

Virus or not, the law remains the law

“I have no idea why people would say this is discrimination... this is simply not the right time to bring the issue up.”

A member of a local political party was quoted as saying the above in a media report on 14 March, referring to shops and eateries turning away Mandarin-speaking customers amid COVID-19 scares.

The blunt comment, which came just a week before the International Day for the Elimination of Racial Discrimination on 21 March, reveals a perhaps widespread belief: “People are not happy with the border control measures, and they are doing whatever they can to contain the spread of the virus. To say that they are committing discrimination not only misses the point, but also discredits their fear and undermines their effort.”

But even the most sensible objective can be marred by the way it is pursued. As the saying goes, the end does not always justify the means. Is what you are doing actually relevant to your stated goal? Are there alternative ways to achieve the same objective without affecting a disproportionate number of people?

Technicalities like these may be dull or pedantic to some, but in some cases they may go to determine whether an act violates Hong Kong’s anti-discrimination ordinances. As much as the Equal Opportunities Commission (EOC) strives to stay in touch with public sentiment, we cannot bend the law for the sake of brownie points.

So what exactly does the law say?

First of all, *nothing* in the Race Discrimination Ordinance (RDO) suggests that for racial discrimination to occur, the perpetrator must be of a different race or ethnicity than the victim. An example: a shop run by a Caucasian refuses to serve fellow Caucasians while opening its doors to Africans, Asians and people of other races. Obviously, Caucasians in this instance are being treated less favourably on the ground of race – the very definition of racial discrimination under the RDO.

Also, racial discrimination may occur when a requirement, such as a language-related

condition, disproportionately and adversely affects people of a particular race. This is known as indirect discrimination, and according to section 4(2) of the RDO, it is only lawful when: (i) there is a legitimate objective; and (ii) the condition bears a rational and proportionate connection to the objective.

Because a considerable number of ethnic Chinese are Mandarin speakers, eateries banning Mandarin-speaking customers may risk committing indirect discrimination against ethnic Chinese. Of course, preventing the spread of the novel coronavirus may be a legitimate objective, but is there a “rational and proportionate connection” between the ban and the stated objective?

Considering the 14-day mandatory quarantine that now applies to arrivals from mainland China, and the fact that COVID-19 cases have sprung up in numerous countries and regions, it would be far-fetched to say that there is a rational and proportionate connection between the objective of disease control and a ban targeted at Mandarin-speaking customers.

What is more, it is against the Disability Discrimination Ordinance (DDO) to discriminate against a person based on the perception or speculation that she or he carries a virus or disease. While section 61 of the DDO states that the ordinance does not apply to an act targeted at a person with an infectious disease, the act in question must be *reasonably necessary* for the purpose of protecting public health. Again, for the reasons stated above, it would be extremely difficult to prove that the ban on Mandarin-speaking customers is necessary and closely relevant to safeguarding public health.

The author and educator Parker Palmer once wrote, “The human soul doesn't want to be advised or fixed... It simply wants to be witnessed – to be seen, heard and companioned exactly as it is.” The EOC is well aware of Hongkongers’ frustration and where it is coming from, but the fact remains that some of the acts borne out of these anxieties may be unlawful under the anti-discrimination ordinances.

If social distancing and personal hygiene are half of the battle against COVID-19, the other half comes down to honouring the truth and saying no to misinformation. The law is part of that truth, and we must strive to uphold it.

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