

Don't Pass a Self-contradictory Law

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The Race Discrimination Bill (the “Bill”) recently published by the Government of the Hong Kong Special Administrative Region of China (the HKG) for the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICEARD) has excluded the newly arrived Chinese from the mainland of China (“New Arrivals”) from its application. By doing so, it has materially violated the Hong Kong Basic Law and international law as well as the principle of justice which is essential to every contemporary society governed by the rule of law. The Bill, if adopted, will be the most ironical and embarrassing legislation in the history of Hong Kong.

THE BILL MATERIALLY VIOLATES THE BASIC LAW

“All Hong Kong residents shall be equal before the law” is unambiguously provided in Article 25 of the Basic Law of Hong Kong. The HKG admits that:

“Discrimination against new arrivals from the Mainland of China has been a matter of concern in the community. There has also been continued pressure from human rights groups and New Arrivals organizations for the Bill to make specific provisions against such discrimination.”

It is evident that the HKG is fully aware of the fact that the New Arrivals are being discriminated against. Yet, the HKG has done nothing with regard to removing the discrimination against the New Arrivals. It has not even given a clear definition as to who may be considered as New Arrivals. Knowing the existence of discrimination but not doing anything to eliminate it, the HKG has violated Article 25 of the Basic Law.

Having admitted the existence of discrimination against the New Arrivals but excluding such people from the application of the Bill, and without producing another set of rules to protect the group, the actions and omission of actions by the HKG constitute an undisguised and undeniable discrimination against the New Arrivals. A law dedicated to eliminating the existence of discrimination has, on the one hand, admitted that the “new arrivals should, as of right, enjoy the same protection against racial discrimination as everybody else in Hong Kong” and, on the other hand, ignored the very evil that it claims to aim at. This is an irony of Hong Kong which claims to be governed by the rule of law.

Once the Bill is adopted, the discrimination against the New Arrivals will not only be *de facto* but also *de jure*. The Bill covers both public and the private institutions. There are legislations dealing with disability discrimination, sex discrimination, family status discrimination, etc. Therefore, after the adoption of the Bill, nearly every sector of Hong Kong society, except the New Arrivals, will be entitled to legal protection against discrimination.

The excuse given by the HKG for excluding the New Arrivals from the protection of the Bill is that the Bill deals with discrimination based on race and that as the discrimination against the New Arrivals is “social discrimination”, it should not offer any protection to them. It further argues that “as almost all of the new arrivals are of the same ethnic origin as the local Chinese, they do not constitute a separate racial group under the definition of ‘race’ in Article 1 of the ICEARD” and that the discrimination experienced by New Arrivals is “in essence a form of social, not racial, discrimination”. None of these arguments can stand.

THE BILL MATERIALLY VIOLATES INTERNATIONAL LAW

Protection of its own citizens is the responsibility of every sovereign State,

regardless of the political structure of the country, being democratic or a monarchy. Such responsibility is also extended to the State's nationals residing outside the territory of the country concerned, which is usually done via diplomatic protection. It has become a well-recognized and established international law principle. It is also well-settled in international customs that State responsibility is not confined to the central government but also extends to local governments. As the HKG is a local government of China, it has the same responsibility to offer protection to Chinese nationals. In this regard, the HKG has obviously violated international customary law by its failure to protect the New Arrivals.

Hong Kong, being a local government of China, is obliged to perform the international obligations assumed by the Government of China unless other arrangements are made. With regard to the Bill, not only the ICEARD but also the ICCPR must be observed. The ICEARD and ICCPR provide for the basic standards relating to protection of nationals of every society.

China is a party to both the ICEARD and ICCPR. Thus, all Chinese nationals, including those residing in Hong Kong, should be entitled to the protection under the Conventions. In other words, Hong Kong has the obligations pursuant to the ICEARD as a result of China's ratification of the Covenant. Specifically, Article 5 of the ICEARD, *inter alia*, provides:

“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 law.”

The United Nations Committee on Elimination of Racial Discrimination has interpreted the above obligation under the ICEARD to mean that jurisdictions like Hong Kong must introduce specific legislations to curtail racial discrimination. Furthermore, the United Nations Committee on Economic, Social and Political Rights has pointed out that Hong Kong's lack of legislation prohibiting racial discrimination

in the private sector is a breach of Hong Kong's obligations under the ICEARD.

Article 26 of the ICCPR provides that:

“... 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.”

As discussed earlier, the HKG is fully aware of the existence of discrimination against the New Arrivals. Yet it has failed to offer any protection to the New Arrivals by law and has thus violated the ICCPR.

THE BILL MATERIALLY VIOLATES THE SPIRIT OF THE RULE OF LAW

The Bill has not only violated the Basic Law of Hong Kong, international customary law and international treaties, but also the generally accepted spirit of the rule of law.

By excluding the New Arrivals from the application of the Bill, the HKG has in fact divided Hong Kong society. Before the introduction of the Bill, there were ethnic groups and New Arrivals in Hong Kong society, all of whom were discriminated against, and there was no law to offer any protection to any of them. Once the Bill is enacted into law, the same Hong Kong society will be divided into at least three groups: those who may discriminate against others; those who may be discriminated against but are protected by the law; and those who may be discriminated against but are not protected by the law. The last group is solely composed of the New Arrivals.

The existence of discrimination demonstrates the inequality of people and unequal opportunities for different people in society. Such inequality may lead to discontent of people and, therefore, to disorder in society. The very reason for enacting anti-discrimination laws is to rebalance and reconcile the different opinions and the prejudices between groups of people with different ethnic backgrounds, nationalities and cultures. The aim of such law-making is, on the one hand, to achieve the social value of “everyone equal before the law” and, on the other hand, to stop the potential disorder and turbulence in society. However, the present draft is driving society exactly to the opposite direction of harmony.

#### THE BILL VIOLATES THE POLICY OF THE HKG

The Chief Executive of Hong Kong has, by following the policy of the Chinese central government, advocated building a harmonious society in Hong Kong. Social harmony is predicated on a fair, just and stable society.

The building of a harmonious society can only be accomplished by the implementation of corresponding policies and the maintenance of a fair legal system. In this regard, the Bill obviously has a negative effect on the stated policies of the HKG. The HKG has also adopted a policy of attracting elite talents from the mainland of China to work and settle in the territory (but not providing them legal equality). Therefore, the Bill also contravenes the above policy.

#### POLICY ALTERNATIVES

The Bill introduced by the HKG has materially violated the Hong Kong Basic Law, international law, the spirit of the rule of law and the HKG's own policy. It has set an extremely bad example for Hong Kong and the whole world. It is therefore strongly suggested that the HKG should stop adopting the Bill as it is and should seriously consider the following alternatives:

- (a) amending the title of the Bill, changing it to be in line with the legislation of modern world, expanding the application of the Bill to cover all kinds of discrimination, including the protection of New Arrivals against discrimination;
- (b) giving a wider definition of race without changing the title of the Bill, whereby the New Arrivals would be entitled to the protection under the Bill; and
- (c) enacting a new law specifically designed to protect the New Arrivals, on condition that the specifically designed law comes into force at the same time as the Bill.

Without these parallel actions, one can foresee that the Bill would cause more conflicts rather than harmony, creating more discontent rather than peace and making Hong Kong to be a severely divided society which is opposite to the wish of the law-makers. Rather than passing such a bad law, it is much wiser for the HKG to re-consider the views of all the concerned parties and the likely victims of this Bill. Don't turn peace into war!

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