



*公道自在民心 The Civic Way, the Fairer Way*

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LC Paper No. CB(2)1335/17-18(04)

**CIVIC PARTY**

**(CP)**

**Submission to the**

**United Nations**

**UNIVERSAL PERIODIC REVIEW**

**Hong Kong Special Administrative Region (HKSAR)**

**CHINA**

**31<sup>st</sup> session of the UPR Working Group**

**of the Human Rights Council**

**November 2018**

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## Introduction

1. We are making a stakeholder's submission in our capacity as a political party of the pro-democracy camp in Hong Kong for the 2018 Universal Periodic Review on the People's Republic of China (PRC), and in particular, the Hong Kong Special Administrative Region (HKSAR). Currently, our party has five members elected to the Hong Kong Legislative Council, the unicameral legislature of HKSAR.
2. In the Universal Periodic Reviews of PRC in 2009 and 2013, not much attention was paid to the human rights, political, and social developments in the HKSAR, whilst some positive comments were reported on the HKSAR situation.<sup>1</sup> We wish to highlight that there have been substantial changes to the actual implementation of human rights in Hong Kong since the last reviews, which should be pinpointed for assessment in this Universal Periodic Review. In particular, as a pro-democracy political party with members in public office at the Legislative Council (LegCo), we wish to draw the Council's attention to issues related to the political structure, election methods and operations, and the exercise of freedom and rights within and outside the Legislative Council in HKSAR. Most notably, recent incidents demonstrate that the PRC and HKSAR authorities have not addressed recommendations made by the Human Rights Committee in previous concluding observations in assessing the implementation of International Convention on Civil and Political Rights (ICCPR). There are worrying signs of further erosion of rights in the HKSAR.
3. This submission focuses on issues related to Art. 19, 21, and 25 of the ICCPR. Civic Party urges the PRC and HKSAR governments to ensure the implementation of the relevant rights in the HKSAR.

### *Part 1 - Constitutional Reforms for Chief Executive and Legislative Council elections*

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4. Constitutional reforms for genuine universal suffrage for the Chief Executive and the Legislative Council elections have been delayed for almost a decade and still lack progress. As it currently stands, LegCo is a semi-democratically elected body comprising 70 members, 35 of whom are directly elected through five geographical constituencies (GCs) under the proportional representation system with largest remainder method and Hare quota. The other 35 seats are indirectly elected through trade-based and profession-based functional constituencies (FCs) with limited electorates largely controlled by the pro-Beijing camp. The *main functions of the Legislative Council* are to enact, amend or repeal laws; examine and approve budgets, taxation and public expenditure; and raise questions on the work of the government. Meanwhile, the Chief Executive is elected by the Election Committee comprising 1200 members from selective constituencies and industries, while ordinary residents of HKSAR are not entitled to direct votes in the election.
  
5. When constitutional reform was initiated in 2014, on 31 August 2014, the Standing Committee of the National People's Congress (NPCSC) adopted a decision (831 Decision) on the selection method of the 2017 Chief Executive and 2016 Legislative Council elections. The 831 Decision provides for a "one person, one vote" electoral framework. However, it came with a pre-selection process that raised serious concerns about the representativeness and openness of the nomination process. The requirement that "the Chief Executive has to be a person who loves the country and loves Hong Kong" also brought about controversy. As the 831 Decision stipulates that a nomination committee of 1200 members, which is largely controlled by the pro-Beijing camp, would nominate two or three candidates, and each candidate must have the endorsement of more than half of all members of the nominating committee. There was public backlash against the 831 Decision as the mechanism it proposed would exclude candidates of certain political views, especially ones that are not pro-Beijing.

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6. The Human Rights Committee stated its concerns in its Concluding Observations (April 29, 2013, para 6) and recommended that: “Hong Kong, China, should take all necessary measures to implement universal and equal suffrage in conformity with the [ICCPR] as a matter of priority for all future elections. **It should outline clear and detailed plans on how universal and equal suffrage might be instituted and ensure enjoyment by all its citizens**, under the new electoral system, of the right to vote and to stand for election in compliance with article 25 of the Covenant, taking due account of the Committee's general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service. It is recommended to consider steps leading to **withdrawing the reservation to article 25(b) of the Covenant.**”<sup>ii</sup> (Emphasis added).
  
7. Civic Party LegCo members co-signed a submission in response to OHCHR’s request on 16 November 2017 for information relating to the Questionnaire on the contribution of parliaments (See Annex I), illustrating the incompatibility of the 831 Decision with Art. 25 of the ICCPR, and the lack of proper human rights considerations in the NPCSC as the 831 Decision was formulated. As of today, the NPCSC and the HKSAR Administration have not shown any initiative in altering or removing the 831 Decision so that it would be aligned with universally recognised standards for democratic elections, such as that provisioned in ICCPR. Worse still, it appears that the HKSAR Administration has no plan to introduce any constitutional reform in this administrative term (2017-2022). This highlights that the PRC and HKSAR Administration have no desire to fulfill their treaty obligations under Art. 25 of the ICCPR or under their constitutions to implement genuine universal and equal suffrage for the Chief Executive and Legislative Council elections.

***Part 2 - The Freedom of Assembly, of Procession, of***  
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***Demonstration and of Expression***

8. Public backlash to the 831 Decision prompted the 79-day Occupy Central protests, aka the Umbrella Movement, a peaceful demonstration drawing a large number of HK residents and members of the civil society to the streets. In its aftermath, the HKSAR Administration ordered numerous arrests and prosecution of student leaders, politicians, and participants of the movement. This shows the HKSAR Administration's increasing intolerance on the exercise of freedom of assembly and expression by Hong Kong residents.
  
9. On 7 November 2017, a group of UN experts urged the HKSAR Government to honour its human rights commitments towards democracy activists when three democracy activists, Joshua Wong, Nathan Law and Alex Chow were sentenced by the Court of Appeal to imprisonment. They were charged unlawful assembly as they had entered into an enclosed area, commonly known as the Civic Square, outside the Government Headquarters at the beginning of Occupying Central.<sup>iii</sup> Although the three student leaders successfully appealed against their imprisonment sentences in the Court of Final Appeal, the relatively strict sentencing guidelines set by the lower court with regards to unlawful assemblies were upheld.<sup>iv</sup>
  
10. It is worth noting that the Human Rights Committee has expressed concerns regarding the Public Order Ordinance itself : ***“[t]he Committee is concerned about (a) the application in practice of certain terms contained in the Public Order Ordinance, inter alia, “disorder in public places” or “unlawful assembly”, which may facilitate excessive restriction to the Covenant rights, (b) the increasing number of arrests of, and prosecutions against, demonstrators, and (c) the use of camera and video-recording by police during demonstrations (arts. 17 and 21).” It also recommended that “Hong Kong, China, should ensure that the implementation of the Public Order Ordinance is in conformity***

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*with the Covenant. It should also establish clear guidelines for police and for records for the use of video-recording devices and make such guidelines accessible to the public.” (Emphasis added).<sup>v</sup>*

11. The same Court of Appeal, upon a similar application made by the Secretary for Justice to review sentences, changed the sentences of thirteen activists convicted of unlawful assembly from community service orders to 8-13 months of imprisonment on 15 August 2017.<sup>vi</sup> These cases are pending appeal at the Court of Final Appeal. Another nine Occupy Central leaders are facing different charges of common law public nuisance, an archaic offence rarely used in Hong Kong,<sup>vii</sup> with ongoing hearings in process.
12. These legal actions criminalise legitimate and relatively peaceful exercise of fundamental rights of opinion and expression, peaceful assembly and association, and the right to defend these rights under Art. 19 and 21 of the ICCPR.

### ***Part 3 - The Right to Vote and to be Elected, to Take Part in Public Affairs, and the Rule of Law***

#### ***Barring Candidates from Running at Elections***

13. Following the Umbrella Movement, the HKSAR administration barred a number of candidates from standing in elections. In the Legislative Council General Election in September 2016 (2016 LegCo Election), five candidates were disqualified on the basis that they allegedly campaigned on pro-independence platforms, despite most of them were non-violent.<sup>viii</sup> This contrasts with the fact that Edward Leung Tin Kei, who ran a similar pro-independence campaign, was qualified to run in the Legislative Council By-Election in February 2016. Among the disqualified five in September 2016 was Chan Ho Tin, convener of the Hong Kong National Party, who launched a petition against the Returning Officer’s decision to disqualify him from running. The court however ruled against him, citing NPCSC’s interpretation of

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the Basic Law and that the Returning Officer's decision was "clearly correct".<sup>ix</sup>

14. Similarly, in the 2018 by-election, Agnes Chow Ting, member of Demosistō, was disqualified from running as the self-determinist platform of Demosistō was deemed unconstitutional. The Hong Kong Bar Association issued a statement regarding the event, stating that "[t]his regrettably is *equivalent to the introduction of a political screening process for any prospective candidate, and there is no fair, open, certain and clear procedure to regulate this process; nor any timely remedy against an adverse decision of the Returning Officer, resulting in an indefinite duration of disqualification of the persons concerned.*" Rather than a check on the administrative power of the government, constitutionality has become a tool for the government to deprive opposition activists of their right to stand in elections. Such disenfranchisement lacks clear guidance and constitutes "unreasonable restrictions" as illustrated in Art. 25 of the ICCPR.

#### ***Disqualifying popularly elected legislators***

15. After the 2016 LegCo Election, the HKSAR Administration lodged judicial proceedings to disqualify two pro-independence members-elect and four pro-democracy members-elect over their oath taking. The court ruled for disqualification in light of NPCSC's interpretation of the Basic Law, which substantially altered the legal requirements and conventional practice of oath-taking by legislators-elect.
16. On 12 October 2016, pro-independence members-elect, Sixtus "Baggio" Leung Chung-hang and Yau Wai-ching, promulgated their separatist agenda at the oath-taking ceremony.<sup>x</sup> On 18 October 2016, the HK Government initiated legal proceedings at the Court of First Instance to disqualify Leung and Yau. On 7 November 2016, before the judgment being laid down, the NPCSC unanimously passed "The National People's Congress Standing

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Committee's interpretation of the Basic Law Article 104 of the Hong Kong Special Administrative Region". NPCSC's interpretation introduced additional requirements to the oath-taking process, such that a member-elect must take his/her oath in one attempt before assuming office and "*the oath taker must take the oath sincerely and solemnly*".<sup>xi</sup> These requirements were not found in the wording of the original provision of the Basic Law and relevant local legislation. **Ever since 2004, some members-elect have been using the oath-taking ceremony as a platform to protest, whereas members who did not take their oaths successfully in their first attempt were allowed to retake their oaths.**

17. On 15 November 2016, the Court of First Instance disqualified Leung and Yau without referring to the Oath-taking Interpretation.<sup>xii</sup> The two appealed to the Court of Appeal, where three presiding judges rejected the appeal, referring to NPCSC's interpretation as the "true meaning" of the relevant provision in the Basic Law.<sup>xiii</sup> On 25 August 2017, the Appeal Committee of the Court of Final Appeal rejected further appeal on the cases<sup>xiv</sup>.
18. In December 2016, the HKSAR Government lodged another judicial review against four other pro-democracy legislators over their oath. They were Lau Siu-lai, Nathan, Leung Kwok-hung, and Yiu Chung-yim. The four pro-democracy members weaved protest into their oaths. The oaths of Law and Leung were validated in their first attempt, while Lau and Yiu were allowed to retake their oaths after their first attempt, which were also validated by the LegCo Secretary-General at the time.<sup>xv</sup>
19. On 14 July 2017, the Court of First Instance, referring to NPCSC's Interpretation, ruled that the four pro-democracy legislators were to lose their seats.<sup>xvi</sup> The court found that the oaths of Leung, Law and Yiu were invalid as they added extra statements before, during and after the oaths. As for Lau, she took such long pauses between

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the words that the oath lost its meaning.

20. It is worth mentioning that the UN Human Rights Committee has taken note of HKSAR Government's view that NPCSC's power of interpretation is "in general and unqualified terms" and made the following observations: "*...the Committee remains concerned that a mechanism of binding constitutional interpretation by a non-judicial body may weaken and undermine the rule of law and the independence of judiciary (arts. 2 and 14)*" and recommended that "*Hong Kong, China, should ensure the proper functioning of judicial structures in accordance with the Covenant and with principles governing the rule of law. As previously recommended (CCPR/C/HKG/CO/2, para.18), it should also ensure that all interpretations of the Basic Law, including on electoral and public affairs issues, are in full compliance with the Covenant.*"<sup>xvii</sup>
21. The disqualification of candidates and legislators, driven by an interpretation of a constitutional provision made by a political institution of the PRC, contributes to weakening the rights and equal opportunities of citizens to take part in the already constrained framework of LegCo elections, including the right to stand in elections, as provided for in Art. 25 of the ICCPR. It also raises question on the rule of law and judicial independence in Hong Kong. The same has been addressed in the IPU-UPR Submission (Annex I).

#### **Part 4 - The Right to Participate in Public Affairs and Freedom of Expression in the Legislative Council**

22. Several other incidents also demonstrate the willfulness of pro-Beijing legislators and the HKSAR Administration to curb freedom of expression of elected legislators in LegCo. In December 2017, pro-Beijing lawmakers launched a series of amendments to the Rules of Procedure of LegCo, the set of rules

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providing for parliamentary procedures, speeches and conduct. Pro-Beijing lawmakers claimed that such amendments were introduced to “curb filibustering” but many of their amendments were designed to encroach the capabilities of LegCo members in delivering public concerns.<sup>xviii</sup> As a result, it becomes increasingly difficult for pro-democracy members, as the minority under the rigged electoral system, to voice their concerns through petition.

23. Other ways to discourage opposition legislators from expressing their views include laying criminal charges to these legislators. In October 2016, legislator Cheng Chung-tai has been charged and later found guilty of desecrating the national and regional flag by flipping the flags upside down in protest during a legislative session. In November 2016, legislator “Longhair” Leung Kwok-hung was charged contempt of LegCo for snatching a folder of documents from a government official during a committee meeting. In the same month, Sixtus “Baggio” Leung Chun-hang and Yau Wai-ching were charged unlawful assembly<sup>xix</sup> when they tried to enter the LegCo chamber to retake their oaths after their initial oaths were invalidated by the Secretary-General of LegCo. In May 2018, the court ruled in favour of “Longhair” Leung Kwok-hung, citing that contempt charges could not be laid on legislators. The Department of Justice, however, pledged to launch an appeal. Pro-Beijing lawmakers also frequently threatened to report opposition legislators’ behaviour, such as certain attempts to block proceedings and legislation, as criminal activity.
24. While the HKSAR administration claimed these charges were lawful and constitutional, these charges served to deter legislators from exercising their freedom of speech and debates or proceedings within the physical setting of the LegCo building, otherwise known as parliamentary privilege in Commonwealth countries as set out in the Erskine May Parliamentary Practice.<sup>xx</sup>

## Conclusion

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25. The following recommendations should be raised during the UPR process on the PRC:

- **HKSAR should establish a monitoring mechanism according to the Paris Principles to ensure that its human rights obligations are fulfilled by the HKSAR authorities and in the Legislative Council.**
- **The PRC and HKSAR authorities should explain on their recent acts stated above, which raise questions on their compatibility of their human rights obligation as set out in the constitutional document of HKSAR - the Basic Law, our domestic legislation - the Bill of Rights Ordinance (Cap.383) and the ICCPR.**
- **PRC and HKSAR authorities should honour their international treaty obligation, in particular of those under the ICCPR, to provide for electoral systems of genuine universal and equal suffrage, and administer elections in an open and fair manner without prejudice to a candidate's political view.**
- **HKSAR authorities should provide safe, equal, and fair environments for political expression to Hong Kong residents and elected members of the Legislative Council.**

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Submission by Members of the Hong Kong Legislative Council  
to the OHCHR in response to its request on 16 November 2017 for information  
relating to the Questionnaire on the contribution of parliaments  
in the work of Human Rights Council and its Universal Periodic Review

## I. Introduction

1. This submission is respectfully made by the undersigned as local parliamentarians in their individual capacity and as representing their political parties as constructive input to the High Commissioner for Human Rights (OHCHR) and the Inter-Parliamentary Union (IPU) study to promote greater synergism between the parliaments and the work of the Human Rights Council (HRC) and its universal periodic review (UPR) and to contribute to strengthening the effective promotion and protection of human rights (OHCHR/IPU Study).
2. We are legislators of the Legislative Council of the Hong Kong Special Administrative Region (Chinese: 香港特別行政區立法會; LegCo), the unicameral parliamentary legislature of the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC). As stakeholders directly impacted by the decisions of the national parliament, the National People's Congress of the PRC (Chinese: 中華人民共和國全國人民代表大會; NPC), we welcome this opportunity to provide input with a view towards strengthening the future capacity of the NPC to play a more effective role in delivering concretely on human rights.
3. LegCo is established under the constitutional documents of HK and the PRC upon the transfer of sovereign of HK from the United Kingdom (UK) to the PRC in 1997, namely (i) the Sino-British Joint Declaration (SBJD) signed between the PRC and the UK in 1984 and (ii) the HK Basic Law promulgated by the national parliament of the PRC, the National People's Congress (NPC) in 1990 pursuant to the PRC's Constitution and the SBJD. *This constitutional arrangement provides that HK exercises a high degree of autonomy and enjoys executive, legislative and independent judicial power based on the principle of "One Country, Two Systems".*

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5. According to relevant legal provisions of this constitutional framework, the NPC does not enact laws or deal with affairs directly applicable to HK except in very limited circumstances when the relevant matters are not within the autonomy of HK. While the focus of the OHCHR/IPU study is on national parliaments, *as local parliamentarians and relevant stakeholders, we are concerned that recent decisions by the national parliament, the NPC, adversely impact on our local legislature, the LegCo, in particular its representativeness and ability to effectively promote and protect the rights of the HK people, and the human rights of parliamentarians.* Further, this submission does not attempt to question and deal with the merits and details of the constitutional arrangement between the PRC and HK, as such matters are well within the autonomy of the PRC sovereign. It wishes to *highlight the human rights implications of acts of the national parliament, the NPC and its standing committee, the Standing Committee of the National People's Congress (the NPCSC) on HK and the local parliament, LegCo, of which we, the undersigned are members of.*
6. Recent decisions of the national parliament, the NPC, raise significant issues

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relevant to the goals of the OHCHR/IPU study -- that is, to promote enhanced synergies between the parliaments and the work of the Human Rights Council. We provide information on and describe two examples below: (1) a decision made by the NPCSC in 2014 on the election method for Chief Executive in HKSAR and (2) a legislative interpretation made by the NPCSC in 2016 prescribing the requirements and manners for members-elect of LegCo to take their oaths after being elected and before taking office, aka the “831 Decision” as explained below. These two examples highlight the importance of addressing the impact of decisions by a national parliament that operates within the constraints of a one-party system.

7. While the PRC has signed but not yet ratified the International Covenant on Civil and Political Rights (ICCPR), the ICCPR is in effect for the HKSAR, through ratification by the United Kingdom in 1976, entrenchment in the constitution document of HK promulgated by the NPC, and the enactment of the Bill of Rights Ordinance (Cap.383) domestically in HK. The political constraints of the NPC shape national parliament decisions, policies and actions that not only weakens the autonomy promised under the One Country, Two Systems principle, but the decisions and actions of the NPC in relation to HK affairs raise compatibility issues with the ICCPR. The impact of these tensions with international standards also highlights the need to strengthen the independence and effectiveness of the national parliament to carry out its functions to promote and protect human rights guaranteed by international law and the international obligations of the state, which is the focus of the OHCHR/IPU Study.

## II. NPCSC’s Actions and the Impact on Human Rights in HK

### The NPCSC’s Decision on Electoral Methods in HK

8. Under the current process, the HK Chief Executive is elected by the Election Committee comprising 1200 members from selective constituencies and industries, while ordinary residents of HK are not entitled to direct votes in the election. LegCo is also not fully democratic and representative within the electoral framework as stated in para 3 above.

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9. In December 2013, the HK government launched a public consultation over the electoral method of the 2017 Chief Executive election and 2016 LegCo election as the HK Basic Law expressly provides for the selection of the Chief Executive and LegCo by universal suffrage and democratically<sup>1</sup>.
10. On 31 August 2014, the NPCSC adopted a decision (831 Decision) on selection method of the 2017 Chief Executive and 2016 Legislative Council elections<sup>2</sup>, which provides for a “one person, one vote” electoral framework with a pre-selection process that raised serious concerns about the representativeness and openness of the nomination process, as well as the political aspect of the requirement that “the Chief Executive has to be a person who loves the country and loves HK.” As the 831 Decision requires a nomination committee of 1200 members being largely controlled by the pro-China camp to nominate two or three candidates, where each candidate must have the endorsement of *more than half* of all members from the nominating committee, there was strong public concern that this pre-selection process at the nomination stage of the 831 Decision would screen out candidates of certain political beliefs and opinions. The 831 Decision also stated that the 2016 LegCo election method would remain unchanged. The HK SAR Government then introduced a constitutional reform proposal based on the 831 Decision and claimed that such conformed to the definition of universal suffrage.<sup>3</sup>

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<sup>1</sup> Art. 45(2) of the HK Basic Law provides that “...[t]he ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedure.”

Art. 68(2) of HK Basic Law provides that “...[t]he ultimate aim is the election of all the members of the Legislative Council by universal suffrage.”

<sup>2</sup> Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016

(<http://www.2017.gov.hk/filemanager/template/en/doc/20140831b.pdf>)

<sup>3</sup> The then Chief Secretary, Ms. Lam Cheng Yuet Ngor (the current Chief Executive) claimed that the 831 Decision satisfies the requirement of universal suffrage and that “... after the Chief Executive is selected by universal suffrage through ‘one person, one vote’ in 2017, the ultimate aim of the selection of the Chief Executive by universal suffrage as prescribed in Article 45 of the Basic Law will

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11. It is worthy to note that before the issuance of the 831 Decision, the Human Rights Committee stated its concerns in its Concluding Observation (April 29, 2013, para 6) and recommended that: “Hong Kong, China, should take all necessary measures to implement universal and equal suffrage in conformity with the Covenant as a matter of priority for all future elections. **It should outline clear and detailed plans on how universal and equal suffrage might be instituted and ensure enjoyment by all its citizens**, under the new electoral system, of the right to vote and to stand for election in compliance with article 25 of the Covenant, taking due account of the Committee's general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service. It is recommended to consider steps leading to **withdrawing the reservation to article 25(b) of the Covenant.**”<sup>4</sup> (Emphasis added). (When the UK ratified the ICCPR in 1976, it entered a reservation to Article 25(b) as it might require the establishment of an elected Executive or Legislative Council in HK.)
12. The constitutional reform proposal made pursuant to the 831 Decision also falls short of the standard set out in ICCPR Art. 25. The Special Rapporteur for Follow-up to Conclusion and Observations repeatedly requested the HKSAR Government to provide information on how the proposed election method based on the 831 Decision is compatible with the ICCPR, and measures to withdraw the reservation to art.25(b) of the ICCPR but did not receive satisfactory or appropriate responses despite repeated requests<sup>5</sup>.

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have been attained.” Hansard of the Hong Kong Legislative Council of its meeting dated 22 April 2015 (p.9033;

<https://www.legco.gov.hk/yr14-15/english/counmtg/hansard/cm20150422-translate-e.pdf#nameddest=sta01>)

<sup>4</sup> U.N. Human Rights Committee, *Concluding observations on the third periodic report of HK, China, adopted by the Committee at its 107th session.* (CCPR/C/CHN-HKG/CO/3, para 6)

<sup>5</sup> Letter from Fabian Omar Salvioli, SR for Follow-up to Concluding Observations Human Rights Committee dated 24 November 2014 [citation]

Letter from Sarah Cleveland, SR for Follow-up to Concluding Observations Human Rights Committee dated 6 August 2015 [citation]

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13. Public opposition to the 831 Decision prompted the Occupy Central Movement, aka the Umbrella Movement, a peaceful civil society demonstration drawing a large number of HK residents to the streets which lasted for 79 days. The constitutional reform proposal pursuant to the 831 Decision was vetoed by LegCo in June 2015 but the HKSAR Government repeatedly insisted that the 831 Decision would continue to form the basis of any future constitutional reform<sup>6</sup>. As such, there remain grave concerns that any future “reform” of the election methods of the Chief Executive and LegCo will raise issues regarding the representativeness of any election, whether the Chief Executive and LegCo, as the local parliament could reflect the will and diversity of all components of society, including persons holding diverse political opinions<sup>7</sup>.

#### The NPCSC’s Interpretation on Oath-Taking Laws related to LegCo Members

14. The Human Rights Handbook for Parliamentarians emphasizes *the freedom of expression of parliamentarians and that parliamentarians shall not be subject to arbitrary actions or sanctions during the exercise of their mandate*. In 2016, two pro-independence candidates and four pro-democracy candidates elected to LegCo were disqualified pursuant to an interpretation of a Basic Law provision by the NPCSC setting out the requirement for LegCo members-elect to swear allegiance before taking office<sup>8</sup> (the NPCSC Oath Interpretation). The NPCSC Oath Interpretation was made by the NPCSC, a standing committee convened between plenary sessions of the NPC, the national parliament. Its “interpretation” substantially altered the legal requirements and conventional practice of oath-taking by local parliamentarians, LegCo members-elect of the HKSAR. A brief description of the relevant events and proceedings are set out below.

15. On 12 October 2016, pro-independence members-elect, Sixtus Leung and Yau Wai-ching from Youngspiration, protested and pronounced their political beliefs

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<sup>6</sup> The Chief Executive’s 2017 Policy Address, para 24  
(<https://www.policyaddress.gov.hk/2017/eng/pdf/PA2017.pdf>)

<sup>7</sup> Human Rights Handbook for Parliamentarians p. 90

<sup>8</sup> Article 104 of the HK Basic Law

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at the oath-taking<sup>9</sup>. On 18 October 2016, the HK Government initiated legal proceedings at the Court of First Instance to disqualify Leung and Yau. On 7 November 2016, after the court hearing but before the judgment being laid down, the NPCSC unanimously passed "The National People's Congress Standing Committee's interpretation of the Basic Law Article 104 of the Hong Kong Special Administrative Region" – the NPCSC Oath Interpretation as stated above.

16. The NPCSC Oath Interpretation explicitly introduced additional requirements to oath-taking process, such that a member-elect has only one attempt to take his/her oath before assuming office and "*the oath taker must take the oath sincerely and solemnly*"<sup>10</sup>. These requirements were not found in the wording of the existing provision of the Basic Law and the relevant local legislation. *Ever since 2004, some members-elect have made use of the oath-taking ceremony as a platform to protest, where members who did not successfully take their oaths at first attempt were allowed to retake their oaths.*

17. On 15 November 2016, the Court of First Instance disqualified Leung and Yau without referring to the Oath-taking Interpretation<sup>11</sup>. The two appealed to the

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<sup>9</sup> Leung and Yau asserted "as a member of the Legislative Council, I shall pay earnest efforts in keeping guard over the interests of the HK nation," displayed a "HK is not China" banner, and mispronounced "People's Republic of China" as "people's re-fucking of Chee-na" (Hansard of the Hong Kong Legislative Council meeting dated 12 October 2016, p.10 footnote (3) and (4); <https://www.legco.gov.hk/yr16-17/english/counmtg/hansard/cm20161012-translate-e.pdf#nameddest=mbp> )

<sup>10</sup> Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress dated 7 November 2016 [http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext\\_doc25.pdf](http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc25.pdf)

<sup>11</sup> The Chief Executive of the HKSAR & Secretary for Justice v the President of the Legislative Council & Sixtus Leung Chung Hang & Yau Wai Ching (HCAL185/2016); The Chief Executive of the HKSAR & Secretary for Justice v the President of the Legislative Council & Yau Wai Ching (HCAL185/2016)

[http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=106799&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=106799&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU)

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Court of Appeal, where three presiding judges rejected the appeal, following and referring to the NPSCS Oath Interpretation as giving the "true meaning" to the part of the Basic Law<sup>12</sup>. On 25 August 2017, the Appeal Committee of the Court of Final Appeal rejected further appeal on the cases<sup>13</sup>.

18. In December 2016, the HK Government lodged another judicial review against other four pro-democracy legislators over their oaths, Lau Siu-lai, Nathan Law from Demosisto, Leung Kwok-hung from the League of Social Democrats and Yiu Chung-yim. The four pro-democracy members protested as they took their oaths, whereas the oaths of Law and Leung were validated at first attempts, and Lau and Yiu were allowed to retake their oaths which were also validated by the LegCo Secretary-General<sup>14</sup>. Some other LegCo members from the pro-democracy also made additional statements on top of the prescribed oath, chanted slogans and protested immediately before or after reciting the prescribed oath at the oath-taking ceremony but the SAR Government did not seek to

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<sup>12</sup> The Chief Executive of the HKSAR & Secretary for Justice v the President of the Legislative Council & Sixtus Leung Chung Hang & Yau Wai Ching (CACV 224-227/2016)  
[http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=107012&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=107012&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU)

<sup>13</sup> The Chief Executive of the HKSAR & Secretary for Justice v the President of the Legislative Council & Sixtus Leung Chung Hang & Yau Wai Ching (FAMV No. 7-10 of 2017)  
[http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=111119&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=111119&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU)

<sup>14</sup> Leung Kwok-hung held a yellow umbrella symbolising the Umbrella Revolution with many words thereon, including "ending one-party rule", and a paper board showing the words "NPC 831 decision" with a cross on it. Nathan Law raised his tone when swearing allegiance to China, sounding like he was asking a question. The oath administrator, the LegCo Secretary-General validated the oaths of Leung and Law at their first attempts. Yiu Chung-yim inserted phrases such as "universal suffrage" in the oath. Lau Siu-Lai spent about ten minutes reading the 80-word oath in extreme slow motion. The oaths of Yiu and Lau were invalidated at the first attempt but they were allowed to retake their oaths at later LegCo meetings and their oaths were subsequently validated. (Hansard of the Legislative Council meeting on 12 October 2016; footnotes (2) and (5)

<https://www.legco.gov.hk/yr16-17/english/counmtg/hansard/cm20161012-translate-e.pdf#nameddest=mbp>

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disqualify them.

19. The four LegCo members continued to discharge their duties as public officers by participating in LegCo meetings from October 2016 to July 2017 upon being sworn in. On 14 July 2017, the Court of First Instance, referring to the NPCSC Oath Interpretation, ruled that the four pro-democracy legislators were to lose their seats<sup>15</sup>. The court found that the oaths of Leung, Law and Yiu were invalid as they added statements before, during and after the oaths and for Lau, she took such long pauses between the words that the oath lost its meaning. As of this submission date, the appeal cases of Leung and Lai are still pending whereas Yiu and Law have decided not to appeal further.
20. *“The IPU Committee on Human Rights of Parliamentarians has consistently stressed that, in accordance with their mandates, parliamentarians must be able to express themselves freely as defenders of the rights of the citizens who elect them<sup>16</sup>.”* The members-elect were exercising their freedom of expression on behalf of their electorate in the oath-taking process. Further, an express objective of the IPU is to protect parliamentarians against arbitrary measures by way of *“parliamentary immunities, so that parliamentarians in the exercise of their functions may express themselves freely without the risk of sanctions, other than that of being disavowed by the electorate”<sup>17</sup>.*
21. The narrow and restrictive NPCSC Interpretation is contrary to the understanding of the legal requirements of oath-taking and past practice adopted by LegCo: the ambit for expressing political opinions at oath-taking ceremonies

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<sup>15</sup> Secretary for Justice & the Chief Executive of the HKSAR v the President of the Legislative Council & Yiu Chung Yim; Secretary for Justice & the Chief Executive of the HKSAR v the President of the Legislative Council & Nathan Law Kwun Chung; Secretary for Justice & the Chief Executive of the HKSAR v the President of the Legislative Council & Lau Siu Lai; Secretary for Justice & the Chief Executive of the HKSAR v the President of the Legislative Council & Leung Kwok Hung (HCMP 3378,3379, 3381 and 3382/2016

[http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=110555&QS=%28%7Bnathan+law%7D+%25parties%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=110555&QS=%28%7Bnathan+law%7D+%25parties%29&TP=JU)

<sup>16</sup> Handbook for Parliamentarians P. 164

<sup>17</sup> Ibid. P. 92



and that a member-elect could legitimately expect to retake the oath if his/her oath is invalidated at the first attempt. Although the NPC did not directly disqualify LegCo members-elect from office through the NPCSC Interpretation, it, as a legal decree made by the national parliament, has apparently encouraged the HKSAR Government to further pursue legal proceedings against LegCo members. Despite disavowals by the authorities that any pressure was put on the HK Court to decide in the Government's favour, the clear result is that four more democratically elected members and a total of six members of the LegCo, the local parliament, have been disqualified by legal proceedings initiated by the administrative branch of the government.

22. The UN Human Rights Committee has taken note of HKSAR Government's view that the NPCSC's power of interpretation is "in general and unqualified terms" and made the following observations: "...the Committee remains concerned that a mechanism of binding constitutional interpretation by a non-judicial body may weaken and undermine the rule of law and the independence of judiciary (arts. 2 and 14)" and recommended that "Hong Kong, China, should ensure the proper functioning of judicial structures in accordance with the Covenant and with principles governing the rule of law. As previously recommended (CCPR/C/HKG/CO/2, para.18), it should also ensure that all interpretations of the Basic Law, including on electoral and public affairs issues, are in full compliance with the Covenant."<sup>18</sup>

23. The NPCSC Oath Interpretation thus raises serious concerns as to the attempts by the PRC Government, through the NPC and the NPCSC, exercising its power as the national parliament and through administrative and judicial actions taken by the HKSAR Government, to interfere with the elections and election results of the local parliament, LegCo and to curb opposition participation in LegCo and opposition voices. This chain of events contributes to weakening the rights and equal opportunities of citizens to take part in the already constrained framework of LegCo elections, including the right to stand for election as provided for in Art. 25 of the ICCPR. *These actions by the NPC highlight the gap between the*

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<sup>18</sup> U.N. Human Rights Committee, *Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session*. CCPR/C/CHN-HKG/CO/3, para 5

*appropriate role of the national parliament to implement human rights, including monitoring the government.*

24. We appreciate this opportunity to share our concerns within the framework of the issues and topics addressed by the OHCHR/IPU questionnaire, and wish to also advance some suggestions for strengthening the effectiveness of the NPC in carrying out its parliamentary functions to promote and protect human rights as clearly described in The OHCHR/IPU Handbook for Parliamentarians (2016).

### III. The PRC's National People's Congress

25. The National People's Congress of the People's Republic of China is the highest organ of state power. The NPC and its permanent body, the Standing Committee of NPC, exercise the legislative power of the State. The NPC is composed of deputies elected from the provincial level administrative regions and the armed forces, who meet in session once a year. Key functions and roles include: 1) enacting and amending basic laws governing criminal offences, civil affairs, the State organs and other matters; 2) electing and removing from office the President and high-level officials such as the Premier of the State Council, ministers, President of the Supreme People's Court, and Procurator-General of the Supreme People's Procuratorate; 3) examining and approving the plan for national economic and social development, the State budget, and their implementation reports; 4) deciding on the establishment of special administrative regions and the systems to be instituted there. *Upon the handover of HK in 1997, the Central People's Government recognized that the relevant provisions of the ICCPR ratified in HK continue to be in force<sup>19</sup>.*

26. *The NPC does not have specialized committee that deals with human rights, but does have one working committee, the HKSAR Basic Law Committee (BL Committee) that make recommendations and give advice to the NPCSC on issues that impact on the promotion and protection of human rights in the HKSAR, such as the 831 Decision and the NPCSC Interpretation on oath-taking*

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<sup>19</sup> Note from the Permanent Representative, People's Republic of China, to the Secretary-General, United Nations, June 20, 1997, 36 I.L.M. 1675 (1997)

laws as elaborated above. The BL Committee comprises six members from the PRC and six members from HK. Some of the PRC and HK members are have legal or academic background and all of them are appointed by the NPC. The BL Committee advised on occasions where the NPCSC made interpretations on the Basic Law and decisions related to HK but the committee works within the constraints and limit of the NPC, being a national parliament of a single-party driven state. The meetings of the BL Committee are not open and the records of the meetings and consultative process are not made public. As demonstrated above, the decisions and legal interpretations made by the NPCSC, having sought advice from the BL Committee, raise serious concerns regarding transparency, accountability, and compliance with international human rights standards obligations.

27. Since the BL Committee does not have an express human right mandate, *there is still a pressing need for an independent NPC human rights committee* that could serve as an independent monitor, promote the ratification and implementation of international treaties, play a significant role in government delegations or provide input into state party reports for the UPR or human rights treaty bodies. However, as the BL Committee is tasked with the important function of advising the NPC and the NPCSC on issues related to human rights in HK, it also needs to play a more active and independent role in the genuine promotion and protection of human rights.

#### IV. Recommendations and Suggestions

28. We urge the OHCHR/IPU study to reflect the challenges faced by local parliaments operating within a restrictive one party political system. In particular, the unique status of the HK LegCo under the One Country, two System Principle, must be recognized and protected. The constructive goal and outcome of the OHCHR/IPU study is undermined if the serious weaknesses of such national parliaments and their impacts on local parliaments are not clearly and concretely addressed.
29. We respectfully urge the OHCHR/IPU study to include in its recommendations the following:

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- Where national parliaments such as China's NPC, do not have an independent and effective human rights committee, they should be *encouraged to take immediate and concrete measures to set up such a committee* in conformity with the IPU Handbook for Parliamentarians. This committee should operate with full transparency and accountability to the citizens and be representative of different constituencies and properly resourced.
- Specifically, the creation of such an NPC human rights committee should be tasked with roles set out in the Handbook, including participation in China's next UPR and the next treaty body reviews, ensuring implementation of UPR and treaty body human rights recommendations.
- In addition to the creation of a human rights committee, a subcommittee could be created that could also exercise an oversight responsibility regarding decisions made in relation to HK SAR and interpretations on provisions of the HK Basic Law that impact on fundamental rights and freedoms protected under international law and the international obligations of the mainland and HKSAR governments. This subcommittee should be representative of different constituencies and properly resourced, comprising lawyers, experts and academics on human rights from the PRC and HKSAR. This may also be done by reforming the BL Committee.
- We also encourage and support the convening of seminars and workshops for national and local parliamentarians on the international human rights obligations of the government, and on ways to participate, and on closing the implementation gap between UN human rights recommendations, treaty obligations of the government.

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**Hon Alvin YEUNG, member of the Legislative Council (Civic Party)**

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**Hon Tanya CHAN, member of the Legislative Council (Civic Party)**  
**Hon Jeremy TAM Man-ho, member of the Legislative Council (Civic Party)**  
**Prof Hon Joseph LEE Kok-long, member of the Legislative Council**  
**Hon Charles Peter MOK, member of the Legislative Council**  
**Hon Kenneth LEUNG, member of the Legislative Council**  
**Hon IP Kin-yuen, member of the Legislative Council**  
**HON SHIU Ka-chun, member of the Legislative Council**

**15 January 2018**

<sup>i</sup> Human Rights Council, Report of the Working Group on the Universal Periodic Review on China dated 5 October 2009 (A/HRC/11/25), para 100;

Human Rights Council, Report of the Working Group on the Universal Periodic Review on China dated 4 December 2013, para 151

<sup>ii</sup> U.N. Human Rights Committee, *Concluding observations on the third periodic report of HK, China, adopted by the Committee at its 107th session.* (CCPR/C/CHN-HKG/CO/3, para 6)

When the UK ratified the ICCPR in 1976, it entered a reservation to Article 25(b) as it might require the establishment of an elected Executive or Legislative Council in HK.

<sup>iii</sup> “Hong Kong should respect human rights of democracy activists during appeal – UN experts”

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22359&LangID=E>

<sup>iv</sup> *Secretary For Justice v Wong Chi Fung, Law Kwun Chung and Chow Yong Kang Alex* [2018] HKCFA 4

<sup>v</sup> U.N. Doc. CCPR/C/CHN-HKG/CO/3, para 5

<sup>vi</sup> *Secretary for Justice v Leung Hiu Yeung & Ors.* (CAAR 3/2016) At a protest outside the Legislative Council in 2014 against the North-East Development Project when the subject matter was being discussed at the Financial Committee of the council, thirteen activists were convicted of unlawful assembly and sentenced to community service orders by the Magistrate’s Court in 2016. The Secretary for Justice then applied for review of sentences at the Court of Appeal. (Full judgment can be found at

[http://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=111277](http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=111277))

<sup>vii</sup> It is worthy to note that the District Court has criticised the prosecution on the charges used against the nine leading Occupy Movement protesters, saying the ones they now face are overlapping. (“Charges against Occupy leaders irk court” on 15 June 2017, RTHK <http://news.rthk.hk/rthk/en/component/k2/1336351-20170615.htm>)

<sup>viii</sup> “Hong Kong Restricts Election Candidates, Renewing Fears of Lost Rights”, the New York Times dated 3 August 2016 (<https://www.nytimes.com/2016/08/04/world/asia/hong-kong-independence-elections.html>)

<sup>ix</sup> *Chan Ho Tin v Lo Ying Ki Alan & Ors.* (HCAL 162/2016) Paragraph 143: “The conclusion reached by the RO [Returning Officer] based on the materials before him is therefore one that is clearly correct in the circumstances of the present case.” (Full judgement can be found at

[http://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=113686](http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=113686))

<sup>x</sup> Leung and Yau asserted “as a member of the Legislative Council, I shall pay earnest efforts in keeping guard over the interests of the HK nation,” displayed a “HK is not China” banner, and mispronounced “People’s Republic of China” as “people’s re-fucking of Chee-na” (Hansard of the Hong Kong Legislative Council meeting dated 12 October 2016, p.10 footnote (3) and (4);

<https://www.legco.gov.hk/yr16-17/english/counmtg/hansard/cm20161012-translate-e.pdf#nameddest=mbp>)

<sup>xi</sup> Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress dated 7 November 2016 [http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext\\_doc25.pdf](http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc25.pdf)

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- <sup>xii</sup> The Chief Executive of the HKSAR & Secretary for Justice v the President of the Legislative Council & Sixtus Leung Chung Hang & Yau Wai Ching (HCAL185/2016); The Chief Executive of the HKSAR & Secretary for Justice v the President of the Legislative Council & Yau Wai Ching (HCAL185/2016)  
[http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=106799&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=106799&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU)
- <sup>xiii</sup> The Chief Executive of the HKSAR & Secretary for Justice v the President of the Legislative Council & Sixtus Leung Chung Hang & Yau Wai Ching (CACV 224-227/2016)  
[http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=107012&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=107012&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU)
- <sup>xiv</sup> The Chief Executive of the HKSAR & Secretary for Justice v the President of the Legislative Council & Sixtus Leung Chung Hang & Yau Wai Ching (FAMV No. 7-10 of 2017)  
[http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=111119&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=111119&QS=%28%7BYau+Wai+Ching%7D+%25parties%29&TP=JU)
- <sup>xv</sup> Leung Kwok-hung held a yellow umbrella symbolising the Umbrella Revolution with many words thereon, including "ending one-party rule", and a paper board showing the words "NPC 831 decision" with a cross on it. Nathan Law raised his tone when swearing allegiance to China, sounding like he was asking a question. The oath administrator, the LegCo Secretary-General validated the oaths of Leung and Law at their first attempts. Yiu Chung-yim inserted phrases such as "universal suffrage" in the oath. Lau Siu-Lai spent about ten minutes reading the 80-word oath in extreme slow motion. The oaths of Yiu and Lau were invalidated at the first attempt but they were allowed to retake their oaths at later LegCo meetings and their oaths were subsequently validated. (Hansard of the Legislative Council meeting on 12 October 2016; footnotes (2) and (5)  
<https://www.legco.gov.hk/yr16-17/english/counmtg/hansard/cm20161012-translate-e.pdf#nameddest=mbp>)
- <sup>xvi</sup> Secretary for Justice & the Chief Executive of the HKSAR v the President of the Legislative Council & Yiu Chung Yim; Secretary for Justice & the Chief Executive of the HKSAR v the President of the Legislative Council & Nathan Law Kwun Chung; Secretary for Justice & the Chief Executive of the HKSAR v the President of the Legislative Council & Lau Siu Lai; Secretary for Justice & the Chief Executive of the HKSAR v the President of the Legislative Council & Leung Kwok Hung (HCMP 3378,3379, 3381 and 3382/2016  
[http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=110555&QS=%28%7Bnathan+law%7D+%25parties%29&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=110555&QS=%28%7Bnathan+law%7D+%25parties%29&TP=JU))
- <sup>xvii</sup> U.N. Human Rights Committee, *Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session*. CCPR/C/CHN-HKG/CO/3, para 5
- <sup>xviii</sup> One of the amendments, for example, raised the number of Legislative Councilors required to rise in their place in order to investigate a petition of grievance from twenty members to one half of all members (thirty-five members)
- <sup>xix</sup> The same offence discussed in Part 2 of this submission
- <sup>xx</sup> P. 221 of the Erskine May Parliamentary Practice reads, "Freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament," in which "proceedings" cover anything said or done by a member of the Parliament, or in Hong Kong's case the LegCo.

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