

COVID-19 - The Law Un-Masked: A New Cluster of Regulations: The Right to Property and Potential Legal Challenges against Forced Closure of Certain Business Premises

In our fourth article in the series “The Law Un-masked”, Hectar Pun SC and Anson Wong Yu Yat share their observations on the shortcomings of the Government’s order of forced closure of certain business premises under the new regulation and how it may disproportionately affect individual’s property rights.

Background

In the leadup to enacting emergency regulations to impose social distancing measures, the Chief Executive announced plans to ban the sale of alcohol at bars and restaurants on 23 March 2020 (Monday). However, no such ban was found in the cluster of new regulations announced on 27 March 2020. Instead, the Government sought to, *inter alia*, order closure of six types of business premises perceived to be “with higher infection risks of COVID-19”¹ by making the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation, Cap 599F (“**the Business and Premises Regulation**”), which was published in the Gazette at the night of 27 March 2020.²

Forced Closure

The Business and Premises Regulation provides for a list of “scheduled premises” in Part 1 of Schedule 2, namely: (1) amusement game centre, (2) bathhouse, (3) fitness centre, (4) place of amusement, (5) place of public entertainment, and (6) premises (commonly known as party room) that are maintained or intended to be maintained for hire for holding social gatherings (“**Scheduled Premises**”).³

Section 8 of the Business and Premises Regulation empowers the Secretary for Food and Health to issue a direction imposing requirements or restrictions, for a period

¹ See Government Press Release entitled “Prevention and Control of Disease (Requirement and Directions) (Business and Premises) Regulation gazetted” issued on 27 March 2020.

² The Business and Premises Regulation came into operation on 28 March 2020 and will expire at midnight on 27 June 2020: see sections 1 and 14 of the Business and Premises Regulation.

³ The definitions of these six types of premises are given in Part 2 of Schedule 2 to the Business and Premises Regulation.

specified in the direction, in relation to any or all of the following: (1) the mode of operation of any business or activity carried on at any Scheduled Premises; (2) the closing of any Scheduled Premises, or part of the Scheduled Premises; (3) the opening hours of any Scheduled Premises on a day.

By a notice published in the Gazette on 27 March 2020, the Secretary for Food and Health directed that all Scheduled Premises “must be closed for a period of 14 days beginning at 6:00 p.m. on 28 March 2020” (“**the Forced Closure**”).⁴ Given the fluidity of the public health situation, it is uncertain whether any further direction(s) will be issued to extend the Forced Closure after this 14-day period.⁵

Right to Property

In Hong Kong, the right to property is constitutionally entrenched by Articles 6 and 105 of the Basic Law of the HKSAR. The central feature of Articles 6 and 105 is that they impose an obligation on the HKSAR to protect private property rights.⁶ The overall intention is the protection of an individual in the use of his property, which is not confined to tangible assets but includes any right which has an economic value.⁷ It is also well established that economic interests connected with the running of a business constitute property.⁸

Where there is an encroachment on an individual’s private property rights, the encroaching measure’s validity is determined by a proportionality analysis involving four steps, namely: (1) whether the intrusive measure pursues a legitimate aim; (2) if so, whether it is rationally connected with advancing that aim; (3) whether the measure is no more than necessary for that purpose; and (4) 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.⁹

⁴ See G.N. (E.) 17 of 2020.

⁵ According to section 8(2) of the Business and Premises Regulation, “a period specified in any direction issued under subsection (1) must not exceed 14 day”.

⁶ See *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §29.

⁷ See *Interush Ltd v Commissioner of Police* [2019] 1 HKLRD 892 at §6.18.

⁸ See *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309 at §53.

⁹ See *Hysan* at §§132-135.

Potential Legal Challenges

By virtue of the direction ordering the Forced Closure of 14 days, the rights of owners of Scheduled Premises to use their private properties (such as their premises and the equipment set up therein) to carry on businesses during this 14-day period (which might be further extended) are clearly encroached upon. While the Forced Closure forms part of the Government's "temporary measures to address the current situation of public health emergency"¹⁰, it is questionable whether the Forced Closure, if challenged by way of judicial review, could survive the proportionality test.

The burden falls squarely on the Government to justify the encroachment. It has to show that the Direction is "no more than necessary". In this connection, it is arguable that at least some of the Scheduled Premises do not pose "higher infection risks of COVID-19" than catering premises, in that the activities at some of the Scheduled Premises do not require the removal of masks at all. It thus begs the question why measures similar to those imposed on catering premises¹¹ (such as mandatory wearing of masks, body temperature screening, provision of hand sanitisers and maintenance of an appropriate distance, etc) could not, as an alternative to forced closure, be imposed on those Scheduled Premises so as to reduce infection risks.

Further, the lack of compensation for the Forced Closure will no doubt cause serious financial difficulties to many proprietors such as to amount to "an unacceptably harsh burden" on them. In this regard, it is arguable that the Government may have failed to strike a reasonable balance, especially when the Direction was made without consultation with the relevant stakeholders.

Concluding Remarks

The unprecedented measures imposed by the Government to control community spread may be made with good intention. However, it is in these times of crisis that the rule of law must be cherished and an important facet of the rule of law is the effective protection of human rights, which are enshrined in the Basic Law as well as the Hong Kong Bill of Rights.

¹⁰ See note 1 above.

¹¹ See G.N. (E.) 16 of 2020.

Should any measures amount to an excessive or unnecessary interference with constitutionally protected human rights, such measures may not withstand scrutiny and are liable to be struck down if challenged in court.

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