

Submission by 23 pro-democracy members of the

Hong Kong Legislative Council

to the

United Nations Human Rights Committee

On

The Second Report of the Hong Kong Special Administrative Region
of the People's Republic of China in the light of the International Covenant
on Civil and Political Rights

16 March 2006

Introduction

1. This submission focuses on the Constitutional and legal framework within which the Covenant is implemented in the HKSAR and on the situation with regard to the implementation of Article 25 of the ICCPR. The signatories to this submission see the fundamental causes of systemic problems within the HKSAR as being essentially linked to the absence of an elected Chief Executive and an elected Legislative Council in the HKSAR both of which are elected by universal and equal suffrage and to the absence of constitutionalism and the Rule of Law within the Sovereign State. The political parties or NGOs of which the signatories are members may be making separate submissions on the HKSAR's Government's compliance with other Articles of the ICCPR. That these issues are not covered in detail in this submission does not mean that the signatories do not see them as important or disagree with the submissions of others. However, the signatories do not wish to detract from the single submission that until constitutional reform takes place with elections by systems which are fully compliant with Article 25 for the Chief Executive and the Legislative Council of the HKSAR and until the unelected NPC Standing Committee practises self-restraint in the exercise of its power of interpretation under the PRC Constitution and the Basic Law with regard to the HKSAR, these systemic problems will continue and the residents of the HKSAR will continue to suffer.

2. Major reversals in progress towards universal suffrage have taken place since 1 July 1997. The principal ones are the abolition of the elected Regional Councils where representatives were elected by universal and equal suffrage and where the Councils had real responsibilities for safeguarding environmental hygiene and public health as well as providing cultural services and venues and recreational programmes and facilities, the abolition of the broadly-based functional constituencies and the reintroduction of those with a narrow franchise in their place and the reintroduction of appointees to the District Councils which had been wholly elected by universal and equal suffrage. Moreover, constitutional development has been at a standstill. The year 2007 was the first time under which it would have been possible for the Chief Executive of the HKSAR to be elected by universal and equal suffrage under the Basic Law and the year 2008 could have been the first year in which all members of the Legislative Council were returned by election by universal and equal suffrage provided that the procedures set out in paragraph 7 of Annex I and part III of Annex II to the Basic Law had been followed. However, throughout the period from 1997-2004, the Government has refused even to hold discussions or to discuss proposals for progress towards universal suffrage.

3. Such moves were not made until 2004 when the Government set up the Constitutional Development Task Force consisting of the Chief Secretary, the Secretary for Constitutional Affairs

and the Secretary for Justice. In its First Report, the Task Force expressed its views that changes to the methods of elections specified in Annexes I and II would be initiated by the HKSAR Government if there was a need for amendment (see paras. 3.7 and 3.13). However, on 6 April 2004, the SCNPC issued its 2nd Interpretation of the Basic Law whereby a procedure not set out in Annexes I and II to the Basic Law was introduced before any change could be made to the method for selecting the Chief Executive in 2007 and thereafter and for forming the Legislative Council in 2008 and thereafter. The latter procedure was in violation of the clear words of Annex II which only required such changes to be reported to the Standing Committee for the record. This interpretation effectively amended Annexes I and II of the Basic Law.

4. On 26 April 2004, following consideration of the Chief Executive's Report, the SCNPC issued its "Decision on relevant issues concerning methods for selecting the Chief Executive of the HKSAR in 2007 and for forming the Legislative Council in 2008." Although this was not an interpretation of the Basic Law, as a matter of political reality, the Central Authorities had decided that the HKSAR was not to have an elected Chief Executive and that the system of functional constituencies would not be abolished.

5. The Government's proposals for changing the electorate in the Election Committee (which 'elects' the Chief Executive) and for changes in the constituencies electing the Legislative Council did not obtain the requisite two-thirds majority in the Legislative Council and the Government has thereafter refused to put any alternative proposals so that progress towards universal and equal suffrage remains at a standstill. The opposing minority (of whom the signatories form the greater part) have rejected the proposals on the grounds that without any timetable or plan for constitutional development based on universal and equal suffrage, the proposals were directionless. Nor did the proposals make substantive progress towards universal and equal suffrage. The Government insisted on giving votes to appointed as well as elected District Councillors who under the proposals, would have been the electorate in the new functional constituencies and included as the electorate in the Election Committee. Also, the Government refused to change the electorates in functional constituencies where corporate voters made up the entirety or part of the electorate so as to abolish corporate voting. Thus, the method which ensures dominance by business and quasi-monopolies through the functional constituencies is maintained.

Constitutional and legal framework within which the Covenant is implemented and conformity of laws with it (art. 2)

Interpretations and Decisions by the SCNPC affecting the HKSAR

6. The constitutional framework within which the Covenant is implemented is already well known and understood by the Committee. Essentially, the Basic Law is a law made by the NPC under the PRC Constitution. Under the Basic Law, the HKSAR is supposed to enjoy a high degree of autonomy and the HKSAR is supposed to be vested with independent judicial power including that of final adjudication. Chapter II of the Basic Law sets out the relationship between the Central Authorities and the HKSAR. Articles 16-19 and Articles 22 and 23 exist to maintain that high degree of autonomy and judicial independence. However, as experience has shown, the exercise of the power of interpretation and decision of the Standing Committee can easily undermine the high degree of autonomy and the independence of the judiciary.

7. Of the 3 interpretations which have taken place, the first effectively overturned a decision of the Court of Final Appeal (CFA) concerning fundamental rights of persons claiming to be entitled to permanent residency within the HKSAR. Essentially, the CFA held that they were entitled and the Standing Committee of the NPC issued an interpretation to the contrary effect. The persons most directly affected had no means of being heard. This gives the lie to any suggestion by the HKSAR Government or the Central Government that fundamental rights will not be the subject matter of any interpretation. The most recent interpretation in May 2005 was pre-emptive; it was given at a time when the issue the subject matter of the interpretation was already before the High Court.

8. The NPC is unelected and the Standing Committee of the NPC is therefore unelected. People within the HKSAR have no means of taking part in any meaningful way in decisions and interpretations of the Basic Law made by the Standing Committee which directly impact on constitutional and electoral reform. There are no set procedures beyond the necessity to consult the Committee for the Basic Law. That is also an unelected body. As mentioned above, even the views of the top HKSAR officials as expressed in the 1st Task Force Report as to the procedures set out in Annexes I and II of the Basic Law were overridden.

9. The Central Government has prevented any progress being made towards compliance with Article 25 of the ICCPR by ruling out universal suffrage for the 2007 (small circle) election of the Chief Executive (which has twice resulted in a no-contest walkover by the candidate of the Central Government's choice) and the 2008 election of Legislative Councillors.

10. Having laid the groundwork through the Interpretation of 6 April 2004, the Standing Committee's Decision of 26 April 2004 precluded elections by universal suffrage for 2007 and 2008 and required that there be no change in the proportions of directly elected legislators from geographical constituencies to those elected from functional constituencies. Thus the HKSAR Government was compelled to put forward proposals which either did not increase the number of directly elected legislators from geographical constituencies (where the franchise is universal

and equal) or increased both the number of geographical and functional constituency seats.

11. These prohibitions and restrictions introduced by interpretation and decision by the SCNPC were themselves not foreshadowed in any way by the provisions of the Basic Law. No constitutional or statutory procedure of any kind exists for the steps which are required to be taken by the Chief Executive according to the Interpretation before reporting that there is a need for change in the method of elections. Thus, this is left to the individual whim or fancy of a Chief Executive. There are no checks or balances. The Chief Executive is not required to consult either the Executive Council or the Legislative Council or the public.

12. Through interpretation and decision by the Standing Committee, uncertainty is introduced and the HKSAR is subject to 'ad hoc' rule or intervention when the Central Authorities see it as necessary or desirable. Although the processes may be in accordance with the PRC Constitution, the effect is damaging to confidence in the Rule of Law within the HKSAR and the lack of 'due process' alienates the citizens of the HKSAR and diminishes trust in the Central Government as well as the HKSAR Government.

The signatories request that the Committee urge the Central 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.

Implementation of Article 25

13. The signatories refer to the Committee's General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service (Article 25 of the ICCPR) and in particular to paragraphs 1-3 and 5 on the right to participate in public affairs. The citizens of the HKSAR are in substance denied the right to participate in public affairs because although they can elect representatives to the Legislative Council and quite apart from the non-conformity of the electoral system with Article 25, the powers of the Legislative Council are so circumscribed that in no meaningful sense can it be said that the citizens of the HKSAR enjoy the right and opportunity to take part in the conduct of public affairs. The Legislative Council does not make policy, cannot change policy, and cannot initiate legislation except under restricted circumstances (Article 74 of the Basic Law).

14. The Chief Executive is elected through a 'small circle' election. There is no legal or political requirement for any candidate for the Chief Executive to put before the public his or her programme or policy proposals. The avenues through which governments, whether parliamentary or presidential are made accountable to the public are absent under the constitutional framework in the HKSAR. Thus, the will of the people can only be influential through mass demonstrations. This

then becomes the sole measure by which the Government can gauge the acceptability of its proposals, by polling and counting the number of participants in any demonstration. The Government is not substantively based upon the consent of the people. It is an inherently unstable form of government.

15. The system of election of legislative councillors is non-compliant with Article 25 being inherently discriminatory. Corporate voting makes a bad system worse since single powerful individuals or groups with diverse economic interests can control certain functional constituencies. The deficiencies and distortions resulting from the functional constituencies are documented in [here suggest reference material eg Civic Exchange Papers published in Jan. and March 2005 by Sing Ming and Simon Young respectively, recent articles by Jake van der Kamp in SCMP on Heung Yee Kuk and building of hard infrastructure].

Effects of the dysfunctional system

16. Given the limited powers of the Legislative Council to initiate legislation and the existence of powerful vested interests within the Legislative Council in the form of functional constituencies, there is no likelihood in the near future that the HKSAR will truly respect and ensure to all individuals within the HKSAR the rights recognized in the Covenant without distinction of any kind nor adopt such legislative or other measures necessary to give effect to these rights let alone ensuring effective remedies for those whose rights have been violated. Foot-dragging on the passing of legislation prohibiting discrimination on the grounds of race or ethnic origin is evident and the HKSAR Government refuses to pass a comprehensive anti-discrimination law. There are no laws prohibiting discrimination against persons on the grounds of their religion or political or other opinion. There is no positive protection for the freedoms and rights in Articles 18 and 19 which are vital for political activities and healthy development of civil society.

17. Institutional protections against abuse of power and misconduct by law enforcement agencies, the Immigration Authorities and the Correctional Services Department remain weak or non-existent. The HKSAR Government has no interest or incentive to strengthen institutional protections. In particular, the ICAC is accountable directly to the Chief Executive who does not appear to take any interest in their conduct when issues of possible abuse of power are raised in public in connection with invasions of privacy through covert surveillance or breach of legal professional privilege. On the contrary, the Chief Executive himself signed an executive order in August 2005 purporting to authorize the continuing invasions of privacy by law enforcement agencies which the High Court has held to have no effect in law.

18. While the Bill seeking to introduce legislation under Article 23 of the Basic Law has been withdrawn, the existing offences of treason and sedition remain in place and are a powerful weapon for the suppression of political freedoms and rights.

19. The existence of legal professional privilege, namely the absolute confidentiality attaching to communications passing between client and lawyer for the purposes of obtaining legal advice (where no fraud or illegality is involved in the seeking of legal advice) is recognized as being essential to the administration of justice. Yet in several cases in recent years, it has become evident that the law enforcement agencies have ignored or paid little regard to the existence of the privilege. In one case, a barrister was arrested for failing to report a suspicion that his client may have committed a money-laundering offence when his knowledge was acquired in the course of his professional work for the purposes of representing his client on a bail application. The result was that the client had to seek alternative legal representation. The barrister was later successful in obtaining a declaration from the High Court that the arrest was unlawful. In another case, a conversation between client and lawyer was recorded by a person present at the conversation and who had been wired by the ICAC when it was anticipated that the lawyer would be giving legal advice. The form of internal authorization used by the ICAC revealed that there was no consideration of the possibility that the conversation would be protected by legal professional privilege. Apparently, ICAC officers were not required in the form to notify their superior authorizing officers whether this might be the case.

20. No compensation was offered to the lawyer who was the victim of the unlawful arrest. No information is available as to what disciplinary measures were imposed on the officer who authorized the arrest or whether any internal inquiry was held. Since the existing protections against police abuse operate mainly on a complaints system, there is no pro-active independent investigation of abuses committed by the law enforcement agencies.

21. Approximately 900 demonstrators against the WTO and innocent spectators who were swept along with them were detained on an open road by the police for a night. Only Hong Kong residents were permitted by the police to leave. It is not known under what legal authority these persons were detained and why non-residents were detained but not Hong Kong residents. Only 14 persons were charged with offences and detained. 11 were eventually released and charges against them dropped. Strong suspicions remain that there was no justification for charging them with offences in the first place. No inquiry is likely to take place.

22. The Government's proposals for legislation on interception of communications and covert surveillance shows its complete failure to maintain a proper balance between the enjoyment of citizens' political and civil rights including the right to freedom of association and expression and the right to privacy on the one hand and the needs of the law enforcement agencies on the other. Unrestricted surveillance of every kind including eavesdropping and recording of private conversations and communications without the need for any authorization of any kind, whether

external or internal, where such communications occur in a public place. Thus conversations on a mobile phone while one of the parties is in a street or in a restaurant can be bugged and taped by any one of the law enforcement agencies at will. In those cases where authorization is required, interceptions and surveillance can be conducted for the purpose of protecting public security; 'public security' is undefined. The conditions required to be satisfied before authorization can be granted are inadequate to protect the exercise of citizens' rights and freedoms. In particular, there is totally inadequate measures to protect the absoluteness of legal professional privilege.

23. These are but symptoms of a dysfunctional government which is not firmly rooted in democratic principles.

The signatories request the Committee to call for the immediate introduction of elections by universal and equal suffrage of the Chief Executive and the Legislative Council.

Yours sincerely,

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Hon Tam Heung-man	Hon Frederick Fung	Hon Audrey Eu	Hon Margaret Ng
Hon Fernando Cheung	Hon Lee Wing-tat	Hon Fred Li	Hon Joseph Lee
Hon Leung Yiu-chung	Hon Sin Chung-kai	Hon Ronny Tong	Hon James To
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