Press Summary (English)

Press Summary (Chinese)

FACV Nos. 6, 7, 8 and 9 of 2020
[2020] HKCFA 42

FACV Nos. 6 and 7 of 2020

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NOS. 6 and 7 OF 2020 (CIVIL)

(ON APPEAL FROM CACV NOS. 542 AND 583 OF 2019)

BETWEEN

KWOK WING HANG	**1st Applicant**
CHEUNG CHIU HUNG	**2nd Applicant**
TO KUN SUN JAMES	**3rd Applicant**
LEUNG YIU CHUNG	**4th Applicant**
JOSEPH LEE KOK LONG	**5th Applicant**
MO, MAN CHING CLAUDIA	**6th Applicant**
WU CHI WAI	**7th Applicant**
CHAN CHI-CHUEN RAYMOND	**8th Applicant**
LEUNG KAI CHEONG KENNETH	**9th Applicant**
KWOK KA-KI	**10th Applicant**
WONG PIK WAN	**11th Applicant**
IP KIN-YUEN	**12th Applicant**
YEUNG ALVIN NGOK KIU	**13th Applicant**
ANDREW WAN SIU KIN	**14th Applicant**
CHU HOI DICK EDDIE	**15th Applicant**
LAM CHEUK-TING	**16th Applicant**
SHIU KA CHUN	**17th Applicant**

TANYA CHAN	**18th Applicant**
HUI CHI FUNG	**19th Applicant**
KWONG CHUN-YU	**20th Applicant**
TAM MAN HO JEREMY JANSEN	**21st Applicant**
FAN, GARY KWOK WAI	**22nd Applicant**
AU NOK HIN	**23rd Applicant**
CHARLES PETER MOK	**24th Applicant**
	(Appellants)
and	
CHIEF EXECUTIVE IN COUNCIL	**1st Respondent**
SECRETARY FOR JUSTICE	**2nd Respondent**
	(Respondents)

FACV No. 8 of 2020

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 8 OF 2020 (CIVIL)

(ON APPEAL FROM CACV NO. 541 OF 2019)

BETWEEN

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

FACV No. 9 of 2020

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 9 OF 2020 (CIVIL)

(ON APPEAL FROM CACV NO. 542 OF 2019)

BETWEEN

KWOK WING HANG	**1st Applicant**
CHEUNG CHIU HUNG	**2nd Applicant**
TO KUN SUN JAMES	**3rd Applicant**
LEUNG YIU CHUNG	**4th Applicant**
JOSEPH LEE KOK LONG	**5th Applicant**
MO, MAN CHING CLAUDIA	**6th Applicant**
WU CHI WAI	**7th Applicant**
CHAN CHI-CHUEN RAYMOND	**8th Applicant**
LEUNG KAI CHEONG KENNETH	**9th Applicant**
KWOK KA-KI	**10th Applicant**
WONG PIK WAN	**11th Applicant**
IP KIN-YUEN	**12th Applicant**
YEUNG ALVIN NGOK KIU	**13th Applicant**
ANDREW WAN SIU KIN	**14th Applicant**
CHU HOI DICK EDDIE	**15th Applicant**
LAM CHEUK-TING	**16th Applicant**
SHIU KA CHUN	**17th Applicant**
TANYA CHAN	**18th Applicant**
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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 (Respondents)**
and	
CHIEF EXECUTIVE IN COUNCIL	**1st Respondent**
SECRETARY FOR JUSTICE	**2nd Respondent (Appellants)**

(HEARD TOGETHER)

Before: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Cheung PJ and Lord Hoffmann NPJ

Dates of Hearing: 24-25 November 2020

Date of Judgment: 21 December 2020

JUDGMENT

The Court:

A. Introduction

1. As is now a matter of public record, between June and October 2019, Hong Kong, a city long regarded as safe, experienced an exceptional and sustained outbreak of violent public lawlessness. The evidence of these extraordinary events is essentially common ground between the parties to these appeals and will be addressed in more detail later in this judgment but there is no question that by early October 2019 the situation in Hong Kong had become dire. Something had to be done.

2. For reasons we shall examine in detail below, the Chief Executive in Council ("CEIC") determined that what should be done was to introduce a law prohibiting the wearing of face masks and face coverings at certain types of public gatherings. That law, made by the CEIC on 4 October 2019 and coming into effect at midnight on 5 October 2019, is the Prohibition on Face Covering Regulation ("PFCR").[1] The PFCR was made by the CEIC under section 2 of the Emergency Regulations Ordinance ("ERO").[2]

3. The question at the heart of these appeals is whether, in the light of the Basic Law of the Hong Kong Special Administrative Region ("Basic Law"), the CEIC was lawfully given power by the Legislative Council to make the PFCR under the ERO. As well as that core question of constitutionality, a number of additional specific legal challenges to the ERO are advanced. These are "the constitutionality issues".

4. If the ERO is determined to be constitutional and the PFCR duly made thereunder, the other principal question central to these appeals is whether certain of the provisions of the PFCR are a proportionate restriction of protected rights. The appeals raise issues concerning the appropriate standard of review and the application of a proportionality analysis. These are "the proportionality issues".

A.1 The PFCR

5. The PFCR consists of six sections. Section 1 specifies the commencement and section 2 is an interpretation section containing various definitions, including "facial covering" meaning "a mask or any other article of any kind (including paint) that covers all or part of a person's face".

6. Section 3 creates an offence of using a facial covering in certain circumstances. It reads:

> "3. **Use of facial covering in certain circumstances is an offence**
>
> (1) A person must not use any facial covering that is likely to prevent identification while the person is at –
>
> (a) an unlawful assembly (whether or not the assembly is a riot within the meaning of section 19 of Cap. 245);
>
> (b) an unauthorized assembly;

(c) a public meeting that –

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

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

(d) a public procession that –

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

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

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 1 year."

7. Section 4 provides, for a person charged with an offence under section 3(2), a defence of lawful authority or reasonable excuse for using a facial covering in the following terms:

"4. **Defence for offence under section 3(2)**

(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."

8. Section 5 gives a police officer power to require a person using a facial covering in a public place to remove the facial covering, failing which an offence is committed, and provides:

"5. **Power to require removal in public place of 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 and to imprisonment for 6 months."

9. Section 6 extends the time limit for commencement of a prosecution for an offence under section 3(2) or section 5(3) to 12 months from the date on which the offence is committed.

A.2 The ERO

10. As already mentioned, the PFCR was made under the ERO. The ERO was enacted on 28 February 1922 and contains three operative sections (sections 2, 3 and 4). The relevant parts of those provisions are identified in Section B.1 below.

A.3 The CEIC's decision to make the PFCR

11. The CEIC's decision to invoke the ERO and to make the PFCR was taken at a meeting of the Executive Council held on the morning of 4 October 2019. At a press conference that afternoon at which the Chief Executive announced the decision, she emphasised four points:

"One – although the Ordinance carries the title 'Emergency', Hong Kong is not in a state of emergency and we are not proclaiming that Hong Kong is entering a state of emergency. But we are indeed in an occasion of serious danger, which is a stated condition in the Emergency Regulations Ordinance for the Chief Executive in Council to exercise certain powers, and I would say that we are now in rather extensive and serious public danger. It is essential for us to stop violence and restore calmness in society as soon as possible. We hope that the new legislation can help us to achieve this objective.

The second point I want to make is the objective of this regulation is to end violence and restore order, and I believe this is now the broad consensus of Hong Kong people.

The third point is this regulation targets rioters or those who resort to violence. That's why the regulation 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.

> Fourth, the regulation is a piece of subsidiary legislation subject to negative vetting. So when Legislative Council resumes on October 16, the regulation will be tabled in the Legislative Council for members' discussion."

12. The PFCR was annexed to a Legislative Council Brief (File Reference: SBCR 3/3285/57) setting out a justification for the invocation of the ERO by the CEIC and the decision to make the PFCR thereunder.[3] The PFCR was laid on the table of the Legislative Council ("LegCo") on 16 October 2019 pursuant to the negative vetting procedure prescribed under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO").

A.4 The judicial review challenges

13. These appeals arise out of two separate applications for judicial review. The first in time was that made on 5 October 2019 by 24 members of LegCo in HCAL 2945/2019. The second was that made on 8 October 2019 by Mr Leung Kwok Hung, the former member of LegCo known as "Long Hair", in HCAL 2949/2019. Together, the 24 LegCo member applicants and Mr Leung Kwok Hung will be referred to in this judgment as "the applicants". The respondents to those applications were the CEIC and the Secretary for Justice, who together as a party to the proceedings will be referred to in this judgment as "the Government".

14. There were various grounds of challenge mounted in the two judicial review applications. The applicants did not contend that the CEIC had acted otherwise than in good faith in reaching the decision to invoke the ERO to make the PFCR. Nor did any of the applicants suggest that the decision to do so was unreasonable in the *Wednesbury* public law sense.[4] Instead, it was contended, in summary, that:

> (1) The ERO was an unconstitutional delegation of general legislative power by the legislature to the CEIC, contrary to various provisions of the Basic Law. This was referred to below as Ground 1, or "the delegation of legislative power ground".

(2) The ERO was impliedly repealed by section 3(2) of the Hong Kong Bill of Rights Ordinance,[5] either entirely or to the extent inconsistent with section 5 of the HKBORO, alternatively by Article 4 of the International Covenant on Civil and Political Rights ("ICCPR") applied through Article 39 of the Basic Law. This was referred to below as Ground 2, or "the implied repeal ground".

(3) The ERO infringes the "prescribed by law" requirement in Article 39 of the Basic Law. This was referred to below as Ground 3, or the "prescribed by law ground".

(4) The PFCR is *ultra vires* by reason of the principle of legality which precludes the adoption of measures under section 2(1) of the ERO that infringe fundamental rights otherwise than in circumstances amounting to emergency situations. This was referred to below as Ground 4, or the "principle of legality ground".

(5) Section 3 of the PFCR constitutes a disproportionate restriction of the rights to liberty and privacy, freedom of expression and right of peaceful assembly under the BOR and the Basic Law. This was referred to below as Ground 5A, or the "section 3 proportionality ground".

(6) Section 5 of the PFCR constitutes a disproportionate restriction of various rights and freedoms under the BOR and the Basic Law. This was referred to below as Ground 5B, or the "section 5 proportionality ground".

15. The two judicial reviews were heard together before G. Lam J and Chow J on 31 October 2019 and 1 November 2019. By their joint judgment dated 18 November 2019 ("the CFI Judgment"), their Lordships held in favour of the applicants on: (i) the delegation of legislative power ground (Ground 1); (ii) the section 3 proportionality ground (Ground 5A) in respect of the provisions in sections 3(1)(b), 3(1)(c) and 3(1)(d) of the PFCR; and (iii) the section 5 proportionality ground (Ground 5B).

16. By notices of appeal in CACV 541/2019 and CACV 542/2019, the Government sought to challenge those holdings in the CFI Judgment. The 24 applicants in HCAL 2945/2019 sought to cross-appeal (in CACV 583/2019) against the rejection of Grounds 2 and 3 in the CFI Judgment and to affirm, by respondent's notice in CACV 542/2019, the CFI Judgment on Ground 4. The applicant in HCAL 2949/2019 also filed a cross-appeal and respondent's notice in CACV 541/2019, seeking to challenge aspects of the CFI Judgment in respect of Ground 5B and the rejection of Ground 3.

17. The appeals were heard together by Poon CJHC, Lam VP and Au JA on 9 and 10 January 2020. By a judgment of the Court dated 9 April 2020 ("the CA Judgment"), the Court of Appeal allowed the Government's appeal under Ground 1 and partially allowed its appeal under Ground 5A to the extent that it set aside the CFI Judgment that section 3(1)(b) of the PFCR is disproportionate but dismissed the Government's appeal under Ground 5B. The Court of Appeal otherwise dismissed the applicants' cross-appeals and respondents' notices.

18. The resulting position, following the CA Judgment, is that the ERO, insofar as it empowers the CEIC to make emergency regulations on any occasion of public danger, has been held to be constitutional. The constitutionality of section 3(1)(a) of the PFCR has not been challenged. Section 3(1)(b) of the PFCR has been held to be constitutional but sections 3(1)(c), 3(1)(d) and 5 of the PFCR have been held to be unconstitutional. Essentially, the applicants failed on their Grounds 1, 2, 3, 4 and 5A (partially in respect of section 3(1)(b) of the PFCR) and the Government failed on Ground 5A (in respect of sections 3(1)(c) and 3(1)(d)) and Ground 5B.

A.5 The certified questions on appeal

19. The parties sought leave to appeal to this Court on the grounds on which they had failed in the Court of Appeal. The issues in the appeals being of obvious general and public importance, the Court of Appeal granted leave to appeal to this Court to all the applicants and also to the Government in respect of various questions of law. It is not necessary to set those questions out at length in this judgment. It is sufficient to state that the parties were respectively granted leave to argue those issues on which they lost in the Court of Appeal. As noted below, the Government did not pursue Ground 5B (in respect of section 5 of the PFCR) before this Court.

20. The questions raised as to the constitutionality of the ERO and the power to make regulations thereunder are logically anterior to considerations of the proportionality or otherwise of sections 3(1)(b), 3(1)(c) and 3(1)(d) of the PFCR. The constitutional issues will therefore be addressed first in Section B below. Thereafter, we shall address the proportionality issues in Section C below.

B. The Constitutionality Issues (Grounds 1 to 4)

B.1 The ERO

21. The ERO was enacted in 1922 by the legislature to give the Governor in Council power to make regulations in case of emergency or public danger. Since its enactment, various regulations have been made under the ERO by the Governor in Council.[6] There have been two unsuccessful legal challenges against the *vires* of the Ordinance.[7] On both occasions, the Full Court held that the Ordinance was not unconstitutional under the pre-1997 constitutional set-up.

22. Upon the establishment of the Hong Kong Special Administrative Region ("HKSAR") on 1 July 1997, the ERO was adopted as part of the laws of the Special Administrative Region pursuant to articles 8, 18 and 160 of the Basic Law, the Ordinance not being amongst those listed in Appendix I or II to the Decision of the Standing Committee of the National People's Congress ("SCNPC" and "NPC" respectively) dated 23 February 1997 as being in contravention of the Basic Law.[8] The CEIC has replaced the Governor in Council as the regulation making authority under the ERO.

23. The ERO consists of only four sections. Its preamble says that it is an Ordinance to confer on the CEIC power to make regulations on occasions of emergency or public danger. This power is set out in section 2(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."

24. Section 2(2) of the Ordinance specifically provides, without prejudice to the generality of section 2(1), that the regulations made by the CEIC may provide for a number of matters, including, amongst other things, censorship of publications;[9] arrest, detention, exclusion and deportation;[10] appropriation, control, forfeiture and disposition of property and of the use thereof;[11] entry and search of premises;[12] requirement to do work or render services;[13] and the apprehension, trial and punishment of persons offending against the regulations.[14] Furthermore, section 2(2)(g) stipulates that regulations made by the CEIC may provide for:

> "amending any enactment, suspending the operation of any enactment and applying any enactment with or without modification."

25. Section 2(3) provides that the regulations made by the CEIC "shall continue in force until repealed by order of the [CEIC]".

26. Section 2(4), which should be read together with section 2(2)(g), provides:

> "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."

27. Section 3 of the Ordinance says that regulations made by the CEIC may provide for the punishment of any offence with penalties and sanctions up to and including a maximum penalty of mandatory life imprisonment.[15]

28. Section 4 was added to the ERO for the removal of doubt and declares that the power to make regulations in section 2(1) has always included the power to make regulations as mentioned in section 2(2)(g), namely regulations to amend, suspend the operation of or apply any enactment, and that the provisions of section 2(4) have always been incorporated in the ERO.

B.2 The decisions below

29. The courts below came to opposite conclusions on the constitutionality of the ERO. Essentially, the Court of First Instance ("CFI") took the view that on a proper construction of the Basic Law as a whole, the constitutional order established by the Basic Law after 1997 vests the general legislative power of the HKSAR in LegCo only.[16] Whilst the CEIC has the power to make subordinate legislation, she does not have and cannot be delegated with general legislative power which belongs only to LegCo.[17] The ERO attempts to do what cannot be done under the Basic Law, namely to delegate LegCo's general legislative power to the CEIC to enact what is in nature of primary legislation.[18] In the CFI's own words:

> "It is the power and function of the LegCo as the designated legislature of the Hong Kong SAR to legislate. Other bodies cannot consistently with the constitutional framework be given general legislative power but only the power to make subordinate legislation. It may be a matter of degree whether a power granted is in truth general legislative authority rather than the acceptable power to make subordinate legislation. But insofar as the public danger ground is concerned, the ERO is so wide in its scope, the conferment of powers so complete, its conditions for invocation so uncertain and subjective, the regulations made thereunder invested with such primacy, and the control by the LegCo so precarious, that we believe it is not compatible with the constitutional order laid down by the Basic Law having regard in particular to Arts 2, 8, 17(2), 18, 48, 56, 62(5), 66 and 73(1) of the Basic Law. We do not consider that, within the proper limits of remedial interpretation as set out in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at §66 and *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372 at §97, the ERO in relation to the public danger ground could be made compatible with the Basic Law without introducing changes that the court is ill-equipped to decide on or producing something wholly different from what the legislature originally intended."[19]

30. This part of the CFI's decision was reversed by the Court of Appeal. Relying heavily on the theme of continuity as informing the analysis of the constitutionality of the ERO,[20] and after examining in detail the principal features of the Ordinance,[21] the Court of Appeal concluded that the ERO does not confer on the CEIC general legislative power to make primary legislation.[22] Regulations made pursuant to the ERO are only subsidiary legislation. The constitutional set-up under the Basic Law is not infringed. Since the Court of Appeal, like the CFI, also rejected the other grounds for challenging the constitutionality of the ERO,[23] it therefore concluded that the Ordinance is constitutional.[24]

B.3 The impermissible delegation argument

31. Before us, the applicants essentially repeated the arguments run in the courts below, namely the impermissible delegation argument, the principle of legality argument, the HKBORO section 5 argument and the prescribed by law argument.

32. We will first deal with the impermissible delegation argument – the argument that divided the CFI and the Court of Appeal – before dealing with the other arguments which were rejected by both courts below.

B.3.1 The applicants' core propositions

33. Under the impermissible delegation argument, the "core propositions" of the applicants are as follows:

> "The constitutional framework that underpins the system of law and governance in the HKSAR, which is the [Basic Law], confers general legislative powers on LegCo as the Legislature of the HKSAR, and gives no power to LegCo to confer such powers on the executive branch, and that any primary legislation which purports to confer such powers, or which enables the executive branch to circumvent this constitutional role and function of LegCo, is unconstitutional and invalid.
>
> The ERO, which allows the CEIC to enact any regulation of any kind and without any limit; which the CEIC considers desirable in the public interest; which can take immediate effect; which prevails over any other laws; and which is impervious to repeal without the CEIC's consent, is therefore unconstitutional and invalid." [25]

34. We have no difficulty with the first proposition. Chapter IV of the Basic Law clearly sets out the political structure of the HKSAR. Sections 1 to 4 under Chapter IV deal with, respectively, the Chief Executive, the Executive Authorities, the Legislature and the Judiciary. They all have different roles to play, powers to exercise and functions to perform. So far as legislative power is concerned, the legislative power which the NPC authorises the HKSAR to exercise, pursuant to article 2 of the Basic Law, is exercisable by LegCo, which is made the legislature of the HKSAR under article 66. Article 73(1) specifically says that LegCo shall exercise the power and function "to enact, amend or repeal laws in accordance with the provisions of [the Basic Law] and legal procedures."

35. However, this does not mean that the Chief Executive and the Executive Government have no role to play in terms of legislating for the HKSAR. So far as the Government is concerned, article 62(5) provides that the Government has the power and function "to draft and introduce bills, motions and subordinate legislation". As for the Chief Executive, who is both the head of the HKSAR[26] and head of the executive authorities of the HKSAR, i.e. the Government,[27] article 56(2) states:

> "Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council."

36. This being the relevant constitutional set-up, three points can immediately be made. First, the legislative power of the HKSAR is vested in LegCo only. Subject to one exception, the Basic Law does not provide for any power on the part of LegCo to delegate its general legislative power to any other body. Secondly, it follows that LegCo cannot delegate its power to make primary legislation to anybody, including the CEIC. Thirdly, the above does not, however, mean that LegCo cannot give another person or body power to make subordinate legislation. Article 62(5) specifically refers to the Government's role in drafting and introducing subordinate legislation to LegCo. Moreover, article 56(2) expressly provides that the CEIC may make subordinate legislation – if the power to do so has been delegated by LegCo. (It is not disputed by the parties that, apart from the CEIC, LegCo may also give other persons or bodies power to make subsidiary legislation.)

B.3.2 The only issue

37. This therefore brings into sharp focus the only real issue raised under the impermissible delegation argument, that is, whether in truth and in substance, the ERO is a piece of legislation which seeks to delegate to the CEIC general legislative power to make primary legislation, in which case the Ordinance is unconstitutional, or whether it merely authorises the CEIC to make subordinate legislation in times of emergency or public danger – in which case the Ordinance cannot be challenged on the present ground. Put in terms of these two core propositions of the applicants, the real debate here is in relation to the second proposition, that is whether:

> "[t]he ERO, which allows the CEIC to enact any regulation of any kind and without any limit; which the CEIC considers desirable in the public interest; which can take immediate effect; which prevails over any other laws; and which is impervious to repeal without the CEIC's consent, is therefore unconstitutional and invalid."

38. Underlying this proposition advanced by the applicants is the contention that in legal systems with a written constitution and a common law tradition, the courts have interpreted statutes as conferring impermissible general legislative power to the executive when:

> "(1) the power to enact is virtually unfettered and unrestricted; or
>
> (2) there are no prescriptive guidelines for its use; or

> (3) the legislature fails to establish the 'principles and policies' in the statute and the delegation is thus more than a mere giving effect to statutory principles and policies or 'filling in the details'."[28]

39. In other words, the applicants' point is that in the above-mentioned situations, what has been purportedly delegated to the executive is not a power to make subordinate legislation, but general legislative power that can only be exercised by the legislature ordained under the written constitution.

40. In support of this point, the applicants contended that the general features of subsidiary legislation in Hong Kong are these.[29] First and foremost, subordinate legislation cannot go outside the confines of the primary legislation enacted by LegCo, especially as expressed in the stated purpose of any subordinate legislation. A hallmark of subordinate legislation is that the *vires* of any regulation can be determined by reference to the stated purpose. Secondly, subordinate legislation is by definition subordinate to primary legislation such that, whenever there is a conflict between subordinate and primary legislation, the latter prevails.[30] Thirdly, subordinate legislation is not meant to introduce major changes to the law.

B.3.3 Reasons for subordinate legislation

41. It is unnecessary to comment on whether the applicants have correctly or fully summarised the relevant case law said to be in support of their contention on the distinction between impermissible delegation of general legislative power and legitimate delegation of the power to make subordinate legislation. This can be accepted for present purposes. We also have no difficulty in accepting what the South African Constitutional Court has said about the fundamental purpose the legislature under a written constitution like the Basic Law is intended to serve and the need for delegated legislation:

> "The reason why full legislative authority, within the constitutional framework mentioned above, is entrusted to Parliament and Parliament alone would seem to be that the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision-making process, the involvement of civil society in relation to committee hearings, and the pluralistic interaction between different viewpoints which parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution. It is Parliament's function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes. It is not its duty to attend to all the details of implementation. Indeed, if it were to attempt to do so, it would not have the time to serve its primary function. Hence the need for delegated legislation, which has become a feature of parliamentary democracies throughout the world. The power to delegate should therefore be considered as an integral part of the legislative authority; it simply cannot legislate wisely if it tries to legislate too well."[31]

42. What is, however, important is to remember that there are different reasons why a legislature may find it necessary or desirable to delegate legislative power, and the reason mentioned in the passage quoted above is but one, albeit a very common one. As pointed out by *Bennion on Statutory Interpretation*,[32] these reasons include:

> "(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 legislative powers to deal with it whether or not Parliament is sitting."

43. It can be readily seen that in situations (a) to (d), the power to make subordinate legislation is almost by definition expected to be controlled and limited. There would be neither necessity nor justification to delegate to the executive a power to enact which is "virtually unfettered and unrestricted"; neither is there any reason for the legislature not to give guidelines for the exercise of the delegated power to legislate; nor is there any reason to expect that the subordinate legislation so made is anything other than there to fill in the details of the principal legislation.

B.3.4 Emergency subordinate legislation

44. However, this is not so in relation to situation (e) described in *Bennion*. That situation deals with what we are concerned with in the present appeals, namely the situation of emergency or something akin to it. Indeed, the applicants seemed to accept that the CEIC can enact legislation to deal with emergencies through powers conferred by primary legislation.[33] It is recognised that in such situations, it is "essential" to give the executive "wide and flexible legislative powers" whether or not the legislature is sitting. Such situations must, we think, also include circumstances of public danger.

45. In this regard, the Court of Appeal was right to emphasise that under situation (e) concerning emergency (or public danger), the considerations are entirely different:

> "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 broad 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.'"[34]

46. As Hogan CJ pointed out in *Li Bun*:

> "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 or state of public danger, be brought into session or meet."[35]

47. This is not to say that the delegated power to make emergency regulations can be totally untrammelled and unguided, not subject to control by the legislature or the courts, or may ignore constitutional protection of fundamental rights. What it does mean, however, is that in deciding whether the ERO purports to delegate to the CEIC general primary legislative power (and is thus unconstitutional under the Basic Law), one must firmly bear in mind the subject matter concerned, namely occasions of emergency or public danger, which, by definition, require the delegation of "wide and flexible legislative powers" to the executive in order to meet them.

B.3.5 Applicants' criticisms of the ERO

48. The applicants submitted that when looked at as a whole, the ERO which confers the powers to "make any regulations whatsoever which [the CEIC] may consider desirable in the public interest"[36] must constitute an impermissible attempt to delegate general legislative power. The invoking of the Ordinance is left to the subjective, and therefore, potentially arbitrary, consideration of the CEIC. There are no definitions or guidelines for "emergency", "public danger" or "public interest". There is no safeguard against "authoritarian abuse" of the wide powers given under the Ordinance. There is no requirement for the CEIC to proclaim a state of emergency or public danger, or to specify what the occasion of emergency or public danger is. There is no mechanism to compel a review as to whether the state of affairs which gives rise to the public danger has subsided so as to revoke the regulations. There is no constraint on the duration of the regulations, nor is there any statutory mechanism to review the necessity or propriety of the regulations. The regulations made under the Ordinance take immediate effect when gazetted, and there is no minimum period before the regulations can take effect, or specified period before they must be placed before LegCo to be scrutinised. Furthermore, the regulations made under the Ordinance have primacy over all inconsistent legislation including primary legislation, and are capable of amending or suspending any primary legislation. Finally, it is also said that the regulations made under the Ordinance confer the widest powers of punishment.

49. We find these criticisms of the Ordinance to be more apparent than real. The power of the CEIC to make emergency regulations, as well as any regulations so made, are controlled and restrained by the internal requirements of the Ordinance, by the courts, by LegCo and by the Basic Law.

B.3.6 Internal requirements of the ERO

50. The power to make emergency regulations can only be invoked if and when there exists an occasion which the CEIC considers to be one of emergency or public danger, as laid down in section 2(1) of the Ordinance. This imports a requirement of good faith on the part of the CEIC which is judicially reviewable in court. It also requires the CEIC's conclusion that an occasion of emergency or public danger has arisen to be a reasonable one in the public law sense, such that it may withstand a challenge in court for *Wednesbury* unreasonableness. That there should be some leeway, or margin of discretion, accorded to the CEIC in determining whether an occasion of emergency or public danger exists is fully consistent with the very nature of the Ordinance, which requires the conferring of "wide and flexible powers" on the executive to deal with emergencies or public dangers of all kinds.

51. It is true that neither "emergency" nor "public danger" is defined. However, as the Court of Appeal has rightly pointed out,[37] by nature, emergency or public danger is not capable of exhaustive definition, and any definition that may be offered is bound to be general or broad. Whether a general or broad definition is used in the empowering Ordinance, or whether, as is the case here, the matter is left to the judgment of the CEIC, and if challenged, to the court, this cannot be determinative of the question of whether general legislative power is impermissibly sought to be delegated to the CEIC.

52. The same comments can be made in relation to the power given to the CEIC to make whatever regulations she may consider desirable in the public interest to make. There can be no real criticism of the wide scope of regulations that the CEIC may choose to make, since the regulations are, by definition, in response to an emergency or public danger, which, by nature, is not capable of specific or exhaustive definition in advance. Again, given that one is concerned with an emergency or public danger, the hands of the CEIC cannot be tied and there can be no real objection to the Ordinance giving the CEIC the power to make regulations which she may consider "desirable".

53. As was pointed out by O'Regan J in *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others*2000 (3) SA 936 (CC) at [53]:

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. *At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance.* Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made. …" (emphasis added)

54. Likewise, the fact that regulations made by the CEIC may take effect immediately only highlights the point that one is here not concerned with the making of ordinary subordinate legislation, but an empowering Ordinance to make regulations to deal with occasions of emergency or public danger, which may well require swift and urgent responses.

B.3.7 Judicial control

55. All this is not to say that the power given to the CEIC is unrestrained and uncontrolled. The courts control the exercise of the power to make regulations on three bases. First, the CEIC has to consider that an occasion of emergency or public danger has arisen. This must be a *bona fide* conclusion which is not *Wednesbury* unreasonable. There can be no arbitrary exercise of the power. Secondly, no matter how desirable the CEIC may consider them to be, the regulations made must be for the purpose of dealing with the emergency or public danger in question, and for no other irrelevant purpose.[38] Thirdly, the regulations must be made "in the public interest", subject to the margin of discretion accorded to the CEIC's judgment of what is "desirable". We disagree with the applicants' contention that these facets do not amount to meaningful judicial control.

56. In a public law challenge, there is no question of the CEIC concealing the reasons for finding the existence of an occasion of emergency or public danger, or the considerations and justification for the regulations that are actually made. The applicants' submission that the CEIC can hide behind the rule of confidentiality of the deliberations of the Executive Council and may refuse to disclose the reasons and considerations to the court is unreal. Indeed, in the present case, as one might expect, the CEIC has been anxious to explain to LegCo and the general public the reasons why she has considered it necessary to invoke the ERO and make the PFCR.

B.3.8 LegCo control

57. Furthermore, LegCo retains full control of any regulations made under the ERO. The Ordinance empowers the CEIC to make "regulations". Putting aside the debate over the nature of the regulations so made for the time being, "regulations" has the same meaning as subsidiary legislation and subordinate legislation,[39] and as such they are governed by Part V of IGCO. In particular, section 34 provides for the "negative vetting" of any regulations made under the ERO by LegCo. They are required to be laid on the table of LegCo at the next sitting thereof after the gazetting of the regulations.[40] LegCo may by resolution amend the regulations "in any manner whatsoever consistent with the power to make such subsidiary legislation", and the regulations shall be deemed to be amended accordingly. [41]

58. We reject the applicants' argument that section 34 has been excluded by a contrary intention[42] appearing in the ERO.

59. We also reject a further argument by the applicants that LegCo does not have any power, whether by negative vetting or otherwise, to amend or repeal any regulations made under the ERO – that only the CEIC has the power to do so.

60. Both these arguments were advanced on the basis of section 2(3) of the ERO which says that any regulations made under the Ordinance "shall continue in force until repealed by order of the [CEIC]." The applicants construed this to mean that only the CEIC has the power to amend or repeal any regulations made under the Ordinance. There is therefore no room, it was contended, for any negative vetting under section 34, nor even any amendment or repeal by LegCo under its general legislative power.

61. We see no justification whatsoever, on a purposive construction of section 2(3), for adopting such a narrow and restrictive interpretation. Nor was that the position of the Government in the past when regulations were made under the ERO or on this occasion in relation to the PFCR.[43] It should be remembered that the purpose of the ERO is to provide the CEIC with wide and flexible legislative powers in times of emergency or public danger in order to deal quickly and adequately with the situation in question. This is particularly so when, depending on what emergency or public danger is involved, LegCo may not be able to function and respond promptly enough or at all to the occasion of emergency or public danger in terms of passing the requisite legislation, and thus the need to delegate the legislative power to the CEIC to do so in the first place. Where, however, LegCo is in a position to sit and examine the situation,[44] and in particular to examine the regulations made by the CEIC under the ERO in response to an emergency or a public danger, and it is able to take a view on whether the regulations so made require amendment or should be repealed, there is no reason at all why LegCo should be deprived of the power to do so. On a purposive construction of section 2(3), there is simply no support for an interpretation that makes the CEIC the only body which can amend or repeal emergency regulations.

62. Indeed, the applicants' interpretation would go directly against article 73(1) of the Basic Law which vests the legislative power of the HKSAR in LegCo to, amongst other things, amend or repeal laws. Section 2A(1) of IGCO, which specifically requires that all pre-1997 laws, of which the ERO is one, to be construed "with such modifications, adaptations, limitations and exceptions as may be necessary so as not to contravene the Basic Law", operates to mandate the court to adopt a construction which does not contravene article 73(1).

63. In any event, there is simply nothing to stop LegCo from amending or even repealing section 2(3) of the ERO if (contrary to our view) it bears the meaning argued for by the applicants, so as to regain "control" over any regulations made by the CEIC under the ERO.

64. The fact that, in the Basic Law,[45] there are restrictions on the introduction of private bills to LegCo does not detract from the fact that LegCo itself retains the full legislative power to amend or repeal any regulations made under the ERO, and indeed the ERO itself. Any political or other difficulties in introducing a private bill to LegCo with a view to amending or repealing regulations made under the ERO do not affect the legal position as to whether LegCo has sought to delegate general legislative power to the CEIC under the ERO in contravention of the constitutional set-up laid down under the Basic Law.

65. In short, any regulations made under the ERO are subject to the scrutiny and control of LegCo, just like any other subsidiary legislation.[46]

B.3.9 Duration and review

66. What we have said above in relation to judicial and legislative control also adequately deals with the point made by the applicant that the ERO is general and vague in that it does not provide for the duration of the regulations made, or any review mechanism regarding the necessity or propriety of the regulations. Quite to the contrary, LegCo retains full control over these matters, and, in any event, they are open to challenge in court.[47] The fact that some of the regulations made in the past under the ERO remained on the statute book for years[48] does not mean that LegCo did not at any stage have power to amend or repeal them or that they were not open to judicial challenge. Indeed, there was an occasion when regulations made under the ERO were debated in LegCo with a view to repealing them. The motion was however defeated.[49] As a matter of law and as a matter of past practice, the applicants' argument that section 2(3) of the ERO only allows the CEIC to amend or repeal regulations made under the ERO is unsound.

B.3.10 Constitutional control

67. Not only are the power to make regulations under the ERO and the regulations so made subject to legislative and judicial control, they are also subject to the Basic Law. We have already referred to article 73(1) which specifically provides that it is for LegCo to amend or repeal laws, and section 2A(1) of IGCO mandates the adoption of a compliant statutory construction. As explained, it is one of the reasons why we reject the applicants' interpretation of section 2(3) of the ERO.

68. The points we now make are in relation to the protection of fundamental rights under the Basic Law. First, article 39 gives a constitutional guarantee of the provisions of the ICCPR as applied to Hong Kong and implemented by the HKBORO. Accordingly, any regulations made under the ERO that seek to restrict fundamental rights protected under the ICCPR and HKBORO are (as the Government accepts) subject to the constitutional control of the courts in terms of the dual requirements of "prescribed by law" and proportionality.

69. In other words, despite the apparently wide powers given to the CEIC under section 2(1) and (2) of the ERO to make regulations on a variety of matters, there can be no restriction of fundamental rights protected under the ICCPR and the HKBORO as guaranteed under article 39 of the Basic Law unless the regulations satisfy the prescribed by law requirement and proportionality analysis.

70. Secondly, section 5 of the HKBORO, which is based on article 4 of the ICCPR, provides for the derogation from the fundamental rights in the BOR (ICCPR) in times of public emergency subject to specified conditions. Given the constitutional guarantee of the ICCPR as implemented by the HKBORO under article 39, there is no question of construing the ERO to mean that LegCo has given the CEIC any power to make any regulations that are inconsistent with section 5 of the HKBORO, and indeed section 2A(1) of IGCO operates to mandate the adoption of a contrary construction. [50]

71. Thirdly, nothing in any regulations made under the ERO can restrict the rights guaranteed under the Basic Law itself, including the right of access to the courts,[51] unless the restriction can be justified.

B.3.11 Sections 2(2)(g) and 2(4) of the ERO

72. The applicants argued that sections 2(2)(g) and 2(4) of the ERO give the regulations made by the CEIC a status not enjoyed by any other ordinary subsidiary legislation in that these regulations may amend any enactment, suspend the operation of any enactment and disapply any enactment with or without modification. The applicants argued that only primary legislation can have such effect.

73. We reject the argument for the simple reason that regulations made under the ERO have the described effect over other enactments because sections 2(2)(g) and 2(4) of the ERO, which is primary legislation, say so. In any event, as already mentioned, sections 2(2)(g) and 2(4) cannot and do not mean that regulations made under the ERO can override the HKBORO.

B.3.12 Penalties

74. We do not see the power to impose punishment, including extremely heavy punishment, under the regulations made by the CEIC has any material bearing on the question under discussion. In any event, one must remember that the ERO concerns occasions of emergency or public danger. Maximum flexibility must be accorded to the CEIC to handle those occasions.

B.3.13 The theme of continuity

75. For these reasons, we conclude that there is no impermissible delegation of general legislative power to the CEIC under the ERO, and we reject the impermissible delegation argument. In so doing, we have not found it necessary to labour the theme of continuity to which both the CFI and the Court of Appeal devoted substantial portions of their judgments,[52] save to observe that the ERO has been in our statute book for almost 100 years. It has been resorted to on many occasions before 1997. It has survived two constitutional challenges in the pre-1997 days. It has not been declared by the SCNPC to be in contravention of the Basic Law pursuant to article 160(1) of the Basic Law. There is nothing to suggest that the ERO was regarded as incongruent with the new constitutional order under the Basic Law during the drafting stage of the Basic Law. For the reasons we have given, we do not see the ERO as being incompatible with the post-1997 constitutional design under the Basic Law. In those circumstances, we do not find it necessary to dwell on the theme of continuity or to resort to it in rejecting the applicants' impermissible delegation argument.

76. We can deal with the applicants' remaining arguments challenging the constitutionality of the ERO very briefly.

B.4 The principle of legality argument

77. First, the principle of legality argument. As argued before us in the written case,[53] this argument boils down to the general propositions that "[t]he common law has also gone a long way in protecting the separation of powers and imposing constitutional limits on both executive power and even the notion of Parliamentary sovereignty",[54] and the common law thus "embodies the values and principles of the separation of powers and the rule of law, including the rule of the constitution and the courts' role as the guardian of the constitution."[55] The applicants therefore contended that "[t]hese values and principles cannot allow the legislature to confer an unfettered power such as the ERO on the Executive".[56]

78. We need not comment on these propositions, save to say that they add nothing to the applicants' impermissible delegation argument which, for the reasons we have given, is rejected. For the same reasons, we reject the present argument.

B.5 The HKBORO section 5 argument

79. Secondly, the argument based on section 5 of the HKBORO, which was all but withdrawn at the hearing. In any event, it is a non-starter. As we have explained, the ERO and any regulations made thereunder must be read subject to section 5 of the HKBORO concerning derogation of fundamental rights protected under the BOR in times of public emergencies. Given the constitutional protection under article 39 of the Basic Law regarding the ICCPR as implemented by the HKBORO, section 2A(1) of IGCO requires the ERO to be construed in such a way as to be compatible with the Basic Law, and via article 39 of the Basic Law, section 5 of the HKBORO. The other side of the same coin is that there is no question of any implied repeal of the ERO for being inconsistent with section 5 by virtue of section 3(2)[57] of the HKBORO when the latter came into effect in 1991, which was the gist of the applicants' argument based on section 5. We therefore reject the applicants' argument.

B.6 The prescribed by law argument

80. Thirdly, the prescribed by law argument. There is no dispute that any regulations made under the ERO which purport to restrict fundamental rights must pass the prescribed by law test as required by article 39(2) of the Basic Law. However, the applicants argued that the prescribed by law requirement is applicable not only to the regulations, but also to the ERO, it being a law which empowers the making of regulations that may restrict fundamental rights.

81. Both the CFI and the Court of Appeal were right in rejecting this argument on the ground that the prescribed by law requirement is not engaged.[58] Article 39(2) of the Basic Law provides that the rights and freedoms enjoyed by Hong Kong residents "shall not be restricted unless as prescribed by law". The requirement is directed at actual restrictions on the rights and freedoms enjoyed by Hong Kong residents. It is not directed at empowering legislation such as the ERO which merely authorises the making of subsidiary legislation which, if and when made, may seek to restrict fundamental rights. Of course, we do not necessarily exclude the possibility of a situation arising where the empowering Ordinance and the subsidiary legislation made thereunder are so intertwined that it is unrealistic or artificial to separate the two. However, we are not faced with such a situation here. We also consider that the protection intended to be afforded by the prescribed by law requirement under article 39(2) is fully achievable by subjecting any regulations made under the ERO that seek to restrict fundamental rights to that requirement.

82. The applicants' reliance on what this court said in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at [29] [59] is misplaced. There the court was referring to a law which empowers a public official to exercise powers that may interfere with fundamental rights. It was not dealing with an empowering Ordinance which delegates to the CEIC power to make regulations which, if and when made, may affect rights.

83. Likewise, we find the applicants' reference to what was said in the South African case of *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at [34] [60] to be unhelpful. The observations relied on were not directed at any prescribed by law requirement as such, but rather at the principle of legality under the South African Constitution,[61] which was the basis of the constitutional challenge in that case.[62]

84. In any event, there is no substance in the prescribed by law argument insofar as it relies on the same or similar points made under the impermissible delegation argument to say that the ERO is too general and vague to pass the prescribed by law test. For the reasons we have given, those points are rejected.

B.7 Conclusion on the constitutional challenge to the ERO

85. In conclusion, we reject the applicants' constitutional challenge to the ERO and now turn to address the proportionality issues.

C. The Proportionality Issues (Ground 5A)

86. It was common ground both in this Court and below that, to the extent that the PFCR restricts any protected rights, the validity of any such restrictions will depend on the provision in question satisfying the four-step proportionality test laid down in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at [134]-[135]. We shall address each of those steps in turn below but will begin by examining the evidence as to the circumstances said by the Government to justify the imposition of the PFCR in the first place.

C.1 The evidence of deteriorating law and order

87. The PFCR was made by the CEIC because of a sudden and severe deterioration of law and order in Hong Kong arising from protests and social unrest in opposition to the Government's proposal in February 2019 to enact the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 ("Fugitive Offenders Bill"). This bill was controversial and attracted opposition from many members of the public. Notwithstanding that opposition, the Government announced that it would seek to have the bill debated and passed by LegCo before the end of its session in July 2019. That announcement stimulated further protests and public processions on a massive scale which eventually persuaded the Government, in June 2019, to suspend the bill's legislative process. On 9 July 2019, the Government acknowledged that the bill was "dead" and, on 4 September 2019, the Government announced that the bill would be formally withdrawn, which it was on 16 October 2019.

88. The Government adduced evidence from a police superintendent, the Principal Assistant Secretary for Security and a clinical psychologist to demonstrate the dire situation that had developed in Hong Kong in the period leading to the making of the PFCR and to explain the necessity for the regulation.[63] None of that evidence was challenged by the applicants. Nor was it disputed that, if the ERO was constitutional, there was a proper basis for the CEIC to form the opinion that there was an occasion of public danger. The unchallenged evidence paints a bleak picture of the degeneration of law and order in Hong Kong and the ever increasing violence and lawlessness, almost on a daily basis, that was becoming common on the streets of Hong Kong in the period up to 4 October 2019. A number of discrete features of that evidence need to be emphasised to put the discussion of the proportionality issues that follows into proper context.

89. The first point to emphasise is the scale and extent of the events disrupting public order. From 9 June 2019 to 4 October 2019, over 400 public order events arising from the Fugitive Offenders Bill were staged and led to a significant number of outbreaks of violence. These public order events took place in various parts of Hong Kong at frequent intervals every week and involved hundreds and thousands of participants. The violence involved escalated and included the following acts: repeatedly charging police cordon lines with weapons whilst wearing body armour; blocking roads, including scattering nails on roads; vandalising public facilities (including pavements, roadside fences and barriers, signs, dust bins, lamp posts, traffic lights, street lights and CCTV cameras) and Government buildings (including the LegCo Complex, Police Headquarters, Cheung Sha Wan Government Offices); setting fires at and near police stations and other public places; damaging private shopping malls, shops and restaurants; looting some of the damaged shops; damaging residential premises and harassing residents; attacking members of the public and police officers with weapons including high-powered laser pointers, slingshots, sharpened objects, bricks and inflammable liquids; throwing petrol bombs at police vehicles and police stations; damaging and obstructing the operation of critical infrastructure including Hong Kong International Airport, the Mass Transit Railway and the Cross-Harbour Tunnel; stopping motorists and extorting mobile phones or money by threatening to damage their vehicles. As at 4 October 2019, a total of 2,135 individuals had been arrested for taking part in public order events of an unlawful or criminal nature.

90. The second point to emphasise is the alarming breakdown of law and order and escalating violence on 29 September and 1 October 2019 in particular. The frequency of outbreaks of violent protests increased and the locations at which they took place also spread from one or two areas to become a phenomenon described colloquially as "blossoming everywhere"[64] in which multiple outbreaks of violence happened simultaneously on Hong Kong Island, in Kowloon and in the New Territories. On 29 September, violent protesters participated in unlawful assemblies on Hong Kong Island and blocked roads, vandalised various MTR stations, threw petrol bombs at police and started fires at multiple locations. On 1 October, there was further violence and widespread use of petrol bombs across various parts of Hong Kong. Whilst a total of 419 persons were arrested from 1 to 24 September 2019, on 29 September and 1 October 2019 alone 429 persons were arrested. The use of inflammable liquid bombs increased in frequency and extent, with around 100 thrown on 29 September and over 100 thrown on 1 October. The number of incidents of violence and vandalism was particularly acute on 1 October. On that date: 283 individuals were arrested and 123 were sent to hospital; in Tuen Mun, a police officer was injured by protesters throwing corrosive liquid on him, causing a third degree burn; police officers were attacked by large groups of protesters using a range of objects and potentially lethal weapons; 1,439 tear gas canisters or grenades had to be deployed (slightly less than half the number used from 9 June to 30 September 2019) and 6 live rounds, 919 rubber bullets and 192 bean bags were fired (more than the total of each of these respectively fired from 9 June to 30 September 2019) in attempts to disperse protesters and restore law and order.

91. The third point to emphasise is the phenomenon of the protesters' use of what are described as "black bloc" tactics for concealing their identities and evading arrest and prosecution. These black bloc tactics include quick mobilisation via social media and involve groups of protesters wearing black clothing with little or no distinguishing features and covering the whole or most of their faces with gas masks, balaclavas, goggles, sunglasses or surgical masks in order to conceal their identities. The use of facial coverings has the additional feature of emboldening protesters to participate in increasingly violent acts and to abuse their anonymity by acting with a sense of impunity and an ability to evade police investigation. It also encourages their non-violent supporters to provide assistance including food and water, tools and weapons and transport. The concealment has hampered police investigation and hindered police work and its effectiveness.

92. The fourth point to note is the propensity for peaceful assemblies to degenerate into unlawful public gatherings and descend into violence. Whilst many public gatherings started lawfully, many degenerated into violence and unlawfulness. A major part of the reason why this happened was that violent protesters who were masked would "often mix themselves into a larger group of protestors (consisting of those who are taking part in a largely peaceful public meeting or procession), and instigate acts of violence or vandalism".[65] From 9 June to 4 October 2019, out of a total of 103 public meetings or processions for which a Letter of No Objection had been issued by the police, 28 ended in violence. A public meeting or public procession which was taking place lawfully at first could turn into an unauthorised or unlawful assembly quickly with protesters deviating from the original location or route approved by the police and radical protesters then resorting to violence. For example: on 24 August 2019, a public procession in Kwun Tong for which a Letter of No Objection was issued by the police led to the obstruction of roads, damage to lamp posts and assaults on police officers; and on 21 September 2019, a public procession in Tuen Mun for which a Letter of No Objection was issued by the police degenerated at its conclusion with protesters vandalising Light Rail stops, placing objects on the tracks, blocking roads, setting fires and hurling petrol bombs, and eventually leading to the spread of violence to other areas in Yuen Long and a siege of the Mongkok Police Station. This trend of peaceful protests degenerating into violence continued after the PFCR was made.

93. The fifth point to emphasise is the trend of an increasing number of young persons and students taking part in unlawful assemblies and riots as well as engaging in unlawful or criminal acts of violence and vandalism. Of the total number of persons arrested as at 4 October 2019, 30.7 per cent were students and 10.4 per cent were aged under 18. These figures show a steady increase in the number of young persons and students arrested from the beginning of September 2019.

94. The sixth point to emphasise is the extent to which innocent bystanders (including motorists) and law-abiding passersby were subjected to violent reprisals by some protesters if they sought to voice opposition to the damage or inconvenience that the protesters were causing. Even peaceful protesters were attacked and assaults were committed against people with different views to those perpetrating the violence. For example, as will be seen below: one person was set on fire and another killed when struck by a hard object thrown by protesters. Many ordinary and innocent people as well as businesses were adversely affected if not actually harmed. As mentioned in a speech made by the Chief Executive on 4 October 2019 at a press conference "treatment of people with different views have gone from yelling and beating in the earlier days to vigilantism".[66] In addition, looting and thefts from shops and other premises that had been damaged caused loss to operators of businesses and shop owners.

95. The seventh point to emphasise is that the evidence filed by the Government following the CFI Judgment,[67] also unchallenged, shows the continued deterioration of the situation during October and November 2019, despite the making of the PFCR. The following is a selective list of some of those events.

(1) On 5 October 2019, violent masked protesters caused extensive damage to the MTR system leading to its first ever network-wide shut down.

(2) On 13 October 2019, masked protesters vandalised LegCo and threw objects onto the tracks of the MTR at Sha Tin station and damaged the Light Rail tracks, leading to a closure of the entire Light Rail network and a number of MTR stations in the afternoon. A masked protester slashed a police officer's neck with a blade and another assaulted an officer and tried to snatch his equipment.

(3) On 20 October 2019, despite a Letter of Objection from the police, protesters staged a procession in Tsim Sha Tsui and blocked roads and attacked various police stations, government facilities, MTR stations and certain banks and shops, committing various acts of arson.

(4) On the night of 31 October 2019, there was an unauthorised assembly in Mong Kok with protesters blocking roads, building barricades and throwing petrol bombs.

(5) On 3 November 2019, masked protesters vandalised MTR facilities and shopping malls, during which a District Council member had part of his ear bitten off.

(6) On 11 November 2019, a student was shot by a police officer during an incident in which the police officer had been attacked. Also on that date, during a confrontation between different groups of protesters at Ma On Shan, a 57-year old man was doused in flammable liquid and set on fire by a masked protester, resulting in severe burns to nearly 30 per cent of his body.

(7) On 11 and 12 November 2019, after protesters had hurled objects from a footbridge onto the Tolo Highway, there were various serious confrontations and clashes between police officers and protesters at the Chinese University of Hong Kong which included the use of bricks, bows and arrows and petrol bombs.

(8) On 13 and 14 November 2019, the blocking of roads, vandalism and attacks continued. An employee of the Food and Environmental Hygiene Department was struck on the head by a hard object thrown by masked rioters and subsequently died of his injuries. For safety, all schools in Hong Kong were suspended from 14 to 19 November 2019.

(9) The violence continued on 17 to 18 November 2019 with the occupation of the roads around the campus of the Hong Kong Polytechnic University by violent protesters. A member of the Force Media Liaison Cadre was hit in the calf by an arrow. Other violent protests also occurred on the same date elsewhere in Hong Kong and included an incident in which rioters attacked police who had arrested a woman for taking part in an unlawful assembly and removed her from police custody.

96. As it was put in the evidence of the Principal Assistant Secretary for Security:

> "… the further escalation of violence and vandalism especially since the week of 11 November 2019 can simply be summed up by (1) the more frequent appearances of increasingly aggressive assaults and attacks (even including setting a person on fire as well as throwing of hard objects at persons resulting in severe injury or even death), (2) the more extensive road blockage with dangerous items placed on vehicular passageways and railway tracks or even petrol bombs and hard objects hurled at moving vehicles, not only causing severe disruption to public transport but also a genuine safety concern to motorists and passengers of the MTR, and (3) the growth in the severity of clashes and confrontations between police officers and protestors/rioters, resulting in even more damage to public properties and facilities and the need for the use of force. All of the above were carried out by persons wearing facial coverings that prevented identification."[68]

97. The eighth point to emphasise is the increasing number of persons arrested and the increasing need to use appropriate force for dispersal and to curb violent acts. At the same time, the use of facial coverings hampered the effectiveness of the police use of tear gas as a crowd dispersal tactic.

(1) Between 5 October and 14 November 2019, 2,184 persons were arrested (compared to 2,137 in the period between 9 June and 4 October 2019). In the week of 8 November 2019 alone, 582 persons were arrested and, between 15 and 17 November 2019, 154 persons provisionally arrested for offences relating to public order events.

(2) Between 9 June and 4 October 2019, tear gas was used 5,501 times in violent public order events occurring on 28 days. In contrast, between 5 October and 17 November 2019, tear gas was used 4,522 times in violent public order events occurring on 22 days. On 12 November 2019 alone, tear gas was used 1,500 times and about 1,300 rubber bullets were fired. On 11 and 17 November 2019, 3 and 4 live rounds were respectively fired.

C.2 Application of the proportionality test

98. The starting point of the proportionality test is the prerequisite of identifying the constitutional right engaged and to determine whether the provision under challenge restricts any such right: *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754 at [65]; *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950 at [39].

99. In the present case, the PFCR makes the wearing, at particular types of public gatherings, of facial coverings likely to prevent identification an offence punishable by a fine and imprisonment. It is not disputed that the restrictions in the PFCR affect the enjoyment of (i) the freedom of assembly, procession and demonstration under Article 17 of the BOR[69] and Article 27 of the Basic Law,[70] (ii) the freedom of speech and expression under Article 16 of the BOR[71] and Article 27 of the Basic Law, and (iii) the right to privacy under Article 14 of the BOR.[72] The extent to which these rights are affected by a ban on facial coverings is further discussed below.[73]

100. None of these rights is absolute but may be subject to lawful restrictions. As will be apparent from its wording, the freedom of assembly, procession and demonstration under Article 17 of the BOR is not absolute but is subject to lawful restrictions including the interests of public safety, public order and the protection of the rights and freedoms of others. The freedom of speech and expression is similarly subject to lawful restrictions by reason of Article 16(3) of the BOR.[74] The right to privacy under Article 14 of the BOR is likewise not absolute, being a protection against arbitrary or unlawful interference.

101. It is in this context that we shall now examine the PFCR by reference to the four steps of the proportionality test. Since the Government accepts that section 3 of the PFCR restricts the protected rights identified, it is necessary to assess whether the interference with such rights is proportionate. However, it is relevant to note at the outset of this discussion that, on the footing that the ERO itself is constitutional, the applicants do not seek to challenge the lawfulness of the prohibition in section 3(1)(a) of the PFCR on the use of a facial covering likely to prevent identification at an unlawful assembly. They accept that this is rationally connected to the legitimate aim of the PFCR and is proportionate as being no more than necessary and strikes a fair balance between an individual's rights and the societal benefits served by the restriction.

C.3 Step One – Legitimate aim

102. It is the Government's case that the PFCR has a two-fold aim: (1) the deterrence and elimination of the emboldening effect for those who may otherwise, with the advantage of facial covering, break the law; and (2) the facilitation of law enforcement, investigation and prosecution. These aims were found by the courts below to be legitimate aims: CFI Judgment at [130] and CA Judgment at [165] and [170]-[171].

103. The evidence of the background leading to the making of the PFCR is set out in Section C.1 above. In the light of that evidence, the aims of the Government in making the PFCR are undeniably legitimate. Indeed, no party to these appeals has sought to suggest otherwise. The escalating violence and continued lawlessness arising from the ongoing protests made it essential to take some action to prevent, deter[75] and stop the violence in the first place or at least to assist the police to detect and apprehend those persons breaking the law.[76] That action had become necessary to restore stability and maintain law and order in Hong Kong. The applicants' acceptance that section 3(1)(a) is a proportionate, and therefore lawful, restriction on any of the rights engaged incorporates an acceptance that that provision in question pursues a legitimate aim. But there is no suggestion that the restrictions in sections 3(1)(b), 3(1)(c) and 3(1)(d) on the use of facial coverings likely to prevent identification at those other public events do not also pursue the same legitimate aims.

C.4 Step Two – Rational connection

104. The rational connection between (i) section 3 of the PFCR and the aim of deterring those wearing facial coverings from breaking the law and eliminating the emboldening effect of, and consequent propensity to break the law arising from, the anonymity provided by facial coverings was analysed in the CFI Judgment at [133], and (ii) between section 3 of the PFCR and the aim of facilitating law enforcement, investigation and prosecution at [134]. At [146] of the CFI Judgment, their Lordships concluded that the measure adopted in section 3 of the PFCR was rationally connected to the two legitimate aims identified by the Government. This conclusion was not challenged on appeal to the Court of Appeal: CA Judgment at [170]. Nor has that conclusion been challenged in this Court.

105. As in relation to the first step of the proportionality test, therefore, it is unnecessary to deal at length on the question of whether the measures taken by section 3 of the PFCR are rationally connected to the legitimate aims identified by the Government. That such rational connection is established is plainly made out. As their Lordships rightly pointed out (at [135] of the CFI Judgment), whether a measure is rationally connected to an identified aim is largely "a matter of logic and common sense". Leaving aside the scope of the ban, which will be addressed below, by prohibiting the use of facial coverings at public events the Government would self-evidently directly address both unlawful behaviour itself and the emboldening effect the wearing of masks has on both violent and peaceful protesters alike. It would also obviously assist in the identification of those who nevertheless do break the law and facilitate their apprehension and prosecution.

C.5 Proportionality

106. As was the case in the courts below, the focus of the argument on the constitutionality of the PFCR has been on the third and fourth steps of the proportionality test. The scope of that argument is also narrower in this Court since the Government has not appealed against the decision of the Court of First Instance, upheld by the Court of Appeal, that section 5 of the PFCR, concerning the power of a police officer to require a person using a facial covering in a public place to remove the facial covering, is a disproportionate restriction of the protected rights in question. The absence of an appeal against this holding is understandable since the Court of Appeal accepted that existing powers in the Public Order Ordinance (Cap. 245) ("POO") and Police Force Ordinance (Cap. 232) to demand proof of identity are sufficient.[77] The focus in this Court is therefore solely on section 3 of the PFCR and, as has already been stated, both the applicants and the Government appeal against the Court of Appeal's judgment. The applicants appeal against the Court of Appeal's holding that section 3(1)(b) of the PFCR is proportionate and the Government in turn appeals against the Court of Appeal's holding that sections 3(1)(c) and 3(1)(d) of the PFCR are not proportionate.

C.5.1 The protected rights and their proper limits

107. The freedom of speech and the freedom of peaceful assembly are "precious and lie at the foundation of a democratic society": *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 at [1]. But it is important to stress that their cardinal importance hinges on their *peaceful* exercise. This has been stressed before. In *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837, having referred to the permitted restrictions in Article 17 of the BOR, Ribeiro PJ held (at [38] and [39]) that:

> "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*, having recognized that the interests of 'public order (*ordre public*)' are listed by art. 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."

We would note that the public disorder and violence displayed in *Chow Nok Hang* was far less significant or extensive compared with the facts in the present case.

C.5.2 The ambit of section 3 of the PFCR

108. The legitimate aim of the PFCR is set out above. Section 3 of the PFCR prohibits the wearing of facial coverings likely to prevent identification at four categories of public gatherings defined by reference to the POO, being those types of public gatherings where public order issues might arise. These are: (a) an "unlawful assembly", (b) an "unauthorized assembly", (c) a "public meeting", and (d) a "public procession".

109. An "unlawful assembly" is defined in section 18(1) of the POO, which provides:

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

110. There being no challenge to the proportionality of section 3(1)(a) of the PFCR, it is unnecessary to consider this prohibition on the use of facial coverings at any length. All that need be said is that the acceptance by the applicants that this is a proportionate restriction of the protected rights in question is plainly correct. Once any public gathering has deteriorated to the point it is an unlawful assembly, the protected rights are no longer being exercised by those particular individuals who are behaving in the disorderly, intimidating, insulting or provocative manner as defined. In doing so, that person "crosses the line separating constitutionally protected peaceful demonstration from unlawful activity which is subject to legal sanctions and constraints".[78] Requiring a person at such a gathering to do so without a facial covering is no more than reasonably necessary to achieve the two legitimate aims of preventing law breaking and assisting law enforcement. Equally, prohibiting a person present at an unlawful assembly, even if not taking part in it so as to attract prosecution under section 18(3) of the POO, from wearing a facial covering is no more than reasonably necessary to achieve the legitimate aims of avoiding the emboldening effect of anonymity from a facial covering and the consequent propensity to break the law, as well as assisting in law enforcement when the law has been broken.

111. It is the public events in sections 3(1)(b), 3(1)(c) and 3(1)(d) upon which it is necessary to focus in these appeals.

112. An "unauthorized assembly" is defined in section 17A(2) of the POO, which provides:

> "Where –
>
> > (a) any public meeting or public procession takes place in contravention of section 7 or 13;
> >
> > (b) 3 or more persons taking part in or forming part of a public gathering refuse or wilfully neglect to obey an order given or issued under section 6; or

> (c) 3 or more persons taking part in or forming part of a public meeting, public procession or public gathering, or other meeting, procession or gathering of persons refuse or wilfully neglect to obey an order given or issued under section 17(3),
>
> the public meeting, public procession or public gathering, or other meeting, procession or gathering of persons, as the case may be, shall be an unauthorized assembly."

113. A "public meeting" is defined in section 2(1) of the POO as being "any meeting held or to be held in a public place", which "takes place under section 7(1)" of the POO and which is not an unlawful assembly or unauthorised assembly. Section 7(1) of the POO regulates public meetings and permits a public meeting to take place if the Commissioner of Police has been notified of the intention to hold the meeting and has not prohibited it. In practice, this is indicated by a Letter of No Objection issued on behalf of the Commissioner of Police. Section 7 of the POO does not apply to a meeting of not more than 50 persons and so, by definition, a public meeting will involve more than that number of persons.

114. A "public procession" is defined in section 2(1) of the POO as being "any procession in, to or from a public place", which "takes place under section 13(1)" of the POO and which is not an unlawful assembly or unauthorised assembly. Section 13(1) of the POO regulates public processions and permits a public procession to take place if the Commissioner of Police has been notified of the intention to hold the procession and has not prohibited it. Again, this is indicated in practice by a Letter of No Objection issued on behalf of the Commissioner of Police. Section 13 of the POO does not apply to a procession of a public procession of not more than 30 persons and so, by definition, a public procession will involve more than that number of persons.

115. It can be seen, therefore, that a common factor in the events that are the target of the disputed provisions of section 3 of the PFCR (sections 3(1)(b), 3(1)(c) and 3(1)(d)) is that they are all gatherings, public meetings or public processions of which (i) the Commissioner of Police is aware and to which he has not objected, or (ii) which are in contravention of the statutory conditions (in section 7 or 13 of the POO) or involve some refusal or wilful neglect by 3 or more persons to obey an order issued by the police (under section 6 or 17(3) of the POO) thus making the gathering, public meeting or public procession an unauthorised assembly. The distinction between an unauthorised assembly in section 3(1)(b) and a public meeting or public procession in sections 3(1)(c) and 3(1)(d) is that, in the case of the former, some breach of condition will have already occurred, whereas in the case of the latter, the public meeting or public procession will be taking place in accordance with any conditions duly imposed by the police under the POO.

C.5.3 Are sections 3(1)(b), 3(1)(c) and 3(1)(d) proportionate?

116. The applicants contended that the Court of Appeal's decision that section 3(1)(b) is a proportionate restriction on the rights in question was wrong for two principal reasons. Their arguments can be summarised thus:

> (1) First, it was contended that the prohibition in section 3(1)(b) is too wide because an outbreak of isolated violence, or a breach of a relevant condition by as few as three persons causing the assembly to become unauthorised (pursuant to section 17A(2) of the POO), does not deprive a peaceful demonstration as a whole of its essential characteristic as such. The demonstration remains essentially peaceful and is an exercise of the freedom of peaceful assembly. In other words, the rights of peaceful protesters are disproportionately undermined.
>
> (2) Secondly, it was contended that casting the scope of the prohibition in section 3 by reference to persons "at" an unlawful assembly is too wide because it catches an innocent bystander or passerby who may not be participating in the public gathering that has become an unauthorised assembly.

117. These contentions applied, so argued the applicants, all the more so to the prohibitions on facial coverings in sections 3(1)(c) and 3(1)(d) because, by definition, these are public meetings or public processions which are wholly peaceful and, by definition, in compliance with any conditions duly imposed by the police. Accordingly, it was contended, the courts below were right to conclude that these prohibitions were disproportionate and therefore unconstitutional.

118. There is support for the proposition that a peaceful demonstration does not lose its character as such simply because of an outbreak of isolated violence. In relation to Article 11 of the European Convention on Human Rights (paragraphs (1) and (2) of which are in substantially the same terms as Article 17 of the BOR), the European Court of Human Rights ("ECtHR") has held:

> "… 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 art. 11(1), and any restriction placed thereon must be in conformity with the terms of para. (2) of that provision."[79]

119. Similarly, United Nations Human Rights Committee's General Comment No. 37,[80] observes (at [16]-[17]) that:

> "16. If the conduct of participants in an assembly is peaceful, the fact that certain domestic legal requirements pertaining to an assembly have not been met by its organizers or participants does not, on its own, place the participants outside the scope of the protection of article 21. …
>
> 17. … [I]solated acts of violence by some participants should not be attributed to others, to the organizers or to the assembly as such. Thus, some participants in an assembly may be covered by article 21, while others in the same assembly are not."

120. It is undoubtedly correct that a peaceful demonstration does not lose its character as such because of an isolated outbreak of violence. The question is, however, inevitably one of degree and will be highly fact sensitive. The violence may come from the participants themselves, or from counter-demonstrators, or from members of the public aimed at the demonstrators. It may be entirely isolated and discrete. It may be readily contained without leading to the spread of violence. But it may not.

121. All that notwithstanding, the fundamental flaw in the applicants' first contention (summarised at [116(1)] above) is that the legitimate aim to which the PFCR is directed is not limited just to public gatherings at which violence has already broken out or where an identified criminal offence under the POO has already occurred. As we have noted above (in Section C.3), the PFCR has a two-fold aim, both to deter violence and crime and to promote effective law enforcement. Inherent in these legitimate aims is the fact that, as the events of 2019 in Hong Kong show (see Section C.1 above), large demonstrations are fluid events which can be difficult to control and police. What may start as a peaceful demonstration may readily degenerate from a peaceful gathering into a serious public order incident involving hundreds or even thousands of people. The preventative and deterrent nature of the PFCR is therefore crucial.

122. In this regard, the summary of the evidence in Section C.1 above shows clearly that the Court of Appeal was entirely justified in referring to (CA Judgment at [228]):

> "… 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 [sic] 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."

123. At [237] of the CA Judgment, the Court of Appeal reached the view that the prohibition in section 3(1)(b) of the PFCR is no more than necessary to achieve the legitimate aims identified. The Court of Appeal recognised that the threat to law and order posed by the violence that gave rise to the need to make the PFCR arose not just from actual violence but also from the propensity for peaceful demonstrations to deteriorate into violence and the emboldening effect of the anonymity provided by facial coverings. The legitimate aim of the PFCR (see Section C.3 above) is not limited to the suppression of violence after it has broken out but is also preventative and intended to deter violence from developing out of the highly fluid and volatile situations that had been occurring in Hong Kong over a period of many months.

124. The Court of Appeal noted (CA Judgment at [168]) that the Court of First Instance agreed (CFI Judgment at [137]) with the Government's contention that "many public assemblies or processions in the past months which took place lawfully and peacefully at the beginning turned into unauthorised or unlawful ones with some radical protesters resorting to violence". As the Court of Appeal also noted (CA Judgment at [169]) there is not 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." However, despite recognising this, as the Court of Appeal rightly observed, "the Judges [of the Court of First Instance] failed to have regard to the pre-emptive nature of the provisions" (CA Judgment at [211]).

125. We would therefore respectfully agree with the Court of Appeal that the ambit of section 3(1)(b) is not disproportionate. Given the legitimate aim of the prohibition on facial coverings, the application of that prohibition to situations within section 3(1)(b) is a proportionate means to achieve the legitimate aim in question.

126. But the reasoning in respect of section 3(1)(b) also appears to us to apply equally to sections 3(1)(c) and 3(1)(d). We reiterate that the preventative and deterrent nature of the PFCR is crucial and the need to prevent the deterioration of peaceful gatherings into violence is an integral part of the legitimate aim. As such, it is clearly proportionate for the PFCR to seek to prohibit the wearing of facial coverings – used to hide the identity of law breakers and having an emboldening effect leading to degeneration of peaceful protests into violence – whether at an unauthorised assembly, a public meeting or a public procession.

127. The Court of Appeal, however, thought otherwise. At CA Judgment [243], the Court of Appeal concluded that, so long as a public meeting or public procession proceeded in accordance with sections 7(1) and 13(1) of the POO, "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". They considered that, if the gathering was "hijacked" by violent protesters, there was "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."

128. The Court of Appeal were unpersuaded by the Government's argument based on the evidence that there was a propensity for demonstrations to become violent. Their reasoning (at CA Judgment [246]) was as follows:

> "… 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)."

129. Two errors are apparent in this reasoning. First, it appears to ignore the previous acceptance (see the references at [123] and [124] above) that there is no simple dichotomy between peaceful and violent protesters and that it is important to give effect to the preventative and deterrent nature of the prohibition. Resort to police powers to order a dispersal when a fluid situation is deteriorating is too late and of little practical efficacy in the factual circumstances surrounding the making of the PFCR.

130. Secondly, it appears erroneously to limit the need for preventative measures to be taken to those situations in which an offence under section 17A(2)(a) or 17A(3) of the POO has been committed. The legitimate aim of the PFCR is not limited to the situation in which an offence under the POO has already been shown to be established. The PFCR is tied to categories of public gatherings under the POO but its scope is not determined by reference to offences under that ordinance. Given the clear and urgent need to address a serious situation of public danger, the prohibition on facial coverings in sections 3(1)(c) and 3(1)(d) does not go further than reasonably necessary to achieve the legitimate aim of the PFCR. The adoption of the POO definitions of public gatherings in the PFCR was simply a convenient way to limit the breadth of the prohibition on facial coverings, confining it to those situations where public order issues might arise, and it is not necessary to find an offence under POO before the prohibition can apply. As we have repeatedly stressed above, the PFCR is intended to be preventative and to dampen the emboldening effect of a facial covering.

131. We turn to the applicants' second main contention (summarised at [116(2)] above), that section 3(1)(b), and also by extension sections 3(1)(c) and 3(1)(d), are disproportionately widely framed because they give rise to the possibility of innocent bystanders or passersby at these public gatherings being subject to criminal prosecution for wearing a facial covering.

132. This contention is somewhat artificial. If an innocent bystander or other passerby were to find themselves accidentally present at a public gathering caught by section 3 of the PFCR, it would be a matter of evidence in any given case to determine if they were "at" the relevant public gathering for the purposes of the PFCR. But if they were present there, wearing a mask for medical or other proper reasons, they would *prima facie* have a defence of reasonable excuse under section 4 of the PFCR.

133. The applicants also emphasised the nature of the rights they were asserting and drew attention to the United Nations Human Rights Committee's General Comment No. 37 (*supra*) at [60] where the committee observed:

> "The wearing of face coverings or other disguises by assembly participants, such as hoods or masks, or taking other steps to participate anonymously may form part of the expressive element of a peaceful assembly or serve to counter reprisals or to protect privacy, including in the context of new surveillance technologies. The anonymity of participants should be allowed unless their conduct presents reasonable grounds for arrest, or there are other similarly compelling reasons, such as the fact that the face covering forms part of a symbol that is, exceptionally, restricted for the reasons referred to above … The use of disguises should not in itself be deemed to signify violent intent."

134. That observation is to be read in context. The wearing of a facial covering, whilst it may be a legitimate form of expression or be used for reasons of privacy or a legitimate desire for anonymity, does not lie at the heart of the right to peaceful assembly. It is still possible to demonstrate peacefully without wearing a facial covering. Prior to the events of June to October 2019, Hong Kong did not have a tradition of demonstrations by persons wearing masks to conceal their identities.

135. The observation is also, of course, made in the context of a commentary on the right to *peaceful* assembly. The situation in Hong Kong in 2019 leading to the making of the PFCR was not one in which public assemblies were remaining peaceful. Similarly, nothing in *Kudrevičius v Lithuania* (*supra*) prohibits restrictions being imposed to prevent a recognised trend of violence breaking out in deteriorating public assemblies. That case did not involve the situation prevalent in Hong Kong at the time in question of non-violent protesters helping violent ones. Nor was the case decided in the context of a situation of public danger arising from continuing violence sustained over a period of four months. On the contrary, the reasoning of the ECtHR recognises that restrictions "on freedom of peaceful assembly in public places may serve to protect the rights of others with a view to preventing disorder …".[81] This reasoning is consistent with what was said by the ECtHR in *Austin v United Kingdom* (2012) 55 E.H.R.R. 14, p.380 ([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 (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 251, ECHR 2011). 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 (*Giuliani and Gaggio,* cited above, § 244; *P.F. and E.F. v. the United Kingdom,* (dec.), no. 28326/09, § 36, 23 November 2010). 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 (*Giuliani and Gaggio,* cited above, § 245; *P.F. and E.F. v. the United Kingdom*, cited above, § 40)."

In this context, it should also be noted that in the passage from General Comment No. 37 set out above it was said that the "anonymity of participants should be allowed unless … there are other similarly compelling reasons".

136. In the context of what we have earlier referred to as the degeneration of law and order, and the ever increasing violence and lawlessness, the ban on facial coverings can be regarded as a relatively minor incursion into the relevant rights on which the applicants rely. As we have said, this does not lie at the heart of the right of peaceful assembly.

137. Mr Johannes Chan SC's submission that the evidence showed that about 70% of all public gatherings for which Letters of No Objection had been issued by the police between June and October 2019 remained peaceful ignores the far more alarming statistic that about 30% of all such gatherings ended in violence. That is a high proportion of incidences of violence and not one which the law should require the public of Hong Kong to have to continue to endure.

138. That there might have been some other means of achieving a suitably defined set of circumstances in which to impose a prohibition on the wearing of facial coverings does not affect the conclusion that the PFCR is proportionate as no more than reasonably necessary. This Court has previously approved[82] the dictum of McLachlin J in *RJR-MacDonald Inc v The Attorney General of Canada* [1995] 3 SCR 199 at [160] that:

> "… the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."

139. In his oral submissions, Mr Chan did not address a number of submissions on proportionality that had been included in the applicants' written case.[83] We do not propose to deal with them at any length. None of them, either singly or in combination, provides a sound basis for concluding that the prohibition in section 3 of the PFCR is disproportionate.

140. Having reached this conclusion on the basis addressed by the Court of Appeal, namely that the standard of review is the "no more than necessary" standard, it is unnecessary to address the Government's contention that the applicable standard should be some other standard on the relevant spectrum between "no more than necessary" and "manifestly without reasonable foundation".

141. It is also not necessary to address the applicants' contention regarding the meaning of the word "at" in section 3 of the PFCR, namely that the words "at an unauthorised assembly" in section 3(1)(b) imported the same requirements as section 17A(3)(b) of the POO. On its face, the preposition "at" means a temporal spatial proximity to the public gathering in question. If a bystander or passerby gets caught up in a demonstration to which the PFCR applies, they may have a defence of reasonable excuse or lawful authority under section 4. If they are not participating and their presence is wholly fortuitous, then it is likely that defence will be made out. It is not necessary to define "at" in terms of "taking part in" an unauthorised assembly because, as we have already explained above, it is not necessary for there to be an existing public order offence under the POO for the PFCR to apply. In any event, this question is not engaged on the facts of the present case. It is preferable to address it when it arises on the facts.

C.5.4 Supervening events not relevant

142. A discrete point that calls for comment arises from the current requirement under the Prevention and Control of Disease (Wearing of Mask) Regulation (Cap. 599I). This regulation, made under section 8 of the Prevention and Control of Disease Ordinance (Cap. 599), was introduced on 15 July 2020 as part of a raft of measures introduced by the CEIC to combat the pandemic caused by COVID-19 this year.

143. The fact that almost every person in Hong Kong is therefore now wearing a mask in public does not affect the decision on the proportionality of the PFCR and is wholly irrelevant to these appeals. The proportionality of the PFCR has to be judged by reference to the circumstances pertaining in October 2019 when the prohibition on facial coverings was made. It is irrelevant to that question that subsequent events have changed the legal context. Whilst the Court may certainly take judicial notice of the fact that there have not been the same number of public demonstrations, the reason for this is not in evidence before the Court. In any event, there is no evidence before the Court as to what effect the ongoing mandatory mask wearing rule has had on the behaviour of persons participating in the various public gatherings specified in the PFCR. It has not been determined by the CEIC that the time has come to revoke the PFCR, nor has any application been made for an order of mandamus to that end. Whether or not the time has come when it can safely be assumed that peaceful assemblies in Hong Kong will not be liable to be affected by violence or by black bloc tactics is simply not a matter that has been debated before the Court in these appeals.

C.6 Whether a fair balance has been struck

144. This Court held in *Hysan Development Co Ltd v Town Planning Board* (*supra*) that a fourth step should be adopted in the proportionality analysis. This requires that:

> "… where an encroaching measure has passed the three-step test, the analysis should incorporate a fourth step asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual."[84]

This requires the Court to take an overall balanced view.[85] Without such a step:

> "… the proportionality assessment would be confined to gauging the incursion in relation to its aim. The balancing of societal and individual interests against each other which lies at the heart of any system for the protection of human rights would not be addressed."[86]

145. As Ribeiro PJ noted in *Hysan* at [73], in the great majority of cases, the application of the fourth step would not invalidate a restriction which has satisfied the requirements of the first three stages of the inquiry. The PFCR is not an exception to that general rule. As we have already noted, in the present case, the Government did not decide to address the legitimate aim to deter violence and crime and to promote effective law enforcement by casting the net of the prohibition on facial coverings as widely as possible. Instead, the prohibition was tailored to the specific public gatherings listed in section 3 of the PFCR. They are all events of which the police will be aware. In the case of sections 3(1)(a) and 3(1)(b), the police will likely have been dealing with them because of reports of unlawful activity. And in the case of sections 3(1)(c) and 3(1)(d), the police will have been notified of the intention to hold the public meeting or public procession and will have issued a Letter of No Objection.

146. Relevant to the fourth step in the present case is the fact that the PFCR was made to address an ongoing situation of violence and unlawfulness that had existed over a period of months and had led to the CEIC to conclude that there was an occasion of public danger under the ERO. The situation on the streets and in other public places in Hong Kong had become dire. Members of the public were fearful of going out to certain places and significant inconvenience was caused to the public at large by the blockage of roads and closure of public transport facilities. There is a clear societal benefit in the PFCR when weighed against the limited extent of the encroachment on the protected rights in question. As Mr Benjamin Yu SC submitted, the PFCR affects a range of different people in Hong Kong. Although some people might wish to demonstrate in public but with a facial covering as a form of expression or for reasons of privacy, there were others who might wish to demonstrate peacefully but who were deterred from doing so because of the ongoing violence. The interests of that latter category should be given due weight in the balance. Similarly, due weight must be given to those persons who had sustained personal injury or property damage as a result of the actions of the violent protesters. And finally, the interests of Hong Kong as a whole should be taken into account since the rule of law itself was being undermined by the actions of masked lawbreakers who, with their identities concealed, were seemingly free to act with impunity.

D. Conclusion and disposition

147. For the reasons set out above, we:

(1) Dismiss the applicants' appeals in FACV 6, 7 and 8 of 2020; and

(2) Allow the Government's appeal in FACV 9 of 2020.

148. We make an order *nisi* that the costs of the appeals be paid by the respective applicants to the Government. We further direct that any submissions that the parties may wish to make as to costs be submitted in writing within 14 days of the date of the handing down of this judgment and that, in default of such submissions, the order *nisi* stand as an order absolute without further direction.

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

(Andrew Cheung)	(Lord Hoffmann)
Permanent Judge	Non-Permanent Judge

FACV 6 & 7/2020

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 1st to 24th Applicants (Appellants)

Mr Benjamin Yu SC, Mr Jenkin Suen SC, Mr Jimmy Ma and Mr Mike Lui, instructed by the Department of Justice, for the 1st to 2nd Respondents (Respondents)

FACV 8/2020

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, for the Applicant (Appellant)

Mr Benjamin Yu SC, Mr Jenkin Suen SC, Mr Jimmy Ma and Mr Mike Lui, instructed by the Department of Justice, for the 1st to 2nd Respondents (Respondents)

FACV 9/2020

Mr Benjamin Yu SC, Mr Jenkin Suen SC, Mr Jimmy Ma and Mr Mike Lui, instructed by the Department of Justice, for the 1st to 2nd Respondents (Appellants)

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 1st to 24th Applicants (Respondents)

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[1] (Cap. 241K), originally L.N. 119 of 2019.

[2] (Cap. 241), originally Ordinance No. 5 of 1922.

[3] It was stated in this Brief (at [3]) that "[t]he escalating illegal and violent acts of radical protesters are not only outrageous, they also push Hong Kong to a very dangerous situation".

[4] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[5] (Cap. 383) ("HKBORO") setting out, in Part II, the Hong Kong Bill of Rights ("BOR").

[6] Regulations were made in the context of, amongst other things, the general strike and boycott which nearly ruined the economy between June 1925 and October 1926; the fear of subversion by prescribed organisations in 1927; the severe drought in 1929; the prevention and mitigation of cholera in 1932; the outbreak of World War II in 1939; the Chinese civil war in 1949; the banking crisis in 1965; the outbreak of the Cultural Revolution and riots in 1967; and the oil crisis in 1974: CA Judgment at [65].

[7] *R v To Lam Sin* (1952) 36 HKLR 1; *R v Li Bun* [1957] HKLR 89.

[8] The Decision was made pursuant to art. 160(1) of the Basic Law which provides: "Upon the establishment of the Hong Kong Special Administrative Region, 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 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."

[9] S. 2(2)(a).

[10] S. 2(2)(b).

[11] S. 2(2)(f).

[12] S. 2(2)(h).

[13] S. 2(2)(l).

[14] S. 2(2)(n).

[15] S. 3(1).

[16] CFI Judgment at [48].

[17] CFI Judgment at [49]-[52].

[18] CFI Judgment at [53]-[96].

[19] CFI Judgment at [97].

[20] CA Judgment at [58]-[121].

[21] CA Judgment at [122]-[152].

[22] CA Judgment at [153].

[23] CFI Judgment at [98]-[125]; CA Judgment at [154], [283]-[352]. These were Grounds 2, 3 and 4 as set out earlier.

[24] CA Judgment at [355].

[25] Case for the Applicants (FACV 6 & 7/2020) at [11].

[26] Basic Law, art. 43.

[27] Basic Law, art. 60(1).

[28] Case for the Applicants (FACV 6 & 7/2020) at [66].

[29] Supplemental Case for the Applicants (FACV 6 & 7/2020) at [21]-[26].

[30] IGCO, s. 28(1)(b).

[31] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) [205].

[32] (7th ed.) p. 68.

[33] Case for the Applicants (FACV 6 & 7/2020) at [1] and [47].

[34] CA Judgment at [126].

[35] [1957] HKLR 89 at p. 101.

[36] ERO, s. 2(1).

[37] CA Judgment at [126].

[38] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

[39] IGCO, s. 3.

[40] IGCO, s. 34(1).

[41] IGCO, s. 34(2).

[42] IGCO, s. 2(1).

[43] The PFCR was subject to the negative vetting procedure: see [12] above.

[44] Whether at the request of the CE pursuant to art. 72(5) of the Basic Law or otherwise.

[45] Art. 74.

[46] For the reasons given, we disagree with *Li Bun* insofar as it suggests (at p. 97), without detailed reasoning, that the negative vetting procedure has been displaced by s. 2(3) of the ERO. It is to be noted that the Full Court came to the opposite view in *To Lam Sin* (at p. 14).

[47] *Teh Cheng Poh v Public Prosecutor, Malaysia* [1980] AC 458, 473F-474B.

[48] See Norman Miners, *The Use and Abuse of Emergency Powers by the Hong Kong Government* (1996) 26 HKLJ 47.

[49] CA Judgment at [67].

[50] See also the discussion of the HKBORO section 5 argument below.

[51] Art. 35.

[52] CFI Judgment at [82]-[93]; CA Judgment at [58]-[121].

[53] Case for the Applicants (FACV 6 & 7/2020) at [117]-[120]; no separate oral argument was presented at the hearing.

[54] At [119].

[55] At [120].

[56] At [120].

[57] S. 3(2) provided: "All pre-existing legislation that does not admit of a construction consistent with [the HKBORO] is, to the extent of the inconsistency, repealed." S. 3 of the HKBORO was not adopted as part of the laws of the HKSAR under the Decision of the SCNPC dated 23 February 1997.

[58] CFI Judgment at [110]-[117]; CA Judgment at [305]-[331].

[59] "A law which confers discretionary powers on public officials, the exercise of which may interfere with fundamental rights, must give an adequate indication of the scope of the discretion."

[60] "However, the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute."

[61] The principle of legality was explained at [48]-[49].

[62] At [24].

[63] Affirmation of Cheung Tin Lok dated 18 October 2019; affidavit of Chui Shih Yen, Joceline dated 18 October 2019; and affidavit of Dr Tsui Pui Wang, Ephraem dated 23 October 2019.

[64] This being a translation of the Chinese phrase: "遍地開花".

[65] Affirmation of Cheung Tin Lok at [22.2].

[66] The speech was delivered in Chinese and the words quoted are a translation of the following statement: "對於持不同意見的人士，往時是對罵、毆打，現在是用私刑解決".

[67] Second affidavit of Chui Shih Yen, Joceline dated 20 November 2019.

[68] Second affidavit of Chui Shih Yen, Joceline dated 20 November 2019 at [19].

[69] BOR Article 17 reads: "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

[70] Basic Law Article 27 reads: "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike."

[71] BOR Article 16(2) reads: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[72] BOR Article14(1) reads: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

[73] At [133] to [134] below.

[74] BOR Article 16(3) reads: "The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary – (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals."

[75] Deterrence was said to be the main objective of the PFCR: affirmation of Cheung Tin Lok at [22.1].

[76] The concealment of identity by facial coverings was said to be "a major impediment to law enforcement" and "a significant number of violent protestors [remained] at large": affirmation of Cheung Tin Lok at [22.5], [22.8].

[77] CA Judgment at [269]-[272], [278]-[279].

[78] *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 at [39].

[79] *Kudrevičius v Lithuania* (2016) 62 E.H.R.R. 34, p.1107, at p.1128 ([94]).

[80] CCPR/C/GC/37 (2020) on the right of peaceful assembly (article 21); referring to Article 21 of the ICCPR, which is given effect in Hong Kong via Article 17 of the BOR.

[81] *Kudrevičius v Lithuania* (*supra*) at p.1142 ([157]).

[82] See *Official Receiver v Zhi Charles* (2015) 18 HKCFAR 467 at [53]; *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at [85], [88].

[83] Case for the Applicants (FACV 6 & 7/2020) at [191].

[84] (2016) 19 HKCFAR 372 at [135].

[85] *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353 at [47].

[86] *Ibid.*