

立法會
Legislative Council

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**Paper for the Subcommittee on
Prohibition on Face Covering Regulation**

**Implications of impending judicial review proceedings
on the scrutiny of the Regulation by the
Subcommittee and the Legislative Council**

At the meeting of the Subcommittee on Prohibition on Face Covering Regulation ("Subcommittee") held on 22 October 2019, the Legal Service Division ("LSD") was requested to advise on the implications of the impending judicial review ("JR")¹ proceedings relating to the legality and constitutionality of the Prohibition on Face Covering Regulation ("Regulation") on the scrutiny of the Regulation by the Subcommittee and the Legislative Council ("LegCo"). This paper sets out LSD's views on the relevant issues.

Issues to be decided in the impending JR proceedings

2. An application for leave to apply for JR on the legality and constitutionality of the Regulation has been filed by 24 Members. Having regard to the Reasons for Decision of the Court of First Instance ("Court") on the application for interim relief pending the hearing of the JR application, we understand that the issues to be decided by the Court in the impending JR proceedings include whether:

- (a) the Emergency Regulations Ordinance (Cap. 241) has been impliedly repealed by section 3(2) of the Hong Kong Bill of Rights Ordinance (Cap. 383) either entirely or to the extent it is inconsistent with section 5 of Cap. 383;
- (b) section 2 of Cap. 241 is inconsistent with Articles 48, 62(5), 66 and 73 of the Basic Law ("BL") to the extent it permits the Chief Executive ("CE") in Council to bypass LegCo and violates the prescribed distribution of power between the Government and LegCo, and because it constitutes an impermissibly general and vague delegation of legislative power;

¹ HCAL 2945/2019.

- (c) by reason of the principle of legality, the general words in section 2(1) of Cap. 241 are not to be read as allowing the Government to adopt measures that infringe fundamental rights of the individual. The Regulation is therefore *ultra vires*;
- (d) there is public danger demonstrated that justifies the exercise of power under section 2(1) of Cap. 241; and
- (e) the Regulation itself amounts to a disproportionate restriction of a person's liberty and privacy, freedom of expression and right of peaceful assembly under Articles 5, 14, 15, 16 and 17 of the Bill of Rights and BL 27.²

Whether the scrutiny of the Regulation by the Subcommittee and the Legislative Council would be affected by the impending JR proceedings

3. Under BL 73(1), LegCo has the constitutional power and function to enact, amend or repeal laws (including subsidiary legislation) in accordance with the provisions of BL and legal procedures.

4. In relation to subsidiary legislation, a scrutiny mechanism commonly referred to as the negative vetting procedure is provided in section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) to enable LegCo to perform its constitutional power and function under BL 73(1). Under section 34(1) of Cap. 1, all subsidiary legislation shall be laid on the table of LegCo at the next sitting after its publication in the Gazette. Where subsidiary legislation has been so laid, LegCo may, pursuant to section 34(2), by resolution passed at a sitting of LegCo held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation. The scrutiny period may be extended under section 34(4) to the first sitting of LegCo held not earlier than the twenty-first day after the 28-day period. Under section 3 of Cap. 1, "amend" includes repeal.

5. The Regulation is a piece of subsidiary legislation which was laid on the table of LegCo at the Council meeting of 16 October 2019. Hence, section 34 of Cap. 1 is applicable and the Regulation is subject to scrutiny of LegCo pursuant to the negative vetting procedure. Section 28(1)(c) of Cap. 1 expressly empowers the maker of a piece of subsidiary legislation to amend it in the same manner in which it was made. It follows that as CE in Council has the

² See paragraph 6 of the Reasons for Decision of the Court of First Instance in HCAL 2945/2019 relating to the application for interim relief.

power to make the Regulation, he also has the power to amend (including repeal) the Regulation. By virtue of section 34(2) of Cap. 1, LegCo should have the same power to amend or repeal the Regulation. The impending JR proceedings themselves do not automatically excuse or exempt the Regulation from LegCo's scrutiny. It is also noted that no interim injunction order that may affect the current legislative exercise concerning the Regulation has been granted by the Court. In the light of the above, we take the view that LegCo can and indeed has the constitutional duty to scrutinize the Regulation in accordance with section 34 of Cap. 1. However, as there are impending JR proceedings on the legality and constitutionality of the Regulation, it is advisable for the Subcommittee to take into account the *sub judice* rule (explained below) in the course of its scrutiny.

Application of the *sub judice* rule

6. Section 3 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) provides Members with the freedom of speech and debate, and such freedom of speech and debate is not liable to be questioned in any court or place outside the Council. Under section 4 of Cap. 382, no civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to the Council or a committee, or by reason of any matter brought by him therein by petition, bill, resolution, motion or otherwise.

7. Despite the privileges provided in Cap. 382, LegCo has imposed upon itself certain restrictions in relation to contents of speeches in Rule 41(2) of the Rules of Procedure ("RoP"), which provides that:

"Reference shall not be made to a case pending in a court of law in such a way as, in the opinion of the President or Chairman, might prejudice that case."

8. The rule reflects what is commonly known as the *sub judice* rule. By virtue of RoP 43, the *sub judice* rule provided in RoP 41(2) applies to proceedings in a committee unless the chairman of the committee orders otherwise. It should be noted that LegCo has not formulated any further general guidelines beyond what has been expressly provided for in RoP. In the case of a subcommittee, the precise application of the rule is at the discretion of the chairman of the subcommittee. Nevertheless, the following principles from past application of the *sub judice* rule locally and from practices and procedures in other jurisdictions may be helpful:

- (a) references to matters awaiting adjudication in a court of law should be excluded if there is a risk that they might prejudice its adjudication;

- (b) such references would include commenting on, inquiring into and making of findings on such matters;
- (c) matters awaiting adjudication would include matters in respect of which a charge has been laid or proceedings have been initiated by the filing of the appropriate documents; and
- (d) prejudice might arise from an element of explicit or implicit prejudgment in the proceedings of the legislature in two possible ways:
 - (i) the references might hinder the court in reaching the right conclusion or lead it to reach other than the right conclusion; and
 - (ii) whether the court is affected in its conclusion or not, the references might amount to an effective usurpation of the court's judicial functions.

9. In view of RoP 41(2), it would be advisable for members of the Subcommittee to avoid making references which might prejudice the impending JR proceedings by framing questions as neutrally as possible, and refraining from making any prejudgments on any issue required to be decided by the Court in the impending JR proceedings.

Prepared by

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