Submission to the LegCo Bills Committee on the Race Discrimination Bill for the meeting on 10 Jan 2008

In Response to the "Paper prepared by the Legal Service Division dated 12 November 2007"

YK Chong
6 Jan 2008

This submission supplements my submission to this Bills Committee dated 3 March 2007. This submission is to respond to the "Paper prepared by the Legal Service Division for the meeting on 21 November 2007".[1] The LegCo Paper proposed draft amendments in relation to the clauses on a. application to the Government; b. indirect discrimination; c. new arrivals from the mainland; and d. exemption from languages. This submission sets out relevant international human rights standards and comments options raised in the LegCo Paper.

Clause 3—Binds the Government

The Government's explanation that clause/section 3[2] of the Race Discrimination Bill is so drafted because the Hong Kong Bill of Rights Ordinance, Cap. 383 (BORO) has guaranteed to all persons equal and effective protection against discrimination on any ground including, specifically, race.

International Standards

In article 1(1) of the International Convention on the Elimination of Racial Discrimination (ICERD),

> "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**."

Hence, ICERD sought to combat discrimination in all fields of public life, but the Government limited its application to the Government and alleged that discrimination has been dealt with by the BORO. Indeed, BORO is mainly focus on civil and political

[1] LC Paper No. LS14/07-08. May read the Paper by visiting the LegCo website on Race Discrimination Bill Committee at www.legco.gov.hk

[2] Clause/section 3 of the Race Discrimination Bill states: "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."

rights.

According to article 2(1) of the ICERD,

> "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
> (b) …
> (c) Each State Party shall take **effective measures** to **review governmental**, national and local **policies**, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
> (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization".

Hence, clause 3 limits the power of the law to review government policy which may breach the ICERD.

As regards to remedy, article 6 of the ICERD states that:

> "States Parties shall assure to everyone within their jurisdiction **effective protection and remedies**, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and **adequate reparation** or satisfaction for any damage suffered as a result of such discrimination."

The General Recommendation is the interpretation of the UN Committee on the Elimination of Racial Discrimination (CERD) on the content of the human rights provisions, often seek to clarify the reporting duties and suggest approaches to implementing treaty provisions.[3] In the General Recommendation No. 26 of the CERD in March 2000, "[t]he Committee notifies States parties that, in its opinion, the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate."[4] The Criminal and Law Enforcement Injuries Compensation Scheme can be a model scheme for victim of

[3] Office of UN High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 30 The UN Human Rights Treaty System—an introduction to the core human rights treaties and the treaty bodies*, 2005, p40
[4] A/55/18, paragraph 2

discrimination.[5]

Option A preferred

Option A is the best choice. First, it complies with the international human rights standards. Second, it is in line with the other three anti-discrimination Ordinances. Further, this clause can also be improved by adding "and public authorities" after the word "Government". Such drafting is in line with BORO and other anti discrimination laws should follow suit. Moreover, this Bill should also add a clause like s21 of SDO: "it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers."

Option B/original clause 3 unreasonable

Since the first paragraph of Option B is the same as the original clause 3, the following comment also applies to the clause 3 in the Bill.

In practice, such a limited application to government will send a wrong message to the civil servants that they need not fully comply with the obligations under CERD to protect racial equality. They may become more reluctant to take actions to prevent racial discrimination because they may perceive that they are not required to do so under this law. Further, the Government should take led in promoting racial equality instead of evading international obligations under CERD.

It does not solve the problem of the original clause 3: one may query why the applicability of the existing discrimination laws is different from that of race law. Is racial equality is not as important as other kinds of discrimination? This creates a **hierarchy among the discrimination laws**. Why should a woman being discriminated receive better protection than a ethnic minority being discriminated? This **violates article 22 of the BORO**: All persons are equal before the law and are **entitled without discrimination to the equal protection of the law**[6].

The meaning of acts "of a kind similar to an act done by a private person" implies acts "similar to acts that could be done by private persons" and quite different in kind from acts done in the course of formulating or carrying out government policy is the holding by the UK House of Lords in *R v Entry Clearance Officer, Bombay ex parte Amin* [1983]2 All ER 864. This decision was criticized by the UK Commission for Racial Equality in its

---

[5] The Scheme offers financial assistance to innocent victims (or to their dependants in cases of death) who are injured as a result of a crime of violence, or by a law enforcement officer using a weapon in the execution of his duty. Visited the webpage on 29 Dec 2007 at http://www.swd.gov.hk/vs/english/welfare.html

[6] Article 22 continues stating that "[i]n this respect, the law shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or use their own language."

reviews of the Race Relations Act in 1985, 1992[7] and 1998. The three reviews requested to amend the Race Relations Act to overrule the *Amin* judgment so that the Act applies to all acts of government and public bodies.

Aileen McColgan, an UK anti-discrimination law expert, shared her experience with the Race Relations Act at HKU in March 2007. She noted that the UK's previous position (as the present clause 3) caused "complete confusion as to what were these function that a government could perform which were similar to private sector functions." In other words, it **caused complete confusion as to how the law binds the government**.

In the Race Relations (Amendment) Act 2000, the *Amin* judgment was finally overruled by section 19B: "[i]t is unlawful for a public authority in carrying out any functions of the authority to so any act which constitutes discrimination"[8]. I do not understand that why the HKSAR adopt the UK bad laws. Nowhere in the world is willing to accept such an overseas garbage. When we make reference to overseas experiences, we should learn from others' lessons and good examples instead of collecting the bad examples outside. The State party to an international Convention must comply with the international obligations and to implement the Convention in good faith under the Vienna Convention of the Law of Treaties. When reading Clauses 3 and 4, 8 and 58 together with various exemptions clauses in the Bill, a right-thinking person will reasonably suspect whether the HKSAR is willing to fully and sincerely comply with the international human rights obligations under ICERD which has been extended to Hong Kong since 1969.

As to the clause 3(2), the declaration of the BORO, this is unnecessary as case laws clearly show the entrenched status of BORO.

BORO cannot effectively protect racial equality

The Government should not narrowly and rigidly interpret the Concluding Recommendations made by CERD on HK report "to extend the scope of protection so as to prohibit racial discrimination by persons or organizations in the private sector." It is obvious that BORO cannot effectively combat racial discrimination. "Virtually, all the **public policy** matters are **exempted** from this Bill because they are not similar to acts by a private person. Litigations like *EOC v the Director of Education* (HCAL1555/2000) cannot happen pursuant to this Ordinance as the allocation of places in secondary schools

[7] "The Commission believes that this is wrong. This lack of remedy occurs precisely where the individual is most vulnerable. In the private sector, if there is discrimination at one source, the individual generally has both the opportunity of going elsewhere to another provider of services and also has a remedy under the Act. There appears to be neither opportunity when the individual is facing an immigration officer, prisoner officer or police officer prepared to discriminate improperly in exercising control functions." (Recommendation 3: Governmental functions, pp.30-31, Second Review of The Race Relations Act 1976, Commission for Racial Equality, UK, 1992)

[8] Section 19B (2) - (6) exempts certain government functions such as judicial act, any act done on the instruction, or on behalf, of a person acting in a judicial capacity; any act of making, confirming or approving any enactment or secondary legislation by a Minister of the Crown under an enactment. (Section 19C (1) – (5)) HKSAR may refer to the above the provisions. As to the exemptions the immigration and nationality functions (Section 19D (1) – (4)), HKSAR Government should draft it in a way comply with the relevant General Recommendations of CERD.

is a public policy matter. The Government may respond that the Government will be bound by the HK Bill of Rights Ordinance, Cap. 383, **BORO**. Indeed, first, the Bill of Rights is very **brief**, only two articles dealing with racial discrimination. While the ICERD gives more substance to the meaning of race discrimination. The race law defines the concrete meaning of race discrimination in detail. Second, BORO **basically protects civil and political rights** whereas the Bill mainly protects economic, social and cultural rights, such as employment, education and provision of goods, services and facilities. Third, the legislation and does not have an effective **implementation mechanism**. In the above case, EOC published its Formal Investigation Report before commencing the action. Without EOC, it is very difficult for individual parents to sue the Government. Fourth, more importantly, it is very difficult to get compensation if BORO is violated. Article 2(3) of the ICCPR provides that the State undertakes to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". However, this statement does not appear in BORO. Indeed, s6 of the BORO does provide that "a court may grant such remedy or relief…as it considers appropriate and just in the circumstances.""[9]

For the reasons stated above, the BORO cannot provide effective remedy. Clause 3 cannot fulfill the obligations under article 6 of the ICERD.

<u>The Administration not respond some questions in my March submission</u>

I noticed that the Administration only responded to some of the questions set out in my submission to this Bills Committee on 3 March 2007. In my March submission, I raised the following questions:

> "Since the enactment of the BORO, how many cases did the victims get the monetary compensation granted by the Court under s6 per se (without relying on other ordinances or common law)? What are the amounts of those compensations and the violation of BORO in question? What are the legal authorities and the Government's position on this (the court may grant monetary compensation by solely relying on s6 of BORO)? Take recruiting civil servants as an example, is it an act similar to an act done by a private person? The Government may answer in the negative and allege that employment contract with a civil servant is greatly different from other employment contract. They have different legal frameworks governing the disciplinary proceedings and disputes (civil servants cannot claim via Labour Tribunal)."
>
> "**Why don't follow the example of SDO** having such a clause? Would you provide overseas examples like s3? What is the justification of not following the examples of the existing three anti-discrimination Ordinances that "this Ordinance binds the Government"? Any discussion on this during the consultation period? Other examples in HK laws and other common law jurisdictions having the provisions of "an act done by …the Government that

[9] Quoted from my submission to this Bills Committee dated 3 March 2007

is of a kind similar to an act done by a private person"? If there are, what are the case law defining the concept?"

In April 2007, the Administration response[10] totally ignored the above questions and my arguments in my March submission in respect of inadequacy of BORO in protecting racial equality. I request the Bills Committee to urge the Administration to respond to the above arguments and questions.

Option C not preferred

Option C is too complicated. It is unnecessary to exempt those Basic Law provisions as the Basic Law is the supreme law in HKSAR. It does not clarify the law but complicated it.

Clause 4—Indirect discrimination

International Standards

As cited above, article 1(1) of the ICERD defines discrimination "which has the purpose or the **effect** of nullifying or impairing" the equality of treatment. The final result matters regardless of the intention of the act. The above definition of discrimination is basically the same as found in article 1 of the Convention of Eliminating all forms of Discrimination Against Women (CEDAW) and article 1 of UNESCO Convention against discrimination in Education and was adopted by the United Nations Committee on Economic, Social and Cultural Rights (UN Committee on ESCR). The UN Committee on ESCR clearly stated that article 2(2) of the ICESCR implies a prohibition of both direct and indirect discrimination. In its General Comment No. 5 merely referred to the "effect" of the distinction, exclusion or preference.[11] When considering the Belgium report, the Belgium Government had clearly stated that the legislation was not intended to be discriminatory. Indeed, the UN Committee on ESCR still expressed concern at the discriminatory effect of legislation though it was uniformly applied to men and women, even[12] The approach in the Belgium case was in line with that of CERD which stated that "in seeking whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group"[13].

In *Siu Kai Yuen v Maria College*[14], the HK District Court cited overseas authorities to support its ruling that there existed indirect disability discrimination[15]. In this case, the

[10]The Administration response to the issues raised by deputations/individuals at the meeting held on 3 March 2007 (LC Paper No. CB(2)1594/06-07(01))
[11] Paragraph 15
[12] Concluding Observations Belgium E/2001/22 paragraph 484
[13] CERD General Recommendation XIV paragraph 2
[14] [2005] 2 HKLRD 775, The District Court judgment dated 18 April 2005
[15] Paragraph 10 of the judgment explained the meaning of indirect discrimination: "[s]ection 6(b) of the DDO defines what we know as indirect discrimination. Indirect discrimination occur when a person

school dismissed a teacher who suffered cancer. The school alleged that it had a right to dismiss teachers who have to take sick leave beyond 10% of his/her total number of classes in the month under the contract. In the judgment, it elaborated the concepts of indirect discrimination:

> "57. The Plaintiff's Legal Representative referred to *London Underground Ltd. v. Edwards (No. 2)*, even when there is only one person who is unable to comply with the condition, unlawful indirect discrimination can still be established if the court is satisfied that the condition in question has disparate impact between people with a particular disability and people without that disability.
>
> 58. I agree with the Plaintiff's Legal Representative that it is common sense that people who are seriously ill cannot attend work. The requirement to attend work can clearly be an element of indirect discrimination.
>
> 59. As to whether the requirement related to attendance is justifiable, the *Board of Governors of St. Matthias Church of England School v. Crizzle* [1993] IRLR 472, set out the factors that the Court should consider as follows:
>
> (1) Whether the objective was legitimate?
>
> (2) Whether the means used to achieve the objective are reasonable?
>
> (3) Whether the conditions are justified when balanced on the principles of proportionality between the discriminatory effect upon the applicant's racial group and the reasonable needs of those applying the condition?"

> "63. I agree with the Plaintiff's Legal Representative that the conditions are not justified when balanced on the principles of proportionality between the discriminatory effect upon the Plaintiff's group and the reasonable needs of those applying the condition.
>
> 64. I find therefore that the Defendant has not shown the Absence and Substitution Terms to be justifiable. The Plaintiff has established indirect discrimination against him as a person with a disability."

Option A preferred with conditions

---

commits an act of indirect discrimination against another person if he applies a condition or requirement equally to all people, which has a discriminatory effect on persons with disability and a person with disability is subjected to a detriment because he cannot comply with it."

Option A is the best choice provided that s4(2)-(5) is deleted. The deletion of s4(2)-(5) is based on the understanding of indirect discrimination in international human rights discourse set out above.

The definition of the indirect discrimination should be as simple as that of the Disability Discrimination Ordinance. Its detail definition is a matter for the Court to interpret and should be developed through case law. Clause 4(2)-(5) unnecessarily restricts the development of human rights jurisprudence and common law development.

A fatal defect of clause (3)-(5) was mentioned by Patrick Yu in his draft Submission to this Bills Committee. Clause 4(3)-(5) defines affirmative action or special measures which should not be referred to define indirect discrimination:

> "Clause 4(3) – 4(5) are mirrored s. 18B of the Disability Discrimination Act 1995 (as amended) regarding the Duty to make reasonable adjustment for disabled persons (accessibility to both workplace and public goods, facilities and services). This is the special measures or positive action to remedy the disadvantaged position of the people with disability. It is justifiable to set such factors for the judge in order to determine whether or not to provide such accessibility to people with disability (justification test).[16]
> 3.9 The implications of the Clause 4(3) – 4(5) is that it will further restrict the judge to strike the balance of interests of the society on one hand, misuse the factors for special measures or positive actions on the others. In light of the circumstances it is suggested to delete the whole Clause 4(3) – 4(5), which is irrelevant for the definition of "Indirect Discrimination"**.**"

Indirect discrimination and special measures are different concepts. In the Administration paper "Indirect Discrimination and assessment of justifiability"[17] provided to this Bills Committee, it explains clause 4(5) that "[i]t does not, nor do we consider it appropriate to, impose a more onerous duty requiring people to incur additional expenditure or suffer additional detriment in order to accommodate the **special needs** of persons of any particular racial groups who are not disadvantaged in their physical or mental capabilities."[18] For adopting a special measure, the law uses a higher threshold to meet the standard than that of taking action preventing indirect discrimination. It is misleading to state that "the provision relating to reasonable practicability in Clause 4(2)(b) follows the same standard adopted in our Sex Discrimination Ordinance and Family Status Discrimination Ordinance."[19]

Inclusion of clause (1A)(1B)(1C) shows an improvement to better protect those who are indirectly discriminated. However, clause 4(2)(b) should be deleted as "as it sets a very

[16] See also Part VI general exceptions, in particular s. 38 – on the special measures for racial groups, which provides conditions to implement the special measures.
[17] LC Paper No. CB(2)1823/06-07(01), March 2007
[18] Ibid, Paragraph 7
[19] Ibid, Paragraph 14

unreasonably low standard, i.e. very difficult to prove indirect discrimination."

In my March submission, I put forward the following questions to the Administration but they do not respond:

> "What is the justification of not following the examples of the existing three anti-discrimination Ordinances?" "Any discussion on this during the consultation period?"

I request the Administration to respond to the above questions.

Option B not preferred

Option B is more desirable than option A. However, after deleting s4(2)-(5), Option A is better because the provisions of Option B and the underlying concepts are different from the existing anti-discrimination laws.

New Clause on Mainland New Arrivals

International Standards

International human rights standards of the definition of race are as follows:

In ICERD, article 1(1) provides that

> "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."

In 1990, the General Recommendation No. 8 of the UN CERD, the Committee "[i]s of the opinion that such identification (of being members of a particular racial or ethnic groups or groups) shall, if no justification exists to the contrary, be based upon **self-identification** by the individual concerned."[20]

In 2004, the UN CERD adopted its General Recommendation No. 30 in respect of non-citizens, it relates not only to the definition of race but also various exemption clauses in this Race Discrimination Bill. The Committee affirms that

> "1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2 [21] provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3 declares that,

[20] A/45/18

[21] Article 1(2) of ICERD: "[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."

concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;

2. **Article 1, paragraph 2**, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it **should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights** (ICESCR) **and the International Covenant on Civil and Political Rights** (ICCPR);

3. Article 5[22] of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, **human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law**;

4. Under the Convention, **differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim**. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;

5. States parties are under an obligation to report fully upon legislation on non-citizens and its implementation. Furthermore, States parties should include in their periodic reports, in an appropriate form, socio-economic

[22] Article 5 of the ICERD: "[in] compliance with the fundamental obligations laid down in article 2 of this Convention, States 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, notably in the enjoyment of the following rights:
(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights, in particular..:
(e) Economic, social and cultural rights, in particular..:
(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks."

data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin".[23]

And the CERD further recommends the State Parties to:

"6. Review and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination

7. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;

8. Pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens[24], to report on any such practices and to take all necessary steps to address them;

9. Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin".

Option A preferred

Option A is the preferred choice provided that it deleted the relevant items in Schedule 5 and the words "a near relative" are replaced by "an associate" in s7A. The Administration should also extend the protection by adding the following grounds (in addition to the five): language, place of origin outside the HKSAR, nationality, residency (HK resident status), status of being, or having been, an immigrant. Further, add "actual or perceived" before race, colour and other grounds of discrimination prohibited in this law.

Option B not acceptable

Section 8(2)-(6) in Option B is unacceptable and is below international human rights standards.

On 13 May 2005, the **UN Committee on ESCR** in its Concluding Observations (paragraph 79) states that "the Committee is concerned that, in the **proposed racial discrimination law, the protection afforded by this law will not cover migrants from**

[23] General Recommendation No. 30 of the CERD (2004)

[24] The policy that pregnant women who are not HK residents have to pay much higher fees in public hospitals since early 2007 may violate ICERD. HKSAR should at least report such situation to CERD in its supplemental report.

the Mainland despite the widespread *de jure* (legally) and *de facto* (in reality) discrimination against them on the basis of their origin. The Committee is also concerned that, according to the proposals made by the Hong Kong Home Affairs Bureau, the new law will not affect the existing immigration legislation in HKSAR".

In my March submission, I stated that

> "During the consultation period in late 2004, the Government's stand is to leave the issue (whether new arrivals should be protected under this Bill) to be decided by the court. All human rights instruments must be regarded as a living instrument, whose interpretation develops over time. By ruling out the possibilities of the Convention offering protection to **newly arrivals**, this unreasonably restricts the development of human rights laws. In addition, races are not natural forces but social constructs that stemmed from human perception and classification. A racial difference is culturally determined and racial categories change over time. Ethnicity is a **social and cultural construction** and not unchanging traits. Ethnic groups are situational defined in relationship to their social interactions with other groups. Interpretation of race and ethnicity **vary over time, place and context**."

In my March submission, I asked "[w]hat is the difficulty to protect the new arrivals under the new race law?" The Administration does not reply.

Clause 58—Language Exemption

International Standards

Article 5(2) of the BORO provides that in time of public emergencies, no measure shall be taken that "involves discrimination solely on the ground of race, colour, sex, **language**, religion or social origin." (*cf.* ICCPR article 4) This shows that both international and local communities take language discrimination very seriously and should not be exempted in the race law. .

Language discrimination is recognized by CERD as a form of indirect discrimination on the ground of race. "In the CERD's Concluding Observations on Mongolia's Report (2006), the Committee "is also concerned about the lack of measures to ensure that children whose mother tongue is a minority language…are provided with adequate opportunities to learn Mongolian as a second language, art.5(e)(v) and (vi)". In its Estonia's Report (2006), "the (CERD) Committee reiterates its previous concern that the scope of the requirement of Estonian language proficiency, including in the private sector, may have a discriminatory effect on the availability of employment to members of this community (art. 5(e)(i))".[25]

[25] Quoted from my March Submission to this Bills Committee

Language discrimination may infringe the right to education. The General Comment No. 13 of UN Committee on Economic, Social and Cultural Rights (CESCR) (1999) on "the right to education": "The Committee interprets article 2(2) (the non-discrimination article)…in the light of the UNESCO Convention against Discrimination in Education…the ICERD, the CRC…"

In *Lau v Nichols* 414 U. S. 563 [1974], the Supreme Court held that the **failure** of the **school system** of San Francisco to provide **supplemental English language instruction** to about 1,800 Chinese students **denied** from a **meaningful opportunity to participate in the public educational program**. It was a violation of Title VI of the Civil Rights Act 1964 which prohibited discrimination based on race, colour, or national origin in any programme or activity receiving Federal financial assistance. " I also request PRC to ratify the 1960 Convention against Discrimination in Education for HKSAR."[26]

Option A unacceptable

Option A is not acceptable. Language is very often a form of indirect discrimination. By exempting language discrimination, the law cannot effectively combat racial discrimination.

In my March submission, I queried that "[d]oes s26(2) breach or comply with articles 2 and 26 of the ICCPR (articles 1(1) and 22 of the BORO), article 5(e)(v) of the ICERD, article 2(2) of the ICESCR and the 1960 Convention against Discrimination in Education?" But the Administration does not reply.

Option B reasonable

Option B is acceptable provided that clause 5B(5) becomes a sunset clause.

Conclusion

Apart from the above four areas, there are still many clauses in the Race Discrimination Bill that are below international human rights standards. I hope that the LegCo Legal Service Division may continue proposing amendments to other clauses. In addition to the questions I raised in my March submission, there are many other questions being ignored by the Administration. I requested this Bills Committee to urge the Administration to respond to those questions in my March submission.

On 24 August 2007, the Chairman of the CERD sent a letter to HE Mr. Sha Zukang, Permanent Representative, Permanent Mission of China to the UN at Geneva. In the letter, it pointed out the fatal defects of the Race Discrimination Bill:

"(the Bill) **does not appear to be in conformity with the Committee's**

[26] ibid

> **recommendation**. In particular, it has been brought to the attention of the Committee that the Bill provides for a **narrow definition of direct and indirect discrimination differing from Sex Discrimination and Disability Discrimination Ordinances**. Furthermore, **Clause 3** of the Bill as presently drafted **appears to exclude a substantial portion of Government action** from the legislation and thus from the statutory right to seek redress against racial discrimination perpetrated by State authorities.
>
> In accordance with article 9 (1) of the Convention and rule 65 (1) of its rules of procedure, the Committee invites Your Government to comment on these issues and to send it information, to be submitted before 30 November 2007, relating to the content of the Race Discrimination Bill as a whole, and on the extent to which the obligations of the State party under the Convention have been taken into account and reflected in the Bill. This information will be considered by the Committee at its seventy-second session to be held from 18 February to 7 March 2008."

I request that the Administration should disclose the above report to CERD.

A bad law is often worse than no law at all. The Race Bill Discrimination Ordinance will legitimatize the discriminatory laws, policies and practices which become an obstacle to combat racial discrimination. HKSAR Government is used to allege that racial discrimination is not serious in Hong Kong. No matter how serious the present situation is, this Bill will probably make the situation worse. I warn that this Bill laid the seeds of racial hatred and conflict. In the future, when the ethnic minorities realize that the law is so unjust and discriminatory, the law becomes one of their major sources of anger and social discontent. The law therefore cannot be acted as a tool of promoting racial harmony but adding fuel to future racial conflict and anti-social behaviour. If the Government and the Legislative Council Members underestimate the harmful effect of this bad law, our society will pay a high price for this in the future. Perhaps the sensitivity and awareness of racial discrimination and conflict in Hong Kong society is not high. As an international city, we should be highly aware of the present and possible racial conflict and should pay much higher attention to this important Bill.

One may query that this Bill appears to be the worst anti-racial discrimination law in the world. It cannot solve the racial problem and cannot accommodate the new circumstances and the needs of our society in the 21st century. I requested the Legislative Council Members to stand firm to reject those provisions which are below the international human rights standards.

Chong Yiu Kwong, a solicitor, LLM(Human rights), HKIE teaching fellow and CUHK part-time lecturer. The author is indebted to Patrick Yu for his helpful comment. All errors are the author's own. Patrick Yu is the Executive Director of the Northern Ireland Council for Ethnic Minorities and is currently the member of the Legal Expert Panel to advise the government on the Single Equality Bill for Northern Ireland. I have also the benefit of reading the draft submission to this Bills Committee drafted by Patrick Yu.

6 Jan 2008