THE FACE-MASK CASE

On 18 November 2019 two High Court judges delivered a judgment striking down the Prohibition on Face Covering Regulation (PFCR). The principle ground was that the enabling statute – the Emergency Regulations Ordinance, Cap. 241 – under which the Chief Executive in Council (CEIC) had issued that regulation was unconstitutional, being in contravention of the Basic Law.

The judgment evoked an immediate negative response from the Legislative Commission of the Standing Committee of the National Peoples' Congress.

Cap. 241, para 2 (1) states:
"*On any occasion which the Chief Executive in Council may consider to be an occasion of emergency or public danger he may make any regulation whatsoever which he may consider desirable in the public interest.*"

The PFCR was enacted on 4 October 2019, at a time of grave public danger. As the judges said, Hong Kong was then in a "dire situation" (para 165). Not only were violent acts by masked men taking place in the streets, public facilities immobilized on a massive scale and the general population cowed, the LegCo chamber had been broken into and vandalized and LegCo itself had ceased to function as a source of legitimate power.

It is against this background that the court considered the applications for leave to bring proceedings for judicial review.

The applicants were 24 LegCo members and an ex-member. They sought a determination that "the constitutional order laid down by the Basic Law" rendered Cap.241, passed by the LegCo in 1922, unconstitutional.

Four Senior Counsel assisted by numerous junior barristers appeared before the Court to argue the matter. The judgment is over 100 pages, replete with references to authorities from America, Canada, Europe, South Africa, England and Australia, barely intelligible to lawyers and totally incomprehensible to the ordinary person. : Such is the court's subservience to counsels' "arguments" and insensitivity to the real issues at stake.

In the result, the court concluded that Cap.241 was "incompatible with Articles 2,8,17(2),18,48,56,62(5),66 and 73(1) of the Basic Law''.

The ruling is catastrophic for Hong Kong. The authorities – police, Justice Department, Judiciary – are overwhelmed by numbers. Thousands of offenders have been arrested but only a tiny proportion charged and brought to court. Most of them, after a short detention in a police station, have been released.

They have to be released because, under existing laws, the police power of detention is limited to 48 hours from the time of arrest: adequate for normal investigations and processing, but totally inadequate in these exceptional times. The masked thug who knows his rights can simply refuse to disclose his identity (carrying no identity card of course) knowing full well that if he sits tight for 48 hours he must be released from detention.

After seven months of turmoil, not one person has been convicted of a serious crime arising from the arrests: A total abnegation of the Rule of Law.

The High Court judgment now makes it impossible for the government to invoke powers under Cap.241 to extend the lawful period of detention so as to give the police time for investigation. Likewise it is now impossible to make it an offence under Cap. 241 for an arrested person to refuse to disclose his identity when required to do so in a police station.

The police are restricted to normal processes to deal with a totally abnormal situation.

Can the Basic Law, properly interpreted, lead to such an absurd result ? The argument, which succeeded in court, boiled down to this: LegCo alone had the power to make laws; LegCo had never "delegated" its powers to the Executive to make subsidiary legislation; the PFCR was "subsidiary legislation"; insofar as the CEIC purported to enact the PFCR under the provisions of Cap. 241, she was acting unlawfully; that was because the enabling statute – Cap.241 – was itself contrary to the Basic Law.

This line of argument was based on a fundamental fallacy. When LegCo enacted the Emergency Powers Ordinance back in 1922, it was not "delegating" its authority in any way. It simply passed a law to deal with a situation then existing: a general strike in Hong Kong. But in so enacting it left scope for the Executive to deal with other situations of public danger, or emergencies such as terrorism, epidemics, natural disasters or civil unrest. Hence the law has been used to deal with a cholera epidemic, a drought, an Anti-Japan Movement in 1931 and, more recently, the 1967 Disturbances.

In October 2019 that law stood intact in the statute book and was as valid and effective as any other statute law in Hong Kong, not having been declared contravening the Basic Law under Article 160 at the time of the Handover.

When the CEIC invoked it in October to deal with the public danger then prevailing, it was used in a very limited way: to help the police identify offenders and to act as a deterrent to those marginally inclined to join in unlawful gatherings. As the judgment itself noted (para 145) the evidence was *"supportive of the proposition that face covering would, or at least could, embolden protesters to commit violent or unlawful acts which they might not otherwise commit without concealment of their identities. In any event, we consider this proposition to be a matter of common sense …"*

In October 2019 the normal legislative function of the Hong Kong SAR had broken down; the ordinary laws and legal processes were inadequate to deal with the extraordinary situation; the resources of the police were stretched to near breaking

point; the only source of effective power left to the Executive to deal with an extraordinary situation was Cap. 241.

How, in such circumstances, could the Basic Law have been interpreted as removing from the Hong Kong SAR its one effective power ? In effect the court says this: " go and read Articles 2,8,17(2),18,48,56,62(5),66 and 73(1) of the Basic Law and you'll find out".

Really ? How precisely is one meant to extract meaning from those nine Articles ? By putting them all together ? Or some together ? Or read them one by one ?

Take Article 8 which says that existing "ordinances" shall be maintained "except for any that contravenes this Law". So Cap. 241 being an existing Ordinance is maintained as part of Hong Kong law after the Handover, having been found compatible with the Basic Law under Article 160. Is Article 8 to be turned on its head and read as striking down Cap. 241 ?

None of the other Articles gives the least hint that the Basic Law disempowers the Executive in the way accepted by the court. And, in para 96 of the judgment comes this amazing passage:

> **" …..we do not wish it to be thought to be our opinion that the Basic Law categorically precludes any emergency powers from being given to the Executive. Rigidity is not a virtue in constitutional interpretation, and one recalls the adage that a constitution that will not bend will break. We have not been addressed on the possibility that states of emergency necessitating urgent action can occur from which an implication can arise out of necessity that the LegCo can in wide terms authorise the Executive authorities to take necessary action: see e.g. *The Executive Council of the Western Cape Legislature, supra para 62, 140; Cheng Kar Shun v Li Fung Ying* …..and consequently we ought not to express any view on it*".***

Surely the court cannot be saying that the case turns on a fine distinction between a "state of emergency" and a "state of public danger" ?

Yet there are other passages which suggest that is precisely what it was thinking: for instance para 37:

> **"*Our decision below is confined to the public danger ground in Cap.241 and to the powers it confers when the CEIC considers there to be an occasion of public danger, which is the ground on which the PFCR has been made. There may be considerations of necessity arising from real emergencies that may affect the proper analysis on which we do not think we have been fully addressed and on which we should express no opinion".***

Note the qualifying adjective "real". Was the situation facing Hong Kong in October not one of "real" public danger ? The applicants rely on nine Articles in the Basic Law to say that Cap 241 was "unconstitutional". Do those Article take on a different flavour depending on whether the situation on the ground was "real emergency" or "real public danger" ?

The truth is that in considering the constitutional validity of Cap.241, the Basic Law was in no way engaged: either by the Articles cited in the judgment, or by any other provision of the Basic Law.

What happened in court was this: Counsel for the applicants threw out a bait - the question whether the legislature had "delegated" part of its function to the Executive – and the judges swallowed it hook line and sinker.

Counsel for the government, instead of dismissing the whole approach as nonsense, engaged with it. The court then embarked on an elaborate dance, judges and senior counsel holding hands, pirouetting through overseas cases irrelevant to a proper interpretation of the Basic Law, their gyrations smothering the fundamental truth that Cap 241 was passed to allow the Executive to enact measures in times of exceptional public danger or emergency, such measures to last for the duration of that emergency or situation of public danger and no more.

When the verbiage and grandiloquent phrases are stripped away, it is plain that the applicants never had a case. And yet they now stand triumphant in court.

So the net result is that a minority of legislators, aided and abetted by the court, have made a nonsense of a vital and valid law, to the detriment of Hong Kong in its time of need.

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