

## The New Battleground for Hong Kong's Political Independence: Beijing's Response to the Mask Ban

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The past nine months of protests in Hong Kong have elicited no shortage of condemnatory remarks from mainland China's media outlets. Official responses to the protests have tended to rely on tropes, such as American "black hands"<sup>1</sup> fostering "color revolutions"<sup>2</sup> in a bid to "challenge China's sovereignty"<sup>3</sup> or even "hurt the feelings of the Chinese people."<sup>4</sup>

Much of this party media rhetoric has been ignored by Euro-America media outlets and China watchers. This is understandable. Beijing seems to bring out the same jingoistic propaganda lines whenever the Chinese Communist Party (CCP) feels threatened, and given the current trade war, the United States is an obvious target for party-state ire. The same rhetoric of "black hands" and "color revolutions" was deployed by the CCP propaganda apparatus during the last round of pro-democracy protests in 2014.<sup>5</sup> By framing pro-democracy protests as lawless riots fomented by evil foreign forces, the party-state attempts to simultaneously discredit the protesters and their cause. This is part of a broader strategy to mobilize public opinion along "us versus them" lines, which in turn aims to bolster CCP legitimacy through the "rally 'round the flag" effect.

On occasion, Beijing's propaganda regarding the Hong Kong protests has been shrill enough to attract Euro-American media coverage. In early August, Beijing warned protesters not to "underestimate the firm resolve [of] the central government," a cryptic message

appearing to warn against party-state retaliation.<sup>6</sup> After violent protests on the 70th anniversary of CCP rule, Secretary General Xi Jinping remarked that "Anyone who attempts to split any region from China will perish, with their bodies smashed and bones ground to powder."<sup>7</sup> Despite Xi's colorful remarks, however, Euro-American media coverage of Beijing's response to the protests remained fleeting at best.

It is notable, then, that a brief, Chinese-only statement on the protests from Zhang Tiwei, spokesperson of the Legislative Affairs Committee of the Standing Committee of the National People's Congress (NPCSC), elicited a strong and sustained response from Euro-American China watchers and reporters.<sup>8</sup> The statement, published on November 19 by *Xinhua*, China's official state-run press agency, warned that a ruling by the Hong Kong High Court<sup>9</sup> (CFI) overturning the Hong Kong government's ban on face masks at public gatherings had "severely weakened" the special administrative region's capability to govern, and asserted that only the central people's government is entitled to interpret Hong Kong's constitution.

The NPCSC statement constitutes Beijing's most dramatic affirmative measure regarding the Hong Kong protests to date. This point has been widely acknowledged by Western media, and merits sustained attention from Euro-American analysts. This brief outlines the context, meaning, and potential effects of the NPCSC's November 19 statement. If enforced, the NPCSC's



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statement may signal the extension of unchecked central dictatorship over Hong Kong's political apparatus. This drastic response to the CFI's mask ban ruling—an appealable decision regarding an ineffectual policy measure – demonstrates Beijing's resolute determination to crush the Hong Kong protests, and indicates that the stakes may be even higher than protesters previously thought.

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## BACKGROUND: THE PROTESTS

The statement in question was delivered by the NPCSC in response to a judgment delivered the previous day by the CFI, in which two judges struck down an executive ordinance issued by Hong Kong's chief executive, Carrie Lam, under the 1922 "Emergency Regulations Ordinance" (ERO).<sup>10</sup> The effect of the ordinance, known formally as the "Prohibition on Face Covering Regulation" (PFCR) and colloquially as the "mask ban," was to prevent individuals from wearing face coverings to public meetings, and requiring that individuals wearing masks remove them if a police officer so demanded.

Lam had implemented the mask ban following several months of unrest related to the HK government's attempt to pass sweeping extradition legislation earlier this year. In February 2019, Hong Kong's government announced its intention to amend Hong Kong's extradition law in a way that would allow for case-by-case extraditions to mainland China. Fearing exposure to a legal system where conviction rates are upwards of 99%, and Stalin-esque forced confessions remain commonplace, thousands filled the streets of Hong Kong in late March to protest against the proposed bill.<sup>11</sup> The protests rapidly escalated as Lam's government refused to back down from its pro-extradition position, and Lam withdrew the bill in early September.<sup>12</sup>

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## THE MASK BAN

Throughout the protests that led to the withdrawal of the extradition bill, including the July 1 storming of Hong Kong's

legislature and July 16 march featuring nearly two million Hong Kongers, protesters frequently wore masks to maintain their anonymity and defend themselves from tear gas.<sup>13</sup> After massive protests marred the 70th anniversary of CCP rule on October 4, during which the Hong Kong Police Force (HKPF) used over 1,400 canisters of tear gas in a single day and shot a student protester, Lam promulgated the mask ban.<sup>14</sup>

When the mask ban went into effect on October 5, 24 members of Hong Kong's legislative council applied to the CFI for judicial review of the executive ordinance. The legislators' petition, which was subsequently joined with another petition from a veteran activist, challenged the mask ban on six discrete legal grounds. On November 18, Judges Godfrey Lam and Anderson Chow published the CFI's opinion, upholding three of the six grounds raised by the petitioners. It was this opinion to which the NPCSC responded the next day.

Between the filing of the petition and the CFI's decision, the mask ban was widely ignored. The recent sieges of the Chinese University of Hong Kong and Hong Kong Polytechnic University<sup>15</sup> make it clear that the mask ban did little to disincentivize protesters in general, and nothing to prevent them from wearing masks in particular.

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## LEGAL HISTORY

To fully grasp the implications of the CFI's ruling, and the potential ramifications of the NPCSC's subsequent statement, a quick legal history lesson is in order.

Hong Kong was a British colony until 1997. In 1984, the British and Chinese governments agreed to the Sino-British Joint Declaration, which stipulated that Hong Kong would be restored to Chinese sovereignty on July 1, 1997, with several important conditions. Section 3(3) of the joint declaration guaranteed Hong Kong's right to maintain an independent judiciary, and stipulated that "laws currently in force in Hong Kong will remain basically unchanged." Section 3(1), however, required that Hong Kong's territorial status as a "special administrative region" (HKSAR) of

the People's Republic of China (PRC) was subject to Article 31 of China's constitution, which in turn states that "The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress (NPC) in the light of the specific conditions." The broad language of Article 31 is characteristic of Chinese legislation, and appears to be designed to afford the NPC, China's party-dominated rubber-stamp legislature, the widest possible latitude to control its special administrative regions.

When sovereignty over Hong Kong was formally transferred from the United Kingdom to the PRC in 1997, the "Basic Law" replaced the colonial Letters Patent and Royal Instructions as Hong Kong's effective constitution. The Basic Law continues to serve as the touchstone of Hong Kong's effective legal system. It confirms that Hong Kong will continue to have an independent judiciary (Article 2), and that laws previously in force in Hong Kong remain in force to the extent that they do not contravene the rest of the Basic Law (Article 8). Article 19 complements Article 2, stipulating that HKSAR will be vested with independent judicial power. Article 85 expressly indicates that Hong Kong's courts should operate free from interference, a narrower application of the broad principle established in Article 22, which stipulates that the Chinese government shall not interfere in Hong Kong's affairs.

The Basic Law also furnishes certain "inviolable" rights and protections for Hong Kong citizens (Article 28), complemented by Hong Kong's effective adoption of the International Covenant on Civil and Political Rights in the 1991 Hong Kong Bill of Rights Ordinance.

Certain sections of the Basic Law, however, clearly allow the CCP to influence Hong Kong's political process, as well as its judiciary. Article 11 refers to the aforementioned Article 31 of the Chinese constitution, and Article 158 explicitly vests the National People's Congress Standing Committee (NPCSC) with the power to interpret the Basic Law. Article 158, however, only explicitly allows the NPCSC to interpret the Basic Law when such guidance is requested by the Hong

Kong judiciary, and enshrines the Hong Kong courts' ability to interpret their own constitution. Article 160 allows the NPCSC to determine whether or not pre-existing laws contradict the Basic Law.

The NPCSC has utilized its powers under Articles 158 and 160 of the Basic Law, and more broadly Article 31 of China's constitution, to influence Hong Kong's judiciary on several occasions since 1997.<sup>16</sup> In 1999, the NPCSC effectively overruled a Hong Kong Court of Final Appeal decision regarding the right of abode for children of permanent residents, siding with the CCP's handpicked chief executive over the "independent" judiciary.<sup>17</sup> In 2004, the NPCSC issued an unprompted interpretation of two annexes to Article 45 of the Basic Law, governing electoral reforms that would ensure universal suffrage in the election of the SAR's chief executive.<sup>18</sup> Despite the absence of a request for guidance (as required by Art. 158 Basic Law), the NPCSC interpreted the annexes so as to snuff the Basic Law's guarantee of universal suffrage. In the 2011 Hemispheres case, a Hong Kong Court of Appeal decision was overturned by the Court of Final Appeal after the CFA requested an interpretation from Beijing regarding Hong Kong's sovereign immunity standard.<sup>19</sup> Prior to the 2011 case, Hong Kong adhered to a "restrictive" theory of immunity according to the UK's 1978 State Immunity Act. The NPCSC does not appear to have identified the act as "incompatible" with the Basic Law in 1997, but this did not stop the organ from invalidating the legislation 14 years later.

In 2016, the NPCSC issued another unprompted interpretation regarding the Hong Kong High Court's pending decision on the status of two legislators-elect to Hong Kong's Legislative Council.<sup>20</sup> The two lawmakers had been disqualified from office for advocating Hong Kong independence during their swearing-in, and the Hong Kong government sought a judicial review application to prevent the lawmakers from retaking their oaths. Before the high court could rule, the NPCSC issued an interpretation banning the legislators-elect from assuming office, sparking widespread protests.

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The NPCSC's recent mask ban interpretation is not the first time that the CCP has relied on an extraordinarily broad construction of its powers under the Basic Law to intervene in Hong Kong's judiciary. The November 19 interpretation, however, may very well be the party's most brazen, and most consequential, intervention to date. For an indication of why this might be the case, we turn to the CFI's judgment.

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### THE JUDGMENT

The CFI heard six arguments from 25 petitioners. Three of the arguments asserted that the mask ban was unconstitutional because of the procedure used to promulgate it, and another three argued that the ban was invalid as a matter of legal principle. The judges, after considering all six arguments, ruled in favor of the petitioners on three of them.

First, the court held that the Emergency Regulations Ordinance (ERO), which Lam had used to promulgate and enforce the mask ban, was incompatible with Hong Kong's Basic Law. The ERO empowers Hong Kong's chief executive to make and enforce regulations that circumscribe basic rights so long as the executive "considers" an "occasion of emergency or public danger" to exist. Judges Lam and Chow held that the ERO, where enforced on the subjective "public danger" criterion, created an unconstitutional delegation of legislative power to the executive branch. Given the breadth of the ERO—"public danger" is not defined anywhere in the applicable statutory law, and "consider" is an extremely flexible term—the court found that the ERO, when exercised on the grounds of "public danger," effectively created "a separate source of laws that are primary legislation in all but name."

While case law from the colonial era had upheld the ERO on multiple occasions, the CFI found that Hong Kong's constitutional order under the Basic Law was substantially different from that under the colonial Letters Patent and Royal Instructions, such that the ERO was incompatible with the Basic Law. The court rejected the (Hong Kong) government's assertion that Article 160 of

the Basic Law endowed the NPCSC with the exclusive right to find laws incompatible with the Basic Law, holding that the NPCSC's decision not to declare the ERO unconstitutional in 1997 did not preclude the CFI's ability to subsequently find the legislation incompatible with the Basic Law.

Second, the court held that sections 3(1)(a), (b), (c) and (d) of the mask ban were unenforceable as a matter of legal principle. These sections prohibited citizens from wearing face coverings to authorized, peaceful demonstrations. Lam and Chow held that the mask ban's abrogation of the rights to privacy, freedom of expression, and peaceful assembly was not proportional to the "legitimate aims" sought by the ordinance, especially in light of the lack of evidence regarding the measure's effectiveness.

The court applied a similar line of reasoning to Section 5 of the mask ban, which required citizens wearing masks to uncover their faces at the request of police officers. Lam and Chow held that, especially given the lack of limitations on this exercise of police power (in the UK, for instance, a police officer must be of a certain rank to demand that citizens remove face coverings), Section 5 of the mask ban exceeded the scope of "reasonable" means to achieve its legitimate aim of law enforcement. Put more simply, the court held that the mask ban failed to appropriately balance the abrogation of individual rights of privacy, freedom of expression, and freedom of assembly, with the dubious societal benefit of fewer anonymous protesters.

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### THE CCP'S RESPONSE

Of the CFI's three holdings in favor of the petitioners, the NPCSC's November 19 response appears to be aimed at one in particular: the ruling that "The ERO, insofar as it empowers the CEIC to make regulations on any occasion of public danger, is incompatible with the Basic Law."

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Article 158 of the Basic Law—takes aim not at the CFI's particular interpretation of the Basic Law, but rather the HK judiciary's authority to interpret the Basic Law more broadly. In a single extraordinarily brazen stroke, the NPCSC appears to assert that the Hong Kong judiciary no longer has the authority to interpret its own constitution:

“香港特别行政区法律是否符合香港基本法，只能由全国人大常委会作出判断和决定，任何其他机关都无权作出判断和决定”。

*Or in English:* “Whether the laws of the Hong Kong Special Administrative Region are compatible with the Basic Law can only be determined and decided by the Standing Committee of the National People's Congress: All other organs have no right to make such judgments and decisions.”

This is the crux of the NPCSC's “interpretation.” The CCP does not take issue with the CFI's application of the proportionality test to the mask ban, or even its eventual finding that the mask ban should be voided. Instead, the commanding heights of the Chinese party-state are sending a message that only the NPCSC has the authority to determine the constitutionality of Hong Kong's laws.

The NPCSC applies its reasoning to the ERO in particular, claiming (as Hong Kong's government did before the CFI) that because the NPCSC did not explicitly find the ERO to be incompatible with the Basic Law in 1997, Articles 8 and 160 of the Basic Law together suggest that the ERO cannot subsequently be held unconstitutional. This line of reasoning appears to rely on the principle that all laws that precede the Basic Law, and that have not been found unconstitutional by the NPCSC itself, remain on the books unless Beijing says so. The NPCSC's position appears to be one of political convenience, rather than legal principle, since it seems to directly contravene the committee's interpretation in the 2011 Hemispheres case.

The potential political implications of the NPCSC's declaration cannot be understated. Democratic systems with a separation of powers rely on an independent judiciary to check the lawmaking authority of the

legislature and executive branches. This is only possible where courts have authority to interpret all laws promulgated by the other branches. Beijing is claiming that, in a system where it controls the appointment of the executive (due in no small part to its 2004 interpretation of the Basic Law), and that executive has power to rule by fiat under the ERO, Hong Kong's courts have no authority to use the Basic Law to balance executive power. The NPCSC's line of reasoning has the potential to expand Beijing's influence over Hong Kong to the point of unchecked dictatorship.

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## IMPLICATIONS

Protestors initially demonstrated against the extradition law because they saw it as a further infringement upon the rapidly eroding liberties guaranteed by the Sino-British Joint Declaration and Basic Law. Hong Kongers' fears with respect to extradition were recently validated by the CCP's detention and torture of a Hong Kong national and British consular official, Simon Cheung, after he observed anti-extradition protests at the request of the British consulate.<sup>21</sup>

The NPCSC's November 19 statement, whether authoritative “interpretation” or not, indicates that the stakes are far higher than the protestors may have imagined. Instead of the occasional kidnappings and torture of Hong Kong citizens (no prize in and of itself), the protestors are now fighting against the imposition of China's uniquely cruel brand of justice on their own territory.

While Euro-American analysts are finally starting to give Hong Kong protestors the attention they are due, protestors have long suspected that they are fighting not against a single extradition law or chief executive, but for universal suffrage and freedom from CCP domination more broadly. This conviction was reflected in the tidal wave of support for pro-democracy lawmakers in Hong Kong's late-November district council elections.<sup>22</sup>

Pro-democracy activists, however, face an uphill battle. The United Kingdom, instead of pressuring China to honor the Sino-British Joint Declaration, has busied

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itself advertising for Huawei,<sup>23</sup> and trying to keep political tensions from torpedoing the deal to sell British Steel to a Chinese competitor.<sup>24</sup> Cambridge's Wolfson College has publicly refused to revoke Lam's honorary doctorate.<sup>25</sup> After he was tortured while in China on embassy business, Simon Cheung was dismissed by the Foreign & Commonwealth Office for his trouble.<sup>26</sup> The United States, for its part, recently passed the Hong Kong Human Rights and Democracy Act (HKHRD),<sup>27</sup> and several lawmakers (most notably Josh Hawley and Ted Cruz) have been ardent in their support of pro-democracy protestors, but meaningful international support for the movement has been minimal thus far.

As the protests have escalated over the course of the summer and into autumn, it has become increasingly clear that pro-democracy activists have sought to apply pressure to Beijing directly, in addition to the less-than-representative government of the SAR itself. Petitioning for Lam's resignation, defacing PRC symbols at the Legislative Council and Liaison Office,<sup>28</sup> toting American flags to protests,<sup>29</sup> drawing explicit allusions to the taboo Tiananmen massacre of 1989,<sup>30</sup> and putting direct pressure on U.S. lawmakers to pass the HKHRD are all evidence of democracy activists' full-court press against Beijing. The NPCSC's November 19 ruling is the clearest indication yet that the protesters have succeeded in drawing the party-state's political attention, in addition to its propaganda aspersions.

The November 19 statement also demonstrates the immense paranoia that will likely characterize the CCP's response to future protests in Hong Kong. The NPCSC responded to a ruling upholding an ineffective mask ban by drastically reasserting Beijing's authority over Hong Kong's judiciary. In response to a temporary setback in the enforcement of a feckless policy measure (the Hong Kong government will almost certainly appeal), the Zhongnanhai felt compelled to strip Hong Kong courts of the ability to interpret their own constitution, and empower their puppet leader to rule by executive fiat.

The last time the CCP exhibited a similar degree of paranoia was in 1989. As is well known everywhere but the very country where it occurred, the CCP resolved student protests in spring and summer of that year by ordering the People's Liberation Army (PLA) to massacre hundreds or thousands of peaceful protesters in central Beijing.<sup>31</sup> But even the 1989 travesty does not do justice to the CCP's present level of paranoia. Back in 1989, paramount leader Deng Xiaoping was surrounded by handpicked "yes-men" in the PLA, but also had to contend with senior party leaders like Zhao Ziyang, who opposed the regime's decision to murder student demonstrators.<sup>32</sup> The contemporary consolidation of power under "People's Leader" (人民领袖) Xi Jinping has already far eclipsed that of Deng.<sup>33</sup> Despite his "red first generation" credentials and uniquely powerful "commissar" status, even Deng was unable to engineer the detention of millions of Chinese citizens in domestic concentration camps,<sup>34</sup> or discipline over a million party cadres (many of them political rivals) in a sweeping "anti-corruption" campaign.<sup>35</sup>

What we are witnessing in Hong Kong could very well be every China watcher's worst nightmare with respect to the past half-decade of power consolidation under Xi Jinping. If Xi wakes up one morning and decides to send the PLA down from the mainland to liquidate the Hong Kong protests, there is every indication that such an order would be unflinchingly obeyed. Hong Kongers wanted Beijing's attention, and now they have it. The stakes have never been higher.

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