

The Battle for Jurisdiction over Hong Kong

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The battle over Hong Kong between China and British institutions over Hong Kong is not over. A legacy of the colonial rule is a legal order with independent courts in the English common-law tradition. China has taken no steps to dismantle this legacy.

The “one country, two systems” framework established by the [Basic Law of Hong Kong](#) recognises the independent judicial power of the Courts of Hong Kong, the continuation of common law and the law-making powers of the Hong Kong legislative assembly. The independent judicial power vested in the courts includes that of final adjudication. The Basic Law states in Article 19 (2) that “The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.”

There is a latent inconsistency in the basic law in that Beijing’s National People’s Congress Standing Committee, “[which holds the final power to interpret the Basic Law, can curtail the Hong Kong courts’ jurisdiction or alter their composition by issuing an idiosyncratic “interpretation” of that law’s relevant provisions](#)”. Beijing’s National People’s Congress Standing Committee has now triggered its weapon to dismantle the independence of the courts of Hong Kong. The background to this is litigation arising over measures adopted by the Chief Executive of Hong Kong to quell the ongoing demonstrations in Hong Kong.

As On November 18th, the High Court of Hong Kong [ruled on the constitutionality and legality](#) of the Emergency Regulations Ordinance and the Prohibition on Face Covering Regulation made thereunder. The Emergency Regulations Ordinance dates back to 1922 and the British rule, whereas the Prohibition on Face Covering Regulation was made by the Chief Executive of Hong Kong in council on 4 October 2019. The use of facial covering was not prohibited in Hong Kong before the Prohibition on Face Covering Regulation.

The High Court found that the Emergency Regulations Ordinance was incompatible with the Basic Law of Hong Kong in so far as it empowers the Chief Executive to make regulations on any occasion of public danger. To what extent it empowers the Chief Executive to make regulations in occasion of emergency was left open by the court. The court also found that the Bill of Rights are not suspended by the Emergency Regulations Ordinance, and that any measure adopted under it must comply with the Bill of Rights.

On the Prohibition on Face Covering Regulation the High Court concluded that the breadth of the prohibition against the use of facial covering of any type and worn for whatever reasons was disproportionate to the aims pursued. The court referred

to the absence of any mechanism for a case#by#case evaluation or assessment of the risk of violence or crimes, the lack of robust evidence on the effectiveness of the measure, and lastly the importance that the law attaches to the freedom of expression, freedom of assembly, procession and demonstration, and the right to privacy.

The court based its reasoning on jurisprudence from the European Court of Human Rights, the Human Rights Committee and on courts from common law jurisdictions. To the argument by the government referring to the grave public danger that the violence used by some protesters cause to Hong Kong the Court replied that “we consider that even in these challenging times, and particularly in these challenging times, the court must continue to adhere to and decide cases strictly in accordance with established legal principles”.

The Legislative Affairs Commission of the Standing Committee of the National People’s Congress reacted promptly. In a [statement 19 November](#) a spokesperson expressed “deep concern over the ruling by the High Court. “Whether a law of the HKSAR is in conformity with the Basic Law of the HKSAR can only be judged and decided by the NPC Standing Committee, and no other organ has the right to judge or decide,” the spokesperson said. The spokesperson went on to say that the Emergency Regulations Ordinance is consistent with the Basic Law, and that the ruling “has seriously undermined the legitimate power of the Chief Executive and the Government of the HKSAR to govern in accordance with laws, and is inconsistent with the Basic Law of the HKSAR and the relevant decisions of the NPC Standing Committee”.

This statement challenges the right of Hong Kong Courts to protect the citizens of Hong Kong against measures taken by the authorities of the special administrative region. The courts have already exercised considerable deference to the authorities. Now the battle is over whether they have an independent and final say over these issues at all. The basic law confers the right of Beijing’s National People’s Congress Standing Committee to review legislation passed by Hong Kong, and to invalidate it on the grounds that it is in in compliance with the basic law. The committee now seeks to extend this power and exercise it over the judiciary.

This approach is eerily similar of the approach taken by the German *Reichskommissar* against the Norwegian Supreme Court during the German occupation of Norway in 1940. The conflict started when the Reichskommissar decided to appoint a civilian government from the local Nazi party, and to use German military power to turn Norway into a National Socialist state. The Norwegian Supreme Court stated that this was *ultra vires* the rights of an occupying authority under international law. After attempts of court packing, the result was the collective resignation of the Norwegian judges. The events are documented in [my recent book](#) (in German) on the courts and the rule of law in Norway under German occupation.

The battle over jurisdiction that is developing over Hong Kong now is not only about protecting civil rights in Hong Kong during the current demonstrations and the measures taken by the authorities to control the situation. It seems that Beijing is about to capture the right to determine the development of Hong Kong by

disempowering its courts. The case has been appealed. Much depends on what the response of the Court of Appeals will be in this difficult situation.

