



HONG KONG BAR ASSOCIATION

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31st March 2014

Ms. Kate Fox Principi
Secretary of the Human Rights Committee
Human Rights Committee Secretariat
8 – 14 Avenue de la Paix
CH 1211 Geneva 10
Switzerland.

Attention: Kate Fox/Sindu Thodiyl

Dear *Kate*,

The Hong Kong Bar Association has prepared a Follow-up Report on Hong Kong's Implementation of Certain Concluding Observations of the United Nations Human Rights Committee held in April 2013.

A copy of the Follow-up Report of the Hong Kong Bar Association dated 28th March 2014 is enclosed for the consideration of the Human Rights Committee.

Yours sincerely,

Paul Shieh SC
Chairman

Encl: 20 hard copies of the Follow-up Report of the HKBA.

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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伍中彥

Hong Kong's Implementation of Certain Concluding Observations of the
United Nations Human Rights Committee (April 2013)

Follow-up Report of the Hong Kong Bar Association

1. The United Nations Human Rights Committee (“the Committee”) requested in its Concluding Observations on the Third Periodic Report of Hong Kong, China adopted on 29 April 2013 (CCPR/C/CHN-HKG/CO/3) that the HKSAR Government shall provide within 1 year relevant information on the implementation of the Committee’s recommendations made in three specified paragraphs of the Concluding Observations, namely –

“6. 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.

21. Hong Kong, China, should adopt measures to ensure that all workers enjoy their basic rights, independently of their migrant status, and establish affordable and effective mechanisms to ensure that abusive employers are held accountable. It is also recommended to consider repealing the “two-weeks rule” (whereby domestic migrant workers have to leave Hong Kong within two weeks upon termination of contract) as well as the live-in requirement.

22. In light of the recommendation made by the Committee on the Elimination of Racial Discrimination (CERD/C/CHN/CO/10-13, para. 31), Hong Kong, China, should intensify its efforts to improve the quality of Chinese language education for ethnic minorities and non-Chinese speaking students with an immigrant background, in collaboration with the Equal Opportunities Commission and other groups concerned. Hong Kong, China, should further intensify its efforts to encourage the integration of students of ethnic minorities in public school education.”

2. The Hong Kong Bar Association (“the HKBA”) sent a submission to the Committee in 2013 to assist its consideration of the Third Periodic Report of Hong Kong, China. The HKBA now sends this submission to the Committee to provide information and observations on the implementation of the Concluding Observations of the Committee.
3. As to para 6 of the 2013 Concluding Observations, the HKBA submits –
 - The Central People’s Government and the HKSAR Government appear to be taking the position that the reform of the electoral systems for the return of a candidate of the Chief Executive of the HKSAR for appointment and for the formation of the Legislative Council of the HKSAR to systems based on universal suffrage needs only to follow the relevant provisions of the Basic Law of the HKSAR and the Decisions of the Standing Committee of the National People’s Congress (“NPCSC”).
 - The Central People’s Government and the HKSAR Government also appear to be taking the position that: (a) Neither Article 26 of the Basic Law of the HKSAR (which guarantees constitutionally the right to vote and the right to stand for election in accordance with law of HKSAR permanent residents) nor Article 25 of the ICCPR (which has been incorporated into the laws of the HKSAR by virtue of the Hong Kong Bill of Rights Ordinance (Cap 383)) is relevant to or informs the reform of the two electoral systems; (b) The 1976 reservation entered by the United Kingdom in respect of Article 25(b) of the ICCPR to reserve “the right not to apply article 25(b) in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong” has been adopted by the People’s Republic of China to continue to apply to the HKSAR; (c) The 1976 reservation has the effect of excluding Article 25(b) of the ICCPR from being a provision of the ICCPR as applied to Hong Kong so as to have constitutional relevance in Hong Kong; (d) There

has been no consideration of steps that will lead to the withdrawal of the 1976 reservation.

- The Central People's Government and the HKSAR Government further appear to be taking the position that in respect of the reform of the electoral system for the return of a candidate of the Chief Executive of the HKSAR for appointment, the ultimate electoral system to return such a candidate by universal suffrage will be stipulated by Article 45 of the Basic Law, which has been read by them to provide for three phases: (a) nomination by a broadly representative nominating committee in accordance with democratic procedures; (b) selection of the Chief Executive by universal suffrage from the persons nominated by the nominating committee; and (c) appointment by the Central People's Government of the selected Chief Executive candidate.
- The Central People's Government and the HKSAR Government further appear to be taking the position that in respect of the nomination by the nominating committee: (a) the nominating committee is to be constituted by four sectors of equal number of persons, representing (i) industrial, commercial and financial sectors; (ii) the professions; (iii) labour, social services, religious and other sectors; (iv) members of the Legislative Council, representatives of District Councils, Hong Kong deputies to the National People's Congress and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference; (b) the nominating committee nominates as an institution, implicating the adoption of a form of majority decision-making process; and (c) the nominating committee nominates a specified maximum number of persons.
- The HKBA takes the position that by virtue of consistent statements and conduct, the People's Republic of China has assumed the responsibility to continue the application of provisions of the ICCPR as applied to Hong Kong.

The provisions of the ICCPR “as applied to” Hong Kong refer to the ICCPR as applied to Hong Kong under international law. Further, the provisions of the ICCPR as applied to Hong Kong refer to provisions of the ICCPR in so far as they are applied to Hong Kong or to the extent that they are applied to Hong Kong. Accordingly, one cannot assume that Article 25(b) of the ICCPR is not a provision of the ICCPR as applied to Hong Kong by reason of the 1976 reservation having been entered in respect of Article 25(b); the wording of the 1976 reservation must be examined to find out what has been expressly reserved upon.

- The HKBA takes the position that the 1976 reservation, interpreted in its context and purpose, means that it does not require the establishment of an elected Executive Council and Legislative Council. Given that a state reserves no more than what is contained in the text of the reservation itself, the 1976 reservation cannot possibly cover the electoral method of the Chief Executive of the HKSAR, which is an office separate from the Executive Council.
- The HKBA therefore takes the position that the provisions of the ICCPR as applied to Hong Kong include Article 25(b) in full in so far as the electoral method for the Chief Executive is concerned.
- The HKBA in addition takes the position that Article 25(a) of the ICCPR covers the electoral method for the Chief Executive. The domestic mode of the exercise of the right under Article 25(a) must ensure that representatives are “freely chosen” in a process that is without discrimination and ensures a plurality of participation, whether or not it is direct or indirect suffrage. “[There] can be no democracy without pluralism”: *Socialist Party & Ors v Turkey* (App No 20/1997/804/2007, 25 May 1998), para 41.

- The HKBA accordingly submits that Article 25(a) and Article 25(b) of the ICCPR apply in so far as the electoral method for the Chief Executive is concerned and non-compliance will entail international responsibility on the part of the People's Republic of China.
 - Turning to the terms of Article 25(a) and Article 25(b) of the ICCPR, the HKBA submits that the Central People's Government and the HKSAR Government's understanding of Article 45 of the Basic Law as mandating a nomination process performed by a nominating committee institutionally or collectively for the purpose of nominating a specified maximum number of persons runs the risk of limiting the free choice of voters among various alternatives and undermines the requirement that Chief Executive elections shall be genuine periodic elections that guarantee the free expression of the will of the electors without unreasonable restrictions.
 - The HKBA also submits that functional constituency elections to return members of the Legislative Council in the present format do not comply with Article 25(a) and Article 25(b) of the ICCPR, particularly the principle of equality.
 - The HKSAR Government's consultation on the methods for selecting the Chief Executive in 2017 and for forming the Legislative Council in 2016 is still on-going at the time of the preparation of this Submission. The HKBA anticipates that the HKSAR Government will announce the proposed methods in 2015. Accordingly, the HKBA urges the Committee to further require the HKSAR Government to provide information on or before 29 April 2015 of its implementation of the recommendation in para 6 of the 2013 Concluding Observations.
4. As to para 21 of the Concluding Observations, the HKBA notes the recent newspaper reports of criminal complaints by foreign domestic helpers of alleged

wounding and assaults by their employers and of criminal prosecutions, convictions and imprisonment of several such employers of wounding and assault. On the other hand, the HKBA finds no inclination on the part of the HKSAR Government to consider removing the “two-week rule” and the “live-in requirement” from the immigration policy applicable to foreign domestic helpers, even though these two restrictive conditions may well be a not uncommon reason for conflict between the foreign domestic helper and her employer. Rather the HKBA believes that the HKSAR Government could take the view that since, in the recent judgment of the Court of Final Appeal in *Vallejos & Anor v Commissioner of Registration* (FACV 19, 20/2012, 25 March 2013), the said immigration policy with its restrictive conditions of entry, stay and departure was accepted by the Court as justifying the exclusion of foreign domestic helpers as a class from being capable of ordinarily residing in Hong Kong for the purpose of acquiring permanent resident status with enjoyment of right of abode in Hong Kong, the said immigration policy and its restrictive conditions (including the “two-week rule” and “the live-in requirement”) ought to be steadfastly maintained. The HKBA urges the Committee to question the HKSAR Government as to its views of the *Vallejos* judgment and the consequential implications for the immigration policy towards foreign domestic helpers.

5. As to para 22 of the 2013 Concluding Observations, the HKBA notes that thus far, the HKSAR Government has been unable to implement a Chinese as a Second Language Curriculum to assist non-Chinese speaking students to master the language according to their pace, thereby affecting their opportunities for further education and employment. Further, in 2013, the United Nations Committee on the Rights of the Child recommended in its Concluding Observations (CRC/C/CHN/CP/3-4) that the HKSAR Government should urgently abolish the system of “designated schools” which had led to the phenomenon of eight schools having non-Chinese speaking students accounting for over 90% of their respective student populations. Although the HKSAR Government responded with a change in the mode of funding of these schools, the fact remains that parents of many ethnic minority children have to send their

children to these schools because the children cannot manage the Chinese based curriculum in ordinary schools and there is no adequate learning support or resources provided in ordinary schools to enable teachers to provide assistance to non-Chinese speaking students so that they may learn the curriculum at a suitable pace.

6. The HKBA had in its 2013 submission urged the Committee to question the HKSAR Government on occurrences of assault, damaging of property and vandalism against politicians, NGOs and independent media groups, their offices and their banners and other promotional materials at street level. In the light of the vicious stabbing of Kevin Lau, the former chief editor of the Ming Pao newspaper, on the street in the morning of 26 February 2014, the assault with metal sticks of two senior editorial staff of a newspaper under preparation for publication on 19 March 2014, the fact that these attacks were the latest of a number of incidents within the last decade in which journalists had been violently attacked, and the fact that the majority of these crimes had not been solved by the police, the HKBA urges the Committee to further require the HKSAR Government to provide information on or before 29 April 2015 of its implementation of the recommendation in para 13 of the 2013 Concluding Observations, which states –

“Hong Kong, China, should, in line with the Committee’s general comment No. 34 (2011) on freedoms of opinion and expression, take vigorous measures to repeal any unreasonable direct or indirect restrictions on freedom of expression, in particular for the media and academia, to take effective steps including investigation of attacks on journalists and to implement the right of access to information by public bodies.”

Dated: 31st March 2014.

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