

香 港 人 權 監 察
HONG KONG HUMAN RIGHTS MONITOR

Room 602, Bonham Commercial Centre, 44-46 Bonham Strand West, Sheung Wan.

電話 Phone: (852) 2811-4488 傳真 Fax: (852) 2802-6012

Hong Kong Human Rights Monitor
Submission to LegCo Panel on Constitutional Affairs
on the second review of Hong Kong Special Administrative Region by
Working Group on the Universal Periodic Review of the United Nations Human Rights Council
discussed on the 16 December 2013 meeting

Introduction

1. After the Handover of Hong Kong from the United Kingdom to the People's Republic of China in 1997, China has adopted a 'One Country, Two Systems' policy by which the Hong Kong Special Administrative Region (HKSAR or HK) 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 only highlights below six major areas of current human rights concerns in the HKSAR.

A). Democracy and universal suffrage

2. Article 45 of the HKSAR Basic Law stipulates, "The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures." The Standing Committee of the National People's Congress (SCNPC) decided in 2007 that universal suffrage may be implemented for the Chief Executive in 2017, and for the Legislative Council in 2020.¹
3. There remain serious concerns as to whether the "universal suffrage" to be implemented in Chief Executive Election in 2017 and Legislative Council Election in 2010 is to be genuine, or will be distorted. Recent speeches alluding to a different concept of what they regard as universal suffrage have been made by Mainland China officials.² The timing is not coincidental, but is seen as part of a carefully choreographed effort to obfuscate and re-define. The transparent aim is to build into the Chief Executive electoral system hurdles to exclude candidates considered not "loving the Country and loving Hong Kong" by the central authorities, and to perpetuate the gerrymandering in favour of pro-Government and pro-establishment parties by the maintenance of the functional constituency system

¹ "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 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage". 29 December 2007

² South China Morning Post, "Beijing offers definition of HK suffrage, 8 June 2010. Ming Pao, "Constitutional Reforms in HK and issues on universal suffrage in the future – the full text of Qiao Xiao-yang's speech", 8 June 2010.

in Legislative Council, which has been criticized for breaching human rights by various UN treaty bodies.³ The achievement of a non-ersatz system depends on whether distorting elements will be totally abolished, as well as on how the future nomination committee be composed and returned, and on whether there will be high or unreasonable nomination threshold as well as pre-screening, etc., designed to exclude candidates from the opposition.

4. **We urge the HKSAR government to implement universal suffrage in a way consistent with all Covenant rights and Concluding Observations of the UN Human Rights Committee, especially the equal right to nominate and be nominated to run for elections, and to run for elections and be elected in the Chief Executive Elections. The HKSAR government should also abolish all forms of functional constituencies in the Legislative Council Elections. No distorting elements and pre-screening, nor unreasonable thresholds, should be adopted in the nomination process or mechanism in all the Chief Executive and Legislative Council Elections.**

B). The Rule of Law

5. The Sino-British Joint Declaration promises the continuation of a Common Law legal system in HK. One key feature of a Common Law system is that no one other than the Court has the power to interpret what the law means. No one, including the legislature or the executive, other than the judiciary itself can impose, other than by emending the law, 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 the HKSAR adopted by the national parliament purportedly to implement the Joint Declaration, requires the HK judiciary to be bound by the interpretation of the Basic Law by the SCNPC. There are already four instances of interpretations since 1997, which the SCNPC interprets the law according to political needs and inevitably undermines judicial independence and autonomy in HK.
6. The HKSAR government has threatened to trigger interpretation of the Basic Law by the SCNPC on important issues with serious human rights implications. For instance, the Department of Justice (DoJ) filed the Respondents' cases in foreign domestic worker's rights of abode appeal in accordance with Court of Final Appeal on 12 Dec 2012.⁴ The DoJ suggested the Court consider seeking the NPCSC's interpretation on Article 158(1) of the Basic Law in order to clarify the legal effect of NPCSC's interpretation in 1999, which may deny right of abode to babies born in HK to mainland couples. Naturally, it triggered lawyers, legal academics and civil society's strong criticisms for damaging judicial independence, pressurizing the Court to overturn its 2001 decision that the opinions of the Preparatory Committee (another body) for the Hong Kong Special Administrative Region of the National People's Congress were not binding. This seeking of SCNPC's interpretation would set a very

³ The electoral system of restricted franchise has been criticized repeatedly by the UN Human Rights Committee to be inconsistent to several articles of the ICCPR in 1995, 1999 and 2006. For instance, it is criticized for violating the principle of universality and equality, giving undue weight to the business community and discriminating between voters on the basis of property & functions.

⁴ HKSAR Government press statement, "SJ on foreign domestic helper's case" 13 December 2012

bad precedent as it implied the triggering of SCNPC's interpretation on provisions of the Basic Law on affairs totally internal to HK.⁵

7. Justice Kemal Bokhary, the former permanent judge of the Court of Final Appeal warned that a "storm of unprecedented ferocity" was gathering over the rule of law in HK just before he retired in Oct 2012.⁶ He has rightly highlighted the fact that the rule of law in HK has been under pressure from individuals with influential political backgrounds and from certain media favouring the Mainland authorities. But the HKSAR government has failed to discharge its duty to defend the judiciary against attacks.
8. For example, senior Chinese leaders, including current China president Xi Jin-ping, have said the judiciary should cooperate with the Chief Executive during his trip as vice president to HK in 2008.⁷ Ms. Elsie Leung, the HKSAR's first Secretary for Justice who is also currently a Deputy Chairperson of the Committee for the Basic Law, alleged that the legal profession in HK, including judges, had a poor understanding of and misunderstood the Central-HKSAR relationship in Oct 2012,⁸ which suggests that she may be more interested in supporting the Central China government than she is in supporting the HKSAR judiciary and legal profession, which is what she is supposed to do as a former HKSAR Secretary of Justice and a current HK Member of the Committee for the Basic Law.
9. **We urge the HKSAR and Mainland authorities not to use interpretation of the Basic Law by the Standing Committee for any purposes, thereby weakening or undermining the rule of law and the Common Law system in HK.**

C). Press Freedom and freedom of information

10. In the World Press Freedom index 2013 by Reporters without Borders, the rank of HK has dropped sharply from 34 in 2010-2011, 54 in 2011-2012 to 58 in 2012-2013. The World Press Freedom Index 2011-12 stated "Arrests, assaults and harassment worsened working conditions for journalists to an extent not seen previously, a sign of a worrying change in government policy."⁹
11. There are frequent arrests of journalists by the HK Police Force. For instance, a photo journalist was arrested and charged with common assault when he was obstructed in his performance of his reporting duty in the new HKSAR government headquarters in 2012.¹⁰ He was acquitted by the Court.

⁵ South China Morning Post, "Right of abode appeal to Beijing a bad precedent". The Standard, "'Ask Beijing' call dismays lawyers". 14 December 2012.

⁶ South China Morning Post. "Retiring Court of Final Appeal judge Kemal Bokhary warns of legal turmoil". 25 October 2012

⁷ South China Morning Post. "Xi tells Tsang to 'govern sensibly'". 8 July 2008.

⁸ Hong Kong Bar Association, "HKBA Press Statement in Response to Recent Remarks Made by Ms Elsie Leung" [http://hkba.org/whatsnew/press-release/HKBA%20Press%20Statement%20dated%2010%20Oct%20\(Eng\).pdf](http://hkba.org/whatsnew/press-release/HKBA%20Press%20Statement%20dated%2010%20Oct%20(Eng).pdf)

⁹ "At the top, the good boys turn bad". 2011-2012 World Press Freedom Index. Reporters without borders. 25 Jan 2012 http://en.rsf.org/IMG/CLASSEMENT_2012/C_GENERAL_ANG.pdf

¹⁰ The International Federation of Journalists "Journalists Protest in Hong Kong over Photographer's Assault Charge". 28 September 2012.

12. Unjustified restrictions on press freedom reached the peak during visits of Mainland China leaders. A reporter was detained for about 15 minutes, for shouting out question to the visiting China president Hu Jin-tao in June 2012 if Hu had heard about the HK People's wishes to vindicate 4 June Tiananmen crackdown, enough to prevent him from carrying out his legitimate journalistic duties. Another incident involved an attempt to prevent a photo journalist from filming during a visit by vice-premier Li Ke-qiang in August 2011.
- 13. We urge the HKSAR government to ensure that the handling of press by the police officers should be in consistent with freedom of information enshrined by the ICCPR.**
14. The HKSAR government has various attempts to restrict access to information by journalists, which will eventually undermine the freedom of information of public. For instance, the HK Police Force and the Fire Services Department have implemented a new system for releasing information about spot news incidents following the digitalization of their communication systems. Now journalists must rely on short announcements released through the Information Services Department that highlight the nature, place and time of a case, without giving any meaningful details. Another example is that the government intends to restrict public access to personal information of the managers in the company registry, which is an important way of collecting information for investigative reporting by journalists, researches on collusion between the government and tycoons by scholars and civil society, assessment of potential trade partners by companies and creditors, and meaningful tool for claiming unpaid salaries from absconding employers by workers.
15. There is no Freedom of Information Act in HK. The government maintains that its March 1995 administrative code on access to information introduced is effective. Even the government appointed Ombudsman severely criticized that Code in 2010.¹¹ Under the Code, people of HK are not provided reasonable information and documents.
16. There is no archive law. There are no legal framework and professional standards for managing public records and archives. Only non-binding administrative rules and guidelines are present which public officials frequently ignored without serious consequences. In recent years, repeated loss, unauthorized massive destruction and mishandling of public records have been widely reported, which undermines people's right to know and the court to hold the Government accountable, e.g. in *HK Association of Falun Dafa v Director of Immigration (CACV 119/2007)*. The HKSAR government destroyed over 30,000 linear meters of documents last year, undermining HK's historical records last year.
- 17. We urge the HKSAR government to adopt policies and measures on media in line with the ICCPR. The government should "enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation" as stated in general**

¹¹ Chapter 5, "Direct Investigation Report: Effectiveness of Administration of Code on Access to Information", Office of the Ombudsman Hong Kong, January 2010.

comment no. 34 by the UN Human Rights Committee. The government should “proactively put in the public domain Government information of public interest” and enact an archive law.

D). Freedom of expression, police abuses and complaints handling system

18. The HKSAR government has been taking hard line approach and threatening freedom of expression though prosecutions motivated by political reasons and abuses of law and procedures.
19. The UN Human Rights Committee expresses in its Concluding Observations that the Public Order Ordinance could be applied to restrict unduly enjoyment of the rights guaranteed in article 21 of the ICCPR. Indeed the number of protestors arrested has significantly increased in recent years.¹² The regulation of the same Ordinance on public assemblies and its offences like “unauthorized assembly”, “unlawful assembly” and “disorder in public places” are too vaguely, broadly and subjectively defined, which may be conducive to arbitrary and selective prosecution of protestors. **We urge the HKSAR government to carry out the Committee's recommendations "to review this Ordinance and bring its terms into compliance with article 21 of the Covenant."**¹³
20. Furthermore, the police tightened its restriction on freedom of expression the most when Mainland China officials visited HK in 2011 and 2012. For instance, when the Appeal Board on Public Meetings and Processions has ruled in favour of a location for demonstration nearer to the demonstration target, the police defeated the Board’s intention by engulfing the demonstration in 2-metre tall water barriers in order to stifle the petition to and demonstration against the visiting China President Hu Jin-tao in HK in late June 2012. Such abusive uses of water-filled barriers further provoked confrontation of the protestors with the police. **We urge the HKSAR government to ensure police handling of protests and assemblies should be in line with freedom of expression enshrined by Article 19 and article 21 of the ICCPR.**
21. The Independent Police Complaint Council (IPCC) cannot effectively monitor and check the police because of its limited mandate. It has no jurisdiction in investigation but basically in the review of complaints handled by the Complaint Against Police Office (CAPO), which is an internal unit of the police. IPCC gives non-binding advice to the CAPO to reconsider complaint substantiation classifications and on measures against police officers found to be at fault. IPCC’s limited access to the information of police forces further undermines its effectiveness.
22. Different UN Treaty bodies have called for establishing an independent police monitoring body with binding power. For instance, the Human Rights Committee’s Concluding Observations in 2006 stated “The HKSAR should ensure that the investigation of complaints against the police is carried out by an

¹² The number of protestors arrested in demonstration is greatly increased from 57 in 2010 to 440 in 2011.

¹³ See e.g. Concluding Observations of the Human Rights Committee on Hong Kong Special Administrative Region (CCPR/C/79/Add.117), 15 November 1999, para. 19 and repetitions of calls in the subsequent Concluding Observations.

independent body, the decisions of which are binding on relevant authorities.” However there is no progress in empowering the IPCC to have power of investigation, verdict and punishment.

23. **We urge the HKSAR to expand the mandate and powers of the IPCC to conduct investigation into complaints against police officers.**

E). National education, civic education and human rights education

24. The HKSAR government has marginalized civil education and devoted its efforts and resources to promoting dubious uncritical "national education". The government attempted to boost nationalism in schools by focusing on the positive sides of China, emphasizing responsibility but not rights, requiring the students to recognize national identity at the expense of critical thinking. Increasing resources have been deployed to support production of indoctrination materials and trips to see the positive sides of Mainland China. The HKSAR government released the amended Moral and National Education Curriculum guide in May 2012 and made the subject compulsory in primary and secondary schools. However, the curriculum guide was criticized as rollback as it displaced civic education which emphasized universal human rights. Facing strong oppositions from parents and civic society through continued public assemblies, protests, hunger strikes and strikes in universities, the HKSAR government shelved the curriculum guide in Oct 2012.

25. **We urge the HKSAR government to better include and implement human rights education in an improved civic education framework according to the Plan of Action of World Programme for Human Rights Education.**

F). Human Rights Institution

26. **We urge the HKSAR government to set up, in line with the Paris Principles, a statutory human rights commission for the protection and promotion of human rights in HK.**