulations may provide for the specific matters in sections 2(2)(a) - (n), which plainly allow the imposition of restrictions on rights and freedoms. This is reinforced by sections 3(1) and (2), which provide that (without prejudice to the powers conferred by section 2) regulations made may provide for the punishment of any offence with such penalties and sanctions.

351. In the premises, when these are properly construed against the above background and purpose, it is plain as a matter of logic that the use of the general wording in sections 2(1) and (2) was objectively intended by the legislature to give the CEIC a wide power to make regulations, which the legislature also envisaged that might impose restrictions on rights and freedoms, including but not limited to the specific instances in sections 2(2)(a) - (n).

352. For these reasons, we reject KWH's submissions and dismiss Ground 4.

H. DISPOSITIONS

353. We allow the respondents' appeal under Ground 1 and partially allow their appeal under Ground 5A, but dismiss the appeal under Ground 5B. In the premises, we set aside:

(1) The Judges' declarations that (a) the ERO, insofar as it empowers the CEIC to make regulations on any occasion of public danger, is incompatible with the BL, and (b) the PFCR made pursuant to the ERO on an occasion of public danger is accordingly invalid and of no effect.

(2) The Judges' declaration that section 3(1)(b) of the PFCR is inconsistent with BL27 and BOR14, 16, 17 and is therefore null, void and of no effect.

354. We dismiss the KWH-NoCA and KWH-RN, as well as the LKH-NoCA.

355. In sum, we uphold the constitutionality of the ERO insofar as it empowers the CEIC to make emergency regulations on any occasion of public danger. In respect of the PFCR, there is no challenge against section 3(1)(a) relating to unlawful assembly. We uphold the constitutionality of section 3(1)(b) relating to unauthorized assembly. We however hold that sections 3(1)(c) and (d), relating to public meeting and public procession respectively, and section 5 on police powers in relation to facial covering, are all unconstitutional.

356. We will invite parties' written submissions on costs in relation to these appeals and the hearing below. The respondents shall lodge and serve their submissions (not more than five pages) within seven days from today and the applicants shall lodge and serve their submissions (not more than five pages) seven days thereafter. Unless otherwise directed, we will determine the costs on paper.

357. Lastly, we thank counsel for their assistance.

(Jeremy Poon)	(Johnson Lam)	(Thomas Au)
Chief Judge	Vice President	Justice of Appeal

Mr Benjamin Yu SC, Mr Jenkin Suen SC, Mr Jimmy Ma and Mr Mike Lui, instructed by the Department of Justice, for the respondents in CACV 541/2019, CACV 542/2019 and CACV 583/2019

Mr Hectar Pun SC, Mr Lee Siu Him and Mr Anson Wong Yu Yat, instructed by JCC Cheung & Co, assigned by the Director of Legal Aid, and Mr Jasper Wong (on a *pro bono* basis), instructed by JCC Cheung & Co., for the applicant in CACV 541/2019

Ms Gladys Li SC, Mr Johannes Chan SC (Hon), Mr Earl Deng, Mr Jeffrey Tam, Mr Geoffrey Yeung and Ms Allison Wong, instructed by Ho Tse Wai & Partners, for the applicants in CACV 542/2019 and CACV 583/2019

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[1] Respectively under CACV 541/2019 (on appeal from HCAL 2949/2019) and under CACV 542/2019 (on appeal from HCAL 2945/2019).

[2] The undisputed background leading to the enactment of the PFCR is set out in detail in the unchallenged evidence filed by the Government. See the Affirmation of Cheung Tin Lok at [3] - [33], the Affidavit of Chui Shih Yen, Joceline at [6] - [15] and [26] - [30] and the Affidavit of Dr Tsui, Pui Wan Ephraem at [8] - [17]. It has been succinctly set out by the Judges at [3] - [9] of the Judgment.

[3] "Black-bloc" tactics is where the protestors would often appear in groups and wear black clothing with little or not distinguishable feature, and cover the whole or a substantial part of their faces with sunglasses, goggles, masks, or respirators etc. See the Affirmation of Cheung Tin Lok at [8] - [9].

[4] See, in particular, the Affirmation of Cheung Tin Lok at [20] - [24] and [31].

[5] See the Affidavit of Dr Tsui, Pui Wan Ephraem at [17].

[6] The word "anti-social" refers to acting against larger social norms which, within the group, can be their own emerging group norm. It implies that the person is not really losing his self in the group, but is just following the group norm.

[7] Moreover: (a) the use of inflammable liquid bombs has become more frequent and extensive, and even more so since late September 2019. On 29 September and 1 October 2019, the number of inflammable liquid bombs hurled by the protestors were respectively around 100 and over 100; (b) on 1 October 2019, a police officer was injured by protestors throwing corrosive liquid at him, causing a third degree burn; (c) on the same date, some police officers were seen viciously attacked by large groups of protestors by a range of objects and lethal weapons, and a few of them whose lives were under imminent threat had to defend themselves with firearms; (d) as at 4 October 2019, a total of 2,135 individuals have been arrested for taking part in public order events of an unlawful or criminal nature, or being involved in other unlawful or criminal activities. See the unchallenged evidence in the Affirmation of Cheung Tin Lok at [4] - [6], and the Affidavit of Chui Shih Yen, Joceline at [26] - [28].

[8] See the Affirmation of Cheung Tin Lok at [5] - [6] on the statistics and descriptions showing the significant increase and extensive use of inflammable liquid bombs by the protestors, attacks on police officers and individuals who held different views with the protestors, and the growing degree of violence and vandalism.

[9] See [18] of the Decision.

[10] See the relevant Press Release.

[11] The current situation was described in more detail in the CE's speech given in Chinese. See the Chinese version of the Press Release.

[12] The Chinese speech explained more about the aim of making the PFCR. See the Chinese version of the Press Release.

[13] Section 2 contains the definitions while section 6 provides for the time in which prosecution may be brought.

[14] That is, the Public Order Ordinance ("the POO").

[15] This means $25,000: see section 113B of and Schedule 8 to the Criminal Procedure Ordinance (Cap 221) ("the CPO").

[16] "Facial covering" is defined in section 2 to mean a mask or any other article of any kind (including paint) that covers all or part of a person's face.

[17] This has the same meaning as in section 18 of the POO.

[18] This has the same meaning as in section 17A(2) of the POO.

[19] As meeting of no more than 50 persons, meeting in private premises with no more than 500 persons, and certain meetings in school do not have to be notified for the purpose of the POO, they therefore fall outside section 3(1)(c).

[20] Public processions of no more than 30 persons and public processions not on a public highway or thoroughfare or in a public park, which do not have to be notified for the purpose of the POO, fall outside section 3(1)(d).

[21] This means $10,000: see section 113B of and Schedule 8 to the CPO.

[22] International Covenant on Civil and Political Rights.

[23] See [13] and [37] of the Judgment.

[24] As the ICCPR through the BOR is constitutionally enshrined under BL39.

[25] Since section 5 of the HKBORO and ICCPR4 are of identical terms, the Judges therefore deals with this ground by reference to section 5 of the HKBORO only, which they say the analysis and reasons apply equally to the argument based on ICCPR4. See [104] of the Judgment.

[26] The 4 steps are: (1) does the measure pursue a legitimate aim; (2) if so, is it rationally connected with advancing that aim; (3) whether the measure is no more than reasonably necessary for that purpose; and (4) whether a reasonable balance has been struck between the societal benefits promoted and the inroads made into the protected rights, asking in particular whether pursuit of societal interest results in an unacceptably harsh burden on the individual.

[27] BOR17 and BL27.

[28] BOR16 and BL27.

[29] BOR14.

[30] The legitimate aims being (a) deterrence and elimination of the emboldening effect for those who may otherwise, with the advantage of facial covering, break the law, and (b) facilitation of law enforcement, investigation and prosecution. See [130] of the Judgment.

[31] See [152] - [157] of the Judgment.

[32] Having concluded that these provisions do not meet step 3, the Judges do not find it necessary to consider step 4. However, they have expressed the view that if it is necessary to do so, they would conclude, for the same reasons, that the provisions have failed to satisfy step 4.

[33] See the transcript of the proceedings of the LegCo dated 26 August 1936.

[34] See, for example, (a) in respect of the GIC: section 62 of the Employment Ordinance (Cap 57), section 31 of the Import and Export Ordinance (Cap 60), section 25 of the Fire Services Ordinance (Cap 95), section 42 of the New Territories Ordinance (Cap 97), section 59 of the Immigration Ordinance (Cap 115), section 14(1) of the Town Planning Ordinance (Cap 131), section 33(1) of the Medical Registration Ordinance (Cap 161), section 7 of the Registration of Persons Ordinance (Cap 177), section 45 of the Police Force Ordinance (Cap 232), section 22 of the Customs and Excise Service Ordinance (Cap 342), section 41 of the Building Management Ordinance (Cap 344); and (b) in respect of the various Secretaries: section 14(2) of the Town Planning Ordinance (Cap 131) (Secretary for Development), section 72 of the Mental Health Ordinance (Cap 136) and section 33(3A) of the Medical Registration Ordinance (Cap 161) (the Secretary for Food and Health).

[35] See for example, section 5 of the Official Languages Ordinance (Cap 5), section 69 of the Evidence Ordinance (Cap 8), section 10 of the Lands Tribunal Ordinance (Cap 17), section 45 of the Labour Tribunal Ordinance (Cap 25), section 117 of the Insurance Ordinance (Cap 41), section 15 of the Telecommunications Ordinance (Cap 106), section 101I of the Banking Ordinance (Cap 155), section 72 of the Legal Practitioners Ordinance (Cap 159), section 8 of the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189), section 32 of the Matrimonial Proceedings and Property Ordinance (Cap 192), section 10 of the Partition Ordinance (Cap 352), section 44 of the Control of Obscene and Indecent Articles Ordinance (Cap 390).

[36] See for example, in respect of the CEIC, section 8 of the Prevention and Control of Disease Ordinance (Cap 599) which came into force on 14 July 2008; sections 208 and 273 of the Companies Ordinance (Cap 622) which came into force on 3 March 2014; in respect of the Financial Secretary, section 909 of the Companies Ordinance; in respect of the Secretary for Food and Health, section 7 of the Prevention and Control of Disease Ordinance; in respect of the Chief Justice, sections 233 and 269 of the Securities and Futures Ordinance (Cap 571), which came into force on 1 April 2003, section 37ZJ of the Financial Reporting Council Ordinance (Cap 588), which came into force on 1 December 2006, section 76 of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap 615) which came into force on 8 July 2011.

[37] Those non-derogable rights are set out in articles 2, 3, 4(1) and (2), 7, 12, 13, and 15 of the BOR.

[38] It is not the respondents' case that such measures include legislative measures such as emergency regulation. In other words, the measures envisaged under BL56(2) are executive or administrative measures only.

[39] See BL62(2).

[40] See BL60(1).

[41] We observe by way of judicial notice that in tackling the current Covid-19 pandemic, the Government has invoked sections 7 and 8 of the Prevention and Control of Disease Ordinance (Cap 599) to make emergency regulations. If that Ordinance did not exist, it would appear that the Government would need to invoke the ERO: see [65(4)] above.

[42] [88] of the Judgment.

[43] [89] of the Judgment.

[44] [90] of the Judgment.

[45] [91] of the Judgment.

[46] [92] of the Judgment.

[47] [93] of the Judgment.

[48] Nor is there any for emergency.

[49] In the course of oral submissions, we invited the parties to assist us on the meaning of "public danger" for the purpose of the ERO. On reflection, we need not dwell on this aspect as it is not necessary to interpret the phrase for present purpose. The only point that we wish to make is that a definition is certainly achievable by means of statutory interpretation.

[50] In the present case, apart from the LegCo Brief relating to the PFCR dated October 2019, the CE, the Secretary for Justice and the Secretary for Security explained the Government's decision and the operation of the PFCR at a press conference on 4 October 2019; the responsible Government officials also attended and answered questions at open meetings of the LegCo Subcommittee on Prohibition on Face Covering Regulation held on 22 and 28 October, 5, 9, 12 and 18 November 2019. They have all been adduced as evidence before the court.

[51] For the meaning of the principle of legality as advanced by KWH, see the court's discussion at Section G3 below for Ground 4.

[52] LKH's contentions under Ground 5B have been addressed above at [251] - [255].

[53] That is, derogation from the rights protected under the ICCPR can only be made when there is a "public emergency", which has to be one that "threatens the life of nation" and its "existence", and that the public emergency has to be "official proclaimed".

[54] It may not be entirely correct to say that the existing legislations which are regarded to be inconsistent with a regulation enacted to be "repealed". Under section 2(4), any such inconsistent provision of an enactment will only be rendered to have "no effect" when the concerned regulation made under the ERO remains in force.

[55] As provided in section 5(1) of the HKBORO, the measures to derogate from the rights "shall be taken in accordance with the law".

[56] LKH also seeks to cross appeal the Judges' rejection of Ground 3. See LKH-NoCA, at [4].

[57] BL39(2) provides: "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law ..."

[58] See KWH's skeleton submissions on the cross appeal dated 16 December 2019 at [33].

[59] *AG v Reynolds,* supra at 655A-B.

[60] These are cited in *Chee Fei Ming v Director of Food and Environmental Hygiene,* supra, at [56] - [57].

[61] These are in substance a rerun of the arguments made before the Judges. As mentioned above, the Judges do not find it necessary to deal with these arguments as they find them to be inconsistent with the arguments raised under Ground 1, which they have found in favour of KWH.

[62] See: *R v Home Secretary Ex p Simms,* supra, at p131 *per* Lord Hoffmann; *A v Commissioner of ICAC* (2012) 15 HKCFAR 362 at [24] - [29] *per*Ribeiro PJ; *HM Treasury v Ahmed* [2010] 2 AC 534 at [45] - [46] *per* Lord Hope, at [112] *per* Lord Walker.

[63] See: *R (Morgan Grenfell Ltd) v Special Commissioner* [2003] 1 AC 563, 616 at [45] *per*Lord Hobhouse.

[64] Which provides "Without prejudice to the generality of the provisions of [section 2(1)]".

[65] With the exception of sections 2(2)(g) and (i) which are wide empowering provisions and thus could not be construed to necessarily imply enabling the enacting of regulations that restrict or interfere with fundamental rights.