



The basis of the international human rights regime could be found in Art 1 of the Universal Declaration of Human Rights (“UDHR”), which reads:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

2 This article defines the basic assumptions of the UDHR: that the right to liberty and equality is man's birthright and cannot be alienated; and that, because man is a rational and moral being, he is different from other creatures on earth and is therefore entitled to certain rights and freedoms which other creatures do not enjoy.

INTERNATIONAL PROTECTION OF HUMAN RIGHTS

The UDHR was adopted by the General Assembly of the United Nations on 10 December 1948. The General Assembly proclaims the UDHR as “a common standard of achievement for all peoples and all nations...”¹ It has become a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards. The rights enshrined in the UDHR were subsequently elaborated and converted into binding multilateral treaties with measures for their implementation in the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). Both Covenants were adopted by the General Assembly on 16 December 1966 and came into force in 1976.

At the international level, the Covenants have applied to Hong Kong since the year they came into force -1976- and their provisions have remained in force in the HKSAR since 1 July 1997. So far as the PRC is concerned, the CPG signed and ratified the ICESCR respectively in October 1997 and on 27 March 2001. She became a party to it on 27 June 2001. Further, the CPG also signed the ICCPR in October 1998. The ICCPR will be binding on the PRC three months after the CPG has deposited the instrument of ratification with the Secretary General of the United Nations.

In general, and as is usual in common law systems, international treaties that apply to the HKSAR do not have the force of law in our domestic legal system. They are not directly enforceable in courts as a source of individual rights. However, the courts will, when possible, construe domestic legislation in such a way as to avoid incompatibility with these international obligations.



¹ Preamble to the UDHR.

In the case of the Covenants and several other human rights treaties, there are obligations on the HKSARG to submit periodic reports, through the CPG, to the United Nations Treaty Monitoring Bodies regarding the implementation of the treaties in the HKSAR. For a summary of the reporting obligations of the HKSARG under various treaties, see *Sidelights* at p 15.

PROTECTION OF FUNDAMENTAL RIGHTS UNDER THE BASIC LAW

At the domestic level, the rule of law, an independent judiciary and the human rights provisions of the Basic Law provide the foundation for human rights protection in the HKSAR. BL 4 provides that the HKSAR shall safeguard the rights and freedoms of the residents of the HKSAR and of other persons in the Region in accordance with law. Since 1 July 1997, the ICCPR has been given a special status in the HKSAR by virtue of BL 39 which reads:

“The provisions of the [ICCPR], the [ICESCR], and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the [HKSAR].

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

The provisions of the ICCPR, as applied to Hong Kong, have been incorporated into our domestic law by virtue of the Hong Kong Bill of Rights Ordinance (Cap 383) (“HKBoRO”). The HKBoRO was enacted



in June 1991 and sets out in Part II of it a detailed Hong Kong Bill of Rights (ie, the BoR), the terms of the BoR are almost identical to those relevant articles of the ICCPR.

The protection guaranteed in BL 39 is further reinforced by other provisions in Chapter III of the Basic Law, which cover various fundamental rights of the HKSAR residents. Some of those fundamental rights could be found also in the ICCPR (eg freedom of speech under BL 27) and some are only provided for in the Basic Law (eg right to travel under BL 31). Those fundamental rights, with the exception of a permanent resident’s right to vote and to stand for election under BL 26 and right of abode under BL 24, are enjoyed by all HKSAR residents, including permanent and non-permanent residents.

The provisions of Chapter III of the Basic Law ensure that the protection of fundamental rights is firmly rooted in the HKSAR constitutional system.

Human rights challenge by way of judicial proceedings may be brought against legislation or actions of the government or public authorities on the ground of inconsistency with the Basic Law. Because the Basic Law’s protection of human rights is wider in scope than the BoR, this mechanism is not only a continuation, but an expansion, of the Hong Kong domestic human rights regime. Indeed, the interpretation and application of various human rights provisions of the Basic Law have already been tested in several court cases and they go beyond the protection conferred by the BoR. For a summary of the important rulings on human rights since 1 July 1997, see *Sidelights* at pp16-18.

PERMISSIBLE RESTRICTIONS ON THE PROTECTED RIGHTS

With a few exceptions,² the rights guaranteed in the ICCPR are not absolute and may be subject to certain

² Examples of absolute rights are the right not to be subjected to torture under ICCPR Art 7, the right not to be held in slavery under ICCPR Art 8 and the right to hold opinion without interference under ICCPR Art 19(1).



restrictions. Since individuals live in community with others, the exercise of individual rights may need to be restricted to the extent necessary to accommodate the rights of others and the legitimate need to protect the community. The Preamble to the ICCPR also recognizes that the individual has duties to other individuals and to the community to which he belongs.

In respect of rights which could be found both in the Basic Law and the ICCPR, BL 39(2) permits restrictions on the rights protected in Chapter III provided that those restrictions are prescribed by law and are compatible with various international instruments including the ICCPR.³ In many cases, provisions of the ICCPR define the circumstances under which a restriction on the right is permitted. The best known test is the phrase that any restrictions on a right shall be “prescribed by law” and “necessary” for the attainment of certain legitimate aims laid down in the provisions. Such legitimate aims typically include the protection of national security, of public order, of public health or morals and the protection of fundamental rights and freedoms of others.

It is well established that, in the determination of the scope of protected rights and permissible restrictions, a generous interpretation should be given to the rights and freedoms whilst restrictions thereof should be narrowly interpreted.⁴ The burden to justify the restriction lies on the government.⁵ Further, when interpreting the provisions of Chapter III of the Basic

Law and the provisions of the BoR, the SAR courts may take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions.⁶

The requirement of “prescribed by law” has an established meaning under the international human rights jurisprudence. To be “prescribed by law” a restriction must not only have some basis in the domestic law, but the law in question must also be accessible and formulated with sufficient precision to enable citizens to regulate their conduct.⁷ Having made reference to international jurisprudence, the CFA has recently affirmed that the expression “prescribed by law”, when used in a context such as BL 39, mandates the principle of legal certainty.⁸

In considering whether a restriction is justifiable as *necessary* for the attainment of legitimate aims, the first issue to be satisfied is whether the restriction in question pursues one of the stated legitimate aims. Secondly, if the answer is in the affirmative, the issue is whether the restriction is necessary for the protection of the legitimate aim. In applying the test of “necessity” the court must consider whether the restriction on the guaranteed rights is *proportionate* to the aims sought to be achieved. And the context in which such issues

³ *per* Chan CJHC and Keith J (as they then were) in the CFI in *Secretary for Justice v The Oriental Press Group Ltd & Others* [1998] 2 HKLRD 123, at pp 164J-165A and discussed by the CFA in *Gurung Kesh Bahadur v Director of Immigration* [2002] 2 HKLRD 775 at p 785 (para 31).

⁴ *Ng Ka Ling & Others v Director of Immigration* [1999] 1 HKLRD 315, at pp 339I-340J and *HKSAR v Ng Kung Siu & Another* [1999] 3 HKLRD 907, at p 922C.

⁵ *Ng Kung Siu*, note 4 above.

⁶ *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793, at p 810A-B (para 59).

⁷ *The Sunday Times v The United Kingdom* (1976) 2 EHRR 245, at p 271 (para 49) and Emmerson & Ashworth, *Human Rights and Criminal Justice* (London : Sweet & Maxwell Limited, 2001), at paras 2.80-2.82.

⁸ *Shum Kwok Sher*, note 6 above, at p 810D (para 60).

arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the legislature when assessing the issues.⁹

In respect of rights conferred only by the Basic Law, which are not found in and are additional to those provided for by the ICCPR as applied to Hong Kong, the CFA has recently had an opportunity to address the issue concerning restrictions on such rights. It held that the second requirement in BL 39(2), which any purported restriction must satisfy, had no application to rights not found in the ICCPR such as the freedom to travel under BL 31. The question whether such rights found only in the Basic Law can be restricted, and if so the test for judging permissible restrictions, would depend on the nature and the subject matter of the rights in issue. This would turn on the proper interpretation of the Basic Law and is ultimately a matter for the courts.¹⁰

IMPLEMENTATION THROUGH DOMESTIC LEGISLATION

Apart from Chapter III of the Basic Law which provides constitutional protection for rights enshrined in the ICCPR and the ICESCR, international human rights standards are also implemented in the HKSAR through the enactment of specific legislation and through administrative measures. In respect of human rights treaties which require some changes in existing laws, specific new legislation may be enacted to create or define the rights protected and to provide civil remedy

or criminal sanction in cases of denial of or interference with the protected rights. An example of such specific legislation is the Crimes (Torture) Ordinance (Cap 427) enacted in January 1993 to give effect in Hong Kong to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Section 3 of that Ordinance defines the act of torture and imposes a maximum penalty of life imprisonment on persons convicted of the offence.

To implement the principles against discrimination on the ground of certain types of personal status in domestic law, three pieces of anti-discrimination legislation were

introduced in the mid-1990s. First, the Sex Discrimination Ordinance (Cap 480) (“SDO”) was enacted in July 1995 to prohibit discrimination on the grounds of sex, marital status and pregnancy in the work place, by educational establishments and in the provision of goods, facilities, services and premises. The SDO also provides for the establishment of an Equal Opportunities Commission (“EOC”) which is tasked with the responsibility of eliminating discrimination and promoting equal opportunities. This was followed by the enactment of the Disability Discrimination Ordinance (Cap 487) (“DDO”) in August 1995 with the aim of prohibiting discrimination on the ground of disability. The third piece of anti-discrimination legislation, the Family Status Discrimination Ordinance (Cap 527) (“FSDO”), was enacted in June 1997 to prohibit discrimination on the ground of having responsibility for the care of an immediate family member. The EOC is also empowered to oversee the implementation of both the DDO and the FSDO.

Apart from the anti-discrimination legislation, the Personal Data (Privacy) Ordinance (Cap 486)

⁹ *Lau Cheong & Another v HKSAR* [2002] 2 HKLRD 612, at p 641 F-G (para 102).

¹⁰ *Gurung Kesh Bahadur v Director of Immigration* [2002] 2 HKLRD 775, at p 784F-H (para 28).



(“PDPO”) was enacted in August 1995 to protect an individual’s right to privacy with respect to personal data. The PDPO provides for the establishment of an office by the name of the Privacy Commissioner for Personal Data to enforce and promote compliance with its provisions. The provisions of the PDPO and the three pieces of anti-discrimination legislation bind all sections of society including both public and private bodies.

CONCLUSION

To conclude, the protection of fundamental rights and freedoms is firmly rooted in our constitutional and legal systems. The applicable international human rights treaties have been implemented in the HKSAR through the Basic Law and SAR legislation and administrative measures. The implementation of such protection is monitored, at the international level, by the United Nations Treaty Monitoring Bodies and, at the domestic level, by an independent judiciary and relevant statutory bodies. **BLB**

sidelights



PRC Nationality Law and the NPCSC’s Explanations with reference to the case of Tse Yiu Hon

The Nationality Law of the People’s Republic of China (the “Nationality Law”) applies to the HKSAR by promulgation with effect from 1 July 1997. The Explanations of Some Questions by the Standing Committee of the National People’s Congress Concerning the Implementation of the Nationality Law of the People’s Republic of China in the Hong Kong Special Administrative Region (the “Explanations”) adopted by the NPCSC on 15 May 1996 is a component part of the Nationality Law and is an interpretation aid on the application of the Nationality Law in the HKSAR.

In the case of *Tse Yiu Hon v HKSAR Passports Appeal Board and Director of Immigration*, CACV No 351 of 2001, Tse Yiu Hon (“Tse”) was born in Germany in 1985 and his parents were Hong Kong permanent residents settling there. Tse’s status as a Hong Kong permanent residents before 1 July 1997 was confirmed by the issue to him a British Dependent Territories Citizen passport. In 1990, his parents were granted German nationality by naturalization and Tse also became a German citizen thereafter by naturalization. Tse was issued an HKSAR Passport in 1998 but the Director of Immigration subsequently notified his mother that his

passport would be cancelled on the ground that he had already acquired the German Nationality and hence lost his Chinese nationality at the time he applied for the HKSAR Passport.

To obtain an HKSAR Passport, an applicant must meet the requirements set out in s 3 of the Hong Kong Special Administrative Region Passports Ordinance (Cap 539), namely that he must be a Chinese citizen and permanent resident in the HKSAR holding a valid Hong Kong Permanent Identity Card. Section 2 of that Ordinance provides that “Chinese citizen” (中國公民) means a person of Chinese nationality under the Nationality Law, as implemented in the HKSAR in accordance with the Explanations.

The CA agreed that Tse had met the requirements of being a Hong Kong permanent resident as well as holding a Hong Kong Permanent Identity Card. If Tse were a Chinese national, he would be entitled to an HKSAR Passport. The question in issue was, therefore, whether Tse was a Chinese national in accordance with the Nationality Law and the Explanations.