Surviving Executive-Led Pandemic Control in Executive-Led Hong Kong

A Year in Review

Pui-yin Lo

03.03.2021 doi: 10.17176/20210303-154036-0

Hong Kong was one of the front urban regions that recorded COVID-19 cases in early 2020. One year later, there were recorded over 11,000 confirmed cases and 200 deaths. At the time of writing, this Special Administrative Region of the People's Republic of China is struggling with the fourth wave of infections, which is the most virulent thus far, due to the combination of community spread initiated a cluster of dancing instructors and students, and the infiltration of the coronavirus, finally, into the least hygienic environs of the built-up areas. In contrast, the first and the second wave of infections were due to inbound passengers into Hong Kong from Mainland China and the rest of the world other than Mainland China respectively. The third wave was probably a combination of persons, like crews of vessels, having been allowed to enter and stay in Hong Kong for short durations *sans* quarantine for transit, and sporadic community transmission, as restrictions were then being eased for re-invigorating the local economy.

Pandemic Control by Executive Rule-Making

As Geoffrey Yeung stated in his contribution to *Verfassungblog* in April 2020, the Hong Kong Government's responses to the COVID-19 pandemic have been based on executive rule-making pursuant to pre-existing statutory authorizations. The principal piece of legislation here is the Prevention and Control of Disease Ordinance (Chapter 599, Laws of Hong Kong), which was made in 2008. Under this legislation, regulations have been made, in phases (and amended from time to time), to impose compulsory quarantine of arriving passengers, to require disclosure of information from patients and passengers, to enforce social distancing in catering businesses and their premises (including restrictive powers on opening hours, seating, etc.), to make directions on the mode of operation of premises like cinemas, clubs, fitness centres and beauty parlours, to prohibit gatherings of more than a specified number of persons in public places, to prohibit aircrafts and vessels from landing or entering Hong Kong and its waters, to require the wearing of masks in public transport and specified public places, to require compulsory testing of persons (including by declaring, without prior notice, an area in Hong Kong to be subject to 'restriction-testing', a measure better known as 'ambush lockdown' for COVID-19 testing of every person found within the area), and to authorize the emergency use of COVID-19 vaccines. Most of these regulations, and the directions made under any of them, are of limited duration, and require extension by the executive rule-maker if they are to continue.

Legislative Consideration of Pandemic Control Measures

A subcommittee of the Legislative Council, Hong Kong's legislature, was formed in May 2020 to conduct scrutiny of the regulations made for the prevention and control of COVID-19 in Hong Kong. Meetings of the subcommittee (with reports up to July 2020 and up to date) allowed queries and exchanges be made with the executive authorities on the contents and merits of the regulations, as well as on the effects of the measures, including the relief measures for the businesses affected by the restrictions. Thus far, none of the regulations have been amended by the Legislative Council.

Judicial Challenges to Pandemic Control Measures

Judicial control of the regulations is available through review of the constitutionality and legality of them. However, in the course of 2020, there were only 6 applications to the courts challenging the prohibition of group gatherings, decisions to require categories of arriving passengers to be quarantined at a designated quarantine centre, the decision to exempt thousands of sailors to enter Hong Kong without compulsory quarantine, the terms of the Government's employment subsidy scheme to support the economy, and the requirement of wearing of masks in public places. Most of these applications were conducted without legal representation and thus failed to articulate detailed grounds. The Hong Kong Court of First Instance, in short judgments, did indicate that it considered the prohibition of group gatherings and the requirement of wearing of masks in public places to be proportionate responses to legitimate societal aims and thus consistent with the Hong Kong Basic Law and constitutional.

Two cases concerning compulsory quarantine at designated centres of arriving passengers were argued at some length, with the Court of First Instance concluding that, constitutionally, the decision to require a Hong Kong permanent resident to be quarantined at a quarantine centre was a proportionate restriction on personal liberty for protection of public health; and that administratively, the regulation empowering such decisions to be made was not outside the scope of the empowering legislation and would not authorize arbitrary detention, and the decisions that were made did have regard to individual circumstances. It is notable that the Court of First Instance adopted, here, the less rigorous standard of 'manifestly without reasonable foundation' in reviewing the extent of the restriction in the impairment of personal liberty (i.e. the component of *Erforderlichkeit* in the German concept of proportionality); and considered that the executive authorities were entitled to take a cautious approach in entertaining requests for individualized consideration.

General Election of Legislature Postponed

Of the measures taken by the Hong Kong Government in the name of prevention of disease and protection of public health in 2020, the one of the most political impact was the postponement of the general election of the Legislative Council. Electoral laws were overridden by a regulation made under the Emergency Regulations Ordinance (Chapter 241, Laws of Hong Kong) so that instead of the election being held in September 2020, it would be held in September 2021. In the meantime, the Legislative Council that was supposed to be outgoing was allowed by decision of the Standing Committee of the National People's Republic of China to continue to operate beyond its term for not less than 1 year until the new term of the Legislative Council begins. This decision overrides the term limit stipulated in the Hong Kong Basic Law. The Chinese Central Authorities thereafter resolved on the qualification of the members of the Legislative Council, and directed this decision to apply to those members of the Legislative Council in the continuing Legislative Council whose candidature nominations were rejected on allegiance grounds before the Hong Kong Government made the decision to postpone the general election. And, as it now well known, the Hong Kong Government announced on 11 November 2020 that 4 such members of the Legislative Council had lost their seats in this way, and 20 odd of their colleagues, constituting the bulk of the so-called 'pro-democracy' opposition in the council, resigned their seats in solidarity. There have been no challenges to these decisions in the Hong Kong courts.

Observations

It might seem remarkable that on the facts of Hong Kong's population density of over 7.5 million people living in 276 square kilometres constituting the 25% developed land of the total land area of the region, the pandemic's footprint on Hong Kong could be described as light. It might also seem remarkable that Hong Kong has not resorted to the long duration general lockdown measures adopted in the United Kingdom, Australia, Canada and many European Union countries or

regions, with less drastic impact on the transaction of business (except catering and entertainment). Indeed, the Hong Kong courts have stayed open in 2020 with the exception of two periods of 'general adjournment' between January and May and two days in July.

Yet, it can be stated that while the Hong Kong Government has the adequate legal instruments to quarantine and test arriving passengers and persons in Hong Kong by a specification that can be related to a clinically described criterion, the common criticism against it has been that it was partly responsible for the third and the fourth waves of COVID-19 infections in the region because of the exemptions it allowed in the regulations it made. Then, as the number of infections surged in the last months of 2020, the governmental responses have become more concerning, intrusive and coercive. Apart from 'ambush lockdown' described above (which involves deployment of a combined force of police officers, public health officers and COVID-19 test contractors at the declared area at 7pm sharp with the aim of completing the testing within 12 hours), there has emerged soft measures that the Government would have Hong Kong residents to adopt as part of the 'new normal', without too much questioning of the implications to personal freedom and potential applications in 'enhanced' forms. For example, a tracing mobile app for venue registration could well become, through service provision-related 'nudging', a requisite for persons in Hong Kong visiting government buildings, public facilities and business premises, and using public transport like taxis, with potential implications on personal information privacy and governmental monitoring of the population.

Another form of public advocacy involves coordinating with the neighbouring regions of China, which appear to have controlled the pandemic much better than Hong Kong. Having assessed Hong Kong to be of higher risk, they have imposed quarantine restrictions on arriving passengers from Hong Kong. For resumption of visiting, Hong Kong has to do its utmost to suppress the coronavirus within and to accept the conditions demanded from these neighouring regions, including exchange of public health related personal data of visitors.

Checks on the executive rule-making and the executive actions according to the rules made appear to be inhibited. The legislature's scrutiny of the regulations has become less skilled and organized due to the departure of some of the more experienced legislators by resignation. The court's review of constitutionality and legality has appeared to be deferential and cautious in recognition of either the expertise and information the public health authorities have or the lack of institutional competence on the part of the courts to evaluate on the factual, evaluative or predictive matters.

2021 Outlook

Hong Kong suffered in 2020 a systemic shock to its system of governance. Further measures are to be legislated to ensure the national loyalty of the politically active, including those who wish to participate in the upcoming elections to the Legislative Council and to the Election Committee that will elect the Chief Executive, the region's leader and head of its executive authorities, for appointment by the Chinese Central Government.

Courts remain functioning in Hong Kong on Rule of Law values. However, as the discussion above shows, they have so far felt less than able to check and second-guess the executive rule-maker.

What is left on the table is probably the hallowed option of self-restraint and periodic reviews by the executive authorities who make the regulations discussed above. They have consulted respected public health experts, who act on verified scientific information, but have not followed each and every of their recommendations.

Vaccines are needed to help Hong Kong to weather out of the pandemic. Governmental procurement and authorization efforts have been lacklustre. The optimistic earliest arrival date of the first batch of BioNTech vaccines is late February 2021. There is now a clamour from politicians here for the Chinese Central Government to help procure and distribute SinoPharm vaccines to Hong Kong notwithstanding that the scientific information of its protection has not been made available in peer reviewed format. On the one hand,

this seems to indicate of a readied tendency to seek and depend on the support of the Chinese Central Authorities. On the other hand, if the Chief Executive requests on behalf of Hong Kong and the Chinese Central Authorities respond with full support, this will strengthen the Chinese conception of Hong Kong's political system as 'executive-led'.

ABOUT THE AUTHOR

Pui-yin Lo

Dr. Pui-yin Lo is a barrister in private practice in Hong Kong and a part-time lecturer of the Faculty of Law of the University of Hong Kong.Dr. Pui-yin Lo is a barrister in private practice in Hong Kong and a part-time lecturer of the Faculty of Law of the University of Hong Kong.

SUGGESTED CITATION

Lo, Pui-yin: Surviving Executive-Led Pandemic Control in Executive-Led Hong Kong: A Year in Review, Verfassungsblog, 03.03.2021, doi: 10.17176/20210303-154036-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20210303-154036-0.