Comparative Reflections on COVID-19 Responses: Drafting, Powers, and Interpretation

Thomas Yeon*

ABSTRACT
This article examines comparatively approaches in Hong Kong and English law on powers created by the use of subordinate legislations to combat the COVID-19 pandemic from the perspectives of legislative drafting and statutory interpretation. These powers, being wide and flexible in nature, pose a tension between two competing concerns. On the one hand, they enable law enforcement officers to be able to deal with the unique challenges posed by a public health crisis. On the other hand, they pose the potential to restrict fundamental human rights disproportionately. This article will proceed in three parts. First, the article will analyse the responsibilities of drafters in drafting subordinate legislations and the techniques therein; the discussion will be contextualized within a need for urgent public health responses to combat the pandemic. Second, the powers conferred upon law enforcement officers and restrictions on individual liberty under Hong Kong law and English law will be analysed. Third, approaches to interpreting the relevant legislations under the two jurisdictions will be examined. It will be argued that despite the need to confer wide and flexible powers to the executive to combat the pandemic, specificity of language and precision in articulating these powers remain of cardinal and overarching importance.

1. INTRODUCTION
The exceptional circumstances brought by the COVID-19 pandemic, caused by the highly contagious SARS-Cov-2 virus,¹ have called for swift actions from governments to curb its spread by enforcing social distancing and/or lockdown measures.² In light of the urgency of responding to the pandemic, the executive is given considerable powers in drafting subordinate legislation that outlines the limitations on individual freedoms. The broad powers and discretions enjoyed by law enforcement officers, however, pose a tension between two competing concerns. On the one hand, they allow law enforcement agencies

* PCLL Graduate, The University of Hong Kong, Hong Kong, email: yeonky@connect.hku.hk
¹ S Sanche et al. ‘High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2’ (2020) 26 Emerg Infect Dis 1470.
² For a comprehensive overview of the legal regulations enacted various European and Asian countries, see S Thomson and E Ip, ‘COVID-19 Emergency Measures and the Impending Authoritarian Pandemic’ [2020] J Biosci 1.
to tailor their responses to unique scenarios which may give rise to further spread of the Sars-Cov-2 virus across communities. On the other hand, they pose the potential to restrict fundamental human rights disproportionately under the guise of fighting the virus.

This article examines comparatively the approaches in Hong Kong and the United Kingdom on powers restricting movements and gatherings for combating the COVID-19 pandemic. As the measures outlining social distancing and lockdown requirements in the four countries of the United Kingdom are broadly similar, for the sake of succinctness, this article will focus on restrictions outlined in English law as representing the approach in the United Kingdom for the purposes of the present article. Hong Kong law and English law provide meaningful comparison because while their methods of restricting individual liberty are different (for example, Hong Kong law did not adopt a lockdown approach, but English law did), they both concern the same outcome: preventing the further spread of the Sars-Cov-2 virus by limiting people’s interactions with one another. The article proceeds in three parts. First, the article will analyse the responsibilities of legislative drafters in drafting subordinate legislation and the techniques therein, contextualizing the discussion within the field of public health legislation responding to situations of emergency, for example a serious and/or imminent threat to public health. Second, the drafting of the COVID-19-related legislations imposing restrictions on individual freedom in Hong Kong law and English law will be comparatively analysed. Third, approaches to interpreting COVID-19-related legislations under Hong Kong law and English law will be examined. It will be argued that despite the need to confer wide and flexible powers to the executive to combat the COVID-19 pandemic, it is pertinent for the drafters of subordinate legislation not to lose sight of the importance of crafting precisely and specifically powers that seek to restrict individual freedom and liberty.

2. THE RESPONSIBILITIES OF DRAFTERS OF LEGISLATION RESPONDING TO URGENT SITUATIONS: TECHNIQUES AND ISSUES TO CONSIDER

A precise definition provides a useful starting point in indicating the situation(s) under which a power may or would be exercised and the parameters of such a power. Before drafting a definition, one should be certain of its intended purpose. Xanthaki suggests that a definition can do three things: (i) delimit the commonly accepted meaning, (ii) extend a common meaning, or (iii) narrow a common meaning. Giving a complete meaning is important, since the possible interpretations that may be generated by an extended meaning may lead to an unintended interpretation of the word that does not contribute to or clarify its meaning (as intended by the drafters). For definitions

3 H Xanthaki Thornton’s Legislative Drafting (5th edn Bloomsbury London 2013) 167–8. An example of a purpose of a definition is to remove any ambiguity that may arise from an interpretation of that term.
4 Ibid.
5 An example of a choice of phrase which may carry an extended meaning is using the word ‘includes’ rather than ‘means’ when defining a term. Using the former word instead of the latter may lead one to conclude that as long as an interpretation falls within the ‘natural import’ of the term, that interpretation is acceptable for the purpose of defining that term: see n 47. That said, if the wording meaning of a definition (the satisfaction of its meaning as a precondition for triggering, e.g., the use of emergency powers in responding to an outbreak of the Sars-Cov-2 virus) and its purpose(s) are sufficiently clear, it ought not be necessary to make a pretence of scientific precision of further infusing the word with voluminous details: see M MacKenzie and D Purdie Thring’s Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents (3rd edn Luath Press Edinburgh 2015) 102.
granting wide-ranging powers, it is crucial for the definition which preconditions the exercise of such a power be clearly and exhaustively spelt out. While this does not mean that the words employed in crafting the definition must circumscribe the power restrictively, the circumstances enabling the use of such power (as listed out in the form of a definition) ought to be exhaustively defined.

A key to good legislation drafting (and thus laying ground for defensible judicial interpretations) is that the stipulated meaning of a word should ensure that it would only be used in the way(s) it is defined in turn. Abstract or generic definitions tend to convey an imprecise meaning with blurred edges, limiting the effectiveness of the communication of ideas from the definition. In this regard, effectiveness encompasses a number of issues: enforcement, impact, and compliance. In the context of responding to incidents of the outbreak of the Sars-Cov-2 virus and also the COVID-19 pandemic in general, effectiveness should be seen as the ultimate measure of the quality of public health legislation. This is because an assessment of a public health legislation based on effectiveness reveals the extent to which it manages to introduce adequate mechanisms capable of producing the ‘desired regulatory results’. It is to be achieved by means of precise and unambiguous communication with the intended audience. For legislation that enable law enforcement officers to respond to swiftly changing situations, it is crucial for their powers to be precisely crafted. However, given the rapidly changing social, ethical, and operational context of rules limiting interactions between people under the COVID-19 pandemic, it might not be realistic to demand drafters to craft a piece of legislation that can respond to all the possible circumstances that might arise under the pandemic. Public health regulations are not mere elaborations of legal doctrine—they have effect on, for example, social life. This observation is particularly relevant in the context of combating the COVID-19 pandemic, which relies significantly on measures aiming to minimize social interactions. All the above said focuses on achieving clarity, and precision is not necessarily a desirable goal in all circumstances in the first place. An example of this is the limits of a ‘plain language’ approach to legislation: plain language cannot be distilled to the set of rules that must always be followed: rules are relative and directly affected by the precise audience of the specific legislative communication.

6 Xanthaki, n 3, 56–7.
7 H Xanthaki, ‘Judges v Drafters: The Saga Continues’ in J Barnes (ed) The Coherence of Statutory Interpretation (The Federation Press New South Wales 2019) 61.
8 For an account of using ‘effectiveness’ as the benchmark of measuring the quality of a piece of legislation, see H Xanthaki ‘On Transferability of Legal Solutions’ in C Stefanou and H Xanthaki (eds) Drafting Legislation: A Modern Approach (Ashgate Publishing Aldershot 2008) 1, 6.
9 Xanthaki, n 7, 62.
10 An example of this would be an urgent need to contain the spread of the Sars-Cov-2 virus in a densely populated area.
11 TE Webb ‘The Drafters’ Dance: The Complexity of Drafting Legislation and the Limitations of “Plain Language” and “Good Law” Initiatives’ (2020) 41 Statute L Rev 129, 142. See also Ruhl and Salzman’s suggestions that legislation should attempt to build ‘adaptive structures’ that can respond to rapidly changing status quo in order to facilitate the smooth operation of rules: JB Ruhl and J Salzman ‘Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State’ (2003) 91 Georgetown L J 757, 764.
12 F Synder ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 Modern L Rev 19, 19. For an example of the impact of public health regulations on social life in the context of public mental health, see D Cheung and E Ip ‘COVID-19 Lockdowns: A Public Mental Health Ethics Perspective’ (2020) 12 Asian Bioethics Rev 503.
in question. In the context of COVID-19 legislation, this is not limited to a selected portion of the society, but the general society as a whole.

When drafting a piece of legislation, drafters ought to be alert to the approaches a court may take to interpret the text, in particular to the presumptions that they may apply. Of increasing importance are the presumptions derived from the principle of legality, a seminal explanation of which is provided by Lord Hoffmann in Simms:

[T]he principle of legality means that the Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

Viewed in this light, the principle of legality would ensure a piece of legislation that is said to satisfy its requirements would reflect the legislative intention behind it. The aim of legislative clarity also means that it is not necessarily the case that shorter and simpler drafting is good drafting. This observation is equally apposite to subordinate legislation which, as will be shown below, plays a key role in enforcing COVID-19-related measures aiming at minimizing interactions between people. The fact that the intended audience of a piece of public health legislation is the general public ought not to be treated as an escape ticket from the need to meticulous and precise drafting which (i) sets out clearly and precisely the powers of law enforcement officers and (ii) the limitations placed on individual liberty in times of the pandemic.

The responses to the COVID-19 pandemic under Hong Kong law and English law featured subordinate legislations. Subordinate legislation is important because it would neither be practical nor realistic to expect a legislature to pay full attention to ‘the details of implementation’ of a piece of primary legislation, particularly in times where swift response from the government is required. The importance of subordinate legislation is best illustrated by the following passage from the South African Constitutional Court:

The reason why full legislative authority, within [the South African Constitutional framework], is entrusted to Parliament and Parliament alone, would seem to be that the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision-making process, the involvement of civil society in

13 Xanthaki, n 7, 63. For comprehensive analysis on the strengths and weaknesses of a ‘plain language’ approach to legislation, see Jeffrey Barnes, ‘The Continuing Debate about “Plain Language” Legislation: A Law Reform Conundrum’ (2006) 27 Statute L Rev 83 and Webb, n 11.

14 E Moran PSM QC ‘The Coherence of Statutory Interpretation: Drafting Perspectives’ in Barnes, n 7, 53.

15 R v. Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115, 131 (emphasis added). Lord Hoffmann’s explanation of the principle of legality is accepted in Hong Kong in A v. Commissioner of ICAC (2012) 15 HKCFAR 362, [24]–[29]. On the presumption against interference with rights, see also D Greenberg, Craies on Legislation (11th edn Sweet & Maxwell London 2017) 593–4.

16 P Sales ‘Legislative Intention, Interpretation, and the Principle of Legality’ (2019) 40(1) Statute L Rev 53, 61–2. The principle in Hong Kong is recently affirmed in Hong Kong as a ‘principle of construction, not a rigid principle of law’: Horsfield Leslie Grant v. Chief Executive of the HKSAR [2020] HKCFI 903, [24(6)].
relation to committee hearings, and the pluralistic interaction between different viewpoints which Parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution. It is the Parliament’s function and responsibility to deal with the broad and controversial questions of legislative policy according to these processes. It is not its duty to attend to all details of implementation. Indeed, if it were to attempt to do so, it would not have the time to serve its primary function. Hence the need for delegated legislation, which has become a feature of Parliamentary democracies throughout the world.\textsuperscript{17}

This passage illustrates that subordinate legislation serves a highly practical purpose of filling in the details of implementing a legislative scheme. In the case of, for example, an emergency, it may be essential to give the executive ‘wide and flexible’ powers to deal with it whether or not Parliament is sitting.\textsuperscript{18} This observation is apt in the context of combating the COVID-19 pandemic. Given the airborne nature of the Sars-Cov-2 virus and its ability to spread quickly, the need for swifter measures and more assertive containment and prevention are all the more pertinent.\textsuperscript{19} Combined with ‘wide and flexible’ powers conferred on them, the executive would not be required to go through the comparatively lengthier process of passing a piece of primary legislation in establishing responses to, for example, a sudden incident of outbreak of the Sars-Cov-2 virus. That said, such ‘wide and flexible’ powers conferred upon the executive may also open door for the potential abuse of such powers. Such possibility may be further increased as a result of, among others, the lack of visibility as to the legislative process and pluralistic engagement of different viewpoints on the articulation of the particulars of a piece of legislation.\textsuperscript{20}

The qualities that should be possessed by a piece of subordinate legislation may be indirectly reflected by the grounds of challenge that may be mounted against it—in that the purported exercise of power is, for example, ultra vires, unreasonable,\textsuperscript{21} or insufficiently uncertain.\textsuperscript{22} These challenges may be avoided by careful and precise drafting that ensures the law enforcement officers would act within their powers reasonably and that the guidelines delineating so are sufficiently certain. In responding to the public health challenges brought by the COVID-19 pandemic, the use of subordinate legislation may be said to represent a tension between two competing interests. On one hand, the statement(s) laying out the permissible scope of actions of an officer ought to be

\textsuperscript{17} Executive Council, Western Cape Legislature \textit{v.} President of the Republic of South Africa (1995) (4) SA 877 (CC) [205] (emphasis added). It is suggested that this observation is equally apt for both Hong Kong and the United Kingdom, for both of them are (broadly speaking) parliamentary democracies in which the legislature (for the Hong Kong, the Legislative Council; for the United Kingdom, the Westminster Parliament) is the only body empowered to make primary legislation.

\textsuperscript{18} D Bailey and L Norbury (eds) \textit{Bennion on Statutory Interpretation} (7th edn LexisNexis London 2017) 68.

\textsuperscript{19} See J Giesecke ‘The Invisible Pandemic’ (2020) 395 Lancet e98.

\textsuperscript{20} The two issues flagged up here reflect the scrutiny that a piece of primary legislation is likely to go through in a parliament: see Executive Council, \textit{n} 17.

\textsuperscript{21} The notion of reasonableness described here is that familiar in administrative law, as to which the leading case remains that of \textit{Associated Provincial Picture Houses Ltd \textit{v.} Wednesbury Corporation} [1948] 1 KB 223. See in particular the observations of Lord Greene MR at 228–9.

\textsuperscript{22} Greenberg, \textit{n} 15, 153–4.
sufficiently broad to ensure that the officer can achieve the legislation’s intended purpose. \(^{23}\) On the other hand, manifest articulation of the nature and extent of the power and the circumstances in which it may be exercised remains of cardinal importance. \(^{24}\)

### 3. THE USE OF SUBORDINATE LEGISLATION IN COMBATING COVID-19

In the following sections, various articulations of the powers to carry out measures enforcing social distancing requirements under Hong Kong law and English law will be analysed comparatively. As a preliminary point, it should be flagged up that the English approach sketched below concerns primarily *lockdown* measures, while the Hong Kong approach sketched above concerns primarily *crowd dispersal* measure. That said, comparing between the two aforesaid approaches remain valuable as they both confer significant powers on the executive to enforce them—it is the *methods of enforcement* the following sections will devote its attention on.

#### (A) Subordinate Legislations in Hong Kong Law: Further and Better Particulars Needed

It is accepted that public health emergency regulations may introduce measures that impose substantial limits on constitutional freedoms, including the freedom of movement and assembly. \(^{25}\) Among the regulations enacted by Chief Executive in Council (‘CEIC’) \(^{26}\) in response to the COVID-19 pandemic in Hong Kong, the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap.599G) (‘PGGR’) is arguably the most eye-catching. It is because it confers extensive powers on law enforcement officers to disperse group gatherings and issue penalties for people who fail to observe social distancing requirements and/or orders of dispersal. Section 3 of the PGGR provides that no group gathering may take place in any public place, \(^{27}\) save, and except an exhaustive list of exempted group gatherings in Schedule 1 of the PGGR. Any individual who participates or organizes a prohibited group gathering, or provides a venue for it, commits an offence. \(^{28}\)

Under section 14 of the PGGR, the Director of Health may appoint any public officer, including a police officer, as an ‘authorized officer’ for enforcing the PGGR. An authorized officer enjoys a wide range of powers, including (i) demand personal details and inspect proof of identity, (ii) enter and inspect public places and premises, as well

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\(^{23}\) G Appleby and J Howe ‘Scrutinising Parliament’s Scrutiny of Delegated Legislative Power’ (2015) 15 OUCLJ 3, 4–5.

\(^{24}\) Xanthaki, n 3, 269.

\(^{25}\) K Bokhary and J Chan *Halsbury’s Laws of Hong Kong: Constitutional and Human Rights Law* (LexisNexis Hong Kong 2015) 364. Under the Basic Law of the Hong Kong Special Administrative Region (‘BL’), the freedom of movement and the freedom of assembly are protected under Art. 31 and Art. 27, respectively. Under the Hong Kong Bill of Rights, the freedom of movement and the freedom of assembly are protected under Art. 8 and Art. 17, respectively.

\(^{26}\) Under the BL, Art. 43 provides that the Chief Executive is the head of the executive branch of the government. Article 54 of the BL provides that the Executive Council, as part of the executive branch of the Government, is an organ assisting the Chief Executive in her execution of duties. The Chief Executive, acting after consultation with the Executive Council, will be deemed as acting in the capacity of the CEIC. This capacity is defined and provided for under section 3 of the Interpretation and General Clauses Ordinance (Cap.1).

\(^{27}\) The period specified and published by the Secretary for Food and Health, in practice, usually refers to a period of 14 days or less: see PGGR, sections 4(1)–(2). At the time of writing (15 December 2020), the maximum amount of people allowed in a group gathering is 2.

\(^{28}\) Ibid, section 8 and Schedule 2.
as (iii) disperse prohibited group gatherings. Section 10(1) of the PGGR provides that an authorized officer may disperse a gathering in a public place if he/she reasonably believes that the gathering is a prohibited group gathering or that it is a dispersable gathering. In dispersing a prohibited gathering in a public space, three options are open to an authorized officer:

(3)

For the purposes of exercising a power conferred by [section 10(1) of the PGGR], an authorised officer may:

(a) give any order that the officer reasonably considers necessary or expedient;
(b) use any force that is reasonably necessary to disperse a gathering that the officer reasonably believes to be a prohibited group gathering; or
(c) enter any public place in which the officer reasonably believes that a prohibited group gathering or a dispersable gathering is taking place.

Although the powers an authorized officer may exercise in dispersing a prohibited group gathering is laid out exhaustively under section 10(3) of the PGGR, the section itself confers noteworthy significant discretion on an authorized officer. This is evident from sections 10(3)(a) and (b), under which he/she can ‘give any order’ and ‘use any force’, respectively, so long as they are, in the subjective opinion of the authorized officer, reasonably necessary. The exercise of such ‘wide and flexible’ powers on the part of an authorized officer, therefore, boils down to what he/she believes to be the most appropriate course of action at the scene.

The unique factual matrix of each ‘dispersable gathering’, including the number of departure routes from the place of gathering and the number of people to be dispersed, means that it would be impractical to prescribe exhaustively what an authorized officer should be permitted to do in each case. This practical observation, however, does not mean that the formulation of the powers enjoyed by an authorized officer under section 10(3) of the PGGR is satisfactory. Rather than only satisfying the legal requirements provided by the black-letters of the PGGR, an authorized officer would be required to decide swiftly on a multitude of matters highly relevant to the risk of spreading the Sars-Cov-2 virus, including the method and end goal of a dispersal. Adequate satisfaction of these issues likely either require some deliberations beforehand or public health training in advance, which is not a requirement for someone to be appointed an

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29 Ibid, sections 9–12.
30 Section 10(1) of the PGGR provides that an authorized officer may disperse a gathering in a public place if (a) he/she ‘reasonably believes that the gathering is a prohibited group gathering’ or (b) it is a ‘dispersable gathering’ within the meaning of section 10(2) of the PGGR.
31 Ibid, section 10(3) (emphasis added). Note that the word choice ‘may’ suggest that the powers under this sub-section are listed out in an ‘exhaustive’ manner: Bailey and Norbury, n 18, 474–5.
32 On the point about use of powers in situations requiring urgent responses, the Hong Kong Court of Final Appeal recently addressed that for legislation dealing with a situation of emergency or public danger, it would be more appropriate to provide a broader or more general definition. Such an approach would be supported by the need for the Executive to deal with the aforesaid situation in an expeditious and effectual manner: Kwok Wing Hang and others v. Chief Executive in Council and another [2020] HKCFA 42, [44]–[47].
33 Defined under PGGR, section 10(2).
‘authorized officer’ in the first place.\textsuperscript{34} Therefore, the lack of elaboration provided by the plain meaning of the text, for example the meaning of ‘reasonable’ or ‘necessity’, may prove difficult for law enforcers to understand and apply them in practice.\textsuperscript{35} The ‘wide and flexible’ nature of a power that is meant to respond to urgent situations does not necessarily entail that there ought to be minimal stipulation as to how such powers are to be exercised.

Rather than focusing only on the need to confer ‘wide and flexible’ powers, it is suggested that the appropriate approach would be to draft as tight a statement of those principles and policies as practicable and, wherever possible, to state the factors and procedural guidance that are relevant to the methods the power is exercised.\textsuperscript{36} This approach is helpful in two ways. First, an authorized officer will be equipped with more detailed guidance as to how his/her powers should be exercised. This in turn enables his/her actions to be able to reflect the legislative intent behind the PGGR—to minimize the risk of and contain the spread of the Sars-Cov-2 virus—in an effective manner. It also provides room for engaging with concerns regarding potential lack of public health expertise on the part of an authorized officer or disproportionate encroachment of, for example, an individual’s right to assembly, remedying the lack of ‘pluralistic interaction between different viewpoints’.\textsuperscript{37} As will be shown below, the United Kingdom’s approach in this regard, despite undermined by issues of its own, provides a good insight as to what appropriate guidance of the course of actions available to an authorized officer would look like.

Second, and more importantly, such an approach provides clearer guidance and indication to those against whom such power is exercised. The issue goes directly towards the targeted audiences’ internal perspective(s) of the method of compliance with such power.\textsuperscript{38} Detailed and precise drafting of the powers under public health regulation under a pandemic enables the audiences of such a piece of regulation to understand how they might be expected to comply with it. Affording the general public a clear understanding of the circumstances they ought to expect crowd dispersal enforcement actions and the ways they will be required to comply with it\textsuperscript{39} allow for easier compliance with the regulations on their part. This in turn enables the public health objectives of such regulations to be achieved in effectively. On the other hand, the question as to whether people will comply with public health regulations (for example, PGGR) is

\textsuperscript{34} As section 14 of the PGGR does not contain such a requirement, it would be premature to assume that all authorized officers, including police officers, have received adequate training or possess adequate knowledge in public health control to ensure that a crowd dispersal can minimize the risk of further spread of the Sars-Cov-2 virus (and thus lowering any risk of further spread of the COVID-19 pandemic).

\textsuperscript{35} On the practical issues generated by the use of indefinite terms, see generally J Barnes ‘Statutory Interpretation Against an “Infinite Variety of Facts”’ in Barnes, n 7, 97–100. For an example of judicial observations on issues generated by the lack of prescriptive guidelines for the executive’s exercise of powers, see \textit{J Astaphan & Co (1970) Ltd v. The Comptroller of Customs [1996]} ECSCJ No. 28 Civil Appeal No. 8 of 1994, 158D–E.

\textsuperscript{36} Xanthaki, n 3, 270–2.

\textsuperscript{37} Executive Council, n 17.

\textsuperscript{38} For a succinct theoretical overview of the point of view from the targeted audience of a legal regulation, see HLA Hart \textit{The Concept of Law} (3rd edn OUP Oxford 2012) 98 and the explanation of Hart’s account in S Shapiro ‘What Is the Internal Point of View?’ (2006) 75 Fordham L Rev 1157. On the importance of the legislative audiences’ observable behaviour and attitudes corresponding with those intended by legislators, see L Mader ‘Evaluating the Effects: A Contribution to the Quality of Legislation’ (2001) 22 Statute L Rev 119, 126.

\textsuperscript{39} As indicated by the possible methods of enforcement that may be opted by an authorized officer.
unlikely to be an issue that can be resolved by meticulous and articulate drafting. This is because drafting techniques and considerations, at least insofar as sketched above, are unlikely to be able to go as far as dictating how people should act—a question of will of compliance that is beyond the scope of this article. As the analysis on English law below will further illustrate, taking into account the perspective(s) of the legislative audience are important in ensuring that public health regulations can be effectively carried out and introduce changes to people’s behaviour (in light of the COVID-19 pandemic) swiftly.

(B) Enter English Law: More Elaborations, Similar Problems

Similar to the approach in Hong Kong, the implementation of COVID-19 measures in England is supported by an array of subordinate legislations in the form of regulations. At the initial stages of the COVID-19 pandemic in England in around March to April 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350 (‘SI 2020/350’) was used for imposing significant (some may even suggest, draconian) restrictions on social interactions and the daily lives of the general public. The phrases authorizing the implementation of restrictions on social interactions must be chosen carefully as any restriction of individual movement must be prescribed by law. In order to avoid over complexifying the analysis, while SI 2020/350 will be used primarily as the basis for comparison with Hong Kong law in the following analysis, references to other relevant COVID-19 public health statutory instruments will also be made.

Among the regulations under SI 2020/350, regulations 6 and 7 raise particular concern for present purposes. Not only can they be compared directly with sections 3 and 10 of the PGGR, they also raise problems of specificity and enforcement that drafters and courts ought to be aware of.

Regulation 6(1) of SI 2020/350 provides that ‘no person may leave the place where they are living without reasonable excuse’. This restriction is more recently replicated in the Health Protection (Coronavirus, Regulations) (England) (No. 4) Regulations, SI 2020/1200 (‘SI 2020/1200’). Commentated by Ewing as a restriction that ‘perhaps no one ever expected to read in English law’, regulation 6(1) drastically restricts one’s freedom of movement by restricting their movements to their residence only. This succinctly formulated lockdown measure is crucial in containing the spread of the highly contagious Sars-Cov-2 virus, as it limits interactions between people to a very significantly extent. It also provides an easy starting point for the general public to follow—do not go out unless you have an excuse. A non-exhaustive list of exceptions is provided for under both SI 2020/350 and SI 2020/1200. This non-exhaustive

40 Thomson and Ip, n 2, 14.
41 SI 2020/350 is made in exercise of powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984 (as amended by the Health and Social Care Act 2008) (‘PHCDA’).
42 R (Gillian) v. Commissioner of Police for the Metropolis [2006] UKHL 12, [34].
43 SI 2020/350, regulation 6(1).
44 SI 2020/1200, Part 2. Regulation 5(1) of Part 2 uses the ‘without reasonable excuse’ formula found in regulation 6(1) of SI 2020/350.
45 K Ewing ‘Covid-19: Government by Decree’ (2020) 31 King’s L J 1, 17.
46 For the exceptions in SI 2020/350, see regulation 6(2) of that regulation. For the exceptions in SI 2020/1200, see regulation 6 of that regulation.
approach in creating the list of exceptions to such lockdown requirement allows any possible excuses to be covered, so long as the ‘natural import’ of the term ‘reasonable excuse’ may be said to signify.47

The English approach sketched above is different from the Hong Kong approach under Schedule 1 of the PGGR, where an exhaustive list of exceptions is provided to the general rule that no group gathering consisting of more than a certain number of people can take place in a public place.48 The English approach therefore provides greater flexibility in tailoring the application of COVID-19 combating measures to the particular factual circumstances of a case. Such flexibility is important because, in light of the need for measures combating emergency to grant ‘wide and flexible’ powers to the law enforcement officers, it should correspondingly be necessary for the possibilities of avoiding legal sanctions (giving rise to criminal penalties) to be commensurately flexible. As ‘reasonableness’ is an ordinary word frequently invoked in both legislation and judicial interpretations of legislation, its employment to denote what is permissible under lockdown restrictions should not be adjudged as bad drafting practice.49

However, the flexibility behind the notion of ‘reasonable excuse’ does not come without cost. Thomson and Ip observe that this opens doors to varying enforcement practices and requiring the police to decide whether an excuse offered by one is ‘reasonable.’50 This suggests that one might inadvertently behave in an unlawful manner (due to an inadequate guidance as to the boundaries of ‘reasonable excuse’) and thus subject to criminal sanctions. In this regard, it is useful to refer to the National Police Chiefs’ Council and College of Policing’s instructions to apply the four-step escalation principles—namely to ‘engage’, ‘explain’, ‘encourage’, and ‘enforcement’; enforcement is to be considered and applied as a ‘last resort’ (the ‘Four-Step Principles’).51 Briefly speaking, the Four-Step Principles mean that constables are not required to issue penalties to individuals who contravene COVID-19-related public health regulations at the first instance. In other words, the fact that one contravenes such regulations does not mean that one will definitely be subjected to criminal penalties.52 This additional guidance, apart from the contents of the subordinate legislation(s) conferring powers on law enforcement officers, renders the English approach more comprehensive than Hong Kong’s: the enforcement of measures is supplemented by a detailed list of procedural

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47 *Dilworth v. Commissioner of Stamps* [1899] AC 99, 105.

48 Rather than referring to a particular number of people, the reference to ‘a certain number of people’ here allows this article to accommodate crowd-dispersal measures of various stringency. For example, at the peak of a wave of COVID-19 pandemic, the maximum number of people that can attend a social gathering outdoors is likely to be lower than at times when the COVID-19 pandemic is less serious.

49 *CLP Power Hong Kong Limited v. Commissioner of Rating and Valuation* (2017) 20 HKCFAR 168, [18].

50 Thomson and Ip, n 2, 8. This observation is made in their discussion of SI 2020/350.

51 National Police Chiefs’ Council and College of Policing COVID-19 – Policing Brief in Response to Coronavirus Government Legislation (31 March 2020) <https://www.college.police.uk/Documents/COVID-19-Police-brief-in-response-to-Coronavirus-Government-Legislation.pdf> (accessed 30 November 2020).

52 For the penalties relevant to the statutory instruments referred to in this section of the article, see regulations 9–10 of SI 2020/350, regulations 8–9 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (No. 2), SI 2020/684 (‘SI 2020/684’), regulation 13–14 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (No. 3), SI 2020/750, regulations 20–21 of SI 2020/1200, and regulations 10–11 of the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, SI 2020/1374 (‘SI 2020/1374’).
guidance as to how a law enforcement officer’s powers ought to be utilized.\(^53\) That said, these advantages of the Four-Step Principles cannot mitigate the negative effects of its definitional and operational vagueness. This is so for two reasons.

First, as the Four-Step Principles are not legally binding on a constable (that is, a relevant person),\(^54\) he/she is not required to follow it.\(^55\) In the case of removing a person from a public place to his/her residence,\(^56\) a constable may remove that person so long as he/she ‘considers [that person] is outside the place where they are living’\(^57\) and may ‘use reasonable force, if necessary’\(^58\) in the exercise of the aforesaid power. This means that similar to the issue of over-discretion conferred upon an authorized officer in Hong Kong under section 10(3) of the PGGR, a relevant person in England may opt for enforcement at the first instance. As long as an individual’s explanation of their excuse for going out falls out of an applicable list of excuse\(^59\) and not deemed by a relevant person as ‘reasonable’, they can be subject to criminal penalties immediately.

Secondly, the Four-Step Principles do not, as a matter of principle, provide an adequate response to the inherent ambiguity generated by the non-exhaustive approach to excuses sketched above. This is because what constitutes a ‘reasonable’ excuse that is not provided for statutorily lies largely at the hands of the relevant person. This problem is exacerbated by the fact that criminal penalties may be imposed once the explanation offered by a person is adjudged to fall below the requirement of ‘reasonable excuse’. On a related note, this approach is also unconducive to the general public’s understanding of the contours of COVID-19-related social distancing requirements. The fact that a lockdown requirement provides a starting point that is easy to follow (as discussed above) is of limited help: it does not go to elaborate the lawful limits of a person’s freedom of movement in light of the aforesaid public health regulations.

The general public’s freedom of movement is also indirectly restricted by regulation 7 of SI 2020/350: during the emergency period, ‘no person may participate in a gathering in a public place of more than two people [except for the exhaustive list of scenarios provided in regulations 7(a)–(d)]’.\(^60\) This restriction is also included and expanded in Part 2 of SI 2020/1200.\(^61\) The overarching method of enforcing regulation 7 is straightforward: ‘A relevant person may take such action as is necessary to enforce...’

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53 See n 36 above.
54 SI 2020/350, regulation 8(12)(a). For the purposes of SI 2020/350, a ‘relevant person’ means (i) a constable, (ii) a police community support officer, (iii) a person designed by a local authority for the purposes of SI 2020/350 (this is subject to regulation 8(13)), and (iv) a person designed by the Secretary of State for the purposes of SI 2020/350. The notion of a ‘relevant person’ is also relevantly used (in terms of the context and discussion of the present article) in regulation 7(10)(b) of SI 2020/684, regulation 19(11)(b) of SI 2020/1200, and regulation 9(9)(b) of SI 2020/1374.
55 Given its non-bindingness, it would be premature to assume that it would be followed at all instances.
56 SI 2020/350, regulation 8(3)(b).
57 Ibid, regulation 8(3).
58 Ibid, regulation 8(4).
59 At time of writing (15 December 2020), SI 2020/1200 was repealed to the extent as provided in regulation 16 of SI 2020/1374. SI 2020/1374 re-establishes the three-tier legal framework first introduced by the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020, SI 2020/1103. Under regulation 10(a) of SI 2020/1374, a person commits an offence if, ‘without reasonable excuse’, the person contravenes a Tier 1, Tier 2, or Tier 3 restriction. The details of the restrictions imposed under the tiers system are laid out in detail in Schedule 1–3 of SI 2020/1374.
60 SI 2020/350, regulation 7(1).
61 SI 2020/1200, regulations 8–11.
any requirement imposed by [regulation 7], with the possible methods of enforcement listed out in regulations 8–11.

This approach, similar to the Hong Kong approach under section 10(3) of the PGGR, represents an undesirable degree of definitional and enforcement uncertainty. It is true that the method of enforcement couched on the notion of ‘necessity’ sketched above is supported by instructions in some detail. That said, they do not go to stipulate the quality of the enforcement measures. Rather, they focus on dealing with the different scenarios which such an enforcement measure may be responding to. There is therefore a lack of instructions, as a matter of the requirements that such an enforcement measure would need to adhere to, for law enforcement officers to follow. The fact that some measures have to be exercised in ‘necessary and proportionate means’ is of limited remedy, since they do not go to stipulate the methods one may expect a law enforcement officer to undertake. Resorting to the classic claim of needing to give the executive ‘wide and flexible’ powers is also of limited help, since such description does not dictate that law enforcement officers ought to be given a significant power of discretion in deciding how to enforce the measures provided. To interpret ‘wide and flexible’ powers to mean minimal stipulation would also, on a related note, pose a risk of contravening the principle of legality discussed above.

That said, this criticism on regulation 8(1) of SI 2020/350 may be qualified by regulation 8(9) of the same regulation. Regulation 8(9) provides, exhaustively, three options which a relevant person may opt for if he/she considers that three or more people are gathered together. In contrast to section 10(3) of the PGGR in Hong Kong, regulation 8(9) is easier to enforce since the options provided for therein also provides for the method of dispersing a regulation 7-contravening gathering. He/she is not required to, for example, gauge the degree of force that is ‘reasonably necessary to disperse a group gathering’. Moreover, compared to section 10(3) of the PGGR, regulation 8(9) reconciles the tension between the need to give ‘wide and flexible’ powers to law enforcement officers on one hand and the need to craft precise legislation that imposes (potentially significant) restrictions on individual liberty. The provision of specific methods of enforcement therein shows clearly what individuals subject to a dispersal measure under regulation 8(i) ought to expect. This in turn enables them to, in the event of a dispersal, able to comply with the directions of law enforcement officers more effectively. This renders is easier to achieve the ‘desired regulatory results’ of a social distancing measure in response to the COVID-19 pandemic—to minimize risk of further interactions between people.

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62 SI 2020/350, regulation 8(1). A similar method of enforcement is provided for under regulation 19 of SI 2020/1200.
63 SI 2020/350, regulation 8(8). Under SI 2020/1200, this is provided for under regulation 19(9).
64 Under SI 2020/350, such gathering would be in contravention of regulation 7. This ‘three-option’ approach is also provided for under regulation 19(5) of SI 2020/1200.
65 PGGR, section 10(3)(b).
4. THE IMPACT OF LOCKDOWN RESTRICTIONS ON FUNDAMENTAL HUMAN RIGHTS: UNDERSTANDING AND INTERPRETATION

The foregoing analysis has argued that it is necessary for statutory provisions conferring broad powers on law enforcement officials to be precisely defined and elaborated in detail. Not only would that be conducive to an officer’s execution of his/her duties, but it also enables the general public to have a clearer understanding of what the social distancing measures entail. A public health emergency should not, moreover, be seen as licensing a government to cast aside their obligations to observe fundamental rights and liberties. Reinforced by threats of criminal sanctions, subordinate legislations tackling the spread of the Sars-Cov-2 virus have exerted paternalist power on citizens, despite questions as to their efficacy and proportionality. The measures required to combat the COVID-19 pandemic in effect represent a tug of war between the collective interests of the general public to end the pandemic on one hand and protection of civil liberties on the other.

This section turns to Hong Kong and English courts’ interpretation of COVID-19 public health responses vis-à-vis their human rights implications. The essence of this inquiry is succinctly summarized by Swift J recently in Hussain: whether the impugned measure, so far as it interferes with a human right, ‘strike[s] a fair balance between that interference and the general interest.’ Factors affecting the assessment of this balance may include, for example, the conditions for triggering the imposition of criminal penalties and the scope of a prohibition on the freedoms of assembly and movement. Rather than prioritizing deferentially the importance of preventing the further exacerbation of the COVID-19 pandemic, controversial provisions purporting to restrict fundamental rights and freedoms should be ‘read in the context of the [statute in question] as a whole…and read in the historical context of the situation which led to its enactment.’ The key to ascertain the meaning of a legal provision lies in its black-letter text, read in a broad context, that encompasses not only the relevant piece of legislation as a whole but the policy backdrop to it.

(A) Implantation of a Ground for Dispersing a Gathering: Hong Kong’s Mistake

Apart from operating as a ban against group gatherings of more than a given amount of people, the PGGR also bans public meetings and processions (as notified to the Commissioner of Police under the Public Order Ordinance (Cap.245) (‘POO’)). Although not as explicit and draconian as the measures provided in some approaches under English law as sketched above, subordinate legislations enacted under section 8 of the Prevention and Control of Diseases Ordinance (Cap.599) (‘PCDO’) deter

66 LM Henry ‘An Overview of Public Health Ethics in Emergency Preparedness and Responses’ in AC Mastroianni, JP Kahn and NE Kass (eds) The Oxford Handbook of Public Health Ethics (Oxford University Press New York 2019) 770.
67 Thomson and Ip, n 2, 4.
68 RR Faden, S Shebaya and AW Siegel ‘Distinctive Challenges of Public Health Ethics’ in Mastroianni, Kahn and Kass, n 16, 19.
69 R (Hussain) v. Secretary of State for Health and Social Care [2020] EWHC 1392 (Admin), [19]. In Hong Kong law, this inquiry is reflected in the final step of proportionality analysis: see Hysan Development Ltd v. Town Planning Board (2016) 10 HKCFAR 372, [78]–[79].
70 R (Quintavalle) v. Secretary of State for Health [2003] UKHL 13, [8].
71 Moran, n 14, 52.
citizens from engaging in social activities and encourage them to stay-at-home and work-from-home.\textsuperscript{72}

It has been acknowledged that the question of \textit{vires} is undebatable insofar as the scope of the CEIC’s power under section 8 of the PCDO is concerned.\textsuperscript{73} The proportionality of sections 3 and 10 of the PGGR remains, however, unexamined by courts. In this regard, it is necessary and indeed useful to turn to the views of law enforcement agencies. In an April 2020 press release, the Hong Kong Police Force stated that:

\begin{quote}
‘Police noted that some netizens are calling for participation in a public even… as long as the person gather \textit{for a common purpose} in public place, it is irrelevant whether the participants have kept a distance of 1.5m from each other or between each \textit{small group of four};… [all participants of such an event] will commit \textit{an offence under section 3(1) PGGR}]…\textsuperscript{74} (the ‘HKPF Statement’)
\end{quote}

Before moving on to discuss the problems of the HKPF Statement, an issue should be clarified first. The HKPF Statement was issued as a response to calls for participation in a public event. Nowhere in the PGGR, however, introduces or employs the term ‘common purpose’. This invites consideration of the usage of the phrase in the POO, which is the principal piece of Hong Kong primary legislation that deals with conditions and restrictions on public gathering, assemblies, and procession. Under the POO, ‘common purpose’ and ‘purpose’ are used to describe a public meeting, public gathering, or procession.\textsuperscript{75}

Section 2 of the PGGR defines a group gathering as ‘a gathering of more than 2 people’ (as of 15 December 2020). It does not, however, go any further to say how a ‘group’ may be constituted. A ‘dispersable gathering’ under section 10(1)(b) of the PGGR means two or more ‘groups’ of gathering in a public place; these groups of gatherings are less than 1.5m from one another and have more than four people in total.\textsuperscript{76} Being exhaustive in nature, this definition should be seen as displacing any other meaning that the term may otherwise have. As section 3(1) of the PGGR does not employ the term ‘common purpose’, nor is the dispersal of a prohibited group gathering conditional upon the existence of such a purpose, the HKPF Statement’s claim of the possibility of committing a criminal offence under the PGGR based on the existence of a common purpose is premature and substantiated both as a matter of law and legal argument. The legislative intent of the PGGR provides no argumentative support for the HKPF Statement either. The PGGR aims to promote social distancing, reduce social activities and prevent any congregation of people in order to combat the spread

\textsuperscript{72} For example, the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap.599F) provides for compulsory closure and/or enforcement of social distancing measures in, \textit{inter alia}, restaurants and places of entertainment.

\textsuperscript{73} \textit{Horsfield}, n 16, [23]–[24].

\textsuperscript{74} \textit{Hong Kong Police Force, Police Appeal to Public Not to Participate in Prohibited Group Gathering} (26 April 2020) \<https://www.police.gov.hk/ppp_en/03_police_message/pr/pr_archives.html?month=202004> (accessed 30 November 2020).

\textsuperscript{75} POO, section 2.

\textsuperscript{76} See n 33 above.
of COVID-19.\textsuperscript{77} Nowhere in the regulation does it purport to, for example, maintain public order or control unlawful assemblies.

Nor can the HKPF Statement’s inference of a ‘common purpose’ element in the meaning of ‘group gathering’ an instance of an interpretation \textit{in pari materia}, the two legislations in question being the PGGR and the POO. This concept does not only apply to primary legislation, but also approaches of interpretation involving one primary legislation and one subordinate legislation.\textsuperscript{78} Legislations that are \textit{in pari materia} are considered to be ‘dealing with the same or similar subject matter and are to be construed as one.’\textsuperscript{79} Two or more pieces of legislation may be described as \textit{in pari materia} if any of the following criteria is satisfied: (i) they have been given a collective title, (ii) they are required to be construed as one, (iii) they have identical short titles (apart from the year), or (iv) they otherwise deal with the same subject matter on similar lines.\textsuperscript{80} Returning to the HKPF’s statement (which, as argued above, appears to insert requirements of the POO into the PGGR), criteria (i)–(iii) above can be dismissed immediately as they clearly do not arise on the facts. A careful reading of the key provisions of the POO and the PCDO (pursuant to which the PGGR, a piece of subordinate legislation, was enacted) also suggests firmly that criterion (iv) is not met. The POO’s intention is to consolidate the law on public law and, among others, control organizations, meetings, processions, and gatherings.\textsuperscript{81} In a different vein, the PCDO provides for the ‘control and … prevent the introduction into, the spread and transmission from, Hong Kong of any disease.’\textsuperscript{82} Relevantly, section 8(1) of the PCDO, which is the provision that empowered the CEIC to enact the PGGR, stipulates that the regulations enacted thereunder are only to be made ‘for the purpose of preventing, combating or alleviating the effects of [a] public health emergency and protecting public health.’\textsuperscript{83} The POO and PGGR (as enacted under the PCDO) clearly deal with different subject matters—it is clear that the HKPF Statement is indefensible as a matter of legal analysis.

Therefore, the interpretation of the requirements of committing the section 3(1) PGGR offence in the HKPF Statement ought not to be accepted by a court, nor is it required or obliged to do so.\textsuperscript{84} This unsafeness is a result of the lack of textual and contextual support for the interpretation of the PGGR in the HKPF Statement. Courts are obliged to accept a legislative intent of a legislator, not that of a law enforcement agency.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{77} Legislative Council Debate 24 June 2020 (Hansard), 8757–60.
\item \textsuperscript{78} Greenberg, n 15, 839. For an example of an application of the principle to a piece of subordinate legislation, see \textit{R v. Newcastle upon Tyne Justices, ex p Skinner} [1987] 1 WLR 312, where the Divisional Court held that guidance was to be caught from rule 26 of the Crown Court Rules 1982 in construing the scope of section 114 of the Magistrates’ Courts Acts 1980.
\item \textsuperscript{79} Bailey and Norbury, n 18, 520. The principle underlying the treatment of legislations which are \textit{in pari materia} is based on the idea that there is a continuity of legislative approach and uniformity in the use of language: \textit{Rainey v. Greater Glasgow Health Board} [1987] AC 224, 240 and \textit{Chief Adjudication Officer v. Foster} [1993] AC 754, 769.
\item \textsuperscript{80} The definition was approved by the majority of the UK Supreme Court in \textit{R (Miller) v. Secretary of State for Exiting the European Union} [2017] UKSC 5. In Hong Kong, a similar approach was approved by the Court of First Instance in \textit{Kwok Cheung Kin v. Director of Food and Environmental Hygiene} [2015] HKCFI 279, [45].
\item \textsuperscript{81} See section 1 (‘short title’) of the POO and Parts II and III of the Ordinance.
\item \textsuperscript{82} See the Preamble to the PCDO.
\item \textsuperscript{83} PCDO, section 8(1).
\item \textsuperscript{84} \textit{R (Gillian) v. Metropolitan Police Commissioner} [2004] EWCA Civ 1067; [2005] QB 388, [30]. Greenberg, n 15, 948.
\item \textsuperscript{85} Bailey and Norbury, n 18, 275–7, 280–1.
\end{itemize}
(B) The Kaleidoscopic Notion of ‘Context’: Insights from the United Kingdom

Before turning to the interpretation of the right to liberty in light of lockdown restrictions by the English courts, it should first be observed that Article 5 of the European Convention on Human Rights (‘ECHR’) is usually narrowly interpreted. It protects physical liberty only and does not confer ‘a right to do what one wants or go where one pleases.’86 In Austin, rejecting the House of Lords’ emphasis on the need to take into account the purpose of the measure in question,87 the European Court of Human Rights emphasized the importance of contextual analysis instead. It noted that requirements to take into account the ‘type’ and ‘manner of implementation’ of a measure enables a court to have regard to the specific context and circumstances surrounding different types of restriction(s) it carries.88 Furthermore, an interpretation of Article 5(1) of the ECHR must take into account the specific context in which the relevant techniques are employed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public.89

A mere reference to ‘context’, while clearly better than the mis-implantation of the meaning in a provision in a statute to another under the HKPF Statement as scrutinized above, provides little illumination on the factors to be considered in interpreting a piece of public health legislation purporting to limit (significantly) individual liberty. In light of the fluidity of the factual matrix of the COVID-19 pandemic, it is crucial for regulations enacted in response to it to ‘work as harmoniously as possible with the surrounding law and practice’.90 By extension, this includes the human rights guarantees they purport to limit. The circumstances surrounding the operation of a piece of legislation ought to be taken into account for determining what the scope of potentially ambiguous phrases, for example ‘necessary and proportionate’,91 are in the context in which they operate.92

In Dolan, the challenge concerned the compatibility of the suspension of visitors to a care home (as a result of the COVID-19 pandemic) with the applicant’s rights under Article 5 of the ECHR.93 Lewis J noted that in examining the proportionality of regulation 6 of SI 2020/350, account should be taken of a wide range of factors including the nature, duration, effects, and manner of execution of the measure.94 In holding that the interference with the applicant’s Article 5 right is proportionate, his Lordship noted that the emphasis of the prohibition is on one ‘staying overnight at a place other than

86 Chester West and Chester Council v. P [2014] UKSC 19, [46].
87 Austin v. Commissioner of Police for the Metropolis [2009] UKHL 5, [27].
88 Austin v. United Kingdom (2012) 55 EHRR 14. This emphasis on contextual analysis and interpretation was later accepted in Cheshire West and Chester Council, n 86, [37] and [43].
89 Ibid at [60]. In the present article, this refers to social distancing and/or lockdown measures aimed at combating the COVID-19 pandemic.
90 Bailey and Norbury, n 18, 287–8.
91 See n 63.
92 R v. Secretary of State for the Environment, Transport and the Regions and another, ex p Spath Home Ltd [2001] 2 AC 349, [42]. Pierson v. Secretary of State for the Home Department [1998] AC 539, 573–574. On this point more generally, see Greenberg, n 15, 598–9.
93 Dolan v. Secretary of State for Health and Social Care and another [2020] EWHC 1786 (Admin), [1]–[2].
94 Ibid at [69].
their home’, and people continue to have access to all ‘usual means of contact with the outside world’.95

These observations, despite common sense, pay insufficient emphasis on the context in which regulation 6 was made. The exceptions under regulation 6(2) to the lockdown requirement under regulation 6(1) of SI 2020/350 do not illuminate the reason(s) behind and the context in which why the regulation 6(1) restriction is considered proportionate to an individual’s rights under Article 5 of the ECHR. In this regard, the context in which SI 2020/350 operates can serve as a useful epistemological tool for understanding the scope of ‘reasonable excuse’: it was enacted in response to the initial outbreak of the Sars-Cov-2 virus in England, at a time when there is relatively limited understanding on the virus and the potential scope of the pandemic. The enactment of the regulation aims to provide a public health response to the incidence or spread of infection in England and Wales,96 which ‘present or could present significant harm to human health’.97 A contextual analysis of the aforesaid provisions therefore affords a court a more comprehensive grasp of the appropriate contours of a lockdown measure, which has a draconian effect on the right to liberty.

The foregoing analysis shows that the historical and social contexts surrounding the enactment of a piece of public health legislation is crucial to its smooth operation. This includes both the general prohibition and exceptions to it. Such awareness was illustrated in BP, where Hayden J observed that COVID-19 represents a ‘public emergency’ which is ‘threatening the life of the nations’.98 In holding the ban on visitors at an elderly’s home proportionate with BP’s right under Article 5 of the ECHR, his Lordship noted that reasons pleaded in favour of liberty-restrictions ‘must be confirmed on solid and compelling evidence’ before they can be adjudged established.99 This reflects the importance of a thorough understanding of both the context in which a provision restricting individual liberty stems from and the precise wording of that provision. Apart from contextual considerations pointing in favour of lockdown restrictions, the wording selected must also illustrate accurately the degree of restriction as adjudged necessary. In a similar vein, well-particularized contextual factors which reflect accurately the gravity of public health crisis posed by the COVID-19 pandemic, and the liberty-restrictions enacted in response, can inform future judicial interpretations on the defensibility of lockdown restrictions.

5. CONCLUSION

The COVID-19 pandemic poses unique challenges to the balance between the need for swift and effective public health responses on the one hand and the need to prevent potential for abuse of powers on the other hand. Calls for broader powers to fight it—to fight fire with fire—is an understandable approach. It remains, however, impractical and perilous to rely on generically formulated statutory language. This article has illustrated the importance of specificity of language both as a matter of legislative drafting

95 Ibid at [71].
96 PHCDA, section 45C(1). See also n 41 above.
97 PHCDA, section 45A(3).
98 BP v. Surrey County Council [2020] EWCOP 17, [27].
99 Ibid.
on and interpretation of restrictions aimed at combating the spread of the Sars-Cov-2 virus. It has argued that, despite the attractiveness of granting law enforcement officers ‘wide and flexible’ powers for responding to the pandemic, the importance of precisely crafted legislation remains cardinal for both law enforcement officers and the general public. Although a comprehensive analysis of the various public health regulations targeting social interactions in Hong Kong and English law cannot be examined in the limited space of this article, it is clear that the need for swift and flexible public health responses comes second to maintaining the quality of drafting of public health legislation. This does not only facilitate the exercise of law enforcement powers, but it also equips the general public and courts to have a clearer understanding of the details and contours of them.