

**Submission to Legislative Council Subcommittee on the  
Prohibition on Face Covering Regulation**

**Amnesty International Hong Kong**

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**AMNESTY  
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**A. Introduction**

1. The Subcommittee on Prohibition on Face Covering Regulation, by public announcement on 4 November 2019, invited interested parties to give views on the Regulation. Amnesty International Hong Kong (“AIHK”) sets out in this submission its main position and recommendations for the Subcommittee and the Government of Hong Kong for immediate further actions.
2. AIHK is the Hong Kong membership branch of Amnesty International, the latter of which has been working and advocating on human rights issues since 1961 and is now the world’s largest human rights organization. There are more than 7 million members and supporters in over 150 countries and territories. Although they come from many different backgrounds and have widely differing political and religious beliefs, they are united by a determination to work for a world in which everyone enjoys human rights.
3. This submission contains AIHK’s principal concerns about selected provisions and their implementation of the Prohibition on Face Covering Regulation 2019 (“PFCR”) and the use of the Emergency Regulation Ordinance 1922 (“ERO”) as the primary legislation on the base of which the PFCR was introduced. Both the ERO and the PFCR are in their present form incompatible with Hong Kong’s international human rights obligations, whether embodied in treaties or other instruments. In particular, AIHK will refer to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC), as well as the Basic Law of Hong Kong (the “Basic Law”) and the Hong Kong Bill of Rights Ordinance (Cap. 383) (“HKBORO”). The ICCPR is constitutionally entrenched under the Basic Law, which mandates its implementation through the laws of Hong Kong.<sup>1</sup> Further, the HKBORO is specifically intended to give effect in local law to the provisions of the ICCPR as applied to Hong Kong.
4. It should be noted at the outset that AIHK is concerned with the extremely short timeframes provided to the public to register for the public hearing, make written submissions and prepare oral submissions (for a hearing within six days). These time frames do not allow for comprehensive assessment and full accountability in an area that is causing great concern and unrest and further undermines Hong Kong’s legislative processes.
5. The Government and the Legislative Council indicated that the PFCR would be subject to scrutiny by the Legislative Council using the negative vetting procedure, which enables secondary legislation to be discussed, and if agreed, amended. The Subcommittee also indicated in its meetings to date that it considered public hearings crucial for considering the public’s views on the PFCR. AIHK believes the review of the legislation should be effective and subject to comprehensive public scrutiny given the importance of the issues at stake and that a number of people have already been charged under the PFCR. The above time frames for the public hearings and submissions do not allow sufficient time for relevant stakeholders and the general public to formulate their submissions.

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<sup>1</sup> Article 39 of the Basic Law; HKBORO. The Convention on the Rights of the Child applies to Hong Kong as notified by China to the UN Secretary-General on 10 June 1997.

6. In this submission, AIHK provides illustrative and non-exhaustive examples of its main issues of concern, while not purporting that this a comprehensive human rights analysis of both legal instruments. The fact that a specific issue or provision is not addressed should not be interpreted as acceptance of its compatibility with international law and standards.
7. **AIHK calls on the Legislative Council and the Government to ensure that a comprehensive, detailed and effective review of the PFCR and the use of the ERO is carried out, with full and effective participation of civil society and other stakeholders.**

## **B. The Emergency Regulation Ordinance 1922 (“ERO”)**

8. The adoption of the PFCR was fast-tracked using, and based on, the Emergency Regulations Ordinance (ERO) of 1922, which provides the power to introduce “any regulations whatsoever” the Chief Executive in Council considers “desirable”. The implications of using this colonial-era law are far-reaching, and its potential for abuse is wide. The wording of the ERO essentially provides a blank cheque for the Government to restrict human rights without any conditions or safeguards.
9. When the Chief Executive announced the adoption of the PFCR on 4 October, she said that while the present situation of “street violence” in Hong Kong warranted the use of emergency powers, she also stated that this did not mean there was a state of emergency now. Instead she said there was a “state of serious public danger”.<sup>2</sup>

### **(i) The Emergency Regulations Ordinance**

10. AIHK submits that the ERO is an outdated and deeply flawed piece of legislation. Under its wording, emergency measures can only be repealed by the executive branch of Government; they trump any other piece of legislation or other rule in case of conflict, seemingly regardless of which rule is more recent or its position in the legal hierarchy; and there is no requirement of periodic review, explicit renewal or any other prescribed form of emergency regulations ceasing to have effect. Both the decision to declare that an “emergency or public danger” exists and all measures taken in response are at the exclusive discretion of the executive branch of government, without expressly requiring involvement of the Legislative Council. In terms of process, using the ERO means that Hong Kong’s legislature is bypassed during the initial law-making process. However, it should be noted that the Hong Kong Government has internationally confirmed that any “regulations [under the ERO] would be subsidiary legislation and therefore subject to vetting by the Legislative Council”.<sup>3</sup>
11. The broad-ranging executive powers under the ERO include, among other things, censorship and the suppression of communications and their means; arrest, detention and deportation; control of means of transportation; search of premises; confiscation of property; and forcing people to work or provide services. On its face, this could theoretically, for example, enable the authorities to shut down certain online platforms or mobile phone services, or even impose a total internet blackout, if they claim this is needed. At present, there have been public calls for the Government to extend periods of detention before a court appearance or amend electoral laws to allow the postponement of the upcoming District Council elections. In addition, although not covered by the wording of the ERO, the imposition of formal curfews and the creation of special courts and a special “constabulary” for detaining and transporting arrested

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<sup>2</sup> SCMP, [Hong Kong leader rolls out emergency mask law to quell anti-government protests](#) (5 October 2019).

<sup>3</sup> Addendum, UN Doc. CCPR/C/HKSAR/99/1/Add.1 (2000), para. 43.

protesters have all been reportedly considered.<sup>4</sup>

**(ii) The Emergency Regulations Ordinance as an “emergency law”**

12. The powers granted by the ERO are also very much those traditionally permitted, or rather reserved, for actual states of emergencies “that threaten the life of a nation” (see below). In particular, it should be noted that the Hong Kong Government in its reports to the UN Human Rights Committee has always referred to the ERO in the context of states of emergency as set out in Article 4 of the ICCPR. However, as previously stated the Government has not declared that there is a state of emergency but, rather, one of “public danger”. This raises the concern that the ERO is being used, and could be used in the future, in situations that are not sufficiently serious to warrant the more substantial limitations on human rights that are permissible in times of emergency only.
13. Responding to concerns about the absence of detailed legislation covering emergencies and that the provisions of Article 18 of the Basic Law did not correspond with those of Article 4 of the ICCPR, in its initial report to the Human Rights Committee in 1999 the Government referred to Article 5 of the HKBORO (implementing Article 4 of the ICCPR) and Article 39 of the Basic Law (constitutionally enshrining the ICCPR in Hong Kong law).<sup>5</sup> It stated that any regulations necessitated by future “emergencies” would be consistent with Article 4 of the ICCPR. It went on to explain the “remote” possibility of the application of Article 18 in conjunction with Article 14 of the Basic Law would be in “extreme scenarios” only and that this would still occur in line with the obligations under the ICCPR, as per Article 39 of the Basic Law.<sup>6</sup> Despite the Human Rights Committee asking for specificity, at no point did the Hong Kong Government state that the ERO could be applied outside of situations as contemplated by Article 4 of the ICCPR, or that “occasions of ... public danger” would be subject to a separate framework.
14. In a follow-up report to the Human Rights Committee in 1999,<sup>7</sup> the Hong Kong Government explicitly stated:

*“The Emergency Regulations Ordinance empowers the Chief Executive in Council, on any occasion which he considers to be an occasion of emergency or public danger, to make regulations that he considers desirable in the public interest. Although that power appears to be very wide, it is subject to Article 39 of the Basic Law, which entrenches the ICCPR as applied to Hong Kong.”<sup>8</sup>*
15. Here, the applicability of the ICCPR in full is confirmed to both “occasions of emergency or public danger”, whether or not these constitute different scenarios. Again, reference is made to Article 4 of the ICCPR (“derogations in states of emergencies”).
16. In further reports to the Human Rights Committee, the Hong Kong Government only referred back to its initial report in general terms, without providing additional

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<sup>4</sup> See, SCMP, [Hong Kong protests: growing number of repeat arrests prompts calls for special court to fast-track cases related to violent unrest](#) (21 October 2019); HKFP, [Hong Kong gov't considers enlisting staff from other dept's to become police 'special constables](#) (14 October 2019).

<sup>5</sup> Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Hong Kong Special Administrative Region of the People's Republic of China, UN Doc. CCPR/C/HKSAR/99/1 (1999), paras 93-97.

<sup>6</sup> See in particular paras 94 and 96.

<sup>7</sup> Addendum, UN Doc. CCPR/C/HKSAR/99/1/Add.1 (2000), paras 42-44.

<sup>8</sup> Para. 43 (emphasis added).

information.<sup>9</sup> Even its most recent report, submitted in September 2019, months after the present protests began and only two weeks before the PFCR was introduced, does not contain any further elaboration or any discussion of the legal framework applicable to situations of “public danger”.<sup>10</sup>

17. AIHK is concerned that the current wording and application of the ERO mean that it can be used in situations that are in fact not states of emergency, despite the fact that the powers provided under the ERO reflect those normally reserved for states of emergency.
18. **The Hong Kong Government should clarify which powers and procedures allowed under the ERO are applicable to states of emergency and how situations of “public danger” are defined in contrast to emergencies, on the one hand, and to disturbances of public order in normal times, on the other.**

**In order to clarify the law and limit the scope for abuse, the Government should further consider expressly limiting the application of the ERO to states of emergency in the legal sense (see below).**

**(iii) Emergencies in international law**

19. International law, including the ICCPR binding on Hong Kong, allows for “derogations”, meaning the temporary restriction of the full exercise of certain human rights, in exceptional situations of states of emergency. In those cases, derogations are permitted only in time of an officially proclaimed state of emergency that threatens the life of the nation, and only to the extent required by the exigencies of the situation.<sup>11</sup>
20. It should be noted that it is in times of national crisis that states are most likely to trample on human rights. The declaration of an emergency generally lies exclusively with the executive, which often has the power to introduce emergency orders or regulations, sometimes without reference to normal processes. New criminal laws are frequently enacted, including restrictions on the rights to freedom of expression, association and assembly. Wider powers of arrest and detention, longer periods of detention in police custody, special tribunals and summary trial procedures are also often introduced.<sup>12</sup>
21. These aspects are reflected in the wording and present implementation of the ERO. Amnesty International has documented many situations in which emergency powers have been abused by the respective governments, including on the right to peaceful assembly.<sup>13</sup>

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<sup>9</sup> Second periodic report, UN Doc. CCPR/C/HKG/2005/2 of 3 March 2005), para. 119; Third periodic report, UN Doc. CCPR/C/CHN-HKG/3 (2011), para. 80.

<sup>10</sup> Fourth Periodic Report (Advance unedited version), UN Doc. CCPR/C/CHN-HKG/4 of 23 October 2019 (received 19 September 2019), para. 24.

<sup>11</sup> Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 2. At a regional level there are similar provisions in the European Convention on Human Rights (Article 15) and the American Convention on Human Rights (Article 27).

<sup>12</sup> See, for example, WGAD Opinion No. 23/2008 (*Rastanawi v Syrian Arab Republic*), UN Doc. A/HRC/13/30/Add.1 (2010) pp. 25-27, paras 12-17; See CAT Concluding Observations: Peru, UN Doc. A/53/44 (1998) pp. 21-22, para. 202, Cameroon, UN Doc. CAT/C/CMR/CO/4 (2010) para. 25; Special Rapporteur on torture, Sri Lanka, UN Doc. A/HRC/7/3/Add.6 (2009) paras 41-46, 84, 91-92, 94.

<sup>13</sup> See, for example, Amnesty International: *Ecuador: Authorities must end repression of demonstrations immediately* (9 October 2019); *France: A Right Not A Threat: Disproportionate Restrictions On Demonstrations Under The State Of Emergency In France* (Index number: EUR 21/6104/2017); *Sudan: State of emergency intensifies brutal government crackdown on protests* (25 February 2019); *Tunisia, ‘We want an end to the fear’: Abuses under Tunisia’s state of emergency* (Index number: MDE 30/4911/2017); *Turkey: Amnesty International’s brief on the human rights situation*

22. States of emergency can only be declared if a very high threshold is met, namely if it can be effectively demonstrated that the state is facing a public emergency threatening the life of the nation and that the emergency measures are strictly necessary to confront that situation.
23. The 1984 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights set out that such a situation must involve exceptional and actual or imminent danger, which:
- “affects the whole of the population and either the whole or part of the territory of the State, and*
- threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.”*<sup>14</sup>
- The Siracusa Principles further state: “Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.”<sup>15</sup>
24. The European Court of Human Rights has held that the notion of “threatening the life of the nation” refers to an exceptional situation of crisis or emergency that affects the whole population and constitutes a threat to the organized life of the community of which the state is composed.<sup>16</sup>
25. The OSCE Guidelines of Freedom of Assembly explain that
- “the crisis or emergency must be actual or imminent, and one ‘which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’, meaning, essentially, that the fundamental capacity of a state to function effectively must be compromised.”*<sup>17</sup>
26. Under international law, if a state of emergency is invoked and human rights derogations introduced, the reasons for doing so, the specific rights reduced, the respective measures and their detailed reasoning have to be officially declared, subjected to judicial oversight and internationally notified to enable full scrutiny.<sup>18</sup> The Human Rights Committee has stated that measures derogating from the provisions of the ICCPR pursuant to a state of emergency must be exceptional and temporary.<sup>19</sup> The continuation of such measures or their periodic renewal should not be automatic or presumed. Additional limitations should be interpreted restrictively, and all rights have

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[- Turkey's state of emergency ended but the crackdown on human rights continues](#) (Index number: EUR 44/9747/2019).

<sup>14</sup> Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1984/4 (1984), para. 39.

<sup>15</sup> Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1984/4 (1984), para. 40.

<sup>16</sup> European Court of Human Rights, *A and others v. UK* (3455/05) (2009), paras 173-190.

<sup>17</sup> European Commission for Democracy through Law / OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Guidelines on Freedom of Peaceful Assembly](#) (3<sup>rd</sup> edition 2019), Explanatory Notes, para. 92 (references omitted).

<sup>18</sup> Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1984/4 (1984), para. 45.

<sup>19</sup> Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 2.

to be restored in full once the “emergency” situation has passed.<sup>20</sup> Exceptional measures must not become a “new normal”.

27. In a state of emergency, all exceptional and temporary rules should be subject to periodic re-evaluation with a view to renewing or terminating them. The burden of proof is on the derogating state to justify its measures and their continuance. Each measure adopted under a state of emergency must be narrowed down to what is strictly required by the exigencies of the situation, which requires a careful analysis under each article of the ICCPR based on an objective assessment of the actual situation.<sup>21</sup>
28. This process should not be left solely to the executive, but the procedure should allow for meaningful scrutiny and challenge, both nationally and internationally. In this context a lot of responsibility falls onto national systems to assess the legitimacy of exceptional measures and their continued necessity, as well as and to provide redress for any breaches.<sup>22</sup> The Siracusa Principles state: “The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.”<sup>23</sup>
29. Some rights cannot be derogated from even in the exceptional and temporary circumstances of a state of emergency. These include, among others, the prohibitions of torture and other ill-treatment, enforced disappearance and arbitrary arrest or detention, including unacknowledged detention. The principle of legality in the field of criminal law (see also the section on the PFCR below) – that is, that any prosecution must be on a proper legal basis that is clear and precise, and that no retrospective laws are allowed – must always be observed. A state must still provide effective remedies, including equal and effective access to justice, including adequate, effective and prompt reparation for harm suffered and access to relevant information concerning violations and reparation mechanisms. Fundamental requirements of fair trial must be guaranteed, such as trials only before independent, impartial, competent and properly constituted courts, the right to be brought promptly before a judge and the presumption of innocence.<sup>24</sup> No human right may be entirely eliminated, and any “emergency” cannot legitimately be used to justify a crackdown on the exercise of human rights.
30. When proclaiming a state of emergency, a government is still bound by the rule of law, including those international law obligations from which it may not or has not derogated.<sup>25</sup> If emergency powers are used, they must still comply with relevant international safeguards and may not be used to simply circumvent safeguards applicable under normally applicable criminal or other law. To ensure respect for the rule of law and human rights, both a declaration of a state of emergency and emergency measures must be subject to judicial oversight. Such oversight should ensure that the

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<sup>20</sup> Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), paras 1-2.

<sup>21</sup> Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 6.

<sup>22</sup> European Court of Human Rights, *A and others v. UK* (3455/05), paras. 173-4, 184.

<sup>23</sup> Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1984/4 (1984), para. 55.

<sup>24</sup> For further details, see Amnesty International, *Fair Trial Manual* (2<sup>nd</sup> edition 2014) (Index number: POL 30/002/2014), chapter 31.

<sup>25</sup> Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), paras 2, 9; See *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ (2004), including paras 89-113, especially 106; See HRC Concluding Observations: Israel, UN Doc. CCPR/C/ISR/CO/3 (2010), para. 3.

declaration, the emergency measures and their implementation are consistent with national and international law.<sup>26</sup> Effective remedies must be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.<sup>27</sup>

31. The ERO contains no limiting provisions, especially as to whether any regulation passed under it would have to have an expiration date (“sunset clause”) or be subject to mandatory periodic review and express confirmation of renewal (nor does the PFCR have such temporal or review provisions). Furthermore, the ERO does not set out which, and how far, specific human rights could be limited by emergency regulations, as obligated by Article 4 of the ICCPR.<sup>28</sup> The ERO is thus not in line with Hong Kong’s international human rights obligations and is therefore in urgent need of reform or replacement, especially if further use of such wide-ranging powers is envisioned.
32. **AIHK recommends that the Emergency Regulations Ordinance be amended in order to bring it into line with Article 4 of the ICCPR and section 5 of the HKBORO. In particular, any use of the ERO to introduce “emergency” regulations should be subject to a time limit, mandatory periodic review and express renewal to consider whether those regulations need to be continued. This review must involve full scrutiny of both the declaration of an “occasion of emergency or public danger” and any implementing measures.**

**(iv) Emergency regulations outside of “states of emergency”**

33. Alternatively, should one accept that the ERO is also applicable to situations that are not formally “states of emergency”, then under international law, and as accepted by the Hong Kong Government, the existing human rights protections apply in full. There is no “intermediate” category of rules that applies to “public dangers” deemed serious enough to invoke emergency legislation but not serious enough to declare a state of emergency. Furthermore, the ERO does not define “public danger”, which could lead to arbitrary implementation.<sup>29</sup> If no derogations have been notified, the “normal” rules apply in full.
34. In fact, the Human Rights Committee has determined that, while states are permitted in exceptional circumstances to derogate from the right to peaceful assembly under Article 4 of the ICCPR, the existing possibility for states to restrict some rights, including the right to peaceful assembly, provided by international human rights law, including the ICCPR (Article 21), is generally sufficient in emergency situations and therefore no derogation from the provisions in question would be justified by the exigencies of the situation.<sup>30</sup>
35. The OSCE Guidelines express the same sentiment, namely that:

*“In situations that do not meet the high threshold for derogations, the possibility of*

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<sup>26</sup> Special Rapporteur on states of emergency, UN Doc. E/CN.4/Sub.2/1997/19 (1997), para. 151; Special Rapporteur on the independence of judges and lawyers, UN Doc. A/613/271 (2008), paras 16-19; See, Principle B(5) of the Paris Minimum Standards of Human Rights Norms in a State of Emergency.

<sup>27</sup> Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 14.

<sup>28</sup> For example, forced labour is to some extent permitted under Article 4 of the ICCPR, but the prohibition of slavery is non-derogable.

<sup>29</sup> For comparison, “emergency” is to some extent circumscribed in Article 18 of the Basic Law, although this has been queried by the Human Rights Committee.

<sup>30</sup> Human Rights Committee, *General Comment No. 29 States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 5.

*imposing proportionate and content-neutral time, place and manner restrictions on public assemblies specifically tailored to the particular situation at hand should be sufficient.”<sup>31</sup>*

36. This means, first, that there is a presumption in international human rights law that issues pertaining to the regulation of the right of peaceful assembly can and should be dealt with without using emergency legislation. Generally, using emergency legislation must remain exceptional and subject to a high threshold, rather than becoming a “new normal” of law-making.
37. Secondly, this means that any restrictions to human rights, such as to freedom of expression, association and peaceful assembly, are only allowed if they meet stringent tests, namely that they are provided by sufficiently clear and precise law; are for the purpose of protecting a legitimate public interest; are demonstrably necessary and proportionate, meaning the least restrictive possible, to that purpose; and are subject to independent and effective procedural safeguards against their abusive imposition, such as judicial review.
38. These principles will be applied with regard to the PFCR in the next section. However, it is clear that *even* in formal states of emergencies there are stringent limitations setting out what additional restrictions to human rights are permissible. These include the rights that can be subject to such emergency measures, and to what extent they can be restricted; that such measures need to be specifically and demonstrably justified; that they must be interpreted narrowly; that meaningful legislative and judicial scrutiny and challenge must be ensured; and that states of emergency may not be invoked simply to circumvent safeguards applicable under normally applicable criminal or other law.

This being the case, this applies *a fortiori* to situations less grave, such as the proclaimed “state of serious public danger” in the present context.

39. **AIHK calls on the Hong Kong Government to refrain from using emergency legislation for the purpose of regulating the right of peaceful assembly, and to ensure that all restrictions are compatible in full with Hong Kong’s obligations under international human rights law and standards.**

### **C. The Prohibition on Face Covering Regulation 2019 (“PFCR”)**

40. The so-called “mask ban” prescribed in the PFCR of 4 October 2019 is another example of the authorities’ approach of increasing restrictions on freedom of expression and peaceful assembly in Hong Kong. This process has been ongoing for several years.<sup>32</sup> AIHK believes that the near-total ban on the use of face coverings during any larger protests (whether peaceful or violent, lawful or unlawful under domestic law), as well as in other public places is excessive and in violation of Hong Kong’s obligations under international human rights laws and standards.
41. AIHK further believes that the PFCR has far-reaching repercussions for other human rights, in particular the human rights to privacy, dignity, health and protection against discrimination, as well as the rights of children, which are each discussed further below.
42. Any restrictions to human rights such as to freedom of expression and peaceful assembly are only allowed if they meet stringent tests, namely that they are provided by sufficiently clear and precise law; are for the purpose of protecting a legitimate public

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<sup>31</sup> European Commission for Democracy through Law / OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Guidelines on Freedom of Peaceful Assembly](#) (3<sup>rd</sup> edition 2019), Explanatory Notes, para. 92.

<sup>32</sup> Amnesty International, *Beijing’s “Red Line” in Hong Kong* (Index: ASA 17/0944/2019).



interest; are demonstrably necessary and proportionate, meaning the least restrictive possible, to that purpose; and are subject to independent and effective procedural safeguards against their abusive imposition. In addition, it needs to be borne in mind that such limitations should be the exception, while the freedom to exercise one's human rights is the norm; hence any legal restriction has to be interpreted strictly and narrowly.<sup>33</sup>

**(i) Principle of legality**

43. The principle of legality, a core general principle of law, enshrined, *inter alia*, in Article 15 of the ICCPR, requires laws to be clear and accessible and for their application in practice to be reasonably predictable. The principle has been affirmed as an essential element of the rule of law and an important protection against arbitrariness.<sup>34</sup> To be able to adjust their behaviours, people need to understand precisely what actions would constitute an offence and what would, for example, constitute a defence of reasonable excuse.
44. As the public discussions and initial experiences since the enactment of the PFCR in early October 2019 show, many aspects are unclear, and both the law and its implementation are inconsistent. The lack of clarity includes, for example, the type of facial coverings that are prohibited, such as whether the ban covers clear protective “goggles”; large sunglasses, scarves or “hooded” tops that could be worn in reaction to the weather conditions; or the common wearing of surgical masks, especially by children during the present onset of the flu season; or the simple use of handkerchiefs for protecting oneself against tear gas or other airborne irritants.
45. In relation to the defence relating to professions, it is not clear the extent to which it applies to groups such as student journalists and others who are not protesters but are engaged in informal reporting; legal or NGO observers; social workers; or “first aid/street medics” who may not be professional medical personnel. Inconsistency is also apparent from the provisions, as the section 4 defences relating to professions, pre-existing medical or other health reasons and religious reasons only apply to persons engaging in assemblies, public meetings and public processions (section 3), but not to the section 5 offence relating to any persons wearing a facial covering in a public place. In fact, there are no explicit defences to section 5 offences at all.
46. The PFCR therefore also shows the risks of enacting new rules without proper scrutiny and discussion. The rushed enactment has meant no sufficient guidance could be drawn up and training conducted for law enforcement.

**(ii) Legitimate aim**

47. Any restriction placed on relevant human rights must be for the purpose of protecting a legitimate public interest. Under Article 21 of the ICCPR, public safety and “public order (*ordre public*)” are such interests, in principle. Therefore, situations of “public danger”, if existing, and the prevention of violence during protests could serve to restrict the exercise of the right of peaceful assembly, assuming all other conditions are met. However, preventing or even deterring peaceful protest and other lawful behaviour would not be an acceptable purpose.

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<sup>33</sup> European Court of Human Rights, *Djavit An v. Turkey* (20652/92) (2003), para. 56; Venice Commission Opinion on the Law Making Amendments and Addenda to the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations in Armenia, (2005), para. 30; Inter-American Commission, Report on the Situation of Human Rights Defenders in the Americas (2006), para. 60.

<sup>34</sup> See, for example, European Court of Human Rights, *Del Rio Prada v. Spain* (42750/09), (Grand Chamber, 2013), para. 77.

48. In the Government's Legislative Council Brief of October 2019 ("Government Brief"), it is stated that the reasons for introducing the legislation is to prevent violence, allow for identification of persons engaging in such violence and deter people from engaging in violence.<sup>35</sup> Similar reasons for the legislation have been provided by the Government in its response to the Legislative Council's legal questions on the PFCR ("Response to Legal Questions").<sup>36</sup>
49. However, under international human rights standards, the prohibition of the wearing of facial coverings in the context of protests should only be lawful where a person is engaging in or shows a clear intent to immediately engage in violence. Assemblies and their participants should be assumed to be peaceful, rather than posing a threat to public order, and the authorities have to demonstrate the opposite for specific cases.<sup>37</sup> Covering up one's face does not, in itself, equate to violent or otherwise criminal intent.
50. While the violence at some protests has been escalating, along with the continued unnecessary and excessive use of force by police, the majority of protesters in Hong Kong remain peaceful.
51. Furthermore, the wearing of masks, such as for expressive purposes or to protect oneself against retaliation, is considered legitimate under international law. The UN Special Rapporteur on the Right of Peaceful Assembly stated in 2014:
- "Numerous jurisdictions have in recent years banned peaceful protesters from covering their faces during demonstrations, motivated by fears that demonstrators who wear masks or hoods could engage in violence and escape punishment due to their concealed identities. Besides the fact that violent acts during peaceful demonstrations are already illegal under the laws of virtually every jurisdiction, the Special Rapporteur is concerned that bans on face coverings during assemblies are in some circumstances used to target particular groups and improperly curtail their right to freedom of peaceful assembly ... There may be legitimate and non-criminal reasons for wearing a mask or face covering during a demonstration, including fear of retribution."*<sup>38</sup>
52. Under the OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly ("the OSCE Guidelines"):
- "The wearing of masks or other face coverings at a peaceful assembly should not be prohibited where there is no demonstrable evidence of imminent violence. An individual should not be required to remove a mask unless his/her conduct creates probable cause for arrest and the face covering prevents his/her identification."*<sup>39</sup>
53. This indicates that legitimate law enforcement purposes must relate to conduct giving reasonable suspicion of a crime. The wearing of a mask by itself should not be criminalized, and there may be legitimate reasons for persons wearing masks. AIHK believes the existing provisions of the PFCR do not satisfy these requirements, as they

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<sup>35</sup> Legislative Council Brief, October 2019, [https://www.legco.gov.hk/yr19-20/english/subleg/brief/2019In119\\_brf.pdf](https://www.legco.gov.hk/yr19-20/english/subleg/brief/2019In119_brf.pdf)

<sup>36</sup> Response to Request for Information from the Legal Service Division of the Legislative Council, October 2019, [https://www.legco.gov.hk/yr18-19/english/hc/sub\\_leg/sc63/papers/sc6320191028cb2-74-2-e.pdf](https://www.legco.gov.hk/yr18-19/english/hc/sub_leg/sc63/papers/sc6320191028cb2-74-2-e.pdf)

<sup>37</sup> Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66 (2016), para. 18; Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/23/39 (2013), para. 50.

<sup>38</sup> United Nations Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. [A/HRC/26/29](https://www.ohchr.org/en/docd.aspx?id=14122) (2014), paras 32, 33.

<sup>39</sup> European Commission for Democracy through Law / OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Guidelines on Freedom of Peaceful Assembly](https://www.osce.org/odihr/docs/guidelines-on-freedom-of-peaceful-assembly) (3<sup>rd</sup> edition 2019), Explanatory Notes, para. 153.

are not restricted to situations where a person is reasonably suspected of having committed or being likely to commit a crime, in particular to imminently engage in violence.

**(iii) Necessary and proportionate restrictions**

54. Any restrictions placed on relevant human rights must be demonstrably necessary and proportionate, meaning the least restrictive possible to factually achieve the legitimate aim, and the intended legitimate aim must not be out of balance with the human rights implications of said restrictions.
55. In the first place, AIHK submits that the PFCR does not appear to be a necessary law. As referred to in the Government Brief and Response to Legal Questions, the police already have extensive powers to stop and search people under existing laws, including to demand proof of identity.<sup>40</sup> Further, a refusal to comply with such a request to verify an identity is already an offence of resisting or obstructing a police officer in the due execution of the officer's duty.<sup>41</sup> As conceded by the Government in the Response to Legal Questions, a refusal to comply could consist of a person refusing to remove a facial covering.<sup>42</sup> It should further be noted that most of the existing provisions under other laws which enable police officers to request proof of identity, contain a required element linked to actual or suspected criminal activity.<sup>43</sup>
56. AIHK believes the PFCR to be in essence a blanket ban, even if certain minimal conditions as to the size of the gatherings are set. The banning of all masks for all protesters in larger gatherings clearly does not meet the requirement to only use the least intrusive means. The OSCE Guidelines state that masks and other face-coverings should not be subject to blanket or routine restrictions.<sup>44</sup> Blanket restrictions are intrinsically disproportionate and discriminatory measures, as they impact on all citizens willing to exercise their right to freedom of peaceful assembly and because they preclude consideration of the specific circumstances of each proposed assembly.<sup>45</sup>
57. AIHK submits that facial coverings may not be prohibited for peaceful protests, unless ordering faces be shown becomes necessary and proportionate in order to address an individual's clear intent to immediately engage in violence. The use of facial coverings by itself does not make a protest violent or otherwise unlawful, nor does it indicate intent to engage in violent behaviour.

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<sup>40</sup> Section 17C of the Immigration Ordinance (Cap. 115), section 54 of the Police Force Ordinance (Cap. 232), section 49 of the Public Order Ordinance (Cap. 245).

<sup>41</sup> Such as section 36(b) of the Offences Against the Person Ordinance (Cap. 212) section 63 of the Police Force Ordinance (Cap. 232) and section 23 of the Summary Offences Ordinance (Cap. 228).

<sup>42</sup> See para. 23 Response to Legal Questions.

<sup>43</sup> Under section 54(1) of the Police Force Ordinance a person can be asked their identity where the person acts "in a suspicious manner"; under section 54(2) of the Police Force Ordinance a person may be asked their identity where the police officer "reasonably suspects the person concerned of having committed or about to commit or of intending to commit any offence"; under section 49(1) of the Public Order Ordinance a person can be asked their identity where the police officer "reasonably believes that it is necessary for the purpose of preventing, detecting or investigating any offence.

<sup>44</sup> European Commission for Democracy through Law / OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Guidelines on Freedom of Peaceful Assembly](#) (3<sup>rd</sup> edition 2019), Explanatory Notes, para. 153.

<sup>45</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/23/39 (2013), para. 63; Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66 (2016), para. 30.

**AHK submits that the current provisions under the PCFR are not necessary and proportionate, as they do not require any demonstrable link between wearing a facial covering and imminent engagement in violence.**

**(iv) Concerns with the existing defences**

58. The PFCR provides for some defences, but not sufficiently so, which is further evidence that the provisions are not a proportionate interference with relevant human rights. For example, there is no exception for situations where the facial covering itself is part and purpose of the expressive intent, such as using face masks resembling prominent politicians or the use of full-body costumes to demonstrate, for example, against nuclear energy or detention practices such as in Guantanamo Bay.<sup>46</sup> The use of masks during protests for expressive purposes is accepted as legitimate in international human rights standards.<sup>47</sup> Nor are there exceptions for other types of public groups gatherings and processions, such as theatrical productions, Halloween, masquerades/carnivals, sporting events or civil or military parades.
59. Furthermore, the use of the defences listed in section 4 of the PFCR is limited to the wearing of facial coverings during assemblies (section 3), but not the stopping of any person in any public place (section 5). In the latter situation there may be no connection to any assembly at all, let alone a violent one, so it is questionable why this is included in the present regulations. The fact that there are no defences at all included in the PFCR section 5 public place offence also creates the possibility of a breach of the right to equality before the law and non-discrimination under article 26 of the ICCPR. This could for example mean that religious groups wearing facial coverings for religious reasons or persons with disabilities wearing facial coverings for medical reasons connected to their disability are discriminated against. The Human Rights Committee recently found that French laws providing a blanket ban to facial coverings in public places was a breach of the right to freedom of religion and the prohibition of religious discrimination.<sup>48</sup>
60. The near-total ban on face coverings during public assemblies jeopardizes the right to peaceful assembly itself,<sup>49</sup> as well as the right to health of persons protesting. The present protests are characterized, among other things, by a climate of fear and physical danger in which many protesters feel the need to wear facial coverings to protect their privacy, personal safety and health, and in order to avert arbitrary arrest and unjustified surveillance.
61. As documented by Amnesty International, there has been indiscriminate and excessive use of tear gas, pepper spray, rubber bullets and other projectiles considered less lethal weaponry.<sup>50</sup> In the current context of disproportionate use of force and policing

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<sup>46</sup> Other examples could be animal masks to protest against cruelty during medical or cosmetic research; “skull masks” in anti-war protests; or occupational clothing, such as surgical masks or welding helmets, during labour disputes.

<sup>47</sup> European Commission for Democracy through Law / OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Guidelines on Freedom of Peaceful Assembly](#) (3<sup>rd</sup> edition 2019), Explanatory Notes, para. 153.

<sup>48</sup> Human Rights Committee, [Miriana Hebbadj v. France](#) (Communication No. 2807/2016), UN Doc. CCPR/C/123/D/2807/2016 (2018).

<sup>49</sup> Human Rights Committee, [Bakur v. Belarus](#), UN Doc. CCPR/C/114/D/1902/2009 (2015), para. 7.8; [Pugach v. Belarus](#), UN Doc. CCPR/C/114/D/1984/2010 (2015), para. 7.7; See also, Human Rights Committee, [General Comment 34, Article 19: Freedoms of opinion and expression](#), UN Doc. CCPR/C/GC/34 (2011), paras 21-22.

<sup>50</sup> See, for example, [Verified: Hong Kong Police Violence Against Peaceful Protesters](#) (21 June 2019).

strategies, protecting one's face, and particularly one's eyes, from gases and projectiles is not only legitimate, but often necessary. The PFCR's defence of "pre-existing medical or health reason" (Section 4(3)(c)) is too limited to effectively protect the rights of protesters, observers and bystanders to health and safety.

62. AIHK considers that the mere wearing or possession of protective equipment should not be criminalized, such as gas masks or protective eyewear. In situations like the present, prohibiting such equipment can have a strong deterrent effect on the freedom to demonstrate. It does not comport with the Hong Kong authorities' duty to facilitate peaceful protest<sup>51</sup> and, where necessary, differentiate between peaceful and violent protesters so that the former can carry on exercising their right. It may also lead to arbitrary arrests under international law.
63. The wearing of equipment to protect one's health, by itself, does not amount to an intention to commit violence, and prosecutions simply on these grounds must be dropped. The confiscation of such protective equipment violates the right to peaceful assembly of protesters, since they may not engage in violence but be caught up in the indiscriminate use of force by police. Spare masks and goggles must also be available for injured people. The seizure of first-aid materials may amount to an arbitrary measure that is neither necessary nor proportionate to maintain public order.
64. Participants in public assemblies also retain their right to privacy (Article 17 ICCPR), which means any arbitrary or unlawful interference is prohibited, and the state is under the positive duty to ensure the law protects them, and their families, against such interference. Only domestic state authorities *may* have a legitimate interest to identify specific participants in an assembly, but not private third parties or, for example, agents of foreign states observing a march with refugees or asylum-seekers as participants.<sup>52</sup>
65. In relation to the protests, there is evidence that the right to privacy has been at substantial risk from different sources. This includes protesters facing a risk of retaliation from public or private employers if they can be identified as participating in protests, as well as from the use of facial recognition methods in Hong Kong or by mainland Chinese authorities. Protesters are concerned that by being identifiable they may suffer additional risks from the authorities, for example when wanting to travel to see family members on the mainland, as well as from members of the general public, whether physically on the streets or online. Against this backdrop, it is insufficient to argue that peaceful protesters can still exercise their rights without the use of facial coverings, as the prohibition does not take into account their legitimate interests, but instead could deter anybody, including those who only want to protest peacefully and lawfully, from coming out and participating in the public sphere. The fear of retribution or retaliation is another reason for wearing facial coverings expressly accepted in international standards.<sup>53</sup>
66. The right to protest anonymously is a core aspect of the right to peaceful assembly,

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<sup>51</sup> European Commission for Democracy through Law / OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Guidelines on Freedom of Peaceful Assembly](#) (3<sup>rd</sup> edition 2019), Explanatory Notes, para. 22.

<sup>52</sup> For example, Amnesty International Norway and two other NGOs in 1996, on occasion of a Chinese state visit to Oslo, notified the Norwegian Ministry of Justice that there would be some Chinese dissidents participating in a demonstration who would wear masks to avoid being identified by Chinese authorities, and that applying the ban on masks to these people would be a violation of the rights to freedom of peaceful assembly and expression.

<sup>53</sup> UN [Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association](#), A/HRC/26/29, 14 April 2014; European Commission for Democracy through Law / OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Guidelines on Freedom of Peaceful Assembly](#) (3<sup>rd</sup> edition 2019), Explanatory Notes, para. 153.

which differs from other forms of individuals expressing themselves in that people come together into an amorphous group for a joint purpose and common messaging. The OSCE Guidelines point out that “[traditional] assemblies allow participants if they so desire, a certain level of anonymity or at least a smaller likelihood of being ‘singled out’ or identified.”<sup>54</sup> In fact, anonymous participation is the norm, not the exception at most assemblies. Since it is accepted that at some point individuals in a large assembly are not identifiable anymore, it needs to be assumed that the right not to be individually identifiable is part and parcel of the right of peaceful assembly. The fact that participants to an assembly are anonymous does not make the assembly violent or otherwise illegal.

67. Furthermore, since assemblies, as well as individuals more generally, should not be subject to indiscriminate mass surveillance anyway, it follows that there is no need for all participants to be individually identifiable. Otherwise available technology could in effect amount to automatic compulsory registration of those attending an assembly, which could have a long-term chilling effect on the enjoyment of this right.
68. Further, where a protest concerns controversial or sensitive questions, protesters may have legitimate reasons to conceal their identities. For example, with regard to protests relating to LGBTI rights, people may wish to conceal their identities as part of their right to privacy concerning their sexual orientation or gender identity. In addition, where the protest concerns allegations of police misconduct (for example, women alleging they have been sexually assaulted by police when arrested or detained), they may have legitimate reasons to hide their identity. This is compounded in a situation where online footage of assemblies is ubiquitous and immediate recognition, identification after searches and “trolling” on social networks is easily done. Especially where a threat of the use of facial recognition software by the authorities exists, potentially integrated with CCTV or other footage and/or biometric registration systems, this may in effect negate the right to protest freely and anonymously and instead create a substantial “chilling effect” on the exercise of legitimate rights. In this context, the availability and legality of using facial coverings protect fundamental interests of personal dignity, privacy and autonomy.
69. Particular regard should be paid to the rights of children (that is, persons below the age of 18) in demonstrations. Under the Convention of the Rights of the Child (CRC), children enjoy the rights to freedom of association and freedom of peaceful assembly (Article 15 of the CRC), as well as to privacy (Article 17). But moreover, the authorities must always treat the best interests of the child as a primary concern (Article 3 CRC). This should be a paramount balancing factor when, for example, disallowing face masks that are worn by children during protests for health or expressive reasons.<sup>55</sup> Children also enjoy particular rights to be protected against being photographed in an identifiable manner without their or their parents’ or guardians’ consent.<sup>56</sup>
70. **AIHK submits that the current defences to criminal offences of wearing facial coverings as set out in the PFCR are insufficient as they do not provide sufficient forms of defences to include other legitimate reasons, for example of safety, privacy and expressive intent; and provide no defences for wearing facial coverings in public places that are not public assemblies or processions.**

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<sup>54</sup> European Commission for Democracy through Law / OSCE Office for Democratic Institutions and Human Rights (ODIHR), [Guidelines on Freedom of Peaceful Assembly](#) (3<sup>rd</sup> edition 2019), Explanatory Notes, para. 71.

<sup>55</sup> See, SCMP, [Education Bureau urges Hong Kong’s headmasters to get students to heed anti-mask law](#) (4 October 2019).

<sup>56</sup> See, for example, European Court of Human Rights, *Reklos and Davourlis v. Greece* ([1234/05](#)) (2009); *Bogomolova v. Russia* (13812/09), (2017).

**(v) Comparative law**

71. The Government has, as part of its reasoning, referred to “comparable” bans in other countries. AIHK has inquired into these situations as far as possible in the time available. Details about each cited foreign jurisdiction are listed in the Annex. However, their analysis shows that these comparisons mostly do not hold true and support neither the extent nor the means of introducing the PFCR.
72. While some of these bans are very broad in their wording, their actual application is far more restrictive, or factually rare (for example, in Denmark, Germany and Sweden). In particular, none of the cited laws were introduced as some form of emergency measure, but all were subject – as draft primary legislation (except two Canadian local regulations) – to full parliamentary scrutiny. Furthermore, in most of these jurisdictions there must be a direct connection between the wearing of a facial covering and actual or likely violence or other criminal activity during assemblies. Many of the cited jurisdictions also accept that the fear of reprisals, in one way or another, can constitute a legitimate reason for covering one’s face.

**(vi) Conclusion**

73. As a result of these observations, AIHK submits that the current provisions of the PFCR are in violation of international human rights law and standards on the rights to peaceful assembly, expression and privacy, and pose a substantial risk of breaching the human rights to health and non-discrimination on grounds such as religion and disabilities, as well as of the rights of children.
74. **AIHK therefore urges the Hong Kong Government to withdraw the present PFCR. Should the Government decide that a “mask ban” law is truly needed, it should introduce a new draft that is compatible with Hong Kong’s human rights obligations and do so through the regular law-making channels.**

### **Annex: Bans on facial coverings in other countries as referred to by the Government**

*Note: AIHK cannot guarantee that the following descriptions are legally accurate in every detail, as the time available to gather this information was limited. Secondly, AIHK has only looked at bans on facial coverings in relation to assemblies, not more general bans directed, explicitly or implicitly, at items of religious clothing. The second scenario poses different sets of rules and considerations, and in our opinion is not comparable to situations relating to public assemblies.*

**Austria:** §9 of the Law of Assemblies (“*Versammlungsgesetz*”), in force since 2002, contains a broad ban on use of facial coverings during assemblies in order to avoid identification. However, the explanatory notes to this piece of legislation allow expressly that the ban should not be enforced if a disturbance of public order or safety is not expected, or if foreign participants use coverings to protect their families against reprisals in their home states. The law was passed through regular parliamentary procedures, which included expert hearings on its compatibility with human rights norms.

**Canada:** The Canadian criminal code contains provisions that prohibit being masked but only if it is done with the intent to commit criminal infractions that are already in the code. The ban only applies to unlawful, that is violent, assemblies. It was introduced through the regular parliamentary process as primary legislation. Beyond that, two municipalities introduced mask bans through local by-laws. Montreal introduced a city-wide ban in 2012, which was subsequently invalidated by the Superior Court of Quebec. Before that, a 19th-century mask ban in Quebec City was struck down in 2005. According to these decisions, the bans infringed on the freedoms of expression and peaceful assembly and were excessive, unreasonable and arbitrary, because they were too broad, applying to all situations without exceptions, and because the discretion given to the police for assessing any potential violations was too broad, making it impossible for participants to know what behaviour would be deemed illegal.

**Denmark:** Under §134b of the Criminal Code, covering up the face in order to evade identification during protests, as well as the possession of items of clothing suitable for that purpose, are prohibited for suspected perpetrators of criminal actions. The prohibition was introduced in 2000 and was only meant to be applied in situations of violent clashes or demonstrations between police and “squatters”, including situations involving vandalism. The prohibition extends to situations in “public places” but away from assemblies, if it is apparent that the suspects are on their way to an assembly. In addition, if suspects carry with them garments for protection against the cold, this will not be affected by the masking prohibition if judging by the circumstances, such as the time of season and the weather conditions, they must be considered common and reasonable clothing. Facial coverings during carnival, sports events or for religious reasons, or to avoid reprisals are equally exempted. In particular, the fact that a peaceful assembly turns violent may cause the legal qualification of a mask worn to change. This means masks may become prohibited as a consequence of violence, but it does not mean, *vice versa*, that the wearing of such covering itself makes an assembly violent. Factually, the prohibition has been rarely used in the past decade, since Denmark saw less actions involving “squatters”.

**France:** A law entering into effect in April 2019 to “strengthen and maintain public order during demonstrations” contains the creation of a new offence of “concealment of the face (all or part)”. The law was introduced through regular parliamentary procedures, unconnected to the state of emergency in force in France between 2015 and 2017,<sup>57</sup> and subjected to judicial scrutiny by the Constitutional Court. It does not distinguish between lawful and unlawful assemblies. However, the ban applies only to such actions “within or in the immediate vicinity of an event

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<sup>57</sup> See Amnesty International, *France: A Right Not A Threat: Disproportionate Restrictions On Demonstrations Under The State Of Emergency In France* (Index number: EUR 21/6104/2017); *France: Upturned lives: The disproportionate impact of France's state of emergency* (Index number: EUR 21/3364/2016).



on the public highway, during or after which disturbances of public order are committed". The law has been heavily criticized for its insufficient definitions, blanket application, likely deterrent effect on the rights to expression and peaceful assembly and dangers for the rights to health, safety and privacy of the protesters.<sup>58</sup>

**Germany:** The federal ban on "covering up" ("*Vermummungsverbot*", §17(a)(2.) *Versammlungsgesetz*) in law since 1989 is broad, but not absolute.<sup>59</sup> It covers the use or possession of any coverings capable of preventing and intended to prevent one's identification during assemblies or on the way to them. At the same time, it makes exceptions for religious events, funerals, weddings and traditional cultural processions, and allows the authorities to waive the ban in specific situations. Even this "relative" ban has raised grave concerns as to its compatibility with the German *Basic Law*. The Legislative Research Service of the German federal parliament has noted that the ban is rarely enforced and constitutionally problematic in light of its potential deterrent effect on protesters' fundamental rights and the law's vague terms.<sup>60</sup> This means (and German case law has supported this) that at the very least the law has to be narrowly interpreted ("read down"), for example to allow covering up during peaceful protests; that there would have to be a reasonable connection to violence; and that adequate allowances need to be made for when the covering is part of the expressive intent.

**Norway:** §11 of the Norwegian Police Act, in force since 1995, prohibits participants "from wearing masks, except for participants in a theatrical performance, a masquerade or the like." The law, introduced as primary legislation through the regular legislative process, is applicable to all types of gatherings. The legislative intent at the time does not indicate a specific desire to restrict masks for overcoming a recognized situation in which the previous law was perceived to be insufficient, but rather the ban was introduced during a general overhaul and simplification of Norwegian laws on police powers, including during assemblies.

**Spain:** As indicated in the Government Response to Legal Questions, this ban only applies where a person is participating in a crime or to prevent a crime.

**Sweden:** There is no general mask ban in demonstrations or protests. In 2006 a law went into effect that prohibits covering one's face during assemblies when breaches of public order occur, or when there is an immediate risk of such a disturbance (see now also the Government Response to Legal Questions). This law was introduced through the regular legislative process. In 2017 the law was amended to address specifically the use of masks during sporting events. The 2006 law with its limited scope of application followed a political discussion in which proposals for wider bans were rejected because those were considered to violate the constitutional right to demonstrate. Factually the law is rarely used.

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<sup>58</sup> See [Concerns of Amnesty International France \(AIF\) regarding the proposed law "Aimed at strengthening and guaranteeing the maintenance of public order during demonstrations", following its adoption at first reading in the National Assembly on 5 February 2019](#) (in French, 18 February 2019).

<sup>59</sup> In addition, some of the federal regional entities (*Laender*) have their own laws governing assemblies.

<sup>60</sup> German Bundestag, Wissenschaftliche Dienste, *Das versammlungsrechtliche Vermummungsverbot* (2018) (Index No. WD3-3000-313/18).