

# Hong Kong Human Rights Monitor

## Submission for the UPR of the Peoples' Republic of China (2009)

### *Introduction*

1. After the Handover of Hong Kong's administration to the Peoples' Republic of China, China has adopted a "One Country, Two Systems" policy in which Hong Kong was promised a high degree of autonomy and institutions for it to preserve its way of life, including a legal system distinct from Mainland China. This report intends to provide a brief overview on the major human rights concerns in Hong Kong over the recent years. It purports to highlight 5 areas of concern: A). issues on democracy and the rule of law; B). the abuse of police powers; C). freedom of speech in Hong Kong; D). racial discrimination in Hong Kong; and E). the rights of migrant workers.

### *A). Democracy and the Rule of Law*

#### The Reinterpretation of the Basic Law of the Hong Kong Special Administrative Region by the Standing Committee of the National Peoples' Congress ('NPCSC')

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 and 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.<sup>1</sup> 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 and a electoral system of restricted franchise declared by the UN Human Rights Committee as inconsistent to Art 29 of the ICCPR was entrenched. In the first interpretation in 1999, hundred of thousands of individuals has been deprived the right of abode recognized by in the ruling of the Court of Final Appeal ('CFA'), barring the split families from reuniting. Both the UN Human Rights Committee (UNHRC) and the UN Committee on Economic, Social and Cultural Rights (UNCESCR) have expressed concerns on the impacts on human rights of the interpretation mechanism. Besides calling for humane treatments of the families affected, UNHRC also calls for: **"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."**

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<sup>1</sup> 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](http://www.info.gov.hk/basic_law/fulltext/0426npcsc_e.pdf).

## *B). Abuse of Police Powers*

4. Police abuse has been rapidly increasing in recent years. These include, *inter alia*, torture and arbitrary strip searching.

### Torture in Hong Kong

5. In 1999, the CFA found that a victim was beaten by the police severely while water was poured into his nostrils and mouth causing him to lose consciousness.<sup>2</sup> However, the police officers were only charged with assault but not torture under the Crimes (Torture) Ordinance; the latter offence attracts the maximum penalty of a life imprisonment.<sup>3</sup> Meanwhile, a local NGO for ethnic minorities, Unison, has further reported cases of severe police brutality towards ethnic minorities in recent years.<sup>4</sup>
6. In August 2008, a man was acquitted from the charge of assaulting a police officer; the Magistrate was convinced that the accused was the one who was beaten up inside a room at the police station, yet the police officer was the one to yell out that he was being attacked.<sup>5</sup> What has shocked the society is the close participation of the other police officers within the station which strongly suggests that similar practices have been acknowledged by their colleagues and tolerated (if not, endorsed) by their superiors.
7. The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') has been extended to Hong Kong since 1992. However, the CAT has only been partially domesticated. The Crimes (Torture) Ordinance (Cap. 427) ('CTO')<sup>6</sup> provides a blanket defence for acts which potentially fall into the definition of torture so long as the officer could provide for a "lawful authority, justification or excuse."<sup>7</sup> Despite the Committee's comment that the CTO is inconsistent with Art.1 CAT,<sup>8</sup> the Government has taken no initiative to amend the provision. Furthermore, the examples above reflected the Government's unwillingness to prosecute offenders under the CTO even though the situations warrant their prosecution.<sup>9</sup>

### Arbitrary Strip Searching

8. Arbitrary strip searching in Hong Kong became a common means for the Police to demonstrate and exercise authority. Over the past years, victims of arbitrary strip search included sex workers and cultural preservationists. During 2004-2005, Zi Teng, a local NGO for sex workers recorded 19 complaints of strip searching 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 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 in the presence of male officers who made leering remarks of her body, while a male protestor was being strip-searched twice during which he was ordered to lift up his genitals.<sup>10</sup>

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<sup>2</sup> *Chuen Lai Sze v. HKSAR*, (1999) HKCFA 33.

<sup>3</sup> Conclusions and Recommendations of the Committee against Torture, China, U.N. Doc. A/55/44 (2000), para.139, ('CAT 2000')

<sup>4</sup> In one incident, a Pakistani teenager was dragged out of the car by a police officer after refusing to be called a discriminatory nickname. He was accused of resisting arrest and assaulting a police officer and was severely beaten up at the scene by 10 officers who came for back up. He vomited blood four times during the course of his detention at the police station.

<sup>5</sup> The case was acquitted on the crucial collaborated evidence from a reporter sitting outside the room who gave evidence that while he heard the scream, other officers in the station pretended not to hear and had not offered their colleague help.

<sup>6</sup> See s.3(1) CTO, which was introduced in Hong Kong to create the offence of torture and provide for its prosecution.

<sup>7</sup> See s.3(4) CTO.

<sup>8</sup> See CAT 2000, para.138.

<sup>9</sup> *Ibid.*, paras.139 and 142.

<sup>10</sup> See 'Police Strip-Search Slammed,' *Sing Tao Daily* 2007-11-07.

9. In July 2008, the Police Force Ordinance and the Force Procedural Manual were amended whereby the authorized officer would have to explain to the detained person the reason(s) for the search as well as the scope of the search to be carried out; a recording procedure was also incorporated alongside the amendments. Also added were safeguards to protect the searched person's rights during the search. We welcome the changes. However, there is still a lack of rules governing *when* to conduct searches. We are of the opinion that unjustified strip searches must be outlawed and prohibited.

### The Lack of an Independent Complaints System

10. In the current system, all complaints against the police in Hong Kong are referred to the Complaints against Police Office ('CAPO') which is a part of the police force having jurisdiction over complaints against its own officers. The conflict is obvious - the CAPO is too convenient a place for the Police to dismiss complaints.
11. Although the IPCC purports to be a civilian oversight body, it is only empowered to review the classification of investigations and advise the CAPO to reconsider complaint classifications.<sup>11</sup> It cannot investigate the incidences of police impropriety on its own. In this respect, both the Human Rights Committee ('HRC') and the Committee against Torture has expressed their concerns over the lack of competence of the IPCC and the lack of impartiality of the complaints mechanism "leaving the complaints procedure at the hands of the Police."<sup>12</sup> At issue is the IPCC's lack of power to initiate its own investigations, primary or secondary.<sup>13</sup>
12. On 12 July 2008, the IPCC Bill was passed conferring the IPCC with an independent statutory status.<sup>14</sup> However, all amendments purported to increase the competence of the IPCC were voted down by the pro-government camp. Having been denied the essential power of investigation, the IPCC still suffers from essentially the same deficiencies rendering the whole police complaints procedure ineffective.

### *C). Freedom of Speech in Hong Kong*

#### Self-censorship

13. In 2003, the University of Hong Kong conducted an opinion poll which reveals that over 50 percent of the Hong Kong people think that the media practices self-censorship.<sup>15</sup> One obvious explanation for self-censorship lies in the media ownership. At present, electronic media organizations influential to Hong Kong are directly involved in the Chinese politics. The Hong Kong Journalist Association 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.<sup>16</sup>

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<sup>11</sup> The CAPO is obliged to submit a complete investigation report to the Independent Police Complaints Council ('IPCC') for endorsement. In the report, complaints received by CAPO are classified into different categories. Disciplinary action will only proceed where a complaint is found to be substantiated and the officer at issue is at fault. Note that while the IPCC has the power to advise CAPO as to the reclassification of complaints, however, the advice is not binding on the CAPO.

<sup>12</sup> Concluding Observations of the Human Rights Committee, Hong Kong, U.N. Doc. A/50/40, paras. 408-435 (1995), para.11. CAT 2000, paras.135 and 143.

<sup>13</sup> Primary investigation refers to the investigation directly into complaints against police lodged by civilians. Secondary investigation refers to the re-investigation of civilian complaints that has not been properly investigated by the CAPO.

<sup>14</sup> 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 LegCo to empower the IPCC to conduct investigation of complaints against the police. The revised Bill was introduced for enactment in July 2007.

<sup>15</sup> 'Half think local media self-censors, poll finds,' S.C.M.P. 23-11-2005;

<sup>16</sup> The Hong Kong Journalists Association, '2007 Annual Report: Shrinking Margins – Freedom of Expression in Hong Kong since 1997', p.33. ('HKJA Annual Report 2007') Note also that in 2007, the Hong Kong Journalist Association conducted a survey with local journalists and concluded that the freedom of press has been deteriorating after the handover which is "attribut[able] to self-censorship and tighter government control on the flow of information."

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.<sup>17</sup> 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.

#### Citizens' Radio

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 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.<sup>18</sup> The Magistrate agreed to suspend his ruling pending appeal from the Government. Shortly afterwards, the 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 the society. The application was rejected by the Court of First Instance.<sup>19</sup> An extension of the suspension was sought in February 2008, however, the Government has not introduced legislative amendments to bring the Ordinance back in line with the constitution.

#### Radio Television Hong Kong ('RTHK')

16. During the early years of the millennium, calls from the pro-Beijing front that Radio Television Hong Kong (RTHK), a government department mandated with editorial independence, should instead serve to explain governmental policies. The line of argument was quickly picked up by the CE, Donald Tsang, who further expressed that certain programmes of the RTHK should be cut,<sup>20</sup> causing much anxiety over the future of the RTHK which was then a strong government critic. The Government's attitude provoked a public outcry to enact administrative and legislative measures to consolidate the RTHK's role as a public service broadcaster.

17. In March 2007, a panel was set up by the Government to begin the review on public service broadcasting. The panel released a report recommending that an independent statutory public broadcaster be established in Hong Kong, however, that the RTHK was not fit to take up this role. Many view that the panel review would be a precursor to the strangulation of RTHK. The Government promised to publish the consultation paper by 29 January 2008, however no consultations have currently been made.

18. In short, we opine that the current situation in Hong Kong is not conducive to the implementation of Art.19 of the ICCPR, particularly the "freedom to seek, receive and impart information...through any... media of his choice."

#### *4). Racial Discrimination in Hong Kong*

19. Ethnic minorities in Hong Kong have long suffered from discrimination. With regret, a lot of these discriminatory practices originate from government policies or practices from institutions exercising governmental functions. Concerned areas include welfare, medical services, education and employment training. The HRC and the Committee on the Elimination of all forms of Racial Discrimination has long called for a racial discrimination legislation to be enacted in Hong Kong.<sup>21</sup>

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<sup>17</sup> Note that Ching Cheong was released on the 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.

<sup>18</sup> The judgment is from Magistrate Court and is not published to the public; case reference: ESS31207-31211.

<sup>19</sup> *Secretary for Justice v. Ocean Technology and Ors.*, HCA 70/2008.

<sup>20</sup> See 'Tsang casts a shadow over public broadcaster,' S.C.M.P 12-06-2005.

<sup>21</sup> 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.

20. After 39 years of delay, the Race Discrimination Ordinance was passed on 10 July 2008. However, the Ordinance still suffered from serious defects: (a) it does not cover all government functions (b) it fails to cover education and vocational institutes (c) it does not cover discrimination on the basis of nationality, citizenship and residence thereby effectively excluding mainlanders and migrant workers.
21. Lastly, since the Ordinance only lays ground for litigation, it is a reactive mechanism, rather than a proactive one which would promote equality. Also, a coherent Equality Plan (known as the Race Equality Scheme in UK)<sup>22</sup> is needed in Hong Kong to achieve progressive realization of equality.

##### 5). *Rights of Migrant Workers*

##### Foreign Domestic Workers ('FDWs')

22. At present, there are more than 200,000 FDWs in Hong Kong which is by far the largest group of ethnic minorities working and residing in Hong Kong. However, their rights have not been adequately protected.
23. Firstly, there exists a strict policy in Hong Kong which requires FDWs to leave Hong Kong no later than two weeks after the termination of their employment contract – meaning that it is impossible for them to find a second employment while in Hong Kong after their termination. This has forced FDWs to accept unfair employment terms or to tolerate domestic violence in order to stay in Hong Kong.<sup>23</sup> 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 an employment agency. The agency fee is extortionate (one which requires the FDW 7 months of labour to repay) and is illegal in Hong Kong.<sup>24</sup> However, to circumvent Hong Kong laws, the 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. Nothing has been done by the Hong Kong Government to prohibit or penalize such transactions. To make things worse,<sup>25</sup> in 2008, the Government announced plans to suspend the levy for two years for every new employment contracts or renewal of contracts triggering a wave of premature terminations, as well as forcing them to lose their employment benefits under a continuous employment contract.<sup>26</sup>
24. The incidents above reflect the Government's insensitivity towards the issue of migrant workers. We appeal to the Human Rights Council to urge (a) the Hong Kong government to abolish the two-week rule and to scrap the employee's retraining levy; and (b) the Chinese government to extend the application of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families to Hong Kong.

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<sup>22</sup> See ss.71(1) and (2) of the Race Relations Act 1976 and para 2 of the Race Relations (Amendment) Act 2000.

<sup>23</sup> 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.

<sup>24</sup> See Reg. 10 and Sch. Num.2 Employment Agency Regulation (Cap.57A). Note that other FDWs groups such as Philipinos and Thais suffer from the same but to a different extend.

<sup>25</sup> To add to the above, in 2003, the Government imposed an employee's retraining levy of HKD\$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 towards their local counterparts, thus making the levy discriminatory under 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.

<sup>26</sup> 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).