

香 港 人 權 監 察
HONG KONG HUMAN RIGHTS MONITOR

香港上環孖沙街二十號金德樓4樓
4/F Kam Tak Building, 20 Mercer Street, Sheung Wan, Hong Kong

電話 Phone: (852) 2811-4488 傳真 Fax: (852) 2802-6012
電郵地址 Email: contact@hkhrm.org.hk 網址 Website: <http://www.hkhrm.org.hk>

The Legislative Council
Bills Committee on Chief Executive Election and
Legislative Council Election (Miscellaneous Amendments) Bill 2006

Submission by Hong Kong Human Rights Monitor
on amendments to electoral laws

1 April 2006

Interpretation of the Basic Law

1. Hong Kong Human Rights Monitor regrets that the Standing Committee of the National People's Congress (SCNPC) has used the interpretation of the Basic Law as a tool to deny Hong Kong people of their rights to universal and equal suffrage, equal protection by the law, and to non-discrimination, etc., as guaranteed under the International Covenant on Civil and Political Rights (ICCPR).
2. At a recent UN hearing on the implementation of the ICCPR in Hong Kong, the Human Rights Committee commented that back in 1999, Hong Kong had said that referral of a Basic Law decision to the Standing Committee of the National People's Congress (SCNPC) was only supposed to be on an "exceptional basis", but this did not seem to be the case. All the rights

guaranteed in the Basic Law including those under the ICCPR were at stake, as they could be interpreted in any manner by the SCNPC.

3. Human Rights Monitor regrets that the SCNPC has imposed extra prerequisite procedures for starting any future constitutional review and an approval procedure by the SCNPC. It also regrets the additional reporting procedure by the Chief Executive as well as the determining position of the SCNPC which could stunt constitutional reviews even before they begin. The interpretation has also twisted the requirement in the Basic Law of reporting to the SCNPC making it a requirement that any changes to the LegCo composition and voting methods for the record need the SCNPC's approval.
4. These new obstacles have been designed to stunt constitutional reviews and to require any proposals made to be stamped by the SCNPC. We condemn such efforts to undermine Hong Kong people's right to universal and equal suffrage as well as other rights enshrined in the ICCPR.
5. Human Rights Monitor also regrets the Chief Executive, his Administration and the HKSAR Legislative Council's failure to defend the rights of the Hong Kong people.
6. Even with the constraints imposed on the HKSAR by the SCNPC, Human Rights Monitor submits that improvements could actually be made to the election laws as well as to the District Councils if the Chief Executive and the Legislative Council are concerned about democratic development at all.
7. Chief Executive Donald Tsang and his Administration have failed to propose any meaningful amendments in the current Bill. Unless they are prepared to introduce further amendments to provide for such improvements, they should be held accountable for further denying Hong Kong people the right to participate in public life as enshrined in Article 25 of the ICCPR.

Selection of the CE

8. Human Rights Monitor submits that the election procedures for the Chief Executive (CE) are of critical importance for the constitutional development of Hong Kong, since the CE bears crucial responsibilities, including the implementation of the Basic Law, signing bills and budgets passed by the Legislative Council, promulgating laws, making decisions on government policies and issuing executive orders. These duties are all directly related to the well-being of Hong Kong and its people. Therefore, Hong Kong permanent residents from all walks of life should be affirmed by the election laws to have the right to elect the head of the SAR in accordance with Article 25 of the ICCPR.
9. The Election Committee (EC) is the only organ designated by the Basic Law, to elect the head of Hong Kong Special Administrative Region. Without the opportunity of directly participating in the election of the head of the region, the citizens of Hong Kong can rely solely on the Election Committee. This sort of indirect election based on narrow franchise is not justifiable under Hong Kong's situation and is inconsistent with the ICCPR. Election of the Chief Executive should only be conducted through universal and equal suffrage and in a manner consistent with other requirements under Article 25 of the ICCPR.
10. Among the 800 members, there are 664 members representing 35 elected sub-sectors, with a total electorate of less than two hundred thousand in the 2005 CE election. That is, about one-tenth of the registered voters with the right to vote in Geographical Constituency Election were eligible to vote in these subsectors.
11. Therefore, it is of little surprise that the CE elections are labelled as "small-circle elections. They are biased in favour of the business sector and professionals, and such elections have been open to manipulation by those in power. Even if there is any justification for indirect elections, apart from expanding the EC to minimize manipulation, the subsectors should be expanded drastically. Those who are eligible to participate in subsector

elections should be extended to cover all voters who are eligible to vote in Geographical Constituency Elections.

12. There are many inherent problems with the CE elections.
13. Firstly, there has never been a clear rationale from the Government on the inclusion and or exclusion of the chosen 35 sub-sectors, which do not represent all major economic, social, or professional sectors in Hong Kong, not to mention the entire population.
14. Secondly, there is an imbalanced distribution of the number of members in different sub-sectors in relation to their size.
15. Thirdly, the credibility of the members of the EC can further be questioned given the relatively high number of uncontested candidates. For example, in the 2005 supplementary sub-sector by-election, 12 out of the 33 vacancies were uncontested. In the Religious subsector, there were six vacancies. They were filled by a total of six supplementary nominations without competition. Only 15 vacancies were contested.
16. Apart from the loopholes of the Election Committee, the recent Chief Executive Elections in 2002 and 2005 provided vivid examples of how the current election mechanism can lead to distorted and unfair results.
17. The Chief Executive Election Ordinance (CEEEO) enacted by the Legislative Council on September 21, 2001 stipulated that the election process can close at the end of the nomination stage if only one candidate is able to secure the necessary minimum of 100 nominations. In both the 2002 and 2005 CE Elections, the Chief Executive was elected uncontested, because the then-candidates guaranteed a "sure-win" by securing more than 700 nominations, out of the total of 800 possible nominations, which made it impossible for other candidates to enter the race.
18. The unchallenged victory of the current CE Donald Tsang in the 2005 election sparked public concern over the fairness and validity of the election. Article 25(2) of the ICCPR stated that genuine periodic elections shall be held by secret ballot to

guarantee the free expression of the will of the electors. The biggest loophole in the previous election which violated the above principle was the nomination procedure, in which EC members were required to disclose their preferences. Both the democrats and pro-Beijing parties complained that members of the EC, e.g. the social welfare sector,¹ faced pressure exerted by officials from the Central Government and Mr. Tsang himself.² Even the National People's Congress deputy Victor Sit Fung-shuen said, "a lot of voters supported Tsang only because of pressure from Beijing".³

19. Mr. Tsang even went so far as to question a voting member's morality should they elect to choose another person. Such an opinion was also echoed by pro-Beijing newspapers.⁴ Therefore, the open nomination procedure and the pressure jointly exerted by the Central Government and Mr. Tsang effectively stymied the free expression of the will of the electors, which is the essence of a free and fair election as guaranteed by the ICCPR, Basic Law and the Hong Kong Bill of Rights.
20. The secret ballot system at the voting stage would have allowed the EC members to cast their votes without pressure, yet this was effectively shelved by the "landslide victory" of Mr. Tsang at the nomination stage.
21. Not only were the electors of the EC pressured by the Central Government in Beijing, potential candidates who expressed their intention to challenge Mr. Tsang also reported being subject to direct and indirect pressure from Beijing. Candidates reporting such pressure included Mr. Chim Pui Chung, a legislator representing the financial services constituency. Mr. Chim reported pressure from mainland officials, including the Central

¹ Chris Yeung, 'The winner is...', 3 June 2005, *SCMP*

² Cannix Yau, 'Tsang bulldozed voters to take sides', *The Standard* (Hong Kong), 16 June 2005, A11; Gary Yeung & Dicky Sinn, 'Tsang backs system that gave victory unopposed', *South China Morning Post* (Hong Kong), 17 June 2005, EDT3; '北京操控特首選舉 708 選委支持曾蔭權玩晒', *Apple Daily* (Hong Kong), 16 June 2005, A01; '提名變表態 選舉惹質疑', *Hong Kong Economic Times* (Hong Kong), 16 June 2005, A03.

³ Cannix Yau & Michael Ng, 'So easy for Tsang', 16 June 2005 *The Standard*

⁴ Chris Yeung, 'An immoral choice?', 8 June 2005 *South China Morning Post*

Government's Liaison Office director Gao Siren, when he announced his plan to participate in the election.⁵

22. With all the "hints" from the Central Government to explicitly support Mr. Tsang and thwart other potential rivals, the election has been criticized as a "well-scripted succession"⁶ to ensure a smooth transition from Mr. Tung to the preferred successor of the Central Government – Mr. Tsang.
23. There are approximately 30 to 40 members of the Election Committee who probably have no substantial connection with the subsector they purport to represent. These people at the same time are allowed to stay in the Election Committee without any scrutiny by the Electoral Affairs Committee. Given the small circle nature of the EC, Human Rights Monitor feels that this situation is totally unacceptable.
24. The Subsector elections and the election of the CE by the EC are all inconsistent with Articles 2, 3, 25 and 26 of the ICCPR. Irrespective of whether these elections are constitutional or not, they are nevertheless in breach of the ICCPR.
25. Human Rights Monitor welcomes the proposal to clear the meaning of "substantial connection" with the District Council (DC), the Chinese People's Political Consultative Conference (CPPCC) and the Heung Yee Kuk (HYK) subsectors to exclude members who have ceased to be members of the DCs, Hong Kong members of the National Committee of the CPPCC, the Chairman, a vice-Chairman or a Councillor of HYK will also cease to be EC members.
26. Human Rights Monitor expresses concern over the lack of provisions in the scenario where there is only one candidate and the sole candidate does not get enough support votes, then a new round of nominations would be arranged. However, this process will seemingly go on until a candidate is returned at the election, but in case there are no other contenders, this "never

⁵ Yeung, above n.1.

⁶ Ibid.

ending” process, although unlikely, should be accounted for.

27. Regrettably most of the problems in the CE electoral system raised in this submission have not been properly addressed by the proposed amendments introduced by the HKSAR Government.

Legislative Council Election

28. Human Rights Monitor condemns functional constituencies (FCs) for their inherent problems and violation of international standards laid down in the ICCPR.
29. Like the CE elections, there are inherent problems in the FC elections (FCEs): Most of the FCs are small. There has never been a clear rationale from the Government on the inclusion and or exclusion of the chosen 28 sub-sectors, which do not represent the population in Hong Kong, nor all major economic, social, or professional sectors in Hong Kong. Their distribution of the number of seats also bears no relation to the size of the relevant FCs.
30. The corporate voting system opens the way for the control of multiple votes by giving control of subsidiary corporate bodies by holding companies.
31. Worst of all, not every person eligible to become a voter in the Geographical Constituency Election is eligible to vote in FCEs.
32. The UN Human rights Committee has rightly criticized, “that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25 (b) and 26.”⁷
33. Although the Committee recommends that “immediate steps be taken to ensure that the electoral system be put in conformity

⁷ Concluding Observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and Northern Ireland. 09/11/95.

with [...] the Covenant”,⁸ the current amendments proposed by the Chief Executive and his Administration fail to rectify these defects.

34. As a defence, the Government likes to raise the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. However, such a defence is contrary to the Vienna Convention on the interpretation of treaties. No reservation which in substance denies a right protected by the ICCPR is allowed.
35. The UN Human rights Committee expressly points out that it is “aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant.”⁹

Conclusion

36. Human Rights Monitor urges the Chief Executive and his Administration to introduce further amendments to remove all remaining undemocratic elements in our electoral system, to bring it fully in line with the ICCPR.

⁸ Ibid.

⁹ Ibid.

Extracts

United Nations
Human Rights Committee
Eighty-sixth session

**Consideration of reports submitted by States parties
under article 40 of the International Covenant on
Civil and Political Rights**

**Concluding Observations of the Human Rights
Committee**

Hong Kong Special Administrative Region (HKSAR)

ADVANCED UNEDITED VERSION (Extracts)
30 March 2006

... ..

C. Principal subjects of concern and recommendations

... ..

18. The Committee recalls that in the concluding observations regarding the part of the fourth periodic report of the United Kingdom of Great Britain and Northern Ireland relating to Hong Kong, adopted on 1 November 1995, it referred to the reservation made by the United Kingdom according to which article 25 b) did not require the establishment of an elected legislature in Hong Kong. The Committee took the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. As stated at that time, and reiterated in its concluding observations on the initial report of the HKSAR, adopted on 4 November 1999, the Committee still considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, paragraph 1 and 26 of the Covenant. Furthermore, the Committee is concerned that the implementation of the procedure for interpretation of the Basic Law, such as on electoral and public affairs issues, does not include adequate arrangements to ensure that such interpretations are in compliance with the Covenant (articles 2, 25, 26).

**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.**

... ..

21. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the HKSAR should submit within one year information on the follow-up given to the Committee's recommendations in paragraphs 9, 13, 15, 18. The Committee requests the HKSAR to include in its next periodic report information on its remaining recommendations and on the implementation of the Covenant as a whole.

... ..