ASIA

COVID-19'S IMPACT ON CIVIL AND POLITICAL RIGHTS: REFLECTIONS FROM HONG KONG

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SUMMARY: I. *The context*. II. *Coexistence of conflicting mask wearing regulations*. III. *Social distancing and the civic space to protest*. IV. *Conclusion*.

I. THE CONTEXT

Covid-19 and the government responses to it – e.g., social distancing or quarantine norms, mandatory mask wearing rules and compulsory lockdowns – have raised a range of constitutional questions all over the world.[1] China is no exception. However, these questions are unlikely to enter courts (or even public discourse) in mainland China for three reasons. First, the 1982 Constitution of the People's Republic of China has no direct effect: despite the Constitution containing a long list of fundamental rights, no citizen could rely on these – in the absence of a law – in court proceedings to challenge a government action or inaction. Second, Chinese courts do not enjoy the power of judicial review. Third, the Chinese government strictly controls discussion about politically sensitive issues, and issues surrounding Covid-19 falls into this category.

However, under the 'one country, two systems' principle, the situation in the Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong) has been different, at least until the recent enactment of a wide-ranging and ambiguous National Security Law (NSL).[2] Under

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[1] See, e.g., 'Social Rights During and After COVID-19', *https://blog-iacl-aidc.org/social-rights*; 'COVID 19 and States of Emergency', *https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/*.

[2] For an excellent context for this law, see P Y Lo, 'Constitutional "Vaccination": China's National Security Law-Making for Hong Kong', Int'l J. Const. L. Blog (30 June 2020),

Hong Kong's Basic Law, labelled as mini-constitution, Hong Kong courts enjoy independence, and the power of judicial review to test government policies and decisions for constitutionality.[3] Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are applicable to Hong Kong. The former has been implemented in Hong Kong by the Bill of Rights Ordinance.

Against this backdrop, this short piece will provide critical reflections on two issues concerning civil and political rights. First, human rights implications of the Hong Kong government's regulation to wear mask,[4] while the earlier regulation – introduced as a response to (violent) protests that took place in the second half of 2019 – not to wear masks is still in force.[5] Second, the selective use of social distancing norms to curtail the civic space to protest peacefully, including against the NSL's enactment. Like elsewhere, the Hong Kong government's Covid-19-related measures have also impacted socio-economic rights (e.g., the livelihood of individuals). However, due to space constraints, this piece will examine the impact of these measures only on selected civil and political rights.

II. Coexistence of conflicting mask wearing regulations

On 4 October 2019, the Chief Executive in Council issued the Prohibition on Face Covering Regulation (Mask Regulation) using powers under an antique colonial legislation, the Emergency Regulations Ordinance (ERO). Section 3 of the Mask Regulation criminalises the use of 'any facial covering that is likely to prevent identification while the person' is at an unlawful or unauthorized assembly, a public meeting, or a public procession. It will be a defence to the offence under Section 3 if the person had 'lawful authority or reasonable excuse for using a facial covering', e.g., the facial covering is for religious reasons or for a pre-existing medical or health reason (Section 4). Police officers have a power to require removal of face covering in

http://www.iconnectblog.com/2020/06/constitutional-"vaccination":-china's-national-security-law-making-for-hong-kong.

[3] Article 158 of the Basic Law though vests the power of final interpretation in the Standing Committee of the National People's Congress.

[4] See 'Latest legislative amendments and specifications under Prevention and Control of Disease Ordinance gazetted', *https://www.info.gov.hk/gia/general/202007/22/P2020072200750.htm?fontSize=1*.

[5] Prohibition on Face Covering Regulation, *https://www.elegislation.gov.hk/hk/cap241K*.

a public place and a failure to comply with this requirement will constitute an offence (Section 5).

The constitutionality of the ERO as well as the Mask Regulation was challenged on several ground.[6] The Court of First Instance held that the ERO insofar as it empowers the Chief Executive 'to make regulations on any occasion of public danger' is incompatible with the Basic Law and that the Mask Regulation imposes unproportional restrictions on fundamental rights.[7]

This court decision attracted a sharp reaction from Chinese authorities: an unprecedented claim was made that Hong Kong courts have no authority to judge and decide whether laws are consistent with the Basic Law.[8] Subsequently, the Court of Appeal upheld the constitutionality of the ERO as well as the Chief Executive's wide powers to act in situations of 'public danger'.[9] The Court also ruled the government ban on wearing masks at unlawful assemblies to be constitutional, though it found the ban on facial coverings during lawful public gatherings as well as the power given to police officers to remove masks unconstitutional.

The Mask Regulation, which was an attempt to discourage and deter protestors from covering their face while committing violent acts, remains in force, though hardly any protests are now taking place because of social distancing restrictions related to Covid-19. At the same time, the Hong Kong government introduced regulation to obligate wearing of masks from 15 July 2020:[10] people were initially required to wear masks only while using public transport; this was later extended to include all indoor public places such as shopping malls, markets, shops and building lobbies; and finally, mask wearing was made mandatory in all indoor and outdoor public places, including public transport.

Government regulations to both obligate people to wear or not wear masks can restrict certain human rights, and people have been protesting

6 *Kwok Wing Hang v Chief Executive in Council* [2019] HKCFI 2820, para 11.

7 *Ibid*, para 193.

8 "No other authority has right to make judgments': China slams Hong Kong court's ruling on anti-mask law as unconstitutional' (19 November 2019), *https://www.scmp.com/news/hong-kong/politics/article/3038325/hong-kong-judges-slammed-chinas-top-legislative-body*.

9 'Court rules mask ban was partially unconstitutional' (9 April 2020), *https://news.rthk.hk/rthk/en/component/k2/1519807-20200409.htm*.

10 'Press Release: Prevention and Control of Disease (Regulation of Cross-boundary Conveyances and Travellers) Regulation and the Prevention and Control of Disease (Wearing of Mask) (Public Transport) Regulation gazetted' (14 July 2020), *https://www.info.gov.hk/gia/general/202007/14/P2020071400037.htm*.

in several countries about this issue. However, as not many human rights are absolute, regulations restricting rights could be justified if they (i) seek to serve a legitimate aim, (ii) are rationally connected to the aim, (iii) are no more than necessary in attaining the said aim, and (iv) strike a reasonable balance between the societal benefits gained and the inroads made into the protected rights.[11] The restrictions should also be applied in a non-discriminatory manner.

While dealing with the constitutionality of the Mask Regulation, the Court of Appeal tried to strike a reasonable balance. However, the real problem lies with very wide discretion enjoyed by police to approve or reject applications to organise public meetings or marches. If the Hong Kong police is perceived by public to be taking into account political considerations while exercising their discretion, even legitimate peaceful public assemblies would end up becoming 'unauthorised' and/or 'unlawful' and thus fall foul of the Mask Regulation. The same could be said about the existence of emergency powers under the ERO. What is problematic is not the mere existence of this power, but the exercise of such power by the Chief Executive without effective checks and balances, especially if she acts with Beijing's blessings.

In short, during the pandemic, the Hong Kong government's regulations about both wearing and non-wearing of masks have the potential to undermine human rights, if the power is exercised for politically motivated considerations, rather than for bona fide public interest. The risks become more real when both the executive and the legislature are not elected by universal suffrage, steps are taken to undermine the independence of courts and the media, and civic space is suppressed systematically (as discussed below).

III. Social distancing and the civic space to protest

Since February 2020, the Hong Kong government has issued and relaxed or tightened social distancing measures to regulate public gatherings. Most stringent measures were introduced with effect from 29 July: no public gatherings of more than two persons and complete prohibition on dine-in service in restaurants. It is interesting, however, that public transport – including

[11] *Hysan Development Co Ltd v Town Planning Board* [2016] 9 HKCFAR 372; *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* [2017] 5 HKC 242.

Mass Transit Railway (MTR) which is used by thousands of people at any given point of time – is excluded from this prohibition. Group gatherings to perform any governmental function are also exempted from this ban on public gatherings.

In recent years, Hong Kong has seen a range of political protests, so much so that the title of a prominent book labels Hong Kong as the 'City of Protest'.[12] The most recent saga of protests began in June 2019 as an 'opposition to a proposed extradition law that would have allowed the transfer of fugitives to mainland China'.[13] This then evolved and escalated into a wider anti-government protest, with increasing use of violence on the part of protestors as well as disproportionate use of force and exercise of arbitrary powers by the police.

However, it appears that the Hong Kong government has used the social distancing measures as a pretext to *close* at least three 'protest windows' during June-July 2020. Two of these windows have become an annual protest feature in Hong Kong: the June 4 vigil to honour the victims of the Tiananmen Square massacre, and the July 1 march to mark the handover of sovereignty over Hong Kong to China. The third window was created by the process of enacting the NSL by the National People's Congress and its Standing Committee in June without any consultation with the people of Hong Kong.[14]

On 1 June 2020, the Hong Kong police 'prohibited for the first time the annual June 4 vigil to honor victims of the pro-democracy Tiananmen Square protests in 1989'.[15] Although the pandemic situation in Hong Kong was generally under control during mid-April to mid-June with no (or only a few) new local Covid-19 cases being reported,[16] the police used the pandemic and social distancing norms to deny permission for this annual candlelight gathering. Nevertheless, thousands of people defied

[12] Antony Dapiran, *City of Protest: A Recent History of Dissent in Hong Kong* (Penguin, 2017). See also Antony Dapiran, *City on Fire: The Fight for Hong Kong* (Scribe, 2020).

[13] See 'Hong Kong Protests', *https://www.scmp.com/topics/hong-kong-protests*.

[14] See 'NPCSC Releases Some Details of Draft Hong Kong National Security Law, But Withholds Information on Criminal Provisions' (20 June 2020), *https://npcobserver.com/2020/06/20/npcsc-releases-some-details-of-the-draft-hong-kong-national-security-law-but-withholds-information-on-criminal-provisions/*.

[15] Austin Ramzy, 'Hong Kong Bans Tiananmen Vigil for 1st Time, in New Challenge to Protests' (4 June 2020), *https://www.nytimes.com/2020/06/01/world/asia/Hong-kong-Tiananmen-vigil-banned.html*.

[16] 'Latest situation of cases of COVID-19 (as of 28 July 2020)', Figures 2 and 3, *https://www.chp.gov.hk/files/pdf/local_situation_covid19_en.pdf*. See also *https://www.worldometers.info/coronavirus/country/china-hong-kong-sar/*.

the police ban and joined the vigil. The police subsequently charged 13 prominent opposition leaders for inciting people to take part in an unauthorised assembly on 4 June 2020.[17] This police action received wide condemnation globally.

On 27 June 2020, the Hong Kong police also denied permission to the Civil Human Rights Front to hold an annual march on the 1st July, including to protest against the enactment of the NSL.[18] The police cited the social distancing rule which prohibited gatherings of more than 50 people as one of the reasons behind its decision. Despite the ban, thousands of people who came out on streets to protest were met with aggressive police tactics to disperse the crowd, including arrests under the newly implemented NSL.[19]

In between these two annual protest windows, the Hong Kong government ensured that no plans to organise protests against the then proposed NSL materialised. The social distancing measures related to Covid-19 again proved handy in this regard. It was perhaps intentional that the Chinese government used the pandemic as an opportunity to move at an unprecedented pace to enact the NSL[20] and consequently managed dissenting voices much better.

A few examples of regulatory incoherence and selectivity on the part of Hong Kong government are worth noting here. While the 1st July march was banned despite the organisers willing to take proactive measures to guard against the potential spread of coronavirus, a cocktail reception and the flag-raising ceremony involving hundreds of people were held on the same day to celebrate 'the 23rd anniversary of Hong Kong's return from British to Chinese rule'.[21] Moreover, it is worth noting that the Hong Kong government did not put any restrictions on people using public transport (including

[17] Brian Wong, 'Hong Kong media tycoon Jimmy Lai and 12 others face incitement charges over June 4 Tiananmen vigil' (13 July 2020), *https://www.scmp.com/news/hong-kong/law-and-crime/article/3092957/hong-kong-media-tycoon-jimmy-lai-and-12-others-face*.

[18] 'Hong Kong national security law: police ban July 1 march planned to protest against legislation' (27 June 2020), *https://www.scmp.com/news/hong-kong/politics/article/3090848/hong-kong-national-security-law-police-ban-july-1-march*.

[19] Helen Regan and Joshua Berlinger, 'Protests break out in Hong Kong as first arrest made under new security law' (2 July 2020), *https://edition.cnn.com/2020/07/01/china/hong-kong-national-security-law-july-1-intl-hnk/index.html*.

[20] See '2020 NPC Session: NPC's Decision on National Security in Hong Kong Explained (Updated)' (28 May 2020), *https://npcobserver.com/2020/05/22/2020-npc-session-npcs-imminent-decision-on-national-security-in-hong-kong-explained/*.

[21] Tony Cheung et al, 'Hong Kong national security law: Carrie Lam says peace will return to city and vows to restore its battered reputation' (1 July 2020), *https://www.scmp.com/news/hong-kong/politics/article/3091294/hong-kong-leader-carrie-lam-attends-flag-raising-ceremony*.

MTR) – even wearing of masks in public transport was made mandatory only with effect from 15 July 2020.

Such selective crafting of exceptions raises questions about the politics behind such exceptions: if the Cvoid-19 situation in Hong Kong is serious enough, then these blanket exemptions for public transport or government functions do not make sense. Conversely, if people are allowed to use MTR or attend government functions on wearing masks, the same treatment could have been afforded to people proposing to participate in protests organised by pro-democracy groups.

In late July 2020, it was reported that the government was considering to postpone the Legislative Council elections scheduled for early September 2020 due to the Covid-19 situation.[22] Doing so will be quite controversial and problematic, not least because this would amount to using the Covid-19 as an excuse to shield pro-establishment political parties from suffering likely defeat in elections.

IV. Conclusion

The analysis in this piece shows that like many other governments, the Chinese government as well as the Hong Kong government have used the Covid-19 pandemic as an opportunity to curtail legitimate constitutional rights guaranteed under the Basic Law as well as the Bill of Rights Ordinance. It is yet to be seen whether these restrictions on human rights will become the 'new normal' for Hong Kong, especially because of the NSL. There are some early indications that going forward the freedoms enjoyed by Hong Kong people, pro-democracy political parties, civil society organisations, students, teachers and scholars, and the media will be curtailed in the post-Covid-19 era.

[22] Gary Cheung and Kimmy Chung, 'Hong Kong elections: will Legislative Council polls be postponed, and who stands to gain?' (29 July 2020), *https://www.scmp.com/news/hong-kong/politics/article/3095018/hong-kong-elections-will-legislative-council-polls-be*.