

**HONG KONG BAR ASSOCIATION'S OBSERVATIONS ON THE
REPORT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA TO THE
U.N. HUMAN RIGHTS COMMITTEE**

Update

1. The report covers the period 1.7.1997 to 30.6.1998. The Guidelines for Reporting to the Human Rights Committee ('UNHRC') do not prevent countries from updating reports. The Administration should have in hand the preparation of a supplementary report that will deal with developments since 30.6.1998. Such report should be published soon so as to give the members of the UNHRC the opportunity to fully acquaint themselves with those developments and so as to enable non-governmental organizations to refine the submissions that they propose to make.

Presentation of the Report

2. The Administration should be able to tell members how the report will be presented to the UNHRC. It was a feature of the most recent country reports respecting Hong Kong that the United Kingdom entrusted the presentation of those parts of its report which related to Hong Kong to Hong Kong Government officials. The Administration should now be in a position to say whether the same or a similar procedure will be followed before the UNHRC when the report is presented in the Autumn.

Comments: Part I

Rule of Law

3. Paragraph 29(a) deals with the supremacy of the law. It purports to represent to the UNHRC that administrative decisions affecting rights and obligations must be capable of challenge in the courts.
4. This paragraph may need to be qualified in the light of the Right of Abode litigation and the constitutional reference to the SCNPC. The UNHRC will probably want to know whether legal rights and obligations may be affected by administrative decisions that apply non-judicial and non-reviewable interpretations made by the SCNPC and, if that is so, how that squares with the assertion that no person can suffer *except for a breach of law established before the independent courts*.
5. The paragraph does not deal with the question of ouster clauses that sometimes exclude judicial review of administrative decisions so that there is no possibility of a challenge in the courts. The Administration should be invited to say whether it believes that its statement that an administrative decision *must be capable of successful challenge before the courts* is accurate or whether it should be qualified in this respect.

The Police

6. Paragraph 44 may give the impression that CAPO is an institution that is separate from the police. This part of the report should make it clear that CAPO is not an independent body and that the IPCC has no directory powers and that many have suggested that this situation needs to be changed.

Other Disciplined Services

7. Paragraph 46 is not wholly accurate. Some mention should be made of the limited role of visiting justices. It would also do no harm to make it clear that there is no independent prisons inspectorate.

Comments: Part II

Women in Rural Elections

8. Paragraphs 72-73 need to be updated in order to deal with the two NT election cases this year where there were findings of discrimination against both men and women in the electoral process.

Deaths in Police Custody

9. Paragraphs 98-102 need to be updated to deal with recent deaths in custody.

Torture

10. Paragraph 112 says that it is not possible for the Administration to keep records of allegations of torture and ill-treatment by the police because the police and Legal Department do not keep them. It is possible, however, for the police and the Legal Department to keep a record of those cases where judges and magistrates rule on the issue of ill-treatment of prisoners in trials within trials.

Prison Rules

11. In paragraph 180, it is wrong to describe the Secretary for Security as an “independent appellate body” given the organizational links with the CSD.

Rehabilitation of Offenders

12. At paragraph 184 it is explained that whether a person gets the benefit of the provisions of this ordinance depends on the punishment inflicted. The UNHRC might query whether the provisions discriminate against affluent offenders because the amount of a fine is a relevant factor.
13. It is a basic principle of sentencing that if a court considers that a fine is an appropriate punishment then the amount of the fine must not be beyond the means of the offender. Two offenders convicted of exactly the same offence may be fined in different amounts because of their means. One could qualify under the ordinance for rehabilitation and the other would not. That is arbitrary.

Complains against CSD

14. The UNHRC might query why the word “impartial” in paragraph 199 is in parentheses.
15. Paragraph 203 respecting the work of JP’s would be more credible if statistics relating to action taken were provided. The report does not say, for instance, whether prisoners are able to see JP’s out of the hearing of CSD officers. In 1997 the former Inspector of H.M. Prisons, Sir Stephen Tumin, visited Hong Kong prisons on an inspection tour arranged by a NGO and was not allowed to communicate with prisoners out of the hearing of CSD staff. (It is surprising that this visit is not mentioned as the subsequent report praised CSD staff for their professionalism and found good things to say about nearly all of the institutions he visited.)

Right of Abode

16. Paragraphs 230-241 will need to be updated. It is hoped that in any update provided to the UNHRC the Administration will ensure that the materials provided will reflect the full scope of the legal and constitutional debate. The materials should include the judgment of the CFA and the “clarification”.

Retrospective Criminal Offences

17. Paragraph 298 will need to be updated in the light of the CFA’s judgment on the issue.

Prison (Amendment) Rules 1997

18. In paragraph 320 the Administration identifies correspondence which will never be read by prison officials. The list of addressees does not include legal advisers. Is it the case that CSD staff sometimes reads letters addressed to a prisoner’s legal adviser?

Religious Discrimination

19. Paragraphs 321-325 deal with freedom of thought, conscience and religion. The UNHRC may well ask why the Government denied Roman Catholics the opportunity of a visit by their religious leader when he obviously posed no threat to public order.

Freedom of Information

20. At paragraph 339 the Administration says that a person who is denied access to an official document can always complain to the Ombudsman and that is a good reason for not creating a legally enforceable right of access.

21. The UNHRC might wish to know whether the statutory remit of the Ombudsman enables him to describe a reasoned decision not to provide a document as “maladministration” for it is conceivable that such a decision is not “maladministration” as no legal right is involved. Additionally, the UNHRC would probably wish to know whether a person refused access to a document is, at the time of refusal, told by the department that he may lodge a complaint with the Ombudsman.
22. As regards paragraphs 344-345, the Administration should update to address the controversy about broadcast news reporting of the Taiwanese dual countries policy. Given that no laws on secession have been enacted, what are the limits prescribed by law on any public debate concerning this issue?

Flags Case

23. Paragraphs 364-370 will require updating.

Participation in Public Life: Article 25

24. This section (paragraphs 450-473) needs updating, The UNHRC will want to know the rationale for scrapping the two municipal councils and, with them, the means whereby elected representatives had a say in local government issues.
25. The report fails to deal with the limitations on participation in public life which have been imposed on the majority of residents of the N.T. who cannot claim that an ancestor was living there in 1898. It will be necessary for the Administration to tell the UNHRC that two judges of the CFI have found that Article 25 ICCPR has been breached and to explain their judgments. It will also have to make clear what its position is on those judgments that are the subject of appeal by the Administration.

Equality Before the Law: Article 25

26. Paragraph 504 invites the comment that because the majority would find it irksome to abide by legislation designed to protect a minority in respect of which international obligations have been incurred then the convenience of the majority will prevail. The Administration is likely to find that invidious comparisons may be drawn with that stance and its position on the political rights of the non-ethnic minority living in the N.T..

27. Paragraph 506 is too coy. The UNHRC is entitled to know more about the decision not to prosecute Ms Aw. It should be provided with the text of the SOJ's explanation of her decision so that members can judge for themselves whether the decision is consistent with the DOJ's own published prosecution guidelines.

Dated: 20th September, 1999.