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THE HUMAN RIGHTS OF WOMEN IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

PUJA KAPAI*

ABSTRACT

Although Hong Kong is a party to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) and has enacted legislation to safeguard women's rights, the existing framework of protection is inadequate in critical respects and fails to achieve substantive equal protection for women. This paper examines existing law and policy governing women's rights and identifies the underlying causes for its continued failings. It identifies some of the key gaps that render women continually vulnerable to discriminatory treatment. This paper concludes by outlining recommendations for achieving the goals of substantive and transformative equality for women.

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INTRODUCTION

Hong Kong represents a unique society in that it is full of contradictions. It characterizes both modernity and the conservatism of a bygone era. Whilst the former colony has put into place constitutional protections and legislative provisions to guarantee the equal protection of women's rights, the current state of the law and jurisprudence has left the situation of women precarious and wanting.

Part I provides a very brief historical overview of Hong Kong's transition from a colony to a Special Administrative Region of the People's Republic of China. Part II outlines relevant legislative provisions that protect the human rights of women in Hong Kong,¹ underscoring Hong Kong's international obligations to enact such laws and their constitutional entrenchment under the Hong Kong Basic Law.² Part III charts the enactment of relevant anti-discrimination statutes in Hong Kong. It sets out the institutional framework put into place to protect against violations of women's rights to equality and non-discrimination. In the process, it discusses related jurisprudence emanating from the Hong Kong courts.³ Part IV discusses other legislation that impacts the rights of women.⁴

In evaluating the effectiveness of this framework, this paper argues that it falls short of international standards in numerous respects and undermines the rights of women.⁵ Evidentiary burdens, coupled with impediments in access to justice, renders the institutional protections available less than satisfactory. This results in the withdrawal or non-pursuit of claims by women.⁶ As the examples discussed will show, apart from the procedural obstacles to achieving effective enforcement, the courts, whilst progressive in terms of ascertaining the perpetration of discrimination from a substantive understanding of equality, are unduly deferential to the executive and legislative branches, in particular when claims have implications on economic or social rights and policies.⁷ The courts' reluctance to exercise their powers of strict scrutiny where the fundamental right to equality is concerned exacerbates the plight of women and particularly hurts segments of the female population who already suffer from discrimination on multiple grounds.⁸ These examples

1. See discussion *infra* Parts I–II.

2. See discussion *infra* Part II.

3. See discussion *infra* Part III.

4. See discussion *infra* Part IV.

5. See discussion *infra* Part III.

6. See discussion *infra* Part III.

7. See discussion *infra* Part III.D.2.

8. See discussion *infra* Part III.D.2.

also reveal the underdeveloped nature of arguments relating to equality and intersectional discrimination which are rarely put before the courts. Hence, the jurisprudence on these concepts which are key to addressing invidious and deep-rooted discrimination, trails behind international jurisprudence. These examples include: access to the right abode for Filipina domestic helpers in Hong Kong; the right to health and obstetric services at equal costs for mainland mothers delivering babies in Hong Kong hospitals; and the rights of transsexual women to marry a partner of their choosing. The paper concludes with recommendations on how the protection of women's rights can be enhanced.⁹ It is imperative for the government to institutionalize gender mainstreaming with a view to enabling effective planning in policy and legal developments to advance the interests of women and protect them against direct and indirect forms of discrimination and other violations of their fundamental human rights. Such reform should be urgently prioritized in light of the actual and hidden costs of inadequate protection of the rights of more than half the population of Hong Kong.¹⁰

I. FROM COLONY TO SPECIAL ADMINISTRATIVE REGION: A BRIEF HISTORICAL OVERVIEW

Hong Kong's status as a British colony since the mid-1800s resulted in the application of English common law in Hong Kong, subject to the need for modifications in light of local circumstances, until June 30, 1997.¹¹ Hong Kong also had its own legislature within the first few years of British rule.¹² Together, through the application of local legislation, the principles of common law as developed in England (subject to the modification for local circumstances test), 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 in its ninety-nine years as a British colony.¹³

9. See discussion *infra* Part V.

10. According to the latest available statistics on the population of Hong Kong, as of the middle of 2012, 3,818,100 out of a total population of 7,136,300 people were female. This amounts to 53.5 %. *Population—Overview*, CENSUS & STATISTICS DEPT: HKSAR, <http://www.censtatd.gov.hk/hkstat/sub/so20.jsp> (last visited Jan. 18, 2013).

11. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, China-U.K., para. 4, Dec. 19, 1984, *available at* <http://www.cmab.gov.hk/en/issues/jd2.htm> [hereinafter Joint Declaration].

12. *History of the Legislature*, LEGISLATIVE COUNCIL OF THE HKSAR OF CHINA, http://www.legco.gov.hk/general/english/intro/hist_lc.htm (last visited Jan. 18, 2013).

13. XIANGGANG JIBEN FA art. 84 (H.K.); see Hong Kong Letters Patent 1917 to 1995, app. I (1996), art. IX, *available at* <http://www.law.hku.hk/conlawhk/sourcebook/10062.html>.

The Sino-British Joint Declaration (the Joint Declaration)¹⁴ set the terms for the resumption of Chinese sovereignty over Hong Kong.¹⁵ The treaty provided that Hong Kong was to be constituted a Special Administrative Region (SAR) of the People's Republic of China (China).¹⁶ Under this arrangement, although under Chinese sovereignty, the 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 be retained, save where their continuation would be inconsistent with Chinese sovereignty, in which case, they were to be adapted where possible or otherwise repealed.¹⁷ 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 effect on July 1, 1997, upon the establishment of the Hong Kong SAR.¹⁸ In furtherance of the objectives underlined in the Joint Declaration, the HKBL facilitates the continued application of "laws previously in force,"¹⁹ guarantees judicial independence,²⁰ and enables the SAR to enact its own laws, policies, and to develop related jurisprudence in most areas of governance.²¹

The significance of this arrangement was that it facilitated the smooth transfer of sovereignty to China whilst preserving the social, political, legal, and economic order that had prevailed in the colony for over one hundred years.²² This provided much needed confidence in the future of Hong Kong's continued stability as a region under the sovereignty of China.²³ In the lead-up to the transfer of sovereignty, Hong Kong experienced a growth in its constitutional consciousness. This growth corresponded with the establishment of the city's first Ombudsman's office in the late 1980s,²⁴ the enactment of the Hong

14. Joint Declaration, *supra* note 11, pmbl. This was an international treaty signed between the United Kingdom and China in 1984 and deposited with the United Nations Secretariat upon the exchange of instruments of ratification in June 1985. *The Joint Declaration*, CONSTITUTIONAL & MAINLAND AFFAIRS BUREAU: HKSAR, <http://www.cmab.gov.hk/en/issues/joint2.htm> (last visited Jan. 18, 2013).

15. *Id.* para. 1.

16. *Id.* para. 3(1).

17. *See id.* para. 3(2)–(3).

18. XIANGGANG JIBEN FA intro. and pmbl (H.K.).

19. *See id.* arts. 2, 8, 18, and 85.

20. *Id.* arts. 2, 19, 81, and 85.

21. Pursuant to articles 13, 14, 18, 19, 158, and Annex III of the HKBL, the Central Authorities of China reserve powers with respect to matters of foreign affairs, defense and acts of state, final 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 Hong Kong SAR. *Id.* arts. 13, 14, 18, 19, 158, and Annex III.

22. *See* Joint Declaration, *supra* note 11, para. 5.

23. *See id.* pmbl.

24. The Ombudsman Ordinance, (1997) Cap. 397 (H.K.).

Kong Bill of Rights Ordinance²⁵ (HKBORO) in 1991, and the promulgation of the HKBL, which enshrined Hong Kong's core international human rights commitments,²⁶ followed by the introduction of Hong Kong's anti-discrimination laws, and the establishment of the Equal Opportunities Commission (EOC) in 1996,²⁷ Hong Kong was well positioned to ensure a smooth transition into the unique constitutional experiment that characterized the one country, two systems arrangement.²⁸

In many respects, Hong Kong's status as an international financial center and the modernization of the China's economic system and legal framework, it was hoped, would help guarantee the continuation of the constitutional guarantees and human rights protections put into place in the run-up to the transfer of sovereignty.²⁹ Although these provisions have, with some exceptions, survived the change of sovereignty,³⁰ an analysis of the legal framework and jurisprudence suggests that these guarantees are very much in their infancy and need to be complemented by a more robust monitoring structure to achieve substantive equality for women.

II. 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 the British Empire's colonial territories), and presently as a result of the provisions for the continuity of these obligations after the transfer of sovereignty as provided for under the Joint Declaration.³¹ These commitments have resulted in the enactment of various laws in Hong Kong with a view towards fulfilling these international obligations.³² Apart from the obligation to enact relevant legislation and develop supportive policy directives, state parties are required to report to the relevant treaty bodies periodically.³³ As part of the report, countries

25. Hong Kong Bill of Rights Ordinance, (1997) Cap. 383.

26. XIANGGANG JIBEN FA arts. 25–42 (H.K.).

27. Race Discrimination Ordinance, (2008) Cap. 602 (H.K.).

28. XIANGGANG JIBEN FA arts. 1–2, 5 (H.K.).

29. See Joint Declaration, *supra* note 11, paras. 1, 3(1)–(2).

30. See discussion *infra* Parts IV–V.

31. See Joint Declaration, *supra* note 11, paras. 1, 3(1)–(2).

32. See discussion *infra* Part III.

33. *Human Rights Treaty Bodies: Monitoring the Core International Human Rights Treaties*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, <http://www2.ohchr.org>

are expected to provide an overview of treaty-related developments in their country, highlight problem areas, and identify steps that have been taken to address these gaps.³⁴ Accordingly, Hong Kong files its reports with the relevant treaty bodies periodically, synchronizing its reports with the China's reporting cycle since 1997.³⁵ The treaty bodies' committees review country reports submitted by the government, but also rely extensively on alternative and shadow reports submitted by non-governmental organizations.³⁶ These alternative and shadow reports serve as a check against the country report.³⁷ Upon reviewing all the submissions, the treaty bodies render "Concluding Observations" on the country's fulfilment of the obligations under that treaty, commending good practices and highlighting areas of concern.³⁸ The reporting country is expected to report on measures taken in response to the Concluding Observations in the subsequent reporting cycle.³⁹

Among the treaties that Hong Kong is bound by, the International Covenant on Civil and Political Rights⁴⁰ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights

/english/bodies/treaty/index.htm (last visited Jan. 18, 2013) [hereinafter HIGH COMM'R FOR HUMAN RIGHTS].

34. These obligations are set out in the CEDAW. Convention on the Elimination of All Forms of Discrimination Against Women, art. 18, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. Similar provisions set out equivalent obligations under other treaties. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 33.

35. See LEGISLATIVE COUNCIL SECRETARIAT, SUBMISSION OF REPORTS BY THE HONG KONG SPECIAL ADMINISTRATIVE REGION UNDER UNITED NATIONS HUMAN RIGHTS TREATIES, PANEL ON HOME AFFAIRS, para. 1 (Dec. 12, 2002), *available at* <http://www.legco.gov.hk/yr02-03/english/panels/ha/papers/ha1213cb2-588-2e.pdf>.

36. *A Note About Shadow Reports*, STOP VIOLENCE AGAINST WOMEN, http://www.stopvaw.org/a_note_about_shadow_reports (last visited Jan. 18, 2013).

37. Shadow reports are those that follow after the non-governmental organization has reviewed the government's report to the treaty body. *Shadow and Alternative Reports*, WOMEN'S RESOURCE CENTRE, 3 (2008) http://www.wrc.org.uk/includes/documents/cm_docs/2011/s/shadow_report_overview_feb_2010.pdf. Alternative reports, on the other hand, are reports that are submitted when governments have not made their reports to the treaty bodies publicly available. *Id.*

38. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 33.

39. 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. *Id.* The increasing trend of submitting alternative and shadow reports by non-governmental and other civil society organizations serves to bolster the independence, transparency, and objectivity of the process. Carole J. Petersen & Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of its Implementation and the Role of Non-Governmental Organisations in the United Kingdom and Hong Kong*, 26 HASTINGS INT'L & COMP. L. REV. 1, 24 (2002). Concluding Observations are taken seriously given their status as an international-level report card on the state's performance. HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 33.

40. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

(ICESCR) safeguard a range of civil and political rights including the right to life, freedom of religion, speech and assembly, electoral rights, the right to due process of law, economic, social and cultural rights, including labor rights and rights to health, education, and an adequate standard of living.⁴¹ These protections are available to all individuals.⁴²

Pursuant to the ICCPR, all persons are entitled to equal protection under the law without discrimination.⁴³ Articles 2 and 3 guarantee the rights protected under the treaty to all persons without distinction on any basis,⁴⁴ and Article 3 specifically prohibits gender-based discrimination.⁴⁵ Article 26 further provides that discrimination on any of the prohibited grounds: race, color, sex, language, religion, political 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.⁴⁶ The ICESCR similarly protects individuals against such discrimination under Articles 2(2) and 3,⁴⁷ the latter specifically calling for equality between men and women in the protection of economic, social, and cultural rights set out in the ICESCR.⁴⁸ Between them, these clauses in both treaties serve to emphasize the importance of safeguarding, not only the guarantee of equal protection, but also equal treatment by prohibiting unlawful discrimination and recognizing the invidious impact of discrimination and its primary role in contributing to unequal treatment.⁴⁹

Hong Kong is also a party to numerous other international treaties that have been adopted with a view to protecting specific groups of people and the rights and interests of people in particular circumstances. For example, the International Convention on the Elimination of All Forms of Racial Discrimination⁵⁰ (ICERD), CEDAW,⁵¹ the Convention against Torture and Other Cruel, Inhuman or Degrading

41. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

42. ICCPR, *supra* note 40, arts. 1, 5–11, 13, and 15; ICESCR, *supra* note 41, arts. 1–3, 6, 9, 12, 14, 16–19, 21–22, and 25.

43. ICCPR, *supra* note 40, art. 26.

44. *Id.* arts. 2–3.

45. *Id.* art. 3.

46. *Id.* art. 26.

47. ICESCR, *supra* note 41, arts. 2(2), 3.

48. *Id.* art. 3.

49. Human Rights Committee, General Comment No. 18: Non-Discrimination, 37th Sess., para. 1, U.N. Doc. CCPR/C/21/Add 1/Rev 1 (Nov. 10, 1989).

50. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

51. CEDAW, *supra* note 34.

Treatment or Punishment⁵² (CAT), the Convention on the Rights of the Child⁵³ (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁵⁴ (ICRMW), and more recently, the International Convention for the Protection of All Persons from Enforced Disappearance⁵⁵ (CPED) and the Convention on the Rights of Persons with Disabilities⁵⁶ (CRPD). Pursuant to its obligations under these treaties, the Hong Kong government is required to protect individuals and groups at risk through appropriate policies and legislation.⁵⁷

Despite the existence of these international human rights treaties and parallel national legislation which provides for the equal protection of the human rights of all individuals irrespective of sex,⁵⁸ in practice, women face numerous barriers to the realization of their human rights as a result of discrimination and unequal treatment.⁵⁹ For example, some countries exclude women from participating in the political system (the right to vote or run for public office), access to education, justice, employment, and even prohibit their inheritance of family wealth and assets.⁶⁰ 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, and barriers to certain types of employment or unequal pay for equal work are all factors that negatively impact women's prospects for their equal enjoyment of rights.⁶¹ In these circumstances, countries around the world have recognized the need for specific protections that focus on the needs of women as a group and

52. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

53. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

54. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 92.

55. G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Jan. 12, 2007).

56. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 993 U.N.T.S. 3.

57. See *supra* text accompanying notes 50–54.

58. Women's right to 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. ICCPR, *supra* note 40, art. 2. Article 7 of the ICESCR specifically recognizes the right of women workers to be guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work. ICESCR, *supra* note 41, art. 7.

59. See, e.g., CEDAW, *supra* note 34, art. 15.

60. UN WOMEN, PROGRESS OF THE WORLD'S WOMEN: IN PURSUIT OF JUSTICE 8 (2011), available at <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>.

61. James Crabtree, *UN: Barriers to Gender Equality Remain*, FIN. TIMES (July 6, 2011, 6:52 AM), <http://www.ft.com/cms/s/0/649bd546-a6f1-11e0-a808-00144feabda0.html#axzz27yzhVS1J>.

how their rights to non-discrimination and equal protection can be effectively realized.⁶²

Of the various international treaties listed above, most relevant to the protection of the rights of women is the CEDAW, which is one of the most widely ratified international conventions.⁶³ As the preamble to the CEDAW notes, despite the equal protection rights guaranteed under the ICCPR, the ICESCR, and the Universal Declaration of Human Rights, “extensive discrimination against women continues to exist”⁶⁴ and “violates the principles of equality of rights and respect for human dignity.”⁶⁵ The preamble recognizes 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.⁶⁶ Furthermore, it emphasizes 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.⁶⁷ 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.⁶⁸ 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.⁶⁹

62. CEDAW, U. N. TREATY DATABASE, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Jan. 18, 2013) [hereinafter U. N. TREATY DATABASE].

63. As of September 2012, the CEDAW has been ratified by 187 states. *See id.* Although the CEDAW was ratified by the United Kingdom in 1985, its application was not extended to Hong Kong until 1996. *Id.* In 1997, upon the transfer of sovereignty, the Chinese government took over the reporting and implementations of CEDAW-related obligations for Hong Kong. LEGISLATIVE COUNCIL SECRETARIAT, *supra* note 35, para. 3. It also notified the Secretary General of the extension of reservations made by the China to its own obligations under the said treaty, to Hong Kong. U.N. TREATY DATABASE, *supra* note 62.

64. CEDAW, *supra* note 34, pmb1.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* These views were echoed in the Beijing Declaration and Platform for Action, which was adopted at the Fourth World Conference on Women in 1995. Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, para. 124(f), U.N. Doc. A/CONF.177/20, A/CONF.177/20/Add.1 (Sept. 15, 1995).

69. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the CEDAW, Oct. 4–Oct. 22, 2010, para. 4, U.N. Doc. CEDAW/C/2010/47/GC.2, 47th Sess. (Oct. 19, 2010).

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.⁷⁰

However, given that specific individuals and groups have been internationally recognized as being particularly vulnerable and at risk, leading to a proliferation of treaties to protect them, these other treaties are equally significant to address the impact of the circumstances they find themselves in which tend to have a compounded effect on women.⁷¹ Their situation is exacerbated by the multiple layers of discrimination they experience when inequalities in a range of spheres intersect.⁷² 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, particularly given the multiple inequalities women experience as a group because women as a gendered group are often implicated in numerous other marginalized “groupings.” The lack of an intersectional approach to tackle multiple fronts of discrimination and inequality severely undercuts the effectiveness of human rights protections for women.

III. THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAWS ON THE RIGHTS OF WOMEN AND THE GUARANTEES OF EQUALITY AND NON-DISCRIMINATION

International obligations require the implementation of treaty provisions, usually through the enactment of local legislation. Hong Kong protects a range of human rights through provisions in the HKBL,⁷³ the HKBORO,⁷⁴ and various anti-discrimination laws.⁷⁵ Pursuant to these laws, it has become possible to hold government, and in some instances private actors, accountable for a violation of these rights.⁷⁶ However, apart from the inadequacies inherent in some of the implementing legislation, the supporting machinery

70. The CEDAW Committee comprises twenty-three experts from a range of countries, the representatives serve the Committee on a rotational basis, serving two-year terms. CEDAW, *supra* note 34, art. 17(1)–(5).

71. *See supra* text accompanying notes 50–54.

72. *At the Crossroads of Gender and Racial Discrimination*, WORLD CONFERENCE AGAINST RACISM, <http://www.un.org/WCAR/e-kit/gender.htm> (last visited Jan. 18, 2013).

73. XIANGGANG JIBAN FA arts. 24–42 (H.K.).

74. Hong Kong Bill of Rights Ordinance, (1997) Cap. 383.

75. *See, e.g.*, Race Discrimination Ordinance, (2008) Cap. 602 (H.K.).

76. *See, e.g., id.* §§ 17–18.

that enables the legal enforcement of these rights leaves 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.⁷⁷ The level of scrutiny the government is subject to under the international reporting process is, however, ultimately dependent on the collective efforts of NGOs, human rights groups, and their lobbying efforts directed at the CEDAW committee, all of which provide opportunities to expose the failings of the Hong Kong machinery.⁷⁸

The legal framework for the protection of the fundamental rights of equality and non-discrimination in Hong Kong is modeled after international human rights treaties.⁷⁹ Article 25 of the HKBL provides that “[a]ll Hong Kong residents shall be equal before the law,”⁸⁰ and any legislation contravening this provision is unlawful.⁸¹ 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 labor conventions⁸² that were applicable to Hong Kong prior to 1997, into Hong Kong’s constitutional framework.⁸³ Article 39, paragraph 2 provides that these freedoms shall not be restricted unless prescribed by law and that such restrictions are themselves to be in accordance with said international treaties.⁸⁴ 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 itself is notably brief, and the numerous human rights protections that are enshrined in the HKBL and other local legislation.⁸⁵ Moreover, any laws that contravene either Article 25 or Article 39 of the HKBL would be deemed unconstitutional and, as a result of the powers of

77. *See supra* text accompanying notes 35–39.

78. *See* discussion *infra* Part III.

79. For a comprehensive overview of the constitutional right to equality, its conceptualization and development through the courts’ jurisprudence, see Kelley Loper, *The Right to Equality and Non-Discrimination*, in *THE LAW OF THE HONG KONG CONSTITUTION* (2011).

80. XIANGGANG JIBEN FA art. 25 (H.K.).

81. Article 11 of the HKBL prohibits the enactment of any legislation that contravenes the HKBL. *Id.* art. 11.

82. For an overview of the various labor conventions that are applicable to Hong Kong and their implications on the rights of women in the labor market, see Rick Glofcheski & Ho Yan Leung, *Job Security and Entitlements within Hong Kong’s Maternity Protection Legislation*, 25 INT’L J. COMP. LAB. L. & INDUS. REL. 327, 329 (2009).

83. *HKSAR v. Ng Kung Siu*, [1999] 2 H.K.C.F.A.R. 442, 455B (C.F.A.).

84. XIANGGANG JIBEN FA art. 39 (H.K.).

85. *Id.* arts. 25–41.

judicial review and the doctrine of separation of powers, may be struck down as such by the Hong Kong courts in appropriate circumstances.⁸⁶

These constitutional and international guarantees are implemented through a range of enactments. The HKBORO, for example, provides that men and women shall have equal enjoyment of all civil and political rights set forth in the HKBORO⁸⁷ and shall enjoy equal protection before the law.⁸⁸ It also specifically protects the right to equality and non-discrimination and replicates the list of prohibited grounds of discrimination in the ICCPR. The HKBORO binds the government, all public authorities, and any person acting on behalf of the government or a public authority.⁸⁹ Protection against discrimination on grounds of sex is further elaborated in two anti-discrimination statutes. The Sex Discrimination Ordinance⁹⁰ (SDO) ensures that women are not prejudiced against because of their gender in a range of contexts including: employment, the provision of goods and services, housing, voting, standing for elections, and the development and implementation of government policy.⁹¹ The Family Status Discrimination Ordinance⁹² (FSDO) prohibits discrimination against a person on the grounds that they have responsibilities involving the care of a family member.⁹³ These two statutes apply to the government and the private sector.⁹⁴

Given the overlapping but differentiated applicability of this scheme of 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 with the principle of non-discrimination cannot be overstated. Protection against discrimination has been recognized as an essential counterpart to securing the right to equality.⁹⁵ The

86. For a detailed overview of the circumstances in which Hong Kong courts may legitimately exercise such powers of judicial review, see Puja Kapai, *A Principled Approach Towards Judicial Review: Lessons from Wv. Registrar of Marriages*, 41 H.K.L.J. 49, 67 (2011).

87. Hong Kong Bill of Rights Ordinance, (1997) Cap. 383, § 3, art. 1 (replicating ICCPR, *supra* note 40, art. 2(1), 3).

88. *Id.* at 8, § 8, art. 22 (replicating ICCPR, *supra* note 40, art. 26).

89. Hong Kong Bill of Rights Ordinance at 2, § 7.

90. Sex Discrimination Ordinance, (1997) Cap. 480 (H.K.).

91. *Id.*

92. Family Status Discrimination Ordinance, (1997) Cap. 527 (H.K.).

93. *Id.* at 1, pmb.

94. *See* Sex Discrimination Ordinance at 4, §§ 3, 5; Family Status Discrimination Ordinance at 3, § 3, 5.

95. 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 COLUM. J. TRANSNAT'L L. 335, 335 (1996). *See also* *Discrimination Law*, in *EMPLOYMENT LAW AND PRACTICE IN HONG KONG* (Rick Glofcheski et al. eds., 2010) [hereinafter *EMPLOYMENT LAW*]; Carole J. Petersen, *Implementing Equality: An Analysis*

next section details some of the salient provisions of the SDO, the FSDO, and discusses the mechanisms that the anti-discrimination laws put into place to deal with violations of these rights.

A. Sex Discrimination Ordinance

The SDO was enacted in 1995 and came into force in 1996.⁹⁶ It aims to protect people in Hong Kong against discrimination on the basis of sex, marital status, pregnancy, and against sexual harassment.⁹⁷ Sections 4, 7, and 8 of the SDO prohibit both direct and indirect forms of discrimination.⁹⁸ Where the cause for the treatment can be attributed directly to one of the prohibited grounds of sex, marital status, or pregnancy, this constitutes direct discrimination.⁹⁹ Thus, where a person is treated less favorably than a person of the opposite sex, a different marital status, or a person who is not pregnant, this constitutes direct discrimination.¹⁰⁰ Where a neutral requirement or condition is imposed which has the effect that a person falling within a prohibited category of discrimination would be less likely to be able to meet that condition,¹⁰¹ 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.¹⁰²

Moreover, the SDO protects women against sexual harassment in the workplace.¹⁰³ “Sexual harassment” covers a range of behaviors including: unwelcome sexual advances, requests for sexual favors, or unwelcome conduct that is sexual in nature and would be perceived

of *Two Recent Decisions Under Hong Kong's Anti-Discrimination Laws*, 29 H.K.L.J. 178, 178 (1999); Carole J. Petersen, *Hong Kong's First Anti-Discrimination Laws and Their Potential Impact on the Employment Market*, 27 H.K.L.J. 324, 325–26 (1997).

96. EMPLOYMENT LAW, *supra* note 95, at 305.

97. Sex Discrimination Ordinance at 1, pmbl.

98. *Id.* at 4, §§ 4–5, §§ 7–8.

99. Petersen, *Hong Kong's First Anti-Discrimination Laws*, *supra* note 95, at 335–36.

100. *Id.*

101. *See id.* at 337; *see also* EMPLOYMENT LAW, *supra* note 95, at 325.

102. *See* Petersen, *Hong Kong's First Anti-Discrimination Laws*, *supra* note 95, at 337; *see also* EMPLOYMENT LAW, *supra* note 95, at 325.

103. Sex Discrimination Ordinance at 2, § 2. 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] 2 H.K.L.R.D. 28, 28P–29A (D.C.). This is 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* Petersen, *Implementing Equality*, *supra* note 95, at 188.

as such by a reasonable bystander, with regard to all the circumstances, leading her likely to conclude that the person at the receiving end of the behavior would be offended, humiliated, or intimidated.¹⁰⁴ 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.¹⁰⁵

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 victimized as a result of filing a claim under the SDO against a party, that would also constitute discrimination.¹⁰⁶

Whilst the SDO sets out the “actionable grounds” with respect to various activities and organizations, 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.¹⁰⁷ These exemptions have been the subject of extensive criticism both locally, by non-governmental organizations, and also at the CEDAW Committee level.¹⁰⁸ This is particularly so given the government’s reliance on the provisions and the relevant CEDAW reservation in defense 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.¹⁰⁹ In these circumstances, many helpers are left vulnerable in the event that they have claims to pursue against employers for outstanding debts, sexual or physical abuse, or if they wish to find another employer to continue working in Hong Kong.¹¹⁰

104. Sex Discrimination Ordinance at 2, § 2(5)(a).

105. *Id.* at 2, § 2(5)(b).

106. *Id.* at 5–6, § 9.

107. *Id.* at 12, §§ 21(2), and 38(2). This is consistent with a reservation entered by the Chinese Government in a communication on the question of Hong Kong deposited with the Secretary-General, dated June 20, 1997. See *Historical Information on CEDAW*, U.N. TREATY DATABASE, China note 2, <http://treaties.un.org/pages/HistoricalInfo.aspx?#China> (last visited Jan. 18, 2013).

108. See Comm. on the Elimination of Discrimination against Women, Concluding Comments of the Comm. on the Elimination of Discrimination Against Women, Aug. 7–Aug. 25, 2006, paras. 41–42, U.N. Doc. CEDAW/C/CHC/CO/6, 36th Sess. (Aug. 25, 2006) [hereinafter Concluding Comments].

109. *Id.*

110. This is seen as gender-based discrimination due to the invidious impact of this rule on foreign domestic helpers as a group who are predominantly, if not exclusively, women. See Petersen, *Equality as a Human Right*, *supra* note 95, at 348. The rule has also been criticized for its role in creating an impediment to due process rights and access to justice given that many women have been forced to abandon their claims as a result of not being allowed to continue working in Hong Kong pending the outcome of these claims as the

More recently, this reservation came into play in the government's defense of an immigration exception that specifically singles out foreign domestic helpers as being unentitled to counting their period of stay in Hong Kong towards the seven years of continuous residence requirement that is one of the conditions precedent to acquiring permanent resident status and the right of abode in Hong Kong.¹¹¹ The exclusion of their time spent in Hong Kong as domestic helpers towards the calculation of the seven year period singles out this group of women compared to others who have similarly entered Hong Kong on employment but are entitled to count their stay in Hong Kong during this time towards the calculation of their period of continuous residence in Hong Kong.¹¹²

Among other exceptions in the SDO, § 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.¹¹³ 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.¹¹⁴

Also of particular interest is § 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 body,¹¹⁵ and for relevant positions, including that of village representative or office-holder of a Rural Committee, as defined in the Heung Yee Kuk Ordinance.¹¹⁶ 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

employment contract under which they would have entered Hong Kong would likely have terminated or be the subject of the claim before the courts. *See Submission to the Committee for the Elimination of All Forms of Racial Discrimination (CERD)*, ASIAN MIGRANTS COORDINATING BODY—HONG KONG & MISSION FOR MIGRANT WORKERS, § 1(a) (2009), available at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/MFMW_China_75.doc [hereinafter *Submission to the CERD*]. This makes justice against their violators too expensive an ordeal for them and imposes an exorbitant opportunity cost, one which many of them cannot afford given their impoverished backgrounds. *See id.* § 1(b).

111. *See Submission to the CERD*, *supra* note 110, at § 1(c).

112. *See Vallejos Evangeline Banao v. Comm'r of Registration*, [2012] H.K.E.C. 433, paras. 2, 3(3) (C.A.) (H.K.).

113. Sex Discrimination Ordinance, (1997) Cap. 480, 12, § 22 (H.K.).

114. U.N. TREATY DATABASE, *supra* note 62, n.14.

115. Sex Discrimination Ordinance at 17, § 35(1).

116. *Id.*

(who are selected from village representatives).¹¹⁷ 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 head of household carries with it significant legal and political powers.¹¹⁸ Alternatively, instead of a system in which 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.¹¹⁹ This is despite related exemptions in the SDO, for example, § 61, which provides that nothing in the SDO affects the terms of the New Territories Ordinance¹²⁰ (NTO), the New Territories Leases (Extension) Ordinance¹²¹ (NTLEO), or renders unlawful any act done pursuant to those ordinances.¹²² Although it used to be the case that women were prohibited from inheriting land in

117. See Petersen, *Equality as a Human Right*, *supra* note 95, at 344. Although the case of *Sec'y for Justice v. Chan Wah*, [2000] 3 H.K.C.F.A.R. 459 (C.F.A.) (H.K.), applied this provision, the factual matrix concerned discrimination against non-indigenous residents in the village as opposed to a gender-based preference that emanated from religious doctrine as the reservation requires. *See id.* at 459G–61C. Indeed, it can be argued that this is precisely the kind of gender-based discrimination rooted in cultural practices that CEDAW was designed to help get state parties past.

118. *Id.* at 2.

119. *Few Women Take Part in Elections*, S. CHINA MORNING POST, Mar. 6, 2011, <http://www.scmp.com/article/740029/few-women-take-part-elections> (lamenting that only 2.23 percent of candidates in the 2011 village elections were women and a meager 0.79 percent of candidates were women in indigenous representative elections).

120. New Territories Ordinance, (1997) Cap. 97 (H.K.).

121. New Territories Leases (Extension) Ordinance, (1997) Cap. 150 (H.K.).

122. Sex Discrimination Ordinance, (1997) Cap. 480, § 61(b) (H.K.). A question that arises is whether Article 40 of the HKBL resurrects the exclusive male succession right which was challenged and resulted in the passage of the exemptions in the NTO and the NTLEO. Article 40 preserves the lawful and traditional rights of indigenous inhabitants of the New Territories. XIANGGANG JIBEN FA art. 40 (H.K.). 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 diminished by the passage of any earlier ordinances. *See* LISA HOPKINSON & MANDY LAO MAN LEI, CIVIC EXCHANGE, RETHINKING THE SMALL HOUSE POLICY 31 (2003). However, the counter-argument 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. *See, e.g.*, CHRISTINE LOH, CIVIC EXCHANGE, INHERITANCE RIGHTS OF INDIGENOUS WOMEN OF THE NEW TERRITORIES 4–5, 8–9 (2004). However, *see* Johannes Chan, *Rights of the Indigenous Inhabitants of the New Territories*, in *THE LAW OF THE HONG KONG CONSTITUTION* (2011), 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. *See* XIANGGANG JIBEN FA art. 25; Sex Discrimination Ordinance at 26, § 61.

Hong Kong, purportedly as a result of Chinese customary law, this prohibition was lifted in 1994.¹²³ 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 descended from indigenous male lineage of a recognized village in 1898,¹²⁴ 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.¹²⁵

Section 13 of the NTO empowers courts to recognize and enforce any Chinese custom or customary right affecting land in the New Territories.¹²⁶ Moreover, the HKBL, through Article 40, has effectively entrenched the rights of male indigenous inhabitants.¹²⁷ This 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. The circumstances that might have justified some of these policies in 1898 (after the British invasion) certainly warrant review in an era when property is at a premium in Hong Kong,¹²⁸ and any such discount offered to particular groups on the basis of their lineage and gender should certainly raise grave doubts about the government's commitment to equality.

These circumstances are unfortunate and underscore the continued influence of the Heung Yee Kuk, originally recognized by the colonial government to represent the interests of the indigenous inhabitants of the New Territories.¹²⁹ 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

123. See Sally Engle Merry & Rachel E. Stern, *The Female Inheritance Movement in Hong Kong: Theorizing the Local/Global Interface*, 46 CURRENT ANTHROPOLOGY 387, 387 (2005); see also Petersen, *Equality as a Human Right*, *supra* note 95, at 355–56 (providing a comprehensive treatment of the customary practice and the run-up to its legislative repeal); Harriet Samuels, *Hong Kong on Women, Asian Values and the Law*, 21 HUM. RTS. Q. 707, 720–24 (1999).

124. Merry & Stern, *supra* note 123, at 401.

125. For an elaboration of this policy, see DIRECTOR OF AUDIT, AUDIT COMM'N: HKSAR, REPORT OF AUDIT COMM'N NO. 39 Ch. 8 (2002). 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 Concluding Comments, *supra* note 108, para. 38.

126. New Territories Ordinance, (1997) Cap. 97, 3, § 13(1) (H.K.).

127. XIANGGANG JIBEN FA art. 40 (H.K.).

128. See Merry & Stern, *supra* note 123, at 401.

129. See Heung Yee Kuk Ordinance, (1997) Cap. 1097 (H.K.).

on to their privileges in times and circumstances that no longer justify their position.¹³⁰ 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 special privileges they enjoy over those entitled to ordinary non-indigenous residents. The shifting demographic and social circumstances in light of the urbanization of the New Territories have narrowed the gap between those with indigenous lineage, and the common Chinese population in Hong Kong.¹³¹ However, the continued protection of the rights of indigenous inhabitants under Article 40 of the HKBL represents an almost insurmountable challenge in light of its entrenchment of "traditional rights and interests."¹³² Article 40 of the HKBL provides that "[t]he lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region."¹³³ 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.¹³⁴ 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 Hong Kong were to be challenged in court for their constitutionality.¹³⁵

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 transformative¹³⁶ 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 of equality.¹³⁷ The SDO does, however, provide that voluntary temporary special

130. See Merry & Stern, *supra* note 123, at 394, 398, 401.

131. See *id.* at 396.

132. XIANGGANG JIBEN FA art. 40 (H.K.).

133. *Id.*

134. For a detailed exposition of this argument, see Chan, *supra* note 122.

135. For an overview of the rights of indigenous people in Hong Kong, see *id.*

136. Sandra Fredman has written extensively about the distinction between the formal, substantive, and transformative approaches to equality and the significant and meaningful 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 TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) 111 (Ineke Boerefijin et al. eds., 2003).

137. See Sandile Ngcobo, *The Meaning of Article 4(1) of the UN Convention on the Elimination of All Forms of Discrimination Against Women: A South African Perspective*, in TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) 181, 202 (Ineke Boerefijin et al. eds., 2003).

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.¹³⁸ Unfortunately, this is not a requirement and thus, does not impose any obligations on the government or other relevant institutions to adopt such measures necessary to achieve substantive equality in the representation of women in different spheres, whether in employment, government services, or traditionally male-dominated fields.¹³⁹ The lack of “bite” or the negligible educational value of this section is notable in light of the fact that neither the government nor any other industry or institution in Hong Kong has thus far implemented any such measures.¹⁴⁰ This reaffirms the view that the government is generally loathe to upset the business sector by introducing

138. Sex Discrimination Ordinance, (1997) Cap. 480, 21, § 48 (H.K.). It is noteworthy that no equivalent provision appears in the Race Discrimination Ordinance (or the Disability Discrimination Ordinance for that matter), despite the fact that the Committee on the Elimination of Racial Discrimination’s (CERD) deliberations played a major role in the development and application of this principle as part of the CEDAW. *See* Race Discrimination Ordinance, (2008) Cap. 602 (H.K.); *see also* Comm. on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the ICERD, Aug. 3–Aug. 28, 2009, U.N. Doc. CERD/C/GC/32, 75th Sess. (Sept. 24, 2009) (describing the CERD’s deliberations on recommending special measures).

139. Carole J. Petersen, *Stuck on Formalities? A Critique of Hong Kong’s Legal Framework for Gender Equality*, in *MAINSTREAMING GENDER IN HONG KONG SOCIETY* (Fanny M. Cheung & Eleanor Holroyd eds., 2009) 401, 419.

140. 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 the Secondary School Placement Allocation system in Hong Kong in a manner that boosts the results of the top 30% of boys in order to equalize their numbers with girls, who were performing better than boys on average. *See* Equal Opportunity Comm’n v. Dir. of Educ., [2001] 2 H.K.L.R.D. 690, 738F (C.F.I.) (H.K.). 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, the placement to which they would have been entitled, had it not been for the government’s application of this special measure which enabled boys with lower results to secure placement at elite secondary schools. *See id.* at 713H–14G. This system became the subject of a judicial review application, initiated by the EOC in the Hong Kong courts and eventually, led to the striking down of this practice in view of its discriminatory impact on girls. *See id.* at 692B, 742H. 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. *Id.* at 711F. The argument was that the measure was necessary to achieve equality between girls and boys and therefore, was permitted by § 48 of the SDO. *Id.* at 691E. However, this argument failed due to the fact that temporary measures are supposed to be temporary, and the policy had been (secretly) in place for almost twenty years. *See id.* at 732A. *See also* Andrew Byrnes, *The Committee on the Elimination of Discrimination Against Women*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* (P. Alston ed., 2nd ed., 1999) (arguing that the court could have rejected the special measures defense on grounds that it was designed to advance the interests of women in order to address historical discriminatory practices against them as a group, and as such the provision could not be used to safeguard the interests of men).

law or policy that would interfere with the free market or laissez-faire approach.¹⁴¹

A further area of concern is the lack of appropriate recourse for sexual minorities such as members of the lesbian, gay, bisexual, and transgender community who often face discrimination on the grounds of their sexual orientation and gender identity. There have been some successful challenges brought before the courts drawing on equality and non-discrimination provisions in the HKBL and HKBORO¹⁴² on grounds of sexual orientation discrimination, however. These cases were successful and led to the repeal of legislation that was discriminatory given its detrimental impact against the group concerned.¹⁴³ A successful claim against a private actor has yet to be made to determine whether discrimination on the basis of sexual orientation can be covered by the term “sex” in the SDO.¹⁴⁴ However,

141. See Petersen, *supra* note 139, at 418 (noting that the government’s resistance to quotas or affirmative action is premised on the conflict between such measures and the ideals of a free market economy and a meritocratic system).

142. 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 *Sec’y for Justice v. Yau Yuk Lung*, [2007] 10 H.K.C.F.A.R. 335, 346 (C.F.A.) (H.K.). The argument has yet to be tested for its applicability to persons alleging discriminatory treatment on the basis of gender identity. See, e.g., Robyn Emerton, *Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong*, 34 H.K.L.J. 515, 519 (2004). 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 based on “mental disorder” and therefore, that they had been unlawfully discriminated against under the Disability Discrimination Ordinance. *Id.* at 542–43 (citing Disability Discrimination Ordinance, (1997) Cap. 487, 1, § 2 (H.K.)). 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 Comm. on Econ., Soc., and Cultural Rights, General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights, May 4–May 22, 2009, para. 20, ESCOR, U.N. Doc. E/C12/GV/20, 42nd Sess. (July 2, 2009) [hereinafter ECOSOC]. The category “other status” has likewise been recognized to include “sexual orientation” for the purposes of Article 22 of the HKBORO by the Court of Final Appeal in *Sec’y for Justice v. Yau Yuk Lung*, [2007] 10 H.K.C.F.A.R. 335, 346D (C.F.A.) (H.K.). 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, *supra* note 142, 174, 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.

143. See *Leung v. Sec’y for Justice*, [2006] 4 H.K.L.R.D. 211, 239C–40H (C.A.) (H.K.) (setting the age of consent at 16 for both heterosexual and homosexual intercourse, deeming all government-sponsored discrimination based on sexual orientation to be unconstitutional, interpreting Articles 1 and 22 of the HKBORO to include sexual orientation).

144. 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*

in light of the successes of the constitutional challenges raising similar arguments concerning the breadth of this category at appellate level courts, it is only a matter of time before the right case presents itself before the courts for an explicit determination of this issue.

B. Family Status Discrimination Ordinance

The Family Status Discrimination Ordinance¹⁴⁵ (FSDO) is another important statute enacted in 1997 in recognition of the discrimination that people, predominantly women¹⁴⁶ who are responsible for the care of immediate family members, routinely face, and to prohibit discrimination on the basis of “family status.”¹⁴⁷ This prohibition covers direct and indirect forms of discrimination¹⁴⁸ against persons with family status and recognizes a range of family relationships.¹⁴⁹ Like the SDO, there is a provision to protect victims against retaliation for filing a complaint or taking legal action.¹⁵⁰ However, the jurisprudence relating to the FSDO is underdeveloped insofar as the full ambit of the protections are concerned, particularly in instances where a suitable comparator is required, in order to arrive at a determination of the grounds for discrimination.¹⁵¹

C. Race Discrimination Ordinance

The Race Discrimination Ordinance¹⁵² (RDO) was enacted in July 2008 and came into force in July 2009.¹⁵³ The RDO makes it

Ordinance, 4 ASIAN J. COMP. L. 7 (2009). See also Carole J. Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L. REV. 337 (1997).

145. Family Status Discrimination Ordinance, (1997) Cap. 527 (H.K.).

146. 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 realize their full potential. See LABOUR AND WELFARE BUREAU: HKSAR, WOMEN'S COMMISSION: FINDINGS OF SURVEY ON COMMUNITY PERCEPTION ON GENDER ISSUES 5 (2009), available at http://www.lwb.gov.hk/eng/press/result_e.pdf.

147. See Family Status Discrimination Ordinance, (1997) Cap. 527 (H.K.).

148. *Id.* at 3, § 5.

149. *Id.*

150. *Id.* at 3–4, § 6.

151. See Johannes Chan, *Comparators in Marital Status Discrimination: General or Specific*, 40 H.K.L.J. 563, 563 (2010).

152. Race Discrimination Ordinance, (2008) Cap. 602 (H.K.).

153. 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 problematization of racial discrimination, and the heavily contested nature of the scope and content of the law. Sunny Chiang, *Will the Race Discrimination Ordinance Eliminate Race Discrimination in Hong Kong?*, LEXISNEXIS,

unlawful to discriminate, harass, or vilify a person on the ground of race.¹⁵⁴ "Race" is defined as a person's race, color, descent, or national or ethnic origin.¹⁵⁵ The ordinance covers not only acts of discrimination that are motivated by the victim's race, but also acts based on the race of a near relative of the victim.¹⁵⁶ As with the other anti-discrimination legislation in Hong Kong, direct and indirect discrimination are covered by the RDO.¹⁵⁷ Significantly, the RDO also renders unlawful conduct constituting victimization on the grounds of a complaint being lodged by the victim¹⁵⁸ or harassment based on the victim's or a close relative's race.¹⁵⁹ Harassment as defined includes unwelcome words or conduct which would cause a reasonable person in the circumstances to feel offense, humiliation, or intimidation.¹⁶⁰ 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.¹⁶¹

Section 45 replicates a provision in the Disability Discrimination Ordinance,¹⁶² prohibiting any act designed to incite hatred towards,

Sept. 4, 2008, <https://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/Will-the-Race-Discrimination-Ordinance-Eliminate-Race-Discrimination-in-Hong-Kong>. Although initially resisted by the government with a view toward guarding business and corporate interests, when the sentiment of this constituency changed in light of increasingly competitive Asian market economies which were attracting talented labor on account of better protection for minority groups, the government yielded to calls for the introduction of this law. Carole J. Petersen, *International Norms and Domestic Law Reform: The Difficult Birth of Hong Kong's Racial Discrimination Law*, 6 DIRECTIONS 13, 18. 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." Kelley Loper, *One Step Forward, Two Steps Back? The Dilemma of Hong Kong's Draft Race Discrimination Legislation*, 38 H.K.L.J. 15, 18 (2008). But see Race Discrimination Ordinance, (2008) Cap. 602, 3, § 3 (H.K.). 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 Petersen, *supra* note 153; Loper, *supra* note 153; Carol J. Petersen, *Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong*, 34 H.K.L.J. 459 (2004).

154. Race Discrimination Ordinance at 1, pmbl.

155. *Id.* at 4–5, § 8(1)(a).

156. *Id.* at 4, § 5.

157. *Id.* at 3–4, § 4.

158. *Id.* at 4, § 6.

159. *Id.* at 4, § 7.

160. See Race Discrimination Ordinance, (2008) Cap. 602, 4, § 7 (H.K.).

161. See *Race Discrimination Ordinance and I*, EQUAL OPPORTUNITIES COMM'N, <http://www.eoc.org.hk/eoc/GraphicsFolder/showcontent.aspx?content=Race%20Discrimination%20Ordinance%20And%20I> (last visited Jan. 18, 2013).

162. Disability Discrimination Ordinance, (1997) Cap. 487 (H.K.).

serious contempt for, or severe ridicule of, a person or group of persons in public based on race.¹⁶³ Section 46 further provides that where the incitement is accompanied by threat of physical harm, it will constitute serious vilification and may attract a fine of up to HK\$100,000 and imprisonment for up to two years.¹⁶⁴ These provisions set out the legal framework and provisions that guarantee protection against a range of discriminatory acts.

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

This section considers the effectiveness of the legal framework by evaluating the availability of channels for redress under the said anti-discrimination laws and constitutional provisions on equality and non-discrimination. In doing so, it reviews the work of the EOC and the impact of the local courts on the development and protection of the rights and interests of victims of discrimination.

1. The Equal Opportunities Commission

Section 66 of the SDO constituted the EOC, which has been tasked with the oversight and the enforcement of the anti-discrimination laws in Hong Kong.¹⁶⁵ It has the power to investigate and conciliate discrimination claims brought under the four ordinances and indeed, has the statutory duty to attempt conciliation prior to exercising its power to provide legal assistance to a party to bring a claim in the courts when conciliation has failed.¹⁶⁶ This raises

163. Race Discrimination Ordinance at 20, § 45.

164. *Id.* at 21, § 46.

165. The EOC has the mandate to receive complaints pertaining to all four anti-discrimination laws: the SDO, FSDO, DDO, and most recently, the RDO. Race Discrimination Ordinance, (2008) Cap. 602 (H.K.); Disability Discrimination Ordinance, (1997) Cap. 487 (H.K.); Family Status Discrimination Ordinance, (1997) Cap. 527 (H.K.); Sex Discrimination Ordinance, (1997) Cap. 480 (H.K.). 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. Petersen, *Equality as a Human Right*, *supra* note 95, at 372–73, 376, 380 (explaining that the government rejected proposals by drafting their own competing legislation which did not include a tribunal). The result is that impecunious claimants who lack the resources and are not backed by the EOC may lack a remedy due to the sheer expense involved in litigating in Hong Kong courts. *Id.* at 380 (clarifying that the court is the only option if conciliation fails).

166. Arguably, the mandatory requirement to attempt conciliation also serves businesses' 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. 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

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.¹⁶⁷

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 has 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.¹⁶⁸ Taking the latter issues first, the EOC has been criticized for its lack of institutional independence because the Chief Executive of the HKSAR (the highest ranking official in the administration, accountable only to the National People's Congress of China) appoints all its members, including the chairperson.¹⁶⁹ Apart from the first chairperson, Miss Anna Wu, who was instrumental in tabling Hong Kong's first, expansive anti-discrimination bill in the Legislative Council in the early 1990s,¹⁷⁰ the subsequent appointments have been fairly conservative and are usually drawn

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 Petersen, *supra* note 139, at 401, 423. Similar issues have been encountered in other jurisdictions. See, e.g., Anna Chapman, *Discrimination Complaint-Handling in New South Wales: The Paradox of Informal Dispute Resolution*, 22 SYDNEY L. REV. 321, 347 (2000).

167. See Petersen, *supra* note 139, at 401, 423. 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 be an obstacle to the substantive right to litigate. *Id.* 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. *Id.* at 428. The pressure of encountering the perpetrator during the conciliation process and the prospect of protracted litigation can cause many claimants to relive the trauma of humiliation. See, e.g., UN Women, *supra* note 60, at 96 (illustrating that appearing before truth seeking bodies has been shown to bring about such results among victims of sexual violence). 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 likely to be well-armed with advisors and legal experts in tow. See David Luban, *The Right to Legal Services*, in A READER ON RESOURCING CIVIL JUSTICE (Paterson & Goriely eds., 1996) (demonstrating the crucial link between the right to legal representation and the right of access to justice and equality before the law); see also *F.B. & Ors. v. Dir. of Immigration*, [2009] 1 H.K.C. 133, 162 (C.F.I.) (H.K.) (affirming the fundamental link between the three rights).

168. See Puja Kapai, *The Hong Kong Equal Opportunities Commission: Calling for a New Avatar*, 39 H.K.L.J. 339, 343 (2009).

169. Sex Discrimination Ordinance, (1997) Cap. 480, 44, Schedule 6 (H.K.).

170. This measure was tabled before the government decided to introduce its own anti-discrimination laws one by one.

from people formerly in the service of the government.¹⁷¹ This has grossly undermined the public's confidence in the EOC's ability and willingness to take issue with equality claims involving the government.¹⁷² From the lack of procedural transparency concerning the appointment of its members, to its funding being tied to the government's purse, the structural set-up bodes ill for anybody tasked with a mandate as important as this one.¹⁷³ Invariably, the EOC's accountability to the government rather than the public has also been extensively criticized as interfering with the EOC's institutional mandate: its capacity for handling discrimination-related complaints against the government. Most importantly, this framework violates the Paris Principles,¹⁷⁴ which require that such a body be plural and independent in its representation.¹⁷⁵ 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.¹⁷⁶ The lack of independence crucially impacts the ability of the institution to carry out its mandate effectively and in a manner that wins the public's confidence, particularly in terms of its willingness to pursue discrimination claims against the government and its policies.¹⁷⁷

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

171. Kapai, *supra* note 168, at 355.

172. *Id.* at 358.

173. *See, e.g., id.* at 355.

174. G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Mar. 4, 1994) [hereinafter 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* Comm. on Econ., Soc. and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao), Apr. 25–May 13, 2005, para. 41, ESCOR, U.N. Doc E/C.12/1/Add.107 34th Sess. (May 13, 2005); Carole J. Petersen, *The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away from the Mark?*, 33 H.K.L.J. 513, 514 (2003); *see also* Kapai, *supra* note 168, at 355–56 (detailing the numerous scandals pertaining to the EOC, tarnishing its reputation and public confidence in the body).

175. Paris Principles, *supra* note 174, at 5, para. 2.

176. *Id.*

177. 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.

the investigation process.¹⁷⁸ This was unsatisfactory for claimants who found the prospect that they had to face the perpetrator (especially in sexual harassment claims) particularly intimidating, daunting, and unhelpful insofar as the process itself failed to yield any conclusive “finding” or “judgment” pertaining to the respondent’s conduct after the investigation process is complete.¹⁷⁹ Petersen and her team conducted an in-depth study of 188 SDO and FSDO complaints filed with the EOC.¹⁸⁰ Of these, the majority pertained to pregnancy-related and sexual harassment claims in the employment context.¹⁸¹ Of this sample, 45% of the claims were discontinued and only a small number (28 out of 188) were discontinued on the basis that they did not pertain to conduct rendered unlawful under the ordinance or were frivolous or lacking in substance.¹⁸² 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.¹⁸³ The EOC instigated a trial program for “early conciliation” in which 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.¹⁸⁴ Claimants who were unsuccessful in conciliation would be invited to apply for legal assistance with the EOC or alternatively, litigate in courts if they could afford to do so without assistance.¹⁸⁵ Those who were unable to do either of these would abandon their complaint.¹⁸⁶ The EOC’s record of assistance, however, is shockingly low at less than 4% of the complaints received.¹⁸⁷

The study’s findings reveal that 42% of this sample successfully attempted conciliation.¹⁸⁸ Whilst this appears to be a comparatively

178. This view, taken by EOC officers, as reported in the study is disappointing and, as the authors suggest, reveals a limited and purely formal approach to equality. *See* Petersen, *supra* note 139, at 427–28.

179. *Id.* at 428.

180. *Id.* at 424.

181. CAROLE J. PETERSEN ET AL., ENFORCING EQUAL OPPORTUNITIES: INVESTIGATION AND CONCILIATION OF DISCRIMINATION COMPLAINTS IN HONG KONG (2003).

182. *See* Petersen, *supra* note 139, at 424.

183. *Id.* at 425.

184. *Id.*

185. *Id.*

186. PETERSEN ET AL., *supra* note 181.

187. *See* Petersen, *supra* note 153, at 474–75.

188. PETERSEN ET AL., *supra* note 181.

favorable rate in terms of the reported rates for other countries,¹⁸⁹ it is unsurprising given the obligatory requirement to attempt such conciliation under the SDO.¹⁹⁰ Similarly, the 80% success rate of conciliation is likewise unsurprising given the rate of complaint withdrawal and the reported fatigue and desire to come to early conciliation where possible.¹⁹¹ 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.¹⁹² At best, the process yields an unworthy compromise for those willing to see their complaints through to the end, a result fueled by the respondent’s knowledge of the difficulties of the victim’s financial or other situation.¹⁹³ Respondents, often well-armed and advised, tend to capitalize on the pressures of the process to get the best possible outcome from their point of view.¹⁹⁴ 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 proposing 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.¹⁹⁵

Furthermore, as Petersen’s study reveals, victimization is rampant in its express and subtle forms.¹⁹⁶ Although the statutes contain important provisions against victimization 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.¹⁹⁷

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

189. See Petersen, *supra* note 139, at 425 (citing R. Hunter & A. Leonard, *The Outcomes of Conciliation in Sex Discrimination*, Ctr. for Emp’t and Labour Relations Law, Working Paper No. 8, 1995).

190. Sex Discrimination Ordinance, (1997) Cap. 480, 27, § 64 (H.K.).

191. Petersen, *supra* note 139, at 425.

192. *Id.* at 428 (explaining that respondent possesses most of the bargaining power).

193. *Id.*

194. *Id.* at 426 (explaining that the respondent often takes advantage of its economic resources to choose the most highly trained employees to handle complaints).

195. *Id.* at 426.

196. *Id.* at 424 (showing that 10 of 188 complaints in the sample alleged victimization).

197. Peterson, *supra* note 139, at 424.

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 the 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 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 toward eradicating serious harms to the integrity, dignity, and respect of marginalized groups. That women, as a group, comprising almost half the population of Hong Kong, can continue to be so marginalized speaks volumes about the extent of the government's commitment to eradicate gender inequality and implement effective substantive equal protection for all.

In light of the current enforcement model, the Hong Kong Human Rights Monitor has proposed, together with the EOC, that an Equal Opportunities Tribunal be set up in order to facilitate a more effective enforcement mechanism for such claims.¹⁹⁸ 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.¹⁹⁹ However, such a system would still be expensive and procedurally complex in terms of accessibility compared to an Equal Opportunities Tribunal.²⁰⁰ 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.

2. *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.²⁰¹ However, due to the

198. See HONG KONG HUMAN RIGHTS MONITOR, REVIEW ON ADJUDICATION OF EQUAL OPPORTUNITIES CLAIMS BY THE DISTRICT COURT, 2 (2010), available at http://www.judiciary.gov.hk/en/other_info/consult_papers/eoc_consultation_document_eng.pdf.

199. *Id.* (detailing Civil Justice Reform).

200. Petersen, *supra* note 139, at 418.

201. 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 the Legal Aid Ordinance, (1997) Cap. 91, 3, §§ 5, 5A (H.K.). Furthermore, the Director of Legal Aid has the discretion to waive the means test where the claim concerns the HKBORO. *Id.* at 3, § 5A.

exorbitant costs of litigation and the statutorily mandated conciliation attempt which unduly lengthens the process, only a limited number of claims have made it to the courts.²⁰² 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.²⁰³ The courts have also held that intent to discriminate is irrelevant to the finding of unlawful discrimination.²⁰⁴ As such, where direct or indirect discrimination is found as a matter of fact based on the circumstances, that would be sufficient.²⁰⁵ 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 within a particular class.²⁰⁶ 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 that the means used were proportionate to the ends.²⁰⁷ Where this justification is demonstrated, there is no finding of discrimination.²⁰⁸ 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.²⁰⁹

Inevitably, given the recent realization of the more comprehensive implications of the concept of equality and its implementation,

202. Petersen, *supra* note 139, at 418.

203. See, for example, the Court of Appeal’s explication that “discrimination” includes conduct that has the effect of differential treatment even if it is facially neutral in *Leung v. Sec’y for Justice*, [2006] 4 H.K.L.R.D. 211, 236I–37A (C.A.) (H.K.). 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 one naturally available to male homosexual couples, it had the effect of discriminating against men who had male partners and therefore, amounted to sexual orientation discrimination. *See id.*

204. *Sec’y for Justice v. Chan Wah*, [2000] 3 H.K.C.F.A.R. 459, 476C (C.F.A.) (H.K.).

205. Sex Discrimination Ordinance, (1997) Cap. 480, 4, § 5 (H.K.).

206. *See* Race Discrimination Ordinance, (2008) Cap. 602, 3–4, § 4 (H.K.); Disability Discrimination Ordinance, (1997) Cap. 487, 5, § 6 (H.K.); Family Status Discrimination Ordinance, (1997) Cap. 527, 3–4, § 6 (H.K.); Sex Discrimination Ordinance at 4, § 5 (H.K.).

207. *Sec’y for Justice v. Yau Yuk Lung*, [2007] 10 H.K.C.F.A.R. 335, 349A (C.F.A.) (H.K.). 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. *Id.* at 335. However, there are exceptions that may exempt certain practices or policies that have been provided for in the ordinances.

208. *See id.* at 336B.

209. Sex Discrimination Ordinance at 21, § 48.

there is an internationally recognized sentiment that a more complex approach to equality is required.²¹⁰ 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 proven difficult in some instances.²¹¹ This difficulty has been most pronounced in the application of the “but for” test in determining the existence of direct discrimination.²¹² 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 on which discriminatory treatment is alleged.²¹³

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.²¹⁴ 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.²¹⁵ The claimant argued that this amounted to discrimination contrary to the FSDO.²¹⁶ 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.²¹⁷ Thus, the differential treatment was based on her specific marital status with respect to a particular individual.²¹⁸ It was not of a general nature wherein other similarly situated married persons could be compared.²¹⁹ Unfortunately, in the case concerned, these aspects could not be sufficiently distinguished for the purposes of the application of the comparator test.²²⁰ Fortunately, the Hong Kong court

210. See SANDRA FREDMAN, *THE FUTURE OF EQUALITY IN BRITAIN* (2002); Catherine Albertyn, *Substantive Equality and Transformation in South Africa*, 23 S. AFR. J. HUM. RTS. 253, 254 (2007); Beverley McLachlin, *Equality: the Most Difficult Right*, 14 SUP. CT. L. REV. 17, 18 (2001).

211. See Albertyn, *supra* note 210, at 258.

212. See Chan, *supra* note 151, at 571.

213. See *id.*

214. *M v. Sec’y for Justice*, [2009] 2 H.K.L.R.D. 298, 326–28 (D.C.) (H.K.).

215. *Wong Lai Wan Avril v. Prudential Assurance Co.*, [2009] 5 H.K.C. 494 (D.C.) (H.K.); see Chan, *supra* note 151; see also Aileen McColgan, *Cracking the Comparator Problem: Discrimination, ‘Equal’ Treatment, and the Role of Comparisons*, 6 EUR. HUM. RTS. L. REV. 650, n.50 (2006).

216. See *Wong Lai Wan Avril*, 5 H.K.C. at 498–99.

217. See *id.* at 512–14.

218. See *id.* at 504–05.

219. See *id.* at 512–14.

220. See *id.*

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.²²¹ This broader inquiry 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 to recognize the need for adopting broader investigative and interpretive approaches in tackling difficult questions of this nature as they arise in the context of anti-discrimination law. Achieving substantive equal protection is necessarily a complex exercise which requires different approaches for different people and groups for a number of reasons.

Because 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 scaling the results of boys seeking entry into secondary schools in order to place them in elite schools, to the detriment of girls who had performed better.²²² 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.²²³ The court failed to comment on the broader, invidious implications of this policy in light of the relative position of girls and women in society when compared to boys and men²²⁴ 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. 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.²²⁵

Although the courts have been fairly open in recognizing different forms of discrimination and have not held back from holding parties accountable, including where the government is the respondent in the proceedings, there is some hesitation in extending the

221. Chan, *supra* note 151, at 571.

222. See *Equal Opportunity Comm’n v. Dir. of Educ.*, [2001] 2 H.K.L.R.D. 690, 738 (C.F.I.) (H.K.).

223. 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* (Nov. 8, 1999); see also Kelley Loper, *Constitutional Adjudication and Substantive Gender Equality in Hong Kong*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES* 149, 159 (Beverly Baines et al. eds., 2012); Petersen, *Implementing Equality*, *supra* note 95, at 178.

224. Loper, *supra* note 79, at 843.

225. *Id.* at n.91.

application of these principles to some areas of policy, for example, economic policies and social welfare rights.²²⁶ In the consideration of such cases, the Court of First Instance has, for example, categorized the prohibited grounds into two distinctive categories, one entailing traits such as race, caste, noble birth, membership in a political party, gender, and the other including grounds such as ability, education, wealth, and occupation.²²⁷ In applying this dictum, Cheung J in *Kong 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 behavior was based on grounds falling within the first category.²²⁸ 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

226. See *Sec'y for Justice v. Yau Yuk Lung*, [2007] 10 H.K.C.F.A.R. 335, 349E (C.F.A.) (H.K.), 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 rights spheres. It appears from this distinction that the courts are likely to grant executive and legislative branches a wider measure of discretion in these areas. See *Fok Chun Wa v. Hosp. Auth.*, [2011] 1 H.K.L.R.D. A1 (C.A) (H.K.); *Yao Man Fai George v. Dir. of Soc. Welfare*, [2011] 1 H.K.L.R.D. A2 (C.F.I.) (H.K.); *Kong Yun Ming v. Dir. of Soc. Welfare*, [2009] 4 H.K.L.R.D. 382 (C.F.I.) (H.K.); *Fok Chun Wa v. Hosp. Auth.*, [2008] H.K.C. 2161 (C.F.I.) (H.K.). 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. See *Kong Yun Ming*, 4 H.K.L.R.D. at 403. This area is seen as 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 H.K.L.R.D. 109, 118I (C.F.I.) (H.K.) 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. See *id.* at 132G. 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 Paris Principles, *supra* note 174, paras. 69–70. The government's response to this was to accept that the ICESCR “creates binding obligations at the international level.” HKSAR, SECOND REPORT OF THE HKSAR OF THE PRC IN THE LIGHT OF THE ICESCR 42 (2003). 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 *id.*

227. *Kong Yun Ming*, 4 H.K.L.R.D. at 404–05 (citing Lord Hoffmann in *R (Carson) v. Sec'y of State for Work and Pensions*, [2006] 1 A.C. 173, 182).

228. *Id.* at 405.

fundamental to him/her and that goes to the core of his/her being as a human being; something that defines the person physically or intrinsically.²²⁹

This bifurcation of discrimination grounds 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.²³⁰ Furthermore, the varying level of scrutiny applied on these terms is likely to have a disproportionate and negative impact on women, which is not 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.²³¹ Four recent cases that have come before the Hong Kong courts attest to the disproportionate impact of such policies on women.²³²

For example, relying on the right to social welfare²³³ and equality under the HKBL and HKBORO,²³⁴ a Mainland Chinese 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).²³⁵ The court accepted the government’s justification that there were economic reasons for this policy in light of the limited availability of resources and that, as matters of policy, issues concerning the allocation of such resources necessarily

229. *Id.*

230. Fredman advocates the use of equality to achieve four key objectives in order to realize a more substantive application of the concept of equality. *See* SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED* 179 (2008). The first is to break the cycle of disadvantage for marginalized 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, to enable full participation in society. *See id.* at 10.

231. Again, this is not something that is unique to Hong Kong; 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 subcategories. *See, e.g.,* Kamala Sankaran, *Special Provisions and Access to Socio-Economic Rights: Women and the Indian Constitution*, 23 S. AFR. J. HUM. RTS. 277, 290 (2007); Catherine MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects and Personal Laws*, 4 INT’L J. CONST. L. 181, 182–83 (2006).

232. *See* Fok Chun Wa, [2011] 1 H.K.L.R.D. A1 (C.A.) (H.K.); Yao Man Fai George, [2011] 1 H.K.L.R.D. A2 (C.F.I.) (H.K.); Kong Yun Ming, [2009] 4 H.K.L.R.D. 382 (C.F.I.) (H.K.); Raza v. Chief Exec.-in-Council, [2005] 3 H.K.L.R.D. 561 (C.F.I.) (H.K.).

233. XIANGGANG JIBEN FA art. 36 (H.K.).

234. *See id.* art. 25; Hong Kong Bill of Rights Ordinance, (1997) Cap. 385, 8, § 8, art. 22 (H.K.).

235. *Kong Yun Ming*, 4 H.K.L.R.D. at 386.

need to be treated with a view to their long-term sustainability.²³⁶ The court held that “[c]onstitutionally and institutionally, the courts are not well-placed and equipped to deal with or adjudicate [such questions concerning the social welfare system].”²³⁷ At the same time, however, the court acknowledged that the policy could be challenged for its “infring[ement of] other constitutionally-guaranteed rights under the Basic Law or the Hong Kong Bill of Rights” including any “unequal treatment amongst residents of the [SAR] that cannot be justified, in other words discrimination.”²³⁸ 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 they are not able to find work or have children to fend for. The seven-year waiting 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.²³⁹ Because 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 impoverishment as a result of this policy needs to be critically understood and specifically addressed.

Similarly, the court in *Yao Man Fai George v. Director of Social Welfare*²⁴⁰ held that a similar requirement that the applicant of CSSA be a resident in Hong Kong for a continuous period of one year immediately preceding the date of her/his application for the allowance was valid on the basis that, in areas involving social or economic policy, the court would defer to the relevant arm of the government charged with governance in that field, except in cases in which there was an inherently suspect ground of discrimination involved.²⁴¹ It further affirmed the differential level of scrutiny that applied in examining justifications for such policies.²⁴² Although this case was brought by a man, it is important to recognize 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,²⁴³ to spend extended periods of time across the border to look after children waiting to be reunited with their families in Hong Kong.

236. *See id.* at 414.

237. *Id.* at 399.

238. *Id.* at 400.

239. *See id.* at 395–96.

240. [2011] 1 H.K.L.R.D. A2 (C.F.I.) (H.K.).

241. *Id.* para. 45.

242. *Id.* para. 46.

243. *See id.* paras. 7, 33, 38.

Likewise, in *Raza v. Chief Executive-in-Council*,²⁴⁴ 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.²⁴⁵ 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.²⁴⁶ The court ruled in favor of the government on the grounds that the importation of foreign labor 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.²⁴⁷ This ruling also overlooks the disproportionate and negative impact of the policy on women as a group because 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.²⁴⁸ This places minority ethnic women at a protracted risk of multiple discriminatory treatment in a range of spheres.

Finally, in *Fok Chun Wa v. Hospital Authority*,²⁴⁹ 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.²⁵⁰ The hospital categorized her as falling into the group of "Non-Eligible Persons" for the purposes of determining the obstetric costs associated with her delivery.²⁵¹ This resulted in her having to pay significantly higher costs compared to other residents.²⁵² 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.²⁵³ However, in line with the courts' approach in earlier cases and the categorization 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

244. [2005] 3 H.K.L.R.D. 561 (C.F.I.) (H.K.).

245. *See id.* at 566I–67A.

246. *See id.* at 569H.

247. *See id.* at 593I–95A.

248. *See id.* at 580B.

249. [2011] 1 H.K.L.R.D. A1 (C.A.) (H.K.); *see also* *Fok Chun Wa v. Hosp. Auth.* [2008] 1 H.K.C. 2161 (C.F.I.) (H.K.).

250. *See Fok Chun Wa*, 1 H.K.C. paras. 7, 9.

251. *See id.* paras. 2, 11.

252. *See id.* para. 11.

253. *See id.*

of “broad social policy” to be deferred to the government.²⁵⁴ It is interesting that the judgment 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.²⁵⁵ Thus, the question of whether the distinction between children born to a permanent resident woman and children born to a non-permanent resident whose partner is a Hong Kong permanent resident is justifiable on grounds of economic and social policy needs to be critically assessed. It is also important to closely review the situation with regards to married and unmarried women and their treatment. It would constitute unjustifiable marital status discrimination if women who were married were to be treated more favorably under a revised policy as opposed to unmarried mothers in using marriage to verify the degree of “permanence” of such family connection if this is seen as a ground based on which the differential treatment between the two groups of women can no longer be justified.²⁵⁶

In light of recent jurisprudence that has highlighted the major policy gaps that detrimentally impact the fundamental rights of women, it is imperative that the courts apply greater scrutiny to policies, at least with a view toward signaling to the relevant government departments that there is a higher threshold they will be held to account for 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 bifurcated grounds of discrimination and to reassess whether different levels of scrutiny applied to economic or social policies, as opposed to discrimination based on immutable traits, can be justified.

Indeed, the government’s failure to effectively implement gender mainstreaming at various levels renders it even more important for the courts to scrutinize law and policy in all areas closely with a view toward performing its primary function as a check on the exercise of power by the other government branches and to ensure that fundamental rights are fully protected. More importantly, the role of Hong Kong courts has become increasingly significant given its unique position as a guardian of minority interests in a political framework crippled by a lack of democratic progress and the consequent under-representation of such groups in law and policy-making processes.²⁵⁷ In these circumstances, if courts fail claimants in cases

254. *See id.* paras. 74–78.

255. *See id.* para. 33.

256. *See, e.g., Fok Chun Wa*, 1 H.K.C. para. 13.

257. *See* Kapai, *supra* note 86, at 73–74, 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.

similar to those brought in recent years, these victims of systemic and structural discrimination will continue to be marginalized. The strained relationship between the people and the executive government has put Hong Kong courts at the forefront of rights-related developments.²⁵⁸ Without the courts stepping up to their role as the only guardian with the power to effectively protect against excesses of the majority and the government, there is little prospect that minorities will ever extricate themselves from the cycle of disadvantage.²⁵⁹

Of further significance is the need to recognize 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, suffer from a disability, are unemployed or single parents, for example, are not only discriminated against on the basis of their sex, but the impact of discrimination on grounds of sex is often compounded by their membership in another marginalized community.²⁶⁰ The cases above aptly illustrate this concept of intersectional discrimination.²⁶¹ 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 because men do not need obstetric services.²⁶² Likewise, the foreign domestic helpers in *Raza* and *Vallejos* faced unequal treatment on grounds of their immigration status, economic class, occupation, and indirectly, their sex, given that most domestic helpers tend to be women.²⁶³ Moreover, it is likely that the policy discriminates against individuals on grounds of race or nationality because domestic helpers in Hong Kong come from particular countries within the region.²⁶⁴

However, the courts did not consider any of these cases as instances of multiple discrimination.²⁶⁵ Nor did the courts seek to deconstruct the impact of such complex and layered discrimination

258. *See id.* at 54.

259. *See id.* at 51–52.

260. *See, e.g.,* Vallejos Evangelina Banao v. Comm'r of Registration, [2012] 1 H.K.C. 433, paras. 2, 6 (C.A.) (H.K.); *Fok Chun Wa v. Hosp. Auth.*, [2011] 1 H.K.L.R.D. A1, paras. 1–2 (C.A.) (H.K.); *Raza v. Chief Exec.-in-Council*, [2005] 3 H.K.L.R.D. 561, 566G–67H (C.F.I.) (H.K.).

261. *See Vallejos*, 1 H.K.C. paras. 2, 6; *Fok Chun Wa*, 1 H.K.L.R.D. paras. 1–2; *Raza*, 3 H.K.L.R.D. at 566G–67H.

262. *Fok Chun Wa*, 1 H.K.L.R.D. paras. 1–2; *see* Alvin So, *Cross Border Families in Hong Kong: The Role of Social Class and Politics*, 35 CRIT. ASIAN STUD. 515, 528, 531 (2003).

263. *Vallejos*, 1 H.K.E.C. paras. 2, 5–6; *Raza*, 3 H.K.L.R.D. at 566–67.

264. *See So*, *supra* note 262, at 530.

265. *Vallejos*, 1 H.K.C. para. 10; *Fok Chun Wa*, 1 H.K.L.R.D. paras. 3–5; *Raza*, 3 H.K.L.R.D. at 566G–67H.

on particular groups of women.²⁶⁶ 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.²⁶⁷ Intersectional discrimination may be considered as falling within the meaning of the phrase “other status.” Indeed, ECOSOC notes that “[s]ome 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.”²⁶⁸ The lack of a substantive approach to applying anti-discrimination law and equality-related constitutional provisions grossly undermines the potential of women to extricate themselves from their disadvantaged position in society and to compete on equal terms with others.²⁶⁹

IV. 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 Ordinance²⁷⁰ (DVO) seeks to protect individuals against violence in intimate or family contexts; the Crimes Ordinance²⁷¹ (CO) and the Offenses Against Persons Ordinance (OAPA)²⁷² criminalize violent and harmful behavior such as rape, sexual assault, physical assault, grievous bodily harm, murder, and other behavior causing injury and death and are also used alongside DVO provisions where the acts concerned meet the standards required for criminal liability to attach; and the Matrimonial Causes Ordinance²⁷³ (MCO), to name but a few.

Although most of these are general in nature in that they apply regardless of the gender of the victim seeking relief under the said

266. *Vallejos*, 1 H.K.E.C. para. 10; *Fok Chun Wa*, 1 H.K.L.R.D. paras. 3–5; *Raza*, 3 H.K.L.R.D. at 566–67.

267. See, e.g., XIANGGANG JIBEN FA arts. 24–25 (H.K.); Hong Kong Bill of Rights Ordinance, (1997) Cap. 383, 8, § 8, art. 22.

268. See ECOSOC, *supra* note 142, 174, paras. 7–10 (emphasis added) (highlighting the need to “prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.”).

269. 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, *supra* note 223.

270. Domestic Violence Ordinance, (2010) Cap. 189 (H.K.).

271. Crimes Ordinance, (1997) Cap. 200 (H.K.).

272. Offenses Against the Person Ordinance, (1997) Cap. 212 (H.K.).

273. Matrimonial Causes Ordinance, (1997) Cap. 179 (H.K.).

ordinances, it is recognized that some of the provisions are more likely to impact the rights and circumstances of women.²⁷⁴ However, these laws have had to be reconsidered in light of changing circumstances, culture, and calls for reforms that 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, eleven out of every 100 women experience physical violence during their lifetime, with six out of every 100 women experiencing physical violence at the hands of their husband or partner during their lifetime.²⁷⁵ 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 2008.²⁷⁶ The number of women who reported rape and indecent assault during the same period increased from 1,263 to 1,406.²⁷⁷ In light of this dramatic increase of incidents and reporting, it was argued that the DVO, first enacted in 1986, was outdated and failed to adequately address the various forms of domestic violence that women were experiencing. Furthermore, it was argued that in light of the increased incidence of cohabiting as opposed to living together only in the context of marital relationships, which presents 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 tied to the temporality of the relationship 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 who pushed 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 amendments to the ordinance.

The reform has been welcomed for its expansion of the scope of relationships which are now covered by the DVO, including same-sex cohabitantes, its extension to past relationships and its improvements in terms of accessibility to a range of court remedies and the

274. *See, e.g.*, Crimes Ordinance at 35, § 118.

275. UN Women, *supra* note 60, at 131.

276. WOMEN'S COMM'N, HONG KONG WOMEN IN FIGURES 50 (2009), *available at* http://www.women.gov.hk/download/library/report/HK_Women2009_e.pdf.

277. *Id.* at 51.

arrest powers of the police where court orders have been violated.²⁷⁸ 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 available 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 provisions for their right to housing and social welfare in order to make their independence from their spouse sustainable.²⁷⁹ Moreover, single women's need for government housing is relegated in priority to the pressing needs of married couples and families with children. Under the current system, women victims hardly have a real choice when it comes to leaving the abuser. In its most recent Concluding Observations on Hong Kong, the CEDAW Committee once again highlighted the need for the government to more effectively address domestic violence in society.²⁸⁰ It 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.²⁸¹

In other reform, the Crimes Ordinance was amended to remove the marital rape exemption that existed as a defense against a charge of rape of a woman by her lawful husband.²⁸² The Evidence Ordinance²⁸³ has also been amended to remove the "rape shield," the need for a special direction to the jury or corroboration of the victim's testimony in sexual offense cases, and spouses are privileged against incrimination of their spouses in general and in criminal proceedings.²⁸⁴

These changes have been long coming, and in light of the existing legal and policy framework, are hardly sufficient. There is a dire need to implement a policy of gender mainstreaming at all levels

278. For an overview of key amendments, see Kapai, *supra* note 144.

279. See, e.g., Polly Hui, *Families in Trouble Not Getting Help, Says Inquiry*, S. CHINA MORNING POST, Oct. 30, 2004, <http://www.scmp.com/article/476113/families-trouble-not-getting-help-says-inquiry>.

280. See Concluding Comments, *supra* note 108, paras. 35–36.

281. See *id.* 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 well-being. See Hui, *supra* note 279.

282. Robyn Emerton, *Marital Rape and the Related Sexual Offences: A Review of the Proposed Amendments to Part XII of the Crimes Ordinance*, 31 H.K.L.J. 415, 423 (2000).

283. Evidence Ordinance, (1997) Cap. 8 (H.K.).

284. *Id.* at 2–3, 4B.

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. Despite this, much remains to be done.²⁸⁵ 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 bodies,²⁸⁶ these initiatives are piecemeal and do not represent a genuine and focused effort at redressing the historic and persistent discrimination faced by women. To ensure effective measures for structural changes that apply substantive measures to unravel the impact of past discrimination, a systematic approach to a change in the policy development processes, including impact assessments of law and policy, and the implementation of laws that offer substantive protection to women in areas where they face particular risks of being marginalized by general norms is required. This can best be met by instituting a procedure similar to that required under the United Kingdom's Human Rights Act of 1998 and the Equality Act 2010, both of which mandate that an Equality and Human Rights Impact Assessment be carried out with respect to proposed legislation and policy by relevant government bureaus before the measure can be enacted formally.²⁸⁷

V. 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 that beckon 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 constituency arrangements work to the advantage of men. Women

285. LEGISLATIVE COUNCIL PANEL ON WELFARE SERVICES, POLICY INITIATIVES OF LABOUR AND WELFARE BUREAU IN PROMOTING WELL-BEING AND INTERESTS OF WOMEN (2010), *available at* <http://www.legco.gov.hk/yr10-11/english/panels/ws/papers/ws1020cb2-23-2-e.pdf>.

286. *Id.*

287. *See, e.g.*, DEP'T FOR CONST. AFFAIRS, JUSTICE, RIGHTS AND DEMOCRACY, HUMAN RIGHTS, HUMAN LIVES, A HANDBOOK FOR PUBLIC AUTHORITIES, D.C.A. 55/06, at 52–53 (U.K.) (2006), *available at* <http://www.justice.gov.uk/downloads/human-rights/human-rights-handbook-for-public-authorities.pdf>.

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).²⁸⁸ 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.²⁸⁹

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.²⁹⁰ It is only most recently that the Chief Executive Leung Chun Ying's incoming government has, for the first time since the handover, a woman as its Chief Secretary as well as a female chair of its Executive Council.²⁹¹

Likewise, women are more likely to be single parents than men²⁹² and also, more widely represented in those classified as "poor,"²⁹³ more likely to be unemployed,²⁹⁴ or receive unequal pay for work of equal value when compared to men,²⁹⁵ and they are less likely to sit on

288. For a general overview of the workings of the functional constituency system in Hong Kong, see SIMON N.M. YOUNG & ANTHONY LAW, A CRITICAL INTRODUCTION TO HONG KONG'S FUNCTIONAL CONSTITUENCIES, FUNCTIONAL CONSTITUENCY RESEARCH PROJECT 26–42 (2004), available at <http://www.hku.hk/ccpl/Docs/FCsreport.pdf>; SIMON N.M. YOUNG, HONG KONG'S FUNCTIONAL CONSTITUENCIES: LEGISLATORS AND ELECTIONS 24 (2004), available at http://www.civic-exchange.org/eng/upload/files/200503_FunctionalConstituencies.pdf. The September 2012 elections are the first in which each individual will now be entitled to two votes: one in the geographic constituency and the other in the functional constituency which comprises professional classes, but for the first time, for those who do not fall into a pre-existing functional constituency, they are entitled to vote for another list of candidates. See, e.g., Press Release, Legislative Council, Statement by the Chief Secretary for Administration, Mr. Henry Tang, on the Consultation Document on the Methods for Selecting the Chief Executive and for Forming the Legislative Council in 2012 (Nov. 18, 2009), available at <http://www.legco.gov.hk/yr09-10/english/panels/ca/papers/ca1126-ppr091118-e.pdf>.

289. See YOUNG, *supra* note 288, at 12–13.

290. WOMEN'S COMM'N, *supra* note 276, at 40–41.

291. See Fiona Law, *DJ China Appoints Carrie Lam as Chief Secretary*, John Tsang Financial Secretary, DOW JONES NEWSWIREs, June 27, 2012.

292. WOMEN'S COMM'N, *supra* note 276, at 10.

293. 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, *supra* note 60, at 104.

294. See UN Dev. Programme, Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development, 156 (2010) available at <http://hdr.undp.org/en/reports/global/hdr2010/>, which reveals that whilst 79.2% of men participate in the labor market in Hong Kong, only 60.5% of women do.

295. WOMEN'S COMM'N, *supra* note 276, at 25.

boards of corporations²⁹⁶ or other influential bodies.²⁹⁷ Three segments of the Hong Kong population that have grown in recent years are older women, single mothers and female foreign domestic helpers.²⁹⁸

Indeed, the Hong Kong government has itself acknowledged some of these issues in its report to the CEDAW Committee, recognizing that “obstacles still remain to the advancement of women in Hong Kong.”²⁹⁹ It acknowledged the difficulties that elder women experienced in rejoining the labor force, the fact that a larger proportion of women were engaged in low income jobs, casual labor, and that there were growing income disparities between men and women.³⁰⁰

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 is 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.³⁰¹ They merely put into context the limited impact of the current framework despite the existence of protections and frameworks that facilitate access to justice and law reform and their inadequacies by failing to achieve these crucial objectives and protecting women’s interests effectively.

CONCLUSION

Internationally, it appears that Hong Kong ranks relatively well on two of the United Nations’ measures relating to the assessment

296. See SHALINI MAHTANI ET AL., WOMEN ON BOARDS: HANG SENG INDEX 2009 (2009) available at <http://www.communitybusiness.org/images/cb/publications/2009/WOB.pdf>. The study found that with a rate of 8.9% representation of women on boards, whilst Hong Kong compares favorably to the likes of the Australia, it fell far behind in this regard compared to the United Kingdom, the United States of America, and Canada, who had representations in the double digits up to 15%. *Id.* at 16. 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, also there was a perception of the talent pool among women being limited. *Id.* at 5. 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. *Id.* The others shied away from preferential treatment and preferred other ways of improving female representation on corporate boards. *Id.*

297. Women comprised 27.6% of the composition of all statutory and advisory bodies in 2008. WOMEN’S COMM’N, *supra* note 276, at 43. See also YOUNG, LEGISLATURES AND ELECTIONS, *supra* note 288.

298. WOMEN’S COMM’N, *supra* note 276, at 1, 3, 10.

299. Comm. on the Elimination of Discrimination Against Women, Consideration of Reports Submitted by States Parties Under Article 18 of the CEDAW, para. 9, U.N. Doc. CEDAW/C/CHN/5-6/Add.1 (June 14, 2004).

300. *Id.*

301. See WOMEN’S COMM’N, *supra* note 276.

of gender disparities in a country.³⁰² For example, in 2007, Hong Kong ranked 22nd out of 155 countries on the Gender-Related Development Index.³⁰³ However, the analysis in this paper points to the need for a critical review of 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 and institutionalizes procedures and structures that achieve the goals of equal protection at a substantive level. The development of a substantive and transformative approach to equality has unfortunately, not been fully incorporated at relevant levels of governance in Hong Kong to facilitate the critical shift towards a more systemic and entrenched regime that would 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 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 women, as victims of discrimination and unequal treatment, face in multiple spheres.³⁰⁴ It is unsatisfactory to leave decisions about the plight of the powerless in the hands of the powerful majority.³⁰⁵ 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.³⁰⁶ 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 key areas relating to political representation and professional and other opportunities to address the historical discrimination that women have suffered

302. *Id.* at 56.

303. *Id.*

304. See *supra* Part III.D.1 for a discussion of the EOC and the courts.

305. See *supra* Part III.D.1.

306. See *supra* Part III.D.1.

as a group and to promote fully their empowerment and inclusion in society as full and equal members.³⁰⁷

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 toward addressing fully, and in good faith, the recommendations made by the Committee.³⁰⁸ 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 raise the government's awareness to better inform their policy development and law-making initiatives. There should also be a greater culture of cooperation and openness between the government and such organizations 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 to impact proposed changes.

Finally, the government would be well-served to begin charting figures that depict the plight of women who are members of other marginalized groups.³⁰⁹ 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.³¹⁰ Effective data collection tools will further the government's ability to assess the impact of law and policy more comprehensively and 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 on multiple grounds of discrimination and to assess the effectiveness of measures to enable substantive equal protection.³¹¹ 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.³¹²

The achievement of equality in the substantive and transformative sense is a journey that is long and calls for critical self-reflection.

307. See *supra* Part III.D. for a discussion of special measures the government is empowered to enact.

308. See Concluding Comments, *supra* note 108.

309. See *supra* Part III.D.

310. See *supra* Part III.D.

311. See *supra* Part III.D.

312. See *supra* Part III.D.

We are committed to internationally recognized standards and have witnessed the impact of the empowerment of women on the well-being of society as a whole. The state of inequality that persists in Hong Kong implores us to charge fully forward to internalize these important principles and to heed the lessons of international successes reflecting the outcomes of the implementation of these standards so that the equal rights of women can be substantively recognized to deliver the promise of equal respect, worth, and dignity of all human beings.