

**The Legislative Council
Bills Committee on Broadcasting Bill**

Prohibition of certain television programmes by Court

Background

Clause 35(1)(a) of the Broadcasting Bill (the Bill), which reproduces section 33 of the Television Ordinance (Cap. 52), provides that “a licensee shall not include in its licensed service a television programme that is likely, in Hong Kong, to incite hatred against any group of person, being a group defined by reference to colour, race, sex, religion, nationality or ethnic or national origins”. At the Bills Committee meeting on 26 April 2000, Members asked the Administration to provide further information about what would constitute ‘incitement to hatred’.

2. Having obtained legal advice on the issue, this paper sets out our views on how the court is likely to construe ‘incitement to hatred’.

Local precedent case

3. As far as we can ascertain, there has been no legal challenge in Hong Kong over section 33 of the Television Ordinance in the past nor has the Court been asked to invoke its power to issue a proscription order under that section. There is thus no local authority in existence.

The ICERD

4. “Racial discrimination” is defined in Article 1 of International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as follows:

“The term ‘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.”

5. Articles 4 and 5 of the ICERD provide that -

Article 4

“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia :

- (a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
-”

Article 5

“State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law....”

6. It should be noted that a commentator on ICERD has written “The relationship between hatred and incitement was stressed by those who considered that “the fact of creating an atmosphere of racial hatred” would inevitably lead indirectly to racial discrimination”. (Natan Lerner, *The UN Convention of the Elimination of All Forms of Racial Discrimination*, 1980, p.52).

Overseas authority

7. In the case of *Jersild v Denmark*, 36/1993/431/510, the European Court of Human Rights considered a television journalist’s appeal against conviction based on a provision in the Danish Penal Code which provides that “any person who assists another person to publicly make a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief is guilty of an offence liable to a fine or imprisonment”. In this case, the journalist conducted an interview with a group of young people, calling themselves “the Greenjackets”. During the interview, the Greenjackets made abusive and derogatory remarks about immigrants and ethnic groups in Denmark.

8. The European Court was very mindful of the importance to combat racial discrimination in all its forms and manifestations and the need to reconcile this and the protection of the right to freedom of expression.

9. The following extracts of the judgment of the European Court would be of useful reference for our present purpose :

“The Court will look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued. In doing so the Court has to satisfy itself that the national authorities did apply standards which were in conformity with the

principles embodied in Article 10 (of the European Convention of Human Rights)¹ and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

The Court's assessment will have regard to the manner in which the Greenjackets feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme. Bearing in mind the obligations on States under the UN Convention and other international instruments to take effective measures to eliminate all forms of racial discrimination and to prevent and combat racist doctrines and practices, an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas."

10. It should be pointed out that the European Court did not criticise the Danish Penal Code which proscribes the making of racial discrimination statement in public, short of violence being the likely result.

¹ Article 10 of the European Convention of Human Rights reads -

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Our proposed provision

11. The incitement to hatred against any group of persons on specified grounds in the Bill is the effect of the programme and the reason for the prohibition. In view of the fact that the prohibition in the Bill does not lead to criminal sanction and the power to issue proscription order vests with the judiciary after a judicial process, we are of the view that the prohibition is consistent with the right to freedom of expression as it is proportionate and necessary for respect of the rights or reputations of others or for the protection of public order (ordre public).

12. Drawing reference from the above European Court case, if our court were to construe 'incitement to hatred' in Clause 35(1) of the Bill, we are advised that the court might adopt a similar approach as the European Court did in the Jersild case, i.e. the court would look at the facts and evidence before it can decide whether the alleged television programme considered as a whole, its context, format, purpose, contents and presentation, appeared from an objective point of view to be a programme which is likely to provoke or stir up the audience to hate any group of our community on the basis of their colour, race, sex, religion, nationality or ethnic or national origins.

Information Technology and Broadcasting Bureau
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