

RACIAL DISCRIMINATION LEGISLATION

NATURE, CONCEPTS, TARGETS, SCOPE, EXCEPTIONS AND REMEDIES

NATURE AND CONCEPTS OF RACE DISCRIMINATION LEGISLATION

There are two basic, rival, and quite different concepts to be found in different kinds of anti-discrimination legislation in different countries.

Both these concepts originate with the same underlying recognition that certain members of particular groups in society are disadvantaged because of discrimination. The difference is in the type of action to be taken to remedy this situation.

The first concept has been prevalent in legislation in the United States, India, and in the Northern Ireland Fair Employment Act 1989. In these jurisdictions a common theme of anti-discrimination legislation has been the imposition of a requirement of positive action by government bodies and employers, to redress the impact of past discrimination by taking steps to ensure that members of minorities which have been discriminated against in the past are given special assistance. The aim of the special assistance is to redress the imbalance by ensuring a fair representation of those minorities in the employment market. In India this has been attempted by means of reserved quotas for members of Scheduled Castes. In the United States, it has centred on the concept of affirmative action, while in Northern Ireland the legislation requires steps to be taken by those employers with more

than 10 employees to ensure that the Roman Catholic minority is adequately represented in their workforce.

In Britain a much less interventionist approach has been adopted. The aim of the British race discrimination legislation has been to outlaw acts of discrimination, but not to require positive steps to correct the results of past discrimination. The only recognition of the need to correct the results of past discrimination is in the recognition of the lawfulness of training opportunities limited to one group, which would otherwise be discriminatory, where the purpose of the training is to overcome disadvantages previously faced by members of that group.

In Hong Kong the existing Sex Discrimination Ordinance and Disability Discrimination Ordinance essentially follow the British model – although differing considerably in detail – in that they do not attempt to mandate action to correct past discrimination, but merely to outlaw acts of discrimination.

The British and Hong Kong approaches are sometimes referred to as “complaints based” approaches.

There are almost as many views on the relative merits of these two approaches as there are commentators, so any generalizations are very risky. For what it is worth my own assessment is that the major concern about some more interventionist approaches is that they may actually increase friction between different groups. For example if a member of the majority is passed over for a job in favour of a possibly less qualified member of a

minority which has been the victim of past discrimination, that member of the majority is likely to feel a sense of unfairness and grievance and may be more inclined to discriminate against the minority concerned in future. Of course where past discrimination has been massive and outrageous, and there is a large pool of well-qualified and excluded people waiting for employment opportunities, the case for intervention may be overwhelming despite such difficulties. This may account for the apparent success of the Northern Ireland Fair Employment Act.

The main criticism of complaints based approaches is that they are insufficiently effective in outlawing discrimination. Not enough people complain, so that many acts of discrimination go unchallenged, and some discrimination may be hidden so that the victim does not even know about it. In addition some employers or service providers who discriminate may be very recalcitrant, refusing to abandon discriminatory practices despite losing court cases.

Studies of British race discrimination legislation, which was introduced in three stages in 1968, 1976 and 1986, showed that in the decade between its the early 1970s and the early 1980s it had little effect on patterns of discrimination, with about a third of employers continuing to discriminate against non-white job applicants. However in more recent years there has been evidence of major changes in employment patterns. According to Bourne & Whitmore "Anti-discrimination Law in Britain", by 1990 the proportion of persons of Indian, African or Chinese origin in managerial or professional positions was similar to the proportion of white people.

My view, having seen how Britain has changed over my life-time, is that the British complaints based racial discrimination legislation has had a big effect in changing attitudes and reducing racial discrimination.

I also think that this type of legislation is much easier to enact and enforce, as the public tends to be much more sympathetic to the idea of a “level playing field” and the outlawing of acts of prejudice, than to reserving favourable treatment to members of a particular group.

TARGETS AND SCOPE

The basic aim of race discrimination legislation, as of other anti-discrimination legislation, is to outlaw acts of irrational prejudice. Fairness, social harmony, and business efficiency are all reasons for ensuring that the most competent person is appointed to a particular job, rather than the appointment being influenced by irrational pre-conceptions.

A particular difficulty with race discrimination legislation is that the concept of human beings being divided into different biological races, widely accepted 100 years ago, is now completely discredited as a biological concept. Of course if some-one discriminates because they believe another person to be a member of another race, they are still discriminating on racial grounds even if that belief as to race is wrong. However this does not get round the fact that what constitutes a race for the purpose of identifying

discrimination on grounds of race is a more difficult issue than identifying discrimination on grounds of sex or, in most cases, on grounds of disability.

The UK legislation refers to discrimination “on racial grounds” and in some contexts refers to “racial groups”. “Racial grounds” is defined as meaning on the grounds of colour, race, nationality, ethnic or national origins. This definition has been subject to much statutory interpretation, some of which I will refer to shortly.

By way of comparison Article 26 of the International Covenant on Civil and Political Rights (the “ICCPR”) provides that:-

“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”.

Article 22 of the Hong Kong Bill of Rights Ordinance is in identical terms to ICCPR Article 26, and is incorporated into Hong Kong’s constitution by Article 39 of the Basic Law. This definition is therefore already binding on the public sector in Hong Kong, but is not binding in relation to discrimination by the private sector, which so far has been held not to be justiciable under the Bill of Rights.

It will be seen that race, colour and national origin are common to both British and the ICCPR definitions.

“Nationality” exists only in the British definition. It is in some ways a peculiar inclusion, as in some contexts, such as immigration, being a national of country confers an exemption from immigration control which non-nationals do not have. That is why I did not include “nationality discrimination” in the outlawed forms of discrimination in the draft racial discrimination bill published by Human Rights Monitor. I believe that objectionable forms of nationality discrimination can be outlawed as discrimination on grounds of national origin, and I think it is preferable to proceed this way than to outlaw discrimination based on nationality, but then provide for wide-ranging exceptions such as immigration control.

“Ethnic origin” is likewise used in the British legislation but not the ICCPR. It is less wide than “membership of a particular social group”, which is the equivalent ICCPR expression. It has been given a well-defined meaning in the jurisprudence and it seems to me to be a useful flexible concept which can be used to cover groups which are subject to prejudice and discrimination but difficult to categorise. The Monitor’s draft bill therefore outlaws discrimination on grounds of ethnic origin.

The leading English case on ethnic origin is Mandla v Dowell Lee [1983] 2 AC 548. The case concerned the status of Sikhs and whether Sikhs were an ethnic group. Lord Fraser said:-

“For a group to constitute itself an ethnic group... it must ... regard itself and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to these two essential characteristics the following characteristics are ... relevant; (3) either a common geographical origin, or descent from a number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or dominant group within a larger community... A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member... It is possible for a person to fall into a particular racial group either by birth or adherence, and it makes no difference by which route he finds his way into the group”.

It was conceded in the case that Sikhs met this definition of an ethnic group. Sikhs were originally a religious community founded about the end of the 15th century in the Punjab, India, by Guru Nanak, who was born in 1469. However their community is no longer

purely religious in character. They were described in the judgment as “a distinctive and self-conscious community”.

Other groups which have been found to be within the definition of an ethnic group include Jews (Seide v Gillette Industries [1982] I.R.L.R. 564) and Gypsies (CRE v Dutton [1989] I.R.L.R. 8, CA).

In Hong Kong much concern has been expressed in the context of the proposed race discrimination legislation about the position of Mainland immigrants and whether they could be described as falling within the definition of an ethnic group. I am doubtful whether Mainland immigrants would fall within the definition in Mandla v Dowell-Lee. However there is a serious problem of discrimination against Mainland immigrants which should be tackled. Human Rights Monitor’s solution to this problem in our draft bill is to extend the definition of “national origin” to include “origin in a particular jurisdiction of the People’s Republic of China”. The term jurisdiction is a legal term but a clear and precise one. It means a system of law. There are 4 legal systems in the People’s Republic of China: those of Hong Kong; the Mainland; Macau and Taiwan. Discrimination against people because they come from one rather than another of these 4 entities is very similar in nature to discrimination on grounds of national origin and equally objectionable. We therefore hope that our proposal will be adopted and this form of discrimination outlawed by the new legislation.

The ICCPR and Hong Kong Bill of Rights outlaws discrimination on grounds of religion. Discrimination against Sikhs or against Jews can in many cases be categorized as

discrimination on grounds of religion rather than membership of an ethnic group, and the rationalizations in cases like Mandla v Dowell-Lee can be seen as attempts to fill a gap in English law which until the recent incorporation of the European Convention on Human Rights did not expressly outlaw discrimination based on religion.

The only reason that our draft bill does not include discrimination on grounds of religion is that it is a more controversial area than the others listed above, and our aim has been to draft a bill which will have a wide consensus of support in the community. The position of religious based educational establishments, and the wide range of educational, medical and charitable institutions for which a particular religious affiliation is often regarded as necessary by the employer, are complicating factors, and if discrimination on grounds of religion is to be outlawed in the private sector we feel that this should be after a separate debate and after anti-discrimination law relating to colour, race and national or ethnic origins that already been in place for some time and seen to be working effectively.

Turning from who is to be protected to what situations they are to be protected in, anti-discrimination law aims to cover the whole range of activities by people in society.

In the employment field anti-discrimination legislation outlaws discrimination in employment; discrimination against contract workers (who are not technically in the employment of the discriminator); discriminatory training; discriminatory access to benefits; discrimination in relation to union membership; discrimination in relation to qualification for professions or trades; discrimination against commission agents; and discrimination by employment agencies.

Such legislation also outlaws discrimination by bodies responsible for educational establishments; discrimination in the provision of goods, facilities and services; in the disposal or management of premises; in relation to consent for assignment or sub-letting of premises; in relation to eligibility to vote for and to be elected or appointed to advisory bodies; in relation to barristers, and by clubs.

In Hong Kong existing anti-discrimination law also outlaws harassment and vilification on grounds of gender or disability. In the UK there is a separate Protection from Harassment Act designed to protect members of the public from harassment whatever the reason for the harassment. We consider that the provisions in Hong Kong discrimination law are very important and have included equivalent provisions in our draft Bill.

Two further concepts require consideration. The first is indirect discrimination. This is where some-one does not directly discriminate against another person, but discriminates by applying to that other person a requirement or condition which he applies or would apply equally to a person of a different colour, race or ethnic or national origin, but which is such that the proportion of persons of that other person's race, colour or ethnic or national origin who can comply with it is considerably smaller than the proportion of persons of another race, colour, or national or ethnic origin who can comply with it. This type of conduct is outlawed by Hong Kong's existing discrimination legislation and by most anti-race discrimination legislation. At the heart of the idea of indirect discrimination is that the imposition of the discriminatory requirement is not something that is necessary. A border line case in England has been the height requirements for

entry to the police, which have traditionally been set at levels which would tend to exclude a much higher proportion of some ethnic minority candidates than of members of the majority community. In response to this concern many police forces in Britain have now altered their minimum height requirements. A clearer case in relation to sex discrimination in England was considered in the case of Price v Civil Service Commission [1977] 1 WLR 1417, where it was held that an upper age entry requirement of 28 for the “fast stream” entry into the civil service, indirectly discriminated against women, as many more women than men would wish to spend their 20s bringing up children and enter or re-enter the work-force later in life by applying to join the Civil Service. The age 28 rule was not intended to discriminate against women, but that was one of its unintended effects and it was therefore held to be unlawful.

The second concept is victimization. That is where some-one treats another person less favourably than he otherwise would because that other person has made a complaint of discrimination, or given evidence as a witness in relation to a complaint of victimization, or is believed to be planning to complain or give evidence. Victimization is outlawed under Hong Kong’s existing discrimination laws and it is clearly necessary that it should be outlawed for any complaints based anti-discrimination law to be effective.

EXCEPTIONS

Under the system in use in Hong Kong’s sex and disability discrimination legislation, a discriminatory act may be lawful where a person’s gender or lack of disability is a “genuine occupational qualification”. A similar exception is included in our draft racial

discrimination bill. In practice however its application is likely to be much narrower than in relation to gender and disability as there are few situations where colour, race or national or ethnic origins are likely to be a genuine occupational qualification. The only one which comes to mind is representation of particular characters in plays or films.

A further exception, referred to above, is for what are termed “special measures”, again following the precedents of the sex and disability discrimination legislation. These are measures designed to ensure that persons of a particular race, colour, national or ethnic origin have equal opportunities with others in relation to employment, education, clubs or sports, premises, goods, facilities or services, or to meet special needs of persons of a particular race, colour or national or ethnic origin.

REMEDIES

The most effective legal remedy against racial discrimination in most cases is to hit the discriminator hard in his or her pocket. However there are some situations where this is not enough and additional or alternative remedies are required.

Existing Hong Kong anti-discrimination law gives the District Court the following powers in a discrimination case. It may (a) make a declaration that the respondent to the case has engaged in conduct, or committed an act that is unlawful; (b) order that the Respondent shall not repeat or continue such unlawful conduct or act; (c) order that the Respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the Claimant; (d) order that the Respondent shall employ or re-

employ the Claimant; (e) order that the Respondent shall promote the Claimant; (e) order that the Respondent shall pay the Claimant damages by way of compensation for any loss or damage suffered by reason of the Respondent's conduct or act; (f) order that the Respondent shall pay the Claimant punitive or exemplary damages; or (g) make an order declaring void in whole or in part either from the outset or from such date as may be specified in the order , any contract or agreement made in contravention of this Ordinance.

We have included this same range of remedies in our draft Bill as we believe that they are all necessary in appropriate cases to enable the court to take effective action against those who discriminate on racial grounds.

We have also provided for the role of the Equal Opportunities Commission to be extended to race discrimination under the new legislation. The Equal Opportunities Commission has two roles of mediation and enforcement in relation to discrimination on grounds of sex, marital status, and disability. Some critics feel that the EOC, despite some high profile enforcement cases, has tended to take a too conciliatory role with too much emphasis on mediation and not enough on enforcement. However our view is that whatever its shortcomings that there is no substitute for the EOC and that for a race discrimination law to be effective it is essential that there is a public body charged with taking steps to enforce the law.

It should be clear from the issues I have described that in enacting anti race discrimination law Hong Kong will be very far from breaking new ground. The main

issues likely to arise have already arisen and been the subject of intense debate and court decisions in the context of sex and disability discrimination in Hong Kong and of race discrimination law in other jurisdictions. The new anti race discrimination law is following a well-trodden path, and should be relatively uncontroversial.

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