

Hong Kong Human Rights Monitor

Submission for the Universal Periodic Review of the People's Republic of China (Hong Kong Special Administrative Region) scheduled to be held in March 2009

Introduction

1. After the Handover of Hong Kong's administration to the People's Republic of China in 1997, China has adopted a 'One Country, Two Systems' policy in which Hong Kong was promised a high degree of autonomy and institutions for preserving its way of life, including a legal system distinct from Mainland China. This report provides a brief overview on the major human rights concerns in Hong Kong over the recent years. It highlights six areas of concern: A). democracy and the rule of law; B). police abuses and complaints handling system; C). press freedom; D). the racial discrimination law; E). the rights of migrant workers; and F). the Women's Commission and a Human Rights Commission.

A). Democracy and the Rule of Law

2. The Sino-British Joint Declaration promises the continuation of a Common Law legal system in Hong Kong. One key feature of a Common Law system is that no one other than the Court has the power to declare what the law is. No one, including the legislature or the executive, other than the judiciary itself can impose a binding interpretation of the law on the judiciary whether before, during or after a court case. Contrary to this promise, the Basic Law, the mini-constitution of Hong Kong adopted by the national parliament purportedly to implement the Joint Declaration, requires the Hong Kong judiciary to be bound by the interpretation of the Basic Law (BL) by the NPCSC.
3. Worst of all, in the three instances of interpretation so far after the handover, two of them have clearly led to serious violations of the human rights guaranteed to a large number of families and individuals. The most recent interpretation was on 6 April 2004 in which the NPCSC reinterpreted Art.45 and Art.68 BL. Its subsequent decision dated 26 April 2004 ruled out universal suffrage for the CE in 2007 and all the seats of the Legislative Council ('LegCo') in 2008.¹ In December 2007, relying on the said interpretation, the NPCSC further ruled out universal suffrage for electing the CE and the whole LegCo in 2012. More than three million eligible voters have been deprived of the right to universal suffrage. The electoral system of restricted franchise maintained by the interpretations and decisions has been repeatedly criticised by the UN Human Rights Committee to be inconsistent to several articles of the ICCPR in 1995, 1999 and 2006. In the first interpretation in 1999, hundreds of thousands of individuals were deprived of the right of abode recognized in the ruling of the Court of Final Appeal ('CFA'), barring the split families from reuniting.² Both the UN Human Rights Committee (HRC) and the UN Committee on Economic, Social and Cultural Rights (CESCR) have expressed concerns on the impact on human rights of the interpretation mechanism in 1999 and 2001 respectively. The HRC also urged in its 2006 concluding observations, **'The HKSAR should ensure that its policies and practices regarding the right of abode fully take into consideration its obligations regarding the right of families and children to protection enshrined in articles 23 and 24 of the Covenant.'** It also recommends, **'All necessary measures should be taken whereby the Legislative Council is elected by universal and equal suffrage. It should be ensured that all interpretations of the Basic Law, including on electoral and public affairs issues, are in compliance with the Covenant.'**

B). Police Abuses and the Defective Mechanisms to Handle Complaints against Police Officers

¹ See 'Decision of the Standing Committee of the National People's Congress on issues relating to the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in the year 2007 and for forming the Legislative Council of the Hong Kong Special Administrative Region in the year 2008,' available at http://www.info.gov.hk/basic_law/fulltext/0426npcsc_e.pdf.

² According to a Government Press Release 'Interpretation: A "legal and constitutional" option' dated 18 May 1999, about 1.5m individuals have been striped the right of abode in Hong Kong. For our own estimate, see: **New Survey on Right of Abode Casts Doubt on Government's 'Taxi Method' Survey** (<http://www.hkhrm.org.hk/english/reports/press/pr181099.html>).

4. Police abuses have been a common phenomenon in Hong Kong. Recent cases have ranged from arbitrary strip searches to torture.
5. Arbitrary body searches, including strip searches, became a common means for the Police to demonstrate and exercise authority in Hong Kong. Over the past couple of years, victims of arbitrary strip searches included sex workers and cultural preservationists. During 2004-2005, Ziteng, a local NGO for rights of sex workers recorded 19 complaints of strip searches while the number of complaints soared to 90 in 2007 (of which 22 complained of being strip searched 3 times in 24 hours and 3 complainants, 4 times in 12 hours). On 5 October 2007, 15 peaceful environmental protesters who demanded a halt to an under-consulted urban redevelopment demolition programme were arrested for obstruction of a public place and obstructing a police officer in the due execution of duty and were detained overnight. It was reported that a female was strip searched within the sight of a male officer who had verbally sexual harassed her before the search, while a male protestor has been strip-searched twice during which he was ordered to lift up his genitals.³
6. In July 2008, the administrative guidelines in the Police Standing Orders and the Force Procedural Manual were amended to provide certain procedural safeguards under strong public resentment over such incidences. However, the new guidelines lack the force of laws, a blatant disregard of the Hong Kong Law Reform Commission's proposals for legislative protection in its Report on Arrest issued many years ago. Worst of all, the guidelines provide for a routine repeated searches of the person arrested, first at the time of arrest, then when he was taken to a police station, and then every time when he was put into or returned to a police temporary holding area without any need for the police to consider the necessity of such searches. Nor reasonable suspicion is required in the searches.
7. In August 2008, the assistant of a District Councillor was acquitted of the charge of assaulting a police officer; the Magistrate was convinced that the accused was being beaten up inside a room at the police station by a police officer who was yelling 'assaulting police officers' in inflicting the beating. The Magistrate highlighted the testimony by a reporter arrested in the same case that the yells have been ignored by the police officers outside the room. This lack of response has shocked society because it strongly suggests that this way of torturing a detainee while yelling 'assaulting police officers' is by no means an isolated incident and similar practices are familiar to and have been accepted by other officers in the same police station if not also the police force.
8. In the current system, all complaints against the police in Hong Kong are referred to the Complaints against Police Office ('CAPO') which is a branch of the police force having jurisdiction over complaints against police officers. The conflict is obvious - CAPO is too convenient a place for the Police to dismiss complaints.
9. Although the Independent Police Complaints Council (IPCC) purports to be a civilian oversight body, it is basically empowered to study investigation reports, review the classification of investigations (on whether it is substantiated or not), to give non-binding advice the CAPO to reconsider complaint classifications and on measures against police officers found to be at fault. The IPCC has been persistently denied by the Hong Kong authorities the power to investigate incidents of police impropriety.⁴ In this respect, both the HRC and the Committee Against Torture (CAT) has expressed its concerns over the lack of competence of the IPCC and the lack of impartiality of the complaints mechanism for 'leaving the complaints procedure at the hands of the Police.'⁵

³ See 'Police Strip-Search Slammed,' Sing Tao Daily 2007-11-07.

⁴ The first Independent Police Complaints Council Bill (IPCC Bill) for Hong Kong was introduced into the LegCo for enactment in 1996. It has been withdrawn in disgrace by the Government in 1997 after an amendment was passed by the LegCo to empower the IPCC to conduct investigation of complaints against the police. The revised Bill was introduced for enactment in July 2007.

⁵ Concluding Observations of the Human Rights Committee, Hong Kong, U.N. Doc. A/50/40, paras. 408-435 (1995), para.11. See also CAT 2000, paras.135 and 143.

10. A new IPCC Bill was introduced into LegCo for enactment in July 2007. The Bill aims to transform administrative body IPCC to a statutory one but with constraints firmly entrenched in the law to restrict the power of IPCC and therefore its effectiveness. The then (now former) Chairman of the IPCC, *Ronny Wong Fook-hum*, QC, SC, in his testimony before the Bills Committee, described the system proposed by the Bill to have ‘all the odds stacked against the complainant’ and warned that the Bill could make the council ‘an instrument being used to protect the police.’⁶
11. The following recommendation by the HRC in its 2006 concluding observations has been deliberately ignored in the enactment of the IPCC Bill: ‘**The HKSAR should ensure that the investigation of complaints against the police is carried out by an independent body, the decisions of which are binding on relevant authorities.**’ All amendments for enhancing the competence of the IPCC were opposed by the HKSAR Government and voted down by the LegCo, which is not fully democratically elected.
12. The Human Rights Council should urge the HKSAR to prevent and combat arbitrary body searches, torture and other forms of police abuses. It should call for the amendments of the defective IPCC Ordinance by the HKSAR.

C). Press Freedom

13. The Hong Kong Journalists Association (HKJA), an independent reputable NGO focused on freedom of the press and expression, in its 2007 Annual Report, cited a Lingnan University survey commissioned by the HKJA, ‘almost sixty percent (58.4 percent) of journalists thought the current press freedom in Hong Kong is less than it was at the time of the 1997 handover. Among them, more than seventy percent (72.5 percent) believed that self-censorship is the most important indicator of decreased press freedom and a major issue being confronted by the trade.’ The Hong Kong University’s Public Opinion Programme has also found that about half the respondents believed that Hong Kong news media perform self-censorship. The HKJA reported that ‘five out of eight media owners are members of the National People’s Congress and the Chinese People’s Political Consultative Conference.’ Meanwhile, the majority of owners of newspaper agencies have close connections with the Chinese leadership.⁷
14. In August 2006, a veteran Hong Kong journalist, Ching Cheong, was convicted of spying and was sentenced to a 5-years imprisonment after a seven-hour closed trial; his appeal was set aside in a 15-minutes hearing. Many believed that the trial was unfair and demanded his release.⁸ Others feared that the case would cause significant damage to the freedom of press in Hong Kong; increasing the tendency of political self-censorship restricting the freedom in reporting mainland affairs.
15. In 2005, organizers of the Citizens’ Radio applied for a broadcasting license which was rejected in 2006. On 4 October 2006, in an attempt to defy the law, they hosted and broadcast a radio show on air and were arrested for unlicensed broadcasting. In January 2008, they were acquitted by the court on the ground that the Telecommunications Ordinance was unconstitutional; that the Ordinance imposed a licensing regime which unduly restricts the freedom of speech as enshrined in the BL and the Hong Kong Bill of Rights, the local replica of the ICCPR.⁹ The Magistrate agreed to suspend his ruling pending appeal from the HKSAR Government. Shortly afterwards, the HKSAR Government sought an injunction to prohibit the Citizens Radio from going back on air on the ground that the unregulated broadcasting would pose a danger to society. The application was rejected by the Court of First Instance.¹⁰ An extension of the suspension was

⁶ Recorded proceedings of the testimony by *Ronny Wong Fook-hum*, QC, SC, before the Bills Committee on 24 April 2008 on these points could be found at about 0:58:00 to 01:02:00 in the LegCo’s website: <http://drs.legco.gov.hk/public/search/search.html> . The testimony has also been reported by the South China Morning Post in the following piece of news: ‘Bill will clip police watchdog’s wings : chief,’ South China Morning Post, 25-4-2008.

⁷ The Hong Kong Journalists Association, ‘2007 Annual Report: Shrinking Margins – Freedom of Expression in Hong Kong since 1997’, p.33. (‘HKJA Annual Report 2007’). See: http://www.hkja.org.hk/Host/hkja/UserFiles/File/annualreport/e_annual_report_2007.pdf

⁸ Note that Ching Cheong was released on 5 February 2008, which many consider as a political gesture prior to the 2008 Beijing Olympics Games. See ‘Welcome home, Mr. Ching!’ The Standard, 06-02-2008.

⁹ The judgment is from the Magistrate Court and is not published to the public; case reference: ESS31207-31211.

¹⁰ *Secretary for Justice v. Ocean Technology and Ors.*, HCA 70/2008.

sought in February 2008. However, the HKSAR Government has not introduced legislative amendments to bring the Ordinance in line with the constitution.

16. Radio Television Hong Kong (RTHK), a government department given editorial independence through an administrative inter-governmental memorandum, has been acting as a de facto public service broadcaster (PSB) in HK for over two decades. It has won a large number of prizes for its quality productions. As a PSB, it has been a strong critic of the Chinese and Hong Kong authorities.
17. During the early years of the millennium, calls from the pro-Beijing circle that RTHK should be brought under control and should instead serve as a government mouthpiece. The former CE Tung Chee-hwa responded with the remarks ‘Slowly, Slowly.’ The views expressed by the current CE, Donald Tsang, were that certain programmes produced by RTHK should be cut,¹¹ causing much anxiety over the future of RTHK. The HKSAR Government’s attitude provoked a public outcry to enact administrative and legislative measures to consolidate the RTHK’s role as a public service broadcaster.
18. On 17 January 2006, a Committee was appointed by the HKSAR Government to conduct a review on public service broadcasting in Hong Kong. In spite of the fact that the Committee has persistently claimed that it has no jurisdiction over the future of RTHK and it has refused to enter into any discussions on the future of RTHK, the Committee released in March 2007, it published a report recommending that a new Hong Kong Public Broadcasting Corporation should be established in Hong Kong and concluded that the RTHK was not fit to act as the future PSB. Many view that the recommendations would be precursors to the strangulation of RTHK.¹² The HKSAR Government promised to publish the consultation paper by 29 January 2008. However the consultation was abruptly postponed at the last minute.
19. The HRC, urged the HKSAR to **‘take vigorous measures to prevent and prosecute harassment of media personnel’**, has rightly urged the HKSAR to **‘ensure that the media can operate independently and free from government intervention.’** **The HRC should highlight the need to ensure the independence of RTHK and other media bodies in Hong Kong.**

D). Racial Discrimination

20. Ethnic minorities in Hong Kong have long suffered from discrimination. A lot of these discriminatory practices originate from government performance of powers and exercise of functions. Concerned areas include immigration, police, welfare, medical services, education and vocational training. The HRC, the CESCR and the CERD have long called for a racial discrimination legislation to be enacted in Hong Kong.¹³
21. Finally, a Race Discrimination Bill with serious flaws was introduced by the HKSAR Government into the legislative process in December 2006. The CERD has written to the Permanent Mission of the PRC in Geneva first under its follow-up procedure in August 2007 and then under its early action/urgent action in March 2008 procedure to express concerns, and to call for information and improvements.¹⁴ The Bill was passed into law in July 2008 with most of its problems largely intact: (a) it has a weak definition of indirect discrimination; (b) does not cover most government functions, especially those of the immigration and the police; (c) fails to address the language difficulties in education and vocational training; (d) does not cover discrimination on the basis of nationality, citizenship and residence thereby effectively excluding mainlanders, immigrants and migrant workers; and (e) offers no protection for foreign domestic workers (FDWs) against the discriminatory government policies like the ‘Two-Week Rule’ (See paragraph 23 below).

¹¹ See ‘Tsang casts a shadow over public broadcaster,’ S.C.M.P 12-06-2005.

¹² ‘Mouthpiece or messenger?’ South China Morning Post, 1 April 2007.

¹³ HRC 1999, para. 15; HRC 2006, para. 19.; Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, China, U.N. Doc. A/56/18, (2001), para.247; note that the Committee has once invoked the early warning procedure against the Hong Kong Government, see Letter to the Permanent Mission of China from CERD dated on 24 August 2007, Ref.:NP/JF.

¹⁴ The letters are available at: <http://www2.ohchr.org/english/bodies/cerd/docs/LetterChina24Aug07.pdf> and http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/China070308.pdf

22. The Human Rights Council should echo the CERD's call to urge the HKSAR to amend the race law to address these problems to ensure the law's full compliance with international human rights standards.

E). Rights of Migrant Workers

23. At present, there are more than 200,000 FDWs in Hong Kong. They are subject to various discriminatory policies, the most notorious being the Two-Week Rule, which requires FDWs to leave Hong Kong once their contract expires or is prematurely terminated. That means that it is impossible for them to change employment or employer without leaving Hong Kong first. As pointed out by CEDAW, it has forced FDWs to accept unfair employment terms or conditions in order to stay in Hong Kong.¹⁵ Moreover, it is a requirement by the Indonesian Government for every Indonesian migrant worker who is to work in Hong Kong, to process her employment contract through designated Indonesian employment agency. The agency fee is extortionate, of an amount of HK\$21,000 (one which requires the FDW 7 months of labour to repay).¹⁶ Many Indonesian FDWs are made to enter into arrangements with financial companies, having the latter to transmit the sums to the respective employment agencies, forcing FDWs into debt bondage. The agencies usually confiscate the respective FDWs' passports making it almost impossible for them to leave their job, even if they were abused, underpaid or forced to work long hours and deprived of statutory rest days. The agencies' Hong Kong counterparts usually offer free replacement for the FDWs with different ones after about seven months' service to get the earlier FDWs terminated and therefore needing to apply for a new contract and to pay a further HK\$21,000 sum, forcing the worker into a continuing debt bondage situation. Nothing has been done by the Hong Kong and Indonesian Governments to prohibit or penalize such a modern form of slavery and human trafficking. To make things worse,¹⁷ in 2008, the HKSAR Government announced plans to suspend the domestic worker employment levy (formally 'Employees Retraining Levy' because it was raised for training local workers) for two years but only starting from the time of signing a new or renewing an existing contract. This has triggered a wave of premature terminations, as well as forcing many of the FDWs to agree to forgo their employment entitlements promised by law, in order to keep their job.¹⁸
24. The incidents above reflect the HKSAR Government's insensitivity towards the rights and welfare of migrant workers. We appeal to the Human Rights Council to urge (a) the PRC and HKSAR governments to make the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families applicable to Hong Kong (and other part of China); (b) to scrap the employee's retraining levy; and (c) to echo the calls of the CEDAW (2006), CESCR (1994, 1996, 2001 & 2005) and CERD (1996 & 2001) to urge the HKSAR Government to abolish and address the problems of the Two-Week Rule.

F). Women's Commission and a Human Rights Commission

25. We urge the Human Rights Council to express concern on the future of the Women's Commission of Hong Kong. It has been brought under the Family Council recently with a possible prospect of being absorbed into the Council¹⁹, making it even more difficult to contribute to gender mainstreaming in Hong Kong. It is also important to urge the HKSAR to set up, in line with the Paris Principles, a statutory human rights commission for the protection and promotion of human rights in Hong Kong.

¹⁵ Concluding Observations of the Committee on the Elimination of Discrimination against Women, China, U.N. Doc. CEDAW/C/CHN/CO/6 (2006), paras.41 and 42. Similar remarks could be found in concluding observations issued by the Committee on Economic, Social and Cultural Rights in 1996, 2001 and 2005.

¹⁶ See Reg. 10 and Sch. Num.2 Employment Agency Regulation (Cap.57A). Note that other FDWs groups such as Filipinos and Thais suffer from the same but to a different extent.

¹⁷ To add to the above, in 2003, the Government imposed an employee's retraining levy of HK\$400 to local employers of FDWs and at the same time lowering the minimum allowable wage to FDWs by the same amount. Many perceived that the amount was in effect levied against the FDW rather than the employer and was unjust. Moreover, there is no similar levy in respect of their local counterparts or other expatriates working in other trade, thus making the levy discriminatory under e.g. Art.6(1)(c) of the International Labour Convention No.97. See also Art.48 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

¹⁸ This would include, among other benefits, a substantial amount of long service payment for serving under a continuous employment contract for over 5 years. See S.31R Employment Ordinance (Cap.57).

¹⁹ 'Overlapping bodies invite criticism,' Oriental Daily, 27 September 2007.