

The Equal Opportunities Commission and the Courts in Hong Kong: A Partnership Model?*

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Abstract

Since the 1950s, the federal courts in the U.S. have developed a "new partnership" with public administrative agencies. The partnership enables the courts to play a large role in shaping public administrative decision making, implementation, other activity, and values. Severely criticized by scholars and practitioners as judicial meddling and interference with administration, the partnership model rests on the establishment of new constitutional rights for individuals in their encounters with public agencies, facilitation of suits against agencies, creation of remedial law, provision of qualified, rather than absolute, immunity in constitutional tort suits against public employees and officials, and adjustment of the level of judicial scrutiny of agencies on a continuum ranging from virtually "no look" to a "soft look" to a "hard look" depending on the administrative action involved. Our research demonstrates that some elements of the partnership model are present in Hong Kong, at least with respect to the courts and the Equal Opportunities Commission (EOC). Specifically, the courts have: 1) strengthened the statutory right to equal opportunity and the constitutional right to equality; 2) applied a hard look to administrative rationales for breaching these rights; 3) rejected "administrative difficulty" as a basis for using discriminatory gender classifications; and 4) mandated substantial institutional reform. In so doing, the courts have strengthened the EOC's ability to promote equal opportunity. This single case study adds to extant knowledge about courts and public administration and the adaptability of the partnership model to different political systems.

Introduction

The relationship between courts and administrative agencies has long been a subject of academic research in the fields of law, public administration, and political science. To a

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considerable extent, interest focuses on the scope of judicial review of administrative action. The courts must be able to check agency activity in order to protect the rule of law and individual rights under constitutions, basic laws, international covenants, treaties, and other legal instruments. However, judges are typically generalists whereas administrators are expert specialists. Matters are further complicated by institutional self-interest, divergent policy orientations, and public administration's typical emphasis on cost-effectiveness and favorable benefit-cost ratios which, if left unchecked, can seriously victimize segments of any society. These factors may make for an uneasy relationship that alternates between periods of "crisis and legitimacy."¹ In periods of crisis, the relationship between courts and agencies is likely to be antagonistic, as was the case in the U.S. from the inception of the administrative state in the late nineteenth century to the mid-1930s.² In periods of legitimacy, the relationship between courts and agencies will be more supportive, perhaps even approaching a partnership.³

In this article we examine the relationship between courts and a single agency in Hong Kong, the Equal Opportunities Commission (EOC). We do so with a view toward comparison with the United States, which has developed a comprehensive constitutional- and administrative law-based partnership model for far reaching judicial superintendence over administrative agencies. We start with a quick review of that model followed by a brief description of the Hong Kong judicial system. We then turn to a discussion of the EOC and its implementation of the four ordinances it administers: the Race Discrimination Ordinance, Sex Discrimination Ordinance, Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance. Next we assess how court cases have affected the EOC's mission, powers, and legitimacy, with particular attention to a major institutional reform case brought by the EOC, *Equal Opportunities Commission v. Director of Education* (2001).⁴ The article concludes with an assessment of the applicability of the partnership model to the relationship between the Hong Kong courts and the EOC.

The U.S. Partnership Model

The U.S. partnership model between the federal courts and administrative agencies can serve as a baseline or benchmark for comparisons with other common law based constitutional (or basic) law jurisdictions with highly developed administrative systems. This is not to take a normative stance or suggest that partnership is necessarily the best, or even a good model. Rather, the comparison is intended to explore whether and how courts elsewhere may gain comprehensive, generally perceived legitimate, leverage over administrative agencies.

In the U.S., courts were hostile to administrative agencies from the 1890s to the mid-1930s. Judicial opposition was based on reluctance to allow the common law, which empowered

¹ James Freedman, *Crisis and Legitimacy* (New York: Cambridge University Press, 1978).

² David Rosenbloom, "Administrative Law and Regulation," in Jack Rabin, W. Bartley Hildreth, and Gerald Miller, eds., *Handbook of Public Administration*, 3rd ed. (New York: Taylor & Francis, 2007). pp. 635-696.

³ David Bazelon, "The Impact of the Courts on Public Administration," *Indiana Law Journal* 52 (1976), 101-110; David ; Rosenbloom "Public Administration and the Judiciary: The 'New Partnership,'" *Public Administration Review* 47 (January/February 1987), 75-83.

⁴ HCAL 1555/2000, decided June 22, 2001.

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the judiciary to make rules for the economy and society, replaced by statutes and administrative rules. Judicial hostility to major New Deal legislation in 1935 provoked tremendous pushback from President Franklin D. Roosevelt, who threatened to "pack" the Supreme Court by convincing Congress to raise the number of justices from nine to as many as 15 and then filling the new slots with his own appointees. The court packing scheme was never implemented, but by 1937, a slim majority of justices was able to uphold the constitutionality of New Deal economic programs. This ushered in a period of deference by federal courts to administrative expertise and acquiescence in the growth of administrative powers for rulemaking, adjudication, enforcement, and the allocation of public values and resources.⁵

Next, beginning in the 1950s, a partnership incrementally developed between judges and administrators, with the judiciary generally acting as the senior partners. When it fully crystallized in the mid-1970s, the partnership model was based on five developments that provide the courts with very substantial leverage over administrative behavior. First, the courts interpreted or reinterpreted constitutional law to create, find, or articulate new rights for individuals in their encounters with public administration.⁶ For example, constitutional equal protection, cruel and unusual punishments, and procedural due process were redefined in ways that protected minorities and women, prisoners, and agencies' clients/customers and employees. Second, relying on administrative law, the courts required agencies to provide greater clarity in their rulemaking activities and to adduce stronger evidence in support of their final rules (e.g., *Industrial Union Department, AFL-CIO v. American Petroleum Institute* 1980; *Motor Vehicles Manufacturers Association v. State Farm* 1983⁷). Third, the courts relaxed the rules of standing to sue, thereby making it easier for individuals to bring cases against agencies and administrators (*United States v. Students Challenging Regulatory Agency Procedures* 1973⁸). Fourth, the courts developed a new kind of lawsuit—for the U.S., at least—called remedial law which enables a single district court judge to take over an entire administrative operation, such as a prison or public school, mental health, or personnel system.⁹ Fifth, the judiciary redefined constitutional tort law, making public administrators and officials potentially liable for monetary damages to individuals they injured by violating "clearly established constitutional rights of which a reasonable person would have known."¹⁰

The partnership model has come under massive criticism for judicial overreaching, usurpation of lawmaking and administrative functions, self-aggrandizement, incompetence, expense, inefficiency, adverse unintended consequences, and negative impacts on public budgeting, administration, and federalism.¹¹ But what would be more appropriate? Certainly, the

⁵ See David Rosenbloom, Rosemary O'Leary, and Joshua Chanin, *Public Administration and Law*, 3rd ed. (Boca Raton, Florida: Taylor & Francis, 2010), chapter 1; Rosenbloom, "Administrative Law and Regulation," pp. 644-651, 657-665.

⁶ Rosenbloom, O'Leary, and Chanin, *Public Administration and Law*, 3rd ed.

⁷ 448 U.S. 607; 463 U.S. 29.

⁸ 412 U.S. 669.

⁹ Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89(1976): 1281-1316.

¹⁰ *Harlow v. Fitzgerald* 457 U.S. 800, 818 (1982).

¹¹ See Rosenbloom, O'Leary, and Chanin, *Public Administration and Law*, 3rd ed. chapter 9 for a review of the literature on the courts and public administration during the partnership period.

earlier models were laden with problems. Judicial opposition to the administrative state was politically untenable. Acquiescence failed to protect individuals from administrative abuse. Perhaps there are better models elsewhere, which is one reason for undertaking comparative and additional single country studies, such as this one.

Why Hong Kong?

We chose Hong Kong as the subject of this research because it is almost a quintessential administrative state with a legal system and judiciary that share several important similarities with the U.S., but also manifest some significant differences. The U.S. and Hong Kong each have a common law tradition, initially derived from the British. Although statutory law has gone a long way to replace common law in the U.S. and is increasingly prominent in Hong Kong, the judiciary in both systems continues to "make law" through statutory and constitutional interpretation. In Hong Kong, the "constitution" is formed by the Basic Law and the Bill of Rights Ordinance, rather than by a single comprehensive written constitution per se. However, judges and others frequently refer to actions as contrary to the constitution. Judicial rulings based on constitutional interpretation and having significant impacts on agency operations are very common in the U.S.¹² Examples in Hong Kong include giving prisoners the right to vote and overturning a one-year residency requirement for public assistance.¹³ Both systems have a multi-tiered hierarchy of courts reaching from the trial level (district courts), through an appeals level, to a single "high court" at the top of the hierarchy. They also have a number of specialized courts. Finally, at the federal level in the U.S.¹⁴ and in Hong Kong, judges are appointed and enjoy tenure at good behavior.

In some areas of law, the similarities go well beyond structure and include substantive interpretation. Equal protection of the laws is a good example and one that is highly relevant to the relationship between the EOC and the courts. In the U.S. equal protection is explicit in the Fourteenth Amendment and incorporated into the word "liberty" in the Fifth Amendment by judicial interpretation.¹⁵ (*Bolling v. Sharpe* 1954). When public laws, policies, or patterns of practice classify individuals by race or ethnicity, the burden of persuasion will be on the government to show that its action is "narrowly tailored" to serve a compelling interest, such as promoting public health or safety. Narrow tailoring requires that the means—that is, the classification—closely fit achievement of the compelling interest and do not gratuitously abridge equal protection. The courts will apply "strict scrutiny" (that is, very limited deference) to the government's assumptions, claims, and rationales.¹⁶ Coming from different legal provisions, Hong Kong law closely tracks this interpretation and application of equal protection. In *Yao Man*

¹² Rosenbloom, O'Leary, and Chanin, *Public Administration and Law*, 3rd ed.

¹³ *Chan Kin Sum v. Secretary for Justice & Electoral Affairs Commission*, H.K.L.R.D, 166 (C.F.I.) (2008); *Yao Man Fai George v. Director of Social Welfare*, HCAL 69/2009 (2010).

¹⁴ As of 2008, at least some judges were elected in 39 U.S. states and 87 percent of all judges in the states were elected. See Liptak, "Rendering Justice, With One Eye on Re-election," *New York Times*, May 25, 2008: <http://www.nytimes.com/2008/05/25/us/25exception.html>

¹⁵ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁶ See Rosenbloom, O'Leary, and Chanin, *Public Administration and Law*, 3rd ed., pp. 130-132).

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Fai George v. The Director of Social Welfare (2010).¹⁷ Article 25 of the Basic Law provides that Hongkongers will be equal before the law, a provision repeated in Article 22 of the Hong Kong Bill of Rights. As in the U.S., equality before the law does not always require precisely equal treatment. In Hong Kong, provisions that trench on equality before the law must pass "the justification test." As the High Court explained, 1) "difference in treatment must pursue a legitimate aim" which requires that "a genuine need for such difference must be established"; 2) "[t]he difference must be rationally connected to the legitimate aim"; 3) "[t]he difference in treatment must be no more than is necessary to accomplish the legitimate aim"; and 4) "the court will scrutinize with intensity whether the difference in treatment is justified."¹⁸ Also similar to the U.S., the High Court found that a one-year continuous residency requirement for eligibility for social welfare benefits unjustifiably "impedes upon the constitutional right to travel."¹⁹ In fact, the Court referred to the U.S. Supreme Court decisions in *Shapiro v. Thompson* (1969) and *Saenz v. Roe* (1999) in reaching this conclusion.²⁰

There are also significant differences between U.S. and Hong Kong law that may bear on judicial review of agencies. Although often subject to criticism and ridicule in the press, public administration is a much higher status occupation in Hong Kong than in the U.S.²¹ Hongkongers are much more trusting of government than Americans and engage in less "bureaucrat bashing." Each court system has specialized courts that have no counterpart in the other. Juvenile and small claims courts exist in both systems. However, Hong Kong has an Obscene Articles Tribunal and a Labor Tribunal while the U.S. has a Tax Court and Courts of Appeals for the Armed Forces and Veterans Claims. The appeals courts in Hong Kong serve as trial courts in some criminal cases. Justices on the Hong Kong Court of Final Appeal decide cases in panels of three whereas in the U.S., all nine members of the Supreme Court hear and decide individual cases. Only three justices who serve on the Court of Final Appeal are permanent, with others rotating on and off cases before it. Hong Kong is also a "loser pays" system, which should deter would-be plaintiffs from bringing weak suits against agencies in the hope of reaching pre-litigation settlements, which are very common in the U.S. Finally, officials in Hong Kong do not personally face law suits seeking money damages for constitutional torts committed within the framework of their jobs.

The Hong Kong Judicial System

The Hong Kong judicial system is independent of the legislature and chief executive. Administratively and judicially, it is headed by Chief Justice of the Court of Final Appeal. Judges are appointed by the chief executive upon recommendation of an independent statutory body called the Judicial Officers Recommendation Commission. Judges must be qualified legal practitioners and may be drawn from common law systems outside Hong Kong. As at the U.S. national governmental level, judges serve during good behavior. However, removal is by a

¹⁷ HCAL 69/2009 (2010).

¹⁸ *Ibid.*, 18.

¹⁹ *Ibid.*, 44.

²⁰ *Ibid.*, 45.

²¹ See Ian Scott, *The Public Sector in Hong Kong* (Hong Kong: Hong Kong University Press, 2010), chapters 1, 12.

tribunal of three or more judges, rather than legislative impeachment, and may be based on inability to perform judicial functions as well as inappropriate behavior.

Figure 1 displays the organizational structure of the Hong Kong judiciary.

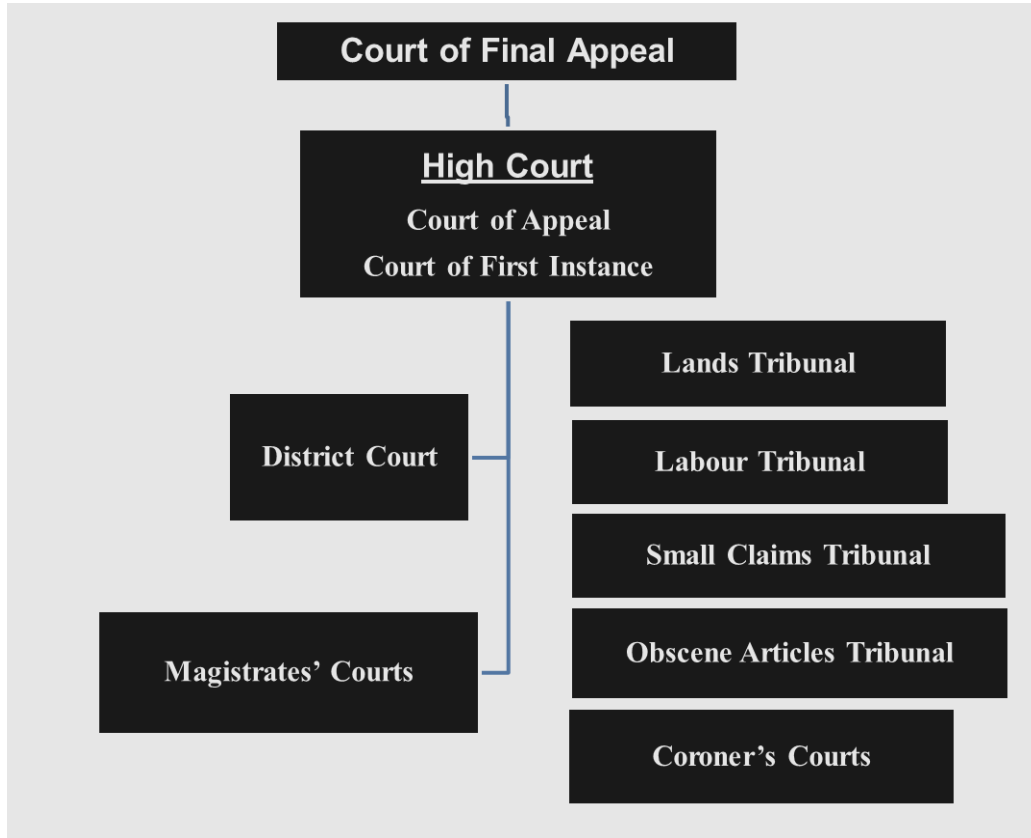


Figure 1: The Hong Kong Court System

Briefly, the judicial division of labor is as follows. The Court of Final Appeal hears civil and criminal appeals from the High Court. The Court of Appeal hears appeals on all civil and criminal matters from the Court of First Instance and the District Court. It also hears appeals from Lands Tribunal and various tribunals and statutory bodies. The Court of First Instance has unlimited jurisdiction in both civil and criminal matters. It also hears appeals from Magistrates' Courts, the Small Claims Tribunal, the Obscene Articles Tribunal, the Labour Tribunal, and the Minor Employment Claims Adjudication Board. For criminal trials, judges of the Court of First Instance sit with a jury of seven (nine on the special direction of the judge). The District Court hears civil disputes where money damages are between Hong Kong \$50,000 and \$1 million. Its criminal jurisdiction is limited punishments not exceeding seven years' imprisonment. The seven Magistrates' Courts have criminal jurisdiction over a wide range of offences meriting up to two-three years' imprisonment and fines of \$100,000 to as much as \$5 million in some cases.²² The specialized Lands Tribunal, Labour Tribunal, Small Claims Tribunal, Obscene Articles Tribunal, and Coroner's Court adjudicate disputes in the areas of law suggested by their names.

²²Judiciary, http://www.judiciary.gov.hk/en/crt_services/pphlt/html/guide.htm#2 (last accessed June 20, 2011).

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The courts are staffed as follows. The Court of Final Appeal is comprised of the chief justice, three permanent judges, three non-permanent Hong Kong judges, and eleven non-permanent judges from common law systems elsewhere. It hears appeals in panels of five judges.

The High Court is headed by a chief judge and includes ten justices of the Court of Appeal and 32 judges of the Court of First Instance. The District Court has one chief judge, one principal Family Court judge, and 33 additional judges. It does not use juries. A chief magistrate heads the Magistrates' Courts, which have seven principal magistrates, 51 permanent and seven special magistrates in seven locations. These courts handle about 90 percent of criminal cases annually. They also deal with juvenile offenders and traffic violations.²³ The High Court and Court of Final Appeal are most relevant to the relationship between the Hong Kong courts and administrative agencies.

The Equal Opportunities Commission

The Equal Opportunities Commission (EOC), a statutory organization, was established on May 20, 1996 by the Sex Discrimination Ordinance (SDO), enacted in 1995.. It was also charged with implementing the Disability Discrimination Ordinance (DDO) (1995). At the time, formalized regulations against discrimination in these areas were new and the public had mixed expectations regarding the potential effectiveness of the EOC.²⁴ Especially important was how the EOC would define its mandate and the somewhat abstract provisions of the SDO and DDO.

Like the Family Status Discrimination Ordinance (FSDO) and Race Discrimination Ordinance (RDO) that were put into operation in 1997 and 2009, the SDO and the DDO apply both to employment and other activities (such as the provision of services; see the discussion of each ordinance *infra*). The non-employment requirements of the SDO and DDO took effect four months after the EOC was established and the employment related provisions followed three months later. The purpose of delaying implementation was to enable the EOC to consult with the public, employers, labor organizations, and other stakeholders. Following consultation, the EOC produced Codes of Practice on Employment under both ordinances.

The EOC defines its overall mission as helping Hong Kong to be "a pluralistic and inclusive society free of discrimination where there is no barrier to equal opportunities."²⁵ It seeks to achieve this by "establishing partnerships with all sectors in the community; promoting awareness, understanding and acceptance of diversity and equal opportunities and providing education to prevent discrimination; enforcing compliance with provisions in the anti-discrimination legislation; and providing access to redress for discrimination."²⁶ Organizationally, the EOC is an independent agency accountable to the government through a designated bureau. In its first year, it had a full-time chairperson and sixteen members who came from different backgrounds representing a broad range of economic and social interests. Members of the EOC

²³The Information Services Department, the Government of HKSAR(2010), <http://www.gov.hk/en/about/abouthk/factsheets/docs/judiciary.pdf> (last accessed June 20, 2011).

²⁴ EOC, *Annual Report 1996/1997* (Hong Kong: Equal Opportunities Commission, 1997), pp. 2-24.

²⁵ *Ibid.*, 1.

²⁶ *Ibid.*

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are appointed by the government to two year, renewable terms; the chairperson's usual term, also renewable, is three years. In 2006, it is recommended that many of the chairpersons' administrative responsibilities will be vested in the newly created position of chief executive officer in a move that some interpreted as "checking the power of the head of the EOC."²⁷ As of

Table 1: The EOC's Financial Statement for Fiscal 2009

Income:	
Government subventions	HK\$77,687,880
Reimbursement of cost from legal litigation	HK\$1,890
Interest Income	HK\$673,686
Sundry income	\$1,108,791
Sub-total	HKS79,472,247
Expenditure:	
Staff Salaries	HK\$43,005,092
Staff Gratuity, other benefits and allowances	HK\$13,247,249
MPF	HK\$906,298
Increase in provision for unutilized annual leave	HK\$229,874
Legal fees	HK\$2,836,731
Publicity and public education expenses	HK\$6,180,393
Publicity and public education expenses financed by capital subvention fund	HK\$73,120
Research projects and training modules	HK\$893,873
Operating lease rentals in respect of office premises	HK\$7,873,448
Depreciation	HK\$2,786,806
Loss on disposal of property, plant and equipment	HK\$5,424
Overseas visits and conferences	HK\$10,581
Staff training	HK\$31,245
Auditor's remuneration	HK\$77,240
Repair and Maintenance expenses	HK\$276,317
Repair and Maintenance expenses financed by capital subvention fund	HK\$13,965
Other operating expenses	HK\$2,387,006
Sub-total	HK\$80,660,492
Deficit for the year	HK\$1,188,245

Source: EOC, *Annual Report 2008/2009* (Hong Kong: Equal Opportunities Commission, 2009), Financial Statements.

²⁷ Scott, *The Public Sector in Hong Kong*, 263.

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March 2009, the EOC had 88 employees organized largely into the following units: Operations, Legal Service, Planning and Administration, Corporate Communications and Training, and Policy and Research. The Planning and Administration Division includes subunits for Language, Accounting, IT, Compliance, Planning, and Administration and Personnel (EOC 2009, appendixes 3, 4).²⁸ A review of the minutes of EOC meetings from its inception to 2009 indicate that much of its work involves outreach, training, educational seminars, surveys of infrastructure in connection with the DDO. Table 1 presents the EOC's revenues and expenditures for fiscal 2009.

The Legal Framework for Non-discrimination

*The Race Discrimination Ordinance and Employment*²⁹

The Race Discrimination Ordinance (RDO) was enacted in July 2008 and took effect a year later. Like the incumbent anti-discrimination ordinances, the RDO covers discrimination, harassment, hostile environments, victimization, and further includes vilification as the DDO based on race, color, descent, and national and ethnic origin in employment, employment related activities such as advertising and vocational training, education, disposal or management of premises, eligibility to vote and to stand for election or appointment to public bodies, offering pupilage or tenancy in a barrister's chambers, participation in clubs, and the provision of goods, facilities, or services.³⁰ It applies to both public and private employers, with an exception until 2011 for employers with five or fewer employees.³¹ It does not directly cover discrimination based on religion. However, when religion coincides with one of the prohibited bases for discrimination, such as national origin or ethnicity, the RDO may apply. Only about five percent of Hong Kong's population is comprised of racial or ethnic minorities.³² From January 1, 2010 to December 31, 2010, the EOC received 353 inquiries relating to prospective complaints and handled 75 actual complaints. Of these, 22 were employment related and 52 involved non-employment matters. Conciliation was attempted in five cases and successful in one in the employment field; 15 of 22 attempted conciliations were successful in non-employment cases.³³ The EOC denied legal assistance in the only instance in which it was requested.³⁴

²⁸ EOC, *Annual Report 2008/2009* (Hong Kong: Equal Opportunities Commission, 2009), Appendixes 3, 4.

²⁹ The EOC's focus with respect to the RDO has been primarily on employment and employment related activities.

³⁰ EOC, *Race Discrimination Ordinance and I*, p. 3,

<http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=Race%20Discrimination%20Ordinance%20Aand%20I> (last accessed June 20, 2011).

³¹ The grace period does not apply to harassment and victimization, which are defined *infra*. Other exceptions include the hiring of domestic workers, though not their subsequent employment, and employment by religious organizations when religious requirements or "susceptibilities" require employing persons of "particular racial groups" (EOC, *Code of Practice on Employment under the Race Discrimination Ordinance*, 10).

³² EOC, *Race Discrimination Ordinance and I*, p. 1.

³³ For example, one such conciliation involved an ethnic minority group member who alleged that unlike Chinese and white customers, he was given the check (bill) for his food very shortly after it arrived. The successful conciliation concluded with the restaurant agreeing to deliver checks only with the approval of the customer (EOC, *Register of Settlement by Conciliation: Race Discrimination Ordinance*,

Limited experience with the RDO notwithstanding, the EOC has defined the ordinance broadly and made a number of recommendations for compliance. The EOC is concerned with six categories of discrimination under the RDO.³⁵

1. *Direct discrimination* ". . . occurs when a person is treated less favorably than another under comparable circumstances because of his/her or his/her near relative's race." The EOC provides the following example: "A person of Pakistani origin who speaks fluent Cantonese and has adopted a Chinese name applies by telephone for the job of salesperson and is invited for an interview. But, because his appearance indicates that he is of Pakistani origin, when he turns up for the interview he is falsely told that someone else has already been hired and the interview is declined."

2. *Indirect discrimination* ". . . occurs when a same requirement (rule, policy, practice, criterion or procedure) or condition, which cannot be justified on non-racial grounds, is applied equally to people of different races but which has an unfair effect on a particular group because (i) only a small proportion of people from that racial group can meet that requirement compared to the proportion of people of other racial groups, and/or (ii) the condition is to the detriment of the persons of that particular group because they cannot meet it." An example is prohibiting beards in the workplace, which would illegally discriminate against a group such as Sikhs if the ban were not justifiable on health, safety, or other legitimate workplace grounds.

3. *Discrimination by way of victimization* occurs ". . . if a person treats another person less favorably than other people because that person or a third person has done an act protected under the RDO, such as making or planning to make a race discrimination complaint, taking legal action, acting as a witness against race discrimination or helping somebody else to do so." For example, a manager of non-Chinese origin complains that Chinese managers received bigger bonuses and is subsequently fired for alleging a violation of the RDO.

4. *Racial harassment* occurs "[i]f a person engages in an unwelcome, abusive, insulting or offensive behavior because of another person's or his/her near relative's race, which makes him feel threatened, humiliated or embarrassed. . . ." Racial slurs are an example.

5. *Racially hostile environment* exists when ". . . an intimidating work environment [is] created by a racially prejudiced unwelcome conduct or behavior towards a person that interferes with his/her work performance." A hostile environment may exist even when no particular person is the object of the conduct at issue as in the case of displays of racist slogans or symbols.

6. *Racial vilification* ". . . is an activity in public which incites hatred, serious contempt for, or severe ridicule of a person because of his/her race." The activity can include "speaking, writing,

http://www.eoc.org.hk/EOC/settlement/rdo_e.html, accessed July 4, 2010).

³⁴ EOC, *Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2010 to 31 December 2010*, pp. 1-3, <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/papers/statisticcontent.aspx?itemid=9243> (last accessed June 20, 2011).

³⁵ Unless otherwise noted the quoted material that follows in this list is from EOC, *Race Discrimination Ordinance and I*, p. 2-3.

gestures or wearing of clothing, displaying signs, flag, emblems and insignia."³⁶ When vilification involves threats of physical injury or damage to property it is punishable by a HK\$100,000 fine and up to two years imprisonment.

The EOC is required to investigate complaints of any of the above. However, it may decline to investigate or discontinue investigations when there is no violation of the RDO, the complainant does not want the investigation to continue, the incident occurred more than 12 months earlier, or "the complaint cannot be appropriately pursued as a representative complaint" because it is "frivolous, vexatious, misconceived or lacking in substance."³⁷ If the investigation warrants it, the EOC will try to arrange conciliation, in which it acts as a neutral facilitator. Statements made by a party in conciliation are shielded from admission as evidence in the same proceedings unless with the consent of that party. If conciliation fails, the EOC may provide the complainant with legal assistance at his or her request and its discretion. Legal assistance includes advice and representation by EOC attorneys or other legal counsel. The EOC provides assistance on consideration of whether legal principles are involved, complexity of the facts and issues, quality of the evidence, strategic concerns such as the frequency with which the practice in question arises.³⁸ The complainant can also file suit on his or her own within 24 months from the date of the challenged act.

Within this overall framework, the EOC issued a *Code of Practice on Employment under the Race Discrimination Ordinance* that broadly defines the scope of protected groups and prohibited practices. It also urges employers to adopt maximal rather than minimal policies to facilitate non-discrimination. For example, "national origin" is interpreted to include nations that never existed in a modern sense or no longer exist. "Ethnic groups" are broadly defined as ". . . a distinct segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a long common history or presumed common history," which can bring religious groups such as Jews and Sikhs under the RDO's ambit.³⁹

Noting that the absence of complaints is not proof of non-discrimination, the code calls on employers to adopt and publicize clearly worded, comprehensive equal opportunity policies and grievance procedures. It also recommends that they keep records on dismissals and layoffs for 24 months.

The code applies the RDO to "commissions, bonuses, allowances, pensions, health insurance plans, annual leave, merit or performance pay, or any other fringe benefits available to employees and workers."⁴⁰ It specifies that "jobs of equal value warrant equal pay" regardless of

³⁶ EOC, *Code of Practice on Employment under the Race Discrimination Ordinance*, p. 44, http://www.eoc.org.hk/EOC/GraphicsFolder/cops1.aspx?cops_type=rdo (last accessed June 20, 2011).

³⁷ EOC, *Race Discrimination Ordinance and I*, p. 6; EOC, *Code of Practice on Employment under the Race Discrimination Ordinance*, p. 48.

³⁸ EOC, *Code of Practice on Employment under the Race Discrimination Ordinance*, p. 50.

³⁹ *Ibid.*, 6.

⁴⁰ *Ibid.*, 25.

job titles and requires that employment tests be specifically job related, "relevant and free from any bias."⁴¹

The RDO itself takes a broad view of prohibited practices by specifying that ". . . if an act is done for more than one reason and one of the reasons is the race of a person (whether or not it is the dominant or substantial reason), then it is taken to be done for the reason of the race of the person."⁴² It also makes employers responsible for prohibited discriminatory acts committed by their employees. The same vicarious *respondeat superior* liability principle applies to principal-agent relationships. Employers and principals can insulate themselves from such liability by taking "reasonably practicable steps to prevent" breaches of the ordinance."⁴³ Employees can be held personally liable for engaging in racial harassment.

The RDO exempts "genuine occupational qualifications" from its coverage. These include performances, entertainment, thematic restaurants and bars, and photographic and artists' modeling in which a particular race is required for "authenticity," as well as socio-therapeutic and personal services where race improves effectiveness.⁴⁴ The burden of persuasion regarding the legality of genuine occupational qualifications rests with the employer. The RDO also contains language that can be read to allow race conscious measures that promote equal opportunity: ". . . RDO section 49 allows employers and other concerned parties to provide people from a particular racial group (or groups) goods, access to facilities, services, opportunities, grants, benefits or programs to meet their special needs in relation to employment, when it is reasonably intended to ensure that they have equal opportunities in employment."⁴⁵

The EOC's listing of "Significant Court Cases" does not include a heading for racial discrimination and there have not been important judicial decisions affecting the commission's enforcement of the RDO.⁴⁶ This is not surprising given that the ordinance has been in effect for less than two years as of this writing. If experience elsewhere can be a guide, substantial litigation is likely in the future, particularly, perhaps, with regard to special measures by employers under section 49, mentioned above, that may be viewed by non-minorities as so called reverse discrimination (for example, see the U.S. Supreme Court decision in *Adarand Constructors, Inc. v. Peña* (1995)).⁴⁷

The Sex Discrimination Ordinance

The Sex Discrimination Ordinance (SDO) was the first of the several anti-discrimination ordinances under the EOC's jurisdiction. As noted earlier, the SDO established the EOC. The SDO prohibits sexual harassment and discrimination based on sex, marital status, and pregnancy.

⁴¹ *Ibid.*, 24, 26.

⁴² *Ibid.*, 38. This provision, which is repeated in the other nondiscrimination ordinances, is not intended to preclude bringing a complaint based on two or more actions such as discrimination based on race and sex.

⁴³ *Ibid.*, 13.

⁴⁴ *Ibid.*, 21.

⁴⁵ *Ibid.*, 36.

⁴⁶ <http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Significant%20Court%20Cases>

⁴⁷ 515 U.S. 200.

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It applies to employment, non-employment related activities, education, participation in clubs, governmental activity,⁴⁸ sale and management of property, eligibility to vote for and to be elected or appointed to advisory bodies, and the provision of goods, facilities, or services.⁴⁹ The fact that the SDO has been in existence for 15 years notwithstanding, the EOC continues to handle a relatively large number of SDO complaints. During the EOC's most recent reporting period, January 1 to December 31, 2010, it received 822 prospective complaints and a total of 303 actual complaints. It engaged in 284 investigations. Including the backlog from earlier periods, the EOC handled 424 SDO complaints during the year. Of these, all but 27 were unemployment related. Its efforts to conciliate were successful in 57 of 90 of the employment related cases and all five of the others. During the year, it received 24 requests for legal assistance of which six were granted, six were under consideration, and 12 were not granted. Cumulatively, since 1996, it received 206 applications for legal assistance of which 92 were granted, 108 rejected, and six remained under consideration. Of 29 legal actions based on the SDO, 26 were successfully concluded, and two remained active (the status of the other case is not specified).⁵⁰

The SDO is written with a view toward preventing discrimination against women. Rather than phrase its prohibitions in terms of combating discrimination based on sex or gender, its terms tend to refer specifically to women, with the addendum that specific parts and provisions of the ordinance "shall be treated as applying equally to the treatment of men."⁵¹ This approach eliminates any doubt as to the fundamental purpose of the ordinance. In fact, section 57 specifically allows differential treatment for the protection of women.

The SDO covers direct discrimination, indirect discrimination,⁵² victimization, and harassment. The first three of these categories are treated similarly or identically to their counterparts with under the RDO. However, sexual harassment differs from racial harassment. It is defined as "an unwelcome sexual advance, or an unwelcome request for sexual favors;" "unwelcome conduct of a sexual nature. . . in circumstances in which a reasonable person having regard to all the circumstances, would have anticipated that [the woman being harassed] would be offended, humiliated, or intimidated;" or individual or joint "conduct of a sexual nature which creates a hostile or intimidating environment for [the harassed woman]."⁵³ The EOC categorizes sexual harassment as "quid quo pro" and "hostile environment." These categories can include

⁴⁸ The SDO does not apply with regard to immigration and competing statutory provisions.

⁴⁹ EOC, *Sex Discrimination Ordinance and I*, p. 1, <http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=Sex%20Discrimination%20Ordinance%20and%20I> (last accessed June 20, 2011). Partnerships with fewer than six partners, religious organizations, single sex educational establishments, sports, communal residential arrangements, some forms of training, and some small entities are exempted.

⁵⁰ EOC, *Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2010 to 31 December 2010*, 1- 3, <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/papers/statisticcontent.aspx?itemid=9243> (last accessed June 20, 2011).

⁵¹ SDO, Part I, section 2, subsection 8.

⁵² The SDO does not contain a vilification clause. Vilification is subsumed by indirect discrimination due to a hostile environment.

⁵³ SDO, Part I, section 2, subsection 5 [a][i-ii], [b].

pressure for dates and threats or persistent requests for sex, "[c]omments with sexual innuendoes and suggestive or insulting sounds," "[r]elentless humor and jokes about sex or gender in general," propositions and "pressure for sex," "[o]bscene gestures or inappropriate touching (e.g., patting, touching, kissing or pinching)," "sexually obscene or suggestive photographs or literature," and assault, including rape.⁵⁴ Harassment can take place even if no one beside the victim and perpetrator is aware of it, the harasser is a coworker, rather than a boss, the victim was not disciplined or dismissed, the victim played along against her/his wishes, and there was only one instance.⁵⁵

The EOC urges victims to "Say 'No,'" keep written records of events and work, talk with coworkers, family members, union representatives, the employer, and others, consult an appropriate non-governmental organization, file a complaint with the EOC, and/or consult a lawyer.⁵⁶ The SDO's provisions with regard to employer and principal vicarious *respondere superior* liability are similar to those of the RDO. The SDO also permits favorable treatment as special measures based on sex, marital status, or pregnancy to promote equal opportunity in limited circumstances.

Discrimination based on marital status occurs when someone "treats [a] person less favorably than he treats or would treat a person of the same sex with a different marital status;" or "applies to that person a requirement or condition which he applies or would apply equally to a person with a different marital status" when "the proportion of persons with the relevant marital status who can comply with it is considerably smaller than the proportion of persons of the same sex with a different marital status who can comply with it;" the requirement or condition is not "justifiable irrespective of the marital status of the person to whom it is applied;" and "which is to that person's detriment because he or she cannot comply with it."⁵⁷ Refusing to provide housing, education, or a similar benefit to a married person whose spouse also receives such a benefit is permitted, regardless of the source of the benefit.⁵⁸ Discrimination based on marital status is also permitted with regard to providing reproductive technology. The prohibition against discriminating on the basis of pregnancy requires comparison with treatment of a person who is not pregnant. Differential treatment is prohibited when it disproportionately and detrimentally affects pregnant women but cannot be justified.

The genuine occupational qualifications are similar to those of the RDO, except that they include physiology, "including physical strength or stamina," the preservation of "decency or privacy," same-sex custodial care, and work outside of Hong Kong where the laws and customs

⁵⁴EOC, "Preventing and Dealing with Sexual Harassment, p. 1
<http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?Leaf=1&content=Preventing%20and%20Dealing%20with%20Sexual%20Harassment&mode=ce> (last accessed June 20, 2011).

⁵⁵ EOC, *Know Your Rights (Sexual Harassment)/Know Your Rights (Pregnancy Discrimination)*, p. 1,
[http://www.eoc.org.hk/EOC/GraphicsFolder/KYR.aspx?content=Know Your Rights\(Pregnancy\)](http://www.eoc.org.hk/EOC/GraphicsFolder/KYR.aspx?content=Know%20Your%20Rights(Pregnancy)) (last accessed June 30, 2011.)

⁵⁶ *Ibid.*, 2.

⁵⁷ SDO, Part I, section 7[1] [a], [b] [i-iii].

⁵⁸ *Ibid.*, Part V, section 56A.

would make it impossible for a woman to do her job effectively.⁵⁹ The EOC's *Register of Settlement by Conciliation: Sex Discrimination Ordinance* provides excellent examples of the kinds of issues that arise under the SDO.

- *Exclusion or Termination Based on Sex.* Surprisingly as late as 2008-2009, some employers and educational programs were excluding or terminating individuals based on their sex. For instance, a chef refused to have female kitchen staff and an employer frankly stated that he wanted to employ a male clerk.⁶⁰ Previous cases involved posting a job vacancy notice limited to female candidates, exclusion of males from knitting classes, domestic helper training, and tutoring positions, dismissing a female employee for misconduct after she protested that a job assignment that unacceptably caused her skirt to reveal her thigh, excluding a female employee from a work team requiring night shifts and strenuous duties.⁶¹ In several cases, the employer specified male only for security positions.⁶²

- *Pregnancy Discrimination.* These cases show a pattern in which employers adhere to the SDO's anti-discrimination provisions with respect to maternity leave until the employee returns to work, after which she is terminated, generally in violation of the ordinance.⁶³ In some instances, pregnant employees are subject to insulting or harsher treatment than prior to their pregnancy, including dismissal. In one case, the employee's boss also told her "she looked like a pig when she was pregnant."⁶⁴ In another, the employer verbally abused the employee and threw objects at her.⁶⁵ Differential treatment might also involve denying an opportunity available to other employees, such as rejecting a pregnant employee's application for an overseas trip or renewing a contract.⁶⁶ Constructive dismissal occurred in one case in which a pregnant employee was ordered to travel in mainland China and, after she refused for health reasons, was denied work assignments, a computer, and a telephone.⁶⁷ In some cases, pregnancy discrimination also involved disability discrimination.⁶⁸

- *Harassment.* These cases involve: unwanted kissing and touching, including breasts, nipples, and thighs; sexual remarks and banter; comments about one's body; lifting a skirt; making obscene jokes; calling a female employee a "chicken" (slang for prostitute); offering to buy a female employee a sexy nightgown; quid pro quo offers involving jobs; displaying or causing an employee to view nude photos and pornography; staring at a female employee's breasts; a male

⁵⁹*Ibid.*, Part II, section 12 [2-3].

⁶⁰ EOC, *Register of Settlement by Conciliation: Sex Discrimination Ordinance*, pp. 1, 4, http://www.eoc.org.hk/EOC/settlement/sdo_e.html (last accessed June 21, 2011).

⁶¹ *Ibid.*, 5-6, 7, 11, 18, 20, 24, 27.

⁶² *Ibid.*, 13, 14, 36.

⁶³ *Ibid.*, 1, 3, 5, 9, 10, 15, 23, 25, 26, 31, 35, 36, 37, 43-44.

⁶⁴ *Ibid.*, 1, 7.

⁶⁵ *Ibid.*, 16.

⁶⁶ *Ibid.*, 9, 27.

⁶⁷ *Ibid.*, 39.

⁶⁸ *Ibid.*, 16, 22, 23.

employee ordering a female employee to share a room with him on a business trip, inviting her to his room after she refused, and suggesting that she could ride him like a horse; and indecent assault.⁶⁹

● *Marital Status Discrimination.* Differential treatment based on marital status occurred in two cases. One involved the denial of medical benefits to the fifth child in an employee's family because her husband's policy at the same school covered only up to four children. In the other, a job applicant was rejected because he was single.⁷⁰

● *Victimization.* These cases involve retaliation for complaints of sexual harassment.⁷¹

Conciliation in sex discrimination cases typically resulted in monetary compensation (ranging from HK\$1 to several months salary, which could amount to as much as HK\$170,000. Settlements ranging from HK\$25,000-\$50,000 were not unusual. A female employee who was indecently assaulted at work received HK\$1,000,000.⁷² Apologies and promises to write good reference letters were also common, as were reinstatements and similar efforts to make one whole. In one sexual harassment case, the parties agreed to communicate in the future only by email or with others present.⁷³

The Disability Discrimination Ordinance

The Disability Discrimination Ordinance (DDO) was enacted in 1995 and came into full effect in 1996. Its structure is much like that of the RDO and the SDO. However, it gives rise to more enquiries and complaints than those ordinances. For instance, during the period from January 1 to December 31, 2010, the EOC received 1,920 DDO inquiries and 516 complaints. It handled 609 DDO complaints, including those originating earlier. Seventy-eight of 107 conciliations were successful in the employment field and 27 of 41 in other areas. Five applications for legal assistance were granted, 17 were denied, and four remained under consideration. Cumulatively, since 1996, the EOC granted legal assistance in 125 cases and denied it in 190.⁷⁴ Complaints can be based on direct or indirect discrimination, harassment, victimization, or vilification.

Disability is defined as ". . . total or partial loss of a person's bodily or mental functions, . . . part of the body, the presence of organisms causing disease or illness (such as HIV), the malfunction, malformation or disfigurement of a part of the person's body, or a disorder, illness or disease that affects a person's perception of reality, emotions or judgment or that results in disturbed behavior, and learning difficulties."⁷⁵ The ordinance has broad coverage applying to

⁶⁹ *Ibid.*, 3, 4, 8, 18, 19, 20-21, 28, 30, 34, 37, 40, 43, 45.

⁷⁰ *Ibid.*, 17, 22.

⁷¹ *Ibid.*, 21, 25.

⁷² *Ibid.*, 45.

⁷³ *Ibid.*, 33.

⁷⁴ EOC, *Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2010 to 31 December 2010*, 1-3.

⁷⁵ EOC, *Disability Discrimination Ordinance and I*, p. 1, <http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?itemid=8823> (last accessed June 22, 2011); DDO,

present, past, possible future, and imputed disabilities. It also applies to discrimination against an associate based on the disability of ". . . a spouse, another person living with a person with a disability, relative, carer⁷⁶ [*sic*] and a business, sporting or recreational partner."⁷⁷ The ordinance applies to employers, barristers, advertisers, contractors, service providers, educational institutions, trade unions, employment agencies, and others, as well as to the government, with the usual proviso that it does not pertain to governmental actions involving immigration or statutory obligations. As with the RDO and SDO, employers and principals are subject to vicarious *respondeat superior* liability for the acts of their employees and agents.⁷⁸

In the DDO context, discrimination includes treating a person "less favorably" if he or she is accompanied by an interpreter, reader, assistant, carer."⁷⁹ Harassment is defined as ". . . any unwelcome conduct on account of a person's disability where it can be reasonably anticipated that the person would be offended, humiliated or intimidated."⁸⁰ Examples include insulting comments and jokes. Like the RDO and SDO, the DDO provides that if discrimination is *a* reason for an action, it will be treated as *the* reason for that action.⁸¹

Genuine occupational qualifications are based on the requirement that an employee must be without a disability due to considerations of physiology, performances and entertainment, authenticity, and the nature of employee living arrangements.⁸² The ordinance permits a disabled applicant to propose reasonable physical alterations to the employer's accommodations insofar as the employee agrees to pay for them and restore the facilities to their previous state upon leaving.⁸³ The ordinance does not require physical modifications that "would impose an unjustifiable hardship" on employers, the providers of premises, goods, services, and facilities, and others.⁸⁴

The DDO allows those covered to discriminate against individuals with infectious diseases and for reasons of public health. However, the ordinance specifically states that HIV/AIDS is not an infectious disease to form a basis for discrimination.⁸⁵ It does not preclude special efforts to include or accommodate persons with disabilities.⁸⁶

Part I, section 2 [1].

⁷⁶ "Carer" includes the director and officers in the Social Welfare Department.

⁷⁷ EOC, *Disability Discrimination Ordinance and I*, p. 1.

⁷⁸ DDO, Part V, section 48.

⁷⁹ *Ibid.*, Part II, section 10.

⁸⁰ EOC, *Disability Discrimination Ordinance and I*, p. 2.

⁸¹ DDO, Part I, section 3.

⁸² *Ibid.*, Part III, section 12.

⁸³ *Ibid.*, Part I, section 12[5].

⁸⁴ *Ibid.*, Part III, section 12[2][c][ii]; Part IV, section 25[2][b].

⁸⁵ *Ibid.*, Part VI, section 61[1][2].

⁸⁶ *Ibid.*, Part IV, section 50.

The EOC's *Register of Settlement by Conciliation: Disability Discrimination Ordinance* provides several examples of the issues that arise under the DDO. Several conciliations involved alleged dismissals due to disability in violation of the DDO. Some of these were for taking long sick leave, chronic illness, or having a specific medical condition.⁸⁷ Accessibility and quality of treatment issues for wheelchair users and others requiring devices, such as crutches, for moving about also figured prominently in conciliations.⁸⁸ A variety of issues also arose with respect to educational facilities, such as medical conditions, including epilepsy and autism.⁸⁹ There were also cases involving harassment, including two in which employees were referred to as cripples or crippled.⁹⁰ One harassment case involved a restaurant that told a patron afflicted with cerebral palsy to leave because she ate with her feet. The restaurant apologized and agreed to provide training for its staff.⁹¹ Other cases involved refusal to hire based on disability or imputed disability, such as a potential for schizophrenia or tuberculosis.⁹² There was one case of vilification in which a visually impaired teenager was humiliated on a public playground.⁹³ As with the SDO, conciliation resulted in a variety of outcomes. Apologies were common as was monetary compensation, which ranged from nominal to \$660,000.⁹⁴ Physical alterations for wheelchair users and others were undertaken in a few cases.⁹⁵

The Family Status Discrimination Ordinance

The Family Status Discrimination Ordinance (FSDO) was enacted in 1997. Its purpose is to prevent discrimination against individuals who are responsible for taking care of an immediate family member. "Immediate" includes relationships by ". . . blood, marriage, adoption or affinity."⁹⁶ "Affinity" relationships include in-laws. Therefore, the application of the ordinance includes "mother, father, brother, sister, son, daughter, grandmother, grandfather, grandchild, aunt, uncle, cousin, nephew. . . niece. . . mother-in-law and father-in-law" and step children.⁹⁷ It covers employment, education, election and appointment to advisory bodies, participation in clubs, the disposal or management of premises, and the provision of goods, facilities, or services as well as some barrister activity.⁹⁸ It also applies to government, except with regard to

⁸⁷ EOC, *Register of Settlement by Conciliation: Disability Discrimination Ordinance*, pp. 4, 5, 10, 11, 12, 13, 21, 22, 24, 25, 26, 30, 34, 35, 36, 44, 47, 48, 49, 50, 51, 52, 56, http://www.eoc.org.hk/EOC/settlement/ddo_e.html (last accessed June 21, 2011)

⁸⁸ *Ibid.*, 2, 6, 7, 14, 15, 16, 21, 28, 31, 33, 38, 39, 40, 45, 47, 53, 54.

⁸⁹ *Ibid.*, 4, 19, 20, 37, 55.

⁹⁰ *Ibid.*, 3, 18, 24, 27, 38.

⁹¹ *Ibid.*, 40-41.

⁹² *Ibid.*, 33, 43, 49, 51.

⁹³ *Ibid.*, 42.

⁹⁴ *Ibid.*, 13.

⁹⁵ *Ibid.*, 22, 28, 31, 40, 53, 54.

⁹⁶ EOC, *Family Status Discrimination Ordinance & I*, p. 1, [http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Family Status Discrimination Ordinance and I](http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Family%20Status%20Discrimination%20Ordinance%20and%20I) (last accessed June 23, 2011).

⁹⁷ *Ibid.*; FSDO, Part I, section 2[1].

⁹⁸ EOC, *Family Status Discrimination Ordinance & I*, 1; FSDO, Part IV, section 26.

immigration and competing statutory obligations. The FSDO has not generated very many complaints, and the majority of these are in the employment field. For instance, between January 1 and December 31, 2010, the EOC received 153 enquiries and 37 complaints under the ordinance. It handled 44 complaints, including backlogged cases. Of the 41 cases it processed, 30 were in the employment field. The EOC held 10 conciliations and received no applications for legal assistance. Cumulatively, from the ordinance's inception to December 31, 2010, it received 19 applications for legal assistance of which it granted 11 and rejected eight.⁹⁹

In terms of employment, the FSDO seeks to allow employees to balance their work and family commitments. It covers such circumstances as denial of a job because one's family commitments would make working late hours or traveling difficult. Any unequal treatment based on covered family demands can potentially violate the ordinance, including an unjustifiable employment requirement that falls disproportionately on individuals or employees with caregiver obligations. In addition to such direct and indirect discrimination, the ordinance covers victimization. It applies to contract workers but not to enterprises with five or fewer employees. Employers and principals are not required to extend "benefits, facilities or services" to the immediate family of the worker.¹⁰⁰ Like the other ordinances it treats discrimination as the sole cause for acts done to applicants or employees regardless of other reasons an employer may have or proffer. It also allows special measures to accommodate covered caregivers. The ordinance does not cover vilification, harassment or address genuine occupational qualifications.

The EOC's *Register of Settlement Conciliation: Family Status Discrimination Ordinance*¹⁰¹ reflects the low level of activity under the FSDO. It contains only seven pages, whereas the DDO *Register* runs 58. Cases involve being told by a restaurant employee to stop breastfeeding a baby because other customers would be offended; being assigned night shifts or late hours, which interfered with child care obligations, denial of time off to visit a hospitalized child, dismissal due to imputed emotional stress due to the death of a parent, and rejection or unfavorable employment conditions due to childcare obligations. Of the 10 conciliations reported, three involved monetary compensation ranging from \$500 to \$100,000, four included apologies, and two led to an adjustment of the employee's work hours.

Litigation: Judicial Development of Anti-discrimination Law

Because the EOC does not adjudicate complaints of discrimination, it is unable to build a body of equal opportunity rules or law. Its various codes and the commentaries in its registers provide general guidance, but they do not build a common law of equal opportunity, establish a set of binding rules or confront the inevitable trade-offs among legal principles. This stands in contrast to practices elsewhere, such as the United States, where agencies, including the Equal Employment Opportunity Commission, do hear and decide cases and, in the process, develop legal principles and precedents that apply to future cases. In Hong Kong, the task of developing anti-discrimination law has fallen on the executive and legislature, through amendments, and the

⁹⁹ EOC, *Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2010 to 31 May 2010*, 3, <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/papers/statisticcontent.aspx?itemid=9243> (last accessed June 23, 2011).

¹⁰⁰ FSDO, part III, section 8 [10]; section 9 [5].

¹⁰¹ http://www.eoc.org.hk/EOC/settlement/fsdo_e.html (last accessed June 23, 2011).

courts through adjudication. The judiciary has developed several principles that, overall, tend to strengthen the application of the ordinances. These can be ferreted out of the EOC's review of *Significant Court Cases*.¹⁰²

● *Burden of persuasion*. The burden of persuasion is on the plaintiff to show that, on the balance of probabilities,¹⁰³ the defendant violated one or more of the ordinances. The defendant may proffer an explanation for the alleged discriminatory behavior but does not have the burden of proving the absence of discrimination. For example, an employer may maintain that the adverse action was performance based, not discriminatory, and offer documentation to that effect.

● *The "but for" test*. The but for test asks whether the plaintiff would have received the same treatment as a comparable (comparator) employee except for his or her race, sex, disability, or family status. If the answer is affirmative, then there is discrimination regardless of the employer's motive. However, the presence of discrimination does not automatically violate the law because the RDO, SDO, and DDO allow the employer to offer a sufficiently strong employment related justification for differential treatment, including the existence of a genuine occupational qualification.¹⁰⁴

● *Damages*. Monetary damages can be assessed for: injury to feelings; loss of income/earnings or future earnings; loss of benefits such as paid sick leave, housing, and pensions; as well as for exemplary or punitive reasons. The latter are intended to serve as an example to others and/or to punish the discriminator. If the defendant's conduct prolongs the litigation and insults the plaintiff and/or pressures he or she to drop the case, aggravated damages may be awarded. Collectively, damages to the plaintiff can be very substantial, reaching one million dollars or more. In rare circumstances, the court can order the defendant to apologize to the plaintiff.¹⁰⁵ (EOC, *Significant Court Cases* 23-24; *Ma Bik Yung v. Ko Chuen*, [2002] 2HKLRD1).

● *Subjective approach under the DDO*. If an employer, other entity, or individual has no knowledge of the plaintiff's disability, that defendant cannot be in violation of the ordinance. The subjective approach logically comports well with the but for test as a defendant with no knowledge of the plaintiff's disability at the time the action at issue was taken could not be said

¹⁰² <http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Significant Court Cases> (last accessed June 23, 2011).

¹⁰³ This test is equivalent to the "preponderance of evidence" standard used in U.S. administrative law. It is more burdensome to the complainant than the "substantial evidence" standard that is applied by the U.S. Equal Employment Opportunity Commission. Substantial evidence means a reasonable basis; preponderance of evidence means more likely than not.

¹⁰⁴ The FSDO exempts employers when affinity would present "a significant likelihood of collusion" that "would result in damage to the business of the employer concerned." EOC, *Code of Practice on Employment under the Family Status Discriminatory Ordinance*, section 5.3, [http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=CoPs on Employment\(FSDO\)&fld=content#4](http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=CoPs on Employment(FSDO)&fld=content#4) (last accessed June 23, 2011).

¹⁰⁵ EOC, *Significant Court Cases*, 6; *Wong Kwok Mui, Enoch v. Lee Yuen Tim*, DCEO 9/1999, DC, HK (unreported, 1999).

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to have taken it based on the individual's disability. However, "knowledge of the manifestation of a disability is" taken as "knowledge of the disability itself."¹⁰⁶

● *Sexual harassment, unwelcome behavior.* Sexually oriented behavior will be assumed to be unwelcome "if a reasonable person will have anticipated that a complainant will be offended, humiliated or intimidated in that circumstance."¹⁰⁷ Where evidence is disputed or contradictory, the plaintiff should focus on the entire pattern, if there is one, and the most significant incidents. The court should consider the plaintiff's power to stop the alleged harassment and his or her behavior toward the alleged harasser after the actions at issue took place. Evidence from third parties and other sources should also be taken into account, when available. In the case at issue, ". . . after the alleged acts of sexual harassment, the Plaintiff could still travel with the Defendant to see a free-fighting competition in Shenzhen, an act which the Court found unnecessary, avoidable and impossible to comprehend."¹⁰⁸

Litigation: Remedial Law and the EOC

To date, the EOC has been involved in one major remedial law case, *EOC v. Director of Education* (2001). The issue before the High Court was whether the Secondary School Places Allocation system (SSPA) violated the SDO. The SSPA was used to allocate students from primary to secondary schools. Its inner workings became transparent in 1998 and shortly thereafter, the EOC began receiving complaints from parents who were unhappy with the placement of their children. In response, the EOC launched a formal investigation which concluded that:

1. The "scaling mechanism, which scaled the scores of all primary students in their school assessments to ensure that they could be fairly compared with scores given by other primary schools, was being employed on a gender basis" (i.e., girls were assessed against other boys with separate scaling ratios which put girls at disadvantage);
2. "[A] banding mechanism, which banded all students into broad orders of academic merit, was being employed on a gender basis"; and
3. "[A] form of gender quota was being employed to ensure that a fixed ratio of boys and girls were admitted to individual co-educational secondary schools."¹⁰⁹

As is common in remedial law cases in the U.S., the plaintiff (EOC) sought a system wide remedy for the violation of legal rights. It recommended that the Director of Education comply with the SDO by altering or abandoning the SSPA system to eliminate the separate treatment of girls and boys and the use of quotas. The Director responded by asserting that "any such apparent discrimination was justified in order to make 'due allowance' for the inherent

¹⁰⁶ *Ibid.*, 17; *M v. Secretary for Justice*, CACV 265/2007, 2 HKLRD 298, CA (2009).

¹⁰⁷ *Ibid.*, 7; *Ratcliff v. Secretary for Civil Service*, CACV 57/1999, 4 HKC 237, CA (1999).

¹⁰⁸ *Ibid.*

¹⁰⁹ *EOC v. Director of Education*, HCAL 1555/2000 (2001), 8.

developmental differences between boys and girls."¹¹⁰ In the Director's view, making "due allowance" required that the placement of students be cognizant of the putative fact that 11-12 year old girls performed better than boys on tests requiring memorization whereas boys did better than girls on an Academic Aptitude Test that focuses on "pure verbal and numerical reasoning."¹¹¹ Because boys eventually catch up with girls and the two types of assessments cannot be integrated, the Director maintained that "[i]n order to neutralise [the girls'] advantage, some form of gender-based mechanism is required to ensure that both boys and girls are, in fact, afforded *equal opportunity* to do well over the full span of their school years."¹¹² In other words, the SSPA removes "an initial gender bias" and therefore does not violate the SDO.¹¹³

In addition to the gender classification, without which there could not be discrimination, the Court noted that secondary school placement also incorporated an element of parental preference. Consequently in the Court's view, "[i]f parents are entitled to indicate a preference, they are entitled to expect that the system which will attempt to honour that preference will be one that does not discriminate against their children."¹¹⁴ However, parental preference for a secondary school within the geographic net in which their children lived could be undermined by the Director's policy of using quotas to maintain a gender balance in co-educational schools that matched the gender balance in that net (i.e., the gender balance of children in the net minus those going to single sex schools).¹¹⁵ Within this framework, individual schools retained some discretion, which might be used to keep siblings together, for instance.

According to the EOC, the net result of this system was that "girls generally needed a higher score to get into a band than boys did," "fewer girls than boys got their first choice of school," and "in individual cases, the gender-based mechanisms of the SSPA system resulted in less favourable treatment of boys."¹¹⁶ Put in stark terms, the system "says something to this effect: if you (a girl) do better than boys, it doesn't count. Only when you do better than a girl will [it] count your better performance in the calculation of the scaled SSPA score."¹¹⁷

In finding that the SSPA system violated the SDO, the Court emphasized that under the Ordinance, as noted earlier, even where gender is just one factor in a decision or policy, it is treated as the sole reason for the action involved. In deciding in favor of the EOC, the Court set forth several principles of importance to both legal equality and remedial law:

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 9.

¹¹² *Ibid.*, 9-10.

¹¹³ *Ibid.*, 10.

¹¹⁴ *Ibid.*, 15.

¹¹⁵ *Ibid.*, 20.

¹¹⁶ *Ibid.*, 23-24.

¹¹⁷ *Ibid.*, 25.

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1. "[A] fundamental right such as equal treatment free of sex discrimination is a right which attaches itself to the individual" that cannot be trumped by a utilitarian equation in favor of "group fairness."¹¹⁸
2. Continued use of the SSPA would require the Director of Education to provide "'convincing and weighty' reasons. . . to demonstrate; first, that any restriction is demonstrably necessary; second, that it is rational in the sense that it is not arbitrary, unfair or based on irrational considerations, and, third, that it is no more than is necessary to accomplish the legitimate objective, in other words that it is a proportionate response" which requires "that the restriction should impair as little as possible the fundamental right or freedom in question"¹¹⁹
3. In deciding what is proportionate, while giving "full deference . . . to the legislature and to the makers of administrative policies, it is for the court to reach its own judgment on whether there has been a breach of fundamental rights."¹²⁰
4. Of particular importance to remedial law, "the fact that the remedy is not easy is not (in itself) an answer to the [Equal Opportunities] Commission's challenge. Fundamental human rights are at issue, rights of individual boys and girls which are demanding of this Court's protection. In short, administrative difficulty cannot be accepted as a reason under section 48 (or any other provision) of the [Sex Discrimination] Ordinance for the entrenchment of a discriminatory regime."¹²¹

A major consideration in remedial law cases is how to remedy the violation of fundamental rights. Some remedies, such as prison and public school reform, can be very expensive as well as difficult to implement. In some situations, including the reform of public mental health facilities, all the alternatives may be problematic (see Rosenbloom, O'Leary, and Chanin 2010, chapter 7). However, the judiciary's task in such cases is to ensure that the violation of basic rights ceases and judges will typically call on the parties to the litigation to formulate and propose remedies for the court's approval. This is essentially what the High Court did in *Equal Opportunities Commission v. Director of Education*: "Are the problems facing the Director intractable? It seems not. . . . Elsewhere in the world the same problems have been faced and solutions have been found that do not, because of developmental differences, perpetuate a system of discrimination."¹²² As to the director's claim that a ruling in favor of the EOC would put her in an impossible bind because jettisoning the gender based features of the SSPA would result in discrimination against boys, the Court averred that it did "not see her concern as one which excuses the present use of gender-based mechanisms."¹²³ Finally, as is also common in remedial law, the Court indicated that neither it nor the EOC sought to "dismantle the

¹¹⁸ *Ibid.*, 29-30.

¹¹⁹ *Ibid.*, 44, 46. This is essentially the equivalent of the least restrictive alternative test frequently used in First Amendment litigation in the U.S. See Rosenbloom, Carroll, and Carroll 2000, p. 109.

¹²⁰ *Ibid.*, 44.

¹²¹ *Ibid.*, 48.

¹²² *Ibid.*, 52.

¹²³ *Ibid.*, 53.

SSPA 'at a stroke.'¹²⁴ Hence, the Court settled the legal questions, but largely left the design and implementation of a remedy to the Director with possible input from the EOC.

Implementing *Equal Opportunities Commission v. Director of Education*

In the U.S., implementation of court decisions in remedial law cases often involves participation by the parties to the case under the direction of a special master or, possibly a supervisory group of some kind. The Department of Education set up a task force to design a revised or replacement system for making secondary school placements. However, the EOC chose not to provide advice or assistance to either it or the director. Rather, it was "prepared to recommend suitable local or overseas experts who are in a position to advise on a new system and to assist the Director in designing a system which is lawful and non-discriminatory as soon as possible."¹²⁵ Neither would the EOC participate in setting-up a Department of Education grievance procedure for students who believed they were denied placement in the school of their first choice due to discrimination or process complaints regarding placements on its own: "it is not appropriate for the EOC, or any servant or agent of the EOC, to participate in any of the interim measures introduced by the Director to redress discrimination complaints, as the EOC administers its own statutory complaint handling mechanism, and has certain statutory obligations which would bring it into conflict if it were to adopt a role as insisted by the Director."¹²⁶ Nevertheless, the EOC did respond to consultation documents sent to it by the Director of Education.¹²⁷

With the EOC playing a limited role in implementation, much of the task of overseeing reform fell to a Monitoring Group established under the Secondary School Places Allocation Committee. The group included representatives from primary and secondary schools as well as a parent and a member of the community. The first concrete step in implementing the Court's decision was processing grievances. The Department of Education received 7,722 requests for different placements, of which 3,001 were deemed likely to have been affected by the gender-based problems in the SSPA. Seventy-five percent (2,262) of these resulted in placement of the students in schools of a higher choice. Eventually, the remaining 740 students were also satisfactorily placed.¹²⁸ By December 2001, six months after the Court's decision, the Department of Education had decided to remove the three offending features of the SSPA in making the allocations for the 2002 school year. Therefore, from a legal point of view, implementation was complete. However, the overall impact of the remedial law decision went further.

Remedial law reforms of public administrative systems and institutions often have unintended and unforeseeable consequences. One possibility is that the public agency involved

¹²⁴ *Ibid.*

¹²⁵ EOC, Submission by the Equal Opportunities Commission to the LegCo Panel on Education, Special Meeting on 19 July 2001 (Paper No. CB(2)2130/00-01(01), pp. 4-5.

¹²⁶ *Ibid.*, 4.

¹²⁷ LC (Legislative Council) Paper No. CB(2)837/01-02(01), 2001, p. 1.

¹²⁸ Education Department, Submission to Legislative Council Panel on Education 17 December 2001 (LC Paper No. CB(2)712/01-02(01), "Relief Measures under 2001 Secondary School Places Allocation" Appendix 1, pp. 1-2.

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will go beyond the requirements of a court decision and redesign, reengineer, or reinvent what it does and how it does it. *Equal Opportunities Commission v. Director of Education* had this effect on the SSPA even though initially the Director of Education was deeply concerned that using non-gender related criteria for placements would have negative consequences for the Hong Kong educational system. Today's secondary school placement system offers more choice and transparency. It works in two stages, participating schools may allocate up to 30 percent of their Secondary One seats based on discretionary placement. These placements are open on a Hong Kong wide basis, rather than by districts or nets. The remainder of the placements are centrally allocated using a mix of geography and merit. Geographically, 10 percent of the allocations are unrestricted; the rest are restricted to one of the 18 nets that comprise the entire territory. Within the merit component, pupils are put into three equal sized bands. Within the bands they are given randomized numbers that determine the order of selection. In so far as practicable, allocations are made in accordance with parents' preferences, which can rank order a maximum of 30 participating secondary schools. The pupils in each net band one will be allocated first, with bands two and three following in that order. The system also builds in arrangements for feeder and "through-train schools" (i.e., secondary schools with enough places to accommodate all the applicants from a linked primary school). Although the Director of Education initially greeted the EOC's lawsuit and the Court's decision with opposition and skepticism, almost all professional educators would probably agree that the SSPA system is better today than when it was heavily gender-dependent.

Conclusion: Two Faces of the Partnership Model: Constraint and Empowerment

In the U.S. the judicial partnership with public administrators developed largely in an effort by the courts to place constitutional constraints on agency behavior. The partnership enables the judiciary to play broad and deep roles in structuring and regulating public administrative operations. Judicial decisions affect agency agendas, authority budgets, decision making, morale, priorities, staffing levels, internal and external operations, and more. Due to judicial decisions, constitutional law now substantially controls how agencies deal with clients and customers, their own employees, prisoners and public mental health patients. Constitutional considerations also bear upon street-level regulatory encounters and agencies' relationships with contractors.¹²⁹ Based on administrative law, the courts also take a "hard look" at aspects of agency decision making, including the substance of their rules.¹³⁰ However, the partnership model also enables the courts to empower agencies and to leave some matters almost exclusively to administrative discretion. For instance, the judiciary has supported agency flexibility regarding statutory interpretation, choice of rulemaking procedures, and decisions not to enforce some aspects of their missions.¹³¹

Based on the present research, it is reasonable to conclude that the judiciary has partnered with the EOC and empowered it. Two aspects of the U.S. partnership model are prominent. The

¹²⁹ Rosenbloom, O'Leary, and Chanin, *Public Administration and Law*, 3rd ed.

¹³⁰ E.g., *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980); *Motor Vehicles Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

¹³¹ E.g., *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Heckler v. Chaney*, 470 U.S. 821 (1985).

court significantly strengthened the equality rights of the Department of Education's clients (or customers) and its decision was a clear example of remedial law. In upholding the EOC's position, of necessity, the court placed constraints on the director of education. However, the larger point is that the courts have partnered with the EOC by strengthening equal opportunity law based on the Hong Kong constitution (Basic Law and Bill of Rights Ordinance), common law, and the provisions of the SDO, DDO, FSDO, and RDO. *Equal Opportunities Commission v. Director of Education* makes it clear that equality is one of "fundamental rights attaching to the individual," placed the burden of persuasion on the director to "provide 'cogent and persuasive' reasons" for the gender-based features of the SSPA, and refused to consider "administrative difficulty" as a basis for retaining it.¹³² The practical effect of this language is to strengthen the EOC's position in implementing the non-discrimination ordinances by strengthening the right to equality and making it more difficult to justify differential treatment based on sex, disability, family status, and race. The "but for" test coincides with the court's holding by effectively placing a heavy burden of persuasion on the alleged perpetrator, who has to convincingly establish legitimate reasons for the differential treatment of the complainant. Additionally, *Equal Opportunities Commission v. Director of Education* serves notice on those covered by the EOC's ordinances that the courts may well enable the agency to accomplish outcomes that it cannot attain on its own. Importantly, the Education Committee of the Hong Kong Legislative Council looked partly to the EOC for oversight of implementation of the court's decision.

A single agency can enter into a partnership model with a jurisdiction's judiciary.¹³³ The agency empowering partnership between the EOC and the courts does not provide a basis for generalizing about the overall relationship between judges and administrators in Hong Kong. Whether, on balance, these fit a partnership model requires considerably more research. However, this single case study does indicate that the partnership model created by the judiciary in the U.S., or at least significant features of it, may exist elsewhere. As such, it broadens our understanding of the roles of courts in public administration.

¹³²*Equal Opportunities Commission v. Director of Education*, 43, 48.

¹³³ Martin Shapiro, *The Supreme Court and Administrative Agencies* (New York: Free Press, 1968).