

LITIGATION RAISING ISSUES RELATING TO WOMEN'S HUMAN RIGHTS IN THE ASIA-PACIFIC REGION: THE SEX DISCRIMINATION ORDINANCE AND DOMESTIC VIOLENCE IN HONG KONG



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Introduction

The provisions of the International Covenant on Economic, Social and Cultural Rights¹ and the International Covenant on Civil and Political Rights² are applicable to Hong Kong following the ratification by the United Kingdom of the two covenants in 1976.³ In June 1994, the Hong Kong Government announced its decision to seek the extension of the Convention on the Elimination of All Forms of Discrimination against Women (the Women's Convention)⁴ to Hong Kong and to introduce legislation against sex discrimination. Hong Kong first implemented the two Covenants through existing legislation and policy. Then, in 1991, the Hong Kong Bill of Rights Ordinance was enacted.⁵

The application of the two Covenants to Hong Kong has been preserved by the Basic Law, which will be applicable to Hong Kong after 1 July 1997 when sovereignty over Hong Kong will be resumed by the People's Republic of China.

The extension of the Women's Convention to Hong Kong is now on the agenda of the Sino-British Joint Liaison Group pending the approval of the Chinese Government.⁶

In recent years, local legislation has been undergoing review and amendments in pursuance of the elimination of differential treatment of women and men. These include, for example, amendment of the Inland Revenue Ordinance⁷ in 1989 to provide for separate taxation for married women; the Parent and Child Ordinance which was introduced in 1993, and the amendment of the Protection of Women and Juveniles Ordinance in 1993 to the present Protection of Children and Juveniles

¹ 993 UNTS 3, adopted on 16 December 1966, entered into force 3 January 1976.

² 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

³ The United Kingdom signed both Covenants on 16 September 1968 and ratified them on 20 May 1976.

⁴ 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981. The United Kingdom signed the Convention on 22 July 1981 and ratified it on 7 April 1986, but it did not extend the Convention to Hong Kong at that time.

⁵ Hong Kong Bill of Rights Ordinance (Cap 383), reprinted in 1 HKPLR liv-lxviii.

⁶ The People's Republic of China signed the Convention on 17 July 1980 and ratified it on 4 November 1980. [Eds] The Convention was extended to Hong Kong with effect from 14 October 1996.

⁷ Inland Revenue Ordinance (Cap 112).

Ordinance.⁸ Legislation in the process of amendment include: the Marriage Ordinance,⁹ the Matrimonial Causes Ordinance,¹⁰ the Adoption Ordinance,¹¹ the Affiliation Proceedings Ordinance,¹² and the Separation and Maintenance Orders Ordinance.¹³

More recently, part of the Women's Convention is being introduced locally by the Sex Discrimination Ordinance.¹⁴ The Equal Opportunities Commission is now in the process of being set up. To date, cases under the two new pieces of legislation have yet to come through the judicial process.

Objects of the Sex Discrimination Ordinance

This is an ordinance introduced to render unlawful certain kinds of sex discrimination, discrimination on the ground of marital status or pregnancy, and sexual harassment; to provide for the establishment of a commission with the functions of working towards the elimination of such discrimination and harassment and promoting equality of opportunity between men and women generally; and to provide for matters incidental thereto or connected therewith.

A summary of the Ordinance

Part I sets out the application, interpretation and definitions section. Part II deals with the discrimination against women and men on the ground of sex, and discrimination based on marital status, pregnancy and victimisation. Part III deals with discrimination and sexual harassment in the employment field, which is further divided into the following areas of concern:

- Sections 11-14: discrimination by employers against applicants and employees in the offer and terms of employment, access to opportunities for promotion, training, benefits, facilities and services; and discrimination against contract workers; with the exception where the gender of the person is a genuine occupational qualification.
- Sections 15-20: discrimination by partnerships, trade unions, qualifying bodies, vocational training bodies, employment agencies and commission agents.
- Sections 21-22: deals with discrimination by Government, religious orders etc.

⁸ Protection of Children and Juveniles Ordinance (Cap 213).

⁹ Marriage Ordinance (Cap 181).

¹⁰ Matrimonial Causes Ordinance (Cap 179).

¹¹ Adoption Ordinance (Cap 290).

¹² Affiliation Proceedings Ordinance (Cap 183).

¹³ Separation and Maintenance Orders Ordinance (Cap 16).

¹⁴ Sex Discrimination Ordinance (Cap 480).

- Section 23: deals with sexual harassment of employees by the principal, or persons in position to offer employment, a fellow worker or fellow contract worker, a partner or fellow partner of a firm, a commission agent or fellow commission agent.
- Section 24: deals with other sexual harassment by member of an organisation of another member or the woman seeking to be a member, member of an authority or woman seeking an authorisation or qualification, training organisations etc.

Part IV deals with discrimination and sexual harassment in other fields such as:

- Sections 25–27: educational establishments, with the exception of single sex education establishments.
- Sections 28–34: deal with persons concerned with the provision of goods, facilities, services and premises such as hotels, banks, schools, restaurants, transport facilities, government departments and public libraries etc., including the occupation of rented premises, with the exception of premises of voluntary bodies, hospitals, religious establishments, and toilets etc.
- Sections 35–39: render it unlawful to discriminate against a woman in her eligibility to vote for and to be elected or appointed to advisory bodies set up under the law, to be offered a pupillage or tenancy or given work in the practice of a barrister, to be admitted as a member of a club, or in the performance of the functions of the government.
- Sections 39–41: deal with sexual harassment of a woman in educational establishments, in premises for occupation etc.

Part V deals with other unlawful acts such as discriminatory practices and advertisements; criminalising actions of instigators and aiders in such unlawful acts and making their principals liable.

Part VI sets out the exceptions such as charities, sport activities, communal accommodations, special training bodies, certain elected bodies or trade unions, including its application to New Territories land under the New Territories Ordinance¹⁵ and the New Territories Leases (Extension) Ordinance.¹⁶

Part VII establishes the Equal Opportunities Commission, its functions and powers. Part VIII is the enforcement part, which sets out the procedure in bringing a claim under the Ordinance in court, and the assistance the Commission offers to persons suffering from discrimination or sexual harassment in obtaining information, conciliation, advice and legal assistance.

¹⁵ New Territories Ordinance (Cap 97).

¹⁶ New Territories Leases (Extension) Ordinance (Cap 150).

Domestic violence

Domestic violence is an area of particular concern in the context of the Women's Convention. The adoption of the Declaration on the Elimination of Violence against Women (the Violence Declaration) on 20 December 1993 by the United Nations General Assembly is evidence of such concern.¹⁷ The General Assembly recognises in the preamble of the Declaration that:

“effective implementation of the Convention on the Elimination of All Forms of Discrimination against Women would contribute to the elimination of violence against women and that the Declaration on the Elimination of Violence against Women, set forth in the present resolution, will strengthen and complement that process”¹⁸

and concerns that:

“violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of their full advancement, and that violence against women is one of the crucial social mechanisms by which Women are forced into a subordinate position compared with men.”¹⁹

and that:

“violence against women is an obstacle to the achievement of equality, development and peace...”²⁰

Role of the judiciary

Article 4 of the Violence Declaration provides:

“States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

- ...
- (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;

¹⁷ GA Res 48/104, UN Doc A/48/49, at 217 (1994), reprinted in 1 IHR 329.

¹⁸ Violence Declaration, preamble, para 3.

¹⁹ *Id* at para 6.

²⁰ *Id* at para 4.

- (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;

...

- (g) Work to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialised assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, health, and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation;

...

- (i) Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitise them to the needs of women”.

The Victoria Falls Declaration on the Promotion of Human Rights of Women²¹ in 1994 confirms the Violence Declaration.²²

Background

For many years in the past, our community had acted as if domestic violence did not exist. There was a reluctance to do anything about it as it is regarded as interference in private family matters, and if a problem arose, it would have been dealt with as a family law matter. There is now a gradual awareness as to the problems of domestic violence.

Legal solutions come in two forms, namely, criminal law remedies and matrimonial relief.

Prosecutions under criminal law may be brought under legislation such as the Crimes Ordinance,²³ and the Offences Against the Person Ordinance.²⁴

²¹ See Commonwealth Secretariat, *Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women*, Victoria Falls, Zimbabwe, August 1994. The Declaration is also reproduced at the beginning of this volume.

²² Victoria Falls Declaration, paras 13 and 14.

²³ Crimes Ordinance (Cap 200).

²⁴ Offences Against the Person Ordinance (Cap 212).

Matrimonial relief, such as divorce and ancillary relief, are sought under the Matrimonial Causes Ordinance,²⁵ the Matrimonial Proceedings and Property Ordinance,²⁶ the Married Persons Status Ordinance,²⁷ and the Domestic Violence Ordinance.²⁸

Criminal law remedies

This is perhaps the most effective and immediate method to deter further physical violence in the home for most abused women. It is, however, not often pursued further after the initial report to the police. It is also not surprising to find in the courts of Hong Kong, victims are reluctant to give evidence against their abusers who were the husband in a battered wife case or the father in a case involving incest with the female victim.

The victim in a wife abuse case is a competent but not compellable witness in the Hong Kong courts. In a case of incest, where the daughter is both a competent and compellable witness, there have been a number of cases in the last year alone where the victims, who were either a daughter or step-daughter, had turned hostile at the trial. The court in those cases, failing other corroborating or independent evidence, finds itself bound to acquit the offender.

This year, we have seen for the first time, the introduction of the giving of evidence or examination by way of live television links in our courts for vulnerable witnesses. The legislation regulating criminal procedure²⁹ has been amended to admit evidence on video recorded evidence and from live television-linked rooms in the court building so that young and/or vulnerable victims of cruel or sexual crimes do not have to face the perpetrators in an open court. There is now also a better witness protection programme during the period the victims of violent crimes are giving evidence in court.

In most domestic violence cases, the sentences handed down tended to be non-custodial and less severe than for other violent crimes. Incarceration is usually ordered in the most serious cases of domestic violence. It is certainly a matter of concern to the court that custodial orders often create financial hardship to the victims. There are as yet no compulsory reeducation programmes or counselling available to offenders in cases involving domestic violence. Each prison in Hong Kong has a resident psychologist. These psychologists, however, are not required to provide specially designed rehabilitation programmes, treatment programmes, training or reeducation for offenders of domestic violence. The work on reeducating the offenders is placed on the probation officers for those who are put on probation or the supervising officers for those who have served a custodial term in prison.

²⁵ Matrimonial Causes Ordinance (Cap 179).

²⁶ Matrimonial Proceedings and Property Ordinance (Cap 192).

²⁷ Married Persons Status Ordinance (Cap 182).

²⁸ Domestic Violence Ordinance (Cap 189).

²⁹ Criminal Procedure Ordinance (Cap 221).

Remedies under matrimonial law

These are the most common remedies sought by abused women who are either married to or have a long-term cohabitation relationship with the abusers.

These remedies include divorce and separation orders (for those who are married), and injunctions and non-molestation or eviction orders against the abusers.

Up until the 1980s, domestic violence injunctions were obtained under the inherent jurisdiction of the court. The criteria for the granting of restraining orders depended on the facts of each individual case. An application for a restraining order can only be made in cases where the abuser and the abused were legally married to each other and divorce proceedings had commenced or were about to commence. This was changed by the Domestic Violence Ordinance introduced in 1986. That legislation has made it possible for the abused woman to obtain an injunction restraining the husband or the cohabitant from further molestation or to restrain the abuser from entering the matrimonial home or from a particular part of the matrimonial home. Such applications can be made independently of any other legal action. Furthermore, under this Ordinance, the police can arrest the abuser without a warrant in cases where he is found acting in defiance of the order of the court.

In the year 1994, 2,736 divorce petitions were filed in the divorce registry in Hong Kong applying for divorce on the ground of irretrievable breakdown of marriage due to "unreasonable behaviour" (under which domestic violence is classified). The figure for 1995 was 3,048 out of 10,292 divorce petitions. There were 13 applications for orders under the Domestic Violence Ordinance not made in the course of divorce proceedings in 1994, and a total of 16 applications in 1995.

The courts in Hong Kong often find that the abused person would come back for an extension after the initial 3 months granted for the non-molestation injunctions. Such injunctions, however, cannot be extended beyond a total period of 6 months. Furthermore, under the Domestic Violence Ordinance, women who are divorced and/or living apart from their husbands or abusers are not entitled to apply for an injunction or to ask for it to be continued.

Another area of difficulty found in the family court in Hong Kong is the housing problem of the litigants. Private housing is expensive for most people in Hong Kong. Over 50% of the local population live in public housing. In applying for public housing, a family applies as a unit and usually the husband, as head of the household, is the registered tenant. Consequently, the Housing Department of the Hong Kong Government as the landlord finds the ouster injunctions to exclude the wife-battering husbands from the Housing Department unit difficult to enforce. As a result, abused women who are reluctant to return to their husbands have resorted to applying for compassionate rehousing which has become available in recent years after years of complaints from

victims of domestic violence. Those living in privately purchased homes in joint names may find themselves living under the same roof as their husbands long after the parties' divorce, in spite of histories of domestic violence.

There are as yet no available remedies provided in our legislation for children who are witnesses of domestic violence, who may have developed behavioural and emotional adjustment problems due to the impact of growing up in an environment of domestic violence.

Further, Hong Kong courts do not have jurisdiction to compensate victims of domestic violence for the pain they suffered, as is the case in some other jurisdictions in the Commonwealth.

Domestic violence is not just a legal problem, it is a social problem. Education may be the primary medicine. The community's attitude towards the role of women must also change if domestic violence is to be eliminated. Legal solutions such as injunctions, divorce and criminal prosecutions can only provide temporary relief and prohibit physical violence or harassment, applying punishment as a deterrent when victims approach for help, but for those who prefer to suffer in silence, the court can provide no solutions.