

Bills Committee on the Race Discrimination Bill

Equality protection under Article 22 of the Hong Kong Bill of Rights

Purpose

At the meeting held on 21 November 2007, a question was raised as to whether Article 22 of the Hong Kong Bill of Rights (HKBOR) only regulated discrimination under the law or whether it also dealt with individual acts in the enforcement of the law. The Administration was requested to provide a supplementary paper to confirm whether the complainant in the hypothetical case referred to in paragraph 11 of the discussion paper entitled “Application to Government” (LC Paper No. CB(2)173/07-08(01)) could seek remedies under Article 22 of the HKBOR.

2. This paper sets out the Administration’s view on the application of Article 22 of the HKBOR to law enforcement activities.

General approach to equality guarantees under the Basic Law and HKBOR

3. The principle of equality is enshrined in Article 25 of the Basic Law which guarantees that all Hong Kong residents shall be equal before the law. This right is also protected by Article 22 of the HKBOR which incorporates Article 26 of the International Covenant on Civil and Political Rights (ICCPR) into our domestic law. Article 22 reads as follows:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

4. As referred to by Hartmann J in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690, the guarantees under Article 25 of the Basic Law and Article 22 of the HKBOR “call for a generous and purposive interpretation by our courts”. This is to ensure that each person, adult or child, Chinese or non-Chinese, will enjoy the full measures of those guarantees.

5. Under the hypothetical case mentioned in paragraph 11 of the discussion paper (LC Paper No. CB(2)173/07-08(01)), an ethnically Indian driver believed that the police officer committed racial discrimination because he observed that he received a speeding ticket but the police officer let the other two drivers (who are of different ethnic groups) leave the scene with just a verbal warning. In determining whether the ethnically Indian driver concerned would have a claim under the HKBOR, the court would probably adopt a generous and purposive interpretation to ensure that ethnic minorities enjoy the full protection of the right to equality.

Nature of protection in Article 22 of HKBOR

6. Article 22 of the HKBOR provides in itself an autonomous right to equality. In the opinion of the United Nations Human Rights Committee, the treaty monitoring body of the ICCPR, Article 26 of the ICCPR prohibits discrimination in law or in fact in any field regulated and protected by public authorities. The article is concerned with obligations imposed on the Government in regard to its legislation and the application thereof. When a law is passed, it must comply with the requirement of Article 26 that its content should not be discriminatory.

7. The jurisprudence on Article 26 of the ICCPR suggests that it guarantees both **equality in substance** and **equality in enforcement**. Equality in substance means that the substance of laws should not contain any arbitrary provisions and that the legislature should not enact arbitrary discriminatory laws.

8. Equality in enforcement means that the laws should be enforced without arbitrary discrimination. The principle of equality will be violated where a law is arbitrarily applied, and where like fact patterns lead to different legal consequences for manifestly unobjective motives such as race, colour or descent.

9. In the hypothetical case concerned, assuming that all the three drivers have committed the same speeding offence under the Road Traffic Ordinance but the police officer only issues a speeding ticket to the ethnically Indian driver and allows the others to go, the police officer seemingly would be applying or enforcing the law in an arbitrary manner. Legal Proceedings may be instituted by the victim alleging breach of Article 22 of the HKBOR.

Other safeguards for arbitrary law enforcement activities

10. It should be reiterated that the Police, in the performance of their law enforcement functions, are subject to the common law, administrative law and other legislation in addition to the HKBOR. They include the Police Force Ordinance, and the human rights provisions of the Basic Law. In addition, there are established administrative complaint avenues, for example, the Complaints Against Police Office and the Independent Police Complaints Council, and disciplinary procedures. A person who believes he or she has been discriminated by the Police on racial ground in the performance of the latter's duties can seek remedies and redress against the Police under existing law and existing complaint avenues.

**Constitutional and Mainland Affairs Bureau
December 2007**