

Abstract

This paper focuses on the mechanisms developed over the past ten years to address issues of gender equality in Hong Kong, and how the need for upholding equal opportunities led to the establishment of the Equal Opportunities Commission to administer the relevant law. Also discussed are the challenges of maintaining the independence of the commission that is tasked with protecting the right to equality. This paper also looks at the social impact of upholding these rights.

Introduction

An English professor once wrote the words, “A woman without her man is nothing” on the blackboard and asked his students to punctuate the phrase. All of the men in the class wrote, “A woman, without her man, is nothing.” The women in the class wrote, “A woman: without her, man is nothing.” We know men and women are different, yet that does not make one less equal than the other.

This paper will discuss the growth of equal opportunity law in Hong Kong and mechanisms developed over the course of the past ten years to address issues of gender equality.

History

In 1976, the British government extended both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to Hong Kong. However, it was not until the 1984 signing of the Joint Declaration, by which sovereignty over Hong Kong reverted to the People’s Republic of China on July 1, 1997, that the public became widely aware of the existence of these covenants. It was only in 1989 that the British government began to implement the obligations of the Covenants.

The June 4th, 1989 Tiananmen Square tragedy in Beijing disrupted the apparent tranquility of Hong Kong. To shore up confidence in Hong Kong, the British government decided to entrench the International Covenant on Civil and Political Rights, which includes a right to equality, through domestic legislation in the form of a Bill of Rights Ordinance (BOR). This was enacted in 1991.

In 1994, as a member of the Legislative Council, I initiated a Private Member’s Bill,

entitled the “Equal Opportunities Bill”, to prohibit different forms of discrimination, including sex, race, age, disability, and sexuality.¹ A Private Member’s Bill, is a public bill put forward by a member of the legislature who is not a government servant and must not require government to provide specific funding after enactment of the bill. The Equal Opportunities Bill was the first time that a Private Member’s Bill was introduced for a whole policy area. After July 1 1997, such a bill requires executive consent before it can be initiated by a private member, thus making it almost impossible for a Private Member’s Bill to be presented.

The traditional Hong Kong government response to discrimination has been that there is no discrimination, there is no evidence of discrimination, legislation creates friction, we don’t want Hong Kong to become a litigious society, and that Hong Kong should rely on education to change people’s behaviour. The lack of a definition of discrimination before legislation made it easy for government to say that there was no evidence of discrimination, as there was no mechanism for measuring it, and no complaints could be made. Furthermore, the lack of a remedy made it meaningless to lay any kind of complaint.

The process of vetting the Equal Opportunities Bill in the Legislative Council became a consultation and hearing exercise. Many victims and NGOs used this process to submit their views and experiences. The NGOs worked hard to pin down political parties. The Bill created a lot of pressure for government, and the government reacted by providing its own bills in the areas of gender, disability and family status.

In Hong Kong, we have an executive led government and all laws and policies should

be initiated by the government. The initiation of a Private Member’s Bill reversed the role of the legislature and the government. The power of initiation is regarded as an executive prerogative and should be left to government. This initiation did not sit comfortably with the executive and the government became very defensive.

Why do we need equal opportunity?

The basic philosophy behind the concept of equal opportunities is to create a level playing field for every individual. Everyone should have access to education, employment, services and facilities. The right to a fair chance to participate in the social, political and cultural life of a community should also be guaranteed. This right enables an individual to develop his or her potential and to rely on his or her own abilities as far as possible. Such an environment encourages competition and empowers the individual to be self-reliant rather than to become dependent on welfare.

In the employment world, the concept of equal opportunities is about using human resources effectively. It means matching the right person with the right job. By tapping into the largest pool of available talents, employers can enhance the quality of their staff. Successful companies around the world now recognize that equal opportunities enhance their competitive edge and lead to business growth, enhance worker loyalty, reduce turnover and absenteeism, and improve creativity and productivity. Many leaders have come to realize that to survive and excel in today’s world, they must focus on getting the best talents. Nothing is more important than developing the human capital of a community and bias of any kind can hinder that development. This is key to creating a sustainable society and can be a

tool for the alleviation of poverty.

Of all forms of human rights, nothing can be more basic than the rights to life and to survival; the right to development is an extension of these rights. The rule of law requires that every individual is equal before the law and shall not be treated in any lesser way because of his or her gender, disabilities or colour.

The primary sources that support equality laws for Hong Kong are found in: the Basic Law, Articles 25 and 39; the International Covenant on Civil and Political Rights, Articles 3 and 24; the International Covenant on Economic, Social and Cultural Rights as incorporated into the Basic Law, Article 39; the International Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Bill of Rights Ordinance; and the Sex Discrimination Ordinance (SDO).

Bill of Rights Ordinance

International treaties are not, by themselves, directly enforceable by ordinary citizens against the Hong Kong government in a court of law because they do not have the status of domestic law. A right which cannot be enforced means nothing and a justice system that is inaccessible or cost prohibitive makes justice illusory.

While the BOR was laudable when introduced, as it ensured that the rights under the ICCPR were justiciable in the courts of Hong Kong, it was lacking in crucial areas. For example, in the area of discrimination, the Bill's broad guarantee only binds the government, not the private sector. The Bill of Rights Ordinance has a general prohibition against discrimination on all grounds but is limited to the public sector, although the original intention was to cover the private

sector as well. The objection at the time was that to enforce the laws in the private sector properly, detailed provisions as distinct from a general prohibition would be required.

The BOR though lacking details and not applicable to the private sector was the first law in Hong Kong to publicly recognize a right to gender equality.²

Sex Discrimination Ordinance

The Sex Discrimination Ordinance prohibits discrimination on the grounds of sex, pregnancy and marital status, while also prohibiting sexual harassment. The areas of activities covered include education, employment, services, housing, elections, government administration and programs. The SDO is relied upon for any discrimination complaints against the Government or the private sector. The significance of the Ordinance is to make protection against discrimination a right, to define discrimination, provide the methodology for its determination, provide remedies and enforcement in court, provide a mechanism for resolving disputes through conciliation, and to establish an independent institution, the "Equal Opportunity Commission", to administer the laws.

The Equal Opportunity Commission (EOC):

Creation of the EOC and its functions

The Equal Opportunity Commission was created by the SDO to administer the law. It is important to have a dedicated body with adequate resources to administer the law, to undertake preventive measures and to promote awareness. In many instances, the cases can become too daunting in terms

of expertise and funding for the individual to take to court and credible institutional support is needed to take on these cases. It is also important to have a body with a sufficiently wide remit to set its own agenda and strategies, and to design comprehensive approaches.

The responsibilities of the EOC include: working towards the elimination of discrimination; promoting equal opportunity; to undertake conciliation of complaints; to undertake research and education programs; to conduct formal investigation and issue enforcement notices; to establish codes of practice; and to litigate in specified circumstances. Within this framework, the core function of the EOC is to receive complaints and to conciliate disputes. There are a number of advantages in using conciliation as the initial settlement mechanism. It is friendlier, more flexible, less costly, and can create win-win situations. As an example, this approach could be useful in sexual harassment cases where parties may want to have an apology, or with changes in corporate procedures and not money. This process brings us closer to restorative justice versus strictly retributive justice.

This is not to say, however, that conciliation should be made the only mechanism available. For those who wish to go directly to court, particularly where major principles of law are involved and for those that failed conciliation, litigation rights must be made available.

Conciliation and litigation

In cases where conciliation fails, the complainant may apply to the EOC for legal assistance. The EOC only grants legal assistance when a question of principle arises or where the evidence is complex. Generally,

these would include systemic discrimination where a large number of people are affected or where public interest reasons exist. Because it is not a legal aid agency, the EOC does not accept all applications, instead, it undertakes strategic litigation. The function of strategic litigation gives the EOC its teeth and provides the bargaining power for respondents to want to conciliate.

Victims can file an action in the District Court without using the EOC. Legal arguments and evidence can be complex and legal representation is often cost prohibitive, therefore a specific provision has been made in the SDO to exempt parties from having to pay the cost when losing a case. A cost order can also be made if there are special circumstances and if the case was maliciously or frivolously brought before the court.

Under the implied and inherent powers of the court, cases may be brought to higher courts under judicial review proceedings. This is an effective route when dealing with major policy and systemic issues involving the government. This process imposes legal accountability on government and, if used well, can create a great deal of impact through educational and deterrent value. In this instance, the court can declare a government policy illegal and require the government to stop a practice. This method of judicial review proceedings was applied in the High School Case discussed below.

Additional capacity of the EOC

In addition to the conciliation and litigation powers, the EOC also has the power to require the production of information and attendance at conferences, to commence general and formal investigation with enforcement notices following a formal investigation, to initiate court actions against

discriminatory job ads without a complainant, and to issue codes of practices. In particular, codes of practices are extremely useful in providing guidance to parties and to provide consistency of behaviour.

The EOC has a dual role, to eliminate discrimination and to promote equal opportunities; elimination is punitive but promotion is proactive. Where we are dealing with paradigm shifts in attitudes, promotion and education are essential and a balanced mix of litigation and education is the most effective. Good investigation and research capabilities, promotion strategy and codes of practice are essential tools in the EOC arsenal.

Why legislate?

The mindset: Social norms and values continue to be defined according to male needs and perspectives. This leads to male values continuing to dominate the decision making process.

Rights: Individuals involved with lobbying for protection of the vulnerable, fair participation, and for enjoyment opportunities, would often say that protection must be rights based. There is no protection unless there is a right, and gender equality must be based on legislation.

Vested interest: Vested interest and status quo create very powerful resistance to change. We say possession is 90% of the law. I have also learned that status quo is 90% of the law. We need law to change prevailing status quo and attitudes.

Many years ago, in Hong Kong, spitting was highly prevalent and linked to the spread of diseases. The Hong Kong government legislated against spitting that resulted in

not only a law enforcing the cessation of a bad habit, but it also created an awareness of public health issues. The law can be a tool for social engineering and helps to fast-track learning. Centuries of prejudices and status quo cannot even begin to shift without application of the law.

We call such laws “empowerment laws” because they give an individual the platform to self-initiate change based on the law. The law distributes protection and rights to the individual and helps the individual to help him/herself. The already disadvantaged individual often has no means or resources at their disposal and the law is the one thing that can empower them. Legality is the means and the resource that can be created for the disadvantaged individual.

Independence of the EOC

The independent status of the EOC does not sit comfortably with some government officials who perceive these laws as interfering with executive prerogative and calling into question long-standing policies and practices. Maintaining independence is the number one challenge for all human rights and equal opportunities institutions around the world and Hong Kong is no different. These institutions have a common predicament; they are critics of their benefactor, the government, and tensions can build up.

The relationship between national human rights institutions and their governments was addressed at a UN sponsored meeting in Paris in 1991. At this meeting, a comprehensive series of recommendations on composition, status, and functions of national human rights institutions were drafted. These recommendations became commonly known as the Paris Principles, and in 1993 they were endorsed by the General Assembly.³ The

key features of the Paris Principles, regarding national human rights institutions, provide for the following: independence and autonomy of national human rights institutions from their government; a broad mandate based on universal human rights standards; adequate powers of investigation; and the provision of sufficient resources.

The attempts of governments to intervene with the independence of national human rights institutions are exemplified by the following cases in Australia and Thailand.

Australia

The Human Rights and Equal Opportunity Commission (HREOC) of Australia was reprimanded by the Howard government after they intervened in, and criticized the government's handling of, an asylum-seeking case, known as the "Tampa Affair." In response to these actions, the government introduced legislation to limit the Commission's power to intervene in court and seek judicial reviews.

Thailand

At a meeting in Islamabad, the National Human Rights Commissioner of Thailand, Professor Pradit Chareonthaitawee, expressed his concern over the killing of over 400 drug suspects in Thailand. The UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Execution then contacted the Thai government and advised that they strictly abide by international human rights law and mind the defined limits on the use of lethal force.

The Thai Prime Minister chastised Professor Chareonthaitawee for making a "non-patriotic allegation" to the United Nations. In response to the allegations, the Government also released information to

discredit the Professor's claims. As a result, his family received anonymous, harassing and life threatening telephone calls. The Spokesperson for the ruling party claimed that the Professor had no authority to raise the case with the UN and, as the National Human Rights Commissioner of Thailand; he should have investigated the case domestically. The ruling party then called for the impeachment of the Professor.

Hong Kong

There are several issues of concern for the Hong Kong Equal Opportunities Commission. These relate to the appointment of chairpersons and members and funding for litigation. Lack of transparency, lack of diverse representation in appointment, and unreasonable funding cuts can compromise the independence and credibility of the Commission.

Cases brought before the EOC

The following cases represent the diversity of issues and that have been brought before the Equal Opportunity Commission.

The High School Case

EOC v. Director of Education,
2001 2 HKLRD 690

For the first time, in 1998, the Hong Kong education authorities provided access to admissions scores that affect the entrance of boys and girls into secondary school. The information derived from this access revealed that girls with better scores were unable to get into the same schools admitting boys with lower scores, and that this system had been in place since 1978. An investigation ensued and verified that the system preferred the top 30% of boys and penalized the top 30% of

girls as well as the lower 70% of boys.

This case dealt with systemic discrimination and succeeded in requiring a policy change. The outcome was that it set a precedent and provided the basis of interpreting discrimination, and defined what “special measure” is by taking a purposeful approach and cross-referencing it to CEDAW. It made clear that the law must be construed as intended to carry out the obligations of CEDAW and not be inconsistent with it. In addition, the rights attached to the individual and the government cannot look at “group fairness” and turn a blind eye to the rights of the individual, and that separate treatment of groups (segregation) does not provide equality.

The Mental Illness Case

K, Y and W v. The Secretary for Justice,
2000 3 HKLRD 777

K applied to the Fire Services for the post of an ambulance-man and was rejected because his mother suffered from schizophrenia. Y applied for the post of fireman and was rejected because the fire department formed the view that his father had a mental illness that could be inherited. W applied to the Customs and Excise Department, started working as a trainee and was dismissed when the Department learned of his mother's schizophrenia.

Expert evidence was adduced by the EOC and the court decided that the risk of inheriting the illness, as well as sudden onset, in each of the cases would be very rare. The small risk of developing the illness was cited as not a sufficient threat to safety. The decision to exclude the plaintiffs from employment did not constitute a genuine occupational requirement as claimed. The court awarded the three plaintiffs three million dollars in

damages plus the EOC cost. In this instance, the court felt the government's behaviour constituted special circumstances for a cost order to be made against government, contrary to the normal order of no cost against the defendants. Upon the application of the EOC, due to the stigma that might attach to the plaintiffs, an anonymity order was issued by the court.

The Pregnancy Case

Chang Ying Kwan v. Wyeth,
2001 2 HKC 129

A former marketing manager of Wyeth gave notice of her pregnancy. At the time of notice she was asked to resign or accept a demotion. When she complained to the EOC, she was victimized and the inappropriate treatment continued even after she returned from maternity leave. This treatment led to her eventual resignation.

In this case, the court found that pregnancy was one of the factors causing this discriminatory act, although not the sole factor (this approach is prescribed in Section 4 of the SDO), and determined that there was victimization. There was also vicarious liability on the part of the employer and the resignation was regarded as constructive dismissal.

The Apology Case

Ma Bik Yung v. Ko Chuen,
2002 2 HKLRD 1

In this case, the plaintiff filed harassment under the Disability Discrimination Ordinance. The judge ordered damages, and required the defendant to apologize for the humiliation caused to the plaintiff. The defendant was unwilling to apologize and the Court of Appeal held that it was unable to order an apology against an unwilling defendant. The case went on to further appeal where it was decided

that the Court does have the ability to order an apology against an unwilling defendant; however, in this instance it did not meet the requirements of rare cases with exceptional circumstances.⁴ This case sought to lower the social cost of litigation by maintaining an apology as a remedy and implementing restorative versus retributive justice.

Women's Commission of Hong Kong

In November 1998 the EOC issued a report citing the need for a high-level central mechanism on women's affairs to fulfill its obligations under CEDAW. The importance of this mechanism being a high-level body was emphasized since a Commission outside of the Government cannot coordinate policies and services for women at the governmental level.⁵ In 2001, the Women's Commission was established to promote the well-being and interests of women in Hong Kong.

The Commission is comprised of eighteen non-official and four ex-officio members who are appointed for three-year terms. According to their mandate, the Commission is responsible for advising the Government on women's issues and policy direction. The Commission is comprised of four working groups and functions as an advisory mechanism for longer-term strategies related to the development and advancement of women, reviews all needs and services within and outside of government, is responsible for identifying priority areas, and serves as a conduit between the government and women's groups and NGO's.⁶ However, what is unfortunate is that the Commission is an advisory body and not an accountable high-level central mechanism to take women's issues and policies to the next level.

Endnotes

- 1 HKABPW's History of Campaigns and Legislation in Hong Kong, page 1. Available online at, www.bpw-international.org/word/activities-project-HKABPW-Campaigns-Legislations.doc.
- 2 Carol J. Peterson. *Engendering a Legal System: The Unique Challenge of Postcolonial Hong Kong*. Chapter 2, pages 23-26. Gender and Change in Hong Kong: Globalization, Postcolonialism, and Chinese Patriarchy, Ed. Eliza W.Y. Lee. UCB Press, Vancouver: 2003.
- 3 Office of the High Commissioner for Human Rights, "Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights." Available online at, <http://www.unhcr.ch/html/menu6/2/fs19.htm>.
- 4 Ma Bik Yung and Ko Chuen, In the Court of Final Appeal of the Hong Kong Special Administrative Region. Available online at, http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=33042&AH=&QS=&FN=&currpage=
- 5 Equal Opportunities Commission: NGO Report on the Convention on the Elimination of All Forms of Discrimination Against Women. November 1998. Available online at, http://www.hku.hk/ccpl/research_projects_issues/cedaw/eoccedawreport.html.
- 6 Official Women's Commission Website. Available online at, <http://www.women.gov.hk/eng/home.html>