

**Statement of Hong Kong Bar Association  
On Comments made by the Legislative Affairs Commission of the NPCSC  
relating to High Court Judgment on the Emergency Regulations Ordinance  
and Prohibition on Face Covering Regulation**

1. On 18 November 2019, the Court of First Instance issued a judgment (“Judgment”) holding that the Emergency Regulations Ordinance (Cap 241) (“ERO”), insofar as it empowers the Chief Executive in Council (“CEIC”) to make regulations on any occasion of public danger, and the Prohibition on Face Covering Regulation (Cap 241K) made by the CEIC pursuant to the ERO are contrary to provisions of the Basic Law.
2. On 19 November 2019, the Xinhua News Agency reported that a spokesman for the Legislative Affairs Commission (“LAC”) of the National People's Congress Standing Committee (“NPCSC”) commented that the Judgment “did not comply” with aspects of the Basic Law and that the NPCSC is the “only body” which could decide whether Hong Kong laws comply with the Basic Law.
3. The spokesman further said that the ERO which was a law previously in force in Hong Kong before 1997 had been “adopted” by the NPCSC under Article 160 of the Basic Law in 1997 and must therefore be consistent with the Basic Law.
4. HKBA considers that the remarks of the LAC spokesman are legally incorrect.
5. The Courts in Hong Kong have previously struck down unconstitutional laws. There was no suggestion previously that the Courts cannot do so. As has been held by the Court of Appeal,<sup>1</sup> Hong Kong courts must apply the letter and spirit of the Basic Law and the Bill of Rights and it is their “duty” to strike down unconstitutional laws. Indeed, for a court not to decide any case which argues that a legislative provision is contrary to the Basic Law is to fail to uphold the Basic Law, which every judicial officer has sworn to do.<sup>2</sup>
6. Further, Article 160 of the Basic Law does not envisage that Hong Kong laws which have been adopted by the NPCSC in 1997 cannot be challenged after 1997. Article 160 itself provides that if any laws adopted are later discovered to be in contravention of the Basic Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by the Basic Law.
7. Under Article 19 of the Basic Law, the HKSAR shall be vested with independent judicial power, including that of final adjudication. Under Article 85, the courts of the HKSAR shall exercise judicial power independently and free from interference. Any suggestion that the Courts in Hong Kong cannot conduct constitutional review circumscribes the exercise of judicial power by the Courts which they have always enjoyed and is contrary to the Basic Law.

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<sup>1</sup> *Leung T C William Roy v. Secretary for Justice* [2006] 4 HKLRD 211 at §53

<sup>2</sup> *Mok Charles v Tam Wai Ho* (2010) 13 HKCFAR 762 at §80

It also undermines the high degree of autonomy granted to the HKSAR under the Basic Law.

8. While any judgment is open to criticism and comment, any suggestion that the NPCSC should make an interpretation or any statement, before the conclusion of the entire judicial process, that could be perceived to be intended to put pressure on the judiciary would not be helpful in maintaining respect for the rule of law.

Hong Kong Bar Association

Dated: 19 November 2019