

**POWER FOR DEMOCRACY  
AND  
THE FRONTIER**

**JOINT SUBMISSION**

**To the**

**United Nations Human Rights Committee**

**on the Second Periodic Report of the**

**Hong Kong Special Administrative Region of**

**the People's Republic of China in light of the**

**International Covenant on Civil and Political Rights (ICCPR)**

**15 March 2006**

## **1. Recommendations not implemented**

As your Committee rightly pointed out in the 1999 Concluding Observations, most of the recommendations to the HKSAR Government still had not been implemented. In fact, even up till now, we still cannot see major progress.

We urge your Committee to express grave concern at the HKSAR Government's refusal to act on those recommendations.

## **2. Re-interpretation of the Basic Law**

On 1 July 2003, more than half a million Hong Kong people took part in a huge demonstration to protest against proposed legislation on Article 23 of the Basic Law. The march forced the HKSAR government to withdraw the controversial bill but has alarmed the Chinese government.

In April 2004, without consulting the Hong Kong people, the Standing Committee of the National People's Congress (SCNPC) re-interpreted the Basic Law and subsequently ruled out direct elections for the HKSAR Chief Executive in 2007 and for all members of the Legislative Council in 2008. The move had a devastating effect on the development of constitutional reform and showed Beijing's lack of confidence in the HKSAR. The move ignored popular demand for direct elections in 2007 and 2008. For many years, public opinion surveys consistently showed Hong Kong people support direct elections, and the earliest opportunity permitted by the Basic Law was 2007 and 2008.

In March 2005, the unpopular Chief Executive Mr. Tung Chee-wah was forced to step down. This was another fallout of the July 2003 demonstration. Although the Basic Law states clearly that Mr Tung's successor should serve a full five-year term, and the Tung administration had confirmed this to the Legislative Council, the administration of the Acting Chief Executive, Mr Donald Tsang, argued that the new Chief Executive should only serve the remainder of Mr Tung's term, i.e. two years. The HKSAR administration requested SCNPC to re-interpret the Basic Law to give the next Chief Executive a two-year term. A member of the Legislative Council, Mr Albert Chan, applied for a judicial review to challenge the administration's interpretation. However the action was brought to an abrupt end because of the re-interpretation.

These re-interpretations, whether initiated by Beijing or by the HKSAR administration, are a source of concern because they undermine the HKSAR's "high degree of autonomy" and the jurisdiction of the courts by inviting the central government to interfere with something which is clearly stated in the Basic Law. The re-interpretations were acts of political expediency because Beijing wanted to forbid democratic elections in 2007 and 2008 and to have Mr Tung's successor serving for only two years. It also showed that Beijing had little respect for civil and political rights in the HKSAR.

We urge your Committee to request the Chinese Government to exercise utmost self-restraint in the use of interpretations of the Basic Law and decision-making by the SCNPC in relation to the HKSAR.

### **3. Constitutional Reforms**

The Legislative Council elected in September 2004 consists of 30 directly elected members returned by geographical constituencies and 30 members returned by functional constituencies (FCs). Some FCs use corporate voting and have very small number of voters. For example, the Agricultural and Fisheries FC has 162 voters, Insurance FC has 154 voters, Transport FC has 181 voters and Finance FC has 147 voters. Under the Basic Law, the Chief Executive is chosen by an Election Committee consisting of 800 people. They are drawn from an electorate of under 200,000 many of whom are business and professional people with ties to Beijing.

To prepare for the election of the Chief Executive in 2007 and the election of the Legislative Council in 2008, the HKSAR administration proposed a package of changes in October 2005. Instead of widening the franchise for the Election Committee and the FCs, the administration only proposed to double the size of the Election Committee from 800 to 1,600 members. A key feature was to include all 529 members of the 18 District Councils in the Election Committee. Although most of the District Councillors are directly elected, 102 are appointed by the Chief Executive and 27 are ex-officio members because they are chairmen of rural committees. Besides giving District Councillors the right to choose the Chief Executive in 2007, they will also be able to elect five FC members of the Legislative Council in 2008. Such arrangement is unacceptable because it is vulnerable to manipulation by the authorities and is against the principle of universal and equal suffrage.

The 25 pro-democracy Legislative Councillors could not support the administration's proposals because they did not widen the franchise in a meaningful way and they failed to

provide a timetable and roadmap for universal suffrage. On 21 December 2005, the administration's proposals were rejected by the Legislative Council.

On future developments of constitutional reform, the Chief Executive said they would be considered by the Commission on Strategic Development. However, the members of the Commission were appointed by the Chief Executive and mainly from the business and professional sectors. We are of the view such move is an attempt to sideline the Legislative Council.

In an effort to preserve the FCs, the administration is trying to explore the possibility of a bicameral legislature, with the upper house consisting of members returned by the FCs. In a paper to the committee under the Commission in January 2006, the administration tried to explore the meaning of "universal suffrage" under the Basic law and under the Covenant.

The paper said some countries which practice a bicameral system, like Canada and the United Kingdom, the whole or part of the membership of the upper house are returned by appointment and the UN Human Rights Committee has not made any criticism on these methods. In conclusion, the administration said the concept of "universal suffrage" includes the principles of "universal" and "equal" but the right to vote can be subject to restrictions, provided they are "reasonable" restrictions established under the law.

In a statement issued in February 2006, a Government spokesman said during a meeting of the committee under the Commission on 20 January, members suggested that universal suffrage does not necessarily require precise authentic equality in voting power. Indeed, in the case of Hong Kong, taking geographical constituency elections as an example, there can be reasonable variations amongst the constituencies in respect of the ratio between the number of seats and the size of registered voters. The spokesman said committee plans to conclude discussions on a universal suffrage system for the Chief Executive and the Legislative Council by early 2007. After they have drawn conclusions on the model and roadmap for universal suffrage, they will commence study a timetable for universal suffrage. The Government has not taken a view on the long-term future of functional constituency seats in the Legislative Council, the spokesman added.

We urge your Committee to ask the Chinese Government to respect Hong Kong people's right to elect their government by universal and equal suffrage. The HKSAR Government should also be urged to change the electoral systems for the Chief Executive and for all members of the Legislative Council to ensure they comply with the Covenant.

The two Municipal Councils were abolished at the end of 1999 and their powers were transferred to the HKSAR Executive Authorities. At that time, the administration gave an undertaking that some of the powers would be devolved to the District Councils. Seven years later, the administration still has not kept its promise. The two Municipal Councils were regarded as training ground for political talents, and were more useful than the advisory District Councils. As the Committee has predicted, their abolition further diminished the Hong Kong people's ability to take part in public affairs.

Later this year, the administration will conduct a review of the role, functions and structure of the District Councils. However, Government officials have already indicated that only minor changes will be made.

We urge your Committee to request the HKSAR authorities to abolish the appointed and ex-officio seats in the District Councils and give the District Councils more power and resources to deal with local matters including those relating to recreation, culture and environmental hygiene.

#### **4. Right to privacy**

Ever since 1997, the HKSAR administration has not tabled any amendments in the Legislative Council to restrict the power of the law enforcement agencies regarding intrusion of privacy of individuals. The recommendations of your Committee in 1995 and 1999 were wholly ignored.

In April 2005, in the Li Man-tak case the District Court Judge ruled that the covert surveillance operation in the case had been carried out unlawfully, although he allowed the evidence to be used as evidence. The judge found there was no legislative framework in Hong Kong to regulate covert surveillance, and the minimum degree of legal protection to which Hong Kong residents are entitled under Article 30 of the Basic Law was lacking. The ruling gave rise to wide public concern about how law enforcement agencies carry out covert surveillance in the course of their work.

On 30 July 2005, the Chief Executive, Mr Donald Tsang, made the Law Enforcement (Covert Surveillance Procedures) Order and published it in the Gazette on 5 August 2005. The Order, which regulates covert surveillance activities undertaken by law enforcement agencies, came into operation on 6 August 2005.

The validity of the existing legislative and administrative framework authorising and

regulating secret monitoring was challenged in a judicial review: *Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region*. The judge of the Court of First Instance handed down his judgment on 9 February 2006. The court ruled that the Chief Executive had acted unlawfully in failing to determine a date for the Interception of Communications Ordinance to come into operation. The court further ruled that Article 30 of the Basic Law and Article 14 of the Bill of Rights incorporated into their constitutional requirements the need for the existence of laws which make for legal certainty and require that any limitations on the right be proportionate. On that basis, Section 33 of the Telecommunications Ordinance does not meet the requirements of those constitutional articles. The court also ruled that the Executive Order gazetted in August 2005 was no more than a set of administrative directions. It does not purport to be legislation, nor can it be taken to be legislation. The court rejected the government's argument that the Order constituted a set of "legal procedures" for the purposes of Article 30 of the Basic Law.

During the hearing, the court was informed that should Section 33 of the Telecommunications Ordinance be found inconsistent with the Basic Law, and the Order be found not "legal procedures" for the purposes of Article 30 of the Basic Law, then until a new or amended body of law is made effective, there would be no operative body of law which is in compliance with the Basic Law to regulate covert surveillance by law enforcement agencies. This would mean that for an extended period of time (the Government submitted to be six months), it will be unlawful for Hong Kong's law enforcement agencies to conduct many forms of covert surveillance. Hence the Government applied for an order to the effect that section 33 of the Telecommunications Ordinance and the Executive Order are valid and of legal effect for six months notwithstanding the judgment of the court.

The court was satisfied that any immediate declaration of invalidity would give rise to the probability of danger to Hong Kong residents, disorder by way of a threat to the rule of law and deprivation to Hong Kong residents generally. The court was also satisfied that the six month period named was proportionate, and that an order of temporary validity for six months should be made. The applicants have lodged an appeal against the judgment.

When the Chief Executive made the Order last August, the Administration announced its intention to regulate covert surveillance operations by means of legislation. In February 2006, the Secretary for Security, Mr Ambrose Lee, said proposals for legislation covering both interception of communications and covert surveillance would soon be introduced into the Legislative Council. He urged members to scrutinize the bill speedily, within the six month period given by the court. Failing that, the administration may introduce an emergency bill and ask the Legco to pass all three readings within one day.

During a meeting of the Legco Security Panel in February 2006, the Secretary for Security was asked why the administration had ignored recommendations of the UN Human Rights Committee. The Secretary replied the administration had other pressing issues to address. He was most probably referring to the bill on national security which was introduced under Article 23 of the Basic Law.

We strongly urge your Committee to request the HKSAR administration to consult the Hong Kong people fully and should not try to rush the legislation through. The administration must not repeat of debacle of Basic Law Article 23 in 2003.

## **5. Statutory Human Rights Commission**

No independent statutory Human Right Commission has been set up. The HKSAR Government claims the Equal Opportunities Commission, the Ombudsman and the Privacy Commissioner perform the functions of a human rights commission. However, the fact is that none of the three agencies have the power to oversee the implementation of the various UN human rights covenants. They are not even allowed to investigate complaints against the police and the ICAC.

Thus we urge your Committee to continue to call the HKSAR Government to stop dragging it feet and must take action to set up the independent Human Rights Commission forthwith.

## **6. National Security Legislation (Article 23 legislation)**

In February 2003, the HKSAR Government introduced the National Security (Legislative Provisions) Bill into the Legislative Council in order to implement Article 23 of the Basic Law. The bill raised serious concerns about the freedom of expression, freedom of conscience, freedom of assembly and freedom of association. On 1 July 2003, more than half a million people, dressed in black, took to the streets to protest against the bill. The march rocked the HKSAR to its foundation. Because of the demonstration, the Liberal Party withdrew support for the bill. Because of this, the administration was forced to withdraw the bill.

We urge your Committee to continue to monitor the situation and urge the HKSAR

Government to act with extreme caution if it tries to enact legislation on Article 23 of the Basic Law again. It must fully consult the Hong Kong people and must ensure the legislation is in conformity with the ICCPR and other international human rights covenants.

## **7. Anti-discrimination Legislation**

Only three pieces of legislation have been enacted to outlaw discrimination on the grounds of sex, disability and family status. NGOs have been demanding legislation to prohibit discrimination on the grounds of race, age and sexual orientation.

We urge your Committee to request the HKSAR Government to enact such legislation as soon as possible.

## **8. Equal Opportunities Commission (EOC)**

In the summer of 2003, the respected Chairman of the EOC, Ms Anna Wu, was replaced by Mr Michael Wong, a retired judge of the Court of Appeal. On assuming office, Mr Wong decided to terminate the employment of Mr Patrick Yu, who was appointed Director (Operations) shortly before Ms Wu's departure. The decision was challenged by Mr Yu and raised concern about the credibility of the EOC.

Two meetings were held on the nights of 4 and 5 November 2003. They were attended by several EOC members including the Chairman and the Secretary for Home Affairs, Dr Patrick Ho. The following day, Mr Wong tendered his resignation. Legislators were stunned by the series of incidents and felt they had adversely affected the credibility of the EOC.

The HKSAR Government has recently proposed to split up the post of the executive chairman of the EOC into a non-executive chairman and a chief executive officer under the pretext of improving corporate governance. However there is concern that such a change could weaken the EOC and render it less effective. The Government has been telling the international community that the EOC, together with the Privacy Commissioner and the Ombudsman are key institutions for protecting human rights in the HKSAR. Ironically, the latter two agencies are not even overseen by a board, let alone having a non-executive chairman and a CEO. The human rights NGOs in the HKSAR are concerned that the authorities are using an excuse to undermine the EOC's independence and effectiveness.



We urge your Committee to request the HKSAR Government not to meddle with the structure and the powers of the EOC. In order to set up a more transparent mechanism for appointing the chairman, the administration should list the requirements for the job and conduct open recruitment. To enhance transparency of the EOC, the meetings should be open to the public and the papers made available on the EOC website.

## **9. Freedom of Expression**

In April 2004, two popular radio talk show hosts, Mr. Albert Cheng and Mr. Wong Yuk-man, both working for Hong Kong Commercial Radio, were forced to abandon their programmes and left Hong Kong. It was widely believed that the authorities in the HKSAR and in Beijing did not want the two men to host the radio programmes in the run-up to the big march planned for 1 July 2004 and during the Legislative Council elections in September 2004. There were reports that national security officers from mainland China were involved in getting the two men to leave Hong Kong.

When the two men returned to Hong Kong several months later, they could not continue to broadcast at Commercial Radio. Another commentator, Mr. Allen Lee, who is a delegate to the NPC, also decided to stop broadcasting after he received a threatening phone call at home late in the evening. During that time, there were also reports that the HKSAR administration was considering replacing the Director of Radio Television Hong Kong (RTHK), Mr. Chu Pui-hing. RTHK, a public service broadcaster, has been criticized by pro-Beijing politicians for failing to act as the propaganda arm of the government.

The full frontal assault on the freedom of expression in early 2004 has had a chilling effect on the community in general and the journalistic profession in particular. It shows that if Beijing perceives there is a threat in the HKSAR, they would do whatever it takes to minimize the damage. Many Hong Kong people were stunned and awed by the events and the reaction to the plight of Mr. Cheng and Mr. Wong was muted. The HKSAR Government did little to defend the Covenant rights of the Hong Kong residents.

In January 2006, the HKSAR administration appointed a committee to review public service broadcasting. The committee, which will submit a report in October, will examine the role of and justifications for public service broadcasting and how such service should be funded. The committee consists mainly of people from the mass media. Not only is there no representative from RTHK, no member can claim to be well versed in public service broadcasting. At present, RTHK is the de facto public service broadcaster in the HKSAR. It

delivers its sound broadcast programmes through the seven radio channels on spectrum assigned to it and television programmes broadcast mainly on the channels of two domestic free television stations.

The review has alarmed the human rights community and the staff of RTHK because they believe the review is aimed at RTHK. They fear the administration may use the exercise to restrict RTHK's freedom of expression by undermining its editorial independence. There is also concern that the funding for RTHK would be affected. The Chief Executive, who is likely to stand for re-election in March 2007, may use this exercise to gain favour with pro-Beijing politicians.

We strongly urge your Committee to express alarm and concern at disturbing developments since early 2004 which are aimed at undermining the freedom of expression and press freedom. We also urge your Committee to ask the HKSAR administration to take pro-active steps to defend and uphold the freedom of expression and press freedom.

On the review of RTHK, we urge your Committee to request the HKSAR administration to ensure RTHK's editorial independence and freedom of expression and that the department will continue to be adequately funded.

#### **10. The case of Ching Cheong**

Veteran journalist Ching Cheong is a correspondent of the Singapore Straits Times. He has been detained in mainland China for more than 300 days and no charges have been made. Such detention has had a chilling effect on the HKSAR news media and will increase the tendency for self-censorship.

We urge your Committee to express serious concern at the unreasonable and unacceptable detention and urge the HKSAR Government to do its utmost to secure his release.