

**For discussion on
9 February 2007**

Legislative Council Panel on Home Affairs

Existing human rights protection mechanisms in Hong Kong

Purpose

This paper appraises Members of the existing arrangements and mechanisms for protection of human rights in Hong Kong.

Legal Protection for Human Rights

2. In Hong Kong, human rights are fully protected by law. The legislative safeguards are enshrined in the Basic Law, the Hong Kong Bill of Rights Ordinance, and other relevant ordinances. They are buttressed by the rule of law and an independent judiciary. The Government also abides by various international human rights treaties and conventions which are applicable to Hong Kong.

Basic Law

3. The Basic Law is the fundamental constitution for Hong Kong. Article 4 of the Basic Law states clearly that—

“the Hong Kong Special Administrative Region shall safeguard the rights and freedoms of residents of the Hong Kong Special Administrative Region Government and of other persons in the Region in accordance with law.”

4. Chapter III of the Basic Law further prescribes the fundamental rights and freedoms of residents of and people in the Hong Kong Special Administrative Region (HKSAR). These include –

- (a) equality before the law;
- (b) freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike;

- (c) freedom of the person; freedom from torture; freedom from arbitrary or unlawful arrest, detention or imprisonment; freedom from arbitrary or unlawful search of the body; and right against arbitrary or unlawful deprivation of life;
- (d) freedom from arbitrary or unlawful search of, or intrusion into, one's home or other premises;
- (e) freedom and privacy of communication;
- (f) freedom of movement within the HKSAR and freedom of emigration to other countries and regions and freedom to travel and to enter or leave HKSAR;
- (g) freedom of conscience; freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public;
- (h) freedom of choice of occupation;
- (i) freedom to engage in academic research, literary and artistic creation, and other cultural activities;
- (j) right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies; right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel;
- (k) right to social welfare in accordance with law; and
- (l) freedom of marriage and right to raise a family freely.

In addition, Hong Kong permanent residents enjoy the rights to vote and to stand for election in accordance with law.

International Human Rights Treaties

5. A total of 14 international human rights treaties apply to Hong Kong. These are, specifically –

- (a) International Covenant on Civil and Political Rights (ICCPR);

- (b) International Covenant on Economic, Social and Cultural Rights (ICESCR);
- (c) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- (d) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- (e) Convention on the Rights of the Child (CRC);
- (f) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- (g) International Agreement for the Suppression of the White Slave Traffic;
- (h) International Convention for the Suppression of the White Slave Traffic and the Protocol amending the Agreement and the Convention;
- (i) International Convention for the Suppression of the Traffic in Women and Children;
- (j) Slavery Convention and the Protocol amending the Convention;
- (k) Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery;
- (l) Convention on the Political Rights of Women;
- (m) Convention Relating to the Status of Stateless Persons; and
- (n) Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

6. Article 39 of the Basic Law guarantees the provisions of the ICCPR and the ICESCR as applied to Hong Kong. The Article further provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and that such restriction shall not contravene the provisions in the two Covenants.

Hong Kong Bill of Rights Ordinance

7. The Hong Kong Bill of Rights Ordinance (Cap. 383) was enacted in June 1991 specifically to give effect in local law to the provisions of the ICCPR as applied to Hong Kong. It achieves this by setting out a detailed Bill of Rights, the terms of which are almost identical to those of the ICCPR. The Ordinance binds the Government and all public authorities.

Anti-discrimination Legislation

8. Apart from the Basic Law, the Hong Kong Bill of Rights Ordinance and international treaty obligations, further human rights protection is accorded by the enactment of the three pieces of anti-discrimination legislation, namely the Sex Discrimination Ordinance (SDO) (Cap. 480), Disability Discrimination Ordinance (DDO) (Cap. 487), and the Family Status Discrimination Ordinance (FSDO) (Cap. 527). The SDO, enacted in July 1995, renders discrimination unlawful on the grounds of sex, marital status, or pregnancy in specific areas of activity including employment, education, disposal and management of premises, government activities, provision of goods and services. The DDO, commenced in December 1996, gives people with disabilities a comprehensive system of redress in areas of life in which they may face discrimination, harassment or vilification. It covers discrimination in employment, education, transport, access to buildings and services, and participation in partnerships, professional organizations, clubs and sports. The FSDO was enacted in June 1997 to promote equal opportunities between persons of different family statuses. The areas covered by the Ordinance include employment, education, provision of goods, facilities, or services, disposal or management of premises, advisory bodies, clubs and Government.

9. A new anti-discrimination legislative proposal - the Race Discrimination Bill - has just been introduced into the Legislative Council for Members' deliberation. It proposes to render unlawful discrimination on the basis of race, colour, descent, or national or ethnic origin in the areas of employment, education, provision of goods, service, facilities and premises, public bodies, barristers, and clubs.

Mechanisms for Protection of Human Rights

10. Within the framework of statutes and international treaty obligations, human rights are protected through the legal system and various statutory bodies and institutions.

Rule of Law

11. The fundamental basis for the protection of human rights is the rule of law maintained by an independent judiciary.

12. The key principles behind the rule of law are –
 - (a) ***the supremacy of the law*** – in this context, no Government authority or official, and no individual, is above the law. No individual is punishable or can lawfully be made to suffer personally or financially except for a breach of law established before the independent courts. Where, under the law, an official or an authority has discretion to make a decision, that discretion must be exercised legally, fairly and reasonably. Where it does not do so, the decision must be capable of successful challenge before the courts. The Basic Law guarantees the right of Hong Kong residents to institute legal proceedings in the courts against the acts of the executive authorities and their personnel; and

 - (b) ***equality before the law*** - Article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. Article 22 provides that all offices set up in the HKSAR by departments of the Central People's Government, or by provinces, autonomous regions, or municipalities directly under the Central Government and personnel of these offices shall abide by the laws of the HKSAR. All persons, regardless of race, rank, politics, religion or sex, are equal before the law and subject to the same law. Individuals and the HKSAR Government have the same access to the courts to enforce legal rights or defend an action.

Independent Judiciary

13. The Judiciary of Hong Kong is independent of the executive authorities and the legislature. Article 19 of the Basic Law provides for the independent judicial power of the HKSAR, including that of final adjudication. The courts of the HKSAR have jurisdiction over all cases in Hong Kong, except for restrictions imposed on their jurisdiction by the legal system, the Basic Law and principles previously in force in Hong Kong.

14. All judges and judicial officers are qualified legal practitioners in Hong Kong or in a common law jurisdiction and have substantial professional

experience. They also have security of tenure to ensure the independence of the Judiciary.

Legal Aid

15. To ensure that any person who has reasonable grounds for pursuing or defending a legal action is not prevented from doing so by lack of means, the Government provides legal aid services through the Legal Aid Department (LAD) and the Duty Lawyer Service.

16. The LAD provides legal aid service in the form of legal representation in virtually all criminal and civil cases to eligible persons, regardless of their religion, race, nationality or residency. Applicants have to satisfy the Director of Legal Aid (DLA) of their financial eligibility (the means test) and of the justification for legal action (the merits test). In criminal cases, the DLA has the discretion to grant legal aid in the interests of justice even if the applicant fails the means test. He also has the same discretion in meritorious applications where a breach of the BORO and ICCPR as applied to Hong Kong is an issue. The grant of legal aid in cases of murder, treason or piracy with violence is mandatory. For other offences, provided the applicant passes the means test, a judge may grant legal aid notwithstanding that legal aid has been refused on merits by the DLA.

17. The Duty Lawyer Service complements the services provided by the LAD and comprises three schemes –

- (a) the ***Duty Lawyer Scheme*** which offers legal representation to defendants who are charged in the Magistracies and who cannot afford private representation;
- (b) the Legal Advice Scheme which provide members of the public with free legal advice through individual appointments; and
- (c) the “Tel Law Scheme” which provides taped information on the legal aspects of everyday problems.

Legal Aid Services Council

18. The Legal Aid Services Council, an independent statutory body, was established in 1996. Its role is to oversee the provision of legal aid services by LAD and advise the Chief Executive on legal aid policy.

Equal Opportunities Commission

19. The Equal Opportunities Commission (EOC) was established as an independent statutory body under the SDO. The Commission is responsible for overseeing the implementation of the SDO, the DDO and the FSDO. Its functions include formal investigations, handling complaints, encouraging conciliation between parties in dispute, providing assistance to aggrieved persons, and publishing codes of practices on how to comply with the above three ordinances. It also undertakes public education, research and training programmes to promote equal opportunities in the community.

Privacy Commissioner for Personal Data

20. The Office of the Privacy Commissioner for Personal Data was an independent statutory body established under the Personal Data (Privacy) Ordinance. It is responsible for investigations and enforcement of the Ordinance which aims particularly to protect the individual's right to privacy in relation to personal data. The responsibilities of the Privacy Commissioner also include promoting awareness and understanding of the Ordinance, publishing codes of practice on how to comply with the Ordinance, and examining proposed legislation that may affect the privacy of individuals in relation to personal data.

The Ombudsman

21. The Ombudsman is an independent authority established under The Ombudsman Ordinance to investigate and report on grievances of members of the public as a result of administrative actions. She is empowered to initiate investigation on her own volition if she is of the opinion that any person may have suffered injustice in consequence of maladministration. Her jurisdiction also extends to public bodies.

22. After her investigation of a complaint, The Ombudsman is required by law to inform the head of the organization concerned of the result of the investigation. If The Ombudsman is of the opinion that there is evidence of any maladministration on the part of the organization or that the matter concerned should be referred to the organization for further consideration, she may report her opinion and her reasons together with a statement of any remedy and recommendation that she considers necessary to the head of the organization. If she is of the opinion that a serious irregularity or injustice has taken place, she may make a report to the Chief Executive; such a report is bound by law to be laid before the Legislative Council.

Concluding Observations

23. Members will note from the above that there already exists in Hong Kong an extensive mechanism for protection of human rights. The rights of individuals are clearly enshrined in the laws. The constitutional and legal provisions are firmly underpinned by the rule of law, an independent judiciary, statutory bodies and institutions, and a comprehensive legal aid system. Moreover, the effectiveness of the existing mechanism and the work of the Government and these bodies are continually and closely monitored by the Legislative Council, the public, including particularly the media. We do not see an obvious need for establishing another human rights institution to supersede existing mechanisms and have no plans or timetable for the establishment of such in the immediate future.

Home Affairs Bureau
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