

Joining Hands for Social Harmony

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An Introduction to
the Race Discrimination Bill



Lesson Series 58

Racial discrimination legislation in Hong Kong

Summary

Equality for all, especially before the law, is crucial for a pluralistic and democratic society. This lesson examines the new race discrimination law passed in Hong Kong. By looking at various instances of racial discrimination, the lesson underlines the need for effective legislation in protecting the rights of all peoples.



THEME: Racial discrimination legislation in Hong Kong

The Issue

Racial discrimination is an issue that goes to the very root of equality before the law and the human dignity of all. Together with more violent forms of racial discrimination, there also exists a quieter form of institutional discrimination. While legislation prohibiting any form of racial discrimination is meant to be a protection, when the law itself is discriminatory in nature or poorly drafted, it ends up as a means to legitimize the abuse it is meant to protect against. This is common in many Asian countries, where rule of law is not yet genuinely established.

The Lessons

Lesson 1 will examine Hong Kong's racial discrimination law.

Cover image taken from the Hong Kong government's booklet on the Race Discrimination Bill, http://www.cmab.gov.hk/en/issues/equal_racebill.htm.

Lesson 1

This lesson will first look at the necessity of having race discrimination legislation, and secondly examine the provisions of Hong Kong's new legislation passed in July 2008.

A. Equality for all

According to the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 'racial discrimination',

“shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Very few Asian countries have specific legislation prohibiting against racial discrimination. Rather, most countries have constitutional provisions protecting the right to non-discrimination on the basis of race, sex, gender. The United Kingdom and Australia have progressive racial discrimination legislation, and as both countries have served as models for Hong Kong in the past, local groups expected the same to be done this time, to their disappointment. (Although the United Kingdom has amended its law on racial discrimination, the Hong Kong government used the older—and defunct—version of the law as its model.)

For more than a decade, Hong Kong has been debating having a law on racial discrimination, to conform with its ICERD and other international human rights obligations. In fact, all major UN treaty bodies have commented on the city's absence of racial discrimination legislation. In the government's view however, Hong Kong's Bill of Rights Ordinance (BORO) was sufficient to protect against racial discrimination, despite that the law is more difficult for individuals to enforce and offers few remedies. Most importantly, the BORO only applies to racial discrimination committed by the government; it has no provisions for regulating the private sector or individuals.

Although Hong Kong does not suffer from instances of racial violence or hatred, there does exist a more underlying and institutionalized form of racial discrimination, practiced in fields such as employment, hospitals, immigration, accommodation, education and even public transport.

Some instances of such discrimination, as cited in a paper presented by Vandana Rajwani at a seminar on anti-racial discrimination, are as follows:

- Bars in Hong Kong's Wan Chai district were found to operate "a sliding-scale of entrance fees based on a colour-coding system: a skin colour price code". Caucasians were not charged, Chinese were charged a small fee and Indians were charged a higher fee.
- In accordance to the provision of accommodation in their contract, an international company negotiated the lease of an apartment for a newly recruited senior executive. Once the landlord became aware the senior executive was an Indian, he withdrew his offer and refused to rent the flat to the company.
- A research project by the Hong Kong University's Centre for Comparative and Public Law on education in Hong Kong found the following:
 - a. There are a limited choice of schools and places in Hong Kong for ethnic minority communities;
 - b. The fees of schools falling on the government's list of 'Education facilities for non-Chinese speaking children' are particularly high.
 - c. Language of instruction is problematic: Mother tongue teaching has limited the number of schools available for non-Chinese speaking students, and when Chinese language classes are provided, they are not at a level to enable students to function at school.
 - d. There is a lack of information about the education system; much of the information is available only in Chinese.
 - e. There is a lack of coherent policy in relation to ethnic minority students.

For this reason, the report concludes that certain local education policies could constitute direct or indirect racial discrimination.

Finally, in 2004, the Hong Kong government issued a consultation paper on the topic, expressing a commitment to legislate and indicating that the new law would be modelled on the territory's existing sex, disability and family status discrimination ordinances. Draft legislation was introduced in 2006 and passed in July 2008, despite the many limitations of the law, as well as the criticism of local rights groups, legal academics and professionals, as well as legislators.

B. Race Discrimination Ordinance, No. 29 of 2008

Process

The process of drafting a law is very important, particularly one dealing with the rights of equality, non-discrimination. While this law is to protect all Hong Kong people from racially discriminatory practices, ethnic minority groups have the highest stake. For this reason, it is important that their participation and inclusion in the law making process is ensured. Although there was an effort made to reach out to the ethnic minority groups in Hong Kong, it was not an effective engagement in soliciting their views regarding the draft law.

While the Hong Kong government's 2004 consultation paper indicated that the new law would use the existing definitions of direct and indirect discrimination, and would be modelled on the territory's existing three anti-discrimination ordinances, this was not in fact the case. The government changed its position without any explanation.

Provisions

According to a submission made to the Committee on the Elimination of all Forms of Racial Discrimination (CERD) in February 2008, the following three provisions of the Ordinance are particularly problematic:

Clause 3: The ordinance's application to the government

While Hong Kong's three existing discrimination laws respectively state that "it is unlawful for the Government to discriminate against [a woman/a person with a disability/a person who has family status] in the performance of its functions or the exercise of its powers," clause 3 of the Race Discrimination Ordinance (RDO) merely states that "This Ordinance binds the Government."

In fact, an earlier version of the draft bill stated, "This Ordinance applies to an act done by or for the purposes of the Government that is of a kind similar to an act done by a private person." In response to criticisms, the government noted that "to expand the scope of the Bill to cover all government functions would cause uncertain and potentially far-reaching adverse implications on Government's ability to make and implement policies" [LC Paper No. CB(2) 1292/07-08(01)].

There are thus concerns that the law will allow the government to continue policies already criticized as discriminatory, as well as exempt government officials accused of discriminatory acts or behaviour in the performance of their duties. Article 56 of the RDO clearly states that none of the law's provisions render "unlawful any act done by a person if it was necessary for that person to do it in order to comply with a requirement of an existing statutory provision". A police officer for instance, who in the course of duty discriminated against an individual based on her race, would not be guilty of racial discrimination under this law. Similarly, article 55 exempts immigration policy and law from constituting racial discrimination.

That the law is different from the territory's three other discrimination laws also suggests that certain types of racial discrimination is tolerated and that ethnic minorities in Hong Kong do not have the same levels of protection as other groups.

Clause 8: Exceptions based on nationality and immigration status

In defining 'race' or 'racial group', clause 8 (2) notes that "An act done on the ground of any matter specified in subsection (3) does not constitute an act done on the ground of the race, colour, descent or national or ethnic origin of a person; and section 4 (1)(b) [which defines acts of discrimination] does not apply to a requirement or condition as to any matter specified in subsection (3)."

The matters specified in subsection (3) are that the person—

- Is or is not an indigenous inhabitant of the New Territories;
- Is or is not a person who was in 1898 a resident of an established village in Hong Kong or a person descended through the male line from such person;
- Is or is not a Hong Kong permanent resident;
- Has or has not the right of abode or the right to land in Hong Kong;
- Is or is not subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap. 115);
- Has or has not been given the permission to land or remain in Hong Kong under the Immigration Ordinance (Cap. 115);
- The length of residence in Hong Kong of the person;
- The nationality, citizenship or resident status of the person under the law of any country or place concerning nationality, citizenship, resident status or naturalization of or in that country or place.

In other words, the law exempts the following categories from being classified as racial discrimination: whether someone is or is not a Hong Kong permanent resident; whether someone is or is not a New Territories indigenous inhabitant; the condition of stay imposed under the Immigration ordinance; the length of residence, nationality, citizenship or resident status.

To illustrate the absurdity of these conditions, Professor Carole Petersen notes that the following hypothetical advertisements would be legal under this law:

- ‘Wanted, hairdresser: No person with French nationality may apply.’
- ‘This school does not admit children with South African citizenship.’
- ‘No person with Nepalese citizenship may enter this restaurant.’
- ‘Only persons with American passports may enter this bar.’

Hong Kong’s Equal Opportunities Commission—the body responsible for monitoring the implementation of the law—sets out further scenarios acceptable under the law:

- A shop owner who runs a small shop in a village and who would only employ indigenous inhabitants from the village does not racially discriminate against other persons.
- A company who would only employ permanent residents who have the right of abode in Hong Kong without any restriction or condition of stay does not racially discriminate against others.
- In a recruitment exercise, if a candidate is chosen because he has lived the longest in Hong Kong when compared to candidates who are equally or even better qualified, it would not be unlawful racial discrimination against these other candidates.
- A company that has business in the United States of America and chooses to employ a person who is of American nationality and holds an American passport, does not racially discriminate against people who are not of American nationality.

The Hong Kong government’s explanation of excluding differential treatment on the basis of nationality or length of residence is that the ICERD does not require a state party to prohibit nationality discrimination. While article 1 of the ICERD does provide the possibility for some forms of citizenship discrimination, this does not mean that a domestic anti-discrimination law should be giving blanket endorsement to differential treatment. In fact, the CERD’s general recommendations of 2004 (No. 30) clearly condemn policies and practices that discriminate against non-citizens.

Another significant impact of this clause will be to deny new immigrants from mainland China and foreign domestic workers from claiming any remedies under the Racial Discrimination Ordinance.

Clauses 20 & 26: Language exemption

According to these two clauses, it is not unlawful for educational establishments/training institutes to fail to “modify... regarding holidays or medium of instruction” or to “make different arrangements regarding holidays or medium of instruction”.

Lack of provisions regarding religious and immigrant discrimination

Hong Kong’s RDO, as it stands at present, includes no provisions dealing with religious affiliation, while it specifically notes that immigrant status cannot be seen as a grounds for discrimination. Professor Carole Petersen emphatically argues that both of these grounds are related to racial discrimination and should in fact be included in the territory’s legislation.

There is, in fact, no logical reason why discrimination on the grounds of religion and immigrant status should not also be prohibited in a diverse community like Hong Kong. The SDO [Sex Discrimination Ordinance] prohibits marital status and pregnancy discrimination because the legislature and the government recognized that the SDO could not tackle gender discrimination without addressing these related forms of discrimination [Carole J Petersen, ‘Hong Kong’s Race Discrimination Bill: A Critique and Comparison with the Sex Discrimination and Disability Discrimination Ordinances’, submission to the Hong Kong Legislative Council’s Bills Committee, June 2007, p. 19].

C. Impact

A recap of the problems and implications of this race discrimination law:

- Not as strong as Hong Kong’s other discrimination ordinances, which puts minorities at a disadvantage.
- Does not take into account international laws and experiences, making it regressive and a step backwards in Hong Kong’s human rights protection mechanisms. It does not conform to the ICERD or the BORO.
- Also, the law in fact seems to allow for certain forms of discrimination—there is already evidence that certain government departments/bodies are using certain clauses as justification for their behaviour/inaction.
- Does not include religion and immigrant status; discrimination against mainland Chinese is not seen as a form of racial discrimination.
- The law makes it very difficult to prove ‘indirect racial discrimination’.

Questions For Discussion

1. Have you come across race discrimination laws in other countries? If so, how do they compare with Hong Kong's, as described above?
2. In your opinion, what are the most important elements of any law prohibiting racial discrimination? Have they been addressed by Hong Kong's law?
3. Apart from legislation, discuss other means to effectively address discrimination in society.
3. What is the situation regarding racial discrimination in your own country and how is it being addressed?

References

Equal Opportunities Commission, 'Draft Race Discrimination Ordinance Code of Practice for Employment', October 2008, http://www.eoc.org.hk/eoc/OtherProject/rdo/COP_RDO_E.pdf.

Hong Kong Human Rights Monitor and Unison, 'Briefing on Hong Kong's Race Discrimination Bill', prepared for the Committee on the Elimination of all Forms of Racial Discrimination, February 2008. <http://www.hkfs.org.hk/declarations/080223.pdf>

Carole J Petersen, 'Hong Kong's Race Discrimination Bill: A Critique and Comparison with the Sex Discrimination and Disability Discrimination Ordinances', submission to the Hong Kong Legislative Council's Bills Committee to study the Race Discrimination Bill, June 2007. <http://www.hku.hk/ccpl/pub/conferences/documents/Paper-CarolePetersen-rev19June.pdf>

Vandana Rajwani, 'Combatting Racial Discrimination in Hong Kong—Case studies identifying and examining the characteristics and effects of direct and indirect discrimination'. Paper presented at a seminar on anti-racial discrimination, Hong Kong Polytechnic University, 5 September 2004. http://www.hkhrm.org.hk/racial%20discrimination/database/eng/Vandana_paper.pdf