

Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on minority issues

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and Special Rapporteur on minority issues, pursuant to Human Rights Council resolutions 34/35 and 34/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the Race Discrimination Ordinance (RDO). Of the four anti-discrimination ordinances in Hong Kong, the RDO is the only one of limited scope; unlike the other ordinances, the RDO does not apply to all government functions and powers. We are concerned that these government exemptions to RDO undermine the right to equality before the law, limit the scope of protection, permit discrimination on the basis of race, ethnicity and national origin, and impede racial and ethnic minorities' access to justice.

According to the information received:

The Race Discrimination Ordinance (RDO) is critical to protecting the rights of racial and ethnic minorities in Hong Kong, which comprise about 8% of the population.¹ Adopted on 10 July 2009, the RDO prohibits discrimination, harassment and vilification on the basis of race, colour, descent, or national or ethnic origin. The law covers a wide range of areas and bars discrimination in employment; education; provision of goods, facilities and services; disposal, management or access to premises including tenancy; eligibility to vote in and stand for election to public bodies; membership and participation in clubs; and pupillage or tenancy in a barrister's chambers.²

RDO is the only anti-discrimination law in Hong Kong that does not apply to Government functions and powers

The RDO was the last of Hong Kong's four anti-discrimination laws to come into force. Unlike its counterparts, the RDO is the only anti-discrimination ordinance in Hong Kong that fails to protect individuals from discrimination arising from Government functions and powers.

¹ The Government of the Hong Kong Special Administrative Region, "Race Relations Unit." Available at https://www.had.gov.hk/rru/english/info/info_dem.html

² Race Discrimination Ordinance, Cap. 602 (10 July 2009). Available at <https://www.elegislation.gov.hk/hk/cap602>.

All four anti-discrimination laws in Hong Kong contain a Section 3 provision stating that each of the laws binds the Government. Every anti-discrimination law in Hong Kong except the RDO contains a section extending the reach of the law to Government functions and powers. Section 21 of the Sex Discrimination Ordinance, Section 21 of the Disability Discrimination Ordinance and Section 17 of the Family Status Discrimination expressly deem unlawful Government discrimination in the performance of its functions or exercise of its powers.³

We are concerned that the RDO's failure to bind Government functions and powers is incompatible with the International Convention on the Elimination of All Forms of Racial Discrimination. Furthermore, we express our serious concern over this exemption's numerous consequences, several of which we detail below.

History of the RDO's exemption of Government functions and powers

During the bill's deliberations in 2008, some members of the Bills Committee expressed concerns that Government exemptions to the RDO constituted a major loophole that would subvert the purpose of the law.⁴

In response, the Secretary for Constitutional and Mainland Affairs defended the RDO exemptions as necessary to prevent needless complaints and litigations:

Some Members have suggested that, in addition to the prescribed areas of activities stipulated in the Bill, the Bill should also cover all the Government functions, including all acts of the Government in 'the performance of its function and the exercise of its power'. We should note that, unlike discrimination on the grounds of gender, disability or family status, racial discrimination involves much more complex issues and may therefore be easily abused. The inclusion of all government functions

³ Section 21(1) of the Sex Discrimination Ordinance states that "Subject to subsection (2), without prejudice to the operation of the other provisions of this Part in relation to the Government, it is unlawful for the Government to discriminate against a woman in the performance of its functions or the exercise of its powers." Sex Discrimination Ordinance, Cap. 480 (20 September 1996). Available at https://www.elegislation.gov.hk/hk/cap480?xpid=ID_1438403244564_002. Section 21(1) of the Disability Discrimination Ordinance also states "Subject to subsection (2), without prejudice to the operation of the other provisions of this Part in relation to the Government, it is unlawful for the Government to discriminate against a person with a disability in the performance of its functions or the exercise of its powers." Disability Discrimination Ordinance, Cap. 487 (09/01/2015). Available at https://www.elegislation.gov.hk/hk/cap487?xpid=ID_1438403263876_002. Protection from discrimination by government officials is also included in Section 21(1) of the Family Status Discrimination which states "Subject to subsection (2), without prejudice to the operation of the other provisions of this Part in relation to the Government, it is unlawful for the Government to discriminate against a person with a disability in the performance of its functions or the exercise of its powers." Family Status Discrimination, Cap. 527. Available at <https://www.elegislation.gov.hk/hk/cap527>.

⁴ The Legislative Council of the Hong Kong Special Administrative Region, "Official Record of Proceedings Wednesday, 9 July 2008." Available at <https://www.legco.gov.hk/yr07-08/english/counmtg/hansard/cm0709-translate-e.pdf>.

beyond the prescribed scope of the Bill could run the risk of an influx of litigation and complaints which are unreasonable and unnecessary. Such complaints and litigation are bound to detract government resources from proper use and would hamper efficient administration.⁵

RDO exemptions prevent equal protection under the law and equal access to justice

The Equal Opportunities Commission (EOC) investigates complaints, facilitates mediations and pursues legal action against offenders. It appears that RDO's exemptions impede the EOC from carrying out its mandate. Because the RDO does not apply to government powers and functions, an individual alleging racial discrimination by the Government is unable to access the EOC's free complaint mechanism.

According to information received, such alleged victims of racial discrimination are obliged to pay expensive court fees and pursue litigation. However, litigation is not a viable alternative for many potential victims of racial discrimination. Statutory exemptions and the limited scope of judicial review reportedly pose immense barriers on racial and ethnic minorities' access to justice and protection under the law.

Only one case has been adjudicated under the RDO, *Singh Arjun v. Secretary for Justice*.⁶ This case demonstrates how the RDO's limited applicability to Government functions and powers creates an inequitably high legal threshold for victims of racial discrimination and fractures the protection of fundamental rights and freedoms of racial and ethnic minorities in Hong Kong.

The *Singh* case involved Arjun Singh, a Hong Kong-Indian child, who sued the Hong Kong Police Force for alleged racial discrimination and unlawful arrest. At the time of the incident in 2010, Arjun was eleven years old. Arjun alleged that, while on the escalator, another of the escalator's occupants violently grabbed him. She counter alleged that Arjun had assaulted her, bumping into her as he was walking up the escalator. Both parties called the emergency "999" number. Two police constables dispatched to the scene arrested Arjun. In contrast, the other individual was neither arrested nor subject to an investigation; instead, she was taken to the hospital.⁷

⁵ Ibid.

⁶ In the District Court of the Hong Kong Special Administrative Region, *Singh Arjun by his next of friend Singh Anita Guruprit and Secretary of Justice Hung Kai Kam*, Case No. DCEO 9/2011, 30 May 2016. Available at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=104250&QS=%2B&TP=JU&ILAN=en

⁷ Ibid, paras. 6-8.

Arjun’s mother commenced an action against the Hong Kong Police Force. Ms. Singh alleged that the police had failed to provide Arjun services as defined under Section 27 of RDO, which prohibits discrimination on the basis of race when providing goods, facilities or services.⁸ The defendants argued that the plaintiff’s case was outside the purview of the Race Discrimination Ordinance because police activities, including arresting suspects and investigating cases, are not a service but instead a part of police duties and functions.⁹

The EOC joined the legal proceedings as amicus curiae and stated that policing activities including pursuit, arrest and investigation should be interpreted as “services” under the RDO. The EOC’s recommendation was informed and guided by decisions of courts in similar jurisdictions, including Canada and Australia.¹⁰

The District Court dismissed the plaintiff’s racial discrimination claim, ruling that police conduct during investigation or arrest does not constitute “services” under Section 27 of the RDO.¹¹ As a result, actions relating to police power remain outside the scope of anti-discrimination law.

Other guidelines have been insufficient to remedy the RDO’s broad exemptions

In 2010, the Constitutional and Mainland Affairs Bureau issued “Administrative Guidelines on Promotion of Racial Equality”, which emphasizes the obligations to ensure equal access to public services and to consider the rights of all races when formulating, implementing and reviewing relevant policies and measures.¹² Reports received indicate that the Guidelines have an unclear or negligible effect on advancing racial equality or influencing Government policy. Many bureaus and departments are reportedly unaware of the guidelines. Furthermore, there exists no system for complaints or accountability for failures to follow the guidelines.

Failure to act on recommendations to amend the RDO

The Equal Opportunities Commission (EOC) has gathered evidence corroborating concerns about the RDO’s exemptions. In 2013, EOC initiated a Discrimination Law Review to analyze the four anti-discrimination laws in Hong Kong. In 2014, the EOC carried out consultations and obtained over 125,000 written submissions. In March 2016, the EOC provided 73 recommendations to the HKSAR Government. These included 19 recommendations relevant to racial discrimination. One key recommendation was that the Government amend the

⁸ Ibid, para. 15.

⁹ Ibid, para. 256.

¹⁰ Ibid, paras. 314-315.

¹¹ Ibid, paras. 313, 372, and 477.

¹² “Administrative guidelines on promotion of racial equality.” Available at https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/agpre/adm_guidelines.pdf

RDO “by providing that it is unlawful for the Government to discriminate in performing its functions or exercising its powers.”¹³

A Bills Committee on the Discrimination Legislation (Miscellaneous Amendments) was established in December 2018. This committee selected eight of the twenty-seven recommendations made by the EOC.¹⁴ Regrettably, the Bills Committee did not take heed of EOC’s advice to amend the RDO to include all government functions and powers.

The Committee on the Elimination of Racial Discrimination (CERD) has previously expressed similar concerns, urging the Government to amend the RDO to bring the law in line with international standards. During a 2018 session, CERD reiterated its concern that “in Hong Kong, China, law enforcement activity does not necessarily fall within the scope of the prohibition on racial discrimination in the Race Discrimination Ordinance.”¹⁵ The Committee recommended that Hong Kong amend its “domestic laws to expressly define and criminalize all forms of racial discrimination in conformity with article 1 of the Convention, and expressly prohibit both direct and indirect racial discrimination in all fields of public life, including law enforcement and other government powers.”¹⁶

Ongoing concerns about the RDO

The exemptions in the RDO alone give rise to serious concerns that executive powers in Hong Kong may discriminate with impunity. Barriers to EOC adjudication and to litigation concerning the RDO, failure to amend the RDO, and the ruling in *Singh Arjun v. Secretary for Justice* jointly exacerbate these concerns and undermine racial and ethnic minorities’ enjoyment of human rights in Hong Kong.

Recent incidents involving police use of force during protests motivate particular concern about the RDO’s exemptions. We have received reports that police in Hong Kong frequently subject racial and ethnic minorities to racial profiling. Racial and ethnic minorities are allegedly stopped, hassled and detained by law enforcement based on their perceived race and/or ethnicity. Such unequal application of the law can create profound distrust between over-policed communities and law enforcement.

Exemption of Government and police powers from accountability further undermines public trust. The RDO, as written and as applied under *Singh*, fails to

¹³ Equal Opportunity Commission, “Discrimination Law Review.” Available at <https://www.eoc.org.hk/eoc/upload/DLR/2016324141502000459.pdf>.

¹⁴ Legislative Council Brief, “Discrimination legislation (miscellaneous amendments) bill 2018. Available at https://www.legco.gov.hk/yr18-19/english/bills/brief/b201811302_brf.pdf.

¹⁵ CERD/C/CHN/CO/14-17, para. 7.

¹⁶ Ibid, para. 8.

ensure equal protection under the law and fails to provide for racial and ethnic minorities in Hong Kong with access to justice and effective remedies.

Although we do not wish to prejudge the accuracy of the information made available to us, we would like to express our concern that limited application to government functions and powers severely undermines the RDO. The RDO occupies a central role in protecting the rights of racial and ethnic minorities in Hong Kong. Unfortunately, this role has not been fully realized. We believe that reform is necessary to address structural discrimination in Hong Kong and promote substantive racial equality. In particular, legislative reform should bring the RDO in line with the anti-discrimination ordinances on sex, disability and family status.

We strongly urge the government to amend the RDO and bring all government functions and powers within the scope of the law. Amendments are necessary to creating a uniform and effective anti-discrimination framework and adhering to international standards.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on any measures that your Excellency's Government has taken, or intends to take, to bring RDO into conformity with international norms and standards.
3. Please provide information on the legislation in place to implement and enforce the International Convention on the Elimination of Racial Discrimination.
4. Please provide information on criminal complaints, investigations, prosecution, sentences, convictions, sanctions and remedies lodged by victims alleging racial discrimination and the outcome of the cases.
5. Given the fact that the Equal Opportunity Commission (EOC) is mandated to investigate allegations of racial discrimination, please provide information on the number of investigations carried out and the outcomes. Specifically, please provide statistics, disaggregated by national origin and ethnicity of the complainant, type and outcome of racial discrimination-related administrative and civil complaints.

6. Please provide information on the national human rights action plan (if any) and/or policies the Government has implemented to improve the situation for ethnic minorities.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

E. Tendayi Achiume
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia
and related intolerance

Fernand de Varennes
Special Rapporteur on minority issues

Annex
Reference to international human rights law

In connection with above alleged facts concerning government exemptions to the Race Discrimination Ordinance (RDO), we would like to remind your Excellency's Government of its international human rights obligations. We would like to draw the attention of your Excellency's Government to the human rights norms and standards delineated in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) acceded to by China in 1981, and the International Covenant on Civil and Political Rights (ICCPR) signed in 1998. We would like to emphasize that the State Party must guarantee non-discrimination and equality, take effective measures to amend or eliminate racially discriminatory policies and provide effective protection and remedies.

All State Parties Must Guarantee Non-Discrimination & Equality

The inherent dignity and the equal and inalienable rights of all persons is rooted in the Universal Declaration of Human Rights (UDHR). Articles 2, 3, 10, 11(1), 12, 13 and 18 of the UDHR provide for the principle of non-discrimination and equality, rights to liberty and security of a person; to be recognized as a person before the law; to be equal before the law and receive equal protection of the law; to have access to effective remedy; to not be subjected to arbitrary arrest, detention or exile; to have equal access to a fair and public hearing; the presumption of innocence until proven guilty; to not face arbitrary interference with privacy, family and home; to freedom of movement and to leave any country, including one's own; and freedom of religion or belief.

The principles of non-discrimination and equality before the law are core State obligations. This is affirmed in ICERD. ICERD states that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination. This commitment to non-discrimination and equality is clearly evident from article 1, which broadly defines racial discrimination as "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."

We would also like to remind your Excellency's Government that article 5 of the ICERD obliges States parties to guarantee the rights of all people to equality before the law, without distinction as to race, colour, or national or ethnic origin. Article 26 of ICCPR also provides: "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."

In its General Recommendation XXX on Discrimination against Non-Citizens (2004), the Committee on the Elimination of Racial Discrimination clarifies that “[u]nder the Convention, differential treatment based on citizenship [...] 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” (para. 4). The Recommendation also calls on States to ensure that implementation of legislation does not have a discriminatory effect on non-citizens (para. 7). We express apprehension that the exemptions to the RDO undermine the State Party’s obligations to ensure formal and substantive equality in the enjoyment of these rights.

We would also like to call attention to the international standards concerning the protection of the rights of persons belonging to minorities, in particular article 27 of the ICCPR and the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which outlines States obligations to protect the existence and the identity of minorities within their territories (article 1) and adopt the required measures to ensure that persons belonging to minorities can exercise their human rights without discrimination and in full equality before the law (article 4).

All State Parties must take Effective Measures to Amend or Eliminate Racially Discriminatory Policies

Article 2 (1) of ICERD obliges States Parties to prohibit and eliminate any act or practice of racial discrimination against persons and/or groups. Specifically, article 2(2) authorizes States, "when the circumstances so warrant, [to] take ... special and concrete measures to ensure the adequate development and protection of certain racial groups ... for the purpose of guaranteeing them the full and equal enjoyment of human rights"

Article 2(c) is of particular relevance to the Racial Discrimination Ordinance. Article 2(c) obligates the Government to "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." States must ensure that public authorities and institutions on the national and local levels act in compliance with this obligation. In accordance with article 6, States Parties must not only ensure the effective protection against racial discrimination of everyone within their jurisdiction, but also provide access to remedies and adequate reparation to victims of racial discrimination.

All State Parties Must Provide Effective Protection and Remedies

Article 6 of the ICERD and Article 2(3) of the ICCPR require that individuals whose rights have been violated have access to effective remedies. Articles 9 and 10 of the ICCPR also set out the right to liberty and security of the person; and the right of a detainee to be treated with humanity and respect. We are concerned that the exemptions of the RDO prevent access to effective protection and effective remedies to racial and ethnic minorities. The legal challenges racial and ethnic minorities face due to systematic

barriers in accessing justice contravene the State Party's treaty obligation. We strongly urge the Government to amend the law and comply with its treaty obligations under ICERD and ICCPR.