



Title	The Human Rights of Women in the Hong Kong Special Administrative Region
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Citation	William & Mary Journal of Women and the Law, 2013, v. 19 n. 2, article no. 3, p. 255-300
Issued Date	2013
URL	http://hdl.handle.net/10722/144485
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THE HUMAN RIGHTS OF WOMEN IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

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ABSTRACT

Although Hong Kong is a party to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and has enacted relevant protections to safeguard the rights and interests of women under the Hong Kong Basic Law (HKBL) and anti-discrimination laws, the existing framework of protection is inadequate in critical respects and fails to offer substantive protection. The paper critically examines existing law and policy governing women's rights, highlighting the reasons for its failings and outlines recommendations for achieving substantive and transformative equality for women.

Introduction

This chapter sets out the legal framework for the protection of the rights of women and girls in Hong Kong and evaluates these protections in light of international, comparative and local legislation and jurisprudence. Whilst it appears that the former colony has largely retained the common law system, human rights heritage and culture of constitutionalism it inherited during its colonial past, some aspects of the law and jurisprudence leave the situation of women precarious and wanting in this fast-paced, competitive and modern society that is full of contradictions with its uncanny ability to characterise both modernity and the conservatism of a bygone era. The chapter offers a brief overview of relevant legislative provisions that protect the human rights of women in Hong Kong. Primarily, the chapter focuses on international and constitutional obligations of Hong Kong to enact laws protecting the rights of women, the enactment of relevant anti-discrimination statutes in Hong Kong, the relevant institutional framework that exists to enforce these rights and related jurisprudence emanating from the Hong Kong courts.

In considering the effectiveness of the framework of protection of women's rights, the chapter offers a critique of the supporting machinery for guarding against the breach of anti-discrimination laws and other provisions relating to the rights of women in Hong Kong. As the chapter details, the protection framework falls short of international standards in various respects, undermining the rights of women. As the discussion portrays, the institutional protection offered is less than satisfactory and results in the withdrawal or non-pursuit of claims. Furthermore, the courts, whilst progressive with respect to ascertaining the perpetration of discrimination from a substantive notion of equality, when it comes to certain categories of rights entailing economic and social policy, their undue deference to the government in these areas exacerbates the plight of women and particularly hurts segments of the female population who already suffer from discrimination on multiple grounds. The chapter

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ends with recommendations on how the protection of women's rights can be enhanced by drawing extensively on civil society organisations and international mechanisms whose work has successfully garnered change thus far. Furthermore, it is imperative that the government commitment to gender mainstreaming in practice with a view to enabling effective planning and legislation of law and policy in a manner that advances the interests of women and protects them against discrimination and violations of their fundamental human rights. Such reform is to be urgently prioritised in light of the actual and hidden costs of non-protection or inadequate protection of more than half the population in Hong Kong.¹

From Colony to Special Administrative Region: A Brief Historical Overview

Hong Kong's status as a British colony since the mid-1800's resulted in the application of English law in Hong Kong, subject to the need for modifications in light of local circumstances, until 30 June 1997. This rendered common law principles and rules of equity developed in English courts applicable in Hong Kong insofar as they were not inapplicable by virtue of local circumstances. Despite this general proclamation, Hong Kong had its own legislature within the first couple of years of British rule. Together, through the application of legislation enacted locally and the principles of common law and equity as developed in England and any English statutes that were applicable by the Queen's Order in Council, this body of rules constituted the laws that would govern Hong Kong for its 99 years as a colony.

The Sino-British Joint Declaration ("the Joint Declaration", an international treaty signed between Britain and the People's Republic of China ("PRC") in 1984 and deposited with the United Nations Secretariat upon the exchange of instruments of ratification in June 1985, set the terms for the resumption of Chinese sovereignty over Hong Kong. The treaty provided that Hong Kong was to be constituted a Special Administrative Region ("SAR") of the PRC. Under this arrangement, although under Chinese sovereignty, Hong Kong SAR was to be granted a high degree of autonomy and more importantly, the laws and economic systems previously in force, were to continue, save where their continuation would be inconsistent with Chinese sovereignty, in which case, they were to be adapted where possible and otherwise, repealed. Furthermore, Hong Kong would be governed in accordance with its mini-constitution, the Basic Law of Hong Kong (HKBL), which was promulgated in 1990 and came into force on 1 July 1997 upon the establishment of the HKSAR. In furtherance of these objectives, the HKBL facilitates the continued application of 'laws previously in force'², guarantees judicial independence³ and enables the SAR to enact its own laws and policy and develop related jurisprudence in most aspects.⁴

¹ According to the latest available statistics on the population of Hong Kong, as at the end of 2010, 3,782,700 out of a total population of 7,102,300 people were female. This amounts to 53 per cent. Census and Statistics Department website, at: http://www.censtatd.gov.hk/hong_kong_statistics/statistics_by_subject/index.jsp?subjectID=1&charsetID=1&displayMode=T#FOOTNOTE1, last visited 3 October 2011.

² See Articles 2, 8, 18 and 85, HKBL.

³ Articles 2, 19, 81 and 85, HKBL.

⁴ Pursuant to Articles 13, 14, 18, 19, 158 and Annex III of the HKBL, the Central Authorities of the PRC reserve the exercise of power in matters of foreign affairs, defence and acts of state, final

In many respects, Hong Kong's status as an international financial centre and the modernization of the PRC's economic system and legal framework, have served to ensure that many of the constitutional guarantees and human rights protections put into place in the run-up to the transfer of sovereignty, have, with some exceptions, survived the change of sovereignty.

International Legal Obligations: Human Rights Protections and the Guarantees of Equality and Non-Discrimination

Hong Kong is bound by various international treaties, formerly through the obligations of the United Kingdom as a signatory to the treaties concerned, which were specifically extended to apply to its colonial territories and presently, as a result of provisions for the continuity of such obligations under the Joint Declaration. These obligations require and have led to the enactment of various laws in Hong Kong with a view to fulfilling these international obligations. Apart from the obligation to enact relevant legislation and develop related policy directives, there are reporting requirements pursuant to which state parties are to report to the relevant treaty body periodically, providing an overview of treaty-related developments in their country, setting out problem areas and relevant action that has been taken to address any gaps.⁵ Hong Kong fulfils its reporting requirements pursuant to some of these treaties by filing a report with the relevant treaty body under the periodic reporting scheme, synchronising its report with the PRC's reporting cycle since 1997. The committees for each treaty review country reports submitted by the government concerned but also draw extensively on alternative and shadow reports from relevant non-governmental organisations, which serve as a check against the country report. The committee renders 'Concluding Observations' on the country's protection of the rights under that treaty, setting out areas of concern. The reporting country is expected to address areas of concern emphasised in the concluding observations and report on measures taken in the subsequent reporting cycle.⁶

Among the treaties that Hong Kong is bound by, the International Covenant on Civil and Political Rights⁷ ("ICCPR") and the International Covenant on Economic Social and Cultural Rights⁸ ("ICESCR") safeguard a range of civil and political rights including the right to life, freedom of religion, speech and assembly, electoral rights, rights to fair process of law, economic social and cultural rights, including labour rights and rights to health, education and an adequate standard of living. These protections are available to all individuals.

interpretation of the HKBL, and affairs that are the responsibility of the Central Authorities or matters pertaining to the relationship between the Central Authorities and the HKSAR.

⁵ These obligations are set out in Article 18 of the CEDAW.

⁶ The periodic reports to the treaty body serve an important function to ensure that the government remains committed to the implementation and enforcement of international human rights standards. The increasing tendency of non-governmental and other civil society organisations filing alternative and shadow reports to those produced by the government serve to bolster the independence, transparency and objectivity of the process. Concluding Observations are taken seriously given their representation as an international-level report on the state's performance.

⁷ GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1996), 999 UNTS 171, entered into force 23 March 1976.

⁸ 993 UNTS 3, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316, 999 UNTS 171, entered into force 3 January 1976.

Pursuant to the ICCPR, all persons are entitled to equal protection before the law without discrimination. Articles 2 and 3 guarantee the rights under the treaty to all persons without distinction on any basis, with Article 3 specifically prohibiting distinction on grounds of sex. Article 26 further provides that discrimination on any of the prohibited grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is impermissible and requires legal prohibition of, and equal and effective protection against, such discrimination. The ICESCR similarly guards against such discrimination in Articles 2(2) and 3, the latter specifically calling for equality between men and women in the protection of economic, social and cultural rights set out in the ICESCR. Between them, these clauses in both treaties serve to emphasise the importance of safeguarding not only the guarantee of equal protection but also, equal treatment by prohibiting unlawful discrimination, recognising the invidious impact of discrimination and its primary role in contributing to unequal treatment.⁹

Additional international treaties have been adopted with a view to protecting specific groups or the rights of people in particular circumstances, for example, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women¹⁰ (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). More recently, the international community has adopted the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the Convention on the Rights of Persons with Disabilities (CRPD). Hong Kong is bound by all these treaties and is thereby required to protect individuals and groups at risk through appropriate policies and legal enactments.

Despite the many international human rights treaties and national legislation which stipulate the equal applicability of human rights protections to all individuals irrespective of sex¹¹ and the principle of non-discrimination, in practice, women face numerous barriers towards the realisation of their human rights as a result of discrimination and unequal treatment. For example, some countries exclude women's participation in the political system (the right to vote or run for public office) or their access to education, justice, employment and inheritance of family wealth and assets. Women may also face circumstantial barriers to full and equal participation in society, for example, violence against women, the lack of adequate access to healthcare or child support, barriers to certain types of employment or unequal pay for equal work, are factors that negatively impact women in their pursuit of equal enjoyment of rights and opportunities. In the circumstances, countries around the world have recognised

⁹ Human Right Committee, General Comment No. 18: Non-Discrimination, UN Doc CCPR/C/21/Add 1/Rev 1 (1989), para. 1.

¹⁰ GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980).

¹¹ Women's equality is guaranteed under the ICCPR and ICESCR under Article 2 of both treaties, committing states to ensuring the equal right to the enjoyment of all civil, political, economic, social and cultural rights and non-discrimination on grounds of sex, among other things. Article 7 of the ICESCR specifically recognises the right of women workers to be guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

the need for specific protections that focus on the needs of women as a group and their rights to non-discrimination and equal protection.

Therefore, of the various international treaties listed above, most relevant to the protection of the rights of women is the CEDAW, one of the most widely ratified conventions.¹² As the Preamble to CEDAW notes, despite the equal protection rights offered under the ICCPR and ICESCR and the Universal Declaration of Human Rights, “extensive discrimination against women continues to exist” and “violates the principles of equality of rights and respect for human dignity”. The Preamble recognises that discrimination against women impedes the ability of women to participate fully and on equal terms with men, in political, social, economic and cultural life, hampering prosperity of the family and the society as a whole. Furthermore, it emphasises the need to develop women’s capacities and potential for equal and maximum participation in the service of humanity in order to secure development, welfare and peace for countries. Finally, it singles out the historical lack of recognition of women’s contribution to the welfare of families and societies and the need for a change in the traditional role of women and men in the family and society in order to facilitate full equality between men and women.¹³ The central objective of the CEDAW “is the elimination of all forms of discrimination against women on the basis of sex. It guarantees women the equal recognition, enjoyment and exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, domestic or any other field, irrespective of their marital status, and on a basis of equality with men.”¹⁴ The implementation of the CEDAW by state parties is overseen by the CEDAW Committee, which is established pursuant to Article 17 of the CEDAW Convention.¹⁵

As the ensuing discussion reveals, however, given that certain circumstances have come to be internationally recognised as placing specific individuals or groups at a particular risk, leading to a proliferation of treaties to protect them, these other treaties are equally significant as the circumstances described tend to have a compounded effect on women, whose situation is exacerbated by virtue of the multiple layers of discrimination they experience when inequalities in a range of spheres intersect. For present purposes however, it is sufficient to note the array of international obligations that are binding on Hong Kong, which make it incumbent on personnel involved in the development of law, policy and jurisprudence, to incorporate international standards into these processes to enhance the quality of protection for women as a group and to account for the multiple inequalities they experience as a group that is often implicated in various other marginalised ‘groupings.’ The lack of an

¹² As of October 2011, the CEDAW has been ratified by 187 states. See, United Nations Treaty Database, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-8&chapter=4&lang=en, last visited October 2011. Although the CEDAW was ratified by the United Kingdom in 1985, its application was not extended to Hong Kong until 1996. In 1997, upon the transfer of sovereignty, the PRC government took over the reporting and implementations of CEDAW-related obligations for Hong Kong. It also notified the Secretary General of the extension of reservations made by the PRC to its own obligations under the said treaty, to Hong Kong.

¹³ Preamble to CEDAW. These views were echoed in the Beijing Declaration and Platform for Action, which were adopted at the Fourth World Conference on Women in 1995.

¹⁴ CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 2010, para 4.

¹⁵ The CEDAW Committee comprises 23 experts from a range of countries, the representatives of which serve the Committee on a rotational basis, serving 2-year terms.

intersectional approach to tackle multiple fronts of discrimination and inequality severely undercut the effectiveness of human rights protections for women.

International obligations require the implementation of treaty provisions, usually through the enactment of local legislation. Hong Kong has sought to do so through legal provisions protecting a range of human rights, both in the HKBL and the Hong Kong Bill of Rights Ordinance¹⁶ as well as various anti-discrimination laws. Pursuant to these laws, it has become possible to hold government and in some instances, private actors, to account for breach of the guarantees provided. However, as the sections below detail, apart from the inadequacies inherent in some of the implementing legislation, in their present state, the supporting mechanisms that enable the legal enforcement of these rights leave much to be desired. To this end, the reporting obligations force a degree of self-scrutiny and reflection and are most useful in prompting change (given the international nature of any commendation or censure) before the next reporting cycle. The level of scrutiny the government is subject to under the international reporting process, is however, ultimately dependent on the collective efforts of NGOs and human rights groups and their lobbying of the CEDAW committee as regards the failings of the Hong Kong machinery,

The Domestic Implementation of International Human Rights Laws on the Rights of Women and the Guarantees of Equality and Non-Discrimination

The legal framework for the protection of the fundamental rights of equality and non-discrimination in Hong Kong is based on international human rights treaties.¹⁷ Article 25 of the HKBL provides that “all Hong Kong residents shall be equal before the law” and any legislation or contravening this provision is unlawful.¹⁸ These rights have been further entrenched through Article 39 of the HKBL, which incorporates the provisions of the ICCPR, the ICESCR as well as International Labour conventions¹⁹ that were applicable to Hong Kong prior to 1997, into Hong Kong’s constitutional framework.²⁰ Article 39(2) provides that these freedoms shall not be restricted unless prescribed by law and that such restrictions are themselves to be in accordance with the said international treaties. The equality and non-discrimination guarantees in these instruments are therefore, directly co-opted into the constitution to supplement the right to equality under Article 25 of the HKBL, which is notably brief, and the numerous human rights protections that are enshrined in the HKBL and other local legislation. Moreover, any laws that contravene either Article 25 or Article 39 of the HKBL would be deemed unconstitutional.

These constitutional and international guarantees are implemented through a range of legislative provisions. The HKBORO, for example, provides that men and women

¹⁶ Cap. 383, Laws of Hong Kong, hereinafter “BORO”.

¹⁷ For a comprehensive overview of the constitutional right to equality, its conceptualisation and development through the courts’ jurisprudence, see Kelley Loper, *The Right to Equality and Non-Discrimination, The Law of the Constitution*, Sweet and Maxwell: 2011, Chapter 27.

¹⁸ Article 11 of the HKBL prohibits the enactment of any legislation that contravenes the HKBL.

¹⁹ For an overview of the various labour conventions that are applicable to Hong Kong and their implications on the rights of women in the labour market, see Rick Glofcheski and Ho Yan Leung, *Job Security and Entitlements Within Hong Kong’s Maternity Protection Legislation, International Journal of Comparative Labour Law and Industrial Relations* 25(3) (2009) 327-345. See also,

²⁰ *HKSAR v. Ng Kung Siu* [1999] 3 HLRD 907, Court of Final Appeal.

shall have equal enjoyment of all civil and political rights set forth in the HKBORO²¹ and shall enjoy equal protection before the law.²² It also specifically protects the right to equality and non-discrimination on various prohibited grounds, including sex.²³ The Ordinance binds the Government and all public authorities and any person acting on behalf of the Government or a public authority.²⁴ Protection against discrimination on grounds of sex is further elaborated in two anti-discrimination statutes, the Sex Discrimination Ordinance²⁵ to ensure that women are not prejudiced by reasons of their gender in a range of contexts, including employment, the provision of goods and services, housing, voting and standing for elections and government policy and the Family Status Discrimination Ordinance²⁶ which prohibits discrimination against a person on the grounds that they have responsibilities involving the care of a family member. These two statutes apply to the Government and the private sector.

Given the overlapping but differentiated applicability of the various legislative provisions that seek to protect women against inequality and discrimination, the importance of court-related jurisprudence in the elaboration of the nature and extent of the right to equality and its relationship to the principle of non-discrimination cannot be overstated. Protection against discrimination has been recognised as an essential counterpart to securing the right to equality.²⁷ The next section details some of the salient provisions of the SDO and the FSDO and discusses the mechanisms the anti-discrimination laws put into place to deal with breaches.

Sex Discrimination Ordinance

The SDO was enacted in 1995 and came into force in 1996. It aims to protect people in Hong Kong against discrimination on the basis of sex, marital status and pregnancy and against sexual harassment. Sections 4, 7 and 8 of the SDO prohibit both direct and indirect forms of discrimination. Where the cause for the treatment can be attributed directly to one of the prohibited grounds of sex, marital status or pregnancy, this would constitute direct discrimination. Thus, where a person is treated less favourably than a person of the opposite sex, or a person with a different marital status or a person who is not pregnant, this would constitute direct discrimination. In the case of indirect discrimination, where a neutral requirement or condition is imposed, which has the effect that a person falling within a prohibited category of

²¹ Article 1, replicating Articles 2(1) and 3 of the ICCPR.

²² Article 22, modelled on Article 26 of the ICCPR.

²³ *Ibid.*

²⁴ Section 7, HKBORO.

²⁵ Cap. 480, Laws of Hong Kong (also available on the Equal Opportunities Commission's website at <http://eoc.org.hk>), hereafter referred to as the "SDO".

²⁶ Cap. 527, Laws of Hong Kong ((also available on the Equal Opportunities Commission's website at <http://eoc.org.hk>), hereafter referred to as the "FSDO".

²⁷ For a detailed discussion of the development of equality law and related jurisprudence in Hong Kong in the early years of Hong Kong's anti-discrimination laws, see Carole J. Petersen, Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong, 34 *Columbia Journal of Transnational Law* 335 (1996). See also, Carole J Petersen, Hong Kong's First Anti-Discrimination Laws and Their Potential Impact on the Employment Market (1997) 27 *HKLJ* 324; Carole J Petersen, Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong's Anti-Discrimination Laws, (1999) 29 *Hong Kong Law Journal* 178-194 and Kelley Loper, Discrimination Law, in Glofcheski and Aslam (eds.) *Employment Law and Practice in Hong Kong* (Sweet & Maxwell: 2010), p. 303.

discrimination would be less likely to be able to meet that condition; that condition cannot be justified regardless of the sex of the party concerned; and its application would have a detrimental impact on a person in the position of the party concerned, it would constitute indirect discrimination.

Moreover, the SDO protects women against sexual harassment in the workplace.²⁸ ‘Sexual harassment’ covers a range of behaviours including unwelcome sexual advances, requests for sexual favours or unwelcome conduct that is sexual in nature and would be perceived as such by a reasonable bystander, having regard to all the circumstances, leading her likely to conclude that the person at the receiving end of the behaviour would be offended, humiliated or intimidated. The section also provides that a person, either acting alone or together with others, may create a hostile or intimidating working environment for another, by engaging in conduct that is sexual in nature.

Section 9 of the SDO foresees the possibility that victims of sexual harassment or discrimination may face retaliation for lodging a complaint and therefore, provides that where a person is victimised due to their having brought a claim under the SDO against a party, for example, by less favourable treatment, that would also constitute discrimination.

Whilst the SDO sets out the ‘actionable grounds’ with respect to various activities and organisations, some sections specifically exempt certain entities from the application of provisions. For example, sections 21 and 38 exempt the government from actionable unlawful discrimination where the acts done are pursuant to immigration legislation pertaining to entry into, stay in or departure from Hong Kong.²⁹ These exemptions have been the subject of extensive criticism, both locally, by non-governmental organisations but also, at the CEDAW Committee level.³⁰ This is particularly so given the Government’s reliance on the provisions and the relevant CEDAW reservation in defence of the two-week rule that is imposed on foreign domestic helpers who are required to leave the territory within two weeks of the termination of their contract. In the circumstances, many helpers are left vulnerable

²⁸ Section 2, SDO. This section is to be read expansively so as to include hostility created in learning environments. *See Yuen Sha Sha v. Tse Chi Pan* [1999] 1 HKC 731, one of the first sexual harassment cases brought under the SDO by a female student at the Chinese University of Hong Kong whose roommate’s boyfriend had installed a hidden camcorder in her bedroom aimed to capture images near her dressing area. The liability for sexual harassment was constituted on the basis of invasion of the privacy of the student. As various commentators have noted however, the decision also represents the difficulties victims of harassment, unequal treatment and discrimination face in seeking to implement their rights through litigation, which can be a stressful, lengthy and expensive process. *See Carole Petersen, Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong’s Anti-Discrimination Law, (1999) 29 Hong Kong Law Journal 178.*

²⁹ This is consistent with a reservation entered by the PRC Government in a communication on the question of Hong Kong deposited with the Secretary-General, dated 10 June 1997. *See Multilateral Treaties Deposited with the Secretary-General, Note 2 under China, at <http://treaties.un.org/pages/HistoricalInfo.aspx>, last visited 30 September 2011.*

³⁰ *See CEDAW Committee, Concluding Observations on China, Hong Kong and Macau, CEDAW 36th session 2006. CEDAW/C/CHC/CO/6, 26 August 2006, paras. 41 and 42.*

where they have claims against employers for outstanding debts, abuse or wish to stay to find another employer to continue working in Hong Kong.³¹

Among other exceptions in the SDO, s. 22 notably confers an exception to religious bodies where the preference for a person of a particular sex for certain duties is based in religious doctrine. This comports with the list of reservations made by the PRC Government at the time it lodged its acceptance of CEDAW-related obligations with respect to Hong Kong.³²

Also of particular interest is s.35 which secures the equal right of women to be eligible to stand for and vote in elections in any advisory body, defined to include a public body, public authority, a statutory advisory body, a prescribed body³³ and for relevant positions including that of Village Representative or office-holder of a Rural Committee, as defined in the Heung Yee Kuk Ordinance.³⁴ Despite this seemingly progressive stance against the entrenchment of cultural and indigenous practices pertaining to the rights of women, in practice, women do not have equal standing in such elections given the importance of the selection of heads of household, a process which invariably tends to be male-dominated, in determining the pool of candidates for selection as Village Representatives, which in turn, affects their eligibility to serve as Rural Committee members (who are selected from Village Representatives).³⁵ Thus, the process of determining heads of households is one which ought to be checked for discrimination, as opposed to the broader level elections. This is particularly important where the designation as household head carries with it significant legal and political powers. Alternatively, instead of a system where households elect village representatives (through their head), individuals should be given the right to vote for village representatives.

However, despite the availability of legal protection against sex-based discrimination, women continue to face opposition and intimidation in the exercise of their rights to fully participate in public life in the New Territories.³⁶ This is despite related exemptions in the SDO, for example, s. 61, which provides that nothing in the SDO affects the terms of the New Territories Ordinance³⁷ or the New Territories Leases (Extension) Ordinance³⁸ or renders unlawful any act done pursuant to those ordinances.³⁹ Whilst it used to be the case that women were prohibited from inheriting

³¹ This is seen as gender-based discrimination due to the invidious impact of this rule of the foreign domestic helper contingent who are predominantly, if not exclusively, women. The rule has also been criticized for its role in creating an impediment to due process rights and access to justice.

³² *Ibid.*

³³ Section 35(1), SDO.

³⁴ Section 35(2), SDO.

³⁵ Although the case of *Secretary for Justice v. Chan Wah* 3 HKCFAR 459 applied this provision, the factual matrix concerned discrimination against non-indigenous residents in the village.

³⁶ 'Rural Affairs', *South China Morning Post*, 6 March 2011, lamenting that only 2.23 per cent of candidates in the 2011 village elections were women and a meagre 0.79 per cent of candidates were women in indigenous representative elections.

³⁷ Cap. 97, Laws of Hong Kong.

³⁸ Cap. 150, Laws of Hong Kong.

³⁹ A question that arises is whether Article 40 of the HKBL resurrects the exclusive male succession right which was the subject of challenge and resulted in the passage of the exemptions in the NTO and the NTL(E)O. Article 40 preserves the lawful and traditional rights of indigenous inhabitants of the New Territories. Insofar as it protects the interests of male indigenous inhabitants as a matter of tradition, it is arguable that such rights have been inadvertently 'restored' to the extent that these were

land in the New Territories purportedly as a result of Chinese customary law, this prohibition was lifted in 1994.⁴⁰ Despite this change, however, the Small House Policy extended by the government in 1972, under which it offered free building licenses or government land at a discounted premium to male indigenous inhabitants who were descendants of the male lineage of an indigenous inhabitant of a recognized village in 1898, remains firmly intact today despite the discrimination inherent in such a policy insofar as it works to enrich indigenous men so defined as opposed to indigenous women in such clans and to the extent that it discriminates against non-indigenous peoples.⁴¹

Section 13 of the New Territories Ordinance empowers courts to recognize and enforce any Chinese custom or customary right affecting land in the New Territories. Moreover, insofar as the HKBL, through Article 40, has effectively entrenched the rights of male indigenous inhabitants, it represents a significant and missed opportunity to rectify outdated practices and strike an appropriate balance between the preservation of cultural practices and the need for their reconciliation with modern constitutional principles such as gender equality.

These circumstances are unfortunate and underscore the stronghold of the Heung Yee Kuk, originally recognised by the colonial government to represent the interests of the indigenous inhabitants of the New Territories. It is arguable, however, that their original function, has largely been dispensed with and they now remain warlords of power in their individual fiefdoms, eager to hold on to their privileges in times and circumstances that no longer justify their position. In fact, the Heung Yee Kuk remains a male-dominated consultative body, which ought to be democratized in view of the power the committee wields over the interests of women and the shifting demographic and social circumstances that have narrowed the gap between those with indigenous lineage and the common Chinese population in Hong Kong. However, the continued protection of the rights of indigenous inhabitants under Article 40 of the HKBL represents a challenge in light of its entrenchment of ‘traditional rights and interests.’ Article 40 of the Basic Law provides that ‘[t]he lawful traditional rights and interests of the indigenous inhabitants of the “New Territories” shall be protected by

diminished by the passage of any earlier ordinances. However, the counterargument to this position would be that Article 40 only protects the ‘lawful’ rights and to the extent that the rights asserted by male indigenous inhabitants are discriminatory against female indigenous inhabitants, they cannot be lawful rights. However, see Johannes Chan, *Rights of the Indigenous Inhabitants of the New Territories, The Law of the Constitution*, (Sweet and Maxwell: 2011), Chapter 30, where he argues that since the protection of such traditional rights entail their exclusivity to male indigenous inhabitants and as such, cannot be attacked on grounds of gender equality to diminish such rights whether by relying on the equality provision, Article 25 of the HKBL or the SDO.

⁴⁰ See Sally Engle Merry and Stern, *The Female Inheritance Movement in Hong Kong: Theorizing the Local / Global Interface*, (2005) 46(3) *Current Anthropology*, 387-409. See also, Carole Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 *Columbia Journal of Transnational Law* 355 (1996) for a comprehensive treatment of the customary practice and the run-up to its legislative repeal and Harriet Samuels, *Hong Kong on Women, Asian Values and the Law*, 21 *Human Rights Quarterly* 707 (1999), at pp. 720-724.

⁴¹ For an elaboration of this policy, see *Report of Audit Commission No 39*, Ch 8, 15 Oct 2002 (http://www.aud.gov.hk/pdf_e/e39ch08.pdf). It is also pertinent to note the CEDAW Committee’s call that the Hong Kong Government repeal discriminatory provisions of the Small House Policy and ensure that indigenous women have the same rights and access to property as indigenous men. See CEDAW Committee, *Concluding Observations on China, Hong Kong and Macau*, CEDAW 36th session 2006. CEDAW/C/CHC/CO/6, 26 August 2006, para. 38.

the Hong Kong Special Administrative Region.’ Arguably, it could be said that the entrenchment of any policies, traditions, rights or interests that contravene the equality guarantee is itself unlawful and thereby, not protected by this provision.⁴² However, such a watered down reading would be perceived as a threat by the Heung Yee Kuk and would be strongly contested if the Small House Policy or other discriminatory policies persisting in the New Territories were to be challenged in court for their constitutionality.⁴³

On the whole, the anti-discrimination legislation in Hong Kong reflects a fairly formal approach to the concept of equality. A version of equality that is substantive or transformative⁴⁴ such that it would serve to eliminate the impact of past discrimination and build capacities to empower prejudiced individuals to militate against past setbacks remains a distant goal for local advocates for equality. The SDO does, however, provide that voluntary temporary special measures such as affirmative action policies or other special measures ‘reasonably intended’ to allow equal access to traditionally marginalized groups, are permissible as part of the aims of anti-discrimination law.⁴⁵ Unfortunately, this is not a requirement and thus, does not impose any obligations on the government or other relevant institutions to adopt such measures to achieve substantive equality in the representation of women in different spheres, whether in employment, government services or traditionally male-dominated fields. The lack of ‘bite’ or even educational message this section sends is notable in the fact that neither the government, nor any other industry or institution in Hong Kong, has thus far implemented any such measures.⁴⁶ This reaffirms the view

⁴² For a detailed exposition of this argument, see Johannes Chan, Rights of the Indigenous Inhabitants of the New Territories, *The Law of the Constitution*, (Sweet and Maxwell: 2011), Chapter 30.

⁴³ For an overview of the rights of indigenous people in Hong Kong, see Johannes Chan, Rights of the Indigenous Inhabitants of the New Territories, *The Law of the Constitution*, (Sweet and Maxwell: 2011), Chapter 30.

⁴⁴ Sandra Fredman has written extensively about the distinction between the formal, substantive and transformative approaches to equality and the significant and impactful changes that can be brought about through government commitment to visions of transformative equality in its framework laws for equal protection and non-discrimination. See Sandra Fredman, Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights, in Boeregijn Ineke et al. (ed.), *Temporary Special Measures: Accelerating de Facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women*, Antwerpen: Intersentia (2003).

⁴⁵ Section 48, SDO. It is noteworthy that no equivalent provision appears in the RDO (or the DDO for that matter), despite the fact that the CERD Committee’s deliberations played a major role in the development and application of this principle as part of the CEDAW.

⁴⁶ Shockingly, the one instance in which the government has adopted a ‘special measure’ is with respect to advancing the position of boys by computing their results in a manner so as to boost the results of the top 30% so as to equalise their numbers with girls, who were performing better than boys on average, in the Secondary School Placement Allocation system in Hong Kong. Overall, the policy worked to the severe detriment of girls, who, although performing better than the boys, would not be placed in an elite school to which placement she would have been entitled, had it not been for the government’s special measure which enabled boys with lower results than top-performing girls to secure place at such elite secondary schools. This system became the subject of a judicial review application, initiated by the Equal Opportunities Commission in the Hong Kong courts and eventually, led to the striking down of this practice in view of its discriminatory impact on girls. Surprisingly, despite the government’s general stance against affirmative action of any kind, the government defended the policy as a necessary temporary measure in order to ensure that girls did not obtain a majority of the places in the highly coveted elite schools. The argument was that the measure was necessary to achieve equality between girls and boys and therefore, was permitted by s. 48 of the SDO. However, this argument failed on account of the fact that temporary measures are supposed to be

that the government is generally loathe to upset the business sector by introducing law or policy that would interfere with the free market or laissez-faire approach.⁴⁷

A further area of concern has been the lack of appropriate recourse for sexual minorities such as members of the lesbian, gay, bisexual and transgender community who often face discrimination on grounds of their sexual orientation or gender identity. Although there have been some successful challenges brought before the courts on the basis of sexual orientation discrimination drawing on equality and non-discrimination provisions in the HKBL and HKBORO⁴⁸, these have challenged the government. A successful claim against a private actor is yet to be made to determine whether discrimination on the basis of sexual orientation can be covered by the term 'sex' in the SDO.⁴⁹

temporary and the policy had been (secretly) in place for almost twenty years. For a critique of the policy and a discussion of the court's decision in the case, see Carole J Petersen, Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong's Anti-Discrimination Laws, (1999) 29 HKLJ 178-194 and Andrew Byrnes, The Committee on the Elimination of Discrimination Against Women, in P Alston (ed.) *The United Nations and Human Rights: A Critical Appraisal* (2nd ed.), Oxford: Oxford Clarendon Press, 1999, where he argues that court could have rejected the special measures defence on grounds that it was designed to advance the interests of women in order to address historical discriminatory practices against them as a group. As such the provision could not be used to safeguard the interests of men.

⁴⁷ See Carole Petersen, A Critique of Hong Kong's Legal Framework for Gender Equality, in Fanny M Cheung & Eleanor Holroyd (eds.), *Mainstreaming Gender in Hong Kong Society*, The Chinese University Press: Hong Kong: 2009, 401, at 418, noting that government's resistance to quotas or affirmative action as contrary to a free market economy and a meritocratic system.

⁴⁸ Despite the lack of an explicit category prohibiting discrimination on grounds of sexual orientation, the claimants were able to successfully argue that the phrase 'sex' or 'other status' reasonably covered discrimination against persons of different sexual orientation as a group. See *Leung T C Roy William v Secretary for Justice* [2006] 4 HKLRD 211 and *Secretary for Justice v. Yau Yuk Lung* (2007) 10 HKCFAR 335. The argument has yet to be tested for its applicability to persons alleging discriminatory treatment on the basis of gender identity. At present, a transgender person would need to establish that they suffer from gender identity disorder, which would bring them within the prohibited ground of discrimination on grounds of 'mental disorder' and therefore, that they have been unlawfully discriminated against under the Disability Discrimination Ordinance, Cap. 487, Laws of Hong Kong. However, it should be noted that the Committee on Economic, Social and Cultural Rights (ECOSOC), has defined 'sex' to include 'physiological characteristics' and 'the social construction of gender stereotypes, prejudices and expected roles'. See General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art. 2(2), ICESCR), UN Doc E/C12/GV/20 (2 July 2009), para. 20. The category 'other status' has likewise, been recognised to include 'sexual orientation' for the purposes of Article 22 of the HKBORO by the Court of Final Appeal in *Secretary for Justice v. Yau Yuk Lung* (2007) 10 HKCFAR 335. This category has been broadly construed to include multiple discrimination, age, marital and family status and sexual orientation and gender identity, among other things. See ECOSOC, General Comment No. 20: Non-discrimination in economic, social and cultural rights, *ibid.*, at para. 27. The Human Rights Committee (which oversees state implementation of the ICCPR) and ECOSOC have also repeated calls for Hong Kong to implement relevant anti-discrimination law to guard against sexual orientation and gender identity discrimination.

⁴⁹ On Hong Kong's public movement towards the development of protections for the LGBT community and its brush with faces of extreme conservatism within the community in the context of domestic violence protection for lesbian and gay couples, see Puja Kapai, The Same Difference: Protecting Same-Sex Couples Under the Domestic Violence Ordinance, (2009) 4(1) *Asian Journal of Comparative Law*, Article 9, available at, <http://www.bepress.com/asjcl/vol4/iss1/art9> (last visited 11 September 2011). See also, Carole Petersen, Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong, *Loyola of Los Angeles International and Comparative Law Journal*, (1997)(3), 337.

Family Status Discrimination Ordinance

The Family Status Discrimination Ordinance⁵⁰ (“FSDO”) is another important statute enacted in 1997 in recognition of the discrimination that people, predominantly women⁵¹, who are responsible for the care of immediate family members, routinely face and to prohibit discrimination on the basis of ‘family status.’ This prohibition covers direct and indirect forms of discrimination⁵² against persons with family status and recognises a range of family relationships. Like the SDO, there is a provision to protect victims against victimisation for filing a complaint or taking legal action.⁵³

Race Discrimination Ordinance

The Race Discrimination Ordinance⁵⁴ (RDO) was enacted in July 2008 and came into force in July 2009.⁵⁵ The RDO makes it unlawful to discriminate, harass or vilify a person on the ground of his or her race. ‘Race’ is defined to mean a person’s race, colour, descent or national or ethnic origin.⁵⁶ The ordinance covers not only acts of discrimination that are motivated by the victim’s race but also based on the race of a near relative of the victim.⁵⁷ As with the other anti-discrimination legislation in Hong Kong, direct and indirect discrimination are covered by the RDO.⁵⁸ Significantly, the RDO also renders unlawful conduct that constitutes victimisation on grounds of a complaint being lodged by the victim⁵⁹ and also harassment on grounds of the victim

⁵⁰ Cap. 527, Laws of Hong Kong.

⁵¹ A recent survey on public attitudes towards gender issues revealed that almost 80% of the respondents cited gender-based prejudice regarding the roles and abilities of women, their responsibilities for taking care of children and the prevalence of sex discrimination and gender inequality in society as the three primary reasons that women in Hong Kong fail to realise their full potential. See The Women’s Commission, *Women’s Commission Findings of Survey on Community Perception on Gender Issues* (2009), p. 5.

⁵² Section 5, FSDO.

⁵³ Section 6, FSDO.

⁵⁴ Cap. 602, Laws of Hong Kong.

⁵⁵ The circumstances surrounding the passage of the RDO are unprecedented considering the heavily politicized discourse surrounding the need for such legislation in Hong Kong, societal attitudes towards the problematisation of racial discrimination and the heavily contested nature of the scope and content of the law. Although initially resisted by the government with a view to guarding business and corporate interests, when the sentiment of this constituency was altered in light of increasingly competitive Asian market economies which were attracting talented labour on account of better protection for minority groups, the government yielded to calls for the introduction of this law. However, as numerous scholars have noted, the version of the law proposed, the prolonged and antagonized public and legislative discussion on various provisions and the law in its enacted form, are depictive of the stronghold of corporate power in Hong Kong, the government’s open servitude to such interests and the self-serving nature of the law given its exemption of government acts conducted in any capacity other than ‘as a private person.’ For a critique of the process leading to the enactment of the RDO and its comparatively weak stance against discrimination on grounds of race as compared to other anti-discrimination legislation in Hong Kong, see Carole J Petersen, *Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong*, (2004) 34 *Hong Kong Law Journal* 459, Kelley Loper, *One Step Forward, Two Steps Back? The Dilemma of Hong Kong’s Draft Race Discrimination Legislation*, (2008) 38 *Hong Kong Law Journal* 15 and Carole J Petersen Carole J. Petersen, *International Norms and Domestic Law Reform: The Difficult Birth of Hong Kong’s Racial Discrimination Law*, 6(2) *Directions*, 13-21 (Canadian Race Relations Foundation 2011).

⁵⁶ Section 8(1)(a), RDO.

⁵⁷ Section 5, RDO.

⁵⁸ Section 4, RDO.

⁵⁹ Section 6, RDO.

or a close relative's race.⁶⁰ Harassment is defined to include unwelcome words or conduct which would cause a reasonable person in the circumstances to feel offense, humiliation or intimidation. Likewise, conduct or words that create an intimidating or hostile work environment for the victim will constitute racial discrimination and even a single incident would suffice if the elements of the offence are met.⁶¹

Section 45 replicates a provision in the Disability Discrimination Ordinance⁶², prohibiting any act designed to incite hatred towards, serious contempt for or severe ridicule of a person or group of persons in public on ground of their race. Section 46 further provides that where the incitement accompanied by threat of physical harm will constitute serious vilification and may attract a fine of up to HK\$100, 000 and imprisonment for up to two years.⁶³

Machinery for the Implementation of Anti-Discrimination Laws in Hong Kong

The Equal Opportunities Commission

Section 66 of the SDO constituted the Equal Opportunities Commission ("EOC"), which has been tasked with oversight for the enforcement of the anti-discrimination laws in Hong Kong.⁶⁴ It has powers to investigate and conciliate discrimination claims brought under the four ordinances and indeed, has the statutory duty to attempt conciliation prior to exercising its powers to consider whether to provide legal assistance to a claimant to bring a claim in the courts where conciliation has failed.⁶⁵ This has raised concerns about whether this invariably places an obstacle to a woman's right to bring a suit at law without such prior obligation to attempt conciliation.⁶⁶

⁶⁰ Section 7, RDO.

⁵⁹ See Equal Opportunities Commission website, <http://www.eoc.org.hk/eoc/GraphicsFolder/showcontent.aspx?content=Race%20Discrimination%20Ordinance%20And%20I> (last visited 9 September 2011).

⁶² Cap. 487, Laws of Hong Kong, ("DDO").

⁶³ RDO.

⁶⁴ The EOC has the mandate to receive complaints pertaining to all four anti-discrimination laws, namely, the SDO, FSDO, DDO and most recently, the RDO. It was unfortunate that at the time of the drafting of the SDO, the government rejected proposals to establish a tribunal that would hear disputes and resolve complaints where conciliation had failed. The result is that impecunious claimants who lack the resources and are not backed by the EOC may be put out of a remedy due to the sheer expense involved in litigating in Hong Kong courts.

⁶⁵ Arguably, the mandatory requirement to attempt conciliation also serves business interests, who may prefer that such matters be dealt with behind closed doors without the unnecessary publicity that would necessarily accompany any trial involving allegations of discrimination against them. It also provides, as studies have revealed, an opportunity for companies to wield their power in the conciliation process by pressuring complainants into dropping their claims through the use of senior human resource management or in-house counsel who can prove intimidating to the layperson in a process which was designed to preserve an equality of arms by keeping the complaint outside of the courtroom. See Carole Petersen, A Critique of Hong Kong's Legal Framework for Gender Equality, in Fanny M Cheung & Eleanor Holroyd (eds.), *Mainstreaming Gender in Hong Kong Society*, The Chinese University Press: Hong Kong: 2009, 401, at 423. Similar issues have been encountered in other jurisdictions. See, for example, A Chapman, Discrimination Complaint-handling in New South Wales: The Paradox of Informal Dispute Resolution, (2000) 22 *Sydney Law Review* 321.

⁶⁶ See Petersen, *ibid.* Although it is arguable that the requirement to conciliate prior to receiving the EOC's assistance is a condition precedent only if a party relies on the EOC to bring a lawsuit, where a party does not have the means and the EOC or legal aid are the only avenues that make the prospect of bringing the perpetrator to account possible, such a requirement can arguably be said to be an obstacle

Whilst the fact that there is a statutory body that is tasked with the investigation and regulation of such complaints pertaining to discrimination is significant, empirical research and scholarship on the work of the EOC since its inception have revealed various problems and limitations, many of which are inherent in the statutory set-up of the body, its restricted mandate and most crucially, its lack of independence.⁶⁷ Taking the latter issues first, the EOC has been criticised for its lack of institutional dependence given that the Chief Executive of the HKSAR appoints all its members, including the chairperson.⁶⁸ Apart from the first chairperson, Miss Anna Wu, who was instrumental in tabling the initial, expansive anti-discrimination bill in the Legislative Council, the subsequent appointments have been fairly conservative and usually, formerly in the service of the government. The lack of institutional independence of the body, from procedures relating to the appointment of its members to its funding and accountability to the government rather than the public, has also been extensively criticised as interfering with the EOC's institutional mandate, its capacity for handling complaints against discrimination and most importantly, its violation of the Paris Principles⁶⁹, which require that such a body be plural and independent in its representation.⁷⁰ The Paris Principles call particularly for adequate funding and financial independence so that the control of the purse is not used as a means to influence the work of such an institution. The lack of independence is one, which crucially impacts the ability of the institution to carry out its mandate effectively and in a manner that wins it the confidence of members of the

to the substantive right to litigate. However, with recent civil justice reform trends, it is likewise arguable that such a course of action is an important means to streamline cases brought to court. The issue, however, is particularly sensitive in cases concerning discrimination and warrants further study given the impact of a failed (or successful) conciliation attempt on the victim and their resolve to pursue the claim through courts given the encounter with the perpetrator during the conciliation process. In Hong Kong, the issue is further exacerbated by the victim's lack of legal representation or support when compared to the likelihood that the respondent is well-armed with advisors and legal experts in tow. See David Luban, *The Right to Legal Services*, in Paterson & Goriely (ed.), *A Reader on Resourcing Civil Justice* (Oxford: OUP: 1996), Chapter 1, on the crucial link between the to legal representation and the right of access to justice and equality before the law. See also, *FB & Ors. v. Director of Immigration & Anor* [2009] 1 HKC 133 affirming the fundamental link between the three rights.

⁶⁷ See Puja Kapai, *The Hong Kong Equal Opportunities Commission: Calling for a New Avatar*, (2009) 39 *Hong Kong Law Journal* 339-359 for a detailed discussion of some of these issues.

⁶⁸ Schedule 6, SDO.

⁶⁹ United Nations General Assembly Resolution, *Principles Relating to the Status of National Institutions*, adopted 20 December 1993, available at <http://www2.ohchr.org/english/law/parisprinciples.htm> (last visited 11 September 2011) ("Paris Principles"). Indeed, Hong Kong has been repeatedly called upon to establish an independent human rights commission to oversee the implementation of human rights in Hong Kong. See ECOSOC, *Concluding observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao)*, para. 41, Thirty-fourth Session, U.N. Doc E/C.12/1/Add.107, available at <http://www.unhcr.org/refworld/publisher,CESCR,CONCOSPERSERVATIONS,CHN,43f306770,0.html> (last visited 11 September 2011) and Carole J. Petersen, "The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?" (2003) 33 *Hong Kong Law Journal* 513 at 516. See also Puja Kapai, *The Hong Kong Equal Opportunities Commission: Calling for a New Avatar*, (2009) 39 *Hong Kong Law Journal* 339-359, detailing the numerous scandals pertaining to the EOC, tarnishing its reputation and public confidence in the EOC.

⁷⁰ Paris Principles, *ibid.*, section headed, 'Composition and guarantees of independence and pluralism.'

public, particularly in terms of its willingness to pursue discrimination claims against the government and its policies.⁷¹

Separately, the effectiveness of the enforcement machinery has emerged as less than satisfactory from the claimants' perspective. In one of the most comprehensive studies of the operation of the EOC's legal enforcement framework for gender-related complaints to date, Petersen, Fong and Rush found that the process entrenched a sense of powerlessness in the complainants given the lack of assistance provided to them as part of the EOC's policy to remain 'neutral' in the investigation process⁷², was unsatisfactory for claimants who found the prospect that they had to face the perpetrator (particularly in sexual harassment claims) particularly intimidating and daunting and unhelpful insofar as this process itself failed to yield any conclusive 'finding' or 'judgment' pertaining to the respondent's conduct after the investigation process is complete.⁷³ Petersen and her team conducted an in-depth study of 188 complaints relating to the SDO and FSDO filed with the EOC. Of these, the majority pertained to pregnancy-related and sexual harassment in the employment context.⁷⁴ Of this sample, it was found that 45% of the claims were discontinued and only a small number of these (28 out of 188) were discontinued on the basis that they did not pertain to conduct rendered unlawful under the ordinance, were frivolous or lacking in substance.⁷⁵ Although there was no direct information available from the study as to the specific reasons for the withdrawal of the remainder of the complaints, interviews and focus groups revealed that fatigue and an imbalance between the time invested and the prospects for a worthy outcome are typical reasons.⁷⁶ The EOC instigated a trial program for 'early conciliation' where parties were invited to reconcile before the investigation process was completed by the EOC and it found that in the majority of cases, parties were more likely to reach an early conciliation for similar reasons.⁷⁷ Claims that were unsuccessful in conciliation would be invited to apply for legal assistance with the EOC or alternatively, litigate in courts where they can afford to do so without assistance if they wished to pursue the claim. Those who were unable to do

⁷¹ Although the EOC has succeeded in securing some measure of public confidence given its openness and success in pursuing claims against the government in the field of sex and disability discrimination.

⁷² This view, taken by EOC officers, as reported in Petersen *et al*'s study is disappointing and, as the authors suggest, reveal a limited and purely formal approach to equality. See Carole Petersen, A Critique of Hong Kong's Legal Framework for Gender Equality, in Fanny M Cheung & Eleanor Holroyd (eds.), *Mainstreaming Gender in Hong Kong Society*, The Chinese University Press: Hong Kong: 2009, 401, at 427-428.

⁷³ Carole Petersen, A Critique of Hong Kong's Legal Framework for Gender Equality, in Fanny M Cheung & Eleanor Holroyd (eds.), *Mainstreaming Gender in Hong Kong Society*, The Chinese University Press: Hong Kong: 2009, 401, at 428.

⁷⁴ Carole Petersen, Janice Fong and Gabriella Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong*, Centre for Comparative and Public Law, Occasional Paper Series, 2003.

⁷⁵ See Carole Petersen, A Critique of Hong Kong's Legal Framework for Gender Equality, in Fanny M Cheung & Eleanor Holroyd (eds.), *Mainstreaming Gender in Hong Kong Society*, The Chinese University Press: Hong Kong: 2009, 401, at 424.

⁷⁶ *Ibid.* at p. 425.

⁷⁷ *Ibid.*

either of these would abandon their complaint.⁷⁸ The EOC's record of assistance, however, is shockingly low at less than 4% of the complaints received by it.⁷⁹

The study's findings reveal that 42% of this sample successfully attempted conciliation.⁸⁰ Whilst this appears to be a comparatively favourable rate in terms of the reported rates for other countries⁸¹, it is unsurprising given the obligatory requirement to attempt such conciliation under the SDO. Similarly, the 80% success rate of conciliation is likewise unsurprising given the rate of withdrawal of complaints and the reported fatigue and desire to come to early conciliation where possible. Thus, these figures are not necessarily indicative of the 'effectiveness' of the enforcement mechanism but rather, reveal the inherent burdens and limitations of this model for the enforcement of such claims, particularly considering the unequal bargaining positions of the likely victims and respondents in such cases. The process at best yields an unworthy compromise for those willing to see their complaints through to the end, a result which is fueled by the respondent's knowledge of the difficulties of the victim's financial or other situation, who capitalize on the pressures of the process to get the best possible outcome from their point of view. There are various points during the process when the respondent wields full power to negotiate other terms and thus, there is nothing to lose by continuously pitting unreasonable offers for the victim to reject or accept. This is true even once litigation has commenced in court. As such, the respondent remains stronger in the current model.

Furthermore, as Petersen's study reveals, victimization, in its express and subtle forms is rampant. Although the statutes contain important provisions against victimisation in order to ensure that victims are not precluded from pursuing their lawful rights and remedies by the discriminating party's power, might or determination to coerce them through financial or other means to silence or persuade them to drop their claims, it is inevitable that in the face of the tactics used by and the relative power of the respondent, the victim will be driven towards withdrawal of the claim in many instances.

Finally, even where conciliation is successful, the 'remedy' obtained is usually incommensurate to the energy, time and personal struggle involved in pursuing the respondents. In many respects, it could be argued that these failings send out an unfortunate message about the seriousness of the conduct involved, the impact of such conduct on victims and the relative importance of pursuing such claims to achieve justice in our society. At a most basic level, it sends the signal that these types of incidents are not as serious as other violations of the law, or alternatively, that the

⁷⁸ Carole Petersen, Janice Fong and Gabriella Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong*, Centre for Comparative and Public Law, Occasional Paper Series, 2003.

⁷⁹ See Carole J. Petersen, Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong, (2004) 34 *Hong Kong Law Journal* 459 at 474-5.

⁸⁰ Carole Petersen, Janice Fong and Gabriella Rush, *Enforcing Equal Opportunities: Investigation and Conciliation of Discrimination Complaints in Hong Kong*, Centre for Comparative and Public Law, Occasional Paper Series, 2003.

⁸¹ See R Hunter and A Leonard, *The Outcomes of Conciliation in Sex Discrimination*, Centre for Employment and Labour Relations Law, Working Paper No. 8, August 1995, cited in Carole Petersen, Carole Petersen, A Critique of Hong Kong's Legal Framework for Gender Equality, in Fanny M Cheung & Eleanor Holroyd (eds.), *Mainstreaming Gender in Hong Kong Society*, The Chinese University Press: Hong Kong: 2009, 401, at 425.

treatment of particular groups of people in society on account of their differences, is somehow acceptable or not worth putting up as much of a fight for. That women fall into this category along with other groups who are routinely marginalized in free-market societies, is a reflection of the attitude of the Hong Kong government and the level of its commitment towards eradicating serious harms to the integrity, dignity and respect of marginalized groups.

In light of the workings of the current enforcement model, the Hong Kong Human Rights Monitor has proposed, together with the Equal Opportunities Commission that an Equal Opportunities Tribunal be set up in order to facilitate a more effective enforcement mechanism for such claims.⁸² Despite this however, the initial response in some quarters has simply been to offer to further streamline the litigation process when these claims get to the District Courts. However, such a system would still be expensive and procedurally complex in terms of accessibility compared to an Equal Opportunity Tribunal. However, whether and the extent to which these suggestions result in reform of the process and avenues for pursuing discrimination-based claims, remains to be seen.

The Courts of the HKSAR

As discussed earlier, the courts remain open to adjudicating claims filed by litigants with their own means or those who appear before them with the assistance of the EOC.⁸³ However, due to the exorbitant costs of litigation and the mandatory conciliation attempt that is statutorily required which unduly lengthens the process, only a limited number of claims have made it to the courts. Hong Kong courts use international standards and jurisprudence and have generally been receptive to arguments pertaining to the application of substantive standards of equality in reviewing objectionable government policy where claims have been brought.⁸⁴ The courts have also held that intent to discriminate is irrelevant to the finding of unlawful discrimination. As such, where direct or indirect discrimination are found as a matter of fact based on the circumstances, that would be sufficient. Indirect discrimination is defined as the imposition of a condition or requirement that, although equally applicable to all, results in a disproportionate and negative impact on a person falling

⁸² See Hong Kong Human Rights Monitor, *Submission to the Judiciary on Review on Adjudication of Equal Opportunities Claims by District Court*, 31 October 2011, available at http://www.judiciary.gov.hk/en/other_info/consult_papers/eoc_consultation_document_eng.pdf, (last visited 31 October 2011). See also, Equal Opportunities Commission, *Equal Opportunities Commission's Recommendations to the Government on the Establishment of an Equal Opportunities Tribunal in Hong Kong*, March 2009.

⁸³ Since the EOC does not have the mandate to deal with complaints pertaining to the equality guarantees under the HKBL and the HKBORO, arguably, claimants who have failed to conciliate and are unsuccessful in seeking assistance from the EOC, may still seek legal aid if they satisfy the means and the merits test set out in ss. 5 and 5A of the Legal Aid Ordinance, Cap. 91, Laws of Hong Kong. Furthermore, the Director of Legal Aid has the discretion to waive the means test where the claim concerns the HKBORO.

⁸⁴ See, for example, the Court of Appeal's explication that 'discrimination' includes conduct that has the effect of differential treatment albeit it is facially neutral in *Leung v. Secretary for Justice* [2006] 4 HKLRD 211. The court held that the Crimes Ordinance provision prohibiting consensual buggery until participants were aged 21 was a form of 'disguised discrimination' on the basis that whilst it appeared to be equally applicable to all persons, in effect, because this means of sexual expression was the only means natural to male homosexual couples, it had the effect of discriminating against men who had male partners and was sexual orientation discrimination. See *ibid.*, at para. 48.

within a particular class.⁸⁵ Where the court finds differential treatment based on prohibited grounds, the burden shifts to the party accused of such conduct to show that the distinctive treatment was justified because it pursued a legitimate aim that was connected to a rational objective and was no more than necessary to achieve such objective (i.e. that the means used were proportionate to the ends).⁸⁶ Where the justification is made out, then there is no finding of discrimination.⁸⁷ Indeed, this is how the ‘special measures’ clause in the context of anti-discrimination legislation is seen as an imperative of the obligation to achieve equality, as opposed to an ‘exception’ to the equality principle.

Inevitably, given the recent realisation of the more comprehensive implications of the concept of equality and its implementation, there is an internationally recognised need that a more complex approach to equality is required.⁸⁸ Although the tests of direct and indirect discrimination have worked relatively well in simpler instances of discrimination where a substantial body of case law has been developed internationally and locally, arriving at a more just outcome has proved difficult in some instances. This difficulty has been most pronounced in the application of the ‘but for’ test in determining the existence of direct discrimination. This test requires an assessment of whether another person similarly-situated as the claimant, would have been treated in the same manner but for the particular trait based on which discriminatory treatment is alleged.

The difficulty of identifying a suitable hypothetical ‘comparator’ against which to test the discriminatory nature of the policy complained of has been lamented particularly where pregnancy related claims are concerned.⁸⁹ More recently, the problem was encountered in the context of marital status discrimination, where an employer dismissed a woman on the basis of her husband’s dismissal by the same employer.⁹⁰ The claimant argued that this amounted to discrimination contrary to the FSDO. It proved difficult to establish whether there was discrimination on grounds of marital status since no comparator seemed suitable given that a single person would not have been so dismissed and neither would any other married person, except if they were married to this particular claimant’s husband. Thus, the differential treatment was based on her specific marital status with respect to a particular individual. It was not, as in the usual cases, of a general nature wherein other similarly situated married persons could be compared. Unfortunately, in the case concerned, these aspects could

⁸⁵ See s. 5, SDO, s. 6 DDO, s.6, FSDO and s. 4, RDO.

⁸⁶ *Secretary for Justice v. Yau Yuk Lung* (2007) 10 HKCFAR 335. It is important to note, however, that no justification is permissible where there is a finding of direct discrimination since it is defined as ‘unfavourable treatment’ of a person falling within the class of persons that the ordinance seeks to protect against discrimination on the respective prohibited grounds. However, there are exceptions that may exempt certain practices or policies that have been provided for in the ordinances.

⁸⁷ See *Secretary for Justice v. Yau Yuk Lung* (2007) 10 HKCFAR 335, para. 22.

⁸⁸ See Beverley McLachlin, Equality: the Most Difficult Right, (2001) 14 *Supreme Court Law Review* 17; Sandra Fredman, The Future of Equality in Britain, (2002) and Catherine Albertyn, Substantive Equality and Transformation in South Africa, (2007) 23 *South African Journal of Human Rights*, 253, cited in Kelley Loper, The Right to Equality and Non-Discrimination, *The Law of the Constitution*, Sweet and Maxwell: 2011, Chapter 27.

⁸⁹ *M v. Secretary for Justice* [2009] 2 HKLRD 298.

⁹⁰ *Wong Lai Wan Avril v The Prudential Assurance Co. Ltd.* [2009] 5 HKC 494. See Johannes Chan, Comparators in Marital Status Discrimination: General or Specific, (2010) 40 *Hong Kong Law Journal*, 564. See also, Aileen McColgan, Cracking the Comparator Problem: Discrimination, ‘Equal’ Treatment, and the Role of Comparisons, (2006) 6 *European Human Rights Law Review* 650.

not be sufficiently distinguished for the purposes of the application of the comparator test. Fortunately, the Hong Kong court applied a broad interpretation of the concept of ‘marital status’ or ‘family status’ and embarked on an inquiry of the circumstances surrounding the discriminatory act as opposed to limiting itself to the ‘mechanical’ realm of the ‘but for’ analysis.⁹¹ This broader enquiry in the attempt to elucidate whether there was differential treatment on the basis of a prohibited ground is to be much welcomed. It is hoped that the courts will continue in their endeavours in tackling difficult questions of this nature that will continue to arise in the context of applying anti-discrimination law given the recognition that achieving equality is necessarily a complex exercise which requires different approaches for different people and groups for a number of reasons.

Since the Hong Kong government has not as yet implemented gender mainstreaming across the board in its development of law and policy, there has been no opportunity to see the special measures provision in action. There was, however, one opportunity in which Hong Kong courts considered its application in light of the government’s attempted use of the provision to justify a policy which involved the scaling of the results of boys seeking entry into secondary schools to them favourably in elite schools and to the detriment of girls. Although the court arrived at the right decision, its approach in construing the relevant policy in terms of its nature has been described as somewhat formalistic.⁹² The court failed to comment on the broader implications of the invidiousness of this policy in light of the relative position of girls and women in society when compared to boys and men⁹³ and the original purpose of the special measures clause which is underscored by the recognition that the group protected under the ordinance belongs to a class that has suffered discrimination as a matter of historic practice, and as such, the use of the special measures provision to advance the interests of boys as a group was contrary to the purpose of the said provision.⁹⁴

Although the courts have been fairly open in recognising different forms of discrimination and have not held back from holding parties to account including where the government is the respondent in the proceedings, there is some hesitation in extending the application of these principles to some areas of policy, for example, economic policies and social welfare rights.⁹⁵ In the consideration of such cases, the

⁹¹ Johannes Chan, *Comparators in Marital Status Discrimination: General or Specific*, (2010) 40 *Hong Kong Law Journal*, 564, at 571.

⁹² See Andrew Byrnes, *Affirmative Action, Hong Kong Law and the SSPA*, paper presented at *Equal Opportunities in Education: Boys and Girls in the 21st Century*, Conference organised by the Equal Opportunities Commission, 8 November 1999. See also, Carole Petersen, *Implementing Equality: AN Analysis of Two Recent Decisions Under Hong Kong’s Anti-Discrimination Law*, (1999) 29 *Hong Kong Law Journal*, 178 and Kelley Loper, *Constitutional Adjudication and Substantive Gender Equality in Hong Kong*, in Baines, Barak-Erez and Kahana (eds.), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, forthcoming).

⁹³ Kelley Loper, *The Right to Equality and Non-Discrimination*, *The Law of the Constitution*, Sweet and Maxwell: 2011, Chapter 27, p. 843, note 81.

⁹⁴ *Supra.*, note 91.

⁹⁵ See *Secretary for Justice v. Yau Yuk Lung* (2007) 10 HKCFAR 335, para. 21, where the Court of Final Appeal identified the grounds of race, sex and sexual orientation as those which will receive intense scrutiny to assess whether the difference in treatment is justified. However, the practice of lower courts indicates that the level of scrutiny will vary depending on the extent to which the basis for the treatment affects ‘fundamental notions of dignity’ and whether the matter implicates policy-making in the economic or social sphere. It appears from this distinction that the courts would likely grant executive and legislative branches a wider measure of discretion in these areas. See *Yao Man Fai*

Court of First Instance has, for example, categorised the prohibited grounds into two distinctive categories, one entailing traits such as race, caste, noble birth, membership in a political party and gender, and the other, as including grounds such as ability, education, wealth, and occupation.⁹⁶ In applying this dictum, Cheung J in *Kung Yun Ming* relegated the second category of traits to one where differential treatment based on one of these grounds could be justified by a less onerous test of justification when compared to the more rigorous justification test that would apply if the discriminatory behaviour was based on grounds falling within the first category. The grounds in the first category are traits that one might arguably construe as ‘innate’ or ‘immutable’ and in the words of Cheung J, “matters that go to the very make up or identity of the person in question as an individual; something that is basic, essential or fundamental to him or her and that goes to the core of his or her being as a human being; something that defines the person physically or intrinsically.”⁹⁷

This bifurcation of grounds of discrimination and the differential levels of scrutiny they are subjected to based on an elusive concept such as the ‘centrality’ of the trait to the person concerned is problematic. Discrimination on grounds falling in the second category may well affect a person’s ability and right to live a meaningful life of equal dignity.⁹⁸ Furthermore, it is likely the case that the varying level of scrutiny on these terms is likely to have a disproportionate and negative impact on women, which is not

George v. Director of Social Welfare [2010] HKEC 968; *Kong Yun Ming v. Director of Social Welfare* [2009] 4 HKLRD 382; *Fok Chun Wa v. Hong Kong Hospital Authority* [2008] HKEC 216, CFI and *Fok Chun Wa v. Hong Kong Hospital Authority* [2010] HKEC 713, Court of Appeal. This is not unique to Hong Kong. Courts in liberal democratic countries around the world have generally been reluctant to interfere with government policy insofar as the determination may impact questions of social and economic policy, which necessarily carry financial implications. This is seen as an area which is the exclusive prerogative of the government treasury and in light of the doctrine of separation of powers, firmly within the powers of the executive branch. See for example, *Chan To Foon v. Director of Immigration* [2001] 3 HKLRD 109, where the claimant sought to rely on the ICESCR in support of the claim. However, it was held that the treaty, although incorporated into Hong Kong’s constitutional structure through Article 39 of the HKBL, remained aspirational and promotional, rather than presenting a justiciable set of rights. Indeed, ECOSOC, concerned about the implications of such a ruling asked the government to reaffirm that it acknowledges that the ICESCR creates binding obligations on the government of Hong Kong and as such, are not merely ‘promotional’ or aspirational in nature.’ See ECOSOC, *Concluding observations of the Committee on Economic, Social and Cultural Rights: People’s Republic of China (including Hong Kong and Macao)*, Thirty-fourth Session, U.N. Doc E/C.12/1/Add.107, available at <http://www.unhcr.org/refworld/publisher,CESCR,CONCOBSERVATIONS,CHN,43f306770,0.html> (last visited 11 September 2011). The government’s response to this was to accept that the ICESCR ‘creates binding obligations at the international level.’ One would question whether this means that the government does not see the treaty as specifically implementable through domestic law despite its entrenchment in Article 39, HKBL. See Hong Kong Government, *Second Report of the Hong Kong Special Administration Region of the People’s Republic of China in the light of the International Covenant on Economic, Social and Cultural Rights*, Hong Kong: Hong Kong Government Printer, (2003).

⁹⁶*Kong Yun Ming v. Director of Social Welfare* [2009] 4 HKLRD 382, paras., 74-75, citing Lord Hoffmann in *R (Carson) v. Secretary of State for Work and Pensions*, paras., 14-17.

⁹⁷*Ibid.*, *Kung Yun Ming*, at para. 79.

⁹⁸Fredman advocates the use of equality to achieve four key objectives in order to realise a more substantive application of the concept of equality. The first is to break the cycle of disadvantage for marginalised communities; second, to address and redress membership-based stigma, stereotyping, humiliation and violence through recognition of the equal worth and dignity of all human beings; third, to celebrate identity within communities and encourage the use of affirmative action policies; and fourth, enable full participation in society. See Sandra Fredman, *Human Rights Transformed* (Oxford University Press: 2007), p. 10.

only unfortunate but critical to note in view of the tendency of economic and social policies to work against the interests of women as a group in many instances.⁹⁹ Four recent cases that have come before the Hong Kong courts attest to the disproportionate impact of such policies on women.

For example, relying on the right to social welfare¹⁰⁰ and equality under the HKBL and HKBORO¹⁰¹, a Mainland woman married to a Hong Kong resident whose husband died shortly after she came to Hong Kong, sought to challenge the seven-year residency requirement before she could qualify as a recipient of Comprehensive Social Security Assistance (“CSSA”).¹⁰² The court accepted the government’s justification that there were economic reasons for this policy in light of limited availability of resources and that as a matter of policy, issues concerning the allocation of such resources necessarily need to be treated with a view to their long-term sustainability, holding that “constitutionally and institutionally the courts are not well placed and equipped to deal with or adjudicate [such questions concerning the social welfare system].”¹⁰³ At the same time however, the court acknowledged that the policy could be challenged for its “[infringement of] other constitutionally guaranteed rights under the Basic Law or the Bill of Rights” including any “unequal treatment amongst residents of the SAR that cannot be justified, in other words discrimination.”¹⁰⁴ This decision has critical implications for a number of women, particularly immigrant women, whose marital, economic or other status might change for the worse if she is not able to find work or has children to fend for. The wait for a seven-year period before women in such situations can obtain social security in light of the sudden change in circumstances is discriminatory not only on grounds of sex but also, immigration status and potentially race or nationality. Since immigrant women may experience exclusion from the employment market for a certain period of time, in the eventuality of divorce, separation or death of a spouse or partner, their povertisation as a result of this policy needs to be specifically addressed.

Similarly, the court in *Yao Man Fai George v Director of Social Welfare*¹⁰⁵ held that a similar requirement that the applicant of CSSA be resident in Hong Kong for a continuous period of one year immediately preceding the date of their application was valid on the basis that in areas involving social or economic policy, the court would, save in cases where there was an inherently suspect ground of discrimination involved, defer to the legislative or relevant executive or administrative arm of government charged with governance in that field.¹⁰⁶ It further affirmed the differential level of scrutiny that applied in examining justifications for such

⁹⁹ Again, this is not something that is unique to Hong Kong but numerous countries have failed in adequately mainstreaming law and policy for the adverse impacts such provisions may have for women as a class and for women as members of specific sub-categories. *See, for example*, Kamala Sankaran, Special Provisions and Access to Socio-Economic Rights: Women and the Indian Constitution, (2007) 23 *South African Journal of Human Rights*, 277 and Catherine MacKinnon, Sex Equality Under the Constitution of India: Problems, Prospects and ‘Personal Laws’, (2006) 4 *International Journal of Constitutional Law* 181.

¹⁰⁰ Article 36, HKBL.

¹⁰¹ Article 25, HKBL and Article 22, HKBORO.

¹⁰² *Kung Yun Ming v. Director of Social Welfare* [2009] 4 HKLRD 382.

¹⁰³ *Ibid.*, para 57.

¹⁰⁴ *Ibid.*, para. 58.

¹⁰⁵ *Yao Man Fai George v. Director of Social Welfare* [2010] HKEC 968.

¹⁰⁶ *Ibid.*, para., 45.

policies.¹⁰⁷ Although this case was brought by a man, it is important to recognise the reality that the provision has important implications for a number of women from Mainland China who may travel back and forth on two-way permits pending the determination of their permanent residence status or alternatively, to spend extended periods of time across the border to look after children waiting to be reunited with their families in Hong Kong.

Likewise, in *Raza v. Chief Executive-in-Council*¹⁰⁸, an applicant challenged the government's imposition of a HK\$400 levy on employers of foreign domestic helpers and its reduction of the stipulated minimum wage for foreign domestic helpers by the same amount. It was argued that the policy amounted to a form of 'disguised taxation' levied on foreign domestic helpers and was discriminatory in that it did not apply similarly to other foreign workers. The court ruled in favour of the government on the grounds that the importation of foreign labour into Hong Kong was a policy area which the government was better placed to consider in light of social needs and thus, the government ought to be given a wide realm of discretion within which to formulate such policy.¹⁰⁹ This ruling also overlooks the disproportionate and negative impact of the policy on women as a group since most foreign domestic helpers tend to be women and in the context of Hong Kong, they tend to be women belonging to particular ethnic or national identity-groups.

Finally, in *Fok Chun Wa v. Hospital Authority*¹¹⁰, a Chinese woman from the Mainland, married to a Hong Kong permanent resident and awaiting her one-way permit to join him delivered her baby in Hong Kong whilst on a two-way permit. The hospital regarded her as falling into the category of 'Non-Eligible Persons' for the purposes of determining the obstetric costs for her delivery. This resulted in her having to pay significantly higher costs compared to other residents. She challenged the policy in court on the ground that her circumstances were different from Non-Eligible Persons because unlike them, she had a direct family connection in Hong Kong which should allow her to be classified as an Eligible Person. However, in line with the courts' approach in earlier cases and the categorisation of the discriminatory treatment as falling in the 'second category' of the grounds enumerated in *R (Carson) v. Secretary of State for Work and Pensions*, the court held that this was a matter of 'broad social policy' to be deferred to the government.¹¹¹ It is interesting that the judgement of the Court of First Instance in the case notes that of all babies born to Non-Eligible Persons, 75% of them were born to Hong Kong permanent resident fathers.¹¹² Thus, the question whether the distinction between children born to a permanent resident woman and a non-permanent resident but whose partner is a Hong Kong permanent resident is justifiable on grounds of economic and social policy is one which needs to be critically assessed. It is also important that the situation as regards married and unmarried women and their treatment in this regard be closely reviewed. It would constitute unjustifiable marital status discrimination if women who were married were to be treated more favourable under a revised policy as opposed to unmarried mothers in using marriage to verify the degree of 'permanence' of such

¹⁰⁷ *Ibid.*, para., 46.

¹⁰⁸ [2005] 3 HKLRD 561.

¹⁰⁹ *Ibid.*, paras., 118 and 120.

¹¹⁰ [2008] HKEC 216, Court of First Instance and [2010] HKEC 713, Court of Appeal.

¹¹¹ See *Fok Chun Wa* [2010] HKEC 713, Court of Appeal. Paras. 74-78.

¹¹² [2008] HKEC 216, Court of First Instance, para. 33.

family connection if this is seen as a ground based on which the treatment between the two groups of women can no longer be justified.

It is therefore, imperative that the courts apply greater scrutiny to policies at least with a view to signalling to the relevant government departments that there is a higher threshold that they will be held to account to in light of the negative and disproportionate impact of many of these policies on women as a group. In this vein, it would also be desirable for the courts to evaluate the basis for the bifurcation of grounds of discrimination and the different levels of scrutiny applied to economic or social policies with respect to which government proffers justification.

Indeed, as the section below details, the government's failure to effectively implement gender mainstreaming at various levels, renders it even more important that the courts scrutinise law and policy in all areas closely with a view to performing its primary function as a check on the exercise of powers by the other branches of government. More importantly, the role of the court has in recent years become increasingly significant, given its unique position in safeguarding minority interests in light of the lack of democratic progress in Hong Kong and the underrepresentation of such groups in law and policy-making processes.¹¹³ In the circumstances, if courts fail claimants in cases similar to those brought in recent years, these victims of systemic and structural discrimination will remain excluded from the possibility of even extricating themselves from the cycle of disadvantage.

Of further significance is the need to recognise that certain groups of women face intersectional discrimination. This means that they face discrimination on multiple fronts because they fall within two or more categories of persons who are routinely discriminated against. Women who are immigrants, racial or ethnic minorities, unemployed or single parents, for example, are not only discriminated on the basis of their sex but the impact of discrimination on grounds of sex is often compounded by their membership of another marginalised community. The cases above illustrate this concept of intersectional discrimination aptly. Consider, for example, that the unequal treatment of the non-permanent resident mother in *Fok Chun Wa* was extended to her on the basis of her immigration status and invariably, her sex since men do not need obstetric services.¹¹⁴ Likewise, the foreign domestic helper in *Raza* faced unequal treatment on grounds of her immigration status, her economic class, her occupation and indirectly, her sex given that most domestic helpers tend to be women. Moreover, it is likely that the policy is discrimination on grounds of race or nationality since Hong Kong helpers come from particular countries.

However, in none of these cases did the courts consider this multiple discrimination and the impact it has on particular groups of women. Indeed, this would have been open to the courts not only on the basis of the existing anti-discrimination statutes but also on the basis of provisions in the HKBL and HKBORO. Intersectional discrimination may be considered as falling within the meaning of the phrase 'other

¹¹³ See Puja Kapai, A Principled Approach to Judicial Review: Lessons from *W v Registrar of Marriages*, (2011) 41 *Hong Kong Law Journal*, 49 for a detailed elucidation of this argument advocating the legitimacy of the courts' application of heightened standards of scrutiny in judicial review applications involving the rights of minorities.

¹¹⁴ See Alvin So, Cross Border Families in Hong Kong: The Role of Social Class and Politics, *Critical Asian Studies*, (2003) 35(4), 515-534.

status.’ Indeed, ECOSOC notes that “some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such *cumulative discrimination* has a unique and specific impact on individuals and merits particular consideration and remedying.”¹¹⁵ The lack of a substantive approach to applying anti-discrimination law and equality-related constitutional provisions grossly hurt the potential of women to extricate themselves from their disadvantaged position in society and to compete on equal terms with others.¹¹⁶

Other Provisions Protecting the Interests of Women

There are numerous other laws in Hong Kong that protect the interests of women. For example, the Domestic Violence Ordinance¹¹⁷ which seeks to protect individuals against violence in intimate or family contexts; the Crimes Ordinance¹¹⁸ and the Offences Against Persons Ordinance¹¹⁹, which criminalise violent behaviour and harmful behaviour such as rape, sexual assault, physical assault, grievous bodily harm, murder and other behaviour causing injury and death but are also used alongside DVO provisions where the acts concerned are caught by criminal laws; and the Matrimonial Causes Ordinance¹²⁰ to name but a few.

Although most of these are generalist in nature in that they apply regardless of the gender of the victim seeking relief under the said ordinances, it is recognised that some of the provisions are more likely to impact the rights and circumstances of women. However, these laws have had to be reconsidered in light of changing circumstances and culture and calls for reforms have recently been met in some respects.

For example, while the reported rate of violence against women in Hong Kong is lower than that in other countries, 12 out of every 100 women experiences physical violence during her lifetime, with six out of every 100 women experiencing physical violence at the hands of their husband or partner during their life.¹²¹ The number of reported instances of battering between spouses in Hong Kong showed an increase from 970 to 5,575 for women between 1998 and 2008. The number of women who

¹¹⁵ See ECOSOC, *General Comment No. 20: Non-Discrimination in Economic Social and Cultural Right (Art 2(2), International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C12/GC/20 (2 July 2009), paras. 7-10, highlighting the need to ‘prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.’

¹¹⁶ For a detailed presentation of the impact of intersectional discrimination on women victims of domestic violence and how the failure to develop suitable law and policy to provide substantive equal protection against such violence can result in severe consequences and even death, see Puja Kapai, *Minority Women: A Struggle for Equal Protection*, in Baines, Barak-Erez and Kahana (eds.), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, forthcoming).

¹¹⁷ Cap. 189, Laws of Hong Kong, (“DVO”).

¹¹⁸ Cap. 200, Laws of Hong Kong, (“CO”).

¹¹⁹ Cap. 212, Laws of Hong Kong, (“OAPA”).

¹²⁰ Cap. 179, Laws of Hong Kong, (“MCO”).

¹²¹ UN Women, United Nations Entity for Gender Equality and the Empowerment of Women, *2011-2012 Progress of the World's Women in Pursuit of Justice Report*, 2011, p. 131, available at <http://progress.unwomen.org>, (last visited 11 September 2011).

reported rape and indecent assault during the same period increased from 1,263 to 1,406.¹²² In light of this dramatic increase of incidents and reporting, it was argued that the DVO, first enacted in 1986, was out-dated and failed to adequately address the various forms of domestic violence that women were experiencing today. Furthermore, it was argued that in light of the increased incidence of cohabiting as opposed to marital relationships, which present an equal risk of violence in intimate spheres, there was a need to update the DVO to extend protection across a range of relationships and that such protection should not be temporal given that people now move in and out of relationships. The government's long-held position was that many of the acts, if not covered by the DVO were caught by the criminal law in any event and thus, there was no pressing need for reform. The lobbying efforts of numerous groups on the need for civil remedies against domestic violence given the sensitivities involved in such a case, the need to broaden the scope of the DVO's applicability to other filial and past intimate relationships and the need for a new working definition of domestic violence as well as the CEDAW Committee's reiteration of the need to ensure adequate protection against domestic violence finally led to an amendment ordinance being enacted.

The reform has been welcomed for its expansion of the scope of relationships which are now covered by the DVO, including same-sex cohabitants, its extension to past relationships and its improvements in terms of accessibility to court remedies and the arrest powers of the police where court orders have been violated.¹²³ There remain, however, deep-rooted problems in victims accessibility to timely police and social welfare assistance due to failings at the policy level as well as the lack of sufficient resources to assist women in pursuing relevant remedies. For example, the costs of obtaining an injunction still remain prohibitively high for women, particularly where they are economically dependent on the perpetrator of the abuse or have left the family home with their children. Moreover, if women make the decision of seeking temporary shelter in government-run or other shelters, there must be provision for their right to housing and social welfare in order to make their independence from their spouse sustainable. Under the current system, women victims hardly have a real choice of leaving the abuser. The CEDAW Committee, in its most recent Concluding Observations on Hong Kong once again highlighted the need for the government to more effectively address domestic violence in society and has called on the government to provide a budget overview to enable the CEDAW Committee to ensure that resources are fully applied to tackle this acute problem.¹²⁴

¹²² Women's Commission, *Hong Kong Women in Figures 2009*, at 50-51, available at http://www.women.gov.hk/download/library/report/HK_Women2009_e.pdf, (last visited 11 September 2011).

¹²³ See Puja Kapai, The Same Difference: Protecting Same-Sex Couples Under the Domestic Violence Ordinance, (2009) 4(1) *Asian Journal of Comparative Law*, Article 9, available at <http://www.bepress.com/asjcl/vol4/iss1/art9> (last visited 11 September 2011) for an overview of the key amendments.

¹²⁴ See CEDAW Committee, Concluding Observations on China, Hong Kong and Macau, CEDAW 36th session 2006. CEDAW/C/CHC/CO/6, 26 August 2006, paras. 35 and 36. In 2004, the government was severely criticized for the lack of coordination between social service agencies and the police, which led to the murder of a woman and her daughters just hours after she had sought police assistance after leaving a government-run shelter for fear for her own and her children's wellbeing. See Families in Trouble Not Getting Help, Says Inquiry, *South China Morning Post*, 30 October 2004.

In other reform, the Crimes Ordinance amended to remove the marital rape exemption that used to exist as a defence against a charge of rape of a woman by her lawful husband.¹²⁵ The Evidence Ordinance¹²⁶ has also been amended to remove the ‘rape shield’, the need for a special direction or corroboration of the victim’s testimony in sexual offence cases and spouses are privileged against incrimination of their spouses in general and in criminal proceedings.¹²⁷

These changes have however, long been coming, and in light of the current framework of law and government policy, are hardly sufficient. There is a dire need to implement a policy of gender mainstreaming at all levels. Although the government has long promised to do so and has even set up a Women’s Commission with the mandate to oversee this task, there is much that remains to be done. Although the government prides itself on the development of a gender mainstreaming checklist, the application of this checklist to the initiatives of various departments, the training of staff in various departments in gender sensitivity, raising awareness and the empowerment of women through public education and the benchmark it has set for women’s participation in advisory and statutory bodies¹²⁸, these initiatives are piecemeal and do not represent a genuine and focused effort at redressing historic and persistent discrimination faced by women as a group. To ensure effective measures for structural changes that apply substantive measures to unravel the impact of past discrimination, a systematic approach to change in policy development processes, impact assessment of law and policy and the implementation of laws that offer substantive protection to women in areas where they face particular risks of being marginalised by general norms is required. This can best be met by instituting a requirement similar to that required under the United Kingdom’s Human Rights Act 1998 and Equality Act 2010, both of which require that an Equality and Human Rights Impact Assessment be carried out with respect to proposed legislation and policy by relevant government bureaux before the measure can be enacted formally.¹²⁹

Putting the Legal Framework into Context

There are numerous areas in which the government has long been dragging its feet and a brief overview of some key areas beckoning urgent reform reveals that the lack of a systematic policy through which gender-based impact analyses of law and policy is mandated has allowed various groups of women to fall through the cracks. For example, the continuation of the functional constituencies in Hong Kong’s legislative body has gender equality implications given that men are more widely represented in the professional classes and therefore, as corporate and individual voters, functional

¹²⁵ Robyn Emerton, Marital Rape and the Related Sexual Offences: A Review of the Proposed Amendments to Part XII of the Crimes Ordinance, (1999) 31 *Hong Kong Law Journal* 415.

¹²⁶ Cap. 8, Laws of Hong Kong.

¹²⁷ Section 4B, Cap. 8, Evidence Ordinance.

¹²⁸ Labour and Welfare Bureau, *Policy Initiatives of Labour and Welfare Bureau in Promoting Well-being and Interests of Women*, Legislative Council Panel on Welfare Services, LC Paper No. CB(2)23/10-11(02), October 2010, available at, www.legco.gov.hk/yr10-11/english/.../papers/ws1020cb2-23-2-e.pdf (last visited 11 September 2011).

¹²⁹ See, for example, Department for Constitutional Affairs, Justice, Rights and Democracy, *Human Rights, Human Lives, A Handbook for Public Authorities*, 2006, available at, <http://www.justice.gov.uk/guidance/docs/hr-handbook-public-authorities.pdf> (last visited 11 September 2011).

constituency arrangements work to the advantage of men. Women who are not professionals or who are homemakers suffer as they have only one vote as opposed to two (or even three in the case of some corporate voter representatives).¹³⁰ An even more telling indicator of the representativeness of women under this system is the fact that there have only ever been eight functional constituency legislators who were women and there is an average rate of return of three female legislators from this voting component every election cycle, only recently improving to return five female legislators in 2000 and 2004 respectively.¹³¹

In terms of political representation of women by women in other bodies, note that in the District, Executive and Legislative Councils, women comprised less than 20% of the total number of elected candidates in each of the three bodies.¹³²

Likewise, women are more likely to be single parents than men¹³³ and also, more widely represented in those classified as ‘poor’¹³⁴, more likely to be unemployed¹³⁵ or receive unequal pay for work of equal value when compared to men¹³⁶ and they are less likely to sit on boards of corporations¹³⁷ or other influential bodies.¹³⁸ Three

¹³⁰ For a general overview of the workings of the functional constituency system in Hong Kong, see Young and Law, *A Critical Introduction to Hong Kong’s Functional Constituencies*, Centre for Comparative and Public Law Research Report, the University of Hong Kong, available at www.hku.hk/ccpl, (last visited 11 September 2011) and Simon Young, *Hong Kong’s Functional Constituencies: Legislators and Elections*, *Functional Constituency Research Project 2004*, Commissioned by Civic Exchange Hong Kong, Centre for Comparative and Public Law, March 2005, available at http://www.civic-exchange.org/eng/upload/files/200503_FunctionalConstituencies.pdf, (last visited 11 September 2011).

¹³¹ See *Ibid.*, Simon Young, *Hong Kong’s Functional Constituencies: Legislators and Elections*, para. 44.

¹³² Women’s Commission, *Hong Kong Women in Figures 2009*, at 40-41, available at http://www.women.gov.hk/download/library/report/HK_Women2009_e.pdf, (last visited 11 September 2011).

¹³³ Women’s Commission, *Hong Kong Women in Figures 2009*, at 10, available at http://www.women.gov.hk/download/library/report/HK_Women2009_e.pdf, (last visited 11 September 2011).

¹³⁴ In 22 out of the 25 countries for which data are available, women are more likely than men to live in conditions of poverty. See UN Women, United Nations Entity for Gender Equality and the Empowerment of Women, *2011-2012 Progress of the World’s Women in Pursuit of Justice Report*, 2011, p. 104, available at <http://progress.unwomen.org>, (last visited 11 September 2011).

¹³⁵ United Nations Development Program, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development*, Table 4 Gender Inequality Index, p. 156, which reveals that whilst 79.2% of men participate in the labour market in Hong Kong, only 60.5% of women do. Available at <http://hdr.undp.org/en/reports/global/hdr2010/>, (last visited September 2011).

¹³⁶ Women’s Commission, *Hong Kong Women in Figures 2009*, at 20, available at http://www.women.gov.hk/download/library/report/HK_Women2009_e.pdf, (last visited 11 September 2011).

¹³⁷ See Community Business and Cranfield School of Management, *Women on Boards: Hang Seng Index 2009*, available at www.communitybusiness.org, (last visited 11 September 2009). The study found that with a rate of 8.9% representation of women on boards, whilst Hong Kong compares favourably to the likes of the Australia, it fell far behind in this regard compared to United Kingdom, the United States of America and Canada, who had representations in the double digits up to 15%. The women interviewed cited various reasons, including the ‘invisible filter’ where they would themselves pull back from promotions or higher positions due to family obligations or the fact that they found they were not as well networked as the men and there was a perception of the talent pool among women being limited. Interestingly, of all the women surveyed, only one was supportive of the use of quotas as adopted in some European countries in order to address the situation. The others shied away from preferential treatment and preferred other ways of improving female representation on corporate boards.

segments of the Hong Kong population that have grown in recent years are older women, single mothers and female foreign domestic helpers.¹³⁹

Indeed, the Hong Kong government has itself acknowledged some of these issues in its report to the CEDAW Committee, recognising that “obstacles still remain to the advancement of women in Hong Kong.”¹⁴⁰ It acknowledged the difficulties that elder women experienced in re-joining the labour force, the fact that a larger proportion of women were engaged in low-income jobs and casual labour and that there were growing income disparities between men and women.¹⁴¹

These figures speak to the dire need for more to be done in order to ensure that the human rights of women are adequately protected and enforced. The limited number of challenges brought to the courts are no indication of the lack of need for reform. If anything, they reveal a severe lack of accessibility to justice and reparations in light of the figures that are depictive of the inequalities experienced by women in multiple spheres. They merely put into context the existence of the current law and policy and reveal the limited impact of the current framework of human rights protections seeking to protect women’s interests in effectively achieving these crucial objectives.

Conclusion

Internationally, it appears that Hong Kong ranks relatively well on two of the United Nations’ measures relating to the assessment of gender disparities in a country. For example, in 2007, Hong Kong ranked 22nd out of 155 countries on the Gender-related Development Index.¹⁴² However, the analysis in the preceding sections points to the need for careful reflection about our laws and institutional frameworks for protecting the human rights of women. In addition to having strong rule of law and constitutional and domestic protections enshrined in legislation to protect the rights of women, it is equally important that the framework itself be predicated on a system that enables reform in light of international developments. The development of a substantive and transformative approach to equality have unfortunately, not been fully incorporated at relevant levels in of governance in Hong Kong to facilitate the critical shift towards a more systemic and entrenched regime to ensure that the rights of women are fully protected. Measures such as the adoption of an equality and human rights impact assessment framework through which law and policy is vetted at all levels of

¹³⁸ Women comprised 26.7% of the composition of all statutory and advisory bodies in 2008. Women’s Commission, *Hong Kong Women in Figures 2009*, at 43, available at, http://www.women.gov.hk/download/library/report/HK_Women2009_e.pdf, (last visited 11 September 2011). See also, Simon Young, *Hong Kong’s Functional Constituencies: Legislators and Elections, Functional Constituency Research Project 2004*, Commissioned by Civic Exchange Hong Kong, Centre for Comparative and Public Law, March 2005, available at, http://www.civic-exchange.org/eng/upload/files/200503_FunctionalConstituencies.pdf, (last visited 11 September 2011).

¹³⁹ Women’s Commission, *Hong Kong Women in Figures 2009*, at 1, 3, 10, available at, http://www.women.gov.hk/download/library/report/HK_Women2009_e.pdf, (last visited 11 September 2011).

¹⁴⁰ Committee on the Elimination of All Forms of Discrimination against Women, Consideration of reports submitted by States parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined fifth and sixth periodic report of States parties, Addendum 1, China (CEDAW/C/CHN/5-6/Add.1), 14 June 2004, at para 9.

¹⁴¹ *Ibid.*

¹⁴² *Hong Kong Women in Figures 2009*, at 56.

government departments and ministries would go a long way towards bridging the gap between the sexes. Moreover, the role of the EOC and the courts needs to be evaluated in light of the circumstances of women as victims of discrimination and unequal treatment in multiple spheres. It is unsatisfactory to leave in the hands of the powerful majority decisions about the plight of the powerless. Indeed, this is precisely where courts need to step in to apply substantive equality measures to adjudge the impact of government policies on marginalized communities whose particular vulnerabilities exacerbate their experience of inequality. The tools that enable the courts to do so already exist in the HKBL and the HKBORO. This mandate to apply equality provisions rigorously must extend to economic and social policy. Anything less than that violates the constitutional and human rights guarantee of equality and non-discrimination.

Furthermore, the government needs to seriously consider whether the adoption of special measures is necessary in certain spheres to address the historical discrimination that women have suffered as a group and to promote fully their empowerment and inclusion in society as full and equal members.

In terms of where to begin, the government could start by taking its cue from the Concluding Observations issued by the CEDAW Committee over the last two reporting cycles with a view to addressing fully and in good faith, the recommendations made by the Committee therein. Moreover, it should note the burgeoning civil society movement in Hong Kong and review the various reports submitted by the numerous NGOs who work on different aspects of women's rights. Their insights are crucial to give government departments the required insight in order for their policy and law-making initiatives to be better informed. There should also be a greater culture of cooperation and openness between the government and such organisations so as to facilitate a good faith exchange of views on upcoming policy and legislative changes so that interested groups can speak on an informed basis as to the impact of the proposed change on specific sections of the community. Finally, the government would be well-served to begin charting figures that depict the plight of women who are members of other marginalised groups.

For example, it should develop tools to obtain figures on migrant women, women belonging to ethnic, national or religious minority groups, disabled women, older women and sexual minorities. Women in these groups represent some of the most vulnerable sectors of the population in Hong Kong and remain severely under-protected and under-represented. Effective data collection tools will further the government's ability to assess the impact of law and policy and to enable it to devise specific policies that address the vulnerabilities of these groups. Intersectional analysis has proved to be an immensely useful tool to identify populations at risk of multiple discrimination and to assess the effectiveness of measures to enable substantive equal protection. This data would enable better benchmarking of standards and would facilitate better planning and budget allocation in times where resource allocation is the key to implementing effective and sustainable change.

The achievement of equality in the substantive and transformative sense is a journey that is long and requires critical self-reflection. Where we have committed ourselves to these internationally recognised values and in times where we have seen the impact of the empowerment of women on the wellbeing of society as a whole, the state of

inequality that persists in Hong Kong implores us to charge fully forward to internalise these important principles and international stories of their successes so that the equal rights of women can finally be recognised in substance to deliver the promise of equal respect, worth and dignity of all human beings.